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COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS. SUPERIOR COURT



In the matter of

RICHARD R. LAVIGNE

On September 2, 1993, Trooper Thomas Daly of the Massachusetts State Police presented to this court an application for a warrant to search the blood of Richard R. Lavigne. The application requested authorization to cause a sample of Father Lavigne's blood to be drawn by trained medical personnel at a medical facility, using reasonable force only if necessary; permission to transport Father Lavigne to a convenient place for that purpose; and authorization to enter the home of Father Lavigne for that purpose. The application was accompanied by an affidavit of Trooper Daly, the contents of which may be summarized as follows.

On Saturday, April 15, 1972 at 8:25 AM, the dead body of Daniel Croteau was discovered in the Chicopee River in the area under the Governor Robinson Bridge. Daniel was 14 years old, having been born on November 12, 1958, and was a student in the 7th grade in Our Lady of the Sacred Heart School in Springfield. His body was found floating face down in the river about five feet from the south bank.

An autopsy performed on April 16th revealed that the cause of death had been blunt trauma to the head which had resulted in fractures of the skull. Investigation also revealed that death had occurred between the hour of 4:30 PM on April 14, 1972 when the victim was last seen alive, and the hour of 8:25 AM on April 15, 1972 when the body was found. The autopsy report also indicated that the stomach of the victim contained many chewed portions of candy gum; that his blood had an ethyl alcohol content of .18%; and that his blood type was Group "O."

A police report filed by Lieutenant Edmund Radwanski of the Chicopee Police Department on April 15, 1972 indicated that there were two cement piers, each 9 feet wide and 33 feet long, supporting that section of the Governor Robinson Bridge between the north side of East Main Street (Rte. 141) and the river bank. An area of blood-stained sand, about 6"x 12" in size, was found about 16 feet from the south side of the most northerly pier. Near to that stain there were marks in the sand which seemed to indicate that a struggle had taken place in that area, and there were marks and blood stains close to a set of tire tracks from a motor vehicle which had been driven into the area, had backed around, and had been driven off at a high rate of speed. There were marks in the sand which indicated that some heavy object had been dragged 83 feet from this blood-stained area to the edge of the river. The marks ended in a large pool of blood on the river bank directly south of the position of the body in the river. From this pool of blood there were bloodstains spattered on the rocks and soil for a

distance of 15 feet in a westerly direction.

In the course of the 1972 investigation of Daniel's murder, Father Richard R. Lavigne was one of numerous persons who were interviewed by the police. Father Lavigne was a Roman Catholic priest who at that time was stationed at St. Mary's parish on Page Boulevard in Springfield. He was a close friend of the Croteau family, including Daniel's father and mother and his four brothers, Carl, Gregory, Joseph and Michael. The friendship had developed during the period from May 6, 1967 to June 29, 1968 while Father Lavigne was assigned to St. Catherine of Siena Parish at 1001 Parker Street in Springfield where the Croteau family were parishioners and where all five of the Croteau brothers had served as altar boys. Lavigne developed a close relationship with the Croteau boys that continued after he was transferred to St. Mary's Parish. He would often visit the Croteau home and would take the Croteau boys on camping trips and other outings. At the time of Daniel's murder he was a trusted family friend and confidant.

On April 16, 1972, Lieutenant Radwanski observed Father Lavigne alone at the scene of the crime. On that same day, the Chicopee police received a report from a Mrs. Mary Bobek of 675 Granby Road in Chicopee in which she stated that Daniel Croteau had come to the door of her home on Friday, April 7, 1972, at about 10:30 PM. He had told her he was lost and looking for Father Lavigne. She allowed him to use her telephone and he placed a call. She overheard him ask, "Is Father Lavigne still there?" After a short conversation he hung up the phone and said that he

would wait outside. Within about five minutes a car drove up, picked Daniel up and drove off. Mrs. Bobek described the car as a Ford Mustang and positively identified the boy as Daniel Croteau from a photograph shown to her. She also identified a jacket which had been owned by Daniel as the jacket he was wearing when he arrived at her house. The police had information on file which indicated that Father Lavigne was at that time the owner of a maroon colored Ford Mustang.

On the following day, April 17, 1972, Lieutenant Radwanski interviewed Father Lavigne. In the course of that interview Lavigne asked him, "If a stone was used and thrown in the river, would the blood still be on it?" He also asked, "In such a popular hang-out with so many cars and foot prints, how can the prints you have be of any help?" He also admitted that he had received a phone call from Daniel on April 7th from a home on Granby Road. He said that Daniel had said he was lost and that he had picked him up, called his parents, and that Daniel had spent the night at Lavigne's parents' home in Chicopee. This admission was in contradiction of a statement made by Father Lavigne at an earlier interview when he had stated that whenever he took Daniel anywhere it was with his brothers or a gang of kids.

The evidence of the close relationship that had existed between Father Lavigne and Daniel, his presence at the scene of the crime on the day after the body was discovered, the unusual questions he had asked of the investigators in the course of his interview, and his admission that he had been alone with Daniel on

the night of April 7th focused police suspicion on Father Lavigne. It appears, in fact, that he was the prime suspect (if not the only suspect) at the time.

Father Lavigne was again asked about the April 7 incident in a subsequent interview on May 11, 1972. In that interview he stated that he believed he had called Daniel before Daniel went to a scout meeting, and that Daniel had asked about going to Vermont. He said that Daniel had indicated he wanted to go to Father Lavigne's house and that he had told him not to come to his house. He said that after he picked Daniel up on Granby Road and brought him to his parents' home, he had told Daniel to call his parents and allowed him to watch television in the finished basement of the house. The following morning he woke Daniel up, gave him breakfast and drove him home. He said he dropped Daniel off at the corner of his street and did not see Daniel's parents. He said that Daniel did not appear to be ill. He denied that he had ever given Daniel any alcohol, but stated that he had a well stocked bar in the basement and that Daniel might have taken some himself. He also stated that the next time he saw Daniel was at the funeral home on April 15th, and that he had not spoken to him since April 8th.

On August 7, 1972, the Chicopee Police took the following statement from Bernice Croteau, Daniel's mother:

> On April 7, on Friday at around supper time, my son Danny dressed up, in fact dressed up better than he usually does. He wore his knit shirt, tie, herringbone jacket with a fur collar. He said he was going some place with Father Lavigne. He had been trying to contact the Father on the phone. I don't know if he had contacted Father Lavigne, but he left.

> That was the last we had heard of him that evening until we received a call from Father Lavigne, it was around 11:30 or around midnight, and the Father asked me if Danny could stay over for the night. The following morning at around 8:00 A.M. or 9:00 A.M. Danny walked into the house. He didn't say too much, he just laid around for a while and complained about his stomach. Toward evening he told me that he had vomited several times during the day. At about 6:30 P.M. he went out for the evening, he said that he was getting on the bus and going to the YMCA. At no time did Danny tell me how he got to Chicopee and returned home. I thought that Father Lavigne had brought him back home.

On Monday, April 17, 1972, a telephone call had been made to the Croteau home. Carl Croteau, Jr., who was then nineteen years old, had answered the phone. After a long pause, a male voice that Carl recognized as very familiar said, "We're very sorry what happened to Danny. He saw something behind the circle[1] he shouldn't have seen. It was an accident." Carl realized that he was talking to someone who knew something about his brother's death and asked, "Who is this?" several times. The party on the other end of the line then hung up the telephone.

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[1] Trooper Daly did considerable research (which he details in his affidavit) to determine the significance of the mention of the word "circle" by the caller. He determined that it refers to a wooded area directly behind the Sixteen Acres Library at 1187 Parker Street in Springfield where the city had created a small reading or sitting area by placing a circle of benches around a large oak tree. It had become the gathering place for a group of youths who had become known as "the circle gang" and sufficiently notorious to have been the subject of a book written by James A. Coleman of American International College. It was located less than one half mile from the Croteau home and less than one half mile from St. Catherine of Siena Church. Trooper Daly was able to establish that Father Lavigne had been familiar with the members of "the circle gang," and that although Daniel Croteau had been known and liked by the members of the group he was not a member of the "gang."

Carl and Daniel's father, Carl Croteau, Sr., was in the room when Carl, Jr. received the call. He immediately called the police and reported the incident. At the time when the call came, Daniel had not yet been buried and was still being waked. The entire family was in a highly emotional state. Carl, Jr. reports that he was particularly bothered because he recognized the voice but could not immediately associate it with a face. He attributes his inability to do so to the activity and commotion that was going on in the Croteau household at the time.

Sometime later, in the course of the police investigation, a captain of the Chicopee police and Lt. James Fitzgibbon of the Massachusetts State Police were at the Croteau home and informed the family that Father Lavigne was a suspect in the case. They asked Carl if the voice on the phone could have been that of Father Lavigne.

Carl reports that at that moment he realized that Father Lavigne had in fact been the caller. He states that he was shocked and did not want to believe it. Father Lavigne had been his friend, counselor and confidant and had said the Mass and final prayers at Daniel's funeral. He, as well as his brothers, had been an altar boy at St. Catherine of Sienna while Father Lavigne was there, and he had associated with him in many outside activities such as camping, overnight trips to the mountains and fishing trips. He states that during the time when Father Lavigne was at St. Catherine's and St. Mary's he had been very close to him and had spoken to him on the telephone at least once each week. He is

today completely confident that the voice on the other end of the line was that of Father Lavigne.[2]

Although Father Lavigne was considered a suspect as a result of the 1972 investigation, no charges were ever made against him and he was never arrested. The investigation eventually became inactive for lack of evidence. It remained dormant until October of 1991 when Father Lavigne was charged with rape of a child and indecent assault and battery upon a child in Franklin County. He was at that time assigned to St. Joseph's Parish in Shelburne Falls. He had been transferred from St. Mary's Parish in Springfield to St. Francis's Parish in North Adams on July 6, 1976, and from St. Francis's Parish to St. Joseph's Parish on November 30, 1977.

The 1991 charges against Father Lavigne triggered an investigation of his activities by the Crime Prevention and Control Unit of the State Police attached to the office of the District Attorney for the Northwestern District. As a result of that investigation, a total of 18 persons came forward to claim that they had at one time been sexually molested by Father Lavigne. They included parishioners of three of the parishes to which Father Lavigne had been assigned – St. Catherine of Siena and St. Mary's in Springfield and St. Joseph's in Shelburne Falls. Five of the complainants made charges that fell within the statute of limitations. As

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[2] The circumstances of the voice identification were of course highly suggestive – so much so perhaps as to make the identification inadmissible at trial. It may nevertheless be considered, I think, where the issue is the existence of probable cause to conduct further investigation.

a result of those charges, Father Lavigne was indicted and arraigned in the Franklin County Superior Court and eventually (on June 25, 1992) pleaded guilty to one charge of indecent assault and battery on a person over the age of 14 years. He was placed on probation for a term of 10 years and agreed to receive treatment at St. Luke's Institute in Suitland, Maryland, an institution specializing in the psychiatric treatment of clergy with sexual or alcohol related disorders.

Trooper Susan M. Mosman prepared a complete report of the investigation conducted by the Hampshire/Franklin CPAC Unit of the Massachusetts State Police. A copy of that report is annexed to and made a part of Trooper Daly's affidavit. The report includes statements of a number of victims of child molestation at the hands of Father Lavigne. It reveals a pattern of conduct which has persisted throughout his adult life and in at least three of the parishes to which he has been assigned. His victims, for the most part, have been altar boys under his supervision and often members of the same family. His practice was to befriend the boys and their parents and develop a close relationship with them. As the relationship grew he would take the boys on overnight trips and invite them for dinner and for overnight stays at his rectory or at other locations. He often bought them gifts and did them other favors. He sometimes gave them wine or other alcoholic beverages.

It was during the overnight stays that the sexual attacks usually occurred. He would often invite the boys to take a shower and would then give them a long nightshirt to wear to bed even when

they had their own nightclothes with them. He would ask the boys to sleep in his bed with him. While in bed he would playfully touch them, tickling them and giving them back rubs and massages. He would then ask them to return the favor. This would often lead to his touching of the boys' genital areas and buttocks and an invitation to them to touch his.

The investigation revealed that he engaged in this type of conduct before, during and after the period of time when he was in contact with Daniel Croteau and his family.

The information obtained by the Hampden/Franklin CPAC Unit caused the Hampden County CPAC Unit of the State Police to re-open its investigation of the Daniel Croteau murder. Since it now appeared clear that Father Lavigne was very probably a pedophile, the police set out to determine what part, if any, that malady played in the Daniel Croteau Case. On May 27, 1993 they obtained the following statement from Carl and Bernice Croteau, Daniel's parents.

> Danny became acquainted with Father Lavigne when he became ass't Pastor at St. Catherine's of Siena. Our four other sons were altar boys at the time and serve mass with Father. Father would come to our home and visit 3 or 4 times a week. He would sometimes take one son for a ride or to visit his mother and father's home. At times he would call and ask if he could stay over night dropping him off in the morning. At first Danny wasn't usually included. Danny became an altar boy taught by Father Lavigne and was an altar boy for 5 years or better. Danny served Mass with Father Lavigne mostly every Sunday while Father was at St. Catherine's. Father Lavigne would pick Danny up on Friday or Saturday evening two or three times aa month during school year and three times a week during school vacation time. They were always alone during these trips and over night stays, this continue when Father Lavigne was transfer to St. Mary's parish in Springfield. He Father Lavigne continue

to visit our family home and continue to take one of our sons on rides and trips. However Danny was the one Father most frequently took for rides and kept him over night. The over night stays happen when Father Lavigne would call around 8:30 pm to 9:30 pm and asked to have Danny over night. This hour was late for our sons. This relationship continue until Danny's murder. There were times that we didn't know that Danny was with Father Lavigne until Father would call us to tell us he was with him and wanted to keep him over night, this would happen occasionally. This statement is written from the best of our knowledge.

The police learned from Daniel's brother [redacted] that while he was a student at Our Lady of the Sacred Heart School he was repeatedly molested by Father Lavigne over a period of time. [redacted] stated that he stayed many nights at St. Mary's rectory in Springfield and at Father Lavigne's parents house in Chicopee, and that during those overnight visits Lavigne sexually molested him. Another brother, [redacted] stated that when he was about fourteen years of age Father Lavigne initiated the same type of activity with him and at some time gave him alcohol.

On December 1991, Detective Lieutenant Brad Holmes interviewed Stephen R. Burnett of 78 Briarcliff St., Springfield, MA. Burnett gave him the following statement:

> Danny and I were best friends since about 1965, I was about 6 years old. We both attended Our Lady of Sacred Heart elementary school. I knew Danny as a good natured kid, he didn't have alot (sic) of material goods, and not to (sic) many friends. Danny stayed back a year in school and was therefore a year older than the other kids in our class. We were both alter boys at St. Catherine's. I served Mass with Danny for Father Lavigne for about a year before I moved with my family to Mississippi. When we did funeral Masses with Father Lavigne at St. Catherine's, he would usually get us out of school. this was always during the week. After the Mass, Father Lavigne would

offer us the wine in the chalice. The chalice was always filled with more wine than when he performed the Mass. This only took place during the week, when no one else was around. It never happened on Sunday. Danny and I would share one chalice of wine. Father Lavigne would joke around a little and encourage us to drink the wine. I remember this because I didn't like the wine, but Danny seemed to. While we drank the wine, Father Lavigne would change into his regular clothes. He always wore his regular clothing under his robes, except for his shirt. After we finished Father Lavigne would always tell us to chew gum and provide us with the gum. I think it was Wrigley's gum. After we finished the wine we would go to the locker room to change. Father Lavigne would come with us. We changed from our robes while Father Lavigne watched. We had our regular clothing on under our robes so the most we actually changed was our shirts. I never cared for the wine, but the most important thing for Danny was drinking the wine at the end of the Mass. The highlight for me was getting out of school. I found it strange that the other priests never watched us change, but Father Lavigne always did. In fact he helped us by assisting us pull off the robes. We thought Father Lavigne was a cool guy. He didn't act like a priest. He acted like a playboy, very carefree and never serious outside the church. We would cruise with him in a car which was a convertible. I didn't know whose convertible it was, but he also drove a funeral-like car, either dark blue or black, with four doors. It could have been a cadillac. We usually drove to Friendly's. I didn't go with him as often as Danny did. I do remember that there were Playboy magazines in the convertible, under the driver's seat. Father Lavigne gave them to us to look at and in fact encouraged it.

We played street hockey alot (sic) on Lumae St. in Springfield. I can remember very clearly that on many occasions, we would be in the middle of a game, well before supper time, everybody would be having a good time, all of a sudden I would see Danny crying and I would look up to Prouty St. which was about five houses away, and see Father Lavigne parked in the big four-door car, but he wouldn't come

out of his car or park any closer like he was trying to conceal his identity. Danny would say "I have to go" and he would run to the car crying with no further explanation. Danny told me that Father Lavigne was his uncle and that's why I never thought any more about it. This would happen alot. And Danny was with Father Lavigne alot (sic). Where Father Lavigne parked his car on Prouty St. was only about five houses from the Croteau house. I know that Father Lavigne did not bring Danny home to his (Danny's) house as he went the opposite direction. They drove towards Sunrise Terrace down Lumae St.

I know Danny seemed to latch on to Father Lavigne because he didn't have many friends, and it seemed like his father was never home. We never went to Danny's house.

The above statement is true and accurate to the best of my knowledge.

On May 3, 1993 [redacted] currently of [redacted] sent a written statement to Trooper Daly in which he described an incident that had taken place while he was on an overnight camping trip with Father Lavigne and the Croteau family in the Town of Goshen when he as about ten or eleven years old. That statement is as follows:

To whom it may concern,

I recently had an opportunity to speak to my brother [redacted] regarding the weekend I, [redacted] was sexually molested by Richard Lavigne. We began this discussion with my inquiry of whether (sic) or not [redacted] had been molested as well. He had not.

As we spoke of that weekend in Goshen, Ma. a fog seemed to lift from my memory. He spoke of things as he remembered them and those same memories came rushing back to me clear and true. We both agreed upon the recollection of Danny Croteau, being the youngest one there, as the focal point of name calling and mild ridicule by his three brothers, Joe, Michael and Greg and the boys from my family, myself, Tommy and Brian. It was obvious that Danny was frustrated and upset that Lavigne joined in the taunting. He seemed upset at being the

focal point of Lavigne's attention. More than once Danny threatened Lavigne with the words "I'll tell ...! I'll tell ...!" This had an obvious effect on Lavigne. He began to pay more attention to Danny and ordered us to stop the name calling. He also showed a change of behavior due to the threats. At one point Danny and I were vying (sic) for Lavigne's attention when I pushed him to the floor. Lavigne reacted violently by slapping me across the face so hard it knocked me to the floor.

I think the change in Lavigne's behavior on that summer weekend 25 years ago was a direct result of Danny Croteau threatening to tell. At the time I thought "I wonder what he has on Lavigne." That night I was molested by Lavigne and I then figured that Lavigne must have molested Danny too.

I failed to recall any of this because I buried everything about that weekend due to the shame and guilt I felt. The discussion I had with my brother on April 17, 1993 was the first time I had spoken about that weekend in detail with him. His recollections stirred many memories I had buried.

If Danny Croteau had begun threatening Lavigne with exposure as early as 1967 or 1968, who knows how serious these threats became by the time he was murdered in 1972? I believe they became too much for Lavigne to handle. I believe the violence he displayed in striking me in 1968 was displayed again in 1972 when he lost control of it and murdered Danny Croteau. Only God and Richard Lavigne know for sure.

Among the evidence collected by the police during the 1972 investigation were Daniel's clothing, soil and stones from the area near his body, a stained piece of paper, chewing gum wrappers, a piece of newspaper, a straw and a piece of cotton rope. Those items were sent to the State Crime Laboratory for testing. The tests established that the blood on Daniel's clothing was Group "O," as were traces of human blood found on the stained piece of paper. Blood found in the soil collected from near the body and on the stones tested positive for human blood, but no blood grouping could be identified. The testing done on the cotton rope and plastic straw, however, indicated that human blood was present on

those items which was identified as Group "B."

Trooper Daly determined from weather data on file with the National Weather Service and Westover Air Force Base in Chicopee that there had been an intense rainfall (0.96 inches) on Thursday, April 13, 1972, just 24 hours before Daniel's murder. From this information he deduced that the type "B" blood found at the scene could not have been there before the murder because the rain would have washed it away, so there is a strong likelihooe that this blood came from the person who committed the murder.

The rope and plastic straw were sent to Forensic Science Associates (FSA), 3053 Research Drive, Richmond, California for DNA typing using the PCR DNA amplification procedure. FSA was told that this evidence was collected in the course of a murder investigation about twenty years ago, but was not told the names of the victim and possible suspects in the case. The testing was conducted by Edward T. Blake and Jennifer S. Mihalovich of FSA[3], and their report was issued on January 8, 1993. A copy of their report is appended to and made a part of the affidavit. Their findings revealed that a low level of the DQ∝x gene could be amplified from one area of the plastic straw and that it was determined to be type 1.1,4. They report that this DQ∝x type occurs in approximately 8% of the Caucasian population and approximately 9% of the Black population. The gene could not be amplified or typed from a second area of the straw or from any of

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[3] The rather impressive credentials of both scientists are described in detail in the affidavit.

the specimens obtained from the rope.

On the basis of the facts set forth in the affidavit, I determined that a sample of Father Lavigne's blood would probably produce evidence relevant to the question of his guilt or innocence of the murder of Danny Croteau. I accordingly issued a warrant in the form requested in the application.

On September 3, 1993, I received a faxed copy of a motion from Father Lavigne's attorney moving for a stay of the seizure of the blood sample pending a hearing, or, in the alternative, an order that Bay State Medical Center maintain custody, possession and control to any blood seized pending a hearing and further order of this court. I granted the alternative relief sought.

Father Lavigne filed a motion to have the blood sample that was taken from him in pursuance of the warrant returned to him. The Commonwealth has filed a motion to have the blood sample released to it for testing. A hearing on those two motions was held before me on September 10, 1993.

## I. Statutory Authority

Father Lavigne first contends that there is no provision in Massachusetts law that authorizes the non-consensual extraction of blood from a suspect in the absence of a grand jury proceeding or a pending criminal proceeding. He points specifically to the provisions of G.L. c. 276, § 1 which authorizes the issuance of warrants to search for and seize (1) property or articles stolen, embezzled, or obtained by false pretenses, or otherwise obtained in the commission of a crime; (2) property or articles which are

intended for use, or which are or have been used, as a means or instrumentality of committing a crime, including but not in limitation of the foregoing, any property or article worn, carried or otherwise used, changed or earmarked in the preparation for or perpetration of or concealment of a crime; (3) property or articles the possession or control of which is unlawful, or which are possessed or controlled for an unlawful purpose; except property subject to search or seizure under sections forty-two through fifty-six, inclusive of chapter one hundred and thirty-eight; (4) the dead body of a human being; and (5) the body of a living person for whom a current arrest warrant is outstanding. He argues that there is no authority to use a search warrant to seize a person's bodily fluids.

It is true that the statute does not specifically mention "mere evidence" or the blood of a human being. The final paragraph of the section, however, provides as follows:

> Nothing in this section shall be construed to abrogate, impair or limit powers of search and seizure granted under other provisions of the General Laws **or under the common law.** (Emphasis supplied).

At the very least, that paragraph suggests that the Legislature did not intend to limit the authority of courts to issue search warrants to the five classes of property listed in the section.

Prior to May 29, 1967, the federal courts distinguished between the seizure of items of evidential value only and the seizure of contraband or the fruits and instrumentalities of crime. Searches for and seizure of "mere evidence" were prohibited – and

the distinction was one of constitutional dimension. On that date, however, the Supreme Court abolished the distinction in **Warden, Maryland Penitentiary v. Hayden**, 387 U.S. 294, 300-301; 87 S.Ct. 1642, 1646-1647. It is interesting, and I think significant, that in explaining its reasons for changing the rule, the court relied to a substantial extent on its earlier decision in **Schmerber v. California**, 384 U.S. 757, 86 S.Ct. 1826 (1966), a landmark decision in which the court approved the taking of a blood sample from an intoxicated driver without a warrant on the basis of exigent circumstances. The **Warden v. Hayden** court said, (387 U.S. at 306 and 87 S.Ct. at 1650):

> **Schmerber** settled the proposition that it is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals. The Fourth Amendment can secure the same protection of privacy whether the search is for "mere evidence" or for fruits, instrumentalities or contraband[4].

I am advised that since the **Warden v. Hayden** decision a number of the justices of this court have issued search warrants for blood samples of suspected felons. In at least one instance, the fact that a blood sample had been obtained from the defendant in such a manner was noted without criticism or comment by our Supreme Judicial Court and the defendant's conviction of first degree murder affirmed, **Commonwealth v. Gomes**, 403 Mass.258 (1988). In view of the fact that the blood comparison that was made possible

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[4]**Warden v. Hayden** was cited and followed by the Supreme Judicial Court in **Commonwealth v. Murray**, 359 Mass. 541, 547, 269 N.E. 2d 641, 645 (1971).

by the seizure of the sample was a critical issue in that case, and the fact that the court engaged in a plenary review of the record pursuant to the provisions of G.L. c. 278, § 33E, the silence of the court implies a tacit approval of the procedure that was followed.

I also take judicial notice of the fact that in a substantial number of our jurisdictions the form of search warrant has been changed (despite the language of G.L. c.276, § 2A) by adding the phrase, "is evidence of a crime or is evidence of criminal activity" in the space provided for a statement of the reason why the property is being sought.

I am of the opinion that the common law of this Commonwealth has now evolved to the point where courts may issue warrants to permit searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals,[5] and that includes warrants for the seizure of blood samples in appropriate cases.

There must, of course, be a nexus between the item to be seized and the criminal behavior. **Warden v. Hayden**, supra, 387 U.S. at 307, 87 S.Ct. at 1650. When the item to be seized is a sample of a suspect's blood, it must be shown that there is probable cause

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[5] In the last analysis the common law of this Commonwealth is what the Supreme Judicial Court decides it to be. See, for example, **Gaudette v. Webb**, 362 Mass. 60, 71 (1972) where the court proclaimed that the right to recover for wrongful death is of common law origin, and **Whitney v. Worcester**, 373 Mass. 208, 366 N.E. 2d 1210 (1977) where the Court promised to abrogate the common law doctrine of governmental immunity if the Legislature failed to do so. Until the SJC speaks on a particular issue, a trial court must attempt to predict as accurately as possible what the ultimate judgment of that court will be.

to believe that it will produce evidence relevant to the question of the suspect's guilt of a particular crime. Such a showing has been made in this case. Trooper Daly's affidavit amply demonstrates that there is probable cause to believe that Father Lavigne was responsible for Daniel Croteau's death. Even if the testing of his blood sample were to reveal no more than his blood type, it would be very relevant evidence. If it proves to be Group "B" and hence consistent with the blood on the cotton rope and plastic straw found at the scene of the crime, while not in itself conclusive, it could quite properly be used as evidence which, when correlated with other evidence, would be sufficient to form a web of circumstances leading to a conviction of guilt. **Commonwealth v. DiMarzo**, 364 Mass. 699, 308 N.E.2nd 538, 534 (1974). If, on the other hand, his blood type proves to be other than Group "B," it would go a long way toward exculpating him and removing the cloud of suspicion that the other facts and circumstances have placed upon him.

II. **The Issue of Due Process**

Father Lavigne's second argument is that he was entitled to a hearing before having his blood taken and that the procedure that was followed therefore deprived him of due process of law in violation of both the federal and Massachusetts constitutions. That argument overlooks the fact that all, or nearly all, search warrants and, for that matter, all or nearly all, arrest warrants are issued ex parte. The test of their validity is the existence or non-existence of probable cause. Search warrants are frequently

issued while a case is still in the investigatory stage and before an indictment or complaint has been either sought or obtained.

There is not and should not be any rule of law requiring the police or a prosecutor to seek an indictment or complaint as soon as they have sufficient probable cause to justify its issuance and before they have completed their investigation. Evidence sufficient to establish probable cause is not necessarily evidence sufficient to convict, and a premature levelling of formal charges may often result in the loss of valuable evidence. Furthermore, even after probable cause exists, further investigation may uncover exculpatory evidence clearing a suspect before unwarranted charges are made. If, as Father Lavigne would have it, adversary hearings had to be held before police with probable cause could be permitted to search for relevant evidence, the investigatory process, and hence the entire system of criminal justice would be severely hampered.

Father Lavigne relies primarily upon the language of the Supreme Judicial Court in **Commonwealth v. Trigones**, 397 Mass. 633, 492 N.E.2nd 1146 (1986). In that case the court did say that a postindictment order to obtain a blood sample should be based on a showing of probable cause made at an adversary hearing, and that at such a hearing the Commonwealth must show that a sample of the defendant's blood would probably produce evidence relevant to the question of the defendant's guilt. In that case the defendant was already indicted and in custody and (the court said) the indictment, the uncontroverted facts stated in an affidavit signed by the

prosecutor and additional facts stated by the prosecutor in open court warranted a finding of probable cause. The court held that the Commonwealth had adequately justified, "the relatively minor intrusion so as to make the search 'reasonable." The court did not hold or imply that in a preindictment setting an adversary hearing is required as a pre-condition to the issuance of a search warrant.

In Commonwealth v. Downey, 407 Mass. 472, 553 N.E. 2nd 1303 (1990), a grand jury had been convened to investigate a bank robbery and kidnapping that had occurred in the Town of Burlington. The kidnapping victim had identified the defendant from a photographic array as one of his abductors[6] and a mask had been recovered from the backseat of an automobile which had been identified as the getaway car. An F.B.I. laboratory report indicated that saliva and hair had been deposited in the mask by a person with type "O" blooe, and that the saliva and hair could be compared to blood, saliva and hair samples taken from suspects in the criminal investigation. The Grand Jury, at the request of the prosecutor, voted that there was sufficient cause to compel the defendant to provide blood, saliva and hair samples and they issued an order that he do so.

The supervising judge held a hearing at which both the prosecutor and the defense counsel were heard,[7] and then issued an order compelling the defendant to produce the samples.

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[6]There was also other evidence pointing toward the guilt of the defendant presented to the Grand Jury.

[7]It was apparently not an evidentiary hearing.

The defendant argued that his detention for the purpose of a blood test in connection with the bank robbery investigation was unconstitutional because he had not first been indicted, arrested, subjected to a probable cause determination, or even summoned to appear before the grand jury.

The court held that since the evidence that had been presented to the grand jury was adequate to support the arrest or indictment of the defendant, he was not harmed by the fact that the order issued in the absence of either. It overruled his objection to his detention for purposes of obtaining the blood sample for that reason.

The court did point out that the defendant had in fact been given a hearing before the supervising judge at which he was afforded an opportunity to oppose the grand jury order and contest the constitutionality of his detention, but it did not suggest that such a hearing was a necessary precondition to the validity of his detention. The crucial test was the existence of probable cause.

There is no requirement that law enforcement authorities present their evidence to a grand jury as soon as they have sufficient evidence to warrant the issuance of an indictment. They may decide to continue their own investigation and obtain further evidence before presenting what they have to the grand jury and seeking an indictment. Such further investigation may include a search for further evidence and - given probable cause - a properly obtained and executed search warrant is the appropriate means of obtaining it.

I do not believe that Father Lavigne's constitutional rights have been violated by the procedures following in this case to this date.

Father Lavigne contends that an adversarial hearing must be held whenever the government seeks to compel someone to undergo a medical procedure in order to extract evidence from his or her body. It is undoubtedly true that some medical procedures are so extremely intensive that special precautions must be taken before an individual can be compelled to submit to them. In the recent case of Rodriquez v. Furtado[8] for example, the Supreme Judicial Court exercised its power of general superintendence and laid down a rule that in the future it would deem a warrant authorizing the search of a body cavity to be invalid unless issued by the authority of a judge, on a strong showing of particularized need supported by a high degree of probable cause. Even in that case which involved a forced entry of a woman's vagina in search of narcotics believed (mistakenly) to be concealed there (a procedure which the court described as "intrusive, humiliating and demeaning"), the court did not foreclose the use of a search warrant for future searches of body cavities. Instead it limited the issuance of such warrants to judges, and raised the standards to be observed in issuing them.

The taking of a blood sample for purposes of testing is a much less intrusive procedure than the search of a body cavity. the Supreme Court of the United States has described the extraction of

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[8]410 Mass. 878, 888 (1991).

blood samples for testing as "commonplace in these days of periodic physical examinations" and noted that "experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma or pain." Schmerber v. California, 384 U.S. 757, 771, 86 S. Ct. 1826 (1966). The Supreme Judicial Court has described it as a "relatively minor intrusion." Commonwealth v. Trigones, supra.

In this case the warrant authorized the use of force "only if necessary", and required that the sample be drawn by trained medical personnel at a medical facility. It was in fact issued by a judge (myself) on what I believe was a sufficiently strong showing of a particularized need supported by a high degree of probable cause. Even if the Supreme Judicial Court's order in the Rodriquez Case is applicable to the compelled taking of a blood sample, I believe the requirements of that order have been satisfied.

## III. Admissibility of Evidence to be Obtained

Father Lavigne finally argues that the affidavit fails to establish probable cause to believe that a blood test will produce admissible evidence of guilt. His argument on this point is twofold. He first contends that the Commonwealth was required to establish the chain of custody of the blood samples that were retrieved from the scene of the crime, and secondly contends that the affidavit lacks information from which the court could conclude that the DNA blood test performed by the California laboratory will be admissible under the standards prescribed by the court by

Commonwealth v. Lanigan, 413 Mass. 154 (1992).

With regard to the first prong of the argument, it is well established in this Commonwealth that issues as to the chain of custody of evidence go to its weight and not to its admissibility. Commonwealth v. White, 353 Mass. 409, 419-420 (1977). Apart from he legal point, however, a copy of the report of Department of Public Safety chemist who tested the blood sample in 1972 is appended to the affidavit and describes the chain of custody up to and including the testing, and the affidavit itself describes the person and the manner by which the rape and plastic straw were delivered to the California laboratory. I do not believe any more is required for the purpose of establishing probable cause.

With regard to the second prong of the argument, I recognize that acceptance of the DNA test results in a future trial will undoubtedly have to be determined at a voir dire hearing. Commonwealth v. Curnin, 409 Mass. 218, 222 (1991). Even if such evidence should prove to be inadmissible, however, the blood sample taken from Father Lavigne will still provide evidence as to his blood type which will be relevant for the reasons stated above (p. 20).

## IV. Conclusion

I conclude that the motion of Father Lavigne that the blood sample taken from him be returned to him should be denied, and that the Commonwealth's motion that the blood sample be delivered to it for further testing should be allowed. I recognize, however, that the issues raised by the motions are novel and complex, and Father Lavigne's attorneys have moved for a stay of my order to give them

an opportunity to seek interlocutory review of my conclusion by an appellate court. I believe they should have such an opportunity.

Accordingly it is **ORDERED**

(1) that the motion of Father Lavigne for a return of his blood sample be, and the same hereby, is denied;

(2) that the motion of the Commonwealth be allowed and Baystate Medical Center be, and it hereby is, ordered to deliver the said blood sample to the Hampden County District Attorney or his designee; and

(3) that execution of this order be stayed until Monday, October 4, 1993 to provide Father Lavigne with an opportunity to seek appellate review.

John F. Moriarty
Justice of the Superior Court

Dated: Sept 29, 1993

# SEARCH WARRANT

G.L. c. 276, §§ 1-7

28

TRIAL COURT OF MASSACHUSETTS #1

Massachusetts Superior COURT DEPARTMENT

Hampden DIVISION

SEARCH WARRANT DOCKET NUMBER

**TO THE SHERIFFS OF OUR SEVERAL COUNTIES OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR COMMONWEALTH:**

Proof by affidavit, which is hereby incorporated by reference, has been made this day and I find that there is **PROBABLE CAUSE** to believe that the property described below:

- ☐ has been stolen, embezzled, or obtained by false pretenses.
- ☐ is intended for use or has been used as the means of committing a crime.
- ☐ has been concealed to prevent a crime from being discovered.
- ☐ is unlawfully possessed or concealed for an unlawful purpose.
- ☒ is evidence of a crime or is evidence of criminal activity.
- ☐ other *(specify)*_____

**YOU ARE THEREFORE COMMANDED** within a reasonable time and in no event later than seven days from the issuance of this search warrant to search for the following property:

The blood of Richard R. Lavigne, sample to be drawn by trained medical personnel at a medical facility. This includes the authorization to use reasonable force only if necessary, permission to transport Richard R. Lavigne to a convenient place for these purposes, and authorization to enter the residence of Richard R. Lavigne for these purposes.

☐ at:

which is occupied by and/or in the possession of:

☒ on the person or in the possession of:
Richard R. Lavigne

You ☐ are ☑ are not also authorized to conduct the search at any time during the night.

You ☐ are ☑ are not also authorized to enter the premises without announcement.

You ☐ are ☑ are not also commanded to search any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered.

**YOU ARE FURTHER COMMANDED** if you find such property or any part thereof, to bring it, and when appropriate, the persons in whose possession it is found before the Hampden Division of the Massachusetts Superior Court Department.

DATE ISSUED: September 2, 1993

SIGNATURE OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

X John F. Moriarty

FIRST OR ADMINISTRATIVE JUSTICE

WITNESS:

PRINTED NAME OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

John F. Moriarty

SW-1 (6/87)

# RETURN OF OFFICER SERVING SEARCH WARRANT

*A search warrant must be executed as soon as reasonably possible after its issuance, and in any case may not be validly executed more than 7 days after its issuance. The executing officer must file his or her return with the court named in the warrant within 7 days after the warrant is issued. G.L. c. 276, §3*

his search warrant was issued on September 2, (DATE), 1993, and I have executed it as follows:

The following is an inventory of the property taken pursuant to this search warrant:

1. (3) Three vials of blood of Richard R. Lavigne
2.
3.
4.
5.
6.
7.
8.
9.
10.
12.
13.
14.
15.
16.
17.
18.
19.
20.

(attach additional pages as necessary)

This inventory was made in the presence of: Troopers Thomas J. Daly, Stephen J. Griffin, Sgt. Gibbons of the Massachusetts State Police.

I swear that this inventory is a true and detailed account of all the property taken by me on this search warrant.

| SIGNATURE OF PERSON MAKING SEARCH | DATE AND TIME OF SEARCH | SWORN AND SUBSCRIBED TO BEFORE |
|---|---|---|
| Thomas J. Daly | 09/03/93 2:58 p.m. | X Elizabeth D. Lovejoy (Signature of ~~Justice, Clerk-Magistrate~~ or Assistant Clerk) |
| PRINTED NAME OF PERSON MAKING SEARCH | TITLE OF PERSON MAKING SEARCH | DATE SWORN AND SUBSCRIBED TO |
| Thomas J. DALY | Trooper #861 | Sept 9, 1993 |

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
#1

IN THE MATTER OF RICHARD R. LAVIGNE

COMMONWEALTH'S MOTION FOR IMPOUNDMENT

Now comes the Commonwealth in the above-captioned matter and respectfully requests this Honorable Court to impound the application for search warrant by Massachusetts State Police Trooper Thomas Daly in the above-captioned matter, its attached affidavit and supporting documents, the search warrant based upon these documents issued by this court, per Moriarty, J., on September 2, 1993, and its return.

As grounds for its motion the Commonwealth states that the above-named materials necessarily contain information gathered in an on-going criminal investigation which should not be disclosed to the public so as to maintain the integrity of this investigation.

HAMPDEN COUNTY
SUPERIOR COURT
FILED
SEP 7 1993
William J. Martin Jr.
CLERK-MAGISTRATE

Respectfully submitted,

THE COMMONWEALTH

William M. Bennett

William M. Bennett
District Attorney

Dated: September 7, 1993

1404p

September 7, 1993
Motion allowed except as to Richard R. Lavigne and his legal counsel
John F. Moriarty
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
#1

IN THE MATTER OF RICHARD R. LAVIGNE

COMMONWEALTH'S MOTION FOR HEARING UPON RELEASE OF BLOOD

Now comes the Commonwealth in the above-captioned matter and respectfully requests this Honorable Court to hold a hearing on September 8, 1993 to determine whether to release the sample of blood taken from Richard R. Lavigne on September 3, 1993 pursuant to a search warrant issued, per Moriarty, J., on September 2, 1993, and currently stored at Baystate Medical Center in Springfield. As grounds for its motion the Commonwealth states that it has been unable to reach an agreement for the date of such hearing with the attorneys representing Richard R. Lavigne, and that time is of the essence to resolve this matter.

Respectfully submitted,

HAMPDEN COUNTY
SUPERIOR COURT
FILED
SEP 7 1993
CLERK-MAGISTRATE

THE COMMONWEALTH

William M. Bennett
District Attorney

Dated: September 7, 1993

September 7, 1993
Motion allowed. Hearing to be held
on September 9, 1993 at 2:00 P.M.
John F. Moriarty
Justice of the Superior Court

1407

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, ss:

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT



1993 Sept 7 - allowed. (Motion 2)
Elizabeth J. Gorgon
Asst Clerk

In re Richard Lavigne, artist
Petitioner

**PETITIONER'S MOTION FOR COPY OF SEARCH WARRANT AND SUPPORTING AFFIDAVIT**

Petitioner, hereby, moves this Court to order the Commonwealth to photocopy the search warrant, application, and affidavit and attachments (executed on September 3, 1993 at the residence of Richard Lavigne) and to send the photocopies to defense counsel via Federal Express or by courier to be delivered to defense counsel on Wednesday, September 8, 1993.

In support of this motion, defendant states:

1. A hearing is scheduled for 2:00 p.m. on Thursday, September 9, 1993 at which time the contents of the search warrant application and the procedures undertaken by the state police will be challenged.

2. Defense counsel are located in Boston, MA and will be unable to get to Springfield before Thursday, September 9, at the time of the hearing.

3. Defense counsel will pay the price of the copying, Federal Express and/or courier.

4. Defense counsel will not be able to prepare for this hearing unless they are able to review the search warrant papers in

advance of the hearing.

Respectfully submitted,

Patricia Garin

Max D. Stern
BBO# 479560
Patricia Garin
BBO# 544770
STERN, SHAPIRO, ROSENFELD
& WEISSBERG
80 Boylston Street
Suite 910
Boston, MA 02116
(617) 542-0663

Dated: September 7, 1993

LAW OFFICES
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DENNIS SHEDD
JENNY C. CHOU

OF COUNSEL
JOAN RACHLIN
JEFFREY M. FEUER
VIRGINIA M. FLEMING

FAX TRANSMITTAL SHEET

DATE: Sept. 7, 1993

TO: Clerk Betty Gengrow
BUSINESS: Clerk's Office - Superior Court
FAX NUMBER: 413 ~~488~~ 737-1611
FROM: Patty Garin
RE: Richard Lavigne

THE FOLLOWING MESSAGE HAS 3 PAGE(S) INCLUDING THIS COVER SHEET. IF YOU HAVE ANY DIFFICULTY READING IT, OR IF TRANSMISSION WAS INCOMPLETE, PLEASE ADVISE LAURA BRADWAY, LAURISA CLAYTOR, CAROL FREDO OR HELEN EWER AT (617) 542-0663.

Thank you for your assistance

Patty Garin

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss:

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

In re Richard Lavigne,
Petitioner

**PETITIONER'S MOTION FOR AN IN-CAMERA HEARING**

Petitioner hereby moves this Court to conduct the hearing on Petitioner's Motion for Return of his Blood Sample in-camera. In support of this motion, petitioner states that he has not been charged with a crime; the purpose of this proceeding is to challenge the in-camera, ex parte proceeding at which the Commonwealth obtained a search warrant to forcibly extract petitioner's blood; the media has persistently and extensively covered this case; and, any coverage of the media on this explosive topic will adversely effect petitioner's right to a fair trial should he be charged in this matter.

Respectfully submitted,

Patricia Garin

Max D. Stern
BBO# 479560
Patricia Garin
BBO# 544770
Dennis Shedd
BBO #555475
STERN, SHAPIRO, ROSENFELD
& WEISSBERG
80 Boylston Street
Suite 910
Boston, MA 02116
(617) 542-0663



Dated: September 9, 1993

9/9/93

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss:

SUPERIOR COURT [illegible] COUNTY
OF THE TRIAL CO[illegible] SUPERIOR COURT



In re Richard Lavigne,
Petitioner

**PETITIONER'S MOTION FOR A STAY, IN THE ALTERNATIVE**

Before the Court at present is Petitioner's Motion For Return of Blood Sample and the Commonwealth's motion for access to the blood sample.[1] In the event that this Court denies petitioner's motion and allows the Commonwealth to have access to the blood sample, petitioner hereby moves this Court, in the alternative, for a stay of its order requiring the Bay State Medical Center to release petitioner's blood sample to the State Police until such time as the petitioner is able to obtain a hearing before a Single Justice of the Supreme Judicial Court on petitioner's request for relief pursuant to M.G.L. c.211, §3.

Respectfully submitted,

Patricia Garin

Max D. Stern
BBO# 479560
Patricia Garin
BBO# 544770
STERN, SHAPIRO, ROSENFELD
& WEISSBERG
80 Boylston Street
Boston, MA 02116
(617) 542-0663

Dated: September 10, 1993

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[1] If the Commonwealth's motion was reduced to writing, petitioner did not receive a copy of that motion.

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
# /



In re Richard R. Lavigne,
petitioner

**COMMONWEALTH'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR RELEASE OF BLOOD AND IN OPPOSITION TO PETITIONER'S MOTION FOR RETURN OF HIS BLOOD SAMPLE**

Now comes the Commonwealth in the above-captioned matter and respectfully requests this Honorable Court to release to the Commonwealth the sample of the petitioner's blood drawn from him pursuant to a search warrant issued by this court, per Moriarty, J., on September 2, 1993 to enable further investigation in this matter as detailed in the Affidavit of Massachusetts State Police Trooper Thomas J. Daly filed in support of the Commonwealth's application for a search warrant to seize a sample of the petitioner's blood. In so doing, the Commonwealth necessarily requests this Honorable Court to deny the petitioner's request for the return of his blood sample.

As grounds for its requests, the Commonwealth relies upon the following:

## INTRODUCTION[1]

On Saturday, April 15, 1972 at 8:25 A.M., the body of thirteen year old Daniel Croteau was discovered in the Chicopee River in the area under the Governor Robinson Bridge overpass in the city of Chicopee. Based upon the results of an autopsy conducted by a forensic pathologist, Dr. George G. Katsas, the cause of death was determined to be blunt trauma to the head. The manner of death was ruled a homicide. Investigation revealed that the time of death was between the hours of 4:30 P.M. on April 14, 1972 when the victim was last seen alive and 8:25 A.M. on April 15, 1972 when the body had been found.

According to a Chicopee Police Department report filed by Lieutenant Edward Radwanski dated April 15, 1972, initial examination of the crime scene revealed the following: From the north side of East Main Street to the river bank there are two cement piers each nine feet wide and thirty-three feet long, which support the Governor Robinson Bridge. A large section of blood-stained sand, about six feet by twelve feet was found about sixteen feet from the south side of the

[1] For the sake of clarity, the Commonwealth provides this court with a synopsis of procedural events in the investigation of this case. However, the Commonwealth relies upon the entire affidavit of Trooper Thomas J. Daly in support of the factual predicate establishing probable cause for the issuance of this court's September 2 search warrant for a sample of the petitioner's blood.

northernmost pier. Nearby were marks in the sand which seem to indicate some sort of a scuffle had taken place. These marks and the bloodstain were close to a set of tire tracks from a motor vehicle which had driven in the area, backed around and then taken off at a high rate of speed. From this blood-stained area, marks in the sandy soil indicated that some heavy object had been dragged eighty-three feet to the edge of the river and ended in a large pool of blood on the river bank directly south of the location of the body in the river. From this pool of blood, bloodstains were found spattered on the rocks and soil for a distance of fifteen feet in a westerly direction.

Although a primary suspect was developed early on in the case, no charges were ever filed. The suspect at that time was identified as Richard R. Lavigne, a Roman Catholic Priest who at the time was assigned to St. Mary's parish located at 840 Page Boulevard in the city of Springfield. At the time of the murder, Father Lavigne had been closely associated with the Croteau family which included the five boys, Carl, Gregory, Michael, Joseph, and the decedent, Daniel. The investigation first conducted in 1972, however, eventually became inactive due to a determination by the then District Attorney that there was insufficient evidence to proceed at that time. When the present District Attorney took office in January 1990, all unsolved murder files were reviewed. During this process,

additional investigation was conducted into the death of Daniel Croteau .

To date, this investigation has revealed that Father Lavigne was convicted in Franklin County of indecent assault and battery upon a child under fourteen and placed on ten years probation. During the course of the investigation which formed the basis of his conviction, it was learned that eighteen individuals had come forward to claim that they at one time had been sexually molested by Father Lavigne. These included persons who were parishioners at the parishes to which Father Lavigne had been assigned. A total of five victims who made allegations against Father Lavigne fell within the statute of limitations. Father Lavigne's conviction upon a single count of sexual assault was the result of plea negotiations with the prosecuting authorities in Franklin County.

Publicity generated by the Franklin County investigation and the subsequent indictment of Father Lavigne caused persons to come forward with new and previously undisclosed information relating to the Croteau homicide investigation. A pattern of sexual abuse by Father Lavigne was discovered. For the most part, his victims served as altar boys at the parishes to which Father Lavigne was assigned, as was Daniel Croteau and his four brothers. Each victim's family had established a close relationship with Father Lavigne. At the time of the victim's murder, the Croteau family thought of Father Lavigne as a close

friend and confidant. It was learned that Father Lavigne routinely gave the boys alcohol prior to the molestation. One week before his death, Daniel Croteau had been with Father Lavigne overnight at his parents home in Chicopee and returned home the next morning ill and vomiting. Investigation showed that Father Lavigne had given other children alcohol in similar overnight visits at his parent's home, although he denied ever giving alcohol to the victim or other youngsters when he was initially questioned by police in 1972. At times, Father Lavigne also would provide gum to the boys to hide the smell of the alcohol. An autopsy of Daniel Croteau's body revealed a blood alcohol level at .18%. Gum was found in the stomach contents of the victim at the time of his death.

Contemporaneouly, a decision had been made by investigators to further test the physical evidence deposited at the scene. In 1972, forensic tests performed upon two pieces of the physical evidence -- a piece of rope and a plastic straw found on the river bank -- revealed the presence of human blood, Type B. On March 13, 1992, these two articles were sent to the Forensic Science Laboratory in California. Due to the age of the evidence, a type of DNA analysis conducive to older samples was asked to be performed upon the evidence. On January 8, 1993, a report of the examination of the rope and plastic straw sent to FSA laboratory for analysis was issued by Dr. Edward T. Blake and his associates. This report was subsequently sent to the

Hampden County District Attorney's Office. The results of this testing revealed genetic material upon a section of the plastic straw occurring in approximately 8% of the Caucasian population and 9% of the black population. The FSA laboratory confirmed that if a blood sample was sent to them that sample could be tested to either include or exclude the donor as the depositor of the genetic material analyzed on the straw found at the scene of Daniel Croteau's death.

In addition, evidence indicative of the defendant's consciousness of guilt -- namely, his inordinate interest in the police investigation into the victim's murder -- and further investigation regarding a phone call received by the victim's family soon after the murder -- in which the caller, identified as Father Lavigne, expressed remorse for the killing -- lead Trooper Thomas J. Daly, assigned to the Crime Prevention and Control Unit attached to the Hampden County District Attorney's office, to seek a search warrant for a sample of Father Lavigne's blood to be tested in relation to the findings previously reported on the plastic straw.

A search warrant for that purpose was issued by this court on September 2, 1993. It was executed, without incident, on September 3, 1993. Upon the petitioner's motion, the blood sample seized was secured at Baystate Medical Center. The Commonwealth sought a hearing so as to request the release of the petitioner's blood sample on September 7, 1993. Prior to

that time, the issuing judge had granted the Commonwealth's oral motion to impound the search warrant, its application and affidavit. On September 9, 1993, a non-evidentiary hearing was held before the court, Moriarty, J., presiding. A return of the search warrant was made to the Superior Court earlier that day. It indicated three vials of the petitioner's blood were seized on September 3, 1993. At that September 9 hearing, the petitioner motioned for the return of his blood sample.[2]

[2] To the extent the petitioner's counsel summarizes their contact with the Hampden County District Attorney's Office since the investigation of this case was begun anew, the named members of this office dispute the petitioner's portrayal of the actions or statements attributable to each of them. However, to rebut each claim individually is neither necessary, nor conducive to a speedy resolution to this matter. The information is not relevant to the action presently pending before this court. To the extent its position need be clarified further, the Commonwealth maintains that the decision to seek a search warrant in this case was neither rash or haphazard. The Commonwealth notes that it spoke to counsel representing the petitioner's counsel in an effort to obtain the petitioner's cooperation voluntarily without court action. Although not required to do so, the Commonwealth provided previously undisclosed information to his counsel relating to the blood found at the scene, its past test results, and the possibility of its future testing. The Commonwealth told the petitioner's attorneys that the blood in question was Type B. The Commonwealth asked petitioner's counsel if the petitioner would voluntarily submit to a blood test, or at the very least, provide information regarding his blood type. The petitioner indicated, through counsel, that he would not voluntarily provide a blood sample nor would he provide any information regarding his blood type. After the Commonwealth was advised that the petitioner would not voluntarily cooperate with its investigation, the Commonwealth provided no further information to the petitioner or his counsel regarding the details of its investigation.

The timing of the warrant also was not a strategic effort by the Commonwealth to deny the petitioner assistance of his counsel. The fact that his attorneys would be (Cont'd)

## ARGUMENT

**THE ISSUANCE OF A SEARCH WARRANT FOR THE SEIZURE OF THE PETITIONER'S BLOOD WAS VALID WHERE THE PROVISIONS OF G.L. C. 276, §1 HAVE LONG BEEN INTERPRETED TO AUTHORIZE THE SEARCH FOR EVIDENCE OF A CRIME, AND JUDICIAL REVIEW OF TROOPER DALY'S AFFIDAVIT FILED IN SUPPORT OF THE SEARCH WARRANT APPLICATION SUPPLIED THE PETITIONER ADEQUATE DUE PROCESS AND EFFECTIVELY PRESERVED HIS STATE AND FEDERAL CONSTITUIONAL PROTECTIONS FROM UNREASONABLE SEARCH AND SEIZURE.**

The petitioner's blood sample, taken pursuant to a valid search warrant issued by this court on September 2, 1993, should be released to the Commonwealth to enable further testing of the sample as proposed in Massachusetts State Trooper Thomas J. Daly's Affidavit filed in support of the search warrant. The petitioner's motion for return of his

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[2] (Cont'd) unavailable due to scheduling conflicts and vacation was not known. Neither did the Commonwealth attempt to prevent the defendant from reviewing the search warrant and its relevant documents once issued. At the time of petitioner's counsel's initial request, the warrant had been impounded, albeit through an oral motion, and the Commonwealth informed petitioner's counsel that it could not release the requested documents without judicial approval. Upon the petitioner's motion, the Commonwealth sent the requested information, via federal express courier service, immediately. Likewise, at no time did the Commonwealth tell petitioner's counsel that a hearing would be held on this matter outside their presence. The Commonwealth called petitioner's counsel in an effort to arrange a mutually convenient time for a hearing regarding the release of the petitioner's seized blood sample. Petitioner's counsel never represented a date in which she would be available to hold a hearing on this matter, preferring to focus instead upon a inquiry of the Commonwealth's motives for requesting a speedy resolution regarding the release of the blood. Having failed to reach an agreement, the Commonwealth told petitioner's counsel that the date and time of the hearing would be set by the issuing judge.

blood sample, as a matter of law, is meritless and should be denied.

**A. The Fourth Amendment of the United States Constitution authorizes, and thus far, Article Fourteen of the Massachusetts Declaration of Rights does not prohibit, the forcible extraction of blood such that under the circumstances of this case the taking of the defendant's blood pursuant to a valid search warrant was proper.**

Although a person has a recognized expectation of privacy in his body, the Fourth Amendment to the United States Constitution does not prevent a court ordered compulsion to give a blood sample. Schmerber v. California, 384 U.S. 757,767 (1966). Those courts reviewing the issue since Schmerber uniformily agree that the expectation of privacy in bodily security can be outweighed upon justification. Cf. Cupp. v. Murphy, 412 U.S. 291, 295 (1973)(scrapings from under a suspect's fingernails); Commonwealth v. Downey, 407 Mass. 474, 476 (1990)(forcible extraction of blood); Horsemen's Benevolent & Protective Ass'n v. State Racing Commission, 403 Mass. 692, 705-706 (1989)(urine sample); People v. Santistevan, 715 P.2d 792, 795 (Colo. 1986)(ultraviolet scanning of defendant's hands). The more intrusive the invasion of the body, the more compelling must be the justification for the search. For example, forced surgery requires an extraordinary showing of necessity, Winston v. Lee, 470 U.S. 753, 765 (1985). See Rochin v. California, 342 U.S. 165 (1952)(forced ingestion of an emetic solution). Whereas, the taking of a blood sample is

a commonplace occurrence. As the Schmerber court found, "experience with [the drawing of blood samples] teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." Schmerber, 384 U.S. at 771.

Thus far, Article Fourteen of the Massachusetts Declaration of Rights has not been interpreted to give a defendant greater constitutional protections in the taking of his blood. Neither does the petitioner set forth any legitimate reason why state constitutional protections should be greater. Indeed, the Supreme Judicial Court, in the past, has upheld court ordered compulsion for the taking of a blood sample when obtained in three different instances: through a grand jury subpoena, Downey, 407 Mass. at 476; through a post-indictment court order, Commonwealth v. Trigonnes, 397 Mass. 633, 640-641 (1986); and through a court order to establish paternity, Commonwealth v. Beausoleil, 397 Mass. 206, 222-223 (1986). This would not have been possible if the provisions of Article Fourteen do not authorize the forcible extraction of blood. To the extent the petitioner here essentially takes issue with the manner in which the Commonwealth received the legal authority to seize the defendant's blood, his arguments are unpersuasive and should be rejected by this court.

B. G.L. c. 276, §1 does not forbid the issuance of a search warrant for a blood sample and its statutory language has long been interpreted to authorize the search

for evidence of a crime or criminal activity upon a showing of a nexus between the item sought and the criminal activity.

The issuance of the search warrant for a sample of the petitioner's blood was valid pursuant to G.L. c. 276, §1. Contrary to the defendant's assertion, this procedure was not without precedent. The Commonwealth notes that the Supreme Judicial Court has impliedly adopted the use of a search warrant for the seizure of blood. Upon plenary review of a defendant's first degree murder conviction based, in part, upon the test results of a blood sample obtained by a search warrant in circumstances nearly identical to the present case, the Supreme Judicial Court refused to exercise its extraordinary powers pursuant to G.L. c. 278, §33E to alter the jury's guilty verdicts. Commonwealth v. Gomes, 403 Mass. 258, 278 (1988). In Gomes, as in the case at bar, the Commonwealth was granted a search warrant for a sample of the defendant's blood for chemical analysis. At the time of the defendant's request he, like the petitioner in this case, had not been arrested, indicted, or even the subject of a grand jury proceeding. Test results for the defendant's blood and conclusive blood grouping results obtained two years earlier from a piece of forensic evidence in the case -- a blood-stained paper bag -- were identical. Id. at 264. Since the Supreme Judicial Court is statutorily required to review the record of any first degree murder case to determine whether justice requires their

intervention regardless of the interposition of an objection on those grounds from the defendant's trial counsel, see G.L. c. 278, §33E, and the Gomes court indicated it had undertaken that type of review, Id. at 277, it follows that the Supreme Judicial Court approves of the use of search warrants for the taking of blood samples under the circumstances of this case.

Moreover, G.L. c 276, §1 does not prohibit the seizure of evidence of a crime or evidence of criminal activity. The specific language in the statute categorizing the type of evidence to be seized as fruits, instrumentalities, or contraband, since 1967, has implied the type of search at issue here. In Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967), the United States Supreme Court, noting that nothing in the nature of the property seized as evidence renders it more private than other property, held that the necessary protection of an individual's privacy interests can be maintained whether the authorized search is for "mere evidence" or for fruits, instrumentalities, or contraband. Id. at 310.[3]

[3] The Hayden court said: "The 'mere evidence' limitation has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection." Hayden, 387 U.S. at 307. Commentators, calling categorized limitations on the type of evidence to be seized with a warrant "elaborate obfuscation," uniformily heralded the Hayden decision. See 2 LaFave, Search and Seizure 123, §4.1(b) (2d. ed. 1987), quoting Traynor, Mapp v. Ohio at Large in Fifty States, 1962 Duke L.J. 319, 331), and citing Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories," 53 J. Crim. L.C. & P.S., 171, 177 (1962). See also Hayden, 387 U.S. at 300 & nn.6-7.

> Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit or contraband. A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact. Id. at 301-302.

The Hayden reasoning was adopted, with approval, by the Supreme Judicial Court in Commonwealth v. Murray, 359 Mass. 541 (1971). There, as well as rejecting a constitutionally based protection for the seizure of "mere evidence," the court found G.L. c. 276, §1 also does not prohibit the seizure of articles of clothing to be used for evidentiary purposes, where, as here, there is a nexus between those articles and the crime. Id. at 547.

Previously, the Supreme Judicial Court has held that the wording of G.L. c. 276, §1 should be broadly interpreted. Commonwealth v. Fancy, 349 Mass. 196, 203 (1965)(the term "place" as it was used within G.L. c. 276, §1 implied legislative authorization to search and seize evidence from a motor vehicle prior to the statute's amendment explicitly authorizing the same). G.L. c. 276, §1 allows for the search and seizure of "property," being defined as, among other things, "any tangible object." G.L. c. 276, §1. Previously, when holding that the one-party consent provision of G.L. c. 272, §99 B 4 violated Article Fourteen of the Massachusetts Declaration of Rights, see Commonwealth v. Blood, 400 Mass. 61, 65-77 (1987), the Supreme Judicial Court necessarily broadened

the scope of "other tangible property" authorized to be searched for and seized under G.L. c. 276, §1, and once again, included the Hayden approach to its statutory interpretation of G.L. c. 276, §1. Cf. Commonwealth v. Davis, 407 Mass. 1001 (1990)(rejecting the defendant's claim that the search warrant required for one-party consent eavesdropping in G.L. c. 272, §99). These rulings are in direct contrast to the narrow focus of the statute advanced by the petitioner.

There must, of course, be a nexus between the item to be seized and the criminal behavior. Hayden, 387 U.S. at 307. In this case, that nexus is detailed in Trooper Daly's affidavit. The two types of blood found at the scene, the condition of the river's bank, and the discovery of numerous lacerations about the victim's body collectively suggest that the killer injured himself when carrying out his acts and left traces of his blood behind. Cf. Commonwealth v. Yesilciman, 406 Mass. 736, 744 (1990)(evidence that occult blood found on defendant's jacket and in his automobile was relevant to whether defendant was the perpetrator where other evidence made it clear that whoever committed the crime would have gotten blood on himself and his clothing). Along the reasoning of Fancy, therefore, it seems inconceivable that a legislative policy permitting searches of homes, and being interpreted to protect a person's conversations as well, both "citadels of privacy," would not also embrace a judicially sanctioned search and seizure of

bodily fluids as presented here. See Fancy, 349 Mass. at 203.

Moreover, G.L. c. 276, §1 also states that its provisions "shall not be construed to abrogate, impair or limit powers of search and seizure granted under other provisions of the General Laws or under the common law." G.L. c. 276, §1, ¶9. In Schmerber it was made clear that, "[t]he requirement that a warrant be obtained [for the taking of a blood sample] is a requirement that the inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" Schmerber, 384 U.S. at 770. This reasoning was echoed by the Supreme Judicial Court, in Blood, when similarly defining reasoning behind the the warrant requirement for purposes of Article Fourteen of the Massachusetts Declaration of Rights. Blood, 400 Mass. at 73, quoting Johnson v. United States, 333 U.S. 10, 14 (1948). The warrant procedure also necessarily allows for a "legally trained" eye to pass upon the Commonwealth's application. G.L. c. 276, §1, therefore, should not be interpreted to prevent these occurrences, and cannot, as a matter of law, be read to limit the Commonwealth's common law right to seek a warrant for a blood sample as sanctioned in Schmerber.[4]

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[4] Although Schmerber itself involves a warrantless search, it is apparent that it determines the question, pursuant to the Fourth Amendment, when an intrusion into the body may be authorized by a warrant since the decision focuses on the (Cont'd)

In addition, nothing in the facts of this case, violates the Supreme Judicial Court's mandate regarding body cavity searches annunciated, in dicta, in Rodrigues v. Furtado, 410 Mass. 878, 888 (1991). In Rodrigues, involving a much more "intrusive, humiliating, and demeaning [body cavity] search" than the one at issue here, the court commented that, thereafter, a search warrant authorizing the search of a body cavity must be issued by a judge and can be granted only upon a showing of particularized need supported by a high degree of probable cause. Id. at 888 & n.12. Trooper Daly's affidavit filed in support of this search warrant, without question, meets this standard. The petitioner's motive and opportunity to have killed the victim, if not overwhelmingly documented, is at the very least straightforward. Based upon the facts outlined in the affidavit, it is an inescapable conclusion that there is a high degree of probable cause to support the Commonwealth's request. Also, the need for the petitioner's blood sample is specifically stated. In issuing the warrant, the reviewing judge must have been aware of the heightened scrutiny to be applied to the Commonwealth's application when

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[4] (Cont'd) aspects of the intrusion -- forced extraction of blood -- rather than on the police failure to obtain a warrant. 2 LaFave, Search and Seizure, 128-129, §4.1(d) (2d. ed. 1987). Also the Supreme Judicial Court looked to the reasoning of Schmerber in deciding Downey, Trigonnes, and Beausoleil, its three previous cases involving the forcible extraction of blood. See Downey, 407 Mass. at 476; Trigonnes, 397 Mass. at 640-641; Beausoleil, 397 Mass. at 222-223.

authorizing the seizure of the petitioner's blood. The Commonwealth in no way calculated to deprive the petitioner of his statutory rights. To the contrary, the Commonwealth's action in this case was of sound policy. See Rodrigues, 410 Mass. at 888. The petitioner cannot, as a matter of law, and should not, as a matter of fact, be able to dictate the course of the Commonwealth's investigation. Neither can he command it to institute formal proceedings just because the Commonwealth has probable cause to seize his blood.

C. Neither federal or state guarantees of due process required the issuing judge to grant the defendant an adversarial hearing prior to the seizure of his blood.

Likewise, due process did not dictate an adversarial hearing prior to the issuance of the search warrant authorizing the seizure of his blood. Under G.L. c. 276, review of the validity of the search warrant in this case, by necessity, would be limited to the facts as set forth in Trooper Daly's affidavit. G.L. c. 276, §2B. Cf. Commonwealth v. Sheppard, 394 Mass. 381, 388 (1985)(motion judge cannot give any effect to sworn oral statements outside the written affidavit); Commonwealth v. Monosson, 351 Mass. 327, 330 (1966)(same). Subsequent oral testimony as proposed by the petitioner, cannot be relied upon except to the extent that it would support a hearing as contemplated in Franks v. Delaware, 438 U.S. 154 (1978). See Commonwealth v. Nine Hundred & Ninety-two Dollars, 383 Mass. 764 (1981). Yet, the petitioner rightly makes no

claim that Trooper Daly's affidavit suffers from any misstatement, yet alone the required showing of a deliberate falsehood or reckless statement. Neither could such an assertion be sustained. In short, because it is sound policy, according to Rodrigues, to encourage police to use the warrant process, the hypertechnical review of Trooper Daly's affidavit urged by the petitioner should be rejected. If and when the petitioner faces a trial in this case (not to mention an arrest or indictment), the issues, if any, arising from the evidentiary foundations necessary for the introduction of any one piece of physical evidence will be determined. It must not be forgotten that the testing the Commonwealth contemplates may provide the petitioner with exculpatory evidence.

Finally, in those cases where the Supreme Judicial Court has sanctioned a hearing prior to the forcible extraction of blood, neither has had pre-judicial review of the Commonwealth's request for the specific finding of probable cause to believe that the blood has a nexus to the criminal activity. In Downey, although the defendant was similarly situated to the petitioner in that he had not been arrested, indicted, or subpoened to a grand jury prior to the Commonwealth's request for a sample of his blood, the petitioner and Downey stand on considerably different ground since the Commonwealth's request here was subject to a probable cause determination by a neutral and detached magistrate prior

to the taking of his blood sample. Moreover, in Trigonnes, the defendant, post-indictment, had every reason to request a hearing before the court, since unlike the present case, the probable cause determination sufficient to indict him may not have focused on the probable cause necessary to extract his blood. Compare Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982)(probable cause to sustain an indictment may be found when sufficient evidence is presented to a grand jury to show that a crime has been committed and that the defendant is the perpetrator of the crime) with Commonwealth v. Cefalo, 381 Mass. 319, 328 (1980)(where court stated that in the case of a search warrant, as distinguished from an arrest warrant, probable cause is established when the affidavit contains enough evidence for the issuing magistrate to determine that the items sought are related to the criminal activity, and that they reasonably may be expected to be at the location to be searched). There is simply no basis to abandon the long standing practice of issuing a search warrant ex-parte.

In sum, nothing in the procedures employed by the Commonwealth to obtain the petitioners blood sample were violative of due process or his statutory or constitutional rights against unreasonable searches and seizures. On the contrary, the Commonwealth complied with the law in obtaining the petitioner's blood and should be allowed to continue its investigation in this most serious matter.

## CONCLUSION

For the foregoing reasons the Commonwealth respectfully requests that its motion for the release of the petitioner's blood sample seized pursuant to a search warrant issued by this court on September 2, 1993 be granted. The Commonwealth further requests that the petitioner's motion for the return of his sample be denied.

Respectfully submitted,

THE COMMONWEALTH

By _____
William M. Bennett
District Attorney

Elizabeth Dunphy Farris
Assistant District Attorney
B.B.O. #545992
(on brief)

1418p

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss: SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
#1

In re Richard Lavigne,
Petitioner

**PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR RETURN OF HIS BLOOD SAMPLE**

**Introduction**

On Friday, September 3, 1993, two Massachusetts State Troopers entered the home of Father Richard Lavigne and commanded him to go with them to a medical facility, where a sample of the priest's blood was drawn against his will. Father Lavigne, however, was not, and has not been, charged with any crime. He was arrested pursuant to a search warrant -- a search warrant which authorized the troopers to "use reasonable force" to take Father Lavigne to a medical facility and obtain a sample of his blood.

Petitioner has filed a motion for return of his blood sample. In support of that motion, he argues herein that: 1) there is no provision of Massachusetts law which authorizes the non-consensual extraction of blood from an individual and the detention of an individual for that purpose absent a grand jury or pending criminal proceeding; in particular, M.G.L. c.276, §1, which controls the issuance of search warrants in the Commonwealth, does not authorize the issuance of a search warrant to perform an intrusive procedure upon a person's body; 2)

petitioner was entitled to certain procedural protections prior to the taking of his blood; the pre-deprivation ex parte proceedings which resulted in the taking of petitioner's blood failed to provide petitioner the procedural protections to which he was entitled pursuant to the Fourth and Fourteenth Amendments of the United States Constitution and Articles 12 and 14 of the Massachusetts Declaration of Rights; 3) the Commonwealth failed to meet its burden of establishing probable cause that the blood test results will produce admissible evidence of guilt.

**Prior Proceedings**

On Wednesday, September 2, 1993, Massachusetts State Trooper Thomas Daly appeared before this Court (Moriarty, J.) with a search warrant application. In the application, Daly wrote:

> I am a seeking the issuance of a warrant to search for the following property: The blood of Richard R. Lavigne, sample to be drawn by trained medical personnel at a medical facility. This includes the authorization to use reasonable force only if necessary, permission to transport Richard R. Lavigne to a convenient place for these purposes, and authorization to enter the residence of Richard R. Lavigne for these purposes.

Attached to the application was a twenty-eight page affidavit (with numerous attachments) in which the affiant alleged that he had probable cause to believe that Richard Lavigne murdered Daniel Croteau on April 14, 1972.

The application was granted after an ex parte proceeding held on September 2, 1993. During the afternoon of Friday, September 3d, Trooper Daly went to petitioner's home, served him with the warrant and commanded Father Lavigne to accompany him

to the Bay State Medical Center. Father Lavigne telephoned his counsels' office, but both of his attorneys, Max D. Stern and Patricia Garin, were out of town for the holiday weekend. An attorney at the office, Jonathan Shapiro, spoke to Trooper Daly and asked him to delay transporting Father Lavigne to the Medical Center until he had spoken with the Court. Daly refused and left with Father Lavigne.

Attorney Shapiro telefaxed a motion to the Court requesting a stay of the search warrant, or in the alternative, an order that Bay State Medical Center "maintain custody, possession and control of any blood seized from petitioner" pending a hearing and further order of the Court. The Court granted petitioner's motion for alternative relief. Petitioner now moves this Court for return of the blood sample.

## Statement of Facts

On April 15, 1972, the body of Daniel Croteau was discovered in a river bed alongside the Chicopee River. Croteau died from blunt trauma to the head. When his body was found, there was blood on the rocks and stones along the river's edge, blood on Croteau's clothing and blood splattered on objects that were strewn about the river's edge, such as a plastic drinking straw and a piece of rope. Croteau's blood was type O. All of the blood found, with the exception of a minute amount of blood on the drinking straw and on the rope, was type O blood. The blood on the straw and on the piece of rope was type B. Other than

typing the blood, no further tests were performed on the straw and rope at that time.

In 1972, the investigation into the Croteau murder became inactive due to a lack of evidence. The case remained unsolved.

The investigation remained inactive until late 1991, when Father Lavigne was arrested on charges of indecent assault and battery involving five teenage boys.[1/] After these arrests had received extensive publicity in the western Massachusetts media, the Commonwealth re-opened the investigation into the murder of Croteau, naming Father Lavigne as the prime suspect. In January of 1992, the District Attorney's office informed defense counsel, Max D. Stern and Patricia Garin, that they were exploring the possibility of performing DNA tests on the blood found on the rope and the straw.[2/]

In January of 1992, attorneys Max D. Stern and Patricia Garin began to have regular contact with the Hampden District Attorney's Office concerning the re-opening of the murder investigation. On January 22, 1992, District Attorney William Bennett informed attorney Stern that the "blood was not preserved," that "it had not been refrigerated" and that "it does not appear that a DNA test can be done." He stated that the FBI

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[1/] In June of 1992, Father Lavigne pled guilty to two counts of indecent assault and battery and was placed on probation for ten years.

[2/] Due to time constraints, petitioner's counsel have not been able to write affidavits concerning the facts alleged herein. However, at the end of this memorandum counsel verify that the facts contained herein are true and based on their personal knowledge, unless otherwise noted.

had informed his office that their laboratory could not test a twenty year old, unpreserved blood sample.

On January 30, 1992, District Attorney Bennett and attorney Stern spoke again concerning the possibility of testing the straw and rope. Mr. Bennett informed attorney Stern that his office had not located anyone who could do the test.

According to Trooper Daly's affidavit, on March 13, 1992, the rope and straw were sent to a laboratory in California "for DNA typing to be conducted on the biological evidence using the PCR DNA amplification procedure in order to determine traits associated with the blood on the rope and the straw."

On April 6, 1992, Bennett and Stern spoke again. Bennett stated that he was having the straw and rope looked at "to determine what kind of tests can be run." He stated that the tests would not be run without "an o.k. from [him]" and that he was aware of his obligations concerning preservation of the testing sample.

On June 1, 1992, attorney Stern spoke with assistant district attorney Carmen Picknally who advised him that it was his "understanding" that they had heard nothing yet from the "California lab" about whether the tests could be done.

On June 4, 1992, ADA Picknally informed attorney Stern that there was enough genetic material to do one test, but he did not know if there was enough for two tests. He still did not know whether or not a test could be conducted on the twenty-one year old sample.

During the next year attorney Garin spoke with ADA Picknally on several occasions to determine if anything new had happened in the murder investigation. As late as May 19, 1993, ADA Picknally informed attorney Garin that "they have nothing new." However, according to Daly's affidavit, on January 8, 1993 a report setting forth the DNA test results had been issued by the California laboratory and sent to the Hampden County District Attorney's Office.

On July 13, 1993, attorney Garin spoke to ADA Picknally to advise him that Trooper Daly had gone to Father Lavigne's residence in Ashfield to question him. Attorney Garin informed ADA Picknally that Father Lavigne did not wish to speak to Trooper Daly, or any agent of the Commonwealth, and that Picknally should so advise Daly. Defense counsel faxed a letter to ADA Picknally confirming the telephone conversation. On July 15, Trooper Daly telephoned attorney Garin and told her that he would question Father Lavigne all he wanted until he was told by Father Lavigne to leave him alone and that he was not bound by what a defense attorney told him. He informed attorney Garin that her letter advising ADA Picknally that Trooper Daly should stay off of Father Lavigne's property was "off base" and that he had no intention of complying with the request.

On August 6, 1993, Trooper Daly completed the instant search warrant affidavit. Despite the fact that the Hampden County District Attorney's Office had had numerous conversations with defense counsel during the preceding two years concerning the

Commonwealth's investigation into the unsolved murder of Danny Croteau in 1972, on September 2, 1993, Trooper Daly appeared before Judge Moriarty ex parte to apply for the warrant at issue in this case. After obtaining the search warrant on September 2, 1993, Trooper Daly, presumably to further insure that Father Lavigne would be deprived of access to his counsel, waited until the afternoon of Friday, September 3d -- the Friday preceding the Labor Day holiday weekend -- to serve the warrant.

There is no pending criminal action against Father Lavigne. No arrest warrant has been issued for Father Lavigne. No grand jury has been convened to hear evidence. This twenty-one year old murder case remains unsolved.

## Argument

### I.

**THERE IS NO PROVISION OF MASSACHUSETTS LAW WHICH AUTHORIZES THE NON-CONSENSUAL EXTRACTION OF BLOOD FROM AN INDIVIDUAL AND THE DETENTION OF AN INDIVIDUAL FOR THAT PURPOSE ABSENT A GRAND JURY OR PENDING CRIMINAL PROCEEDING; IN PARTICULAR, M.G.L. C.276, §1, WHICH CONTROLS THE ISSUANCE OF SEARCH WARRANTS IN THE COMMONWEALTH, DOES NOT AUTHORIZE THE ISSUANCE OF A SEARCH WARRANT TO PERFORM AN INTRUSIVE PROCEDURE UPON A PERSON'S BODY**

The issuance of search warrants in Massachusetts is governed by M.G.L. c.276, §1. Commonwealth v. Murray, 359 Mass. 541, 269 N.E.2d 641 (1971). Nowhere does this statute authorize the use of a search warrant to seize a person's bodily fluids.

In relevant part, the statute provides as follows:

> A court or justice authorized to issue warrants in criminal cases may, upon

complaint on oath that the complainant believes that any of the property or articles hereinafter named are concealed in a house, place, vessel or vehicle or in the possession of a person . . . if satisfied that there is probable cause for such belief, issue a warrant identifying the property and naming or describing the person or place to be searched and commanding the person seeking such arrant to search for the following property or articles:

First, property or articles stolen, embezzled or obtained by false pretenses, or otherwise obtained in the commission of a crime;

Second, property or articles which are intended for use, or which are or have been used, as a means or instrumentality of committing a crime, including, but not in limitation of the foregoing, any property or article worn, carried or otherwise used, changed or marked in the preparation for or perpetration of or concealment of a crime;

Third, property or articles the possession or control of which is unlawful, or which are possessed or controlled for an unlawful purpose; except property subject to search or seizure under sections forty-two through fifty-six, inclusive, of chapter one hundred and thirty-eight;

Fourth, the dead body of a human being.

<u>Fifth, the body of a living person for whom a current arrest warrant is outstanding</u>.

A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings.

(emphasis added).

Without question, a search warrant may be used to authorize the search of the body of a living person only when there is a current outstanding arrest warrant. In this case, there was no outstanding arrest warrant.

Furthermore, even if the Commonwealth could have obtained a valid arrest warrant[3/], the statute would still not permit the taking of blood pursuant to a search conducted at the time of arrest. The statute explicitly restricts the scope of a body search pursuant to arrest to two purposes: (1) seizing evidence which may be destroyed or concealed, and (2) removing weapons that might be used to resist arrest or escape. Even if this were a search of a living body pursuant to arrest, the matter seized, a blood sample, is neither evidence subject to destruction or concealment, nor capable of use to resist arrest or escape.

In the Commonwealth of Massachusetts, only searches which come within the scope of M.G.L. c.276, §1 are legal. See e.g., Commonwealth v. Murray, supra, where, when the defendant contended that a search warrant could not be used to obtain "mere evidence in the form of clothing," the Supreme Judicial Court looked to M.G.L. c.276, §1 and concluded that the search was permissible because it came within the terms of the statute. ("General Laws c.276, §1 specifically refers to 'article worn . . .in the . . . perpetration of . . . a crime.'"). After diligent

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[3/] It is defendant's position that the Commonwealth does not have probable cause to arrest.

research, defense counsel has been unable to identify any appellate decision affirming the use of a search warrant to obtain bodily fluids.

When the Commonwealth seeks to obtain blood samples for the purpose of a criminal investigation, there are legitimate procedures which preserve the rights of the accused. In the recent case disallowing the introduction of DNA tests as evidence, the blood samples were obtained by a court order following indictment, arrest and an adversarial hearing. Commonwealth v. Lanigan, 413 Mass. 154, 596 N.E.2d 311 (1992) (post indictment and arrest) In Commonwealth v. Trigones, 397 Mass. 633 (1986), the Court held that, "[a] postindictment order to obtain a blood sample for identification purposes should be based on a showing of probable cause made at an adversary hearing." When a grand jury issues a subpoena requesting that an individual produce a blood sample, that person's constitutional rights to procedural due process are preserved when he receives notice, has the opportunity to be heard and the opportunity to challenge the constitutionality of the subpoena at an adversarial hearing on a motion to quash. Commonwealth v. Downey, 407 Mass. 472, 553 N.E.2d 1303 (1990).

There is, however, no lawful mechanism for extracting specimens from the body of a living person pre-arrest or pre-indictment and in the absence of a grand jury subpoena or pending criminal action. Trooper Daly's use of a search warrant in this case to enter Father Lavigne's home, to detain him, to command

him to ride with trooper Daly to a public medical center, and to forcibly extract blood from his body is beyond the contemplation of any law and utterly shocks the conscience. This use of an ex parte search warrant proceeding to forcibly detain Father Lavigne in order to obtain a bodily specimen is nothing more than an attempt to prevent petitioner from exercising his right to counsel and to intimidate him.

Because the seizure of petitioner's blood is not authorized by M.G.L. c.276, §1 or by any other provision of Massachusetts law, the search and seizure was unlawful and the blood sample must be returned to petitioner.

II.

**PETITIONER WAS ENTITLED TO CERTAIN PROCEDURAL PROTECTIONS PRIOR TO THE TAKING OF HIS BLOOD, THE PRE-DEPRIVATION EX PARTE PROCEEDINGS WHICH RESULTED IN THE TAKING OF PETITIONER'S BLOOD FAILED TO PROVIDE PETITIONER THE DUE PROCESS TO WHICH HE WAS ENTITLED PURSUANT TO THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLES 12 AND 14 OF THE MASSACHUSETTS DECLARATION OF RIGHTS**

**A. The Due Process Provisions of the Fourteenth Amendment and Art. 12 of the Declaration of Rights Require That an Adversarial Hearing Be Held Before a Search Warrant Is Issued Compelling a Medical Procedure.**

The petitioner did not receive any notice or opportunity to be heard before police officers forcibly took him to a hospital to have a blood sample taken. The lack of a prior opportunity to be heard deprived him of a vital procedural due process protection mandated by the federal and state constitutions.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70 (1972); Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974).

> The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). . . . Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 333, 335 (1976). The opportunity to be heard must be provided prior to the deprivation unless prior notice would create a serious risk that the item in question would then be hidden or destroyed. Mitchell v. W.T. Grant & Co., 416 U.S. 600, 609 (1974). If exigent circumstances justify seizing the item without a predeprivation hearing, the petitioner must be given a right to an immediate post-deprivation hearing. Id. at 616-18. The requirements of procedural due process apply to criminal cases as well as civil cases. Aime v. Commonwealth, 414 Mass. 667, 674-75, 681 (1993) (provisions of

Bail Reform Act do not satisfy requirements of procedural due process).

In this case, the government sought and obtained a warrant authorizing police officers to go to Father Lavigne's home, forcibly take him to a hospital against his will, and then compel him to provide a blood sample. Applying the Mathews balancing test, it is clear that a full adversarial hearing should have been held. The private interests implicated by this warrant are fundamental. All citizens have a right to privacy in their own homes and a right not to be compelled to undergo invasive medical procedures.[4] This search warrant authorized the government to violate both of those rights.

The use of an ex parte procedure created a great risk of erroneous deprivation which could have been alleviated by providing a predeprivation adversarial hearing. The Commonwealth sought the blood sample so it could perform DNA tests in an effort to compare Father Lavigne's blood to twenty-one year old samples found at the murder scene. But the Supreme Judicial Court has held that evidence of DNA matches are inadmissible in evidence due to the lack of acceptance of the underlying theory. Commonwealth v. Lanigan, 413 Mass. 154, 163 (1992). In its application for a search warrant, the Commonwealth presented this Court with no more than the affidavit of a police officer alleging that a different form of DNA testing would be performed than was done in Lanigan, and that this other form of testing did

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[4] See Argument II(B).

not suffer from the lack of acceptance that concerned the SJC in that case. This claim raises complex scientific issues that cannot and should not be decided on an ex parte basis without hearing any scientific evidence whatsoever.

Finally, while the government has a strong interest in solving a murder case, providing a predeprivation adversarial hearing would not have hindered that interest in any way. There was certainly no reason to believe that giving notice would have led to a loss of evidence: Father Lavigne cannot alter his blood type and despite the years of legal proceedings against him he has never shown any intention of leaving Massachusetts.

Art. 12 of the Declaration of Rights provides even greater protections than the Fourteenth Amendment. Breese v. Commonwealth, 415 Mass. 249, 252 (1993); Attorney General v. Colleton, 387 Mass. 790, 800-801 (1982). Even if a prior adversarial hearing is not required by the federal constitution, in the circumstances of this case - where the state seeks authorization to infringe in such a fundamental way on a citizen's right to privacy and where it has not even been established that any resulting evidence would be admissible - such a hearing is required under art. 12.

In the circumstances, an adversarial hearing should have been held before the search warrant was issued, and the failure to do so violated the petitioner's right to due process.

Even if this Court should decide that petitioner is only entitled to some kind of post-deprivation due process, today's

hearing on Petitioner's Motion For Return of His Blood Sample is constitutionally inadequate.

Trooper Daly appeared before this Court on Thursday, September 2d without notice to petitioner or his counsel. When Trooper Daly appeared at petitioner's home on Friday, September 3d, neither petitioner's counsel nor petitioner had any understanding of what was occurring. Both of petitioner's attorneys, Max D. Stern and Patricia Garin, were out of town. Stern returned to Boston on the morning of September 5th to prepare for an argument before the First Circuit Court of Appeals on Tuesday, September 7 and to prepare for a first degree murder trial which started on Wednesday, September 8th. Garin returned to her office from Buffalo, New York at noon on Tuesday, September 7th to deal with this case. She had planned on staying in Buffalo for another week with her critically ill mother.

When attorney Garin spoke to assistant district attorney Elizabeth Farris at noon on September 7th, Farris informed her that she would not release the search warrant or affidavit and that she was seeking impoundment. She stated that she was seeking a hearing on a motion by the Commonwealth for access to the blood sample and that she planned to request a hearing on Wednesday, September 8. When attorney Garin explained that she would be unable to make the hearing at that time, Farris replied that the hearing would go forward without counsel. When attorney Garin inquired as to why the Commonwealth needed to have an immediate hearing on a case that was twenty-one years old, Farris

replied that she did not have to explain her reasons. Attorney Garin informed Farris that she could not be ready until the following week at the earliest because she needed to retain a DNA expert and because she needed to study the search warrant and affidavit. Farris replied that she would request that a hearing be scheduled for the following day and repeated that she did not have to explain her reasons for the urgency.

At an ex parte proceeding on Tuesday, September 7th, the hearing was scheduled for 2:00 p.m. on Thursday, September 9, 1993.

Defense counsel is unprepared for the constitutionally required hearing concerning the validity of the search warrant. Petitioner was entitled to sufficient notice to adequately prepare. He did not get this. Indeed, petitioner's counsel has not even had time to read the attachments to the search warrant affidavit or to meet with petitioner. Petitioner is entitled to an adversarial hearing where he can call expert witnesses to challenge the Commonwealth's unsupported representations about the likelihood that their DNA evidence will be admissible. He is entitled to challenge the Commonwealth's chain of custody of this unpreserved blood sample during the past twenty-one years because it is petitioner's position that this evidence will never be admissible. He is entitled to demonstrate that the Commonwealth has not met its burden under Commonwealth v. Trigones, supra, that is:

> At such a hearing the Commonwealth must show that a sample of the defendant's blood will

> probably produce evidence relevant to the question of the defendant's guilt.

Id. at 492 N.E. 2d at 1151. As set forth in Argument III, infra, the Commonwealth has failed to meet this burden. Defendant, however, has a right to have an evidentiary hearing to challenge the Commonwealth's contention that they have met the burden. Defendant is not prepared to proceed with this hearing without an expert witness and without the time to subpoena witnesses from the Chicopee Police department, Massachusetts State Troopers and others.

Today's hearing will not satisfy the mandates of Trigones. It will not provide petitioner with the due process to which he is entitled.

**B. The Fourth and Fourteenth Amendments of the United States Constitution and Art. 14 of the Declaration of Rights Require Greater Procedural Protections Than Those Which the Petitioner Received.**

The defendant argues herein that his rights under the Fourth and Fourteenth Amendments of the United States Constitution and Art. 14 of the Declaration of Rights were violated when this Court issued a search warrant authorizing the police to seize him and take him to a hospital for the extraction of a blood sample without first holding an adversarial evidentiary hearing. He further argues that his constitutional rights were violated because the Commonwealth failed to establish that there was probable cause to arrest or indict him or that the test was likely to produce relevant information.

In the same way that the procedural protections mandated by the Due Process Clause depend on the nature of the interests of the individual and the state, the scope of the procedural protections that must be afforded to subjects of searches and seizures under the Fourth Amendment varies with the degree of the proposed intrusion into one's expectation of privacy.

> Where the Court has found a lesser expectation of privacy, or where the search involves a minimal intrusion on privacy interests, the Court has held that the Fourth Amendment's protections are correspondingly less stringent. Conversely, however, the Fourth Amendment's command that searches be "reasonable" requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search "reasonable."

Winston v. Lee, 470 U.S. 753, 767 (1985). Where the police seek a warrant to search for evidence in a building or on real property, the Fourth Amendment simply requires that a magistrate find there is probable cause to believe a crime has been committed and that the specified evidence will be found in the designated location. Coolidge v. New Hampshire, 403 U.S. 443, 450-51 (1971). However, a stronger showing must be made when the police seek to obtain evidence from someone by means of a medical procedure.

When the government wants to compel someone to undergo a medical procedure in order to extract evidence from their body, an adversarial hearing must be held to determine the justification for the order. In Commonwealth v. Trigones, 397

Mass. 633 (1986), after the defendant was indicted, the Commonwealth moved for an order compelling the defendant to give a blood sample, which the Superior Court allowed after a hearing. The Court stated:

> A postindictment order to obtain a blood sample for identification purposes should be based on a showing of probable cause made at an adversary hearing. At such a hearing the Commonwealth must show that a sample of the defendant's blood will probably produce evidence relevant to the question of the defendant's guilt.

Id. at 640. Trigones is not limited to postindictment orders. In Commonwealth v. Downey, 407 Mass. 472 (1990), an investigating grand jury ordered the defendant to submit to a blood test, and the Commonwealth then filed the order with the Superior Court and, after a hearing, obtained an order compelling the defendant to submit to the test. The Supreme Judicial Court rejected the defendant's challenge to the order in part because he had received a hearing before the judge issued his order.

The same result has been reached in other jurisdictions. In United States v. Crowder, 543 F.2d 312 (D.C.Cir. 1976), cert. denied 429 U.S. 1062 (1977), the defendant was arrested for murder after a codefendant had implicated him and stated that he had been shot in the course of the attack. He was then taken to a hospital, and x-rays revealed two bullets. The state then moved for an order to remove them which was allowed following an evidentiary hearing concerning the nature and risks of surgery. The Court of Appeals affirmed the order, citing the following factors:

> (1) the evidence sought was relevant, could have been obtained in no other way, and there was probable cause to believe that the operation would produce it; (2) the operation was minor, was performed by a skilled surgeon, and every possible precaution was taken to guard against any surgical complications, so that the risk of permanent injury was minimal; (3) before the operation was performed the District Court held an adversary hearing at which the defendant appeared with counsel; (4) thereafter and before the operation was performed the defendant was afforded an opportunity for appellate review.

Id. at 316. In Winston, the Supreme Court had to decide whether an order compelling the defendant to submit to a surgical procedure to extract a bullet complied with the Fourth Amendment. Since several evidentiary hearings were held concerning the nature and risks of the proposed surgery, the Court did not have to decide whether such a hearing was constitutionally required, but it did note that the defendant "had a full measure of procedural protections and has been able fully to litigate the difficult medical and legal questions necessarily involved in analyzing the reasonableness of a surgical incision of this magnitude." 470 U.S. at 763 & n.6.

The Supreme Court has discussed the requirements imposed by the Fourth Amendment when the government seeks to extract evidence from an individual's body in two cases. In Schmerber v. California, 384 U.S. 757 (1966) the defendant was arrested at a hospital for drunk driving following a traffic accident. A police officer then directed a doctor to take a blood sample for the purpose of analyzing its alcohol content. The Court stated

that "the Fourth Amendment's proper function is to constrain, not against all intrusions [into the body] as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." Id. at 768. The Court relied on several factors in determining that the taking of the blood sample was justified as a search incident to an arrest. Id. at 771. First, there was probable cause to arrest the defendant before the blood sample was taken, and he in fact had been arrested. Id. at 768. Second, it considered the likelihood that the test would reveal evidence relevant to the defendant's guilt or innocence, stating:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions [beyond the body's surface] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.[5/]

Id. at 769-70. Third, it noted that the test chosen was reasonable and was performed in a reasonable manner: it was highly effective in determining alcohol levels, it was a routine test that "involve[d] virtually no risk, trauma or pain," and it was performed by a doctor in a hospital using accepted medical procedures. Id. at 771.

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[5/] Noting that blood alcohol level decreases over time, the Court found that there were exigent circumstances for a warrantless search due to the threatened loss of evidence. Id. at 770.

The Court next confronted this issue in Winston. After being indicted for attempted armed robbery, the state moved for an order that the defendant undergo surgery to remove an object believed to be a bullet fired by the victim's gun. After several evidentiary hearings regarding the nature and risks of surgery, the state court allowed the motion, and a federal court subsequently enjoined the procedure. The Court stated that "the reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interest in conducting the procedure." Id. at 760. Factors to consider include whether there is probable cause to arrest the defendant and to believe that the procedure will reveal relevant evidence, id. at 760-61, citing Schmerber, 384 U.S. at 768-69, "the extent to which the procedure may threaten the safety or health of the individual," id. at 761, "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," id. at 761-62, and "the community's interest in fairly and accurately determining guilt or innocence," id. at 762. The Court held that the proposed surgery violated the Fourth Amendment in light of the dispute concerning the risks of surgery, the extent of the intrusion on personal privacy and bodily integrity, and the fact that the state had other substantial evidence that the defendant was the perpetrator of the crime. Id. at 764-66. The Court also noted that there was an unresolved question as to whether the bullet in the

defendant's body could be reliably compared to bullets fired from the victim's gun. Id. at 766 n.10.

To summarize, the Supreme Court has held that invasive medical procedures to obtain evidence of crime satisfy the Fourth Amendment only if the following conditions are satisfied: there is probable cause to arrest the subject,[6/] there is probable cause to believe that the procedure will reveal evidence of crime, and the proposed procedure is an effective one for obtaining the evidence and will be performed in a reasonable manner. In addition, the court must weigh the health risks and the intrusiveness upon dignitary interests in personal privacy and bodily integrity to the subject of the proposed procedure against the state's need for the evidence.

The procedural protections afforded to the defendant in this case fall woefully short of those required by the Fourth Amendment. First, and most importantly, no adversarial hearing was held prior to the issuance of the warrant. Rather, in direct contravention of the principle established in Trigones, Downey, and Crowder, it was obtained on an ex parte basis without notice to the petitioner or his attorney. He had no opportunity to

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[6/] In Commonwealth v. Downey, 407 Mass. 472 (1990), the a judge issued an order compelling the defendant to provide a blood sample pursuant to a grand jury order. The defendant challenged the order on the ground that he had not been arrested or indicted and no finding was made that there was probable cause to arrest him. The Supreme Judicial Court affirmed the conviction, stating: "If the evidence before the grand jury would have supported the arrest or indictment of the defendant, he was not harmed by the fact that the order issued in the absence of either." Id. at 477.

challenge the efficacy of the proposed tests or to argue before the Court why the testing would be an unjustified intrusion on his dignitary interests. Indeed, the need for an adversarial hearing is particularly acute in a situation such as this where the suspect has not even been arrested or indicted. The dignitary interests of one who has been arrested or indicted have already been diminished, and a finding has already been made that there is reason to believe the suspect committed the crime in question. The same cannot be said for a suspect who has not been subjected to arrest or indictment. Moreover, the Commonwealth can point to absolutely no reason whatsoever why this highly unusual procedure for obtaining a blood sample was required in this case. Normally, the state obtains blood samples from suspects in one of two ways: a grand jury issues a subpoena, or a court order is obtained after arrest or indictment. In the former case, the person has an opportunity to move to quash the subpoena and in the latter case an adversarial hearing is held on the justification for the procedure. Either of those procedures could have been utilized here. But rather than doing that, the Commonwealth sidestepped petitioner's counsel and obtained a warrant for a blood sample on an ex parte basis. There are no exigent circumstances necessitating an ex parte procedure: Father Lavigne's blood type is certainly not going to change over time and there is no reason to believe he is about to leave the jurisdiction. In the circumstances, there is no justification for the failure comply with the Fourth Amendment requirement that

an adversarial hearing be held prior to compelling a suspect to submit to an invasive medical procedure.

Second, the defendant has not been arrested or indicted for the murder nor has the Commonwealth presented this Court or a grand jury with sufficient evidence to support a finding of probable cause to arrest. Third, the Commonwealth has failed to establish probable cause to believe that the procedure will yield evidence that the defendant committed the murder. They have not established that DNA testing can be reliably performed on a dried sample that is over twenty years old, or that such a sample can be reliably compared to a fresh blood sample from a suspect. See Commonwealth v. Lanigan, 413 Mass. 154, 163 (1992) (DNA matches inadmissible in evidence due to unreliability). Nor have they presented any evidence concerning chain of custody that would establish where the sample has been stored and how it has been preserved for all these years.

Finally, it is unclear whether the court weighed the intrusiveness of the testing on dignitary interests in personal privacy and bodily integrity against the state's need for the evidence. While taking a blood sample from someone who has been arrested and is at the hospital already may not be a great intrusion, Schmerber, 384 U.S. at 771, the situation here is entirely different. Father Lavigne has not been arrested for the murder and he was not at a hospital. He was at his home when police officers arrived, forced him to go to a hospital against his will, and then compelled him to provide a blood sample. Such

a clear-cut violation of the right to be let alone should not be condoned.

Art. 14 of the Declaration of Rights provides even greater protection for individual rights than the Fourth Amendment. Commonwealth v. Amendola, 406 Mass. 592, 600 (1990) (defendant charged with possessory crime has automatic standing to challenge search and seizure); Commonwealth v. Bishop, 402 Mass. 449, 451 (1988) (items seized during inventory search that was not conducted in accordance with written procedures must be suppressed); Commonwealth v. Upton, 394 Mass. 363, 373 (1985) (warrant affidavit based on anonymous tip must establish reliability and basis of knowledge of informant). Even if the procedures employed in this case do not violate the Fourth Amendment, they do violate art. 14. An individual has a strong interest in not being compelled to submit to an unwanted medical procedure. That interest is particularly strong where the individual has not even been charged with any wrongdoing. An adversarial hearing would minimize the risk of an unjust decision by enabling the court to hear both sides on the issues of the need, efficacy, and reliability of the proposed testing and the scope of the intrusion into the suspect's dignitary interests. Such a hearing is especially appropriate in a case such as this where there is virtually no risk that loss of evidence may result from giving notice to the suspect.

III.

**THE COMMONWEALTH HAS FAILED TO MEET ITS BURDEN OF ESTABLISHING PROBABLE CAUSE THAT THE BLOOD TEST RESULTS WILL PRODUCE ADMISSIBLE EVIDENCE RELEVANT TO THE QUESTION OF GUILT.**

As noted earlier, in Commonwealth v. Trigones, supra, the Supreme Judicial Court placed the burden on the Commonwealth to establish probable cause that a blood test result will produce admissible evidence of guilt. The Commonwealth has failed to meet this burden.

First, the Commonwealth has failed to set forth any information concerning the chain of custody of this twenty-one year old blood sample.

Second, the Commonwealth has failed to set forth any information from which this Court could conclude that the DNA blood test performed by the California laboratory will be any more admissible than the blood test rejected as evidence by the Supreme Judicial Court in Commonwealth v. Lanigan, supra.

Third, the Commonwealth has failed to set forth any information concerning whether or not there is sufficient evidence remaining for petitioner to perform his own test. Clearly, if there is not, the Commonwealth's evidence would be inadmissible. Moreover, prior to the Lanigan decision, Massachusetts Courts generally required that any DNA testing be performed in the presence of a defense expert. The blood test evidence in this case may well be inadmissible on this ground

alone. See e.g., Order of Judge Volterra in Commonwealth v. Herbert, attached hereto.

Fourth, the Commonwealth's test results are not even probative of guilt. The Commonwealth's evidence, at best, is that 8% of the Caucasian population and 9% of the Black population have the kind of blood found on one spot on the straw. (The laboratory tested other areas of the straw and concluded there was not enough blood for them to properly complete the tests. The laboratory also tested the blood on four spots on the rope, but was unable to obtain reliable test results.) This kind of evidence is not probative of guilt. It surely is not enough evidence of guilt to justify arresting someone in his home, forcing him to go to a hospital where blood in forcibly extracted, and forcing him to endure the humiliation, anxiety, and fright caused by such an experience.

## Conclusion

For the foregoing reasons, petitioner's blood sample should be returned to him.

Respectfully submitted,

Max D. Stern
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Patricia Garin
BBO# 544770
Dennis Shedd
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& WEISSBERG
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## Verification

Max D. Stern and Patricia Garin, hereby verify and state under the pains and penalties of perjury that the factual allegations contained herein are true and are based on personal knowledge unless otherwise noted.

Max D. Stern

Patricia Garin

Dated: September 9, 1993

K:\LAVIGNE\RETURN.MEM

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
#1

HAMPDEN COUNTY
SUPERIOR COURT
FILED
SEP 29 1993
William J. Martin Jr
CLERK/MAGISTRATE

IN THE MATTER OF RICHARD R. LAVIGNE

COMMONWEALTH'S MOTION FOR IMPOUNDMENT

Now comes the Commonwealth in the above-captioned matter and respectfully requests this Honorable Court to continue to impound the application for search warrant by Massachusetts State Police Trooper Thomas Daly in the above-captioned matter, its attached affidavit and supporting documents, the search warrant based upon these documents issued by this court, per Moriarty, J., on September 2, 1993, and its return, the memorandums of law filed in support and oppositions of the parties positions, and the issuing judge's order and rulings filed in the above-captioned matter.

As grounds for its motion the Commonwealth states that the above-named materials necessarily contain information gathered in an on-going criminal investigation which should not be disclosed to the public so as to maintain the integrity of this investigation and not to interfere with the petitioner's rights in any future prosecution, if any.

September 29, 1993
This motion for impoundment is allowed ex parte pending receipt by the Court of a memorandum from the District Attorney no later than October 4, 1993 to be read in camera setting forth the reasons why disclosure of the materials impounded would be prejudicial to effective law enforcement that such disclosure would not be in the public interest.
John F. Moriarty
Justice of the Superior Court

Respectfully submitted,

THE COMMONWEALTH

William M. Bennett
District Attorney

Dated: September 29, 1993

1404p

See WBZ-TV4 v. District Attorney for Suffolk District, 408 Mass 594, 562 NE 2d 817.

87

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss:

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
IMPOUNDED #1

1993 Sept. 30 -
Allowed (Moriarty J)
Attest
Elizabeth R Faragon
Asst Clerk

In re Richard Lavigne,
Petitioner

**PETITIONER'S MOTION TO CONTINUE THE STAY**

Petitioner hereby moves this Court to continue the stay of its September 29, 1993 order directing the Baystate Medical Center to deliver the sample of petitioner's blood to the Hampden District Attorney's Office to October 20, 1993.

In support of this motion, petitioner states:

1. There is no urgency involved in this matter. The murder in this case happened twenty-one years ago. The Commonwealth has had the results of the blood tests performed on the known samples of evidence since January 8, 1993. Although the hearing on the instant motion occurred on September 9, 1993, the Commonwealth did not file its memorandum of law until September 27, 1993. And, most importantly, the petitioner's blood sample is being safely and securely held by Baystate Medical Center. Finally, District Attorney Bennett has been quoted in the newspapers as saying that once he obtains the blood test results, he may wait a year or more before proceeding with this case, to allow the law with respect to the admissibility of DNA blood tests to change.

2. While there is no reason to rush this issue to judgment, there are numerous reasons to allow the petitioner's motion to

three days next week and also has a day long deposition involving ten attorneys scheduled for October 8, 1993. Attorney Garin will be in Buffalo, New York from the evening of October 8 to the evening of October 14, 1993 as her mother is critically ill.

**Wherefore**, petitioner requests that this Court continue the stay of its order releasing the blood sample until the case is heard in the Supreme Judicial Court before Justice Lynch on October 20, 1993.

Respectfully submitted,

Patricia Garin

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Dated: September 30, 1993