

1983 WL 181901 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 31, 1983

**\*1 Re: Admissibility of Breathalyzer Results Concerning an Offense on Private Property**

The Honorable Jack S. Gerrard  
Post Office Box 4046  
Anderson, South Carolina 29621

Dear Magistrate Gerrard:

This is to confirm our telephone conversation on May 10, 1983, in which I rendered the following information concerning driving under the influence on private property. In a prior informal opinion of this office, we advised that the 'implied consent' statute does not apply when the offense occurs on private property. This statute states that 'the test shall be administered at the direction of a law enforcement officer who has apprehended a person while driving a motor vehicle upon the public highways of the state while under the influence of intoxicating liquor.' [Section 56-5-2960, Code of Laws of South Carolina \(1976\)](#). The driving under the influence statute has a broader application because it applies to driving any vehicle 'within this State' and not just public highways. [Section 56-5-2930, Code of Laws of South Carolina \(1976\)](#).

As stated in the previous opinion, the breathalyzer may still be administered if the offense and arrest occurred on private property but refusal to take the test would not result in an automatic suspension. In your case, the defendant did not refuse to take the test after his arrest and the issue was the admissibility of the breathalyzer results. A recent opinion in the Ninth Circuit concerning taking of blood samples for alcohol-related highway accidents provides an excellent analogy on the issue that you were faced with concerning the breathalyzer test. As a general rule it applied [Schmerber v. California, 384 U.S. 757 \(1966\)](#) to hold that a blood sample may not be taken from a suspect unless a formal arrest has occurred prior to or 'substantially contemporaneously' with the seizure. This formality may be omitted only if the suspect is so incapacitated that he cannot 'appreciate the significance' of his arrest.

To help officers (and the Court) apply the rule and its exception, these procedures should be followed for determining whether a suspect is unable to appreciate the significance of the arrest. First, and in all cases, the investigating officer should request the suspect's consent to take the blood sample (or breathalyzer test). If the suspect's consent is freely given, that ends the matter. If, however, the suspect refuses consent, he or she should be placed under arrest (with probable cause necessary) prior to the taking of the blood sample (or test). Again, it must be clear that the arrest, as well as the removal of blood or breathalyzer test, must be supported by probable cause. If the officer does not receive a refusal of the request, and considering the physical and mental condition of the suspect, it may be assumed that the suspect is not lucid. In that case, a formal arrest is not required, but, the seizure of the person and the blood must be supported by probable cause. See [U.S. v. Harvey, 701 F.2d 800, 806 \(9th Cir. 1983\)](#). Therefore, the blood results may be introduced if the threshold requirements are met. In addition, as in all other breathalyzer cases, proper foundation must be presented concerning the test and its results.

**\*2** I hope that this resolves your inquiry about this matter.

Sincerely,

Donald J. Zelenka  
Assistant Attorney General

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