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

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.

Appellants

Ronnie Moore
Jeff Moore

Appellants Counsel

Jerry L. Mills, MSB [redacted]
John P. Scanlon, MSB [redacted]
PYLE, MILLS, DYE & PITTMAN
800 Avery Blvd. Ste. 101
Ridgeland, MS 39158
Telephone: 601-957-2600
Facsimile: 601-957-7440

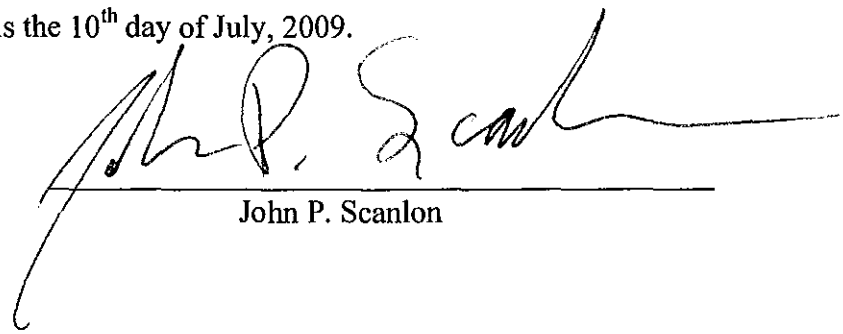
Jeffrey J. Hosford, MSB [redacted]
ROSS, KELLEY& HOSFORD, PLLC
115 A South Lafayette
Starkville, MS 39759
Telephone: 662-323-0844
Facsimile: 662-323-0844

Appellee Counsel:

Jim Hood, Attorney General
Tom Mueller, Esq.
Deanne B. Saltzman, Esq.
Martin Millette, Esq.
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 23577
Jackson, MS 39225-3577

Other Interested Parties

Respectfully submitted this the 10th day of July, 2009.



John P. Scanlon

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER

STATEMENT REGARDING ORAL ARGUMENT

Ronnie and Jeff Moore, Appellants, respectfully submit that this Court's decisional process would be significantly aided by oral argument, given the absence of Mississippi case law with respect the proper disposition of property seized pursuant to a search warrant, as well as the dearth of Mississippi gaming law on these specific facts; therefore Appellants respectfully request same from this Court.

STATEMENT OF ISSUES

1. Whether the computers at issue in this matter are not illegal gambling devices as the elements of consideration and chance are absent and thus, whether they are not contraband per se, and should be returned to the Moores.

2. Whether the cards used in this case are directly comparable to those in *MGC v. Treasured Arts*, and do not constitute an illegal gambling device alone, or when used with the computers.

3. Whether the Justice Court retained jurisdiction over the seized computers and a replevin action was not merited.

STATEMENT OF THE CASE

I. Nature of the Case

This matter, which began in Justice Court, and then proceeded through Circuit Court, arose out of criminal charges that were filed by the State of Mississippi against the Defendants, Appellants here, Ronnie and Jeff Moore for possessing and operating, respectively, illegal gambling machines without a license in their internet café in West Point, Mississippi[1]. In

[1] The charges brought against Appellant Ronnie Moore are primarily in connection with his ownership of the internet café, while those brought against Appellant Jeff Moore are in connection with his management of and involvement in the business of the internet café. Jeff Moore had and has no ownership in the seized computers or in

connection with those charges, the State seized dozens of computer terminals from the internet café. The events in what would otherwise be a relatively simple matter are somewhat muddled by the fact that was never a true trial in the Justice Court to determine the Appellants' guilt. This is mostly because the criminal charges were dismissed upon motion by the State in the Justice Court before those charges could have actually been tried. Further, the true underlying issues were also not actually tried in Circuit Court, but rather were the subject of a hearing. Even today, as this matter is reviewed by a Mississippi court for the third time, there has never been an actual trial on the determination of the Appellants' guilt, and no criminal charges are on file against the Defendants.

Thus, this matter has arrived before this Court in a most unusual fashion; the Defendants are yet to have their guilt, or lack thereof, determined by any court, in no small part because *no criminal charges are pending against them.* At the request of the State, the trial court ordered that the charges be dropped and the case dismissed; afterward, the present dispute arose as to whether the Justice Court should and/or could order the computers returned to Ronnie Moore, which depends on whether the computers at issue are illegal gambling devices and thus contraband per se. The Moores now request this Court reverse the Circuit Court's decision.

II. Course of Proceedings and Disposition in the Courts Below

A. Justice court proceedings and disposition.

On approximately September 12, 2007, the State of Mississippi filed criminal charges in the Justice Court of Clay County against Ronnie Moore for his ownership of and involvement in

---

the internet café. However, for sake of ease, and without undermining this distinction, the Appellants will sometimes be referenced collectively herein as "the Moores," and the café as "the Moores' internet café," notwithstanding the fact that only Ronnie actually owned the café.

the Paradise Isle Internet Café[2] and Jeff Moore for his involvement in managing the internet café in West Point, Mississippi. (R. 34, 44.) The criminal charges were set for trial on October 18, but the State eventually sought dismissal of the charges before the date of trial. (R. 44-45.) On October 16, in a meeting between counsel and the Justice Court judge, the State made an oral motion to the Justice Court requesting that the charges be dismissed without prejudice. (R. 10-11, 26, 30, 298.) The reasoning for this decision by the State is not entirely clear, but was purportedly to allow for additional time to analyze the items seized. (R. 10-11.) The Moores objected to the State's motion, and also made an oral motion of their own to the Court that the computers be returned. (R. 11, 298.) On October 16, 2007, the Justice Court entered an order granting the State's motion and dismissing the charges against the Appellants without prejudice, but reserved ruling on the Moores' motion that their computers be returned, instead setting that matter for hearing on October 18, 2007, the date originally reserved for trial. (R. 11, 298.)

On October 18, 2007, the Clay County Justice Court held a hearing, to determine only whether the seized items should be returned to the Moores, based on the dismissal requested by the State. (R. 76, 77-79.) Counsel for the State represented to the Justice Court that Mississippi case law dictated that "where a machine *obviously* appears to be an illegal gaming device, the owner of that machine does not have a property right in that machine." (R. 81, emphasis added.) The Justice Court made it clear that the computers had not been proven to be "illegal gambling devices" and that the computers should likely be returned, partially on the basis that the State, by its own admission, was not prepared or able to try a case based on the crimes that had been

[2] Some confusion exists in the record as to name of the internet café business which is the subject of this appeal. The proper name of the internet café is Paradise Isle Internet Café. For the sake of clarity, the sign for "One Step Shoes" which still hung above the internet café's front door at the time these events took place belonged to and identified the previous tenant of the retail space the internet café occupied. A sign for the internet café had already been ordered at the time.

previously charged against the Moores. (R. 77-79.) The Justice Court emphasized that the court suspected Ronnie Moore was being unjustly deprived of their property without a determination of the nature of the machines, and without either Defendant having been found guilty. (R. 80.)

Nevertheless, 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.) Eventually, the Justice Court also entered a written order on November 1, 2007, to this effect – ordering that by November 8, 2007, or exactly three (3) weeks after the hearing, the State was either to file criminal charges against the Moores, or return the seized items to both Defendants[3]. (R. 11, 299.) Those three (3) weeks came and went with no action taken by the State. The State did not, in accordance with that order, return the computers to the Moores, and as of the filing of this appellate brief, has still not returned the computers to the Moores, despite the fact that no criminal charges have been filed or reinstated since the State's request to dismiss the case was granted. Thus, the ruling by the Clay County Justice Court was ultimately in favor of Defendants/Appellants Ronnie Moore and Jeff Moore.

B. Circuit court proceedings and disposition.

From that November 1 order, the State filed its Notice of Appeal[4] on November 29, 2007, in the Circuit Court. (R. 10-14.) In its Notice of Appeal to the Circuit Court, the State argued that 1) the State was not allowed to present fully its arguments at the initial hearing, and that 2) the State "was led to believe a subsequent hearing would occur on November 15, 2007." (R. 11.)

[3] This was the sole issue determined by the Justice Court. There was no determination made, or argument presented, regarding the question of whether the seized computers were in fact illegal gambling devices.

[4] Because the initial proceedings took place in Clay County Justice Court, upon appeal, the State would have normally been entitled to a trial de novo in the Circuit Court; however, no trial ever occurred.

However, by the counsel for State's own admission at that hearing, the State did not have a case at that time for the misdemeanors previously charged against the Defendants, and was not prepared to try those charges. (R. 77.) Additionally, nowhere in the record is there any indication that any court proceeding was to take place on November 15.

Shortly thereafter, on December 26, 2007, the Moores had a Subpoena Duces Tecum issued by the Circuit Court, instructing the Mississippi Gaming Commission to deliver the seized computers to the Circuit Court on January 14, 2008. (R. 17-20.) Also on December 26, 2007, the Moores had the Circuit Court issue a Subpoena to Special Agent E.W. Williams of the Mississippi Gaming Commission, instructing him to testify at the hearing on January 14, 2007. (R. 22-23.) On January 9, 2008, the State then filed 1) a Motion to Quash Appellees' Subpoena, and 2) a Motion to Quash Appellees' Subpoena Duces Tecum, or in the Alternative, Motion for Protective Order. (R. 25-33.)

On January 11, 2008, the State filed its Memorandum of Law in the Circuit Court, asking the Circuit Court to vacate the Justice Court's Nov. 1, 2007, order, based on a variety of arguments. (R. 34-42.) The State argued that the Justice Court erred with respect to Defendant Jeffrey Moore as he had no ownership in the computers and was only involved through management of the internet café, that Defendants were required to file a replevin action to recover the seized property, that the Justice Court had no jurisdiction over the matter because of the monetary limits imposed by statute, that venue was not proper in Clay County, and finally that the computers should not be returned because they were illegal gambling devices and the subject of an ongoing criminal investigation in the process of being analyzed. (R 35-42.) In opposition, the Moores filed their responsive Memorandum of Law on January 14, 2008. (R. 44-47.) The Defendants pointed out the inconsistencies with the State's arguments, namely that the

State claimed the computers were illegal gambling devices, while simultaneously arguing that the State needed to maintain possession over the seized computers for forensic analysis to determine whether they were actually illegal, despite the fact that no criminal charges were pending against the Defendants, and the State was not prepared to try its case. (R. 44-47.) The Defendants also cited authorities that the Justice Court had the authority to control the disposition of property seized pursuant to its own warrant and that an officer holding the property must respond to court orders as he or she holds the property subject to the court's direction. (R. 46-47.) The State eventually submitted a Notice of Hearing for January 14, 2008, on its Motions to Quash. (R. 91.)

At the Circuit Court proceedings held on January 14, 2008, before Judge Kitchens, the State failed to produce the computers pursuant to the Moores' Subpoena Duces Tecum, believing their arguments so strong in the Motions to Quash as to prevent the need even to bring the computers to court. (T. 24.) At the hearing, the State first put on legal arguments for the court before calling any witnesses[5]. (T. 3-27.) The State was asking in essence for the Circuit Court to vacate the orders of the Justice Court. (T. 22.) Following argument of counsel, the Circuit Court requested evidence in the form of testimony that would tend to show the computers were illegal gambling devices under Section 97-33-7 of the Mississippi Code and this Court's decision in *Mississippi Gaming Commission v. Henson*, 800 So. 2d 110 (Miss. 2001). (T. 23.) The State then called two witnesses to testify, Robert Sharp and E.W. Williams, both of whom are special agents with the Mississippi Gaming Commission. (T. 28-91.)

At the close of the hearing, the Circuit Court had requested post-hearing briefs be submitted by both sides within the following thirty (30) days. (T. 92.) After several requests for

[5] Scott Johnson, counsel for the State, insinuated at the Circuit Court hearing the State's intention to present the case to the grand jury in April of 2008, despite the absence of any criminal charge on file. (T. 12-13.)

extensions of time were granted, the Circuit Court entered an Order for Continuance, granting a Motion made by the State, extending the deadline for the filing of all briefs until May 16, 2008. (R. 106.) Pursuant to that court Order, the Moores submitted their post-hearing brief for filing on May 16, 2008. (R. 108-22.) The Moores included a number of exhibits with their brief. (R. 123-266). The Moores argued that the court had the authority to dispose of property seized pursuant to its own warrant and that the State had wholly failed to meet its prima facie case in establishing all of the elements of an illegal gambling device. (R. 108-22.)

Despite the Circuit Court's Order, the State failed to file its brief timely; in fact, the State did not submit its post-hearing brief for filing until June 13, 2008, almost a full month after the Moores had submitted their brief, and almost a full month after the court-ordered deadline, as well. (R. 267-68, 269-97.) The State argued that the computers seized were illegal gambling devices, that the Justice Court erred in ordering the return of the items to the Defendants, that no prosecution is required where items are contraband per se, and that public policy dictated a ruling in the State's favor. (R. 269-97.) The State also included numerous exhibits with its brief, including several not previously admitted as evidence by the court. (R. 298-330.)

The Moores later filed their Motion to Docket and Dismiss on June 27, 2008. (R. 331-34.) The basis of this Motion was that the State's failure to file their brief timely gave the State an unfair advantage in that it was able to review and respond to the Moores' brief, despite the fact that both briefs from all parties were due on the same day by court order. (R. 331-34.) The Moores also alleged that the State had improperly introduced evidence not already on record. (R. 332.) The Moores also noted that, at the time of their Motion, June 25, 2008 – now more than one (1) year 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 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 two (2) 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.

The State filed its "Response to Appellees' Motion to Docket and Dismiss," arguing – without any citation to legal authority – that the introduction of exhibits not in evidence is allowable because the information is in the public domain and comes from the Tel-Sweeps website, and again that the State may properly hold the Defendants' seized property for this long of a time period without any criminal charges pending or prosecution of the Defendants because no property rights exist in contraband per se, likening the computers to cocaine. (R. 336-41.)

Finally, the Moores filed a "Response of the Appellees" as rebuttal in opposition to the State's Response, highlighting the State's failure to point to any facts proving the computers were contraband per se and the continued lack of criminal charges while the State remains in possession of the Moores' property, purportedly because of a need for continued forensic analysis. (R. 343-47.) The Moores also explained in their rebuttal brief that the sweepstakes prizes are simply part of a sweepstakes promotion of the phone cards they sell in their internet café, and pointed out the lack of the need for consideration, as well as the lack of a random-number generator in the computers at issue, a distinguishing characteristic making slot machines illegal under the law because of the element of chance. (R. 344, 45.)

On the State's appeal of the Justice Court decision, the Clay County Circuit Court eventually ruled in favor of the State, finding that the computers at issue constituted illegal gaming devices, and that the computers seized were contraband per se. (R. 415-20.) The Circuit Court divided its Order and Opinion into three issues – whether the Justice Court properly had

jurisdiction of the subject matter, whether the phone cards were comparable to those in the Supreme Court case of *MGC v. Treasured Arts*, and whether the computer devices were contraband per se, and thus not to be returned to the Defendants. (R. 415-20.) The Court ordered that the computers were deemed contraband per se, and that the State should continue to possess the seized devices. (R. 420.) Thus, in ordering that no devices should be returned to the Moores, the Circuit Court reversed the ruling of the Justice Court. (R. 420.)

The Circuit Court found that the computers at issue constituted illegal gaming devices, and that the State "was justified in seizing the computers." (R. 415.) The Circuit Court additionally found that Jurisdiction was not proper in the Justice Court, based on the monetary jurisdictional limits imposed by Section 9-11-9 of the Mississippi Code. (R. 416.) In finding against the Defendants, and despite the fact that the telephone cards in the present case were legitimate phone calling cards that can be lawfully used and sold, the Circuit Court specifically found that when the cards and the computer terminals were used together, they constituted an illegal "slot machine," under the statutory definition. (R. 419-20.) The Court noted that "the phone cards and the computer terminals by themselves are not contraband per se," but found that when used together, their collective status became contraband per se. (R. 419-20.) The Circuit Court entered its Order and Opinion on January 6, 2009. (R. 415-20.) From this Order and Opinion, the Moores now bring this appeal to this Court, requesting reversal. (R. 421.)

III. Statement of Facts Relevant to the Issues Presented for Review

Defendants Ronnie and Jeff Moore own and operate, respectively, the Paradise Isle Internet Café, in West Point, Mississippi, which is in a retail location formerly occupied by a store named "One Step Shoes," and at the time of the events in the court record, the shoe store sign was still affixed to the building above the internet café's front door. ((R. 34, 44, R. Supp.

5.)[6] The internet café provides public internet use for an hourly charge, sells long-distance telephone cards, and offers free participation in the optional "Phone-Sweeps Prepaid Sweepstakes." (R. Supp. 4, 9, 14, 16-17.) No purchase is necessary for participation in the sweepstakes; however, a patron may elect to participate in concert with a purchased phone card, though this is "completely optional" and "not required to receive phone time purchased." (R. Supp. 14, 17.) In fact, customers are given a "no purchase necessary" opportunity and can participate in the sweepstakes without actually buying any phone time, or using a phone card, at all. (R. Supp. 17.) The sweepstakes points themselves – which are digitally assigned a "win" or "loss" for each specific entry – cannot be bought or redeemed, as they have no cash value, but, as a marketing promotion, free sweepstakes points do accompany the phone time purchased; for each dollar of phone time purchased, the buyer receives a corresponding amount of free sweepstakes points. (R. Supp. 17.)

Each sweepstakes point has a pre-determined winning value in money prizes or merchandise, and cash prizes can be used to purchase additional phone time, which would again come with accompanying free sweepstakes points. (R. Supp. 17.) The sweepstakes points can be redeemed or validated in several ways, including mailing them in, or utilizing a "quick redeem" feature, allowing the participant to redeem his winnings at the point-of-sale counter immediately upon receipt of the sweepstakes points, even if no purchase was made. (R. Supp. 17.) Additionally, the user can redeem his or her sweepstakes points in groups through the use of the validation computers, which utilize onscreen displays of graphical representations of spinning wheels for entertainment purposes only that have no effect on the sweepstakes prizes,

[6] The court record consists of four volumes, numbered 1-4, as well as a smaller, fifth, unnumbered volume which contains the exhibits introduced at the Circuit Court hearing held on January 14, 2008. This appears to be a supplemental volume to the record. Any citations herein referencing "R. Supp.," denote pages within that supplemental record of the Circuit Court exhibits.

but are simply a visual representation of the results pre-determined sweepstakes winnings; however, this is not required as a user has the option of the "quick redeem" feature to redeem or validate all her or her free points at the point-of-sale counter without use of the computers. (R. Supp. 14, 17.)

As "game play" takes place, sweepstakes wins are accumulated in a win account which cannot be used for additional play, but is rather a totally separate account from any sweepstakes points. (R. Supp. 17.) Regardless of whether the free sweepstakes points are mailed in, used via the validation computers' displays, or redeemed directly at the point-of-sale counter without any game play on the computers at all, the probability is the same for each predetermined sweepstakes point. (R. Supp. 17.) The phone time is not at all affected by participation in the sweepstakes games and can only be expended by use of the card for long-distance phone calls. (R. Supp. 17.)

When a purchaser buys long-distance phone time for an amount greater than five dollars ($5), use of a phone card[7] on one of the computer terminals in the internet café is required to validate the purchased phone time above the initial five dollars' worth. (R. Supp. 14, 17.) The user would have any of the amount purchased above the initial five dollars ($5) in an account format on the card, displayed onscreen, and would have to use the validation computers to click on the "Buy $1.00 phone time" to purchase the actual phone time, which moves the funds from the customer's account in one-dollar increments to another onscreen area indicating the phone time actually purchased. (R. Supp. 14.) Each purchase of phone time is accompanied by a corresponding amount of free sweepstakes points. (R. Supp. 17.)

[7] All such purchases are for phone time only, and not for the card itself. The card, as a vehicle to use the phone time or participate in the sweepstakes, is provided free with the phone time and is not sold individually and separate from phone time. (R. Supp. 17.)

On approximately September 12, 2007, the State of Mississippi filed charges in the Justice Court of Clay County against Ronnie Moore for his ownership of and involvement in the internet café and Jeff Moore for his involvement in managing the internet café. (R. 34, 44.) The charges were 39 counts of violations of Sections 75-76-55(1)(a) and 97-33-7(1) of the Mississippi Code, which in general make it illegal to possess, control, or operate "slot machines" or similar gambling devices without a gambling license. (R. 44, 48-51.) In connection with those charges, the State seized thirty-nine (39) computers from the Defendants' internet café, as well as a few other items. (R. 34.)

On that same day, September 12, 2007, the State later obtained arrest warrants for both Defendants, and a search warrant to seize the computers, and had those warrants issued by the Justice Court, though they were not served upon the Defendants until hours after the seizure had begun[8]. (R. 48-53, 349-50.) Special Agent E.W. Williams of the Mississippi Gaming Commission stated in his general affidavits, supporting the September 12, 2007, arrest warrants of both Defendants, that the computers Ronnie Moore possessed displayed "a video 8 liner gambling machine," allowing the public to play illegal slot machines. (R. 48-49.) The Justice Court also issued the search warrant on September 12, 2007. (R. 52-53, 349-50.) Williams provided a narrative of the "Underlying Facts and Circumstances" which was purportedly attached to this search warrant as Attachment "A." (R. 54-55, 351-52.) Agent Williams had indicated in his "Underlying Facts and Circumstances" narrative that after receiving credible information a few days earlier, he and Special Agent Lyn Chambers had conducted an undercover investigation on September 11, 2007, during which time he had played an "illegal

[8] During the initial arrest, the Defendants were served with a search warrant that failed to include the necessary affidavit. Following the arrest, the court file was taken from the court house at the request of the Attorney General's office. (R. 83-84, T. 85.) The File was not returned until after the hearings in Justice Court. (R. 83-84, T. 85.) When the file was returned the warrant included an affidavit that was clearly written after the search warrant was performed.

video 8 line slot machine type game" on one of the computers in the internet café where he both won and lost "credits." (R. 54.) Special Agent Williams had purchased phone time and obtained a plastic "Tel-Connect" card from the Defendant Jeff Moore who was working at the internet café on that day. (R. 54.) According to Agent Williams, he "purchased" one thousand points[9], played with those points on the computer until they were exhausted, and then redeemed his points for six dollars ($6). (R. 54.) Agent Sharp had also erroneously testified that the cost of play was a "penny-a-point," or that ten dollars ($10) would get a player 1,000 points. (T. 34.) Special Agent Williams recounted that he returned to the Defendants' internet café business on the next day, September 12, 2007, and again "purchased" and "played" points on one of the computers in the internet café, this time spending twenty dollars ($20), playing two-thousand points, and redeeming his winnings for eleven dollars and fifty-five cents ($11.55). (R. 55.) At this time, according to his facts and underlying circumstances, Special Agent Williams determined that the business being conducted in the internet café amounted to "illegal gambling activity" in violation of sections 75-76-55 and 97-33-7 of the Mississippi Code, and that he required a search warrant for the premises. (R. 55.) Agent Williams provided a separate "Affidavit for Search Warrant," dated September 12, 2007, containing similar information, namely that the Defendants were in possession and control of illegal gambling devices. (R. 56, 348.) The items were seized that day, on September 12, 2007. (R. 10, 34, 44.)

Curiously, on October 2, 2007, Special Agent Williams executed a second, separate "Affidavit for Search Warrant" and a second, separate "Statement of Underlying Facts and Circumstances" both of which were in support of a second separate search warrant. (R. 60-69.)

[9] Because "bonus entries" are not accounted for when ten dollars' worth of phone time is purchased, Williams would later recant this during cross-examination in the Circuit Court, and admit his error. (T. 74, lines 9-11.)

The second warrant was issued for the same computers which had already been seized pursuant to the first warrant. (R. 60-69.) Much of the second "Underlying Facts and Circumstances" narrative is verbatim identical to the first, though the latter is much longer. (R. 65-69.) Special Agent Williams alleged that the Defendants were – at the time of the second affidavit – using computers and requested that a search warrant be issued. (R. 66.) However, all of the computers had already been seized weeks earlier pursuant to the first search warrant. (R. 10, 34, 44.) The lists of seized items from both warrants were identical. (R. 57-58, 73-74.)

Williams would later testify that he completed his affidavit statement of "Underlying Facts and Circumstances" to have the first search warrant executed only after the seizure of the machines had actually already begun. (T. 83-84.) This is evidenced in part by the fact that Williams identified a card in his affidavit statement as "later tagged as item 16," yet the affidavit was purportedly executed well before the card would have actually been tagged. (T. 85, R. 55.) Williams would also later testify that nothing was actually seized from the second search warrant, primarily because the location identified therein, the address of the internet café, contained no more computers as they had all been seized in accordance with the earlier affidavit. (T. 85-88.) The second warrant was in fact not even served on either Ronnie or Jeff Moore, but on the Justice Court clerk. (T. 88.)

When the matter eventually was heard in the Circuit Court, counsel for the State argued that as one plays, the cards will go up or down in value, depending on whether the player wins or loses. (T. 4.) The State argued that the computers and cards at issue were not a sweepstakes akin to fast food restaurant promotions. (T. 9.) Counsel for the State argued that after the case had been dismissed – upon motion by the State – from the Clay County Justice Court, the Justice Court would not have retained jurisdiction, and that the correct course of action for the

Defendants to recover their property would have been through a replevin action. (T. 11-12.) Counsel for the Moores argued that replevin is not the correct course of action and that the Justice Court did in fact retain jurisdiction over the computers seized pursuant to warrant issued by that court. (T. 15, 17-18.) Additionally, two special agents with the Mississippi Gaming Commission provided testimony regarding the findings of their investigation. (T. 28-90.)

The Circuit Court found that the computers at issue, when used in conjunction with the phone cards at issue, constituted illegal gaming devices – or contraband per se – and thus, that the State should continue to possess the seized devices. (R. 415-20.) Thus, the Court reversed the ruling of the Justice Court and ordered that no devices should be returned to the Moores. (R. 420.) The Moores appeal to this Court from that Order and Opinion of the Circuit Court. (R. 425-26.) The Moores now request this Court reverse the Circuit Court.

SUMMARY OF THE ARGUMENT

Because the elements of consideration and chance are absent, the computers at issue in this matter are not illegal gambling devices and thus, they are not contraband per se, and should be returned to Ronnie Moore. Additionally, the phone cards used in this case are directly comparable to those in *MGC v. Treasured Arts*, and do not constitute an illegal gambling device alone, or when used in conjunction with the computers. The Justice Court properly had, and retained, jurisdiction at all times over the seized computers and a separate replevin action was not merited. This Court should reverse the decision of Judge Kitchens and the Circuit Court.

ARGUMENT

I. STANDARD OF REVIEW

Because of how this case is unusually situated, ascertaining the correct standard of review is difficult. Normally, this Court would likely apply a deferential standard of review with respect

to Mississippi Gaming Commission actions in part because of the Commission's status as a state administrative agency. See, e.g., *Mississippi Gaming Com'n v. Board of Educ.*, 691 So. 2d 452, 455 (Miss. 1997); *His Way Homes, Inc. v. Mississippi Gaming Com'n*, 733 So. 2d 764, 766-67 (Miss. 1999); *Mississippi Gaming Com'n v. Pennebaker*, 824 So. 2d 552, 554 (Miss. 2002); *Mississippi Gaming Com'n v. Freeman*, 747 So. 2d 231, 238 (Miss. 1999). However, the deferential standard of review contemplated actual administrative rulings and findings by the Commission as provided for in Sections 75-76-121, -127, and -171 of the Mississippi Code. In this case, though, there was never a finding made or issued by the Commission.

In other matters criminal matters concerning whether a prima facie case has been established, a "clearly erroneous" standard of review applies: "Since any finding concerning whether a prima facie requirement has been met involves questions of fact and credibility, the clearly erroneous standard of review is appropriate." *Simon v. State*, 679 So. 2d 617, 622 (Miss. 1996). This standard likely applies to the present appeal, as the Moores contend that the State has failed to establish its prima facie case. In general, when reviewing a criminal appeal, this Court will apply a "clearly erroneous" standard of review to findings of fact, and a de novo standard of review to findings of law. "When reviewing a lower court's decision . . . this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous." *Brown v. State*, 731 So. 2d 595, 598 (Miss. 1999). "However, where questions of law are raised the applicable standard of review is de novo." *Id.* Additionally, this Court has held: "Since the interpretation of a statute is a question of law, we are required to employ a de novo standard of review." *Champluvier v. State*, 942 So. 2d 145, 763 (Miss. 2006).

Under either standard, however, the Circuit Court erred in rendering its decision and Order and Opinion of January 6, 2009, and this Court should reverse the trial court, find the computers are not illegal gambling devices, and order the computers returned to Ronnie Moore.

II. THE COMPUTERS AT ISSUE ARE NOT ILLEGAL GAMING DEVICES SUBJECT TO SEIZURE AS CONTRABAND PER SE.

The Defendants were arrested and Ronnie Moore's property was seized based on violations of the statutes that criminalize control, operation, and possession of illegal gaming devices without a license[10]. Under Mississippi law, the term "slot machine" is often used broadly to describe any illegal gaming device. However, there are statutes in both the criminal law section of the Mississippi Code, as well as the Mississippi Gaming Control Act, § 75-76-1, et. seq., regarding illegal gambling devices and "slot machines."

Mississippi's criminal law makes possession of a "slot machine" as defined by statute illegal. The specific provision reads:

> Any slot machine other than an antique coin machine as defined in Section 27-27-12 which delivers, or is so constructed as that by operation thereof it will deliver to the operator thereof anything of value in varying quantities, in addition to the merchandise received, and any slot machine other than an antique coin machine as defined in Section 27-27-12 that is constructed in such manner as that slugs, tokens, coins or similar devices are, or may be, used and delivered to the operator thereof in addition to merchandise of any sort contained in such machine, is hereby declared to be a gambling device, and shall be deemed unlawful under the provisions of this section.

Miss. Code Ann. § 97-33-7 (Rev. 2006). The Mississippi Gaming Act defines a "slot machine" this way:

> "Slot Machine" means any mechanical, electrical or other device, contrivance or machine which, upon insertion of a coin, token or similar object, or upon payment of any consideration, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of

[10] See also Miss. Code Ann. § 75-76-55(1)(a) (Rev. 2002).

> the element of chance, or both, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise, tokens or anything of value, whether the payoff is made automatically from the machine or in any other manner. The term does not include any antique coin machine as defined in Section 27-27-12.

Miss. Code Ann. § 75-76-5(ff) (Rev. 2002). See also *Mississippi Gaming Com'n v. Henson*, 800 So. 2d 110, 113 (Miss. 2001).

When reviewing questions related to the one presented to this Court for review today, Mississippi appellate courts have read these two statutes together, and extrapolated at least one three-part test from them. The Mississippi Court of Appeals has stated that prohibited machines are those that "(1) are operated by coin, token, or other consideration, and (2) dispense a product with (3) the possibility of dispensing additional items at varying quantities." *Miss. Gaming Comm'n v. Six Electronic Video Gambling Devices,* 792 So. 2d 321, 324 (Miss. Ct. App. 2001) (examining Section 75-76-5). See also *Trainer v. State*, 930 So. 2d 373, 378 (Miss. 2006). The Circuit Court in this matter actually centered its analysis on a four-element definition of "slot machine" as outlined in *Six Electronic Video*. (examining § 75-76-5(ff)) (R. 417-18.)

Only a few months following the Court of Appeals' decision in *Six Electronic Video*, this Court also had the opportunity to examine what constituted an illegal device, this time reviewing Section 97-33-7, stating:

> Three essential elements can be extrapolated from the above language: consideration, value, and the potential for reward. Thus, a device is clearly a slot machine of the type prohibited under Section 97-33-7 if:
> 1. Its play or operation requires the insertion of money, tokens or similar objects, or payment of *consideration;* and
> 2. As a result of playing or operating the device, the player or operator has the potential to win a reward in the form of cash, premiums, merchandise, token, or *anything of value;* and
> 3. The winning of some part or all of the *potential reward* is dependent in substantial part on an element of chance.

Mississippi Gaming Com'n v. Henson, 800 So. 2d 110, 113 (Miss. 2001) (examining § 75-76-5 (ff)). Thus, three elements recognized by this Court for a device to be a "slot machine" within the statutory meaning are: consideration, receipt of something of value, and a potential reward dependant on chance. *Id.* Under the Gaming Control Act, however, "whether by reason of the skill of the operator or application of the element of chance, or both," amusement devices satisfying the elements of consideration and payoff are deemed illegal gaming devices and seized accordingly. Miss. Code Ann. § 75-76-5(ff) (2000). *Mississippi Gaming Com'n v. Henson*, 800 So. 2d 110, 113 (Miss. 2001). Regardless of which definition this Court applies in the present case, one factor in common with all of the above is the element of consideration.

A. The element of consideration is not present.

The Circuit Court found that the swiping of the telephone card met the consideration element, stating "without the telephone card, the player would not be able to work the machine, thus fulfilling the [consideration] requirement." (R. 418.) This, however, is not true and in contradiction with record evidence.

That consideration is a required element for a machine to be an illegal gambling device has long been the rule in Mississippi. In *Mississippi Gaming Commission v. Six Electronic Video Gambling Devices*, 792 So. 2d 321, 323 (Miss. Ct. App. 2001), the Commission had seized devices it claimed to be illegal gambling devices, and later filed a petition for permission to destroy the machines with the trial court, which eventually found the machine in question was not an illegal gambling device. Reversing the trial court, the Court of Appeals found that the device in question fell within the statutory definitions of an illegal slot machine under both Sections 97-33-7 and 75-76-5(ff). *Id.* at 324-26. The Court first noted that Section 97-33-7 makes it a crime to possess a "slot machine" or similar device as defined by that statute, which

includes an element of consideration. *Id.* at 323. In interpreting the statute, the Court even provided its own three-part definition, with consideration being the first element, as previously discussed herein, above. *Id.* at 324. The Court also noted that the definition under the Mississippi Gaming Control Act, specifically under Section 75-76-5(ff), is a similar, but not identical definition, which also includes the element of consideration. *Id.* at 324-26. The Court, assuming the latter definition under the gaming statute was also applicable to the criminal statute, made it clear that the Commission has the authority to utilize both statutes. *Id.* at 325. The Court noted that the consideration element is the requirement that "the machine must operate by the insertion of coins, tokens or similar items." *Id.* at 326.

Though the Court of Appeals, in looking at the decision in *Mississippi Gaming Commission v. Treasured Arts, Inc.*, 699 So. 2d 936 (Miss. 1997), discussed in more detail herein, below, recognized that case was somewhat distinguishable as it examined lotteries and not slot machines, the Court of Appeals also noted that the *Treasured Arts* decision turned on the element of consideration and that "the State failed to prove that extra value had been paid for the chance to win a prize." *Id.* at 326-27. The Court held that machines which operate "upon the insertion of a coin," and which meet the other elements, are slot machines as defined by statute. *Id.* The U.S. Supreme Court has discussed the issue of sweepstakes promotions and the difference between illegal gambling activity in *Federal Communications Com'n v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954) (holding various promotion gift enterprises were not illegal as no consideration was involved), and its holding makes it clear that the distinction is immaterial as consideration is a common element. "But 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." *Id.* at 347 U.S. at 291, n.8, 74 S.Ct. at 598, n.8. "A typical 'gift enterprise' differs from [a lottery] in that it involves the purchase of merchandise or other property; the purchaser receives, in addition to the merchandise or other property, a 'free' chance in a drawing." *Id.* (citations omitted).

In *Mississippi Gaming Commission v. Henson*, 800 So. 2d 110, 111-12 (Miss. 2001), this Court examined consolidated appeals concerning two specific devices, a "Cherry Master," and a "Quarter Pusher," under the legal issue of whether a payoff was required before such machines could be seized. Thus, the primary legal issue there, though distinguishable, is nonetheless related to the case at bar. The trial courts had issued rulings in favor of the owners of the machines in question. *Id.* at 111. This Court concluded that "where the elements of consideration and chance are present," the statute only required a machine to possess the "potential for reward" for it to be subject to seizure. *Id.* at 112. This Court began its analysis by examining the illegality of the possession of "slot machines" and noted that the operative term "slot machine" was not defined under the criminal statute, requiring examination of 75-76-5(ff). *Id.* at 112-13. This Court noted under that statutory definition that an illegal machine required consideration for operation. *Id.* at 113. This Court also extrapolated yet another three-part test, with consideration being the first element. *Id.* This Court noted that both machines in question there required some form of consideration to initiate play. *Id.* at 113-14. This Court then employed an analysis around the question of the existence of a "payoff," and whether additional playing time was something of value within the statutory meaning. *Id.* at 115. This Court concluded, in accordance with persuasive precedent from other jurisdictions, that because the machines at issue there required consideration, had an element of chance, and returned a thing of

value, they were illegal slot machines within the statutory meaning. *Id.* Thus, this Court reversed the trial court's decision and remanded the matter back to that court. *Id.* at 116.

These holdings are directly applicable to the case at bar as the State has wholly failed to meet its burden to prove its prima facie case that the machines seized are contraband per se as illegal gambling devices. At no point has the State been able to establish the element of consideration, and could not do so through either witness called to testify at the Circuit Court hearing. In fact, Robert Sharp even testified on behalf of the State that without consideration, the machines would not be illegal, in accord with the statutes. (T. 40.) Sharp also testified that he did not investigate what "no purchase necessary" meant, or whether any consideration was necessary to play the games. (T. 40.) Sharp's primary role was in coordinating outside surveillance on the premises of the internet café, and taking the photographs of the outside of the premises. (T. 28.) Sharp testified that he did not even purchase a card as part of the undercover investigation, but instead relied upon the accounts conveyed to him by the agents who did purchase the cards. (T. 33.) The testimony from Agent Williams would offer little more, as both Agents displayed their complete misunderstanding of how the computers operated. The graphics on the computers appear to be video-game displays, and were referred to as "games" at the Circuit Court hearing, but they are in fact not games at all – the apparent "spinning" of the wheels is simply for entertainment purposes. The computer displays merely reveal the pre-determined outcome of the sweepstakes, and do not award any extra play time. Simply put, computers that display spinning wheels are not illegal.

Sharp contended that the screen displays, similar to an "eight-liner" constituted games that are the basis for the alleged gambling operation. (T. 31.) However, Sharp's primary role was in coordinating outside surveillance on the premises of the internet café, and taking the

photographs of the outside of the premises. (T. 28.) Sharp also testified that he saw the large, black sign providing notice to customers behind the point-of-sale counter, listing the rules and terms and conditions of the sweepstakes. (T. 33, R. Supp. 14.) Sharp also testified he understood by clicking, one was electing the option of actually buying more phone time (T. 36.) Sharp further testified that by playing the game, one can win and lose points, and discussed his understanding of the sweepstakes points. (T. 34-35, R. Supp. 7, 11.) However, Sharp was simply unable to describe the operation of the computer precisely. (T. 35-36.) In fact, when asked about "redeem" option on the computers and "quick redeem" option, Special Agent Sharp testified that he did not know what the "quick redeem" option was, and that he has not even played the game to testify about the "redeem" option, among other things, but was instead just relying on reports he read. (T. 36.)

On cross-examination, Special Agent Sharp again testified that he was not personally sold any phone time and that he never received any phone cards. (T. 37.) Sharp also testified that the cards sold at the Defendants' internet café were in fact functional phone cards, and that the State was not challenging the sale of the phone cards. (T. 39.) Sharp testified that he knew consideration is a criterion for the games to be illegal, and that the games without consideration are not in fact illegal. (T. 40.) Sharp admitted he did not even investigate what "no purchase necessary" meant in this case. (T. 40.) Further, after having testified otherwise on direct examination, Special Agent Sharp admitted he did not even know if each of the computers in the internet café did in fact have internet access, in part because he did not test or examine the machines. (T. 41.) It was later determined and proven that each computer in the internet café did in fact have internet access. (T. 71, lines 16-19.) He also had to retract his earlier testimony, admitting there was no indicator of tiers or denominations of prices and/or card-value on the

cards themselves. (T. 42.) Sharp repeatedly testified he did not play any games on the machines himself, or even know how the games functioned, instead basing his testimony on assumptions and what he was told by other agents. (T. 43.) Sharp testified he did not in fact even know whether purchases were necessary to participate in the sweepstakes, and was not even told "one way or the other" as to whether a purchase was in fact a necessary prerequisite. (T. 48-49.) Also, Sharp testified he did not know how the "odds" of winning were determined on the system, whether the cards were priced at a fair-market value, whether each of the computers had internet access, or how the sweepstakes points are assigned. (T. 49.) On re-direct, Special Agent Sharp admitted that his basis for his earlier testimony regarding denominations on the card was not from the facts of this case, but instead from an internet website. (T. 49-50.)

Special Agent Williams, upon cross examination, would also testify that he knew of nothing – and that his investigation had produced nothing – to counter the fact that sweepstakes points are awarded free each time a customer purchased long-distance phone time. (T. 67-68, R. Supp. 14, 17-18.) Agent Williams additionally testified that he did not read the rules of the sweepstakes. (T. 68-69.) On direct examination, Special Agent Williams testified that he played a large role in investigating the Defendants' internet café and actually conducted an undercover investigation. (T. 54.) He testified that on September 11, 2007, when he first entered the internet café as a part of the undercover investigation, he was required to fill out a paper form before purchasing the telephone card; he understood that completing the form was a prerequisite to purchasing the phone card. (T. 55-56.) Williams testified that after purchasing the phone card, he, like the other patrons, used their cards in a "card-swipe" reader to utilize the games on the computers. (T. 57.) Special Agent Williams testified that as one plays, points are deducted from one category on the screen display and added to another on-screen category, based upon

winnings. (T. 60.) Williams testified that when playing, he did not use the entire twenty-dollar ($20) amount of money he had initially spent on the card, and then later turned his card back in to the point-of-purchase counter after playing the games for a short period of time, receiving back an amount of cash less than what he had initially paid for the phone time. (T. 60-61.) This is however in direct contrast to his details in his search warrant affidavits. Continuing the investigation, Special Agent Williams returned the next day on September 12, 2007, and again filled out the required form in order to purchase the phone card. (T. 62.) He then returned to a computer and begin playing the games once more, eventually returning his card to the counter and receiving his "winnings." (T. 62-63.)

On cross-examination, Special Agent Williams initially could not 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.) However, Williams later recanted this testimony and clarified 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.) Reading aloud from the document, Williams testified that 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.) Williams further testified that he was simply unable to dispute those statements because he did not find anything in the State's investigation that could prove the statements untrue. (T. 68.) Clearly, the sweepstakes did not require consideration, and the State has wholly failed to produce any evidence to prove otherwise.

Williams further testified that 1) before playing the games, the rules of the sweepstakes were displayed onscreen, 2) the computer user is asked to accept or decline the rules and terms of the sweepstakes, and that 3) he simply "clicked" through these terms and rules without reading them. (T. 69.) Williams also admitted seeing options to visit other sweepstakes, accessible at all validation terminals, and also testified erroneously testified regarding points by identifying the wrong "play column." (T. 70, 75.) Williams also testified that, in keeping with his sworn statements of "Underlying Facts and Circumstances" which were affidavits attached to the warrants, upon swiping the phone card through the card-reader, he was given a credit of 1,000 points, yet upon further examination was actually unable to discern between the winning points and the sweepstakes points or explain how he reached that conclusion. (T. 72-75, R. 54, 65.)

Williams continued that through play, the "play points" decreased, and the winning points could increase, depending on the results of the game. (T. 76-77.) As play continued, and Williams had the opportunity to use more points to keep playing, he testified that he only "assumed" he was actually buying the points, and did not know that he was in fact buying more telephone time, and actually "didn't have any idea that those were telephone cards." (T. 77.) Despite the fact that the on-screen "balloon" indicator which popped up after clicking on the button labeled to buy more phone time, clearly read "one dollar or purchase amount will be added to your phone card account," which was clearly shown at the hearing via the slide show presentation, Special Agent Williams testified that he did not see that indicator because he was not even looking at the machine, but was instead watching his surroundings at the time. (T. 78.) Williams repeatedly testified that, despite signing the required terms and rules agreement, despite the sign in the internet café, and despite the on-screen indicator, he did not know that he was purchasing phone time. (T. 78-79.) In fact, Williams testified that his education on how the

computers and the games functioned was almost entirely based on what a neighboring patron at the internet café told him, and that he had no idea what he had won or purchased until cashing out at the counter. (T. 56, 79.)

Throughout the testimony of both Special Agents, the State only demonstrated its complete inability to prove its case, and the Agents' complete lack of understanding of how the sweepstakes system worked. Beyond that, the State revealed that it had in fact no case at all, as testimony consistently showed that the investigators had not discovered through its investigation anything that made the computers and the sweepstakes illegal under Mississippi law. Williams testified that he had no idea that the determination of winners and losers was pre-determined before the purchase of the phone card, and no idea that the playing of the game had no influence in any way whatsoever of the amount won or lost. (T. 79.) Williams further testified that he did not read the provision that allows players to "quick redeem" and not play the game at all, by simply handing the card to the person behind the point-of-sale counter. (T. 80.) Williams was also unable to provide accurate testimony about the number of free points he received on each day he used the computer games at the internet café, because he was not even watching the computer – by his own admission – as well as he should have been. (T. 80.)

In fact, Williams, who apparently already had his mind made up regarding the alleged illegality of the machines, testified that the purpose of his "investigation" was not to determine at all whether the computers were in fact "slot machines," but rather "to make sure that this was an illegal operation." (T. 81.) In fact, Williams agreed that he simply set out to prove the illegality of the internet café's operation without regard to how the cards and the computers actually functioned and operated. (T. 82.) Williams testified that he did not even know that the cards could be redeemed without playing the games at all, that the playing of the games had no effect

on the result of the winnings, which were pre-determined. (T. 81.) Despite understanding that consideration was a necessary element for a device to be an illegal gambling device, Williams was unable to testify that a purchase was a necessary prerequisite to entering the sweepstakes, or that the document explaining the sweepstakes was less than 100 percent correct and accurate. (T. 81, 89-90.)

The State has attempted arguing that no prosecution is required where items are contraband per se and that public policy dictated a ruling in the State's favor. (R. 269-97.) The State's characterization of the *Trainer* case is that a machine is subject to seizure if it "obviously" appears to be an illegal gambling device. (R. 81.) For this proposition, however, State is making a complete mischaracterization of the *Trainer* holding. 930 So. 2d 373. *Trainer* stood for the proposition 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 State has completely failed to prove that any consideration is needed for participation in its sweepstakes promotion. In truth, no consideration is required at all, because there is simply no purchase necessary to participate. The Circuit Court's finding otherwise is unsupported by any evidence and, as a result, clearly erroneous. This Court should reverse the lower court's judgment and rule in favor of the Moores that the computers in question today lack the element of consideration and are simply not illegal gambling devices.

B. The element of chance is not present.

Without any evidentiary basis or support, the Circuit Court also found that the computers "randomly selected" the lines on the spinning-wheels display, and that the games in the internet

café were operated through chance. (R. 419.) This finding is clearly erroneous and rebutted by record evidence, as nothing within the record proves the result of the display is random at all. The Court in *Henson* required that the third element of the definition of a "slot machine" is that the "winning of some part or all of the *potential reward* is dependent in substantial part on an element of chance." 800 So. 2d at 113 (emphasis in original). As discussed herein, above, the sweepstakes points did not result in random results of winnings, but were rather entirely predetermined before they were given to participants. (R. Supp. 17.) Thus, any alleged "chance for reward" is the same as in all legal sweepstakes – dependent on whether a participant was holding a pre-determined winner, or a pre-determined loser, not dependent on if a random spinning wheel stops with a particular readout. Additionally, the State has wholly failed to introduce even a scintilla of evidence to rebut this. In fact, neither Agents Sharp nor Williams provided any testimony whatsoever to disprove this. This is further evinced and supported by the fact that the State still claims to be conducting a forensic analysis of the seized machines; no such analysis would be necessary if the State had any proof or evidence that the machines operated randomly or through chance.

The Circuit Court lacked adequate proof and foundation to make its findings. The State simply failed to introduce any sufficient proof to establish that consideration was present. The computers at issue delivered nothing of value. The prizes came from the sweepstakes that did not require the computers, and any consideration was for long-distance phone time. As the Court in *Six Electronic* noted, the sweepstakes offer at the internet café is no different from that offered by Wal-Mart, or that offered by Pepsi or McDonalds, which was even won at one point by a West Point resident. (R. 360-72, 413-14.) The Circuit Court clearly erred in rendering its

decision and order, and this Court should reverse the trial court, find the computers are not illegal gambling devices, and order the computers returned to the Moores.

III. THE TELEPHONE CARDS AT ISSUE ARE IN FACT COMPARABLE TO THOSE IN THE *TREASURED ARTS* CASE.

The Circuit Court held that the phone cards in this case are not comparable to those in the *Treasured Arts* case on the grounds that the *Treasured Arts* case dealt with a different factual scenario, a lottery. (R. 416-17.) This finding is clearly erroneous, and must be overturned.

In *Mississippi Gaming Commission v. Treasured Arts, Inc.*, 699 So. 2d 936 (Miss. 1997), this Court examined a case in which a phone-card product, similar to the ones in the present case, was at issue. The card in *Treasured Arts* provided long-distance phone time to the purchaser, with phone-use instructions on the card, and also had attached to it a "scratch-and-win" game piece for a prize opportunity. *Id.* at 937. The Mississippi Gaming Commission refused to issue a formal opinion as to the legality of the card with the game piece attached; thus, Treasured Arts, Inc., filed an action for declaratory judgment. *Id.* The Commission argued unsuccessfully in opposition that a difference existed between the cards at issue in that case and similar cards, such as those which were a part of soft-drink sweepstakes and grocery store scratch-and-win promotions, primarily because there was a product received in exchange for the consideration paid in the latter, but not the former. *Id.* at 938. The Commission attempted to argue that the cards at issue there offered a prize, the "winning" of which was determined by chance, and that the consideration paid for that chance to win and not just the phone cards alone. *Id.* This Court rejected this distinction attempted by the Commission. *Id.* at 940-41.

The analysis in *Treasured Arts* differed slightly from the analysis which this Court should apply in the present case in that the question in that case 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; however, the precise question there nonetheless centered on the element of consideration and thus, that case controls as it is in fact similar and analogous to the case at bar. *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. This remains true in Mississippi to this day.

In that case, Treasured Arts, Inc., argued the consideration was paid for the card, not for chance to win via the attached game piece; therefore, the element of consideration was not present, preventing the card from being an illegal lottery. *Treasured Arts*, 699 So. 2d at 939. The Commission tried to argue that the price paid was more than the maximum usual value of a per-minute phone card based on another long-distance carrier's rates; however, this Court rejected that argument, finding instead that 1) the seller of the card could essentially charge what it wanted, without regard to another long-distance carrier's rate, and 2) because there was no purchase necessary to participate in the game – and in fact, one could obtain a game piece for free by submitting a written request – then there was no consideration paid for the game piece, precluding it from being an illegal lottery. *Id.* at 939-40. This holding was in line with the *Williams Furniture* decision, as the promotion in both cases lacked the element of consideration and was therefore not an illegal lottery. *Id.* at 939. The Commission argued that, although one could obtain a game piece for free by submitting a written request, this process was too onerous and complicated, and thus impractical; however, this Court rejected this argument. *Id.* at 940.

Under a de novo review, this Court found that the lack of consideration made it a legal impossibility for the cards and game-pieces to be considered illegal under Mississippi's gambling statutes. *Id.* at 941.

This is precisely the case today. As in *Treasured Arts*, the phone cards here have a two-fold purpose: 1) to operate as a long-distance calling card, and 2) to provide sweepstakes opportunity to those participating. This distinction is simply more easily seen in the *Treasured Arts* case as the card was physically two pieces – the card itself, and the attached "scratch-and-win" game piece. However, the analogy holds in its entirety to the cards in the case at bar as the card has two different purposes, calling and sweepstakes, even if not as physically evident because of their use in conjunction with the computers. As in *Treasured Arts*, consideration is paid for the product itself, the calling card, but not for the chance to participate in the sweepstakes.

It is also noteworthy that the *Six Electronic* Court stated: "We do not ignore the obvious. Our conclusion means that the machine itself is the problem, not the merchandise that is being dispensed." 699 So. 2d at 327. The Court continued: "Had the cards been sold over the counter at the same truck stop, absent better evidence than was introduced by the State in *Treasured Arts*, the card might not constitute a lottery." *Id.* This is directly applicable to the case at bar, as in essence the opportunity to participate in the sweepstakes, analogous the cards the *Six Electronic* Court was analyzing, is offered separately from the phone time, and does not require the use or operation of a computer. The Court continued: "This makes the phone cards an integral and not just incidental factor in deciding that this is a slot machine." *Id.* at 328. This, however, is not true in the case at bar – the computer is not needed at all for participation in the sweepstakes, nor are the cards.

The Court also acknowledged that "a line has implicitly been drawn in the Commission's enforcement activities between what it considers to be legal vending machines that sell products with promotional sweepstakes and illegal devices . . . ." *Id.* The Court noted that even the Commission identified certain distinctions between the two, including that product promotions often "have dubious enough odds of winning significant prizes that winning is only an incidental reason for purchasing the merchandise," and that "large numbers of calling cards were thrown away in a trash can . . . once the purchaser discovered that no prize was won." *Id.* Rejecting this argument, the Court reasoned: "Similarly, large numbers of cans of colas sold by vending machines likely are not opened solely to determine if a prize has been won, then discarded with the contents unconsumed," and that "[t]hese are relevant considerations in determining whether a device is a slot machine intended to encourage gambling or instead is a product dispense with a sales promotion." *Id.* Thus, unused phone time in this matter would not be evidence of illegal gambling, but rather only evidence of a marketing and sales promotion; in any case, however, this argument is inapplicable as the Moores have invoices showing that the long-distance phone time they sell at the internet café is in fact used by the purchasers.

The Circuit Court's erroneous reasoning is fatal in part because of the court's recognition that the cards were legal when used alone, but somehow became illegal when used in conjunction with the computers for participation in the sweepstakes. (R. 415-20.) In fact, participation in the sweepstakes does not require the use of the cards or the computers at all, and even validation of the phone cards do not require the use of the computers in all cases; those cards representing five dollars' worth of phone time need not be validated on the computers to be used for telephoning. The Circuit Court, with no evidentiary support or foundation, clearly erred in rendering its decision and order, making errors in its findings of fact, and this Court should

reverse the trial court, find the computers are not illegal gambling devices, and order the computers returned to the Moores.

IV. THE JUSTICE COURT RETAINED JURISDICTION OVER THE SEIZED COMPUTERS AND A REPLEVIN ACTION WAS NOT MERITED.

The State chose the Justice Court of Clay County by filing the charges there against the Moores in the first place. (R. 34.) Now, the State wishes to challenge both jurisdiction and venue on the grounds that the value of the seized property was never before the court; this would of course be an action that was entirely in the State's hands to be taken, and never the Moores'. However, the State cannot have its proverbial cake and eat it, too. The Circuit Court found the Justice Court did not have proper jurisdiction, relying on Section 9-11-9 to do so. That statute reads: "Justice court judges shall have jurisdiction of all actions for the recovery of debts or damages or personal property, where the principal of the debt, the amount of the demand, or the value of the property sought to be recovered shall not exceed Three Thousand Five Hundred Dollars ($3,500.00)." 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.

In fact, it is perfectly permissible under the law for the Justice Court to order the machines returned as the machines were seized pursuant to a warrant issued by that Justice Court. Though the issue is somewhat novel in Mississippi, the accepted rule is as follows: "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. Mississippi law is also in accord as this Court stated: "Most states have statutes governing disposition of property seized under a search warrant. Mississippi has no such statute and this Court has not discussed the issue in any previous decisions. We, therefore, 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 Court went on to recognize that 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). 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). Thus, the Justice Court had proper jurisdiction of the matter, and properly disposed of the computers via its Order for the State to return them to Ronnie Moore; the Justice Court had authority to do so because the computers were seized under a warrant issued by the Justice Court.

Finally, though the Circuit Court discussed only jurisdiction, and not replevin, the Appellee's repetition of this argument throughout these proceedings in connection with the jurisdictional issues merits its discussion here.

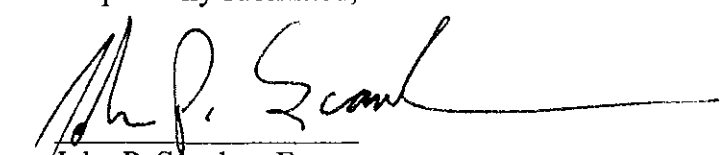
The State has repeatedly attempted its proposition that Section 11-37-101 requires that the Moores file a replevin action, a civil remedy often utilized in debtor-creditor matters. See § 11-37-101 (Rev. 2004). However, that statute simply lays out the procedure which is required of a replevin action; nowhere within that statute does the law require parties situated similarly to the

Moores, having had personal property seized with no criminal charges pending, to file a replevin action to recover that property. While replevin is allowed, it is certainly not required. Thus, the State's argument is bereft of a single 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. The Circuit Court clearly erred in rendering its decision and order. This Court should reverse the Circuit Court, find the state failed to present sufficient evidence meet its burden to prove the computers are contraband per se, find the computers are not illegal gambling devices, reinstate the ruling of the Justice Court, and order the computers returned to Ronnie Moore.

CONCLUSION

The State failed to put on sufficient evidence to prove their claims in whole, and all issues raised are without merit. The State still cannot show this Court that the computers at issue are illegal gambling devices and the criminal charges were dropped almost two full years ago, while the State remained in possession of Ronnie Moore's computers the entirety of this time. The Circuit Court clearly erred in rendering its decision and order, and this Court should reverse the trial court, find the computers are not illegal gambling devices, and order the computers returned to Ronnie Moore. The Moores respectfully request this Court reverse the decision of the Circuit Court and reinstate the earlier ruling of the Justice Court, rendering judgment in favor of the Moores.

Respectfully submitted,



John P. Scanlon, Esq.
Counsel for Defendants/Appellants
Ronnie Moore and Jeff Moore

Jerry Mills, MS Bar N[redacted]
John P. Scanlon, MS Bar N[redacted]
Pyle, Mills, Dye & Pittman
800 Avery Boulevard North, Suite 101
Ridgeland, MS 39157
Phone: (601) 957-2600
Fax: (601) 957-7440
jmills@pdmd.biz
jscanlon@pdmd.biz

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 Brief of Appellants, and have sent, via U.S. Mail, a copy of the bound brief to opposing counsel at the address listed below:

Tom Mueller, Esq.
Deanne B. Saltzman, Esq.
Martin Millette, Esq.
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 23577
Jackson, MS 39225-3577

Respectfully submitted, this the 10th day of July, 2009.

John P. Scanlon, Attorney for
Defendants/Appellants,
Ronnie Moore and Jeff Moore