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IN THE SUPREME COURT OF FLORIDA

DANTE MARTIN,

Petitioner,

v. CASE NO. SC17-200

STATE OF FLORIDA,

Respondent.

_______________________________/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF FACTS

The State submits the following additions to the Defendant's Statement of Facts:

Lissette Sanchez testified that she was a member of the percussion section of the FAMU band. (T. 578). In her second year with the band she began riding on Bus C, with the other members of the percussion section. (T. 580-81). In the fall of 2011, the Defendant was the bus president. (T. 583). The bus president decides when someone is allowed to participate in crossing Bus C. (T. 587).

Ms. Sanchez testified that before participating in the crossing, she was required to sit on the bus facing forward and was not allowed to look back; when she got on the bus, she had to walk backwards to her seat. (T. 581). She was not allowed to go to sleep on the bus or to listen to music. (T. 581-82). Those rules no longer applied once a person had crossed the bus. (T. 584).

Ms. Sanchez was not required to submit to the crossing, but she felt like she was being left out and breaking tradition by not going through it. (T. 586, 612). She had initially decided not to do the crossing, but the senior members of the percussion section did not like that decision; Ms. Sanchez felt shunned by them and changed her mind. (T. 621-22, 627-30). There was a strong tradition that people in the percussion section did the crossing. (T. 587). Those who had crossed even had their own chant on the field. (T. 617).

Before being allowed to cross, people had to go through a hot seat, which meant sitting on the bus with their heads between their knees while other members hit them. (T. 584). Once the hot seat process was satisfactorily completed, they would be told that they could cross the bus – that is, they could make their way down the aisle of the bus to the back, while being beaten by others as they passed. (T. 585).

Ms. Sanchez asked the Defendant to be allowed to cross on an earlier bus trip to South Carolina, but that request was denied. (T. 587). She received three hot seats on different trips before the Florida Classic in November. (T. 587-89).

After the Classic, Ms. Sanchez waited on the bus, and the Defendant told her what was going to happen and confirmed that she wanted to do it. (T. 593). It was dark and hot on the bus; the lights and air conditioning were off. (T. 618-19). She took off her uniform and was prepped – standing in the aisle and holding on to the luggage rail of the bus while others slapped her, with force, on her back. (T. 594-95).

After the prepping, the Defendant told Sanchez to go through. (T. 596). She then ran as far as she could toward the back of the bus, but was stopped by people in the middle of the aisle, who blocked the way and hit her with open palms and sticks. (T. 597-98). It felt like it took forever for her to get through, and she was hit approximately 100 times. (T. 599). The beating hurt a lot initially, but after the first minute Sanchez did not feel it as

much because “your body goes into shock after so much beating.” (T. 599-600). When she got to the back of the bus, everyone cheered. (T. 600). Ms. Sanchez laid down because she was tired, hurt, and in and out of consciousness; her clothing had been ripped off. (T. 600-02).

Two other people crossed that night as well – Keon Hollis and Robert Champion. (T. 602). Ms. Sanchez did not see them until they reached the back. (T. 603). She testified that Champion looked tired and beaten when he finally got through. (T. 603-04).

Keon Hollis testified that he had been in the band since the summer of 2008, rising to a leadership position as a drum major in 2011. (T. 392-93, 396). Drum majors assist the band staff with the day-to-day operations of the band and make sure the band stays on the same page during performances. (T. 397-99, 402). They are also responsible for addressing any difficulties within the sections they are leading, making sure everyone is doing what they are supposed to be doing and assigning discipline if they fail. (T. 399).

Robert Champion was already a section leader when Hollis joined the band, and they became close when they made the drum major staff together in 2011. (T. 400-01).

Mr. Hollis explained that the percussion section engaged in a ritual on Bus C, where individuals were punched and kicked as they tried to make their way from the front to the back of the bus. (T. 405-06). Mr. Hollis had contemplated going through this ritual

once he made the drum major staff. (T. 407). As a person in a position of authority, he felt that going through the ritual would demonstrate to his peers in the band that he took his position seriously and deserved it. (T. 407-08). People who had crossed were treated with a greater level of respect and admiration than those who had not. (T. 408-09).

Mr. Hollis and Mr. Champion had discussed crossing Bus C a few times; neither particularly wanted to do it, but they understood that it was something that they needed to get out of the way so they could really do their jobs. (T. 409-10). While most of the band members did not cross Bus C, the drum majors did; as far as Mr. Hollis knew, only one drum major ever had not crossed Bus C. (T. 560). No one keeps score in these crossings in any way; there are no points, the crossing is not timed, and the person crossing is not competing against another person and does not win anything. (T. 568-69).

On November 19, 2011, the band made its last road trip of the season, to Orlando for the Florida Classic football game; crossing was only done during road trips. (T. 410). After the game was over, the Defendant asked Mr. Hollis if he was going to cross, and Hollis said he was. (T. 411-12). Mr. Champion told Hollis that he had made up his mind and wanted to do it as well. (T. 414).

When Hollis and Champion arrived at the bus, the Defendant instructed them to sit in a seat and wait for the process to start.

(T. 416). Lissette Sanchez was there to go through the ritual as well. (T. 417).

Once they got on the bus, they were required to keep their heads down; the bus was completely dark, and it was dark outside. (T. 418). There were 15-20 people on the bus. (t. 418).

Mr. Hollis was told get into the hot seat position, with his head between his knees, and others on the bus proceeded to punch and kick him and hit him with drumsticks. (T. 418-20). While this was going on, Ms. Sanchez was crossing the bus. (T. 420-21). Mr. Hollis knew she was done when the Defendant came over and told him to stand up. (T. 421).

The Defendant told Hollis to take off his shirt to receive his preps, standing in the aisle of the bus with his hands on the luggage rail above while people struck him full force with an open hand on the front and back of his body. (T. 422-24). Mr. Hollis was struck 5-10 times; it was painful. (T. 424). The Defendant was one of the people who struck him. (T. 442-43).

The Defendant then told Hollis to start, which meant to try to get to the back of the bus. (T. 424). There were approximately 15 people on the bus between Hollis and the back. (T. 425). He proceeded to try to run through the aisle and push through everyone as best he could, with his head down. (T. 425).

Mr. Hollis is 6'3, 200 pounds. (T. 425). He could not make it through. (T. 425). He tried to run as fast as he could, but he only made it a couple steps before he was stopped by the people

kicking, punching, and hitting him everywhere with sticks and drum mallets. (T. 426). He fell completely to the ground, and he struggled to get back up because people were on his back, continuing to hit and kick him. (T. 428).

Mr. Hollis eventually reached the back of the bus; it felt like it took forever. (T. 427). He was dizzy and nauseous, and he was in pain. (T. 430). Ms. Sanchez was sitting in the back. (T. 430).

Mr. Hollis faced the front of the bus and saw the Defendant instruct Mr. Champion to take off his shirt and stand up; he then saw a lot of commotion as Champion was trying to get through. (T. 431, 558-59). He saw people punching and kicking Champion as he tried to get to the back. (T. 433). Mr. Hollis could hear people hitting Champion, and he heard someone say that they could not let it be easy because they were drum majors. (T. 432). Mr. Hollis had expected the process to be harder because of that position – all season he had been in the face of the band members, pushing them to perform better, so he expected tension to be directed at him. (T. 432).

Mr. Hollis saw Champion fall, and he was picked up and pulled closer to the front so he had to pass through that section of the bus again. (T. 433-34). People continued to hit and kick Champion, as they had Hollis, and Champion eventually made it to the back of the bus. (T. 434). Once he made it, everyone started leaving the bus. (T. 435).

Mr. Champion seemed exhausted. (T. 434-35). Mr. Hollis gave him a beverage. (T. 435). They got up and left, but noticed that Champion was not with them. (T. 435). As soon as he got off the bus, Hollis fell to his knees and started vomiting. (T. 436).

The head drum major, Jonathan Boyce, testified that he would not let Hollis and Champion do the crossing until after the last game of the season, because he did not want them to get hurt and be unable to perform. (T. 640-41). This was not their last year of marching, so they could have done the crossing during the summer or the following season – just not under Boyce's watch. (T. 688).

After the Florida Classic, the Defendant texted Boyce and asked him to let Hollis and Champion know that if they wanted to cross after the game, it would be available. (T. 642).

Mr. Boyce later learned that they were going forward with the crossing, so he went to the bus to help them. (T. 646). When he arrived, he saw Champion half way through the bus, being kicked and hit with hands and objects, by 5-10 people. (T. 651-52). As Champion moved back he would encounter new groups of people who hit and kicked him. (T. 653).

Mr. Boyce and a friend climbed over the seats to get to Champion three quarters of the way to the back, grabbing him by the arms and pulling him away from the crowd to the back of the bus; Champion touched the back and everyone cheered. (T. 654-57, 732-38).

Mr. Champion seemed to be fine, just out of breath. (T. 657). Boyce gave him a beverage and went with the group to leave; realizing Champion was not coming along, Boyce went back to check on him. (T. 657). Champion was panicking, saying that he could not breathe. (T. 658). He then said "oh god" twice and passed out. (T. 658).

Someone called 911, and law enforcement took Champion away in an ambulance. (T. 659). When law enforcement arrived, Champion was cold to the touch, had vomit on his chin, was not breathing, and had no heartbeat. (T. 796). Attempts to resuscitate him were unsuccessful. (T. 823).

The medical examiner testified that Mr. Champion died from a massive hemorrhage into his soft tissue; he lost over half of his blood supply into his tissue and muscle, causing him to go into shock, which led to his death. (T. 836-38). The injuries were the result of blunt trauma, caused by repeated blows – probably 40 or more. (T. 838-41).

In sum, the record reveals that the Defendant initiated the actions that led to the injuries to Ms. Sanchez and Mr. Hollis and the death of Mr. Champion. (T. 411, 412, 416, 417, 421-422, 424, 442, 593, 596-597, 641-642). The Defendant advised that the crossing would occur that night. (T. 411, 412, 641-642). When the three victims arrived at the bus in the dark, the Defendant was the one telling them what to do and in fact participated in the initial

part of the hazing. (T. 416, 417, 421-422, 424, 442, 587, 593, 596-597).

In the trial court, the Defendant filed an amended motion to declare the hazing statute unconstitutional, arguing that the statute was overbroad because of the language in subsection (5) eliminating certain defenses, and that the statute was vague because it failed to define the terms "brutality" and "competition." (R. 271-91). The Defendant noted that the overbreadth problem could be corrected by severing subsection (5) from the statute, but claimed that the vagueness problem could not be cured by the courts. (R. 288-90). This motion was denied, as was the request for reconsideration. (R. 360, 454-55; T. 15).

On appeal, the Fifth District Court of Appeal rejected these arguments as well, finding that the hazing statute was sufficiently definite to give adequate notice of prohibited conduct and that it did not improperly impinge on any First Amendment rights. Martin v. State, 207 So. 3d 310, 314-18 (Fla. 5th DCA 2016).

The Defendant sought review in this Court, arguing that the district court of appeal had expressly declared valid a state statute. Art. V, § 3(b)(3), Fla. Const. This Court granted review.

SUMMARY OF ARGUMENT

ISSUES I & II: The district court of appeal correctly concluded that the hazing statute is not unconstitutionally vague. The statute gives ample notice of prohibited conduct, using ordinary logic and common understanding. The statute defines the term hazing, provides examples of hazing, and provides a list of activities excepted from the definition of hazing.

The adequacy of the statutory terms is especially true as applied to the conduct here – subjecting the victims to repeated blows and kicks as they tried to make their way through a bus.

ISSUE III: The district court of appeal correctly concluded that the hazing statute is not unconstitutionally overbroad. The statute does not implicate any First Amendment rights, and any right of association ends at the point where the conduct becomes criminal – that is, where the defendant recklessly or intentionally endangers the health or safety of the victim.

ISSUE IV: Even assuming that the hazing statute is unconstitutional, the Defendant's manslaughter conviction should stand. His argument to the contrary was not preserved below and should not be considered by this Court. Further, beating and kicking the victim repeatedly to the point of death is not a "lawful act" done with "usual ordinary caution."

ARGUMENT

PETITIONER'S ISSUE I & II

THE DISTRICT COURT OF APPEAL PROPERLY CONCLUDED THAT THE HAZING STATUTE IS NOT UNCONSTITUTIONALLY VAGUE.

As his first two points on appeal, the Defendant contends that the hazing statute is unconstitutionally vague, on its face (Issue II) and as applied to him (Issue I). Neither claim has merit, and the district court of appeal correctly rejected these arguments. Martin, 207 So. 3d at 317-18.

In assessing a statute's constitutionality, this Court is required "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent." State v. Weeks, 202 So. 3d 1, 4 (Fla. 2016) (quotation omitted). Applying that standard here, the lower court's decision should be affirmed.

Florida's Hazing Statute

Florida's hazing statute was enacted in 2002. Ch. 2002-387, § 333, Laws of Fla. In 2005, the statute was amended to include criminal penalties for those who engage in this conduct. Ch. 2005-146, § 3, Laws of Fla.

In this statute, the Legislature has defined hazing in pertinent part as "any action or situation that recklessly or

intentionally endangers the mental or physical health or safety of a student for purposes including, but not limited to, initiation or admission into or affiliation with any organization operating under the sanction of a postsecondary institution." § 1006.63(1), Fla. Stat.

Under the statute, hazing is a third degree felony where, as here, an individual "intentionally or recklessly commits any act of hazing . . . upon another person who is a member of or an applicant to any type of student organization and the hazing results in serious bodily injury or death of such other person." § 1006.63(2), Fla. Stat. Hazing is a first degree misdemeanor when such an action merely "creates a substantial risk of physical injury or death" to another person. § 1006.63(3), Fla. Stat.

The statute provides a non-exclusive list of examples of hazing, which specifically includes "brutality of a physical nature, such as whipping [or] beating." § 1006.63(1), Fla. Stat. Consent of the victim is not a defense, nor is the fact that the conduct was not sanctioned by the organization or required as a condition of membership. § 1006.63(5), Fla. Stat.

Finally, the statute excludes from the definition of hazing "customary athletic events or other similar contests or competitions or any activity or conduct that furthers a legal and legitimate objective." § 1006.63(1), Fla. Stat.

Vagueness

A statute is unconstitutionally vague if it "'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" Bouters v. State, 659 So. 2d 235, 238 (Fla.) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)), cert. denied, 516 U.S. 894 (1995). See also Samples v. Florida Birth-Related Neurological Injury Comp. Ass'n, 114 So. 3d 912, 920 (Fla. 2013) (vagueness doctrine is invoked where statute requires "the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all") (quotation omitted). A court must find an allegedly vague statute to be constitutional "if the application of ordinary logic and common understanding would so permit." State v. Hoyt, 609 So. 2d 744, 747 (Fla. 1st DCA 1992).

Here, the Defendant contends that the hazing statute is vague because it exempts a "competition" from its reach yet fails to define that term. The lack of a specific definition for this common word does not render the statute unconstitutional.

First, it has long been held that the legislature's failure to define a specific statutory term does not render a statute unconstitutional, and in the absence of such a definition courts must give statutory language its plain and ordinary meaning. See, e.g., Green v. State, 604 So. 2d 471, 473 (Fla. 1992); State v. Hagan, 387 So. 2d 943, 945 (Fla. 1980); State v. Campbell, 664 So.

2d 1085, 1087 (Fla. 5th DCA 1995). In evaluating this meaning, it is common to refer to a dictionary. Green, 604 So. 2d at 473; Gardner v. Johnson, 451 So. 2d 477, 478 (Fla. 1984).

This is exactly what the Fifth District Court of Appeal did here, using a standard dictionary definition to define the word competition as "the act or state of trying hard to win or gain something wanted by others" or the "action of seeking to gain what another is seeking to gain at the same time; ... a common struggle for the same object." Martin, 207 So. 3d at 318. This common sense explanation of the meaning of competition belies the Defendant's position that the term is vague.

In support of his argument, the Defendant changes the facts of his case, contending that a competition is not so easily defined when considered in the context of, in this case, a race to the back of two buses, or a crossing wherein time or blows absorbed are tracked and a "winner" declared.

The Missouri Supreme Court addressed, and rejected, a similar argument in finding that its hazing statute was not vague, explaining as follows:

> **It is, of course, virtually impossible for the legislature to employ the English language with sufficient precision to satisfy a mind intent on conjuring up hypothetical circumstances in which commonly understood words seem momentarily ambiguous.** The constitution, however, does not demand that the General Assembly use words that lie beyond the possibility of manipulation. Instead, the constitutional due process demand is met if the words used bear a meaning commonly understood by persons of ordinary intelligence.

State v. Allen, 905 S.W.2d 874, 877 (Mo. 1995) (emphasis added). See also People v. Anderson, 591 N.E.2d 461, 467 (Ill.) ("the English language cannot be expected to be mathematically precise . . . and we will not require the legislature to specify every activity" that could fall under hazing statute), cert. denied, 506 U.S. 866 (1992); People v. Lenti, 253 N.Y.S.2d 9, 13 (N.Y. Co. Ct. 1964) ("it would have been an impossible task if the legislature [had] attempted to define hazing specifically . . . because Fraternal organizations and associations have never suffered for ideas in contriving new forms of hazing.")

The word "competition" easily satisfies the constitutional demand for clarity and notice in criminal statutes, and the Defendant's argument was properly rejected below.

Moreover, that the Defendant was compelled to change the facts in this case to attempt to demonstrate that the statute is vague in itself shows the opposite. It is well-established that a statute may only be deemed facially void-for-vagueness if it is "impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982). In other words, vagueness challenges to statutes "must be examined in light of the facts at hand." United States v. Mazurie, 419 U.S. 544, 545 (1975). If the statute is not vague when considered in light of the facts of the individual's case, then by definition it is not vague in all of its applications. See United States v. Powell, 423 U.S. 87 (1975).

For this reason, a facial challenge to a statute is not allowed where, as here, the statute clearly applies to the conduct of the challenger:

> [A] person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. **If the record demonstrates that the [petitioner] engaged in some conduct clearly proscribed by the plain and ordinary meaning of the statute, then [s]he cannot successfully challenge it for vagueness nor complain of its vagueness as applied to the hypothetical conduct of others.** Thus, in undertaking a vagueness analysis, this Court should examine the complainant's conduct before analyzing other hypothetical applications of the law.

Sieniarecki v. State, 756 So. 2d 68, 74–75 (Fla. 2000) (citations and quotations omitted) (emphasis added).

In this case, the statutory language specifically prohibits "brutality of a physical nature, such as whipping [or] beating." 1006.63(1), Fla. Stat. This is exactly what happened here. The victims were repeatedly beaten, kicked, and struck with objects. As the Missouri Supreme Court noted, "[b]eating is not a word shrouded in mystery or squirming with ambiguity." Allen, 905 S.W.2d 874 at 877.[1]

Further, repeatedly striking someone as they attempt to make their way to the back of the bus is not a competition under any reasonable definition of that word. How does one "win" such a

[1]The Defendant has not reiterated in this Court his argument, made below, that the term "brutality" is vague. Martin, 207 So. 3d at 317.

competition? By surviving? This was, at best, a jury question, and the jury simply did not agree with the Defendant's position.

The record plainly demonstrates that the Defendant engaged in conduct clearly proscribed by the plain and ordinary meaning of the statute, and he therefore cannot challenge it as vague nor complain of its vagueness as applied to the hypothetical conduct of others. The statute is not so imprecise as to require individuals to guess at its meaning, especially when applied to the facts at hand.

The Defendant also complains, for the first time in this Court, about language in the statute regarding the purpose of the hazing – that is, "*including but not limited to*, initiation or admission into or affiliation with any organization operating under the sanction of a postsecondary institution." § 1006.63(1), Fla. Stat. (emphasis added). According to the Defendant, by not limiting the statute to such affiliated activities, the statute allows the State to charge hazing in situations that have no nexus or relationship to a student organization, taking the statute well outside the context of the legislative intent to protect students and rendering it vague.

He also complains, again for the first time on appeal, that "customary athletic events," "other similar contests," and "conduct that furthers a legal and legitimate objective" are impossible to understand, yet essential to the legislative purpose and accordingly cannot be severed.

First, these specific arguments were never made in the district court of appeal or the trial court and accordingly may not be raised now, for the first time, in this Court. See, e.g., Norman v. State, 215 So. 3d 18, 25 n.4 (Fla. 2017); Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005) .

Second, once again the Defendant is attempting to take his argument outside of the facts of his own case. The record reflects that the hazing was conducted by FAMU band members, the victims were FAMU band members, and the crossing had been going on for years at the school, as a traditional way to earn the respect of other band members. The facts of this case fall squarely under the plain statutory language and the legislative intent to protect students.

Further, the Defendant's construction of the statute as allowing prosecution for a hazing that has absolutely nothing to do with a student organization or activity is contrary to the language defining the criminal aspects of the statute, which require that the victim be "a member of or an applicant to" a student organization. § 1006.63(2), (3), Fla. Stat. This argument requires an absurd result not mandated by the statutory language and certainly not applicable here. Cf. Weeks, 202 So. 3d at 8 (where a statute includes both general words and specific examples, general words are construed as applying to same class as those specifically mentioned; "a word is known by the company it keeps") (citation omitted).

Finally, the Defendant never claimed below that crossing a bus while being kicked and beaten is a customary athletic event or other similar contest, or that it furthers some legal and legitimate objective. One would be hard pressed to show that this beating falls under any common understanding of those terms. Again, there is no basis for finding that this statute is unconstitutionally vague.

Other States

The Fifth District Court of Appeal is not alone in finding that Florida's hazing statute is not unconstitutionally vague. See Morton v. State, 988 So. 2d 698, 702-03 (Fla. 1st DCA 2008) (rejecting vagueness challenge to this statute). Indeed, numerous courts around the country have reached the same conclusion as the court below, rejecting vagueness challenges to hazing statutes with language similar to, or more ambiguous than, Florida's statute. See McKenzie v. State, 748 A.2d 67, 74-77 (Md. Ct. Spec. App. 2000); Allen, 905 S.W.2d at 877; Anderson, 591 N.E.2d at 467-68; Lenti, 253 N.Y.S.2d at 12-14. Cf. Carpetta v. Pi Kappa Alpha Fraternity, 718 N.E.2d 1007, 1017-18 (Ohio Ct. Common Pleas 1998) (finding civil hazing statute constitutional as applied to the term "physical harm" but vague as applied to the term "mental harm").

This Court should approve the decision of the district court of appeal and find section 1006.63 constitutional.

ISSUE III

THE DISTRICT COURT OF APPEAL PROPERLY CONCLUDED THAT THE HAZING STATUTE IS NOT UNCONSTITUTIONALLY OVERBROAD.

As his third point in this proceeding, the Defendant contends that the hazing statute is unconstitutional because it is overbroad, making consensual, voluntary conduct a crime and impinging on the First Amendment rights of Floridians.[2] The district court of appeal properly rejected this argument. Martin, 207 So. 3d at 315-16.

As this Court has explained, the overbreadth doctrine applies when a statute criminalizes constitutionally protected activities along with unprotected activities, sweeping too broadly and causing a chilling effect that infringes on fundamental rights. State v. Catalano, 104 So. 3d 1069, 1077 (Fla. 2012). Because this doctrine (unlike vagueness, discussed above) allows a defendant to raise a claim even when his own conduct is not constitutionally protected, the potential for overreach in this context is significant. Accordingly, this doctrine "is strong medicine that must be used sparingly." Id. at 1078.

The overbreadth doctrine applies only if the legislation "is susceptible of application to conduct protected by the First

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[2]As discussed at length in the Amicus Brief filed by Hazingprevention.org, the notion that participation in these activities is in fact wholly voluntary is a fallacy in and of itself.

Amendment." Southeastern Fisheries Ass'n, Inc. v. Dep't of Nat. Res., 453 So. 2d 1351, 1353 (Fla. 1984) (finding that overbreadth argument had no merit because "the possession and use of fish traps are not activities protected by the first amendment.")

Outside this limited First Amendment context, a criminal statute cannot be attacked as overbroad. Norman, 215 So. 3d at 25 n.4 (quoting Schall v. Martin, 467 U.S. 253, 268 n.18 (1984)). The first step in an overbreadth analysis, then, is determining whether the statute substantially restricts First Amendment rights. Catalano, 104 So. 3d at 1078. As the court found below, the Defendant cannot satisfy this test.

The Defendant asserts that the hazing statute fails because it criminalizes actions taken with the consent of the victim, impinging on the individual's right of free association under the First Amendment. According to the Defendant, any group activity that may be physically dangerous is made illegal by this statute, impinging on associational activities that are part of the very fabric of society. Examples he cites include a "Tough Mudder" competition and the "Great Bull Run." These are not the type of "associations" protected by the Constitution.

The United States Supreme Court addressed the freedom of association in detail in its decision in Roberts v. United States Jaycees, 468 U.S. 609 (1984), a case involving the Jaycees' exclusion of women from its regular membership, in violation of the

Minnesota Human Rights Act. The Court explained the scope of the freedom of association as follows:

> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties. . . .
>
> [T]he nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case.
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> * * *
>
> **As a general matter, only relationships with [intimate or familial] sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities — such as a large business enterprise — seems remote from the concerns giving rise to this constitutional protection. Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.**
>
> Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a

> particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.

Id. at 617-18, 620 (emphasis added).

Under this analysis, not every group gathering is protected by the First Amendment. The State submits that a group coming together to engage in an activity such as running through mud and other obstacles, or dodging bulls, is not the type of associational activity that has been deemed to warrant First Amendment protection.

Further, to the extent such activities are in any manner protected by the First Amendment, such protection ends at the point the statute's application begins – that is, at the point where the participants "intentionally or recklessly" endanger the physical or mental health or safety of another person, resulting in serious bodily injury, death, or a substantial risk of injury or death.

The statute does not prohibit these groups from meeting at any time and place they choose, conducting activities as they see fit. It merely prohibits them from intentionally or recklessly hurting each other. See Bouters, 659 So. 2d at 237 ("While the First Amendment confers on each citizen a powerful right to express oneself, it gives the [citizen] no boon to jeopardize the health, safety, and rights of others.") (citation and quotations omitted).

Simply stated, no First Amendment right exists to associate or assemble for the purpose of promoting or conducting criminal acts

or violent acts. Cole v. Arkansas, 338 U.S. 345, 352–54 (1949). As the Court noted in Roberts, "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." 468 U.S. at 628. See also State v. Simpson, 347 So. 2d 414, 416 (Fla.) ("It is no abridgement of free speech or assembly to make criminal an assembly which has as its purpose the breach of the peace."), appeal dismissed, 434 U.S. 961 (1977).

Even if this statute does in some manner impinge on the freedom of association, such freedom is not absolute. Where there is a substantial and legitimate governmental interest requiring interference, the State may appropriately impinge on First Amendment freedoms in a limited fashion – especially where the statute is not intended to control the content or viewpoint of the activity, but is instead "incidentally limiting its unfettered exercise." Konigsberg v. State Bar of Cal., 366 U.S. 36, 50-51 (1961).

This is, at most, what the statute does here – incidentally infringing on associative conduct in order to serve the substantial government interest in protecting individuals from significant harm. The law targets acts that cause harm, not particular First Amendment activities or viewpoints.

Again, the Fifth District Court of Appeal does not stand alone in finding that Florida's hazing statute is not unconstitutionally

overbroad. Numerous courts around the country have reached the same conclusion as the court below, rejecting overbreadth challenges to hazing statutes with language similar to Florida's statute. See McKenzie, 748 A.2d at 71-73, 77-79; Carpetta, 718 N.E.2d at 1013-16; Allen, 905 S.W.2d at 877-78; Anderson, 591 N.E.2d at 466-67.

As the Maryland Court of Special Appeals explained, these hazing statutes do not eviscerate student activities and traditions, but instead provide protection to those individuals as they interact with each other:

> **Fraternities, sororities, clubs, and athletic teams have long enriched student life, and our holding today does nothing to threaten the existence of such groups on Maryland campuses. Group initiations, however, should not entail violence or endanger would-be members.** This State should keep its students safe in situations where peer pressure and the fear of losing face propels initiates to submit to conduct that strays well beyond the boundaries of criminal liability. A series of campus tragedies in Maryland and other states showed that, in 1985 and even today, the student perpetrators of violence have shielded themselves from punishment behind the defense of consent. According to the legislative history, the General Assembly sought to close that loophole. We find that the legislative records, along with our other research, support our view that **Maryland has a compelling interest in preventing violent or dangerous initiation activities on campuses, and that the student groups regulated by this statute lose no significant First Amendment freedoms when it is enforced.**
>
> * * *
>
> We expect that our holdings today will disappoint some alumni recalling their student days through the mists of fond memories. Yet, to believe that beatings, mock kidnappings, forced binge drinking, and similar activities are necessary tests of an initiate's loyalty,

> because “it's always been done that way,” is to engage in Orwellian “groupthink.” Maryland has the power to regulate conduct that threatens public health, safety, morals or general welfare, even if authorities have treated such conduct as grand old traditions and turned a blind eye in the past. Not too many years ago, some law enforcement officials might have considered lynching, date rape, and wife-beating to be grand old traditions as well. A rash of student injuries and deaths has focused public awareness on the abuses associated with campus initiations. The legislature reacted, and we hold that their statutory response survives constitutional scrutiny.

McKenzie, 748 A.2d at 79–80 (emphasis added) (footnotes omitted).

The hazing statute is not overbroad, and the decision of the district court of appeal should be affirmed.

ISSUE IV

THE PETITIONER'S JOA CLAIM WAS NOT PRESERVED AND IS NOT PROPERLY BEFORE THIS COURT.

As his final point, the Defendant contends that if this Court finds that the hazing statute is unconstitutional, it must also find that a judgment of acquittal should have been granted on his manslaughter conviction because the record shows excusable homicide as a matter of law. This argument was not properly preserved for this Court's review.

While the Defendant raised this argument in his motion for judgment of acquittal in the trial court (T. 859-62), he did not raise this as a claim of error on direct appeal to the Fifth District Court of Appeal. This claim was waived by not raising it on direct appeal, and it is not properly before this Court. Norman, 215 So. 3d at 25 n.4.

Further, even if this claim had been preserved, it has no merit. A motion for judgment of acquittal admits not only the facts in evidence, but every reasonable inference from the evidence favorable to the State. See, e.g., Proko v. State, 566 So. 2d 918, 920 (Fla. 5th DCA 1990). The credibility and probative force of conflicting testimony may not be determined on a motion for judgment of acquittal, and such a motion may only be granted where there is *no* view of the evidence which can sustain a conviction. Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974); Hardwick v. State, 630 So. 2d 1212, 1213 (Fla. 5th DCA 1994). Once competent

substantial evidence has been submitted on each element of the offense, the jury is left to decide the credibility of the witnesses. Coday v. State, 946 So. 2d 988, 996 (Fla. 2006), cert. denied, 551 U.S. 1106 (2007). Applying that standard here, the Defendant's manslaughter conviction should be affirmed.

A homicide is excusable "when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent." § 782.03, Fla. Stat. Here, even if the Defendant's conduct could not constitute hazing because of problems with that statute, it still did not constitute excusable homicide as a matter of law. Beating and kicking the victim repeatedly, 40 or more times, to the point that he lost over half of his blood supply into his tissue and muscle, is not a "lawful act" done with "usual ordinary caution."

The motion for judgment of acquittal was properly denied, and the Defendant's manslaughter conviction should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court approve the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief On the Merits has been furnished to Rupak R. Shah, counsel for Petitioner, 2917 West Kennedy Boulevard, Suite 100, Tampa, Florida 33626, by e-service to rshah@escobarlaw.com, this 12th day of October, 2017.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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