IN THE SUPREME COURT OF FLORIDA

HOWARD REED, Petitioner,	)	
v	)	CASE NO. 65,323
STATE OF FLORIDA, Respondent.	)	

RESPONDENTS BRIEF ON MERITS

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ARGUMENT

I. DOES A CRIMINAL ACCUSED HAVE THE RIGHT TO A JURY TRIAL IN A COUNTY COURT FOR A PETTY OFFENSE CREATED BY STATE STATUTE UNDER THE FLORIDA CONSTITUTION.

Although the Petitioner poses the question of whether an accused has the right to a jury trial in a county court for a petty offense created by state statute under both the Florida Constitution and the due process clause of the United States Constitution, it is unnecessary to reach the issue of whether the due process clause would mandate a jury trial in this instance as (1) such a question was not certified to this Court as a question of great public importance and is not properly before the Court and (2) such issue was fully resolved in Baldwin v New York, 399 U.S.66, 90, S.Ct. 1886, 26 L.Ed. 2d 437 (1970) and Duncan v Louisiana, 391 U.S. 145 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) which held there is a class of petty offenses which may be tried without a jury despite a seemingly inflexible constitutional mandate to the contrary.

It is well established that, except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. Steinhorst v State, 412 So.2d 322,338 (Fla. 1982); State v Jones, 377 So.2d 1163 (Fla. 1979); State v Barber, 301 So.2d 7 (Fla. 1974).

The Petitioner now argues that the crime of malicious mischief is one which was a crime at common law, is malum in se, involves moral turpitude and, therefore constitutes a serious offense for which trial by jury at common law existed and which exists under the constitution of the State of Florida. Petitioner failed, however, to present such arguments for the consideration of the lower court and such arguments should now be considered waived. (A. 22-34).

A constitution, being organic in nature, it is hard to imagine that the authors of the Florida Constitution supposed that this State would always be limited to the mid-19th century conceptions of "liberty" and "due process of law" but that the increasing experience and evolving conscience of the people of this State would add new refinements. The State asks not that its citizens abdicate a right, but that the rights of citizens be secured through the strengthening of the machinery of justice.

Trial by jury is of ancient and somewhat doubtful origin, it being, as now practiced, the result of a long process of development during which the nature and functions of the jury have been materially changed. Although previously regarded as a right, it was in England first guaranteed as such by the Magna Carta. It was introduced into this country by the English colonists who considered it a right under the English law. 50 C.J.S. Juries Sec. 9 (1947); See Tharp v Kitchell, 151 Fla. 226, 9 So.2d 457 (1942). The right to a jury trial is generally guaranteed by constitutional provisions. See State

v Parker, 87 Fla. 181, 100 So. 260 (1924); Spafford v Brevard County, 92 Fla. 617, 110 So. 451 (1926); Hill v American Home Assur. Co., 193 So.2d 638 (Fla. 2d DCA 1966). However, the provisions of the various state constitutions are somewhat differently worded but may be divided into three classes as follows: in some it is merely provided that the right of trial by jury shall be inviolate; in others that the right shall remain inviolate; and in others that the right as heretofore used or enjoyed shall remain inviolate. 50 C.J.S. Juries Sec. 10 (1947). The Florida Constitution provides that the right shall "remain inviolate." Art. 1, §22, Fla. Const.; Olin's Inc. v Avis Rental Car System of Florida, 131 So.2d 20 (Fla. 3d DCA 1961). This right initially appeared in Florida's first constitution adopted upon its admission to the Union in 1845. Similar provisions are found in the subsequent constitutions of 1861, 1865, 1868 and 1885. The incorporation of the guaranty within the constitution is designed to preserve the right of trial by jury according to the common law as known and practiced at the time of the adoption of the first Florida constitution. 33 Fla. Jur. 2d Juries Sec. 3 (1982); Hunt v City of Jacksonville, 34 Fla. 504, 16 So. 398 (1894; see also Hilliard v City of Gainesville, 213 So.2d 689 (Fla. 1968); Boyd v County of Dade, 123 So.2d 323 (Fla. 1960). The common law and statutes of England as they existed July 4, 1776, have been statutorily adopted as the foundation of Florida law. §2.01, Fla. Stat. (1977). A fortiori, in cases

such as the instant one governed only by the general provisions that the right to trial by jury or the right as before used shall "remain inviolate," the question is determined according to the practice prior to the adoption of the constitution. 50 C.J.S. Juries Sec. 76(b) (1947); See State v Webb, 335 So.2d 826 (Fla. 1976). British procedure in 1776 exempted from the requirement of jury trial:

> "Violations of the law relating to liquor, trade and manufacture, labor, smuggling, traffic on the highway, the sabbath, "cheats," gambling, swearing, small thefts, assaults, offenses to property, servants and seaman, vagabondage ...[and] at least a hundred more * * *.
> (Emphasis added).

Frankfurter, Petty Federal Offenses & The Constitutional Guarantee of Trial by Jury, 39 Harv. L. Rev. 917,928 (1926) (quoting R. Burns, Justice of the Peace 1776).

It appears then, that the crime of criminal mischief was not triable by a jury at common law. Justice Frankfurter points out that the English procedure was essentially adopted by the colonies. In support of that position, attached to the article were four appendices containing a list of the early laws of New York, Pennsylvania, Maryland and Virginia, respectively, listing the crimes in which there was no right to a jury trial for the offender. Three of the four states had listed crimes that dealt with malicious injury to property which were summarily disposed of. New York and Pennsylvania provided for summary disposition for the crime of breaking

glass lamps. Pennsylvania also provided for summary disposition of the crime of breaking pump handles. Virginia dispensed with a jury trial for the crime of damaging tobacco warehouses. See also Boyd v County of Dade, 123 So.2d 343, 330 n. 16 (Fla. 1960).

The statutory offense of criminal mischief, belonging to a class of cases previously triable without a jury, may be properly tried without a jury. 50 C.J.S. Juries Sec. 76(b) (1947). More importantly, Article I, section 22 of the Florida Constitution does not mandate jury trial for the offense of criminal mischief, which is a crime against the property of another, since Florida has adopted the common law and statutes of England as they existed July 4, 1776, and at that time no jury trial was accorded citizens for simple property crimes.

The general provisions of the state constitutions are uniformly construed as not conferring a right to a trial by jury in all classes of cases, but merely as guaranteeing the continuance of the right in those classes of cases in which it existed either at common law or by statute in the particular state at the time of the adoption of the constitution except as modified by the Constitution itself. 50 C.J.S. Juries Sec. 10 (1947). The general provisions of the Florida Constitution have been so construed. R.C. No. 17 Corp. v Korenblit, 207 So.2d 296 (Fla. 3d DCA 1968); Dudley v. Harrison, McCready & Co., 127 Fla. 687, 173 So. 820 (1937), rehearing denied, 128 Fla. 338, 147 So. 729; Hawkins v Rellim Inv. Co., 92 Fla. 784, 110 So. 350 (1926); State v Parker,

87 Fla. 81, 100 So. 260 (1924). Thus the provisions do not govern as to the right to a jury trial in those classes of cases in which there was no right to a jury trial at the time of the adoption of the constitution, or to those classes of cases which were unknown to the common or statutory law of that time. 50 C.J.S. Juries Sec. 10 (1947); State v Webb, 335 So.2d 826 (Fla. 1976).

The Sixth Amendment to the United States Constitution provides generally:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. (emphasis added).

The Florida Constitution similarly provides:

> In all criminal prosecutions, the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall have the right to have a speedy and public trial by impartial jury in the county where the crime was committed.

Art. 1, §16, Fla. Const. (1968).

"Crime" has been called a term of broad and general import, including both felonies and misdemeanors, and hence covering all infractions of the criminal law; in this sense, it is not a technical phrase, strictly speaking, as are "felony" and "misdemeanor," but a convenient general term. The word crime has also sometimes been used to designate a gross violation of the law as distinguished from a mere mis-

demeanor. 22 C.J.S. Criminal Law Sec. 1(b) (1961). It has been previously recognized that the term "crime" may or may not be broad enough to include petty offenses subject to summary convictions by a magistrate. 22 C.J.S. Criminal Law Sec. 1(b) (1961). The Supreme Court of the United States has determined impliedly that the sweeping language of the Sixth Amendment reference to "all criminal prosecutions" is not broad enough to include petty offenses, by determining that petty offenses do not require a jury trial. See Duncan v Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 491 (1968); Baldwin v New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970). Applicable provisions of the Federal Constitution, within their proper sphere of operation, are dominant authority in the interpretation and enforcement of state constitutional provisions which may be affected by federal organic provisions. State ex rel. Women's Ben. Assoc. v Palm Beach Dist., 121 Fla. 746, 164 So. 851 (1935). This should be particularly so when, as in the instant case, a state constitutional provision echoes a federal provision in language or general import. Article I, section 16 of the Florida Constitution should be construed in accord with the construction given to its ancestor and mentor, the Sixth Amendment to the United States Constitution to exempt petty offenses from the class of crimes for which an impartial jury is required in criminal proceedings.

Moreover, it has been said that each provision in

the constitution was inserted with a definite purpose and all its sections and provisions must be construed together in order to determine its meaning, effect, restraints and prohibitions, and the purpose of the people adopting it. Re Advisory Opinion of Governor, Appointment of County Commissioners, 313 So.2d 697 (Fla. 1975); State v Division of Bond Finance of Dept. of General Services, 278 So.2d 614 (Fla. 1973). It is a fundamental rule of construction and interpretation of constitutions that not only should a constitutional provision be construed in its entirety, but all the provisions of a constitution should be interpreted with reference to each other unless a different intent is clearly manifested. Amos v Mosley, 74 Fla. 555 (1917); Wheeler v Meggs, 75 Fla. 687, 78 So. 685 (1918). In other words, all sections and provisions of the constitution must be construed in para materia. Re Advisory Opinion of Governor, Appointment of County Commissioners, 313 So.2d 697 (Fla. 1975). Construing article I, section 16 in para materia with article I, section 22 of the Florida Constitutiton leads to the inescapable conclusion that reference to "all criminal prosecutions" in article I, section 16, is also not broad enough to include such petty offenses as criminal mischief, otherwise the provisions of article I, section 22, which have been consistently construed as granting a jury trial only where it was granted at common law, would be obliterated by the sweeping language of article I, section 16. The reasonable conclusion is that the term "in all criminal prosecutions," were not meant in a technical sense but were broad convenient terms.

In State v Webb, So.2d 826 (Fla. 1976), a person was charged with having violated section 325.12, Florida Statutes (1975), for driving a motor vehicle without a valid inspection certificate. This Court held that there was no right to a jury trial for this offense under the state constitution. Justice Atkins pointed out that this was a non-criminal traffic infraction pursuant to section 318.14(1), Florida Statutes (1975), which was not punishable by incarceration. He went on to say, however, that even if this had been a traffic offense carrying its former penalty of ten to sixty days and/or a fine of $100.00 to $500.00, no jury trial would have been required.

> Although this right [to a jury trial] has been carefully protected and enforced by this Court, it is not unlimited. It has long been established that this provision guarantees the right to trial by jury in only those cases in which the right was recognized at the time of the adoption of the State's first constitution . . . . It does not extend to those cases where the right and the remedy with it were unknown at the time of the adoption of the first constitution. (citations omitted).

Id. at 828. This Court adopted an interpretation of the state constitution, similar to the federal view that allows petty offenses to be tried without a jury. See Baldwin. This is consistent with its views in Boyd.

In another post-1968 case, Aaron v State, 345 So.2d 641 (Fla. 1977), this Court held that a person charged with attempting to influence a grand juror was not entitled to

a jury trial. The trial court found Aaron guilty of criminal contempt, and sentenced him to four months in prison. The court adopted the federal rule that a court may try criminal contempt cases without juries where the sentence does not exceed six months. See Bloom v Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed. 2d 522 (1968).

More recently, in Whirley v State, No. 62,948 (Fla. May 17, 1984) [9 F.L.W. 191] this Court, citing Aaron v State, 345 So.2d 641 (Fla.), cert. denied, 434 U.S. 868 (1977) and Aaron v State, 284 So.2d 673 (Fla. 1973) stated at page 191:

> ... We hold that the federal petty crime exception to the jury trial requirement in criminal prosecutions is also an exception under our own constitutional provision.

Justice Overton, specially concurring, noted "the decision reached by the majority in this case is in accordance with the United States Supreme Court's construction of the federal constitution that there is no right to a jury trial for an offense punishable by less than six months in prison ..."

The State asks this Court not to retreat from its position adhering to the dictates of Duncan and Baldwin for policy reasons as well.

Not all have found trial by jury to be the very essence of ordered liberty. One of such notables was Justice Harlan who said:

> ...The right to trial by jury and the immunity from prosecution except

> as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . Few would be so narrow or so provincial as to maintain that a fair and enlightened system of justice would be impossible without them." Id., at 325, 58 S.Ct., at 152.

Duncan v Louisiana, supra, 391 U.S. at 181 (dissenting).

Times have changed, and the government itself is now under the absolute control of the people. The judges, if appointed, are selected by the agents of the people, and if elected are selected by the people directly. The need for the jury as a political weapon of defense has been steadily diminishing for a hundred years, until now the jury must find some other justification for its continuance. Sunderland, The Inefficiency of the American Jury, 13 Mich.L.Rev. 302,305. We no longer live in a medieval society where limitations must be imposed to conrol a tyrannous judiciary."... That trial by jury is not the only fair way of adjudicating criminal guilt is well attested by the fact that it is not the prevailing way either in England or in this country." Duncan 391 U.S. at 1470.

Every American jurisdiction provides for trial by jury in criminal cases. The question before us is not whether jury trial is an ancient institution, which it is;

nor whether it plays a significant role in the administration of criminal justice, which it does; nor whether it will endure, which it shall. Duncan v Louisiana, 391 U.S. 145, 213, 88 S.Ct. 1444,1460, 20 L.Ed.2d 491 (1968). The question in this case is whether the State of Florida, which provides trial by jury for all serious crimes, is prohibited by state constitution or rules from trying charges of criminal mischief (petty offenses) to the court alone. In the view of the State, the answer to that question, mandated alike by our constitutional history and by the longer history of trial by jury, is clearly "no."

The most compelling reasons for not extending the right to a jury trial for petty crimes or second degree misdemeanors as in the case sub judice are, as previously suggested, those of public policy. This court is not unaware of and can take judicial notice as did the lower court of the fact that court trial dockets are overcrowded and that the cost of trial by jury is, in fact, oftentimes in excess of any possible penalty for "petty offenses." (Petitioner's A. 10).

The Fourteenth Amendment denies the states the power to deprive any person of life, liberty, or property, without due process of law. Many of the rights guaranteed by the first eight amendments to the Constitution have been held to be protected against state action by the due process clause of the Fourteenth Amendment. The clause now protects the right to compensation for property taken by the state

and the Fourth Amendment right to be free from unreasonable seizures. Chicago B & Q R. Co. v City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 14 L.Ed.2d 979 (1897); Mapp v State of Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Surely, the seizure of a citizen for jury duty for the trial of a petty offense, which deprives him of his liberty, takes him from his gainful employment and results in the expenditure of tax dollars, especially when the penalty does not outweigh the cost of the trial, is within the spirit, if not the letter of the Fourteenth Amendment protections extended not only to defendants but to all citizens alike.

The State would submit that a balancing test is called for. The rights of these forgotten citizens (the juror and the taxpayer) must be weighed against the right of defendants charged with petty offenses to have a trial by jury.

Petty offenses were tried without juries both in the colonies and England. In this age, however, we have developed, perpetuated and at the same time perverted the myth of a jury trial by one's "peers." However, we have devised no method of determining absolutely who is the peer of whom. What is clear, is that a peer is anyone other than a trial judge. In fact, in this computer age, a "peer" is not what we are looking for in selecting a juror. Depending on what jury selection manual one reads, one could be looking for members of various ethnic groups and occupations as fa-

vored jurors, likely to show sympathy to a defendant. The real issue is, does justice demand that the petty offender be permitted to clog the courts in search of a mythical, non-punitive juror, when no one can say with certainty what verdict any juror will reach? The state of the art may so decry, but the State would submit that justice does not; not at the expense of the people of this state. (See Mr. Justice Black, dissenting, Bumper v North Carolina, 391 U.S. 556, 88 S.Ct. 1788,1795 (1968) for an example of jury unpredictability).

Those who oppose having petty offenses tried without a jury do so pursuant to a common notion held by many that the judgment of a jury is somehow preferable to that of the court. Incongruously enough, however, it is to a panel of judges we appeal when the jury fails us or renders an unappealing verdict, and at such a juncture we view them as Solomon, not arms of the government. The United States Supreme Court, while acknowledging a preference on the part of defendants for jury trials also recognized in Duncan v Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), that the result of a non-jury trial is not that of unfairness, stating:

> . . .We would not assert, however, that every criminal trial--or any particular trial--held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus we hold no constitutional doubts about the practices,

> common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial.

The State would conclude that in view of the above, there is no constitutional right to a jury trial in Florida for petty offenses, more particularly, the petty offense of criminal mischief. Duncan and Baldwin make clear that there is also no Federal Constitutional right.

II. DOES A CRIMINAL ACCUSED HAVE THE RIGHT TO A JURY TRIAL IN A COUNTY COURT FOR A PETTY OFFENSE CREATED BY STATE STATUTE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.251?

Florida Rule of Criminal Procedure 3.251 states as follows:

> In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury in the county where the crime was committed. (Emphasis added).

The 1972 Committee Note to the above rule acknowledges that the substance of the above rule is derived from article I, section 16 of the Florida Constitution. This rule is, therefore, the embodiment of the dictates of article I, section 16, of the Florida Constitution. As such it is susceptible to similar interpretation and should not be construed as creating a right previously unknown, i.e., the right to jury trial for petty offenses, especially in view of the fact that it is an express adoption of article I, section 16.

As early as 1804, the Florida Supreme Court recognized that "section 3 of the declaration of rights in our constitution, providing that 'the right of trial by jury shall be secure to all, and remain inviolate forever' was never intended to extend the right of jury trial, but merely secure it in the cases in which it was a matter of right before the adoption of the constitution." Hunt v City of

Jacksonville, 34 Fla. 504, 16 So. 398 (1804).

The rule tracks the language of Article I, section 16, of the Florida Constitution, and there is nothing to indicate in the committee note thereto, the opinion of this Court adopting the criminal rules, In Re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1973), or in any later discussion by this Court that rule 3.251 was intended to change or expand a criminal defendant's right to jury trial under our state constitution. In various instances our state legislature has granted a right to jury trial in situations not reached by our state constitution. See §§ 316.1934(4), 932.61, Fla. Stat. (1983). The Fifth District Court of Appeal properly determined that rule 3.251 was intended to implement, but not expand, the right to a jury trial as created by the State and Federal Constitutions, and our state statutes. (Petitioner's A. 32-44).

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court affirm the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief has been furnished, by delivery to Geoffrey B. Dobson and Meredith Dobson, 77 Bridge Street, P.O. Drawer 1957, St. Augustine, Fl. 32085-1957 this 29th day of June 1984.

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