

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI,
STATE OF OHIO,

Plaintiff-Appellant,

-vs-

DANIEL ILG,

Defendant-Appellee.

* Case No. 2013-1102
* On appeal from the
* Hamilton County Court of
* Appeals, First Appellate
* District
* Court of Appeals No. C-120667
*

BRIEF OF AMICUS CURIAE LUCAS COUNTY PROSECUTING ATTORNEY
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RECEIVED
JAN 27 2014
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JAN 27 2014
CLERK OF COURT
SUPREME COURT OF OHIO

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Lucas County Prosecutor's Office prosecutes thousands of felony cases every year, many of which involve the Intoxilyzer 8000 or other testing equipment approved by state agencies for forensic evidence purposes. Virtually every felony case involves the issuance of subpoenas by one party or the other.

The scope of authority to subpoena documents related to recognized and accepted testing equipment, as well as permissible sanctions for failures to comply with such a subpoena, is of vital interest to Lucas County Prosecutor Julia Bates. She therefore submits the following brief in support of the City of Cincinnati.

INTRODUCTION

Appellee Daniel Ilg subpoenaed various documents from the Ohio Department of Health related to Intoxilyzer 8000's in general, as well as the particular Intoxilyzer 8000 used to conduct his breath test.

ODH provided most of the documents either in hard copy or by way of information accessible on its website. However, one request was problematic. Ilg sought "[a]ny and all computerized online breath archives data, also known as 'COBRA' data." The COBRA database contains all data transmitted to ODH from Intoxilyzer 8000's located throughout the state, not just the data from a specific test subject or even the data from a specific machine with a particular serial number. The database includes a great deal of personal information about individuals tested.

An ODH representative testified that providing a read-only copy of the database suitable for public release would cost approximately \$100,000 and require six to eight

months to prepare. Ilg failed to respond with any evidence as to how the data would be used in his case.

Despite the lack of evidence that the data would be relevant and admissible in Ilg's case, the trial court concluded that the database was relevant and suppressed the test results from the Intoxilyzer 8000 as a sanction for failure to comply with the demands of the subpoena.

Crim.R. 17(C) specifically permits a subpoena to be contested on grounds that compliance would be "unreasonable and oppressive." When such a challenge is raised, the proponent of the subpoena bears the burden of demonstrating that the requested documents are "evidentiary and relevant" and that the subpoena is issued in "good faith and is not intended as a general 'fishing expedition.'" *In re Subpoena Duces Tecum Served Upon Potts*, 100 Ohio St.3d 97, 2003-Ohio-5234, 796 N.E.2d 915, syllabus, following *United States v. Nixon*, 418 U.S. 683, 699-700, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

In this case, Ilg did not demonstrate how the COBRA data could be "evidentiary and relevant." The only evidence presented to the trial court about the COBRA data was that an expert would have to review certain items before he could determine whether he could perform additional requested tasks with the data. The database at best appears to be "potentially useful" for some unknown purpose. Amicus therefore seeks a rule of law that the power to subpoena documents should be limited to documents reasonably likely to affect the outcome of a trial.

In this case, the database could not be deemed reasonably likely to affect the outcome of trial. Because the database involved tests and machines other than the

specific machine used in Ilg's case, the database appears likely to be used to contest the general reliability of the Intoxilyzer 8000, rather than to ensure that Ilg's test was conducted in conformity with statutory and regulatory requirements. But admission of the test results is dependent on compliance with such requirements, so that data related to other tests and other machines have no value in Ilg's case. See *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984); and *State v. Plummer*, 22 Ohio St.3d 292, 294, 490 N.E.2d 902 (1986).

STATEMENT OF FACTS AND CASE

On October 26, 2011, Daniel Ilg was charged with operating a vehicle under the influence of alcohol (R.C. 4511.19(A)(1)), operating a vehicle with a prohibited level of alcohol in his breath (R.C. 4511.19(A)(1)(d)), and failure to maintain control of his vehicle. (R.C. 4511.202.)

On November 18, 2011, Ilg's counsel requested numerous documents related to the breath test administered to his client on the Intoxilyzer 8000 and the operator. He also filed a motion to suppress the test results from the Intoxilyzer.

The City responded to the discovery request on December 12, 2011. However, Ilg's counsel issued two essentially identical subpoenas seeking various documents from the Ohio Department of Health.

Ilg subsequently filed a motion for sanctions related to the subpoenas. The motion attached a curriculum vitae and affidavit from Alfred E. Staubus, a forensic toxicologist consultant. (Exhibit 3 to Motion for Sanctions.) Staubus' affidavit discussed the need for repair and maintenance records and software changes. (*Id.*, ¶¶5, 6.) The

affidavit did not mention the need for computerized online breath archives data ("COBRA data"). (*Id.*)

At a hearing on a motion to strike the subpoena, Mary Martin, a representative of the Ohio Department of Health, testified that most of the items requested, including any repair and maintenance records for each intoxilyzer, were available online through an ODH website.¹ She explained that the machine used in Ilg's test had been returned to the manufacturer shortly after it was received, when it was discovered that the machine had arrived without the proper software loaded. The machine had not been placed into service before it was returned, so that the online record of repairs during service time did not include the factory return. (Tr. Aug. 27, 2012 at pp. 233-25.)

Only a few of the requests were problematic. One of the requests was for "all computerized online breath archives data, also known as 'COBRA' data." Ms. Martin explained that ODH did not have the capability to provide the data in a form suitable for release to the public:

The COBRA data is our actual database. We get all our records, not even records, **all data sent to us**, it's put into -- it's called COBRA database. Think of it like an Excel spreadsheet, is the easiest thing to. It is in a read-only format. So we don't have the personnel or the ability to copy the database to give it out because there's several different things we'd have to do with the database before we were to release it to the public. We have to redact it because it has vast amounts of personal information in it. It is not in -- I said it was like an Excel spreadsheet but

¹See <http://publicapps.odh.ohio.gov/BreathInstrument>, last accessed Jan. 22, 2014. The Breath Instrument Data Center permits queries by name, by date range, by the age, sex, and race of the subject, and by whether there was a recorded refusal to test. The center also permits query by the name of either the arresting officer or the operator, by the instrument serial number, by the agency name, court code, or National Crime Information Center number. The location of the violation may also be searched by street name or number.

it's not that easy to read. It's a lot of code. . . . there's several different tables that coexist together for us to be able to look at the database itself. So at this time we don't have the ability to give the database out.

(Tr. Aug. 27, 2012 at pp. 15-16; emphasis added.)

Defense counsel asked Ms. Martin whether she had been told by Thomas Workman, an individual described by defense counsel as "an expert on the Intoxilyzer 8000," that the entire database could be copied within an hour. (Tr. Sept. 25, 2012 at pp. 46-49.) Ms. Martin responded that in fact, he said he needed to review the schema for the sixty or so tables involved in the COBRA data before "he would be able to come back and tell us if he would be able to do what the defense was requesting of him." (*Id.* at p. 50.) When defense counsel inquired as to whether Workman opined that the cost would be \$75, Martin responded that he actually stated that the \$75 cost would be the cost to provide copies after the initial work was done to prepare the database to be copied in a read-only format. (*Id.* at pp. 43-51.) Workman did not know the cost of the initial work, but ODH's IT department had informed her that complying with the request for the COBRA data would require hiring an outside consultant for six to eight months, with other associated costs. (*Id.* at p. 53-54.)

The other problematic requests were broad requests for correspondence related to the Intoxilyzer 8000. Ms. Martin estimated that it would take six to eight months to compile all the correspondence and have it reviewed by counsel to ensure that documents protected by the attorney-client privilege were not disclosed. (Tr. Aug. 27, 2012 at pp. 56-58.)

At the conclusion of the hearing, the court ordered ODH to disclose most of the documents within two weeks. The court allowed items of correspondence requiring

attorney review for privileged documents to be produced on November 5, 2012.

On September 25, 2012, the court held a second hearing. Ms. Martin again testified and reiterated her concerns regarding the department's inability to comply with the request for the COBRA data. She detailed her efforts to collect information about the practicalities of responding to the request, including speaking to between ten and twenty individuals at ODH, an outside contractor, Thomas Workman, and individuals at the Office of the Attorney General. She stated that the estimated cost of compliance was projected to be \$100,000. (Tr. Sept. 25, 2012 at pp. 117-120.)

Ilg failed to offer any evidence as to the intended purpose of the COBRA data. Thomas Workman, the expert referred to by defense counsel at the first hearing, did not testify at the second hearing. Defense counsel also did not elicit testimony from Ms. Martin regarding the usefulness of the data.

Significantly, the second hearing occurred before the deadline for production of the correspondence. The only request that was unsatisfied by the court's first deadline was the request for the COBRA data and the COBRA login record. The following summarizes the status of the documents requested by the subpoena as of the date of the second hearing:

ITEM	DESCRIPTION	PRODUCTION STATUS
1a.	"Any and all computerized online breath archives data, also known as 'COBRA' data."	Not produced due to expense in preparing database in a format suitable for public distribution. (Tr. Sept. 25, 2012 at pp. 115-116, 120.)
1b.	"Any and all log in history, including but not limited to, log in times, dates, duration, and identity of person logging in. This includes the history for any and all Ohio employees, employees of CMI, Inc, and any other persons who have logged in even if not employed by the State of Ohio or CMI, Inc."	Available online, except for COBRA login data, which was technically inaccessible. (Tr. at pp. 18, 113, 126.)
1c.	"Any and all repair records."	Available online when records exist, but no repairs had been made to the machine used in Ilg's test. (Tr. Aug. 27, 2012 at p. 19; Tr. Sept. 25, 2012 at p. 135.)
1d.	"Any and all maintenance records."	Available online when records exist, but no records existed. (Tr. Aug. 27, 2012 at p. 19; Sept. 25, 2012 at p. 137.)
1e.	"Any and all Radio Frequency Interference (RFI) certification records."	Produced to trial court. (Tr. Sept. 25, 2012 at p. 139.)
1f.	"Any software changes or modifications since the machine has been in use in Ohio by either the Ohio Dept. of Health employees and/or agents and or CMI, Inc. employees and/or agents."	Produced to trial court. (Tr. Sept. 25, 2012 at pp. 144, 155-156.)
1g	"The number of times the machine has been taken out of or removed from service and the reasons for removal."	The machine was never removed from service. (Tr. Sept. 25, 2012 at p. 149.)

1h.	"A statement from the Ohio Dept. of Health and/or CMI, Inc. explaining the reason this machine (serial number 80-004052) was initially calibrated on May 6, 2009 and returned to the factory for re-calibration on October 4, 2009 without any 'taken out of service' notice or repair records."	Testimonial explanation that the machine came from the manufacturer with improper software and was returned before ever being put into service. (Tr. Aug. 27, 2012 at pp. 20-26; Tr. Sept. 25, 2012 at p. 150.)
1i.	"Ohio Dept. of Health official records of repair and maintenance for this machine."	Available online when records exist, but this machine did not have a repair/maintenance history. (Tr. Aug. 27, 2012 at pp. 26-33; Tr. Sept. 25, 2012 at p. 151.)
1j.	"The full and official Ohio Dept. of Health subject test report for Daniel Joseph Ilg on October 22, 2011, including but not limited to, computer print-outs reflecting sample and/or test duration; sample and/or test volume; sample and/or test attempts; any and all information on no .020 agreement and any and all problems associated with Radio Frequency Interference (RFI)."	Available online. (Tr. Aug. 27, 2012 at p. 34.)
1k.	"Any and all correspondence, including but not limited to, letters, emails, memorandums, correspondence, notes, text messages, internal correspondence regarding the Intoxilyzer 8000 among and between Ohio Dept. of Health employees and/or agents, Ohio Dept. of Public Health Safety employees and/or agents, and CMI, Inc. employees and/or agents."	Not provided because the trial court ordered that Ilg's test results be suppressed before the deadline for disclosure of correspondence on November 5, 2012.
1l.	"Any and all communications between Ohio Dept. of Health and the Cincinnati Police Dept. and/or any prosecuting attorney or assistant prosecuting attorney for the City of Cincinnati about the Intoxilyzer 8000."	Not provided because the trial court ordered that Ilg's test results be suppressed before court-imposed deadline for disclosure of correspondence on November 5, 2012.

2a.	"Any and all computerized online breath archives data, also known as 'COBRA' data on the following individuals who were tested on the Intoxilyzer 8000, serial number 80-004052, located at Cincinnati Police Department, District 3****"	Request withdrawn by defense counsel. (Tr. Aug. 27, 2012 at p. 36.)
2b.	". . . for the above mentioned individuals, the full and official Ohio Dept. of Health subject test reports for their respective breath test(s) dates mentioned above ****"	Request withdrawn by defense counsel. (Tr. Aug. 27, 2012 at p. 36.)

Although Ilg did not offer any evidence as to the intended use of the COBRA data at either hearing, the court nevertheless concluded that ODH failed to comply with the court order and ordered as a sanction that Ilg's test result be suppressed. The court reasoned that ODH must "provide appropriately-requested, relevant and ordered documentation," and that "when it comes to a citizen's rights in this court, I won't accept high cost as a valid defense to why appropriately-requested documents are not being provided." In rendering the decision, the court did not identify how the COBRA data was relevant to Ilg's defense or how the data could be used in any respect. (Tr. Sept. 25, 2012 at p. 163.)

On review, the First Appellate District affirmed. See *City of Cincinnati v. Ilg*, 1st Dist. No. C-120667, 2013-Ohio-2191. The court held that "the COBRA database was a comprehensive repository of information relative to the functioning of the Intoxilyzer 8000 used in this case." From that information alone, the court concluded "Ilg therefore demonstrated that the COBRA data was relevant to the reliability of his breath test."

Id., ¶19.

Amicus Lucas County Prosecutor supports appellant's request for reversal, because Ilg did not offer and the trial court did not solicit evidence as to the intended use of the COBRA data. Rather, the trial court assumed that any data generated by Intoxilyzer 8000 equipment would be relevant to his defense. However, neither Crim.R. 17(C) nor the Confrontation Clause nor the Compulsory Process Clause entitles a criminal defendant to all data contained in a "comprehensive repository of information relative to the functioning of the Intoxilyzer 8000." Such data will not reveal whether Ilg's test was conducted in conformity with statutory and regulatory requirements, the basis for the admission of the test results. Rather, the likely use of the data would be to contest the general reliability of ODH-approved technology in contravention of this court's prior precedents.

ARGUMENT

First Proposition of Law: When a subpoena issued pursuant to Crim.R. 17(C) is contested on grounds that compliance would be unreasonable or oppressive, the proponent's burden of demonstrating that the documents are "evidentiary and relevant" requires a showing that there is a reasonable probability that the documents will affect the outcome of the proceeding in his favor. *In re Subpoena Duces Tecum Served Upon Potts*, 100 Ohio St.3d 97, 2003-Ohio-5234, 796 N.E.2d 915, applied.

Crim.R. 17(C) specifically permits an individual to contest a subpoena on grounds that "compliance would be unreasonable or oppressive." At any hearing on a motion to quash a subpoena, the proponent bears the burden of demonstrating that the subpoena is not unreasonable or oppressive by showing

(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due

diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition." (*United States v. Nixon* [1974], 418 U.S. 683, 699-700, 94 S.Ct. 3090, 41 L.Ed.2d 1039, followed.)

In re Subpoena Duces Tecum Served Upon Potts, 100 Ohio St.3d 97, 2003-Ohio-5234, 796 N.E.2d 915, syllabus.

The phrase "evidentiary and relevant" is undefined in *Potts*. However, authorities applying *Nixon* have held that the equivalent rule of federal procedure "was never intended to be a broad discovery device going beyond that which is required either by Rule 16 of the Federal Rules of Criminal Procedure or by *Brady [v. Maryland]*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)." *United States v. Stokes*, N.D.Miss. No. 2:09-CR-001, 2009 U.S. Dist. LEXIS 28590 (N.D.Miss.2009), quoting *United States v. Edwards*, 191 F.Supp.2d 88, 89 (D.C.2002).

Brady requires disclosure of material exculpatory evidence, but "materially exculpatory evidence" is distinct from "potentially useful" evidence. *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). "Material evidence" has a "reasonable probability" of affecting the outcome of the proceeding. *United States v. Bagley*, 473 United States 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). On the other hand, "potentially useful" evidence is evidence of which "no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Youngblood, supra*, at 57. See also *United States v. Wittig*, 250 F.R.D. 548, 552-553, 2008 U.S. Dist. LEXIS 8813 (D.Kan.2008), citing *Nixon* and *United States v. Anderson*, 31 F.Supp.2d 933, 944 (D.Kan.1998) (a mere

assertion that a document requested in a subpoena is "potentially" relevant or admissible is not enough, and conclusory allegations of relevance and admissibility are insufficient). Like the federal rule, Ohio Crim.R. 17(C) should be interpreted to apply "only to admissible *evidence*, not to materials that might lead to the discovery of exculpatory evidence." *United States v. Shinderman*, 432 F.Supp.2d 157, 158 (D.Me.2006) (emphasis in original). The subpoena power should not be used to see "what may turn up." *United States v. Libby*, 432 F.Supp.2d 26, 32 (D.D.C.2006).

Restricting Crim.R. 17(C) to permit only subpoenas of material evidence does not infringe on other constitutional rights. Neither the constitutional right of confrontation nor the right to compulsory process is absolute. Case law does not "transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery." *Pennsylvania v. Ritchie*, 480 U.S. 39, 53, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). The right of confrontation "does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony" but "is satisfied if defense counsel receives wide latitude at trial to question witnesses." *Id.* The right of confrontation merely proves "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.*, quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (emphasis in original).

Likewise, the right of compulsory process does not extend to all evidence which might have any "conceivable benefit" to the defendant. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 866, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982). Rather, the

defendant must demonstrate that the evidence in question is material and favorable in that there is "a reasonable likelihood that the [evidence] could have affected the judgment of the trier of fact." *Id.* at 869. *Accord Ritchie, supra*, 480 U.S. at 57 and *State v. Smith*, 168 Ohio App.3d 141, 2006-Ohio-3720, 858 N.E.2d 1222, ¶¶123-125.

In this case, the sole witness testified that the defense expert indicated he needed to see the schema of the tables used in the COBRA data in order to "come back and tell us if he would be able to do what the defense was requesting of him." (Tr. Aug. 27, 2012 at p. 50.) There was no evidence whatsoever to contradict that statement. The actual value of the data to the defense is thus speculative and cannot be said to have a "reasonable probability" of affecting the outcome of the proceeding. Rather, like the "potentially useful" evidence described in *Youngblood*, no more can be said than the COBRA data and schema were intended to be reviewed by an expert to see "if he would be able to do what the defense was requesting of him."

At least one other jurisdiction has considered--and rejected--a similar effort to subpoena COBRA data for an intoxilyzer:

. . . Hsu's contention that the District Court's denial of his motion to compel constituted a due process violation is not persuasive. Hsu sought the COBRA data in order to discern any operational issues that the specific Intoxilyzer used to test him might have experienced over time. He indicated no particular reason why he believed that such data would tend to be exculpatory in his case. It appears that, at most, he hoped the data would indicate operational issues, such that he could utilize the data to impeach the test result. Accordingly, we find that the data he sought was merely potentially useful evidence (or that it had only the potential of leading to useful evidence), rather than materially exculpatory evidence that would render the trial fundamentally unfair if not disclosed. Thus, we do not find a due process violation.

State v. Hsu, 129 Haw. 426, 301 P.3d 1267 (Ct.App. 2013) (footnote omitted).

Similarly, the Oregon Court of Appeals upheld the denial of a request for among other items, schematic diagrams related to the intoxilyzer, because "*Brady* is not authority for a defendant obtaining evidence of unknown import to test whether it helps or hurts his case." *State v. West*, 250 Ore. App. 196, 279 P.3d 354 (2012).

Quashing the request for the database would have been consistent with Ohio case law applying the Public Records Act and Crim.R. 16. The request for COBRA data necessitated the creation of a unique format of the database not currently possessed by ODH, a read-only format with personal information redacted. However, agencies have no duty to create documents in order to satisfy R.C. 149.43. *State ex rel. McCaffrey v. Mahoning County Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, ¶26, citing *State ex rel. Chatfield v. Gammill*, 132 Ohio St.3d 36, 2012-Ohio-1862, 968 N.E.2d 477. Likewise, this court has held that the prosecution cannot be obliged to turn over documents which it does not possess. *State v. Lawson*, 64 Ohio St.3d 336, 1992-Ohio-47, 595 N.E.2d 902. "A demand for production of documents contemplates documents which are in existence, not the creation of new documents." *Seebeck v. Ohio Adult Parole Auth.*, 10th Dist. No. 93APD11-1506, 1994 Ohio App. LEXIS 3417.

Appellee Ilg did not demonstrate how the COBRA data could be material and relevant to his defense. The trial court assumed without analysis that the COBRA data was relevant because it included data related to Ilg's test. That assumption was improper and imposed an undue burden on ODH to create an entirely new format for a database. That assumption was also inconsistent with this court's prior precedents limiting attacks on the general reliability of approved testing methodology.

Second Proposition of Law: The operation of breath testing machines other than the machine used in the defendant's test, or the conduct of other breath tests besides defendant's test, will have no bearing on whether the defendant's test was conducted in conformity with statutory and regulatory requirements. Data related to other machines or other tests will therefore not have a reasonable probability of affecting the outcome of the proceeding. *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984), applied.

This court has repeatedly upheld the validity of breath testing conducted in conformity with applicable statutes and regulations. In *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984), this court held that the Ohio legislature has determined properly conducted breath tests to be reliable and admissible:

[The judiciary must recognize] the necessary legislative determination that breath tests, properly conducted, are reliable irrespective that not all experts wholly agree and that the common law foundational evidence has, for admissibility, been replaced by statute and rule; and that the legislative delegation was to the Director of Health, not the court, the discretionary authority for adoption of appropriate tests and procedures, including breath test devices.

Id. at 188-189, quoting *State v. Brockway*, 2 Ohio App. 3d 227, 232, 441 N.E.2 602 (1981). *Vega* concluded that a defendant is not deprived of his constitutional right to present a defense, and the prosecution is not relieved of the requirement to prove guilt beyond a reasonable doubt when the defendant is not permitted to introduce expert testimony "to attack the reliability of intoxilyzers in general." *Vega* at 186.

Shortly after *Vega*, this court clarified that admissibility of the test results under R.C. 4511.19 "turns on substantial compliance with ODH regulations." *State v. Plummer*, 22 Ohio St.3d 292, 294, 490 N.E.2d 902 (1986); and *Defiance v. Kretz*, 60 Ohio St.3d 1, 3, 573 N.E.2d 32 (1991). Two years after *Kretz*, the court confirmed the

deference required the judgment of the Director of Health, noting that "it must be presumed that the Director of Health acted upon adequate investigation and in full awareness of the perceived problems with RFI." *State v. Yoder*, 66 Ohio St.3d 515, 613 N.E.2d 626 (1993). *Accord State v. French*, 72 Ohio St.3d 446, 451, 1995-Ohio-32, 650 N.E.2d 887 (failure to challenge the admissibility of test results in pre-trial motion waives the prosecution's burden to lay a foundation establishing substantial compliance with statutory and regulatory requirements). As the court more recently noted, R.C. 4511.19 "provides that *compliance with the regulations*, rather than a judicial determination as to reliability, is the criterion for admissibility." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶32 (emphasis in original).

Some of these authorities, including *Burnside*, were issued after Evid.R. 702 was adopted in 1980 and amended in 1994. *Burnside* was also issued after the adoption of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) in *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 1998-Ohio-178, 687 N.E.2d 735. The amendment of Evid.R. 702 and the adoption of *Daubert* thus have no impact on this court's previous holdings.

The Intoxilyzer 8000 is federally certified and specifically approved as an evidential breath testing instrument for use in determining whether a person's breath contains a concentration of alcohol prohibited by R.C. 4511.19. See Highway Safety Programs; Conforming Products List of Evidential Breath Alcohol Measurement Devices, 77 Fed. Reg. 35747-01 (June 14, 2012); OAC 3701-53-02(A)(3). ODH

regulations set forth record retention policies and requirements related to instrument checks, controls, and certifications. OAC 3701-53-02 and 3701-53-04. Ilg's test result from the Intoxilyzer 8000 is therefore entitled to admissibility pursuant to the well-established criterion of substantial compliance with applicable regulations.

This is not a case in which Ilg's test results were lost or not maintained properly. ODH regulations require only that test results be retained for "not less than three years." OAC 3701-53-01(A). Ilg's test results were retained and are in fact accessible online, so the COBRA data cannot have been sought in order to contest ODH's substantial compliance with its record retention requirements. *See, e.g., State v. Clemente*, 1st Dist. No. C-120628, 2013-Ohio-5213, ¶7 (when the defendant's test results were retained, ODH substantially complied with its record retention obligations).

Of course, Ilg never stated that he wanted the COBRA data in order to test ODH's retention of his own test results. And the breadth of the request belies that notion in any event. The COBRA database includes "all the data" sent to ODH from intoxilyzers across the state, including the vast amounts of personal information to be redacted before the database could be released to the general public. (Tr. Aug. 27, 2012 at pp. 15-16.)

The breadth of the requested data suggests that Ilg sought more than information about regulatory compliance with respect to his own test. And indeed, at least one individual has observed that breath testing systems "can be analyzed and their reliability assessed using traditional engineering and computer science techniques." Further, "[t]he most logical first step in this process is an analysis of data collected on the machines." Workman, *Massachusetts Breath Testing for Alcohol: A*

Computer Science Perspective," 8 J. High Tech. L. 209, 234 (2008).

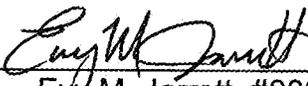
Such an analysis of data represents a challenge to the general reliability of a model selected by ODH. It is inconsistent with the presumption of admissibility afforded to a breath test result when the test was conducted on approved equipment in conformity with statutory and regulatory requirements, and such data therefore cannot be said to have evidentiary value pursuant to this court's prior precedents.

CONCLUSION

Because Ilg failed to demonstrate the evidentiary value of the COBRA data, and because much of the data can have no bearing on his case, amicus curiae joins the City of Cincinnati in requesting reversal of the First District's decision.

Respectfully submitted,

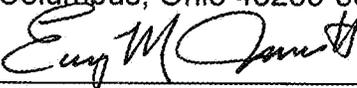
JULIA R. BATES, PROSECUTING ATTORNEY
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By: 

Ewy M. Jarrett, #0062485
Assistant Prosecuting Attorney

CERTIFICATION

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 27th day of January, 2014, to Jennifer Bishop, 801 Plum St., Ste. 226, Cincinnati, Ohio 45202; Marguerite Slagle, 8 West Ninth Street, Cincinnati, Ohio 45202; and Mark Kitrick, 445 Hutchison Ave., Ste. 100, Columbus, Ohio 43235-8630.



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