IN THE SUPREME COURT OF FLORIDA

RONALD REYNOLDS, :

Petitioner, :

v. : CASE NO. SC01-1114

THE STATE OF FLORIDA, :

Respondent, :

INITIAL BRIEF OF PETITIONER ON MERITS

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_____:

INITIAL BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal. Reynolds v. State, 784 So.2d 509 (Fla. 1st DCA April 12, 2001).

Petitioner was convicted at jury trial of animal cruelty. Proceedings were held in Leon County; Circuit Judge Janet E. Ferris heard the trial and imposed sentence, but Judge J. Lewis Hall, Jr. heard the first motion to dismiss.

The one-volume record on appeal, with three separately bound hearing transcripts attached, will be referred to as "R"; the two-volume trial transcript as “T1” and “T2,” and the sentencing transcript as “Sent.”

II STATEMENT OF THE CASE

Petitioner, Ronald Reynolds, was charged by third amended information filed February 5, 1998, in Leon County, with cruelty to an animal, the allegation being that he slashed a dog's throat; the animal did not die; the date alleged was October 10, 1997 (R 13,17).

November 6, 1998, Reynolds filed a motion to dismiss, arguing the statute was unconstitutional as applied on the ground the distinction between the misdemeanor and the felony - that is, the distinction between "unnecessary cruelty," "tor-ment" and "torture" was unconstitutionally vague, and was being selectively enforced (R 28-29). After a hearing December 22, Judge Hall denied the motion (R 69 et seq.,101).

February 5, 1999, Reynolds filed a second motion to dismiss, arguing the state committed a Brady violation in failing to reveal exculpatory evidence until after the jury was selected (R 32-35). The evidence at issue was a written incident report from the animal shelter in which an unnamed 12-year-old witness identified Anthony Jones, also known as "Ronnie," who was the dog's owner, as the person who slit its throat.

After a hearing February 8, the prosecutor said the late-filed reports were not police reports, but were from the animal shelter, and they were provided to the defense the same

day the prosecutor received them (R 111). Judge Ferris held there was no discovery violation, or if there were, it was inadvertent (R 121) and denied the motion (R 129).

February 10, the state filed a motion in limine seeking to prohibit any mention of out-of-court statements made by Animal Control Officer Joe Williams to Police Officer Andrew McClenahan on the ground they are hearsay (R 36-37).

At a hearing,[1] the defense argued the statements were not hearsay because they would not be offered for the truth of the matter asserted, but rather, to show the police's failure to investigate (R 141-46). The state argued the defense intended to offer the statements for the truth of the matter (R 148). Judge Ferris ruled the defense would be allowed to inquire as to failure to investigate, but otherwise reserved ruling (R 151,158-59). The out-of-court statements were excluded at trial.

At trial February 10 before Judge Ferris, petitioner's motions for judgment of acquittal were denied (T1 86-87, T2 191). The jury found Reynolds guilty as charged (R 44).

April 9, 1999, Reynolds was sentenced to 78.8 months (6.56

[1]The date of this hearing is marked on the transcript as February 10, but the trial was held February 10, and this hearing must have been held the afternoon before, as the court and the parties discussed what they could expect as far as news media.

years) in prison, with credit for time served of 508 days (R 49-53). His presumptive guidelines sentence was 63 months, with a range of 47.2 to 78.8 months (5.25 years, with a range of 3.93 to 6.56 years) (R 45-46). A public defender lien of $540 was imposed (R 56), and court costs of $308 were reduced to a civil judgment (R 55).

Petitioner appealed the facial constitutionality of the statute. The First District rejected this argument, and petitioner sought review in this court. Reynolds v. State, 784 So.2d 509 (Fla. 1st DCA April 12, 2001).

The district court said:

> [Reynolds] seeks review of his conviction for "intentionally commit[ting] an act to an[ ] animal which result[ed] in the ... excessive or repeated infliction of unnecessary pain or suffering" in violation of section 828.12(2), Florida Statutes (1997).

Id.

> He claims that (1) section 828.12(2) is facially unconstitutional because it does not include a specific intent element. In the alternative, he claims that, assuming specific intent is an element of the offense, (2) his motion for a judgment of acquittal should have been granted because the state failed to present a prima facie case as to intent; (3) the information is fundamentally defective because it does not allege that he acted with specific intent; and (4) the trial court committed fundamental error when it gave a jury instruction. . .that did not include a specific intent element.

Id. The court held:

> We conclude that (1) section 828.12(2) requires only

> general intent; and (2) the lack of a specific intent element does not render the statute facially unconstitutional. Accordingly, we affirm.
>
> According to the court:
>
> . . . the clear language of the statute requires only that one "intentionally commit[ ] an act to any ani-mal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering" to be guilty of the offense. It does not require that one commit an act intending to cause a cruel death or excessive or repeated unnecessary pain or suffering. Historically, the former has been called a "general intent" crime, and the latter has been called a "specific intent" crime.

Id. The court then explained the distinction, citing Linehan v. State, 442 So.2d 244, 247-48 (Fla. 2d DCA 1983)*(en banc)*, *app'd as to result only*, 476 So.2d 1262 (Fla. 1985).

> The court concluded:
>
> 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.

Id.

III STATEMENT OF THE FACTS

Over his denial, petitioner, Ronald Reynolds, was con-victed of animal cruelty for slashing a dog's throat. Surgery was performed and the animal survived.

First motion to dismiss. Petitioner argued the statute was unconstitutional as applied for failing to give fair notice that slitting a dog's throat intending to kill it constituted "excessive infliction of unnecessary pain or suffering" under the felony statute, as opposed to "torment" or "unnecessary mutilation" under the misdemeanor provision (R 75 et seq.). Counsel argued that throat-slitting was recognized by deer hunters and slaughterhouses as a humane method of killing an animal, and the fact this animal did not die was not determina-tive of criminal liability (R 75). The motion was denied.

Trial. Tallahassee Animal Control Officer Lisa Yarbrough responded to a call to Golf Terrace on October 10, 1997 (T1 25). She found the dog in a 15-foot-deep ditch with its throat slashed. It was bloody and looked terrified. There was a lot of debris in the ditch (T1 26). Yarbrough called the police because she needed a ladder or other assistance from the fire department to get the dog out, because the ditch was so deep (T1 26-27). Tallahassee Police Officer McClenahan

answered the call (T1 27).

The dog hid under some debris. Yarbrough had to use a control pole and a muzzle to control it (T1 28-29). She took the dog to an animal hospital, where surgery was performed and it survived (T1 30).

The complainant, Dorothy Bivins, gave Yarbrough a description of the suspect, but made no statement about the facts. Five days later, on October 15, Bivins spoke to Control Officer Joe Williams, while Yarbrough was present (T1 30-32).

On cross, Yarbrough said Bivins lived at 2508 Golf Ter-race, and the dog was found in the ditch across the street in front of 2514. There's a big tree in front of the ditch (T1 34). No one claiming to be the dog's owner spoke to Yarbrough, and she did not speak to Anthony Jones (T1 35-36).

Dorothy Bivins testified that she knew Ronald Reynolds, not personally, but as someone who lived at the neighbor's house (T1 39-40). While Bivins was sitting on the porch with her kids, Reynolds told some kids to catch the dog (T1 41). Then he took the dog over toward the ditch, slashed its throat with a pocketknife, and threw it in the ditch (T1 41-43). Bivins' son, Solomon Houston, age 16, testified he saw Reynolds slash the dog; then Reynolds washed off the knife at a spigot (T1 56).

Bivins called the police, who said they did not handle that, so she called the animal shelter. They told her it would be 30 minutes to an hour before they arrived; she told them the dog would be dead by then (T1 44-45). Bivins said she was con-cerned about her own dog being cut (T1 45). Several months earlier, there had been some fighting between her daughters and the daughters of the woman (Reynolds' girlfriend) who lived at 2510 Golf Terrace, and a police officer spoke to the other mother (T1 46-48). Bivins had moved away from there six months before trial (T1 49).

On cross, Bivins said she may have told Officer McClenahan she was 500 to 600 feet away from where the dog was slashed, but she was mistaken and it was not that far (T1 49-51).

On cross, Solomon Houston, Bivins' son, agreed that An-thony Jones, who is his cousin and his mother's nephew, owned the dog (T1 59-60).[2] Anthony did not want the dog. Did he want to get rid of the dog? "I guess so" (T1 60). Although Anthony was related to Bivins and Houston, he was staying at Reynolds' house. Anthony was at Reynolds' house that night; Solomon believed Anthony was not outside (T1 62). Solomon did not know whether Anthony knew Ronald cut the dog (T1 63).

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[2]Officer McClenahan suggested it was more of a neighborhood stray (T1 115). Petitioner Reynolds said he fed it sometimes (T2 178)

Leslie Campbell, DVM, testified that the wound was obviously painful to the dog, which was a couple of months old (T1 70). The wound was deep and wide. It went across the throat from ear to ear (T1 69,74). It went through skin, a fat layer and the muscles, all the way down to the internal structures - breathing tube and food tube - but the internal structures were not cut (T1 71). If you cut the jugular vein, the person or animal would bleed to death immediately. The cut was a "milli-meter" away from and exposed the jugular vein (T1 75). Because the wound did not hit a major artery or vein, the blood would seep out, rather than spurting (T1 71). That means the person who did it would not necessarily have much blood on him (T1 72). The doctor had to suture the tissue in layers, so the dog probably had 100 internal stitches and 50 external stitches and staples (T1 78,80).

On cross, asked whether the injuries were intended to kill the dog, Dr. Campbell said, "I would assume there's no other reason to slit a dog's throat." Q: And the wound was sufficiently deep? A: Yes, ma'am (T1 82-83).

After the state rested, the defense called Police Officer Andrew McClenahan as a hostile witness (T1 93). He and Officer Dave Johnson arrived together. There was a small crowd present (T1 94). Sergeant Lewis Johnson and two more

officers arrived within minutes. It was too hard to get the dog out of the ditch because it was 10 to 12 feet deep, filled with trash, and the sides were very slick. McClenahan helped Yarbrough “secure the dog” in the ditch (T1 95).

He is not sure how long Sgt. Johnson stayed on the scene. Q: What did Sgt. Johnson do to investigate? “Nothing.” McClenahan would say he was in charge of the case from the 13th until Reynolds was arrested, but from the 10th to the 13th, McClenahan would say he was not in charge, but no one was (T1 96-98). Sometime around then, McClenahan wrote an affidavit to have an arrest warrant issued (T1 99).

McClenahan did not secure the crime scene (T1 100). In his opinion, it is impossible to secure a crime scene when it is someone’s yard with a crowd of people in it (T1 101). He saw nothing of evidentiary value at the location where Bivins and Houston said it happened (T1 102). There was no blood at the faucet where Bivins said Reynolds washed blood off the knife (T1 105). There were no muddy footprints leading from the faucet to the house. The only blood he saw was what dripped off the dog’s coat (T1 109).

Bivins did not identify Reynolds to him until he interviewed her on a later date, the 14th or 15th. He did not interview her immediately, because she was afraid the people

at 2510 would see her talking to the police (T1 110). Reynolds was **not** among the people standing on the porch at 2510 that night (T1 110-11).

Anthony Jones' name, also known as Ronnie, was initially given as a suspect. McClenahan ruled him out on the basis of Jones' written statement which denied any involvement. Bivins - Jones' aunt - gave McClenahan the statement. Jones wrote that he was present that night, and that he had cared for the dog (T1 112-14). McClenahan never interviewed Jones (T1 119). McClenahan also received information from Joe Williams, at Animal Control, but Williams did not witness the incident (T1 112-13). McClenahan ruled out Jones as a suspect because Bivins and Houston said Reynolds did it, i.e., his evidence consists solely of their statements (T1 118). When inter-viewed, Reynolds denied he cut the dog (T1 115).

When he interviewed Reynolds, McClenahan took a pocket knife from him, but it was never tested to see if it were the same knife used to cut the dog (T1 121-22). McClenahan had no way of knowing if it were the same knife (T1 123).

On cross, when asked if the people at 2510 were coopera-tive or uncooperative, McClenahan said:

> I'm very familiar with that address and they're not cooperative.

(T1 127). The defense objected that the state had violated the court's order granting a pretrial motion in limine regarding people in the house. The court offered a cautionary instruc-tion, which defense counsel accepted (T1 127-30). Bivins, on the other hand, was "hesitantly cooperative. She was a little nervous about talking to me" (T1 131).

His sergeant decided this was an animal control matter, the police were there only for crowd control, and once the police left the scene, it was animal control's investigation. McClenahan did not agree with that and pursued his own inves-tigation (T1 138).

Ann Marie Dowden, of the FDLE Regional Crime Lab serology section, did not find any blood on either of two knives [taken from Reynolds] she received in this case (T2 167-68). She believes the knives could have been tested to determine if they caused the dog's cuts (T2 169). Blood could have been on the knives and washed off, but it is unlikely blood was undetec-table because the tests are "extremely sensitive" (T2 171). Washing a knife under a spigot would ordinarily cause some back splash of blood onto the knife, if the blood was still wet (T2 172).

Ronald Reynolds testified in his own behalf that he has been convicted of a felony three times. He was living at 2510 Golf

Terrace with his girlfriend, Joann Walker, and her chil-dren. He was working maintenance at a trailer park 100 yards away (T2 174). Anthony Jones occasionally stayed at Walker's house; at one time, Jones was dating one of her daughters (T2 176). Reynolds was not personally aware of the problems between Walker and Bivins. When he saw some kids looking in the ditch, Reynolds went over and saw the dog there with its throat slashed (T2 177). He did not call the police because he thought it was dead. He went back to work (T2 178).

Reynolds had seen the dog in the neighborhood before and occasionally fed it (T2 178). He did not cut the dog. Nor was he "hiding under the bed" when McClenahan arrived; he was hook-ing up a cable line behind the bed and did not know the police were there (T2 179-80). He was arrested at work on October 16. He does not know who cut the dog (T2 181).

Chris Rollins, Joann Walker's 10-year-old son, testified that, while Anthony Jones owned the dog, everybody fed it sometimes. Did [Jones] take care of the dog? "Not really, because he used to be gone" and did not take care of it (T2 188). Chris did not see who hurt the dog (T2 187). Ronnie was on the porch; Chris was inside wrestling with his brothers (T2 187,190).

IV SUMMARY OF ARGUMENT

Issue I: **Constitutionality**. Florida has no general ban on the killing of animals, as with all due respect, anyone who has eaten a hamburger should realize. In applying that rule to the instant case, there are two issues. First, is the rule differ-ent where pet animals, as opposed to livestock or animals raised to be killed for food, are concerned? Second, is the suffering accidentally caused an animal by the inefficient attempt to kill it in a humane method prosecutable under the statute?

Petitioner contends, first, that Florida law makes little distinction - none that is relevant here - among different types of animals. Second, assuming arguendo that Reynolds attempted to kill the dog, killing an animal is lawful, as long as the killing is done humanely; he chose a method recognized as humane; and the fact that he accidentally failed to kill, and in failing, accidentally caused the dog to suffer are not prosecutable under the statute.

Petitioner contends that, assuming arguendo that the lite-ral language of the statute allows his conviction, it is faci-ally unconstitutional for failing to contain a scienter/speci-fic intent element. The scienter/specific intent element means it is not sufficient that he intend the act, he must

also intend to cause suffering.

In holding animal cruelty to be a general intent crime, the district court holds **unintentional** cruelty sufficient for the crime, because no specific intent is required. The fatal flaw in the court's reasoning is that killing or attempting to kill an animal is generally not a crime in Florida. Thus, specific intent to cause suffering is constitutionally essential in order to distinguish those limited circumstances under which an ordinarily lawful act can be prosecuted.

Issue II: **Charging document and sufficiency of the evidence**. In failing to allege the scienter/specific intent element, the information wholly failed to charge a crime, and the failure to charge a crime is fundamental error.

The evidence is also legally insufficient for the state offered no evidence Reynolds intended the animal suffer, as opposed to it having happened inadvertently. Sufficiency is also fundamental error.

Issue III: **Jury instructions**. Assuming arguendo this court believed the state's evidence created a jury question, then the jury instructions were fundamentally in error for failing to instruct the jury on scienter/specific intent.

V ARGUMENT

ISSUE I

CONSTITUTIONALITY: NO LAW PROHIBITS KILLING AN ANIMAL. GIVEN THAT THE ANIMAL CRUELTY STATUTE, SECTION 828.12, FLORIDA STATUTES, PROHIBITS CAUSING CRUEL DEATH OR EXCESSIVE INFLICTION OF UNNECESSARY PAIN OR SUFFERING, BUT DOES NOT PROHIBIT KILLING, IT IS FACIALLY UNCONSTITUTIONAL AND VIOLATES DUE PRO-CESS, UNLESS A SCIENTER/SPECIFIC INTENT ELEMENT - THAT THE DEFENDANT MUST INTEND NOT ONLY THE ACT, BUT MUST ALSO INTEND TO CAUSE CRUEL DEATH OR UNNECESSARY SUFFERING - IS READ INTO IT.

Petitioner, Ronald Reynolds, was convicted of animal cruelty for slashing a dog's throat, intending to kill it. Although the dog was seriously injured, it survived after sur-gery. Reynolds was sentenced to 6-1/2 years in prison. He contends that, because Florida has no general prohibition against killing an animal, but prohibits only causing "cruel" death or "excessive" pain and suffering, the statute is faci-ally unconstitutional unless a scienter/specific intent element is read into the act.

Assuming arguendo the state proved he intended to kill the animal, it offered no evidence he **intended** to do so cruelly, rather than that pain and suffering were caused accidentally. In rejecting his claim, the First District Court misconstrued the statute as a defining a general intent crime. Since it requires no specific intent, the district court's opinion has

the effect of holding **unintentional** cruelty sufficient to constitute the crime, but petitioner contends this reading is unconstitutional. Rather, specific intent to cause suffering is constitutionally essential in order to distinguish those limited circumstances under which an ordinarily lawful act can be prosecuted. This is what distinguishes the instant case from Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983)*(en banc)*, *app'd as to result only*, 476 So.2d 1262 (Fla. 1985), on which the court below relied. Very few, if any, of Linehan's examples were premised on an act which is ordinarily lawful.

Florida has no general ban on the killing of animals, as with all due respect, anyone who has eaten a hamburger should realize. In applying that rule to the instant case, there are two issues. First, is the rule different where pet animals, as opposed to livestock or animals raised to be killed for food, are concerned? Second, is the suffering accidentally caused by the inefficient attempt to kill an animal in a humane method prosecutable under the statute?

Petitioner contends, first, that Florida law makes little distinction - none that means anything here - among different types of animals. Second, assuming arguendo that Reynolds

attempted to kill the dog,[3] killing an animal is lawful, as long as the killing is done humanely; he chose a method recognized as humane; and the fact that he accidentally failed to kill, and in failing, accidentally caused the dog to suffer was not prosecutable under the statute.

The United States Supreme Court has acknowledged that Florida has no general ban on the killing of animals. In the case which held the Santería church could conduct animal sacrifice despite the City of Hialeah's attempt to forbid it, the Court said:

> The city concedes that "neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals."

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 544, 113 S.Ct. 2217, 2232, 124 L.Ed.2d 472 (1993).

The court's exposition of how the government wished to distinguish lawful killings from unlawful killings based on motive is analogous to petitioner's point here that distinguishing lawful from unlawful killing by type of animal - where no statute so provides - also demonstrates governmental/soci-etal schizophrenia on that subject. The

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[3]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.

Court said:

> It asserts. . .that animal sacrifice is "different" from the animal killings that are permitted by law. According to the city, it is "self-evident" that killing animals for food is "important"; the eradi-cation of insects and pests is "obviously justified"; and the euthanasia of excess animals "makes sense." These ipse dixits do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's inter-est in preventing the cruel treatment of animals. (cites to brief omitted)

Id. In discussing why the government's claim that it was preventing cruelty to animals was not compelling, the court catalogued some of Florida's laws:

> Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohi-bited or approved by express provision. For exam-ple, fishing--which occurs in Hialeah, is legal. Extermination of mice and rats within a home is also permitted. Florida law incorporated by Ordinance 87-40 sanctions euthanasia of "stray, neglected, abandoned, or unwanted animals," § Fla.Stat. 828.058 (1987); destruction of animals judicially removed from their owners "for humanitarian reasons" or when the animal "is of no commercial value," § 828.-073(4)(c)(2); the infliction of pain or suffering "in the interest of medical science," § 828.02; the placing of poison in one's yard or enclosure, § 828.08; and the use of a live animal "to pursue or take wildlife or to participate in any hunting," § 828.122(6)(b), and "to hunt wild hogs," § 828.122(6)(e). (cite omitted)

508 U.S. at 543-544, 113 S.Ct. at 2232.

In criticizing an ordinance, the Court was necessarily criticizing the underlying Florida statute:

> Ordinance 87-72 is underinclusive on its face, since it does not regulate nonreligious slaughter for food in like manner, and respondent has not explained why the commercial slaughter of "small numbers" of cattle and hogs does not implicate its professed desire to prevent cruelty to animals and preserve the public health.

Id., 508 U.S. at 522, 113 S.Ct. at 2221. This city ordinance must be derived from section 828.24, Florida Statutes. Section 828.22 provides that Florida policy requires that animals be slaughtered in a humane method. The statute provides:

> 828.24 Prohibited acts; exemption
>
> (1) No slaughterer, packer, or stockyard operator shall shackle, hoist, or otherwise bring livestock into position for slaughter, by any method which shall cause injury or pain.
>
> (2) No slaughterer, packer, or stockyard operator shall bleed or slaughter any livestock **except by a humane method.**
>
> (3) **This act shall not apply** to any person, firm or corporation slaughtering or processing for sale within the state not more than 20 head of cattle nor more than 35 head of hogs per week. (emphases added)

Not to mention that no statute prohibits a person from abandoning a dog at an animal shelter, knowing it will be euthanized, for no better reason than that he does not want it anymore. In its opinion, the First District did not distinguish or even mention this case or the principles cited.

This case amply illustrates a degree of societal schizo-

phrenia on the issue of animals. Some people treat their pets like babies, and some may have cried over the injury of the dog in the instant case (which was the subject of a great amount of local publicity), but some were eating hamburgers while they cried, yet did not see the irony. The statute prohibits caus-ing unnecessary pain or suffering or cruel death, but not death itself, and death itself necessarily may cause momentary pain.

Reynolds was convicted of slashing the throat of a dog, intending to kill it. Any reason for this was only hinted at at trial and never clarified. The veterinarian who performed surgery which saved the dog's life testified the cut was a "millimeter" away from the jugular vein, and had the jugular been cut, death would have followed rapidly. The vet testified that the only reason to slash a dog's throat would be with intent to kill (T1 82-83). The prosecutor seemed to believe, mistakenly, that intent to kill was itself unlawful, thus making the state's case, but killing is **not** unlawful.

Reynolds' act may have been intemperate, but it was not illegal. There seems to be no question but that, had the dog died quickly, Reynolds could not have been prosecuted, because no law prohibits killing animals. One need only go to the average abattoir or animal shelter to know no such prohibition

exists. The only requirement is that death not be “cruel” or result from abuse; killing is not in and of itself abusive. The law makes no distinction on this point between animals generally regarded as pets and those generally regarded as food,[4] for they are not killing cattle or chickens at the animal shelter.

Most people would take an unwanted pet to a shelter, where it would be killed, and the law governs the prescribed manner of euthanasia. § 828.058, Fla.Stat. (1997). The law regulates the killing of animals by vets and shelters, and even for example in the case of a rabid dog allows killing an animal without the express consent of the owner, section 828.05, Florida Statutes, but no law prohibits private citizens from killing animals.

An interesting point of comparison is that the euthanasia statute, after setting out the training required before a person can perform the task, requires:

> (4)(a) * * *
>
> Euthanasia must be performed in a humane and proficient manner.

§ 828.058, Fla.Stat. Any violation of the statute is a first-degree misdemeanor, subsection (6), but it is hardly clear

---

[4]A weird area in itself...

whether a veterinarian or animal control officer could be prosecuted, not for failing to be trained as the statute requires, nor for failing to comply with procedural requirements, but rather, for accidentally failing to kill "proficient[ly]."

Clearly the training requirements are designed to ensure that euthanasia is performed in a humane and proficient manner, but what would happen if a vet or animal control officer made a mistake?

Killing was intended, killing was lawful, but the euthanizer made a mistake in the dosage, or the strength of the poison (something like mistakenly giving the dosage for a 10-pound dog, when the dog weighed 50 pounds), so the animal did not die quickly and quietly. Instead, death was protracted, which caused the animal to suffer, even though no suffering was intended. Counsel has found few cases interpreting the statute under any circumstances, let alone this scenario. However, it is worth noting that a vet most likely could not be prosecuted for an inept killing, because they are expressly exempted from civil or criminal liability by the statute:

> (3) A veterinarian licensed to practice in the state shall be held harmless from either criminal or civil liability for any decisions made or services rendered under the provisions of this section. Such a veterinarian is, therefore, under this subsection, immune from a lawsuit for his or her part in an investiga-tion of

cruelty to animals.

§ 828.12, Fla.Stat. (1997). Low-paid animal shelter employees, however, are not expressly exempt. Nor are hunters.

As a practical matter, the euthanasia of abandoned or hunted animals is usually done beyond the reach of public scru-tiny, so even if mistakes are made, they are not likely to be made public. Even so, common sense and public policy would seem to indicate that, if a person - such as a low-paid animal control employee - could become **criminally liable** for an inadvertent mistake, few people would accept the job.[5] Or, since hunting is legal, how could wounding an animal, with the lawful intent to kill, but failing to kill efficiently and thus causing suffering, be prosecuted? But this is a crime under the literal wording of this statute.

Slashing an animal's throat is recognized as a humane method of killing:

> 7) "Humane method" means either:
>
> (a) A method whereby the animal is rendered insensible to pain by mechanical, electrical, chemi-cal, or other means that are rapid and effective, before being

[5]With medical doctors in mind, and while civil liability is another matter, counsel can think of hardly anyone who becomes criminally liable for an inadvertent mistake. Imagine if all doctors who were found to have committed malpractice could be jailed!

shackled, hoisted, thrown, cast, or cut; or

> (b) A method in accordance with ritual require-ments of any religious faith whereby the animal suf-fers loss of consciousness by anemia of the brain caused by the **simultaneous and instantaneous sev-erance of the carotid arteries with a sharp instru-ment.** (emphasis added)

§ 828.23, Fla.Stat. (1997).

The vet described the wound as deep and wide. It went across the dog's throat from ear to ear, and it was deep enough to cause death (T1 69,74). While the record is silent on arteries, the vet said the cut was a millimeter away from the jugular vein, and if the jugular had been cut, death would have been immediate (T1 75). In other words, Reynolds attempted to use the second method of humane slaughter; the fact he acci-dentally did so inefficiently does not create criminal liabil-ity under the statute.

Defense counsel also argued this is the method hunters use if a deer which has been shot does not die instantly (R 75). This argument was not disputed by the state. Therefore, no law prohibits Reynolds from killing the animal, and the method he chose is recognized as humane.

Assuming arguendo he slashed the dog, Reynolds did not kill efficiently, for it survived. There is no question but that, in the words of the vet, the wound was a millimeter away from cutting the jugular vein, which would have caused death

immediately (T1 75). In surviving a near-fatal wound, the dog necessarily experienced pain and suffering, whatever "unnecessary" might mean when the pain was unintended.

Since killing is not prohibited by statute, neither can the pain of death be sufficient to sustain conviction. Need it be said, except perhaps for lethal injection - impossible for use at the slaughterhouse as animal flesh intended for human consumption cannot be poisoned - death usually causes some suffering, and the suffering intrinsic to death is not prohibited by the statute.

So, had Reynolds succeeded in killing the dog quickly, as he intended, he would have committed no crime. Does it become a crime because he was unintentionally inefficient? Petitioner contends that, assuming arguendo that the literal language of the animal cruelty statute allows his conviction, it is facial-ly unconstitutional for failing to contain a scienter/specific intent element. The scienter/specific intent element means it is not sufficient that he intend the act, he must also intend to cause suffering.

Even assuming arguendo that the statute is written in language which sounds like it requires only general intent, but to be constitutional, it must be a specific intent crime. If it were not, then acting with the lawful intent to kill,

but accidentally failing to kill efficiently, as in the case of the animal shelter employee or hunter described above, could be prosecuted, yet there is not indication whatsoever that the legislature intended to prosecute such events.

There is precedent from this court for saving a statute from being found unconstitutional by reading a scienter element into it. In Chicone v. State, 684 So.2d 736 (Fla. 1996), this Court held that knowledge of the illicit nature of the contraband is an element of drug possession, and the jury should be so instructed. This court has recently upheld Chicone in Scott v. State, no. SC94701 (Fla. Jan. 3, 2002). See also State v. Oxx, 417 So.2d 287 (Fla. 5th DCA 1982), app'd, Chicone.

Part of the court's rationale follows:

> We are also influenced by the fact that "[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 500, 71 S.Ct. 857, 862, 95 L.Ed. 1137 (1951). The United States Supreme Court has stated that offenses that require no mens rea generally are disfavored, and has suggested that some indication of legislative intent, express or implied, is required to dispense with mens rea as an element of a crime. Staples, 511 U.S. at 605-06, 114 S.Ct. at 1797. There is no such indication of legislative intent to dispense with mens rea here. Our holding depends substantially on our view that if the legislature had intended to make criminals out of people who were wholly ignorant of the offending characteristics of items in their possession, and subject them to lengthy prison terms, it would have spoken more clearly to that effect.

Chicone, 684 So.2d at 743. Similarly, in the instant case, petitioner contends that, had the legislature intended to criminalize the inadvertent, inefficient application of a lawful intent to kill, it would have spoken more clearly to that effect.

In Staples v. United States, 511 U.S. at 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), the defendant was convicted of possessing an unregistered machine gun. The U.S. Supreme Court read a scienter/specific intent requirement into the statute, holding the government was obliged to prove Staples knew his machine gun possessed the characteristics which required it to be registered.

Petitioner does **not** dispute that the legislature may create general intent crimes, but that is not the question. The questions here are 1) Did the legislature intend the crime to include unintended cruelty in an otherwise lawful killing of an animal; and 2) Given that killing an animal is lawful unless done cruelly, if cruelty need not be intentional, does the statute violate due process? Petitioner contends the legisla-ture intended to and did create a specific intent crime.[6]

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[6]This narrow issue is limited to acts involving killing or attempting to kill an animal, as killing is generally lawful, and allegations of neglect or torture may be distinguishable

This court should first consider which word or phrase is modified by the adjective "intentionally":

> 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 suffer-ing, or causes the same to be done, is guilty of a felony of the third degree. . .

§ 828.12(2), Fla.Stat. (1997). What does "intentionally" modify? Only "commits an act," and the result may be unintentional? Or does "intentionally" modify the whole sentence which follows:

> ***intentionally*** **commits an act to any animal which** ***[intentionally]*** **results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering**. . .

In State v. Huggins, the court considered which word or phrase an adjective modified. At issue was the statute requiring a Prison Releasee Reoffender (PRR) sentence for "burglary of an occupied structure or dwelling." §775.082(8), Florida Statutes (1997). As the Fourth District put it, "the issue presented is whether the word 'occupied' modifies both structure and dwelling or just structure." State v. Huggins, 744 So.2d 1215 (Fla. 4th DCA 1999), app'd 26 Fla. L. Weekly S174 (Fla. March 22, 2001)(*rehearing denied Dec. 14, 2001*). The courts rejected the state's argument that the "doctrine of

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and are not at issue.

nearest antecedent" meant that "occupied" modified only structure and not dwelling. Instead, the courts found the construction ambiguous and applying the rule of lenity, held that "occupied" must apply to both nouns following it. Petitioner contends that "intentionally" in the cruelty statute modifies not only "commits an act," but also the result of the act, that is, the entire sentence. At a minimum, the statute is ambiguous, thus the rule of lenity would require finding that it modifies both phrases, and this issue should be considered in light of the general disapproval of statutes not requiring mens rea.

Should the court inquire beyond the statutory construction issue above, in State v. Simbach, 742 So.2d 365 (Fla. 2d DCA 1999), the Second District Court held that scienter - that is, the "specific intent to cause a cruel death or excessive or repeated infliction of unnecessary pain or suffering" - was an element of the crime of animal cruelty. The court offered little explanation of its rationale, but it appears to be a Chicone-type analysis, that scienter **must** be an element, and the statute would be unconstitutional without it.

Some facts of Simbach are distinguishable from the instant case - the defendant twice shot a dog belonging to someone else, and there was an inference this was done without the

owner's consent. The dog did not die immediately but was euthanized two hours later. Simbach's defense was similar to Reynolds's, however, in that he argued he did not intend cruel death or unnecessary pain or suffering.

Simbach is also procedurally distinct from the instant case, because the trial court granted a (c)(4) motion. Rule 3.190(c)(4), Fla.R.Crim.P. The district court reversed, holding intent is not an issue which can be resolved on a motion to dismiss. By contrast, Reynolds has already gone to trial, and the state offered evidence that he cut the dog's throat, but the evidence proved he intended to kill the dog quickly using a humane method; no evidence proved he intended for the dog to suffer unnecessarily. As will be argued in ***Issue II***, the charge was not properly alleged, and the evidence was legally insufficient to sustain conviction. The district court neither distinguished nor mentioned Simbach.

The 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. 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.

Undersigned believes the trouble with identifying the particular constitutional violation is because this issue involves the point at which statutory construction meets due process. Read as a whole, Chicone indicates that the failure to have a scienter element where one is necessary is a due process viola-tion. A scienter element is constitutionally necessary where innocent persons could be convicted without it. Moreover, Chi-cone expressly held that an incorrect jury instruction violated due process.

Although Chicone involves a different type of scienter, it is a true analogy for this charge, as it requires a person to **know** he is committing the crime in order to be prosecuted. A person who kills an animal is, generally speaking, **not** committing a crime, therefore, his knowledge, intent, scienter, mens rea[7] must come from something besides the act of killing.

Petitioner contends that the district court erred in failing to distinguish the fact that killing an animal is generally lawful. That is what makes Linehan inapplicable to him. The district court quoted Linehan as to the distinction between

[7]"We have generally used 'mens rea,' 'scienter,' and 'guilty knowledge' loosely and interchangeably in this opinion." Chi-cone, 684 So.2d at 741, n.6.

general and specific intent crimes:

> A "general intent" statute is one that prohibits either a specific voluntary act or something that is substantially certain to result from the act.... A person's subjective intent to cause the particular result is irrelevant to general intent crimes because the law ascribes to him a presumption that he intended such a result....
>
> ....
> Specific intent statutes, on the other hand, prohibit an act when accompanied by some intent other than the intent to do the act itself or the intent (or pre-sumed intent) to cause the natural and necessary consequences of the act.... The existence of a sub-jective intent to accomplish a particular prohibited result, as an element of a "specific intent" crime, is perhaps most clearly evident in the crime of first degree, premeditated murder.

Reynolds, slip op., quoting Linehan, supra, 442 So.2d at 247-48.

This quotation does not withstand application where killing is generally lawful. General intent "prohibits either a specific voluntary act or something that is substantially certain to result from the act." The specific voluntary act of killing an animal is not prohibited, so that cannot establish mens rea. Nor is cruelty "substantially certain to result" from a lawful act of killing. Without a presumption that the killing will be cruel, there is no reasonable basis on which to base "a presumption that he intended such a result."

If only general intent were required, then a number of

people whose killing of animals is otherwise lawful could be prosecuted if the killings were not done proficiently, so that death was protracted and the animals suffered. Animal shelter, slaughterhouse and pest-control employees, hunters and fisher-men, all could be prosecuted if they made any errors which unintentionally caused an animal to suffer. The law makes no distinction between pet animals, food animals or fish, or mice and rats, which is part of the problem. It is nearly incon-ceivable that anyone would be prosecuted for treating a fish cruelly, or dropping live lobsters into boiling water, yet the statute does not explain where the line is drawn, for types of animals, or the type of pain which may be inflicted upon them.

What if an animal shelter employee accidentally gives a dose of poison sufficient to kill a 10-pound dog to an 80-pound dog, which protracts death and causes the dog to suffer? What if the cows are not yet dead when the slaughtering begins? See, Warrick, "They Die Piece by Piece: In Overtaxed Plants, Humane Treatment of Cattle Is Often a Battle Lost," Washington Post (April 10, 2001, p. A1). If the dog here had been a cow, Reynolds would not have been prosecuted. The point is, what makes the difference? The statute provides no way to distin-guish any of these acts from his.

The district court's citation to State v. Gray, 435 So.2d 816 (Fla. 1983)(elements of crime are derived from the statutory definition; at issue was a witness-tampering statute) merely demonstrates that no bright-line rule resolves every statutory construction/constitutionality question, especially because that issue must be balanced against the rule of lenity. Gray relied on the general rule, but Chicone did not. See also State v. Cohen, 545 So.2d 894 (Fla. 4th DCA 1989), aff'd, 568 So.2d 49 (Fla. 1990)(witness-tampering statute subsequent to Gray held to be unconstitutional due to a scienter problem).

The **standard of review** for whether a statute is facially unconstitutional is de novo. The statute is facially unconstitutional without a scienter element, and the state failed to prove scienter, thus his conviction must be reversed.

ISSUE II

> **CHARGING DOCUMENT AND SUFFICIENCY OF EVIDENCE**: ASSUMING THIS COURT HAS READ A SCIENTER ELEMENT INTO THE STATUTE, THEN 1) THE INFORMATION WAS FUNDAMEN-TALLY DEFECTIVE FOR FAILING TO ALLEGE AN ESSENTIAL ELEMENT OF THE CRIME, IN FACT, IT CHARGED NO CRIME AT ALL, AND 2) REYNOLDS'S CONVICTION CANNOT STAND BECAUSE THERE WAS NO EVIDENCE HE INTENDED TO CAUSE UNNECESSARY SUFFERING; RATHER THE EVIDENCE SHOWED AN INTENT TO KILL, AND THAT INTENT IS LAWFUL. THAT HE INADVERTENTLY FAILED TO KILL THE ANIMAL AND THUS THE ANIMAL SUFFERED, IS NOT SUFFICIENT TO SUSTAIN CONVICTION.

Having rejected petitioner's argument that the statute was unconstitutional for failing to have a scienter element, the district court did not reach the issue of charging and proving the scienter element.

. . . . . .

A. Failure to charge element of the offense

> . . .[A] conviction on a charge not made by the indictment or information is a denial of due process of law. If the charging instrument completely fails to charge a crime, therefore, a conviction thereon violates due process. Where an indictment or infor-mation wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state.

Akins v. State, 691 So.2d 587, 588 (Fla. 1st DCA 1997). This is fundamental error, which can be raised for the first time on appeal. See Jozens v. State, 649 So.2d 322 (Fla. 1st DCA 1995)(reversing conviction because information failed to charge a crime and conviction for non-existent offense is

reversible fundamental error); see also, State v. Gray, 435 So.2d at 818.

This issue more commonly arises when a defendant is convicted of a lesser-included offense and all the elements of the lesser offense were not alleged in the information. For example, in Andrews v. State, 679 So.2d 859 (Fla. 1st DCA 1996), the defendant was charged with attempted first-degree murder by stabbing the victim with a knife; she was convicted of aggravated battery. The court held her conviction could not stand because the information did not allege that the victim suffered great bodily harm, thus it was error to instruct the jury on that element. See also Von Deck v. State, 607 So.2d 1388 (Fla. 1992)(defendant charged with attempted murder of police officer; convicted of aggravated assault; conviction reversed because information did not allege element of putting in fear).

In Carrodine v. State, 633 So.2d 120 (Fla. 1st DCA 1994), the defendant was improperly convicted of the lesser-included offense of grand theft because the information charging robbery failed to allege the value of the property taken.

This principle applies equally to the charged offense. 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] an 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. While petitioner relies on Chicone in Issue I, Chicone is distinguishable from the instant case in holding that, while guilty knowledge is an element, it need not be charged:

> Additionally, since we find that guilty knowledge is implicit in the concept of possession as provided in the statute, it need not be specifically alleged in the information in a manner more explicit than that provided in the statute.

684 So.2d at 744. Possessing an illegal drug is ordinarily a criminal act, thus the court could find that guilty knowledge is implicit, but killing an animal is ordinarily a **lawful** act, thus guilty knowledge cannot be inferred from the act alone, and without this inference, the failure to allege scienter invalidates the information.

. . . . . .

B. Evidence legally insufficient

The burden is on the state to prove every essential ele-ment of a crime beyond a reasonable doubt. Purifoy v. State, 359 So.2d 446 (Fla. 1978). Yet, the state failed to offer any evidence that Reynolds intended to cause the dog to suffer. The evidence is therefor insufficient to sustain conviction. Petitioner contends this issue is fundamental error which can

be raised on appeal, even though it was not preserved in the trial court. In Sanders v. State, the First District Court certified conflict on the issue of whether insufficiency of the evidence was fundamental error. This Court dismissed Sanders on the ground that review was improvidently granted, so the interdistrict conflict certified in Sanders remain. Sanders v. State, 765 So.2d 778 (Fla. 1st DCA 2000), review dism., 796 So.2d 533 (Fla. 2001).

ISSUE III

JURY INSTRUCTIONS: ASSUMING ARGUENDO THE COURT WERE TO FIND THAT THE FACTS CREATED A JURY QUESTION AS TO WHETHER PETITIONER INTENDED TO CAUSE UNNECESSARY SUFFERING, THE JURY INSTRUCTIONS WERE FUNDAMENTALLY IN ERROR FOR FAILING TO INSTRUCT ON THIS ELEMENT.

Having rejected Reynolds's argument that the statute was unconstitutional for failing to have a scienter element, the district court did not reach the jury instruction issue. This court need reach this issue only if has rejected petitioner's argument that the evidence was legally insufficient.

Petitioner contends the failure to instruct the jury on specific intent - that the jury had to find, not that he intended to kill, but that he **intended** to cause suffering and pain - was fundamental error. The failure to instruct violated the rule that:

> It is an inherent and indispensable requisite of a fair trial. . .that a defendant be accorded the right to have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proved by com-petent evidence.

Gerds v. State, 64 So.2d 915, 916 (Fla. 1978); see also Robles v. State, 188 So.2d 789 (Fla. 1966).

Fundamental error has been defined as "error which goes to the foundation of the case or goes to the merits of the cause of action." Ray v. State, 403 So.2d 956, 960 (Fla. 1981), quoting Sanford v. Rubin, 237 So.2d 134, 137 (Fla.

1970). To be considered on appeal without preservation in the trial court, the error "must amount to a denial of due process." Ray, 403 So.2d at 960, citing Castor v. State, 365 So.2d 701,704 n.7 (Fla. 1978).

To constitute fundamental error:

> the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.

Brown v. State, 124 So.2d 481, 484 (Fla. 1960), quoted in State v. Delva, 575 So.2d 643, 645 (Fla. 1991). In Stewart, the Florida Supreme Court said:

> [f]undamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict.

Stewart v. State, 420 So.2d 862, 863 (Fla. 1982), cert. denied, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983).

Unless this court reads it as requiring the specific intent to cause suffering, the statute is unconstitutional, and there was no evidence of this element. In the absence of such evidence, Reynolds' conviction cannot stand. Even if this court were to find that the state's case created a jury ques-tion, the failure to give an instruction on specific intent meets the criteria for fundamental error. The missing instruc-tion goes to the foundation of the case; it goes to the very heart of the conviction. It reaches down into the

validity of the trial itself. It is obviously pertinent to what the jury must consider to convict. Ray; Stewart.

As argued earlier, Chicone's theory regarding scienter is applicable to the instant case, but the procedure it allows is not. After holding that knowledge of its illicit nature was an element of drug possession, this Court did **not** require it to be charged in the information. Except possibly for the issue of non-consent in burglary - where this court treated consent as an affirmative defense, rather than nonconsent as an element - counsel can think of no other area where this court has said that an element of the crime need not be charged, nor need the jury be instructed, unless the defendant requests instruction. State v. Hicks, 421 So.2d 510 (Fla. 1982) (consent in burg-lary).

Chicone's reasoning that failing to give the instruction is not fundamental error, however, cannot be applied to the instant case. Here the state proceeded as though the attempt to kill were itself unlawful, and the jury was never instructed otherwise. Instead, the prosecutor invited the jury to be horrified at the dog's suffering. The jury's attention was **never** directed by the prosecutor or any instruction by the court to contemplate beyond the dog's suffering, in light of no legal prohibition against killing

itself, to whether Reynolds intended the dog to suffer.

As argued earlier, this essential element was neither charged nor proved, which is fundamental error. The state failed to prove its case at trial, which rendered the evidence legally insufficient. If this court should find the evidence created a jury question, then the jury instructions were funda-mentally erroneous for failing to instruct on specific intent.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court declare the statute unconstitutional, unless the court reads in a scienter/ specific intent element; find the evidence insufficient to prove scienter/specific intent; or find fundamental error in failing to instruct the jury on this crucial element.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Daniel David, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Ronald Reynolds, inmate no. 049776, Baker Work Camp, P.O. Box 500, Sanderson, FL 32087, this _____ day of January, 2002.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

KATHLEEN STOVER