THE NEW AND IMPROVED VEGA
OR UNDERSTANDING WHAT VEGA REALLY MEANT POST CINCINNATI V ILG

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As noted in Joe Hada's article, Ohio OVI law recently changed forever. The OACDL and its members can take pride in leading the effort in effecting this change. That effort has, so far, culminated with the Ohio Supreme Court's decision in *Cincinnati v. Ilg*. [1] This was clearly a landmark decision. However, as Mr. Hada noted, this sea change in OVI law and procedure did not happen overnight or as the result of just one case.

> "*Vega* - You keep citing it but I don't think it means what you say it means." - Paraphrasing Inigo Montoya from the movie Princess Bride [2]

In *Ilg* the Ohio Supreme Court basically said that the view of "*State v Vega*." [3] repeated by prosecutors like a mantra for thirty plus years is flat out wrong. In this article we call this the "prosecutors' version of *Vega*" or "the old *Vega*" to distinguish it from the "true *Vega*" as applied by the *Ilg* Court, which some are also calling "the new *Vega*."

The City of Cincinnati banked on the court accepting without question this "prosecutors' version of *Vega*" as too many lower courts historically had done. Indeed, at oral argument counsel for the city told the court repeatedly "that's the law." Amusingly, when counsel could not defend her version of the law one of the justices responded, "Well it's a good thing we are in the Ohio Supreme Court where we make the case law."

Obviously it was a huge win for the defense when the Ohio Supreme Court, hardly a liberal, defense leaning body, rejected the prosecutors' traditional view of *Vega*. But it is perhaps more important to note that the *Ilg* Court was not the first or only court to do so; the *Ilg* trial judge also rejected it and a conservative appellate court was unanimous in backing the trial court. Even those decisions did not occur in a vacuum.

As discussed below, judges throughout Ohio, and the federal court in Columbus, have in the past few years reviewed and rejected the prosecutors' view of *Vega*. By and large these courts have recognized that the prosecutors' version of *Vega* is unconstitutional. Trial courts that don't recognize this are likely to find their rulings appealed and reversed. On the other hand, courts that embrace the "new *Vega*" will find that it is a fairer view of *Vega* and that allowing the accused to fully challenge breath test evidence is easy; treat it like any other piece of evidence.

In the short time since *Ilg* was decided the few trial courts that held trials involving breath test evidence have acknowledged that *Ilg* has changed their understanding of *Vega* and when they employed the new *Vega* the sky did not fall. Some examples of what these courts have permitted are included in the conclusion to this article.

The traditional "prosecutors' interpretation" of Vega is unconstitutional

The *Ilg* decision is good news for anyone who faces the nasty allegation of being a drunk driver and whose primary accuser is a machine that almost no one knows anything about other than it is permitted to make such accusations because the Ohio Department of Health (ODH) has blessed it. Prior to *Ilg* the fact that the ODH gave that blessing was interpreted by prosecutors, and entirely too many courts, to mean that an accused citizen cannot question or challenge the scientific accuracy of a breath test results or the scientific reliability of the machine that was used to conduct the test. Prosecutors also asserted that the only relevant issue was whether the government followed the ODH rules in conducting the test and maintaining the machine.

According to the prosecutors' traditional view version of *Vega* neither the judge nor jury could consider anything else and thus counsel for the City of Cincinnati in her brief and at oral argument asserted that the following "is the law in the state of Ohio." [4]

> *State v. Vega* prohibits defendants in OVI cases from making attacks on the reliability of breath testing instruments, thus a defendant cannot compel any party to produce information that is to be used for the purpose of attacking the reliability of the breath testing instrument.

The Ohio Supreme Court's response can be summarized very briefly as – wrong. Moreover specifically the Court held, in ¶29 and in its conclusion at ¶31[5], that the mere fact that the ODH blessed the machine and the police

1 Cincinnati v. Ilg, Slip Opinion, No. 2014-Ohio-4258

2 The actual quote is "You keep using that word. I do not think it means what you think it means. "

3 State v. Vega (1984), 12 Ohio St.3d 185.

4 This led to a several very humorous exchanges with the justices. The oral arguments available on the Ohio Supreme Court website are worth watching for these exchanges alone.

5 The full paragraph reads, "Relying on this delegation of authority, State v. Vega, 12 Ohio St.3d 185, 465 N.E.2d 1303, precluded an accused from presenting expert testimony to attack the general scientific reliability of breath-alcohol tests conducted in accordance with methods approved by the director of the Ohio Department of Health. However, the approval of a breath-analyzer machine by the director of the Ohio Department of Health as a device to test breath-alcohol concentration does not preclude an accused from challenging the accuracy, competence, admissibility, relevance, authenticity, or credibility of specific test results or whether the specific machine used to test the accused operated properly at the time of the test."

followed the ODH rules does not preclude an accused from challenging the specific tests results at issue in a pending case on matters relating to:

- accuracy
- competence
- admissibility [6]
- relevance
- authenticity or
- credibility

Thus *Cincinnati v Ilg* does represent a sea change in Ohio DUI jurisprudence; the "prosecutors' traditional interpretation" of *Vega* has to be considered to be a dead letter. Moreover, while the *Ilg* Court reaffirmed *Vega*'s prohibition against attacking the "general scientific reliability of breath-alcohol tests,"[7] as discussed below, courts throughout Ohio have been reexamining *Vega* and many have concluded that this phrase has been misinterpreted and, indeed, this misinterpretation is where those who followed the prosecutors' version of *Vega* fell off the boat.

This is important in understanding what *Ilg* means as the Ohio Supreme Court was well aware that the lower courts had been questioning the old view of *Vega*, indeed, many of these decisions were fully discussed in the briefs. The Amicus brief filed by the National College for DUI Defense also included summaries of case law supplied by NCDD members from across nation, thus the *Ilg* Court well aware that accepting the prosecutors' version of *Vega* would place Ohio not only outside the mainstream but in a world of its own.

Thankfully, the *Ilg* Court rejected that view -which unfortunately many lower courts have historically followed- and Ohio has now rejoined the rest of the country. Ohio practitioners and courts, searching for guidance on how to apply this new *Vega* would be well advised to, similarly, look to sister states to see what a DUI breath test trial looks like when the defense and the court are not saddled with "old *Vega*."

Ohio courts' rejection of "old Vega" was an evolution not a revolution

As noted at the outset, while the Ohio Supreme Court clearly rejected the prosecutors' traditional view of *Vega*, it was not remotely the first Ohio court to do so. Thus while *Ilg* represents a sea change, to view *Ilg* in a vacuum would understate the magnitude of the change that has occurred in Ohio OVI jurisprudence in the last few years.[8] It would also fail to give credit to the numerous judges across Ohio who had, similarly, questioned and rejected the prosecutors' view of *Vega*.

Perhaps the first judge in Ohio to question the interpretation of *Vega* that has long been trotted out by prosecutors for years was Judge William Grim in State v Gerome [9] the first case where the defense really took on the Intoxilyzer 8000 and the prosecution sought to prevent any such attacks by citing *Vega*. One of the preliminary issues in Gerome was whether the trial court had the authority to consider the reliability of the Intoxilyzer 8000 and, as "gatekeeper," bar the results if it found them to be unreliable. The prosecution argued that *Vega* prohibited trial courts from acting as "gatekeepers" stating the "admissibility of the breath test results turn on substantial compliance with ODH regulation, not compliance with the Constitution." [10]

Judge Grim pointed out that RC 4511.19 itself undermines this assertion as it provides that upon proof of compliance with the ODH regulations the "court may admit" the results. [11] Judge Grim's decision considered relevant case law from Marbury v Madison [12] to State v *Vega* to State v French. [13]

Ultimately, Judge Grim, like the *Ilg* Court, held that the prosecutors' view of *Vega* was contrary to both the statutory language and the Ohio Constitution. Judge Grim did opine that *Vega* should be "reexamined and clarified" in regard to the above issues. However, those issues were not squarely, or even remotely, before the *Ilg* Court.

It would seem unwise and a disservice to the Ohio Supreme Court to assume that it decided these important constitutional issues by virtue of snippets we can pull from *Ilg*. Thus although we mention in footnote 6 the inclusion of "reliability" and "admissibility" in the *Ilg* Court's discussion of permissible uses of the COBRA, data it seems prudent to leave for another day and the proper case conclusions as to how the Ohio Supreme Court may address the question of whether a trial court can exclude test results it deems to be completely unreliable or, alternatively, must allow such results to be admitted at trial no matter how unreliable the trial court deems the results. (However, see also the discussion of State v Jimenez below.)

The prosecutors' traditional view of *Vega* was also reviewed in State v Lancaster [14] another major Intoxilyzer 8000 reliability challenge. In Lancaster the court took direct aim at this view stating:

> "Because this Court is bound to apply the rule of Vega as articulated by the Vega court itself, and not the ostensible or purported rule of Vega, a close reading of Vega is appropriate, and indeed required."

The court then went on to point out how the prosecutors' view of *Vega* missed the crux of the *Vega* decision.

> "When the trial court stated that Mr. Vega's expert witness would have testified as to the general reliability of the intoxilyzer, did it mean the general reliability of the particular model of alcohol concentration testing instrument used in the case, or the reliability of alcohol concentration instruments in general? That is, did Mr. Vega's expert intend to attack the reliability of alcohol concentration testing, conceptually, in terms of whether methods of chemical analysis may be implemented, in theory, to scientifically and reliably measure the alcohol content of a given sample of

STORY CONTINUED...

6 Because Ilg was a battle over discovery the Court did not address the question of what Mr. Ilg would be permitted to use the information for, however, given that the Court included "accuracy," "credibility and "admissibility" in its list of challenges that apply notwithstanding the delegation of authority to the ODH, it seems that both pretrial and trial challenges would be available to Mr. Ilg. Thus, even though the issue was not remotely before the Ilg Court, the "gatekeeping" role asserted by numerous judges in excluding specific Intoxilyzer 8000 test results by virtue of a defense showing of unreliability would seem to be consistent with the Ilg decision.

7 Ilg at ¶ 2.

8 This is not meant to undervalue the incredible work done by Steve Adams and Margie Slagle in Ilg, without their practically extra-human efforts, particularly in making concrete solid record, the sea change may never have come to fruition.

9 State v Nicole Gerome, Athens County Municipal Court Case No. 11TRC01909, decided June 29, 2011

10 Gerome "Decision and Journal Entry" dated 5-21-2011 quoting page 5 of the State's Motion in Limine.

11 Id.

12 Marbury v. Madison (1803), 1 Cranch (5 U.S.) 137, at 155.

13 State v. French, 72 Ohio St. 3d 446, 650 N.E.2d 887, 1995 Ohio 32 (1995).

14 State v Chelsea Lancaster, Marietta Municipal Court Case No. 12 TRC 1615, decided August 14, 2014.

bodily substance? Resolution of this ambiguity is critical to an accurate understanding of Vega because, today, courts regularly distinguish between the general concept of breath testing and specific breath testing instruments such as the BAC DataMaster, the Intoxilyzer 5000, and the Intoxilyzer 8000."

The nuances of the Ohio Supreme Court's opinion in Vega ultimately reveal that when the court characterized the issue presented as "whether an accused may use expert testimony to attack the general reliability of intoxilyzers as valid, reliable testing machines," the court was referring to the latter interpretation articulated above, that is, whether an accused may attack the reliability of testing for alcohol concentration in a bodily substance as a general, conceptual and scientific matter. Vega, 12 Ohio St.3d at 186.

The Lancaster interpretation of *Vega* seems very much in accord with the decision and resolution in *Ilg*. It should be noted that like *Ilg*, the Lancaster decision relied heavily on State v French[15]. Indeed, Lancaster pointed to the discussion of *Vega* in French, as did *Ilg*, in holding that the results of the specific intoxilyzer 8000 could be excluded through the court's gatekeeper function. Ultimately Lancaster held that *Vega*, per French, permits challenges to "admissibility" notwithstanding the delegation of authority to the ODH.

Similarly, numerous judges in northeastern Ohio, in the area covered by the Eleventh District Court of Appeals, have also question the prosecutors' traditional interpretation of *Vega*, as have various members of that appellate court. In Lancaster cases representing the majority view of Eleventh District appellate panels were discussed and Judge Liston, who authored Lancaster, borrowed from those cases in her decision excluding the test results.

While the number of recent Ohio trial court decisions where *Vega* has been considered is too large to touch upon them all, a few more unique Ohio decisions bear mention. In a case involving a DataMaster, not an intoxilyzer 8000, the Sixth District Court of Appeals rejected the prosecutors' version of *Vega* in upholding a trial court's suppression of test results it found to be unreliable notwithstanding that "there is no dispute that the state complied with the directives of the department of health in its conduct of the breath test and in the procedures promulgated to assure the accuracy of the test." in State v. Jimenez[16] the court held:

> "As to whether a suppression hearing is an appropriate forum to rebut the rebuttable presumption [discussed in Vega] we believe it is. The purpose of a pretrial hearing is to resolve evidentiary issues without recourse to a general trial, Crim.R. 12(C)(3), and the reliability of a chemical alcohol test is such an issue. Kretz, 60 Ohio St.3d at 4, 573 N.E.2d 32. Moreover, since the issue of whether a defendant has successfully rebutted the statutory presumptions is a question of fact, Vega, 12 Ohio St.3d at 189, 465 N.E.2d 1303, it is matter that may be resolved in a suppression hearing. [17]

The prosecution attempted to overturn this decision via review by the Ohio Supreme Court but the court declined cert even as it was considering *Ilg*[18]. In City of Parma v. Adam Malinowski, Parma Municipal Court No. 12TRC 03580, decided June 2013, the trial court went so far as to hold that "it is clear that *Vega* is no longer good law." On unrelated issues the accused appealed the trial court's denial of his suppression motion. On appeal the Ohio Municipal League, on behalf of municipal court prosecutors, filed an amicus brief and asked the court of appeals to review the trial court's ruling re *Vega*. The Court of Appeals declined to do so.

Federal court holds prosecutors' version of Vega violates the Confrontation Clause

In Knapke v. Hummer[19] the federal judiciary recently weighed in on and rejected the prosecutors' traditional interpretation of *Vega*. In Knapke, a case originating in Franklin County Municipal Court, the accused took a breath test on a DataMaster breath-analyzer machine. At trial the state put the breath test evidence through on the testing officer. On cross-examination of that officer Knapke's counsel attempted to ask one question which drew an objection. That question was, "why didn't you run a diagnostic test when you tested Ms. Knapke?" [20]

Following a *Vega* objection by the prosecution the trial court demanded to know why counsel wanted to ask that question. Counsel candidly admitted that he wanted to argue in closing that the Trooper should have done a diagnostic test if he wanted the jury to rely on the breath test results.

The trial court sustained the *Vega* objection and Knapke pursued appeals through the Tenth District Court of Appeals, which affirmed the trial court, and ultimately brought a habeas corpus action in the Federal District Court, Southern District of Ohio. In the federal court Knapke argued that the trial court's ruling violated her confrontation rights under the Sixth Amendment and argued that *Vega* (as interpreted by the prosecution and trial court) was unconstitutional.

The Federal District Court sided with Knapke on the Confrontation Clause issue and thus reversed the state courts and ordered a new trial. The Court declined to find *Vega* to be unconstitutional particularly because it would "necessarily have this Court decide a matter of constitutional magnitude that will result in no more relief to the Petitioner…" The Court also felt constrained by the holding in a previous habeas appeal involving *Vega*, Miskel v Karnes. [21]

However the court distinguished the traditional prosecutors' interpretation of *Vega* that was applied in Knapke, which it found did

15 State v French supra.
16 State v. Jimenez, 2013-Ohio-5469.
17 State v. Jimenez, Id, at ¶ 21.
18 State v. Jimenez, cert denied, 2014 Ohio 2021 (2014).
19 Knapke v. Hummer, S.D. Ohio No. 2:10cv485, 2013 U.S. Dist. LEXIS 21334 (Feb. 15, 2013.)
20 Police agencies can have the machine run a diagnostic self-check when performing either a subject test or a weekly Instrument Check. This step is completely optional and is not required by the ODH rules.
21 Miskel v. Karnes, 397 F. 3d 446 (6th Cir. 2005.)

violate the Constitution, with the Miskel Court's interpretation and application of *Vega*:

> "Unlike the trial court in Miskel the trial court in this case prohibited Petitioner from attacking the accuracy or reliability of the specific BAC Verifier used to measure her blood-alcohol content on the date and time in question." Cf. Miskel … 452-453 (trial court permitted cross examination on 'whether the specific machine used to test Petitioner functioned properly and reliably during the particular test in question…"

Thus in reversing Ms. Knapke's conviction and the trial court's ruling in Knapke, the federal Court rejected the prosecutions' interpretation of *Vega* in favor of one where the accused can fully challenge the particular machine and particular test in question. Moreover, it held the later was constitutionally mandated.

Conclusion

Cincinnati v *Ilg* was a landmark decision. In it the Ohio Supreme Court clearly rejected the traditional prosecutors' version of State v *Vega*. This should not be totally shocking as many lower court judges have long viewed the "old view" of *Vega* to be unfair, nonsensical and unconstitutional – yet felt bound to accept and apply that version of *Vega*. Some judges shared this opinion in private, some in public and others derided old *Vega*'s "false promises" in written decisions. [22]

At the same time other lower courts, when given an opportunity (generally in the context of intoxilyzer 8000 litigation), reexamined the old version of *Vega* and found it was not supported by *Vega* itself much less later decisions such as State v French, supra. These courts found that the "old" or "traditional" interpretation of *Vega* violated the constitution; as did the federal court in Knapke v Hummer, supra.

Trial courts are now not only free to allow the accused to vigorously challenge the accuracy of his BAC test; they are required to allow it. Moreover, courts are not finding that to be as difficult a transition as they might have presumed.

In just one week recently Dr. Al Staubus appeared as an expert in two trials in Cincinnati. In one case he was permitted to testify fully about how an accused's workplace exposure to certain volatile contaminants could affect the results produced by a DataMaster cdm breath testing device resulting in a finding of Not Guilty at a bench trial. In another the judge overruled the State's motion in limine and permitted Dr. Staubus to testify as to how reflux could affect the results from another DataMaster breath testing device and held that Dr. Staubus would be permitted to testify about dual testing (which was not done) versus taking a single test and similar matters not required under the ODH rules. In Franklin County as this article is going to the publisher, Judge Ted Barrows is starting a trial where he announced that he would allow the accused to fully challenge the weight and credibility of his DataMaster breath test including permitting all prior maintenance and repair records to be used for that purpose.

As we move forward trials and rulings such as these should become common place. At the same time, as noted above, pretrial challenges to the accuracy and reliability of any intoxilyzer 8000 breath testing device used to test an accused's breath sample should continue and be guided by the analysis in *Lancaster*, infra, which is completely in accord with *Ilg*. However, now, in mounting such challenges, the accused should be permitted to obtain all relevant information including but not limited to the COBRA information addressed *Ilg*.

Those involved in such challenges should take note that Florida, which preceded us in identifying major problems with these devices, continues to lead us in this litigation. On September 22, 2014 an en banc panel in Florida's Ninth Judicial District after weeks of testimony held that intoxilyzer 8000 "source code" and prior versions of the software are relevant and material to the defense and due process requires that they be produced or the results be excluded. See Florida v Lance Conley, Case No. 48-2012-CT-000017-A/A.

The "new *Vega*" should finally provide those accused of DUI in Ohio the opportunity to fully question and challenge the reliability, credibility and admissibility of results of his test just as those accused in all other states have been able to do for years. Welcome to America Ohio!

-D. Timothy (Tim) Huey has spent thirty (30) years defending accused citizens generally focusing on OVI and vehicular homicide cases. He has argued numerous times in the Ohio Supreme Court, most recently on behalf of the National College for DUI Defense (NCDD) working with the OACDL in Cincinnati v. ILG. His professional memberships and activities include the OACDL: President 2012; DUI Seminar Committee Chair 2004-2015. The OSBA: frequent seminar speaker. The CBA: frequent seminar speaker. The National College for DUI Defense: Teaching Faculty 2013-16; Sustaining Member; Ohio Delegate 2006-2012. NACDL: Life Member. DUI Defense Lawyers Association: Charter Member and Trustee for the DUIDLA Justice Foundation. Mr. Huey has given presentations on legal topics in Oklahoma, Georgia, Texas, Wyoming, Florida, Arkansas, Arizona, Louisiana, Colorado and Maryland.

22 In an unpublished decision involving a pretrial ruling on trial challenges to a DataMaster Judge Ann Taylor not long ago opined that (the old) Vega made a "false promise to the defendant that he may vigorously challenge the accuracy of his BAC test at trial" and that it "undermines the defendant's confrontational rights and his guarantee of a vigorous defense." None the less Judge Taylor felt constrained by Vega and held, "It is, therefore sadly the case that this court concludes that the defendant, at trial, may offer expert testimony only to show that something went wrong with his particular test, such as a machine malfunction or operator error." Columbus v DiDomenico, Franklin County Municipal Court Case No. 2012 TRC 195838, decision rendered May 12, 2013.