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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

January 14, 1997

The Honorable Scott Beck
Member, House of Representatives
416A Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Beck:

In light of the recent Supreme Court decision, Martin v. Condon, Op.No. 24518 (November 4, 1996), you have asked what is the impact of this decision upon the authority of cities and counties to regulate video poker cash payouts.

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).

Justice Burnett, although concurring with the Martin majority's conclusion of unconstitutionality, strongly disagreed with the majority's Connor analysis. Finding that "the majority's reliance on Connor is misplaced", Justice Burnett's reasoning is summarized in his concurring opinion as follows:

> Connor, held, inter alia, a municipal enactment prohibiting nude dancing violative of Article VIII, § 14, even though no State law prohibited nude dancing. In my opinion the Connor court erred. The court held that conduct which is not unlawful under State laws cannot be made unlawful by local enactment. As laudable as this may be, the court effectively provides that all conduct is lawful unless made unlawful by enactment of the General Assembly. Article VIII, § 14, do not yield to such an interpretation. Local government enactments, which are not inconsistent with any State law does not "set aside" any criminal laws enacted by the State. See, Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990) (in order to preempt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way).

Thus, Justice Burnett was unwilling to go so far as to conclude that "all conduct is lawful unless made unlawful by enactment of the General Assembly", thus in effect mandating a rule that "conduct which is not unlawful under State laws cannot be made unlawful by local enactment." It must be remembered, however, that Justice Burnett was the fourth vote in the majority opinion and that two other Justices signed Justice Moore's opinion.

The Connor case, relied upon by the Martin majority, involved an ordinance making it illegal to participate in nude or semi-nude dancing. The Court found the Town

of Hilton Head "exceeded its powers in enacting the ordinance in question." The Court's reasoning was that

> [u]nder S.C.Code Ann. § 5-7-30 (Supp.1993), a municipality has the power to enact ordinances "not inconsistent with the Constitution and general law of this State." Article VIII, § 14, of our State Constitution provides that criminal laws and the penalties and sanctions for the transgression thereof shall not be set aside. We recently construed this constitutional provision to hold that a municipality may not impose a greater punishment that provided under State law for the same offense. City of No. Charleston v. Harper. 306 S.C. 153, 410 S.E.2d 569 (1991). We now construe article VIII, 14 to prohibit a municipality from proscribing conduct that is not unlawful under State criminal laws governing the same subject.
>
> State law governing nudity does not prohibit nude dancing per se. See S.C.Code Ann. § 16-15-305 (C)(1)(b) (Supp.1993) ... . Since town has criminalized conduct that is not unlawful under relevant State law, we conclude Town exceeded its power in enacting the ordinance in question. (emphasis added).

442 S.E.2d at 609-610. Thus, while this Office disagrees strongly with the Court's analysis in both Martin and Connor, it is obvious that until these decisions are set aside or overruled in some other case, they must be followed as representing the current state of the law in this area.

Martin, Connor and Blackmon, when read together, would thus appear to require the General Assembly to repeal (or at least substantially amend the statutes.). The focus of such repeal or amendment undoubtedly needs to be § 16-19-60, which the Court has deemed first in Blackmon, and now in Martin, to make such payouts "legal" under State law. While an alternate reading of § 16-19-60 would be simply to make the general gambling laws [§§ 16-19-40 and 50] inapplicable to video poker payouts, rather than to go so far as rendering such payouts "legal", clearly the majority of the Court has not chosen this course. The Martin majority thus appears to take the position employed in Connor -- that the fact that the General Assembly has not made cash payouts illegal or prohibited by State law, the fact even that the State has addressed cash payouts at all in this context, in effect renders localities unable to regulate or prohibit such payouts, whether such prohibition be by a general law with a local option mechanism, or by individual local governments.

An examination of Blackmon itself seems to substantiate this reading. There, the Court stressed that

> [w]e take judicial notice of the fact that several bills have been proposed in the legislature which would eliminate this statutory exemption. See H.R. 3823, 108th Leg., 2d Sess. (1989) (bill to repeal Section 16-19-60); H.R. 3867, 108th Leg., 2d Sess. (1989) (bill to make it unlawful to have or to operate a machine for playing games which utilizes a deck of cards); H.R. 3104, 109th Leg., 1st Sess. (1991) (bill to repeal Section 16-19-60). However, despite its awareness that persons paying out money to players of these machines may escape prosecution under the provisions of Section 16-19-60, the legislature has, as of this date, refused to amend or repeal Section 16-19-60. (emphasis added).

The foregoing language in Blackmon is also consistent with the majority's parting words in the denial of the petitioners' petition for rehearing in Martin that "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."

Obviously then, according to Martin and Blackmon, a repeal or amendment of § 16-19-60 is required to possibly hope to satisfy the Court's rigorous standards. "[R]epeal" is spoken of in Martin, but Blackmon speaks in terms of "amendment or repeal". A repeal of § 16-19-60 would, of course, remove any exemption of cash payouts from the State gambling laws, thereby treating such payouts similarly to gambling generally, and would thus appear to resolve constitutional problems. If, however, the General Assembly chooses instead to retain the exemption for poker payouts from §§ 16-19-40 and -50, in order to have a reasonable chance to meet the Martin standards, the Legislature would have to make it crystal clear that it is not the intent of the General Assembly, by exempting cash payouts from the local gambling laws, to authorize or make "legal" such payouts by virtue of State law and thus to limit in any way the authority of localities to prohibit such conduct. Therefore, the General Assembly will need to delegate explicitly to localities the authority to prohibit cash payouts from video poker. It would appear that such authority on the part of local government should be made clear in the Video Games Machines Act as well.

For comparison, your attention is called to Amvets v. Richland County Council, 280 S.C. 317, 313 S.E.2d 293 (1984). There, the Court reviewed the validity of a Richland County Ordinance regulating bingo beyond state law's effort to so regulate it. The Richland County Ordinance did not absolutely prohibit bingo, but sought simply to impose regulations beyond those required by State law. The Court upheld the regulation,

noting that the General Assembly had specifically "contemplated further regulation of bingo by counties and municipalities" in stating in the statute that "No [bingo] license shall be issued unless such person or organization is in compliance with all county or municipal ordinances in regard to bingo." The language of this statute, however, probably did not go so far as enabling counties to prohibit bingo altogether, but to further regulate such games.

In Town v. Hilton Head v. Fine Liquors, Ltd., supra, the Court recognized that "in order to preempt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way." The converse of this would be, of course, an express recognition that localities are free to prohibit video poker payouts because the General Assembly does not intend by creating exemptions from the general gambling laws to make such payoffs "legal" in terms of the power of cities and counties to prohibit payoffs.

The point is further emphasized in the cases of City of Charleston v. Jenkins, 243 S.C. 205, 133 S.E.2d 242 (1963) and Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735 (1943). In the Arnold case, the Court noted that

> ... [i]t must be borne in mind that the ordinance in question does not prohibit the carrying on of a legal business, but is only a regulation of that business under the police power of the city.

In Jenkins, the Court, in upholding an ordinance regulating hours in which beer could be sold, stated that "[t]he ordinance is regulatory and not prohibitory since it appears that all dealers in beer in the City of Charleston are treated alike, under similar circumstances, under the terms of the ordinance." 133 S.E.2d at 244.

It goes without saying that this Office strongly disagrees with the Court's ruling both in Martin and in Blackmon as well as Connor. However these cases are now the law of this State until altered or modified. Thus, if the General Assembly desires to lawfully allow local communities to prohibit video poker cash payouts, the cases, discussed above, must be fully dealt with and reconciled.

Any new statute which the General Assembly enacts must, of course, be presumed constitutional. I am advised that one alternative being contemplated may be to employ a local option system once again, presumably, a referendum on a county-by-county basis. This time, however, rather than criminal penalties for a violation in the localities which prohibit cash payouts, civil penalties such as fines and license revocation would be used.

Such an approach 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.'"

In my view, while the "civil penalties" approach would appear to remove concerns regarding the Legislature's effort to "criminalize" conduct only in certain areas, I am hesitant, however, to say this approach by itself goes far enough in light of the Martin Court's strong emphasis that § 16-19-60 makes payouts "legal under a statewide criminal law." The Court's emphasis appears to have been as much that the statewide "criminal" scheme, of which, § 16-19-60, is an integral part, not be "set aside" by those counties voting "no", as it was that the penalty in the "no" counties was "criminal" rather than "civil" in nature. The Court's statement that Article VIII, § 14(5) "requires statewide uniformity of general law provisions regarding 'criminal laws and the penalties and sanctions for the transgression thereof'", as well as its distinction of the video poker local option from others "that do not infringe areas where uniformity is constitutionally required" further illustrates this point. In essence, what the Martin Court seemed to be saying was that so long as § 16-19-60 remains part of a "statewide criminal law" in its present form, or is part of the statewide criminal scheme, there would be a constitutional problem with its being set aside by localities either through a local option vote or otherwise. Moreover, when the Court's reasoning in Connor and Thompson is added to the mix, the Court seems to be saying that localities are preempted by State law from action beyond that taken by the State with respect to criminal laws. I hope I am wrong and simply being overly cautious, but this is where the Martin Court seemed to come down.

Accordingly, my best "guess" reading of Martin, is the need either to repeal or substantially amend § 16-19-60 in order to comply with Martin's extremely high standards for constitutionality. Repeal would appear to be the surest way. Providing for "civil" penalties, rather than criminal, obviates part of the problem but, again, I am not sure it goes all the way to meet the Court's analysis. If § 16-19-60 were amended rather than repealed, however, the Legislature somehow would need to make it clear that in exempting cash payouts from the gambling laws, it does not intend to "legalize" such payouts for purposes of permitting localities to prohibit them either by virtue of a local option or otherwise. In short, the General Assembly in any legislative overhaul must deal with the Martin Court's concern that a local option law "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 exception, the effect is to criminalize conduct that remains legal elsewhere under State law." (emphasis added). In essence, to my mind, the General Assembly would need to include language in any amendment of § 16-19-60 which expresses the idea that the State does not intend to regulate by its criminal laws (§§ 16-19-40, -50, -60) video poker cash payouts one way or the other (making them either legal or illegal) statewide, and that such payouts may be prohibited at the local level.

Of course, I must caution that in light of the very strict requirements which the Court has imposed in Martin, this Office cannot predict with any degree of certainty whether any proposed amendment of the laws relating to cash payouts will be upheld by our Court. At this point, all that can be done is to attempt to follow Martin to the fullest extent possible and hope that the courts will uphold the new statute if and when enacted. The General Assembly will simply have to do the best it can and hope for the best.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph