A Perfect Storm: New Mexico as a Case Study for Driving While Intoxicated and Driving Under the Influence Investigation and Persecution Post-\textit{Birchfield}

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A Perfect Storm: New Mexico as a Case Study for Driving While Intoxicated and Driving Under the Influence Investigation and Prosecution Post-Birchfield

Cynthia Armijo

Abstract: Changes in societal acceptance of the medicinal and recreational use of marijuana has had a significant impact on the investigation and prosecution of driving while under the influence of marijuana cases. The increased amount of marijuana use has resulted in an increase in driving while under the influence investigations and prosecutions involving marijuana. Adding to the increasing numbers of driving while under the influence cases, the Birchfield decision added an additional hurdle to overcome by prohibiting law enforcement from obtaining blood samples without a warrant. This article discusses the investigation and prosecution of driving while under the influence of drug cases before and after Birchfield. It also addresses how New Mexico case law has interpreted the requirements of Birchfield to New Mexico law. Finally, suggestions are offered about what should be done in the future to address the perfect storm of the post-Birchfield limitations of blood draws without consent and the increasing numbers of suspects driving under the influence of marijuana.

Societal acceptance of marijuana has undergone significant changes in recent years. In the past, marijuana was considered deviant, pathological, and criminogenic, resulting in laws that restricted its use.2 The strict prohibition of marijuana resulted in a war on drugs based on the presumption that marijuana was considered a gateway drug.3 In the past, offenders faced significant jail/prison time for possession of marijuana.4 Recently, society’s perspectives of marijuana have changed, resulting in changes to the law regarding marijuana use.5 Once considered a pariah of society, marijuana is now becoming more and more respected for its medicinal benefits.6 Some states have even condoned recreational use of marijuana by minimizing the penalties associated with marijuana from a criminal offense resulting in jail time to a civil penalty.7

Despite changes in societal and legislative acceptance of marijuana, there are collateral issues that the legalization of marijuana has created. Marijuana use, as it relates to driving while intoxicated laws, has changed significantly after amendments to laws dealing with marijuana use. As a result, law enforcement now has to address an increase in the number of suspects under

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1 Cynthia Armijo is a Visiting Professor for the Driving While Intoxicated/Domestic Violence Clinic at the University of New Mexico School of Law.
the influence of marijuana while driving a motor vehicle. In 2016, the U.S. Supreme Court further complicated matters when it decided Birchfield. In Birchfield, the U.S. Supreme Court decided that imposing an increased penalty if a suspect refused to submit to a blood test was unconstitutional. Driving under the influence cases involving marijuana have always been difficult to prove. However, the decision handed down by the U.S. Supreme Court in Birchfield, made marijuana cases even more difficult to prosecute. This article will analyze New Mexico driving while intoxicated law and the changes that have resulted in the prosecution of these cases in the wake of Birchfield.

I. NEW MEXICO DRIVING WHILE INTOXICATED/DRIVING UNDER THE INFLUENCE LAW GENERALLY

In order to understand how prosecuting driving under the influence of drug (DUID) cases involving marijuana are different than driving while intoxicated (DWI) cases involving alcohol, it is important to understand DWI/DUID prosecution generally. New Mexico’s DWI/DUID statute reads as follows:

66-8-102. Driving under the influence of intoxicating liquor or drugs; aggravated driving under the influence of intoxicating liquor or drugs; penalties.

A. It is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this State.

B. It is unlawful for a person who is under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle to drive a vehicle within this State.

C. It is unlawful for:

(1) a person to drive a vehicle in this State if the person has an alcohol concentration of eight one hundredths or more in the person’s blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle.[12]

This statute sets forth the elements to prove driving while intoxicated (DWI) and driving under the influence of drugs (DUID). In New Mexico, DWI is described in Section A. This section prohibits a person who is under the influence of intoxicating liquor from driving a vehicle. Section B describes DUID as driving a vehicle under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle.[14]

A. Driving While Intoxicated

To prove a DWI, the prosecutor must show that the defendant had an alcohol concentration of eight one hundredths or more in his or her breath or blood within three hours of driving and the alcohol was consumed before or while driving the vehicle. New Mexico law provides for prosecution of DWI prosecution under one of two theories. A prosecutor can prove a DWI using a per se theory or an impaired to the slightest degree theory. Under a per se theory, the State must prove that the

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[10] Id. at 2186.
[13] Id. at § 66-8-102(A).
[14] Id. at § 66-8-102(B).
defendant had a breath score of eight one hundredths or above. Alternatively, a prosecutor can use an impaired to the slightest degree theory. Under this theory, the State must prove that the defendant drove while under the influence of liquor to a degree that rendered the person incapable of safely driving a vehicle either mentally or physically or both.

1. Per Se Driving While Intoxicated

New Mexico’s statute defines a person as intoxicated if he or she has an alcohol concentration of eight one hundredths or more in the person’s blood or breath within three hours of driving a vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle. To prove a per se DWI violation, the State must present evidence that the defendant operated a vehicle within three hours of drinking alcohol with a breath score of eight one hundredths or above. The breath score is typically determined by submitting a breath sample into an Intoxilyzer® 8000. A breath result of eight one hundredths or more is considered a per se violation of the statute.

2. Impaired to the Slightest Degree

Alternatively, the prosecutor may use an impaired to the slightest degree theory. Using this theory, a prosecutor must prove that:

[A]t the time, the defendant was under the influence, intoxicating liquor; that is, as a result of drinking liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public.

Using this approach, the State does not have to prove a breath score of eight one hundredths or above. The jury instruction requires that the prosecutor prove that the defendant did not have the clear judgment and steady hand necessary to handle a vehicle with safety because he or she was under the influence of an intoxicating liquor. This is usually accomplished by showing that the defendant’s driving was negatively impacted by his or her intoxication. Typically, the prosecutor would show impairment by eliciting testimony by the officer about how badly the defendant was driving. The court uses a totality of the circumstances analysis. Cases that involve the defendant getting into an accident, hitting a curb, almost hitting another car, or running his or her car off the road are the easiest to prove under this theory. The more difficult cases are cases

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15 Id. at § 66-8-102(C)(1).
16 UJI 14-4501 NMRA. UJI 14-4501 NMRA applies to an impaired to the slightest degree prosecution: Driving while under the influence of intoxicating liquor; essential elements. For you to find the defendant guilty of driving while under the influence of intoxicating liquor [as charged in Count ________], the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
1. The defendant operated a motor vehicle;
2. At the time, the defendant was under the influence of intoxicating liquor, that is, as a result of drinking liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public;
3. This happened in New Mexico, on or about the ______ day of ______, ______.
17 N.M. STAT. ANN. § 66-8-102(C)(1).
18 Id.
20 N.M. STAT. ANN. § 66-8-102(C)(1).
21 UJI 14-4501 NMRA.
22 N.M. STAT. ANN. § 66-8-102(C)(1).
23 UJI 14-4501 NMRA.
where the defendant was stopped for a traffic violation, such as running a stop sign, or cases involving a failure to maintain a traffic lane. The most difficult cases under an impaired to the slightest degree theory are cases where the defendant was stopped in a roadblock because officers did not observe a traffic violation before the defendant was stopped.

3. Driving While Under the Influence of Drugs

The DUID portion of the statute, Section B, requires that the State prove that the defendant drove while under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle. However, the statute is silent as to a per se level the state must prove in a DUID prosecution. While DWI clearly requires that the prosecutor establish that the defendant’s alcohol concentration is eight one hundredths or more, the statute does not set forth the level of drug concentration required for a DUID conviction. It appears that the statute allows for any amount of drug concentration as sufficient for a DUID conviction.

4. Aggravated Driving While Intoxicated and Driving While under the Influence of Drugs

Aggravated DWI/DUID cases require proof of one of the following circumstances: (i) the defendant’s breath score was sixteen one hundredths or above, (ii) the defendant was in an accident that caused bodily injury to a human being, or (iii) the defendant refused to take a breath test. Note that this statute can be applied to either DWI or DUID cases. One method of proving an aggravated DWI is by arguing that the defendant’s blood or breath score was sixteen one hundredths within three hours of driving. Another method of proving an aggravated DWI/DUID is by proving that the defendant refused to take a breath or blood test. When a subject refuses to submit to a driver’s blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle; (2) causing bodily injury to a human being as a result of the unlawful operation of a motor vehicle while driving under the influence of intoxicating liquor or drugs; or (3) refusing to submit to chemical testing, as provided for in the Implied Consent Act, and in the judgment of the court, based upon evidence of intoxication presented to the court, the driver was under the influence of intoxicating liquor or drugs.


Id.

For you to find the defendant guilty of aggravated driving while under the influence of intoxicating liquor [as charged in Count _________], the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
1. The defendant operated a motor vehicle;
2. Within three hours of driving, the defendant had an alcohol concentration of sixteen one hundredths (.16) grams or more in [one hundred milliliters of blood;] [or] [two hundred ten liters of breath;] [and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle];
3. This happened in New Mexico, on or about the day of ____________, ________.


For you to find the defendant guilty of aggravated driving while under the influence of [intoxicating liquor] [or] [drugs] [as charged in Count _________], the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
1. The defendant operated a motor vehicle;
2. At that time the defendant was under the influence of [intoxicating liquor; that is, as a result of drinking liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public;] [or] [drugs to such a degree that the defendant was incapable of safely driving a vehicle;]
3. The defendant refused to submit to chemical testing;
4. This happened in New Mexico, on or about the day of ____________, ________.

26 See id.
27 See id. § 66-8-102(C).
28 See id. § 66-8-102(D).
29 Aggravated driving under the influence of intoxicating liquor or drugs consists of:
   (1) driving a vehicle in this State with an alcohol concentration of sixteen one hundredths or more in the
breath and/or blood test, according to the statute, he or she can be charged with aggravated DWI/DUID.\textsuperscript{33} The statute requires that the administration of the breath or blood test must comply with the requirements of the Implied Consent Act.\textsuperscript{35} Because this charge is aggravated, this statute allows for increased penalties if a defendant is charged with this crime.\textsuperscript{35} This will become important later when \textit{Birchfield} is used to analyze this statute.

5. Standardized Field Sobriety Tests

An understanding of standardized field sobriety tests (SFSTs) is necessary to understand how officers investigate DWI/DUID cases. After an officer observes a violation of a traffic law and stops a vehicle, if the officer observes that the driver has bloodshot or watery eyes, slurred speech, or a moderate or strong odor of alcohol, the officer may conduct a DWI/DUID investigation.\textsuperscript{36} What follows is a summary of the SFSTs that officers use to investigate whether a defendant has alcohol in his or her system.

a. Horizontal gaze nystagmus

Typically, the first SFST that an officer administers is the horizontal gaze nystagmus (HGN). The instructions for the HGN are:

- Are you wearing glasses or contacts? I’m going to check your eyes.
- Stand with your feet together, with your hands by your side.
- Follow the stimulus with your eyes, but do not move your head.
- Focus on the stimulus until I tell you to stop.

The officer then holds a stimulus approximately twelve to fifteen inches in front of the suspect’s face. The officer checks that the eyes have equal tracking and pupil size. The officer then moves the stimulus from left to right for two seconds out and two seconds back. The officer looks for:

- Lack of Smooth Pursuit \textit{[of the eyes]}

- Distinct Nystagmus \textit{[shaking of the eyes]}

  \textbullet{} Maximum Deviation
  \textbullet{} Hold minimum of 4 seconds

b. Walk and Turn

The next SFST that officers use in their DWI/DUID investigations is the walk and turn (WAT) test. In the instructional phase of the WAT, the officer instructs the defendant to do the following:

- Place your left foot on a line, (real or imaginary) and put your right heel against the toe of the left foot.
- Place your arms by your sides.

\textsuperscript{35} N.M. STAT. ANN. § 66-8-102/D(3). This is the section of the statute that has been affected by \textit{Birchfield} in that \textit{Birchfield} prohibited imposing increased incarceration time if the defendant refused to submit to a blood draw. It is important to note that \textit{Birchfield} does not apply to refusals to submit to breath tests. \textit{Birchfield} does not prohibit requiring a suspect to submit to a breath test or be subjected to an increased penalty. Birchfield v. North Dakota, 136 S. Ct. 2160, 2169 (2016); UJI 14-4508 NMRA (footnotes omitted).

\textsuperscript{34} UJI 14-4508 NMRA (footnotes omitted); Birchfield, 136 S. Ct. at 2169.

Maintain this position and do not do anything until I tell you to start.
Do you understand?
When I tell you to start, take nine heel-to-toe steps along a line, and nine heel-to-toe steps back down the line.
On the ninth step, keep your front foot on the line & turn by taking several small steps with the other foot.
Keep your arms by your side, count your steps out loud, and keep watching your feet.
Once you begin to walk, do not stop until the test is completed.
Do you understand?

During this test, officers are looking for the following clues:
Can’t balance during instructions
Starts too soon
Stops while walking
Misses heel to toe
Steps off the line
Uses arms to balance
Turned improperly
Wrong number of steps
Cannot perform test (test stopped or not requested for suspect’s safety)\(^{38}\)

c. One-leg stand

The final standardized field sobriety test is the one-leg stand (OLS). During the administration of this SFST, the officer instructs the defendant to:
Stand with your feet together.
Keep your arms by your side.
Maintain that position until told to do otherwise.
Do you understand?

When I tell you to start, raise one leg approximately 6 inches off the ground, foot pointed out.
Keep both legs straight, arms at your side
Keep your eyes on the elevated foot.
While holding that position, count out loud (one-thousand-one, one-thousand-two) until told to stop.
This test will take approx. 30 seconds.
Do you understand?

During the suspect’s performance of this test, the officer is looking for the following clues:
Sways
Uses arms to balance
Hops
Puts foot down
Cannot perform test (test stopped or not requested for suspect’s safety)\(^{39}\)

6. Drug Recognition Experts

Although SFSTs are commonly used to evaluate alcohol use, determining drug use with SFSTs is problematic because these tests were developed to determine impairment by alcohol, not marijuana. To address the limited use of SFSTs in prosecutions for marijuana, Drug Recognition Experts (DREs) have been used by many jurisdictions to assess impairment when the officer suspects that a driver is under the influence of drugs.\(^{40}\) These programs provide police officers specialized training in the recognition of drug impairment symptoms in drivers.\(^{41}\) DREs are also trained to determine the type of drug that is the cause of an individ-

\(^{38}\) Id.
\(^{39}\) Id.
ual’s impairment. DREs are specially trained to evaluate and analyze a person’s appearance, behavior, and vital signs in order for the DRE to make an informed decision regarding a person’s potential drug use.

Unfortunately, training is expensive and time consuming for these officers, so their numbers are limited. This is especially true in smaller jurisdictions who do not have the resources to train DREs. For this reason, prosecution of cases involving DRE trained officers is rare in New Mexico. Prosecutors are generally limited to a positive drug test and impaired driving to prove a DUID. In cases where the suspect did not submit to a blood test, the only proof a prosecutor has to prove DUID is impaired driving.

7. Implied Consent Act

Pursuant to the Implied Consent Act, Section 66-8-105 of the New Mexico Statute, before an officer asks a suspect to submit to a breath test, the officer is required to read the defendant the Implied Consent Act Advisory. The Implied Consent Act Advisories for a breath test read as follows pre-Birchfield:

The New Mexico Implied Consent Act requires you to submit to a breath test, a blood test or both to determine the alcohol or drug content of your blood. After you take our tests, you have the right to choose an additional test . . .

If you choose to take this additional test, you have the right to a reasonable opportunity to arrange for a physician, a licensed nurse, or laboratory technician or technologist who is employed by a hospital or physician of your own choice to perform an additional chemical test. The cost of the additional test will be paid by the law enforcement agency. Do you agree to take our tests?

[If “Yes,” proceed with your tests . . .]

[If “No,” or driver does not respond, read]: I cannot force you to take our tests, but if you refuse you will lose your New Mexico driver’s license or resident operator’s privilege for one year. If you are convicted in court of Driving While Under the Influence, you may also receive a greater sentence because you refused to be tested. Do you understand?

The Implied Consent Act Advisory informed the defendant that if he or she refuses to take a breath test, then he or she would be

46 N.M. STAT. ANN. § 66-8-102(B), (D).
47 See id. § 66-8-102(B).
49 Id.
charged with an aggravated DWI/DUID. An aggravated DWI/DUID conviction could result in the defendant losing his or her license for a year and the defendant would face mandatory jail time should he or she be convicted at trial.

8. Breath and Blood Tests

To prosecute a per se DWI or an aggravated DWI/DUID, the prosecutor must prove that the defendant’s breath or blood score was above the legal limit. To prove the breath or blood score, the prosecutor must show how much alcohol was in the suspect’s blood at the time of the test. The breath score is measured by an Intoxilyzer 8000. A blood test is measured by drawing blood from the suspect’s arm using a needle. Officers have the choice of whether to administer a breath test, a blood test, or both.

It is important to understand that the investigation methods described above all changed after the Birchfield decision. What follows is a discussion of the Birchfield decision and an analysis of how the decision changed the investigation and prosecution of DUID in New Mexico.

II. Birchfield’s Aftermath in DWI/DUID Investigation and Prosecution in New Mexico

Thus far, this article has analyzed how DWI/DUID cases were prosecuted before Birchfield. All aspects of DWI/DUID prosecutions changed after Birchfield. The next section analyzes how the Birchfield decision affected the prosecution of DUID prosecutions and investigations. As discussed above, prior to Birchfield, a DWI/DUID investigation began when an officer saw a traffic infraction. An officer developed reasonable suspicion for a DWI/DUID investigation if he approached the vehicle and saw that a suspect had bloodshot watery eyes, slurred speech, an odor of alcohol, admission of alcohol, or a number of other indicators that the suspect may be under the influence of an intoxicating substance. Once the officer developed reasonable suspicion for a DWI/DUID investigation, the officer could conduct standardized field sobriety tests (SFSTs) to develop probable cause to arrest a suspect. If the officer detected signs of impairment in the SFSTs, the officer would then read the suspect the Implied Consent Act Advisory and ask the suspect whether he or she wanted to submit to a breath test. Prior to Birchfield, the implied consent law allowed the officer to choose a breath test, a blood test, or both to determine the alcohol or drug content of the defendant’s blood. No warrant was necessary to obtain a blood test. The suspect impliedly consented to submit to

50 Id. § 3.3.
51 Id. §§ 3.2, 5.6.
52 N.M. STAT. ANN. § 66-8-102(D).
53 See id.
55 N.M. CODE R. § 7.33.2.14(A), (B) (2018).
56 N.M. JUD. EDUC. CTR., supra note 48, § 3.3.
a breath or blood test or face additional penalties if he or she was convicted.63 Most suspects would face aggravated charges leading to an increased penalty if they refused to submit to breath or blood testing.64

A. Birchfield v. North Dakota

In Birchfield, the U.S. Supreme Court reviewed three cases: a breath test refusal, a blood test refusal, and a consensual blood test.65 After noting that on average, one person in the U.S. dies every fifty-three minutes from a drunk-driving related accident,66 the Court ruled that the intrusion of a breath test is minimal so increased punishment is acceptable should the suspect refuse a breath test.67 Regarding blood tests, the Court reasoned that the intrusion of using a needle to draw blood is signification and requires either consent by the suspect or a search warrant.68 Birchfield is significant in that officers are now prevented from drawing blood in a DWI/DUID case if the suspect refuses to consent to having his or her blood drawn.69 The Court determined that blood testing is different than breath testing in that it is a significant invasion.70 Blood draws are more emotionally painful and more likely to cause anxiety for the suspect.71 The Court reasoned that expulsion of breath is natural but inserting a needle in a person’s arm is not.72 Additionally, blood draws result in more privacy concerns since the blood may be passed to many actors in the criminal justice system.73 For these reasons, the Court reasoned that refusing a breath test may result in an increased penalty but refusal to submit to a blood test cannot.74 The Court acknowledged that this decision places an additional burden on law enforcement in that officers will have to obtain a warrant to obtain a blood sample if the defendant does not consent to a blood draw.75 However, the Court reasoned that technology allows officers to obtain warrants quickly.76

B. Investigation and Prosecution of Driving While Intoxicated and Driving Under the Influence of Drug Cases in the Wake of Birchfield v. North Dakota

The practical application of the Birchfield decision has been problematic in New Mexico. New Mexico law does not permit officers to obtain a warrant for a DWI/DUID case if the crime is a misdemeanor.77 Law enforcement would not be able to obtain a warrant to administer a blood test in the majority of DWI/DUID cases which are charged as misdemeanors.78 Necessarily, a large number of suspects cannot be tested unless the suspect consents to have his or her blood drawn.79 Before an officer conducts a breath test or blood test, in most jurisdictions, the officer is required to read an Implied Consent Act Advisory in which the

63 Suazo, 877 P.2d at 1089.
64 Id.
66 Id. at 2178.
67 Id. at 2179.
68 Id. at 2184 85.
69 Id. at 2186.
70 Id. at 2178.
71 See id.
72 Id.
73 Id.
74 Id. at 2185.
75 Id. at 2180 81.
76 Id. at 2192.
77 See N.M. Stat. Ann. § 66-8-111(A) (2015) (indicating that a person who committed a felony while under the influence of alcohol or a controlled substance is subject to a chemical test that will be administered only after obtaining a warrant).
79 See Birchfield, 136 S. Ct. at 2185.
suspect was informed that he or she can refuse to submit to breath or blood testing, but would face increased penalties if he or she refused. After Birchfield, the content of Implied Consent Act Advisory that was read in most cases was no longer valid. Because the Implied Consent Act Advisory that was read to suspects prior to Birchfield was no longer valid, the results of blood testing for those could no longer be used as evidence. Proving a DWI/DUID for drug cases without a blood test is very difficult so a significant amount of cases post-Birchfield were dismissed at trial because prosecutors faced an uphill battle proving the DWI beyond a reasonable doubt without a blood test.

In effect, when defendants refuse to take a blood test under the new Implied Consent Act Advisory, DWI/DUID cases involving marijuana—or any drug, for that matter—are very difficult to prove. Without a blood test, there is no proof of drugs in the defendant’s system for a per se prosecution. Many defendants do not consent to a blood test. An officer’s only alternative is to obtain a warrant to conduct a blood test. Unfortunately, New Mexico does not allow for a warrant for a blood draw in a misdemeanor case. Without a blood test, prosecutors are required to prove that the defendant was impaired to the slightest degree to obtain a conviction.

1. New Mexico Case Law Post-Birchfield

Three recent New Mexico decisions have interpreted Birchfield as it applies to New Mexico DUID prosecution: State v. Vargas, State v. Storey, and State v. Gonzales. Vargas and Storey echo Birchfield’s prohibition of increasing penalties when a subject refuses to submit to a blood test. Gonzales opened the door for courts to consider performance on SFSTs in determining whether a suspect is DUID.

a. State v. Vargas

In State v. Vargas, the court determined that because blood draws used in DUID prosecution were too invasive, the blood test was an unlawful search and the blood score obtained from that unlawful search should be suppressed. In that case, officers stopped the defendant at a checkpoint. The defendant greeted the officer with “good afternoon” which was odd since it was 1:00 a.m. The officer detected the odor of alcohol coming from the vehicle and the defendant had bloodshot watery eyes. The defendant denied drinking alcohol. The officer administered field sobriety tests (FSTs) and the defendant performed poorly. The off-

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80 See id. at 2168, 2171.
81 See id. at 176 77 (citation omitted) (demonstrating that in Texas cases, mandatory-blood-draw statutes are unconstitutional).
82 See id. at 2168.
84 See N.M. Dep’t of Transp., New Mexico DWI Report 70 (2016), https://gps.unm.edu/gps_assets/tru_data/ Crash-Reports/DWI-Reports/2016-dwi-report.pdf (describing the percentage of BAC tests that were refused have increased in seven of the past nine years).
88 See 389 P.3d 1080, 1085 (N.M. Ct. App. 2017), aff’d, 404 P.3d 416 (N.M. 2017) (explaining the prohibition of increasing penalties when a subject refused to submit to a blood test and the considerations performance has on SFSTs).
90 Vargas, 389 P.3d at 1082.
91 Id.
92 Id.
93 Id.
94 Id.
95 Id.
Officer read the defendant the Implied Consent Act Advisory. The defendant then admitted to drinking alcohol and her breath test results were .04/.05.

The officer did not believe the breath result was accurate given the defendant’s performance on the FSTs. For this reason, the officer asked the defendant to submit to a blood test. The defendant initially agreed to the blood test, but later refused. The defendant was charged with Aggravated DWI/DUID based on her refusal to take the blood test.

The court reasoned that the correct analysis for this case was the impaired to the slightest degree standard. The court found that the evidence supported the defendant’s conviction for driving while impaired to the slightest degree because she was unable to follow instructions during the FSTs. Additionally, the defendant admitted to consuming alcohol and her breath test results were .04/.05.

The court then analyzed whether the defendant could be convicted of aggravated DWI/DUID based on her refusal to submit to a blood test. After discussing the court’s reasoning in Birchfield, the court reasoned that blood tests are significantly intrusive because they pierce the skin. Also, the court was concerned that a blood sample could be used to extract information beyond just a blood alcohol content reading. After reviewing the U.S. Supreme Court’s balancing the need for the government’s and the State’s interest in preventing the carnage and slaughter caused by drunk drivers, the court reasoned that although it may be argued that a driver has consented to a warrantless blood test pursuant to implied consent laws, a criminal penalty cannot be imposed for refusal to take a blood test. The court held that because the defendant was threatened with an unlawful search, the refusal to submit to the search could not be the basis for increasing her DWI/DUID sentence.

b. State v. Storey

The defendant in this case was found guilty at trial of aggravated driving under the influence of marijuana. The court used an impaired to the slightest degree analysis. The court found that a state cannot hold a defendant criminally liable for refusing to submit to a warrantless blood draw. The court ruled that the portion of the statute that allowed for increased punishment for refusing to submit to a blood draw was unconstitutional.

The defendant was stopped because he failed to maintain a traffic lane and almost grazed a concrete lane divider. The officer smelled the odor of burnt marijuana coming from the vehicle and after questioning, the defendant produced a marijuana pipe from the center console of the car. The defendant admitted to smoking marijuana a few hours ear-
lier. The officer administered FSTs and the defendant performed poorly in that he missed heel-to-toe twice, turned incorrectly, and used his arms for balance. During the one-leg stand test, the defendant hopped once, failed to look at his foot, and failed to keep his hands to his sides. Because the defendant performed poorly on his FSTs, the officer placed the defendant under arrest for DWI/DUID.

The issue before the court was whether standardized FSTs help a law enforcement officer to assess a driver’s ability to safely operate a motor vehicle. The State argued that because FSTs are divided attention tests, FSTs can be used to assess a person’s intoxication regardless of the intoxicating substance. The officer testifying in this case had received specialized training as a DRE. The officer then read the defendant the Implied Consent Act Advisory, which required the defendant to consent to a breath test, blood test, or both, and also stated that the defendant then had the option to request another independent test to be performed. The defendant agreed to submit to a breath test, which showed negative for alcohol. After the defendant took the breath test, the officer then informed the defendant that he could face a greater sentence if he refused the blood test. The officer then asked the defendant to submit to a blood test and even after he was advised of the greater sentence, the defendant again refused to submit to a blood test. The defendant’s case was tried in the lower court before the Birchfield decision. After reasoning that drawing blood for alcohol content analysis constitutes a search, the court ruled that blood tests are different from breath test because of its intrusiveness and use of blood to extract information beyond blood alcohol content. The court held that the constitution does not only prohibit an enhanced criminal penalty based on refusal to consent to a blood test for alcohol but it also prohibits an enhanced sentence for refusal to consent to a blood test for other drugs including marijuana. However, the State would still be allowed to comment on the defendant’s refusal to consent to a blood test.

c. State v. Gonzales

The defendant was charged with speeding at 95 mph in a 60 mph zone and failing to maintain a traffic lane. The officer observed that she had bloodshot and watery eyes and detected an odor of marijuana. When asked, the defendant stated that she along with her passengers had smoked earlier. The officer administered SFSTs, the HGN, the WAT and the OLS. The officer testified that the WAT and OLS SFSTs are divided attention tests that are used to determine whether a person can safely operate a vehicle. During the WAT, the defendant stepped out of the starting position twice and stepped off line twice. During


Id. at 2178.

Id. at 267.

Id. at 269.


Id.

Id.

See discussion supra Section I.A.5.

Gonzales, 2017 N.M. Unpub. LEXIS 2, at *2.

Id.
the OLS, the defendant swayed and dropped her foot and her legs were shaking.\textsuperscript{135} The officer testified that body tremors are associated with marijuana use based on his training as a DRE.\textsuperscript{136} After objection, the court ruled that the court would give appropriate weight to the statement that it deserved since the State had not laid the foundation for the officer to give expert testimony.\textsuperscript{137} On appeal, the State conceded that that the trial court’s decision to admit the officer’s opinion that marijuana caused tremors was erroneous, but stated that the error was harmless.\textsuperscript{138} The only issue before the court was whether the evidence presented was sufficient to support a conviction.\textsuperscript{139} The court reasoned that given the defendant’s admission of smoking marijuana and the fact that the defendant was speeding, there was sufficient evidence to support the verdict that defendant was incapable of safe driving.\textsuperscript{140} The court also noted that DRE evidence is helpful to a fact finder but is not needed in every case.\textsuperscript{141} Ultimately the court held that despite the erroneous admission of the officer’s testimony that marijuana causes tremors, there was sufficient evidence for the lower court to convict the defendant.\textsuperscript{142}

III. OTHER ISSUES WITH MARIJUANA BLOOD DRAW PROSECUTION

When suspects do consent to a blood draw, prosecutors are faced with an additional burden in New Mexico. The statute prohibiting DWI/DUID in New Mexico is not clear about what is required to prove a DWI/DUID regarding a drug.

Generally, marijuana impairment can be difficult to prove. For example, alcohol dissipates quickly while marijuana does not. A suspect may have marijuana in his or her system, but since the marijuana does not dissipate quickly, the marijuana may have been smoked days or even weeks prior to driving.\textsuperscript{143} The fat-soluble nature of the chemical THC enables it to be stored in human fat tissue for a variable period of time while gradually being released back into the bloodstream anywhere from a day for an occasional user, to several weeks for a chronic user.\textsuperscript{144} The speed with which THC is released back into the blood stream is highly variable across individuals. It generally occurs almost completely within twenty-four hours after smoking, but it may not end for several weeks.\textsuperscript{145} When marijuana is smoked, the THC is absorbed into the bloodstream through the lungs.\textsuperscript{146} It is then circulated through the body and is stored in fat tissue and is released over time.\textsuperscript{147} The rate for the release of the marijuana from the fat cells can be anywhere from twenty-four hours to several weeks after smoking.\textsuperscript{148} Individuals may respond differently to the same drug dose depending on genetics, drug metabolism, age, weight, sex, disease, and history of use.\textsuperscript{149} Additionally, use of other substanc-

\textsuperscript{135} Id.
\textsuperscript{136} Id. at *2 3.
\textsuperscript{137} Id. at *3.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at *10; see also State v. Aleman, 194 P.3d 110, 120 21 (N.M. Ct. App. 2008).
\textsuperscript{142} Gonzales, 2017 N.M. Unpub. LEXIS 2, at *10.
\textsuperscript{143} Charles R. Cordova, Jr., DWI and Drugs: A Look at Per Se Laws for Marijuana, 7 Nev. L.J. 570, 592 (2007).
\textsuperscript{145} Cordova, supra note 143, at 578 (citations omitted).
\textsuperscript{146} Id. (citing Marilyn A. Huestis & Edward J. Cone, Urinary Excretion Half-Life of 11-nor-9-carboxy-A9-tetrahydrocannabinol in Humans, 20 Therapeutic Drug Monitoring 570 (1998)).
\textsuperscript{147} Id. at 570.
\textsuperscript{148} Id. at 578.
es at the same time as marijuana use can cause different reactions on a person’s behavior or driving abilities.\textsuperscript{150} The highly variable nature of marijuana makes it difficult to test when a person last used marijuana and the degree to which that person may or may not be currently impaired.\textsuperscript{151} Because marijuana stays in the system at different levels based on individual tolerance, it is difficult—if not impossible—to determine if someone is impaired by marijuana through blood testing.\textsuperscript{152} The research also shows, however, that frequent marijuana users develop a tolerance that minimizes impairment at a given THC dosage, as compared to infrequent users given the same THC dosage.\textsuperscript{153} Additionally, there is no biological test for tolerance.\textsuperscript{154} Suspects who use medical marijuana are most susceptible to DUID prosecution despite the fact that they are most tolerant to marijuana’s effects.\textsuperscript{155} These issues make legal marijuana patients and chronic recreational users especially susceptible to DUID prosecution, even though their tolerance minimizes impairment.\textsuperscript{156} Regular users would likely always be driving with at least some level of THC metabolites in his or her blood system, even during a prolonged period of abstinence.\textsuperscript{157} Chronic users will always test positive.\textsuperscript{158} Given the differences between alcohol and marijuana testing, proving that the defendant was intoxicated at the time of driving is very difficult.

A review of New Mexico’s DUID statute shows that there is no per se amount required to prove intoxication for purposes of the statute.\textsuperscript{159} The statute simply uses an impaired to the slightest degree assessment to determine impairment.\textsuperscript{160} In a DWI/DUID involving marijuana in New Mexico, a prosecutor must prove that the suspect had drugs in his or her system and that caused him or her to be impaired to the slightest degree.\textsuperscript{161} The previous section discussed the use of Standardized Field Sobriety Tests (SFSTs) to prove impairment.\textsuperscript{162} The per se approach presents several problems for prosecutors. SFSTs were created to test for alcohol use and not marijuana use so their relevance is limited. Additionally, what if a defendant refuses a blood test? How does a prosecutor prove that the defendant had any drugs in his or her system? Even in cases where the defendant had marijuana or paraphernalia in his or her vehicle, there is no way to establish when and whether the suspect ingested any of the drug.

IV. RECOMMENDATIONS FOR THE FUTURE OF DUID ENFORCEMENT

To address the increased numbers of marijuana users and of DUID cases, law en-

\textsuperscript{150} See generally R. Andrew Sewell et al., The Effect of Cannabis Compared with Alcohol on Driving, 18 Am. J. Addictions 185 (2009) (comparing the differing effects of marijuana use and alcohol use).


\textsuperscript{152} Goldberg, supra note 43, at 253 (citing Sewell, supra note 150, at 188).

\textsuperscript{153} Id. at 251 (citation omitted).

\textsuperscript{154} See id. at 278-79.

\textsuperscript{155} See id. at 249-50.

\textsuperscript{156} Equal protection issues have arisen because of issues with minimized impairment. See Cordova, supra note 143, at 591-92.

\textsuperscript{157} Goldberg, supra note 43, at 243.

\textsuperscript{158} Id.

\textsuperscript{159} See N.M. Stat. Ann. § 66-8-102(D)(1) (3).


enforcement must explore other options to determine whether a suspect is driving under the influence of marijuana. Given the prohibition of blood draws in Birchfield, the method used must be non-invasive. This method should also be portable and easy to operate. Officers must be able to use the device roadside to determine marijuana use. At this time, this device does not exist and there is not one available. Given the increase in the numbers of marijuana users, the problem of marijuana DUID enforcement will only get worse.

One of the difficulties in prosecuting DWI/DUID is the invasive nature of blood draws as determined by the U.S. Supreme Court in Birchfield. Newer tests are available that are not as invasive as the blood draw that was limited by the Supreme Court. Oral Fluid (OF) testing involves swabbing the inside of a suspect’s mouth. OF testing has been used in workplace drug testing, establishing evidence in non-DUID criminal cases, and monitoring medication for pain management. It is minimally invasive, and results are obtained rapidly. Nine European countries, Australia, and New Zealand permit OF testing. Another option is hair testing. Hair testing also has the problem of recency of the marijuana use. A positive result could be from three to four weeks prior and have no relationship to ability to drive.

Although these methods may address the invasiveness issue that the Court expressed in Birchfield, it still does not address the concern the Court had about the information that could be obtained from the samples collected for other law enforcement uses.

V. Conclusion

The perfect storm of increasing numbers of suspects driving under the influence of drugs, and the Birchfield decision prohibiting blood draws to determine blood alcohol content without consent, has caused much difficulty in the investigation and prosecution of driving while under the influence cases. Many jurisdictions have enacted statutes allowing for decreased penalties or allowing for medicinal or recreational use. Necessarily, law enforcement agencies are struggling with increased enforcement of driving under the influence of drug cases. Adding to their increasing caseload, officers and prosecutors are limited in their ability to prove their cases unless the suspect consents to a blood draw. As a result of Birchfield, officers have revised the Implied Consent Act Advisory to reflect the holding in Birchfield preventing prosecutors from pursuing aggravated charges that may result in increased incarceration if a defendant refuses to submit to a blood test. Although the U.S. Supreme Court in Birchfield reasoned that because of technology, officers may easily and quickly obtain warrants for blood draws, officers in New Mexico are not able to obtain a warrant for misdemeanor cas-

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163 See John Flannigan et al., Oral Fluid Testing for Impaired Driving Enforcement, POLICE CHIEF, JAN. 2017, at 58, 58 (discussing the prevalence of DUID and the need for testing).

164 See id. (noting that oral fluid detection is a viable option for roadside testing of drivers because there is a high degree of agreement when simultaneously collected blood and oral fluid samples are tested for drugs).

165 Cordova, supra note 143, at 570 71.


167 Elisabeth Leere Oiestad et al., Oral fluid drug analysis in the age of new psychoactive substances, 8 Bioanalysis 691, 691 (2016).

168 Cordova, supra note 143, at 580 (quoting Makes various changes concerning controlled substances and impaired operation of vehicles and vessels: Hearing on S.B. 481 Before Assemb. Comm. on Judiciary, 1999 Leg., 70th Sess. 12 (Nev. 1999)).
es, which are the majority of DUID cases. Prosecutors must seek other less invasive options to determine whether a suspect is DUID. All of these barriers to enforcement of DUID have created the perfect storm for prosecutors and law enforcement.
ABOUT THE AUTHOR

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