O.A. 8-30-95

IN THE SUPREME COURT OF FLORIDA

CASE NOS. 85,225
85,226 (CONSOLIDATED)

FOURTH DISTRICT NOS. 93-3825
94-0055

RICHARD MARCOLINI,
and MERCEDES ACOSTA,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

FILED
SID J. WHITE
MAY 30 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

BRIEF OF AMICUS CURIAE,
FLORIDA POWER & LIGHT COMPANY

On Appeal from the District Court of Appeal of Florida, Fourth District

Robert E. Stone, Esquire
Florida Bar No. 352446
P. O. Box 029100
Miami, Florida 33102-9100
(305) 552-4657

Counsel for Florida Power
& Light Company

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CITATIONS

CASES

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

STATUTES

TREATISES

Disc J/brf2.tbl

STATEMENT OF THE CASE AND THE FACTS

Amicus Curiae, Florida Power & Light Company ("FPL") adopts the Statement of the Case and Facts as set forth in Respondent, State of Florida's, answer brief.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal reversed the trial court's dismissal of the information in these consolidated cases on the basis that Section 812.14(3), Florida Statutes (1991) is a permissive presumption or inference whose constitutionality must not be determined facially but rather in light of the facts and jury instructions. This statute creates a presumption which may be used to establish a prima facie case of a violation of the substantive portions of that statute, which define the crime of trespass and larceny with relation to utility or cable television fixtures.

The Fourth District's ruling is consistent with the holdings of the Supreme Court of the United States and of the Supreme Court of Florida regarding the validity and effect of presumptions in a criminal case. Specifically, the Fourth District's ruling that the language "shall be prima facie evidence" contained in Section 812.14 Florida Statutes (1991) creates a permissive inference follows clear precedent previously established by this Court.

In its present form, Section 812.14(3) is a statute well designed to comport with the most recent teachings of the United States Supreme Court on the validity and use of criminal presumptions and to satisfy the constitutional infirmities identified in a predecessor statute in MacMillan.

Moreover, the Fourth District correctly held that the trial court erred in deciding the constitutionality of Section 812.14(3), Florida Statutes (1991) prior to hearing any evidence available to

the State of Florida, contrary to the teachings of the United States Supreme Court. Finally, even assuming Section 812.14(3), Florida Statutes (1991) is unconstitutional, the trial court should have permitted the prosecution to proceed without the presumption and to permit it to prove its case under Section 812.14(2)(c), Florida Statutes (1991).

I.

THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT SECTION 812.14(3), FLORIDA STATUTES (1991) IS A PERMISSIVE INFERENCE AND THAT ITS CONSTITUTIONALITY MUST NOT BE DETERMINED FACIALLY, BUT RATHER IN LIGHT OF THE FACTS AND JURY INSTRUCTIONS

INTRODUCTION

At issue before this Court is the constitutionality of Section 812.14(3), Florida Statutes (1991) which provides:

> (3) The presence on property in the actual possession of a person of any device or alteration which effects the diversion or use of the services of a utility, cable television service, or community antenna line service so as to avoid the registration of such use by or on a meter installed by the utility or so as to otherwise avoid the reporting of use of such service for payment shall be prima facie evidence of the violation of this section by such person; however, this presumption shall not apply unless:
>
> (a) The presence of such a device or alteration can be attributed only to a deliberate act in furtherance of an intent to avoid payment for utility services;
>
> (b) The person charged has received the direct benefit of the reduction of the cost of such utility services; and
>
> (c) The customer or recipient of the utility services has received the direct benefit of such utility service for at least one full billing cycle.

The Fourth District Court of Appeal held this subsection to be a permissive inference whose constitutionality is not to be determined facially but rather on the facts. Respondent, State of Florida, and Amicus Curiae, Florida Power & Light Company, urge this Court to affirm the decisions of the Fourth District that Section 812.14(3), Florida Statutes (1991) creates a valid

constitutional permissive presumption or inference which the trier of fact is free to accept or reject.

A. The Use of Presumptions in Criminal Cases

"Inferences and presumptions are a staple of our adversary system of fact finding. It is often necessary for the trier of fact to determine the existence of an element of the crime - that is, an 'ultimate' or 'elemental' fact - from the existence of one or more 'evidentiary' or 'basic' facts." This basic principle of law was cited in County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed. 2d 777 (1979), upholding under due process standards the use of statutory presumptions in a criminal trial. Id. at 156.

The role and validity of statutory as well as common law presumptions in criminal trials has been recognized and defined by the Supreme Court in a long line of cases.[1] Following the guidance of these Supreme Court decisions, the courts of this state have routinely upheld criminal presumptions in Florida Law.[2]

Those decisions refute the proposition that Section 812.14(3), Florida Statutes (1991) suffers from constitutional infirmities so

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[1] Barnes v. United States, 412 U.S. 837 (1973); Turner v. United States, 396 U.S. 398 (1970); Leary v. United States, 395 U.S. 6 (1969); United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965); Tot v. United States, 319 U.S. 463 (1943).

[2] State v. Waters, 436 So.2d 66 (Fla. 1983); State v. Ferrari, 398 So.2d 804 (Fla. 1981); Fitzgerald v. State, 339 So.2d 209 (Fla. 1976); Hamilton v. State, 329 So.2d 283 (Fla. 1976); Dirk v. State, 305 So.2d 187 (Fla. 1974).

patent that it may be declared invalid merely from a reading of its contents alone.

B. The United States Supreme Court Has Recognized A Distinction between Mandatory and Permissive Presumptions -- A Permissive Criminal Presumption Must Satisfy a Rational Connection Standard.

In Ulster County, the United States Supreme Court discussed two types of presumptions in criminal cases: a "mandatory presumption" and a "permissive presumption." Ehrhardt, Florida Evidence § 301.2 (1992 Edition) describes these presumptions, as follows:

> In using the term "permissive presumption" the court referred to what is traditionally called an "inference;" that is, a logical deduction or conclusion that the trier of fact may, but is not required to, draw from the existence of another set of facts. These presumptions are created either by statute or by judicial decision. If a presumption in a criminal case is permissive, the jury is told that it may find the presumed fact if it finds the underlying fact to be true. The jury may then credit or reject this inference or presumption as it deems appropriate.
>
> The term "mandatory presumption" was used by the Ulster County court to describe traditional presumptions in which the jury is told it must find the presumed fact to be true if it finds the underlying facts to be true.

The United States Supreme Court in Ulster County, described the role of presumptions in a criminal case in the context of the fundamental requirements of due process:

> The value of these evidentiary devices [presumptions] and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the state, to find the ultimate facts beyond a reasonable doubt.

442 U.S. at 156.

Continuing the analysis from that constitutional touchstone, the court then considered how a permissive criminal presumption might operate to interfere with a jury's execution of its constitutional duty in a criminal case to find ultimate or elemental facts beyond a reasonable doubt. The court concluded that a permissive criminal presumption could have this effect only if it allowed a jury to draw an inference which would not satisfy the "rational connection" or "more likely than not" standard employed in Tot, Leary and other presumption cases:

> The most common evidentiary device is the entirely permissive inference or presumption, which allows -- but does not require - the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant. See, e.g., Barnes v. United States. . . In that situation the basic fact may constitute prima facie evidence of the elemental fact. See, e.g., Turner v. United States. . . When reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him. [citations omitted] Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of

> proof, it affects the application of the "beyond a reasonable doubt" standard [by the jury] only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

Id. at 157.

The Ulster County court concluded its analysis by rejecting the proposition that permissive criminal presumptions had to satisfy the "beyond a reasonable doubt" standard to pass constitutional muster.

> Respondents argue ... that the validity of the New York presumption must be judged by a "reasonable doubt" test rather than the "more likely than not" standard employed in Leary. Under the more stringent test, it is argued that a statutory presumption must be rejected unless the evidence necessary to invoke the inference is sufficient for a rational jury to find the inferenced fact beyond a reasonable doubt. [citation omitted] Respondents' argument again overlooks the distinction between a permissive presumption on which the prosecution is entitled to rely as one not necessarily sufficient part of its proof and a mandatory presumption which the jury must accept even if it is the sole evidence of an element of the offense.
>
> In the latter situation, since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt. But in the former situation, the prosecution may rely on all of the evidence in the record to meet the reasonable - doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable - doubt standard before it may be permitted to play any part in a trial than there is to require

> that degree of probative force for other relevant evidence before it may be admitted.

Id. at 166-67.

Accordingly, the Ulster County court determined that mandatory criminal presumptions must satisfy the "beyond a reasonable doubt" standard whereas permissive presumptions need only satisfy the "more likely than not" test to withstand due process scrutiny.

C. Section 812.14(3), Florida Statutes (1991) is a Permissive Presumption or Inference

The Fourth District's decision below holds that the phrase "shall be prima facie evidence of the violation of this section" contained in Section 812.14(3), Florida Statutes (1991) creates a permissive inference and not a mandatory rebuttable presumption. Such a decision is consistent with the law of the State of Florida and with the United States Supreme Court's opinions in Ulster County and subsequent cases.

This Court has reviewed the language "shall be prima facie evidence" on several occasions and has on each occasion held that such language created a permissive presumption.

In State v. Rolle, 560 So.2d 1154 (Fla. 1990), this Court was faced with reviewing nearly identical language found in Section 316.1934(2)(c) Florida Statutes (1985), which states that if there was more than .10 percent or more alcohol in a person's blood, the fact shall be "prima facie evidence that the person was under the influence of alcoholic beverages..." The Rolle Court, after

thoroughly reviewing the statute and analyzing it in light of the Ulster County case, held that such language created a permissive inference. This Court stated:

> Further, this Court has interpreted the language "shall be prima facie evidence" in other contexts as creating an inference. See State v. Waters, 436 So.2d 66 (Fla.1983) (burglary); State v. Ferrari, 398 So.2d 804 (Fla. 1981) (misappropriation of construction funds), contra, Miller v. Norvell, 775 F.2d 1572 (11th Cir.1985), cert. denied, 476 U.S. 1126, 106 S.Ct. 1995, 90 L.Ed.2d 675 (1986); Fitzgerald v. State, 339 So.2d 209 (Fla. 1976) (auto theft).

560 So.2d at 1157.

In Wilhelm v. State, 568 So.2d 1 (Fla. 1990) this Court, citing Rolle, again stated that the language "shall be prima facie evidence" in Section 316.1934(2)(c) Florida Statutes (1985) created a permissive inference. This Court however determined in Wilhelm that the specific language of the jury instructions given in that case unconstitutionally relieved the State of the burden of proof.

In State v. Ferrari, 398 So.2d 804 (Fla. 1981), this Court reviewed the constitutionality of Section 713.34(3) Florida Statutes (1979), a criminal statute prohibiting the misapplication of funds by a building contractor. Specifically, this Court held the language "shall constitute prima facie evidence of intent to defraud" created a permissive inference.

Petitioners cite no decisions from this Court or any of the District Courts of Appeal that the language "shall be prima facie evidence" creates anything other than a permissive presumption or inference. Rather, Petitioner's rely on case law of other non-

Florida jurisdictions. It is clear under the teachings of the United States Supreme Court, that the Florida Supreme Court is the final interpreter of state statutory language. Sandstrom v. Montana, 442 U.S. 510, 516-17, 99 S.Ct. 2450, 2455, 61 L.Ed. 2d 39 (1979) ("The Supreme Court of Montana is, of course, the final authority on the legal weight to be given a presumption under Montana law ...")

Accordingly, the clear precedent set by this Court in Rolle, Ferrari and Wilhelm would require the conclusion that the language in Section 812.14(3) creates a permissive presumption or inference.

The caselaw, construing various non-Florida statutes, relied upon by the Petitioners are simply of no precedential value here in Florida. Furthermore, these cases can be distinguished, or otherwise explained.

The Petitioners and the trial court below primarily rely on the decision in Miller v. Norvell, 775 F.2d 1572 (11th Cir. 1985), cert. denied, 476 U.S. 1126, 106 S.Ct. 1995, 90 L.Ed. 2d 675 (1986). In Miller, the Eleventh Circuit Court of Appeals declared that Section 713.34(3) Florida Statutes (1979) created an unconstitutional mandatory rebuttable presumption both on its face and as applied to the contractor defendant in that case. Specifically, the Eleventh Circuit declared unconstitutional the language in Section 713.34(3) Florida Statutes (1979) which stated that the failure to spend funds as agreed upon "shall constitute prima facie evidence of intent to defraud", the same language this Court in Ferrari held to be constitutional.

The determination by the Eleventh Circuit in Miller that the statute was unconstitutional on its face was inappropriate. FPL would adopt the position of Chief Justice Burger, as concurred by Justices Rehnquist and O'Connor in the dissenting opinion to the certiorari denial by the United States Supreme Court in Norvell v. Miller, 476 U.S. 1126, 106 S.Ct. 1995, 90 L.Ed. 2d 675 (1986). In that dissenting opinion, Chief Justice Burger opined that the Eleventh Circuit Court of Appeals went too far in declaring Section 713.34(3), Florida Statutes (1979) unconstitutional:

> The Court of Appeals suggested that, while the Florida Supreme Court said that the statute created only a permissive inference, as a matter of federal law it created a mandatory rebuttable presumption. The Florida Supreme Court, however, is the final expositor of Florida law, not the Eleventh Circuit. Whether the troublesome phrase in the statute -- "shall constitute prima facie evidence" -- places the burden upon the defendant to rebut the State's showing is a question properly left to the Florida Supreme Court. Even if the Florida Supreme Court had not already declared that the statute created only a permissive inference, the Court of Appeals still should have allowed the Florida courts to interpret their statute to conform with federal constitutional requirements. And, even if the statute were incapable of such interpretation, the Florida courts should have been left free to make that determination in the first instance.

476 U.S. at 1128.

Further, in Santiago Sanchez Defuentes v. Dugger, 923 F.2d 801 (11th Cir. 1991), the Eleventh Circuit Court of Appeals itself acknowledged that the federal District Court had no standing to declare the presumption in Section 316.1934(2)(c), Florida Statutes (1987) (the same statute as in Rolle) unconstitutional. As noted

by the Fourth District, "Miller may be of limited precedential validity in light of Defuentes v. Dugger, 923 F.2d 801 (11th Cir. 1991)." State v. Marcolini, 20 Fla. L. Weekly D300 (Fla. 4th DCA 1995) footnote 2.

As previously discussed, this Court in Ferrari, previously held the same statute reviewed in Miller to be a permissive inference. The Petitioners and trial court in the case at bar attempt to distinguish Ferrari from Miller on the basis that Ferrari was decided prior to the United States Supreme Court decision in Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985). However, the Petitioners and the trial court apparently have failed to consider that Rolle was decided subsequent to both Miller and Francis and accordingly is the Florida supreme court's most recent pronouncement that the language "shall be prima facie evidence" creates a permissive presumption or inference and not a mandatory presumption. Clearly, the only federal decisions binding on the courts of Florida are those of the United States Supreme Court. Board of County Commissioners of Lee County v. Dexterhouse, 348 So.2d 916 (Fla. 2nd DCA 1977). Further, the Florida Supreme Court is the final interpreter of state statutory language. Sandstrom v. Montana, 442 U.S. 510, 516-17, 99 S.Ct. 2450, 2455, 61 L.Ed. 2d 39 (1979) ("The Supreme Court of Montana is, of course, the final authority on the legal weight to be given a presumption under Montana law ..."); Norvell v. Miller, 476 U.S. 1126 (dissenting opinion of Chief Justice Burger); Wilhelm

v. State, 568 So.2d 1 (Fla. 1990). Accordingly, FPL urges this Court to follow the clear precedent set in Rolle and in Ferrari.

Petitioners also rely on Government of Virgin Islands v. Parrilla, 7 F.3d 1097 (3rd Cir. 1993) to support their position that Section 812.14(3) Florida Statutes (1991) creates a mandatory presumption. In Parrilla, the Third Circuit Court of Appeals, reviewed the language in Virgin Islands Code 14 V.I.C. § 1341(b)(1992).

14 V.I.C. § 1341 (1992) defines the offense of mayhem. Subsection (b) provides:

> (b) The infliction of injury is presumptive evidence of the intent required by subsection (a) of this section.

The Parrilla court held the language "is presumptive evidence" to be a mandatory presumption. Parrilla is distinguishable as follows. First, the Third Circuit in Parrilla was acting as the equivalent of a state supreme court under 48 U.S.C. § 1612 et seq. The Parrilla court reviewed the language of 14 V.I.C. § 1341 as a matter of first impression under Virgin Islands law. The Parrilla court did not have the benefit of any prior Virgin Islands case law construing this statute or similar language in other Virgin Islands statutes. As Sandstrom indicates, it is up to the state to interpret their statutes. The law in the Virgin Islands treats the language "is presumptive evidence" as a mandatory presumption. The law of the State of Florida treats the language "shall be prima facie evidence" as a permissive presumption or inference. Second, it should be noted that the action in Parrilla proceeded to trial

and the jury was instructed as to the law. The Parrilla court applied the facts of the case and then determined the statute created a mandatory presumption. In the case at bar, the trial court dismissed the informations prior to any trial and therefore did not have the benefit of all the facts nor did the trial court even give the State the opportunity to present evidence and to submit instructions which would clearly instruct the jury that Section 812.14(3) Florida Statutes was a permissive presumption or inference.

Third, as noted by the dissent in Parrilla, the Ulster County decision by the United States Supreme Court upheld the constitutionality of the New York statute which used the identical phrase as the Virgin Islands statute, " . . . is presumptive evidence . . ." Comparing the two statutes, the dissent in Parrilla stated:

> The difference between the two statutes is only that they deal with different issues -- the New York statute with an inference of possession of weapons in a car and the Virgin Islands statute with an inference of intent to maim.

7 F.3d at 1107.

Accordingly, Parrilla is of no precedential value to this Court and is furthermore distinguishable on its facts.

The next question for this Court is whether Section 812.14(3) Florida Statutes (1991) passes the "rational connection" or "more likely than not test" imposed by the Ulster County decision. A comparison of the predecessor statute with the current Section

812.14(3) Florida Statute (1991) should be considered in determining the constitutionality of the current statute.

D. MacMillan v. State -- The Florida Supreme Court Declares Former Section 812.14(3), Florida Statutes (1977) Invalid Under the "Rational Connection" Standard.

In 1978, this Court considered the validity of the presumption established by Section 812.14(3), Florida Statutes (1977), a precedessor statute to Section 812.14(3), Florida Statutes (1991), whose constitutionality has been placed in issue in this proceeding. The version of Section 812.14(3) which appeared in the 1977 Florida Statutes permitted a jury to infer that a defendant had committed the misdemeanor of trespass and larceny with relation to utility fixtures from either one of two specified proven facts: The existence on property in a defendant's actual possession of a device which allowed the use of the service of a utility without registration or measurement for payment or the use or receipt of the direct benefits of a utility service derived from the tampering or alteration of equipment associated with the provision of that service.[3]

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[3]Section 812.14(3), Florida Statutes (1977) provided:

(3) The existence, on property in the actual possession of the accused, of any connection, wire, conductor, meter alteration, or any device whatsoever, which effects the diversion or use of the service of a utility or a cable television service or community antenna line service or the use of electricity, gas, or water without the same being reported for payment as to service or measured or registered by or on a meter installed or provided by the utility shall be prima facie evidence of intent to violate, and of the violation of,

At the time MacMillan v. State was decided, the most recent pronouncement of the United States Supreme Court on the constitutionality of presumptions in criminal cases was Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed. 2d 380 (1973). The MacMillan Court, not having the guidance of Ulster County, traced the development by the Supreme Court of the United States of the due process standards for determining the constitutionality of criminal presumptions and quoted from that portion of the decision in Barnes which noted the then prevailing uncertainty over the applicability of the "beyond a reasonable doubt" standard to these evidentiary devices. MacMillan v. State, 358 So.2d 547, 548-49 (Fla. 1978). But like the United States Supreme Court in Leary, Turner and Barnes, the Florida court found it unnecessary to consider the validity of the statute before it under that latter standard since both of the statutory presumptions created by Section 812.14(3), Florida Statutes (1977) were found to be wanting under the "rational connection" or "more likely than not standard." Id. at 549.

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this section by such accused. The use or receipt of the direct benefits from the use of electricity, gas water, heat, oil, sewer service, telephone service, telegraph service, radio service, communication service, television service, or television community antenna line service derived from any tampering, altering, or injury of any connection, wire, conductor, device, altered meter, pipe, conduit, line, cable, transformer, amplifier, or other apparatus or device shall be prima facie evidence of intent to violate, and of the violation of, this section by the person or persons so using or receiving such direct benefits.

In explaining the basis for its decision the Florida supreme court in MacMillan noted three particular aspects of the statute which could cause a jury to draw an irrational inference through reliance on the presumptions established by the statute:

First, the device or apparatus tampered with or altered to effect the larceny of the service of a utility are generally located on the outside of a building and are easily accessible to anyone;

Second, the "direct benefits" from the use of a utility service are commonly derived by any occupant of the premises in question, and the billing which would constitute notice of possible violation is done no more frequently than monthly;

Third, there are many ways to make an alteration of a utility meter or registration device which are so simple in nature that a prankster, vandal or angry neighbor could utilize them to cause the one in possession of the premises unknowingly to receive benefits from the tampering and thereby subject a person to the effect of the presumption. Id. at 550.

The MacMillan court therefore considered the constitutionality of Section 812.14(3), Florida Statutes (1977) under the standard which the United States Supreme Court in County Court of Ulster County v. Allen, 442 U.S. 140 (1979) has subsequently confirmed as appropriate for permissive criminal presumptions. However, unlike the statutory presumption invalidated in MacMillan, the statute under consideration in this proceeding, Section 812.14(3), Florida Statutes (1991), not only satisfies the general standard for review

established in Ulster County, but also meets each of the specific criticisms leveled at its statutory predecessor in MacMillan.

E. Present Section 812.14(3), Florida Statutes (1991) Meets the Requirements Imposed by MacMillan and Ulster County.

Following the decision in MacMillan v. State, the Florida legislature reenacted Section 812.14(3), Florida Statutes in a substantially revised form designed to meet the MacMillan critique of its earlier lawmaking. As rewritten, Section 812.14(3), Florida Statutes (1991) bears little resemblance to the statutory provision considered by the supreme court in MacMillan:

> (3) The presence on property in the actual possession of a person of any device or alteration which effects the diversion or use of the services of a utility, cable television service, or community antenna line service so as to avoid the registration of such use by or on a meter installed by the utility or so as to otherwise avoid the reporting of use of such service for payment shall be prima facie evidence of the violation of this section by such person; however, this presumption shall not apply unless:
>
> (a) The presence of such a device or alteration can be attributed only to a deliberate act in furtherance of an intent to avoid payment for utility services;
>
> (b) The person charged has received the direct benefit of the reduction of the cost of such utility services; and
>
> (c) The customer or recipient of the utility services has received the direct benefit of such utility service for at least one full billing cycle.

Now, under Section 812.14(3), the receipt of the "direct benefit" of a diverted utility service does not constitute a fact which if proven justifies the drawing of an inference of violation

of the substantive portions of the statute. Instead, a series of facts must be proved to establish a prima facie case of trespass and larceny with relation to utility and cable television fixtures:

First, it must be shown that a device or alteration of equipment allowing the use of a utility service without registration for payment was present on property in the actual possession of the defendant.

Second, evidence must be adduced to show that the presence of the device or alteration on the defendant's property can be attributed only to a deliberate act in furtherance of an intent to avoid payment for utility services. This requirement is clearly designed to remove the category of conditions and devices possibly attributable to casual vandalism or to the pique of an angry neighbor from the scope of the presumption and thus to satisfy one of the concerns expressed by the Florida supreme court in the MacMillan decision. Many of the devices and alterations employed to effect the theft of utility services are quite sophisticated and time-consuming to install. They are readily distinguishable from conditions whose presence could be attributed equally to the random act of a vandal or to the conduct of a person bent on avoiding payment for utility service. If the evidence introduced by the prosecution does not show that the device or condition found on the property of a defendant could not be reasonably attributed to vandalism, then the presumption cannot be used.

Third, the prosecution must adduce evidence to show that the defendant was the recipient of the direct benefit of the reduction

in cost of a utility service effected by the alteration condition in order to satisfy the statutory definition of a prima facie case of larceny of utility service. The object of this requirement is to focus the effect of the statutory presumption on the person legally responsible for payment for the utility service in question, not just a visitor or casual passerby. This person is the individual connected with a particular premises who common experience indicates would be "more likely than not" to be interested in receiving utility service without charge.

Finally, use of the presumption is also contingent on the introduction of evidence that the accused has received the direct benefit of the utility service for at least one full billing cycle. This provision was plainly included in the statute by the legislature to insure that a defendant has received "the billing which would constitute notice of possible alteration." MacMillan v. State, 358 So.2d 547, 550 (Fla. 1978).

The Florida legislature has gone to elaborate and extensive lengths to more than insure that the presumption established by Section 812.14(3), Florida Statutes (1991) would meet the requirements of the due process "rational connection" test as well as satisfying the specific concerns expressed by the Florida supreme court in MacMillan. As presently written, Section 812.14(3) contains far more elaborate safeguards to assure rationality in the inference it allows than have been present in any of the statutes considered by the Supreme Court of the United States or in the statutory presumptions approved by the Supreme

Court of Florida itself in State v. Waters, 436 So.2d 66 (Fla. 1983); State v. Ferrari, 398 So.2d 804 (Fla. 1981); Fitzgerald v. State, 339 So.2d 209 (Fla. 1976), Hamilton v. State, 329 So.2d 283 (Fla. 1976), or Dirk v. State, 305 So.2d 187 (Fla. 1974).

As stated by the Fourth District,

> If the New York statute in Allen passes the rational connection test, then the Florida statute, as applied to the facts in this case so far as we know them, also passes the rational connection test. In our opinion the odds are just as good that the defendant in the present case is the culprit as the odds were that all of the occupants of the vehicle in Allen were in possession of the handguns in the open handbag of one of the occupants.

20 Fla. L. Weekly at D301.

In State v. Navarro, Case No. 80-237-AC (Fla. 11th Cir. Ct. June 30, 1981), the Eleventh Judicial Circuit Court in and for Dade County, Florida sitting in its appellate capacity held that the current Section 812.14(3) Florida Statutes overcame the deficiencies of its predecessor as set forth in MacMillan and is constitutional. A copy of the Navarro decision can be found in the Appendix to FPL's brief.

In Dougan v. State, Case No. 93-32 AC A02 (Fla. 15th Cir. Ct. April 18, 1994), Mr. Dougan argued in his brief that Section 812.14(3) Florida Statutes (1991) was an unconstitutional mandatory rebuttable presumption. As Petitioners' counsel in the instant case is aware, having been Mr. Dougan's appellate counsel, the conviction of Mr. Dougan under Section 812.14 Florida Statutes (1991) was per curiam affirmed by the Fifteenth Judicial Circuit

sitting in its appellate capacity. A copy of the Dougan affirmance can be found in the Appendix to FPL's brief.

The trial court below cited State v. McCoy, 395 So.2d 319 (La. 1980) in which the Louisiana supreme court declared as unconstitutional portions of their theft of electricity statute. The Louisiana Statute R.S. 14:67.6B under review in McCoy provided:

> The presence at any time on or about any wire, cable, pipe, main or meter is affixed or attached, or any device or devices resulting in diversion of electricity, gas or water or any device resulting in the prevention of the proper action or accurate registration of the meter or meters used to measure the amount of such meter or meters, shall constitute prima facie evidence of knowledge of the person, firm or corporation having custody or control of the room, structure or place where such device or wire, cable, pipe, main or meter is located, and benefitting from the misappropriation of such utility service, and shall constitute prima facie evidence of the intention of the part of such person, firm or corporation to defraud and shall bring such person, firm or corporation prima facie within the scope, meaning and penalties provided in Subsection C herein.

FPL suggests that this Louisiana statute is more akin to the Section 812.14(3) Florida Statute (1977) which was declared unconstitutional by MacMillan. The current Section 812.14(3) bears little or no resemblance to either the Louisiana statute or its own statutory predecessor, and therefore McCoy is distinguishable. Further, the Louisiana supreme court subsequently questioned the vitality of McCoy.

In State v. Lindsey, 491 So.2d 371 (La. 1986), the Louisiana supreme Court was asked to review whether the presumption contained

in R.S. 14:71(A)(2), Louisiana Statutes, was a mandatory or permissive presumption. This statute provided in part:

> The offender's failure to pay a check, draft, or order, issued for value, within ten days after notice of its nonpayment upon presentation has been deposited by certified mail in the United States mail system addressed to the issuer thereof either at the address shown on the instrument or the last known address for such person shown on the records of the bank upon which such instrument is drawn or within ten days after delivery or personal tender of the written notice to said issuer by the payee or his agent, shall be presumptive evidence of his intent to defraud. La. R.S. 14:71 (A)(2).

In Lindsey, the Louisiana supreme court questioned its earlier decision in McCoy when it stated:

> We recognize that our holding conflicts with the statutory interpretation of some of our earlier cases, particularly State v. Williams, 400 So.2d 575 (La. 1981) and State v. McCoy, 395 So.2d 319 (La. 1980). We emphasize that we agree with the enunciation of constitutional principles in these earlier cases; we only question the interpretations of the statutory phrases "presumptive evidence" or "prima facie evidence." **After consideration of the statutes listed above, our earlier cases, and jurisprudence from other jurisdictions, we conclude that words such as "shall be presumptive evidence" create only a permissive inference, not a mandatory presumption.**

491 So.2d at 375. (emphasis supplied)

The Lindsey court further indicated that if the statute was ambiguous as to whether it is a mandatory or permissive presumption, it should be interpreted in a constitutional manner. Accordingly, the Lindsey court held that statute to contain a permissive presumption.

Additionally, in the case of State v. Kriss, 232 Kan. 301, 654 P. 2d 942 (1982) the Supreme Court of Kansas upheld as a permissive presumption the constitutionality of K.S.A. 17-1921, the Kansas theft of electricity statute, which provided that the existence of certain facts "shall be prima facie evidence of intent to violate, and of the violation of this action."

The statutory presumption in Section 812.14(3) Florida Statutes (1991) plainly satisfies the applicable standard to be declared constitutional and should therefore be upheld by this Court. This particular statutory presumption, as any other, may not operate with perfect accuracy in every imaginable case that could be hypothesized, but such a requirement has never been imposed as a prerequisite to a determination of validity.[4] But the control over the use of permissive presumptions in a criminal trial is, after all, left to the trial judge under the constitution, and this due process requirement represents the final and most sensitive safeguard over the operation of these evidentiary devices.

F. The Trial Judge's Control Over the Conduct of a Criminal Proceeding Represents the Ultimate Safeguard Over the Use of Presumptions.

Section 812.14(3), Florida Statutes (1991) establishes a permissive criminal presumption. If the prosecution proves the

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[4] See, e.g., County Court of Ulster County v. Allen, 442 U.S. 140, 155n. 14 (1979) and Hamilton v. State, 329 So.2d 283, 285 (Fla. 1976).

facts which trigger its operation, a trial court may permit the case to be submitted to a jury for determination. However, the statute does not require the jury to draw an inference of guilt from any of the facts proven by the prosecution, including those specifically mentioned by Section 812.14(3), Florida Statutes (1991).

Moreover, it should also be kept in mind that a permissive criminal presumption such as Section 812.14(3) does not limit the trial judge's control over a criminal proceeding in any way. For that reason, a trial judge is not required to submit a case to the jury even if the prosecution adduces some evidence facially sufficient to trigger the operation of a criminal presumption. This point was made clear by Mr. Justice Stewart in his opinion in United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed. 2d 658 (1978):

> Our Constitution places in the hands of the trial judge responsibility for safeguarding the integrity of the jury trial, including the right to have a case withheld from the jury when the evidence is insufficient as a matter of law to support a conviction. The statute before us deprives the trial judge of none of his normal judicial powers. We do not interpret the provision in the statute that unexplained "presence ... shall be deemed sufficient evidence to authorize conviction" as in any way invading the province of the judge's discretion. The language permits the judge to submit a case to the jury on the basis of the accused's presence alone, and to this extent it constitutes congressional recognition that the fact of presence does have probative worth in the determination of guilt. But where the only evidence is of presence the statute does not require the judge to submit the case to the jury, nor does

> it preclude the grant of a judgment notwithstanding the verdict.

380 U.S. at 68 (emphasis added).

And, in addition to the controls mentioned in United States v. Gainey, the trial judge also wields the power to instruct a jury on the significance to be accorded a statutory presumption. In fact, the Supreme Court in Ulster County emphasized that the manner in which a trial court issues such a jury instruction is generally crucial to the outcome of a constitutional challenge to its use. County Court of Ulster County v. Allen, 442 U.S. 140, 157n. 16 (1979).

The case law since Ulster County also emphasizes that in order to determine whether a presumption is mandatory or permissive, the jury instructions will generally control. The Petitioners cite United States v. Kim, 884 F.2d 189 (5th Cir. 1989), Yates v. Evatt, 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991), Francis v. Franklin, 471 U.S. 307 (1985), Sandstrom v. Montana, 442 U.S. 510 (1979), State v. Kipf, 234 Neb. 227, 450 N.W.2d 397 (1990) and Sheriff, Clark County v. Boyer, 637 P.2d 832 (Nev. 1981) in support of their position. In each of these decisions, the reviewing courts looked to the jury instructions in the particular case in order to determine how the jury was instructed on the presumption. In each of these cases, the respective courts found that the instructions created a mandatory rebuttable presumption. In the case at bar, the trial court prematurely dismissed the action by impermissibly reviewing the statute on its face and not permitting the case to proceed to trial.

The trial court's power over the conduct of a criminal trial thus constitutes the ultimate safeguard over the use of a criminal presumption or of any other evidentiary device for that matter. This factor was apparently overlooked by the trial court, but certainly should be considered by this Court in determining the constitutionality of a statute establishing a criminal presumption such as Section 812.14(3), Florida Statutes (1991).

II.

THE TRIAL COURT REACHED A CONSTITUTIONAL QUESTION UNNECESSARILY AND FAILED TO ACCORD PROPER DEFERENCE TO LEGISLATIVE DETERMINATIONS OF RATIONALITY INHERENT IN A STATUTORY CRIMINAL PRESUMPTION.

The Fourth District held that the trial court erred when it reached its decision on the constitutionality of Section 812.14(3), Florida Statutes (1991) prior to hearing the evidence available to the State of Florida to show the guilt of the accused.

This approach toward determining the constitutionality of statutes establishing permissive criminal presumptions prior to hearing the evidence has been specifically disapproved by the United States Supreme Court in County Court of Ulster County v. Allen, 442 U.S. 140 (1979). There, the Supreme Court emphasized that in the case of a permissive criminal presumption, the entire evidence in a case must be examined to determine whether or not the record contained evidence other than the presumption which would justify a determination of guilt by a jury. Id. at 157-163.

This sort of judicial analysis seems eminently logical since a jury is entirely free to disregard a permissive presumption.

The Supreme Court in Ulster County clearly instructed reviewing courts that testing the facial constitutionality of a presumption would be appropriate only if the evidentiary device under consideration was a mandatory presumption. Id. This holding seems to be yet another reiteration of the well settled principle that courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively

disposed of on other grounds. See, e.g., Singletary v. State, 322 So.2d 551, 552 (Fla. 1975). Viewed in this light, the action of the trial court in dismissing the action below was both premature and unnecessary.

The dismissal of the case on constitutional grounds is also inconsistent with the admonition expressed in United States v. Gainey, 380 U.S. 63, 66-67 (1965) and Leary v. United States, 395 U.S. 6, 36 (1969) that legislative empirical determinations of rationality inherent in statutory presumptions, especially with regard to matters not completely commonplace, should be accorded deference by the judiciary. The problem of the theft of utility services is such a matter and one posing a significant economic burden for society. This can be demonstrated from a brief consideration of the crime of theft of electric power alone.

Industry sources vary in describing the magnitude of the losses caused by the theft of electricity. The disagreement is not over the conclusion that losses are enormous, but over how large they may really be. FPL estimates unmetered revenue totalling $8.3 million in 1994 associated with meter tampering in its service area. The cost of stolen electricity of course adds to a utility's operating expense and results inevitably as a burden carried by customers who do not steal. Of course, gas, telephone and other utilities have also encountered problems with theft of service, as have cable television companies. Their losses must be added to those suffered by electrical utilities.

The electrical utility industry has responded to this problem by making efforts to develop ever more tamper-proof equipment and by urging the passage of legislation to facilitate the prosecution of persons who engage in stealing electricity. But successful prosecution of this crime is not a simple task. It is usually committed under the cover of secrecy. Eyewitnesses to this crime are rarely available, and cases usually must be constructed on circumstantial evidence alone.

It is against this background that the Florida legislature chose in 1979 to enact the statutory provision at issue in this case. The legislature undertook to describe a situation "pregnant with illegality"[5] in Section 812.14(3), and to attach to the set of factual circumstances which it described the permissible inference that a violation of law had occurred.

The mere fact that a particular court might disagree with the legislative determination of the exact relevance or weight of the set of facts described in Section 812.14(3) does not represent a valid basis for determination that this statute is facially unconstitutional. To the extent the dismissal of this action by the trial court on constitutional grounds was attributable to such considerations it was plainly erroneous and should be reversed by this Court.

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[5]See, United States v. Gainey, 380 U.S. 63, 66-67 (1965).

III.

THE TRIAL COURT ERRED IN DISMISSING THE CASE EVEN ASSUMING SECTION 812.14(3), FLORIDA STATUTES (1991) IS UNCONSTITUTIONAL

Appellee was charged under Section 812.14(2)(c), Florida Statutes (1991) which provides:

> (2) It is unlawful to: ...
> (c) Use or receive the direct benefit from the use of a utility, cable television service, or community antenna line service knowing, or under such circumstances as would induce a reasonable person to believe, that such direct benefits have resulted from any tampering with, altering of, or injury to any connection, wire, conductor, meter, pipe, conduit, line, cable, transformer, amplifier, or other apparatus or device owned, operated, or controlled by such utility or cable television service or community antenna line service, for the purpose of avoiding payment.

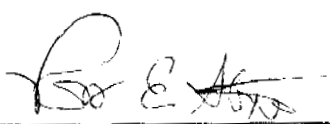
Even if this Court determines Section 812.14(3), Florida Statutes (1991) is unconstitutional, the trial court should not have dismissed the case because the prosecution could still have proceeded to prove its case without the presumption under Section 812.14(2)(c), Florida Statutes (1991).

CONCLUSION

Section 812.14(3), Florida Statutes (1991) establishes a permissive criminal presumption which a jury is free to consider as any other evidence in a trial and which deprives the trial judge of none of his control over a criminal proceeding. This statute satisfies the "rational connection" test which is firmly established as the standard under which the constitutionality of permissive criminal presumption must be determined. The trial court below not only failed to apply this standard in dismissing this action, but also unnecessarily and improperly reached a constitutional question by ruling on the facial constitutionality of the statutory presumption without considering the evidence available to the prosecution to prove the guilt of the defendant. Finally, even assuming Section 812.14(3), Florida Statutes (1991) to be unconstitutional, the trial court should have permitted the State to proceed without the presumption. The decisions of the Fourth District Court of Appeal should therefore be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this 26th day of May, 1995, to: Myra J. Fried, Attorney for State of Florida, Office of Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, FL 33401-2299, and Anthony Calvello, Assistant Public Defender, Attorney for Petitioners, Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, FL 33401.



Robert E. Stone, Esquire
Florida Bar No. 352446
P. O. Box 029100
Miami, Florida 33102-9100
(305) 552-4657

Attorney for Florida Power & Light Company

res/brief3.td

IN THE SUPREME COURT OF FLORIDA

CASE NOS. 85,225
85,226 (CONSOLIDATED)

DISTRICT COURT OF APPEAL,
FOURTH DISTRICT - NOS. 93-3825
94-0055

RICHARD MARCOLINI
and MERCEDES ACOSTA,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

APPENDIX OF AMICUS CURIAE,
FLORIDA POWER & LIGHT COMPANY

On Appeal from the District Court of Appeal of Florida, Fourth District

Robert E. Stone, Esquire
Florida Bar No. 352446
P. O. Box 029100
Miami, Florida 33102-9100
(305) 552-4657

Counsel for Florida Power
& Light Company

INDEX

IN THE CIRCUIT COURT

ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

APPELLATE DIVISION

STATE OF FLORIDA, et al.	**	
Appellants	**	
vs.	**	CASE NO. 80-237-AC
FERNANDO NAVARRO	**	
Appellee	**	

Opinion filed June 30, 1981.

An appeal from the County Court for Dade County

Robert M. Deehl, Judge

Jim Smith, Attorney General, Anthony C. Musto, Assistant Attorney General and Paul Bonavia, for Appellants

Mark R. Baer, for Appellee

Before RIVKIND, SIMONS, SMITH, JJ.

SMITH, J.

Appellee, Navarro, was prosecuted for altering utility equipment to avoid the payment of electric utility bills. in violation of FS 812.14(3) which prohibits trespass and larceny with relation to utility fixtures. The trial court dismissed the Information on the ground that the statute was unconstitutional. The State appeals.[1/]

At issue is the statutory presumption which provides that the presence on property in the possession of defendant of a device which avoids registration of use of electrical service shall be prima facie evidence of guilt. The presumption does not apply however unless, inter alia,

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1/ Joining the State, as "amicus curiae" is the victim of the alleged offense, Florida Power and Light Company.

> The presence of such device or alteration can be attributed only to a deliberate act in furtherance of an intent to avoid payment for utility services. 2/

Because we find that this "presumption" requires proof of the defendant's intent to avoid payment before it becomes operative, we hold the statute constitutional and reverse the trial court's dismissal.

2/FS 812.14 (3)(a)

> (3) The presence on property in the actual possession of a person of any device or alteration which effects the diversion or use of the services of a utility, cable television service, or community antenna line service so as to avoid the registration of such use by or on a meter installed by the utility or so as to otherwise avoid the reporting of such service for payment shall be prima facie evidence of the violation of this section by such person; however, this presumption shall not apply unless:
> (a) The presence of such a device or alteration can be attributed only to a deliberate act in furtherance of an intent to avoid payment for utility services.
> (b) The person charged has received the direct benefit of the reduction of the cost of such utility services; and
> (c) The customer or recipient of the utility services has received the direct benefit of such utility service for at least one full billing cycle.

The statute was amended in 1979 following the Florida Supreme Court's holding in MacMillan v. State, 358 So. 2d 547 (Fla. 1978) that the predecessor statue contained an unconstitutional presumption. See discussion, infra.

The predecessor statute challenged in MacMillan created a presumption of intent to violate the law merely by proof that the defendant either (1) was in possession of the property

wherein a diversion device was found or (2) was the user or recipient of direct benefits of the device.

> We find that it cannot be said with substantial assurance that the presumed fact that defendant is guilty of violation of Section 812.14, Florida Statutes (Supp. 1976), is more likely than not to flow from the proved fact of possession of the premises or receipt of benefits. MacMillan v. State, 358 So. 2d 547 (Fla. 1978), at 549.

In an effort to remedy the defect described by the Court in Macmillan, the legislature enacted the 1979 statue which all but emasculated the original presumption. Under the present statute, intent can be presumed only upon a finding that an act was done with intent to avoid payment. The guilty intent is itself a fact to be proved and the ultimate fact presumed.

It is clear that in order for a presumption to pass constitutional muster there must be a rational connection between the fact to be proved and the ultimate fact presumed. Tot v. United States, 319 US 463, 63 S.Ct. 1241 (1943); County Court of Ulster County v. Allen, 442 US 140 (1979); MacMillan v. State, supra; State v. Ferrari, So. 2d_____(Fla. 1981) Case No. 58,603, opinion filed April 2, 1981, 6 F.L.W. 246.

In the present case not only does such a rational connection exist, but the fact to be proved (intent to avoid payment) and the ultimate fact presumed (intent to avoid payment and thereby violate the law) are one and the same.

REVERSED AND REMANDED with directions to vacate the order of dismissal.

SIMONS, RIVKIND, JJ.
CONCURRING SPECIALLY:

We concur in the result reached that the statute in question overcomes the infirmities found in MacMillan v. State 358 So. 2d 547 (Fla. 1978) and is constitutional.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL)

CASE NO. 93-32 AC A02

JOHN DOUGAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

Decision filed April 18, 1994.

Appeal from the County Court for Palm Beach County; Stephen Cohen, Judge.

Richard Jorandby, Public Defender, and Anthony Cavello, Assistant Public Defender, West Palm Beach, for Appellant.

Barry Krischer, State Attorney, and Alan Johnson, Assistant State Attorney, West Palm Beach, for Appellee.

PER CURIAM.

AFFIRMED.

MOUNTS, LUPO and PHILLIPS, JJ., concur.

Florida Power & Light Company, P. O. Box 029100, Miami, FL 33102-9100

FPL

Law Department
(305) 552-4657

AIRBORNE EXPRESS

May 26, 1995

Clerk's Office
Supreme Court of Florida
Supreme Court Building
500 S. Duval Street
Tallahassee, FL 32399

Re: Richard Marcolini and Mercedes Acosta vs. State of Florida
Case Nos. 85,225 and 85,266
Consolidated

Dear Sir/Madam:

Enclosed are Florida Power & Light Company's Motion for Leave to File Amicus Curiae Brief and the proposed Brief of Amicus Curiae, Florida Power & Light Company. I am also enclosing eight copies of same and the diskette that contains the brief.

It is requested that one copy of the Motion and one copy of the Brief be stamped with the date of filing and returned to me in the enclosed self-addressed stamped envelope.

Thank you.

Robert E. Stone
Attorney

RES:tad