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## HUNDREDS OF DUIS AT RISK BREATH-TEST DATA DELETED

*Dennis Wagner, The Arizona Republic*

Hundreds of drunken driving cases throughout Arizona could be dismissed because prosecutors and crime lab technicians allegedly concealed evidence from breath-testing equipment.

Dubbed "Data Dump" by defense lawyers, the controversy already has caused judges in Phoenix and Tempe to suppress Intoxilyzer results, forcing prosecutors to dismiss charges.

In a series of recent court hearings and depositions, lab technicians for the Phoenix Police Department and the Department of Public Safety acknowledged that quality assurance test errors are routinely deleted from a computer that provides information to defense lawyers.

And now attorneys statewide are swamping the courts with motions alleging that DUI defendants have been denied due process by authorities who intentionally hid data on breath-testing for the past five years.

"This is important," said Clifford Girard, a Phoenix lawyer. "There can literally be thousands of people convicted of misdemeanor and felony offenses in DUI cases based on erroneous evidence."

Prosecutors and lab experts claim that there has been no wrongdoing and that the controversy is only a mass example of legal maneuvering.

"We're not playing games with discovery," said Jerry Landau, special assistant to Maricopa County Attorney Rick Romley. "And we're not trying to hide anything

from a defendant. . . . It's basically the issue of the month (for DUI lawyers). Anyone can make allegations."

But defense lawyers almost universally agree that prosecutors have violated ethical canons. And some contend there may be criminal misconduct.

"Unquestionably, there are ethical problems with this," said **Craig Penrod**. "These are clearly public records. They're clearly being destroyed. . . . And it's a Class 6 felony to tamper with a public record."

Daniel Furlong, a Prescott lawyer, agreed.

"I think they need to appoint a special investigator," Furlong said. "What about all those people who were convicted?"

The controversy involves not only DUI defendants, but those charged with felonies such as aggravated assault or manslaughter because of charges that they were under the influence of alcohol.

**Penrod** also said guilty defendants could get off on a technicality caused by the government's conduct. And inmates sentenced to prison because of prior DUI convictions may have grounds to appeal.

Landau, who once supervised DUI prosecutions in Maricopa County, denied that there have been any ethical or criminal violations. He said drunken-driving defendants have received all relevant and required evidence. And he expressed doubt that a huge number of DUI cases will be lost.

But Tempe Municipal Court Judge Mary Ann Majestic recently ordered breath-test evidence suppressed for 15 defendants in a single hearing. Majestic ruled that defendants were being subjected to "trial by machine," without an opportunity to present a full defense.

"It is this court's belief that this is a denial of fundamental fairness, which is, and should be, shocking to the universal sense of justice," she wrote.

**Penrod** said a majority of the Tempe cases were later dropped by the City Attorney's Office because it is difficult to win a conviction without lab results.

The controversy affects most courts statewide, except for Mesa, Scottsdale and Tucson, where police do not use crime labs run by the DPS or Phoenix police for blood-alcohol data storage.

In Phoenix, hundreds of dismissal motions have been filed in Municipal Court.

"They're putting out these motions like water," Landau said. "The court's being flooded with them."

In Chandler City Court, a single hearing scheduled today involves motions in 98 DUI cases - all concerning the breath-test controversy.

Criminalists and prosecutors justified the deletion of quality assurance test errors by saying that the "error" readings were caused by flawed tests, rather than a problem with the breath-testing machine itself.

They argued that it would be misleading to release records showing such errors.

"It's not a scientifically valid piece of information," said Todd Griffith, DPS scientific analysis supervisor.

But Chester Flaxmayer, a former DPS criminalist, said the flaws could also be caused by faulty breath-test equipment.

"This came as a shock to us because it does go to the integrity of the system," said Girard, the Phoenix lawyer. "They just want to keep the system going, make the machine look good. And if people get burned, too bad."

The dispute involves a complicated mix of science and computers. Here's how it works:

A drunken-driving suspect submits a breath sample to the Intoxilyzer 5000, which calculates blood-alcohol levels. Anyone with a reading of 0.10 percent is presumed drunk and faces a separate charge and immediate driver's license suspension.

Law enforcement officials conduct routine quality assurance tests to verify that the machine is properly calibrated and in good working order. Those tests, as well as actual breath-test results, are stored in a DPS database known as ADAMS.

The system is considered so accurate and foolproof that Arizona defense attorneys are not entitled to backup breath samples for independent evaluation. Instead, they are given printouts of testing results.

Those printouts come through Arizona's Criminal Justice Information System, a computer linked to police agencies and prosecutor offices statewide. For the past five years, defense lawyers thought they were getting all the test data.

Then Furlong, the Prescott lawyer, and two colleagues began investigating. Defense attorneys discovered that crime lab workers were actually asking police agencies which test results should be deleted and that software had been installed to automatically erase some test results.

Some of the most damaging revelations came in a 1997 memo written by DPS criminalist Terry Hogan. That memo describes a meeting with 10 Maricopa County prosecutors who were told of the hidden test results and "thought it would be no problem." It also says they agreed to fight defense motions seeking the information.

Griffith, the DPS supervisor, said there is nothing nefarious about those policies. He said flawed test results - caused by power surges or condensation, for example - have no bearing on the accuracy of breath tests.

He and Hogan denied defense allegations that information was concealed to prevent outside experts from challenging breath test results.

But defense attorneys say the lab techs and prosecutors knew exactly what they were doing.

"It's collusion - a conspiratorial agreement," said Anthony Zuniga, a Phoenix defense lawyer. "That's unethical and inappropriate."