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Attorney General Opinions

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ATTORNEY GENERAL OPINIONS

The Authority To Issue An Attorney General's Opinion

The Attorney General of Mississippi is empowered by the law of this state to issue written answers to questions posed by authorized persons. Section 7-5-25, Miss. Code Ann. (1972) sets forth a list of those authorized to request such opinions. In general, the list includes the governor, the legislature, the chancery and circuit court clerks, the secretary of state, the various state departments, state officers and commissioners operating under the laws of this state, the heads and trustees of state institutions, district attorneys, the various county and city officials and their attorneys.

The Attorney General opinions function as a protective measure, so that there can be no civil or criminal liability against any person or governmental entity who has properly requested the opinion, setting forth all governing facts on the basis of which the Attorney General's Office has prepared and delivered a legal opinion, and which the requesting party has followed in good faith. This general proposition holds true, unless a court of competent jurisdiction, after a full hearing, shall judicially declare that such opinion is manifestly wrong and without substantial support. No opinion shall be given or considered if said opinion is given after suit is filed or prosecution begun.

*Issuance Of An Attorney General's Opinion**

Attorneys in the Attorney General's Office are assigned to specific areas of law in which they specialize. After an opinion request is received by the Office of the Attorney General, it is assigned to the attorney whose area of law it might concern. He then researches the problem and prepares a draft of the opinion or answer. This draft is then submitted to the Opinion Committee which is composed of nine attorneys in the office, including the Attorney General. The Opinion Committee meets twice weekly, on Tuesday and Thursday. At the meeting of the Committee, the draft is discussed and reviewed. The Committee either suggests changes, requests more information, or approves the draft if it is agreed that the analysis of the law is correct.

Should changes be suggested or more information requested, the Committee sends the draft back to the attorney for revision. Upon correction or addition, the draft is returned to the Committee where it is again processed. If there are no further changes, additions, or corrections suggested, the draft will be given final approval and issued as an official Attorney General's opinion.

*Prepared by Attorney General's office

OPINION NO. CV 78-01

SUBJECT: WHETHER AN EMPLOYEE OF A PUBLIC SCHOOL DISTRICT CAN RUN FOR PUBLIC OFFICE WHILE EMPLOYED BY SAID SCHOOL DISTRICT. A teacher or other employee has the same right as any other citizen to become a candidate for public office. *Chatham v. Johnson*, 195 So. 2d 62 (Miss. 1976). In this case, the Mississippi Supreme Court held that the school board could require the employee to take a leave of absence without pay during the period of the political campaign. Although the case specifically referred to the employment of a teacher, it would appear that the ruling would apply to all school employees.

DATE RENDERED: December 13, 1977

REQUESTED BY: Mr. Harold C. King, Superintendent of Yazoo City Public Schools

OPINION BY: A. F. Summer, Attorney General, by George M. Swindoll, Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Summer has received your letter of request dated December 7, 1977, and has assigned it to me for research and reply. In your letter you inquire as follows:

> "The Yazoo City Municipal Separate School District has an employee that is running for Mayor of the City of Yazoo City, Mississippi. This person is a Vocational Counselor for the Yazoo City High School.
>
> The Board of Trustees of this School District would like to request your opinion in regard to this person running for public office while employed by the Yazoo City Public Schools. Our question is - can this person be legally employed by this School District and run for public office at the same time? Your opinion on this matter would be appreciated at the earliest possible date."

In case of *Chatham v. Johnson*, 195 So. 2d 62, the Mississippi Supreme Court held that a teacher has the same privilege as any other citizen to become a candidate for public office. However, the court also held in said case that the school board could require ". . . a teacher to take a leave of absence without pay during the time such teacher is engaged in a political campaign." It is the opinion of this office that any other employee of the school district, vocational counselor, guidance counselor, coach, etc. would be subject to the same ruling as above stated regarding the privilege to seek office and the subsequent right of the board to require a leave of absence for an

employee of the school who is engaged in a political campaign.

With kind regards, I am

Very truly yours,
A. F. SUMMER, ATTORNEY GENERAL

BY: George M. Swindoll
George M. Swindoll
Assistant Attorney General

GMS:cm

OPINION NO. SO 78-01

SUBJECT: RIGHT OF ATTORNEY TO LIST AND SELL REAL ESTATE. A licensed attorney, in performance of his primary or incidental duties as an attorney at law, may list and sell real estate without obtaining a license as required by Title 73, Chapter 35, Miss. Code Ann. (1972).

An Attorney cannot make fee appraisals for an individual he does not represent as counsel. Facts and circumstances would determine whether he could make such fee appraisals for a government agency.

Pursuant to Section 73-35-3(a), Miss. Code Ann. (1972), an attorney who does not hold a real estate license may not advertise in the yellow pages of the telephone directory under "real estate". Under Section 73-35-3(e) (2), Miss. Code Ann. (1972), he may not solicit listings on real property. Circumstances would determine whether an attorney, not holding a real estate license could submit propects to the Veterans Administration or Federal Housing Administration in order that they might purchase properties foreclosed by those two bodies. Whether an attorney could submit such prospects would determine whether he would be eligible for a 5% real estate commission in the event the prospects are selected.

DATE RENDERED: November 30, 1977

REQUESTED BY: J. Daniel Schroedor, Administrator, Mississippi Real Estate Commission

OPINION BY: A. F. Summer, Attorney General, by Stephen J. Kirchmayr, Special Assistant

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Summer is in receipt of your letter of request of November 28, 1977, and has assigned it to me for research and reply. In your letter you inquire as follows:

"Enclosed you will find a copy of a letter received by the Mississippi Real Estate Commission from the Cleveland Board of Realtors on November 4, 1977. This letter states an attorney in Cleveland, Mississippi, is attempting to sell property that belongs to a client of the attorney.

Mr. Brad Janoush, President of the Cleveland Board of Realtors, spoke with this attorney who advised Mr. Janoush that he had the right to list and sell this property under Section 73-35-3(f) of the Real Estate Brokers License Act of 1954, as amended.

Due to the misinterpretation of this section by the Mississippi Real Estate Commission or this attorney, this Commission would kindly request a written opinion from your office as to the right of an attorney to list and sell real estate without obtaining a license as prescribed by law under the Mississippi Real Estate Brokers License Act of 1954, as amended."

Section 73-35-3(f), Mississippi Code of 1972, provides:

"(f) The provisions of this chapter shall not apply to:

(1) Attorneys at law in the performance of primary or incidental duties as such attorneys at law.

(2) Any person holding in good faith duly executed power of attorney from the owner, authorizing the final consummation and execution for the sale, purchase, leasing or exchange of real estate.

(3) The acts of any person while acting as a receiver, trustee, administrator, executor, guardian or under court order, or while acting under authority of a deed of trust or will.

(4) Public officers while performing their duties as such.

(5) Anyone dealing exclusively in oil and gas leases and mineral rights."

This office is of the opinion that an attorney at law in the performance of his primary or incidental duties as such attorney at law may list and sell real estate without obtaining a license as required by Title 73, Chapter 35, Mississippi Code of 1972.

We enclose herein a copy of Special Assistant Attorney General J. B. Garretty's letter to Mr. James D. Hobson, Jr., dated March 4, 1976, relative to your question, which, by reference, is incorporated into this opinion. It should be noted that the enclosed letter dated March 4, 1976 makes reference to Mississippi Code Sections that have been amended; however, said amendments do not alter the opinion contained in said letter.

Yours very truly
A. F. SUMMER, ATTORNEY GENERAL

BY:
Stephen J. Kirchmayr
Special Assistant Attorney General

SJK/mg

OPINION NO. CR 78-01

SUBJECT: POWER OF COUNTY ATTORNEY TO RELEASE INDIVIDUAL FROM JAIL; WRIT OF HABEAS CORPUS; IMPRISONMENT OF AN INDIGENT FOR NONPAYMENT OF FINES; CONFISCATED WEAPONS; YOUTH COURT JURISDICTION. A county attorney does not have the power to have an individual released from jail. A sheriff who releases a prisoner is liable on his bond. Therefore, only he or his duly authorized deputy may release a prisoner and then only under the conditions set forth in Section 19-25-35, Miss. Code Ann. (1972). Section 19-23-13 of the Mississippi Code and *Myers v. State*, 296 So. 2d 695 (Miss. 1974) preclude a county prosecuting attorney from seeking habeas corpus relief for one accused of a crime. The case of *Nelson v. Tullos*, 323 So. 2d 539 (Miss. 1975) stands for the principle that a reasonable alternative must be sought to afford an indigent the chance to pay his fine. Confiscated weapons should either be retained by the arresting officer or placed for safekeeping in the custody of some person lawfully entitled to them. After it is offered into evidence the clerk of the court becomes its custodian until final ajudication. The cases of *Lee v. State*, 214 Miss. 740, 59 So. 2d 338 (1952) and *Smith v. State*, 229 So. 2d 551 (Miss. 1969) represent the general rule in this state that unless a child is being held for an order rendered before his eighteenth birthday, the youth court has no jurisdiction.

DATE RENDERED: November 22, 1977

REQUESTED BY: Honorable Philip A. Sherman, County Attorney

OPINION BY: A. F. Summer, Attorney General, by Karen Gilfoy, Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Your request for an opinion dated November 11, 1977 has been assigned to me for research and reply.

In your first question you ask:

> Whether or not the County Attorney has the authority and power to have an individual charged with the crime, either misdemeanor or felony, released from jail pending trial over the objection of the local sheriff?

1972 Miss. Code Ann. Section 19-25-35, in pertinent part, is explicit in directing that the sheriff ". . . shall take into his custody, and safely keep, in the jail of his county, all persons committed by order of either of said courts, or by any process issuing therefrom, or lawfully required to be held for appearance before either of them."

Should the sheriff permit a prisoner to be released except upon order of the court or by admission to approved bail, the sheriff is

liable on his bond, thus only the sheriff or his duly authorized deputy may effect the release of a prisoner and then only on the above conditions.

You then ask:

> Whether or not the County Attorney may file a Writ of Habeas Corpus on behalf of a defendant who has been given a greater sentence to be served in jail than the one recommended by the County Attorney after plea bargaining?

1972 Miss. Code Ann. Section 19-23-13 (Supp.1977) directs:

> The county prosecuting attorney shall not represent or defend any person in any criminal prosecution in the name of the state, county or municipality of the county, nor shall he give any advice against the state, his county or in a criminal case against a municipality of his county, and shall not represent any person in any case against the state, his county, or in a criminal case arising in a municipal court of his county. Nothing herein shall prohibit any county prosecuting attorney from defending any person in any criminal prosecution in any county not within the circuit court district of such county prosecuting attorney.

See also the case of *Myers v. State*, 296 So.2d 695 (Miss. 1974). The above statute and case law preclude the county prosecuting attorney from seeking habeas corpus relief for one accused of a crime committed in the circuit court district of the county attorney.

I note only in passing that the matter of sentencing is a discretionary one resting with the trial judge. So long as the sentence is within the statutory limit, the judge is not bound by the recommendation of the prosecutor.

Question three:

> Whether or not a [sic] indigent non-resident of this state or resident of another county in the State of Mississippi may be held in jail until the fine and court costs are paid, even though he has no funds?

This query is fully answered by the case of *Nelson v. Tullos*, (Miss. 1975) 323 So.2d 539, which advises that "[r]easonable alternatives to incarceration must first be resorted to in an attempt to afford the indigent an opportunity to satisfy his fine." However, that case goes on to observe, "[t]his is not to say that an indigent defendant may never be imprisoned for his inability to satisfy his fine in spite of a good faith effort to pay the fine."

Question four:

> Whether or not some official procedure is to be followed in the disposal of confiscated weapons or whether the disposal shall be made in any manner which the sheriff deems possible?

I am attaching hereto three opinions previously issued by this

office which I believe are responsive to your query.

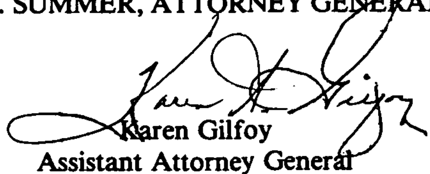
In your fifth and final question you inquire:

> Whether or not a youth who has just turned 18 years old can be tried in the Justice of the Peace Courts for a crime committed prior to his 18th birthday, and if so, does jurisdiction have to be transferred out of the Youth Court?

I refer you to the cases of *Lee v. State*, 214 Miss. 740, 59 So.2d 338 (1952), cited in 89 A.L.R. 2d 506 at 511, and *Smith v. State*, (Miss. 1969) 229 So.2d 551 which holds, "[t]he Youth Court has no jurisdiction over any young person eighteen (18) years of age for any cause [citations omitted], unless the child is being held under an order made prior to his eighteenth (18th) birthday [citations omitted]." (229 So.2d 551, 557).

I trust this information is responsive to your request.

Sincerely yours,
A. F. SUMMER, ATTORNEY GENERAL

BY: 
Karen Gilfoy
Assistant Attorney General

KG/ms

Attachments (3)

OPINION NO. SO 78-02

SUBJECT: COUNTY SUPERINTENDENT OF EDUCATION: RIGHTS TO CONTRACT AND FIRE. There is no statutory requirement for written contracts between the superintendent or school district trustees and an employee of the County Superintendent of Education. Public officials can expend public funds and enter contracts only as expressly authorized by law. The County Superintendent of Education may not enter into a written contract with an employee without legislative authority. No dismissal hearing is statutorily authorized for an employee of the said office, either before the Superintendent or the County Board of Education. Employees of the County Superintendent of Education serve at the "will and pleasure" of the Superintendent who is the employing authority and may dismiss such employee at his "will and pleasure," pursuant to Section 37-5-89, Miss. Code Ann. (1972).

DATE RENDERED: November 21, 1977

REQUESTED BY: Attorney, Hancock County School System

OPINION BY: A. F. Summer, Attorney General, by George M. Swindoll, Assistant Attorney

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Summer has received your letter of request dated November 14, 1977, and has assigned it to me for research and reply. In your letter you inquire as follows:

> "Upon request of the Superintendent of Hancock County School System, I would like to propound to the Attorney General's Office the following questions:
>
> 1. Does the state law require written contracts between the Superintendent or School System and the employee in the office of the County Superintendent?
>
> 2. If a written contract is entered into between the employee and the superintendent, does the superintendent have the authority to dismiss said employee without cause?
>
> 3. Does an employee in the office of the Superintendent of Education have a legal right to a fair dismissal hearing before either the superintendent or the Board of Education?
>
> 4. When does the State law consider an employee a 'will and pleasure employee' and do the employees of the superintendent's office come under such a hearing."

Answer 1

In answer to your first inquiry, there is no statutory requirement *for written contracts* between the superintendent or school district trustees and an employee in the Office of the County Superintendent of Education. As a general rule of law, public officials can expend public funds and enter into contracts only as expressly authorized by law.

Answer 2

In response to your second inquiry, I am of the opinion that without authority having been granted by the legislature for a written contract to be executed between the County Superintendent of Education and an employee in his office, any effort to so contract would be of no legal effect. For emphasis, the County Superintendent can contract and expend school funds only as statutorily authorized.

Answer 3

In answer to your third question, contrary to the right of professional employees of the school district as defined in Section 37-9-103, Mississippi Code of 1972, as amended, as well as the rights of such persons under the provisions of Section 37-9-59, supra, when either not being recommended for employment or when being suspended or removed as set forth in said Section 37-9-59, no hearing is authorized for an employee in the Office of the County Superintendent of Education before either the Superintendent or the County Board of Education.

Answer 4

In answer to your fourth, it is the opinion of this office that employees of the County Superintendent of Education serve at the will and pleasure of the County Superintendent of Education who is, under authority of Section 37-5-89, Mississippi Code of 1972, the employing authority and who may subsequently dismiss such employees at his "will and pleasure."

With kind regards, I am

Very truly yours,
A. F. SUMMER, ATTORNEY GENERAL

BY: George M. Swindoll
George M. Swindoll
Assistant Attorney General

GMS:cm

OPINION NO. SO 78-03

SUBJECT: TRANSPORTATION OF STUDENTS WHO ATTEND MUNICIPAL SEPARATE SCHOOLS. Section 37-41-5, Miss. Code Ann. (1972) permits the municipal separate school district board of trustees, with the municipality's governing authority's concurrence, to provide transportation for the public school students, other than as provided in Section 37-41-3, Miss. Code Ann. (1972) (Supp.1977), when extraordinary circumstances warrant such transportation. However, such transportation must be without state funds as provided by Section 37-41-5, Miss. Code Ann. (1972). The board has the authority and also the duty to transport students who live outside the city limits. The board of trustees of a municipal separate school district with added territory has a duty to transport those students who live outside the city limits but within the municipal separate school district and who live one mile or more from the school to which they are assigned by the nearest traveled road.

DATE RENDERED: October 27, 1977

REQUESTED BY: Marby R. Penton, Esq.

OPINION BY: A. F. Summer, Attorney General By Hubbard T. Saunders, IV Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General A. F. Summer has received your letter of August 22, 1977, in which you request his written opinion. Your letter has been assigned to this writer for research and reply.

In your letter you stated:

> As attorney for the Ocean Springs Municipal Separate School District I would appreciate your written opinion with reference to Section 37-41-1 through 37-41-133 of the Mississippi Code of 1972. The hypothetical questions propounded are:
>
> 1. Does the board of Trustees of the Ocean Springs Municipal Separate School District have authority under the above stated section of the Code to transport children within the city limits to and from school? Further, does the Board of Trustees have authority to transport students outside of the city limits to and from school?
>
> 2. If it is compulsory or mandatory that they transport children outside the city limits, does this begin at the city limits and end at the school district boundary lines?

With regard to the first question which you pose in item 1 *supra*, I enclose a copy of a previous opinion letter rendered by this office on July 6, 1976. That letter is addressed to Honorable Thomas W. Tyner and recognizes that Miss. Code Ann. § 37-41-5 (1972) permits the board of trustees of a municipal separate school district (with the concurrence of the governing authority of the municipality) to provide transportation for public school students other than those entitled to transportation pursuant to Miss. Code Ann. § 37-41-3 (Supp. 1977) whenever the board of trustees and the governing authority find that extraordinary circumstances warrant such transportation. Miss. Code Ann. § 37-41-5 (1972) provides, however, that such transportation must be accomplished "without state appropriations."

Therefore, based upon Miss. Code Ann. § 37-41-5 (1972) and his previous opinion letter of July 6, 1976, the Attorney General is of the opinion that the Ocean Springs Municipal Separate School District has the authority to transport public school students who reside within the city limits if the requirements set out in Section 37-41-5 are met and no state funds are utilized to finance such transportation.

Your second question in item 1 asked if the board of trustees has the authority to transport students outside the city limits to and from school. It is the opinion of the Attorney General that the board of trustees has not only the authority but also the *duty* to transport all eligible public school students in the district who live outside the city limits. The source of this duty is found in Miss. Code Ann. § 37-41-9 (1972) which provides that such a board of trustees of a municipal separate school district with added territory is "authorized, empowered, and directed to lay out transportation routes for school children and provide transportation of all school children living or attending school within the said added territory, who are entitled to transportation,. . . " of course, entitlement to transportation is defined by Miss. Code Ann. § 37-41-3 (Supp. 1977).

The question raised in item 2 is likewise answered by Miss. Code Ann. § 37-41-9 (1972) which provides: "[W]here ever the term 'added territory' is used in Sections 37-41-1 to 37-41-51, with reference to municipal separate school districts, it shall mean territory annexed to such school district outside the municipal corporate limits." Thus, construing Sections 37-41-3 and 37-41-9 together, the board of trustees of a municipal separate school district with added territory has a duty to transport those public school students who reside outside the city limits (but within the municipal separate school district) and who reside one (1) mile or more by the nearest traveled road from the school to which they are assigned.

Hopefully, this response will answer the questions presented in your letter. However, if your have further questions, please contact this office.

Sincerely yours,
A. F. Summer, Attorney General
State of Mississippi

Hubbard T. Saunders, IV
Special Assistant Attorney General

BY:

Hubbard T. Saunders, IV

HTSIV/cb

Attorney General Summer has received your letter of request dated June 25, 1976, and has assigned it to me for research and reply. In your letter you state that subsequent to the creation of the Petal Municipal Separate School District ". . . the lack of sidewalks, traffic hazards, and other safety considerations, the mayor and Board of Aldermen of the City of Petal would desire to enter into a contract with the Separate School District for the transportation of the school children within the city limits" and further that this "can be accomplished for the approximate sum of $12,000.00 per school year."

You then ask our opinion as to whether or not this would be a proper expenditure on behalf of the City and whether or not the City might enter into such a transportation contract with the Separate School District.

Section 37-41-3, Mississippi Code of 1972, as amended, provides, among other things, that pupils who live within the corporate limits of a municipality and who are assigned to a school within said corporate limits *shall not* be considered as eligible for transportation (except those pupils who are otherwise eligible for transportation under Section 37-41-11). Said Section further provides that "However, nothing contained in this section shall be construed to bar any child from such transportation, where he or she lives less than one (1) mile

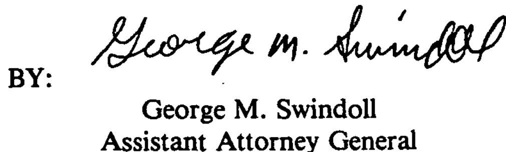
and *is on the regular route of travel* of a school bus, and space is available in such bus for such transportation." (Emphasis added) It also further provides therein that ". . . no state funds shall be paid for the transportation of children living within one (1) mile of the school and such children shall not be included in transportation reports."

As set forth in the above stated statutory provisions, the transportation of pupils within the corporate limits of a municipality who are assigned to a school within said corporate limits are prohibited from being transported by the expenditure of state funds unless authorized by the exceptions as described therein.

Subsequent to our telephone conversation wherein you indicated you were actually interested in knowing if local funds were authorized to be spent to transport pupils who reside in the municipality, it is therefore noted that under the provisions of Section 37-41-5, Ibid, local funds may be expended for the transportation of children under extraordinary circumstances and conditions as described in said Section 37-41-5. It is provided therein that, ". . . the board of trustees of municipal separate school districts with the concurrence of the governing authorities of the municipality . . ., in their discretion and with local tax funds or other local contributions or support exclusively and without state appropriations, may provide transportation for students or pupils to the public schools whenever the within described boards or officers find that extraordinary circumstances and conditions are prevalent in said school district . . ." The extraordinary conditions and circumstances which are applicable are described in the latter part of said Section. Therefore, upon a finding, consistent with fact, that such extraordinary circumstances and conditions are prevalent in your school district, the school trustees with the concurrence of the municipal authorities may, in their discretion, *with local tax funds or other local* contributions, exclusively and without State appropriations, provide transportation for students or pupils to the public schools with the district.

With the usual kind personal regards, I am

Very truly yours,
A. F. SUMMER, ATTORNEY GENERAL

BY: 

George M. Swindoll
Assistant Attorney General

GMS:cm

OPINION NO. CR 78-02

SUBJECT: FORFEITURE OF DRIVER'S LICENSE UPON REFUSAL OF BREATH TEST. If an arrestee refuses to submit to "the photoelectric intoximeter test of any other chemical test or test of the breath," which he impliedly consented to by virtue of Section 63-11-5, Miss. Code Ann. (1972), he automatically forfeits his driver's license upon demand of it by the officer who arrests him as provided by Section 63-11-21, Miss. Code Ann. (1972). The result would be the same even if the suspect gave his consent to a blood test at his own expense and the facilities for such are available. It should be noted, however, in light of the decision of *Scarborough v. State,* 261 So. 2d 475 (Miss. 1972), it would amount to a denial of due process to refuse to allow the defendant to secure a blood test at his own expense.

DATE RENDERED: October 24, 1977

REQUESTED BY: Honorable J. Murray Akers, Legal Assistant District Attorney, 4th Judicial District

OPINION BY: A. F. Summer, Attorney General, By Billy L. Gore, Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Summer has received your letter of request dated September 14, 1977, and has assigned it to me for research and reply. Your inquiry concerns the construction and application of certain sections of the State of Mississippi's Implied Consent Law [Section 63-11-1 et seq., Mississippi Code 1972 Annotated (1973)] and is restated here as follows:

> If a person is suspected of driving under the influence of an intoxicating beverage, or driving while intoxicated, I realize that he forfeits his license upon refusal to submit to the intoximeter test. However, my question is, if a person refuses to submit to the intoximeter test, but agrees to submit to a blood test, where the facilities for administering such are present, and the accused can afford such, does the accused still forfeit his driver's license? In other words, must the accused submit to *some* chemical test to determine the blood - alcohol content, or the intoximeter test alone?

Your question is not subject to an easy resolution. The rights of the arrestee must be preserved on the one hand [SEE: *Scarborough v. State*, 261 So.2d 475 (Miss. 1972)[1], yet the law enforcement agency concerned is certainly entitled to the full benefits granted under the Act.

---

[1]Decided prior to the Implied Consent Act and presenting the Mississippi position when no test is given by the law enforcement agency and the defendant requests one.

Section 63-11-5, our basic statute, reads, in part, as follows:

> Any person who operates a motor vehicle upon the public highways, public roads and streets of this state shall be deemed to have given his consent, subject to the provisions of this chapter to a chemical test or tests of his breath for the purpose of determining the alcoholic content of his blood if lawfully arrested for any offense arising out of acts alleged to have been committed while the person was driving a motor vehicle on the public highways, public roads and streets of this state while under the influence of intoxicating liquor. The test or tests shall be administered at the direction of any highway patrolman, sheriff or his duly commissioned deputies or any police officer in any incorporated municipality when such officer is the arresting officer and has reasonable grounds and probable cause to believe that the person was driving or having under his actual physical control a motor vehicle upon the public streets or highways of this state while under the influence of intoxicating liquor. No such tests shall be given by any officer or any agency to any person within fifteen minutes after the actual arrest.
>
> At the time of such arrest, if the arresting officer has reasonable grounds and probable cause to believe such person to have been driving a motor vehicle upon the public highways, public roads and streets of this state while under the influence of intoxicating liquor, *such officer shall inform such person that his failure to submit to such a chemical test or tests will result in the suspension of his privilege to operate a motor vehicle upon the public streets and highways of this state for a period of ninety days.* Anyone arrested under the provisions of this chapter shall be informed immediately after being booked that he had the right to telephone for the purpose of requesting legal or medical assistance.

* * * * *

Section 63-11-5 (emphasis supplied)

A subsequent section, 63-11-21, provides for the forfeiture of the suspect's drivers's license upon refusal to submit to a chemical test designated by the law enforcement agency. We quote, in its entirety, this portion of the Implied Consent Act:

> *If a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test designated by the law enforcement agency as provided in Section 63-11-5, none shall be given, but the arresting officer shall at that point demand the driver's license of the person who shall forfeit his license for ninety days.* Upon demand by the arresting officer, the person who refuses to take the test shall deliver his driver's license into the hands of the arresting officer who shall give the driver a receipt for his license on forms prescribed and furnished by the commissioner of public safety. The arresting officer

> shall forthwith forward the license to the commissioner of public safety together with a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving a motor vehicle upon the public highways, public roads and streets of this state while under the influence of intoxicating liquor, stating such grounds, and that the person had refused to submit to the test upon the request of the law enforcement officer. The person's license or permit to drive for a period of ninety days, or the privilege of driving a motor vehicle on the highways of this state given to a nonresident, shall stand forfeited and suspended from the time of his arrest. If the person is a resident without a license or permit to operate a motor vehicle in this state, the commissioner of public safety, or his duly authorized agent, shall deny to the person the issuance of a license or permit for a period of ninety days after the date of the alleged violation, subject to review as provided in this chapter. Such forfeiture and suspension shall not affect in any way the prosection by conventional evidence of the offense with which the person was charged.
>
> If a person is acquitted on the charge of driving a motor vehicle upon a public highway of this state while under the influence of intoxicating liquor or while intoxicated, then in that event the commissioner of public safety shall reinstate the license of such person.

Section 63-11-21 (emphasis supplied)

It is my opinion that if an arrestee refuses to submit to the photoelectric intoximeter test or any other "chemical test or tests of his breath" designated by the particular law enforcement agency involved, he automatically, by virtue of Section 63-11-21, forfeits his driver's license upon demand of same by the arresting officer. This is true even though the suspect may give his express consent to a blood test at his own expense and the facilities and equipment for such are available.

A caveat, however, is in order here. The *Scarborough* case, *supra*, held that holding a prisoner incommunicado and unreasonably denying or ignoring his request for assistance in procuring a blood test at his own expense amounted to a denial of due process of law. In this posture I would grant the request of the arrestee to obtain a blood test at his own expense - if, in fact, he demanded one - provided the additional criteria set forth in *Scarborough* are met. SEE: 261 So.2d at p. 479.

Voluntary submission to the blood test, however, would not, in my opinion, obviate the necessity of the defendant forfeiting his driver's license upon demand by the arresting officer where the arrestee refused to submit to the intoximeter or other "chemical test or tests of his breath" designated by the particular law enforcement agency involved.

I hope that this satisfactorily answers the inquiry presented. If you have further questions concerning this or any other matter, please do not hesitate to let us know.

Sincerely yours,
A. F. SUMMER, ATTORNEY GENERAL

BY:
Billy L. Gore
Special Assisstant Attorney General

BLG/ds

OPINION NO. SO 78-04

SUBJECT: JUSTICE COURT JURORS; RESIDENCE REQUIREMENTS. Under provisions of Section 11-9-143, Miss. Code Ann. (1972), the justice court judge "shall order the proper officer to summon six persons. . . ." Jurors summoned must necessarily be summoned from within the justice court district since the "proper officer" would be the constable whose official powers stop at the borders of his district. If the order to summon jurors is issued to the sheriff, under authority of Section 11-9-107, Miss. Code Ann. (1972), or through some other "reputable person" under authority of Section 11-9-109, Miss. Code Ann. (1972), the person acting in lieu of constable would also be geographically limited by the boundaries of the justice court district.

DATE RENDERED: October 13, 1977

REQUESTED BY: Benton County Attorney

OPINION BY: A. F. Summer, Attorney General, R. Hugo Newcomb, Sr., Special Assistant

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Summer has received your letter of September 2, 1977, and assigned it to the undersigned for research and reply.

You ask, "Should the Justice Court Jurors be drawn by the Circuit Court Clerk from the compartment or box containing the names of competent jurors residing within the territorial jurisdiction or venue of the justice of the peace before whom the justice court case is to be tried?"

The method of drawing jurors to which you refer defines under Section 13-5-4(a), Mississippi Code of 1972, "Court," as the circuit, chancery and county courts of this State and includes when the context requires, any judge of the court. Accordingly, a justice court judge and his court would not be included therein, and Section

11-9-143 would still be applicable. This statute would apply equally to civil and criminal trials (Section 99-33-9).

You also ask for an opinion as to whether or not a juror before a justice court must reside in the district where the criminal offense is committed and within the venue of the duly elected, qualified and acting justice court judge who will hear and preside over the case.

In an opinion dated August 31, 1977, over the signature of the undersigned, Section 26 of the Mississippi Constitution of 1890 was referred to:

> "In all criminal prosecutions, the accused shall have the right to . . . a speedy and public trial by an impartial juror of the county where the offense was committed. . ."

Then the opinion stated:

> "I find no Mississippi statutes or State Supreme Court judicial decisions requiring that jurors in a justice court trial, either civil or criminal, must be residents of the justice court district."

However, under provisions of Section 11-9-143, the justice court judge "shall order the proper officer to summon six persons . . ." Inasmuch as the "proper officer" would obviously be the constable whose official powers stop at the borders of his district, the jurors summoned by him must necessarily be summoned from within the district. If the justice court order to summon jurors should be issued, in the absence of the constable, to the sheriff, under authority of Section 11-9-107, or through some other "reputable person" under authority of Section 11-9-109, I believe that he, acting in lieu of the constable, would also be geographically limited by the boundaries of his district.

Sincerely,
A. F. SUMMER, ATTORNEY GENERAL

BY:

R. Hugo Newcomb, Sr.
Assistant Attorney General

RHN:hs

OPINION NO. CV 78-02

SUBJECT: LAW ENFORCEMENT OFFICERS EXECUTING WRIT OF REPLEVIN. The United States Supreme Court has applied the protection of the fourth amendment against unreasonable search and seizure to civil matters as well as criminal. In view of the volatile area of the law and the potential for liability, when a law en-

forcement officer attempts to enter a defendant's locked property to execute a writ of replevin issued by the proper Judge as provided by Section 11-37-101, et seq. Miss. Code Ann. (1972), and the officer cannot serve the writ, it would appear advisable to use alternative methods rather than resort to forceable action to seize such property. Sections 11-37-121, 137, 141, and 143, Miss. Code Ann. (1972), provide methods for proceeding to judgment should the property not be available for seizure.

DATE RENDERED: October 11, 1977

REQUESTED BY: Attorney for Board of Supervisors, Wiggins, Mississippi

OPINION BY: A. F. Summer, Attorney General; William James Cole, III, Special Assistant

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Summer has received your opinion request and has assigned it to the undersigned for research and reply.

In your letter you state:

> "As attorney for the Board of Supervisors, I have been requested by local law enforcement officers to obtain your opinion as to whether a proper Writ of Replevin issued by the proper Judge as provided in MCA § 11-37-101 *et seq.* authorizes a law enforcement officer to enter the Defendant's locked property in order to seize and take possession of the property described in the said Writ which the Writ orders the officer to seize, take possession of, and deliver to the Plaintiff?
>
> Also, would your answer be different if the Defendant or some other person is present but refuses to allow the officer to enter the premises, or if no one is present?"

In *Galloway v. Brown*, 93 So.2d 459, 230 Miss. 471, the Mississippi Supreme Court stated that a "deputy sheriff was entitled to employ all reasonable means in executing writs of replevin." In 66 Am. Jur.2d Replevin § 69, we find a statement that "an officer may in executing a writ of replevin enter a dwelling house to seize property described in the writ, provided that such seizure can be accomplished without a breach of peace." However, we are constrained from applying such language so as to authorize clearly the situation contemplated in your letter particularly in view of the increased judical activity in this volatile area.

As you well know, the United States Supreme Court, although not completely addressing the situation here, has applied the protection of the Fourth Amendment against unreasonable search and seizure to civil matters as well as criminal. *Camara v. Municipal Court,* (1967) 387 US 523, 18 L. Ed.2d 930, 87 S. Ct. 1727; *See v. City of Seattle,* (1967) 387 U.S. 541, 18 L. Ed.2d 943, 87 S. Ct. 1737; *Wyman v. James* (1971) 400 U.S. 309, 27 L. Ed.2d 408, 91 S. Ct. 381.

Although we find no cases in this jurisdiction, the California Supreme Court in a similar situation in *Blair v. Pitcher.* 5 Cal. 2d 258, 486 P.2d 1242, 45 ALR3d 1206 stated:

"The teaching of these cases is that the Fourth Amendment applies to civil as well as criminal matters. However, not every official intrusion into the sanctity of the home will be deemed a search within the meaning of the Fourth Amendment. As we read the majority opinion in Wyman, if the entry is, in large part, for the benefit of those whose homes are invaded, and if such persons may refuse to allow the intrusion without fear of criminal sanctions, then it is not a search within the Fourth Amendment. Furthermore, since the Fourth Amendment prohibits only unreasonable searches and seizures, the governmental interests must be weighed against the citizen's right to privacy to determine under what circumstances a particular type of search will be allowed. (Camara v. Municipal Court, Supra, 387 US 523, 534-539 [18 L. Ed2d 903, 938-941]; Wyamn c. James, supra, 400 US 309, 318-324 [27 L. Ed2d 408, 414-418].)

"Applying these principles to the present case, we find that the official intrusions authorized by Section 517 are unreasonable searches and seizures unless probable cause first be shown.

"In contrast to the visit of a caseworker, the sort of intrusion authorized by Section 517 is clearly a search within the meaning of the Fourth Amendment. As with a search in a criminal case, the sheriff executing claim and delivery process enters homes with the full force of the law to seize property on the premises. There can be no pretension that the sheriff enters for a rehabilitative purpose; his only aim is to seize property.

Nor can the occupant refuse to allow such entry; indeed, the sheriff may 'call to his aid the power of his county' to overcome any resistance which the occupant may offer. (§517.) Therefore, we conclude that intrusions into private places in execution of claim and delivery process are searches and seizures within the meaning of the Fourth Amendment.

"We also hold that such searches are unreasonable unless made upon probable cause. The only governmental interests which are furthered by the intrusions incident to execution of claim and delivery process are the promotion of commerce, particularly the extension of credit, and the assurance that valid debts will be paid. (Note (1970) 68 Mich L Rev 986, 996-997.) On the other hand, as already pointed out, the citizen's right to privacy is infringed almost as much by such civil intrusions as by searches in the traditional criminal context. Balancing these important individual rights aginst the less compelling state interests (which, as we note infra, are only slightly promoted by execution of claim and delivery process), we find that a search incident to the execution of claim and delivery process is unreasonable unless it is supported by a warrant issued by a magistrate upon a showing of probable cause. . . .

"Obviously, the affidavits customarily required of those initiating claim and delivery procedures do not satisfy the probable cause standard. Such affidavits need allege only that the plaintiff owns property which the defendant is wrongfully detaining. The affiants are not obligated to set forth facts showing probable cause to believe such allegations to be true, nor must they show probable cause to believe that the property is at the location specified in the process. Finally, such affidavits fail to comply with the probable cause standard because they are not passed upon by a magistrate, but are examined only by the clerical staff on the sheriff's or marshal's department, and then merely for their regularity in form . . . ."

Furthermore in *Laprease v. Raymours Furniture Company*, 315 F. Supp. 716, a New York U. S. District Court stated:

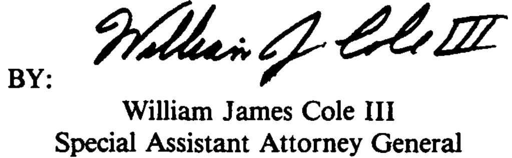
> "If the Sheriff cannot invade privacy of a home without a warrant when the state interest is to prevent crime, he should not be able to do so to retrieve a stove or refrigerator about which the right to possession is disputed. Nor should he have any greater right to make a seizure of these or similar chattels not within a building or enclosure by virtue of a requisition '*deemed* to be the mandate of the court,' (emphasis added), but which in fact is the mandate of the plaintiff's attorney issued without the examination or approval of an intervening magistrate, and resulting in a taking against the will of the owner. . . . "

It is most difficult to determine a firm rule upon which your actions might rely in taking the steps contemplated in your letter; and, therefore, we have attempted to set forth here the problems that might be encountered in taking such actions so as to demonstrate that although such action might appear permissible under Mississippi law, a court, based upon the principle set forth here, might take a different view. We would also note that such action taken by a law enforcement official might create §1983 liability, and we would refer you to a reading of *Hall v. Garson*, 430 F.2d 430, (5th Cir. 1970), *Calderon v. United Furniture Co.*, 505 F.2d 950 (5th Cir. 1974), *North Georgia Finishing, Inc. v. Di-Chem., Inc.*, 419 U. S. 601 (1975). In view of this volatile area of law and the potentiality of liability when taking this action, it would appear advisable that when the writ cannot be served then the alternately provided methods should be taken rather than to resort to any forceable action to seize such property.

It is, therefore, the opinion of this office that although absent any pronouncement by courts of this jurisdiction that the principles set forth above would apply and operate to restrict any activity under Section 11-37-101, et seq., Mississippi Code of 1972, to those permissible within the protective features of the United States Constitution. In order to diminish any potentiality for liability, it is incumbent upon officers in the administration of these statutes to conduct themselves in manner so as to remain within the bounds of clearly permitted authority. We would note that the statutes, Sections 11-37-121, 11-37-137, 11-37-141 and 11-37-143, Mississippi Code of 1972, pro-

vide for the means of proceeding to judgement should the property not be available for seizure.

Very truly yours,
A. F. SUMMER, ATTORNEY GENERAL

BY: 

William James Cole III
Special Assistant Attorney General

WJCIII:lm

OPINION NO. SO 78-05

SUBJECT: MUNICIPALTIES; USE OF "VASCAR"; TRAFFIC LAW ENFORCEMENT. The term "radar speed detection equipment" as described in Section 63-3-519, Miss. Code Ann. (1972), is generic, and is intended to include all speed detection equipment used upon "any public street, road, or highway of this state." Therefore, the device "VASCAR", a time and distance computer is statutorily prohibited for certain size municipalities.

DATE RENDERED: October 10, 1977

REQUESTED BY: Chief of Florence Police Department

OPINION BY: A. F. Summer, Attorney General S. E. Birdsong, Jr., Special Assistant

Attorney General Summer has received your request for an opinion and has referred it to the undersigned for research and reply.

You refer to Section 63-3-519, Mississippi Code of 1972, Annotated, which provides, inter alia, the following:

> "It shall be unlawful for any person or peace officer or law enforcement agency, except the Mississippi Highway Safety Patrol, to purchase or use or allow to be used any type of radar speed detection equipment upon any public street, road or highway of this state."

with certain exceptions therein specified which exceptions do not include municipalities having a population of less than 2,000, and present the question for opinion as to whether the use of a time and distance computer, which you describe as being manufactured by Federal Sign and Signal Corporation having a trade name of VASCAR, would be included in the statutory prohibition.

"Radar speed detection equipment" is a generic term which, as it appears in Section 63-3-519, in the opinion of this office, was intended to include all speed detection equipment used upon any public street, road or highway of this state.

Consequently, this office is also of the opinion that VASCAR would be included in the statutory prohibition.

Should the governing authorities of Florence desire to employ VASCAR or other speed detection equipment upon the municipal streets, they may consider addressing the Legislature concerning enactment of appropriate laws.

With kind regards, I am

Very truly yours,
A. F. SUMMER, ATTORNEY GENERAL

BY:

S. E. Birdsong, Jr.
Special Assistant Attorney General

SEB,Jr./ped

OPINION NO. SO 78-06

SUBJECT: MUNICIPALITIES; ELECTIONS; ALDERMAN IN CODE CHARTER MUNICIPALITIES. Section 21-3-7, Miss. Code Ann. (1972), provides that all code charter municipalities having a population of 10,000 or more according to the latest federal census shall have seven aldermen. Should a federal census show a population count of 10,000 or more for the first time, election of seven aldermen would be held at the next regular municipal election. *Stewart v. Waller*, 404 F. Supp. 206 (N. D. Miss. 1975) holds that all code charter municipalities with a population of 10,000 or more must hold aldermanic elections by wards. In order to divide a municipality into wards the municipality would have to comply with the Voting Rights Act of 1965 by either: (1) obtaining a declaratory judgment from the United States District Court for the District of Columbia that the plan does not have the purpose or the effect of denying the right to vote on account of race or color; or (2) submitting the plan for approval to the Attorney General of the United States.

DATE RENDERED: September 28, 1977

REQUESTED BY: Honorable D. L. Connor, Mayor of Ocean Springs

OPINION BY: A. F. Summer, Attorney General, by S. E. Birdsong, Jr. Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Summer has received your request for opinion dated September 21, 1977, and has referred it to the undersigned for reply.

Your letter stated:

> "The City of Ocean Springs is considering having a new Federal Census taken. In 1970 the Federal Census stated that we had a popula-

tion of 9,500. A recent survey by Gulf Regional Planning Commission estimates our population to be in excess of 15,000.

"At the present time, the City of Ocean Springs is operating under the aldermanic system form of government, with a mayor and 5 aldermen.

"I am concerned with the following:

"1. If our population exceeds 10,000 citizens, would we have to adopt the 7 aldermen form of government?

"2. If so, would we have to hold an immediate election, or could we operate under the present system until the next election?"

Section 21-3-7 of the Mississippi Code of 1972, Annotated, states that in all code charter municipalities having a population of 10,000 or more according to the latest federal census there shall be seven aldermen. Ocean Springs is a code charter municipality.

In my opinion, unless otherwise ordered by a court of competent jurisdiction, should a federal census count the population of Ocean Springs to be 10,000 or more, election of seven aldermen by the municipal electors would be held on the date of the next regular municipal general election in Ocean Springs.

In *Stewart v. Waller,* 404 F.Supp. 206, (1975), the United States District Court for the Northern District of Mississippi ruled that all code charter municipalities in the State of Mississippi with a population of 10,000 or more must hold aldermanic elections by wards.

Dividing the geography of Ocean Springs into wards for the election of seven aldermen is a situtation which would subject the municipality of Ocean Springs to the requirements of Section 5 of the *Voting Rights Act of 1965*, 42 U.S.C. 1973c: as a prerequisite to it being effective the creation of such wards would oblige the municipality to either (1) obtain from the United States District Court for the District of Columbia a declaratory judgment that the plan does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or (2) submit the plan to the Attorney General of the United States for consideration and approval.

With kindest regards, I am

Very truly yours,
A. F. SUMMER, ATTORNEY GENERAL

S. E. Birdsong, Jr.
Special Assistant Attorney General

SEBJr.:nm

OPINION NO. SO 78-07

SUBJECT: AUTOMOBILE LICENSE TAGS. Section 27-19-57, Miss. Code Ann. (1972) sets forth the provisions and requirements for the paying of the privilege license and the registration of automobiles. The question involved here is whether it is illegal for a Mississippi resident to drive a vehicle with an out of state license tag, i.e., whether the automobile is required to have a Mississippi tag. It would be a matter of factual determination as to whether the alleged borrowing or possession was for the purpose of avoiding taxes.

DATE RENDERED: September 28, 1977

REQUESTED BY: Honorable Robert Linn, Lowndes County Justice Court Judge

OPINION BY: A. F. Summer, Attorney General; by R. Hugo Newcomb, Sr., Assistant Attorney General.

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Summer has received your letter of request dated September 26, 1977, and assigned it to the undersigned for research and reply.

You asked three questions:

> (1) Is it illegal for a Mississippi licensed driver to borrow and drive an Alabama licensed car on Mississippi roads?
>
> (2) Is it illegal to live in Mississippi and have in your possession Alabama licensed cars registered to Alabama residents and being driven by you and your family daily?
>
> (3) Is it illegal to live in Mississippi and drive a pickup truck with an Alabama tag.

Varying facts in each situation involved in your questions make it impossible to adequately answer by way of an Attorney General's opinion. However, we set out below information which may be used as guidelines.

Section 27-19-57, Mississippi Code of 1972, provides that all persons required to pay the privilege license prescribed by this act shall register their private passenger vehicles and pay such tax in the county in which such person resides, and all commercial vehicles shall be registered in the county in which the owner or operator maintains his principal place of business, if the vehicle or vehicles owned by such persons be operated in the classification for which the license is issued by the county tax collectors. Provided, however, that when a person has no such residence in Mississippi, he may register his vehicle in the county in which it is principally operated or, if operated in more than one county, in any such county. If any vehicle, the license for which issued by the county tax collector, shall be registered in any county other than the county in which the owner or operator thereof resides, in the case of a private passenger vehicle, or, in the case of a commer-

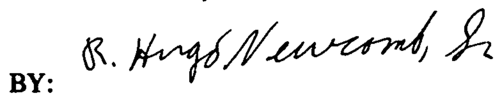
cial vehicle, where such owner or operator maintains his principal place of business, the said vehicle shall be regarded as having no privilege license, and the owner or operator thereof shall be liable for the full annual tax in the county in which he resides or maintains his principal place of business, plus a penalty thereon of 25 percent.

The fact that the car carried an Alabama license would not be material. The material point would be whether or not it did or did not carry a Mississippi license, or was required to. The act also refers to "their private passenger vehicles" and "all commercial vehicles." It would be a matter of factual determination whether or not the Mississippi licensed driver had the right of possession to the extent that it could be called his private passenger vehicle. As to whether or not the car was actually borrowed, or the alleged borrowing was a subterfuge to avoid payment of taxes, would be a matter of factual determination.

The answer above would equally apply to your second question.

In answer to your third question, again, the matter of whether or not the vehicle had an Alabama tag would not be relevant. Whether or not he was legally required to have and did or did not have on the pickup truck an appropriate Mississippi tag would be the issue.

Sincerely,
A. F. SUMMER, ATTORNEY GENERAL

BY: 

R. Hugo Newcomb, Sr.
Assistant Attorney General

RHN:hs

OPINION NO. SO-78-08

SUBJECT: MUNICIPALITIES; ADVERSE POSSESSION. A municipality can acquire an easement for water lines by prescriptions. The city in question had been an adverse user beyond the period prescribed by Section 15-1-13, Miss. Code Ann. (1972). Final determination is for a court of competent jurisdiction.

DATE RENDERED: September 27, 1977

REQUESTED BY: City Attorney, Brandon, Mississippi

OPINION BY: A. F. Summer, Attorney General John M. Weston, Special Assistant

*Full text of Attorney General's Opinion is reprinted as follows:

Your letter of September 13, 1977, addressed to Honorable A. F. Summer, Attorney General, has been received and assigned to me for research and reply. Your letter states:

> "The Mayor and Board of Alderman have authorized and directed me as their attorney to request an Attorney General's opinion on the following:
>
> The City of Brandon secured an easement for construction of water service lines across private property in 1964, however, it now appears that the water lines were placed outside of the easement boundary without written approval of the land owner. The property has changed hands and the present owner has discovered the error. *QUESTION:* Can a municipality acquire an easement for water lines by prescription?
>
> "The City of Brandon's water line across subject property has been exposed by land owner and is in danger of freezing this winter and an opinion is requested prior to city funds being spent to bring action against the land owner."

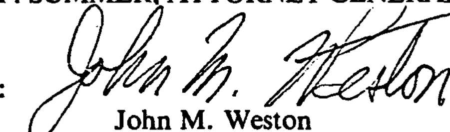
You also advised me via the phone yesterday that the water line in question is a ten (10) inch cast iron main line pipe leading from the City's sole water tank; that the line was installed in 1964 and has been continuously used since then; that the Pentacostal Church (present property owner) has graded the property down and wants the City to move the line at the City's estimated cost of $10,000.00.

In view of your letter and the above oral information, it is my opinion that the answer to your question is "yes." The prior owner must have known of the existing placement of the water line at the time it was put in situs. Furthermore, the City has been the adverse user for longer than the period prescribed by law (Section 15-1-13, Code of 1972). Also, see *Sturges v. City of Meridian,* (1909) 95 M 35, 48 So. 620, holding that:

> Where a city dug a ditch to drain a certain area of municipal territory and maintained it as originally constructed continuously for more than ten years:-
>
> (a) It thereby obtained the right by prescription to maintain it; but
>
> (b) Did not acquire the right to enlarge the ditch or increase the flow of water through it.

In passing, of course the ultimate determination of the City vis' a vis' the Church is for a court of competent jurisdiction to decide. Trusting this answers your question, I am, with kind personal regards

Very truly yours,
A. F. SUMMER, ATTORNEY GENERAL

BY: 
John M. Weston
Special Assistant Attorney General

JMW/ped

OPINION NO. SO 78-09

SUBJECT: DUTIES OF A CONSTABLE OUTSIDE HIS DISTRICT. In a previous opinion of the attorney general, it was stated that "a constable has no powers as such outside the geographic limits of his district, except, under the conditions of hot pursuit." Accordingly, Section 97-11-35, Miss. Code Ann. (1972), which provides that a constable who willfully neglects or refuses to return any person who has committed an illegal act, in his presence or within his knowledge, shall be fined and may be removed from office, would not apply to a constable outside of his district.

DATE RENDERED: September 26, 1977

REQUESTED BY: Mr. Bobby J. Boyte, Constable

OPINION BY: A. F. Summer, Attorney General, By Hugo Newcomb, Sr., Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Summer has received your letter of request dated September 15, 1977, and assigned it to the undersigned for research and reply.

You stated that on the basis of a recent Attorney General's opinion, the Pearl River County Chancery Clerk advised you that a constable had no more authority than a private citizen to make arrests beyond the confines of his district unless pursuit began within the confines of his district. You stated that he futher advised you that the Board of Supervisors could not allow a claim in accordance with the provisions of Title 99-27-37 (authorizing supervisors to pay constables one-third of certain fines) from a constable when the arrest was made beyond the confines of his district.

You asked, "Would Title 97-11-35 be applicable to a constable if he were beyond the confines of his district?" This section provides that if a constable shall "wilfully neglect or refuse to return any person committing any offense against the laws, committed in his view or knowledge, or of which he has any notice, or shall wilfully absent himself when such offense is being or is about to be committed, for the purpose of avoiding a knowledge of the same, he shall, on conviction, be fined not less than one hundred dollars nor more than five hundred dollars, and may, in the discretion of the court, be removed from office."

As stated in the previous opinions from this office, and the opinions to which you refer seem to be in accord therewith, a constable has no powers as such outside the geographic limits of his district, except, under the conditions of hot pursuit, as was mentioned above. Accordingly, outside of his district, the provisions of Section 97-11-35 would not apply to him in his capacity as constable, inasmuch as his powers do not go beyond the district limits, and his

status (except for the exception above) is the same as any other private citizen.

Sincerely,
A. F. SUMMER, ATTORNEY GENERAL

BY:

R. Hugo Newcomb, Sr.
Assistant Attorney General

RHN:hs

OPINION NO. CR-78-03

SUBJECT: CUSTODIAL ARREST FOR POSSESSION OF MARIJUANA; MOTOR VEHICLE OPERATORS; IMPEACHMENT OF WITNESSES RIGHT TO COUNSEL. The legislature has provided no guidelines as to the types of summons to be used in order to enforce Section 41-29-139(d)(2)(A), Miss. Code Ann. (1972) (Supp. 1977), which deals with custodial arrest for possession one ounce or less of marijuana. It appears to be left to the arresting officers' discretion to determine the meaning of the statutory terms "satisfactory proof of identity" and "satisfactory written promise to appear." The amended code section does not preclude custodial arrest, but the arrestee may avoid custodial arrest if he provides satisfactory proof of identity and a written promise to appear.

Under authority of Section 41-29-139(d)(2)(B), Miss. Code Ann. (1972), an operator of a motor vehicle in which marijuana is found may be subject to custodial arrest if he knowingly keeps or allows to be kept in said vehicle more than 1 gram, but not more than 1 ounce of marijuana. It is not necessary that offenders be released after issuance of summons.

Violations of Subsection (d)(2)(B) are misdismeanors, and could be used for impeachment purposes in subsequent criminal proceedings. A violation of Subsection (d)(2)(A) does not constitute a criminal record upon conviction.

Only second or subsequent offenders are entitled to a court appointed attorney pursuant to a violation of Section 41-29-139(d)(2)(A) Miss. Code Ann. (1972).

DATE RENDERED: August 12, 1977

REQUESTED BY: City Attorney, Poplarville, Mississippi

OPINION BY: A. F. Summer, Attorney General Scherry J. LeSieur, Special Assistant

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Summer has received your letter of request and has assigned it to the undersigned for research and reply.

In your letter of July 21, 1977, you asked the following questions:

(1) What form of summons should be used in enforcing Miss. Code Ann. § 41-29-139(d)(2)(A) as amended this year?
(2) What is meant by "satisfactory proof of identity" and "satisfactory written promise to appear" as those terms are used in the statutory amendment?
(3) Does § 41-29-139(d)(2)(A) as amended preclude custodial arrest for possession of one ounce or less of marijuana?
(4) (a) Does § 42-29-139(d)(2)(B) allow custodial arrest of the operator of a motor vehicle in which marijuana is found?
(b) Is it necessary or suggested that an officer issue a summons in this instance?
(5) Are passengers in vehicles governed by § 41-29-139(d)(2)(A) or 41-29-139(d)(2)(B)?

In our telephone conversation of July 22, 1977, you added the following question:

(6) Under what circumstances must one charged with a violation of § 41-29-139(d)(2)(A) be afforded an attorney?

The amendment of Section 41-29-139(d)(2)(A) effective July 1, 1977, provides that this paragraph of the statute "shall be enforceable by summons." However, the legislature provided no guidelines as to the type of summons to be used, nor did they assign to any state authority the responsibility of drafting a uniform citation summons for this purpose. Although this office has no authority to prepare a summons form, I have enclosed a copy of the form of summons which the Jackson Police Department proposes to use in enforcing this law. You will notice that I have marked several places on the form which would require modification in order to apply specifically to the marijuana law and to your particular county, city, etc. It is our opinion that a summons of this type would be most helpful in providing for the Mississippi Bureau of Narcotics necessary information about marijuana offenders. The Bureau is charged with maintaining for two (2) years the record of any conviction under this section.

Since the Bureau must keep and reveal such records to officers of the court for purposes of determining whether an affidavit should charge a defendant as a second or subsequent offender, and for the courts to use in sentencing, we have come to the conclusion that uniform statewide use of a form such as the enclosed example would insure the most efficient operation of the Bureau's record-keeping and information-dispensing functions. The summons, of course, should be printed at least in triplicate so as to provide copies for the offender, the arresting officer and the judge.

Regarding your questions on the phraseology used in the statute, the wording appears to clearly leave to the arresting officer's discre-

tion the determination of what constitutes satisfactory proof of identity, and satisfactory written promise to appear. Some guidance may be found in the summons itself, for if the offender provides all of the information necessary to complete the summons, the arresting officer might well be satisfied as to proof of identity. Further, the offender's signing of the summons could then be construed as satisfactory written promise to appear.

The amendment of Section 41-29-139(d)(2)(A) does *not* preclude custodial arrest for possession of one ounce or less or marijuana, it merely provides an alternative to custodial arrest where the specified conditions are met, i.e., the arrestee provides satisfactory proof of identity and written promise to appear. Cf., *State v. County School Board*, 181 Miss. 818, 181 So. 313 (1938) in which the Mississippi Supreme Court held that the word "shall" may be construed as permissive rather than mandatory. The Court quoted H. Black, Handbook on the Construction & Interpretation of Laws 529 (2d ed. 1911):

> [W]ords in a statute importing permission or authorization may be read as mandatory, and words importing a command may be read as permissive or enabling, whenever, in either case, such a construction is rendered necessary by the evident intention of the legislature or the rights of the public or of private persons under the statute. (Id. 829, 181 So. at 315).

It is our position that "shall" must be construed as permissive rather than mandatory in the context of the entire section since there are conditions precedent to the enforcement of the law by summons. It is necessarily inferred that law enforcement officers may, by means other than summons, i.e., custodial arrest, enforce the law where these conditions are not met.

Section 41-29-139(d)(2)(B) does allow custodial arrest of the operator of a motor vehicle in which the operator knowingly keeps or allows to be kept "more than one (1) gram, but not more than one (1) ounce of marijuana." The provisions for enforcement by summons are limited to paragraph (d)(2)(A) of the statute, therefore it is neither necessary nor suggested that offenders under (d)(2)(B) be released after issuance of a summons. In fact, there is no statutory authority for the use of a summons in this situation. A violation of paragraph (d)(2)(B) is a misdemeanor, unlike a violation of (d)(2)(A) which is merely an offense which does *not* constitute a criminal record upon conviction. A conviction under (d)(2)(B) would constitute a criminal record and could be used for impeachment purposes in subsequent criminal proceedings.

Motor vehicle passengers would be governed by paragraph (d)(2)(A) since paragraph (d)(2)(B) deals exclusively with *operators* of motor vehicles.

Regarding your question as to the circumstances under which one

charged with a violation of Section 41-29-139(d)(2)(A) must be afforded an attorney, it is our opinion that only those charged as second or subsequent offenders are entitled to court-appointed counsel. This conclusion is based upon *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), which requires, in the absence of a knowing and intelligent waiver, that cousel be made available for anyone charged with a crime in which imprisonment is a possible punishment. Second and subsequent offenders of this section must, according to the statute, be confined for not less than five (5) days in the county jail upon conviction. Thus counsel must be made available to them. Since first offenders are subject only to imposition of a fine upon conviction, there is no requirement that they be provided counsel.

If this office can be of further assistance please do not hesitate to contact us.

Sincerely yours,
A. F. SUMMER, ATTORNEY GENERAL

BY:

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Special Assistant Attorney General

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Enclosure