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 earmarked in the preparation for or perpetration of or concealment of a crime; (3) 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; (4) the dead body of a human being; and (5) the body of a living person for whom a current arrest warrant is outstanding. He argues that there is no authority to use a search warrant to seize a person's bodily fluids.

It is true that the statute does not specifically mention "mere evidence" or the blood of a human being. The final paragraph of the section, however, provides as follows:

> Nothing in this section shall 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.** (Emphasis supplied).

At the very least, that paragraph suggests that the Legislature did not intend to limit the authority of courts to issue search warrants to the five classes of property listed in the section.

Prior to May 29, 1967, the federal courts distinguished between the seizure of items of evidential value only and the seizure of contraband or the fruits and instrumentalities of crime. Searches for and seizure of "mere evidence" were prohibited – and

the distinction was one of constitutional dimension. On that date, however, the Supreme Court abolished the distinction in **Warden, Maryland Penitentiary v. Hayden**, 387 U.S. 294, 300-301; 87 S.Ct. 1642, 1646-1647. It is interesting, and I think significant, that in explaining its reasons for changing the rule, the court relied to a substantial extent on its earlier decision in **Schmerber v. California**, 384 U.S. 757, 86 S.Ct. 1826 (1966), a landmark decision in which the court approved the taking of a blood sample from an intoxicated driver without a warrant on the basis of exigent circumstances. The **Warden v. Hayden** court said, (387 U.S. at 306 and 87 S.Ct. at 1650):

> **Schmerber** settled the proposition that it is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals. The Fourth Amendment can secure the same protection of privacy whether the search is for "mere evidence" or for fruits, instrumentalities or contraband[4].

I am advised that since the **Warden v. Hayden** decision a number of the justices of this court have issued search warrants for blood samples of suspected felons. In at least one instance, the fact that a blood sample had been obtained from the defendant in such a manner was noted without criticism or comment by our Supreme Judicial Court and the defendant's conviction of first degree murder affirmed, **Commonwealth v. Gomes**, 403 Mass.258 (1988). In view of the fact that the blood comparison that was made possible

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[4]**Warden v. Hayden** was cited and followed by the Supreme Judicial Court in **Commonwealth v. Murray**, 359 Mass. 541, 547, 269 N.E. 2d 641, 645 (1971).

by the seizure of the sample was a critical issue in that case, and the fact that the court engaged in a plenary review of the record pursuant to the provisions of G.L. c. 278, § 33E, the silence of the court implies a tacit approval of the procedure that was followed.

I also take judicial notice of the fact that in a substantial number of our jurisdictions the form of search warrant has been changed (despite the language of G.L. c.276, § 2A) by adding the phrase, "is evidence of a crime or is evidence of criminal activity" in the space provided for a statement of the reason why the property is being sought.

I am of the opinion that the common law of this Commonwealth has now evolved to the point where courts may issue warrants to permit searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals,[5] and that includes warrants for the seizure of blood samples in appropriate cases.

There must, of course, be a nexus between the item to be seized and the criminal behavior. **Warden v. Hayden**, supra, 387 U.S. at 307, 87 S.Ct. at 1650. When the item to be seized is a sample of a suspect's blood, it must be shown that there is probable cause

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[5] In the last analysis the common law of this Commonwealth is what the Supreme Judicial Court decides it to be. See, for example, **Gaudette v. Webb**, 362 Mass. 60, 71 (1972) where the court proclaimed that the right to recover for wrongful death is of common law origin, and **Whitney v. Worcester**, 373 Mass. 208, 366 N.E. 2d 1210 (1977) where the Court promised to abrogate the common law doctrine of governmental immunity if the Legislature failed to do so. Until the SJC speaks on a particular issue, a trial court must attempt to predict as accurately as possible what the ultimate judgment of that court will be.

to believe that it will produce evidence relevant to the question of the suspect's guilt of a particular crime. Such a showing has been made in this case. Trooper Daly's affidavit amply demonstrates that there is probable cause to believe that Father Lavigne was responsible for Daniel Croteau's death. Even if the testing of his blood sample were to reveal no more than his blood type, it would be very relevant evidence. If it proves to be Group "B" and hence consistent with the blood on the cotton rope and plastic straw found at the scene of the crime, while not in itself conclusive, it could quite properly be used as evidence which, when correlated with other evidence, would be sufficient to form a web of circumstances leading to a conviction of guilt. **Commonwealth v. DiMarzo**, 364 Mass. 699, 308 N.E.2nd 538, 534 (1974). If, on the other hand, his blood type proves to be other than Group "B," it would go a long way toward exculpating him and removing the cloud of suspicion that the other facts and circumstances have placed upon him.

II. The Issue of Due Process

Father Lavigne's second argument is that he was entitled to a hearing before having his blood taken and that the procedure that was followed therefore deprived him of due process of law in violation of both the federal and Massachusetts constitutions. That argument overlooks the fact that all, or nearly all, search warrants and, for that matter, all or nearly all, arrest warrants are issued ex parte. The test of their validity is the existence or non-existence of probable cause. Search warrants are frequently

issued while a case is still in the investigatory stage and before an indictment or complaint has been either sought or obtained.

There is not and should not be any rule of law requiring the police or a prosecutor to seek an indictment or complaint as soon as they have sufficient probable cause to justify its issuance and before they have completed their investigation. Evidence sufficient to establish probable cause is not necessarily evidence sufficient to convict, and a premature levelling of formal charges may often result in the loss of valuable evidence. Furthermore, even after probable cause exists, further investigation may uncover exculpatory evidence clearing a suspect before unwarranted charges are made. If, as Father Lavigne would have it, adversary hearings had to be held before police with probable cause could be permitted to search for relevant evidence, the investigatory process, and hence the entire system of criminal justice would be severely hampered.

Father Lavigne relies primarily upon the language of the Supreme Judicial Court in **Commonwealth v. Trigones**, 397 Mass. 633, 492 N.E.2nd 1146 (1986). In that case the court did say that a postindictment order to obtain a blood sample should be based on a showing of probable cause made at an adversary hearing, and that at such a hearing the Commonwealth must show that a sample of the defendant's blood would probably produce evidence relevant to the question of the defendant's guilt. In that case the defendant was already indicted and in custody and (the court said) the indictment, the uncontroverted facts stated in an affidavit signed by the

prosecutor and additional facts stated by the prosecutor in open court warranted a finding of probable cause. The court held that the Commonwealth had adequately justified, "the relatively minor intrusion so as to make the search 'reasonable." The court did not hold or imply that in a preindictment setting an adversary hearing is required as a pre-condition to the issuance of a search warrant.

In Commonwealth v. Downey, 407 Mass. 472, 553 N.E. 2nd 1303 (1990), a grand jury had been convened to investigate a bank robbery and kidnapping that had occurred in the Town of Burlington. The kidnapping victim had identified the defendant from a photographic array as one of his abductors[6] and a mask had been recovered from the backseat of an automobile which had been identified as the getaway car. An F.B.I. laboratory report indicated that saliva and hair had been deposited in the mask by a person with type "O" blooe, and that the saliva and hair could be compared to blood, saliva and hair samples taken from suspects in the criminal investigation. The Grand Jury, at the request of the prosecutor, voted that there was sufficient cause to compel the defendant to provide blood, saliva and hair samples and they issued an order that he do so.

The supervising judge held a hearing at which both the prosecutor and the defense counsel were heard,[7] and then issued an order compelling the defendant to produce the samples.

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[6]There was also other evidence pointing toward the guilt of the defendant presented to the Grand Jury.

[7]It was apparently not an evidentiary hearing.

The defendant argued that his detention for the purpose of a blood test in connection with the bank robbery investigation was unconstitutional because he had not first been indicted, arrested, subjected to a probable cause determination, or even summoned to appear before the grand jury.

The court held that since the evidence that had been presented to the grand jury was adequate to support the arrest or indictment of the defendant, he was not harmed by the fact that the order issued in the absence of either. It overruled his objection to his detention for purposes of obtaining the blood sample for that reason.

The court did point out that the defendant had in fact been given a hearing before the supervising judge at which he was afforded an opportunity to oppose the grand jury order and contest the constitutionality of his detention, but it did not suggest that such a hearing was a necessary precondition to the validity of his detention. The crucial test was the existence of probable cause.

There is no requirement that law enforcement authorities present their evidence to a grand jury as soon as they have sufficient evidence to warrant the issuance of an indictment. They may decide to continue their own investigation and obtain further evidence before presenting what they have to the grand jury and seeking an indictment. Such further investigation may include a search for further evidence and - given probable cause - a properly obtained and executed search warrant is the appropriate means of obtaining it.

I do not believe that Father Lavigne's constitutional rights have been violated by the procedures following in this case to this date.

Father Lavigne contends that an adversarial hearing must be held whenever the government seeks to compel someone to undergo a medical procedure in order to extract evidence from his or her body. It is undoubtedly true that some medical procedures are so extremely intensive that special precautions must be taken before an individual can be compelled to submit to them. In the recent case of **Rodriguez v. Furtado**[6] for example, the Supreme Judicial Court exercised its power of general superintendence and laid down a rule that in the future it would deem a warrant authorizing the search of a body cavity to be invalid unless issued by the authority of a judge, on a strong showing of particularized need supported by a high degree of probable cause. Even in that case which involved a forced entry of a woman's vagina in search of narcotics believed (mistakenly) to be concealed there (a procedure which the court described as "intrusive, humiliating and demeaning"), the court did not foreclose the use of a search warrant for future searches of body cavities. Instead it limited the issuance of such warrants to judges, and raised the standards to be observed in issuing them.

The taking of a blood sample for purposes of testing is a much less intrusive procedure than the search of a body cavity. the Supreme Court of the United States has described the extraction of

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[6]410 Mass. 878, 888 (1991).