IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Appellant,	)	
v.	)	CASE NO. 70,647
ROBERT COGSWELL, Appellee.	)	

REPLY BRIEF OF APPELLANT

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STATUTES

PRELIMINARY STATEMENT

Appellant accepts the Preliminary Statement as found on page one (1) of the Initial Brief of Appellant.

STATEMENT OF THE CASE AND FACTS

Appellant accepts the Statement of the Case and Facts as found on pages two (2) through three (3) of the Initial Brief of Appellant.

SUMMARY OF THE ARGUMENT

Appellant accepts the Summary of the Argument as found on page five (5) of the Initial Brief of Appellant.

ARGUMENT

Defendant raises several issues which warrant response. Defendant first challenges the constitutionality of the instant statute under the due process and equal protection clauses, answer brief, p. 9. He argues a violation of said clauses exists as there are no articulated standards contained within the felony bookmaking statute which the prosecutor can utilize to exercise his discretion in choosing whether to prosecute as a felony or a misdemeanor, answer brief, p. 9-14.

This court, however has specifically addressed this issue of "unbridled discretion" as applied to a violation of the equal protection and due process clauses of both the U.S. and the Florida Constitutions. In Johnson v. State, 314 So.2d 573 (Fla. 1975), Defendant Johnson argued that §39.02(5)(c), Fla. Stat., was unconstitutional in that "some children charged with violations of Florida law punishable by death or by life imprisonment are indicted and may thereafter be handled in every respect as an adult, while others similarly charged are not indicted and are thereby retained within the jurisdiction of Juvenile Division of the Circuit Court", Id. 575. The argument, similar to the instant argument, was based upon the fact that the "statute is defective because it sets no guidelines to assist the State Attorney or Grand Jury in determining which child should be

indicted and which should be dealt with as a delinquent" Id. at 577. It was argued that the State Attorney has "complete discretion" to determine which cases are submitted to the Grand Jury and the Grand Jury only reviews those cases brought before it by the State Attorney, Id. at 577. This court held, however, that equal protection was not violated as the discretion of the prosecutor as to election of prosecutions has historically been and continues to be "absolute". See also McCloud v. State, 335 So.2d 257 (Fla. 1976), where this court again affirmed the constitutionality of §39.02(5)(c), rejecting this same attack based upon the "prosecutor's unfettered discretion to charge such offense" Id. at 258.

Similarly in Crews v. State, 366 So.2d 117 (Fla. 1st DCA 1979), defendant Crews argued that due to complete prosetorial discretion as to choice of crime to prosecute -- Defendant's behavior equally violated a Jacksonville Ordinance as well as a state statute -- equal protection and due process were violated.[1] In rejecting Crew's claim the Crews court, relying on federal case law, found no constitutional violation due to the inherent, 'unbridled' prosecutorial discretion. The court relied on Hutcherson v. U.S., 120 U.S.App.D.C. 274, 277, 345 F.2d 964, 967 (1965), cert. den. 382 U.S. 894 (1965), where, under circumstances more favorable to Defendant than under the instant case, "identical" statutes were involved. In Hutcherson it was found

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[1]As in the instant case Crews was charged with the crime providing the greater penalty, the state statute.

that "Defendant has no constitutional right to elect which of two applicable statutes shall be the basis of his indictment and prosecution. That choice is to be made by the United States Attorney" Crews at 118. The Crews court also relied upon Davis v. U.S., 385 A.2d 757, 759 (D.C. App 1978) where it was similarly stated that

> . . . it is not a denial of due process or equal protection for the government to choose to prosecute under a federal statute which imposes greater penalties for the same offense than an identical District of Columbia statute and the reasoning applies with equal force where the local statute provides greater penalties than the federal one.[2] A Defendant has no constitutional right to elect which of two applicable statutes will form the basis of his indictment and prosecution [citations omitted]. . . it is within the discretion of the United States Attorney to determine which shall form the basis of the prosecution. [citations omitted]. Appellant thus cannot protest the government's right to elect to prosecute him under either statute.
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> Crews at 118

Along these same lines, a Defendant similarly has no constitutional right to know whether his unlawful conduct constitutes a felony or a misdemeanor. Defendant's

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[2]It is irrelevant that in the instant case we are dealing with two state statutes as in Crews at n.1, again citing to Hutcherson, supra, and referring to the opinion as "wise", it was implied that to "draw such a distinction would be to sanction the kind of hairsplitting judicial sophistries that undermine rather than advance a rational and fair administration of the criminal law".

constitutional rights only extend to include a requirement that he be given a warning as to what conduct is legally proscribed, Street v. State, 383 So.2d 900, 901 (Fla. 1980).

It must be noted that the instant statute is not unconstitutionally overbroad, as said attack is only proper when the statute could be applied to innocent, protected activity, Street, Id.; State v. Ashcraft, 378 So.2d 284 (Fla. 1979)[3]. In the instant case Defendant does not, nor can he argue his behavior to be innocent.

In support of his due process claim Defendant further argues the applicability of State v. DeLeo, 356 So.2d 306 (Fla. 1978), Id. In DeLeo this Court actually struck down a statute prohibiting "official misconduct" by a public servant as being susceptible to arbitrary application in violation of the due process clause. However, in DeLeo the statute itself was too vague to give "men of common intelligence sufficient warning of what is corrupt and outlawed" Id. at 308. This court found susceptibility to arbitrary application as behavior not intended to be encompassed by the penal statute was in fact included within the "catch-all" nature of said statute. As quoted by Defendant in his brief

> Theoretically, then, using this definition an appointed employee could be charged with official misconduct, a felony in the third degree and punishable

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[3]Defendant must also establish his own conduct as innocent to raise such a challenge, Ashcraft at 285.

> 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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> Id. at 308.

Clearly the statute in DeLeo was properly held unconstitutional as it could have been applied to activity never intended to be made criminal. The converse, however, is true in the case at bar where Defendant's argument acknowledges that his behavior is illegal. It is solely the degree of illegality that is in issue -- felony vs. misdemeanor.

It must be noted that the constitutionality of the instant statute, §849.25, Fla. Stat., under the equal protection and due process clauses, has been upheld by the Second District Court of Appeal in State v. Bryce, 422 So.2d 1069 (Fla. 2d DCA 1982) and State v. Tate, 420 So.2d 116 (Fla. 2d DCA 1982). It is interesting to note that although the exact argument espoused in the instant case was not before the court, unconstitutionality was argued in that the statute "did not define the term 'taking or receiving'", the exact language currently in issue, Bryce at 1069. The Court, however, upheld the constitutionality of the instant statute and held "that section 849.25 does not violate the equal protection clauses of the United States and Florida constitutions and is not so vague that men of common intelligence must necessarily guess at the statute's meaning and differ as to its application" Id. at 1069.

Lastly, it is again reiterated that there are implicit

standards present within the felony bookmaking statute which necessarily distinguish between conduct prohibited under the felony statute and conduct prohibited under the misdemeanor statute. The felony bookmaking statute defines "bookmaking" albeit incompletely. In such a circumstance it is appropriate to look to the common law for the definition of the crime, see Adams v. Murphy, 394 So.2d 411, 412 (Fla. 1981), where this court found that the crime of perjury was defined by statute, however not fully so that resort needed to be made to the decisional law of Florida, see also Purvis v. State, 377 So.2d 674, 676 (Fla. 1979), which similarly provides that when a statute makes an act criminal but does not provide the elements of the crime, courts will refer to the common law; Carnley v. State, 102 So. 333 (1924). Also, see specifically State v. Tate, 420 So.2d 116 (Fla. 2d DCA 1982), where the constitutionality of the instant statute was upheld after resort was made to the common law to determine legislative intent.

As the common law clearly provides that the "business or profession of gambling" is prohibited under the felony statute while the casual, occasional or single act of gambling is prohibited under the misdemeanor statute, precise standards and/or elements are necessarily included within said statutes, Ferguson v. State, 377 So.2d 709, 711 (Fla. 1979); Tate, supra.

Second, on p. 14 of the answer brief Defendant argues that "The Legislature's recent revisions to §849.25 virtually concede that the statute applicable to COGSWELL was defective".

However, it is well settled that the mere change of language in a statute does not necessarily indicate an intent to change the law. Intent may be to clarify what was doubtful as to the existing law and to safeguard against its misapprehension, State v. Dickinson, 286 So.2d 529, 531 (Fla. 1973); Williams v. Hartford Accident and Indemnity Co., 382 So.2d 1216, 1220 (Fla. 1980), see also Keyes Investors v. Dept. of State, 487 So.2d 59 (Fla. 1st DCA 1986), Speight v. State, 414 So.2d 574, 577 (Fla. 1st DCA 1982); Ocala Breeder Sales Co. v. Division of Pari-Mutual Wagering, 464 So.2d 1272 (Fla. 1st DCA 1985). The timing and circumstances of an enactment may indicate that it was formal only and served as a legislative clarification of existing law, and thus an enactment may suggest that the same rights existed before it. Williams, supra at 1220.

In the case sub judice it is clear that the legislative amendment was merely formal in nature. The basis purpose and substantive content of the law remained unchanged, Speights at 577-578, as did its title, Speights at 578. The title of an act is a valuable aid in sifting out legislative intent behind enactment, Speights at 578. Further, the amendment came in direct response to the Fourth District Court of Appeal's order of unconstitutionality. The District Court had found insufficient standards to differentiate applicability of the felony bookmaking statute from its misdemeanor counterpart. Pursuant to the amendment standards were added which resulted in the felony bookmaking statute specifically applying to persons engaged

solely in the business or profession of gambling with concrete examples given. As this court has historically interpreted said statute to apply in exactly this fashion -- to an individual engaged in the business or profession of gambling, no legislative change is apparent, see Ferguson v. State, 377 So.2d 709, 711 (Fla. 1979), where this court found "the statutory scheme of Chapter 849 (gambling) evinces a general intent to treat the business or profession of gambling as a felony while treating the casual or occasional act of gambling as a misdemeanor".

Third, Defendant argues that he is a small time receiver whose bets ranged from $1.00 to $10.00 for a total of $34.00 and should have been prosecuted under the misdemeanor statute, p. 11, 14 of his answer brief. However, what Defendant fails to point out is that it was clear from the record that the issue was not money received. Even though the bets received totalled only $34.00, Defendant was proven to be involved in a full scale professional bookmaking operation with the instant $34.00 consisting only of the 'tip of the iceberg'. The betting slips utilized were professionally printed and designed (R.18-21). Each contained a professionally printed number. The numbers began at No. 6235 and terminated at No. 6245. Clearly an individual not engaged in the business or profession of gambling but in the single act of gambling would not have preprinted professionally designed betting cards and would not have numbered the cards. The cards, if numbered, certainly would not have begun with 6,235!

As such, State v. Hoag, 419 So.2d 416 (Fla. 3d DCA 1982), does not apply. The legislative purpose behind the felony bookmaking statute is very much served by prosecuting Cogswell, obviously a professional bookmaker. The instant defendant's conduct was not at all 'harmless', as was Defendant Hoags. Further the statute in the instant case was not found unconstitutional as applied to the facts of the case, see Hoag at 417.

Fourth, Defendant argues that the 'underpinning' of the Supreme Court's decision in United States v. Batchelder, 60 L.Ed.2d 755 (1979), was that the two statutes in question included different elements and thusly imposed different burdens on the prosecution, answer brief, p.22. It is true that the Batchelder court, in a footnote, makes note of the fact that even in the case of convicted felons, the area of statutory overlap, the two statutes are not coextensive, n.5. However, it is also very obvious that this footnote does not underpin the courts ultimate decision. If this were the case the courts most vital analysis would be contained solely within a footnote!

Further, the majority opinion makes it perfectly clear that Defendant Batchelder's previous felony conviction fell into an area of overlap and not an area of difference. Justice Marshall began the opinion by acknowledging that Defendant's "conduct violates both statutes" Batchelder, 60 L.Ed.2d at 759; the Court of Appeals found the two statutes "identical as applied to a convicted felon who unlawfully receives a firearm"

Batchelder, 60 L.Ed.2d at 760; and, Justice Marshall continued by stating that "This Court has previously noted the partial redundancy of §§992(h) and 1202(a), both as to the conduct they proscribe and the individuals they reach" Batchelder, 60 L.Ed.2d at 761.

However, assuming arguendo that Defendant is correct and "the underpinning of the Supreme Court's decision in Batchelder was the difference between the statutory elements", answer brief, p. 22, the instant statutes are similarly not coextensive in their area of overlap. Initially, review of the State's initial brief, specifically n.2, reveals that the two instant statutes are very different and a violation of one does not ivariably constitute a violation of the other. As to their area of overlap, the 'receiving of bets', the misdemeanor statute solely prohibits the receiving of bets placed upon contests involving man or beast, §849.14, Fla. Stat., whereas, the felony statute additionally prohibits the receiving of bets placed upon the result of "any chance, casualty, unknown, or contingent event whatsoever" §849.25(1), Fla. Stat. As such Defendant's attempt to distinguish Batchelder based upon a difference between statutory elements in the area of overlap fails.

As to Defendant's allegation that the instant prosecutor predetermined which sanction would be imposed where the prosecutor in Batchelder did not, the Batchelder Court continued to eventually find that the government did not predetermine which sanction would be imposed as

> Contrary to the court of Appeals' assertions, a prosecutor's discretion to choose between §§922(h) and 1202(a) is not "unfettered." Selectivity in the enforcement of criminal law is, of course, subject to constitutional constraints. And a decision to proceed under §922(h) does not empower the Government to predetermine ultimate criminal sanctions. Rather, it merely enables the sentencing judge to impose a longer prison sentence than §1201(a) would permit and precludes him from imposing the greater fine authorized by §1202(a).[4]
>
> Batchelder, 60 L.Ed.2d at 765

Such analysis applies equally to the instant prosecutor as well as in Batchelder.

Defendant further urges this court to follow the dissenting opinion in Berra v. U.S., 351 U.S. 131, 76 S.Ct 685, 100 L.Ed.2d 1013 (1956), answer brief, p. 19-21, which would construe the overlaping statutes so as not to place control over the liberty of citizens within the unreviewable discretion of the prosecutor. However, in Batchelder, Id., 60 L.Ed.2d 765, the lower court had followed the dissenting opinion in Berra, supra, and was scathingly reversed:

> The Court of Appeals acknowledged this "settled rule" allowing prosecutorial choice. 581 F2d, at 632. Nevertheless, relying on the dissenting opinion in Berra v. United States, 351 US 131, 100 L.Ed. 1013, 76 S.Ct 685 (1956), the court distinguished overlapping statutes with identical standards of proof from provisions that vary in some

[4]It is also for these reasons that the prosecutor may properly elect to charge Defendant with a felony even though it engenders the inherent prohibition of suspension, deferral or withholding of adjudication of guilt, Answer Brief, p.23.

> particular. 581 F2d, at 632-633. In the court's view, when two statutes prohibit "exactly the same conduct," the prosecutor's "selection of which of the two penalties to apply" would be "unfettered." Id., at 633, and n.11. Because such prosecutorial discretion could produce "unequal justice,' the court expressed doubt that this form of legislative redundancy was constitutional. Id., at 631. We find this analysis factually and legally unsound.

Obviously, it has been definitely determined that the dissenting opinion in Berra, supra, is legally unsound and should remain just that - a dissenting opinion.

CONCLUSION

WHEREFORE, the State submits that the order appealed from must be REVERSED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Reply Brief of Appellant" has been forwarded to Mr. George T. Pallas, Esq., Suite 400, LeJeune Centre, 780 N.W. LeJeune Road, Miami, FL 33126, on this 14th day of September, 1987.

Diane E. Leeds
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