

# ALBUQUERQUE CRIMINAL LAWYER BLOG

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## DWI Expert Attack on Breath Alcohol Scores Now Severely Limited in New Mexico

The law in New Mexico regarding the validity of breath alcohol tests (BAC) in DWI/DUI cases has been recently modified by statute. The modification has severely curtailed the use of expert testimony by the defense to attack the validity of the breath alcohol scores. These issues were addressed in the 2009 New Mexico Court of Appeals case of *State v. Jenita Chavez*.

In the past, DWI/DUI defendants would often bring expert testimony to address the possibility that the blood alcohol levels at the time of driving were different than the levels at the time of BAC. The arguments were based on the absorption rates of alcohol into the blood stream, or retrograde extrapolation. For example, if one were to take a shot of tequila and jump in the car for a quick drive home, it is possible that the alcohol would not have absorbed during the short drive and the driver would suffer no impairment. If the driver is pulled over and later tested at a substation, sometimes hours later, there was an argument that the alcohol had more time to absorb so that the blood alcohol levels at the time of the test were higher than at the time of driving.

The New Mexico legislature took this line of defense away by amendment to the DWI/DUI statute NMSA 66-08-102(C) to read "It is unlawful for ... 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." Expert testimony on the absorption rates is now largely prohibited in DWI/DUI trials.

However, the court in *State v. Chavez* recognized that expert testimony may still be available to attack other aspects of the breath alcohol test. In that particular case, the court upheld the exclusion of the expert testimony because the defendant had failed to show the relevance of the testimony for any legitimate line of defense.

The court, citing the 2007 New Mexico Supreme Court case of *State v. Martinez*, specifically allowed for DWI/DUI expert testimony to attack the accuracy and reliability of the breath alcohol scores. In *State v. Chavez*, the defendant attempted to admit expert evidence on how the outcome of the test might be impacted by the person giving the sample. The Court stated that the defendant failed to explain the relevance of this testimony other than for purposes of the now prohibited retrograde extrapolation.

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In short, there is now a pretty significant burden on the defense to show the relevance of the DWI/DUI expert testimony for purposes of attacking the reliability of the breath alcohol test. And the attack on the BAC cannot have as its basis alcohol absorption and elimination rates.

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