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January 14, 1998

The Honorable Dan Morales
Attorney General
State of Texas
Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

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Opinion Committee
FILE # W/ 40017-1
I.D. # 40017

Dear General Morales:

I am writing to request your legal opinion regarding the applicability of Section 47.01(4) of the Texas Penal Code to the use and operation of certain electronic or electromechanical gambling devices currently in use across Texas. As reported in the media, these devices, generally known by the industry name of "eight-liners," have dramatically increased in number and use over the past three years. Law enforcement authorities believe that upward of 50,000 of the machines are operating in Texas today. Also, by all accounts, this rapid growth in gaming shows no sign of abating. Law enforcement authorities report that many, if not most, of these machines are being operated in a manner that violates Texas' gambling laws.

It is an offense under Section 47.06 of the Penal Code to own, manufacture, transfer, or possess a gambling device with the intent to further gambling. See Tex. Pen. Code sec. 47.06(a). In 1995, the 74th Legislature changed the Penal Code's definition of "gambling device." Specifically, the Legislature amended Section 47.01(4) of the Penal Code by adding the following exception to what constitutes a gambling device:

[a gambling device] does not include any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or \$5, whichever is less.



This amendment essentially legalized machines that pay off in coupons redeemable for non-cash merchandise valued at no more than five dollars. In practice, these machines have been used to permit accumulation of credits so that players have obtained winnings well in excess of the statutory limit. However, because of the exception's inherent ambiguity, law enforcement authorities have encountered great difficulty in successful prosecution. That difficulty prompted the 75th Legislature to propose an amendment that would have clarified the exception, thus enhancing prosecutions. Despite widespread support from the law enforcement community, that proposal failed to become law.

Article III, Section 47, of the Texas Constitution requires the Legislature to pass laws prohibiting lotteries, except with respect to bingo games, charitable raffles, and the state operated lottery. The Texas Supreme Court, in *City of Wink v. Griffith Amusement Co.*, set out a test for determining whether a certain activity constitutes a lottery under the Constitution. 100 S.W.2d 695 (Tex. 1936). According to the Court, a lottery includes the offering of a prize by chance in exchange for the giving of consideration for an opportunity to win the prize. *Id.* In 1994, the Attorney General determined that the Legislature could not legalize the operation of slot machines simply by amending the Penal Code's definition of "bet." However, as noted above, the 1995 Legislature changed the definition of "gambling device" so that video slot machines that pay off in non-cash merchandise valued at no more than five dollars are now legal.

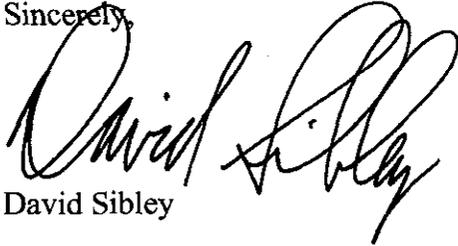
The 75th Legislature's failure to remedy the ill brought forth by this change, namely, the huge growth in "eight-liner" use, led Governor Bush in August 1997 to form the Governor's Task Force on Illegal Gambling. The Task Force, whose membership includes law enforcement authorities from across the state, was charged by the Governor to examine the state's existing gambling laws and to suggest ways in which the laws could be improved to combat the growth of illegal gambling in Texas. The Task Force's study has included a careful review of the state's existing gambling laws. In pursuing that study, several questions have arisen that merit your opinion. Specifically, they are as follows:

1. Is the 1995 amendment to section 47.01(4) of the Texas Penal Code constitutional under Article III, section 47, of the Texas Constitution?
2. Does Chapter 47 of the Texas Penal Code prohibit the use of machines known as "eight liners," which are video versions of slot machines, and other machines that operate wholly or partially by chance, reward players with prizes, and are not "adapted solely for bona fide amusement purposes?"
3. If "eight liners" are prohibited gambling devices under Texas law, then do the Texas Lottery Commission and the Texas Alcoholic Beverage Commission possess the statutory enabling authority to pass rules permitting the agencies to suspend or revoke a license if a regulated entity owns or operates an "eight liner?"

It is clear that the illegal use of "eight liners" in Texas continues to grow at a rapid pace. This growth has been fueled by a vague and potentially constitutionally defective amendment to the Penal Code's gambling device definition. Because of the continuing proliferation and use of

what may be illegal devices, I respectfully ask that you expedite the issuance of an opinion on the questions asked above. Thank you for your prompt consideration and review of the legal issues raised by this request.

Sincerely,

A handwritten signature in black ink, appearing to read "David Sibley". The signature is fluid and cursive, with the first name "David" being larger and more prominent than the last name "Sibley".

David Sibley

cc: The Honorable George W. Bush
Governor of the State of Texas

The Honorable Bob Bullock
Lt. Governor of the State of Texas

The Honorable Pete Laney
Speaker of the House of Representatives