

sealed, and that the Petitioner initialed the cup containing the sample.

Officer Dretzke further testified that the Petitioner was not directed to, and did not void her bladder prior to providing the sample.

3. Donna Zittel, (hereinafter, Ms. Zittel”) a Bureau of Criminal Apprehension (hereinafter, “BCA”) toxicologist, performed a gas chromatography test of the sample, which revealed the Petitioner’s alcohol concentration to be 0.13 grams per 67 milliliters of urine. Ms. Zittel testified that the BCA procedures for alcohol testing of urine do not contain a pre-test void requirement. Ms. Zittel further testified that the length of time between when the bladder was last voided and when the sample is produced may affect the results of the test, and that the lack of a requirement that an individual void prior to providing a sample for testing makes it theoretically possible for an individual’s urine to contain a concentration of alcohol greater than the legal limit for driving at the same time that an individual’s blood contains no detectable alcohol. Ms. Zittel conceded at hearing that she is unaware of any peer-reviewed articles supporting as scientifically valid the administration of a urine test without a pre-test voiding of the bladder.
4. Thomas Burr (hereinafter, “Mr. Burr”), the Petitioner’s forensic expert, testified that in his opinion, the failure to require the Petitioner to void her bladder prior to providing a sample resulted in an alcohol concentration measurement that was not scientifically valid because the urine obtained was “pooled” and measured the average alcohol concentration since the last time the Petitioner urinated, rather than the alcohol concentration at the time of the test. Mr. Burr further testified that the consensus among the scientific community is that testing of urine obtained without requiring

the bladder to be voided first does not result in a reliable measure of alcohol concentration, and that to his knowledge, Minnesota is the only state in which there is no requirement that the bladder be voided prior to conducting alcohol testing of urine.

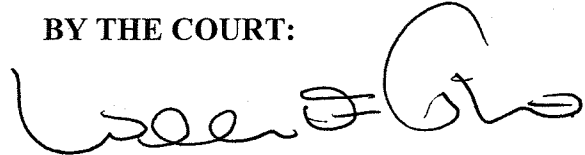
Based upon the foregoing Findings of Fact, the Court makes the following:

ORDER

1. The revocation of the Petitioner's driving privileges is RESCINDED.
2. The attached Memorandum is incorporated herein.

Dated: November 25, 2007

BY THE COURT:



**William F. Thuet
Judge of District Court**

MEMORANDUM

The Statutes of Minnesota provide that an individual's driving privileges shall be revoked upon certification by a peace officer that there existed probable cause to believe the individual had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired) and that the individual submitted to a test and the test results indicate an alcohol concentration of 0.08 or more. Minn. Stat. § 169A.52, subdivision 4. Alcohol concentration is defined as the number of grams of alcohol per 100 milliliters of blood; the number of grams of alcohol per 210 liters of breath; or the number of grams per 67 milliliters of urine. Minn. Stat. § 169A.03, subdivision 2.

A party offering the results of a chemical or scientific test into evidence has the burden of establishing a prima facie case that the test is reliable and that its

administration conformed to the procedure necessary to ensure reliability. *Genung v. Comm'r. of Pub. Safety*, 589 N.W.2d 311, 313 (Minn.App. 1999), quoting *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977). The burden of production then shifts to the party opposing admission to show why the test is untrustworthy. *Id.* The burden of persuasion regarding the accuracy of the result remains with the proponent of the evidence. *Id.*

The Minnesota Court of Appeals, when dealing with the issue of the scientific validity of urine testing for alcohol concentration, has deferred to the judgment of the BCA and concluded that so long as the BCA does not require a pre-test void, the lack of a pre-test void will not by itself render a urine test untrustworthy. *Id.* at 313; *State v. Galloway*, No. C1-99-107, 2000 WL 462309 at 2 (Minn.App., April 25, 2000), *Anderson v. Comm'r of Pub. Safety*, No. C8-99-2009, 2000 WL 665712 at 2 (Minn.App. May 23, 2000).

Here, however, the Court is confronted with overwhelming evidence that a test performed upon a urine sample obtained without first voiding is not a reliable measure of alcohol concentration at the time it is administered, and thus the level of intoxication, of the driver. The Commissioner's own witness, Ms. Zittlel, conceded that the length of time between when the bladder was last voided and when the sample is produced may affect the results of the test. Moreover, Ms. Zittel admitted that it is theoretically possible for an individual's "pooled" urine to contain a concentration of alcohol greater than the legal limit for driving at the same time that an individual's blood contains no detectable alcohol.

The Court finds that the continued use of a testing procedure which experts agree may not measure the level of alcohol concentration, and thus intoxication of a driver at the time it is administered, and which the state's witness admitted may yield results that do not correlate with blood tests performed at the same time, constitutes an absurd result which the Legislature could not possibly have intended, especially given the stated goal

of enhancing safety by removing intoxicated drivers from the roads. In light of this, the Court is compelled to rescind the revocation of the Petitioner's driving privileges.

WFT