SUPREME COURT OF FLORIDA

DANTE MARTIN,
Petitioner,

No. SC17-200

Vs.

L.T. Case No. 5D15-284

STATE OF FLORIDA,
Respondent.

On Discretionary Review from a Decision of the
Fifth District Court of Appeal

PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

SUMMARY OF ARGUMENT

The United States Supreme Court's decision in *Johnson v. United States* supports invalidation of section 1006.63 based on the vagueness doctrine. The Supreme Court held that a law, like section 1006.63, violates the Due Process Clause if "the indeterminacy of the wide-ranging inquiry" required by the statute fails to provide defendants fair notice and/or invites arbitrary enforcement. Under *Johnson*, such a law is void for vagueness even if it can be clearly applied to a set of circumstances.

ARGUMENT

I. *Johnson v. United States* supports invalidation of section 1006.63

A. Introduction

The United States Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015) has several implications for this case. The *Johnson* ruling makes clear that a statute requiring an overly indeterminate inquiry violates the vagueness doctrine if fails to provide fair notice or lacks sufficient enforcement standards. *Id.* at 2557-60. Further, *Johnson* clarifies that the "theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp" is not and has not been a legal requirement for invalidation under the Supreme Court's vagueness doctrine jurisprudence. *Id.* at 2560-62.

Section 1006.63 is unconstitutional because it, like the statutory provision deemed void for vagueness in *Johnson*, is "hopeless[ly] indeterminate" and not subject to a sufficiently reliable interpretation that satisfies the constitutional requirements of fair notice and adequate enforcement standards. *Id.* at 2557-59. *Johnson* also supports the invalidation of section 1006.63 because even if the statute could clearly be applied to a hypothetical set of facts, it would still violate the Due Process Clause. *Id.* at 2560-61; U.S. Const. amend. V, XIV; Art. 1, § 9, Fla. Const.

B. *Johnson* holds that the inquiry required under the residual clause failed to comply with the Due Process Clause's requirements

In *Johnson*, the United States Supreme Court invalidated the residual clause of the Armed Career Criminal Act ("ACCA") based on the vagueness doctrine. *Id.* at 2557; 18 U.S.C. § 924(e)(1). *Johnson* held that the residual clause was unconstitutional under the Due Process Clause because it "den[ied] fair notice to defendants and invite[d] arbitrary enforcement." *Johnson*, at 2556-57.

The ACCA imposes a 15-year minimum mandatory sentence in the case of a person that violates the federal 'felon in possession of a firearm' provision and has three previous "violent felony" and/or "serious drug offense" convictions. § 924(e)(1). "Violent felony" is defined under the ACCA as:

> "any crime punishable by imprisonment for a term exceeding one year... that-
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*."

§ 924(e)(2)(B) (emphasis added). *Johnson* invalidated the residual clause, which is the provision stating that an offense which "otherwise involves conduct that

presents a serious potential risk of physical injury to another" is a violent felony for purposes of ACCA enhancement.

Until *Johnson* was issued, the United States Supreme Court's precedent directed district courts to use a framework to decide whether an offense satisfies section 924(e)(1)(i) or (ii). This framework, referred to as the "categorical approach," required district court judges to assess whether a crime qualifies as a violent felony. Concerning the residual clause, district court judges were required "to picture the kind of conduct that the crime involve[d] in 'the ordinary case' and to judge whether that abstraction present[ed] a serious potential risk of physical injury." *Johnson*, at 2557.

In *Johnson*, the court found that two features of the residual clause rendered it unconstitutionally vague. One concerned the need for judges to image an "ordinary case" of a crime. *Id.* at 2557-58. The second step required district court judges to assess how much risk that "ordinary case" had to pose in order to constitute a violent felony. *Id.* at 2558.

Johnson ultimately held that the "indeterminacy of the wide-ranging inquiry required by the residual clause both denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges." *Id.* at 2557. This is because when "combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the

residual clause produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, at 2557 (emphasis added).

The Supreme Court rejected the contention that the residual clause is valid because there are some offenses that clearly satisfy its language. *Id.* at 2560. The *Johnson* ruling noted that the Supreme Court's "*holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, at 2560-61 (emphasis in original). For example, a law prohibiting grocers from charging an "unjust or unreasonable rate" was deemed void for vagueness despite the fact that "charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable." *Johnson*, at 2561 (citation omitted). Similarly, the majority opinion noted that a law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by" was held to be void for vagueness even though "spitting in someone's face would surely be annoying." *Id.* (citation omitted). The *Johnson* Court bluntly noted that the "supposed requirement of vagueness in all applications is not a requirement at all, but a tautology: If we hold a statute to be vague, it is vague in all its applications (and never mind the reality.)" *Id.*

The United States Supreme Court therefore held in *Johnson* that a criminal statute is void for vagueness if it promotes excessive "unpredictability and

arbitrariness," despite being capable of valid application to some set of circumstances. *Id.* at 2557-60. That excessive "unpredictability and arbitrariness" can deny fair notice to the citizens subject to the law and/or authorize or encourage arbitrary enforcement. *Id.* "Invoking so shapeless a provision to condemn someone to prison for 15 years to life," the *Johnson* court further held, "does not comport with the Constitution's guarantee of due process." *Johnson*, at 2560.

C. Section 1006.63 is void for vagueness under *Johnson v. United States*

Johnson stands for the proposition that a criminal statute violates the Due Process Clause if it fails to offer a reliable method of interpretation. *Johnson* therefore supports invalidation of section 1006.63, as the statute under review requires the citizens of the State of Florida and law enforcement to engage in a multi-step analysis rife with ambiguity, unreliability, and uncertainty in order to determine whether specific conduct is prohibited or authorized.

The multi-step framework for interpreting the residual clause bears similarities to the methodology required to ascertain the boundary between criminalized and lawful conduct under section 1006.63. Prior to *Johnson*, district court judges were required to "judicially imagin[e]" an "ordinary case" of a crime, assess the "serious potential risk" of said ordinary case, and then determine whether it falls under the residual clause. This was a highly subjective analysis that rendered the residual clause hopelessly indeterminate. *Johnson*, at 2558.

The language of section 1006.63 presents an even greater level of uncertainty and unreliability than the residual clause, despite that the fact that the statute here is applied to real-world circumstances. Section 1006.63 requires that citizens, police officers, prosecutors, and judges, among other things: (i) ascertain whether a specific act or situation "endangers the mental or physical health or safety of a student" regardless of whether the complainant's consent is obtained or the quantity of physical or mental injury potentially sustained by the victim; (ii) determine the meaning of (a) "customary athletic events," (b) "similar contests" to "customary athletic events," (c) "competitions," and (d) "any activity or conduct that furthers a legal and legitimate objective;" (iii) divine a meaning and definition for the four aforementioned category of protective activities in a manner that does not render any of the language surplusage; and (iv) delineate a boundary between acts of "hazing" and those that are protected in one of the four categories of protected activity. *Initial Brief*, 30-39.

Each step of the analysis required to interpret section 1006.63 presents an impermissibly high degree of arbitrariness and unpredictability. The statute's lack of any discernable limit on the quantity of harm to a student's "mental or physical health or safety" required for an individual to violate the statute necessarily gives rise to an inordinate level of subjectivity. *See Johnson*, at 2558 (the residual clause

is void for vagueness because it "leaves uncertainty about how much risk it takes for a crime to quality as a violent felony.")

Persons of ordinary intelligence cannot reliably determine the meaning of "customary athletic events," "similar contests" to "customary athletic events," "competitions," and "any activity or conduct that furthers a legal and legitimate objective." *Initial Brief*, at 30-39.

It is also not reasonably possible for a person of ordinary intelligence to sufficiently determine whether conduct, such as "exposure to the elements" or "physical activity that could adversely affect the physical health or safety of the student," is permitted under the law. Looking to the actual practices in the State of Florida does not aid the citizen or law enforcement officer in determining whether specific conduct is criminal, as physically brutal and grueling conduct is openly practiced in our society. *State v. Brake*, 796 So. 2d 522, 527-28 (Fla. 2001) ("In order for a criminal statute to withstand a void-for-vagueness challenge, the language of the statute must provide adequate notice of the conduct it prohibits when measured by common understanding and practice.")

Further, the specific definition of "competitions" is impermissibly elusive. There are multiple definitions of "competition," and choosing one over the other could determine whether conduct is lawful or not. *Initial Brief*, at 30-39.

Moreover, according to the district court below and the State, slight alterations in conduct separate legitimate activities from those which can result in prosecution and incarceration. Under the district court's or State's definitions of hazing, had performance times been recorded, if prizes were handed out to individuals who successfully crossed, or if another crossing was simultaneously conducted on a separate bus - then no criminal liability under the statute would attach. In light of this, there is simply "no reliable way to choose between these competing" definitions. *Johnson*, at 2558; *see Initial Brief*, at 30-39.

Johnson also presents another reason why Petitioner's request for relief should be granted – that ruling is the first discernable one from the United States Supreme Court which expressly clarified the tautological rule that statutes which could clearly apply to a specific set of circumstances may nonetheless be void for vagueness due to the "indeterminacy of the wide-ranging inquiry required" by said statute. *See also United States v. Bramer*, 832 F. 3d 908, 909 (8th Cir. 2016) (*Johnson* "clarified that a vague criminal statute is not constitutional merely because there is some conduct that falls within the provision's grasp.") (internal quotations omitted).

The State contended in its *Answer Brief* that a law may be deemed facially void-for-vagueness only if it is "impermissibly vague in all of its applications." *Answer Brief*, at 15-16. *Johnson* makes clear that the United States Supreme

Court's decisional law concerning the vagueness doctrine does not mandate this purported requirement. 2560-61. The *Johnson* clarification was nonetheless reflected in holdings from both the United States Supreme Court and this Court. *See, e.g. Johnson,* at 2561, *citing United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921) *and Coates v. Cincinnati*, 402 U.S. 611 (1971); *Papachristou v. Jacksonville,* 405 U.S. 156, 156 n.1 (1972) (anti-loitering ordinance deemed void for vagueness despite being susceptible of clear application to some factual circumstances); *State v. Wershow*, 343 So. 2d 605, 606-610 (Fla. 1977) (law criminalizing "malpractice in office" held to violate the vagueness doctrine, although some acts clearly constitute "malpractice" by an officeholder); *State v. Winter*, 346 So. 2d 991, 992-94 (Fla. 1977) (law prohibiting negligent treatment of children held to deny fair notice despite the fact that some acts of parental malfeasance would unambiguously violate the statute).

Johnson therefore supports what Petitioner previously contended before this Court in his Initial Brief: the statute under review was both vague as applied to his conduct and is facially void for vagueness.

CONCLUSION

Consistent with the relief requested in his Initial Brief, Mr. Martin requests that (1) his convictions on counts 2, 3, and 4 be vacated because the applicable statute was unconstitutionally applied to him, (2) that his convictions be vacated on counts 2, 3, and 4 because section 1006.63 is facially void for vagueness, (3) that his convictions on counts 2, 3, and 4 be vacated because those judgments cannot stand if this Court severs section 1006.63(5)(a) on overbreadth grounds, and (4) the trial court's denial for his motion for judgment of acquittal on count 1 be reversed, or in the alternative he be granted a new trial on count 1.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service to: the Office of the Attorney General at CrimAppdab@myfloridalegal.com and Kristen Davenport, Assistant Attorney General, at kristen.davenport@myfloridalegal.com; to the Florida Association of Criminal Defense Lawyers, M. Stephen Turner at sturner@broadandcassel.com on this 16th day of January 2018.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the instant brief has been prepared with 14-point Times New Roman type, in compliance with Fla. R. App. P. 9.210(a)(2).

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