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Recommended Citation

Gunther, Robert J. Jr. (1983) "Blood Sample Taken Without Defendant's Consent During a Prearrest Investigation Is Inadmissible in Subsequent Prosecution Unless Taken Pursuant to an Authorizing Court Order," *St. John's Law Review*: Vol. 57 : No. 4 , Article 14. Available at: <https://scholarship.law.stjohns.edu/lawreview/vol57/iss4/14>

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Blood sample taken without defendant's consent during a prearrest investigation is inadmissible in subsequent prosecution unless taken pursuant to an authorizing court order

The United States Supreme Court has declared that the non-consensual taking of a blood sample from a defendant, upon findings of probable cause and exigency, is constitutionally permissible.²⁰¹ This has resulted in more effective state prosecution of alcohol-related crimes,²⁰² since evidence of blood-alcohol content

sion stated that in order to obtain a blood sample from a suspect, a formal charge must have been filed against him. 81 App. Div. 2d at 369, 440 N.Y.S.2d at 93. The court reasoned that "[i]f the police have probable cause to arrest, they should effect the arrest. However, if this is lacking, then the individual should be free from the intrusion which the People seek to impose upon him." *Id.* Similarly in *In re Mackell v. Palermo*, 59 Misc. 2d 760, 300 N.Y.S.2d 459 (Sup. Ct. Queens County 1969), the court, in denying an application by the District Attorney to have a suspect shave his beard for identification purposes, noted that "the rub here, and the reason compelling a denial of the District Attorney's application, is that the respondent, whose facial hair is sought to be removed, is not a defendant in any proceeding in this county." *Id.* at 765, 300 N.Y.S.2d at 463 (emphasis in original); cf. *People v. Moselle*, 57 N.Y.2d 97, 109, 439 N.E.2d 1235, 1240, 454 N.Y.S.2d 292, 297 (1982) (CPL § 240.40 has preempted authorization and regulation of the taking of blood samples).

²⁰¹ *Schmerber v. California*, 384 U.S. 757, 770-71 (1966). In *Schmerber*, the defendant-driver was involved in an automobile accident. *Id.* at 758. The defendant was arrested after the police detected the odor of alcohol on his presence. *Id.* Subsequently, the arresting officer directed a physician to take a sample of defendant's blood, although the defendant refused, on the advice of counsel, to consent to the tests. *Id.* at 758-59. The sample ultimately revealed a blood-alcohol content (BAC) in excess of the legal intoxication level in California. *Id.* at 759. The defendant was convicted of driving an automobile under the influence of intoxicating liquor. On appeal, he argued, *inter alia*, that he was subjected to an unreasonable search and seizure in violation of the fourth amendment. *Id.* at 758-59. The Court held that the taking of a blood sample is a search and seizure covered by the fourth amendment, *id.* at 767, and stated that a warrant normally would be necessary to justify this type of bodily intrusion, *id.* at 770. The Court nevertheless held that:

The officer . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence," . . . [T]he percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content . . . was an appropriate incident to petitioner's arrest.

Id. at 770-71; see P. WESTON & K. WELLS, *CRIMINAL EVIDENCE FOR POLICE* 174-75 (2d ed. 1976).

²⁰² See, e.g., *Delarosa v. State*, 384 So.2d 876, 878 (Ala. Crim. App. 1980) (prosecutor need only introduce evidence of defendant's BAC and produce expert testimony that driver was impaired); *Palmer v. State*, 604 P.2d 1106, 1109 & n.6 (Alaska 1979) (statutory presumption based on BAC); *People v. Meyers*, 198 Colo. 295, 298, 599 P.2d 891, 892 (1979) (prosecutor need only introduce evidence of BAC and expert testimony); *Commonwealth v.*

(BAC), when admissible, is difficult to overcome.²⁰³ Although the New York Court of Appeals, in *In re Abe A.*,²⁰⁴ condoned the prearrest, compelled extraction of blood pursuant to a court order,²⁰⁵ nonetheless, an uncertainty exists as to what extent a court order is required to obtain such evidence. Recently, in *People v. Moselle*,²⁰⁶ the Court of Appeals held that a court order must issue prior to the nonconsensual taking of a blood sample during a prearrest investigation that ultimately leads to a prosecution under the Penal Law.²⁰⁷

This appeal involved three cases consolidated for argument, two of which are relevant to this discussion.²⁰⁸ In *People v.*

Guiliano, 274 Pa. Super. 419, 425, 418 A.2d 476, 479 (1980) (statutory presumption based on BAC).

²⁰³ See L. TAYLOR, DRUNK DRIVING DEFENSE 314-20 (1981) (blood sample analysis "is the most accurate of the three common procedures, leaving the least room for cross-examination").

The necessity for an accurate method of measuring BAC is clear. Surveys have revealed that of the 100 million drivers in the United States, 7 million are problem drinkers. This means that at any given time, 1 in 50 drivers has a BAC that exceeds the legal limit. 30,000 of the 55,000 traffic fatalities per year are alcohol related. See B. LANDSTREET, THE DRINKING DRIVER 4 (1977). In New York State, there has been a sharp increase in alcohol-related traffic deaths. In 1979, there were 535 alcohol-related traffic fatalities. In 1980, the fatalities figure rose to 737, and, in the following year, 979 such deaths occurred. *People v. Moselle*, 57 N.Y.2d 97, 115, 439 N.E.2d 1235, 1243, 454 N.Y.S.2d 292, 300 (1982) (Jasen, J., dissenting).

²⁰⁴ 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982).

²⁰⁵ *Id.* at 291, 437 N.E.2d at 266, 452 N.Y.S.2d at 7; see *infra* note 237 and accompanying text.

²⁰⁶ 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982).

²⁰⁷ *Id.* at 101, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293. The Court prefaced its opinion by recognizing that "blood samples taken without a defendant's consent are inadmissible in prosecutions under the Penal Law unless taken pursuant to an authorizing court order." *Id.*

²⁰⁸ The third case, *People v. Moselle*, concerns a separate issue which will not be discussed in depth. In *Moselle*, the motor vehicle that the defendant was operating collided with another car, killing its driver. *Id.* A police officer at the hospital noticed the odor of alcohol emanating from the defendant, and without getting the defendant's consent, directed a physician to take a blood sample from the defendant. *Id.* The blood sample subsequently revealed a BAC of .17 of 1% by weight. *Id.* at 102, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293. The defendant later was charged with operating a motor vehicle with a BAC in excess of .10 of 1%. *Id.*; see N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney 1970). He was not charged under the Penal Law. 57 N.Y.2d at 102, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293. The issue in the case was whether the above-mentioned procedure complied with the New York implied consent statute, N.Y. VEH. & TRAF. LAW § 1194 (McKinney 1970 & Supp. 1982-1983), which relates to the taking of blood samples when the defendant has "been placed under arrest or after a breath test indicates the presence of alcohol in his system." 57 N.Y.2d at 107, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296; see N.Y. VEH. & TRAF. LAW § 1194 (McKinney 1970 & Supp. 1982-1983). The Court held that the statute was not complied with, and thus, suppressed the evidence derived from the blood sample. 57 N.Y.2d at 107,

Daniel,²⁰⁹ the van that the defendant was driving collided with two cars, resulting in the death of a passenger of one of the automobiles.²¹⁰ The police found evidence of alcoholic beverages in the defendant's van.²¹¹ Approximately 1 hour after the accident, a police officer directed a physician to extract a blood sample from the defendant.²¹² Subsequent analysis revealed a BAC of .22 of 1% by weight.²¹³ Based upon this evidence, the defendant was indicted for driving while intoxicated²¹⁴ and for criminally negligent homicide.²¹⁵ The defendant's pretrial motion to suppress the evidence relating to the blood sample was granted by the Supreme Court, Erie County,²¹⁶ and the Appellate Division, Fourth Department, affirmed that order on appeal.²¹⁷

In *People v. Wolter*,²¹⁸ the automobile driven by the defendant struck another vehicle head on, resulting in the death of the

439 N.E.2d at 1239, 454 N.Y.S.2d at 296.

²⁰⁹ 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982), *aff'g*, 84 App. Div. 2d 916, 446 N.Y.S.2d 658 (4th Dep't 1981).

²¹⁰ 57 N.Y.2d at 102-03, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.

²¹¹ *Id.* at 103, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293. The police officer at the scene of the accident observed a half-full bottle of cold beer on the console of the defendant's van and two empty beer bottles on the dashboard and on the floor. *Id.*

²¹² 84 App. Div. 2d at 916, 446 N.Y.S.2d at 659. The defendant was neither arrested at the time the blood test was administered, nor asked whether he would consent to the taking of a blood sample. 57 N.Y.2d at 103, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.

²¹³ 57 N.Y.2d at 103, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293. It is unlawful for a person to operate a motor vehicle while he has .10 of 1% or more by weight of alcohol in his blood. See N.Y. VEH. & TRAF. LAW § 1192(1) (McKinney 1970). A BAC of .05 of 1% or less is prima facie evidence that the person's ability to drive a motor vehicle has not been impaired. *Id.* § 1195(2)(a). A BAC between .05 and .07 of 1% is relevant evidence that the individual was driving while impaired. *Id.* § 1195(2)(b). A BAC between .07 and .10 is prima facie evidence that the person's driving was impaired by alcohol. *Id.* § 1195(2)(b).

²¹⁴ 57 N.Y.2d at 103, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294; see N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney 1970 & Supp. 1982-1983).

²¹⁵ 57 N.Y. 2d at 103, 439 N.E.2d at 1237, 454 N.Y.S. 2d at 294, see N.Y. PENAL LAW § 125.10 (McKinney 1970).

²¹⁶ 57 N.Y.2d at 103, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294.

²¹⁷ 84 App. Div. 2d at 917, 446 N.Y.S.2d at 659-60. It should be noted that the rationale used by the appellate division to support its affirmance was based upon its finding that section 1195(1) of the Vehicle and Traffic Law (dealing with admissibility of blood samples under the Vehicle and Traffic Law) mandated the application of section 1194, concerning requirements for blood tests, such as probable cause and time limits for the taking of blood samples, to prosecutions under the Penal Law, as well as under the Vehicle and Traffic Law. *Id.*; see N.Y. VEH. & TRAF. LAW §§ 1194, 1195(1) (McKinney 1970 & Supp. 1982-1983). The Court of Appeals rejected this rationale. 57 N.Y.2d at 108, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296.

²¹⁸ 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982), *aff'g*, 83 App. Div. 2d 187, 444 N.Y.S.2d 331 (4th Dep't 1981).

driver of the other vehicle.²¹⁹ A police officer who was present at the scene of the accident detected the odor of alcohol emanating from the defendant, and subsequently arrested him for driving while intoxicated.²²⁰ The defendant, after being read his preinterrogation rights, refused to consent to a blood test.²²¹ The police officer later directed a physician to withdraw a blood sample from the defendant, which ultimately revealed a BAC of .23 of 1% by weight.²²² As a result of this finding, the defendant was indicted for manslaughter in the second degree²²³ and driving while intoxicated.²²⁴ The defendant pleaded guilty to a charge of criminally negligent homicide²²⁵ in satisfaction of all counts against him,²²⁶ but the Appellate Division, Fourth Department, reversed the defendant's conviction, ordering suppression of the evidence relating to the blood sample.²²⁷

²¹⁹ 57 N.Y.2d at 103, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294. The defendant's vehicle crossed over the center line into the opposite lane of traffic and struck the decedent's car head on, killing him instantly. 83 App. Div. 2d at 187-88, 444 N.Y.S.2d at 332.

²²⁰ 57 N.Y.2d at 103, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294. The defendant was also arrested for failure to keep to the right-hand side of the road. Section 1193 of the Vehicle and Traffic Law gives the police broad arrest authority in this area:

A police officer may, without a warrant, arrest a person, in case of a violation of section eleven hundred ninety-two, [operating a motor vehicle while under the influence of alcohol or drugs] if such violation is coupled with an accident or collision in which such person is involved, which in fact has been committed, though not in the police officer's presence, when he has reasonable cause to believe that the violation was committed by such person.

N.Y. VEH. & TRAF. LAW § 1193 (McKinney 1970).

²²¹ 57 N.Y.2d at 103, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294. In both *Moselle* and *Daniel*, there was no conscious refusal on the part of the defendants to submit to a blood test. *See id.* at 102, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293; *supra* text accompanying note 205.

²²² 57 N.Y.2d at 103, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294. The appellate division stated that defendant's BAC was .21 of 1% by weight. 83 App. Div. 2d at 188, 444 N.Y.S.2d at 332. Thus, there was a discrepancy between the BAC reported by the Court of Appeals and that reported by the appellate division.

²²³ 57 N.Y.2d at 104, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294; *see* N.Y. PENAL LAW § 125.15 (McKinney 1970 & Supp. 1982-1983).

²²⁴ *Id.*; *see* N.Y. VEH. & TRAF. LAW § 1192(3) (McKinney 1970 & Supp. 1982-1983).

²²⁵ 57 N.Y.2d at 104, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294; *see* N.Y. PENAL LAW § 125.10 (McKinney 1970 & Supp. 1982-1983).

²²⁶ 57 N.Y.2d at 104, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294. The defendant also had been charged with assault in the second degree. *Id.*; *see* N.Y. PENAL LAW § 120.05(4) (McKinney 1970 & Supp. 1982-1983).

²²⁷ 83 App. Div. 2d at 189-90, 444 N.Y.S.2d at 333. The appellate division declared that "[w]hile a warrantless taking of blood from a person under arrest . . . is undoubtedly constitutional, . . . it is not permissible to utilize the results of such a blood test in a trial where a statute [namely, Vehicle and Traffic Law section 1194(2)] plainly indicates it shall not be taken if the subject refuses to consent . . ." *Id.* at 189, 444 N.Y.S.2d at 333 (citations

On appeal, the Court of Appeals affirmed the orders of suppression in both cases,²²⁸ holding that the issuance of a court order is a prerequisite to the nonconsensual extraction of a blood sample during a prearrest investigation which culminates in a prosecution under the Penal Law.²²⁹ Judge Jones, writing for the majority,²³⁰ stated initially that the Court's decision was based upon statutory, rather than constitutional, grounds.²³¹ Indeed, the Court reasoned, since both *Daniel* and *Wolter* involved prosecutions under the Penal Law,²³² section 240.40 of the Criminal Procedure Law,²³³ which deals with court-ordered discovery, is controlling as to the admissibility of the evidence derived from the blood tests.²³⁴ The majority

omitted). Moreover, the court stated that the language of section 1194(2) forecloses the use of blood test evidence in prosecutions under the Penal Law. *Id.* at 187, 444 N.Y.S.2d at 331; see N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney 1970 & Supp. 1981-1982).

²²⁸ 57 N.Y.2d at 104, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294.

²²⁹ 57 N.Y.2d at 101, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.

²³⁰ Chief Judge Cooke, and Judges Wachtler, Fuchsberg, and Meyer joined in the majority opinion. Judge Jasen dissented, and Judge Gabrielli took no part in consideration of the case.

²³¹ 57 N.Y.2d at 104, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294.

²³² *Id.* at 109-10, 439 N.E.2d at 1239-40, 454 N.Y.S.2d at 296-97; see *supra* text accompanying notes 215 & 225.

²³³ CPL § 240.40 (1982). Section 240.40 of the Criminal Procedure Law provides in pertinent part:

Upon motion of the prosecutor, and subject to constitutional limitation, the court in which an indictment, superior court information, prosecutor's information or information is pending; (a) must order discovery as to any property not disclosed upon demand pursuant to section 240.30, if it finds that the defendant's refusal to disclose such material is not justified; and (b) may order the defendant to provide non-testimonial evidence. Such order may, among other things, require the defendant to:

. . . .
(v) permit the taking of samples of blood, hair or other materials from his body in a manner not involving an unreasonable intrusion thereof or a risk of serious physical injury thereto;

. . . .
(vii) Submit to a reasonable physical or medical inspection of his body.

This subdivision shall not be construed to limit, expand, or otherwise affect the issuance of a similar court order, as may be authorized by law, before the filing of an accusatory instrument consistent with such rights as the defendant may derive from the constitution of this state or of the United States.

Id. § 240.40(2).

²³⁴ 57 N.Y.2d at 109, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297-98. The Court stated that section 240.40, although termed a discovery statute, was not designed to relate solely to traditional discovery inside a pending action. Indeed, noted the Court, "[t]he explicit recognition [in the last sentence of subdivision two] . . . confirms that the Legislature had within its contemplation a broad all-inclusive scope of consideration." *Id.* at 110 n.4, 439 N.E.2d at 1240 n.4, 454 N.Y.S.2d at 297 n.4; see *supra* note 233.

observed that subdivision two of that section manifests the legislature's intention to preempt the field with respect to the taking of blood samples, and provides that no such tests are authorized absent a court order.²³⁵ The Court then remarked that apart from the statute, its recent decision in *In re Abe A.*²³⁶ requires a court order for any nonconsensual withdrawal of blood prior to the filing of an accusatory instrument against the defendant.²³⁷ Additionally, Judge Jones summarily rejected the argument that an exception to the court order requisite should be made in this instance due to the existence of exigent circumstances.²³⁸

In a dissent, Judge Jasen disagreed with the majority's construction of section 240.40, arguing that by its terms, it is a discovery statute, and thus only applies to instances when criminal proceedings are pending.²³⁹ The dissent, unlike the majority, then addressed the contention that a forced extraction of blood from a motorist who is believed to be intoxicated is constitutionally prohibited.²⁴⁰ Judge Jasen asserted that no constitutional infringement occurred since there was exigency, given the "evanescent nature of the evidence sought," and since the standards set forth in *In re Abe A.* to measure the constitutionality of a compelled ex-

²³⁵ 57 N.Y.2d at 110, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297.

²³⁶ 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982); see *supra* text accompanying notes 204-05.

²³⁷ 57 N.Y.2d at 108, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296. In *Abe A.*, the Court of Appeals held that a prearrest extraction of blood pursuant to a court order is constitutional so long as there is probable cause to believe that the suspect committed the crime, as well as a clear indication that relevant material evidence will be found, and a safe, reliable means of obtaining the sample is utilized. 56 N.Y.2d at 291, 437 N.E.2d at 266, 452 N.Y.S.2d at 7. The *Abe A.* panel also stated that a court should balance such factors as the seriousness of the crime, the importance of the evidence to the investigation, and any alternative means of gathering evidence, against the individual's right to be free from "bodily intrusion." *Id.* at 291, 299, 437 N.E.2d at 266, 271, 452 N.Y.S.2d at 7, 12.

²³⁸ 57 N.Y.2d at 109, 439 N.E.2d at 1239-40, 454 N.Y.S.2d at 296-97. The Court rejected the argument that the taking of a blood sample without a court order is permissible in cases where exigent circumstances are present, stating that, "[w]hile the existence of exigent circumstances may excuse the failure to obtain a court order, their existence does not provide a source of authority to conduct discovery." *Id.* It is submitted that this statement by the Court effectively eliminates the utility of the doctrine of exigent circumstances by expanding the concept of discovery to include action taken before an accusatory instrument is filed against the individual.

²³⁹ 57 N.Y.2d at 111-12, 439 N.E.2d at 1241-42, 454 N.Y.S.2d at 298-99 (Jasen, J., dissenting). Judge Jasen, in expressing his surprise that the majority relied upon the last paragraph of section 240.40(2) of the CPL, see *supra* notes 233-34, asserted that this section never was meant to broaden discovery to the preaccusatory instrument stage. 57 N.Y.2d at 111-12, 439 N.E.2d at 1241-42, 454 N.Y.S.2d at 298-99 (Jasen, J., dissenting).

²⁴⁰ 57 N.Y.2d at 112-13, 439 N.E.2d at 1242, 454 N.Y.S.2d at 299 (Jasen, J., dissenting).

traction of blood were satisfied.²⁴¹

It is suggested that an examination of the legislative history,²⁴² as well as the language of section 240.04,²⁴³ demonstrates that that section was not intended to apply to the taking of a blood sample prior to the commencement of a criminal proceeding. The asserted purpose of the provision was to "broaden criminal discovery, while accommodating reasonable concerns of the *prosecutors* and *defense counsel*."²⁴⁴ This legislative purpose,²⁴⁵ coupled with the language of the statute itself, which refers to court-ordered discovery after an accusatory instrument has been filed,²⁴⁶ clearly contemplates that section 240.40 applies only after a penal proceeding has been instituted against the defendant.²⁴⁷ Moreover, the existence of citation to *Schmerber* in the legislative history of section 240.40 impliedly recognizes that the presence of exigency affects application of the statute.²⁴⁸ It is thus suggested that the court's recent

²⁴¹ *Id.* at 113-14, 439 N.E.2d at 1242-43, 454 N.Y.S.2d at 299-300 (Jasen, J., dissenting); see *supra* notes 201 & 237.

²⁴² Section 240.40 of the Criminal Procedure Law, dealing with court-ordered discovery was a Governor's program bill, developed through consultation with various groups such as the Office of Court Administration, the Judicial Conference, the State Bar Association, the State District Attorney's Association, the Legal Aid Society, and the Senate and Assembly Codes Committee. 57 N.Y.2d at 110, 439 N.E.2d at 1240, 454 N.E.2d at 297. The measure was adopted on July 5, 1979, and became effective on January 1, 1980. Act of July 5, 1979, ch. 412, § 2, [1979] N.Y. Laws 928 (current version at CPL § 240.40 (1982)).

²⁴³ See CPL § 240.40(2) (1982); *supra* note 233. The statute was expressly intended to apply in the context of an indictment, superior court information, prosecutor's information pending action. CPL § 240.40(2) (1982) (emphasis added).

²⁴⁴ Letter from Frederick Miller to Honorable Richard A. Brown (June 26, 1979) (discussing proposed amendments to section 240.40) (emphasis added).

²⁴⁵ Most of the commentators on the proposed bill indicated that section 240.40 was intended to apply only to those cases in which a criminal proceeding already was pending. See, e.g., Letter from Patrick O. Monserrate to Governor Hugh L. Carey (June 8, 1979) (District Attorney's Association approves statute's effect on pretrial discovery); Letter from Robert M. Schlanger to Honorable Richard Brown (June 27, 1979) (Division of Criminal Justice Service's recommendation of approval for section 240 as an improvement "of the prosecutorial phase of the criminal justice process"). In the memorandum of Senator Ronald B. Stafford, it again was indicated that the statute was to apply solely in the context of pending actions. Indeed, the memorandum states that the bill favored neither the prosecutor nor the defense counsel in a criminal proceeding. These parties are not involved until a criminal proceeding has begun, thus section 240.40 was intended to apply in instances where a criminal proceeding has begun. Memorandum of Sen. Stafford, reprinted in [1979] N.Y. LEGIS. ANN. 250; see *supra* note 233.

²⁴⁶ CPL § 240.40(2) (1982); see *supra* note 233.

²⁴⁷ CPL § 240.40, commentary at 383 (1982). Professor Bellacosa, referring to the *Moselle* case, questions the applicability of the statute to "the acquisition of evidence in a pre-commencement of criminal proceeding context in any event." *Id.*

²⁴⁸ Memorandum of Office of Court Admissions, reprinted in [1979] N.Y. Laws 1889

decisions in the area of nontestimonial evidence are rendered problematical by the court's inconsistent application of the doctrine of exigency.²⁴⁹

Notwithstanding these statutory difficulties, it nevertheless is proper, as the dissent observed, to address the constitutional issue of whether a prearrest extraction of blood without a court order is ever permissible.²⁵⁰ It is clear that sound constitutional precedent supports the proposition that the nonconsensual taking of a blood sample without a court order during a prearrest investigation is permissible when exigent circumstances exist.²⁵¹ Practically speaking, a court order prerequisite under such circumstances seemingly will prevent the prosecution of alcohol-related violations of the Pe-

(McKinney) (citing *Schmerber* in discussing proposed section 240.40). Mr. Frederick Miller, the legislative counsel to the Office of Court Administration, noted that:

Under this section, a court may order discovery of material found to be improperly refused, and may, again subject to constitutional limitation, order the defendant to give nontestimonial evidence. He may be ordered to . . . give a blood, voice, or handwriting sample, . . . or submit to a reasonable physical or medical inspection. Under adequate court-imposed safeguards such orders will not violate the defendant's constitutional rights. *Schmerber v. California*, 384 U.S. 757 (1966).

Letter from Frederick Miller to Honorable Richard A. Brown (June 26, 1979). The legislative history's citation of *Schmerber*, a case which recognizes that exigency excuses the failure to obtain a search warrant, *see supra* note 201, seemingly indicates the belief that the exigency exception to the fourth amendment requirement of a search warrant may apply notwithstanding the applicability of section 240.40. Such reasoning, it is suggested, weakens the *Moselle* court's absolute view of the court order requisite of section 240.40.

²⁴⁹ In *Abe A.* the Court in urging that a prearrest blood sample may be taken pursuant to court order, relied upon *Cupp v. Murphy*, 412 U.S. 291 (1973) and *Schmerber v. California*, 384 U.S. 757 (1966). *Abe A.* 56 N.Y.2d at 295-97, 437 N.E.2d at 269, 452 N.Y.S.2d at 10-11. It has been suggested that this reliance was misplaced since those cases, unlike *Abe A.* involved the presence of exigency. *See The Survey*, 57 ST. JOHN'S L. REV. 805, 852-53 (1983). Because of the lack of exigency in *Abe A.* it has been contended that the Court should have required institution of a penal proceeding, and thus, an application of section 240.40 allowing the production of the blood samples in a pending action. *See The Survey*, *supra*, at 834; *supra* note 234 and accompanying text.

In *Moselle*, however, exigency was present. Therefore, it is submitted that the Court, rather than applying section 240.40, should have relied on *Schmerber* and *Cupp* to permit the nonconsensual extraction of blood samples.

²⁵⁰ 57 N.Y.2d at 112-13, 439 N.E.2d at 1242, 454 N.Y.S.2d at 299 (Jasen, J., dissenting).

²⁵¹ *See, e.g.*, *Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (evidence obtained by scraping defendant's fingernails held admissible since defendant put his hands behind his back and attempted to rub off the incriminating evidence); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (blood sample taken without a court order in attempt to ascertain BAC held not an unreasonable search and seizure, given the evanescent quality of alcohol in the blood); *People v. Berzups*, 49 N.Y.2d 417, 427, 402 N.E.2d 1155, 1159, 426 N.Y.S.2d 253, 258 (1980) (evidence obtained without a search warrant by scraping defendant's fingernails held admissible due to the high probability that the evidence would be destroyed if the police waited to procure a warrant).

nal Law.²⁵² Indeed, imposition of such a requirement is particularly inappropriate at a time when the number of alcohol-related traffic accidents is increasing dramatically.²⁵³

Robert J. Gunther, Jr.

No cause of action may be maintained by a nonpatient kidney donor under the rescue doctrine

It is well established that one who is injured while attempting to rescue another may recover from the tortfeasor whose original negligence precipitated the need for the rescue.²⁵⁴ An independent

²⁵² See Note, *Constitutional Limitations on the Taking of Body Evidence*, 78 YALE L.J. 1074, 1078 & n.37 (1979) (discussing the exigency involved in testing for BAC); N.Y. VEH. & TRAF. LAW § 1192(1) (McKinney 1970) (prescribing a 2-hour time limit for the taking of blood samples to determine BAC).

²⁵³ See *supra* note 203.

²⁵⁴ See generally Tiley, *The Rescue Principle*, 30 MOD. L. REV. 25, 25 (1967); Note, *Torts: Proximate Cause: Rescue Doctrine*, 3 OKLA. L. REV. 476, 476-81 (1950). A rescue is considered to be a normal, intervening action which does not break the original chain of causation, regardless of whether the actual rescue was foreseeable. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 44, at 276-77 (4th ed. 1971). Indeed, "[t]he right of one person to render another assistance, when the latter is in danger from any cause, under conditions rendering it safe to do so, is as clear as his right to perform any other lawful act." *Bond v. Baltimore & O. R.R.*, 82 W. Va. 557, 561, 96 S.E. 932, 934 (1918); cf. RESTATEMENT (SECOND) OF TORTS § 294 comment a (1965) (one who creates "an unreasonable risk of harm" to a person may be liable to that person's rescuer).

The first New York case considering the rescue doctrine was *Eckert v. Long Island R.R.*, 43 N.Y. 502 (1871), in which the Court of Appeals stated that negligence will not be imputed to one who attempts to preserve human life, "unless [his act was done] under such circumstances as to constitute rashness. . . ." *Id.* at 506. In a similar vein, Judge Cardozo, in the oft-quoted language of *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921), observed:

Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.

Id. at 180, 133 N.E. at 437-38 (citation omitted).

The rescue doctrine has been recognized in virtually all jurisdictions. See, e.g., *Barger v. Charles Mach. Works, Inc.*, 658 F.2d 582, 587 (8th Cir. 1981); *Solgaard v. Guy F. Atkinson Co.*, 6 Cal. 3d 361, 368, 491 P.2d 821, 824-25, 99 Cal. Rptr. 29, 32-33 (1971); *Walker Hauling Co. v. Johnson*, 110 Ga. App. 620, 624, 139 S.E.2d 496, 499 (1964); *Seibutis v. Smith*, 83 Ill. App. 3d 1010, 1015-16, 404 N.E.2d 950, 954 (1980); *Brock v. Peabody Coop. Equity Exch.*, 186 Kan. 657, 659-60, 352 P.2d 37, 40 (1960); *Parks v. Starks*, 342 Mich. 443, 450, 70 N.W.2d 805, 808 (1955); *McConnell v. Pic-Walsh Freight Co.*, 432 S.W.2d 292, 299-300 (Mo. 1968);