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400 drunken-driving convictions in D.C. based on flawed test, official says

By Mary Pat Flaherty
Washington Post Staff Writer
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Nearly 400 people were convicted of driving while intoxicated in the District since fall 2008 based on inaccurate results from breath test machines, and half of them went to jail, city officials said Wednesday.

D.C. Attorney General Peter Nickles said the machines were improperly adjusted by city police. The jailed defendants generally served at least five days, he said.

Nickles's office has begun notifying the drivers, a move that immediately triggered at least one lawsuit against the District and could lead to requests for expungements, new trials and even deeper skepticism about the integrity of testing. Challenging test results is at the heart of drunken-driving cases, and this revelation will only strengthen those challenges, defense attorneys said.

The District's badly calibrated equipment would show a driver's blood-alcohol content to be about 20 percent higher than it actually was, Nickles said. All 10 of the breath test machines used by District police were wrong, he said. The problem occurred when the officer in charge of maintaining the machines improperly set the baseline alcohol concentration levels, Nickles said.

The flawed testing does not jeopardize cases involving accidents or injuries, including fatal crashes, because blood or urine samples would have been taken as additional evidence, Nickles said.

Nickles said he does not believe the new findings will change the results of the routine DWI cases, either, because officers often relied on field sobriety tests and other observations for their arrests. Still, Assistant Police Chief Patrick Burke said he could see "reduced charges in cases."

The machines have been [under investigation by Nickles's office since February](#), when an outside consultant working for the city suspected an accuracy problem. The District has replaced the breath equipment with another brand and has begun to devise stricter standards for testing the accuracy of the machines to put the city more in line with nearby jurisdictions.

The flawed cases emerged after a review of 1,100 prosecutions between September 2008 and February 2010 that relied heavily on breath test results, according to a June 4 letter that Nickles sent to the local trial lawyers association and the public defender's service.

His letter listed each of the affected cases and told the lawyers' groups that they "may take whatever action you deem appropriate" to spread the word among the legal community. His office, he wrote, has begun contacting each of the drivers and their attorneys, but "that process may take several more weeks."

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D.C. resident Hector Molina-Aviles, 45, drew a five-day jail sentence after his blood-alcohol level in a 2008 arrest registered .21 -- a level that triggers mandatory incarceration in the District. He had been celebrating his wife's birthday in Mount Pleasant. He was pulled over on 16th Street for speeding, and an officer later said he smelled alcohol, Molina-Aviles said.

His is one of the flawed cases, according to the list.

Molina-Aviles said he initially refused to take the test but relented because he needed his license to drive to work as an actor and writer. He said he "never believed the high number they gave me" but pleaded guilty in January "because fighting this for years took over my life." He remains on probation, has to seek permission to travel to out-of-state jobs and has been told that if he wants to become a citizen after more than 30 years as a legal resident, he has to wait to apply.

He said, "I understand there are consequences for actions, but I knew that result could not be right."

Some lawyers who specialize in drunken-driving cases questioned Nickles's continued confidence in the DWI convictions, with one lawyer, [Thomas A. Key](#), calling it "utter bull."

"The way [the law is written in the District](#), you cannot bring a DWI without a .08 result," Key said. "It demands that result to make that arrest. I'd take a case without a score any day and beat that. But once they have that test number in there, it's a whole new ballgame for a client."

The breath test alone is enough for a charge of DWI, Burke and Nickles said, and field sobriety tests are not needed to bolster the case.

Key, along with the [Albo & Oblon firm](#) and lawyer [Bryan Brown](#), filed suit Wednesday on behalf of some clients whose DWI cases are now called into question. They are seeking damages and allege that the problems with the system were well known in the department.

Brown said he particularly objected to having had a DWI charge used as leverage to get a client to plead guilty to lesser charges.

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