Case No. S217896

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KIRNPAL GREWAL et al.,

Defendants and Appellants.

After a Decision By the Court of Appeal, Fifth Appellate District
Consolidated Case Nos. F065450/F065451/F065689

Kern County Superior Court Case Nos. CV-276959, CV-276958, CV-276961
William D. Palmer, Judge

PETITIONER'S REPLY BRIEF ON THE MERITS

TORY E. GRIFFIN (186181)
HUNT JEPPSON & GRIFFIN LLP
1478 Stone Point Dr., Suite 100
Roseville, CA 95661
Telephone: (916) 780-7008
tgriffin@hjg-law.com
Attorneys for Defendant/Petitioner John Stidman

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tgriffin@hjg-law.com
Attorneys for Defendant/Petitioner John Stidman

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Petitioner John Stidman ("Petitioner"), by and through his attorneys, respectfully submits his Reply Brief on the Merits.

I. INTRODUCTION

Contrary to Respondent's claim, Petitioner does not seek to have this Court "re-write California's slot machine and gambling device prohibitions to sanction their sweepstakes gaming schemes as a new, and unregulated, form of illegal gambling." (Respondent's Br., at p. 2.) Rather, Petitioner simply asks this Court to adopt and apply the interpretation of Penal Code Section 330b as articulated in *Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401 ("*Trinkle II*"). Alternatively, Petitioner asks this Court to hold that the Court of Appeal's ruling that Petitioner violated Penal Code Section 330b violates Petitioner's due process rights and runs counter to the rule of lenity.

Naturally, Respondent does its best to minimize the impact of the holding in *Trinkle II* on this case, and attempts to pass off the holding of *Trinkle II* as one that is limited to the specific facts of that case and need not be seriously analyzed any further. As hard as Respondent might try, however, it cannot escape the simple truth that *Trinkle II* interpreted Penal Code Section 330b in a way that set precedent in California, and that Petitioner's conduct did not violate Section 330b as interpreted in *Trinkle II*.

Although Respondent never expressly says so, Respondent's argument therefore *must* be that the interpretation of Penal Code Section 330b articulated in *Trinkle II* was wrong, and that the contrary interpretation adopted by the Court of Appeal in this case is correct. The problem with this argument is that, even if Respondent is correct that the court's interpretation of Section 330b in *Trinkle II* was in error, Respondent cannot then legitimately argue that Petitioner, consistent with due process and the rule of lenity, can be found to have violated Section 330b based on the Court of Appeal's interpretation contrary to that established by *Trinkle II*.

Accordingly, and as demonstrated further below, the Court of Appeal's decision must be reversed.

II. LEGAL ARGUMENT

A. Respondent's Attempts to Diminish the Significance of the Ruling in *Trinkle II* Miss the Mark

1. Prior to the Court of Appeal's Decision, *Trinkle II* was the Controlling Law on the Issues in this Case

Respondent attempts to dismiss the import of the Court of Appeal's decision in *Trinkle II*, claiming that *Trinkle II* "does not involve sweepstakes gambling machines," but instead "merely examines the legality of selling state lottery tickets through ordinary vending machines." (Respondent's Br., at 2.) Respondent's spin on *Trinkle II* is disingenuous, at best.

Even the Court of Appeal below acknowledged that *Trinkle II* explicitly interpreted Penal Code Section 330b. The Court of Appeal also properly identified the core holding of *Trinkle II* as follows: "the Legislature linked the element of chance to the operation of the machine, requiring that the *machine itself* determine the element of chance and become the object of play," and "[w]ithout the element of chance *incorporated into the operation of the machine*, the machine is nothing more than a vending machine which dispenses merchandise for consideration." (*Id.* at 1410 [emphasis added].)

Notwithstanding this explicit language and holding in *Trinkle II*, Respondent would have this Court believe that the Court of Appeal's decision here is entirely consistent with the decision in *Trinkle II*, and that both can be reconciled with one another based on the facts. Respondent's argument is wrong for at least two reasons.

First, such argument is belied by the Court of Appeal's ruling below, which had to explicitly reject the holding of *Trinkle II* in order to reach its conclusion:

> [W]e disagree with *Trinkle II's* description of the manner in which the chance element must be realized in order to constitute a slot machine or device under section 330b. Specifically, *Trinkle II* held that the chance element must be created by a randomizing process occurring at the moment the machine or device is being played. (*Trinkle II, supra*, at p. 1411.) As will be explained below, we think that holding was in error. Since we disagree with *Trinkle II* on these

> significant matters relating to the statutory elements, we adopt a different approach here than what was articulated in that case.

(*People v. Grewal* (2014) 224 Cal.App.4th 527, 541.)

Second, Respondent's argument misconstrues what it claims to be the applicable law. Respondent claims that, notwithstanding the decision in *Trinkle II*, the established precedent for the sweepstakes at issue here is found in *Trinkle v. Stroh* (1997) 60 Cal.App.4th 771, *People ex rel. Lockyer v. Pacific Gaming Technologies* (2000) 82 Cal.App.4th 699, and *Score Family Fun Center, Inc. v. County of San Diego* (1990) 225 Cal.App.3d 1217. Respondent is wrong.

In *Score Family Fun Center*, the defendant argued that the device at issue was not a slot machine because even though the elements of hazard and chance were present, the statute also required that the outcome be unpredictable to the user. According to the defendant, the outcome was mathematically predictable, so the device did not violate Section 330b. The court simply rejected the defendant's argument that, to violate Section 330b, the results had to occur both by reason of hazard or chance *and* be unpredictable to the user. (*Id.* at 1221.) The court said nothing about whether the predictability of the outcome had to be linked to the operation of the machine, which was the issue in *Trinkle II*, and is the issue here. But, even so, it appears evident by the nature of the games involved that the operation of the device at issue *did* produce the result. *Score Family Fun*

Center, therefore, does not inform the issue here, and in no way conflicts with the holding in *Trinkle II*.

Similarly, *Trinkle v. Stroh* involved a device that was physically attached and connected to a jukebox. That device "randomly flashed" when a customer played a song on the jukebox and, if all five lights randomly stopped on the same color, the customer would win a prize. Obviously, as pointed out in *Trinkle II*, the element of chance was in this case was generated by the machine itself. The *Trinkle v. Stroh* decision, therefore, does not help Respondent, and again does not conflict with *Trinkle II*.

Finally, Respondent overplays the significance of the decision in *Pacific Gaming Technologies*. Respondent's reliance on this decision hinges on cursory language in a footnote, where the court noted that the device at issue had a "10 percent payout structure" with "predetermined winners" spread out over a period of time. (Respondent's Brief, at p.22 [citing *Pacific Gaming Technologies*, 82 Cal.App.4th 699, 702 n. 4].) Nothing in the opinion in *Pacific Gaming Technologies*, however, conclusively indicates that the device delivered the "predetermined winners" at predictable, non-random times. To the contrary, as stated by the court in *Trinkle II*, the machines in question in *Pacific Gaming Technologies* and *Trinkle v. Stroh* were slot machines under Penal Code Section 330b "*because the outcome was dependent on the element of*

chance that was generated by the machines themselves." (*Trinkle II*, 105 Cal.App.4th at 1410-11 (emphasis added).) Contrary to Respondent's assertions, therefore, *Pacific Gaming Technologies* hardly can be called "well-established case law" standing for a contrary holding to that articulated in *Trinkle II*, or otherwise "right on point as to Appellants' sweepstakes schemes." (Respondent's Br., at pp. 22, 41.)

The several federal and out of state decisions cited by Respondent also do not impact the result. In *United States v. Davis* (5th Cir. 2012) 690 F.3d 330, *Barber v. Jefferson County Racing Ass'n, Inc.* (2006) 960 So.2d 599, and *City of Cleveland v. Thorne* (2013) 987 N.E.2d 731, the courts were analyzing the legality of different sweepstakes systems under the laws of different states. In each case, the courts construed the language of the applicable state statutes, none of which was the same as Penal Code Section 330b. Moreover, unlike the situation here, none of these courts were confronted with a prior judicial decision stating that in order to be a slot machine under the applicable statute, the element of chance must be created by the machine itself. Consequently, none of these cases have any applicability here.

Telesweeps of Butler Valley, Inc. v. Kelly (2012) 2012 WL 4839010 (M.D. Penn. October 12, 2012) is also unhelpful to Respondent. That case, in addition to being an unpublished federal district court decision, dealt with a statute prohibiting a "simulated gambling program." (*Id.* at *1.)

That is a very different issue than the issue of whether the operators of the sweepstakes at issue here operated illegal slot machines within the meaning of Penal Code Section 330b.

Consequently, based on the straightforward review of the applicable decisions, it is clear that *Trinkle II* was *the* controlling law on the issue of whether the machine itself had to generate the element of chance and become the object of play in order for the device to be considered a slot machine. The Legislature's response to the decision in *Trinkle II* confirms this. Penal Code § 330b has been amended three times since the decision in *Trinkle II*, yet on none of those occasions did the Legislature amend the statute in any way intended to alter the decision in *Trinkle II*. Had the Legislature disagreed with *Trinkle II's* interpretation of Section 330b, the Legislature had at least three opportunities to change the statute in response, but the Legislature did not do that. Nor does it appear from the legislative history that the Legislature ever even considered such an amendment. The Legislature's failure to amend Section 330b following the decision in *Trinkle II*, "while not conclusive, may be *presumed* to signify legislative acquiescence" in the *Trinkle II* decision. (*Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal.4th 1139, 1156 (2006) (emphasis added); *see Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353.) Respondent offers no argument to overcome this presumption.

The recent adoption of AB 1439 into law conclusively removes any

remaining doubt as to whether the Legislature approves of the interpretation of Penal Code Section 330b announced in *Trinkle II*. AB 1439, which was signed by Governor Brown and became law on January 1, 2015 (codified at Business and Professions Code Section 17539.1), expressly makes the type of sweepstakes offered by so-called Internet cafés illegal. The bill adds specific provisions to the Business and Professions Code that *directly* prohibit the types of sweepstakes promotions offered by Internet cafés. Had the Legislature believed that the sweepstakes promotions offered by Internet cafés illegal under *existing* law, the Legislature again easily could have said so by disapproving the interpretation of Penal Code Section 330b as set forth in *Trinkle II*, or by amending the language of Section 330b to make clear that the element of chance only had to be unpredictable to the player, as noted above. The Legislature, however, did not do that. So, once again, the Legislature expressly declined an opportunity to address *Trinkle II*'s interpretation of Penal Code Section 330b, even though virtually *all* of the litigation in California related to Internet Cafés revolved around the question of whether the computer terminals used in such businesses constituted an illegal slot machine under Section 330b. Consequently, there can be little doubt that the interpretation of Section 330b as set forth in *Trinkle II* was, and remains, the controlling law on the issues in this case.

Because Respondent never accepts *Trinkle II* as a controlling precedent, it never attempts to explain how Petitioner's conduct violates

Penal Code Section 330b based on the interpretation of that section set forth in *Trinkle II.* Even if Respondent attempted to make that showing, such attempt would fail.

2. Respondent Fails to Demonstrate How, Under *Trinkle II*, Petitioner's Computers Were Illegal Slot Machines Under Penal Code Section 330b

Respondent fails to point to any evidence in the record that the computer terminals used by Petitioner contained any random number generator, or that the element of chance was dictated by the machine itself. To the contrary, it is undisputed that the sweepstakes entries, as well as the order in which they were to be distributed, were all predetermined. The fact that the sweepstakes entries at some point long ago were "randomly arranged" does not, as Respondent seems to suggest, equate to a machine-generated random selection of a single game piece out of thousands of game pieces each time a customer plays the game. (Respondent's Br., at 4.)

Respondent's apparent reliance on a statement from its investigator is also misplaced. That investigator stated: "*Chance* means there is a *random* element involved. *This too, is part of any sweepstakes game.*" (Respondent's Br., at 5 [citing Stidman CT 71-72] (emphasis in Respondent's Brief).) This comment is of absolutely no significance to this Petition. First, it says nothing about the actual workings of the computer terminal. It is merely the opinion of an individual end-user, and thus

simply begs the question of whether Penal Code Section 330b should be interpreted as articulated in *Trinkle II*, or as articulated by the Court of Appeal below. Second, if the investigator were correct that the element of randomness is part of any sweepstakes game, then, under Respondent's theory, *any* sweepstakes game that utilizes some form of electronic device to deliver or display the results – whether it be a computer, a pda device, phone, or something else – then that device necessarily becomes an illegal slot machine. Such an absurd result cannot be the law.

Accordingly, there is no evidence in the record to support the conclusion that the devices at issue here met the definition of a slot machine under Penal Code Section 330b as interpreted by *Trinkle II.* Because *Trinkle II* is the controlling law and property interprets Section 330b, the Court of Appeal's ruling must be reversed.

B. The Adoption of AB 1439 Into Law Forecloses The Possibility of Future Public Harm Predicted by Respondent, and Crystallizes the Due Process Issues Before this Court

Since Petitioner filed his Opening Brief on the Merits, AB 1439 was signed by the Governor and became law effective January 1, 2015. The passage of AB 1439 changes the dynamics of this appeal.

As an initial matter, the passage of AB 1439 into law means that the impact of this Court's decision on Internet Café businesses in California is, for all practical purposes, retroactive only. Reversing the decision in *Grewal* will not, as Respondents seem to suggest, give Petitioner and others

in California the green light to operate Internet cafés in California. The Legislature, through the passage of AB 1439, has done what a Legislature (*not* an appellate court) is supposed to do if it perceives a loophole in the law – enact a new law to close the perceived loophole.

Here, the Legislature, through AB 1439, chose to directly and specifically prohibit the conduct at issue by making the following an unfair business practice:

> Using or offering for use any method intended to be used by a person interacting with an electronic video monitor to simulate gambling or play gambling-themed games in a business establishment that (A) directly or indirectly implements the predetermination of sweepstakes cash, cash-equivalent prizes, or other prizes of value, or (B) otherwise connects a sweepstakes player or participant with sweepstakes cash, cash-equivalent prizes, or other prizes of value. For the purposes of this paragraph, "business establishment" means a business that has any financial interest in the conduct of the sweepstakes or the sale of the products or services being promoted by the sweepstakes at its physical location. This paragraph does not make unlawful game promotions or sweepstakes conducted by for-profit commercial entities on a limited and occasional basis as an advertising and marketing tool that are incidental to substantial bona fide sales of consumer products or services and that are not intended to provide a vehicle for the establishment of places of ongoing gambling or gaming.

Bus. & Prof. Code § 17539.1(a)(12). The Legislature's adoption of this statute effectively puts an end the Internet café business model at issue before this Court, and nothing this Court could conceivably do in its opinion would sanction the continued operations of Internet cafés in California. Consequently, the catastrophic future harm to the public in the

event of a reversal, as predicted by Respondent, is no longer possible.

The real impact of this Court's decision will be whether Petitioner and others can be punished through substantial civil fines or criminal prosecution for *past* conduct. As demonstrated below, in light of all the facts and circumstances of this case, including the decision in *Trinkle II* and the Legislature's implicit approval thereof, this Court cannot, consistent with due process and the rule of lenity, construe Penal Code Section 330b in the manner urged by Respondent.

C. Both Due Process and the Rule of Lenity Preclude any Finding that Petitioner Violated Penal Code Section 330b

It has long been established that due process requires fair notice of what the law requires or forbids. "The basic principle that a criminal statute must give fair warning of the conduct that makes a crime has often been recognized by this Court." (*Bouie v. City of Columbia* (1963) 378 U.S. 347, 350-51; *see FCC v. Fox* (2012) 132 S. Ct. 2307.) The United States Supreme Court has recognized "three related manifestations of the fair warning requirement." (*United States v. Lanier* (1997) 520 U.S. 259, 266.)

> First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); accord, *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619,

> 83 L.Ed. 888 (1939). Second, as a sort of "junior version of the vagueness doctrine," H. Packer, The Limits of the Criminal Sanction 95 (1968), the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. *See, e.g., Liparota v. United States*, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 85 L.Ed.2d 434 (1985); *United States v. Bass*, 404 U.S. 336, 347–348, 92 S.Ct. 515, 522–523, 30 L.Ed.2d 488 (1971); *McBoyle, supra*, at 27, 51 S.Ct., at 341. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, *see, e.g., Bouie, supra*, at 357–359, 84 S.Ct., at 1704–1706; *Kolender, supra*, at 355–356, 103 S.Ct., at 1856–1858; *Lanzetta, supra*, at 455–457, 59 S.Ct., at 619–621; Jeffries, Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L.Rev. 189, 207 (1985), due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope, *see, e.g., Marks v. United States*, 430 U.S. 188, 191–192, 97 S.Ct. 990, 992–993, 51 L.Ed.2d 260 (1977); *Rabe v. Washington*, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972) (per curiam); *Bouie, supra*, at 353–354, 84 S.Ct., at 1702–1703; cf. U.S. Const., Art. I, § 9, cl. 3; *id.*, § 10, cl. 1; *Bouie, supra*, at 353–354, 84 S.Ct., at 1702–1703 (Ex Post Facto Clauses bar legislatures from making substantive criminal offenses retroactive).

(*Lanier, supra*, 520 U.S. at 266.)

Both the second and third manifestations of the fair warning requirement – the rule of lenity and rule against retroactive application of a novel interpretation of a criminal statute – are present here. And, both preclude any finding that Petitioner violated the law.

1. Due Process Bars Any Retroactive Application of the Interpretation of Penal Code Section 330b as articulated by the Court of Appeal

In *Bouie*, the United States Supreme Court was confronted with the

issue of whether a criminal defendant could be found guilty for trespass. The applicable statute defined the prohibited conduct as "entry upon lands of another ... after notice from the owner or tenant prohibiting such an entry." (*Id.* at 349.) The defendants argued that they received no notice from the owner or tenant prior to entering. They were convicted at trial, and those convictions were upheld by the South Carolina Supreme Court, which interpreted the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave. (*Id.* at 350.) On certiorari to the United States Supreme Court, the defendants argued that they were unlawfully punished for conduct that was not criminal at the time they committed it, and that such punishment violated their right to Due Process of law.

The United States Supreme Court agreed, and reversed the convictions. The Court distinguished the case from situations where no fair notice exists because the statue as written was vague, and subject to differing interpretations. (*Id.* at 351-52.) Although that vagueness can result in lack of fair notice, the Court noted the *greater* deprivation of the right to fair notice "where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction...." (*Id.* at 352.) The due process violation is "much greater" when, "because the uncertainty as to the statute's meaning itself is not revealed until the

court's decision, a person is not even afforded an opportunity" to speculate that the statute might be interpreted differently until the court's decision. (*Id.*) "There can be no doubt that a deprivation of the right to fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." (*Id.* at 352.) "[J]udicial enlargement of a criminal act by interpretation is at war with the fundamental concept of the common law that crimes must be defined with appropriate definiteness." (*Id.* (quoting *Pierce v. United States* (1941) 314 U.S. 306, 311.) "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law," which the Constitution "forbids." (*Id.* at 353.) "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." (*Id.)* Accordingly, when an "unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." (*Id.* at 354-55.)

Applying these principles, the Court found that because the interpretation of the trespass statute adopted by the South Carolina Supreme Court found no support in prior South Carolina decisions, the defendants

had no fair warning of the criminal prohibition under which they were convicted. (*Id.* at 359-61.) The Court therefore reversed the convictions as violating the defendants' right to Due Process of law.

Notably, in reaching this conclusion, the Court found its decision "confirmed" by the fact that, after the defendants' conduct which led to the charges against them, the South Carolina Legislature amended the trespass statute to make criminal the act of failing and refusing to leave the premises after be requested to do so. (*Id.* at 361.) The Court interpreted the state legislature's action as an admission that the state legislature, like the defendants, was not aware of any South Carolina authority criminalizing the defendants' conduct.

As applied here, *Bouie* compels the conclusion that Petitioner cannot, consistent with due process, be found in violation of Penal Code Section 330b. In light of the language of Section 330b, together with the interpretation of that section in *Trinkle II* and the California State Legislature's multiple amendments to that section without changing or even commenting on the *Trinkle II* interpretation, Petitioner did not have fair notice that the conduct at issue here would be found to violate Section 330b. No reading of *Trinkle II* would possibly lead a reasonable person to conclude that the element of "chance" that must exist for a device to be a slot machine is to be determined by the user's subjective experience of the game. Instead, Petitioner had every reason to believe that the interpretation

of Section 330b as set forth in *Trinkle II*, requiring that the machine itself generate the element of chance, was the accepted law in California. Under that interpretation, Petitioner's conduct was not unlawful.

Also, as in *Bouie*, the Legislature's adoption of AB 1439 in order to close a perceived "loophole" in existing law further demonstrates that due process precludes any finding that Petitioner violated existing law. As noted in *Bouie*, this new law can be seen as an admission that no state law existed criminalizing the conduct at issue. Consistent with this concept, federal courts have found no violation of a criminal statute where subsequent legislation was enacted to close a perceived "loophole" in the law.

In *United States v. McKie* (3d Cir. 1997) 112 F.3d 626, the statute at issue was a provision allowing persons a 24-hour grace period to register a newly acquired firearm (under Virgin Islands law). Defendants were arrested within 24 hours of purchasing the firearms and so literally fell within the grace period. But the government urged the court to follow a Virgin Islands case that said the grace period was unavailable if the defendant did not *intend* to register within 24 hours. Another Virgin Islands case reached the opposite conclusion. The legislature then eliminated the grace period (after defendants' alleged offense). In doing so, it noted the conflict between the two Virgin Islands territorial courts, and stated its intent to close the 24-hour "loophole." The Third Circuit

discussed this legislative history of the amendment at length, and held that, because of the rule that criminal statutes be construed strictly, the legislative closure of the loophole meant that the convictions had to be reversed. (*See id.* at 632.)

In *United States v. McKelvey* (1st Cir. 2000) 203 F.3d 66, the court interpreted a statute making it illegal to possess photographs of minors engaged in sexually explicit conduct. The statute at issue made it illegal to knowingly possess "3 or more books, magazines, periodicals, films, video tapes, or other matter...." (*Id.*) The defendant was caught possessing one negative strip containing more than three images, and the question was whether his conduct violated the statute. In finding that the conduct did *not* violate the statute, the court noted the rule that criminal statutes be strictly construed, and gave significant weight to Congress's view that it was closing a "loophole" in amending the statute. After quoting the legislative history in which a Congressman referred to a "loophole" in existing law, the First Circuit stated: "As the legislative history of the amendment demonstrates, Congress knew what the original statute required, and exercised its prerogative to alter the statute so that conduct such as McKelvey's could be punished in the future. Fortunately for McKelvey, Congress did so after McKelvey's indictment." (*Id.* at 72.)

These federal cases are instructive because the legislative history of AB 1439 reflects the Legislature's stated belief that the amendment would

resolve "a gray area" and close a "loophole" in the law related to the operation of sweepstakes cafés. Specifically, the author's statement in support of AB 1439 states, in pertinent part, as follows:

> A loophole in the law has permitted internet gambling sweepstakes to operate in a "gray area" and evade law enforcement. These internet sweepstakes are thinly veiled gambling operations. The law must be updated to prohibit these activities and provide authorities with the necessary enforcement tools to regain local control of the public safety issues that arise because of illegal internet gambling sweepstakes.
>
> ...
>
> Recently, there has been a growing proliferation of these gaming operations throughout the State. AB 1439 will close the loophole that has allowed these illegal cafes to operate.

(Report on AB 1439 by Assembly Committee on Business, Professions and Consumer Protection, April 29, 2014; Report on AB 1439 by Assembly Committee on Governmental Organization, April 23, 2014.)

In addition, the report by the Assembly Committee on Business, Professions and Consumer Protection noted that the enactment of AB 1439 was necessary even in the face of the Court of Appeal's decision in *Grewal*. It stated:

> Unfortunately, the recent caselaw may not be a complete solution to the problem. Some enterprising businesses may yet be tempted to slightly modify their sweepstakes software in order to claim that it no longer technically meets the definition of an illegal slot machine or device, therefore requiring a new court decision to prohibit the modification. Instead, this bill would cast a broader net and prohibit any contest or sweepstakes that use an interactive electronic video

> monitor to simulate gambling or play gambling-themed games for cash or prizes. AB 1439 is intended to close loopholes that would allow Internet cafés to continue operating sweepstakes while claiming the games did not meet the statutory elements of a lottery.

(Report on AB 1439 by Assembly Committee on Business, Professions and Consumer Protection, April 29, 2014, at p. 6.)

Accordingly, any finding that Petitioner violated Penal Code Section 330b necessarily would rest on a retroactive judicial expansion of that statute, and would ignore the Legislature's actions to close a "loophole" in the law, and thus would violate Petitioner's due process rights. (*Bouie,* 378 U.S. at 350-362; *see Clark v. Brown* (9th Cir. 2005) 442 F.3d 708, 720 ("An unforeseeable judicial enlargement of a criminal statute, applied retroactively, violates the federal due process right to fair warning of what constitutes criminal conduct."); *LaGrand v. Stewart* (9th Cir. 1998) 133 F.3d 1253, 1260 ("[T]he Due Process Clause ... protects criminal defendants against novel developments in judicial doctrine."); *Oxborrow v. Eikenberry* (9th Cir. 1989) 877 F.2d 1395, 1399 ("An unforeseeable, albeit legitimate, construction of a state law by the courts may not be retroactively applied to a defendant."); *People v. Vis* (1966) 243 Cal.App.2d 549, 554.)

2. The Rule of Lenity Precludes Any Finding that Petitioner Violated Penal Code Section 330b

Respondent argues that the rule of lenity does not apply because Penal Code Section 330b is unambiguous on its face. Respondent,

however, never directly addresses how the rule of lenity analysis is impacted by the decision in *Trinkle II*. As explained, *Trinkle II*'s interpretation of Section 330b cannot be reconciled with the interpretation by the Court of Appeal here. As the Court of Appeal acknowledged, the two interpretations directly contradict one another. (*Grewal, supra*, 224 Cal.App.4th at 541.)

In the face of *Trinkle II*, therefore, one of two situations was present – either (i) *Trinkle II* was and still is the controlling law on the issues germane to this case, in which case Petitioner's conduct was legal; or (ii) the issue whether the element of chance had to be created by the machine itself was ambiguous or unsettled after *Trinkle II*, meaning that individuals at best were left to guess as to how Section 330b would be interpreted in the future as applied to the sweepstakes at issue. Under the first scenario, the Court of Appeal's decision must be reversed for the reasons stated above. Under the second scenario, the rule of lenity indisputably applies, again requiring reversal.

Ultimately, Respondent does not dispute that neither the Court of Appeal nor this Court has the "power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 59.) In order for Respondent to prevail, therefore, this Court *must* not only conclude that the interpretation of Penal Code Section 330b articulated in *Trinkle II* was

wrong, but must further conclude that it should have been obvious to Petitioner and the whole world that the interpretation of Section 330b set forth in *Trinkle II* was wrong. Because it far from obvious that the decision in *Trinkle II* was wrong, especially given the Legislature's failure to amend Section 330b on at least three separate occasions following the decision in *Trinkle II*, as a matter of law due process and the rule of lenity preclude any finding that Petitioner violated Section 330b based on the interpretation of that statute as articulated by the Court of Appeal.

D. Reversal of the Court of Appeal's Decision Would Not Sanction Illegal Conduct, But Rather Would Judicially Expand Penal Code Section 330b and Call Into Serious Question the Continuing Legality of Many Established Games

Respondent is generally correct that California's Penal Code provisions forbid a wide range of gambling devices. In accordance with fundamental rules of due process articulated above, however, California law contains many examples of gambling statutes being strictly construed to prohibit (and thus criminalize) only gaming activities that are expressly prohibited by statute. (*See Tibbetts v. Van de Kamp* (1990) 222 Cal.App.3d 389, 393 (Because Texas Hold-em was not one of the games specifically prohibited by the Legislature, it did not violate Penal Code § 330; "a card game played for money not *specifically listed* under section 330 and not played as a banking or percentage game is not prohibited") (emphasis added); *City of Bell Gardens v. County of Los Angeles* (1991) 231

Cal.App.3d 1563, 1567-70 (pai gow does not violate Penal Code § 330 where the players act as bankers and are charged a flat fee to play).) By the same token, numerous cases cited by Respondent reflect situations where courts analyzed the specific workings of a device in comparison with the specific elements of the crime alleged. (Respondent's Brief, at p. 16.) All of these decisions follow the fundamental rule of construction of criminal statutes: "'A penal statute should not be interpreted to cover an alleged offense which is not plainly within its terms.'" (*Tibbetts, supra*, 222 Cal.App.3d at 395 (quoting *Mains v. Bd. Of Barber Examiners* (1967) 249 Cal.App.2d 459, 466).)

Moreover, all of these cases demonstrate that California's anti-gaming laws have historically been strictly construed to prohibit specific conduct, and that slight modifications of "traditional" gambling games have been found and accepted as perfectly legal. The sweepstakes at issue here is no different. Far from acting illegally to exploit a perceived "loophole," Petitioner did what entrepreneurs legally have done for decades – used a modified form of entertainment that complies with California's anti-gaming laws.

If this Court were to interpret Section 330b as urged by Respondent, there can be no doubt that such decision would have the effect of overruling *Trinkle II*, thus making illegal the Lottery Scratcher Vending Machines as well as many other devices and sweepstakes promotions throughout

California. Although Respondent attempts to explain why that is not the case, Respondent's explanation misses the mark.

Respondent claims that the result of the operation of the Lottery Scratcher vending machine is entirely predictable to the user, since if a user purchases one ticket, that is exactly what the user gets. If the user purchases five (5) tickets, that again is exactly what the user gets. (Respondent's Br., at p. 38.) But Respondent ignores that the same is true for the sweepstakes. Every time the customer hits a button to reveal the next entry, he or she gets to see the result of exactly one entry.

Respondent's argument uses the wrong analogy, and proves nothing. The question of whether the outcome is subjectively predictable to the user does not depend on the predictability of the number of tickets received, but rather the *value* of those tickets once the results are revealed. The user cannot predict this ahead of time, and must await the surprise once he or she scratches off the ticket to reveal the results. The same is true in the sweepstakes at issue here – the user cannot predict the outcome ahead of time, but must wait for the result to be revealed on the computer screen. In both cases, however, the results of either the lottery ticket or the sweepstakes entry were determined and fixed long before they are delivered to and revealed by the user. Importantly, in both cases the patron obtains the chance to win a prize through outcome unpredictable to him or her. Thus, if the element of chance does not have to originate from the operation

of the machine itself, as urged by Respondent, then the Lottery Scratcher Vending Machines, like the sweepstakes terminals at issue here, are illegal slot machines. Indeed, while the Lottery enjoys a statutory exemption from the recently enacted AB 1439, it enjoys *no* such exemption from the prohibitions contained in Penal Code Section 330b.

The impact on the Lottery of an interpretation of Penal Code Section 330b as urged by Respondent does not end with the Lottery's Scratcher Vending Machines. The Lottery recently announced its "Play at the Pump" game, described by the Lottery as follows:

> There's a new convenient and fast way to play your favorite California Lottery draw games. At select Los Angeles and Sacramento area locations, you can try your luck while you pump your gas. Whether your game is SuperLotto Plus, Powerball, or Mega Millions, all you have to do is swipe your debit or credit card at the gas pump and you might drive away with a lot more than a tank full of gas.

(*See* http://www.calottery.com/lucky-retailers/more-ways-to-buy/play-at-the-pump.)

Under the Court of Appeal's decision below, the gas pump in the Lottery's new "Play at the Pump" game is unquestionably an illegal slot machine within the meaning of Section 330b. The use of the debit card meets the "insertion" requirement, the patron is paying for a lottery ticket, and, by doing so, the patron obtains the chance to win a prize through outcome unpredictable to him or her.

Accordingly, the interpretation of Section 330b urged by Respondent indeed would have far ranging consequences, many of which are no doubt unintended and, more importantly, contrary to the Legislature's intent.

III. CONCLUSION

If particular conduct is not expressly prohibited by the Penal Code, it is the Legislature's job to fix if, if it so desires. As it turns out, the Legislature has done just that in this context, through the enactment of AB 1439, which became effective January 1, 2015. The Court of Appeal here went too far, and usurped the role of the Legislature by rejecting the established interpretation of Penal Code Section 330b set forth in *Trinkle II* and adopting a new interpretation that statute. The Court of Appeal then violated Petitioner's right to due process and the rule of lenity by applying its new interpretation retroactively against Petitioner.

The decision therefore must be reversed.

Dated: February 18, 2015

Tory E. Griffin
HUNT JEPPSON & GRIFFIN, LLP
Attorneys for Petitioner John Stidman

IV. CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.204(c)(1)

The text of this brief consists of 6,460 words as counted by Microsoft Word, the word-processing software used to generate this brief.

Dated: February 18, 2015

Tory E. Griffin
HUNT JEPPSON & GRIFFIN, LLP
Attorneys for Petitioner John Stidman

PROOF OF SERVICE

CASE TITLE: *People v. Grewal, et al.*
COURT: Supreme Court of California
CASE NO.: S217896

I am a citizen of the United States, and I am employed in Placer County, State of California. My business address is 1478 Stone Point Drive, Suite 100, Roseville, CA 95661. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with HUNT JEPPSON & GRIFFIN, LLP'S office practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in the U.S. mailbox after the close of each day's business.

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PETITIONER'S REPLY BRIEF ON THE MERITS

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Kamala Harris
Attorney General of the State of California
PO Box 944255
Sacramento, CA 94244-2550
(Served pursuant to Business &Professions Code §§ 17209 and 17536.5)

Clerk of the Court
Court of Appeal, Fifth Appellate District
2424 Ventura Street
Fresno, CA, 93721

Clerk of the Court
Kern County Superior Court
1415 Truxtun Avenue
Bakersfield, CA 93301

John H. Weston
G. Randall Garrou
Jerome H. Mooney
Weston, Garrou & Mooney
Wilshire Bundy Plaza
12121 Wilshire Blvd., Suite 525
Los Angeles, CA 90025
Attorneys for Defendants/Appellants Kirnpal Grewal and Phillip Ernest Walker

Lisa S. Green, District Attorney
Gregory A. Pulskamp, Deputy District Attorney
Kern County District Attorney's Office
1215 Truxtun Avenue
Bakersfield, CA 93301
Attorney for the People of the State of California

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on February 18, 2015, at Roseville, California.

SARA SEBERGER