S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

May 4, 2000

Opinion No. 00-084

Are the amendments proposed in Senate Bill No. 2665 constitutional?

QUESTION

Do the amendments to the implied consent law contained in Senate Bill No. 2665 violate an accused person's right not to be compelled to give evidence against himself or herself?

OPINION

No. The amendments to Tenn. Code Ann. §§ 55-10-406(a)(2) & (a)(3) proposed by Senate Bill No. 2665 do not violate an accused person's constitutional right not to be compelled to give evidence against one's self.

ANALYSIS

The amendments to Tenn. Code Ann. §§ 55-10-406(a)(2) & (a)(3) proposed by Senate Bill No. 2665 are highlighted below for ease of reference.

> (a)(2) Any law enforcement officer who requests that the driver of a motor vehicle submit to a test pursuant to this section for the purpose of determining the alcoholic or drug content of the driver's blood shall, prior to conducting such test, advise the driver that refusal to submit to such test will result in the suspension of the driver's operator's license by the court ***and, if such driver is driving on a revoked, suspended or canceled license, when the person's privilege to do so is cancelled, suspended or revoked because of a conviction for vehicular assault under § 39-13-106, vehicular homicide under § 39-13-213, or driving while intoxicated under § 55-10-401, that the refusal to submit to such test will, in addition, result in a fine and mandatory jail or workhouse sentence.*** The Court having jurisdiction of the offense for which such driver was placed under arrest shall not have the authority to suspend the license of a driver who refused to submit to the test if the driver was not advised of the consequences of such refusal.
>
> (a)(3) If such person having been placed under arrest and thereafter

> having been requested by a law enforcement officer to submit to such test and advised of the consequences for refusing to do so, refuses to submit to the test, the test shall not be given and such person shall be charged with violating this subsection. The determination as to whether a driver violated the provisions of this subsection shall be made at the same time and by the same court ***or jury as the one considering the offense for which the driver was placed under arrest.*** If the court finds that the driver violated the provisions of this subsection, the driver shall not be considered as having committed a criminal offense ***if the driver is not driving on a revoked, suspended or canceled license or is driving while unlicensed***; however, the court shall suspend the license of such driver for a period of twelve (12) months. If the court finds that the driver of a motor vehicle involved in an accident in which one (1) or more persons suffer serious bodily injury violated this subsection by refusing to submit to such a test, the court shall suspend the license of such driver for a period of two (2) years. If the court finds that the driver of a motor vehicle involved in an accident in which one (1) or more persons are killed violated this subsection by refusing to submit to such a test, the court shall suspend the license of such driver for a period of five (5) years. ***In addition to the consequences set forth in this section, if the court or jury finds that the driver violated the provisions of this subsection while driving on a revoked, suspended or canceled license, when the person's privilege to do so is cancelled, suspended or revoked because of a conviction for vehicular assault under § 39-13-106, vehicular homicide under § 39-13-213, or driving while intoxicated under § 55-10-401, said driver shall be guilty of committing a Class A misdemeanor and shall be fined not more than one thousand dollars ($1,000.00) and shall be sentenced to a minimum mandatory jail or workhouse sentence of forty-five (45) days which shall be served consecutively, day for day, and which sentence cannot be suspended.***

In Tennessee, anyone who operates a motor vehicle on the roads of our state is "deemed to have given consent to a test for the purpose of determining the alcoholic or drug content of that person's blood . . . ." Tenn. Code Ann. § 55-10-406(a)(1). If an accused is charged with driving under the influence and "refuses to submit" to testing, the tests "shall not be given." *Id*. § 55-10-406(a)(3). Since one may refuse to submit to tests administered for the purpose of determining blood-alcohol or drug content, one cannot be said to be compelled to give evidence against one's self in violation of their constitutional rights. Further, admission into evidence of a defendant's refusal to submit to a blood-alcohol or drug test as substantive evidence of guilt in a prosecution for driving while intoxicated has been determined previously not to violate a defendant's rights under either the Fifth Amendment of the United States Constitution or Article I, § 9 of the Tennessee Constitution. *See e.g., State v. Frasier*, 914 S.W.2d 467, 471-472 (Tenn. 1996)(citing *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916, L.Ed.2d 748 (1983)).

The provisions proposed by Senate Bill No. 2665, which appear to make a violation of the implied consent law a criminal offense since a person would be sentenced for failure to consent to a test, do not change the answer to the question posed.[1] In this regard, the Fifth Amendment has been construed to prohibit statements of a "testimonial or communicative nature" only. More particularly, the Fifth Amendment does not pertain to "real" evidence such as blood, hair samples, and fingerprints. *Id*. at 472 (citing *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). In *Frasier*, the Tennessee Supreme Court specifically declined to grant Tennesseans greater protection under Article I, § 9 of the Tennessee Constitution with respect to this issue than they are afforded under the Fifth Amendment of the United States Constitution. *Id.* at 473.

Accordingly, it is the opinion of this office that Senate Bill No. 2665, as drafted, does not violate an accused person's right not to be compelled to give evidence against himself or herself.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

MARVIN S. BLAIR, JR.
Assistant Attorney General

Requested by:

Honorable Curtis Person, Jr.
Chairman, Senate Judiciary Committee
308 War Memorial Building
Nashville, Tennessee 37243-0040

[1] Although refusal to consent to a blood-alcohol test does not currently constitute a criminal offense, but rather carries only the sanction of suspension of one's driver's license by the Department of Safety, a previous version of this statute did make it a crime to refuse to consent to a blood-alcohol test. Prior to repeal of that earlier provision, this office issued an opinion letter on the subject, *i.e.*, Tenn. Op. Atty. Gen. No. 87-166 (copy attached).