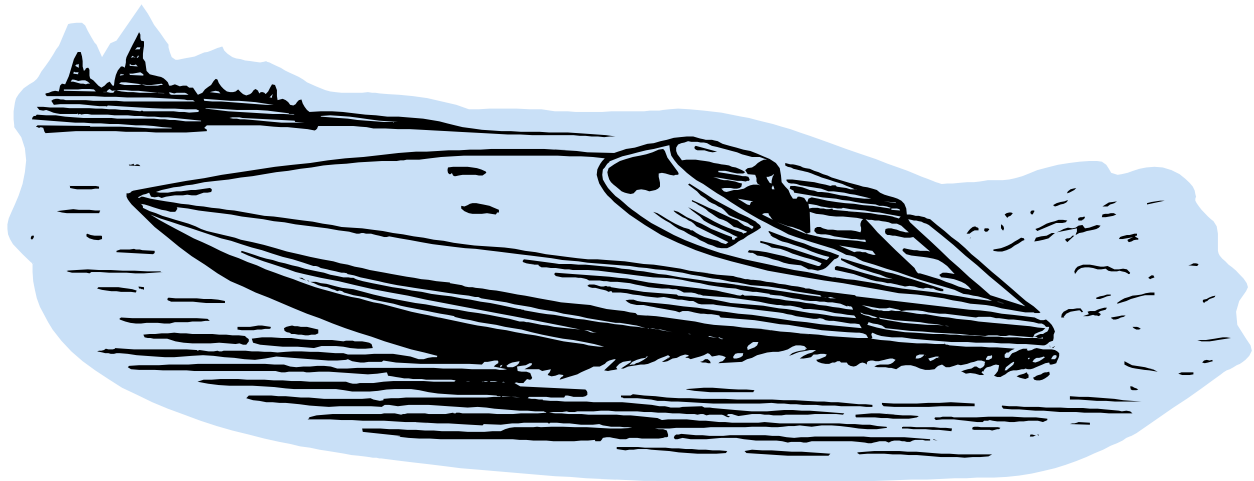


# **BOATING UNDER THE INFLUENCE**

## **The Differences Between BUI & DUI Law (Including a DUI/BUI Conversion Chart)**

by Carla Oglo, AGC, and Captain (Ret.) Alan S. Richard,  
Florida Fish & Wildlife Conservation Commission  
(Updated April 18, 2013)



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#### A. RANDOM VESSEL INSPECTIONS - What kind of suspicion does the officer need in order to stop, board, inspect or search a vessel?

- 1. STOPPING THE VESSEL** – Law enforcement officers do not need probable cause for the random stopping and brief detention of motorboats for the limited purpose of checking fishing permits, registration certificates and safety equipment. State v. Casal, 410 So.2d 152 (Fla. 1982). The court in Casal, stated that there are differences between vehicles and vessels. A person’s reasonable expectation of privacy is lowered when operating a vessel. Operating a vehicle is a basic, pervasive, and often necessary mode of transportation to and from one’s home, workplace, and leisure activities. Many people spend more hours each day travelling in cars than walking on the streets. Operating a vessel is not a pervasive or necessary mode of transportation for most people. There is not as great a sense of security and privacy when travelling in a boat as when travelling in an automobile. Unlike a vehicle, annual vessel inspections would not adequately ensure vessel safety as many of the safety items required on a boat, like life jackets and fire extinguishers, are portable and can be removed from the boat at any time. Requiring vessels which may be carrying valuable marine life to stop for the inspection of valid permits is like requiring trucks capable of carrying agricultural products to stop at agricultural inspection stations. Therefore, “the state’s interest in random stopping and brief detention of motorboats for the limited purpose of checking fishing permits, registration certificates and safety equipment outweighs a person’s interest in being completely free from such limited intrusion.” Id. at 155.
- 2. BOARDING THE VESSEL** – F.S. 327.56 limits an officer’s authority to board a vessel for the purpose of conducting a boating safety inspection or a marine sanitation equipment inspection. “No officer shall board any vessel to make a safety or marine sanitation equipment inspection if the owner or operator is not aboard.” F.S.327.56(1). If the owner or operator is aboard, the officer may board the vessel with consent or when the officer has probable cause or knowledge to believe that a violation of chapter 327, Fla. Stat., has occurred or is occurring. F.S. 327.56(1). The officer may also board the vessel when the operator refuses or is unable to display the safety or marine sanitation equipment required by law, if requested to do so by the officer, or when the safety or marine sanitation equipment to be inspected is permanently installed and is not visible for inspection unless the officer boards the vessel. F.S. 327.56(1). Safety and marine sanitation equipment inspections of

floating structures are to be performed by a duly authorized representative of the Department of Environmental Protection as provided in s. 403.091, which is part of the Florida Air and Water Pollution Control Act. F.S. 327.56(2).

However, the officer may have reasons to board the vessel other than to conduct a boating safety or marine sanitation equipment inspection. For instance, an FWC officer may board the vessel to conduct a fisheries inspection. For a discussion regarding the inspection or search of the vessel, see the next subsection.

The U.S. Coast Guard may make suspicionless administrative boardings in U.S. waters and bring Florida law enforcement with them. For a discussion of the boarding and inspection authority of the U.S. Coast Guard, see Saunders v. State, 758 So.2d 724 (Fla. 2d DCA 2000).

- 3. INSPECTING / SEARCHING THE VESSEL** – In addition to stopping vessels, officers have the authority to inspect vessels for compliance with vessel safety and registration requirements. Sherman v. State, 419 So.2d 375 at 376-377 (Fla. 1<sup>st</sup> DCA 1992). While observing the vessel, the officer may observe evidence of fishing aboard the vessel. There are statutes, rules and case law indicating that when an officer has reason to believe someone is hunting, fishing or possessing wildlife in Florida, the officer is authorized to perform an administrative inspection to determine compliance with the rules for hunting, fishing or possessing wildlife. The officers' inspection authority does not extend to the sleeping quarters of the vessel.

“[A] law enforcement officer of the commission who has probable cause to believe that the vessel has been used for fishing prior to the inspection shall have full authority to open and inspect all containers or areas where saltwater products are normally kept aboard vessels while such vessels are on the water, such as refrigerated or iced locations, coolers, fish boxes, and bait wells, but specifically excluding such containers that are located in sleeping or living areas of the vessel.” F.S. 379.3313(2). When the legislature used the term “probable cause” in regulatory schemes, they were recognizing a lesser standard of probable cause to inspect than that required in criminal cases. Sherman v. State, 419 So.2d 375 (Fla. 1<sup>st</sup> DCA 1992). A person’s reasonable expectation of privacy is lowered when engaged in a highly regulated activity like fishing. State v. Starkey, 605 So.2d 963 (Fla. 1<sup>st</sup> DCA 1992).

Section 379.3311(2)(e), Fla. Stat. , states that an FWC officer has the authority to examine any person, boat, conveyance, vehicle, game bag, game coat, or other receptacle for wild animal life, marine life, or freshwater aquatic life.

Rule 68A-4.006, Fla. Admin. Code, states that if a person is participating in the privileges of taking or possessing freshwater fish or wildlife in Florida, the person must allow an officer to determine whether the rules for possessing wildlife are being followed. No person shall refuse or obstruct such inspection by any authorized officer of the state.

After the initial stopping and boarding of the vessel for a boating safety inspection or a fish and wildlife inspection, the officer must have probable cause before conducting a further search for violations of the law unrelated to boating, fishing and wildlife. Casal. The search can go from a regulatory inspection to a criminal probable cause search when the officer inadvertently sees a violation in plain view while conducting a proper and limited stop or inspection. Sherman v. State, 419 So.2d 375 (Fla. 1<sup>st</sup> DCA 1992).

The scope of the officers' inspection authority is limited to locations where evidence of the regulated activity is likely to be found at the time of the inspection. Casal and Sherman. For example, when officers are opening compartments, coolers and containers while inspecting for fishing violations, officers should limit the scope of the inspection to places where the officer has reason to believe evidence of fishing violations is likely to be found at the time of the inspection. Officers should state in their report their reason for believing that evidence of a fishing violation was likely to be found where they found the evidence. And if the officer is looking in the cooler for fish and finds empty beer cans or marijuana in plain view, that evidence would be admissible in the BUI case.

**Note:** During a boating safety inspection, the officer will ask the operator to bring the officer his/her life jacket, fire extinguisher, registration, etc. The officer gets a good indication of the operator's sobriety while watching the operator locate each item and bring it to the officer. If the officer has reasonable suspicion of BUI, the officer can investigate further. State v. Taylor, 648 So.2d 701 (Fla. 1995). And, anything in plain view is not a search. Rimmer v. State, 825 So.2d 304 (Fla. 2002).

**Note:** If an officer observes the operation of a vessel on the water, but is unable to make contact with the operator until after the vessel is ashore and loaded onto the trailer, can the officer conduct the boating safety inspection now that the vessel is no longer on the water? There is no requirement in the law that the vessel stop and inspection occur on the water. If the officer has the authority to conduct the vessel inspection, the officer can follow the operator and conduct the stop and inspection when the officer is able to make contact with the operator, so long as the delay does not make the results of the inspection stale or no longer relevant. A similar situation for DUI cases is when the officer's observations of the operation of the vehicle provide the officer with reasonable suspicion of impairment, justifying the stop of the vehicle and brief detention of the operator to investigate the circumstances that caused the officer to be suspicious; but before the officer turns on his/her blue lights to initiate the stop, the driver pulls over, gets out of his car and walks into a convenience store. At that point, the officer can walk into the convenience store, approach the operator, ask to see his driver's license and vehicle registration, and require the operator to perform field sobriety exercises, even though the driver is no longer on the road or driving.

Sometimes the officer will conduct a fisheries inspection along with a vessel safety inspection while the vessel is ashore. If the officer has reason to believe evidence of

fishing will be found on the vessel at the time of inspection, the inspection would be authorized. See above inspection authority references.

## **B. OPERATOR**

- 1. WHO IS THE OPERATOR?** Unlike a car, a boat can be operated without a “driver.” Who do you charge with BUI if no-one is standing at the wheel but everyone on board is impaired? F.S. 327.02(27) defines “operate” as “to be in charge of or in command of or in actual physical control of a vessel upon the waters of this state, or to exercise control over or to have responsibility for a vessel’s navigation or safety while the vessel is underway upon the waters of this state, or to control or steer a vessel being towed by another vessel upon the waters of the state.” The definition of “operate” was amended in 1998 because of a tragic case in Volusia County where the man steering the boat decided to leave the wheel and urinate off the back of the boat. The boat then crashed, killing a teenaged girl who was a passenger.

The point of the legislative change was to make it clear that someone has to be in charge of the vessel, and that “someone” is considered to be an operator. Note that the statute says “an” operator, not “the” operator. Unlike a vehicle, a vessel can have several people simultaneously as operators; the duties of helmsman (the person in actual physical control at the wheel), look-out, navigator, and master may all be performed by one person or may be spread among several persons, all of whom are considered operators.

If you cannot tell who is in charge, a reasonable inference is that the owner of the boat is in charge. If the owner is not aboard, look next to the person who rented or borrowed the boat. If one person is giving orders and others on board are following them, that would also be evidence of who is “in charge of or in command of” the boat. Remember also that having “responsibility for a vessel’s navigation or safety” would include anyone acting or designated to act as a look-out or anchor watch. Finally, don’t forget that any person in actual physical control of the vessel, including but not limited to the steering wheel, the throttles, or the trim tabs, is also an operator of the boat.

The 1998 amendment provided a specific exclusion from this definition for “a person on a vessel that is docked or otherwise made fast to the shore and shall not apply to a vessel owner or operator who designates a driver pursuant to s. 327.35.” In 2000, the Legislature removed this language. Now, a vessel tied to a dock or the shore is still being operated. Now, even having a “designated driver” does not insulate the owner or some other person in charge or command of the vessel from also being considered an operator.

- 2. INCAPACITY OF AN OPERATOR** - F.S. 327.34 makes it “unlawful for the owner of any vessel or any person having such in charge or in control to authorize or knowingly permit the same to be operated by any person who by reason of physical or mental disability is incapable of operating such vessel under the prevailing

circumstances. Nothing in this section shall be construed to prohibit operation of boats by paraplegics who are licensed to operate motor vehicles on the highways.” Impairment by alcohol or drugs is both a physical and mental disability within the meaning of this statute.

3. **DESIGNATED DRIVER** - F.S. 327.35(10) says “It is the intent of the legislature to encourage boaters to have a “designated driver” who does not consume alcoholic beverages.” The statute does not say it is ok to turn control of the boat over to someone because they have been drinking less than you; it says to turn control of the boat over to someone who does not consume alcoholic beverages. Remember also, simply having a “designated driver” does not insulate the person who put the designated driver behind the wheel from also being considered an operator.
4. **BOATING SAFETY IDENTIFICATION CARDS** - There is no vessel operator’s license. What kind of training and experience is required before someone can operate a vessel? F.S. 327.395 requires everyone born on or after January 1, 1988 to possess a photo ID and a boating safety identification card to operate a vessel powered by a motor of 10 horsepower or greater. To obtain a card, operators must pass an approved 8 hour course or an equivalent. Boaters born before January 1, 1988 do not have to take a course, but they must operate the vessel in a reasonable and prudent manner and they must comply with the navigation rules. F.S. 327.33.

**C. WHAT IS A VESSEL?** In order to be boating under the influence, the person must be operating a “vessel.” F.S. 327.35(1). What is a vessel? F.S. 327.02(39), defines vessel as “‘Vessel’ is synonymous with boat as referenced in s. 1(b), Art. VII of the State Constitution and includes every description of watercraft, barge, and airboat, other than a seaplane on the water, used or capable of being used as a means of transportation on water.” The current standard jury instructions define vessel as “a boat that is subject to a license tax for operation and includes every description of watercraft, barge, and airboat, other than a seaplane, on the water used or capable of being used as a means of transportation on the water.” Fla. Std. Jury Instr. (Crim.) 28.14. The Second DCA recently ruled that the state is not required to prove the boat defendant was operating was subject to a license tax and the suggested that the Standard Jury Instructions in Criminal Cases Committee revise the definition of *vessel* as used in the BUI jury instruction by omitting the reference to a boat being subject to a license tax for operation. State v. Davis, 38 Fla. L. Weekly D458 (Fla. 2d DCA 2013). The Supreme Court Committee on Standard Jury Instructions in Criminal Cases is moving towards doing just that. They have submitted the recommended amendment for comment. See the April 1, 2013 edition of *The Florida Bar News*.

Floating structures which are not primarily used as a means of transportation on water but which serve purposes or provide services typically associated with a structure or other improvement to real property are not vessels. Incidental movement upon water or resting partially or entirely on the bottom shall not, in and of itself, preclude an entity from classification as a floating structure. F.S. 327.02(10). See also 192.001(17). When determining whether the item is capable of being used as a means of transportation on water, think in terms of practical possibilities and not merely theoretical ones. Lozman v. City of

Riviera Beach, 568 U.S. \_\_\_, 133 S.Ct. 735, 184 L.Ed.2d 604; 2013 A.M.C. 1 (January 15, 2013); Land v. State, Dept. of Revenue, 510 So.2d 606 (Fla. 3d DCA 1987), *in accord with Fla. Dept. of Revenue v. Fla. Boaters Assn., Inc.*, 409 So.2d 17 (Fla. 1981).

Sea planes are specifically excluded from the definition of vessel under F.S. 327.02(39), so intoxicated sea plane operators would not be boating under the influence. Pilots who operate a sea plane while intoxicated may be violating F.S. 860.13, which makes it unlawful for any person to operate an aircraft in the air or on the ground or water while under the influence of alcoholic beverages, any substance controlled under chapter 893, or any chemical substance set forth in s. 877.111. F.S. 860.13 also makes it unlawful to operate an aircraft in the air or on the ground or water in a careless or reckless manner so as to endanger the life or property of another. A violation of F.S. 860.13 is a third-degree felony. Note that because this offense is a felony, a blood test may be obtained through a search warrant. State v. Geiss, 70 So.2d 642 (Fla. 5<sup>th</sup> DCA 2011). An argument can be made that because there is no implied consent for aircraft operators, a warrantless blood draw may be lawful, even if there is no death or serious bodily injury involved. A warrantless blood draw is unauthorized unless the state can establish exigent circumstances. While the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in Schmerber v. California, 384 U.S. 757, 764, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances. Missouri v. McNeely, \_\_\_ S.Ct. \_\_\_ (US. Mo., 2013). Consult with your agency attorney before conducting a warrantless blood draw.

**D. U.S. COAST GUARD DETENTION PASSED TO FLORIDA OFFICER** - If a U.S.Coast Guard officer has probable cause to believe that a boater is BUI, can that officer hand that boater over to a Florida officer to make the arrest under Florida law even though the Florida officer did not see the boater operate the vessel? F.S. 901.15(10) allows the Florida officer to make an arrest for a misdemeanor that was committed in the presence of a law enforcement officer of the United States Government if the Florida officer has probable cause to believe that a misdemeanor has been committed, based upon a signed affidavit provided to the Florida officer by the federal law enforcement officer. The wording of F.S. 901.15(10) can be confusing. If you read the entire section together, it seems that the offense has to occur on federal military property. However, the section deals with two types of officers. The first part of the section deals with law enforcement officers of the U.S. government, recognized by United States statute and the second part of the section deals with U.S. military law enforcement officers, recognized as such by the Uniform Code of Military Justice or the U.S. Dept. of Defense Regulations. The first type of officer includes officers from the Coast Guard, Customs, Border Patrol, FBI, DEA, ATF, etc. These officers have arrest authority throughout the country and on U.S. flagged vessels anywhere in the world. For the first type of officer, the misdemeanor needs to be committed “in the presence of the United States law enforcement officer.” It does not matter where the misdemeanor is committed as long as it is committed in the federal officer’s presence.

The second type of officer includes officers from the Military Police, Shore Patrol, Masters at Arms and Air Police. This second type of officer only has authority to arrest military



personnel for offenses committed “on base.” Because these officers only have full arrest authority on military property, their ability to pass misdemeanor cases to state and local officers is contingent upon the misdemeanor having been committed in their presence while on federal military property. **Note:** The U.S. Coast Guard works with the state FWC officers and local officers on a regular basis and has signed memoranda of understanding with these state and local agencies to memorialize the partnerships. The U.S. Coast Guard may make suspicionless administrative boardings in U.S. waters and bring Florida law enforcement with them. Saunders v. State, 758 So.2d 724 (Fla. 2d DCA 2000).

- E. JURISDICTION** – Like the DUI statute, the BUI statute prohibits operating while impaired “within this state.” The difference is that for vessels, “within this state” extends out into the water. The state boundary is defined in Article II, section 1 of the Florida Constitution. The boundary of the state extends 3 geographic miles out into the Atlantic Ocean or to the edge of the Gulf Stream, whichever is the greater distance; and three leagues (9 nautical miles) out into the Gulf of Mexico. Note that a “geographic” mile is often used interchangeably with “nautical” mile, however, a “geographic” mile is slightly longer than a “nautical” mile. Attorney General Opinion 95-51, n. 14.

## **F. FIELD SOBRIETY EXERCISES**

- 1. FIELD SOBRIETY EXERCISES STANDARDIZED FOR USE IN A MARINE ENVIRONMENT** - The Standardized Field Sobriety Exercises (SFSEs) typically used for roadside investigations of impaired drivers, which have been widely supported by the National Highway Traffic Safety Administration (NHTSA) and the International Association of Chiefs of Police (IACP), were designed to be performed while the subject is standing on a firm, stable, flat surface. In order to have a BUI suspect perform the balance-related SFSEs (Walk-and-Turn and the One-Leg Stand), an officer would need to move the suspect to an appropriate location on land. This is inconvenient for both the officer and the boat operator, and, in some cases, may create a de facto arrest (For a discussion of this issue, see the subsection below on moving the boater ashore to perform field sobriety exercises).

The Southern California Research Institute (SCRI) has been involved in the scientific validation of SFSEs for several decades, and SCRI was contracted by the National Association of State Boating Law Administrators (NASBLA) to validate an SFSE battery suitable for use in the marine environment. The recently validated exercises are referred to as the “Seated Battery of SFSEs.” The seated battery is designed to be performed with the suspect in a seated position while in a patrol boat, and they rely on the concept of divided attention, just like the roadside SFSEs do. The seated battery consists of Horizontal Gaze Nystagmus, Finger to Nose, Palm Pat and Hand Coordination. The first three are familiar to officers who have been enforcing Florida’s BUI laws, but the Hand Coordination exercise is a new one that was created by the SCRI researchers. Based on their experience with creating the Walk-and-Turn exercise back in the late 1970s, SCRI created the Hand Coordination exercise to mimic the Walk-and-Turn with the suspect performing a walking motion with their

fists minus any reliance on balance. The seated battery of SFSEs are also suitable for use with DUI suspects who are mobility impaired, overweight or elderly and those with leg, ankle, hip injuries which might lead to an inability to perform the roadside SFSEs.

An introduction to the seated battery of SFSEs and information on the validation study can be found at the (NASBLA) website at [www.nasbla.org/sobrietytest](http://www.nasbla.org/sobrietytest). This website was developed to help inform prosecutors, judges and hearing officers about the seated battery. Any needs for technical assistance on the seated battery should be directed to FWC Captain Richard Moore either by phone at 850-617-9544 or by email at [richard.moore@myfwc.com](mailto:richard.moore@myfwc.com).

2. **GENERAL OBSERVATIONS** - An officer should always work to build a BUI case by identifying evidence of impairment observed during the initial observations of the boat and the personal contact with the boat operator. An officer should be able to describe observations which would lead to reasonable suspicion of BUI prior to having the subject perform the seated battery of SFSEs. In some cases, there are actions by the boat operator that led the officer to stop a particular boat. Those need to be documented in the case report. There are also very important pieces of evidence of impairment which will be observed during a boating safety inspection, provided the officer conducts the inspection in a deliberate way which will have the operator move around the boat. For example, the officer might ask for more than one item at a time, such as the registration certificate and photo identification. Then the officer may ask for equipment stored in the bow of the boat, then have the operator move to the stern to check equipment there or engine compartment ventilation, then to the console or cabin for a fire extinguisher, possibly back to the stern to check the backfire flame arrestor, then to the console to check the horn or whistle. Properly conducted, the boating safety inspection can serve as some of the best field sobriety exercises for boat operators suspected of BUI. By the time the inspection is concluded with an impaired operator, the officer should easily be able to articulate indicators of impairment to establish reasonable suspicion to have the operator perform the SFSEs or may have even developed probable cause for BUI. The evidence which comes to light in these phases of BUI detection must not be overlooked and should be well documented in the arrest report.
  
3. **MOVING THE BOATER ASHORE TO PERFORM FIELD SOBRIETY EXERCISES** - If the officer takes the vessel and the operator to shore in order to more safely perform SFSE's, must the officer read *Miranda* warnings before any verbal portions of the exercises or answers to questions can be admitted into evidence? The question becomes: When is the operator "in custody" requiring the warnings? This will depend on the facts of each case. The issue of "custody" can be avoided if the officer asks the operator to move the vessel to a nearby dock or marina, the same as if an officer asks a vehicle operator to move the car over to a nearby parking lot, away from busy traffic.

Ideally, the officer should ask the vessel operator to move over to the dock or marina immediately upon stopping the vessel, before the face-to-face phase begins and before impairment is suspected. Remember, if the vessel is obstructing traffic or will be endangered by passing vessels or their wakes, the officer does not want to be sitting there doing a safety or fisheries inspection. Asking the operator to move the vessel allows the officer to observe the operator as he operates the vessel and will allow the officer to articulate signs of impairment if they are present, like having difficulty in controlling the speed and direction of the vessel because of over-steering and applying too much or too little throttle or having difficulty coming alongside the dock and coming to a stop at the dock. Officers should not ask the operator to move the vessel if the officer suspects impairment. *Miranda* warnings should be given after the implied consent warnings are read and field sobriety exercises have been given.

Does moving the suspect amount to an arrest, requiring probable cause of a criminal violation? In State v. Nessler, 12 Fla. L. Weekly Supp. 966a (Miami-Dade County Court, May 20, 2005), the defendant was stopped for violating a no-wake zone or speeding and was then suspected of boating under the influence. The officer believed he had reasonable suspicion for BUI, but not probable cause. The officer transported the defendant to a ranger station to perform SFST's. This happened during the Columbus Day Regatta and an officer was designated to do all of the SFST's for the boaters taken in for DUI during the time of the stop. Even though the arresting officer may have been capable of performing the SFST's, the defendant had to wait 2 hours for this other designated officer to do them. The court ruled that this was a de facto arrest requiring probable cause, which the officer did not have at that time. The motion to suppress all of the evidence obtained as a result of the unlawful arrest was granted.

For some cases dealing with moving the driver of an automobile to perform the field sobriety exercises, see, State v. Evans, 692 So.2d 305 (Fla. 4th DCA 1997). In *Evans*, the defendant was told to remain at the scene. The deputy took the defendant over to a nearby gas station, told him he was conducting a DUI investigation and asked him questions, such as whether he had anything to drink, whether he had been injured, etc. The deputy also administered roadside testing to him. This amounted to custodial interrogation which required *Miranda* warnings. There was a similar case, State v. Albanese, 7 Fla. L. Weekly Supp. 807 (Palm Beach County Court, August 14, 2000), where the Court distinguished the facts from *Evans*. In this case, the officer asked the defendant to walk with him across the street to perform field sobriety exercises. The only reason the defendant was asked to go to the bank parking lot was because the sprinklers were on covering the sidewalk and he did not feel the roadway was safe at that location. At no time was the defendant handcuffed or placed in a police car and transported. A case that appears to conflict with *Evans* is Johnson v. State, 800 So.2d 275 (Fla. 1<sup>st</sup> DCA 2001). This was a road rage case. When the officer arrived at the scene, the occupants of both trucks were still out in the middle of the street. The officer arguably asked the defendant to move his truck into the parking lot and to wait for her there. The defendant then made an

incriminating statement. The defendant argued that although the defendant was briefly detained by the police, he was not in custody and therefore, not entitled to be warned of his constitutional rights. “It would be unrealistic to require the officers to give every injured person and every potential witness a *Miranda* warning in a situation like this merely because one of them might eventually be charged with a crime.” In Weaver v. DHSMV, 10 Fla. L. Weekly Supp. 161 (Hillsborough Circuit Court, January 8, 1002), the officer transported the defendant to another location to perform SFSE’s. Because of the limited duration and inconvenience and because the defendant was not handcuffed while being transported, the court found this to be proper. The court did not mention *Evans*. In Green v. DHSMV, 11 Fla. L. Weekly Supp. 273 (Duval Circuit Court, January 21, 2004) and Gruentzel v. DHSMV, 11 Fla. L. Weekly Supp. 593 (Duval Circuit Court, May 4, 2004), the Court held that transporting the defendant to a safer place to perform SFSE’s was reasonable and did not transform the detention into an arrest. To force the officer either to release a DUI suspect or conduct the sobriety exercises in a dangerous location would be unreasonable and is not required by law.

**G. ZERO TOLERANCE FOR BOATERS UNDER 21 YEARS OF AGE** – It is unlawful for a person under the age of 21 to operate a vehicle or vessel in Florida with a breath alcohol level of 0.02 or higher (Zero Tolerance). The zero tolerance statutes for drivers and boaters are primarily the same except for the following:

- 1. SIMULTANEOUS PROSECUTION FOR BUI AND ZERO TOLERANCE VIOLATIONS** - Unlike the traffic statute, the boating statute specifically authorizes prosecuting both the BUI and the Zero Tolerance charges and states that the penalties for the Zero Tolerance violation shall be imposed in addition to any other penalty provided for boating under the influence or for refusal to submit to testing.” F.S. 327.355(4).
  
- 2. PRELIMINARY BREATH TEST DEVICES (PBT’s)** - In the underage drinking and driving statute, F.S. 322.2616(17), the preliminary alcohol screening device result “is presumed accurate” if it is on the U.S. DOT’s conforming-products list of evidential breath-measurement devices, and is “admissible in evidence in any administrative hearing conducted under this section.” In the underage drinking and boating statute, F.S. 327.35(3), the statute states that test results from a preliminary alcohol screening device listed on the U.S.D.O.T.’s conforming-product list of evidential breath-measurement devices are “admissible in evidence in any trial or hearing.” This means that the underage boater’s PBT result will be admissible at trial on a charge of boating under the influence, notwithstanding the fact that the test was performed using an instrument which was not approved by the Florida Department of Law Enforcement under F.S. 316.1932 or F.S. 327.352, so long as the instrument was on the DOT conforming-products list. The State will likely have to prove the reliability of the instrument under the traditional scientific predicate. For a discussion of the traditional scientific predicate in DUI cases, see, State v. Bender, 382 So.2d 697 (Fla. 1980) and Robertson v. State, 604 So.2d 783 (Fla. 1992).

**3. PENALTIES** - For young drivers, there are license suspension consequences. If the violator was driving a car and they tested over a .05 BAC, they must complete a substance abuse course and an evaluation before they get their driver's license back. The license suspension cannot be imposed cumulatively with the DUI license suspension. F.S. 322.2616. For young boaters, the penalty is 50 hours of public service and a suspension of the privilege to operate a vessel until the public service is completed. To operate a vessel while your privilege is suspended for this violation is a first degree misdemeanor. They must also successfully complete a boater's safety course. Although the court may withhold adjudication, it must impose the prescribed sentence whenever there is any finding of guilt or the acceptance of a plea of guilty or nolo contendere. F.S. 327.355.

**H. BAC AT THE HOSPITAL** - There is no BUI provision which is similar to the DUI provision which shields a health care provider from civil and criminal liability if they tell a police officer the results of a BAC test when a traffic crash patient has a BAC over the legal limit. F.S. 316.1932(1)(f)2.b.

**I. OPEN CONTAINER** - There are no "open container" provisions in boating law.

**J. DUI & BUI MANSLAUGHTER (UNBORN QUICK CHILD)** – DUI Manslaughter involves the death of any human being or unborn quick child. F.S. 316.193(3)(c)3. BUI manslaughter involves the death of any human being. There is no reference to an unborn quick child in F.S. 327.35(3)(c)3.

## **K. PENALTIES**

### **1. REFUSING THE BREATH, BLOOD OR URINE TEST -**

**a. CIVIL PENALTIES** – Because a license is not required to operate a vessel in Florida, there is no vessel operator's license suspension for failure to take the breath, blood or urine test. What is the penalty for refusing the test? The penalty is a \$500 civil penalty. F.S. 327.35215(1). To challenge the penalty, the defendant can request a hearing before a county court judge within 30 days of being advised of this penalty. F.S. 327.35215(3). If the defendant does not pay the penalty within 30 days or request a hearing within 30 days, the defendant is prohibited from operating a vessel in this state until the penalty is paid. To do so is a first degree misdemeanor. F.S. 327.35215(4). Payment of the penalty may be made a condition of probation in the criminal proceeding. F.S. 948.039.

**b. CRIMINAL PENALTIES FOR THE SECOND REFUSAL** – The second refusal to provide a breath, blood or urine test as described in s. 327.352 is a first degree misdemeanor if the requirements of F.S. 327.359 are met. F.S. 327.359 is almost identical to its DUI counterpart found in 316.1939. What is unusual is that DUI and BUI refusals don't mix like DUI and BUI

convictions. BUI refusals don't count towards subsequent DUI refusals and vice versa.

2. **IGNITION INTERLOCK** - There is no ignition interlock provision for those convicted of BUI offenses. F.S. 327.35.
3. **IMPOUNDMENT OR IMMOBILIZATION** - Vehicles are impounded for DUI convictions. F.S. 316.193(6). Vessels are impounded for BUI convictions. 327.35(6).
4. **DRUG EVALUATION AND TREATMENT** - For a DUI Conviction, the defendant does not get his/her driver's license back until the defendant has completed a drug evaluation and any required treatment. F.S. 316.193(5). For a BUI conviction, the defendant must complete a drug evaluation and any required treatment as a condition of probation. Officers should alert the assistant state attorney that the court needs to inform the defendant of this condition of probation and the sentencing documents need to reflect this condition of probation. Failure to complete this requirement does not affect the boater's driver's license. F.S. 327.35(5).
5. **PRIOR CONVICTIONS** - A BUI conviction counts as a prior conviction when sentencing a DUI defendant. F.S. 316.193(6)(k). A DUI conviction counts as a prior conviction when sentencing a BUI defendant. 327.35(6).
6. **COMMUNITY SERVICE HOURS** - A first time offender convicted of DUI is required to perform 50 hours of community service, but is allowed to buy out of that service at the rate of ten dollars per hour. F.S. 316.193(6)(a). This buy-out provision is not available to a person convicted of BUI and the 50 hours of community service must be performed. F.S. 327.35(6)(a).
7. **MINIMUM MANDATORY SENTENCE FOR DUI MANSLAUGHTER** - A person who is convicted of DUI manslaughter shall be sentenced to a mandatory minimum term of imprisonment of 4 years. F.S. 316.193(3). There is no minimum mandatory sentence for BUI manslaughter.
8. **LEAVING THE SCENE OF A VEHICLE CRASH or BOATING ACCIDENT WITH INJURIES OR DEATH** – Leaving the scene of a vehicle crash involving property damage and leaving the scene of a boating accident involving property damage are both second degree misdemeanors. F.S. 316.061(1), 316.063(1) & 327.30(5). The penalties for leaving the scene of a vehicle crash involving injury or death and leaving the scene of a boating accident involving injury or death are similar, but not identical.

F.S. 327.02(3) defines “boating accident” as “a collision, accident, or casualty involving a vessel in or upon, or entering into or exiting from, the water, including capsizing, collision with another vessel or object, sinking, personal injury, death,

disappearance of any person from on board under circumstances which indicate the possibility of death or injury, or property damage to any vessel or dock.”

Leaving the scene of a vehicle crash involving death is a first degree felony. F.S. 316.027(1)(b) and F.S. 921.0022. A person who is arrested for this violation and who has previously been convicted of a violation of s. 316.027, s. 316.061, s. 316.191, or s. 316.193, or a felony violation of s. 322.34, shall be held in custody until brought before the court for admittance to bail in accordance with chapter 903. F.S. 316.027(1)(b). There is mandatory restitution to the victim for any damage or loss unless the court finds clear and compelling reasons not to order the restitution and the payment of restitution must be made a condition of probation. F.S. 316.027(1)(c). The driver’s license is to be revoked by DHSMV. F.S. 316.027(2). If the defendant was also driving under the influence at the time of the offense, there is a minimum mandatory 2 year prison sentence. F.S. 316.027(1)(b).

Leaving the scene of a vehicle crash involving injury of any person is a third degree felony. F.S. 316.027(1)(a). The driver’s license is to be revoked by DHSMV. F.S. 316.027(2). The mandatory restitution described above is also required. F.S. 316.027(1)(c).

Leaving the Scene of a BUI manslaughter is a first degree felony. F.S. 327.35(3)(c)3.b. Leaving the scene of a vessel homicide is a first degree felony. F.S. 782.072(2). Leaving the scene of a boating accident involving personal injury is a third degree felony. F.S. 327.30(5). F.S. 327.30(2) discusses personal injury in terms of “personal injury requiring medical treatment beyond immediate first aid.” There is no distinction made between leaving the scene of a boating accident involving personal injury and leaving the scene of a boating accidents involving death. When the leaving the scene charge involves a vessel, there is no minimum sentence, no bail restrictions, no minimum prison time, no mandatory restitution and no operator’s license revocation.

# DUI/BUI Conversion Chart

	<b>DUI Statute</b>	<b>BUI Statute</b>
<b>Elements of the Crime</b>		
Driving and Operating Under the Influence	316.193(1)	327.35(1)
Water Skiing Under the Influence	N/A	327.38
Designated Driver	N/A	327.35(10)
<b>Penalties</b>		
Fines for First and Second Conviction	316.193(2)(a)1.	327.35(2)(a)1.
Imprisonment for First and Second Conviction	316.193(2)(a)2.	327.35(2)(a)2.
Second w/in 5 years – 48 Hours of Cons. Confinement	316.193(6)(b)	327.35(6)(b)
Probation / Community Service – First Conviction	316.193(6)(a)	327.35(6)(a)
Imp. or Imm. of the Veh./Vessel - First Conviction	316.193(6)(a)	327.35(6)(a)
Imp. or Imm. of the Veh./Vessel - Second within 5 Yrs.	316.193(6)(b)	327.35(6)(b)
Second Conviction – Ignition Interlock	316.193(2)(a)3.	N/A
Second Conviction (within 5 years of prior) 10 Days Jail	316/193(6)(b)	327.35(6)(b)
Third Conviction (Within 10 years of prior)	316.193(2)(b)1.	327.35(2)(b)1.
Third Conviction (Within 10 years of prior) 30 Days Jail	316.193(6)(c)	327.35(6)(c)
Third Conviction (Within 10 years of prior) Veh. Imp.	316.193(6)(c)	327.35(6)(c)
Third Conviction (After 10 years of prior)	316.193(2)(b)2.	327.35(2)(b)2.
Fourth Conviction	316.193(2)(b)3.	327.35(2)(b)3.
Offenses Considered Prior DUI Offenses	316.193(6)	327.35(6)
DUI/BUI Causing Damage to Property	316.193(3)(c)1.	327.35(3)(c)1.
DUI/BUI Causing Serious Bodily Injury to Another	316.193(3)(c)2.	327.35(3)(c)2.
DUI/BUI Causing Death of Another	316.193(3)(c)3.	327.35(3)(c)3.
With Underage Passenger or BAC of 0.15 or higher	316.193(4)	327.35(4)
Substance Abuse Course/Treatment	316.193(5)	327.35(5)
Impoundment - Process	316.193(6)	327.35(6)
Residential Treatment Program	316.193(6)(k)	327.35(6)(i)
Civil Suit Not Barred	316.193(7)	327.35(7)
Additional Court Costs	938.07	938.07
<b>Testing for Alcohol and Controlled Substances</b>		
Implied Consent to Take Breath Test	316.1932(1)(a)1.a.	327.352(1)(a)1.
Implied Consent to Take Urine Test	316.1932(1)(a)1.b	327.352(1)(a)2.
Implied Consent to Take Blood Test	316.1932(1)(c)	327.352(1)(c)
Right to Request Test if Officer Does not Request Test	316.1932(1)(d)	327.352(1)(d)
Right to Independent Breath/Blood/Urine Testing	316.1932(1)(f)3.	327.352(1)(e)3.
Persons Qualified to Withdraw Blood	316.1932(1)(f)2.a.	327.352(1)(e)2.
FDLE Alcohol Testing Program	316.1932(1)(a)2.	316.1932(1)(a)2. 327.352(1)(b)3.
Admissibility of Blood or Breath Test Results Affidavit	316.1934(5)	327.354(5)
Substantial Compliance with FDLE Rules	316.1932(1)(b) & 316.1932(1)(f) 1.	327.352(1)(b)
Failure to Request Legal Blood Effect on Admissibility of Medical Blood	316.1932(1)(f)1.	327.352(1)(e)
No Civil Liability for Those Assisting LE with Test	316.1932(1)(f)5.	327.352(1)(e)5.



Medical Record Confidentiality Exception for Blood Release of Test Results relating to DUI	316.1932(1)(f)2. 316.1932(3)	327.252(3) 327.352(3)
Test Results Not Admissible To Prove Possession of Controlled Substances	316.1932(2)	327.352(2)
<b>Failure to Submit to Testing</b>		
Driver's License Suspension	322.2615	N/A
Civil Penalty of \$500	N/A	327.35215(1)
Requesting a Hearing	322.2615	327.35215(3)
Driving While License is Suspended	322.34	N/A
Operation of a Vessel Without Paying the Civil Penalty	N/A	327.35215(4)
Criminal Penalties for Second Refusal	316.1939	327.359
<b>Blood Draw - Death or Serious Bodily Injury</b>		
LEO May Require Blood Draw by Reasonable Force	316.1933(1)(a)	327.353(1)
Persons Qualified to Withdraw Blood	316.1933(2)(a)	327.353(2)(a)
Failure to Request Legal Blood Effect on Admissibility of Medical Blood	316.1933(2)(a)	327.353(2)(a)
Substantial Compliance with FDLE Rules	316.1933(2)(b)	327.353(2)(b)
No Civil Liability for Those Assisting LE with Test	316.1933(2)(c)	327.353(2)(c)
Charges Resulting From Incident Tried Concurrently	316.1933(3)(a)	327.353(3)(a)
Test Results Not Admissible for Possession Charges	316.1933(3)(b)	327.353(3)(b)
Medical Confidentiality of Test Results – DUI Exception	316.1933(2)(a)	327.353(4)
<b>DUI/BUI Trials</b>		
Discovery Regarding Test Results	316.1932(1)(f)4.	327.352(1)(e)4.
Right to a Jury Trial	316.1934(4)	327.354(4)
Refusal Can Be Used Against The Defendant	316.1932(1)(a)1.a. 316.1932(1)(a)1.b 316.1932(1)(c) 316.1933(3)	327.353(3)(a)
DHSMV Record Presumptive Proof of Prior Convictions	316.193(12)	N/A
Admissibility of DHSMV Rulings and Evidence	316.193(10)	N/A
Impairment of Normal Faculties	316.1934(1)	327.354(1)
Presumption of Impairment	316.1934(2)	327.354(2)
Approved Testing Methods	316.1934(3)	327.354(3)
<b>Persons Under 21 Years of Age / B.A.C. of .02</b>		
Unlawful to be in actual physical control	322.2616(1)(a)	327.355(1)(a)
Officer May Detain and Request Testing	322.261(1)(b)	327.355(1)(b)
This Detention is Not an Arrest	322.2616(19)	327.355(4)
Suspension of Driving Privileges	322.2616(2)	N/A
Implied Consent for Breath Testing	N/A	327.355(2)
Breath Testing Approved for Determining B.A.C.	322.2616(17)	327.355(3)
Violation is a Non-Criminal Infraction	N/A	327.355(4)
Penalties for BUI Under 21 Years Old	N/A	327.355(5)
Operating Veh. or Vessel While Privileges are Susp.	322.34	327.355(6)
<b>When Person Arrested Can Be Released From Custody</b>	316.193(9)	327.35(8)