CATEGORICAL SUMMARY OF
INTOXILYZER 8000 CASES

CATEGORIES ARE:
Constitutional Issues
Courts' Authority Under Vega
Reliability of Intoxilyzer 8000
Operator Access Card
Dry Gas Controls
Certification Documentation
Admission of Contrary Testimony
Retention/Modification of Records
Invalid Test – Lack of .02 Agreement
Techniques or Methods
Yearly Calibration
Initial Instrument Check or Certification

A) Constitutional Issues

State v. Ilg, 2014- Ohio-4258 (Ohio Supreme Court 10/1/2014) - This Ohio Supreme Court opinion did not explicitly discuss the separation of powers/"court may admit" issue as it was not raised in this case. Implicit in the decision not to consider this issue, combined with the affirmation that ODH has the sole authority to determine reliability of breath testing machines, is an acceptance that such legislative delegation of authority is constitutionally permissible.

State v. Gerome (Merits Opinion) 6/29/11 Athens County Municipal Court

1. R.C. 4511.19(D)(1)(b) is not in violation of the separation of powers provision in Article IV of the Ohio Constitution so long as the statutory language "the court may admit" does not remove the discretion of a court to determine the admissibility of technical evidence under Evidence Rule 702.

2. So long as the application of the Vega rule allows for the admission of contrary expert testimony going to the weight of the evidence, it does not violate constitutional principles against conclusive presumptions as found in the United States Supreme Court cases of *Sandstrom* and *Crane*.

State v. Anderson (Marysville Municipal Court 10/17/11) – Admission of certification documents without authenticating witness is a violation of the confrontation clause.

State v. Howell (Ottawa County Municipal Court 2/23/12) - It is not a violation of equal protection or due process to conduct a breath test on a single sample machine such as the

BAC Datamaster or Intoxilyzer 8000 OH-2 model (used by ODNR Division of Watercraft) instead of an available dual sample machine such as the Intoxilyzer 8000 OH-5 model.

State v. Ong (Maumee Municipal Court 10/22/12) – It is not a violation of equal protection to use a BAC Datamaster instead of an available Intoxilyzer 8000. Cites *Howell*.

State v. Mongeau - 2013-Ohio-5230 (3rd Dist 11/13/12) – It is not a violation of equal protection to test on a BAC Datamaster rather than an available Intoxilyzer 8000.

B) Courts' Authority Under *Vega*

State v. Ilg, 2014- Ohio-4258 (Ohio Supreme Court 10/1/2014) - Citing State v. Burnside, "the General Assembly instructed the Director of Health - and not the judiciary - to ensure the reliability of alcohol test results by promulgating regulations precisely because the former possesses the scientific expertise that the latter does not". The effect of this is that Evidence Rule 702 pretrial hearings are not appropriate to determine reliability and that, unless a test result from an ODH approved machine is suppressed on statutory/regulatory or constitutional grounds, it must be admitted into evidence.

State v. Hall (Monroe County Court 7/28/10) – R.C. 4511.19 legislatively replaced the common law foundational requirements for admissibility.

Logan v. Cole (Hocking County Municipal Court 2/18/11) – *Vega* prohibits trial courts from ruling on the admissibility of Intoxilyzer 8000 test results.

State v. Gerome (Preliminary opinion) (Athens County Municipal Court 5/25/11) – Trial courts have the right to determine admissibility of technical evidence under the Ohio Constitution, using Evidence Rules 104 and 702.

State v. Reid (Preliminary opinion) (Circleville Municipal Court 6/2/11) – *Vega* requires use of "proper equipment". The acceptance of the Intoxilyzer 8000 by ODH as an approved instrument is not sufficient in itself to lay the necessary foundation. New breath testing machines should be reviewed just as new speed measuring devices. [Note: reversed on appeal]

State v. Miles (Wayne County Municipal Court 6/28/11) – Once the State shows ODH certification and operator qualification, *Vega* prohibits an attack on the reliability of the Intoxilyzer 8000.

State v. Lentz (Cambridge Municipal Court 8/12/11) – Trial judge is to act as a gatekeeper regarding the admission of scientific evidence. Testimony of program administrator alone does not provide sufficient evidence of proper setup.

State v. Peters (Madison County Municipal Court 9/19/11) – *Vega* prohibits an inquiry in to the reliability of the Intoxilyzer 8000. [Note: opinion raises separation of powers concern]

State v. Linville (Warren County Court 11/1/11) – *Vega* prohibits trial courts from making an independent judgment as to the reliability of an approved instrument. Motion to Suppress denied.

State v. Toth (Oberlin Municipal Court 1/4/12) – An Evidence Rule 702 predetermination of admissibility is not appropriate given *Vega* and other cases construing Federal Evidence Rule 702. [Note: a well reasoned counterpoint]

State v. Johnson (Portage County Municipal Court 1/6/12) – Prosecution chose not to call any witness to explain the 8000. The Court suppressed results for lack of foundation. (Follows *Reid I* rationale). [Note: effectively overruled by *Carter, Rouse, and Miller* below] [reversed on appeal]
State v. Pinkston (Oberlin Municipal Court 1/23/12) – Reiterates decision and reasoning in *Toth*.

State v. Howell (Ottawa County Municipal Court 2/23/12) - There must be some evidence presented to the Court on some case, similar to the procedure for a speed measuring device, to establish the reliability of the technology of a particular breath testing machine. Since no such evidence has been offered regarding the Intoxilyzer 8000 OH -2 model used by the Division of Watercraft, results from that machine are presently inadmissible. (This holding is specific to the decision in the companion case of *State v. Hendrickson*.)

State v. Nicholson (Hamilton County Municipal Court 5/2/12) – *Reid II* opinion is persuasive but *Vega* is binding to prohibit consideration. [reversed on appeal]

State v. Welch (Cuyahoga Common Pleas Court 5/15/12) – *Vega* negates the necessity for an ER 702 pretrial determination of admissibility. This opinion notes with emphasis, but does not discuss the "court may admit" language of the statute.

State v. Sibley (Lawrence County Municipal Court 5/29/12) – Given the statutory language of "the court may admit", a trial court must act as a gatekeeper to determine the admissibility of technical evidence under Evidence Rules 104 and 702. As the prosecution declined to present any evidence regarding the technology of the Intoxilyzer 8000, the test results are inadmissible.

State v. Collazo (Painesville Municipal Court 6/1/12) – 4511.19 provides that "court may admit evidence", so it is the constitutional function of al court to act as a gatekeeper under Evidence Rules 104 and 702. Cites *Reid I* and *Miller v. Bike Athletic Co.* [reversed on appeal]

State v. Harmon (Portage County Municipal Court) 6/20/12 – State declined to present any evidence of reliability, arguing *Vega*. Court held that courts are to determine admissibility of

evidence, and to deny the defendant an opportunity to challenge scientific evidence is a denial of due process. Motion to Suppress granted. [reversed on appeal]

State v. Consolo (Portage County Municipal Court 8/30/12) - When the prosecution chooses not to present any evidence in response to a pretrial challenge to the reliability of the Intoxilyzer 8000, evidence from this instrument shall not be admitted. The decision cites this court's previous opinion of *Johnson*.

State v. Kyle Jones (Portage County Municipal Court 8/30/12) – Same procedural facts, holding and author as *Consolo*.

City of Fairfield v. Reid Jr. (Fairfield Municipal Court 9/27/12) – ER 104 requires a court to determine admissibility. As a gatekeeper, a court must allow only reliable evidence to be admitted. Pursuant to *Vega*, the defense may not make a (pretrial) general attack on the reliability of a breath testing instrument approved by ODH.
State v. Mongeau, 2013-Ohio-5230 (3rd Dist 11/13/12) – A challenge to the BAC Datamaster base on its single breath sample is a generalized attack, not a challenge to the specific test, and so is prohibited by *State v. Vega*.

State v. Carter 12/3/12 – 2012-Ohio-5583 (11th Dist)

State v. Rouse 12/3/12 – 2012-Ohio-5584 (11th Dist)

State v. Miller 12/3/12 – 2012-Ohio-5585 (11th Dist)

RC 4511.19 (D)(1)(b) creates a rebuttable presumption of reliability of an administratively compliant breath test on an ODH approved instrument. The prosecution need not initially produce foundational evidence. The defense has the burden of making a specific challenge to reliability and of going forward with the evidence. A trial court retains its constitutional authority to determine admissibility based on a specific reliability challenge and defense expert testimony sufficient to overcome the statutory presumption of reliability if the prosecution does not sufficiently respond. See also *State v. Rouse* and *State v. Miller* opinions by the same panel of judges on this issue. [Note-These cases overrule *Johnson* in the 11th District. These opinions do not reach the issue as to what is a specific, as opposed to a generalized, attack on reliability. Must the challenge be specific to the facts of that case or to that instrument, or, may it be to a specific design flaw in all such breath testing instruments of that type?]

State v. Collazo 2/8/13 – 2013-Ohio-439
State v. Johnson 2/8/13 - 2013-Ohio-440
State v. Schrock 2/8/13 - 2013-Ohio-441
State v. Harmon 2/8/13 - 2013-Ohio-442
State v. Funk 2/8/13 - 2013-Ohio-444
State v. Hatcher 2/8/13 - 2013-Ohio-445

State v. Webb 2/19/13 - 2013-Ohio-541
State v. Neice 2/19/13 - 2013-Ohio-542
State v. Butler 2/19/13 - 2013-Ohio-543
State v. Lucas 2/19/13 - 2013-Ohio-544
State v. Pizzino 2/19/13 - 2013-Ohio-545
State v. Kuntz 2/19/13 - 2013-Ohio-546
State v. McCune 2/19/13 - 2013-Ohio-547
State v. Zoeckler 2/19/13 - 2013-Ohio-548
State v. Tagliaferri 2/19/13 - 2013-Ohio-549
Sta*te v. Hinton* 2/19/13 - 2013-Ohio-550
State v. Canino 2/19/13 - 2013-Ohio-551
State v. Bellard 3/4/13 - 2013-Ohio-739
State v. Hobson 3/4/13 - 2013-Ohio-740

These nineteen cases include lead, concurring, and dissenting opinions from all five of the 11th district judges. There is agreement on some issues and disagreement on others. The procedural facts are identical in each case. No evidence was taken in the trial court in that the prosecution and defense each claimed that the other had the burden of producing evidence regarding the reliability of the Intoxilyzer 8000. The trial court held that it was the state's burden.

All of the appellate judges agreed that the prosecution need not present foundational evidence for an ODH approved instrument. All five judges agreed that expert testimony regarding a specific problem was admissible at trial to go to the weight of the evidence. The appellate judges disagreed on two related issues: (1) Does the "court may admit" language of 4511.19 D1b give courts authority to not admit ODH compliant tests based on other specific reliability concerns raised? (2) Under the separation of powers provision of Article IV, Section 5 of the Ohio Constitution, is the legislative delegation of responsibility for admissibility standards to the Ohio Department of Health unconstitutional?

In *Harmon*, the majority remanded on the burden of proof issue with instructions to consider the specific administrative compliance issues raised.

Webb, Neice, Butler, Lucas, Kuntz, Pizzino, Zoeckler McCune, Tagliaferri, and *Hinton* and were remanded with instructions that the defense had the burden of proof regarding reliability but that the statutory presumption of reliability was rebuttable at a pretrial motion hearing by a specific rather than a general challenge.

In *Schrock* and *Johnson*, there was a disagreement between the two majority judges as to whether the legislative presumption of reliability was rebuttable in a pretrial motion.

In *Funk* and *Collazo*, the majority remanded with specific conclusions of law finding the delegation of authority constitutional and limiting the pretrial motion to statutory and regulatory compliance.

In *Hatcher*, the majority remanded with a specific conclusion of law limiting the pretrial motion to statutory and regulatory compliance.

In *Canino*, *Bellard*, and *Hobson*, the majority remanded on the burden of proof issue but also found the delegation of authority to ODH constitutional as not being in conflict with the Evidence Rules, allowing a court to deny admissibility based on a specific, rather than general, challenge.

In each of the above nineteen cases, the dissent found the "court may admit" language to give trial courts discretion and that any other interpretation was unconstitutional as a violation of separation of powers under Article IV, Section 5.

*Editor's note: A review of all of the Intoxilyzer 8000 cases from the 11th District indicates a 2-2-1 split among the judges regarding the "may admit" and separation of powers issues. To say that the 11th District has established one position would be an oversimplification, especially given the subsequent change in judges at the last election. *Funk, Schrock, Hatcher, Webb*, *Kuntz, Tagliaferri*, and *Canino* are representative of the spectrum of opinions. The diverse opinions in these cases provide an excellent discussion of these issues and should be read by all judges.]

State v. Reid 2013-Ohio-562 (4th Dist 2/7/13) – The majority opinion held that *Vega*, ipso facto, required admission of ODH compliant breath tests, but invited the Ohio Supreme Court to revisit the issue due to changes in the legal landscape since 1984 and concerns about lack of definition of a "general attack". The dissent would find that the "court may admit" language grants courts discretion not to admit such evidence.

State v. Dugan 2013-Ohio-562 (12th Dist 2/11/13) - Majority opinion held that the only issues recognizable in a motion to suppress a breath test result are compliance with ODH regulations and qualification of the operator. The majority disagreed with the 11th district decisions of *Miller/Rouse/Carter* which recognized a third category of specific reliability problems with a machine or test. The majority did hold that such specific problems would be admissible at trial to go to the weight of the evidence. Judge Ringland's concurring opinion noted that the constitutional issue of separation of powers was not before the court but was an issue that should be resolved by the Ohio Supreme Court.

State v. Zachary Nicholson 2013-Ohio-639 and *State v. Smith* 2013-Ohio-640 2/25/13
These cases have the same procedural facts and holding as *Carter/Rouse/Miller*, remanded on the burden of proof issue, with the dissent in each case questioning the constitutionality of the legislative/administrative determination of reliability.

State v. Kohr – 2013-Ohio-877 3/11/13
State v. Britt – 2013-Ohio-878 3/11/13
State v. Wilson – 2013-Ohio-879 3/11/13
State v. Whittaker – 2013-Ohio-996 3/18/13

State v. Hoegler – 2013-Ohio-997 3/18/13
State v. Witherspoon – 2013-Ohio-1000 3/18/13
State v. Rose 2013-Ohio-1001 3/18/13
State v. Farrar – 2013-Ohio-1002 3/18/13
State v. Hart – 2013-Ohio-1003 3/18/13
State v. Pardee – 2013-Ohio-1004 3/18/13

These ten additional cases from the 11th District have the same procedural facts and holding as the court's earlier decisions of *Carter, Rouse*, and *Johnson*. An ODH approved machine is presumed generally reliable without the prosecution offering foundational evidence. The defense may make a specific challenge to reliability at a pretrial hearing with the defense having the burden of going forward and burden of proof.

The concurring opinion in *Hoegler, Witherspoon, Rose, Farrar* and *Hart* would hold that the presumption of reliability is not rebuttable at a pretrial hearing. The dissenting opinion in all ten cases found that the "court may admit" language gave trial courts discretion and that any other interpretation was unconstitutional as a violation of separation of powers under Article IV, Section 5.

State v. Yanchar 2013-Ohio-1296 (11th Dist 4/1/13) - By statutory delegation and regulation, the Intoxilyzer 8000 is presumed to be reliable. The defense may raise specific challenges to reliability in a pretrial motion for which the defense has the burden of proof and after which the trial court may choose not to admit the results. Cites *Miller, Rouse, Pizzino* and *Canino*. Dissent would find the delegation of authority to be a violation of separation of powers.

City of Parma v. Malinowski (Parma Municipal Court 4/22/13) – Trial courts are required to admit the results of an administratively compliant Intoxilyzer 8000 test without the necessity for the prosecution to lay a foundation under ER 702 (C). Reliability is to be determined at trial rather than as a pretrial admissibility determination.

State v. Lucarelli 2013-Ohio-1606 (11th Dist 4/22/13) - By statutory delegation and regulation, the Intoxilyzer 8000 is presumed to be reliable. The defense may raise specific challenges to reliability in a pretrial motion for which the defense has the burden of proof, and after which the trial court may choose not to admit the results. Cites *Miller* and follows *Canino, Bellard* and *Hobson.* Dissent would find the delegation of authority to be a violation of separation of powers.

State v. Palmer 2013-Ohio-2404 (11th Dist 6/11/13) – Follows *Johnson, Rouse*, and *Carter* decisions by this court. ODH approved instrument is presumptively reliable. Defense has burden of going forward and burden of proof with a specific attack at a pretrial hearing to overcome this rebuttable presumption.

State v. Consolo 2013-Ohio-2611 (11th Dist 6/24/13) - This case cites *Miller* and reaches the same holding as *Palmer*. [Reversing trial court decision.]

State v. Mason 2013-Ohio-2612 (11th Dist 6/24/13) - The majority opinion follows the *Canino/Bellard/Hobson* holdings of the machine being presumptively reliable with the burden of proof on the defense and Evidence Rule 702 being inapplicable. This case is most significant for the dissenting opinion from the newly elected judge, which is her first published view on this issue. The dissent would join another judge from this district whose previous dissents in other related cases would find that the "court may admit" language of 4511.19 D1b gives courts discretion to not admit results, noting that *Vega* requires "proper equipment"*Editor note: See Reid 1/26/12 trial court decision for a full discussion of this point], and also finding a violation of the confrontation clause if the machine is not judicially vetted. [Editor note: It now appears that the Eleventh District has a different 2-1-2 split on the meaning and constitutionality of 4511.19D1b.]

State v. Bergman, 2013 Ohio 3078 (11th District Court of Appeals 7/15/13)
This opinion is the first case to affirm the trial court's suppression of test results for failure of the prosecution to lay a foundation for the reliability of the Intoxilyzer 8000. The lead opinion adopts the *Reid I* rationale that the "may admit" language of 4511.19 D1b gives trial courts authority to not admit and that, absent proof of reliability, it is a violation of due process to admit the test result. The lead opinion also extensively cites *Parma v. Malinowski*. The dissenting opinion notes that the majority opinion in this case is a minority view among the five district judges, with the other three having authored opinions holding that the statute creates a rebuttable presumption of reliability which eliminates the need for foundational evidence by the prosecution. [Overruled by en banc reconsideration 2013-Ohio-5811].

State v. O'Neill 2013-Ohio-2619 (11th District 6/24/13)
Trial court is limited to deciding administrative compliance. There is no conflict between 4511.19D1b and the Evidence Rules. Dissent would require prosecution to establish reliability before admission. Trial Court affirmed on other procedural grounds.

State v. Raynish 2013-Ohio-2620, 11th District 6/24/13
Lead opinion same as *O'Neill.* Concurring opinion follows *Rouse/Miller/Carter* of shifting burden of production to defense with evidence presumed admissible without need for prosecution foundation. Dissent same as *O'Neill*.

State v. Albaugh 2013-Ohio-2834 (11th Dist 6/28/13)
Lead opinion same as concurring in *Raynish.* Concurring opinion same as lead in *Raynish*. Dissent same as in *O'Neill and Raynish.*

State v. Haught 2013 – Ohio – 2835, 11th District 6/28/13
Same three positions as *Albaugh* with a different dissenting judge. [Editor note: Of the five current district judges, in the several cases on this issue, two have held that an administratively compliant test is presumably reliable and admissible unless the defense produces specific evidence at a pretrial motion to shift proof to the prosecution. One judge has held that an administratively compliant test must be admitted, with specific challenges to reliability going to

the weight of the evidence at trial. The other two judges have held that the prosecution must produce foundational evidence of reliability for admissibility.]

State v. Lancaster 8/14/2013 -- The "may admit" language of 4511.19D1b vests the trial court with discretion in making a determination as to admissibility. The prosecution does not bear an initial burden to establish reliability because such gatekeeping function has been legislatively delegated to the Director of Health. Once specific issues are raised by the defense, a court is required to apply ER 702 with the defense having the burden of proof.

State v. Warner, 2013-Ohio-4116, (11th Dist. 9/23/13)
State v. Morrison, 2013 –Ohio-4117 (11th Dist. 9/23/13)
State v. Haney, 2013-Ohio-4119 (11th Dist. 9/23/13)
State v. Bevilaqua, 2013-Ohio-4120 (11th Dist. 9/23/13)
These cases follow the same split as in the earlier 11th district cases. The lead opinion places the burden of proving unreliability on the defense; the concurring opinion would hold that an administratively compliant test must be admitted; the dissenting opinion would hold the "may admit" language of the statute gives trial courts discretion to admit or not.

State v. Metzger, case no. TRC-1202160 (New Philadelphia Municipal Court, 11/6/13) -- RC 4511.19 D1b and ODH approval create a rebuttable presumption of admissibility. A trial court must admit the test result unless the defense overcomes the presumption with other than a general attack. A general attack would be against the science of breath testing. The issue presented here was whether the machine was proper equipment with testimony regarding specific equipment error issues.

State v. Jiminez, 2013-Ohio-5469 (6th District 12/13/13) -- A Datamaster passed both the pre-test and post-test weekly calibration checks, but failed 9 calibration checks within 60 days after the subject test. The trial court granted a motion to suppress, finding "no faith in the reliability of the test". Court of appeals affirmed, holding that 4511.19D1b created a rebuttable presumption of reliability but that the evidence in this case overcame that presumption and it was within the trial court's authority to suppress the result. "The legal standard is simply that a chemical breath test must be suppressed if it is not reliable. [Editor note: This is a conflict with the 10th District decision in State v. Luke.]

State v. Bergman, 2013-Ohio-5811, (11th District 12/31/13 en banc) -- This is an en banc reconsideration of this court's July 2013 opinion(2013-Ohio-3078) in which a majority of that panel found that the prosecution had the burden of proving reliability at a pretrial hearing. This 3-2 opinion overrules that decision and follows the Carter/Rouse/Miller line of cases finding that the test results are presumptively admissible without foundational evidence and that the

defense has both the burden of going forward with a specific challenge and the burden of proof to overcome the presumption. This case settles the burden of proof issue in the 11th District.

State v. Hamrick, 2013-Ohio-5808, (11th District 12/31/13)
State v. Wine, 2013-Ohio-5810, (11th District 12/31/13)
State v, Devitt, 2013-Ohio-5812, (11th District 12/31/13)
State v. Gold, 2013-Ohio-5813, (11thDistrict 12/31/13)
State v. Tucker, 2013-ohio-5814, 11th District 12/31/13)
These five cases cite and follow the en banc decision of Bergman (2013-Ohio-5811) regarding burden of proof.

State v. Forbes, 2014-Ohio-67 (11th District 1/13/14) – Follows Bergman en banc decision regarding burden of proof

State v. Titmas, 2014-Ohio-66 (11th District 1/13/14) – Follows Bergman en banc decision regarding burden of proof

State v. Zanni, 2014-Ohio-2806 (4th District 6/24/14) - A pretrial Motion in Limine challenging all Intoxilyzer 8000s as a class is a general attack prohibited by Vega. An ER 702 hearing as to reliability is not necessary or appropriate. Follows this district's decision in Reid. The dissent in this case coupled with the dissent by another judge in the Reid case means there is an even split among the four judges in the district.

C) Reliability of Intoxilyzer 8000

State v. Gerome (Merits) (Athens County Municipal Court 6/29/11) – Machine results meet Evidence Rule 702 threshold standards for admissibility although it has vulnerabilities. Reliability, like credibility, is to be determined by the trier of fact at trial.

State v. Wallace (Mason Municipal Court 9/1/11) – Unexplained discrepancy regarding sample attempts fails to show machine was in proper working order for this test and therefore the test results are suppressed. [Note: compare to *State v. Luke*, 2006-Ohio-2306]

State v. Reid (Merits) (Circleville Municipal Court 1/26/12) – Machine results do not pass gatekeeper standards of Evidence Rule 702. Results suppressed.

State v. Howell (Ottawa County Municipal Court 2/23/12) - The decision references the rationale of the June 29, 2011 opinion of *State v. Gerome* to find that results from the Intoxilyzer 8000 OH-5 model are admissible.

State v. Dugan (Butler Area III County Court 3/20/12) – Follows *Wallace*. Unexplained discrepancy requires suppression of test results in this case. Opinion also notes "court may admit" language of 4511.19(D)(1)(b). [Note: reversed on appeal]

State v. Collazo (Painesville Municipal Court 6/1/12) – Machine results do not pass gatekeeper standards of Evidence rule 702. Cites *Reid II, Wallace* and *Dugan*. [reversed on appeal]

State v. Muchmore (Hamilton County Municipal Court 11/30/12) – The directive in the operator's manual to take the instrument out of service after consecutive indications of the same failure is not part of the OAC regulations and therefore not mandatory. Failure to do so goes to weight not admissibility [Similar analysis as *State v. Luke*]

State v. Dugan 2013-Ohio-447 (12th Dist 2/11/13) – Reverses *State v. Dugan* above on basis of courts' authority to consider the issue.

State v. Lancaster (Marietta Municipal Court, 12TRC01615, 8/14/2013) - *Vega* requires courts to accept the scientific principles of breath testing but requires the tests be done on proper equipment. Upon consideration of expert testimony from both sides, the Court found the Intoxilyzer 8000 not to be proper equipment due to design deficiencies.

State v. Metzger, case no. TRC-1202160 (New Philadelphia Municipal Court, 11/6/13) -- The Intoxilyzer 8000 does not meet the "proper equipment" standard of State v. Vega. There are problems with ethanol distinction, breath volume, operator manipulation and radio frequency interference.

State v. Schmidt, case no. 12CR 084583 (Lorain County Common Pleas, 11/14/2013) -- The Intoxilyzer 8000 does not meet Daubert and Evidence Rule 702(C) standards (which were established after State v. Vega) for the admissibility of scientific evidence. There are problems with mouth alcohol distinction, breath temperature, breath volume, and radio frequency interference.

D) <u>Operator Access Card</u>

State v. Michael, 2014-Ohio-4535 (3rd District 10/14/2014) - An operator access card does not expire every 12 months but is subject to a proficiency test each calendar year. A card issued in February 2012 is still valid in April 2013.

State v. Hudepohl 166 Ohio Misc 2d1 (Athens County Municipal Court 7/15/11) – Holder of 8000 access card is not disqualified from also operating BAC Datamaster. Administrative code provisions must be read in *pari materia*. Test admitted.

State v. Blair (Licking County Municipal Court 7/19/2011) - Holder of 8000 access card is not disqualified from operating a BAC Datamaster.

State v. Noble (Fairfield Municipal Court 1/24/2012) - Holder of 8000 access card is not disqualified from operating a BAC Datamaster.

State v. Castle (Franklin County Municipal Court 4/24/12) – Holder of 8000 access card is disqualified from also operating BAC Datamaster. Regulation language is not ambiguous and should be given is plain meaning. Test suppressed. [reversed by 10th District]

*State v. Musulin (*Columbiana County Municipal Court 5/9/12) – Follows *Castle* reasoning, but finds substantial compliance nevertheless, admitting test results.

Worthington v. Cook (Franklin County Municipal Court 5/30/12) – Holder of both Datamaster permit and 8000 operator access card is not disqualified from operating Datamaster. Court rejects defense argument that purpose of paragraph (D) is to eliminate use of older machines, given that ODH renewed the operator's permit after issuing his operator access card. Opinion questions, but does not answer, the legality of the issuance of operator access cards. The statute explicitly authorizes "permits", not access cards. Is an 8000 access card a permit?

State v. Moore, Montague (Athens County Municipal Court 8/17/12) – There are no standards promulgated in OAC Chapter 3701-53 regarding qualifications necessary to obtain an operator access card. Such omission is a failure to comply with the mandate of R.C. 3701.143 and, pursuant to *State v. Ripple*, requires suppression of all Intoxilyzer 8000 test results. [Reversed on Appeal]

State v. Mouzon (Oberlin Municipal Court 10/9/12) – The standards necessary to obtain an operator access card are the same as for an operator's permit under OAC 3701-53-07(E).

State v. Poland (Dayton Municipal Court 10/12/12) – Holder of Intoxilyzer 8000 access card and Datamaster senior operator permit is not disqualified from operating BAC Datamaster.

Cincinnati v. McMahon (Hamilton County Municipal Court 10/25/12) – The program administrator testified that there are no specific standards in OAC 3701-53-07 to qualify for an operator access card. Her practice is to require an applicant to meet the qualifications for an operator's permit for another machine, take training and pass a test on the Intoxilyzer 8000. The court found that the absence of any qualification standards in the regulations was a failure to comply with the RC 3701.143 requirement for the ODH Director to set forth necessary qualifications. Pursuant to *State v. Ripple*, such lack of regulations require test results being suppressed. [Note: reversed on appeal]

State v. Nethers 2012-Ohio-5198 (5th Dist 11/5/12) – Holder of Intoxilyzer 8000 access card and a permit for BAC Datamaster is not disqualified to operate BAC Datamaster. Cites *Hudepohl.*

State v. Garay (Hamilton County Municipal Court 11/15/12) – Noting the conflicting opinions of *Castle* and *Cook*, the Court followed *Cook*, finding that an officer holding both a permit for an Intoxilyzer 5000 and an access care for an Intoxilyzer 8000 was authorized to operate both.

State v. Nussbaum (Massilon Municipal Court 11/19/12) – Officer holding both an 8000 operator access card and a later issued senior operator permit for a BAC Datamaster is not disqualified to operate the Datamaster, but rather is qualified to operate both instruments.

State v. Muchmore (Hamilton County Municipal Court 11/30/12)
1) An operator access card is a type of permit authorized by statue. "A rose by any other name".
2) There are no regulations in OAC establishing standards to obtain an operator access card, so there are no properly qualified operators of the Intoxilyzer 8000.

State v. Castle 2012-Ohio-6028 (10th Dist 12/20/12) – An officer holding both a senior operator certificate for the Datamaster and an operator access card for the Intoxilyzer is authorized to operate both. Cites *Nethers* and *Hudepohl*. [reversing trial court above]

State v. Carmony 2013-Ohio-1869 (5th Dist 1/29/13) – Holder of 8000 access card is not disqualified from operating BAC Datamaster. Cites *Nethers* and *Hudepohl*

State v. Sisson 2013-Ohio-1869 (5th Distr 5/7/2013) – Holder of both an 8000 access card and a Datamaster senior operator permit is authorized to operate both. Cites *Hudepohl* and *Nethers*.

Cincinnati v. McMahon 2013-Ohio-2557 (1st Dist 6/21/13) – An operator access card is the type of permit that is issued under OAC 3710-53-07 (E) to those qualified to operate the Intoxilyzer 8000. The qualifications are the same as for an operator's permit. There need not be separate regulations for qualifications for an operator access card.

State v. Justice 10/22/12 - An officer holding both a senior operator permit for the BAC Datamaster and an operator access card for the Intoxilyzer 8000 is authorized to operate both. Cites *Hudepohl* and *Worthington v. Cook*.

State v. Maslar 8/9/13 – Prior to the July 25, 2013 amendment to OAC 3701-53-09, there were no regulations establishing qualifications for issuance of operator access cards. The testing officer was not properly qualified at the time of the November 18, 2012 test so the test result is suppressed. Opinion concurs with the trial court opinion of *Moore/Montague* and disagrees with the appellate opinion in *McMahon*.

State v. Walsky, 2013-Ohio-4115 (11th Dist. 9/23/13) -- An operator access card is a type of permit authorized by statute. The opinion notes that operator qualification standards for an access card was not raised as an issue.

State v. Muchmore, 2013-Ohio-5100 (1st Dist. 11/20/13) -- Follow this district's ruling in Cincinnati v. McMahon (6/21/13) accepting the ODH interpretation of the regulation that the standards are the same as for an operator's permit. [The opinions note, but do not discuss, the July 2013 amendment to the regulation that added language regarding qualifications.]

State v. McNett, 2013-Ohio-5099 (1st Dist. 11/20/2013) -- Follow this district's ruling in Cincinnati v. McMahon (6/21/13) accepting the ODH interpretation of the regulation that the standards are the same as for an operator's permit. [The opinions note, but do not discuss, the July 2013 amendment to the regulation that added language regarding qualifications.]

State v. Clemente, 2013-Ohio-5213 (1st District 11/27/13) -- Follows McMahon that standards are the same as for an operator's permit.

State v. Harrington, 2013-Ohio-5214 (1st District 11/27/13) -- Follows McMahon that standards are the same as for an operator's permit.

State v. Wirth, 2013-Ohio-5215 (1st District 11/27/13) -- Follows McMahon that standards are the same as for an operator's permit.

State v. Montague, 2013-Ohio-5505 (4th District 12/11/13) -- Follows the First District appellate opinion of McMahon that the qualifications for an operator access card are the same as for an operator's permit. The majority held that the July 2013 OAC amendments clarified, rather than provided, the required qualifications. Dissent agreed with trial court analysis. [Reversing trial court]

State v. Moore, 2013-Ohio-5506 (4th District 12/11/13) -- Follows the First District appellate opinion of McMahon that the qualifications for an operator access card are the same as for an operator's permit. The majority held that the July 2013 OAC amendments clarified, rather than provided, the required qualifications. Dissent agreed with trial court analysis. [Reversing trial court]

State v. Inman, 2014-Ohio-97 (1st District 1/15/14) – Follows Mc Mahon that qualifications are the same as for an operator's permit.

E) <u>Dry Gas Controls</u>

State v. Allen 5/11/11 – Only two needed per subject. Noble County Court

State v. Vermillion 6/1/11 – Only two needed per subject. Athens County Municipal Court

State v. Kormos 8/31/11 – Three needed, including one between the first and second samples/subject tests. [Note: reversed on appeal; see below] Clermont County Municipal Court

Lebanon v. McFarland 1/30/12 – Three needed. Lebanon Municipal Court

State v. Collins 3/16/12 – Only two needed. Lima Municipal Court

Cincinnati v. Scott Nicholson 5/2/12 – Three needed. [reversed on appeal] Hamilton County Municipal Court

State v. Starr 5/8/12 – Only two needed per subject. The operations manual does not require an interim check. Noble County Court

State v. Welch 5/15/12 – Only two dry gas controls are required. According to expert testimony provided, such is consistent with scientific protocol. Cuyahoga Common Pleas Court

State v. Kormos 7/9/12 – "Subject test" is defined as the test of a subject, meaning the entire sequence of the test rather than just one of the breath samples. Therefore, only two dry gas controls are required for each complete two sample test. [Note: reversing trial court above] 2012-Ohio-3128 (12th Dist)

State v. Consolo 8/30/12 – The absence of dry gas control between subject tests/samples is in violation of the plain language of the regulation. Portage County Municipal Court

State v. Kyle Jones 8/30/12 – Same procedural facts, holding and author as *Consolo*. Portage County Municipal Court

State v. Muchmore 11/30/12 – Only two needed per subject, citing *Kormos* appellate decision. Hamilton County Municipal Court

Cincinnati v. Scott Nicholson 3/1/13 – Only two required, before first sample and after second sample. Cites *Kormos* appellate decision. 2013-Ohio-708 (1st Dist) [Reversing trial court decision]

State v. *Consolo* 6/24/13 – Only two controls are required. Case cites the appellate decisions of *Kormos* and *Nicholson*. [Reversing trial court decision] 2013-Ohio-2611 (11th Dist)

State v. Lambert 8/21/13 – Follows appellate decisions of *Kormos* and N*icholso*n that only two controls are required. 2013-Ohio-3589 (1st Distr)

State v. Kyle Jones, 2013-Ohio-4114 (11th Dist. 9/23/13) -- Only two required per subject test, citing appellate decisions of Kormos and Nicholson.

State v. Wirth, 2013-Ohio-5215 (1st District 11/27/13) -- Only two required. Notes the 7/25/13 OAC amendment which explicitly clarifies this issue.

F) <u>Certification Documentation</u>

State v. Parlier 3/5/10 – Uncertified copy is admissible and sufficient to prove initial certification and calibration at setup. See also *Fintak* and *Horton* by the same author with the same reasoning citing *State v. Edwards* (2005) 107 Ohio St.3d 169. Clermont County Municipal Court

State v. Gerome (Merits) 6/29/11 – Certified copies admissible without live authenticating witness. Cites *Parlier*. Athens County Municipal Court

State v. Dial, 2013-Ohio-3980 (3rd District 9/16/13) -- Uncertified documentation re the Intoxilyzer 8000 calibration is admissible without a live witness. Such does not violate the right of confrontation as interpreted by Melendez-Diaz and Bullcoming as this documentation was not for an individual subject test. Cites earlier cases on similar Datamaster documentation from the 1st, 5th, and 6th districts.

State v. Anderson 10/17/11 – Admission of certification documents without live witness is a violation of the confrontation clause. Marysville Municipal Court

State v. Nicholson 5/2/12 – Photocopies admissible to prove compliance. Opinion discusses confrontation issue. [reversed on appeal] Hamilton County Municipal Court

State v. Mouzon 10/9/12 – An uncertified copy from ODH is admissible and sufficient at a pretrial hearing to prove initial instrument certification. Oberlin Municipal Court

State v. Miller 10/23/12 – Certification and other regulatory compliance was shown by the stipulated documentary evidence. Hamilton Municipal Court

State v. Littlefield 2/13/13 – The inability of the testing officer to identify the testing instrument as an OH-5 model rather than an OH-2 model of the Intoxilyzer 8000 did not require suppression of the test results. The certified and stipulated documentation showed the instrument to be an OH-5 model and that the instrument was in regulatory compliance. 2013-Ohio-481 (4th Dist)

State v. Dial, 2013-Ohio-3980 (3rd District 9/16/13) -- Admission and acceptance of copies of inspector's initial certification of machine, without live testimony at suppression hearing, did not violate the confrontation clause. Cites cases from the 1st, 5th, and 6th Districts re Datamaster records.

G) <u>Admission of Contrary Testimony</u> [Note: See Evidence Rule 104(E)]

State v. Ilg, 2014- Ohio-4258 (Ohio Supreme Court 10/1/2014) - ODH approval of a breath analyzer machine "does not preclude an accused from challenging the accuracy, competence, admissibility, relevance, authenticity or credibility of specific test results or whether the specific machine used to test the accused operated properly at the time of the test". Data from such machine or test is relevant and subject to discovery and subpoena. Failure of the State to provide such relevant evidence to the accused allows exclusion of the machine test results as a discovery sanction.

State v. Gerome (Merits) 6/29/11 – The defense may present relevant contrary evidence, including technical evidence, regarding the 8000 so long as the issue relates specifically to this case rather than a general attack on the machine. Athens County Municipal Court

State v. Peters 9/19/11 – Although *Vega* prohibits a pretrial determination as to the reliability of the Intoxilyzer 8000, evidence of irregularities is admissible at trial to go to the weight of the evidence of the test results. Madison County Municipal Court

State v. Toth 1/4/12 – Expert testimony is admissible at trial with Criminal Rule 16 notice compliance. Oberlin Municipal Court

State v. Howell 2/23/12 - The result from an evidentiary breath testing machine is some evidence of breath alcohol content at the time of operation but is not a conclusive presumption. Contrary evidence is admissible if relevant to the specific facts of the case. Ottawa County Municipal Court

State v. Nicholson 5/2/12 – Evidence of contemporaneous machine problems is admissible at trial. Hamilton County Municipal Court

City of Fairfield v. Reid Jr. 9/27/12 – Case specific evidence going to the weight of the evidence regarding the reliability of instrument results are admissible (at trial) upon discovery and evidence rule compliance. Fairfield Municipal Court

State v. Muchmore 11/30/12 – Any issues regarding credibility, reliability, or the operation of an individual test are appropriate for trial. Hamilton County Municipal Court

City of Parma v. Malinowski 4/22/13 – The defense may present evidence at trial attacking the reliability of the Intoxilyzer 8000 test result in a specific case. Such evidence may include information on the machine and its science, notwithstanding its blessing by the Ohio Department of Health, and also specific irregularities to the particular test involved. *Vega* may not be construed to create a conclusive presumption as to the amount of alcohol in a person's breath, as conclusive presumptions are unconstitutional under *Sandstrom v. Montana.* Parma Municipal Court, Case 12TRC03580

H) <u>Retention/Modification of Records</u>

State v. Ilg, 2014- Ohio-4258 (Ohio Supreme Court 10/1/2014) - Affirmed 1st District that exclusion of the test result was within the trial court's discretion as a remedy for the discovery and subpoena compliance violations.

State v. Starr 5/8/12 – ODH has changed some of the information on its website regarding past test results but OAC 3701-53-01 requires retention of records for three years. ODH Program Director testified that original evidentiary data is retained at the bureau office.

Information on the website is for informational purposes only and is not intended as evidence. Opinion notes that ODH is not required to have a website or have any particular information on that website. Requirement is for retention, not accessibility. (Note: ODH website data is not only non-evidentiary but also misleading as appearing to be a factual record. Is the defense required to make a specific discovery request and/or subpoena for original records? How can a court resolve any dispute as to what is original?) Noble County Court

State v. Consolo 8/30/12 – ODH retroactive change of their records does not change the facts and forms existing at the time the test was given. Portage County Municipal Court

State v. Kyle Jones 8/30/12 – Same procedural facts, holding and author as *Consolo*. Portage County Municipal Court

State v. Muchmore 11/30/12 – Hamilton County Municipal Court
1) Court granted defense motion to compel certain instrument specific information which was once on the ODH website but was later removed. ODH restored information and the motion was withdrawn.
2) When the ODH computer system loses one week's records for a particular instrument, there is a failure of substantial compliance to maintain all records of the instrument for three years.

Cincinnati v. Ilg 5/31/13 – [*Appeal Accepted Ohio Supreme Court Case 2013-1102] Court of Appeals held that exclusion of test results was a proper discovery sanction for refusal of Ohio Department of Health to comply with subpoena for COBRA records regarding the individual machine used in Defendant's test. Prosecution unsuccessfully argued they should not be sanctioned for ODH noncompliance. 2013-Ohio-2191 (1st Dist)

State v. Consolo 6/24/13 – ODH modification of terminology in recorded test of "subject tests" to "subject samples" is not a change in the numerical results and is therefore immaterial. [Reversing trial court decision.] 2013-Ohio-2611 (11th Dist)

State v. Muchmore, 2013-Ohio-5100 (1st Dist. 11/20/13) -- The requirement to retain records for three years pertains only to subject test results, meaning the lower score breath sample. There is no requirement to retain COBRA data. [Note: Compare to State v. Ilg, which upheld exclusion of evidence for a similar discovery violation.]

State v. McNett, 2013-Ohio-5099 (1st Dist. 11/20/2013) -- The requirement to retain records for three years pertains only to subject test results, meaning the lower score breath sample. There is no requirement to retain COBRA data. [Note: Compare to State v. Ilg, which upheld exclusion of evidence for a similar discovery violation.]

State v. Clemente, 2013-Ohio-5213 (1st District 11/27/13) -- Follows McNett that only test results must be kept. Holds that police on site records satisfy this requirement when ODH records are missing for this time period.

State v. Harrington, 2013-Ohio-5214 (1st District 11/27/13) -- Loss of dry gas control records for ten tests is substantial compliance with OAC 3701-53-04 (G) as ODH did not lose most of the dry gas control records.

State v. Wirth, 2013-Ohio-5215 (1st District 11/27/13) -- Follows McNett that only test results must be kept. Holds that police on site records satisfy this requirement when ODH records are missing for this time period. Although the missing test data included Defendant's particular test, Defendant failed to show prejudice from the failure to preserve. [Editor note: How does one show prejudice without knowing what is in the test data? Is not this the test specific information that should be admissible at trial to go to the weight of the evidence? Should the existence of a specific regulation requiring preservation take it out of the "exculpatory/potentially useful" analysis?]

State v. Inman, 2014-Ohio-97 (1st District 1/15/14) – Follows McNett and Clemente re types of records required to be kept.

Parma v. Schoonover, 2014-Ohio-400 (8th District 2/6/14) – A trial court must hold an evidentiary hearing on an ODH motion to quash a subpoena for COBRA records, using the four part Nixon/Potts criteria.

State v. Hogue, 2014-Ohio-1565 (9th Dist. 4/14/2014) - Trial Court correctly suppressed the breath test results when the State did not maintain all data from defendant's test. The State lost the electronic data and the paper copy did not include information about atmospheric pressure, intake pressure, subject volume, subject duration and sample attempts so Defendant did show necessary prejudice.

Cincinnati v. Neff, 2014-Ohio-2026 (1st District 5/14/14)
Trial court denied Ohio Dept. of Health motion to quash subpoena for Intoxilyzer 8000 records after considering oral argument. Appellate Court remanded, holding that an evidentiary hearing, rather than argument alone, was required for proponent of subpoena to show appropriateness.

I) <u>Invalid Test – Lack of .02 Agreement</u>

State v. Kitzler (Third District) 10/24/11 – While invalid test results are normally inadmissible, it was not error to admit such when accompanied by expert testimony and a separate valid test score. Opinion also held that it was not error to give the subsequent test on a Datamaster rather than retest on the 8000. 2011-Ohio-5444

J) Techniques or Methods

City of Fairfield v. Reid Jr. 9/27/12 – ODH has satisfied the requirement of RC 3701.143 to approve techniques or methods to determine breath alcohol content by approving specific instruments such as the Intoxilyzer 8000 rather than identifying the IR methodology which the instrument uses. While techniques or methods are generally described for blood and urine laboratory tests, the specific approvals in OAC 3701-53-02 necessarily implicitly determine the IR method to be proper. Fairfield Municipal Court

State v. Miller 10/23/12 – The regulations in OAC Chapter 3701-53 regarding the Intoxilyzer 8000 satisfy the requirements of RC 3701.143 to approve techniques or methods. Hamilton Municipal Court

K) Yearly Calibration

State v. Muchmore 11/30/12 – The regulation requires calibration once each year. An instrument calibrated June 15, 2011 need not be calibrated again in January 2012 before using it in the new calendar year. Hamilton Municipal Court

State v. Patel 7/15/13 -- OAC 3701-53-04 (C) requires calibration certification "once each calendar year". Certifications in July 2011 and then in August 2012 are sufficient as calendar year has been defined by Ohio Supreme Court. [Note: This interpretation differs from that of *Muchmore* and will allow interims of up to 23 months.]

State v. Vu, 2014-Ohio-3463 (1st District 8/13/14) - The requirement of calibration "once every calendar year" does not mean within 365 days of the last calibration. A machine calibrated any time in 2011 need not be calibrated again until any time in 2012. Cites and follows the 5Th District case of State v. Patel.

L) Initial Instrument Check or Certification

State v. Jablonowski 1/22/13 – When a breath testing instrument is placed in or returned to service, there must be an initial testing of the instrument done before any subject tests. The type of initial test depends on the type of instrument. A BAC Datamaster requires an instrument check under OAC 3701-53-04 (A) performed by a senior operator. An Intoxilyzer 8000 requires a certification under OAC 3701-53-04 (C) by an ODH representative. Only one such test is required, not both. Athens County Municipal Court

State v. Lambert. The requirement of OAC 3701-53-04 (D) for an initial certification is that it be done prior to use. There is no additional requirement that it be done on the site of intended use. 2003-Ohio-3589 (1st Dist) 8/21/13