

Opinion No. 56-6423

April 20, 1956

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Henry Gallegos, State Representative, Valencia County, Box 221, Grants, New Mexico

On April 16 you addressed an inquiry to this office inquiring whether a crane or claw machine, wherein a coin is inserted and the operator by means of levers, handles or knobs may control the action of a claw and obtain from the inside of the machine a prize, constitutes a lottery within the laws of New Mexico, and a violation of § 14-25-1, N.M.S.A., 1953 Compilation. You state that the element of skill with this machine is a predominant factor in determining whether a player will win a prize or an award.

In the case of *State v. Jones*, 44 N.M. 623, 107 P. 2d 324, the Supreme Court of New Mexico held that the elements of a lottery were prize, consideration and chance. In the case of *D'Orio v. Startup Candy Company*, 265 P. 1037, the Supreme Court of Utah, operating under exactly the same requirements for a lottery, viz., chance, consideration and prize, held that the operation of a game of skill, where skill was a predominant factor, was not a violation of the lottery statutes. A United States Circuit Court held to the same effect in the case of *United States v. McKenna*, 149 Fed. 252, and in the case of *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 135 A.L.R. 99, the New York Court held that the character of the game is the determining factor of whether it is a game of chance or not. This would necessarily be true, as prizes could not be awarded at a shooting gallery or at a golf tournament, or under any other circumstances, if skill is not the determining factor and sufficient to take the action out of the lottery prohibition.

The California Court stated in the case of *Brown v. Board of Police Commissioners*, 58 C.A. 2d 473, "Assuming that competitive shooting at a target is a game of skill, the fact that a definite charge is exacted for the privilege of demonstrating such skill does not bring the sport within the classification of a misdemeanor under Pen. Code No. 330."

Therefore, it is the opinion of this office that assuming, as you state in your letter, that the operation of this machine is dependent upon the skill of the operator, we believe that it is not a violation of § 14-25-1, N.M.S.A., 1953 Compilation.

We sincerely hope this answers your inquiry.

By Fred M. Standley

Assistant Attorney General