7947 Judiciary

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

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Dear Major Keel:

Your recent letter referenced several gaming machines (GT 2001 - GT 2004, Mega Touch, and Slingo Video Gaming Machines). Therein, you state that "SLED has seized several of the above-mentioned machines for illegal payouts." By way of background, you noted that

> [a]fter review/inspection of the machines, it was determined that they contain games, which simulate the play of cards.
>
> In the machines, different icons such as pool balls are used in the card games. The player can discard the icons of playing cards to obtain the best possible winning hand. No skill is required to determine the final outcome of these games.

You ask whether "[u]nder Section 12-21-2710, does the machine itself become illegal per se because of the illegal games?"

We begin our analysis by noting that in rendering an Attorney General's opinion, this Office has consistently recognized that it cannot make factual findings. As we stated in *Op. S.C. Atty. Gen.*, Op. No. 85-132 (November 15, 1985), "[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able in a legal opinion to adjudicate or investigate factual questions."

The General Assembly has designated the judicial procedure to be used in determining the legality of a particular video machine by virtue of the enactment of § 12-21-2712 of the Code. This provision states that "[a]ny machine, board, or device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county ... who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it immediately be destroyed."

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Our Supreme Court recognized this procedure and commented at length upon it in *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000) and *Allendale County Sheriff's Office v. Two Chess Challenge II, games of skill*, 361 S.C. 581, 606 S.E.2d 471 (2004). In *State v. 192 Video Game Machines, supra*, the Court concluded that "the magistrate's examination of the seized machines must include an opportunity for the owner of the machines to be heard concerning their legality." 338 S.C. at 195. In the Court's view, due process requires "a post-seizure opportunity for an innocent owner 'to come forward and show, if he can, why the [machine] ... should not be forfeited and disposed of as provided by law.'" *Id.*

Moreover, *State v. 192 Video Games* Court rejected any argument that a legal opinion rendered by the Circuit Solicitor to the effect that the machines in question could be legally stored, served to validate the machines in any way. To the contrary, the Court emphasized that the question of the legality of a machine is a matter to be determined by the magistrate pursuant to the procedure established by § 12-21-2712 and that in the case before it, "the magistrates [correctly] set out what statute was violated and how the machines violated it." *Id.* at 197.

In *Two Chess Challenge II*, the Court reaffirmed its conclusions in *State v. 192 Game Machines*. Moreover, the Court emphasized anew its earlier ruling that § 12-21-2712 imposes upon the magistrate the duty to determine whether a particular machine or machines seized violates § 12-21-2710, holding that such determination must be made on an individual machine basis. The Court clarified the § 12-21-2712 forfeiture process as follows:

> [i]n the present case, the magistrate ruled on the legality of the two machines before the court and "all those [machines] operating in an identical manner." The broad ruling exceeded the scope of the magistrate's authority and is contrary to the machine-by-machine forfeiture process outlined in the statute and carried out in other cases. Therefore, we find that the magistrate court lacked jurisdiction to determine the legality of machines not before court.

361 S.C. at 586-587.

Thus, the question of whether any particular machine is an illegal gambling device proscribed by § 12-21-2710 as contraband *per se* must be determined initially by law enforcement and ultimately by the fact finder (magistrate) in a court of law. Accordingly, this Office cannot in an opinion resolve the factual questions necessarily surrounding the legality or illegality of a particular video game machine.

Law / Analysis

With those caveats, we turn now to your inquiry which we deem as primarily a legal question. The issue here is whether a machine which contains games which simulate the play of card games (such as poker) is illegal *per se* pursuant to § 12-21-2710. We presume from this question that such

a machine contains other games not illegal. Your question thus requires a construction of § 12-21-2710. Therefore, the scope of this opinion will address that question rather than the facts surrounding a particular machine.

> S.C. Code Ann. Section 12-21-2710 provides in pertinent part as follows:
>
> [i]t 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, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, *or other device operated by a slot in which is deposited a coin or thing of value, for the play of poker, blackjack, keno, lotto, bingo or craps*, or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind .... (emphasis added).

Accordingly, we must initially address the meaning of the phrase "or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto or craps ...."

A number of principles of statutory construction are pertinent here. First and foremost, is the cardinal rule of statutory interpretation, which is to ascertain and effectuate the legislative intent, whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002) (citing, *State v. Baucom,* 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used, and such language must be interpreted in light of the statute's intended purpose. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

Moreover, a statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. *Caughman v. Cola. Y.M.C.A.*, 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). A court must apply the clear and unambiguous terms of a statute according to their literal meaning. *Id.*

We note that Section 12-21-2710 was amended by Act No. 125 of 2000. The General Assembly, as part of Section 1 of the Act (which reenacted § 12-21-2710 in its entirety), inserted after the words "slot machine," and before the words "or any punch board, pull board, or other device pertaining to games of chance" the following clause:

> or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value

, as well as this clause:

> , or other device operated by a slot in which is deposited a coin or thing of value *for the play of poker, blackjack, keno, lotto, bingo or craps* .... (emphasis added).

These insertions represented a major strengthening of § 12-21-2710 which, as noted above, designate gambling devices as contraband *per se* and subject to seizure and destruction.

Furthermore, it is well established that a court will consider "relevant information about the historical background of the enactment of a statute in the course of making decisions about how it is to be construed and applied." *Op. S.C. Atty. Gen.*, Op. No. 78-10 (January 9, 1978), quoting Sutherland, *Statutory Construction*, § 48.03. The background leading up to passage of Act No. 125 of 2000 is aptly described by our Supreme Court in *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 534 S.E.2d 270 (2000). There, the Court traced the entire history of video gambling in South Carolina, culminating in Act No. 125's enactment by the General Assembly. The Court described these events as follows:

> For nearly seventy years, gaming machines have been illegal in this State and subject to forfeiture as contraband. In 1931, the General Assembly enacted a comprehensive statute outlawing the possession of all forms of gambling devices, including vending machines that could be operated as gambling devices. 1931 S.C. Act No. 368. ... In 1982, however, the General Assembly enacted an exemption for "video games with free play feature" which were a relatively recent technological development. 1982 S.C. Act No. 466. ... In *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991), we held nonmachine cash payouts from these video gaming machines were legal under a pre-existing statute, S.C. Code Ann. § 16-19-60 (Supp. 1999). ....
>
> In the ensuing years, our State witnessed the dramatic growth of video gaming into a multi-billion dollar industry that became the subject of much public debate. Despite the repeated introduction of legislation aimed at repealing the exemption for video gaming machines, ... no legislation was passed until 1993. In July of that year, the General Assembly provided for local option referenda to be held on a county by county basis to determine whether nonmachine cash payouts for video gaming should become illegal. 1993 S.C. Act No. 164, Pt. II, § 19H. In November 1994, twelve counties voted in favor of making such payouts illegal. The local option referenda, however, were ultimately struck down by this Court in 1996 as unconstitutional special legislation. *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996). Cash payouts once again became legal throughout the State.
>
> In November 1998, this Court upheld the statutory scheme regulating video gaming machines against a challenge that this type of gaming device constituted an unconstitutional lottery. *Johnson v. Collins Entertainment Co.*, 333 S.C. 96, 508 S.E.2d 575 (1998).

> Finally, in an extra session called by the Governor in June 1999, the General Assembly enacted 1999 S.C. Act No. 125 providing for a November referendum to be held statewide to decide the fate of video gaming. Voters would be asked whether cash payouts for video gaming machines should continue to be allowed after June 30, 2000. If voters answered "no," Part I of the Act would become effective July 1, 2000. This part of the Act repeals § 16-19-60, which allows nonmachine cash payouts, and amends S.C. Code Ann. § 12-21-2710 (2000) to remove the exemption for video gaming machines, thereby rendering the possession or operation of these machines illegal. ... Further, under S.C. Code Ann. § 12-21-2712 (2000), these machines are then subject to forfeiture and destruction by the State. ...
>
> Before the referendum was held, an action was brought challenging its constitutionality. After taking the case in our original jurisdiction, in October 1999, this Court struck down the referendum but severed it from the remaining parts of the Act. Specifically, we found Part I, which bans the possession or operation of these machines, to be a free standing legislative enactment and therefore valid. *Joytime Distrib. and Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999). Accordingly, on July 1, under §§ 12-21-2710 and -2712, these machines will become contraband subject to forfeiture and destruction regardless of their use or operability. *See State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000).

341 S.C. at 300-302.

Thus, in amending § 12-21-2710 by virtue of the passage of Act No. 125 of 2000, the General Assembly sought to make "any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value illegal *per se*. At the same time, Act No. 125 repealed § 16-19-60, which the Court had earlier held in *State v. Blackmon, supra* to exempt such machines from illegality. Section 16-19-60, as stated, exempted "video games with free play feature." Thus, those machines commonly known as "video poker" machines were clearly outlawed by the statute and deemed to be contraband *per se*.

However, Act No. 125 went further than banning what was commonly known video poker machines, which typically had a "free play feature." Section 12-21-2710, as amended by Act No. 125, also declared to be contraband *per se* two other categories of devices. These are: (1) "other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps" and (2) "any machine or device licensed pursuant to § 12-21-2720 and used for gambling ...." It is the first additional clause – declaring illegal a device "for the play of poker," etc. – with which we are concerned here.

Clearly, in our view, this prohibition is one separate and apart from the preceding clause relating to "any video game machine with a free play feature operated by a slot ...." The phrases are

separated by the word "or," which typically signifies the disjunctive. *See, Mungo v. Smith*, 289 S.C. 560, 568, 347 S.E.2d 514 (1986) ["In its elementary sense, the word "or" as used in a statute is a disjunctive indicating that the various members of the sentence are to be taken separately. 73 *Am.Jur.*2d, Statutes Section 241 (1974). Where the statute contains two clauses which prescribe its applicability and the clauses are connected by the disjunctive "or," application of the statute is not limited to cases falling within both clauses, but applies to cases falling within either."] Moreover, while punctuation is general not controlling, it should not be disregarded to create an ambiguity where none exists. *Cf.*, *Lewis v. Carnaggio*, 257 S.C. 54, 183 S.E.2d 899 (1971).

Furthermore, the canon of statutory construction "expressio unius est exclusio alterius" is a well recognized principle of statutory construction meaning "to express or include one thing implies the exclusion of another, or of the alternative." *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). Here, in amending § 12-21-2710, the General Assembly omitted the phrase "free play feature" in describing the devices prohibited in the clause "other device operated by a slot in which is deposited a coin or thing of value for the play of poker ..." etc. Yet, such phrase was used in the preceding clause. Both clauses use the phrase "operated by a slot in which there is deposited a coin or thing of value." The use of the term "free play feature" in one clause and its omission in the next is further evidence that the latter clause was independent and different from the preceding one.

In addition, our Supreme Court has interpreted § 12-21-2710 as making those items specifically enumerated therein as illegal *per se* upon a showing that the device is in itself what the statute prohibits. For example, in *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995), the Court rejected any argument that a slot machine with a free play feature was exempted from the reach of § 12-21-2710 by former § 16-19-60. The Court reasoned that

> [h]ere, the General Assembly has declared slot machines unlawful. Respondent's construction of the statute equating the slot machines in question with a "video game with free play feature" is untenable.

317 S.C. at 399.

And, most recently, in *Sun Light Prepaid Phonecard Co. v. State of South Carolina and SLED*, 360 S.C. 49, 600 S.E.2d 61 (2004), the Court held that phone cards and phone card dispensers were illegal *per se* pursuant to § 12-21-2710. In *Sun Light*, the Court described the phone cards in question as follows:

> [t]he phone cards, including the game pieces, are pre-printed by the manufacturer before they are placed in a dispenser. The cards are printed on rolls containing 7,500 cards. Attached to each phone card is a game piece that gives the customer a chance to win a cash prize. The entire card contains a paper cover, which, when pulled back, reveals a toll-free number and pin number for activating the phone service as well as an array of nine symbols in a 8-liner format. If the game piece contains symbols

> arranged in a certain order, the customer wins a prize. The computer that prints the card randomly generates winners on the cards. Seventy percent of the revenue from the cards is paid out in prizes and the rest is a hold percentage. A hold percentage is the net profit received by the sellers of the cards. The dispensers do not adjust to ensure the hold percentage is received; however, the amount of the hold percentage is predetermined based on the printing of the phone card rolls.
>
> After printing, the roll of pre-printed phone cards are placed inside the dispenser and the dispenser cannot work without a roll of phone cards inside. Each card sells for $1 and gives the customer two minutes of long distance telephone service. The customer can use the two minutes of time by dialing a toll-free number and entering a PIN number. The customer can also recharge the card and put additional long distance time on the card at the rate of 14.9 cents per minute
>
> Appellants contend the purpose of the game piece is to promote the sale of the phone cards. The prizes are paid to the winning customer either by the cashier in the store or by mail, but not by the dispenser itself. A customer does not need to purchase a phone card to obtain a free game piece. A free game piece could be obtained from the operator of the dispenser by mail. Instructions on how to obtain a free game piece were posted on the side of the machine and on the video screen of the machine.

Id. at 51-52. The dispenser aspect of the game was further described by the Court as operating in the following way:

> The phone card dispensers are housed within a standard slot machine cabinet. The dispensers contained several features present in a gambling machine as opposed to a vending machine that simply dispenses a product: (1) the dispensers contain a video screen that has a gambling theme in that, if the user so chooses, the user can see reels turn as if the winner is chosen by the machine; ... (2) if the machine dispenses a winning game piece, celebration music is played, whereas no music plays if the game piece is a loser; (3) the machine has a lock-out feature which freezes the operation of the machine when a pre-determined level of prize money is reached; (4) the machine contains two hard meters, one is an in-meter that records the amount of money going into the machine, and the other is labelled "WON" and records the value of the prizes issued by the machines; (5) the machine, although it accepts $1, $5, $10, $20, $50 and $100 bills, does not have a mechanism for returning change; and (6) the machines could be linked, a feature of a gambling device. ...
>
> Further, although the sweepstakes promotion was set to run for 22 months, the long distance service on the phone cards was valid only for six months from the time the *first* phone card pin number was used. There was testimony that appellants,

> the manufacturer, and the distributor did not keep any records of the phone time used or what pin numbers have been sold via the cards. Also, some stores contained more than one phone card dispenser. According to the least and purchase agreements, Phonecards R Us, Sun Light, and another company not involved in this case, were under contract to sell 117 million and 360 thousand (117,360,000) cards a year in the state of South Carolina. The South Carolina population in early 2000, the time of the seizures, was only about three million people. A marking study had not been conducted to determine whether there would be such a high demand for the phone cards. Finally, the phone company from which the long distance service was purchased could not legally provide intrastate service in South Carolina because it had not been licensed to do so.

Id. at 52-53.

The *Sun Light* Court thus concluded that the phone card portion of the game was contraband *per se* pursuant to § 12-21-2710 because it was a "pull board or other device pertaining to games of chance." In the Court's words,

> [a]lthough the phone cards are an integral component of the dispensers, the phone cards would be illegal if they were issued over the counter as opposed to being placed in the dispensers. As the trial court found, § 12-21-2710 declares illegal any pull board or other device pertaining to games of chance. The phone card itself contains an element of chance and is a type of gambling device known as a pull-tab. Appellants' expert stated that if the card did not include the long distance phone service but only the sweepstakes portion, the card would be a gambling device. Given the characteristics of the phone cards, the phone portion of the cards is mere surplusage to the game piece. Accordingly, the trial court properly determined the phone cards themselves were illegal gambling devices.

Id. at 54-55.

With respect to the dispensers themselves, such devices were deemed by the Court to violate § 12-21-2710 for a different reason. The Court concluded that

> ... the trial court correctly determined the phone card dispensers are like slot machines and not traditional vending machines. The dispensers have a gambling-themed video screen, play celebration music when a customer is a winner, have a lock-out feature which freezes the operation of the machine when a pre-determined level of prize money is reached, contain a meter that records the value of the prizes paid out, and do not give change. None of these features is present in a traditional vending machine that is exempted from § 12-21-21710.

Id. at 55.

Based upon the foregoing, it is clear that the purpose of § 12-21-2710 is to designate all devices "pertaining to games of chance" as gambling devices. Such devices are deemed by law to be contraband *per se*, and thus subject to forfeiture and destruction. As the Court recognized in *Westside, supra*, the forfeiture process "serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable." 534 S.E.2d at 273.

Certain devices, such as slot machines, video game machines with a free play feature operated by a slot, punch boards and pull boards are expressly outlawed by the statute. Also included in this list of banned devices are those "operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo or craps." The devices expressly named in § 12-21-2710 are deemed to be inherently "pertaining to a game of chance," and thus prohibited. In addition, any "other device pertaining to games of chance" is also designated by the General Assembly as contraband *per se*.

Courts have held that "[t]he purpose of the game [of poker] is to get the best poker hand possible." *Mills-Jennings of Ohio, Inc. v. Dept. of Liquor Control*, 70 Ohio St. 2d 95, 435 N.E.2d 407 (1982). There, it was stated that

> [w]hether the game being played is on a video screen or a card table makes no real difference. *In whatever way the game is played the object is the same and that is to win by obtaining the best hand possible. Therefore, the game being played on the machine is a game of "poker" and as such falls within the purview of R.C. 2915.01(D).*

Id. at 96 (emphasis added).

And, in *Flynn v. State*, 34 Ark. 441, 1879 WL 1322 (1879), the Supreme Court of Arkansas held that a criminal statute prohibiting betting money on a game of poker was violated, notwithstanding slight changes made in the game. The Court concluded that

> [t]he statute can not be evaded by slight variations in the name or mode of playing the game; nor by paying money into the hands of a stakeholder or banker, and taking chips to bet with, nor by obtaining chips from others to bet with, which would draw money.

See also, *Op. S.C. Atty. Gen.*, August 12, 1980. ["game of "blind poker" played with dollar bills is game of poker for purposes of lottery statute.].

In *VFW Post 8586 v. Ohio Liquor Control Commission*, 83 Ohio St.3d 79, 697 N.E.2d 655 (1998), the Court recognized that Ohio statutes deemed devices "designed for use in connection with a game of chance" as gambling devices *per se*. Another statute defined a "game of chance to include poker, craps, roulette, a slot machine, or other game ... the outcome which is determined largely or wholly by chance." The Ohio Supreme Court held that Ohio law was violated by video machines which played poker. In the Court's view, once it has been demonstrated that machine "played poker," no other showing was necessary to render the machines gambling devices *per se*. The machines in the case before the Court played a variation of draw poker which did not vary essentially "from poker as it is commonly played." 697 N.E.2d at 659, n. 2. The Court concluded that such machines thus violated Ohio law, stating that

> [b]ecause poker is *per se* a "game of chance" within the meaning of R.C. 2915.01(D), and because it was stipulated that the machines in question play poker, ... the department was not required to produce separate evidence regarding a player's giving of value in hope of gain. *That additional demonstration is required only for games not specifically labeled* as games of chance in R.C. 2915.01(D). Therefore, the commission had before it sufficient evidence to find that the video poker machines at issue played a "game of chance."
>
> Our analysis is consistent with this court's earlier holdings in *Mills-Jennings*, 70 Ohio St. 2d 95, 24 O. O. 3d 181, 435 N.E.2d 407, syllabus, and *Garona v. State*, (1988), 37 Ohio St. 3d 171, 175, 524 N.E.2d 496, 500, both of which classified draw poker machines as gambling devices *per se*. To be a gambling device under R.C. 2915.01(F)(3), the draw poker machines had to be "designed for use in connection with a *game of chance*." (Emphasis added). Because the General Assembly specifically listed poker as a "game of chance," and because the machines at issue played the game of poker, this court concluded that draw poker machines play a "game of chance" within the meaning of R.C. 2915.01(D) .... Additionally, in *Garona*, we settled the issue "once and for all" by specifically holding that "the General Assembly appropriately determined poker to be a game of chance." .

Id.

A similar analysis can be employed with respect to § 12-21-2710. As our Supreme Court expressly recognized in *Squires v. SLED*, 249 S.C. 609, 612, 155 S.E.2d 859 (1967), "[i]t is clear that the Legislature, by the enactment of [§§ 12-21-2710 and 12-21-2712] did condemn any devices pertaining to games of chance." In so doing, the General Assembly enumerated certain devices, such as a slot machine, punch board, or pull board, as devices which are inherently "pertaining to games of chance." By Act No. 125 of 2000, the Legislature added certain other devices including any video game machine with a "free play feature." Act No. 125 also added to the list of devices deemed contraband *per se* any "device operated by a slot in which is deposited a coin or thing of value for

the play of poker, blackjack, keno, lotto, bingo or craps ...." Those devices enumerated are deemed by the Legislature to be inherently games of chance.

Accordingly, any machine simulating the play of poker has been designated as inherently illegal pursuant to § 12-21-2710. Just as our Supreme Court held in *Sun Light, supra* that phone card dispensers "are like slot machines and not traditional vending machines," and thus violate § 12-21-2710, machines containing games which simulate the game of poker are also violative of § 12-21-2710.

Your letter does not specify what particular "card game" is offered in conjunction with the machines in question, but you strongly imply that some variation of the game of poker is involved because you indicate that the game permits the player "to discard the icons or playing card to obtain the best possible winning hand." If the game is, in fact, the simulation of poker or some variation thereof, our opinion is that § 12-21-2710 now expressly prohibits such a game. In short, any device which simulates the game of poker is expressly proscribed by § 12-21-2710. If, on the other hand, a machine simulates some other card game, and none of the other express prohibitions contained in § 12-21-2710 are applicable (such as slot machine), law enforcement officers (and ultimately the magistrate) will have to determine whether the particular card game is one "pertaining to games of chance."

As to any question suggested by your letter as to whether "the machine itself [becomes] illegal *per se* because of the illegal games [i.e. poker], it is our opinion that the answer to this question is "yes." If a machine contains "games" which § 12-21-2710 proscribes, the machine is rendered contraband *per se*. The machine is not "legalized" because it might be used for a legal purpose.

This issue was addressed in some detail by our opinion dated July 27, 2000. There, the question presented was whether "video gambling machines would still be illegal *per se* if they were converted to other uses such as PAC-MAN or as a device for internet gambling. We concluded that such conversion did not serve to make legal an otherwise illegal gambling device. There, we stated the following:

> [t]he Supreme Court in *Westside Quik Shop v. Stewart and Condon* [*supra*] made the answer to SLED's question very clear. In *Westside*, the Court stated that "on July 1, ... these machines will become contraband subject to forfeiture and destruction regardless of their use or operability."
>
> ... Citing, *State v. 192 Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). Consistent with the *Westside* ruling is our opinion to you, dated May 8, 2000, wherein we advised that "the General Assembly did not intend to play games here .... An illegal video game machine will remain illegal regardless of what parts are removed therefrom or what parts remain thereof." And as the Supreme Court said

> earlier in *Squires v. S.C. Law Enforcement Division*, 249 S.C. 609, 155 S.E.2d 859 (1967), "we think it would abort the legislative purpose to hold that an assembled gambling device is the only one that is condemned and subject to seizure and destruction ...."
>
> Finally, the Supreme Court in *State v. 192 Game Machines* anticipated that the video gambling industry would attempt to circumvent the statute by converting gambling devices to other types of machines. There, the Court summarized the gambling operators' argument as follows: "Today, with the advent of the computer, a video game machine is simply a box containing a computer which can be configured to play a variety of games, from poker to PAC-MAN; therefore the machine itself should not be considered illegal." The Court rejected this argument, stating that "possession of these machines is illegal regardless of their intended use or operation."

Thus, it is clear that, notwithstanding other non-illegal "games" contained as part of a machine, if a machine simulates the game of poker, or is some other device specifically designated as illegal *per se* by § 12-21-2710, or offers games "pertaining to games of chance," such machine violates § 12-21-2710 and is *per se* illegal.

Conclusion

As noted above, this Office cannot resolve in an opinion the alleged illegality or legality of a specific machine. If a law enforcement officer possesses probable cause that a machine or device violates § 12-21-2710, he or she must seize such machine or device and take it to the magistrate, who is then empowered to rule upon the alleged illegality of the machine on a machine-by-machine basis.

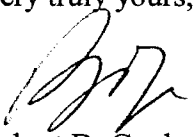
Assuming any machine simulates the game of poker, we advise that Section 12-21-2710 expressly prohibits such a device as *per se* illegal. This express prohibition was added by Act No. 125 of 2000, which amended § 12-21-2710 to include as contraband *per se* any "device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo or craps ...." This clause stands separate and apart from § 12-21-2710's preceding clause (also added by Act No. 125 of 2000) which proscribes video game machines "with a free play feature operated by a slot in which is deposited a coin or thing of value ...." In other words, the statute prohibits not only machines commonly known as "video poker" machines, but separately prohibits as *per se* illegal those machines which simulate the play of poker, as well as those other specific devices enumerated in § 12-21-2710 (i.e. slot machines, pull tabs etc.). Moreover, §12-21-2710 bans (as it has since 1931) all devices "pertaining to games of chance."

Moreover, if a law enforcement officer determines that a video game machine does not simulate the game of poker, but some other "card game," then he or she must determine whether any other express enumeration contained in § 12-21-2710 is applicable (such as slot machine, etc.). If

no expressly enumerated device is apparent, then the officer must determine if the card game is one "pertaining to games of chance." In any of these instances, the machine is *per se* illegal.

Finally, it is also our opinion that any machine which contains a game or games prohibited by § 12-21-2710 – such as poker, for example – is illegal *per se*, notwithstanding the existence of other games which also might be programmed for play on the same machine. Our Supreme Court has emphasized that a device which violates § 12-21-2710 makes possession of such machine "illegal regardless of... intended use or operation." Thus, the fact that an illegal *per se* machine may be used for other purposes is irrelevant. An illegal *per se* machine is not rendered legal because it may be used for legal purposes.

Very truly yours,



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