

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 Rodriguez 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 the 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

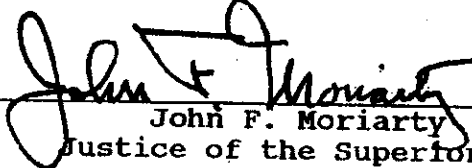
an opportunity to seek interlocutory review of my conclusion by an appellate court. I believe they should have such an opportunity.

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
Hamden	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  
Hamden Division of the Massachusetts Superior Court Department.

DATE ISSUED

September 2, 1993

SIGNATURE OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

X John F. Moriarty  
PRINTED NAME OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

FIRST OR ADMINISTRATIVE JUSTICE

WITNESS: \_\_\_\_\_

## 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:

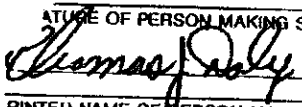
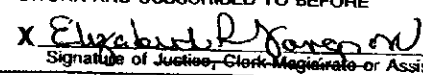
The following is an inventory of the property taken pursuant to this search warrant:

1. (3) Three vials of blood of Richard R. Lavigne
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_
7. \_\_\_\_\_
8. \_\_\_\_\_
9. \_\_\_\_\_
10. \_\_\_\_\_
11. \_\_\_\_\_
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 09/03/93 2:58 p.m.	SWORN AND SUBSCRIBED TO BEFORE X  <small>Signature of Justice, Clerk, Magistrate or Assistant Clerk</small>
PRINTED NAME OF PERSON MAKING SEARCH THOMAS J. DALY	TITLE OF PERSON MAKING SEARCH Trooper #861	DATE SWORN AND SUBSCRIBED TO 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. Martoff*  
CLERK

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*  
*Judge 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

*Stills of Matt...*  
CLERK OF THE COURT

THE COMMONWEALTH

*William M. Bennett*

William M. Bennett  
District Attorney

Dated: September 7, 1993

1407

*September 7, 1993*  
*Motion allowed. Hearing to be held*  
*on September 9, 1993 at 2:00 P.M.*  
*John T. Morin*  
*Judge of the Superior Court*

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, ss:

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

HAMPDEN COUNTY  
SUPERIOR COURT

FILED  
SEP 7 1993

In re Richard Lavigne,  
Petitioner

1993 Sept 7-  
allowed. (Mousety 2)  
attest  
Elizabeth J. Gardner  
Dist. Clerk

*William J. [Signature]*

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