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IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,647

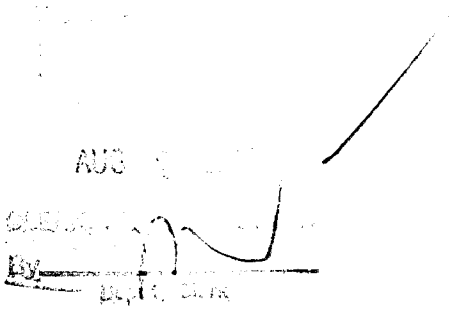
THE STATE OF FLORIDA,

Appellant,

vs.

ROBERT COGSWELL,

Appellee.



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AN APPEAL FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

****

ANSWER BRIEF FOR APPELLEE

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PREFACE

Appellee was the Defendant in the trial court and the Appellee before the Fourth District Court of Appeal. Appellant was the prosecution in the trial court and the Appellant before the Fourth District Court of Appeal. The parties will be designated as follows:

The Appellant will be referred to as "Appellant" or "State."

The Appellee will be referred to as "COGSWELL" or "Appellee."

References to the record will be made by use of the symbol "R." Reference to the attached Appendix will be made by use of the symbol "A."

All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

COGSWELL stood accused of nine (9) counts of Bookmaking in violation of ss.849.25(1) and 849.25(2), Fla. Stat. (R.18-21). The charges arose from COGSWELL allegedly receiving nine (9) football betting cards along with thirty four ($34) dollars. (R.26).

COGSWELL filed a Motion to Declare s.849.25, Fla. Stat. Unconstitutional pursuant to the Due Process clause of the Florida and United States Constitution. (R.22-25). The claim centered upon a comparison of s.849.25 and s.849.14, in that the conduct alleged in the instant case (i.e., receiving a bet), fell within the purview of s.849.25, the felony, and s.849.14, the misdemeanor. COGSWELL contended that the absence of standards in the two statutes to differentiate what conduct constituted the felony offense as opposed to the misdemeanor offense rendered s.849.25 susceptible to arbitrary, capricious and erratic application. (R.32). In a well-reasoned Order, the trial court agreed specifically finding that "[t]he conduct alleged in the instant case indisputably falls within the purview of both the felony and misdemeanor statute," but that "there is no added element or standard which necessarily makes it the felony offense." (R.34); State v. Cogswell, 17 Fla.Supp.2d 40 (17th C.C.1986). As such, the trial court found the felony statute "susceptible to arbitrary and discriminatory application" and therefore violative of due process. (R.33). The court refused to

"read into" s.849.25 any added element or standard to distinguish the felony offense from the misdemeanor. (R.35).

The State timely filed a Notice of Appeal to the Fourth District Court of Appeal. (R.37). The District Court affirmed on appeal similarly finding a violation of the due process and equal protection clauses in that the alleged conduct may be prosecuted as either a felony or misdemeanor depending entirely upon the discretion of the prosecution. State v. Cogswell, 504 So.2d 464 (Fla. 4th DCA 1987).

The State's Motion for Rehearing was denied on April 22, 1987. On May 21, 1987, twenty-nine (29) days later, the State filed a Notice of Appeal to this Court. A Motion to Dismiss Appeal based upon the untimely filing of the Notice of Appeal was denied by an Order of this Court dated July 7, 1987.

STATEMENT OF THE ISSUES

I.

WHETHER THIS COURT HAS JURISDICTION TO HEAR THE INSTANT CRIMINAL APPEAL WHERE THE STATE FILED THEIR NOTICE OF APPEAL MORE THAN FIFTEEN (15) DAYS AFTER THE DISTRICT COURT'S DECISION BECAME FINAL AND WHERE THE RULES OF APPELLATE PROCEDURE CLEARLY MANDATE THAT A NOTICE OF APPEAL IN ALL CRIMINAL APPEALS BY THE STATE BE FILED WITHIN FIFTEEN (15) DAYS?

II.

WHETHER THE TRIAL COURT AND DISTRICT COURT OF APPEAL CORRECTLY FOUND THE FELONY BOOKMAKING STATUTE TO BE VIOLATIVE OF DUE PROCESS AND EQUAL PROTECTION WHERE THERE WAS NO ADDED ELEMENT OR STANDARD WHICH DIFFERENTIATED IT FROM THE MISDEMEANOR GAMBLING STATUTE, THUS RENDERING THE FELONY STATUTE SUSCEPTIBLE TO ARBITRARY, ERRATIC AND DISCRIMINATORY ENFORCEMENT?

SUMMARY OF ARGUMENT

As to Issue I, the Court is without jurisdiction to hear the instant appeal. The Florida Rules of Appellate Procedure clearly require that the Notice of Appeal be filed within fifteen (15) days where, as here, the State is appealing in a criminal case. The failure to timely file the Notice of Appeal constitutes an irremediable jurisdictional defect.

As to Issue II, the trial court and District Court of Appeal correctly declared the felony bookmaking statute unconstitutional as violative of due process and equal protection. A comparison of the felony bookmaking statute with the misdemeanor gambling statute demonstrates that there is no functional difference between the two when applied to a "receiver" of bets. The absence of any additional element or standard which necessarily makes the conduct alleged herein the felony offense renders the statute susceptible to arbitrary and discriminatory application.

The arguments presented by the State must fail. Every Florida case cited by them is distinguishable in that in every instance where the prosecution was permitted discretion in deciding what to charge, the Court recognized that the prosecution assumed an additional elemental burden or was required to meet an additional statutory standard. This crucial distinction is lacking in the gambling and bookmaking statutes.

The State's reliance on Batchelder and its federal progeny is similarly misplaced. First, Batchelder is factually distinct. Secondly, the discretion the prosecutor has herein does more than merely enable the sentencing judge to impose a longer prison sentence. It renders the trial judge powerless to withhold adjudication for the felony offense. Finally, even if the Batchelder decision were deemed applicable to the case at bar, this Court has repeatedly recognized that the Court has the power and authority to construe, and has construed, our Florida Constitution in a manner which may differ from the manner in which the United States Supreme Court has construed a similar provision of the federal constitution.

The Legislature, by recently revising the Bookmaking statute by adding seven (7) separate statutory standards, any two of which constitute prima facie evidence of Bookmaking, has conceded that the previous standard statute was indeed defective and has sought to correct the same flaws that were the basis for the trial court's decision.

I.

THIS COURT DOES NOT HAVE JURISDICTION TO HEAR THE INSTANT CRIMINAL APPEAL WHERE THE STATE FILED THEIR NOTICE OF APPEAL MORE THAN FIFTEEN (15) DAYS AFTER THE DISTRICT COURT'S DECISION BECAME FINAL AND WHERE THE RULES OF APPELLATE PROCEDURE CLEARLY MANDATE THAT A NOTICE OF APPEAL IN ALL CRIMINAL APPEALS BY THE STATE BE FILED WITHIN FIFTEEN (15) DAYS.

The State of Florida, Appellant herein, purports to undertake an appeal of a final decision of the Fourth District Court of Appeal in a criminal case entered on March 11, 1987, and rendered final by the denial of rehearing on April 22, 1987. State v. Cogswell, 504 So. 2d 464 (Fla.4th DCA 1987).

The State's Notice of Appeal was filed on May 21, 1987, twenty-nine (29) days after the lower tribunal's decision became final.

Rule 9.110 governs, in general, appeal proceedings, including appeals from the District Courts to this Court. Subsection (b) of that Rule mandates a thirty (30) day period within which the Notice of Appeal must be filed.

However, the provisions of Rule 9.140 control where, as here, it is an appeal in a criminal case:

> Rule 9.140. Appeal Proceedings in Criminal Cases
> (a) Applicability. Appeal Proceedings in criminal cases shall be as in civil cases except as modified by this rule.

In fact, Rule 9.140 specifically refers to Rule 9.110 when it modifies the period within which the Notice must be filed where, as here, the State appeals in a criminal case:

> (c) Appeals by the State.
> (2) Commencement. The State shall file the notice prescribed by Rule 9.110(d) with the clerk of the lower tribunal within 15 days of rendition of the order to be reviewed.

The Committee Notes to both Rule 9.110 and 9.140 are in accord as to which Rule controls in the circumstances presented in the instant case. The 1977 Committee Note to Rule 9.140 provides:

> Criminal appeals are to be governed by the same rules as other cases, except for those matters unique to criminal law which are identified and controlled by this rule.

The 1977 Committee Note to Rule 9.110 is even more succinct:

> Except to the extent of conflict with Rule 9.140 governing appeals in criminal cases, this rule governs: (1) appeals as of right to the Supreme Court. (emphasis added).

The instant case is an appeal by the State in a criminal case. The Notice of Appeal was filed twenty-nine (29) days after rendition of the decision to be reviewed. The failure to timely file the Notice of Appeal in the case sub judice constitutes an irremediable jurisdictional defect in that the timely filing of a notice of appeal at the place required by the rules is essential to confer jurisdiction on this Court. State ex rel. Diamond Berk Insurance Agency, Inc. v. Carrol, 102 So.2d 129 (Fla.1958). The filing of a notice of appeal is jurisdictional and an appellate court cannot exercise its jurisdiction unless the notice is filed within the time and in the manner prescribed by the rules.

Id.; Lampkin-Asam v. District Court of Appeal, 364 So.2d 469 (Fla.1978). Accordingly, the Court is without jurisdiction to hear the instant appeal and, therefore, should dismiss this cause.

II.

THE TRIAL COURT AND THE DISTRICT COURT OF APPEAL CORRECTLY FOUND THE FELONY BOOKMAKING STATUTE TO BE VIOLATIVE OF DUE PROCESS AND EQUAL PROTECTION WHERE THERE WAS NO ADDED ELEMENT OR STANDARD WHICH DIFFERENTIATED IT FROM THE MISDEMEANOR GAMBLING STATUTE, THUS RENDERING THE FELONY STATUTE SUSCEPTIBLE TO ARBITRARY, ERRATIC AND DISCRIMINATORY ENFORCEMENT.

The trial court and the Fourth District Court of Appeal correctly found s.849.25 Fla.Stat.(1983) unconstitutional as violative of defendant's due process and equal protection rights by "felonizing" conduct which is identical to that proscribed by the misdemeanor statute, s.849.14 Fla.Stat. (1983), without affording any standards by which the prosecutor's discretion can be meaningfully narrowed in circumstances where conduct constituting a violation of the misdemeanor statute invariably constitutes a violation of the felony statute.

Section 849.25, Fla.Stat. (1983), provides:

> (1) The term "bookmaking" means the act of taking or receiving any bet or wager upon the result of any trial or contest of skill, speed or power or endurance of man or beast, or between men, beasts, fowl, motor vehicles, or mechanical apparatus or upon the result of any chance, casualty, unknown, or contingent event whatsoever.

The offense is a third degree felony with a mandatory adjudication of guilt. Section 849.25(2), Fla.Stat.(1983).

Section 849.14, Fla.Stat.(1983), which constitutes a second degree misdemeanor, provides in pertinent part as

follows:

> Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed orpower or endurance of man or beast, or whoever receives in any manner whatsoever any money or other thing of value staked, bet or wagered, or offered for the purpose of being staked, bet or wagered, by or for any other person upon any such result... .

Both the felony and misdemeanor provisions are to be read in pari materia. State v. Tate, 420 So.2d 116, 117 (Fla.2d DCA 1982).

Section 849.14, the misdemeanor statute, prohibits both one who "bets" or "wagers" and one who "receives in any manner" a bet or wager. Section 849.25, the felony statute, on the other hand, prohibits only the "taking" or "receiving" of a bet or wager. Thus, one who places a bet can be prosecuted only for the misdemeanor while one who takes or receives a bet can be prosecuted for both the felony or the misdemeanor offense, depending solely on the whim of the prosecutor. COGSWELL asserts, as both courts below have agreed, that s.849.25 is therefore constitutionally invalid in that one cannot determine whether his or her conduct constitutes a felony or a misdemeanor and that the absence of any standard by which a prosecutor is to discern what conduct constitutes the felony or the misdemeanor renders the statute susceptible to arbitrary and standardless application in violation of his right to due process and equal protection of law pursuant to Section 9, Article I, of the Florida Constitution and the

Fourteenth Amendment to the United States Constitution.

The conduct alleged in the information in the case at bar clearly falls within the purview of both the above quoted felony and misdemeanor provisions of Chapter 849. Inasmuch as there is no added element or standard which necessarily makes the conduct alleged in this case a felony offense as opposed to a misdemeanor offense, the prosecutor retains unlimited and unguided discretion in determining whether to charge a felony or a misdemeanor. Moreover, the statute in question thus renders it susceptible to unequal application to persons engaging in identical conduct. While one person might be subjected to prosecution as a felony, another might be prosecuted for the misdemeanor.

The Legislature, in enacting section 849.25, has failed to sufficiently delineate any standards so as to limit law enforcement and prosecutorial discretion in prosecuting only the professional exploitative gambler under section 849.25. The case at bar is particularly illustrative of the prosecutorial abuse that directly results from such a standardless statute. Indeed, the State, in footnote 3 of their brief, makes the remarkable contention that this discretion "may inure to a defendant's benefit," in that the "small time 'receiver'" may be given "the benefit of the doubt" and charged with the misdemeanor offense. The statement actually underscores the potential for abuse in that no explanation is given why COGSWELL, whose bets ranged from $1.00 to $10.00 for a total of $34.00, was not given "the benefit of the doubt."

It is a basic requirement of due process that a statute must provide ascertainable standards of guilt to protect against arbitrary, erratic, and discriminatory enforcement. Grayned v. City of Rockford, 408 U.S. 104(1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Florida Businessmen, etc., v. City of Hollywood, 675 F.2d 1213 (11th Cir.1982). Without sufficiently precise standards in statutes, the legislature impermissibly delegates basic policy decisions to the personal predilections of police, prosecutors, and juries. See Smith v. Goguen, 415 U.S. 576 (1976); State v. DeLeo, 356 So.2d 306 (Fla. 1978).

The statute at issue here, section 849.25, fails in this respect. It is unknown, and indeed unknowable, whether the conduct sought to be prohibited constitutes a felony or a misdemeanor. State v. Cogswell, 17 Fla.Supp.2d 40 (17th C.C.1986). Clearly, COGSWELL's purported conduct of taking or receiving bets or wagers falls within the prohibition of both the felony and misdemeanor provisions of Chapter 849. The problem lies in the fact that there is no added element or standard which necessarily makes his conduct a violation of the felony statute as opposed to the misdemeanor statute. The prosecution, by electing to proceed under the felony bookmaking statute, section 849.25 (with its mandatory adjudication of guilt provision), as opposed to the misdemeanor gambling statute, section 849.14, does not assume the added burden of proving any additional element whatsoever. Indeed, the statute requires no such additional element. It is for this reason that the statute "is simply

too open-ended to limit prosecutorial discretion in any reasonable way." State v. DeLeo, supra at 308.

The last cited case, DeLeo, is particularly significant. There, this Court struck a statute prohibiting "official misconduct" by a public servant as being susceptible to arbitrary application in violation of the due process clause. In so ruling, the Court observed that "official misconduct" as defined under the statute there at issue was keyed into the violation of any statute, rule or regulation, whether or not they contained any criminal penalties themselves, "and no matter how minor or trivial." 356 So.2d at 308. This Court this stated:

> Theoretically, then, using this definition [a defendant] could be charged with official misconduct, a felony of the third degree and punishable by up to five years in prison or a fine up to $5,000, for violating a minor agency rule applicable to him, which might carry no penalty of its own.
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> * * *
>
> While some discretion is inherent in prosecutorial decision-making, it cannot be without bounds. The crime defined by [this] statute...is simply too open-ended to limit prosecutorial discretion in any reasonable way. The statute could be used, at best, to prosecute, as a crime, the most insignificant of transgressions or, at worst, to misuse the judicial process for political purposes. We find it susceptible to arbitrary application....356 So.2d at 308 [footnotes omitted].

Precisely the same defect plagues the bookmaking statute that condemned the "official misconduct" statute in DeLeo. Using the definition of "bookmaking" set forth in

s.849.25, the prosecution in the case at bar has "felonized" COGSWELL's thirty-four ($34) dollar football pool notwithstanding the fact that "one is not necessarily in violation of the bookmaking statute by merely participating in one or more acts of gambling." State v. Tate, 420 So.2d 116, 118 (Fla.2d DCA 1982).

The Legislature's recent revisions to s.849.25 virtually concede that the statute applicable to COGSWELL was defective. Effective October 1, 1987, a defendant must be "engaged in the business or profession of gambling," to be subjected to the felony penalties. The statute lists seven (7) separate factors, the existence of any two which give rise to prima facie evidence of a commercial bookmaking operation. (A.8). The Legislative staff analysis explains that s.849.25 was ammended "to provide parameters for the court to consider in determining whether a person is engaged in the crime of bookmaking." (A.9). Thus, the statute now affords sufficient guidance to those who must apply it, namely police officers, prosecutors, judges and juries. Indeed, it is now clearly the legislative intent and purpose to differentiate penal treatment of the social gambler and the exploitative commercial gambler to the end that only the latter suffers the mandatory felony penalty.

The Third District Court's decision in State v. Hoag, 419 So.2d 416 (Fla.3d DCA 1982), lends much support to COGSWELL's constitutional analysis in the case sub judice. There, after the defendant destroyed a junk vehicle by driving it to an isolated portion of the Everglades and

causing it to be exploded, he was charged under a mandatory minimum statute prohibiting the unlawful discharge of a destructive device notwithstanding the existence of a non-mandatory minimum statute prohibiting the identical conduct. In affirming the trial court's order dismissing the information, this Court held:

> No conceivable public purpose could be served by prosecuting harmless conduct pursuant to a mandatory imprisonment statute where there is another statute, with a discretionary sentence provision, prohibiting those same acts which constitute the material part of the charge. Had the statute been applied to the facts of this case we would be faced with a serious challenge as to its constitutionality. 419 So.2d at 417 [footnote omitted].

The analysis in Hoag is compelling. The mandatory minimum destructive device statute in Hoag is analogous to the felony bookmaking statute (with its mandatory adjudication of guilt provision) used by the prosecution in the case at bar. In both Hoag and here, the conduct alleged as constituting a violation of the harsher statute encompasses the "same acts" covered by the less severe statute. Precisely as noted by the Third District in Hoag and by this Court in Sovering, application of the felony statute to identical conduct comprising a violation of the misdemeanor statute raises the same "serious challenge as to [the felony statute's] constitutionality."

The Florida decisions cited in the State's Brief provide no answer to COGSWELL's constitutional challenge to the bookmaking statute. Those cases simply establish the

unchallenged rule that it is not unusual for a course of criminal conduct to violate laws that overlap, yet vary in their penalty. See, e.g., Fayerweather v. State, 332 So.2d 21 (Fla. 1976); Soverino v. State, 356 So.2d 269 (Fla. 1978); Davis v. State 475 So.2d 223 (Fla. 1985); It is clearly the rule of law in Florida and elsewhere that where a course of conduct violates two statutes, the State has complete discretion to prosecute under either statute.

However, unlike these just-cited decisions, in the case at bar, there is no additional element or standard which necessarily makes the purported conduct at issue a felony offense as opposed to a misdemeanor offense. The prosecution in the case at bar, by exercising unfettered and unguided discretion to proceed under the felony bookmaking statute as opposed to the misdemeanor gambling statute does not assume any added burden of proving any additional element. The Florida Supreme Court's most recent illustration of this principle is Davis v. State, supra, where the defendant stole a Mercedes Benz automobile valued in excess of $20,000. He was charged, tried and convicted of first degree grand theft which punishes the theft of any property valued at more than $20,000 as a second degree felony. The defendant argued on appeal that he could only be charged with second degree grand theft, a third degree felony, in that the section of the statute specifically covering motor vehicles made their theft solely a third degree felony. This Court upheld the conviction, permitting the State's prosecutorial discretion in deciding which

section to charge only if the State was willing to assume the burden of proof as to an additional element not contained in the lesser offense. This Court held:

> Thus, the state may prosecute Davis for grand theft in the first degree and assume the burden of proving beyond a reasonable doubt that the value of the motor vehicle is $20,000 or more. 475 So.2d at 224.

The Court upheld the conviction finding that

> the state both accepted and met the burden of proving that the motor vehicle in question was worth $20,000. Id.

There is no additional burden of proof in the instant case which the State, in electing to proceed under the felony statute, assumes.

Fayerweather v. State, 332 So.2d 21 (Fla.1976), is similarly inapplicable. The case concerned the prosecutorial discretion the State possesses in determining whether to prosecute under the general receiving stolen goods statute or the more specific credit card crime act. This Court, in holding that Fayerweather was properly convicted, stated:

> We do not read [the State Credit Card Crime Act] to require exclusive prosecution under this act when the elements of other criminal laws are also present. 332 So.2d at 22.

The State's reliance upon Soverino v. State, 356 So.2d 269 (Fla.1978) and State v. Cain, 381 So.2d 1361 (Fla.1980) is likewise misplaced.

In Soverino, this Court found no constitutional barrier in providing the prosecutor, when a police officer has been

the victim of a battery, the discretion to charge under either the misdemeanor battery statute (s.784.03, Fla. Stat.) or the felony battery upon a police officer statute (s.784.07, Fla. Stat.). Implicit in that decision is the fact that the prosecutor, in deciding to visit upon the offender the felony penalty, assumes the burden of proof as to an additional element, that is, that the victim of the battery is a police officer. This added element erases the potential for arbitrary and erratic enforcement and thus the constitutional infirmity existing in the case sub judice.

Similarly, in State v. Cain, this Court found no due process violation in a statute vesting the state attorney with authority to criminally prosecute juveniles as adults in certain circumstances. The Court expressly found that the statute was not arbitrary because the statutory provision "controlled the state attorney's charging authority" in permitting the prosecutor the discretion to criminally prosecute the juvenile only when he is 16 years of age or older and has in the past committed two delinquent acts, one of which would constitute a felony if committed by an adult. 381 So.2d at 1364-5. Thus, the potential for arbitrary and discriminatory application was removed by the legislature's determination, based on age and past record, that certain juvenile offenders were not suitable for treatment in the juvenile justice system.

While the United States Supreme Court has never addressed the situation where identical conduct constituting a violation of a misdemeanor statute will invariably

constitute a violation of a felony statute, the dissenters in Berra v. United States, 351 U.S. 131, 135-140 (1956), did squarely address the question and found the identical due process and equal protection violations raised in the case at bar. There, the defendant was prosecuted for violation of the federal income tax laws under a felony statute that prohibited the same conduct also proscribed by a misdemeanor provision of the United States tax code. The defendant there had made no motions before the trial court addressed to the validity of the indictment, conviction, or sentence, and instead only challenged on appeal the trial court's denial of a lesser-offense instruction to the jury. The majority of the Supreme Court rejected this isolated assertion. However, Justice Black's dissent, joined by Justice Douglas, argued strongly that the Court should address the due process-equal protection problem arising out of the prosecution of conduct that constituted a violation of both the misdemeanor and the felony statute:

> Regardless of whether it was error to refuse the requested instruction, the record raises a serious question as to whether the four-year sentence...was lawfully imposed. The [majority's] opinion takes the position that no proper challenges to the sentence under the felony statute were raised below and hence that "No such questions are presented here." 351 U.S. at 137.

Although the due process-equal protection assertion was not raised below, the dissenters believed that application of the felony statute to Berra was "plain error" and required the Court to address the issue. Justice Black then directly met the issue and stated:

> I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual--a result which seems to me to be wholly incompatible with our system of justice. Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit prosecution for a felony...
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> * * *
>
> Here...two statutes proscribe identical conduct and no "different proof" was required to convict petitioner of the felony than would have been required to convict him of the misdemeanor. 351 U.S. at 138-9.

It is submitted that the identical operative facts exist in the case at bar where the defendant's conduct invariably violates the misdemeanor and the felony provisions of Chapter 849, and there is no "different proof," that is, no additional element, required for prosecution of the identical conduct under the felony statute. In Berra, the government relied upon the "stark premise" that the prosecuting authority has the power to say under which statute an accused will be prosecuted. Id. at 139. Similarly, here, the State asserts that the prosecutorial decision of what to charge and how to prosecute is absolute, and not subject to review. Of course, that discretion is not at all absolute. As Justice Black asserted in Berra, 351 U.S. at 139:

> A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if

> either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General. "For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." Yick Wo v. Hopkins, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220.
>
> A congressional delegation of such vast power to the prosecuting department would raise serious constitutional question.***A judge and jury act under procedural rules carefully prescribed to protect the liberty of the individual. ***No such protections are thrown around decisions by a prosecuting attorney. 351 U.S. at 139-40.

In addition, Justice Black found that the application of the felony statute to the identical conduct prohibited by the misdemeanor statute would constitute a violation of the equal protection clause, since "no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same." 351 U.S. at 140.

Justice Black's Berra analysis is directly applicable to the case at bar where no different proof need by met by the prosecution in exercising its unfettered discretion to prosecute the defendant under the felony statute with its mandatory adjudication of guilt and harsher penalty for conduct which invariably constitutes a violation of the misdemeanor statute.

The United States Supreme Court's decision in United States v. Batchelder, 442 U.S. 114 (1979), is not to the

contrary. There, the defendant asserted that where his conduct violated two criminal statutes, he could only be sentenced under that statute carrying the lesser penalty. The conduct at issue, possession of a firearm by a convicted felon, violated two statutes, one calling for a sentence up to five years imprisonment and the other for a sentence up to only one year imprisonment. The lower court, the United States Court of Appeals for the Seventh Circuit, ruled that the defendant could be sentenced only under the statute calling for the lesser penalty, finding that there was an ambiguity between the two statutes, that the lesser statute repealed the earlier statute since passed by Congress at a later point in time, and that the prosecutorial power to select which of the two statutes applied implicated "important constitutional protections." 442 U.S. at 117. Finding no ambiguity, and rejecting the repealer assertion, the Supreme Court reversed the lower court's decision and found that there was no impediment to subjecting the defendant to the harsher penalty. However, in so doing, the Supreme Court was careful to note that, contrary to the lower court's assumption, the two statutes in question "are not coextensive," but include different elements and impose different burdens on the prosecution. See 442 U.S. at 118 & notes 5, 7. Thus, the underpinning of the Supreme Court's decision in Batchelder was the difference between the statutory elements, and the fact that the government did not predetermine which "sanction" would be imposed by its selection of statutes under which to prosecute; rather, the

government's choice "merely enables the sentencing judge to impose a longer prison sentence...". 442 U.S. at 125. Certainly, the same cannot be said in the case at bar where, by virtue of the prosecutor's selection of the felony statute, the trial judge is powerless to withhold adjudication for the felony offense.[1]

Finally, even if the Batchelder decision were deemed applicable to the case at bar, this Court has repeatedly "recognize[d] that this Court has the power and authority to construe our Florida Constitution in a manner which may differ from the manner in which the United States Supreme Court has construed a similar provision of the federal constitution. See Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980)." Rose v. State, 12 FLW 227 (Fla. May 7, 1987); see also State v. Kinchen, 490 So.2d 21, 23 (Fla. 1985); State v. Glosson, 462 So.2d 1082, 1085 (Fla. 1985) (Due Process clause of Florida Constitution construed more broadly than its federal counterpart).

The legislature in enacting Chapter 849, whether wittingly or not, has provided the prosecutor with unbridled discretion to visit upon any offender felony or misdemeanor sanctions for factually indistinguishable conduct. Unlike the cases relied upon by the State, the prosecutor here assumes no additional elemental burden or complies with no

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[1]Section 849.25(2) prohibits the suspension, deferral or withholding of adjudication of guilt. See also, State v. Zardon, 406 So.2d 61 (Fla. 3d DCA 1981); State v. Lillo, 506 So.2d 94 (Fla.2d DCA 1987).

added statutory standard in electing to charge a felony as opposed to a misdemeanor.

The circumstances here are not unlike removing the $300 elemental distinction between misdemeanor petit theft and felony grand theft, thereby permitting the State to prosecute all thefts as either a felony or a misdemeanor depending entirely upon prosecutorial whim. The absence of the $300 element would enable the State to prosecute some thefts under $300 as felonies and some thefts over $300 as misdemeanors, thereby rendering the application of the theft statute erratic and capricious.

The same holds true in the instant case. A comparison of the felony bookmaking and misdemeanor gambling statute demonstrates, as both courts below readily discovered, that the two statutes do not afford sufficient guidance to those who must apply them. Without an added element or standard which necessarily makes receiving a bet a felony offense, the Legislature's policy decision to "felonize" the professional or commercial gambler is delegated to the personal predilections of various police agencies, prosecutor's offices and triers of fact. Such a situation can lead only to arbitrary, capricious, erratic and discriminatory application of the statute, rendering it violative of the Florida and United States constitutional guarantee of due process. Accordingly, the trial court's order and the Fourth District Court of Appeal's decision declaring s.849.25, Fla.Stat. unconstitutional should be affirmed.

CONCLUSION

Based upon the foregoing argument and citations of authorities, the Appellee submits that the judgment of the District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 4th day of August, 1987, to: DIANE E. LEEDS, Assistant Attorney General, Palm Beach County Regional Center, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401.

By: _____
GEORGE T. PALLAS, Esq.