No. S 217896
(Court of Appeal No. F065450, consolidated with F065451 and F065689
(Kern County Superior Court Nos. CV-276959 and CV-276961)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff/Respondent

v.

KIRNPAL GREWAL, *et al.*,
Defendant and Appellant

PETITIONER GREWAL'S REPLY IN SUPPORT OF PETITION FOR REVIEW

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I
RESPONDENT'S ANSWER INCORRECTLY ASSERTS THAT THERE IS NO CONFLICT BETWEEN *GREWAL* AND *TRINKLE II*

Respondent's Answer to Petition for Review ("Answer") surprisingly asserts that there is no conflict between the opinion below, *People v. Grewal*, 224 Cal.App.4th 527 (5th Dt. 2014) ("*Grewal*") and *Trinkle v. California State Lottery,* 105 Cal.App.4th 1401 (3d Dt. 2003) (*"Trinkle II"*), notwithstanding that *Grewal expressly rejected* the reasoning and holding of *Trinkle II*! Understandably, the Answer fails to present any persuasive argument in support of that position.

In disputing the existence of the conflict, Respondent refers to the portions of *Trinkle II* with which it disagrees as "*dicta,*"[1] although they were irrefutably essential components of *Trinkle's holding*. The asserted "*dicta*" in *Trinkle II* with which *Grewal* expressly took issue include:

> (1) the ruling that "chance operation" of the machine is a prerequisite which cannot be satisfied merely because the result is unpredictable to the customer; and
>
> (2) the ruling that a slot machine must be a "house banked" game.

Neither of these rulings was even arguably *dictum* in *Trinkle II*. They were the very *foundation* of the court's decision in *Trinkle II*. It was solely because of these two determinations that *Trinkle II* concluded that the California State Lottery's Scratchers Vending Machines ("SVMs") were not prohibited slot machines. Nothing in the State's Answer

[1] The Answer asserts: "While the Court of Appeal in *Grewal* took issue with some of *Trinkle II's dicta*, . . . *Trinkle II* did not apply to Petitioner's illegal operations." *Id.* at 4 (emphasis added).

demonstrates that there is anything less than a complete and irreconcilable conflict between the respective holdings in *Trinkle II* and *Grewal*.

As further evidence of Respondent's inability to demonstrate the lack of conflict with *Trinkle II*, the Answer neither mentions nor contests the irrefutable fact that, under the holding in *Grewal*, *the State's SVM's are now all illegal slot machines*. *Trinkle II* cannot be reasonably distinguished in any way. The illegality of the state's SVMs under *Grewal* cannot be erased by any attempt to distinguish *Trinkle II*.

Finally, as if it were some evidence of the absence of conflict between *Grewal* and *Trinkle II*, the Answer relies heavily on out-of-state cases construing their states' completely different slot machine statutes. (*See* Answer, pp. 5-6.) These decisions have no relevance to the conflict analysis here, which involves two different interpretations of a California state statute by two California courts of equal stature, and an express rejection of the earlier interpretation in the second court's opinion.

II
THE ANSWER INCORRECTLY DENIES THAT *GREWAL* CRIMINALIZES MOST PROMOTIONAL SWEEPSTAKES

Equally unpersuasive is the Answer's assertion (at p. 6) that Penal Code § 330b, as newly re-construed by *Grewal*, does not prohibit, as illegal "slot machines," cell phones or computers used to access the ubiquitous sweepstakes programs run by countless companies. Rather than pointing to any linguistic or analytical flaws in Petitioner's observation that Penal Code § 330b, as interpreted by *Grewal,* now applies to cell phones and computers used to obtain results of sweepstakes programs, the Answer (at p. 6) instead *assumes the correctness of Petitioners' observation*, but argues that

Petitioners lack standing to make a successful "discriminatory prosecution argument." However, Petitioners did not make that assertion in their Petition for Review, nor at any stage below. This is *not* about equal protection. This is about statutory construction and *Grewal's* expanded statutory construction of § 330b which gives that statute a limitless sweep. By eliminating any requirement of "insertion of an object," and any requirement "that the machine operate in a chance manner," *Grewal* has rendered every "smartphone," laptop, tablet and personal computer with Internet access a "slot machine" as defined in Penal Code § 330b(d). The Answer points to no flaw in Petitioners' reasoning, nor even disputes Petitioners' assertion. Notably, smart phones, computers, etc., need not even be *used* in connection with any sweepstakes promotion in order to be unlawful under *Grewal's* construction of § 330b.[2]

III
THE ANSWER FAILS TO ADDRESS THE DUE PROCESS AND STARE DECISIS RAMIFICATIONS OF *GREWAL*

The Answer ignores the necessity of resolving whether entrepreneurs may rely and base their businesses on long-standing and controlling interpretations of statutes provided by published opinions of the

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[2] It is enough to be a "slot machine" under § 330b(d) that a machine or device "*may readily be converted for* use in a way that, as a result of . . . any . . . means, . . . may be operated, and by reason of any . . . operation unpredictable by him or her, the user may . . . become entitled to receive any . . . thing of value."

Since § 330b(a) makes mere *possession* of a slot machine a crime, *Grewal's* interpretation makes criminals of anyone *possessing* a smart phone or computer with Internet access. It *certainly* makes criminals of anyone *using* a computer or cell phone to learn the result of a sweepstakes program.

courts of appeal which have been undisturbed by the Legislature. The fundamental issue presented by the Petition is whether under due process or stare decisis, a business may confidently and safely be based upon the authoritative interpretation of a statute by a court of appeal in a published opinion that has existed for over a decade without significant legislative amendment or judicial questioning. Respectfully, this Court must resolve whether a business operating lawfully in compliance with such a decision may be destroyed (and those associated with it made criminals and liable for ruinous financial penalties, fines, disgorgements, etc.) by a contrary interpretation of the same statute rendered *years later* by a court of equal stature.

There is a profound paralyzing impact on the business community from knowing that a court of appeal's statutory interpretation crucial to the life of a business could be wiped out by a conflicting decision from another court of appeal, and, indeed, one occurring as much as a decade after the original opinion. Particularly in today's perilous and mercurial economic climate, business cannot abide uncertainty. The doctrine of *stare decisis* is fundamental to the ability of businesses to be developed and to operate. Although, as noted in the Petition, under *Auto Equity Sales, Inc. v. Superior Court,* 57 Cal.2d 450, 455 (1962): "[d]ecisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state...," *Auto Equity* does not prohibit different courts of appeal from reaching diametrically different conclusions. Consequently, it is imperative that this Court grant review to resolve the conflict and restore predictability to the law.

For all the reasons above, the due process issue presented here is of significant statewide importance and warrants this Court's review

independent of any other issue presented, notwithstanding the Answer's inexplicable failure to address it.

IV
THE ANSWER'S RELIANCE ON *GREWAL'S* ATTEMPTED FACTUAL DISTINCTION OF *TRINKLE II* FAILS TO DISPEL *GREWAL'S* EXPRESS DIRECT CONFLICT WITH *TRINKLE II*

In support of its assertion that there is no *conflict* between *Trinkle II* and *Grewal*, the Answer offers what, at best, is only a *non sequitur*, i.e., the Court of Appeal's belief that Petitioners' conduct was not necessarily lawful under *Trinkle II* (Answer at 4-5.) Even if the attempt to distinguish the facts in *Trinkle II* from those in the present case were found to be meaningful, *Grewal nonetheless expressly rejected Trinkle II's* construction of the slot machine statutes. *Grewal's* express rejection of *Trinkle II's* construction of the slot machine statutes creates a conflict necessitating this Court's review.

The Answer offers nothing to refute that conflict, nor does it explain why this Court should not resolve this significant conflict between two appellate districts. Regardless of whether the *facts* in *Trinkle II* are distinguishable from those in *Grewal*, the diametrically opposite *holdings* in these two cases create a *very* significant conflict *with great practical import*. For example, under one district's ruling, the State's SVMs are lawful; under another's, they are unlawful. Superior courts, prosecutors and other litigants (both plaintiffs and defendants) throughout the state must have guidance to resolve whether the SVMs are still lawful. Unless review is granted, every private merchant with an on-site state-sponsored SVM is now subject to an unfair competition suit brought either by any rival who does not have such a machine, or by any maverick or publicity-seeking

local official.[3] This controversy will not be eliminated by any presently pending new legislation, but will only grow. This controversy and the conflict which gave birth to it need to be resolved.

There are also *scores* of cases throughout the state involving businesses similar to Petitioners', and lower courts will now be confronted with diametrically opposite rulings of two courts of appeal regarding the very elements of the "slot machine" offense. This conflict needs to be resolved to settle the applicability of the slot machine statutes specifically with respect to the types of businesses *presently before the Court.*

Likewise no distinction, asserted or otherwise, between the facts in *Trinkle II* and *Grewal* will eliminate the problem for the national and regional companies (and their participating retailers) whose computer-linked sweepstakes programs are now unlawful under *Grewal's* new construction of Penal Code § 330b. Given the irresistible allure of statutorily authorized attorneys fees, those companies will almost certainly be targets for lawyers representing their competitors (which do not offer sweepstakes) in proceedings brought under BPC § 17200, *et seq.* Although it is unlikely that state or local officials would bring an action against the California State Lottery, there will be no shortage of lawyers eager to launch potentially limitless private unfair competition suits against businesses offering heretofore lawful sweepstakes.

Even more startling is the potential green light under *Grewal* for a *class action* suit for restitution of all sums spent buying lottery tickets from

---

[3] Penal Code § 330b makes it a crime to possess or maintain a slot machine, so those retailers who currently house SVMs are, at least under *Grewal, engaged in an unlawful business practice.*

Scratchers Vending Machines brought on behalf of everyone who, within the past four years,[4] has purchased a lottery ticket from an SVM.[5]

Finally, while the asserted factual differences between *Trinkle II* and *Grewal* would more appropriately be discussed in a *merits* brief following this Court's grant of review, Petitioners nonetheless respectfully suggest that *Grewal's* attempt to distinguish *Trinkle II,* reiterated in the Answer, seems to make no sense. In a nutshell, the argument, which *Grewal* adopted from the unpublished federal decision in *Lucky Bob's Internet Café, LLC. v. Cal. Dpt. of Justice*, S.D.Cal., May 1, 2013, No. 11-CV-148 BEN (2013 U.S.Dist. Lexis 62470) ("*Lucky Bob's II*"), *see* 224 Cal.App.4th at 545, is that because Petitioners' system involved a combination of computer terminals for patrons linked to the store's two main computers, the *combination* of these computers somehow acted to create "chance operation" of the machines[6] and therefore satisfied the "chance operation"

[4] BPC §17208 imposes a four year statute of limitations on all unfair competition claims.

[5] Although the unfair competition laws do not allow private parties to sue for monetary damages or penalties, they *do* allow suits for *restitution.* (*See* BPC § 17203, which authorizes "any person" to seek restitution of "any money . . . which may have been acquired by means of . . . unfair competition.")

"Unfair competition" is defined in BPC §17200 to include "any unlawful ... business ... practice." It is an unlawful business practice to obtain money from the use of illegal slot machines since PC § 330b(a) makes it a crime "to manufacture,... sell, or lease" a slot machine and also "for any person to make ... an agreement with another person regarding any slot machine or device."

"Use" of a slot machine is not an illegal act. However, those who have paid money to use an illegal product (thinking it is legal) are presumably entitled to restitution of any sums they paid out as it is "money . . . acquired by means of . . . unfair competition." Accordingly, a massive class action for restitution of all amounts paid for Scratchers tickets obtained from illegal SVMs is not a fanciful concern.

[6] This is akin to "the whole is greater than the sum of its parts."

requirement of *Trinkle II*. Although Petitioners' computers were indeed linked, there was no "chance operation" in *any* of the computers and there is nothing in the record to suggest otherwise.[7]

V
THE ANSWER'S RULE OF LENITY DISCUSSION IS FLAWED

Petitioners believe that virtually everything in the Answer regarding the rule of lenity is incorrect. More importantly, Petitioners now believe that discussion of the rule of lenity is, at this time, premature. They recognize that at this stage of the case, where only injunctive relief is at issue, the relevant considerations are due process and stare decisis, rather than the rule of lenity. While the rule of lenity forbids penalizing past conduct which occurred when there was a reasonable belief that it was lawful, it is not implicated by the injunction herein. Consequently, Petitioners are not pressing the "rule of lenity" claim raised in their Petition.

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[7] In contrast, there *was* a random number generator in the in-store computers at issue in the unpublished federal *Lucky Bob's* case on which *Grewal* based this argument. The *Grewal* panel may have overlooked a footnote in Petitioners' Reply Brief (n. 15 at p. 17), noting that an earlier order in the *Lucky Bob's* case contained a finding that there were *random number generators* (and thus chance operation) in the devices there found to be slot machines.

Though not referenced in the May 1, 2013 *Lucky Bob's II* opinion quoted by the *Grewal* opinion, the earlier order in *Lucky Bob's* made this finding expressly. *See Lucky Bob's Internet Café, LLC. v. Cal. Dpt. Of Justice*, S.D.Cal., No. 11-CV-148 BEN, Order of March 25, 2013 ("*Lucky Bob's I*"), Doc. No. 79, Order Granting Defendant Key's Motion for Summary Judgment, at p. 3, lines 7-11, stating that the World Touch software system "randomly generated numbers." It then concluded (at p. 6, lines 16-17) that "the operation of [defendant's] machine was . . . 'unpredictable and governed by chance.'" There is no such evidence in the present case nor can there be, because Petitioners' system does not utilize any random number generators nor does it have any other type of chance operation.

Nonetheless, since *Grewal* discussed the rule of lenity, and since it will no doubt be relevant on any remand should the court of appeal opinion not be vacated, Petitioners will briefly point out why the discussion of the rule of lenity in the Answer should not be found persuasive for any purpose.

The Answer asserts that "[t]here is no ambiguity as to the meaning of Penal Code § 330b, and certainly no reasonable competing statutory interpretation that requires the rule of lenity's application to this case." (Answer, p. 8.) If it becomes germane to discuss the merits of the rule of lenity, Petitioners will argue that the very existence of a binding published Court of Appeal interpretation of this statute (*i.e.*, as in *Trinkle II*) is a "reasonable competing statutory interpretation" to the one recently announced in *Grewal.* The issue is not whether *Grewal* would have violated the rule of lenity had it been the *first* published California Court of Appeal decision to address the "chance operation" and "house banked game" elements of the statute. Rather, the question is whether *Grewal* violated the rule of lenity given the existing decade old precedent of *Trinkle II.* That significant issue remains for subsequent resolution depending on the nature of any remand in this case.

VI
THE ANSWER IMPROPERLY FAULTS PETITIONERS FOR "EVADING" CALIFORNIA'S GAMBLING LAWS

At p. 2, the Answer asserts that "Petitioners . . . used integrated computer systems to *evade* California's gambling laws." (Emphasis added.) Of course, had Petitioners done so, the parties would not be before this Court. Rather, repeating Respondent's argument below, the Answer implies that it is a crime to run a business so as to avoid violating a law

which might otherwise apply. However, conduct which does not violate the law is ordinarily deemed compliant and called "lawful." As Judge Learned Hand noted nearly a century ago:

> Anyone may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the treasury. There is not even a patriotic duty to increase one's taxes. Over and over again the Courts have said that there is nothing sinister in so arranging affairs as to keep taxes as low as possible. Everyone does it, rich and poor alike and all do right, for nobody owes any public duty to pay more than the law demands.

Gregory v. Helvering, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).[8]

CONCLUSION

There is a compelling, direct and express conflict in the interpretation of a significant state statute by two different courts of appeal. This is the classic situation where grant of review is most appropriate, and in this case, very much needed.

[8] This principle remains the law. *See, e.g.*, the Wall Street Journal's summary of Apple Computer's exploitation of the tax laws to minimize its tax liability http://online.wsj.com/article/SB10001424127887324102604578497263976945032.html While condemned by many (though not all, *see* above), Apple has not been indicted.

For all the reasons above, this Court is respectfully urged to grant review.

Respectfully submitted,

Dated: May 19, 2014

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by _____
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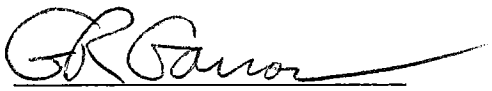
CERTIFICATE OF WORD COUNT BY APPELLATE COUNSEL

I am one of the attorneys who participated in preparation of this document and hereby certify, per the requirements of CRC 8.504(d), that it consists of 2,900 words, exclusive of the cover, tables, signature blocks, proof of service and appendices.



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PROOF OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE

I am a resident of and also employed in the County of Los Angeles, State of California. I am over the age of eighteen years and am not a party to the within entitled action. I work at the law firm of Weston, Garrou & Mooney located at 12121Wilshire Boulevard, Suite 525, Los Angeles, CA 90025.

I am readily familiar with this law firm's practice for the collecting and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, any correspondence delivered to our firm's mail room employee(s) is routinely stamped with postage and then deposited for mailing on the same day with the United States Postal Service.

PETITIONER GREWAL'S REPLY IN SUPPORT OF PETITION FOR REVIEW

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated: May 19, 2014

Judy Kushner

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