an adversarial hearing be held prior to compelling a suspect to submit to an invasive medical procedure.

Second, the defendant has not been arrested or indicted for the murder nor has the Commonwealth presented this Court or a grand jury with sufficient evidence to support a finding of probable cause to arrest. Third, the Commonwealth has failed to establish probable cause to believe that the procedure will yield evidence that the defendant committed the murder. They have not established that DNA testing can be reliably performed on a dried sample that is over twenty years old, or that such a sample can be reliably compared to a fresh blood sample from a suspect. See Commonwealth v. Lanigan, 413 Mass. 154, 163 (1992) (DNA matches inadmissible in evidence due to unreliability). Nor have they presented any evidence concerning chain of custody that would establish where the sample has been stored and how it has been preserved for all these years.

Finally, it is unclear whether the court weighed the intrusiveness of the testing on dignitary interests in personal privacy and bodily integrity against the state's need for the evidence. While taking a blood sample from someone who has been arrested and is at the hospital already may not be a great intrusion, Schmerber, 384 U.S. at 771, the situation here is entirely different. Father Lavigne has not been arrested for the murder and he was not at a hospital. He was at his home when police officers arrived, forced him to go to a hospital against his will, and then compelled him to provide a blood sample. Such

a clear-cut violation of the right to be let alone should not be condoned.

Art. 14 of the Declaration of Rights provides even greater protection for individual rights than the Fourth Amendment. Commonwealth v. Amendola, 406 Mass. 592, 600 (1990) (defendant charged with possessory crime has automatic standing to challenge search and seizure); Commonwealth v. Bishop, 402 Mass. 449, 451 (1988) (items seized during inventory search that was not conducted in accordance with written procedures must be suppressed); Commonwealth v. Upton, 394 Mass. 363, 373 (1985) (warrant affidavit based on anonymous tip must establish reliability and basis of knowledge of informant). Even if the procedures employed in this case do not violate the Fourth Amendment, they do violate art. 14. An individual has a strong interest in not being compelled to submit to an unwanted medical procedure. That interest is particularly strong where the individual has not even been charged with any wrongdoing. An adversarial hearing would minimize the risk of an unjust decision by enabling the court to hear both sides on the issues of the need, efficacy, and reliability of the proposed testing and the scope of the intrusion into the suspect's dignitary interests. Such a hearing is especially appropriate in a case such as this where there is virtually no risk that loss of evidence may result from giving notice to the suspect.

III.

THE COMMONWEALTH HAS FAILED TO MEET ITS BURDEN OF ESTABLISHING PROBABLE CAUSE THAT THE BLOOD TEST RESULTS WILL PRODUCE ADMISSIBLE EVIDENCE RELEVANT TO THE QUESTION OF GUILT.

As noted earlier, in Commonwealth v. Trigones, supra, the Supreme Judicial Court placed the burden on the Commonwealth to establish probable cause that a blood test result will produce admissible evidence of guilt. The Commonwealth has failed to meet this burden.

First, the Commonwealth has failed to set forth any information concerning the chain of custody of this twenty-one year old blood sample.

Second, the Commonwealth has failed to set forth any information from which this Court could conclude that the DNA blood test performed by the California laboratory will be any more admissible than the blood test rejected as evidence by the Supreme Judicial Court in Commonwealth v. Lanigan, supra.

Third, the Commonwealth has failed to set forth any information concerning whether or not there is sufficient evidence remaining for petitioner to perform his own test. Clearly, if there is not, the Commonwealth's evidence would be inadmissible. Moreover, prior to the Lanigan decision, Massachusetts Courts generally required that any DNA testing be performed in the presence of a defense expert. The blood test evidence in this case may well be inadmissible on this ground

alone. See e.g., Order of Judge Volterra in Commonwealth v. Herbert, attached hereto.

Fourth, the Commonwealth's test results are not even probative of guilt. The Commonwealth's evidence, at best, is that 8% of the Caucasian population and 9% of the Black population have the kind of blood found on one spot on the straw. (The laboratory tested other areas of the straw and concluded there was not enough blood for them to properly complete the tests. The laboratory also tested the blood on four spots on the rope, but was unable to obtain reliable test results.) This kind of evidence is not probative of guilt. It surely is not enough evidence of guilt to justify arresting someone in his home, forcing him to go to a hospital where blood in forcibly extracted, and forcing him to endure the humiliation, anxiety, and fright caused by such an experience.

Conclusion

For the foregoing reasons, petitioner's blood sample should be returned to him.

Respectfully submitted,

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Patricia Garin
BBO# 544770
Dennis Shedd
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& WEISSBERG
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(617) 542-0663

Verification

Max D. Stern and Patricia Garin, hereby verify and state under the pains and penalties of perjury that the factual allegations contained herein are true and are based on personal knowledge unless otherwise noted.

Max D. Stern

Patricia Garin

Dated: September 9, 1993

K:\LAVIGNE\RETURN.MEM

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
#1

HAMPDEN COUNTY
SUPERIOR COURT
FILED
SEP 29 1993
William J. Martin Jr.
CLERK/MAGISTRATE

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 continue 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, the memorandums of law filed in support and oppositions of the parties positions, and the issuing judge's order and rulings filed in the above-captioned matter.

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 and not to interfere with the petitioner's rights in any future prosecution, if any.

September 29, 1993
This motion for impoundment is allowed ex parte pending receipt by the court of a memorandum from the District Attorney no later than October 4, 1993 to be read in camera setting forth the reasons why disclosure of the materials impounded would be prejudicial to possible effective law enforcement that such disclosure would not be in the public interest.
John F. Moriarty
Justice of the Superior Court

Respectfully submitted,

THE COMMONWEALTH

William M. Bennett

William M. Bennett
District Attorney

Dated: September 29, 1993

1404p

See WBZ-TV4 v. District Attorney for Suffolk District, 408 Mass 594, 562 NE 2d 817.

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss:

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
IMPOUNDED #1

1993 Sept. 30 -
Allowed. (Moriarty J.)
Attest
Elizabeth R Karonon
Asst Clerk

In re Richard Lavigne,
Petitioner

PETITIONER'S MOTION TO CONTINUE THE STAY

Petitioner hereby moves this Court to continue the stay of its September 29, 1993 order directing the Baystate Medical Center to deliver the sample of petitioner's blood to the Hampden District Attorney's Office to October 20, 1993.

In support of this motion, petitioner states:

1. There is no urgency involved in this matter. The murder in this case happened twenty-one years ago. The Commonwealth has had the results of the blood tests performed on the known samples of evidence since January 8, 1993. Although the hearing on the instant motion occurred on September 9, 1993, the Commonwealth did not file its memorandum of law until September 27, 1993. And, most importantly, the petitioner's blood sample is being safely and securely held by Baystate Medical Center. Finally, District Attorney Bennett has been quoted in the newspapers as saying that once he obtains the blood test results, he may wait a year or more before proceeding with this case, to allow the law with respect to the admissibility of DNA blood tests to change.

2. While there is no reason to rush this issue to judgment, there are numerous reasons to allow the petitioner's motion to

three days next week and also has a day long deposition involving ten attorneys scheduled for October 8, 1993. Attorney Garin will be in Buffalo, New York from the evening of October 8 to the evening of October 14, 1993 as her mother is critically ill.

Wherefore, petitioner requests that this Court continue the stay of its order releasing the blood sample until the case is heard in the Supreme Judicial Court before Justice Lynch on October 20, 1993.

Respectfully submitted,

Patricia Garin

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Dated: September 30, 1993