

1980 WL 120812 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

August 11, 1980

*1 Lee M. Thomas

Director

Alcohol Subcommittee of the Governor's Committee on Highway Safety

Division of Public Safety Programs

Edgar A. Brown Building

1205 Pendleton Street

Columbia, South Carolina 29201

Dear Mr. Thomas:

You have requested two opinions of this office concerning your subcommittee's work on problems related to alcohol abuse and highway safety. Your first question concerning the requirement of a blood alcohol test on all drivers involved in any motor vehicle accident in which a fatality has occurred, has presented substantial problems and is still being worked on. Since I know that your subcommittee will be meeting in the near future, I have taken the liberty of responding to the second question with the promise that the other matter will be resolved as quickly as possible.

You have inquired as to whether law enforcement officers, in light of [Code of Laws of South Carolina § 56-5-2950](#) may administer a preliminary breath test to any motorist who is suspected of driving under the influence to establish probable cause prior to charging the motorist with DUI, and then require a subsequent breathalyzer test. I am assuming that the preliminary breath test you have referred to would involve some sort of roadside, on-the-scene chemical testing of the suspect's breath, administered by the officer who made the stop. Of course, the officer must have probable cause to make the initial stop before any test may be administered.

As you are aware, subsection (a) of [§ 56-5-2950](#) states in part:

No person shall be required to submit to more than one test for any one offense for which he has been charged, and the test shall be administered as soon as practicable without undue delay.

An opinion of this office, Opinions Attorney General No. 3245, page 30, 1971-72, a copy of which is enclosed, concluded that the 'one test' referred to in that section 'means a complete test, which allows analysis to be made of the subject's breath for purposes of determining its alcoholic content'. It appears, therefore, that the preliminary breath test would violate the 'one test' rule under [§ 56-5-2950](#) if the suspect were required to submit to that test. On the other hand, if the suspect were merely requested to take the preliminary breath test on a voluntary basis, with no penalty for refusal, then essentially what you have is a search consented to by the suspect which violates none of his Fourth Amendment rights, nor does it violate the 'one test' rule of [§ 56-5-2950](#). If, on the other hand, the suspect is 'required to submit' to a preliminary breath test, with resulting penalties for refusal, then the existing legislation would have to be changed to allow for a subsequent breathalyzer test.

It is the opinion of this office that if the suspect voluntarily agrees to submit to the test, with no penalty for refusal, he may subsequently be required to submit to a breath test.

Very truly yours,

*2 Richard D. Bybee

Assistant Attorney General

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