IN THE SUPREME COURT OF MISSISSIPPI

EDWARD PAYTON — **APPELLANT**

V. — **CAUSE NO. 2010-CC-00046**

BOOMTOWN CASINO AND
BALLY GAMING AND SYSTEMS — **APPELLEES**

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

David C. Morrison
Mississippi Bar No. [redacted]
The Morrison Law Firm
169 Lameuse Street, Suite A
P.O. Box 322
Biloxi, MS 39533
Phone: (228) 435-2340
Fax: (228) 435-2341

Will Bardwell
Mississippi Bar No. [redacted]
Will Bardwell Law Firm, PLLC
416 E. Amite Street
Jackson, MS 39202
P.O. Box 13305
Jackson, MS 39236
Phone: (601) 604-4150
E-mail: will.bardwell@gmail.com

IN THE SUPREME COURT OF MISSISSIPPI

EDWARD PAYTON **APPELLANT**

V. **CAUSE NO. 2010-CC-00046**

BOOMTOWN CASINO AND
BALLY GAMING AND SYSTEMS **APPELLEES**

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 28 of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of the Mississippi Court of Appeals and/or the justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

1. David C. Morrison, *Counsel for Edward Payton*
2. Will Bardwell, *Appellate Counsel for Edward Payton*
3. Kathryn Hester, *Counsel for the Appellee*
4. James Shelson, *Counsel for the Appellee*
5. Luther T. Munford, *Counsel for the Appellee*
6. Hon. Lisa P. Dodson, *Circuit Court Judge*

RESPECTFULLY SUBMITTED,

Will Bardwell
Attorney for Edward Payton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitutional Provisions

Mississippi Constitutional Provisions

Mississippi Supreme Court Cases

Mississippi Court of Appeals Cases

Mississippi Statutes

STATEMENT OF THE ISSUES

The sole issue presented to the Court by the instant appeal is whether, under ***Grand Casino Biloxi v. Hallmark***, 823 So. 2d 1185 (Miss. 2002), a botched investigation amounting to a violation of due process requires the Mississippi Gaming Commission to view the case's evidence through the lens of spoliation.

STATEMENT OF THE CASE

On February 14, 2004, Edward Payton might have hit the jackpot. But because of the blunder-plagued investigation that followed, he will never know.

That day, Payton played the Millionaire Blazing Sevens slot machine at Boomtown Casino in Biloxi. That machine, which was manufactured by Bally Gaming and Systems, presented a bifurcated game: a preliminary round that, if completed successfully, gave way to a bonus round that would yield a prize ranging from $20 to a progressive jackpot of approximately $2.1 million. But after Payton won in the first round, his luck ran out. The machine locked up and did not permit Payton to pursue the jackpot.

Aggrieved, Payton sought out the assistance of the Boomtown Casino staff. A slot technician immediately opened the door of the machine and closed it, causing the game's reels to spin and forever foreclosing any possibility of determining definitively what would have come of Payton's continued play.

But the staff did not stop. A supervisor arrived at the machine, and at his request, the technician again opened and closed the machine's door, again spinning the machine's reels. Soon thereafter, a second technician turned the machine on and off several times, rebooting again and again the computer that governed the game.

Only then did Boomtown's staff notify the Mississippi Gaming Commission of its

dispute with Payton.

Some time later, a Gaming Commission enforcement agent arrived, and in his presence, a Bally technician again turned the machine off and on, then again opened and closed the machine's door. Finally, the enforcement agent physically removed the machine's central processing unit for delivery to and testing in the Gaming Commission's laboratory.

Ultimately, the Commission determined that, based on the laboratory's analysis of the CPU, Payton should be awarded only the game's minimum bonus-round prize of $20. The Harrison County Circuit Court affirmed the Commission's determination, and Payton now brings the instant appeal.

SUMMARY OF THE ARGUMENT

Payton presents a single issue for review in this Court: whether a denial of due process required the Gaming Commission to consider the spoliation of evidence.

In the cases of ***Pickle v. IGT***, 830 So. 2d 1214 (Miss. 2002), and ***Grand Casino Biloxi v. Hallmark***, 823 So. 2d 1185 (Miss. 2002), the Supreme Court outlined the procedural safeguards to be employed upon the manifestation of a machine-based gaming dispute. The series of unsanctioned door openings and computer reboots violated the due process protections recognized by the ***Pickle*** and ***Hallmark*** Courts and requires reversal of the circuit court's decision with remand to the Gaming Commission to reconsider whether spoliation requires judgment in Payton's favor.

STANDARD OF REVIEW

When a Mississippi court is asked to review a decision of the Gaming Commission, it may only reverse under certain limited circumstances. One such instance is when the Commission acted "[i]n violation of constitutional provisions," such as the right to due process.

Miss. Code Ann. § 75-76-171(3)(a).

An inquiry into whether due process has been denied amounts to a question of law and is, therefore, reviewed *de novo*. ***Tucker v. Hinds County***, 558 So. 2d 869, 872 (Miss. 1990).

ARGUMENT

Both Article 3, Section 14 of the Mississippi Constitution and the Fourteenth Amendment to the U.S. Constitution guarantee that, in any matter at law, no action will survive unless it affords due process. Even in disputes before the Gaming Commission concerning casino winnings, the constitutional guarantee of due process makes demands of the manner in which evidence is collected during the dispute's first moments.

The Mississippi Supreme Court discussed those requirements in two 2002 cases: ***Grand Casino Biloxi v. Hallmark***, 823 So. 2d 1185 (Miss. 2002), and ***Pickle v. IGT***, 830 So. 2d 1214 (Miss. 2002). In the former, the Court found due process violations that required awarding a jackpot to a casino patron. In the latter, the Court found strict adherence to procedural safeguards and affirmed the denial of winnings. But in both cases, the Court recognized explicitly that the collection of evidence within a dispute over a machine-based game must be conducted subject to due process.

Hallmark, like the matter at bar, involved a machine-based game's disputed results. The case featured a litany of investigative foul-ups that, the Supreme Court held, amounted to violations of the patron's constitutional guarantees of due process.[1] Those violations included:

- Failure to notify the Gaming Commission immediately of a dispute involving at least

[1] Although the holding stems from a case that was decided by a 5-4 vote and only over a strongly worded dissent, the dissent's disagreement with the ***Hallmark*** majority focused primarily on whether the Gaming Commission's conclusion rested on sufficient evidence and not on whether a botched investigation implicates the right to due process. *See* ***Hallmark***, 823 So. 2d at 1197 (Smith, J., dissenting) ("The majority also opines about the lack of evidence available for review by the Commission. This is ridiculous!").

$500, pursuant to Section 75-76-159 of the Mississippi Code, ***Hallmark***, 823 So. 2d at 1187;

- "[T]he casino['s] fail[ure] to preserve tangible and unaltered evidence" that would make "the subsequent investigation . . . conclusive or complete," ***id.*** at 1189;
- The fact that the tests conducted on-sight by the Commission's agent "were meaningless because the machine had been entered and manipulated by [casino] employees before [the agent] arrived on the scene," ***id.*** at 1190;
- The fact that "[t]he gaming agent did not have the benefit of conducting an investigation on the machine as it existed directly after the jackpot," ***id.***

In sum, ***Hallmark*** held that the patron's guarantee of due process had been violated because "[e]vidence that would have been helpful to the jackpot incident and assisted the agents in their investigation was not preserved due to the casino's actions." ***Id.*** at 1191.

Less than three months later, the Supreme Court fielded another case regarding the protections of due process within the confines of a gaming dispute, but the majority reached a different conclusion than in ***Hallmark*** based on starkly distinct facts. In ***Pickle v. IGT***, 830 So. 2d 1214 (Miss. 2002), the Court affirmed its ***Hallmark*** decision but concluded that no due process violation had occurred when the Commission's "agent was at the machine within an hour, all surveillance was preserved, and all entries into the machine were monitored." ***Pickle***, 830 So. 2d at 1223. On the other hand, "[i]n ***Hallmark***, Grand Casino failed to provide notice to the [Commission] of a patron dispute and destroyed the surveillance tape and custom buffer report rendering the [Commission] investigation inconclusive and incomplete." ***Pickle***, 830 So. 2d at 1223.[2]

---

[2] In addition to its facial holding, ***Pickle*** stands as an important and immediate affirmation of the Court's earlier and contentious holding in ***Hallmark***. Although ***Pickle*** implicitly viewed ***Hallmark*** as a narrow holding, ***Pickle*** clearly endorsed ***Hallmark*** as good law – an important statement, given that the majority announcing that endorsement included each of the four ***Hallmark*** dissenters. *See* ***Pickle***, 830 So. 2d at 1222-23. Even as recently as 2009, the Mississippi Court of Appeals relied on the ***Hallmark*** decision as good law, although it ultimately held against the party resting thereon because of a stark distinction between that case and the facts presented by ***Hallmark***. ***Simpson v. Holmes Co. Bd. of Educ.***, 2 So. 3d 799, 805 (Miss. Ct.

But in the valley of facts lying between the ***Hallmark*** and ***Pickle*** mountains of jurisprudence, the case at bar falls far closer to the former than to the latter. As in ***Hallmark***, and unlike in ***Pickle***, Boomtown's employees did not lock down the machine and refrain from manipulation prior to the arrival of the Gaming Commission's agent. *Compare* ***Hallmark***, 823 So. 2d at 1186 ("Before Commision employees arrived, the machine was entered and manipulated by casino employees who testified that the reels were spun and removed from the machine"), *with* ***Pickle***, 830 So. 2d at 1223 ("all entries into the machine were monitored"). Similarly, in the case at bar, because of the repeated manipulations, "the agent for the Commission did not have the benefit of conducting an investigation on the machine as it existed directly after the alleged jackpot." ***Hallmark***, 823 So. 2d at 1186. *Contra* ***Pickle***, 830 So. 2d at 1216 (first person to inspect the machine after a disputed jackpot was the Commission's agent). And even after the agent in the case at bar arrived on the scene, he removed the machine's CPU and left it for three days in a plastic bag in his desk drawer – a far cry from the steps taken by the Commission's agent in ***Pickle***, who removed the entire machine from the casino floor and brought it immediately to a secure location for further investigation. ***Pickle***, 830 So. 2d at 1218.

As in ***Hallmark***, these failures to conform with applicable requirements resulted in a fundamentally flawed investigation that "afforded no substantive due process protection to" Payton. ***Hallmark***, 823 So. 2d at 1188.

Of course, such a determination leaves unanswered the question of the appropriate remedy. Although the Court awarded the disputed prize of $509,000 to the aggrieved patron in ***Hallmark***, even that decision merely affirmed a circuit court's judgment. A review of the Supreme Court's jurisprudence yields no case in which the Court has been the first reviewing

---

App. 2009). *See also* ***Eash v. Imperial Palace LLC***, 4 So. 3d 1042, 1048 (Miss. 2009) (relying on ***Pickle***).

body to render a judgment in favor of a casino patron in a dispute over winnings.

Typically, when an appellate court determines that due process has not been afforded to a party, the proper course of action lies in reversing the tainted judgment for proceedings consistent with due process. In the case at bar, that is impossible. The due process violations suffered by Payton relate to the earliest moments of the investigation, and no decision by this Court can perfectly fashion a remedy to atone for those infractions.

Therefore, because the due process violations in question amount essentially to spoliations of evidence, the appropriate – and most feasible – solution is to reverse the judgments of the circuit court and the Gaming Commission and to remand to the Commission with instructions to reconsider the matter in light of that spoliation. The Commission, as a fact-finding body, is in a better position than this Court to determine, *inter alia*, whether the infractions amounted to intentional spoliation or negligent spoliation and, specifically, how the inferences therefrom affect the case as a whole.[3] Although such a conclusion does not perfectly compensate for the due process violations inflicted on Payton, it stems from the recognition that a perfect solution is unreachable because the moment at which those violations occurred is irretrievable.

But even so, "[t]he Constitution is a living law protecting human rights, not a mere rhetorical bauble to adorn an afterdinner speech or a Fourth of July oration." ***State v. Bates***, 187 Miss. 172, 183, 192 So. 832 (1940). Fundamental rights to not dabble in degrees; when the Constitution is violated, it is violated – period. And if the guarantee of due process provides any

---

[3] Although the matters are, in this unique setting, related to the health of evidence, the point central to this appeal's adjudication is that the assignment of error is, fundamentally, a violation of the constitutional guarantee of due process and not solely a discretionary matter of evidence admission. Furthermore, to the extent that these objections are enunciated for the first time on appeal, they nevertheless are not procedurally barred because the protections outlined by ***Hallmark*** are rooted in the fundamental constitutional guarantee of due process, violations of which are never waived. *See, e.g.*, ***Luckett v. State***, 582 So. 2d 428, 430 (Miss. 1991) (quoted favorably by ***Jackson v. State***, No. 2008-CT-00074-SCT (Miss. April 1, 2008).

guarantee at all, then Payton is entitled to proceedings atoning, to the extent realistically possible, for previous violations thereof.

CONCLUSION

Because the investigation preceding the arrival of the Gaming Commission's agent was fumbled in such a manner as to contaminate "[e]vidence that would have been helpful to the jackpot incident and assisted the agents in their investigation," ***Hallmark***, 823 So. 2d at 1190, Payton was deprived of a fair, meaningful investigation and, therefore, the protection of due process. The only manner by which this Court can atone for that constitutional violation in a meaningful way is to REVERSE the judgment of the circuit court and to REMAND the matter to the Gaming Commission for reconsideration of the evidence in the light of spoliation.

RESPECTFULLY SUBMITTED this TWENTY-THIRD day of July 2010,

Will Bardwell
Attorney for Edward Payton

David C. Morrison, Esq.
The Morrison Law Firm
MSB #99425
169 Lameuse Street, Suite A
P.O. Box 322
Biloxi, MS 39533
(228) 435-2340 (phone)
(228) 435-2341 (fax)

Will Bardwell
Mississippi Bar No. 102910
Will Bardwell Law Firm, PLLC
416 E. Amite Street
Jackson, MS 39202
P.O. Box 13305
Jackson, MS 39236
Phone: (601) 604-4150
E-mail: will.bardwell@gmail.com

CERTIFICATE OF SERVICE

I, Will Bardwell, hereby certify that I have, on this day, served true and correct copies of the foregoing *Brief of Appellant* on the following interested parties by United States Postal Service mail, postage prepaid:

Kathryn H. Hester, Esq.
Watkins Ludlam Winter & Stennis
P.O. Box 427
Jackson, MS 39205-0427

James W. Shelson, Esq.
Phelps Dunbar
P.O. Box 16114
Jackson, MS 39236-6114

Luther T. Munford, Esq.
Phelps Dunbar
P.O. Box 16114
Jackson, MS 39236-6114

Hon. Lisa P. Dodson
Harrison County Circuit Court
P.O. Box 1461
Gulfport, MS 39502-1461

RESPECTFULLY SUBMITTED this TWENTY-THIRD day of July 2010,

Will Bardwell
Attorney for Edward Payton

Will Bardwell
Mississippi Bar No [redacted]
Will Bardwell Law Firm, PLLC
416 E. Amite Street
Jackson, MS 39202
P.O. Box 13305
Jackson, MS 39236
Phone: (601) 604-4150
E-mail: will.bardwell@gmail.com