IN THE SUPREME COURT OF FLORIDA

RICHARD MARCOLINI,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 85,225

DCA Case No. 93-3825

PETITIONER'S BRIEF ON DISCRETIONARY JURISDICTION

RICHARD L. JORANDBY
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15th Judicial Circuit of Florida

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the County Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida and the appellee in the Fourth District Court of Appeal. Respondent was the prosecution and the appellant below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Appellee, Richard J. Marcolini, was charged with the misdemeanor offense of trespass and larceny with relation to utility or cable television services in violation of Section 812.14(2)(c), *Fla. Stat.* (1991). Section 812.14(3) establishes a statutory presumption of an intent to violate said statute. Appellee subsequently filed a written motion to declare Section 812.14, *Fla. Stat.* (1991) unconstitutional. R 17-32. A hearing was held on Appellee's motion on November 23, 1993. The Trial Court rejected Appellee's argument that Section 812.14(2)(c) was unconstitutional on the ground that it was void for vagueness. T 62. At the conclusion of the hearing the Trial Court ruled that the statutory presumption contained in Section 812.14(3), F.S. (1991) was unconstitutional because "this raises an impermissible presumption of guilt that isn't really rationally related to-I mean this is not beyond a reasonable doubt.... So I think that it is, like Defense said, an unconstitutional shifting of the burden. And I declare that Section of the law to be unconstitutional. And I think it could be written in such a way that it could be constitutional." R 59-60. The Trial Court ruled in his written order that Section 812.14(3), F.S. (1991), "creates an unlawful mandatory presumption even if it is rebuttable and is therefore unconstitutional on its face." R 59-61.

Appellee-State filed a Notice of Appeal with the Fourth District Court of Appeal.

The Fourth District in a written opinion rendered on February 1, 1995, *State v. Marcolini*, 20 Fla. Law. Weekly D300 (Fla. 4th DCA Feb. 1, 1995) [See Appendix 1] reversed the order of the trial court declaring Section 812.14(3), *Fla. Stat.* (1991) unconstitutional.

Petitioner-Defendant filed a timely Notice of Discretionary Review to this Honorable Court [See Appendix 2].

SUMMARY OF ARGUMENT

Petitioner respectfully submits that this Honorable Court has discretionary jurisdiction over the instant cause on three (3) separate grounds.

First, the Fourth District Court of Appeal expressly declared *valid* a Florida state statute, Section 812.14(3), *Fla. Stat.* (1991), entitled: "Trespass and larceny with relation to utility or cable television fixtures." Second, the opinion of the Fourth District expressly and directly conflicts with this Court's decision in *MacMillan v. State*, 358 So. 2d 547 (Fla. 1978) on the same question of law. See *State v. Marcolini*, 20 Fla. Law Weekly at D302. Third, the Fourth District expressly ***interpreted*** the due process clause of the Fourteenth Amendment to the United States Constitution which this Court has discretionary jurisdiction to review. Hence, this Honorable Court should grant discretionary review based on any of the grounds cited herein.

ARGUMENT

THIS COURT HAS JURISDICTION OVER THE INSTANT DECISION OF THE FOURTH DISTRICT ON THREE (3) SEPARATE GROUNDS.

This court has the power to review a district court decision which expressly and directly declares valid a state statute. Article V, Section 3(b)(3), *Florida Constitution* (1980), which states: "[The Supreme Court] may review any decision of a district court of appeal that expressly and directly declares valid a state statute." See also *Kane v. Robbins*, 556 So. 2d 1381 (Fla. 1989).

The Fourth District in the instant cause held that Section 812.14(3), *Fla. Stat.* (1991)[1], the statutory presumption contained within the "theft of utilities" statute, Section 812.14(2)(c),[2] was constitutional. See *State v. Marcolini, supra* [Appendix 1].

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[1] (3) The presence on property in the actual possession of a person of any device or alteration which affects the diversion or use of the services of utility 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.

[Emphasis Supplied].

[2] Section 812.14(2)(c) provides, in pertinent part, that it is unlawful to: 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.

A decision expressly construing a provision of the state or federal constitution is also subject to the discretionary review of this court. See Article V, Section 3(b)(3), *Florida Constitution* (1980); *Fla.R.App.P.* 9.030(a)(2)(A)(ii). Here, the decision of the Fourth District expressly construed, explained, or defined the due process clause of the Fourteenth Amendment of the United States Constitution. See *State v. Marcolini*, 20 Fla. Law Weekly at D300-301.

Finally, the instant opinion of the Fourth District expressly and directly conflicts with the Court's decision in *MacMillan v. State*, 358 So. 2d 547 (Fla. 1978)(See Appendix 3) on the same question of law. This Court in *MacMillan* held that the predecessor statutory presumption [Section 812.14(3), *Fla. Stat.* (1976)] was ***unconstitutional*** on it's face.

This Court held that:

> Sub judice, we need not consider whether the subject statutorily created presumption meets the reasonable doubt standard since we agree with appellant that it does not satisfy the rational connection standard. Under the challenged statute, the presumed fact of intent to violate and of violation comes into play merely upon proof that the property wherein diversion of some sort has occurred is in the actual possession of the accused or upon proof that the accused has received direct benefit from a utility. 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. One in actual possession of property or one receiving direct benefits would not more likely than not be the guilty person. Such an inference is irrational and arbitrary.
>
> *MacMillan*, 358 So. 2d at 549-550.

In the instant case, the Fourth District, in reversing the order of the trial court, relied on this court's decision in *State v. Rolle*, 560 So. 2d 1154 (Fla. 1990) but "recognized that we are *creating conflict* with *MacMillan*, we are satisfied that we should follow *Rolle*,

particularly in light of the refinement of this area of the law in the interim." *Marcolini*, 20 Fla. L. Weekly at D302.

Petitioner respectfully submits that the statutory presumption created by Section 812.14(3) is unconstitutional under the due process clause. Said presumption is mandatory, not permissive, which unconstitutionally shifts the burden of proof to Petitioner-Defendant and relieves the state of the burden of persuasion on elements of the offense charged in violation of the due process clause of the Fourteenth Amendment. See *Yates v. Evatt*, 111 S. Ct. 1884 (1991); *In Re Winship*, 397 U.S. 358 (1970).

Therefore, based on the grounds cited by Petitioner, this Honorable Court has discretionary jurisdiction over the instant case. Petitioner requests this Court to grant his petition for discretionary review, declare Section 812.14(3) unconstitutional and affirm the order of the trial court declaring said statute unconstitutional.

CONCLUSION

Petitioner requests this Court to accept jurisdiction to review the merits of this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Myra Fried, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 23rd day of February, 1995.

Attorney for Richard Marcolini

IN THE SUPREME COURT OF FLORIDA

RICHARD MARCOLINI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO._____

APPENDIX

APPENDIX 1

notice of appeal was filed in the case below back in May 5, 1994. The appeal is still pending before this court. The petitioner is asking this court to compel the trial court to exercise jurisdiction that it does not have. Moreover, the petition alleges that petitioner was represented by a lawyer in the proceeding below. Indigent defendants are not allowed to proceed pro se at the same time that they are represented by counsel.

The petitioner's response to the show cause order argues that his petitions cannot be deemed frivolous because they have all been dismissed for technical deficiencies so there has never been a ruling on the merits. The petitioner does not seem to understand that repeatedly filing petitions for relief which cannot be granted or making successive requests from a court that lacks jurisdiction to grant the relief he seeks, constitutes abusive and frivolous pleading practice just as surely as if his factual allegations were found to be without merit.

The petitioner promises that he will not file frivolous petitions in the future if the court will just not take away his indigent status. Although he may be sincere, this is an empty promise. If he does not understand that his previous activities were so egregious as to constitute an abuse of this court, he cannot be expected to discriminate in the future between frivolous pleadings and those that may have merit. His "emergency" motion is a perfect example. The show cause order clearly stated that the current petition had been found to be frivolous. Nevertheless, he continues to argue not only that he was entitled to the relief requested but that he was entitled to obtain that relief immediately.

The prospective denial of indigent status for his future *pro se* petitions will not affect his ability to seek the issuance of an extraordinary writ in connection with his current criminal prosecutions, since petitions may still be filed by his court-appointed counsel. Nor will he be precluded from filing a *pro se* appeal of a judgment of conviction or an order denying him post-conviction relief.

We conclude that the petitioner has failed to show cause why the sanction should not be imposed.

We therefore dismiss the petition as a sanction for abusive filings. We further order the prospective denial of in forma pauperis status for future petitions for extraordinary writs unless they are presented by a member of the Florida Bar who represents appellant. (HERSEY, WARNER and POLEN, JJ., concur.)

* * *

Criminal law—Theft of electricity—Error to dismiss prosecution for theft of electricity on ground that statute which provides that presence of device in electric meter which effects use of services of a utility so as to avoid registration of such use shall be prima facie evidence of violation of statute is facially unconstitutional—Because statute uses the phrase "shall be prima facie evidence," statute provides for a permissive inference, and therefore, constitutionality is determined on facts of each case rather than facially

STATE OF FLORIDA, Appellant, v. RICHARD MARCOLINI, Appellee. 4th District. Case No. 93-3825. L.T. Case No. 93-4714-MM AO2. Opinion filed February 1, 1995. Appeal from the County Court for Palm Beach County; Robert S. Schwartz, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, Melvina Racey Flaherty and Myra J. Fried, Assistant Attorneys General, West Palm Beach, for appellant. Richard L. Jorandby, Public Defender, and Anthony Calvello, Assistant Public Defender, West Palm Beach, for appellee. Robert E. Stone, Miami for Amicus Curiae - Florida Power & Light Company.

(KLEIN, J.) The appellee was charged with theft of electricity as a result of the discovery of a wire having been inserted in a hole which had been drilled in his electric meter. The statute under which he is charged provides that these facts constitute prima facie evidence of a violation of the statute, and the county court held this provision unconstitutional under the principle that the provision so restricts a fact-finder's freedom to determine whether the evidence reflects guilt beyond a reasonable doubt as to amount to a denial of due process. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 2368 (1970). We have jurisdiction because, along with dismissing the case, the county court certified the issue as a question of great public importance pursuant to Florida Rule of Appellate Procedure 9.030(b)(4)(B). We reverse.

The statute in question, section 812.14(3), Florida Statute (1991), entitled "Trespass and larceny with relation to utility or cable television fixtures," provides in subsection (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 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 service; 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. (Emphasis added).

The legislature passed this provision in 1979, after its predecessor was held unconstitutional on its face in *MacMillan v. State*, 358 So. 2d 547 (Fla. 1978). The trial court concluded that despite the changes in the statute, this provision is still unconstitutional on its face under *MacMillan*.

The portion of the statute held unconstitutional in *MacMillan* 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 the intent to violate, and of the violation of*, 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." (Emphasis added).

Section 812.14(3), Fla. Stat. (Supp. 1976).

While we are not persuaded that the changes made by the legislature would make the provision constitutional under the analysis used by the *MacMillan* court, post-*MacMillan* decisions by the United States Supreme Court and the Florida Supreme Court hold that the constitutionality of a statutory provision such as this is not to be determined facially, but rather in light of the facts and jury instructions. The trial court's determination that this provision is unconstitutional on its face is therefore erroneous.

In *MacMillan* our supreme court quoted from *Tot v. United States*, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1549 (1943), in which the Supreme Court stated:

> [T]he due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. . . .

> Under our decisions, a statutory presumption cannot be sustained if there be no *rational connection* between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts. (Emphasis added).

MacMillan, 358 So. 2d at 548-49.

In addition to *Tot*, the *MacMillan* court relied on *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), in which the Supreme Court discussed the *Tot* "rational connection" test and explained that in order for a statutory presumption to be constitutional there had to be "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Relying further on *Tot* and *Leary*, the Florida Supreme Court in *MacMillan* held that the predecessor to section 812.14(3) was facially unconstitutional, stating:

> We find that it cannot be said with substantial assurance that the presumed fact that the 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. One in actual possession of property or one receiving direct benefits would not more likely than not be the guilty person. Such an inference is irrational and arbitrary. Common experience tells us that the device or apparatus tampered with or altered is generally on the outside of a building and accessible to anyone; that 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 are commonly derived by any occupant of the premises, including family members, business partners, associates, employees and others; and that the billing which would constitute notice of possible alteration is done no more frequently than monthly. Furthermore, there are many ways to make an alteration which are so simple in nature that a prankster, a vandal or any angry neighbor could utilize them to cause the one in possession of the premises to receive benefits therefrom without his knowledge and, thereby, subject him to the presumption.

Id. at 549-50.

After *MacMillan* was decided, the Supreme Court, in *Ulster County Court v. Allen*, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979), clarified its earlier decisions on these statutory presumptions which it had previously recognized were "not all together clear." *See Barnes v. United States*, 412 U.S. 837, 843, 93 S. Ct. 2357, 2361, 37 L. Ed. 2d 380 (1973).

In *Allen*, the issue was the constitutionality of a New York statute providing that the presence of a firearm in an automobile is "presumptive evidence of its possession by all persons occupying such automobile" with certain exceptions. The New York Court of Appeals held the provision unconstitutional on its face, and the Supreme Court reversed, deciding that this was not a mandatory presumption, but rather a "permissive inference or presumption." *Allen*, 99 S. Ct. at 2224. The Court explained that whereas a mandatory presumption requires the trier-of-fact to find the elemental fact of the crime upon proof of the basic fact and is generally examined on its face to determine its validity, a permissive presumption or inference allows, but does not require, the trier-of-fact to find the elemental fact upon proof of the basic fact. A permissive presumption or inference is evaluated for constitutionality under the facts of the case, not on its face. *Allen*, 99 S. Ct. at 2224-25.

Applying this rationale, the *Allen* Court concluded that there was a rational connection between the basic facts and the ultimate facts presumed. *Id.* at 2228. It also emphasized that the trial court's instructions to the jury made it clear that the provision was only permissive, that it could be ignored, and that there was a mandatory presumption of innocence. *Id.* at 2226. The provision was, therefore, constitutional.

The statute in the present case uses the term "presumption," and our supreme court in *MacMillan* referred to the predecessor provision as a presumption. The United States Supreme Court decisions up to and including *Allen* used the words "presumption" and "inference" interchangeably, when referring to a provision which it deemed permissive. *Allen*, 99 S. Ct. at 2224. In *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 1971, 85 L. Ed. 2d 344 (1985), the Supreme Court began to limit itself to using the term "inference" where the provision is permissive. *Francis*, 105 S. Ct. at 1971.

The Florida Supreme Court recognized the significance of *Allen* in *State v. Rolle*, 560 So. 2d 1154 (Fla. 1990). In *Rolle* the issue was the constitutionality of our DUI statute, which provided that a 0.10 percent blood-alcohol level "shall be prima facie evidence that the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired." Notwithstanding that the statute in *Rolle* contained the same language, "shall be prima facie evidence," as the provision held unconstitutional 12 years earlier in *MacMillan*, our supreme court concluded in *Rolle* that the DUI statute created a "permissive inference, not an unconstitutional presumption." *Rolle*, 560 So. 2d at 1157.

Instead of evaluating the statute on its face, as it did in *MacMillan*, the *Rolle* court evaluated it in light of the record, specifically the manner in which the jury was instructed, and concluded that there was no constitutional error.[1] Citing *Allen*, the *Rolle* court emphasized that the words in the DUI statute, "shall be prima facie evidence," were crucial to the determination that the provision created a permissive inference, not a mandatory presumption. *Rolle*, 560 So. 2d at 1157. Because "shall be prima facie evidence" are the statutory words used in the present case, we can arrive at no other conclusion but that this is a permissive inference; thus, constitutionality is not determined facially, but rather on the facts in each case.

In *Rolle*, the Florida Supreme Court referred to the rational connection test by quoting from *Allen*, but did not discuss it, presumably because the facts in *Rolle* (alcohol in defendant's blood) easily passed the test. The rational connection test bears discussion here.

Unlike *Allen* and *Rolle*, this case did not proceed to trial. Rather, defense counsel advised the court at a pre-trial hearing on constitutionality that the charges were based on the fact that the electric meter on the outside of defendant's home was made inoperable by a wire having been inserted through a hole which had been drilled.

In *Allen*, as we noted earlier, the New York statute provided that the presence of a firearm in an automobile was "presumptive evidence of its possession by all persons occupying such automobile." The Supreme Court, after considering all of the facts, held the provision constitutional as applied to three occupants of an automobile, where two handguns were in an open handbag of a fourth occupant and were visible to the officer who had stopped the vehicle for speeding. 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.

In addition to *Allen*, *State v. Ferrari*, 398 So. 2d 804 (Fla. 1981), also supports our conclusion that the present inference passes the rational connection test. In *Ferrari*, the supreme court held that a statutory provision which made it "prima facie

evidence" of criminal fraud for a contractor to use a payment made by the owner for any purpose other than paying for the labor or services performed on the owner's property passed the rational connection test. Justice Sundberg dissented, stating:

> As a matter of judicial knowledge, it is common practice in the construction industry to treat contract receipts as fungible for purposes of defraying labor and material costs in subdivision developments. In our inflationary economy with material costs escalating daily, it has been almost essential to buy building materials in advance, in bulk amounts for use on multiple house "starts." To do otherwise would result in a further increase in residential housing prices, which already strain the imagination. No contractor has felt obligated to match up invoices against revenues for each job contracted-on a trust accounting, "collect-on-delivery" basis- anymore than the local haberdasher has felt bound to apply a customer's layaway payment against the invoice for the particular three piece suit selected.

Id. at 808. If the *Ferrari* inference, notwithstanding the dissent, passes the rational connection test, the inference in this statute also passes it.[2]

We are not unmindful of the fact that as a district court of appeal we cannot overrule our supreme court's decision in *MacMillan*; however, we are convinced that the supreme court has itself overruled *MacMillan* in *Ferrari* and in *Rolle*. As authority for its holding that the inference in the DUI statute was constitutional, the *Rolle* court cited *State v. Waters*, 436 So. 2d 66 (Fla. 1983) (stealthy entry prima facie evidence of intent to commit burglary); *Ferrari*; and *Fitzgerald v. State*, 339 So. 2d 209 (Fla. 1976) (failure to return rental car within 72 hours of due date prima facie evidence of auto theft). Although *MacMillan* was decided in 1978, after *Fitzgerald*, the *Rolle* court did not attempt to distinguish the statute in *MacMillan* from the statute in *Rolle*. We cannot distinguish the statutes involved in *MacMillan* and *Rolle*, nor can we reconcile the decisions. Accordingly, although we recognize that we are creating conflict with *MacMillan*, we are satisfied that we should follow *Rolle*, particularly in light of the refinement of this area of the law in the interim.

Even though we have concluded that the inference, considered in light of the bare-bones facts related to the court by counsel, passes the rational connection test, the final determination of whether it is constitutional should be made in light of the facts in evidence at trial. If the trial court concludes, based on the evidence, that the inference passes the rational connection test, then the jury should be instructed on it in accordance with *Rolle*.

Reversed. (HERSEY and WARNER, JJ., concur.)

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[1]In *Wilhelm v. State*, 568 So. 2d 1 (Fla. 1990), our supreme court held that a jury instruction different from that given in *Rolle*, but based on the same provision of the DUI statute, did violate defendant's constitutional rights.

[2]The Eleventh Circuit subsequently held the *Ferrari* provision unconstitutional in *Miller v. Norvell*, 775 F.2d 1572 (11th Cir. 1985). The supreme court, however, cited *Ferrari* as authority for its 1990 decision in *Rolle*, noting that *Miller* was contrary to *Ferrari*.

* * *

Prohibition—Petition for writ of prohibition or mandamus to prevent trial court from holding hearing dismissed as frivolous and for failure to show cause why petitioner should not be denied in forma pauperis status—District court of appeal has inherent authority to prevent abuse of judicial system by denying abusive litigants the right to proceed pro se

ANTHONY R. MARTIN, Petitioner, v. HON. EDWARD GARRISON and HON. HAROLD J. COHEN, Respondents. 4th District. Case No. 94-2875. Opinion filed February 1, 1995. Petition for writ of prohibition or mandamus to the Circuit Court for Palm Beach County. Counsel: Anthony R. Martin, Palm Beach, pro se petitioner. No appearance required for respondents.

(PER CURIAM.) By order dated January 17, 1995, we dismissed Anthony Martin's petition for writ of mandamus or prohibition. The dismissal was based on the frivolous nature of the petition and the failure of the petitioner to show cause why he should not be denied *in forma pauperis* status. Petitioner failed to pay the required filing fee. We now write to explain our reasons for dismissal.

Petitioner, Anthony R. Martin, *pro se*, filed a petition for writ of prohibition or mandamus on October 10, 1994 to prevent the trial court from holding a hearing on the defendant's motion to dismiss. The hearing was scheduled for October 7, 1994, and on October 4, 1994, petitioner faxed a letter to the trial court requesting a continuance of the hearing until the following week because he was out of town. Petitioner did not provide us with a copy of the order denying the continuance, but we presume the continuance was denied.

From the face of the petition, it appeared that the petition was frivolous and lacking in merit. A decision to grant or deny a continuance lies within the discretion of the trial court. Both mandamus and prohibition have extremely narrow applications; neither of which apply to the facts set forth in the petition.

In addition, with the filing of the petition, petitioner filed an affidavit of indigency. In light of the petitioner's previous history of filing, this court issued an Order to Show Cause why the petition should not be dismissed. Although petitioner was given twenty days to respond, he failed to file a response. We then dismissed the case. However, by letter dated December 21, 1994, petitioner requested until January 9, 1995 to file a response. We reinstated the case, granting petitioner until January 9, 1995 as requested to file his response. Significantly, petitioner failed to file any response by January 9, 1995. After 5:00 p.m. on January 17, 1995 petitioner filed an untimely response which we have treated as a motion for rehearing of the order of dismissal.

We find petitioner's arguments to be without merit and therefore deny rehearing. Petitioner's arguments center on prior orders which have found him to be indigent for the purpose of costs, rather than addressing the propriety of denying him indigent status as a sanction. Petitioner did not address this court's complaint that his pleadings are not merely unsuccessful; the majority of the pleadings are utterly devoid of merit and frivolous. The remainder of the response is devoted to insulting this panel and complaining that this court is engaged in retaliation, harassment and a "smear campaign" against him. A review of our order to show cause reveals that there is not one statement in that order which has not already been made in an earlier published opinion. We refuse to repeat the scandalous remarks against individuals that petitioner has incorporated in his prior pleadings as requested by petitioner. Petitioner obviously has access to his prior pleadings, and if not, he can be assumed to have knowledge of the contents of them since he was the author.

Accordingly, in light of the above findings the petition for prohibition is dismissed and rehearing is denied.

PETITION DISMISSED.

This court publishes the Order to Show Cause in its entirety and incorporates its findings in this opinion.

ORDER TO SHOW CAUSE OF NOVEMBER 28, 1994

Ordered, sua sponte, that this court takes judicial notice of its records. Specifically, the court takes notice of the cases filed by petitioner in a three-year period since this court issued sanctions against him in *Martin v. Stewart*, 588 So. 2d 996 (Fla. 4th DCA), *mandamus granted sub nom. Martin v. District Court of Appeal, Fourth District*, 591 So. 2d 182 (Fla. 1991).

During this three-year period, petitioner has filed seventeen appeals (both final and non-final) and fourteen original proceedings. He has obtained relief only once, in *Martin v. Circuit Court, Seventeenth Judicial Circuit*, 627 So. 2d 1298 (Fla. 4th DCA 1993). In that case, the Seventeenth Judicial Circuit's injunction preventing petitioner from filing new cases without the benefit of counsel was reversed for failure to provide Martin with notice and an opportunity to be heard.

One appeal was affirmed on the merits with a published opinion, *Martin v. Town of Palm Beach*, 19 Fla. L. Weekly D2130 (Fla. 4th DCA Oct. 7, 1994). Three cases are still pending,

APPENDIX 2

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

STATE OF FLORIDA,

Appellant,

vs.

RICHARD MARCOLINI,

Appellee.

CASE NO. 93-3825

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that Petitioner/Appellee, Richard Marcolini, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered on February 1, 1995. The decision was affirmed on the authority of a case that expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same point of law and expressly declares valid a state statute.

Respectfully submitted,

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Attorney for Richard Marcolini

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Mrya Fried, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401-2299, by courier and by U.S. Mail to Robert E. Stone, Counsel for Florida Power & Light, P.O. Box 29100, Miami, FL, 33102 this 13 day of February, 1995.

Attorney for Richard Marcolini

APPENDIX 3

Neil D. MacMILLAN, Appellant,

v.

STATE of Florida, County of Dade, Appellees.

No. 52084.

Supreme Court of Florida.

April 27, 1978.

Defendant was convicted in the County Court, Dade County, C. P. Rubiera, J., of trespass and larceny with relation to utility fixtures, and he appealed challenging constitutionality of statute under which he was charged. The Circuit Court, Dade County, ordered cause transferred to Supreme Court. The Supreme Court held that statutory presumption that one in possession of real property where there is found to be existing connection, wire, conductor, meter alteration, or any device which affects the diversion of service of a utility is guilty of trespass and larceny with relation to utility fixtures is unconstitutional and should be severed from statute.

Reversed and remanded.

England, J., dissented.

Electricity ⇐21

Statutory presumption that one in possession of real property where there is found to be existing connection, wire, conductor, meter alteration, or any device which affects the diversion of service of a utility is guilty of trespass and larceny with relation to utility fixtures is unconstitutional. West's F.S.A. §§ 812.14, 812.14(3).

Lawrence G. Ropes, Jr., Coral Gables, for appellant.

Robert L. Shevin, Atty. Gen., Tallahassee, Janet Reno, State's Atty., and George Volsky, Asst. State's Atty., Miami, for appellees.

William L. Richey of Steel, Hector & Davis, Miami, for Florida Power and Light Co.

W. Robert Fokes, Tallahassee, for Florida Cable Television Association, Inc.

William P. Burns, Miami, for Miami-Dade Water and Sewer Authority.

James W. Vance and Peter R. Tanzy, West Palm Beach, for Lake Worth Utilities Authority.

Michael E. Watkins, City Atty. of Turner, Hodson, Watkins & Lynn, Homestead, for City of Homestead, Dade County, amici curiae.

PER CURIAM.

This cause is before us on direct appeal to review the judgment of the County Court, in and for Dade County, upholding the constitutionality of Section 812.14(3), Florida Statutes (Supp.1976).

Appellant was charged by an information dated December 27, 1976, with trespass and larceny with relation to utility fixtures in violation of Section 812.14, Florida Statutes (Supp.1976). More specifically, the information charged that the appellant had, through the use of some device, used electricity owned by Florida Power and Light without first letting it pass through a meter provided by Florida Power and Light and used for measuring and registering the quantity of electricity passing through same. On January 25, 1977, the appellant was arraigned and pled not guilty to the charge. Appellant waived his right to jury trial and, after the close of the state's case, moved for a directed verdict, arguing, inter alia, that the statute was unconstitutional as it applied to homeowners. The motion was denied, and the appellant was convicted and sentenced to thirty days. His motion for a stay pending appeal was granted.

A motion for new trial was filed by the appellant. The motion alleged that Section 812.14, Florida Statutes (Supp.1976), was unconstitutional in that it placed

> "an untenable burden upon [appellant]-property-owner by requiring him to be the custodian, caretaker, insuror, and pro-

tector of the personal property of the 'Utility' (such as a meter or meters) attached to the real property in the actual possession of the [appellant] and setting forth therein that the said [appellant] is thereby prima-facie [sic] guilty of an intent to violate said statute if there is found to be existing connection, wire, conductor, *meter* alteration, or any device which effects the diversion of service of the 'Utility.'"

The motion further alleged that the statute violated the Fifth Amendment privilege against self-incrimination. The trial judge denied the appellant's motion but stated no reasons for the denial in his order. An appeal was taken by the appellant to the Circuit Court for Dade County. The appellant assigned as error, inter alia, the trial court's determination that Section 812.14, Florida Statutes (Supp.1976), was constitutional. The Circuit Court, holding that the trial judge directly passed upon the constitutionality of Section 812.14, Florida Statutes (Supp.1976), ordered that the cause be transferred to this Court.

The primary question presented for our consideration is the constitutionality vel non of Section 812.14(3), Florida Statutes (Supp.1976), which establishes a presumption of intent to violate and of the violation of Section 812.14, Florida Statutes (Supp. 1976). The challenged statutory presumption provides:

"(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, 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."

Appellant argues that this statutory presumption is unconstitutionally irrational and arbitrary in that it fails to meet the rational connection test. Appellee argues that the challenged section meets the tests of due process established by this Court and the Supreme Court of the United States.

The Supreme Court of the United States, in *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1549 (1943), established the "rational connection" test as the primary method of determining the constitutional validity of statutory presumptions. *Tot v. United States*, supra, involved a federal statute which made it a crime for one previously convicted of a crime of violence or a fugitive from justice to receive any firearm in an interstate transaction and which further provided that possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm was shipped, transported or received, as the case may be, by such person in violation of this act. Utilizing the "rational connection" test, the Supreme Court of the United States held that the presumption created by this law was violent and inconsistent with any argument drawn from experience and explained the due process limitations placed on authority of Congress to prescribe what evidence is to be received in the courts as follows:

"The rules of evidence, however, are established not alone by the courts but by the legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States. The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth Amendments

set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits.

. . . . . .

"Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." *Tot v. United States*, supra, at 467, 468, 63 S.Ct. at 1245.

Cf. *United States v. Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965); *United States v. Romano*, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965); *Fitzgerald v. State*, 339 So.2d 209 (Fla.1976).

More recently, in *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), the Supreme Court held invalid a federal act which provided that a defendant's possession of marijuana shall be deemed sufficient evidence that the marijuana was illegally imported or brought into the United States and that the defendant knew of the illegal importation unless the defendant explains his possession to the satisfaction of the jury. Therein, the Supreme Court emphasized

"that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, *unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.* And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily." (Emphasis supplied.) Supra at 36, 89 S.Ct. at 1548.

Subsequently, in *Barnes v. United States*, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973), the Supreme Court confronted the question of whether a presumption which meets the "more likely than not" test must also satisfy the "beyond a reasonable doubt" standard and concluded:

"The teaching of the foregoing cases is not altogether clear. To the extent that the 'rational connection,' 'more likely than not,' and 'reasonable doubt' standards bear ambiguous relationships to one another, the ambiguity is traceable in large part to variations in language and focus rather than to differences of substance. What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process." *Barnes v. United States*, supra, at 843, 93 S.Ct. at 2361.

Sub judice, we need not consider whether the subject statutorily created presumption meets the reasonable doubt standard since we agree with appellant that it does not satisfy the rational connection standard. Under the challenged statute, the presumed fact of intent to violate and of violation comes into play merely upon proof that the property wherein diversion of some sort has occurred is in the actual possession of the accused or upon proof that the accused has received direct benefit from a utility. 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. One in actual posses-

sion of property or one receiving direct benefits would not more likely than not be the guilty person. Such an inference is irrational and arbitrary. Common experience tells us that the device or apparatus tampered with or altered is generally on the outside of a building and accessible to anyone; that 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 are commonly derived by any occupant of the premises, including family members, business partners, associates, employees and others; and that the billing which would constitute notice of possible alteration is done no more frequently than monthly. Furthermore, there are many ways to make an alteration which are so simple in nature that a prankster, a vandal or an angry neighbor could utilize them to cause the one in possession of the premises to receive benefits therefrom without his knowledge and, thereby, subject him to the presumption.

Since we find subsection 3 to be unconstitutional, we must proceed to determine its severability from Section 812.14, Florida Statutes (Supp.1976).

Relative to the question of severability of an invalid subsection from a statutory section, this Court, in *High Ridge Management Corp. v. State*, 354 So.2d 377 (Fla.1977), stated:

> "The mere fact that the act does not contain a severability clause does not mandate a determination that the entire statutory provision should be condemned. *State ex rel. Limpus v. Newell*, 85 So.2d 124 (Fla.1956). If an unconstitutional portion of an act can be logically excised from the remaining valid provisions without doing violence to the legislative purpose expressed in the valid portions, if such legislative purpose can be accomplished independently of the invalid provisions, if the act is complete in itself after striking the invalid provisions and if the valid and invalid provisions are not so inseparable that the Legislature would not have enacted the one without the other, it is the duty of the Court to give effect to that portion of the statute which is not constitutionally infirm. . . ." Supra at 380.

The deletion of subsection 3 from Section 812.14, Florida Statutes (Supp.1976), does not disturb the valid portions of this statutory provision and leaves intact a workable statute and is, therefore, severable.

We have carefully reviewed the remaining issues in light of oral argument, the briefs and the record and find them to be without merit.

Accordingly, the judgment of the trial court is reversed, and this cause is remanded for a new trial.

OVERTON, C. J., and ADKINS, BOYD and HATCHETT, JJ., concur.

ENGLAND, J., dissents.

Richard A. PAYNE, Petitioner,

v.

STATE of Florida, Respondent.

No. 52901.

Supreme Court of Florida.

April 27, 1978.

By a judgment of the Circuit Court, Orange County, W. Rogers Turner, J., the defendant was convicted of the crime of robbery and he appealed. The District Court of Appeal, 356 So.2d 10, affirmed and certiorari was granted. The Supreme Court held that the sentence of imprisonment for term of years greater than the life expectancy of sentenced persons was lawful.

Affirmed.

England, J., dissented.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Appendix has been furnished by courier to Myra Fried, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 23rd day of February, 1995.

ANTHONY CALVELLO
Assistant Public Defender
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Attorney for Richard Marcolini