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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

May 4, 2005

The Honorable Catherine Ceips
Member, House of Representatives
326-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Ceips:

In a letter to this office you questioned the legality of an event conducted at the Beaufort Water Festival described as "River Rally". At such event, boaters draw cards at different docks and at the end of the event, the individuals with the winning hands receive prizes donated by sponsors. Each individual pays ten dollars per card.

In my opinion, such activity constitutes a lottery which is prohibited under state law. S.C. Code Ann. § 16-19-10 (2003) provides:

(w)hoever shall publicly or privately erect, set up, or expose to be played or drawn at or shall cause or procure to be erected, set up, or exposed to be played, drawn, or thrown at any lottery under the denomination of sales of houses, lands, plate, jewels, goods, wares, merchandise, or other things whatsoever or for money or by any undertaking whatsoever, in the nature of a lottery, by way of chances, either by dice, lots, cards, balls, numbers, figures, or tickets or who shall make, write, print or publish, or cause to be made, written, or published any scheme or proposal for any of the purposes aforesaid is guilty of a misdemeanor and, upon conviction, must be fined one thousand dollars and imprisoned for one year. One-third of the fine imposed shall be paid to the person, if any, who informed law enforcement officials or other appropriate authorities about the violation which led to the conviction. Each violation constitutes a separate offense.

S.C. Constitution, Article XVII, Section 7 sets forth that

Only the State may conduct lotteries, and these lotteries must be conducted in the manner that the General Assembly provides by law. The revenue derived from the lotteries must first be used to pay all operating expenses and prizes for the lotteries. The remaining lottery revenues must be credited to a separate fund in the state treasury styled the 'Education Lottery Account', and the earnings on this account must

be credited to it. Education Lottery Account proceeds may be used only for education purposes as the General Assembly provides by law. The game of bingo, when conducted by charitable, religious, or fraternal organizations exempt from federal income taxation or when conducted at recognized annual state and county fairs, is not considered a lottery prohibited by this section

Typically, a raffle whereby an individual buys a ticket for the opportunity to win a prize based upon a random drawing is considered a lottery. See: Op. Atty. Gen. dated June 23, 2004. However, other games or events may also be considered a lottery. In Darlington Theatres, Inc. v. Coker, et al., 190 S.C. 282, 292, 2 S.E.2d 782, 786 (1939), the State Supreme Court determined that a lottery is

...a species of gaming, which may be defined as a scheme for the distribution of prizes or things of value by lot or chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize.

Therefore, the three elements of a lottery are (1) the offering of a prize (2) for payment of some consideration (3) with the winner determined by chance.

Based upon the description as to how "River Rally" is played, it is my opinion that such event has all these three elements of a lottery. Clearly, there is a prize and the required payment of consideration, the ten dollars, in order to play. Furthermore, it appears that the winner is determined by chance by accumulating the winning hand. While typically the determining of the winner by chance is accomplished by a random drawing at the conclusion of the lottery, it appears that the element of a random drawing is also present in "River Rally" in that the individual who is playing randomly draws the cards at different docks. The June 23, 2004 opinion previously referenced states that "random" is a synonym for "chance". The fact that the drawing for purposes of determining a winner is accomplished over a series of draws rather than one draw as might be done in some lotteries is, in my opinion, of no significance. The game of bingo is played by a series of drawings of numbers during the course of the game. Bingo is a game which is exempted from being considered a lottery only by the referenced constitutional provision. The inference, therefore, is that but for the exemption in the State Constitution, bingo would be considered a lottery. See, Army Navy Bingo, Garrison v. Plowden, 281 S.C. 226, 314 S.E.2d 339 (1984) [bingo is a lottery and is gambling].

Additionally, Section 16-19-10 specifically prohibits lotteries utilizing cards. As stated in such provision,

(w)hoever shall publicly or privately erect, set up, or expose to be played or drawn at or shall cause or procure to be erected, set up, or exposed to be played, drawn, or thrown at any lottery...by any undertaking whatsoever, in the nature of a lottery, by way of chances, either by dice, lots, cards, balls, numbers, figures, or tickets... is guilty of a misdemeanor....

Such conclusion is consistent with a prior opinion of this office dated August 12, 1980 which concluded that the game of "liars poker" is illegal under Section 16-19-10 in that it is also a game founded upon chance.¹

As referenced by numerous prior opinions of this office, present statutes and Article XVII, Section 7 of the Constitution make no exception for lotteries conducted by or on behalf of charitable organizations. See: Ops. Atty. Gen. dated June 23, 2004; December 4, 1997 and March 17, 1975. As stated in an opinion dated June 2, 1977, "(t)he fact that your lottery is to be held for humanitarian purposes is, unfortunately, immaterial."

As set forth by Article XVII, Section 7 of the State Constitution, the only exceptions to the lottery prohibition in this State is for the State-run lottery and bingo. As referenced in the June 23, 2004 opinion,

The fact that the State-run lottery and bingo are the only exceptions contained in Art. XVII, § 7 reinforces the conclusion that other forms of lottery are clearly prohibited by South Carolina law. It is well recognized that "the canon of construction 'expressio unius est exclusio alterius' holds that to express or include one thing implies the exclusion of another, or the alternative." Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)...Similarly, decisions in other jurisdictions have held that the exception contained in the state constitution for state-run lotteries is exclusive. See Miller v. Radikopf, 51 Mich. 393, 214 N.W.2d 897 (1974); Poppen v. Walker, 520 N.W.2d 238 (S.D. 1994). In Poppen, the Court held that a video lottery was not an authorized "lottery" under the State Constitution, but was, instead, an unauthorized game of chance. In Miller, the Court held that authorization of a state-run lottery in the Michigan Constitution was the only legal lottery to be conducted in the State and that other lotteries remained prohibited. As the Court in that case observed, "... since the state lottery has as its purpose the raising of revenue for the state, ... it would seem incongruous that the Legislature would allow private lotteries to compete with the public lottery and thereby reduce the revenues earned for the state." 214 N.W.2d at 898.

¹The opinion states that

...the game of 'liars poker' is defined as a game of chance, whereby a number of players are utilizing actual dollar bills as cards. The object of the game is for each player to draw dollar bills as one would draw cards, utilizing the serial numbers on the respective dollar bills in order for each player to make his or her bid. In the making of the bid, a player may utilize the bills other players have...By completing his hand, the player wins, also winning the money contained within such hand.

The Honorable Catherine Ceips
Page 4
May 4, 2005

Consistent with such, it was the conclusion of the referenced opinion that the provisions of Art. XVII, § 7 authorizing the South Carolina Education Lottery, which has among its contests, state-run raffles, reinforces the conclusion that all other lotteries are constitutionally prohibited by such provision.

One additional provision to be considered is S.C. Code Ann. Sec. 61-2-180 (Supp. 2004) which states that

[n]otwithstanding any other provision of law, a person or organization licensed by the department...(of Revenue for purposes of serving alcoholic beverages)...under this title may hold and advertise special events such as bingo, raffles and other similar activities intended to raise money for charitable purposes.

As set forth, § 61-2-180 authorizes raffles "to raise money for charitable purposes" if the person or organization conducting the raffle is "licensed by the department [of revenue] under this title"

Generally, any statute enacted by the General Assembly must be presumed to be constitutional. As set forth in Op. S.C. Atty. Gen., March 23, 2004, "[i]t is always to be presumed that the Legislature acted in good faith and within constitutional limits" Scroggie v. Scarborough, 162 S.C. 218, 160 S.E. 596, 601 (1931). It is recognized that the powers of the General Assembly are plenary, unless limited by the Constitution, unlike the federal Congress, whose powers are specifically enumerated. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. Furthermore, an act of the General Assembly will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939). Moreover, every doubt regarding the constitutionality of an act of the General Assembly must be resolved favorably to the statute's constitutional validity. While this Office in an opinion may comment upon what we deem an apparent constitutional defect, we may not declare an act void as unconstitutional.

Recognizing such conclusions, the June 23, 2004 opinion stated that

At the same time, it must be recognized that "the General Assembly may not permit what the Constitution expressly prohibits." Op. S.C. Atty. Gen., December 4, 1997. While the Supreme Court has recognized that a legislative construction of the Constitution is entitled to weight, Bradford v. Richardson, 111 S.C. 205, 97 S.E. 58 (1918), at the same time it must be recognized "[t]hat which is prohibited by the Constitution cannot be authorized by the legislature" Beatty v. Wittekamp, 171 S.C. 326, 172 S.E. 122 (1933). As the Court noted in Scroggie v. Bates, 213 S.C. 141, 48 S.E.2d 634 (1948), "[u]nder no circumstances can this Court agree to the suggested proposition that by repeated violations of the Constitution, the Legislators may thus amend that instrument." And, as the Court stated in Richardson v. Town of

Mt. Pleasant, 350 S.C. 291, 566 S.E.2d 523 (2002), words used in the State Constitution must be given their "plain and ordinary" meaning.

That opinion also recognized that cases in other jurisdictions have concluded that statutes which attempt to create exceptions to the state constitutional prohibition against lotteries are unconstitutional. In State ex rel. Evans v. Brotherhood of Friends, 247 P.2d 787 (1952), it was recognized that a statute which exempted non-profit clubs from provisions penalizing possession, use or operation of slot machines was unconstitutional as authorizing a lottery. While determining that a slot machine constituted a lottery for purposes of that State's Constitution, the Court concluded:

[i]t is our judgment that the attempted exemption as to clubs, contained in chapter 119, is in direct conflict with Art. II § 24, of the Washington constitution, and the statute in that respect is thereby held to be unconstitutional.

247 P.2d at 798. See also: Commonwealth v. Malco-Memphis Theatres, 169 S.W.2d 596, 598 (1943) ("[t]he clearly expressed purpose of the 1938 amendment to section 2573 of Carroll's Kentucky Statutes was to exempt theatres from the prohibition of conducting lotteries. The amendment is in direct contravention of the mandatory language of Section 226 of the Constitution, and, consequently is void."); Otto v. Kosofsky, 476 S.W.2d 626, 630 (Ct. App. Ky. 1972) ("Bingo Licensing Act" providing that cities could in certain instances license certain bingo games with the net proceeds of the games to be donated to educational, charitable, patriotic or religious uses was invalid under constitutional provision prohibiting lotteries; "[t]he plain fact is that our constitution forbids all lotteries and gift enterprises. This prohibition can be repealed by a constitutional amendment but not by legislative enactment."). Additionally, in State v. One Coin-Operated Video Game Machine, 321 S.C. 176, 467 S.E.2d 443 (1996), the State Supreme Court determined that a license to operate a game or machine otherwise illegal does not serve to legalize such activity. See also: Ingram v. Bearden, 212 S.C. 399, 404, 47 S.E.2d 833, 835 (1948) ["the licensing of any machine shall not make lawful the operation of any gambling machine or device the operation of which is made unlawful under the laws of the State."]. Of course, as recognized in the June 23, 2004 opinion, "...only a court may declare § 61-2-180 to be in conflict with Art. XVII, § 7 of the State Constitution. Until such time as a court so declares this statute to be unconstitutional, it remains a part of the statutory law of South Carolina."

As previously stated, it is my opinion that "River Rally" as described above has the three elements of a lottery, the elements of prize, chance and consideration. As a result, the playing of such would be contrary to South Carolina law. The adoption of the amendment to Article XVII, § 7 of the Constitution authorizing the South Carolina Education Lottery reinforces my conclusion. As a result, any lottery which is not operated by the State is in conflict with the constitutional authorization and thus unconstitutional. Moreover, the Constitution provides no exceptions for lotteries conducted by charitable organizations or for charitable purposes. The provisions of Section 61-2-180 of the Code authorizing lotteries to raise money for charitable purposes by any organization licensed to sell alcoholic beverages pursuant to Title 61 is in conflict with the Constitutional

The Honorable Catherine Ceips
Page 6
May 4, 2005

provision forbidding lotteries. While such a statutory provision is generally presumed constitutional until set aside by a court, it is my conclusion that a court would declare such provision to be unconstitutional. As to any means to make such activities such as "River Rally" legal, it is my understanding that legislation is pending to amend the State Constitution to specifically allow raffles when such are conducted by charitable organizations.

Additionally, S.C. Code Ann. § 16-19-40 (2003) prohibits any person from playing "...at any tavern, inn, store for the retailing of spiritous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field, or open place at (a) any game with cards or dice.... (emphasis added). This Office has consistently concluded that the game of poker is prohibited even when conducted by charitable organizations during events such as a "Monte Carlo night". In an opinion dated April 13, 1984 it was determined that games such as poker played at a "Monte Carlo night" violate the various gambling statutes, including § 16-19-40. The 1984 opinion reasoned cited

Holliday v. Governor of the State of South Carolina et al., 78 F.Supp. 918 (1948),
affd. 335 U.S. 803 (1948) which "...recognizes that it is the public policy of the State
of South Carolina to suppress gambling and that gambling in all forms is illegal in
South Carolina."

Consistent with such, the "River Rally" as described in your letter would also be expressly prohibited by § 16-19-40 as the playing of "any game with cards." Therefore, the game would violate South Carolina's gambling laws. The fact that the event is conducted by a non-profit entity would not change this conclusion. In order for such tournaments to be made legal, legislative amendment would be necessary to exempt such game from the gambling laws prohibitions.

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



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