

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Edward Deandre Blevins,
Defendant.

MEMORANDUM AND ORDER

Court File No. 06020565

State of Minnesota,

Plaintiff,

v.

Deron Vaughnta Hazley,
Defendant.

Court File No. 05045926

State of Minnesota,

Plaintiff,

v.

Robert Lawrence Hosley,
Defendant.

Court File No. 05073277

State of Minnesota,

Plaintiff,

v.

Elliott Lamar-Seccer Pierson,
Defendant.

Court File No. 06025878

State of Minnesota,

Plaintiff,

v.

Court File No. 05043793

Derek Cameron Stevens,
Defendant.

APPEARANCES:

Steve Redding, Assistant Hennepin County Attorney, appeared for the State of Minnesota. Also present were Assistant Hennepin County Attorneys John F. Halla (Hazley) and Teresa Froehlke (Hosley). Assistant Hennepin County Attorneys Martha Holton Dimick (Blevins), Peter Orput (Pierson) and Amy Sweasy (Stevens) waived their appearances

Patrick Sullivan, Assistant Hennepin County Public Defender appeared for all of the Defendants as well as Assistant Hennepin County Public Defender Richard Trachy for Defendant Blevins, Assistant Hennepin County Public Defender Constance Ebert for Defendants Hosley and Stevens and Assistant Hennepin County Public Defender Rene Clemenson for Defendant Hazley.

I. INTRODUCTION

These cases are before the Court pursuant to a Special Assignment Order which consolidated these actions for a DNA hearing. Assistant Hennepin County Attorney Steve Redding appeared on behalf of the State of Minnesota in all five cases. The individual Assistant Hennepin County Public Defenders appeared on behalf of each defendant, except for Cynthia McCollum who waived her appearance through Assistant Hennepin County Public Defender Patrick Sullivan. All five defendants were personally present. Each personally agreed to allow, Assistant Hennepin County Public Defender Patrick Sullivan to appear on their behalf and present their arguments in all five cases. Both

Assistant Hennepin County Attorney Steve Redding and Assistant Hennepin County Public Defender Patrick Sullivan did an outstanding job in ably arguing these cases.

The parties agreed that the five cases were properly consolidated for this Court's consideration of all DNA motions made in each case and that there was a complete and adequate record before the Court to rule on the motions.

The seven common motions made by each of the defendants are as follows:

1. Suppress the DNA sample as the alleged basis for the blood draw, Minn. Stat. 609.117, is unconstitutional on its face and as applied to this case.
2. Suppress the DNA sample as the original sample was drawn in violation of the Fourth Amendment to the U.S. Constitution and Article I, Section 10 of the Minnesota Constitution.
3. Suppress the DNA sample as the search of the DNA database was conducted in violation of the Fourth Amendment to the U.S. Constitution and Article I, Section 10 of the Minnesota Constitution.
4. Suppress the DNA sample as the subsequent blood sample was taken in violation of the Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution.
5. Suppress the results of the STR DNA testing in this case because there is no generally accepted method of determining the significance of a match in a database search case; or in the alternative, forbidding the State from introducing statistics calculated using the product rule.
6. Requiring the State to turn over to the defense the database searched to identify the Defendant with all identifying information removed;
7. Requiring the State to search all the national criminal offender databases using the DNA pattern identified in the questioned sample in this case;

The Court notes that these same seven motions have been presented to three different Hennepin County District Court Judges in our District. The Court has read all three of those rulings.¹ The factual record before this Court is essentially the same factual record that was before Judges Connolly and Rosenbaum at the time they issued

¹ Judge Francis Connolly issued a January 2006 order in State v. Jackson, File No. 04085182 denying all seven motions; Judge Marilyn Rosenbaum issued a March 2005 order in State v. Temple, File No. 02040491 denying all seven motions; and Judge Steven Pihlaja issued his August 2004 decision in the consolidated cases of State v. Johnson and State v. Gant, File No. 04031951 denying all six motions made in that case. Each of these cases were "cold hit" cases.

their orders and the Court has reviewed that entire record.² The parties agreed that the record before the Court is a sufficient record upon which to rule on all seven motions.

II. FACTUAL BACKGROUND³

Each of these five cases is referred to as a “cold hit” DNA case.

Each defendant was convicted of a felony offense and a DNA sample was taken from them pursuant to Minnesota Statutes Section 609.117. The DNA profile from that sample was entered into the Bureau of Criminal Apprehension (BCA) Minnesota Offender Database pursuant to Minnesota Statutes Section 299C.155. The DNA profile from some evidence at crime scenes in unsolved cases is entered into a database containing the DNA profiles from unsolved crimes. The profiles in those two databases are periodically compared and searched for matches. During those comparisons, matches were noted for each of the five defendants. The match of the offender’s profile to the profile from the unsolved crime is often referred to as a “cold hit.”

In each case, the information pertaining to the match was used to obtain a search warrant to take a new known sample from each defendant. Those known samples were tested and each was again found to match the DNA profile from the particular DNA crime scene evidence in each case. The DNA Profile match in each case would not be expected to occur more than once amongst unrelated persons in the world’s population.

A. Edward Deandre Blevins - 06020565

The factual allegations in this case indicate that on October 12, 2003 Minneapolis police officers were dispatched to 8th Street and 1st Avenue North in Minneapolis on a report of a sexual assault. When the officers arrived they spoke to the victim of the

² The defendants have submitted a 9/20/06 article, *Devlin’s Angle*, which was not part of the record before Judges Connolly, Rosenbaum and Pihlaja.

³ The Factual Background for each case is taken from the allegations in the complaint.

assault. She reported that she went to a club/bar with several friends earlier in the evening. She stated that sometime around 1:45 a.m. she left the bar without telling anyone. After leaving, she had problems locating her vehicle. While looking for her vehicle, she was approached by the defendant who offered to help find her vehicle.

The defendant led the victim through yards and neighborhoods with which she was not familiar. The victim ended up under a deck of a house, where the defendant shoved her to the ground and got on top of her. The victim said she was scared and told the defendant not to touch her. The defendant pulled off the victim's left boot and pulled down the right side of her pants and began performing oral sex on her. The victim started crying and was afraid that the defendant would hurt her. The victim reported that the defendant then penetrated her vaginally with his penis. She further reported that the defendant did not use a condom and that she thought he ejaculated inside of her. After the defendant ejaculated, he got off of her and the victim stayed there on the ground hoping that the defendant had left. He was still there after she dressed herself. The victim asked the defendant where they were so she could call her friends to come get her. The defendant gave her two different locations and the victim called her friends to give them the locations. The victim was eventually picked up by her friend in a cab. The victim got into the cab and broke down, reporting that she had been raped. The cab driver pulled into a parking lot and asked if she was okay. The victim reported the assault and was transported to the hospital. A sexual assault exam was completed.

One of the investigating officers took the victim's sexual assault kit to the BCA for DNA analysis. The DNA analysis revealed that a sperm fraction taken from the

victim had been linked to the Alabama DNA data bank. The DNA genetic code matched that of the defendant's.

B. Deron Vaughnta Hazley – 05045926

The factual allegations in this case indicate that on December 6, 2000 at approximately 10:30 p.m., a woman reported that she had been carjacked by a man with a gun who assaulted her. She stated that she had gone to the convenience store located at Brooklyn Boulevard and Regent Avenue in Brooklyn Park to buy diapers with her last five dollar bill. She came out of the store and got into her car. A black male then jumped into the passenger seat of her car and stated that "This is a jack – move." He forced her to drive towards Brooklyn Boulevard then south on Penn Avenue into Minneapolis. When he demanded money from her, the woman stated that she had spent all her money on diapers. He told her that she had a smart mouth. At 25th and Penn he told her to shut off her car, but she refused. He slammed the shift lever into park and took the keys. He then came around to the driver's door, brandished a gun and told her to move over. He pushed her, got in the car and began driving with the woman as a passenger. He instructed her to lock her doors. He then drove on various streets and alleys in the vicinity of 26th and Lyndale. In one alley, he stopped and again demanded money from her. When the woman again stated she had none, he went through the pockets of her jeans, opened her coat, put his hand up her shirt and fondled one of her breasts. When she shoved him away, he struck her with the gun over her left eye. She then fled from the car and found a Minneapolis police squad.

The officers located her car. In the ashtray they recovered the butt of a Newport cigarette which the woman said her assailant had smoked. She described her assailant as a black male in his early 20's.

On January 12, 2005, the BCA reported that the "unidentified DNA profile that was collected from the cigarette butt had been matched to a known convicted offender sample said to be from the defendant.

On May 25, 2005, a BCA forensic scientist reported that mouth swabs from the defendant had been processed and a positive hit comparison was made with the saliva on the Newport cigarette butt. The BCA forensic scientist stated that DNA profiling was performed on a known biological sample from the defendant. DNA profiling was previously performed on a cigarette butt. The DNA profile obtained from the cigarette butt matches the DNA profile obtained from the defendant. The DNA profile obtained from the cigarette butt would not be expected to occur more than once among unrelated individuals in the world's population.

C. Robert Lawrence Hosley – 05073277

The factual allegations in this case indicate that on August 10, 1997 at approximately 5:00 a.m., Minneapolis police officers were dispatched to 1510 23rd Street East, Minneapolis, regarding a sexual assault. Upon arriving at the apartment, officers made contact with the victim who reported the events that happened earlier that morning. The victim was awoken by an unknown black male, later identified as the defendant, standing over her as she slept on the couch in her living room. When the victim saw the man, she began screaming and attempted to run out the door. The defendant caught her in

the kitchen, trapped her in a headlock, and told her that if she did not stop screaming he would kill her.

The victim was able to briefly escape from the defendant's hold and armed herself with the spike end of a doorknob. The defendant then threatened to use his gun on the victim if she did not put down the doorknob. Next, the defendant wrestled the doorknob away from the victim and tackled her to the ground. The defendant brought the victim into the bedroom where he pushed her on the bed and forced his penis into her mouth. After the victim tried to bite down, the defendant turned the victim over and inserted his penis into her vagina and had forced vaginal intercourse with the victim. The defendant then ejaculated onto the backside of the victim and ordered her not to move. He then took the victim's keys, stole her car, and fled the scene. During the conversation the police officers had with the victim, the officers observed scratch marks and reddening on the victim's neck. The victim also provided the police with an extremely detailed description of her attacker.

The victim willfully submitted to a sexual assault exam and DNA samples were taken during the exam and also from the scene where the assault occurred. Those samples were submitted to the Bureau of Criminal Apprehension (BCA) for analysis. At that time no matches were made with the samples in the database.

In 2002, the defendant was convicted of the crime of false imprisonment. When the defendant was released from custody in 2005, he submitted to DNA tests before his departure from prison. Those samples were submitted to the BCA. On September 13, 2005 it was found that the defendant's DNA matched the samples from the victim's

sexual assault in 1997. The defendant's DNA also connected him to another unsolved sexual assault from 1990 in Brooklyn Park.

On November 17, 2005, the police arrested the defendant for the 1997 sexual assault and his first court appearance was on November 21, 2005. The victim of the 1997 assault was not present at the first court appearance. On December 1, 2005, the police presented the victim with a photo lineup in order to see if she could identify the man who had assaulted her. With no hesitation, the victim identified the defendant from the photo lineup as the man who had assaulted her.

D. Elliott Lamar-Seccer Pierson – 06025878

The factual allegations in this case indicate that on August 28, 2005 Minneapolis police officers were dispatched to Ron's Market located at 4600 Bryant Avenue South in Minneapolis, on the report of a robbery. Officers met with a clerk at Ron's Market who told the officers that he locked up the store at approximately 10:15 pm that night and walked across Bryant to his parked car. As he was walking across the street, he observed a man, later identified as the defendant, attempting to open the locked store doors. The clerk continued to unlock his car door, but the defendant approached him. The defendant was armed with a long knife and told the clerk that they were going back and that the clerk was going to give the defendant what money was in the store. Fearing for his safety, the clerk went back to the store with the defendant following him. Once at the doors to the store, the defendant held the knife to the clerk's back and commanded him to unlock the door. Defendant threatened the clerk, saying "if you don't [open the door] I am going to pop you."

The clerk unlocked the door and tried to quickly pull it closed between himself and the defendant. The defendant was able to get a foot in the door and a physical struggle ensued. The clerk grabbed the defendant's hand that was holding the knife. The two men struggled into a corner, with the clerk sustaining cuts to his left arm and hands during the struggle. The clerk was able to wrestle the knife from the defendant, and he then ran out of the doors and threw the knife on the sidewalk. The defendant jumped behind the counter, opened the till, took the money, and fled the store on foot.

After the struggle, the clerk noticed a watch with a green band lying on the floor that had not been there prior to the struggle. Officers collected the watch as evidence. DNA testing indicated that the DNA on the watch matched that of the defendant. The description given by the clerk of the assailant matches the description of the defendant.

The defendant was subsequently charged with one count of First Degree Aggravated Robbery. Defendant has a prior aggravated robbery conviction stemming from a robbery of Ron's Market in 2000.

E. Derek Cameron Stevens – 05043793

The factual allegations in this case are that on October 23, 2002, the owner of a liquor store located in northeast Minneapolis received a call that an alarm had been activated at his store. The owner went to the liquor store at approximately 2:40 a.m. and saw that the rear door had been pried open. He parked his truck in front of the back door blocking the ability to use that door as an exit. He then entered the front door using his key. He then heard pounding coming from the rear of the store.

The owner walked to the back of the store and saw two men pounding on the back door trying to get out. The men saw the owner and attacked him with a hammer, cutting

him and causing him to bleed from his head. The owner grabbed a beer bottle and hit one of the men, causing the bottle to break. The men stopped assaulting the owner, kicked a plate glass doorframe out, and escaped through the front. The owner was unable to identify the burglars because both wore dark ski masks over their faces.

On January 13, 2005, a customer came into the liquor store and told the owner that he knew who burglarized the store in 2002. The customer identified himself as the uncle of the defendant and said that the defendant and his brother were the perpetrators.

Numerous blood samples had been taken from the scene because both the owner and the man he hit with the beer bottle were injured. The samples were submitted to the BCA for testing along with a sample from the owner. The samples were also compared to the sample in the DNA database submitted by the defendant. Several of the blood samples from the crime scene as well as the gloves from the crime scene that had DNA on them matched the defendant's DNA.

III. DISCUSSION

A. SUPPRESS THE DNA SAMPLES AS THE ALLEGED BASIS FOR THE BLOOD DRAWS, MINN. STAT. 609.117, IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THIS CASE.

The defendants contend that the statute which forms the basis for the taking of their DNA sample should be declared unconstitutional on its face and as applied to each case because it requires courts and correctional officers to conduct suspicionless searches and seizures for law enforcement purposes. The State concedes that the taking of the test sample pursuant to the statute is a search, but contends that the statute is constitutional as the searches are reasonable.

Further, the State has referred the Court to an ALR 5th annotation entitled *Validity, Construction and Operation of State DNA Database Statistics* (76 ALR 5th 239) in which it is indicated that all 50 states and the federal government have a statute such as 609.117 and that not one Court has ever found the statute unconstitutional on the basis urged by the defendants in this case. See, also, State v. Scarborough, ___ S.W.3d ___ (Sup. Ct. Tenn. Aug. 28, 2006), 2006 WL 2471439 (Tenn.) which contains citations to these cases. The defendants concede that there is no court decision which has declared statutes similar to 609.117 unconstitutional on the basis they urge and that Judges Connolly and Rosenbaum of this Court have rejected the defendants' argument and found the statute constitutional.

In addition, in Krueger v. Erickson, 875 F.Supp. 583 (D.Minn. 1995), *affm'd* 77 F.3d 1071 (8th Cir. 1996), the Minnesota federal district court addressed a number of constitutional challenges to Minn. Stat. 609.3461 which was renumbered as 609.117, and rejected them all.

In State v. Enyeart, 676 N.W.2d 311 (Minn. App. 2004) the Court set forth a number of principles when examining challenges to the constitutionality of a statute. Laws are presumed to be constitutionally valid. Minn. Stat. 645.17(3)(2002).⁴ The presumption of constitutional validity governs the adjudication of constitutional challenges until disproved beyond a reasonable doubt. Courts have a duty to uphold legislative enactments as reasonably certain when possible, and should resort to all acceptable rules of construction to discover a competent and efficient expression of the

⁴ **645.17 Presumptions in ascertaining legislative intent.**

In ascertaining the intention of the legislature the courts may be guided by the following presumptions:

3) the legislature does not intend to violate the Constitution of the United States or of this state;

legislative will. The courts' power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary.

With these principles in mind, the Court is persuaded by the authorities contained in the above mentioned ALR 5th annotation, by the reasoning of our Court of Appeals in three unpublished opinions dealing with this specific statute, namely State v. Hvass, (Unpublished) 2006 WL 1148090 (May 2, 2006) *review denied*, July 19, 2006 (Minn. Stat. 609.117 is not penal in nature and is not an ex post facto law); State v. McBride, (Unpublished) 1999 WL 185175 (April 6, 1999) (predecessor statute to MSA 609.117 serves a legitimate governmental purpose that is nonpunitive in nature and is constitutional); and State v. Merkt, (Unpublished) 1998 WL 202638 (April 28, 1998) *review denied*, June 23, 1998 (Because MSA 609.117 serves a reasonable and appropriate legislative purpose that is not punitive in nature, we conclude the registration statute is constitutional), by Judge Connolly's Order and Memorandum of Law of January 2006 in State v. Jackson, File No. 04085182, and by the reasoning of the court in Krueger v. Erickson, 875 F.Supp. 583 (D.Minn. 1995), *affm'd* 77 F.3d 1071 (8th Cir. 1996), that the statute serves a legitimate government interest of assisting in the investigation and prosecution of crimes and that it is a legitimate function of the state to provide for a mandatory system in aiding in the identification of persons committing crimes and thus providing for the peace and safety of its citizens. These defendants, as convicted felons, simply have a lesser expectation of privacy in this instance. Thus, the Court finds that Minn. Stat. 609.117 is constitutional and that the DNA samples in each case should not be suppressed on the basis urged by the defendants. Having found that

the Statute itself is constitutional, the Court will address the other suppression issues raised by the Defendants.

B. SUPPRESS THE DNA SAMPLES AS THE ORIGINAL SAMPLES WERE DRAWN IN VIOLATION OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MINNESOTA CONSTITUTION

The United States District Court for the District of Minnesota has addressed this specific issue in the case Kruger v. Erickson, 875 F.Supp. 583 (D. Minn. 1995), *affm'd per curiam*, 77 F.3d 1071 (8th Cir. 1996). The Court applied the traditional Fourth Amendment analysis, or what is sometimes referred to as the “totality of the circumstances test” or the “balancing test” (i.e., in determining the reasonableness of a search, courts must balance “the need to search against the invasion which the search entails”), and held that withdrawal of Kruger’s biological samples constituted a search and seizure, however, it was reasonable and did not violate the Fourth Amendment to the United States Constitution. The court concluded that the officials were “justified in requiring petitioner to submit to the test.” The court noted that the statute authorizing the test served the legitimate governmental interest of assisting investigation and prosecution of sex crimes. The Kruger court held that the need to search in that case outweighed the minimal invasion which occurred.

Judges Connolly, Rosenbaun, and Pihlaja (see footnote 1 above), relying on Kruger v. Erickson, 875 F.Supp. 583 (D. Minn. 1995), *affm'd per curiam*, 77 F.3d 1071 (8th Cir. 1996), came to the same conclusion and denied the defendant’s motion in each of their cases.

The written Memoranda submitted by the defendants in the present cases did not cite to Kruger, and did not attempt to distinguish their cases from Kruger or otherwise

argue that it was incorrectly decided. Nor did the written Memoranda attempt to distinguish their cases from the cases decided by Judges Connolly, Rosenbaun, and Pihlaja or argue that those cases were incorrectly decided. However, during oral argument, the defendants, indicated that the Kruger decision was erroneously decided as the court applied the wrong legal test as it analyzed the constitutional issue. The defendants contend that the Kruger court should have applied the “special needs” test⁵ instead, and that the Kruger court, as well as Judges Connolly, Rosenbaum and Pihlaja, would have come to a different decision had the correct “special needs” test been applied as set forth in Ferguson v. Charleston, 532 U.S. 67 (2001), Indianapolis v. Edmond, 531 U.S. 32 (2000), and Chandler v. Miller, 520 U.S. 305 (1997).

This Court disagrees. Recent cases suggest that the “special needs” test is applicable under appropriate circumstances to members of the general population but has never been extended to convicted felons in prison⁶. See, e.g., People v. Johnson, 139 Cal. App. 4th 1135 (May 25, 2006). In Padgett v. Ferrero, 294 F.Supp. 2d 1338 (N.D. Ga. 2003) the court was called upon to examine the constitutionality of a Georgia DNA statute similar to the Minnesota statute which required DNA sampling of all convicted felons. In that case, just as done by the Kruger court, the court applied the traditional Fourth Amendment analysis. Importantly, the court specifically addressed the contention that it should apply the “special needs” test. The court pointed out that the Supreme Court has not used the “special needs” analysis in defining the Fourth Amendment rights of

⁵ The “special needs” doctrine is an exception to the general requirement of individualized suspicion for searches. If a search is in furtherance of a special need outside of general law enforcement, then individualized suspicion is not required.

⁶ The defendants cite United States v. Miles, 228 F. Supp. 2d 1130 (E.D. Calif. 2002) as a specific DNA Fourth Amendment case and states “The court accordingly upheld the suppression of evidence of an inmate defendant’s blood, taken for a DNA database and criminal investigatory purposes, citing as the basis for its decision Ferguson and Edmond.” However, the Court notes that the Miles case was **reversed** on appeal. See United States v. Miles, 130 Fed. Appx. 108 (9th Cir. 2005).

prisoners. In Hudson v. Palmer, 468 U.S. 517 (1984) the Supreme Court declined to extend the special needs doctrine to prisoners and that the Fourth Amendment special needs analysis is not applicable to searches of convicted felons currently serving prison terms. The special needs cases cited by the defendants do not alter the Supreme Court's holding in Hudson, supra.

Similar to the discussions in Padgett v. Ferrero, 294 F.Supp. 2d 1338 (N.D. Ga. 2003) and People v. Johnson, 139 Cal. App. 4th 1135 (May 25, 2006), the court in Kruger discussed at length the fact that lawful incarceration “brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” (Cite omitted) Prisoners' Fourth Amendment rights are limited by institutional security needs and the prisoners' reduced expectation of privacy. (Cite omitted) Even though the intrusion has nothing to do with the institutional security, internal functions of the prison, or the protection of others, the limited expectation of privacy results from the status of “prisoner” regardless of the governmental purpose for the search. Instead, the governmental purpose for the search is relevant when balancing the need for the search against the intrusion. If the purpose is slight and the intrusion great, then a search may be unreasonable despite the reduced expectation of privacy.

This Court agrees with the Kruger decision and that it used the appropriate balancing test. This Court also agrees with Judges Connolly, Rosenbaun, and Pihlaja (see footnote 1). Thus, the Court finds that the traditional Fourth Amendment analysis, also referred to as the balancing test or the totality of the circumstances test, is the appropriate

test to be applied and that applying that test, the original sample was not drawn in violation of the Fourth Amendment and the original DNA sample will not be suppressed

The Court is also aware that although the United States Supreme Court and our Supreme Court have yet to opine on this issue, to date all Fourth Amendment challenges to the DNA collection, analysis and storage in a data base have been ultimately unsuccessful. See, State v. Scarborough, ___ S.W.3d ___ (Sup. Ct. Tenn. Aug. 28, 2006), 2006 WL 2471439 (Tenn.) for citations to all the cases. In Scarborough the Tennessee Supreme Court recognized that the courts considering these Fourth Amendment challenges have not been unanimous in their analysis. Some have found the legislation at issue valid under the traditional “totality of the circumstances” approach (citations omitted) while other courts have upheld the challenged legislation after finding that the government’s interest in collecting the DNA is a “special need” beyond the normal need for law enforcement (citations omitted). The Scarborough court determined that searches of incarcerated felons undertaken pursuant to the Tennessee DNA statute, which requires persons convicted of any felony to submit a biological specimen for DNA analysis, passes constitutional muster under all of the circumstances.

Further, even if the “special needs” test is the appropriate one to be applied, it is noted that there are numerous recent court decisions which have upheld the reasonableness of the searches under comparable DNA sampling statutes as Minn. Stat. 609.117 applying the “special needs” test. See, e.g. United States v. Conley, 453 F.3d 674 (6th Cir. 2006); Roe v. Marcotte, 193 F.3d 72 (2nd Cir. 1999); Green v. Berge, 354 F.3d 675 (7th Cir. 2004); and United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003); People v. Edwards, 818 N.E. 2d 814 (Ill. App, 1st Dist. 2004); State v. O’Hagen, 881 A.2d 733

(N.J. Super. A.D., 2005); A.A. ex rel. B.A. v. Attorney General of New Jersey, 894 A.2d 31 (N.J. Super. A.D., 2006).⁷ Therefore, in the alternative, even applying the “special needs” test as urged by the defendants in these cases, the original sample was not drawn in violation of the Fourth Amendment.

Lastly, with respect to the defendants’ argument that the samples were drawn in violation of Article I, Section 10 of the Minnesota Constitution, the Court’s conclusions with respect to the Fourth Amendment are equally applicable to the guarantees against unreasonable searches and seizures set forth in Article I, section 10 of the Minnesota Constitution.

C. SUPPRESS THE DNA SAMPLES AS THE SEARCHES OF THE DNA DATABASE WERE CONDUCTED IN VIOLATION OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MINNESOTA CONSTITUTION

Minn. Stat. Section 609.117 mandates the taking of samples from certain offenders for DNA analysis. Minn. Stat. Section 299C.155 requires the Bureau of Criminal Apprehension (BCA) to establish a centralized system to cross-reference data obtained from DNA analysis. The defendants contend that once the blood sample from the defendants is collected, that the subsequent searches of the database are also unconstitutional searches. Having found that the taking of the specimen pursuant to Minn. Stat. 609.117 does not violate the Fourth Amendment of the United States

⁷E.G., the court in Roe held that the submission of a blood sample for DNA analysis and inclusion in the State’s DNA database did not violate the Fourth Amendment’s mandate against unreasonable searches and seizures inasmuch as the government’s significant interest in special needs beyond law enforcement in the form of solving past and future crimes and deterring crimes, outweighed the inmates’ interest in avoiding the intrusion of having a blood sample drawn; the court in Green held that the state statute requiring those convicted of felonies to furnish DNA samples for storage in a data bank comported with the Fourth Amendment’s reasonableness requirement under the “special needs” doctrine, even though the primary purpose of testing was to assist law enforcement, inmates had no misunderstanding about the purpose of samples or their potential use and the statute was narrowly drawn and served important state interest in solving past and future crimes. Further, inmates were already “seized” and DNA was the most reliable evidence of identification.

Constitution or Article I, Section 10 of the Minnesota Constitution, and having reasoned that a purpose of the statute was to create and maintain a database that could be used to identify felons and compare samples taken from crime scenes to convict or exonerate individuals, it would make no constitutional sense to find that a search of the database for that purpose would be an unreasonable search. For all the reasons set forth above that the drawing of the initial blood sample is reasonable and not in violation of the Fourth Amendment or the Minnesota Constitution, and the Court being in agreement with the reasoning and decisions on this same issue as Judges Connolly, Rosenbaum and Pihlaja (see footnote 1), the Court finds that the search of the DNA database is also reasonable and not in violation of the Fourth Amendment to the United States Constitution or Article I, Section 10 of the Minnesota Constitution and the results of those searches will not be suppressed.

D. SUPPRESS THE DNA SAMPLES AS THE SUBSEQUENT BLOOD SAMPLES WERE TAKEN IN VIOLATION OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MINNESOTA CONSTITUTION

There is no dispute that each of the subsequent samples taken in each case was taken pursuant to a valid court order. As such, the subsequent blood samples taken in each of the defendants' cases was not done in violation of the Fourth Amendment to the United States Constitution or of Article I, Section 10 of the Minnesota Constitution. Further, the Court being in agreement with the reasoning and decisions on this same issue of Judges Connolly, Rosenbaum and Pihlaja (see footnote 1), the Court finds that the drawing of the subsequent sample from each of the defendants pursuant to a valid court order was not in violation of the Fourth Amendment to the United States Constitution or

Article I, Section 10 of the Minnesota Constitution and the results of those searches will not be suppressed.

E. SUPPRESS THE RESULTS OF THE STR DNA TESTING IN THESE CASES BECAUSE THERE IS NO GENERALLY ACCEPTED METHOD OF DETERMINING THE SIGNIFICANCE OF A MATCH IN A DATABASE SEARCH CASE; OR IN THE ALTERNATIVE, FORBIDDING THE STATE FROM INTRODUCING STATISTICS CALCULATED USING THE PRODUCT RULE

The Defendants contend that there is no generally accepted method for calculating the statistical frequency of a DNA match when the suspect is identified by the methodology that is used in “cold hit” cases (i.e., by a “database trawl”) and thus the statistical frequency of a DNA match is inadmissible under the Frye standard⁸ as reiterated in Goeb v. Tharaldson, 615 N.W.2d 800 (Minn. 2000). The Defendants support this absence of a generally accepted method by attempting to demonstrate that there is significant disagreement within the professional statistician community as far as reporting the statistical frequency of a DNA profile if the suspect is identified by a database search as opposed to identification by a conventional police investigatory method .

It is noted that this motion and the Defendants’ supporting argument in the cases now before this Court, is exactly the same motion, and the same argument, based on essentially the same record that existed in the “cold hit” DNA cases that were before Judges Connolly, Rosenbaum and Pihlaja (see footnote 1). Each of the three Judges rejected the defendants’ arguments and denied the motions. The Defendants in the present cases argue that Judges Connolly, Rosenbaum and Pihlaja were all simply wrong

⁸ The Defendants do not dispute that the product rule is generally accepted in the scientific community for use in cases where the suspect is identified through traditional investigative techniques and is then compared with an evidentiary sample.

in their decisions. This Court disagrees and finds that each of these decisions was correctly decided.

Judge Connolly, with whom this Court agrees, indicated in his decision that:

...how the defendant is identified as a suspect is not relevant. The relevant question for the jury is how often you would expect to find this DNA profile in the general population. This is calculated by what is called the “product rule”. [Defendant] argues that the relevant question for the jury is: what is the probability of finding a particular DNA profile in a database containing a certain number of DNA profiles.

The Minnesota Supreme Court has endorsed the use of the product rule. In State v. Roman Nose, 667 N.W.2d 386, 397 (Minn. 2003), the Court stated:

While recognizing the potential impact the large numbers generated by the use of the product rule may have on jurors, we also recognize that the scientific community has approved the use of the product rule for analysis of results obtained from the PCR-STR method of testing DNA, and we have continually looked to the scientific community for guidance in resolving difficult issues such as these.

In addition, the Minnesota Supreme Court has stated that the standards of the DNA Advisory Board (“DAB”) control. In State v. Traylor, 686 N.W.2d 885 (Minn. 2003), the Court affirmed the determination of the trial court that the appropriate standards and controls currently in effect in the scientific community are the DAB standards.

In his January 2006 decision, Judge Connolly also relied heavily on the December 2005 case, United States v. Jenkins, 887 A.2d 1013 (App. D.C. 2005)⁹ which provided an extensive review of this issue and concluded that there was no lack of scientific consensus for Frye purposes regarding the statistical formulas used to calculate match significance. Since Judge Connolly’s January 2006 decision, there have been at least two court decisions, both of which extensively addressed this specific issue and both of which rejected the position that the Defendants are arguing in these cases. See, People v.

⁹ Jenkins overruled the trial court which had stated that the methodology used in calculating a “cold hit” has not gained general acceptance in the relevant scientific community and thus could not be introduced. The Jenkins court, after conducting an exhaustive review, rejected the same arguments that the Defendants are making in these cases.

Nelson, ____ Cal. Rptr. 3d ____ (August 31, 2006); 2006 WL 2506667 and People v. Johnson, 139 Cal. App. 4th 1135 (May 25, 2006).

The only two additions to the record before this Court that were not in the record before Judges Connolly, Rosenbaum and Pihlaja (see footnote 1) are a letter submitted by the defendants which was written by twenty five scientists to the California Supreme Court encouraging that Court to grant review the decision in People v. Johnson, 139 Cal. App. 4th 1135 (May 25, 2006) “to address the lower court’s imperfect appreciation of the interplay between law and science and its apparent misunderstanding of the scientific discipline of statistics and the role of the statistician,”¹⁰ and an article entitled *Statisticians not wanted* written in September 2006 by one of the defendants’ experts, Professor Keith Devlin, regarding this same criticism of the People v. Johnson decision. The Court has carefully reviewed this additional information.

Notwithstanding this additional information, the Court is in agreement with Judge Rosenbaum’s decision in State v. Temple (see footnote 1) in which she indicated that:

There is not one accepted - - generally accepted method by which to describe the significance of a match in a cold hit case. However, although there may be several opinions and approaches which can be described to the jury, those will be allowed to be described to the jury either through direct or cross examination.¹¹

The lack of consensus among the experts...is not a Frye-Mack issue. However, I will put on the record that if, in the alternative, it is ever determined to be a Frye-Mack issue, that under the two-prong test, nothing presented to this court rises to the level of a novel scientific evidence issue. And I think that Frye-Mack really talks about that as the base or beginning for that type of hearing.

¹⁰ At oral argument, the Defendants informed the Court that the California Supreme Court denied review of the case.

¹¹ During oral argument on the motions in these cases, the Court specifically asked the defendants what the testimony would be from the defendants’ experts in each of the defendants’ situations using the calculations as Professor Devlin advocates. The question was not specifically answered. Rather the defendants indicated it would just be a matter of “doing the math.”

The State as proponent of the statistical evidence has sustained its burden and has established that first, this is not a novel scientific issue, and secondly, that their proposed testimony and evidence would be reliable....regardless of how the defendant was identified as a suspect, the State should be allowed to produce the match and should be allowed to establish a statistical frequency using either the NRC II approach, including the product rule, or in addition, the evidence that they propounded under the DAB report and standards...The defendant may, of course, through cross-examination or through expert testimony present or question statistical probability calculations.

The Court has also carefully reviewed the well reasoned court decisions in the Johnson and Nelson cases and is in agreement with the reasoning and the conclusion of those courts.¹²

The Court concludes that the scientific community has generally accepted the random match probability (RMP) derived through the product rule in a DNA databank case and therefore will not suppress the results of the STR DNA testing in these cases nor will the Court, in the alternative, forbid the state from introducing statistics calculated using the product rule. The defendants may, of course, through cross examination or through expert testimony present or question statistical probability calculations.

F. REQUIRING THE STATE TO TURN OVER TO THE DEFENSE THE DATABASE SEARCHED TO IDENTIFY THE DEFENDANTS WITH ALL IDENTIFYING INFORMATION REMOVED

The Defendants request an order compelling the State to turn over the database searched to identify him. As previously noted, Minn. Stat. Section 609.117 mandates the taking of samples from certain offenders for DNA analysis. Minn. Stat. Section 299C.155 requires the Bureau of Criminal Apprehension (BCA) to establish a centralized system to

¹² See also the court's comment in footnote 11 of People v. Johnson, 139 Cal. App. 4th 1135 (May 25, 2006), and the court's comment on page 18 of People v. Nelson, 2006 WL 2506667, both of which suggest that the reasoning of those courts and the conclusions they reached are the same as Judge Rosenbaum's in her 2005 decision.

cross-reference data obtained from DNA analysis. The collection of DNA samples dates back to 1989.

Also as previously noted, a “cold hit” case is a case where a suspect is identified through a search of an offender DNA database. Each biological sample the BCA receives from a convicted offender is typed and the offender’s DNA is numerically coded. The profile is then placed in the BCA’s offender database. The profiles are periodically updated into the National DNA index system (NDIS). Once an offender’s DNA profile has been “flagged” by the computer as a “hit” to the profile from an unsolved case, the BCA will double check its results. The BCA will contact the local law enforcement agency that was involved in investigating the unsolved case.

The results of this database search are used by the local law enforcement agency to establish probable cause and to obtain a search warrant for a new reference biological sample from the offender. Pursuant to that search warrant a new reference biological sample is taken from the suspect as part of a follow up investigation. This new reference biological sample is used to compare to the evidence profile to confirm or reject the initial hit from the database. The database hit thus does nothing more than contribute to the probable cause needed to obtain another blood sample from the defendants.

The defendants request that the State provide them with the complete DNA profiles of all offenders in the Minnesota database. However, disclosure of this material is prohibited by Federal and State law. DNA profiles in the Minnesota Offender database are barred from disclosure under the provisions of the Federal DNA Identification Act, 42 U.S.C. 14132(b)(3). Under that Act, disclosure of this information is only permitted for the following reasons:

- (a) to criminal justice agencies for law enforcement identification purposes;
- (b) in judicial proceedings, if otherwise admissible pursuant to applicable statutes and rules;
- (c) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; or
- (d) if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.

42 U.S.C. 14132 (b)(3)

In these cases, none of these exceptions apply. There is not a fact situation under which DNA profiles of offenders convicted of unrelated crimes would be admissible in court. There is no relevance between the DNA profiles of the defendants and the DNA profiles of several thousands of individuals who are in the Minnesota DNA offender database. As for the exception dealing with criminal defense purposes, all relevant samples or analyses connected to the cases have been provided to the defense.

Furthermore, disclosure of this data is prohibited by State law. Minn. Stat. Section 13.03 states as follows:

Subdivision 1. **Public data.** All government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified by statute, or temporary classification pursuant to section 13.06, or federal law, as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential...

Minn. Stat. Section 13.03.

Offender DNA profiles are private under this section because they are classified as private or confidential under federal law. It is also considered to be private information under Minnesota law. Minn. Stat. Section 13.87 states:

Subdivision 1. **Criminal history data.** (a)
Definition. For purposes of this subdivision, "criminal history data" means all data maintained in criminal history records compiled by the Bureau of Criminal Apprehension and

disseminated through the criminal justice information system, including, but not limited to fingerprints, photographs, identification data, arrest data, prosecution data, criminal court data, custody and supervision data.

(b) **Classification.** Criminal history data maintained by agencies, political subdivisions and statewide systems are classified as private, pursuant to section 13.02 subdivision 12.....

Minn. Stat. Section 13.87, subd 1 (a), (b).

To determine whether the private whether the private data would be discoverable under Minnesota law, two requirements must be met. Minn. Stat. Section 13.03, subd. 6 states:

Subd. 6. Discoverability of not public data. If a government entity opposes discovery of government data or release of data pursuant to court order on the grounds that the data are classified as not public, the party that seeks access to the data may bring before the appropriate presiding judicial officer, arbitrator, or administrative law judge an action to compel discovery or an action in the nature of an action to compel discovery.

The presiding officer shall first decide whether the data are discoverable or releasable pursuant to the rules of evidence and of criminal, civil, or administrative procedure appropriate to the action.

If the data are discoverable the presiding officer shall decide whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the entity maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy interest of an individual identified in the data. In making the decision, the presiding officer shall consider whether notice to the subject of the data is warranted and, if warranted, what type of notice must be given. The presiding officer may fashion and issue any protective orders necessary to assure proper handling of the data by the parties. If the data are a videotape of a child victim or alleged victim alleging, explaining, denying, or describing an act of physical or sexual abuse, the presiding officer shall consider the provisions of

section 611A.90 subdivision 2, paragraph (b).

Minn. Stat. Section 13.03 Subd. 6.

The first requirement before disclosure of private data can be ordered is that the court must find that the data is “discoverable or releasable pursuant to the rules of evidence and of criminal...procedure appropriate to that action.” Minnesota Rules of Criminal Procedure 9.01 governs the disclosure obligations of the prosecution and nothing in that rule implies that DNA profiles should be disclosed. Therefore, the Court need not look to the second requirement. Nevertheless, the Court will examine the second requirement briefly. The second part of the requirement states that “if the data are discoverable, the presiding officer shall decide whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interest of the agency maintaining the data.” The harm to the BCA and to the legitimate public safety interest of the citizens of the State of Minnesota clearly outweighs any possible benefit to these defendants. The harm to the BCA is the loss of the ability to participate and use the system set up by the federal government, because disclosure of this data would result in the termination of the BCA’s status as an NDIS Participating Laboratory. This would outweigh any possible benefit to these defendants. Of course, to the extent the database contains any exculpatory evidence, the prosecution would be obligated to disclose that information to the defendants under Minnesota Rule of Criminal Procedure 9.01 Subd. 1(6) and (7) which incorporates the rule established in Brady v. Maryland, 373 U.S. 83 (1967).

Further, the data is irrelevant to the cases that are being presented in these matters. The DNA evidence presented by the State at the trials will not be derived from

the database “hit” but rather from the comparison of the non-database reference sample which was independently matched by the BCA DNA lab. The defendants are entitled to the discovery concerning the tests, the lab, and the analyses.

For all these reasons, the Defendants’ Motions requiring the state to turn over to the defense the database searched to identify the defendant with all identifying information removed is denied.

G. REQUIRING THE STATE TO SEARCH ALL THE NATIONAL CRIMINAL OFFENDER DATABASES USING THE DNA PATTERN IDENTIFIED IN THE QUESTIONED SAMPLE IN THES CASES

The Defendants contend in their written Memoranda, simply that “...a search of the National database maintained by the government could potentially produce another suspect in th[ese] case[s].” The Defendants did not supplement their position during oral argument. Neither do they cite to any case law in support of their motions. Based upon the reasoning set forth above with respect to the motion requiring the state to turn over to the defense the database searched, and based upon the obligations of the prosecution under Minnesota Rule of Criminal Procedure 9.01 Subd. 1(6) to disclose exculpatory information and Minnesota Rule of Criminal Procedure 9.01 Subd. 1(7) which defines the scope of the prosecutor’s obligations, the Defendants’ motions requiring the State to search all the national criminal offender databases using the DNA pattern identified in the questioned samples in these cases is denied.

IV. CONCLUSION

For the reasons stated in this Memorandum, IT IS HEREBY ORDERED:

1. The Defendants’ Motions to Suppress the DNA Evidence (Motions 1-5 above) are denied;

2. The Defendants' Motions Requiring the State to turn over to the defense the database searched to identify the Defendant with all identifying information removed (Motion 6 above) are denied; and

3. The Defendants' Motions Requiring the State to search all the national criminal offender databases using the DNA pattern identified in the questioned sample in this case (Motion 7 above) are denied.

BY THE COURT:

Dated: August 4, 2007

Robert M. Small
Judge of District Court