Case No.

IN THE
SUPREME COURT OF THE UNITED STATES

MASSOOD JALLALI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the
District Court of Appeal
Fourth District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN DISCOVERY RULINGS THAT RESULTED IN A MISCARRIAGE OF JUSTICE AND DEPRIVATION OF PETITIONER'S CONSTITUTIONAL RIGHTS?

WHETHER THE TRIAL COURT'S DISCOVERY RULINGS DEPRIVED PETITIONER OF EVIDENCE UNDER *BRADY* THAT WOULD SUPPORT AN AFFIRMATIVE DEFENSE AND PETITIONER'S THEORY OF INNOCENCE?

WHETHER THE TRIAL COURT'S DISCOVERY RULINGS CAUSED PETITIONER IRREPARABLE INJURY WHICH WILL CONTINUE THROUGHOUT THE REMAINDER OF THE CASE, IMPACTING THE IMPENDING TRIAL, LEAVING PETITIONER NO OTHER ADEQUATE REMEDY TO REVIEW THE DISCOVERY ORDERS, BUT CERTIORARI?

PARTIES TO PROCEEDING

The petitioner is Massood Jallali.

The respondent is the State of Florida.

David Lebejko has an interest in the outcome of this litigation.

The Seminole Tribe of Florida has an interest in the outcome of this litigation.

STATEMENT OF RELATED CASES

State v. Massood Jallali, No. 15-13438CF10A, 17th Judicial Circuit, Broward County, FL (criminal trial pending).

State v. David Lebejko, No. 15-13437CF10A, 17th Judicial Circuit, Broward County, FL (criminal trial pending).

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PETITION

Massood Jallali, by and through the undersigned attorney, respectfully petitions the Supreme Court of the United States for a Writ of Certiorari.

OPINIONS BELOW

The decision of the Florida Supreme Court entered on June 17, 2019, is contained in Appendix A. The decision of the Fourth District Court of Appeal entered May 17, 2019, which denied rehearing is contained in Appendix B. The decision of the Fourth District Court of Appeal entered April 8, 2019, which dismissed certiorari review is contained in Appendix C. The four orders of the trial court entered February 14, 2019, are contained in Appendix E, Appendix F, Appendix G and Appendix H.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the Florida Supreme Court was entered on June 17, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law…"

The Fourteenth Amendment provides that "[n]o state shall…deprive any person of life, liberty, or

property, without due process of law…"

STATEMENT OF THE CASE AND FACTS

Petitioner, Massood Jallali, will be referred to by name, as "Petitioner" or as "Defendant", throughout this petition.

Respondent, State of Florida, will be referred to as "the State", Plaintiff" or as "Respondent", throughout this petition.

Andrew L. Siegel, will be referred to as "Judge Siegel" in this petition.

References to "Appx." are to the appellate appendix relied upon in the below proceeding before the Fourth District Court of Appeal.

1. Arrest and Initial Charges

Defendant was arrested on November 2, 2015 (Appx., p. 5) after the State charged Defendant with allegedly acting in concert to knowingly deprive Coconut Creek Casino of $5,000 cash on July 27, 2015, by cheating on a card game (Appx., p. 5).

2. First Motion to Dismiss and Statement of Affirmative Defense

Defendant filed an initial motion to dismiss on November 28, 2016 (Appx., p. 20-27). In that motion Defendant stated his affirmative defense:

> "Defendant's affirmative defenses and theories of innocence:
>
> Defendant regularly plays the "dealer match" bet, and did so at least 15 times

> on July 27, 2015; Defendant lacked any intent to cheat because the text message the State relies upon as intent was not even read by Defendant until after Defendant had placed his bet" (Appx., p. 20).

3. Defendant's Election to Participate in Discovery

Defendant elected to participate in discovery on November 9, 2015 (Appx., p. 5). Defendant served a motion for leave to issue subpoenas (Appx., pp. 28-50), and a hearing was taken up by the trial court on September 29, 2017 (Appx., pp. 190-232). The following item in a proposed subpoena was taken up: "All Casino marketplace data regarding the defendant, including but not limited to betting, gambling pattern, win, losses, dealing, match and player rating" (Appx., p. 194).

Counsel for the Defense stated that Petitioner "wants to prepare a defense" (*id.*, line 17), that Petitioner "need[ed] this to prepare [a] defense in this case" (*id.*, lines 15-16). The trial court placed Petitioner under oath to testify (Appx., p. 196) about the "Casino Marketplace" and tracking of bets and betting patterns (*id.*). Petitioner testified that the Casino "keeps track on the way each player plays" (*id.*, lines 23-24), and "they have a record, that they know how this individual likes to play blackjack or baccarat or whether play[] match the dealer" (Appx., p. 197, lines 1-4).

At the conclusion of the hearing the trial court granted the Defense leave to serve subpoenas upon the Casino and others (Appx., p. 51).

4. Depositions and Testimony of Dealer-Match Tracking and Records

Discovery ensued. Defendant began taking depositions in an effort to obtain evidence to support his affirmative defense.

Robert Jackson was deposed on July 20, 2017 (Appx., pp. 374-448). Jackson was then a director at the Casino for ten years (Appx., p. 376). Jackson testified that the Seminole Casino uses CMP ("Casino Market Place") to track player plays and bets for the purpose of rating (Appx., p. 411 [RJ Depo, pg. 38]). Jackson referred to the CMP as the "Player's Club System" (*ibid.*). Jackson testified that the CMP is used for "tracking play" (Appx., p. 411) to track player plays or bets for the purpose of rating (*ibid.*).

Jackson also testified that Defendant was subjected to the CMP (*id.*, at 411-412) and testified that the casino tracks the chips cashed by players (Appx., pp. 422), including "a record of profit and loss of players" (Appx., pp. 422, 424). Jackson further testified that when a player gets a membership card or a player card, the casino maintains records on that player (Appx., pp. 419).

Shawn Gookins was deposed on July 21, 2017 (Appx., pp. 449-530). Gookins functioned as the Vice President of Casino Operations (Appx., p. 454). Gookins explained that he is "in charge of anything in the building with gaming" (Appx., p. 464). In speaking about gambling records, Gookins stated that "If Mr. Jallali was playing with his player's card, then there should be a record of his gaming activity" (Appx., p. 473). Gookins testified that the casino implemented a "system for rating the player" (*ibid.*).

In explaining the rating system, Gookins testified that,

> "…there is a little screen on the table where that player's card will be swiped and it opens a rating for that guest and they are put in. They are basically on a screen that looks like a little black jack table and put on the seat where the player is playing, record their buy-in, their average bet, their win, loss" (Appx., p. 474).

Gookins testified that CMP is "the software we use for the tracking of tables" (Appx., p. 474 [SG Depo, pg. 26, lines 15-16]) and "player plays and bets" (*id.* at line 17). Gookins explained that "the Tribe" has these records (*id.* at line 25), and that there are "different types of notes" on player accounts that relate to patterns of play (*id.* at lines 20-23). Gookins directly testified that "Yes. There are ratings and CMP for Mr. Jallali" (Appx., p. 475 [SG Depo, pg. 27, lines 13-24]).

5. The Casino's Objections to Subpoenas and Ruling

On March 5, 2018, the Casino (and the Seminole Tribe) moved the trial court for entry of an order requiring Defendant to pay $49,500 and $82,500 prior to compliance with the subpoenas (Appx., pp. 52-62).

The Defense responded on April 13, 2018, to the Casino's motion for advanced payment of $49,500 and $82,500 (Appx., pp. 78-85). In that response, the Defense asserted that the alleged victim was suppressing the evidence, or alternatively that the Casino purposely used an information storage system that deliberately made it costly to produce records in

response to litigation.

In the interim, the trial court entered an order on March 16, 2018 requiring production under the subpoena (within 15 days from March 16, 2018) (Appx., p.63-66). When the Casino failed to produce the records Defendant sought, the Defense moved on April 10, 2018 to compel production and better answers (Appx., pp. 67-77).

6. Amended Information, Motion to Dismiss, Affirmative Defense and Ruling

On April 18, 2018, the State increased the charges against Petitioner by way of amended information (Appx., pp. 86-87). Count I charged Defendant with theft of $5,000 on July 27, 2015 from the Coconut Creek Casino. Count II charged that Defendant somehow committed "gross fraud or cheat at common law" on July 27, 2015.

Defendant filed a motion to dismiss on April 20, 2018 (Appx., pp. 88-135). In that motion, Defendant again announced his "affirmative defense and theory of innocence: (1) Defendant regularly plays the dealer-match bet, and did so multiple times on July 27, 2015; (2) Defendant lacked any intent to cheat because the text message the State relies upon as intent was not even read by Defendant until after Defendant had placed his bet" (Appx., p. 89, ¶8).

The State filed a traverse on May 8, 2018 (Appx., pp. 136-165). On May 10, 2018, the trial court sustained Count I and dismissed Count II with leave to amend (Appx., p. 166).

7. Second Amended Information, Motion for Particulars and Ruling

The State filed a second amended information on May 18, 2018 (Appx., p. 167-168). In response, the Defense filed a motion seeking particulars (Appx., 169-172), which the trial court denied on February 7, 2019 (Appx., p. 180).

8. Affidavit of Black Jack Dealer and Images of Dealer Match Screens

An affidavit submitted by David Lebejko on February 17, 2019, states that he entered dealer-match transaction information many times while Petitioner was playing the dealer-match bet (Appx., p. 189).

Petitioner filed on February 8, 2019, proposed proofs of screenshots of the gambling tables used during black jack to depict the computer terminal used for entering dealer-match bet information (and tracking of betting patterns players use while gambling at the black jack tables) (Appx., pp. 181-184).

9. Motions to Compel the Dealer Match Disclosures and to Depose Witness

Defendant filed several motions to obtain the dealer-match bets. Defendant moved to compel the Casino to provide the dealer-match information (Appx., pp. 67-77) (Appendix I).

Defendant moved for the State to obtain and furnish specific gambling information, including the dealer-match bets (Appx., pp. 176-179) (Appendix J).

10. The Hearing and Rulings on Dealer-Match and Affirmative Defense

The trial court took up discovery matters on January 17, 2019 (Appx., 311-373). The hearing was set to resolve, in part, motions related to Petitioner's request for "dealer-match" records to support his affirmative defense to the charges. The following two motions related to "dealer-match" records were heard: (1) Motion to Compel Production and Better Answers From Coconut Creek Casino (Appx., pp. 64-77); (2) Motion for Order Requiring the State to Obtain and Furnish Specific Gambling (Dealer-Match) betting Evidence to Support Defendant's Affirmative Defense and Theory of Innocence (Appx., pp. 176-179).

The issue of dealer-match records was taken up. The attorney for the Casino, Mark Schellhase, represented to the Court that,

> "[w]e do not maintain specific dealer match bets. They don't exist…"

(Appx., p. 332, lines 6-7).[1]

Next, the prosecutor, Mr. McCormick stated that "[t]hey don't exist" (*id.* at line 25). Attorney Schellhase again represented to the Court that "[w]e don't maintain dealer match bets record[s]" (Appx., p. 333, lines 1-2). Mr. McCormick then again claimed that the

[1] The representations of Schellhase and McCormick are inconsistent with the deposition testimony of casino employees, Robert Jackson and Shawn Gookins, that established the casino was tracking Defendant's dealer-match bets (Appx., pp. 411-412, 473-475). An affidavit from a black jack dealer also attests to the tracking of dealer-match bets (Appx., p. 189), and even Defendant testified to knowledge about the tracking of his betting habits and the tracking of his dealer-match bids (Appx., pp. 196-197).

Casino does not have such records (*id.*, at lines 8-9).

Defense Counsel, Mr. Weinstein, advised the court on a "good-faith basis" that there are "picture[s]" (Appx., p. 333, lines 13-14), and stated:

> "When someone places a dealer match bet and as the Court knows, you are placing your money down on this specific area of the table, the dealer matches it. There is a computer screen that shows that that bet has been placed" (Appx., pp. 333, lines 16-20).

Mr. Weinstein then brought to remembrance that two casino employees (Robert Jackson and Shawn Gookins) testified under oath that the Casino tracks dealer-match bets (Appx., p. 334, lines 20-25). Mr. Weinstein went on to state that "I would like to know, specifically, whether or not they are dealer match bets. That is what he is accused of gaming the system. That what's he is accused of doing illegally" (Appx., p 335, lines 6-8).

The trial court responded, stating that,

> "they [Schellhase and the Prosecutor] are saying that they don't keep a record of that… [a]nd the dealer match bet is not kept as a record" (Appx., p. 335, lines 9-10, 13-14).

Judge Siegel then accepted the representations of the attorney for the Casino, Mark Schellhase, and Prosecutor McCormick to deny the motion to compel dealer-match betting records.

Judge Siegel stated that "I will deny the motion based upon the fact that the tribe said they do not [have] that. And they could not have those records"

(Appx., pp. 335, lines 17-20).[2]

The trial court turned to the casino/tribe's motion to require Defendant to pay $49,500 and $82,500 in advance of receipt of discovery (Appx., p. 370, lines 20-24). Defendant had responded and objected (Appx., p. 78-85) and also had a motion to depose with records the person (Mr. Landau) who determined the $49,500 and $82,500 as costs of discovery (Appx., pp. 173-175).

Judge Siegel ruled that Defendant would have to pay "whatever money [the casino's] expert says that it will cost…you are entitled to a deposit on that money before it is done" (Appx., p. 371, lines 1-5). The trial court stated that the Defense would "not [be] precluded" from taking the deposition of Mr. Landau (Appx., p. 371, lines 15-20), but that production of any records would require "payment in advance…they will be entitled to have it as a deposit" (Appx., pp. 371, lines 24-25; 372, line 1).

On February 14, 2019, the trial court entered the following four orders:

1) Order Denying Motion to Compel Production and Better Answers from Coconut Creek Casino (Appx., p. 185) (Appendix E).

2) Order Denying Motion for Order Requiring the State to Obtain and Furnish Specific Gambling (Dealer-Match) Betting Evidence to Support Defendant's Affirmative Defense and Theory of Innocence (Appx., p. 186) (Appendix F).

3) Order Granting Seminole Tribe of Florida's and Seminole Tribe of Florida D/B/A Seminole Hard

[2] It was error for Judge Siegel to credit things said by attorneys as evidence, and to give the same greater weight than the sworn-to testimony of Casino employees who made clear that dealer-match records are kept and exist.

Rock Hotel & Casino-Hollywood's, Motion for Costs in Advance of Compliance with Defendant's Subpoena Duces Tecum Without Deposition (Appx., P. 187) (Appendix G).

4) Order Granting Motion for Leave to Depose Michael Landau or Corporate Representative with the Most Knowledge of $49,500 and $82,500 Invoices (Appx., p. 188) (Appendix H).

11. State Court Review

On March 18, 2019, Petitioner moved the Fourth District Court of Appeal for certiorari review (Appendix C) of the lower court's four (4) discovery orders dated February 14, 2019. The Fourth District dismissed the petition for certiorari review by order entered April 8, 2019 (Appendix C), then declined on May 17, 2019 to grant rehearing (Appendix B). The Florida Supreme Court entered a dismissal on June 17, 2019 of a request for discretionary review (Appendix A).

This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

A writ of certiorari is to be granted if a trial court commits an error so serious that it amounts to a miscarriage of justice. *State v. Smith*, 951 So. 2d 954, 957 (Fla. 1st DCA 2007); *State v. Pettis*, 520 So. 2d 250 (Fla. 1988).

To grant certiorari, the petitioner must show: (1) the order departed from the essential requirements of law; (2) the order will cause material injury; (3) and the injury must be irreparable. *State v. De La Osa*, 28 So. 3d 201, 203 (Fla. 4th DCA 2010).

"[R]eview by certiorari is appropriate when a discovery order departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings and effectively leaving no adequate remedy on appeal." *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995) (citing *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987)); accord *Beverly Enterprises.-Fla., Inc. v. Ives*, 832 So. 2d 161, 162 (Fla. 5th DCA 2002) (material injury throughout the law suit, leaving the petitioner without no other adequate remedy to review the alleged erroneous order).

DISCUSSION

A. Irreparable Harm

The first consideration in any certiorari proceeding is whether irreparable harm has been demonstrated. *State v. Foley*, 193 So. 3d 24, 26 (Fla. 3rd DCA 2016).

Irreparable harm warranting certiorari has been held to flow from an order that eviscerates a party's claim or defense. *Giacalone v. Helen Ellis Memorial Hospital Foundation, Inc.*, 8 So. 3d 1232 (Fla. 2nd DCA 2009). The Court in *Giacalone* explained that,

> "…when the requested discovery is relevant or is reasonably calculated to lead to the discovery of admissible evidence and the order denying that discovery effectively eviscerates a party's claim, defense, or counterclaim, relief by writ or certiorari is appropriate. **The harm in such cases is not remediable on appeal because there is no practical way**

> **to determine after judgment how the requested discovery would have affected the outcome of the proceedings**…" (*Id.* 8 So. 3d at 1234-35, bold added).

In this case, the harm the petitioner claims is the denial of access to evidence supporting his affirmative defense, *Brady* or exculpatory evidence or evidence which would negate the State's theory of guilt. Should the trial of this matter take place under these conditions, it will be an unbalanced, fundamentally unfair proceeding where the petitioner's affirmative defense is eviscerated. This constitutes irreparable harm "not remediable on appeal because there is no practical way to determine after judgment how the requested discovery would have affected the outcome of the proceedings…" *Giacalone*, 8 So. 3d at 1234-35.

B. Requirements of Law

A criminal defendant is entitled to discoverable, relevant material under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). See also *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (In order to comply with Brady, "the individual prosecutor has a duty to learn of any favorable evidence known to the others…").

"A defendant's fundamental right to defend himself or herself under the Sixth Amendment is denied when exculpatory evidence is excluded." *Alexander v. State*, 931 So. 2d 946, 950 (Fla. 4th DCA 2006). See also *Chambers v. Mississippi*, 410 U.S. 284, 294, 302 (1973) (the exclusion of critical evidence, inter alia, denied the accused "a trial in accord with traditional and fundamental standards of due process," and noted

that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"); *Jenkins v. State*, 872 So. 2d 388, 389 (Fla. 4th DCA 2004) (there are few rights more fundamental than the right of an accused to present a defense).

In weighing established fact-based testimonial evidence, a trial court shall "reject the use of unsworn assertions made by attorneys as evidence." *Smith v. Smith*, 64 So. 3d 169 (Fla. 4th DCA 2011); *Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982) (holding that unsworn statements do not establish facts in the absence of stipulation).

C. Departure from Essential Requirements of Law

Upon a showing of irreparable harm, the analysis turns to whether there has been a departure from the essential requirements of the law. *State v. Clyatt*, 976 So. 2d 1182, 1182 (Fla. 5th DCA 2008).

In this case, the petitioner established testimonial evidence from two casino employees that dealer-match bets are tracked by the casino (Appx., pp. 411-412, 473-475). An affidavit from a black jack dealer also attests to the tracking of dealer-match bets (Appx., p. 189). Defendant also testified to knowledge about the tracking of his betting habits and the tracking of his dealer-match bids (Appx., pp. 196-197). Defendant also submitted screen shots of the computer terminals used by the casino to enter dealer-match betting information (Appx., pp. 181-184).

Judge Siegel erred in departing from the essential

requirements of law by treating attorneys' arguments as evidence at the January 17, 2019 hearing. The trial judge credited the attorneys' arguments greater weight than the testimonial evidence obtained from two casino employees at depositions.[3]

The statements of Mark Schellhase (attorney for the casino) and Prosecutor McCormick at the January 17, 2019 hearing were but mere representations of attorneys, not fact witnesses. These statements were insufficient to trump the well established testimony of two casino employees that supported proof that the Casino maintains dealer-match records. Accord *Leon Shaffer*, 423 So. 2d at 1017 (holding that unsworn statements do not establish facts); *Smith*, 64 So. 3d at 169 ("As we have explained, we reject the use of unsworn assertions made by attorneys as evidence."); see e.g., *Brown v. School Bd. of Palm Beach County*, 855 So. 2d 1267, 1269-1270 (Fla. 4th DCA 2003) (the trial court erred by relying on the unsworn statements of counsel in makings its decision... to establish a fact, the attorney should provide sworn testimony through a witness or a stipulation to which his opponent agrees).

These are the unsworn statements of attorneys that the trial court relied upon over the testimonial evidence of record:

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[3] It was error for the trial judge to credit things said by attorneys as evidence, and to give the same greater weight than the sworn-to testimony of Casino employees who said dealer-match records are kept and exist. Where a circuit court impermissibly reweighs evidence, it departs from the essential requirements of law, and certiorari is available to an aggrieved party. *Dade County v. Blumenthal*, 675 So. 2d 598, 608-09 (Fla. 3rd DCA 1995).

The Casino's Attorney, Mark Schellhase:

> "…[w]e do not maintain specific dealer match bets. They don't exist" (Appx., p. 332, lines 6-7).
>
> "…[w]e don't maintain dealer match bets record[s]" (Appx., p. 333, lines 1-2).

The Prosecutor, Mr. McCormick:

> "…[t]hey don't exist" (Appx., p.332, line 25).
>
> "…[t]hey don't keep detailed records of those" (Appx., p.333, lines 8-9).

The representations of Schellhase and McCormick are inconsistent with the deposition testimony of casino employees, Robert Jackson and Shawn Gookins, that established the casino was tracking Defendant's dealer-match bets (Appx., pp. 411-412, 473-475). An affidavit from a black jack dealer also attests to the tracking of dealer-match bets (Appx., p. 189), and even Defendant testified to knowledge about the tracking of his betting habits and the tracking of his dealer-match bids (Appx., pp. 196-197).

Defense Counsel, Mr. Weinstein, advised the court on a "good-faith basis" that there are "picture[s]" (Appx., p. 333, lines 13-14), and stated:

> "When someone places a dealer match bet and as the Court knows, you are placing your money down on this specific area of the table, the dealer matches it. There is a computer screen that shows that that bet has been placed" (Appx., p. 333, lines 16-20).

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The trial court responded by stating that,

> "they [Schellhase and the Prosecutor] are saying that they don't keep a record of that… [a]nd the dealer match bet is not kept as a record" (Appx., p. 335, lines 9-10, 13-14).

Judge Siegel then accepted the representations of the attorney for the Casino, Mark Schellhase, and Prosecutor McCormick to deny the motion to compel dealer-match betting records. Judge Siegel stated that "I will deny the motion based upon the fact that the tribe said they do not [have] that. And they could not have those records" (Appx., pp. 335, lines 17-20).

D. Spill-Over Prejudice

Defendant has been ordered to pay $49,500 and $82,500 in advance of any production of records from the casino that would support his affirmative defense. This ruling is spill-over prejudice which serves to render the evidence unobtainable, resulting in procedural prejudice. Prejudice in this context means procedural prejudice materially affecting a party's preparation for trial. *McDuffie v. State*, 970 So. 2d 312, 321 (Fla. 2007); see also *State v. Farley*, 788 So. 2d 338, 339 n.2 (Fla. 5th DCA 2001).

The Casino sought to prevent Defendant from

obtaining records. This was manifest in the filing of a motion requesting the trial court to require Defendant to pay $49,500 and $82,500 in advance as a cost for records. (Appx., pp. 52-62) (Appendix K). Defendant served a response (Appx., p. 78-85) asserting that the alleged victim was suppressing the evidence, or alternatively that the casino purposely used an information storage system that deliberately made it costly to produce records in response to litigation.

The trial court would not entertain Defendant's argument, nor hear the case-law favoring Defendant's position. That case law is discussed hereafter.

Turning to *Peskoff v. Faber*, 240 F.R.D. 26, 31 (D.D.C. 2007), the Court held that "accessible data must be produced at the cost of the producing party; cost-shifting does not even become a possibility unless there is first a showing of inaccessibility." Accord *Pipefitters Local No. 636 Pension Fund v. Mercer Human Res. Consulting, Inc.*, 2007 WL 2080365, at *2 (E.D. Mich. July 19, 2007).

In *Wagoner v. Lewis Gale Med. Ctr., LLC*, 2016 WL 3893135 (W.D. Va. July 14, 2016), the plaintiff sought discovery from his two former supervisors over a four-month period. Defendant sought $70,000 in costs for the collection, review, and production of emails by arguing that the email search was unduly burdensome. Defendant claimed it would have to hire a third-party vendor to search its email archive because its active email system stored some emails for only three days, "making it costly to produce relevant e-mails when faced with a lawsuit."

The Wagoner opinion denied the request for cost-shifting. The court's analysis turned on whether the defendant had proven that its email was inaccessible.

The court reasoned that the defendant had chosen an information system that made it "costly to produce relevant e-mails when faced with a lawsuit," and should bear the costs of that choice. Here, the Casino maintains information, knowing it will result in high costs to produce digital discovery, which the Casino should therefore have had to bear as a consequence of their chosen storage system.

Turning to *Juster Acquisition Co., LLC v. N. Hudson Sewerage Auth.*, No. 12-3427 (JLL), 2013 WL 541972 (D.N.J. Feb. 11, 2013), the court held that "[a]s a preliminary matter, '[c]ost shifting is potentially appropriate only when inaccessible data is sought.'" The court determined that the defendant "failed to satisfy its burden" of showing that the ESI sought was inaccessible, reasoning, in part, that by "asserting that it ha[d] hired an outside vendor to perform the word searches," Defendant had "acknowledged that the ESI is accessible." Here, the Casino's hiring and use of an outside vender is case-similar.

The trial judge reasoned that the State does not need the evidence to prosecute its case. It certainly should not have become Defendant's obligation to pay $49,500 and $82,500 to the alleged victim (the casino) to obtain evidence supporting his affirmative defense and theory of innocence.

The State should have acquired this evidence and provided it to the Defense.[4]

[4] Since the trial court awarded costs in advance to the casino, the Defense is unable to perpetuate a deposition with records of Mr. Landau.

CONCLUSION

WHEREFORE, Petitioner, MASSOOD JALLALI, prays that this Honorable Court GRANT the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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INDEX TO APPENDIX

Appendix A

Order of Dismissal (Florida Supreme Court)
(June 17, 2019)

SUPREME COURT OF FLORIDA

FRIDAY, JUNE 7, 2019

CASE NO.: SC19-933
Lower Tribunal No(s).:
4D19-770; 062015CF013438A88810

MASSOOD JALLALI v. STATE OF FLORIDA

Petitioner(s) Respondent(s)

This case is hereby dismissed. This Court lacks jurisdiction to review an unelaborated decision from a district court of appeal that is issued without opinion or explanation or that merely cites to an authority that is not a case pending review in, or reversed or quashed by, this Court. See *Wells v. State*, 132 So. 3d 1110 (Fla. 2014); *Jackson v. State*, 926 So. 2d 1262 (Fla. 2006); *Gandy v. State*, 846 So. 2d 1141 (Fla. 2003); *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002); *Harrison v. Hyster Co.*, 515 So. 2d 1279 (Fla. 1987); *Dodi Publ'g Co. v. Editorial Am. S.A.*, 385 So. 2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

No motion for rehearing or reinstatement will be entertained by the Court.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

Served:
CELIA TERENZIO, EUGENE STEELE
HON. BRENDA D. FORMAN, CLERK
HON. ANDREW L. SIEGEL, JUDGE

Appendix B

Appellate Order Denying Rehearing
(May 17, 2019)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

May 17, 2019

CASE NO.: 4D19-0770
L.T. No.:15-13438 CF10A

MASSOOD JALLALI v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

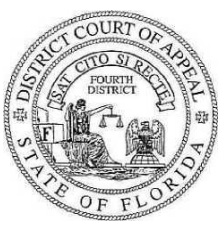
ORDERED that the petitioner's April 23, 2019 "motion for reconsideration or rehearing with alternative relief of certification of questions" is denied.

Served:
cc:
Attorney General-W.P.B., Eugene Steele,
J.Scott Raft, Justin Mccormack

kr

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



Appendix C

Appellate Order of Dismissal
(April 8, 2019)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

April 8, 2019

CASE NO.: 4D19-0770
L.T. No.:15-13438 CF10A

MASSOOD JALLALI v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that the petition for writ of certiorari is dismissed for failure to establish irreparable harm. See *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011); *Bared & Co., Inc. v. McGuire*, 670 So. 2d 153 (Fla. 4th DCA 1996).

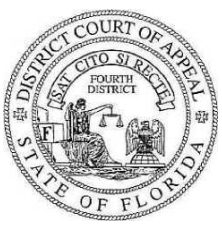
GERBER, C.J., WARNER and FORST, JJ., concur..

Served:
cc:
Attorney General-W.P.B., Eugene Steele,
J.Scott Raft, Justin Mccormack, State Attorney-Broward, Clerk Broward, Hon. Andrew L. Siegel

dl

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



Appendix D

Petition for Certiorari to the
District Court of Appeal, Fourth District
(March 18, 2019)

Case No. 4D19-0770

DISTRICT COURT OF APPEAL
FOURTH DISTRICT

MASSOOD JALLALI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

An Original Proceeding
Petition for Writ of Certiorari

LT. No. 15-13438CF10A

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

/s/ Eugene Steele
Eugene Steele, Esq.
Florida Bar No. 144190
Counsel to Petitioner
P.O. Box 30212
Fort Lauderdale, FL 33303-0212
Office: (954) 548-6690
Email: apiggg@yahoo.com

CERTIFICATE OF INTERESTED PERSONS

The below persons may have an interest in the outcome of this petition.

Massood Jallali, Petitioner/Defendant

David Lebejko, Interested Nonparty (Co-defendant)

Justin McCormack, Esquire

J. Scott Raft, Esquire

Mark Schellhase, Esquire

Andrew L. Siegel, Circuit Court Judge

The Seminole Tribe of Florida

State of Florida, Respondent/Plaintiff

Eugene Steele, Esquire

Michael Weinstein, Esquire

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STATEMENT OF JURISDICTION

The original jurisdiction of this Court is invoked pursuant to Florida Rule of Appellate Procedure §9.100(b), (e). Concomitant with this Petition is an Appendix as required pursuant to Florida Rule of Appellate Procedure §9.100(i) and §9.220.

PETITION

Massood Jallali respectfully petitions the District Court of Appeal, Fourth District, for issuance of a Writ of Certiorari.

In the proceedings below, Petitioner (as Defendant therein) has been denied the constitutional right to evidence that would support his affirmative defense and theory of innocence. Testimony from several witnesses identified the existence of critical, *Brady* evidence. This petition challenges the trial court's discovery based rulings as departures from the essential requirements of law, and makes a colorable showing that Petitioner will suffer irreparable harm at trial as a result thereof.

In denying critical *Brady* evidence to Petitioner, the trial court has departed from the essential requirements of law. If Petitioner is forced to a jury trial without the *Brady* material to support his affirmative defense and theory of innocence, Petitioner will suffer irreparable harm that will unbalance the scales in favor of the prosecution, thus denying Petitioner the constitutional right to a fair trial.

Petitioner should be afforded the relief requested in this petition.

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

Petitioner, Massood Jallali, will be referred to by name, as "Petitioner" or as "Defendant", throughout this petition.

Respondent, State of Florida, will be referred to as "the State", Plaintiff" or as "Respondent", throughout this petition.

Andrew L. Siegel, will be referred to as "Judge Siegel" in this petition.

B. RECORD REFERENCES

Record references are cited to the document and page number contained in the Appendix of Excerpts where suitable.

C. FACTUAL BACKGROUND

1. Arrest and Initial Charges

Defendant was arrested on November 2, 2015 (Appx., p. 5) after the State charged Defendant with allegedly acting in concert to knowingly deprive Coconut Creek Casino of $5,000 cash on July 27, 2015, by cheating on a card game (Appx., p. 5).

2. First Motion to Dismiss, Statement of Affirmative Defense

Defendant filed an initial motion to dismiss on November 28, 2016 (Appx., p. 20-27). In that motion Defendant stated his affirmative defense:

> "Defendant's affirmative defenses and theories of innocence:

> Defendant regularly plays the "dealer match" bet, and did so at least 15 times on July 27, 2015; Defendant lacked any intent to cheat because the text message the State relies upon as intent was not even read by Defendant until after Defendant had placed his bet" (Appx., p. 20).

3. Defendant's Election to Participate in Discovery

Defendant elected to participate in discovery on November 9, 2015 (Appx., p. 5). Defendant served a motion for leave to issue subpoenas (Appx., pp. 28-50), and a hearing was taken up by the trial court on September 29, 2017 (Appx., pp. 190-232). The following item in a proposed subpoena was taken up: "All Casino marketplace data regarding the defendant, including but not limited to betting, gambling pattern, win, losses, dealing, match and player rating" (Appx., p. 194).

Counsel for the Defense stated that Petitioner "wants to prepare a defense" (*id.*, line 17), that Petitioner "need[ed] this to prepare [a] defense in this case" (*id.*, lines 15-16). The trial court placed Petitioner under oath to testify (Appx., p. 196) about the "Casino Marketplace" and tracking of bets and betting patterns (*id.*). Petitioner testified that the Casino "keeps track on the way each player plays" (*id.*, lines 23-24), and "they have a record, that they know how this individual likes to play blackjack or baccarat or whether play[] match the dealer" (Appx., p. 197, lines 1-4).

At the conclusion of the hearing the trial court granted the Defense leave to serve subpoenas upon the Casino and others (Appx., p. 51).

4. Depositions and Testimony of Dealer-Match Tracking and Records

Discovery ensued. Defendant began taking depositions in an effort to obtain evidence to support his affirmative defense.

Robert Jackson was deposed on July 20, 2017 (Appx., pp. 374-448). Jackson was then a director at the Casino for ten years (Appx., p. 376). Jackson testified that the Seminole Casino uses CMP ("Casino Market Place") to track player plays and bets for the purpose of rating (Appx., p. 411 [RJ Depo, pg. 38]). Jackson referred to the CMP as the "Player's Club System" (*ibid.*). Jackson testified that the CMP is used for "tracking play" (Appx., p. 411) to track player plays or bets for the purpose of rating (*ibid.*).

Jackson also testified that Defendant was subjected to the CMP (*id.*, at 411-412) and testified that the casino tracks the chips cashed by players (Appx., pp. 422), including "a record of profit and loss of players" (Appx., pp. 422, 424). Jackson further testified that when a player gets a membership card or a player card, the casino maintains records on that player (Appx., pp. 419).

Shawn Gookins was deposed on July 21, 2017 (Appx., pp. 449-530). Gookins functioned as the Vice President of Casino Operations (Appx., p. 454). Gookins explained that he is "in charge of anything in the building with gaming" (Appx., p. 464). In speaking about gambling records, Gookins stated that "If Mr. Jallali was playing with his player's card, then there should be a record of his gaming activity" (Appx., p. 473). Gookins testified that the casino implemented a "system for rating the player" (*ibid.*). In explaining the rating system, Gookins testified

that,

> "…there is a little screen on the table where that player's card will be swiped and it opens a rating for that guest and they are put in. They are basically on a screen that looks like a little black jack table and put on the seat where the player is playing, record their buy-in, their average bet, their win, loss" (Appx., p. 474).

Gookins testified that CMP is "the software we use for the tracking of tables" (Appx., p. 474 [SG Depo, pg. 26, lines 15-16]) and "player plays and bets" (*id.* at line 17). Gookins explained that "the Tribe" has these records (*id.* at line 25), and that there are "different types of notes" on player accounts that relate to patterns of play (*id.* at lines 20-23). Gookins directly testified that "Yes. There are ratings and CMP for Mr. Jallali" (Appx., p. 475 [SG Depo, pg. 27, lines 13-24]).

5. The Casino's Objections to Subpoenas and Ruling

On March 5, 2018, the Casino (and the Seminole Tribe) moved the trial court for entry of an order requiring Defendant to pay $49,500 and $82,500 prior to compliance with the subpoenas (Appx., pp. 52-62).

The Defense responded on April 13, 2018, to the Casino's motion for advanced payment of $49,500 and $82,500 (Appx., pp. 78-85). In that response, the Defense asserted that the alleged victim was suppressing the evidence, or alternatively that the Casino purposely used an information storage system that deliberately made it costly to produce records in response to litigation.

In the interim, the trial court entered an order on

March 16, 2018 requiring production under the subpoena (within 15 days from March 16, 2018) (Appx., p.63-66). When the Casino failed to produce the records Defendant sought, the Defense moved on April 10, 2018 to compel production and better answers (Appx., pp. 67-77).

6. Amended Information, Motion to Dismiss, Affirmative Defense and Ruling

On April 18, 2018, the State increased the charges against Petitioner by way of amended information (Appx., pp. 86-87). Count I charged Defendant with theft of $5,000 on July 27, 2015 from the Coconut Creek Casino. Count II charged that Defendant somehow committed "gross fraud or cheat at common law" on July 27, 2015.

Defendant filed a motion to dismiss on April 20, 2018 (Appx., pp. 88-135). In that motion, Defendant again announced his "affirmative defense and theory of innocence: (1) Defendant regularly plays the dealer-match bet, and did so multiple times on July 27, 2015; (2) Defendant lacked any intent to cheat because the text message the State relies upon as intent was not even read by Defendant until after Defendant had placed his bet" (Appx., p. 89, ¶8).

The State filed a traverse on May 8, 2018 (Appx., pp. 136-165). On May 10, 2018, the trial court sustained Count I and dismissed Count II with leave to amend (Appx., p. 166).

7. Second Amended Information, Motion for Particulars and Ruling

The State filed a second amended information on May 18, 2018 (Appx., p. 167-168). In response, the Defense filed a motion seeking particulars (Appx.,

169-172), which the trial court denied on February 7, 2019 (Appx., p. 180).

8. Affidavit of Black Jack Dealer and Images of Dealer Match Screens

An affidavit submitted by David Lebejko on February 17, 2019, states that he entered dealer-match transaction information many times while Petitioner was playing the dealer-match bet (Appx., p. 189).

Petitioner filed on February 8, 2019, proposed proofs of screenshots of the gambling tables used during black jack to depict the computer terminal used for entering dealer-match bet information (and tracking of betting patterns players use while gambling at the black jack tables) (Appx., pp. 181-184).

9. Motions to Compel Dealer Match Disclosures and to Depose Witness

Defendant filed several motions to obtain the dealer-match bets. Defendant moved to compel the Casino to provide the dealer-match information (Appx., pp. 67-77), alternatively for the State to provide the information (Appx., pp. 176-179).

10. Hearing and Rulings on Dealer-Match and Affirmative Defense

The trial court took up discovery matters on January 17, 2019 (Appx., 311-373). The hearing was set to resolve, in part, motions related to Petitioner's request for "dealer-match" records to support his affirmative defense to the charges. The following two motions related to "dealer-match" records were heard: (1) Motion to Compel Production and Better Answers From Coconut Creek Casino (Appx., pp. 64-77); (2)

Motion for Order Requiring the State to Obtain and Furnish Specific Gambling (Dealer-Match) betting Evidence to Support Defendant's Affirmative Defense and Theory of Innocence (Appx., pp. 176-179).

The issue of dealer-match records was taken up. The attorney for the Casino, Mark Schellhase, represented to the Court that,

"[w]e do not maintain specific dealer match bets. They don't exist"

(Appx., p. 332, lines 6-7).[1] Next, the prosecutor, Mr. McCormick stated that "[t]hey don't exist" (*id.* at line 25). Attorney Schellhase again represented to the Court that "[w]e don't maintain dealer match bets record[s]" (Appx., p. 333, lines 1-2). Mr. McCormick then again claimed that the Casino does not have such records (*id.*, at lines 8-9).[2]

Defense Counsel, Mr. Weinstein, advised the court on a "good-faith basis" that there are "picture[s]" (Appx., p. 333, lines 13-14), and stated:

> "When someone places a dealer match bet and as the Court knows, you are placing your money down on this specific

[1] The representations of Schellhase and McCormick are inconsistent with the deposition testimony of casino employees, Robert Jackson and Shawn Gookins, that established the casino was tracking Defendant's dealer-match bets (Appx., pp. 411-412, 473-475). An affidavit from a black jack dealer also attests to the tracking of dealer-match bets (Appx., p. 189), and even Defendant testified to knowledge about the tracking of his betting habits and the tracking of his dealer-match bids (Appx., pp. 196-197).

[2] Mr. McCormick's alleged basis of personal knowledge is unknown.

> area of the table, the dealer matches it. There is a computer screen that shows that that bet has been placed" (Appx., pp. 333, lines 16-20).

Mr. Weinstein then brought to remembrance that two casino employees (Robert Jackson and Shawn Gookins) testified under oath that the Casino tracks dealer-match bets (Appx., p. 334, lines 20-25). Mr. Weinstein went on to state that "I would like to know, specifically, whether or not they are dealer match bets. That is what he is accused of gaming the system. That what's he is accused of doing illegally" (Appx., p 335, lines 6-8).

The trial court responded by stated that,

> "they [Attorney Schellhase and Prosecutor McCormick] are saying that they don't keep a record of that… [a]nd the dealer match bet is not kept as a record" (Appx., p. 335, lines 9-10, 13-14).

Judge Siegel then accepted the representations of the attorney for the Casino, Mark Schellhase, and Prosecutor McCormick to deny the motion to compel dealer-match betting records.[3] Judge Siegel stated that "I will deny the motion based upon the fact that the tribe said they do not [have] that. And they could not have those records" (Appx., pp. 335, lines 17-20).

The trial court turned to the casino/tribe's motion to require Defendant to pay $49,500 and $82,500 in advance of receipt of discovery (Appx., p. 370, lines 20-

[3] It was error for Judge Siegel to credit things said by attorneys as evidence, and to give it greater weight than the sworn-to testimony of Casino employees who made clear that dealer-match records are kept and exist.

24). Defendant had responded and objected (Appx., p. 78-85) and also had a motion to depose with records the person (Mr. Landau) who determined the $49,500 and $82,500 as costs of discovery (Appx., pp. 173-175).

Judge Siegel ruled that Defendant would have to pay "whatever money [the casino's] expert says that it will cost…you are entitled to a deposit on that money before it is done" (Appx., p. 371, lines 1-5). The trial court stated that the Defense would "not [be] precluded" from taking the deposition of Mr. Landau (Appx., p. 371, lines 15-20), but that production of any records would require "payment in advance…they will be entitled to have it as a deposit" (Appx., pp. 371, lines 24-25; 372, line 1).

On February 14, 2019, the trial court entered the following four orders:

1) Order Denying Motion to Compel Production and Better Answers from Coconut Creek Casino (Appx., p. 185).
2) Order Denying Motion for Order Requiring the State to Obtain and Furnish Specific Gambling (Dealer-Match) Betting Evidence to Support Defendant's Affirmative Defense and Theory of Innocence (Appx., p. 186).
3) Order Granting Seminole Tribe of Florida's and Seminole Tribe of Florida D/B/A Seminole Hard Rock Hotel & Casino-Hollywood's, Motion for Costs in Advance of Compliance with Defendant's Subpoena Duces Tecum Without Deposition (Appx., P. 187).
4) Order Granting Motion for Leave to Depose Michael Landau of Emag Solutions or Corporate Representative with the Most Knowledge of $49,500 and $82,500 Invoices

(Appx., p. 188).

This Petition for Writ of Certiorari follows.

STANDARD OR SCOPE OF REVIEW

A writ of certiorari is to be granted if a trial court commits an error so serious that it amounts to a miscarriage of justice. *State v. Smith*, 951 So. 2d 954, 957 (Fla. 1st DCA 2007); *State v. Pettis*, 520 So. 2d 250 (Fla. 1988).

To grant certiorari, the petitioner must show: (1) the order departed from the essential requirements of law; (2) the order will cause material injury; (3) and the injury must be irreparable. *State v. De La Osa*, 28 So. 3d 201, 203 (Fla. 4th DCA 2010).

"[R]eview by certiorari is appropriate when a discovery order departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings and effectively leaving no adequate remedy on appeal." *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995) (citing *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987)); accord *Beverly Enterprises.-Fla., Inc. v. Ives*, 832 So. 2d 161, 162 (Fla. 5th DCA 2002) (material injury throughout the law suit, leaving the petitioner with no other adequate remedy to review the alleged erroneous order).

REASONS FOR GRANTING THE WRIT

WHETHER THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN RELATED DISCOVERY ORDERS CAUSING ERROR SO SERIOUS THAT IT AMOUNTS TO A MISCARRIAGE OF JUSTICE, WHERE PETITIONER SHALL BE DENIED *BRADY* EVIDENCE TO SUPPORT HIS AFFIRMATIVE DEFENSE, RESULTING IN IRREPARABLE INJURY THROUGHOUT THE REMAINDER OF THE CASE WHICH WILL IMPACT THE IMPENDING TRIAL, LEAVING PETITIONER WITH NO OTHER ADEQUATE REMEDY TO REVIEW THE ERRONEOUS DISCOVERY ORDERS?

A. Irreparable Harm

The first consideration in any certiorari proceeding is whether irreparable harm has been demonstrated. *State v. Foley*, 193 So. 3d 24, 26 (Fla. 3rd DCA 2016).

Irreparable harm warranting certiorari has been held to flow from an order that eviscerates a party's claim or defense. *Giacalone v. Helen Ellis Memorial Hospital Foundation, Inc.*, 8 So. 3d 1232 (Fla. 2nd DCA 2009). The Court in *Giacalone* explained that,

> "…when the requested discovery is relevant or is reasonably calculated to lead to the discovery of admissible evidence and the order denying that discovery effectively eviscerates a party's claim, defense, or counterclaim, relief by writ or certiorari is appropriate. **The harm in such cases is not remediable on**

> **appeal because there is no practical way to determine after judgment how the requested discovery would have affected the outcome of the proceedings…**" (*Id.* 8 So. 3d at 1234-35, bold added).

In this case, the harm the petitioner claims is the denial of access to evidence supporting his affirmative defense, Brady or exculpatory evidence and/or evidence which would negate the State's theory of guilt. Should the trial of this matter take place under these conditions, it will be an unbalanced, fundamentally unfair proceeding where the petitioner's affirmative defense is eviscerated. This constitutes irreparable harm "not remediable on appeal because there is no practical way to determine after judgment how the requested discovery would have affected the outcome of the proceedings…" *Giacalone*, 8 So. 3d at 1234-35.

B. Requirements of Law

A criminal defendant is entitled to discoverable, relevant material under *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United States,* 405 U.S. 150 (1972). See also *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (In order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others…").

"A defendant's fundamental right to defend himself or herself under the Sixth Amendment is denied when exculpatory evidence is excluded." *Alexander v. State*, 931 So. 2d 946, 950 (Fla. 4th DCA 2006). See also *Chambers v. Mississippi*, 410 U.S. 284, 294, 302 (1973) (the exclusion of critical evidence, inter alia, denied the accused "a trial in accord with traditional and fundamental standards of due process," and noted

that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"); *Jenkins v. State*, 872 So. 2d 388, 389 (Fla. 4th DCA 2004) (there are few rights more fundamental than the right of an accused to present a defense).

In weighing established fact-based testimonial evidence, a trial court shall "reject the use of unsworn assertions made by attorneys as evidence." *Smith v. Smith,* 64 So. 3d 169 (Fla. 4th DCA 2011); *Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982) (holding that unsworn statements do not establish facts in the absence of stipulation).

C. Departure from Essential Requirements of Law

Upon a showing of irreparable harm, the analysis turns to whether there has been a departure from the essential requirements of the law. *State v. Clyatt*, 976 So. 2d 1182, 1182 (Fla. 5th DCA 2008).

In this case, the petitioner established testimonial evidence from two casino employees that dealer-match bets are tracked by the casino (Appx., pp. 411-412, 473-475). An affidavit from a black jack dealer also attests to the tracking of dealer-match bets (Appx., p. 189). Defendant also testified to knowledge about the tracking of his betting habits and the tracking of his dealer-match bids (Appx., pp. 196-197). Defendant also submitted screen shots of the computer terminals used by the casino to enter dealer-match betting information (Appx., pp. 181-184).

The trial court departed from the essential requirements of law by **treating attorneys' arguments as evidence** at the January 17, 2019 hearing. The trial

judge credited **the attorneys' arguments greater weight than the testimonial evidence obtained from two casino employees at depositions**.[4]

The statements of Mark Schellhase (attorney for the casino) and Prosecutor McCormick at the January 17, 2019 hearing were but mere representations of attorneys, not fact witnesses. These statements were insufficient to trump the well established testimony of two casino employees that supported proof that the Casino maintains dealer-match records. Accord *Leon Shaffer*, 423 So. 2d at 1017 (holding that unsworn statements do not establish facts); *Smith,* 64 So. 3d at 169 ("As we have explained, we reject the use of unsworn assertions made by attorneys as evidence."); see e.g., *Brown v. School Bd. of Palm Beach County*, 855 So. 2d 1267, 1269-1270 (Fla. 4th DCA 2003) (the trial court erred by relying on the unsworn statements of counsel in makings its decision... to establish a fact, the attorney should provide sworn testimony through a witness or a stipulation to which his opponent agrees).

These are the unsworn statements of attorneys that the trial court relied upon over the testimonial evidence of record:

The Casino's Attorney

Mark Schellhase (the attorney for the Casino):

> "…[w]e do not maintain specific dealer

[4] It was error for the trial judge to credit things said by attorneys as evidence, and to give it greater weight than the sworn-to testimony of Casino employees who said dealer-match records are kept and exist. Where a circuit court impermissibly reweighs evidence, it departs from the essential requirements of law, and certiorari is available to an aggrieved party. *Dade County v. Blumenthal*, 675 So. 2d 598, 608-09 (Fla. 3rd DCA 1995).

match bets. They don't exist" (Appx., p. 332, lines 6-7).

"…[w]e don't maintain dealer match bets record[s]" (Appx., p. 333, lines 1-2).

The Prosecutor

Mr. McCormick (the prosecutor):

"…[t]hey don't exist" (Appx., p.332, line 25).

"…[t]hey don't keep detailed records of those" (Appx., p.333, lines 8-9).

The representations of Schellhase and McCormick are inconsistent with the deposition testimony of casino employees, Robert Jackson and Shawn Gookins, that established the casino was tracking Defendant's dealer-match bets (Appx., pp. 411-412, 473-475). An affidavit from a black jack dealer also attests to the tracking of dealer-match bets (Appx., p. 189), and even Defendant testified to knowledge about the tracking of his betting habits and the tracking of his dealer-match bids (Appx., pp. 196-197).

Defense Counsel, Mr. Weinstein, advised the court on a "good-faith basis" that there are "picture[s]" (Appx., p. 333, lines 13-14), and stated:

"When someone places a dealer match bet and as the Court knows, you are placing your money down on this specific area of the table, the dealer matches it. There is a computer screen that shows that that bet has been placed" (Appx., p. 333, lines 16-20).

Mr. Weinstein then brought to remembrance that two casino employees (Robert Jackson and Shawn Gookins) testified under oath that the Casino tracks

dealer-match bets (Appx., p. 334, lines 20-25). Mr. Weinstein went on to state that "I would like to know, specifically, whether or not they are dealer match bets. That is what he is accused of gaming the system. That what's he is accused of doing illegally" (Appx., p. 335, lines 6-8).

The trial court responded by stated that,

> "they [Attorney Schellhase and Prosecutor McCormick] are saying that they don't keep a record of that… [a]nd the dealer match bet is not kept as a record" (Appx., p. 335, lines 9-10, 13-14).

Judge Siegel then accepted the representations of the attorney for the Casino, Mark Schellhase, and Prosecutor McCormick to deny the motion to compel dealer-match betting records. Judge Siegel stated that "I will deny the motion based upon the fact that the tribe said they do not [have] that. And they could not have those records" (Appx., pp. 335, lines 17-20).

D. Spill-Over Prejudice

Defendant has been ordered he must pay $49,500 and $82,500 in advance of any production of records from the casino that would support his affirmative defense. This ruling is spill-over prejudice which serves to render the evidence unobtainable, resulting in procedural prejudice. Prejudice in this context means procedural prejudice materially affecting a party's preparation for trial. *McDuffie v. State*, 970 So. 2d 312, 321 (Fla. 2007); see also *State v. Farley*, 788 So. 2d 338, 339 n.2 (Fla. 5th DCA 2001).

The Casino sought to prevent Defendant from obtaining records. This was manifest in the filing of a motion requesting the trial court to require Defendant to pay $49,500 and $82,500 in advance as a cost for

records. (Appx., pp. 52-62). Defendant served a response (Appx., p. 78-85) asserting that the alleged victim was suppressing the evidence, or alternatively that the casino purposely used an information storage system that deliberately made it costly to produce records in response to litigation.

The trial court would not entertain Defendant's argument, nor hear the case-law favoring Defendant's position. That case law is discussed hereafter.

Turning to *Peskoff v. Faber*, 240 F.R.D. 26, 31 (D.D.C. 2007), the Court held that "accessible data must be produced at the cost of the producing party; cost-shifting does not even become a possibility unless there is first a showing of inaccessibility." Accord *Pipefitters Local No. 636 Pension Fund v. Mercer Human Res. Consulting, Inc.*, 2007 WL 2080365, at *2 (E.D. Mich. July 19, 2007).

In *Wagoner v. Lewis Gale Med. Ctr., LLC*, 2016 WL 3893135 (W.D. Va. July 14, 2016), the plaintiff sought discovery from his two former supervisors over a four-month period. Defendant sought $70,000 in costs for the collection, review, and production of emails by arguing that the email search was unduly burdensome. Defendant claimed it would have to hire a third-party vendor to search its email archive because its active email system stored some emails for only three days, "making it costly to produce relevant e-mails when faced with a lawsuit."

The *Wagoner* opinion denied the request for cost-shifting. The court's analysis turned on whether the defendant had proven that its email was inaccessible. The court reasoned that the defendant had chosen an information system that made it "costly to produce relevant e-mails when faced with a lawsuit," and should bear the costs of that choice. Here, the Casino

maintains information, knowing it will result in high costs to produce digital discovery, which the Casino should therefore have had to bear as a consequence of their chosen storage system.

Turning to *Juster Acquisition Co., LLC v. N. Hudson Sewerage Auth.*, No. 12-3427 (JLL), 2013 WL 541972 (D.N.J. Feb. 11, 2013), the court held that "[a]s a preliminary matter, '[c]ost shifting is potentially appropriate only when inaccessible data is sought.'" The court determined that the defendant "failed to satisfy its burden" of showing that the ESI sought was inaccessible, reasoning, in part, that by "asserting that it ha[d] hired an outside vendor to perform the word searches," Defendant had "acknowledged that the ESI is accessible." Here, the Casino's hiring and use of an outside vender is case-similar.

The trial judge reasoned that the State does not need the evidence to prosecute its case. It certainly should not have become Defendant's obligation to pay $49,500 and $82,500 to the victim (the casino)[5] to obtain evidence supporting his affirmative defense and theory of innocence. The State should have acquired this evidence and provided it to the Defense.

CONCLUSION

WHEREFORE, the Court should issue a writ of certiorari in this matter as to the discovery orders, and further include a prohibition of prosecution and trial without the dealer-match records, or any relief as is deemed just and proper.

---

[5] Since the trial court awarded costs in advance to the casino, the Defense is unable to perpetuate a deposition with records of Mr. Landau.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of March, 2019, the foregoing has been furnished upon: Broward State Attorney's Office, Main Office - Downtown Fort Lauderdale, Broward County Judicial Complex, c/o: Justin McCormack / J. Scott Raft, 201 Southeast 6th Street, Suite 655, Fort Lauderdale, Florida 33301, Primary email: courtdocs@sao17.state.fl.us, secondary email: JMcCormack@sao17.state.fl.us, additional email: SRaft@sao17.state.fl.us.

Respectfully submitted,

/s/ Eugene Steele
Eugene Steele, Esq.
Florida Bar No. 144190
Counsel to Petitioner
P.O. Box 30212
Fort Lauderdale, FL 33303-0212
Office: (954) 548-6690
Email: apiggg@yahoo.com

CERTIFICATE OF COMPLIANCE

I CERTIFY that the lettering in this pleading (is Times New Roman 14-point Font) complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

/s/ Eugene Steele
Eugene Steele, Esq.
Florida Bar No. 144190
Counsel to Petitioner
P.O. Box 30212
Fort Lauderdale, FL 33303-0212
Office: (954) 548-6690
Email: apiggg@yahoo.com

Appendix E

Trial Court's Order on Motion to Compel Production and Better Answers from Coconut Creek Casino (February 14, 2019)

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.: **15-13438 CF10A**

STATE OF FLORIDA,

Plaintiff,

v.

MASSOOD JALLALI,

Defendant.

_____/

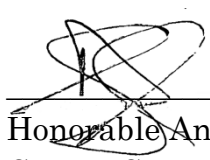
ORDER ON DEFENDANT'S MOTION TO COMPEL PRODUCTION AND BETTER ANSWERS FROM COCONUT CREEK CASINO

THIS CAUSE came on before the Court for a hearing on January 17, 2019, on Defendant's Motion to Compel Production and Better Answers from Coconut Creek Casino. The Court reviewed the motion, the court file, heard argument of counsel, and being otherwise fully advised on the premises, it is hereby,

ORDERED AND ADJUDGED as follows:

The Motion is hereby DENIED.

DONE and ORDERED in Chambers, in Broward County, Florida the 14th day of February, 2019.



Honorable Andrew L. Siegel
Circuit Court Judge

Copies furnished to:

Justin McCormack, Esq.,
Office of the State Attorney
Michael Weinstein, Esq.,
Co-counsel for Defendant Jallali
Eugene Steele, Esq.,
Co-Counsel for Defendant Jallali
Mark Schellhase, Esq.,
Counsel for Seminole Tribe of Florida
Patrick Trese. Esq.,
Counsel for Defendant, David Lebejko

Appendix F

Trial Court's Order on Motion to Require State to Obtain and Furnish Special Gambling Evidence (February 14, 2019)

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: 15-13438 CF10A

STATE OF FLORIDA,

Plaintiff,

v.

MASSOOD JALLALI,

Defendant.

_____/

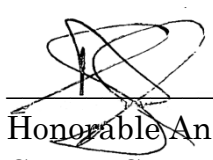
ORDER

THIS CAUSE came before the Court for a hearing on January 17, 2019, on Defendant's Motion for Order Requiring the State to Obtain and Furnish Specific Gambling (Dealer-Match) Betting Evidence to Support Defendant's Affirmative Defense and Theory of Innocence, and the same having been argued by counsel for the respective parties, and duly considered by the Court, it is hereby,

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion is DENIED.

DONE and ORDERED in Chambers, in Broward County, Florida the 14th day of February, 2019.



Honorable Andrew L. Siegel
Circuit Court Judge

Copies furnished to:

Justin McCormack, Esq.,
Office of the State Attorney
Michael Weinstein, Esq.,
Co-counsel for Defendant Jallali
Eugene Steele, Esq.,
Co-Counsel for Defendant Jallali

Appendix G

Trial Court's Order Granting Seminole Tribe of Florida's Motion for Costs in Advance of Compliance (February 14, 2019)

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.: 15-13438 CF10A

STATE OF FLORIDA,

Plaintiff,

v.

MASSOOD JALLALI,

Defendant.

_____/

ORDER ON SEMINOLE TRIBE OF FLORIDA'S AND SEMINOLE TRIBE OF FLORIDA D/B/A SEMINOLE HARD ROCK HOTEL & CASINO-HOLLYWOOD'S MOTION FOR COSTS IN ADVANCE OF DISCOVERY COMPLIANCE WITH DEFENDANT'S SUBPOENA DUCES TECUM WITHOUT DEPOSITION

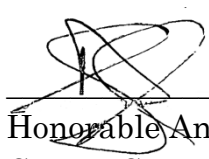
THIS CAUSE came on before the Court for a hearing on January 17, 2019, on Seminole Tribe of Florida's and Seminole Tribe of Florida d/b/a Seminole Hard Rock Hotel & Casino Hollywood's Motion for Costs in Advance of Discovery Compliance with Defendant's Subpoena Duces Tecum Without Deposition. The Court reviewed the motion, the court file, heard argument of counsel, and being otherwise fully advised on the premises, it is hereby,

ORDERED AND ADJUDGED as follows:

1. The Motion is hereby GRANTED.
2. Defendant shall pay the costs associated with

production of all discovery material.

DONE and ORDERED in Chambers, in Broward County, Florida the 14th day of February, 2019.



Honorable Andrew L. Siegel
Circuit Court Judge

Copies furnished to:

Justin McCormack, Esq.,
Office of the State Attorney
Michael Weinstein, Esq.,
Co-counsel for Defendant Jallali
Eugene Steele, Esq.,
Co-Counsel for Defendant Jallali
Mark Schellhase, Esq.,
Counsel for Seminole Tribe of Florida
Patrick Trese. Esq.,
Counsel for Defendant, David Lebejko

Appendix H

Trial Court's Order on Motion for Leave to Depose
(February 14, 2019)

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO.: 15-13438 CF10A

MASSOOD JALLALI,

Defendant.

_____/

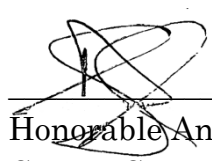
ORDER

THIS CAUSE came before the Court for a hearing on January 17, 2019, on Defendant's Motion for Leave to Depose Michael Landau of Emag Solutions or Emag Solution's Corporate Representative with the Most Knowledge of $49,500 and $82,500 Invoices, and the same having been argued by counsel for the respective parties, and duly considered by the Court, it is hereby,

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion is GRANTED. This Request shall not be construed to require the production of documents or work to be performed until payment is actually made by Defendant consistent with the orders of same date requiring advance payment.

DONE and ORDERED in Chambers, in Broward County, Florida the 14th day of February, 2019.



Honorable Andrew L. Siegel
Circuit Court Judge

Copies furnished to:

Justin McCormack, Esq.,
Office of the State Attorney
Michael Weinstein, Esq.,
Co-counsel for Defendant Jallali
Eugene Steele, Esq.,
Co-Counsel for Defendant Jallali

Appendix I

Motion to Compel Production and
Better Answers from Coconut Creek Casino
(April 10, 2018)

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO.: 15-13438 CF10A

MASSOOD JALLALI,

Defendant.

_____/

MOTION TO COMPEL PRODUCTION AND BETTER ANSWERS FROM COCONUT CREEK CASINO

Defendant, MASSOOD JALLALI, by and through the undersigned attorney, pursuant to Rule §3.220(n), Florida Rules of Criminal Procedure, files this Motion to Compel Production and Better Answers from Coconut Creek Casino.

INTRODUCTION

1. On October 9, 2017, the Court entered an Order granting Defendant additional discovery, permitting Defendant to serve the Coconut Creek Casino (and others) with a subpoena for records (Order, October 9, 2017).

2. Defendant served Coconut Creek Casino with a subpoena for records.

3. On March 16, 2018, the Court entered an order requiring Coconut Creek Casino to "produce all responsive materials … within fifteen (15) days of entry of this Order" (Attachment "A" hereto).

4. Coconut Creek Casino's responses to Request #1, #2, #3, #4, #5 and #11 are deficient, indicating suppression or noncompliance with this Court's March 16, 2018 order.

5. Defendant moves to compel Coconut Creek Casino's compliance, better answers and production, for the grant of an entitlement to attorney's fees and costs against Coconut Creek Casino, and for such other relief as is deemed just.

RULE OF LAW

6. Rule 3.220(n)(1), Florida Rules of Criminal Procedure, provides in pertinent part:

> "If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order the party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances."

7. Rule 3.361(d), Florida Rules of Criminal Procedure, provides in pertinent part:

> "A witness subpoenaed for … production of tangible evidence …who refuses to obey a subpoena …may be held in

contempt."

ANALYSIS

Request #1, #2, and #3

8. The Casino produced a single date-based log showing how much money was bet, won or lost. This information was produced as Bates No. CONFIDENTIAL-STOF-MJOOOOOl CONFIDENTIAL-STOF-MJ000031.

9. The response is deficient because it failed to include "bettering and gambling patters" and "dealer-match bets" (Request #1), "All 'Player's Club System' data" with "betting and gambling patterns, wins, losses, dealer-match bets and player rating" (Request #2), and it failed to include "[a]ll records of player bets dealer-match bets, wins, losses, financial records and tracking data regarding Massood Jallali (Player # 174392)" (Request #3). The materials requested certainly do exist and are part of the digital player tracking system. The Casino tracks every single bet a player makes. None of the betting information was produced. In depositions taken on July 20, 2017 and July 21, 2017, it was discovered that the casino tracks all bets of players, win-loss records, and maintains financial information as records.

10. Robert Jackson was deposed on July 20, 2017. Jackson testified that the Seminole Casino uses CMP ("Casino Market Place") to track player plays and bets for the purpose of rating (RJ Depo, pg. 38). Jackson referred to the CMP as the "Player's Club System" (ibid.). Jackson also testified that Defendant was subjected to the CMP (id., at 38-39) and testified that the casino tracks the chips cashed by players (RJ Depo, pg. 49), including "a record of profit and loss of

players" (RJ Depo, pg. 50). Jackson also testified that when a player gets a membership card or a player card, the casino maintains records on that player (RJ Depo, pg. 46).

11. Shawn Gookins was deposed on July 21, 2017. Gookins testified that CMP is "the software we use for the tracking of tables" (SG Depo, pg. 26, lines 15-16) and "player plays and bets" (SG Depo, pg. 26, line 17). Gookins explained that "the Tribe" has these records (SG Depo, pg. 26, line 25), and that there are "different types of notes" on player accounts that relate to patterns of play (SG Depo, pg. 26, lines 20-23). Gookins directly testified that "Yes. There are ratings and CMP for Mr. Jallali" (SG Depo, pg. 27, lines 13-24).

Request #4 and #5

12. The Casino responded to Request #4 and #5 by claiming there are no records that indentify that use of "Shufflemaster" (Request #4) or "the use of an MD 2, MD 3 or a continuous shuffler on any gambling table that [Defendant] visited on July 27, 2015" (Request #5). The Casino's answer constitutes a refusal to produce, particular where the Casino's employee testified that there are records of anti-cheat styled shuffle systems.

13. Robert Jackson testified that the casino uses "Shuffle Master" on some games, which is an electronic device to shuffler cards (RJ Depo, pg. 40, line 3). This cheat-proof shuffling system was allegedly used on the gaming table that the State claims Defendant had foreknowledge of card events. Shawn Gookins testified that "[w]e have shufflers that shuffle cards…there is two different types" (SG Depo,

pg. 28, lines 22, 25), and that "[f]or Black Jack you would either have an MD 2 or MD 3 or a continuous shuffler" (SG Depo, pg. 29, lines 1-2).

Request #11

14. In Request #11, the Casino was required to provide all video surveillance of Defendant from the Coconut Creek Casino for July 27, 2015.

15. The Casino produced the following files:

InternalInvestigation-SpecialObservation,07-27-15,0049,CC-15-656-S12,1087,Part1.sdc

InternalInvestigation-SpecialObservation,07-27-15,0057,CC-15-656-S12,1087,Part2.sdc

InternalInvestigation-SpecialObservation,07-27-15,0109,CC-15-656-S12,1087,Part3.sdc

16. According to records received in response to the Court approved subpoena, the following video file was not produced for July 27, 2015:[1]

InternalInvestigation-SpecialObservation,07-27-15,2006,CC-15-656-S13,1337.sdc

CONTEMPT, SANCTIONS, ATTORNEY'S FEES AND COSTS.

17. The Casino filed a notice of compliance (efiling #70011677).

18. The Casino is not in compliance with the Court's Order dated March 16, 2018.

19. Defendant moves pursuant to Rule 3.361(d), Florida Rules of Criminal Procedure, for entry of an order of contempt against the Casino and/or the answering party to the subpoena.

[1] See CONFIDENTIAL-STOF-MJ000187.

20. Defendant also moves pursuant to Rule 3.220(n)(1), Florida Rules of Criminal Procedure, for entry of an order awarding Defendant reasonable attorney's fees and costs to be recovered from the party who answered the subpoena (yet claiming compliance).

21. Defendant also moves for specific sanctions against the Casino; that the Court order the Casino to produce all of the following investigative surveillance[2]

InternalInvestigation-SpecialObservation,07-26-15,2047,CC-15-656-S10,0759,Part1.sdc
InternalInvestigation-SpecialObservation,07-26-15,2056,CC-15-656-S10,0759,Part2.sdc
InternalInvestigation-SpecialObservation,07-26-15,2238,CC-15-656-S10,0759,Part3.sdc
InternalInvestigation-SpecialObservation,07-23-15,2113,CC-15-656-S6,0759,Parti.sdc
InternalInvestigation-SpecialObservation,07-23-15,2146,CC-15-656-S6,Part2.sdc
InternalInvestigation-SpecialObservation,07-22-15,1957,CC-15-656-S6,Part3.sdc
InternalInvestigation-SpecialObservation,07-22-16,2010,CC-15-656-S6,Part4.sdc
InternalInvestigation-SpecialObservation,07-23-16,2008,CC-15-656-S6,Part5.sdc
InternalInvestigation-SpecialObservation,07-23-15,2022,CC-16-656-S6,Part6.sdc
InternalInvestigation-SpecialObservation,07-23-15,0022,CC-16-656-S6,Part7.sdc
InternalInvestigation-SpecialObservation,07-22-15,2301,CC-15-656-S6,Part8.sdc
InternalInvestigation-SpecialObservation,07-22-15,2313,CC-15-656-S6,Part9.sdc

[2] See CONFIDENTIAL-STOF-MJ000182;MJ000184.

InternalInvestigation-SpecialObservation,07-22-15,2326,CC-16-656-S6,Part10.sdc
InternalInvestigation-SpecialObservation,07-22-15,2339,CC-15-656-S6,Part11.sdc
InternalInvestigation-SpecialObservation,07-22-15,2351,CC-15-656-S6,Part12.sdc
InternalInvestigation-SpecialObservation,07-23-15,0004,CC-16-656-S6,Part13.sdc
InternalInvestigation-SpecialObservation,07-23-15,0015,CC-15-656-S6,Part14.sdc
InternalInvestigation-SpecialObservation,07-23-15,2210,CC-15-656-S6,Part15.sdc
InternalInvestigation-SpecialObservation,07-23-15,2220,CC-15-656-S6,Part16.sdc
InternalInvestigation-SpecialObservation,07-23-15,2230,CC-15-656-S6,Part17.sdc
InternalInvestigation-SpecialObservation,07-23-15,2238,CC-15-656-S6,Part18.sdc

CONCLUSION

WHEREFORE, Defendant, MASSOOD JALLALI, respectfully prays for the entry of an Order holding the Coconut Creek Casino or the party who answered the subpoena in contempt; entry of an requiring the Coconut Creek Casino to provide complete production in response to Requests #1, #2, #3, #4, #5, and #11; that the Court sanction Coconut Creek Casino and require production of the video files identified in ¶21 herein; grant Defendant an entitlement to an award of attorney's fees and costs against Coconut Creek Casino; or provide any other relief as is deemed just and proper, if any there be at law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via ePortal upon all parties subject to automatic eservice, on this 10th day of April, 2018.

Respectfully submitted,

/s/ Eugene Steele

Eugene Steele, Esq.
Florida Bar No. 144190
P.O. Box 30212
Fort Lauderdale, FL 33303-0212
Office: (954) 548-6690
Email: apiggg@yahoo.com

Appendix J

Motion to Require State to Obtain and Furnish
Special Gambling Evidence
(November 27, 2018)

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO.: **15-13438 CF10A**

MASSOOD JALLALI,

Defendant.

_____/

MOTION FOR ORDER REQUIRING THE STATE TO OBTAIN AND FURNISH SPECIFIC GAMBLING (DEALER-MATCH) BETTING EVIDENCE TO SUPPORT DEFENDANT'S AFFIRMATIVE DEFENSE AND THEORY OF INNOCENCE

Defendant, MASSOOD JALLALI, by and through the undersigned attorney, moves this Honorable Court for the entry of an order requiring the State to obtain from the alleged victim, specific gambling (Dealer-Match) betting information from the date of incident (July 27, 2015), to support Defendant's affirmative defense and theory of innocence. The undersigned shows the Court as follows:

1. On April 18, 2018, the State filed an amended information charging Defendant in two counts: Count I: unlawfully and knowingly obtaining property on July 27, 2015 valued more $300.00 but less than $5,000.00 from the Coconut Creek Casino, with intent to temporarily or permanently deprive the same, contrary to Florida Statutes §812.014(1)(a), §812.014(1)(b), §812.014(2)(c)1; Count II: unlawfully

committing gross fraud or cheat at common law on July 27, 2015, contrary to Florida Statute. §817.29 (Amended Information, efiling #70879472).

2. Count I alleges that Defendant committed theft of $5,000 on July 27, 2015 from the Coconut Creek Casino. The Defense understands through discovery that the State hinges the allegations of lawlessness upon a theory the Defendant cheated on one hand in a card game. The State's case hinges upon a theory that Defendant received a text message from a card dealer at the Coconut Creek Casino ("Casino") advising that an upcoming card hand in a game of Black Jack would be favorable for a "dealer match" bet.

3. ***Affirmative Defense***. Defendant's affirmative defense and theory of innocence: Defendant regularly plays the "dealer-match" bet, and did so multiple times on July 27, 2015; Defendant lacked any intent to cheat because the text message the State relies upon as intent was not even read by Defendant until after Defendant had placed his bet.

4. ***Proffer***. Defendant generally plays the dealer-match bet about every 2nd or 3rd bet that Defendant places when playing Black Jack. Thus, if Defendant remained in the casino at a Black Jack table for 6 hours, then **hundreds of dealer match bets** occurred on July 27, 2015.

5. ***Prior Ruling***. The Court previously ruled that on October 9, 2017 that Defendant could serve the Coconut Creek Casino with a subpoena for records of "betting and gambling patters" and "dealer-match bets" (Order, October 9, 2017).

6. The casino initially objected to the subpoena, subsequent to which, on March 16, 2018, the Court entered an order requiring Coconut Creek Casino to "produce all responsive materials … within fifteen

(15) days of entry of this Order" (Order, March 16, 2018). The Court's order required the casino to provide "betting and gambling patters" and "dealer-match bets" (Request #1), "All 'Player's Club System' data" with "betting and gambling patterns, wins, losses, dealer-match bets and player rating" (Request #2), and to include "[a]ll records of player bets dealer-match bets, wins, losses, financial records and tracking data regarding Massood Jallali (Player # 174392)" (Request #3).

7. ***Victim Non-Compliance***. The casino responded to the Court's order, but failed to produce the dealer-match bets from July 27, 2015, among many other deficiencies. A motion to compel compliance was filed and is currently pending before the Court.

8. ***State's Obligation to Obtain***. Since the alleged victim is unwilling to comply or provide the dealer-match bets for July 27, 2015, then the State must obtain the information, (*i.e.*, the dealer-match bets from July 27, 2015) in order to safeguard access to materials that support Defendant's affirmative defense and theory of innocence.

The "Dealer-Match" Information is Regularly Kept and Available (Yet Withheld)

9. The dealer-match betting materials requested certainly do exist and are part of the digital player tracking system. The Casino tracks every single bet a player makes. In depositions taken on July 20, 2017 and July 21, 2017, it was discovered that the casino tracks all bets of players, win-loss records, and maintains financial information as records.

10. Robert Jackson was deposed on July 20, 2017. Jackson testified that the Seminole Casino uses CMP ("Casino Market Place") to track player plays and bets

for the purpose of rating (RJ Depo, pg. 38). Jackson referred to the CMP as the "Player's Club System" (*ibid.*). Jackson also testified that Defendant was subjected to the CMP (*id.*, at 38-39) and testified that the casino tracks the chips cashed by players (RJ Depo, pg. 49), including "a record of profit and loss of players" (RJ Depo, pg. 50). Jackson also testified that when a player gets a membership card or a player card, the casino maintains records on that player (RJ Depo, pg. 46).

11. Shawn Gookins was deposed on July 21, 2017. Gookins testified that CMP is "the software we use for the tracking of tables" (SG Depo, pg. 26, lines 15-16) and "player plays and bets" (SG Depo, pg. 26, line 17). Gookins explained that "the Tribe" has these records (SG Depo, pg. 26, line 25), and that there are "different types of notes" on player accounts that relate to patterns of play (SG Depo, pg. 26, lines 20-23). Gookins directly testified that "Yes. There are ratings and CMP for Mr. Jallali" (SG Depo, pg. 27, lines 13-24).

State's Obligation to Safeguard Defendant's Constitutional Right to Evidence

12. When the alleged victim refused to comply, the State became obligated to obtain the evidence directly from the casino (the alleged victim). Indeed, the dealer-match evidence constitutes discoverable, relevant material under *Brady* v. *Maryland,* 373 U.S. 83 (1963) and *Giglio* v. *United States,* 405 U.S. 150 (1972). The State is now obligated to obtain and provide this material in discovery. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (In order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the

others…").

CONCLUSION

WHEREFORE, Defendant, MASSOOD JALLALI, respectfully prays for the entry of an Order requiring the State to obtain from the alleged victim, specific gambling (Dealer-Match) betting information from the date of incident (July 27, 2015), to support Defendant's affirmative defense and theory of innocence; or provide any other relief as is deemed just and proper, if any there be at law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via ePortal upon all parties subject to automatic eservice, on this 27th day of November, 2018.

Respectfully submitted,

/s/ Eugene Steele
Eugene Steele, Esq.
Florida Bar No. 144190
P.O. Box 30212
Fort Lauderdale, FL 33303-0212
Office: (954) 548-6690
Email: apiggg@yahoo.com

Appendix K

Seminole Tribe of Florida's
Motion for Costs in Advance of Compliance
(March 5, 2018)

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO.: 15-13438 CF10A

MASSOOD JALLALI,

Defendant.

_____/

NON-PARTIES, SEMINOLE TRIBE OF FLORIDA'S AND SEMINOLE TRIBE OF FLORIDA D/B/A SEMINOLE HARD ROCK HOTEL & CASINO-HOLLYWOOD'S, MOTION FOR COSTS IN ADVANCE OF COMPLIANCE WITH DEFENDANT'S SUBPOENA DUCES TECUM WITHOUT DEPOSITION

Non-parties, Seminole Tribe of Florida and Seminole Tribe of Florida d/b/a Seminole Hard Rock Hotel & Casino-Hollywood (hereinafter "Seminole Hard Rock Hotel & Casino-Hollywood"), pursuant to Fla. R. Crim. P. 3.361(c), moves this Court for an Order requiring Defendant to pay the costs of complying with the Subpoena Duces Tecum Without Deposition served on the Seminole Tribe of Florida and Seminole Hard Rock Hotel & Casino-Hollywood on or about November 13, 2017, by Defendant. As grounds for this Motion, the Seminole Tribe of Florida and Seminole Hard Rock Hotel & Casino-Hollywood allege as follows:

1. Defendant served a Subpoena Duces Tecum Without Deposition on Seminole Tribe of Florida on or

about November 13, 2017, which is attached hereto as "Exhibit A". That same day, Defendant also served a Subpoena Duces Tecum Without Deposition on Seminole Hard Rock Hotel & Casino-Hollywood, which is attached hereto as "Exhibit B."

2. Thereafter, on or about October 26, 2017, Seminole Tribe of Florida and Seminole Hard Rock Hotel & Casino-Hollywood filed their respective Objections to Defendant's Subpoena Dues Tecum Without Deposition, To Quash Subpoena, and Motion for Protective Order.

3. At the hearing on December 20, 2017 regarding Seminole Tribe of Florida's Objections to Defendant's Subpoena Dues Tecum Without Deposition, To Quash Subpoena, and Motion for Protective Order, the Court ruled that Seminole Tribe of Florida must produce the responsive documents to requests numbers 1-3 and 5 to Defendant's Subpoena Duces Tecum Without Deposition, but with a limitation that the document production include the responsive documents for up to and including July 27, 2015.

4. Further, on March 1, 2018 at the hearing on the Seminole Hard Rock Hotel & Casino-Hollywood's Objections to Defendant's Subpoena Dues Tecum Without Deposition, To Quash Subpoena, and Motion for Protective Order, the Court ruled that the Seminole Hard Rock Hotel & Casino-Hollywood must produce the responsive documents to request number 1, which required the Seminole Hard Rock Hotel & Casino-Hollywood to produce all emails, memos, writings, images, or reports regarding Defendant up to and including the date of the incident, July 27, 2015.

5. Nonetheless, in an effort to comply with the Court's rulings, the aforementioned requests in each

Subpoena Duces Tecum Without Deposition directed to the Seminole Tribe of Florida and Seminole Hard Rock Hotel & Casino-Hollywood requires a production of documents, which would require the Seminole Tribe of Florida and Seminole Hard Rock Hotel & Casino-Hollywood to expend over $45,000.00 with no guarantee that any of the documents will be responsive to Defendant's Subpoena Duces Tecum Without Deposition that is directed to each non-party, which is evidence from the quotes attached as "Exhibit C."

6. Consequently, in order for Seminole Tribe of Florida and Seminole Hard Rock Hotel & Casino-Hollywood to retrieve the aforementioned documents to comply with Defendant's Subpoena Duces Tecum Without Deposition, it will work a hardship to pay the costs of complying with same.

WHEREFORE, Seminole Tribe of Florida and Seminole Tribe of Florida d/b/a Seminole Hard Rock Hotel & Casino-Hollywood requests this Court Order Defendant to pay to the Seminole Tribe of Florida and Seminole Tribe of Florida d/b/a Seminole Hard Rock Hotel & Casino-Hollywood, in advance, the costs of compliance with the Subpoena Duces Tecum Without Deposition

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was served by Electronic Mail on:

Justin McCormack, Assistant State Attorney, Office of the State Attorney, 201 S.E. 6th Street, #655, Fort Lauderdale, FL 33301

(JMcCormack@saol7.state.fl.us);

Michael D. Weinstein, Esq., Michael D. Weinstein

P. A., 12 S.E. 7th Street, Suite 713, Fort Lauderdale, FL 33301 (mdw@mdwlawfirm.com) this 5th day of March, 2018.

Respectfully submitted,

GRAYROBINSON, P.A.
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/s/ _____
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Appendix L

Motion for Leave to Depose
(May 24, 2018)

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO.: 15-13438 CF10A

MASSOOD JALLALI,

Defendant.

_____/

MOTION FOR LEAVE TO DEPOSE MICHAEL LANDAU OF EMAG SOLUTIONS OR CORPORATE REPRESENTATIVE WITH THE MOST KNOWLEDGE OF $49,500 AND $82,500 INVOICES

Defendant, MASSOOD JALLALI, by and through the undersigned attorney and pursuant to Rule 3.220(f), Florida Rules of Criminal Procedure, hereby moves this Honorable Court for leave to depose Michael Landau of Emag Solutions or the person with the most knowledge of the $49,500 and $82,500 invoices for costs of production. As grounds thereof, Defendant shows the Court the following:

1. On November 13, 2017, Defendant served both the Seminole Tribe of Florida ("the Tribe") and the Seminole Hard Rock Hotel & Casino ("HR Casino") with a Subpoena Duces Tecum Without Deposition.[1]

[1] The Tribe and HR Casino filed Objections on October 26, 2017, which the Court ruled upon on December 20, 2017 (Tribe) and March 1, 2018 (Tribe and HR Casino). On March 16, 2018, the Court entered orders requiring both the Tribe and the HR Casino to "produce all responsive materials … within fifteen (15) days of entry of this Order."

The subpoenas required production of documents and things.

2. In a delay to production, the Tribe and HR Casino filed a motion seeking $49,500 in costs (to produce emails) and $82,500 (for undeclared production). The costs appear to flow from the Tribe's and HR Casino's decisions to use a 3rd party vender for production.

3. The $49,500 and $82,500 figures appear as invoiced estimates created by an employee of Emag Solutions identified as Michael Landau.

4. A review of the $49,500 and $82,500 invoice estimates reveals that all of the data is available on a storage system that the Tribe maintains as part of its required compliance for operating gambling institutions. The production sought is of accessible data.

5. Defendant suggests that the costs ($49,500 and $82,500) are excessive, inflated, unreasonable, and should be subjected to scrutiny to test Mr. Landau's basis of knowledge.

6. Defendant needs to question Mr. Landau about the billing methods, the terms identified on the $49,500 and $82,500 invoices, the storage and retrieval methods of the records sought, to verify the authenticity of the records, and to determine the basis of Mr. Landau's knowledge, among other things relevant to the discovery sought.

7. Defendant suggests that the Tribe and HR Casino are engaging in attempts to delay and/or frustrate discovery by deliberately using a 3rd party vender to "mak[e] it costly to produce relevant e-mails when faced with a lawsuit." See *Wagoner v. Lewis Gale Med. Ctr., LLC*, 2016 WL 3893135 (W.D. Va.

July 14, 2016).[2]

8. Florida Rule of Criminal Procedure 3.220(f) authorizes a court to "require such other discovery to the parties as justice may require" upon "a showing of materiality." Fla. R. Crim. P. 3.220(f). "In the discovery context, material means reasonably calculated to lead to admissible evidence." *Franklin v. State*, 975 So.2d 1188, 1190 (Fla. 1st DCA 2008). "[T]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *State v. Gonsalves*, 661 So.2d 1281, 1282 (Fla. 4th DCA 1995).

9. Accordingly, Defendant requests that this Honorable Court permit Defendant to depose Michael Landau or the person at Emag Solutions with the most knowledge of the $49,500 and $82,500 invoices. The deposition is for the purpose of determining and verifying facts that are calculated to lead to relevant

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[2] In *Wagoner v. Lewis Gale Med. Ctr., LLC*, 2016 WL 3893135 (W.D. Va. July 14, 2016), the plaintiff sought discovery from his two former supervisors over a four-month period. Defendant sought $70,000 in costs for the collection, review, and production of emails by arguing that the email search was unduly burdensome. Defendant claimed it would have to hire a third-party vendor to search its email archive because its active email system stored some emails for only three days, "making it costly to produce relevant e-mails when faced with a lawsuit." The *Wagoner* opinion denied the request for cost-shifting. The court's analysis turned on whether the defendant had proven that its email was inaccessible. The court reasoned that the defendant had chosen an information system that made it "costly to produce relevant e-mails when faced with a lawsuit," and should bear the costs of that choice. Here, the Tribe appears to maintain information, knowing it will result in high costs to produce digital discovery as a consequence of their chosen storage system.

and admissible evidence.

CONCLUSION

WHEREFORE, Defendant respectfully requests this Honorable Court to enter an Order allowing the Defense to depose Michael Landau or the person at Emag Solutions with the most knowledge of the $49,500 and $82,500 invoices, or any other relief as is deemed just and proper, if any there be at law, lest Defendant suffer irreparable harm.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via ePortal upon all parties subject to automatic eservice, and sent by e-mail to the Office of Assistant State Attorney (courtdocs@sao17.state.fl.us), on this 24th day of May, 2018.

Respectfully submitted,

/s/ Eugene Steele
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