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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

RICHLAND COUNTY SHERIFF'S DEPARTMENT,

Appellant,

vs.

NIZAR AWDE

Respondent.

Appellate Case No: 2012-205508

RECORD ON APPEAL

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SC Court of Appeals

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RICHLAND COUNTY SHERIFF'S DEPARTMENT V. NIZAR AWDE

1 THE COURT: -- bring up before we get started?

2 First of all, let me call the case. This is
3 Richland County Sheriff's Department versus Nizar from
4 4703 Briarwood Road here in Columbia. Zip code is 29206.
5 And there were two machines that were seized: two Chess
6 Challenger II video gaming devices, and this is a hearing
7 to determine as to whether or not they are to be destroyed
8 or not.

9 Now, is there anything to bring before the
10 Court?

11 MR. SPENCER: Your Honor, just a couple
12 preliminary matters. First matter is -- and I meant to
13 bring this up with counsel before -- is I just want to
14 make sure we have -- I just want to understand which party
15 it is that's asserting, that's basically here for the
16 legality of these machines. I want to make sure it's
17 somebody that has standing. So that's the first thing,
18 and something I should have brought up before.

19 MR. ALTMAN: You should have, but
20 nevertheless, I'm Jonathan Altman, Your Honor. I
21 (inaudible).

22 THE COURT: Jonathan --

23 MR. ALTMAN: Altman --

24 THE COURT: Altman.

25 MR. ALTMAN: A-L-T-M-A-N, Your Honor.

1 THE COURT: Okay.

2 MR. ALTMAN: Dave, we represent Mr. Awde in
3 this matter, but we also represent the owners and
4 developers of the machines as well. So we certainly have
5 standing to appear on behalf of everybody, and certainly,
6 the named party has retained us as well.

7 MR. SPENCER: The named party, and what's the
8 party, the owners of the machines, if we can just have
9 that for the record?

10 MR. ALTMAN: Well, the machines were developed
11 and distributed by Castle King LLC. Mr. Awde is actually
12 the named party in the -- who retained my office and Mr.
13 Gasser.

14 MR. SPENCER: Oh, okay.

15 MR. ALTMAN: But I appreciate that concern.

16 MR. SPENCER: Okay. So, yeah, so I think the
17 caption of the case will stay the same. Castle King has
18 an interest in this, but Mr. Awde is the one with the
19 standing, as I understand it.

20 MR. ALTMAN: Mr. Awde is the party who
21 requested the --

22 MR. SPENCER: Is the party.

23 MR. ALTMAN: -- the hearing.

24 MR. SPENCER: And that's so that you know we
25 get to these things sometimes, Your Honor, and we're not

1 quite sure who the defendant is or owner asserting --

2 MR. ALTMAN: Yeah.

3 MR. SPENCER: -- trying to assert ownership of
4 the machine.

5 The second thing, I think there's a bit of an
6 impasse, burden of proof, and procedure to go forward on
7 these. So just to go, just to go forward, our position is
8 the nature of this proceeding is a rule to show cause
9 under "192 Coin-Operated Machines."

10 Do y'all have a copy of that?

11 MR. ALTMAN: We do?

12 MR. SPENCER: I'll just bring it up here, Your
13 Honor. And Your Honor, I'm going to try -- I just want to
14 have the record reflect this: Under Headnote 25, I
15 believe that's on Page 17 of the opinion, it states, it
16 states that the most due process requires -- (indistinct)
17 for the owner -- is a post-seizure opportunity for the
18 innocent owner to come forward and show, if he can, why
19 the *res* should not be forfeited and disposed of as
20 provided for by law."

21 And our position is is this is the nature of
22 the rule to show cause. Your Honor has already issued an
23 order of destruction, found probable cause to believe
24 these machines are illegal, and it's up to the owner to
25 show, if he can, their burden to show that these machines

1 are not actually machines in violation of the machine
2 statute 12-21-2710.

3 And I think Mr. Altman might have an argument
4 against that. I know in the past, you had us come make an
5 additional presentation --

6 THE COURT: I understand that was -- now that
7 I think about it, I think that was improper when I did
8 that, after I thought about it and slept on it real good.

9 MR. SPENCER: Thank you, Your Honor.

10 THE COURT: Let the record show that the, the
11 two machines that are in question here today were brought
12 before me actually at my home back on or about December
13 the 29th at approximately 5:30 pm, and that is when I
14 initially examined the machines and determined that they
15 should be destroyed. So --

16 Now, to show cause, what do you have to show
17 me?

18 MR. ALTMAN: Your Honor, there are a couple of
19 matters, housekeeping matters, that I spoke to with Mr.
20 Spencer before which I think probably aren't in dispute.
21 One is I've got a legal notebook to hand up, and I've got
22 a copy for Mr. Spencer. It includes the "192" game case,
23 also a number of (inaudible phrase).

24 In the cases, there are only three or four
25 cases. This is an area of the law that, frankly, there

1 isn't a whole lot in dispute as to what the legal standard
2 is. And even though this is the first -- I've had cases
3 with Mr. Spencer before, never had the opportunity to
4 appear with him, but I have worked with his office on
5 these sort of post-seizure hearings.

6 The way that we structure them is we try to
7 stipulate as to what the legal standard is (indistinct).
8 Frankly, since our frame of reference is Attorney General
9 opinions and Supreme Court cases, there really is no
10 dispute in my mind as to what the appropriate legal
11 standard is. I don't know whether you (indistinct) to
12 that at all --

13 MR. SPENCER: There is, and you know, I think
14 we may have some argument over what the standard means,
15 and I'm anticipating we may, we may exactly be in
16 agreement. I don't know. But the standard has not been
17 clearly enunciated by the Supreme Court. However, our
18 position has always been that the Supreme Court is most
19 likely to favor what's known as the predominant factor
20 test.

21 There's two, primarily two standards out
22 there. The predominant factor test is by far the majority
23 standard. I take it Mr. Altman isn't arguing in the pure
24 chance standard. That's the minority one. There is a
25 footnote. The Supreme Court hasn't decided this, and it's

1 up to them to decide the law, but there's a footnote in an
2 opinion by Justice Burnett in the Collins case. It's
3 escaping me at the moment the actual title of the case.

4 MR. ALTMAN: It's "Johnson v. Collins."

5 MR. SPENCER: Thank you.

6 "Johnson v. Collins" that, that suggests it
7 possibly could be a pure chance standard, even, which
8 would be any chance. The Supreme Court most likely would
9 pick the predominant -- accept the predominant factor
10 test. And I think there will be some argument about what
11 that is. But I agree, that's the proper standard to judge
12 whether these are games of skill or chance as to the
13 portion of the standard that talks about games pertaining
14 to chance.

15 MR. ALTMAN: Dave is incorrect. There are two
16 standards, Your Honor. One is a pure chance standard
17 where, under that standard, if a party could show a game
18 had any element of skill, it passed the test. It was a
19 more stringent standard (inaudible) the dominant factor
20 standard. And in that standard, if a player, through the
21 application of skill, can control the outcome and achieve
22 the desired result, it would meet the standard. That's
23 what the Attorney General's adopted. That's what the
24 Supreme Court has adopted, and that's what we're prepared
25 to stipulate, that our games today will meet that higher

1 standard, that a player through the application of skill
2 can achieve the desired result.

3 And when we talk about the application of
4 skill, the Attorney General, who has been very kind in its
5 opinion, has talked about what skill is. It could be
6 hand-eye coordination. It could be academic exercise. It
7 could be study and learning a pattern, all those things
8 that you associate with any activity: baseball, golf, any
9 of those things that over time allows a player to develop
10 skill at a particular task and achieve a desired result.

11 To the converse, if a player can't achieve the
12 desired result because the game has a feature that
13 prevents it from achieving that despite all those things,
14 despite having hand-eye coordination, despite having
15 dexterity, despite having focus. It all relates to that
16 one thing. If through the application of skill the player
17 can do what he wants to do, and the game or the program
18 doesn't impede him, we've got a legal game.

19 That's, in its simplest terms, what I
20 understand dominant factor is, and that's certainly the
21 position the Attorney General has taken in other cases,
22 and I think it'll make their job easier knowing that the
23 parties agree upon what the legal standard is today.

24 THE COURT: So what you're telling me is that
25 if part of that game is a game of chance, but if some part

1 of it, the end result has some skill to it, it's legal.

2 MR. ALTMAN: That's exactly what -- no, what
3 I'm telling you, Your Honor, is if the game has got an
4 element of chance, but the predominant feature, the
5 dominant feature of the game allows a player through the
6 application of skill to achieve the desired result, yes,
7 it complies. It is a -- it is not -- we're not a pure
8 skill or a pure chance state --

9 THE COURT: I got it. All right. I
10 understand.

11 MR. ALTMAN: It is is skill the dominant,
12 predominant feature in this game, and we're prepared to
13 show you today that yes, through the application of skill,
14 through familiarity with a pattern, learning how to play
15 this game, a player can win this game every single time.
16 It has no feature -- if you win ten times, the pattern
17 doesn't change. If you win 50 times, the pattern doesn't
18 change.

19 And that is the crux of this game: Can a
20 player win because he's got skill, or does this game keep
21 a skillful player from winning to guarantee some sort of
22 return? That is the difference between a legal game and
23 an illegal game. And that's what we're prepared to show
24 today. That's, that's one of the issues.

25 MR. SPENCER: There's going to be multiple

1 grounds. The machine statute is broadly worded to
 2 prescribe them a great amount of conduct. And I don't
 3 know how much you want to hear opening arguments, Your
 4 Honor, but there's two -- I want to talk about some of the
 5 other things that made this machine illegal (indistinct
 6 phrase) our belief that it's a game of chance, but I want
 7 to talk about the dominant factor test, and just a couple
 8 modifications.

9 One thing is when you're trying to determine
 10 if chance or skill is the dominant factor, you have to
 11 look at your exercise of skill -- if a player exercises
 12 skill to the fullest degree, does he still stand to lose
 13 due to chance. And we're going to be able to show that
 14 you can't achieve the maximum result on this machine but
 15 for chance.

16 We're also -- conversely, our contention is
 17 it's a game of chance because you can win purely on chance
 18 on this machine. You can win by not doing anything more
 19 than pressing a button, one button. And so the converse
 20 of that is if there's no skill involved to win, then it's
 21 also a game of chance.

22 Now, going to, briefly, about some of the
 23 other reasons this machine is illegal, it's a video game
 24 with a free play feature. We're going to develop that
 25 testimony.

1 MR. ALTMAN: I'm sorry. I'm trying to -- are
2 we making opening arguments or just trying to talk about
3 what's not --

4 MR. SPENCER: We can --

5 THE COURT: Let's go into this later.

6 MR. SPENCER: That's fine with me, Your Honor.

7 THE COURT: Let's see what they can show me,
8 and --

9 MR. SPENCER: That's fine. Thank you.

10 MR. ALTMAN: Well, Judge, that's one of the
11 issues before you today is is this a lawful game of skill.
12 The second key issue is did they have probable cause to
13 take this machine. What was their basis for picking it
14 up? Because they have to have, under the law, a
15 reasonable basis for concluding that this game does
16 (inaudible) before they ever bring it to you.

17 So that's going to be a key issue today
18 because this game, Chess Challenge II, is the only game
19 that I'm aware of that was vetted all the way through by a
20 magistrate's seizure, a circuit court approving the
21 magistrate finding that Chess Challenge II was a legal
22 game, and then our Supreme Court affirming that two other
23 Chess Challenge II games were, in fact, lawful games of
24 skill.

25 So it's out position today, and if you read

1 the Allendale case that I provided to you, that the burden
2 on law enforcement, they can seize Chess Challenge II
3 despite the Allendale ruling. But the burden and what the
4 order says is they have to have reasonable basis for
5 believing that that game has been manipulated or changed.

6 Now, I believe the AG's going to take issue
7 with that opinion, but that is what the opinion says.
8 Chess Challenge II can be seized if it's in the street
9 even though the Supreme Court declared it to be legal, but
10 they can't do it without believing that these games
11 operate differently than the games that had gone up
12 through the court system before.

13 Now, I'll be interested to hear what basis the
14 officer or the State's expert can tell us how are these
15 games different than those other games from Allendale,
16 because I can tell you I don't know of any difference.
17 Our expert's going to go ahead and say that they're the
18 same. But that is the issue -- the two issues before the
19 Court: what is their basis for seizing these machines?
20 was there probable cause to do so? Are they different?
21 How were they changed? Or are we just redoing something
22 that was litigated five years ago?

23 The second is are these games lawful games of
24 skill? If the Court finds that -- I want to hear that
25 they provide some basis for believing that they were

1 changed, and then we get to that second threshold
 2 question, all right, maybe these games are different.
 3 Let's see if they're different but still skillful. We
 4 think the answer's going to be that there was no probable
 5 cause, and these games are the same, and they're skillful
 6 just like the prior Allendale cases because a player can
 7 win every single time.

8 So that's how we see the two issues before you
 9 today.

10 THE COURT: I read that case that went to the
 11 Supreme Court, and I didn't exactly read it like you just
 12 mentioned it.

13 MR. ALTMAN: Your Honor, I --

14 THE COURT: But they actually ruled that this
 15 particular Chess Challenger machine -- maybe I, maybe I
 16 missed a page of it.

17 MR. ALTMAN: Your Honor, if you turn to Page 6
 18 of that order --

19 THE COURT: You've got it here?

20 MR. ALTMAN: I do. It's the very first -- it
 21 is under B of your packet.

22 MR. SPENCER: And is this -- this is the
 23 circuit court order?

24 MR. ALTMAN: No, this is the Supreme Court
 25 order.

1 MR. SPENCER: Oh, okay. Just so we're looking
2 at the same thing --

3 MR. ALTMAN: We are.

4 MR. SPENCER: -- what page was that again?

5 MR. ALTMAN: It's Page 6.

6 It's actually the first full paragraph on Page
7 6 before you get to "Other Grounds," Your Honor.

8 THE COURT: Mm-hmm.

9 MR. ALTMAN: And the language that I'm
10 referring to, the Supreme Court states, "As the two
11 machines seized, examined, and deemed legal, there was
12 nothing preventing the Sheriff's Office from seizing the
13 machines once again for examination, although they've
14 already been declared legal, because machines may be
15 manipulated so as to change their nature from lawful to
16 unlawful. Law enforcement, based on probable cause, may
17 seize those machines once again."

18 what the court is saying is these machines,
19 those two machines were lawful at the time, but because
20 they can be changed, and their nature may go from lawful
21 to unlawful, if law enforcement thinks they've been
22 changed and has a probable cause basis for doing so, they
23 can seize them. But that is the burden on law enforcement
24 to show that they've been changed. They could seize those
25 very two Allendale games again. However, to do so, they

1 would have to show the games are different, and now they -
 2 - and that their inherent nature had been changed, no
 3 different than a burden we think is on law enforcement
 4 today.

5 MR. GASSER: And Judge, may --

6 MR. SPENCER: Judge, can we have just one
 7 attorney arguing today? I mean, I don't think we need to
 8 tag team. And I don't mean to cut Mr. Gasser off, but I
 9 think that would be appropriate. And I also --

10 THE COURT: I think that is appropriate also.

11 MR. SPENCER: Thank you. And I would like to

12 --

13 MR. GASSER: I'm assuming that's issue by
 14 issue.

15 THE COURT: Issue by issue or -- no, just
 16 argument. I understand where you're coming from on the,
 17 about those machines that were being seized. Let's go
 18 ahead and start the -- instead of sitting here arguing
 19 about it, go ahead and let's -- the machines have been
 20 seized, and we'll go over the probable cause later.

21 MR. ALTMAN: Thank you, Your Honor.

22 MR. SPENCER: Thank you.

23 MR. GASSER: Judge, do you want us to go with
 24 the probable cause issue first or the skill issue first?

25 THE COURT: It doesn't make any difference.

1 Let's get into it. Do you have witnesses to testify?

2 I think we need to go on about the machines,
3 and then we'll, you can discuss the probable cause about
4 the seizing of the machines, and they can --

5 MR. ALTMAN: Your Honor, the petitioner would
6 call Robert Snyder.

7 THE COURT: Come around, Mr. Snyder. Witness
8 stand over here to the left. And place your left hand on
9 the Bible. Raise your right hand. Do you swear or affirm
10 that the information you're about to give is the truth,
11 the whole truth?

12 THE WITNESS: Yes, I do.

13 THE COURT: Have a seat, and state your full
14 name.

15 (Inaudible discussion.)

16 MR. SPENCER: No problem.

17 MR. ALTMAN: Mr. Snyder can go ahead, and I'm
18 going to come around here and (inaudible).

19 DIRECT EXAMINATION

20 BY MR. ALTMAN:

21 Q. How are you this morning?

22 A. I'm fine, thank you. My name is Robert John
23 Snyder, S-N-Y-D-E-R.

24 Q. If you don't mind, if you would (inaudible).

25 A. I'm a California lawyer licensed for the past

1 eight years. Began my gaming, amusement game, gambling
 2 career, I'm just entering my 40th year. From 1961 to
 3 1983, I was a deputy sheriff promoted to supervisor
 4 sergeant with the Los Angeles County Sheriff's Department.
 5 The last 12 of those years up until my retirement in 1983,
 6 I was in charge of special investigations involving
 7 gambling; gambling machines, pull-tab sweepstakes,
 8 electronic machines, slot machines

9 From 1983 to current, I've done consulting
 10 internationally with manufacturers of gambling machines,
 11 conducted law enforcement seminars throughout the country
 12 and in about 18 states, three times before the FBI at
 13 their training academy, always on the subject of gaming,
 14 gambling, and the machines involved.

15 Testified as an expert in courtrooms, federal
 16 court, state courts, circuit courts, magistrates courts,
 17 federal court; also in Canada, the provincial, the
 18 provincial court and before Her Majesty the Queen's bench
 19 on gambling issues and gambling equipment. Probably in
 20 excess of 100 to 125 times or greater, I've been qualified
 21 as an expert in these gambling machines.

22 I've published articles in trade magazines on
 23 gambling, gambling equipment, and the behavior of gambling
 24 victims; presented seminars of up to three days in length
 25 on the subject of gambling, gaming for law enforcement and

1 for the amusement industry itself at trade shows.

2 Q. (Inaudible.)

3 A. Yeah, there's more, but I'm getting forgetful
4 as I get older.

5 Q. (Inaudible.) Have you previously been
6 qualified as an expert in the state of South Carolina?

7 A. Yes, I have.

8 MR. ALTMAN: Your Honor, to expedite this
9 process, I have Mr. Snyder (inaudible phrase).

10 MR. SPENCER: No, I have no objection. That's
11 fine.

12 MR. ALTMAN: (Inaudible.)

13 MR. SPENCER: Thank you.

14 BY MR. ALTMAN:

15 Q. Besides professional background, Mr. Snyder, I
16 heard you say earlier (inaudible) experience working with
17 law enforcement divisions. (Inaudible) the LA County
18 Sheriff's Office?

19 A. Yes, almost, a little over 21 1/2 years with
20 the LA County Sheriff's and then training multiple states.

21 Q. (Inaudible.)

22 A. Yes.

23 Q. Have you had an opportunity to examine the two
24 games which are the subject of today's hearing?

25 A. I did.

1 Q. what specific games (inaudible)?

2 A. Yes, those are identical machines.

3 Q. And when did you have a chance to examine
4 those?

5 A. Yesterday at the sheriff's office in a
6 conference room. Oh, probably spent about two, 2 1/2
7 hours examining them, doing some technical examinations,
8 et cetera.

9 Q. Based on your examination, have you reached an
10 opinion as to the legality of these games?

11 A. Yes.

12 MR. ALTMAN: Your Honor, I would move that Mr.
13 Snyder be admitted as an expert in this case, as an expert
14 in gaming.

15 THE COURT: Any objection?

16 MR. SPENCER: I have no objection.

17 THE COURT: So noted for the record.

18 BY MR. ALTMAN:

19 Q. Bob, if you would explain to the Court -- if
20 you weren't in here earlier (inaudible) attorneys
21 jockeying back and forth about this notion of (inaudible)
22 dominant skill (inaudible) pure chance (inaudible).

23 If you would explain to this Court what those
24 (inaudible) dominant skill (inaudible).

25 A. Yes, I just remembered also I have taught as

1 the adjunct law professor of gaming law at an ABA school.

2 There are actually four standards of skill
3 within the United States as to skill and chance. The
4 majority of states follow what's called the predominance
5 test or dominant test, and that is the courts have
6 recognized that all games contain some elements of luck
7 and perhaps some elements of skill. The real test is what
8 is the predominating or greater factor. A game of chance
9 with just some skill is still a game of chance. A game of
10 skill, just because it may have some elements of chance,
11 if it's predominantly skill, it's a game of skill.

12 So the weight of the overall considerations in
13 the same, if it's greater --greater than, you might say --
14 if there's more skill than luck, it's a game of skill. If
15 there's more luck than skill, it's obviously a game of
16 chance.

17 Q. Tell me more of what the goal (inaudible).

18 A. Well, in these particular two games, the, the
19 thrust of the game, there's four windows on top, little
20 circles that are -- you could call them windows or reels.
21 And the object is to stop those particular icons as they
22 move and try to get three or more of the same type of
23 icons. And if you achieve three or four, you are returned
24 a number of points.

25 As you accumulate points, you can ultimately

1 hit the ticket button, and it'll dispense a ticket, which
2 is -- I'm not sure what the tickets are good for in this
3 state, but it does give you a Chuck E. Cheese game type of
4 ticket.

5 So the focus of the game when you look at the
6 attract mode and when you play the game, the part that
7 draws the attention are the four upper windows. And
8 they're going through a fixed speed of sequential icons.
9 And the object is to stop each one of those windows on an
10 icon, and hopefully, you have three or more of the same
11 type.

12 Q. You referred to the four windows at the top of
13 the (inaudible). Just to assist the Court, these are the
14 four windows you were referring to.

15 A. Yes, upper right of the screen where you're
16 looking, there's a castle in the first window from here,
17 picture of a king with a crown on his head, another
18 castle, and then it looks like a horse or a dragon.
19 Those, those symbols are somewhat like chess pieces in
20 this game. The name of the game is Chess Challenge, so in
21 here, you'll find the king and castles and queens and
22 pawns or bishops or --

23 Q. So the goal of the game is to match, is to
24 match icons. Is that, is that my understanding?

25 A. Yes. When those four windows stop, you hope

1 to have three or four of the same type, a match.

2 Q. Do the icons rotate in any (inaudible) never
3 change?

4 A. Within each window, there is a sequence of 255
5 icons. That sequence is the same in all four windows. It
6 never changes. Where it starts its spinning process may
7 differ in each window, but from that point on, it stays
8 the same. In other words, you could have a listing of 250
9 icons, and window 1 might start at Position 10, for
10 instance. Window Number 2 may start at window 10 or
11 window 50 or window 100, but the sequence is the same, the
12 speed of rotation is the same, in all four windows.

13 Q. (Inaudible) 255 icons is a lot of icons. Do
14 you have to know the (inaudible) to successfully play this
15 game?

16 A. No. When you play, you quickly start
17 recognizing certain colors and shapes and certain icons.
18 I give this analogy: When you drive home from the
19 courthouse or wherever you're going, you learn that you go
20 to the Dunkin' Donuts, you turn right, drive a ways, and
21 there's this gas station. You turn left at the gas
22 station, and ultimately, you arrive at your destination.
23 It doesn't matter the names of the streets that you passed
24 on the way because you're looking for landmarks.

25 In playing this game, certain land -- certain

1 icons are more predominant or perhaps easier to see, and
 2 that's what you look for. When I play this game, and when
 3 I've had people play the game, they explain to me they see
 4 certain things. Two red queens together will jump at them
 5 because they're the color red, and there's two back to
 6 back, and that shows up. Or the king itself, the most
 7 valuable piece on the chessboard and the most valuable
 8 icon in this game, is predominant, and it's easy to see,
 9 and because there's less of them, they tend to jump at you
 10 when they appear. And it's not long before you recognize
 11 a particular icon and, sure enough, what's behind it.

12 Another way to think of this is if you were in
 13 an alley, and there's tall buildings on both sides, and
 14 you're looking at the street, and around that street
 15 traveling was 255 vehicles over and over, but they never
 16 change position, you would quickly recognize that perhaps
 17 the brown UPS truck is followed by a white convertible,
 18 and two cars later is an ice cream truck. Well, pretty
 19 soon, here comes the UPS truck again, and sure enough,
 20 there's the convertible, and two cars later, there's the
 21 ice cream truck. So really, in that case, what you're
 22 looking for is there's the UPS truck again.

23 And (inaudible) not needed all the other
 24 (inaudible) you get a sense of timing about every so many
 25 seconds, there comes the UPS truck, and sure enough,

1 there's the, the vehicles behind it.

2 So in this game, it's the same way. You
3 become very proficient by recognizing just a few select
4 patterns. And it'll just come from doing it.

5 Q. In your analysis of these two games, is the
6 same pattern present in both, in both games?

7 A. Yes, both machines were identical. Part of my
8 examination yesterday I actually videotaped the sequence.
9 I looked at that sequence in frame-by-frame action, 30
10 frames a second, recorded the sequence of the icons, and
11 they were identical.

12 Q. So it's your testimony that the pattern in
13 both games is identical.

14 A. Yes, in these two machines, yes.

15 Q. And are these same patterns present in all
16 four windows in both machines?

17 A. Yes. Only the starting point varies, but the
18 pattern is the same.

19 Q. Now, is the speed at which the icons rotate,
20 is that the same?

21 A. It is. It actually comes out to, rounded off,
22 3.8 icons a second. So in the course of a one clock
23 second, there will be 3.8 icons, almost like in music,
24 playing 16th notes, if you play music, at a slow tempo.
25 sixty beats a minute would be one-ay-and-a two-ay-and-a.

1 And musicians play that all the time. So 3.8 icons will
2 rotate in a window, and all four windows are the same
3 speed.

4 Q. Now, if you play this game and you're
5 successful (inaudible) number of times (inaudible) 20
6 times in a row (inaudible) increase the level of
7 difficulty?

8 A. No. It's interesting. The speed never
9 changes. The icon sequence doesn't stop -- change. The
10 frequency of icons does not ever alter. There's ten kings
11 out of the 255. That never changes. And their position
12 in that 255 never change. So that strip, if it was
13 pictures on a paper, would, would never change. And the
14 speed doesn't change.

15 Part of the testing I did was to see if it
16 stops accurately; when you hit the button, does it really
17 stop right when you want it to. And that was determined
18 two ways: one electronically, and one from playing the
19 game and being able to nail that king virtually at will.

20 Electronically, I use a device that I actually
21 invented called a electronic contact visual reference
22 device. But really, what it means is this:
23 Electronically, you connect to the button that says
24 "stop." From that wire, it's connected to a little box
25 with a light on it, LED -- light-emitting diode -- on it.

1 So at the moment the button is activated, the light comes
2 on.

3 Now, if you put that light on the, on the
4 monitor where it's visually hanging, when you tape and
5 film, when you hit the stop button, the icon'll stop. At
6 the exact same impulse of electricity, the light will go
7 on. Now it's just a matter of looking at the, at the
8 digital image and see when the light comes on, does the
9 icon stop, or does it keep rotating? Is it consistent?
10 And yes, in all cases, it was very consistent. And more
11 importantly, did it stop in true form of the sequence, not
12 substitute and give you something else.

13 Every case, it stopped in true sequence of the
14 ones before it, if once you know the pattern, you can
15 quickly determine that. And it stops consistently
16 accurate on all four windows on both games.

17 THE COURT: Let me ask you something.

18 THE WITNESS: Yes, sir.

19 THE COURT: You're saying there are 250-some
20 images.

21 THE WITNESS: Two hundred fifty-five images.

22 THE COURT: Two hundred fifty-five images, and
23 you say they never change sequence, but you don't know
24 where it's going to start.

25 THE WITNESS: That's correct.

1 THE COURT: It'll start somewhere in that
2 sequence, but you don't know where it is.

3 THE WITNESS: That is correct.

4 MR. ALTMAN: And Judge, one (inaudible).

5 BY MR. ALTMAN:

6 Q. (Inaudible.)

7 A. That's correct.

8 Q. How do you play the game (inaudible) how do
9 you put strategy (inaudible)?

10 A. Well, when you start it, I look for kings.
11 Kings, when I see a king, that's my starting point, and I
12 say, "That's one of the ten kings. I know what follows
13 it," or, "It isn't one of the ten kings that I know" --

14 THE COURT: How do you know there's ten kings?

15 THE WITNESS: Through videotape analysis.

16 THE COURT: Oh. But a regular person stepping
17 up to the machine doesn't know that.

18 THE WITNESS: He would not know that.

19 BY MR. ALTMAN:

20 Q. (Inaudible.)

21 A. Well, I actually had test subjects without any
22 knowledge of the workings of the machines in 2003,
23 conducted this test. And four different subjects -- they
24 could use a notepad. They could not use any cameras or
25 any other devices. And it turned out that they all

1 learned certain techniques. And they learned about the
2 double queen. One of them spotted two castles.

3 THE COURT: Hold on a second.

4 MR. SPENCER: I apologize. I have an
5 objection to this. He's talking apparently about some
6 testing about some other machines. He's talking about
7 2003. At issue today is just these two machines. He's
8 talking about some other machines that apparently are
9 called Chess Challenge machines that may or may not work
10 similar, I think is going to be the contention.

11 But this is about these two machines. I would
12 just object and say that any testimony concerning some
13 machines that he tested back in 2003 that aren't these two
14 individual machines is irrelevant.

15 THE COURT: Okay, objection so noted for the
16 record.

17 whenever you're discussing something like
18 that, and you're discussing machines, explain to me
19 whether or not they're these machines you examined or
20 whether or not they're some other machines.

21 THE WITNESS: They were of this brand and this
22 type and this sequence and this speed and these icons, but
23 they were not physically these two cabinets.

24 THE COURT: Okay. That's what I need to know
25 is whether or not they're these machines or whether or not

1 they're some other machines that you examined that are
2 similar to these.

3 MR. ALTMAN: Your Honor, if I may, at a prior
4 post-seizure hearing (inaudible) the very same
5 (inaudible). And my expectation -- and I'll ask Mr.
6 Snyder to (inaudible) -- every Chess Challenge machine he
7 has ever tested is identical in every detail (inaudible).

8 MR. SPENCER: Your Honor, same objection.

9 THE COURT: Okay, objection so noted or the
10 record. Objection overruled.

11 MR. SPENCER: Thank you.

12 BY MR. ALTMAN:

13 Q. Mr. Snyder, (inaudible)?

14 A. Play trials (inaudible) give you some accurate
15 -- if I can look at my notes.

16 MR. SPENCER: While he's doing that too, just,
17 if we can just agree any testimony about other machines, I
18 just want to have a continuing objection just so I'm
19 protected for the record here.

20 THE COURT: So noted for the record.

21 MR. SPENCER: Thank you.

22 I'm sorry, this is --

23 MR. ALTMAN: You've been provided copies of
24 those previously. Those are the play trial results.
25 They're part of the record on appeal. It's right there.

1 MR. SPENCER: Um, in this case here.

2 MR. ALTMAN: This here.

3 MR. SPENCER: That's, yeah, that's --

4 I just have, you know, I have the same
5 objection as to this report as -- just because it concerns
6 other machines. So that would be my objection to that
7 exhibit.

8 BY MR. ALTMAN:

9 Q. Mr. Snyder, on the (inaudible) of the
10 document, titled "Second Supplemental Report, a Summary of
11 Subject Play Trials in Chess Challenge II" and have you
12 identify that report.

13 A. Yes, this document, with the exception of the
14 last page with some court signature on it, or the last two
15 pages, the pleadings --

16 Q. (Inaudible.)

17 A. Yeah, the last three pages are court pleadings
18 and some court reporter signature page.

19 Q. What was the part that was in 2003 (inaudible)
20 of those play trials?

21 A. In September 3, 2003, my company in its
22 division of it, the National Games Laboratory, wanted to
23 know basically the following: whether or not persons not
24 familiar with the technical workings in Chess Challenge II
25 and without any inside knowledge of the patterns or how

1 many icons of any type or pattern sizes, might they be
2 self -- might they learn some self-taught technique to
3 obtain a skillful result.

4 Secondly, I wanted to know could a layperson
5 actually improve with practice and learn to obtain
6 successful play results or, in essence, beat the machine
7 at least in part, and if so, to what degree, and how long
8 would it take a motivated player to do that.

9 And third thing, whether laypersons can play
10 successfully, and whether those persons can demonstrate
11 human skills, and what did they learn in the process.

12 So the testing was how do real laypeople
13 without any knowledge, can they learn, learn any patterns
14 or learn how to play the machine.

15 Q. So these purpose of these play trials was to
16 determine whether somebody without your professional
17 background, without your knowledge of the inner workings
18 of this game, could play it successfully.

19 A. Yes.

20 Q. And how many subjects participated in this
21 trial?

22 A. There were four subjects.

23 Q. Did any of them have any professional gaming
24 background?

25 A. No. One -- two were students. One was in

1 college with, I think, a degree in some unrelated field.
 2 One was an air conditioning/heating mechanic. None of
 3 them were familiar with Chess Challenge or any games
 4 beyond whatever they play at home, Nintendo or something.

5 Q. what were the results of those trials?

6 A. Well, within -- one subject within 36 minutes
 7 had learned a, a pattern. within two hours, one subject
 8 was actually accomplishing to achieve kings. At the end
 9 of four hours, all of them were achieving kings, and the
 10 slowest one, at the end of 12 hours over two days was able
 11 to play about 1400 percent greater than what would occur
 12 at random.

13 It's simple to determine whether -- what
 14 happens at random because we know, or I know, that there's
 15 255 icons, 10 of which are kings. So just blindly pushing
 16 a button, you'll, about every 25 1/2 games, or 10 out of
 17 255 times, you'll achieve a king icon. So you can
 18 calculate what would happen randomly just by straight
 19 math.

20 I use the analogy of four dice. If you had
 21 the first die, and you're trying to say I'm going to get a
 22 six and you roll it, well, you have one chance out of six
 23 because there are six sides. The second die would be the
 24 same thing, the third die and the fourth die.

25 So we know there's 10 kings, 255 icons, so at

1 random, you're going to stop, and you have 10 chances out
2 of 255. So you can calculate what's going to come up
3 randomly. And then you compare that to how test subjects
4 do, and you can get a comparison.

5 Q. And your play trial results are that a player,
6 without possessing knowledge of the patterns, that's
7 unfamiliar with the game, could play this game skillfully.

8 A. Yes. Their skill was anywhere from about
9 1300, without looking at the details, to about 1500
10 percent greater results at the end of their trial period.
11 I typically would test them at approximately two hours,
12 four hours, six hours. Some did better. The younger ones
13 seemed to do, the youngest one did the best.

14 And interesting -- there's also in this packet
15 some affidavits from those four subjects -- but they all
16 learned to do it differently and all keyed off different
17 icons. One used double shields. One used double queen.
18 One looked at the kings. One looked from left to right.
19 One played from right to left. They all had their
20 personal preferences. But all of them also stated they
21 learned more from watching than actually playing, which I
22 thought was interesting. They could see the patterns
23 better as they watched.

24 Q. watching other people play.

25 A. watching others play, yes. The playing gave

1 them a sense of timing of how fast they had to react, but
2 the actual standing back, observing, just watching them go
3 is what helped them the most.

4 Q. And those Chess Challenge II games that they
5 were playing during these trials are identical to those
6 that are before you today --

7 A. Uh --

8 Q. -- as far as play.

9 A. As far as play, they had more time. I think
10 those were one-minute plays and not 30 seconds. But the
11 sequence and icons --

12 Q. Same sequence, same pattern.

13 A. Same speed.

14 Q. Same speed.

15 A. Yes, sir.

16 Q. Mr. Snyder, I'm going to ask you to step down

17 --

18 MR. SPENCER: If I can just renew my objection
19 one more time because he just testified that the machines
20 that he tested with were allowing only -- were allowing 60
21 seconds, and these machines he just testified are allowing
22 30 seconds, so those machines operated -- that he tested
23 with operated differently than these machines. So I would
24 renew my objection to any testimony about those machines
25 that were tested because that's not a true test. These

1 are 30 seconds. Those are 60 seconds.

2 THE COURT: I have taken that into
3 consideration.

4 MR. SPENCER: Thank you, Your Honor.

5 THE COURT: Your objection's noted for the
6 record.

7 MR. SPENCER: Thank you.

8 BY MR. ALTMAN:

9 Q. I'm going to ask you step down here
10 (inaudible) talk a little while about the games. Let's
11 demonstrate the game and show how -- these strategies and
12 how we play this game and try and achieve the desired
13 result (inaudible).

14 why don't we start --

15 MR. ALTMAN: Your Honor, which machine do you
16 have a better view of?

17 THE COURT: Doesn't make any difference.
18 Fine.

19 BY MR. ALTMAN:

20 Q. why don't we start with that one, Bob, and
21 let's focus on the one windmill. And if you would tell
22 the Court -- let's start the game and explain to the Court
23 what we're trying to do and what results we're trying to
24 obtain and see if -- see how we do.

25 A. when you walk up -- when the person walks up

1 to the game, they can look at what's called the award
2 table. And this tells you how many points you will
3 achieve for certain icons. The four kings gives you the
4 most amount of points, eight points. It costs you five
5 points to play, and if you get four kinds, you get eight.
6 Then the queen's a little less, and so forth.

7 So looking at this, you immediately see
8 (inaudible) the kings are probably the most favorable
9 because it returns the most. If you put in five, you can
10 get eight points for that. That's (inaudible).

11 Q. Go back to that for a second if you don't
12 mind. So the goal is you're trying to get four of a
13 particular type of icon.

14 A. Yes.

15 Q. Okay. And the kings are worth the most, and
16 in descending order, the queens, and so forth.

17 A. Queens, bishops, castles, knights or horses,
18 (inaudible), (inaudible). So (inaudible) always get four
19 of a kind, yes.

20 Q. Let's go back (inaudible). And these four
21 windows give you an opportunity to (inaudible) four of a
22 kind. Is that correct?

23 A. That's correct. (Inaudible.)

24 Q. Is there a fifth opportunity to get that? If
25 you miss one of these --

1 A. Well, there is. This is the process. You'll
2 probably use just most of your 30 seconds (inaudible) in
3 here. The remaining time, there is this grid portion that
4 gives you -- I can see one king. There's a queen.
5 There's 28 (inaudible). So this added to this accounts
6 for your, for your --

7 Q. This is the fifth opportunity to get that
8 (inaudible).

9 A. Yeah. This is like a bonus opportunity
10 because you can get four up here.

11 Q. You can get four up here, and you don't even
12 need to use the grid.

13 A. That's correct. In fact, during the testing,
14 they focused, they were so focused on the (inaudible).

15 Q. I'm going to go ahead and try, try one window
16 first, and explain --

17 A. Okay. First, I'll just focus on one window to
18 begin, and I'll cover up the other three. Can you see
19 that?

20 Q. Mm-hmm.

21 A. We'll just watch it rotate for a minute. And
22 I'm going to start looking for kings. It's that black
23 thing. King, king, king, king, king. So we have the,
24 where you could see kings go by. And so when I play --
25 well, let me do that again. Now I'm going to try to stop

1 it on a king knowing the particular pattern. There's the
2 first king. Because I happen to -- I don't know what's
3 going by, but when I see a king, it grabs my attention.

4 From that point on, I'm looking for two or
5 three different (inaudible). I know this particular king,
6 there's a symbol after it. I don't know what it is, but
7 then there's a castle. A half second later, there's
8 another castle, and then I know there's a bishop. And if
9 I stop on the bishop, I'll (inaudible) the following king.

10 The game is slow enough to see, but it's fast
11 where you cannot see the object and stop on it. So you
12 learn, I have to stop one before or two before, like the
13 truck going through the alley. If I'm going to get the
14 ice cream truck, I'm going to hit the button when I see
15 the convertible because right behind it is the ice cream
16 truck.

17 well, I'll go through that again. So I'm
18 looking -- that king was not helpful to me. I'm looking
19 for particular kings that (inaudible) patterns I know.
20 Five seconds (inaudible).

21 Q. Now, you testified earlier that there's a 1 in
22 25 chance of getting a king (inaudible).

23 A. Twenty-five and a half.

24 Q. Twenty-five and a half. You've just gone two
25 for two.

1 A. Right.

2 Q. Now, you wanted -- I know it's a lot to try
3 and play more than one window at a time (inaudible). You
4 want to try and demonstrate --

5 A. I can do that. So my key is only the king. I
6 don't care about these other (inaudible). I don't need to
7 memorize them. I'm only looking for certain patterns.
8 And different players key off different things. That's
9 what works for me.

10 I'll try more than one window. (Inaudible)
11 one spot (inaudible).

12 Q. It's not easy, is it?

13 A. No. I need to --

14 THE COURT: Is there the -- is it the same 255
15 sequence in all four windows, or are they at a different -
16 -

17 THE WITNESS: No, they're identical, Your
18 Honor.

19 BY MR. ALTMAN:

20 Q. The judge, the judge asked you is the icon
21 sequence the same in each of the four windows.

22 A. Yes.

23 That's one early.

24 Q. And we've seen that happen a couple times
25 where you've hit it early and had it on a shield. You got

1 three out of four on that one.

2 A. Right. (Inaudible.)

3 MR. ALTMAN: I'm glad you can do that, because

4 --

5 THE COURT: (Laughs.)

6 THE WITNESS: And interesting, Your Honor, the

7 likelihood of that occurring at random is 1 chance out of

8 25 1/2 times 1 chance out of 25 1/2, like the, like the

9 dice. Four dice, six times six times six times six. So

10 now there's (inaudible). To get four kings at random

11 comes out to 1 chance out of 422,825, to do it at random.

12 So --

13 BY MR. ALTMAN:

14 Q. I would say that playing the game in a

15 courtroom, crowded courtroom is about as difficult an

16 atmosphere as you could --

17 A. Well, (inaudible) calm down, get my, get my

18 sense of timing. But interesting, when I play it, I was

19 only looking for kings, and this other stuff's going by,

20 and I have no idea what it is. But the kings, every time

21 I'd see a king, I would (inaudible) king, or that's the

22 one I want, and then I knew what was coming.

23 Q. Now, one of the terms that I heard you mention

24 earlier is substituting or (inaudible) substitution.

25 Explain to the Court what that is if you don't mind.

1 A. Yes, there are, in some video games -- not
2 these particular, not the Chess Challenge II that I've
3 examined -- but in some video games, a couple things
4 happen. One, you can preset the amount of return you want
5 the public to receive. That's part of the software and
6 the computer basis of the machine. And to accomplish
7 that, the machine needs to recognize that it's given away
8 too much or not enough to achieve that set percentage. So
9 it will do some trickery involved.

10 And what happens, on some machines, there's
11 not a sequence, first of all. It's just random each time
12 what goes by. The second thing is when you hit the stop
13 button, it may not stop consistently because the computer
14 says, well, wait. I'm going to give you what I need the
15 program to give you to maintain a percentage. So if it
16 was a picture of a -- I'll use the term "king," but it's
17 certainly not in this machine -- that the machine would
18 say, wait a minute. I can't give you the king because I'm
19 giving too much away, so it will substitute another
20 picture, but because it happens quickly or doesn't stop
21 immediate, it's able to do that substitution of images,
22 and it stops on something else.

23 That would be like playing cards, and the
24 poker machine says, Hmm, I'm starting to give too much
25 away, so we'll just throw a couple aces on the floor, and

1 I'll deal the rest of the cards. In software, that's
2 called bandits.

3 And so picture substitution means the computer
4 picks a symbol other than the one it should have stopped
5 at and gives you that symbol. Sometimes the term
6 "morphing" comes to apply, but it's really a substitution
7 more than a morphing.

8 A morphing is a, a substitution, but you can
9 see it happen. It's like these kids' toys now that look
10 like some kind of musclemen hero, but it evolves or morphs
11 into a truck or an airplane. And so that's morphing.
12 Machines really don't morph because the player would see
13 that even though maybe the law enforcement community calls
14 it morphing. It's really a picture substitution. Behind
15 the scenes, it's throwing another symbol instead.

16 THE COURT: These machines don't do that.

17 THE WITNESS: They do not, sir. If they did,
18 I certainly wouldn't be able to get four kings.

19 BY MR. ALTMAN:

20 Q. Now, Mr. Snyder, am I correct that if the game
21 has got picture substitution or morphing, it would not be
22 a game of skill?

23 A. Well, that would certainly be a huge strike
24 against it because it would negate whatever effort you
25 tried to make.

1 Q. (Inaudible) there was picture substitution or
2 morphing (inaudible), a skillful player may lose a game by
3 circumstances beyond his control. The game itself may
4 decide to make that person lose.

5 A. That's true.

6 MR. SPENCER: Just, I just have a leading
7 objection. You know, that's fine if he's already
8 answered, but I want the leading to be watched.

9 THE COURT: Thank you.

10 BY MR. ALTMAN:

11 Q. And there's no picture substitution in this
12 game.

13 A. No. I could play that repeatedly and get the
14 same results. In looking at it on video frame after
15 frame, stopping it, when it, when it stops, even though
16 the light comes on, you record a while, then you stop it,
17 and you can verify, here's the sequence, known sequence,
18 and sure enough, it stopped right where it should.

19 Q. Now, does this game have a house (inaudible)?
20 Is there a preset (inaudible)?

21 A. There is not. There's no way to set -- to
22 change the whole circuit board and have someone write new
23 software. It's like taking your computer board out and
24 putting another computer board in. But there's, there's
25 no adjustment to set a percentage.

1 Q. So in a game like this, (inaudible) --

2 --- end of Tape 1, Side 1 ---

3 --- Tape 1, Side 2 ---

4 A. -- but what you get, you're putting -- each
5 play requires five points or five credits, and even though
6 I got four kings, I only get eight back, and if I only get
7 three kings, I break even. So there's not much advantage
8 to -- other than just the personal challenge, at least to
9 that part of the play.

10 Q. Is that, in your opinion, why people, people
11 would play this game?

12 MR. SPENCER: I object to that, Your Honor.

13 MR. ALTMAN: I'll withdraw it.

14 THE COURT: Thank you.

15 MR. ALTMAN: I don't know whether there's any,
16 any issue. Mr. Snyder played one, one of the two games,
17 and I believe he testified that they're identical. Do you
18 want him to play the second game, or is --

19 MR. SPENCER: Um --

20 MR. ALTMAN: -- stipulate that both games
21 operate identically? I'm sure he's happy to demonstrate
22 it.

23 MR. SPENCER: Just a moment. I'm just going
24 to talk to my expert.

25 No, we will stipulate that these two machines

1 operate identical to each other. That's fine.

2 MR. ALTMAN: (Inaudible.)

3 BY MR. ALTMAN:

4 Q. Mr. Snyder, are you familiar with Cherry
5 Masters and eight-liners, those class of games?

6 A. Yes.

7 Q. would you tell the court how this game differs
8 from that (inaudible) class.

9 A. The Cherry Masters and what's called eight-
10 liners -- they get the name "eight-liners" because there's
11 a grid of three by three, almost like a tic-tac-toe. You
12 got nine windows moving, and you can put multiple bets and
13 get three the columns, you can get three across, or two
14 diagonal, thus eight possible ways, so it's called an
15 eight-liner.

16 The eight-liners, the operator or person with
17 the key to the machine can set up a percentage that you
18 want the machine to return. It typically goes from 55
19 percent to 95 percent. Sometimes in the machine, it's
20 called level. Sometimes it's called difficulty.
21 Sometimes it's just simply called percentage. So you
22 predetermine what you want the machine to return.

23 During the play of the machine, the machine
24 will do a few things. There will not be a fixed sequence.
25 The ran -- the processor in the machine, being computer-

1 based, knows what it's giving away and will not stop
2 consistently. Typically when you stop, it goes one or two
3 more symbols. And the reason for that is so it can
4 substitute symbols for what it needs to give you. So that
5 substitution is there, or morphing. It's more correctly
6 substitution.

7 And so when you compare that, it's just
8 principally luck if you win. There may be some feature in
9 the machine that offers some small amount or some skill,
10 but predominantly, it's clearly one of chance.

11 Q. Do these games, Chess Challenge II, have any
12 feature that would prevent a player (inaudible) skill from
13 being successful at playing it?

14 A. No. I've played this game where I've got four
15 kings four or five times in a row, and then one -- and
16 then maybe get three kings and then another four kings
17 repeatedly. So there's no feature in the machine. It
18 just gives you whatever you stop at.

19 THE COURT: (Inaudible.)

20 MR. ALTMAN: Court's indulgence (inaudible.)

21 I'm almost through with the (inaudible)
22 Court's indulgence on this.

23 BY MR. ALTMAN:

24 Q. Mr. Snyder, did you have an opportunity to
25 recently play one of the two games that was seized in the

1 Allendale case?

2 A. I played two games --

3 MR. SPENCER: Your Honor, I would just request
4 a little foundation of, I mean, how do we know those were
5 the two machines seized in the Allendale case, I guess.
6 And then the same objection. There's two machines out. I
7 mean, these are two machines that are not before the
8 Court. Only these two machines are.

9 THE COURT: I'm anticipating the question's
10 going to be are these machines any different than the
11 machines if he examined the ones from the Allendale case.

12 MR. ALTMAN: That's correct, Your Honor.
13 That's correct. And since he's already testified as to
14 it's a 2003 opinion. The play trials' in 2003. He simply
15 revisited those machines.

16 The machines that you examined --

17 MR. SPENCER: My understanding was those tests
18 were on prototype, Chess Challenge II.

19 MR. ALTMAN: Actually not.

20 MR. SPENCER: Did they also examine the two
21 machines in that case?

22 MR. ALTMAN: If you look at your exhibits on
23 your desk, you'll have your --

24 MR. SPENCER: Okay, that's fine.

25 MR. ALTMAN -- forensic exam.

1 BY MR. ALTMAN:

2 Q. All right, Mr. Snyder, you've already
3 testified as to your 2003 examination of the games prior
4 to Allendale.

5 A. Yes.

6 Q. The games that you examined yesterday, were
7 those identical to the games that you examined for the
8 Allendale case?

9 A. Yes. They're two different machines, two
10 different cabinets, that played identical in speed,
11 sequence, and giving the same results.

12 Q. Are those games identical to the games in the
13 courtroom today?

14 A. Yes, they play identical, and the sequence was
15 identical.

16 Q. In fact, have you ever seen a Chess Challenge
17 game which contains a different pattern, a different speed
18 of rotation, any of those (inaudible) features?

19 A. No.

20 Q. Have you ever examined a Chess Challenge game
21 you would not consider (inaudible) as a lawful game of
22 skill?

23 A. I have not.

24 MR. SPENCER: I just, I didn't hear the
25 question. I'm sorry.

1 MR. ALTMAN: The question is whether he had
2 ever seen a Chess Challenge game (indistinct) in his
3 opinion that this was a game of skill.

4 MR. SPENCER: Okay, that's fine. Thank you.

5 BY MR. ALTMAN:

6 Q. In closing, is it your opinion that those, the
7 games in the courtroom today are lawful games of skill in
8 accordance with South Carolina law?

9 A. Yes, I have a firm belief that these are
10 predominantly skill. I think you can learn it over a
11 short period of time, and if you're motivated, you can do
12 well.

13 MR. ALTMAN: That's all I have at this time.
14 Thank you, Mr. Snyder.

15 MR. SPENCER: Your Honor, may it please the
16 Court.

17 THE COURT: Yes, sir.

18 CROSS-EXAMINATION

19 BY MR. SPENCER:

20 Q. I had a -- through your testimony, you
21 testified that these icons rotated -- did you say 3.8
22 icons a second?

23 A. Yes, I did.

24 Q. Okay, now, when you examined -- and do you
25 have your January 10th, 2003 report before you? Is that -

1 -

2 A. I don't think I do.

3 MR. ALTMAN: Dave, I don't think I'm familiar
4 with a January 2003 report.

5 MR. SPENCER: Oh, did I say January? Sorry,
6 July, July 10th, 2003.

7 MR. ALTMAN: Do you have a copy of the report
8 you're referring to?

9 MR. SPENCER: It's right here. I'm looking at
10 -- you know, and actually, that would be the August 15th
11 report. Just at the top, it says July 10th.

12 MR. ALTMAN: Okay. Do you have a copy of that
13 for us?

14 MR. SPENCER: (Inaudible) the Court's
15 indulgence for a moment. I can get a copy of it --

16 MR. ALTMAN: Thank you.

17 MR. SPENCER: -- record.

18 BY MR. SPENCER:

19 Q. Did you -- and the actual date on the report
20 on the front page is August 15th, 2003.

21 MR. ALTMAN: I'm sorry, Dave.

22 BY MR. SPENCER:

23 Q. (Inaudible) forensic report.

24 MR. ALTMAN: Tell you what, I'm not sure we're
25 looking at the same things. This doesn't have a date on

1 it.

2 MR. SPENCER: (Inaudible.)

3 I apologize, Your Honor.

4 MR. SPENCER: (Inaudible.)

5 THE WITNESS: I think it's a photocopy in
6 reverse. The pages are --

7 MR. SPENCER: Okay.

8 THE WITNESS: -- backward.

9 MR. SPENCER: Oh, yeah, I see what you're
10 saying. I see. Thank you.

11 Okay, I see what I've done wrong. It would be
12 -- this just says, "Confidential attorney work" -- well,
13 it says, "Summary of Forensics Examination Findings."

14 MR. ALTMAN: Okay.

15 MR. SPENCER: (Inaudible.)

16 Thanks for helping me out with that. I
17 apologize.

18 THE WITNESS: You're welcome.

19 MR. ALTMAN: And Your Honor, we have no
20 objection to this report being entered. I will note that
21 this report is from the same series of documents that Mr.
22 Spencer objected to being considered earlier relative to
23 the (inaudible) officer.

24 THE COURT: So noted for the record.

25 MR. SPENCER: Your Honor, I'm not moving to

1 object -- I'm not moving it into evidence right now.

2 BY MR. SPENCER:

3 Q. Do you recall in this report what the rate of
4 icon sequence was that you --

5 A. I --

6 Q. Do you need to refresh your memory?

7 A. I need to see the report.

8 Q. Sure. After you look, if you just --

9 And I can show you --

10 A. It, it may save the Court time if you can show
11 me --

12 Q. Sure.

13 It's under "General (inaudible)."

14 A. This report of 2003 on a prototype says the
15 fixed sequence was at the rate of 2.9 seconds -- I'm
16 sorry, 2.96 icons per second, and then, when the icon was
17 stopped, it was at 3.68 icons per second.

18 Q. Okay. So on that Chess Challenge II
19 prototype, that rotated at a different speed than these
20 machines here.

21 A. Uh, 3.8 -- the difference would have been at
22 the faster speed, 3.8 versus 3.67.

23 Q. Now, in those machines, the initial rate was
24 2.96.

25 A. Yeah. This, this prototype was a two-speed

1 machine that rotated at 2.96 icons per second --

2 Q. Okay.

3 A. -- and when you stopped the first icons, then
4 it changed and remained constant at 3.68.

5 Q. And --

6 A. This is three --

7 Q. -- these machines today go at equal rate at
8 3.8.

9 A. well, actually, yeah, one was 3.8, and one was
10 3.7-something, but we're talking hundredths of a second.

11 Q. Thank you. (Inaudible.)

12 Now, your testimony is there were 200 --
13 there's a fixed sequence of 255 icons.

14 A. That's correct.

15 Q. Okay. And what happens -- if you initiate
16 play with these machines, do they time out?

17 A. Uh --

18 Q. Do they stop play -- if you just press a
19 button and don't press any other button -- to initiate
20 play, and don't press any other buttons, do these machines
21 --

22 A. Yes.

23 Q. -- time out?

24 A. Yes. Once you initiate play, at the end of 30
25 seconds, the machines will time out.

1 Q. Thirty seconds. Now, the machines that you
2 tested in the courts, those machines were timing out at 60
3 seconds, right?

4 A. Uh, the subject testing was at 60 seconds;
5 yes.

6 Q. Okay. I want to ask you again about the 255-
7 icon sequence. How did you determine there was a -- well,
8 let me back up before I go there.

9 So in 30 seconds, about how many icons out of
10 the 255-icon sequence would be presented?

11 A. Less than 100 and -- well, it would be 30
12 seconds times 4, 120, just under 120 icons.

13 Q. And there would be -- whatever you --

14 A. Three point eight times 30.

15 Q. Thirty. If my math was good today, I
16 (inaudible) 114 icons. Is that --

17 A. I --

18 Q. Is that a number you would agree with?

19 A. I, I think so. I can tell you quickly here.
20 One fourteen; yes, sir.

21 Q. Okay. So in that particular game, where you
22 actually go through all the icons, you have -- your
23 testimony would be you would get a fixed sequence of 114
24 icons.

25 A. Part of -- yes, that sequence --

1 Q. I mean, that's all you would see in that 30-
2 second game.

3 A. Right, it would time out, yeah. It's rotating
4 255, but you only get a 30-second view of it.

5 Q. Right. So it stops before you would see any
6 of the other 140 or so icons.

7 A. That's correct, but in all cases, you will see
8 multiple kings.

9 Q. Well, let me ask you this: You said they
10 don't all start from the -- let me back up and -- say you
11 play a game that goes through -- just for the sake of
12 simplicity, starts at the first icon, ends at the 114th
13 icon. The next game in that window, will it start from
14 the 115 icon?

15 A. Not necessarily. It may or may not.

16 Q. And what's the likelihood that it may or may
17 not?

18 A. I would have to run some testing on that to
19 find out, but for the sake of argument, it'll start at a
20 new, fresh, unknown position.

21 Q. Right. And would you say most of the time,
22 it's going to start at a new, unknown, fresh position?

23 A. I would think so. Sometimes you'll see two,
24 two windows rotating next to each other, exact same
25 sequence, and you can stop both at the same moment. So

1 they could start together. It could pick up where it left
2 off. You don't know where it's going to start.

3 Q. But most of the time, would you agree there's
4 four different sequences, they're starting from four
5 different positions in each window?

6 A. I would say that's fair most of the time; yes,
7 sir.

8 Q. All right. And so what's being demonstrated,
9 each window is, is, if you allow it to time out, 114 icons
10 out of the 255-icon sequence, but you don't know which --
11 the machine decides which 144-icon sequence you're going
12 to receive, right?

13 A. That's correct. Where it starts, you don't
14 know as a player where it's going to start.

15 Q. Um --

16 A. But once it starts, it remains what you do
17 know, and it remains constant.

18 Q. Let me ask you, you mentioned that you have
19 tested, had four people come in and test the machine --
20 you did trials with four people.

21 A. That's correct.

22 Q. Now, what instructions did you give them to --

23 A. That is -- the exact wordage, I believe, is in
24 this report.

25 Q. And --

1 A. Um --

2 Q. -- and which report is that in?

3 A. It's the second supplemental report, "A
4 Summary of Subject Play Trials of Chess Challenge II."

5 Q. Okay.

6 A. Four subjects were enlisted, and they did the
7 testing from August 29th to September 2nd. It was over
8 the Labor Day weekend. The 60-second play was because at
9 that time, the consideration was the market had 60 seconds
10 per machine, so it was tested. Each of the four subjects
11 were required to read and sign employment-related
12 instructions and given game play instructions that follow
13 in this section.

14 The subjects were not permitted the use of
15 cameras, video recorders, and were not provided with
16 reports or any other data. Compensation was provided on
17 an hourly basis, with an incentive bonus or bonuses for
18 demonstration of successful play techniques. And the
19 reason you do that, because you want motivated players.
20 If someone's not motivated, I don't think they're ever
21 going to learn the thing. The first subjects worked in
22 overlapping times and on different schedules and different
23 days. Not all subjects met with each other. Then I
24 summarized the dates of the four subjects.

25 The instructions were this. These were the

1 instructions provided to the testers: "The main play of
2 the game consists of achieving the top four icons. A
3 fifth icon opportunity is offered in the grid that can
4 help your results. Any bonus segments are offered at no
5 additional cost." I should mention the testers played
6 free anyway.

7 "Achieving three or more icons of the same
8 type creates a win. Icons are ranked as the credits
9 awarded as shown in the award table, pay table." That's
10 what I showed the Court, what you win and when.

11 "Icons that return a greater percentage of
12 credits appear less frequency within the pattern."
13 That's, that's obvious when you play. The kings don't
14 show up that often. The other ones do. But that's just
15 the way they're mixed. There's only ten kings.

16 "Play segment consists of top four rotating
17 icons. The grid determines a fifth icon. Bonus at no
18 additional cost or penalty. Each of the top four
19 positions contains the same identical repeating pattern.
20 Each pattern is the same, although each play can begin at
21 a different starting point within the pattern. The
22 pattern of each is consistent and does not change." I can
23 tell you, the public, in my knowledge, the public doesn't
24 know morphing and substitution anyway.

25 "They are patterned sequences within each

1 position rotation that are unique and recognizable with
2 practice. The top four positions stop accurately and
3 immediately, thus your command to stop within the allotted
4 time determines the outcome.

5 Have fun. Practice can improve your play."

6 Q. All right, so what these people, when you gave
7 them out, is that it was a fixed sequence that was
8 rotating in those four windows.

9 A. The instructions said that, and I think that
10 was fair, and I don't think the public knows about random
11 mixture of symbols anyway. That's my thought.

12 Q. And that's just your opinion.

13 A. Yes, it is.

14 Q. Let me ask you about -- you testified about
15 the play on these top four windows. Tell me about the
16 bottom screen or (inaudible) of icons. How does that play
17 work?

18 A. That portion is referred to as the grid. It's
19 seven columns, four rows; seven up and down in columns,
20 four rows horizontally, a total of 28 icons. Each new
21 game, each time you reactivate the machine, that grid will
22 be in different positions. The grid stays the same, but
23 the icons will be different. If you look at that grid on
24 the machine on the right, there is a flashing light on the
25 warrior. Next row below, a couple to the right is a king.

1 So in our cases, you'll see one king and some other icons.

2 while you're playing the upper four, at the
3 same time, the grid has activity. The icons do not move
4 at all, but there is a horizontal and vertical light
5 pattern that moves from left to right repeatedly and from
6 up -- top to bottom repeatedly. It's where those two
7 light bars intersect at the given moment the grid is
8 stopped determining if the grid is to help your top play
9 or not.

10 Q. You testified as far as getting any icon you
11 want, the bottom grid -- excuse me -- in your report, I
12 believe, you've indicated that chance plays a role in
13 attempting to get the icon -- the desired icon at the
14 bottom.

15 A. Right. Yeah, it does play a role in the grid.
16 Stopping on the seven columns, you can learn to do that by
17 timing because the light bar that moves from left to right
18 is very consistent. So you --

19 Q. How about, how about the four rows?

20 A. Yeah, I'll get to that.

21 Q. Okay.

22 A. The -- so you certainly can skill,
23 predominantly, probably, with some 80 percent accuracy or
24 better, the, the vertical columns. The rows, I've not
25 found skill in stopping on which row it is. You can stop

1 on the column, but not which row.

2 Q. Right.

3 A. So the row portion was more random than the
4 columns.

5 Q. And that's random -- there are seven rows.

6 A. Yeah, so --

7 Q. So it would be a one in seven chance, or is it
8 a one in four chance?

9 A. Well, the columns --

10 Q. Two and --

11 A. -- the columns, to get the column you want
12 randomly would be one out of seven because there's seven
13 columns.

14 Q. Okay.

15 A. So then you could run some trials and see if
16 you could time any particular column and improve at that,
17 and I found yes, people can, and I certainly could.

18 Q. Now, the rows --

19 A. The rows are eh. There's no skill in the
20 rows.

21 Q. The rows. And so there's four rows, so
22 there's a one in four chance of getting the row you want.

23 A. That would be accurate.

24 Q. Okay. Now, do you get points if you have
25 three icons in the window or four icons in the window

1 above?

2 A. That's correct.

3 Q. Or you get an opportunity to win down here to
4 get your third or fourth, right?

5 A. That's correct.

6 Q. Okay. What if you have four kings up here in
7 your last play -- if you get a fifth king, what happens?

8 A. Then you get the, the bonus of whatever that
9 fifth king returns. I think it's a hundred points. It
10 would be on that pay table.

11 Q. So you would get additional points on top of
12 the points you've already earned (inaudible).

13 A. That's correct.

14 Q. Okay, and does that trigger the vault?

15 A. It does not.

16 Q. Okay, what triggers the vault?

17 A. You need to achieve warriors to get --

18 Q. Warriors, how many warriors?

19 A. How many warriors in the sequence?

20 Q. How many warriors would you need to achieve to
21 unlock the vault?

22 A. I don't recall. I think it's three. I don't
23 recall.

24 Q. And what happens -- if you get three and
25 unlock the vault, what happens?

1 A. well, the vault, I've never seen people play
2 for the vault because it's like a bonus feature. what
3 happens, if you get enough warriors to activate the vault,
4 you see that number scrolling in the vault?

5 Q. Right.

6 A. As you insert credits into the machine or play
7 more money, that number will change, and it will stop on a
8 random number on the vault.

9 Q. Okay.

10 A. I've never seen anyone hit the vault or every
11 played with a vault. I guess.

12 Q. But if you win the vault, does it give you,
13 issue you credits?

14 A. I would think so, yes.

15 Q. Okay, so that just -- you could randomly win
16 credits on the vault.

17 A. Yes.

18 Q. Okay, and if you get four kings, you want that
19 fifth king, you can exercise your skill, you know, as you
20 said, to get the roll -- excuse me, the column you want --

21 A. Column.

22 Q. -- but you're still subject to chance to get
23 that fifth king, right?

24 A. That's correct.

25 Q. And so wouldn't you agree with me -- I'm going

1 to withdraw that question.

2 I want to talk to you about the "score"
3 columns here. What does the "prize" column or the "prize"
4 field represent?

5 A. Well, if you look right now, that prize, where
6 it says "prize" in the lower left, it says -- is that a
7 number 8 in there?

8 Q. Um, actually, it says zero right now.

9 A. Oh, okay. Well, when you achieve the four
10 kings, it should show you -- the prize is the 8.

11 Q. Okay, so when you achieve a prize, it'll --

12 A. I'll have to experiment with it to tell you
13 exactly what it is. I don't recall.

14 Q. Okay, so you don't recall the scoring method
15 on this machine?

16 A. Uh, I don't know if it goes right to score
17 first or --

18 Q. Oh, okay.

19 A. -- moves up to prize.

20 Q. What does the "total" field represent?

21 A. I don't recall. Without playing it a couple
22 of times, I can't tell you.

23 Q. You don't recall what the "total" field is?

24 A. I, I think when you -- I don't know what that
25 is as I sit here. I don't recall. I could quickly

1 determine that, but --

2 Q. So you don't know the "score" field or the
3 "total" field --

4 A. Well --

5 Q. -- was also on the Chess Challenge II machines
6 --

7 A. Well, yes.

8 Q. -- (inaudible) in the past.

9 A. Well, yes. The "score" field and the "total"
10 and the "prize" -- the "score" field, first of all, can be
11 turned on or off. Depends on jurisdiction if they want
12 that. Some states require a "score" field to show what
13 happened on that particular hand or play. When you win
14 eight -- I could go up there and get four kings or win
15 something, and I can tell you what those numbers are.

16 Q. Are you familiar with a free -- what a free
17 play feature is?

18 A. On a game, sure, sure.

19 Q. Could you explain to the Court what that is.

20 A. Well, on games, perhaps like pinball, if you
21 get a certain score, you get a free game. That's what
22 that is.

23 Q. And so --

24 A. It means your very next game you can play
25 courtesy of the game.

1 Q. So when you buy a successful play, you win
2 free (inaudible). Is that --

3 A. Correct.

4 Q. -- my understanding?

5 A. Correct.

6 Q. And what would be a knock-off?

7 A. A knock-off feature is used on gray-area
8 gambling machines, and that's like video pokers, perhaps,
9 other than in a strict casino environment where they're
10 regulated. That's where you achieve points, but then,
11 when you want to cash out or get the prize, the overseer
12 of the game can erase those points from the screen.

13 Q. Okay.

14 A. And typically, what happens in a situation
15 like that, an eight-liner or poker game in a bar, somebody
16 wins 20 points, the bartender sees it, pays you 20 points,
17 and has the means to erase or knock off those credits from
18 the screen.

19 Q. Okay.

20 A. Internally, they're kept in the bookkeeping,
21 and then the route person come around and divvy up with
22 you, knowing that you already paid out X amount of
23 dollars.

24 Q. Um.

25 A. This game has no knock-off.

1 Q. well, let me ask you this: If you -- you said
2 it dispenses tickets.

3 A. Yes, it does.

4 Q. How does it dispense tickets?

5 A. Uh, if you get a hundred points, it will dis -
6 - typically, they're set up at a hundred points -- it'll
7 dispense a ticket. There's a ticket dispense button.

8 Q. So it will -- so, in fact, you had a feature
9 that turns your -- that redeems your credits, if you will,
10 for tickets.

11 A. Yes, it will take your credits and exchange it
12 for tickets. Like paper coupons come out of the machine.

13 Q. Right. And those tickets, are they
14 (inaudible) -- in your experience, will those tickets be
15 exchanged for something of value?

16 A. Typically, tickets are exchanged for, redeemed
17 for merchandise or something of value, yes.

18 Q. (Inaudible.)

19 A. Could be.

20 Q. Could be money.

21 A. Could be, depending on the jurisdiction; yes.

22 Q. Well, could be, whether or not it's lawful
23 (inaudible).

24 A. Well, you asked me what they could be
25 exchanged for. They could be exchanged for virtually

1 anything. Most commonly, like in Chuck E. Cheese, you win
2 tickets, and you trade them in for bears or toys or
3 whatever you trade them for.

4 Q. Let me ask you -- maybe what I need to have
5 you do is come up and play one of these machines. It
6 looks like this one right here (inaudible) this one. Go
7 ahead.

8 Now, which button are you pressing as you
9 play?

10 A. Well, I (inaudible) start.

11 Q. Okay. Why don't you press the start button,
12 and just let it time out.

13 A. You want (inaudible) to play?

14 Q. Nope, just let it time out.

15 Now, in this case, the player didn't win
16 anything, but is it possible for the player, playing just
17 like you did, to, to win?

18 A. Well, we would have a debate (inaudible)
19 activate (inaudible). If you (inaudible) activate the
20 machine, stand back, and do nothing, you might get a win
21 (inaudible).

22 Q. All right, now, this button starts the play.
23 Is there a button that stops the play in all five fields?

24 A. Yes, you can stop each window. I'll
25 demonstrate that. You can stop each window individually.

1 You can stop the grid.

2 Q. All right.

3 A. Game's over.

4 Q. Okay, but can you, can you, after you start
5 playing, just stop playing with one button?

6 A. I can stop everything with the "stop all"
7 button.

8 Q. All right, with the "stop all" button. And
9 with that, can you win -- accumulate credits just by doing
10 that?

11 A. Well, you could win. I think you would
12 quickly lose credits. I've actually tried that
13 (inaudible).

14 Q. But in each --

15 A. Right now, we have 549 credits, and if we look
16 at our total here, 1010.

17 Q. So this is actually the credits you're playing
18 with in the "total" column.

19 A. Right, this -- yeah, total points, right. In
20 that case, when it stopped, I got two points --

21 Q. Right.

22 A. -- (inaudible) the score.

23 Q. So --

24 A. You asked me about the score. When you win,
25 it goes in the score total, which is how many credits you

1 have --

2 Q,. Right.

3 A. -- remaining to play.

4 Q. So you can accumulate -- so you can win this
5 game on any individual play by pressing just one button.

6 A. You could, yes.

7 Q. Or pressing two buttons if you stop
8 (inaudible) all five grids.

9 A. Yes.

10 Q. Okay, in that, is there any exercise of skill
11 in playing that way?

12 A. No, but if you do your (inaudible). But to
13 answer your question, (inaudible) played yet (inaudible).

14 Q. Okay. And I think you can take your seat now.
15 I think I'm done.

16 MR. SPENCER: Beg the Court's indulgence.

17 BY MR. SPENCER:

18 Q. I wanted to ask you again, now that you've had
19 a chance to look at the -- hopefully, you can do this
20 without getting up, having to get up again. You said that
21 you play credits out of the "total" column.

22 A. That's correct.

23 Q. That's the, when you put money in the machine,
24 that's where your credits to play with are.

25 A. I didn't put any money in.

1 Q. Yeah, but a player did.
 2 A. The credits were on there.
 3 Q. Okay, but that's --
 4 A. Yes, that's correct.
 5 Q. Thank you. And the score credits are the ones
 6 that you win. Is that your understanding?
 7 A. Uh, yes, it did go up when you actually win.
 8 So right now, there's a winning on there of 551.
 9 Q. So if you run out of credits from your "total"
 10 column, can you continue to play with the credits that are
 11 in the "score" column?
 12 A. I, I don't know for certain without trying to
 13 play.
 14 Q. You don't recall.
 15 A. I don't recall.
 16 Q. Do you recall if the machines that you
 17 examined in the past allowed a player to do that?
 18 A. Usually, the "score" feature is not even on.
 19 The points go right into the main total.
 20 Q. So you don't know if the Allen -- the machines
 21 that you examined in Allendale have this same feature.
 22 A. I, I don't recall as I sit here. I could
 23 quickly determine that for you, but as I sit here, I don't
 24 recall.
 25 Q. Do you recall if the Allendale machines timed

1 out at 60 seconds?

2 A. Thirty seconds.

3 Q. Your testimony is 30 seconds.

4 A. I looked at the machines yesterday; yes, sir.

5 Q. Well, when you were preparing for the case in
6 Allendale, do you remember what they timed out at?

7 A. I don't recall.

8 Q. I wanted to ask you about trigger points.

9 Previously, you said you learned -- excuse me, I should
10 rephrase that -- I read in one of your reports that you
11 learned how to use, keep a trigger point. And that's
12 where you see a king followed by two -- a particular two
13 icons, and then, you know, three icons (inaudible). Do
14 you recall that in your report?

15 A. No, but it sounds familiar. I know --

16 Q. I'll see if we, I'll see if we can find that,
17 then, if you don't recall.

18 A. If it, if it saves the Court time, I, I
19 frequently -- or it's not frequently, but trigger points I
20 explain different ways, but they amount to the same thing.

21 Q. Let me ask you this, actually. You may recall
22 this. How often does a particular trigger point occur in
23 a 255-icon sequence?

24 A. That would be -- how do you determine that?
25 It's whatever preference a particular player has. I look

1 at kings. Other, others, my subjects, one looked for
2 double queens, and another looked for double shields.
3 It's whatever your personal preference is to help you find
4 the point you want to get to. So I think it's an infinite
5 number. Certain ones are more obvious, perhaps, than
6 others. I probably know four, possibly five different
7 trigger points around the kings. Others may know one or
8 two.

9 Q. Okay, I think I have my hands on it.

10 MR. ALTMAN: What document are you looking at?

11 MR. SPENCER: I am looking at the

12 "Supplemental Summary Examination of Chess Challenge II."

13 Nope, I take that back. I'm looking at the -- this one is
14 addressed to you.

15 MR. ALTMAN: This is the (inaudible) strategy
16 for successful (inaudible) play.

17 MR. SPENCER: Right. Do you have that?

18 MR. ALTMAN: I'm certain it was -- I certainly
19 had it before. Go ahead. I've got it.

20 BY MR. SPENCER:

21 Q. And I'm just going to present this document
22 just to refresh your memory. And I'm looking at the first
23 trigger point you described in that report.

24 A. Yeah, it's the September 3 report I generated.

25 Q. And how'd you (inaudible) front page?

1 A. Yes, this was a report, premise of plays. Did
2 you have some -- I forgot the question.

3 Q. What I wanted to look at, you described -- and
4 tell me if you agree with this -- you described Trigger
5 Point 1 as a king followed by an icon of a warrior on a
6 horse. And I'll let you read that paragraph for yourself.

7 A. Yes.

8 Q. Okay. How often does that trigger point occur
9 in 255 icons?

10 A. That particular trigger point is one trigger
11 point. That appears once in the 255.

12 Q. Okay. So if you most icons you can see is 114
13 icons, and there is a more likely than not (inaudible)
14 more likely than not (inaudible) see that?

15 A. That particular trigger point, but you'll see
16 many, many others. There's more than one way to skin the
17 cat, so to speak. I probably know five or six, probably
18 five trigger points, and any one of those will give me a
19 clue, and I've never seen a situation where I've not seen
20 a trigger point. They're just spaced throughout, and
21 personal preference. If you really were motivated to
22 play, you'd find some trigger points other than mine.

23 Q. What do you define as a motivated player?

24 A. A player that wants to learn and not just go
25 through the motions. Are you competitive and you want to

1 learn.

2 MR. SPENCER: Beg the Court's indulgence.

3 BY MR. SPENCER:

4 Q. A player walks up to this machine for the very
5 first time. Could be the smartest person in the world,
6 knows nothing about this game at all. Could be the
7 smartest person in the world. Could be the most
8 physically adroit, the most precise with motor skills, if
9 you will. Can all those qualities help him win the first
10 time if he doesn't have any knowledge beyond what buttons
11 to press? (Inaudible.)

12 A. Well, first of all, I'd like to meet that
13 person. But beyond that, the person would probably start
14 off, if they're that sharp, by reading the, any
15 instructions and watching the attract mode. When you walk
16 up to this game, before you play, there's what's called an
17 attract mode.

18 Q. Right.

19 A. And it, it goes through the visual
20 demonstration from 13, 15 seconds, whatever it is. It
21 gives you an idea of what you're trying to accomplish.

22 Q. That's about 15 seconds.

23 A. Thirteen to 15, approximately.

24 Q. You aren't going to see those icons
25 (inaudible).

1 A. Oh, no, absolutely not.

2 Q. You're going to see what, about, less than 60.
3 would you agree with me?

4 A. Yes, I would agree with that. But it gives
5 you a sense of the speed and the timing and what the
6 object of play is.

7 MR. SPENCER: Thank you. I appreciate it.

8 THE WITNESS: You're welcome.

9 THE COURT: Anything further?

10 MR. ALTMAN: I just have a few questions in
11 follow-up, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. ALTMAN:

14 Q. Mr. Snyder, Mr. Spencer asked you what a
15 motivated player was, and you gave your answer. Would you
16 characterize a player who hits all four buttons at once as
17 a motivated player?

18 A. I would not; not motivated to learn,
19 certainly.

20 Q. And a player who allowed the machine to time
21 out wouldn't be a motivated player.

22 A. That would even be, perhaps, less motivated.
23 I don't know why you'd stand there and stare for 30
24 seconds, but if someone --

25 Q. (Inaudible.)

1 A. -- someone might.

2 Q. (Inaudible) with your eyes closed.

3 A. That's probably fair.

4 Q. Now, Mr. Spencer showed you a document
5 entitled "(Inaudible) Strategy (inaudible) Successful
6 Play" (inaudible) copy of that.

7 MR. ALTMAN: Have you any objection to that
8 (inaudible) being entered into evidence?

9 MR. SPENCER: No, I have no objection.

10 MR. ALTMAN: Then I will --

11 MR. SPENCER: Just -- well, just the same
12 objection I've had (indistinct) concerning other machines.

13 BY MR. ALTMAN:

14 Q. Now, Mr. Spencer asked you some questions
15 about (inaudible). Is it your testimony today that any
16 (inaudible) player (inaudible) successfully play this
17 game?

18 A. Yes.

19 Q. You don't need to see (inaudible) to
20 successfully play this game.

21 A. No. I successfully got four kings, which I
22 could do repeatedly, and I never see all 255, nor do I
23 know what all 255 are. You don't need to memorize that.
24 You do need to see that alerts your attention.

25 Q. I believe you testified yesterday that you

1 examined the Allendale games.

2 A. Yes.

3 Q. What was the time (inaudible)?

4 A. Thirty seconds.

5 MR. ALTMAN: That's all I have, Your Honor.

6 RE-CROSS EXAMINATION

7 BY MR. SPENCER:

8 Q. I believe your testimony before on the timing
9 feature was that you don't remember (inaudible) on direct.
10 Is that --

11 MR. ALTMAN: That's not, that's not what I
12 asked him.

13 MR. SPENCER: I'm trying to understand what
14 he's --

15 BY MR. SPENCER:

16 Q. Let me see if I can address this. I'm not
17 sure. Is it that it had a 30-second setting, or is it
18 that the machines, the machines in Allendale were timing
19 out at 30 seconds?

20 A. You're saying the same thing. The machines
21 are set to play for 30 seconds.

22 Q. Can you set them to play at multiple speeds --
23 excuse me, at multiple timeouts?

24 A. Yes, and that's in my reports. Thirty seconds
25 was the minimum.

1 Q. Thirty seconds was the minimum.

2 A. Yes.

3 Q. You could set it for 60 seconds.

4 A. I think you can set it for infinity where you
5 can come back two days later and they're still turning.

6 Q. So you could set it for 30, you could set it
7 for 60, or you could set it for (inaudible).

8 A. Well, it would be. My report tells you what
9 those settings are. I don't know if it's 60, but
10 typically, it might be 30, 45, 60, or forever.

11 Q. And you don't -- do you recall what those
12 machines in Allendale were set on at the time that
13 (inaudible)?

14 A. Thirty seconds.

15 Q. Okay, so -- and when I asked that question
16 before and you said you didn't recall --

17 A. Well, I played two machines yesterday
18 represented to me to be Allendale machines, and they were
19 set at 30 seconds, so --

20 Q. Okay, well, I'm talking about when you
21 inspected them back in 2003. Do you remember if they were
22 set on 30 seconds or 60 seconds or infinite spin?

23 A. They certainly were not infinite spin, and I
24 doubt if they were 60, so --

25 Q. You don't recall --

1 (Inaudible discussion.)

2 BY MR. SPENCER:

3 Q. Did you examine -- are you familiar with the
4 case -- with the Allendale case?

5 A. Yes, I've read it.

6 Q. You've read it. Okay. Did you inspect the
7 machines? It was two machines (inaudible) that were the
8 subject of that Allendale case?

9 A. Yesterday, yes.

10 Q. Yes -- how did you know that those were the
11 same two machines from the Allendale case?

12 A. Well, I wouldn't bet my life on it, but they
13 were represented to me to be the Allendale machines.

14 Q. So someone advised you that they were the
15 Allendale machines.

16 A. Yes.

17 Q. Okay.

18 (Inaudible)

19 Concerning the 255-icon sequence, how did you,
20 how did you discover the 255-icon sequence?

21 A. Well, you videotape, vigilly (sic) videotape
22 the screen.

23 Q. Were -- did you have to set the machine on
24 infinite spin (inaudible)?

25 A. No, you don't -- that's an easy way to do it,

1 but you do not need to do that to determine --

2 MR. SPENCER: I have no further questions.

3 THE COURT: Explain to me a little more about
4 the vault. What is that used for?

5 THE WITNESS: The vault, if you get three
6 warriors in the top, it activates the vault portion, and
7 in the vault, you'll see seven circular icons of warriors.
8 So a light will flash around those seven repeatedly.
9 It'll, it'll eventually time out, but it circulates, and
10 you can hit the stop, and the light will stop on an icon.
11 All of them are losers except that one with the larger
12 face or the head of the warrior, and if you get on that
13 one, that opens the vault.

14 THE COURT: And when multitudes of games, what
15 if you win (inaudible)?

16 THE WITNESS: Well, you'd win if -- whatever
17 value is in the vault.

18 THE COURT: Oh, I see. But that particular
19 little section up there, would that be a game of skill or
20 a game of chance?

21 THE WITNESS: Well, that's, that's a good
22 point. Getting the three warriors you could do skillfully
23 if you --

24 THE COURT: Right.

25 THE WITNESS: -- if you practiced that. Once

1 you go into the vault, that light goes pretty fast, Your
2 Honor, and it's happened so infrequently, I've never been
3 able to really analyze it. My best guess would be it's
4 probably luck if you're going to get the vault or not.
5 But to get the warriors to get there is skillful. But
6 once you get there, I never really analyzed that because
7 it just doesn't happen. I don't know how many hours of
8 study, and I've done a lot of hours on this machine, and
9 no one's ever tried to get the vault. But it's certainly
10 a possibility.

11 THE COURT: Okay.

12 That's it. You can step down.

13 THE WITNESS: Thank you.

14 THE COURT: How many -- any other witnesses
15 for --

16 MR. ALTMAN: Your Honor, we have one
17 additional witness to (inaudible) for the purpose of
18 demonstrating the game.

19 THE COURT: All right, we won't -- you want to
20 take -- let's take a five-minute recess.

21 MR. ALTMAN: Sure.

22 THE COURT: Let's take a five-minute recess,
23 and we will -- five-minute recess.

24 (Recess.)

25 MR. GASSER: Your Honor, at this time, again,

1 now that we're back on the record, we have another witness
2 to come up here and play the game successfully, but if the
3 Court has any hesitation that there are people that can
4 play this game successfully, we can call that witness
5 later on if that's still an issue.

6 But in order to advance this (inaudible)
7 forward, we will call one more witness as to the issue as
8 to skill, and that would be Phil Grimsley.

9 THE COURT: Place your left hand on the Bible
10 and raise your right hand. Do you swear or affirm that
11 the information you're about to give is the truth, the
12 whole truth?

13 THE WITNESS: I do.

14 THE COURT: Have a seat, and state your full
15 name.

16 THE WITNESS: Phil Dewey Grimsley.

17 DIRECT EXAMINATION

18 BY MR. GASSER:

19 Q. Mr. Grimsley, tell us, sir, where are you
20 currently employed?

21 A. I have a business I started. It's a
22 consulting business, Alcohol Beverage Consulting and
23 Investigations.

24 Q. And prior to you starting that business, where
25 were you employed?

1 A. The State Law Enforcement Division.

2 Q. And how long were you employed by SLED?

3 A. Um, I went to SLED in '93, so I was there for
4 15 years. Prior to that, I was with the ABC Commission
5 since '82 and started off with the local sheriff's
6 department in 1976.

7 Q. So you had, when you retired last year with
8 SLED, what month did you retire in officially last year?

9 A. June.

10 Q. And when you retired in June of 2008, what was
11 your rank at SLED?

12 A. Lieutenant.

13 Q. And where were you staying?

14 A. I was in the -- we called it the Lowcountry
15 for the vice unit. It's a little different region than
16 the criminal regions, but it encompassed everything from -
17 -

18 --- end of Tape 1, Side 2 ---

19 --- Tape 2, Side 1 ---

20 A. -- alcohol, video poker, gaming machines,
21 prostitution, and illegal drugs.

22 Q. Did you enforce the video gaming laws in South
23 Carolina from the time that you became a (inaudible) SLED
24 agent (inaudible) until June 2008?

25 A. Yes, sir.

1 Q. And when you were with the ABC Commission, did
2 you have anything to do with gaming machines in South
3 Carolina?

4 A. We did some, but not nearly as much as we did
5 when we were transferred to SLED.

6 Q. And did you supervise -- or were there SLED
7 agents under your command and supervision and direction
8 involved in seizing video games throughout that area you
9 described to the judge during the past 15 years that you
10 worked at SLED?

11 A. Hundreds and hundreds and hundreds.

12 Q. Well, that's the next question. If you could
13 estimate for the judge the number of machines either you
14 personally seized in South Carolina and/or that you
15 supervised the seizure of, if you could (inaudible)
16 estimate the number.

17 A. It was many, many; I mean, in the thousands,
18 I'm sure.

19 Q. So are you familiar with the Cherry Master
20 machines that were ruled by our South Carolina Supreme
21 Court as illegal games of chance in 1996? Are you
22 familiar with that Cherry Master game?

23 A. Yes, sir.

24 Q. Are you familiar with the eight-liner, Lucky
25 Eight-Liner games that were deemed by our South Carolina

1 Supreme Court in 1995 to be illegal games of chance? Are
2 you familiar with those games?

3 A. Yes, sir.

4 Q. Have you become familiar with the Chess
5 Challenge II games, first generally speaking with Chess
6 Challenge II games and also these two machines that are
7 before the Court today?

8 A. Yes, sir.

9 Q. Were you present at the Richland County
10 Sheriff's Department yesterday afternoon, and did you have
11 an opportunity to observe these machines in action
12 yourself?

13 A. Yes, sir.

14 Q. Okay. And were you also, yesterday afternoon,
15 had an opportunity to inspect and observe a machine,
16 another Chess Challenge II machine in the condominium here
17 in Columbia that Mr. Snyder and others were staying with,
18 and was that machine, at least told to you, was one of the
19 machines in the Allendale case?

20 A. That's correct.

21 MR. SPENCER: Your Honor, I object on grounds
22 of hearsay as to the supposed machine from the Allendale
23 case.

24 THE COURT: So noted for the record.

25 BY MR. GASSER:

1 Q. Are you familiar with the Allendale case?

2 A. Yes, sir.

3 Q. Are you familiar with the case we commonly
4 refer to as the "192" case, the case that emanated out of
5 -- SLED case out of Greenville that ultimately, in 2000,
6 Justice Finney wrote the opinion of the supreme court?
7 Are you familiar with that case?

8 A. Yes, sir.

9 Q. Okay. And just for the purposes of background
10 for the judge, in the "192" case, some SLED agents posing
11 as under -- a confidential and reliable informant had seen
12 Cherry Masters and Lucky Eight-Liners at a warehouse in
13 Greenville. Is that correct?

14 A. That's what I was told; yes, sir.

15 MR. SPENCER: Your Honor, I'd object on the
16 grounds of relevance --

17 MR. GASSER: Your Honor --

18 MR. SPENCER: -- to the facts of the case. I
19 mean --

20 MR. GASSER: This gets into --

21 MR. SPENCER: -- this is a published opinion.

22 we can discuss the facts reflected in the opinion, but as
23 to, if he's testifying to his personal recollection if he
24 was involved in this investigation, I would object on
25 grounds it's not relevant to this proceeding concerning

1 these two machines.

2 THE COURT: Just explain to me why it's
3 relevant to this one.

4 MR. GASSER: It's -- I'm kind of using Mr.
5 Grimsley on both the issue of probable cause and the issue
6 of skill, and so that's the only reason why I was asking
7 about that case, because that really goes into the
8 probable cause issue.

9 THE COURT: Objection overruled.

10 MR. GASSER: Thank you, Your Honor.

11 BY MR. GASSER:

12 Q. In the issue -- in that particular case,
13 ultimately, some Lucky Eight-Liners and some Cherry Master
14 machines were seized by SLED that were in a warehouse,
15 unplugged, not operationable (sic), and ultimately taken
16 before a magistrate and to the South Carolina Supreme
17 Court. Are you aware of that opinion?

18 A. Yes, sir.

19 Q. And in that South Carolina Supreme Court
20 opinion of 2000, Chief Justice Finney and the justices
21 ruled that Cherry Masters and eight-liners are per se, on
22 site, illegal and can be seized. That's enough for
23 probable cause. Are you aware that's what the, one of the
24 holdings in the opinion is?

25 MR. SPENCER: Your Honor, I object to that.

1 Legal conclusion.

2 THE COURT: Okay, on what grounds?

3 MR. SPENCER: I object. What he's trying to
4 say is that -- and of course, this is just Mr. Grimsley's
5 understanding of the law, I guess, is what he's trying to
6 get out -- but my understanding is, is that those machines
7 -- is that it was the determination of whether those games
8 -- whether there was probable cause to believe those games
9 were illegal.

10 We're here today not to determine probable
11 cause. That's a done issue. Your Honor has ruled that
12 all the cases, there was probable cause to seize the
13 machines. The cure if there's a seizure without probable
14 cause, first of all, is Your Honor saying no, there's no
15 probable cause, and refusing to issue an order of
16 destruction, or what we're here for today, this seizure.

17 The only issue today is the legality of these
18 machines. Probable cause is long since done with. If
19 there was no probable -- if these machines are legal,
20 they're legal. If they're illegal, it doesn't matter
21 whether there was probable cause at the time they were --
22 if the officer had probable cause. It doesn't matter if
23 Your Honor was mistaken as to probable cause. And of
24 course, my contention is you weren't mistaken.

25 So the only issue is the legality of this, and

1 this probable cause issue is really just a red herring.

2 MR. GASSER: Your Honor, I completely
3 disagree. Courts across South Carolina and this country
4 every single day, after an item has been seized,
5 magistrates with circuit court judges are determining
6 whether or not probable cause existed to continue on with
7 the case. That occurs in courts across South Carolina
8 every single day.

9 And we didn't have a right to be the
10 litigants. Only one party was present. So just because -
11 - for instance, when a magistrate signs a search warrant,
12 if you were to sign a search warrant, and that, and a law
13 enforcement agency in Richland County executed a search
14 warrant, somewhere down the line, a criminal defense
15 lawyer, if somebody's charged with that, every single day,
16 you file motions to challenge, and another judge
17 determines whether or not probable cause existed to
18 execute that search warrant. That happens in cases in
19 South Carolina every day, every week in the courts in
20 South Carolina.

21 And we put all parties on notice. When the
22 sheriff's department was involved in this case, I put the
23 parties on notice. When Mr. Altman wrote you the letter
24 requesting the hearing, all parties have been on notice.
25 I put Mr. Spencer on verbal notice that the two issues

1 here today, we are challenging after the fact whether or
 2 not probable cause -- we're not -- everyone -- we're not
 3 saying that Deputy Crane (phonetic) in Richland County did
 4 not act in good faith. No one's saying that, or that the
 5 Court did not act in good faith. What we are saying is
 6 now, with the full knowledge of the Allendale case and the
 7 "192" case, the question becomes did, did, now did
 8 probable cause exist. And that probable cause issue is
 9 litigated after the fact in courts across South Carolina
 10 every single day.

11 MR. SPENCER: Your Honor, just -- I think Mr.
 12 Gasser's analysis has a flaw in it. If you -- these
 13 machines as they stand now, based on your probable cause
 14 finding, are contraband per se; same legal standing as,
 15 say, cocaine.

16 If a police officer were to pull over a car
 17 and find cocaine on somebody, and he didn't have at least
 18 reasonable suspicion or probable cause to seize the
 19 cocaine, there's two things that could happen. One is the
 20 evidence can be excluded in the criminal trial. The other
 21 one is it may be grounds for a 1983 suit in federal court.
 22 But one thing that doesn't happen is you don't get your
 23 cocaine back. Your cocaine's not returned because it's
 24 contraband per se.

25 These machines, as they stand now, are

1 contraband per se, and if Your Honor believes that these
2 are illegal machines after this hearing, they're still
3 contraband per se, and the exclusionary rule does not
4 apply. And that is a holding in "192 Coin-Operated
5 Machines." In that case, they challenged whether a search
6 warrant was properly done, a Fourth Amendment issue. The
7 court ultimately concluded yes, it was, but they also
8 said, also, there is no remedy available if it were
9 because exclusionary rule would not apply to the machines
10 because they're contraband per se.

11 MR. GASSER: He just answered -- he just
12 argued my point. Under his theory, if the supreme court
13 were to say probable cause was determined that a
14 magistrate (indistinct) the case, and there's no standing,
15 and we don't even need to rule on that. They didn't.
16 They went ahead and did a full, thorough analysis as to
17 whether or not probable cause existed, and that case was a
18 warrant case, but they still did a full, thorough
19 analysis, and that's all we're asking you to do, to do a
20 full, thorough analysis as to whether or not probable
21 cause existed.

22 MR. SPENCER: No, no, Mr. Gasser's confusing
23 the issues again. He's talking about the court found
24 alternative grounds for affirming the destruction of the
25 machines. One is because the argument is first of all,

1 there's Fourth -- it violates the Fourth Amendment. They
2 analyzed that issue, but they analyzed a potential remedy.
3 And they said that, believed that what the owners were
4 asking for was to have their machines returned, and they
5 said if that's the case, no matter what, the machines
6 could not be returned because of contraband per se. The
7 exclusionary rule would not apply.

8 That's just additional sustaining grounds.
9 There's two sustaining grounds. First of all, no, it
10 doesn't violate the Fourth Amendment. Second, if it does,
11 you still don't get it back because your, your product is
12 contraband per se.

13 MR. GASSER: Your Honor, let me -- I can speed
14 this up. Let me speed this up. Let me tell you the point
15 I'm trying to make, and I just want to do it through a
16 witness so that there's a record of it since you're
17 recording these.

18 My point is this: we all know, we can agree,
19 it's uncontradicted, it's a matter of law that in 1995,
20 the South Carolina Supreme Court ruled that Lucky Eight-
21 Liners were illegal games of chance, and in 1996, the
22 South Carolina Supreme Court ruled, and the cites are in
23 the "192" case, that the Cherry Masters were illegal games
24 of chance. That's uncontradicted. Mr. Spencer cannot
25 dispute that.

1 In 2000, in the "192" case we're all referring
2 to, one of the issues was do law enforcement officials,
3 because of the previous rulings on the Cherry Masters and
4 the Lucky Eight-Liners, does probable cause exist if a law
5 enforcement officer simply sees, sees, sees a Cherry
6 Master or a Lucky Eight-Liner, even if it's in a warehouse
7 like they were here, even if they're unplugged, even if
8 they're not in operation.

9 That was Issue Number 2: Are the machines
10 contraband per se? We conclude the machines are
11 contraband per se. A unanimous supreme court ruled that
12 the Cherry Masters and the Eight-Liners, because of their
13 1995 and 1996 cases, ruled that they are contraband per
14 se; that probable cause exists to seize any of those
15 machines from that point on in South Carolina. Even as I
16 stand here today, if you see an Eight-Liner or a Cherry
17 Master machine, every single certified law enforcement
18 officer in South Carolina can seize it. That's probable
19 cause.

20 Conversely, in the Allendale case, our supreme
21 court, five-nothing opinion, Chief Justice Toal ruled that
22 the two games before her, before the Magistrate Love who
23 ruled on games of skill and before the Circuit Court Judge
24 Buckner who ruled on games of skill, in the conclusion
25 paragraph, Justice Toal: "We affirm the magistrate's

1 decision finding that the two Chess Challenge II machines
2 seized and examined were lawful." This is the only time
3 that a Chess Challenge II machine made it all away through
4 the three ascending courts: magistrate's court, circuit
5 court, supreme court. Along each one on the way, they
6 were deemed to be lawful, the Chess Challenge II.

7 Therefore, under simple logic, it's our
8 position, Your Honor, that every Cherry Master game has
9 always been deemed to be illegal. Every Eight-Liner game
10 has always been deemed to be illegal. And then, in 2000,
11 Justice Finney and the supreme court said they are
12 contraband per se.

13 To this date, as I stand before you, there's
14 been no court ruling anywhere in South Carolina that a
15 Chess Challenge II game is illegal, none, not a
16 magistrate's order, not a circuit court judge order, not a
17 supreme court order. In fact, just the opposite. There's
18 orders from the magistrate's court level, at the circuit
19 court level, and the supreme court.

20 That's our position that simply as a matter of
21 law, if the Cherry Masters and the Eight-Liners, which
22 were deemed to be illegal and then are illegal per se and
23 can be seized on sight -- that's probable cause -- it is
24 our position because these two, the two, the Chess
25 Challenge II games that have been vetted by the courts,

1 were deemed to be legal, you have got to have probable
2 cause -- and I quote Chief Justice Toal in the same
3 Allendale opinion: "Because video machines may be
4 manipulated so as to change their nature from lawful to
5 unlawful, law enforcement may, based on probable cause,
6 seize the machines in question once again."

7 Now, we can sit here and debate how many
8 angels can dance on the head of a pin, but it's her
9 language that says because these machines can be
10 manipulated. I submit if you look at this purely on
11 logic, not on political ideology but on put logic --

12 MR. SPENCER: I object to the political
13 ideology comment.

14 MR. GASSER: Your Honor --

15 THE COURT: Objection overruled.

16 MR. GASSER: -- if you look at this based on
17 pure logic -- you don't even have to, you don't got to go
18 to law school, it's simple third-grade logic -- I would
19 submit that she is saying in this opinion because video
20 machines may be manipulated so as to change their nature
21 from lawful to unlawful, law enforcement may, based on
22 probable cause, seize the machines in question again,
23 well, if the Cherry Masters and the Eight-Liners are per
24 se illegal, because every court's always ruled all of them
25 illegal, and the only courts that have ruled on Chess

1 challenge II have found them to be legal, then clearly, a
 2 law enforcement officer has to find a particular chess
 3 challenge II game at a particular location is somehow
 4 operating differently than the two that were legal. They
 5 have to find it. They can't just simply create probable
 6 cause out of the air. They can't use their own personal,
 7 "well, I disagree with the magistrate. I disagree with
 8 the circuit court judge. I disagree with the five members
 9 of the supreme court. I disagree with that. I think
 10 they're illegal, so I'm going to seize them, and I'm going
 11 to say probable cause exists."

12 And so that's the reason why I was laying the
 13 foundation. Mr. Grimsley has read these opinions, is
 14 going to offer an opinion on not only the probable cause
 15 issue but also on the skill issue, and I was simply laying
 16 a foundation as to his knowledge of these, of these cases.

17 THE COURT: Last argument.

18 MR. SPENCER: Thank you, and there's those two
 19 aspects of it now that he's said what he's going to
 20 testify about. He's offering an opinion on a law, and
 21 Your Honor is the expert on law. We don't need, whether
 22 it was an attorney or whether it's a former law
 23 enforcement officer here to tell you what the law is. So
 24 I would object on that grounds of relevance.

25 But also, the Allendale case is not -- stands

1 for the polar opposite of what Mr. Gasser is saying. In
 2 the Allendale case, there were two machines that were
 3 seized, brought before a magistrate. According to the
 4 opinion, two machines were seized, brought before the
 5 magistrate, appealed, the magistrate found them legal, it
 6 was appealed to circuit court, the solicitor who appealed
 7 it -- for whatever reason, we don't know why -- asked the
 8 judge to affirm the finding. So it wasn't really a true
 9 adversary proceeding.

10 Our office intervened and challenged only two
 11 issues, well, sort of three issues. But the one issue we
 12 challenged was we contended there was lack of jurisdiction
 13 because what the magistrate did in his order is he said
 14 that the two machines before him and all the other
 15 machines like them are, are legal. We challenged. We
 16 didn't have a chance to challenge the facts anymore; that
 17 that, that, by the time we were involved, that ship had
 18 sailed. But we said there was no jurisdiction for the
 19 magistrate to order the legality of any other machines
 20 except the two physical machines in the court, and it
 21 didn't have the jurisdiction to order as to the legality
 22 of machines not before him. And the supreme court agreed
 23 with us on that.

24 Then we challenged another issue as to whether
 25 the order should be void because SLED didn't have notice.

1 SLED was actively involved at that point in seizing
2 machines. And they ruled against us on that.

3 And then -- and you have to have the whole
4 paragraph -- "As to the two machines seized," those, the
5 two machines in Allendale, "seized, examined, and deemed
6 legal, there's nothing preventing the sheriff or other law
7 enforcement officials from seizing the machines once again
8 for the magistrate's examination." So that comment --

9 THE COURT: Was there another line right after
10 that?

11 MR. GASSER: Yes, sir.

12 MR. SPENCER: Yes, sir. Excuse me. And I'm
13 not trying to mean anything -- not trying to leave
14 anything out.

15 "Because video machines may be manipulated so
16 as to change their nature from lawful to unlawful, law
17 enforcement may, based on probable cause, seize the
18 machines" -- and I think in the context of this paragraph,
19 it's, they're just talking about those two machines --
20 "the machines in question once again. In other words, the
21 effect of the magistrate's order is that it deems the
22 machines lawful at the time they were seized and
23 examined."

24 So what this, what this opinion concludes is
25 the magistrate has to only look -- has to look at the

1 machines in front of him and determine if the machines in
2 front of him, not any other machines, and it's only the --
3 and that only goes to the legality of those machines at
4 that moment. The two machines that are referenced in
5 those paragraph -- in that paragraph -- are not these two
6 machines here today.

7 And that only -- and that statement about
8 because machines can be manipulated is, to me, a statement
9 of policy. The law is machines can be seized at any time,
10 based on probable cause, and brought to a magistrate to
11 determine probable cause. It does not mean that the fact
12 of the Allendale opinion is that all Chess Challenge II
13 machines that are identical operate alike or that operate
14 alike are legal. That's the opposite of what they found.
15 They found only those two machines were legal at that
16 moment, and they did not pass on the legality of any
17 machines that were not before that magistrate.

18 THE COURT: Objection overruled.

19 MR. SPENCER: Thank you.

20 MR. GASSER: Thank you, Your Honor.

21 BY MR. GASSER:

22 Q. So, Mr. Grimsley, you have -- you are familiar
23 with the Allendale case and with the "192" case we
24 referred to before. Is that correct? You've read those
25 cases, familiarized yourself with those cases. Is that

1 correct?

2 A. Somewhat; yes, sir.

3 Q. And have you, are you a graduate of the South
4 Carolina Criminal Justice Academy?

5 A. Yes, sir.

6 Q. And while you were at the Criminal Justice
7 Academy, were you trained in determining the issue of
8 probable cause in this country to seize either contraband
9 or items that may be involved in criminal activity?

10 A. Yes, sir.

11 Q. And during your time as a supervisor at SLED,
12 did you also assist in in-house training of some of your
13 agents on issues such as probable cause and similar type
14 everyday issues in law enforcement.

15 A. Yes, sir.

16 Q. Did you have an opportunity to take part in
17 seizure hearings of video games from 1993 throughout 2008
18 in South Carolina?

19 A. Yes, sir.

20 MR. GASSER: Your Honor, we would offer him at
21 this time as an expert in law enforcement policies and
22 procedures, particularly in the gaming, gaming, gaming,
23 seizure of games in South Carolina based on his 15 years
24 of experience.

25 MR. SPENCER: What was, I'm sorry, what was

1 that an expert again in?

2 MR. GASSER: We would offer him as an expert
3 first of all in the area of law enforcement, general law
4 enforcement policy and procedure, and secondly,
5 specifically in the area of gaming machines.

6 MR. SPENCER: If I can just do a short voir
7 dire.

8 THE COURT: Sure.

9 BY MR. SPENCER:

10 Q. You said that you have been involved in the
11 seizure of various video gaming machines.

12 A. Yes, sir.

13 Q. Okay. What training did you have in
14 determining whether machines, whether you had probable
15 cause to think machines were legal or illegal?

16 A. It was in house with, at that time, I think he
17 was probably a captain, Stacy Drakeford.

18 Q. Okay. So Stacy Drakeford instructed you how
19 to identify machines that there would be probable cause to
20 believe were illegal gaming machines.

21 A. He instructed us on the type games that were
22 games of chance compared to a game of skill.

23 Q. Okay.

24 BY MR. GASSER:

25 Q. I'll flesh it out even further in that you had

1 occasion when you guys would play the particular video
2 game that was at a location. Did you, pursuant to your
3 duties, would you on occasion go and actually play these
4 games?

5 A. Yes, sir. Prior to the, and I think it was
6 2003, but the Allendale case, with these Eight-Liners and
7 Cherry Masters, because they were, we were told, they were
8 illegal per se, you know, we would just go seize them.
9 And then, after the Allendale case, at SLED, in our unit,
10 at that time, Captain and I assume -- I can't remember
11 when he made major -- but it was left up to each unit to,
12 "Okay, we got complaints on this store. Go see if these
13 machines are illegal."

14 well, after the Allendale case, I would tell
15 my agents that before Allendale -- and this was my
16 terminology -- if it looks like a duck, if it walks like a
17 duck and it quacks like a duck. Seize it. That was the
18 Eight-Liners and the Cherry Masters. After Allendale, I
19 would say the same thing except it looks like a duck,
20 walks like a duck, quacks like a duck, it's probably a
21 duck, but you're going to have to play it. There's no way
22 to tell unless you play that machine and see if it's a
23 game of chance or a game of skill.

24 Q. At the time, did you even, did you, would you
25 use videotaping as a tool in your line of work?

1 A. We did, because at some point, and I think it
2 was Charleston, but when we seized some machines and
3 unplugged them to transport them to the magistrates to
4 have them look at it, somehow, the computers, once you
5 unplugged them, were fixed to where they wouldn't come
6 back on. So when you got there, there was no way to show
7 the magistrate what it did. So we would then start
8 videoing to be able to show if they wouldn't come back on.

9 MR. SPENCER: Okay --

10 BY MR. GASSER:

11 Q. Okay, let me ask you this: Are you familiar
12 with some of these terms on games --

13 THE COURT: Do you have an objection?

14 MR. SPENCER: I mean, there had never been a
15 ruling on whether he was an expert or not. I don't object
16 to him being qualified as an expert. He's demonstrated --

17 THE COURT: All right, so noted for the
18 record.

19 MR. SPENCER: -- that he had some training
20 with another SLED agent.

21 BY MR. GASSER:

22 Q. Okay. Are you familiar with some of these,
23 these terms, features that exist in games that have been
24 deemed to be illegal such as the Cherry Masters and Eight-
25 Liners? I'm going to run down a list. Are you familiar

1 with the term picture substitution or morphing?

2 A. Vaguely because here again, Captain Drakeford
3 would tell us about that, but have never been to these
4 schools that he had gone to.

5 Q. The fact that on illegal games, there are
6 random sequences versus, say, the Chess Challenge II game
7 with fixed sequences. Are you familiar with that concept?

8 A. Yes, sir. The random is, and the sequences
9 fixed, is what we would look for.

10 Q. And whether or not the, there's a house
11 retention rate, or some people refer to it as fixing the
12 percentages, meaning that in some certain games, if you
13 could only win 58 percent, then it doesn't matter how
14 skillful you are, you're going to lose. Are you familiar
15 with that concept as well?

16 A. Yes, sir.

17 Q. These features, in your, in your examination
18 of the two games in question that are before the court
19 yesterday, as well as your examination of the machine at
20 the condominium that was deemed to be or was said to be
21 one of the machines in Allendale, did any of these
22 machines have those features that were commonly found or
23 are commonly found in illegal games of chance? Did you
24 see any picture substitution or morphing occurring?

25 A. I didn't see any of those.

1 Q. Did you, did you see any random sequencing
2 versus a fixed sequencing?

3 A. Um, the top four were on a sequence. I mean,
4 they rotate the same. Then, when it goes down to the
5 bottom, that appeared to me to be a random when it went
6 down to that grid.

7 Q. Now, you're -- did you familiarize yourself
8 with the dominant factor testing or the dominant factor
9 standard that's been discussed in this courtroom earlier
10 this morning?

11 A. Have I what, now?

12 Q. Are you familiar with the dominant factor
13 standard --

14 A. It predominates skill over --

15 Q. Right.

16 A. -- chance.

17 Q. And did you have an opportunity to even play
18 these, play these machines -- you live in Florence; is
19 that correct?

20 A. Correct.

21 Q. Did you have an opportunity to play these
22 machines prior to observing these two machines yesterday
23 at the Richland County Sheriff's Department?

24 A. I played the Chess Challenge II in Florence
25 because they're out.

1 Q. Okay.

2 MR. SPENCER: Just continuing objection. I
3 mean these are some machines out in Florence now we're
4 talking about.

5 THE COURT: Okay, they're not these machines.
6 You play these machines?

7 THE WITNESS: These --

8 THE COURT: Two here.

9 THE WITNESS: One of them.

10 BY MR. GASSER:

11 Q. That was yesterday at the sheriff's
12 department.

13 A. Yes, sir, for --

14 Q. Okay. Based on your experience at SLED, your
15 15 years experience of seizing games that were deemed to
16 be illegal games of chance, and based on playing not
17 necessarily these two machines -- I'll get to that -- but
18 Chess Challenge II machines that are out on the streets in
19 South Carolina now, the Chess Challenge II machine that
20 was deemed to be an Allendale machine in the condominium,
21 and playing one of these two machines yesterday at the
22 sheriff's department, do you have an opinion as to whether
23 or not these, these Chess Challenge II machines are games
24 of skill under the legal standard or games of chance?

25 A. My opinion would be it has more skill involved

1 than it does chance.

2 Q. Now, if you were aware -- if you, as a law
3 enforcement officer when you were a SLED agent and you
4 were made aware of the Allendale case, that the two
5 machines before the Court were deemed to be legal games of
6 skill, if you saw a Chess Challenge II machine now, would
7 you just simply seize it sitting in a convenience store or
8 a bar?

9 A. After knowing the Allendale case, I would not.

10 Q. And why is that?

11 A. I would have to play it to see if it had been
12 manipulated.

13 THE COURT: One question: Do you, are you
14 familiar with anything that if they put this particular
15 machine in a convenience store someplace or another or a
16 bar, wherever they put it, is there something on there you
17 push a button and it could change it in some particular
18 way? I have seen machines where you could push something
19 on the screen, and all of a sudden, something pops up, and
20 it tells you do you want it to be loose or tight or what
21 have you, or 85 percent or 95 percent or what -- is there
22 something on this machine that you could do that?

23 THE WITNESS: I don't know about --

24 THE COURT: Or do you know?

25 THE WITNESS: I don't know on this machine. I

1 know that -- and I'm, I have the knowledge of the street
2 person, not the knowledge of Mr. Snyder there at all.

3 THE COURT: Yeah, well, I meant -- I should
4 have asked him that. I might bring him back and ask him
5 that.

6 THE WITNESS: But I do know, like the chips
7 that are on the board, you know, if you take that chip out
8 and insert another chip, but --

9 THE COURT: well, I understand that.

10 THE WITNESS: -- this machine has a safety
11 feature on it. If the chips was removed, you would know
12 it.

13 THE COURT: Okay.

14 MR. GASSER: Just one more.

15 BY MR. GASSER:

16 Q. And yesterday at the sheriff's department,
17 with these two specific machines, you saw people play this
18 machine and continuously win it game after game, did you
19 not?

20 A. Two people; yes sir.

21 MR. ALTMAN: Your Honor, I believe Mr. Snyder
22 testified as to whether this game had the feature that you
23 posed to the agent. I'm sure he's happy to answer it
24 again for you --

25 THE COURT: All right, well, I'll take care of

1 that later.

2 MR. ALTMAN: Okay.

3 THE COURT: Answer any questions this
4 gentleman has of you.

5 CROSS-EXAMINATION

6 BY MR. SPENCER:

7 Q. Mr. Grimsley, do you know Agent Godfrey?

8 A. Yeah, very well.

9 Q. And did you work with Agent Godfrey while you
10 were at SLED?

11 A. We were in the same unit, but Brad was in the
12 Upstate.

13 Q. Okay. When you went to seize machines, were
14 there times in which you called Agent Godfrey for his
15 opinion as to whether or not the machines in front of you
16 were something you should seize?

17 A. There were times we called Brad to come
18 testify in a hearing like this about the legality of the
19 machine.

20 Q. Did you ever call him from a location?

21 A. I don't remember, but I could have easily. We
22 would either call him or Major Drakeford, and I would have
23 probably preferred to call Brad.

24 Q. Thank you.

25 And your training was with Agent Drakeford --

1 A. Yes, sir.

2 Q. -- who was also knowledgeable as to the
3 machines.

4 A. To my knowledge, Stacy and -- or Major
5 Drakeford -- and Brad were the only two people that I know
6 that went to these school taught by experts outside of
7 SLED.

8 Q. So you're, so you're aware that Agent Godfrey
9 had asked for training.

10 A. Yes, sir.

11 Q. Thank you.

12 Since the Allendale opinion, do you recall
13 whether or not you've ever seized or agents you were
14 working with or other law enforcement ever seized any
15 Chess Challenge II machines?

16 A. Since the Allendale.

17 Q. Right.

18 A. I don't remember if it, if it was before or
19 after the Allendale. I don't remember.

20 Q. So it could have been before or it could have
21 been after.

22 A. I know it was before, and it was a different
23 type machine. It was a Chess Challenge I that was
24 normally out at that time.

25 Q. Okay, so do you recall have you ever seized

1 any Chess Challenge II machines?

2 A. Um, I'm sure that we -- well, I'll say I don't
3 recall specific dates, but I'm sure we had, had taken some
4 prior to that ruling.

5 Q. Are you sure that --

6 A. We seized so many machines it's --

7 Q. Are you sure that you didn't seize any after
8 that ruling?

9 A. We could have. We could have.

10 Q. Um --

11 A. I just don't remember. I tell you, we seized
12 -- SLED's, SLED's --

13 Q. I understand.

14 Now, you said you saw no morphing on these two
15 machines.

16 A. Um, I didn't play this one that much. I
17 watched --

18 Q. Okay.

19 A. -- watched them play it. But like I say, on
20 the street level of what we did, not what Brad or Major
21 Drakeford did, it was the, the look at the game, play it
22 to see -- our terminology was if you can beat it --

23 Q. Right.

24 A. -- if you can beat it and it's consistent, you
25 don't see anything random, then the skill would

1 predominate the chance of it.

2 Q. Okay, and your testimony is that you had a
3 limited amount of chance to observe the play of the
4 machine to even determine if there was any morphing or
5 not.

6 A. Right. I watched these two gentlemen play,
7 and they were exceptionally --

8 Q. Right, but as to the -- I understand you're
9 saying that they were successful, but as to seeing any
10 morphing --

11 A. I didn't, I didn't see --

12 Q. -- you didn't really have any opportunity --

13 A. No.

14 Q. Okay. And tell me the basis of your knowledge
15 that it's that the machines scroll in a fixed sequence.

16 A. In, in watching them play and being, you know,
17 told exactly what they're looking for like he's testified
18 here to today, then you can pick up on that it's in a
19 sequence.

20 Q. So basically, it's based on the testimony that
21 -- simply, he informed you individually, Mr. Snyder
22 informed you individually the same thing he's testified to
23 today.

24 A. Basically, yes, yesterday.

25 Q. And that's the basis of your belief that it's

1 a fixed sequence.

2 A. Yes.

3 MR. SPENCER: Beg the Court's indulgence.

4 THE COURT: You ever get to see (inaudible)

5 over there?

6 THE WITNESS: Yes, sir; every once in a while.

7 THE COURT: Tell him I said hello.

8 THE WITNESS: I'll do it.

9 THE COURT: The last time I saw him on TV, he
10 looked awful old.

11 THE WITNESS: That job has aged him.

12 (Laughter.)

13 THE WITNESS: He's in the (inaudible).

14 MR. SPENCER: Your Honor, I have no further
15 questions.

16 MR. GASSER: Just, just one.

17 REDIRECT EXAMINATION

18 BY MR. GASSER:

19 Q. The fact that, or did, yesterday, did you have
20 an opportunity to see both Kay McDonald (phonetic) and Mr.
21 Snyder on one of these machines at the Richland County
22 Sheriff's Department just continuously score four kings or
23 three kings across the top, the top four?

24 A. Four kings almost all the time.

25 MR. GASSER: That's all we have.

1 THE COURT: Thank you, sir.

2 MR. GASSER: Your Honor, I think we got
3 relatively two other short witnesses.

4 THE COURT: Okay.

5 MR. GASSER: I guess we have to call Robbie
6 Crane (phonetic), I guess, deputy, the seizing deputy.

7 THE COURT: Come around, please, sir.

8 Do you swear or affirm the information you're
9 about to give is the truth, the whole truth?

10 THE WITNESS: I do.

11 THE COURT: Have a seat, and state your full
12 name.

13 THE WITNESS: Robert Crane (phonetic).

14 DIRECT EXAMINATION

15 BY MR. GASSER:

16 Q. Investigator Crane, you are employed at the
17 Richland County Sheriff's Department; is that correct?

18 A. Yes, sir.

19 Q. And how long have you been employed there?

20 A. Almost 12 years, or it's been 11 1/2.

21 Q. And what are your current duties and
22 responsibilities there?

23 A. Narcotic investigation.

24 Q. Does that include at times other vice-related

25 --

1 A. Yes.

2 Q. -- investigations?

3 A. Yes.

4 Q. And of course, you're a graduate from South
5 Carolina Criminal Justice Academy. Is that correct?

6 A. Yes.

7 Q. And are you familiar with the term probable
8 cause?

9 A. Yes.

10 Q. You use that literally every day in your line
11 of work; is that correct?

12 A. Right.

13 Q. Tell me, tell us, please -- and if you need
14 your incident report, a copy of your incident report, I've
15 got it here if you want to take a look at it -- but would
16 you describe the circumstances on, I believe that was a
17 Monday, December the 29th, 2008 at 5901 North Main Street
18 that lead to the seizure of these two machines.

19 A. We received an anonymous Crime Stoppers
20 complaint in reference to some video poker machines at
21 5901 North Main Street in Richland County. Myself, Agent
22 Jordan (phonetic), and Byrum Bell (phonetic), who's with
23 the South Carolina National Guard that's assigned to our
24 unit went to the location. Prior to this date, Pat
25 Jackson had been assigned to our unit, and he had, he had

1 told me about these Chess Challenge II games.

2 Q. who's that, now?

3 A. Pat Jackson. He was with SLED.

4 Q. Pat Jackson.

5 A. Yes. So when I saw the machines, I called Pat

6 because he's a whole lot more versed in video poker

7 machines and has got a whole lot more experience than I

8 would, and asked him what his opinion was on the machines.

9 And he stated that his opinion was the machines were

10 illegal. so based upon that, I took the machines and

11 presented them to Judge Davis later on that afternoon.

12 Q. Okay, so let me get this straight. You got a

13 Crime Stoppers tip that there might be some video --

14 illegal video poker machines at this particular

15 establishment.

16 A. Right.

17 Q. You physically went to the location.

18 A. Right.

19 Q. And who else, who was physical with you?

20 A. Byron Bell, who is with the South Carolina

21 National Guard that's the Counterdrug Task Force who's

22 assigned with us, and Agent Jordan, who is also a narcotic

23 investigator.

24 Q. And Agent Bell and Investigator Jordan have no

25 familiarity with --

1 A. Correct.

2 Q. -- Chess Challenge II games whatsoever.

3 A. Correct.

4 Q. And those were the only two other individuals
5 with you --

6 A. That's correct.

7 Q. And you yourself have no, had no familiarity
8 with --

9 A. Correct.

10 Q. Chess Challenge II games. So you contacted
11 Pat Jackson at SLED, and he is -- in what division is he?

12 A. He was with their vice unit, alcohol, and he
13 had experience with the Chess Challenge II games. So
14 based upon his experience with the games, he told me that
15 he felt as though they were illegal.

16 Q. Okay. Do you know whether -- are you familiar
17 with this consent agreement that at one point in time
18 Director Lloyd at SLED had signed off on involving Chess
19 Challenge II games? Are you familiar with that?

20 A. I've heard people mention it, but I'm not
21 familiar with it. I haven't read it.

22 Q. Okay. Do you know whether or not Mr. Jackson,
23 whether Director Lloyd and General Counsel Todd Hagins and
24 any of the other experts at SLED that advised Director
25 Lloyd on that issue, whether or not Mr. Jackson was one of

1 them?

2 A. I have no knowledge whatsoever of the, of
3 anything to deal with that.

4 Q. So Mr. Jackson did not physically come down to
5 the location at 5901 Main Street and personally observe
6 these machines.

7 A. Right.

8 Q. And so if -- the basis of you seizing these
9 machines was not based on your knowledge of gaming
10 machines; is that correct?

11 A. That's correct.

12 Q. Did you even play the machines?

13 A. No, I did not.

14 Q. Did you see anyone play the machines?

15 A. No.

16 Q. So you didn't even see the machines in
17 operation.

18 A. No.

19 Q. So -- I appreciate sincerely your directness
20 and honesty, Robbie. I really do.

21 so it was simply -- you didn't play the
22 machines. You didn't look at the machines. You didn't
23 observe the machines. You just simply called a SLED agent
24 who has a personal opinion that Chess Challenge II games
25 are.

1 A. Well, see, I have no experience with these
2 machines. I have no experience, no training on video
3 poker. So most of my experience comes from making contact
4 with these guys that come in contact with these machines
5 on a day-to-day basis.

6 Q. (Indistinct.) Let me ask you this: Do you
7 agree that people, courts, whether it's South Carolina
8 courts or the United States Supreme Court on touchy issues
9 like the death penalty or abortion or whatever, people
10 have -- they might disagree with a judicial decision.
11 Somebody might just disagree with it, "I personally
12 disagree with that court's order." "I personally disagree
13 with that court's opinion." That happens every day, and
14 you would agree with that.

15 A. Right.

16 Q. Okay. So the basis of you seizing these
17 machines again -- I want the judge to be clear with the
18 court -- was not on any experience or not on any tipsters
19 from a confidential and reliable informant. Let's say
20 these machines were being paid off on cash. You didn't
21 have that, right?

22 A. No.

23 Q. You didn't have a confidential and reliable
24 informant indicate that either one of these machines had
25 been manipulated.

1 A. Right.

2 Q. As far as you know, Mr. Jackson, Agent
3 Jackson, had no information that these two machines were
4 paying off in cash. He didn't tell you that, did he?

5 A. That's correct.

6 Q. Okay. And Agent Jackson didn't tell you that
7 he had personal information that -- from a confidential
8 and reliable informant -- that the internal guts of this
9 machine had been manipulated. He didn't tell you that,
10 did he?

11 A. No, he didn't.

12 Q. He simply said, without even coming to the
13 location, without even seeing the machines in action, he
14 simply gave his personal opinion that all Chess Challenge
15 II machines are illegal.

16 A. That's correct.

17 Q. And that's the basis of you seizing the
18 machines.

19 A. That's correct.

20 Q. Subsequent, Deputy Crane, I believe it was on
21 the 31st of, that Wednesday, do you remember when I came
22 to the Richland County Sheriff's Department and met with
23 you and the Richland County sheriff's general counsel
24 Scott Hayes?

25 A. Yes.

1 Q. And I believe I provided with -- to you a copy
2 of the Allendale case and to Mr. Hayes and a copy of Judge
3 Buckner's order affirming Magistrates Love's ruling that
4 the two Chess Challenge II machines before him were legal
5 games of skill back in 2003. I gave you those documents.

6 A. Right.

7 Q. Okay. And did you have an opportunity to look
8 at those documents?

9 A. Yes.

10 Q. Now, Deputy Crane, now knowing what you know,
11 knowing that two Chess Challenge II machines were deemed
12 to be lawful games of skill by a magistrate and a circuit
13 court judge, and then the supreme court said, "We affirm
14 the magistrate's decision that these two games are games
15 of skill," and knowing that you know Jean Toal's position
16 that because the games can be manipulated, law enforcement
17 may, based on probable cause, seize the machines, would
18 you have seized those machines, or would you have asked
19 legal counsel for assistance?

20 A. To me, the four icons on top, we've seen that
21 we were able to get those. The grid and the vault to me
22 is strictly a game of chance.

23 Q. I'm not talking -- I'm talking about the
24 knowledge that you had. You didn't play those machines or
25 see them in operation, right?

1 A. Right.

2 Q. So if you would have had knowledge of the
3 Allendale case on the 30th -- on the 29th, on the way to
4 the location --

5 A. Oh, I see what you're saying.

6 Q. -- if you had knowledge of Judge Buckner's
7 order, written order that you now have and the knowledge
8 of the supreme court case, would you have seized those
9 machines, or would you have asked, at least asked Dan
10 Johnson, who's a lawyer with the Sheriff's Department, or
11 Scott Hayes, who's the general counsel, would you have
12 asked them for some direction, knowing that there's court
13 orders out there indicating at least two of these machines
14 are legal?

15 A. Right, I probably would have played them prior
16 to taking the machines.

17 Q. And would you have, other than being, other
18 than going into the guts of the machine, how would you
19 have been able to determine that these two machines had
20 been manipulated somehow differently than the two that --

21 A. I could not.

22 MR. GASSER: And just -- wait, I have just one
23 more question. Just let me speak to co-counsel for a
24 little bit.

25 BY MR. GASSER:

1 Q. Okay, and lastly, I want to -- because I've
2 asked a bunch of questions, and probably the lateness in
3 the morning confuses some people here. The sole basis of
4 you seizing those machines that day was by a, an opinion
5 of a SLED agent that wasn't even there and didn't even
6 have an opportunity to observe the machines.

7 A,. Yes, sir.

8 MR. GASSER: That's all we have, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. SPENCER:

11 Q. Detective Crane --

12 A. Yes.

13 Q. As I understand your testimony, you spoke with
14 Agent Pat Jackson about Chess Challenge II machines.

15 A. Yes.

16 Q. Okay, did he describe the play of the machines
17 to you?

18 A. He did.

19 Q. Is his description of the play of those two
20 machines -- excuse me -- is his description of play of
21 Chess Challenge II games consistent with the play of these
22 two machines?

23 A. Yes.

24 MR. GASSER: Your Honor, I object to that. He
25 indicated he didn't play the machine.

1 THE COURT: Okay.

2 MR. GASSER: I mean, he --

3 MR. SPENCER: I can lay some foundation.

4 Thank you. I can lay some foundation on that, Your Honor.

5 BY MR. SPENCER:

6 Q. Have you had a chance to play those machines
7 since?

8 A. Yes.

9 Q. And is the play of those machines that you --
10 let's start again. I'm sorry.

11 You had an opportunity since the seizure to
12 play these two machines.

13 A. Yes.

14 Q. And based on your play of those machines since
15 the seizure, is the play consistent with Pat Jackson's
16 description of how a Chess Challenge II machine is played?

17 A. Yes.

18 Q. And, sorry if I'm replying, but you said that
19 based on your work with Pat Jackson, he's familiar with
20 enforcement of the gaming statutes --

21 A. Yes.

22 Q. -- including the gaming machine statute.

23 A. Right.

24 Q. And he expressed your opinion that, that, he
25 expressed his view that there was probable cause to

1 believe that the machines were illegal.

2 A. Yes.

3 Q. As part of your duties, do you sometimes fill
4 out warrants?

5 A. Yes.

6 Q. And that would be arrest warrants or search
7 warrants?

8 A. Both.

9 Q. Both. Okay. And when you provide -- do you
10 at times, in providing your magistrate with information in
11 either a search warrant or arrest warrant, do you rely on
12 information relayed to you by other police officers?

13 A. Yes.

14 Q. Or other law enforcement officers?

15 A. Yes.

16 Q. Is that standard procedure?

17 A. Yes. If they're sitting on a location, and
18 they have the probable cause, but they can't leave the
19 location, then they'll relay the information to someone
20 else or to me to type up the search warrant to execute the
21 search warrant or whatever.

22 Q. And to go to the magistrate (inaudible) --

23 A. Yes.

24 Q. -- to have the magistrate agree that there's a
25 probable cause.

1 A. Yes.

2 Q. Okay. Your testimony at -- well, I don't know
3 if you testified to this -- when you seized the machines,
4 what did you do with the two machines?

5 A. I immediately left the location and took them
6 to Magistrate Davis at his house.

7 Q. Okay, and Magistrate -- did Magistrate Davis
8 play these two machines?

9 A. Yes. We hooked them up, both up, and he had
10 the opportunity to play both of the machines.

11 Q. After you presented the machines to Magistrate
12 Davis, and he had had an opportunity to play -- and
13 actually did play the machines, what did Magistrate Davis
14 do?

15 A. He said that the machines were illegal. I
16 took the machines and took them to our warehouse, and the
17 order of Destruction I typed up and presented to him, and
18 he signed it

19 MR. SPENCER: Beg the Court's indulgence.

20 Your Honor, I have no further questions.

21 THE COURT: Umm --

22 REDIRECT EXAMINATION

23 BY MR. GASSER:

24 Q. Um, just, just a, for the record, the probable
25 cause I was asking you about was probable cause at the

1 time that you seized the machines; is that correct? What
2 probable cause you had at the time --

3 A. Right.

4 Q. -- you seized the machines, not information
5 you just, you didn't have an opportunity to play the
6 machines until after you seized the machines, correct?

7 A. Right.

8 MR. GASSER: That's all we have.

9 THE COURT: You may step down.

10 Anything further?

11 MR. GASSER: Our last witness would be David
12 Byrd, and he'd be brief.

13 THE COURT: Please place your left hand on the
14 Bible and raise your right hand. Do you swear or affirm
15 that the information you're about to give is the truth,
16 the whole truth?

17 THE WITNESS: I do.

18 THE COURT: And state your full name for the
19 record.

20 THE WITNESS: David Wesley Byrd.

21 MR. SPENCER: Your Honor, (indistinct) a
22 moment.

23 Your Honor, I just wanted to just -- and the
24 reason I talked with Mr. Gasser is I just -- my
25 understanding, he's also going to testify about probable

1 cause, and I just want to continue my objection to that
2 testimony, and I just wanted to kind of do it up front
3 rather than --

4 THE COURT: It's so noted for the record.

5 MR. GASSER: Thank you.

6 MR. SPENCER: Thanks.

7 DIRECT EXAMINATION

8 BY MR. SPENCER:

9 Q. Mr. Byrd, tell us, sir, where are you
10 employed?

11 A. I'm self-employed now with Stillinger, Byrd &
12 Associates here in Columbia.

13 Q. And what do you do for a living?

14 A. Private investigation and consulting.

15 Q. Okay. Would you please describe for us,
16 please, your law enforcement background.

17 A. In 1982, I was employed with the Irmo Police
18 Department, and within a couple years, obtained a rank of
19 chief. And I left in 1992 and went into private
20 investigative work. Then, last year, just for a short
21 stint, I worked for a little bit over three months at SLED
22 in regulatory, where I was laid off during to the budget
23 crunches and went into business with (inaudible) Streeter
24 (phonetic), who retired from SLED, and we're now working
25 as private investigators and consulting.

1 Q. In 1982, when you first started with Irmo, did
2 you have an opportunity to attend the South Carolina
3 Criminal Justice Academy?

4 A. I did.

5 Q. Become a certified police officer?

6 A. Yes, sir.

7 Q. Were you trained in all aspects of probable
8 cause, whether it was probable cause to make an arrest or
9 probable cause to seize contraband in plain view or
10 probable cause to get a search warrant; were you trained
11 in all of those aspects of law enforcement?

12 A. Yes, sir.

13 Q. Did you have an opportunity to go to the FBI
14 National Academy?

15 A. Yes, sir.

16 Q. And briefly, tell us what the FBI National
17 Academy is.

18 A. Well, that's -- you're picked from the state.
19 They have three classes a year, so it's -- well, it
20 changes year to year how many classes they have, but back
21 then, it was three. So three -- six people go, and it's
22 about, more about administrative skills that they teach
23 you in law enforcement for leadership and things of that
24 nature: supervisory forensics, legal issues, constitutional
25 issues. I can't tell you right off the top of my head

1 every class I took, but it's a prestigious --

2 Q. And did you successfully complete that line of
3 work as well?

4 A. I did.

5 Q. Are you familiar with these issues -- the
6 issues involving video games in South Carolina?

7 A. I'm becoming more and more familiar.

8 Q. And how are you becoming more and more
9 familiar?

10 A. Well, several years ago, a couple years ago,
11 when I was in the private investigative field, I've been
12 approached by a couple people in this type of line of work
13 trying to get a legal machine or game here in South
14 Carolina. And so just through that, with talking with
15 them and seeing cases, as this one. I knew about the case
16 prior to being contacted by you.

17 Q. And are you -- so you're familiar with the
18 gambling statutes and the seizure statutes in Title XII.
19 Are you familiar with those statutes?

20 A. I'm familiar with them.

21 Q. And you're familiar with many of the South
22 Carolina Supreme Court cases, for instance, the two cases
23 we referred to, the "192" case, the "Allendale County
24 Sheriff and SLED" case involving two Chess Challenge II
25 games of skill.

1 A. Yes, sir; I've read them.

2 Q. In part of your duties and responsibilities as
3 Chief of Police, did it include training some of your
4 officers on in-house training on issues such as probable
5 cause?

6 A. It was dealt with on a daily basis.

7 Q. And for full disclosure, I became an assistant
8 solicitor in 1987, and we actually worked, started working
9 professionally together at that time; did we not?

10 A. Yes, sir.

11 Q. And also became personal friends as a result
12 of our professional relationship. Is that correct?

13 A. Yes, sir.

14 Q. And have been friends for over 20 years.

15 A. Yes, sir.

16 Q. Back on December the 31st, did I hire you as a
17 consultant in this matter involving the two, two Chess
18 Challenge II games that were seized by the Richland County
19 Sheriff's Department?

20 A. You did.

21 Q. And did you have, have you had an opportunity
22 to look at the incident report in this particular case?

23 A. I have.

24 Q. And an opportunity again to view the Allendale
25 County Sheriff's vs. the two Chess Challenge II games and

1 read Justice Toal's opinion in regards to probable cause;
2 did you read that opinion as well?

3 A. I have.

4 Q. And do you bring with you today your full area
5 of expertise over the last 27 years of law enforcement,
6 first of all, and law enforcement-related issues with
7 regards to probable cause?

8 A. Yes, I do.

9 MR. GASSER: Your Honor, at this time, we
10 would offer him as an expert in the area. Based on his
11 graduation from the Criminal Justice Academy, his years as
12 a police officer, the fact that he was the chief of police
13 of Irmo, a training officer during that time period, an
14 FBI National Academy graduate, we would offer him as an
15 expert in the area of police procedure.

16 MR. SPENCER: I have no objection to that. I
17 have the same objection as to relevance.

18 THE COURT: Okay. Objection so noted for the
19 record.

20 BY MR. GASSER:

21 Q. Mr. Byrd, I'm going to draw your attention to
22 -- based on all of your experience on probable cause, on
23 December the 31st -- also, you had an opportunity, I
24 wanted you to be in here when Deputy Crane testified, and
25 you had an opportunity to listen to his rendition of facts

1 as to what led to him seizing these machines on December
2 29th, 2008; correct?

3 A. That's correct.

4 Q. Okay. Based on your expertise in police
5 procedure, when law enforcement got that Crime Stoppers
6 call, and the deputy went to -- a law enforcement officer
7 went to -- well, let me just do this in general, in
8 general first.

9 If you were a chief of police or you were a
10 supervisor in a law enforcement agency, knowing what you
11 know about the Allendale case, knowing what you know about
12 Judge Buckner's opinion, knowing what you know about the
13 "192" case and the Cherry Masters and Eight-Liners being
14 illegal per se but not the Chess Challenge II games, if
15 you got a Crime Stoppers tip to go to a particular
16 location, and there were Chess Challenge II machines
17 playing, what would you do before making a determination
18 that probable cause existed to seize the machines?

19 A. I would examine the machines. And I'm not
20 trained on examining the machines, but hopefully, I would
21 have somebody in my police department that was because I
22 wouldn't answer the complaint if I wasn't. I'd have
23 someone else answer it.

24 However, I would examine it knowing that we
25 would be able, have to articulate at the time of seizure

1 probable cause to believe that this, these two machines
2 right here are acting differently or manipulated, several
3 different ways of putting it, than the supreme court
4 ruling on the same game before I seized it.

5 Q. Okay, and why is that?

6 A. Well, it's probable cause. Before you seize
7 papers, effects, people, you have probable cause then.
8 You don't make your probable cause after a seizure.

9 Q. And is it important to you to know that, that,
10 that at least the two games, two games that have been
11 vetted all the way through three ascending courts in South
12 Carolina, at least those two games were deemed to be legal
13 games of skill as designed and operated? Was that
14 something that you would want to know as a law enforcement
15 officer?

16 A. Absolutely.

17 Q. And knowing that, would you just simply seize
18 a Chess Challenge II machine at any convenience store, any
19 bar, or any restaurant simply because it was that, a Chess
20 Challenge II machine?

21 A. No, sir; I would not.

22 Q. You would have to make some sort of
23 determination as to what?

24 A. That it's acting different than the one that's
25 in the supreme court.

1 Q. And when you were a sworn law enforcement
2 officer, obviously, if a court, magistrate or circuit
3 court or a supreme court ruling came down, even if you
4 disagreed with it, would you still follow it?

5 A. Oh, absolutely, follow it.

6 Q. Because that's the law.

7 A. Absolutely.

8 MR. GASSER: Beg the Court's indulgence.

9 That's all I have, Your Honor.

10 THE COURT: Questions?

11 MR. SPENCER: Yes, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. SPENCER:

14 Q. Mr. Byrd, you, you indicated that you did some
15 consulting work, I guess help, trying to help some
16 individuals determine the legality of potential gaming
17 machines.

18 A. I don't know if I'd word it that way. There's
19 more people out in the gaming industry, or coin-operating,
20 I guess I should word it, and they would like to develop a
21 game that they feel meets our state standard.

22 Q. Okay.

23 A. And I've been contacted by them, and they've
24 asked me my opinion, and they've had a game in front of
25 me. I asked questions, played it, things of that nature.

1 And I'm learning. I'm still learning in this field.

2 Q. And was one of the people you were consulting
3 for, was that Roy Stevens (phonetic)?

4 A. It is, it's one.

5 --- end of Tape 2, Side 1 ---

6 --- Tape 2, Side 2 ---

7 Q. -- did that, did you -- let's back up. Do you
8 know Agent Godfrey?

9 A. I do.

10 Q. Okay. When you did that, did you consult with
11 Agent Godfrey about the Palmetto Gold machine?

12 A. Well, I don't know if you'd call it
13 consulting. I had one of the games in a small cabinet at
14 my office when I was located on -- gosh, I can't remember
15 -- Marion Street, and Agent Godfrey was kind enough to
16 stop by, plugged it up, and let them look at it. I wanted
17 his opinion.

18 Q. You wanted his opinion as to whether that
19 machine was legal or illegal.

20 A. That's correct.

21 Q. Did you play -- you said you've read the Chess
22 Challenge II opinion.

23 A. Yes, sir.

24 Q. Did you ever play or see the two Chess
25 Challenge II machines in the Allendale case back in 2003

1 or 2004?

2 A. I have not.

3 MR. SPENCER: Beg the Court's indulgence.

4 No further questions.

5 THE WITNESS: Thank you.

6 MR. GASSER: No questions, Your Honor.

7 THE COURT: You may step down.

8 MR. GASSER: Your Honor, that's all we would
9 have.

10 THE COURT: All right, is there anything
11 further to bring before the Court?

12 MR. SPENCER: Your Honor, the State would have
13 one witness. If I may just have a short break to get some
14 water and also kind of --

15 THE COURT: Okay.

16 MR. SPENCER: I apologize, but (indistinct) --

17 THE COURT: All right, we'll take a five-
18 minute recess.

19 MR. SPENCER: Thank you, Your Honor.

20 THE COURT: But you know --

21 (Recess.)

22 THE COURT: Anything to offer from the state?

23 MR. SPENCER: Yes, Your Honor. I would call
24 Agent Brad Godfrey to the stand.

25 Oh, a quick housekeeping matter. How do you

1 spell Mr. Byrd's last name? Is it B-I --

2 MR. GASSER: B-Y-R-D.

3 MR. SPENCER: B-Y. Okay, thank you.

4 THE COURT: And raise your right hand. Place
5 your left hand on the Bible. Do you swear or affirm that
6 the information you're about to give is the truth, the
7 whole truth?

8 THE WITNESS: Yes, sir.

9 THE COURT: Have a seat, and state your full
10 name, please.

11 THE WITNESS: Bradley -- oh, excuse me --
12 Bradley Glenn Godfrey.

13 DIRECT EXAMINATION

14 BY MR. SPENCER:

15 Q. Mr. Godfrey, what is your educational
16 background?

17 A. I have a bachelors of science in criminal
18 justice from the University of South Carolina.

19 Q. Did you say criminal justice?

20 A. Yes, sir.

21 Q. Okay. (Inaudible.) And where are you
22 currently employed?

23 A. The South Carolina Law Enforcement Division.

24 Q. Okay. How long have you been employed there?

25 A. Right at five years, a couple weeks away from

1 five years.

2 Q. Have you attended the South Carolina Criminal
3 Justice Academy?

4 A. Yes, sir.

5 Q. And graduated from the academy?

6 A. Yes, sir.

7 Q. What is your position at SLED?

8 A. I'm now currently assigned to the Drug
9 Enforcement Administration's resident office in
10 Greenville, South Carolina as a task force officer.

11 Q. Okay. And prior to that, what division or
12 department were you in?

13 A. The State Grand Jury, narcotics section.

14 Q. Oh, yeah. And prior to that, where were you -
15 - what division were you in?

16 A. The vice unit.

17 Q. Okay. And what were your duties with the vice
18 unit?

19 A. We enforced state law in every aspect of
20 alcohol, prostitution, video poker, gambling, and
21 narcotics.

22 Q. Okay. And did your duties include the review
23 of video gaming devices?

24 A. Yes, sir.

25 Q. All right. And how long have you been

1 involved in the enforcement of the antigaming laws?

2 A. I've been involved throughout my entire tenure
3 at SLED, but I have been working as the, as SLED's expert
4 witness now for approximately three years.

5 Q. And do you have any specialized training
6 related to gambling laws and video gaming laws?

7 A. Yes, on-job training by, at the time was -- I
8 believe he was, when I started, he was Inspector
9 Drakeford. On-job training with him, and then I also have
10 attended the National Liquor Law Enforcement Association's
11 National Training Academy in Salt Lake City, Utah.

12 Q. Okay. And describe that training.

13 A. It was a week-long training academy, which was
14 40 hours worth of classroom, that taught us how to
15 identify the different characteristics of a gambling, a
16 video gambling device.

17 Q. All right.

18 other than these two machines here today, have
19 you had previous opportunity to review gambling devices?

20 A. Yes, sir.

21 Q. Approximately how many?

22 A. I would -- approximately 300, I would say.

23 Q. Have you ever been recognized as an expert in
24 the area of gambling devices?

25 A. Yes.

1 Q. In a court in South Carolina?

2 A. Yes, in -- yes, sir.

3 Q. And approximately how many times have you been
4 admitted as an expert?

5 A. I would say now it would be around --
6 approximately 30 times in the state.

7 Q. In state court?

8 A. Yes, sir, as the -- state court,
9 administrative law court; yes, sir.

10 Q. And you mentioned that part of your training
11 was with Inspector Drakeford. Is that the same Inspector
12 Drakeford that the, Mr. Grimsley had also --

13 A. Yes, sir. He was, he went from captain to
14 inspector to major fairly quickly. I believe now he's a
15 lieutenant, actually. But he was, at the time, he was the
16 expert, and I did work under him with his training; yes,
17 sir. Same, same gentleman. I'm sorry to (inaudible) my
18 answer.

19 Q. And now have you been admitted as an expert in
20 video gaming devices in front of Magistrate Davis?

21 A. Yes, sir, I believe on two occasions.

22 MR. SPENCER: Then, Your Honor, I would offer
23 Agent Godfrey as an expert in video gaming devices and
24 gambling devices based on his knowledge and experience and
25 training in the area.

1 MR. GASSER: No objection.

2 THE COURT: So be it.

3 BY MR. SPENCER:

4 Q. Mr. -- excuse me -- Agent Godfrey, have you
5 had a chance to review these two machines that are before
6 us in court today?

7 A. Yes, sir. I've spent approximately, over the
8 past two days, I've spent approximately 30 hours with
9 these two machines.

10 Q. And --

11 MR. SPENCER: Beg the Court's indulgence.

12 BY MR. SPENCER:

13 Q. And are you familiar with the gaming machine
14 statute, South Carolina Code 12-21-2710?

15 A. Yes, sir.

16 Q. Okay. Do you, based on your analysis of these
17 machines and your expertise, do you have an opinion as to
18 whether these two machines are games of skill or games of
19 chance?

20 A. It's my opinion that these are games of
21 chance.

22 Q. All right. Is it your understanding that the
23 statute that I just mentioned prohibits video games with a
24 free play feature --

25 A. Yes, sir.

1 Q. -- in which a coin's deposited?

2 A. Yes, sir.

3 Q. Do these machines have free play features?

4 A. Yes, they do.

5 Q. Are they video games?

6 A. Yes, sir.

7 Q. All right. Are you familiar --

8 well, let's move forward a little bit. What
9 are the six characteristics of a -- what are the
10 characteristics of a video gambling device?

11 A. When I analyze devices, the features that I
12 look for is, the first one is the knock-off device, which
13 is the first element of the reward, and which, I believe
14 it was testified to earlier, is simply a function that
15 removes credits from the device.

16 The second element would be the meters, which
17 these device does have the two hard meters inside the
18 device, and what the hard meter is, it's essentially like
19 a odometer in your car. One records the amount of
20 currency that goes into the device, and the other meter
21 records the amount that comes out of the device, which is
22 consistent with gambling devices.

23 The third would be what is referred to in the
24 industry as a power interrupt circuit.

25 Q. Okay.

1 A. What that does, if I went over -- I'm going to
2 go Game 1, 2, just in order, Game 1 being the closest to
3 Mr. Altman. If you look at Game 1, the totals as it sits
4 right now says 1,005, and the score says 551. Now, what
5 the power interrupt circuit does on that device, if I go
6 over right now and unplug it, showing a power failure,
7 when I plug the machine back in, that number will still be
8 there. And what that's there for is to protect the player
9 because he has his time and money invested in the device,
10 and it also protects the owners of the machines who need
11 to keep up with the internal accounting features with how
12 much that money has -- how much that machine has taken in.
13 It just saves that information.

14 Q. And what are the -- are there a couple more
15 characteristics?

16 A. Yes, sir. The next would be the multiple coin
17 characteristic. And when I say multiple coin, these
18 machines allow a player to -- I mean, you can sit over
19 there and feed \$20 bills into it until -- I mean, you can,
20 you can insert more money into the device than it costs to
21 play, which I think we've established you have to have at
22 least five credits to play, which would be 25 cents. But
23 this machine, as you can see, doesn't even have a coin
24 acceptor on it, only a bill acceptor. The machine will
25 allow you to insert more money than it's used to play.

1 And with your typical, typical amusement
2 devices -- we've talked about Frankie's Fun Park -- or a,
3 any type of a vending machine, these devices only allow
4 you to put the amount of money in the machine that it
5 costs to play the game. And with these machines, they're,
6 they're in, you're allowed to insert more money so the
7 player can place multiple, so the player can place
8 multiple bets.

9 Q. So you can put in more than one bill, and it's
10 going to keep on accumulating credits based on the --

11 A. Yes, sir.

12 Q. -- amount of money put in.

13 A. Yes.

14 Q. Okay. And what's another characteristic? I
15 think there's one more.

16 A. The variable coin, which I go back to -- it's
17 kind of similar to the multiple coin. The bill acceptor
18 on this machine, I don't know exactly, I know I put up to
19 a \$20 and a one-dollar bill in the machine while I was
20 analyzing it. But the bill acceptor is set up to take a
21 multiple type of currency, which also allows the player to
22 rapid, rapidly put a multiple number of credits on the
23 machine so he or she can wager more than one credit per
24 game. And these devices, I mean, the money that's put in
25 the machine is intended to play because if we have a

1 vending machine or, in a vending machine, these machines
2 do not give change.

3 Q. And so your testimony is, to make sure I'm
4 correct, is that they have all those characteristics that
5 you just described.

6 A. Yes, sir.

7 Q. That -- the record's going to be messy --
8 those two machines have all the characteristics that you
9 just described.

10 A. Yes, sir.

11 Q. Now, I think you stated before you spend 30
12 hours analyzing those machines, those two machines.

13 A. Yes, sir, and to, to clarify what I meant by
14 that, I went to the sheriff's department's warehouse,
15 which is located down near the USC football stadium, with
16 Mr. Crane. We spent maybe about five hours there in the
17 warehouse. I did videotape the machines. And so I didn't
18 personally stand in front of these machines for 30 hours.
19 I put from, with the time that I actually spent with the
20 machines and reviewing the videos, approximately 30 hours.

21 Q: Tell me what you determined about these
22 machines.

23 A. Through playing the machines and reviewing the
24 video imaging of the machines, well, to start with, the
25 player inserts money. He then decides how much he wants

1 to wager on any set game. You can wager from five to 40
2 credits per game. So that's either a quarter or up to two
3 dollars per game you can wager on this game.

4 Q. While you're on that, why don't, if you may,
5 just step down and go to the machines, and then we can,
6 just so we can demonstrate.

7 A. What I'm saying, you can only hit the play
8 button once. On this one, I'm going to put five, five
9 credits on the game.

10 Q. And describe, describe how it does that.

11 A. Well, what you're doing is you're betting one
12 credit on each one of the four reels, and then you have
13 one (inaudible) credit. So you have a -- the minimum play
14 is five. And as you notices, with putting five, you don't
15 have a chance at the vault.

16 Q. What (inaudible)?

17 A. Jackpot.

18 Q. Now, do you have to wager more credits than
19 five credits?

20 A. Yes. You'll notice after I hit the play
21 button again, I've now wagered ten credits, almost 50
22 cents, the vault will begin going through the numbers, and
23 as I increase my wager up to eight, that number increases.
24 Eight is the maximum bet per icon. And then once I hit
25 that, the game will start.

1 So essentially, here, what I've done is I've
2 started the reel in motion, same as you would in Vegas
3 when you pull the lever on a slot machine. And it will
4 eventually give me my outcome whether I have any
5 interaction with it or not.

6 Q. Can you win simply by letting the machine time
7 out?

8 A. Yes.

9 Q. Now, just to kind of back up a little bit, I
10 wanted to ask you about the three fields where it says
11 "prize," it has a number, your "total" and it has a
12 number, and "score" where it has a number. Can you
13 explain those fields?

14 A. It's the prize based on a (inaudible) of this
15 game, if you create that winning score, that score will
16 show up in the prize portion just for a couple seconds.
17 It then is transferred here to the score. The total, the
18 number below the total is the actual amount that you have
19 inserted into the device.

20 Q. So that's the number of credits you buy.

21 A. Yes. The total is the number that you buy,
22 and the score is the number that you win.

23 Q. Okay, and win the total -- when you play a
24 game, what happens to the total?

25 A. The total points decreases.

1 Q. Okay. How much does it decrease by?

2 A. Well, the minimum is five to play the game.

3 Q. And the score table, the score field you

4 testified to represents the amount of credits won.

5 A. Yes.

6 Q. So right now, it reflects that the player has

7 won 551 credits.

8 A. That's correct.

9 Q. Okay, what happens if you play all the credits

10 in the total column (inaudible) all those credits, and you

11 want to still play?

12 A. Well, I think we can use this machine as an

13 example because it doesn't -- as you can see, the prize is

14 zero, the total is zero, but your score, you have won 20

15 points, and I can continue to play with those points.

16 Q. And so in that case, you were able to play

17 with points that a player had previously won.

18 A. That's correct.

19 Q. And is that what's referred to as a free play

20 feature?

21 A. It is. And those are, those are free plays

22 that I have won during the duration of my game play.

23 Q. Now, is there another way to erase the total

24 in the score column or (inaudible) total in the score

25 column?

1 A. Yes, there is the ticket (inaudible) ticket
2 button or the knock-off device. When you hit the ticket
3 dispenser, it will clear your score in increments of a
4 hundred because this machine is obviously set up in a way
5 where it's only giving out tickets -- the key-out is set
6 at a hundred points, so you have to have at least a
7 hundred points to redeem a ticket. But the ticket, the
8 ticket button will knock off your score in increments of a
9 hundred.

10 Q. Okay. And it gives you a ticket for each
11 hundred points it knocks off.

12 A. Yes, sir. (Inaudible) \$5 for a ticket.

13 Q. And would you just (inaudible) for the record,
14 what does it say -- there's an index card here taped on
15 the machine. What does that index card say?

16 A. It has "redemption" written in blue ink, and
17 then below, in red ink, "no cash payouts."

18 Q. And what does that signify to you?

19 A. It would -- nothing, really, just that the
20 owners or whoever -- I'm not familiar with where these
21 machines were, but it would be a deterrent for law
22 enforcement that they don't give cash payouts on this
23 device.

24 Q. Could the tickets be exchanged for something
25 other than cash payouts?

1 A. Merchandise. I don't know.

2 Q. It could be; you just don't --

3 A. Yes, sir. I don't know the, the location from
4 where they were, these were seized, so I have no
5 information on what, how they were operating the machines.

6 Q. I understand. Let's not -- skipping around on
7 you, but let's -- if you could just describe the field of
8 play as to the four icons there at the top and on the
9 right side.

10 A. (Inaudible) ask the question? I'm sorry.

11 Q. Oh, I'm sorry. If you could describe the, the
12 play, for the record, of the four fields with the four
13 icons at the top.

14 A. Okay. When you -- once you initiate the play,
15 the four icons go through a sequence, and through video
16 that I, that I have recorded, I did, it did show that the
17 icons were in a, say in a fixed pattern. And then, the
18 player is then to (inaudible) the large number of icon
19 sequence that there is, (inaudible) Mr. Snyder testified
20 255 icons. The player then has to stop the icons where
21 they (inaudible) to make a winning combination. You have
22 to stop the game at those icons.

23 Q. Okay, and the duration of play is -- I think
24 it's established well by now -- but the duration of play
25 is about 30 seconds.

1 A. Yes.

2 Q. And would you agree with the testimony that in
3 that 30 seconds, the most that can be displayed is 114
4 icons?

5 A. Yes, sir. Of course, I didn't do -- I don't
6 know the -- I believe Mr. Snyder testified to 3.8 -- I
7 don't know the exact -- it was approximately around three
8 icons per second.

9 Q. And when you, you described that it appeared
10 to be a fixed sequence. And when you initiate play, do
11 the icons begin in the same sequence of that master 255-
12 icon sequence.

13 A. No, they, they do not. Just for example, if -
14 - to make it simple, if these four icons were all the
15 first icons in the sequence, so they were all Number 1,
16 Number 1, Number 1, Number 1, once you initiate play,
17 you'll notice that the icons change to ready before the
18 actual icons start rotating, and from there, it's -- the
19 icons are in a completely different place in the sequence.

20 So like I was saying, if this was, if this
21 icon here, the castle, was Number 1, when you play your
22 next came, you're not going to get the Number 2 icon
23 necessarily. It could be the hundredth icon, the 200th
24 icon. It's just random where it's going to start in that
25 255-icon sequence.

1 Q. Okay. And just to demonstrate right now, it
2 looks like there is a -- the (inaudible) last play, would
3 you agree with me that it's represented a castle, a
4 prince, I don't know if that's a princess, and a castle?

5 A. Yes.

6 Q. Okay. And demonstrate what happens when you
7 initiate play and then --

8 A. You're going to see it changes -- the four
9 icons will change to a ready position, where it's just a
10 white screen with the word "ready" written in red, and
11 then it will get back into the icon sequence.

12 Q. And does it start with different icons than
13 the last icons displayed at the end of the last game?

14 A. Yes.

15 (Machine chimes.)

16 Q. Congratulations.

17 Um, based on your examination, does anything --
18 - does it appear to randomly decide where out of the 255-
19 icon sequence -- let me see if I can rephrase a little
20 clearer -- based on your examination and -- were you --
21 does it seem to randomly determine where in the 255-icon
22 sequence each of those four fields will start?

23 A. Yes.

24 Q. And so as to each field that's being played,
25 they're going to have an individual -- if we go by Mr.

1 Snyder's testimony, Mr. Snyder I believe testified that
2 114 icons would be displayed if full play was allowed. Is
3 there going to be an individual 114-icon sequence in each
4 of the four fields?

5 A. Yes. The, the evidence that I found from the
6 video, each time, each -- it was never -- I believe he
7 testified earlier that it essentially could be to where
8 they're in a, they're aligned and together, but with the
9 video that I reviewed, in the instances, there were no,
10 there were never -- each icon was never in the same exact
11 sequence.

12 Q. So is it fair to say which 114-icon sequence
13 you receive to play is something that's random?

14 A. Yes.

15 Q. Did you have a -- first, if you could describe
16 the grid below those four icons.

17 A. The grid below the four main icons is set as a
18 28-icon grid, which is 7 by 14. And --

19 Q. That's 7 by 14 or 7 by 4?

20 A. Seven by four. Excuse me. I'm sorry. And
21 once you initiate the play, notice that you've got the
22 icons going up one way and across the other. And that's -
23 - that would be, that would be your fifth icon where the
24 player would obtain the maximum number of credits. So the
25 grid -- you come to the grid to get your, your fifth icon.

1 Q. So is it possible the result would be to get
2 five of any particular icon?

3 A. Yes.

4 Q. And I think you heard Mr. Snyder's testimony
5 that assuming that you could develop the skill to stop the
6 bottom sequence anywhere on the seven-table -- let me
7 rephrase -- assuming that you can develop the skill to
8 stop on whichever one of the seven rows you want, it's
9 still only a one in four chance of getting a particular
10 icon than you would want in that row.

11 A. Yes.

12 Q. And so in terms of the play at the bottom, do
13 you have an opinion as whether skill or chance determines
14 the result?

15 A. Chance.

16 Q. And in determining -- and if the player uses
17 his ultimate skill, and assuming for a moment that all --
18 the play at the top four, with the top four fields,
19 assuming that -- let me rephrase again, I (inaudible) --
20 assuming that there is a mild exercise of skill in the top
21 four fields, and the result you're seeking is the fifth
22 icon, does skill or chance determine whether you get that
23 fifth icon?

24 A. The chance.

25 Q. And just to -- beat at that horse, if you get

1 three icons at the top, and you want to get the fourth
2 one, does skill or chance determine the result?

3 A. Chance.

4 Q. And you get two at the top, and you just need
5 one more, does skill or chance determine whether you get
6 that third one?

7 A. Chance.

8 Q. Have you had any experience with the -- I'm
9 going to withdraw that question.

10 As to the overall playing, do you have an
11 opinion as to whether skill or chance determines the
12 outcome of the play?

13 A. In my, in my opinion, (inaudible) the total
14 outcome of the game's based on chance. I do believe I
15 have a way that I can show the Court that if the Court
16 will allow it.

17 Q. Then you can go ahead and demonstrate it.

18 THE WITNESS: Your Honor, I would first like
19 to establish that when you play the game and you win,
20 there, is celebration music.

21 Okay, I did not win. There was no celebration
22 music.

23 I did win. I have celebration music.

24 what I want to do now is what is referred to
25 in the industry as a blind test. what I'm going to do is

1 show the Court that I can turn this screen off, play the
2 game without even seeing what's going on up here, and I
3 can still win this game, which shows that there's no skill
4 whatsoever involved. And I believe that I can accurate --
5 I can do that. So what I'm going to do, I'm simply going
6 to unplug the monitor from the board, and I will start
7 playing.

8 I won. I had no idea what was going on on the
9 screen, but the game still allowed me to win. And I
10 believe I can continue to do that.

11 Just as Mr. Snyder won this morning, you can
12 win without seeing what you're doing. And in my opinion
13 there's -- what I do up there, there's no skill involved.

14 BY MR. SPENCER:

15 Q. Likewise, just to follow up, if you play --
16 and if you don't mind maybe just turning the screen back
17 on. I think we're done with that.

18 And I think we've already discussed the -- how
19 you can just hit one button and let it time out and still
20 -- and your testimony is you can win doing that, right?

21 A. Yes.

22 Q. Okay, is there, is there a way to stop all
23 five buttons -- stop playing all five fields at once?

24 A. Yes. You can start the game and then just hit
25 the "play" button again, and it will stop all, all five at

1 the same time.

2 Q. Okay, and there's -- and I see you just won
3 there and got, got a couple shields. Was there any skill
4 involved in obtaining that result?

5 A. No, sir. I just simply pressed two buttons.

6 Q. Um --

7 MR. SPENCER: Beg the Court's indulgence. I
8 lost my train of thought there.

9 BY MR. SPENCER:

10 Q. Oh, and while you have that open, this door
11 here open, what are these two black pins right here?

12 A. Those are the -- excuse me -- the hard meters
13 that I was referring to earlier. One records the amount
14 of currency that is placed into the device, and the other
15 one is the number of tickets that come out of the device.

16 There are also these, these wires which, in
17 other machines that I have examined, these are usually
18 attached to buttons. What these do, these wires enable
19 you to get to the administrative screen which, during my
20 examination, I was able to do that. But I did not have
21 the password needed to get into the, the system setup
22 where the game would actually be -- go in and change just
23 the features of the game. I was not given that password.
24 And I believe it was -- someone was asked this morning,
25 and they did not have the password.

1 Q. And did it allow you in, or --

2 A. Yes, you can. It gives you the, also the
3 internal accounting function, which has the coin in, coin
4 out, and the key in and key out.

5 Q. Is that duplicative of the two hard meters?

6 A. No, the numbers are different.

7 Q. And do you know why that would be?

8 A. I believe because the way these tickets, the
9 key out is set up to a hundred credit per ticket, and that
10 is recorded here in the soft meter, and the hard meter is
11 actually counting each individual ticket.

12 Q. And what function might a meter keeping track
13 of the tickets dispense -- why would, why would an owner
14 want to have an accounting system for the tickets that are
15 being dispensed from the machine?

16 A. Because at some point, the owner of this
17 machine or whoever, whoever's machine, whoever has
18 authority over this machine and access to it, at some
19 point during the day or during the week or the month, he
20 or she would come and collect the money from the bill
21 acceptor in the device, and he could then compare, in my
22 experience with these type of investigations, there's
23 usually a receipt for whatever -- whoever's maintaining
24 these devices, they will right down the numbers, compare
25 that to the amount of money taken out. They will then

1 compare it to the amount of money that has been paid out,
2 or essentially, the amount of money that has been paid out
3 of the machine. They then, the owners and -- the owners
4 of the machines and the businesses usually have some type
5 of 50/50 spit, 60/40 split, and that's the way they would
6 actually determine their, their split.

7 Q. I'm going to talk about the tickets real quick
8 again. If you put it, say, a fixed amount of money, and
9 we'll say you put in a dollar, which gets you 20 credits.

10 A. Yes.

11 Q. Okay. If you're -- play successfully, can
12 you, based on just that one dollar play, can you end up
13 with a variable number of tickets?

14 A. Only if you wager the entire amount and got
15 the -- you would have to get one of the bonus features,
16 the jester or the vault to give you a hundred credits to
17 equal five dollars.

18 Q. Okay, let me ask you this way: If you put in -
19 - what kind of bills does that bill acceptor accept?

20 A. I know that it will accept multiple
21 denominations. I did use a one-dollar bill and a 20-
22 dollar bill. I would assume that it probably accepts 1s,
23 5s, 10s, 20s, and possibly 50s or 100s.

24 Q. So it does accept 20-dollar bills.

25 A. Yes.

1 Q. And that would get you 20 credits times \$20.
 2 Is that --
 3 A. Yes.
 4 Q. Four thousand credits.
 5 MR. ALTMAN: Four hundred.
 6 BY MR. SPENCER:
 7 a. Four Hundred.
 8 Q. Four hundred, thank you. Four hundred
 9 credits. Can you accumulate a variable score under the
 10 score column?
 11 A. Yes.
 12 Q. And right now, if you were to redeem those,
 13 what those tickets -- right now, the score reads 579.
 14 A. Yes, so there's \$25 worth of tickets.
 15 Q. You would get how many tickets?
 16 A. Five, and it would leave 70 points on the
 17 score.
 18 Q. Could you, depending on your success of play,
 19 only end up winning two tickets from the same \$20?
 20 A. Yes.
 21 Q. Or no tickets?
 22 A. Yes.
 23 Q. Or possibly, you know, dozens of tickets?
 24 A. Yes.
 25 Q. So would you agree with me this machine vends

1 tickets?

2 A. Yes, it does.

3 Q. And does it vend a variable number of tickets?

4 A. Yes.

5 Q. Let me back -- would you agree with me it
6 vends a variable number of tickets for each \$20 you put
7 in?

8 A. Yes.

9 Q. And it would eventually give a variable number
10 of tickets for each denomination of money that it accepts.

11 A. Yes.

12 Q. What are the three elements of gambling?

13 A. Prize, chance, and consideration.

14 Q. Okay. If you -- does this machine accept
15 consideration?

16 A. Yes. The bill acceptor puts -- accepts paper,
17 U.S. currency.

18 Q. And would the tickets be considered a prize?

19 A. Yes.

20 Q. And does it give out -- does this machine give
21 out a prize?

22 A. Well, it gives you a ticket, which would be,
23 yes, a prize. Many, many regulated states, out in Las
24 Vegas, now do not give out currency. They give you a
25 receipt which you then take to a teller, and they give you

1 the currency.

2 Q. And your testimony is chance -- let me -- does
3 skill or chance determine the outcome of play on this
4 machine.

5 Q. And therefore, is this machine capable of use
6 for gambling?

7 A. Yes.

8 Q. Is there any way to -- did you start play with
9 the start button and then use this "stop all" button next
10 to it? Is there any way to use skill and to obtain a
11 result out of that machine using that skill button -- or
12 that play button?

13 A. No. It would be completely based on chance.

14 Q. So is a player who's utilizing nothing but the
15 start button and the play button gambling?

16 A. Yes.

17 Q. Is this machine licensed, to your knowledge?

18 A. Yes, it has a current Type II coin-operated
19 device license which was issued by the South Carolina
20 Department of Revenue which expires May 31st, 2010, tax ID
21 number 2026548.

22 Q. And might as well -- can we publish it on the
23 other machine too?

24 A. Yes. The other device has the same Type II
25 coin-operated device license, expiration date May 31st,

1 2010, tax ID number 2026547.

2 Q. So would your opinion be that these are
3 licensed machines capable of being used for gambling?

4 A. Yes.

5 Q. And if your method of play is using the start
6 and the play buttons, is there any way -- if your method
7 of play is the start and the play buttons, are you
8 gambling?

9 A. Yes,

10 Q. Now, I want to go back to the four skill stop
11 buttons. Is there any description of how to play this
12 game anywhere either in attract mode or during the course
13 of play or on the outside of the machine anywhere?

14 A. The attract mode goes through a simulation of
15 how the game is played, but as far as, it doesn't tell me
16 anywhere that there's 255 icons or, or -- I mean, there's
17 no instructions on how exactly to play the game, no.

18 Q. Does it tell you anywhere on the machine that
19 it's a fixed sequence?

20 A. No, it does not.

21 Q. Does it tell you anywhere on the machines that
22 you can learn trigger points to maximize your results?

23 A. No, it does not.

24 Q. To someone who is approaching this machine for
25 the first time and no knowledge of the game beyond

1 whatever instructions or on the outside of the machine or
2 on the attract mode or any other screens available to a
3 player, is there anything for them to believe that they're
4 looking at something that's a game of skill?

5 A. No. Well, other than it says, "Chess
6 Challenge II game of skill."

7 Q. So other than the sort of conclusory statement
8 that it's a game of skill.

9 A. Yes, sir.

10 Q. What's a, what's a random generator? How's
11 that work in the context of gaming machines?

12 A. A random number generator would generate the -
13 - why don't we use, for example, the -- I think we talked
14 earlier about the Cherry Master. The icons associated
15 with the icon sequence on the Cherry Master is related to
16 a number. So if there were 25 icons in each sequence,
17 each icon would be numbered 1 through 25. And to get that
18 outcome on the sequences, what's called a random number
19 generator, which a randomly generated number 1 through 25,
20 and whichever random number that was, that would be the
21 icon that it would show.

22 Q. Let me ask you this: Is there anything on this
23 machine anywhere in the attract mode, any screens
24 available to the player or on the outside of the machine
25 that would tell you that these four icons at the top are

1 generated in some method other than randomly?

2 A. No. I, I doubt that -- I mean, there's a
3 master -- I've seen the master icon sequence. I doubt
4 they publish that to too many, too many individuals, and I
5 would doubt if, I doubt Mr. Snyder would be allowed to
6 play in this establishment's business if they witnessed
7 him play this morning, because I know if I owned a
8 business, I would not want him playing in my device, same
9 as the Nevada Gaming Commission operates.

10 Q. Explain that. You mentioned the Nevada Gaming
11 Commission. What regulations do they have for somebody
12 who works on these devices?

13 A. You are not allowed to play them in the
14 casinos (inaudible).

15 Q. As somebody who -- and which people, which
16 people wouldn't be allowed to play on the machines?

17 A. The individuals that actually developed the
18 software and go out and do the inspections on the devices
19 in the casinos.

20 Q. And why is that?

21 A. Well, they have, they have the advantage. I
22 mean, the casinos, I mean, those billion-dollar casinos
23 are not built on the machines designed to give out money.
24 They're designed to take money.

25 Q. There's a -- are you familiar with the jester

1 function on this machine?

2 A. Yes. It's, it's not present right now. There
3 were -- well, with one of them, it's not a jester. I
4 found through video that there are three what I want to
5 call wild cards. One is the jester. You have this
6 vampire-looking guy that has "X 6," and there's another
7 icon that looks kind of like a frog that has an "X 4."
8 And if you land on those icons in the grid, it simply
9 multiplies your, your wins. And then, if you land on the
10 jester icon, it then sends this bottom grid into like a
11 frenzy. It's going every which way. And you then hit the
12 stop again, and it's just an extra bonus feature that
13 allows the player to earn more credits.

14 Q. And is that function determined by skill or
15 chance, in your opinion?

16 A. Well, first, it's pure chance whether or not
17 those icons will even show up in this bottom grid.

18 Q. They randomly appear.

19 A. Yes, sir. And then, once you get to the grid
20 aspect of the game, it will be based on chance whether or
21 not you can land on an icon.

22 Q. What is your understanding of what a slot
23 machine is?

24 A. My definition of a slot machine is a device in
25 which you insert money. You then initiate play, and the

1 machine, the machine gives you your outcome. The outcome
2 is based on the machine itself.

3 Q. And under that, under that measure, would you
4 -- under that definition, do you believe these machines
5 are slot machines?

6 A. Yes. If you, if you use the method where you
7 hit, where you insert your currency, hit the start button,
8 and do nothing, the device, after approximately 30
9 seconds, gives you an outcome. And by using that method,
10 yes, it would be considered a slot machine in my opinion.

11 Q. Describe the -- are you familiar with the
12 predominant factor test?

13 A. Yes.

14 Q. And would you describe that test.

15 A. It's just a test on different games to
16 determine whether skill or chance is the predominant
17 factor in the outcome of the game.

18 Q. Based on your view of these machines, do you
19 have an opinion as to whether skill or chance
20 predominates?

21 A. Yes, my opinion is that the, that chance is
22 the predominant factor in this device.

23 Q. In both two, both of those devices.

24 A. Yes, sir.

25 MR. SPENCER: Beg the Court's indulgence.

1 THE COURT: Let me ask you this: In each
2 particular section, like you've got one section up at the
3 top up there with the four features and also the one down
4 at the bottom, are you talking about it's predominant in
5 all of them?

6 THE WITNESS: Yes, sir, because based on my
7 example I showed earlier with the blind test, I was able
8 to successfully win -- I mean, I had to at least match two
9 of the icons on top as well as one down here to, to win.
10 And I believe I showed that earlier that I could do that
11 blindly, which was I was not asserting any skill
12 whatsoever to get the icons on top.

13 THE COURT: But what Mr. Snyder did earlier
14 today, getting all four kings up there, was that a game of
15 chance, or was that skill that he had?

16 THE WITNESS: I believe that that was done by
17 an individual that had spent a lot of time and knows
18 exactly how this machine works from the inside out.

19 THE COURT: That took skill on his part.

20 THE WITNESS: Yes, sir.

21 BY MR. SPENCER:

22 Q. Follow up with that. Is that all -- you
23 tested -- excuse me. Follow up with that. Does it appear
24 from your reports and Mr. Snyder's reports that you've
25 seen and Mr. Snyder's testimony today that Mr. Snyder has

1 particularized knowledge of these machines that would not
2 be available to the average person coming off the street?

3 A. Yes. I believe the documents are identified
4 as "Attorney confidential," something of that fashion.

5 Q. And you've reviewed those documents.

6 A. Yes.

7 Q. And does it appear that he has knowledge
8 superior to that that would be presented, that would be
9 available to the average person coming off the street?

10 A. I would not believe so, no.

11 Q. That he would or wouldn't have superior
12 knowledge?

13 A. That the average player off the street would
14 not be privy to the information included in those
15 documents.

16 Q. Thank you.

17 MR. SPENCER: Beg the Court's indulgence.

18 Your Honor, I have no further questions.

19 THE COURT: Could you go over this thing again
20 about the -- y'all went over it briefly -- The free play
21 feature, and I want to make sure I'm absolutely correct on
22 this -- is putting money in the machine, and you win free
23 plays.

24 THE WITNESS: Yes, sir.

25 THE COURT: That's basically what it is.

1 THE WITNESS: Yes, sir.

2 THE COURT: Okay.

3 All right, answer any questions --

4 CROSS-EXAMINATION

5 BY MR. ALTMAN:

6 Q. Go ahead and sit down. I appreciate you being
7 here. I'm going to ask you a few questions that I think -
8 - I would hope is (inaudible) what we agreed upon.

9 Now, if I heard you correctly, you told me
10 that SLED had been provided the 255-icon sequence, and you
11 came across that in preparing for today's hearing.

12 A. Yes.

13 Q. Okay, so you were familiar that this, this
14 game has got a fixed sequence before you, before you came
15 into court today.

16 A. Yes, sir.

17 Q. In your review, did you find any difference in
18 the sequence that had previously been provided to SLED and
19 the sequence in playing these machines?

20 A. No, sir. It was identical to the 255-icon
21 sequence.

22 Q. The identical sequence that's in SLED's
23 records is the same sequence at play in these machines
24 today.

25 A. Yes, sir.

1 Q. You've never seen a different sequence in any
2 Chess challenge II machine.

3 A. No, sir.

4 Q. This is the only one that you're aware of, the
5 same one that Mr. Snyder was (inaudible) you have in your
6 records; correct?

7 A. Correct.

8 Q. Now, relative to how you describe the game,
9 the purpose of the game is to match icons, and these top
10 four windows provide you four opportunities to do so; is
11 that correct?

12 A. Yes, sir.

13 Q. And the grid provides you a fifth opportunity.

14 A. Yes, sir.

15 Q. And you described a slot machine -- and I want
16 to make sure I heard you correctly -- a slot machine is a
17 game in which the player has no ability to impact the
18 outcome.

19 A. Correct.

20 Q. There is no skill in using a slot machine.

21 A. Correct.

22 Q. All you do is you pull it, and the machine
23 decides whatever results that you're going to get.

24 A. Correct.

25 Q. Now, if I heard you correctly, you said that

1 Mr. Snyder is not the type guy that you would want playing
2 your machine if you owned a business.

3 A. Correct.

4 Q. If this game was a slot machine --

5 --- end of Tape 2, Side 2 ---

6 --- Tape 3, Side 1 ---

7 Q. So there is a key distinction. You have to
8 try not to employ skill for this to be a slot machine.

9 A. Yes, sir.

10 Q. Why would you do that? Why would you make a
11 decision not to employ skill?

12 A. Why would you have the feature on the game?

13 Q. Well, because you can play this game
14 skillfully. Why would you -- have you ever tried to make
15 a foul shot blindfolded?

16 A. No.

17 Q. (Inaudible) dumb thing to do.

18 A. No, sir.

19 Q. But people do that. It's the same thing.

20 Just because you are blindfolded shooting a basketball
21 doesn't mean that your foul shot is (inaudible) skillful
22 (inaudible) --

23 MR. SPENCER: Your Honor, just -- objection
24 and argumentative.

25 THE COURT: Objection overruled.

1 BY MR. ALTMAN:

2 Q. You would agree that you can play those top
3 four windows skillfully.

4 A. I would not, because I have not been able to.

5 Q. Okay. You've already testified that that is a
6 fixed pattern.

7 A. Yes.

8 Q. And you know of no instance when that pattern
9 has never been changed.

10 A. Correct.

11 Q. And you saw Mr. Snyder nail those four
12 windows.

13 A. Yes, sir.

14 Q. And you testified earlier that because he's
15 able to do that, you wouldn't want him in your place of
16 business because he'd (inaudible).

17 A. True.

18 Q. He could win almost every time.

19 A. Yes, sir.

20 Q. If this wasn't a game of skill, why would you
21 care? why would it make any difference?

22 A. I'm sorry. (Inaudible.)

23 Q. If this, if this is a game of chance, how
24 could he do that?

25 A. Because, in my opinion, he knows how this game

1 was developed and how it was designed to work.

2 Q. Now, if you couldn't play this game
3 skillfully, why (inaudible)?

4 A. The player is not going to have the knowledge
5 that Mr. Snyder -- I mean, if we took a random sample of
6 everybody in this courtroom today --

7 Q. You're not answering my question.

8 A. Okay.

9 Q. Why would --

10 MR. SPENCER: Your Honor, I would let him
11 finish. He is answering that question.

12 BY MR. ALTMAN:

13 Q. Why -- I'll rephrase it -- why would you
14 choose to play a game of skill without applying the skill?

15 A. You would not.

16 Q. Exactly. You would not. There is no reason,
17 in a game that allows you to win by application of skill
18 that you would not (inaudible). Would you agree with
19 that?

20 A. I would agree with that, but there are still
21 features on that game that, if that's the case, those
22 features should not be on that device.

23 Q. Is it your testimony that that game has -- can
24 you be played skillfully unless you choose not to play it?

25 A. Yes, sir. I mean, Mr. Snyder showed that this

1 morning.

2 Q. He did. He showed that you can play this game
3 skillfully. So is it your determination that this game is
4 a game of chance because you can choose not to play it
5 skillfully and still win?

6 A. It is my opinion that it's a game of chance
7 because of the, the overall workings of the machine and
8 the dominant factor. Chance dominates skill in my
9 opinion.

10 Q. And you're familiar with the Allendale case.

11 A. Yes, sir.

12 Q. When did you first become familiar with the
13 Allendale case?

14 A. I, when, as I began my training in becoming an
15 expert, I read it just to know that it's, there's so many
16 different machines on the market that these machine-by-
17 machine, instant-by-instant moment just so I understood
18 that part of the law.

19 Q. As you sit here today, do you know of any
20 difference in the way those two Chess Challenge II games
21 are played and the games in Allendale?

22 A. I've never seen the games in Allendale.

23 Q. But you have testified that the icon sequence
24 is the same.

25 A. It is the -- the icon sequence on these two

1 devices is the same as the icon sequence in the document
2 that was provided by Mr. Snyder.

3 Q. Now, are you aware that your employer, the
4 South Carolina Law Enforcement Division, entered into an
5 agreement with (inaudible) of Castle King?

6 A. Yes, sir; I have heard about that.

7 Q. Were you part of that process?

8 A. No, sir; I was not.

9 Q. Have you reviewed the agreement?

10 A. Yes, sir; I have.

11 Q. I'm going to hand you a copy of this document.
12 If you would review it and indicate whether or not that is
13 the agreement.

14 MR. SPENCER: Do you have an extra copy of
15 that?

16 MR. ALTMAN: I do.

17 MR. SPENCER: Thank you.

18 MR. ALTMAN: You can have mine. Bear with me
19 one moment.

20 THE COURT: Thank you.

21 BY MR. ALTMAN:

22 Q. Does that appear to be the agreement that you,
23 you reviewed?

24 A. I've never seen the last page that says,
25 "three yards of extra blue" -- I've never seen that. But

1 all this (inaudible) --

2 MR. Altman: That must have been in my, in my
3 copy, Your Honor. (Inaudible.) I apologize for that.

4 (Laughter.)

5 MR. ALTMAN: Three yards of extra blue, like
6 (inaudible). I have no idea where that came from.

7 BY MR. ALTMAN:

8 Q. Besides that last page, does that appear to be
9 the agreement that Mr. (inaudible) signed on behalf of the
10 South Carolina Law Enforcement Division?

11 A. Yes, sir; it is.

12 Q. And does that agreement provide for the
13 continued distribution of Chess Challenge II?

14 A. Yes, it does.

15 Q. Now, on that agreement, there were certain
16 steps that your employer mandated to ensure that this game
17 does not (inaudible). Were you aware of that?

18 A. Yes; sir.

19 Q. Do you recall what those measures were?

20 A. Just by, I mean, by reason of the agreement.

21 Q. That there was tamper-proof seals on these
22 program chips to ensure that they operate the same way.

23 A. Yes, sir.

24 Q. Does this game have a tamper-proof seal on its
25 program chip?

1 A. Yes, sir; they do.

2 Q. Does it have the special decal to identify
3 that it's gone through the testing?

4 A. Yes, sir.

5 Q. Okay. And these two games in fact do have
6 those decals.

7 A. Yes, sir.

8 Q. Now, relative to the types of machines within
9 the agreement, I refer you to section 4, which describes
10 the games.

11 A. Okay.

12 Q. 4(1)a. "Chess Challenge II machines display
13 four rotating reels in which seven icons spin according to
14 a fixed sequence." Is it your testimony that these two
15 machines display four reels in which seven icons rotate
16 according to a fixed sequence?

17 A. Yes, sir.

18 Q. They do.

19 If you turn over, C, "The Chess Challenge II
20 machines display seven different icons pictured as a pawn,
21 a shield, a horse, a castle, prince, queen, and a king in
22 various combinations over the course of a fixed 255-icon
23 repeating sequence."

24 A. Yes.

25 Q. "Chess Challenge II machines have neither

1 random number generator nor utilize picture substitution."

2 A. I do not agree with that completely.

3 Q. You disagree with your employer and your legal
4 counsel.

5 A. I, as I've testified to earlier, I did not
6 have any involvement in this opinion. And from what I
7 understand, this agreement has been rescinded. I'm simply
8 stating that I do disagree with D. Yes, I do.

9 Q. You found a random number generator in this
10 game.

11 A. Not -- let me explain why I disagree with
12 that. Just simply because the, the icons on the four top
13 reels, it doesn't -- like, if you take a barrel slot
14 machine out in Vegas, those icons, game to game, are going
15 to stay fixed on that barrel. Well, and we've had
16 testimony by Mr. Snyder and myself that when you start a
17 new game, those icons could start from Number 1 or Number
18 100. So it's not a constant fixed sequence as it would be
19 on an actual barrel. So that would be my disagreement.

20 Q. But what you're talking about, though, is
21 something completely different than picture substitution.
22 (Inaudible) --

23 MR. SPENCER: Object, Your Honor. It's
24 argumentative.

25 THE COURT: Objection overruled.

1 BY MR. ALTMAN:

2 Q. What you're testifying about is something,
3 something different than picture substitution. You're
4 saying that the game starts in a different point in the
5 icon sequence.

6 A. Yes, sir, which would be random.

7 Q. And you testified that the sequence is the
8 same on every Chess Challenge machine you've ever seen.

9 A. Yes, sir. Yes, sir.

10 Q. "Chess Challenge II games -- game icons --
11 rotate at a rate consistent with those operated during,
12 during the other tests."

13 Did you find any difference in speed from what
14 Mr. Snyder told you?

15 A. No, sir.

16 Q. You're in basic agreement with most of the
17 things in this agreement, aren't you?

18 A. Yes, sir.

19 Q. And you testified earlier that the game has an
20 attract mode.

21 A. Yes, sir.

22 Q. The attract mode, in fact, is part of the 200
23 -- it's (inaudible) the 255-icon sequence.

24 A. Yes.

25 Q. It's not different.

1 A. No.

2 Q. So (inaudible) watch the attract mode and
3 learn part of that sequence without spending a dime.

4 A. No, I -- in my -- I don't believe a player
5 could do that. It -- I don't believe that would be
6 possible.

7 Q. You just testified the attract mode is part of
8 the same sequence that you play in the game itself.

9 A. A very small portion of that; yes.

10 Q. So you could learn a portion of the sequence
11 from the attract mode without spending a penny.

12 A. Yes, sir.

13 Q. Just want to make sure we agree about that.
14 Now, the speed of the attract mode is the same
15 as game play.

16 A. Yes, sir.

17 Q. No difference.

18 A. No, sir.

19 Q. You would agree, and I believe you've already
20 testified to this, that a game of skill is a game in which
21 a player applying skill can achieve a desired outcome.

22 A. Yes.

23 Q. And you would agree that that's what Mr.
24 Snyder demonstrated today.

25 A. Yes, sir.

1 Q. That's all I have.

2 THE COURT: Any follow-up?

3 MR. SPENCER: Yes, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. SPENCER:

6 Q. Returning to Mr. Snyder's (inaudible) skill,
7 if you will, does it appear to you that he obtained that
8 skill in part by having the access to information or
9 features on the machine that are not available to the
10 general public?

11 A. Yes.

12 Q. Is it your opinion -- what is your opinion on
13 whether a player from the general public, without inside
14 or special information provided outside the machine itself
15 -- let me rephrase (inaudible).

16 Somebody from the general public, without any
17 of this outside information -- inside information or
18 specialized information about the machines other than from
19 the machines themselves, can they attain skill in your
20 opinion, as demonstrated by Mr. Snyder?

21 A. No. I believe that you would need to have --
22 you would need to know that it is a 255-icon, fixed icon
23 sequence and just have that, that prior knowledge before
24 playing the game, which I don't believe would -- I, I
25 would not believe that this information is made available

1 to the public.

2 Q. I just want to go over the agreement between
3 SLED and Castle King. First of all, your understand is
4 that agreement has been rescinded.

5 A. Yes, sir. I read, I believe it was in the
6 "Charleston, Charleston Post and Courier" that the
7 governor and the attorney general consulted with Director
8 Lloyd, and it has been since rescinded.

9 MR. SPENCER: (Inaudible) sure you all have a
10 copy of that. Do you have any objection?

11 MR. Altman: I have no objection.

12 MR. SPENCER: Okay.

13 BY MR. SPENCER:

14 Q. If you could just describe this document I'm
15 handing to you.

16 A. This document is a, a letter on SLED
17 letterhead addressed to Jonathan S. Gasser, Harris &
18 Gasser, 1525 Laurel Street, Columbia, South Carolina.

19 "Mr. Gasser, this letter is to memorialize the
20 South Carolina Law Enforcement Division's decision to
21 withdraw from a consent agreement with Castle King LLC.

22 "Due to SLED's withdrawal from the consent
23 agreement, both parties maintain the legal status quo that
24 existed prior to the execution of the agreement.

25 Therefore, SLED must now pursuant to South Carolina Code

1 12-21-2710 and 12-21-2712 have probable cause that chess
2 Challenge II is a game of chance to legally seize the
3 machine for presentment to a magistrate.

4 "To reiterate, this letter places Castle King
5 LLC on written notice that SLED's withdrawing from its
6 consent agreement following oral notice of such on
7 December 11th, 2008. Therefore, the agreement will become
8 void on December 26th, 2008."

9 Signed by Todd Hagins, General Counsel for
10 SLED.

11 Q. And based your employment with SLED, is Mr.
12 Hagins counsel for SLED?

13 A. Yes, sir; he is.

14 MR. SPENCER: I would just move this letter
15 into evidence.

16 MR. Altman: Could we admit the agreement
17 itself.

18 MR. SPENCER: I have no problem (inaudible) --

19 MR. Altman: why don't we, why don't we admit
20 them, then, together.

21 MR. SPENCER: And I only, think I may only
22 have one copy of that. Do you have your copy (inaudible)?

23 MR. Altman: Of the agreement?

24 MR. SPENCER: Yes.

25 MR. Altman: Yes, and in fact, I think the

1 agent has got (inaudible) a copy that he's looking at of
2 the agreement.

3 MR. SPENCER: Okay, great. I'll just
4 (inaudible) hand it back to you.

5 I would also move the consent agreement into
6 evidence.

7 THE COURT: So noted for the record.

8 BY MR. SPENCER:

9 Q. And I think you've testified that you reviewed
10 the agreement.

11 A. Yes, sir.

12 Q. Does it contain a clause as to the
13 equipability to law enforcement divisions other than SLED?

14 A. By reading this agreement, it was only binding
15 to the South Carolina Law Enforcement Division and did not
16 by any way restrict local authorities to seize the Chess
17 Challenge II gaming device.

18 Q. So it doesn't seem to restrict the Richland
19 County Sheriff's Office from seizing a machine.

20 A. No, sir.

21 MR. SPENCER: Beg the Court's indulgence.

22 BY MR. SPENCER:

23 Q. Does this agreement alter in any way your
24 opinion as to whether or not these two games are illegal
25 games?

1 A. No, sir; it does not.

2 Q. Does it alter in any way your opinion as to
3 whether these two games are games of chance under the
4 dominant factor test?

5 A. No, sir.

6 Q. Does it change your opinion as to the
7 existence of the free play feature on the machine?

8 A. No, sir.

9 Q. Does it change your opinion as to whether the
10 machines give out a variable number of tickets for amounts
11 of money put into the machine?

12 A. No, sir.

13 Q. Does it change your opinion as to the ability
14 of these machines to be used for gambling?

15 A. No, sir.

16 Q. I believe the agreement, part of the agreement
17 is that there's not to be cash prizes given out, but it
18 would allow for the awarding of merchandise and
19 (inaudible) cards and things of that nature. Was that
20 your understanding of the agreement?

21 A. Yes, sir. It's under -- if I can find it --
22 it's under, it's under Section 4.3, which talks about
23 payouts. It states that "Castle King agrees to prohibit a
24 monetary payout in any form resulting from the successful
25 player operation of the Chess Challenge II machine. This

1 monetary payout does not prevent an entity from awarding a
2 successful player with gift certificates, discounts,
3 additional play, toys, or other novelty items as long as
4 they are not redeemable for cash.

5 Q. And so the awarding of any of those items that
6 were enumerated, would all of those items constitute a
7 prize?

8 A. Yes.

9 Q. When Mr. Altman had asked you about viewing
10 icons in an attract mode, and you agreed with him that you
11 might be able to view a portion of the fixed sequence --

12 A. Yes, sir; a small portion of the -- you would
13 view a very small portion of the 255 icons.

14 Q. I believe the testimony by Mr. Snyder before
15 was attract mode lasted for about 15 seconds.

16 A. Yes, sir.

17 Q. And would you agree with his testimony?

18 A. Yes, sir.

19 Q. And would you agree with his testimony that
20 you would see fewer than 60 icons in the attract mode?

21 A. Yes, sir. That sounds correct. Yes, sir.

22 Q. Is there any guarantee that those 60 icons,
23 60-icon sequence you might see in attract mode would show
24 up in the sequence during the play in any of the four
25 fields?

1 A. No, there would be no guarantee of where, of
2 what piece of the 255 icons that you get when you're
3 playing.

4 Q. In a single play, is there any guarantee that
5 that 60-icon sequence would even show up in any one icon
6 field?

7 A. No, sir.

8 MR. SPENCER: Beg the Court's indulgence.

9 BY MR. SPENCER:

10 Q. Now, in your reading of the Allendale opinion,
11 did you see anywhere where it mentioned that those two
12 machines in that case six years ago were, had a button
13 that would stop all five, you could stop playing all five
14 fields?

15 A. No, sir.

16 Q. Do you see anything in the description in the
17 opinion that indicates it has a free play feature?

18 A. No, sir.

19 Q. Is there anything in the text of the opinion
20 that you see that indicates that it has a halt feature?

21 A. No, sir.

22 Q. Do you see anything in the opinion anywhere
23 that indicates that the machines had a 7 by 4 grid in
24 which you could stop field -- stop -- in which you could
25 pick up a fifth icon?

1 A. No, sir.

2 Q. Did it describe that style of playing anywhere
3 in the opinion?

4 A. No, sir.

5 MR. ALTMAN: I'm sorry. What opinion are you
6 referring to?

7 MR. SPENCER: I'm sorry. I'm referring to the
8 Allendale County Sheriff's Office opinion, "Allendale
9 County vs. Two Chess Challenge Machines."

10 BY MR. SPENCER:

11 Q. And in that line of questioning, was that your
12 understanding of what I was asking you about?

13 A. Yes, sir.

14 Q. Does it mention anywhere in the opinion that
15 these machines have hard meter?

16 A. No, sir.

17 Q. Or has an internal accounting function?

18 A. No, sir.

19 Q. To your knowledge, did a SLED agent testify
20 before the fact finder in the "Allendale County Sheriff's
21 office" case?

22 A. No, sir; I do not, I do not believe there was.

23 Q. And just to be clear, because I want to make
24 sure that I'm clear on this, assuming any skill that's
25 exercised, even by Mr. Snyder himself, in obtaining the

1 optimum result in the top four icons, what determines the
2 result in the fifth field?

3 A. Chance.

4 Q. So if your object is to get five kings, what
5 is the (inaudible) -- does the exercise of skill by
6 anyone, Mr. Snyder or anyone in the general public, can
7 that be thwarted by chance in, in playing in the fifth
8 field?

9 A. No, sir; it would be based on chance.

10 Q. And what's the dominant factor in play -- even
11 if, even assuming that skillful play can be done in the
12 top four icons, what's the dominant factor in the outcome
13 of the game?

14 A. Chance.

15 Q. Notwithstanding any prior agreement with SLED
16 that have been rescinded or anything else involved in this
17 case, if these two machines right there -- if you felt, in
18 your opinion, that these two machines right there were
19 games of skill, would you have told me when you examined
20 these machines?

21 A. Yes, sir.

22 Q. Would you testify that they're games of chance
23 when they're -- when -- if you thought that they were
24 actually games of skill?

25 A. No, sir.

1 Q. Let me ask you this -- no, I'm going to
2 withdraw that.

3 MR. SPENCER: Beg the Court's indulgence.

4 I just wanted to verify before I have Mr.
5 Godfrey step down, did the letter rescinding, did that get
6 marked as an exhibit?

7 MR. ALTMAN: It did.

8 MR. SPENCER: Okay, that's --

9 MR. ALTMAN: They were entered together.

10 MR. SPENCER: They were entered together?

11 MR. ALTMAN: They were.

12 MR. SPENCER: Is there --

13 THE WITNESS: That's the agreement.

14 MR. ALTMAN: Mm-hmm.

15 MR. SPENCER: (Inaudible) the agreement.

16 Well, actually, I think the agreement got
17 entered, but the letter has disappeared on me, through my
18 fault, I'm sure.

19 MR. ALTMAN: He was reading it. He may still
20 have it.

21 MR. SPENCER: Do you still have it?

22 THE WITNESS: No, I gave the -- I handed the
23 letter up.

24 MR. SPENCER: I thought I --

25 THE COURT: I've got a copy of the agreement

1 here, a copy of the consent agreement (inaudible) --

2 MR. SPENCER: Judge --

3 THE COURT: That's the letter.

4 MR. SPENCER: Is that the letter from --

5 THE COURT: (Inaudible.)

6 MR. SPENCER: No, that's not the letter

7 (inaudible).

8 Here it is. I had moved that into evidence.

9 I believe there was no objection.

10 MR. ALTMAN: There is no --

11 MR. SPENCER: I just wanted to make sure

12 (inaudible).

13 I have no further questions, Your Honor.

14 THE COURT: All right.

15 MR. ALTMAN: Judge, I just have one --

16 THE COURT: One question.

17 MR. ALTMAN: One question.

18 RE-CROSS EXAMINATION

19 BY MR. ALTMAN:

20 Q. Agent, are you aware of a single seizure of a
21 Chess Challenge game by SLED in Richland County even since
22 that agreement was rescinded? In the intervening seven or
23 eight weeks, has SLED picked up a single one of these
24 machines?

25 A. Not to my knowledge.

1 MR. ALTMAN: Nothing further, Your Honor.

2 THE COURT: Okay.

3 You may step down.

4 Anything further from the State concerning --

5 MR. SPENCER: Your Honor, that would be the
6 State's case.

7 THE COURT: All Right.

8 Anything in closing, or any closing summations
9 or anything? Five minutes.

10 MR. ALTMAN: (Inaudible) Your Honor.

11 THE COURT: Four minutes.

12 (Indistinct conversation and laughter.)

13 MR. GASSER: I think two minutes would do.

14 THE COURT: Two minutes.

15 (Indistinct conversation.)

16 MR. GASSER: -- touch on the probable cause
17 issue.

18 Your Honor, first of all, everybody agrees
19 that everyone acted in good faith. That's never been an
20 issue as to the probable cause. But clearly, if the
21 standard is that because Cherry Masters and Lucky Eight-
22 Lines have been deemed to be, over and over again,
23 illegal, and finally, in 2000, the Supreme Court said,
24 "They're illegal per se; you can seize them on sight even
25 if they're not operating; they're illegal per se," well,

1 then, conversely, it would be our position that the only
2 court orders out there on the Chess Challenge II games are
3 Judge Love's -- or Magistrate Love, Judge Buckner, and the
4 Supreme Court cases claiming that the, at least the games
5 before them, were legal games of skill, and they can still
6 be seized because of the manipulation capability with
7 probable cause.

8 I would submit that just logic, if Cherry
9 Masters and Eight-Liners by our courts are deemed to be
10 illegal every time, and therefore now, they're per se
11 illegal, and you can just pick them up on sight, the fact
12 that the only court opinions out there on Chess Challenge
13 II are that they are legal games, and you haven't had a
14 probable cause that in some form or fashion that they're
15 operating in a different fashion than those deemed to be
16 legal, and in this particular case, Deputy Crane was very,
17 very honest when he indicated he didn't even play the
18 machines. He didn't play these machines. He didn't
19 observe their play. He simply has no knowledge of it at
20 all. He called a SLED agent who gave his personal opinion
21 that the games in general -- and that's what it was
22 because he wasn't there. He wasn't there to observe these
23 machines. If it's a -- they want to have it both ways.
24 If it's a case-by-case basis, then somebody had to have
25 personal observation or based on confidential and reliable

1 information that each one of these machines themselves
2 were operating in an illegal fashion. And the SLED agent,
3 according to Deputy Crane, he wasn't even there. He was
4 talking to him on the phone. How could he, how could he
5 determine that these games were somehow manipulated or
6 somehow when he didn't have an opportunity. So that's our
7 argument there.

8 with regard to the skill, Your Honor, just
9 because the de facto (inaudible) the dominant factor test,
10 and it's 51 percent dominant factor. The fact that there
11 are elements of chance, there's elements of chance in
12 every video game being played in South Carolina. The
13 video game, the popular video golf game Golden Tee or the
14 popular video bowling game Silver Strike, you can
15 blindfold, and you can roll that thing down on that Silver
16 Strike, and you can obtain points. Now, I submit to you
17 that if you're not blindfolded and you play Silver Strike,
18 you're going to get a higher bowling score, but the fact
19 that you can do it blindfolded doesn't mean that it's any
20 less a game of skill.

21 And nobody's seizing Silver Strike games. Not
22 one law enforcement agency has seized a Silver Strike.
23 Not one law enforcement agency has seized a Golden Tee.
24 You can play Golden Tee blindfolded. You can hit a, you
25 can hit a 25-foot putt blindfolded. It's clearly just

1 luck, clearly just chance if you're blindfolded. But no
2 one's seizing Golden Tees in South Carolina.

3 So the fact that there is some element of
4 chance, that's not the issue. That's not the standard in
5 South Carolina. The question is can a person employing
6 skill beat the machine more often than a person just
7 randomly in chance. And clearly, we've demonstrated that
8 to you, that a person employing skill has a better shot at
9 beating this machine than somebody just randomly stopping
10 the machine or allowing it to go up. And that's the
11 standard is the 51-percent standard, the dominant, the
12 dominant factor.

13 And so, and most importantly, our expert
14 looked at the Allen, at one of the Allendale machines.
15 They didn't even want to look at the Allendale machine,
16 and I submit to this Court there's a reason why. Wouldn't
17 you want --

18 MR. SPENCER: Your Honor, I object to that.
19 we were not offered to look at the Allendale machine.

20 MR. GASSER: They didn't ask. We've had it
21 here for two days. They didn't ask. They never asked,
22 and I submit to you there's a reason why, Your Honor. And
23 just think about this.

24 THE COURT: The actual Allendale machine is
25 still, is --

1 MR. GASSER: They knew that there might be
2 litigation after the fact, and they kept the two machines
3 intact in their warehouse in Goose Creek. And they didn't
4 even ask to look at it.

5 But wouldn't you, if you were an expert, if
6 you wanted to come in here with an objective, the goal of
7 objectivity, "Well, let me look at that Allendale machine,
8 and let me see how that's operated in compared to these
9 two machines."

10 Our expert did that. Our expert did that, and
11 he testified to that. He analyzed again the Allendale
12 machine, and it is in the exact same condition as these
13 two machines in court. He looked at them over a period of
14 time on Wednesday, Thursday, and this morning, and of
15 course, he looked at these for two and a half hours
16 yesterday.

17 But wouldn't you want, if you really want to
18 give an expert opinion, wouldn't you want to see those
19 Allen -- one or two of those Allendale machines? Wouldn't
20 you want to know how that operates? And they never asked.
21 They never asked.

22 And our expert -- you've only heard from one
23 person that looked at one of the machines that was deemed
24 to be legal and these two machines. You've only heard
25 from one person, and that's Bob Snyder. And he's a former

1 law enforcement officer, and he's an attorney, a member of
2 the bar, the California Bar. And, of course, you saw his
3 credibility in his area of expertise.

4 And again, it all comes down to the dominant
5 factor test and whether or not skill dominates over
6 chance. And repeatedly, repeatedly, repeatedly, he
7 demonstrated that skill dominates over chance. And all
8 you have to do -- let me tell you, they indicated they
9 wouldn't want Bob Snyder. I would submit that any
10 operator of this machine would not put one in a fraternity
11 house, would not put one in a college dorm room at USC or
12 at Clemson because think about young people and how gifted
13 they are in video games as opposed to those of us that are
14 more senior, so to speak. And they would never -- because
15 all, they have all this free time to learn how to play
16 this game.

17 And that just goes to show you that you can
18 learn how to play the game and beat the game each and
19 every time. And under the standards used by the South
20 Carolina courts, that means skill, 51 percent, dominates
21 over the chance features that are in this video game just
22 like -- there's no question there are chance features in
23 this game, and there are chance features with all games,
24 in all games. But we, so that is my argument on both the
25 probable cause issue and on the, the skill/chance issue.

1 THE COURT: Thank you, sir.

2 MR. SPENCER: Your Honor, just addressing
3 these issues, because there's -- the dominant factor test
4 is not a percentage test. The dominant factor test also
5 isn't a measure of whether skillful play can improve your
6 chances. The dominant factor test is well articulated in
7 a North Carolina case, which is "Collins Coin Music v.
8 North Carolina Amusement." And I have a copy here, Your
9 Honor.

10 And the quote in there -- and I wish I had
11 highlighted this particular copy ahead of time -- the
12 pertinent question in the dominant factor test is
13 articulated in here. It's on Page 5 of the opinion under
14 -- it's under Headnote 1. There is an inset paragraph.
15 And it talks about skill -- I'm going to read the very
16 last sentence -- "Or to speak alternatively, whether or
17 not the element of chance is present in such a manner as
18 to thwart the exercise of skill or judgment." That's how
19 they descr -- this North Carolina opinion describes the
20 predominant factor test.

21 What is the best result you can get on this
22 machine? Five kings get into that vault. That vault
23 value is generated randomly (indistinct). Sure, he can
24 get partway there, but he can't get the fifth king except
25 through chance. He own testimony, at best, you have a one

1 in four chance. And this vault is just completely
2 randomly generated.

3 The predominant factor of the machine,
4 assuming skill in the top four icons, the predominant
5 factor in this machine is chance. They're trying to
6 cherry-pick. But you see chance all over the place.
7 First of all, there's chance in the vault. There's chance
8 in the field at the bottom. Mr. Snyder testified about
9 trigger points. Well, and I gave you an example, and that
10 trigger point only showed up once in the 255 master
11 sequence, fixed sequence, and you may not get that trigger
12 point. So you exercise your skill in finding that trigger
13 point, but chance still stands to thwart it.

14 The other thing that I would like to go into -
15 - and I want to talk a little bit more about the dominant
16 factor test, which is explained in Justice Burnett's
17 dissenting opinion in "Johnson v. Collins Entertainment."

18 MR. ALTMAN: David, both of those cases are in
19 the notebook that I provided --

20 MR. SPENCER: Oh, okay. Good, then.

21 Justice Burnett's dissenting opinion, the
22 reason it's a dissenting opinion is the issue in that case
23 was whether the video poker machines violated the
24 constitutional provision, the lottery provision that
25 prohibited lotteries that was in existence at the time.

1 The three -- the majority of that court, three
2 judges, did not reach the question of chance. They
3 basically said that video poker machines aren't a lottery
4 because it's not the same as a lottery ticket system. And
5 they did approach the issue of, of the three elements of
6 gambling, which is consideration, chance, and prize.

7 Justice Burnett in his dissent did address
8 that. That's what has led both sides to believe the
9 predominant factor test is, is the test to follow. And
10 his analysis, he talks about marbles in a glass bowl.
11 Somebody who was some specialized -- a mathematician, for
12 instance, might be able to calculate the number -- an
13 approximate number of marbles in the bowl, but he can't --
14 there's just things that are beyond his control, such as
15 thickness of the glass and number of marbles hidden from
16 view that he would not be able to account for. And so I
17 believe the conclusion was is that would come to, that
18 would be chance.

19 He comes to the conclusion that dominant
20 factor is the test we follow, and he does talk -- and I
21 can just not bring my eyes on it right now, but he does
22 conclude also that just improving someone's odds is not --
23 to improve your odds of winning does not change a game
24 from a game of skill -- excuse me -- from a game of chance
25 to a game of skill. And that's, that's what we're looking

1 at here is possibly increasing your odds to win.

2 Another out-of-state case that has important
3 implications in this case, I think, is the "Score Family
4 Fun Center" case from California.

5 MR. ALTMAN: I'm sorry, this is a California
6 case?

7 MR. SPENCER: That's right.

8 And the reason I'm bringing this case up is it
9 has a good analysis. It's talking about a video poker --
10 I can't remember if it's a high-low game or a video poker
11 game, actually, right now.

12 THE COURT: Mini-Boy 7?

13 (Laughter.)

14 MR. GASSER: Is this a video case or a
15 pornography case?

16 MR. SPENCER: This is a video game case. It
17 talks about, about the player coming to the machine and
18 not knowing what he's being confronted with. And someone
19 approaching this machine, not having the specialized
20 knowledge that Mr. Snyder had acquired through analysis of
21 the machine and videotaping and whatever, all -- and
22 whatever consulting he did with his clients -- all he'd
23 see -- all a player would see is a bunch of icons -- I'm
24 just going to demonstrate -- just rotating. A player
25 doesn't know whether that's fixed, whether it's random,

1 whether that's morphing. A player has no knowledge of
2 what he's looking at.

3 I think it's important to, in analyzing this
4 to understand that without inside knowledge of the 255-
5 icon sequence or that it's fixed or anything like that,
6 this is a game of chance to anybody who walks up to this
7 machine. The players that were tested, the four people
8 that Mr. Snyder ran his experiment with, they were told
9 it's a fixed sequence and that you can learn trigger
10 points in the sequence. The average person walking off
11 the street has nothing to tell them that information.
12 Those four people had inside information that's not
13 available to the general public anywhere on this machine.

14 That makes, in the same reason that someone
15 who operates on these machines in Las Vegas, that makes it
16 a game of chance. You have to be able to walk up and to
17 be able to ascertain the skill involved in this machine.
18 And there's nothing, no evidence that anyone without
19 inside knowledge could do that.

20 Your Honor, I want to now briefly go over --
21 we've focused a lot on chance and skill, but there's other
22 language in the statute. One of the things that's
23 prohibited by statute is a video game -- I'm going to read
24 the language right straight out of the statute -- "any
25 video game or machine with a free play feature operated by

1 a slot in which is deposited a coin or a thing of value."
2 A coin or a thing of value is deposited into this machine.

3 --- end of Tape 3, Side 1 ---

4 --- Tape 3, Side 2 ---

5 MR. SPENCER: -- illegal vending machine. The
6 statute -- at the top of the statute, it outlaws anyone to
7 keep on his premises or operate within the state any
8 vending or slot machine. And it goes to describe other
9 things prescribed. From that, it appears that all vending
10 machines are outlawed, but that's not the case. It gives
11 exception to vending machines which are constructed as to
12 give a certain uniform and fair return in value for each
13 coin deposited and in which there is no element of chance.

14 Now, whether -- you know, the predominant
15 factor test determines whether a game is illegal
16 pertaining to chance. This one, this phrase down at the
17 bottom says, "no element of chance." Obviously, there's
18 an element of chance in this game. I think Mr. Snyder
19 admitted as much. But more importantly, which is just
20 absolutely beyond argument is it's not constructed to give
21 a certain uniform and fair return in value for each coin
22 deposited. You can win any number of tickets. Agent
23 Godfrey testified to this. If you put a 20 in, you might
24 get one ticket or maybe dozens of tickets or no tickets.
25 That's a variable return.

1 And there is a case from 1929 known as "Harvie
2 v. Heise." And one of the things it shows is that there's
3 really nothing new under the sun. People have not
4 designed the master game; it's almost like gambling, but
5 not. What they've designed is a vending machine that
6 gives a variable return. In "Harvie v. Heise," the
7 machine operated by a slot. The player would get, for
8 five cents, he would get a mint, but he would also get a
9 variable number of tokens. And it was contended by the
10 respondent that -- or the petitioner, I'm not sure which
11 side it was -- but it was contended that, that those
12 tokens has no trade value.

13 It appears that these may have some trade
14 value in this case. The Court, however, found that it was
15 an illegal vending machine because it returned variable
16 return. This is an illegal vending machine under the
17 plain language of the statute and under the "Harvie v.
18 Heise" case because you can put money in, and you're going
19 to get a variable number -- variable return of tickets.
20 What those tickets are traded for, who knows, but that's
21 the statute.

22 And the statute is broadly worded for good
23 reason. It's designed to make sure that gambling machines
24 are kept out of the state. It has to be broadly written
25 because this is something, there's going to be another

1 kind of machine out there the next day, always trying to -
 2 - always going to be machines out there that attempt to
 3 follow the letter of the law without following the spirit.
 4 This one doesn't -- these two machines do not follow the
 5 letter or the spirit of the law. They're illegal.

6 There's one other reason I believe it's
 7 established that -- establishes that these machines are
 8 illegal. Also outlawed is any machine or device licensed
 9 pursuant to 12-21-2720 -- these machines are licensed by
 10 DOR, that's what that pertains to -- and used for
 11 gambling.

12 why does this machine have the "stop all"
 13 button? You can infer a lot from that button that stops
 14 everything. One thing is is it's not intended to be
 15 played as a game of skill. It's intended to be able to
 16 have somebody come to court and testify that I mastered
 17 this machine based on some information that's not provided
 18 to the general public, but it's intended to be played as a
 19 game of chance and is capable of being played as a game of
 20 chance and is capable of being played as a gambling
 21 machine because you put your money in, you press that
 22 button, you could win, it's all chance, and you can get
 23 some tickets, and you can get a prize. And so I think
 24 that the machine would be illeg -- my contention would be
 25 the machines are illegal under that section as well.

1 Your Honor, I'm going to just very briefly
2 touch on the probable cause issue because that's a red
3 herring. Basically, whether or not Robbie Crane should
4 have played the machines before he seized them, whether he
5 -- whether it was sufficient not to do anything more that
6 consult with an agent who he knew was familiar with the
7 enforcement of the gaming statute, whether or not Mr.
8 Crane didn't attain the information to determine probable
9 cause, he brought these machines to you, and that is your
10 function to determine probable cause, and you determined
11 probable cause, Your Honor. And the issue's dead now.

12 The issue is what's the character of the
13 machines. Because even if there -- Mr. Crane was mistaken
14 about probable cause, if Your Honor finds that these
15 machines are illegal under the statute, under no
16 circumstances do the defendants get the machines back
17 because of the character of these machines are contraband
18 per se. It's like giving back the cocaine in a drug case.
19 And "192 Coin-Operated Machines" says that very clearly.

20 Your Honor, I know I've taken up a lot of time
21 in argument. There's a lot of things to touch on. But
22 quite clearly, for several reasons, these machines are
23 illegal machines, and I would ask that you affirm the
24 order of destruction.

25 MR. GASSER: Your Honor, may I make it real

1 cases, and he's presenting cases from California.

2 And lastly, my last point is this -- and this
3 (indistinct) the law and the facts and common sense --
4 Your Honor, you have precedent to go by. You have a
5 magistrate's court opinion. You have a circuit court
6 opinion. You have a Supreme Court opinion on two Chess
7 Challenge II games, and you have an expert that says, "I
8 examined one of those two Allendale games, and it's
9 exactly like these two games that are before you in your
10 courtroom today."

11 The fact of the matter is there are many
12 people that don't like -- that did not like the magistrate
13 court, that did not like the circuit court, and that did
14 not like the Supreme Court's opinion. And I submit to you
15 that it is a slap in the face to that magistrate, to that
16 circuit court judge, and to the Supreme Court when we have
17 demonstrated to you that these machines are in the exact
18 same condition as one of the Allendale machines. That is
19 what my concern is. We are asking you to, to consider
20 that type of a precedent that's out there. And if there
21 was any evidence before you that these machines are
22 somehow operated differently than those two machines, then
23 I'd like to see it because that has not been brought
24 before you.

25 Thank you, Your Honor.

1 when to jump over those things. You got to learn how to
 2 play Pacman so you know when those things are going to
 3 come up and eat you. You got to learn how to play
 4 Galactica so you can figure out what the pattern is of the
 5 missiles coming at you. You don't know that the first
 6 time. You may not know that the second time. But as you
 7 play Donkey Kong and Pacman and Galactica, you get better
 8 and better and better at it. They're not saying those are
 9 illegal games.

10 with regard to the free play, this statute
 11 refers to only solely. It refers to if the game is solely
 12 a free play game. It doesn't say anything about the fact
 13 that there's a free play aspect, however, there's all
 14 these other -- you can stop it individually, and you can
 15 play it as a game of skill.

16 with regard to the -- he's not presented you a
 17 case that says -- there's not a case out there that says
 18 if the game is a game of skill, and skill can better, you
 19 can get a better score employing skill, but there's also
 20 some game -- you can also play it as a sole game of
 21 chance, that's an illegal game. He hasn't presented you
 22 with one case that says that, not one case in South
 23 Carolina or any other state in the country, and that's
 24 exactly what this game is. And if there's a case out
 25 there, he would have presented -- he's presenting 1924

1 brief, because he obviously -- he clearly had more time
2 than I did. I swear I'll be under 90 seconds.

3 THE COURT: You did five minutes. He did 15
4 minutes.

5 (Laughter.)

6 MR. GASSER: And I'm going to be, I'm going to
7 be less than two minutes.

8 First, this is an attorney general's opinion
9 written by David -- Assistant Attorney General David Avant
10 quoting Justice Burnett on this dominant factor standard:
11 "If through the exercise of skill or judgment a
12 participant can determine the outcome, the scheme is not a
13 game of chance."

14 This is their own attorney general's opinion,
15 and clearly, we've demonstrated to you that a person,
16 through the exercise of skill and judgment, can determine
17 the outcome better than just a random selection. This is
18 -- and you've got a copy of this in your notebook. That's
19 the attorney general's opinion interpreting the cases he's
20 talking about.

21 The fact that there's no instructions, Your
22 Honor, those popular games Donkey Kong and Pacman and
23 Galactica, they don't have instructions on them. And the
24 first time you play the, you got to learn how to play Pac
25 -- you got to learn how to play Donkey Kong so you know

1 MR. SPENCER: Can I bring up one more case,
2 Your Honor? "Alexander v. Martin." It finds that the
3 game is a game of chance, and it also -- video game --
4 well, not a video game, but it also discusses a free play
5 feature.

6 THE COURT: 1939 case.
7 (Laughter.)

8 MR. SPENCER: 1939 case, and it's still good.
9 It's still good law, Your Honor.

10 THE COURT: Well, you brought up Sheriff --
11 you said Heise, but it's actually, if that's who I'm
12 thinking it is, Sheriff "Heisee" (phonetic). And there
13 was a Sheriff Heise here in Richland County. I used to
14 sit on his lap when I was a little chap, if that's the
15 same guy. I don't know. Twenty-nine, that's about 1930,
16 and this was in the 40s. It could be the same guy. It
17 probably was.

18 But anyway, because of the unique situation in
19 this particular case and the names of these machines and
20 these two machines, because there has been a case on two
21 similar machines to this, the Allendale case, I will rule
22 that due to that fact, I'm going to rule that there really
23 was no probable cause to seize the machines on that
24 particular date.

25 If I was that particular officer that took

1 those machines on that particular day, and I was in his
2 shoes, I would have probably taken those machines because
3 he contacted someone that was familiar with the machines.
4 They said, "Yes, I'd seize the machines." So he did.

5 I don't feel as if he would have seized the
6 machines if he was aware of the Allendale case. I just
7 don't think that would have happened because I think he
8 would have had to have gone in to show that there was a
9 different type machine, and they'd been altered in some
10 particular fashion.

11 All right, that's the part on the probable
12 cause. On the ruling as to whether or not these are legal
13 machines or not, there is no doubt that whoever designed
14 these machines is right at the envelope. I mean, it is so
15 close, it is just unbelievable how they could have done
16 this with these particular machines. But what was really
17 impressed was when Mr. Snyder from California strolls in
18 here, and he hit all kings right in a row.

19 I wanted to ask him if he could do the queen
20 the same way, get all the queens in there in arrow, but
21 I'm almost sure it would take maybe a little more skill
22 and a little more practice, he could probably come in here
23 tomorrow and do it.

24 So the predominant situation you're talking
25 about with the, whether or not it's a game of skill or a

1 game of chance, I think it is predominantly -- hmm, boy,
2 and it's really just there -- predominantly a game of
3 skill and not a game of chance.

4 So I am ruling that the, the machines will be
5 given back, and whatever monies that were seized inside
6 the machines or whatever, if there was any in there. I
7 cannot remember. There was some (inaudible) was, they'll
8 go back. But I am ruling that each one of them is a
9 predominantly game of skill.

10 MR. GASSER: Your Honor, would you like us to
11 prepare a written order for you in that regard?

12 THE COURT: If you would be so kind.

13 MR. SPENCER: (Inaudible) argued it's illegal
14 because it's an illegal vending machine that gives a
15 variable return. And I would just request Your Honor to
16 rule on those two aspects of our argument because those
17 are prohibited in the same statute that prohibits game
18 pertaining to chance.

19 THE COURT: What are you, under Title 12?

20 MR. SPENCER: Yeah, it's 12-21-2710.

21 THE COURT: I was sitting there reading some
22 of it. I didn't see where it's been amended any. I don't
23 have -- 12-21 again?

24 MR. SPENCER: Twenty-seven ten. And the video
25 game with a free play feature was first put into the

1 statute in 2000, I believe.

2 THE COURT: Twelve, twenty-one --

3 MR. SPENCER: And Your Honor, (inaudible) you
4 probably have sufficient copies of that statute.
5 (Inaudible.)

6 THE COURT: You got the part in there about
7 concerning what the magistrate's responsibility is on the
8 --

9 MR. GASSER: Of course, Your Honor, you have
10 to read that whole statute. It still has to be all of
11 those features, plus a game of chance.

12 MR. SPENCER: Your Honor, it's a freestanding,
13 it is a freestanding provision in there.

14 MR. GASSER: But it's all separated by commas.

15 MR. SPENCER: Exactly, but it's --

16 MR. GASSER: But it all talks about games of
17 chance.

18 MR. ALTMAN: AS --

19 MR. SPENCER: No, it doesn't, Your Honor.
20 That's not true at all. It talks about "vending or slot
21 machine," comma, "or any video game with a free play
22 feature operated by a slot in which is deposited a thing
23 or coin (sic) of value," comma --

24 MR. ALTMAN: But it refers --

25 MR. SPENCER: Then it talks about "other

1 device operated by a slot." So we already are moving on
 2 to some other kind of machine because they've already
 3 talked about the free play feature operated by a slot.
 4 "Or other device operated by a slot in which is deposited
 5 a coin or thing of value for the play of several
 6 enumerated games."

7 That's a freestanding feature. That isn't you
 8 have to show A, B, and C. That's that you have to show A
 9 or B or C. And I'm sorry. I'll give you some time to
 10 look at that.

11 MR. ALTMAN: Your Honor, I would just refer
 12 David to the opinions issued by his office which, time and
 13 time again, have defined what is an illegal game -- a game
 14 of chance -- what qualities it has and also what qualities
 15 a game of skill has and how it's defined. We stipulated
 16 to it at the very beginning of this case. The precedent
 17 is all South Carolina.

18 It's your office that has laid out the
 19 standard that we've satisfied.

20 MR. SPENCER: It's this --

21 MR. ALTMAN: So your argument is not with us.
 22 Your argument is with your internal office --

23 MR. SPENCER: No, that's not true at all.

24 THE COURT: No, let's don't go there.

25 MR. SPENCER: This is -- there has not been an

1 attorney general opinion on that provision that I am aware
2 of. It talks about how a machine might be illegal because
3 it's gambling, but this is a freestanding -- this is the
4 plain language of the statute, Your Honor, the South
5 Carolina statute.

6 MR. GASSER: The statute as a whole refers to
7 "pertaining to games of chance." You can't get around
8 that portion of the statute. And every single Supreme
9 Court case has talked about pertaining to games of chance.
10 It's just describing games, and then it includes -- it
11 lists a description of all the games, but it adds
12 "pertaining to games of chance."

13 MR. SPENCER: No, that's --

14 MR. GASSER: It is a --

15 well, that's just your, your opinion, but, I
16 mean --

17 THE COURT: Hold on. Let's -- don't, don't be
18 arguing between each other. Y'all need to chat with me.

19 MR. SPENCER: I apologize, Your Honor.

20 THE COURT: In this particular case, if I went
21 up here to Chuck E. Cheese, are those machines up there
22 illegal?

23 MR. SPENCER: That's -- you know, we don't
24 have those machines here. Can (indistinct) be applied,
25 yes. Can be applied to machines that are, are on the

1 cusp, as you said. Yes, and I think that's the
2 legislature's intention is they really want to make sure -
3 -

4 MR. GASSER: Judge, he just made my argument.
5 If this was the case, every -- there's no way that all of
6 those machines that have variable payouts and coupons and
7 all those machines at all the Chuck E. Cheeses and all the
8 Frankie's Fun Parks and all the amusement parks around the
9 Grand Strand and the amusement park up in Rock Hill or
10 outside of Rock Hill, all of those -- we would be shutting
11 down all of those -- under his interpretation of this
12 statute, we would be seizing all of those machines and
13 ticketing all of those people and arresting all of those
14 people. And clearly, that hasn't happened, and that's not
15 the intent.

16 MR. SPENCER: Well --

17 MR. GASSER: That's the reason why they have
18 "pertaining to games of chance," the language in that
19 statute. Every magistrate, every circuit court judge,
20 every supreme court has always interpreted this statute,
21 when you're identifying games under it, are "pertaining to
22 games of chance."

23 MR. SPENCER: Your Honor, you know, I've
24 argued this -- I've argued machines with video game --
25 with the free play feature is illegal a number of times

1 before. It's not a new ground I have suddenly raised.
 2 It's a freestanding. And if it's, if it's any game
 3 pertaining to chance, why do you need that language in the
 4 statute in the first place? There would be no need for
 5 it. It would be superfluous. The way a statute's read is
 6 -- effect should be given to every provision in the
 7 statute, and that statute which is freestanding -- that
 8 phrase which is freestanding makes it clear under the
 9 plain language that would be illegal.

10 Now, whether some Chuck E. Cheese or other
 11 machines might violate the statute, that's a law
 12 enforcement decision. Law enforcement can seize the
 13 machines that seem most odious, most threatening to the
 14 morals of the public.

15 THE COURT: I am leaning toward the, the idea
 16 of the, the defense has brought out, that if it's not a
 17 game of chance, that that will not apply here. So the
 18 ruling stands as is.

19 MR. SPENCER: And the same as to the vending -
 20 -

21 THE COURT: There is no doubt that every,
 22 every machine that's in all these different places of
 23 business, they are coin-operated devices and that they do
 24 have a free play feature, but I think that they are a game
 25 of skill and not a game of chance. So the ruling stays as

1 is.

2 MR. GASSER: Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. ALTMAN: Thank you, Your Honor.

5 --- end of Tape 3, Side 2 ---

6 --- Tape 4, Side 1 ---

7 THE COURT: -- and this is a motion hearing to
8 alter or amend the case of the "Richland County Sheriff's
9 Department vs. Nizar" -- how do you pronounce his last
10 name?

11 MR. ALTMAN: It's "Adwe" (phonetic).

12 THE COURT: "Adwe" (phonetic).

13 And so argument from the State.

14 MR. SPENCER: Thank you, Your Honor. Dave
15 Spencer from the Attorney General's Office. I'm here
16 representing Richland County, which was -- the Richland
17 County Sheriff's Department, which was actually the
18 seizing party in this case.

19 Just to begin with, I just want to, just out
20 of an abundance of caution, I want to expressly state that
21 we're going to be arguing several pertinent aspects today
22 of, in our motion, but I also want to make clear that I'm
23 reserving all my prior arguments from the hearing and from
24 various pleadings and briefing that's occurred in this
25 case already.

1 Moving on from that, Your Honor, the reason
2 we're here today, of course, is our Motion to Alter or
3 Amend. We're asking the Court to reassess some arguments
4 that were raised during the hearing. And I want to start
5 with -- and before I do get into the argument, Your Honor,
6 I just want to bring up an e-mail Wednesday, a reply to
7 the defendant's motion in opposition to my Motion to Alter
8 and Amend.

9 THE COURT: Right, right, I got that, yeah.

10 MR. SPENCER: I just want to bring a hard copy
11 up, assign a copy up.

12 And although it's the last argument I got to
13 in the motion, I want to touch on it first. It's the free
14 play feature issue. And this is an issue -- free -- this
15 is an issue that was raised during the hearing. Brad
16 Godfrey, the SLED agent, had testified as to the free play
17 feature.

18 Mr. Snyder, I believe, also testified,
19 ultimately, that it had a free play feature. First I
20 asked him, and he said he didn't recall, he didn't
21 remember, but I think as we went on through the hearing,
22 he, looking at the machine, basically stated that there
23 was a free play, or free play mechanism, that it did
24 potentially award free plays.

25 And what the free play feature is, Your Honor,

1 is that machine, those machines, you may recall, had three
2 fields for posting scores. There's one field where it
3 reflects the amount of credits you've purchased. If
4 you've purchased, say, 200 credits, they'll appear in this
5 field. Then, as you play the game -- you can wager on the
6 game anywhere from 5 to 40 credits -- as you play the
7 game, that total depletes. If you waged (sic) 40
8 credits, it would deplete from 200 to 160, 160 to 120, and
9 so forth and so on.

10 If you're successful in the play where you win
11 something, win some credits, that initially appears, I
12 believe, at the top field, but transfers down to the
13 bottom, the third field, and would be posted as credits
14 won. The machine kept a tab of credits won during the
15 course of your play.

16 Say if you continued playing from 200 credits
17 down all the way to zero, in that field which shows the
18 credits that you initially purchased, and say you've won
19 120 credits, the player has two choices at that point:
20 The player could knock off 100 credits, basically redeem
21 100 credits, and he would be issued a red ticket for
22 credits won, for 100 credits won. That would still leave
23 a balance of 20. Or he could continue playing with those
24 credits won. Those are -- so those credits won are used
25 to play free games.

1 And as a matter of fact, a player has to have
2 100 credits in order to be able to -- at least 100 credits
3 in order to be able to earn any tickets. If he doesn't,
4 the only choice he has at that point, using up the points
5 he's purchased, it to play with the points that he's won.
6 And that's a free play feature.

7 THE COURT: All right, now, this -- you're
8 just now describing the machines at Chuck E. Cheese.
9 Would you say that?

10 MR. SPENCER: I understand that. Your Honor,
11 and I recalled you mentioning, I recalled, I thought, you
12 mentioning Frankie's Fun Park. I went up to Frankie's Fun
13 Park, and Your Honor, I saw a quarter push machine at
14 Frankie's Fun Park. I had a case out in Batesburg where
15 those machines were declared illegal. You know, I don't
16 know what to say about Chuck E. Cheese or Frankie's --

17 THE COURT: I haven't been to Frankie's Fun
18 Park, but Chuck E. Cheese, I've been there with the
19 grandkids.

20 MR. SPENCER: Right.

21 THE COURT: And you just described those
22 machines. You go and give them a couple of bucks, and
23 they give you --

24 MR. SPENCER: Sure.

25 THE COURT: -- these coins, round devices that

1 you drop into the machines and play. And they're kicking
2 out red tickets.

3 MR. SPENCER: I understand that, Your Honor.

4 THE COURT: And they get prizes for them.

5 MR. SPENCER: I understand that, Your Honor.
6 We have a broad statute. We have a broad statute for a
7 good reason. It's very hard to keep, keep gambling
8 interests at bay. It has to be a broad statute. I
9 understand, now, you know, of course, SLED isn't out there
10 seizing Chuck E. Cheese machines. They're not as
11 innocuous as the machines that you're finding, such as, I
12 would submit, the Chess Challenge II are -- Chess
13 Challenge II machines. They're not as -- not innocuous,
14 but they're not as, as harmful in SLED's view, I believe,
15 or the sheriff's view. I don't know exactly what the
16 policy is on that, but I think that's a reasonable
17 assumption.

18 And the thing with the Chuck E. Cheese
19 machines and the -- is generally, those class machines,
20 those kind of machines that are in those stores, you're
21 never going to win more than what you put in the machine.
22 I've seen (indistinct) authority to that effect.
23 Basically, you know, you put in a dollar, you're not going
24 to win a prize greater than the dollar. That's the way it
25 works.

1 But, but that being said, it really doesn't
2 matter if Chuck E. Cheese has machines that are legal or
3 not. The critical question is whether these machines are
4 illegal or not. And, Your Honor, I'm just going to bring
5 up the statute. And in yellow, it says it makes unlawful
6 any video game with a free play feature operated by a slot
7 in which deposited a coin or thing of value.

8 The statute expressly prohibits video games --
9 these were video games -- with a free play feature --
10 these had a free play feature. Of course, they took
11 consideration. They took coins or bills for deposit.

12 And, Your Honor, that's what the legislature
13 has given us. And that's, that was put into the statute
14 in 2000. It had never been in the statute before that
15 time. However, historically, the supreme court has found
16 that the awarding of free plays is, constitutes a prize
17 for the purposes of gambling. There's a historical
18 precedent for it in that sense. But the language
19 expressed any video game with a free play feature. That's
20 separate from provisions that talk about devices
21 pertaining to chance.

22 Your Honor, they cited -- Your Honor, in the
23 order that you signed, there was a reference to an
24 Attorney General's opinion that they have suggested means
25 that the only way a machine can be illegal under 12-21-

1 2710 is if it is a game of chance. Your Honor, that
2 opinion does not stand for that proposition.

3 The second opinion that was cited in the
4 response to my motion, basically, is very similar to the
5 first one, same language. There's nothing in there to
6 suggest that, that our office has ever taken the position
7 that it means something, that that provision in the
8 statute means anything separate from what it says.

9 As a matter of fact, the 2002 opinion cited in
10 the order and the 2003 opinion both have the same phrase,
11 "While the statute specifically focuses upon the
12 prohibition of machines such a slot machines and punch
13 boards, it also bans any other device pertaining to games
14 of chance of whatever name or kind." "It also bans." A
15 device is banned if it pertains to chance. But it also's
16 band if it fits in plain language of the statute. If it's
17 a slot machine, it's banned. If it's a punch board, it's
18 banned. If it's a video game with a free play feature,
19 it's banned.

20 And as a matter of fact, after that 2002 and
21 2003 opinion, our office issues a 2005 opinion. And, Your
22 Honor, unfortunately, that's sitting right on my desk. I
23 intended to bring that this morning. It was sitting on my
24 desk. It was going to be the last thing I looked at. If
25 I may just provide that to you after this hearing, I can

1 simply scan it and e-mail it to you, of course copy
2 opposing counsel.

3 But that opinion in 2005 makes clear that this
4 provision, along with the provision that also made illegal
5 per se machines that play poker and blackjack and keno,
6 that was, it makes clear that that provision was put in
7 there to strengthen the statute, and we describe it as,
8 "These insertions represented a major strengthening of 12-
9 21-2710, which designate devices as contraband per se,
10 subject to seizure and destruction." And later in that
11 opinion, our office concluded that the General Assembly
12 sought to make such video games containing a free play
13 feature as illegal per se.

14 So our office -- and I think Mr. Altman was
15 incorrect. He made this argument at the hearing that our
16 office had issued an opinion that somehow suggested that I
17 was arguing contrary to our office's prior opinions. In
18 fact, our office has never issued an opinion suggesting
19 that, that there are video games with a free play, free
20 play feature -- excuse me -- that are okay, and the 2005
21 opinion actually says the exact opposite.

22 Your Honor, so, if nothing else, I would
23 suggest that the reference to the 2002 opinion be removed
24 from any order because it doesn't support what opposing
25 counsel purports it to say. It doesn't suggest that we

1 thought it was okay for a free play -- video game with a
2 free play feature, never suggested we thought that was --
3 and in any instance not violative of the statute.

4 That being said, Your Honor, I would ask that
5 this Court reverse its decision as to the video game with
6 a free play feature. The express language of the statute
7 makes clear it's illegal. It had a free play feature. We
8 presented testimony from SLED, and I believe that was
9 affirmed by Mr. Snyder. It's clearly a free play feature.
10 And, you know, we put the evidence out there. There's not
11 a whole lot more to talk about with that issue. I think
12 that issue's very straightforward.

13 The second issue I want to touch upon is the
14 language concerning -- is the fact that this machine's
15 illegal because it's an illegal vending machine.

16 THE COURT: wait, now, say that again, now,
17 about illegal vending machine.

18 MR. SPENCER: It's an illegal vending machine.
19 And, Your Honor, I'm looking for -- I've been moving stuff
20 around. Here we go.

21 I highlighted in blue the provisions
22 pertaining to a vending machine. And it's illegal for any
23 person to keep -- you know, the statute, in this first
24 sentence, says it's illegal for any person to keep any
25 vending or slot machine.

1 Now, that doesn't mean every -- there's an
2 exception to that, obviously, Your Honor. Obviously, a
3 Coke machine's not illegal. That exception's provided for
4 down at the bottom. "The provisions of this section do
5 not extend to coin-operated nonpayout pin tables, in-line
6 pin games or to automatic weighing, measuring, musical" --
7 and then it gets to the vending machine exception -- "and
8 vending machines which are constructed to give a certain
9 uniform and fair return in value for each coin deposited
10 and in which there is no element of chance." There's two
11 parts to that: "must give a uniform and fair return,"
12 "must not be an element of chance."

13 Taking the first one, you can -- this machine
14 vends red tickets. It's a vending machine that gives out
15 red tickets. Those red tickets appear to be redeemable
16 for merchandise or something in the store or the premises
17 in which it was found. There was a sign that said, on
18 those machines, that said, "for redemption only." Those
19 red tickets make it a vending machine.

20 It does not give a uniform return of those red
21 tickets. You can, depending on your success on the game,
22 if you earn 2,000 credits, you would get 20 tickets. If
23 you only got 100 credits, you get one ticket. If you
24 didn't win anything, you wouldn't get any, any -- didn't
25 win at least 100 credits, you wouldn't get any tickets.

1 So it's not a fair and uniform return.

2 Also, this language, which is separate from
3 the provision prohibiting other devices pertaining to
4 chance, this provision, it says, "and in which there is no
5 element of chance." That suggests that we aren't looking
6 at a predominant factor test when we're judging these
7 video -- when we're judging vending machines. It suggests
8 that any chance at all makes the machine illegal under the
9 plain language of the statute.

10 And, of course, there is chance involved in
11 this machine. Everyone is in agreement on that. There's
12 at least the fifth field, which Mr. Snyder admitted that
13 the result, a success in the fifth field was a matter of
14 chance.

15 Again, this is -- just like the free play
16 feature, this is the express language of the statute. I
17 think it's very clear. There is a case that discussed
18 this. This provision is a much older provision and
19 statute. I believe I handed up this case last time,
20 "Harvie v. Heise." It's a 1929 case. This provision of
21 the statute was part of the statute at the time of the
22 "Heise" decision. The machine in "Heise" vended, vended
23 two things. First, it vended, for five cents, you would
24 get a mint, and then it also had some spinning reels, kind
25 of like a slot machine, and the player would win anywhere

1 from two to 20 tokens. The "Heise" court found that not
2 only was it a game of chance, but they did also focus on
3 the fact that it would give anywhere from two to 20
4 tokens, and therefore, gave a variable return and for that
5 reason was illegal.

6 The "Heise" case is still good law. Law
7 doesn't expire. It's either overruled or the legislature
8 changes its mind. In this case, this provision's been out
9 there for the whole duration, and also, this case has been
10 out there for the whole duration. It hasn't been
11 overruled, and it's good authority, and there's a,
12 certainly a reason for that and a reason for the free play
13 feature.

14 We would ask that the -- Your Honor also
15 reverse the language in this order concerning the vending
16 machine and find these legal -- these machines are illegal
17 vending machines.

18 And the policy behind the free play feature,
19 behind the vending machine provision, is really clear.
20 This statute is broadly written. There's always going to
21 be somebody out there trying to come up with a machine
22 that somehow passes judicial muster and can be out there
23 and can be used for gambling purposes. And these are
24 aspects of, of illegal machines. Illegal machines often
25 have free play features. Illegal machines often have

1 variable returns. They need some kind of payout feature
2 such as tokens or tickets or something like that.

3 The legislature wrote this statute very
4 broadly because they don't want gambling in this state.
5 They don't want machines that relate to gambling in this
6 state. That also explains the provision about poker
7 machines and keno machines. You're Honor has had the
8 Megatouch machine before you which didn't even have a
9 payout feature or a free play feature. It just played
10 poker. And that was illegal because the statute says that
11 machines that play poker are illegal.

12 But the last thing -- and one thing I want to
13 make sure is clear is that we're not conceding that there
14 was any aspect of skill in those machines that were
15 played, despite Mr. Snyder's success. I'll get into that
16 in a bit. But also, these are games where chance
17 predominates over skill. Does chance or skill predominate
18 the outcome? Well, first of all, you have that "stop all"
19 button. You can use no skill at all and win in this game.

20 Now, I don't know of any true game of skill
21 where you can actually exert no skill and get a successful
22 result, just no skill at all. The blindfold, taking free-
23 throw shots with the blindfold analogy falls flat. You
24 have to actually have the strength to get the ball to the
25 basket. You have to have at least some sense of

1 direction. It may be chance that helps you get in, but
2 even then, you actually have to have some skill to get a
3 result.

4 So you can win this game without any skill.
5 You can win this game if your skill's insufficient because
6 of that fifth field. You know, you only match two up at
7 the top, that fifth field gives you a chance to win a
8 third, that fifth field which Mr. Snyder admitted was
9 chance.

10 The bonus feature, there's that bonus feature,
11 or I think it was referred to as a vault at the top. That
12 was completely chance. You have to, first of all, get
13 five -- I can't remember if it's five of any icon, or it
14 might have been five of the horses or something like that,
15 but you have to get five icons to unlock the vault and get
16 the bonus play, and then scoring appears to be random too,
17 and I think Mr. Snyder admitted as much also. So the
18 bonus feature is a matter of chance.

19 MR. ALTMAN: (Inaudible.)

20 I don't want to interrupt you, but it doesn't
21 require the use of the fifth field. It's three, three
22 warriors which actually gives access to the vault.

23 MR. SPENCER: Three warriors.

24 MR. ALTMAN: Three warriors.

25 MR. SPENCER: All right. I wasn't --

1 MR. ALTMAN: That's what Mr. Snyder's report
2 says (inaudible).

3 THE COURT: Yeah, I remember that.

4 MR. SPENCER: There's no showing that there
5 was skill involved in the bonus. I apologize if I was
6 wrong about that aspect of the game. (Indistinct) the
7 record, what the record is on that.

8 Getting to Mr. Snyder, Mr. Snyder was
9 obviously able to come up here and hit all those, you
10 know, hit all those kings. The thing is, that doesn't
11 make it a game of skill. Mr. Snyder had inside knowledge.
12 He was familiar that it was, first of all, a fixed icon
13 sequence.

14 And Your Honor, I just want you to think back,
15 because initially, this machine was brought to you, and
16 you found probable cause. You were confronted with this
17 machine that looked like a slot machine. You were
18 confronted with a machine that you saw icons flashing by,
19 but you had no idea the nature of those icons flashing by.
20 Was that just a pure random, a pure random number
21 generator? Was that something -- was there any ability to
22 determine what's coming through on that? There's nothing
23 on that machine that tells you, nothing on that machine
24 that tells you that this is a game of skill, that there's
25 some strategy you could employ, that this is anything

1 other than just stop the button and see what happens.

2 Mr. Snyder had the inside knowledge that it
3 was fixed. He's an expert. He's been doing this for
4 years. He's looked at tons and tons of machines. He was
5 able to come up with a gimmick to hit some -- to keep on
6 hitting those keys. That doesn't make it a game of skill.
7 There's nothing to tell a player when he steps up to the
8 machine that he's not looking at anything but random
9 numbers. And I would submit, Your Honor, that doesn't
10 rise to the level of a game of skill when Mr. Snyder, with
11 inside knowledge of the workings of the game, can hit
12 kings with success. He did.

13 That being said, also, chance doesn't
14 predominate over skill. Assuming even that that's skill
15 in those four fields, chance doesn't predominate over --
16 excuse me -- skill doesn't predominate over chance.
17 You're still subject to that fifth field. You're still
18 subject to the unknown. There's no evidence that any
19 skill is employed in the bonus feature. Chance, you can
20 win this game without this display of skill. Chance
21 permeates this game all the way through, and this really
22 is a game of chance. It looks like a slot machine. It
23 really is intended to be a slot machine.

24 I want to get back to the "stop all" button.
25 I think the "stop all" button alone makes the machine

1 illegal. And opposing counsel has suggested and the
2 testimony generated suggested that somehow it's a player's
3 fault if the player is using this button. "why would a
4 player use this button? Makes no sense at all." They
5 keep positing that. And the thing is, the machine was
6 designed that way. It costs money to put a button in, to
7 put the extra switches, the extra programming to have the
8 "stop all" button. The "stop all" button lets you play,
9 wager your credits, five times faster than if you had to
10 stop on each line.

11 This is the design of the machine, and this
12 isn't something that SLED came up with or our office came
13 up with. we looked at a machine that has a "stop all"
14 button. And why does it have a "stop all" button? If
15 it's a game of skill, why does it have a "stop all"
16 button? It has a "stop all" button because you can wager
17 five times faster. The house can make money five times
18 faster. The player can gamble five times faster. That's
19 why you have that "stop all" button. It's, first of all,
20 evidence that this machine is really intended for
21 gambling. It's evidence. But it alone makes the machine
22 illegal.

23 Case I cited -- I think it's the last case I'm
24 bringing up -- but the case I cited in my brief,
25 "Alexander v. Martin," basically states that the fact that

1 a machine can be used for a legal use doesn't make it
 2 legal if it can also be used for an illegal use. And in
 3 this case, assuming -- and I certainly do not concede that
 4 there's skill involved in the top four fields to a player
 5 who's not been given any inside information -- but
 6 assuming that there is a way to skillfully play the
 7 machine by stopping one button at all, the "stop all"
 8 button makes this machine illegal because what are you
 9 doing? You're putting money in a machine, you're gambling
 10 with that "stop all" button.

11 There's absolutely no skill involved in that.
 12 That's undisputed. And you can win as a result of playing
 13 through that methodology. That button alone -- it's their
 14 design, they designed it that way -- that function alone
 15 makes this game illegal, also shows you what the real
 16 characteristic of this game is, what the real intended
 17 purpose of this game is. It's very simple. You have an
 18 expert coming in who can come up with a gimmick to impress
 19 the Court, and it's very impressive, but at the end of the
 20 day, the public is not going to have any idea what they're
 21 confronted with except what it looks like, which is a
 22 gambling machine.

23 Your Honor, so as to that aspect of the order,
 24 I would ask this Court to reverse itself.

25 Very briefly, on the probable cause issue,

1 certainly, it doesn't matter -- if these machines are
 2 legal, the probable cause issue is moot. I agree with
 3 that. If these machines are illegal, the fact that there
 4 may not have been probable cause, we challenged what we
 5 submitted that there was probable cause at the time. But
 6 I'm not readdressing that today. Assuming that there's no
 7 probable cause, if the machines are illegal, the machines
 8 are illegal, and they get them back.

9 It's like getting your cocaine back. Mr.
 10 Gasser I think mentioned his considerable prosecution
 11 experience, and I'm pretty certain that Mr. Gasser --
 12 whether Mr. Gasser or any of the people he's supervised
 13 ever lost a Fourth Amendment issue in General Sessions,
 14 I'm sure they never had to give back any cocaine or
 15 marijuana or anything like that to the defendant. That's
 16 because it's contraband per se, and illegal gambling
 17 machines are contraband per se, and the "192 Machines --
 18 Coin-Operated Machine" case that I cite in that, in my
 19 motion basically says that you can't give them back if
 20 they're illegal because they're contraband per se.

21 Your Honor, the only other thing I briefly
 22 want to mention is in the order, it mentioned that we
 23 agreed that the predominant factor test controls. I agree
 24 with that. I don't think we exactly -- the opposing
 25 counsel and I exactly see eye to eye in what that

1 predominant factor test means, and I just -- I don't
2 believe I agree to just the two-sentence phrase as to what
3 the proper standard is.

4 And, Your Honor, I just want to quickly refer
5 to that. I beg your indulgence.

6 And this says -- the cite they refer to is,
7 "If, through the exercise of skill or judgment, a
8 participant can determine the outcome, the scheme is not a
9 game of chance." Your Honor, I submit that it's not
10 whether a player can determine an outcome alone, it's
11 through the exercise of skill, chance -- if the exercise
12 of skill can be thwarted by chance, chance predominates.
13 And a good scenario for that is the, some of the poker
14 machines that we've seen out there where you can choose
15 some cards, and that might improve your chances of
16 winning, but you're stills stuck in a five-card draw
17 situation where you choose some cards, discard some
18 others. You may be improving your chances, but you're
19 still waiting on the turn of a friendly card. That would
20 be an example where a chance thwarts skill.

21 I also submit that where skill or -- excuse me
22 -- where chance is going to determine the outcome, such as
23 a "stop all" button, it doesn't pass the predominant
24 factor test. So I would say, basically, it shouldn't be
25 if through the exercise of skill or judgment, participant

1 can determine the outcome but rather through the exercise
2 of skill or judgment, a player does determine the outcome,
3 You know, if sometimes, maybe they can; sometimes maybe
4 they can't, that wouldn't pass the predominant factor
5 test.

6 With that, Your Honor, that would be my
7 motion, and I would ask this Court to reverse, if for
8 nothing else, the free play feature, which I think is
9 clear statutory language that would condemn these
10 machines.

11 Thank you, Your Honor.

12 MR. ALTMAN: Thank you, Your Honor.

13 Thank you, David.

14 I've been involved in (inaudible) of these
15 cases, and many of them with other attorneys in David's
16 office. The nice part about trying these cases is the
17 legal standard has been established for a good while. It
18 was established in this case. The dominant factor
19 standard is what courts have to apply in determining
20 whether a game is one of skill or chance. We stood up
21 before you before we had a five-hour trial, and both of us
22 said, "Judge, this is a standard you have to determine in
23 assessing whether this game is one of skill or chance."

24 It's pretty darned simple. We agree upon the
25 precedent. It's established by Justice Burnett: Can a

1 player, through the exercise of skill or judgment, achieve
2 the desired outcome?

3 That's what it is. That's what we agreed to
4 before we went through a long trial to figure it out, and
5 that's what we've done in every single case. That's what
6 I did in Allendale before Magistrate Love. That was
7 argued before Circuit Court Judge Buckner. It was
8 acknowledged by the Supreme Court in Allendale. We got in
9 Charleston. And that is just what magistrates have to
10 apply in determining whether or not a game is one of skill
11 or chance.

12 This notion that, through inside information,
13 that Mr. Snyder somehow was (inaudible) to achieve the
14 desired result, a game of skill, inside information
15 wouldn't help at all. That's the definition of a slot
16 machine. Despite the exercise of skill, because of some
17 feature of the game, either picture substitution,
18 morphing, or a random number generator, it's impossible
19 for a player to win skillfully.

20 Even Agent Godfrey -- we could have won this
21 case, frankly, we could have won this case without Mr.
22 Snyder because Agent Godfrey was, to his credit,
23 completely honest. He testified that the pattern was the
24 same pattern he's seen in every one of these games. He
25 testified that the pattern doesn't change a lick. He

1 testified that the speed doesn't change at all through the
2 course of play.

3 In essence, he testified that this is a true
4 skill game. It plays true. It doesn't conspire against a
5 player to try and trick them into thinking they can
6 exercise skill.

7 And I spoke with Mr. Spencer about another
8 game that actually does that. It's a game that starts off
9 as a game of skill, but actually, if a player is
10 successful, another feature clicks in then to guarantee a
11 set return. That allows the distributor and the marketer
12 of this other game -- it's called Palmetto Gold -- to
13 guarantee if you put this machine on the floor of your
14 place of business, we can guarantee you a 35-percent
15 return because as soon as it starts giving out too much in
16 tickets or whatever it gives out, it'll flip over and
17 transform from a game of skill into a game of chance.

18 This game isn't designed this way. It doesn't
19 operate this way. Since 2003, when Mr. Snyder first
20 looked at the game, it has had the same exact patter. And
21 that's what, that's what Agent Godfrey testified to.
22 There's no inside information (inaudible). It's a skill
23 that's developed over time. And that's why SLED
24 recognized that this game is a game of skill and entered
25 into an agreement with us at the end of last year

1 acknowledging that this game is different.

2 Now, what I thought was -- now, at the trial,
3 Mr. Spencer argued that that agreement is no longer in
4 effect; it's been rescinded, and SLED disagrees with that
5 characterization. And in his moving papers, I believe his
6 reply, he cited an opinion to SLED saying that 2710
7 doesn't really stand for what, what we said in all our
8 prior opinions. It's an expansion.

9 Now, while this case was pending, I was
10 involved in another case with SLED where a bunch of
11 machines were seized down in Surfside. In addition to to
12 Chess Challenge II machines that were seized, Lucky Liner
13 machines were seized, which is a game of chance. Slingo
14 was seized, which is a game of chance, GT 2003 also
15 seized, and two Chess Challenge II machines. And I have
16 the SLED reports from those seizures for the Court and Mr.
17 Spencer.

18 MR. SPENCER: And are you offering this as
19 authority or just what SLED's position is?

20 MR. ALTMAN: I'm offering this for what SLED's
21 position is --

22 MR. SPENCER: Okay.

23 MR. ALTMAN: -- and to provide the Court the
24 outcome of that case.

25 MR. SPENCER: Okay.

1 MR. Altman: Now, we asked for a post-seizure
2 hearing in that case, not for the Monkey -- I don't have
3 anything to do with the Monkey Land or the other games --
4 but for the games that are before this Court: two Chess
5 Challenge II.

6 Now, SLED's position in this case was that we
7 made a mistake. The Chess Challenge II games are legal.
8 we want to return those games to you. And I've
9 highlighted the bottom portion. Those machines were
10 returned to the location on April 29, 2009.

11 That's SLED's position with regard to this
12 particular game, that it's a game of skill, it's always
13 been a game of skill, and it complies with the dominant
14 factor test, and we're sorry that we picked them up.

15 So I think it's instructive to the Court that
16 the position that Mr. Spencer is taking for the Sheriff's
17 Department is contrary to the position that SLED took less
18 than a month ago. And the position that SLED took is
19 taken historically.

20 Now, I commend Mr. Spencer for putting forth
21 every argument he possibly could make. But the notion
22 that this case is somehow a vending machine doesn't pass
23 the smell test. Everybody knows that a vending machine
24 vends merchandise: snacks, Coca-Cola, like Mr. Spencer
25 referenced. This game is a redemption machine. It's a

1 game that vends tickets, dispenses tickets that can be
2 redeemed for merchandise.

3 It doesn't, doesn't in any way meet the
4 definition, and I haven't seen a single case in South
5 Carolina or in any jurisdiction that describes a
6 redemption machine as a vending machine. It simply
7 doesn't.

8 But what we see here is that 2710 -- and he's
9 right, it's a broad statute, it seeks to render illegal
10 every game of chance: keno, blackjack, poker. A lot of
11 them are set forth in that statute, and there is a
12 catchall phrase, "any game pertaining to a game of
13 chance."

14 That is the catchall for 2710. And that's why
15 the decision for every court is is a game a game of
16 chance. And it's got to apply the dominant factor test in
17 making that decision. And the critical decision in
18 determining whether a game is one of skill or chance is
19 can a player achieve the desired outcome, or is something
20 else going on that's going to prevent a player from doing
21 that?

22 What we've got in Chess Challenge II, the game
23 is a true game. It's a skill game that has a (inaudible)
24 pattern. A player learns a pattern, he can win every
25 single time. A distributor of Chess Challenge II doesn't

1 have the ability to go in and say, "We're going to
2 guarantee you a set return on this game." He can't do it
3 because the game's a skill game.

4 Somebody could, I can, I've been involved in
5 situations where locations have lost money, where you get
6 a very skillful player. Somebody who learns the pattern
7 comes in and says -- and actually walks out with winnings.
8 And the location is upside-down. That is the risk in
9 putting a skill game on the floor. And that's why this
10 game is different.

11 And I would submit that the court, after five
12 hours of hearing this, understood and made the proper
13 decision, made a decision consistent with the decision
14 that SLED made last month in a comparable case. And we
15 would ask for, for the order to be affirmed and the
16 Attorney General's motion to be denied.

17 And I don't know whether you have anything
18 (inaudible).

19 MR. GASSER: Just Judge, you mentioned at the
20 end of the last hearing, and then you brought it up, the
21 first thing you brought up this morning was, is the whole,
22 this whole, the whole Chuck E. Cheese analysis. And, and,
23 and Mr. Spencer handed you the statute. And the one thing
24 that he didn't highlight in the statute, if you go about
25 halfway down the statute to the far right where it says

1 "pertaining," and then -- it's actually pertaining,
2 hyphenated -- he (indistinct) the key language.

3 This statute refers to -- only prohibits these
4 items, which are games of chance, which is why, in all of
5 these cases, as Mr. Altman, as Mr. Altman indicated in his
6 preliminary remarks to you, all the magistrates and the
7 circuit court judges, that is the key. That is the
8 gateway, that's the gateway issue in all of these cases is
9 first determining whether or not a game is a game is a
10 game of skill or a game of chance because all other issues
11 really play on that, that primary issue.

12 And he didn't highlight those, that language,
13 "or other devices pertaining to games of chance." Every
14 other one of those games cited in that are all games
15 chance, are commonly recognized games of chance, which is
16 why, Your Honor, you can take your grandchildren to Chuck
17 E. Cheese. And I've been. I just was recently to
18 Frankie's Fun Park, and they do got the same free play
19 games. They do got the ticket dispensing. I took one of
20 my children to a birthday party there.

21 And, I mean, a lot of what we do here is based
22 on common sense. And do you honestly believe that the
23 legislature, in passing this statute, legislators who take
24 their own children and take their grandchildren, and
25 judges and solicitors who take their grandchildren and

1 children to the Chuck E. Cheeses and Frankie's Fun Parks
2 and all these amusement parks up and down the Grand Strand
3 wanted -- actually believed that those games are illegal
4 games? And, of course, the answer to that question is no,
5 because they're games of skill. This statute refers to
6 games of chance.

7 And so the telltale -- once you've determined
8 that, or once you make a determination, previous
9 determination, that it was a close call, but it was a game
10 of skill, then it takes it out of this particular statute.

11 And so he's, he didn't spend a lot of time
12 dealing with that issue. He spent a lot of time dealing
13 with these side issues of vending machines and free play
14 and whatnot. And I just, I cannot believe that the
15 legislature who passed this statute would want a --
16 actually believes that all the owners and operators, and
17 quite frankly, if you take the stretch, all of the patrons
18 of all of these Chuck E. Cheese and Frankie's Fun Parks
19 are, are violating the law. Because that's what he's
20 asking you to find, quite frankly, that we're all engaged
21 in this when we take our kids to the Chuck E. Cheeses and
22 the Frankie's Fun Parks because it has a free play feature
23 and because it's dispensing tickets.

24 And I submit that that's a wrong analysis.
25 That's not, that's not, that is an illogical analysis

1 because those games are games of skill. The primary game
2 is the Skee-Ball game that you got to -- you got to throw
3 that ball up, and you got to hit in one of those circles,
4 and you got to get whatever those points are for those
5 circles in order to gain any, any tickets.

6 And that's the key distinguishing factor is is
7 it a game of skill, or is it a game of chance. And you
8 touched on that at the end of your, the previous hearing.
9 You started off your remarks in response to Mr. Spencer's
10 initial argument, and I just wanted to focus on that one
11 issue, Your Honor.

12 THE COURT: Any follow-up --

13 MR. SPENCER: Just briefly, just --

14 THE COURT: -- before I make my ruling?

15 MR. SPENCER: Well, first, I'd better take up
16 the SLED issue before I forget that. Our office, in terms
17 of interpretation of our law -- of law -- our office takes
18 precedence. Our offices is the State in terms of the
19 executive function of interpreting the law. That SLED has
20 decided to give these machines back has no precedential
21 effect. That's, what SLED's doing is whatever SLED's
22 doing, but it's not something I was aware of, Your Honor.
23 But, first of all, I represent Richland County. Second of
24 all, this doesn't trump an attorney general's opinion, you
25 know, this is just an action by a law enforcement agency.

1 we have a legal opinion out there. we're, the attorney
2 general's the lead law enforcement officer in the state.

3 I disagree that the machines are legal, and I
4 disagree with the action, and I believe our (inaudible)
5 returning the machines because our position is that these
6 machines are illegal.

7 In terms of, you know, Mr. Altman has been
8 doing this for a while. I've been doing this for a while.
9 Our paths really hadn't crossed before. This is the first
10 case that ever went to a hearing where we've met up with
11 each other, but I've been arguing various machines that
12 have free play features are illegal because they have free
13 play features. I've been arguing that around the state
14 quite for some time, and our office has for some time.
15 we've been winning that argument.

16 As to the Chuck E. Cheese and the Frankie's
17 Fun Park, Frankie's Fun Park had right there a quarter
18 pusher machine. It's the same kind of machine that I had
19 successfully won in magistrate's court, on appeal to
20 circuit court, over in Lexington County for a machine that
21 -- three machines that were (inaudible) in Batesburg. One
22 of the reasons I won that's in the order is that the
23 machine was an illegal vending machine because you put
24 quarters in --

25 --- end of Tape 4, Side 1 ---

1 --- Tape 4, Side 2 ---

2 MR. SPENCER: -- the statute makes a video
3 game with a free play feature illegal, makes a vending
4 machine that returns a product -- and red tickets may be a
5 stupid product. They have trade value like the tokens in
6 the "Harvie" case, or it certainly appears that way. But,
7 you know, it vends red tickets. That's -- the vending
8 machine gives out a product. The fact that the product is
9 kind of useless or not very interesting doesn't make it
10 not a vending machine.

11 As to what Mr. Gasser mentioned about the
12 other device language, there's a -- you have to follow the
13 commas in this, and there's a number of independent
14 clauses. It's "unlawful for a person to keep on his
15 premises or operate or permit to be kept on his premises
16 or operated with the state any vending or slot machine,"
17 comma, independent phrase.

18 Same thing with the next phrase: "any video
19 game with a free play feature operated by a slot in which
20 is deposited a coin or thing of value," another comma.
21 The next provision talks about machines that play "poker,
22 blackjack, keno, lotto" --

23 THE COURT: Let me interrupt you there just a
24 second. I have read this thing, and I have read it. And
25 the way I am reading this, "or any video game machine with

1 a free play feature operated by a slot in which is
2 deposited a coin or thing of value," comma, and it says,
3 "or," and it lists something else, and another "or," or
4 what have you. But if you keep right on going down here,
5 it's got an "and."

6 MR. SPENCER: Right.

7 THE COURT: "And used for gambling."

8 MR. SPENCER: Right.

9 THE COURT: So you've got to put that sentence
10 or that section and add to it "and used for gambling."

11 MR. SPENCER: Your Honor, if you look at the -
12 -

13 THE COURT: Does that make sense?

14 MR. SPENCER: And I understand what you're
15 saying, Your Honor.

16 THE COURT: And I think that's the reason --

17 MR. SPENCER: I've heard this before.

18 THE COURT: -- Chuck E. Cheese and Frankie's
19 Fun Park can do what they're doing because they're not
20 using it for gambling purposes even though it's a machine
21 that you drop coins in.

22 MR. SPENCER: It's like the Megatouch machine.
23 You know, there was no payout function, nothing to show it
24 was used for gambling, but it was a game of chance, so it
25 was illegal.

1 If you look at that phrase "or any machine" --
2 because you have the phrase before that talks about "other
3 device operated by a slot in which is deposited a coin or
4 thing of value," gives some def -- gives various games
5 ending with craps, "or craps," comma, so that's an
6 independent phrase. And then you have this phrase, "or
7 any machine or device licensed pursuant to 12-21-2720 and
8 used for gambling." That "and used for gambling"
9 pertains to 12-21-2720, that phrase. It doesn't refer to
10 the rest of the statute.

11 You don't have to show that, you don't have to
12 show that these machines are being used for gambling. And
13 that's why it's not, that's why it's contraband per se.
14 It doesn't matter if it's being used for, you know, you
15 could argue it's being used for a lawful purpose, but if
16 it's an illegal machine, it's an illegal machine, and it's
17 contraband per se.

18 MR. GASSER: Judge, under that theory, why do
19 we even have a dominant test factor? why do you even need
20 to distinguish between games of skill and games of chance?
21 I mean, under his argument, you would never even need to
22 make that determination. And clearly, all the courts in
23 the statute --

24 MR. SPENCER: Your Honor, if I, Your Honor, if
25 I could finish, and it -- I appreciate the question, Mr.

1 Gasser.

2 The reason is because you have -- the chance
3 is a catchall. The chance -- any other device pertaining
4 to chance. That's a catchall. But this machine -- and
5 if, you know, under their analysis, all you would have to
6 do to write a statute under their analysis would be you
7 just could say it's illegal to have any device pertaining
8 to games of chance because that's the only phrase that
9 they're asserting matters in this whole statute. But,
10 obviously, there's quite a bit of other language in this
11 statute. Vending machines are illegal per se unless it
12 fits an exception. Slot machines are illegal per se.
13 That's why the Cherry Master, the Eight-Liners were
14 illegal. And that's what they're talking about when they
15 say "per se." A slot machine's illegal per se.

16 Why do they talk about poker and blackjack and
17 keno and lotto and bingo and craps in here? They wouldn't
18 have to, it's just pertaining, devices pertaining to
19 chance. The reason they do is because those machines are
20 illegal per se. And the same thing with any game with a
21 free play feature, illegal per se.

22 You don't have to show that these machines are
23 used for gambling. You only have to if it's, if the
24 theory you're proceeding under is "any machine or device
25 licensed pursuant to 21-2720 and used for gambling." But

1 that's an indep -- that's an independent phrase. That
2 doesn't, these are all independent phrases, and the
3 gambling element doesn't pertain to the provisions that
4 prohibit slot machines or video games with a free play
5 feature or poker machines or keno machines.

6 Thank you, Your Honor.

7 MR. GASSER: Your Honor, he's come completely
8 180 degrees from when he started his argument. Now he's
9 trying to say the phrase that you have just focused on,
10 which we believe and we concur with the Court is critical,
11 "and used for gambling," now he's trying to say, "Aw,
12 that's really irrelevant. That's just an independent
13 phrase," when he started his argument by saying the whole
14 purpose and intent of the legislature is to, is to fight
15 illegal gambling. And that's how he started his whole
16 argument.

17 we concur with the Court that the "and used
18 for gambling" is a critical phrase, and there's -- because
19 they'd lose on that, because there's no evidence in the
20 record that these games, that these two games were used
21 for gambling purposes.

22 MR. SPENCER: Your Honor, that's not
23 inconsistent. This machine, this statute meant to be
24 broadly worded. The reason is you don't have to show
25 there's gambling in every instance. You don't have to

1 have a camera in each facility to watch each machine to
2 figure out if it's being used for gambling, Your Honor.
3 That's not a 180 turn. That's just the plain language of
4 the statute.

5 The policy of this statute, obviously, is to
6 attack gambling, and I think there's gambling, I think
7 that's what these machines really are for, Your Honor.
8 But besides that, I don't have to show that unless I was
9 arguing under the 12-21-2720 phrase. That's not
10 inconsistent, Your Honor. Slot machines are illegal per
11 se because they know slot machines are generally used for
12 gambling. Video game with a free play feature, that is,
13 that is paraphernalia of, of illegal gambling.

14 MR. GASSER: Slot machines are, are illegal
15 games of chance. That's the primary reason why they're
16 illegal. And that's why they lose. It's the two key
17 phrases of that statute dealing with "games of chance" and
18 dealing with "and used for gambling." And I would submit,
19 those are the two key phrases of that statute, and I would
20 submit they lose on both of those two key phrases because
21 there's no -- you determine the dominant test factor that
22 this is a game of skill, and there's no evidence in the
23 record that these two games were being used for illegal
24 gambling purposes.

25 MR. SPENCER: You put money in, you hit the

1 "stop all" button, you win, you're gambling. It's really
2 very simple, Your Honor. Um --

3 THE COURT: Okay.

4 MR. SPENCER: I appreciate it, Your Honor.
5 Thank you.

6 THE COURT: It's very interesting arguments,
7 and I can honestly say that I have thoroughly enjoyed
8 them.

9 I'm going to deny the motion to change or
10 alter the order that I have previously signed. Thank you
11 so much.

12 MR. SPENCER: Thank you, Your Honor.

13 --- end of Tape 4, Side 2 ---

14 --- end of transcript ---

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CERTIFICATE OF TRANSCRIPTIONIST

I, Carroll Anne Boutahar, do hereby certify:

That the foregoing audiotapes entitled "Richland County Sheriff's Department v. Nizar Awde" were transcribed; that the foregoing transcript as typed is a true, accurate and complete record of the audiotapes to the best of my ability under the prevailing circumstances.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Carroll Anne Boutahar

Carroll Anne Boutahar

March 22, 2010

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) COURT OF COMMON PLEAS
2010-CP-40-07546

Richland County Sheriff's)
Office,)
Plaintiff,)
vs.) TRANSCRIPT OF RECORD
Nizar Awde,)
Defendant.)

September 1, 2011
Columbia, South Carolina

B E F O R E:
THE HONORABLE DEANDREA G. BENJAMIN, JUDGE.

A P P E A R A N C E S:
DAVID A. SPENCER, ASSISTANT ATTORNEY GENERAL
Attorney for the Plaintiff
JONATHAN S. GASSER, ESQ.
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Attorneys for the Defendant

DEBORAH M. McCURDY, RPR
Official Court Reporter

I N D E X O F W I T N E S S E S

(WHEREUPON, no witnesses were called
during these proceedings.)

E X H I B I T S

(WHEREUPON, no exhibits were introduced
during these proceedings.)

SEPTEMBER 1, 2011

THE COURT: Richland County Sheriff's
Department versus Nizer Awde. Is this your appeal?

MR. SPENCER: Yes, Your Honor.

THE COURT: I am reading the order of Judge
Davis right now, but if you could give me some
background on it I would appreciate it.

MR. SPENCER: I'd be happy to, Your Honor.
And, Your Honor, if it is okay, just before I
forget, this case, when I filed the notice of
appeal, it was filed under the 2009 action number,
2009-5067.

When the return was sent by Magistrate Davis
about -- sometime late in 2010, it got clocked in
as a separate action number, which caused some
confusion on it for both parties, but it was
clocked in as 2010-7546.

I think for the sake of probably the clerk
more than anyone else, I would just ask that we
just merge those two cases.

THE COURT: Any objection?

MR. GASSER: No, ma'am.

THE COURT: All right. Those two will be
merged. That is 09-CP-40-1060002 and
2010-CP-40-7546.

1 Yes, sir?

2 MR. SPENCER: Thank you, Your Honor. Just for
3 the record, my name is David Spencer with the
4 Attorney General's Office here on behalf of the
5 Richland County Sheriff's Department.

6 This case concerns the seizure and disposition
7 of two video machines, which I have actually had
8 brought to the court today. Your Honor can see
9 them. They are what is called Chess Challenge II
10 machines.

11 Your Honor, just to familiarize -- and I
12 apologize if I'm telling you -- I'm explaining
13 things that you have heard quite often before, but
14 the process set out by statute is that if the
15 statute that prohibits machines -- and we allege
16 these are prohibited under Section 12-21-2710.
17 And, Your Honor, if I may approach, I can hand you
18 copies of the statute.

19 (Mr. Spencer hands up to the Court.)

20 MR. SPENCER: It is basically a long run-on
21 sentence with a bunch of independent clauses, and
22 I'll go through that in a little bit, but basically
23 the process as set out by cases cited by us, and
24 I'm sure cited by respondent, but basically the
25 process is, if the officer, law enforcement officer

1 seizes machines and believes them -- has probable
2 cause to believe that they are illegal machines
3 under 2710, the process is he seizes them, brings
4 them before a magistrate, and then the magistrate
5 is supposed to determine whether there is probable
6 cause to believe that the machine is illegal. And
7 so the magistrate would issue what is called an
8 order of destruction.

9 At that point, it is up to the owner to seek a
10 post-seizure hearing. It is the nature of a rule
11 to show cause. The owner of the machines are
12 allowed -- or given the opportunity to come in and
13 show why the machine should not be destroyed.

14 Your Honor, in terms of the statute itself
15 that prohibits certain types of machines and
16 devices, you know, I handed up to you, like I said,
17 it is kind of a long run-on sentence with a bunch
18 of independent clauses, it has been amended a
19 number of times over the years. It prohibits -- it
20 doesn't require, with the exception of one clause,
21 it doesn't require that law enforcement show that
22 the machine was used for gambling. It prohibits
23 the possession and operation of an illegal machine.

24 It is unlawful -- and I'll just start reading
25 the statute if Your Honor will indulge me.

1 It is unlawful for any person to keep on his
2 premises or operate or permit to be kept on his
3 premises or operated within the state -- it starts
4 off with any vending or slot machines, which, you
5 know, at first blush sounds like it is about to
6 prohibit coke machines, and I'll explain what that
7 phrase means.

8 And then there is an independent phrase, or
9 any video game machine with a free play feature
10 operated by a slot in which is deposited a coin or
11 thing of value, comma, and then it goes on to
12 describe another kind of device, and which I'm not
13 going to get into at length, but other devices that
14 operate, and a series of things, poker, blackjack,
15 the like.

16 There is an exception here -- we have argued
17 this below, and I won't argue it today -- is that
18 it also prohibits any machine or device licensed
19 pursuant to 12-21-2720. That is the -- just
20 basically a license you need to get if you have any
21 kind of coin operated device and used for gambling.
22 That is just yet another kind of machine that is
23 prohibited.

24 Then there is what is sort of the catchall
25 phrase, it didn't come into the statute until I

1 think 1932, other device pertaining to games of
2 chance. And then it gives a long description that
3 I won't go into, but, you know, it basically has a
4 catchall provision, any kind of game of chance.

5 Getting back to the issue of vending machines,
6 which I mentioned in the beginning, at first blush
7 it appears to prohibit a lot of machines that we
8 have today, snack machines, coke machines, the
9 like. But there is an exception to that. It says:

10 But the provisions of this section do not
11 extend to -- and it gives a number of examples
12 including an automatic way of measuring musical
13 machines, and this is where the vending machine
14 comes in -- vending machines, which are constructed
15 to give a certain uniform and fair return in value
16 for each coin deposited. And the second half of
17 that requirement being, which there is no element
18 of chance.

19 And, Your Honor, we proceeded on several
20 theories as to why the machines were illegal. My
21 experience has been most machines that we have been
22 up against that are illegal are illegal for more
23 than one reason. And, Your Honor, that is what we
24 have argued to the magistrate and what I would
25 argue to the Court today.

1 The first being that we feel that we have
2 established without a doubt, that these machines
3 have -- are video games with a free feature and
4 they are operated by a slot which deposits a coin
5 or thing of value.

6 I believe their expert admitted, you know, to
7 it. Our expert certainly established that. It is
8 not contradicted anywhere in the record that it is
9 not a -- it doesn't have a free play feature. And,
10 you know, I think basically the argument was
11 presented below is that should be applied because
12 it would prohibit games and start talking about
13 games that work in the courtroom, games at Chuck E.
14 Cheese's, and I can get into that in a bit.

15 The other theory proceeded on was it was a
16 game of chance. We did argue the catchall
17 provision. They argued that is a game of skill,
18 and that is a question, there is a lot of case law
19 out there, but not so much case law from South
20 Carolina, and we'd like to see it spelled out, but
21 our contention is that these are games of chance.

22 The third thing was we said these are vending
23 machines. And because it is in the record
24 basically these machines spit out red tickets, and
25 the number of red tickets you get is based on the

1 success of play. It vends red tickets, which
2 doesn't seem like what you think of as a vending
3 machine, but nonetheless you are getting a product
4 and you are getting something that our courts
5 recognize must be worth something.

6 The last thing, I believe the fourth ground,
7 we can argue that these are illegal that I'm going
8 to get in today is that we believe we established
9 that these are games that are licensed pursuant to
10 DOR.

11 Your Honor, that was established in the record
12 that these have DOR licenses, that it would be
13 illegal if they didn't as a matter of tax law, not
14 the statute, the tax law, but they have licenses
15 and they take consideration. You give out a prize,
16 that is those red tickets. And, further, that they
17 are used for gambling because they are quite
18 capable of being played with chance.

19 And I want to skip ahead to the issue of
20 whether it is a game of skill or chance.

21 Now, both parties I think agree that probably
22 the way the Supreme Court would analyze this issue
23 is under what is called the dominant factor test.
24 There is two tests out there: The dominant factor
25 test, pure chance doctrine. By far, the majority

1 rule in most states is the dominant factor test.
2 We agree that would be the test that would be
3 followed below.

4 As I had indicated to the magistrate very
5 early on I felt that, you know, in all likelihood
6 we were going to have a disagreement as to what
7 that meant. And I think that is in the record --
8 clear from the transcripts.

9 Your Honor, there is two cases in which I
10 would like to hand up to you.

11 (Mr. Spencer hands up to the Court.)

12 MR. SPENCER: One is -- thank you, Your Honor.
13 One is a South Carolina case, Johnson versus
14 Collins. The other one is a North Carolina case,
15 Collins versus North Carolina.

16 And Johnson versus Collins, the South Carolina
17 case, it actually did not deal with this statute.
18 It actually dealt with the question of whether
19 under the constitution, which at the time
20 prohibited lotteries, whether video poker machines
21 constituted a lottery. And the majority really did
22 a very kind of quick and dirty analysis and
23 basically said, no, I mean, the machines are not
24 lottery tickets, it is not a traditional lottery,
25 you know, so we don't need to even really worry

1 about whether chance is involved in the play of the
2 machines.

3 The dissent, which was Justice Burnett, and
4 Chief Justice Toal joined, had a short concurring
5 opinion of her own, Justice Burnett wrote an
6 extensive opinion on what constitutes how do you
7 determine if a device or machine plays a game of
8 chance or a game of skill in that case.

9 And it is quite frankly the best anyone has
10 gotten to determine what the Supreme Court is
11 likely to do, but he concluded by far the majority
12 rule is what is called the dominant factor test and
13 said that he would adopt it. Chief Justice Toal I
14 believe concurred in that. And it is South
15 Carolina's best guess as to where we fall in terms
16 of which of those two tests to follow -- that are
17 followed.

18 And it also goes on, Your Honor, to
19 describe -- well, let me back up there a bit. The
20 other case, North Carolina versus Collins,
21 considering you don't have a definitive definition
22 of what the dominant factor test is, I think has
23 the best definition of any cases that I have read.

24 A game of chance is such a game as determined
25 entirely -- well, let me get everyone on the same

1 page, I apologize. If you look on -- it would be
2 Page 408, and actually the page I printed out would
3 be Page 4 of the handout, the printed case that I
4 just handed up to Your Honor.

5 THE COURT: I have it.

6 MR. SPENCER: Under Headnote 1, Section --
7 second full paragraph.

8 A game of chance is such a game that is
9 determined entirely or in part by lot or mere luck
10 and in which judgment, practice, skill or
11 adroitness have honestly no office at all -- and
12 this is the part I am concerned about -- or are
13 thwarted by chance.

14 That I think is the probably the best
15 definition working out there of how you do the
16 dominant factor test. The question -- there is
17 games -- in Justice Burnett's opinion he notes
18 there is games such as Five Card Draw that you can
19 play on machines where you might make a series of
20 decisions as to how to most likely achieve the best
21 result, but then you are still stuck with a random
22 turn of a friendly card, if you will. And perhaps,
23 you know, you are dealt five cards and you have two
24 aces, best seen, the best way to increase your odds
25 of winning is to get rid of three cards. Perhaps

1 there is skill in that, but, even so, you stand to
2 have the optimal result thwarted by chance.

3 Your Honor, turning to these machines and how
4 that affects these machines, and, Your Honor, I'm
5 just going to -- just kind of to demonstrate --

6 MR. GASSER: Judge, I'm going to object to
7 that. This is -- we are not retrying the case.
8 This is at the appeals level at this point in time.
9 I mean, we weren't prepared to have an expert here
10 to -- because I don't believe the rules allow it,
11 but he's trying to retry the case and offer
12 evidence on a matter that has already been decided
13 by a magistrate. And the standard is whether or
14 not the magistrate misapplied some sort of legal
15 standard when he ruled on the facts of the case.
16 So we would object to any demonstrations or going
17 back and rehashing the facts of the case. That is
18 not what this appeal is about.

19 MR. SPENCER: Your Honor, I can just point, I
20 think --

21 MR. ALTMAN: Your Honor, I think it is frankly
22 inappropriate for the machines to even be here.
23 I'm Jonathan Altman, for the record. I have
24 participated in a dozen of these appeals. We had
25 no notice that the Attorney General's Office was

1 going to bring these machines. We certainly would
2 have objected had we received that notice. And it
3 is simply inappropriate. We are not going to try
4 this case over again. There is an ample transcript
5 of the record. And this was a day-long trial.
6 There was lay testimony. SLED offered experts.
7 Their testimony is part of the record. And we
8 certainly object to any reference of machines
9 frankly even being present for this appeal today.

10 MR. SPENCER: Your Honor, if I may?

11 THE COURT: Yes, sir.

12 MR. SPENCER: Your Honor, this is the race to
13 the action. This is an interim action, although we
14 had it labeled as, you know, the Sheriff's Office
15 versus the owner. In truth, the proper way to do
16 it, if you were to get technical, is it is us
17 versus these two machines. This is the race to the
18 action. This is an interim forfeiture. These
19 machines were obviously before the magistrate and
20 they are obviously proper for appeal. Your Honor,
21 you know --

22 THE COURT: I understand. But the issue --
23 but the issue is an issue -- I'm determining the
24 issue of law from the lower court as to the judge's
25 ruling.

1 And I read over his order, and you all had
2 expert witnesses here -- I mean, there. You had an
3 expert and they had an expert, from what I'm
4 reading. And there was extensive testimony taken
5 regarding the machines. I will rely on the
6 transcript. And at this time I will sustain the
7 objection and I will rely solely on the transcript
8 from the trial.

9 MR. GASSER: Thank you, Judge.

10 MR. SPENCER: Thank you, Your Honor. Just --
11 I think I'm covered for the record, but just I
12 would note my objection, Your Honor.

13 THE COURT: Yes, sir.

14 MR. SPENCER: Your Honor, just -- I want to,
15 before we get too much further, respond to
16 something they said too, because this is not -- the
17 standard of review is not simply do you look for --
18 and it is not like when the Court of Appeals
19 reviews the case, it is not looking for an error of
20 law. Your Honor, the standard, which is stated --
21 and I think I've got it in my brief under
22 18-7-170 -- that statute provides on appeal from
23 Magistrate's Court the Circuit Court may make its
24 own findings of fact.

25 Your Honor, some of these grounds it is

1 clearly going to be really a matter of law, an
2 error of law, I think, particularly with the
3 vending machine and free play feature issues with
4 chance.

5 One of the things that -- one of the grounds
6 or one of the things that I think Magistrate Davis
7 relied on and got caught up on was they brought an
8 expert. He had very surprising success with these
9 machines. No doubt about it. However -- and it is
10 outlined in my memorandum that I handed up to you,
11 Your Honor -- that on Page 26 of the transcript --
12 and it is actually -- my quote for it is Page --

13 THE COURT: What page is it?

14 MR. SPENCER: Of the transcript it was Page
15 26. And I was starting from Line 8.

16 THE COURT: Yes, sir?

17 MR. SPENCER: And you notice that this occurs
18 during the direct examination of Mr. Snyder, who
19 was their expert.

20 THE COURT: And I don't have your -- did you
21 send us any memorandum of law?

22 MR. SPENCER: Your Honor, you know, I meant to
23 bring that up to you.

24 THE COURT: You handed me the cases. You
25 handed me the cases up. I don't think --

1 MR. SPENCER: I'm sorry, Your Honor. I handed
2 a copy to -- I went to, you know, hand a copy to
3 opposing counsel and I forgot to bring my copy up.

4 (Mr. Spencer hands up to the Court.)

5 THE COURT: All right, thank you.

6 MR. ALTMAN: Your Honor, while he is
7 submitting his, this is just -- here is our
8 memorandum as well.

9 (Mr. Altman hands up to the Court.)

10 THE COURT: All right, thank you.

11 MR. SPENCER: And, Your Honor, I did provide
12 the memorandum to them, my memorandum to them
13 yesterday. I didn't get the Respondent's
14 memorandum in advance, so I would -- you know, so I
15 really haven't had the opportunity to look closely
16 at it. It looks like it is fairly short. But,
17 Your Honor, I would like the ability to respond to
18 that, you know, within 15 days if necessary.

19 THE COURT: Ten. Ten days.

20 MR. SPENCER: Ten days?

21 THE COURT: Yes, sir.

22 MR. SPENCER: Thank you, Your Honor.

23 Your Honor, getting back to Page 4, well, Page
24 26 of the transcript, it is Page 4 of the
25 memorandum I handed up to you.

1 THE COURT: Yes.

2 MR. SPENCER: The testimony, Mr. Snyder
3 basically testified that he had learned or had
4 developed a skill to be able to hit Kings
5 consistently. And he came in and hit Kings
6 consistently. I think that is reflected in the
7 transcript.

8 And he said that, you know, basically he had a
9 strategy, he used a skill. I guess the skill was
10 reflexes or hand-eye coordination or whatever. But
11 this portion of the testimony is very telling, Your
12 Honor.

13 And this occurs during direct, he is asked:
14 How do you put strategy -- I assume what is the
15 strategy is the full question because it is partly
16 inaudible, but it says: Well, you start out, I
17 look for Kings. Kings -- when I see a King, that
18 is my starting point and I say, that is one of the
19 ten Kings. I know what follows it. It isn't one
20 of the ten Kings that I know, which I assume
21 playing at the time looking at it.

22 The Court interjects, which I thought was a
23 very good question, is: How do you know there is
24 ten Kings?

25 His answer is: Through videotape analysis.

1 But a regular person doesn't -- stepping up to the
2 machine doesn't know that.. He would not know that.
3 Which that is very curious.

4 This is the thing, Your Honor. It is a 255
5 fixed icon sequence. They go, rotate 3.8 icons per
6 second. The play lasts for 30 minutes. You are
7 only going to see 144 -- or, excuse me, I believe
8 there is 114 of those icons out of 255 icons. It
9 starts randomly any point in the sequence, so it
10 might show you icons 1 through 114 in one window,
11 it might show you, you know, 100 through 244 in
12 another window. His expert admits that, you know,
13 where it starts in that sequence is random.

14 The expert admitted that while it stays on
15 that 255 icon sequence, it doesn't deviate from
16 that, and you are not going to see the whole
17 sequence during the play.

18 How do you know there is a 255 icon sequence?

19 Well, he knows that because it is inside
20 information. How does he know that it doesn't do
21 what is called morphing. And morphing is a tactic
22 that were in some other illegal games where
23 basically the icons deviate from that sequence in
24 order to basically keep the player from winning.

25 He did it through videotape analysis. And how

1 did he know there was ten Kings? He admitted it,
2 he knows there was ten Kings because of this
3 videotape analysis.

4 Now, basically what I mean by 255 icon
5 sequence, Your Honor, is there are several
6 different icons. There is Kings, Queens, I think
7 they are probably listed somewhere in the
8 testimony, but just basically seven relate
9 somewhat tangentially to gambling, a gambling theme
10 as it is.

11 And through these seven are -- appear through
12 different icons, appear through the sequence.
13 Kings are paid the highest. I think it is
14 established in the record. They only appear ten
15 times. If you divide seven by 255, the most icons
16 you could have would be, you know, each one would
17 appear about 30 some times. This only appears ten.
18 He knows there is ten. He knows it is fixed. He
19 had to do videotape analysis apparently to
20 understand it, or at least know there is ten Kings.

21 Your Honor, what really happened in court that
22 day is he had inside information, he was working on
23 the machine, he gets to see something the consumer
24 does not and he comes in and he has a gimmick and
25 he hits it and hits it and hits it. And that

1 impresses the magistrate. And the magistrate
2 decides to call it a game of skill because
3 Mr. Snyder could exert some skill.

4 Our expert said, yes -- obviously I'm
5 paraphrasing, but he said, there is a skill
6 Mr. Snyder is exerting, but that is because he has
7 become familiar with the machine, which, you know,
8 which obviously part of that is through videotape
9 analysis. And he knows how the machines work. And
10 that is not something that is available, you know.
11 And what I -- I don't want to substitute my
12 statement for his, but that is not available to the
13 average consumer. And that is where I'm asking
14 Your Honor to make a finding because, quite
15 frankly, having a gimmick and winning isn't enough
16 to show it is a game of skill.

17 What is it like to the consumer? What is it
18 like for the person who doesn't have the ability to
19 do videotape analysis? I'm not calling it
20 cheating, Your Honor, but what I'm calling it is
21 akin somewhat to blackjack in Las Vegas where you
22 are not supposed to count the cards. Counting the
23 cards is a skill. I don't think anyone would doubt
24 that. It increases the odds of winning. But that
25 doesn't turn it into a game of skill. Learning a

1 little trick for the machine from videotape
2 analysis doesn't turn it into a game of skill, Your
3 Honor. It is a game of chance for everyone who
4 doesn't bring in video equipment.

5 And that is just one area that I think, Your
6 Honor, that the magistrate erred in. I think you
7 can make your own findings of facts and find it is
8 really a game of chance. It is realistic --
9 unrealistic that you are going to be able to see
10 3.8 icons a second, 114 icons and not even the
11 whole sequence and be able to figure out a strategy
12 that is going to be able to get you to win unless
13 you have some edge that is not available to the
14 consumers.

15 And, Your Honor, another aspect of it, there
16 was some testimony developed about it was called
17 the -- that was acknowledged by the expert -- what
18 is called a stop-all button I call it in the
19 transcript.

20 Basically the way this machine works -- I
21 don't know if I have explained this adequately yet,
22 but there is four different fields of play where
23 the icons are rotating and you can stop each icon
24 separately, which is how Mr. Snyder played it.
25 There was also a fifth field that I will talk

1 about later. But you can stop the icons
2 individually.

3 Well, it also has a stop-all button. And
4 instead of having to stop four different fields,
5 actually five different fields -- and I don't know
6 why my voice is cracking today, I'm sorry.

7 THE COURT: It's okay.

8 MR. SPENCER: You can press the button and all
9 five fields will stop simultaneously.

10 And, Judge, excuse me, Mr. Snyder testified to
11 it, our expert of course testified to it. There is
12 no skill in that. It is absolutely no skill. You
13 can play the game without there being a chance of
14 exerting a skill because it is just random.

15 Why is that button there? I think
16 Mr. Snyder's reaction was, well, what happened if
17 you pull the string on the play. I think the
18 argument below was along the same lines. And I
19 think what I pointed out to Magistrate Davis and
20 what I think is obvious is, because you can gamble
21 five times faster.

22 Instead of pressing four buttons, or actually
23 five buttons, you can press one. So you can play
24 the house or the house get its money five times
25 faster. You can gamble five times faster. And

1 that button gives away the whole thing. That
2 button is enough reason for you, Your Honor, to go
3 in and review Magistrate Davis's findings and make
4 findings that I think really show truly what this
5 machine -- these machines are about, which is they
6 are games of chance, Your Honor.

7 Another -- and, Your Honor, I also would
8 submit the argument I made below, the argument I
9 would make now, Your Honor, is that, you know, it
10 is not a game of skill if you can win with
11 absolutely no exertion of chance -- excuse me, no
12 exertion of skill.

13 And I submit that if you actually go back to
14 the North Carolina case that I quoted, it said --
15 talked about such a game as determined entirely or
16 in part by lot or mere luck.

17 And, in part, that stop-all button, there was
18 no doubt that is determined by luck.

19 The fifth field I want to talk to Your Honor
20 about -- and I know we're throwing a lot at you at
21 once, Your Honor -- the fifth field is described in
22 the transcript as a 4 x 7 grid. You can control --
23 you know, it is basically by call right. It is
24 seven icons with basically four rows of seven icons
25 across. And you can stop play. You have some

1 skill that you can exert in stopping any one of
2 those seven columns, if you will. But as to the
3 four rows -- and Mr. Snyder tested it briefly, as
4 well as of course my expert. That is controlled by
5 luck. If you want to hit one of those icons, you
6 have a one in four chance. If you can control the
7 one in seven aspect, if you can get it on the one
8 in seven that you want, it is going to be a one in
9 four chance of getting the icon you want in that
10 fifth field. That is chance. That fifth field is
11 pure chance. There is no two ways about it. That
12 is what Mr. Snyder testified to.

13 Your Honor, that is chance. It warrants the
14 exercise of skill, because assuming we were to
15 accept Mr. Snyder's testimony that there really is
16 skill in the top four fields, that fifth field is
17 pure chance. And that fifth field works, if you
18 want to get five Kings, your skill, you get that
19 skill on those first four fields, if you get to
20 that fifth field, that is pure chance. And that is
21 thwarted.

22 Your Honor, I think the way their strategy was
23 to define success for the Court saying: Well, we
24 only want to get three or four Kings. Mr. Snyder
25 testified he gets a higher score for five Kings,

1 and you can't get five Kings without chance. And
2 that alone, you know, quite frankly, that is the
3 testimony.

4 MR. ALTMAN: I don't want to interpret you,
5 but that is not what the testimony was.

6 MR. SPENCER: Your Honor, they are able to
7 argue --

8 THE COURT: I'll read the testimony.

9 MR. SPENCER: Thank you. But the fifth field
10 is completely -- completely chance, and that makes
11 the whole game chance.

12 One of the things I disagree with is
13 Mr. Gasser had abdicated that the predominant
14 factor test means that if it was 51 percent skill
15 it is a game of skill. I disagree with that
16 assessment. I don't think the -- I'm not going to
17 get too into it, but I want to make it clear I
18 don't agree with that.

19 I think it comes down to, even blackjack where
20 your odds of winning are really good, with that
21 turn of a friendly card it can just shatter away.
22 That would be defined as chance.

23 So I think the ultimate thing is chance going
24 to interfere with the ability to succeed.

25 THE COURT: All right.

1 MR. SPENCER: Beg the Court's indulgence.

2 (Pause.)

3 MR. SPENCER: And I think I mentioned video
4 games with a free play feature before. I want to
5 touch on that a little bit.

6 We have an old case, Alexander versus Martin.
7 This predates the video game language in the
8 statute actually.

9 In that case it said that a machine that
10 awards free games alone, free games based on
11 chance, if you will, that makes it illegal. That
12 case actually predates the statute as the statutory
13 provision regarding video games.

14 Your Honor, that portion went in effect in
15 2000. That has not been defined yet by any court.
16 I think the question -- there is a good question as
17 to whether that just means getting awarded free
18 plays or what about video games that have what is
19 called a free play feature and a knock-off feature.
20 We developed the testimony on that. We determined
21 that not only doesn't it have a free game feature,
22 it also -- excuse me, free play feature, it also
23 has knock-off.

24 And the way that works, we developed the
25 testimony at the hearing, is you have three

1 columns. One column is going to be the credits you
2 buy. You buy a hundred credits for I think \$5.
3 There is a second field that is going to show what
4 you win as you play. And there is a third column
5 that totals all your winnings.

6 So if you start with a hundred credits and you
7 bet ten, let's say, what is going to happen is that
8 very top field is going to go -- play down to 90.
9 If you win something in that single play you'll get
10 something in the second column. The third column
11 is going to total all your winnings. What happens
12 is, as the third column is totaled up, as you play
13 down those credits in the top field, the hundred
14 credits you buy, is that goes down to zero. Once
15 you use those up, you can go and use the credits in
16 the bottom and continue to play. And that is the
17 free play aspect of it.

18 The knock-off future, which was testified to
19 and I think was corroborated by Mr. Snyder, is
20 where you are able to take, say, if you have won
21 say a hundred and fifty credits, the machine, the
22 testimony developed was you could knock off a
23 hundred points of those credits and for that
24 hundred points you would get what is called -- you
25 get one of the red tickets that I mentioned before.

1 That is what a knock-off feature is. You take the
2 winnings and knock it out and get something out of
3 the machine.

4 That goes hand in hand, you use that, you
5 know, you would use the red tickets. And
6 Mr. Snyder confirmed that a lot of time this is
7 what happened. He used the red tickets to exchange
8 for something. It could be anything. It could be
9 merchandise. It can be cash.

10 THE COURT: Kind of like the little games at
11 Chuck E. Cheese?

12 MR. ALTMAN: Yes.

13 MR. SPENCER: And some in regard to this.
14 Now, Chuck E. Cheese machines -- and I recall
15 playing I think with my daughter, it has been so
16 long ago -- I think you get the tickets actually
17 for just playing, I don't think you get it based on
18 score. Here you get tickets based on playing.

19 But, regardless, and whether that makes Chuck
20 E. Cheese machines illegal is really not an issue
21 for the magistrate, he has got to look at these
22 machines. Our case law is clear on that.

23 Your Honor, it is a very explicit statute. It
24 says that any game with free play features are
25 illegal.

1 The vending machine I want to turn to quick.
2 And, Your Honor, I know this is going on quite for
3 a long time. It is quite a scheme to try and do in
4 a short term.

5 Harvey versus Heise is a 1929 case. It is a
6 very important case. It, is a case that is still
7 good law. It actually predates the "pertaining to
8 chance" phrase in the statute.

9 Your Honor, in that case, and this is -- there
10 were a rash of these kind of machines nationally at
11 the time during the early part of the last century,
12 but basically what he had is a machine, you put a
13 nickel in, you would get a mint. No doubt you
14 would get a mint. But then also what you would get
15 would be anywhere from two to 20 tokens. It was
16 variables based on chance, but it was a variable
17 return.

18 And that case found -- first of all, it found
19 it was a game of chance. It also found that you
20 got a variable return. And I think the argument
21 was the tokens aren't worth anything. And the
22 Supreme Court was not willing to accept that, they
23 were sure that it was worth something. And, you
24 know, found that the fact that it was kicking out a
25 variable return of those tokens made it an illegal

1 vending machine.

2 Thank you, Your Honor. I'm just going to
3 publish this from the case, I'm just going to read
4 this section:

5 That in order to escape the condemnation of
6 the statute, one, the vending machine must give a
7 certain uniform and fair return in value for each
8 coin deposited therein; and, two, there must be no
9 element of chance in the operation of the machine.

10 That is, gosh, a one and two. If we give them
11 chance, if we give away chance, which I was saying
12 not, the vending machine must give a certain
13 uniform and fair return in value for each coin
14 deposited.

15 Your Honor, it gives a variable number of
16 tickets based on your success. You put a dollar or
17 75 cents in a coke machine, you get one coke every
18 time unless there is a malfunction. The design of
19 this is you can get any number or no tickets out of
20 that machine based on your success, which is
21 certainly in part due to chance due to the fifth
22 field, which can count towards -- or do the
23 stop-all button, which I mentioned before.

24 The second part is different from the --
25 different phrasing from "pertaining to chance."

1 Does it mean something else? I'm not sure, but I
2 think I think it does. It says: There must be no
3 element of chance in the operation of the machine.
4 There is clearly an element of chance. No matter
5 whose testimony you read, there is clearly an
6 element of chance in the operation of the machine.
7 Does that mean there is a different standard? Does
8 that mean what it says or does the dominant factor
9 test apply to that?

10 Your Honor, I think we should go by the plain
11 language of the statute. Anyhow, I think it was
12 error to find that skill played the dominant factor
13 in playing these machines.

14 I also argued below and I'm going to argue now
15 that these machines are licensed and used for
16 gambling.

17 And I explained to the magistrate -- and we're
18 getting towards the end, Your Honor -- as I
19 explained to the magistrate, you put consideration
20 in the machine, you are going to get a prize if you
21 are successful. That is two elements of gambling
22 right there. The third element of gambling is
23 chance. So if you are using that stop-all button,
24 the button that lets you play against the house
25 five times faster, you are gambling. There is no

1 doubt about it. They try and keep on saying that
2 the player is dumb to do that, the consumer is dumb
3 to do that. They designed the machine that way.
4 That is the way the machine is designed. That is
5 what it is designed for.

6 Under one of the cases cited in this -- in my
7 memorandum that has been cited, 192 Machines, you
8 can use the machine for illegal use as well as an
9 illegal use. It doesn't make it legal. If you can
10 use it for an illegal use it is illegal. And it
11 says it in 192 Coin-Operated Video Game Machines.

12 Your Honor, it is set up for gambling. I
13 think everyone who would come up to it considers it
14 is a gambling machine. I think we established that
15 in the testimony. You can go and make your own
16 findings of fact as to the import of Mr. Snyder's
17 success. But there is no doubt you can use it for
18 gambling. It is set up to use for gambling. And
19 it is licensed for DOR. That is uncontested. And
20 therefore the provision that says it is illegal to
21 use a game licensed by DOR for gambling,
22 paraphrasing that, it is illegal. And so that is
23 another ground that we pursued.

24 One more thing, Your Honor, I would submit
25 that as matter of law the video game -- excuse me,

1 the video free play feature, the vending machine,
2 the license used for gambling, as a matter of law I
3 don't think you really need to make any separate
4 findings of fact to find that these games are
5 illegal. I think the record doesn't support the
6 judge's finding -- the magistrate's findings in
7 that regard.

8 The fourth thing -- yes, I think this is a
9 great case of -- a good example of why the standard
10 has been established as it is, that you should be
11 able to look at this and see that, you know, what
12 we have really got here is somebody with a gimmick
13 who used videotape analysis to make an impression
14 upon Magistrate Davis, but it is not really the
15 exercise of skill, it is really by card counting.

16 The last thing -- the last thing, Your Honor,
17 is part of the findings -- and I just need to do
18 this out of an abundance of caution -- is part of
19 the findings found that Deputy Crane did not have
20 probable cause to seize the machines.

21 I'm not clear from the order, frankly, if that
22 is an independent -- if the magistrate felt that
23 was an independent sustaining ground. Your Honor,
24 it is not. And there is two good reasons for that.
25 One is clear, it is Supreme Court precedent. That

1 would be according to 192 Coin-Operated Machines,
2 the case I referred to before. It actually covers
3 a lot of ground. It is a very long opinion.

4 And to cut to the short of it, Your Honor, so
5 Your Honor would have a case to read, is they were
6 looking, the owners of 192 Machines were looking to
7 have the machines returned on alleged Fourth
8 Amendment violation.

9 And the Court, first of all, said, there is no
10 procedural violation. But they went on to say very
11 explicitly and very clearly, is that because these
12 machines are illegal, contraband per se, they are
13 incapable of ownership and cannot be returned to
14 the owner. The exclusionary rule does not apply.

15 Whether Deputy Crane -- and I'm not going to
16 argue whether or not there was probable cause --
17 whether Deputy Crane had probable cause or not is
18 irrelevant by the time you get to that rule to show
19 cause hearing that we had, which was encompassed by
20 that big, huge transcript.

21 The other simple reason is that Deputy Crane,
22 through zealousness or whatever, and I think the
23 other side acknowledged he was acting in good faith
24 at least, if he brings the machines that shouldn't
25 be seized, that is what the magistrate is supposed

1 to do, the magistrate is supposed to review those
2 machines for probable cause. And Magistrate Davis
3 found probable cause. That is the cure for any
4 violation seizing machines without probable cause.

5 Your Honor, I would ask Your Honor to reverse
6 the findings of Magistrate Davis. I think
7 Magistrate Davis just got caught up in what was
8 really just a gimmick in playing the machines. And
9 I think, as a matter of law, I think he was worried
10 about concern with the Chuck E. Cheese machines.
11 And the case law is clear, you are only supposed to
12 be looking at what is in front of you. And what
13 was in front of him had a free play feature and it
14 was an illegal vending machine. And as I explained
15 before, it was licensed and used for gambling.

16 Thank you, Your Honor.

17 THE COURT: Thank you.

18 MR. GASSER: Good afternoon, Your Honor.

19 THE COURT: Good afternoon.

20 MR. GASSER: I will not be as lengthy. Before
21 I get to the heart of our memorandum that we handed
22 up, quite frankly, I think this Court is going to
23 be able to resolve this matter really by looking at
24 two specific cases, neither one of which the
25 Attorney General's Office has cited, but both of

1 which are literally right on point.

2 And one of them involves two machines that are
3 exactly designed and operated as these machines
4 that went all the way to the Supreme Court and
5 ruled on by Justice Toal.

6 So those aren't in his briefs. And all the
7 cases that he gave -- I will hand that case up to
8 you. It is mentioned in another case that was just
9 decided in March by the Court of Appeals that is
10 included in our memorandum. That was a case from
11 Derham Cole, again, on magistrate's -- went to the
12 magistrate's jurisdiction to Judge Derham Cole's
13 Circuit Court jurisdiction in Common Pleas to the
14 Court of Appeals that was recent that is absolutely
15 right on point and favors and corroborates and
16 vindicates Michael Davis's ruling in this case.
17 That is what we commonly refer to as the
18 Speedmaster case we handed to you. Every single
19 issue was decided by the Court of Appeals on the
20 issue before this Court this afternoon.

21 But before I get to that, so I don't forget,
22 let me -- I have to respond for the record on a
23 number of points.

24 First, the fact that Judge Michael Davis got
25 caught up with the gimmick, this Court probably

1 knows that Judge Davis has been a Richland County
2 magistrate for well over 30 years. He is -- the
3 overwhelming majority of video games are brought
4 before Michael Davis, and I believe the Sheriff's
5 Department and SLED will stipulate to this, he
6 ordered destroyed.

7 Michael Davis spent all of the -- any gaming
8 case, per order of the chief magistrate, ever since
9 video gaming was ruled illegal, every single video
10 gaming case that is seized in Richland County by
11 the Sheriff's Department, City of Columbia, Forest
12 Acres and SLED is brought before one magistrate,
13 and one magistrate alone, and that is Michael
14 Davis. He has specific qualifications. That is
15 why he hears all gaming cases.

16 And if you were to read that transcript, Your
17 Honor, you will notice the questions that he was
18 asking I submit were every bit as good if not
19 better than the questions than the lawyers were
20 asking the witnesses, because he has done so many
21 of these. He knows what these issues are. He
22 knows what the law is in this area. And the idea
23 that he could be somehow gimmicked by an expert I
24 would -- we would take issue with.

25 Mr. Spencer talked to you and he referred to

1 his brief where he cited Page 26 of the transcript,
2 and it is interesting in his brief he ends when he
3 is talking about the Kings and our expert talking
4 about you go and you look for the Kings.

5 And the Court interjects: Well, how do you
6 know there is ten Kings?

7 He answers: Through videotape analysis.

8 And the Court says: Oh. Again, this is
9 Michael Davis. But a regular person stepping up to
10 the machine doesn't know that?

11 The answer: He would not know that.

12 Then of course he ends the colloquy there in
13 his brief, but if you go to the actual record, what
14 is so critical there is the next answer. It
15 literally was a continuation. It is a continuation
16 of that same answer that was excluded in the
17 Attorney General's brief.

18 While I actually had test subjects without any
19 knowledge of the workings of the machines in 2003.
20 conducted this test and four different subjects,
21 they could use a notepad, which you can use napkins
22 or any paper when you are at a facility, a
23 convenience store or a pub or whatever.

24 So he allowed them to do that. Of course he
25 didn't allow them to use any video tape. But they

1 could use a notepad. They could not use any
2 cameras or any other devices. And it turned out
3 that they all learned certain techniques. They all
4 learned about the Double Queen. One of them
5 spotted the Two Castles. In other words, all of
6 the testing that he did on the machines that were
7 exactly designed for them to judge, again, not the
8 lawyers, the judge said: Well, those testing
9 machines, were they in any way different in design
10 and operation than these machines?

11 This is Judge Michael Davis that he wants you
12 to believe was gimmicked. He was asking all these
13 technical specific questions of this expert.

14 And of course the expert said: No, all of the
15 test subjects played the same exact machines as
16 operated and designed as these two machines that
17 were before Judge Davis.

18 Further on in the transcript he talks about he
19 would advise the clients, our clients, not to
20 market these -- this product to any -- where young
21 people play, because young people tend to be a lot
22 more technically savvy, a lot quicker with video
23 games because they are brought on from when they
24 can crawl literally, and so he says, if these
25 aren't the type of games that are going to be in

1 fraternity houses and sorority houses and in Chuck
2 E. Cheese's or anywhere where there is young people
3 playing, because they are going to be able to --
4 they, like his test subjects, will be able to
5 memorize the sequence.

6 So that is in the -- this idea that these are
7 games of chance according to Mr. Spencer for
8 everyone who does not bring in video equipment,
9 that is absolutely false. And it is even stated in
10 the same exact answer and continuation that he cut
11 off in his brief.

12 And so there is no edge to the expert as
13 opposed to the regular consumer. So I wanted to
14 make that point of clarification.

15 The other point is that he wants to say that
16 any machine that can be used for gambling. If a
17 machine can be used for legal purposes and it can
18 be used for gambling, then it is illegal per se,
19 well, then the Sheriff's Department and SLED and
20 Richland County, they need to seize every single
21 video game.

22 In fact, you know, SLED has most of -- the
23 overwhelming majority of video games that SLED
24 seizes for gambling purposes are legal games. They
25 are the type of games like Pac-Man, they are the

1 type of games like Space Invaders, because any game
2 in which you can keep score and people can compete
3 by keeping score, people can put money on it. You
4 can do side bets.

5 I would submit to you that more money is
6 wagered on those -- the video golf games, there are
7 more video golf tournaments, all those games are
8 legal, every bar in South Carolina has a video golf
9 game.

10 So the idea -- I don't believe that this
11 current Attorney General wants to go on record that
12 every single video game in the State of South
13 Carolina, because every single video game
14 technically can be used for gambling purposes. If
15 two people want to play Space Invaders, I can bet
16 Mr. Altman here 20 bucks that I am going to beat
17 him on that Space Invaders, then that Space
18 Invaders game, according to Mr. Spencer, is
19 illegal. I just do not believe that any Court is
20 going to take that -- make that wide of a ruling.

21 And the plain fact of the matter is that
22 Mr. Spencer on the record at the magistrate's level
23 did acknowledge, did opine -- and, again, he was
24 speaking on behalf of the Attorney General -- when
25 Judge Davis was asking some of the same -- making

1 some of the same comments as this Court, well, wait
2 a minute, all of those games at Chuck E. Cheese and
3 Frankie's Fun Park that my grandchildren -- he is a
4 little bit older than us, so he has got
5 grandchildren -- that my grandchildren play that
6 dispenses tickets, what you are telling me is that
7 by dispensing tickets that those games are illegal
8 per se?

9 And even Mr. Spencer, well, I mean,
10 technically, yes.

11 And I just cannot believe that the legislature
12 in passing these laws, that their intent under the
13 new statutes was to outlaw all those games that all
14 those kids play at Frankie's Fun Park, Chuck E.
15 Cheese and amusement parks because it dispenses red
16 tickets that you can then buy, you know, cameras
17 and other merchandise for at all those legal
18 establishments.

19 And the other point, Your Honor, that I wanted
20 to make, I actually agree, we actually agree with,
21 when you look at these games, once the Supreme
22 Court and the legislature started passing statutes
23 and interpreting statutes, the people in the gaming
24 industry knew that if they needed to comply with
25 South Carolina law they needed to change the

1 internal operations of the games to make them under
2 the predominant test -- predominant skill factor,
3 make them legal. And so a significant amount of
4 money went into certain games.

5 This game, I can tell you, and Speedmaster
6 are the only two games that have withheld appellate
7 review, Chess Challenge II and the Speedmaster game
8 in March, only two video games that we are aware of
9 that have gone all the way up to appellate review.
10 And so this is a significant amount of money that
11 goes into this software as opposed to the old video
12 poker, a bunch of the illegal games that are
13 currently out there on the street, and the video
14 blackjack games.

15 One of them is that in those games there is
16 not a fixed sequence, it is just a random sequence,
17 like your classic One Arm Bandit, the slot
18 machines. There is no fixed sequence when you are
19 doing a regular slot machine and video poker games.

20 The Attorney General's expert conceded in
21 these games there is a fixed sequence. And why
22 that is important is, somebody with a clear head
23 playing this game can memorize the sequence and
24 that enhances their ability to win. That is
25 critically important because the illegal games,

1 they are random sequences.

2 Secondly, the Attorney General's expert agreed
3 when questioned by both Mr. Altman and I and by the
4 Court is that there is no morphing in these games
5 like there are in most of those illegal games.

6 What morphing is it is, in the old illegal
7 games, is if a person developed a skill where you
8 are getting to stop something on an icon that they
9 want it stopped on, then automatically, literally a
10 fraction of a second that you can't even see, there
11 is an internal part of the game, of the software
12 that says no. So it makes them stop on something
13 right before or stop on something right after, or
14 what they stop on is the accurate icon that is
15 morphed into something that doesn't make them one
16 win.

17 And all experts in Judge Davis's courtroom
18 indicated there is no morphing in these Two Chess
19 Challenge II games.

20 A third thing is a house switch. In many of
21 the illegal games, you could -- once -- the house
22 switch involved a situation where the owner of the
23 convenience store or the bar or the restaurant,
24 they can go inside the internal guts of the machine
25 and make it so there is only a set number of

1 winners. So they are always guaranteed a certain
2 percentage of that scheme during a period of say 30
3 days. So they know every 30 days they are going to
4 get at least "x" amount of money. It is a fix.

5 And all experts agree that there was no
6 manipulation to these games, there was no house
7 switch attached to these games, so it was a fixed
8 sequence, no morphing and no fixed house switch on
9 these games. And both experts agreed with that.

10 Now, as to his argument dealing with the
11 vending machines, a vending machine as defined by
12 the American Heritage dictionary is a coin operated
13 machine that dispenses merchandise.

14 And even the case that he cited, the
15 H-E-I-S-E, or the Harvey versus Heise, the case
16 that he cited, it talks about mints. So you are
17 putting in money and you are getting a product, an
18 actual physical product that you can use.

19 The Attorney General's Office itself in a 2006
20 opinion in which Henry McMaster was still the
21 Attorney General, as he was the Attorney General
22 when these games were seized and brought before
23 Judge Davis, Charles Richardson, a senior Attorney
24 General, defined a vending facility as automatic
25 vending machines, cafeterias, snack bars, canteens,

1 or car service shelters, counters, and other
2 auxiliary equipment which may be operated by blind
3 licensed vendors in which it is necessary for the
4 sale of newspapers, periodicals, confections,
5 tobacco products, food, beverages and other
6 articles or services dispensed automatically or
7 manually and prepared on or off the premises in
8 accordance with all applicable health laws.

9 So they defined a vending machine as a coin or
10 currency operated machine which dispenses articles
11 or services. And it talks about the postal
12 service. It talks about actual products: Chewing
13 gum, coca-cola, a newspaper, a map, you can go
14 somewhere close to interstates and get a map.
15 These are vending machines. This is a redemption
16 machine. There is a complete difference in the law
17 between a vending machine and a redemption machine.
18 The games at Chuck E. Cheese and Frankie's Fun Park
19 and amusement arcades at the coast of South
20 Carolina that -- exactly like this, they are games
21 of skill that both young people and teenagers and
22 even older people play. You get the tickets. No
23 different than these games, you are getting tickets
24 and there is a redemption. There was a difference
25 in the law between a vending machine and a

1 redemption machine.

2 So those are just some of the points I wanted
3 the record to reflect with regard to certain points
4 that Mr. Spencer put on the record.

5 Your Honor, I will get back to our brief. I'm
6 not going to go through the order. Judge Davis,
7 both of his orders, his order, his first order and
8 his second order that we attached which upheld and
9 ruled that these -- not only was there no probable
10 cause, but that these were legal games of skill.
11 And this was a day-long -- a day-long hearing, as
12 the transcript, the thickness of the transcript
13 reflects.

14 Your Honor, before -- Judge -- he wanted a
15 little bit of historic analysis. And this is in
16 the record as well. This case was talked about in
17 the record. It is also cited in the recent
18 Speedmaster case that Judge Davis didn't have the
19 benefit of, but, again, as I indicated, completely
20 vindicates Judge Davis's order in this case. But I
21 will get to Speedmaster.

22 But the history of Chess Challenge II was that
23 two machines were seized in 2003 in Allendale
24 County. And in Allendale County these machines --
25 a full trial, just like in front of Judge Davis, a

1 trial pursuant to the requisite statute was held in
2 front of the magistrate. And in that case the
3 magistrate, just like Judge Davis, took testimony
4 from lay witnesses and from expert witnesses.

5 The magistrate ruled that these were games --
6 that these two games are lawful games of skill,
7 these Two Chess Challenge II games that were before
8 him, lawful games of skill.

9 That was appealed up to Perry Buckner in
10 Common Pleas Court in the Circuit Court in
11 Allendale County. Perry Buckner then, during the
12 appeal, he found with the -- during that appeal,
13 Ralph Hoisington, who was very aggressive, the late
14 Ralph Hoisington when he was Solicitor in
15 Charleston, of seizing these machines, there was an
16 affidavit by Ralph Hoisington saying in his opinion
17 as the chief law enforcement officer in Charleston
18 County, being an expert in this area, he looked at
19 Chess Challenge II and he found that they were
20 lawful games of skill.

21 The Solicitor in Allendale County at the time
22 had indicated to the Court that he wanted to either
23 withdraw the appeal -- that would be Solicitor
24 Murdaugh -- or have the judge, Perry Buckner, rule
25 in the favor of Chess Challenge II.

1 These are two sworn constitutional officers
2 that had a history of seizing machines and getting
3 machines destroyed, that however recognized that if
4 a particular product passes lawful constitution and
5 statutory muster, then they are lawful.

6 MR. SPENCER: Your Honor --

7 MR. GASSER: And, again, this case is cited in
8 Speedmaster, which is part of our brief, and it was
9 discussed in our hearing in front of Judge Davis.
10 This case was. That is why I'm discussing it now.

11 MR. SPENCER: And I understand he is
12 discussing it. Your Honor, I would just object to
13 the extraneous comments regarding what Solicitor
14 Hoisington's reputation was, whatever that is. To
15 the extent you are going to overrule that and
16 consider it, I do have the record on appeal for the
17 Allendale case that I would like to put in because
18 I think it would be illuminating on what really
19 happened in Allendale.

20 MR. GASSER: Well, I'm just talking about what
21 is in -- I am referring to what occurred -- and
22 this is in the Supreme Court opinion. The fact
23 that those two Solicitors, I'm not getting it out
24 of my memory, what somebody told me, I'm getting it
25 from the Supreme Court opinion.

1 MR. SPENCER: I don't think the Supreme Court
2 opinion rendered any opinion on Mr. Hoisington --

3 MR. GASSER: I'm not saying they rendered an
4 opinion, I am saying they stuck a footnote in
5 there, an affidavit by Solicitor Ralph Hoisington
6 was submitted in which he stated the following.

7 MR. SPENCER: Right. And what I said is that,
8 you know, whether or not he was aggressive on
9 gambling, extraneous --

10 THE COURT: Well, I'm not going to take that
11 into consideration, but I will consider that as
12 part of his argument.

13 MR. GASSER: Thank you, Your Honor.

14 THE COURT: I do know that the Court did
15 not -- I'll note that the Court -- it is not
16 discussed in the body -- I mean, if he wants to
17 argue that.

18 MR. GASSER: That's fine. I guess we just
19 want to make the point of what Allendale stands
20 for. Perry Buckner ruled that they were lawful
21 games of skill. Then the case was -- certain legal
22 issues were brought before the Supreme Court. And
23 I am reading straight from the Supreme Court:

24 We affirm the magistrate's decision finding
25 that the Two Chess Challenge II machines seized and

1 examined were lawful. That is a direct quote. We
2 affirm the magistrate's decision finding that the
3 Two Chess Challenge II machines seized and examined
4 were lawful, those two machines being the machines
5 in Allendale County.

6 But why that is important is this. In this
7 case before this Court, our expert testified -- and
8 it is in the transcript -- in front of Judge Davis
9 that he examined these two machines that were
10 before Judge Davis and that he examined -- he then
11 also examined, before coming into court and
12 testifying, both the day before and the day of his
13 testimony in front of Judge Davis, he re-examined
14 the two machines that were still -- that the two
15 machines that -- and played and examined the
16 internal workings of the two machines that the
17 Supreme Court ruled were lawful in Allendale. That
18 is in the transcript.

19 So he looked at these two machines. He
20 said -- they were in a condominium that we had set
21 up for him here in Columbia, and he looked at these
22 two machines from Allendale as to their
23 functioning, as to their software, as to their
24 operation.

25 Then he had the ability -- law enforcement

1 gave him the ability to look at these two machines
2 that were before Judge Davis and that are now
3 before you, and he testified that the two machines
4 that are before you, Your Honor, and that were
5 before Judge Davis were the exact same in
6 operational, procedural and in all functions as the
7 two machines that the Supreme Court of the State of
8 South Carolina ruled were lawful games of skill.
9 That is in the record. It is uncontradicted. And
10 it was before Judge Davis.

11 There is no evidence -- the Attorney General's
12 Office, the Sheriff's Department, the SLED expert
13 presented no evidence to Judge Davis, nor have they
14 presented any argument here, that two machines that
15 were designed in the exact same manner, technique
16 and operations as two machines that Chief Justice
17 Toal ruled and her colleagues and that Perry
18 Buckner ruled were legal. Same exact machines.
19 And that is uncontradicted and it is unchallenged.

20 What they are trying to do is circumvent, I
21 submit to you, the fact that the Supreme Court of
22 South Carolina and a Circuit Court judge has opined
23 that certain games are lawful, because there is no
24 evidence that these two games are not exactly
25 designed and operated in the same way as these two

1 Chess Challenge games. Just the opposite, that
2 they are exactly the same.

3 But it goes better than that. Because then in
4 March of this year, Your Honor, after Judge Davis
5 ruled that these were lawful games of skill after
6 he denied this -- their subsequent motion for
7 reconsideration claiming that they were -- because
8 they were -- that they were a vending or slot
9 machine operated with a free play feature. He
10 denied that as well. Every issue that is before
11 this Court then became issues before Judge Derham
12 Cole, an issue before the Court of Appeals, and it
13 was ruled upon in Speedmaster.

14 MR. SPENCER: Your Honor, I don't know if he
15 is intending to hand up the Circuit Court order. I
16 would object to the Circuit Court order from
17 Speedmaster. Obviously I don't have a problem with
18 the Court of Appeals decision. I'm familiar with
19 that.

20 MR. GASSER: I handed up a copy of the Court
21 of Appeals, but I would note that it is an appeal
22 from Judge Derham Cole, who they were appealing
23 Judge Derham Cole's affirmation of a magistrate
24 finding that this Speedmaster was a game of skill,
25 that that particular Speedmaster, Serial Number

1 00218, was a game of skill. The magistrate found
2 it was a game of skill. Judge Derham Cole at the
3 same level we are now found it as -- you know,
4 upheld and affirmed that magistrate's finding.

5 The Court of Appeals, actually they even ruled
6 that they didn't even have to make a determination
7 whether it is the dominant test factor or the pure
8 chance factor. They said under either analysis
9 they believe that the Speedmaster game is a game of
10 skill.

11 And it is interesting, the expert in that
12 case, similar, he was a technician, he played it
13 and won 15 out of 16 times, similar to our expert.
14 I mean, you know, you call experts to testify and
15 to demonstrate to a judge how the game is played,
16 and that is exactly what was done.

17 And Judge Cole -- a magistrate, Judge Cole and
18 the Court of Appeals indicated that that testimony
19 under the law, you know, was -- they took that
20 weight and not the testimony of any SLED expert or
21 any -- or SLED's position or the Attorney General's
22 Office position, because they handled that appeal
23 as well, Your Honor.

24 And so in that case -- again, this whole
25 argument with the free play feature, they didn't

1 have to decide it in that case, but I would again
2 submit to you that under that theory every single
3 game in Frankie's Fun Park and Chuck E. Cheese
4 under that theory where you can earn enough points
5 to get a free play they are saying is illegal.
6 They are saying that all these teenagers and all
7 these parents and grandparents that are going on
8 weekends and having birthday parties and going down
9 to arcades to spend their summer money, all these
10 kids and all these teenagers and the parents going
11 to supervise them are all engaging in illegal
12 gambling activity, because there is a free play
13 feature. That is what they think our legislature's
14 intent was.

15 The other part is, is that with regard to
16 the -- again, Your Honor, I'm not going to spend
17 any more time, this was an hour-long hearing and
18 Judge Michael Davis listened from two experts;
19 watched the games being played, and he found that
20 they were lawful games of skill.

21 Then we go next to, used for gambling
22 evidence. And that is part of Mr. Spencer's
23 argument here. And this again is exactly in the
24 Speedmaster case exactly what Judge Davis had to
25 rule on. And I would submit that these games fall

1 under the same analysis as the Speedmaster case.

2 If you look on Page 4 of the Speedmaster case,
3 the Court indicates, according to the plain
4 language of the statute, on the bottom of Page 4,
5 Speedmaster does not fall within Categories 1 or 2
6 of 12-21-2720(a). And we would agree that neither
7 do these two machines.

8 However, Speedmaster, it does appear to fall
9 within the third category as a machine of the
10 non-payout type operated by slot which is deposited
11 a coin or thing of value. Just like these games,
12 Your Honor.

13 And it says: Therefore, the analysis that the
14 Court of Appeals took is, was it used for gambling.
15 And whether something is used for gambling, then it
16 goes back to the old lottery laws. What is it.
17 And it is consideration and it is chance and it is
18 a prize. So again they have to go back to, all
19 right, is this a game of skill or a game of chance.

20 And when going right back to that analysis
21 that they had previously ruled on, they indicated,
22 well, we have already ruled on that. The
23 Speedmaster on either test is a game of skill.
24 Therefore, it is not in violation of the statute.

25 Those were exactly the issues that Michael

1 Davis had to rule on, and he didn't even have the
2 benefit of three judges on the Court of Appeals'
3 analysis.

4 But Speedmaster, you know, that case came down
5 in March. I don't know who called each other
6 quicker, me or Mr. Altman, but at the end of the
7 day, that case completely affirmed Judge Davis's
8 factual and legal analysis at our hearing that now
9 is before this Court on appeal.

10 Beg the Court's indulgence.

11 THE COURT: I just have one quick question.
12 He brought up the issue regarding the stop-all
13 button.

14 MR. GASSER: That's correct.

15 THE COURT: Can you address that?

16 MR. ALTMAN: Your Honor, Jonathan Altman. I
17 was involved in the original Chess Challenge case.
18 And what the Attorney General's Office has done in
19 this case is, the argument regarding whether it is
20 a game of skill or a game of chance, and it has
21 been pretty consistent over the last ten years, if
22 you look at the Attorney General opinions, look at
23 Allendale case, look at the dissent from Justice
24 Burnett, the critical question is can a player
25 through the exercise of skill achieve the desired

1 results.

2 And we talked a lot at trial and you have
3 heard today about the expert. The critical
4 analysis for this Court, for Justice Davis, for any
5 magistrate in a gaming case is can a player,
6 through the exercise of skill, be it concentration,
7 hand-eye coordination, physical skill, memory,
8 those sort of things, do what he wants it to do.
9 Or does the game itself, some mechanism within the
10 game preclude him from doing that to pay out a
11 certain percentage.

12 Now, we know that slot machines do. We know
13 that Cherry Masters do that sort of thing to
14 achieve a desired result. Now, we know that this
15 game does not.

16 Now, Mr. Spencer can say it is because our
17 expert had a high level of skill, that he had
18 inside information. With a typical gambling
19 device, that is irrelevant. The machine takes
20 over. I don't care whether you videotape it, I
21 don't care what you do, the machine is
22 preprogrammed to guarantee a specific return. It
23 is -- by the record, SLED's expert, our expert,
24 everybody agrees, this game doesn't have those
25 qualities. It doesn't have picture substitution

1 that will trick a skillful player. It doesn't have
2 morphing where one icon scrolls into another.

3 The issue here, it is almost turning logic on
4 its head, everybody agrees that this machine can be
5 played skillfully, that a player can achieve what
6 he wants to achieve, that a player can get ten
7 Kings every time. If he misses it is because he
8 was sloppy, not because the machine conspired
9 against him.

10 Every game, even skillful games you can play
11 blindfolded and because of natural odds you will
12 occasionally win. That is turning logic on its
13 head. The law requires for a game to be a lawful
14 game of skill that a player, through the exercise
15 of his skill, achieve what he wants to. It doesn't
16 say that a legal game of skill can be converted
17 into an illegal gambling device because I go up and
18 play blindfolded, even though I could have played
19 skillfully, and somehow win. The game itself is
20 lawful.

21 And the Attorney General's Office, frankly,
22 and to this case, if you review their opinions, has
23 always said that is a critical distinction. And
24 dominant factor does not mean a game has to be a
25 hundred percent skillful. It means exactly what

1 Justice Burnett said in his dissent and that
2 everybody recognized. Can a player on his own
3 skill win the game. Can he get what he is trying
4 to get through his own physical ability. If he
5 can't do that, if the game tricks him into thinking
6 that he can when he really can't, that is an
7 illegal game and should be destroyed.

8 This game has been reviewed by a whole bunch
9 of Courts before Your Honor. I was involved in the
10 Allendale case. I argued the Allendale case at
11 every level. I argued against Solicitors. I was
12 in the meeting with Solicitor Hoisington. So this
13 is hardly the first time that this game has been
14 reviewed.

15 Now, one of things that the Court speaks to in
16 the Allendale case is that games can be changed.
17 In the Allendale games, had they been changed, had
18 they been manipulated, would be subject to seizure
19 again. And that was part of the discussion before
20 Magistrate Davis.

21 Now, what the expert testified to -- and,
22 frankly, I don't believe there is anything in the
23 record disputing this -- these games have never
24 been changed. We have got the same icon sequence,
25 we have got the same speed, we have got the same

1 order, the same exact number of icons. This game
2 has been reviewed by, I would submit, more law
3 enforcement bodies, more Courts than any other game
4 in this state.

5 MR. SPENCER: Your Honor, I just ask him to
6 stay inside the record. There is nothing about how
7 many -- how much law enforcement looked at it.

8 MR. ALTMAN: That was me submitting, not the
9 record.

10 MR. SPENCER: Right.

11 MR. ALTMAN: That was my submission, and I was
12 not --

13 MR. SPENCER: He is offering facts outside the
14 record, and I would object.

15 THE COURT: Okay. Sustained. Yes, sir?

16 MR. ALTMAN: But when we go back -- and I'm
17 just trying to circle back to what the critical
18 issue is in these gaming cases -- you look to the
19 dominant factor, you look to whether a player,
20 through the exercise of skill, memory,
21 concentration, hand-eye coordination -- johnny
22 spoke to why kids are better than old people like
23 me at games. Can they achieve the desired result.
24 If they can, that is a legal game of skill not only
25 in this state, in virtually all states.

1 If there is a gimmick that tricks a player,
2 that player is unable to achieve the desired result
3 time after time after time. And I would submit to
4 you, if the game was an illegal game, it wouldn't
5 matter what inside information our expert or any
6 expert had, the program of the game would kick in
7 at some point and despite his memory, despite his
8 background, dispute his expertise, he would not be
9 able to achieve the desired result because the game
10 is programmed to give off a specific return.

11 And that is why these games are hard to market
12 because you can't guarantee a certain return. If
13 you put them in a location, they may not generate
14 any revenue. And, frankly, that is the reason why
15 they are redemption machines, because the
16 developers of these machines know that if they
17 marketed them for cash payouts you would attract
18 professional players who could achieve such a
19 mastery level of these games that they would be a
20 guaranteed loser.

21 They are redemption games like Chuck E. Cheese
22 because they are designed to increase customer
23 flow, you win a prize, nothing of value, and you
24 move on. It is not a gambling device. It wasn't
25 designed for this. It is a niche product, no

1 different than Chuck E. Cheese the market permits.

2 THE COURT: All right. I am going to allow
3 Mr. Spencer to -- he said they just received your
4 memorandum. He wants to reply to that. I'm going
5 to take it under advisement and give you an
6 opportunity to send me proposed orders.

7 Yes, sir?

8 MR. SPENCER: If I could -- two minutes,
9 because I do want to talk --

10 THE COURT: Two minutes, because --

11 MR. SPENCER: I know I have kept you so long,
12 Your Honor.

13 THE COURT: Well, it is not me, but these
14 other folks sitting back here.

15 MR. SPENCER: And I apologize to everyone else
16 too. But the Speedmaster decision, I don't think
17 Mr. Altman actually ever answered the stop-all
18 button. Speedmaster doesn't have a stop-all
19 button. That is one thing to distinguish. I'll
20 catch up to the rest later.

21 Allendale, the decision in Allendale says you
22 have got to -- the magistrate can only be concerned
23 with what is in front of him, the machines in front
24 of him. The problem in Allendale is the magistrate
25 declared all Chess Challenge II machines illegal.

1 And the Court said, no, that is not the way it
2 works. You can only have jurisdiction for the two
3 in front of you.

4 THE COURT: Do you disagree that the expert
5 came in and said that he examined the two and came
6 in and examined these two and that they were
7 exactly -- is that accurate?

8 MR. SPENCER: I don't object if he says he
9 looked at what is purported to be the Allendale
10 machines. I don't think they established a
11 foundation really on that to support the findings,
12 but I don't -- you know, that argument is in the
13 transcript.

14 And I think that turns the Allendale case on
15 its head to say that we have to go compare the
16 machines seized eight, nine years ago. That is,
17 you know, that is not what Allendale actually
18 stands for, it stands for the very opposite. What
19 are these two machines doing the day the magistrate
20 looked at them. That is the issue.

21 Quickly, on the quote about Page 26, I
22 followed up and I did talk about the test that
23 Mr. Snyder purported to give, and they gave -- he
24 actually gave some very specific inside information
25 to the four people that he tested on. It is not

1 available on the machines. The record establishes
2 that.

3 And, you know, the last thing -- I am just
4 going to conclude because I'm going to try and get
5 everything else in the order, hopefully. My
6 response is that Chuck E. Cheese machines aren't
7 before us. That is not the analysis. And they may
8 be illegal for all we know. They may be legal. I
9 haven't looked at them myself.

10 Thank you, Your Honor. I appreciate it. I
11 appreciate your indulgence.

12 MR. GASSER: Thank you, Your Honor.

13 MR. ALTMAN: Thank you, Your Honor.

14 MR. SPENCER: And everyone else.

15 THE COURT: Thank you. And you all can e-mail
16 that to -- your proposed orders to my law clerk. I
17 think it is dbenjaminlc@sccourts.org. And also
18 your reply.

19 MR. SPENCER: Thank you, Your Honor. Is that
20 going to be ten days?

21 THE COURT: The proposed order?

22 MR. SPENCER: Proposed orders?

23 THE COURT: You can get it to me after the
24 reply.

25 MR. SPENCER: Okay, so I will do the reply and

1 then we would submit proposed orders?

2 THE COURT: Yes. Because I have -- I think I
3 have taken quite a few things under advisement this
4 week, so it may be a minute before I --

5 MR. GASSER: Do you have a copy of the
6 Allendale case?

7 THE COURT: No, I don't. I have a cite.
8 (Mr. Gasser hands up to the Court.)

9 THE COURT: Thank you.

10 MR. GASSER: Thank you, Your Honor.

11 MR. ALTMAN: Thank you, Your Honor.

12 MR. SPENCER: Thank you, Your Honor.

13 THE COURT: Thank you.

14 (WHEREUPON, the proceedings were concluded.)

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(END OF TRANSCRIPT)

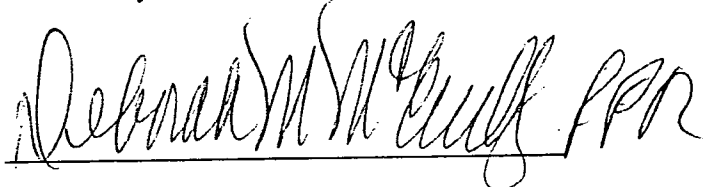
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

I, Deborah M. McCurdy, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 1st day of September, 2011.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

February 21, 2012



Deborah M. McCurdy, RPR
Fifth Circuit Court Reporter

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STATE OF SOUTH CAROLINA)

COUNTY OF Richland)

Richland County Sheriff's Department)
PLAINTIFF(S))

vs.)

Awde, Nizar N)
4703 Briarfield Rd
Columbia, SC 29206

DEFENDANT(S)

IN THE MAGISTRATES COURT

2010C P400 75-46

ORDER OF DESTRUCTION/
NOTICE OF POST SEIZURE
HEARING

2- Chess Challenge II video gaming
devices both of which are the stand
up style games

2009CV4012-0002
CIVIL CASE NUMBER

2010 OCT 21 PM 3:15
FILED
RICHLAND COUNTY

Pursuant to S.C. Code Ann. §12-21-2712, the above listed machine(s) were seized on December 29, 2008 from El Cheapo (business) at 5901 North Main St (address) by the Plaintiff and brought before me on December 29, 2008 for examination to determine if the machine(s) are prohibited pursuant to S.C. Code Ann. § 12-21-2710.

Upon careful examination of the machine(s), I find the machine(s) to be: a vending or slot machine, or a video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to S.C. Code Ann. § 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine.

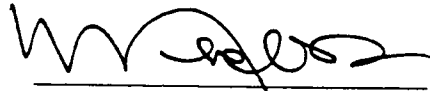
I find that the Defendant's machine(s) are in violation of S.C. Code Ann. §12-21-2710 and do hereby order their destruction. **The Defendant has 15 days from the date of receipt of this Order to request a post seizure hearing to contest the illegality of the machine(s). Otherwise, the machine(s) will be destroyed.**

SCCA 690 (2006)

Pursuant to state law, the State Law Enforcement Division is authorized to retain, expend, and carry forward all monies associated with illegal gaming devices seized by the Division, once orders of destruction and awarding of these monies have been received from a court of competent jurisdiction. I find that \$80 was seized by the Division and shall be retained for the purposes provided by law.

AND IT IS SO ORDERED.

December 31, 2008


(MAGISTRATE)

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE MAGISTRATE'S COURT
CIVIL CASE NO.: 2009-CV-401060002

Richland County Sheriff's
Department,

Plaintiff,

v.

Nizar Awde,

Defendant.

ORDER

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2009 MAR -3 AM 10:23
RICHLAND COUNTY

The trial of this matter was heard on February 6, 2009 in accordance with S.C. Code Ann. § 12-21-2712 to determine whether two Chess Challenge II games violated S.C. Code Ann. § 12-21-2710 or any other law of this state. The defendant was represented by Jonathan S. Gasser, Esq. and Jonathan S. Altman, Esq. The plaintiff was represented by Assistant Attorney General, David A. Spencer, Esq.

Two Chess Challenge II games were seized from a business operating at 5901 North Main Street. Prior to the hearing of this case, the parties agreed that the procedure to determine the legality of the games is set forth in Allendale County Sheriff's Office v. Two Chess Challenge II, games of skill, 361 S.C. 581; 606 S.E. 2d 471; (2004) and State of South Carolina v. 192 Coin-Operative Video Game Machines, 338 S.C. 176; 525 S.E. 2d 872; (2000). As the Supreme Court made clear in these cases, this Court is the proper judicial forum to determine the legality of these games in accordance with S.C. Code Ann. § 12-21-2712.

At the trial of this case, the Court examined each game separately. Based on the testimony of lay and expert witnesses, arguments of counsel, review of the evidence and examination of the operation and play of the two Chess Challenge II games, I hereby make

factual findings and conclude as a matter of law that these two Chess Challenge II games are legal games of skill and that the plaintiff, although acting in good faith, lacked probable cause to seize the games.

FINDINGS OF FACT

Separate examination of each game, as well as the testimony of Robert Snyder, the expert for the defendant, and SLED Agent Brad Godfrey, the expert for the plaintiff, confirmed that the two games operate in an identical manner. On the screen of each, four rotating wheels spin through a series of seven icons in a fixed sequence for a duration of thirty seconds. A player's goal is to stop each reel on matching icons and matching three of the four reels is considered a win. A player is able to stop each reel individually by pushing the corresponding button and employing hand/eye coordination and dexterity. Experts for both parties testified that the games' icon sequence is fixed.

This Court observed defendant's expert play the game. Mr. Snyder has an impressive resume, which includes a lengthy tenure in law enforcement. He was qualified as an expert on gaming devices without objection. Mr. Snyder demonstrated through actual play that the games could be played skillfully. He was able to stop the rotating icons with a high degree of certainty on the icon of his choosing and testified that he uses learnable techniques to play successfully. Based on the observation of the games actually being played, the Court concluded that the two games are indeed games of skill as a matter of law as a player is able to determine the outcome of play by application of skill.

For its part, plaintiff offered SLED agent Bradley Godfrey. Agent Godfrey testified that the icon sequence was fixed and that the speed of rotation was constant. Agent Godfrey did not dispute Mr. Snyder's testimony that the games contain no picture substitution, morphing or other

quality that would prevent a player from being able to stop the rotating wheels on the icon of his choosing. Agent Godfrey testified that he believed that the Chess Challenge II games were games of chance. The Court did not find his position to be availing on the ultimate issue(s). As demonstrated and testified to by Mr. Snyder, it is possible for a player to skillfully play this game and achieve the desired result. I find that a player, through observation and experience, can learn some or all of the icons sequence within the pattern and develop a strategy for successful play.

CONCLUSIONS OF LAW

While games of skill are lawful in South Carolina, S.C. Code Ann. § 12-21-2710, 16-19-40, and 61-4-580(3) declare games of chance to be illegal (with certain exceptions). The Office of the Attorney General has opined that awarding merchandise or prizes to successful players of games of skill is in accordance with South Carolina law. The central legal issue before this Court was whether the two Chess Challenge II games seized by plaintiff are games of chance or games of skill.

There are two possible tests that this Court could have applied to determine whether the games were games of skill or chance. The more liberal standard is known as the "pure chance doctrine" and the more stringent standard is known as the "dominant factor test." While it is an unsettled question in South Carolina as to which doctrine applies, the distinction is largely academic as these two games satisfy the more stringent, dominant factor test. At trial, both parties agreed that the elements of the dominant factor test are found in the dissent of *Johnson v. Collins Entertainment Co., Inc.*, 333 SC 96; 508 SE2d 575(1998)(Burnett, J., dissent): "if through the exercise of skill or judgment a participant can determine the outcome, the scheme is

not [a game of chance.]" *Id.* At 584.¹ According to the Attorney General's office, the exercise of skill includes manual dexterity, eye-hand coordination, reflexes, muscular control, concentration, judgment, practice, adroitness, intellectual abilities, deductive analysis, alertness, and mental superiority. *See, e.g.,* A.G. Opinion dated August 28, 2002 (2002 S.C. A.G. Lexis 137).

For the reasons set forth in the Findings of Fact, these two Chess Challenge II games satisfy the "dominant factor" test. As the dissent in *Johnson* states "skill should be defined in terms of the ability to obtain the desired outcome by a certain icon . . ." It has been proven to this Court that the two Chess Challenge II games are games of skill because a skillful player can select a specific icon and, through the exercise of skill, stop each individually rotating reel and obtain the desired result.

NO PROBABLE CAUSE

As an additional ground for its Order, this Court also finds that the seizure of the games was improper and without probable cause. The Court received the testimony of Investigator Robbie Crane in support of the seizure. Investigator Crane testified that he did not play either game or observe others engaged in play. Investigator Crane further testified that he had no knowledge of the Allendale case and no experience in distinguishing between lawful games of skill and illegal games of chance. Upon seeing the games, he contacted an agent with SLED who advised Investigator Crane that he believed them to be gambling devices without conduct any examination of their operation. Investigator Crane acknowledged that he would have

¹ In *Johnson*, the machine at issue was a Cherry Master (an illegal game where the outcome is determined by a random number generator). Cherry Masters have been deemed illegal games of chance in *South Carolina v. One Coin-Operated Video Game Machine*, 321 S.C. 176, 467 S.E.2d 443 (1996); *South Carolina v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995).

proceeded differently had he been aware of the Allendale case. It is well settled that the legality of each machine must be determined on an individual basis. Only Investigator Crane was involved with the physical seizure of these games.

In the Allendale case, the Supreme Court affirmed a magistrate's finding that two Chess Challenge II games were lawful games of skill. In doing so, the Court stated "because video machines may be manipulated so as to change their nature from lawful to unlawful, law enforcement may, based on probable cause, seize the machines in question once again." Mr. Snyder testified that the games before this Court were identical to those seized in the Allendale case. Agent Godfrey testified that he knew of no difference between the icon sequence in the Allendale Chess Challenge II games and the games before the Court. This Court received no testimony that the two Chess Challenge II games before it had been manipulated or changed to distinguish them from the games deemed lawful in the Allendale case. In addition, the defendant presented two experts as to police procedure, David Byrd and Philip Grimsley, who both testified that the plaintiff lacked probable cause in seizing the two games. In light of the above, this Court finds that although acting in good faith, the plaintiff was without sufficient knowledge of the functioning of these games to have formed any reasonable basis for conducting this seizure. This Court further finds that although Investigator Crane acted in good faith, probable cause did not exist for the seizure of these games.

Lastly, Mr. Spencer argued that despite this Court's findings that the two games are games of skill, they are violative of S.C. law as vending machines which contain a free play feature. The Court does not concur with Mr. Spencer's contention. S.C. Code Ann. § 12-21-2710 sets forth criteria for determining games of chance, which are illegal under S.C. law. The two games before the Court are not games of chance and thus not prohibited. In its opinion of

August 28, 2002 (2002 S.C. A.G. Lexis 137), the Attorney General opined that "a violation of the state's gambling laws occurs when the elements of consideration, prize and chance are present. If one of those elements are removed, the gambling laws do not appear to be implicated." The Attorney General also stated "the payment of an entry fee and the awarding of prizes for a game of skill does not violate the states lottery laws." In light of the above, the Supreme Court's ruling in the Allendale case and this Court's findings and interpretation of the statute, Mr. Spencer's argument is rejected.

THEREFORE, it is hereby ORDERED and DECLARED THAT:

- (a) The two Chess Challenge II games are games of skill that are lawful to possess, own and operate under South Carolina law as redemption machines distributing prizes, including gift certificates, and merchandise;
- (b) The seizure of these Chess Challenge II machines was unlawful and without probable cause.

Date: MARCH 3, 2009


The Honorable Michael Davis,
Magistrate Richland County

RECEIVED
RICHLAND MAGISTRATE'S OFFICE
RICHLAND COUNTY
2009 MAR -3 AM 10:23

STATE OF SOUTH CAROLINA)

IN THE MAGISTRATE'S COURT

COUNTY OF RICHLAND)

CIVIL CASE NO.: 2009-CV-401060002

Richland County Sheriff's)
Department,)

Plaintiff,)

vs.)

Nizar Awde,)

Defendant.)

ORDER

2009 JUN 19 PM 3:01

RECEIVED
LYNNESLAND MAGISTRATES OFFICE
RICHLAND COUNTY

This matter came before me on Friday, May 22, 2009 on Plaintiff's Notice of Motion and Motion to Alter Amend Judgment pursuant to Rule 59(e), SCRCPP. Plaintiff was represented by Assistant Attorney General David A. Spencer, Esq. The Defendant was represented by Jonathan S. Gasser, Esq. and Jonathan S. Altman, Esq.

The trial of this matter was heard on February 6, 2009. In addition to hearing arguments of counsel, the Court received the testimony of experts for both parties and observed the subject games being played. The Court ultimately determined that the two Chess Challenge II games at issue are games of skill that are lawful to possess, own and operate under South Carolina law as redemption machines distributing prizes, including gift certificates, and merchandise. The seizure of these games was unlawful and without probable cause.

In its motion, Plaintiff contends that the Court misapplied the legal standard established to determine the legality of such games. Plaintiff also contends that the Court overlooked points of law and maintains that even if the two games are games of skill,

they are still illegal. Having again heard arguments of counsel on these issues, which were raised at the trial of this case, Plaintiff's motion is denied.

Plaintiff acknowledges that the Court applied the correct legal standard, the dominant factor test, in determining the two Chess Challenge II games to be games of skill. Applying this standard, the Court concluded "that a skillful player can select a specific icon and through the exercise of skill, stop each individually rotating reel and obtain the desired result. In doing so, the Court correctly applied the dominant factor test in reaching this conclusion.

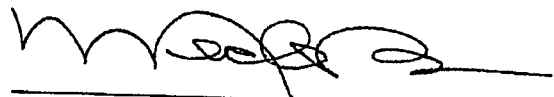
The law governing legality of video machines has been addressed in detail in a number of Attorney General opinions, including an opinion issued May 5, 2003. The legal standard applied by the Court is identical to the legal standard endorsed by the Attorney General. The dominant factor test was also utilized in *Allendale County Sheriff's Office v. Chess Challenge II, games of skill*, 361 S.C. 581, 606 S.E. 2d 471, 2004. In *Allendale*, three courts, Magistrate's Court, Circuit Court and Supreme Court found that the two other Chess Challenge II machines were legal to operate as games of skill. In sum, the two Chess Challenge II games at issue in this case do not function like games of chance. Thus a player is able to affect the outcome of play, which is neither random, nor predetermined. Having reviewed Plaintiff's filings and heard the arguments of Plaintiff's counsel, the Court finds that it correctly applied South Carolina Code Ann. § 12-21-2710 in this case. South Carolina Code Ann. § 12-21-2710 prohibits certain specific illegal gambling devices and all games pertaining to games of chance.

Plaintiff contends that even if the two games satisfy the dominant factor test, they are illegal because they are vending machines and have a free play feature. This Court

rejects Plaintiff's contention that the games are illegal despite being games of skill. South Carolina Code Ann. § 12-21-2710 prohibits certain games including vending or slot machines and video games with a free play feature which are used for gambling. As the subject games satisfy the dominant factor test and are games of skill, they are not used for gambling. In addition, Chess Challenge II is not a vending machine. Vending machines provide snacks, beverages or other products to consumers. Chess Challenge II is an amusement game of skill and thus not a vending machine. In addition, a successful player of Chess Challenge II uses his winnings for prizes or merchandise. The Attorney General has opined that awarding merchandise or awarding prizes to successful players of games of skill is in accordance with South Carolina law. This Court concurs with the opinion of the Attorney General.

For the reasons set forth herein, Plaintiff's Motion to Alter or Amend Judgment pursuant to Rule 59(e) SCRPC is denied.

Date: June 19, 2009



The Honorable Michael Davis,
Magistrate Richland County



HENRY McMASTER
ATTORNEY GENERAL

July 17, 2009

The Honorable Jeanette W. McBride
Richland County Clerk of Court
PO Box 2766
1701 Main Street, Rm 205
Columbia, SC 29202

Re: Richland County Sheriff's Department v. Nizar Awde

Dear Ms. McBride:

Enclosed for filing is the original and one copy of the Notice of Civil Appeal in the above-referenced matter, along with a check in the amount of \$150.00 for the filing fee, the Civil Action Cover Sheet, and the Certificate of Service. I appreciate your filing the original and returning a clocked-in copy to me in the stamped envelope provided. By copy of this letter and enclosures, I am serving the Honorable Michael R. Davis and counsel of record.

Thank you for your assistance in this matter. If you have any questions, please contact me anytime.

Very sincerely yours,

David Spencer
Assistant Attorney General

Enclosures

cc: Jonathan S. Gasser, Esq.
1529 Laurel Street
Columbia, SC 29201

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

RICHLAND COUNTY SHERIFF,

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

Plaintiff(s)

vs.

NIZAR AWDE

Defendant(s)

(Please Print)

Submitted By: David Spencer
Assistant Attorney General

Address: PO Box 11549
Columbia, SC 29211

SC Bar #: 68571

Telephone #: 803 734 3680

Fax #: 803 734 3677

Other:

E-mail: dspencer@scag.gov

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts**
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

- Torts - Professional Malpractice**
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Notice/ File Med Mal (230)
☐ Other (299)

- Torts - Personal Injury**
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

- Real Property**
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

- Inmate Petitions**
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

- Judgments/Settlements**
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)

- Administrative Law/Relief**
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899)

- Appeals**
☐ Arbitration (900)
☒ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

- Special/Complex /Other**
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Sexual Predator (510)

Submitting Party Signature: 

Date: 7/17/09

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

RICHLAND COUNTY SHERIFF,

Appellant,

-VS-

NIZAR AWSE

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

NOTICE OF CIVIL APPEAL

JEANETTE W. JOHNSON
C.C.P. & C.S.

2009 JUL 17 PM 2:58

RICHLAND COUNTY
CLERK

Appellant, the Richland County Sheriff's Office (Sheriff), through its undersigned attorneys, hereby gives notice of appeal from the March 3, 2009 order of the Honorable Michael Davis of the Richland County Magistrate's Court to the Richland County Court of Common Pleas. Appellant received notice of Judge Davis's order upon receipt of a copy sent by e-mail on March 6, 2009. On March 16, 2009, Appellant filed a motion to alter or amend judgment pursuant to Rule 59(e), SCRPC. The motion was heard before Magistrate Davis on May 22, 2009. By order dated June 19, 2009, this motion was denied. Notice of the final order denying the motion was received when the motion was sent to appellant by e-mail from opposing counsel on July 7, 2009.

In its appeal, the Sheriff would raise the following exceptions:

- 1) S.C. Code Ann. § 18-7-170 provides that on appeal from Magistrate's Court, the Circuit Court may make its own findings of fact. See Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2004).
- 2) Evidence presented to the Magistrate establishes that the machines are illegal pursuant to S.C. Code Ann. § 12-21-2710.
- 3) Evidence presented establishes that the machines contain a "game of chance" which

renders them illegal pursuant to S.C. Code § 12-21-2710 (Supp. 2005). The pertinent question is whether skill or chance predominates. "A game of chance is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance." Collins Coin Music Co. v. North Carolina Alcoholic Beverage Control Comm'n, 451 S.E.2d 306 (N.C. Ct. App. 1994) (emphasis added, internal quotations omitted).

- 4) The Magistrate erred in finding the machines contain a "game of skill."
- 5) The Magistrate erred in failing to find that the machines contain a game of chance because a player, without any exercise of skill, and solely through chance, can obtain winning results.
- 6) The evidence presented to the Magistrate establishes that the machines have a free play feature which renders them illegal pursuant to S.C. Code Ann. § 12-21-2710.
- 7) The evidence presented establishes that the machines are illegal vending machines pursuant to S.C. Code Ann. § 12-21-2710 in that they vend red tickets and the machines are not "constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance" as required by statute to be legal vending machines.
- 8) The evidence presented shows that the machines are capable of being used, and are used, for gambling in violation of S.C. Code Ann. § 12-21-2710.
- 9) The evidence presented shows that the machines are slot machines or simulate slot machines in violation of S.C. Code Ann. § 12-21-2710.
- 10) In his March 6, 2009 order, Magistrate Davis found that the Sheriff seized the machines without probable cause. To the extent the Sheriff lacked probable cause, this lack of probable cause was cured because the Sheriff brought the machines to Magistrate Davis, a neutral and detached magistrate, who examined the machines and determined that there was probable cause to believe the

machines violated S.C. Code Ann. § 12-21-2710 and issued an order for the machines' destruction.

11) Because the machines are illegal pursuant to S.C. Code Ann. §12-21-2710 they cannot be returned to the owner notwithstanding the purported lack of probable cause to seize the machines. State v. 192 Coin-operated Video Game Machines, 336 S.C. 176, 525 S.E.2d 872 (2000).

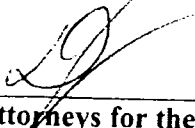
CONCLUSION

For the reasons stated in this Notice and in the proceedings in Magistrate's Court, the Magistrates Order declaring the machines legal should be reversed and the machines should be destroyed.

Respectfully submitted,
HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DAVID SPENCER
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

By: 
Attorneys for the Respondents

July 17, 2009

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2010CP4007546

Richland County Sheriffs Dept

Nizer N Awde

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Pl. No suit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 19 day of Oct, 2011 to attorneys of record or to parties (when appearing pro se) as follows:

David A Spencer

ATTORNEY(S) FOR THE PLAINTIFF(S)

Court Reporter _____

Jonathan S. Gasser

ATTORNEY(S) FOR THE DEFENDANT(S)

Clerk of Court

Janette W. McBride

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CASE NO.: 2010-CP-40-07546

Richland County Sheriff's Dept.,)

Appellant,)

v.)

Nizar Awde,)

Respondent.)

ORDER

JEANETTE W. HARRIS
C.C.P. & G.S.

2011 OCT 17 PM 2:12

RICHLAND COUNTY
FILED

This matter came before me on Thursday, September 1, 2011 on Appellant's appeal of Orders issued by the Honorable Michael Davis, Richland County Magistrate March 3, 2009 and June 19, 2009. In his initial Order, Magistrate Davis applied the "dominant factor test" and found that the two Chess Challenge II games before him did not violate S.C. Code Ann. § 12-21-2710 and were lawful games of skill. Magistrate Davis also found the seizure of these two games to have been without probable cause. In his second Order, Magistrate Davis denied Appellant's Motion to Alter or Amend Judgment pursuant to Rule 59 (e).

The post seizure hearing/trial of this matter was heard by Magistrate Davis on February 6, 2009. The two Chess Challenge II games at issue were seized by Appellant from a business operating at 5901 North Main Street in Columbia. Prior to the post seizure hearing/trial, the parties agreed that the procedure to determine the legality of the two games was set forth in *Allendale County Sheriff's Office v. Two Chess Challenge II games of skill*, 361 S.C. 581, 606 S.E. 2d 471 (2004) and *State of South Carolina v. 192 Coin Operative Video Game Machines*, 338 S.C. 176, 525 S.E. 2d 872 (2000). The post seizure hearing/trial lasted a full day during which Magistrate Davis examined each game

separately and received the testimony of lay and expert witnesses. Magistrate Davis also observed the two Chess Challenge II games being played and heard arguments of counsel. Magistrate Davis ultimately found the games to be legal games of skill and that Appellant, although acting in good faith, lacked probable cause to have seized them. His specific findings include the following:

1. The two games operate in an identical manner. This fact was confirmed by the testimony of Robert Snyder, the expert for the Respondent, and SLED Agent Brad Godfrey who testified for Appellant. On each screen, four rotating wheels spin through a series of seven icons in a fixed sequence for a duration of thirty seconds. A player's goal is to stop each reel on matching icons and matching three of the four reels is considered a win.

2. The icon sequence for both games is fixed and not subject to manipulation. A player is able to stop each reel individually by pushing the corresponding button and employing hand/eye coordination and dexterity.

3. The games could be played skillfully. Magistrate Davis observed Respondent's expert repeatedly stop the rotating icons with a high degree of certainty on the icon of his choosing.

4. The games contain no picture substitution or morphing that would prevent a player from being able to stop the rotating reels on the icon of his choosing. SLED Agent Godfrey did not dispute Snyder's testimony that the games contain no quality that would prevent a player from being able to play the game skillfully.

In determining the two games to be games of skill, Magistrate Davis applied the more stringent "dominant factor test." Both parties agreed that the elements of the

dominant factor test are set forth in Justice Burnett's dissent in *Johnson v. Collins Entertainment Co., Inc.*, 333 S.C. 96, 508 S.E. 2d 575 (1998) (Burnett, J., dissent): "if through the exercise of skill or judgment a participant can determine the outcome, the scheme is not [a game of chance.]" *Id.* At 584. Magistrate Davis also cited a prior Attorney General's opinion in which the Attorney General declared that "the exercise of skill includes manual dexterity, eye-hand coordination, reflexes, muscular control, concentration, judgment, practice, adroitness, intellectual abilities, deductive analysis, alertness, and mental superiority." See, e.g., A.G. Opinion dated August 28, 2002 (2002 S.C. A.G. Lexis 137). Magistrate Davis found that the two games satisfied the dominant factor test and stated "It has been proven to this Court that the two Chess Challenge II games are games of skill because a skillful player can select a specific icon and, to the exercise of skill, stop each individually rotating reel to obtain the desired result."

Magistrate Davis also found the seizure of the games to have been without probable cause. Magistrate Davis received the testimony of Investigator Robbie Crane in support of Appellant's seizure. Investigator Crane testified that he did not play either game or observe others engaged in play. Investigator Crane further testified that he had no knowledge of the *Allendale* case involving two other Chess Challenge II games and acknowledged having no experience in distinguishing between lawful games of skill and illegal games of chance. Investigator Crane testified that he would have proceeded differently had he been aware of the *Allendale* case.

In *Allendale*, the Supreme Court affirmed Magistrate Love and Judge Buckner's findings that two other Chess Challenge II games were lawful games of skill. Respondent's expert Snyder testified that the games before Magistrate Davis operated in

an identical manner to those seized in the *Allendale* case. Magistrate Davis received no testimony that the games before him had been manipulated or changed in any manner to distinguish them from the Chess Challenge II games deemed lawful by the Supreme Court, Judge Buckner, and Magistrate Love.

On May 22, 2009, Magistrate Davis heard Appellant's motion to alter or amend judgment. Appellant contended that the Court misapplied the legal standard established to determine the legality of the two Chess Challenge II games and maintained that even if the games are games of skill, they are still illegal. In denying Appellant's motion, Magistrate Davis referenced an advisory opinion dated May 5, 2003 in which the Attorney General "*summarized the basic law in determining whether a video game is legal or illegal under South Carolina law.*" According to the Attorney General, "*a game of skill is one in which the element of skill is predominant over the element of chance*" and cited Judge Burnett dissent in *Johnson v. Collins Entertainment Co., Inc.*, 333 S.C. 96, 508 S.E. 2d 575 (1998). Magistrate Davis properly applied the "dominant factor test", the legal standard promoted by the Attorney General and set forth in Justice Burnett's dissent in reaching his conclusion.

Appellant also contended that even if the two games satisfied the dominant factor test, they are illegal because they are vending machines and have a free play feature. Magistrate Davis rejected this contention and noted that amusement games such as Chess Challenge II are not "vending machines" as they do not vend products to consumers. Magistrate Davis also found that the Chess Challenge II games are not "*used for gambling*" and thus, do not violate S.C. Code Ann. § 12-21-2710.

In its appeal, Appellant restates its trial and post-trial arguments. Having heard the arguments of counsel, reviewed Magistrate Davis' Orders, and the memorandum of the parties, the Court affirms Magistrate Davis' findings and specifically affirms Magistrate Davis' finding that the two games before him are lawful games of skill which comply with South Carolina law including S.C. Code Ann. § 12-21-2710.

This Court has also relied upon the opinion recently issued by the Court of Appeals in *South Carolina Law Enforcement Division v. 1-Speedmaster S/N 00218 Opinion No.: 4834* (Ct. of Appeals, 2011) (hereinafter "*Speedmaster*") which provides additional support for Magistrate Davis' findings. In *Speedmaster*, the Court considered a Circuit Court Order affirming a Magistrate's determination that a *Speedmaster* game was a game of skill as contemplated by S.C. Code Ann. § 12-21-2710. In *Speedmaster*, the Court addressed the issues presently before the Court and also recognized the "*dominant factor test*" applied by Magistrate Davis as the legal standard in determining whether a game constitutes a legal game of skill as opposed to an illegal game of chance. As in the present case, the Magistrate had observed successful game play. In *Speedmaster*, the Court noted that the evidence showed a good player can win every game and affirmed the Magistrate's determination that the *Speedmaster* game was a game of skill.

The Court of Appeals also addressed the "*used for gambling*" argument raised in this appeal. In *Speedmaster*, the court rejected Appellant's "*used for gambling*" argument and found it contemplates two parties betting or wagering on a game. As in *Speedmaster*, the record reflects that no such wagering was involved in the games' seizure.

This Court affirms Magistrate Davis' rejection of Appellant's contention that the games are illegal despite being games of skill because they are vending machines with a free play feature. Magistrate Davis correctly found amusement devices to be distinguishable from vending machines and noted that a successful player of Chess Challenge II uses winnings for prizes or merchandise. The Attorney General has opined that awarding merchandise or prizes to successful players of games of skill does not violate South Carolina law. This Court concurs with the findings of the Attorney General and Magistrate Davis.

In light of the above, the rulings in the Allendale case, and the recently issued *Speedmaster* decision, Magistrate Davis' Orders are hereby affirmed.

IT IS SO ORDERED, this 13 day of Oct, 2011.

Date: 10-13-11

W/B
DeAndrea G. Benjamin, Circuit Court Judge
Fifth Judicial Circuit



ALAN WILSON
ATTORNEY GENERAL

October 27, 2011

The Honorable Jeanette W. McBride
P.O. Box 2766
1701 Main St., Room 205
Columbia, SC 29202

Re: **Richland County Sheriff v. Nizar Awde**
2010-CP-40-7546

Dear Ms. McBride:

Enclosed for filing are the original and one copy of **Notice Of Motion and Motion To Alter Or Amend Judgment Pursuant To Rule 59(E), SCRCP**. Please return the clocked-in-copy to me in the envelope provided.

By copy of this letter to all counsel of record, I am hereby serving them with a copy of same. Thank you for your assistance in this matter.

Sincerely,

David Spencer
Senior Assistant Attorney General

DS/nb
Enclosures

cc: The Honorable DeAndrea G. Benjamin (1 copy enclosed)
Jonathan S. Gasser, Esquire (1 copy enclosed)
Jonathan S. Altman, Esquire (1 copy enclosed)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Richland County Sheriff

☒ Plaintiff

v.

Nizar Awde

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2010-CP-40-7546

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
David Spencer, Bar No. 68571
Address:
P.O. Box 11549
Columbia, SC 29211
phone: (803) 734-3737 fax: (803) 734-4113
e-mail: other:

Defendant's Attorney:
Jonathan S. Altman, Esquire
Jonathan S. Gasser, Esquire, Bar No. 68571
Address:
phone: fax:
e-mail: other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: 30m Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

October 27, 2011

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☒ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

RICHLAND COUNTY SHERIFF,

Appellant,

-vs-

NIZAR AWSE

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2010-CP-40-7546

NOTICE OF MOTION AND
MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO
RULE 59(E), SCRPC

JEANETTE
G.S.
McBRIDE

2011 OCT 31 AM 11:50

RICHLAND COUNTY
FILED

Appellant respectfully moves for this Court to alter or amend its judgment by order dated October 13, 2011 pursuant to Rule 59(e), SCRPC. This Order was signed October 13, 2011 and mailed on October 17, 2011. Appellant received this letter on October 20, 2011. Appellant, in making this argument, reserves all its previous arguments presented on appeal, and incorporates all previous arguments.

Appellant moves to alter or amend the judgment on the following grounds:

(1) The order relies on a Court of Appeals' opinion that has been withdrawn. South Carolina Law Enforcement Division v. One Speedmaster S/N 00218, 2011 WL 2139081 (S.C. Ct. App., filed May 25, 2011) withdrawn and substituted by South Carolina Law Enforcement Division v. One Speedmaster S/N 00218, 2011 WL 4550184 (S.C. Ct. App., refiled Sept. 27, 2011). Specifically, the analysis, that the "used for gambling" definition was two players waging on a game, was excluded from the substituted opinion.

Accordingly, this Court should alter its opinion and find that the machines are illegal because they are licensed pursuant to section 12-21-2720 and used for gambling. In the instant case, use of

the “stop all button” allows a player to win or lose based purely on chance as admitted by Respondent’s expert, Mr. Snyder. Accordingly, a consumer plays a game of chance with consideration and opportunity for prize, meeting all three elements of gambling discussed in the Speedmaster opinion. Further, the machine is licensed pursuant to S.C. Code §12-21-2720. Accordingly, Chess Challenge II games are illegal because of their design specifically for gambling. Respondents have been unable to ever explain the stop all button’s existence on a so-called game of skill, and have resorted to making irrelevant blind-fold analogies or blaming consumers who would utilize the button.

This Court should reverse because the machine is designed for gambling and violates that particular provision of S.C. Code §12-21-2710.

(2) This Court should amend its judgment and find that the game is an illegal vending game pursuant to S.C. Code §12-21-2710. In Harvie v. Heise, 150 S.C. 277, 148 S.E. 66 (1929), the machine found illegal dispensed a mint and between 2 to 20 tokens. In the instant case, the Chess Challenge II machine dispenses a variable number of red tickets based on degree of success in playing the machines.

This Court’s order, in finding the machine was not a vending machine, overlooks that the machine dispenses red tickets. In contrast to this Court’s analysis; in Moore v. Greenville Restaurants, 287 S.C. 295, 337 S.E.2d (1985), the Court of Appeals found that video game machines fell withing the “all other vending type machines. . . .” provision of a revenue sharing contract between a lessor and lessee. Id.

Under §12-21-2710 a person may not keep or operate “any vending or slot machine”, “but the provisions of this section do not extend to . . . vending machines which are constructed as to give

a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.” In the instant case, the machines offer a variable return of red tickets, which alone makes the machines illegal.

Further, this portion of the statute requires “no element of chance” and clearly, chance plays a role in several aspects of play on this machine as admitted by Respondent’s own expert. See Tr. pp. 58-60 (testifying that in fifth field of play, the “grid”, the player has a one in four chance of attaining a particular row, even though the player might be able to use skill in selecting the optimal column); pp. 61-62 (play in the vault is random); pp. 80-81 (testifying vault play is probably luck); pp. 68-69 (agreeing there is no exercise of skill utilizing the “stop-all” button to play). Accordingly, this Court should alter or amend its judgment and find that the machines are illegal vending machines.

(3) This Court should alter or amend its findings that the Chess Challenge II machines are not illegal because they have a free play feature. This Court’s order refers, with approval, to Magistrate Davis’s finding that a video game with a free-play feature is illegal only if it is used for gambling. However, the statute does not provide such a requirement.

This Court also appears to rely on Speedmaster for this assessment, although in Speedmaster, the Court of Appeals did not review the free play provision. Further, as discussed above, this Court relied on the withdrawn version of Speedmaster to support its determination that Appellants needed to show that the machine was used for gambling.

This Court’s Order also misapprehends the Attorney General’s Opinions on this subject. For instance, the free-play feature clause is discussed in length in the Attorney General Opinion letter dated April 29, 2005 to then Major Mark A. Keel. 2005 WL 1024601 (S.C. A.G.). The opinion,

consistent with arguments presented on behalf of the Sheriff in this case, asserts as follows: “Certain devices, such as slot machines, **video games with a free play feature operated by a slot**, punch boards and pull boards **are expressly outlawed by statute.**” (Emphasis added).

This Court notes Magistrate Davis’s reliance on a May 5, 2003 opinion from the Office of the Attorney General. Magistrate Davis misinterprets the opinion as claiming that a machine is illegal under section 12-21-2710 only if it is a game of chance. In fact, the opinion notes other provisions of the statute that make devices illegal: “While the statute **specifically focuses upon the prohibition of machines such as ‘slot machines’ and punch boards,**’ it also bans any ‘other device pertaining to games of chance of whatever name or kind’” *Id.* (emphasis added). The opinion was focused on the narrow issue of the definition of a “game of chance.” Ironically, the opinion noted “the potential [for] misapplication of opinions rendered”. *Id.* Suffice to say, the plain language of the statute indicate that a machine may be illegal under numerous other provisions than the “other device pertaining to games of chance” provision. *See* § 12-21-2710.

Under § 12-21-2710, it is unlawful to possess “**any video game machine with a free-play feature operated by a slot in which is deposited a coin or thing of value**”. (Emphasis added).¹ The record establishes that the machines have a free-play feature and therefore the plain language of the statute applies and makes the two Chess Challenge II games illegal. Therefore, this Court should amend its judgment and find the games illegal because they have a free-play feature.

(4) This Court should alter or amend its judgment finding that the Chess Challenge II machines were games of skill. In the instant case, it is clear from the record that Respondent’s

¹ When a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. *State v. Gaines*, 380 S.C. 23, 667 S.E.2d 728 (2008).

expert, Mr. Snyder attained his success from video tape analysis unavailable to the consumer. He claimed he gained his "skill" from learning "trigger points". Mr Snyder further testified as follows:

Q: How do you play the game [inaudible] how do you put strategy [inaudible]?

A: Well, when you start it, I look for kings. Kings, when I see a king, that's my starting point, and I say, "That's one of the ten kings. I know what follows it," or "It isn't one of the ten kings that I know"

Court: How do you know there's ten kings?

A: Through videotape analysis.

Court: Oh. But a regular person stepping up to the machine doesn't know that.

A: He would not know that.

Tr. p. 26, lines 8-19; see also Tr. p. 79 (testifying need for videotape analysis to determine that there was a fixed 255 icon sequence).

So the record establishes that Mr. Snyder's success was artificial success from video tape analysis. This differentiates the instant case from Speedmaster.

Further, assuming Mr. Snyder achieved "skill" in the four fields of play with rotating icons, chance predominated other fields of play as clearly indicated by Mr. Snyder's testimony. Chance determines the outcome in the fifth field – where lights flash across a seven icon by four icon grid – as admitted by the Defendant's expert witness, Mr. Snyder. He also admitted random play to be eligible to play "the Vault" which he admitted being unfamiliar with. Tr. pp. 58-62. The optimum desired result, of obtaining five identical icons (such as five kings) ², is ultimately determined by

² Mr. Snyder testified that a player would get bonus points for five kings, his recollection was a hundred points. Tr. p. 61, lines 6-13.

chance, despite a player's exercise of skill. Further, scoring in the bonus play resulting from a match of five icons is based on chance, not skill.³

Finally, the "stop-all" button allows success without the use of any skill. This alone makes the game illegal. Testimony and argument was presented to the Magistrate concerning the "stop all button" which allows play to stop in all fields with the push of one button. Despite being Respondent's machine, Respondent was unable to explain this button's existence in what Respondent alleges to be a game of skill. Mr. Snyder testified that no skill is used in playing the machine using the stop all-button and that a player could win playing the games in this fashion. Tr. pp. 68-69. **Because of the design of the machine**, the player may play a game of chance by choosing to use the stop-all button, regardless of the supposed intentions of its owners. Chance predominates over the utter lack of skill where no effort needs to be exercised to win. See State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 188-189, 525 S.E.2d 872, 879 (2000) (Supreme Court reaffirms Squires v. SLED, 249 S.C. 609, 155 S.E.2d 859 (1967), which held that subparts of illegal machines were contraband per se, noting "the plain language of the statute makes clear the legislature's intent to outlaw mere possession of such machines The Circuit Court correctly ruled possession of these machines is illegal, regardless of their intended use or operation.").

Therefore, the machines play games of chance and are illegal. Alexander v. Hunnicutt, 196 S.C. 364, 13 S.E.2d 630 (1941) (finding under the predecessor statute that a pin table game that did

³ A North Carolina Court of Appeals case summarizes the predominate factor test pointedly: "A game of chance is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance." Collins Coin Music Co. v. North Carolina Alcoholic Beverage Control Comm'n, 451 S.E.2d 306 (N.C. Ct. App. 1994) (emphasis added, internal quotations omitted).

not have a payout mechanism or award free plays was still illegal noting: “if we may assume that no free games are awarded and that the only element of chance as to the score which may be made and indicated as the affidavits state, the machine comes directly within the terms of the criminal statute”). Accordingly, this Court should amend its judgment and find that the Chess Challenge II games are illegal because they play games of chance.

(5) This Court should amend the judgment affirming Magistrate Davis’s findings concerning whether probable cause existed to seize the machines. Whether the Sheriff’s Office seized the machines without probable cause is irrelevant to the determination of the legality of the machines because the exclusionary rule does not apply in the context of a post-seizure hearing.

In 192 Coin Operated Machines, the Supreme Court addressed an allegation that machines were found subject to an illegal search. The Court found the search legal, but went further, noting: “Finally, even if the searches were illegal – and we conclude they were not – appellant has no remedy.” Id., 338 S.C. at 195, 525 S.E.2d at 882. Noting that machines in violation of S.C. Code § 12-21-2710 are contraband *per se* as opposed to derivative contraband, the Supreme Court concluded: “Furthermore, because the machines are contraband *per se*, the State certainly cannot return them to appellant, which is presumably the remedy sought.” Id., 338 S.C. at 196, 525 S.E.2d at 882 (internal quotations omitted).

Accordingly, the machines cannot be returned on the basis of whether the Sheriff had developed probable cause to seize the machines. This Court should alter its judgment to exclude all such analysis of the issue which contradicts the plain language of 192 Coin-Operated Video Game Machines.

(6) The order misapplies Allendale County Sheriff’s Office v. Two Chess Challenge II, 361

S.C. 581, 606 S.E.2d 471 (2004) and suggests that Appellant was required to show that the machines were "altered" from the machines referenced in the Allendale opinion. Allendale stands for the polar opposite of this analysis. Allendale holds that each machine must be viewed independently and analyzed on the basis of its operation and not the operation of machines not before the Magistrate. In this regard, the judgment should be amended.

CONCLUSION

For the foregoing reasons, Appellant would request that the judgment be altered or amended to reflect that the machines are illegal and should be destroyed. In the alternative, Petitioner would request that these issues be addressed in the order.

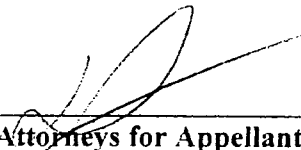
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DAVID SPENCER
Senior Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211

By: 

Attorneys for Appellants

October 27, 2011

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

RICHLAND COUNTY SHERIFF

Applicant,

v.

NIZAR AWSE,

Respondent.

RICHLAND COUNTY
FILED
2011 OCT 31 AM 11:50
JEANELLE W. McBRIDE
C.C.P. & G.S.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Notice of Motion and Motion to Alter or Amend Judgment Pursuant to Rule 59(E), SCRPC has been served upon the following persons by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

The Honorable DeAndrea G. Benjamin
P.O. Box 192
Columbia, SC 29202

Johnny S. Gasser, Esquire
1529 Laurel St.
Columbia, SC 29201

Jonathan S. Altman, Esquire
P.O. Box 600
Charleston, SC 29402

This 27th day of October, 2011.


NORMA BIGBEE
FOR RESPONDENT

5
DS

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2010-CP-40-7546

Richland County Sheriff

Nizar Arde

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☒ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☒ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

Motion to alter or amend is denied

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge H/B

Judge Code 2161

Date 11-22-11

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 2009 day of NOV., 20 11 to attorneys of record or to parties (when appearing pro se) as follows:

David A. Spencer
ATTORNEY(S) FOR THE PLAINTIFF(S)

Jonathan S. Gasser
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

**David A Spencer
S C Attorney General Office
P.O . Box 11549
Columbia, SC 29211**

STATE OF SOUTH CAROLINA	)	
COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
RICHLAND COUNTY SHERIFF,	)	
	)	2010-CP-40-7546
Appellant,	)	
	)	APPELLANT'S MEMORANDUM
	)	FOR ORAL ARGUMENT
-vs-	)	
	)	
NIZAR AWSE	)	
	)	
Respondent.	)	

Appellant would respectfully request this Court to consider this memorandum in conjunction with the arguments Appellant will present to the Court for oral argument. This memorandum is intended to serve as an outline of Appellant's arguments and Appellant will gladly brief the matters more fully if requested by this Court.

PROCEDURAL HISTORY

This matter was heard in the Richland County Magistrate's Court before the Honorable Magistrate Michael R. Davis and concerns the legality of two machines termed Chess Challenge II machines under S.C. Code § 12-21-2710 and seized in accordance with S.C. Code § 12-21-2712. The machines were initially brought to Magistrate Davis, who issued an Order of Destruction, pursuant to State v. 192 Coin Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000). Following the hearing, Magistrate Davis issued an order finding the machines were not illegal under S.C. Code § 12-21-2710 on March 3, 2009. Appellant moved to alter or amend the judgment. A hearing on Appellant's motion was heard and Appellant's motion was denied by written order dated June 19, 2009. Appellant timely appealed the order after receiving written

notification of the written order by e-mail from opposing counsel dated July 7, 2009.

(1) The two machines are illegal pursuant to § 12-21-2710 because they are illegal vending machines.

The Magistrate erred in determining that the machines were not vending machines. Under § 12-21-2710, in relevant part, a person may not keep or operate "any vending or slot machine", "but the provisions of this section do not extend to . . . vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance." This provision remains in tack from the 1922 code provision analyzed in Harvie v. Heise, 150 S.C. 277, 148 S.E. 66 (1929). In that case the machine at issue vended a single mint and between 2 to 20 tokens, which Harvie alleged had no trade value and the Sheriff contended were traded for merchandise. The South Carolina Supreme Court noted as follows:

From a reading of this section it is seen that, in order to escape the condemnation of the statute (1), the vending machine must give a certain uniform and fair return in value for each coin deposited therein, and (2) there must be no element of chance in the operation of the machine.

Id. at 67. The Court found chance in the operation of the machine and that the machine did not give a certain uniform return for each coin deposited. Id. at 69 ("we are satisfied that the checks or tokens have some monetary or trade value, and, in view of the fact that they are released by the machine at irregular intervals and in uncertain numbers, the element of chance is always present and there is no certain and uniform return in value for the coin deposited in the machine. In these respects, the operation or possession of the machine clearly violates the statute in question.").

In the instant case, the machine dispenses red tickets instead of tokens, which seemed to be at a minimum, redeemable for merchandise, and like the machine in Heise, the number of tickets

dispensed is variable based on success in playing the games on the machine. Further, this portion of the statute requires "no element of chance" and clearly, chance plays a role in several aspects of play on this machine as admitted by Respondent's own expert. Accordingly, the Magistrate's findings that the machine is not a prohibited vending machine is in error.

(2) The two machines are illegal pursuant to § 12-21-2710 because they have a free-play feature in violation of the statute.

The statute also prohibits "any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value". The clause is an independent clause, and not modified by any other language in the statute. Agent Brad Godfrey's testimony proved the machines have a free-play feature. Tr. pp. 148-150. Contrary to Respondent's assertions and the Magistrate's rulings, section 12-21-2710 does not require Appellant show anything more in order to establish that the two machines are illegal, accordingly, the Magistrate's findings are in error.

(3) The magistrate erred in finding that the games were a game of skill on the grounds that Respondent's expert played the game successfully.

Note S.C. Code Ann. § 18-7-170 provides that on appeal from Magistrate's Court, the Circuit Court may make its own findings of fact. See Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2004). The Magistrate's findings that the games played were games of skill is in error and this Court should find otherwise. The Magistrate was impressed by Mr. Snyder's degree of success as is evident from the March 3, 2009 order and concluded: "as demonstrated and testified to by Mr. Snyder, it is possible for a player to skillfully play this game and achieve the desired result."

However, what the Magistrate overlooked was Mr. Snyder's admission of specialized

knowledge unavailable to the actual consumer playing the machine. The game has five principle fields of play. Four of those fields involves a series of icons revolving at 3.8 icons a second in each of the four fields. The sequence of icons is a portion of a fixed 255 icon sequence. The player is able to push a button to stop play in each of four fields of play. However, if a player does not stop play, the machine will automatically do so in thirty seconds, so a player will be able to view, at most, approximately 114 icons (30 x 3.8). Further, the machine randomly starts play in any portion of the fixed sequence. See Tr. pp. 52-55.

Mr. Snyder testified that he learned "trigger points" to be able to successfully attain the King icons. On direct examination, Mr. Snyder testified as follows:

Q: How do you play the game [inaudible] how do you put strategy [inaudible]?

A: Well, when you start it, I look for kings. Kings, when I see a king, that's my starting point, and I say, "That's one of the ten kings. I know what follows it," or "It isn't one of the ten kings that I know"

Court: How do you know there's ten kings?

A: through videotape analysis.

Court: Oh. But a regular person stepping up to the machine doesn't know that.

A: He would not know that.

Tr. p. 26, lines 8-19.

Respondent attempted to rebuild this testimony by referring to testing with trial subjects, specifically four individuals who played the machine, but in their instructions, they were advised about the workings of the machine and strategy that is not made available to the consumer. So the

four subjects likewise had inside knowledge of the machine unavailable to a consumer. Tr. pp. 55-58.

In this case, the skill Mr. Snyder was able to display was derived by particularized knowledge of the inner workings of the machine unavailable to the consumer. Even his test subjects had to be advised of how the machine worked and the strategy necessary for them to "improve play". Video tape analysis is not available to the consumer, so for the consumer, it is a game of chance. Accordingly, the Magistrate erred in finding the display of skill and this Court should find otherwise in light of Mr. Snyder's admission.

(4) The magistrate erred in finding that the machines were games of skill under the predominant factor test.

The Magistrate in its order adopted the dominant factor test in determining whether a machine is a game of skill or chance, however, the Magistrate erred in its application. Appellant agreed that the dominant factor test is likely the test that would be followed by the Supreme Court, but noted several times its disagreement with how Respondent sought to apply the test. Justice Burnett's dissent in Johnson v. Collins Co., 333 S.C. 96, 508 S.E.2d 575 (1998)¹ is informative in constructing the standard the Supreme Court would likely adopt.

The full text of the paragraph from which the sentence is taken is as follows:

Instead, I would hold, where the dominant factor in a participant's success or failure in a particular scheme is beyond his control, the scheme is a lottery, even though the participant exercises some degree of skill or judgment. If a participant's skill does not govern the result of the game, the scheme contains the requisite chance

¹ At issue was whether various machines playing a variety of games, violated the Constitutional prohibition of lotteries rather than determining violations of S.C. Code § 12-21-2710.

necessary to constitute a lottery. On the other hand, if through the exercise of skill or judgment a participant can determine the outcome, the scheme is not a lottery. My opinion is supported by the majority of jurisdictions which have considered this question. Only three jurisdictions adopt the pure chance doctrine.

Collins, at 333 S.C. 113, 508 S.E.2d at 584.

Further, Justice Burnett later concluded: "In my opinion, skill should be defined in terms of the ability to obtain the desired outcome – a certain card – rather than the ability of one play to play more judiciously than another. As noted by the certification order, a video poker player is unable to control the random selection of cards, in spite of his skill, knowledge, or experience." Id. at 333 S.C. 119, 508 S.E.2d at 587.

In the instant case, assuming a player could obtain the desired result in four fields of play (the four fields where the icons spin), chance determines the outcome in the fifth field – where lights flash across a seven icon by four icon grid – as admitted by the Defendant's expert witness, Mr. Snyder. He also admitted random play to be eligible to play "the Vault" which he admitted being unfamiliar with. Tr. pp. 58-62. The optimum desired result, of obtaining five identical icons (such as five kings), is ultimately determined by chance, despite a player's exercise of skill. Further, scoring in the bonus play resulting from a match of five icons is based on chance, not skill. Therefore, the video game is a game of chance, not skill. Alexander v. Hunnicutt, 196 S.C. 364, 13 S.E.2d 630 (1941) (finding under the predecessor statute that a pin table game that did not have a payout mechanism or award free plays was still illegal noting: "if we may assume that no free games are awarded and that the only element of chance as to the score which may be made and indicated as the affidavits state, the machine comes directly within the terms of the criminal statute").

(5) The Magistrate erred in finding the machines were games of skill where pure chance could achieve a successful outcome.

Testimony and argument was presented to the Magistrate concerning the "stop all button" which allows play to stop in all fields with the push of one button. Despite being their machine, the Respondents were unable to explain this button's existence in what they allege to be a game of skill. Mr. Snyder testified that no skill is used in playing the machine using the stop all-button and that a player could win playing the games in this fashion. Tr. pp. 68-69. Besides being demonstrative of the true intent that the machine be utilized for gambling, the stop-all button allows players to win without exercising any skill. Indeed that a player can win without exerting any skill shows the true colors of this machine as a gambling machine. Chance predominates over the utter lack of skill where no effort needs to be exercised to win. See Johnson, supra. Accordingly, the Magistrate erred in finding that the machines did not play games of chance.

(6) The machines are licensed pursuant to Section 12-21-2720 and used for gambling.

At the hearing, Appellant established that the Department of Revenue issued licenses for both machines. Further, it was established that consideration, money, was inserted into the machine and that successful play resulting in the reward of red tickets likely redeemable for merchandise or other prizes. Assuming "skill" elsewhere, the stop-all button, as admitted by Mr. Snyder, allowed successful play based solely on chance. Thus the three elements of gambling are present. See Johnson, supra. Since the machine is licensed and readily capable in its design to be used for gambling, it is illegal. Accordingly, the Magistrate erred in not finding the machines illegal.

(7) Illegal machines pursuant to S.C. Code § 12-21-2710 are contra band *per se* and may not be returned to the owner even if allegedly seized without probable cause.

The Magistrate found the Sheriff did not have probable cause to seize the machines. To the extent the Magistrate's order requires the Sheriff to return the machines on this ground, the Magistrate erred. For the reasons stated above, Petitioner would argue that the machines are illegal under S.C. Code § 12-21-2710, and therefore are contraband *per se*. Under State v. 192 Coin Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), the exclusionary rule explicitly does not apply to illegal machines due to their status as contraband *per se*. Therefore, if these machines violate S.C. Code § 12-21-2710, as Petitioner continues to maintain, then the failure of probable cause does not implicate the remedy of returning the machines.

In 192 Coin Operated Machines, the Supreme Court addressed an allegation that machines were found subject to an illegal search. The Court found the search legal, but went further, noting: "Finally, even if the searches were illegal – and we conclude they were not – appellant has no remedy." Id., 338 S.C. at 195, 525 S.E.2d at 882. Noting that machines in violation of S.C. Code § 12-21-2710 are contraband *per se* as opposed to derivative contraband, the Supreme Court concluded: "Furthermore, because the machines are contraband *per se*, the State certainly cannot return them to appellant, which is presumably the remedy sought." Id., 338 S.C. at 196, 525 S.E.2d at 882 (internal quotations omitted).

Because the machines are contraband *per se* pursuant to section 12-21-2710, they constitute contraband *per se* and should not be returned regardless of whether the Sheriff's Department had probable cause at the time of seizure.

CONCLUSION

For the foregoing reasons, Appellant requests this Court to reverse the Magistrate's Order and find the machines illegal under S.C. Code §12-21-2710.

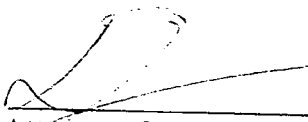
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DAVID SPENCER
Senior Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211

By: 

Attorneys for Appellants

August 31, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO.: 2010-CP-40-07546
Richland County Sheriff's Dept.,	)	
	)	
Appellant,	)	
	)	
v.	)	RESPONDENT'S MEMORANDUM OF LAW
	)	
Nizar Awde,	)	
	)	
Respondent.	)	
	)	

Respondent Nizar Awde (hereinafter "Respondent"), respectfully submits this Memorandum of Law relative to Appellant Richland County Sheriff's Department's (hereinafter "Appellant") appeal of Magistrate Michael Davis' orders (attached hereto as Exhibits "A" and "B") finding two Chess Challenge II games to be lawful games of skill pursuant to S.C. Code Ann. § 12-21-2710 and also finding Appellant's seizure of these games to have been without probable cause.

BACKGROUND

The Chess Challenge II games that are the subject of this appeal were seized by Appellant's agents from a business operating at 5901 North Main Street in Columbia, South Carolina. A trial and post seizure hearing was held on February 6, 2009 to determine whether the games violated S.C. Code Ann. § 12-21-2710. During the daylong trial, Magistrate Davis examined each game separately and heard the testimony of lay and expert witnesses, as well as arguments of counsel. Magistrate Davis concluded as a matter of law that the two Chess Challenge II games were legal games of skill and that Appellant, although acting in good faith, lacked probable cause to seize the games.

Appellant filed a motion to alter/amend judgment in which it contended that Magistrate Davis erred in finding that the two Chess Challenge II games to be games of skill. Appellant also maintained that the games are illegal because they are vending machines with a free play feature. Respondent's Memorandum in Opposition to Defendant's Motion to Alter or Amend Judgment Pursuant to Rule 59(E), SCRCP is attached hereto as Exhibit "C."

In his Order of June 19, 2010, Magistrate Davis denied Appellant's motion and rejected it's contention that the games are illegal despite being games of skill because they are vending machines with a free play feature. Magistrate Davis noted that S.C. Code Ann. § 12-21-2710 prohibits vending or slot machines and video games with a free play feature which are "*used for gambling.*" Having determined the subject games to be games of skill, Magistrate Davis found that they do not constitute gambling devices and ,thus, do not violate South Carolina law.

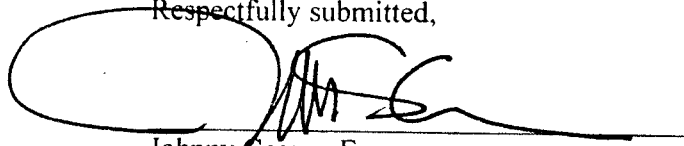
In May 2011, the Court of Appeals issued an opinion in *South Carolina Law Enforcement Division v. 1-Speedmaster S/N 00218 Opinion No.: 4834 (Ct. of Appeals, 2011)* (hereinafter "*Speedmaster*"). A copy of this opinion is attached hereto as Exhibit "D". In *Speedmaster*, the Court considered a Circuit Court order affirming a Magistrate's determination that a *Speedmaster* game was a game of skill as contemplated by S.C. Code Ann. § 12-21-2710. In *Speedmaster*, the Court addressed the same issues presently before the Court, including (1) Appellant's contention that a game constituted an illegal game of chance; (2) Appellant's contention that the game violated S.C. Code Ann. § 12-21-2710 because it contained a free play feature; and (3) Appellant's contention that the

Magistrate erred in finding that S.C. Code Ann. § 12-21-2710 required that a game must be used for gambling to be illegal.

In *Speedmaster*, the Court rejected these arguments and affirmed the Magistrate and the Circuit Court's determination that the game was a lawful game of skill under S.C. Code Ann. § 12-21-2710. The Court also found that once a device has been determined to be a game of skill under the dominant factor test, such a game does not violate South Carolina law.

The Court of Appeals' opinion in *Speedmaster* is consistent with Magistrate Davis' findings in the present case. Accordingly, Respondent respectfully requests that the Court issue an Order affirming the findings of Magistrate Davis.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'JG', written over a horizontal line.

Johnny Gasser, Esq.
Harris & Gasser
1529 Laurel Street
Columbia, SC 29201

Date: September 1, 2011

Jonathan S. Altman, Esq.
Derfner, Altman & Wilborn, LLC
575 King Street, Suite B (29403)
P.O. Box 600
Charleston, SC 29402

Attorneys for Respondent

EXHIBIT A

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Richland County Sheriff's
Department,)

Plaintiff,)

v.)

Nizar Awde,)

Defendant.)

IN THE MAGISTRATE'S COURT

CIVIL CASE NO.: 2009-CV-401060002

ORDER

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The trial of this matter was heard on February 6, 2009 in accordance with S.C. Code Ann. § 12-21-2712 to determine whether two Chess Challenge II games violated S.C. Code Ann. § 12-21-2710 or any other law of this state. The defendant was represented by Jonathan S. Gasser, Esq. and Jonathan S. Altman, Esq. The plaintiff was represented by Assistant Attorney General, David A. Spencer, Esq.

Two Chess Challenge II games were seized from a business operating at 5901 North Main Street. Prior to the hearing of this case, the parties agreed that the procedure to determine the legality of the games is set forth in Allendale County Sheriff's Office v. Two Chess Challenge II, games of skill, 361 S.C. 581; 606 S.E. 2d 471; (2004) and State of South Carolina v. 192 Coin-Operative Video Game Machines, 338 S.C. 176; 525 S.E. 2d 872; (2000). As the Supreme Court made clear in these cases, this Court is the proper judicial forum to determine the legality of these games in accordance with S.C. Code Ann. § 12-21-2712.

At the trial of this case, the Court examined each game separately. Based on the testimony of lay and expert witnesses, arguments of counsel, review of the evidence and examination of the operation and play of the two Chess Challenge II games, I hereby make

factual findings and conclude as a matter of law that these two Chess Challenge II games are legal games of skill and that the plaintiff, although acting in good faith, lacked probable cause to seize the games.

FINDINGS OF FACT

Separate examination of each game, as well as the testimony of Robert Snyder, the expert for the defendant, and SLED Agent Brad Godfrey, the expert for the plaintiff, confirmed that the two games operate in an identical manner. On the screen of each, four rotating wheels spin through a series of seven icons in a fixed sequence for a duration of thirty seconds. A player's goal is to stop each reel on matching icons and matching three of the four reels is considered a win. A player is able to stop each reel individually by pushing the corresponding button and employing hand/eye coordination and dexterity. Experts for both parties testified that the games' icon sequence is fixed.

This Court observed defendant's expert play the game. Mr. Snyder has an impressive resume, which includes a lengthy tenure in law enforcement. He was qualified as an expert on gaming devices without objection. Mr. Snyder demonstrated through actual play that the games could be played skillfully. He was able to stop the rotating icons with a high degree of certainty on the icon of his choosing and testified that he uses learnable techniques to play successfully. Based on the observation of the games actually being played, the Court concluded that the two games are indeed games of skill as a matter of law as a player is able to determine the outcome of play by application of skill.

For its part, plaintiff offered SLED agent Bradley Godfrey. Agent Godfrey testified that the icon sequence was fixed and that the speed of rotation was constant. Agent Godfrey did not dispute Mr. Snyder's testimony that the games contain no picture substitution, morphing or other

quality that would prevent a player from being able to stop the rotating wheels on the icon of his choosing. Agent Godfrey testified that he believed that the Chess Challenge II games were games of chance. The Court did not find his position to be availing on the ultimate issue(s). As demonstrated and testified to by Mr. Snyder, it is possible for a player to skillfully play this game and achieve the desired result. I find that a player, through observation and experience, can learn some or all of the icons sequence within the pattern and develop a strategy for successful play.

CONCLUSIONS OF LAW

While games of skill are lawful in South Carolina, S.C. Code Ann. § 12-21-2710, 16-19-40, and 61-4-580(3) declare games of chance to be illegal (with certain exceptions). The Office of the Attorney General has opined that awarding merchandise or prizes to successful players of games of skill is in accordance with South Carolina law. The central legal issue before this Court was whether the two Chess Challenge II games seized by plaintiff are games of chance or games of skill.

There are two possible tests that this Court could have applied to determine whether the games were games of skill or chance. The more liberal standard is known as the "pure chance doctrine" and the more stringent standard is known as the "dominant factor test." While it is an unsettled question in South Carolina as to which doctrine applies, the distinction is largely academic as these two games satisfy the more stringent, dominant factor test. At trial, both parties agreed that the elements of the dominant factor test are found in the dissent of *Johnson v. Collins Entertainment Co., Inc.*, 333 SC 96; 508 SE2d 575(1998)(Burnett, J., dissent): "if through the exercise of skill or judgment a participant can determine the outcome, the scheme is

not [a game of chance.]" *Id.* At 584.¹ According to the Attorney General's office, the exercise of skill includes manual dexterity, eye-hand coordination, reflexes, muscular control, concentration, judgment, practice, adroitness, intellectual abilities, deductive analysis, alertness, and mental superiority. *See, e.g.*, A.G. Opinion dated August 28, 2002 (2002 S.C. A.G. Lexis 137).

For the reasons set forth in the Findings of Fact, these two Chess Challenge II games satisfy the "dominant factor" test. As the dissent in *Johnson* states "skill should be defined in terms of the ability to obtain the desired outcome B a certain icon . . ." It has been proven to this Court that the two Chess Challenge II games are games of skill because a skillful player can select a specific icon and, through the exercise of skill, stop each individually rotating reel and obtain the desired result.

NO PROBABLE CAUSE

As an additional ground for its Order, this Court also finds that the seizure of the games was improper and without probable cause. The Court received the testimony of Investigator Robbie Crane in support of the seizure. Investigator Crane testified that he did not play either game or observe others engaged in play. Investigator Crane further testified that he had no knowledge of the Allendale case and no experience in distinguishing between lawful games of skill and illegal games of chance. Upon seeing the games, he contacted an agent with SLED who advised Investigator Crane that he believed them to be gambling devices without conduct any examination of their operation. Investigator Crane acknowledged that he would have

¹ In *Johnson*, the machine at issue was a Cherry Master (an illegal game where the outcome is determined by a random number generator). Cherry Masters have been deemed illegal games of chance in *South Carolina v. One Coin-Operated Video Game Machine*, 321 S.C. 176, 467 S.E.2d 443 (1996); *South Carolina v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995).

proceeded differently had he been aware of the Allendale case. It is well settled that the legality of each machine must be determined on an individual basis. Only Investigator Crane was involved with the physical seizure of these games.

In the Allendale case, the Supreme Court affirmed a magistrate's finding that two Chess Challenge II games were lawful games of skill. In doing so, the Court stated "because video machines may be manipulated so as to change their nature from lawful to unlawful, law enforcement may, based on probable cause, seize the machines in question once again." Mr. Snyder testified that the games before this Court were identical to those seized in the Allendale case. Agent Godfrey testified that he knew of no difference between the icon sequence in the Allendale Chess Challenge II games and the games before the Court. This Court received no testimony that the two Chess Challenge II games before it had been manipulated or changed to distinguish them from the games deemed lawful in the Allendale case. In addition, the defendant presented two experts as to police procedure, David Byrd and Philip Grimsley, who both testified that the plaintiff lacked probable cause in seizing the two games. In light of the above, this Court finds that although acting in good faith, the plaintiff was without sufficient knowledge of the functioning of these games to have formed any reasonable basis for conducting this seizure. This Court further finds that although Investigator Crane acted in good faith, probable cause did not exist for the seizure of these games.

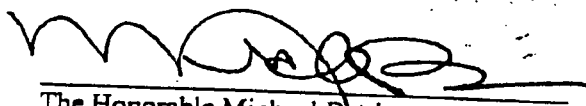
Lastly, Mr. Spencer argued that despite this Court's findings that the two games are games of skill, they are violative of S.C. law as vending machines which contain a free play feature. The Court does not concur with Mr. Spencer's contention. S.C. Code Ann. § 12-21-2710 sets forth criteria for determining games of chance, which are illegal under S.C. law. The two games before the Court are not games of chance and thus not prohibited. In its opinion of

August 28, 2002 (2002 S.C. A.G. Lexis 137), the Attorney General opined that "a violation of the state's gambling laws occurs when the elements of consideration, prize and chance are present. If one of those elements are removed, the gambling laws do not appear to be implicated." The Attorney General also stated "the payment of an entry fee and the awarding of prizes for a game of skill does not violate the states lottery laws." In light of the above, the Supreme Court's ruling in the Allendale case and this Court's findings and interpretation of the statute, Mr. Spencer's argument is rejected.

THEREFORE, it is hereby ORDERED and DECLARED THAT:

- (a) The two Chess Challenge II games are games of skill that are lawful to possess, own and operate under South Carolina law as redemption machines distributing prizes, including gift certificates, and merchandise;
- (b) The seizure of these Chess Challenge II machines was unlawful and without probable cause.

Date: MARCH 3, 2009


The Honorable Michael Davis,
Magistrate Richland County

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EXHIBIT B

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

Richland County Sheriff's)
Department,)
Plaintiff,)

vs.)

Nizar Awde,)
Defendant.)

IN THE MAGISTRATE'S COURT
CIVIL CASE NO.: 2009-CV-401060002

ORDER

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This matter came before me on Friday, May 22, 2009 on Plaintiff's Notice of Motion and Motion to Alter Amend Judgment pursuant to Rule 59(e), SCRCPP. Plaintiff was represented by Assistant Attorney General David A. Spencer, Esq. The Defendant was represented by Jonathan S. Gasser, Esq. and Jonathan S. Altman, Esq.

The trial of this matter was heard on February 6, 2009. In addition to hearing arguments of counsel, the Court received the testimony of experts for both parties and observed the subject games being played. The Court ultimately determined that the two Chess Challenge II games at issue are games of skill that are lawful to possess, own and operate under South Carolina law as redemption machines distributing prizes, including gift certificates, and merchandise. The seizure of these games was unlawful and without probable cause.

In its motion, Plaintiff contends that the Court misapplied the legal standard established to determine the legality of such games. Plaintiff also contends that the Court overlooked points of law and maintains that even if the two games are games of skill,

they are still illegal. Having again heard arguments of counsel on these issues, which were raised at the trial of this case, Plaintiff's motion is denied.

Plaintiff acknowledges that the Court applied the correct legal standard, the dominant factor test, in determining the two Chess Challenge II games to be games of skill. Applying this standard, the Court concluded "that a skillful player can select a specific icon and through the exercise of skill, stop each individually rotating reel and obtain the desired result. In doing so, the Court correctly applied the dominant factor test in reaching this conclusion.

The law governing legality of video machines has been addressed in detail in a number of Attorney General opinions, including an opinion issued May 5, 2003. The legal standard applied by the Court is identical to the legal standard endorsed by the Attorney General. The dominant factor test was also utilized in *Allendale County Sheriff's Office v. Chess Challenge II, games of skill*, 361 S.C. 581, 606 S.E. 2d 471, 2004. In *Allendale*, three courts, Magistrate's Court, Circuit Court and Supreme Court found that the two other Chess Challenge II machines were legal to operate as games of skill. In sum, the two Chess Challenge II games at issue in this case do not function like games of chance. Thus a player is able to affect the outcome of play, which is neither random, nor predetermined. Having reviewed Plaintiff's filings and heard the arguments of Plaintiff's counsel, the Court finds that it correctly applied South Carolina Code Ann. § 12-21-2710 in this case. South Carolina Code Ann. § 12-21-2710 prohibits certain specific illegal gambling devices and all games pertaining to games of chance.

Plaintiff contends that even if the two games satisfy the dominant factor test, they are illegal because they are vending machines and have a free play feature. This Court

rejects Plaintiff's contention that the games are illegal despite being games of skill. South Carolina Code Ann. § 12-21-2710 prohibits certain games including vending or slot machines and video games with a free play feature which are used for gambling. As the subject games satisfy the dominant factor test and are games of skill, they are not used for gambling. In addition, Chess Challenge II is not a vending machine. Vending machines provide snacks, beverages or other products to consumers. Chess Challenge II is an amusement game of skill and thus not a vending machine. In addition, a successful player of Chess Challenge II uses his winnings for prizes or merchandise. The Attorney General has opined that awarding merchandise or awarding prizes to successful players of games of skill is in accordance with South Carolina law. This Court concurs with the opinion of the Attorney General.

For the reasons set forth herein, Plaintiff's Motion to Alter or Amend Judgment pursuant to Rule 59(e) SCRPC is denied.

Date: June 19, 2009


The Honorable Michael Davis,
Magistrate Richland County

EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE MAGISTRATE'S COURT
	)	
COUNTY OF RICHLAND	)	CIVIL CASE NO.: 2009-CV-401060002
	)	
Richland County Sheriff's	)	
Department,	)	
	)	
Petitioner,	)	
	)	
v.	)	MEMORANDUM IN OPPOSITION TO
	)	PETITIONER'S MOTION TO ALTER OR
Nizar Awde,	)	AMEND JUDGMENT PURSUANT TO
	)	RULE 59(E), SCRPC
Defendant.	)	
	)	

This memorandum is respectfully submitted in opposition to Petitioner's Motion to Alter/Amend Judgment pursuant to Rule 59 (e), SCRPC.

In its Motion, Petitioner asserts that the Court misapplied the legal standard established to determine the legality of games as set forth in *Allendale County Sheriff's Office v. Two Chess Challenge II, games of skill*, 361 S.C. 581; 606 S.E. 2d 471(2004) and *Johnson v. Collins Entertainment Company, Inc.*, 333 S.C. 96, 508 S.E. 2d 575 (1998) in finding the two Chess Challenge II games before it to be games of skill. Petitioner also contends that the Court overlooked points of law. Both submissions are without merit.

I. The Court correctly applied the dominant factor test.

Petitioner acknowledges that the Court applied the correct legal standard, the dominant factor test, in determining the two Chess Challenge II games to be games of skill. Petitioner also acknowledges that the elements of the dominant factor test are set forth in Justice Burnett's dissent in *Collins*, in which Justice Burnett concluded that "if for the exercise of skill or judgment a participant can determine the outcome, the scheme

is not a game of chance" *Collins* at 333 S.C. 113, 508 S.E. 2d at 584. In addition to referring to the standard set forth by Justice Burnett, the Court also cited the Attorney General who had defined the "exercise of skill" to include "manual dexterity, eye-hand coordination, reflexes, muscular control, concentration, judgment, practice, adroitness, intellectual abilities, deductive analysis, alertness and mental superiority." *See, e.g.,* A.G. Opinion dated August 28, 2002 (2002 S.C. A.G. Lexis 137). Applying this standard, the Court concluded that "the two Chess Challenge II games are games of skill because a skillful player can select a specific icon and, through the exercise of skill, stop each individually rotating reel and obtain the desired result." The Court correctly applied the dominant factor test in reaching this conclusion.

The law governing the legality of video machines was addressed in detail by the Attorney General in an opinion issued May 5, 2003. A copy of this opinion is attached hereto and includes a section entitled "Law Governing Legality of Video Machines," in which the Attorney General states "while the statute (S.C. Code Ann. § 12-21-2710) specifically focuses upon the prohibition of specific machines such as "slot machines" and "punch boards," it also bans any "other device pertaining to games of chance of whatever name or kind." In this opinion the Attorney General advises how a Court should determine whether a game is one of chance or skill and summarizes the law to be applied in this type of case. In sum, all devices and machines pertaining to games of chance are illegal, while games that satisfy the dominant factor test are games of skill and thus legal.

The legal standard endorsed by the Attorney General is identical to the test applied by the Court. The dominant factor test was also utilized in *Allendale*, in which

three Courts (Magistrate Court, Circuit Court and Supreme Court) found that two other Chess Challenge II machines were legal to operate as games of skill. In *Allendale*, the two games had been seized and taken before Magistrate Love. In a lengthy order, Magistrate Love found that the games were not illegal because chance did not predominate over skill in their play. The Supreme Court held that Magistrate Love, who was affirmed by Circuit Court Judge Buckner, provided ample evidence to support his ruling that the machines were games of skill. As in this case, Magistrate Love had before him expert reports and observed the Chess Challenge II games being played.

Robert J. Snyder, Respondent's expert in this case, issued the reports considered by the Courts in *Allendale*. The record in *Allendale*, as in this case, reflect that a player, through practice and the application of skill, can win the game. In both cases, Mr. Synder testified that the Chess Challenge II games examined do not possess random number generators or employ the deceptive technique of picture substitution. Petitioner's expert, SLED Agent Brad Godfrey, did not dispute this conclusion. The Chess Challenge II games do not function like games of chance as a player is able to affect the outcome of play, which is neither random nor predetermined.

In its motion, Petitioner concedes that a skillful player can obtain the desired result in four fields of play but claims that chance determines the outcome of the fifth field. Petitioner maintains that since one of the five fields may be determined by chance, the Chess Challenge II games are games of chance. Petitioner is incorrect in its assertion and conclusion. The optimal result in Chess Challenge II is to match four of a particular type of icon. Matching three of a kind is considered a win. Thus, even under Petitioner's

standard, a skillful Chess Challenge II player can achieve the optimal result one hundred percent (100%) of the time.

Petitioner also maintains that because a player may choose (for unknown reasons) to play the game unskillfully, that such intentional disregard would somehow transform the games' skillful and legal nature. Gambling devices have been consistently defined as machines in which the exercise of skill through eye-hand coordination, judgment, practice, intellectual abilities, etc. does not impact the outcome of play. While Petitioner concedes that such qualities affect the outcome of Chess Challenge II, it maintains that because a player can choose to play unskillfully, the games are illegal. Petitioner's position defies common sense and is without merit.

II. The Court properly found that Petitioner lacked probable cause to seize the games.

The Court properly found that Petitioner, although acting in good faith, was without sufficient knowledge of the functioning of the games to have formed any reasonable basis for seizing them. While Petitioner does not dispute the Court's conclusion that Petitioner lacked the probable cause to effectuate these seizures, it maintains that the games should not be returned because they violate South Carolina law. As the games are legal games of skill, the Court correctly ordered their return.

III. The Court correctly applied S.C. Code Ann. § 12-21-2710.

Following the Court's ruling, Petitioner sought the reconsideration of its order and maintained that although the games may satisfy the dominant factor test they remain violative of S.C. Ann. § 12-21-2710. The Court properly rejected this argument. Petitioner has reasserted this contention and maintains that the games, although of

“predominant skill”, are illegal because they are 1) vending machines or 2) are video games with a free play feature. Both assertions are incorrect. S.C. Ann. § 12-21-2710 prohibits certain specific devices and games pertaining to games of chance. It declares that games involved with the playing of poker, blackjack, kenô, lotto, bingo or craps as illegal per se along with devices such as punch boards or pull boards. The critical consideration in determining whether a game is prohibited by S.C. Ann. § 12-21-2710 is whether the game at issue is one of skill or chance. The trial of this case was solely devoted to this determination. The application of the dominant factor test has been the central issue in this class of cases.

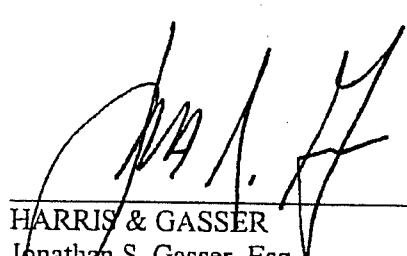
Petitioner now contends that that games are illegal despite being games of skill. Contrary to Petitioner’s assertion, Chess Challenge II is not a vending machine. A vending machine provides snacks, beverages or other products to consumers and vends such products without a cashier. In *Anonymous Taxpayer, Petitioner, v. South Carolina Department of Revenue, Respondent*, 2001 SC Tax Lexis 29, (2001) Judge Matthews defined a “vending machine” as a “coin-operated machine for vending merchandise.” As amusement games of skill, Chess Challenge II is not a vending machine.

A successful player of Chess Challenge II redeems his winnings for prizes or merchandise. The goal of play is not to accumulate “free plays” and such a feature is not present on Chess Challenge II. In its Order, the Court correctly noted that the Attorney General has opined that awarding merchandise or prizes to successful players of games of skill was in accordance with South Carolina law. When considering Petitioner’s argument following the trial, the Court asked Petitioner’s counsel as to whether such a finding would result in a determination that virtually all amusement devices available for

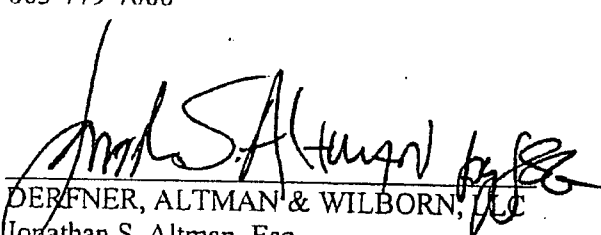
play in South Carolina would be rendered illegal. Petitioner's counsel acknowledged the practical affect of such a finding. For the reasons set forth herein, Petitioner is incorrect. Chess Challenge II is a lawful game of skill that does not violate S.C. Code Ann. § 12-21-2710.

For the foregoing reasons, Respondent respectfully requests that Petitioner's Motion to Alter/Amend Judgment Pursuant to Rule 59(e) SCRPC be denied.

Date: 4/14/09



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EXHIBIT D

**South Carolina Law Enforcement Division,
Appellant,**

V.

1-Speedmaster S/N 00218, Respondent.

Appeal From Cherokee County
J. Derham Cole, Circuit Court Judge

Opinion No. 4834
Heard September 15, 2010 – Filed May 25, 2011

AFFIRMED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General T. Stephen Lynch, Assistant Attorney General Mary Francis Jowers, and Assistant Attorney General Geoffrey K. Chambers, all of Columbia, for Appellant.

Wade S. Weatherford, of Gaffney, for Respondent.

KONDUROS, J.: The South Carolina Law Enforcement Division (SLED) appeals the circuit court's affirmance of the magistrate's order finding a Speedmaster machine confiscated from a convenience store was not an illegal gaming device pursuant to section 12-21-2710 of the South Carolina Code (2000). We affirm.

FACTS

The Speedmaster machine that is the subject of this action was seized by SLED agents from the Cherokee Food Mart on February 13, 2007, for being an illegal gaming device. SLED took the Speedmaster to Cherokee County's chief magistrate, who issued an Order

of Destruction/Notice of Post-Seizure Hearing. The magistrate conducted a post-seizure hearing and concluded the Speedmaster was not an illegal gaming device as contemplated by section 12-21-2710 of the South Carolina Code. He held SLED failed to produce evidence the Speedmaster was used in gambling endeavors or that the game constituted a game of skill as opposed to a game of chance. SLED filed a motion to alter or amend the judgment, which was denied. The circuit court affirmed the magistrate's order, determining the order was legally and factually correct. This appeal followed.

STANDARD OF REVIEW

"When there is any evidence, however slight, tending to prove the issues involved, [the appellate court] may not question a magistrate court's findings of fact that were approved by a circuit court on appeal." Allendale Cnty. Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 585, 606 S.E.2d 471, 473 (2004).

LAW/ANALYSIS

I. Free Play Feature

In its first issue on appeal, SLED urges us to adopt an interpretation of section 12-21-2710 of the South Carolina Code (2000) that would make any machine with a free play feature illegal. This issue is not preserved for our review. SLED raised this issue at the hearing before the magistrate, but the magistrate failed to address this argument in its final order. SLED raised the issue again in its motion to alter or amend the judgment, which was summarily denied. The filing of the motion to alter or amend with the magistrate preserved the issue for review by the circuit court. See Pye v. Estate of Fox, 369 S.C. 555, 565-66, 633 S.E.2d 505, 510-11 (2006) (holding an issue is preserved for appellate review, even if it is not ruled upon, provided it was raised at trial and raised to the court in a post-trial motion). However, the circuit court's order does not specifically address the free play feature argument. It confirms the magistrate's final order, finding the order was "legally and factually correct." However, as previously stated, the magistrate's order failed to address the free play feature argument. No motion to alter or amend the circuit court's order is contained in the record on appeal, and therefore we have no ruling from the circuit court as to this issue. Consequently, the issue is not properly preserved for our review. See Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 22 n.11, 698 S.E.2d 612, 623 n. 11 (2010) ("[T]he circuit court has the authority to hear motions to alter or amend when it sits in an appellate capacity and such motions are required to preserve issues for appeal where the circuit court fails to rule on an issue."); see also City of Rock Hill v. Suchenski, 374 S.C. 12, 16, 646 S.E.2d 879, 880 (2007) (interpreting United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 107, 413 S.E.2d 866, 869 (Ct. App. 1992) (the "circuit court sitting on appeal did not address an issue and Wal-Mart made no motion pursuant to Rule 59(e), SCRCP[,] to have the court rule on the issue; thus, the allegation was not preserved for further review by the Court of Appeals.").

II. Game of Skill or Game of Chance

SLED also contends the magistrate erred in finding the game on the Speedmaster constituted a game of skill as opposed to a game of chance. We disagree.

SLED advocates adoption of the "dominant factor test," which is discussed at some length

in Johnson v. Collins Entertainment Co., 333 S.C. 96, 508 S.E.2d 575 (1998). There, the court was asked to determine whether video poker machines, legal at the time, constituted lotteries as prohibited by the South Carolina Constitution. Id. at 98, 508 S.E.2d at 577. The dissent opined South Carolina should apply the dominant factor test in determining whether something was a lottery involving chance. Id. at 113, 508 S.E.2d at 584 (Burnett, J. dissenting). The dominant factor test provides when "the dominant factor in a participant's success or failure in a particular scheme is beyond his control, the scheme is a lottery, even though the participant exercises some degree of skill or judgment." Id. "If a participant's skill does not govern the result of the game, the scheme contains the requisite chance necessary to constitute a lottery." Id.

In contrast, under the "pure chance doctrine," founded in British law, "any skill, however minimal, is sufficient to remove a scheme from the definition of lottery." Id. Neither test has been judicially adopted in South Carolina.^[1] However, based on our standard of review, we need not adopt a test. In this case, under either standard, at least slight evidence tended to prove the game at issue was one of skill. See Allendale Cnty. Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 585, 606 S.E.2d 471, 473 (2004) (holding this court will not disturb the magistrate's findings of fact affirmed by the circuit court if any evidence supports them).

Jay Blair was a technician who worked on the Speedmaster. According to the record, at the hearing before the magistrate, he played several games and won them all. Then, the magistrate requested he play more. Blair won fifteen out of sixteen games with the one loss being due to player error. Even a player adept at playing a game will not always win if an element of the game is beyond his or her control. Such is the case with card games in which a good player cannot win every hand simply because the cards they are given are determined by chance. Here, the evidence showed a good player could win every game. Therefore, based on our standard of review, we affirm the circuit court's affirmation of the magistrate's determination that the only game on the Speedmaster was a game of skill.

III. Used for Gambling/Evidence of Gambling

In its next argument, SLED maintains the magistrate erred in finding the statute contained a requirement that a machine must be used for gambling to be illegal. SLED further contends if the statute contained such a requirement, the magistrate erred in finding it presented no evidence of gambling. We disagree.

The question presented combines two standards of review. The interpretation of a statute is a question of law for the court and may be decided with no particular deference to the circuit court. Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Regarding questions of fact, as previously stated, if "there is any evidence, however slight, tending to prove the issues involved, [the appellate court] may not question a magistrate court's findings of fact that were approved by a circuit court on appeal." Two Chess Challenge II, 361 S.C. at 585, 606 S.E.2d at 473.

Section 12-21-2710 provides:

It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which

is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different picture, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

(emphasis added).

SLED is correct that the statute contains no specific "used for gambling" requirement for machines hosting the specifically enumerated games (poker, blackjack, keno, lotto, bingo, or craps) or for punch boards, pull boards, and other games of chance.^[2] However, machines licensed pursuant to section 12-21-1720 of the South Carolina Code (2000), if "used for gambling," constitute illegal gaming devices. The devices listed in section 12-21-2720(A) include:

(1) a machine for the playing of music or kiddy rides operated by a slot or mechanical amusement devices and juke boxes in which is deposited a coin or thing of value. . . .

(2) a machine for the playing of amusements or video games, without free play feature, or machines of the crane type operated by a slot in which is deposited a coin or thing of value and a machine for the playing of games or amusements, which has a free play feature, operated by a slot in which is deposited a coin or thing of value, and the machine is of the nonpayout pin table type with levers or "flippers" operated by the player by which the course of the balls may be altered or changed. . . .

(3) a machine of the nonpayout type, or in-line pin game, operated by a slot in which is deposited a coin or thing of value except machines of the nonpayout pin table type with levers or "flippers" operated by the player by which the course of the balls may be altered or changed.

The Speedmaster, according to the plain language of the statute, does not fall within categories one or two. However, it does appear to fall within the third category as a "machine of the nonpayout type . . . operated by a slot in which is deposited a coin or thing of value." If so, the Speedmaster is prohibited by section 12-21-2710 if it is "used for gambling."

The phrase "used for gambling" is not defined in the statute. However, in the recent case of Ward v. West Oil Co., this court cited with approval the following definition: "[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of chance, no matter how small the intrinsic value." 387 S.C. 268, 278, 692 S.E.2d

516, 522 (2010) (quoting C.J.S. Gaming § 10 (Supp. 2010)) (emphasis added). The Ward opinion also provided: "The three elements of gambling – consideration, chance and reward – are thus clearly present in a device which, for a price, and based upon chance, offers a monetary or merchandise reward to the successful player." Id. (quoting State v. 158 Gaming Devices, 499 A.2d 940, 951 (Md. 1985)) (emphasis added).

Additionally, gambling and gaming are defined in the treatise South Carolina Jurisprudence. "As legal terms, 'gaming' and 'gambling' are the same and involve either fraud, or cheating or chance applied in a situation of agreement between two or more persons in which, in accordance with certain rules, the parties play a game or contest, or await the outcome of some event that will determine one or more winners or losers." 7 S.C. Jur. Gaming § 3 (1991) (citing Am. Jur. 2d Gaming § 10 (1967)) (emphasis added). Gambling is also defined in section 3-11-100(2) of the South Carolina Code (Supp. 2010) governing gambling cruises. "'Gambling' or gambling device' means any game of chance and includes, but is not limited to, slot machines, punchboards, video poker or blackjack machines, ke[eno], roulette, craps, or any other gaming table type gambling or poker, blackjack, or any other card gambling game." Id. (emphasis added).

The common thread in all these definitions is the element of chance. As previously discussed, we affirm the magistrate's ruling that the Speedmaster was not a game of chance. However, consideration of this issue reveals an apparent contradiction in the statute. Devices licensed pursuant to section 12-21-2720 are largely what would be considered games of skill, not chance; for example, a traditional pinball machine game or arcade game. If so, under the aforementioned definitions of gambling, such a device could never be "used for gambling," although section 12-21-2710 obviously contemplates that it could. The seeming contradiction can be reconciled, however, if we apply the definition of gambling previously cited from South Carolina Jurisprudence. That definition contemplates two parties betting or wagering on a game.^[3] The record reveals no evidence of parties wagering on the Speedmaster game. Therefore, we conclude the circuit court properly affirmed the magistrate's ruling the Speedmaster was not "used for gambling" under the statute.

IV. Lost Post-Seizure Hearing Tapes

Finally, SLED contends if the arguments set forth above are not persuasive, it is entitled to a new post-seizure hearing because the tapes of the original proceeding were lost. We disagree.

SLED's argument on this point is not preserved for our review. SLED began its argument before the circuit court by seeking a new trial based on the lost tapes. The circuit court then inquired of SLED if the record of the post-seizure hearing might be reconstructed. SLED did show some apprehension at this point, but moved forward by going through a list of evidentiary items it considered important that were not reflected in the magistrate's order or return. Speedmaster and SLED were in agreement with respect to most items with the exception of what denominations of currency the machine would accept. SLED stated, "I mean, in terms of the currency, we think that - I mean, I don't want to stop the whole thing just for that. So I can go - I'll be glad to go forward on the merits." Because SLED proceeded with its case and did not reserve any objection regarding which currency the Speedmaster would accept, the issue of lost post-seizure hearings should not be considered by this court. See In re Estate of Boynton, 355 S.C. 299, 305, 584 S.E.2d 154,

157 (Ct. App. 2003) (citing 4 C.J.S. Appeal & Error § 185 (1993)) ("A party who voluntarily acquiesces in or takes a position inconsistent with the right to appeal impliedly waives or is estopped to assert his right to appellate review.").

Based on all of the foregoing, the circuit court's affirmance of the magistrate's ruling is **AFFIRMED.**

WILLIAMS and PIEPER, JJ., concur.

[1] We are aware of a case currently under consideration by the South Carolina Supreme Court, Town of Mt. Pleasant v. Chimento (heard October 19, 2010), which may address this issue.

[2] Our determination of Issue II removes Speedmaster from the purview of "games of chance."

[3] When parties wager on a game of skill, the element of chance is injected back into the game. For example, if Player A bets Player B \$10 he can get a higher score in pinball, Player A has left to chance how Player B will perform. Even though Player A controls his own score, he does not control Player B's performance, and therefore, Player A does not control the outcome of the wager.



ALAN WILSON
ATTORNEY GENERAL

September 7, 2011

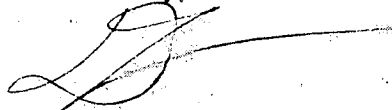
The Honorable DeAndrea G. Benjamin
Post Office Box 192
Columbia, SC 29202

Re: **Richland County Sheriff v. Nizar Awde**

Dear Ms. Benjamin:

Enclosed please find **Appellant's Reply To Respondent's Memorandum Of Law**. By copy of this letter we are serving opposing counsel with this Reply today.

Sincerely,



David Spencer
Senior Assistant Attorney General

DS/nb

Enclosures

cc: Jonathan S. Gasser, Esquire (1 copy enclosed)
Jonathan S. Altman, Esquire (1 copy enclosed)

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
RICHLAND COUNTY SHERIFF,	)	
	)	2010-CP-40-7546
Appellant.	)	
	)	APPELLANT'S REPLY
	)	TO RESPONDENT'S
-vs-	)	MEMORANDUM OF LAW
	)	
NIZAR AWDE	)	
	)	
Respondent.	)	
	)	

At Appellant's request, this Court allowed Appellant to make reply to Respondent's Memorandum of Law, provided to Appellant and Court simultaneously at oral argument. Appellant reserves all its former arguments. Further, it is Appellant's understanding that subsequent to submission of this Reply, both parties will be submitting proposed orders. In making specific reply to Respondent's Memorandum, Appellant would submit the following:

ARGUMENT

Respondent relies on the recent Court of Appeals decision of South Carolina Law Enforcement Division v. One Speedmaster S/N 00218, 2011 WL 2139081 (S.C. Ct. App., decided May 25, 2011). Appellant would note that the Office of the Attorney General filed a timely petition for rehearing that is still pending.

The Speedmaster opinion first addressed the issue raised on appeal that the Speedmaster machine was illegal because it had a free-play feature. However, the Court of Appeals declined to address the issue, opining that it was not preserved for review. In the instant case, Appellant has preserved the issue for review and is asking for a specific ruling from this Court on the issue. The

plain language of the statute prohibits video games with a free play feature, and despite claims from Respondent that the provision does not mean what it says, they have failed to show that the plain language of the provision should not apply. When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008). In the instant case, the machines are illegal for the free play feature alone.

The second issue in Speedmaster concerned whether the Magistrate erred in finding that the games were games of chance. In that case, a technician who worked on the Speedmaster machine was successful fifteen out of sixteen times in playing the Speedmaster game. The Court of Appeals found "based on our standard of review, we affirm the circuit court's affirmance of the magistrate's determination that the only game on the Speedmaster was a game of skill." Speedmaster.

In the instant case, Respondent's expert witness, Mr. Snyder, played the game with some success in Magistrate's court, but admitted to using videotape analysis and was aware that the game utilized a 255-icon fixed sequence. Accordingly, evidence is clear that Mr. Snyder learned to play the game through methods unavailable to the consumer. This distinguishes the instant case from the Speedmaster opinion.

Additionally, his testimony concerning a "study" with four individuals in California is not probative evidence of skill. As Mr. Snyder admitted subsequently on cross-examination, he gave extensive instructions to the subjects not available to the consumer. Further, the "test" is not relevant since it concerned machines not before the magistrate. See Allendale County Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004) (magistrate has no jurisdiction over machines not brought before it). Appellant maintains, as it always has, that Mr. Snyder's "success"

was artificial.

Further, Mr. Snyder has admitted the role of chance in several aspects of play, such as the fifth field of play, a four by seven icon grid, in which he admits that a player has, at best, a one in four chance of success.

Finally, Mr. Snyder admitted that chance controls play through the use of a single button (stop-all button) which stops play simultaneously in all five fields. Aside from suggesting that a player would be foolish for using that button, Respondents are unable to explain the button's existence on their machine. Appellant offers the reasonable inference that the button exists to speed up the pace of wagering so the consumer may gamble five times faster and the house make its returns five times faster.

The Court of Appeals lastly addressed the circuit court's finding the Speedmaster machines were not used for gambling. The Court of Appeals' opinion on this last ground is somewhat ambiguous. However, to the extent that it requires a showing that machines are only illegal if it is shown they are used for gambling, the Court of Appeals' opinion is clearly in contrast with Supreme Court case law on the subject. See e.g., 192 Coin-Operated Video Machines, 338 S.C. at 188-189, 525 S.E.2d 878-879 (finding possession of machines prohibited under §12-21-2710 are illegal regardless of their intended use or operation); State v. Appley, 207 S.C. 284, 288, 35 S.E.2d 835, 836 (1945) (possession of a prohibited machine is a violation in itself, separate from the crime of operation); Alexander v. Hunnicutt, 196 S.C. 364, 13 S.E.2d 630, 632 (1941) (game of chance illegal even if it did not have a free play feature and the only element of chance is to the score that may be made).

The Court of Appeals opined that since chance was not involved in playing the Speedmaster

machine, then the machine could not be used for gambling. In the instant case, because of the stop-all button, the game is readily available for use for gambling, since play with the stop-all button involves consideration, prize, and based on even Mr. Snyder's testimony, chance. Tr. p. 69. The machine is illegal because **its design** is specifically for gambling, due to, if for no other reason, the stop-all button. This differentiates the instant case markedly from Speedmaster.

CONCLUSION

For the foregoing reasons, Appellant requests this Court to reverse the Magistrate's Order and find the machines illegal under S.C. Code §12-21-2710.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DAVID SPENCER
Senior Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211

By: 

Attorneys for Appellant

September 7, 2011



ALAN WILSON
ATTORNEY GENERAL

October 7, 2011

The Honorable DeAndrea G. Benjamin
Post Office Box 192
Columbia, SC 29202

Re: **Richland County Sheriff v. Nizar Awde**

Dear Ms. Benjamin:

Enclosed please find **Appellant's proposed Order reversing the Magistrate's ruling**. Also, please find enclosed a copy of SLED v. Speedmaster, a case discussed at oral argument. Since the September 1 argument, the Court of Appeals has withdrawn its original opinion and substituted a new one. By copy of this letter we are serving opposing counsel with this proposed order.

Sincerely,

David Spencer
Senior Assistant Attorney General

Enclosures

cc: Jonathan S. Gasser, Esquire (1 copy enclosed)
Jonathan S. Aliman, Esquire (1 copy enclosed)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

RICHLAND COUNTY SHERIFF,

Appellant,

-vs-

NIZAR AWSE

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2010-CP-40-7546

ORDER

This matter is before this Court by way of an appeal from a Magistrate's Court ruling ordering the return of two video game machines known as Chess Challenge II machines. Oral argument on this matter was heard before this Court on September 1, 2011. Respondent, the machine owner, was represented by Jonathan S. Gasser, Esquire and Jonathan S. Altman, Esquire. The Sheriff's Office was represented by Senior Assistant Attorney General David Spencer. This Court had before it the Magistrate's Order, the Magistrate's Return with attached records from the Magistrate's Court proceedings, and the appellate pleadings of both parties. Provided with the return was a transcribed copy of the Magistrate Court's proceedings.

PROCEDURAL HISTORY

This matter was heard in the Richland County Magistrate's Court before the Honorable Magistrate Michael R. Davis and concerns the legality of two machines termed Chess Challenge II machines under S.C. Code § 12-21-2710 and seized in accordance with S.C. Code § 12-21-2712. The machines were initially brought to Magistrate Davis, who issued an Order of Destruction, pursuant to State v. 192 Coin Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872

(2000). Following the hearing, Magistrate Davis issued an order finding the machines were not illegal under S.C. Code § 12-21-2710 on March 3, 2009. Appellant moved to alter or amend the judgment. A hearing on Appellant's motion was heard and Appellant's motion was denied by written order dated June 19, 2009. Appellant timely appealed the order.

DISCUSSION

This Court notes the burden of proof in a post-seizure hearing is on the machine owner. Pursuant to S.C. Code § 12-21-2712, Magistrate Davis found probable cause to believe the machines were illegal and issued an order of destruction. "The most due process requires is a post-seizure opportunity for an innocent owner 'to come forward and show, if he can, why the *res* should not be forfeited and disposed of as provided for by law.'" State v. 192 Coin-Operated Video Games Machines, 338 S.C. 176, 197, 525 S.E.2d 872, 883 (2000). The Sheriff contends that Respondent did not meet their burden of proof at the post-seizure hearing and that the Magistrate made errors of law and fact.

S.C. Code Ann. § 18-7-170 provides that on appeal from Magistrate's Court, the Circuit Court may make its own findings of fact. See Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2004). "In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact." § 18-7-170. In reviewing this matter, this Court concludes that the Magistrate erred in finding the machines were not illegal under S.C. Code § 12-21-2710.

(1) The two machines are illegal pursuant to § 12-21-2710 because they are illegal vending machines.

This Court finds the Magistrate erred in determining that the machines were not vending

machines. Under § 12-21-2710, in relevant part, a person may not keep or operate “any vending or slot machine”, “but the provisions of this section do not extend to . . . vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.” This provision remains in tack from the 1922 code provision analyzed in Harvie v. Heise, 150 S.C. 277, 148 S.E. 66 (1929). In that case the machine at issue vended a single mint and between 2 to 20 tokens, which Harvie alleged had no trade value and the Sheriff contended were traded for merchandise. The South Carolina Supreme Court noted as follows:

From a reading of this section it is seen that, in order to escape the condemnation of the statue (1), the vending machine must give a certain uniform and fair return in value for each coin deposited therein, and (2) there must be no element of chance in the operation of the machine.

Id. at 67. The Court found chance in the operation of the machine and that the machine did not give a certain uniform return for each coin deposited. Id. at 69 (“we are satisfied that the checks or tokens have some monetary or trade value, and, in view of the fact that they are released by the machine at irregular intervals and in uncertain numbers, the element of chance is always present and there is no certain and uniform return in value for the coin deposited in the machine. In these respects, the operation or possession of the machine clearly violates the statute in question.”).

In the instant case, the machine dispenses red tickets instead of tokens, which at a minimum, are redeemable for merchandise, and like the machine in Heise, the number of tickets dispensed is variable based on success in playing the games on the machine. See also Moore v. Greenville Restaurants, Inc., 287 S.C. 295, 337 S.E.2d 892 (1985) (finding in interpreting a gross sales sharing clause of a lease that a video game machine was a “vending type machine” expressly exempted from

the sharing provision). Further, this portion of the statute requires “no element of chance” and clearly, chance plays a role in several aspects of play on this machine as admitted by Respondent’s own expert. See Tr. pp. 58-60 (testifying that in fifth field of play, the “grid”, the player has a one in four chance of attaining a particular row, even though the player might be able to use skill in selecting the optimal column); pp. 61-62 (play in the vault is random); pp. 80-81 (testifying vault play is probably luck); pp. 68-69 (agreeing there is no exercise of skill utilizing the “stop-all” button to play). Accordingly, the Magistrate’s findings that the machine is not a prohibited vending machine is in error.

(2) The two machines are illegal pursuant to § 12-21-2710 because they have a free-play feature in violation of the statute.

The statute also prohibits “any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value”. The clause is an independent clause, and not modified by any other language in the statute. When a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008). In the instant case, the machines are illegal for the free play feature alone based on the plain language of the statute.¹ Agent Brad Godfrey’s testimony proved the machines have a free-play feature. Tr. pp. 148-150. Mr. Snyder, disturbingly, did not know whether the machines had a free play feature although he described accumulating points won in the “score” column. Tr. pp. 63-65; pp. 68-70.

¹ The free-play feature clause is discussed in length in the Attorney General Opinion letter dated April 29, 2005 to then Major Mark A. Keel. 2005 WL 1024601 (S.C. A.G.). The opinion, consistent with arguments presented on behalf of the Sheriff in this case, asserts as follows: “Certain devices, such as slot machines, video games with a free play feature operated by a slot, punch boards and pull boards are expressly outlawed by statute.”

Further, Mr. Snyder described a knock-off feature and claimed the Chess Challenge II machines did not have a knock-off feature, but then admitted that the machine allowed the exchange of points won for red tickets, meeting even his own definition of a knock-off feature. Tr. pp. 64-66.

The Magistrate erred as a matter of law, finding that section 12-21-2710 only prohibits video games with a free-play feature if they are used for gambling. This Court finds that the ruling is in error as a matter of law.

Contrary to Respondent's assertions and the Magistrate's rulings, section 12-21-2710 does not require Appellant show anything more in order to establish that the two machines are illegal since they have a free-play feature. Accordingly, the Magistrate's findings are in error.² Respondent, at oral argument asserted that the recent Speedmaster opinion found that a machine must be used for gambling to be illegal under this clause. However, the Court of Opinions, since oral argument in the instant case, has withdrawn the original opinion and substituted an opinion that merely states that the circuit court's findings in that case were supported by evidence that the machine was a game of skill, and therefore, the Court of Appeals did not need to reach the portion of his order stating that the machines were not used for gambling since it was not a game of chance. South Carolina Law Enforcement Division v. One Speedmaster S/N 00218, 2011 WL 4550184 (S.C. Ct. App., refiled Sept. 27, 2011) *withdrawing* South Carolina Law Enforcement Division v. One Speedmaster S/N 00218, 2011 WL 2139081 (S.C. Ct. App., filed May 25, 2011). In the subsequent opinion, the Court of Appeals agreed with SLED that the statute does not specifically require a showing that an illegal

² The free play feature clause was asserted in the recent case of South Carolina Law Enforcement Division v. One Speedmaster S/N 00218, WL 4550184 (S.C. Ct. App., refiled Sept. 27, 2011), but was found to not be preserved for review. Respondent's assertion, in its Memorandum of Law submitted at oral argument, that Speedmaster addressed the free-play feature clause of section 12-21-2710 is erroneous.

gaming device be used for gambling. Speedmaster at 3.

At oral argument, Respondent failed to offer any argument that the plain language of the statute does not mean what it says, instead speculating that the legislature could not intend such a result because it would prohibit video games marketed to children such as those found in commercial establishments such as Chucky-Cheese restaurants. This Court will not speculate on the legality of machines not before it. The Chess Challenge II machines in the instant case are clearly machines within the scope of the letter and spirit of the free-play feature clause found in section 12-21-2710 since they have a free-play feature and additionally, a knock-off feature found in gambling related machines that are clearly intended to be prohibited by section 12-21-2710.

(3) The magistrate erred in finding that the games were a game of skill on the grounds that Respondent's expert played the game successfully.

Pursuant to § 18-7-170 this Court respectfully disagrees with the Magistrate's findings of fact in determining that the Chess Challenge II machines were games of skill. See Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2004). The Magistrate was impressed by Mr. Snyder's degree of success as is evident from the March 3, 2009 order and concluded: "as demonstrated and testified to by Mr. Snyder, it is possible for a player to skillfully play this game and achieve the desired result."

However, what the Magistrate overlooked was Mr. Snyder's admission of specialized knowledge unavailable to the actual consumer playing the machine. The game has five principle fields of play. Four of those fields involves a series of icons revolving at 3.8 icons a second in each of the four fields. The sequence of icons is a portion of a fixed 255 icon sequence. The player is able to push a button to stop play in each of four fields of play. However, if a player does not stop

play, the machine will automatically do so in thirty seconds, so a player will be able to view, at most, approximately 114 icons (30 x 3.8). Further, the machine randomly starts play in any portion of the fixed sequence. See Tr. pp. 52-55.

Mr. Snyder testified that he learned "trigger points" to be able to successfully attain the King icons. On direct examination, Mr. Snyder testified as follows:

Q: How do you play the game [inaudible] how do you put strategy [inaudible]?

A: Well, when you start it, I look for kings. Kings, when I see a king, that's my starting point, and I say, "That's one of the ten kings. I know what follows it," or "It isn't one of the ten kings that I know"

Court: How do you know there's ten kings?

A: Through videotape analysis.

Court: Oh. But a regular person stepping up to the machine doesn't know that.

A: He would not know that.

Tr. p. 26, lines 8-19; see also Tr. p. 79 (testifying need for videotape analysis to determine that there was a fixed 255 icon sequence).

Respondent attempted to rebuild this testimony by referring to testing with trial subjects, specifically four individuals who played the machine, but in their instructions, they were advised about the workings of the machine and strategy that is not made available to the consumer. So the four subjects likewise had inside knowledge of the machine unavailable to a consumer. Tr. pp. 55-58.

In this case, the skill Mr. Snyder was able to display was derived by particularized knowledge of the inner workings of the machine unavailable to the consumer. Even his test subjects had to be

advised of how the machine worked and the strategy necessary for them to “improve play”.³ Video tape analysis is not available to the consumer, so for the consumer, it is a game of chance.

Respondent relies on Speedmaster, arguing that Mr. Snyder displayed a similar degree of success as the expert in the Speedmaster case. However, in the instant case, it is clear Mr. Snyder utilized video analysis to help create his success, and the Speedmaster opinion is silent as to how the expert was able to learn successful play on the machine in that case. Further, the Court of Appeals was limited in its ability to review the Circuit Court’s affirmation of a Magistrate’s findings. This Court finds that it is appropriate to make its own determination of facts from the record.

Accordingly, the Magistrate erred in finding the display of skill and this Court finds that the game is a game of chance despite Mr. Snyder’s apparent successful play.

(4) The magistrate erred in finding that the machines were games of skill under the predominant factor test.

The Magistrate, in its order, adopted the dominant factor test in determining whether a machine is a game of skill or chance, however, the Magistrate erred in its application. Appellant agreed that the dominant factor test is likely the test that would be followed by the Supreme Court, but noted several times its disagreement with how Respondent sought to apply the test. Justice Burnett’s dissent in Johnson v. Collins Co., 333 S.C. 96, 508 S.E.2d 575 (1998)⁴ is informative in

³ In Johnson v. Collins, 333 S.C. 96, 508 S.E.2d 575 (1998), a case more fully discussed later in this order, Justice Burnett, in his dissent, disagreed that merely improving play indicates a game of skill: “In my opinion, skill should be defined in terms of the ability to obtain the desired outcome – a certain card – rather than the ability of one player to play more judiciously than another.” Id., 333 S.C. at 118-119, 508 S.E.2d at 587.

⁴ At issue was whether various machines playing a variety of games, violated the Constitutional prohibition of lotteries rather than determining violations of S.C. Code § 12-21-2710.

constructing the standard the Supreme Court would likely adopt.

The full text of the paragraph from which the sentence is taken is as follows:

Instead, I would hold, where the dominant factor in a participant's success or failure in a particular scheme is beyond his control, the scheme is a lottery, even though the participant exercises some degree of skill or judgment. If a participant's skill does not govern the result of the game, the scheme contains the requisite chance necessary to constitute a lottery. On the other hand, if through the exercise of skill or judgment a participant can determine the outcome, the scheme is not a lottery. My opinion is supported by the majority of jurisdictions which have considered this question. Only three jurisdictions adopt the pure chance doctrine.

Collins, at 333 S.C. 113, 508 S.E.2d at 584.

Further, Justice Burnett later concluded: "In my opinion, skill should be defined in terms of the ability to obtain the desired outcome – a certain card – rather than the ability of one play to play more judiciously than another. As noted by the certification order, a video poker player is unable to control the random selection of cards, in spite of his skill, knowledge, or experience." Id. at 333 S.C. 119, 508 S.E.2d at 587.

A North Carolina Court of Appeals case summarizes the issue pointedly: "A game of chance **is such a game as is determined entirely or in part by lot or mere luck**, and in which judgment, practice, skill or adroitness have honestly no office at all, **or are thwarted by chance.**" Collins Coin Music Co. v. North Carolina Alcoholic Beverage Control Comm'n, 451 S.E.2d 306 (N.C. Ct. App. 1994) (emphasis added, internal quotations omitted).

In the instant case, assuming a player could obtain the desired result in four fields of play (the four fields where the icons spin), chance determines the outcome in the fifth field – where lights flash across a seven icon by four icon grid – as admitted by the Defendant's expert witness, Mr.

Snyder. He also admitted random play to be eligible to play "the Vault" which he admitted being unfamiliar with. Tr. pp. 58-62. The optimum desired result, of obtaining five identical icons (such as five kings), is ultimately determined by chance, despite a player's exercise of skill.⁵ Further, scoring in the bonus play resulting from a match of five icons is based on chance, not skill. Therefore, the video game is a game of chance, not skill. Alexander v. Hunnicutt, 196 S.C. 364, 13 S.E.2d 630 (1941) (finding under the predecessor statute that a pin table game that did not have a payout mechanism or award free plays was still illegal noting: "if we may assume that no free games are awarded and that the only element of chance as to the score which may be made and indicated as the affidavits state, the machine comes directly within the terms of the criminal statute . . .").

(5) The Magistrate erred in finding the machines were games of skill where the machines contain a "stop-all" button allowing for play solely on chance and without any skill.

Testimony and argument was presented to the Magistrate concerning the "stop all button" which allows play to stop in all fields with the push of one button. Despite being Respondent's machine, Respondent was unable to explain this button's existence in what Respondent alleges to be a game of skill. Mr. Snyder testified that no skill is used in playing the machine using the stop all-button and that a player could win playing the games in this fashion. Tr. pp. 68-69.

Besides being demonstrative of the true intent that the machine be utilized for gambling, the stop-all button allows players to win without exercising any skill. Indeed that a player can win without exerting any skill shows the true colors of this machine as a gambling machine. This Court

⁵ Mr. Snyder testified that a player would get bonus points for five kings, his recollection was a hundred points. Tr. p. 61, lines 6-13.

agrees with Appellant that its existence is to allow a player to play and wager five times faster than if the player has to press a button to stop play for each of the five fields of play, and thus the stop-all button allows machine owners to obtain profit at a markedly faster rate. Respondent asserted a blind-fold analogy in an attempt to defend the function, but in the instant case, the machines are designed for this play, unlike where a player decides to use an extraneous impediment such as a blindfold.

This Court finds the machine is illegal because its design makes it a game of chance due to the inclusion of the "stop-all" button. State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 188-189, 525 S.E.2d 872, 879 (2000) (Supreme Court reaffirms Squires v. SLED, 249 S.C. 609, 155 S.E.2d 859 (1967), which held that subparts of illegal machines were contraband per se, noting "the plain language of the statute makes clear the legislature's intent to outlaw mere possession of such machines The Circuit Court correctly ruled possession of these machines is illegal, regardless of their intended use or operation.").

Chance predominates over the utter lack of skill where no effort needs to be exercised to win. See Johnson, *supra*. Accordingly, the Magistrate erred in finding that the machines did not play games of chance.

(6) The machines are licensed pursuant to Section 12-21-2720 and used for gambling.

At the hearing, Appellant established that the Department of Revenue issued licenses for both machines. Further, it was established that consideration, money, was inserted into the machine and that successful play resulting in the reward of red tickets likely redeemable for merchandise or other prizes. Assuming "skill" elsewhere, the stop-all button, as admitted by Mr. Snyder, allowed successful play based solely on chance. Tr. p. 69. Thus the three elements of gambling are present.

See Johnson, supra. Since the machine is licensed and readily capable in its design to be used for gambling, it is illegal. Accordingly, the Magistrate erred in not finding the machines illegal.

(7) Illegal machines pursuant to S.C. Code § 12-21-2710 are *contra band per se* and may not be returned to the owner even if allegedly seized without probable cause.

The Magistrate found the Sheriff did not have probable cause to seize the machines. To the extent the Magistrate's order requires the Sheriff to return the machines on this ground, this Court finds the ruling is in error. Having found that the Chess Challenge II machines in this case are illegal under S.C. Code § 12-21-2710, they are contraband *per se*. Under State v. 192 Coin Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), the exclusionary rule explicitly does not apply to illegal machines due to their status as contraband *per se*. Therefore, since these machines violate S.C. Code § 12-21-2710, then the failure of the deputy to have probable cause before seizing the machines does not implicate the remedy of returning the machines.

In 192 Coin Operated Machines, the Supreme Court addressed an allegation that machines were found subject to an illegal search. The Court found the search legal, but went further, noting: "Finally, even if the searches were illegal – and we conclude they were not – appellant has no remedy." Id., 338 S.C. at 195, 525 S.E.2d at 882. Noting that machines in violation of S.C. Code § 12-21-2710 are contraband *per se* as opposed to derivative contraband, the Supreme Court concluded: "Furthermore, because the machines are contraband *per se*, the State certainly cannot return them to appellant, which is presumably the remedy sought." Id., 338 S.C. at 196, 525 S.E.2d at 882 (internal quotations omitted).

Because the machines are contraband *per se* pursuant to section 12-21-2710, they constitute contraband *per se* and should not be returned regardless of whether the Sheriff's Department had

probable cause at the time of seizure.

Conclusion

For the foregoing reasons, it is the Order of the Court that the Magistrate' Order is reversed and the Mega Touch device is to be destroyed.

AND IT IS SO ORDERED this ____ day of ____ 2011.

DeAndrea Gist Benjamin
Presiding Judge
Fifth Judicial Circuit

_____, South Carolina

Westlaw.

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Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of South Carolina.
 SOUTH CAROLINA LAW ENFORCEMENT DIVISION, Appellant,
 v.

1- SPEEDMASTER S/N 00218, Respondent.

No. 4834.

Heard Sept. 15, 2010.

Decided May 25, 2011.

Withdrawn, Substituted, and Refiled Sept. 27, 2011.

Appeal From Cherokee County, J. Derham Cole, Circuit Court Judge.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General T. Stephen Lynch, Assistant Attorney General Mary Francis Jowers, and Assistant Attorney General Geoffrey K. Chambers, all of Columbia, for Appellant.

Wade S. Weatherford, of Gaffney, for Respondent.

KONDUROS, J.

*1 The South Carolina Law Enforcement Division (SLED) appeals the circuit court's affirmance of the magistrate's order finding a Speedmaster machine confiscated from a convenience store was not an illegal gaming device pursuant to section 12-21-2710 of the South Carolina Code (2000). We affirm.

FACTS

The Speedmaster machine that is the subject of

this action was seized by SLED agents from the Cherokee Food Mart on February 13, 2007, for being an illegal gaming device. SLED took the Speedmaster to Cherokee County's chief magistrate, who issued an Order of Destruction/Notice of Post-Seizure Hearing. The magistrate conducted a post-seizure hearing and concluded the Speedmaster was not an illegal gaming device as contemplated by section 12-21-2710 of the South Carolina Code. He held SLED failed to produce evidence the Speedmaster was used in gambling endeavors or that the game constituted a game of skill as opposed to a game of chance. SLED filed a motion to alter or amend the judgment, which was denied. The circuit court affirmed the magistrate's order, determining the order was legally and factually correct. This appeal followed.

STANDARD OF REVIEW

"When there is any evidence, however slight, tending to prove the issues involved, [the appellate court] may not question a magistrate court's findings of fact that were approved by a circuit court on appeal." *Allendale Cnty. Sheriff's Office v. Two Chess Challenge II*, 361 S.C. 581, 585, 606 S.E.2d 471, 473 (2004).

LAW/ANALYSIS

I. Free Play Feature

In its first issue on appeal, SLED urges us to adopt an interpretation of section 12-21-2710 of the South Carolina Code (2000) that would make any machine with a free play feature illegal. This issue is not preserved for our review. SLED raised this issue at the hearing before the magistrate, but the magistrate failed to address this argument in its final order. SLED raised the issue again in its motion to alter or amend the judgment, which was summarily denied. The filing of the motion to alter or amend with the magistrate preserved the issue for review by the circuit court. *See Pye v. Estate of Fox*, 369 S.C. 555, 565-66, 633 S.E.2d 505, 510-11 (2006) (holding an issue is preserved for appellate review, even if it is not ruled upon,

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provided it was raised at trial and raised to the court in a post-trial motion). However, the circuit court's order does not specifically address the free play feature argument. It confirms the magistrate's final order, finding the order was "legally and factually correct." However, as previously stated, the magistrate's order failed to address the free play feature argument. No motion to alter or amend the circuit court's order is contained in the record on appeal, and therefore we have no ruling from the circuit court as to this issue. Consequently, the issue is not properly preserved for our review. See *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 22 n. 11, 698 S.E.2d 612, 623 n. 11 (2010) ("[T]he circuit court has the authority to hear motions to alter or amend when it sits in an appellate capacity and such motions are required to preserve issues for appeal where the circuit court fails to rule on an issue."); see also *City of Rock Hill v. Suchenski*, 374 S.C. 12, 16, 646 S.E.2d 879, 880 (2007) (interpreting *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 107, 413 S.E.2d 866, 869 (Ct.App.1992) (the "circuit court sitting on appeal did not address an issue and Wal-Mart made no motion pursuant to Rule 59(e), SCRCPL, to have the court rule on the issue; thus, the allegation was not preserved for further review by the Court of Appeals.")).

II. Game of Skill or Game of Chance

*2 SLED also contends the magistrate erred in finding the game on the Speedmaster constituted a game of skill as opposed to a game of chance. We disagree.

SLED advocates adoption of the "dominant factor test," which is discussed at some length in *Johnson v. Collins Entertainment Co.*, 333 S.C. 96, 508 S.E.2d 575 (1998). There, the court was asked to determine whether video poker machines, legal at the time, constituted lotteries as prohibited by the South Carolina Constitution. *Id.* at 98, 508 S.E.2d at 577. The dissent opined South Carolina should apply the dominant factor test in determining whether something was a lottery involving chance.

Id. at 113, 508 S.E.2d at 584 (Burnett, J. dissenting). The dominant factor test provides when "the dominant factor in a participant's success or failure in a particular scheme is beyond his control, the scheme is a lottery, even though the participant exercises some degree of skill or judgment." *Id.* "If a participant's skill does not govern the result of the game, the scheme contains the requisite chance necessary to constitute a lottery." *Id.*

In contrast, under the "pure chance doctrine," founded in British law, "any skill, however minimal, is sufficient to remove a scheme from the definition of lottery." *Id.* Neither test has been judicially adopted in South Carolina.^{FN1} However, based on our standard of review, we need not adopt a test. In this case, under either standard, at least slight evidence tended to prove the game at issue was one of skill. See *Allendale Cnty. Sheriff's Office v. Two Chess Challenge II*, 361 S.C. 581, 585, 606 S.E.2d 471, 473 (2004) (holding this court will not disturb the magistrate's findings of fact affirmed by the circuit court if any evidence supports them).

^{FN1}. We are aware of a case currently under consideration by the South Carolina Supreme Court, *Town of Mt. Pleasant v. Chimento* (heard October 19, 2010), which may address this issue.

Jay Blair was a technician who worked on the Speedmaster. According to the record, at the hearing before the magistrate, he played several games and won them all. Then, the magistrate requested he play more. Blair won fifteen out of sixteen games with the one loss being due to player error. Even a player adept at playing a game will not always win if an element of the game is beyond his or her control. Such is the case with card games in which a good player cannot win every hand simply because the cards they are given are determined by chance. Here, the evidence showed a good player could win every game. Therefore, based on our standard of review, we affirm the circuit court's affirmation of the magistrate's determination that the only game on the Speedmaster was a game of skill.

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III. Used for Gambling/Evidence of Gambling

In its next argument, SLED maintains the magistrate erred in finding the statute contained a requirement that a machine must be used for gambling to be illegal. SLED further contends if the statute contained such a requirement, the magistrate erred in finding it presented no evidence of gambling. We agree in part and disagree in part.

*3 In *Ward v. West Oil Co.*, the supreme court cited with approval the following definition: "[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of *chance*, no matter how small the intrinsic value." 387 S.C. 268, 278, 692 S.E.2d 516, 522 (2010) (quoting C.J.S. *Gaming* § 10 (Supp.2010)) (emphasis added). The *Ward* opinion also provided: "The three elements of gambling—consideration, *chance* and reward—are thus clearly present in a device which, for a price, and based upon *chance*, offers a monetary or merchandise reward to the successful player." *Id.* (quoting *State v. 158 Gaming Devices*, 499 A.2d 940, 951 (Md.1985)) (emphasis added).

Additionally, gambling and gaming are defined in the treatise *South Carolina Jurisprudence*. "As legal terms, 'gaming' and 'gambling' are the same and involve either fraud, or cheating or *chance* applied in a situation of agreement between two or more persons in which, in accordance with certain rules, the parties play a game or contest, or await the outcome of some event that will determine one or more winners or losers." 7 S.C. Jur. *Gaming* § 3 (1991) (citing Am.Jur.2d *Gaming* § 10 (1967)) (emphasis added). Gambling is also defined in section 3-11-100(2) of the South Carolina Code (Supp.2010) governing gambling cruises: "'Gambling' or gambling device' means *any game of chance* and includes, but is not limited to, slot machines, punchboards, video poker or blackjack machines, keno, roulette, craps, or any other gaming table type gambling or poker, blackjack, or any other card gambling game." *Id.* (emphasis added).

SLED is correct that section 12-21-2710 does

not specifically require that an illegal gaming device be used for gambling. However, we have affirmed the magistrate's ruling that the Speedmaster was not a game of chance. According to the authorities previously cited, the term gambling necessarily encompasses the element of chance. Therefore, we conclude the circuit court properly affirmed the magistrate's ruling the Speedmaster was not "used for gambling."

IV. Lost Post-Seizure Hearing Tapes

Finally, SLED contends if the arguments set forth above are not persuasive, it is entitled to a new post-seizure hearing because the tapes of the original proceeding were lost. We disagree.

SLED's argument on this point is not preserved for our review. SLED began its argument before the circuit court by seeking a new trial based on the lost tapes. The circuit court then inquired of SLED if the record of the post-seizure hearing might be reconstructed. SLED did show some apprehension at this point, but moved forward by going through a list of evidentiary items it considered important that were not reflected in the magistrate's order or return. Speedmaster and SLED were in agreement with respect to most items with the exception of what denominations of currency the machine would accept. SLED stated, "I mean, in terms of the currency, we think that—I mean, I don't want to stop the whole thing just for that. So I can go—I'll be glad to go forward on the merits." Because SLED proceeded with its case and did not reserve any objection regarding which currency the Speedmaster would accept, the issue of lost post-seizure hearings should not be considered by this court. See *In re Estate of Boynton*, 355 S.C. 299, 305, 584 S.E.2d 154, 157 (Ct.App.2003) (citing 4 C.J.S. *Appeal & Error* § 185 (1993)) ("A party who voluntarily acquiesces in or takes a position inconsistent with the right to appeal impliedly waives or is estopped to assert his right to appellate review.").

*4 Based on all of the foregoing, the circuit court's affirmance of the magistrate's ruling is

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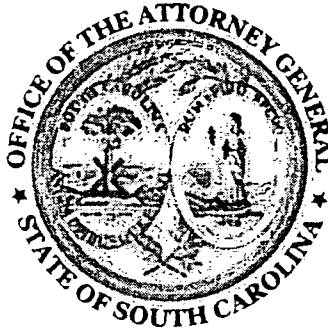
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AFFIRMED.

WILLIAMS and PIEPER, JJ., concur.

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END OF DOCUMENT



HENRY McMASTER
ATTORNEY GENERAL

March 16, 2009

The Honorable Michael R. Davis
1403 Caroline Road
Columbia, SC 29209

Re: Richland County Sheriff's Department v. Nizar Awde

Dear Mr. Davis:

Enclosed please find Plaintiff's Notice of Motion and Motion to Alter or Amend Judgment Pursuant to Rule 59(E), SCRPC in the above-referenced matter.

By copy of this letter, I am serving opposing counsel.

Thank you for your assistance in this matter. If you have any questions, please contact me anytime.

Very sincerely yours,

David Spencer
Assistant Attorney General

Enclosures

cc: Jonathan S. Gasser, Esq.
1529 Laurel Street
Columbia, SC 29201

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Richland County Sheriff's Dept.,

Petitioner,

-vs-

Nizar Awde,

Defendant.

IN THE MAGISTRATE'S COURT

**NOTICE OF MOTION AND MOTION
TO ALTER OR AMEND JUDGMENT
PURSUANT TO RULE 59(E), SCRPC**

PLEASE TAKE NOTICE that the Richland County Sheriff's Department, through its undersigned attorneys, moves to alter or amend this Court's ruling on March 3, 2009. (Petitioner first received notice of the written order, when it was attached to an e-mail, on March 6, 2009). This motion is made pursuant to Rule 59(e), SCRPC and Rule 81, SCRPC.

Petitioner respectfully submits the order overlooks points of law and are not supported by a reasonable factual or legal basis on several grounds.

1) Petitioner would submit that this Court should find that the machines are games of chance under the predominant factor test.

Petitioner agrees that the predominant factor test is the test the Supreme Court would likely follow. However, Petitioner does not recall agreeing to limit the elements of the dominant factor test to the single sentence found on pages 3 and 4 of the order, quoted from Justice Burnett's dissent in Johnson v. Collins Co., 333 S.C. 96, 508 S.E.2d 575 (1998).¹ However Petitioner does agree that

¹ At issue was whether various machines playing a variety of games, violated the Constitutional prohibition of lotteries rather than determining violations of S.C. Code § 12-21-2710.

the full text of Collins is informative in constructing the standard the Supreme Court would likely adopt.

The full text of the paragraph from which the sentence is taken is as follows:

Instead, I would hold, where the dominant factor in a participant's success or failure in a particular scheme is beyond his control, the scheme is a lottery, even though the participant exercises some degree of skill or judgment. If a participant's skill does not govern the result of the game, the scheme contains the requisite chance necessary to constitute a lottery. On the other hand, if through the exercise of skill or judgment a participant can determine the outcome, the scheme is not a lottery. My opinion is supported by the majority of jurisdictions which have considered this question. Only three jurisdictions adopt the pure chance doctrine.

Collins, at 333 S.C. 113, 508 S.E.2d at 584.

Further, Justice Burnett later concluded: "In my opinion, skill should be defined in terms of the ability to obtain the desired outcome – a certain card – rather than the ability of one player to play more judiciously than another. As noted by the certification order, a video poker player is unable to control the random selection of cards, in spite of his skill, knowledge, or experience." Id. at 333 S.C. 119, 508 S.E.2d at 587.

In the instant case, assuming a player could obtain the desired result in four fields of play (the four fields where the icons spin), chance determines the outcome in the fifth field – where lights flash across a seven icon by four icon grid – as admitted by the Defendant's expert witness, Mr. Snyder. The optimum desired result, of obtaining five identical icons (such as five kings), is ultimately determined by chance, despite a player's exercise of skill. Further, scoring in the bonus play resulting from a match of five icons is based on chance, not skill. Therefore, the video game is a game of chance, not skill. Alexander v. Hunnicutt, 196 S.C. 364, 13 S.E.2d 630 (1941) (finding under the predecessor statute that a pin table game that did not have a payout mechanism or award free plays was still illegal noting: "if we may assume that no free games are awarded and that the

only element of chance as to the score which may be made and indicated as the affidavits state, the machine comes directly within the terms of the criminal statute").

Further, the machines have a feature where play in all five fields can be stopped simultaneously. Mr. Snyder admitted that no skill is involved in playing the machines in that fashion. Defendants attempt to explain this feature by analogy to shooting a basketball with a blind fold on. However, where a blindfold is extraneous to the common instruments in the play of basketball, the stop-all button on these machines are part of the design of the machine, deliberately present by the manufacturer and designer of the machines and remaining enabled by the owner of the two machines before this Court.² Besides being demonstrative of the true intent that the machine be utilized for gambling, the stop-all button allows players to win without exercising any skill.

Indeed a player can win without exerting any skill, showing the true colors of this machine as a gambling machine. Chance predominates over the utter lack of skill where no effort needs to be exercised to win; and chance predominates over the exercise of skill, where the fifth field and and bonus play are determined by chance as admitted by Mr. Snyder.

2) Even assuming that the games are games of skill under the predominate factor test, the machines are still illegal because they are video games with a free play feature. Under S.C. Code § 12-21-2710: "It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State . . . any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, ..."

² The analogy further fails, because it assumes a person making a basket with a blindfold on does so exclusively as a matter of chance. However, logic and experience would indicate that between, for example, a professional basketball player and an eight-year old child, the professional would likely fair better. Here, absolutely no skill is involved for a person to win using the stop-all function except the ability to push a button.

The Attorney General's Opinion letter dated August 28, 2002 and cited on page 6 of this court's order is not inconsistent with the plain language reading of the statute.³ The opinion notes the following:

The statute makes illegal the mere possession of certain machines and devices regardless of their use or intended use. See State v. 192 Coin Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000); Squires v. South Carolina Law Enforcement Division, 249 S.C. 609, 155 S.E.2d 859 (1967); State v. Appley, 207 S.C. 284, 35 S.E.2d 835 (1945). Machines and devices that fall within the proscriptions of §12-21-2710 are therefore considered contraband per se. State v. 192 Coin-operated Video Game Machines, *supra*. **While the statute specifically mentions such machines and devices as "slot machines" and "punch boards," it also outlaws any "other device pertaining to games of chance of whatever name or kind ..."**

(Emphasis added, opinion letter attached).

The opinion letter goes on to analyze what constitutes a game of chance.

The opinion itself recognizes that types of machines such as slot machines and punch boards are explicitly made illegal under the statute without regard to the role of chance in the play of the machine. Accordingly, the opinion is consistent with Petitioner Richland County Sheriff's Office's position.

3) As argued at the hearing, the machines are illegal vending machines. Under §12-21-2710: "It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, . . . , but the provisions of this

³ Further, the opinion letter states:

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

section do not extend to . . . vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance."

The machines have a payout feature that dispense or vend tickets based on credits won during play. The return is based on a player's success and is not a fair and uniform return for each coin deposited. Further, this portion of the statute requires "no element of chance" and clearly, chance plays a role in several aspects of play on this machine.

4) This Court found that the Sheriff's Office did not have probable cause to seize the machines. For the reasons stated above, Petitioner would argue that the machines are illegal under S.C. Code § 12-21-2710, and therefore are contraband per se. Under State v. 192 Coin Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), the exclusionary rule does not apply. Therefore, if these machines violate S.C. Code § 12-21-2710, as Petitioner continues to maintain, then the failure of probable cause does not implicate the remedy of returning the machines.

In 192 Coin Operated Machines, the Supreme Court addressed an allegation that machines were found subject to an illegal search. The Court found the search legal, but went further, noting: "Finally, even if the searches were illegal – and we conclude they were not – appellant has no remedy." Id., 338 S.C. at 195, 525 S.E.2d at 882. Noting that machines in violation of S.C. Code § 12-21-2710 are contraband per se as opposed to derivative contraband, the Supreme Court concluded: "Furthermore, because the machines are contraband per se, the State certainly cannot return them to appellant, which is presumably the remedy sought." Id., 338 S.C. at 196, 525 S.E.2d at 882 (internal quotations omitted).

If the machines violate the statute, and Petitioner would contend that these machines do violate the statute, then they constitute contraband per se and should not be returned regardless of whether the Sheriff's Department had probable cause at the time of seizure.

For the foregoing reasons, the Petitioner would request that the judgment be altered or amended to reflect that the machines are illegal and should not be returned to the owner. In the alternative, Petitioner would request that these issues be addressed in the order.

Respectfully submitted,
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By: 

Attorneys for the Respondents

March 13, 2009

STATE OF SOUTH CAROLINA	)	IN THE MAGISTRATE'S COURT
	)	
COUNTY OF RICHLAND	)	CIVIL CASE NO.: 2009-CV-401060002
	)	
Richland County Sheriff's	)	
Department,	)	
	)	
Petitioner,	)	
	)	
v.	)	MEMORANDUM IN OPPOSITION TO
	)	PETITIONER'S MOTION TO ALTER OR
Nizar Awde,	)	AMEND JUDGMENT PURSUANT TO
	)	RULE 59(E), SCRPC
Defendant.	)	
	)	

This memorandum is respectfully submitted in opposition to Petitioner's Motion to Alter/Amend Judgment pursuant to Rule 59 (e), SCRPC.

In its Motion, Petitioner asserts that the Court misapplied the legal standard established to determine the legality of games as set forth in *Allendale County Sheriff's Office v. Two Chess Challenge II, games of skill*, 361 S.C. 581; 606 S.E. 2d 471(2004) and *Johnson v. Collins Entertainment Company, Inc.*, 333 S.C. 96, 508 S.E. 2d 575 (1998) in finding the two Chess Challenge II games before it to be games of skill. Petitioner also contends that the Court overlooked points of law. Both submissions are without merit.

I. The Court correctly applied the dominant factor test.

Petitioner acknowledges that the Court applied the correct legal standard, the dominant factor test, in determining the two Chess Challenge II games to be games of skill. Petitioner also acknowledges that the elements of the dominant factor test are set forth in Justice Burnett's dissent in *Collins*, in which Justice Burnett concluded that "if for the exercise of skill or judgment a participant can determine the outcome, the scheme

is not a game of chance" *Collins* at 333 S.C. 113, 508 S.E. 2d at 584. In addition to referring to the standard set forth by Justice Burnett, the Court also cited the Attorney General who had defined the "exercise of skill" to include "manual dexterity, eye-hand coordination, reflexes, muscular control, concentration, judgment, practice, adroitness, intellectual abilities, deductive analysis, alertness and mental superiority." *See, e.g.*, A.G. Opinion dated August 28, 2002 (2002 S.C. A.G. Lexis 137). Applying this standard, the Court concluded that "the two Chess Challenge II games are games of skill because a skillful player can select a specific icon and, through the exercise of skill, stop each individually rotating reel and obtain the desired result." The Court correctly applied the dominant factor test in reaching this conclusion.

The law governing the legality of video machines was addressed in detail by the Attorney General in an opinion issued May 5, 2003. A copy of this opinion is attached hereto and includes a section entitled "Law Governing Legality of Video Machines," in which the Attorney General states "while the statute (S.C. Code Ann. § 12-21-2710) specifically focuses upon the prohibition of specific machines such as "slot machines" and "punch boards," it also bans any "other device pertaining to games of chance of whatever name or kind." In this opinion the Attorney General advises how a Court should determine whether a game is one of chance or skill and summarizes the law to be applied in this type of case. In sum, all devices and machines pertaining to games of chance are illegal, while games that satisfy the dominant factor test are games of skill and thus legal.

The legal standard endorsed by the Attorney General is identical to the test applied by the Court. The dominant factor test was also utilized in *Allendale*, in which

three Courts (Magistrate Court, Circuit Court and Supreme Court) found that two other Chess Challenge II machines were legal to operate as games of skill. In *Allendale*, the two games had been seized and taken before Magistrate Love. In a lengthy order, Magistrate Love found that the games were not illegal because chance did not predominate over skill in their play. The Supreme Court held that Magistrate Love, who was affirmed by Circuit Court Judge Buckner, provided ample evidence to support his ruling that the machines were games of skill. As in this case, Magistrate Love had before him expert reports and observed the Chess Challenge II games being played.

Robert J. Snyder, Respondent's expert in this case, issued the reports considered by the Courts in *Allendale*. The record in *Allendale*, as in this case, reflect that a player, through practice and the application of skill, can win the game. In both cases, Mr. Snyder testified that the Chess Challenge II games examined do not possess random number generators or employ the deceptive technique of picture substitution. Petitioner's expert, SLED Agent Brad Godfrey, did not dispute this conclusion. The Chess Challenge II games do not function like games of chance as a player is able to affect the outcome of play, which is neither random nor predetermined.

In its motion, Petitioner concedes that a skillful player can obtain the desired result in four fields of play but claims that chance determines the outcome of the fifth field. Petitioner maintains that since one of the five fields may be determined by chance, the Chess Challenge II games are games of chance. Petitioner is incorrect in its assertion and conclusion. The optimal result in Chess Challenge II is to match four of a particular type of icon. Matching three of a kind is considered a win. Thus, even under Petitioner's

standard, a skillful Chess Challenge II player can achieve the optimal result one hundred percent (100%) of the time.

Petitioner also maintains that because a player may choose (for unknown reasons) to play the game unskillfully, that such intentional disregard would somehow transform the games' skillful and legal nature. Gambling devices have been consistently defined as machines in which the exercise of skill through eye-hand coordination, judgment, practice, intellectual abilities, etc. does not impact the outcome of play. While Petitioner concedes that such qualities affect the outcome of Chess Challenge II, it maintains that because a player can choose to play unskillfully, the games are illegal. Petitioner's position defies common sense and is without merit.

II. The Court properly found that Petitioner lacked probable cause to seize the games.

The Court properly found that Petitioner, although acting in good faith, was without sufficient knowledge of the functioning of the games to have formed any reasonable basis for seizing them. While Petitioner does not dispute the Court's conclusion that Petitioner lacked the probable cause to effectuate these seizures, it maintains that the games should not be returned because they violate South Carolina law. As the games are legal games of skill, the Court correctly ordered their return.

III. The Court correctly applied S.C. Code Ann. § 12-21-2710.

Following the Court's ruling, Petitioner sought the reconsideration of its order and maintained that although the games may satisfy the dominant factor test they remain violative of S.C. Ann. § 12-21-2710. The Court properly rejected this argument. Petitioner has reasserted this contention and maintains that the games, although of

"predominant skill", are illegal because they are 1) vending machines or 2) are video games with a free play feature. Both assertions are incorrect. S.C. Ann. § 12-21-2710 prohibits certain specific devices and games pertaining to games of chance. It declares that games involved with the playing of poker, blackjack, kenô, lotto, bingo or craps as illegal per se along with devices such as punch boards or pull boards. The critical consideration in determining whether a game is prohibited by S.C. Ann. § 12-21-2710 is whether the game at issue is one of skill or chance. The trial of this case was solely devoted to this determination. The application of the dominant factor test has been the central issue in this class of cases.

Petitioner now contends that that games are illegal despite being games of skill. Contrary to Petitioner's assertion, Chess Challenge II is not a vending machine. A vending machine provides snacks, beverages or other products to consumers and vends such products without a cashier. In *Anonymous Taxpayer, Petitioner, v. South Carolina Department of Revenue, Respondent*, 2001 SC Tax Lexis 29, (2001) Judge Matthews defined a "vending machine" as a "coin-operated machine for vending merchandise." As amusement games of skill, Chess Challenge II is not a vending machine.

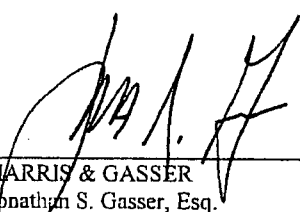
A successful player of Chess Challenge II redeems his winnings for prizes or merchandise. The goal of play is not to accumulate "free plays" and such a feature is not present on Chess Challenge II. In its Order, the Court correctly noted that the Attorney General has opined that awarding merchandise or prizes to successful players of games of skill was in accordance with South Carolina law. When considering Petitioner's argument following the trial, the Court asked Petitioner's counsel as to whether such a finding would result in a determination that virtually all amusement devices available for

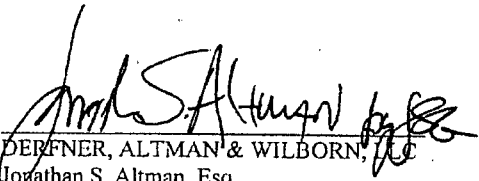
play in South Carolina would be rendered illegal. Petitioner's counsel acknowledged the practical affect of such a finding. For the reasons set forth herein, Petitioner is incorrect. Chess Challenge II is a lawful game of skill that does not violate S.C. Code Ann. § 12-21-2710.

For the foregoing reasons, Respondent respectfully requests that Petitioner's Motion to Alter/Amend Judgment Pursuant to Rule 59(e) SCRCP be denied.

Date:

4/14/09


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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Richland County Sheriff's Dept.,)
Petitioner,)
-VS-)
Nizar Awde,)
Defendant.)

IN THE MAGISTRATE'S COURT

**PETITIONER'S REPLY TO
DEFENDANT'S MOTION IN
OPPOSITION TO PETITIONER'S
MOTION TO ALTER OR AMEND**

This memorandum is respectfully submitted in reply to Defendant's Motion in Opposition to Petitioner's Rule 59(e) Motion.

I. Games are games of chance, not skill.

Contrary to Defendant's assertion, Petitioner has not conceded that the games are games of skill. Defendant's primary evidence was the testimony and demonstration of Mr. Snyder. Mr. Snyder has considerable experience working with gaming machines and utilized inside knowledge of the machine unavailable to the public to display successful results. Further, even Mr. Snyder conceded that chance governs portions of the game.

Defendant makes the self-serving assertion that: "The optimal result in Chess Challenge II is to match four of a particular type of icon." However, matching five icons is a superior result that allows access to a "vault" for bonus play. Four is not the optimal result. Defendant attempts to cherry pick portions of play in the game to argue that it is a skill based game, although chance inhabits and determines success, lack of success, credits earned, and the achievement of bonus play and bonus points.

Defendant's game is designed to allow gambling with a stop all button. Yet Defendant

chastises Defendant's customers who might use the button "for unknown reasons". Defendant's machine is designed with a stop all button which allows a player to win without the exercise of skill. The reason for the design is not hard to discern: each game can be played by stopping one button instead of five, thus allowing a person to gamble five times faster. The option allows the player to maximize wagering and the gambling house to maximize profits. A player cannot win a true game of skill without deploying skill. These machines are not games of skill. Alexander v. Martin, 192 S.C. 176, 6 S.E.2d 20 (1939) (quoting with approval Meyers v. City of Cincinnati, 190 N.E. 569 (Ohio 1934) as follows: "Even if the slot machine involved in this case is manufactured and intended for lawful operation, its potentiality and design is such that it may be easily put to unlawful use. The regulation or prohibition of such a mechanism need not be postponed until such event occurs.")

II. Exclusionary rule does not apply to illegal machines in forfeiture hearing.

Petitioner agrees that the pertinent question is the legality of the machines. If they were legal, which Petitioner contends they are not legal, then the issue of probable cause is moot. If the machines are illegal, which Petitioner argues that they are, then the games cannot be returned as they are contraband *per se* and incapable of ownership. State v. 192 Coin Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000) (exclusionary rule does not apply to machines that are illegal under § 12-21-2710, since those machines are contraband *per se* and are incapable of ownership).

III. The machines are illegal because they are vending machines and also because they are video games with a free play feature.

Petitioner established through testimony of its witnesses and also, to Petitioner's best recollection, through Mr. Snyder, that the games **vend** red tickets based on credits earned and also that the machines are video games which have free play features.

Free play feature

First, Defendant speciously states that the machines do not have a free play feature. This is false. A player inserting money is given credits to wage during play and this credit total is displayed in one field. After each wager, the total is depleted by the amount of the wager. The credits won are displayed in a separate field. Once the total credits purchased are depleted, the player has two options: 1) "redeem" or be paid out for credits won, each 100 credits won earns a red ticket; 2) use the winnings to continue play by wagering them on subsequent plays. Since the player can use the credits won to continue play, the machine has a free play feature. Indeed, if a player won less than a hundred credits, say eighty credits, then the player cannot redeem those credits, his only option would be to continue play with the credits. The plain language of 12-21-2710 renders the machines illegal as video games with a free play feature. (Also Petitioner did not concede that application of the statute would render most amusement games in the state illegal).

The Attorney General issued an opinion dated April 29, 2005, to Major Keel at the State Law Enforcement Division (WL 1024601), in which the Attorney General noted the following:

We note that Section 12-21-2710 was amended by Act No. 125 of 2000. the General Assembly as part of Section 1 of the Act (which reenacted § 12-21-2710 in its entirety), inserted after the words "slot machine," and before the words "or any punch board, pull board, or other device pertaining to games of chance" the following clause:

or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value",

as well as this clause:

, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack . . . (emphasis in office opinion).

The Attorney General opined "These insertions represented a major strengthening of § 12-21-2710 which, as noted above, designate gambling devices as contraband per se and subject to seizure

and destruction.” The Attorney General later concludes that the General Assembly sought to make such video games containing a free play feature as illegal *per se*.

Vending machine

Additionally, the machines issue or vend red tickets in varying amounts based on the degree of success in playing the machines. Once again, Defendant cannot escape the plain language of the statute to argue that the machines are not made illegal.

Defendant appears to rely on an Administrative Law Court decision to argue that the machine is not a vending machine. Without the benefit of Lexis (the Office uses Westlaw), it appears the decision referenced is Anonymous Taxpayer v. SCDOR, 00-ALJ-17-0137-CC. That case concerned whether an “honor box” vending service came within the term “vending machine” for purposes of a tax law, S.C. Code §12-36-110(g). Judge Matthews determined that the honor boxes were not vending machines because they were not machines: “I find that these honor boxes cannot be characterized as vending machines. The honor box has no mechanical device or mechanical capabilities and it does not preclude a certain effect or result.” Judge Matthews also noted that the honor box does not dispense a product. In this case, the machines dispense a product, red tickets for each hundred credits won.

The opinion, from a quasi-judicial agency, is not binding. On the other hand, Harvie v. Heise, 150 S.C. 277, 148 S.E. 66 (1929), controls this issue. In that case, a slot machine, for the deposit of 5 cents, dispensed a pack of mints and varying numbers of tokens (two to twenty tokens). The statute in effect at the time made unlawful: “any slot machine of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return in value for each coin deposited therein, and in which there is no element of chance.” *Id.* at 67 (citing South Carolina Code section 196, vol. 2 (1922)).

The Heise Court noted: "From a reading of this section it is seen that, in order to escape the condemnation of the statute (1), the vending machine must give a certain uniform and fair return in value for each coin deposited therein, and (2) there must be no element of chance in the operation of the machine."

The Heise Court found that the machines were illegal, holding as follows:

Viewing the question from all possible angles, we are satisfied that the checks or tokens have some monetary or trade value, and in view of the fact that they are released by the machine at irregular intervals and in uncertain numbers, the element of chance is always present, and there is no certain and uniform return in value for the coin deposited in the machine. In these respects, the operation or possession of the machine clearly violates the statute in question.

Id. at 69.

In the instant case, the machines in question vend tickets in varying amount for each amount deposited, based on success in the game. Further, unlike the provision "pertaining to games of chance", the vending exception language, "in which there is no element of chance", suggests that any chance renders a vending machine illegal. As discussed above, chance permeates throughout the play of the machine.

CONCLUSION

For the foregoing reasons, the Petitioner would request that the judgment be altered or amended to reflect that the machines are illegal and should not be returned to the owner. In the alternative, Petitioner would request that these issues be addressed in the order.

Respectfully submitted,
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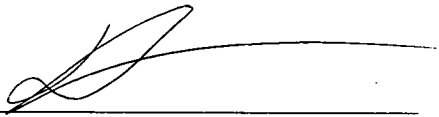
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By: 
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May 20, 2009

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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ATTORNEY FOR APPELLANT

April 23, 2013

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APR 23 2013

Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

SC Court of Appeals

RICHLAND COUNTY SHERIFF'S DEPARTMENT,

Appellant,

vs.

NIZAR AWDE,

Respondent.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Record on Appeal on Respondents by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jonathan S. Altman, Esquire
P.O. Box 600
Charleston, SC 29402

Jonathan S. Gasser, Esquire
1529 Laurel St.
Columbia, SC 2921

I further certify that all parties required by Rule to be served have been served.

This 23rd day of April, 2013.


NORMA BIGBEE
Legal Assistant

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