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**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: CS/HB 1057
RELATING TO: Driving & Boating Under Influence
SPONSOR(S): Committee on Crime Prevention, Corrections & Safety and Representative Simmons
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME PREVENTION, CORRECTIONS & SAFETY YEAS 8 NAYS 1
 - (2) JUDICIAL OVERSIGHT
 - (3) COUNCIL FOR HEALTHY COMMUNITIES
 - (4)
 - (5)
-

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

CS/HB 1057 amends various statutes relating to driving under the influence (DUI) and boating under the influence (BUI) laws as follows:

- A fourth DUI or BUI conviction is a third degree felony. CS/HB 1057 makes a third conviction for DUI or BUI a third degree felony. It also requires that an ignition interlock device be installed in vehicles of persons convicted of a second DUI.
- The committee substitute allows law enforcement officers to take certain DUI and BUI offenders into protective custody.
- The committee substitute requires a police officer to order a breath or blood test of persons involved in accidents involving death or serious bodily injury if the officer has probable cause to believe the driver who caused the crash is driving under the influence.
- The committee substitute makes the refusal to submit to a breath or blood alcohol test a first degree misdemeanor.
- The committee substitute requires that any vehicle owned by a person convicted of a third or subsequent DUI or BUI and used in the commission of the offense shall be forfeited to the state in accordance with the provisions of the Florida Contraband Forfeiture Act

The Criminal Justice Impact Conference considered a bill similar to this one in 2001 and estimated a five year cost of approximately \$61 million. See "Fiscal Comments" for details.

SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- 1. Less Government Yes No N/A
- 2. Lower Taxes Yes No N/A
- 3. Individual Freedom Yes No N/A
- 4. Personal Responsibility Yes No N/A
- 5. Family Empowerment Yes No N/A

For any principle that received a “no” above, please explain:

The committee substitute creates enhanced penalties for DUI and BUI, creates a criminal penalty for refusal to submit to a blood or breath alcohol test, and provides that a person may be taken into protective custody for involuntary admission or involuntary treatment. The committee substitute also requires that upon a third or subsequent conviction for DUI or BUI, an offender’s vehicle must be forfeited. Additionally, the committee substitute requires that an “interlock device” be placed on an offender’s vehicle after a second DUI conviction. These provisions may be seen as creating more government and lessening individual freedom

B. PRESENT SITUATION:

A driving under the influence (DUI) conviction requires proof of the following elements:

That the person was driving or in actual physical control of a vehicle and either:

- 1. The person’s breath or blood alcohol level at the time was .08% or greater or
- 2. The person was under the influence of alcohol, a chemical substance or a controlled substance to the extent that their normal faculties were impaired.

s. 316.193(1), F.S.

A first, second and third DUI are punishable by a jail sentence and a fine as indicated below. A fourth or subsequent conviction for DUI is a third degree felony, punishable by up to five years in prison.

The penalties for DUI and for DUI when the blood alcohol level of the driver was over .20 or when the driver was accompanied in the vehicle by a person under the age of 18 are as follows:

	Maximum Incarceration	Incarceration Over .20 Blood Alcohol Level	Fine	Fine Over .20 Blood Alcohol Level
1st Offense	6 months jail	9 months jail	\$250-\$500	\$500-\$1,000
2nd Offense	9 months jail	12 months jail	\$500-\$1,000	\$1,00-\$2,000
3rd Offense	12 months jail	12 months jail	\$1,000-\$2,500	\$2,000-\$5,000
4th Offense (3rd Degree felony)	5 years in prison	5 years prison	\$1,000-\$5,000	\$1,000-\$5,000

s. 316.193(2), F.S.

Further, there are mandatory jail sentences associated with certain repeat DUI offenses. For example, if a person is convicted of a second DUI that occurred within 5 years after the date of the prior conviction, he or she must serve a mandatory minimum of 10 days in jail. s. 316.193(6)(b), F.S. For a third or subsequent DUI conviction for an offense that occurs within 10 years after the date of a prior conviction, the person must serve at least 30 days in jail. s. 316.193(6)(c), F.S.

A prior conviction for boating under the influence (BUI) is considered the equivalent of a prior conviction for DUI for purposes of sentencing an offender for a subsequent DUI. s. 316,193(6), F.S.

Section 316.193, F.S. also provides penalties for a person who operates a vehicle while under the influence and “who, by reason of such operation, causes”:

- damage to the property or person of another;
- serious bodily injury to another; or
- the death of another (DUI manslaughter)

The standard jury instruction for DUI manslaughter indicates that the state must prove that a DUI offender “caused or contributed to the cause” of the death. In State v. Hubbard, 751 So. 2d 552, 566-568 (Fla. 1999), Justice Anstead criticized the jury instruction, arguing that the statute did not contain the language “contributed to the cause”.

Interlock Devices

Section 316.1937, F.S., allows a judge to require that:

[a]ny person who is convicted of driving under the influence in violation of s. 316.193, and who is granted probation, shall not operate a motor vehicle during the period of probation unless that vehicle is equipped with a functioning interlock device certified by the [Department of Highway Safety and Motor Vehicles]....and installed in such a manner that the vehicle will not start if the operator’s blood alcohol level is in excess of 0.05 percent or as otherwise specified by the court.

Boating Under the Influence

The fines and maximum jail sentences for boating under the influence are the same as those for DUI which are specified in the chart above. s. 327.35, F.S. A fourth conviction for BUI is also a third degree felony, punishable by up to five years in prison. However, unlike a fourth DUI conviction which is ranked in level 6 of the offense severity ranking chart of the Criminal Punishment Code, a fourth BUI conviction is not ranked and therefore defaults to a level 1 offense. s. 921.0022, F.S. The offenses of BUI with serious injury and BUI manslaughter are treated in the same manner as the corresponding DUI offenses.

Implied Consent

Section 316.1932, F.S., provides that:

Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including but not limited to, an

infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath, and to a urine test for the purpose of detecting the presence of chemical substances as set forth in s. 877.111 or controlled substances if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages, chemical substances or controlled substances.

The breath or urine test must be incidental to a lawful arrest at the request of a law enforcement officer who has reasonable cause to believe the offender was driving under the influence. The offender must be told that the failure to submit to any lawful test will result in the suspension of the offender's driver's license. An offender's license must be suspended for a year for a first refusal and for eighteen months if the offender's license has previously been suspended for refusal to submit to a breath, blood or urine test. s. 322.2615, F.S. The refusal to submit to the test is admissible into evidence in any criminal proceeding.¹

A person is deemed to have given his or her consent to a blood test even if the person has not yet been arrested, if there is reasonable cause to believe the person was driving under the influence, if the person appears for treatment at a medical facility and if the administration of a breath or urine test is impractical or impossible. s. 316.1932(1)(c), F.S. If a law enforcement officer has probable cause to believe that a person who was driving under the influence has caused the death or serious bodily injury² of a human being, the person must submit to a blood test conducted by a medical professional or technician. If necessary, reasonable force may be used to require the offender to submit to the performance of the blood test. s. 316.1933, F.S.

These provisions also apply to an arrest for boating under the influence. ss. 327.352 and 327.353, F.S. The refusal to submit to the lawful breath, urine or blood test is punishable by a civil penalty of \$500.

Custody of Person Arrested for DUI or BUI

A person who is arrested for DUI or BUI may not be released from custody:

1. Until the person is no longer under the influence of alcohol, chemical substance or controlled substance and affected to the extent that his or her normal faculties are impaired;
2. Until the person's blood-alcohol level or breath-alcohol level is less than .05.; or
3. Until 8 hours have elapsed from the time the person was arrested.

ss. 316.193(9) and 327.35(8), F.S.

Involuntary Commitment

Section 397.675, F.S., provides for that a person may be involuntarily admitted if there is good faith reason to believe the person is substance abuse impaired and because of the impairment has lost the power of self control with respect to substance abuse and:

¹ The result of any test pursuant to this section which indicates the presence of a controlled substances is not admissible in a trial for the possession of a controlled substance.

² Serious bodily injury is defined as an injury "which consists of a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Sec. 316.1933(1), F.S.

- Has inflicted, or threatened or attempted to inflict, or unless admitted is likely to inflict, physical harm on himself or herself or another; or
- Is in need of substance abuse services and, by reason of substance abuse impairment is unable to recognize the need for such treatment.

When a law enforcement officer recognizes that a person appears to meet these conditions, the officer may take the person into protective custody. Within 72 hours of being taken into protective custody, the person must be evaluated by an attending physician and can only be retained in custody if a petition is filed with the court as provided in s. 397.6773, F.S. The court must hold a hearing on the petition and can issue an order authorizing involuntary assessment and stabilization or involuntary treatment if the person meets the criteria of s. 397.675, F.S.

Fines

Section 938.07, F.S. imposes an additional court cost of \$135 on any person convicted of DUI. The fund is distributed as follows: \$25 to the Emergency Medical Services Trust Fund; \$50 to the Criminal Justice Standards and Training Trust Fund of the Department of Law Enforcement and \$60 to the Brain and Spinal Cord Injury Rehabilitation Trust Fund.³

Florida Contraband Forfeiture Act

Sections 932.701-932.707, Florida Statutes are known as the "Florida Contraband Forfeiture Act". Contained within s. 932.701, F.S. is a list of items that are considered within the definition of "contraband articles". Included in the list is "any personal property, including...any vessel..[or] vehicle of any kind...which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony". Section 932.704 provides a mechanism for the forfeiture of contraband articles to the seizing law enforcement agency. Forfeiture cases are tried in front of jury in civil court. s. 932.704(3), F.S. Section 932.7055 provides for the satisfaction of liens on the forfeited property.

C. EFFECT OF PROPOSED CHANGES:

Driving Under the Influence

Currently, a fourth or subsequent DUI is a third degree felony. The bill makes a third or subsequent DUI conviction a third degree felony. A third or subsequent DUI conviction will be punishable by up to five years in prison and a fine of not less than \$1,000 or more than \$5,000.⁴

The bill also clarifies that any person who causes or contributes to the cause of property damage or serious bodily injury or the death of another person while committing DUI or BUI can be convicted of those crimes even if he or she is not the sole cause of the accident. This language is consistent with the Standard Jury Instruction relating to DUI manslaughter and addresses Justice Anstead's criticism of the jury instruction in Hubbard.

³ The section provides that effective March 1, 2002, the funds shall be "added to any fine imposed pursuant to s. 316.193" rather than be considered a "court cost". The clerks are required to remand the funds to the Department of Revenue who is required to distribute them in the manner described above.

⁴ Unless otherwise specified, the maximum fine for a third degree felony is \$5,000. 775.083(1)(c), F.S.

Boating Under the Influence

A fourth conviction for BUI is currently a third degree felony. The bill makes a third BUI a third degree felony. The offense of felony BUI is currently not ranked within the offense severity ranking chart of the Criminal Punishment Code. As a result, the offense defaults to level one offense. The bill ranks the offense of a third or subsequent BUI conviction in level 6 of the offense severity ranking chart in the same manner the corresponding DUI offense. The bill also ranks the offense of BUI manslaughter where the offender fails to stop and render aid or give information in the offense severity ranking chart in the same manner as the corresponding DUI offense.

Current law requires the imposition of a \$135 court cost for a DUI conviction. This bill requires that this court cost also be imposed for BUI convictions.

Interlock Devices

The committee substitute requires that upon a second conviction for DUI, the judge must order the placement for a period of not less than two years, at the offender's sole expense of an interlock device approved by the Department of Highway Safety & Motor Vehicle upon all vehicles owned individually or jointly which are routinely operated by the offender.

Forfeiture

The committee substitute requires that any vehicle owned by a person convicted of a third DUI and used in the commission of the offense shall be forfeited to the state in accordance with the provisions of the Florida Contraband Forfeiture Act.

The committee substitute also amends the Florida Contraband Forfeiture Act to include any motor vehicle or vessel used in the court of committing a DUI or BUI within the definition of "contraband article".

Protective Custody

The bill provides that the arresting officer may place a person in protective custody pursuant to s. 397.6772 if:

1. The person has previously been convicted of a violation of DUI or BUI;
2. The person's blood alcohol level or breath alcohol level, as determined by a test conducted incident to the person's arrest, was .20 or greater;
3. The person, by reason or operation of a motor vehicle, has caused death or serious bodily injury as defined in s. 316.1933 or
4. The person is on pretrial release for a previous DUI or BUI offense.

Within 72 hours of being taken into protective custody, the person would then be evaluated by an attending physician and could only be retained in custody if a petition is filed with the court as provided in s. 397.6773, F.S.

Involuntary Admission

The bill provides that in addition to any other ground that may give rise to a finding that a person has lost the power of self-control with respect to substance abuse and is likely to inflict physical

harm on himself or herself or another, a court may find that a person has lost the power of self-control with respect to substance use and is likely to inflict physical harm on himself or herself or another if the person has been:

1. The person has, previous to the arrest, been convicted of a DUI or BUI violation.
2. The person's blood or breath alcohol level, as determined by a test conducted incident to the person's arrest, was 0.20 or greater.
3. The person, by reason of operation of a motor vehicle or vessel, has caused death or serious bodily injury.
4. The person is on pretrial release for a previous DUI or BUI offense.

This bill further provides that if a person is placed in protective custody, meets the criteria for involuntary admission and is a "qualified resident" pursuant to s. 212.055(4)(d), F.S., the person could have the costs of evaluation paid for. Counties can collect an indigent health care sales surtax. Under this bill, funds from the surtax would be used to pay for the costs of evaluation and treatment of qualified residents. If a person whose care is paid for is subsequently convicted of DUI or BUI, the court must order the person to reimburse the provider of the services for the reasonable cost of the services. If the person is unable to reimburse the provider, a civil judgment in favor of the fund must be entered.

Implied Consent

As discussed above, under current law, if an offender refuses to submit to a breath, blood or urine test after an arrest for DUI, the offender's driver's license is suspended. The refusal to submit is not a crime.

The bill makes the refusal to submit a misdemeanor offense. The bill provides that a person who has refused to submit to a chemical or physical test of his or her breath, blood, or urine as described in s. 316.1932, F.S., and:

1. Who the arresting law enforcement officer had probable cause to believe was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages, chemical substances, or controlled substances.
2. Who was placed under lawful arrest for a violation of s. 316.193, unless such test was requested pursuant to s. 316.1932(1)(c)⁵.
3. Who was informed that if he or she refused to submit to such test, his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months, and that the refusal to submit to such test is a misdemeanor.
4. Who, after having been so informed, refused to submit to any such test when requested to do so by a law enforcement officer or correctional officer

commits a first degree misdemeanor, punishable by up to one year in jail.

⁵ s. 316.1932(1)(c) applies in cases in which there is reasonable cause to believe that the person was driving which under the influence and the person appears for treatment at a hospital, clinic or other medical facility and the administration of a breath or urine test is impractical or impossible.

Section 316.1933, F.S., currently requires a person to submit to a blood test, upon request of a law enforcement officer, when a law enforcement officer has probable cause to believe the person was driving under the influence and caused death or serious bodily injury. This bill amends this section to require the officer to order a blood test if there is probable cause and provide that the testing required by this paragraph need not be incidental to a lawful arrest of the person. This bill further amends this section to provide that the law enforcement officer must offer any person subject to a blood test under this provision the opportunity to submit instead to an approved breath test. If the person submits to a breath test and a "valid reading" is obtained, the person's blood will not be tested. This provision does not apply when the person is unconscious, when the person is unable to submit to a breath test or when the law enforcement officer has probable cause to believe the person was under the influence of a chemical or a controlled substance⁶ (rather than under the influence of alcohol).

This bill also applies these changes to the BUI statutes.

This bill takes effect July 1, 2002.

D. SECTION-BY-SECTION ANALYSIS:

See Effect of Proposed Changes.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

An indeterminate amount of revenue will be generated due to the number of increased fines imposed by courts associated with DUI and BUI prosecutions.

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

An indeterminate amount of revenue will be generated due to the number of increased fines imposed by the courts associated with DUI and BUI prosecutions.

2. Expenditures:

This bill creates a new criminal offense for refusal to submit to blood alcohol testing. The penalty for this offense is a first degree misdemeanor, punishable by up to one year in county jail. This provision will likely have an indeterminate impact on local county jail populations.

⁶ The presence of a chemical substance or a controlled substance cannot be detected by using a breath test.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have a fiscal impact on person's convicted for a third or subsequent DUI who will be sentenced for a third degree felony.

D. FISCAL COMMENTS:

The Criminal Justice Impact Conference has not met to consider the prison bed impact of this bill on the Department of Corrections. However, during the 2001 session, the conference analyzed the impact of HB 1401 which was substantially similar to HB 1057. The fiscal impact of the bill was determined as indicated in the chart below:

Fiscal Year	Projected Additional Cumulative Prison Beds Required Under HB1401	Projected Additional Annual Prison Beds Required	FUNDS REQUIRED			
			Annual Operating Costs	Annual Fixed Capital Outlay Costs	TOTAL Annual Funds	TOTAL Cumulative Funds
2001-2002	127	127	\$1,203,516	\$9,270,000	\$10,473,516	\$10,473,516
2002-2003	360	233	\$4,690,297	\$3,585,153	\$8,275,450	\$18,748,966
2003-2004	497	137	\$8,395,172	\$4,445,039	\$12,840,211	\$31,589,177
2004-2005	664	167	\$11,589,102	\$2,196,963	\$13,786,065	\$45,375,242
2005-2006	745	81	\$14,387,299	\$1,026,565	\$15,413,864	\$60,789,106
Total	745	745	\$40,265,386	\$20,523,720	\$60,789,106	\$60,789,106

III. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

IV. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Involuntary admissions

The provision of the bill relating to involuntary treatment for substance abuse may face a constitutional challenge. The bill permits the court to find a person has lost the power of self-control with respect to substance abuse and is likely to inflict physical harm on himself or others if the person has a prior DUI or BUI conviction, if the person's BAL is 0.20 or greater, if the person has caused death or serious bodily injury, or if the person is on pretrial release for another DUI or BUI offense. In Kansas v. Hendricks, 521 U.S. 346 (1997), the United States Supreme Court approved a Kansas statute authorizing the civil commitment of sexual predators if the person has been charged or convicted of a sexual violent offense and suffers from a mental disorder that makes it likely that the person will engage in such behavior again. The court restated the test in Kansas v. Crane, 2002 WL 75609, at page 2 (US January 22, 2002), noting, "we have consistently upheld such involuntary commitment statutes when (1) the confinement takes place pursuant to proper procedures and evidentiary standards, (2) there is a finding of dangerousness either to one's self or others, and (3) proof of dangerousness is coupled with the proof of some additional factor such as a mental illness or mental abnormality." (internal quotations omitted). In Crane, the court clarified that the mental illness or abnormality must include finding that the individual cannot control his or her behavior. See Crane, 2002 WL 75609 at 2-6. This bill does not specifically require a mental disorder and one could argue that it permits commitment upon a finding that a person has committed a crime and might commit another one. Hendricks warned that "a finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite voluntary civil commitment." Hendricks, 521 U.S. at 358.

Hendricks did not address a situation, like here, where a person has engaged in substance abuse and endangered self and others by driving or operating vehicles or vessels. It could be argued that such behavior constitutes the "lack of control" discussed in Crane. Further, a person committed under chapter 397 is not committed indefinitely. If the court orders assessment and stabilization, the person is released once stabilization is complete and cannot be held longer than 5 days absent court order. ss. 397.6811-397.6822, F.S. If the court orders involuntary treatment, the period cannot exceed 60 days absent a court order. ss. 397.693-397.6977, F.S. Clients can be released from involuntary treatment early if the conditions requiring treatment no longer exist. s. 397.6971, F.S.

Hendricks rejected arguments that civil commitment violated double jeopardy or ex post facto principles. Hendricks, 521 U.S. at 361-370. The proceedings in Hendricks, as here, are civil in nature and not criminal. Id. at 361. Neither the Kansas act nor this one implicates the primary objectives of criminal punishment: retribution and punishment. Id. at 361-362. It can be argued that this bill's purpose is to see if DUI and BUI offenders have a substance abuse problem and provide treatment if necessary.

Required Breath or Blood Testing

The United States Supreme Court has held that requiring someone to submit to breath or blood testing in DUI cases does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures or the Fifth Amendment right against self-incrimination. See Schmerber v. California, 384 U.S. 757 (1966).

B. **RULE-MAKING AUTHORITY:**

None.

C. **OTHER COMMENTS:**

Currently, a person convicted of a third DUI with a blood alcohol level of 0.20 or higher must pay a fine of between \$2,000 and \$5,000. The bill removes the \$5,000 maximum fine. However, section 775.083 provides that the maximum fine for a third degree felony is \$5,000 unless otherwise provided. Thus, even though the maximum fine has been removed, a judge will not have the authority to impose a fine in excess of \$5,000.

V. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Crime Prevention, Corrections & Safety adopted four amendments to the bill and the bill as amended was made a committee substitute. The amendments added the provisions of the committee substitute relating to requiring interlock devices and forfeiture of the motor vehicle after a third DUI conviction which were not contained in the original bill.

VI. SIGNATURES:

COMMITTEE ON CRIME PREVENTION, CORRECTIONS & SAFETY:

Prepared by:

Staff Director:

Trina Kramer

Trina Kramer

AS REVISED BY THE COMMITTEE ON JUDICIAL OVERSIGHT:

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