SUPREME COURT OF FLORIDA

DANTE MARTIN,
Petitioner,

Vs.

STATE OF FLORIDA,
Respondent.

No. SC17-200

L.T. Case No. 5D15-284

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the Case and Course of Proceedings Below

Dante Martin (hereinafter "Petitioner" or "Mr. Martin") was charged and tried by a jury in Orange County with one count of Manslaughter (§ 782.07, Fla. Stat.), one count of Hazing Resulting in Death (§ 1006.63(2)), and two counts of Hazing (§ 1006.63(3)). [R. 457-59][1]. The charges originated from an incident from November 19, 2011 in which three members of the Florida A&M marching band, called the Marching 100, took part in an activity referred to as "Crossing Bus C." Robert Champion was the victim under counts 1 and 2. Keon Hollis and Lissette Sanchez were the victims of counts 3 and 4, respectively.

Mr. Martin filed a pretrial motion requesting that, among other things: (i) section 1006.63 be declared unconstitutional because it is vague as applied, void for vagueness, and overly broad; [R2. 271-91]; and (ii) expert witnesses (English professors) be allowed to testify at a hearing as to whether as to whether the final sentence of section 1006.63(1) – which states that "[h]azing does not include customary athletic events or other similar contests or competitions or any activity or conduct that furthers a legal and legitimate objective" – renders portions of the

[1] References to the record on appeal will be as [Rx. P], where "x" is the volume number and "P" is the page number. References to the trial transcripts will be as [T. P], where "P" is the page number.

statute vague as applied to the facts. [R3. 386-419; R5. 690-695]. The trial court denied these motions without a hearing. [R2. 360].

Petitioner filed a Motion for Reconsideration in Part and Motion for Hearing in Part wherein he again requested a hearing concerning his constitutional claims. [R3. 386-419]. Petitioner specifically contended that if the lower court "declines to grant [Mr. Martin] [a] full and meaningful evidentiary hearing on these motions, [he] respectfully moves the Court to grant [him] hearing time to proffer the evidence that he would have introduced in support of his motions for purposes of preserving the issues raised by the motions for appeal." [R3. 395]. The trial court also denied this aforementioned Motion for Reconsideration without a hearing. [R7. 1080-82, 1108-09].

Jury selection and the trial were conducted on October 27 through 31, 2014 before Circuit Court Judge Renee A. Roche of the Ninth Judicial Circuit. At the conclusion of the trial, the jury found Petitioner guilty as charged on all four counts.

At the January 9, 2015 sentencing, the trial court found that decedent Robert Champion "was a willing participant in the ritual that led to his death." [R6. 892]. The trial court further found that:

> [a]t trial, various witnesses testified that Mr. Champion decided on his own to "cross Bus C." He was asked by several people if he was sure about his decision and he assured each person that he was sure. Once aboard Bus C, Mr. Champion willingly participated in the rituals

> leading up to the crossing that ultimately led to his death. There was absolutely no evidence that Mr. Champion ever objected to the rituals or that he ever manifested reluctance to participate in them.

[R6. 892]. The trial court found that there was a legal basis for a downward departure from the minimum presumptive scoresheet sentence and sentenced Petitioner to seventy-seven months of imprisonment. [R6. 872-74, 892].

On direct appeal to the Fifth District Court of Appeal, Mr. Martin argued, among other things, that section 1006.63 violates the overbreadth doctrine and that said statute was vague as applied to the facts of the case. *Martin v. State*, 207 So. 3d 310 (Fla. 5th DCA 2016). Regarding the overbreadth claims, the district court held that the statute was valid and lawful. *Id.* at 313-21.

The district court further held that Petitioner lacked standing to raise a void for vagueness challenge. *Id.* at 317. In so ruling, the district court did not distinguish between the standing requirements for a facial vagueness challenge versus a claim regarding statutory vagueness as applied to the facts. *Id.*

Following Mr. Martin's timely request for review based on statutory validity grounds, this Court accepted jurisdiction on June 2, 2017.

2. Statement of Facts

A. Petitioner's pretrial constitutional challenges to Section 1006.63

Before trial, Mr. Martin contended before the circuit court that Section 1006.63 was unconstitutional because (i) it was unconstitutionally applied to him,

(ii) it was void for vagueness, and (iii) it criminalized activities protected by the First Amendment.

Concerning the vagueness as applied challenge – Mr. Martin contended that the last sentence of section 1006.63(1), which contained four categories of protected activities that did not constitute hazing, failed to place a person of ordinary intelligence on notice of what conduct was criminalized and what was lawful. In support of his position, Mr. Martin presented affidavits from two expert witnesses in the English language. The conclusion was the aforementioned last sentence created four categories of protected activities: [1] customary athletic events; [2] contests similar to athletic events; [3] competitions; and [4] any activity or conduct that furthers a legal and legitimate objective.

The first, Professor Beth Rapp Young of the University of Central Florida, stated that from a grammatical, semantical, and stylistic standpoint it is unclear as to what the conduct is encompassed by the last sentence of Section 1006.63 is unclear. [R3. 410-13]. Professor Dianne Donnelly of the University of South Florida stated in her affidavit that said that the meaning of last sentence of the referenced statute is also unclear. [R3. 415-19]. They both concluded that

In the filed motion, Petitioner contended that the statutory defense of a "competition" and the word "brutality" in section 1006.63(1) were unlawfully

vague as applied to the facts of the case. [R2. 278-89]. It was argued that those terms cannot be severed in accordance with the applicable precedent. *Id.*

No hearing was held on the motions.

B. Trial Testimony

Petitioner was a member of the percussion unit of the Marching 100. On November 19, 2011, the band performed at the Florida Classic in Orange County. [T. 416].

After the performance, Petitioner sent Jonathan Boyce, the head drum major, a text message stating "let Keon [Hollis] and Robert [Champion] know that if they wanted to do it, it's available." The text message was in reference to a ritual conducted on "Bus C," the motor coach in which Petitioner and other members of the percussion unit rode. [T. 638, 652].

The ritual involved members of the marching band walking from the front to the back of the motor coach. Some members of the percussion unit would attempt to prohibit or prevent the individual crossing the bus from completing their objective – which was to reach and touch the wall at the back of the bus – by slapping or hitting the crosser. Other members on the bus could aid the crossing member while they attempted to reach the back. [T. 405, 427, 433-34, 598, 651-54, 734-35, 736-37].

Participation in the ritual was voluntary. [T. 530, 612]. here was no evidence presented at trial indicating that any threats, coercion, or other pressure was applied upon any individual to participate in the ritual. The ritual had been practiced for several decades. [T. 529]

After Mr. Champion crossed the bus and was subjected to slaps and hits, he lost consciousness and ultimately died from injuries he sustained. [T. 657-58, 823]. Petitioner was charged with manslaughter and hazing resulting in death resulting in Mr. Champion's death. Mr. Hollis and Ms. Sanchez were the complainants for the two counts of misdemeanor hazing. [T. 467-470].

C. Petitioner's Motion for Judgment of Acquittal

At the close of the State's case, Petitioner moved for the granting of a judgment of acquittal on all four counts. [T. 852-63]. Regarding the hazing counts, Petitioner contended that the State failed to establish a prima facie case that the crossing of the bus was not a "competition" under section 1006.63(1). [T. 852-57]. Given that the last sentence of that statute expressly states that a "competition" is not hazing, it was contended that dismissal of those charges was compelled. *Id.*

Petitioner argued that the State also failed to prove a prima facie case that this was not an excusable homicide under the manslaughter statute. [T. 859-62]. It was contended that because the crossing of the bus was a lawful activity – it was a "competition" under section 1006.63(1) – and the other proof presented, dismissal

of the manslaughter count was required. [T. 859-63]. The trial court denied the motions. [T. 863].

D. Closing arguments

Both the State and the Defense acknowledged to the jury that the hazing statute and their determination with the corresponding charges affected whether a manslaughter conviction could stand.

During summation, defense counsel contended that the conduct from the incident was a "competition" under section 1006.63(1). Petitioner further argued that acts constituting a "competition" are lawful under the statute and that the jury should find, among other things, that the death of Mr. Champion was an excusable homicide. [T. 986-1010].

The State argued, among other things, that consent is not a defense under the hazing statute. [T. 941-42; T. 1011]. The prosecutor further stated, in relation to whether the death was an excusable homicide, that

> The real question is, was it in doing a lawful act by lawful means? And that comes down to the hazing instruction. The question is, was Mr. Martin and his coconspirators acting – committing a lawful act by lawful means? That takes us to the hazing instruction." [T. 946-47].

The State repeatedly argued that the crossing process constituted "hazing." [T. 947-49].

The State, referencing the first sentence of section 1006.63(1) concerning the purposes of the conduct, stated that:

> Let's talk about the purposes. For purposes including, but not limited to, initiation? No. Admission? No. Affiliation? Yes. The purposes of this hazing was for the purpose of affiliation with any organization operating under the sanction of a postsecondary institution. The purposes of the hazing was to get respect, to get acceptance through the Florida A&M Band, Florida A&M being a postsecondary institution. This was hazing. [T7. 949].

The prosecutor claimed, however, that under the first sentence of section 1006.63(1), the purpose underlying an act of "hazing" is irrelevant and not a bar to a conviction. [T. 949]. The State said that "hazing is supposed to cover everything." *Id.*

The prosecutor specifically argued that "this killing is not excusable homicide because it was not a lawful act using lawful means because both the act and the means are prohibited by [section 1006.63]." [T. 951]. He argued to the jury that the evidence showed that Petitioner and the others "came together on that bus for one and only one purpose, to haze; to violate this law. That was their purpose in being there." [T. 953].

The prosecutor acknowledged the operative role of the last sentence of section 1006.63(1). [T. 950]. The State admitted that the hazing statute "applies to every single alleged crime in this particular case." [T. 986-87].

E. Jury Verdict

The jury found Petitioner guilty on all four counts.

SUMMARY OF ARGUMENT

Claim I: The hazing statute is unconstitutionally vague as applied to Petitioner and the facts of this case. The term "competition" lacks precision, failed to (i) place either Petitioner or a person of ordinary intelligence of adequate notice of its meaning, and (ii) enables the government to engage in selective prosecution due to the absence of any explicit standards. Section 1006.63(1) states that "competition[s]" are an excluded and protected category of conduct and cannot constitute hazing. Given the fact that the bus crossing bore sufficient indicia of being a competition, the absence of a sufficiently ascertainable meaning of the word, and other factors in this case, the statute was unconstitutionally applied to Petitioner. His hazing-related convictions and sentences for counts 2, 3, and 4 must be vacated.

Claim II: The hazing statute is void for vagueness its entirety because the voiding of the unconstitutionally vague provisions would increase the law's scope of criminal liability to the citizens of Florida. Multiple portions of the last sentence of section 1006.63(1), which provides four categories of conduct that do not constitute hazing, are vague and should be voided. Given that severability of this aforementioned last sentence is not viable under this Court's precedent, the entire statute must be deemed void for vagueness. His hazing-related convictions and sentences for counts 2, 3, and 4 must be vacated.

Claim III: Sections 1006.63(1) and (5)(a) criminalize protected activity because they hold that consensual, common place conduct bearing First Amendment protections can constitute unlawful hazing. The First Amendment, however, protects the citizenry from such governmental interference. Ultimately, Section 1006.63 proscribes a substantial quantity of protected activity due to the absence of consent being a defense to a hazing prosecution. Given this, section 1006.63(5)(a) must be severed and voided, and Petitioner's hazing-related convictions and sentences on counts 2, 3, and 4 must be vacated.

Claim IV: If any of Petitioner's constitutional claims are granted, then this Court should reverse the trial court's denial of his motion for judgment of acquittal on all counts. Petitioner moved for a judgment of acquittal because, among other things, the State failed to establish a prima facie case that the crossing of a bus was a competition – in other words, a lawful act. A reversal and vacating of Petitioner's hazing-related convictions would compel a reversal of the trial court's denial of the motion for a judgment of acquittal. The State failed to establish a prima facie case that the incident did not constitute excusable homicide. Accordingly, Petitioner's manslaughter conviction and sentence on count 1 should be vacated under these circumstances.

ARGUMENT

I. The due process clause prohibits the prosecution of Petitioner under section 1006.63(1) because the law failed to place him on adequate notice that his conduct was unlawful

A. Standard of Review

A vagueness as applied challenge is a mixed question of fact and law. *Glendale Federal Sav. And Loan Ass'n v. State, Dept. of Ins.*, 485 So. 2d 1321, 1324 (Fla. 1st DCA 1986). When the challenge is vagueness "as-applied," there is a two-part test: (1) does the statute "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and (2) does the statute provide "explicit standards for those who apply [it]." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). If the law interferes with the right of free speech or of association, a more stringent vagueness test applies. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Further, penal statutes must be strictly construed and "shall be strictly construed... most favorably to the accused." Section 775.021(1), Fla. Stat. (2016).

Regarding standing – though a party "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," *Hoffman Estates*, at 495, a vagueness as applied challenge may still be raised and litigated. *Sieniarecki v. State*, 756 So. 2d 68, 74-75 (Fla. 2000).

For this reason, a court should "examine the complainant's conduct before analyzing other hypothetical applications of the law." *Sieniarecki*, at 74-75, quoting *Hoffman Estates*, at 495[2].

B. Argument

The due process clauses of both the Florida Constitution, Article 1, section 2, and the Fifth and Fourteenth Amendments of the United States Constitution mandate that a law should place a person of ordinary intelligence on notice of what conduct is prohibited. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Id.*

The constitutional requirement that a criminal statute provide a person of ordinary intelligence "with some precision [of what] exactly what is prohibited" deters arbitrary and discriminatory enforcement. *Maxwell v. State*, 110 So. 3d 958 (Fla. 4th DCA 2013). This is because "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, at 108-09. For this reason the due process clause requires

[2] The district court held that Petitioner lacked standing to raise a facial vagueness challenge because he violated the plain terms of the statute. *Martin*, 207 So. 3d at 317. The district court did not address Petitioner's vagueness as applied claim, though it was raised in his brief. *See Initial Brief of Appellant*, at 22-24. Petitioner also raised the issue of vagueness as applied before the trial court. [R2. 285-88]; *see also Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002).

that the legislature establish guidelines to govern law enforcement, or else a criminal statute would allow "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

1. An overview of 1006.63(1)

In ascertaining the meaning of section 1006.63 or any other statute, this Court has held that it "must consider the plain language of the statute, give effect to all statutory provisions, and construe related provisions in harmony with one another." *Hechtman v. Nations Title Ins. Of New York*, 840 So. 2d 993 (Fla. 2003).

Section 1006.63(1), Fla. Stat. (2010) states that:

> (1) As used in this section, "hazing" means 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. "Hazing" includes, but is not limited to, pressuring or coercing the student into violating state or federal law, any brutality of a physical nature, such as whipping, beating, branding, exposure to the elements, forced consumption of any food, liquor, drug, or other substance, or other forced physical activity that could adversely affect the physical health or safety of the student, and also includes any activity that would subject the student to extreme mental stress, such as sleep deprivation, forced exclusion from social contact, forced conduct that could result in extreme embarrassment, or other forced activity that could adversely affect the mental health or dignity of the student. Hazing does not include customary athletic events or other similar contests or competitions or any activity or conduct that furthers a legal and legitimate objective.

(2) A person commits hazing, a third degree felony, punishable as provided in s. 775.082 or s.775.083, when he or she intentionally or recklessly commits any act of hazing as defined in subsection (1) 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.

(3) A person commits hazing, a first degree misdemeanor, punishable as provided in s. 775.082 or s. 775.083, when he or she intentionally or recklessly commits any act of hazing as defined in subsection (1) upon another person who is a member of or an applicant to any type of student organization and the hazing creates a substantial risk of physical injury or death to such other person.

(4) As a condition of any sentence imposed pursuant to subsection (2) or subsection (3), the court shall order the defendant to attend and complete a 4-hour hazing education course and may also impose a condition of drug or alcohol probation.

(5) It is not a defense to a charge of hazing that:

(a) The consent of the victim had been obtained;

(b) The conduct or activity that resulted in the death or injury of a person was not part of an official organizational event or was not otherwise sanctioned or approved by the organization; or

(c) The conduct or activity that resulted in death or injury of the person was not done as a condition of membership to an organization.

Section 1006.63(1), which provides a definition of hazing, states in part that "'hazing' means any action or situation that recklessly or intentionally endangers the mental or physical health or safety of a student". (e.s.) Sections 1006.63(2) (felony hazing) and (3) (misdemeanor hazing) both provide that hazing occurs

when, among other things, an individual commits any "act of hazing upon another person who is a member of or an applicant to any type of student organization." (e.s.) The statute is thus violated when any person - irrespective of age, occupation, or location of the act committed - commits an act of "hazing" upon any "member of or applicant to any type of student organization." An alleged act of hazing can therefore be committed on- or off- the campus of a postsecondary institution, and on public or private property.

The statute also presents uncertain limitations on the circumstances under which an individual may be prosecuted for an act of "hazing." Section 1006.63(1) states that "'hazing' means 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." Sections 1006.63(5)(b) and (c), further state that:

> It is not a defense to a charge of hazing that:
>
> [...]
>
> (b) The conduct or activity that resulted in the death or injury of a person was not part of an official organizational event or was not otherwise sanctioned or approved by the organization;
>
> or

> (c) The conduct or activity that resulted in death or injury of the person was not done as a condition of membership to an organization.

As with other portions of the statute, the inclusion of the phrase "purposes including, but not limited to" has no discernable limiting construction. *See United States v. Philip Morris USA Inc.*, 566 F. 3d 1095, 1115 (D.C. Cir. 2009), *citing Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 n.1 (1934) (the phrase "including but not limited to" emphasizes that a non-exhaustive list is contemplated). Further, an individual can violate the statute even if the conduct or activity at issue "was not part of an official organizational event or was not otherwise sanctioned or approved by the organization." § 1006.63(5)(b). These two provisions, when read together, therefore hold that despite the plain language's intent to criminalize acts committed for a specific "purpose," an action without any nexus or relationship to a student organization can still sustain a criminal prosecution under the statute.

In order for the person of ordinary intelligence to be able to distinguish between lawful and unlawful conduct, however, a definition of "hazing" is necessary. *Grayned*, at 108-09. Section 1006.63(1) defines hazing as an "action or situation[3]" that

> includes, but is not limited to, [1] pressuring or coercing the student into violating state or federal law, [2] any brutality of a physical

[3] Though a person cannot be prosecuted for a "situation" – individuals may be prosecuted for acts of omission and/or commission – the legality of this word is not challenged in this appeal.

> nature, such as [2.1] whipping, [2.2] beating, [2.3] branding, [2.4] exposure to the elements, [2.5] forced consumption of any [2.5.1] food, [2.5.2] liquor, [2.5.3] drug, or [2.5.4] other substance, or [3] other forced physical activity that could adversely affect the physical health or safety of the student, and also includes [3.1] any activity that would subject the student to extreme mental stress, such as [3.1.1] sleep deprivation, [3.1.2] forced exclusion from social contact, [3.1.3] forced conduct that could result in extreme embarrassment, or [3.1.4] other forced activity that could adversely affect the mental health or dignity of the student.

(e.s.). The phrase "includes, but is not limited to" emphasizes the non-exhaustive nature of the types of activities that could constitute hazing – excepting for the examples provided in the last sentence of section 1006.63(1). *Philip Morris*, 566 F. 3d at 1115. The use of the phrases "any brutality of a physical nature," "other forced physical activity," and "any activity" also indicate that there are additional, unlisted, "action[s] or situation[s]" that would violate the statute.

Section 1006.63(5), in turn, holds that "it is not a defense to a charge of hazing that [t]he consent of the victim has been obtained." Though section 1006.63(1) includes within the definition of hazing a number of prohibited forced activities, this latter provision makes clear that whether conduct is compelled or voluntary plays no role in determining whether criminal liability may be imposed.

2. Section 1006.63(1) provides four categories of conduct that do not constitute hazing

The last sentence of section 1006.63(1) provides a list of activities that are not considered hazing. A syntactical/grammatical and semantical/definitional

analysis of the sentence "[h]azing does not include customary athletic events or other similar contests or competitions or any activity or conduct that furthers a legal and legitimate objective" *eventually* yields a conclusion that there are four categories of protected conduct under section 1006.63(1). Those categories of protected activities are: [1] customary athletic events; [2] contests similar to athletic events; [3] competitions; and [4] any activity or conduct that furthers a legal and legitimate objective.

The aforementioned analysis is largely dependent on the inclusion of the word "or." The use of the word "or" is a coordinating conjunction that links elements of similar hierarchical weight. For example, in the sentence "A or B or C or D" it is assumed that A, B, C, and D are hierarchically equivalent. There is not any textual indication that the sentence should mean "A or (B or C) or D." The four categories of excluded conduct are, notably, not separated by commas or other punctuation.

Though semantically "contests" and "competitions" are often used as synonyms, there are several reasons why they have distinct meanings. The adjective "similar" is only placed near "contents", meaning that "contest" must be similar to "customary athletic events" to not qualify as hazing. However, because "similar" is not placed next to "competitions," the word "competitions" does not have the same requirement.

Further, "contests or competitions" is not an idiomatic phrase. Idiomatic phrases like "aid and abet" pair synonyms as a matter of custom – but no such practice exists for "contests or competitions". "Contests" and "competitions", for this additional reason, are separate categories of protected activities.

Given the above, a proper statutory construction of the last sentence yields a conclusion that hazing under section 1006.63(1) does not include: [1] customary athletic events; [2] contests similar to athletic events; [3] competitions; and [4] any activity or conduct that furthers a legal and legitimate objective.

3. Each category of non-hazing activities must be given a separate and distinct meaning

A person of ordinary intelligence would be unable to discern the parameters of the four categories of protected conduct in section 1006.63(1). Words and phrases such as "athletic activity," "contests," "competitions," and "activit[ies]" or "conduct" that further a "legal and legitimate objective" are connotative in that they signify or suggest an associative or secondary meaning. Their meanings are vague, generalized, and open to multiple interpretations.

In addition, this Court's precedent requires that, absent impossibility, each and every category of activity within the last sentence of section 1006.63(1) be given some meaningful effect and definition. This is because "it is an elementary principle of statutory construction that significance and effect must be given to

every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Hechtman*, 840 So. 2d at 996 (citation omitted); *see also Florida Police Benevolent Ass'n, Inc. v. Dep't of Agriculture & Consumer Servs.*, 574 So. 2d 120, 122 (1991) (it is a "common-sense rule that all words in a statute should be construed so as to give them some effect, not so as to render them meaningless surplusage. In other words, the courts should not presume that the legislature enacted statutory language with the intent that it have no meaning, unless this is the only possible construction.")

To date, only the district court below has been afforded the opportunity to interpret this aforementioned last sentence. The district court held that various dictionaries define "competition" as "the act or state of trying hard to win or gain something wanted by others" and "the act or action of seeking to gain what another is seeking to gain at the same time; … a common struggle for the same object." *Martin v. State*, 207 So. 3d, at 318 (citing to World Book Dictionary (2009) and Webster's Third International Dictionary (1976), respectively). After determining that these definitions placed Petitioner on sufficient notice of the meaning of "competition", however, the district court ventured no further.

The district court did not define the parameters of the four categories of conduct, address Petitioner's claim that given the facts of his case an ordinary person would be able to determine whether crossing the bus was a "competition",

nor contemplate the fact that the statute does not prohibit all acts which can constitute hazing.

It also warrants noting that had the district court cited to a different dictionary, a definition of "competition" that comports with Petitioner's claim would have been found. Dictionary.com, which is based on the Random House Dictionary, *see Alachua County v. Expedia, Inc.*, 110 So. 3d 941, 948 (Fla. 1st DCA 2013), lists the second definition of "competition" as "a contest for some prize, honor, or advantage[4]." (emphasis added). Although a court may resort to dictionaries to determine the meaning of an undefined statutory term, *Martin*, 207 So. 3d, at 318 (citation omitted), *which* dictionary is utilized can ultimately determine the legal meaning of the word in question. *See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts*, 415 (Thompson/West 2012), *quoting Max Radin, "A Juster Justice, a More Lawful Law,"* in Legal Essays in Tribute to Orrin Kip McMurray 537, 538 (Max Radin & A.M. Kidd eds., 1935) ("When [lawyers and judges] look up a word in a dictionary – and they often do – they are as likely as not to select a poor dictionary.")[5].

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[4] *Dictionary.com Unabridged*. Random House, Inc. [Dictionary.com http://www.dictionary.com/browse/competition] [last accessed August 11, 2017].

[5] The proceedings in this case illustrate this notion. At trial, both defense counsel and the prosecutor endeavored to utilize definitions of the word "competition" from different dictionaries. [T. 856-87, 902].

The due process requirements that a person of ordinary intelligence be given the reasonable opportunity to know what is prohibited under a criminal statute and for the law to present explicit standards for enforcement are not satisfied given the significant difficulties in establishing what is hazing under section 1006.63(1).

4. The statute does not place a person of ordinary intelligence on sufficient notice of which acts constituting hazing are protected activities

Section 1006.63(1) does not criminalize all acts of hazing. The allowance for categories of protected activities makes this clear. The acts constituting hazing are legally authorized - provided they occur as part of one or more of the four categories listed in section 1006.63(1).

Moreover, "common practice and understanding," *Hughes v. State*, 943 So. 2d 176, 187 (Fla. 3d DCA 2006), supports a determination that section 1006.63(1) does not criminalize all acts of hazing committed upon an applicant to or member of student organizations. "[B]rutality of a physical nature" is, for example, part and parcel of many activities that are openly discussed, critiqued, promoted, advertised, and practiced by students and adults throughout the State of Florida. This highly vague statute, however, fails to provide ordinary people with adequate notice of what is proscribed and what is protected under the statute. [R2. 281-85].

For example: in 2011, the students at the University of Florida put together a team to participate in Tough Mudder, a competition so dangerous that participants

were required to sign a "death waiver."[6] Participants would cross through "fire holes" where burns could be sustained during the crossing, dive into pools of ice-cold water, and climb slopes slicked with cooking oil. Participation was not mandatory, nor was it apparently officially sanctioned by the university. Involvement in the dangerous activities was not necessary for membership or promotion in any organization. Records of completion times were not maintained. Lennon, Independent Florida Alligator.

Section 1006.63(1) does not give a person of ordinary intelligence a reasonable opportunity to determine whether participation in the Tough Mudder is an act of hazing or a protected activity. The race is brutal and grueling. Diving into ice-water pools causes substantial pain to the participant. Lennon, Independent Florida Alligator. Exposure to cold air makes humans susceptible to illness and can even cause death. *Gilliam v. Stewart*, 291 So. 2d 593, 596 (Fla. 1974) (Adkins, J., dissenting) (citation omitted). Running up slopes slick with cooking oil – an inherently dangerous act – could easily result in a fall and a head injury or a bone fracture - which in turn could lead to a serious physical injury or death. *Weir v.*

[6] Clare Lennon, *UF team tests endurance, gets dirty at Tough Mudder obstacle course*, The Independent Florida Alligator, December 6, 2011 [http://www.alligator.org/news/online_exclusives/article_9df9b3d2-1fd5-11e1-86dc-0019bb2963f4.html] [last accessed August 10, 2017] ("Lennon, Independent Florida Alligator").

State, 777 So. 2d 1073, 1074 (Fla. 4th DCA 2001) (blunt trauma to the head can cause death).

A person of ordinary intelligence reading the statute would be given the reasonable opportunity to conclude that any individual that encouraged a member of or applicant to a student organization to engage in the Tough Mudder could be prosecuted for placing the student at substantial risk of physical injury under sections 1006.63(1) and (3). The fact that the consent of the participant was obtained would not be a defense to prosecution. § 1006.63(5)(a). That the event occurred away from campus and in a manner and for a purpose utterly detached from any student organization would also not serve as a bar to prosecution under the statute. §§ 1006.63(5)(b), (c).

Further, the person of ordinary intelligence would also not be placed on adequate notice as to whether participation in Tough Mudder is a protected activity under the last sentence of section 1006.63(1). The ordinary person may, looking at a dictionary, conclude that Tough Mudder is not a customary athletic event. This is because "customary" is defined "[a]ccording to custom or usage; founded on, or growing out of, or dependent on, a custom." *Levario v. Ysidro Villareal Labor Agency*, 906 P. 2d 266, 268 (NM Ct. of App. 1995) (citing Black's Law Dictionary (1990)). Laypersons, however, cannot be expected to understand in many situations, using their ordinary level of intelligence, of what is customary. A

thorough investigation of the practice of voluntary participation in highly dangerous and brutal events like Tough Mudder may reveal that there is indeed such a custom in the State of Florida – but a law is vague if determination of the meaning of an operative phrase of a criminal statute requires such a research endeavor. In fact, Tough Mudder was only recently created by a former Harvard Business School student. Lennon, Independent Florida Alligator.

Whether Tough Mudder is a contest similar to an athletic event is also not reasonably apparent from the statute. One participant of Tough Mudder said the event "emphasized teamwork and camaraderie[7]." Lennon, Independent Florida Alligator. The reasonable person may alternatively conclude, however, that unlike in some athletic events, no prize is given, it is not a race, and the event is not timed. *Id.*

According to the State in this case, Tough Mudder would also not count as a "competition." Per the prosecutor during summation:

> What is a competition? What are the features that we think of as part of the competition? One of the things… is you're trying to win something. You know, you're trying to gain a prize or gain something that somebody else is competing for. They're trying to get it, you're trying to get it, but only one can win it. That's a competition. Two people competing for one thing or two groups of people competing for one thing.

[7] Comradeship; good-fellowship. *Dictionary.com Unabridged.* Random House, Inc. [Dictionary.com http://www.dictionary.com/browse/camaraderie] [last accessed August 10, 2017]

> [...]
>
> So if it's a competition, you have to be competing for something. What are they competing for? No one – no one said they were competing for anything.
>
> [...]
>
> What are the other attributes of a competition? Well, usually a competition involves two relatively equal parties or two relatively equal groups.
>
> [...]
>
> Competition implies equality of size. It implies some sort of scoring. It implies something to win.

[T8. 1016-18].

If the prosecutor's statements to the jury in Mr. Martin's trial are an accurate statement of the law, then any and all individuals that encouraged a member of or applicant to a student organization to participate in Tough Mudder would also not find legal protection under the "competition" exclusion.

Perhaps the sole factor that would lead the person of ordinary intelligence to conclude that participation in Tough Mudder is lawful is that thousands of other individuals are *voluntarily* taking part in the event in an open and notorious way. The fact that participants are not being arrested by law enforcement officers *en masse* may lead that hypothetical person to conclude that Tough Mudder is "any activity or conduct that furthers a legal and legitimate objective." The phenomena of individuals not being arrested for allowing, encouraging, or pressuring members

of or applicants to student organizations to participate in Tough Mudder, however, is not attributable to the applicable statute establishing "explicit standards" for enforcement. Rather, it is because numerous law enforcement officers arbitrarily opted to not enforce this criminal statute.

Applicants to and members of student organizations commonly participate in other activities that may or may not be in violation of section 1006.63. Student organizations, for example, routinely produce and host events following completion of the semester final exams. Alcohol and food are frequently available in abundance. Consumption of the beverages and food is voluntary. Excessive consumption – particularly of alcohol – by participants is often encouraged by words (e.g. "c'mon, have another") or by act (e.g. placement an open bottle of beer in front of a third-party with the expectation that it will be ingested).

It is indisputable that excessive alcohol consumption places an individual at substantial risk of "physical injury." The symptoms of a hangover – headaches, gastrointestinal problems, and other physical pain – are well-known, documented, and widely experienced. It is also beyond dispute that alcohol consumption has been the but-for and proximate cause of substantial physical injury and death in countless circumstances.

A person of ordinary intelligence would not be placed on reasonable notice as to whether participation in that post-final exam festivity constitutes an act of

hazing. A mere statement encouraging another attendee to consume alcohol places the encourager in legal jeopardy.

A person of ordinary intelligence could also not look at the words of section 1006.63(1) and find a sufficiently ascertainable boundary between criminal liability and lawful conduct. Given the broad definition of "hazing," the specific reference to alcohol consumption, and the language making clear that consent is not a defense to prosecution, an ordinary person would not be able to sufficiently determine whether the festivity involving food and drink furthered a lawful and legal objective. §§ 1006.63(1), (2), (3), (5)(a).

Another example: application and admission into student organizations – including but not limited to fraternities and sororities – often requires the applicant to perform a series of acts over an extended period of time. This "pledging" process may entail having applicants voluntarily performing acts demonstrating their inferior status to existing members. Those acts may include the performance of cleaning duties like washing bathrooms or the vehicles of members, answering embarrassing questions (including on their sexual history), standing firm while being subjected to verbal critiques of their physical strength or intelligence, and preparing meals for members.

A person of ordinary intelligence would recognize that mental discomfort can lead to physical injury. Mental health issues can manifest itself in physical

changes, like muscle pain, headaches, and sleep disturbances. A person of ordinary intelligence would look at the statute, recognize that the entire pledging process - often designed and intended to make applicants recognize their inferior status to existing members - can create a substantial risk of both mental distress and in turn physical injury. The person of ordinary intelligence would not be able to distinguish between what is lawful and unlawful under the statute. §§ 1006.63(1), (3), (5)(a). Moreover, given the language of the statute this ordinary person would not be able to sufficiently determine whether committing an act upon or uttering words to an applicant of a student organization furthers a legal and legitimate purpose. § 1006.63(1).

In light of the statutory language and the practices throughout our society, the statute does not place a person of ordinary intelligence on reasonable notice of what conduct is proscribed. Further, given the actual activities taking place in the State of Florida, it is clear that law enforcement has arbitrarily opted to refrain from employing this readily available statute to prosecute individuals that commit purported acts of hazing. This too supports a conclusion that the statute is void for vagueness, as it does not establish explicit standards for prosecution.

5. The statute was unconstitutionally applied because it failed to place Petitioner on adequate notice of the proscribed and protected conduct

The plain language of section 1006.63(1) failed to place Mr. Martin on adequate notice that his alleged conduct violated section 1006.63. The language of the statute concerning the four categories of protected activites failed to place him on notice that the crossing on the bus was not a competition.

First, the statute does not prohibit all "brutality of a physical nature." Immediately after listing some of the actions that constitute hazing, the same statue holds that such conduct is fully authorized by the law - provided it is part of a [1] customary athletic event, [2] contest similar to athletic events, [3] competition, or [4] any activity or conduct that furthers a legal and legitimate objective. § 1006.63(1). The statute therefore places the burden on the reader to determine the definitions, characteristics, and parameters of each of the four protected categories of conduct.

Second, the definition, characteristics, and parameters of "competition" cannot be sufficiently ascertained. "Competition" is vague and susceptible to multiple interpretations. For example, the Random House Dictionary defines a "competition" as "a contest for some prize, honor, or advantage[8]." The State

[8] *Dictionary.com Unabridged*. Random House, Inc. [Dictionary.com http://www.dictionary.com/browse/competition] [last accessed August 11, 2017].

presented witness testimony from participants of the crossing that upholding tradition and gaining honor were indeed objectives of the activity.

Alternatively, the district court held in part that a "competition" is the "act or action of seeking to gain what another is seeking to gain at the same time." *Martin*, 207 So. 3d at 318. Under this alternative definition, a competition *necessarily* entails an activity whereby two or more individuals or groups are simultaneously endeavoring to reach the same objective. Under the district court's definition, the conduct that occurred in this case was not protected under the last sentence of section 1006.63(1). However, had there been simultaneous crossings of two volunteers on two separate buses and the bus with the longest (or perhaps shortest) times for completion were given a prize, then the Fifth District's definition would be satisfied.

There is yet another definition of "competition" - the duly elected State Attorney for the Ninth Judicial Circuit who prosecuted the case contended to the jury that a competition "implies some sort of scoring" and "implies something to win." [T8. 1018]. If these are hallmarks of a competition, then no criminal liability would have attached if: someone kept score of the number and types of blows for subsequent comparison; time was measured to determine the crossing time; time was measured and the individuals verbally compared their performances afterwards; time and the number and type of blows are recorded, and years later

people review the records for appreciation and commemoration (e.g. on June 1, 2016, John Doe crossed in 24 seconds, was hit 18 times, 12 of which were from open palm blows to the chest); an award was given to crossers (e.g. a certificate, a pin, or a free beer); a superior award was be provided to those that cross rapidly (e.g. a trophy or a full dinner); etc.

This Court must find that the word "competition" is unconstitutionally vague as applied to these facts, because these aforementioned miniscule alterations to the crossing process cannot be determinative of whether someone committed an act of hazing. If and when minute alterations in conduct separate a criminal act from a lawful one, it strongly indicates that the law in question provides insufficient notice to Florida citizens (and postsecondary students) as to what is banned. The word "competition" is ultimately "so imprecise that it is impossible to tell from the statute's plain language what the Legislature intended to target." *Brown v. State*, 629 So. 2d 841, 843 (Fla. 1994) (holding "public housing facility" as void for vagueness).

Third: if a longstanding dictionary (Dictionary.com, Random House Dictionary) cited by courts in this state, *Alachua County*, 110 So. 3d at 948, three judges of a district court, *Martin*, 207 So. 3d at 318, and an elected State Attorney, [T8. 1018], cannot agree on the definition of "competition," there is no reasonable likelihood that a person of ordinary intelligence could do the same.

Fourth: The statute cannot and did not provide explicit standards of enforcement. This is illustrated by the varying definitions of "competition." Further, the slightest modifications to the crossing process under any of the referenced definitions would render the acts in this case lawful and protected. This Court can and should conclude that if a criminal prosecution is determined by mere record keeping of crossing times, the awarding of a prize, and other trivial factual distinctions, "arbitrary or discriminatory enforcement is likely." *Brown*, at 843.

Fifth: There is a reasonable likelihood a person of ordinary intelligence would concluded that the bus crossing satisfies the definition of competition. Prior to the bus crossing, a volunteer who wished to participate in the competition was required to undergo a series of "hot seats." During this phase, the volunteer was covered with a heavy blanket and was subjected to a series of openhanded slaps. This phase prepared the volunteer for crossing, not dissimilar to how football players or other athletes will subject themselves to physical contact in order to prepare their bodies for the competition.

When crossing, the volunteer endeavored to move from the front of the bus to the back and touch the back door. Other members attempted to prohibit the volunteer from making it to the back. To hinder the volunteer's progress, other participants were allowed to strike the volunteer or otherwise grab the volunteer and attempt to pull him back. Often, other members tried to help the volunteer

move forward and avoid being struck or grabbed by his or her fellow colleagues, making it a team "competition." When the competitor touched the back, he or she was greeted with cheers and accolades.

A person of ordinary intelligence could reasonable conclude that the physically challenging nature of the crossing, the long-standing tradition of making the crossing, the camaraderie associated with the event, and other attendant factors rendered it a "competition."

Given all of the above, the facts and law strongly support a finding that the statute is vague as applied to Petitioner. The statute, and in particular the definition of competition, is unclear and is not reasonably susceptible to definition by Petitioner or any hypothetical ordinary person. Dictionaries, appellate court judges, and prosecutors cannot agree on a definition of "competition." The statute does not provide sufficient standards of enforcement because minute modifications would render the bus crossing a "competition".

C. Conclusion

Given the above, Petitioner requests that this Court vacate the hazing convictions and sentences under Counts 2, 3, and 4.

II. Section 1006.63 is facially vague and must be declared unconstitutional because it fails to apprise individuals of ordinary intelligence of the conduct that is proscribed and it fails to establish explicit standards for enforcement

A. Standard of Review

If after a vagueness as applied challenge is deemed to have merit, a reviewing court may consider the vagueness of the law as applied to the conduct of others. *Sieniarecki*, at 74-75, quoting *Hoffman Estates*, at 495. A decision regarding the constitutionality of a statute is reviewed de novo. *State v. Catalano*, 104 So. 3d 1069, 1075 (Fla. 2012). Concerning facial vagueness challenges, this Court held in *State v. Brake*, 796 So. 2d 522 (Fla. 2001):

> The rules of statutory construction require a court to resolve all doubts of a statute in favor of its validity, when reasonably possible and consistent with constitutional rights. However, any doubt as to a statute's validity that is raised in a vagueness challenge should be resolved in favor of the citizen and against the state.
>
> 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. The language of a statute must provide a definite warning of what conduct is required or prohibited, measured by common understanding and practice.
>
> Additionally, the statute must define the offense in a manner that does not encourage arbitrary and discriminatory enforcement. A statute may be worded so loosely that it leads to arbitrary and selective enforcement by vesting undue discretion as to its score in those who prosecute.

Id. at 527-28 (citations and quotations omitted).

B. Argument

The applicable portions of section 1006.63 fail to (i) provide adequate notice of the proscribed and lawful conduct and to (ii) establish sufficiently explicit standards for enforcement. These failures render the entire statute void for vagueness.

The language of section 1006.63(1) both prohibits "acts of hazing" in certain contexts, but simultaneously fully authorizes the same underlying conduct in the last sentence. The aforementioned act is not a crime under section 1006.63(1) if it was part of a: [1] customary athletic event; [2] contest similar to athletic events; [3] competition; or [4] any activity or conduct that furthers a legal and legitimate objective. The purpose, location, context, and other attendant circumstances underlying and surrounding the act therefore determine whether an individual did or did not violate this criminal statute. The nature and characteristics of each of the four categories must therefore be ascertained with sufficient particularity.

Starting with "customary athletic activity" – whether an act or practice is "customary" depends on whether it is "usual" or "habitual"[9]. Football and baseball, for example, are athletic competitions that have been repeatedly and frequently

[9] "customary". *Dictionary.com Unabridged*. Random House, Inc. [Dictionary.com http://www.dictionary.com/browse/customary] [last accessed August 10, 2017]

played for continuous decades. The statute's protection of "customary athletic activit[ies]" is, however, limited to such long-standing activities. Possible "athletic activit[ies]" that have recently been developed – perhaps Mixed Martial Arts ("MMA") – may not be protected.

"Similar contests" is unlawfully vague. While some precision can be given to the phrase "customary athletic events," the same cannot be said for "similar contents" to "customary athletic events." In order to determine the meaning of "similar," the *degree* to which the "contest" is identical must be ascertained. Using MMA as an example, one could argue that this relatively new phenomena is "similar" to boxing, which is a "customary athletic event." Yet, MMA allows individuals to kick, wrestle on the floor with, use martial arts of various types against, and inflict blows upon the opponent in a manner that is prohibited under boxing.

If someone in the State of Florida battles an applicant to or member of a student organization in an MMA match (which clearly presents a substantial risk of physical injury and possible death), the question of whether MMA is a "similar contest" to an established "customary athletic event" will be answered by a government agent. An investigating police officer may decide that because both MMA and boxing involves two individuals engaged in physical battle in a ring with a supervising referee, they are indeed "similar contents." A prosecutor,

however, may decide that given the stark disparity in the types of physical blows that can be inflicted in MMA contests, it is not similar to boxing. The lack of a definition for this phrase renders it vague and presents the real possibility of arbitrary prosecutions.

Further, "similar contests" to "customary athletic activities" must be defined in a manner so as to give it a separate meaning and significance from "athletic events" and "competitions." This cannot be sufficiently accomplished.

As noted above, "competition" is a vague and imprecise phrase that poses a significant risk of arbitrary prosecutions. The phrase is not defined within the statute. The dictionary definitions of the word greatly vary. Minor modifications to an activity, even one where there is a substantial risk of physical injury, can transform a criminal act into a "competition."

The fourth category of protected activity - "any activity or conduct that furthers a legal and legitimate objective" - is tautological. It is self-evident that any activity or conduct that furthers a legal and legitimate objective is, in fact, legal. Such a phrase is patently vague. *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972) (the phrase "without any lawful purpose or object" is vague).

The vagueness of "similar contests," "competition" and "any activity or conduct that furthers a legal and legitimate objective" individually and cumulatively render the statute void. Here, the last sentence of section 1006.63(1)

clearly reflects the Legislative intent to protect certain activities. Rendering one or more of the categories as void would expand the scope of the criminal liability imposed by the law. Similarly, the legislative purpose expressed in the remaining provisions could not be accomplished independently from the severed words and phrases. Severability is therefore precluded under this Court's precedent. *Waldrup v. Dugger*, 562 So. 2d 687, 693 (Fla. 1990).

Given the above, this Court should declare section 1006.63 void for vagueness. After the vague portions of the law are voided, the remainder must be struck down as well.

C. Conclusion

Petitioner requests that this Court vacate the hazing convictions and sentences under Counts 2, 3, and 4.

III. Section 1006.63(1) and (5)(a) criminalize constitutionally protected conduct and speech

A. Standard of Review

A decision regarding the constitutionality of a statute is reviewed de novo. *Catalano*, 104 So. 3d at 1075 (Fla. 2012). A statute is overbroad on its face when it affects a substantial amount of constitutionally protected conduct. *Hoffman Estates*, 445 U.S. at 494.

B. Argument

Section 1006.63(5)(a), which holds that consent of the victim is not a defense to a charge of hazing, results in the criminalization of a wide array and of protected conduct.

Courts may invalidate laws that encroach on the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 412 U.S. 601, 615 (1973). "Hypothetical consequences are considered in the case of allegedly overbroad statutes precisely because this is the only way to give effect to the constitutional right of free speech." *Schmitt v. State*, 590 So. 2d 404, 411-12 (1991). Here, section 1006.63's prohibition on purely voluntary acts requires the severing and invalidation of section 1006.63(5)(a).

The statute's criminalization of voluntary acts in many circumstances chills commonplace and customary conduct. Physically grueling, dangerous, and brutal activities, for example, are part of the fabric of our society. Individuals frequently participate in such activities in groups. Postsecondary students are no exception.

To use the Tough Mudder as an example – it is highly questionable whether it or other similarly brutal events are encompassed by the protections of the last sentence of section 1006.63(1). As noted above, it is not "customary" in that it is a relatively new activity. The highly dangerous nature of the event and the

particularly devious obstacles, in fact, makes it highly *dissimilar* to athletic events. Further, a law enforcement officer could conclude that the absence of timekeeping or dueling over prizes precludes it from being a competition. The fourth category encompassing legitimate and lawful activities and conduct cannot be defined, and it therefore provides no answer for the Tough Mudder participant who seeks to discover whether criminal hazing is being committed.

If consent is not a defense to a charge of hazing, there is no possible breathing room for events such as Tough Mudder, The Great Bull Run (similar to the running of the bulls in Pamplona, Spain), and other activities where there is a substantial risk of physical injury.

To use the example of alcohol consumption – each day applicants to and members of student organizations over the age of 21 voluntarily opt to consume alcohol. Some students consume alcohol to the point where there is a substantial risk of some physical injury. §§ 1006.63(1), (3). An individual that uses words or actions to encourage and/or facilitate an applicant to or member of a student organization to consume alcohol can be prosecuted for hazing – even if the purported victim voluntary participated and was of a legal age.

Regarding pledging at postsecondary institutions – this illustrates the circumstances where a voluntary participant agrees to be subjected to subservient treatment or ridicule as part of an admission process to a student organization.

Anyone that subjects the pledge to such non-physical treatment could be deemed to be intentionally endangering the mental health of a student and creating the substantial risk of physical injury – which can foreseeably stem from psychological distress. § 1006.63(1), (3).

Applicants to and members of student organizations, as with many other Florida citizens, participate in the types of conduct described in the above three examples. All of those activities are protected by the First Amendment and Fourteenth Amendments to the federal constitution, provided they are indeed voluntary. *See, e.g. Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 622 (1984) (First Amendment protects the right to associate with others in a wide variety of political, social, economic, educational, religious, and cultural ends without government intrusion) (citations omitted). Participation in events like Tough Mudder, post-exam eating and drinking festivities, and fraternities bear First Amendment protections. *See, e.g. Boy Scouts of America v. Dale*, 530 U.S. 640, 647-49 (2000) (citations omitted).

For these reasons, Section 1006.63(5)(a)'s language stating that consent is not a defense to an act of hazing infringes upon a broad array of protected activity. It should therefore be held to be void. In so ruling, Mr. Martin's convictions on Counts 2, 3, and 4 must be vacated, as he was convicted based on a law that stated consent is not a defense to hazing.

C. Conclusion

Given the above, Petitioner requests that this Court vacate the hazing convictions and sentences under Counts 2, 3, and 4.

IV. The granting of any of Petitioner's constitutional claims requires and compels a dismissal with prejudice of his manslaughter conviction

A. Standard of Review

This Court held in *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002) that:

> In reviewing a motion for judgment of acquittal, a de novo standard of review applies. Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. *Id.* at 803.

B. Argument

If this Court vacates Petitioner's convictions on his hazing convictions on counts 2, 3, and/or 4, the trial court's denial of his motion for judgment of acquittal on count 1 for manslaughter would constituted a legal error that requires reversal.

In his oral motion, Petitioner noted that the State failed to establish a prima facie case that the crossing of the bus constituted a "competition" under section 1006.63(1). This is legally significant and operative for several reasons.

First, if it is determined that the relevant statute is unlawful for being vague as applied, void for vagueness in its entirety, or subject to partial voiding due on

overbreadth grounds, then a prosecution against Petitioner on counts 2, 3, and 4 would not stand because the crossing of the bus now constitutes a lawful act. Second, in such a circumstance the evidence at trial would show that the prosecution failed to establish a prima facie case that Mr. Champion's death was not an excusable homicide. § 782.03, Fla. Stat. (2010).

In particular, the absence of the hazing convictions would render Petitioner's conduct lawful under the laws in Florida. A finding of an excusable homicide must be based, in part, on the fact that the defendant committed a lawful act. *Cf. Dominique v. State*, 435 So. 2d 974, 975 (Fla. 3d DCA 1983). The State, notably, admitted that the hazing statute "applies to every single alleged crime in this particular case." [T8. 986-87]. Given this and the other proof in the record, a reversal on his hazing-related convictions compels the granting of his motion for judgment of acquittal.

In the event that this Court vacates Petitioner's hazing convictions on counts 2, 3, and/or 4, but denies reversing the trial court's denial of the motion for judgment of acquittal on count 1, it is requested that a new trial be granted. This is because issues concerning whether he engaged in a competition played a critical role in the State and Defense's case. For example, the prosecutor argued to the jury that the evidence showed that Petitioner and the others "came together on that bus

for one and only one purpose, to haze; to violate this law. That was their purpose in being there." [T7. 953].

Even if Petitioner's request for a reversal of the trial court's denial of the motion for judgment of acquittal is denied, the record still establishes that he was denied a fair trial on count 1 as a result of being prosecuted and convicted of an unconstitutional statute on counts 2, 3, and 4.

C. Conclusion

If Petitioner's hazing convictions under counts 2, 3, and/or 4 are vacated, this Court should reverse the trial court's denial of his motion for judgment of acquittal on count 1. In the event this request is denied, then this Court should afford Petitioner a new trial on count 1.

CONCLUSION

Given the above-stated reasons, Petitioner 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 on counts 2, 3, and 4 be vacated because section 1006.63 is void for vagueness, (3) 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 Bonnie Parrish, Assistant Attorney General, at bonnie.parrish@myfloridalegal.com; to the Florida Association of Criminal Defense Lawyers, M. Stephen Turner at sturner@broadandcassel.com and Michael Ufferman at Ufferman@uffermanlaw.com, on this 11th day of August, 2017.

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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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