

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.<sup>5/</sup>

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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<sup>5/</sup> 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,<sup>9/</sup> 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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<sup>9/</sup> 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