ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI,	:	
	:	
Appellant,	:	**Case No.: 2013-1102**
	:	
	:	
v.	:	**On Appeal from the Hamilton County**
	:	**Court of Appeals, First Appellate**
DANIEL ILG,	:	**District**
	:	
Appellee.	:	

BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAYWERS IN SUPPORT OF APPELLEE, DANIEL ILG

Daniel J. Sabol (0081403)
Jessica G. Fallon (0079169)
For the Ohio Association of Criminal Defense Lawyers
2720 Airport Dr., Suite 100
Columbus, Ohio 43219
(614) 418-1824/(740) 654-6097

Jennifer Bishop (00014934), Counsel of Record
Appellant, City of Cincinnati
Assistant City Prosecutor, City of Cincinnati
801 Plum St., Suite 226
Cincinnati, Ohio 45202
(513) 352-4708/(513)352-5217

Steven R. Adams (0052743)
Marguerite Slagle (0082217), Counsel of Record
Appellee, Daniel Ilg
The Law Office of Steven R. Adams
8 W. Ninth St.
Cincinnati, Ohio 45202
(513) 929-9333/(513) 929-9337

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

OTHER AUTHORITIES

INTRODUCTION AND STATEMENT OF AMICUS INTEREST

This case is about a defendant's right to obtain material and relevant evidence. The evidence Ilg sought was specific to his test and the machine he was tested on. Though interpretations of *Vega's* meaning have varied, all courts have consistently held that, at a minimum, a defendant may challenge the reliability of his test and his specific machine. Because the trial court did not abuse its discretion in ordering the state to produce evidence associated with Ilg's test and specific machine, the judgment of the First District Court of Appeals should be affirmed.

The state is in possession of evidence which would demonstrate whether Ilg's test was flawed. The results of Ilg's test were downloaded to a database, and within this database is the information needed to discern the viability of each individual breath test. Courts and juries no longer need to accept the number on a breath test printout as conclusive proof of guilt—technological advances have led to detailed information being available for each test, as well as the operability of the machine at the time of testing. Unfortunately, the state has not embraced the transparency their own database provides, which has led to the instant appeal.

Without the information the state's database contains, innocent people will be convicted of OVI. Fortunately, substantive due process requires the state to disclose this information so a defendant may have a meaningful opportunity to present a complete defense. The four judges who have addressed this case got it right.

The mission of the Ohio Association of Criminal Defense Lawyers is to defend the rights secured by law of persons accused of a criminal offense. As such, the important constitutional issues raised in this appeal are of great interest to our organization.

STATEMENT OF THE CASE AND FACTS

Daniel Ilg was arrested and charged with a per se OVI offense. Ilg hired an expert in forensic toxicology to assist in his defense and discern whether there were problems with his breath test and with the machine on which he was tested. The expert stated the requested data contained "essential information" in determining whether exculpatory evidence existed and whether the specific machine was working properly. As a result, Ilg filed a discovery demand and a subpoena requesting, among other things, the information contained in the Ohio Department of Health's (ODH) computerized online breath archives data (COBRA).

The city failed to deliver the requested data. Ilg subsequently moved to compel the city to produce the data and moved the court for sanctions. The trial court held two separate hearings. Mary Martin, a program administrator for ODH, gave testimony concerning all of the requested material. She stated that ODH was in possession of the data. Martin admitted that she was not intimately familiar with nor firmly understood the database, though she believed it would be difficult and expensive to hire a qualified individual to produce the data. Tr. 45, 46

At the conclusion of the first hearing the court required ODH to deliver "only a fraction" of the requested documents—but the court did find the COBRA data to be relevant to Mr. Ilg's specific test, and ordered this information disclosed. Tr. 71, 74. The trial court continued the hearing to provide ODH and the city time to comply with the court's order.

ODH and the city failed to comply with the court's order. Martin conceded that she had not spoken with anyone about Mr. Ilg's data. Tr. 120. Martin again reiterated her belief that the material would be too difficult to obtain.

As a sanction for its discovery violations, the trial court suppressed Mr. Ilg's test. The court noted it did not believe Ilg's request to be a "fishing expedition," or a "general attack" on

the machine. Rather, the court found the COBRA data was "relevant information" to Mr. Ilg's test and "necessary for Ilg to challenge whether *his particular machine* was operating properly at the time of his breath test." (emphasis added) *State v. Ilg*, Hamilton M.C. No. 2011 TRC 53698 (October 1, 2012).

The city appealed and the First District Court of Appeals unanimously affirmed, finding the discovery violation "implicated Ilg's fundamental right to a fair trial," and that suppression was the proper sanction. *Cincinnati v. Ilg*, 2013-Ohio-2191 ¶19. The court reasoned that the COBRA data was requested in good faith, was relevant to the reliability of his breath test, and was necessary for trial preparation. *Id.* at ¶9. It noted that the requested evidence was limited only to the specific test and machine used, making the request permissible under *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984) and *State v. Burnside* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71. *Id.* at ¶10.

LAW AND ARGUMENT

Appellant's proposition of law must be rejected. Appellant is trying to accomplish two objectives with its proposition of law. First, the state's objective is to distort *Vega's* meaning to include attacks on the reliability of a defendant's specific breath test and machine he was tested on. This runs contrary to *Vega's* holding and decades of jurisprudence recognizing that an accused may always attack the specific machine he was tested on as being unreliable.

Second, the state is seeking a ruling that would preclude defendants from discovering relevant and potentially exculpatory evidence that is in the state's possession. Such a ruling violates the constitutional right to exculpatory and impeachment evidence, as well as the right to present a complete defense.

I. THE INSTANT APPEAL WAS IMPROVIDENTLY ACCEPTED AND SHOULD NOT BE THE IMPETUS FOR A REVIEW OF *STATE v. VEGA.*

It is well settled that a defendant is permitted to make a specific attack on his machine or test. This case involves a precise request for evidence concerning a specific test and machine, not a broad request for information designed to attack breath testing in general or all Intoxilyzer 8000 (I8000) machines in particular. It is well settled that a defendant is permitted to make a specific attack on his machine or test. Thus, this case is not one of public or great concern, and it should be dismissed as being improvidently granted.

The request for evidence in controversy was narrowly tailored to the only machine used in Ilg's case (Intoxilyzer 8000, serial number 80-004052). The requested data was found to be relevant by all four judges who reviewed the testimony of the ODH representative and the affidavit of Ilg's expert witness. Both the trial court and appellate court considered the state's *Vega* claims, and each definitively found *Vega* was not implicated because Ilg's requested evidence was specific and not general in nature.

Ilg's precise request stands in stark contrast to the abstract challenge on the general reliability of breath testing presented in *State v. Vega*. In *Vega*, the defendant was attempting to provide expert testimony to pierce the general scientific reliability of breath testing. The expert in *Vega* had no personal knowledge of the machine used on the defendant; therefore his testimony was simply a general attack on breath testing in general.

In contrast, Ilg is attempting to gather information specific both to his individual test and the machine he was tested on. And under *Vega*, specific attacks are always permitted. Notably, *Vega* does not prevent a defendant from cross examining an officer as to whether the specific machine used was functioning properly and reliably. *Miskel v. Karnes*, 397 F.3d 446, 452 (6th Cir. 2005). Indeed, this Court has consistently held that a defendant has the right to attack a

specific machine and test. *See, e.g., State v. French*, 72 Ohio St.3d 446, 452, 650 N.E.2d 887, 892 (1995) ([e]videntiary objections challenging the competency, admissibility, relevancy, authenticity, and credibility of the chemical test results may still be raised"); *State v. Edwards* 107 Ohio St.3d 169, 2005-Ohio-6180, 837 N.E.2d 752, ¶19 (accused may challenge his test by alleging that "the particular device failed to operate properly at the time of testing.").

Ohio district courts have uniformly followed this precedent and allowed specific challenges to tests and machines. *See, e.g., State v. Schrock*, 2013-Ohio-441, 986 N.E.2d 1068, ¶19 (11th Dist.) (It is well settled that a defendant may challenge the accuracy of his specific test result); *City of Willoughby v. Echersley*, 2013-Ohio-441, 986 N.E.2d 1068, ¶4 (10th Dist.) (Same); *City of Columbus v. Day*, 24 Ohio App.3d 173, 174, 493 N.E.2d 1002 (10th Dist.1985) (Same); *State v. Tanner*, 15 Ohio St.3d 1, 472 N.E.2d 689 (1984) (Same); *State v. Luke*, 10th Dist. No. 05AP-371, 2006-Ohio-2306, ¶25, 26 (Defendant may endeavor to show something went wrong with his test and the result was different with what a properly working machine should have produced); *State v. Columber*, 3d Dist. No. 9-06-05, 2006-Ohio-5490, ¶14 (Same); *State v. Casner*, 10th Dist. No. 10AP-489, 2011-Ohio-1190, ¶22 (though test result admitted into evidence, defendant may attack the validity of his test by other methods.).

There are two significant legal questions involving *Vega* causing discourse in Ohio, and neither is present here:

1. May a defendant challenge the admissibility of a specific type of breath testing machine based on problems specific to those machines at a pre-trial evidentiary hearing? See *State v. Miller*, 2012-Ohio-5585, 983 N.E.2d 837, ¶32, 33 (11th Dist.) (though a machine is presumed valid, at a motion to suppress a defendant may argue that the Intoxilyzer 8000 is unreliable based on specific machines); *State v. Rouse*, 2012-Ohio-5584, 983

N.E.2d 845 (11th Dist.) (same); *State v. Carter*, 2012-Ohio-5583, 983 N.E.2d 855 (11th Dist.) (same); but see *State v. Dugan*, 12 Dist. No. CA2012-04-081, 2013-Ohio-447, ¶27 ("we decline to follow the Eleventh District's approach in allowing defendants to challenge the admissibility of a BAC test based on the unreliability of the specific machine").

2. May a defendant attack a breath test at trial with evidence of relevant deficiencies associated with the type of breath test machines the defendant was tested on? See *State v. Gerome et al.*, Athens Co. Muni. Ct., No. 11TRC01909 (June 29, 2011) (Attached as Ex. 1) (*Vega* does not prohibit relevant attacks to the general vulnerabilities of the Intoxilyzer 8000).

These questions of law are not presented within the facts of our case. In fact, this case does not concern the introduction of specific evidence at a motion hearing or trial—it simply involves Ilg's efforts to obtain relevant discovery. Surely, a trial court does not abuse its discretion in ordering the state to turn over evidence it deems material. This Court should address the important issues listed above within the context of specific evidence being offered in a motion hearing or a trial—not with a case contemplating the collection of relevant evidence that may or may not be introduced at some later hearing.

Finally, the city's proposition of law is so misplaced it was even rejected by its own amicus brief. The city's proposition addresses information "that is to be used for the purpose of attacking the reliability of the breath testing instrument." (Appellant Br. 6) While the State of Ohio represents that they are asking this Court to adopt the city's proposition, their stated proposition of law has a critical addition: "that is to be used for the purpose of attacking the **general** reliability of the breath testing instrument." (emphasis added) (Att'y General Amicus Br.

5). This addition signifies that even the city's most ardent supporters doubt their proposition, and for good reason—the reliability of a specific breath test may always be challenged. That is all Ilg was doing.

"A hallmark of judicial restraint is to rule only on those cases that present an actual controversy." *Ahmad v. AK Steel Corp.*, 119 Ohio St.3d 1210, 2009-Ohio-4082, 893 N.E.2d 1287, ¶3 (O'Connor, J., concurring). This case presents no such controversy. For that reason, this Court should exercise its discretion, and choose a more suitable case to address the meaning of *Vega*.

II. UNDER *STATE v. VEGA*, AN ACCUSED IS NOT PROHIBITED FROM OBTAINING RELEVANT INFORMATION ABOUT HIS BREATH TEST AND THE SPECEFIC BREATH TEST MACHINE FOR THE PURPOSE OF CHALLENGING THE RELIABILITY AND ACCURACY OF THE RESULT.

The state's assertion that "*State v. Vega* prohibits defendants in OVI cases from making attacks on the reliability of breath testing instruments" is false. As noted in the cases above, defendants have always had the right to challenge the reliability of the machine they took a breath test on. Under any interpretation of *Vega*, no court has adopted the state's radical interpretation; doing so would deny defendants their right to a fair trial and to present a complete defense.

The state has failed to perceive what was clear to four judges: this case concerns evidence relevant to Ilg's specific test, therefore it is not an attack on general reliability as contemplated by *Vega*. The evidence demonstrates that the requested data is both relevant and material to Ilg's breath test and how Ilg's machine was operating at the time he was tested. Simply put, this data is the key to discerning whether the machine Ilg was tested on was in proper working order and whether his test was flawed.

It is strange that the state is attempting to prevent the defendant—and consequently the court or jury—from obtaining the data providing the best evidence about whether there were any problems with the test or the machine he was tested on. This is exactly the type of evidence contemplated in *Edwards*, where this Court aptly noted that a defendant may freely challenge whether a machine "failed to operate properly at the time of testing." *Edwards* at ¶19.

A. The Southern District of Ohio has already deemed the state's proposition of law unconstitutional.

If this court adopts the state's proposition of law, defendants will be prohibited from "making attacks on the reliability of breath testing instruments." *Knapke v. Hummer* shows why the state's proposition is unconstitutional. *Knapke v. Hummer*, S.D.Ohio No. 2:10-CV-485, 2012 WL 1883854 (May 21, 2013). In *Knapke*, the defendant was charged with a per se OVI violation. In trial, the defendant attempted to question the officer who administered the breath test about an internal diagnostic test he could have run, but did not. *Id.* at 2. The defendant further proffered that in closing she would argue that, because the officer did not take every step necessary to ensure the test was reliable, the jury should not give the test result enough weight to sustain a conviction. *Id.* at 2, 3.

The trial court refused to allow the defendant to ask the officer about not running an internal diagnostic test. It also refused to allow the defendant to argue that the test was not reliable because the diagnostic test had not been run. The court indicated that the test was admitted in evidence after a motion hearing, nothing in the regulations required an internal diagnostic check to be run for each test, and therefore the defendant's argument was one attacking the general reliability of the machine and was improper under *Vega*. The case was appealed, and the Tenth District Court of Appeals affirmed. The appellate court opined the argument that the officer could have obtained a more reliable test by running a diagnostic check

was a general attack prohibited by *Vega*, and therefore improper. *State v. Knapke*, 10th Dist. No. 08AP-933, 2009-Ohio-2989.

The Federal District Court granted the defendant's habeas corpus petition, and vacated her conviction. It reasoned that a court may not prohibit a defendant "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." *Knapke v. Hummer* at 9. The district court determined that limiting the defendant's ability to fully cross examine an officer on whether he did everything possible to ensure a reliable breath test denied the defendant her constitutional right to confrontation. *Id.*

This habeas decision—only to be granted if the petitioner shows the state court's decision to be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"—show's how wrong the state's position is. *Id.* At 8, citing *Bobby v. Dixon*, 132 S.Ct. 26, 181 L.Ed.2d 328 (2011) (quoting *Harrington v. Richter*, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). The state's proposition seeks to prevent defendants from challenging any aspect relating to the reliability of their specific test, denying defendant's their constitutional right of confrontation.

B. The West Virginia Supreme Court has ruled the downloaded data of a breath testing instrument is relevant, material, and must be provided by the state.

When faced with a case analogous to ours, the West Virginia Supreme Court ruled that the state must produce requested downloaded data concerning the breath testing machine the defendant was tested on. *State ex. Rel. Games-Neely v. Overington*, Supreme Court of Appeals of West Virginia, 230 W.Va. 739, 742 S.E.2d 427 (Apr. 22, 2013) (Attached as Ex. 2). In *Overington*, the defendant was charged with a per se driving offense. Like Ilg, the data associated with the defendant's test and testing machine was downloaded. *Id.* at 8. Like Ilg, an

expert forensic toxicologist filed an affidavit explaining that she needed the data to determine if the defendant's test was valid. *Id.* at 4. The defendant demanded discovery of the data. *Id.* at 3.

The state objected, arguing that the information sought was 'irrelevant to the charge and outside the scope of discovery." *Id.* at 4. The state argued that the defendant had not properly articulated why the requested information was "relevant to the preparation of the defense of the case." *Id.* at 7. The trial court ordered the state to disclose the information. The state refused, appealed the trial court's decision, and the greater court affirmed the lower court's decision. The case was subsequently accepted for review by the West Virginia Supreme Court.

In a unanimous 5-0 decision, the West Virginia Supreme Court found the state must disclose downloaded breath machine data. First, the court found the information both relevant and material to the defendant's case. It then held that under *Brady* "the defendant has a constitutional due process right to discover and to examine evidence that would tend to exculpate him or could be used for impeachment purposes." *Id.* at 19, citing *Brady v. Maryland*, 373 U.S. 83 (1963). The Court reasoned that the results of the defendant's breath test were material to the case, and whether the machine he was tested on was working properly is of critical importance. *Id.* at 20. Because the defendant could challenge whether the testing device was in proper working order, the defendant was therefore entitled to information that would tend to show whether or not the machine was functioning correctly. *Id.*

The citizens of Ohio deserve no less constitutional protection than the citizens of West Virginia. The facts of our case are nearly identical in both procedural background and legal analysis. This Court should agree with the analysis of the West Virginia Supreme Court. The data in possession of the Ohio Department of Health is material to discerning whether Ilg's

machine was working properly, and whether Ilg's specific test was valid. Under the principles of *Brady* and the right to present a complete defense, Ilg is entitled to the data.

C. *The state's argument concerning cost and inconvenience is not before the court, is irrelevant in analyzing the proposition of law, and does not justify the denial of relevant evidence to defendants.*

The state's reluctance to disclose case-specific data is disturbing. For years, prosecutors have objected to testimony they claim to be "general" and not specific to a defendant's case—now they seek to deny defendants specific data now that it is available? Ohio's breath testing system cannot be legitimate in the eyes of the public if the state chooses to disregard the feature of their breath testing machines that enables citizens to determine if their individual tests are susceptible to error.

Nothing in the state's accepted proposition of law references how the state's resources are to be considered within their legal challenge. The proclaimed difficulty of obtaining the requested records is irrelevant; a red-herring inserted by the state to divert this Court's attention from the relevant legal analysis.

Further, the state has provided vague and incomplete testimony as to why, exactly, compliance with the courts order is so costly. One ODH representative—who conceded she had no intimate knowledge of how the system database works—indicated that someone told her it would cost approximately $100,000 to make downloaded data accessible to defendants. Tr. 120. When asked further if the Attorney General's Office advised her "not to give up the data," the representative stated that "the attorney general is my attorney in this and that would be attorney-client privilege." Tr. 121. The state offered no additional testimony, invoices, or exhibits to support their contention.

Assuming, arguendo, that this estimate is accurate, the state still cannot be relieved of their duty to arrange for the data to be disclosed. This is no small sum of money. Yet, this cost must be placed in context with the $6.4 million dollars the state spent on the machines themselves. A cost representing about 1.5% of the machine purchase price is a small price to pay to ensure defendant's have all relevant and material information associated with their specific test.

Constitutional rights cannot be subjugated for reasons of convenience and a desire for easy prosecution. Though compliance with constitutional rights may make "slam-dunk" convictions more difficult, "while considerations of judicial economy are certainly relevant to the instant discussion, this line of reasoning elevates judicial economy above fundamental fairness and subordinates the substantive due process rights of defendants. Indeed, the essential role of the judiciary is not to facilitate 'slam-dunk' prosecutions for Plaintiff, but rather to see that substantial justice is done." *State v. Lancaster*, Marietta Co. Muni. Ct., No. 12TRC1615 (Aug.14, 2013), citing *Jaminet v. Medical Center Real Estate Developers, Inc.*, 7th Dis. No. 87 CA9, 9 (Apr. 25, 1988) (Attached as Ex. 3).

III. EVIDENCE OF A MACHINE'S RELEVANT VULNERABILITIES ARE ADMISSIBLE TO BE CONSIDERED BY THE FINDER OF FACT BECAUSE A DEFENDANT HAS THE CONSTITUTIONAL RIGHT TO A MEANINFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE.

As previously noted, this case does not involve the *Vega* issues currently causing discourse in the lower courts—our case is simply about a defendant's right to obtain relevant, material evidence that is in possession of the state. However, in light of the state's misplaced reading of *Vega* and the inevitably of this issue being raised again, a discussion of *Vega's* meaning and impact upon Ohio's new I8000 machines is warranted.

In 1984, *Vega's* 4-3 decision found that while a defendant could attack a specific testing procedure associated with his test, he could not attack the general reliability of breath testing. While it was clear that the general science behind breath tests was unassailable, lower courts struggled interpreting exactly what a "specific" and "general" attack meant. As the years passed, some lower courts formulated a "traditional" view of *Vega*. This view believed that, not only were defendants prevented from challenging the general science behind breath testing, they also could not challenge the general aspects of the machines on which they were tested. Eventually, *Vega* became a one word objection that prosecutor's utilized when any aspect of a breath test was challenged. Prosecutors, and some courts, came to believe *Vega* prevented any test admitted in evidence from being challenged.

For the first 24 years of *Vega's* existence, significant challenges to the "traditional" *Vega* understanding were few. There were no significant problems with the type of machines defendants were tested on, and more importantly, the data did not exist to facilitate attacks on the machines. Then the I8000 was introduced. Expert witnesses from both the state and the defense showed many trial courts that the machine was flawed. In response, courts were forced to confront what *Vega* truly meant, and how *Vega's* traditional understanding affected a defendant's substantive due process rights.

The trial courts heard evidence proving the I8000's were vulnerable to producing false or inaccurate results. Judges were troubled by the notion that *Vega* prevented them from addressing the admissibility of flawed evidence. Courts were now tasked with reconciling a defendant's right to show the evidence offered against him was flawed, and the state's contention that *Vega* prohibited a defendant from introducing those flaws inherent within I8000.

But when the actual holding and meaning of *Vega's* decision is considered—that one cannot challenge the general reliability of the science behind breath testing—it becomes clear that defendant's may challenge relevant, specific flaws of breath testing machines. *Vega's* "traditional" understanding that all breath tests are unassailable misunderstands this Court's decision.

A. Vega's holding prohibited defendants from challenging the general reliability of the science of breath alcohol testing; it did not prohibit challenging the specific testing equipment used in each case.

Vega permits an attack on a specific instrument, though not the general theory of breath testing. The *Vega* Court relied heavily on *Cunningham*, which made it clear that breath alcohol tests are "generally recognized as being reasonably reliable on the issue of intoxication **when conducted with proper equipment** and by competent operators." (Emphasis added) *Id.* at 187, citing *Westerville v. Cunningham*, 15 Ohio St. 2d 121, 239 N.E.2d 40 (1968). A close reading of *Vega* itself reveals that the manner in which breath testing machines test samples is subject to attack: "there is no question that the accused may also attack the **reliability of the specific testing procedure** and the qualifications of the operator." (emphasis added) *Vega.* at 189. In other words, when it is not the science behind breath testing that a Defendant is challenging, but rather the way in which the machine accepts, analyzes, and reports the results, an attack is specific and compliant with *Vega's* holding.

This understanding of *Vega* was recently confirmed. *State v. Lancaster* (Aug. 14, 2013), Marietta Municipal Court, Case No. 12TRC1615, pp. 1-2. The court addressed the ultimate question of *Vega*: "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?" *Id.* At 5. The court reasoned that "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." *Id.* At 5, 6.

Lancaster concluded *Vega* permits attacks on specific breath testing machines. The court reasoned that:

> "[t]he distinction in the text of *Vega* between attacking the general reliability of breath tests as a scientific concept and specifically attacking the reliability of a particular testing instrument as not being "proper equipment" is further manifested in the fact that while the court held that 'an accused may not make a general attack upon the reliability and validity of the breath testing instrument,' the court also noted that the accused may 'attack the reliability of the **specific testing procedure**.'" (emphasis in original) *Id.* At 6, 7.

After conducting an exhaustive hearing on both *Vega* and the I8000 itself, the *Gerome* court also found defendants may make a specific attack on the I8000 within the bounds of *Vega*. Although the court ultimately found that the breath results in that case were admissible, it found that a specific attack on a specific type of Intoxilyzer machine, the I8000, was the type of attack *permitted* by *Vega:* "This is not a general attack; it is an attack based on the facts of each case that could recur in other cases...system vulnerabilities of the Intoxilyzer 8000 are relevant whenever the underlying triggering facts are in evidence." *Gerome* at 30.

Of particular significance to the *Gerome* analysis was the distinction between admissibility and weight. The court found the United States Supreme Court decision of *Crane* to be "analogous" to the question of whether the defense can introduce relevant faults of a breath testing instrument in trial. *Crane v. Kentucky*, 476 U.S. 683 (1986). *Crane* involved a confession that, once a trial court determined was admissible as voluntary, the defendant was not permitted to present evidence to the jury tending to show the confession was unreliable. A

unanimous Court reversed, and noted that defendants have a fundamental constitutional right to present a complete defense. If evidence exists relevant to the ultimate factual issue of guilt or innocence, it must be admitted in trail. The *Gerome* court concluded this reasoning is applicable to OVI cases as well: "a determination of admissibility cannot foreclose contrary defense evidence designed to challenge the weight to be given to admitted evidence." *Gerome* at 26.

B. *The flaws of the I8000 demonstrate why Vega does not prohibit a relevant attack against a specific type of machine.*

Concerns that the I8000 machine vulnerable to error have been confirmed through expert testimony throughout Ohio and our sister states. Concerns about the machine's accuracy are not general abstract theory; rather, both state and defense experts have sufficiently proven to Ohio trial courts that, when relevant, defendant's due process rights entitle them to attack the specific vulnerabilities of the machine.

Inquiries into the I8000's susceptibility to error began as early as 2003, when a task force implemented in Tennessee evaluated breath testing instruments for use in the state and explicitly found that the I8000 did not produce sufficiently reliable results.[1] Not only had the machine already been found too unreliable for general use in one state, but litigation as to the machine's accuracy arose in Florida, Arizona and Minnesota which resulted in the suppression of thousands of breath tests. See *Florida v. James Briggs, et al.* (Florida, 2nd Cir. 2006), 2006-CT-2638; *Florida v. Robert Yount* (Florida, 16th Cir. 2009), 2009-CF-746-A-K; *Arizona v. Judge Deborah Bernini* (Arizona, 2nd App. Div. 2009), Case no. 2CA-SA 2009-0062; *In Re Minnesota Intoxilyzer 5000EN Source Code Litigation* (Minnesota, Dist. Ct.2009), Case No. 70-CR-09-19749.

[1] Tennessee Bureau of Investigation Forensic Services Division Minimum Standards and Specifications for the Scientific Appraisal of Breath Alcohol Instruments (2003)

The propriety of the I8000 was similarly challenged in Ohio. The cases of *Gerome* and *Lancaster*, in particular, had extensive testimony concerning the reliability and accuracy of the I8000. This was not a one-sided affair—between the two cases, the state presented six expert witnesses[2] and the defense five.[3] After hearing evidence concerning the I8000, the respective trial courts both found the following vulnerabilities material to innocence or impeachment for those who tested on an I8000:

- The machine does not adequately test for Radio Frequency Interference because it was never tested at frequencies used by smartphones and similar devices. The potential for variation is great—the *Gerome* court found that variance due to RFI could alter a sample by an amount of .09-.20 per test.
- The test result on an 8000 machine can be increased or decreased simply by changing the volume of breath forced through the machine, and the volume of breath a subject provides is vulnerable to operator manipulation. Of particular note, the state's experts conceded the operator could manipulate test results to obtain a valid test. Further, the *Gerome* court recognized that a valid reading of .069 g/210L (below the legal limit) could be manipulated by the breath test operator to achieve a test of .085 g/210L (above the legal limit).
- The 8000 has a severely reduced capacity to detect mouth alcohol.

The state's assertion that courts have had no difficult applying *Vega's* legal framework is nonsensical; the very reason this Court is addressing *Vega* is due to the influx of contrary

[2] Specifically, Dr. John Wyman, Mr. Brian Faulkner (manager of engineering at CMI, the company that manufactures the I8000, Ms. Mary Martin (ODH Representative), and Mr. Craig Yanni (trains operators on how to administer tests on the I8000) in *Lancaster* and Falkner, Martin and Mr. Gregory Marquis (information technology specialist with ODH) in *Gerome*.

[3] Specifically, Dr. Alfred Staubus (breath testing and forensic expert), Dr. Michael Hlastala, Mr. Thomas Workman (expert in high technology) in *Lancaster* and Dr. Staubus, Mr. Workman, Mr. John Fusco (head of National Patent Analytical Systems, the company who manufactures the BAC Datamaster), and Mr. Dave Radomsky (expert employed with National Patent Analytical Systems) in *Gerome*.

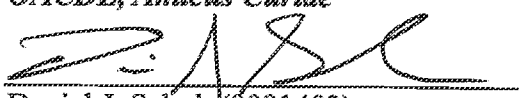
opinions lower courts have produced in attempting to reconcile the flaws of the I8000 and the "traditional" understanding of *Vega's* evidentiary restrictions. *Vega* does not—cannot—infringe on a defendant's constitutional right to present a full and complete defense. *Vega* permits defendants to attack specific, relevant defects on the machine they were tested on. And *Vega* certainly permits defendants access to information they need to discern whether their own test is accurate and their machine was working properly.

CONCLUSION

Based on the foregoing, amicus curiae OACDL respectfully submits that Appellant's arguments are without merit, that the Proposition of Law presented by Appellant should be overruled, and that the decision of the First Appellate District should be upheld.

Respectfully submitted,

OACDL, Amicus Curiae

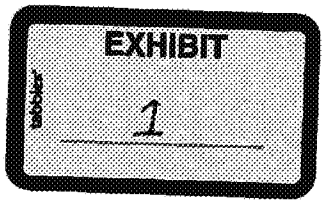


Daniel J. Sabol (0081403)
Jessica S. Fallon (0079169)
For the Ohio Association of Criminal Defense Lawyers
2720 Airport Dr., Suite 100
Columbus, Ohio 43219
(614) 418-1824/(740) 654-6097

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered to the Cincinnati City Prosecutor's Office and The Law Office of Steven R. Adams, via US mail, on this 17 day of March, 2014.

Daniel J. Sabol (0081403)
Jessica G. Fallon (0079169)



IN THE ATHENS COUNTY MUNICIPAL COURT
ATHENS OHIO

State of Ohio,

Plaintiff,

v.

Nicole Gerome, Case Number 11TRC01909

Defendant.

State of Ohio,

Plaintiff,

v.

Jamison Wise, Case Number 11TRC00826

Defendant.

State of Ohio ,

Plaintiff,

v.

Kevin Warren,

Defendant.

Case Number 11TRC01734

State of Ohio,

Plaintiff,

v.

Nathan Hayes,

Defendant.

Case Number 11TRC02434

Hearings May 27 and June 24, 2011

Decision June 29, 2011

William A. Grim, Judge

INTRODUCTION:

This matter came on for consideration of Defendant's Motion to Suppress filed April 20, 2011, Defendant's Supplemental Memorandum filed May 23, 2011 and the State of Ohio's Motion in Limine also filed May 23, 2011. The issues raised by these pleadings are:

1. Probable cause for arrest
2. Compliance with Ohio Department of Health (ODH) regulations
3. Admissibility at trial of Intoxilyzer 8000 test results
4. Admissibility at trial of defense evidence challenging the reliability of Intoxilyzer 8000 test results.

The State of Ohio argued that *State v. Vega*, (1984) 12 Ohio St.3d 185 prohibits any evidentiary hearing regarding the Intoxilyzer 8000. The Court finds that such argument is a misreading of *Vega*, as that decision only restricts defense evidence at trial; it does not prohibit a pretrial evidentiary hearing under Evidence Rule 104 to determine relevancy and reliability of anticipated evidence.

The Court held evidentiary hearings on these issues on May 27, 2011 and June 24, 2011. Representing the State of Ohio was Lisa E. Eliason, Athens Chief City Prosecutor; Tracy W. Meek, Athens City Prosecutor; James K. Stanley, Athens City Prosecutor; and, on June 24, 2011, Assistant Attorneys General Matthew J. Donahue and Aaron Haslam. Defense attorneys were K. Robert Toy, Jon Saia, and D. Timothy Huey on behalf of Nicole Gerome; Douglas J. Francis on behalf of Kevin Warren; Kimberlee

J. Francis on behalf of Jamison Wise and Patrick C. McGee on behalf of Nathan Hayes.

This is the second of two decisions in these cases with the first, filed May 25, 2011, discussing the legal rationale for having a full evidentiary hearing. This decision discusses the evidence received and the application of the law to that evidence. Taken together, the two decisions provide a full discussion of the legal and factual issues involved.

Witnesses at these evidentiary hearings were:

Mary Martin, Program Administrator, Ohio Department of Health Alcohol and Drug Testing
David Radomski, Defense Expert from National Patent Analytical Systems
John Fusco, National Patent Analytical Systems
Cleve Johnson, Screening Committee Member
Thomas Workman, Jr., Defense Expert from the University of Massachusetts
Gregory Marquis, Information Technology Specialist, Ohio Department of Health
John Kucmanic, former Chief Toxicologist, Ohio Department of Health Alcohol and Drug Testing
Brian Faulkner, Chief Engineer, CMI, Inc.
Melanie Provenzano, Trooper, Ohio State Highway Patrol
Dr. Alfred Staubus, Defense Expert, Professor Emeritus The Ohio State University

Many exhibits were identified and offered into evidence. The Court excluded those it deemed immaterial or not properly authenticated, but allowed counsel to proffer those exhibits. The State of Ohio has also included material attached to its June 24, 2011 State's Argument that was not offered for evidence and the Court has placed those attachments with the proffered exhibits.

The lead defendant in this matter is Nicole Gerome. The other defendants are joined in this matter for the limited purpose of instrument certification and check under Ohio Administrative Code 3701-53-04(C) and (D) and admissibility issues regarding the Intoxilyzer 8000 under Evidence Rules 402 and 702. Unless otherwise noted, all factual findings regarding probable cause and other ODH regulations compliance refer to the case of Nicole Gerome.

CERTIFICATION DOCUMENTATION:

The State of Ohio has submitted certified copies of the Ohio Department of Health records regarding the three Intoxilyzer 8000 instruments in use in Athens County. These copies are of actual documents, rather than being derived from the ODH website, so the Court accepts them as authentic under Evidence Rule 902. These documents, being the first three parts of State's Exhibit A, show the following:

Instrument Serial Number 80-003983 (Ohio Highway Patrol Post 5)

Calibrated by CMI April 21, 2009 and October 6, 2009
Certified by ODH Kucmanic December 20, 2010
Checked when placed in service by ODH Yanni January 25, 2011

Instrument Serial Number 80-004089 (Athens Police Department)

Calibrated by CMI May 15, 2009 and October 14, 2009
Certified by ODH Kucmanic December 28, 2010
Checked when placed in service by ODH Yanni January 25, 2011

Instrument Serial Number 80-003948 (Ohio University Police Department)

Calibrated by CMI April 13, 2009 and October 7, 2009
Certified by ODH Kucmanic December 20, 2010
Checked when placed in service by ODH Yanni January 25, 2011

Pursuant to *State v. Edwards*, (2005) 107 Ohio St.3d 169, a trial court may accept documentation at a pretrial motion hearing to show compliance with testing regulations. In *Edwards, supra*, and in *State v. Parlier*, Clermont County Municipal Court Case 2009TRC14102, decided March 5, 2010 regarding the Intoxilyzer 8000 certification, the accepted documentation was not a certified copy. In the present case, the certified documents are self-authenticating under Evidence Rule 902. See also *State v. Allen*, Monroe County Court Case Number 11TRC176AB, decided May 11, 2011. Thus, this foundation is even stronger than that approved by *Edwards*.

The issue under OAC 3701-53-04(C) and (D) is whether the instruments have been certified by representatives of the Ohio Department of Health and then checked when placed in service. This is an administrative determination; if ODH records show certification and check to their satisfaction, the administrative regulations have been met. This is the reverse side of the separation of powers issue discussed by the Court in the May 25, 2011 preliminary opinion in this case. This Court will not review the propriety of an administrative decision but will make an

independent determination as to courtroom admissibility under the Ohio Evidence Rules.

From the above, the Court finds compliance with OAC 3701-53-04(C) and (D) as to all defendants. Testimony regarding the certification process goes to the weight the Court will give in determining relevance and reliability of the Intoxilyzer 8000. Those issues are discussed later in this decision.

PROBABLE CAUSE AND TESTING REQUIREMENTS:

Defendant's vehicle was stopped by Ohio Highway Patrol Trooper Provenzano on March 16, 2011 at 2:33 a.m. after a radar clock of 65 mph in a 55 mph zone. Trooper Provenzano followed defendant's vehicle for approximately one mile before activating the pursuit lights but observed no other traffic violations or *indicia* of impaired driving. Defendant reacted promptly to the pursuit lights, signaled and pulled off to the berm of the road. As shown on the video, defendant's speech and walking and standing balance appeared to be normal.

Trooper Provenzano noted that defendant's eyes were bloodshot, red and glassy and that she had a strong odor of an alcoholic beverage on her. Upon inquiry, defendant admitted consuming one drink about 11:30 p.m. Defendant later said she drank one shot at that time. Defendant showed four of six possible clues on an HGN test conducted in substantial compliance with NHTSA guidelines. Defendant showed no scorable clues on the One Leg Stand test, although she had a

slight sway. On the Walk and Turn test, she showed two of eight possible clues, which is borderline failing. Although Trooper Provenzano only noted one such clue in her report, the other clue was clearly visible on the video.

On a properly calibrated Alco-Sensor III portable breath test device at 2:44 a.m., defendant blew .145. Operating instructions for such device direct the officer to determine the subject has not ingested any alcohol in the fifteen minutes prior to the test. Trooper Provenzano believed defendant's statement of one drink at 11:30 p.m. met this standard.

Defendant was arrested, handcuffed, and patted down. According to the video at 2:55 a.m., Defendant said she had a cell phone on her and, at 2:58 a.m., said her cell phone was in her pocket. On video, Trooper Provenzano did not remove or inspect the reported cell phone. At the June 24, 2011 hearing, Trooper Provenzano testified that she did not recall if Defendant had a cell phone or Blackberry device. From the above, the court concludes that Defendant's cell phone was not removed from her at the Ohio Highway Patrol post.

Defendant was transported to Ohio Highway Patrol Post 5 where, after proper advice of consequences per BMV Form 2255, she agreed to take an evidential breath test. The testing instrument was an Intoxilyzer 8000, serial number 80-003983. Trooper Provenzano has been trained in its use, having received her operator access card in July 2010. Trooper Provenzano properly followed directions

for this instrument and Defendant tested 0.135 g/210L. The instrument printed the test results on Defense Exhibit 19; the same test is reprinted on Defense Exhibit 5, which comes from the ODH website and contains more operational information transmitted by the instrument. The Court finds compliance with OAC Sections 3701-53-04(B) and 3701-53-09(D).

There were reasonable grounds for the traffic stop for the speeding violation. Although defendant's driving, balance, speech, and reported consumption weigh against a finding of impairment, the totality of the circumstances, including the strong odor of alcohol, HGN, and Walk and Turn and portable breath test results, provided probable cause to believe defendant was operating a vehicle with a prohibited concentration of alcohol in her system.

LACK OF RULES:

Defendant has presented an interesting argument under *State v. Ripple*, (1994) 70 Ohio St.3d 86 as to the lack of rules by the Ohio Department of Health regarding the Intoxilyzer 8000. *Ripple* involved a prosecution for OVI for a *per se* level of drugs. As the Department of Health had not yet promulgated any regulations for the testing of such drugs, the Ohio Supreme Court found noncompliance with the requirement of R.C. §4511.19(D)(1)(b) that samples be analyzed in accordance with ODH rules. The key was that there were no applicable rules promulgated.

This Court does note that there are almost no applicable regulations in OAC Chapter 3701-53, with the key word being almost. OAC 3701-53-02(E) requires breath samples from the instrument (note the singular referring to the only instrument in that category) listed under paragraph (A)(3) of this rule shall be analyzed according to the instrument display for the instrument used. OAC 3701-53-04(B) requires a dry gas control which this instrument is programmed to do on its own. OAC 3701-53-09(D) requires that operators of the Intoxilyzer 8000 have an operator access card, which the instrument automatically requires for access.

There are rules although it is debatable how meaningful these rules are. It is troubling that there is no administrative requirement for the operator to follow the procedure set forth in the sixty-four page operator guide promulgated by the Ohio Department of Health. However, this is a separation of powers issue and an administrative decision. So long as ODH has some applicable rule, the requirements of *State v. Ripple*, *supra*, are satisfied.

BREATH TESTING INSTRUMENT BACKGROUND:

The Intoxilyzer 8000 is among the latest generation of breath testing instruments intended to measure the amount of alcohol in the air in a subject's lungs. It has been recognized by the courts for decades that such measurement is possible. *Westerville v. Cunningham*, (1968) 15 Ohio St.2d 121. Several such instruments use the scientific principle of infrared absorption which is a staple of organic che-

mistry to identify organic compounds such as ethanol (the alcohol in beverages). In addition to identifying the presence of ethanol, the instruments are designed to quantify the amount of ethanol in the breath sample and then to calculate that measured quantity to a set standard such as grams by weight per 210 liters of breath.

Infrared technology involves the absorption of electromagnetic radiation by ethanol. Ethanol can be detected and measured by determining the amount of wavelengths of the infrared spectrum absorbed by the distinctive molecular structure of ethanol. When an infrared light passes through a chamber that contains ethanol, some of the light is absorbed. The amount of ethanol in the chamber can be measured by determining the amount of light that passes through the chamber when the air in the chamber contains ethanol and comparing it to the amount of light that passes through that same chamber after the air which contains ethanol is purged from the chamber.

There are four steps any breath testing instrument takes:

1. Recognizing ethanol and distinguishing similar organic compounds;
2. Detecting any outside influence factors such as alcohol in the ambient air, radio frequency interference, and mouth alcohol;
3. Quantifying the amount of alcohol in the chamber sample; and
4. Computing the grams of alcohol per 210 liters of breath by multiplying the size of the chamber by its ratio to 210 liters.

While accepted in principle, there have always been issues as to the reliability or precision of any given instrument or test. Proponents have always acknowledged that there can be outside factors affecting the accuracy of the test, such as radio frequency interference, retained liquid alcohol, and the presence of closely related organic compounds. By various methods, each instrument is designed to detect such outside factors and to report the test as invalid if there is an interferent present. Some detector methods are more precise than others.

HISTORY OF SELECTION:

The history of the selection of the Intoxilyzer 8000 OH-5 model by the Ohio Department of Health is considered only as to weight to be given to the ODH choice. This instrument was in existence and in the field in some jurisdictions when the specifications for a new instrument for Ohio were written. The proposed specifications matched the specifications for this instrument and the proposed specifications eliminated two of the four major manufacturers of breath testing instruments because of components used. The fourth manufacturer, National Patent Analytical Systems (NPAS) declined to participate because it would have required designing an instrument to copy the Intoxilyzer 8000. The citizen committee organized to review proposals thus had only this instrument to review and demonstrations included several failures. The Intoxilyzer 8000 OH-5 was approved by the

Ohio Department of Health and the State of Ohio purchased 700 of these instruments.

OHIO DEPARTMENT OF HEALTH WEBSITE:

The Intoxilyzer 8000 is designed to electronically transmit data from each subject test or instrument test to the Ohio Department of Health central database. As designed and advertised, this would allow public access to a comprehensive unedited history of each instrument and allow contemporaneous monitoring by the Ohio Department of Health.

Mary Martin, Program Administrator for ODH Bureau of Alcohol and Drug Testing, testified that she did not believe anything on the website could be altered or deleted although there could be a several month delay for the instrument information to appear on the website. Ms. Martin also testified that the reason that all three Athens County instruments quit working at about the same time was that each respective memory was full; nobody in Athens County uploaded the information and nobody at the state level exercised their capacity to retrieve the information remotely. At the June 24th hearing, Gregory Marquis, the 8000 program IT specialist, testified that he should have been notified if there were such a problem. He was not and was totally unaware of that situation at the June 24th evidentiary hearing.

The defense presented testimony and documentary evidence regarding the disappearance of two reports that were once on the website but now are not. The first instance involved Instrument #3983, being the same on which defendant Gerome was tested. As shown on Defendant's Exhibit 4, a December 20, 2010 certification report showed a BrAC of 23g/210L. This result is notable in that it is far beyond both human and instrument capacity. A realistic result could be 0.023 or 0.23 g/210L. The second instance was two reports of one Pickaway County subject test in which one report disappeared.

At the June 24th hearing, the State presented evidence to explain the disappearance of data. The Court accepts the technical explanation of a computer glitch in the testimony of witnesses Marquis, Kucmanic, and Faulkner, but is very troubled by the fact that the disappearance of data is by design. When an anomaly such as the above 23 test appears, the CMI software allows it to be replaced with other data. See State's Exhibits E, F, and G. The State's witnesses insisted that the data was not "deleted", just "replaced". The Court concludes that the software in the Intoxilyzer 8000 is designed to hide some inconvenient information. If it is the purpose of ODH to have a comprehensive database, that purpose has not been achieved. Mr. Marquis also testified that the website is not monitored for quality control.

Although the Court does not believe the shortcomings of the database affect the operation of the instruments, the disappearance of data is troubling. At worst, it is evidence of manipulation to hide adverse information. At best, it is evidence that ODH oversight and data collection is a work in progress. In either event, confidence is eroded in ODH's ability to be an impartial overseer of the Intoxilyzer 8000.

This is especially troubling because there is some relevant information that is only available through the ODH website. The test report printout at the testing site does not include the volume of breath or duration of blow, but that data is transmitted from the instrument to the central database. It is important that data be accurate and unchanged. Until the software is changed to eliminate the replacement feature, courts can never be sure we are looking at original data on the website.

SOURCE CODE:

The defense has demanded the source code for the Intoxilyzer 8000. A source code is the software programming that enables an instrument to analyze and report a result. Mary Martin, Program Administrator, testified that the State of Ohio did not have the source code for this instrument. In the ODH certification of this instrument, access to the source code was apparently not deemed necessary. The instrument was able to be tested with both a known control solution and in side by side comparisons with a live subject and other models of instruments. Both as a

discovery issue and as an issue of exculpatory evidence under *Brady v. Maryland*, (1963) 373 U.S. 83, the State of Ohio cannot be compelled to produce evidence it does not have.

Although this Court is aware that several courts in Florida have ordered CMI to release the source code, CMI has resisted on the basis that it is proprietary information and not relevant. That was also the position stated at this hearing by Brian Faulkner, Chief Engineer at CMI. The Court is not yet persuaded that the source code is material to the present determination or to the guilt or innocence of an accused. Therefore, Defendant's Motion for Source Code is denied.

MECHANICS OF THE INTOXILYZER 8000:

The Intoxilyzer 8000 uses infrared spectroscopy as its technology. This is a technology that has been recognized in industry and research for decades. It has been used for breath testing instruments since the 1980s. Both CMI and NPAS use this technology as does, in part, a third manufacturer, Drabold.

This technology is the same as that used by the Intoxilyzer 5000, also manufactured by CMI, which was in the generation of evidential breath testing instruments used previously. The Intoxilyzer 8000 was introduced in response to law enforcement agencies' desire for an instrument more portable than the desktop 5000 or BAC Datamaster but more precise than the handheld portable breath testing devices.

The Intoxilyzer 8000 is on both the National Highway Traffic Safety Administration Conforming Products List and on the Ohio Department of Health list of approved instruments in OAC 3701-53-02(A)(3). There are two models of the Intoxilyzer 8000 currently in use in Ohio: the OH-2 model used by the Division of Watercraft and the OH-5 model used for land enforcement. They have the same internal analytical components but different user features. For purposes of considering strengths and weaknesses, the models present the same issues.

The operation of the Intoxilyzer 8000 is set forth in the sixty-four pege operator guide issued by the Ohio Department of Health Bureau of Alcohol and Drug Testing (revised 9-2009) which is in evidence as the fourth part of State's Exhibit A. In summary, the guide directs operators to turn on the instrument, enter the operator, subject, and arrest data and then follow the prompts from the instrument display.

The instrument performs several self-checks regarding air blanks, diagnostics, and dry gas controls. Beginning at page 37 of the guide, operators are instructed to discontinue use and notify the ODH Bureau of Alcohol and Drug Testing if the instrument shows consecutive identical failures of these checks. However, the instrument itself does not enforce this by shutting down until the technicians can examine and resolve the problem. Therefore, as a practical matter, these particular intended self-checks are optional with the operator.

There are other self-checks that are enforced by the instrument aborting the subject test upon detection of *indicia* of mouth alcohol, radio frequency interference, and deficient sample. This instrument also requires two subject samples that are within .02 agreement of each other to be a valid test. The Intoxilyzer 8000 then prints the lower score of the two samples as the evidential test score.

INTOXILYZER 5000 AND INTOXILYZER 8000 DIFFERENCES

To achieve portability, it was necessary to reduce the size of the instrument from that of the Intoxilyzer 5000. In such downsizing, different components were used in the 8000. There is a different light source, a different detector, and different filters. In the opinion of defense witnesses, that is a step down from the precision of the Intoxilyzer 5000. Witnesses called by the State of Ohio disagreed, although acknowledging the differences. Brian Faulkner testified that the 8000 was designed for portability and to eliminate moving parts and that there were no upgrades regarding precision issues other than the double sampling.

The 8000 uses a pulsed light source which measures at four points per second. The 5000 used a steady state beam with a mechanical chopping wheel measuring at 40 points per second. The 8000 uses a pyroelectric detector instead of a lead selenide detector. The 8000 uses a smaller sample chamber and a less precise airflow measuring pressure device. There is no change, better or worse, in

radio frequency interference detection components. The underlying analysis technology of infrared spectroscopy remains the same.

From the operator's viewpoint, there are changes in procedure from the Intoxilyzer 5000 or BAC Datamaster. Generally speaking, the process is more automatic and guided by the instrument display and less prone to inadvertent operator error. Most operator and subject data is scanned by optical readers and the instrument enforces the time requirements and performs interim self-checks. Following the test, the instrument prints the result and related forms and temporarily stores the test information for later uploading to the ODH central database.

VULNERABILITIES OF THE INTOXILYZER 8000:

There is no such thing as a perfect person, a perfect machine, or a perfect computer operating system. All have limitations or vulnerabilities. Defendant has presented evidence of several vulnerabilities and the Court understands and accepts two and possibly three as material to admissibility and to guilt or innocence.

RFI

The most important vulnerability is radio frequency interference (RFI) being undetected. Evidential breath testing instruments have always used devices to detect frequencies by police radios and such equipment. However, in the last decade, there has been a proliferation of portable digital assistants, smartphones, and other portable electronic devices that emit radio frequencies. Such frequencies can

interfere in the operation of other electronic devices, such as an airplane's navigation system or, as unintentionally demonstrated, this courtroom's recording system. This is true if the device is turned on, even when not in use.

It is agreed by all that evidential breath testing machines cannot be shielded from radio frequencies but such frequencies can be detected and the instrument programmed to abort the test upon recognizing the interference. The Intoxilyzer 8000 does have such an RFI detector, but it has never been tested at frequencies used by smartphones and similar devices. This is surprising, given that, according to Mary Martin, former bureau chief of ODH Alcohol and Drug Testing Dean Ward acknowledged RFI by a Blackberry device. John Kucmanic testified that the Intoxilyzer 8000 failed to detect RFI at a Marion test site.

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 error range can be from .09 to .20. The response of the State of Ohio Department of Health through John Kucmanic was that ODH checked eight frequencies and that it was "impractical" to check all possible frequencies. Brian Faulkner testified that CMI tested for RFI

over a wide range of frequencies but he did not testify that CMI used smartphones, PDAs, or frequencies used by those.

Breath Volume

The second vulnerability deals with the volume of the subject's breath blown into the instrument. This manifests itself in two situations. The first is the relationship between volume and the resulting test score; the second is the opportunity for an operator to manipulate the test score. This Court is aware of two Florida court decisions that have also recognized this problem. As noted in *State v. Briggs*, Second Judicial Circuit Case 2006-CT-2638, decided August 20, 2007, and quoting *State v. Hoover*, Fourteenth Judicial Circuit Case 2003-1754 CTMA:

> Rules that permit a test operator to have the subject blow into the machine as long as he [the operator], in his undirected discretion wishes, with attendant variation in test results, is insufficient to create a scientifically reliable test.

The Intoxilyzer 8000 uses a small sample chamber which requires relatively little breath as a sample. The instrument measures the 1.1 liters necessary and then the display indicates the sample necessary for an accurate reading has been received. See page forty of the study guide in State Exhibit A. 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. As shown in Defendant's Exhibit 22, a longer duration can show an upward variation of 30%. Other studies noted by Dr. Staubus showed an average upward variation of 25%. For example, on average, a shorter duration sample could show 0.68 and a longer duration sample could show 0.85 with the same alcohol content. Therefore, test scores within 25% of the applicable *per se* limit should be examined on the ODH website for volume of breath. Scores much outside that range, such as a .135, are probably not mitigated by the volume of the sample.

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. One of the programmed safeguards of the Intoxilyzer 8000 is that the two subject samples must be within 0.02 agreement of each other for the instrument to record either score as valid. An operator watching the score on the second sample can stop the sample when it is within that 0.02 range of the first sample.

Mouth Alcohol

A third possible vulnerability of the Intoxilyzer 8000 is its reduced capacity to detect a sample that includes moisture. The theory behind all breath testing instruments requires measurement of deep lung air rather than air from the mouth or other moist tissues that would include liquid ethanol at a higher concentration than breath. All such instruments look at the slope of the sample; it should start low and gradually rise to a plateau. If the score starts high or if there is a temporary spike, that is an indication of a reading of something other than deep lung air such as mouth alcohol or Gastroesophageal Reflux Disease (GERD). By the pulse lamp creating only four measures per second as opposed to the forty per second of the Intoxilyzer 5000, there are fewer data points to recognize any spikes.

Although a vulnerability, existence of a problem should be negated by the instrument requirement of an 0.02 agreement between samples so long as there is no indication of operator manipulation in the second sample as discussed in the previous section.

THE GATEKEEPER FUNCTION:

The Court has some doubts about the precision of the Intoxilyzer 8000. Such doubts are those of a potential trier of fact considering whether the evidence is proof beyond a reasonable doubt. This, however, is not the standard to determine the admissibility of evidence. Just as a witness may be competent but not

necessarily credible, a test may meet threshold standards of admissibility without necessarily being persuasive. An Evidence Rule 702 inquiry is concerned with the propriety of the method rather than the correctness of the conclusion. It is the function of the trier of fact to weigh the evidence to determine the correctness of the conclusion.

In examining the criteria of Evidence Rule 702(C), the Court finds as follows:

(1) **The theory upon which the procedure is based is objectively verifiable or is validly derived from widely accepted knowledge, facts or principles:** The science of organic chemistry is based on widely accepted knowledge and principles.

(2) **The design of the procedure, test or experiment reliably implements the theory:** Infrared spectrometry is a recognized procedure to identify an organic compound such as ethanol.

(3) **The particular procedure, test or experiment was conducted in a way that will yield an accurate result:** In the absence of certain facts, the Intoxilyzer 8000 is capable of producing an accurate result. In the presence of certain facts, it is capable of producing an inaccurate result.

As a gatekeeper, the Court finds that the Intoxilyzer 8000 meets Evidence Rule 702 threshold requirements for admissibility. The capacity of the instrument for inaccurate results goes to the weight, not the admissibility, of the evidence. The Court therefore finds that the Intoxilyzer 8000 meets the threshold standards for evidence to be considered. This is not to say that the Intoxilyzer 8000 is relia-

ble; such determination is to be made by the trier of fact at trial after considering all relevant evidence.

CONTRARY EVIDENCE:

This Court has learned much about the Intoxilyzer 8000 through these hearings. Counsel are commended for the thorough presentation of relevant evidence necessary for an informed decision. This is the design of our adversarial system. It would have been unfair to consider only the defense evidence or only the prosecution evidence in this admissibility determination; it would also have been impossible to make an informed decision.

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 defense evidence that attempts to diminish the weight to be given to that evidence. This Court finds the issue to be analogous to that decided by the United State Supreme Court in *Crane v. Kentucky*, 476 U.S. 683 (1986).

Crane involved a confession that the trial court determined, at a pretrial hearing, to be admissible as voluntarily given. The defense was denied the opportunity to present evidence to the jury as to the coerciveness of the circumstances. The defense intent was not an attempted re-litigation of the admissibility of the confession, but rather an attempt to diminish the weight to be given by the jury to

the confession. The issue was whether the trial court's admissibility determination foreclosed contrary evidence.

In a unanimous decision, the *Crane* opinion syllabus held:

> The exclusion of the testimony about the circumstances of his confession deprived petitioner of his fundamental constitutional right – whether under the Due Process Clause of the Fourteenth Amendment or under the Compulsory Process or Confrontation Clauses of the Sixth Amendment – to a fair opportunity to present a defense. Evidence about the manner in which a confession was secured, in addition to bearing on its voluntariness, often bears on its credibility, a matter that is exclusively for the jury to assess. The physical and psychological environment that yielded a confession is not only relevant to the legal question of voluntariness but can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence ...

The Court noted that every jurisdiction other than Kentucky recognized the right of the defense to present testimony going to the weight of the admitted prosecution evidence. Since then, the Ohio Supreme Court, in *State v. Loza*, (1994) 71 Ohio St.3d 61, reaffirmed that principle although distinguishing *Crane* on the facts.

Therefore, the lesson from *Crane* is clear: a determination of admissibility cannot foreclose contrary defense evidence designed to challenge the weight to be given to the admitted evidence. This lesson applies to OVI cases as noted in *State v. French*, (1995) 72 Ohio St.3d 446 at page 451:

> The chemical test result is admissible at trial without the state's demonstrating that the bodily substance was withdrawn within two hours of the time of the alleged violation, that the bodily substance was analyzed with methods approved by the Director of Health, and

> that the analysis was conducted by a qualified individual holding a permit issued by the Director of Health pursuant to R.C. 3701.143 (*Defiance v. Kretz*, [1991], 60 Ohio St.3d 1, 573 N.W.2d 32, approved; *Cincinnati v. Sand*, [1975], 43 Ohio St.2d 79, 70 O.O.2d 44, 330 N.E.2d 908, modified.) This does not mean, however, that the defendant may not challenge the chemical test results at trial under the Rules of Evidence. Evidentiary objections challenging the competency, admissibility, relevancy, authenticity, and credibility of the chemical test results may still be raised.

Citing *French*, the Fourth District Court of Appeals, in *City of Wellston v. Brown*, 2005-Ohio-532 (Jackson County), held as follows:

> Tamara Brown appeals her convictions for driving under the influence of alcohol and underage consumption of alcohol. Brown contends that the trial court erred in excluding her expert testimony, which challenged the credibility of the breath-alcohol test results. ...
>
> We agree that the court erred in excluding her expert testimony. The expert opined that the results of the breath-alcohol test were unreliable because the testing officer failed to wait twenty minutes after receiving two inconclusive samples. The court excluded this testimony on the grounds that it should have been offered during the suppression hearing since it related solely to the admissibility of the results. However, under *State v. French*, 72 Ohio St. 3d 446, 1995-Ohio-32, 650 N.E.2d 887, a defendant can challenge the reliability of breath-alcohol test results at trial under the Rules of Evidence. Therefore, the trial court abused its discretion by not allowing the expert testimony regarding the credibility of the results. *Id.* at pp. 532 and 533.

Since the Fourth District has most recently chosen to follow *French* rather than their 1981 decision in *State v. Brockway*, 2 Ohio App.3d 227, this Court shall also follow the Ohio Supreme Court directive in *French*.

Both parties cite *Daubert v. Merrill Dow Pharmaceuticals*, (1993) 509 U.S. 579 and this Court finds that case instructive and controlling both on Evidence Rule 702 standards and regarding the admissibility of contrary evidence. As to the admissibility of contrary evidence after admitting the offered scientific testimony, the Supreme Court stated:

> Vigorous cross examination, presentation of contrary evidence, and careful instructions on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. See *Rock v. Arkansas*, 483 U.S. 44, 61 (1987). *Id.* At 596.

Several other states' courts are in accord with the *French* holding that challenges to the credibility of the chemical test may be raised at trial. See *State v. Lowther*, (1987) 740 P.2d 251 citing the Hawaii Supreme Court case of *State v. Tengan*, (1984) 691 P.2d 365; *Cooley v. Anchorage*, (1982) 649 P.2d 251 citing the Alaska Supreme Court case of *Keel v. State* (1980) 609 P.2d 555; *Houser v. State*, (Florida Supreme Court, 1985) 474 So.2d 1193.

The recent United States Supreme Court opinion of *Bullcoming v. New Mexico*, Case 09-10876, decided June 23, 2011, is not directly on point. That case dealt with the necessity for the correct witness to appear at trial regarding a blood alcohol test laboratory report. Of persuasive value is that Court's rejection of the prosecution argument that anyone can testify about results since those results were produced by a machine. *Bullcoming* is an affirmation that the adversarial system survives in the

machine age. Since an accused may not confront the Intoxilyzer 8000 by cross examination of the machine itself, due process requires the admission of relevant contrary evidence.

RELEVANCE OF CONTRARY EVIDENCE

The admission of contrary evidence, however, is limited by considerations of relevancy. Relevancy is defined in Evidence Rule 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." As applied to an OVI *per se* case, contrary evidence must tend to make the test result less probable of the person's alcohol level at the time of operation.

As noted earlier in this opinion, the vulnerabilities of the Intoxilyzer 8000 are related to the circumstances of the individual test; the circumstances are fact specific. In order for a particular vulnerability to be relevant, there must be some testimony as to the underlying fact that would trigger that vulnerability.

For example, before a defense expert could testify as to the propensity of the Intoxilyzer 8000 to give a higher reading depending on the volume of breath, there must be evidence that the subject provided more than the minimum volume of breath necessary for the sample. Similarly, before a defense expert could testify as to the propensity of the Intoxilyzer 8000 to miss detection of cell phone radio frequency interference, there must be some evidence that there was a cell phone present and

turned on at the time of the test. In both situations, if the vulnerability has a finite margin of error, a test score above that margin of error would make the vulnerability irrelevant.

Some interpret *Vega* to prohibit any challenge based on the instrument itself. The Court disagrees with that interpretation. If a witness is blind in his right eye, is it not a proper challenge as to whether he is able to see? *Is* it not so relevant in every case this witness testifies? This is not a general attack; it is an attack based on the facts of each case that could recur in other cases. The partial disability is relevant in every case in which this witness testifies. Similarly, system vulnerabilities of the Intoxilyzer 8000 are relevant whenever the underlying triggering facts are in evidence.

The State of Ohio has cited the case of *State v. Luke*, 2006-Ohio-2306 (10th District Ct. Appeals). The facts alleged certain reliability problems with the breath testing instrument at the time. The holding of *Luke* is twofold: (1) a reliability challenge is not a proper Motion to Suppress issue for matters not required by OAC regulations; (2) such matters may be raised at trial to go to the weight of the evidence.

Beginning at page 10, *Luke* explained this second point:

> {¶25} For this reason, we agree with appellant's position that the trial court erred in applying the *Daubert* case to appellee's motion to suppress the BAC Datamaster results. This does not mean, however, that appellee has no avenue of attack as to the specific results of his test. It is important to note that the *Vega* court said, "[t]here is no question that the accused may also attack the reliability of the specific testing procedure and the qualifications of the operator. * * * Defense

expert testimony as to testing procedures at trial going to weight rather than admissibility is allowed." *Vega*, *supra*, at 189.

{¶26} In accord with this notion, the court has held that, though a defendant may not mount a challenge to the general accuracy and reliability of the breath testing machine in question, he "may endeavor to show something went wrong with his test and that, as a consequence, the result was at variance with what the approved testing process should have produced." *Columbus v. Day*, (1985) 24 Ohio App.3d 173, 174, 24 OBR 263, 493 N.E.2d 1002. See, also, *Whitehall v. Weese*, (Oct. 17, 1995) 10th Dist. No. 95APC02-169.

{¶27} This court was squarely presented with the question of the appropriate manner and timing of such an attack in the case of *Columbus v. Caynor*, (1996) 111 Ohio App.3d 394, 676 N.E.2d 540. ...

{¶29} In the case of *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180, 837 N.E.2d 752, the Supreme Court of Ohio approved of this court's holding in *Caynor*. In doing so, the court stated, "a defendant at trial may challenge breath-test results on grounds other than that the results were illegally obtained because they were obtained in noncompliance with the [Department of Health] director's rules. For example, a defendant may argue at trial that the particular device failed to operate properly at the time of testing." *Id.* At ¶19.

JURY INSTRUCTION:

It is the intention of this Court to provide a more appropriate jury instruction in OVI *per se* cases. Currently, OJI CR 711.19(A)(b)-(h) at page 459 provides no standard instruction regarding consideration of an evidential chemical test. Upon request, the Court will draft an instruction similar to OJI CR 409.21 as it regards expert testimony, advising that the jury should consider the test result, giving its reliability such weight as they deem proper.

CONSTITUTIONAL ISSUES:

In its May 24, 2011 preliminary opinion in this case, the Court noted that there are two important underlying issues that have not been resolved by *State v. Vega*, *supra*, or any subsequent Ohio Supreme Court cases. These issues are:

1. How is the legislative assignment of admissibility determination in R.C. §4511.19(D)(1)(b) not in violation of the separation of powers provision in the Ohio Constitution? Is it because the statutory language subjugates it to the Rules of Evidence?

2. What is the rationale for extending the *Vega* principle from a presumption of impairment to a *per se* violation? Is it because the test itself is not the violation and all other relevant evidence is admissible?

This Court finds R.C. §4511.19(D)(1)(b) to be constitutional in that the explicit language "the court may admit" subjugates the statute to the Ohio Rules of Evidence. The statute is finely crafted to encourage but not mandate admission of such evidence. This is the approach taken by the Washington Supreme Court in reviewing the constitutionality of a similar OVI statute. In *City of Fircrest v. Jensen*, (2006) 158 Wn.2d 384, that Supreme Court noted:

> The legislature has made clear its intention to make BAC test results fully admissible once the State has met its *prima facie* burden. No reason exists to not follow this intent. The act does not state such tests must be admitted if a *prima facie* burden is met' it states that such tests are *admissible*. The statute is permissive, not mandatory and can be harmonized with the rules of evidence. There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude the test results under the rules of evidence. The legislature is not invading the prerogative of the courts

> nor is it threatening judicial independence. SHB 3055 does not violate the seperation of powers doctrine. *Id* at 399.

This Court also finds that the *Vega* decision applies to OVI *per se* cases so long as it is recognized that the test result is not conclusive proof of breath alcohol content at the time of operation, but merely some evidence thereof. The defense has a due process right, under *Crane v. Kentucky*, *supra*, to present relevant contrary evidence. To interpret *Vega* otherwise is to create a conclusive presumption prohibited by the United State Supreme Court in *Sandstrom v. Montana*, (1979) 442 U.S. 510.

As noted by the Ohio Supreme Court in *State v. Tanner*, (1984) 15 Ohio St.3d 1, it was never the Ohio Supreme Court's intention to create a conclusive presumption in a *per se* case. At page 6 of that opinion, the Court held:

> There is thus no presumption of guilt. [Citations omitted] (in contrast to other jurisdictions, Ohio's driving while intoxicated statutes is less dependent on chemical testing).

Those who find an evidential breath test result to be conclusive are ignoring both the United States Supreme Court holdings of *Sandstrom*, *Crane*, and *Daubert* and the Ohio Supreme Court holdings of *Tanner*, *French* and *Edwards*. This Court chooses not to ignore such powerful and persuasive precedent. All relevant defense evidence is admissible in OVI *per se* cases.

SUMMARY:

1. There were reasonable grounds for the traffic stop and probable cause for the arrest of Ms. Gerome.

2. All applicable administrative regulations of OAC Chapter 3701-53 were met and the sample was taken within three hours of operation.

3. The test results from the Intoxilyzer 8000 meet threshold standards for admissibility under the Ohio Evidence Rules.

4. The test result from an evidential breath test is circumstantial evidence of the breath alcohol content at the time of operation. Such evidence is not conclusive and is not the only evidence that is relevant.

5. The Intoxilyzer 8000 has vulnerabilities. With specific fact situations, defense expert testimony is admissible to explain such relevant vulnerability.

6. An appropriate jury instruction should be given regarding the jury's function to weigh the evidence of the breath test.

7. R.C. §4511.19(D)(1)(b) is constitutional as construed as being limited by the Ohio Rules of Evidence.

8. So long as *State v. Vega* is interpreted to allow all relevant defense evidence regarding an evidential breath test, its holding passes federal constitutional standards of avoiding a conclusive presumption.

DECISION:

Defendant's Motion to Suppress is denied. The test results from the Intoxilyzer 8000 are admissible under Evidence Rule 702.

The State of Ohio's Motion In Limine is denied. The defense may present all relevant evidence, including applicable instrument vulnerabilities, going to the weight to be given to the test results from the Intoxilyzer 8000.

For all four named cases, these matters are set for final pretrial hearings July 26, 2011 at 8:00 a.m. and for jury trials July 28, 2011 at 8:30 a.m. ✓CZ

William A. Grim, Judge

xc:
Lisa A. Eliason
Tracy W. Meek
James K. Stanley
Matthew J. Donahue
Aaron Haslam
K. Robert Toy
Jon Saia
D. Timothy Huey
Douglas J. Francis
Kimberlee J. Francis
Patrick C. McGee

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2013 Term

No. 11-1648

FILED
April 22, 2013
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
PAMELA JEAN GAMES-NEELY,
Petitioner

v.

THE HONORABLE JOANN OVERINGTON,
Magistrate, Berkeley County, West Virginia
Respondent

Appeal from the Circuit Court of Berkeley County
The Honorable Gina M. Groh, Judge
Civil Action No. 11-C-403

AFFIRMED

Submitted: March 5, 2013
Filed: April 22, 2013

Christopher Quasebarth, Esq.
Chief Deputy Prosecuting Attorney
Berkeley County Prosecutor's Office
Martinsburg, West Virginia
Attorney for the Petitioner

Harley O. Wagner, Esq.
The Wagner Law Firm
Martinsburg, West Virginia

Jason M. Glass, Esq.
Glass Defense Firm
Clarksburg, West Virginia
Attorneys for the Respondent

The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "The standard of appellate review of a circuit court's refusal to grant relief through an extraordinary writ of prohibition is *de novo*." Syl. Pt. 1, *State ex rel. Callahan v. Santucci*, 210 W. Va. 483, 557 S.E.2d 890 (2001).

2. "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

3. "The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented." Syl. Pt. 5, *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992).

4. "'A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code*, 53-1-1' Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977)." Syl. Pt. 2, *State ex rel. Kees v. Sanders*, 192 W. Va. 602, 453 S.E.2d 436 (1994).

5. "Before the result of a Breathalyzer test for blood alcohol administered pursuant to Code, 17C-5A-1 et seq., as amended, is admissible into evidence in a trial for the offense of operating a motor vehicle while under the influence of intoxicating liquor, a proper foundation must be laid for the admission of such evidence." Syllabus, *State v. Hood*, 155 W. Va. 337, 184 S.E.2d 334 (1971).

6. "In the trial of a person charged with driving a motor vehicle on the public streets or highways of the state while under the influence of intoxicating liquor, a chemical analysis of the accused person's blood, breath or urine, in order to be admissible in evidence in compliance with provisions of W. Va. Code, 17C-5A-5, 'must be performed in accordance with methods and standards approved by the state department of health.' When the results of a breathalyzer test, not shown by the record to have been so performed or administered, are received in the trial evidence on which the accused is convicted, the admission of such evidence is prejudicial error and the conviction will be reversed." Syl. Pt. 4, *State v. Dyer*, 160 W. Va. 166, 233 S.E.2d 309 (1977).

7. "There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial." Syl. Pt. 2, *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007).

Per Curiam:

This case is before the Court upon the appeal of the prosecuting attorney of Berkeley County, West Virginia ("the State"), from the October 5, 2011, order of the circuit court of Berkeley County, West Virginia, denying the State's petition for writ of prohibition. Before the circuit court, the State sought to prohibit the enforcement of the Respondent magistrate's order directing the State to produce certain discovery to Christopher Seidell ("the Defendant") in a pending misdemeanor driving under the influence ("DUI") case. The State argues that the circuit court erred in denying the writ of prohibition 1) when the Respondent magistrate exceeded her legal authority by ordering discovery of information not authorized by West Virginia Rule of Criminal Procedure for Magistrate Courts 29 and 2) when the Respondent magistrate exceeded her legal authority in a misdemeanor DUI case by ordering specific discovery requested by the Defendant without a showing of materiality to the defense's case. Having carefully considered the parties' briefs and oral arguments, the appendix record, and all other matters submitted before the Court, we affirm the decision of the circuit court.

I. Facts and Procedural History

On January 6, 2011, the Defendant was charged in the Magistrate Court of Berkeley County with violating the provisions of West Virginia Code § 17C-5-2(d) (Supp.

2012),[1] a misdemeanor DUI offense and a minor traffic offense.[2] The arresting officer administered a secondary chemical breath test using the Intoximeter EC/IR II breath machine ("Intoximeter") on the Defendant that showed a blood alcohol level of 0.149%.

On March 18, 2011, the Defendant filed a motion in the Magistrate Court of Berkeley County for breath test discovery. Specifically, the Defendant requested that he be provided with the following information "pursuant to the United States Constitution, West Virginia Constitution, Rule 16 of the West Virginia Rules of Criminal Procedure and Rule

---

[1]West Virginia Code § 17C-5-2(d) provides, in relevant part:

> Any person who:
> (1) Drives a vehicle in this state while he or she:
> (A) Is under the influence of alcohol;
> . . . .
> (E) Has an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight, but less than fifteen hundredths of one percent, by weight;
> (2) Is guilty of a misdemeanor and, upon conviction thereof, except as provided in section two-b [§ 17C-2-2b] of this article, shall be confined in jail for up to six months and shall be fined not less than one hundred dollars nor more than five hundred dollars . . . .

[2]According to the circuit court's order,

> [t]he arrest was based upon the following allegations: 1) the arresting officer observed the Defendant almost hitting another vehicle at an intersection and then not signaling lane changes and weaving; 2) the Defendant exhibited signs of intoxication and admitted drinking beers; and 3) the Defendant failed each of the non-scientific field sobriety tests and blew a .114 on the preliminary breath test.

29 of the West Virginia Rules of Magistrate Court[:]"

> 1. The downloaded data for the Intoximeter EC/IR II breath machine used in this case. Specifically all of the data for all the records for all of the files downloaded for EC/IR II serial number 008084 for the time period of January 1, 2010[,] through March 1, 2011. It is requested that this data be in both digital and hard copy format with the first row showing headers. Regardless how the data is provided, it is important that all the files, including the blow data and fuel cell data be provided.
> 2. All the maintenance and certification records for EC/IR II serial number 008084 for the time period of January 1, 2010[,] to March 1, 2011.
> 3. All the maintenance and certification records for any and all simulators used in the calibration or verification of accuracy for EC/IR II serial number 008084. This particular request includes documentation for any NIST thermometers that are used in the verification of simulator calibration.
> 4. All assays for any and all simulator solutions used in the calibration or verification of accuracy for EC/IR II serial number 008084.
> 5. Identification and verification of alcohol concentration of any and all dry gas used in the calibration or verification of accuracy for EC/IR II serial number 008084.
> 6. Copies of any and all training materials received by the department from Intoximeters, Inc. [,] for the training of breath test operators and maintenance technicians.
>
> Further, any personal information from individuals other than the named defendant, Christopher Seidell, may be excluded from any and all information provided. However, it is expressly understood that any "fields" omitted by the West Virginia State Police prior to providing said information be identified in some recognizable manner such as a citation number or some similar consistent form thereof.

The State did not file any written opposition to the Defendant's discovery motion. Both the State and the Defendant represented that there was a hearing before the

Respondent magistrate, but there is no record of the hearing and what arguments were made before the Respondent magistrate. On May 10, 2011, the Respondent magistrate ordered the State to produce the discovery sought by the Defendant and twice noted in the order that the State objected to its ruling.

On May 16, 2011, the State filed a petition for writ of prohibition in the circuit court seeking to prohibit the Respondent magistrate from enforcing the order requiring the State to produce the discovery sought by the Defendant. The State's primary argument in its four-page petition was that the information sought was "irrelevant to the charge and outside the scope of discovery allowed in Magistrate Court." The only record submitted with the petition was the Defendant's motion filed in magistrate court and the Respondent magistrate's order.

Thereafter, on July 6, 2011, the Defendant filed a "Motion to Deny State's Petition for Writ of Prohibition." The Defendant provided the circuit court with orders entered in other felony cases in this State in which a defendant had requested the identical information and the circuit court had ordered the State to produce that information. Interestingly, the Defendant also attached an agreed order in which the same prosecuting attorney in this case had agreed to produce the precise discovery being challenged in the instant matter. Additionally, the Defendant attached a copy of an affidavit from Mary

Catherine McMurray, an expert witness that the Defendant intended to use in this case. Ms. McMurray's affidavit was actually prepared for another DUI case. The affidavit provided information involving the Intoximeter, but it was not the identical Intoximeter used on the Defendant as the serial number on the machine was different from the machine in issue. The Defendant's attorney represented to the circuit court that the expert would provide the identical opinions and information regarding the relevancy and materiality of the discovery sought in the instant case.[3]

The circuit court held a hearing on the State's writ of prohibition. The focus of the hearing was the downloaded data from the Intoximeter that was requested by the Defendant. Despite the lack of any transcript from the hearing before the Respondent magistrate, the assistant prosecuting attorney contended that the Defendant's attorney "had not articulated the reason why these items he's requesting are relevant to his preparation of the defense to the case . . . ."

The Defendant's attorney responded that "the machine is designed to produce

[3]The affidavit that was submitted before the circuit court was not attached to the discovery motion that was submitted to the Respondent magistrate. The submission of an affidavit with the motion requesting the instant discovery in magistrate court might have prevented the State's opposition of the discovery motion on the grounds of materiality or relevancy; however, because the State filed no written opposition to the Defendant's motion in magistrate court, there is no record that the Defendant was apprised of the State's objections to the discovery prior to the hearing before the Respondent magistrate.

this data. They're objecting to the very nature of the machine . . . ." The Defendant's attorney further argued that

> it's [referring to the downloaded data] a procedural history of the machine where you get to take a meaningful look at the calibration and how they're doing it. How they're doing their accuracy inspections, when they've exchanged their dry gas tanks. Every aspect that goes into it so when they hand you that printer ticket and say "trust us" you get a scrutinized and meaningful review of the most critical piece of evidence in a DUI case which is the breath box and the days of just handing them the ticket and say "trust us, that's reliable" are over. It's over everywhere. It's over in every state. So to say that it's not relevant it's just missing the mark completely.

In further support of the argument that the discovery sought in the instant case was being provided in other states that use the Intoximeter, the Defendant's attorney argued that

> [a]s far as relevancy, and the only reason I included the North Carolina stuff and the Wyoming stuff who have the same exact breath box as West Virginia, there's nine states[4] that use it and [in] all the other states this data this discovery is being produced I simply showed it as a means to say this isn't something I just woke up, fell out of bed, and said let's come up with this idea. This stuff that's being ordered in other states on the same exact breath box, on the same exact machine, and that's the relevance of showing you in those orders similar judges hearing these same exact arguments all

---

[4]The Defendant also represented before this Court during oral argument that nine states, including West Virginia, currently use the Intoximeter ER/IR breath machine and in all the other states the discovery currently sought by the Defendant is being produced. *See State v. Espinoza*, No. CT-2011-858 (Wy. Cir. Ct. 2nd Jud. Dist. June 14, 2011) (unreported court order); *State v. Marino*, No. 09 CRS 51150 (N.C. Gen. Ct. J. Sup. Ct. Div. Nov. 18, 2010) (unreported court order).

ordering it.

(Footnote added).

Further, contrary to the State's argument that the Defendant did not offer any proof of relevancy before the Respondent magistrate, the Defendant's attorney represented to the circuit court that

> I did the same exact argument [regarding relevancy] with Magistrate Overington [the Respondent magistrate] and it was not some fly-by-night argument. Richard Stephens [the assistant prosecutor in the magistrate court proceeding] and I sat down there for an hour and went back and forth, back and forth, back and forth. Magistrate Overington asked a lot of the same questions [regarding the discovery sought]. . . . Not one of them has denied this because it's relevant. Period. Period.

During the circuit court hearing the Defendant's attorney relied upon Ms. McMurray's affidavit. Ms. McMurray is "a chemist and forensic consultant on issues relating to the measuring of alcohol in the breath." She went into great detail in her affidavit regarding the relevancy of the data stored on the Intoximeter.[5]

---

[5]The State objected to the affidavit on the grounds of hearsay. The State also argues on appeal that Ms. McMurray's affidavit "references software and calibration changes" which were not for the device that was used on the Defendant. The proceeding before the circuit court was a writ of prohibition that turns upon legal and not evidentiary issues. Consequently, there is no need to address the State's evidentiary objections. *See* Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996); Syl. Pt. 2, *State ex rel. Kees v. Sanders*, 192 W. Va. 602, 453 S.E.2d 436 (1994).

Regarding the request for downloaded data from January 1, 2010, to March 1, 2011, the circuit court asked the State the following: "Would you have a different position, Mr. Quasebarth, if he [referring to the Defendant] shortened it [referring to the downloaded data sought] up to six or three months [rather than the requested period of over a year from January 1, 2010, to March 1, 2011]?" The assistant prosecuting attorney responded:

> Well, it's interesting, your Honor, that you bring that up because in the Wyoming order that Mr. Wagner [defense counsel] has attached where the defendant was looking for a wider window the Wyoming court decided that ninety days was sufficiently relevant.
>
> THE COURT: Would we be here with this petition from the State if the window was smaller?
>
> MR. QUASEBARTH: As far as that data that he's requesting probably not *if it was tighter I could see there would [be] a strong[] argument for relevancy in a tighter window.*

(Emphasis added).

Additionally, the assistant prosecuting attorney did not dispute the ease with which the information sought could be downloaded from the Intoximeter. Specifically, the assistant prosecutor stated:

> I'm not disputing–my understanding about whether it's easy to access the information, that's not the dispute. The question has to be relevancy to this proceeding and so your Honor's question was *whether there was a narrower time frame and I would have to concede a narrower time frame I could understand a stronger argument of relevancy rather than the broader window that has been requested. That same logic applies to request number two which is for maintenance certifications records where he's got, you know, a broad window a year before and sixty days afterwards.*
>
> He doesn't have windows for his other–or next couple of requests where he's talking about simulators, but I haven't heard

> from Mr. Wagner why that information is relevant to this proceeding. Why the request for assay simulator solutions used in the calibration are relevant to this proceeding, or the identification verification of alcohol concentration of any and all dry gas used in the calibration for verification of accuracy for the machine.
>
> Again, *maybe there's some relevancy* with that last one for the dry gas that was used for the test but it seems that he's asking for everything that was ever used with this machine over the course of a 14-month period and he hasn't identified the relevancy of that. If your Honor were to deny the writ and this discovery order were to go forward, you know, there might be a later point where in magistrate court we have some argument about, you know, what can be provided or not be provided, that's not going to be germane today. So I don't think there's anything to get into about that, but again we've got a very broad request and a not clear articulation of why that broad request is relevant . . . .

(Emphasis added).

In response to the State requesting a narrower window, the Defendant argued that the computer portion of the Intoximeter is fully capable of storing information for each test and/or sampling. As the circuit court found in its order, the Defendant argued that

> to fairly evaluate an evidential breath alcohol machine's performance it is necessary to have data from a year prior to the date of a defendant's testing and a year subsequent, if possible. This wide time frame allows for a thorough review of how the instrument was functioning at a point in time pre or post the Defendant's test in order to assess whether or not anything has changed with the instrument's functionality. According to the Defendant, issues such as calibration stability and/or drift can only be evaluated if there is sufficient verification data, which is why the Defendant requires a wider window of operational data.

By order entered October 5, 2011, the circuit court denied the requested

petitioner for writ of prohibition. The circuit court determined that it was not clear that the discovery sought was outside the scope of Rule 29 of the West Virginia Rules of Criminal Procedure for Magistrate Courts. The circuit court further concluded that the evidence sought by the Defendant was both relevant and material as follows:

> More fundamentally, though, the Court agrees with the Defendant that Rule 29, W. Va. R. Crim. P. Mag. Ct. notwithstanding, the Defendant has a constitutional due process right, pursuant to both the Fifth Amendment to the United States Constitution and Article III, § 10 of the West Virginia Constitution, to discover and to examine relevant evidence which is material to his defense.

The circuit court then specifically analyzed the Defendant's six discovery requests and found that the discovery sought in each request was relevant and not unduly burdensome for the State to produce.[6] It is from this order that the State appeals.

---

[6]Regarding the Defendant's discovery request for "[c]opies of any and all training materials received by the department from Intoximeters, Inc.[,] for the training of breath test operators and maintenance technicians[,]" the State argued that although such training manuals were relevant and material, the manuals were protected by copyright and could not be reproduced. The circuit court rejected the State's copyright argument; however, the court protected the copyrighted material as follows:

> any reproductions of copyrighted manuals in the instant case shall be solely for purposes of the Defendant's case, and shall not in any way be used for any commercial or economic purpose. For purposes of this case, no person(s) reviewing the manuals shall copy them or distribute them to anyone or permit anyone not directly involved in this case to review them. Furthermore, after this case has been resolved, no one shall maintain copies of the manuals and other records produced.

(continued...)

II. Standard of Review

"The standard of appellate review of a circuit court's refusal to grant relief through an extraordinary writ of prohibition is *de novo*." Syl. Pt. 1, *State ex rel. Callahan v. Santucci*, 210 W. Va. 483, 557 S.E.2d 890 (2001). Additionally, we have held that

> [i]n determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Moreover, in syllabus point five of *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992), this Court held that

> [t]he State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside

---

[6](...continued)
We find no error in the circuit court's handling of the copyrighted manuals.

> of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented.

The State, during oral argument before this Court, maintained that this Court had backed away using the *Lewis* case in writs of prohibition brought by the State. Further, the State argued in its reply brief that

> [i]f this Court were to strictly apply this Lewis standard to the seeking of a writ of prohibition in circuit court from a ruling in magistrate court, and find that the State is not deprived of its right to prosecute, then the State is wholly without remedy to ever have such erroneous rulings of the magistrate court reviewed since the State has no right of appeal in a criminal case.

Contrary to the State's arguments, this Court has recognized that there is "a very narrow avenue by which the State may seek review" of criminal matters by writ of prohibition. *State ex rel. Clifford v. Stucky*, 212 W. Va. 599, 601, 575 S.E.2d 209, 211 (2002). Additionally, we have held that "'[a] writ of prohibition will not issue to prevent a simple abuse of discretion[7] by a trial court. It will only issue where the trial court has no

---

[7]This Court recognized years ago that it "has tended to look with increasing favor upon the liberal use of discretion in criminal discovery while recognizing that the philosophy of full disclosure applicable to civil cases as embodied in the West Virginia Rules of Civil (continued...)

jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code*, 53-1-1.' Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977)." Syl. Pt. 2, *State ex rel. Kees v. Sanders*, 192 W. Va. 602, 453 S.E.2d 436 (1994) (footnote added). Finally, regardless of how frequently the Court may use the *Lewis* decision, it remains the law of this State until we alter the holding in a new syllabus point.[8] Using all of the aforementioned standards, we review the instant matter.

III. Argument

A. Rule 29 of the West Virginia Rules of Criminal Procedure for Magistrate Courts

Our review of this case begins with an examination of Rule 29 of the West Virginia Rules of Criminal Procedure for Magistrate Courts.[9] That rule provides, in relevant

---

[7](...continued)
Procedure is inappropriate in criminal cases." *State v. Dudick*, 158 W. Va. 629, 636, 213 S.E.2d 458, 463 (1975); *see State v. Helmick*, 169 S.E.2d 94, 98, 286 S.E.2d 245, 248 (1982).

[8]*See* Syl. Pt. 2, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001) ("This Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution.").

[9]Rule 29 was drafted and adopted by the Court in 2007 as a result of the Court's decision in *State v. Doonan*, 220 W. Va. 8, 640 S.E.2d 71 (2006). In *Doonan*, we held that

> [u]ntil an appropriate rule is adopted in the Rules of Criminal Procedure for Magistrate Courts, the provisions of Rule 16 of the West Virginia Rules of Criminal Procedure shall govern the procedures and requirements for discovery in criminal cases which are to be heard on their merits in

(continued...)

part:

> (a) The state and the defendant shall make every reasonable effort to informally exchange reciprocal discovery prior to trial. In the event that the parties are unable to reach an agreement on discovery, the following provisions shall apply:
>
> (b) *Disclosure of evidence by the state.*
> (1) The following must be disclosed by the state, if the state intends to use such evidence during any stage of the court proceedings:
> (A) Statement of defendant
> (B) Defendant's prior criminal record
> (C) Documents and tangible objects
> (D) Reports of examination and tests
> (E) Expert witnesses: names, addresses and summary of expected testimony
> (F) State witnesses: names and addresses
>
> (c) *Disclosure of evidence by the defendant.*
> (1) The following must be disclosed by the defendant, if the defendant intends to use such evidence during any stage of the court proceedings:
> (A) Documents and tangible objects
> (B) Reports of examinations and tests
> (C) Expert witnesses: names, addresses and summary of expected testimony
> (D) Defense witnesses: names and addresses

Id.

---

[9](...continued)
magistrate courts.

220 W. Va. at 10, 640 S.E.2d at 73, Syl. Pt. 5.

The State argues that the Respondent magistrate clearly exceeded her lawful authority by requiring it to produce information that is not among the express, specific items listed in Rule 29(b) of the West Virginia Rules of Criminal Procedure for Magistrate Courts. The State contends that because the plain language of Rule 29 does not contemplate the production of the discovery sought by the Defendant in the underlying misdemeanor DUI case, the Respondent magistrate acted in direct contravention to the provisions in Rule 29 in ordering the State to produce the discovery.[10] Consequently, the States argues that the circuit court erred in not issuing the writ to prohibit the production of the discovery.

The provisions of Rule 29 do not expressly require the State to produce the precise discovery sought by the Defendant.[11] The State, however, asks this Court to read the

[10]While the State argues that the discovery sought by the Defendant was discoverable under Rule 16 of the West Virginia Rules of Criminal Procedure that argument is of no conciliation in this case. The essence of the State's contention is that if the Defendant was only before the circuit court Rule 16 would apply and he would be entitled to the discovery he now seeks in magistrate court. Such a position is untenable. The only possible way for the Defendant to have his case heard in circuit court is on appeal. Unlike with civil cases, there is no statute or rule that allows the Defendant to transfer his criminal case to circuit court. *See* W. Va. Code § 50-4-8 (2008) (concerning removal of civil cases to circuit court). Moreover, in order for the Defendant to get a de novo appeal in circuit court that would afford him the application of Rule 16, rather than Rule 29, he would have to forego his right to a jury trial and have his case tried before a magistrate. *See* R. Crim. P. Mag. Ct. 20.1(d) ("An appeal of a magistrate court criminal proceeding tried before a jury shall be heard on the record in circuit court. An appeal of a criminal proceeding tried before a magistrate without a jury shall be by trial de novo in circuit court without a jury.").

[11]Contrary to the State's position, however, the provisions of Rule 16 of the West Virginia Rules of Criminal Procedure do not expressly require the State to produce the (continued...)

provisions of Rule 29 in a vacuum. The provisions of Rule 29 establish a general framework of discovery that both the State and the Defendant must produce if they "intend[] to use such evidence during any stage of the court proceedings[.]" The rule is not intended to be read in isolation of case law or statutes, nor is it intended to be an exhaustive list of items or information that is otherwise discoverable pursuant to case law or statutes.

Instead, Rule 29 requires the State to disclose not only "[d]ocuments and tangible objects[,]" but also "[r]eports of examination and tests[.]" Further, the rule contemplates that

---

[11](...continued)
discovery sought by the Defendant. Rule 16 of the West Virginia Rules of Criminal Procedure provides, in pertinent part:

> (C) Documents and tangible objects. -- Upon request of the defendant, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, . . . or copies or portions thereof, which are within the possession, custody and control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.
>
> (D) Reports of examinations and tests. -- Upon request of the defendant the state shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the state, and which are material to the preparation of the defense or are intended for use by the state as evidence in chief at the trial.

expert witnesses can be used in magistrate court as both the State and the Defendant are required to disclose expert witnesses including names, addresses and summaries of expected testimony. *Id.*

Despite the State's position that it did not intend to offer the information sought by the Defendant in discovery, the State intended to offer the test results from the Intoximeter into evidence to show that after being arrested the Defendant registered a .149 percent blood alcohol content on the secondary chemical test. As provided in West Virginia Code § 17C-5-8(a)(3) (2009), "[e]vidence that there was, at that time, eight hundredths of one percent or more, by weight, of alcohol in his or her blood, shall be admitted as prima facie evidence that the person was under the influence of alcohol." *See* Syl. Pt. 3, *State v. Dyer*, 160 W. Va. 166, 233 S.E.2d 309 (1977) ("Upon the trial of a person arrested for the offense of driving a motor vehicle on a public highway or street of the state while under the influence of intoxicating liquor, evidence of the results of a breathalyzer test, administered in compliance with the requirements of law, showing that there was at the time ten hundredths of one percent [now eight hundredths of one percent] or more, by weight, of alcohol in such person's blood, is admissible as prima facie evidence that the person was under the influence of intoxicating liquor.").

In *State v. Hood*, 155 W. Va. 337, 184 S.E.2d 334 (1971), this Court held,

however, that

> [b]efore the result of a Breathalyzer test for blood alcohol administered pursuant to Code, 17C-5A-1 et seq., as amended, is admissible into evidence in a trial for the offense of operating a motor vehicle while under the influence of intoxicating liquor, a proper foundation must be laid for the admission of such evidence.

155 W. Va. 337, 184 S.E.2d at 335, syllabus. Further, in *Dyer*, the Court also held:

> In the trial of a person charged with driving a motor vehicle on the public streets or highways of the state while under the influence of intoxicating liquor, a chemical analysis of the accused person's blood, breath or urine, *in order to be admissible in evidence in compliance with provisions of W. Va. Code, 17C-5A-5, "must be performed in accordance with methods and standards approved by the state department of health."*[12] When the results of a breathalyzer test, not shown by the record to have been so performed or administered, are received in the trial evidence on which the accused is convicted, the admission of such evidence is prejudicial error and the conviction will be reversed.

160 W. Va. at 167, 233 S.E.2d at 310, Syl. Pt. 4 (emphasis added) (footnote added).

Consequently, when the State seeks to use the results from the Intoximeter, the State must first lay a proper foundation before the results are admissible. *See Hood*, 155 W. Va. at 337, 184 S.E.2d at 335, syllabus. Further, under *Dyer*, the State also must demonstrate that the Intoximeter test was "in compliance with provisions of W. Va. Code, 17C-5A-5," and was "performed in accordance with methods and standards approved by the state

[12]*See* W. Va. C.S.R. §§ 64-10-1 to -9 (setting forth methods and standards for chemical tests for intoxication).

department of health." 160 W. Va. at 167, 233 S.E.2d at 309, Syl. Pt. 4, in part.

Conversely, given the admissibility of the Intoximeter test results, as the circuit court correctly determined relying upon *Brady v. Maryland*, 373 U.S. 83 (1963), the Defendant has a constitutional due process right to discover and to examine evidence that would tend to exculpate him or could be used for impeachment purposes. In syllabus point four of *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982), this Court held that "[a] prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution." Further, in *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007), the Court recognized in its holding that *Brady* material covered not only exculpatory evidence, but impeachment evidence as well:

> There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material,[13] i.e.,

---

[13]In *State v. Morris*, 227 W. Va. 76, 85, 705 S.E.2d 583, 592 (2010), the Court relied upon the following definition of materiality used by the United States Supreme Court in *Youngblood v. West Virginia*, 547 U.S. 867 (2006): "'"Such evidence is material 'if there is a reasonabl[e] probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different[.]' *Strickler v. Greene*, 527 U.S. 263, 280 [119 S.Ct. 1936, 144 L.Ed.2d 286] (1999)(quoting *Bagley, supra*, at 682 [105 S.Ct. 3375] (opinion (continued...)

it must have prejudiced the defense at trial.

Youngblood, 221 W. Va. at 22, 650 S.E.2d at 121, Syl. Pt. 2 (footnote added).

In the instant case, because the State intends to use the test results from the Intoximeter to establish the Defendant's blood alcohol content, the State necessarily has brought the reliability of the Intoximeter into question. Even the State concedes in its brief that "a DUI defendant may choose to question whether the testing device was in proper working order on the day it was used on him." The Defendant, therefore, has the right to challenge the State's foundation for admitting the Intoximeter results, as well as the right to challenge whether the test was in compliance with the statute and the protocols approved by the department of health. *See Hood*, 155 W. Va. 337, 184 S.E.2d at 335, syllabus; *Dyer*, 160 W. Va. at 167, 233 S.E.2d at 309, Syl. Pt. 4. To that end, one of the features of the Intoximeter is that it has the capability to store the information sought by the Defendant.

The Respondent magistrate, in ordering the discovery, and the circuit court, in upholding the Respondent magistrate's decision, determined that each of the discovery requests made by the Defendant was both relevant and material. *See State v. White*, 188 W. Va. 534, 536 n.2, 425 S.E.2d 210, 212 n.2 (1992) ("[H]aving held that a court speaks through

---

[13](...continued)
of Blackmun, J.))[.]" *Morris*, 227 W. Va. at 85, 705 S.E.2d at 592 (quoting *Youngblood*, 547 U.S. at 869-70).

its orders, we are left to decide this case within the parameters of the circuit court's order."). We, therefore, determine that neither the magistrate court nor the circuit court erred in allowing the discovery sought by the Defendant as it is both relevant and material to his case.

B. Writ of Prohibition

In order for a writ of prohibition to issue, substantial weight is given to whether the lower tribunal's order is clearly erroneous as a matter of law. *Hoover*, 199 W. Va. at 14-15, 483 S.E.2d 14-15, Syl. Pt. 4. Both the Respondent magistrate and the circuit court correctly ordered the discovery sought by the Defendant under both Rule 29 of the Rules of Criminal Procedure for Magistrate Courts, as well as case law. Additionally, the State conceded before the circuit court that its real problem with the discovery ordered by Respondent magistrate was the time parameters ordered by the Respondent magistrate. This concession demonstrated that the discovery dispute was not of the magnitude of "clearly erroneous as a matter of law," that is required for writs of prohibition, but was an "abuse of discretion" standard. The latter is not susceptible to the issuance of an extraordinary writ. *See Sanders*, 192 W. Va. at 603, 453 S.E.2d at 437, Syl. Pt. 2, in part ("'A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court.'"). Finally, under *Lewis*, the State did not meet its burden of demonstrating "that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction." 188 W. Va. at 86, 422 S.E.2d at 808, Syl. Pt. 5, in part.

IV. Conclusion

Based upon the foregoing, the decision of the Circuit Court of Berkeley County is hereby affirmed.

Affirmed.

IN THE MARIETTA MUNICIPAL COURT
MARIETTA, OHIO

State of Ohio
Plaintiff,

v.

Chelsea Lancaster ✓	CASE NOS. 12 TRC 1615
Nathan Heiss	12 TRC 3301
Molly Korn	12 TRC 2317
Scott Masa	12 TRC 3165
Wayne Miller ✓	12 TRC 2368
Anthony Molden ✓	12 TRC 2689
John O'Brien ✓	12 TRC 1919
Jessse Shafer	12 TRC 3334
Brian Miller	12 TRC 1422

Defendants.

DECISION AND ENTRY

By agreement of the parties, the above-styled matters have been consolidated solely for the purpose of determining the admissibility of the results of chemical tests administered to each defendant utilizing the Intoxilyzer 8000 ("I8000") after their arrests for violations of R.C. 4511.19. Defendants seek to exclude evidence of the test results on the basis that the results are unreliable.

Based upon evidence adduced at hearing through sworn testimony and exhibits duly admitted, and for the reasons set forth herein, Defendants" motion is **GRANTED** and Plaintiff is prohibited from introducing into evidence at trial the results of tests administered to Defendants utilizing the Intoxilyzer 8000.

This court finds that Plaintiff does not bear an initial burden to establish general scientific reliability of the I8000 because such "gatekeeping" function has been legislatively delegated to the Director of Health. However, this general determination of scientific reliability

is subject to attack by Defendants through specific allegations which go to the ability of the I8000, as designed, to correctly implement the general scientific principals upon which it is based in order to satisfy the requirement under *Vega* that the test of Defendants must be performed using "proper equipment".

Reading together the clear and unambiguous permissive language of R.C. 4511.19 with the holdings in *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984), and *State v. French*, 72 Ohio St.3d 446, 449, 650 N.E.2d 887 (1995), and in consideration of fundamental principles of substantive due process, Defendants are not summarily denied the ability to challenge the specific admissibility of these test results. Defendants are permitted to challenge the ability of the testing device to correctly implement the scientific principals upon which it is based. Once such specific issues are raised by Defendants, this court is required to apply the standard for admissibility set forth in Evid.R. 702 and it is Defendants, not Plaintiff, who bear the burden of demonstrating that the evidence is inadmissible.

Applying Evid.R. 702, and holding Defendants to the burden of overcoming the presumption of reliability granted to the I8000 by virtue of its adoption by the Director of Health, the court finds that the expert testimony presented in this hearing clearly demonstrated that the I8000, *as it existed at the time the tests were administered to Defendants,* did not implement the firmly established scientific principles necessary to yield scientifically reliable results and was not the "proper equipment" contemplated by *Vega*.

However, due to ongoing software changes and with additional research and testing, this decision does not preclude the possibility that the I8000 could, with modifications, meet the standard of reliability necessary for its admission in future cases.

ARGUMENTS OF THE PARTIES

Relying on *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984), Plaintiff argues that a defendant charged under R.C. 4511.19 may seek to suppress the results of a breath-alcohol concentration ("BAC") test only by asserting that Ohio Department of Health ("ODH") procedures were not followed or that the test operator did not have proper ODH authorization. Thus, Plaintiff argues *Vega* to mean that all other attacks against the admissibility of BAC test results are prohibited. Furthermore, Plaintiff argues that the Fourth Appellate District's recent opinion in *State v. Reid*, 4th Dist. No. 12CA3, 2013-Ohio-562, prohibits this court's consideration of the reliability of the chemical test results obtained by use of the I8000 in the instant cases. For these reasons, Plaintiff contends that Defendants' motion to exclude the I8000 test results from being introduced into evidence in this case is impermissible as a matter of law because the attacks asserted therein are strictly forbidden.

Defendants argue that Plaintiff's position is contrary to law because, pursuant to Evid.R. 702 and *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Court has a duty to function as the gatekeeper in order to guard against un-scientific evidence, and such duty requires this court to consider Defendants' specific attacks against the I8000.

LAW AND ANALYSIS

Application of State v. Vega

R.C. 4511.19(A)(1)(a) prohibits a person from operating a vehicle if the person is "under the influence of alcohol, a drug of abuse, or a combination of them." R.C. 4511.19(A)(1)(b)-(j) prohibit a person from operating a vehicle if the person has a prohibited concentration of alcohol or drugs of abuse in the person's whole blood or a prescribed sample quantity of the person's breath, urine, blood serum or blood plasma. R.C. 4511.19(D)(1)(b)

states that

> [i]n any criminal prosecution * * * for a violation of division (A) or (B) of this section * * * the court may admit evidence on the concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant's whole blood, blood serum or plasma, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. * * * The court may admit evidence on the concentration of alcohol, drugs of abuse, or a combination of them as described in this division when a person submits to a blood, breath, urine, or other bodily substance test at the request of a law enforcement officer under section 4511.191 of the Revised Code or a blood or urine sample is obtained pursuant to a search warrant.

R.C. 4511.19(D)(1)(b) further provides that "[t]he bodily substance withdrawn under division (D)(1)(b) of this section shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 of the Revised Code." R.C. 3701.143 states that for purposes of R.C. 4511.19,

> the director of health shall determine, or cause to be determined, techniques or methods for chemically analyzing a person's whole blood, blood serum or plasma, urine, breath, or other bodily substance in order to ascertain the amount of alcohol, a drug of abuse, controlled substance, metabolite of a controlled substance, or combination of them in the person's whole blood, blood serum or plasma, urine, breath, or other bodily substance. The director shall approve satisfactory techniques or methods, ascertain the qualifications of individuals to conduct such analyses, and issue permits to qualified persons authorizing them to perform such analyses. Such permits shall be subject to termination or revocation at the discretion of the director.

Pursuant to the authority delegated to it by R.C. 3701.143, ODH has promulgated regulations pertaining to alcohol testing in OAC 3701-53. Under the heading "methods and techniques," the regulations describe the manner in which BAC test results are to be expressed. OAC 3701-53-01. Under OAC 3701-53-02(A)(3), the I8000 is one of three instruments "approved as evidential breath testing instruments for use in determining whether a person's breath contains a concentration of alcohol prohibited or defined by sections

4511.19."

Plaintiff emphasizes that Ohio appellate courts have "traditionally" understood *Vega*, and its progeny, as having interpreted the statutory scheme detailed above to mean that OVI defendants may never attack the reliability of a BAC testing instrument in any fashion.

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. In *Vega*, Pete A. Vega was charged with driving while under the influence of alcohol under R.C. 4511.19 as it existed before prohibited alcohol concentration offenses were enacted. The trial court excluded Mr. Vega's proposed expert testimony, ruling that, as quoted by the Fifth Appellate District on appeal, Mr. Vega's expert had "no personal knowledge of the particular intoxilyzer instrument utilized in the administration of the breath test to the Defendant, Mr. *Vega*, on the evening in question and, consequently, [the expert's] testimony would have been relating, generally, to the reliability of the intoxilyzer and as such must be excluded * * *." *State v. Vega*, 5th Dist. No. CA-1766, 2-3 (Nov. 22, 1983).

The language quoted above contains the initial seed of ambiguity that sprouted into nearly 30 years of controversy, notwithstanding that a "traditional" understanding of *Vega* has indeed been commonly argued. 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 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. This is so because the court stated at the outset that "[t]he wide acceptance by courts of alcohol breath tests in 'drunk driving' cases is well-documented," and that "such tests are today generally recognized as being reasonably reliable on the issue of intoxication when conducted **with proper equipment** and **by competent operators**." (Emphasis added.) *Id.*, quoting *Westerville v. Cunningham*, 15 Ohio St.2d 121, 123, 239 N.E.2d 40 (1968).

The court went on to acknowledge that, under R.C. 4511.19, the General Assembly has delegated to ODH "the determination as to the mechanism which would be used for measuring blood alcohol content of an individual." *Id.* at 188. Quoting Professor McCormick, the court stated that "the prescription for test procedures adopted by Plaintiff health agency has been taken as acceptance of the general reliability of such procedures [i.e., alcohol concentration tests in general] in showing blood-alcohol content." *Id.*, quoting Evidence (2 Ed. Cleary Ed. 1972) 513, Section 209. The distinction in the text of *Vega* between attacking the general reliability of breath tests as a scientific concept and specifically attacking the reliability of a particular testing instrument as not being "proper equipment" is further manifested in the fact that while the court held that "an accused may not make a general attack upon the reliability and validity of the breath testing instrument," the court also noted

that the accused may "attack the reliability of the **specific testing procedure.**" (Emphasis added.) *Id.* at 190, 188.

While appellate courts have routinely applied the purported rule of *Vega* to be that ODH's approval of a particular testing instrument renders it impervious to any reliability attack, the Fourth Appellate District's recent opinion in *Reid*, 4th Dist. No. 12CA3, 2013-Ohio-562, incisively stressed that "part of the problem in interpreting the true meaning of the *Vega* language is that it is not clear what the terms 'general attack' and 'specific testing procedure' mean. The 'general attack' language seems to indicate that a defendant cannot generally attack the reliability of approved breath testing instruments, but may specifically attack a particular instrument's reliability." *Reid* at ¶ 13.

The *Reid* court astutely pointed to the significant issues raised by the language of *Vega*. On the one hand, the court stated that *Vega* and its progeny have been understood by appellate courts to mean that "the Ohio General Assembly has rendered the ODH's approval of the Intoxilyzer 8000 ostensibly impervious to general reliability and admissibility challenges during a criminal trial." Id. at ¶ 10. On the other, the court emphasized that "a close reading of Vega arguably leaves room for debate about whether a trial court must admit Intoxilyzer 8000 results into evidence." Id at ¶ 12.

Thus, closely reading *Vega* to permit Defendants to specifically attack a particular instrument as not being "proper equipment" comports with the specific language of the decision, as well as applies its holding as intended. ***Application of R.C. 4511.19(D)(1)(b)***

Additionally, this reading of *Vega* upholds the plain meaning of the permissive language in R.C. 4511.19(D)(1)(b) which states that

> [i]n any criminal prosecution * * * for a violation of division (A) or (B) of this section * * * the court **may** admit evidence on the concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or

> a combination of them in the defendant's whole blood, blood serum or plasma, breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. (Emphasis added)

If the General Assembly had desired to mandate that a trial court *shall* admit the results of an alcohol concentration test administered by a properly credentialed operator in compliance with ODH procedures, it could have done so. Indeed, the statutory and regulatory framework associated with the admissibility of chemical tests resulting in prosecutions for violations of R.C. 4511.19 is replete with use of the word "shall," e.g., "[t]he bodily substance withdrawn under division (D)(1)(b) of this section ***shall*** be analyzed * * *," "the director of health ***shall*** determine, or cause to be determined, techniques or methods * * *," and "breath samples withdrawn using an I8000 "***shall*** be analyzed according to the instrument display for the instrument being used." (Emphasis added.) R.C. 4511.19(D)(1)(b); R.C. 3701.143; OAC 3701-53-02(E). Thus, where R.C. 4511.19(D)(1)(b) states that a trial court "***may*** admit evidence of concentration of alcohol," the use of the word "may" is all the more conspicuous and meaningful.

"[W]here a statute contains the word 'shall,' the provision will generally be construed as mandatory," unless there is clear legislative intent to the contrary. *In re Davis*, 84 Ohio St.3d 520, 522, 705 N.E.2d 1219 (1999). "'The statutory use of the word 'may' is generally construed to make the provision in which it is contained optional, permissive, or discretionary.'" *State v. Bergman*, 11th Dist. No. 2012-P-0124, 2013-Ohio-3073, ¶ 23, quoting *State v. Davie*, 11th Dist. No. 2000-T-0104, 2001-Ohio-8813, 16 (Dec. 21, 2001). Furthermore, use of the words "shall" and "may" within the same statute "clearly reflect[s] a legislative intent that the two words be given their usual statutory construction." *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 108, 271 N.E.2d 834 (1971).

In light of the clear facial meaning of the statute, resort to principles of interpretation to enable reading "may" to mean "shall," as Plaintiff would have this court do, is not only unnecessary, but inappropriate. "Thus, R.C. 4511.19(D)(1)(b) does not mandate admissibility of the results of the breath test. Rather, "the statute vests the trial court with discretion in making a determination with respect to admissibility, notwithstanding approval from the director of health." *Bergman*, at p. 23. The use of may recognizes the court's important role in applying rules and principals of evidence in individual cases, while simultaneously acknowledging the legislature's ability to properly delegate the more general "gatekeeping" when determining which "methods or techniques" to adopt in all testing.

Applicability of Rules of Evidence

Thirdly, this reading of *Vega* gives effect to the language in *State v. French* explicitly authorizing evidentiary challenges to the admissibility of chemical tests. In *State v. French*, 72 Ohio St.3d 446, 449, 650 N.E.2d 887 (1995), the court held that challenges to the admissibility of BAC test results based on non-compliance with ODH procedures must be raised prior to trial in the form of a motion to suppress or else they are waived. In so holding, the court was careful to note, in no uncertain terms, that the holding "does not mean * * * that the defendant may not challenge the chemical test results at trial under the Rules of Evidence. Evidentiary objections challenging the competency, ***admissibility***, relevancy, authenticity, and credibility of the chemical test results may still be raised." (Emphasis added.) *Id.* at 452. Furthermore, in *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, the court determined whether the plaintiff could demonstrate that a blood-alcohol test was performed in substantial compliance with ODH procedures where a particular procedure was not followed. In holding that the plaintiff was required to show the particular

procedure had been complied with before the test results could be admitted, the court stated that "[t]he General Assembly established the threshold criteria for the admissibility of alcohol-test results in prosecutions for driving under the influence and driving with a prohibited concentration of alcohol in R.C. 4511.19(D)." (Emphasis added.) *Id.* at ¶ 9.

Thus, ODH approval of a particular instrument creates a threshold presumption of reliability that a defendant may rebut through application of Evid.R. 702. This approach is faithful not only to the text of *Vega*, but also to the *Vega* court's insistence that trial courts "afford the legislative determination that intoxilyzer tests are proper detective devices the respect it deserves" while at the same time preserving trial courts' mandatory role as the gate-keepers against un-scientific evidence. *Vega*, 12 Ohio St.3d at 188.

The Eleventh Appellate District recently adopted this approach, stating "*Vega* prohibits blanket attacks on the reliability of breath analysis machines generally, and premises this upon the use of 'proper equipment.' *Vega*, 12 Ohio St.3d at 186. * * * A breath analysis machine could only be 'proper equipment' if it is reliable." *Bergman*, 11th Dist. No. 2012-P-0124, 2013-Ohio-3073, at ¶ 25.

Moreover, in previously holding that the state must show at least substantial compliance with ODH procedures regarding blood-alcohol testing before the results are admissible, the Ohio Supreme Court characterized R.C. 4511.19(D)(1) as "a three-paragraph gate-keeping statute." *State v. Mayl*, 106 Ohio St.3d 207, 833 N.E.2d 1216, 2005-Ohio-4629, ¶ 20. Thus, R.C. 4511.19(D)(1)(b) necessarily calls upon the trial court to apply the Rules of Evidence regarding alcohol concentration tests, particularly Evid.R. 702, because by using the term "gate-keeping," the court in *Mayl* was certainly alluding to the US Supreme Court's holding in *Daubert* inasmuch as that seminal case introduced the term "gate-keeping" into the lexicon of the law of evidence. Thus, the "traditional" interpretation of *Vega* appears to

directly conflict with the permissive language of R.C. 4511.19(D)(1)(b) as well as the mandate arising out of the Rules of Evidence that a trial court must function as the gate-keeper against un-scientific evidence.

Application of State v. Reid

Finally, this approach also follows the holding in *Reid*, which is the direct precedent binding upon this court. In *Reid*, the appellate court found that the trial court committed error in placing the **initial burden** of demonstrating the reliability of the I8000 on the state and by conducting a *Daubert* analysis of "the principles and methods upon which the Intoxilyzer 8000 breath test results are based." The approach taken by this court does neither.

In *Reid*, the defendants filed a motion to suppress the results of their I8000 test results, arguing that the I8000 is "unreliable and inaccurate as an alcohol breath testing mechanism." *State v. Reid*, Circleville M.C. No. TRC1100716, 2 (June 2, 2011). Notably, the defendants in *Reid* challenged the reliability of the I8000 without articulating specific issues or attacks against the instrument. Rather, the defendants merely raised the subject of reliability via a motion to suppress, whereupon the trial court placed the burden on the state, under Evid.R. 702 and *Daubert*, to demonstrate by expert testimony that the I8000 is "an accurate and reliable instrument for breath testing in OVI cases." The trial court in *Reid* not only placed the burden of proving threshold reliability on the state, it specifically demanded expert testimony from ODH prior to allowing admission of the evidence. After the state presented the testimony of Mary Martin, Program Administrator for ODH, Drug and Alcohol Administration, but otherwise failed to present specific testimony from ODH witnesses explaining how the reliability of the I8000 was determined, the trial court ruled that "the test results in the within cases are held inadmissible for trial purposes * * * until such time as ODH can present testimony of the scientific principles that support its use and insure the accuracy and reliability

of the instrument." *Id.* at 10. After an apparent re-hearing of these issues, in which stipulated testimony was presented, the trial court adhered to its original ruling, holding that Plaintiff had again failed to meet its threshold burden of proving reliability because "too many questions" remained regarding various aspects of the I8000's design.

On appeal, the Fourth Appellate District addressed two of Plaintiff's assignments of error:

> 1) Whether the trial court erred by placing the burden on Plaintiff to prove by way of expert testimony that the I8000 is accurate and reliable despite ODH's approval of the instrument and the fact that the defendants' tests had been properly administered under ODH procedures, and
>
> 2) Whether the trial court erred by performing a Daubert analysis of "the reliability of the principles and methods upon which the Intoxilyzer 8000 breath test results are based, in view of the legislative mandate providing for admission of breath tests if analyzed in accordance with the methods approved by the Ohio Director of Health. Reid, 2013-Ohio-562 at ¶ 2.

These assignments of error were sustained with the court concluding that this initial burden has been eliminated by the legislative delegation of the initial gate-keeping function to the Director of Health, and thus it is improper for a trial court to conduct a *Daubert* analysis in abrogation of the rebuttable presumption of reliability that has attached to the instrument due to its approval by ODH.

Applying the holding of *Reid*, this court has permitted Defendants to mount what can only be described as very specific attacks against the design of the I8000 and has placed the burden on Defendants to rebut the legislatively-created presumption that the instrument is reliable. Furthermore, this court is specifically not conducting a *Daubert* analysis of the principles and methods upon which the I8000 test results are based. Such an analysis is impermissible pursuant to the holdings in both *Vega* and *Reid*. Rather, this court is

conducting a *Daubert* analysis in regards to whether the design of the I8000 has **properly implemented** those unassailable principles and whether the I8000 is therefore "proper equipment" that yields scientifically reliable results.

Applying the holdings in both *Vega* and *Reid*, and in applying the plain meaning of R.C. 4511.19, this court concludes that Defendants are not prohibited from raising specific attacks on reliability where those attacks are based upon design deficiencies which render the device incapable of properly implementing the firmly established scientific principles necessary to yield scientifically reliable results. For if such design deficiencies exist, the Intoxilyzer 8000 is not the "proper equipment" contemplated by *Vega* when the court relied upon the scientific principles it so strongly embraced.

Plaintiff urges that allowing OVI defendants to make specific attacks against the reliability of the I8000 "would bring prosecution of OVI cases in Ohio to a screeching halt, result in clogged dockets and dismissals of cases which would have previously been 'slam-dunk' convictions." While considerations of judicial economy are certainly relevant to the instant discussion, this line of reasoning elevates judicial economy above fundamental fairness and subordinates the substantive due process rights of defendants. Indeed, the essential role of the judiciary is not to facilitate "slam-dunk" prosecutions for Plaintiff, but rather to see that substantial justice is done. *Jaminet v. Medical Center Real Estate Developers, Inc.*, 7th Dist. No. 87 CA9, 9 (Apr. 25, 1988). The court in *Bergman* aptly summarized the substantive due process implications of Plaintiff's position as follows:

> [T]he determination of evidential reliability necessarily implicates the defendant's substantive due process rights.
>
> 'Substantive due process, (although an) ephemeral concept, protects specific fundamental rights of individual freedom and liberty from deprivation at the hands of arbitrary and capricious government action. The fundamental rights protected by substantive due process arise from the Constitution itself and have

been defined as those rights which are "implicit in the concept of ordered liberty." (* * *) While this is admittedly a somewhat vague definition, it is generally held that an interest in liberty or property must be impaired before the protections of substantive due process become available.' State v. Small, 162 Ohio App.3d. 375, 2005 Ohio 3813, ¶11, 833 N.E.2d 774, * * * (10th Dist.), quoting *Gutzwiller v. Fenik*, 860 F.2d. 1317, 1328 (6th Cir. 1989).

However vague the conceptual parameters of one's substantive due process guarantees may be, the following principle is clear; '(substantive) * * * due process is violated by the introduction of seemingly conclusive, but actually unreliable evidence.' *Barefoot v. Estelle*, 463 U.S. 880, 931, fn. 10, 103 S. Ct. 3383, 77 L. Ed. 2d 1090, * * *." (Parallel citations omitted.) *Collazo*, 11th Dist. No. 2012-L-067, 2013 Ohio 439, ¶41-44.

As the Court of Appeals, Tenth Appellate District has observed:

'Substantive due process prohibits the government from infringing upon fundamental liberty interests in any manner, regardless of the procedure provided, unless the infringement survives strict scrutiny; i.e., the government's infringement must be "narrowly tailored to serve a compelling state interest." infringement must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores* (1993), 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1, * * *.' *In re M.D.*, 10th Dist. No. 07AP-954, 2008. *Bergman* at ¶ 28-32.

Defendants' Specific Attacks against Statutory Presumption of I8000 Reliability

Under Evid.R. 702, a witness may testify as an expert, and may give testimony that reports the result of a procedure, test, or experiment, when all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
(2) The design of the procedure, test, or experiment reliably implements the theory;
(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

"[E]xpert scientific testimony is admissible if it is reliable and relevant to the task at hand." *Miller v. Bike Ath. Co.*, 80 Ohio St.3d 607, 740, 687 N.E.2d 735 (1998), citing *Daubert*, 509 U.S. at 589. Furthermore, "[t]o determine reliability, the *Daubert* court stated that a court must assess whether the reasoning or methodology underlying the testimony is scientifically valid." *Id.*, citing *Daubert* at 592-93. Thus,

> [i]n evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance. Although these factors may aid in determining reliability, the inquiry is flexible. The focus is 'solely on principles and methodology, not on the conclusions that they generate.'

(Citations omitted.) *Id.*

The ultimate admissibility of the I8000 results in this case hinges on whether the I8000 meets the requirements of Evid.R. 702(C), and the parties focused particularly on the second and third factors, that is, whether the I8000's design and the manner in which it purports to measure breath-alcohol reliably yields scientifically accurate results.

This court held an evidentiary hearing on Defendants' motion to exclude that lasted for many days, non-consecutively, over the course several months. Each side introduced evidence in the form of reports, exhibits, and expert testimony regarding the reliability and accuracy of the I8000. Plaintiff offered the testimony of Dr. John Wyman, Mr. Brian Faulkner, Ms. Mary Martin and Mr. Craig Yanni. Defendants offered the expert testimony of Dr. Alfred Staubus, Dr. Michael Hlastala, and Mr. Thomas Workman. In their post-hearing briefs, Defendants argue that the "defense expert witnesses demonstrated breath testing on the Intoxilyzer 8000 in Ohio is conducted in a way that does not yield accurate results." Plaintiff argues that the evidence showed conclusively that the I8000 is an accurate and reliable

breath-testing instrument and that the Court should "take judicial notice of its general reliability."

Among myriad others, Defendants focused their attacks on the following specific reliability issues: 1) whether the I8000 has been tested for and designed to address radio frequency interference ("RFI") from devices such as smartphones, 2) whether the I8000 is subject to operator manipulation in a manner that can yield incorrect results, and 3) whether the I8000 yields inaccurate results because it fails to filter substances similar to ethanol out of breath samples, such as mouth alcohol.

Mr. Faulkner, the Manager of Engineering at the company that manufactures the I8000, testified that the I8000 can be affected by RFI. While the I8000 has been tested regarding interferences from certain frequencies, such as police radios, Mr. Faulkner testified that the instrument has not been tested regarding devices that produce similar frequencies, such as smart phones. Dr. Staubus, a breath-testing expert who has been trained regarding the I8000 and who owns and regularly experiments with breath-testing instruments, also testified that it is unknown whether the I8000 is able to detect RFI from devices such as smart phones and wireless networks. Mr. Workman, an expert in high technology, stated that while breath-testing instruments historically have been designed to detect RFI from devices such as police radios, the RFI detector on the I8000 has not been tested regarding digital assistants, smart phones, and other recently-developed, frequency-emitting devices.

Next, the evidence showed that the I8000 requires a subject to submit two separate breath samples, and that the samples must have a .02 agreement. Furthermore, the evidence showed that although the display on the I8000 indicates when the instrument has taken in a complete, 100% sample, it also then allows for taking sample quantities above and beyond a 100% sample. According to Dr. Staubus, the longer a subject blows into the

instrument past 100%, the higher the breath-alcohol concentration measured. Thus, the instrument appears deficient, in terms of reliability, in that the operator of the machine may manipulate the result by requiring a subject to blow beyond a 100% sample. Dr. Hlastala, an expert on the physiology of the human lungs, agreed that results of the I8000 are subject to manipulation by the operator, and he testified that such a deficiency undercuts the reliability of the results because the result will reflect an inflated breath-alcohol concentration. For example, if an operator stops collecting the sample at 100% on the first test and the result is .09, and during the second test the subject's result is only .06 upon reaching 100%, the operator can instruct the subject to continue blowing into the instrument so that the result will increase to within the .02 margin of error. Mr. Yanni, who trains operators on how to administer tests on the I8000, testified that he teaches operators to instruct subjects to take a deep breath and blow into the instrument for as long as they can without reference to the 100% sample display on the instrument. On cross examination, Mr. Faulkner conceded that the design of the I8000 permits operator manipulation of the results. Dr. Wyman, too, acknowledged that it is "theoretically" possible that an operator could manipulate the two I8000 results so that they would be within the .02 margin of error.

Last, according to Dr. Staubus, the I8000 is deficient because the filters and bandwidth the instrument uses make it vulnerable to artificially increasing ethanol measurements when chemical substances similar to ethanol, such as mouth alcohol, are present. As stated by Defendants, Dr. Staubus explained that "[w]hen mouth alcohol is not detected and is instead added to the breath alcohol, the breath alcohol concentration is falsely elevated and is an inaccurate result." Furthermore, Dr. Hlastala agreed that the design of the I8000 is deficient in this manner, because the instrument uses inferior measuring technology that increases the likelihood that a given sample is tainted by the presence of mouth alcohol or other similar

substances. Mr. Workman's testimony also supported the notion that the I8000's design is deficient because the inferior measuring technology it uses gathers far fewer data points than other breath-testing instruments (four points per second instead of forty) and, therefore, the contaminating presence of substances similar to ethanol is more difficult for the instrument to recognize. "Peaks" or "spikes", in the gathered data that would indicate the presence of substances similar to ethanol are, mathematically, more difficult to recognize because with less data, the peaks or spikes will be far less pronounced.

Evaluating whether results produced by the I8000 are reliable under Evid.R. 702(C), this court finds that the guiding factors of whether the instrument has been tested and subjected to peer review also weigh against concluding the I8000 is reliable. Ms. Martin testified that the I8000 was subjected to scientific testing by ODH itself, but she did not produce any test results or data during the hearing relating to that purported testing, and was ultimately unable to substantiate the assertion. Otherwise, the evidence showed that it remains unclear whether and to what extent the I8000 has ever been subjected to any scientific reliability review by CMI, Inc., ODH, or anyone else. Furthermore, in terms of the third factor regarding known or potential rates of error, the evidence showed that the I8000 has at least three critical deficiencies that seriously undermine the reliability and accuracy of its results: 1) whether it has been tested and designed to detect RFI from smartphones, which have become ubiquitous today, 2) the fact that the machine allows for taking breath sample quantities above 100% such that the longer a subject blows, the higher the result, and the potential for operator manipulation of the instrument to thwart the check of the purported .02 margin of error, and 3) the instrument's deficient ability to detect and alert to the presence of contaminating substances in the sample, such as mouth alcohol.

Additionally, this Court is hard pressed to find that the I8000 has achieved general

acceptance as a scientifically reliable breath-testing instrument in light of the specific deficiencies demonstrated by the testimony. The unrebutted evidence is that the only scientific testing of the I8000 has been done by law enforcement. The manufacturer has not engaged in independent scientific testing of its reliability even though the design defects have been the subject of extensive litigation. It refuses to provide a means by which the scientific community at large can review, let alone test, its reliability in light of these serious problems with the current design of the device.

In light of the above, while the I8000 is entitled to a presumption of reliability because ODH has approved it as an evidential breath-testing instrument, Defendants have met their burden of rebutting that presumption. The results of the I8000 are not scientifically reliable and the Court, as the gate-keeper against un-scientific evidence, must prohibit them from being introduced into evidence in this case.

Software Changes and Limited Holding

Both Ms. Martin and Mr. Faulkner testified that there have been numerous software changes made to the I8000 and more changes are ongoing. When ODH approved the I8000, the software version was No.7 and, subsequent to its approval, there have been at least three changes to that software resulting, at the time of the hearing, in software version No. 11. Moreover, the evidence showed that the I8000 software is subject to unilateral, remote modification by its manufacturer, CMI, Inc.

So many changes have been made that Defendants have even argued that the device used in the testing of these defendants is not even the same device approved by ODH, let alone the same device which is currently in use. For these reasons, the court cannot conclude that the deficiencies demonstrated by Defendants continue to exist or will exist in

the future. Additionally, during the course of the hearing on this matter, experts in breath-testing presented by Defendants acknowledged that the current deficiencies in design could be rectified, thus making the device capable of rendering a scientifically accurate result.

In light of the above, this court specifically limits the applicability of its ruling to the particular I8000 instruments employed in this case at the time that Defendants were tested.

Teresa L. Liston

Judge Teresa L. Liston, ret.
By assignment pursuant to Sup.R. 17(A)