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]

[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

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,

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