Defending Boating While Intoxicated Cases

Only two studies have examined the investigation of intoxicated boaters in the marine environment. Just one of these studies examined using seated sobriety exercises on a boat. It is comes as no surprise that both studies were conducted by government agencies with government grant money aimed at coming up with a law enforcement-based solution. The focus of this article is to address these two marine studies, and then examine and explain the seated sobriety exercises and the attendant shortcomings. After explaining and analyzing the findings of these studies, I will discuss defenses in BWI cases.
I. Studies

The first marine study was conducted in 1990 by the United States Coast Guard. Perhaps the main reason this first study was conducted is because, according to the U.S. Coast Guard website, the Coast Guard did not begin to enforce new federal regulations prohibiting operation of a vessel while intoxicated until June 1, 1991.2

A. An Experimental Evaluation of a Field Sobriety Test Battery in the Marine Environment

In 1990, the U.S. Department of Transportation, through the United States Coast Guard, with the assistance of the IACP, set out to determine the usefulness of field sobriety tests in determining if boaters are intoxicated. The study noted that “certain stressors are present in the boating environment which are not present on the highway . . .?” These stressors in boating include heat, spray, boat motion, vibration, and glare, and may cause boaters (whether intoxicated or sober) to perform poorly on field sobriety tests.

This study used the one leg stand, walk and turn, horizontal gaze nystagmus (HGN), finger-to-nose, and finger count exercises. The tracing task was eliminated since papers and pencil tasks were determined to be difficult for all boaters to perform (regardless of alcohol consumption) due to the motion of a boat affected by waves and wakes. The alphabet recital and hand pat test were added to the exercise battery.

Subjects

The test subjects were 97 military men—not women?ages 21 to 40. The mean age was 27. All of the subjects were military personnel, and they were screened for age, amount of boating experience, any susceptibility to seasickness, medical conditions, and drinking history. The presumption is that since most of these subjects were U.S. Coast Guard and other military personnel in a coastal region, they were highly fit and previously passed rigorous water safety fitness tests and had extensive boating experience.

Raters

Only six officers were used in this study. Two officers were from the Maryland Department of Natural Resources, and four marine officers were from the Ohio Department of Watercraft. Five of these officers had nine or more years of experience, and one officer had four years of experience. All officers were classified as having received “extensive training” in field sobriety testing. These six officers were divided into two groups of three officers. Each group of three officers was present when Officer #1 conducted all the exercises, but every officer conducted their own HGN exam.

Boats

The boats were 16-18-foot “Boston Whaler” type patrol boats rented from the U.S. Army. This size boat was selected due to U.S. Coast Guard Statistics in 1986 showing that the majority of fatal accidents occur in boats less than 26 feet long. The test subjects were only given a 90-minute boat ride. This is crucial information, because of the arbitrary 15-minute resting period on land to re-gain “land legs?” was formed based solely on a 90-minute boat ride, which is probably significantly less than a typical BWI client?S own boating experience. Further, these subjects were clearly more experienced in the marine environment, and perhaps in better shape than the majority of clients, making them less susceptible to acquiring “sea legs.” This study is apparently the genesis of the 15-minute waiting period.

Dosing

Alcohol dosing was divided into three groups. Each group was provided a total of four drinks each over a
three-and-a-half-hour period. Three drinks were consumed on land every 40 minutes. The fourth drink was 10 minutes after boarding the boat for the 90-minute boat ride. The drink was 190-proof grain alcohol, mixed with orange, grapefruit, or pineapple juice. Group A was dosed to a 0.12%; Group B was dosed to 0.10%; and Group C was provided four drinks, with only a floater of grain alcohol and was dosed to 0.00%. Subjects were asked to eat only a light breakfast before arriving, yet it was reported that some did not comply.

**Breath Testing**

Breath testing was conducted on land using a Seimens Alcomat, and also on the boat using an Alcometer S-D2 fuel-cell, portable breath testers (PBT). PBT testing was carried out by trained personnel. PBT results were not made known to the six officers. Despite that PBTs are not considered evidentiary breath test results, these particular PBT results were referred to in the study as the actual BAC results.

**Testing Environment**

Testing was done over a 9-day period in May 1987 on the James River in Yorktown, Virginia. The weather was described as relatively mild summer-like weather conditions. None of the subjects were allowed to drive a boat; they were only passengers. The target number of subjects to test was 12 per day, with 2 subjects arriving every hour beginning 7:00 a.m. until noon. All testing was done in daylight hours. These conditions are hardly the environmental conditions and times that accurately reflect most BWI clients' boating experience, who sometimes face much harsher weather conditions and perhaps engage in water sport activities. Importantly, no testing was conducted under adverse conditions such as high winds and disturbed sea state. Subjects were instructed to act as if the situation was an actual encounter with a police officer and as if the person was indeed in danger of arrest. Thus, none of the subjects were under the actual threat, fear, and excitement of being arrested at the time they were tested.

**Testing on the Water**

The officers were instructed to approach subject passengers on the boat and phrase questions in their own words, not from a script. The three officers made observations of the passengers. Officer #1 would do the testing, but the other two officers would do their own HGN. The testing mode consisted of alphabet recital and then hand pat. The officers would write down, based upon what they saw, their estimated BAC. No criteria for instructions, or clues they were looking for, were provided as a basis for the guesses on BAC levels. Next the officers conducted the finger-to-nose and finger-count. Again, officers estimated BAC of the suspects based upon their observations of exercises. And again, no criteria for instructions, or clues they were looking for, were provided as a basis for the guess on the BAC level for each subject. Each officer then conducted an HGN exam and estimated BAC.

The subjects were then transported back to land. Subjects were given 10 minutes to attain land legs, i.e., stabilize balance in order to perform the balance tests to follow. No studies were cited, or other criteria or information provided, to support the belief that the arbitrary selection of 10 minutes was a sufficient amount of time to simulate land legs in a normal boating situation.

**Analysis of Data**

This officer's BAC estimates were found to have been very erratic over the first three days. So BAC estimates for the first three days were selectively excluded. The selective basis for this exclusion was due to one officer having no recent history of arrests. The study cites that he was experienced in the administrative and training aspects of marine law enforcement, but did not have experience in the implementation of OUI arrest procedures in the field. This selective exclusion is not representative of what regular officers would incur out in the field, or in the marine environment. This is a useful tidbit of information for cross examination with an officer with few marine arrests.
The marine environment data compiled was compared to the first two SFST studies in non-marine environments (?Psychophysical Tests for DWI Arrests,? Burns and Moskowitz, 1977, and ?The Development and Field Test of Psychophysical Tests for DWI Arrest,? Tharp, Burns and Moskowitz, 1981). Those two studies showed that the arrest/release decisions were only accurate 76% and 81% of the time. Further, the methodology employed by Burns and Moskowitz in a highway situation is not comparable to the methodology employed by this marine study.

The summary of the data shows that the results indicate that the accuracy of the officers to estimate BAC was significantly improved by the use of the FST battery.10 HGN on the boat contributed to a significant improvement in the estimates of the raters [officers].? However, they oddly concluded that conducting the HGN test on land did not result in significant improvement of overall accuracy.

?Of 97 subjects, the officer correctly classified 21 true arrests (persons with BAC ^ 0.10%) and 59 true releases (persons with BAC , 0.10%).11 The study cites 6 officers made 80 correct classifications out of 97, for an 82% correct decision.

The takeaway from the comparison between the highway and marine studies is that the alphabet, hand pat, finger to nose, and finger count exercises still have no reliability or validity as previously determined by the previous ?studies.? Lastly, the legal limit in 1990 at the time of this study was 0.10, not 0.08.

B.?Validation of Sobriety Tests for the Marine Environment

This second study is another government sponsored and funded product of the Southern California Research Institute entitled Validation of Sobriety Tests for the Marine Environment.12 The study was funded by the U.S. Coast Guard and NASBLA.13 The study was conducted to address lack of state-to-state uniformity in enforcement of BWI and BUI. The study recognizes the difficulties of enforcing BWI. First, it is not illegal to drink while boating. Open containers are legal. Second, there are no speed limits, so excessive speed is not necessarily a clue of impairment. Third, environmental conditions (wind, water choppiness, and glare) can make it difficult to determine a boater’s impairment. Unlike on the roadside, there is no standardized battery used on water. The objective of the study was to develop sobriety tests that could be administered in the seated position, to assist water patrol to detect impairment above .08.14

Site & Timing

The site was Lake of the Ozarks in Central Missouri, particularly Osage Beach location. Data was collected June?September 2009, during the expected busiest boating days of summer: Friday, Saturday, Sunday, and holidays. Shifts for the officers began at noon and lasted roughly 10?12 hours, depending on demand.15

Officers

The four marine officers received four days of intense training by the Southern California Research Institute (SCRI) staff. First day consisted of eight-hour in-class explanation and demonstration of the four seated sobriety tests (HGN, FTN, PP, and HC). Two volunteers (age, weight, health, and sex unknown) were dosed to above 0.08% BAC. Officers performed SFSTs and SCRI staff-provided feedback. Days 2?4 were 10-hour shifts on the water with the sole purpose of becoming proficient. There were also two civilian observers of unknown experience, academic, and professional background.16

Breath Test

These four officers did not use evidentiary certified breath test instruments to verify and confirm their beliefs. Rather, the officers used only an Alco Sensor FST portable breath tester to make an arrest/release decision.17
Procedures

The four marine officers stopped boaters who were suspected of BUI and selected random out-of-flow boats at checkpoints. Thus, officers could already see some degree of impairment to justify the detention, as opposed to random water safety checks that occur in most jurisdictions. Once stopped, boaters were requested to board the patrol boat and sit at the stern. Boaters were asked a few unidentified agency-specific questions, and then HGN, FTN, PP, and HC were conducted. Then the boaters submitted to breath specimens to two different Alco Sensor PBTs. Based on the evidence from the sobriety tests and the breath tests, the officer either released or arrested the boater.18 There is no indication provided in this study of whether the officer made a determination to release or arrest a boater before the breath test was provided!

There were 331 study cases. Of these, 251 cases (76%) were obtained with civilian observers present, with times ranging from 1:59 pm to 6:04 am, and 80 cases (24%) were obtained without observer, with times ranging from 10:20 am to 7:04 am. The observers were staff members of SCRI.19

Results

The test with the highest correlation to BAC was HGN, followed by PP, FTN, and HC.

- HGN: 85% correct prediction of 0.08 BAC or greater
- FTN: 67% (moderate predictor)
- PP: 65% (fair predictors)
- HC: 59% (fair predictors)

Combined HGN and FN equals 75%
Combined HGN, FN, PP equals 72%
Combined HGN, FN, PP, HC equals 68%
Without HGN, best predictor was combination of FN, PP, HC equaling 66%

Subjects were predominately white males 18-80 years old (though no data exists to determine how many people arrested were over 45 years old). BACs ranged .08 to .32. It should be noted that 58% of boaters stopped for probable cause reasons had a BAC at or above .08.

C. Analysis of Marine Studies

These two studies relied upon the 1981 SCRI Study, the 1983 SFST Field Evaluation, the Colorado Study, and the San Diego Study. All of these validation studies specifically excluded the use of finger-to-nose, hand clap, and palm pat exercises. These exercises were determined to be unreliable. They were also unable to validate to any predicted level of BAC in a safe level-highway environment. How can it be that tests determined to be unreliable in the field are now reliable in a marine environment? The data out of this study specifically does not support these seated exercises as reliable or validated. At best, it only concludes what NHTSA previously concluded?HGN is the most reliable indicator of BAC. All of the previous validation studies conclude that the HGN, OLS, and WAT require a level surface. None of the studies that the marine studies rely upon scientifically support any of the marine studies? conclusions. Further, it is required that the OLS and WAT are done on land after a 15-minute waiting period for the subject to get their land legs back. There is no scientific data, or even the smallest amount of anecdotal evidence, to support this arbitrary claim of 15 minutes. No background information exists as to how this arbitrary waiting time was ever derived, except to cite as an accepted standard from the 1990 marine study.

Moreover, there are no stated driving cues for visual detection of boating under the influence or boating while intoxicated cases.
II. The Manual

A. Boating Under the Influence Seated Battery Transition Training Course, Student Manual

The IACP created the seated exercises. These seated exercises later became part of a national curriculum through the National Association of State Boating Law Administrators in their Boating Under the Influence Seated Battery Transition Training Course, Student Manual. This manual is akin to the NHTSA Standardized Field Sobriety Student Manual. This eight-hour training course is provided to water patrol officers over the course of one day.

This manual recognizes the limitations of the standing battery of SFST in the marine environment. Specifically, "when activities (such as boating) disrupt a person’s equilibrium; balance is potentially affected for a period of time following the activity. A common phenomenon occurs, commonly referred to as ‘sea legs,’ where a person feels unsure of their balance on shore, especially after riding in a boat for long periods. The USCG recommends allowing a waiting period onshore for at least 15 minutes before administering the standing SFST battery.? The manual also acknowledges that there is no scientific data to back up the 15-minute waiting period when it stated: "There needs to be additional research performed to thoroughly evaluate and quantify the effects of ‘sea legs’ on a person’s equilibrium."

Prior to administering the seated battery, it is required that the subject ‘must’ be seated? and is ‘properly positioned and stable.? The validation of the seated SFSTs relied upon this assurance, and was an important part of the research.

The Seated Exercises

There are four seated boating exercises: (1) horizontal gaze nystagmus eye exam (HGN); (2) the finger-to-nose exercise (FN); (3) palm pat exercise (PP); (4) and the hand coordination (HC) exercise. All four are akin to a ‘Simon Says’ routine. Failure to follow any of the scripted instructions read by a police officer off a cheat sheet is counted as a clue of intoxication, even if a boater has not consumed alcohol or ingested medication or drugs causing impairment.

Even NASBLA recognized the lack of reliability and validity of seated exercises. ‘Although some of the seated SFSTs are only moderate indicators of impairment individually,’ but then went on to say that ‘the results of the study unmistakably validated the seated battery of SFSTs.? What does this mean? Does 66% accuracy unmistakably prove validation and reliability? Even NHTSA doesn’t think so!

Before administering any of the seated battery exercises, boaters are required to be provided the following instructions before starting any of the seated Battery Standardized Field Sobriety Tests:

- Please sit straight at the front edge of your seat.
- Put your arms down at your sides.
- Place your feet shoulder-width apart so you are comfortable and stable. Are you stable?? (Wait for response.)
- Do not move your feet until the tests are over. Stay in this position and do not do anything else until I tell you to do so.
- Do you understand?? (Get acknowledgement of understanding.)

Horizontal Gaze Nystagmus

Plenty of authoritative articles have been published on defending and excluding horizontal gaze nystagmus. Most notable of these articles is ‘Challenging and Excluding HGN Tests?’ by Troy McKinney, published in The Champion, April 2002, as well as in Drunk Driving Defense, 8th edition, by Lawrence Taylor and
Steven Oberman. There is no reason to rehash all that has been extensively written on HGN except to say that HGN is used by medical professionals to determine if person sustained a head injury, or suffers from a neurological injury. Nystagmus is the involuntary jerking of the eye. It exists in every human being. There are 38 recognized causes of nystagmus other than alcohol and drugs. Officers are trained by other officers to utilize this exercise, and are only taught that two of these causes are alcohol and drugs. Officers are erroneously taught that if the eyes track equally, there is no medical impairment.

The seated SFSTs manual provides key cross-examination gems. First, the HGN test and the times of the passes for standardized administration are specifically identified. Second, the seated SFSTs manual provides the disclaimer that was recently removed from the newest NHTSA manual:

**IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:**

- The tests are administered in the prescribed, standardized manner.
- The standardized clues are used to assess the suspect’s performance.
- The standardized criteria are employed to interpret that performance.

**IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.33**

Below are the exact procedures and clues for each of the three seated sobriety exercises set forth in the NASBLA BUI Seated Battery transition Training Course, Student Manual.

**Finger-to-Nose (FN) Exercise Procedures34**

The procedures for the FN exercise are as follows:

- ?Make a fist with both hands, extend your index fingers and turn your palms forward.? (Demonstrate.)
- ?Remain in this position while I explain the test. Do you understand?? (Wait for response.)
- ?When I say BEGIN, tilt your head back to about a 45-degree angle and close your eyes.? (Demonstrate how the subject is supposed to move the arm up directly in front of the subject and how to properly touch the tip of the nose with the tip of the index finger.)
  NOTE: Show the tip of the index finger as the area immediately below fingernail tip, not the fingerprint pad area or the side of the index finger, and demonstrate touching the tip of the nose (about a dime-sized portion at the very end of the nose).
- ?When I say RIGHT, you must touch your right index finger to your nose; when I say LEFT, you must touch your left index finger to your nose.? 
- ?Do you understand?? (Get acknowledgement of understanding.)
- ?BEGIN.? 
  NOTE: Ensure that the subject tilts the head back and closes the eyes. Do not start to give the commands until the subject is in compliance. If necessary, emphasize to the subject that he must keep the eyes closed until you say to open them.
- ?LEFT, RIGHT, LEFT, RIGHT, LEFT.? (Give the commands in exactly this order.)
  NOTE: Make sure the subject returns the arm to the side immediately after each attempt. Pause two or three seconds between commands to both evaluate a proper return and to allow time for you to document observations.
- ?Open your eyes and straighten your head? (after the sixth attempt).

**Finger-to-Nose (FN) Clues35**

There are a total of 13 clues, during 2 phases of the FN exercise: (1) instruction phase; and (2) performance phase. Nine or more clues ?suggest? that individual is impaired with .08 or higher BAC.
Instruction Stage:

A. Unable to follow instructions? Applies if exercise had to be explained more than twice, or subject did not remain instruction phase.
B. Started at wrong time? Subject began test before being told to begin by tilting head back or closing eyes, or by raising either finger before being told to do so.

Performance Stage:

A. Did not close eyes? Failed to close eyes when told to begin test.
B. Did not tilt head back? Failed to tilt when told to begin; however, if tilted back too much or too little, clue would not be assessed.
C. Opened eyes during test? Opened eyes at all during test.
D. Moved head during test? Moves head backward, forward, or side to side after beginning test. Movement of at least 1 inch is necessary to score clue.

The following require compliance with each attempt

E. Wrong hand? Contacts nose with wrong hand.
F. Wrong finger? Used any finger other than index finger.
G. Hesitated? Starts with one hand then changes to other hand prior to making contact, or when pauses or significantly slows down upon approach to and prior to contact with nose. (No time is provided for pause or significant slows down, leaving subjective interpretation to the officer.)
H. Searched? Any distinct vertical or horizontal movement with finger upon approach to nose. NOTE: Hesitation and searching may both be observed during same attempt.
I. Not fingertip? Touches nose with any part of finger other than area immediately below fingernail tip. Fingerprint pad area of finger is not the fingertip.
J. Missed tip of nose? Fails to touch any part of the finger to tip of nose. Nose is defined as dime-sized portion of the nose furthest away from face.
K. Did not bring hand down? Failed to immediately (if contact is more than one second) bring finger back down to the side after making contact with nose.

Palm Pat (PP) Exercise Procedures

The PP requires one hand extended, palm up, out in front. Other hand is placed on top with palm facing down. Top hand begins to pat bottom hand, rotating 180 degrees alternating between back and palm of hand. Bottom hand remains stationary.

The instructions for the PP exercise are as follows:

- Place your hands palm to palm with one hand up and one hand down, like this. (Demonstrate.)
  NOTE: Start by demonstrating to put one hand out in front with the open palm facing upward. The opposite hand is then placed on top of the first hand with the open palm facing downward with hands/fingers parallel. The demonstration will show that the hand with the palm facing upward is held in a stationary position. The hand on top with the palm facing downward will be the only hand moving.
- Remain in this position while I explain the test. Do you understand? (Wait for response.)
- When I say tell you to begin, turn the top hand over and count out loud one, then turn the hand back over and count out loud two, counting only when your hands make contact, like this. (Demonstrate at least two sets at a moderate pace.)
  NOTE: To begin, the subject will rotate the top hand 180 degrees and pat the back of the top hand to the palm of the bottom hand simultaneously counting out loud, one. The top hand then rotates 180 degrees so the palm of the top hand pats the palm of the bottom hand, simultaneously counting out loud, two. Be sure to exaggerate the palm pat sequence using adequate height between claps.
• ?Repeat this, speed up as you go, and do not stop until told.? 
  NOTE: The process then repeats. The subjects should start at a slower speed then gradually increase the speed un-til a relatively rapid pace is reached.
• ?Make sure to keep your hands and fingers parallel during each pat, like this.? (Demonstrate.)
• ?Do you understand?? (Get acknowledgement of understanding.)
• ?BEGIN.? 
  NOTE: The subject should perform this test for a minimum of 10 seconds but no more than 15 seconds. If the speed has not noticeably increased within 4 or 5 seconds, prompt the subject to increase speed. The goal is to reach a relatively rapid pace.

Palm Pat Exercise Clues

There are a total of 10 clues during the two phases of the PP exercise: (1) instruction phase; and (2) performance phase. Two or more clues suggest that individual is impaired with .08 or higher BAC.

Instruction Stage:

A. Unable to follow instructions? Applies if exercise had to be explained more than twice, or subject did not remain instruction phase.
B. Started at wrong time? Subject began test before being told to begin either by starting on his own at any time or by following along with the officer? s demonstration.

Performance Stage:

A. Did not count as instructed? Counts out loud anything other than ?1, 2, 1, 2, 1, 2,? and so on. ?1? must be said out loud only when the back of the top hand makes contact with the palm of the bottom hand, and ?2? must be said out loud only when the palm of the top hand makes contact with the palm of the bottom hand. If the subject fails to count out loud, check this clue; however, correct him and advise to start counting out loud.
B. Rolled hands? Fails to fully break contact between the two hands when going from one pat to the next, simulating a ?rolling? movement on bottom hand with top hand.
C. Double pat? Conducts two or more of the same pat in a row?e.g., pats the palm of the top hand to the palm of the bottom hand twice in a row.
D. Chopped pat? Hits bottom hand with side of top hand instead of either palm or back of top hand.
E. Other improper pat (document)? Conducts any pat other than what is instructed and cannot be checked above. Be sure to describe in narrative.
F. Did not increase speed? Did not make noticeable increase in speed within any 4 to 5 second period of the test. Correct this and remind him to speed up as he goes.
G. Rotated hands? Fingers no longer run parallel to each other resulting in noticeable and distinct rotation in any pat.
H. Stopped before being told? Subject stops at any time before the command to stop is given.

Hand Coordination (HC) Exercise Procedures

The HC requires a person to perform four tasks with the hands. It is adapted from the Walk-and-Turn SFST performed in the standing position.

The standard instructions for the HC exercise are as follows:

• ?Make fists with both hands. Place your left fist at the center of your chest and your right fist against your left fist, like this.? (Demonstrate.) 
  NOTE: Place your left thumb against the sternum and the thumb side of the right fist against the fleshy side of the left fist.
- ?Remain in this position while I explain the test. Do you understand?? (Wait for response.)
- ?When I say BEGIN, you must perform four tasks.?
- ?The first task is to count out loud from one to four while you move your fists in a step-like fashion, making contact between your fists at each step.? (Demonstrate while counting out loud ?1, 2, 3, 4.)
- ?The second task is to memorize the position of your fists after you have counted to four, clap your hands three times and return your fists to the memorized position.? (Demonstrate.)
  NOTE: No verbalized count is required.
- ?The third task is to move your fists in a step-like fashion in reverse order, counting out loud from five to eight and returning your left fist to your chest.? (Demonstrate while counting out loud ?5, 6, 7, 8.)
- ?The fourth task is to open your hands with palms down and place them in your lap.? (Demonstrate.)
- ?Do you understand?? (Get acknowledgement of understanding.)
- ?BEGIN.?

**Hand Coordination Exercise Clues**

There are a total of 13 clues during the 2 phases of the HC exercise: (1) instruction phase; and (2) performance phase. There are four tasks, with 3 clues in task one; 4 clues in task 2; 4 clues in task 3; and 2 clues in task four. Three or more total clues ?suggest? that individual is impaired with .08 or higher BAC.

**Instruction Stage:**

A. *Unable to follow instructions*?Applies if exercise had to be explained ?more than twice? or subject did not remain instruction phase. Also put when right fist is put to chest instead of left fist when told to put left fist against chest.
B. *Started at wrong time*?Subject began test before being told to begin either by starting on his own at any time or by following along with the officer?s demonstration.

**Performance Stage:**

**Task One: Forward Steps**

A. *Improper count*?Counts anything other than ?1, 2, 3, 4,? while moving fists out away from the chest four times in a step-like fashion. This includes when subject does not count out loud or counts too many or too few steps.
B. *Improper touch*?Drags the fist over one another while moving from one step to another, when the subject does not make end-to-end contact between the two fists or when the subject accidentally makes top to bottom contact between the two fists.
C. *Did not perform*?Skips over and forgets to perform this task.

**Task Two: Hand Clapping**

A. *Improper count*?Does anything but clap three times. Subject does not have to count out loud. This includes too many or too few claps.
B. *Improper touch*?Makes any contact between the hands other than palm-top-palm clapping.
C. *Improper return*?Does not return fists to the memorized position end-to-end with the right fist in front of left. Most common mistake is returning the left fist in front of right.
D. *Did not perform*?Skips over and forgets to perform three hand claps.

**Task Three: Return Steps**

A. *Improper count*?Counts anything other than ?5, 6, 7, 8,? while moving fists toward the chest four times in a step-like fashion. This includes when subject does not count out loud or counts too many or too few steps.
B. *Improper touch*?Drags the fist over one another while moving from one step to another, when the subject does not make end-to-end contact between the two fists or when the subject accidentally makes top to bottom contact between the two fists.

C. *Did not return left fist to chest*?Does not make contact to the chest with the left fist or if the subject brings the right fist to the chest instead of the left fist.

NOTE: Following an improper return on the hand clap, if the subject makes an adjustment to return the left hand to chest along with a proper number of counted steps and proper touch, a clue will not be assessed.

D. *Did not perform*?Skips over and forgets to perform this task.

**Task Four: End Position**

A. *Improper position*?Opens up the fists and places them anywhere other than on the lap. A noticeable attempt to complete this task must be observed?e.g., if the subject opens hands, palms facing down, and then holds them out in the air in front of them, if the subject opens hands, palms facing down, and places the hands beside them in the seat, or if the subject opens hands and then says, ?I can?t remember where to put my hands.?

B. *Did not perform*?Skips over and forgets to perform this task?e.g., if the subject remains with fists closed against the chest and makes no attempt to perform the final task or if the subject takes fists directly to lap or seat with no attempt to open hands up with palms facing down.

NOTE: If subject totally refuses to perform HC, refusal will be noted. Officer will not check all of the ?did not perform? boxes, thus resulting in an indication that four clues were observed.

NOTE: During Task 1 of HC, while moving fists in a step-like fashion out away from the chest, if the subject did not go out away from the chest as much as the officer demonstrated, no clue will be assessed. All the subject must do is place one fist in front of the other in a step-like fashion while counting out loud from 1 to 4. No specific distance from the chest is required.

NOTE: During Tasks 1 and 3 on HC, no clues will be assessed if the subject steps under or around the fist instead of stepping over the fist as demonstrated by the officer.

NOTE: When a clue is observed in any test, it is only counted once, no matter how many times it was observed. The only exception is for those performance clues that require compliance during each attempt during the Finger to Nose test.

### III. Defenses

**A. Limitations of Seated Battery**

The seated battery manual acknowledges that the seated battery may not be appropriate for people with certain disabilities, such as:

1. People with certain arm, shoulder or elbow problems may not be able to perform the tests.
2. People missing a portion of an index finger? or more should not be administered the FTN.

If obvious disabilities are observed that would significantly limit the subject?s ability to perform one or more of the tests, it is best not to administer the tests in question.38

**B. Marine Environment**

The marine environment, as acknowledged in both studies, has ?certain stressors [that] are present in the boating environment which are not present on the highway...?39 The stressors inherent in boating are heat, spray, boat motion, vibration, and glare and may cause boaters (whether intoxicated or sober) to perform poorly on field sobriety tests. These environmental conditions (wind, water choppiness, and glare) can make...
it difficult to determine boaters’ impairment.

The 1990 marine study was not conducted in as harsh of temperatures or general boating conditions that most boaters will endure. The military personnel in that study were only passengers on a boat for 90 minutes. They were young, fit, and ostensibly veteran boaters not susceptible to seasickness or sea legs. Most importantly, they were not under the threat of arrest.

This manual recognizes the limitations of the standing battery of SFST in the marine environment. Specifically, when activities (such as boating) disrupt a person’s equilibrium, balance is potentially affected for a period of time following the activity. A common phenomenon occurs, commonly referred to as sea legs, where a person feels unsure of their balance on shore, especially after riding in a boat for long periods. The USCG recommends allowing a waiting period onshore for at least 15 minutes before administering the standing SFST battery. The manual also acknowledges that there is no scientific data to back up the 15-minute waiting period when it stated: There needs to be additional research performed to thoroughly evaluate and quantify the effects of sea legs on a person’s equilibrium.

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The manual further sets forth that the seated battery must be administered in a reasonably safe and stable environment. It is recommended to administer the seated battery in calmer waters: i.e., backwaters, coves, bays, or stabilized on the shoreline in a location that minimizes significant boat movement.

C. Legal Challenge to Detention

On a roadway stop, an officer can only stop a motorist when reasonable suspicion exists that a law violation has been committed. Moreover, NHTSA has determined that certain driving characteristics are visual cues of an intoxicated driver. In the marine environment, most states allow marine officers to conduct water safety checks without the reasonable suspicion requirement. Specifically in Texas, Tex. Parks & Wild. Code Ann. §31.124 authorizes a certified marine officer to stop and board any vessel only for the purpose of ensuring compliance with the registration and safety requirements.

The Texas Court of Criminal Appeals rejected a constitutional challenge to section 31.124 under the Fourth Amendment so long as the intrusion with the boaters is minimal in scope because the search may only be directed at the safety items listed in the statute. Further, while the boat must carry several safety and registration items, only a brief visual inspection is necessary to determine compliance. See Schenkl v. State, 30 S.W.3d 412, 417 (Tex.Crim.App. 2012)(Meyers, J., concurring opinion).

In Texas, a peace officer or game warden must be a certified marine safety enforcement officer by the department to enforce any provision of Tex. Parks & Wild. Code Ann. §31.121. An officer is only allowed to check a boater for the following:

1. The vessel’s certificate of number. Tex. Parks & Wild. Code Ann. §31.028 (certificate of number shall be carried on board vessel);
2. Identification number and validation decal. Id. at §31.032 (identification number and validation decal shall be painted on or attached to side of vessel near bow);
3. Manufacturer’s identification number. Id. at §31.043 (vessels manufactured in Texas for sale and vessels sold, numbered, or titled in Texas shall carry manufacturer’s hull identification number clearly imprinted on structure of vessel or displayed on plate permanently attached to vessel);
4. Lights. Id. at §31.064;
5. Sound-producing devices. Id. at §31.065;
6. Life preserving devices. Id. at §31.066;
7. Fire extinguishers. Id. at §31.067;
8. Flame arrester or backfire trap on carburetors of gasoline engines, with the exception of outboard motors. Id. at §31.068;
9. Ventilators for bilges of engine and fuel tank compartments, with the exception of open boats. *Id.* at §31.069;
10. Exhaust water manifold or muffler installed on engine. *Id.* at §31.070; and
11. Rearview mirror (in certain circumstances where persons are being towed). *Id.* at §31.071.

Despite Texas and other states allowing random spot checks for water safety inspections, the United States Coast Guard, on their website, specifically acknowledges that they do not con­done or adhere to this practice:

The Coast Guard will not conduct random spot checks, block­ades or checkpoints to detect intoxicated operators, nor will any quota systems be employed. A boarding officer will di­rect a recreational boater to submit to a field sobriety test and/or a breath analyzer test *only* when he has a reasonable suspicion that an operator is intoxicated or when a marine accident has occurred.42

Further, the Arkansas Supreme Court found the state statute authorizing water safety checks?*as it was enforced in this particular case?* did not pass constitutional muster:

Sergeant Tucker testified that, while he tried to stop and perform a safety check on as many vessels as he could in a given day, there was no plan and nothing to determine which boats he stopped. There were no specific, objective facts about Allen?s vessel to indicate that society?s legitimate interests required the seizure of Allen and his particular vessel. As the circuit court found, Allen?s vessel was being legally operated in an unremarkable fashion. Sergeant Tucker testified that he did not believe that he had ?the unfettered discretion to pull over any boat at any time for any reason that [he desired],? but only to perform a safety check. However, this means that whether the stop is proper depends only on the law-enforcement officer?s subjective assertion of his or her purpose when the Fourth Amendment requires objective fact supporting the stop or a plan embodying explicit, neutral limitations. As the circuit court found, the practice of safety-check stops by law-enforcement officers in this case violates the Fourth Amendment.


The Arkansas case is an example of excellent lawyering. Every state has a statute in place allowing suspicionless water safety checks. Do not concede that the stop in your case is legal. Preparation and good cross-examination could potentially obtain the same outcome as in the Arkansas case. Lawyers are encouraged to review their state statutes to determine compliance to ensure that the detention of your client was legally permitted.

D.?Public information Act Requests

Public Information Act requests to determine whether a particular marine officer is a certified marine officer as required by statute is a necessity. In addition, most state marine officers are required to report their water safety check reports to their governing body. These officers are also required to submit BWI offense reports and other arrest paperwork to their governing body for statistical analysis. It is incumbent upon lawyers to also submit public information act requests for all of this information. These reports are a treasure trove of helpful information and can demonstrate a lack of competence, habits and modus operandi of officers, repeated language from report to report, etc. There are also agency violation analysis reports that are helpful to learn more about a particular marine officer.

Lastly, certified marine officers that take the NASBLA BUI seated Battery Transition Training Course take an examination. This examination is forwarded to NSABLA for grading to a key. If NASBLA determines an officer passed the exam, they forward a certificate. A subpoena duces tecum or public in­formation act request should be made to NASBLA for the arresting officer?s exam.
E. Float Camera Audio/Video Recordings

Most water safety patrols utilize some form of electronic audio/visual recording device. It is routine in Texas for game wardens to utilize float cameras affixed to their hats with wireless microphones. These on the boat scene videos are very telling of the observations made by the officers of our clients. These videos generally demonstrate the absurdity and ridiculousness of the seated battery of exercises.

F. Alphabet and Counting Exercises Were Excluded

It is common for water safety patrol to ask our clients to say the alphabet and also count backwards. While these tasks can cause our clients to trip up due to being nervous due to threat of arrests, they have not been determined to be reliable. The truth is, the seated battery is actually even more susceptible to scoring clues due to nervousness and threat of arrest.

G. Seated Exercises Do Not Prove Impairment

The seated exercises do not prove impairment. Rather, the seated exercises when a certain number of clues are exhibited purport to only suggest that a person has a BAC of above .08.43

Rule 401, Texas Rules of Evidence provides: Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Any evidence that the state wants to offer that arises out of the NASBLA methods, procedures, training, and scoring is not relevant to impairment because all that information is only relevant to blood alcohol concentration (BAC). Therefore, the seated exercise BAC evidence does not have any tendency to make the issue of impairment any more or less probable than without evidence. This preclusion of BAC evidence is required by Emerson v. State, 880 SW2d 759 (Tex. Crim. App. 1994) (no quantifying evidence allowed).

Indeed, this no impairment correlation premise is admitted by NHTSA and NASBLA. In the 2000 Student Manual entitled DWI Detection and Standardized Field Sobriety Testing, at section VIII-1, it says, laboratory research indicated that three years ago tests, when administered in a standardized manner, were a highly accurate and reliable battery of tests for distinguishing BACs above 0.10. The manual does not correlate standardized field sobriety test performance to physical or mental impairment.

Moreover, the NHTSA study entitled Development and Field Test of Psychophysical Tests for DWI Arrest? (March 1981), at p. 72, says that the major objectives of this project have been to assess in the field its feasibility and effectiveness when used by the police for estimating BAC...? Additionally, the NHTSA study entitled A Florida Validation Study of the Standardized Field Sobriety Test (S.F.S.T.) Battery? reaffirms the notion that the SFST results are made strictly in terms of BAC? (p. 13). Finally, the NHTSA study entitled A Colorado Validation Study of the Standardized Field Sobriety Test (SFST) Battery? (November 1995) says in pertinent part that this analysis... is defined strictly in terms of the BAC statute and does not speak to the more difficult question of the individual driver?s impairment? (p.3).

Under Rule 402 of Texas Rules of Evidence, the NASBLA seated exercise evidence is not admissible because it is not relevant in an impairment prosecution. Alternatively, under Rule 403, Texas Rules of Evidence, even if it were relevant, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

IV. Summary
The seated battery is as unreliable in the marine environment as NHTSA determined they were in stable and level field environment. The only thing these seated exercises provide is an excuse to justify a further detention to transport a boater to land for further investigation. Defense lawyers need to read these studies and the manual to be prepared to challenge the fallacies of the seated exercises and these so called studies. For BWI manuals and material, follow this link:

[4]https://www.dropbox.com/sh/6ywlywk8wb2et78/AADjXgMrLfVwXXSXb6CaETKHa

Notes

7. Marine Environment Study, p. 16.
10. Marine Environment Study, p. 35.
15. Fiorentino, p. 2.
17. Fiorentino, p. 3.
18. Fiorentino, p. 3.
19. Fiorentino, p. 3.
20. Fiorentino, p. 5.
25. Fiorentino, p. 6.
27. Fiorentino, p. 6.

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Links:
[4] https://www.dropbox.com/sh/6ywlywk8wb2et78/AA DjXgMrLfvWXXSXb6CaETKHa