IN THE SUPREME COURT OF FLORIDA

RONALD REYNOLDS,

Petitioner,

v.

CASE NO. SC01-1114

STATE OF FLORIDA,

Respondent.
_____/

REPLY BRIEF OF PETITIONER ON MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR NO.0513253

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

CASES **PAGE(S)**

RULE

IN THE SUPREME COURT OF FLORIDA

RONALD REYNOLDS, :

Petitioner, :

VS. : CASE NO. SC01-1114

STATE OF FLORIDA, :

Respondent. :

_____:

REPLY BRIEF OF PETITIONER

I SUMMARY OF ARGUMENT

Petitioner argues the animal cruelty statute is facially unconstitutional unless the court reads in a scienter/know-ledge/mens rea element, similar to what the court did with drug possession crimes in Chicone, infra. In its opinion below, the First District Court redefined the issue as specific versus general intent, and held animal cruelty was a general intent crime, and the statute was constitutional.

In its answer, the state argues not only that animal cruelty is a general intent crime, but that this is an appro-priate case for this court to do away with the specific/general intent distinction.

However, the state's focus on voluntary intoxication as the paradigm of what, in its view, is wrong with the legal

distinction between specific and general intent crimes, demon-strates what is wrong with its argument. Intoxication was not at issue in the instant case, and the state's argument demon-strates that there are various kinds of scienter or intent issues, and its examples are inapposite and inappropriate with other types of scienter in other types of crime, such as Chi-cone and the offense here.

Petitioner submits that the fundamental misapprehension of both the district court and the state is in comparing the scienter/intent required to turn ordinarily innocent acts into crimes - the issue here - with the intent element required to prove an act which is ordinarily criminal. The state's argu-ment, and the district court's ruling, go awry because they apply a rule which pertains to acts which are ordinarily crimi-nal, like homicide and aggravated battery, to acts which are not ordinarily crimes but for the scienter element. Chicone, infra, held that possessing a substance is not a crime unless the person knows he possesses it and also knows of its illicit nature. Lukumi, infra, stands for the proposition that killing an animal is not ordinarily unlawful. Therefore, some element is essential to distinguish innocent possession or lawful killing from the identical act which is a crime, and that rule will not be derived from cases involving acts which are ordinarily criminal.

II ARGUMENT

ISSUE I

CONSTITUTIONALITY: NO LAW PROHIBITS KILLING AN ANI-MAL. 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 PROCESS, 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.

The state complains that petitioner Reynolds raised a facial constitutionality claim for the first time on appeal, after disavowing a facial challenge at trial. While it is true that trial counsel characterized its claim as unconstitutional-ity as applied, as opposed to facial unconstitutionality, there are two major problems with the state's argument.

First, the state cites no case which holds a facial claim can be waived at trial. To the contrary, it is well-settled that facial unconstitutionality can be raised for the first time on appeal. Trushin v. State, 425 So.2d 1126 (Fla. 1982); see also State v. Johnson, 616 So.2d 1 (Fla. 1993). Reynolds has not waived his facial claim because he is permitted to, and did, raise it for the first time on appeal.

The fact that trial counsel ineptly characterized the statutory problem does not prevent a defendant from raising a facial claim on appeal under Trushin, and the state has cited no case which holds there is any exception to Trushin.

The only case cited by the state, Rhoden, is not on point (State's Brief (SB), p.8). State v. Rhoden, 448 So.2d 1013 (Fla. 1984), discusses the general rule requiring contemporaneous objection; Trushin holds facial constitutionality is an exception to the contemporaneous objection rule.

Second, the state's argument requires ignoring the fact that the First District Court ruled on the merits, mooting out any lack of preservation claim at this point. Moreover, this argument puts the state in the unseemly position of attacking a district court opinion it won.

The state distinguishes cases cited by petitioner by the substantive crime or issue, even though they were cited for a broader principle. For example, the state argues that "Huggins had nothing to do with construction of the animal cruelty statute. . .rather dealing with. . . Prison Releasee Reoffender sentencing" (SB-10). State v. Huggins, 802 So.2d 276 (Fla. 2001). Yes, of course, except that Reynolds cited Huggins not for sentencing, for how it dealt with a statutory construction issue of what word or phrase an adjective modified.

Likewise, the state argues "Chicone of course had nothing to do with construction of the animal cruelty statute" (SB-9). Chicone v. State, 684 So.2d 736 (Fla. 1996). Chicone was of course a drug case, but as argued in the initial brief, Rey-nolds contends the court's discussion of the need for a scien-ter element applies equally to the

The common principle could be expressed as a scienter element is required to prove the accused knows he is committing a crime. In Chicone, scienter requires the state to prove not only that the defendant knew he possessed a certain substance, but also that he knew it was an illicit substance. Here, because killing or attempting to kill an animal is ordinarily lawful, scienter is necessary to distinguish the relatively few unlawful killings from the ordinarily lawful act.

The state argues that Chicone "never so much as even impliedly address[ed] a facial constitutionality challenge" (SB-10). To the contrary, Chicone indicates that the failure to have a scienter element, where one is necessary to prevent the conviction of innocent people, violates the constitutional guarantee of due process. Chicone also expressly held that an incorrect jury instruction on scienter violated due process (Petitioner's Initial Brief, p. 29).

The state argues the statute is not facially unconstitu-tional because trial counsel "embraced not less than two dis-crete factual situations in which the statute could validly apply" (SB-7). No, again, this argument demonstrates only a certain ineptness of the argument at trial. In the context of his facial constitutionality claim, those "situations" were such that the scienter element might have been proved, but in no way did those "situations" demonstrate the statute was facially

constitutional without a scienter element, which is the only issue here.

Of State v. Simbach, 742 So.2d 365 (Fla. 2d DCA 1999), which held the animal cruelty statute required a scienter ele-ment, the state's approach is to slice the opinion into sli-vers, of which it wants only the tiniest. The state argued the holding of Simbach was only that a motion to dismiss cannot be granted on the issue of intent, while ignoring what the court said about the scienter element of the animal cruelty statute (SB-9 & n.1). Fla.R.Crim.P. 3.190(c)(4). This is akin to arguing the holding of a case was to remand for new trial, while ignoring the reason why new trial was required.

In the initial brief, undersigned counsel acknowledged both the procedural and factual differences in Simbach. The state treats this as some kind of concession (SB-9), which misrepresents petitioner's argument that the cases conflict despite these distinctions.

Simbach and the instant case remain in conflict, despite the state's exertions to convince the court to the contrary. To put it another way, a trial or district court could rely on Simbach as authority for finding the animal cruelty statute requires proof the accused intended a killing to be cruel, while the First District held to the contrary, that such proof is not required. This court should reject the state's argument that review was improvidently granted and resolve the conflict.

The state dismisses the United States Supreme Court's opinion in the Santería case as irrelevant for being, in the state's view, purely a First Amendment case. 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). Again, the state argues a ruling while omitting its context. Yes, the Supreme Court held the Santería church had a First Amendment right to animal sacrifice, but that holding was based on the fact that Florida has no general proscription against killing animals. And the court was not impressed with the city's argument as to why the church's killings could be proscribed, despite the absence of a general prohibition.

By comparison, where there was a general criminal prohibi-tion against peyote, the Court held that Oregon could define sacramental use of peyote in the Native American Church as misconduct in order to deny unemployment benefits. Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). That is, consti-tutionally, Oregon's criminal law trumped the Native American's claim to free exercise of religion. The states could and some have "made an exception to their drug laws for sacramental peyote use," but while permitted or even desirable, it is not constitutionally required. 494 U.S. at 890, 110 S.Ct. at 1606. Contrary to the state's argument, the fact that Florida ordinarily allows animals to be killed is central to the San-tería

decision. That is the salient difference between Lukumi and Smith. Killing animals is not ordinarily prohibited under state law; peyote use is. The point is that, because killing or attempting to kill an animal is ordinarily legal, the state has the burden to prove a scienter sufficient to convert an ordinarily legal act into a crime, and the criminal law requires this no less than the First Amendment.

The state's general attack on the specific versus general intent dichotomy (SB-15-19) has the unintended effect of demon-strating just how the district court's opinion, with all due respect, mischaracterizes the issue as specific versus general intent, rather than scienter/mens rea/knowledge. While speci-fic intent versus scienter may not be entirely separate con-cepts in every case, they are not very similar here.

The state argues the specific versus general intent dis-tinction is useless and, this "is a suitable case upon which to decide the matter" (SB-17). To the contrary, this cannot pos-sibly be the right case for the state's attack for, as noted, scienter is a separate concept from specific intent. This is particularly true since the state offers voluntary intoxication as the paradigm for what is wrong with the specific versus general intent distinction, even though intoxication was **not** at all an issue here.

Petitioner urges the court to reject the state's argument that the court do away with the distinction

between specific and general intent crimes. As the state acknowledges, it did not present this issue to the district court (SB-15, n.3).

Second, voluntary intoxication as the state's paradigm of what, in its view, is wrong with this legal distinction, is not apposite or appropriate with other types of scienter in other types of crime, such as Chicone and the offense here. Peti-tioner submits that the fundamental misapprehension of both the district court and the state is in comparing the scienter/ intent required to turn ordinarily innocent acts into crimes - the issue here - with the intent element required to prove an act which is ordinarily criminal. The state's argument, and the district court's ruling, go awry because they apply a rule which pertains to acts which are ordinarily criminal, like homicide and aggravated battery, to acts which are not ordi-narily crimes but for the scienter element.

While there may be affirmative defenses, the acts of homi-cide and aggravated battery are generally crimes. The same is not true of possessing a substance or killing an animal; they are generally not crimes, absent scienter. Chicone held that possessing a substance is not a crime unless the person knows it is present and also knows of its illicit nature. Lukumi stands for the proposition that killing an animal is not ordi-narily unlawful. Therefore, some element is essential to dis-tinguish innocent possession or lawful killing from the identi-cal act which

is a crime, and that rule will not be derived from cases involving acts which are ordinarily criminal.

The district court cited and the state relies upon Frey v. State, 708 So.2d 918 (Fla. 1998), in which the question was whether aggravated battery on an officer and resisting with violence were specific intent crimes so that voluntary intoxi-cation was a defense (SB-15). Whatever the answer may be to that question, it has no relevance to the issue here.[1] The state calls Frey a "crystalline" example (SB-15), but voluntary intoxication - the issue in Frey and the basis for the state's whole, lengthy argument (SB-15-20) - has virtually nothing in common with the knowledge/scienter issue here. Voluntary intoxication is not at issue here, and scienter retains its validity vis-a-vis the knowledge element which is required to comport with due process.

The state cited Wilkerson v. State, 401 So.2d 1110 (Fla. 1981)(SB-20), for this dicta on **misdemeanor** animal cruelty:

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

Id. at 1112. Wilkerson was decided in 1981, and the legisla-ture has yet to amend the statute. Its silence, however, cannot be read to mean the legislature intended to

---

[1]The state acknowledges that the legislature has abolished the defense of voluntary intoxication (SB-19), which again is **not** an issue in this case, and which begs the question of, what is the point of the state's argument?

criminalize the inadvertent cruelty of hunters, fishermen or pest extermi-nators in killing or attempting to kill animals. The state has offered no evidence of such intent, and such intent is incom-patible with Florida law generally which allows animals to be killed.

While Wilkerson could theoretically have raised the issue raised by Reynolds, he did not, and the court's decision explains why. Wilkerson argued the statute was facially uncon-stitutional for failing to define "animal." This court rejec-ted that argument. The court held that Wilkerson's "torture" of a raccoon was conduct "clearly proscribed by the statute," thus it would not reach the constitutionality of the misde-meanor statute in other situations. Id. In the context of the issue here, torture - implying deliberate, not accidental, conduct - would be sufficient to prove scienter, so Wilkerson would not have gotten anywhere had he taken issue with the lack of scienter.

Since it requires no specific intent, the district court's opinion has the effect of holding **unintentional** cruelty suffi-cient to constitute the crime, but petitioner contends this reading is unconstitutional, and there is no indication whatso-ever of a legislative intent to criminalize unintended cruelty.

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 CONVIC-TION.

The state disagrees that a scienter element is constitu-tionally required; petitioner relies generally on his argument in the initial brief.

The state's claim that it "has no quarrel with the propo-sition that scienter is needed to violate this statute," and it recognizes that "mens rea is required to commit the crime" (SB-23), is inaccurate. Although citing Chicone, which recognized that drug possession has two scienter elements, the state here seems to acknowledge only the single scienter element that the act be intentional. At the same time, the state refuses to acknowledge that, because killing or attempting to kill an animal is ordinarily lawful, the state must prove not only intent to kill, but also an intent to be cruel, which burden of proof it failed to carry.

The state argued the evidence was legally sufficient (SB-26). The state cited facts which, petitioner contends, are also consistent with innocence. Assuming arguendo the state means that the fact the dog survived having its throat cut would be sufficient to sustain conviction, the state noted that the dog was tossed into a ditch, but omitted that the ditch was 10 to 15 feet deep and difficult to access.

Assuming arguendo that, had Reynolds known the dog had not died and was suffer-ing, that would have been sufficient for conviction, there was absolutely no evidence he knew the dog had not died almost immediately, or even that he could see the dog in the ditch.

While intent is usually a jury question, it is not a jury question if the state has failed to offer any evidence to prove intent. Because the state believed the act alone was suffi-cient to prove the crime, without regard to his intent, the state failed to prove intent, and the evidence was legally insufficient as a matter of law.

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.

Petitioner relies primarily on his argument in the initial brief. If the court finds the statute requires a scienter element, then the jury instruction was fundamental error for wholly omitting it, as it was a disputed issue on which the state offered no evidence.

No evidence proved, nor did the defense argue that Rey-nolds intended the dog to suffer. The supposedly concessionary closing argument quoted at SB-2 admitted the dog suffered. That seems a not unreasonable argument in light of the facts, but while admitting the dog suffered, counsel did not concede that Reynolds intended suffering,

which is an essential, and the only disputed, element of the crime.

The state overstates its claim that defense counsel affir-matively agreed to the omitted jury instruction. An affirma-tive agreement would mean the scienter element had been dis-cussed and rejected by the defense, but scienter was never discussed. The state does not claim otherwise. Rather, the state argues that omission equals affirmative agreement, but this incorrectly states the law. The cases cited by the state are inapposite and do not support its argument. In State v. Lucas, 645 So.2d 425 (Fla. 1994) (SB-29), the failure to give an instruction on justifiable and excusable homicide as part of manslaughter was fundamental error. In Armstrong v. State, 579 So.2d 734 (Fla. 1991) (SB-29-30), the failure to give a com-plete justifiable and excusable homicide instruction was **not** fundamental error but only because defense counsel specifically requested an abbreviated instruction tailored to the defense. The instant case involves an omission like Lucas, not an affirmative request like Armstrong.

The state objects that Reynolds's defense at trial was that he did not do it, which the jury rejected, rather than "all of these post-trial legal constructs" (SB-31), but this argument ignores the essential condition precedent to the verdict that the jury be correctly instructed on the law. The state demands the benefit of the jury's conviction, without regard to whether the statute was unconstitutional

and whether Reynolds was entitled to have the jury consider whether he intended the dog to suffer. Contrary to the state's argument, a valid statute and proper jury instruction on every disputed issue is a condition precedent to upholding the verdict, and this case fails on these elements.

On the instructions given, the jury could have convicted Reynolds for causing the animal to suffer, even if it believed the dog's suffering was unintended. The state simply fails to address this crucial omission in the instructions which rises to the level of a due process violation.

III 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 element; find the evidence insufficient to prove scienter; or find fundamental error in failing to instruct the jury on this crucial element.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
Fla. Bar No. 0513253
Assistant Public Defender
Leon County Courthouse
301 S. Monroe, Suite 401
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Daniel David, Assistant Attorney General, The Capi-tol, 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 March, 2002.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

KATHLEEN STOVER