

ORAL ARGUMENT – 9/11/02
01-673 & 01-779
STATE OF TEXAS V. ONE SUPER CHERRY MASTER VIDEO
AND HARDY, ET AL

GARCIA: In State v. Rumfolo, this court recognized that it is both permissible and proper to place the burden of proof upon the owner of the property in a civil forfeiture proceeding.

ENOCH: Section 18.18 of the Code of Criminal Procedure starts out with subpart (a) that assumes that - well it starts out there's a conviction. So there's now been a trial, there's been a conviction and, then, you proceed with the forfeiture. Subpart (b) you don't have the conviction. It seems to me if you read Rumfolo, Rumfolo really accepts that somewhere along the line the state at least by a preponderance of the evidence proves that a crime occurred. And then you move to the level of okay, having proved by a preponderance of the evidence that a crime occurs, now we go and the defendants says well if you don't want your property taken you're going to have to prove this wasn't part of the crime. But unless there's proof that the crime occurred how can the state come in and just say, hey judge, Joe won't quit his gambling and so we want his money. And then the state would require Joe to come in and prove that he didn't commit the crime, or the money wasn't part of the crime. How do we get to that point without there having to be proof in the first place that a crime occurred?

GARCIA: First of all, there is not a crime here. And this is not a proceeding against the person. This is a proceeding against the property.

ENOCH: Then what authorizes the state to force the property owner to prove the state can't take it?

GARCIA: Article 18.18 in its entirety sets up the procedures for when the state can cease property as an illegal gambling device. And we start in art. 18.01, which "requires the state to go before a magistrate and show probable cause in order to obtain a lawful warrant to go and cease the property." And then that property is returned to the magistrate.

Then art. 18.12 requires the magistrate to conduct an investigation. And it is during this time that the property owner can come and challenge the seizure under art. 18.12, and actually get his property back before we proceed to an art. 18.18 forfeiture proceeding.

Now once we've proceeded to an art. 18.18(b) forfeiture proceeding, this is a proceeding strictly against the property, and fundamental due process concerns have been addressed as this court had noted in Rumfolo, because it requires that the magistrate give the property owner notice and a meaningful opportunity to be heard. And then the legislature intended that the property owner would bear the burden of non-persuasion an order - that this property has already been alleged to be an illegal gambling device and that has been supported by probably cause,

which the state obtained a lawful warrant to cease.

HECHT: But you argue that the state has to make that showing or not? I read your brief to say, yes we have to make a showing that this property was used in gambling.

GARCIA: There is language in Rumfolo, which suggests that the state has some showing in a forfeiture proceeding. And that has been construed by different CA's in _____ v. state

HECHT: Let me read your brief. "Petitioners agree in principle with the majority of the Waco CA who required the state to make out a prima facie showing in order to show entitlement to forfeiture." Do you agree with that or not? That's in your brief.

GARCIA: Yes.

HECHT: And what is that prima facie showing?

GARCIA: That it is a gambling device.

HECHT: But what standard? Probable cause? Preponderance of the evidence?

GARCIA: Basically that there has been a lawful seizure and that this seizure was supported by probable cause that this was a gambling device. And then of course the state puts on evidence on how the machine operated, and whether it complied with the definition of a gambling device, which is incorporated into an art. 18.18 proceeding. In art. 18.18(g).

HANKINSON: I don't understand what the difference is then between that showing and what you say the claimant must show in order to carry its burden of persuasion.

GARCIA: Because the state does not have a burden of persuasion in an art. 18.18 proceeding. Basically it just has to establish if anything that this was a gambling device and that it was lawfully seized.

HANKINSON: But what does that mean compared to what the claimant must show, which is to show that it was not a gambling device? Why isn't that the same - I don't understand. Two sides of the same coin is what it sounds like to me.

GARCIA: The legislature established in art. 18.18(f) that forfeitures shall ensue (shall is very specific in the language of the statute) unless the property owner shows by a preponderance of the evidence.

HANKINSON: But what does the prima facie showing mean? Does it mean it has to be by a preponderance of the evidence? Does it just mean to say we seized this and this is all we have to show? What is the burden that the state must undertake?

GARCIA: I think that that would be construed in conjunction in the context of what this proceeding is, and that whatever that showing is, is that it comports with fundamental fairness.

HECHT: Well what is it? That's what we're asking you. Does the state have to put on evidence that if it were true, and nothing else is said, would entitle it to forfeiture, or not? Can the state just sit there?

GARCIA: Certainly that is not in the language of art. 18.18...

HECHT: Well I'm asking you though. You can read the statute. But the judge bangs the gavel and says call in this case. And what says the state? The state says nothing. What says the contestant? The contestant says nothing. Alright. Well then judgment for the state. Is that the way it works?

GARCIA: That is, I think, one possible construction of art. 18.18(f), because it does spare...

HECHT: Is that the state's position is what I'm asking you?

GARCIA: No.

HECHT: Well what is the state's position?

GARCIA: We agree that the state should come forward with evidence that these devices are gambling devices.

HECHT: How much? Probable cause? Enough evidence that if it's true the state wins. Can you put a formula to it that you think is the state's position?

GARCIA: In staying with an ordinary civil proceeding, which is what this is, then of course it would be a preponderance of the evidence standard. It would be by a preponderance of the evidence that these devices are gambling devices.

HECHT: So you think when the trial judge calls the case, the state has to go first, and it has to put on enough evidence that if that were true and no cross-examination or anything else, the state would win?

GARCIA: Yes.

OWEN: Why is that not a prima facie as opposed to preponderance of the evidence standard?

GARCIA: Because this is a civil forfeiture proceeding. And since it's a civil proceeding,

the standard in civil proceedings is a preponderance of the evidence standard. The 10th CA did adopt a prima facie standard...

O'NEILL: Well the concurrence did. Right?

GARCIA: Yes it was the concurrence. The majority held that the property owner failed as a matter of law to prove that the property was not a gambling device.

O'NEILL: But this is all really sort of academic, because the charge here said the state has the burden to show by a preponderance of the evidence, and because that was unobjected to, that's how we measure the evidence.

GARCIA: Well actually there is two different cases. Charity Master was a case to a jury, and so there was a charge. But Hardy was not a jury trial.

O'NEILL: I understand that. But I'm saying in the former case, the state put the burden to the jury, the state's burden by a preponderance of the evidence.

GARCIA: To prove that it was a gambling device only. And then the state objected - well actually complained about the TC's failure to include an instruction that the owner of the property bore the burden of proving by a preponderance of the evidence that his devices fit within the exclusion to the definition of a gambling device.

O'NEILL: But my question is simply that the state seemed to - the state acknowledges, and in your position is that the state has to come in and prove by a preponderance of the evidence, and once it's done that, then the burden shows?

GARCIA: Yes. I don't necessarily believe that it would be a burden shift, because the statute specifically places the burden on the owner of the property...

O'NEILL: Well that's where I get confused. In response to J. Hecht's question, that was seem to indicate then that if the state did nothing, the state would win. And I think you said that's not the case. So the state does have to come in and put on preponderance of the evidence and then it shifts to the defendant. It would have to.

GARCIA: To be clear what I've stated is that first the statute is silent on what the state's burden is. But the state would agree that if it has the burden in a civil forfeiture proceeding, then it would be a burden to prove that the devices were illegal gambling devices based on a preponderance of the evidence. But the statute though it actually probably speaks to a different type of proceeding because art. 18.18(f) says that the magistrate shall conduct a show cause hearing, which is usually an evidentiary hearing. And in a normal process it would mean a hearing specifically before a magistrate and a hearing specifically to show cause why the property should not be forfeited. That's what the statute says. In that hearing, it would seem that the owner of the property would be required

to show cause why the property should not be forfeited. And therefore, he would go forward with the evidence first. That is the framework that is set up in art. 18.18(f).

O'NEILL: Are you asking us to make any evidentiary presumptions based on what happens in the magistrate's court? My understanding is we're starting clean here and trying to figure out what the state's burden is in the first instance. Are you arguing there should be some presumption that applies to...

GARCIA: Because Rumfolo controls that the property owner carries the burden that the devices are not gambling devices, then the question before the court is, did the property owner prove that the ceased eight liners were not gambling devices and not subject to forfeiture.

ENOCH: I read art. 18.18 - if you read it literally it seems to me that the government could come to your house with a warrant, whether mistake and reissued or not, and pick up whatever equipment you have: a computer. And they can take it for evidence. And they search through your computer and find out low and behold you weren't engaging in any sort of illicit activity over the internet. So there's no charges. Nothing further happens. You don't go to the grand jury. And you get this letter from the district clerk's office saying, oh by the way, we've got your \$2000 computer here. We're going to destroy it unless you prove it wasn't used for illicit internet activity. Now a literal reading of 18.18 says that you have the burden to prove that your computer was not used for illicit activity solely because the government has it in its possession from the issuance of a warrant. There is no problem with that statute when there's not been a commission of a crime, there's not been an allegation of the commission of a crime, but you're equipment is picked up through a warrant and stored with the government. Do you think the government has the power to destroy your equipment unless you can prove you didn't commit a crime?

GARCIA: Unless you could prove that the property is not illegal.

ENOCH: You have to prove that the property wasn't used as a part of. You're talking about the gambling devices. The statute isn't limited to gambling devices. The statute says you've got to disprove that it was used somehow in the commission of a crime, that the device wasn't gambling if gambling is their complaint. Do you think the government has the - there is no problem under those circumstances with the government making you come and disprove the allegation that it's a gambling device in order to get it back when you're innocent?

GARCIA: No, because the constitutional concerns of seizing the property have been addressed. They've been addressed first before the property is seized by going before a magistrate and proving by probable cause that there is a reasonable belief that this property is illegal. And then once that's...

ENOCH: Well let me explore this with you. Even the state concedes they have some responsibility to prove something. Isn't the hole filled in by the notion that if there's not a conviction for a crime, just if all you're doing is the civil portion of this - we've got that, and now

you come forward in the civil context doesn't the state have some sort of obligation to prove that in this context that a crime occurred, and they only have to do it by a preponderance of the evidence, not unreasonable doubt, and if they prove that then it's going to be up to the defendant to have to come forward and show why this property shouldn't be forfeited. Isn't that the way it really ought to work when there's not a conviction?

GARCIA: I believe that that's consistent with J. Hecht's question that - I mean in a normal standard civil forfeiture proceeding, the state as the movant should come forward and show that there is no at least evidence by a preponderance of the evidence that the property is illegal and that it should be forfeited.

ENOCH: In our case in Rumfolo really it sort of begins in the middle of that process. It talks about the defendant having to come forward and have some proof, but it really begins with the assumption that the state has already met as a part of this process its burden to show that this equipment was part of a commission of a crime under the lower evidentiary proof...

GARCIA: Yes. That the state has met its burden. Actually it starts with the state meeting the burden to show that there is probable cause that this is an illegal device. And when we go to an art. 18.18 forfeiture proceeding, that's already established. Because the property owner has to challenge the seizure. He hasn't come forward and tried to reclaim the property before the forfeiture. So that is already established. The legislature in art. 18.18 established a constitutional framework for seizing property. And art. 18.18(b) and (f) it has a constitutional framework for forfeiting that property...

JEFFERSON: So there's a separate provision for the claimant to come forward before the state has this show cause hearing?

GARCIA: Yes.

JEFFERSON: Where is that in the statute?

GARCIA: Article 18.12.

O'NEILL: So is it your argument that probable cause equals preponderance of the evidence once you get to the DC?

GARCIA: No. I'm saying that probable cause has already been established before we get to the forfeiture proceeding. The state has already had to establish that before it actually seized the property.

O'NEILL: Which is meaningless in terms of your legal argument. What we're talking about is where you start at the DC level. And whatever has happened prima facie, probable cause, it doesn't matter. You conceded that the state has to start out beginning the case - preponderance of

the evidence?

GARCIA: Right. We start with proving that the devices are illegal gambling devices. And then the statute specifically allocates that the burden of nonpersuasion to the owner of the property. And if the owner of the property does not carry its persuasion and prove that the property is not a gambling device, then the state is entitled to forfeiture, and the magistrate shall dispose of the property.

OWEN: I thought you took the position ultimately in your briefing that these are questions of law and we don't need to be worrying about the jury charge anyway, that this court can decide based on undisputed facts whether these are gambling devices or not.

GARCIA: Exactly. Because as a matter of law whichever way you look at, whether the state has an initial burden of preponderance of the evidence, or the owner of the property has the initial burden of the preponderance of the evidence, the evidence in this case as a matter of law showed that these devices did not fit the exclusion to the definition of gambling device.

OWEN: It seemed to me at least what the legislature was trying to get at is that you can't ever get a prize for a single play that's worth more than \$5. Is that your understanding of what they were trying to get at?

GARCIA: No. Our understanding and what we believe is a reasonable construction of the statute it says that the only awards that can be awarded are exclusively noncash merchandise, prizes, toys or novelties.

OWEN: What if the reward in this case were a gift certificate that could not be aggregated? It was worth \$5. You could take it to WalMart and buy something up to \$5, but you could not aggregate it with other certificates to get something that was worth more than \$5. Would that be a problem under the statute?

GARCIA: Yes. That violates the statute for two reasons. First, because the phrase "noncash merchandise prizes, toys or novelties" is actually a limited list of actual awards that can be awarded. And because toys and novelties are listed with the word "prizes", prizes is limited to the same meaning as toys and novelties. And so therefore what the legislature intended was only an award that is toy or prize, something that's _____ value.

OWEN: So you could give a prize that was worth \$5, but if it was something other than a toy or a novelty that would violate the statute? Five dollars worth of soap would violate the statute?

GARCIA: Well if there was actually a bar of soap, no.

OWEN: But that's not a toy or a novelty.

GARCIA: It's a true bill thing. It's a novelty. It's not something that basically is _____. That's what the legislature intended. It just this nominal value. It just doesn't have any substantive value.

OWEN: So it doesn't turn on what it is, just how much it is worth?

GARCIA: It doesn't start with what it's worth. Of course it's limited to ten times a single play of the game or \$5, whichever is less. But it doesn't start with that.

JEFFERSON: To be clear here. This is a situation under this record where you could aggregate those gift certificates to be whatever amount you ultimately win. I mean you could have \$5,000 worth of gift certificates, go to WalMart and exchange those for merchandise.

GARCIA: Yes. Because there was no limit on how many you could get. Of course, you would get one \$5 gift certificate for every 500 points, or 5 tickets, because each ticket was worth 100 points. So that's correct. And moreover to be clear, in this record there was cash given. Now the respondents attempt to create some confusion about oh well it's replay credit. No. There was no replay credits. Cash was awarded.

OWEN: That was true in Cherry Master. That was not true in Hardy was it?

GARCIA: It was true in both cases.

OWEN: I thought in Hardy, the attendant actually never gave the cash to the player, but the attendant physically put the cash back into a machine.

GARCIA: It makes no difference who gets the cash. Because cash is being awarded. It's not replay credits. That's just basically a red herring. Because cash is being awarded, and you're putting it in another machine it's cash. Anyway you look at it they were awarding cash.

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RESPONDENT

ZINN: There is no evidence in the Cherry Master record that these gift certificates were aggregated. It may have been possible under this record but there is no evidence that they actually were.

PHILLIPS: All of these cases have these machines that are sitting here just like a Buick automobile. It's a very factually intensive inquiry on what happened at the particular location, the particular conduct between the players and the store employees is it not?

ZINN: Yes, it can be.

HECHT: But if the gift certificate does not fall within the exception, then you lose?

ZINN: Probably so. But I don't see how...

HECHT: As a matter of law? I mean we can't have gift certificates in some case and not in another case.

ZINN: I mean ultimately it depends how you define it. But depending on how you define it, it sure well could be.

PHILLIPS: If the facts are undisputed, if the state, whoever is testifying for it agreed with the facts that were cited by the owners or employees would these cases normally go the jury since they are similar in nature?

ZINN: If there is no fact question there wouldn't be a need for a jury. But in this case the state did not object to a jury. Agreed that there were fact questions, and it was submitted.

HANKINSON: Are there fact questions?

ZINN: Yes there were some fact questions.

HANKINSON: What are the fact questions now as this case stands today?

ZINN: Well they weren't raised by the state in their briefing, but they were there at the trial. For example, what is a bona fide amusement device under the statute? They said that was a fact issue and that it ought to be submitted.

HANKINSON: Do you think that there are fact issues?

ZINN: It depends on what you say the ground rules are.

OWEN: How can one jury decide in Waco that the same machine is a bona fide amusement device, and another jury in Austin saying it isn't when they are exactly the same facts? How can that be a fact question?

ZINN: The court in Waco didn't say that.

OWEN: I'm just giving you the hypothetical.

ZINN: We don't have much _____ as there, so I think folks are grasping around and they thought it was a matter of law. They didn't rule on that ground though. They ruled on sort of the nature of the prize itself and that the gift certificates were not prizes.

ENOCH: It seems to me that in this case there is some dispute about whether or not they could take cash off the premises. But essentially there is no dispute that legal tender was used to buy new games, that supposedly was what was supposed to happen, or gift certificates were given. As I read the statute virtually any electronic game whether it's at the movie theater where they are playing games, any of those things could be gambling devices if as a result of whatever you win by playing the game results in some tangible piece of property being given to you. And so whether or not it's a gambling device depends on the fact of what was the reward for having played the game. And in this case there may not be any disputed facts. Awards were given. The awards took the form of a gift certificate or some cash to buy new game on it. And we could decide that question as a matter of law. But the next case could have the identical machine and the argument being over whether they gave gift certificates, or whether they gave cash, in which event the jury would have to decide did they give cash or give an award. And that would determine whether it was a gambling machine. So the same machine. It just depends on what they got for the reward and there could be a dispute over that. But in this case we don't have a dispute over what was given do we?

ZINN: If there is no dispute over what the reward is, then sure that issue could probably be determined as a matter of law depending on how you define...

JEFFERSON: If the reward were a \$5 bill would that violate the statute?

ZINN: Yes. Because that would be cash.

JEFFERSON: What's the difference between a \$5 bill and a sheet of paper that gets you the equivalent of \$5 worth of merchandise?

ZINN: Because that was simply a means to the end, and that reward in the end was play on the machine. It wasn't cash. They could not pocket that cash. They could not put that in their pocket and leave unless they deceived the people as the undercover DPS agent did. But they can't walk away with the cash.

JEFFERSON: But they can pocket the gift certificate correct?

ZINN: They can take the gift certificate, which can only be up to \$5.

JEFFERSON: And then they can use that and they can use that to purchase the same thing \$5 would purchase at the store that's participating?

ZINN: Well they could purchase merchandise with it.

RODRIGUEZ: What if you give an American Express _____, does it make a difference?

ZINN: It could if that's a cash equivalent.

PHILLIPS: How do you measure a cash equivalent? Are you going to go by the IRS definition or something more restrictive?

ZINN: The IRS has a definition. It's listed in the Hardy petitioner's brief. We also have common sense. I can't take my gift certificate and deposit it in my checking account, because it doesn't have - it has value, but it's not a cash equivalent.

OWEN: What if you take it to WalMart and you buy a \$5 trinket and then you take it back the next day and say I want a refund, and they give you cash back?

ZINN: I don't know if they do that based on certificates. There's no evidence that happened here. I suppose in the hypothetical perhaps, but it's not in the evidence here, and it would be something - I don't know WalMart's gift certificate policy and whether you can exchange things and get cash back.

O'NEILL: But didn't the legislature indicate some sort of intent by saying toy, novelty prize?

ZINN: Maybe except they use the word "prize" elsewhere in 47.01. And if prize means just a trivial amount in paragraph b, then it ought to mean the same thing elsewhere. But if it does, then that means prosecutors can only prosecute people under a gambling device if it's a trivial amount. They also define prize at the same time they pass this statute in the lottery, which they said the lottery award is prizes. Well it can be pretty large. The truth is - I mean you have to look at how they use prize elsewhere within the gambling device statute and throughout the legislation, and when you do, you find that prize means an award won in a game.

RODRIGUEZ: What do we do with the word "merchandise", _____ prize?

ZINN: We don't have a definition. It's important I think that they didn't say goods. So they weren't limiting for example in a UCC ch. 2 sense just something tangible. For example, a pinball merchant sells plays on his machine. That's his merchandise. Somebody who runs a pinball arcade, his merchandise is to play on that machine. So these folks got either a play on the machine or that gift certificate only exchangeable for something tangible. In this case merchandise.

HANKINSON: Is it right that there is not a comma between merchandise and prize?

ZINN: Correct.

HANKINSON: So it's non-cash merchandise prizes is one thing. And then it's non-cash toys and non-cash novelties. Is that right?

ZINN: Yes.

HANKINSON: And they have to be redeemed for just those things?

ZINN: The ultimate reward would be those things.

HANKINSON: Or a representation of value redeemable for those items?

ZINN: Right.

HANKINSON: Well the WalMart certificates are not limited to what you can get for them when you go to WalMart.

ZINN: All you can get at WalMart with those certificates -you can't get cash. All you can do is get something that's not cash.

HANKINSON: But you could get something that wasn't a toy or a novelty, or whatever the _____ merchandise prize is.

ZINN: If a prize is defined as something you win in a game, then all they can get at WalMart is something they won with that certificate.

HANKINSON: So you have to really look to merchandise prizes and we have to figure out what that means for the WalMart certificate to not have a problem?

ZINN: Yes. You have to isolate prize out. You can't define it in terms of toy or novelty, because they use prize throughout the gambling statute.

HANKINSON: And I'm looking at it as non-cash merchandise prizes.

ZINN: Yes.

HANKINSON: I'm trying to understand what that means.

ZINN: That would mean non-cash, not cash. Merchandise we would think in terms of things you can get as opposed to cash itself. And a prize would be something you win in a game. It's a noncash something you get other than cash you win in a game kind of thing.

OWEN: In the statute where it defines gambling device. Penal Code §47.01(4). And in (b) it says a gambling device includes games where the thing that you win is another game. Why doesn't that preclude the practice here at least where you win other games on eight liners?

ZINN: Because the evil there is the cash. The legislature didn't want cash being awarded. And so to play on the machine is a merchandise.

OWEN: (a) talks about credit, not cash. So the game keeps track of your credits, awarded and cancels that you get free games. Why doesn't that catch the free games aspect of the eight liners, cash aside?

ZINN: It should. These are free games. But these are credits that are just being used to being put back into the game. What if instead of cash they were tokens? Then it wouldn't be cash.

OWEN: I thought (a) precluded that. That's my question.

ZINN: No, because (b) allows noncash merchandise prize, and we're saying that the credit, the amount that you get back to replay a game, that ticker, is a noncash merchandise prize. It's not cash. You can't walk away from it. All you can do is either play the machine, which is something that merchant is selling, or you get a \$5 gift certificate that can be fully redeemed for noncash merchandise.

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BISHOP: Coming in I thought the biggest issue between the parties related to the burden of proof and how it works. I understand now the state concedes that it would have to make some showing at some point by a preponderance of the evidence that the machine it is seeking to forfeit, to take, is a gambling device. Which goes back to your question your honor. What happens if there is no evidence?

HECHT: On that point, do you agree that if the state makes a prima facie case, if it puts on evidence that if true would entitle it to win if the contestant said nothing, and then the contestant does say something that the contestant ultimately bears the burden of persuasion in the case or not?

BISHOP: Yes, I do. And I think that's what the statute says. But I think it is important that the prima facie case must be a case that it is a gambling device. Now the way this statute is structured, there is an exclusion from the definition of gambling device, the exclusion in paragraph (b) of the statute. So in order to make a prima facie case or a showing by a preponderance of the evidence the state must show that the exclusion doesn't come into play, that it doesn't apply.

HECHT: And do you agree that whether a \$5 gift certificate falls within the exclusion that we've been talking about is a question of law rather than fact?

BISHOP: I think that is a question of law for the court. And I think the intent of the statute, the plain language of the statute is the noncash. There is no question I think that a gift certificate is not cash. Now the CA in the Hardy case came up with a theory of cash equivalent, which is nowhere in the statute. And from that, the Waco court reasoned that this was a cash equivalent and thus it would violate the statute.

Now I suggest to the court that you can look at every definition of cash

equivalent that's available to the court, be it in Texas statutes, other states, federal statutes, the IRS code and case law, and nowhere do you find that a gift certificate is a cash equivalent. And the reason is the gift certificate is redeemable only at one place for certain things. It doesn't have the characteristics of tender. It doesn't have the characteristics of being negotiable where it can pass freely.

JEFFERSON: You say only redeemable at one place for particular things, but at WalMart there is everything isn't there?

BISHOP: But it's only at WalMart. And I suggest to the court that there is some of us who would rather pay \$5 than go into a WalMart, because they are too big. And that is the reason that it's not a cash equivalent.

RODRIGUEZ: Isn't the record here though showing that at least one of the cases that the gift certificate was renewable, not only at WalMart but three other establishments?

BISHOP: In the Hardy case, I believe it was all WalMart. And I don't remember that being in the record. It may well have been in the other case. It was WalMart and HEB that it was a choice of the two or something.

RODRIGUEZ: I'm still stuck on the word merchandise. Can you offer any guidance as to what that means?

BISHOP: I think what the legislature tried to do when it passed this statute was that it recognized that there are kinds of machines out there somewhere that are really not gamblings, and that people play them in a fashion that doesn't violate the peace and dignity of the state. It's just not gambling.

RODRIGUEZ: So is a gift certificate merchandise?

BISHOP: A gift certificate is a certificate - yes. It's merchandise.

O'NEILL: What happens to the gift certificate after WalMart takes it?

BISHOP: Well WalMart makes its profit on the item.

O'NEILL: Surely they just don't give this establishment a bunch of certificates. Does the establishment pay cash in exchange for the certificates? Are the certificates forwarded to the establishment to then reimburse what they were redeemed for?

BISHOP: Actually WalMart would sell the certificates to the operator of the machines.

O'NEILL: So the operator will give WalMart \$5. WalMart issues the certificate.

BISHOP: Or he might negotiate a little better deal. But yes.

O'NEILL: So there is cash being given for the certificate. I mean at the end of the day it's cash for merchandise.

BISHOP: But the operator paying for them is not cash. That's just like you or I going in and buying a gift certificate. The prize that's awarded is only the gift certificate where the value which falls within the limit that the legislature deemed to be harmless are not gambling under the law. I think the whole statute compels a conclusion that the legislature recognized that there are machines all over that can give small prizes.

OWEN: But isn't this the point. They wanted you to be limited to when you won you could get merchandise or a certificate of some kind that would let you get a piece of merchandise as long as the wholesale value wasn't more than \$5.

BISHOP: Exactly.

OWEN: Isn't one of the evils in these certificates is that they may not be the equivalent of cash, but to the extent that you can aggregate them, you can go out and buy a very expensive piece of merchandise where you can't aggregate a bunch of stuffed animals and take them to WalMart and trade them in for...

BISHOP: But the legislature didn't address that. It put the limit as based on a per single play of the game. I can conceive of a person who probably wouldn't have very much else to do, but playing these machines day after day, and hour after hour and winning a lot of certificates.

OWEN: That's the point. It seems to me the legislature was trying to limit you to a prize that did not have a value more than \$5 per single play. And you could get something, let's say a representation or value redeemable for something less than \$5, so that you could get a bunch of prizes that were all less than \$5. But what it didn't want you doing was getting something like cash that you could take out and use to buy something other than merchandise worth \$5.

BISHOP: I think certificate of value limited by per single play means just that. The legislature didn't address the issue of the number of times you could win. I will concede that someone could win a lot of times. That's like a kid with a good arm going that goes to the state fair, he's showing off for his girlfriend and he wins all the bears on the rack.

OWEN: But 100 bears doesn't have the same value as \$100 worth of merchandise. A single \$100 gift certificate from WalMart, that's my point is that you can't aggregate a 100 cupid dolls and have much value. Whereas, when you're aggregating these gift certificates that's something else again.

BISHOP: At least in economic theory 100 bears is worth 100 times what one bear is.

The legislature just didn't address that. It didn't address the number of times you might win. And by putting certificate of value in, the legislature obviously intended that the operator could award a piece of paper or a representation of value that would be redeemable. And that necessarily means that if you get enough of those representations of value or pieces of paper, you can get more than the \$5.

HECHT: But do you think what we're talking about here is like J. O'Neill used Chucky Cheese game or a county fair game, is that what the legislature was getting at or what?

BISHOP: It's exactly the same only it just kind of looks different. The legislature just made a limit. It's arbitrary. But that's what the legislature was there for. And they said this is, if it's noncash, if it's merchandise, if it's 5 times, 10 times the amount of a single player \$5, that just doesn't bother us. And so we are going to exclude that from the definition of a gambling device and leave that alone. And that's what the legislature was there for was to make those kinds of decisions.

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REBUTTAL

RODRIGUEZ: If I understand your position, I thought you conceded today that it's the state's burden to meet your definition of gambling device.

GARCIA: There is attention between what art. 18.18(b) and (f) say should happen in a civil forfeiture proceeding, and what this court said in Rumfolo.

RODRIGUEZ: I'm just trying to figure out what the state conceded.

GARCIA: The state's position is, is that we have to produce evidence, we have to come forward and bear the burden of production that the property was lawfully seized, that we went before a magistrate and we established probable cause, a reasonable belief that this property was illegal or connected to an illegal activity.

RODRIGUEZ: So you would have to establish the definition of gambling device under 47.01 correct?

GARCIA: In order to have met the probable cause standard to obtain a lawful warrant, yes, we would have established that.

RODRIGUEZ: And the second step is, as understand your briefing, you accept yourself from establishing 47.01(4)(b), correct?

GARCIA: That's correct.

RODRIGUEZ: Now why do you exclude the state's burden there?

GARCIA: Because 47.01(4)(b) does not describe a gambling device. It describes what is not a gambling device.

RODRIGUEZ: It's within the definition of gambling device correct?

GARCIA: The phrase not excluded under paragraph (b)? Yes. That's in within the definition of a gambling device. But if we go to 47.01(4)(b) that describes what is not a gambling device. So it could not be the state's burden to prove. In order to prove that it is a gambling device, that's it's also what is not a gambling device.

RODRIGUEZ: 47.09 lists other defenses. It is a defense to prosecution under this chapter that the conduct was and then lists a series of defenses.

GARCIA: I don't have the statute in front of me. I would agree that 47.01(4)(b) would be a potential defense, and that that's what the legislature intended, that it would be a defense.

RODRIGUEZ: If 47.01(b) is a defense as the state argues, why isn't it listed in 47.09 as a defense?

GARCIA: It's actually listed in 47.02. And if you look at 47.02, which defines the offense of gambling, 47.02 specifically states that 47.01(4)(b) is the defense to prosecution for the offense of gambling. Now under principles of statutory construction, 47.01(b) should have the same meaning throughout the entire chapter 47. And if the legislature intended that it would be a defense to the offense of gambling, it has the same meaning.

HECHT: But I've still got trouble here. You go tell the warrant judge, Judge, we want to seize this machine, and we submit to you that it is an electronic device that for consideration affords the player an opportunity to receive a toy, the value of which is partially determined by chance. You're not going to get the warrant.

GARCIA: If it's a toy, right.

HECHT: Well then it looks to me like you have to prove that it's not a toy.

GARCIA: It's not an element of the state's case.

HECHT: Well you can't get a warrant if you go in there and tell the judge it's a toy. He's going to read the statute and say, well you can't get that.

GARCIA: If we tell the judge that it is an electrical/mechanical _____ that based on chance, partially or solely, and it accepts _____ and it awards this prize, even if it's a toy if we say that that is reason to believe that it fits within the definition of a gambling device.

HECHT: How can it if it says just as plain as even you concede that if it's only a toy it's not a gambling device.

GARCIA: If you're saying does the state have to prove that it meets 47.01(4)(b) when it obtains its warrant, it doesn't because it's not an element of the state's case. Because it's a defense. And as a defense like for example in comparison in a criminal proceeding, the state would not have to refute the defense in its charging instrument nor in its state's case in chief.

HECHT: Well it seems like if I'm the warrant judge, I'm going to be awfully upset if the state comes in and says, we want to seize all of these machines and we're not going to tell you whether they only give out toys or not, and it turns out they do, and we've just gown down there and seized a whole bunch of machines when the state knew that they were...

GARCIA: In practicality the state's affidavit would show that these machines were not awarding awards that were within the exclusion to the definition of a gambling device. It would be because there would be a criminal investigation and this criminal investigation would include how these machines were operating and what these machines were awarding. And it is very clear in the facts of this case, that these machines were awarding gift certificates and under the Cherry Master case, not only to WalMart, but to a furniture store, to gasoline stations. That is clearly not award permitted under the statute. Moreover, we cannot forget that they were giving cash. Cash, whether it was placed on other machines or not, it was cash and that violates the statute.

OWEN: If they gave you a ticket at the end of your play, they say okay you can take this ticket and go play on another machine, that's precluded by (a)?

GARCIA: Right.

OWEN: Why didn't y'all argue (a) also precludes this?

GARCIA: That would be another reason, but that was not a reason for _____. But yes, that is another reason. And the evidence did exactly establish that because the evidence is undisputed.

OWEN: But you did not make the argument in the TC, or in the CA?

GARCIA: The argument was not raised in the CA.

O'NEILL: What if the machine just automatically if you've reached a certain number of points awarded games, and they say okay you've reached 500 points so you get two more games. Would that be allowed?

GARCIA: Actually in 47.01(9) it says that a thing of value is any benefit except an unrecorded right of replay. So it would have to be an unrecorded. In other words, if you won and

it immediately just gave you another game, it wasn't recording it, then that would not necessarily fit within the definition of a gambling device. Because the definition of a gambling device prohibits the opportunity to win something by chance as money. Anything that is a thing of value.