either the charters or the laws of the states of incorporation purport to authorize banking institutions organized under the laws of foreign states to engage in activities in New Jersey more extensive than those permitted by the Banking Act of 1948. However, if more extensive activities are conducted, the foreign institution would become subject to the New Jersey corporation tax laws and other applicable tax laws on the same basis as any other foreign corporation engaged in such activities in this state. In our opinion, a foreign banking institution whose only activities in New Jersey are those expressly permitted by N.J.S.A. 17:9A–331, including activities reasonably ancillary to the foreclosure of a mortgage on New Jersey realty, does not become subject to the New Jersey corporation tax because of such activities.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DAVID M. SATZ, JR.
First Assistant Attorney General

APRIL 24, 1961

HONORABLE ARTHUR S. MEREDITH
Prosecutor, Somerset County
Court House
Somerville, New Jersey

FORMAL OPINION 1961—No. 6

DEAR PROSECUTOR MEREDITH:

At a recent prosecutors' meeting my opinion was sought as to whether blood samples may be taken from comatose parties to automobile accidents to determine the presence of alcohol. The question requires a consideration of the constitutionality of such action under both the State and Federal Constitutions and the applicability of the death by automobile statute (N.J.S. 2A:113–9) and certain provisions of the Motor Vehicle statutes (N.J.S.A. 39:4–50 and 50.1).

There can be no doubt that the taking of blood samples from comatose suspects where there exists reasonable grounds to suspect such persons of having committed an offense in which the presence of alcohol is pertinent (see *Schutt* v. *MacDuff*, 127 N.Y.S. 2d 116 (Sup. Ct. 1954)) and where there are adequate health safeguards does not constitute a violation of the due process clause of the Fourteenth Amendment to the United States Constitution. In *Breithaupt* v. *Abram*, 352 U.S. 432, 77 S. Ct. 408 (1957) the Court considered a factual situation almost identical to the one now under consideration. The defendant in that case was involved in an automobile crash in which three persons were killed and he was seriously injured. An almost empty pint bottle of whiskey was found in the glove compartment of the defendant's vehicle. Defendant was taken to a hospital, unconscious, and, after detecting the smell of liquor on defendant's breath, a state policeman requested that a sample of defendant's blood be taken. While defendant was still unconscious a sample of 20 cc. was taken by an attending physician by using a hypodermic needle. Analysis of the sample indicated .17 per cent alcoholic content and this formed the basis of a conviction for involuntary manslaughter. In an ensuing habeas corpus proceeding the argument was made that

the taking of a blood sample while defendant was unconscious came within the proscription of *Rochin* v. *California*, 342 U.S. 165, 72 S. Ct. 205 (1952). In *Rochin* a stomach pump was forcibly used to extract narcotic pills and this conduct was held to be such that "shocked the conscience" and was so "brutal" and "offensive" that it violated traditional ideas of fair play; and, therefore, it constituted a violation of Due Process requirements. In distinguishing the *Rochin* fact situation, the Court in *Breithaupt* said (at page 435 of 352 U.S.):

> "Basically the distinction rests on the fact that there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; and certainly the test as administered here would not be considered offensive by even the most delicate."

It should be noted that the Supreme Court in Breithaupt specifically pointed out, with approval, that State Police regulations applicable there required that such samples be taken by a physician only. It thus is clear that all medical precautions must be observed in the taking of blood samples.*

In *State* v. *Alexander*, 7 N.J. 585 (1951) the defendant was arrested under a charge of murder. While incarcerated prior to trial, he submitted to the taking of a sample of his blood by a Board of Health physician to determine whether he had a venereal disease. Without defendant's knowledge a portion of this sample was turned over to police authorities and analyzed by them to determine his blood type. The result of the test for blood type was admitted in evidence to show the presence of defendant's blood on the knife used in the homicide. It was alleged as error, among others, that the admission of such evidence was a violation of the defendant's privilege against self-incrimination, an invasion of his rights against unreasonable search and seizure and a violation of due process of law. The major portion of the Court's opinion was devoted to the self-incrimination issue, and it was held that in this State the privilege applies to testimonial compulsion only and that no constitutional rights under the due process clause are violated where a defendant is compelled to submit to an examination to determine physical or mental condition. The Supreme Court of Oregon in *State* v. *Cram*, 176 Ore. 577, 160 P. 2d 283, 285 (1945), made the following catalog of instances of non-testimonial compulsion of evidence held to have been not violative of the privilege against self-incrimination:

> "The accused, upon his arrest, may be required to do many things without having his constitutional rights against self-incrimination invaded. For the purpose of identification he may be required to stand up in court; to appear at the scene of the crime (3 Wharton, Crim. Ev., 11th Ed., § 1141); to put

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* While the New Mexico state police regulations involved in the *Breithaupt* case required that the blood sample be taken only by a physician, the court apparently considered that due process would permit the taking of a blood sample by a qualified medical technician not a physician. In a footnote, the court cited with approval the Kansas implied consent statute providing for suspension or revocation of the driving privileges of the operator of a motor vehicle who refuses to submit to a chemical test for the presence of alcohol in his blood. The Kansas statute provides that "only a physician or qualified medical technician * * * can withdraw any blood of any person submitting to a chemical test under this act." Kansas Gen. Stat. 1949, Supp. 1959, § 8-1003. Probably with this provision in mind the court stated in *Breithaupt*:

> "We therefore conclude that a blood test taken by a skilled technician is not such 'conduct that shocks the conscience [citation omitted] nor such a method of obtaining evidence that it offends a "sense of justice" [citation omitted].'" 352 U.S. at 436, 77 S. Ct. at 411.

on a blouse to see if it fits him (*Holt* v. *United States*, 218 U.S. 245, 31 S. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138); to place a handkerchief over his face (*Ross* v. *State*, 204 Ind. 281, 182 N.E. 865); to stand up and remove his glasses (*Rutherford* v. *State*, 135 Tex. Cr. R. 530, 121 S.W. 2d 342); to remove his coat and shirt and permit the jury to see scars on his body and to don a shirt introduced in evidence (*State* v. *Oschoa*, 49 Nev. 194, 242 P. 582); or to exhibit his arm so as to reveal tattoo marks thereon, which a previous witness has sworn were there (*State* v. *Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530). He may also be fingerprinted, photographed and measured under the Bertillon system. *United States* v. *Kelly*, 2 Cir. 55 F. 2d 67, 83 A.L.R. 122, and cases therein cited; *Downs* v. *Swann*, 111 Md. 53, 73 A. 653, 23 L.R.A., N.S., 739, 134 Am. St. Rep. 586; *Bartletta* v. *McFeeley*, 107 N.J. Eq. 141, 152A. 17; *People* v. *Les*, 267 Mich. 648, 255 N.W. 407, and authorities therein cited; *Conners* v. *State*, 134 Tex. Cr. R. 278, 115 S.W. 2d 681. For other instances, see 8 Wigmore, § 2265, footnote 2."

See also *State* v. *Auld*, 2 N.J. 246 (1949); *Roesch* v. *Ferber*, 48 N.J. Super. 231 (App. Div. 1957). With regard to whether the taking of the blood sample constituted an unreasonable search and seizure the Court reiterated the rule in this State that after a lawful arrest the person of an accused may be examined without a search warrant. 7 N.J. at p. 594-5. See also *Breithaupt* v. *Abram, supra* and *cf. Eleuteri* v. *Richman*, 26 N.J. 506 (1958) wherein it was held that evidence unlawfully obtained is admissible in the courts of this State, if material and competent per se.

It is concluded, therefore, that there is no constitutional prohibition, under either State or Federal Constitutions, against taking blood samples with proper medical safeguards and upon reasonable grounds for suspicion from a comatose suspect to be used in a prosecution under the death by auto statute (N.J.S. 2A:113-9).

The foregoing conclusion does not apply, however, in cases in which such samples will be used in a prosecution for driving while under the influence of intoxicating liquor. In such cases there is a specific statutory prohibition against the taking of samples of body fluids without express consent. N.J.S.A. 39:4-50.1 provides in part:

". . . No chemical analysis, as provided in this section, or specimen necessary thereto, may be made or taken unless expressly consented to, or requested by, the defendant."

In the light of the *Alexander* and *Breithaupt* cases discussed *supra*, there is no basis for extending the applicability of the express consent requirement of N.J.S.A. 39:4-50.1 beyond the provisions of N.J.S.A. 39:4-50. It should be noted that N.J.S.A. 39:4-50.1 contains within it such a limitation of its applicability:

"In any prosecution for a violation of section 39:4-50 of Title 39 of the Revised Statutes relating to driving a vehicle while under the influence of intoxicating liquor . . ."

It is my opinion, therefore, that a court, following the *Alexander, Breithaupt* and other decisions, would hold if confronted with these issues that blood samples may be taken from comatose suspects under adequate medical safeguards and upon reasonable grounds for suspicion to be used in a prosecution under the death by auto statute (N.J.S. 2A:113-9) but that such samples cannot be taken to be used in a prosecution

under the statute concerning the operation of a motor vehicle while under the influence of intoxicating liquors. (N.J.S.A. 39:4-50.)

Very truly yours,

DAVID D. FURMAN
Attorney General

APRIL 25, 1961

HON. HAROLD J. ASHBY, *Chairman*
State Parole Board
State Office Building
Trenton, New Jersey

FORMAL OPINION 1961—No. 7

DEAR MR. ASHBY:

You have inquired concerning the application of disenfranchisement provisions of the Constitution of New Jersey and implementing statutes to

(a) Juvenile offenders between the ages of 16 and 18 years, and
(b) Minor offenders between the ages of 18 and 21 years convicted in adult criminal court.

We conclude that these provisions have no application to juvenile offenders under the age of 16 and juvenile offenders between the ages of 16 and 18 years adjudicated as such in the Juvenile and Domestic Relations Court, but such provisions do have application to persons between the ages of 16 and 21 years convicted in the adult criminal court of specified disqualifying offenses.

Art. II, *par.* 7, of the *Constitution of New Jersey* (1947) provides:

> "The legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned or otherwise restored by law to the right of suffrage, shall again enjoy that right."

The legislature implemented this constitutional provision by *Chap.* 438, *P.L.* 1948, as amended, *R.S.* 19:4-1, as amended, where it is provided:

"No person shall have the right of suffrage—

(1) Who is an idiot or is insane; or
(2) Who has been or shall be convicted of any of the following designated crimes, that is to say—blasphemy, treason, murder, piracy, arson, rape, sodomy, or the infamous crime against nature, committed with mankind or with beast, robbery, conspiracy, forgery, perjury or subornation of perjury, unless pardoned or restored by law to the right of suffrage; or
(3) Who was convicted prior to October 6, 1948, of the crime of polygamy or of larceny of above the value of $6.00; or who was convicted after October 5, 1948, and prior to the effective date of this act, of larceny of above the value of $20.00; or