IN THE SUPREME COURT OF FLORIDA

RONALD REYNOLDS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC01-1114

RESPONDENT'S ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

DANIEL A. DAVID
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0650412

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4573
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGE(S)

FEDERAL CASES

STATE CASES

FLORIDA STATUTES

OTHER

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Ronald Reynolds, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of four volumes. No index prepared by the trial court clerk references each of the volumes by number. Thus, Respondent will refer to the volume containing papers and pleadings by use of the symbol “R”; to the two volumes of trial transcript by “TI” or “TII” and to the Supplemental Record by use of the symbol “SR” with any specific page reference following, all in parenthesis. Petitioner's Merits Brief will be so referred to, as well as Petitioner’s Jurisdictional Brief (or as “PJB”). All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner’s Statement of the Case and Facts is inadequate. Respondent supplements with the following significant facts:

Issue One. In connection with his motion to dismiss at the trial court, defendant admitted at least two separate factual scenarios to which this statute could validly apply:

> For example, in North Florida approximately a year ago an individual was prosecuted for throwing live dogs to alligators. And the live dogs were ripped apart. There was expert testimony that the animals were defecating on themselves before they were thrown to the alligators. The animals sensed fear. I would have no problem with suggesting that clearly would constitute cruel death or torture.
>
> Likewise, another individual was prosecuted in South Florida for picking up a dog by its feet and beating it into the pavement until the dog dies. Again, it seems to clearly fall within the cruel death or torture.
>
> (R:72)

In his closing argument at trial Petitioner stated this:

> There are two things the State must prove in this case: That the puppy suffered, excessively suffered and, you know, we admit that, he did. The act resulted in excessive infliction of unnecessary pain or suffering and the act of that puppy getting its throat cut, yes, we'll give you that. But we will not give you that Mr. Reynolds did that because he did not do it and he told you he did not do it. What more can we say?
>
> (TII:216)

Petitioner, through counsel, also told the trial court at the motion to dismiss hearing: "At the outset I should note we are not suggesting the statute is facially invalid; that is, there are certain acts that clearly would fall within the language of the felony subsection." (R. 72); "We are not suggesting the statute is facially invalid, as this court is well aware of he

standard for what constitutes in an [sic] unconstitutionally vague is [sic] applied attack." (R:73); "In this case, of course, I'm not saying that the statute is unconstitutional facially, but merely as applied to the facts of this case." (R:100).

Issue Two, (sub-issue B) From two witnesses, the following was established: Petitioner directed some neighborhood children to catch the puppy (TI:41), Petitioner picked up the puppy, slashed its throat (TI: 41-42, 43) and then tossed the dog into a ditch. (TI:42). The defendant was the one who slashed the dog. (TI:51, 58). After he did this, petitioner walked away and washed his knife off. (TI:56). The puppy was laying on its side, bleeding and shaking. (TI:57). Animal Control arrived about 15-20 minutes after being called. (TI:45).

Issue Three. At jury charge conference, Petitioner stated:

> THE COURT: All right, now, back to the statement of the charge. Does counsel have any proposed language in terms of how to state the elements of the offense?
> MR. LAMPASSO [Prosecutor]: Judge, the State does. Since there wasn't anything in the book, itself, the proposal that we have here is just that it read cruelty to animals, Florida Statutes 828.12, Subsection (2). Before you can find the defendant guilty of cruelty to animals, the State must prove the following two elements beyond a reasonable doubt: One, the defendant intentionally committed an act upon the animal; two, the act resulted in excessive infliction of unnecessary pain or suffering. We're asking to take out the words "or repeated," because we don't really feel that's an issue.

THE COURT: And you're also deleting the cruel death, which obviously does not apply.
MR. LAMPASSO: Right.
THE COURT: All right.
MS KIRWIN [Asst. Public Defender]: **Judge, we would agree with Mr. Lampasso's language**.
THE COURT: All right. Mr. Lampasso, if I could have your draft so we can get that incorporated into the final instructions.
MR. HARLEY [Co-prosecutor]: Judge, you're not going to read the statute, the paragraph that you have here on the first page?
THE COURT: No, I'm deleting that entirely and replacing it with the language that was just read into the record, which is as follows. Cruelty to animals, Florida Statute 828.12, Subsection (2): Before you can find the defendant guilty of cruelty to animals, the State must prove the following two elements beyond a reasonable doubt: One, the defendant intentionally committed an act on the animal; and two, the act resulted in the excessive infliction of unnecessary pain or suffering. Is that it?
MS. KIRWIN: **Yes, ma'am.**
(TII:195)

SUMMARY OF ARGUMENT

Issue One. Respondent suggests review was improvidently granted over whether Chapter 828.12(2), Fla. Stat. (1997) is unconstitutional unless it has "read into" it an element of specific intent, as Petitioner alleges. This is so because Petitioner at trial affirmatively and repeatedly eschewed a facial challenge, and further affirmatively embraced no less than two factual scenarios where the statute validly applied. Thus, Petitioner is unable to set out that there are no set of circumstances to which the statute can be validly applied. Should the Court find merits review appropriate, the First District did nothing other than apply well settled precedent of this Court that the question of general as opposed to specific intent is a matter of legislative prerogative, and that this statute is not unconstitutional for failure to have a specific intent requirement. If the Court reaches the merits, Respondent suggests this case is the apt vehicle to jettison the specific versus general intent distinction that has long been criticized by this Court, the lower courts, and commentators.

Issue Two. Respondent suggests that review on this issue would be improvident, not only for the reasons outlined under Issue One, but for the additional reason that this question was never addressed by the First District below. If merits review is had, the statute obviously requires an intent element, and the charging document so noted. What is not required in either the statute or the charging document is the "reading into" the

offense of specific intent, which is what Petitioner demands. As to Petitioner's sub-issue, that the evidence was legally insufficient, this argument is procedurally barred due to his only making a curt *pro forma* JOA argument at the trial court that never mentioned this claim. As to the merits, as soon as it is realized that no specific intent element is required, the argument falls of its own weight. Petitioner's intent was established by the testimony of at least two witnesses setting out his behavior before, during, and after the crime, from which the requisite *mens rea* is properly inferred.

Issue Three. Respondent again urges that review of this issue would be improvident, not only for the reasons set out in each of the two preceding issues, but on the additional basis that Petitioner at trial affirmatively agreed to the jury instructions he now, on appeal, claims constitute reversible error. As to the merits, his theory of defense at trial was none of this specific versus general intent argument, but rather a straightforward denial that he committed the crime. The jury had adequate standard instructions to weigh his "I didn't do it" theory of defense. Therefore, there is no defect in the jury instructions as given.

ARGUMENT

ISSUE I

IS CHAPTER 828. 12(2), FLORIDA STATUTES (1997), FACIALLY UNCONSTITUTIONAL UNLESS INTERPRETED TO REQUIRE A SPECIFIC VERSUS GENERAL INTENT? (Restated)

Suggestion that Review was Improvidently Granted

Although not addressed in the opinion of the First District below, Respondent (there appellee) argued head-on, and demonstrated from the trial court record that defendant at trial affirmatively embraced not less than two discrete factual situations in which the statute could validly apply. (R:72). Having expressly admitted at least two different factual scenarios to which the statute can be validly applied, Respondent again submits Petitioner cannot on appeal establish facial unconstitutionality. As noted in a well articulated facial unconstitutionality analysis, State v. Barnes, 588 So.2d 633, 637 (Fla. 2d DCA 1996), "...a defendant must shoulder the 'heavy burden' of establishing that the statute is facially unconstitutional in that there exists no set of circumstances in which the statute can be constitutionally applied[.]"

Moreover, defendant at trial repeatedly stated he **was not** claiming facial invalidity of the statute: "At the outset I should note we are not suggesting the statute is facially invalid; that is, there are certain acts that clearly would fall within the language of the felony subsection." (R. 72); "We are

not suggesting the statute is facially invalid, as this court is well aware of he standard for what constitutes in an [sic] unconstitutionally vague is [sic] applied attack." (R:73); "In this case, of course, I'm not saying that the statute is unconstitutional facially, but merely as applied to the facts of this case." (R:100).

Respondent submits a defendant cannot specifically eschew a theory at trial and then claim it as a basis for relief on appeal. See generally, State v. Rhoden, 488 So.2d 1013, 1016 (1984), discussing the contemporaneous objection rule: "The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant."

Additionally, Reynolds petitioned for review in this Court because "the district court's reasoning in the case below conflicts with" this Court's decision in State v. Huggins, 802 So.2d 276 (Fla. 2001), Petitioner's Jurisdictional Brief, p. 6. Conflicts in reasoning rather than conflicts in decisions are no basis for jurisdiction of this Court. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980): it is "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction review by certiorari." Moreover, petitioner further alleged conflict between the decision of the First District below and State v. Simbach, 742 So.2d 365 (Fla. 2d DCA 1999), PJB, pp.4-5. Yet here, on merits review, Petitioner provides, it is

respectfully submitted, only the most cursory and tangential examination of Simbach[1], admitting it is factually distinguishable (Petitioner's Merits Brief, p. 27)[2], it is "procedurally distinct from the instant case," (Petitioner's Merits Brief, p. 28), and further allowing:

> The [First] district court's opinion noted that, while claiming the statute was unconstitutional, Reynolds did not identify a particular constitutional violation. This point was overlooked, to a large extent, because petitioner relied on Chicone [v. State, 684 So.2d 736 (Fla. 1996)]. In Chicone, this Court held the statute unconstitutional unless it had a scienter element, but the court did not clearly identify the particular constitutional violation, nor did Simbach, supra.
> (Petitioner's Merits Brief, p. 28, insertion by bracketing)

Chicone of course had nothing to do with construction of the animal cruelty statute assailed by Petitioner here. Chicone rather announced the unremarkable proposition that to be guilty of possession of a controlled substance the possessor must be aware that the substance he possess is illicit, *scienter* is

---

[1]Moreover, as noted in Respondent's Jurisdictional Brief, the **holding** of Simbach was simply this: a Rule 3.190(c)(4) motion cannot be decided on the basis of **intent**. Thus, the Second District in Simbach reversed a trial court order granting a "(c)(4)" motion: "However, we conclude that the trial court erred in granting Simbach's motion because intent is not an issue to be decided on a motion to dismiss filed pursuant to rule 3.190(c)(4)." 742 So.2d 365, 366. Thus, the Simbach holding does not rest on a distinction between general and specific intent. Whether a "(c)(4)" motion is grounded on specific or general intent, it is still not a legitimate basis for a motion to dismiss.

[2]"Some facts of Simbach are distinguishable from the instant case..." Petitioner's Merits Brief, p. 27.

required, and a person cannot be convicted for innocently possessing something where he is unaware of its illicit nature. 684 So.2d 736, 743-744. Notably, Huggins, supra, also had nothing to do with construction of the animal cruelty statute at issue here, rather dealing with the availability of Prison Releasee Reoffender sentencing to a person who commits burglary of an unoccupied dwelling.

In sum, we have a case where the defendant specifically disclaimed a facial challenge at trial; who further acknowledged no less than two factual situations in which the statute could validly apply; who claims conflict basis on "the reasoning" of the First District below in construing the animal cruelty statute compared to the reasoning of this Court in construing the applicability of PRR sentencing for burglary of an unoccupied dwelling (Huggins); who further claims conflict with a Second District decision (Simbach) he admits is factually dissimilar, procedurally inapposite, and does "not clearly identify the particular constitutional violation." A Petitioner who further claims conflict with the statutory construction of the court below interpreting the animal cruelty statute and of this Court in construing a drug possession statue (Chicone) with Chicone never so much as even impliedly addressing a facial constitutionality challenge, and a Petitioner who "fail[ed] to identify any particular provisions of either the state or the federal constitution that are supposedly violated by this

statute." Reynolds v. State, 784 So.2d 509, 511 (Fla. 1st DCA 2001).

Given the record and procedural posture of this case, Respondent respectfully submits the appropriate course of action is for this Court to find that review was improvidently granted, and dismiss this case.

Merits

Appellant pressed the claim to the Florida First District Court of Appeal that the statute he was charged and convicted under was facially unconstitutional and violative of due process unless the statute was read to require a specific, versus a general intent. The First District held the statute was not unconstitutional because it required a general instead of a specific intent. Reynolds v. State, 784 So.2d 509, 511 (Fla. 1st DCA 2001). The First District was correct in its conclusion, and this Court should thus uphold the decision below.

In rejecting appellant's claim, the First District stated, id.:

> The fact that section 828.12(2), Florida Statutes (1997), requires only general, rather than specific, intent does not, as appellant argues, necessitate the conclusion that the statute is unconstitutional. (We note that appellant fails to identify any particular provisions of either the state or the federal constitution that are supposedly violated by this statute.) Our supreme court has held:
>
> It is within the power of the legislature to declare conduct criminal without requiring specific criminal intent to achieve a certain result; that is, the legislature may punish conduct without regard to the

> mental attitude of the offender, so that the general intent of the accused to do the act is deemed to give rise to a presumption of intent to achieve the criminal result....
>
> The question of whether conviction of a crime should require proof of a specific, as opposed to a general, criminal intent is a matter for the legislature to determine in defining the crime. The elements of a crime are derived from the statutory definition.
>
> *State v. Gray*, 435 So.2d 816, 819-20 (Fla.1983). The legislature has, by plain language, declared that one is guilty of the crime proscribed by section 828.12(2) regardless of whether he or she acted with the specific intent to inflict upon an animal a cruel death or excessive or repeated unnecessary pain or suffering. We hold that section 828.12(2) is not unconstitutional because it lacks a specific intent element.

The first point to be noted is that the First District's decision is nothing other than a pedestrian application of well settled precedent of this Court to a clear statute. This is hardly remarkable.

The second point is that the First District was further correct in holding, in conformity with this Court's Gray decision, that the determination of whether a specific or general intent is required in the commission of a crime is a matter of legislative prerogative. See State v. Bussey, 463 So.2d 1141, 1143 (Fla. 1985): "It is within the authority of the legislature to dispense with specific criminal intent when defining crimes." (citing Gray). Likewise, Chicone v. State, 684 So.2d 736, 740 (Fla. 1996): "Although the legislature may punish an act without regard to any particular (specific) intent, the State must still prove general intent, that is, that the

defendant intended to do the act prohibited." citing with approval State v. Oxx, 417 So.2d 287 (Fla. 5th DCA 1982).

Outside of the context of a First Amendment issue (which patently is inapposite in this case), Respondent is unaware of any case in which this Court has found a statute facially unconstitutional due to a requirement of specific versus general intent. In Wyche v. State, 619 So.2d 231 (Fla. 1993) this Court found unconstitutional a Tampa anti-loitering ordinance that was applied mainly against prostitutes.

The Court rejected the contention it could re-write the ordinance by injecting a specific intent element, and found the enactment unconstitutionally vague because it could result in prosecution for any number of legitimate, First Amendment protected activities such as waving, talking, hailing a cab, or merely slowly walking down a public street.The Wyche Court further found the ordinance defective because it "also violates substantive due process because, as we have discussed, it may be used to punish entirely innocent activities" and also was in conflict with state statute over the maximum possible punishment. 619 So.2d at 237.

Likewise, in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217, 508 U.S. 520, 124 L.Ed.2d 472 (1993) the United States Supreme Court struck down on First Amendment grounds City of Hialeah ordinances that endeavored to bar ritual sacrifices of animals that were central to a particular religion's dogma at a church within the city limits. The First

Amendment issues are so patent that no explication is required. The first sentence of the Court's decision says it all: "The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." 113 S.Ct. 2217, 2222. Moreover, Respondent was unable to find the slightest mention of specific versus general intent in the Lukumi Babalu opinion.

The point is clear that outside of a First Amendment context, the jurisprudence of this Court demonstrates that general intent is entirely appropriate, is an arena of clear legislative prerogative, and a statute is not facially unconstitutional due to some perceived requirement for a specific versus general intent. It is well settled, Bussey, Chicone, Gray, that the determination of general versus specific intent is a legislative prerogative. Unless some sort of First Amendment values are implicated (most assuredly not the case here) there is no Constitutional question. Indeed, in this case, we do not even know what the constitutional question is, because, as noted by the First District, Petitioner in this case never even identified which provision of either the State or Federal Constitutions was purportedly violated by this statute.

Under well settled principles, such as set out in State v. Globe Communications Corp., 648 So.2d 110, 113 (Fla. 1994),

> whenever possible we will construe a statute so as not to conflict with the constitution. Firestone v. News-Press Publishing Co., 538 So.2d 457, 459 (Fla.1989). We will resolve all doubts as to the validity of the statute in favor of its

> constitutionality, provided we can give the statute a fair construction that is consistent with the Florida and federal constitutions and with legislative intent. State v. Stalder, 630 So.2d 1072, 1076 (Fla.1994); State v. Elder, 382 So.2d 687, 690 (Fla.1980).

This Court should uphold the facial constitutionality of the statute in the face of petitioner's perceived need for specific intent. Should this Court find this case inopportune as a vehicle to jettison the "ill conceived framework" of the general/specific intent distinction, infra, the proper course is to apply the settled principles of Gray, Bussey, and Chicone that the determination of whether intent is general or specific is a choice to be made by the Legislature.

Respondent asserts that the distinction between general and specific intent is largely an academic debate that serves no useful purpose in Florida law[3]. It was most often seen as a point of contention in cases where a person claimed voluntary intoxication. A crystalline example of this is to be seen in Frey v. State, 708 So.2d 918 (Fla. 1998) where Frey attacked a deputy who was trying to arrest him. Much analysis was expended

---

[3]Though Respondent did not present this argument to the First District, it is proper to do so here for two complimentary and self-reinforcing reasons. *One*, a District Court cannot overrule decisions of this Court, only this Court can do so. Hoffman v. Jones, 280 So.2d 431 (Fla.1973). *Two,* "[T]he appellee can present any argument supported by the record even if not expressly asserted in the lower court." Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999).
Petitioner will have the opportunity to address the matter in his Reply Brief, assuaging the concern expressed in Justice Harding's Frey concurrence, infra.

in the trial court, in the Second District[4], and in this Court over whether resisting arrest with violence and aggravated battery on a law enforcement officer were specific intent crimes and whether voluntary intoxication was a valid defense to them. 708 So.2d at 919. This Court ultimately determined, through answer of the certified question presented by the Second District, that resisting arrest with violence was a general intent crime to which voluntary intoxication is not a valid defense. Id. at 920.

Notable were the concurrences and partial dissents in Frey. Justice Grimes' concurrence: "There is much to be said for doing away with the distinction between specific and general intent crimes." 708 So.2d 918, 920. Justice Harding's concurrence, id.:

> In his concurrence, Justice Anstead raises some important concerns regarding the distinction between specific and general intent crimes. I agree with Justice Anstead that this is a very confusing area of the law. See Linehan v. State, 442 So.2d 244, 246 (Fla. 2d DCA 1983) ("The distinction between 'specific' and 'general' intent crimes is nebulous and extremely difficult to define and apply with consistency.") approved, 476 So.2d 1262 (Fla.1985). However, this is not the right case to consider abolishing the distinction between specific and general intent crimes. The district court below did not address the possibility of doing away with the distinction and the parties have not had a chance to brief this issue.

Justice Anstead's opinion concurring in part and dissenting in part (joined by Chief Justice Kogan), id. at 921:

---

[4]Frey v. State, 679 So.2d 37 (Fla. 2d DCA 1996), certifying the question which provided this Court's jurisdiction.

> I believe that the artificial distinction we have established between general and specific intent, with only specific intent crimes warranting additional defenses such as voluntary intoxication, often leads to incongruous and harsh results.

Justice Anstead, citing commentators, other courts, and another Justice of this Court, further spoke of "[t]hese arcane rules," id. at 921, the "perplexing division between 'general' and 'specific,'" id., "the 'nebulous distinction' separating general from specific intent crimes," id. at 922, and based on the facts presented in Frey, "the faulty rationale, if any, for maintaining the irrational division of criminal intent between 'general' and 'specific.'" Id. at 925.

As noted, Justice Anstead, in his partial concurrence, quoted another Justice of this Court, namely Justice Shaw, author of the majority opinion in Frey, who earlier in a special concurrence in Chestnut v. State, 538 So.2d 820, 825 (Fla. 1989) stated: "I write only to note again that the nebulous distinction between general and specific intent crimes and the defense of voluntary intoxication bear reexamination in a suitable case." In the earlier case of Linehan v. State, 476 So.2d 1262, 1267 (Fla. 1985), Justice Shaw, in a dissent joined by Justice Alderman, drew on a dissent in the Second District in that case to note "the distinction which we have heretofore drawn between general and specific intent crimes is an artificial irrationality widely condemned by the authorities."

By Respondent's count, no less than six current or former Justices of this Court (Shaw in Chestnut; Shaw and Alderman in

Linehan; Grimes, Harding, Anstead and Kogan in Frey) have recognized the uselessness of the specific versus general intent distinction in Florida law. All that has been wanting is a suitable case upon which to decide the matter. Respondent submits this case has now arrived.

The lower courts have struggled to make sense of the purported distinction between "specific" and "general" intent. It is an exercise in hair-splitting that has long bedeviled both bench and bar. As to its impact on the trial courts of this state, one need look no further than the decision in Frey, 708 So.2d 918, 919:

> Frey was charged with aggravated battery on a law enforcement officer and resisting arrest with violence. He was tried before a jury and in closing argument defense counsel argued that Frey had been too drunk to form the specific intent to commit the crimes. The prosecutor, on the other hand, told the jury that while voluntary intoxication is a defense to aggravated battery, it is not a defense to resisting arrest with violence. The judge in his instructions to the jury echoed the prosecutor's statement of the law. Frey was convicted of battery and resisting arrest with violence. The district court affirmed and certified the above question.
>
> Frey argues that resisting arrest with violence is a specific intent crime and that his requested instruction on voluntary intoxication should have been given on this charge. He asserts that the trial court erred not only in denying the instruction but also in instructing the jury that voluntary intoxication is not a defense to resisting arrest with violence. We disagree.

As to its negative effect on the District Courts of Appeal, the following recent cases are illustrative. Coston v. State, 765 So.2d 52, 53 (Fla. 2nd DCA 1999)(attempted arson case):

> Appellant raises the specter of the judicially created distinction between specific intent and general intent crimes. We believe the court would be best served by following the advice in the opinion, concurring in part and dissenting in part, of Justice Anstead in *Frey v. State*, 708 So.2d 918 (Fla.1998). Justice Anstead advised: "Rather than splitting hairs and attempting to draw a bright line through the murky and ill-defined netherworld that separates general from specific intent, our time would be better spent giving effect to the legislative intent behind a particular statute...." *Frey*, 708 So.2d at 921.

To the same end, Firth v. State, 764 So.2d 734, 735 (Fla. 2nd DCA 2000)(aggravated battery on a pregnant woman):

> To determine whether the statutory language requires proof of a specific intent, we enter, with some degree of reluctance, that "murky and ill-defined netherworld that separates general from specific intent" crimes. *Frey v. State*, 708 So.2d 918, 922 (Fla.1998)(Anstead, J., concurring and dissenting).

Likewise, Glenn v. State, 753 So.2d 669, 670 (Fla. 2nd DCA 2000)(drug trafficking case): “We hesitate to enter the unsatisfying debate over those qualities that distinguish general intent crimes from specific intent crimes.” Also, State v. Franchi, 746 So.2d 1126, 1127 (Fla. 4th DCA 1999)(aiding escape): “For years the distinction between specific and general intent has spurred debate and caused difficulty in determining the applicability of various defenses[]” citing in its n.1 Justice Harding’s Frey concurrence: "The distinction between 'specific' and 'general' intent crimes is nebulous and extremely difficult to define and apply with consistency." (parens deleted)

And, all of this to what end, Respondent must question. From animal cruelty to battery on a law enforcement officer to arson

to battery of a pregnant woman to drug trafficking to escape, the chimera of the difference between specific and general intent has inserted itself into virtually every type of crime in Florida. Attempting to nail down the insolubly ambiguous distinction has generated much learned analysis, a herculean effort at definitional precision, but all with the result of a murky, muddled dichotomy that cannot coherently be applied on a principled basis.

The handmaiden of the specific/general intent imbroglio has already been discarded by the Florida Legislature. Voluntary intoxication has been abolished by statute. Chapter 775.051, Florida Statutes (1999). This Court should take the remaining step, as highlighted in Justice Anstead's Frey partial concurrence, that "Since this perplexing division between 'general' and 'specific' is judicially created, we should seriously consider whether now is the time to revise this ill-conceived framework." 708 So.2d 918, 921.

As cogently set out in Justice Anstead's Frey opinion, 708 So.2d 918, 922,

> Rather than splitting hairs and attempting to draw a bright line through the murky and ill-defined netherworld that separates general from specific intent, our time would be better spent giving effect to the legislative intent behind a particular statute and focusing on the degree of culpability along the lines clearly delineated in the Model Penal Code.

The Model Penal Code, as Justice Anstead explained, n.5, contains no such specific/general intent. Moreover, the Court, as Justice Anstead further explained, is "[in] a sense ...

already moving in [the] direction" of eliminating the specific/general intent distinction, Justice Anstead relying on Chicone as an example of this. 708 So.2d at 925. Curiously, Chicone is the case upon which Petitioner hangs virtually all. Clearly, Petitioner has misread it, for rather than being the standard bearer for not only adherence to the specific/general intent distinction, but for extension of it, as Petitioner argues for here, the true meaning of Chicone is that it is a step in the direction of eliminating that nebulous and ill-based distinction.

As to Petitioner's many policy arguments over meatcutters, euthanasia of strays, veterinary malpractice, sportsmen, etc., peppered throughout his brief, this Court has already addressed that precise question. In addressing the 1979 version of this statute, it was clearly stated, Wilkerson v. State, 401 So.2d 1110, 1112 (Fla. 1981):

> Appellant has raised some difficult questions concerning the applicability of this statute to hunters, fisherman, and pest exterminators. We believe that these hypothetical questions are properly addressed to the legislature than to the courts.

To adopt Petitioner's formulation would require this Court, for the first time in a non-First Amendment scenario as far as Respondent has been unable to uncover, to hold an enactment of the Florida Legislature facially unconstitutional based on "the nebulous distinction" between general and specific intent crimes. It would also require this Court to wade into policy

questions the Court has already wisely determined are the province of the Legislature.

The proper approach is to uphold the well reasoned, legally supported decision of the First District below that general intent is sufficient for this statute. If the Court goes further, it is suggested that this is the appropriate case to eliminate the specific/general intent distinction.

ISSUE II

DID THE CHARGING DOCUMENT FAIL TO CONTAIN AN ELEMENT OF INTENT? (Restated)

Suggestion that Review was Improvidently Granted

Respondent re-adopts this portion of its argument set out under Issue One, but with the observation that the conclusion is even more potent under this issue. For, as Petitioner concedes (Petitioner's Merits Brief, p. 32) and as is inarguable based on the decision below[5], this issue was never passed upon by the First District.

Should this Court find this matter susceptible of merits review, Respondent submits that the proper approach is not initial error review here. This issue breaks no new legal ground. It is rather the application of settled principles to a particular fact pattern. Thus the case should be returned to the First District for resolution and a possible merits decision which would result in a more efficacious review of the legal issue by this Court should such later be deemed warranted on this record.

Merits

Petitioner breaks this issue into two sub-claims, which, for the sake of clarity and coherence, will be addressed in the order presented by Petitioner. Petitioner's first sub-issue ("Failure to charge element of the offense") is grounded entirely on the analytical misperception permeating his entire brief, Petitioner's Merits Brief, p. 33:

---

[5]Reynolds v. State, 784 So.2d 509, 511 (Fla. 1st DCA 2001): "Our resolution of appellant's first claim of error moots his remaining claims."

> In fact, because the statute requires that a scienter/specific intent element be read into it in order for it to be constitutional, this is "the rare instance [where] and information tracking the language of the statute defining the crime [is] insufficient to put the accused on notice of the misconduct charged." Chicone, 684 So.2d at 744
> (insertion by bracketing by Petitioner)

In point of fact, as made clear in Issue One, the statute requires no such thing as a specific intent element to be read into it. Such illusory and unworkable distinction has been explored in Issue One and the points need not be repeated anew.

In so stating, Respondent stresses that it has no quarrel with the proposition that scienter is needed to violate this statute. It is not a strict liability crime, and Respondent recognizes that *mens rea* is required commit the offense.

Such mental element is clearly required by the statute petitioner was convicted under, Chapter 828. 12(2), Fla. Stat. (1997), which provides:

> A person who intentionally commits an act to any animal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering, or causes the same to be done, is guilty of a felony of the third degree, punishable as provided in s. 775.082 or by a fine of not more than $10,000, or both.

The First District below did nothing other than apply the well settled principles of Gray, Chicone, and Bussey that general intent was sufficient under established legislative prerogative and that the statute was thus constitutional. Once the superfluous and unnecessary "distinction" between specific and general intent is not "read into" the statute as Petitioner so

demands, it becomes clear that there is no infirmity with the charging instrument. To stress anew, it is only with the "reading into" the statute of petitioner's self-discerned necessity of specific as opposed to general intent that it even becomes possible for Petitioner to construct this misleading claim.

Once the confusing specific versus general intent claim is "read out" of the statute (which doesn't even have such a requirement to begin with), the issue is clarified. The information in this case tracked the statute, which as noted by the First District below, required a general intent. There is thus no defect with either the statute or the charging document (R:17).

Petitioner's second claim is that the evidence is legally insufficient. (Petitioner's Merits Brief, p. 34). Respondent asserts this claim is procedurally barred because petitioner merely made a cursory *pro forma* JOA argument in the trial court, and did not raise this claim in so doing. (TI:86, TII:191). As such, the issue is procedurally barred. Florida Rule of Criminal Procedure 3.380(b): "The motion [for judgment of acquittal] must fully set forth the grounds on which it is based." Not having done so in the trial court, the claim is unpreserved for purposes of appellate review. Williams v. State, 531 So.2d 212, 216 (Fla. 1st DCA 1988); Ogletree v. State, 525 So.2d 967, 970 (Fla. 1st DCA 1988).

Pregnant in petitioner's assertion that the evidence was not legally sufficient, is his own self-created specific/general intent contention. As noted prior, this is not a valid contention.

Petitioner claims "the state failed to offer any evidence that Reynolds intended to cause the dog to suffer." (Petitioner's Merits Brief, p. 34). In Franqui v. State, 699 So.2d 1312, 1317 (Fla. 1997) this Court stated: "[I]ntent may be proved by considering the conduct of the accused and his colleagues before, during, and after the alleged attempt along with any other relevant circumstances." (in context of attempted armed robbery).(citation deleted). It is also inarguable that intent is a state of mind, hardly ever susceptible of direct proof, but proven up inferentially. See, e.g., State v. Mitchell, 666 So.2d 955, 956 (Fla. 1st DCA 1996)("defendant's knowledge and intent are rarely shown by direct evidence and may be proven by circumstantial evidence") citing State v. Norris, 384 So.2d 298 (Fla. 4th DCA 1980); Bostic v. State, 638 So.2d 613, 614 (Fla. 5th DCA 1994)("mental intent is rarely subject to direct proof, and must be established based on surrounding circumstances in the case"); Brewer v. State, 413 So.2d 1217, 1219 (Fla. 5th DCA 1982):

> Although the State must prove intent just as any other element of a crime, a defendant's mental intent is hardly ever subject to direct proof. Instead, the State must establish the defendant's intent (and jury must reasonably attribute such intent) based on the surrounding circumstances in the case.
> (internal citation deleted)

Thus, the State need have no sworn statement from Petitioner to the end, "Yes, I intended to kill the dog and while so doing I further specifically intended the dog suffer unnecessary pain and a cruel death." His requisite *mens rea* at the time he committed the culpable act is clearly inerrable from the act, and his actions before, during, and after the crime.

From two witnesses, the following was established: Petitioner directed some neighborhood children to catch the puppy (TI:41), Petitioner picked up the puppy, slashed its throat (TI: 41-42, 43) and then tossed the dog into a ditch. (TI:42). The defendant was the one who slashed the dog. (TI:51, 58). After he did this, petitioner walked away and washed his knife off. (TI:56). The puppy was laying on its side, bleeding and shaking. (TI:57). Animal Control arrived about 15-20 minutes after being called. (TI:45).

Contrary to petitioner's claim, this is more than adequate legally sufficient evidence to show his culpability under the applicable statute, *viz*, to "intentionally commit[] an act to an[] animal which results in a cruel death, or excessive or repeated infliction of unnecessary pain or suffering[.]" Chapter 828. 12 (2), Florida Statutes (1997). The testimony of one witness is enough to establish legal sufficiency of the evidence. I.R. v. State, 385 So. 2d 686, 687-688 (Fla. 3d DCA 1980):

> Where the evidence is in conflict, it is within the province of the trier of fact to assess the credibility of witnesses, and upon evaluating the

> testimony, rely upon the testimony found by it to be worthy of belief and reject such testimony found by it to be untrue. ...**The testimony of a single witness, even if uncorroborated and contradicted by other state witnesses, is sufficient to sustain a conviction.**

This Court is in accord with I.R.. Tibbs v. State, 397 So.2d 1120, 1126 (Fla. 1981) evidence of conviction based "primarily on the uncorroborated testimony of the rape victim" legally sufficient. Accord, Thomas v. State, 167 So.2d 309, 310 (Fla. 1964), where the only evidence was testimony of the victim was held legally sufficient for a rape conviction.

The state put on more than one witness who testified to what Petitioner did. The testimony of one establishes legally sufficient evidence to support the conviction. I.R., Tibbs, Thomas. Once the misleading specific/general intent issue is properly eliminated, it becomes apparent Petitioner has no viable argument under this contention.

ISSUE III

MAY A DEFENDANT AT TRIAL AFFIRMATIVELY AGREE TO JURY INSTRUCTIONS AND THEN CLAIM ON APPEAL THAT THESE AGREED TO INSTRUCTIONS CONSTITUTE REVERSIBLE ERROR? (Restated)

Suggestion that Review was Improvidently Granted

Respondent re-adopts this portion of its argument set out under Issue Two, with the observation that this issue, like that in Issue Two was never passed upon by the First District below[6], and further, that this claim is procedurally barred, as will be developed below.

Procedural Bar

This Court has held, Archer v. State, 673 So.2d 17 (Fla.), cert. denied, ___ U.S. ___, 117 S.Ct. 197, 136 L.Ed.2d 134 (1996): "[J]ury instructions are subject to the contemporaneous objection rule, and absent an objection at trial, can be raised on appeal only if fundamental error occurred." The situation here does not constitute fundamental error. Not only were the jury instructions now complained of **not** objected to at trial, the language was **affirmatively agreed to**. This issue is thus incapable of review.

The jury charge conference reveals this:

---

[6]Reynolds v. State, 784 So.2d 509, 511 (Fla. 1st DCA 2001): “Our resolution of appellant's first claim of error moots his remaining claims.”

THE COURT: All right, now, back to the statement of the charge. Does counsel have any proposed language in terms of how to state the elements of the offense?
MR. LAMPASSO [Prosecutor]: Judge, the State does. Since there wasn't anything in the book, itself, the proposal that we have here is just that it read cruelty to animals, Florida Statutes 828.12, Subsection (2). Before you can find the defendant guilty of cruelty to animals, the State must prove the following two elements beyond a reasonable doubt: One, the defendant intentionally committed an act upon the animal; two, the act resulted in excessive infliction of unnecessary pain or suffering. We're asking to take out the words "or repeated," because we don't really feel that's an issue.
THE COURT: And you're also deleting the cruel death, which obviously does not apply.
MR. LAMPASSO: Right.
THE COURT: All right.
MS KIRWIN [Asst. Public Defender]: **Judge, we would agree with Mr. Lampasso's language**.
THE COURT: All right. Mr. Lampasso, if I could have your draft so we can get that incorporated into the final instructions.
MR. HARLEY [Co-prosecutor]: Judge, you're not going to read the statute, the paragraph that you have here on the first page?
THE COURT: No, I'm deleting that entirely and replacing it with the language that was just read into the record, which is as follows. Cruelty to animals, Florida Statute 828.12, Subsection (2): Before you can find the defendant guilty of cruelty to animals, the State must prove the following two elements beyond a reasonable doubt: One, the defendant intentionally committed an act on the animal; and two, the act resulted in the excessive infliction of unnecessary pain or suffering. Is that it?
MS. KIRWIN: **Yes, ma'am.**
(TII:195)

Appellant can make no claim of fundamental error on this record as to the jury instructions he affirmatively agreed to at trial. See State v. Lucas, 645 So.2d 425, 427 (Fla. 1994) ("The only exception [to fundamental error] we have recognized is where defense counsel affirmatively agreed to or requested the

incomplete instruction"), citing Armstrong v. State, 579 So. 2d 734 (Fla. 1991). Compare Black v. State, 695 So.2d 459, 460 (Fla. 1st DCA 1997) (defense counsel only agreed that the "instructions as given to the jury were as reviewed in the charge conference"). Armstrong articulates why the error is not preserved in a case such as this: "Any other holding would allow a defendant to intentionally inject error into the trial and then await the outcome with the expectation that if he is found guilty to conviction will be automatically reversed." 579 So. 2d 734, 735.

Petitioner's claim of fundamental error is waived, on this record, where he **affirmatively agrees** to the instructions as given. Lucas, Armstrong. This is the poster child of self-created error.

Merits

Should the Court find this issue susceptible of merits review, Respondent respectfully submits this is a case where the law of this state would be well benefitted by a short statement re-iterating the principles of Lucas and Armstrong. Succinctly, that one cannot affirmatively agree to jury instructions below and then claim fundamental error on appeal.

As to the claim raised herein, it is all again predicated on Petitioner's self-discerned necessity for specific intent versus general intent. The untenability of this contention has been thoroughly explored prior and need not be undertaken anew here.

Once the unworkable specific/general intent distinction is not injected into the equation, there is no basis for the argument Petitioner posits here. This is not a strict liability offense and Respondent has never contended otherwise. Intent is required. It is just general intent and not specific intent as the First District correctly held.

Demonstrating the inapplicability of Petitioner's contention under this argument is the fact that the theory of defense actually presented at trial had nothing to do with all of these specific versus general intent postulations floated on appeal. It was a straightforward denial that he slashed the puppy's throat. (TII:216). See n.3 of Petitioner's merits brief: "Although Reynolds maintained at trial that he did not injure the dog, this is not an issue which can be raised on appeal, so undersigned counsel acknowledges his defense, but will argue as though Reynolds had committed the act." In other words, ignore what actually happened at trial so as to argue hypotheticals never at issue before the jury.

Petitioner flatly admitted the offense at trial, his defense being that he was not the perpetrator. (TII:216). Here, in complete disregard of the defense theory at trial - that he flatly denied involvement in the crime - an entirely new argument, plucked from mid-air, is made on appeal.

When it is kept in mind what his defense actually was at trial - flat factual innocence - and not all of these post-trial legal constructs - it is seen that the jury could validly reject the

defense theory presented to it: flat factual innocence. The true focus of inquiry on a claim of faulty jury instructions is whether the jury, on the instructions as given, can weigh a defendant's various defenses. Scott v. State, 396 So.2d 271 (Fla. 3d DCA 1981),

> [T]he refusal of the trial court to give a specified requested instruction is harmless when the instructions as a whole clearly and adequately enabled the jury to consider the theory of defense.

Accord, Ortega v. State, 438 So.2d 934 (Fla. 3d DCA 1983), regarding jury instructions: "[T]he instructions as a whole clearly and adequately enabled the jury to consider the theory of defense[.]" (citations omitted). Accord, Yohn v. State, 450 So.2d 899, 901 (Fla. 1st DCA 1984):

> The refusal of a trial court to give a requested instruction is not error, however, when the instructions which are given, considered as a whole, correctly state the law and fairly present the theory of the requesting party to the jury.
> (citations omitted)

The standard enunciated in Yohn expresses no recent point of law. This has consistently been the law in this state for over 50 years. Spanish v. State, 45 So.2d 753, 755 (Fla. 1950):

> In passing upon a single requested instruction or charge, it should be considered in connection with all other instructions and charges bearing on the same subject, and if, when thus considered, the law appears to have been fairly presented to the jury, an assignment predicated upon the given instruction or the refusal to give such instruction must fail.
> (citation omitted)

Thus, the question is whether the jury on these instructions could fairly consider petitioner’s theory of defense. Petitioner’s defense theory at trial was flat factual innocence: I didn’t do it. The jury here was instructed, pursuant to the instructions appellant affirmatively endorsed at trial, that before he could be found guilty the State would have to prove beyond a reasonable doubt that he "intentionally committed an act on the animal, and that the act resulted in the excessive infliction of unnecessary pain or suffering." (TII:224).

The jury was further instructed, in conformity with the standard jury instructions, "To overcome the defendant’s presumption of innocence, the State has the burden of proving the crime with which the defendant is charged was committed, and that the defendant is the person who committed the crime." (TII:225). How it is not possible for the jury to assay petitioner’s "I didn’t do it" theory of defense on the standard instructions as given is a mystery petitioner never even deigns to explain.

On the instructions as given, the jury could weigh petitioner’s theory of defense. That the jury elected to reject this defense is no indication the jury was led astray, or that the instructions affirmatively agreed to by the defense at trial constitute fundamental error but rather that six presumptively rational and clear headed citizens simply weighed witness credibility and rejected appellant’s claim he didn’t do it.

Because the jury could weigh petitioner's "I didn't do it" theory of defense on the instructions as given, there is no error. Darty, Scott, Ortega, Yohn, Spanish.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the First District below in Reynolds v. State, 784 So.2d 509 (Fla. 1st DCA 2001) should be approved, and the judgment and sentence entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Kathleen Stover, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on February 11, 2002.

Respectfully submitted and served,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
JAMES W. ROGERS
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 325791

_____
DANIEL A. DAVID
Assistant Attorney General
Florida Bar No. 0650412

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext. 4573
(850) 922-6674 (Fax)

[AGO# L01-1-7812]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Daniel A. David
Attorney for State of Florida

[T:\BRIEFS\Briefs - pdf'd\01-1114_ans.wpd --- 2/12/02,9:07 AM]