Case No. S217896

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
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Deputy

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 OPENING BRIEF ON THE MERITS

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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 his Opening Brief on the Merits.

ISSUES PRESENTED

1. Did the Court of Appeal err by rejecting established judicial interpretation of Penal Code Section 330b, thus creating a conflict with prior law?

2. Given the language of Penal Code Section 330b, is the aspect of "chance" in a gaming device relative to the user's subjective experience of the game, or is it, as found in *Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1410-1411, something to be analyzed according to the device's actual operation?

3. Did the Court of Appeal exceed its authority in interpreting Penal Code Section 330b by injecting a subjective component into the determination of whether a particular device is an illegal slot machine?

4. Did the Court of Appeal err by eliminating the long-standing requirement of consideration in the determination of whether a device is an illegal slot machine under Penal Code Section 330b?

5. Did the Court of Appeal violate the rule of lenity by applying its new interpretation of Penal Code Section 330b against Petitioner even though that interpretation expressly conflicted with the interpretation set forth in prior, published appellate decisions?

STATEMENT OF THE CASE

The People of the State of California, by and through the Kern County District Attorney (the "People"), filed civil actions under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), seeking to enjoin several Internet café businesses from continuing to engage in practices that allegedly violated the gambling prohibitions set forth at Penal Code sections 319 (unlawful lottery) and 330a, 330b and 330.1 (unlawful slot machines or devices). Generally speaking, the term "Internet café" depicts a café or similar establishment that sells computer use and/or Internet access, as well as other related retail products or services, on its premises. Some of those businesses promote the sale of their products and services by offering a sweepstakes giveaway that allows customers to ascertain their winnings, if any, by playing specialized game programs on the businesses' own computer terminals. Petitioner utilized such a sweepstakes to promote his products and services.

When the People requested preliminary injunctions, the owners and operators of the Internet café businesses in question opposed such relief on

the ground that their businesses did not conduct lotteries but instead offered lawful sweepstakes that promoted the sale of their products. Additionally, the owners and operators maintained that the required statutory elements of an unlawful slot machine or gambling device were not present. The trial court disagreed, and granted the preliminary injunctions as requested by the People. Defendants separately appealed from the orders granting such preliminary injunctions, and the Court of Appeal ordered those appeals consolidated. The Fifth Appellate District, in a published decision, affirmed the trial court, concluding that the People will likely prevail on its claims that defendants violated prohibitions against slot machines or gambling devices under section 330b.

Prior to the Court of Appeal's decision in this case, the law was clear that a device was not a slot machine within the meaning of Penal Code section 330b unless the device itself generates the element of chance in a game, through use of a random number generator or otherwise.[1] (*Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1410-1411 ("*Trinkle II*").) In *Trinkle II*, the Third District Court of Appeal construed the

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[1] Section 330b makes it unlawful to own or possess a slot machine, and as relevant to the element of chance, defines a slot machine in pertinent part as any device that "by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any piece of money, credit, allowance, or thing of value". (Penal Code § 330b(d).)

language of Penal Code section 330b, and held: "Without 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.*)

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 followed the rules. Those rules were relatively simple, and were set by statute. 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.

The undisputed evidence in the record before the trial court and Court of Appeal in this case demonstrates that the computer terminals used by patrons at Petitioner's place of business to reveal their sweepstakes results did *not* and technologically *could not* influence or alter the outcome of the sweepstakes; the computer terminals had no random number generators, and were merely an entertaining way for customers to reveal the next available sweepstakes entry in the electronic stack of pre-determined

entries. In other words, it was undisputed that there was no "element of chance incorporated into the operation of the machine" within the meaning of *Trinkle II*.

In its decision, however, the Court of Appeal expressly rejects the Third Appellate District's interpretation of Penal Code section 330b set forth in *Trinkle II*, and further finds that Petitioner's conduct violated that section based on its contrary interpretation of that statute. In reaching this conclusion, the Court of Appeal for the first time in this State injected a subjective "look and feel" test into the determination of whether a device is an illegal slot machine under Section 330b. That is, prior to the Court of Appeal's decision here, never before has any court purported to determine the legality of a particular machine under Penal Code section 330b based solely on the look and feel of that machine, or the end user's subjective understanding of the game. Indeed, the Court of Appeal broadly characterizes all sweepstakes promotions of the type utilized by Petitioner as illegal gambling because such devices have all the "trappings and experiences involved in playing traditional slot machines." (*People v. Grewal* (2014) 224 Cal.App.4th 527, 545.)

The Court of Appeal's approach violates well-established rules of statutory construction. An appellate court "has no 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 (noting that because the anti-SLAPP statute does not state or imply an "intent-to-chill" requirement, to judicially impose one "would violate the foremost rule of statutory construction") (internal quotations and citations omitted).) But that is exactly what the Court of Appeal did in this case. The Court of Appeal's decision conflicts with long-standing authority in this State, injects a new subjective test, and thus throws the law on its head. It must be reversed for this reason alone.

The Court of Appeal's decision also must be reversed because the appellate court's strained and unprecedented interpretation of Penal Code section 330b expressly contradicts and disagrees with previously controlling case law set forth in *Trinkle II* and other cases. The operation of a sweepstakes has long been legal under California law, so long as the sweepstakes meets certain statutory requirements. (*See* Bus. & Prof. Code §§ 17539-17539.3, 17539.35.) What distinguishes a lawful sweepstakes from an illegal lottery or slot machine is the presence or absence of certain elements specified in the California Penal Code. Determining whether any particular digital sweepstakes promotion (such as the one used by Petitioner) complies with the detailed statutory requirements requires a precise and fact-specific analysis of how the particular sweepstakes software works and how it is used by a business.

In its opinion, the Court of Appeal for the first time in California found that a device may constitute an illegal slot machine even where no consideration is required to play the game on that device. Moreover, the Court of Appeal adopted an extremely broad definition of the term "apparatus" within the meaning of Penal Code Section 330b.

Those conclusions, in conjunction the Court of Appeal's rejection of the holding in *Trinkle II*, call into serious question the continued legality of many well-established and previously unquestioned sweepstakes promotions utilized by retail establishments throughout California. Indeed, many of the highly popular and well-publicized sweepstakes operated in California, such as those utilized by McDonald's, Coca-Cola, and other established retailers, require the end user to enter a code on a device or machine in order to play the game. Under the Court of Appeal's opinion, those sweepstakes are now illegal, because the user's personal phone or computer is part of the "apparatus," and the element of chance is dictated not by operation of the game but rather by the end user's lack of knowledge as to whether or not he or she will win a prize. The unintended and potentially far reaching impacts of the Court of Appeal's decision on long-standing, legitimate sweepstakes demonstrates that the Court of Appeal went far beyond its role as an adjudicative body tasked with interpreting statutes, not rewriting them.

Finally, the Court of Appeal misapplied the rule of lenity. The rule of lenity comes into play when a statute defining a crime is susceptible of two reasonable interpretations. In such circumstances, the rule of lenity requires that the statute be strictly construed and applied in the defendant's favor. The rule of lenity applies here because, prior to the Court of Appeal's decision, the prevailing authority on the issue of whether a machine constituted an illegal slot machine under Penal Code section 330b was set forth in *Trinkle II.* Based on the undisputed evidence in the record, if Petitioner's conduct was measured under Penal Code section 330b as interpreted in *Trinkle II*, then Petitioner's conduct would be legal. But the Court of Appeal rejected *Trinkle II's* interpretation of Section 330b, and found Petitioner's conduct illegal based on the Court of Appeal's contrary interpretation of that Section. The Court of Appeal's "if it walks like a duck" interpretation of Penal Code Section 330b, which runs directly counter to prior judicial interpretation of the same statute, and retroactive application of that new interpretation to a defendant, violates the rule of lenity and fundamental notions of due process.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner founded and owns "I Zone" (CT, p. 44:16-19), which is a Bakersfield business which provided copying service, packaging services, refreshments, and computer terminal rental with Internet access including

access to search engines and social media sites. (CT, p. 126:20-25.) I Zone also offered a promotional sweepstakes game to all customers who purchased their products, such as copying and packaging services, refreshments and computer terminal time, as well as to all others who wished to enter the sweepstakes free of charge. (CT, p. 126: 20-127:1; p. 77; and p. 45:2-10.)

1. **How the Sweepstakes Promotion Works.**

The sweepstakes system involved three types of computer terminals: (1) the Management Terminal, (2) the Point of Sale Terminal, and (3) the Internet Terminal. All sweepstake entries are produced, and randomly arranged into batches, at the Management Terminal. Each batch has a finite number of entries, and of winners and losers. Next, the batch is "stacked" and transferred to the Point of Sale Terminal. When received at the Point of Sale Terminal, the entries in the batch are in the same order as when the batch left the Management Terminal. A customer reveals the entry as a winner or a loser at either the Point of Sale Terminal, by receiving a paper printout display, or at the Internet Terminal electronically. These terminals simply read and display the results of the entries sequentially in the order in which they were originally stacked at the Management Terminal. It makes no difference whether the entry is read and revealed at the Point of Sale Terminal or at the Internet Terminal. (CT, p. 56.)

Neither the computer at the Internet Terminal nor the server used by that terminal contains a random-number generator. Additionally, neither is the actual object of play when a player logs onto the computer to find out whether his entry won or lost. The same is true for the computer at the Point of Sale Terminal. Players cannot use the Internet Terminal to influence or alter the results of the sweepstakes entry, and the various computer terminals as well as the Internet server cannot influence or alter such results either. (CT, p. 151, ¶¶ 7-10.)

In practice, the sweepstakes promotion works in two ways. First, a customer can come into I Zone, and buy one of the services offered by the business, or buy Internet time at the rate of 30¢ a minute. When the customer buys one of the products, he receives free sweepstakes points. He also receives free sweepstakes points for his first purchase of the day, and for being a new customer. For example, a new customer who buys $20 of Internet time receives 3000 sweepstakes points: 2000 free points awarded for purchasing the Internet time, 500 free points for the first $20 of Internet time purchased for the day, and 500 free points for being a new customer. (CT, p. 71:12-16.)

Alternatively, one can enter the sweepstakes ***for free***: the rules at I Zone state "NO PURCHASE OR PAYMENT NECESSARY TO PLAY INTERNET ZONE SWEEPSTAKES." (CT, p. 72:3-4; p. 77.) To play for

free without buying Internet time or other products at I Zone, a player can get four free entries from the cashier every day, and can get four additional free entries by filling out a form and mailing it, along with a self-addressed stamped envelope, to PO Box 163359, Sacramento, California, 95816. Free entries have the same chance of winning as entries gotten by buying products at I Zone. (CT, p. 89.)

When a customer purchases Internet time or receives free sweepstakes entries, the customer receives a white plastic card with a magnetic strip on its back and an identification number on its front. (CT, p. 71:17-19.) Once the card is activated by an employee, it keeps track of the Internet time the customer has purchased. (CT, p. 80:16-17.)

Using the Internet Terminal to reveal whether sweepstakes entries won or lost does not use up any of the Internet time purchased by the customer, nor does it add to that time. (CT, p. 72:19-27; p. 152, ¶ 12.)

2. **The Underlying Complaint and Injunction Proceedings**

On June 21, 2012, the Kern County District Attorney's office filed a complaint alleging that Petitioner engaged in unfair competition (Business and Professions Code §17200) in that he operated his business in violation of California's criminal statutes which prohibit possessing "slot machines" (subd. (a) of Penal Code §330a); prohibit owning or permitting a slot machine in a building which he controls (subd. (a) of Penal Code §330b);

prohibit operating a lottery (Penal Code §319); and prohibit possessing or operating gambling devices (Penal Code §330.1). (CT, p. 11:25-12:14.)

On June 26, 2012, the Kern County District Attorney filed an *Ex Parte* Application for a Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction, seeking the immediate cessation of the operation of the Petitioner's sweepstakes operation (CT, p. 15:24-27), and an order that Petitioner show cause why he should not be restrained from operating the sweepstakes while the civil action against him is pending. (CT, p. 16:2-5.) The *ex parte* application was supported by declarations of the Deputy District Attorney prosecuting the case, and of Bakersfield Police Detective Checklenis, who investigated the case. (CT, p. 26, p. 28, and p. 33.)

Detective Checklenis declared that Ada Denton, the manager at I Zone, told him that playing the sweepstakes reduces the Internet service time available to the player. (CT, p. 29:24-25.) Detective Checklenis stated that another detective went to a computer terminal at I Zone to play the sweepstakes, that he bought Internet time, that he used up his sweepstakes points, and that the amount of time remaining of the Internet time which he originally purchased, as shown on his Internet card, none was left. (CT, p. 30:12-17.)

In her Declaration in Opposition to the Preliminary Injunction, Ada

Denton denied Detective Checklenis' statements attributed to her. She said she told the detective that redeeming the sweepstakes entries uses up the sweepstakes entries, but the Internet time is not affected thereby. She further stated that the Internet card used by the detectives still retains its Internet time, and attached to her declaration a computer printout showing that the detective's Internet card was *not* out of time. (CT, p. 63:11-21.)

Detective Checklenis later admitted his error, saying in another declaration filed on July 18, 2012, "Internet time is not lost when playing the sweepstakes games." (CT, p. 174:2.)

In support of Petitioner, Christopher Speer, Retired Chief Deputy Sheriff for Kern County, declared that he conducted an investigation of I Zone, and determined that there was *no* decrease of time on the Internet card caused by redeeming the sweepstakes entries. Instead, Internet time on the Internet card decreased only when the cardholder left the terminal's sweepstakes screen, and opened the Internet in a separate screen. (CT, p. 72:19-27.)

In opposing the motion for preliminary injunction, Petitioner also presented undisputed evidence regarding how the sweepstakes actually functioned. Petitioner presented evidence of the inner-workings of the sweepstakes and computer terminals showing that the sweepstakes games played on the computer terminals were merely an entertaining way for

customers to reveal a sweepstakes result. The descriptive information was primarily based on two declarations from Petitioner's expert, Nick Farley. whose testing laboratory examined the software used by I Zone. (CT, pp. 35-43, 151 at ¶¶ 5-6.) Mr. Farley declared that when a customer uses an I Zone terminal to display the result of a sweepstakes entry, the use of that terminal for this purpose does not lessen or increase the Internet time purchased by the customer. (CT, p. 151, ¶¶ 1-6; p. 152, ¶ 12.)

Mr. Farley also gave his expert opinion that neither the Point of Sale server nor the Internet Terminal devices determined the outcome of each sweepstakes play: "Based on my test results thus far, the computer terminal and Internet server used at an I Zone business center cannot influence or alter the results of a sweepstakes entry[]"; and, neither the Internet computer terminal nor the Internet server nor the Point of Sale server "contains a random number generator". (CT, p. 151, ¶¶ 7, 8, and 10.)

That undisputed testimony demonstrated that the computer terminal simply acted as a reader and displayed the results of the next sequential sweepstakes entry in the stack—it was never the object of play. In fact, exactly the same results would be displayed for a specified sweepstakes entry whether the customer chose to have the results displayed in paper format from the cashier or in electronic format at the computer terminal.

In rebuttal, the People offered the ***speculative*** Declaration of Pat

Fune, a former investigator with the California Department of Justice, and current agent with the California Department of Alcoholic Beverage Control. The crux of Fune's declaration was that, in 2011, he testified as an expert witness in a San Diego County criminal case, *People v. Kurbis*. (CT, p. 175:2-176:2; p. 176:20-27.) He stated that the defendant in that case was found guilty, and the court found that consideration was present. (CT, p. 176:23-24; p. 178:27-28.) Mr. Fune speculated that, based upon reports which he received, I Zone operates in a ***similar manner*** to the Internet café in *People v. Kurbis*. (CT, p. 178: 8-9.) Mr. Fune noted that ***without "actual hands-on game play"***, further overt or undercover investigation, interviews of owners and employees, ***"or an analysis conducted on the computers by forensic examiners,"*** it ***"appears"*** that the business at I Zone is ***"very similar"*** to cases which he has investigated. (CT, p. 179: 3-9 [emphasis added].)

On July 2, 2012, the court granted the People's *ex parte* application, and issued both a temporary restraining order and an order to show cause why a preliminary injunction should not issue. (CT, pp. 58-60.)

Petitioner filed his opposition to the order to show cause on July 13, 2012, (CT, p. 126), and on the same day filed a supplemental declaration of Nick Farley. (CT, p. 150.)

The hearing on the Order to Show Cause occurred on July 23, 2012. After counsel argued their respective positions, the court granted the People's application for a preliminary injunction. (CT, p. 206; Reporter's Transcript, Volume 2 [hereinafter, "RT2"], p. 25.) The court stated:

> The Court does intend to issue or have issued a preliminary injunction. ...I have no doubt in my mind, based on the presentation, that there is [sic] also violations of the criminal statutes relied on by the People in bringing this injunction. *** So, to quote one of our appellate courts, if it looks like a duck and walks like a duck, it quacks like a duck, I think it's a duck.

(RT2, p. 25, l. 9-23.)[2]

On appeal, the Fifth Appellate District held that the networks of terminals, software, and servers delivering the sweepstakes games at Petitioner's business likely amount to an unlawful slot machine under California Penal Code section 330b, stating that the "integrated system" has all of the "trappings and experiences involved in playing traditional slot machines." (*Grewal, supra,* 224 Cal.App.4th at 545.)

The Court of Appeal repeated the trial court's "if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck" analysis. (*Id.* at 544, fn. 24.) The Court of Appeal did not reach the issue of whether the

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[2] The court is apparently referring to *People ex rel. Lockyer v. Pacific Gaming Technologies* (2000) 82 Cal. App. 4th 699, 700-701. That case is distinguished because in *Pacific Gaming*, one had to put money into the vending machine in order to operate it (*id*, p. 702 and 707), whereas in this case there is no insertion of money, and in fact, there is no consideration at all needed to enter the sweepstakes.

sweepstakes system was an illegal lottery under Penal Code section 319. (*Id.* at 547.)

LEGAL ARGUMENT

1. Based on the Established Law, Petitioner's Computers Were Not Illegal Slot Machines Under Penal Code Section 330b

In *Trinkle II*, the Third District Court of Appeal interpreted Penal Code section 330b, and found that elements of a slot machine under that section "are (1) the insertion of money or other object which causes the machine to operate, (2) the operation of the machine is unpredictable and governed by chance, and (3) by reason of the chance operation of the machine, the user may become entitled to receive a thing of value." (*Trinkle II*, *supra*, 105 Cal.App.4th at 1410.)

With respect to the third element – often referred to as the "chance" element – the court in *Trinkle II* found that "[b]y using the words 'such operation,' 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." (*Id.* at 1410 (Italics added).)[3] Thus, the element of "chance" that must exist for a device to be a slot machine is not determined by the user's subjective experience of the game,

[3] *Trinkle II* interpreted Penal Code section 330b prior to its amendment, which amendment removed the word "such" prior to the word "operation." Nothing in the legislative history of the amendment or subsequent case law exists to indicate that removal of the word "such" changed the meaning of the statue in any way material to the issues in this case.

but rather, as explained in *Trinkle II*, is something to be analyzed according to the machine's operation in itself. The mere fact that the user does not know whether he or she will win does not convert a sweepstakes game into a slot machine. (*Id.* at 1411-1412.)

This conclusion is illustrated by the facts and holding in *Trinkle II.* At issue there were the vending machines used by the California State Lottery to sell Scratchers tickets. The vending machines vended Scratchers tickets in the order the tickets were stacked in the bins inside the machine. The purchasers inserted the purchase price and received the next ticket(s) in line. The court found that the element of chance for the game came from the printing of the winning tickets and the placement of those tickets in a predetermined sequence among the other tickets. The element of chance was therefore built into the game at the time of manufacture and placement in the bins, not at the time of purchase or play. Because the operation of the vending machines did not in any way affect the game's element of chance, the court held that the vending machines were not illegal slot machines. *Id.* at 1411-1412.

In contrast to the machines at issue in *Trinkle II*, the machines in question in *Trinkle v. Stroh* and *People ex rel. Lockyer v. Pacific Gaming Technologies* were found to be slot machines under Penal Code section 330b because the outcome of the games at issue was dependent upon the element of chance that was generated by the machines themselves. As

stated by the court in *Trinkle II*, "in both [*Trinkle v. Stroh*, 60 Cal.App.4th 771 (1997)] and [*People ex rel. Lockyer v. Pacific Gaming Technologies*, 82 Cal.App.4th 699 (2000)], the machines in question were found to be 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).) As noted by the court in *Trinkle II*, "[w]hile 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." (*Trinkle II*, 105 Cal.App.4th at 1411.)

Based on these established authorities and the undisputed facts before the trial court and Court of Appeal, Petitioner's computers were not illegal slot machines within the meaning of Penal Code Section 330b. The most relevant analogy to Petitioner's sweepstakes promotion is a lottery Scratcher ticket vending machine at issue in *Trinkle II*. As explained in *Trinkle II*, the vending machines used to dispense lottery tickets in the Scratchers games consisted of stand-alone cabinets containing a number of bins into which a stock of Scratchers tickets may be loaded. Each bin contained a separate Scratchers game, and the cost of a ticket varied depending upon the game. A customer elected to purchase a ticket from one or another of the bins by pushing a button in front of the window for

that bin, and the tickets were dispensed sequentially, according to the order in which they were loaded into the bin. (*Trinkle II*, 105 Cal.App.4th at 1403-1404.)

Just like the vending machines in *Trinkle II*, it was undisputed below that neither the computer terminal nor the customer's interaction with the program affected the outcome of the sweepstakes results or the odds of winning a prize. None of the servers accessed by the computers utilized by Petitioner contained a random number generator that dictated the outcome of the sweepstakes entries. Instead, the outcome of each entry was predetermined and stored within a database of available entries, and the computer was merely a means of displaying the outcome by revealing the next entry in the pre-shuffled database. Moreover, because the order in which the entries are to be revealed was predetermined, the system did not differentiate entries granted in conjunction with a retail purchase from those granted without purchase; all entries had an equal chance at a prize.

In sum, Petitioner's sweepstakes entries were dispensed just like lottery tickets are dispensed in hard form using the California State Lottery's Scratcher vending devices. The only difference is the way the results are viewed. In the case of the Lottery Scratchers, the results were predetermined, and the customer simply scratches off the top layer of the play card to see whether he or she won a prize. In Petitioner's case, the sweepstakes entries were generated off-site, and shuffled like digital lottery

tickets. Once the customer selected the level of play, the computer revealed the results of the next sweepstakes entry from the top of the predetermined roll of entries based on the off-site shuffle.

Accordingly, under the undisputed facts before the trial court and Court of Appeal, if the decision in *Trinkle II* were recognized as controlling, Petitioner should have prevailed. (*Trinkle II*, 105 Cal.App.4th at 1411-1412 ("[w]ithout the element of chance incorporated into the operation of the machine, the machine is nothing more than a vending machine which disposes merchandise for consideration").)

The Court of Appeal, however, expressly rejected the interpretation of Penal Code Section 330b set forth in *Trinkle II*, and found that Petitioner's computers violated that Section based on its novel interpretation. It stated:

> [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.

(*Grewal, supra,* 224 Cal.App.4th at 541.)

The Court of Appeal's holding expressly conflicts with the

established definition of an illegal slot machine under Penal Code Section 330b. Because the Legislature amended Penal Code section 330 several times after *Trinkle II*, but did nothing to amend the statute in response to the court's decision, it must be presumed that the Legislature was aware of the judicial construction of the statute, and approved of it. *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353. The Court of Appeal's decision runs counter to this previously approved interpretation of section 330b and must be reversed for this reason alone. It must also be reversed for several additional reasons, as explained below.

2. **The Court of Appeal Improperly Injected a Subjective Component Into the Determination of Whether a Device is a Slot Machine Under Penal Code Section 330b, Where no Such Subjective Component Exists in the Statute**

As noted above, the element of "chance" must be satisfied in order for a device to constitute an illegal slot machine under Penal Code Section 330b. Under established law set forth in *Trinkle II*, *Trinkle v. Stroh*, *People ex rel. Lockyer v. Pacific Gaming Technologies*, and elsewhere, whether a customer using a particular device understands how the device works or can predict whether he or she will win is not determinative of the element of chance. Rather, as noted in these cases, the determinative issue is how the machine actually works. These cases make clear that if the machine does not create the element of chance, but just distributes pre-determined

prizes or entries in a pre-determined fixed order, then the machine does not meet the statutory definition of a slot machine or gambling device under Section 330b.

For the first time in California, the Court of Appeal stepped away from looking at the actual workings on the machine or device, and focused instead solely on the end user's experience to determine whether a device is an illegal slot machine. The Court of Appeal stated:

> Defendants insist that their sweepstakes systems are on par with the vending machine in *Trinkle II*, since customers playing defendants' computer sweepstakes games merely receive the next available entry result from a stack that is in a previously arranged, sequential order. We disagree.
>
> For at least two reasons, we hold that *Trinkle II* does not salvage the devices at issue in the present appeal. First, we disagree that the chance element must *always* be generated by some randomizing action of the device itself when it is being played. Section 330b only requires that prizes may be won "by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her …." (§ 330b, subd. (d).) Under this broad wording, if the entries are arranged in a particular order beforehand, rather than rearranged each time the game is played, it will still suffice. Either way, the next sequential entry/result that is dealt out by the software system will be, from the perspective of the player, by "chance or of other outcome of operation unpredictable by him or her …." (*Ibid.*)
>
> Second, *Trinkle II* is distinguishable factually because, in the words of a recent federal district court decision, it involved a passive vending machine that "simply delivered a finished product—the lottery ticket." (*Lucky Bob's Internet Café, LLC v. California Dept. of*

> *Justice, et al.* (S.D.Cal. 2013) 2013 U.S. Dist. Lexis 62470, p. *8 (*Lucky Bob's*).) Here, in contrast, **all the trappings and experiences involved in playing traditional slot machines are actualized in one form or another by defendants' sweepstakes software systems and networked computer terminals**, since in each case points are received upon making a purchase, a game program is activated by the customer at a terminal, points are used or bet in selected increments, audio-visual scenes are played out on the screen to create the feel and anticipation of a slot machine or other gambling game, and prizes are won. For these reasons, the integrated systems in our case are in a different category than the vending machine in *Trinkle II.* The mere fact that winnings are based on a predetermined sequence of results programmed into the software system, rather than on a randomly spinning wheel (or the like), does not change the nature and character of devices herein, which as integrated systems function as slot machines.

(*Grewal, supra,* 224 Cal.App.4th at 545 [emphasis added, internal footnotes omitted].)

The Court of Appeal's focus on whether the "integrated system" has all the "trappings and experiences involved in playing traditional slot machines" finds no support in California law, and improperly injects a subjective component into the determination of whether a device or apparatus violates Penal Code section 330b. This is error, because the Court of Appeal "has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Equilon Enterprise, supra,* 29 Cal.4th at 59.)

Nothing in the California Penal Code purports to regulate the look

and feel of a sweepstakes. The mere fact that a digital sweepstakes game's screen image may bear a passing resemblance in sight or sound to the types of games traditionally played on slot machines does not make the sweepstakes game illegal. The Penal Code focuses not on how the sweepstakes results are revealed, but on the inner workings of the game and the role of chance. Thus, in order to determine if a particular sweepstakes system meets these requirements, a court must go beyond the look and feel of a sweepstakes game, and analyze the internal working of the sweepstakes software and the way it is utilized by the business.

In the proceedings below, the People produced absolutely no evidence regarding the inner workings of Petitioner's sweepstakes systems, but instead relied on legally irrelevant declarations about how Petitioner's sweepstakes games superficially look like certain other sweepstakes games. The People appear to have made no effort to test the actual software systems used by Petitioner. The following facts, therefore, were undisputed in the trial court:

- the computers utilized by Petitioner do not impact the outcome of the sweepstakes, and do not contain random number generators (i.e., they do not create the element of chance).

- the results of the sweepstakes are predetermined, and nothing the player can do will affect the outcome of the sweepstakes.

- anyone can play for free without making a purchase, and nobody may purchase sweepstakes entries; that is, no consideration is required to participate in the sweepstakes.

Had the Court of Appeal properly focused on the actual workings of the device or apparatus and the actual language of the statute, several key differences between Petitioner's sweepstakes and the typical slot machines used in casinos would have been revealed, all of which illustrate why Petitioner's computer terminals are not illegal slot machines. Based on the undisputed evidence before the trial court, some of those key differences include:

- Customers at a casino must pay to play a slot machine. In contrast, Petitioner did not sell sweepstakes entries; he gave them away as a promotion in conjunction with retail purchases. Moreover, no purchase was necessary to enter Petitioner's sweepstakes, as any eligible person could enter Petitioner's sweepstakes for free.

- A typical slot machine contains a random number generator, which is a piece of software that randomly determines the outcome every time someone plays that slot machine. Because the random number generator inside the machine randomly determines the outcome every time the slot machine is played, on any given play, every outcome is just as likely to occur. In contrast, there is no random number generator inside Petitioner's computers or servers. Petitioner's computers simply reveal the next sweepstakes game piece in line based on a shuffle pattern that occurred years ago, and has not been changed since that time.

- If someone is operating a legitimate casino with a slot machine with a million-dollar jackpot, there is a chance that different customers could hit that jackpot five times over the first month the casino is open, and the casino would have to pay the jackpot five times. Unlike a slot machine, the prizes in Petitioner's sweepstakes games are fixed at the outset and distributed among the winners as the applicable game pieces are revealed. Petitioner therefore knows over the life of any individual sweepstakes game exactly how much it will pay out to winners of that game.

Based on these undisputed differences, Petitioner should have prevailed. But the Court of Appeal rejected prior law, and adopted a new,

subjective "look and feel" test to determine whether the "chance" element of Penal Code Section 330b is met.

The Court of Appeal's attempt to explain its "look and feel" test misses the mark. The Court of Appeal stated:

> If this were not the case, then even a casino-style slot machine would be legal as long as it was operated by a computer system that had previously arranged the sequence of entry results in a fixed order. Such a computer system might conceivably frontload hundreds of millions of discrete entry results into a predetermined sequence. A customer using that device would be surprised to learn that merely because there is a preset sequence, he is not playing a game of chance. Of course, in reality, that is exactly what he is doing. As aptly remarked in *People ex rel. Lockyer v. Pacific Gaming Technologies*, *supra*, 82 Cal.App.4th at page 701, "if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck." (Fn. omitted.)

(*Grewal, supra,* 224 Cal.App.4th at 544, fn. 24.) This analysis over-simplifies the issues, and ignores an important point – a casino-style slot machine loaded with millions of pre-determined entries likely would *not* be legal if a customer had to pay to play; i.e., if consideration were required for the chance to win a prize. If the customer had to pay, then, at the very least, the slot machine loaded with millions of pre-determined entries would be an illegal lottery in violation of Penal Code Section 319. The key distinction is the requirement of consideration, which is absent from Petitioner's sweepstakes. (*See California Gasoline Retailers v. Regal Petroleum Corp.* (1958) 50 Cal.2d 844, 858-859 (so long as anyone can

receive sweepstakes entries without making a purchase, the element of consideration necessary for a lottery does not exist).) Here, it was undisputed that patrons did not pay to play the sweepstakes. Instead, they paid for retail products and services, including Internet time. It was undisputed that a patron's Internet time did not decrease while the patron was viewing results of sweepstakes entries. The sweepstakes entries were given away as a promotional tool to sell those products and services. And, it was undisputed that people could play the sweepstakes for free. The Court of Appeal's logic, therefore, has zero application to the facts of this case, and ignores the provisions of Penal Code Section 319.

Ultimately, because Penal Code Section 330b does not purport to regulate the look and feel of a device or apparatus, the Court of Appeal exceeded its judicial authority in interpreting that Section to include a subjective component.

3. **The Court of Appeal's Decision Runs Counter to Established Law By Reading the Long-Standing "Consideration" Requirement out of Penal Code Section 330b**

The Court of Appeal's decision also runs afoul of well-established law because it finds a violation of Penal Code section 330b even though no consideration is required to participate in Petitioner's sweepstakes. The Court of Appeal stated:

Defendants suggest that the devices in question cannot

> qualify as slot machines or devices under section 330b due to a lack of an adequate showing of consideration. We find the argument unpersuasive. Unlike section 319 (regarding lotteries), section 330b does not directly specify that consideration is an element. Therefore, it would seem that as long as the express statutory elements of section 330b are satisfied, no separate showing of consideration is needed. In other words, to the extent that consideration is a factor under section 330b, it is simply subsumed by the existing statutory elements. Since those elements were shown here, nothing more was required.

(*Grewal, supra,* 224 Cal.App.4th at 546.) In reaching this conclusion, the Court of Appeal once again deviated from established precedent.

Section 330b (d) of the California Penal Code defines "slot machine or device" as a "machine, apparatus, or device that is adapted, or may readily be converted, for use in a way that, *as a result of the insertion of any piece of money or coin or other object*, or by any other means, the machine or device is caused to operate or may be operated . . . ." (Cal. Penal Code § 330b(d) (emphasis added).) By referring to the insertion of "money or coin or other object," subdivision (d) of section 330b makes clear that some valuable consideration must be given in exchange for the chance to operate the slot machine or device.

To read the phrase "money or coin or other object" more expansively, as the Court of Appeal did here, would mean that home computers and personal phones, which other valid sweepstakes require the use of in order to enter their sweepstakes promotion, would be illegal slot machines. (*See also* Section 5, *infra.*) That cannot be the case, meaning

that consideration is the touchstone of an illegal slot machine. Thus, if no consideration is necessary to play a sweepstakes on a device, a device is not an illegal slot machine.

That conclusion is supported by the language of section 330a, which makes a misdemeanor the possession of "any slot or card machine, contrivance, appliance or mechanical device, *upon the result of action of which money or other valuable thing is staked and hazarded*, and which is operated, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, or in any other manner...." (Penal Code § 330a(a) (emphasis added).)

Requiring some valuable consideration to be given in exchange for the chance to play is also consistent with existing case law. California law historically has recognized, and continues to recognize, three distinct forms of gambling: "gaming, lotteries and betting." (*Western Telcon, Inc. v. California State Lottery* (1996) 13 Cal.4th 475, 484.) Chapter 10 of title 9, Part 1 of the Penal Code, which includes sections 330 through 337z, addresses gaming. A slot machine or device, defined by sections 330a and 330b, therefore falls under the category of "gaming." (*Trinkle II, supra*, 105 Cal.App.4th at 1412.) This Court has defined gaming as "the playing of any game *for stakes hazarded by the players*." (*Western Telcon, Inc., supra*, 13 Cal.4th at 484 (emphasis added); see also *Trinkle II, supra*, 105 Cal.App.4th at 1407.) Accordingly, for a slot machine or any other type of

gaming to exist, a player must hazard stakes (i.e., offer valuable consideration).

Petitioner's computers are not slot machines or other gambling devices because no stakes are hazarded by the players. The evidence offered by Petitioner, and not contradicted by the People, shows that no purchase was necessary to play Petitioner's sweepstakes. Sweepstakes entries are not sold. Rather, they were offered as a promotion in conjunction with retail purchases of products and services. And, the value of those purchased products or services (including remaining Internet time) were not diminished as a result of any customer's use of computers to reveal the results of sweepstakes entries. Thus, because customers and non-customers alike had the ability to participate in the sweepstakes without furnishing anything of value in consideration for the chance to play, the first element of a slot machine or other gambling device – consideration – is not met.

By reading the consideration requirement out of the analysis, the Court of Appeal improperly ignored established precedent.

4. **<u>The Court of Appeal's Decision Runs Counter to the Rule of Lenity and Deprives Petitioner of His Right to Due Process and Fair Notice</u>**

"The rule of statutory interpretation that ambiguous penal statutes are construed in favor of defendants is inapplicable unless two reasonable

interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable." (*People v. Jones* (1988) 46 Cal.3d 585, 599) The rule does not apply every time there are two or more interpretations available, but rather only when that the court can do no more than guess what the legislative body intended in passing the law. (*People v. Avery* (2002) 27 Cal.4th 49, 58.) Essentially, it is a tie-breaking principal. (*People v. Manzo* (2012) 53 Cal.4th 880, 889; *People v. Nuckles* (2013) 56 Cal.4th 601, 611.) If the Court can discern the Legislature's intent from legislative history or other extrinsic aids to statutory construction, the rule of lenity will not come into play. (*Id.*)

Moreover, "[i]t 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.*" (*People v. Vis* (1966) 243 Cal.App.2d 549, 554 (emphasis added) (internal citations and quotations omitted).) "In other words, criminal statutes will not be built up 'by judicial grafting upon legislation ... [I]t is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute." (*Id.* [citing *People v. Ralph* (1944) 24 Cal.2d 575, 581].) "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.'" (*Id.*) (Emphasis added.)

These rules strict construction of criminal statutes apply equally to civil proceedings, such as the proceeding here. (*Walsh v. Department of Alcoholic Beverage Control* (1963) 59 Cal.2d 757, 765; *Vis, supra,* 243 Cal.App.2d at 554 ("the foregoing principles apply even when the underlying action is civil in nature").)

The Court of Appeal's analysis violates these fundamental principles. In essence, the Court of Appeal ignored existing law, redefined Penal Code Section 330b by grafting its "look and feel" and "trappings and experiences" tests into the statutory analysis, and then applied its new interpretation of Penal Code Section 330b to Petitioner. Petitioner, in other words, has been found guilty of violating a statute based on an interpretation of that statute that did not exist at the time of his conduct. Even worse, Petitioner has been found guilty of violating a statute even though his conduct was *not* illegal under the interpretation of Penal Code Section 330b set forth in published appellate decisions. Such application of Penal Code Section 330b against Petitioner exceeds the Court of Appeal's authority, violates the rule of lenity, and violates the fundamental notion that courts must "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.)

To the extent any doubt exists about whether the Court of Appeal's application of its new interpretation of Penal Code Section 330b to Petitioner was improper under the above authorities, currently awaiting signature by the Governor is proposed legislation – Assembly Bill 1439 – which would expressly make the type of sweepstakes offered by so-called Internet cafés illegal. The very fact that this proposed bill has been approved by the Legislature reveals that existing law does not clearly prohibit such activity or, at a minimum, that the legality of Petitioner's activity was not entirely clear under existing law.

Indeed, the Senate Rules Committee's Analysis of AB 1439, dated August 22, 2014, states as follows: "As long as there is a legitimate free method of entry into the sweepstakes or promotion, the consideration element is absent, and the 'sweepstakes' is not an illegal lottery. According to the Senate Governmental Organization Committee, it appears that most Internet cafés are not operating as illegal lotteries under California law." (Senate Rules Committee, Office of Senate Floor Analysis, Third Reading of AB 1439, August 23, 2014, at p.3.)

As explained above, the element of "consideration" is not only relevant to the determination of whether a particular game is an illegal lottery under Penal Code section 319. It is also relevant to the determination of whether a device is an illegal slot machine under Penal

Code Section 330b. If no consideration is required to play the device, then the device is not an illegal slot machine either.

Consequently, the very existence of AB 1439, which at present sits on the Governor's desk waiting to be signed into law, demonstrates that *existing* law can hardly be said to provide fair notice that the conduct at issue in this case would be found to violate Penal Code section 330b. Under the principles of statutory construction set forth above, Petitioner was entitled to the benefit of the doubt. Through its opinion, however, the Court of Appeal jumped the gun, and improperly attempted to legislate, instead of adjudicating based on existing law. Such a decision cannot stand. If any governmental body is going to rewrite the applicable statute, it must be the legislature (through AB 1439), not the Court of Appeal.

5. **If The Court of Appeal's Decision Stands, it Calls Into Serious Question the Continuing Legality of Well-Established Sweepstakes and Other Games Whose Validity Were Previously Beyond Question**

By focusing on the customer's perspective, and broadly interpreting the term "apparatus" within the meaning of Penal Code Section 330b, the Court of Appeal's decision calls into question the legality of sweepstakes promotions routinely used throughout the State.

As noted above, under previously-established law whether a customer using a particular device understands how the device works or

can predict whether he or she will win is not determinative of the element of chance. For example, a customer buying a lottery ticket from a vending machine does not know whether he or she will win when buying the ticket, but the lottery vending machine still is not an illegal slot machine. Similarly, customers entering a code on their phone or personal computer in order to play a sweepstakes game do not know if they will win when they enter that code, but that does not make their phone or computer an illegal slot machine. Unfortunately, however, these are the direct (and probably unintended) results of the Court of Appeal's analysis.

It is common knowledge that many retail establishments, like McDonald's, Carl's Jr., Pepsi, Coca-Cola, Subway, and others, routinely use sweepstakes programs to promote their products and services. These programs all share common features for a valid sweepstakes as required by California law, including: no purchase necessary, all entries have the same chance of winning, all prizes are final, and limited sweepstakes period.

More importantly, many of the well-known sweepstakes promotions in California openly use computers, cell phones, or other electronic devices not only to allow participants to submit their sweepstakes entries, but also to reveal the results of such entries. The sweepstakes programs run by McDonald's and Coca-Cola, for example, require the participant to enter a code on a computer or other electronic device to enter the sweepstakes and reveal the results thereof. (*See* http://www.mycokerewards.com/home.do.)

A sweepstakes program recently run by Carl's Jr., called the "Wheel of Awesome," also required the use of a computer or an electronic device, and used a simulated casino-like spinning wheel to reveal the results of the sweepstakes entry. (*See* http://vimeo.com/24063584.)

Under the Court of Appeal's analysis, such use of a computer or phone to reveal the results of a sweepstakes entry makes that sweepstakes promotion illegal. That is not, and cannot be, the case. But again, that is the result of the Court of Appeal's decision. The Court of Appeal found:

> As should be apparent from the above analysis, we are treating each defendant's complex of networked terminals, software gaming programs and computer servers as a single, integrated system. Under section 330b, subdivision (d), an unlawful "'slot machine or device'" is not limited to an isolated or stand-alone piece of physical hardware, but broadly includes "a machine, *apparatus*, or device that is *adapted*" for use as a slot machine or device. (*Ibid.*, italics added.) As defined in dictionaries, the ordinary meaning for the term "apparatus" includes "a group or combination of instruments, machinery, tools, or materials having a particular function" (Random House Webster's College Dict. (1992) p. 66), as well as "[t]he totality of means by which a designated function is performed or a specific task executed" (Webster's II New College Dict. (2001) p. 54). Here, each defendant's system of gaming software, servers and computer terminals plainly operated together as a single apparatus. (§ 330b, subd. (d).) While it is true that the end terminals or computer monitors used by patrons—if considered in isolation—may not intrinsically or standing alone contain all the elements of a slot machine, in each case they are part of an integrated system or apparatus wherein the various parts or components work together so as to operate in a manner that *does* constitute an unlawful slot machine or device.

(*Grewal, supra*, 224 Cal.App.4th at 546.)

By so broadly defining the term "apparatus" under Penal Code Section 330b, and by further holding that the "chance" element of Penal Code Section 330b is measured by the end user's perspective and not the inner-workings of the machine or device, the Court of Appeal effectively has called into question the legality of *any* sweepstakes promotion that permits a customer to determine whether they won a prize by using *any* electronic device or apparatus, including a personal computer or cell phone. Under the Court of Appeal's analysis, the "system" of integrated instruments or tools – i.e., the computer server operated by the retail establishment, the computer or cell phone utilized by the end user, and the software or mobile application used by the customer to reveal sweepstakes results – constitutes an "apparatus" within the meaning of Penal Code Section 330b. And, because the Court of Appeal held that the "chance" element depends on the end-user's experience, that "apparatus" now constitutes an illegal slot machine. Accordingly, under this scenario, both the retailers and customers are guilty of possessing an illegal slot machine in violation of Penal Code Section 330b.

Moreover, for obvious reasons, the Court of Appeal's decision calls into serious question the continued legality of California State Lottery scratcher vending machines.

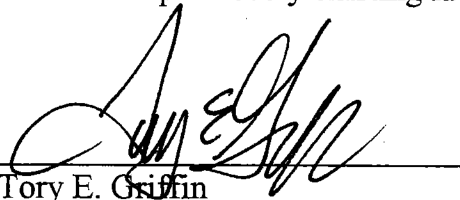
Clearly, these consequences are well beyond the Legislature's intent, and are likely well beyond the intent of the Court of Appeal. But that is the

real impact of the Court of Appeal's analysis, which further demonstrates why the Court of Appeal's decision must be reversed.

CONCLUSION

The Court of Appeal's novel and unprecedented interpretation of Penal Code section 330b violates fundamental principles of statutory construction, creates numerous unintended consequences, and violates fundamental notions of due process by applying the novel interpretation to Petitioner. The Court of Appeal's decision, in short, runs counter to existing law, and has the potential to create far more problems than it solves. The decision must be reversed, and remanded with instructions to judge Petitioner's conduct in accordance with previously existing law.

Dated: September 24, 2014



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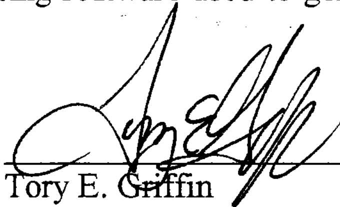
CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 9,704 words as counted by Microsoft Word, the word-processing software used to generate this brief.

Dated: September 24, 2014



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1 **PROOF OF SERVICE**

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

4 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
5 age of 18 years and not a party to the above-entitled action.

6 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
7 collected and deposited in the U.S. mailbox after the close of each day's business.

8 On September 24, 2014, I served the following:

9 **PETITIONER'S OPENING BRIEF ON THE MERITS**

10 ☐ 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
11 outgoing U.S. Mail addressed as follows:

12 ☐ on the party(ies) in this action by causing a true copy(ies) thereof to be delivered by hand as follows:

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14 Overnight Delivery in a sealed envelope(s) with receipts affixed thereto promising overnight delivery thereof addressed as follows:

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☐ on the party(ies) in this action by causing a true copy(ies) thereof to be delivered by
16 causing a true copy(ies) thereof to be sent by facsimile transmission as follows:

17

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28

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 September 24, 2014, at Roseville, California.

SARA SEBERGER