FOUNDATION FOR ADVANCING ALCOHOL RESPONSIBILITY

BAC Test Refusal Penalties

Every state has an implied consent law that stipulates that drivers consent to be tested if they are suspected of driving under the influence of alcohol and/or drugs. Test refusal (breath, blood, urine, etc.) is often the first step a drunk driver takes to avoid prosecution and sentencing. Many DUI suspects fail to cooperate with law enforcement by refusing to answer questions, perform the standardized field sobriety tests (SFSTs), or submit to a chemical test when asked to do so (most commonly a breath test). When drivers refuse to provide a chemical test, law enforcement officers are hindered in gathering the evidence needed to support a DUI charge. Even without the test results, DUI charges may still be brought against the suspect if there is enough evidence to establish the individual was impaired, but in these cases, securing a conviction relies entirely on the law enforcement officer's observations and testimony in court. By refusing to submit to a chemical test, impaired drivers can potentially avoid a criminal conviction and may not be identified as a repeat offender the next time they are stopped for impaired driving.

Test refusals are most common among high-risk/repeat impaired drivers, primarily because these individuals know that their test results are likely to have a high breath alcohol concentration (BAC), they are familiar with loopholes in DUI laws, and they know that penalties for refusing to cooperate with law enforcement may be less severe than sanctions for a DUI conviction. In most states, the penalties for refusal involve administrative license suspensions ranging from 90 to 180 days. This is typically less punitive than the criminal sanctions for per se DUI (i.e., having a BAC above that state's illegal per se limit).

In response to high BAC test refusal rates, a number of states have implemented No Refusal programs to reduce the number of test refusals. No Refusal programs ensure BAC test results by enabling police officers to expediently obtain a search warrant from a judge or magistrate for blood samples of impaired driving suspects. While impaired driving suspects have the ability to refuse to submit to a breath test, they cannot refuse to submit to a blood draw if a search warrant is obtained. When individuals realize that law enforcement can secure a warrant and perform a forcible blood draw, they will often agree to submit to the less invasive breath test. The use of warrants to obtain a chemical test can successfully reduce the number of test refusals and subsequently, result in more pleas and convictions as well as fewer trials (Hedlund and Beirness, 2007).

Research Highlights:

- Law enforcement officers reported experiencing test refusals in 1/3 of the cases they processed, with refusal percentages running even higher among hardcore drunk drivers (Robertson and Simpson, 2003).

- Nationwide, an average of 24% of drivers arrested for DUI refuse the BAC test (Jones & Nichols, 2012; Namuswe et al., 2014). Some states report refusal rates of up to 50% for drivers with a prior DUI conviction (Jones and Lacey, 2000).
- In a 2002 study on DUI prosecutions, 3/4 of the prosecutors interviewed said the BAC test was the single most critical piece of evidence needed for a conviction, evidence they are frequently without (Simpson and Robertson, 2002).
- Zwicker et al. (2005) found that chemical test refusal rates tend to be lower in states where the consequences of refusal are greater than the consequences of test failure.
- To date, no study has examined whether stronger test refusal penalties are associated with a reduction in alcohol-impaired crashes (Goodwin et al., 2015).
- The National Committee on Uniform Traffic Laws and Ordinances (NCUTLO) recommends in its DUI model law that the penalty for test refusal should be double the penalty for test failure. It also recommends that a driver's refusal to take a BAC test be admissible in court.

Court Rulings:

***McNeely v. Missouri*:** The 2013 Supreme Court (SCOTUS) ruling in *McNeely v. Missouri* established that the natural metabolization of alcohol in the blood stream does not present a per se exigency that justifies an exception to the warrant requirement in all drunk driving cases. Rather, the Court opined that exigency must be determined based upon the totality of circumstances in individual cases. Specifically, the Court said that in "*those drunk driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so*" (Missouri v. McNeely, 133 S.Ct. 1552, 1561 (2013)).

This ruling has created a complex situation for law enforcement because it did not identify the precise circumstances under which an officer would be justified in concluding that exigent circumstances existed. Though it does leave some questions unanswered, McNeely clearly allows for warrantless blood draws when exigent circumstances can be shown. Under McNeely, officers should be able to obtain warrantless draws where there has been a crash that will require time to investigate thereby delaying any test, where they have made repeated unsuccessful attempts to contact a prosecutor or judge, or where there is evidence that a substantial portion of alcohol consumed is being eliminated based on the time of the suspect's last drink.

Birchfield v. North Dakota: In the 5-3 majority opinion delivered by Justice Alito in June of 2016, SCOTUS answered whether, in the absence of a warrant, a state may make it a crime for a driver to refuse a chemical test to detect the presence of alcohol in the person's blood. In short, SCOTUS determined that warrants are not required for breath tests in DUI cases but are required for blood draws. Criminal penalties can still be applied for refusing to submit to a breath test, but only administrative penalties can be applied for refusing to submit to a blood draw.

The court held that under the Fourth Amendment (which protects individuals from unreasonable search and seizure), warrantless breath tests incident to arrest are permitted; warrantless blood draws are not. In making this determination, the justices took into consideration the invasiveness of both forms of chemical testing. They ruled that "*breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests*." As a result, a breath test may be administered as a search incident to a lawful arrest for impaired driving, thereby creating an exception to the warrant requirement and denying the right to refuse.

Blood testing, on the other hand, involves the piercing of the skin which is a greater intrusion of individual privacy. The invasive nature of the testing makes it unreasonable for law enforcement to obtain the sample absent a warrant. The court did however, acknowledge that the exigent circumstances exception to the warrant requirement (as outlined in McNeely) remains.

In addressing the issue of criminal refusal penalties, the court determined that "*there must be a limit to the consequences which motorists may be deemed to have consented by virtue of a decision to drive on private roads… we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense*." In other words, refusal to submit to a blood test can no longer incur criminal sanctions. Under the court's ruling, there appears to be nothing that precludes states from continuing to apply criminal penalties for refusing to submit to a breath test.

Multiple states have criminal test refusal penalties in some form. These laws apply to both breath and blood tests and therefore, minor revisions to statutes may be required in these jurisdictions. This decision has required states to examine their impaired driving enforcement practices.

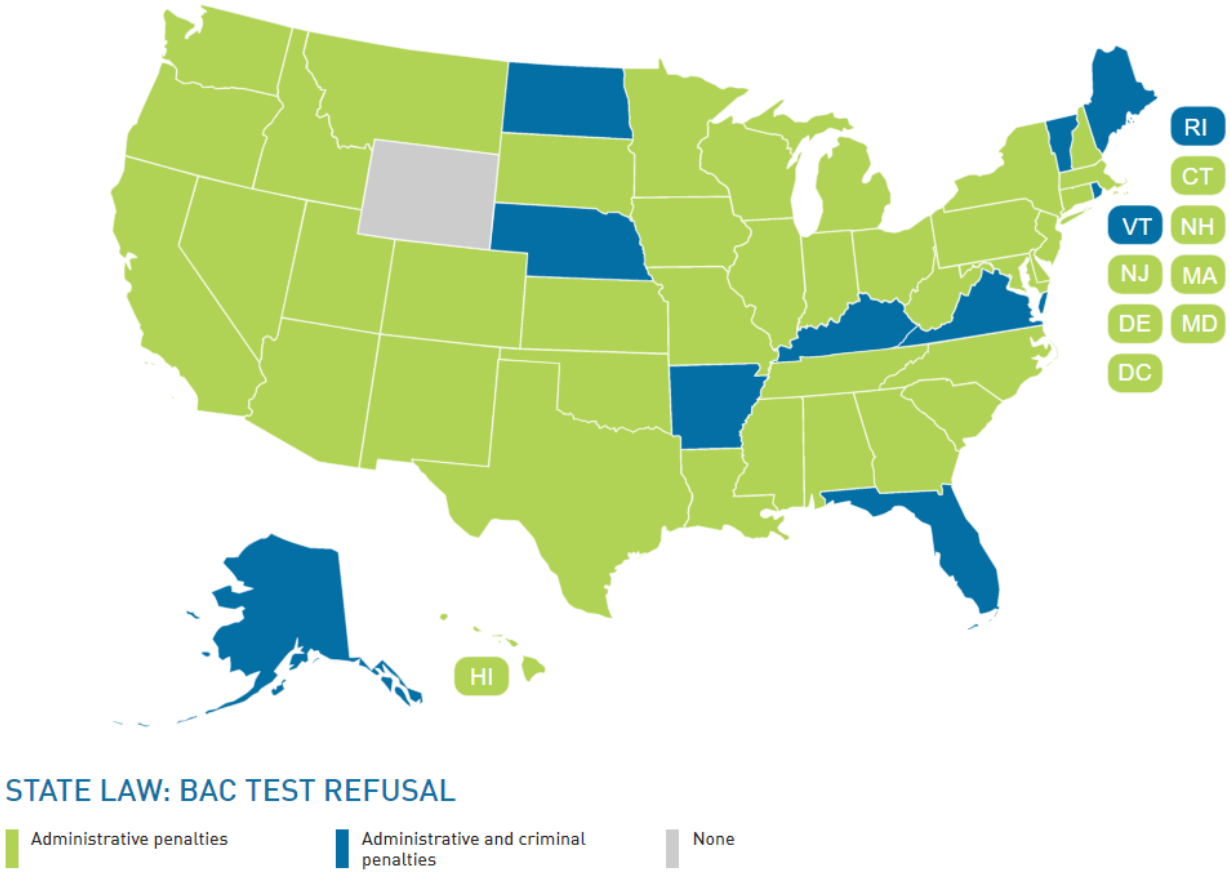
Mitchell v. Wisconsin: In 2019, the Supreme Court took up another case that examined the issue of blood draws and implied consent. In *Mitchell*, law enforcement obtained a blood sample from an unconscious driver without a warrant pursuant to the Wisconsin implied consent law. The driver moved to suppress the results, suggesting that the only consent that matters is the one given at the time of the test. The court denied his motion and the driver was convicted of DUI.

The Supreme Court issued a plurality opinion reaffirming that (1) officers may obtain breath samples from DUI suspects without a warrant incident to arrest; and (2) that officers may obtain blood samples from DUI suspects without a warrant if there are exigent circumstances. The plurality added that officers may obtain blood tests without a warrant when a suspected impaired driver is unconscious as a general rule, reasoning that *"when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed."*

Prevalence:

All states except for Wyoming administrative penalties for chemical test refusal. Approximately 15 states had laws establishing criminal sanctions in addition to administrative actions for BAC test refusal; however, these statutes are now subject to legal challenge and debate following the Supreme Court decisions highlighted in the previous section and they are in the process of being amended. For example, both Kansas and Minnesota had criminal penalties for test refusal but the Supreme Court in each state ruled that the existing refusal laws violate the federal constitutional rights of drivers. States that still have criminal provisions in statute include AK, AR, FL, KY, ME, NE, ND, RI, VT, and VA.[1]

[1] Note that in some of these states, criminal penalties for refusal only apply to drivers with previous convictions or in special circumstances.



Access Responsibility.org's interactive State Laws Map to monitor this evolving policy and legal issue.

Responsibility.org Position:

Responsibility.org supports the efforts of law enforcement and prosecutors to effectively identify and prosecute suspected DUI/D offenders. In an effort to deter impaired drivers from refusing to submit to a chemical test (and therefore, avoid prosecution), Responsibility.org supports criminalizing breath test refusal. The penalties for test refusal should be more punitive than those for a DUI conviction to create deterrence. We also support the use of electronic warrant systems and No Refusal programs to ensure the timely acquisition of warrants in instances where a blood draw is required.

References:

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