



March 12, 2009

The Honorable Richard H. Kyle
 c/o Magistrate Judge Boylan for filing under seal
 United States District Court Judge
 Federal Building, 316 North Robert Street
 St. Paul, MN 55101

Re: Philander Jenkins v. County of Hennepin *et al* (06-CV-3625 (RHK/AJB))

Dear Judge Kyle:

Philander Jenkins complained of a sexual assault in the Hennepin County Adult Detention Center in October 2003. It is his theory that there was a coordinated attempt to frustrate any ability to criminally charge the jailers. This included but was not limited to criminally charging Jenkins. Indeed, Plaintiff now has compelling evidence that the effort also included destruction of the most vital evidence in a rape case: DNA evidence that a jailer's pubic hair was found in Jenkins' underwear (the "questioned" hair) (Ex. 1).

Jenkins first learned of the "hair" evidence while he was in trial on the charges against *him*, in August 2006. Jenkins' team found it: it was *not* disclosed by the State. Jenkins had been *seeking* that evidence since before he was criminally charged. Indeed, as the TAC points out, it was when his attorney sought the physical evidence in order to prosecute a civil case, that Jenkins was criminally charged.

The state court judge held the evidence until Jenkins could get a preservation order from this Court. Of course, the only way to trigger the jurisdiction of this Court, was to file a Complaint, which Jenkins quickly did. His Complaint could then only *suggest* that the hair root was destroyed because it was exculpatory – because he had never had a process to pursue that theory. Then the Attorney General made a motion to modify the Federal Court preservation order, so that the State could *again* keep control of the evidence. The Magistrate Judge issued an order [Docket 77] that essentially allowed the Attorney General pursuing a possible criminal prosecution of the jailers, and Jenkins' civil attorney to "share" the questioned hair. The State retained possession and control of the hair, and its own investigation, during that timeframe.

Some time passed. Finally, in December 2008, Philander Jenkins obtained DNA test results via the Attorney General's office and the Washington County Attorney's Office. These records are compelling evidence that a pubic hair from one of the jailer-

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defendants in this case (Cuscaden) was found in the underwear of Philander Jenkins. Numerous rapists are spending time in prison over far less evidence. (Ex. 1-A*).

As Jenkins noted in his TAC ¶¶ 32-34, there were five black hair also found in his underwear. Yet BCA official, Knutson, ordered that the entire root of the questioned hair be destroyed, allegedly in order to rule out Jenkins as a source of the questioned hair. Again, Jenkins could only argue that this was improper. Now, the recent BCA reports are clear: only a microscope was needed to determine that the questioned hair did not come from Jenkins (Ex. 1-B*). It is now clear that Knudson ordered destruction of exculpatory evidence by destroying the root.¹

Jenkins now seeks guidance from this Court. Jenkins wants to amend his Complaint in this case.² However, because it is possible that the Defendants may claim that such an amended complaint would run afoul of this Court's Order on Rule 12 motions, to the extent necessary, Jenkins seeks this Court's express permission to file a motion to reconsider the Order at Docket 122. L.R. 7.1(g). Jenkins submits that this newly-discovered evidence equates to "compelling circumstances" entitling a review of the Rule 12 motions. Indeed, newly-discovered evidence is even sufficient to vacate a judgment. 11 Fed. Prac. & Proc. Civ.2d § 2808.

Jenkins hastens to add that he has been trying to obtain this evidence since December 2004. The State maintained possession of this evidence and it required an order of this Federal Court (following conclusion of the State proceedings) to allow Jenkins *any* access. Even then, the evidence was controlled by the State. Now, Jenkins finally has what he should have had at the beginning of this case. Jenkins submits that it was palpably unfair to require him to come forward at the beginning of this case, with allegations/evidence that he had been seeking, but could not yet obtain, *due to the actions of the County and State Defendants*. Jenkins also submits that he was essentially held to a summary judgment standard on Rule 12.

Because he cites to L.R. 7.1(g), Jenkins has limited this request to 2 pages. However, he will surely brief the issues should the Court desire or allow. The Second Amended Scheduling Order does provide sufficient time for motion practice and discovery on these issues. Jenkins seeks: 1) an indication from this Court that he may proceed with a motion to amend the complaint; or 2) express permission to file a motion to reconsider this Court's Rule 12 Order – if that is necessary before amending the TAC.

Sincerely,

Jill Clark

C: Opposing counsel (2); Client

¹ At that time, the only way for the BCA to test DNA of a hair was to use nuclear testing of the root. (TAC ¶¶32-34). Science then advanced, and by the time Jenkins sought the preservation order, it was possible to pursue mitochondrial DNA testing of the shaft of the hair.

² Jenkins deems this preferable to commencing a new case and moving to consolidate.



MINNESOTA DEPARTMENT OF PUBLIC SAFETY

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An ASCLD/LAB Accredited Laboratory

To: BCA St. Paul
1430 Maryland Avenue East
St. Paul, MN 55106

Lab No. S03-09549
Report No. 6

Attention: Brian Blanch

REPORT ON THE EXAMINATION OF PHYSICAL EVIDENCE

Mito-DNA 07/31/2008

Laboratory Number: S03-09549 Requesting Agency: BCA St. Paul
Section Reporting: Mito-DNA Agency Case Number: 2003404
Case Type: Criminal Sexual Conduct County: Hennepin

Principals: Philander Dermont Jenkins; Michael Cuscaden; Trent Jovanovich

Description of Submitted Evidence:

Table with 3 columns: Item, Type and Packaging, Description/Source. Contains 7 rows of evidence details.

EXHIBIT 1-A

Results of Laboratory Examination:

Mitochondrial DNA (mtDNA) sequencing* results were obtained from the unknown hair fragments (Items 2-7a through 2-7e) collected from Item 2. MtDNA sequencing results were also obtained from the known samples from Philander Dermont Jenkins (Item 5), Michael Cuscaden (Item 6A) and Trent Jovanovich (Item 7A).

The mtDNA sequences obtained from Item 2-6 (Bode Item #2M08-006-01) and Item 6A are the same. Therefore, Michael Cuscaden cannot be excluded as being a possible source of Item 2-6.

The mtDNA sequence obtained from Item 2-6 has been observed in the population groups as follows**:

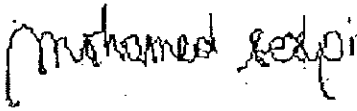
Table with 4 columns: Population group, Observations, Database size, Upper Limit Frequency %. Rows for African American, Caucasian, Hispanic.

The mtDNA sequences obtained from Items 2-6, 5 and 7A are all different. Therefore, Philander Dermont Jenkins and Trent Jovanovich are excluded as being the source of Item 2-6.

Items 2-7a through 2-7e cannot be excluded from originating from the same source.

The mtDNA sequence obtained from Items 2-7a through 2-7e, and the mtDNA sequences obtained from Items 5, 6A and 7A are different. Therefore, Philander Dermont Jenkins, Michael Cuscaden and Trent Jovanovich are excluded as being the source of Items 2-7a through 2-7e.

I hereby certify that the above report is true and accurate.



Mohamed Sedqi, Ph.D.
Forensic Scientist 3

* All sequence data generated is contained within the control region of the human mtDNA.

** The above search results encompass the three major population groups. Additional population group data is available upon request.

PLEASE NOTE: Mitochondrial DNA is maternally inherited. Therefore, individuals that share a maternal lineage will typically have the same mitochondrial DNA type.

Disposition of Evidence:

Evidence will be returned by delivery service.

Portions of pertinent evidence items have been removed and are being stored at the BCA Laboratory.

Distribution: BCA St. Paul - 2



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To: BCA St. Paul
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Lab No. S03-09549
Report No. 5

Attention: Brian Blanch

REPORT ON THE EXAMINATION OF PHYSICAL EVIDENCE

Trace 01/24/2008

Laboratory Number: S03-09549 Requesting Agency: BCA St. Paul
Section Reporting: Trace Agency Case Number: 2003404
Case Type: Criminal Sexual Conduct County: Hennepin

Principals: Philander Dermont Jenkins, Michael Cuscaden, Trent Jovanovich

Description of Submitted Evidence:

Table with 3 columns: Item, Type and Packaging, Description/Source. Contains items 2-6, 2-7, 6, 7, 9 with their respective descriptions and sources.

Results of Laboratory Examination:

Item 2-6 (said to be hair collected from Item 2) contained one Caucasian pubic hair that contained microscopic similarities and differences to the Item 6 combed pubic hairs (said to be from Michael Cuscaden). Therefore, no conclusion can be reached as to the source of this hair based on the Item 6 sample. This result may be affected by the small number of hairs in the Item 6 sample. This hair is suitable for mitochondrial DNA analysis.

The Item 2-6 hair is microscopically different from Item 7 (said to be combed pubic hairs from Trent Jovanovich). Therefore, these hairs can be excluded as coming from a common source based on the Item 7 sample.

The Item 2-6 Caucasian hair is microscopically different from the Item 9 known Negroid pubic hairs (said to be from Philander Dermont Jenkins). Therefore, these hairs can be excluded as coming from a common source based on the Item 9 sample.

Item 2-7 (said to be hairs collected from Item 2) contained three Negroid pubic hairs that are microscopically similar to Item 9. Therefore, these hairs could have originated from a common source. These hairs are suitable for mitochondrial DNA analysis.

EXHIBIT LB

Item 2-7 also contained two Negroid pubic hairs that contained microscopic similarities and differences to Item 9. Therefore no conclusion can be reached as to the source of these hairs based on the Item 9 sample. These hairs are suitable for mitochondrial DNA analysis.

The Item 2-7 hairs were microscopically dissimilar to the Item 6 and Item 7 samples. Therefore, these hairs can be excluded as coming from a common source based on these samples.

Combed pubic hair samples may be used as a known sample in absence of a pulled pubic hair sample. However, it must be noted that combed samples may contain hairs not belonging to the sample donor. Further comparisons can be done on the questioned hairs upon the collection of adequate known samples which contain 25 pulled pubic hairs.

The comparison of the microscopic characteristics in hairs does not constitute a basis for absolute personal identification. The probative value of hair comparisons may be affected by the results of mtDNA analysis.

I hereby certify that the above report is true and accurate.

Katherine Igowsky

Katherine Igowsky
Forensic Scientist

Disposition of Evidence:

Evidence will be held in the lab pending analysis.

Distribution: BCA St. Paul - 1