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The OACDL challenges the Intoxilyzer 8000 and the Department of Health Responds. Is this what they mean by *Putting Lipstick on a Pig*?

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The Ohio Director of Health (DOH) heads the Ohio Department of Health (ODH) and is charged with protecting and improving the health of all Ohioans and, for some reason, also approves satisfactory techniques or methods for analyzing a person's breath for the purposes of OVI prosecutions.[1] The DOH must have "significant experience in the public health profession"[2] but none in forensic breath testing. Therefore, traditionally, he has appointed someone with a scientific background to serve as Chief of the Bureau of Alcohol and Drug Testing (BADT).[3]

The BADT Chief, in reality, discharges the Director's duty of approving testing methods which are scientifically "satisfactory" enough to be given the unique statutory blessing contained in RC § 4511.19. This blessing is seen as making the results almost irrefutable and thus ODH blessed results can damn an accused citizen with a criminal conviction that will stay with him for life.[4] The BADT Chief [5] has also traditionally provided expert testimony related to the methods and procedures through which the ODH purports to ensure that the results of such testing are accurate and reliable.

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Mr. Huey is currently the OACDL President, served many years as DUI Committee Co-Chairman and is the Ohio Delegate to the National College for DUI Defense. He and other OACDL members took on the Intoxilyzer 8000 in *State v Gerome*, discussed in this article, and continue to be at the forefront of litigation regarding this machine.

Mr. Huey thanks Attorney Ashley Lawson, who is of counsel to the Huey Defense Firm, for her help with this article.

[1] See RC 3710.143 which also charges the DOH with ascertaining the qualifications necessary to conduct such analyses, and issuing permits the qualified individuals.
[2] See RC 121.10.
[3] This is now called Alcohol and Drug Testing Program, rather than Bureau.
[4] This responsibility is found 3701.143; the gravamen of the Director's approval can only be understood if one acknowledges that the legislatively created shortcut to admissibility, found in RC 4511.19, gives the testing blessed by the DOH unique, preferential status that is otherwise unheard under the laws of evidence or science.
[5] The Chief is now called the "Program Director" but nothing else has changed.

On January 8th, 2009 the DOH formally amended Ohio Admin. Code § 3701.53 and approved the Intoxilyzer 8000 breath testing device. "Approved" is different from "decided the Intoxilyzer 8000 would be only breath machine police can use in Ohio." The amendment did not do that. Nowhere in our statutes or the OAC is that endgame memorialized. But that was clearly someone's plan; bring in CMI's new machine and force out all other instruments and manufacturers.

Ironically, this year CMI has started promoting a new improved machine; the Intoxilyzer 9000. So much for Ohio's new machine being "state of the art."

Who Really Decided that the 8000 should be Ohio's Only Breath Testing Machine?

When the Intoxilyzer 8000 was approved, Dean Ward was the Chief of the BADT. Mr. Ward, a former police officer [6] became the BADT Chief in 2000. All his predecessors had at least a bachelor's degree in one of the sciences; his immediate predecessor had a PhD. in Toxicology and years of lab experience. Ward did not have a scientific background. His successor is a former prosecuting attorney whose training came from Mr. Ward or "on the job."

On September 30th, 2002, Mr. Ward approved a different version of the Intoxilyzer 8000 (model OH-2) for use in boating under the influence enforcement.[7] Some saw this as a harbinger of things to come. In 2005, Ward pursued a NHTSA grant to purchase new machines and led a work group that looked at various devices. Later, Ward and another ODH staff member took on the responsibility of drawing up the specifications for a new breath testing machine to "upgrade" Ohio's OVI enforcement. The main specification — portability.[8] By coincidence, the Intoxilyzer 8000 has a handle and was, literally, the only available device that could meet the specifications drawn up by Ward without major modifications.

[6] Dean Ward, a Kentucky native, was a Cincinnati Police Officer from 1976 to 2000. During this time he trained officers on how to use alcohol breath-testing equipment from CMI, Inc.

[7] We were told the ODH would monitor and evaluate the performance of the machines purchased for the Ohio Department of Natural Resources but if that occurred no data or report has been released.

[8] In addition Ward 's specifications required that the instrument use an infrared analyzer and not use or incorporate a fuel analyzer (eliminating a number of manufacturers) and that it have both an attached, full size printer and an attached dry gas canister. These two items add substantial weight to the allegedly "portable" Ohio version of the Intoxilyzer 8000.

The Intoxilyzer 8000 is manufactured by CMI, Inc. of Owensboro, Kentucky. Ward and CMI President Toby Hall were friends, reportedly as far back as their college.[9] Their working relationship dates back to 1976. Dean Ward is now an employee of CMI.[10] It is also rumored that the ODH employee who helped with bid specifications has recently been hired by CMI as well. Both Ward and CMI are beyond the Ohio Courts' subpoena power. When Ward's employment relationship with CMI began is uncertain. Media inquiries for details have gotten no response. CMI is not subject to public records requests.

As noted, the Intoxilyzer 8000 was formally approved via an OAC rule change. All proposed rules are to be submitted for a public hearing and presumably the DOH is to consider public input before a final decision on a new rule. However, prior to the approval hearing a contract was signed with CMI and a request was submitted to the Controlling Board for 6.4 million dollars to purchase 700 Intoxilyzer 8000s. Controversy and litigation over the 8000 in other states led to packed hearing room. Many present formally opposed the rule change, including a representative for the Ohio Municipal Judge's Association.

At the hearing an attorney for CMI testified, foreshadowing the ODH's current position, saying Ohio did not have to worry about litigation over the reliability because, he said, the Ohio Supreme Court has ruled "it is not up to the Courts."[11] Afterwards Joshua Engel, Chief Legal Counsel for the ODPS predicted; "we will not see any lawsuits … the Ohio Supreme Court established … that the accuracy of drunken driving testing machines could not be brought up as a defense."[12]

These gurus were obviously wrong. The OACDL[13] and others predicted the litigation that has ensued. Nevertheless, they had already missed a deadline to spend the NHTSA grant money[14] and the Director approved the rule change.[15] The Intoxilyzer 8000 was, seemingly, on the fast track to becoming Ohio's only breath testing device.

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[9] NBC4 news 11-14-2011. http://www2.ohio-votes.com/news/2011/nov/14/8/only-nbc4-intoxilyzer-8000-purchase-questioned-ar-828733/.
[10] Id.
[11] Counsel for CMI testifying at the Ohio Department of Health hearing November 25th, 2008.
[12] *State Reverses $6.4 Million Purchase Order For Controversial Drunken-Driving Testing Machine* The Plain Dealer, 12-1-2008.
[13] This author testified at the hearing as OACDL DUI Committee Chairman.
[14] Id.

Did Ohio really need new machines? Should Agencies be Required to throw out their DataMasters?

Up until 2009 ODH approval was potentially open to any manufacturer of breath testing equipment. Approved machines would then be listed in the OAC, and law enforcement would have its choice of alcohol breath testing machines. The ODH, up until Ward's tenure, was not in the business of anointing or promoting any particular device or manufacturer. That obviously changed.

At the time the Intoxilyzer 8000 was approved, all breath machines in Ohio were individually owned by the police agency who owned the facility where they were located.[16] These agencies could choose which any instrument on the ODH "approved" list, which included 3 Intoxilyzer 5000 models and 3 BAC DataMaster models. Approximately ninety percent (90%) of the machines in use in Ohio at the time were DataMasters, manufactured by NPAS in Mansfield, Ohio.

If law enforcement or prosecutors were unhappy with these machines it was a well-kept secret. Ohio's DataMasters have historically been very sturdy machines, commonly in service for fifteen or more years requiring little maintenance and few repairs. 1n 2009 few if any were at the end of their life cycle, thus few agencies needed new machines.

However, the plan was that every single agency across Ohio would have an Intoxilyzer 8000 – like it or not. Again, there is no law or regulation that says an agency must throw out its DataMaster and start using an 8000. But, as it will be revealed below, the ODH had a multipronged plan for accomplishing that goal.

Was the 8000 really the best choice?

In 2009 when Ohio hitched its wagon to the Intoxilyzer 8000, NPAS was offering the new DataMaster DMT; an Ohio made device that is much lighter, more portable and more advanced instrument. It includes many features not available on the Intoxilyzer

[15] In the last issue on the Vindicator Jon Saia's article "The Intoxilyzer 8000 Breath Alcohol Testing Instrument" provided other details about how Ohio got saddled with 730 Intoxilyzer 8000 devices at a cost of approximately $9,100.00 per machine and the problems known to the ODH before approving the machine.

[16] A few local departments allowed the OSHP to maintain machines at their locations.

8000. One advanced feature is the use of a Windows™ based software package that allows reporting of a large amount of details about the test.[17]

While all the DMT's advantages cannot be listed here, it is important to note that in ***State v Gerome***,[18] which will be discussed later herein, CMI's chief engineer admitted that CMI made no efforts to improve its instruments ability to identify samples contaminated by extraneous alcohol, an issue that the DMT tries to better address with its graphical display of the alcohol profile. The graph also tries to deal with possible breath flow issues, which, per ***Gerome***, plague the Intoxilyzer 8000.

For the above reasons alone, and there are others, the DMT would seemingly be a device many Ohio agencies might want to use but the ODH decided they cannot.

Selling the 8000 in Ohio; Propaganda, Incentives and Coercion

Since 90% of Ohio law enforcement agencies were using and happy with DataMasters how could the ODH and its allies hope to get them to throw out perfectly good machines and start using machines they weren't sold on? The plan was to engage in a public relations campaign aimed primarily at police agencies, judges and prosecutors and follow that with incentives and a lot of coercion. Ultimately, the plan was to eliminate any choice.

The old bait and switch

The PR campaign began long before 2009. Dean Ward and his minions travelled far and wide touting the Intoxilyzer 8000, claiming that it and new rules would make the process more fair and transparent. Ironically, the primary benefits being touted, such as dual testing and online data reporting, could be employed using the **old** DataMasters. The promised benefits included the following:

1. An **Online Records Portal** where all tests, and all details about all tests, repairs, maintenance, certifications and other important information could be found. Defense lawyers were told "you won't have to fight to get all the records anymore."

[17] The new Intoxilyzer 9000 added this feature but to get it and other advances Ohio would have to throw out the 8000s and buy 9000s.
[18] Citations infra.

2. **New Breath Testing Rules** to include and mandate a modern testing protocol encompassing dual testing, a requirement there be a .02 agreement between tests to have a valid test and admissible test and an external standard run before and after each test.
3. **The Best Device Money Can Buy** or at least a breath testing machine that is more accurate and more reliable than models we were already using.

What we got

The idea of an online data portal was an improvement over previous practices of paper records kept, or discarded, by an officer with a vested interest in not documenting errors with subject tests or failed instrument checks. Additionally, as seen in the cases discussed below, the online portal provided more information about the test than the reports printed out by the machines –and, as it turns out, more information than the ODH wants you to have!

The online portal and **the promise of transparency is dead**. This article has been revised several times trying to keep up with changes to ODH's online data practices and policies. No further revisions are necessary. The ODH has advised that as of July 31st, 2012 the online database will be no more; merely the latest gambit aimed at preventing the accused from having access to useful data.

The ODH claims we can get the information by asking them for it, however, the ODH already has a Paul Bunyanesque public records log jam due to its prior actions. [19] The real question is; if the data can be provided online and there is no problem with the defense having it, then why make a change that will cost huge amounts of manpower hours and untold dollars in paper and postage? The ODH and DPS may not care but this log jam will be felt most heavily in our courts. When it does, **judges should be outraged**.

As to the promised "new rules", the ODH has failed to actually enact any real rules govern subject testing procedures. The only rule is "follow the prompts on the machine." The machine's software program and thus "the rules" been changed numerous times

[19] This author sent a very simple Public Records request on 5-23-2012 and on 6-20-2012 got, not the materials but, an "acknowledgment of receipt" that mentioned they were experiencing "a large volume of public records requests." Did they not expect that; how do they plan to address it?

since 2009. Moreover, the ODH's toxicologist has testified that an Intoxilyzer 8000 test reported as "invalid" was reliable,[20] and thus their own requirements don't mean anything.

Incentives—Everything is "Free"

To get agencies to switch to the Intoxilyzer 8000 the machines are currently provided free of charge and agencies were told that ODH would maintain the machines for free.[21] Most importantly, the online record keeping system was supposed to eliminate the need for local agencies to maintain its records for three (3) years as required by the OAC. This would free up manpower considerably as there would be no need for Senior Operators[22] to do weekly instrument checks or to serve as record keepers and thus only the officer who conducted the subject test would, ever, need to appear in court.

Unbeknownst to most courts and police agencies, probably as a result of some bizarre test results found online in the ***Gerome*** case, the ODH later decided that the online records were not the actual official records and the agencies and officers are supposed to be maintaining all those records locally. This was clearly not the original plan as there is certainly nothing in the Intoxilyzer 8000 training (or manual) about local record keeping.

Coercion

The plan; phase out the BAC DataMaster by phasing out DataMaster Operators and/or their ability to use the machines. This was to be achieved by:

1) Writing a rule that says once an officer has an Intoxilyzer 8000 "Access Card" he/she can't use other machines, e.g. DataMasters. This is clear the import and purpose of OAC section 3701-53-09 (D). However, because of the rulings discussed later herein, use of the 8000 is "on again off again" in many places. When officers who have access cards want to go back to DataMasters 3701-53-09 (D) should cause major problems for them. Only few courts have, so far,

[20] See ***State v Kitzler*** infra.
[21] Given numerous other changes one wonders when the ODH will start charging agencies for maintenance or even rental.
[22] The Senior Operator designation does not exist with the Intoxilyzers 8000.

enforced the rule as written,[23] others have opined that "it wouldn't make sense." Perhaps it would make sense if one understands that the rule was part of the plan to **force** agencies to completely switch to the Intoxilyzer 8000.

2) Offering less or no DataMaster training classes and recertification testing. However, due to great clamor by officers and agencies, recertification testing for DataMasters was extended through June 2012.
3) Not approving any additional "Instrument check solutions. Many instrument check solutions expire in July. It remains to be seen whether the ODH will succumb to pressure and approve new batches of solution for use with DataMasters; they have different batches for their 8000s.

Note: the Ohio Highway Patrol, one would think, should have immediately embraced the Intoxilyzer 8000 since, the way things were arranged, the Ohio Highway Patrol, Ohio Department of Public Safety (DPS) own all 700 Intoxilyzer 8000s. [24] But still there is division in the OSP ranks over whether to use the Intoxilyzer 8000. Troopers still seem to prefer the DataMaster when given a choice.

Challenges to the Intoxilyzer 8000

The full implementation of the Intoxilyzer 8000 in Ohio has not happened as planned. In many places it has been an "on again, off again" process. Others, such as Franklin County, have yet to see an Intoxilyzer 8000. Ironically, at the present time, the Intoxilyzer 8000 can hardly be considered "state of the art" at all as CMI is now promoting and selling a new machine – the Intoxilyzer 9000. Thus, before its ensconced in Ohio the Intoxilyzer 8000 is on its way to obsolescence.

Successful challenges by the defense bar, and in particular, members of the OACDL, have revealed a number of issues with Ohio's Intoxilyzer 8000 and the ODH's selection and implementation of the device. To each new issue the response by the ODH has been the equivalent to putting lipstick on a pig; although they have tried hiding and renaming the pig as well. In short, the ODH has sought to eliminate Intoxilyzer 8000 problems by pretending they don't exist, eliminating the defense's access to evidence,

[23] One example of a court that did enforce the rules as written is ***State v Castle,*** Franklin County Municipal Court Case No. 2011 TRC 145779.
[24] As local police chiefs and sheriffs rarely in favor of ceding local ownership or control of anything, it is likely they didn't know this was the plan until it was too late to object.

and by asserting that the ODH, not the courts, get to decide if a problem is really a problem.

The successful challenges and/or potential challenges to the Intoxilyzer 8000 generally fall into four categories.

1. Challenges to the basic reliability of the Intoxilyzer 8000 itself;
2. Challenges to the reliability of specific test results;
3. Challenges based upon lack of proof of compliance with ODH rules, and;
4. Challenges to the adequacy and/or existence of any rules.

The purpose of the remainder of this article is to inform readers, particularly practitioners, how the Intoxilyzer 8000 and/or specific results have been successfully challenged.

1. Challenges to the basic reliability of the Intoxilyzer 8000 itself

Obviously the big issue with any novel testing process or device is whether it is accurate and reliable enough to be admitted into evidence. If so, and it's a breath test in Ohio, there is a subsequent question: should the jury be precluded from hearing about limitations and vulnerabilities associated with the device that may cause them to question the accuracy and reliability of the results in a particular case?

Interestingly, most of the challenges so far have, in part, involved an interpretation of ***State v Vega*** (1984), 12 Ohio St.3d 185 and the prosecution's well-worn mantra: "you can't challenge the machine." This strategy has not been very successful; many, many courts have rejected the assertion that this 28 year old case prevents them from considering possible deficiencies and vulnerabilities related to the Intoxilyzer 8000. While admissibility has primarily be at issue, if judges find these issues import, perhaps they will they follow Judge Grim's lead and hold that juries should also be able to consider such evidence.[25]

[25] As the court noted in the Gerome case discussed herein; "This Court has learned much about the Intoxilyzer 8000 through these hearing. Counsel are commended for their thorough presentation of relevent evidence necessary for an informed decision. This is the design of our adversarioal sytem. It would have been unfair to consider only the defense evidence or only the prosecution evidence… yet it is the State of Ohio's position that the trier of fact at trial should only hear the prosecution evidence regarding the evidential breath test and not the the defense attempts to diminish the weight to be given that evidence." *Gerome*, cited infra, at pg. 25.

The first 8000s were placed into service in Clermont County in 2009. At about the same time, a prosecutor was hired by the DPS as a "Traffic Safety Resource Prosecutor," (TSRP) primarily to help prosecute Intoxilyzer 8000 cases and to train other prosecutors on how to do so. The TSRP also traveled with Dean Ward, the then ODH BADT Chief, and current employee of CMI, Inc., promoting the 8000. The TSRP was Mary Martin who later took over Mr. Ward's responsibilities at the ODH.

State v Gerome – the Intoxilyzer 8000 has problems

On March 16, 2011 Nicole Gerome was tested on an Intoxilyzer 8000 in Athens County. Her case, ***State v Gerome***, Athens County Municipal Court Case No. 11TRC01909, became the first real challenge to the scientific reliability of the Intoxilyzer 8000. In ***Gerome*** the State sought to preclude the jury from hearing expert testimony questioning the reliability of the Intoxilyzer 8000 and the defense moved to exclude the test results altogether absent a showing of reliability under Evidence Rule 702.

Initially, the State was eager for ***Gerome*** to be a "test case to access the reliability of the Intoxilyzer 8000"[26] but later took the position that ***Vega*** took away the court's "gatekeeper" authority asserting "admissibility of the breath test results turn on substantial compliance with ODH regulation, not compliance with the Constitution."[27] Judge William A. Grim instructed asked for briefs on whether the court could hold a hearing on the reliability of the machine.

The 15 page pre-hearing decision[28] in ***Gerome*** was the first real judicial attempt to analyze ***Vega*** in conjunction with the decisions and statutory changes in the last 28 years and should be **required reading** for lawyers, prosecution and defense alike. Irrespective of whether one agrees with the ruling, this decision, which held that the court has the authority to act as gatekeeper in an OVI case, serves as a **comprehensive primer** on the statutes, case law, evidence rules, and constitutional issues that come into play in OVI breath test cases.

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[26] See ***Gerome*** initial "Decision and Journal Entry" dated 5-21-2011.
[27] Id, quoting page 5 of the State's Motion in Limine.
[28] Id.

Later a full hearing, consuming 2 long days, was on the reliability issue. OACDL members Tim Huey, Jon Saia, and Bob Toy represented Ms. Gerome. The Attorney General's Office took over for the Athens County Prosecutor and presented the case for the State of Ohio.

The State presented testimony from John Kucmanic, ODH toxicologist; Brian Faulkner, CMI's Managing Engineer; and, Gregory Marquis, an ODH Infrastructure Specialist II in charge of the data portal on line. The Defense called Mary Martin, no longer a prosecutor but rather the Program Director for ODH;[29] Dr. Alfred Staubus, an OSU Professor Emeritus; Dave Radomski and John Fusco from NPAS, the manufacturer of DataMaster products; and Thomas Workman, a masters degreed electrical engineer and an adjunct professor of law at the U Mass School of Law where he teaches scientific evidence.

In its decision, the Court determined that there were several "vulnerabilities" of the Intoxilyzer 8000, which included the following:

1. **Radio Frequency Interference (RFI).** The Court found that RFI was the "most important vulnerability" of the Intoxilyzer 8000. Relative to this vulnerability, the Court found that evidential breath testing instruments have always used devices to detect frequencies by police radios and such instruments. However, in the last decade, there has been a proliferation of portable digital assistants, smartphones, and other portable electronic devices that emit radio frequencies. The Intoxilyzer 8000 does have such an RFI detector, but it has never been tested at frequencies used by smartphones and similar devices.

Thomas Workman, who has testified in Florida and Arizona as an expert witness regarding the Intoxilyzer 8000, testified that modern cell phones will interfere at frequencies not detected by the Intoxilyzer 8000 and the result of such interference is to scramble the electronics. Such scrambling has produced inapplicable error codes and test scores unrelated to actual ethanol content. Depending on which component is being scrambled by RFI, the court found that the error range can be from .09 to .20.

[29] There was confusion over Ms. Martin's role as the prosecution asked that she be permitted to sit at counsel table and assist them in their case. This request was granted, however once it was clarified that she was not acting as counsel, the Defense immediately called her as a witness.

2. **Breath Volume.** The Court also listed "breath volume" as another "vulnerability" of the Intoxilyzer 8000 which "manifests itself in two situations": (1) the relationship between volume and the resulting test score; and (2) "the opportunity for an operator to manipulate the test score." With respect to this breath volume vulnerability the Court found that the Intoxilyzer 8000 uses a small chamber which, hypothetically, requires relatively little breath for test. The instructions note that when the progress bar reaches 100%, the subject sample is complete. However, the 8000 does not record the measurement of the alcohol until the subject stops blowing. Thus, the instrument does not enforce the operator guide directions and an operator can choose to prolong the breath sample.

In the first situation, studies by Dr. Staubus and others referred to in his testimony show a direct correlation between volume and ethanol reading. "The longer you blow, the higher your score" was the testimony. In the second situation, the instrument displays the rising numbers as the breath sample is given. The operator can choose to end or prolong a sample to achieve a certain score. Thus, the officer can make sure the second test is within .02 margin, currently, required for a valid test.

3. **Mouth Alcohol.** The Court noted mouth alcohol as the third possible vulnerability of the Intoxilyzer 8000. The Court noted that the machine itself has a "reduced capacity to detect a sample that includes moisture". This inherent design problem was noted by the Court due to the fact that the Intoxilyzer 8000 uses a "pulse lamp" or "pulsed light source" which measures at four points per second as opposed to a "steady state beam" which measures at least 10 times that. Thus, "there are fewer data points to recognize any spikes", indicative of "something other than deep lung air such as mouth alcohol."

Given the courts determination that the Intoxilyzer 8000 suffered these vulnerabilities, the State, and particularly the Assistant AG's who handled the hearing, were, to say the least, unhappy with Judge Grim's decision in *Gerome*, ordered the transcript and made it known there would be an appeal. That, however, never happened. Ms. Gerome was made an "offer she couldn't refuse" and she didn't.

State v Reid – the Intoxilyzer 8000 is not Scientifically Reliable

Litigation in ***State v Reid***, cited above, started at about the same time as the litigation in ***Gerome*** but was not finally settled until months afterwards. Initially the state presented only Mary Martin to testify about the reliability of the 8000. The court found her testimony and qualifications lacking and in a detailed decision found that the State had not shown that the Intoxilyzer 8000 met the requirements of Evid. R. 702 and ***Daubert v Merrill Dow*** and, therefore, held that the results would be excluded at trial unless the State could present foundational testimony sufficient to meet such standards.[30] .

The State appealed but later withdrew the appeal preferring to try to present such foundational evidence through witnesses at trial. Trial on the per se charge was set for December 12th, 2011. In as much as the State and Defense asserted they would call the same witnesses as called in ***Gerome****,* by agreement the trial was a trial to the bench based wholly on stipulated evidence consisting, originally,[31] of the *Gerome* transcripts. It was further stipulated that at trial the Defense would renew its objections to admissibility of the results.

After these stipulations the matter was submitted to the court to determine the following trial issues. 1) "Does ***State v Vega*** …bar Defendant's challenge to the Intoxilyzer 8000's results", 2) "Does the Intoxilyzer 8000 meet the ***Daubert*** … test" and 3) "Is the Defendant guilty of per se OVI?" Notably, while the court was considering these matters, the State was permitted to submit supplemental evidence consisting of a report of testing done by NHTSA, in October of 2011, at the request of the ODH, the results of which were provided to the court on December 23rd, 2011. The Defense was unable to confront any witnesses about this testing or present contrary evidence.

On January 26th, 2012 the ***Reid*** Court issued its second decision relating to the issue of the reliability and admissibility of Intoxilyzer 8000 breath test results.[32] The Court held that ***Vega*** did not bar the Defense challenge, that the Intoxilyzer 8000 did not meet the ***Daubert*** test and test results were therefore not admissible; and, accordingly, Ms. Reid was found Not Guilty of the *per se* OVI violation.

[30] This decision, issued 6-2-11, is referred to as Reid I.
[31] Supplemented later by an additional NHTSA report submitted by the State discussed infra.
[32] Generally referred to as Reid II.

In addressing ***Vega*** the Court noted that that decision predated the creation of the "per se" offense and, moreover, the ***Vega*** Court determined, in part, that breath test results are "generally recognized as being reasonably reliable on the issue of intoxication when conducted with the ***proper equipment***". Further, the Court held that the ***Vega*** Court "anticipated that ODH would *determine scientifically* that a given breath test device would be 'proper equipment'" and that there "is a tacit inference or expectation that the ODH does some testing and review *to which it can testify to* demonstrate to the courts and public that there is a scientific standard to which a particular piece of equipment has been compared and evaluated" (Emphasis added). [33] Based on the foregoing the court held that an instrument may be challenged "when the instrument is new to the prosecution and is appearing for the first time in a given jurisdiction."[34]

As noted earlier the ***Reid II*** decision does a good job of summarizing hundreds of pages of testimony from the ***Gerome*** case. The court concluded "the testimony in this case from the experts presented make it difficult, if not impossible to determine whether the test was actually over the limit, given the accuracy and reliability issues addressed in the testimony."[35]

In addition to the Intoxilyzer 8000 vulnerabilities highlighted in the *Gerome* decision, the ***Reid II*** court pointed out additional problems revealed by its review of testimony that it was "troubled by", most of which related to failures by the ODH, including its seeming abdication of its statutory responsibilities which included failing to adequately investigate or test the instrument prior to purchasing and distributing it and simply deciding to trust the manufacturer.[36]

The ***Reid*** Court noted that the ODH's abdication of its proper role in favor of the manufacturer did not end at the purchase of the machines. The testimony of the ODH witnesses showed that it allowed, and continues to allow, the manufacturer to remotely make "updates" to Intoxilyzer 8000 software without knowing or caring, much less documenting, what changes were made to the machines through these updates. The court noted that the testimony showed that software changes could be made "ambient

[33] Id at pg. 15.
[34] Id.
[35] Id at pg. 19.
[36] Id at pgs. 18-20.

fail" issues, "RFI issues" and to "increase or decrease standard testing parameters without notice to the ODH and the public in general."[37]

The ***Reid*** Court also expressed concern "by the fact that there seems to be no desire on the behalf of ODH to address the issues raised by the defense in regard to accuracy and reliability of the Intoxilyzer 8000 or to demonstrate that ODH does not lack internal data surrounding the instrument" This coupled with "less than candid answers regarding the data base, the ability of CMI to enter and alter the machines without knowledge, lack of explanation of newer versions of the software, missing information and unexplained inconsistent results clearly cast doubts on the ODH's transparency[38] as to the Intoxilyzer 8000."[39]

Ultimately the court concluded, "the State of Ohio cannot expect this Court to find the Intoxilyzer 8000 reliable when the State refuses to address known problems and explain why those problems can be ignored."[40]

ODH's fallback position "you can't make us prove reliability"

Subsequent to ***Gerome*** and ***Reid,*** the ODH and prosecutors have seemingly decided to refuse to even try to convince courts that the Intoxilyzer 8000 is reliable. Instead they are putting all their eggs in a basket that says ***State v Vega*** protects the Intoxilyzer 8000 from scrutiny by the courts in Ohio. Ironically, this is precisely the position that CMI told them to take way back in 2008 when hearings were held on whether the Intoxilyzer 8000 should be approved.[41]

As noted previously ***Reid*** and ***Gerome*** were the first courts to truly analyze ***State v Vega*** alongside other, later, Ohio Supreme Court cases, such as ***State v Tanner*** (1984), 15 Ohio St.3d 1; ***Newark v Lucas*** (1988), 40 Ohio St.3d 100; ***State v. Edwards*** (2005), 107 Ohio St.3d 169; and ***State v French*** (1995), 72 Ohio St.3d 446 to name a

[37] Id pg. 19.
[38] In the next section we see that what little transparency the online data base previously provided has, subsequent to Reid II, was all but eliminated in January and February 2012. In May of 2012 it was learned that the ODH has stopped putting any new subject tests on the web site. Smart money says the website will be eliminated before the end of the summer or perhaps before this article is printed.
[39] Id at pg. 20.
[40] Id pg. 19.
[41] Alluding to ***Vega,*** counsel for CMI told the ODH that it need be concerned about litigation occurring in other states similarly plaguing courts in Ohio because based upon "prior Supreme Court rulings in this state , … it is not up to the Courts then to question the reliability or the function of that machine." Ohio Department of Health hearing on Approval of the Intoxilyzer 8000 November 25th, 2008

few and to also consider Evidence Rule 702, ***Daubert, Miller Bike,*** and the Ohio Constitution.

Both ***Gerome*** and ***Reid*** hold that ***Vega*** does not preclude courts from requiring the state to present evidence of reliability when the defense brings a challenge under Evid. R 702. Indeed, not only these courts, but an ever growing list of other courts, have held that is exactly what our statutes, cases and state constitution require.

Recent decisions out of Lawrence County are illustrative of what is happening in many courts across the state. In ***State v Sibley***[42] and three companion cases, the defendants filed several pretrial motions one of which was a challenge under Evid. R 702. The court set the matter for a hearing specifically advising the State that the court believed that the State was required to put on evidence of scientific reliability. Mary Martin and an ODH Inspector[43] were the only witnesses brought in by the prosecution. Not long into the hearing the defense objected to Ms. Martin testifying as an expert as to the scientific reliability of the machine. The State advised the Court that it did not intend to have Ms. Martin or anyone testify about the scientific reliability of the machine.

The ***Sibley*** Court's written decision summed the arguments up as follows:

> "The State argues that ***State v Vega*** is controlling and that under ***Vega*** if the State shows compliance with the ODH rules this court is required to admit the breath test results – period. Under the State's theory the trial courts in Ohio do not have gatekeeping authority regarding issues related to scientific accuracy and/or reliability of breath testing devices. This Court disagrees with the State on these points.
>
> The trial courts' gatekeeping function derives from the traditional role trial courts play in determining the admissibility of evidence and moreover has a constitutional foundation. The independence of the judiciary goes back to the seminal case of ***Marbury v Madison***, (1803) 4 U.S. 137. The principle of "separation of powers" enunciated in ***Marbury*** is incorporated in our state

[42] ***State v Sibley***, Lawrence County Municipal Court Chesapeake, Ohio, 11 TRC 2821 AB decided 5-29-12. See also ***State v Matthew A. Burd,*** Case No. 12 TRC 321 AB; ***State v Tobias D. Pasquale***, Case No. 12 TRC 198 AB and ***State v Shea B. Workman***, 11 TRC 2875.

[43] ODH Inspectors are generally retired law enforcement officers who have limited, in-house training on the various machines and do the periodic "instrument certifications."

constitution. Section 5(B) of Article IV of the Ohio Constitution provides, in pertinent part, "The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state ***. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

The Ohio Supreme Court has promulgated the Rules of Evidence. Rule 104 requires trial judges to determine questions of admissibility of evidence. Rule 702 governs determinations related to the admissibility of scientific evidence. Breath test results are scientific evidence. Thus the statutes the State relies upon do not and cannot eliminate a trial court's gatekeeping authority.

In the instant cases the Defense made clear through its motions that it was challenging the accuracy and reliability of the Intoxilyzer 8000 breath testing device and cited Evidence Rule 702 in doing so. The Intoxilyzer 8000 is a new device that does not appear to have been shown to be accurate and reliable in the courts in Ohio. Moreover, this Court has never heard evidence on this issue. Thus, well in advance of the hearing, the Court advised the State that the Court anticipated that the State would present evidence on this issue and that in the absence of such evidence it was likely that the Court would exclude the results of the breath tests in question."

These matters were set for a hearing wherein the State was given an opportunity to present such evidence. The State declined to do so. Wherefore the Court hereby rules and orders that the State shall not be permitted to introduce results of the Intoxilyzer 8000 as evidence at trial in these cases."[44]

As noted, a growing number of courts across Ohio have ruled similarly, although some have done so without going through as thorough an analysis as the courts in ***Gerome***, ***Reid*** or ***Sibley***. Among the courts that have rejected ***Vega*** arguments and excluded Intoxilyzer 8000 results due to lack of proof of scientific reliability are: ***State v Collazo,*** Painesville Municipal Court Case No. 11 TRC 4827, Issued 6-1-2012 (19 companion cases were similarly decided); ***State v Howell*** et al, Ottawa County Case No. 1004681A (dealing with the Intoxilzer 8000 OH-2 model); ***State v Julia Copper Lentz***,

[44] Id at pgs. 5-6.

Cambridge Municipal Court Case No. 10 TRC07748; ***State v Kyle M. Johnson***, Portage County Municipal Court Case No. R 2011 TRC 4090.

While challenges focused upon the general reliability of the Ohio Intoxilyzer 8000 may seem the most noteworthy, there are a number of other issues upon which successful challenges have been brought and these also point out problems with either the Intoxilyzer 8000 or the manner in which the ODH has implemented them, or both. The next section, in particular, tells us a lot about what the ODH thinks about transparency in regard to its Intoxilyzer 8000 program.

Challenges to the basic reliability of specific test results

Perhaps the biggest selling point for the 8000 was the online database. Judges and defense attorneys were told that all details of all calibration, maintenance, repairs and tests would be available online. The online database was to include details that had not been made available relative to the previous breath testing machines. Similarly, one was supposed to be able to ascertain if an officer was "8000 qualified" by simply searching on the website. The latter, frankly, is not true. Many officers have "access cards" for the 8000 but do not appear anywhere on the website. Worse yet, officers who appear on the website to have valid access cards may actually have had their privileges suspended, as we know of instances where officers somehow managed to fail to properly complete a proficiency test[45] and review of the officers' information on the website would lead you to believe otherwise.

In any event, full transparency and elimination of defense counsels' ever present struggle to get access to breath test records were promised. Even at its best, these promises were never fulfilled. Some new information, not previously provided, was made available on the web site. That lasted until this information raised questions about the results produced by the 8000 in specific cases. Ironically, even those most prone to construe ***Vega*** as a complete shackle on courts and the defense would admit that specific, fact-based challenges to specific breath test results are clearly permitted under ***Vega***.

[45] With the 8000 there is really no proficiency test as that term was previously used; to keep his access card an officer need only do one successful subject test a year. If he can't find a subject he can do a test on himself. There is also no requirement that he passes an annual exam or otherwise demonstrates knowledge of how the machine works.

The ODH response was to rewrite the online computer program to eliminate all this new information. This occurred in January of this year.

Prior to mid-January, 2012 the following information was available online but not available on the actual printout given to the defendant: Breath Volume, Sample Duration, Sample Attempts, Atmospheric Pressure and Tank Pressure. The 8000's Cobra™ system, the program that allows data from the machines to be exported to an external computer, can, clearly, report much more data than this, but this is what the ODH allowed us to have – for a while.

In January and February, 2012 all this data was removed. Thousands and thousands of records were modified, hundreds of thousands of pieces of data gone in a wink of an eye.

Again, this information was **never** included on the breath results report printed out on site and given to the accused and to the courts. The only place this information was available was online. When ODH officials – and their lawyers - were questioned about the removal of this information their response was "there is nothing in the statutes or the Administrative Code that requires to have any information online." They also said "we removed this information because it was causing confusion."

It appears that the ODH was concerned that simple laymen, such as lawyers and judges, would get confused in situations where the machine reports that an accused had made numerous "sample attempts" but the arresting officer testifies that the subject blew one long continuous blow. Judges presented with such conflicting evidence didn't seem to be confused; rather, they recognized this was a problem.

Thus, in ***State v Dugan***, Butler County Area III Court Case No. 11 TRC 01119, 3-20-12, when the online test report indicated that there were 3 sample attempts during Subject Test 1 and the officer disagreed (testifying that he saw no indication that the accused ever stopped blowing once she started and heard no audible tone which would have sounded if he breath volume had decreased below the required level), the court was concerned. After hearing from Mary Martin, twice, the court noted, "while Ms. Martin tried to suggest that the data from the web site has a different meaning … [than what it

appears to say]…this was not supported by competent, credible evidence as required…"

Several other courts have ruled similarly. See, ***State v Wallace***, Mason Municipal Court Case No. 11 TRC 10388; and ***State v McFarland***, Lebanon Municipal Court Case No. TRC 1102982, 1-30-12. Both cases featured testimony by ODH gurus attempting to convince the courts that this was really a non-issue. Neither court bought it.

The ODH's inability to convince jurists in pretty conservative locales that they should ignore this information clearly led to the decision to eliminate the information all together.[46] ***McFarland,*** which featured 19 recorded sample attempts on one Subject Test was probably the impetus. ***McFarland*** also raised a different issue, discussed in the next section, which also resulted in the ODH responding by changing data.

Recent litigation in Florida has unearthed numerous issues with the Intoxilyzer 8000 flow sensors and exposed attempts by CMI and Florida officials to hide the problems. It is important to know that measurements of the rate and volume of a breath sample are critical pieces of information fed into the algorithm that determines whether a result is valid or invalid.

Lest one think that there were only a limited number of instances where the machine recorded numerous sample attempts or that this issue was limited to one or two machines, be assured that attorneys throughout the state have found this phenomenon and have used this issue to resolve their cases favorably.

The ODH claims this information can still be obtained from it "upon request" and perhaps it can - if you are in no particular hurry. But be aware that this and other actions taken by the ODH to remove what little transparency there was has apparently resulted in ODH staff being buried in an avalanche of Public Records requests. Previously quick responses to simple requests are no longer the norm. It might be interesting to do a public records request for statistics on the increase in public records requests. One wonders why they made all that work for themselves?

[46] The ODH claims the information is still available

Challenges based upon lack of proof of compliance

Obviously with any breath test the simplest way to keep out the result is to challenge the state to prove compliance with the ODH rules and have them fail to do so. Ironically, the ODH designed a process which should have resulted in a finding of non-compliance in every case.[47]

The biggest obstacle created by the ODH is that the Ohio Administrative Code (OAC) mandates that a certain step, a dry gas control test, must be done in the testing protocol, however, the ODH failed to have that step programed into the software of the Intoxilyzer 8000. As noted in the next section, there are almost no rules in the OAC governing the use of the Intoxilyzer 8000. Particularly lacking are rules for actually testing OVI suspects. The one and only requirement is found in 3701-53-04 (B) which states that the instrument "shall automatically perform a dry gas control test **before and after every subject test** ..." Clearly the Intoxilyzer 8000 can be programed to comply with this rule, however, the Intoxilyzer 8000s were not so programed.

The Study Guide that, to this day, is given to Ohio officers instructing them how to operate the 8000 shows a testing sequence as follows: Air Blank; Diagnostic; Air Blank; Dry Gas Control; Air Blank; **Subject Test 1**; Air Blank; Air Blank; **Subject Test 2**; Dry Gas Control; Air Blank.[48] This is the sequence printed on every Ohio breath test results form given to subjects and presented in court from 2009 through early 2012. This is also the sequence one would have seen when looking up test results on the ODH website, except that the website included the additional information discussed earlier. **But it does not include a dry gas check between the two subject tests**.

According to the OAC, there should be at least one dry gas control run between Subject Test 1 and Subject Test 2. This fact did not escape the attention of defense lawyers and the courts. Thus, in cases like ***State v Kormos***, Clermont County Municipal Court Case No. 2010 TRC 18017, 8-31-2011, it was held "the language of the administrative code leaves nothing to the imagination. The court is required to give common words their

[47] As we all know often these cases don't even make it to a hearing once the prosecutor sees he will not be able to establish compliance. Hundreds of 8000 cases have been resolved favorable to the accused in this fashion.

[48] This Study Guide is available on the ODH website at www.odh.ohio.gov/odhprograms/at/alc_drug/forms.aspx. See the breath test form on pg. 50 and the steps on the preceding pages.

common meaning … The Court finds that the failure to run a dry gas control test between subject test 1 and subject test 2 is directly contrary to 3701-53-04(B) and therefore in this particular case this test … is not in substantial compliance." The court did note that Mary Martin testified that there was some confusion as to what was meant by OAC 3701-53-04(B) and that "in all likelihood it was going to be changed."

So the state's initial response to this snafu was to try to bring in someone[49] from the ODH to explain that the rule didn't say what it clearly said and some courts were willing to go along with this game. But most courts, and prosecutors, confronted with the clear language of the rule agreed with the ***Kormos*** court. Finally, after the ruling in ***State v McFarland***, Lebanon Municipal Court Case No. TRC 1102982, 1-30-12, the ODH realized that it was faced with three options: 1) change the rule, 2) change the programing of the machines to add a dry gas control between subject tests, or 3) continue forcing prosecutors to give in or lose a lot more cases. Thus, the agency decided to take bold action: it did none of these things.

The old switcheroo

If the ODH did none of the above how did they deal with the problem? The ODH told CMI to modify the software so as to eliminate the words "Subject Test" and replace them with the words "Subject Sample." This change altered thousands and thousands of records overnight. If one looks online at Mr. Kormos or Mr. McFarland's tests or at any test ever run on an Ohio Intoxilyzer 8000 the results have been changed. Similarly, the results of tests stored in the I-8000s themselves were changed. Ironically, if one were not aware of this stealthy switcheroo, someone looking at Kormos and McFarland's test results would simply not understand the courts' decisions in those cases.

Trial by paper

The ODH created other obstacles that didn't previously exist when it took on the job of doing instrument checks for the I-8000. With respect to the Intoxilyzer 8000, a local Senior Operator can no longer do this task and provide testimony related thereto.

[49] This someone was Mary Martin who had no part in writing the rules found in the OAC or in deciding what protocol was originally programed into Ohio's Intoxilyzer 8000s.

Although Dean Ward was all for taking on this task, he simply failed to ensure that the ODH had adequate staff to perform this function. As result the ODH routinely sends Mary Martin to motion hearings to try to prove compliance with the rules. This will normally result in the test being excluded unless she performed the certification herself.

In ***State v Anderson***, Marysville Municipal Court Case No. TRC 1101917 A-C, 8-17-2011, the prosecution tried to go forward by submitting documents allegedly showing that the certification was performed as required. The court ruled this violated the accused's confrontation rights under the Sixth Amendment as outlined in ***Bullcoming v New Mexico*** (2011), 564 US ___, 131 S.Ct. 2705, 180 L.Ed.2d 610.

However, some courts are willing to find compliance based completely on documentary hearsay. Even in such circumstances, the State should lose this issue because the forms don't cover all questions that can be raised about the certification process. This was the outcome in ***State v Collins***, Lima Municipal Court Case No. 11 TRC 08726, 3-16-2012. It is impossible to determine from the ***Collins*** decision who, if anyone, testified at the hearing, however, as the court constantly refers to what the exhibits show, rather than what a witness testified to, it seems pretty clear that no ODH personnel testified but rather the State was allowed to rely entirely on hearsay documents to prove compliance with the ODH regulations. Ultimately this ironically proved to be the State's undoing as the defense pointed out that the forms do not establish that the solution was refrigerated when not in use, nor do the forms establish when the solution was first used.[50]

Note that the ODH is hoping it can overcome this problem by creating new instrument certification forms which purport to fill in these blanks. Moreover, the ODH is reportedly attempting to make these forms retroactive. One would think this would clearly make these forms documents created for the purpose of litigation, which should exclude them from being business records and clearly make them testimonial, if there was any doubt to begin with.

[50] Interestingly, the *Collins* Court rejected the *Kormos* court's ruling on the dry gas issue stating, "If this were so … the State of Ohio has wasted millions of dollars on the purchase of the Intoxilyzer 8000 simply for the failure to notice the nomenclature used by the machine."

Challenges to the adequacy / existence of any rules

Under our laws the Director of Health is supposed to follow certain procedures in adopting and changing the rules governing breath testing. That procedure includes publication of the rules so that citizens can know what the rules and procedures are. At minimum, judges should be able to tell what the rules are without needing an ODH representative to interpret them.

Yet, as previously noted, there are almost no formal written rules detailing the procedures an officer must follow in performing an Intoxilyzer 8000 breath test on an actual human being. To be a "rule" it must be codified in section 3701 of the Ohio Administrative Code. With the exception of OAC 3701-53-04(B), which requires a dry gas test between subject tests, there is only one other rule contained in the OAC directed at testing a person on the Intoxilyzer 8000: OAC 3701-53-02(E), which states:

> Breath samples using the instrument listed under paragraph (A)(3) of this rule **shall be analyzed according to the instrument display** for the instrument being used. The results of subject tests shall be retained in a manner prescribed by the director of health and shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.

You will notice that there is no requirement that the Intoxilyzer 8000 employ the dual test breath testing protocol. Nor is there any requirement that the two subject tests be within .02 of one another for there to be a valid test. Indeed one of the ODH's experts has testified that a test reported as "invalid" due to the lack of the .02 agreement was none the less accurate and reliable.[51]

Legally, and practically, the software currently installed in the Ohio Intoxilyzer 8000s can be changed overnight to **eliminate dual testing** altogether, to **eliminate the .02 agreement requirement**, or to widen the required agreement amount to .03 or .04. If these requirements were meant to be part of the "official rules" then why weren't they included in the provisions formally adopted and published in the Ohio Administrative Code?

[51] See ***State v. Kitzler***, 2011-Ohio-5444.

The ODH's dictate to officers is "do whatever the screen says to do." Their position with the courts is "if the officer follows the prompts on the machine and gets a result the results shall be admissible."[52] The ODH response when their own processes and procedures get in their way is to simply eliminate them.

As seen above the ODH has already adopted the position, when it comes to the Intoxilyzer 8000, that if it is not required by the OAC, a practice or procedure that applies today may not apply tomorrow. Will the ODH eliminate dual testing or otherwise change these procedures? There is nothing to stop this from happening unless the courts or the legislature requires the ODH to actually adopt a coherent set of rules that cannot be changed at its whim and fancy.

To prompt the courts to consider this issue, Defense counsel should consider challenging the lack of an adequate set of rules governing the use of the Intoxilyzer 8000 under both the Administrative Procedures Act and under ***State v. Ripple***, 70 Ohio St.3d 86, 637 N.E.2d 304 (1994).[53] In ***Ripple*** the Ohio Supreme Court held that no drug test could be used in any DUI case because the Director of Health had not properly promulgated a set of rules governing the testing of blood or urine for drugs. The ODH immediately adopted a full set of rules related to drug testing.

Conclusion

As can be seen from this brief history of the Intoxilyzer 8000, the ODH has engaged in a number of different tactics in response to defense challenges to the Intoxilyzer 8000. None of these responses, after their failure in ***Gerome***, have included bringing back the manufacturers "experts" to try and prove that the machine is accurate and reliable – even though many courts are demanding they do so.

The ODH has engaged in bait and switch tactics, has eliminated useful information and has written rules that aren't really rules at all. When the machine itself was not programmed to comply with the one and only specified OAC requirement the ODH simply modified their software and retroactively renamed subject "tests" as subject

[52] Eg the ODH position that ***Vega*** bars all challenges to the Intoxilyzer 8000.
[53] For a thorough analysis of this challenge see the briefs filed in ***State v Gerome***. OACDL members who have not obtained these briefs at the seminars can contact this author.

“samples.” Most shockingly, the main feature - the online data portal- which was to usher in a **new era of transparency**, is going to be completely shut down.

The ODH’s basic stance, at this point, is that it can do whatever it wants and then hide behind ***State v. Vega.*** It remains to be seen if the appellate courts will in the trial courts in rejecting this ploy. At the same time, the defense bar must be ever vigilant and continue to challenge each and every Intoxilyzer 8000 test result.

Moreover, given the history of the selection and implementation of this machine and the shenanigans we have seen thus far, trial court judges ought to continue to refuse to simply accept the results without question. Similarly, if the results of the Intoxilyzer 8000 are, eventually, to be used against citizens at trial, courts should follow Judge Grim’s analysis and rule that all relevant information should be allowed to go to the jury.
