(emphasis added).

Without question, a search warrant may be used to authorize the search of the body of a living person only when there is a current outstanding arrest warrant. In this case, there was no outstanding arrest warrant.

Furthermore, even if the Commonwealth could have obtained a valid arrest warrant[3/], the statute would still not permit the taking of blood pursuant to a search conducted at the time of arrest. The statute explicitly restricts the scope of a body search pursuant to arrest to two purposes: (1) seizing evidence which may be destroyed or concealed, and (2) removing weapons that might be used to resist arrest or escape. Even if this were a search of a living body pursuant to arrest, the matter seized, a blood sample, is neither evidence subject to destruction or concealment, nor capable of use to resist arrest or escape.

In the Commonwealth of Massachusetts, only searches which come within the scope of M.G.L. c.276, §1 are legal. See e.g., Commonwealth v. Murray, supra, where, when the defendant contended that a search warrant could not be used to obtain "mere evidence in the form of clothing," the Supreme Judicial Court looked to M.G.L. c.276, §1 and concluded that the search was permissible because it came within the terms of the statute. ("General Laws c.276, §1 specifically refers to 'article worn . . .in the . . . perpetration of . . . a crime.'"). After diligent

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[3/] It is defendant's position that the Commonwealth does not have probable cause to arrest.

research, defense counsel has been unable to identify any appellate decision affirming the use of a search warrant to obtain bodily fluids.

When the Commonwealth seeks to obtain blood samples for the purpose of a criminal investigation, there are legitimate procedures which preserve the rights of the accused. In the recent case disallowing the introduction of DNA tests as evidence, the blood samples were obtained by a court order following indictment, arrest and an adversarial hearing. Commonwealth v. Lanigan, 413 Mass. 154, 596 N.E.2d 311 (1992) (post indictment and arrest) In Commonwealth v. Trigones, 397 Mass. 633 (1986), the Court held that, "[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." When a grand jury issues a subpoena requesting that an individual produce a blood sample, that person's constitutional rights to procedural due process are preserved when he receives notice, has the opportunity to be heard and the opportunity to challenge the constitutionality of the subpoena at an adversarial hearing on a motion to quash. Commonwealth v. Downey, 407 Mass. 472, 553 N.E.2d 1303 (1990).

There is, however, no lawful mechanism for extracting specimens from the body of a living person pre-arrest or pre-indictment and in the absence of a grand jury subpoena or pending criminal action. Trooper Daly's use of a search warrant in this case to enter Father Lavigne's home, to detain him, to command

him to ride with trooper Daly to a public medical center, and to forcibly extract blood from his body is beyond the contemplation of any law and utterly shocks the conscience. This use of an ex parte search warrant proceeding to forcibly detain Father Lavigne in order to obtain a bodily specimen is nothing more than an attempt to prevent petitioner from exercising his right to counsel and to intimidate him.

Because the seizure of petitioner's blood is not authorized by M.G.L. c.276, §1 or by any other provision of Massachusetts law, the search and seizure was unlawful and the blood sample must be returned to petitioner.

II.

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 DUE PROCESS 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

A. The Due Process Provisions of the Fourteenth Amendment and Art. 12 of the Declaration of Rights Require That an Adversarial Hearing Be Held Before a Search Warrant Is Issued Compelling a Medical Procedure.

The petitioner did not receive any notice or opportunity to be heard before police officers forcibly took him to a hospital to have a blood sample taken. The lack of a prior opportunity to be heard deprived him of a vital procedural due process protection mandated by the federal and state constitutions.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70 (1972); Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974).

> The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). . . . Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 333, 335 (1976). The opportunity to be heard must be provided prior to the deprivation unless prior notice would create a serious risk that the item in question would then be hidden or destroyed. Mitchell v. W.T. Grant & Co., 416 U.S. 600, 609 (1974). If exigent circumstances justify seizing the item without a predeprivation hearing, the petitioner must be given a right to an immediate post-deprivation hearing. Id. at 616-18. The requirements of procedural due process apply to criminal cases as well as civil cases. Aime v. Commonwealth, 414 Mass. 667, 674-75, 681 (1993) (provisions of

Bail Reform Act do not satisfy requirements of procedural due process).

In this case, the government sought and obtained a warrant authorizing police officers to go to Father Lavigne's home, forcibly take him to a hospital against his will, and then compel him to provide a blood sample. Applying the Mathews balancing test, it is clear that a full adversarial hearing should have been held. The private interests implicated by this warrant are fundamental. All citizens have a right to privacy in their own homes and a right not to be compelled to undergo invasive medical procedures.[4/] This search warrant authorized the government to violate both of those rights.

The use of an ex parte procedure created a great risk of erroneous deprivation which could have been alleviated by providing a predeprivation adversarial hearing. The Commonwealth sought the blood sample so it could perform DNA tests in an effort to compare Father Lavigne's blood to twenty-one year old samples found at the murder scene. But the Supreme Judicial Court has held that evidence of DNA matches are inadmissible in evidence due to the lack of acceptance of the underlying theory. Commonwealth v. Lanigan, 413 Mass. 154, 163 (1992). In its application for a search warrant, the Commonwealth presented this Court with no more than the affidavit of a police officer alleging that a different form of DNA testing would be performed than was done in Lanigan, and that this other form of testing did

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[4/] See Argument II(B).

not suffer from the lack of acceptance that concerned the SJC in that case. This claim raises complex scientific issues that cannot and should not be decided on an ex parte basis without hearing any scientific evidence whatsoever.

Finally, while the government has a strong interest in solving a murder case, providing a predeprivation adversarial hearing would not have hindered that interest in any way. There was certainly no reason to believe that giving notice would have led to a loss of evidence: Father Lavigne cannot alter his blood type and despite the years of legal proceedings against him he has never shown any intention of leaving Massachusetts.

Art. 12 of the Declaration of Rights provides even greater protections than the Fourteenth Amendment. Breese v. Commonwealth, 415 Mass. 249, 252 (1993); Attorney General v. Colleton, 387 Mass. 790, 800-801 (1982). Even if a prior adversarial hearing is not required by the federal constitution, in the circumstances of this case - where the state seeks authorization to infringe in such a fundamental way on a citizen's right to privacy and where it has not even been established that any resulting evidence would be admissible - such a hearing is required under art. 12.

In the circumstances, an adversarial hearing should have been held before the search warrant was issued, and the failure to do so violated the petitioner's right to due process.

Even if this Court should decide that petitioner is only entitled to some kind of post-deprivation due process, today's

hearing on Petitioner's Motion For Return of His Blood Sample is constitutionally inadequate.

Trooper Daly appeared before this Court on Thursday, September 2d without notice to petitioner or his counsel. When Trooper Daly appeared at petitioner's home on Friday, September 3d, neither petitioner's counsel nor petitioner had any understanding of what was occurring. Both of petitioner's attorneys, Max D. Stern and Patricia Garin, were out of town. Stern returned to Boston on the morning of September 5th to prepare for an argument before the First Circuit Court of Appeals on Tuesday, September 7 and to prepare for a first degree murder trial which started on Wednesday, September 8th. Garin returned to her office from Buffalo, New York at noon on Tuesday, September 7th to deal with this case. She had planned on staying in Buffalo for another week with her critically ill mother.

When attorney Garin spoke to assistant district attorney Elizabeth Farris at noon on September 7th, Farris informed her that she would not release the search warrant or affidavit and that she was seeking impoundment. She stated that she was seeking a hearing on a motion by the Commonwealth for access to the blood sample and that she planned to request a hearing on Wednesday, September 8. When attorney Garin explained that she would be unable to make the hearing at that time, Farris replied that the hearing would go forward without counsel. When attorney Garin inquired as to why the Commonwealth needed to have an immediate hearing on a case that was twenty-one years old, Farris

replied that she did not have to explain her reasons. Attorney Garin informed Farris that she could not be ready until the following week at the earliest because she needed to retain a DNA expert and because she needed to study the search warrant and affidavit. Farris replied that she would request that a hearing be scheduled for the following day and repeated that she did not have to explain her reasons for the urgency.

At an ex parte proceeding on Tuesday, September 7th, the hearing was scheduled for 2:00 p.m. on Thursday, September 9, 1993.

Defense counsel is unprepared for the constitutionally required hearing concerning the validity of the search warrant. Petitioner was entitled to sufficient notice to adequately prepare. He did not get this. Indeed, petitioner's counsel has not even had time to read the attachments to the search warrant affidavit or to meet with petitioner. Petitioner is entitled to an adversarial hearing where he can call expert witnesses to challenge the Commonwealth's unsupported representations about the likelihood that their DNA evidence will be admissible. He is entitled to challenge the Commonwealth's chain of custody of this unpreserved blood sample during the past twenty-one years because it is petitioner's position that this evidence will never be admissible. He is entitled to demonstrate that the Commonwealth has not met its burden under Commonwealth v. Trigones, supra, that is:

> At such a hearing the Commonwealth must show that a sample of the defendant's blood will