



STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON
ATTORNEY GENERAL

Office of the Attorney General

Columbia 29211
February 9, 1998

The Honorable Michael E. Easterday
Member, House of Representatives
312B Blatt Building
Columbia, South Carolina 29211

Dear Representative Easterday:

You advised that recently a number of proposals requiring a statewide referendum on video poker have been made. Proponents of this idea -- which would allow the voters to decide whether poker payouts will be legal in South Carolina -- will seek to enact a statute authorizing the holding of the statewide vote. You wish to know whether such a statute would be legally valid.

It is my opinion, as this Office has said time and again, that video poker payouts constitute a lottery in violation of Article XVII, § 7 of the South Carolina Constitution. Thus, a referendum, authorized by enactment of a statute only would not be legally sufficient to make payouts legal. To be constitutionally valid, any referendum or statewide vote must be authorized as part of the constitutional amendatory process, thus requiring a two-thirds approval of both the House and Senate in order to be put to a vote.

Law / Analysis

In Op. Atty. Gen., Op. No. 93-19, this Office ruled that "a cash payoff from playing coin-operated video poker games constitutes a lottery, and thus is in violation of the South Carolina Constitution." We further concluded that because such payouts constitute a lottery, "the only mechanism for permitting these machines to provide cash payoffs is by constitutional amendment." In that opinion, we referenced earlier opinions which had found that "... cash payoffs from pinball machines, which are the antecedent of video machines, 'constitutes an illegal lottery within the meaning of [the] ... South Carolina Code ...'". See, Op. Atty. Gen. October 29, 1990. It was also noted therein that "[t]he previous opinion further recognized that the Supreme Court in Powell v. Red Carpet

Lounge, 280 S.C. 142, 311 S.E.2d 719 (1984), resolved that when coin-operated video machines with free play features are not used for gambling, their use does not contemplate a 'lottery' as that term is used in the State Constitution. Most importantly, ... the Court suggested that if these machines were used for gambling, their use may constitute a lottery." In addition, the 1993 Opinion noted that

State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991), does not undermine the prior opinions of this Office that cash payoffs for pinball machines constitute an illegal lottery. In Blackmon, the Court interpreted the statutory exemption contained in Section 16-19-60, supra, as exempting coin-operated, non-payout machines with free play features from the reach of Section 16-19-40 as long as these machines do not disburse money to the player. In reaching this conclusion, the Court chose to follow a literal interpretation of the Section 16-19-60 exemption; thus, it appears that the Court would construe the exemption contained in Section 16-19-60 to apply only to South Carolina Code Sections 16-19-40 and 16-19-50 and not to other statutory criminal provisions since, again, that is the provision's literal import. Interestingly, the Court in dicta realized that cash payoffs from free games won on coin-operated video machines with free play features "seems to be unlawful gambling ...," 403 S.E.2d, at 662. Thus, it is our opinion that the Court in Blackmon agreed with our earlier opinions and the suggestion in Powell v. Red Carpet Lounge that gambling upon these machines constitutes a lottery. ...

The foregoing 1993 Opinion of Attorney General Medlock was reaffirmed by this Office in an Informal Opinion, dated May 23, 1997 and in an Advisory to Law Enforcement dated December 5, 1997. The May, 1997 opinion recognized that "[i]n South Carolina, a lottery contains three elements -- prize, chance and consideration." [citing Darlington Theatres v. Coker, 190 S.C. 282, 2 S.E.2d 782 (1939)]. That Opinion referenced several of a number of decisions from other jurisdictions which have held that video poker and other similar games constitute a lottery or are predominately games of chance in the play thereof or that chance outweighs or easily thwarts any element of skills. See, e.g. Collins Coin Music Co. v. N.C. Alcoholic Beverage Control Commission, 117 N.C. App. 405, 451 S.E.2d 306 (1994); U.S. v. Marder, 49 F.3d 564 (1st Cir. 1995); Poppen v. Walker, 520 N.W.2d 238 (S.D. 1994); O'Carroll Rest. Corp. v. New York State Liquor Auth., 509 N.Y.S.2d 17 (1986); United States v. 20 "Dealer's Choice" Mach. and Coin Contents, 341 F.Supp. 1147 (D.S.C. 1972), revd. on other grounds, 483 F.2d 474 (4th Cir. 1973); U.S. v. 294 Various Gambling Devices, 718 F.Supp. 1236 (W.D. Pa. 1989); Commonwealth of Pa. v. Two Electronic Poker Game Machines, 465 A.2d 973

The Honorable Michael E. Easterday

Page 3

February 9, 1998

(Pa. 1983); SCORE Family Fun Center, Inc. v. Co. of San Diego, 275 Cal. Repr. 358, 361 (1990); Matter of: An Omega Brand: Double Up., Etc., 676 S.W.2d 292, 294 (Mo. 1984).

Our Supreme Court has not as yet spoken to the issue of whether video poker payouts constitute a lottery in violation of Art. XVII, § 7. However, a decision on that question may be imminent in view of the pendency of and rapid progress of Johnson et al. and State ex rel. Condon v. Collins Entertainment Corp. et al. The State of South Carolina has now been allowed to intervene in that case. United States District Judge Joseph Anderson has ruled that he will soon certify the State constitutional question of lottery to the South Carolina Supreme Court. Indeed, evidence as to how the machines operate is being received this week.

Once the question of whether payouts are a lottery -- the last three Attorney Generals of South Carolina have agreed that they are -- is certified to the Supreme Court, a definitive ruling on this question could then come very quickly. Briefs and arguments could be required in March. A decision declaring poker payouts illegal under the South Carolina Constitution could then soon follow.

If the Court indeed declares poker payouts a lottery, only a constitutional amendment could then authorize such payouts. The South Carolina Supreme Court has stated that "Section 1 of Article XVI of the Constitution sets forth the only method by which it may be amended other than by conversation." Watts v. Oliphant, 246 S.C. 402, 143 S.E.2d 813 (1965). The Court recognized that

[t]his method consists of three steps, as follows:

- (1) Any amendment to the Constitution may be proposed in the Senate or House of Representatives. If the same be agreed to by two-thirds of the members elected to each House, such amendment shall be entered on the Journals respectively, with the yeas and nays taken thereon.
- (2) the proposed amendment shall then be submitted to the qualified electors of the State at the next general election thereafter for Representatives; and if a majority of the electors qualified to vote for members of the General Assembly, voting thereon, shall vote in favor of such amendment;

- (3) then, to become part of the Constitution, a majority of each branch of the next General Assembly shall, after such election and before another, ratify the amendment by yeas and nays: Provided, that such amendment shall have been read three times, on three several days, in each House.

Warning that the foregoing requirements must be observed, the Court noted that "[i]t is well established that compliance with the foregoing provisions for amendment of the Constitution is mandatory; and a strict observance of every substantial requirement is essential to the validity of the proposed amendment." (Citing Duncan v. Record Publishing Company, 145 S.C. 196, 143 S.E. 31).

Elsewhere, in Scroggie v. Bates, 213 S.C. 141, 48 S.E.2d 634 (12948), our Court rejected the notion that the legitimate constitutional amendment process could be thwarted by legislative action or approval of a particular practice prohibited by the Constitution. "Under no circumstances can this Court agree to the suggested proposition that by repeated violations of the Constitution, the Legislators may thus amend that instrument," emphasized the Court.

In adopting the constitutional ban against lotteries, our framers showed keen insight and demonstrated remarkable foresight. They dealt with the issue of lotteries in the highest form of law -- the Constitution -- and wrote the Constitutional provision broadly. Thus, the framers required that the intricate legal steps necessary to amend the State Constitution must be followed if the constitutional prohibition is to be lifted or revised. To do so, there cannot be just a simple majority vote of the Legislature, but 2/3 of both houses. There cannot be a county-by-county or statewide referendum authorized by statute, but a referendum which is part of the constitutional amendment process. Ratification by the succeeding Legislature after a favorable constitutional referendum is also mandated. This was the very process required to permit the game of bingo under certain circumstances. Thus, to legitimize games of chance such as video poker, the constitutional framers directed that everyone play by the constitutional rules. A referendum authorized by a statute -- which, of course only requires a simple majority vote in each House -- does not so comply. In short, the Legislature cannot authorize by statute what is prohibited by the Constitution.

A particularly instructive case in this regard is Westerberg v. Andrus, 757 P.2d 664 (Idaho 1988). There, by initiative (through petition) a proposed lottery was placed on the general election ballot. This followed a failure in the Legislature to obtain the necessary 2/3 vote of both houses to propose a constitutional amendment authorizing a lottery. The Court held that the initiative mechanism was an attempt to circumvent the State

The Honorable Michael E. Easterday

Page 5

February 9, 1998

Constitution. Rejecting the argument that the Constitutional prohibition only related to the Legislature and not a vote of the people, the Court opined that

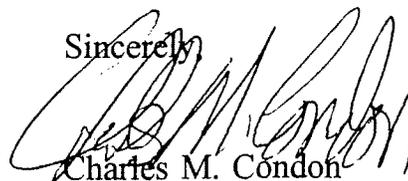
[w]ere the Court today to accept the defendant's argument that initiative legislation is not subject to the same constitutional limitations as legislation enacted by the Idaho legislature, we would have to attribute to those who amended the Constitution ... an intent to make a major change in the public policy of this state

757 P.2d at 668. In the judgment of the Westerberg Court, "[t]he weight of authority demonstrates that the constitutional prohibition against lotteries ... extends to all legislative power, whether exercised by the legislature or by the electorate." Id. at 670. Thus, the lottery initiative was deemed to be unconstitutional.

This Office, of course, strongly supports the idea of letting the people decide key issues. However, the Constitution must be respected and followed even where the people's right to decide an issue is concerned. To maintain a living, breathing Constitution, we cannot afford to have any one of its provisions placed on life-support. The people's right to vote must be provided in the manner and through the means which the State Constitution directs. Cf., Condon v. Martin, ___ S.C. ___, 478 S.E.2d 272 (1995) [county-by-county prohibition on legality of video poker payouts violates State Constitution].

The bottom line is this. The last three Attorneys General have concluded that video poker payouts constitute an unconstitutional lottery. Virtually every jurisdiction which has considered the question agrees. A final decision by the South Carolina Supreme Court on the constitutional lottery question is likely imminent. Thus, it makes little sense to put the State to the expense of what is likely an invalid referendum until this issue is finally resolved by the Court. The function of the Attorney General, who is chief legal advisor to the General Assembly, is to protect and defend the Constitution. Therefore, it is my opinion that the General Assembly must conduct any referendum concerning the legality of video poker payouts in accord with the Constitution to be legally binding. In this instance, the only proper public referendum which would be constitutional is a vote of the people pursuant to a proposed constitutional amendment.

Sincerely,



Charles M. Condon

Attorney General

CMC/an