Original

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,323

Fifth District Court of Appeal
Case No. 83-1821

HOWARD REED,

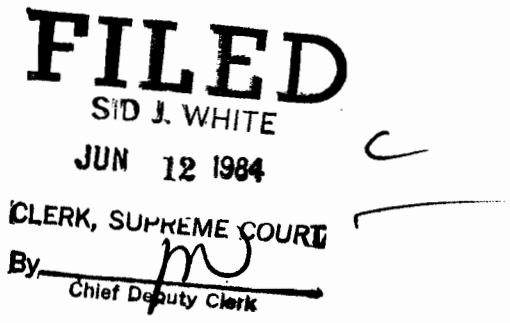
Petitioner

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON MERITS



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STATEMENT OF THE CASE AND FACTS

The present proceeding is before the Court on a certification of great public interest by the Fifth District Court of Appeal in State v. Reed, ____So.2d ____, 9 FLW 731 (1984):

> "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 OR CRIMINAL RULE 3.251?"

As used herein the term "Defendant" shall refer to the Appellant, HOWARD REED, and the term "State" shall refer to the Appellee, STATE OF FLORIDA. The reference to Appendix contained in the Record on Appeal before the Fifth District Court of Appeal shall be denoted (A-).

On May 26, 1983, the Defendant was charged by Amended Information with criminal mischief in violation of Florida Statutes 806.13 (2) (a) specifying that the Defendant, did on or about March 29, 1983 "unlawfully, wilfully and maliciously, injure or damage certain real property of the Atlantic National Bank of Florida, St. Augustine office, by breaking a glass door panel, such damage being less than Two Hundred ($200.00) Dollars." (A-2) On July 6, 1983, the Defendant filed a Notice of Non-Waiver of Trial by Jury (A-3-6).

On July 7, 1983, the County Judge, the Honorable Robert K. Mathis, entered an Order denying the Defendant the

right to trial by jury and concluding that a "petty offense" has been decided "to be any offense punishable by more than six months incarceration". (A-10-13) On July 7, 1983, the Defendant filed a Petition for Writ of Mandamus, Prohibition and Common Law Certiorari in the Circuit Court of the Seventh Judicial Circuit in and for St. Johns County, Florida to review the determination of the trial judge. (A-14) An alternative Write of Mandamus requiring the Honorable Robert K. Mathis to grant a trial by jury unless good cause could be shown was issued by the Honorable Richard O. Watson, Circuit Judge on July 8. 1983. (A-26) On December 1, 1983 the Circuit Court entered an order determining that the Defendant was entitled to a pre-emptory writ of mandamus and holding that:

> "Florida adopted its Criminal Rules of Procedure (272 So.2d 65) after Duncan [v. Louisiana, 391 U.S. 145 (1968)] and Baldwin [v. New York, 399 U.S. 66 (1977)] decisions. Knowing that 'petty offenses' need not be tried by juries, Florida elected to extend that right to Defendants charged with petty offenses in Florida." (A-35-36).

Thereafter, the State filed a Petition for Writ of Common Law Certiorari/Prohibition to review the order of the Circuit Court determining that the Defendant, Reed, was entitled to a pre-emptory writ of mandamus and trial by jury.

On March 29, 1984, the District Court of Appeal for the Fifth District issued its decision holding "the

misdemeanor involved in the case carries a penalty of less than six months and a $500.00 maximum fine, and is therefore within the Federal definition of a petty offense" and concluded that the Defendant did not have a right to a trial by jury under either the State or Federal Constitutions, (9 FLW 731). Motion for Rehearing was filed on April 13, 1984, Rehearing was denied May 1, 1984 and, thereafter, Notice to Invoke Discretionary Jurisdiction was filed in a timely manner.

ISSUES INVOLVED

I

WHETHER A DEFENDANT CHARGED WITH CRIMINAL MISCHIEF IS ENTITLED TO A TRIAL BY JURY UNDER ARTICLE I, SECTION 16, OF THE FLORIDA CONSTITUTION OR UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

II

WHETHER A DEFENDANT IS ENTITLED TO A TRIAL BY JURY PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.251.

ARGUMENT

WHETHER A DEFENDANT CHARGED WITH CRIMINAL MISCHIEF IS ENTITLED TO A TRIAL BY JURY UNDER ARTICLE I, SECTION 16, FLORIDA CONSTITUTION OR UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The decision of the District Court of Appeal in noting that the Defendant was charged with a violation of Section 806.13, Florida Statutes 1983, Criminal Mischief, held "the misdemeanor involved in this case carries a penalty of less than six months and a $500.00 maximum fine, and is therefore within the Federal definition of a petty offense."

Citing to Frankfurter, Petty Federal Offenses & The Constitutional Guarantee of Trial by Jury, 39 Harv. L.Rev. 917, 928 (1926), the Court concluded that the crime of criminal mischief was not triable by a jury at common law.

Preliminarily, it appears that the District Court in determining that criminal mischief was a petty offense looked almost solely to the possible penalty that was involved and the broad sweeping statement contained in the Frankfurter article that offenses to property were triable before a justice of the peace.

Subsequent to the decision of the Fifth District Court of Appeal, this Court visited the subject of the right of a criminal defendant charged with commission of a misdemeanor to a trial by jury, Whirley v. State, ___So.2d ____, 9 FLW 191 (1984). This Court in reviewing the

particular offense noted the Federal Supreme Court decisions holding that there are various classifications of serious crimes which would warrant a trial by jury. This Court noted, 9 FLW at 192:

> "The distinction between petty offenses and serious crimes has focused upon the consideration of whether a given crime is serious enough to warrant a jury trial. If a crime is excluded form the serious category, it is petty. The classes of serious crimes are: crimes that were indictable at common law, Callan v. Wilson, 127 U.S. 540 (1888); crimes that involve moral turpitude, Schick v. United States, 195 U.S. 65 (1904; crimes that are malum in se, or inherently evil at common law, District of Columbia v. Colts, 282 U.S. 63 (1930); and crimes that carry a maximum penalty of more than six months in prison, Baldwin v. New York, 399 U.S. 66 (1970). The first three criteria involve the nature of the offense itself."

Thus, it is apparent that there are four classifications of crimes which require a trial by jury: (1) crimes that are indictable at common law; (2) crimes that involve moral turpitude; (3) crimes that a malum in se, or inherently evil at common law; and (4) crimes that carry a maximum penalty of more than six months in prison. The indication, then, is that even though a crime may carry a maximum penalty of less than six months if it meets one of the other remaining three criteria, it would, nevertheless, require a trial by jury. The Supreme Court of the United States has declined to rule that the length of punishment is the sole criteria for determining whether or not there should

be a trial by jury. In Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970), the court in footnote 6 at 399 U.S. at 69 noted:

> "Decisions of this Court have looked to both the nature of the offense itself, District of Columbia v Colts, 282 US 63, 75 L Ed 177, 51 S Ct 52 (1930), as well as the maximum potential sentence, Duncan v Louisiana, 391 US 145, 20 L Ed 2d 491, 88 S Ct 1444 (1968), in determining whether a particular offense was so serious as to require a jury trial. In this case, we decide only that a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty'."

Accordingly, the starting point for determining whether an offense is a "petty offense" as to which no right to trial by jury is guaranteed by the State or Federal Constitutions is an examination of the nature of the offense as well as an examination of the sentence.

It is quite clear that the offense of malicious mischief was a crime recognized at common law. See Parker v. State, 124 Fla. 780, 169 So. 411 (1936); State v. Watts, 48 Ark. 56, 2 S.W. 342, 3 Am.S.R. 216 (1886); Johnson v. State, 18 Ala. A. 70, 88 So. 348 (1921); Wharton's Criminal Law, Section 485; 38 C.J. Malicious Mischief, Section 1 (1925 Ed.); cases cited in Anno. 19 L.R.A. (N.S.) 273.

In State v. Watts, supra, the court noted:

> "It is difficult to state, with minute precision, what is necessary to constitute malicious mischief at common law. It has

been so much legislated upon, and at such an early day, that its common-law limits are indistinct. Blackstone classes it along with larceny and forgery, and, after treating of larceny, says: 'Malicious mischief or damage is the next species of injury to private property which the law considers a public crime. This is such as is done, not animo furandi, or with an intent of gaining by another's loss, which is some, though a weak, excuse, but either out of a spirit of wanton cruelty, or black and diabolical revenge, in which it bears a near relating to the crime of arson; for as that affects the habitation , so this does the other property, of individuals. An therefore any damage arising from this mischievous disposition, though only a trespass at common law, is now, by a multitude of statutes, made penal in the highest degree.' And he then enumerates several statutes which elevated it to felony.

"Some judges, relying on this passage, and understanding the word 'trespass' therein affording to its modern signification, have denied that the offense of malicious mischief exists under the common law of this country. But, upon a careful reading, it is obvious that the word 'trespass' is used by Blackstone in this passage in the sense of 'misdemeanor.' It is used by him, in various places in his Commentaries, in that sense; as where, speaking of officers who voluntarily suffer prisoners to escape, he says: 'It is generally agreed that such escapes amount to the same kind of offense, and are punishable in the same degree, as the offense of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass.' An again, where he says: 'In treason all are principals, propter odium delicti; in trespass all are principals because the law, quae de minimis non curat, does not descend to distinguish the different shades of guilty in petty misdemeanors.' §§ 1 Bish.Crim.Law, 568,569, 625."

The court continued and holding malicious mischief was a crime under the common law:

> "Without further discussion, it is sufficient to say that, according to the weight of authority and the better and prevailing opinion, the offense of malicious mischief exists under the common law of this country. This offense includes all malicious physical injuries to the rights of another, which impair utility or materially diminish value. 'Thus, it has been considered an offense at common law to maliciously destroy a horse belonging to another; or a cow; or a steer; or any beast whatever which may be the property of another; to wantonly kill an animal, where the effect is to disturb and molest a family; to maliciously cast the carcass of an animal into a well in daily use; to maliciously poison chickens; to fraudulently tear up a promissory note, or break windows; to maliciously destroy any barrack, corn, or crib; to maliciously girdle or injure trees or plants, kept either for use or ornament; to maliciously break up a boat; to maliciously injure or deface tombs; and to maliciously strip from a building copper pipes or sheeting.'" (emphasis supplied)

As already noted, this Court in Parker v. State, supra, recognized the existence of the common law offense of "malicious mischief".

It is, therefore, clear that the offense of malicious mischief was one which was indictable at common law and, therefore, one for which a trial by jury existed.

It is apparent that malicious mischief is malum in se rather than malum prohibitum. As this Court noted in Coleman v. State, 119 Fla. 653, 161 So. 89 (1935):

> "Crimes from early days have been divided into things that are criminal because they are mala in se and crimes which are such because they are prohibited by statute or mala prohibita. The former class embraces those acts which are immoral or wrong in themselves such as burglary, larceny, arson, rape, murder, and breaches of the peace, while the latter embraces those things which are prohibited by statute because they infringe upon the rights of others, though no moral turpitude may attach, and they are crimes only because they are prohibited by statute."

As already noted, Blackstone has indicated that malicious mischief is akin to the crime of arson. See also Herron v. State, 22 Fla. 86 (1886).

21 Am.Jur.2d, Criminal Law, Section 27, discusses the distinction between offenses which are mala in se and those which are mala prohibita:

> "The law divides crimes into acts wrong in themselves, called 'acts mala in se', and acts which would not be wrong but for the fact that positive law forbids them, called 'acts mala prohibita'. An act which is malum in se has been defined as one inherently wicked; one naturally evil, as adjudged by the sense of a civilized community; one involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law; and one immoral in its nature and injurious in its consequences, without regard to the fact of its being noticed or punished by the law of the state."

As noted by the Fifth District Court of Appeal in State v. Oxx, 417 So.2d 287 (Fla. 5th DCA 1982):

> "First, an overall general distinction is

> drawn between statutes codifying crimes recognized at common law and statutes that proscribe conduct not prohibited at common law. The common law crimes were commonly referred to as crimes mala in se or 'infamous' crimes; as such, intent was considered to be so inherent in the idea of the offense that it was deemed included as an element, even though the statute codifying the offense failed to specify an intent element."

The Court notes at page 289 at footnote 4 that mala prohibita crimes in contrast may result from neglect where the law requires care, or inaction where the law imposes a duty to act; and notes that whatever the intent of the violator the injury is the same. Thus, the court notes that in codifying crimes mala in se, intent is required, but where codifying crimes mala prohibita, intent can be disposed of. The essence of malicious mischief is intent. See North Dakota v. Miner, 17 N.D. 454, 117 N.W. 528, 19 L.R.A. (N.S. 273) (1908), and the associated annotation appearing at 19 L.R.A. (N.S.) 273; Williams v. State, 99 Fla. 648, 109 So. 805 (1926); Newman v. State, 174 So.2d 479 (Fla. 2d DCA 1965); K. G. v. State, 330 So.2d 519 (Fla. 1st DCA 1976).

Indeed, the courts of other states have specifically held that malicious mischief is malum in se rather than malum prohibitum. As pointed out by the Supreme Court of Michigan in People v. Causley, 299 Mich. 340, 300 N.W. 111 (1941):

"[I]t must first be observed that the thing

> defendant conspired to do is malum in se, not malum prohibitum. Injuring maliciously an electric transmission wire is wrong, not because it is prohibited (as driving on the left side of the street would be), but because of its intrinsic wickedness."

The intrinsic wickedness was noted in People v. Rader, 140 Misc. 707, 251 N.Y.S. 539 (1931):

> "I find no merit in the contention that the acts charged constitute at most only a civil wrong and not a crime. Without delving deeply into social science, it may be safely asserted that it has ever been the policy, incorporated into our system of jurisprudence, for the sovereign power to punish any wanton injury to another's property which might provoke violent retaliation. In its endeavor to preserve peace, the sovereign power takes cognizance of the impulses that motivate human action; it realizes that willful, malicious violation of one's property rights naturally leads to retaliation on the part of the aggrieved person. To deny punishment may lead to the recrudescence of the feud. Where the act charged is accompanied by a corrupt purpose, a wicked intent to do evil, it involves such high issues that the state, instead of leaving its cognizance to the civil tribunals, declares that the rights of the state have been violated, and it proceeds against the individual charged with the commission of the offense."

Indeed, Blackstone noted the "spirit of wanton cruelty, or black and diabolical revenge which causes the law to consider it a public crime". See Blackstone quoted in State v. Watts, supra.

As noted, the spirit with which the law has treated

malicious mischief indicates that it involves moral turpitude. Everett v. Mann, 113 So.2d 758 (Fla. 2d DCA 1959), indicates that moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duty owed by man to man or man to society.

The fact that the Legislature may have seen fit to impose stronger or lesser penalties dependent upon the value of the property involved does not effect whether the crime is malum in se or involves moral turpitude.

Blackstone in his Commentaries, Book 1, pp. 54-58, says:

> "'Neither do divine or natural duties receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled mala in se, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior Legislature. For that Legislature in all these cases acts only * * * in subordination to the Great Lawgiver, transcribing and publishing His precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and instrinsically right or wrong.' That with 'regard to natural duties, and such offenses as are mala in se; here we are bound in conscience; because we are bound by superior laws, before those human laws were in being, to perform the one and abstain from the other.'" As quoted in Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929) at p. 83.

Tillinghast involved the deportation of an alien who had been convicted of petit larceny, a misdemeanor. There the court considered whether petit larceny was a crime involving moral turpitude. From Blackstone the court noted:

> "From this it appears that theft or larceny was a crime at common law involving an act intrinsically and morally wrong and malum in se, and does not acquire additional turpitude from being declared unlawful by the municipal law. In other words, that an act that was at common law instrinsically and morally wrong, malum in se, does not become any more or any less so by reason of the fact that the Legislature may see fit to call it a felony, if the thing stolen is of a value exceeding a given amount, or to call it a misdemeanor, if the thing stolen is of less value. In either case the offense if one involving moral turpitude.
>
> "In Bartos v. United States, 19 F.(2d) 722, 724, the Circuit Court of Appeals for the Eighth Circuit, in discussing this matter, said: 'A thief is a debased man; he has not moral character. The fact that a statute may classify his acts as grand and petit larceny, and not punish the latter with imprisonment and declare it to be only a misdemeanor, does not destroy the fact that theft, whether it be grant or petit larceny, involves moral turpitude. It is malum in se, and so the consensus of opinion--statute or not statute--deduces from the commission of crimes mala in se the conclusion that the perpetrator is depraved in mind and is without moral character, because, forsooth, his very act involves moral turpitude.'"

This court at an early age determined that in so far as the gravamen of malicious mischief is concerned, the

value of the property is not involved but, instead, the wilfull and malicious destruction of the property, without regard to its value, is the question. See Herron v. State, supra.

It is, therefore, respectfully submitted that the crime of malicious mischief with which the Defendant is charged is one which was a crime at common law, is malum in se and 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 and the Constitution of the United States as made applicable to the State of Florida.

It may be contended that an objective test of the penalty would eliminate the necessity of having to define, in the words of Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), "a line in the spectrum of crime, separating petit from serious infractions." The court noted that the process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little.

The distinction, however, between crimes which are malum prohibitum and those which are malum in se or which involve moral turpitude is very real. A greater consequence is visited upon one who is convicted of a crime which is

malum in se or involves moral turpitude than is visited upon one in which the crime is merely malum prohibitum. In the example of malicious mischief, the accidental destruction of property carries with it no imputation to the perpetrator of blackheartedness, immorality, wickedness, etc. In discussing what constitutes a "petit offense" or a "serious offense" for purposes of a jury trial, the United States Supreme Court in Baldwin v. State noted at footnote 8 at 339 U.S. 69, "both the convicted felon and the convicted misdemeanent may be prevented under New York law from engaging in a wide variety of occupations".

Under Florida law conviction of crimes involving moral turpitude, or, indeed, the performance of acts which are deemed immoral, even though not a crime, may preclude one from entering a learned profession. See Pearl v. Florida Board of Real Estate, 394 So.2d 189 (Fla. 3d DCA 1981); State v. Hollingsworth, 108 Fla. 607, 146 So. 660 (1933); Florida Board of Bar Examiners, 364 So.2d 454 (Fla. 1978). Conviction of a crime involving moral turpitude may preclude an alien from having immigrant status or require his deportation. See Tillinghast v. Edmead, supra.

The reasons why the right to trial by jury should be protected have been expressed by the United States Supreme Court in Duncan v. Louisiana, supra. There the court noted that it is a protection of the liberties of the

people against the executive power and was regarded by the first Congress of the American colonies as one of "the most essential rights and liberties of the colonists". One of the acts, recited in the Declaration of Independence, of George III giving rise to the American Revolution was "depriving us in many cases, of the benefits of Trial by Jury". Duncan indicates that it is "a fundamental right" and interposes a barrier "against arbitrary action".

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reactions of the single judge, he was to have it."

391 U.S. at 156.

The Supreme Court quoted P. Devlin, Trial by Jury 164 (1956):

> "'The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom is the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.'"

391 U.S. at 155.

While it is true that there were certain petit offenses, acts which were malum prohibitum, for which the

right of trial by jury did not exists at common law. The Defendant, however, submits that the preservation of the right to trial by jury in those instances where it existed at common law ought not to be eroded. The framers of our State Constitution certainly intended that it not be eroded and should be left "inviolate". Article I, Section 22, of the Florida Constitution provides:

> "The right of trial by jury shall be secure to all and shall remain inviolate. Qualifications and the numbers of jurors, not fewer than six, shall be fixed by law."

The choice of those words was not accidental. As noted by Judge Taylor:

> "The purpose of this amendment, Lady and Gentlemen of the Commission, is to eliminate the words with reference to the jury trial, 'as heretofore existed', and to substitute a provision that trial by jury shall be secured to all and remain inviolate.
>
> "Research discloses that the term 'remain inviolate' has been habitually carried in the constitution of this state, and particularly in the early decisions it was given a very significant meaning by the courts, as meaning that the <u>right of trial by jury as it existed in the common law should remain untouched and unchanged</u>. So it is a more comprehensive and a m[ore] perfect preservation of the right of trial by jury as previously existed to perfect preservation of the right of trial by jury as previously existed to used those two words, 'remain inviolate', than to say 'as heretofore existed'.
>
> "And of course in either case it is

necessary to carry forward the provision which is a change in the common law, to permit the reduction in the size of juries to six. I move you, sir, the adoption of the amendment.

"CHAIRMAN SMITH: You have heard the motion. This is a substitute to the committee substitute for Amendment No. 33. Is there other comment?

"MR. FRIDAY: Mr. Chairman, are we on the question of whether we shall consider it?

"CHAIRMAN SMITH: Yes, sir.

"MR. FRIDAY: Or whether it shall be adopted?

"CHAIRMAN SMITH: Whether it shall be procedurally considered as a substitution. If you favor the motion you will now say aye.

"COMMISSION MEMBERS; Aye.

"CHAIRMAN SMITH; If you oppose it you'll now say no.

(No response)

"CHAIRMAN SMITH: The ayes have it, ..." (emphasis supplied)

It is respectfully submitted that not only is the decision of the District Court of Appeal, Fifth District, erroneous for the reasons indicated, but that it is subject to misinterpretation and causing the adoption of a rule which says that the test of a right to trial by jury is merely a review of the possible punishment; that if the offense involves "property" and does not involve a punishment of greater than six months, no right to trial by jury exists.

At common law trial by jury did exist for those offenses which existed at common law and where were malum in se. Persons charged with such crimes ought not to be denied their fundamental right to trial by jury; that right by the terms of our Constitution is inviolate.

It is, therefore, respectfully submitted that this Court should reiterate that the test of whether a trial by jury is guaranteed by the Constitution is (1) whether the offense was indictable at common law; (2) whether the offense is malum in se; (3) whether the offense involves moral turpitude; or (4) whether the possible punishment is imprisonment for a term greater than six months; and reverse the decision of the District Court of Appeal, Fifth District.

POINT II

WHETHER A DEFENDANT IS ENTITLED TO A TRIAL BY JURY PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.251.

The Circuit Judge whose decision was reversed based his determination on that a right to trial by jury existed on the provisions of Florida Rules of Criminal Procedure 3.251 which provided "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) As noted in the dissenting opinion of Judge Upchurch in the case below, these Rules were adopted subsequent to the decisions of the United States Supreme Court in Baldwin and Duncan, supra.

Other reasons exist, however, why the Rule can grant a trial by jury even where Duncan and Baldwin might not require it. As noted by this Court in Whirley, there is nothing in the Constitution which precludes the granting of trial by jury where it would not otherwise exist. This Court may very well determine that in the passage of Chapter 316, Florida Statutes, and the creation of non-criminal "infractions", that the Legislature intended in those instances that there be no trial by jury. The Rules of Practice and Procedure for Traffic Courts do not specifically provide for trial by jury where the Florida Rules of Criminal Procedure do.

The manner in which a trial is conducted is procedural and governed by the Rules of this Court, except as limited by the Constitution. Thus, the right to trial by jury is both substantive, constitutional and procedural, the effect being that this Court may provide for trial by jury where none would otherwise be required but may not take away the right to trial by jury where it exists under the Constitution. This Court may note that until recently jury trials were customarily invoked and granted for misdemeanor cases. The granting by a trial judge of a jury trial certainly cannot be said to be reversable error.

It will be noted, in this case, that this matter was before the District Court of Appeal on a Petition for Common Law Certiorari which will lie in those instances where the Circuit Court has departed from the essential requirements of law. Since it cannot be said that there is any statute or constitutional or procedural language which requires that a jury trial by denied, common law certiorari would not lie to reverse the action of the Circuit Judge in requiring a jury trial. See Ford Motor Co. v. Edwards, 363 So.2d 867 (Fla. 1st DCA 1978). Accordingly, it was error for the District Court to reverse the Circuit Court's determination that a trial by jury ought to be granted.

CONCLUSION

Under the Florida Constitution the right to trial by jury as it existed at common law is inviolate. Under the Federal Constitution, as made applicable to the State of Florida, there is a right to a trial by jury in those cases which were (1) indictable at common law, (2) were malum in se, (3) involved moral turpitude, or (4) which have a possible penalty of more than six months imprisonment. The Defendant is charged with a crime which was indictable at common law, which is malum in se or which involved moral turpitude and is, therefore, entitled to trial by jury and the decision of the District Court, Fifth District of Florida, should be reversed.

Additionally, under the Rules of Criminal Procedure, there is a procedural right to trial by jury even where one would not otherwise exist; that it cannot be said that the Circuit Judge departed from the essential requirements of law by requiring a jury trial where no statutory, constitutional or procedural law precludes the granting of same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Margene A. Roper, Assistant Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by United States Postal Service, postage pre-paid, this 11th day of June, A. D., 1984.

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