PUMPHREY LAW
CRIMINAL DEFENSE

COLLEGE AND THE LAW: Understanding Florida Law as It Pertains to College Life

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CHAPTER 1

WHAT TO DO IF YOU GET PULLED OVER

Blue lights flash behind you, indicating you need to pull over. You think, "Oh, crap! What do I do?" After pulling over and coming to a complete stop, ***stay calm, and stay in your vehicle.*** If you can, call to notify someone you are being pulled over (preferably a sober friend or parent who can come to the scene if necessary). You also may record the encounter with a law enforcement officer. Florida law states you may record a law enforcement officer while he/she is performing his/her duty. For everyone's safety, this is recommended. Above all else, remember to be calm, and remain in your vehicle. Answer no questions other than your name, date of birth, address, and place of residence. It is important to note that signing a ticket is not an admission of guilt in Florida.

The officer who approaches will be focused on who and what is in the car, and most importantly, everyone's hands. Keep your hands at all times where the officer can see them. Regardless of the officer's demeanor, remain respectful, polite, and attentive. You will need to show a driver's license, valid registration, and valid proof of insurance. One of the reasons the officer asks for these items is compliance. The officer also may be looking for anything that might indicate another crime. On the compliance side, the officer will run your information to see if there are any summons, **warrants**, or restrictions against you. ***If you have an active warrant against you, it is imperative you call an experienced criminal defense attorney***.

Have your registration, proof of insurance, and your driver's license neatly together (not crumpled in a wad of confusion), and hold them outside the window, awaiting the officer. This shows the officer you are prepared and showing compliance. ***Stay in your vehicle***. Unless you are ordered out of the vehicle, you are safer inside. Remember, there likely are other cars flying by. While Florida's move-over law is a good law, for your safety, remain in the car. Be as respectful as possible, and you'll soon be on your way. A lot of people get pulled over and end up **arrested** in Florida. If you or someone you know are arrested or detained by the police, contact an experienced criminal defense attorney.

CHAPTER 2

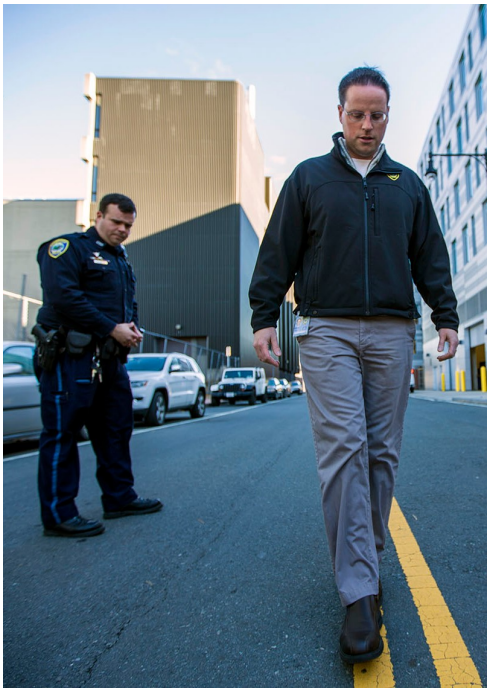
DRIVING UNDER THE INFLUENCE

Criminal penalties for a DUI conviction vary, depending on a number of factors, including prior DUI convictions and the offender's blood alcohol content (BAC). The first DUI conviction is charged as a first -degree misdemeanor, punishable by up to six months in jail and up to $1,000 in fines. A first DUI conviction may include up to 50 hours of community service, up to one year of probation, and mandatory vehicle impoundment. The court, in its discretion, may order an ignition interlock device (IID) installation on an offender's vehicle.

Blood alcohol level or having a minor in the vehicle at the time of the offense may result in increased penalties for a DUI conviction. If a first-time offender has a BAC of 0.15 or higher, the penalties may increase. If a first-time offender is DUI and has a minor in the vehicle, the penalties may increase. In Florida, enhanced penalties for first-time DUI offenders can include up to nine months in jail, mandatory IID installation on all vehicles jointly or individually owned or leased, and up to $2,000 in fines.

Florida law currently does not allow DUI offenses to have adjudication withheld. An adjudication withheld outcome means if an individual has no prior withholds in DUI cases, no prior convictions, and has never sealed or expunged a criminal record, he/she may be eligible to have his/her criminal record sealed.

If a Florida court allows an offender to seal his/her criminal record, several entities must forward copies of the seal order to relevant people or entities (corporation, agency etc.). The arresting agency must provide the seal order to any entity that previously disseminated the criminal record. The court clerk must provide the seal order to the state attorney or statewide prosecutor and any entity that received the criminal record. The Florida Department of Law Enforcement (FDLE) must provide the seal order to the Federal Bureau of Investigation (FBI). The FDLE must maintain the record, but it is protected as confidential, and is exempt from any public disclosure requirements under Fla. Stat. § 943.0585(4) (Florida Statue 943.0585, number 4). Having a record sealed means the record still exists, but no one may view it without a court order. A person who has had a record sealed may deny or fail to report the arrest that was sealed, except in any of the following circumstances:



- The person is seeking a position with a criminal justice agency.
- The person is seeking a license from the Division of Insurance or the Department of Financial Services.
- The person is seeking to be appointed as a guardian.
- The person is seeking a position within an agency that is responsible for the protection of vulnerable people such as children, disabled people, or elderly people.
- The person is a defendant in a criminal prosecution.
- The person is petitioning for an additional expunction or sealing of a criminal record or an offense as a victim of **human trafficking**.
- The person is applying for admission to a state bar such as the Florida Bar.

CHAPTER 3

INTOXILYZER IN FLORIDA: WHAT YOU NEED TO KNOW

The Intoxilyzer is a brand of evidential and preliminary breath alcohol-measuring machine. Florida currently uses the Intoxilyzer 8000, which is the replacement breath-testing machine in Florida – replacing the Intoxilyzer 5000. The attorneys at Pumphrey Law go through rigorous training on the Intoxilyzer (both the Intoxilyzer 5000 and the Intoxilyzer 8000), so we understand the inner workings of the device, how to operate the machine, and where to look for errors – both human and otherwise. All Intoxilyzer 8000s are required to send data to FDLE on a regular basis. Through research, Pumphrey Law tracks the errors involving the Intoxilyzer 8000 so we can see which machines have higher error rates and problems – just like any other manmade machine.

An article by Craig Freudenrich, Ph.D, includes an interesting diagram (©How Stuff Works) of the Intoxilyzer (diagram ©How Stuff Works). The article, along with many others on the internet, correctly explains that the Intoxilyzer machine uses "infrared (IR) spectroscopy, which identifies molecules based on the way they absorb IR light." In 2014, the *Columbus Free Press* released an article by John Lasker titled "The Intoxilyzer 8000, the state's flawed tool in the battle against drunk driving." That article addressed the then-challenge to the Intoxilyzer, specifically the Intoxilyzer 8000 (the same one used in Florida), stating, "Several judges subsequently ruled in the defendant's favor, calling the breathalyzer 'unreliable'."

The Intoxilyzer source code is the software programmed to run the machine. Much like a computer needs an operating system, the Intoxilyzer has software that controls the results your state wants. If you go to Intoxilyzer 8000's information page, you will notice the last sentence on the lead-in statement reads, "The Intoxilyzer 8000 may be programmed to the specific test protocols of a state law enforcement program or customer." ***This means the state can program whatever it wants in the machine.*** To combat this, hire an attorney with immense training and experience in defending against Intoxilyzer cases, and who can give you information to assist you with a positive outcome for your situation.

CHAPTER 4

THE RIGHT TO REMAIN SILENT UNDER THE FLORIDA CONSTITUTION

The last thing you want to do if you are under investigation is incriminate yourself, even if you are innocent. If you are under investigation for committing a crime, seek out the services of a qualified criminal defense attorney before you make a statement or answer any questions. Both the United States Constitution and the Florida Constitution provide important protections against self-incrimination. Let's look at an example of proper use of the right to remain silent (a.k.a. Miranda).

On May 5, 2016, the Florida Supreme Court decided *State v. Horwitz*, SC15-348 (2016). Defendant Donna Horwitz was convicted of first-degree murder with a firearm. During the trial, the state of Florida prosecutors presented evidence of Horwitz's pre-arrest, pre-Miranda silence, and argued the jury should consider this silence as evidence of Horwitz's consciousness of guilt. The issue in the case was whether the prosecutor could introduce evidence of a defendant's pre-arrest, pre-Miranda silence when the defendant does not testify at trial.

The Court of Appeal reversed the decision, and remanded for a new trial. The court concluded that because Horwitz did not testify at trial, the use of her pre-arrest, pre-Miranda silence was improper as a matter of state constitutional law. The Supreme Court approved of the Court of Appeal's decision, concluding the use of Horwitz's silence as substantive evidence of guilt violates the Florida constitutional right against self-incrimination.

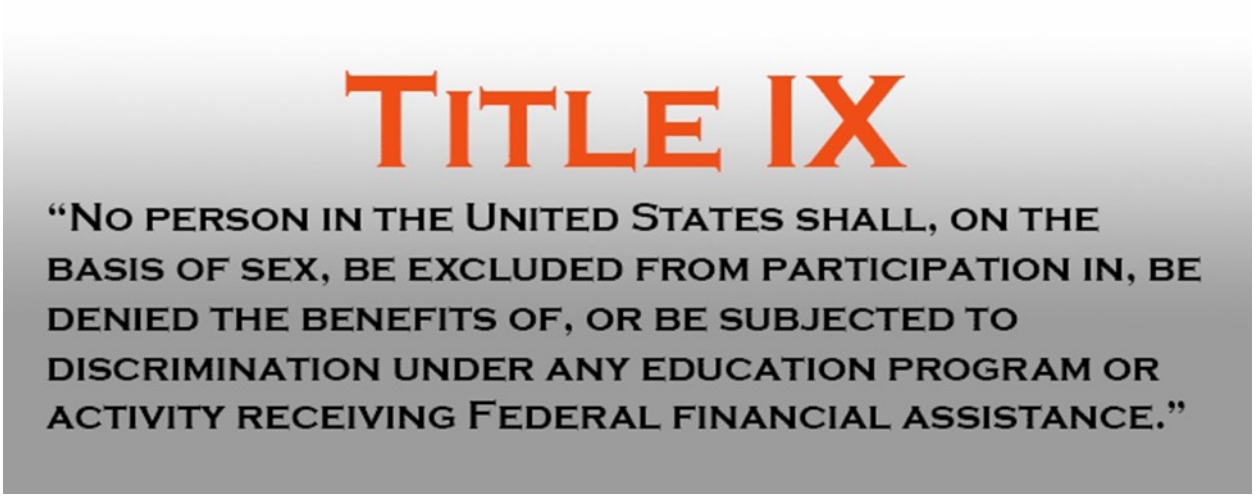
Furthermore, the court found that as a matter of Florida evidentiary law, the prosecutor is precluded from using that silence to argue a defendant's consciousness of guilt. In this case, Horwitz argued the Florida Constitution is more protective of the privilege against self-incrimination than the federal Fifth Amendment. Horwitz concluded that pursuant to Florida Supreme Court precedent, pre-arrest, pre-Miranda silence is only admissible if it is used for impeachment, because it was inconsistent with the trial testimony.

Horwitz exercised her right to remain silent pre-arrest and at trial. The Florida Supreme Court previously stated the privilege against self-incrimination within the Florida Constitution provided more protection than the privilege within the Fifth Amendment of the US Constitution in *State v. Hoggins*, 718 So. 2d 761 (Fla. 1998).

The Florida Supreme Court went on to conclude that "Allowing the defendant's previous silence to be used as substantive evidence of consciousness of guilt would penalize the defendant for exercising that right [to remain silent] at trial." This case is important confirmation of an individual's right to remain silent before and after an arrest.

CHAPTER 5

TITLE IX AND WHY UNIVERSITIES INVESTIGATE SEXUAL ASSAULT



Accusations and Investigations into **sexual assault** are handled by colleges and universities according to Title IX. [1] Title IX mandates require all individuals to receive equal access to higher education, regardless of sex. [2] This requires public institutions to adequately address instances of sexual harassment or assault – to guarantee alleged victims are allowed full access to their education. [3] Generally speaking, Title IX protections are excellent additions to higher education; they protect sports, make sure men and women receive equal funding, and prevent discrimination against either sex. In the context of sexual harassment and assault, they make sure victims can participate in their education without being hindered by wrongdoers.

Universities rapidly have become equipped to assess accusations of sexual harassment and assault, to make sure these protections are in place, and preserve the stream of federal funding. The problem with this arises when there are false accusations. Federal funding can be interrupted when cases of sexual assault go unaddressed, but there is no punishment for overreaction by the school when there was no offense committed. ***If you are accused of sexual assault by your school, the first thing you need to do is get a lawyer.***

The process is required to protect the alleged victim; the goal is not necessarily finding the truth. For that reason, the accused often is presumed to be guilty, and must prove his/her own innocence. [4] Compounding this issue is the addition of a self-regulated process at each institution. Criminal law has a way of naturally spreading – even state-specific laws – and people have general understandings of their rights. Misinformation in the casual spread of criminal procedure is far worse in the world of university Title IX complaints, as each school has a completely different procedure and set of rules. These rules can change every year at the state legislature's or individual school's desire. [5]

If you have been accused by your school of wrongdoing, it may seem similar to a criminal accusation, but it could be more damaging. Expulsion may seem less harsh than incarceration, but for an innocent party presumed guilty in a Title IX investigation, expulsion is a very real possibility, whereas legal punishment is very unlikely. Protect yourself. **Attorneys** regularly handle these cases, and are prepared to protect your rights. If you have been accused or are worried an accusation may arise, many attorneys offer a free consultation.

Citations:

[1] Patsy Mink Equal Opportunity in Education Act, 20 U.S.C. §§ 1681 – 1688.

[2] *Id.* at § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance").

[3] Office of the Assistant Secretary, Dear Colleague Letter (Apr. 4, 2011), **https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html** ("Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities (hereinafter "schools" or "recipients") in meeting these obligations, this letter 1 explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence. 2 Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol.")

[4] Ashe Schow, *What to Do If You're Falsely Accused of Campus Sexual Assault*, Washington Examiner, Feb. 19, 2016, **http://www.washingtonexaminer.com/what-to-do-if-youre-falsely-accused-of-campus-sexual-assault/article/2583661**.

[5] *Id.*

CHAPTER 6

CONSEQUENCES OF USING OR POSSESSING A FAKE ID

You may think being under age 21 and having a fake ID is just a rite of passage. Everyone does it, right? Wrong. In Florida, unauthorized possession of and other unlawful acts in relation to driver's licenses or identification cards can be punishable under **Sections 322.212** and **322.32**, Florida Statutes.

Fake IDs include any identification that has been altered in any way, forged, or unlawfully manufactured. It is illegal to display or have in your possession any canceled, suspended, fictitious, or fraudulently altered driver's license. Many people, instead of creating a false ID, use someone else's legal ID. This is a crime. It is illegal to loan or use someone else's driver's license or identification card to get into age-restricted clubs or bars, or purchase alcohol. In this instance, the younger person may be charged with possession of the license, but the friend who loaned the ID also could be charged. This unlawful use and loaning of a license is a second-degree misdemeanor under Section 322.32, Florida Statutes.

Creating an ID that's completely fake to avoid this charge is not a good idea. It is a third-degree felony under Florida Statutes, 322.212, to knowingly have in your possession a blank, forged, fake, stolen, or counterfeit driver's license or identification. Simply put, it is a third-degree felony to have a fake ID made with your name, photograph, and address, and changing your date of birth – a "fake ID" specific to you. Possession of a false ID, whether you're using it or just carrying it, is a serious crime, with criminal charges that may have a lasting impact on your future.

Does this type of arrest occur on college campuses? Absolutely. If you are trying to get into a bar with a fake ID, typically, the bouncer will just take it from you. However, many times, law enforcement may pull you over for another reason and as they watch you comb through your wallet for your valid ID, they see your fake ID, too. Police officers are not so lenient, because Florida legislature is trying to shut down manufactures of fake IDs. The law is targeted at those who *use* these fake IDs – and those students most likely have no idea they are committing felonies.

A night of drinking is never worth the punishment you could receive. A third-degree felony such as holding a fraudulently created ID may land you up to five years in prison and/or up to a $5,000 fine under Sections 775.082 and 775.083, Florida Statutes.

CHAPTER 7

FLORIDA CRIMINAL HAZING ACCUSATIONS

At many colleges, universities, and post-secondary institutions, hazing is a rite of passage that allows one to cross over into membership to sororities or fraternities. Fraternities and sororities promote camaraderie and philanthropic activity among students and alumni. Although hazing may be tradition for some organizations, hazing incidents may result in criminal charges for those involved. Over the years, fatal sorority and fraternity hazing incidents have gained mass media coverage and attention. Hazing criminal accusations may have very negative consequences on a person's life if he/she is found guilty of committing those acts. Many times, those determined responsible for hazing face criminal charges and disciplinary actions from the school or university for violating the student conduct code. Civil suits also may be filed against organizations and their members, depending on the situation.

Florida Section 1006.63 defines hazing as an action or situation that recklessly or intentionally endangers the mental or physical health or safety of a student for the purposes including, but not limited to, initiation or admission into or affiliation with any organization operating under the sanction of a postsecondary institution. Common forms of hazing may include but are not limited to the following:

- pressuring or coercing the student to violate state or federal laws
- physical and mental manipulation
- pressure to violate the school code of conduct or any school rules
- whipping, beating, drugging, branding
- acts and activities that may lead to one being sleep deprived
- conduct that could result in extreme harassment
- forced consumption of anything

If you have been criminally charged with hazing, it is not a legal defense to say the victim consented to such hazing acts. Many times, individuals want to join sororities and fraternities so badly that they consent to the abuse; however, Florida law does not recognize such consent. If your membership in a sorority or fraternity at FAMU, USF, or a different Florida college or university is at risk due to hazing allegations, or you face criminal or student code of conduct violations in Florida, it is important to contact a law firm as soon as possible.

Penalties for hazing vary from case to case, depending on the severity of the accusations. Some penalties may include but are not limited to the following:

- being charged with a misdemeanor or felony crime depending on the circumstances of each case
- being subject to academic sanctions such as expulsion and suspension, and/or loss of scholarships/financial aid
- being subject to a four-hour hazing education course

If your fraternity, sorority, or an individual member of such an organization is facing criminal charges for hazing, speak with an experienced criminal defense attorney immediately. Do not talk to the police until you have an attorney present. Being charged with hazing in Florida may have serious consequences not only on your record, but on your academic standing and ability to complete your education. Attorneys provide well-guided **criminal defense for college students**. The attorneys at Pumphrey Law have years of experience representing clients at Florida State University in Tallahassee, the University of Florida in Gainesville, the University of South Florida in Tampa, and other Florida schools. It is our primary goal to protect the rights of students facing criminal accusations, throughout the entire process. We understand students may face a lot of pressure from faculty and others to speak about the incident, but it is wise to speak with our **Florida criminal defense attorneys** before saying anything about the alleged hazing incident(s).

CHAPTER 8
RECREATIONAL DRUG USE

Although marijuana legislation in Florida is a controversial issue, recreational use is becoming more acceptable across the country. The health benefits of marijuana are more acknowledged, and more states are getting on board with legalization. As of January 2018, 29 states, including the District of Columbia, have legalized medical marijuana. Eighteen states have decriminalized marijuana, and nine states have legalized marijuana for recreational use.

Marijuana is the most frequently used illegal substance in the United States. Although states throughout the country have amended their laws regarding marijuana, Florida's marijuana laws remain particularly harsh. Charges and convictions can lead to severe punishments, including both criminal punishments and additional indirect consequences.

The increase in marijuana acceptance has resulted in alternate ways of using it. Vaping refers to inhaling the gas released from marijuana after it has been heated. Dabbing, another way to use concentrate, uses a cylinder-like tube to heat and inhale THC (tetrahydrocannabinol) concentrate.

Of course, marijuana is used in baked goods as well as other food. Some **marijuana** users choose to vape, dab, or eat marijuana edibles rather than smoke it, for reasons ranging from health to potency. Individuals choose these methods to reduce the risks of lung diseases or respiratory issues, and for the strength of the THC concentration. What users fail to realize is many states have laws that penalize hash-oil concentrates a lot harsher than they do the green, leafy substance.

Recent methods of marijuana consumption involving higher THC levels raise interesting implications for GC-MS testing for cannabis resin extracts. Gas Chromatography–Mass Spectrometry (GC-MS) is a method for analyzing and identifying various substances in a given test sample. Most counties use the Florida Department of Law Enforcement (FDLE) Crime Lab.

For example, if the police recover a small amount of marijuana concentrate on a piece of wax paper, the weight of the sample is measured in grams, and described as a brown, wax-like substance. Using the GC-MS test, the crime lab returns a report identifying the substances as a cannabis resin extract.

Marijuana is a Schedule I substance. A Schedule I substance describes a drug that has not been approved for medical use and has a high risk of abuse. With respect to marijuana, all cannabis products – except less than 20 grams of marijuana as a green, leafy substance – constitute Schedule I substances.

Penalties for marijuana include a first-degree misdemeanor charge. Possessing marijuana is a first-degree misdemeanor when the person possesses 20 grams or less of marijuana. First-degree misdemeanors are punishable by up to one year in prison and up to $1,000 in fines. Possessing marijuana becomes a third-degree felony when an individual possesses between 20 grams and 25 pounds of marijuana. Possessing any amount of THC concentrate is a felony. A conviction of a third-degree felony is punishable by up to five years in prison and up to $5,000 in fines.

Florida recently legalized medical marijuana. As using marijuana becomes more acceptable, understanding your rights under the new regulations becomes more important. Call Pumphrey Law's experienced marijuana defense attorneys for more information on hash oil, and how the Florida medical marijuana legalization might impact how these crimes are prosecuted.

CHAPTER 9
THE MYTH OF EXPUNGEMENT

Expungement, or sealing of a record, commonly is misunderstood by unknowing students and parents as “the case was dropped, so it’s off my/your record.” The myth of expungement in Florida partly revolves around ideas such as “diversion,” “pre-trial intervention,” “my case was dropped,” “no information,” and any other term or coined phrase that indicates a favorable disposition of an arrest (including a written arrest, also known as an NTA or Notice to Appear).

The reality of expungement (or lack thereof) is harmful when a person buys into the myth and fails to do his/her research, or the attorney fails to inform a defendant (his/her client) that any arrest stays on the record regardless of disposition. For the last 20 years, Pumphrey Law has received hundreds of calls from uninformed college students who call its office after their dream jobs are lost because they are accused of lying on job applications. “No one ever told me. I thought it was off my record.” Wrong.

It’s unfortunate that the separate proceeding of Seal or Expunge (depending on which you qualify for) is so misunderstood. First, there is no such thing as “automatically off my record.” Many (attorneys excluded) in the criminal justice system in Florida, specifically Tallahassee, have no concept that to clear your record, you are required to go through a civil proceeding, and required to get a Certificate of Eligibility from the Florida Department of Law Enforcement in Tallahassee. One then must provide a certified fingerprint card, and after other processing of forms and checklists, a civil petition must be filed with a Circuit Civil Court. After all this, you must receive a court order before something is off your record.

Don’t fall prey to the myth of expungement. Unless you have a court order issued in civil court, ***it’s on your record.***