jurors that they could put their previous knowledge of the case out of their minds.

On the day set for trial at the Essex Superior Court in Newburyport there were news representatives from all over the United States present, including network television news reporters and Court-TV. On that day, Father Lavigne pled guilty to two counts of indecent assault and was placed on probation for a period of ten years.

Since the day when I issued the warrant for a search of Father Lavigne's blood, the media coverage of the proceedings concerning that warrant has already been extensive. Although Father Lavigne has not been personally present at any of the three hearings that I have conducted with regard to this matter, each of them have resulted in public re-airing on the local TV newscasts of video-tapes of him and his counsel taken at Greenfield during his court appearances in his previous cases. The coverage in the printed press has been equally extensive. I am morally certain that if the media is afforded free access to the details and theories of the government's investigation, each of those details and theories will be explored and debated in the press and on the airways to such an extent that if and when Father Lavigne is ever indicted for the murder of Daniel Croteau, a fair trial anywhere in this common-wealth will be extremely difficult if not impossible to attain.

It has been said that "[n]o right ranks higher than the right of the accused to a fair trial," and that protection of that right "is undeniably a substantial government interest." **Newspapers of**

New England, Inc. v. Clerk-Magistrate of the Ware Division, 403 Mass. 628, 632, 531 N.E.2nd 1261, 1264 (1988). Our Supreme Judicial Court has cited the Supreme Court of the United State for the proposition that "[t]o safeguard the due process right of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." Id. @ 633. In that case the court held that a newspaper had no constitutionally guaranteed pre-trial right of access to a search warrant affidavit, and that a District Court judge had not abused her discretion by impounding it. Id. @ 637-638.

The due process right of Father Lavigne to a fair trial is not the only factor that must be taken into consideration. The Commonwealth also has a substantial interest in protecting the integrity of its investigation.

The prosecution of Father Lavigne in the 1991-1992 Franklin County cases had the effect of bringing forth information which had previously been undisclosed. The investigation into the death of Daniel Croteau that had laid dormant for so many years was re-activated, and the state and local police renewed their efforts to solve the twenty year old mystery. That investigation is still on-going, and its success undoubtedly depends to a large extent on the continued cooperation of individuals with knowledge and memory of relevant facts. Such material is still being gathered.

The District Attorney properly concedes that the documents of which the impounded materials are a part are public records as that term is defined in G.L. c. 4, §7(26). He contends, however, that

the impounded portions are exempt from the requirements of that statute by virtue of the provisions of sub-paragraph (f) of that clause which specifically exempts:

> (f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.

It is established that there is a presumption favoring disclosure, and that the custodian of the records, in this case the District Attorney, has the burden of establishing the existence of the exemption. **WBZ-TV4 v. District Attorney of Suffolk County**, 408 Mass. 594, 603, 562 N.E.2nd 817, 822 (1990). I am satisfied that the District Attorney has met that burden.

The Supreme Judicial Court has pointed out that the decision whether an exemption to disclosure applies requires careful case-by-case consideration. **Reinstein v. Police Comm'r of Boston**, 378 Mass. 281, 290, 391 N.E.2nd 881 (1979). The decision turns on whether, because of its possible effect on effective law enforcement, such a disclosure would not be in the public interest. "The relevant public policy concerns," the court has said, "include 'the prevention of the disclosure of confidential investigative techniques, procedures or sources of information, [and] the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation.'" **WBZ-TV4 v. District Attorney of Suffolk County**, supra, citing **Bougas v. Chief of Police of Lexington**, 371 Mass. 59, 62, 354 N.E.2nd 872 (1976). In **Bougas** the court had also mentioned as additional

purposes for the exemption, ". . . the avoidance of premature disclosure of the Commonwealth's case prior to trial, . . . and the creation of initiative that police officers might be completely candid in recording their observations, hypotheses and interim conclusions."

I am convinced that the District Attorney has made out a very good case from the Commonwealth's point of view for continued impoundment of Trooper Daly's affidavit and the attached materials together with those portions of the memoranda and decision that refer to and discuss the affidavit and materials.

Finally, the privacy rights of those innocent individuals who have come forward to provide information to the authorities must be considered. In most instances, publication of the identities and testimony of those persons would be extremely intrusive. Although it is probably true that they have waived their privacy rights in the event their testimony should be required at a trial, I do not believe that they have intentionally relinquished those rights while the investigation remains in a pre-trial status.

Rule 8 of the Trial Court Uniform Rules on Impoundment Procedure provides that an impoundment order must specify the length of its own duration. It has been suggested — in a case quite similar to this — that such an impoundment order should include a provision that it will automatically be dissolved at least as early as the conclusion of the criminal proceedings. Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Division, supra (Wilkins, J. concurring). I believe that such a

provision, qualified to permit an earlier dissolution on the motion of any interested party if appropriate, should be included in the order in this case.

Accordingly it is ORDERED that the ex parte order of impoundment previously entered by me in this matter be continued in effect with respect to the following materials:

(a) the affidavit and attached materials submitted by Trooper Thomas Daly in support of his application for a warrant to search the blood of Richard R. Lavigne;

(b) those portions of the memoranda of the District Attorney and the attorneys for Richard R. Lavigne that were previously redacted when those documents were released for publication;

(c) those portions of the decision written by me with regard to disposition of the blood sample taken from Richard R. Lavigne that were previously redacted when that document was released for publication; and

(d) the memoranda of the District Attorney and the attorneys for Richard R. Lavigne and the accompanying affidavits that were submitted to me to be read in camera in connection with this order.

This order is to be automatically dissolved at least as early as the conclusion of any criminal proceedings that may result from the presently ongoing investigation, unless dissolved or modified at an earlier date by further order of this court or by an order of an appellate court.

John F. Moriarty
Justice of the Superior Court