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