

NOPD CONSENT DECREE MONITOR
NEW ORLEANS, LOUISIANA



September 23, 2019

202.747.1904 direct

File Number: 37PA-191555

Deputy Superintendent Otha Sandifer
Compliance Bureau, New Orleans Police Department
714 Broad Street
New Orleans, LA 70119

Dear Deputy Superintendent Sandifer:

This letter constitutes confirmation that the Office of Consent Decree Monitor ("OCDM") has reviewed and provided comments on Chapter 61.1.11 – D.W.I. Procedures. The OCDM has no objection to the policy as written.

We believe that Chapter 61.1.11 – D.W.I. Procedures, incorporates all requirements of the Consent Decree and sets forth clear and appropriate rules to guide officer conduct. We will continue to assess the adequacy of this policy following its implementation. If we identify any concerns following implementation, we will present those concerns to you and the Department of Justice. Additionally, we note that, pursuant to the Consent Decree, NOPD has agreed to review and revise policies and procedures as necessary upon notice of a significant policy deficiency. We also note NOPD's obligation to review this policy after a year of implementation to ensure it "provides effective direction to NOPD personnel and remains consistent with the Agreement, best practices, and current law." Consent Decree at ¶ 8.

We appreciate your team's effort, cooperation, and responsiveness throughout this process.
Very truly

Very truly yours,

David L. Douglass
For SHEPPARD MULLIN RICHTER & HAMPTON LLP*
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NEW ORLEANS POLICE DEPARTMENT OPERATIONS MANUAL

CHAPTER: 61.1.11

TITLE: D.W.I. PROCEDURES

EFFECTIVE:
REVISED:

PURPOSE

This Chapter explains the procedures to be followed for the processing of individuals arrested for, and collecting evidence to establish, the crime of operating a vehicle while intoxicated.

POLICY STATEMENT

1. The New Orleans Police Department enforces DWI and impaired driving laws, including enforcement of zero tolerance laws. However, where the level of blood alcohol or symptoms of intoxication / impairment clearly indicate a high risk to the safety and health of the driver, or where the person has been injured, the medical care of the driver takes priority over the enforcement of the law.
2. **La. R.S. 14:98, La. R.S. 14: 98.1 and Municipal ordinance Section 154-381 are enforceable on both public highways and private property.**
3. The breath test is the primary/default method of chemical testing for intoxication. A urine sample is requested when a subject is suspected of being impaired from something other than alcohol, or when he or she is incapable of providing a breath sample (hospitalized or medical condition). Where impairment is suspected in a traffic fatality, suspected serious injury accident, or where the subject's medical condition precludes the breath or urine test, the blood test shall be used after obtaining a search warrant.

DEFINITIONS

SFST—Acronym for Standardized Field Sobriety Test. A battery of three tests administered to a person by a law enforcement officer and evaluated in a standardized manner so as to obtain validated indicators of impairment and assist in establishing probable cause for arrest. The three currently accepted tests are: Horizontal Gaze Nystagmus (HGN); Walk-and-Turn (WAT), and; One-Leg Stand (OLS). The SFST testing battery may only be used by officers trained and certified in their administration.

Implied consent law—If a person is lawfully arrested by an officer who has probable cause to believe that they have been operating a vehicle while intoxicated, then the driver impliedly **consents** to taking a chemical test of their blood, breath or urine for the purpose of determining

blood alcohol content (BAC) and/or the presence of any abused substance or controlled dangerous substance. (R.S. 32:661-669). Due to this implied consent, failure to submit to the test will result in consequences under state law.

Suspected serious injury - any injury other than fatal which results in any of the following:

- (a) Severe laceration resulting in exposure of underlying tissues, muscle, or organs, or resulting in a significant loss of blood.
- (b) Broken or distorted extremity.
- (c) Crush injuries.
- (d) Suspected skull, chest, or abdominal injury other than bruises or minor lacerations.
- (e) Significant burns.
- (f) Unconsciousness when taken from the crash scene.
- (g) Paralysis.

(See: Fourth Edition of the Model Minimum Uniform Crash Criteria Guideline.)

ENFORCEMENT OF DWI

4. An officer who has reasonable suspicion that a driver has violated the DWI laws of the state or City shall stop the vehicle in accordance with **Chapter 1.2.4.1 – Stops** and **Chapter 1.2.4.3 – Vehicle Stops**.
5. Any officer may make a warrantless arrest of a person that the officer has probable cause to believe has violated the DWI laws of this state or City, whether or not the officer observed the violation firsthand
6. Reasonable suspicion to stop a driver, or probable cause to arrest a driver, must be established based on the officer's observation of a violation(s) of traffic laws, and/or driving behaviors which are not violations but recognized as indicative of impaired driving.
7. While any officer has authority to stop and/or arrest a driver where they establish the required reasonable suspicion and/or probable cause, only an officer certified and trained in the Standardized Field Sobriety Test (SFST) and suspecting a driver of impairment shall use the SFST in his/her investigation of a person suspected of DWI. If the investigating officer who has detained a person for suspicion of DWI is not certified and trained in the SFST, he/she shall immediately contact a Traffic Section officer who is certified to perform the test. Investigating officers shall transfer enforcement actions to the officer that has a primary traffic or DWI enforcement assignment. Only officers certified by the State of Louisiana in SFST and the Breathalyzer testing apparatus may complete the required testing and forms for DWI.
8. The Traffic Section Commander shall ensure that a Traffic Section officer, certified to conduct DWI testing, is available twenty-four hours a day.
9. If a certified Traffic Section DWI testing officer cannot be contacted via police radio communications by the detaining/investigating officer, the detaining/investigating officer shall notify his/her supervisor. The supervisor shall contact Communications Services and request the on-duty or on-call Traffic Section officer be notified.
10. Injured person(s) arrested for DWI or driving while impaired shall be immediately transported to a medical facility for treatment.
11. All persons arrested for DWI or driving while impaired who have not been hospitalized shall be transported to the Special Operations Division - Traffic Section Office (1899 Tchoupitoulas Street) for processing. The Special Operations Division - Traffic Section facility shall be the primary facility used to conduct the breath test.

12. The detaining and/or investigating officer(s) shall ensure their BWCs and ICC, if available, are activated before the stop and throughout the entire SFST testing process, advisements, and, if the subject is arrested, through transport until the subject is delivered to Central Lockup for booking.

FIELD TESTS FOR DETECTION OF IMPAIRMENT

13. An officer certified and trained by the Louisiana Department of Public Safety and Corrections in the Standardized Field Sobriety Test (SFST) and suspecting a driver of impairment shall use the SFST in his/her investigation of a person suspected of DWI unless the medical or physical condition of the suspect prohibits it.

RELEASE OF DETAINED DRIVERS WITH INSUFFICIENT PROBABLE CAUSE

14. In instances where officers who have detained a person for DWI lack sufficient probable cause to arrest for the offense but still believe the person should not drive, precautions should still be taken to protect the public while respecting the person's rights. Officers should request, though not require, that the person contact an alternate means of transportation. If the person complies with the officer's request, the officer should advise the driver of reasonable options for moving his or her car to a safe location. Since no charges will be placed nor will an incident report be required, officers should document the reasons for the contact and ultimate release of such individuals in an FIC (i.e. a person who is emotionally upset to a degree that it has affected his/her concentration and ability to drive safely).

USE OF "UPON NOTICE" IN LIEU OF BOOKING

15. All persons suspected of DWI shall be physically arrested when probable cause exists. An **Upon Notice** can be issued in lieu of a physical arrest under limited circumstances (i.e. a physical or medical condition which prohibits immediate booking) by checking the appropriate box on the arrest citation form. **An officer shall not issue an Upon Notice without first obtaining permission from a Traffic Supervisor.** If permission is obtained to issue an Upon Notice the reason for the issuance and the Traffic Section Supervisor's name shall be included in the narrative of the report.

DWI TESTING ROOM VIDEO AND AUDIO RECORDINGS

16. When utilizing the Special Operations Traffic Division DWI testing facility, Traffic Section officers shall adhere to the following provisions:
 - (a) Upon arrival, officers shall ensure, including visually checking that the camera is functioning properly, the mobile closed circuit camera located in the testing room is turned on by pressing the "Record" button, and remains activated for recording purposes throughout the entire process while the suspect is undergoing all phases of testing. **The camera shall not be de-activated until the suspect exits the building.** The camera is equipped with a 30 second delay prior to activating and deactivating the system.
 - (b) If it is necessary to conduct a field sobriety test at the DWI testing facility, two officers must be present before the handcuffs may be removed from the arrested subject. Once the field sobriety test is completed, the officers shall reapply the handcuffs to the arrested subject pursuant to the guidelines of **Chapter 1.3.1.1 – Handcuffing and Restraint Devices**. Absent extenuating circumstances, subjects shall be handcuffed when not detained inside the holding cell.
 - (c) Officers shall not leave prisoners unattended in the DWI testing facility.
 - (d) The Traffic Section officer shall maintain constant personal supervision and control of any arrested subject secured in the DWI testing facility.

- (e) Throughout the duration of the testing, the involved officer(s) shall ensure their BWCs are activated.
- (f) Video surveillance of the DWI testing area does not constitute constant personal supervision and control.

AUTHORITY TO CONDUCT A CHEMICAL TEST – IMPLIED CONSENT

17. A person arrested for DWI or driving while impaired is deemed to have consented to a chemical test or tests under any of the following circumstances (R.S. § 32:661(A)):
 - (a) The arresting officer has probable cause to believe the person was driving or in physical control of a motor vehicle while believed to be under the influence of alcoholic beverages or any controlled substance.
 - (b) The person was arrested for an offense committed while the person was driving or in physical control of a motor vehicle while believed to be under the influence of alcoholic beverages or any controlled substance.
 - (c) An officer has stopped a person under the age of 21 and has probable cause to believe the person was operating or in physical control of a motor vehicle after having consumed alcoholic beverages.
 - (d) The person is a victim of a traffic fatality.
18. Individuals under the age of 21 are deemed to have consented to providing a chemical sample when an officer has stopped or arrested the individual and has probable cause to believe that he/she was operating a motor vehicle while intoxicated (R.S. § 32:661(A)(1)).
19. A person who is dead, unconscious or otherwise incapable of refusal shall be deemed not to have withdrawn consent.
20. If a person deemed to consent under state law withdraws that consent and refuses to submit to the chemical test, they shall be informed of the consequences under state law. If the person has refused to submit to such test on two previous and separate occasions, refusing to submit may be a crime.
21. After all requirements are met relating to advisement of rights, if the person arrested for DWI or driving while impaired and is involved in a crash that resulted in suspected serious injury or near death still refuses to submit to chemical testing, the arresting officer shall notify a SOD – Traffic Section supervisor who will determine if the particulars of the case warrant applying for a Search Warrant mandating the subject provide a blood sample. If the officer believes, and the supervisor concurs that a blood sample is not warranted, the reasons for this decision and the name of the concurring supervisor shall be documented in the investigative report.
22. Officers should inform an arrestee that after submitting to the chemical test selected by the officer, if he/she chooses, he or she may have a qualified person of his/her choice administer a chemical test or tests in addition to the test chosen by the officer. The cost of any such test is at the expense of the tested person. After being advised of this right, he or she shall be given the opportunity to telephone and request a qualified person to administer such test.
23. Upon request, the individual or his or her attorney should be given copies of their test results.

OFFICER RESPONSIBILITY - CHEMICAL TESTING

24. Officers requesting a person arrested for DWI or driving while impaired to submit to a chemical test shall:

- (a) Read the **Rights relating to the Chemical Test for Intoxication** from the Department of Public Safety and Corrections (DPSC) standardized form (R.S. § 32:661(C) (1)):
 - (b) After reading the form, request that the person sign the form. If the person is unable or unwilling to sign, the officer shall certify that the person was advised of the information contained in the form and that the person was unable or refused to sign (R.S. § 32:661(C) (2)).
 - (c) Forward a report to the Department of Transportation and Development (R.S. § 32:666(B)):
 - i. Certifying that there were reasonable grounds to believe the person was operating a motor vehicle while under the influence of alcohol or controlled substances.
 - ii. Certifying that the person was informed of his/her rights in accordance with state law.
 - iii. Provides complete information regarding the chemical test that is available at the time the certified report is completed.
25. After being advised of his/her rights, the person will be given the opportunity to telephone and request a qualified person of his/her own choosing to administer a secondary chemical test in a reasonable amount of time after submitting to the department chemical test (R.S. § 32:664(B)). The person shall be responsible for any costs associated with the secondary test. Officers are prohibited from offering or suggesting any person or company to provide the additional test.
26. Any subject whose BAC test shows a reading of **0.30 or higher** shall be immediately taken to a medical facility and screened for possible alcohol poisoning or related complications.

OFFICER RESPONSIBILITY – REFUSAL TO SUBMIT TO TESTING

27. When a person is required to provide a chemical sample but refuses, officers should (see: R.S.32:666(A) (2)):
- (a) Advise the person of the consequences of the refusal.
 - (b) Audio record the **Rights relating to the Chemical Test for Intoxication** and response given. (BWC and L3)
 - (c) Seize the person's driver's license.
 - (d) Document the refusal in a certified report to be forwarded to the Department of Transportation and Development that:
 - i. There were reasonable grounds to believe the person was operating a motor vehicle while under the influence of alcohol or controlled substances.
 - ii. The person was informed of his/her rights in accordance with state law.
 - iii. Provides complete information regarding the chemical test that is available at the time the certified report is completed.
28. The law does not require an officer to reconsider an initial refusal to submit to testing. However, if the subject has refused to provide a breath or urine sample, and prior to transport to lockup for booking, the subject reconsiders, the officer shall allow him/her one additional opportunity to provide the requested sample. If the subject has been taken to a medical facility for a blood draw, and initially refuses, the subject may reconsider until he or she has left the medical facility.

CHEMICAL TESTS FOR INTOXICATION

29. Certified Traffic Section officers may obtain a chemical test(s) sample, including a breath

test, a blood test, or a urine test, in a manner consistent with the procedures set forth by State law from any person arrested for DWI or driving while impaired.

30. The breath test is the primary/default method of chemical testing for intoxication. A urine sample is requested when a subject is suspected of being impaired from something other than alcohol, or when he or she is incapable of providing a breath sample (hospitalized or medical condition). Where impairment is suspected in a traffic fatality, suspected serious injury accident, or where the subject's medical condition precludes the breath or urine test, the blood test shall be used after obtaining a search warrant.

TESTING EQUIPMENT, CERTIFICATIONS AND RESTRICTIONS - TRAFFIC SECTION

31. The Traffic Section Commander will ensure all devices approved and regulated by the State of Louisiana for the collection and analysis of breath samples are properly serviced and tested, and applicable records of such are maintained by the Traffic Section.
32. Only officers certified by the Louisiana Department of Public Safety and Corrections/Office of State Police are authorized to operate an approved breath testing machine.
33. The Special Operations Division - DWI Testing Room shall be equipped with a Digital Video Audio Recording system. The system shall be used to record all encounters with an arrested subject entering the testing room.

DWI BLOOD SAMPLES

34. A blood specimen may be requested by the Traffic Section investigating officer when the person arrested for DWI or driving while impaired was involved in a crash resulting in suspected serious bodily injury, and/or death. If the person refuses to submit to the test, the officer must obtain a Search Warrant prior to having a blood specimen taken.
35. Blood/urine collection kits approved by the Louisiana Department of Public Safety for the purpose of determining blood alcohol content are the only kits authorized by the New Orleans Police Department. The kits are maintained by the Traffic Section / DWI Unit.
36. If the person arrested for DWI has been transported to a medical facility for medical evaluation, the detaining/investigating officer shall relocate to the medical facility with the subject to ensure the subject is not released by medical personnel.
37. Blood specimens may only be collected by medical personnel in a medical facility. (R.S. 32:666(A)). The Traffic Section investigating officer shall notify medical personnel that the subject is under investigation for DWI and a blood sample is needed. The Search Warrant must be obtained **prior to the blood being drawn** by medical personnel if the suspect in custody for the DWI refuses to submit to the blood test (See: **Chapter 1.2.4 – Search and Seizure**). The officer should be prepared to show the signed search warrant to requesting medical personnel.
38. Only persons authorized by law may withdraw a blood sample (R.S. § 32:664(A)). The withdrawal of the blood sample shall be witnessed by the assigned officer. Persons authorized to draw blood include:
- (a) Physician;
 - (b) Physician's assistant;
 - (c) Registered nurse;
 - (d) Practical nurse;

- (e) Emergency medical technician;
 - (f) Chemist;
 - (g) Nurse practitioner; or
 - (h) Other qualified technician (i.e. phlebotomist).
39. NOPD officers, even if properly certified, **shall not** conduct the blood withdrawal.
40. Unless medical personnel object, any time an officer obtains a blood sample from a person, two samples should be drawn and retained as evidence so long as only one puncture is required.
41. Officers shall inform an arrestee that if he/she chooses to provide a blood sample, a separate sample can be drawn for them to be retained as evidence, which they can have independently tested at their own expense.
42. The Traffic Section investigating officer shall be responsible for transporting the blood and/or urine sample to the Central Evidence and Property Section where the proper forms, including a crime lab examination request form, shall be completed. Traffic Section personnel shall retrieve the blood and/or urine sample kits and a copy of the evidence receipt from Central Evidence & Property and transport it to the Louisiana State Police Crime Lab within seven days of sample collection.
43. Upon receiving the blood analysis results from the LSP testing facility, the Traffic Section investigating officer is responsible for completing a supplemental crash report documenting the results.
44. If a person arrested for DWI cannot submit to a blood test for medical reasons (for example, because he/she is a hemophiliac or is using an anticoagulant), he/she shall not be required to take a blood test. **The inability to take a blood test shall not be considered a refusal.** The person arrested for DWI or driving while impaired may be required to complete a remaining available test.
45. The Orleans Parish Coroner's Office shall conduct a chemical test of the blood of any traffic fatality victim (R.S. 32:661). The Traffic Section - Fatality Unit is responsible for documenting the post-mortem test results in the traffic fatality investigation.

URINE SAMPLES

46. Traffic Section officers trained in SFST and authorized by a Traffic Section supervisor to collect urine shall do so in a manner to protect the person arrested for DWI or driving while impaired' s privacy. Officers shall follow the same guidelines for protecting the suspect's privacy as outlined for strip searches (See: **Chapter 1.2.4 – Search and Seizure**). The officer(s) shall be of the same gender identity as the subject being tested. Urine shall be collected using an approved Louisiana Department of Public Safety blood/urine collection kit. The collection kits are maintained by the DWI Unit.

CRASHES

47. Officers investigating a person arrested for DWI or driving while impaired shall obtain a chemical sample if the person was involved in a crash that resulted in a fatality or suspected serious physical injury.
48. A person who is dead, unconscious or otherwise in a condition rendering him/her incapable of refusal is deemed **not to have withdrawn consent** as a matter of State Law

(R.S. § 661(B)).

49. Whenever a district unit requests a DWI officer for a suspect involved in a motor vehicle crash (no injury), the district unit shall be responsible for transporting the suspect to The OPSO Central Lock Up once all testing and paperwork is completed. The DWI officer may relocate the suspect from the accident scene to the testing facility when feasible at his/her discretion and duty permitting.

SEIZURE OF OPERATOR'S LICENSE

50. An officer arresting a person for driving while intoxicated where the arrested person (R.S. § 32:667):
- (a) Refuses a chemical test or whose test indicates a blood alcohol level at or above 0.08 percent or above or, if the person is under the age of twenty-one years, a blood alcohol level at or above 0.02 percent the officer shall:
 - i. Seize the arrestee's driver's license, issue a receipt to the driver, and issue a temporary license as approved by the Department of Public Safety and Corrections. If an arrested subject is not in possession of his/her license a temporary license shall not be issued regardless of the state of issuance. Out of state driver's licenses are confiscated and forwarded to the Louisiana Office of Motor Vehicles, and a temporary license is issued.
 - ii. Provide notice to the arrestee that within fifteen days of the arrest they may make a written request to the Department of Public Safety and Corrections for an administrative hearing.
 - (b) Submits to an approved chemical test for intoxication, but the results of the test are not immediately available, the officer shall:
 - i. Seize the arrestee's driver's license and issue a temporary receipt of license as approved by the Department of Public Safety and Corrections. If an arrested subject is not in possession of his/her license a temporary license shall not be issued regardless of the state of issuance. Out of state driver's licenses are confiscated and forwarded to the Office of Motor Vehicles, and a temporary license is issued...
 - ii. Provide notice to the arrestee that within fifteen days of the arrest they may make a written request to the Department of Public Safety and Corrections for an administrative hearing.
 - iii. After thirty days from the date of arrest if test results have not been received or immediately upon learning if the blood alcohol level was not at or above 0.08 percent or above or, if the person is under the age of twenty-one years, and the blood alcohol level was not at or above 0.02 percent, the license shall be returned to the driver by the Louisiana Office of Motor Vehicles.

ARRESTED PERSON'S VEHICLE

51. The vehicle driven by a person arrested for driving while intoxicated shall be released as follows (R.S. § 32:667(4)):
- (a) If operable, to a passenger who is not under the influence of alcohol and has a valid driver's license. The officer shall not order or procure towing of the vehicle.
 - (b) if not a hazard, or an obstruction to traffic and motorists, and if there is no passenger who is not under the influence of alcohol and has a valid driver's license, the officer shall allow the arrestee a reasonable time and opportunity to contact another person to take possession or control of the vehicle before ordering or procuring towing of the vehicle.
 - (c) If the vehicle can be properly, legally parked and secured, it can be left on the scene with the owner/driver's permission. This permission should be documented

in the FIC, BWC or other arrest related reports.

- (d) If release of the vehicle is not possible, Communication Services shall be contacted by the officer and the vehicle shall be towed according to the towing allocation list maintained by Communications Services.

ARREST BOOKING PAPERWORK

- 52. The forms listed below shall be delivered to Central Lock Up with the arrested subject:
 - (a) Rights Relating to Chemical Test for Intoxication, court copy;
 - (b) Copy of traffic arrest location information;
 - (c) Photocopy of the Louisiana Uniform Field Sobriety Test;
 - (d) Photocopy of the Intoxilyzer Operational Check List;
 - (e) Photocopy of Intoxilyzer Test printout result;
 - (f) Photocopy of the Uniform Arrest Report; and
 - (g) The arrest affidavit.

DWI ARREST CASE PROCESSING AND SCREENING

- 53. The Traffic Section shall forward all records related to the arrest of a person for DWI to the appropriate prosecutor (Orleans parish District Attorney or Traffic Court City Attorney). This will include the following:
 - (a) The main case report
 - (b) All recordings and photographs in a format accessible to the prosecutor
 - (c) Accident reports, if applicable
 - (d) Related DPSC documents
 - (e) Booking screening form
 - (f) Vehicle impound documents, if applicable
 - (g) The Communications Center log or record

SOBRIETY CHECKPOINTS

- 54. See **Chapter 61.15.1 – Vehicle Checkpoints** for conducting sobriety checkpoints. Those detailed at checkpoints for suspected violations of the DWI laws shall be processed in accordance with this Chapter.

TRAINING

- 55. The Traffic Section commander shall ensure that appropriate training, as required by the State of Louisiana, is provided for officers participating in enforcement of DWI laws. The training records and certifications shall be forwarded to the Education & Training Division by the member receiving training for inclusion in the member's training record.
- 56. The Traffic Section commander should relate any training issues as they become apparent, such as information from the designated prosecutor's office that is relevant to improving the department's investigations. The information shall be provided to the Education & Training Division and, if appropriate, disseminated throughout the Department in an information bulletin.