

ACLU calls for probation violations to be thrown out over testing device flaws in Sussex County

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The Delaware American Civil Liberties Union is calling on the state Attorney General's office to throw out as many as 249 probation violations from the past five years because the Department of Correction has not been properly maintaining the machines it has been using to test breath for alcohol consumption.

Richard H. Morse, legal director for the ACLU of Delaware, wrote to State Prosecutor Kathleen Jennings on Dec. 23 asking her to review and possibly overturn all violations related to the "Alco Sensor PBT" device at the Sussex Community Correctional Center in Georgetown since 2009.

"It appears likely from the Department of Correction's responses to an ACLU Freedom of Information Act request we submitted in April that the devices were not adequately maintained and calibrated during the previous five years," Morse wrote.

According to the letter, the DOC could not provide a detailed log of maintenance and calibration for the machines, as required, from January 2009 to April 2013. During that time, according to the ACLU, 249 "positive" results were attributed to the devices "so the number of people wrongfully convicted of violations may be that large."

The man who initially complained to the ACLU remains incarcerated due to a "positive" test by one of the devices in March 2012, according to his family.

"The ACLU's interest in this matter is to make certain that the state follows the relevant due process requirements before incarcerating people," Morse said.

On Friday, the Delaware Attorney General's office declined comment on the issue.

The ACLU sent a second letter on Dec. 23 to DOC Commissioner Robert Coupe asking him to "take immediate action to see that the devices are maintained and calibrated appropriately going forward."

Coupe's office issued a brief response Friday, indicating that Coupe had received the ACLU's letter and Coupe had set up a meeting with Jennings, "to review the current calibration policy and practice with the Attorney General's Office and, if requested, make any necessary changes."

That meeting is scheduled to take place within the next few weeks, according to Coupe's office.

In his letter to the Attorney General's office, Morse noted that DOC first denied the ACLU's April FOIA request for maintenance and calibration information, then the department produced a single handwritten page of notes in June before finally producing a detailed response in December.

"Since the records show calibration only during eight months of the five-year period covered by our FOIA request, the reasonable conclusion is that the machine was not calibrated regularly throughout the five years," Morse wrote, adding it was now the duty of state prosecutors to inform sentencing judges about potential issues with the evidence.

According to the ACLU, the only evidence of any testing or maintenance of the devices by the DOC was the single handwritten page purporting to detail testing in the eight months immediately preceding the ACLU's April FOIA request.

According to Morse, the probationer that complained to them through his fiancée, reported that he was tested twice at the Sussex work-release center in March 2012 and one test showed he had consumed alcohol while a second test showed he hadn't.

The single positive result was then the basis for a probation violation.

"As far as I can tell the trial judge was unaware of the calibration and maintenance issue at the time of sentencing," wrote Morse.

Before approaching the ACLU, the fiancée said she did research on the Internet and got inconsistent responses when she inquired about the calibration and maintenance of the Alco Sensor devices. The woman said the DOC claimed Delaware State Police was responsible for maintenance and the state police claimed DOC was responsible.

According to all sides, the devices at the Sussex Community Correctional Center are only used to test for use of alcohol by probationers who are prohibited from having any alcohol. The devices have not been used by any police agencies in DUI cases.

Wilmington defense attorney Tom Foley said that probation officials often use devices, like a polygraph, that would not be allowed in court to determine guilt or innocence. Instead, Foley said, such devices are used as an investigative tool and violations are found only after additional investigation or if there is a confession or admission.

But, he said, if as the ACLU alleges the results from the uncalibrated Sussex devices alone are being used to deprive probationers of their liberty – "That is a big problem."

Contact Sean O'Sullivan at (302) 324-2777 or sosullivan@delawareonline.com or on Twitter [@SeanGOSullivan](https://twitter.com/SeanGOSullivan).