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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

December 7, 2000

The Honorable Robert M. Stewart, Chief
South Carolina Law Enforcement Division
Post Office Box 21398
Columbia, South Carolina 29221-1398

Re: Your letter of November 20, 2000
S.C. Code §16-19-120 & In-line Pin Game Machines

Dear Chief Stewart:

In your above referenced letter, you request an opinion from this office regarding "in-line pin game machines" licensed under S.C. Code Ann. §12-21-2720(A)(3). Specifically, you ask "[i]f 'in-line pin game machines' are used for the purpose of gambling connected with a pay-off and a criminal charge and conviction is later obtained pursuant to *S.C. Code of Laws, Section 16-19-40*, can the machine be confiscated and destroyed as provided for in *S.C. Code of Laws, Section 16-19-120*?"

Section 16-19-40, generally makes unlawful certain games and betting on certain games and provides for criminal penalties for those who participate in such activities. Section 16-19-120 is titled *Officers shall destroy gambling devices after confiscation* and provides as follows:

All officers of the law in whose care, possession or keeping may be placed any gambling or gaming machine or device of any kind whatsoever or any gambling or gaming punchboard of any kind or description whatsoever which has been confiscated for violation of any criminal law or laws of this State shall immediately after conviction of the violator of the law destroy the same.

When interpreting the meaning of a statute, a few basic principles must be observed. The primary goal of statutory interpretation is to ascertain the intent of the general assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). In determining the meaning of one statute, it is proper to consider other statutory provisions relating to the same subject matter. Southern Ry. Co. v. S.C. State Hwy. Dept., 237 S.C. 75, 115 S.E.2d 685 (1960). A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the

Request Letter

The Supreme Court of Illinois has identified two categories of contraband... Contraband *per se* is material the mere possession of which constitutes a crime... Derivative contraband is material that is not inherently illegal, but is used in an illegal manner...[citations omitted] People v. DeLuca, 302 Ill. App.3d 454, 706 N.E. 2d 927 (1998).

[T]wo distinct classifications of contraband have been developed: contraband *per se*, and derivative contraband. Contraband *per se* is property the mere possession of which is unlawful.... Heroin and 'moonshine' whiskey are examples of contraband *per se*. Derivative contraband is property innocent by itself, but used in the perpetration of an unlawful act. An example of derivative contraband is a truck used to transport illicit goods. Commonwealth v. Howard, 552 Pa. 27, 713 A.2d 89 (1998).

No statute or other law makes the mere possession of "in-line pin game machines" illegal. Therefore, the machines cannot be considered "contraband *per se*." In fact, the General Assembly has specifically excluded such devices from summary confiscation and destruction pursuant to §12-21-2712. See S.C. Code Ann. §12-21-2721. This exclusion, however, does not make these machines and devices immune from being classified as contraband.¹ An "in-line pin game machine" which, as a matter of fact, has been used to determine the outcome of a wager would fit the general definition of gambling device above. It would also appear to fall within the meaning of the sweeping language used in §16-19-120 of a "gambling or gaming machine or device of any kind whatsoever..."² Accordingly, by its use in an illegal gambling enterprise, an "in-line pin game machine," perfectly legal in its own right, would become "derivative contraband." As the Maryland appellate court noted in State v. One Hundred and Fifty-Eight Gaming Devices, 304 Md. 404, 409

¹The distinction between "contraband *per se*" and "derivative contraband" is also seen in the manner in which or the process by which the particular item may be seized and forfeited. "[C]ontraband *per se*," requires no proceeding for forfeiture; 'derivative contraband' does require some kind of showing that property was used illegally." Director of Finance Prince Georges County v. Richard D. Cole, 296 Md. 607, 465 A.2d 450 (1983). This distinction explains the necessity to exclude inherently legal objects from the harsh, summary provisions of §12-21-2712.

²It is apparent from a review of the related statutes contained in the same chapter of the Code as §16-19-120 that the General Assembly specifically recognized that machines and devices, such as "in-line pin game machines," licensed pursuant to S.C. Code Ann. §12-21-2720 could become gambling devices. Section 16-19-40 provides that "[i]f any person shall play...any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes..." such person shall be guilty of a violation of that section and be subjected to its criminal penalties. In addition, §16-19-50 provides that "[a]ny person who shall set up, keep, or use...any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes...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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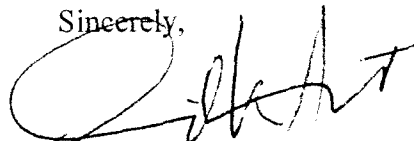
A.2d 940 (1985). "[i]f a pinball machine is not a gambling device per se, it may become one when it is shown that it is in fact put to such use." at 499 A.2d 951.

Further, the use of an otherwise lawful object to perpetrate an unlawful or criminal act thereby making the object derivative contraband also subjects the object to seizure and forfeiture by the state. Derivative contraband has been defined as "things which may be forfeited because they are the immediate instruments of a crime, but are not ordinarily illegal to possess." State v. Edwards, supra. The legitimacy of the state's action in seizing such property has also been expressed this way: "It is equally clear that one who normally has a right to property loses that right where that property is sufficiently involved in illegal... activities... [s]uch constitutes derivative contraband." State v. One Hundred Seventy-five Thousand Eight Hundred Dollars, 942 P.2d 343 (Utah 1997).

While there is no direct authority in South Carolina concerning "in-line pin game machines" and confiscation pursuant §16-19-120, there is some authority for the seizure and forfeiture of machines and devices, legal to own and possess, but which have been used for gambling purposes. In 1966, this Office opined that poker chips, which are in and of themselves legal to possess, when used in violation of the gambling laws, are subject to confiscation and destruction pursuant to §16-514 of the 1962 Code [§16-514 is the verbatim predecessor of the current §16-19-120]. Further, in Powell v. Red Carpet Lounge, 280 S.C. 142, 311 S.E.2d 719 (1984), the Supreme Court held that certain "in-line pin games" were exempted from summary destruction pursuant to §§52-15-10 and 52-15-20 [predecessors of §§12-21-2710 & 2712], but acknowledged that the machines could be used for the purpose of gambling and inferred that, had there been evidence of such, the outcome of the case may have been different. Moreover, our Supreme Court has recognized both the legitimate exercise by the General Assembly of power over gaming devices and that "forfeiture 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." Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 534 S.E.2d 270 (2000). Given this recognition by our Court and the General Assembly's specific proscription of using a device such as an "in-line pin game machine" for the purpose of gambling (see, §16-19-40), to infer that such devices are immune from confiscation and destruction pursuant to §16-19-120 would be to frustrate legislative intent.

Based on the foregoing, it is my opinion that, given the facts as described in your query, "in-line pin game machines" can be confiscated and destroyed pursuant to S.C. Code Ann. §16-19-120. Such an action, however, must be pursued with the following caveat in mind: An item which is alleged to be derivative contraband can be lawfully possessed therefore due process requires that an innocent owner be given the opportunity "to come forward and show, if he can, why the [object] should not be forfeited and disposed of as provided for by law." Moore v. Timmerman, 276 S.C. 104, 276 S.E.2d 290 (1981).

Sincerely,



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