TABLE OF CONTENTS

Page

STATEMENT OF THE CASE.....1

STATEMENT OF FACTS.....2

SUMMARY OF ARGUMENT.....2

ARGUMENT.....4

I. THE CONSIDERATIONS GOVERNING THE CHOICE OF SUBMITTING TO OR REFUSING AN ALCOHOL TEST ARE MUCH MORE COMPLEX NOW THAN WHEN *SITES* WAS DECIDED IN 1984, THE CONSEQUENCES OF A WRONG CHOICE MORE SEVERE, AND THE NEED FOR COUNSEL GREATER.....4

II. THE DUE PROCESS RIGHT TO CONTACT COUNSEL WAS RECOGNIZED BY THIS COURT IN *SITES* PRIMARILY DUE TO A POTENTIAL LOSS OF THE ABILITY TO EARN A LIVELIHOOD, AND THE MVA HEARING IS THE ONLY FORUM WHERE LOSS OF EMPLOYMENT OR INABILITY TO OBTAIN EMPLOYMENT CAN MEANINGFULLY BE ADDRESSED. 10

III. ADDRESSING DUE PROCESS CONCERNS, THE LEGISLATURE AMENDED § 16-205.1(F) TO INCLUDE A REQUIREMENT THAT THE OFFICER "FULLY ADVISE" THE DRIVER OF THE ADMINISTRATIVE SANCTIONS FOR FAILING AND FOR REFUSING THE TEST.....12

IV. THE PRACTICE OF RAISING A *SITES* BASED DEFENSE AT MVA HEARINGS HAS BEEN FIRMLY ENTRENCHED SINCE *SITES* WAS DECIDED IN 1984, AND TRANSP. § 16-205.1 AMENDED IN 1989.....15

V. REQUIRING OFFICERS TO ADHERE TO *SITES* DOES NOT PREJUDICE THE MVA, BECAUSE THE RIGHT TO COUNSEL *BY DEFINITION* DOES NOT IMPAIR THE STATE'S ABILITY TO OBTAIN A CHEMICAL TEST.....17

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE.....1

STATEMENT OF FACTS.....2

SUMMARY OF ARGUMENT.....2

ARGUMENT.....4

I. THE CONSIDERATIONS GOVERNING THE CHOICE OF SUBMITTING TO OR REFUSING AN ALCOHOL TEST ARE MUCH MORE COMPLEX NOW THAN WHEN *SITES* WAS DECIDED IN 1984, THE CONSEQUENCES OF A WRONG CHOICE MORE SEVERE, AND THE NEED FOR COUNSEL GREATER.....4

II. THE DUE PROCESS RIGHT TO CONTACT COUNSEL WAS RECOGNIZED BY THIS COURT IN *SITES* PRIMARILY DUE TO A POTENTIAL LOSS OF THE ABILITY TO EARN A LIVELIHOOD, AND THE MVA HEARING IS THE ONLY FORUM WHERE LOSS OF EMPLOYMENT OR INABILITY TO OBTAIN EMPLOYMENT CAN MEANINGFULLY BE ADDRESSED. 10

III. ADDRESSING DUE PROCESS CONCERNS, THE LEGISLATURE AMENDED § 16-205.1(F) TO INCLUDE A REQUIREMENT THAT THE OFFICER "FULLY ADVISE" THE DRIVER OF THE ADMINISTRATIVE SANCTIONS FOR FAILING AND FOR REFUSING THE TEST.....12

IV. THE PRACTICE OF RAISING A *SITES* BASED DEFENSE AT MVA HEARINGS HAS BEEN FIRMLY ENTRENCHED SINCE *SITES* WAS DECIDED IN 1984, AND TRANSP. § 16-205.1 AMENDED IN 1989.....15

V. REQUIRING OFFICERS TO ADHERE TO *SITES* DOES NOT PREJUDICE THE MVA, BECAUSE THE RIGHT TO COUNSEL *BY DEFINITION* DOES NOT IMPAIR THE STATE'S ABILITY TO OBTAIN A CHEMICAL TEST.....17

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI,	:	
		Case No. 2013-1102
Appellant,	:	
		On Appeal from the Hamilton
v.	:	County Court of Appeals
		First Appellate District
DANIEL ILG,	:	Court of Appeals
		Case No. C-120667
Appellee.	:	

BRIEF OF AMICUS CURIAE NATIONAL COLLEGE FOR DUI DEFENSE IN SUPPORT OF APPELLEE DANIEL ILG

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES 1

STATEMENT OF THE CASE AND FACTS 4

STATEMENT OF INTEREST OF AMICUS CURIAE 5

INTRODUCTION 7

APPELLEE'S PROPOSITION OF LAW 10

Under *State v. Vega,* an accused is not prohibited from obtaining relevant information about his breath test and the specific breath test machine for the purpose of challenging the reliability and accuracy of the result.

CONCLUSION 40

CERTIFICATE OF SERVICE 41

TABLE OF AUTHORITIES

CASES:	See Page
Brown v. State, 171 Md. App. 489 (2006)	33
City of Seattle v. Allison, 148 Wn.2d 75, 79-80, 59 P.3d 85 (2002)	22
Cooley v. Anchorage, 649 P.2d 251, 255 (Alaska 1982)	26,35
Covert v. State, 196 Ga. App. 679, 396 S.E.2d 596 (1990).	29
Crawley v. State, 413 S.W.2d 370, 373 (1967)	38
Curren v. State, 620 So. 2d 739 (Ala. 1993)	23,24
Fircrest v. Jensen, 158 Wn.2d 384, 400, 143 P.3d 776 (2006).	22,23
Fuenning v. Superior Court, (1983) 139 Ariz. 590, 680 P.2d 121	17
Garcia v. District Court, 197 Colo. 38, 589 P.2d 924 (1979)	27
Keel v. State, 609 P.2d 555 (Alaska 1980)	25
Lattarulo v. State, 261 Ga. 124 (1991)	29
Lawrence v. State, 715 P.2d 1213, 1217 (Alaska App. 1986)	25
Love v. State, 861 S.W.2d 899 (Tex. Crim. App. 1993)	39
Mentor v. Giordano, (1967) 9 Ohio St. 2d 140, 224 N.E. 2d 343	13
Morris v. State, Dep. Of Admin, DMV Morris, 186 P.3d 575 (Alaska 2008)	25
People v. Bertsch, 183 Ill.App.3d 23, 538 N.E.2d 1306, 131 Ill .Dec. 750	30
People v. Orth, 124 Ill.2d 326, 530 N.E.2d 210, 125 Ill.Dec. 182	30
People v. Rexford, 228 Mich. App. 371, 579 N.W.2d 111 (1998)	34
People v. Tipolt, 198 Mich. App. 44, 497 NW2d. 198 (1993)	34
Robertson v. State, 604 So. 2d 783, 789 n.6 (Fla. 1992)	28
Simon v. State, 182 Ga. App. 210 (355 SE2d 120) (1987)	29

State v. Aud, 351 Ark. 531, 95 S.W.3d 786 (2003)	26
State v. Belvin, 986 So. 2d 516 (Fla. 2008)	28
State v. Bender, 382 So.2d 697 (Fla. 1980)	27
State v. Brice, 276 Kan. 758, 770-71, 80 P.3d 1113 (2003).	31,32
State v. Cooperman, 232 Ariz. 347, 206 P.3d 4 (2013).	19,20
State v. Dille, 258 N.W.2d 565, 567 (Minn.1977).	34
State v. Dyer, 160 W. Va. 166, 233 S.E.2d 309 (1977)	21
State v. Eumana-Maranchel, 352 OR. 1, 277 P.3d 549 at 555 (Or., 2012)	35
State v. Gai, 2012 MT 235, 366 Mont. 408, 288 P.3d 164	34
State v. Huggins, 659 P.2d 613, 617 (Alaska App. 1982)	25
*State v. Lancaste*r, Marietta Municipal Court Case No. 12 TRC 1615, decided August 14, 2014	7,11
State v. Ronald Landon, 370 S.C. 103; 634 S.E.2d 660	38
State v. McMahon, 557 A.2d 1324 (Me. 1989)	32
State v. Metzger, Case No. TRC-1202160, New Philadelphia Municipal Court rendered 11-6-2013	5
State of W. Virginia ex rel Games-Neely v. The Honorable Joann Overington, (2013) 30 W.Va. 739; 742 S.E.2d 427	20,21
State v. Pendleton, 18 Kan. App. 2d 179, 185-86, 849 P.2d 143 (1993).	31,32
State v. Pickering, 462 A.2d 1151, (Me. 1983.)	33
State v. Preece, 971 P.2d 1, (1998),	39
State v. Sensing, 843 S.W.2d 412, 416 (Tenn. 1992)	38
State v. Smiley, 301 Ga. App. 778 (2009)	30
State v. Straka, 116 Wn.2d 859, 875, 810 P.2d (1991)	22,23
State v. Tanner, 15 Ohio St. 3d 1 (1984)	17

State v. Vega, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984) 7-12,15,16, 40

Stewart v. State, 129 S.W.3d 93 (Tex. Crim. App. 2004) 39

Thomas v. People, 895 P.2d 1040 (Colo. 1995). 26

STATUTES:

A. R. S. § 28–1381(H) 19

AS 28.35.033(d) 25

Ark. Code §§ 5-65-204(e) (Repl. 1997) 26

Ark. Code §§ 5-65-206 (Repl. 1997) 26

Colo. Rev. Stat. § 42-4-1202(6) 26

Fla. Stat. § 316.1932(1)(b)(1)(1987). 27

Fla. Stat. § 322.262(2) (1979) 28

O. R.C. 4511.19 12

RCW 46.61.506(7) 23

S.C. § 56-5-2930 36

S.C. § 56-5-2954 37

W. Va. Code, 17C-5A-5 20

OTHER:

Arizona State Law Journal, Spring, 2004, 36 Ariz. St. L.J. 451 20

http://www.duiblog.com/ (last accessed March 17, 2014) 10

Martin Luther King, Jr., Letter from Birmingham Jail, April 16, 1963. 6

Taylor and Oberman, *Drunk Driving Defense*, 7th Edition, Aspen Law and Business (New York) 6,15

Vindicator, Summer 2012 edition; see *The OACDL Challenges the Intoxilyzer 8000 and the Department of Heath Responds. Is This What They Mean by Putting Lipstick on a Pig*? 8

STATEMENT OF THE CASE AND FACTS

Amicus NCDD adopts the Statement of the Facts as laid out by the Appellee Daniel Ilg. The Statement of the Facts and the Case as laid out by Amicus Ohio Association of Criminal Defense Lawyers (OACDL) provides a short and concise summary of the issues in this matter.

INTEREST OF AMICUS CURIAE

The National College for DUI Defense (NCDD) is a nonprofit professional organization of lawyers with over 1,300 members. The NCDD does not support drunk driving and does not lobby the state legislatures relative to issue of punishment for such offenses or any other matters.

It is the purpose and mission of the NCDD to vindicate the promise of the United States Constitution that an accused citizen has the right to the effective assistance of his or her counsel. The NCDD seeks to fulfill its mission, primarily, through education; it by provides the finest advanced-level training available to the DUI Defense Law practitioner.[1] Indeed, the early founders of the NCDD included the authors of the most popular texts on the topic. Richard Erwin, whose treatise Defense of Drunk Driving Cases (3 Ed. 1971) was cited in *State v Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984), was a mentor to the early founders and the NCDD's highest award is named after Professor Erwin and Lawrence Taylor, another author whose treatise Drunk Driving Defense, 7th Edition, Aspen Law and Business (New York) is perhaps the most widely utilized volume on the subject. Members of the NCDD author texts on the topic in the majority of the states in the Union.

Thus, the NCDD membership offers a wealth of knowledge on the laws and procedures across the country and as a result the NCDD Amicus Committee has been solicited to write briefs in important cases relating to scientific and/or chemical testing. These cases include several landmark decisions in the United States Supreme Court: *Illinois v Lidster*, 540 U.S. 419

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[1] To this end the College offers, or co-sponsors, a minimum of four legal and scientific seminars each year. The Summer Session, conducted at the Harvard Law School in July, a Winter Session in January of each year at varying locations, a seminar each October co-sponsored with the National Association of Criminal Defense Lawyers (NACDL) and the "Mastering Scientific Evidence" an intensive advanced three day seminar dedicated to perfecting the latest trial skills and applying them to current issues in forensic toxicology and other DUI related scientific disciplines.

(2004), *Melendez-Diaz v Massachusetts*, 557 U.S. 305 (2009), *Bullcoming v New Mexico*, 564 U.S. ___ (2011), and *Missouri v McNeely*, 133 S.Ct. 1552 (2013).

NCDD members throughout the nation view *State v Vega* as an anomaly and desire to inform this Honorable Court that adopting the interpretation of *State v Vega* advanced by the City of Cincinnati would result in Ohio law and procedure being an aberration in American jurisprudence. Moreover such an interpretation would surely be in conflict with the Constitution of the United States.

Given that "injustice anywhere, is a threat to justice everywhere" the NCDD has agreed to submit an Amicus brief supporting the Appellee, Daniel Ilg.[2] The purpose of this brief is to provide a view from outside Ohio and therefore the case law and practices in other states, as provided and summarized by NCDD members, are highlighted in the brief.

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[2] Martin Luther King, Jr., Letter from Birmingham Jail, April 16, 1963.

INTRODUCTION

The primary purpose of this brief, filed on behalf of the National College for DUI Defense (NCDD) is to offer an outside perspective of the issues presented. As noted in its Statement of Interest, the NCDD is not in favor of drunk driving. The NCDD is in favor of the proposition that all citizens accused of drunk driving should get a fair hearing and a fair trial. If the accused is convicted after a fair trial where all relevant information is available to the trier of fact then justice is done. Justice is also done if the accused is acquitted after a fair trial.

Amicus NCDD would observe at the outset that the Appellant, City of Cincinnati and its various amici do not seem to agree with the above principles. The City of Cincinnati seeks to make the proceedings unfair and to ensure and that Mr. Ilg and all future citizens charged with OVI in Ohio get an unfair trial. Indeed, Appellant and its Amici do not even attempt to disguise this fact as their briefs appeal to convenience and simplicity not justice and fairness.

In a recent case where *State v Vega* and the reliability of the Intoxilyzer 8000 was at issue the trial court observed that "the essential role of the judiciary is not to facilitate 'slam dunk' prosecutions" (a term used in the *Lancaster* prosecutor's summation) but rather the role of the judiciary is to "see that substantial justice is done."[3] The trial court and the Court of Appeals in this matter clearly embraced this role. Both courts held that Mr. Ilg should be allowed, through discovery and/or the subpoena process, to obtain information and data about his specific breath test and the specific breath testing device utilized to test his sample. The City of Cincinnati sought to keep such data and information secret.

In the trial court the Appellant sought by various means to keep Mr. Ilg from obtaining information that the trial court ultimately held he should be entitled to review. The trial court was

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[3] *State v Chelsea Lancaste*r, Marietta Municipal Court Case No. 12 TRC 1615, decided August 14, 2014. (An appeal to the Fourth District Court of Appeals was filed and later withdrawn.)

satisfied that Mr. Ilg had made a plausible case that he needed to be able to review this information. Mr. Ilg sought the information:

1. To ascertain if the secret information and data provided a basis for asserting that the state failed to comply with its own rules in maintaining and using the machine in question,
2. To ascertain whether the results of his breath test were *scientifically* accurate and reliable and/or,
3. To ascertain if the secret information might be useful at trial to raise questions –for a jury- as to the weight test results should be given.

The trial court and appellate court saw these as proper goals. The City of Cincinnati and Mary Martin, the Director of the Ohio Department of Health's Bureau of Alcohol Drug Testing (BADT), desired to keep the information secret and refused to provide it – notwithstanding the trial court's orders – and appealed the court's decision. The appellate court, giving, as it should, due deference to the trial court's discretion, affirmed. The proposition of law, as framed by the Appellant and submitted to this Court for review is:

> **Proposition of Law No. I: *State v. Vega* prohibits defendants in OVI cases from making attacks on the reliability of breath testing instruments, thus a defendant cannot compel any party to produce information that is to be used for the purpose of attacking the reliability of the breath testing instrument.**

In short the argument is the accused should not be allowed to search for the "smoking gun" because if he found it he is not permitted to tell the court or the jury he found it. In the instant context the City's argument is in essence:

> "Mr. Ilg should not be allowed to pursue his search for evidence that his test results are scientifically unreliable because (according to the City) *State v Vega* says that even if he

could prove beyond any doubt that the results were not scientifically reliable he is not allowed to present that evidence to the trial court or to a jury."

Amicus would note that while the City and its amici assert that *Vega* is "well settled law" they themselves cannot agree upon what it stands for; compare the propositions of law from the City and its various amici. More importantly a significant number, perhaps the majority, of the judges around the state have expressed doubt as to whether *Vega* can truly mean that a trial court judge is required to admit evidence that has been established, to the court's satisfaction, to be unreliable.[4] However in this case, all such arguments are premature. The only questions presented in this case –based upon the proposition of law accepted by the Court- are:

> **"Should Mr. Ilg be permitted to attempt to show that his test and the testing machine are unreliable; e.g., should he be allowed to make his record?"**
>
> **and/or**
>
> **"Should Mr. Ilg be allowed access to data and information that he might be able to use to raise questions about the reliability of his specific test and the specific testing machine at trial?"**

Ultimately the question may be: does *Vega*, truly, completely bar these two pursuits in every way, shape and form; even to such an extent that an accused should be prohibited from *even investigating the possibility* that his test results are unreliable and/or that the machine used to test his breath might have issues and/or problems that might have rendered the results scientifically unreliable and/or might cause a jury to question the results?

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[4] *State v Nicole Gerome*, Athens County Municipal Court Case No. 11TRC01909, decided June 29, 2011; *State v Heather Reid*, Circleville Municipal Court Case No. TRC100716 decided January 26, 2012; *State v Reid*, 4th Dist. 12CA3, 2013-Ohio-562; *State v Chelsea Lancaster*, Marietta Municipal Court Case No. 12 TRC 1615, decided August 14, 2014.

APPELLEE'S PROPOSITION OF LAW

> Under *State v. Vega,* an accused is not prohibited from obtaining relevant information about his breath test and the specific breath test machine for the purpose of challenging the reliability and accuracy of the result.

The City of Cincinnati and the BADT desperately want to nip Mr. Ilg's inquiries in the bud - ***and for good reason***. Thus far in only four cases in Ohio has the question of the scientific reliability of a breath testing device been truly litigated with expert testimony from both sides – including testimony from the engineer employed by the manufacturer.[5] These cases all involved the Intoxilyzer 8000 and in each instance the trial court was convinced that there were issues *with the particular machines at a particular time* which raised questions about the reliability of the results. The pretrial rulings in three of these cases were appealed but the appeals were later withdrawn.[6] In one of the cases, *State v Reid*, after withdrawing its pre-trial appeal the prosecution proceeded to a bench trial and the trial court found the prosecution had not established to the court's satisfaction that the results were reliable beyond a reasonable doubt and the accused was found not guilty. The State appealed that trial court's decision. The issues were, of course, moot as to Ms. Reid but the appellate court heard the matter anyway. In a two to one decision the appellate court held that the prosecution did not have a duty to establish reliability and discussed *Vega*. *Reid* was binding precedent in *State v Lancaster* and was discussed and followed by the trial court which noted that the *Reid* opinions demonstrate the confusion and contradictions caused, not by the *Vega* decision, but by later interpretations of *Vega.*

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[5] *Gerome*, *Reid*, *Lancaster* and *State of Ohio v Brittney Metzger*, Case No. TRC-1202160, New Philidelphia Municipal Court rendered 11-6-2013

[6] *Reid*, *Lancaster* and *Metzger*, *supra.*

Note: none of these courts held that breath testing is not "generally reliable" or that the Intoxilyzer 8000 model machine is unreliable; each court's inquiry was directed at a specific machine and the defendant's test results. A good overview of how these courts focused their attention on the specific tests and machines in question can be found in the *State v Lancaster* decision; similarly the *Lancaster* decision provides a good analysis of why *State v Vega* does not bar such inquires.

The Amicus agrees with the trial judge in *State v Lancaster* as to what this Court, actually said and meant in the *Vega* decision and submits that this Court did not mean what the City of Cincinnati claims it meant, to wit:

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

Alternatively the Amicus submits that if *Vega* did say and mean the above, then the *Vega* decision violates several provisions of the United States Constitution; moreover, if the above is "settled Ohio law" then Ohio is an outlier as no court in any other state in the Union would so rule.

The purpose of the remainder of this brief is to give this Honorable Court an understanding of how the above view of *Vega* and of the "Statutory Predicate" for admissibility of breath test evidence is completely at odds with the manner in which the Statutory Predicate is interpreted and applied everywhere except – if the City of Cincinnati is correct- in Ohio.

In as much as downloaded and stored data from breath testing devices was the focus of the discovery battle in the trial court in this case, the Amicus has also included a discussion of the recent decision by the Supreme Court, in Ohio's neighboring state of, West Virginia holding that

the accused has a constitutional right to access to such data, in part because the state does not preserve the breath sample for later analysis by the accused's expert. Moreover, while Ohio purportedly gives the accused a right to an independent test, it is a right without a remedy. This is not so in many states.[7]

WHERE DID THE ABOVE INTERPRETATION OF *STATE v VEGA* AND THE STATUTORY PREDICATE COME FROM?

The Statutory Predicate

All fifty (50) states have a statutory scheme for the admissibility of breath test evidence. Although the term does not appear to be in broad use in Ohio, elsewhere such a scheme is referred to as a "Statutory Predicate." In Ohio the Statutory Predicate is now found in 4511.19(D)(1)(b) which provides:

> In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section or for an equivalent offense that is vehicle-related, ***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 three-hour time limit specified in this division regarding the admission of evidence does not extend or affect the two-hour time limit specified in division (A) of section 4511.192 of the Revised Code as the maximum period of time during which a person may consent to a chemical test or tests as described in that section.
>
> 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. Only a physician, a registered nurse, an emergency medical technician-intermediate, an emergency medical technician-paramedic, or a qualified technician, chemist, or phlebotomist shall withdraw a blood sample for the purpose of determining the alcohol, drug, controlled substance, metabolite of a controlled substance, or combination content of the whole blood, blood serum, or blood plasma. This limitation does not apply to the taking of breath or urine specimens. A person authorized to withdraw blood under this division may

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[7] See summary of Georgia law, for example, *infra*.

refuse to withdraw blood under this division, if in that person's opinion, the physical welfare of the person would be endangered by the withdrawing of blood.

The bodily substance withdrawn under division (D)(l)(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.

Please note the language "**the court may admit**" which on its face seems to indicate that the trial judge has the authority to decline to admit breath test evidence. Note also that Ohio's Statutory Predicate –like those in all other states- is addressed only at the **admissibility** of breath test evidence.

The purpose for the Statutory Predicate

The entire purpose for creating the Statutory Predicate was to make the job of the prosecutor in a DUI case much easier. Indeed, the legislature has never given a greater gift to any party to any litigation. Before being given this gift, the prosecutor's job in laying a foundation for the admissibility of a chemical test was much more difficult. To understand how true this is, it is instructive to look at the leading Ohio cases on the issue from that period. This Court's decision in *Mentor v. Giordano*, (1967) 9 Ohio St. 2d 140, 224 N.E. 2d 343, which is often cited in current Ohio decisions discussing breath test admissibility, announced the following foundational requirements for the breath test:

It is well established in Ohio (1) that the Supreme Court is not required to and ordinarily will not weigh evidence, but it will examine the record to determine whether the evidence produced in a trial attains that degree of probative force and certainty which the particular case demands ...and (2) that penal statutes and ordinances are to be interpreted and applied strictly against the accuser and liberally in favor of the accused ... Moreover, penal statutes and ordinances must be construed in the light of the mischief they are designed to combat.

Here, defendant was specifically charged with operating a motor vehicle on private property while under the influence of intoxicating liquor, and it was incumbent on the prosecution to establish all essential elements of that charge beyond a reasonable doubt.

Of course, the primary object of statutes and ordinances making "drunk driving" an offense is to protect the users of streets and highways from the hazard of vehicles under the

management of persons who have consumed alcoholic beverages to such an extent as to appreciably impair their faculties.

Let us now examine the evidence and lack of evidence in the instant case.

There is no evidence that the Breathalyzer at the police station was in proper working order or that its manipulator was qualified, other than his own bare declaration to that effect. See *State v. Baker*, 56 Wash. 2d 846, 355 P. 2d 806, and *Pruitt v. State* (Tenn.), 393 S. W. 2d 747.

Nor was there any evidence to explain what the ".18 per cent" reading of the Breathalyzer indicated. Under the cases last cited, the evidence relating to the Breathalyzer test was incompetent and should not have been considered.

> Generally, each "drunken driving" case is to be decided on its own particular and peculiar facts. A majority of this court is of the opinion that in the present case, giving the defendant the advantages to which he is entitled, the competent evidence against him did not reach that high degree of probative force and certainty whereby reasonable minds could reach different conclusions as to the guilt of the accused beyond a reasonable doubt of the precise offense charged.

Thus, prior to the creation of the Statutory Predicate the prosecution had to present significant proof that the breath testing instrument was in "proper working order" and that "its manipulator was qualified." Moreover, whether the proof was sufficient was generally going to be up to the individual trial judge as there was not a set checklist of such requirements. Additionally, the state was required, in every case, to present expert (toxicological) testimony at trial explaining what the numerical reading from the machine might mean relative to the person's blood alcohol content and, thus, the likelihood of impairment.

The Statutory Predicate, coupled with legislation creating first a "presumption of impairment" and then the "per se breath alcohol levels," not only eliminated the requirement that expert, toxicological testimony be presented in order for a chemical test to be relevant and thus admissible, it also provided a mechanism by which the Director of Health created a set of rules setting forth what "qualifications" a breath test operator might need and what procedures had to

be followed for a machine to be deemed to be "in proper working order"; ergo "the ODH Rules" discussed above.

The Statutory Predicate was intended to be an "alternative" method of admissibility, hence the language "may admit", and that is all it was meant to be.

HOW *VEGA*, AS INTERPRETED BY THE CITY OF CINCINNATI IS AN ABERRATION

The City of Cincinnati's interpretation of *Vega* – and its desire to use *Vega* to thwart individuals learning the truth about the breath testing devices used to accuse and convict them- is not the City's invention. When the Intoxilyzer 8000 was being considered for approval, questions arose about possible litigation over the reliability of these particular machines (not breath testing in general.) At that time the manufacturer of the Intoxilyzer 8000 and the folks at the Ohio Department of Health and the Department of Public Safety, who had chosen these devices over other (some say) more reliable devices, publicly stated that Ohio officials need not worry the reliability or unreliability of the machines since *State v Vega* could be used to foreclose accused citizens from raising such challenges.[8]

The reaction of lawyers in other states to this plan helps show how aberrant this view of *State v Vega* is to those in the rest of the country. Lawrence Taylor is the co-author of a treatise on DUI Defense considered "the Bible" by DUI practitioners [9] and is a former Dean of the

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[8] These statements are documented in an article in the Ohio Association of Criminal Defense Lawyers publication The *Vindicator*, Summer 2012 edition; see *The OACDL Challenges the Intoxilyzer 8000 and the Department of Heath Responds. Is This What They Mean by Putting Lipstick on a Pig*?

[9] Taylor and Oberman, *Drunk Driving Defense*, 7th Edition, Aspen Law and Business (New York).

National College for DUI Defense. His "DUI Blog"[10] is read by lawyers through the nation and if anyone has the pulse of the DUI bar it is Mr. Taylor.

On December 2, 2008, Mr. Taylor reported on the above statements made by the individuals attempting to get the Intoxilyzer 8000 approved and, in particular, on the plan to use *State v Vega* as a shield against any efforts to look into claims made in other states that the devices are inferior.[11] Two days later Mr. Taylor's blog post read "Yes: Ohio Bars Defendants from Challenging Breathalyzers." Taylor indicated that he had "received a lot of emails" from people who thought his previous post contained an error. He responded that it was not an error.

> **"No typo, no misinterpretation, no mistake."** [Ohio says] **"if a breath machine is approved for use by the State, its accuracy cannot be challenged in court."**[12]

The instant Amicus Curiae, National College for DUI Defense, advises this Honorable Court that Mr. Taylor's readers are not alone. Members of the NCDD in every state other than Ohio are shocked to hear the above and are similarly shocked by the Proposition of Law advanced by the City of Cincinnati in this case. NCDD members are shocked by this for several reasons:

1. It is somewhat shocking to believe judges in any state are ***required*** to allow unreliable results into evidence,
2. It is somewhat shocking that even as technology advances to allow data to be downloaded and stored the government would be allowed to hide such data from the person whose breath sample was tested and discarded and,

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[10] http://www.duiblog.com/ (last accessed March 17, 2014)
[11] *Id.* 2-8-2008.
[12] *Id.* 12-4-2008.

3. It is universally shocking and appalling that a prosecutor could even suggest that an accused should not be able to pursue discovery in an attempt to question the results of a scientific test that he was ***required to submit to*** and which will be the sole evidence on the primary element of the charge against him and similarly appalling that the jury would not be permitted to receive evidence of unreliability if the accused can marshal it.

NCDD members find the latter appalling because in no other state in the Union could you summons a jury to determine the guilt or innocence of a person charge with a DUI "per se" offense and prohibit the accused from challenging the accuracy and/or reliably of the results of his breath test. And the NCDD members find this appalling notwithstanding the fact that each and every state in the Union has a statute much like the statute that was reviewed and applied in *State v Vega.* The Amicus NCDD has asked its members to summarize the laws and practices of their states with regard to these issues and some of those summaries appear in the next section.

A review of the summary of Arizona is enlightening as at one point Ohio and Arizona seemed to be in agreement on both the meaning of the Statutory Predicate and the application of the, then, new "per se" laws. In *State v Tanner*, 15 Ohio St. 3d 1 (1984), this Honorable Court looked to Arizona for guidance on the issue of whether the "per se" law created an "Unconstitutional Irrebuttable Presumption." This Court relied completely and totally on *Fuenning v Superior Court*, (1983) 139 Ariz. 590, 680 P2d 121, in holding that Ohio's per se statute did not create a "presumption of guilt." However, *Fuenning* had much to say and promise regarding the right of the accused to challenge the results ***at trial***:

> We agree with defendant that the only ultimate issue is whether defendant had a BAC of .10% or greater. In each case in which a violation of subsection B is charged, the state will present evidence of the test and the issue will be whether the test results were an accurate measurement of the defendant's BAC at the time of arrest.

Typically, defendants will attack the margin of error, the conversion rate, the calibration of the test instrument, the technique used by the operator, the absorption and detoxification factors, etc. Evidence of defendant's conduct and behavior — good or bad — will be relevant to the jury's determination of whether the test results are an accurate measurement of alcohol concentration at the time of the conduct charged.

For instance, the test in the case at bench was given several hours after the arrest and showed a .11% BAC. Defendant attacked the results, presenting evidence regarding margin of error, time lapse and other factors. Such evidence might raise considerable doubt whether the test result of .11% indicated .10% or greater BAC at the time defendant was arrested. Evidence that at the time the person charged smelled strongly of alcohol, was unable to stand without help, suffered from nausea, dizziness or any of the other "symptoms" of intoxication would justify an inference that a test administered some time after arrest probably produced lower readings than that which would have been produced had the test been administered at the moment of arrest. The converse is also true. Evidence that at the time of arrest defendant was in perfect control, displayed none of the symptoms of intoxication and had not driven in an erratic manner, is relevant to show that a reading of .11% from a test given some time later does not prove beyond a reasonable doubt that the defendant was driving with a .10% or greater BAC at the time of his arrest. Such evidence has been held admissible. State v. Clark, 286 Or. 33, 593 P.2d 123 (1979); Denison v. Anchorage, 630 P.2d 1001 (Alaska App. 1981).Again, evidence is admissible when it is relevant. Rule 402, Ariz.R.Evid., 17A A.R.S.

Fuenning, at 599.

A review of the summary below of Arizona's current law and procedures shows that Arizona has not backed off the promised protections which *Feunning* said would keep the per se law from becoming unconstitutional irrebuttable presumption.

A review of the Washington state cases is informative on the issue of whether trial courts are required to allow unreliable test results into evidence based merely on the fact that the results were obtained in compliance with the Statutory Predicate.

Finally, as noted previously, a review of the West Virginia Summary provides the most recent state Supreme Court review of the ability to conduct discovery and the accused's constitutional right to access to information. In that case, as in this case, the information was COBRA data.

ARIZONA

ARIZONA LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

Arizona's *per se* statute provides a *rebuttable* presumption, permitting the defendant's "… introduction of any other competent evidence bearing on the question of whether or not the defendant was under the influence of intoxicating liquor." A. R. S. § 28–1381(H).

Arizona recognizes the relevance of scientific challenges to the breath results at trial, where "… the state elects to introduce breath test results only to prove the defendant had 'an alcohol concentration of 0.08 or more within two hours of driving'…." *State v. Cooperman*, 232 Ariz. 347, 206 P.3d 4 (2013). (Finding relevant and admissible the variability of partition ratios in the general public).

Prior to arriving at the Supreme Court, the appellate court articulated the permitted challenge stating Arizona law allowed the Defendant "… offer evidence explaining how breath-to-blood partition ratios vary within an individual and among the general population and how that variability may result in breath-test results that overstate a defendant's actual level of intoxication without having to present evidence of his own ratio at the time of test." *State v. Cooperman*, 230 Ariz. 245, 282 P.3d 446 (2012). (Finding expert testimony that hematocrit, breathing patterns and breath and body temperature can impact the ability of the machine to accurately measure a defendant's breath alcohol concentration relevant to both *per se* and impaired offenses).

The Arizona State Law Journal found, "A jury likely would put little weight on the incriminating breath tests, given the rebuttal evidence documenting the machine's failure." Arizona State Law Journal, Spring, 2004, 36 Ariz. St. L.J. 451.

ACCUSED'S ACCESS TO DOWNLOAD THE STORED DATA OR "SOURCE CODE" IN ARIZONA.

Interestingly, while at the appellate level, the *Cooperman* court approved financial sanctions on a prosecutor who deleted test results so defense attorneys could not use them to discredit the Intoxilyzer machines. *State v. Cooperman*, 230 Ariz. 245, 282 P.3d 446 (2012). Arizona clearly prefers maintaining the availability of historical data.

WEST VIRGINIA

WEST VIRGINIA LAW RECOGNIZES CONSTITUTIONAL RIGHT TO DISCOVERY OF COBRA DATA FROM BREATH TESTING DEVICE

In *State of W. Virginia ex rel Games-Neely v. The Honorable Joann Overington,* (2013) 30 W.Va. 739; 742 S.E.2d 427, the Supreme Court of West Virginia held that the discovery sought by the Defendant was both relevant and material to his case. Specifically, the defendant requested the downloaded data for the Intoximeter EC/IR II breath machine used in his 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. The files should include the blow data and fuel cell data.

The Court 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 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).

The West Virginia Supreme Court went on to note that

> 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. 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.

In *State of W. Virginia ex rel Games-Neely v. The Honorable Joann Overington,* (2013) 30 W.Va. 739; 742 S.E.2d 427.

The West Virginia Supreme Court went on to state "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... 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 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." *State of W. Virginia ex rel Games-Neely v. The Honorable Joann Overington,* (2013) 30 W.Va. 739; 742 S.E.2d 427.

<u>WASHINGTON</u>

WASHINGTON LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

An accused's right to challenge breath test results, evidence and procedures is so well-ingrained in Washington case law that that there are virtually no restrictions beyond the Evidence Rules regarding the accused can contest pre-trial and at trial. As a result, "the defendant may introduce evidence attacking the accuracy or reliability of breath tests. *City of Seattle v. Allison,* 148 Wn.2d 75, 79-80, 59 P.3d 85 (2002); *Fircrest v. Jensen*, 158 Wn.2d 384, 400, 143 P.3d 776 (2006). As other Washington courts have noted, "[a] defendant still has the opportunity to attack the test results. Defendant may introduce evidence refuting the accuracy and reliability of the test reading." *State v. Straka*, 116 Wn.2d 859, 875, 810 P.2d (1991)(internal citations omitted).

WASHINGTON LAW ALLOWS THE ACCUSED TO CHALLENGE THE BREATH TEST EVIDENCE PRE-TRIAL ON RELIABILITY GROUNDS NOTWITHSTANDING COMPLIANCE WITH THE STATUTORY PREDICATE

Notwithstanding the statutory predicate, recent Washington case law confirms the Court's role as gatekeeper and ability to apply evidence rules to determine the admissibility of breath test evidence:

> "Once the *Frye* standard is satisfied, however, the trial court resumes its role as gatekeeper and may exclude otherwise admissible evidence by applying the rules of evidence.
>
> . . . [o]nce reliability of the [breath]est is established by a prima facie showing from the State [of the statutory predicate], all other challenges concerning the accuracy or reliability of the test, the testing instrument, or the maintenance procedures necessarily go to the weight of the test results. That is, the trial court may still utilize the rules of evidence, including ER 702, to determine if the BAC test results will be admitted.
>
> The twin cases of *State v. Zwicker,* 105 Wn.2d 228, 713 P.2d 1101 (1986), and *State v. Long,* 113 Wn.2d 266, 778 P.2d 1027 (1987), . . . involve the implied consent statute, RCW 46.20.308, and its evidentiary counterpart, RCW 46.61.517. . . . In the first version of RCW 46.61.517, refusal to submit to a test was admissible without comment . . .. In 1985 and 1986, the legislature amended the statute to read only that refusal to submit to a BAC test was admissible . . .. [T]his court made clear that depending on the facts of a particular case, a trial court could still exclude such evidence if its probative value were substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury under ER 403.
>
> The same analysis applies here. 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.

Fircrest v. Jensen, 158 Wn.2d 384, 395, 397-99, 143 P.3d 776 (2006).

THE ACCUSED HAS A RIGHT TO COBRA DATA IN WASHINGTON

Washington cases and statutes confirm an accused defendant's right to obtain information such as the downloadable Datamaster database in connection with their defense. "[I]nformation was [and remains] available in the database for discovery to Counsel for Defense." *State v. Straka*, 116 Wn.2d 859, 880, 810 P.2d 888 (1991). "Upon the request of the person who shall submit to a test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or her or his or her attorney." RCW 46.61.506(7).

ALABAMA

ALABAMA LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

NCDD members report Alabama law recognizes the right question breath testing procedure, evidence, and instrumentation at trial. In the leading case of *Curren v. State*, 620 So. 2d 739 (Ala. 1993), the Alabama Supreme Court ruled that because intoxication is not an element of a section 32-5A-191 (a)(1) violation, the defendant was not entitled to a jury charge of the "rebuttable presumption" wording included in the Alabama Chemical Test for Intoxication Act. The Court stated:

> "Section 32-5A-191(a)(1) is commonly referred to as an "illegal per se law," and similar statutes have been enacted in other jurisdictions....
>
> There are only two elements required to establish a violation of a "per se" law: (1) driving, or actual physical control of, a vehicle; and (2) a blood alcohol content of 0.10% or greater....

As noted above, our own statute, § 32-5A-191 (a)(1), Ala. Code 1975, enacts a prohibition against driving, or being in actual physical control of a vehicle, with a blood alcohol content of 0.10% or greater. In order to find the defendant guilty of violating § 32-5A-191(a)(1), the jury is not required to find that the defendant was "under the influence" of alcohol; therefore, the jury need not "presume," in accordance with § 32-5A-194, that he was under the influence from evidence admitted as to his blood alcohol content in order to convict. For that reason, the trial court did not err in refusing to instruct the jury on the rebuttable presumptions found in § 32-5A-194(b), Ala. Code 1975....

Certainly, a defendant can offer evidence to rebut the State's evidence that his blood alcohol content was .10% when he was found driving, or in actual physical control of, a vehicle. "The accused may challenge the test results by competent evidence, such as, for example, that he had not consumed enough alcohol in the relevant time to reach the level indicated by the chemical test results." *Davis*, 8 Va.App. at 300, 381 S.E.2d at 16 (citing *Washington v. District of Columbia*, 538 A.2d 1151 (D.C.App.1988)). The following list of possible defenses in a prosecution for a per se violation is offered by way of example only:

> "1. Time. The blood alcohol concentration at the time the test was made is not dispositive as it does not necessarily prove what the blood alcohol concentration was at the time of driving.
> "2. The breath test is inaccurate and cannot be relied upon to prove the .10% absolute.
> "3. The urine test is inaccurate and cannot be relied upon to prove the .10% absolute.
> "4. Results of the blood, breath, or urine tests were incorrect. The inaccuracy is proved by the fact that the defendant has not consumed enough alcohol to cause a .10% blood alcohol concentration.
> "5. The blood, breath, or urine tests were incorrect since the defendant did not exhibit physical signs of intoxication consistent with ... having .10% blood alcohol concentration or higher.
> "6. The machine is inaccurate."

Ex parte State of Alabama (Re William Maxwell Curren v. State), 620 So. 2d 739 at 742-743. (emphasis added).

Under the *Curren* decision the defendant can present in his or her defense any one or a combination of six (6) different defenses outlined by the Supreme Court to rebut the accuracy of any evidentiary breath test. These defenses specifically include: "The breath test is inaccurate and cannot be relied upon to prove the .10% absolute" and "Results of the blood, breath, or urine tests were inaccurate." *Curren*, supra, at 743. It is therefore the position of the defendant that not

only is he entitled to present a defense, but that the defense he is putting forward has already been recognized by the Alabama Supreme Court as one based on logic and relevance. When the state's primary evidence consists of a breath test result and no more, then the defendant is surely entitled to rebut the state's evidence through the use of an expert witness.

ALASKA

ALASKA LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

"The weight to be given the breathalyzer evidence is strictly a factual matter for the jury." *Keel v. State*, 609 P.2d 555 (Alaska 1980) at 557. AS 28.35.033(d) "defines the elements that must be proved before the breathalyzer test results may be admitted into evidence." Id., at 557. If the State proves compliance with these regulations the test results may be admitted. If compliance with the foundational regulations are proven "there is sufficient evidence to admit test result[s] into evidence, but [the] weight given [to the] evidence is a factual matter for jury." *Morris v. State, Dep. Of Admin, DMV Morris,* 186 P.3d 575, at 579, n. 21 (Alaska 2008) And, the defense is entitled to "point[ing] out to the jury any weaknesses in the foundation" evidence offered by the state which is required for admission of the breath test evidence. *Lawrence v. State*, 715 P.2d 1213, 1217 (Alaska App. 1986).

While the jury can give the breath test evidence any weight it chooses, the burden always lies with the prosecution to convince the jury of the accuracy of the breath test.

> Further, "even after admission of the breathalyzer test results, the burden is still upon the municipality to convince the jury that the breathalyzer test is accurate..."

State v. Huggins, 659 P.2d 613, 617 (Alaska App. 1982), quoting *Cooley*, 649 P.2d at 255.

The defense has no burden of proof, and is not required to affirmatively prove that a particular breath test is faulty. The defense can cross-examine the state's witnesses; it can

introduce evidence to raise doubts or questions in the minds of the jury as to the reliability and validity of the testing procedures; or it can simply rely on the state's burden of proof and the jury's assessment of the evidence related to the breath testing procedures. See, e.g., *Cooley v. Anchorage*, 649 P.2d 251, 255 (Alaska 1982). (Defendant can confront breath test evidence with any other evidence or witness. He "can rely on the fact that the municipality has the burden of proof, he can rely on cross examination, or he can present evidence on his own.")

ARKANSAS

ARKANSAS LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

Arkansas allows for the attack of individual BAC results at trial. *State v. Aud*, 351 Ark. 531, 95 S.W.3d 786 (2003). Arkansas allows, for example, an expert to testify as to the distinction between the government's *measurement* of an accused' BrAC, versus his *actual* BrAC. *Id.* Arkansas refused to accept the **prosecution's** argument that the reading from the breathalyzer machine creates an irrebuttable presumption of guilt. *Id.*

In Arkansas, Defendants can also challenge the government's test with an independent test, in addition to questioning whether the test was performed according to the methods approved by the Arkansas State Board of Health. *See* Ark. Code §§ 5-65-204(e) and 5-65-206 (Repl. 1997).

COLORADO

COLORADO LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

Colorado permits the accused to challenge the machine at trial. *Thomas v. People,* 895 P.2d 1040 (Colo. 1995). While the state can obtain admission of the breath test results by showing the testing device was in proper working order, nothing in Colo. Rev. Stat. § 42-4-

1202(6) shall preclude a defendant from offering evidence concerning the accuracy of testing devices. *Id.* If the prosecution makes such a prima facie showing, then other evidence suggesting *deficiencies in the testing devices*, testing method, or in the operator's administration of the test affects the weight of the test results and not their admissibility. *Id.*

The Colorado system even provides for the defendant to be given a separate sample of his breath at the time of his test or the alcoholic content of his breath at the time to permit scientifically reliable independent testing. *Garcia v. District Court,* 197 Colo. 38, 589 P.2d 924 (1979).

FLORIDA

FLORIDA LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

After the state presents its evidence, a defendant may, in any proceeding, attack the reliability of the testing procedures and the qualifications of the operator. A defendant also may question compliance with HRS regulations and the effect on the machine's integrity of failing to follow them strictly.

In *State v. Bender,* 382 So.2d 697 (Fla. 1980), test results obtained under subsection 322.262(2), Florida Statutes (1979), are admissible into evidence only upon compliance with the statutory provisions and the administrative rules enacted by the Department of Health and Rehabilitative Services (HRS).

There must be probative evidence (1) that a breathalyzer test was performed substantially in accordance with methods approved by HRS, and with a type of machine approved by HRS, by a person trained and qualified to conduct it and (2) that the machine itself has been calibrated, tested, and inspected in accordance with HRS regulations to assure its accuracy before the results

of a breathalyzer test may be introduced. Evidence of the reliability of the machine can be presented by the person conducting its testing and inspection or, if records of use and periodic testing are kept in the regular course of business, by production of such records.

Minor deviations in compliance with the HRS regulations, such as storage location or absolute timeliness of periodic inspection, will not prohibit the test results being presented, provided that there is evidence from which the fact finder can conclude that the machine itself remained accurate. Accord § 316.1932(1)(b)(1), Fla. Stat. (1987).

The presumptions are rebuttable, and a defendant may in any proceeding attack the reliability of the testing procedures, the qualifications of the operator, and the standards establishing the zones of intoxicant levels. In addition, other competent evidence may be presented to rebut the presumptions concerning whether the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired. See also *State v. Belvin*, 986 So. 2d 516 (Fla. 2008), holding that the breath test affidavit is testimonial, and the Accused must have an opportunity to confront and cross-examine the breath test operator.

DEFENSE MAY CHALLENGE SCIENTIFIC VALIDITY

The DUI statute prohibits driving with either unlawful blood or breath alcohol level, and that breath-testing machine was reprogrammed to report breath readings in terms of breath alcohol levels did not justify excluding defense testimony regarding conversion of breath alcohol to blood alcohol percentage and the theory underlying conversion of breath sample to blood alcohol percentage. The defense is always at liberty to rebut the presumptions created by the admission of a breath sample obtained in accordance with the law. In *Robertson v. State*, 604 So. 2d 783, 789 n.6 (Fla. 1992), The Florida Supreme Court recognized that the defense has a right to challenge the scientific validity of the governmental scheme for collecting and preserving

breath or blood samples. Moreover, in *Bender v. State*, 382 So. 2d 697 (Fla. 1980), the Florida Supreme Court held that presumptions created by the admission of a breath or blood alcohol test are rebuttable, and a defendant is free to attack the reliability of the procedures, including the "standards establishing the zones of intoxicant levels".

GEORGIA

GEORGIA LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

"[T] he expert testimony introduced by Lattarulo does not indicate that the Intoximeter 3000 test is not based on sound scientific theory, rather it indicates only that the test has some margin for error or may give an erroneous result under certain circumstances. As we noted above, no procedure is infallible. An accused may always introduce evidence of the possibility of error or circumstances that might have caused the machine to malfunction. Such evidence would relate to the weight rather than the admissibility of breathalyzer results." *Lattarulo v. State*, 261 Ga. 124 (1991). Further, precedents have established that the statute may not be charged to the jury using the word "presumption." *Simon v. State*, 182 Ga. App. 210 (355 SE2d 120) (1987). Under these precedents, the jury may not be instructed that the blood-alcohol level creates a presumption of guilt. *Id.*

Georgia encourages the challenges to the breath testing procedure so much that it provides a right to an independent test and where an accused's request for an independent test is not reasonably accommodated, the prosecution's test suppressed. *Covert v. State,* 196 Ga. App. 679, 396 S.E.2d 596 (1990).

ACCUSED'S ACCESS TO DOWNLOAD THE STORED DATA OR "SOURCE CODE."

Georgia's Court of Appeals provided that if the State has the source code in its possession, custody, or control, and it is found to be relevant, then the State is obligated to disclose it. *State v. Smiley,* 301 Ga. App. 778 (2009).

ILLINOIS

ILLINOIS LAW ACKNOWLEDGES THAT WHILE GENERALLY ACCURATE THERE IS EMPIRICAL EVIDENCE THAT A BREATH TEST CAN BE WRONG AND ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

In *People v. Orth*, 124 Ill.2d 326, 530 N.E.2d 210, 125 Ill.Dec. 182, the court held at page 336;

> "The danger is that placing the burden of proof upon the motorist will discourage the State from properly maintaining*336 its equipment, training its personnel, or preserving its records. This danger is increased by the empirical fact that breathalyzer tests, while generally valid, are not foolproof. (See, e.g., *State v. Canaday* (1978), 90 Wash.2d 808, 585 P.2d 1185; *Scales v. City Court* (1979), 122 Ariz. 231, 594 P.2d 97."

Similarly, *People v. Bertsch*, 183 Ill.App.3d 23, 538 N.E.2d 1306, 131 Ill .Dec. 750, held that when a person challenges the summary suspension of his driver's license, he bears the burden of proof at the rescission hearing. To rescind the summary suspension of a defendant's driver's license, the trial court must find that the defendant has satisfied his burden of proof by a preponderance of the evidence.

KANSAS

KANSAS LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

The defense may still attack the State's proof and attempt to discredit its witnesses, their machines, and their methods during the State's case-in-chief or later. The jury may finally agree that reasonable doubt prevents a conviction. It is the role of the jury to determine the facts and to apply the law to those facts in reaching its decision.

A plea of not guilty places all issues in dispute, including things most patently true. However strong the State's case may be, the jury has the power to accept it, reject it, or find it insufficiently persuasive. See *State v. Brice*, 276 Kan. 758, 770-71, 80 P.3d 1113 (2003). A defendant in a prosecution under K.S.A. 8-1567(a)(2) may raise and argue margin of error or other questions about the reliability or accuracy of his or her blood- or breath alcohol concentration "as measured," in the same way he or she can challenge whether the test was conducted within 2 hours of operating or attempting to operate a vehicle. See *State v. Pendleton*, 18 Kan. App. 2d 179, 185-86, 849 P.2d 143 (1993). Margin of error is simply a factor among many possibilities for the fact-finder to consider.

The State's argument that a defendant should never be permitted to mount a margin of error defense appears to arise out confusion between the concept of a "per se" statute and the concept of a "prima facie" case. The State's introduction of evidence supporting the statutory elements in a per se criminal statute does not endow the evidence with infallibility. It is sufficient to support a conviction but not to guarantee it. It merely establishes a prima facie case, one that may prevail "unless disproved or rebutted."

In short, proof of the elements of a *per se* criminal statute will get the State past a motion for judgment of acquittal and on to a jury. It will not compel a conviction as a matter of law. The

defense may still attack the State's proof and attempt to discredit its witnesses, their machines, and their methods during the State's case-in-chief or later. The jury may finally agree that reasonable doubt prevents a conviction. It is the role of the jury to determine the facts and to apply the law to those facts in reaching its decision. A plea of not guilty places all issues in dispute, including even things most patently true. However strong the State's case may be, the jury has the power to accept it, reject it, or find it insufficiently persuasive. See *State v. Brice*, 276 Kan. 758, 770-71, 80 P.3d 1113 (2003).

A defendant in a prosecution under K.S.A. 8-1567(a)(2) may raise and argue margin of error or other questions about the reliability or accuracy of his or her blood- or breath alcohol concentration "as measured," in the same way he or she can challenge whether the test was conducted within 2 hours of operating or attempting to operate a vehicle. See *State v. Pendleton*, 18 Kan. App. 2d 179, 185-86, 849 P.2d 143 (1993). Margin of error is simply a factor among many possibilities for the fact-finder to consider.

MAINE

NCDD members from Maine report that Maine law recognizes the right to question breath testing procedure and breath testing instrumentation and that there are virtually no restrictions beyond the Rules of Evidence in regard to what can be raised by the accused at trial. Specifically, members report that "nothing precludes us from crossing the state's foundational witness or calling our own expert to attack any aspect of reliability of the test result."

Because it is so well established and well accepted that the accused can attack the weight of the breath test evidence at trial there is little case law on the issue. One of the few cases addressing a prosecution challenge to defense evidence involved the accused's presentation of evidence regarding the "Margin of Error" of the Intoxilyzer. In *State v. McMahon*, 557 A.2d

1324 (Me. 1989) the defense challenged the margin of error for the intoxilyzer. "The record reflects that by direct examination of an expert witness McMahon introduced evidence that the intoxilyzer test had a margin of error of approximately plus or minus .02% and that the reading of .10% blood alcohol resulting from the intoxilyzer test administered to her could be actually .08% to .12% when considered in light of this margin of error. On cross-examination, the State questioned the expert regarding a 1974 study by the California State Department of Health that compared the results of intoxilyzer and blood tests. The court allowed the defense challenge to the margin of error."

EXCLUSION OF THE BREATH TEST EVIDENCE PRE-TRIAL ON GROUNDS OF UNRELIABILITY.

Maine's Statutory Predicate serves as foundational indicia of reliability. The statute declares that any test taken in compliance with those requirements is prima facie evidence of blood-alcohol level in any court. *State v. Pickering*, 462 A.2d 1151, (Me. 1983.) Thus generally "evidence addressing the accuracy and reliability of the result of a properly administered test creates an issue of fact to be considered by the jury in weighing the evidence. *Id.* at 1151. However, the Rules of Evidence also come into play and many test results are excluded via motions in limine on Evidence Rule 401 and 403 grounds.

MARYLAND

MARYLAND LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

Maryland practitioner are permitted to attack the weight of the breath test results at trial and point specifically to *Brown v. State,* 171 Md. App. 489 (2006), which permits a defendant to argue that a test is inaccurate, unreliable, or does not reflect the BrAC at the time of offense.

MICHIGAN

MICHIGAN LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

Arguments as to admissibility may be made pretrial. Then, such arguments can be made at trial going to the weight of the evidence. *People v. Rexford*, 228 Mich. App. 371, 579 N.W.2d 111 (1998).

Michigan requires foundation for a chemical test be laid in that the operator was qualified; the proper methodology was followed; and the testing device was reliable. *People v. Tipolt,* 198 Mich. App. 44, 497 NW2d. 198 (1993). Once the foundation is laid, the accused may challenge the weight at trial by attacking, for example, that the test did not occur within a reasonable time after arrest.

MINNESOTA

MINNESOTA LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

The proponent of a chemical or scientific test must establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability. *State v. Dille,* 258 N.W.2d 565, 567 (Minn.1977). Without a foundation guaranteeing the test's reliability, the test result is not probative as a measurement and hence is irrelevant.

MONTANA

MONTANA LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

In *State v. Gai*, 2012 MT 235, 366 Mont. 408, 288 P.3d 164 the Montana Supreme Court held that "[Defendant] had an evidentiary right to challenge the veracity of his Intoxilyzer breath test at trial, and it was error to the extent the District Court concluded otherwise."

Furthermore the Court stated, "Evidence used to attack the credibility of an Intoxilyzer result would include evidence of the Intoxilyzer's margin of error. M.R. Evid. 806 thus afforded [Defendant] the opportunity to pursue testimony that supported his defense that the Intoxilyzer took an inaccurate reading of his BAC." *Id.*

"Breathalyzer tests results, like any other evidence, may be subject to attack and disproof. Even after the admission of the breathalyzer test results, the burden is still on the municipality to convince the jury that the breathalyzer test is accurate and that the defendant's blood or breath alcohol was above the prohibited level at the time of driving." (quoting *Cooley v. Municipality of Anchorage*, 649 P.2d 251, 254–55 (1982))

OREGON

OREGON LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

Oregon recognizes a right to challenge the test at trial, because Oregon recognizes the distinction between the numerical value rendered by an intoxilyzer and the presence of alcohol in the blood stream at the time of the driving.

"[T]he statute requires the chemical analysis to "show" the actual presence of alcohol in the blood at the time of driving, it does not merely require a certain instrument reading. That is, under the statute, the "chemical analysis" is the numerical result that the machine produces together *with* an explanation of that result." *State v. Eumana-Maranchel*, 352 OR. 1, 277 P.3d 549 at 555 (Or., 2012) (emphasis in original).

SOUTH CAROLINA

SOUTH CAROLINA CODIFIES THE ACCUSED'S RIGHT TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL WITHING ITS STATUTORY PREDICATE.

§ 56-5-2930. Operating motor vehicle while under influence of alcohol or drugs; penalties; enrollment in Alcohol and Drug Safety Action Program; prosecution.

(I) A person charged for a violation of this section may be prosecuted pursuant to Section 56-5-2933 if the original testing of the person's breath or collection of other bodily fluids was performed within two hours of the time of arrest and reasonable suspicion existed to justify the traffic stop. A person may not be prosecuted for both a violation of this section and a violation of Section 56-5-2933 for the same incident. A person who violates the provisions of this section is entitled to a jury trial and is afforded the right to challenge certain factors including the following:

(1) whether or not the person was lawfully arrested or detained;

(2) the period of time between arrest and testing;

(3) whether or not the person was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950;

(4) whether the person consented to taking a test pursuant to Section 56-5-2950, and whether the:

(a) reported alcohol concentration at the time of testing was eight one-hundredths of one percent or more;

(b) individual who administered the test or took samples was qualified pursuant to Section 56-5-2950;

(c) tests administered and samples obtained were conducted pursuant to Section 56-5-2950 and regulations adopted pursuant to Section 56-5-2951(O) and Section 56-5-2953(F); and

(d) machine was working properly.

(J) Nothing contained in this section prohibits the introduction of:

(1) the results of any additional tests of the person's breath or other bodily fluids;

(2) any evidence that may corroborate or question the validity of the breath or bodily fluid test result including, but not limited to:

(a) evidence of field sobriety tests;

(b) evidence of the amount of alcohol consumed by the person; and

(c) evidence of the person's driving;

(3) a video recording of the person's conduct at the incident site and breath testing site taken pursuant to Section 56-5-2953 which is subject to redaction under the South Carolina Rules of Evidence; or

(4) any other evidence of the state of a person's faculties to drive a motor vehicle which would call into question the results of a breath or bodily fluid test.

At trial, a person charged with a violation of this section is allowed to present evidence relating to the factors enumerated above and the totality of the evidence produced at trial may be used by the jury to determine guilt or innocence. A person charged with a violation of this section must be given notice of intent to prosecute under the provisions of this section at least thirty calendar days before his trial date.

SOUTH CAROLINA STATES THAT IF DEFENDANT CAN SHOW PRIMA FACIE PREJUDICE FROM FAILURE TO PROVIDE REPAIR/MAINTENANCE RECORDS THE BURDEN SHIFTS TO THE GOVERNMENT

Code of Laws of South Carolina 1976 Annotated Currentness, Title 56. Motor Vehicles, Chapter 5. Uniform Act Regulating Traffic on Highways, Article 23. Reckless Homicide; Reckless Driving; Driving While Under the Influence of Intoxicating Liquor, Drugs or Narcotics

§ 56-5-2954. Breath testing sites; records of problems with devices.

"The State Law Enforcement Division and each law enforcement agency with a breath testing site is required to maintain a detailed record of malfunctions, repairs, complaints, or other problems regarding breath testing devices at each site. These records must be electronically recorded. These records, including any and all remarks, must be entered into a breath testing device and subsequently made available on the State Law

Enforcement Division web site. The records required by this section are subject to compulsory process issued by any court of competent jurisdiction in this State and are public records under the Freedom of Information Act."

In *State v. Ronald Landon*, 370 S.C. 103; 634 S.E.2d 660; the court held that once a defendant who has taken a breath test makes a prima facie showing of prejudice from a failure of the state to disclose repair and maintenance records for a breath-testing machine pursuant to a discovery request, the burden must shift to the state to prove the defendant was not prejudiced, either by providing records to show that the machine was working properly at the time of testing or by some other contemporaneous evidence. Rules Crim.Proc., Rule 5(a)(1)(C).

TENNESSEE

TENNESSEE LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

In *State v. Sensing*, 843 S.W.2d 412, 416 (Tenn. 1992), the Tennessee Supreme Court held, "The breath test result merely creates a rebuttable presumption of intoxication. T.C.A. § 55–10–408(b). The State must establish the competency of the operator, the proper operation of the machine and that the testing procedures are properly followed. The defense is then free to rebut the State's evidence by calling witnesses to challenge the accuracy of the particular machine, the qualifications of the operator, and the degree to which established testing procedures were followed." (Emphasis added).

TENNESSEE LAW PERMITS THE EXCLUSION OF THE BREATH TEST EVIDENCE PRE-TRIAL.

In *Crawley v. State*, 413 S.W.2d 370, 373 (1967) the Tennessee Supreme Court held,

"The results of such tests are not automatically admissible, but are admissible only when the tests are shown to have been properly administered by qualified experts, and when it is shown that the testing device is scientifically acceptable and accurate for the purpose thereof."

TEXAS

TEXAS ALLOWS CHALLENGES OF THE RELIABILITY OF THE BREATH MACHINE AND UNDERLYING SCIENTIFIC PRINCIPALS AT TRIAL

Under Texas law, it is error to exclude evidence that would discredit an Intoxilyzer result. *Love v. State,* 861 S.W.2d 899 (Tex. Crim. App. 1993) ("the veracity and integrity of the intoxilyzer test result."). In *Love,* the Court expressly held that testimony about "the reliability of the intoxilyzer result" is "testimony [that] has a tendency to make less probable the fact that appellant was intoxicated, the determinative fact in this DWI prosecution." *Love*, 861 S.W.2d at 903.

In *Stewart v. State*, 129 S.W.3d 93 (Tex. Crim. App. 2004), the court explained that even though the results of an Intoxilyzer test taken over an hour after the defendant was driving are not conclusive as to alcohol concentration at the time of the offense, they are a "piece[ ] in the evidentiary puzzle for the jury to consider." *Id.* Once again, the Court recognized that mere admissibility of a breath test result is not conclusive evidence of guilt.

UTAH

UTAH LAW ALLOWS THE ACCUSED TO ATTACK THE BREATH TEST EVIDENCE AT TRIAL.

In *State v. Preece*, 971 P.2d 1, (1998), the Utah Court of Appeals held that "the defendant [is allowed] to challenge the accuracy of the test on any relevant ground." *Id.* By erroneously invoking a conclusive presumption, the trial court denied Preece the ability to challenge the test's accuracy on the ground that he absorbed alcohol after he stopped driving. The trial court erred in

using a conclusive presumption to exclude Preece's alcohol absorption/metabolism evidence. Depending on the view it took of other evidence, the court might well have acquitted Preece had it not held an incorrect view about the matter being conclusively resolved by statutory presumption…."

CONCLUSION

The City of Cincinnati has asserted:

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

If *State v Vega* can be interpreted to say anything remotely like the assertion above then *Vega* is an anomaly and outlier in American jurisprudence and put Ohio on a path that is divergent from all other states. Moreover, the above interpretation clearly abridges constitutional rights and privileges of accused citizens.

This Honorable Court should not give such an unconstitutional interpretation to a thirty (30) year old decision but, rather, should respect the authority and judgment of the trial court which clearly has not abused such authority. The trial court and appellate court decisions below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of Amicus Curiae NCDD was forwarded by regular U.S. Mail, postage prepaid to Jennifer Bishop, Assistant City Prosecutor, 801 Plum Street, Suite 226, Cincinnati, Ohio 45202, this 17th day of March, 2014.

D. TIMOTHY HUEY