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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 9, 1999

The Honorable Luke A. Rankin
Member, South Carolina Senate
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Rankin:

You have requested an opinion as to whether the federal Johnson Act allows not only a state, but a political subdivision of a state to exempt itself through legislative action from the effect of the federal law?

Law/Analysis

It is my understanding that your question refers to pending Bill No. S.3, as amended. This Bill is designed to overcome the effects of the 1992 amendments to the federal Johnson Act, as recently interpreted by Judge Norton in Casino Ventures v. Condon.

In the Casino Ventures case, United States District Judge Norton interpreted 15 U.S.C. § 1175 (Johnson Act amendments) as legalizing so-called "cruises to nowhere." Such cruises offer gambling activities beyond the three-mile limit which delineates the State's territory. Judge Norton held that the 1992 amendments to the Johnson Act, in effect, "preempted" South Carolina's laws prohibiting the possession of gambling equipment with respect to "cruises to nowhere." South Carolina's gambling statutes would ordinarily prohibit these cruises, at least in part, because the cruise operators would be in unlawful possession of gambling equipment in South Carolina both going to and coming from the three-mile limit where the gambling occurs. Judge Norton found that Congress intended the 1992 amendments to supersede such state laws unless and until a state enacted a new law specifically banning "cruises to nowhere." He found, in other words, that for South Carolina

to ban these cruises, would require a new Act of the General Assembly. The State could not rely upon the old gambling statutes in his view. In the language of Judge Norton,

> [t]he South Carolina General Assembly could outlaw day cruises tomorrow and Plaintiff and any business like it would be lawfully put out of business.

Order of the District Court, October 16, 1998. The District Court thus read the Johnson Act amendments and the accompanying legislative history as authorizing any State, including South Carolina, to enact prohibitory legislation to "opt out" of the Congressional amendment. The Court stated in the same Order that

> South Carolina has not [as yet] enacted any statute opting out of the 1992 amendments to the Johnson Act and the statutes South Carolina adopted prior to the 1992 amendments to the Johnson Act . . . do not meet the criteria of the opt out provision of 15 U.S.C. § 1175 . . . .

The specific portion of the 1992 Johnson Act amendments to which Judge Norton was referring was 15 U.S.C. § 1175 (b) (2) (A).

This provision states as follows:

> (2) Application to certain voyages
> (A) General Rule
> Paragraph (1) (A) does not apply to the repair or use of a gambling device on a vessel that is on a voyage or segment of a voyage described in subparagraph (B) of this Paragraph **if the State or possession of the United States in which the voyage or segment begins and ends has enacted a statute the terms of which prohibit that repair or use on that voyage or segment.** (Emphasis added).

As you are no doubt aware, this Office strenuously disagrees with Judge Norton's ruling. We have appealed his Order to the Fourth Circuit Court of Appeals and have filed two Briefs, arguing to that Court that he erred. The basis for our appeal is that we do not find it logical to require South Carolina again to ban what has long been prohibited. Oral arguments are set for May of this year. Thus, as I stated in my January 26, 1999 Opinion to

Mr. Lloyd, Counsel for the House Judiciary Committee, this Office "must be very cautious in any comment it might make regarding the . . . pending legislation. It would be most unwise and imprudent to make any statement which would suggest any inconsistency with the State's official position in court."

In an effort to assist you, however, I would make the following comments with respect to your specific question. In my view, the Johnson Act does not really speak to the issue you have raised. Even assuming for the sake of argument, that Judge Norton's Order is correct, and a statute enacted by the General Assembly banning "cruises to nowhere" is indeed now necessary, the pertinent Johnson Act amendment references only the need for "a statute the terms of which prohibit that repair or use on that voyage or segment." The federal law does not mention the separate action of a political subdivision such as a county or municipality in any way. However, it is my view that the statute's language requires a state to exempt itself completely and not leave it to a local political subdivision to determine whether it will opt out of the statute on an individual basis.

The text of S.3, as recently amended, provides as follows:

> SECTION 1. Gambling activities prohibited by statutory laws and by the Constitution of this State are prohibited on vessels where voyages begin and end in waters of this State, consistent with the standards specified in 15 U.S.C. 1175, commonly referred to as the Johnson Act. Except as otherwise provided herein, this act prohibits gambling activities on so-called "cruises to nowhere".
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> SECTION 2. Chapter 19 of Title 16 of the 1976 Code is amended by adding:
>
> "Section 16-19-170. (A) As used in this section:
>
> (1) 'Vessel' means a boat, ship, casino boat, watercraft, or barge kept, operated, or maintained for the purpose of gambling, with one or more gaming establishments aboard, that carries or operates gambling devices for the use of its passengers or otherwise provides facilities for the purpose of gambling, whether within or without the jurisdiction of this State, and whether it is anchored, berthed, lying to, or navigating and the

sailing, voyaging, or cruising, or any segment of the sailing, voyaging, or cruising begins and ends within this State.

(2) `Gambling' or `gambling device' means a game of chance and includes, but is not limited to, slot machines, punch boards, video poker or black jack machines, keeno, roulette, craps, or any other gaming table type gambling or poker, blackjack, or any other card gambling game.

(B) Except as provided in Section 3, it is unlawful for any person to repair or use any gambling device on a vessel that is on a voyage or segment of a voyage if:

(1) the voyage or segment begins and ends in this State; and

(2) during which the vessel does not make an intervening stop within the boundaries of another state or possession of the United States or a foreign country.

(C) The following voyages and segments are lawful if the voyage or segment includes or consists of a segment:

(1) that begins and ends in this State;

(2) that is part of a voyage to another state or possession of the United States or to a foreign country; and

(3) in which the vessel reaches the other state or foreign country within three days after leaving the state in which the segment begins."

SECTION 3. A violation of Section 16-19-170 is not a criminal offense, but is a violation for which a civil penalty, not to exceed twenty-five thousand dollars for each violation, may be imposed by the Department of Revenue.

SECTION 4. (A) Notwithstanding the provisions of Section 16-19-170: (1) the governing body of a coastal county by

ordinance may suspend the application of the gambling prohibitions provided for in Section 16-19-170 for the unincorporated area of the county; and (2) the governing body of a municipality by ordinance may suspend the application of the gambling prohibitions provided for in Section 16-19-170 for the municipality.

(B) The county election commission or the municipal election commission, as appropriate, shall place the question contained in this subsection on the ballot in November 2000 in a coastal county in which the county governing body or the municipal governing body, as appropriate, has suspended application of the gambling prohibition provided for in Section 16-19-170 by ordinance within ninety days before the 2000 general election. The state election laws apply to the referendum, mutatis mutandis. The State Board of Canvassers shall publish the results of the referendum and certify them to the Secretary of State. If the result of a referendum is in favor of reinstating the gambling prohibition within the county or municipality, Section 16-19-170 applies in that county or municipality after the result of the referendum is certified to the Secretary of State.

The question put before the voters shall read:

"Shall the prohibition against gambling, however described, on a vessel that embarks and disembarks within South Carolina be reinstated in _____municipality/county"?

(C) For purposes of this section, a 'coastal county' means Beaufort, Berkeley, Charleston, Colleton, Horry, Jasper, or Georgetown County.

SECTION 5. Nothing in this act shall be construed to repeal or modify any other provision of law relating to gambling. This section does not repeal or modify any law with regard to bingo or the operation of a device or machine pursuant to Section 12-21-2720(A)(3).

> SECTION 6. If any provision of this act or the application of these provisions to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end, the provisions of this act are severable.

At least two serious legal problems are created by Section 4 of the Bill as recently amended. Section 4 enables the county or municipal governing body to suspend application of the statewide gambling prohibition in a "coastal county", as defined, with a referendum of the voters then to occur in those areas in the year 2000 to determine whether such gambling prohibition shall be reinstated. Assuming arguendo, that Judge Norton's ruling is correct, it is certainly questionable whether S.3 would meet the literal criteria of the Johnson Act's 1992 amendment that there must be a statute "the terms of which prohibit that repair or use on that voyage or segment." Giving effect to S.3, as drafted, could well result in a checkerboard of different laws in various parts of the state relating to "cruises to nowhere". For example, such cruises could conceivably end up illegal in one coastal area such as Georgetown, legal in Horry or Myrtle Beach, and illegal in the rest of the state. That kind of local disparity simply may not meet the literal language of the federal Johnson Act requirement that a state statute must expressly prohibit "cruises to nowhere" in order for the State to have exempted itself from the Johnson Act amendments. Although the Bill makes "cruises to nowhere" illegal throughout the State at the outset of its becoming law, a court might well conclude that the local option provision, allowing some areas of a state to exempt themselves from the general prohibition statewide does not go far enough to meet the federal requirements of a state statute's exemption from the federal preemption. A court may well ask the reasonable question how this is a statute "the terms of which" ban "cruises to nowhere" when it is conceivable that every part of the state where such cruises might occur may elect to make such cruises legal? Again, the federal law simply does not speak to this question and I can only alert you to this as a serious possibility.

Beyond problems with the federal law, however, are those relating to the State Constitution prohibiting special legislation recognized by our Supreme Court in Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996). In Martin, the Supreme Court recently held that S. C. Code Ann. §§ 12-21-2806 and -2808 of the Video Games Machines Act was unconstitutional. Section 12-21-2806 had provided for a referendum vote held on a county-by-county basis to determine the legality of non-machine cash payouts from coin-operated video games machines. As a result of the statutory referenda, such payments had been made illegal in twelve of the forty-six counties in South Carolina. Section -2808

had further provided for subsequent referenda in future years.

The Court found these statutes to be unconstitutional because "the effect of the local option laws is to treat the same conduct differently in each county and the result is unconstitutional special legislation." The Court explained its reasoning as follows:

> [g]aming and betting are activities subject to statewide criminal laws. Under S. C. Code Ann. § 16-19-40 (1985), gaming or betting is unlawful. It is punishable by thirty days' imprisonment or a fine of $100; further, under the same section, keeping a place used for such a purpose is punishable by a one-year term of imprisonment or fine of $2,000. Under S. C. Code Ann. § 16-19-60 (Supp.1995), however, coin-operated nonpayout machines with a free play feature are exempted from § 16-19-40. Under this exemption, non-machine cash payouts are legal. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).
>
> The local option law before us in this case, § 12-21-2806, allows the counties to opt out of the exemption provided in § 16-19-60 for these non-machine cash payouts. In the counties that voted for the elimination of this exemption, the effect is to criminalize conduct that remains legal elsewhere under State law. (Emphasis added).

Justice Toal wrote a vigorous dissent. In denying petitioners' request for a rehearing, the Court further commented that

> [w]e take this opportunity to emphasize once again that our ruling in this case is a narrow one. Where there is no relevant statewide criminal law, local government may regulate conduct consistent with its constitutional and statutory authority. Moreover, we reject the contention that we have somehow limited the power of the General Assembly to delegate police power to local government. It is completely within the General Assembly's discretion to repeal a statewide criminal law in favor of allowing local government to regulate the conduct in question. (Emphasis added).

In Martin, the Court also devoted much discussion to the power of counties and municipalities to regulate conduct beyond that touched by state law. The Court stated that

> [a]rticle VIII, § 14(5), of our constitution requires statewide uniformity of general law provisions regarding "criminal laws and the penalties and sanctions for the transgression thereof." Accordingly, local governments may not criminalize conduct that is legal under a statewide criminal law. Connor v. Town of Hilton Head Island, 314 S.C. 251, 442 S.E.2d 608 (1994) (municipality cannot criminalize nude dancing where relevant State law does not); see also City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991) (local government cannot impose different penalties for possession of marijuana than those established under State law). Here, the effect of § 12-21-2806 is to criminalize in twelve counties conduct that is legal under a State criminal law. This effect conflicts with the constitutional requirement of uniformity in the area of State criminal laws and thus violates Article III, § 34, as unconstitutional special legislation. (Emphasis added).

Thus, the Martin majority clearly seemed to be emphasizing throughout the opinion that the General Assembly is constitutionally impotent to "criminalize in twelve counties conduct that is legal under a state criminal law" or which would have the effect of criminalizing "conduct that remains legal elsewhere under State law." The majority's remedy was for the General Assembly to "repeal a statewide criminal law in favor of allowing local government to regulate the conduct in question." (Emphasis added).

It is true that S.3, as recently amended, does not make the prohibition against "cruises to nowhere" criminal, imposing instead "civil penalties" for a violation thereof. The Bill specifically states that "[a] violation of Section 16-19-170 is not a criminal offense, but is a violation for which a civil penalty, not to exceed twenty-five thousand dollars for each violation, may be imposed by the Department of Revenue." Thus, it could be argued that this distinguishes this Bill from the Martin situation and it may be why the Bill was drafted in this way. Certainly, it would appear to remedy the problem emphasized in Martin that the General Assembly was attempting to "criminalize conduct in certain areas, but not in others." In Martin, the Court stated that

> Article III, § 34, prohibits special legislation where the effect is

> to have different criminal laws in different counties. . . .
>
> We found [in Thompson v. S.C. Comm. on Alcohol and Drug Abuse, 267 S.C. 463, 229 S.E.2d 718 (1976)] the local option was unconstitutional special legislation since some local governments elected to participate and others did not, resulting in the disparate application of a statewide criminal law. Similarly, in Daniel v. Cruz, 268 S.C. 11, 231 S.E.2d 293 (1977), we struck down a local option allowing any county to opt out of a statewide law permitting fortune-telling because the effect of the local option law was to criminalize fortune telling in some counties and not in others.
>
> As mentioned earlier, Martin stressed the importance to its holding of Article VIII, § 14 (5), which "requires statewide uniformity of general law provisions regarding 'criminal laws and the penalties and sanctions for the transgression thereof.'"

Another distinction between this situation and Martin is that § 16-19-170 is a new statute and this is the **very first** time "cruises to nowhere" are expressly addressed in the Code. Martin, on the other hand, simply involved a provision where a longstanding part of the general "criminal scheme" [§16-19-60] involving gambling which made video poker payouts legal could be opted out of by a local option referendum. If the voters of a county voted favorably, poker payouts would be made illegal in that county.

However, § 16-19-170 could be deemed part of the general "criminal scheme" involving gambling in the way § 16-19-60 was viewed in Martin, in this instance, simply providing for a different penalty than other gambling provisions. Moreover, even if § 16-19-170 is considered separately from the other gambling provisions in the Code which are criminal in nature, the Bill, if enacted, **would initially make "cruises to nowhere" illegal throughout the State**. Only following action taken by local governing bodies could such become legal in those specific local areas. These areas would then be subject to the referendum in the year 2000 to determine if the prohibition is reinstated. Thus, the court could view § 16-19-170 as a separate "criminal scheme" which could then be opted out of pursuant to the procedures contained in the statute. The fact that the penalty for violation of § 16-19-170 is characterized as "civil", rather than "criminal" may thus not be constitutionally significant. Moreover, courts have held that the label of "civil fine" is not necessarily controlling with respect to whether a particular penalty is criminal in nature.

See, Hudson v. U. S., 522 U.S. 93 (1997); State v. Womack, 679 A.2d 606, (N.J. 1996); Tench v. Va., 462 S.E.2d 922 (1995). See also, Amer. Amusement et al v. S.C. Dept. of Rev., No. 97-CP-40-2062 (Sept. 12, 1997) [temporary injunction granted pursuant to Martin even where "civil penalties" involved]. Having "cruises to nowhere" treated differently in different parts of the State, thus making such cruises legal in some places, but illegal in others may be what the Martin Court was more concerned with for purposes of the special legislation prohibition of the Constitution. Martin relied upon Daniel v. Cruz, supra, which struck down a statute making fortune telling without a license illegal, but only in those counties where the local governing body took affirmative action by resolution to prohibit the conduct.

Thus, based upon Martin and the earlier cases the Court relied upon, the fact that the actual punishment for violation of S.3 is classified as "civil" rather than "criminal" may be only a secondary factor. What Martin seemed to be more concerned with is that "the effect of the local option laws is to treat the same conduct differently in each county and the result is unconstitutional special legislation." Id. A court could thus reach the same conclusion with respect to the "local option" provision contained in S.3. Thus, I must advise you that the insertion of this provision may not be on solid constitutional ground.

Of course, if S.3 is enacted, it will be presumed valid. This Office can only advise as to potential constitutional problems, but only a court can set the statute aside or declare any portion thereof unconstitutional. If the statute is enacted, it will remain in effect until a court says otherwise. Moreover, the Bill contains a severance provision in case any provision thereof is declared unconstitutional. I am, however, advising you herein, that the local option provision of S.3 is constitutionally suspect under the State Constitution. In addition, as referenced above, it is not at all certain that the federal Johnson Act's requirement that there be present a state statute "the terms of which" prohibit "cruises to nowhere" is fully met where some portions of the state possess the authority to elect not to be bound by the general state ban on those cruises.

Conclusion

I have reviewed S.3, as recently amended, and advise that the Bill creates two serious legal concerns.

First, is the problem of whether a local option provision meets the Johnson Act's requirement that the state must have enacted a statute "the terms of which" ban "cruises to nowhere" in order to be exempt from the federal law. It is my opinion that the Legislature's

giving individual coastal localities the authority to exempt themselves runs the risk of a court declaring that the legislation fails to meet the federal prerequisite for exemption. In my judgment, while the Act does not speak to the question specifically, its language contemplates that the state will **by statute** exempt itself **completely**, **or not at all**. The federal Act does not appear to contemplate that the state can leave it up to individual localities whether or not to exempt themselves. In other words, a state must be in or out of the federal law, not part way. Moreover, a court would probably conclude the federal exemption requirement was not met where it is theoretically possible that every part of the state where these cruises are likely to occur can elect to make them legal, but the cruises **must remain illegal** in the areas where they do not typically take place.

In addition, I must caution that the local option provision may not be on solid footing under the State Constitution, either. While the Act will be presumed valid, and only a court could set it aside, the Bill's local option requirements come perilously close to those struck down in Martin v. Condon. This Office, of course, favors the right of localities to decide issues by public vote and we so argued in Martin. However, our arguments did not prevail there.

Although the penalty in this instance is labeled a "civil fine", rather than a criminal penalty, the Bill still enables different parts of the State to be treated differently for purposes of whether or not that fine will be imposed. Moreover, the imposition of a large civil fine may be considered close enough to the criminal penalty struck down in Martin to fall within that case. The bottom line is that "cruises to nowhere" may be legal in some areas and illegal in others under the Bill, again running the risk of serious legal challenge. You may recall that the "civil penalties" distinction has not passed muster with respect to the modified video poker referendum. In short, a court could conclude that the local option provision in the Bill may create a checkerboard of different laws, and is thus special legislation.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph