

GENERAL OFFICE MEMORANDUM 19-045

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM:  JOSEPH P. ESPOSITO
Chief Deputy District Attorney

SUBJECT: REFUSAL OF CHEMICAL TEST IN DRIVING UNDER THE
INFLUENCE PROSECUTIONS; UPDATED DEPARTMENT OF
MOTOR VEHICLES DS-367 FORM

DATE: APRIL 4, 2019

This memorandum is a supplement to General Office Memorandum (GOM) 18-017 and 18-034, which addressed the recent changes adopted by local law enforcement agencies regarding the advisement of the Chemical Test Admonition pursuant to *Vehicle Code Sections 23577* and *23612*.

The California Department of Motor Vehicles recently published and distributed a new DS-367 form (please see attachment) that modifies the “Chemical Test Admonition” to conform with the United States Supreme Court decision in *Birchfield v. North Dakota*, 136 Sup.Ct. 2160 (2016) and Assembly Bill 2717 (Stats 2018 ch 177 § 3 (AB 2717), effective January 1, 2019).

In *Birchfield*, the Supreme Court held that the Fourth Amendment permits the warrantless administration of a breath test as a lawful search incident to an arrest because a breath test does not infringe on any significant privacy concerns. The Court held that the same cannot be said of a blood test which it determined was significantly more intrusive.

The Court held that since a blood test is a more intrusive search, as compared to a breath test, officers must either obtain the subject’s consent or secure a search warrant to collect a blood sample. Additionally, the Court held that a blood test can no longer be compelled under the threat of criminal penalties, given the intrusive nature of the test.

With the passage of Assembly Bill 2717, Vehicle Code §§ 23577, 23578 and 23612 were amended to comport with *Birchfield* such that the bill substitutes “breath or urine testing” for “chemical testing” and repeals the imposition of criminal penalties for the refusal of a person to submit to, or complete, a blood test if lawfully arrested for Driving Under the Influence (DUI).

Previously, the DS-367 form’s Chemical Test Admonition provided the following admonition:

Section 4: “Refusal or failure to complete a test may be used against you in court. Refusal or failure to complete a test will result in a fine and imprisonment if the arrest results in a conviction for driving under the influence.”

The newly revised DS-367 Chemical Test Admonishment advises:

Section 6: “[R]efusal or failure to complete *breath or urine* testing will result in a fine and mandatory imprisonment if you are convicted of a violation of Vehicle Code violation 23152 and 23153.”

To now determine if the filing of a refusal allegation is appropriate, the filing deputy must determine which type of sample the subject refused to provide: a breath, urine or blood sample. If a subject refused to provide a blood sample, after having been properly advised and requested to do so, the refusal allegation does not apply because motorists can no longer be criminally punished for his or her refusal to submit to a warrantless blood test. If the subject refused to provide a breath or urine sample, after being properly advised pursuant to the DS-367, the filing of the refusal allegation is appropriate. Please refer to the Uniform Crime Charging Manual, Vehicle Code § 23577, for the filing of a refusal allegation.

In situations where an officer obtains a search warrant to collect a subject’s blood sample and the subject continues to refuse to provide the blood sample, the filing deputy may consider filing a contempt of court charge, in violation of Penal Code § 166(a)(4). Whether the police agency chooses to use reasonable force to collect a subject’s blood sample after obtaining a warrant depends on the police agency’s legal policies and procedures.

The “Refusal Instruction” will also be affected by the recent changes in the law and advisements. At trial, the trial deputy should request to modify CALCRIM Instruction 2131, under the section regarding the admonishment of the penal consequences of refusing a test. Specifically, element 4 should read “breath or urine” instead of “test” to reflect the amended language in Vehicle Code § 23612(a)(1)(D).

The modified instruction should now read:

“Failure to submit to or complete a *breath or urine test* will result in a fine and mandatory imprisonment if (he/she) is convicted of driving under the influence or with a blood alcohol level of 0.08% percent or more” (emphasis added).

Trial deputies prosecuting DUI cases with a refusal allegation should also consider requesting the jury instruction on consciousness of guilt when refusing a chemical test (CALCRIM 2130). The trial deputy should request CALCRIM 2130 in cases that involve a refusal to provide a breath or urine sample. For the reasons stated above, this instruction does not apply to refusals to provide a blood sample since the subject has a right to refuse the warrantless search of his or her blood. The instruction is applicable, however, in cases where the suspect refused to provide a blood sample, a warrant was obtained, and the suspect refused to comply with the warrant.

Any questions should be directed to the D.U.I. Training and Prosecution Section (DTAPS) at (213) 974-6757 or by email – DTAPS@da.lacounty.gov.

epd

Attachment



AGE 21 AND OLDER OFFICER'S STATEMENT

California Vehicle Code (CVC) §§13353, 13353.1, 13353.2 & 13389



LAW ENFORCEMENT AGENCY CASE NUMBER	DETENTION/ARREST DATE	FOR DMV USE ONLY		
DRIVER NAME (LAST, FIRST, M.I.)		DRIVER LICENSE NUMBER	COMMERCIAL? <input type="checkbox"/> Yes <input type="checkbox"/> No	STATE
MAILING ADDRESS		STATE	ZIP CODE	
DATE OF BIRTH	SEX	HAIR	EYES	HEIGHT
WEIGHT				
LICENSE: <input type="checkbox"/> Suspended/Revoked <input checked="" type="checkbox"/> Surrendered (Attached) <input type="checkbox"/> Not in Possession <input type="checkbox"/> Unlicensed				
VIOLATION: <input type="checkbox"/> 0.08% or more BAC Chemical Test Results <input type="checkbox"/> 0.01% or more BAC (DUI Probation) <input type="checkbox"/> 0.04% or more BAC (Commercial Vehicle) <input type="checkbox"/> Chemical Test Refusal (Complete Reverse) <input type="checkbox"/> PAS or other Chemical Test Refusal (DUI Probation) (Complete Reverse)				

Arrest Type
For statistical purposes only. Check all that apply.

Alcohol Use
 Cannabis Use
 Other Drug Use

VEHICLE: License Number or VIN: _____
 Commercial Vehicle: Vehicle requires a commercial driver license (CVC §15210). **Hazardous Materials:** Transporting materials requiring placards/markings (CVC §27903).

NARRATIVE: Describe in detail the facts, observations, and circumstances that led to the stop or contact with the driver in **Narrative** section on **Page 2** of this form.
Contact: On date: ____/____/____ at ____:____ AM PM in City/County _____ CA, the above driver was contacted.

DRIVING: Driving observed by this officer or Driving observed by another observer (complete **Observation/Arrest** section on **Page 2**)
Admission of Driving: Driver admitted to driving the vehicle **Collision:** Driver involved in a collision
 (If driving not observed by an officer.)

TIME: What time did you stop driving or how long after driving/collision did you wait for law enforcement to arrive? **Driver Response:** _____ AM PM HR MIN

ARREST OR DETENTION STATEMENT: I had reasonable cause to believe the driver was driving a motor vehicle with alcohol and/or drugs present in the blood or while under the influence. The driver was lawfully arrested, or lawfully detained while on DUI probation, by this officer, or by the person shown in the **Observation/Arrest** section on **Page 2**, on date ____/____/____ at ____:____ AM PM for violation of CVC §§23152, 23153, or 23154.

OBJECTIVE SYMPTOMS OF INTOXICATION: Bloodshot/watery eyes Odor of alcoholic beverage Unsteady gait Slurred speech PAS results (complete below)
 Other: _____ Observed by: This officer Another observer: _____

PRELIMINARY ALCOHOL SCREENING TEST (PAS)	
Driver submitted to and completed a PAS test with the results of:	DUI Probation: Required. Non-DUI Probation: Optional. Always complete section if PAS results available.
Test 1 _____% BAC on ____/____/____ at ____:____ <input type="checkbox"/> AM <input type="checkbox"/> PM	Test 2 _____% BAC on ____/____/____ at ____:____ <input type="checkbox"/> AM <input type="checkbox"/> PM
OFFICER CERTIFICATION: I certify under penalty of perjury under the laws of the State of California that: (1) I obtained the above PAS test results in the regular course of my duties, (2) I used PAS Model (Name/Number) _____, Serial# _____, Manufactured by _____, (3) I administered this PAS test properly in accordance with the manufacturer's guidelines and instructions, (4) I have received training on the proper operation of this device and administration of the PAS test and am competent and qualified to operate the device, and (5) the device was functioning properly at the time of the test.	
Date ____/____/____ Signature X	Badge/ID Number _____ Agcy./Div _____

BREATH TEST RESULTS: CHEMICAL TEST		Attach copy of the results, if available.
Test 1 _____% BAC on ____/____/____ at ____:____ <input type="checkbox"/> AM <input type="checkbox"/> PM	Test 2 _____% BAC on ____/____/____ at ____:____ <input type="checkbox"/> AM <input type="checkbox"/> PM	Test 3 _____% BAC on ____/____/____ at ____:____ <input type="checkbox"/> AM <input type="checkbox"/> PM (WHEN APPLICABLE)
BREATH TEST MACHINE OPERATOR CERTIFICATION: I certify under penalty of perjury under the laws of the State of California, that the above breath test sample results were obtained in the regular course of my duties. I further certify that I am qualified to operate this equipment and that the test was administered pursuant to the requirements of Title 17 of the California Code of Regulations.		
Date ____/____/____ Signature X	Badge/ID Number _____	Agcy./Div _____

BLOOD TEST RESULTS: Blood test on date: ____/____/____ at ____:____ <input type="checkbox"/> AM <input type="checkbox"/> PM	
URINE TEST RESULTS: First void on date: ____/____/____ at ____:____ <input type="checkbox"/> AM <input type="checkbox"/> PM	Test on date: ____/____/____ at ____:____ <input type="checkbox"/> AM <input type="checkbox"/> PM

I certify under penalty of perjury, under the laws of the State of California, that the information contained on all pages of this Officer's Statement is true and correct.

EXECUTED ON: Date ____/____/____ in City _____ County _____

OFFICER'S PRINTED NAME	BADGE/ID NUMBER	TELEPHONE NUMBER (____) _____
AGENCY	AREA	COURT CODE (IF UNKNOWN, COURT NAME)

did did not personally serve a copy of the Order of Suspension/Revocation to the driver.

Date ____/____/____ Signature of Arresting Officer **X**

ORDER SERVED BY ANOTHER OFFICER: If order was served on driver by another Officer have that officer complete this section.
 I personally served a copy of the order to the driver on the date shown below:

Date ____/____/____ Serving Officer's Printed Name _____ Badge/ID Number _____ Signature Of Serving Officer _____
X

CHEMICAL TEST ADMONITION

(CVC §§23154, 23612)

I admonished the driver on date: ____/____/____ at ____ AM PM

1. You are required by state law to submit to and complete a chemical test to determine the alcohol and/or drug content of your blood.
2. Because I believe you are under the influence of alcohol or a combination of alcohol and drugs, you have a choice of taking a breath or blood test. If you are on DUI Probation you are required to submit to a Preliminary Alcohol Screening Test.
3. Availability of Tests. (Read only when applicable.)
 When Applicable: Since the breath and blood tests are unavailable; you are incapable of completing a breath or blood test; or you are afflicted with hemophilia or are using an anticoagulant medication, you are deemed to have given your consent to chemical testing of your urine.
 When Applicable: Since you need medical treatment, your choice is limited to the (check all available) blood, breath, and/or urine test(s), the only test(s) available at _____
4. If you refuse to submit to, or fail to complete a chemical test, your driving privilege **will** be administratively suspended for **one year** or administratively revoked for **two or three years** by the Department of Motor Vehicles. A second offense within ten years of a separate violation of driving under the influence, including such a charge reduced to reckless driving, or vehicular manslaughter, or a violation of CVC §23140, which resulted in a conviction, or separate administrative determination that you were driving with a BAC of 0.01% or more while under age 21; or a separate administrative determination that you were driving with a BAC of 0.01% or more while on DUI probation, or a BAC of 0.04% or more while operating a commercial motor vehicle, or a BAC of 0.08% or more at any age, or you refused a test, will result in a two-year administrative revocation. Three or more offenses within ten years of any combination of the above violations, convictions or separate administrative determinations will result in a three-year administrative revocation.
5. Refusal or failure to complete a chemical test may be used against you in court.
6. Refusal or failure to complete breath or urine testing will result in a fine and mandatory imprisonment if you are convicted of a violation of CVC §§23152 or 23153.
7. You do not have the right to talk to an attorney or have an attorney present before stating whether you will submit to a test, before deciding which test to take, or during the test.
8. If you cannot, or state you cannot, complete the test you choose, you must submit to and complete a remaining test.

DRIVER RESPONSE: Include statements or actions by the driver that indicate a refusal or failure of each test.

- Will you take a Preliminary Alcohol Screening Test? (DUI Probation) _____
- Will you take a Breath Test? _____
- Will you take a Blood Test? _____

TEST UNAVAILABLE: One or more tests were unavailable. PAS test unavailable Breath test unavailable Blood test unavailable

Explain: _____

LANGUAGE: If not given in English, admonition was given in Spanish Other language (specify): _____

Admonition Read by a Different Officer: If the above Chemical Test Admonition was read to arrestee by another officer, indicate that officer's information:

OFFICER NAME	BADGE/ID NUMBER	AGENCY /DIVISION	TELEPHONE NUMBER
			()

DRUG ADMONITION

1. Because I believe you are under the influence of drugs or a combination of drugs and alcohol, you are required by state law to submit to a blood, breath, or urine test. A urine test is available only if you are afflicted with hemophilia or are using an anticoagulant medication.
 When Applicable: Because you have already submitted to or refused or failed to complete a breath test or a breath test is unavailable, your choice is limited to a blood test or a urine test, when applicable.
2. If you refuse to submit to, or fail to complete a chemical test, your driving privilege **will** be administratively suspended for **one year** or administratively revoked for **two or three years**, by the Department of Motor Vehicles. A second offense within ten years of a separate violation of driving under the influence, including such a charge reduced to reckless driving, or vehicular manslaughter, or a violation of CVC §23140, which resulted in a conviction, or separate administrative determination that you were driving with a BAC of 0.01% or more while under age 21, or a separate administrative determination that you were driving with a BAC of 0.01% or more while on DUI probation, or a BAC of 0.04% or more while operating a commercial motor vehicle, or a BAC of 0.08% or more at any age, or you refused a test, will result in a two-year administrative revocation. Three or more offenses within ten years of any combination of the above violations, convictions or separate administrative determinations will result in a three-year administrative revocation.
3. Refusal or failure to complete a chemical test may be used against you in court.
4. Refusal or failure to complete breath or urine testing will result in a fine and mandatory imprisonment if you are convicted of a violation of CVC §§23152 or 23153.
5. You do not have the right to talk to an attorney or have an attorney present before stating whether you will submit to a test, before deciding which test to take, or during the test.

DRIVER RESPONSE: Include statements or actions by the driver that indicate a refusal or failure of each test.

- Will you take a Blood Test? _____
- Will you take a Urine Test? _____

TEST UNAVAILABLE: One or more tests were unavailable. Blood test unavailable Urine test unavailable

Explain: _____

LANGUAGE: If not given in English, admonition was given in Spanish Other language (specify): _____

Admonition Read by a Different Officer: If the above Drug Admonition was read to arrestee by another officer, indicate that officer's information:

OFFICER NAME	BADGE/ID NUMBER	AGENCY /DIVISION	TELEPHONE NUMBER
			()