

In the Superior Court of Pennsylvania

Nos. 167 & 168 MDA 2009

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

DIANE ALICE DENT and WALTER LEROY WATKINS,

Defendants/Appellees.

BRIEF FOR APPELLEES

On appeal from the Judgments of the Court of Common Pleas of Columbia County,
Pennsylvania, entered January 14, 2009 at Nos. 733 and 746 of 2008

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I. INTRODUCTION

This case presents a question of first impression at the appellate level in Pennsylvania: Whether skill or chance predominates in determining success at the game known as Texas hold 'em poker. If skill predominates, then playing Texas hold 'em poker for money does not constitute unlawful gambling under Pennsylvania law, but, if chance predominates, then playing Texas hold 'em poker for money would constitute unlawful gambling under Pennsylvania law.

The trial court, in a scholarly opinion, found as a fact that skill predominates over chance in determining success at Texas hold 'em poker. The prosecution's Brief for Appellant notably fails to address or grapple with any of the substantial body of scholarly authorities on which the trial court relied in finding that skill predominates over chance in determining success at that game.

Instead, the prosecution offers two arguments for reversal on appeal. First, the prosecution asserts that existing precedent mandates the reversal of the trial court's finding. And, second, the prosecution asserts that regardless of whether skill or chance predominates as a theoretical matter in determining success at Texas hold 'em poker, chance predominates in determining success based on how Texas hold 'em poker was actually played in this case. Both of these arguments lack merit.

To begin with, these arguments were never raised at the trial court level, and the law is clear that issues not raised below are waived and thus not appropriate for review on appeal. The record shows that the prosecution explicitly agreed that this case presented a matter of first impression for the trial court. And the record also

shows that at no time did the prosecution make a distinction, nor request that a distinction be made, between the manner in which Texas hold 'em poker is generally played and the manner in which it was played in defendants' garage.

In addition, the prosecution's arguments are entirely without merit. Assuming for the sake of argument that they have not been waived, the arguments are insufficient to overturn the trial court because they are incorrect as a matter of both fact and law. Prior Pennsylvania case law has not resolved whether skill or chance predominates in determining success at Texas hold 'em poker. Rather, prior case law specifically avoided resolving that issue, and the parties' original agreement that this case presents a matter of first impression was thus correct. Moreover, the record provides absolutely no basis to distinguish the game as played in the defendants' garage from the game as analyzed and examined in the learned treatises, legal articles, and scientific studies relied on by the trial court. Based on the virtually undisputed conclusions found in the literature, articles, and studies concerning Texas hold 'em poker as played everywhere (which, of course, includes the defendants' garage), the trial court properly found that skill predominates in determining success at Texas hold 'em poker and that the game therefore is not gambling as that term is used in Pennsylvania's criminal code.

In conclusion, the prosecution's arguments on appeal are waived and fail to establish that the trial court reached a clearly erroneous factual finding as to whether skill predominates in determining success at Texas hold 'em poker. Accordingly, this Court should affirm.

II. STATEMENT OF THE STANDARD OF REVIEW

The prosecution seeks to challenge on appeal the trial court's factual finding that skill predominates over chance in determining success at Texas hold 'em poker. This Court has explained that where a trial court's factual findings control the outcome of a criminal case, "our task is to determine whether the factual findings are supported by the record. If so, we are bound by those findings." *Commonwealth v. Hill*, 874 A.2d 1214, 1216 (Pa. Super. Ct. 2005) (quoting *Commonwealth v. DeWitt*, 530 Pa. 299, 301-02, 608 A.2d 1030, 1031 (1992)).

III. STATEMENT OF THE QUESTIONS INVOLVED

1. Has the prosecution waived its arguments for reversal by failing to present them to the trial court?

Suggested answer: Yes, the prosecution has waived its appellate arguments for reversal because the prosecution could have but failed to present these arguments to the trial court for consideration while the case was pending before that court.

2. Whether the trial court committed clear error in finding as a fact that skill predominates in determining success at the game known as Texas hold 'em poker?

Suggested answer: The trial court's finding that skill predominates in determining success at Texas hold 'em poker is not clearly erroneous but rather is fully supported by the record in this case.

IV. STATEMENT OF THE CASE

A. Relevant Procedural History

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.

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 the game known as Texas hold 'em poker. R.37a–65a. At 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 the game known as Texas hold 'em poker. R.55a–57a.

Unlike on appeal — where the prosecution is arguing that longstanding case law mandates reversal — the very same attorney who wrote the Brief for Appellant conceded at oral argument to the trial judge that the very same case law was “rather nebulous” and “not terribly helpful.” R. 63a–64a. And unlike on appeal — where the prosecution is arguing that some difference exists between the way that Texas hold 'em poker is played in theory and how that same game is played in practice — the prosecution failed to argue to the trial court that any relevant differences existed between how Texas hold 'em poker is played in theory and how it is played in practice.

On January 14, 2009, the Honorable Thomas A. James, Jr. issued a scholarly opinion holding that skill predominates over chance in determining success at Texas hold 'em poker. The trial court's key findings and conclusions based on those findings appear in the final three paragraphs of that 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.

Opinion at 13–14 (footnote omitted).

The prosecution thereafter filed a timely notice of appeal.

B. Relevant Factual History

At the trial court hearing that occurred on December 15, 2008, 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. The manner in which Texas hold 'em poker was being played in the garage was no different than 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.

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. Opinion at 2. 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 had folded at any time before the showdown (the revealing of the player's hole cards after all betting has finished), then the player who had 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 admitted 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 found that skill predominates in determining success at the game known as Texas hold ’em poker and therefore granted defendants’ habeas corpus motions. This appeal followed.

V. SUMMARY OF THE ARGUMENT

The trial court, in its scholarly opinion, correctly found as a fact that skill predominates over chance in determining success at the game known as Texas hold 'em poker. The prosecution, in its Brief for Appellant, has failed to show that the trial court's finding is clearly erroneous or unsupported by the record.

Perhaps recognizing that reversal cannot be obtained on this record using arguments identical to those that the prosecution actually presented to the trial court, the prosecution on appeal advances two new principal arguments, neither of which was presented to the trial court. As a result, the prosecution's arguments on appeal are waived, and this Court may affirm on the basis of waiver alone.

First, the prosecution argues that longstanding case law mandates reversal. But, before the trial court, the prosecution correctly agreed that this case presented a question of first impression in Pennsylvania concerning whether skill predominates over chance in determining success at the game known as Texas hold 'em poker. Moreover, even if the prosecution's argument were not waived, the ruling that the prosecution relies on is a Commonwealth Court decision that is therefore not binding on this Court; the ruling expressly involves the liquor code and not the criminal code; and the ruling fails to disclose which of the many types of poker was at issue in that case.

The prosecution's other argument for reversal fares no better. When this case was pending before the trial court, the prosecution did not argue that the trial court should distinguish between how Texas hold 'em poker is played in theory and how

the game is played in the real world or in the defendants' garage. Rather, the trial court correctly understood, based on the evidence of record, that how Texas hold 'em poker was played in the garage in question in Bloomsburg, Pennsylvania did not differ from how this game is played anywhere else. As a result, the prosecution has waived any ability to argue on appeal, for the very first time in this case, that the trial court erred in failing to take into account how Texas hold 'em poker when played in the real world differs from how Texas hold 'em poker is played in theory.

In any event, the testimony of the prosecution's undercover officer and the representations of opposing counsel at the trial court hearing confirm that the traditional form of Texas hold 'em poker was being played in defendants' garage. Therefore, the trial court did not err in granting defendants' habeas corpus motions based on the trial court's factual finding, well-supported in the record, that skill predominates over chance in determining success at the game known as Texas hold 'em poker.

For these reasons, this Court should affirm the trial court's ruling.

VI. ARGUMENT

A. Existing Pennsylvania Law Does Not Mandate Reversal, And The Commonwealth Has In Any Event Waived This Argument

1. The prosecution has waived this argument by failing to present it to the trial court

For its first argument on appeal, the prosecution submits that the case law cited in its appellate brief “unequivocally mandate[s] the conclusions that the Texas Hold’em Poker game in this case was ‘unlawful gambling’ under Section 5513 of the Crimes Code and that the lower court committed an error of law in concluding otherwise.” Brief for Appellant at 10.

By contrast, while this case was pending before the trial court, the parties were in agreement (and correctly so) that the question whether skill predominates over chance in determining success at the game known as Texas hold ’em poker presented a question of first impression. Unlike on appeal — where the prosecution is arguing that longstanding case law mandates reversal — the very same attorney for the prosecution who wrote the Brief for Appellant conceded at oral argument before the trial judge that the very same case law was “rather nebulous” and “not terribly helpful.” R. 63a–64a.

Pennsylvania Rule of Appellate Procedure 302(a) provides that “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa. R. App. P. 302(a). *See also Wagner v. Erie Ins. Co.*, 801 A.2d 1226, 1233–34 (Pa. Super. Ct. 2002) (noting that matters raised for the first time on appeal are not properly preserved for appellate review and will not be considered).

This Court should therefore hold that the prosecution has waived its argument that existing case law mandates a holding that Texas hold 'em poker constitutes unlawful gambling in Pennsylvania.

2. Existing case law does not mandate a holding that Texas hold 'em poker is unlawful gambling under Pennsylvania law

The prosecution was correct when it forthrightly conceded to the trial court that whether skill predominates over chance in determining success at the game known as Texas hold 'em poker presented a question of first impression under Pennsylvania law. The cases on which the prosecution now relies in seeking to argue to the contrary fail to support the prosecution's newly adopted position.

The first case on which the prosecution relies is the ruling of the Commonwealth Court in *Commonwealth of Pa. Liquor Control Bd. v. Kehler*, 538 A.2d 979 (Pa. Commw. Ct. 1988). The *Kehler* case involved a liquor licensee who decided to host a party that featured both poker playing and dice playing for money. The Commonwealth Court's opinion fails to reveal which of the many types of poker was at issue in *Kehler*. The Commonwealth Court ruled in *Kehler* that poker playing constituted gambling for purposes of the liquor code, but the Commonwealth Court's decision expressly states that "we are not prepared to hold and need not decide that poker playing is 'unlawful gambling' under the Crimes Code." *Id.* at 981. The Commonwealth Court also noted in a footnote that "[t]here

does not seem to be unanimous agreement in other jurisdictions as to whether poker playing is ‘gambling’ as an indictable offense.” *Id.* at 981 n.3.

The prosecution is thus arguing that this Court should rely on the *Kehler* decision for a holding that the Commonwealth Court has expressly disclaimed. *Kehler* cannot establish that poker is unlawful gambling in Pennsylvania because that opinion expressly fails to so hold.

The prosecution’s reliance on *Kehler* is also unavailing for two additional reasons. First, “Commonwealth Court decisions are not binding precedent on” the Superior Court. *See Valley Medical Facilities, Inc. v. Pennsylvania Property & Cas. Ins. Guar. Ass’n*, 902 A.2d 547, 551 (Pa. Super. Ct. 2006). And second, nothing in the *Kehler* opinion, issued in 1988, establishes that the decision involved Texas hold ’em poker as opposed to any other of the many varieties of poker that are commonly played.

The prosecution next asks this Court to rely on its ruling in *Commonwealth v. Betres*, 352 A.2d 495, 498 (Pa. Super. Ct. 1975), for the proposition that any form of gambling that the legislature has not specifically authorized constitutes unlawful gambling. Yet the prosecution’s reliance on *Betres* is an example of circular logic, because the trial court here has correctly ruled that playing Texas hold ’em poker does not constitute gambling. Thus, by definition, and notwithstanding *Betres*, playing Texas hold ’em poker cannot constitute *unlawful* gambling. Similarly, this Court’s even earlier ruling in *Commonwealth v. Indelecato*, 243 A.2d 137 (Pa. Super. Ct. 1968), did not resolve or purport to resolve whether skill predominates

over chance in determining success at the game known as Texas hold 'em poker. Rather, in *Indelecato*, defendants did not challenge whether playing whatever unspecified type of poker was involved in that case constituted unlawful gambling.

The indisputably predominant role that skill plays in determining the outcome of poker games being played among individual human beings has been recognized by the Supreme Court of Pennsylvania in *Commonwealth v. Two Electronic Poker Game Machines*, 502 Pa. 186, 465 A.2d 973 (1983). There, Pennsylvania's highest 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 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.

In sum, the prosecution has waived its argument that existing case law mandates reversal, and, on the contrary, existing case law does not establish that chance predominates over skill in determining success at the game known as Texas

hold 'em poker. If anything, the Supreme Court of Pennsylvania's considered dicta in *Two Electronic Poker Game Machines* demonstrates that the trial court reached the correct result in finding that skill predominates over chance in determining success at Texas hold 'em poker.

B. The Trial Court Correctly Found That Skill Predominates Over Chance In Determining Success At Texas Hold 'Em Poker, And The Prosecution's Only Challenge To That Finding Is Waived

1. The prosecution has waived its lone challenge to the trial court's central finding by failing to present it to the trial court

While this case was pending before the trial court, both parties acknowledged that the lone dispositive question presented was whether skill predominates over chance in determining success at Texas hold 'em poker. R.57a. However, now that this case has reached the appellate stage following a decision adverse to the prosecution, the prosecution has changed the gist of its argument to focus on whether, given how Texas hold 'em poker is played "in the real world," skill predominates over chance in determining success.

The prosecution has waived its newly formulated appellate issue, because the prosecution failed to present this particular question to the trial court for its consideration in the first instance. As we have noted above, Pennsylvania Rule of Appellate Procedure 302(a) provides that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa. R. App. P. 302(a). *See*

also Wagner, 801 A.2d at 1233–34 (noting that matters raised for the first time on appeal are not properly preserved for appellate review and will not be considered).

When this case was argued to the trial court, neither the prosecution nor the defense drew any distinction between how Texas hold 'em poker was played in defendants' garage and the "Platonic ideal" of Texas hold 'em poker as it is played in theory, in televised competitions, or in academic simulations. Moreover, the prosecution's lone witness, Corporal Darrow, testified that the game being played in defendants' garage was "called Texas Hold 'Em," and Corporal Darrow's description of the game described Texas hold 'em poker as commonly played everywhere. R.41a–47a.

Finally on the waiver issue, the prosecution does not argue on appeal that the trial court committed plain error in finding as a fact that skill predominates over chance in determining success in playing the so-called Platonic ideal of Texas hold 'em poker. Because there was no distinction argued to the trial court or supported in the record between how Texas hold 'em poker was played in defendants' garage and the Platonic ideal of Texas hold 'em poker, the prosecution's failure to argue that the trial court's finding was clearly erroneous insofar as the holding concerned the Platonic ideal of Texas hold 'em poker is fatal to the prosecution's appeal.

In seeking reversal on appeal, the prosecution now tries to draw some distinction, factually unsupported on the record of this case, between the manner in which Texas hold 'em poker is played in the real world — specifically in defendants' garage — and the manner in which Texas hold 'em poker is played in theory. Yet

the prosecution failed either to argue any such distinction to the trial court or to furnish any factual basis on which the trial court could find that any such distinction existed. Because the prosecution failed to present this argument or any factual predicate for this argument to trial court, this Court should hold that the prosecution's second and final ground for reversal is both waived and factually unsupported in the record.

2. The trial court was correct, and thus did not reach a clearly erroneous finding unsupported by the record, in finding as a fact that skill predominates over chance in determining success at Texas hold 'em poker

In finding that skill predominates over chance in determining success at Texas hold 'em poker, the trial court's scholarly opinion relied on a variety of learned sources. The prosecution, in its appellate brief, fails to address, and thus entirely fails to take issue with, any of those sources.

The trial court's opinion recognizes that "[t]he compelling case that Texas Hold'em is much more of a game of skill is found in many diverse sources." 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.* Yet the trial court then proceeds to observe 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

Opinion at 11.

The prosecution offers essentially two arguments in response to the trial court's well-supported factual finding that skill predominates over chance in determining success at Texas hold 'em poker. First, the prosecution reasons that skill may indeed predominate over chance in determining success at Texas hold 'em poker in "the long run," but, if only one hand or a small number of hands are played, chance may determine the outcome.

There are two obvious flaws in the prosecution's reasoning. First, a skilled poker player would not unthinkingly put everything at risk at the outset of a poker contest no matter how good his or her cards happened to be. Thus, losing everything too quickly during a poker contest would be a clear sign of an unskilled novice. Only an inexperienced player would risk losing everything at the outset. The prosecution's argument thus proves defendants' point: one who is skilled at Texas hold 'em poker would avoid the self-destructive ways of a novice at the game. And second, there is no factual support for the prosecution's argument. Corporal Darrow described a poker match at which hand after hand of poker was being played. R.41a.

Moreover, playing poker at defendants' garage occurred after the conclusion of a poker contest for a prize at the bar where defendants worked. R.50a–53a. Thus, only those who enjoyed playing poker and were experienced at the game would be invited to play at the garage.

The prosecution's second and final challenge to the trial court's finding that skill predominates over chance in determining success at Texas hold 'em poker observes that chance entirely determines which face-down "hole" cards each player holds and whether those cards, combined with the face-up "community" cards also selected as a function of chance, will produce a winning poker hand.

The prosecution'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 stayed in the game 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. *See* Brief for *amicus curiae* the Poker Players Alliance. 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.

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 factual finding at issue in this appeal, 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:

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 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 finding that skill predominates over chance in determining success at Texas hold ’em poker is not clearly erroneous nor is it unsupported in the record, and therefore this Court should reject the prosecution’s challenge to that finding. The prosecution agreed on the record that if skill predominates over chance in determining success at Texas hold ’em poker, then playing Texas hold ’em poker for money would not constitute gambling (or unlawful gambling) under

Pennsylvania law, and the trial court would need to grant defendants' habeas corpus motions. R.57a. Accordingly, the trial court properly granted defendants' habeas corpus motions, and this Court should affirm the trial court's judgments in these cases.

VII. CONCLUSION

The trial court's finding that skill predominates over chance in determining success at Texas hold 'em poker is well-supported in the record and is not clearly erroneous. This Court should therefore affirm the judgments of the trial court granting defendants' habeas corpus motions.

Respectfully submitted,

Dated: June 5, 2009

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy 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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