

Case No. S217896

**IN THE SUPREME COURT OF CALIFORNIA**



**SUPREME COURT  
FILED**

MAY 20 2014

Frank A. McGuire Clerk

Deputy

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**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**KIRNPAL GREWAL et al.,**

**Defendants and Appellants.**

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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

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**REPLY IN SUPORT OF PETITION FOR REVIEW**

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**TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-  
SAKAUYE AND THE ASSOCIATE JUSTICES OF THE SUPREME  
COURT OF CALIFORNIA:**

Petitioner John Stidman (“Petitioner”), by and through his attorneys, respectfully submits this Reply to the Answer to Petition for Review, filed by Respondent the People of the State of California (“Respondent”) on May 8, 2014.

**LEGAL ARGUMENT**

In its Answer, Respondent claims that Petitioner misrepresents the Court of Appeal’s decision, but never directly addresses the arguments raised by Petitioner. Respondent’s arguments, and its response to Petitioner’s arguments, only reinforce why this Court should review the Court of Appeal’s decision in this case.

**A. The *Grewal* Decision Creates an Express, Irreconcilable Conflict in the Law**

Respondent criticizes Petitioner for employing “an expansive and unwarranted reading of *Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1410-1411 (*Trinkle II*).” (Answer, at p. 3.) Respondent then claims that the Court of Appeal’s decision merely distinguished *Trinkle II* and does not create a conflict in the law. Respondent’s arguments are disingenuous at best, and misleading at worst.

Contrary to Respondent's claim, Petitioner does not need to engage in "hyperbole" to demonstrate that the Court of Appeal's decision creates a conflict in the law. In finding that the lottery scratcher vending machines at issue in *Trinkle II* were not illegal slot machines, the Court there interpreted Penal Code Section 330b and expressly *held* that "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." (*Trinkle II, supra*, 105 Cal.App.4th at 1410 (Italics added).) "While the technology of old slot machines may differ from the modern slot machines, the element of gambling remains the same. The operation of the device (the spinning wheels or a computer program) renders the chance result." (*Id.* at 1411.) The *Trinkle II* court's statements in this regard were not dicta, as suggested by Respondent; they were essential to the holding that the lottery scratcher vending machine was not an illegal slot machine.

There can be no doubt that the Court of Appeal's decision created a conflict in the law with respect to the essential holding in *Trinkle II*. The Court of Appeal found:

[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.

(Opinion, at pp. 16-17.)

As a result of this conclusion, all persons in California now are subject to criminal penalties based on two contradictory and inconsistent interpretations of Penal Code Section 330b. This conflict and resulting chaos not only presents a viable ground for review, but is exactly the type of conflict that this Court *should* review and resolve. This is especially true where, as here, the conflict is created by a judicial interpretation of a state criminal statute. (*See Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 59 (An appellate court “has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed”.); *People v. Vis* (1966) 243 Cal.App.2d 549, 554 (“It is fundamental that crimes are not to be “built up by courts with the aid of inference, implication, and strained interpretation and *penal statutes must be construed to reach no further than their words; no person can be made subject to them by implication.*”) (emphasis added; internal citations and quotations omitted).)

### **B. The Foreign Authorities Cited by Respondent are a Red Herring**

Respondent cites several out-of-state cases, as well as a recent unpublished federal district court decision, in an effort to give the

impression that the Court of Appeal's decision here is in line with prior decisions and does not create any conflict in the law. Respondent's reliance on these cases is misplaced because it improperly ignores the express conflict created by the Court of Appeal's decision here and the previously controlling decision in *Trinkle II*.

With respect to the out-of-state cases cited by Respondent, the court in *United States v. Davis* (5<sup>th</sup> Cir. 2012) 690 F.3d 330, was analyzing the legality of a different sweepstakes system under the laws of Texas, and the court's opinion is therefore wholly irrelevant to whether Petitioner's sweepstakes is legal under the laws of California. Similarly, *Barber v. Jefferson County Racing Association* (2006) 960 So.2d 599 is an Alabama case concerning Alabama law, and *Moore v. Mississippi Gaming Commission* (2011) 64 So.3d 537 is a Mississippi case concerning Mississippi law. The fact that these courts, under the laws of Texas, Alabama, and Mississippi, respectively, found that the devices at issue in those cases were illegal slot machines is wholly irrelevant here. This case concerns *California* law and, prior to the Court of Appeal's decision here, the controlling case in California on the issues relevant here was *Trinkle II*.

Respondent's reliance on *Lucky Bob's Internet Café, LLC v. California Department of Justice*, Case No. 11-CV 148 (S.D. Cal. 2013), a recent unpublished federal district court case in California, is also misplaced. The system at issue in *Lucky Bob's* was not the sweepstakes



promotion utilized by Petitioner here, and therefore the decision in *Lucky Bob's* does not inform the Court as to whether Petitioner's sweepstakes promotion is legal. To the extent the system in *Lucky Bob's* is similar to the sweepstakes system here (a fact which cannot be determined from the limited facts in the record here and the facts described in the court's unpublished opinion in *Lucky Bob's*), the decision in *Lucky Bob's* improperly contradicts established California law as set forth in *Trinkle II*. Since ultimately the issue is one of California law, the decision in *Trinkle II* was the controlling authority prior to the Court of Appeal's decision here, not the decision in *Lucky Bob's*. Indeed, on issues of state law, federal courts are required to *follow* controlling authority from that state. (*See Commissioner v. Estate of Bosch* (1967) 387 U.S. 456, 465 (explaining *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 78).) Moreover, federal decisions on issues of state law are in no way binding on any state court. (*Fidelity Union Trust Co. v. Field* (1940) 311 U.S. 169, 177–78 (federal court interpreting state law cannot change or ignore the decisions of the highest state court because the "highest state court is the final authority on state law").)

Thus, the decision in *Lucky Bob's* does nothing to resolve the conflict in *California* law resulting from the Court of Appeal's decision. With or without *Lucky Bob's*, the conflict in the law still exists in California, warranting review by this Court.

**C. Respondent's Answer Demonstrates Exactly Why the Rule of Lenity *Should* Apply in this Case**

Respondent claims that the rule of lenity should not apply here because Petitioners' sweepstakes gambling systems "are a deliberate and sophisticated attempt to circumvent state gambling laws." (Answer, at p.8.) So, Respondent claims, Petitioners are simply seeking to exploit what they perceive as "loopholes" in California's gambling laws. (Answer, at p.8.)

As stated in the Petition for Review, the whole point of the rule of lenity is to protect defendants from being found to have violated a criminal statute without first providing them fair notice regarding the exact scope of conduct prohibited by that statute. "Indeed, *it is 'the policy of California ... to construe and apply penal statutes as favorably to the defendant as the language of the statute and the circumstances of its application may reasonably permit.'*" (*Vis, supra*, 243 Cal.App.2d at 554) (Emphasis added.)

Prior to the Court of Appeal's decision in this case, under the clear language of the California Penal Code and the previously-controlling cases such as *Trinkle II*, California businesses, including Internet cafés, had every right to use sweepstakes promotions provided they complied with the statutory requirements. So long as no consideration was required to

participate,<sup>1</sup> and so long as the machine did not create the element of chance but just distributed pre-determined prizes or entries in a pre-determined fixed order, then the machine did not meet the definition of a slot machine or gambling device under Penal Code section 330b *regardless* of whether a person using the machine understood how the machine worked or could predict whether he or she would win.

Contrary to Respondent's contention, the specific elements of Section 330b as interpreted by the courts did not create "loopholes" to be exploited. Rather, Section 330b, as interpreted by the courts, set clear and unequivocal limits on what type of device or apparatus a person could use without violating Penal Code Section 330b. The Court of Appeal's decision, however, expressly rejected those clear and unequivocal limits, and established an entirely new test for determining whether a person violates Section 330b. The resulting conflict is *exactly* why the rule of lenity should be applied here. It is also *exactly* why the Court of Appeal went too far in its decision, and overstepped its authority by reading a new "look and feel" test into Section 330b. (*See Equilon Enterprises, supra*, 29 Cal.4th at 59.)

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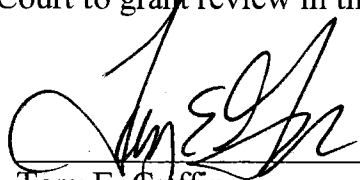
<sup>1</sup> As explained in the Petition for Review, until the Court of Appeal's decision, valuable consideration was required to be given in exchange for the chance to play in order for a device to be considered an illegal slot machine. In its Answer, Respondent simply ignores this argument. Nor does Respondent dispute that no consideration was required to participate in Petitioner's sweepstakes games.

Review by this Court is necessary to resolve the conflict and provide fair notice to all persons in California as to how their conduct will be judged under this Section.

**CONCLUSION**

Respondent's Answer improperly ignores the express conflict in the law created by the Court of Appeal's decision in this case. Respondent also substantially downplays the significance of the resulting conflict, both from the perspective of how the Court of Appeal's decision will impact other previously legitimate sweepstakes in California, *and* from the perspective of the standards under which a person's conduct will be judged if and when that person is charged with violating Penal Code Section 330b. Thus, for the reasons set forth in the Petition for Review and further set forth above, Petitioner respectfully urges this Court to grant review in this case.

Dated: May 19, 2014



Tory E. Griffin  
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Attorneys for Petitioner John Stidman


**CERTIFICATE OF WORD COUNT**

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

The text of this brief consists of 1,756 words as counted by Microsoft Word, the word-processing software used to generate this brief.

DATED: May 19, 2014

By:



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TORY E. GRIFFIN

Attorney 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 JEPSON & 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.

On May 19, 2014, I served the following:

**REPLY IN SUPPORT OF PETITION FOR REVIEW**

- on the party(ies) in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid and deposited in the designated area for outgoing U.S. Mail addressed as follows:
- on the party(ies) in this action by causing a true copy(ies) thereof to be delivered by hand as follows:
- on the party(ies) in this action by causing a true copy(ies) thereof to be delivered to Overnight Delivery in a sealed envelope(s) with receipts affixed thereto promising overnight delivery thereof addressed as follows:
- on the party(ies) in this action by causing a true copy(ies) thereof to be delivered by causing a true copy(ies) thereof to be sent by facsimile transmission as follows:

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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 May 19, 2014, at Roseville, California.

Mariana Wibbenhorst  
MARIANA WIBBENHORST