

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3595/1dn

RLR:nwn:md

October 5, 2009

Representative Hraychuck:

Over the last decade, more than one-fifth of the states, and the U.S. government, have enacted laws requiring the taking of a DNA sample from people arrested for various felonies, and requiring that the DNA profiles of these people be included in a DNA database. Since most of these laws are relatively new, there is little case law discussing whether taking a DNA sample from a person before he or she is convicted without consent and without a warrant constitutes an unlawful search. The Virginia Supreme Court in *Anderson v. Commonwealth of Virginia*, 274 Va. 469, 650 S.E.2d 702 (2007), found that taking DNA samples from a person upon arrest for a felony without consent and without a warrant does not constitute an unlawful search. The Virginia court determined that taking a DNA sample is akin to taking fingerprints and photographs upon arrest.

A Minnesota Court of Appeals reached the opposite conclusion. The relevant Minnesota law is different from this bill and different from the Virginia law in that it requires taking a DNA sample from a person who is charged with a felony, not from all persons arrested for a felony. The Minnesota Court of Appeals found that requiring a person who has not been convicted to provide a sample for DNA analysis without consent and without a warrant constitutes an unlawful search, even after the court makes the probable cause finding necessary to sustain a felony charge. The Minnesota court reasoned that the privacy interests of a defendant who has not been convicted outweigh the state's interest in taking and analyzing the defendant's DNA. *In the Matter of the Welfare of: C.T.L., Juvenile*, 722 N.W.2d 484 (2006). This Minnesota case relates to a juvenile, but there is no indication in the opinion that the outcome would have been different for an adult.

This year, a U.S. district court upheld a federal law that requires a person who is arrested for a felony to provide a DNA sample as a condition of pre-trial release. See *U.S. v. Pool*, 2009 U.S. Dist. LEXIS 64149 (2009). The court in *Pool* stated that its ruling was limited to cases in which a judge or grand jury has determined that there is probable cause to believe that the person committed a felony. The court further noted that it was not addressing cases in which a person is required to provide DNA upon arrest for a felony and before a probable cause finding is made by a judge or grand jury. The court specifically disagreed with the Minnesota Court of Appeals decision in *In the Matter of the Welfare of: C.T.L., Juvenile*.

Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.wisconsin.gov