

In the Supreme Court of Pennsylvania

No. _____

COMMONWEALTH OF PENNSYLVANIA

v.

DIANE ALICE DENT,

Petitioner.

PETITION FOR ALLOWANCE OF APPEAL

On Petition for Allowance of Appeal from the Judgment of the Superior Court of Pennsylvania at No. 167 MDA 2009, filed March 25, 2010, Reversing the Judgment of the Court of Common Pleas of Columbia/Montour County, Pennsylvania, Criminal Division at No. CP-19-CR-0000733-2008, entered January 14, 2009

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v.

WALTER LEROY WATKINS,

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I. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The published, fully-~~pre~~cedential opinion that a divided three-judge panel of the Superior Court of Pennsylvania issued in these consolidated appeals on March 25, 2010, reversing the trial court's grant of habeas corpus in defendants' favor, is attached hereto as Exhibit A.

The opinion and order that the Court of Common Pleas of Columbia/ Montour County, Pennsylvania issued in this matter on January 14, 2009 is attached as Exhibit B.

And the opinion that the Court of Common Pleas of Columbia/ Montour County, Pennsylvania issued pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) on February 17, 2009 is attached as Exhibit C.

II. THE ORDER IN QUESTION

By a vote of 2-1, the Superior Court panel that decided these consolidated appeals ruled, on a question of first impression under Pennsylvania law, that chance predominates over skill in the card game known as Texas hold 'em poker and that, therefore, playing that card game for anything of value constitutes illegal gambling under the Commonwealth's Crimes Code.

The final paragraph of the Superior Court's majority opinion states:

Order **REVERSED**. Case **REMANDED**. Jurisdiction
RELINQUISHED.

See Exhibit A, majority opinion at page 16, ¶28.

III. QUESTION PRESENTED

This case presents the following important question of first impression over which the courts of other states have divided and as to which the trial court and the Superior Court in this very case have disagreed:

Whether skill predominates over chance in determining success at Texas hold 'em poker, so that playing Texas hold 'em poker for anything of value does not constitute illegal gambling under state law?

IV. STATEMENT OF THE CASE

This case presents an important question of first impression under Pennsylvania law: Whether skill or chance predominates in determining success at the card game known as Texas hold 'em poker. If skill predominates — as the trial court ruled in its scholarly opinion attached hereto as Exhibit B — then playing Texas hold 'em poker for money does not constitute unlawful gambling under Pennsylvania law. On the other hand, if chance predominates — as the majority on a divided three-judge Superior Court panel ruled — then playing Texas hold 'em poker for money does constitute unlawful gambling under Pennsylvania law.

Because the question whether the defendants/petitioners in this case should face criminal liability for their actions in playing and dealing hands of Texas hold 'em poker has not only evenly divided the four Pennsylvania state court judges who have issued the earlier rulings in this case, but has also resulted in conflicting rulings from the courts of other States, the issue raised in this case is well-deserving of this Court's review. Moreover, the continued exceptional popularity of Texas hold 'em poker among players of varied ages, backgrounds, and experience makes the question presented here a question of exceptional importance that this Court should agree to resolve at its earliest opportunity.

It cannot be denied that this case squarely presents, and represents the perfect vehicle for resolving, whether playing Texas hold 'em poker for anything of value constitutes illegal gambling under Pennsylvania law. The trial court's decision in this case examined that question in great detail, concluding that —

because skill predominates over chance in determining success at Texas hold 'em poker — playing Texas hold 'em poker does not constitute illegal gambling under Pennsylvania law. *See* Exhibit B.

The three–judge Superior Court panel that reinstated the criminal charges against defendants/petitioners also recognized that this case squarely presented the question whether skill predominates over chance in determining success at Texas hold 'em poker. Although we believe that the Superior Court majority reached the wrong result, the Superior Court’s opinion confirms that this case does indeed present an important question of first impression under Pennsylvania law that is deserving of this Court’s review.

* * * * *

In September 2008, the Columbia County, Pennsylvania District Attorney’s Office issued informations charging Diane Alice Dent and Walter Leroy Watkins with twenty counts each of misdemeanor offenses. The informations charged that defendants “unlawfully allow[ed] persons to collect and assemble for the purpose of unlawful gambling”; “unlawfully solicit[ed] or invite[d] any person to visit any unlawful gambling place for the purpose of gambling”; and were accomplices to such unlawful gambling in violation of 18 Pa. Cons. Stat. Ann. §306(1)(i)(ii) and (2) and 18 Pa. Cons. Stat. Ann. §5513(a)(2), (a)(3), and (a)(4). R.11a, 26a.¹

¹ Cites herein to “R.” followed by a page number refer to the Reproduced Record filed in the Superior Court. In accordance with Pennsylvania Rule of Appellate Procedure 1112(d), petitioners are filing one copy of that Reproduced Record in this Court together with this Petition for Allowance of Appeal.

Defendants, who were represented by the same attorney, filed timely Omnibus Pretrial Motions that included, among other things, a Petition for Writ of Habeas Corpus. Therein, defendants asserted that they could not be held criminally liable for “unlawful gambling” because playing Texas hold ’em poker for money does not constitute gambling under Pennsylvania law given that skill plays a greater role than chance in determining the outcome. R.33a–34a.

On December 15, 2008, the trial court held a hearing at which it received testimony and argument concerning whether skill or chance predominates in determining success at Texas hold ’em poker. R.37a–65a. During the hearing, opposing counsel agreed that in order for something to constitute gambling under Pennsylvania law, three elements must be established. First, there must be consideration, meaning a cost to participate. Second, the outcome must be predominantly determined by chance rather than skill. And third, there must be a payout or reward for winning. Counsel for the opposing parties further agreed that the first and third elements existed here, meaning that the lone issue for the trial court to decide was whether skill or chance predominates in determining success at Texas hold ’em poker. R.55a–57a.

At the hearing, the prosecution presented the testimony of an undercover state police corporal who played Texas hold ’em poker on various nights during July and August 2008 in a one-car garage that was under the control of Mr. Watkins and Ms. Dent in Bloomsburg, Pennsylvania. R.40a–54a.

Corporal Darrow testified that the game being played at all times was Texas hold 'em poker. R.40a–41a. Ms. Dent served as dealer and did not play. R.41a. Mr. Watkins was among those playing the card game. There was no charge or fee assessed to play, and the house deducted no “rake” or commission from the amounts wagered. The card game was not being operated as a business; rather, this was a recreational game at which the players were playing for money. The manner in which Texas hold 'em poker was being played in the garage did not differ from how Texas hold 'em poker is traditionally played. *Id.*

As the trial court’s opinion explains:

The facts are simple and uncontested. An undercover Pennsylvania State Police Trooper attended defendants’ poker games and provided the factual background. Defendants hosted Texas Hold'em poker games in a garage they controlled. Defendant Dent was the dealer. Texas Hold'em was the only game played. The parties placed an ante (\$1 or \$2) in the pot before the cards were dealt. Then the players could bet after their two cards were dealt and after each of the flop, turn, and river. The players could bet a specific dollar amount or go “all-in,” i.e., whatever they have left on the table. Whoever had the best poker hand, won the pot.

Exhibit B, trial court opinion at 2 (footnote omitted).

In other words, after the players anted-up, the first opportunity to wager came after each player received both of their face-down “hole” cards. *Id.* The next opportunity to wager came after the “flop,” which consists of three “community” cards being dealt face-up that all players could use in conjunction with each player’s own private “hole” cards. *Id.* Another round of wagering would occur after the “turn,” which consists of one more face-up “community” card. *Id.* The fifth and final face-up “community” card is known as the “river,” and a final round of

wagering would occur after it is revealed. *Id.* At that point, if more than one player remains in the game, the player with the strongest five-card poker hand using any combination of his two hidden “hole” cards plus the five face-up “community” cards wins the hand and the pot containing all that had been wagered on that hand. *Id.* In the event of a tie, the pot is evenly divided among those who share in having identically strong hands. If all but one player have folded at any time before the showdown (the revealing of the player’s hole cards after all betting has finished), then the player who has not folded wins whatever had previously accumulated in the pot for that hand.

Corporal Darrow, in his testimony, confirmed the importance of skill in succeeding at Texas hold ’em poker:

Q. Do you have to know the hierarchy of hands to play the game?

A. Yes.

Q. You have to know what it means to bluff, you have to know what that tactic is, that’s a tactic in the game?

A. You don’t have to know anything. You could go in there as an idiot and you may get lucky but over the course of time it would be beneficial to know the game of poker, yes.

Q. And that would include the odds on drawing to an inside straight and the odds on drawing to a four flush and the odds on filling up when you have two pair? If you knew all those odds you have a significant advantage, do you agree?

A. If you know the odds, yes, you have an advantage.

Q. Let me ask you, what is a tell? Do you know what a tell is in the game of poker?

A. Yes. If I believe somebody is holding a strong hand, if every time they have — they either bet a certain way or they fidget a certain way, could be anything, then they'll — if I know that, it's going to be my advantage if they're strong or weak.

Q. Certain people are more skillful at reading tells, would you agree?

A. Yes.

Q. The longer the play, especially if you're playing with the same players, the more you can read the tells, would you agree on that?

A. It would depend on the person and their ability. But somebody who is skilled at that, I'm sure the longer they played, absolutely.

R.48a–50a.

Later in his testimony, Corporal Darrow was asked, “Do you know, have there been learned treatises written on the art of poker, books? Have books been written by people to tell others how to play a good game of poker?” In response to that question, Corporal Darrow answered, “A ton, thousands.” R.51a–52a. Indeed, during the argument of counsel that followed the corporal's testimony, the attorney for the prosecution himself conceded that “[a] superior player playing [poker] at the same group of time with players less experienced than he should do better.” R.62a.

Based on the evidence presented at the hearing and the trial judge's in-depth review of learned treatises addressing whether skill or chance controls the outcome of Texas hold 'em poker, the trial court ruled that skill predominates in determining success at Texas hold 'em poker and therefore granted defendants' habeas corpus motions. *See Exhibit B.*

The trial court's key findings and conclusions based on those findings appear in the final three paragraphs of that court's opinion:

Using the predominance test, in conjunction with analyzing skill versus chance using the four prong dominant factor test, it is apparent that skill predominates over chance in Texas Hold'em poker. First, each player has a distinct possibility of exercising skill and has sufficient data available to make an informed judgment. Second, each player has the opportunity to exercise the skill, and they do possess the skill (albeit in varying degrees). Third, each player's skill and efforts sufficiently govern the results. Fourth, the standard skill is known by the players and governs the results. Skill comes with varying degrees of competence, but that is the case with any competition involving skill.

The academic studies and the experts generally agree that a player must be skillful to be successful at poker. At the outset, chance is equally distributed among the players. But the outcome is eventually determined by skill. Successful players must possess intellectual and psychological skills. They must know the rules and the mathematical odds. They must know how to read their opponents' "tells" and styles. They must know when to hold and fold and raise. They must know how to manage their money.

This court finds that Texas Hold'em poker is a game where skill predominates over chance. Thus, it is not "unlawful gambling" under the Pennsylvania Crimes Code.

Exhibit B, trial court opinion at 13–14 (footnote omitted).

From that ruling, the prosecution filed a timely notice of appeal to the Superior Court of Pennsylvania. Illustrating the importance of this case, two organizations — the Poker Players Alliance and the Pennsylvania Association of Criminal Defense Lawyers — filed amicus briefs in the Superior Court to urge the affirmance of the trial court's grant of habeas corpus in favor of defendants/

petitioners Dent and Watkins.² Petitioners believe that these two organizations, and perhaps others, will file amicus briefs on the merits in this Court in support of petitioners if this Petition for Allowance of Appeal is granted.

On March 25, 2010, following briefing and oral argument, a divided three-judge panel of the Superior Court of Pennsylvania issued a decision that reversed the trial court's entry of habeas corpus, reinstated the criminal charges against petitioners/defendants Dent and Watkins, and held that Texas hold 'em poker constitutes illegal gambling under Pennsylvania law because, in the majority's view, chance predominates over skill in determining the outcome of that card game. Senior Judge Robert A. Freedberg wrote the majority opinion, in which President Judge Kate Ford Elliott joined.

Senior Judge Robert E. Colville dissented, explaining that he would have held, based on Trooper Darrow's testimony quoted above, that "the Commonwealth failed to present any evidence which, if accepted as true, would prove that the games played at Appellants' Texas Hold'em Poker tournaments were games where chance predominated rather than skill." Exhibit A, Coleville, S.J., dissenting, at 3, ¶6.

² The amicus brief that the Poker Players Alliance filed in this case in the Superior Court of Pennsylvania can be freely accessed online at this link:

<<http://howappealing.law.com/PaSuperCtPokerAmicusBrief.pdf>>.

Attached to that amicus brief, which the Superior Court panel had in its possession when deciding this matter, are various statistical and scientific studies that objectively establish the predominant role that skill plays in determining success at Texas hold 'em poker.

The Superior Court’s majority opinion in this case recognized that the legality of Texas hold ’em presented a question of first impression under Pennsylvania law: “Neither a statute nor case law specifically addresses the legality of Texas Hold ’Em Poker.” Exhibit A, majority opinion at 5, ¶9. Moreover, the question presented here has not only evenly divided the four Pennsylvania judges who have addressed it in the context of this case, but it has also divided state courts across the Nation. As the trial court’s opinion in this case explains, “The states are divided as to whether Texas Hold’em is gambling.” Exhibit B at 5.

Because the question whether skill or chance predominantly controls the outcome of Texas hold ’em poker, thus determining whether playing Texas hold ’em poker for anything of value constitutes illegal gambling under state law, is an important question of first impression, over which other state courts have divided — and because that question is squarely presented by this case — defendants/petitioners Diane Dent and Walter Watkins have filed this timely Petition for Allowance of Appeal seeking this Court’s review and resolution of that issue.

V. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED

A. This Case Presents An Important Question Of First Impression Over Which Other State Courts Have Divided Concerning Whether Playing Texas Hold 'Em Poker For Anything Of Value Constitutes Illegal Gambling

The Superior Court's majority opinion expressly acknowledges that, under Pennsylvania law, "[n]either a statute nor case law specifically addresses the legality of Texas Hold 'Em Poker." Exhibit A, majority opinion at 5, ¶9; *see also id.* at 5, ¶11 ("Pennsylvania appellate courts have not definitively addressed the precise question of whether poker is a game of chance or a game of skill."). And it cannot be denied that Texas hold 'em poker is of widespread popularity in Pennsylvania and throughout the United States.

Texas hold 'em poker tournaments are regularly shown on both broadcast and cable television stations. The game is popular with teenagers, the elderly, and all ages in between. People from all backgrounds and income levels can and do play Texas hold 'em poker.³

Now, however, as the result of the Superior Court's ruling in this case, when Texas hold 'em poker is played recreationally with anything at stake more valuable than matchsticks, the participants and the dealer will face the daunting prospect of criminal liability under Pennsylvania law. It would be one thing if Pennsylvania law actually compelled that result. But, as the trial court in this case correctly

³ Amicus the Poker Players Alliance, an organization consisting of poker enthusiasts from throughout the United States, reports that it has roughly 54,000 members who reside in Pennsylvania, and surely many times that number of Pennsylvania residents play poker.

recognized, Pennsylvania law does not compel that result, because, under a proper application of Pennsylvania law, Texas hold 'em poker does not constitute gambling since skill predominates over chance in determining the outcome of that card game.

The parties and the courts below agree that under Pennsylvania law, there are three elements to gambling: consideration, chance, and reward. Exhibit A, majority opinion at 5, ¶10; Exhibit B, trial court opinion at 4; *see also Commonwealth v. Two Electronic Poker Game Machines*, 502 Pa. 186, 194, 465 A.2d 973, 977 (1983). Moreover, the courts below and the parties hereto concede that the consideration and reward elements are established on this record, leaving only the issue of whether chance or skill predominates to be decided. Exhibit A, majority opinion at 5, ¶10.

Finally, the parties and the courts below further agree that to constitute gambling under Pennsylvania law, chance must predominate over skill in determining the outcome of Texas hold 'em poker. Exhibit A, majority opinion at 6, ¶11; Exhibit B, trial court opinion at 4; R.57a; *see also Two Electronic Poker Game Machines*, 502 Pa. at 194–95, 465 A.2d at 977–78 (recognizing that whether chance predominates over skill is an element in determining if an activity constitutes gambling under Pennsylvania law). As the trial court's opinion concisely explains:

[T]he controlling sub-issue is whether Texas Hold'em is a game of skill or a game of chance or, if both, does skill trump chance or vice-versa. Simply, if chance predominates, Texas Hold'em is gambling. If skill predominates, it is not gambling.

Exhibit B, trial court opinion at 4. During the oral argument in the trial court on defendants' habeas corpus motions, counsel for both the prosecution and the defense

agreed that the trial court should focus on that controlling legal question to resolve this matter. R.57a.

Not only does this case present an important question of first impression under Pennsylvania law, but that very same question has also divided other state courts, thus further confirming the appropriateness of having that question definitively settled in Pennsylvania by this Commonwealth's highest court. As the trial court observed in its opinion, "[t]he states are divided as to whether Texas Hold'em is gambling." Exhibit B at 5.

One of the most recent examples of a state court's ruling that disagrees with the Superior Court's decision in this case issued from the State of South Carolina in the case captioned *Chimento v. Town of Mount Pleasant*, No. 2009-CP-10-001551 (Oct. 1, 2009, C.C.P. Charleston County, S.C.), available online at <<http://www.scribd.com/doc/20497135/SC-Circuit-Court-Order-Chimento-Et-Alv-Town-of-Mt-Pleasant-10-01-09>>.

In *Chimento*, five individuals appealed their municipal court gambling convictions under South Carolina law to the Court of Common Pleas of Charleston County. The South Carolina Common Pleas Court, relying in part on the trial court's ruling in the Watkins and Dent case that gives rise to this Petition for Allowance of Appeal, announced that "this Court has concluded that Texas Hold'em is not 'gaming' within the meaning of South Carolina law because skill predominates over chance." *Id.*, slip op. at 11.

The South Carolina court offered the following reasoning as the basis for its ruling:

The evidence presented by Appellants convincingly establishes that the outcome of a typical hand of Texas Hold'em is primarily determined by the relative skill of the players. A more skilled player will consistently beat a less skilled player, and a player's skill can be improved over time through study and practice. Moreover, success at a game of Texas Hold'em requires reasoning and deductive skills that belie the notion that the outcome is determined solely—or even primarily—by the cards one is dealt. Accordingly, this Court holds that Texas Hold'em is a game of skill. *Accord Pennsylvania v. Dent*, No. 733–2008, Slip Op. at 13 (Pa. Ct. Com. Pl. Jan. 14, 2009) (holding, under application of dominant factor test, that “it is apparent that skill predominates over chance in Texas Hold'em poker”).

Id., slip op. at 10.

In addition to the fact that this case presents an important question of first impression over which other state courts have divided, this Court should also grant review here because the Superior Court's majority, in reversing the trial court's well-reasoned ruling, reached an incorrect result.

The trial court's opinion in this case recognized that “[t]he compelling case that Texas Hold'em is much more of a game of skill is found in many diverse sources.” Exhibit B, trial court opinion at 6. The trial court's opinion explains that “[w]ithout statistical analysis, many of these ‘how-to’ books state uncategorically that poker is a game of skill.” *Id.* The trial court further noted that “academics and researchers have found scientific and statistical bases for the proposition that poker is a game of skill.” *Id.*

The trial court's opinion contains the following quote from a law review article:

Serious and skilled poker players tend to win consistently, while those relying on luck do not. If skill were not a significant factor, the collection of winners would be more representative of a random selection from the field of all players. If you ask who are the top five poker players in the world, you will receive a meaningful response because skill is a determining factor. But if you ask who are the top five roulette players in the world, the response is utterly meaningless: roulette is purely a game of chance. As seen below, much anecdotal evidence exists among authors and experts regarding the role of skill in poker. The collective expert opinion is unequivocal: poker is a game of skill

Id. at 11.

The Superior Court’s observation that no amount of skill can change the cards that have been dealt is correct as far as it goes. But what the observation overlooks is that seventy–five percent of all Texas hold ’em poker hands are resolved before the “showdown” stage — where the players who have remained in a hand until the very end reveal their “hole” cards to determine who has the best poker hand — because all but one of the players will have folded before that final stage is reached. Thus, at most, only twenty–five percent of the time does the luck of the cards determine the outcome in Texas hold ’em poker. And, even then, bluffing and wagering skills will have determined how much is at stake in the hand and which players remain in the hand.

The participants’ skill at evaluating the strength of their own hand as the cards are dealt, their skill at evaluating the likely strength of the other players’ hands, their skill at bluffing and evaluating whether other players are bluffing, their skill in deciding when and if to raise the amount at stake on the hand, and their skill at determining when it is better to fold than compete for the pot are all

examples of the skills needed in combination to succeed at Texas hold 'em poker, and they are only a small subset of the skills used by successful poker players. The trial court in this case properly relied on the facts of record in finding that skill predominates over chance in determining success at Texas hold 'em poker.

Indeed, to affirm the trial court's ruling, as Judge Coleville noted in his dissent from the Superior Court's decision, this Court need look no further than the testimony of the prosecution's only witness, undercover agent Corporal Darrow, who personally participated in poker games conducted at the defendants' garage. Based on Corporal Darrow's testimony, which we have extensively quoted above, Judge Coleville concluded that "the Commonwealth failed to present any evidence which, if accepted as true, would prove that the games played at Appellants' Texas Hold'em Poker tournaments were games where chance predominated rather than skill." Exhibit A, Coleville, S.J., dissenting, at 3, ¶6. Judge Coleville's conclusion is further bolstered by the fact that, during the argument of counsel that followed the corporal's testimony in the trial court, the attorney for the prosecution himself admitted that "A superior player playing [poker] at the same group of time with players less experienced than he should do better." R.62a.

The trial court's ruling that skill predominates over chance in determining success at Texas hold 'em poker is correct, and therefore the Superior Court erred in reversing that decision. At a minimum, the conflicting rulings that the trial court and the Superior Court issued in this case concerning whether skill predominates

over chance in determining success at Texas hold 'em poker demonstrate that a factual dispute over that critical issue exists that should be resolved at trial.

It is precisely because poker requires roughly the same amount of skill as golf that poker tournaments now rival golf tournaments in popularity on television. By contrast, the only people who watch anyone play roulette on television are casino security guards. And people only watch lottery drawings to see if they have won. But poker matches are spectator events because, as in any game that people tune in to watch, it is fun to watch good players get beaten by even better players. Like golf, tournament poker is a game won and lost predominantly on the basis of the skills of the players. Watkins and Dent were playing and dealing cards, respectively, in a game in which skill predominates, and thus they were not engaged in unlawful gambling.

Although it is unnecessary for present purposes to explain in intricate detail what caused the two-judge Pennsylvania Superior Court majority to reach an incorrect result, it deserves to be noted that the nine opinions from other jurisdictions on which the majority relied heavily in concluding that chance predominates over skill in determining the outcome of Texas hold 'em poker (Exhibit A, majority opinion at 7–13, ¶¶13–22) were of dubious relevance. Those cases were neither cited in the briefs of the parties, nor in the amicus briefs, filed in the Superior Court. None of those cases specifically involved the game of Texas hold 'em poker, which is the only game involved here. Indeed, some of those cases did not even mention poker or apply a predominance test to decide whether an activity

constituted gambling. And the most recent case that the majority cited, *Joker Club, L.L.C., v. Hardin*, 643 S.E.2d 626 (N.C. Ct. App. 2007), purported to apply a predominance test to resolve whether the generic game of poker was controlled by chance or by skill, but in actuality that court ended up holding that unless a game is *entirely* controlled by skill, then chance predominates. *See id.* at 630 (“No amount of skill can change a deuce into an ace. Thus, the instrumentality for victory is not entirely in the player’s hand.”).

That North Carolina ruling thus assigned a meaning to the term “predominate” that differs from the meaning which that term possesses under Pennsylvania law, where something is viewed to predominate so long as it exists more than 50 percent of the time. *See, e.g., City of Philadelphia v. Commonwealth, Bd. of Finance and Revenue*, 569 Pa. 381, 393, 803 A.2d 1262, 1269 (2002) (recognizing that something can be predominant without being exclusive). In other words, so long as skill plays a greater role than chance in determining the outcome of Texas hold ’em poker, then playing Texas hold ’em poker does not constitute illegal gambling under Pennsylvania law.

The North Carolina intermediate appellate court’s ruling in *Joker Club* is also flawed because the element of chance is inherent in most every game in which skill predominates. In golf, for example, the wind may and often does affect the outcome of play. In downhill ski racing, a change in weather conditions may affect how quickly competitors descend the course. The outcome of a chess tournament may depend on who moves first or which opponent one draws at which stage of the

competition. And, in the game of Scrabble, it is true that no amount of skill can turn a “Q” tile into an “E,” but that does not mean that chance predominates over skill in success at Scrabble. Indeed, the fact that luck in the distribution of tiles in Scrabble may, in a given game, allow a weaker player to defeat a more skilled player does not establish that chance predominates in Scrabble any more than the similarly flawed reasoning the prosecution offers here establishes that chance predominates over skill in Texas hold ’em poker.

This Court has already recognized the potentially dispositive role that skill plays in determining the outcome of poker hands when that card game is engaged in between or among human participants. In *Commonwealth v. Two Electronic Poker Game Machines*, 502 Pa. 186, 465 A.2d 973 (1983), this Court was considering whether chance or skill predominated in determining success when playing a video poker machine known as Electro-Sport. Writing on behalf of a unanimous Court, Justice William D. Hutchinson observed:

That the skill involved in Electro-Sport is not the same skill which can indeed determine the outcome in a game of poker between human players can be appreciated when it is realized that holding, folding, bluffing and raising have no role to play in Electro-Sport poker. Skill can improve the outcome in Electro-Sport; it cannot determine it.

Id. at 196, 465 A.2d at 978.

The clear implication of Justice Hutchinson’s observation in *Two Electronic Poker Game Machines* is that skill can and does determine the outcome in poker when the game is played between humans and features the typical elements of holding, folding, bluffing and raising, all of which are present in Texas hold ’em

poker. *See also Bell Gardens Bicycle Club v. Department of Justice*, 42 Cal. Rptr. 2d 730, 750 (Cal. Ct. App. 2d Dist. 1995) (favorably quoting expert testimony offered to establish the dispositive role that skill plays in poker played among humans).

Although petitioners believe that skill predominates over chance in determining success in all forms of poker played among humans, skill plays an even greater role in determining success at Texas hold 'em poker than in many other forms of poker given the uniquely large number of decision points that each player faces in every single hand. The decision whether to fold, check, bet, or raise, and, if a bet or raise is involved, how much to bet or raise, is presented before the flop after the players have received their two face-down hole cards, after the flop, after the turn card is revealed, and after the river card is revealed. With five community cards exposed over the course of each round of play, each player has many more opportunities to make a skill-based judgment about his opponents' hands and his prospects of prevailing, whether because he has the best hand or because he can execute a successful bluff. As a consequence of all of these decision points, and the predominant role that skill plays, only one in four hands actually plays out to the showdown of multiple hands at the end, while the remaining three out of four hands are resolved before the showdown as a consequence of all but one of the players having previously folded.

These facts, the experience-based and scientific studies on which the trial court relied, and the real world evidence establishing that experienced and knowledgeable Texas hold 'em poker players regularly prevail over inexperienced

and less knowledgeable players establish that the trial court was correct in holding that skill predominates over chance in determining success at Texas hold 'em poker.

* * * * *

The question presented herein represents an important question of first impression under Pennsylvania law. The question has divided not only the Pennsylvania state court judges who have addressed it in the context of this case, but it has also divided the courts of other States. Because the many Pennsylvania residents who enjoy playing Texas hold 'em poker deserve a ruling from Pennsylvania's highest court on whether they are involved in criminal activity when they are playing that card game for anything of value, the Petition for Allowance of Appeal should be granted.

VI. CONCLUSION

For the reasons set forth above, the Petition for Allowance of Appeal should be granted.

Respectfully submitted,

Dated: April 26, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two true and correct copies of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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