

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

File No 19HA-CV-08-5448

19HA-CV-08-5587

Mark Allen Westlund and
William James Connor,

Petitioners,

**AMENDED
FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER**

v

Commissioner of Public Safety,

Respondent.

The above-entitled matter came on for hearing before Joseph T Carter, Judge of District Court, on April 3, 2009, at the Dakota County Judicial Center in Hastings, Minnesota. The Order dated June 11, 2009 has been amended to address a clerical error whereby both defense attorneys had not been properly identified as representing the correct party.

Charles Ramsay, Esq represented Petitioner Mark Allen Westlund William Sharon Osborn, Esq represented Petitioner, William James Connor. Neither Petitioner appeared personally. Kristi Nielsen, Esq and David Koob, Esq., Assistant Attorney Generals, appeared on behalf of the Commissioner of Public Safety. Petitioners through their attorneys requested and were granted leave to consolidate their two cases for purposes of this hearing, in light of the consonance of the issues.

FILED DAKOTA COUNTY
CAROLYN M RENN, Court Administrator

JUN 22 2009

BY MK
DEPUTY

Petitioners waived all but the following issues: 1) whether the urine tests failed the standard of validity and reliability because of the lack of standards promulgated by the BCA; 2) whether the urine tests failed foundational objections for standards of validity and reliability required under Frye-Mack or Minnesota Rule of Evidence 702; 3) whether administering the urine tests violated Petitioners' right to equal protection under the law, by irrationally treating Petitioners differently from other Minnesota drivers; 4) whether the continued use of urine testing in Minnesota violates constitutional Due Process; and 5) whether the admissibility of evidence is a power solely relegated to the judicial branch, and whether, therefore, the exclusion of expert testimony and denial of the ability to cross-examine the BCA expert regarding the urine tests would result in a clear violation of the separation of powers doctrine. The Commissioner moved to preclude any testimony or other evidence on the grounds that the Minnesota Appellate Courts have long rejected the claim that a driver must "first void" before providing a urine sample for testing. A decision on the issues was reserved and testimony was provisionally allowed to be offered into evidence. The parties then submitted written legal memorandum that were received on May 29, 2009.

Based upon the file, record, proceedings, and the arguments of counsel, the Court makes the following:

FINDINGS OF FACT

- 1 Because of the consonance of the issues, both parties have consented that their cases be consolidated for purposes of this hearing
- 2 Neither party contests that probable cause existed for his arrest

3. Prior to his arrest, Petitioner Westlund exhibited multiple clues of impairment while performing the Horizontal Gaze Nystagmus test. But he did not exhibit indicia of impairment while performing the One Legged Stand or Walk and Turn test. The officer who arrested Westlund noticed that an odor of an alcoholic beverage was coming from his breath, that his eyes were bloodshot and watery, and that his speech was slurred.
4. Prior to his arrest, Petitioner Connor showed signs of impairment while performing the Horizontal Gaze Nystagmus and Walk and Turn tests. He did not exhibit the requisite indicators of impairment during the One Legged Stand test. The arresting sheriff deputy noticed an odor of an alcoholic beverage coming from Connor's breath, and that his eyes were bloodshot and watery. Connor admitted that he had consumed one beer, one hour prior to his encounter with the deputy.
5. Both Petitioners were read the Minnesota Implied Consent Advisory and both consented to submit a urine sample for testing.
6. The urine testing was completed in accordance with the Minnesota Bureau of Criminal Apprehension (BCA) approved procedures as described on the urine kit.
7. The BCA analyzed Petitioners' urine samples in accordance with its approved practices. Petitioner Westlund's test resulted in a reported alcohol concentration of .13. Petitioner Connor's test resulted in a reported alcohol concentration of .09.

- 8 Petitioners' driver's licenses were revoked as a result of the test report
- 9 Petitioners' expert, Thomas Ryan Burr, is a forensic scientist. He has
practiced in the area of forensic science and criminalistics for forty
years. His education and experience qualifies him as an expert in the
area of forensic toxicology. Specifically, Mr. Burr is qualified to testify as
a scientific expert with respect to urine alcohol testing
- 10 Forensic scientists in general represent the "relevant scientific
community" with respect to urine alcohol testing.
- 11 A vast majority of forensic scientists, according to Mr. Burr's
unchallenged testimony, do not support urine alcohol testing in cases
involving motorists accused of driving while impaired. Furthermore, only
a small minority of forensic toxicologists support urine alcohol testing in
cases involving parties accused of driving while impaired if a "first void"¹
is conducted. However, a vast majority do not support the practice at
all.
12. The Society of Forensic Toxicologists (SOFT) represents the largest
peer organization in forensic toxicology. SOFT has indicated, in its
guidelines, that neither qualitative nor quantitative analysis of urine
permits an evaluation of the effects of alcohol on human behavior.
Ultimately, the consensus in the scientific community is that urine
testing does not indicate whether a person is impaired.

¹ A "first void" is the practice of a subject's first urine sample being discarded and a second urine sample then being submitted for the actual test.

- 13 The National Safety Council's subcommittee on alcohol and other drugs is composed of forensic scientists from throughout the United States. The subcommittee has concluded that urine is not an appropriate sample for driving while impaired cases
- 14 The scientific community is nearly devoid of peer-reviewed articles that support the proposition that urine testing without a "first void" is scientifically valid and reliable. Only a few references exist that support "first void" urine testing
- 15 Additionally, urine alcohol testing suffers a very high and significant residual standard deviation. Specifically, there exist a significant number of cases where reported alcohol concentration has not been representative of the party's current blood-alcohol level. In any one particular case, a very significant variation can exist between blood-alcohol concentration and urine-alcohol concentration. It is possible for a person, for example, to have a .12 urine-alcohol concentration while simultaneously having no alcohol in her blood. Therefore, some have concluded that urine alcohol testing is not appropriate in light of the high residual standard deviation
16. The BCA does not check for glucose in urine samples. Federal rules require glucose testing under all test programs that operate under federal guideline. The presence of glucose in a urine sample may indicate that fermentation has occurred, and that the sample is unreliable for testing purposes

- 17 In a 1991 Lowell C. Van Berkomp, the then director of the Minnesota BCA laboratory, conceded in a published paper that laboratory findings of urine alcohol concentration are speculative when a precise blood alcohol concentration is required.
- 18 Respondent's expert, Jody K. Nelson, is currently employed at the BCA as a forensic scientist. She is a ten-year member of the Society of Forensic Toxicologists.
- 19 Ms. Nelson described the procedures utilized by the BCA to test urine samples for alcohol content. She confirmed that the BCA does not test for the presence of glucose. She agreed that other labs, including labs at MEDTOX, her former employer, test for glucose.
- 20 Ms. Nelson testified that four other states allow urine alcohol testing without a "first void". She expressed uncertainty regarding the important details related to the practice of one of those states, Illinois. She also indicated that eleven states allow urine testing.
- 21 Ms. Nelson's testimony regarding the "absorptive phase" of alcohol consumption was unconvincing. But she did concede that a person could produce a .08 urine-alcohol test result without having any alcohol in his or her bloodstream. She also testified that she did not know the amount of alcohol either Petitioner had in his blood at the time of driving.
- 22 Ms. Nelson lacks the expertise to determine the level of impairment of a person based on his performance during field sobriety testing.

23. Based on this record, the BCA protocol for using urine samples to determine a motorist's alcohol level has not been embraced by the scientific community. Moreover, Ms. Nelson's knowledge of urine testing is generally confined to the procedures at the BCA and MEDTOX. Her conclusions regarding the wider scientific community were not supported by her testimony or by other evidence admitted at the hearing.
24. Based on this record, the BCA protocol for urine testing of alcohol levels in a person's body is somewhat unique in that the BCA does not test for glucose levels and does not require a "first void" before collecting urine from a motorist. The Commissioner has failed to identify any other agency that has a similar protocol.
25. Urine alcohol testing, as implemented by the BCA, is a novel scientific technique, and there is no evidence that it has gained general acceptance in the relevant scientific community.

Based upon the findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Commissioner, as the party offering the results of a chemical or scientific test into evidence, must make a prima facie case that the test is reliable and "that its administration in the particular instance conformed to the procedure necessary to ensure reliability." *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977) (citations omitted). If sufficient, the burden of production then shifts to Petitioners, who oppose its admission. It is implied

consent cases, the driver must offer evidence disputing the validity and trustworthiness of the test. *Falaas v. Comm'r of Pub Safety*, 388 N.W.2d 40, 42 (Minn. Ct. App. 1986). However, the burden of persuasion regarding the accuracy of the result remains with the proponent of the evidence. *Dille*, 258 N.W.2d at 569, n. 2

2. The reliability of a chemical urine test result is established conclusively where an officer abides by BCA procedures. See *Genung v. Commissioner of Public Safety*, 589 N.W.2d 311, 312 (Minn. Ct. App. 1999); See also *Springfield v. Anderson*, 411 N.W.2d 292 (Minn. Ct. App. 1987).
3. Before scientific evidence may be admitted, both prongs of the "Frye-Mack" standard "must be satisfied." *State v. Roman Nose*, 649 N.W.2d 815, 818 (Minn. 2002). The standard, as explained by the Minnesota Supreme Court in 2005 is as follows:

Under the *Frye-Mack* standard, a novel scientific theory may be admitted if two requirements are satisfied. The district court must first determine whether the novel scientific evidence offered is generally accepted in the relevant scientific community. *Id.* Second, the court must determine whether the novel scientific evidence offered is shown to have foundational reliability. *Id.* As with all expert testimony, the evidence must comply with Minn. R. Evid. Rules 402 and 702; that is, it must be relevant, helpful to the trier of fact, and given by a witness qualified as an expert. The proponent of the novel scientific evidence bears the burden of establishing the proper foundation for the admissibility of the evidence.

State v MacLennan, 702 N.W.2d 219, 230 (Minn. 2005) (citations omitted)

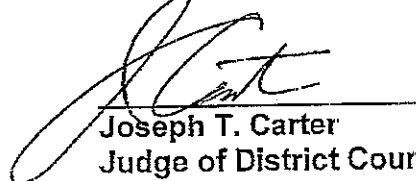
4. Under the general acceptance prong, the district court “defers to the scientific community’s assessment of a given technique” *State v. Taylor*, 656 N.W.2d 885, 891 (Minn 2003). And when a scientific technique is no longer novel or emerging, the pretrial hearing should focus on *Frye-Mack’s* second prong. *State v Roman Nose*, 649 N W 2d 815, 819 (Minn 2002)
5. Urinalysis of a person’s alcohol level is a novel scientific theory that has not been deemed generally accepted in the scientific community by Minnesota courts. See *State v Roman Nose*, 649 N W 2d 815, 821 (Minn. 2002)
6. The Commissioner has failed to meet his burden that the urinalysis of Petitioners alcohol levels met the first prong of the *Frye-Mark* standard, in that the BCA protocol is accepted in the relevant scientific community

ORDER

- 1 The Commissioner’s revocation of Petitioners’ driving privileges is rescinded
- 2 This Order shall be filed in both court files as noted in the caption
- 3 The attached memorandum is incorporated by reference.

June 18, 2009

BY THE COURT


Joseph T. Carter
Judge of District Court

MEMORANDUM

Petitioners present several legal theories whereby they seek to establish whether the results of their urine tests are admissible to form the basis to revoke their driver's licenses for driving while impaired. Pivotal to several of Petitioners' positions is the proposition that they offer a theory of admissibility that has not been settled by Minnesota's appellate courts.

Any party offering the results of a chemical or scientific test into evidence must make a prima facie case that the test is reliable and "that its administration in the particular instance conformed to the procedure necessary to ensure reliability." *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977) (citations omitted). If sufficient, the burden of production then shifts to the party opposing its admission. Hence, in Implied Consent cases, the driver must offer evidence disputing the validity and trustworthiness of the test. *Falaas v. Comm'r of Pub. Safety*, 388 N.W.2d 40, 42 (Minn. Ct. App. 1986). But the burden of persuasion regarding the accuracy of the result remains with the proponent of the evidence. *Dille*, 258 N.W.2d at 569, n. 2.

At the hearing on this case, the Commissioner moved to limit or prevent Petitioners from offering any expert evidence regarding deficiencies in urine tests of a motorist's alcohol level. Of particular importance here is that the Minnesota Court of Appeals has repeatedly rejected the "urine pooling" theory of unreliability with respect to chemical testing of urine and the extent to which the Court's reasoning in related cases extends to the immediate matter.

In *Springfield v. Anderson*, the Court of Appeals considered a motorist's claim that a trial court abused its discretion by refusing to allow expert testimony regarding the proper procedure for collecting a urine sample 411 N W 2d 292 (Minn. Ct. App. 1987). Prior to the trial court's refusal, the motorist's expert proposed to offer testimony before a jury that a subject's bladder must be emptied immediately prior to urine sample collection in order to insure accurate test results. *Id.* at 293. The expert specifically stated that he would not question the validity of the sample. *Id.* After noting potential problematic practical ramifications associated with affirming the motorist's position, the Court of Appeals found that the trial court "did not abuse its discretion by refusing to allow expert testimony regarding the proper procedure for collecting a urine sample when the validity of the sample was not being questioned." *Id.* at 294. Although expressed in a nonbinding, unpublished opinion, the Court of Appeals has since interpreted *Springfield* to stand for the broad proposition that expert testimony may be excluded when it seeks to question the reliability of the urine testing procedure rather than the validity of a sample. See *State v. Galloway*, No. C1-99-1073, 2000 WL 462309 (Minn. Ct. App. April 25, 2000). Another unpublished opinion went so far as to conclude that the Court in *Springfield* "express[ed] [its] unwillingness to add a void-the-bladder requirement to the urinalysis testing ...". *Anderson v. Commissioner of Public Safety*, No. C8-99-2009, 2000 WL 665712 at *1 (May 23, 2000).

Twelve years later, a motorist in *Genung v. Commissioner of Public Safety* contended that a urine test was inaccurate even though it was administered in

accordance with Bureau of Criminal Apprehension (BCA) procedures. 589 N W 2d 311, 312 (Minn. Ct. App. 1999) In district court, the motorist's forensic expert was permitted to testify that the BCA methods were not "scientifically valid" because Appellant had not been required to "void his bladder once and wait approximately 20 to 30 minutes before producing the test sample." *Id.* at 313. The expert expressly grounded this conclusion on the theory that the failure to void resulted in a reading that measured the average alcohol concentration since the last time Appellant urinated, rather than the alcohol concentration at the time of testing. *Id.* But the Court disagreed, concluding that BCA procedures "which do not require voiding once before producing the test sample" had been found to ensure reliability by the Minnesota legislature, by implication, through an administrative ruling. The Court's analysis was dependent upon the language of Minn. R. 7502.0700, and untouched by any immediate appraisal of the credibility of the appellant's expert. Today, that administrative language remains unchanged. In relevant part, it reads as follows:

Blood and urine samples must be tested for alcohol using *only* procedures approved and certified to be valid and reliable testing procedures by the director, Forensic Science Laboratory, Bureau of Criminal Apprehension, Minnesota Department of Public Safety.

Minn. R. 7502.0700 (2005) (emphasis added)

A complete analysis of its decision leads to the inescapable conclusion that the Court believed this administrative language required a finding that the BCA procedures not only "have been found to ensure reliability," but will produce a measurement with "sufficient accuracy" if properly administered. See *Genung*, 589 N W 2d at 313. This understanding of the decision follows when one

considers that there is no indication that the Commissioner countered the appellant's expert with an expert of their own. Rather, the Commissioner's prima facie case appeared sufficient to carry through, satisfying its remaining burden of persuasion, and that prima facie case consisted solely of the fact that the officer who collected appellant's sample abided by applicable BCA procedures. *Id.* Evidently, *Genung* ultimately stands for the proposition that the reliability of a test result is established conclusively where an officer simply abides by BCA procedures. *Id.* While not binding precedent, three unpublished Court of Appeals decisions support the conclusion that this has been its ongoing interpretation of *Genung*.²

In the context of blood testing, *State v. Pearson* interpreted *Genung* as holding that the "use of a BCA kit and BCA analysis methods is sufficient to establish the test's reliability." 633 N.W.2d 81, 85 (Minn. Ct. App. 2001). Here, Petitioners correctly point out that prior Minnesota courts have deferred to the judgment of the BCA. And despite Petitioners' urging, it is not within the purview of this Court's residual authority to weigh the credibility of Petitioners' expert witness against the BCA's statements of reliability and to find the BCA's procedures wanting. Admittedly, this issue is troubling because courts should

² See *Galloway*, No. C1-99-1073 at *2 (concluding *Genung* was applicable to a case involving exclusion of expert testimony because "[it] addressed the same reliable question presented in this case – whether a urine test is accurate when performed in accordance with BCA procedures despite the fact that the procedures do not require a pre-test voiding of the bladder."); *Anderson*, No. C8-99-2009 at *1-2 (concluding that *Genung* stands for the proposition that "[t]his court has held that where an officer follows the BCA urinalysis procedures . . . in obtaining a urinalysis sample, such procedures 'have been found to ensure reliability'"). At the opinion's close, the Court noted that the BCA-approved practice was one the Court had "previously determined to be reliable"; *Husfelt v. Commissioner of Public Safety*, No. C1-00-1629, 2001 WI 379051 at *3 (Minn. Ct. App. April 17, 2001) (interpreting *Genung* as holding "that this court will defer to the Commissioner and not create a purge-before-testing requirement for urine tests because the BCA is silent on the issue").

not abdicate their duty to fence off encroachments of constitutional protections. It is disconcerting to operate within the confines of recognizing an administrative pronouncement to function as the say-all and end-all with respect to test reliability, especially considering the close ideological connections between the BCA and law enforcement agencies. But until our appellate courts reexamine the condition of the aging support of this particular realm of jurisprudence, this Court is constrained to conclude, in the narrow context of reliability analysis, that the Commissioner has met its burden to establish that the BCA's urine testing procedures ensure a measurement of blood alcohol concentration with sufficient accuracy to sustain revocation of Petitioners' driver's licenses.

But Petitioners have raised another issue that deserves consideration; to wit: whether urine testing can withstand "*Frye-Mack*" scrutiny as it relates to the admissibility of evidence obtained through the use of novel scientific techniques. See generally *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *State v. Mack*, 292 N.W.2d 764, 768 (Minn. 1980).

In 2005, the Minnesota Supreme Court explained the standard as follows:

Under the *Frye-Mack* standard, a novel scientific theory may be admitted if two requirements are satisfied. The district court must first determine whether the novel scientific evidence offered is generally accepted in the relevant scientific community. *Id.* Second, the court must determine whether the novel scientific evidence offered is shown to have foundational reliability. *Id.* As with all expert testimony, the evidence must comply with Minn. R. Evid. Rules 402 and 702; that is, it must be relevant, helpful to the trier of fact, and given by a witness qualified as an expert. The proponent of the novel scientific evidence bears the burden of establishing the proper foundation for the admissibility of the evidence.

State v MacLennan, 702 N W 2d 219, 230 (Minn 2005) (citations omitted)

Especially important here is the question of novelty. In the seminal case of *Frye*, the Court did not explicitly voice a novelty requirement, but rather explained its standard with the following language:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye v. United States, 293 F. 1013, 1014. The decision seems to simply imply that experimental principles are those that have not gained general acceptance in their respective fields

In 1992, The Minnesota Supreme Court adopted the *Frye* standard in *State v. Kolander*. 52 N W 2d 458, 465 (Minn 1952). Again, the Court made no explicit mention of a novelty requirement. But the court illustrated its willingness to apply the *Frye* analysis to lie detector testing, a practice that had already been established as "valuable in investigative work of law enforcement agencies." *Id*. The Court ultimately concluded that the test "ha[d] not yet attained such scientific and psychological accuracy, nor its operators such sureness of interpretation of results shown therefrom, as to justify submission thereof to a jury as evidence of the guilt or innocence of a person accused of a crime." *Id*. Significantly, the question of whether the *Frye* analysis was appropriate was not merely

a temporal one with respect to the existence of a particular scientific method.

In 1985, after its seminal decision in *Mack*, the Minnesota Supreme Court enumerated the completed *Frye-Mack* standard in *State v. Anderson*, 379 N.W.2d 70, 79. Again, the standard lacked any reference to the novelty of a particular scientific technique. But seven years later, in *State v. Jobe*, the Court explained that the *Frye-Mack* standard was appropriate when “determining the admissibility of evidence based on *emerging* scientific techniques” 486 N.W.2d 407, 419 (Minn. 1992) (emphasis added). The Court in *Jobe* concluded that a *Frye* hearing was required with respect to the issue of DNA RFLP testing, “given the evolving nature of [the] forensic specialty.” *Id.* at 420. However, the Court focused on the second prong of *Frye-Mack*, because it had already found that the “principles underlying forensic DNA RFLP testing meet the *Frye* and *Mack* tests” *Id.* at 419.³

In 1994, the Minnesota Supreme Court found that a trial court did not err in admitting evidence related to bite-mark analysis because the *Frye* analysis was not appropriate. *State v. Hodgson*, 512 N.W.2d 95, 98 (Minn. 1994). The Court declined to find that the scientific theory was novel, concluding, “[B]ite mark comparisons by an expert are routinely used to prove that a particular person was present at a particular place or

³ This interpretation of *Jobe* was later confirmed in *State v. Roman Nose*, where the Court interpreted *Jobe* to have held, “When the scientific technique that produces the scientific evidence is no longer novel or emerging, then the pretrial hearing should focus on the second prong of the *Frye-Mack* standard.” 649 N.W.2d 815, 819 (Minn. 2002)

did a specific act.” *Id* (citing *A Practical Guide to the Admissibility of Novel Expert Evidence in Criminal Trials under Federal Rule 702*, 22 St Mary’s L.J. 181, 210-11 and n. 122 (1990)) Four months later, in *State v. Klawitter*, the Court declined to find reversible error in a trial court’s decision that the visual nystagmus and convergence examination portion of a “drug recognition protocol” was properly subjected to a *Frye* analysis on the grounds of novelty. 518 N.W.2d 577 (Minn. 1994). The Court found that the tests themselves could “hardly be characterized as emerging scientific theories,” because they had “been in common medical use without change for many years.” *Id.* at 584. However, the issue of admissibility of evidence based on the use of nystagmus testing had not previously been addressed by the Court. *Id.* The Court concluded that “the effectiveness of a nystagmus test as an element of an evaluation to determine drug impairment is not universally accepted.” *Id.* at 584. It then found that the trial judge did not abuse her discretion or arrive at a clearly erroneous conclusion when determining that the tests satisfied the *Frye* standard. *Id.*

In 2002, the Minnesota Supreme Court clarified the proper analysis as it relates to the novelty requirement of *Frye-Mack*. See *State v. Nose*, 649 N.W.2d 815 (Minn. 2002). Appellant Nose claimed that the trial court erred by failing to conduct a pretrial *Frye-Mack* hearing related to a particular “PCR-STR” method of testing DNA conducted by the BCA. *Id.* at 816. The method had already been used by the BCA for three years. *Id.*

at 821. The Court remanded the first degree murder case after finding that the trial court erred in failing to conduct a *Frye-Mack* hearing *Id* at 816. The Court noted that it had previously ruled that DNA typing is generally acceptable *Id* at 819 (citing *State v. Schwartz*, 447 N.W.2d 422, 426 (Minn. 1989)). Further, the Court did not question the basic validity of DNA analysis *Id* (citing *State v. Bloom*, 516 N.W.2d 159, 164 (Minn. 1994)). And in *Jobe*, the Court had concluded that the specific RFLP method of DNA testing should no longer be challenged in pretrial *Frye-Mack* hearings *Id* at 820. But despite the fact that other appellate courts had already upheld PCR-STR testing, the Court noted that "other jurisdictions have different standards for the admissibility of evidence obtained from scientific techniques." *Id*. In addition, the decisions affirming PCR-STR testing generally did so after reviewing the trial court findings of evidentiary hearings *Id*. Ultimately, the Court refused to rely on the decisions of other state appellate courts rather than on the testimony of expert witnesses regarding the issue of general acceptance *Id*. Furthermore, it explained that the issue of novelty hinged on the fact that the Court had "not [yet] decided general acceptance for Minnesota Courts." *Id* at 821. This was true despite the fact that the procedure had been used by the BCA since February 1999 *Id*. Ultimately, the Court found, "The BCA's practice is not dispositive of the issue, but may instead be relevant evidence at the *Frye-Mack* hearing to determine [the issue of] general acceptance within the relevant scientific community." *Id*

Pretrial hearings on the first prong of *Frye-Mack* would no longer be needed only once the Court reviewed and confirmed the issue of general acceptance. *Id.* Because the PCR-STR was a new method “that the Court had never before considered,” and because it was sufficiently different from the method that it had considered, the technique was novel. *Id.* 821.

In 2005, the Court found that expert testimony concerning battered child syndrome was not novel for purposes of a *Frye-Mack* analysis. *State v. MacLennan*, 702 N.W 2d 219, 230 (Minn. 2005). Citing supportive decisions from jurisdictions that also worked under the framework of the *Frye* standard, the Court concluded that “expert testimony on syndromes, unlike DNA evidence or other physical evidence is not the type of evidence that the analytic framework established by *Frye-Mack* was designed to address. *Id.* at 232-33

Concerning the issue of general acceptance in the relevant scientific community, the district court “defers to the scientific community’s assessment of a given technique.” *State v. Taylor*, 656 N.W 2d 885, 891 (Minn. 2003). In order to satisfy the standard, a scientific technique must be “broadly accepted in its field.” *State v. Anderson*, 379 N.W 2d 70, 79 (Minn. 1985).

A district court may not elect to refrain from engaging in a *Frye-Mack* analysis where higher courts have not yet definitively resolved that a novel scientific technique is generally accepted. *See id.* at 818. Rather, both prongs of the standard “must be satisfied” before scientific evidence may be admitted. *Id.*

This stringent requirement assures that trial and appellate judges do not “become scientists,” an approach that the Minnesota Supreme Court has “clearly rejected” *Id.* at 819, n. 3 (citing *Goeb v Tharaldson*, 615 N.W.2d 800, 813-14 (Minn. 2000)). In *Goeb*, the Court carefully considered the historical purposes of the *Frye-Mack* standard before rejecting appellant’s request that the *Daubert* standard replace it: a standard that “stresses a more liberal and flexible approach to the admission of scientific testimony” *Goeb*, 615 N.W.2d at 812; *See also State v. Schwartz*, 447 N.W.2d 422, 424-26 (Minn. 1989). Ultimately, the Court concluded that the *Frye-Mack* standard “ensures that the persons most qualified to assess scientific validity [qualified scientists] of a technique have the determinative voice,” and that it avoids pitfalls associated with endowing trial judges with the roles of “amateur scientists” *Id.* at 812-13.

The Court in *Genung* did not engage in *Frye-Mack* analysis.⁴ Rather, the appellant-motorist received judicial review of the trial court’s determination that his urine test was “properly administered and accurately and reliably analyzed petitioner’s alcohol concentration.” *Genung*, 589 N.W.2d at 313. As discussed above, the Court of Appeals has interpreted Minn. R. 7502.0700 to function as an administrative and, impliedly, legislative proclamation with respect to the reliability of BCA urine testing procedures. But the rule does not address the opinions of experts outside of the BCA. The rule does not contemplate whether the wider relevant scientific community has embraced the BCA’s procedures. Indeed, even an explicit legislative proclamation on this particular issue could be

⁴ Importantly, appellant conceded that he could not appeal the admission of the test result because he had failed to make a foundational objection at trial. *Genung*, 589 N.W.2d at 313, n. 4.

vulnerable to confrontations by credible, conflicting evidence. Consider Minnesota's still-settling source-code jurisprudence. One cannot imagine a legislative proclamation affirming the reliability and widespread scientific acceptance of Intoxilyzer 5000 testing functioning as definitive on both issues and miraculously solving the protracted conflict. The same is true here. Ultimately, the Court of Appeals has remained silent with respect to the issues of novelty and whether the scientific evidence offered here is generally accepted in the relevant scientific community. Accordingly, Petitioners were entitled to a *Frye-Mack* hearing.

In this case Petitioners' expert provided credible evidence that urine alcohol testing, as performed by the BCA, is a novel scientific theory that is not accepted in its relevant scientific community. With respect to the issue of novelty, this Court is not asked to pass judgment on urine testing in general, but rather on urine alcohol testing procedures as specifically implemented by the BCA. And those procedures are *not* routinely used in the sense that bite-mark analysis was used contemporaneously with the Court's decision in *Hodgson*. Rather, this matter presents a case where the practices of a governmental agency have not yet graduated from experimental stages to demonstrable stages. Despite the widespread use of urine testing in general, the testimony in this case has firmly established that the BCA's urine testing procedures remain novel and experimental in the eyes of the wider relevant scientific community. This Court is informed by that scientific community's assessment, as well as its own determination that a novel practice may exist for decades within the confines

of a particular environment. In this case, the particular environment of the BCA appears to have acted as a time capsule of sorts, shielding a novel practice from the supervisory forces of the wider, external scientific community. Moreover, this identification of novelty gives honor to the Supreme Court's desire that "the persons most qualified to assess scientific validity [qualified scientists] of a technique have the determinative voice " *Goeb*, 615 N W 2d at 812. The *Frye-Mack* standard applies, and the Commissioner, on this record, has failed to satisfy its first prong. Accordingly, the results of the urine tests are not admissible and the Commissioner's revocation of both Petitioners driver's licenses was error. In light of this decision, Petitioners other claims have not been addressed.

JTC