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October 29, 1990

The Honorable John W. Tucker, Jr.
Member, House of Representatives
Route 1, Highway 81 North
Anderson, South Carolina 29621

Dear Representative Tucker:

You have asked our advice with respect to the "legality of a coin-operated device called 'eight line' that is presently being distributed in the State of South Carolina." It is your view that "there is no skill involved in playing this machine and it is my belief that under previous ruling regarding video poker machines, that this device is an illegal machine."

This Office has consistently concluded 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., May 23, 1978; see also, Op. Atty. Gen., May 22, 1981.

However, in Powell v. Red Carpet Lounge, 280 S.C. 142, 311 S.E.2d 719 (1984), the South Carolina Supreme Court, in reviewing the legality of certain video machines, including draw poker, concluded that such machines were not per se illegal and did not constitute a lottery. It should be noted that the Court in Powell did not address the situation of the illegal use of such machines.

Then, in State v. Blackmon, 89-GS-29-360 (November 29, 1989), the defendant was indicted pursuant to Sections 16-19-40 and 16-19-50 of the Code for unlawful gambling. The indictment alleged that the defendant had disbursed money to individuals who played electronic poker machines.

Section 16-19-40 states:

If any person shall play at any tavern, inn, store for the retailing of spirituous 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, (b) any gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (c) any roley-poley table, (d) rouge et noir, (e) any faro bank or (f) any other table or bank of the same or the like kind under any denomination whatsoever, except the games of billiards, bowls, backgammon, chess, draughts or whist when there is no betting on any such game ... or shall bet on the sides or hands of such as do game, upon being convicted thereof, before any magistrate, shall be imprisoned for a period of not over thirty days or shall suffer a fine of not over one hundred dollars, and every person so keeping such tavern, inn, retail store, public place or house used as a place for gaming or such other house shall, upon being convicted thereof, upon indictment, be imprisoned for a period not exceeding twelve months and forfeit a sum not exceeding two thousand dollars, for each and every offense.

Section 16-19-50 provides:

Any person who shall set up, keep or use any (a) gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (b) roley-poley table, (c) table to play at rouge et noir, (d) faro bank or (e) any other gaming table or bank of the like kind or of any other kind for the purpose of gaming except the games of billiards, bowls, chess, draughts and backgammon, upon being convicted thereof, upon indictment, shall forfeit a sum not exceeding five hundred dollars and not less than two hundred dollars.

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Pursuant to Section 16-19-60 of the Code:

Nothing in § 16-19-40 or 16-19-50 shall extend to coin-operated nonpayout machines with a free play feature; provided, that nothing herein shall authorize the licensing, possession, or operation of any machine which disburses money to the player. 1/

It was stipulated in Blackmon that the poker machine involved was a "coin operated, nonpayout machine with a free play feature." The Honorable Robert L. McFadden, Chief Administrative Judge, Sixth Judicial Circuit, concluded as follows with respect to the legality of use of video poker machines (and similar devices):

Although these sections [16-19-40 and 16-19-50] seem to make unlawful the alleged gambling activity at the Defendant's store, the language in Section 16-19-60 specifically excludes coin-operated nonpayout machines with a

1/ Similarly, Section 12-21-2710 of the Code provides:

It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, and video games with free play feature or to automatic weighing, measuring, musical, and vending machines which are constructed to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both. (Emphasis added)

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free play feature from the reach of Sections 16-19-40 and 16-19-50. The State and the Defendant have stipulated that the machine in question is a coin-operated nonpayout machine with a free play feature. Thus, I find that the alleged activity at Defendant's store is not unlawful gambling under the South Carolina Code Sections above cited because of the plain meaning of Section 16-19-60. (emphasis added).

A copy of Judge McFadden's Order is included.

This Office has appealed Judge McFadden's ruling. In our brief to the South Carolina Supreme Court, a copy of which is also enclosed, we have argued:

Construing § 16-19-40 and § 16-19-60 in pari materia, it is clear that the trial judge erred when he quashed the indictment based on his belief that § 16-19-40 barred prosecution of Respondent. In creating the exception in § 16-19-60, the General Assembly intended only a limited exemption. Only those coin-operated nonpayout machines that have a free play feature and which do not disburse money to the player are protected. Such a machine is not illegal per se. Powell v. Red Carpet Lounge, supra... When money is disbursed to the player, however, the activity is no longer protected by § 16-19-60. Rather, such activity is illegal "gaming" in violation of §§ 16-19-40 and -50.

While I assume that the machine referenced in your letter is a coin-operated nonpayout machine with a free play feature, I have not seen and am not familiar with the particular type of machine referenced. Of course, this office possesses no authority to investigate potential criminal violations and we are unable to resolve factual issues. See, Op. Atty. Gen. November 15, 1985. Thus we cannot comment as to the legality or illegality of a particular machine or its use.

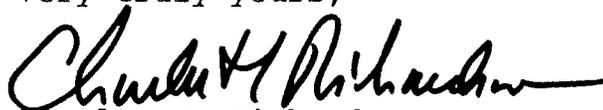
Clearly, we continue to adhere to the positions of this Office referenced above, i.e. that "cash payoffs" from the play of video poker machines constitute a violation of state law, as expressed in previous opinions and as set forth in our brief in State v. Blackmon. Until such time as the Supreme Court rules in the Blackmon case, however, it would be inappropriate to comment beyond what has been stated above.

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Of course, the function of this Office at this point is to provide you with the general law relating to the issue in question. Any prosecutorial decision with respect to a specific case is a matter for the local solicitor and we generally support the Solicitor's decision. As referenced in a prior opinion of this Office dated July 11, 1989, "... the judgement call as to whether to prosecute a particular individual or whether a specific prosecution is warranted, or is on sound legal ground in an individual case remains a matter within ... (the solicitor's) ... exclusive discretion and jurisdiction." Where the local Solicitor has determined, however that there may be a violation of the gambling laws in connection with the use of video poker machines or other similar machines, this Office will, of course, cooperate fully with the local Solicitor and provide him whatever prosecutorial assistance he may need, should he so request our assistance.

With kind regards, I remain

Very truly yours,

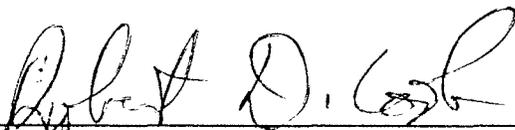


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Enclosures

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