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SUPREME COURT OF FLORIDA

ANTHONY OPPENHEIMER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

SC2020-512

L.T. Case No. 1D18-2083

PETITIONER'S INITIAL BRIEF ON JURISDICTION

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JURISDICTIONAL STATEMENT

Jurisdiction is proper under Article V, section 3(b)(3), Florida Constitution, which states that the Supreme Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of this Supreme Court on the same question of law. The First District's decision below conflicts with *State v. Williams*, 791 So. 2d 1088 (Fla. 2001), and *Williams v. State*, 102 So. 3d 25 (Fla. 5th DCA 2012), that require dismissal of a misdemeanor charge alleging new elements and new victims brought by amended information after the speedy trial time period expires; and also conflicts with *Martin v. State*, 259 So. 3d 733, 736 (Fla. 2018), holding that an act is punishable as criminal hazing only when it falls within the ambit of the statutory definition of criminal hazing as found in section 1006.63(1), i.e., the limit or scope of that definition. The decision below adopts the companion case opinion and thus includes facts necessary for this Court to discern conflict. See *Miles v. Weingrad*, 164 So. 3d 1208, 1216 (Fla. 2015).

STATEMENT OF THE CASE AND FACTS

Anthony Petagine and Petitioner Anthony Oppenheimer were officers of a fraternity that authorized a party upon strict instruction that fraternity pledges would not be forced to drink alcohol. (Tab 2, App p. 9). Tragically, a pledge drank excessive amounts of alcohol and died. (Tab 5, App p. 10). Petagine and

Oppenheimer were charged with one count of felony hazing and later by amended information, one count of misdemeanor hazing. Section 1006.63(1), Florida Statutes (2017), defines criminal hazing as "any action or situation that recklessly or intentionally endangers the mental or physical health or safety of a student" that "includes, but is not limited to, pressuring or coercing the student…forced consumption of any food, liquor, drug, or other substance..."

The State alleged only that Mr. Oppenheimer *created an opportunity* for underage drinking and *may have encouraged overconsumption*. The State did not allege that he forced, coerced, or pressured consumption of liquor. The trial court held the charge "omitted critical elements" of the hazing statute and dismissed the felony. (Tab 2, App p. 14). However, the trial court did not dismiss the later added misdemeanor charge alleging creation of a substantial risk of harm to numerous other pledges. (Tab 2, App p. 10; Tab 5, App p. 57, n. 3). Both sides appealed.

A majority of the First District's panel (Judge B.L. Thomas joined by Judge Osterhaus), reversed dismissal of the felony, holding the State sufficiently alleged the elements of felony hazing under the first part of the definition of criminal hazing in section 1006.63(1), without regard for the whole definition. (Tab 2, App p. 11). In the analysis, the majority decision relied only on the general introductory sentence of section 1006.63(1) that defines hazing as: "any action or situation that recklessly or intentionally endangers the mental or physical health or safety of a

student…", but disregarded the remaining part of the statutory definition that put general hazing behavior in essential context. (Tab 2, App pps. 11, 15). As pointed out by Judge Bilbrey in his dissenting opinion, this ignored the basic principle requiring that a statute be construed and applied in its entirety:[1]

> The majority relies solely on the definition of criminal hazing in the first sentence of section 1006.63(1) in holding that [Defendant] created an "action or situation" that endangered Mr. Coffey for the felony charge or endangered any of the pledges for the misdemeanor charge…I believe all of section 1006.63(1) must be read together. To constitute criminal hazing the act that recklessly or intentionally endangers the student must be along the lines of what is specifically prohibited in the second sentence, otherwise the statute could be unconstitutionally vague. To avoid void for vagueness, the rule of lenity applies to the "run-of-the-mill ambiguity" contained in the hazing statute. *Martin v. State*, 259 So. 3d 733, 741-42 (Fla. 2018).

(Tab 2, App pps. 16-17). The panel majority's decision thus conflicts with the specific directive of *Martin v. State,* 259 So. 3d 733, 736 (Fla. 2019), that "[t]he definition of hazing is, of course, critically important to determining the scope of criminal liability under the statute. An act is not punishable as a crime under the statute unless it falls within the ambit of that definition."

The panel majority decision also held that the State's added misdemeanor charge could proceed to trial even though it was filed beyond the ninety-day

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[1] "[A]ll parts of a statute must be read together" and "courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another." (Tab 2, App p. 16) (citing *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) (prohibiting courts from applying portions of a statute in a vacuum without giving full effect and meaning to the whole of the statute)).

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speedy-trial deadline, stating Mr. Oppenheimer was not prejudiced. (Tab 2, App p. 13). The misdemeanor was a new charge for creating substantial risk of harm to new victims. (Tab 3, App p. 26). Allowing an amended information that brings new charges after the speedy-trial deadline directly conflicts with this Court's decision in *State v. Williams*, 791 So. 2d 1088 (Fla. 2001), and the Fifth District's decision in *Williams v. State*, 102 So. 3d 25 (Fla. 5th DCA 2012), requiring dismissal of a misdemeanor charge filed more than ninety days after a defendant's arrest.

Petitioner moved to certify as issues of great public importance and for rehearing, which the panel majority denied. (Tab 3, App p. 26). Judge Bilbrey again dissented and would have certified two questions of great public importance: the first, regarding statutory interpretation of criminal hazing as expressed in the *Martin* case, and the second, whether allowing an amended information to new criminal charges violated speedy trial requirements.

The District Court denied rehearing *en banc*, not because the majority of the Court thought the panel's decision was correct, but because of resistance to *en banc* review itself. Judge Tanenbaum explained: "we as a full court cannot override a panel decision simply because a majority of us disagree with it." (Tab 5, App p. 36). Judge Makar wrote a lengthy dissent (joined by Judges B.K. Thomas and Bilbrey) noting in particular (Tab 5, App p. 56):

> [T]he Legislature has made the central purpose of the … hazing statute clear: criminalizing a narrow category of intentional/reckless acts that directly caused serious harm arising from pressured or coerced violations of law or forced consumption of substances, here alcohol. Indirect acts, such as encouragement or the creation of celebratory or social occasions where heightened risks may be present, fall short of the statute's mark.
> ***
> A significant difference exists between encouraging or creating an opportunity for overconsumption of alcohol by students and directly coercing, pressuring, or forcing a student to consume substances that seriously affected his/her physical health/safety. The former is not a part of the 2017 criminal hazing statute; the latter is. This elevated level of seriousness is reflected in the statute's plain language…

SUMMARY OF ARGUMENT

I. *State v. Williams*, 791 So. 2d 1088 (Fla. 2001), and *Williams v. State*, 102 So. 3d 25 (Fla. 5th DCA 2012), require the dismissal of an information amendment that is filed after the speedy trial period and that charges a new misdemeanor based on the same criminal episode. Refusal to dismiss is contrary to the holdings in these cases because the amendment was filed beyond the speedy trial time and alleged a new charge of creating substantial risk of harm to new victims. (Tab 2, App p. 13).

II. *Martin v. State*, 259 So. 3d 733, 736 (Fla. 2018), specifically requires courts to consider the entire definition section of section 1006.63(1), not just the broad general introduction, when determining if hazing activity is within its ambit of the statute's narrow scope for criminal liability.

ARGUMENT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH *STATE V. WILLIAMS*, 791 So. 2d 1088 (Fla. 2001), AND *WILLIAMS V. STATE*, 102 So. 3d 25 (Fla. 5th DCA 2012), THAT REQUIRE DISMISSAL OF A NEWLY ADDED MISDEMEANOR CHARGE FILED AFTER THE SPEEDY TRIAL DEADLINE.

The State amended its felony information after the speedy trial deadline lapsed, adding a new misdemeanor charge arising from the same event or circumstances as the original crime charged but alleged new victims harmed differently. (Tab 3, App p. 26). The panel majority's decision refused to discharge the amended criminal charge, although Florida Rule of Criminal Procedure 3.191(a) requires every person charged with a misdemeanor be brought to trial within 90 days of arrest or the charge must be dismissed.

Decisions of this Court and the Fifth District require dismissal of a charge alleging a new crime arising out of the same event filed by amended information after the speedy trial deadline. *State v. Williams,* 791 So. 2d 1088, 1091 (Fla. 2001) ("The State may not file charges based on the same conduct after the speedy trial period has expired."); *Williams v. State,* 102 So. 3d 25 (Fla. 5th DCA 2012) (discharging amended information alleging new misdemeanor charged because it was filed after the speedy trial deadline and added new charges). *See also*, *State v. Conroy*, 118 So. 3d 305 (Fla. 3d DCA 2013) (affirming trial court's dismissal of new charges filed after speedy-trial deadline); *Whitehall v. State*, 81 So. 3d 599

(Fla. 2d DCA 1995) (amended information constituted a new charge filed after the speedy trial period had expired).

The panel majority decision stated that "defendant could not establish any specific prejudice…," citing *Holland v. State*, 210 So. 3d 238, 240 (Fla. 1st DCA 2017) (holding that minor amendment to an information that merely corrects or clarifies a charge need not be dismissed). (Tab 2, App p. 13). The panel majority decision viewed the addition of a new misdemeanor charge that added supposed new victims as if it clarified some detail of the existing felony charge without prejudice to the defendant. But in *Holland,* the State did not *add* a *new* charge; it *reduced* the existing charge to a lesser included offense by correcting the illegal substance involved. Prejudice has nothing to do with entitlement to speedy trial when new charges arising out of the same incident are charged too late. See *Whitehall*, 81 So. 3d at 603-604 ("[L]ack of prejudice does not have any bearing on whether an information can be amended to include a new charge after the speedy trial has expired"); *State v. D.A.*, 939 So. 2d 149, 151 (Fla. 5th DCA 2006) (affirming dismissal of a new charge when the speedy trial period lapsed even though the defendant's ability to address the merits of the State's case was not prejudiced in any way).

This Court should review the panel majority's decision to ensure uniformity of speedy trial rights for criminal defendants across the state.

II. THE DECISION BELOW CONFLICTS WITH *MARTIN V. STATE*, 259 So. 3d 733 (Fla. 2018), HOLDING THAT AN ACT IS NOT PUNISHABLE AS CRIMINAL HAZING UNLESS IT FALLS WITHIN THE AMBIT OF THE STATUTORY DEFINITION OF CRIMINAL HAZING IN SECTION 1006.63(1), FLORIDA STATUTES (2017)

In *State v. Martin* 259 So. 3d at 736 (Fla. 2018), Justice Canaday, writing for the unanimous court, held "[t]he definition of hazing" to be "critically important to determining the scope of criminal liability under the statute….An act is not punishable as a crime under the statute unless it falls within the ambit of that definition."

Section 1006.63(1), Florida Statutes (2017) defines *criminal* hazing as:

> "any action or situation that recklessly or intentionally endangers the mental or physical health or safety of a student" … "Hazing" includes, but is not limited to, pressuring or coercing the student into violating state or federal law…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.

As Judge Makar explained in his dissent in the District Court's opinion denying rehearing *en banc,* the central purpose of the hazing statute is "criminalizing a narrow category of intentional/reckless acts that directly caused serious harm arising from pressured or coerced violations of law or forced consumption of substances…" (Tab 5, App p. 56).

The panel majority's decision only considered the alleged conduct under the introductory sentence of the section generally explaining hazing as "any action or situation that recklessly or intentionally endangers the mental or physical health or safety of a student…." (Tab 2, App p. 11). The full definition of section 1006.63(1) was plainly not considered. By limiting its inquiry as to the scope of criminal hazing to just the first general sentence of the statutory definition, the panel majority disregarded the *Martin* holding that the statutory definition of hazing (meaning the entire definition) "is, of course, critically important to determining the scope of criminal liability under the statute," and an act must fall within the ambit of that definition to be punishable.

Contrary to *Martin*, the panel majority held the alleged action was punishable as criminal hazing even though it was not within the ambit, i.e., limit or scope, of the statute's definition of hazing because there was no pressured, coerced, or forced act as required by the statutory definition. Both Judge Bilbrey in his dissent and Judge Makar in his dissent upon denial of rehearing *en banc* explained that to constitute criminal hazing, the act must be along the lines of what is specifically prohibited in the second part of the definition. (Tab 2, App pps. 16-17; Tab 5, App pps. 57-58). Under *Martin*, actions related to the consumption of alcohol would only become criminal hazing under the statute when accompanied by pressured, coerced, or forced consumption.

The State did not allege that anyone pressured, coerced, or forced any student. (Tab 2, App p. 18). As the trial court correctly found, consistent with *Martin*, these are necessary elements of criminal hazing. (Tab 2, App p. 19). The State admittedly had no evidence that Petitioner did anything to *pressure* or *coerce* or *force* any students, and alleged only that Petitioner *encouraged* the consumption of alcohol…" (Tab 2, App p. 19). Encouragement to drink alcohol at a celebratory occasion falls short of what is necessary for criminal hazing under the statutory definition. (Tab 5, App p. 56).

The District Court's expansive interpretation of the statute would mean any fraternity member could be charged with criminal hazing if underage drinking occurred at a fraternity party. The effect of this holding conflicts with *Martin* which pronounced the critical importance that an alleged hazing act fall within the ambit of the definitional statute, not just the first sentence. (Tab 2, App p. 21).

The panel majority decision should be reviewed to correct the inconsistency with *Martin* and prevent abusive charges of criminal hazing as *Martin* intended.

CONCLUSION

The District Court's decision is inconsistent with established principles of law and cases of this Court and other District Courts. Petitioner requests this Court accept discretionary review jurisdiction.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rules of Appellate Procedure 9.210 (a) (2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 16, 2020, a copy of the foregoing notice invoking supreme court jurisdiction in *State v. Oppenheimer* has been furnished by electronic mail to:

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