

Blood Draws and Video Confrontation: Practical Issues in DWI Law

Courts, Corrections, and Justice Interim Committee

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I. **Blood draws** implicate the constitutional right to be free from an unreasonable search and seizure.

The Fourth Amendment of the US Constitution provides “[t]he right of the people to be secure in their persons... against **unreasonable** searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...”

Implied Consent and DWI Testing: Before the Supreme Court’s ruling in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), implied consent laws allowed for warrantless searches of suspected DWI drivers to test for alcohol or drugs or both to apply to breath and blood tests and allowed a penalty for drivers who refused to provide a breath or blood sample.

- *Birchfield* changed the law, providing that in the absence of a warrant, a state’s implied consent statute may not criminalize the refusal to submit to a blood test because, while the Fourth Amendment allows for warrantless breath tests incident to an arrest for drunk driving, warrantless blood tests incident to an arrest violate the Fourth Amendment.
 - o Breath testing is less intrusive whereas blood testing implicates additional privacy interests and is more physically invasive.
 - o States can no longer punish a refusal to submit to a blood test, such as charging aggravated DWI based on an implied consent statute.
 - o Warrantless exception for DWI breath remains but the exception for a warrantless blood draw no longer applies.
 - Officer must either (a) obtain a warrant, or (b) prove probable cause to require the blood test in addition to exigent circumstances.

Article II, Section 10 of the NM Constitution states “[t]he people shall be secure in their persons... from **unreasonable** searches and seizures, and no warrant to search any person... shall issue without a written showing of probable cause...”

The Implied Consent Act in NM, found in Sections 66-8-105 to 66-8-112 NMSA 1978, permits law enforcement officers who have reasonable grounds to believe that an arrested person has been driving a motor vehicle while under the influence of intoxicating liquor or drugs to direct the administration of multiple or different tests.

After *Birchfield*, in *State v. Vargas*, 404 P.3d 2017 (N.M. 2017), the NM Supreme Court retroactively applied the new standard disallowing a penalty under the State’s implied consent law and clarified that blood draw warrants only apply to felony DWIs.

- After a low breath test, .04/.05 at a checkpoint, driver then refused a blood draw. Officer charged aggravated DUI based off the language in the implied consent statute, a refusal of a test of the officer’s designation, breath or blood or both.

- NMSC held that a driver “cannot be subjected to criminal penalties for refusing to submit to an unreasonable (warrantless blood draw) search.
- NMSC reiterated that Section 66-8-111(A), NMSA 1978 provides that upon a refusal to provide a chemical test, an officer may not seek a warrant for a sample unless there is probable cause that the suspected DWI driver caused **the death or great bodily injury of another person** or committed a **felony** while driving under the influence of alcohol or a controlled substance.
 - o No warrants or penalties are allowed for a refusal to submit to a blood test under a misdemeanor DWI stop; officers may charge under impaired to slightest degree if reasonable.

NM Proposed Legislation: HB 158 (2023), SB 190 (2024)

II. Video confrontation implicates the constitutional right of a defendant to confront witnesses testifying against them in a criminal action.

The Sixth Amendment of the US Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial... **to be confronted with the witnesses against him...** [and] to have compulsory process for obtaining witnesses in his favor.”

Article II, Section 14 of the NM Constitution, states similarly that “[i]n all criminal prosecutions, the accused shall have the right... **to be confronted with the witnesses against him...**to have compulsory process to compel the attendance of necessary witnesses in his behalf, and a speedy public trial...”

Before the ability to appear live via a two-way-video existed, witnesses had no other option than to appear in person at a criminal proceeding. With technological advancements and virtual/remote appearances now possible, federal and some state rules have begun to allow for live virtual testimony in some instances.

- Federal Rule 43 allows witnesses to remotely testify in court under a “good cause” standard, whereas Federal Rule 45 provides that a subpoena compelling a witness to court has a 100-mile reach.
- Tennessee and North Carolina have passed state rules allowing for chemists to testify remotely.

The rules on preliminary hearings in New Mexico, where the defendant may compel witnesses to testify against them and the rules of evidence apply, now allow for witnesses to appear virtually in magistrate, metropolitan, and district court “provided that the witness is able to see, and can be seen by, the defendant, counsel for the prosecution and the defendant, and the judge.” See Rules 5-302, 6-202, 7-202.

However, NM rules for trial testimony have not changed, and chemical analysts who have conducted testing of a blood sample and prepared a report describing the alcohol and/or drug contents of the sample taken pursuant to a suspected DWI driver’s consent or by a felony search warrant, must travel long distances around the state to testify to their findings.

NM Proposed Legislation: HB 62 (2024)