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.

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

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.