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**OFFICIAL OPINION 2001-9**

The Honorable Robert L. Meeks  
Indiana Senate  
5840 E. 25 N.  
LaGrange, IN 46761

RE: Legality of a "Skill Slot" Machine

Dear Senator Meeks:

This letter responds to your request for an advisory on the following question:

Is the "Skill Slot" machine in question legal and it should be excluded from the Indiana State Gambling Code, specifically Indiana Code section 35-45-5.1, based on documentation provided.

**BRIEF ANSWER**

Ind. Code § 35-45-5-2 provides that "A person who knowingly or intentionally engages in gambling commits unlawful gambling, a Class B misdemeanor." "Gambling" means "risking money or other property for gain, contingent in whole or in part upon lot, chance, *or the operation of a gambling device*;..." Ellipses added. A "gambling device" is defined by statute as "a mechanism that awards money or other property in return for consideration as the result of the operation of an *element of chance*;..." Ellipses added. Ind. Code § 35-45-5-1(1). A gambling device is additionally defined as "a mechanism that when operated for a consideration, does not return the same value or property for the same consideration upon each operation." See Ind. Code § 35-45-5-1(2). "Knowingly and intentionally maintaining in a place accessible to the public" various gambling devices, (including slot machines), listed specifically by statute at Ind. Code § 35-45-5-3(3), is the commission of professional gambling, a Class D felony.

The Court of Appeals in the case of *State v. Maillard*, 695 N.E.2d 637 (Ind. Ct. App. 1998), *transfer denied by Cain v. Maillard*, 706 N.E.2d 173 (Ind. 1998), was asked to make a declaratory judgment regarding the status of a "quarter slide" machine and whether it was indeed a "gambling device" prohibited by statute. The Court held that even where the *operation or play* of a machine could be deemed lawful because there was an element of skill

involved, thus bringing the game within the “skill” exception to the statutory violation of “gambling,” this lawful *operation or play* did not remove the *machine* itself from the statutory classification of a prohibited “gambling device.” Therefore, the Court found that because the “quarter slide” machine did not always return the same value or property for the same consideration upon each *operation or play*, that although the *game* itself fell within the statutory “skill” exception to gambling, the *machine* itself was a *gambling device* prohibited by statute.

Because of the findings of this case, and the documentation provided, it is the opinion of this office that the “skill slot” machine is a gambling device prohibited by Indiana’s unlawful gambling statute.

#### ANALYSIS

Ind. Code § 35-45-5-1 provides the definition for a “gambling device.” A gambling device is defined as:

- (1) a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance;
- (2) a mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each operation;
- (3) a mechanism, furniture, fixture, construction, or installation designed primarily for use in connection with professional gambling; ... Ellipses added.

Ind. Code § 35-45-5-3 provides that “A person who knowingly or intentionally:

- (4) maintains, in a place accessible to the public, slot-machines, one-ball machines or variants thereof, pinball machines that award anything other than an immediate and unrecorded right of replay...commits professional gambling, a Class D felony.”

Gaming Laboratories International Incorporated, an agency which provides gaming device and system testing with other similar devices conducted a “likeness review” with diagrams, graphics and language describing the internal mechanism, the software operation, and the operation or play of the “skill slot” machine. This review has been provided to this office in order to assist in making a determination as to whether this machine is indeed a gambling device. Some of the findings of the “likeness review” were as follows:

The machine houses a game that consists of 3 individual reels. Each reel has 44 stops, and each stop has a symbol. Mathematically, there are over 22 thousand winning combinations. The machine is operated by the insertion of legal tender into the bill acceptor. Once money is entered, the player is given “credit” for a particular number of games. A button is pressed, and the game begins. The reels spin, and “stop” lamps light. The player will hit the stop buttons in an attempt to depress a “winning combination.” If no winning combination appears, the game is over, and no award is given. If a “winning combination” is displayed, credits are awarded, and may accumulate with previous credits purchased, and used

to play another game. The player may additionally press a “print ticket” button, which will transfer to a paper voucher the credit accumulated. It appears that the voucher may be exchanged for money or other property. See Gaming Laboratories International Incorporated “Likeness Review” p.4., dated October 25, 1999. (hereinafter “review”)

Other pertinent “discoveries” addressed in the “review” were as follows: “Phantom” pays were discovered during the game play. On some occasions the player was awarded credits although no winning combination was displayed. The reviewing agency could not find any software routine in the submitted source code to support the non-documented pays. Additionally, at times the symbols did not scroll smoothly from bottom to top as the symbol is displayed in the simulated reel’s viewable area. The symbols emerge together, and may overlay one symbol on top of the other. The reviewing agency could not find any function invoked by the submitted source code that accounted for that behavior. And lastly, during game plays, some symbols appeared to be displayed on the payline, when they were actually above or below the payline, confusing the player as to whether he indeed actually depressed a “winning combination.”

Based upon the information provided, the “skill-slot” machine appears to fit the statutory definition of a gambling device. The operation of the machine will give you a right to money or “other property” as specified in the documentation provided, in return for placing legal tender into the machine to begin the game, and the winnings are based perhaps not completely, but on the operation of an “element of chance.” There are over twenty-two thousand winning combinations, and it is not always readily apparent what “symbols” are on the winning combination line. See review, p. 14. Additionally, “phantom pays,” which award credit without the display of a winning combination occur; See review p. 14, thus making the machine a mechanism that does not return the same value or property for the same consideration upon each operation. These documented operations cause the skill slot machine to fall squarely within the definition of a gambling device.

The intended purchaser of the “skill slot” machine addresses the definition of gambling and alleges that the machine itself is indeed a “game of skill,” and should fall within the statutory exception to gambling. “Gambling” is defined by statute as “risking money or other property for gain, contingent in whole or in part upon lot, chance, or *the operation of a gambling device*; but it does not include participating in

- (1) bona fide contests of skill, speed, strength, or endurance in which awards are made only to entrants or the owners of entries;... .” Ellipses added.

However, again in the case of *Maillard* where the Court of Appeals was asked to issue a declaratory judgment concerning the status of machines as “gambling devices” under state law, the Court provides that what is at issue, is not whether the game itself requires the operation of skill, but whether the machine which houses the game is a gambling device as defined by statute. The Court in *Maillard* found that when construing the gambling statute, it was the duty of the court to give effect to the intent of the legislature. *Ashlin Transp. Services, Inc. v. Indiana Unemployment Ins. Bd.*, 637 N.E.2d 162, 166 (Ind. Ct. App. 1994). The court further stated that “If the language of the statute is clear and unambiguous, it is not

subject to judicial interpretation.” *Albright v. Pyle*, 637 N.E.2d 1360, 1363-64 (Ind. Ct. App. 1994). The Court in *Maillard* found no ambiguity in the statute defining a gambling device, and went on to state that “It may be presumed that the legislature’s ban of “gambling devices” could be more stringent than the prohibition against engaging in gambling activity.” Referring to the decision of the trial court, the Court of Appeals went on to state that “Assuming the trial court correctly determined that operation of the machine does not constitute gambling based upon the skill exception, it does not follow that its lawful use *ipso facto* insulates the machine from violation of the gambling device prohibition.” *State v. Maillard*, 695 N.E.2d 637,641 (Ind. Ct. App. 1998), *transfer denied by Cain v. Maillard*, 706 N.E.2d 173 (Ind. 1998),

The court went on to find that it was possible for “gambling devices” to be used in a legal way, and cited *Cf. Matter of Prop. At Marriott Inn, Clarksville*, 456 N.E.2d 444, 446 (Ind. Ct. App. 1983) *cert. denied by Carson v. Indiana*, 470 U.S. 1005 (U.S. Ind. 1985). A case where a horse race machine was found to be a “gambling device” since by choosing a horse, and activating a machine, patrons were playing a game of chance in which they could win a sum of tokens in accordance with odds displayed by the machine. This was so even though the players did not win money. “[T]o say the winning tokens did not represent “other property,” Ind. Code § 35-45-5-1(1), is to ignore both common sense and the plain meaning of the statute.” *Id* at 447.

Therefore, the court in *Maillard* went on to hold that because the quarter slide machine did not always return the same value or property for the same consideration upon each operation, the machine was “a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance,” See Ind. Code § 35-45-5-1 (1); therefore, it was found to be a “gambling device” prohibited by statute. *State v. Maillard*, 695 N.E.2d 637,641 (Ind. Ct. App. 1998), *transfer denied by Cain v. Maillard*, 706 N.E.2d 173 (Ind. 1998).

#### CONCLUSION

Unlawful gambling is defined by statute as “knowingly or intentionally engaging in gambling...” Ellipses added. See Ind. Code § 35-45-5-2. “Gambling” means risking money or other property for gain, contingent in whole or in part upon lot, chance, or *the operation of a gambling device;...*” Ellipses added. See Ind. Code § 35-45-5-1. A “gambling device” is defined as “a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance;” as well as “a mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each operation;... .” Ellipses added. And an individual will be found guilty of professional gambling where they “knowingly or intentionally:...maintain, in a place accessible to the public, slot machines, one-ball machines or variants thereof,...” Ellipses added. See Ind. Code § 35-45-5-3. Based on the decision in *Maillard*, and the documentation provided, it is the opinion of this office, that the skill slot machine, by virtue of the fact that property or value may be credited as the result of the

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operation of an “element of chance,” and because the “phantom pays” do not return the same property for the same consideration upon each operation, the “skill slot” machine is indeed a gambling device prohibited by statute.

Sincerely,

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