IN THE

DISTRICT COURT OF APPEAL

FIRST APPELLATE DISTRICT OF FLORIDA

STATE OF FLORIDA, Appellant/Cross-Appellee, v. ANTHONY PETAGINE, Appellee/Cross-Appellant.	Case No. 1D18-2086 Criminal Appeal Second Circuit/Leon County L.T. No. 2018-CF-209

NOTICE TO INVOKE THE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT

NOTICE IS HEREBY GIVEN that the Appellee/Cross-Appellant, ANTHONY PETAGINE, by and through undersigned counsel, invokes the discretionary jurisdiction of the Florida Supreme Court to review the decision of this Court rendered on January 2, 2020 (rehearing, certification, and rehearing *en banc* denied on March 10, 2020). The decision is within the discretionary jurisdiction of the Florida Supreme Court because the decision expressly and directly conflicts with decisions of other district courts of appeal and/or the Florida Supreme Court on the same question of law. *See* art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

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by email delivery this 9th day of April, 2020.

Respectfully submitted,

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FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-2086

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

ANTHONY PETAGINE,

Appellee/Cross-Appellant.

On appeal from the Circuit Court for Leon County.
Martin A. Fitzpatrick, Judge.

January 2, 2020

B.L. THOMAS, J.

The State appeals the trial court's order dismissing a felony-hazing count. Appellee/Cross-Appellant Anthony Petagine cross-appeals the trial court's denial of his motion to dismiss the misdemeanor-hazing count. We reverse the dismissal of the felony count because the State alleged a prima facie case of felony hazing in the statement of particulars, pursuant to section 1006.63, Florida Statutes (2017). On the cross-appeal, we affirm because the Appellant suffered no prejudice when the State added the misdemeanor count of hazing in the amended information.

Appeal

Our review of the trial court's grant of a motion to dismiss is de novo. *Parks v. State*, 96 So. 3d 474, 476 (Fla. 1st DCA 2012). When reviewing an order on a criminal defendant's motion to dismiss, we apply the following standard of review:

> A motion to dismiss an information pursuant to Florida Rule of Criminal Procedure 3.190(c)(4) is analogous to a motion for summary judgment in a civil case. *Allen v. State*, 463 So. 2d 351 (Fla. 1st DCA 1985). Both should be granted sparingly. *State v. Fuller*, 463 So. 2d 1252 (Fla. 5th DCA 1985). The trial court should not decide factual issues, determine the weight to be given to conflicting evidence or assess the credibility of witnesses. *State v. Feagle*, 600 So. 2d 1236 (Fla. 1st DCA 1992). In considering such a motion, the trial court must construe all evidence and inferences in a light most favorable to the state. *Vanhoosen v. State*, 469 So. 2d 230 (Fla. 1st DCA 1985). The state is not obliged to produce evidence sufficient to sustain a conviction. *Feagle*, 600 So. 2d at 1239. "As long as the State shows the barest prima facie case, it should not be prevented from prosecuting." *Vanhoosen*, 469 So. 2d at 232. Moreover, if the state's evidence is all circumstantial, whether it excludes all reasonable hypotheses of innocence may only be decided at trial, after all of the evidence has been presented. *State v. Upton*, 392 So. 2d 1013 (Fla. 5th DCA 1981).

State v. Bonebright, 742 So. 2d 290, 291 (Fla. 1st DCA 1998).

In addition, "the [S]tate is entitled to the most favorable construction of the evidence with all inferences being resolved against the defendant." *Ramsey v. State*, 124 So. 3d 444, 446 (Fla. 1st DCA 2013) (citing *State v. Ortiz*, 766 So. 2d 1137, 1142 (Fla. 3d DCA 2000)). This standard of review does not change because Appellee filed his motion pursuant to Florida Rule of Criminal Procedure 3.190(c), rather than 3.190(c)(4). In fact, it is arguable that the State is entitled to even greater deference under 3.190(c), which does not require the movant to acknowledge undisputed facts in a *sworn* motion. Here, the unsworn motion fails to acknowledge relevant and undisputed facts. But even assuming

arguendo that the same standard of review applies, the following facts are deemed established in the statement of particulars.

Anthony Petagine was the president and the leader of the Executive Council of Pi Kappa Phi Fraternity at Florida State University during the Fall semester of 2017. Mr. Petagine directed all Fraternity activities, including the training and indoctrination of prospective, associate, or conditional members of the Fraternity, also known as Pledges: "He had the organizational and actual authority to stop all acts of hazing conducted by all members of the [F]raternity. He presided over the Executive Council and the chapter as a whole. . . . He encouraged and assisted and *agreed to all [P]ledge activities.*" (Emphasis added). Most critical to our analysis here, he "was present for a meeting the week of the big brother party where the *danger of [P]ledges becoming intoxicated was discussed* and *encouraged the event to take place* through discussing mitigation of risk strategies and instructions that [P]ledges would not be forced to drink." (Emphasis added). Applying our required standard of review, these alleged facts established that Appellee knew the approved party would involve a dangerous situation where excessive intoxication would certainly occur. The fact that "mitigation strategies" were discussed cannot establish that the State failed to allege a prima facie case of felony hazing, as we discuss further below, but rather simply goes to a factual question for a jury to decide or for a trial court to consider on a motion for a judgment of acquittal, *after* the *evidence* has been presented at trial. *Bonebright*, 742 So. 2d at 291.

The victim was a twenty-year-old active Pledge member who attended a majority of the Pledge events up until his death on November 3, 2017. Pledges were required to attend and participate in events, unless specifically excused. Pledges, including the victim, were subjected to peer pressure and other society pressures as part of the Fraternity's systematic indoctrination process to ensure the Pledges complied with the desires and whims of the Fraternity members. The Pledges also received positive reinforcement such as invitations to social functions and networking opportunities and the privilege to associate themselves with the Fraternity.

On November 3, 2017, the Fraternity conducted it's "Reveal" ritual, during which Pledges learned the identities of their Big Brothers. The Pledges were then instructed to gather materials for the Big Brother party later that evening, specifically authorized by Anthony Petagine and the Executive Council.

Previous Big Brother nights had led to extreme intoxication, and under Fraternity tradition, intoxication was expected at the party. Mr. Petagine presided over the Executive Council and lifted the liquor ban to allow liquor at the party. The party was approved to be held off-campus and liquor was allowed, knowing that under-age Pledges would be present and would consume alcohol. Although Mr. Petagine did not attend the party, the victim, most of the Pledge class, and the Big Brothers attended.

At the party, the victim's Big Brother provided him with a "family bottle" of bourbon and told him there was an expectation to finish the family bottle. Many Pledges drank to the point of intoxication, including vomiting, blacking out, and sadly, the death of the victim. The victim's autopsy indicated his death was the direct result of severe intoxication, with a blood alcohol level of .447 g/dl at the time of the autopsy. Tests indicated his blood alcohol would have been even greater before the autopsy.

The State charged Mr. Petagine by information with one count of felony hazing. The State filed an amended information, which changed only the citation to refer to section 1006.63(2), felony hazing, instead of section 1006.63(3), misdemeanor hazing. § 1006.63, Fla. Stat. Mr. Petagine entered a plea of not guilty. The State filed a second amended information, which charged him with one count of felony hazing and one count of misdemeanor hazing. The State thereafter filed its statement of particulars in response to Mr. Petagine's motion. He then filed a motion to dismiss the second amended information, asserting that the State had failed to comply with the trial court's order for a statement of particulars pursuant to Florida Rule of Criminal Procedure 3.190(c). After a pre-trial hearing, the trial court dismissed the felony-hazing charge and allowed the misdemeanor-hazing charge to proceed.

We hold the trial court erred in dismissing the felony-hazing count. When viewed in a light most favorable to the State, with all inferences being resolved against the defendant, the State's

statement of particulars alleged sufficient facts to show that a reasonable jury could find that Mr. Petagine committed felony hazing under the principal theory. *See Parks*, 96 So. 3d at 476 (rejecting appellant's argument that the State failed to allege a prima facie case of failure to register as a sex offender); *see Ramsey*, 124 So. 3d at 446 (same regarding motion to dismiss theft charge); § 777.011, Fla. Stat. (2017).

Section 1006.63(1), Florida Statutes, defines hazing 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." (Emphasis added.) A person commits felony hazing by "intentionally or recklessly commit[ting] 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." § 1006.63(2), Fla. Stat. In addition, the consent of the victim is not a defense to a charge of hazing. § 1006.63(5), Fla. Stat.

The State alleged that Mr. Petagine violated the statute as a principal. Section 777.011, Florida Statutes, states:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or *aids, abets, counsels, hires, or otherwise procures such offense to be committed*, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

(Emphasis added).

Whether prosecuted as a principal or considered a person who was "constructively present," is irrelevant. *See State v. Dene*, 533 So. 2d 265, 269-70 (Fla. 1988). A correct reading of the statement of particulars, applying the proper standard of review, established that it was legally sufficient to charge a count of felony hazing. The State alleged that Mr. Petagine presided over the Executive

Council and Fraternity chapter as a whole and directed all Pledge training, indoctrination, and other Fraternity activities. Mr. Petagine was explicitly trained and instructed on the dangers of binge drinking in this environment, and had actual knowledge that previous Big Brother parties had led to extreme intoxication. Mr. Petagine also had actual knowledge that the 2017 Pledge class had previously displayed poor behavior at a Fraternity event due to intoxication. Regardless, Mr. Petagine was present for a meeting the week of the Big Brother party where the danger of Pledges becoming intoxicated was discussed, and he encouraged the event to take place.

In addition, as the leader of the Fraternity and Executive Council, Mr. Petagine lifted the liquor ban to allow the Big Brothers to supply liquor at the party, in violation of state law prohibiting "giv[ing], serv[ing], or permit[ting] to be served alcoholic beverages to a person under 21 years of age . . . ." § 562.11(1)(a)(1), Fla. Stat. (2017). This alone establishes that the State alleged a prima facie case of felony hazing, as underage drinkers are clearly more likely to become dangerously intoxicated in the context of a fraternity party in which that kind of behavior is encouraged and allowed, which is precisely the conduct targeted by the statute.

The State presented sufficient facts that Mr. Petagine committed felony hazing by aiding and counseling actions and situations that recklessly or intentionally endangered the physical health or safety of the victim, which resulted in his death. *See* § 1006.63, Fla. Stat. Accordingly, we reverse the trial court's dismissal of the felony-hazing charge.

Cross-Appeal

On cross-appeal, Mr. Petagine argues the trial court erred by allowing the misdemeanor-hazing charge to proceed because the misdemeanor charge was added more than ninety days after Mr. Petagine was arrested, which was a violation of his speedy trial rights under Florida Rule of Criminal Procedure 3.191(a). We disagree.

Interpretation of the rules of procedure with regard to the right to a speedy trial is a question of law subject to de novo review.

See State v. Nelson, 26 So. 3d 570, 573-74 (Fla. 2010). "[E]very person charged with a crime shall be brought to trial within 90 days of arrest if the crime charged is a misdemeanor, or within 175 days of arrest if the crime charged is a felony." Fla. R. Crim. P. 3.191(a).

This Court has previously held that where a defendant could not establish any specific prejudice resulting from an amended information, a motion to dismiss for a violation of speedy trial rights should be denied. *Holland v. State*, 210 So. 3d 238, 240 (Fla. 1st DCA 2017). "An amendment is generally permissible . . . when it 'merely clarifies some detail of the existing charge and could not reasonably have caused the defendant any prejudice.'" *Id.* at 240 (alteration in original) (quoting *State v. Mulvaney*, 200 So. 3d 93, 96 (Fla. 5th DCA 2015)). As in *Holland*, Mr. Petagine has failed to allege or establish any specific prejudice resulting from the amendment. *See Holland*, 210 So. 3d. at 239-40. Accordingly, we affirm.

REVERSED in part, AFFIRMED in part, and REMANDED.

OSTERHAUS, J., concurs; BILBREY, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

BILBREY, J., dissenting.

The question has been asked since primeval times, "Am I my brother's keeper?"[1] Andrew Coffey wanted to be a brother of the Pi Kappa Phi fraternity at Florida State University. He went to a party with brothers of the fraternity and fellow pledges, drank to excess, and tragically died. Mr. Coffey's future brothers did not keep him from harm. But the limited question we are presented with here is not whether any moral, civil, or societal obligation

[1] Genesis 4:9 (KJV).

toward Mr. Coffey was violated by the fraternity brothers, but whether Anthony Petagine, the fraternity president, committed the crime of hazing as specifically defined by Florida law. Based on the record before us, there are insufficient allegations to set forth a prima facie case for either felony or misdemeanor hazing against Petagine. Accordingly, I would affirm the trial court's dismissal of the felony count, and on the cross-appeal, reverse the trial court's denial of dismissal of the misdemeanor count. Because the majority does the opposite, I respectfully dissent.

In the second amended information, Petagine was charged with felony hazing resulting from the death of Mr. Coffey and misdemeanor hazing by creating a substantial risk of injury to any of the pledges at the party. The trial court ordered the State to provide a statement of particulars setting forth "the particulars of the offense sufficiently to enable the defendant to prepare a defense." The trial court further ordered that if the State were proceeding on a principal theory, the State was to provide a description of the action taken by Petagine "which incited, caused, encouraged, assisted or advised another person or persons to actually commit or attempt to commit the crime."

Petagine moved to dismiss the second amended information claiming that the allegations therein and in the statement of particulars "omit critical elements of the charged offense." The trial court granted the motion to dismiss as to the felony charge but denied the motion as to the misdemeanor charge.

An information that omits an essential element of the crime fails to charge a crime. *Connolly v. State*, 172 So. 3d 893, 904 (Fla. 3d DCA 2015) (en banc). A defective information is properly challenged by a motion to dismiss under rule 3.190(c), Florida Rules of Criminal Procedure. *Ingraham v. State*, 32 So. 3d 761, 766 (Fla. 2d DCA 2010). In the statement of particulars, the State was required to "specify as definitely as possible the place, date, and all other material facts of the crime charged." Fla. R. Crim. P. 3.140(n). When a statement of particulars is filed, the State cannot, over defense objection, seek a conviction based on facts other than those contained in the statement. *See State v. Beamon*, 298 So. 2d 376, 378-79 (Fla. 1974); *Brown v. State*, 462 So. 2d 840, 843 (Fla. 1st DCA 1985). Furthermore,

> When the prosecuting officer has, in the statement of particulars, specified as definitely as possible and as is known to him [or her] what the material facts are . . . and, in the opinion of the trial judge, such facts do not legally constitute the crime charged or they affirmatively establish an effective bar to the prosecution, then the motion to dismiss should be granted.

State v. Davis, 243 So. 2d 587, 591 (Fla. 1971).

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

> 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.

This definition of criminal hazing is applicable to both felony and misdemeanor offenses.[2] *See* § 1006.63(2) & (3), Fla. Stat.

[2] Hazing in the broader sense that does not recklessly or intentionally endanger the mental or physical health or safety of a

(2017). Here, the State appeals the dismissal of the felony charge, and Petagine cross appeals the denial of the dismissal of the misdemeanor charge.[3]

"It is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole . . . .Where possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) (alteration in original) (citations omitted). The majority relies solely on the definition of criminal hazing in the first sentence of section 1006.63(1) in holding that Petagine created an "action or situation" that endangered Mr. Coffey for the felony charge or endangered any of the pledges for the misdemeanor charge. As discussed in detail below, I do not believe there are sufficient allegations of Petagine recklessly or intentionally creating a danger. The second sentence of section 1006.63(1) gives a nonexclusive list of matters that could endanger a student. Although there certainly could be other actions that would endanger a student, 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,

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student is not a criminal act. Therefore, various acts of hazing alleged to have been committed against the pledges, including presumably Mr. Coffey, which involved innocuous acts such as requiring the pledges to carry items with them like sunflower seeds or requiring the pledges to learn the history of the fraternity, or more offensive acts such as verbal abuse and name calling by the brothers, do not amount to a crime.

[3] Petagine also raises a speedy trial issue concerning the addition of the misdemeanor charge more than 90 days after the initial information was filed. The majority rejects Petagine's claim of a violation of his right to a speedy trial. Because I would dispose of the misdemeanor charge based on the failure to allege an essential element of the crime of hazing, I find it unnecessary to address the speedy trial issue.

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).

As such, reading section 1006.63(1) as a whole, two of the three examples of criminal hazing in the second sentence could conceivably be applicable based on the allegations in the statement of particulars: 1) "pressuring or coercing the student into violating state or federal law," or 2) "forced consumption of any food, liquor, drug, or other substance."

In his related appeal, Petagine's codefendant and fraternity brother, Anthony Oppenheimer, contends that since forced consumption of liquor is defined as criminal hazing, the specific prohibition outweighs the general prohibition against violating the law, and therefore only forced consumption, the second example above, could be criminal hazing.[4] Oppenheimer further contends that since there are no allegations in the statement of particulars that Mr. Coffey was forced to consume alcohol, dismissal is appropriate.

I agree that there were no allegations of forced consumption of liquor in the statement of particulars. If, for instance, Mr. Coffey had been ordered by Petagine or at Petagine's direction that he must drink liquor to be initiated into the fraternity, such conduct would undoubtedly be criminal hazing. But no such forced consumption is alleged here. In fact, as the majority mentions, the statement of particulars sets forth that Petagine was present for a meeting where the party was planned, but Petagine was involved in "discussing mitigation of risk strategies and instructions that the pledges would not be forced to drink."

So, the criminal hazing statute's prohibition on "forced consumption" cannot support the charges. But I do not agree with

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[4] Case numbers 1D18-2083 involving Oppenheimer and 1D18-2215 involving Anthony Kluttz were consolidated for oral argument since they involve co-defendants and related issues. Similar statements of particulars were filed in Petagine, Oppenheimer, and Kluttz's cases.

Petagine's co-defendant Oppenheimer that forced consumption of liquor is a specific subset of "pressured or coerced" and without allegations of forced consumption the "pressure or coercion" example defining criminal hazing does not apply. Instead, I believe that if there were allegations that Mr. Coffey had been pressured or coerced into violating state law, that could be criminal hazing. At oral argument, the State acknowledged that its theory of the case was that the pledges had been pressured into drinking.

"Forced consumption" can apply to matters that otherwise would not be a crime, like a pledge of legal drinking age being forced to drink liquor or any person being forced to eat or drink so much of anything as to endanger that person's health or safety.[5] But here there is not any allegation in the statement of particulars of Petagine's "pressuring or coercing" Mr. Coffey into violating the law so as to amount to criminal hazing.

It is a crime for a person under the age of 21 to possess alcoholic beverages. § 562.111, Fla. Stat. (2017). If the statement of particulars alleged that Mr. Coffey had been pressured or coerced into possessing alcohol that would meet the definition of criminal hazing under section 1006.63(1). And if the criminal hazing resulted in Mr. Coffey's "serious bodily injury or death" that would be felony hazing.[6] § 1006.63(2), Fla. Stat. But the best allegations the statement of particulars can make is "pledges were

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[5] *See* Coco Ballantyne, *Strange But True: Drinking Too Much Water Can Kill*, SCIENTIFIC AMERICAN, June 21, 2007, https://www.scientificamerican.com/article/strange-but-true-drinking-too-much-water-can-kill/ (last visited Dec. 16, 2019).

[6] I will leave aside the fact I am unaware of anything in Florida law that specifically outlaws the consumption of alcohol by a person under 21 years old as opposed to possession of alcohol. It is difficult, if not impossible, to consume a substance without possessing it. For the sake of argument here, I think that if it was alleged that Mr. Coffey had been pressured or coerced into possessing alcohol, his subsequent consumption of that alcohol would likely be causally connected — although in that event the crime of possession arguably did not automatically mean consumption.

encouraged to illegally drink both directly and indirectly" (emphasis added). As the majority points out, consent of the victim is not a defense to criminal hazing. *See* § 1006.63(5)(a), Fla. Stat. But I think the trial court was correct in finding that since Mr. Coffey consented to drink, "it certainly negates a necessary element" when considering whether Mr. Coffey was pressured or coerced to drink. If Mr. Coffey wanted to drink alcohol, then that would negate the pressure or coerce element to prove criminal hazing.

"It is well established that 'where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense.'" *Shepard v. State*, 259 So. 3d 701, 705 (Fla. 2018) (citations omitted). "Further, when construing a statute, our 'task is to ascertain the meaning of the phrases and words used in a provision, not to substitute [the Court's] judgment for that of the Legislature.'" *Id.* at 704 (quoting *School Bd. of Palm Beach Cty' v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1228 (Fla. 2009)). Being encouraged to undertake an act is not the same as being pressured or coerced to do that act.

The verb "encouraged" is not synonymous with "pressured" or "coerced." *See* https://www.thesaurus.com/browse/encourage (last visited Dec. 16, 2019). "Encourage" means "[t]o instigate; to incite to action; to embolden; to help." *Black's Law Dictionary* (8th ed. 2004). *See also United States v. Lopez*, 590 F.3d 1238, 1249 (11th Cir. 2009) (defining encourage similarly). Advertisements on television, in print, and on the internet encourage consumption of alcohol with only brief disclaimers noting that only people twenty-one years of age and older should drink. American movies since at least *Animal House* (1978) and *Revenge of the Nerds* (1984) have encouraged excessive consumption of alcohol and underage drinking by college students generally and fraternity members specifically. Annual lists appear in print and on the internet of the best "party" universities. Many student organizations, including many fraternities, encourage underage drinking.[7] But none of this

[7] Much of this drinking results in harmful consequences to the students. The National Institute on Alcohol Abuse and Alcoholism, a part of the National Institutes of Health, reports that

societal encouragement of underage consumption of alcohol amounts to an allegation of the exertion of pressure or coercion to violate the law.

"Pressure" implies some compulsion, perhaps short of "force" but certainly more than just being encouraged to act. *See* https://www.thesaurus.com/browse/pressure?s=t (last visited Dec. 16, 2019). Synonyms for "pressure" include "constrain," "press," and "insist." *Id.* "Coerce" is defined as "[t]o compel by force or threat." *Black's Law Dictionary* (8th ed. 2004). *See also Long-Lewis Sterling Western Star of Bessemer v. Sterling Truck Co.*, 460 Fed. Appx. 819, 820 (11th Cir. 2012) (defining coerce to mean "to restrain, control, or dominate, nullifying individual will or desire").

The State could have explicitly tracked the hazing statute if it had evidence to support an allegation that Mr. Coffey was pressured or coerced by anyone into possessing alcohol. But instead the State forthrightly alleged in the statement of particulars that the evidence at best showed only that Petagine encouraged the consumption of alcohol by Mr. Coffey. This allegation does not meet the definition of criminal hazing.

The statement of particulars' mention of "peer pressure," discussed by the majority, likewise does not satisfy the definition of criminal hazing. There are no allegations here of pressure to violate "state or federal law," as required by section 1006.63(1). The allegation in the statement of particulars that "[p]eer pressure and other societal pressures were brought to bear on the pledges in a systematic indoctrination process" does nothing to support an allegation of criminal hazing.[8] That statement would apply to a

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researchers estimate that each year 1,825 college students between "the ages of 18 and 24 die from alcohol-related unintentional injuries, including motor-vehicle crashes." *College Drinking*, https://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/college-drinking (last visited Dec. 16, 2019).

[8] Likewise, the statement of particulars' discussion of the other non-criminal hazing that occurred over the course of the semester does nothing to show any allegation that Mr. Coffey was subjected to criminal hazing that led to his death.

student joining most any campus organization such as a religious society, a band, a sports team, or ROTC. I assume most students try to join a campus organization because the prospective members like the particular organization and aspire to emulate existing members.

Perhaps if the statement of particulars had alleged that there was peer pressure placed on Mr. Coffey from Petagine to violate the law, that allegation would suffice. But instead the statement notes, as mentioned above, that "pledges would not be forced to drink." The majority's statement concerning Mr. Coffey that "the victim's Big Brother provided him with a 'family bottle' of bourbon and told him there was an expectation to finish the family bottle" is not contained in the statement of particulars, and therefore it should not be used to support whether the statement of particulars alleges a crime. *See Brown*, 462 So. 2d at 843. The allegation that "[s]tories and traditions. . . told to the pledges concerning family drinks and drinking all the bottle or at least drinking to excess" is contained in the statement of particulars, but does not allege who told this to the pledges or if Mr. Coffey was so told. But even if it was alleged that Mr. Coffey had been told this by Petagine, it would allege at best "encouragement" to drink, not pressure or coercion. And the "stories and traditions" allegedly told to pledges could not have come from Petagine anyway since he was not alleged to have been at the party where Mr. Coffey drank to excess.

An expansive interpretation of "pressuring or coercing" would allow criminal charges against any fraternity member attending a fraternity party where underage drinking occurred based on the fraternity member attending and thereby "encouraging" underage drinking. That is not how section 1006.63 reads and is not consistent with a reasonable interpretation of the statute.[9] Section

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[9] A person having control of a residence where an underage person is allowed to consume alcohol at a social gathering can be charged with the crime of "open house party." *See* § 856.015, Fla. Stat. (2017). Petagine was not so charged, presumably because he had no control of the residence and was not alleged to have even been there at the time.

1006.63 was amended by chapter 2019-133, Laws of Florida, and now defines criminal hazing to include being "actively involved in the planning of any act of hazing." § 1006.63(2) & (3), Fla. Sta. (2019).[10] But even under that amended definition of criminal hazing, the allegations of Petagine somehow encouraging Mr. Coffey to drink would not suffice since no criminal hazing was planned.

The majority holds that by lifting the liquor ban, Petagine violated section 562.11(1)(a)(1), Florida Statutes (2017), and that allegation establishes a prima facie case of felony hazing. There are various problems with the rationale beyond this holding. First, the State did not even cite section 562.11 in its initial brief, much less argue that Petagine or someone on Petagine's behalf violated that law and thereby committed criminal hazing. Barring fundamental error or jurisdictional issues, "issues not raised in the initial brief are considered waived or abandoned." *Rosier v. State*, 276 So. 3d 403, 406 (Fla. 1st DCA 2019) (en banc). Second, even if the State had raised this issue, the statement of particulars does not allege Petagine lifted the liquor ban; instead it alleges only that the liquor ban was lifted. Third, even if the argument was not waived and even if the State had alleged that Petagine or someone on his behalf had lifted the liquor ban and thereby allowed underage drinking, that would still not show that Mr. Coffey or any of the pledges were pressured or coerced into breaking the law. An allegation of Petagine or someone on his behalf saying, "you underage pledges *can* now drink" is not the same as him saying "you underage pledges *must* now drink."

For the same reason, any contention that Petagine is criminally liable as a principal also fails. "Before an accused may be convicted as an aider and abettor, it must be shown not only that he assisted the actual perpetrator but that he intended to

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[10] Chapter 2019-133, Laws of Florida, also added two subsections that are not applicable here, but which bear mentioning. Section 1006.63(11) & (12) are named Andrew's Law after Mr. Coffey. These subsections provide immunity to a person who summons immediate medical assistance or renders aid to a victim of criminal hazing.

participate in the crime." *Horton v. State*, 442 So. 2d 1064, 1065-66 (Fla. 1st DCA 1983). *See also Ryals v. State*, 150 So. 132 (Fla. 1933); *Cannon v. State*, 180 So. 3d 1023 (Fla. 2015); § 777.01, Fla. Stat. (2017). As discussed above, the statement of particulars does not set forth a prima facie case that anyone committed criminal hazing. Therefore, without an allegation that another person or persons actually committed or attempted to commit a crime, there are insufficient allegations that Petagine was a principal to criminal hazing.

Without criminal hazing or some other criminal act being committed, Florida law does not make Petagine or other fraternity officers criminally liable for college drinking culture, even when that culture has tragic results. The trial court was correct to dismiss the felony charge and for the same reasons should have dismissed the misdemeanor charge since the definition of criminal hazing is the same for both offenses. *See* § 1006.63(1). It is the injury that results from the criminal hazing that distinguishes felony from misdemeanor hazing. Since there were no allegations that Petagine or someone on his behalf forced any of the pledges to consume liquor and since there were no allegations of pressuring or coercing the pledges by Petagine or someone on his behalf to violate state law, there were insufficient allegations of criminal hazing under section 1006.63(1). Without allegations of an act of criminal hazing committed by or on behalf of Petagine, there can be no felony hazing under section 1006.63(2) resulting from the death of Mr. Coffey and no misdemeanor hazing under section 1006.63(3) by creating a risk of injury to any of the pledges. Since the majority reinstates the felony charge and denies the dismissal of the misdemeanor charge, I respectfully dissent.

Ashley Moody, Attorney General, Virginia Chester Harris, Assistant Attorney General, Tallahassee, for Appellant/Cross-Appellee.

Michael Ufferman of Michael Ufferman Law Firm, P.A., Tallahassee, for Appellee/Cross-Appellant Kluttz; Brian L.

Tannebaum of Brian L. Tannebaum, P.A., Miami, for Appellee/Cross-Appellant Petagine.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

March 10, 2020

CASE NO.: **1D18-2086**
L.T. No.: 2018 CF 209 G

State of Florida	v.	Anthony Petagine
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellees'/Cross-Appellants' motion for certification and/or motion for rehearing, filed January 17, 2020, is denied.

B.L. THOMAS and OSTERHAUS, JJ., concur. BILBREY, J., dissents with opinion.

BILBREY, J., dissenting from the denial of certification.

I would certify questions of great public importance including: 1) how expansive are the actions prohibited by section 1006.63(1), Florida Statutes (2017), given the second sentence of section 1006.63(1) and *Martin v. State*, 259 So. 3d 733 (Fla. 2018); and 2) whether a new criminal charge arising from the same event or circumstances as the crime already charged, but alleging a new victim or victims, may be added after the expiration of the speedy trial period following arrest. Because the majority here declines to certify any questions regarding the issues of great public importance raised in the majority and dissenting opinions, I respectfully dissent.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.
Served:

Hon. Ashley Moody, AG	Brian L. Tannebaum
Hon. Jack Campbell, SA	Michael Ufferman
Virginia Chester Harris, AAG	Hon. Martin A. Fitzpatrick, Judge

ks

KRISTINA SAMUELS, CLERK

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-2086

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

ANTHONY PETAGINE,

Appellee/Cross-Appellant.

On appeal from the Circuit Court for Leon County.
Martin A. Fitzpatrick, Judge.

March 10, 2020

ON MOTION FOR REHEARING EN BANC

On the motion of a party, a judge in regular active service on the Court requested that a vote be taken on the motion in accordance with Florida Rule of Appellate Procedure 9.331(d)(1). All judges in regular active service that have not been recused voted on the motion. Less than a majority of those judges voted in favor of rehearing en banc. Accordingly, the motion for rehearing en banc is denied.

RAY, C.J., and WOLF, LEWIS, B.L. THOMAS, ROBERTS, ROWE, OSTERHAUS, WINOKUR, JAY, NORDBY, and TANENBAUM, JJ., concur.

MAKAR, BILBREY, and M.K. THOMAS, JJ., dissent.

B.L. THOMAS, J., concurs with opinion, in which OSTERHAUS, J., joins.

TANENBAUM, J., concurs with opinion, in which OSTERHAUS, J., joins; and in which B.L. THOMAS, J., joins as to Part II only.

MAKAR, J., dissents with opinion, in which BILBREY, J., joins.

KELSEY, J., recused.

B.L. THOMAS, J., concurring in the denial of rehearing en banc.

The opinion dissenting from our decision to deny rehearing en banc mandates a response, given its meritless assertion that judges who disagree have failed to "stand down" to the relevant statutory text, or worse, have judicially "expanded" the statute. Ironically enough, it is the opinion dissenting from the denial of the rehearing en banc that *fails to rely on the text of the statute.* That opinion contains long passages explaining the en banc process, several secondary sources, quotes from the legislative history and a subsequently amended statute, and citations from only one relevant precedent, which *upheld* the statute against constitutional challenge, *Martin v. State*, 259 So. 3d 733 (Fla. 2018).

In addition to avoiding the relevant statutory text, the opinion dissenting from the denial of rehearing en banc also lacks a discussion of the legal standard of review on a motion to dismiss a criminal charge, which the majority opinion here extensively discussed:

> A motion to dismiss an information pursuant to Florida Rule of Criminal Procedure 3.190(c)(4) is analogous to a motion for summary judgment in a civil case. *Allen v. State*, 463 So. 2d 351 (Fla. 1st DCA 1985). Both should be granted sparingly. *State v. Fuller*, 463 So. 2d 1252 (Fla. 5th DCA 1985). The trial court should not decide factual issues, determine the weight to be given to conflicting evidence or assess the credibility of witnesses. *State v. Feagle*, 600 So. 2d 1236 (Fla. 1st DCA 1992). In

> considering such a motion, the trial court must construe all evidence and inferences in a light most favorable to the state. *Vanhoosen v. State*, 469 So. 2d 230 (Fla. 1st DCA 1985). The state is not obliged to produce evidence sufficient to sustain a conviction. *Feagle*, 600 So. 2d at 1239. "As long as the State shows the barest prima facie case, it should not be prevented from prosecuting." *Vanhoosen*, 469 So. 2d at 232. Moreover, if the state's evidence is all circumstantial, whether it excludes all reasonable hypotheses of innocence may only be decided at trial, after all of the evidence has been presented. *State v. Upton*, 392 So. 2d 1013 (Fla. 5th DCA 1981). *State v. Bonebright*, 742 So. 2d 290, 291 (Fla. 1st DCA 1998). . . "[T]he [S]tate is entitled to the most favorable construction of the evidence with all inferences being resolved against the defendant." *Ramsey v. State*, 124 So. 3d 444, 446 (Fla. 1st DCA 2013) (citing *State v. Ortiz*, 766 So. 2d 1137, 1142 (Fla. 3d DCA 2000)). This standard of review does not change because Appellee filed his motion pursuant to Florida Rule of Criminal Procedure 3.190(c), rather than 3.190(c)(4). In fact, it is arguable that the State is entitled to even greater deference under 3.190(c), which does not require the movant to acknowledge undisputed facts in a *sworn* motion. Here, the unsworn motion fails to acknowledge relevant and undisputed facts.

Addressing the statute's actual text, along with the definition of the statute defining criminal liability as a principal, the majority opinion stated the following:

> When viewed in a light most favorable to the State, with all inferences being resolved against the defendant, the State's statement of particulars alleged sufficient facts to show that a reasonable jury could find that Mr. Petagine committed felony hazing under the principal theory. *See Parks*, 96 So. 3d at 476 (rejecting appellant's argument that the State failed to allege a prima facie case of failure to register as a sex offender); *see Ramsey*, 124 So. 3d at 446 (same regarding motion to dismiss theft charge); § 777.011, Fla. Stat. (2017).

Section 1006.63(1), Florida Statutes, defines hazing 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." (Emphasis added.) A person commits felony hazing by "intentionally or recklessly commit[ting] 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." § 1006.63(2), Fla. Stat. In addition, the consent of the victim is not a defense to a charge of hazing. § 1006.63(5), Fla. Stat.

The State alleged that Mr. Petagine violated the statute as a principal. Section 777.011, Florida Statutes, states:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or *aids, abets, counsels, hires, or otherwise procures such offense to be committed*, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

(Emphasis added).

Whether prosecuted as a principal or considered a person who was "constructively present," is irrelevant. *See State v. Dene*, 533 So. 2d 265, 269-70 (Fla. 1988). A correct reading of the statement of particulars, applying the proper standard of review, established that it was legally sufficient to charge a count of felony hazing.

Thus, the majority opinion correctly reversed the trial court's erroneous dismissal of the felony hazing charge. Therefore, I concur in the Court's decision to deny rehearing en banc.

TANENBAUM, J., concurring in the denial of rehearing en banc.

Believe it or not, we as a full court cannot override a panel decision simply because a majority of us disagree with it. I vote to deny the appellee's request for rehearing en banc because both the Florida Constitution and the applicable appellate rule tell me that we have no authority to grant it.

I write here to explain two aspects of my vote.[1] Initially, I discuss my concern that the Florida Constitution does not

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[1] But no, this opinion is not a "concurral." The terms "concurral" and "dissental" curiously have been willed into our argot to refer specifically to opinions like those found here. *See* Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 Yale L.J. Online 601 (2012); Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 Calif. L. Rev. 1479 (2012). I nonetheless maintain that they are not real words, and I refuse to use them.

Indeed, these two words are mere solipsistic creations with no legitimate purpose and no proper place in the juridical lexicon. *Cf. In re Corrinet*, 645 F.3d 1141, 1146 (9th Cir. 2011) (characterizing, for what may be the first time, a prior dissent of Judge Kozinski as a "dissental"); *see also* Eugene Volokh, *Concurral and Dissental*, THE VOLOKH CONSPIRACY (Sept. 12, 2011, 1:13 PM), http://volokh.com/2011/09/12/concurral-and-dissental/ (announcing that "[t]hese two new terms . . . were minted by my former boss, Chief Judge Alex Kozinski"); *see also In re Doe 13-A*, 136 So. 3d 748, 749 (Fla. 1st DCA 2014) (Padovano, J., concurring in en banc denial) (questioning creation of these terms "out of whole cloth"). They certainly come close to striking a pretentious chord. *See* FOWLER'S MODERN ENGLISH USAGE 39 (R.W. Burchfield ed., 3d ed. 1996) (strongly criticizing Victorian use of -al suffix to create new nouns that competed "with synonymous words of

authorize a district court of appeal to decide a case—let alone to re-decide a case—in any manner except through a majority vote of one of its three-judge panels. That is, the constitution does not appear to allow our en banc determination of a case at all. This abiding constitutional concern naturally will color my consideration of any en banc motion, and it certainly does here.

Even if such constitutional authority somehow exists in article V's penumbra, though, it will be the rare and extraordinary case or issue that will justify our collectively re-deciding what a constitutionally authorized two-judge majority already has decided. So, I also discuss why an appeal like this, which merely deals with a basic principle of criminal procedure, does not come

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different formation" and suggesting use of gerund form to fill a need "on an isolated occasion for a verbal noun that shall have a different shade of meaning").

What value is there in adding "-al" to "dissent" or "concur"? None. These neologisms are unnecessary because there is no difference between a concurring or dissenting opinion associated with a panel decision, on the one hand; and opinions like those found here (*i.e.*, those associated with a court order denying a party motion for rehearing en banc), on the other. Either way, independent constitutional officers are exercising sovereign authority by voting, and each has the right (and at times the duty) to explain his or her vote. Each explanation is an opinion. If the majority of the body joins in the opinion, it is the majority opinion. Otherwise, it is a concurring or dissenting opinion, depending on the authoring judge's vote. *See Dissent*, BLACK'S LAW DICTIONARY (6th ed. 1990) (defining as the "refusal to agree with something already stated or adjudged or to an act previously performed," which may "be accompanied by a dissenting opinion"); *Concur*, BLACK'S LAW DICTIONARY (6th ed. 1990) (defining as agreement "with the result reached by another, but not necessarily with the reasoning or the logic used in reaching such a result" and describing "concurring opinion"). There is no legal basis for giving a concurring or dissenting opinion higher or lower stature—or some other differential treatment—depending on the type of official vote that gave rise to it. There in turn is no good reason for these "un-words" to be used in any event.

close to hurdling the "exceptional importance" requirement set by the supreme court's en banc rule.

I. Constitutional Concerns About Our En Banc Authority

Article V of the Florida Constitution vests the judicial power in "a supreme court, district courts of appeal, circuit courts and county courts." Art. V, § 1, Fla. Const. The same article specifies how the appellate courts in that list exercise this judicial power. Five of seven supreme court justices "constitute a quorum," and the "concurrence of four justices shall be necessary to a decision." Art. V, § 3(a), Fla. Const. For a district court of appeal, "[t]hree [district] judges *shall* consider *each* case and the concurrence of two shall be necessary to a decision." Art. V, § 4(a), Fla. Const. (emphasis supplied). The constitution mentions no other manner by which a Florida appellate court may exercise judicial power. It is entirely silent regarding a district court of appeal's deciding a case en banc.

It is fair to ask, then, how a district court of appeal could sit as a whole to decide, or re-decide, a case when the Florida Constitution stands silent on the matter. *Cf. In re Fla. Rules of Appellate Procedure*, 374 So. 2d 992, 995 (Fla. 1979) (Boyd, J., dissenting) ("Because the constitution specifically provides that three judges shall consider each case heard by the district courts, a different procedure cannot be authorized by the promulgation of a court rule."); *see also State v. Georgoudiou*, 560 So. 2d 1241, 1248 (Fla. 5th DCA 1990) (en banc) (Cowart, J., dissenting) (noting how en banc consideration supplants the original panel and thereby subverts a litigant's "constitutional right to have his case on appeal heard and decided by the three judge panel to which it was duly, and constitutionally, assigned for decision"); *In Interest of K.A.F.*, 442 So. 2d 365, 369 (Fla. 5th DCA 1983) (en banc) (Cowart, J., dissenting) (observing that article V, section 4(a) "has absolutely no meaning if a majority of the judges on a district court of appeal, disagreeing with the view of some proposed panel majority decision, can . . . act under Florida Appellate Rule 9.331 to wrestle jurisdiction of a particular case away from the panel to which it was assigned and decide it according to a different view of the law or facts").

The answer, from the Supreme Court of Florida's perspective, appears to be historical necessity—at least when it comes to maintaining "uniformity" in a district court's decisions. After a 1980 revision to article V, the supreme court lost jurisdiction to review any *intra*-district conflict. *See Jenkins v. State*, 385 So. 2d 1356, 1357 (Fla. 1980) (noting elimination of supreme court's certiorari power to review such conflicts). Its conflict review subsequently was limited to express and direct *inter*-district conflicts. *Id.* at 1359 (emphasis supplied). The supreme court in turn feared that if a district court could not resolve an intra-district conflict "by en banc decision, totally inconsistent decisions could be left standing and litigants left in doubt as to the state of law." *See In re Rule 9.331, Determination of Causes by a Dist. Court of Appeal En Banc, Fla. Rules of Appellate Procedure*, 416 So. 2d 1127, 1128 (Fla. 1982).[2] This concern stemmed from the fact that district courts of appeal were (and still are), in many cases, "final appellate courts." *See id.* at 1127; *cf. Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958) (noting that district courts were never intended to be "intermediate courts"; their appellate review in most instances was to be "final and absolute").

The supreme court emphasized "that a direct and important interrelationship exists between the en banc rule and the new constitutional amendment" limiting its jurisdiction, and it declared the rule "an essential part of the philosophy of the [new] constitutional scheme." *In re Rule 9.331*, 416 So. 2d at 1127.[3] The

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[2] Review of those decisions might not be totally foreclosed. The supreme court still may review a question certified by any three-judge district court panel as being of "great public importance." Art. V, § 3(b)(4), Fla. Const.

[3] But the en banc rule predates the constitutional revision. *See generally In re Fla. Rules of Appellate Procedure*, 374 So. 2d 992 (Fla. 1979). Necessity as an explanation came a few years later. The rule originally was to just formalize and bring out into the open a process that had been going on behind the scenes. *See id.* at 993. District courts were holding "ad hoc conferences to discuss problems of conflicts between panels and to determine whether a panel should recede from a prior written opinion of the

court somehow divined that the electorate considered the revision "with the understanding that the district courts of appeal could sit en banc to resolve intra-district conflict." *Id.* at 1128.[4]

However, when a court deviates from constitutional text and reads new meaning into it based on what it infers "must have been the intent," tough questions invariably arise. So it went with the en banc rule. If the constitution provides that "the concurrence of two" judges will decide every case before a district court of appeal, how many judges must concur to override this constitutional prescription and un-decide (or re-decide) a case? The constitution's text does not answer this question because the text does not expressly allow for en banc consideration of cases in the first place. No matter. The supreme court breezily answered the question as follows:

> It is our opinion that a simple majority of the active judges actually participating and voting on a case, without regard to illness or recusal, is all that should be necessary to call an en banc hearing as well as to reach a decision on the merits.

In re Rule 9.331, 416 So. 2d at 1129.

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court." *Id.* There is one other fact to note about the then-new en banc rule. The supreme court at the time *dropped* the portion of the proposed rule that would have allowed district courts, sitting en banc, "to consider cases of exceptional importance." *Id.*; *see also Chase Fed. Sav. & Loan Ass'n v. Schreiber*, 479 So. 2d 90, 93 (Fla. 1985) (noting that when the court adopted rule 9.331 in 1979, it did not include the "exceptional importance" language because "there was no need to authorize the en banc process in the district courts except for use in the settlement of intra-district conflict to help reduce the then-existing caseload of the Florida Supreme Court").

[4] I question the propriety of using supposed electoral intent to inform constitutional interpretation, even if the supreme court at the time did not.

This conclusion is troublesome. From whence does it derive? Why not a two-thirds vote for such an extraordinary step? The supreme court at the time had an answer for this, too. Requiring even "a majority of the active judges on the entire court, whether participating or not" would be too much, because that "could *punish the litigants* by possibly requiring an extraordinary number of judges to call an en banc hearing or, if called, to vote in favor of an opinion to reach a decision in the case." *Id.* (emphasis supplied). Imagine, though, the prejudice felt by the litigant who obtained a favorable decision through the concurrence of two judges (which is all the constitution requires), only to see that decision overturned by an extraordinary (and extra-constitutional) en banc process.[5]

In any event, this supposed historical necessity and presumed electoral intent still do not explain the constitutional basis for a majority of a district court of appeal (that is, more than two judges) to override a three-judge panel decision simply because the case or issue is of "exceptional importance." Again, there is no mention of this in the Florida Constitution. The supreme court nevertheless decided in 1984 to "broaden[] the authority of the district courts of appeal to sit en banc" so that their en banc authority is "consistent with other jurisdictions that provide for en banc proceedings." *The Fla. Bar Re Rules of Appellate Procedure*, 463 So. 2d 1114, 1115 (Fla. 1984). Jurisdiction being a matter of substantive law, however, I am dubious about whether the supreme court can "broaden" our authority in this manner. *Cf. In re Proposed Fla. Appellate Rules*, 351 So. 2d 981, 988 (Fla. 1977) (treating authority of a court to resolve disputes (*i.e.*, jurisdiction) as a matter of "substantive law").

The provenance of Florida's en banc rule, with its questionable constitutional roots, tells me, then, that en banc consideration—if it is to be granted at all—certainly must be the exception and not

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[5] This prejudice might be enough to impel the litigant to challenge, via supreme court prohibition, the district court of appeal's jurisdiction to re-decide en banc a case that the litigant already won before a constitutionally constituted panel. *See* Art. V, § 3(b)(7), Fla. Const.

the rule. An en banc proceeding "engages the attention of every active judge" and "consideration of a case en banc drains judicial resources while burdening the litigants with added expense and delay." *Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1341 (D.C. Cir. 1981) (en banc) (Robinson, J., dissenting). As a consequence, en banc courts typically "are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law" within the appellate jurisdiction. *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960); *cf.* 11th Cir. R. 35-3 (reminding counsel that en banc consideration is an "extraordinary procedure").

This also tells me that I most assuredly cannot vote for an en banc do-over just because I would have written a panel's decision differently or because I would have reached a different outcome (or, dare I say, because I am displeased with some legislative policy, which of course is not our place as judges). An en banc court, in other words, "is not an institution for monitoring panel decisionmaking" in order to "correct individual injustices or mistakes." *Foley*, 640 F.2d at 1341 (quotations and citation omitted). "Disagreement with the panel opinion in a given case is simply insufficient to merit en banc review." *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1338 (11th Cir. 2013) (en banc) (Wilson, J., dissenting); *see also Foley*, 640 F.2d at 1341 (noting widespread agreement that the rule does not authorize "a vote for reconsideration by the entire court merely because [a judge] disagrees with the result reached by the panel"). If disagreement amongst the judges of this Court on a particular legal issue "were the touchstone of en banc review, nary a single opinion would see the light of day." *Evans*, 703 F.3d at 1338.[6]

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[6] I note that this caution comes from *federal* appellate courts, which, unlike Florida's appellate courts, can at least point to substantive law that gives them the authority to sit en banc. *See* 28 U.S.C. § 46(c) ("Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service."). Under our *federal* constitution, Congress has the

Our constitution's text unmistakably bestows upon three-judge panels of a district court, and not the district court as a whole, the power to decide cases. This construct anticipates that each of us will defer to the good judgment and wisdom of our colleagues sitting on panels besides ours, considering the cases we perhaps wish we had but do not. Indeed, a governor appointed each of us as a district court judge; each of us took the same oath to stay true to the constitution. *See Gamble v. United States*, 139 S. Ct. 1960, 1984–88 (2019) (Thomas, J., concurring) (discussing the significance of a judge's oath in the exercise of judicial power).

Moreover, we are a collegial court made up of fifteen intelligent jurists with diverse backgrounds and experience. We do not toil in isolation. Every one of our draft opinions circulates amongst the other fourteen judges for review and comment before its release. *See First District Court of Appeal Internal Operating Procedures* 5.4.2 (March 2019), https://www.1dca.org/content/download/426941/4633902/March_2019_IOP.pdf. Each of us, then, is constantly apprised of the varying panels' proposed decisions. Thus, if I have a concern about a panel's holding or rationale, I can go to the authoring judge or the other panel members to discuss it. That process can produce a better opinion. Still, if I cannot make headway with the panel, I must stand down and respect the Florida Constitution's directive—that it is ultimately the assigned panel's case to decide, not mine.

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authority to create inferior courts and the commensurate power to establish how they operate. *See* Art. I, § 8, cl. 9, U.S. Const.; Art. III, § 1, U.S. Const. The Florida Constitution does not give the Legislature the same type of authority. *See* Art. V, § 1, Fla. Const. (establishing the only four types of courts that may exercise the judicial power); Art. V, § 2(a), Fla. Const. (giving the supreme court the exclusive authority to adopt practice and procedural rules for all state courts, subject to repeal by a two-thirds vote of the two houses of the Legislature); Art. V, § 9, Fla. Const. (severely limiting the Legislature's authority to increase or decrease the number of judgeships, appellate districts, and judicial circuits).

Also, I can take some solace in the realization that any two or three of us can effect a meaningful development in the law only incrementally, at best. Remember that any particular panel decides the application of law to a particular set of facts; the decision's controlling nature in the future is necessarily limited. *See Boxer X v. Harris*, 459 F.3d 1114, 1115 (11th Cir. 2006) (Carnes, J., concurring in en banc denial) ("Our decisions are controlling only in cases involving materially similar facts."). Moreover, I am sure we all take seriously the supreme court's admonition that "[u]nder our appellate structural scheme, each three-judge panel of a district court of appeal should not consider itself an independent court unto itself, with no responsibility to the district court as a whole." *In re Rule 9.331, Determination of Causes by a Dist. Court of Appeal En Banc, Florida Rules of Appellate Procedure*, 416 So. 2d 1127, 1128 (Fla. 1982) (observing that "a three-judge panel of a district court should not overrule or recede from a prior panel's ruling on an *identical* point of the law") (emphasis supplied).

Under our constitution, then, en banc consideration indeed is an extraordinary step for a district court of appeal to take, regardless of whether it is done to "maintain uniformity" or to deal with a "case or issue [] of exceptional importance." Fla. R. App. P. 9.331(a). The rule represents a dramatic departure from the constitutional norm of a three-judge panel considering a case, and of a two-judge majority deciding it. As a consequence of this, the en banc process should be reserved for truly extraordinary circumstances where the need to involve the whole court is so manifest that it demands setting aside constitutional concerns and instead abiding by the supreme court's ostensible justification for the en banc rule in the first place—maintenance of consistency by the district court of appeal, as the faithful steward of the law within its jurisdiction. *Cf. In re Rule 9.331*, 416 So. 2d at 1128 (noting the Florida Constitution's "philosophy of a strong district court of appeal which possesses the responsibility to set the law within its district").

II. No Extraordinary Need Here to Justify Rehearing En Banc

All this said, I turn to the motion for rehearing en banc. The appellee considers the matter before the panel of "exceptional

importance" and asks that we collectively reconsider our colleagues' work. Thoughtful commentary already exists on what constitutes "exceptional importance." *See, e.g.*, *In re Doe 13-A*, 136 So. 3d 748, 753–55 (Fla. 1st DCA 2014) (Rowe, J., dissenting from denial of en banc hearing); *Ortiz v. State*, 24 So. 3d 596, 618–19 (Fla. 5th DCA 2009) (Cohen, J., dissenting from grant of en banc rehearing); *Univ. of Miami v. Wilson*, 948 So. 2d 774, 791–92 (Fla. 3d DCA 2006) (Shepherd, J., concurring in denial of en banc rehearing motion). While a precise definition of "exceptional importance" may prove elusive in the abstract, in considering an en banc motion on this basis, I must look at the case in the context of the constitutional concerns I discussed above. Having done so, I am certain that the procedural matter presented in this appeal falls far short of the "exceptional importance" threshold set out in the rule; nothing here cries out for the extraordinary process of en banc review.

At bottom, while this certainly is a tragic case, its governing legal principle is unremarkable. The motion that started all of this did not even seek dismissal under Florida Rule of Criminal Procedure 3.190(c)(4), as the panel majority astutely noted. A defendant typically relies on that provision to assert, through a *sworn* motion specifying the facts on which it is based, that "the undisputed facts do not establish a prima facie case of guilt against the defendant." *Id.* There was no sworn motion here.

The appellee instead titled his motion as one for dismissal of the information "FOR FAILURE TO COMPLY WITH [THE TRIAL COURT'S] ORDER FOR A STATEMENT OF PARTICULARS." The request essentially sought sanctions, which makes it an entirely different type of motion. *Cf.* Fla. R. Crim. P. 3.220(n) ("Sanctions").[7] The appellee even cited the abuse of

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[7] Rule 3.220(n), in pertinent part, provides as follows:

(n) Sanctions.

(1) If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with

discretion and prejudice standards associated with a sanctions motion.

A sanctions motion does not test the sufficiency of the State's case, so this appeal is not the proper vehicle by which to test the outer limits of criminal liability under the hazing statute. Even though the panel majority here considered whether the State had established a prima facie case, it did not do so in the context of sworn, undisputed facts, which would happen in the typical Rule 3.190(c)(4) context. Instead, the panel majority reviewed the State's charging document (which tracked the hazing statute's language) and the statement of particulars (which detailed the facts and circumstances supporting the charge) and asked whether dismissal of the felony charge was warranted at the beginning of the case, before trial, based on the trial court's assessment of the State's theory of the case.

The panel majority no doubt had in mind the well-worn principle that dismissal is an "extreme sanction and one that should be utilized with caution and only when a lesser sanction would not accomplish the desired result." *State v. Theriault*, 590 So. 2d 993, 995–96 (Fla. 5th DCA 1991); *see also State v. Del Gaudio*, 445 So. 2d 605, 608 (Fla. 3d DCA 1984) (noting magnitude of the sanction and counseling dismissal only as a last resort). Indeed, the criminal rules preclude a trial court from dismissing an information "for any cause whatsoever," unless it concludes as follows:

> that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass

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> an order issued pursuant to an applicable discovery rule, the court may order the party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

> him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense.

Fla. R. Crim. P. 3.140(o).

The "obvious rationale" for this limitation is to ensure "that the public's interest in having persons accused of crimes brought to trial is not sacrificed in the name of punishing a prosecutor's misconduct." *Del Gaudio*, 445 So. 2d at 608. It follows from the reality that "where the prosecutor's failure to make discovery has *not* irreparably prejudiced the defendant, the sanction of dismissal *punishes the public*, not the prosecutor, and results in a windfall to the defendant." *Id.* (emphasis supplied).

Along these lines, then, before such an extreme sanction can be imposed for a rule violation, there must be a showing that the non-compliance "resulted in prejudice or harm to the defendant." *Richardson v. State*, 246 So. 2d 771, 774 (Fla. 1971); *see also Theriault*, 590 So. 2d at 996 ("Before dismissing an information for a prosecutor's violation of a rule of discovery the trial court must find that the prosecutor's violation resulted in prejudice to the defendant."). As the supreme court has observed, the criminal discovery rules were "designed to furnish a defendant with information which would bona fide assist him in the defense of the charge against him. It was never intended to furnish a defendant with a procedural device to escape justice." *Richardson*, 246 So. 2d at 774.

I read the panel majority's decision as applying this principle, and nothing more. The single error that the panel majority corrects is an overzealous dismissal of an otherwise facially sufficient felony charge based on the trial court's reading of the hazing statute and its determination that the roughly four-page statement of particulars was somehow not informative *enough*. The panel majority's correction of the trial court is consistent with Florida's prevailing criminal pleading requirements, and it should not have much application beyond this case.

Put another way, at its heart, this appeal involves a pleading review; it does not have a constitutional dimension to it. The

information's allegations cited section 1006.63 and tracked, nearly verbatim, the statute's essential language. The felony count alleged that "[d]uring the Fall of 2017," the appellee "did unlawfully intentionally or recklessly commit any act of hazing as defined by Florida Statute 1006.63(1) upon Andrew Coffey," that Mr. Coffey "was an applicant or member of a student organization, operating under the sanction of a postsecondary institution as defined by Florida Statute 1006.63(1), Florida State University," and that the "hazing resulted in serious bodily injury or death of Andrew Coffey," in violation of section 1006.63(2), Florida Statutes.

The hazing statute's text prohibits conduct beyond just forced alcohol consumption. It expressly criminalizes the creation of physically or mentally dangerous circumstances—even if done only recklessly and not intentionally. The conduct criminalized as "hazing" is "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. (2017). To be sure, the statute provides a *non-exhaustive* list of examples. *See id.* (providing that the term "hazing" includes conduct involving "pressuring," "coercing," and "forc[ing]"). That list includes the following: "any activity that would subject the student to extreme mental stress," like a "forced activity that could adversely affect the mental health or dignity of the student." *Id.* The statute no doubt contemplates the intense peer pressure brought to bear on judgment-impaired 18- to 20-year-olds who desperately seek acceptance into a fraternity or sorority.

The statute affords the State a significant amount of leeway in deciding who should face criminal liability in these circumstances.[8] This is a policy call that the Legislature made.

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[8] The principal statute expands the scope of potential criminal liability even further. That provision states that "[w]hoever . . . aids, abets, counsels, hires, or otherwise procures [an] offense to be committed, and such offense is committed . . . may be charged, convicted, and punished" as a principal, regardless of "whether he

Naturally, the Legislature "has the primary authority for defining crimes." *Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996). It can "declare an act a crime regardless of the intent or knowledge of the violation thereof." *State v. Adkins*, 96 So. 3d 412, 417 (Fla. 2012) (internal quotation and citation omitted); *see also id.* ("Given the broad authority of the legislative branch to define the elements of crimes, the requirements of due process ordinarily do not preclude the creation of offenses which lack a guilty knowledge element.").

The State in turn gets to decide who it charges, based on what it thinks it ultimately can prove. As long as the information tracks the statutory terms, it typically will be facially sufficient; the State need not "set forth proof with which [it] intends to establish its case." *Martinez v. State,* 368 So. 2d 338, 340 (Fla. 1978) ("Generally, an information is sufficient if it follows the language of the statute . . . .") (internal citations omitted). "[I]t will be the rare instance that an information tracking the language of the statute defining the crime will be found to be insufficient to put the accused on notice of the misconduct charged." *Chicone*, 684 So. 2d at 744.

Still, even when an information tracks a criminal statute that "defines the offense in general terms," it might "not clearly and specifically apprise the accused of what he must defend against." *State v. Covington*, 392 So. 2d 1321, 1324 (Fla. 1981). The statement of particulars can provide a remedy by specifying "the acts alleged to constitute the offense with precision and particularity." *Id.* The availability of such a statement, along with the advent of liberal discovery rules, reduces "the danger of a defendant's being in doubt as to the specifics of his alleged wrongdoing . . . ." *State v. Dilworth*, 397 So. 2d 292, 294 (Fla. 1981). There is a rule for that. *See* Fla. R. Crim. P. 3.140(n) (requiring such a statement when the "information on which the defendant is to be tried fails to inform the defendant of the particulars of the offense *sufficiently to enable the defendant to prepare a defense*") (emphasis supplied). That statement must

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or she is or is not actually or constructively present at the commission of such offense." § 777.011, Fla. Stat. (2017).

"specify as definitely as possible the place, date, and all other material facts of the crime charged." *Id.*

Under this rule, the appellee obtained from the State just such a statement of particulars, which provided several pages of detail about the circumstances and events giving rise to the charges against the appellee and his co-defendants. The statement described the fraternity's history with hazing activities, and the appellee's past approval of and involvement in those activities—even though he was trained in the university's and his own fraternity's policies against hazing and the anti-hazing laws, and even though he was taught the dangers of binge drinking in a hazing environment. The statement described how the appellee knew that his chapter's prior big-brother nights had led to dangerously extreme intoxication and that this particular pledge class had a consistent problem with intoxication.

According to the statement of particulars, the appellee, along with his co-defendants on the fraternity's executive council—despite knowing all of this, including the dangers involved—promoted the big-brother party. It explained that he and his co-defendants lifted the fraternity directive that the pledges not drink. The statement specified the address at which the big-brother party was held as part of the chapter's tradition; it gave the specific night on which the party (and the tragic events that followed) occurred; it described who was there and how they got there; and it described the ensuing excessive drinking about which the defendants had been forewarned.

The trial court, then, should have concerned itself with but one question: Did the defendants have enough information to know "what [they] allegedly did wrong"? *State v. Sutton*, 416 So. 2d 852, 853 (Fla. 1st DCA 1982). Really, though, how could they not?

This is not a prosecution where the State alleged that the appellee and his co-defendants helped procure or promote a fraternity event where some unforeseeable-yet-tragic mishap occurred. The State did not describe the appellee and his co-defendants as planners or promoters of some fraternity event (perhaps volunteering at a food bank or a homeless shelter or

playing a friendly flag football game) in which the brothers and pledges were participating peaceably until something went terribly wrong and someone died. If the State had approached the case this way, the appellee and his co-defendants could be forgiven for their confusion about their charges.

That, however, was not the case here. The appellee was not confused, misled, or hampered in his defense. The State described the appellee's involvement in the planning of a fraternity-sponsored, Friday-night apartment party, attended almost exclusively by underage males (plus two strippers), where an objective was to consume alcohol to excess—illegally. The fraternity's executive council leaders followed fraternity tradition in approving and promoting the event with full knowledge and understanding of the social and emotional pressure it placed on pledges who desperately desired acceptance as brothers and of the serious risk involved in encouraging this particular group of pledges to drink.

If this is indeed the way it happened—something a jury alone must decide—it was a felony under the hazing statute because it resulted in a death. Hazing includes the *reckless* creation of a situation, associated with a university-sanctioned fraternity, that creates a risk of serious injury or death. Can anyone doubt the high risk involved with a bunch of highly motivated young adult males congregating at an apartment on a Friday night with a bunch of liquor and a couple of strippers?

Here is where the trial court went wrong—and how limited the panel majority's decision is. The trial court dismissed the felony charge (but not the misdemeanor charge) based on its interpretation of the statute and what appears to be a pre-judging of the sufficiency of the State's evidence. But there is an "obvious difference between the sufficiency of proof and the adequacy of allegations in an information." *Sutton*, 416 So. 2d at 853. The statement of particulars need not tell the appellee how the State intends to prove its case. "The purpose of a statement of particulars is to fully advise the defendant of the nature and cause of the accusation against him, and to afford him the opportunity to prepare a defense." *Brown v. State*, 462 So. 2d 840, 843 n.2 (Fla. 1st DCA 1985). Nonetheless, the statement of particulars

essentially set out the State's theory: The appellee's encouragement and facilitation of the Friday-night big-brother apartment party worked in tandem with the fraternity's culture and traditions and the pledges' desire to belong, and this created a high-risk situation that meets section 1006.63's definition of criminal conduct. The State's pleading must disclose enough so that the appellee knows what conduct allegedly violated the statute. Nothing more is required.

Arguably, there was no violation of the rules at all. There certainly was no irreparable prejudice to the appellee. Dismissal as a sanction was in no way justified. The panel, faced with a rare trial court dismissal of a felony information for failure to plead sufficient facts, appropriately respected the deference due to the State and the public interest in prosecuting legislatively prescribed crimes. The trial court should not have questioned the State's theory of the case. The panel majority simply corrected the error by reinstating the felony charge, which was consistent with extant case law.

We have, then, a panel majority deciding an appeal based on a well-established and non-controversial criminal pleading principle. There is no sweeping, districtwide statement of how the hazing statute must be applied to a particular set of facts.[9] There is no constitutional right at stake. The underlying circumstances of this appeal are tragic, to be sure; and the ultimate outcome of the case will be terribly significant to all involved. But there is no legal principle at work that could justify taking the extraordinary step of considering an override of the panel's decision, which already garnered the constitutionally mandated (and sufficient) concurrence of two of three judges on one of this Court's panels.

I concur in denying the requested exercise of the constitutionally dubious en banc power in this appeal.

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[9] The appellee might have a meritorious Rule 3.190(c)(4) motion; or, even more likely, a motion for judgment of acquittal at trial. Nothing in the panel majority's decision should preclude either motion in this or any other criminal-hazing prosecution.

MAKAR, J., dissenting in part from denial of rehearing en banc.

En banc review occurs when a majority of the judges eligible to vote decide to do so, which occurs infrequently because of the small number of times annually that members of our court actually vote on a pending motion for rehearing en banc. Voting on a party's motion for rehearing en banc is not automatic: a judge must request the vote, absent which the motion is administratively denied. The request for a vote on a party's motion can come from a panel or non-panel judge, and the resulting internal dialogue can be tepid or fierce, depending on the issues and personal interests of our fifteen members.

Even when an en banc motion fails after a court vote, the adjudicative process nonetheless benefits from the internal discussion, which is true even when the denial is somewhat lopsided. The collective wisdom of the court comes to bear on the process, which often makes the end product better, eliminates rough edges and surplusage, and sometimes produces different views expressed in concurring or dissenting opinions (sometimes on unraised issues as in this case). And even when the en banc vote isn't close, a dissental can shape the path of the law, such as our supreme court's decision in *Wright v. City of Miami Gardens*, 200 So. 3d 765 (Fla. 2016), which relied in part and quoted a dissental from this Court joined by only two members. *See Levey v. Detzner*, 146 So. 3d 1224, 1227 (Fla. 1st DCA 2014) (Makar, J., dissenting from denial of rehearing en banc joined by B.L. Thomas, J.), *abrogated by Wright*, 200 So. 3d at 777. The same can be said of en banc dissents themselves, which are close cousins of dissentals. *See Lee v. State*, 258 So. 3d 1297, 1300 (Fla. 2018) (relying upon and quoting from the two dissents in *Lee v. State*, 223 So. 3d 342, 372 (Fla. 1st DCA 2017), the 13-2 decision of this Court that was quashed). A lopsided denial of en banc review, or a lopsided en banc decision itself, isn't for naught and need not be the end of the story.

The en banc motions of the parties in this case raised important substantive (hazing) and procedural (speedy trial)

criminal law issues.[1] The vote on the motions, though resulting in an 11-3 vote against en banc review, was worthy of the discussion. Because we aren't required to explain our votes, it typically is indeterminate whether votes against en banc review are on the merits or because the issues are viewed as not sufficiently important to justify review (often heard is that "I agree with the dissent, but the issue is not en banc-worthy."). A gray area of uncertainty can arise where a majority of a court disagrees with a panel decision but lacks the en banc votes to deem the case or one of its issues of exceptional importance or necessary for uniformity in its precedents; the same is true for many more cases where a plurality of internal disagreement exists. A murky and malleable jurisprudence can result.

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[1] At this juncture the court is constrained to the issues the parties presented on appeal, not new ones raised by a panel (or a concurral) for the first time. That's what our en banc court recently said in a procedural case. *Rosier v. State*, 276 So. 3d 403, 407 (Fla. 1st DCA 2019) (en banc) (failure to include argument in initial brief operates as a waiver). The sole issue the State presented in its initial brief was: "THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DISMISSED THE FELONY HAZING COUNT BECAUSE THE STATE SHOWED A PRIMA FACIE CASE OF FELONY HAZING AGAINST THE DEFENDANT." No other dismissal-related issue was made throughout the appellate process; instead, the focus of the State and the other parties was exclusively on the trial court's dismissal order and Rule 3.190 (the only rule the State even cited; no mention was made by anyone of Rule 3.220). As a general matter, we adjudicate the case as presented to us and are not supposed to wander far from home. *Rosier*, 276 So. 3d at 406 ("An appellate court is 'not at liberty to address issues that were not raised by the parties.'") (citation omitted). More leeway is allowed, for example, where supplemental briefs are ordered or when a case goes en banc, *see, e.g., Florida Carry, Inc. v. Univ. of N. Florida*, 133 So. 3d 966 (Fla. 1st DCA 2013), or in concurrences and dissents (even from denials of rehearing en banc), which serve important functions in the development of our federal and state jurisprudence.

Turning to this case, one of exceptional importance,[2] criminal hazing laws have spawned much discussion and reforms nationwide. *See generally* Brandon W. Chamberlin, *"Am I My Brother's Keeper?": Reforming Criminal Hazing Laws Based on Assumption of Care*, 63 EMORY L.J. 925 (2014) (detailed survey and discussion of history of hazing laws). They are varied but typically supplement existing criminal laws, such as those for assault/battery, by creating a specifically defined basis for holding campus perpetrators accountable for intentional dangerous acts upon oft-times vulnerable students (e.g., whipping, beating, branding, forced consumption of liquor/drugs/etc.). *See, e.g., Martin v. State*, 259 So. 3d 733, 737 (Fla. 2018) (hazing law applies to member of university band who was responsible for ritual beatings on motor coach causing another member's death). If written or construed too broadly, however, they can result in over-criminalization, converting conventional torts and other social interactions causing harm into crimes. *See* Eric C. Surette, *Tort Liability for Hazing or Initiation Rituals Associated with Schools, Colleges, or Universities*, 100 A.L.R.6th 365 (2014) (general overview of tort liability in hazing context); *see also* Joseph Beckham & Douglas Pearson, *Negligent Liability Issues Involving Colleges and Students: Does A Holistic Learning Environment Heighten Institutional Liability?*, 175 ED. LAW REP. 379 (2003) (reviewing developments regarding institutional liability for negligence involving students, including hazing). Legislators walk a tightrope in drawing a line between those core intentional acts of harm for which criminal liability is appropriate while leaving societal space for private associations and their own distinctive operational principles; in other words, new forms of criminal liability are added guardedly and incrementally, particularly where other criminal (and tort) remedies already exist, thereby preserving those remaining aspects of private social life for which the freedom of association is appropriate.

Florida's hazing statute and its amendment history reflect this balance and incrementalism. The initial version of section

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[2] Rule 9.331(a), Fla. R. App. Pro. (2020) (en banc review warranted where "the case or issue is of exceptional importance or unless necessary to maintain uniformity in the court's decisions").

1006.63 was created almost two decades ago as a part of a massive restructuring of Florida's K-20 education laws. Ch. 2002-387, § 333, Laws of Fla. It included the types of serious physical acts intended to cause physical harm as in *Martin*. A few years later, the statute was broadened and clarified to include acts of hazing such as "pressuring or coercing [a] student into violating state or federal law," while excluding "customary athletic events or other similar contests or competitions or any activity or conduct that furthers a legal and legitimate objective." Ch. 2005-146, § 3, Laws of Fla. It was this substantive version, as adopted in 2005, that remained unchanged until 2019.

Given this background, the Legislature has made the central purpose of the applicable 2017 version 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. The law was amended and broadened in 2019, as discussed below, and might apply to post-2019 situations with similarities to this case, but no one disputes that the substantive version in effect in 2017—unchanged since 2005—is the relevant one in this appeal.

Here, the State failed to allege sufficient facts, despite being required to provide a detailed statement of particulars, that reached the level of a coercive criminal hazing offense under the language of the 2017 statute. Viewing the information and statement of particulars most favorably to the State, *see Boler v. State*, 678 So. 2d 319, 323 (Fla. 1996), the trial judge got it correct, stating:

> Authorizing a social event at which a fraternity pledge consumed too much alcohol despite the fact he was not legally permitted to do so would not support a claim for Felony Hazing *unless he was forced, pressured, or coerced into consuming such alcohol illegally and to excess*. The closest the State comes to such action is alleging that Defendants *created an opportunity* for under-aged drinking and Mr. Coffey *may have been encouraged* to

> partake. ***That is simply not enough under the statute as drafted.***

(Emphasis added).[3] 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 as well as precedent, which notes the narrow and heightened statutory standards for a hazing violation under the applicable version of the statute. *See, e.g.*, *Morton v. State*, 988 So. 2d 698, 704 (Fla. 1st DCA 2008) (hazing statute required "serious" injury such that jury instruction, which distinguished "serious" from "slight" injuries, was erroneous because jury could infer that harm other than slight harm—such as "moderate" harm—supported a violation).

No question exists that the State has alleged extreme hazing activities as they are understood in the collegiate vernacular; the question is whether its allegations fall within the previous statute's narrower parameters and thereby allege *illegal* hazing.[4] Our supreme court has made clear that section 1006.63 is narrowly written and doesn't criminalize all acts constituting "hazing":

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[3] Likewise, the trial judge got it wrong in concluding that a misdemeanor violation of the statute was viable when based on a lesser degree of harm. He split the baby, allowing the misdemeanor count to proceed, but the same deficiencies apply to that count (i.e., it exceeded the hazing statute's reach).

[4] The judicial inquiry is a purely legal one. *Williams v. State*, 244 So. 3d 356, 359 (Fla. 1st DCA 2018) ("The purpose of a motion filed pursuant to Florida Rule of Criminal Procedure 3.190(c)(4) is to determine whether the undisputed facts the State will rely on establish a *prima facie* case, as a matter of law, so as to permit a jury to find the defendant guilty of the charged crime."). Guesswork on appeal as to what a criminal defendant may have or ought to have known about where the prosecution may be headed in a case is not part of that inquiry.

> The 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. But an act may come within the definition of hazing and still not be a criminal offense.* The provisions establishing felony hazing and misdemeanor hazing both contain additional elements that go beyond the definition of hazing. An examination of those elements readily reveals that *they substantially narrow the scope of criminal liability* under the hazing statute.

Martin, 259 So. 3d at 736 (emphasis added). Chief Justice Canady's admonition as to the statute's narrow scope applies here (*Martin* involved the same version of section 1006.63).

Judicially expanding the hazing statute's reach conflicts with supremacy-of-the-text principles, and the Legislature's statutory admonition that Florida's criminal "code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat. (2020). These principles require that courts stand down and apply the statute as written; where a reasonable difference in construction exists, we must construe the statute "most favorably to the accused" as the Legislature has directed. *Id.* Textually, subsection (1) is the only general statement in Florida's written laws that compels strict construction of a statute's substantive language. It applies here because it is a purely legal question whether the allegations, construed in favor of the State, state a claim. *Williams v. State*, 244 So. 3d 356, 359-60 (Fla. 1st DCA 2018) ("A trial court's ruling on a motion to dismiss is reviewed *de novo*. . . . Questions of statutory construction are also reviewed *de novo*.") (citation omitted).

It is significant that the Legislature amended the hazing statute in 2019 in response to the mindless and heart-breaking tragedy in this case. It expanded criminal liability to anyone who "solicits a person to commit, or is actively involved in the planning" of acts of hazing (as defined in section 1006.63(1)). Ch. 2019-133,

§ 1, Laws of Fla. In doing so, the amendment opened up the "prosecution of persons who were known to have planned the hazing or recruited others to participate in hazing but who could not otherwise be identified as having actively participated in the act of hazing itself." Senate Bill Analysis & Fiscal Impact Statement, at 3 (March 11, 2019). The amendment also expanded potential liability to include "the perpetuation or furtherance of a tradition or ritual of any organization operating under the sanction of a postsecondary institution." *Id.* In short, it is for the Legislature to broaden criminal liability for the types of activities alleged in this case, as it has done incrementally in Florida, rather than judicial expansion, making en banc review warranted. Our job is to enforce the statute on the books at the time of the offense; doing otherwise amounts to reassessing and potentially expanding legislative policy.

As an alternative to full court review, the panel was asked by the defendants to certify questions of great public importance. Doing so would alleviate the need for en banc review, move the case along, and give our supreme court—which recently decided the *Martin* hazing case—an opportunity to address either or both issues. District court panels should not certify questions simply to marginalize or sidestep the en banc review process, but certification in appropriate cases can be a conciliating mechanism that focuses upon the issues that may be of concern among a court's members and gives our supreme court the power to decide what's important.

Finally, we do not in any way condone what happened on November 2-3, 2017. Andrew Coffey's needless death breaks the spirit of those of us with children college-age or younger and undoubtedly many others. It is unfathomable how the sudden loss of his young soul has affected his family, friends, and the broader community his life touched. We take solace in the fact that meaningful legislation and cultural reforms on campus—slowly but most assuredly—continue to take place in his memory. *See, e.g.*, Ch. 2019-133, § 1, Laws of Fla. (naming and codifying sections 1006.63(11)-(12), Florida Statutes, as "Andrew's Law.")

Postscript

Like a Coca-Cola Freestyle© machine, district court of appeal judges dispense a large range of judicial tastes on the en banc review process. I've stated my perspectives in detail,[5] and won't repeat them here. But it bears emphasis that the en banc review process in Florida state appellate courts has been both necessary and critical over the past four decades. District courts are the final stop for almost all of the thousands of cases brought to them for relief each year (our court gets close to 5000). We do not rely on supreme court review to correct our errors or to decide every case of importance; they don't have jurisdiction to do so and have a full docket of their own. Only we can police ourselves in the large swath of appellate cases whose journey ends with us. Doing so requires a degree of collective and collegial responsibility for overseeing decisions of three-judge panels, which are not necessarily the ultimate authority in all cases: the full court is. *In re Rule 9.331, Determination of Causes by a Dist. Court of Appeal En Banc,* 416 So. 2d 1127, 1128 (Fla. 1982) ("Under our appellate structural scheme, each three-judge panel of a district court of appeal should not consider itself an independent court unto itself, with no responsibility to the district court as a whole."); *Chase Fed. Sav. & Loan Ass'n v. Schreiber*, 479 So. 2d 90, 94 (1985) ("The en banc process provides a means for Florida's district courts to avoid the perception that each court consists of independent panels speaking with multiple voices with no apparent responsibility to the court as a whole."). Without en banc oversight we'd be merely "an assemblage of 455 randomly-assigned and autonomous three-judge panels each doing as it sees fit." *Mitchell v. Brogden*, 249 So. 3d 781, 784 (Fla. 1st DCA 2018) (Makar, J., dissenting from denial of rehearing) (noting that our 15-member court has 455 possible three-judge panel combinations). As important and necessary as the en banc review process is to our work and the jurisprudence that governs the people and institutions in our district, we have been judicious and infrequently use it (i.e., few are called, even

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[5] *See Florida Fish & Wildlife Conservation Comm'n v. Daws*, 256 So. 3d 907, 930 (Fla. 1st DCA 2018) (dissental); *Mitchell v. Brogden*, 249 So. 3d 781, 783 (Fla. 1st DCA 2018) (dissental); *In re Doe 13-A*, 136 So. 3d 748, 757 (Fla. 1st DCA 2014) (dissental).

fewer chosen), which is appropriate as a matter of judicial policy and discretion resulting from the respectful exercise of judgment when a party or colleague believes review may be warranted. *Schreiber*, 479 So. 2d at 94 ("The [en banc] process provides an important forum for each court to work as a unified collegial body to achieve the objectives of both finality and uniformity of the law within each court's jurisdiction.").

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DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA
2000 DRAYTON DRIVE
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KRISTINA SAMUELS
CLERK OF THE COURT

DANA SHARMAN
CHIEF DEPUTY CLERK

April 9, 2020

Re: State of Florida vs Anthony Petagine
Appeal No: 1D18-2086
Trial Court No.: 2018 CF 209 G
Trial Court Judge: Hon. Martin A. Fitzpatrick
If Crim, LT NOA date: 05/18/2018

Dear Mr. Tomasino:

Attached is a certified copy of the Notice Invoking the Discretionary Jurisdiction of the Supreme Court, pursuant to Rule 9.120, Florida Rules of Appellate Procedure. Attached also is this Court's opinion or decision relevant to this case.

___ The filing fee prescribed by Section 25.241(2), Florida Statutes, was received by this court and is attached.

___ The filing fee prescribed by Section 25.241(2), Florida Statutes, was not received by this court.

___ Petitioner/Appellant has previously been determined insolvent by the circuit court or our court in the underlying case.

___ Petitioner/Appellant has already filed, and this court has granted, petitioner/appellant's motion to proceed without payment of costs in this case.

No filing fee was required in the underlying case in this court because it was:

___ A summary Appeal, pursuant to Rule 9.141
___ From the Unemployment Appeals Commission
___ A Habeas Corpus proceeding
___ A Juvenile case
_✓_ Other _____

If there are any questions regarding this matter, please do not hesitate to contact this Office. **A motion postponing rendition pursuant to Florida Rule of Appellate Procedure 9.020(i) ____ is or _✓_ is NOT pending in the lower tribunal at the time of filing this notice.**

Sincerely yours,

Kristina Samuels
Clerk of the Court

By:_____
Deputy Clerk