

**STATE MUST PRESENT EVIDENCE OF  
RELEVANCY AND RELIABILITY OF OVI BREATH TEST RESULTS**

Much controversy has surrounded Ohio's decision to adopt the Intoxilyzer 8000 as its newest breath alcohol testing instrument. The instrument has been criticized throughout the country as producing inaccurate results, and several states have either refused to purchase the instrument or are currently in lawsuits with CMI, the manufacturer of the instrument. Now the instruments are finally being challenged in courtrooms across Ohio, with favorable results for the defense bar and their clients.

The first court to address the issues with the 8000 instrument was the Circleville Municipal Court. In *State of Ohio v. Reid, et al.* (June 2, 2001) Circleville Municipal Ct., Case No. TRC 1100716, motions to suppress chemical tests produced by the Intoxilyzer 8000 were filed in three separate cases. The cases were consolidated for purposes of the Motion Hearing. After the April 11, 2011 Motion Hearing, the court issued its Decision and Entry finding that:

“Even though the legislature has given ODH [Ohio Department of Health] the power to select the methods and equipment to be used in alcohol breath testing, there is a tacit inference or expectation that ODH does some testing and review to which it can testify to demonstrate to the courts and the public that there is a scientific standard to which a particular piece of equipment has been compared and evaluated. Evid. R. 702 is the gate through which this evidence must pass...There would seem to be no reason to take a lesser approach to the Intoxilyzer 8000 and the court should be able to hear an expert testify as to the scientific principles that support the use of the intoxilyzer and the reliability and accuracy of the equipment before admitting the results of a test with a new instrument under evidentiary rules of Ohio.” *Id.* at 8-9.

The decision in *Reid* did not go unnoticed by the OVI defense bar, and in an effort to bring these reliability issues to light in other counties in Ohio, several OVI defense attorneys joined forces for two full days of pretrial evidentiary hearings in a recent Athens County case involving the 8000, *State of Ohio v. Gerome, et al.* (June 29, 2011) Athens County Municipal Ct., Case No. 11 TRC 01909.

As a result of those hearings, on June 29, 2011, Judge William A. Grim issued a decision requiring the State of Ohio to present evidence of the reliability of the breath test results produced by the Intoxilyzer 8000 instrument to determine the admissibility of such evidence at trial. *State of Ohio v. Gerome et al.* (June 29, 2011) Athens County Municipal Ct., Case No. 11 TRC 01909.

Judge Grim's decision adopts a pretrial process which defendants around Ohio have previously been unable to avail themselves. Initially, *Gerome* calls upon courts to perform their function as "gatekeeper" to ensure that scientific evidence is relevant and reliable before it may be admitted, and thus to conduct a pretrial evidentiary hearing under Ohio Evid. R. 104 and Ohio Evid. R. 702 to determine the relevancy and reliability of breath test results. During such pretrial hearings, the burden is on the State of Ohio to produce evidence of the reliability of the instrument.

*Gerome* then goes on to hold that even if a given breath test is deemed admissible for purposes of trial, that determination of admissibility cannot foreclose contrary defense evidence designed to challenge the weight to be given to the breath test. Stated another way, "The test result from an evidential breath test is circumstantial evidence of the breath alcohol content at the time of operation. Such evidence is not conclusive and is not the only evidence that is relevant." *Gerome* at p. 34.

These decisions are important for defense attorneys in Ohio for several reasons. First, each brings to light the reliability issues that other States have already found with the 8000. Judge Grim specifically found that the 8000 has several vulnerabilities, including failing to detect Radio Frequency Interference, the ability of the operator of the instrument to control the amount of breath going into the instrument, and its reduced capacity to detect mouth alcohol.

Secondly, *Gerome* correctly interprets the holding of *State of Ohio v. Vega*. *Gerome* correctly finds that a court must still find that the results produced by a breath testing device are reliable before they are found to be admissible at trial; and that defendants have a due process right to challenge the weight to be given to any breath test which is admitted into evidence.

Hopefully, decisions like *Reid* and *Gerome* will change the popular perception that the breath instruments approved by ODH are reliable and accurate simply because ODH says they are. Once this perception changes, defense attorneys will finally be able to fully and fairly represent their clients in cases involving alcohol breath testing.