IN THE SUPREME COURT OF FLORIDA

RICHARD MARCOLINI

Petitioner,

v.

S. CT. CASE NO. 85,225
DCA CASE NO. 93-3825

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

AMENDED RESPONDENT'S BRIEF ON JURISDICTION

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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, the State of Florida, was the Prosecution and the Appellant below.

In Respondent's brief for discretionary jurisdiction, the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with Petitioner's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

Discretionary jurisdiction should not be exercised in the case at bar. The Fourth District Court of Appeal did not expressly declare §812.14(3) of the Florida Statutes constitutional; the Fourth District Court of Appeal applied Florida Supreme Court law which receded from the MacMillan case which the Fourth District claimed to find conflict; and the Fourth District Court of Appeal did not expressly interpret the due process clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE FOURTH DISTRICT COURT OF APPEAL'S DECISION IN THIS CASE.

Petitioner alleges that this honorable court should exercise its discretionary jurisdiction to review the instant case on the basis that the Fourth District Court of Appeal expressly declared a state statute valid; the Fourth District's opinion expressly and directly conflicted with this Court's decision in MacMillan v. State, 358 So. 2d 547 (Fla. 1978); and the Fourth District Court of Appeal expressly interpreted the due process clause of the Fourteenth Amendment to the federal Constitution.

Respondent maintains that: (1) the Fourth District Court of Appeal did not expressly and directly declare §812.14(3) of the Florida Statutes constitutional; (2) the Fourth District Court of Appeal applied Florida Supreme Court law which receded from the MacMillan case which the Fourth District claimed to find conflict; and (3) the Fourth District Court of Appeal did not expressly interpret the due process clause of the Fourteenth Amendment to the United States Constitution.

The Fourth District Court of Appeal did not expressly and directly declare §812.14(3) of the Florida Statutes constitutional. In its opinion, the appellate court held that "[b]ecause '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." State v. Marcolini, 20 Fla. L. Weekly 300, 301 (Fla. 4th DCA Feb. 1, 1995). The district court of appeal found that **on the facts of the case at bar** the statute was constitutional.

> 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...
>
> * * *

Id.

> * * *
>
> 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. (Footnote omitted.) 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.

Id.

Article V §3(b)(3) of the Florida Constitution (1980) states that "[The Supreme Court] may review any decision of a district court of appeal that expressly declares valid a state statute." Respondent would maintain that although the Fourth District Court of Appeal found the statute constitutional as it applied to the facts of this particular case, the court thus implied that the same statute could be found unconstitutional based on the facts

of another case. Even if this Court should agree with Petitioner that the Fourth District Court of Appeal did declare the statute expressly valid, Respondent would urge this Honorable Court not to accept jurisdiction since Petitioner has not given this Honorable Court any reasons why this Court should exercise its discretionary jurisdiction to review this case. This Court should not accept jurisdiction on this basis because of the precedents established in State v. Rolle, 560 So. 2d 1154 (Fla. 1990); State v. Ferrari, 398 So. 2d 804 (Fla. 1981); Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); and Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 1971, 85 L.Ed.2d 344 (1985).

The Respondent acknowledges that the Fourth District Court of Appeal did state in its opinion that:

> We cannot distinguish the statutes involved in MacMillan and in 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.

State v. Marcolini, 20 Fla. L. Weekly 300, 302 (Fla. 4th DCA Feb. 1, 1995). Since the Fourth District Court of Appeal has stated that it has created conflict with MacMillan, it behooves the Respondent to acknowledge this. However, Respondent would contend that the Fourth District Court of Appeal has followed the Supreme Court's legal precedent by applying State v. Rolle, 560 So. 2d 1154 (Fla. 1990) and other Florida Supreme Court cases.

In Wainwright v. Taylor, 476 So. 2d 669 (Fla. 1985), this honorable court dismissed a habeas corpus petition because conflicting incorrect case law was eliminated by cases which applied the correct rule of law.

> Our concern in cases based on our conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions which are in conflict with decisions reflecting the correct rule of law. Mystan Marine, Inc. v. Harrington, 339 So. 2d 200 (Fla. 1976); Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958). We have, in the past, dismissed cases reflecting the correct rule of law, where the conflicting, incorrect cases have been eliminated as to precedential effect. Bailey v. Hough, 441 So. 2d 614 (Fla. 1983)(conflicting case receded from in subsequent decision); Wackenhut Corp. v. Judges of District Court of Appeal, 297 So.2d 300 (Fla. 1974)(conflicting case reversed).

Wainwright v. Taylor, 476 So. 2d at 670. In the instant case, the Fourth District Court of Appeal looked to State v. Rolle, 560 So. 2d 1154 (Fla. 1990), and State v. Ferrari, 398 So. 2d 804 (Fla. 1981) to evaluate the statute in question. The Fourth District Court of Appeal determined that "[w]e 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 Rolle." State v. Marcolini, 20 Fla. L. Weekly 300, 302 (Fla. 4th DCA Feb. 1, 1995). Therefore, since this honorable court has held in the past it would not review cases which apply the correct rule of law even though a case might conflict with an incorrectly decided case, this court should not accept discretionary jurisdiction to review the case at bar on

the basis of direct conflict with this court's decision in MacMillan.

The Fourth District Court of Appeal did not expressly interpret the due process clause of the Fourteenth Amendment to the United States Constitution. Instead, it applied the United States Supreme Court's discussion of the constitutionality of a state statute in Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 1971, 85 L.Ed.2d 344 (1985); as well as this honorable court's decisions in State v. Rolle, 560 So. 2d 1154 (Fla. 1990); and State v. Ferrari, 398 So. 2d 804 (Fla. 1981), which apply the rational connection test. See State v. Marcolini, 20 Fla. L. Weekly D300-302 (Fla. 4th DCA Feb. 1, 1995). The Fourth District Court of Appeal merely **applies** the dues process clause; there is no express construction involved.

The Florida Supreme Court has held that it lacked jurisdiction to review an appeal from a district court of appeal decision which did not explain or define any constitutional terms or language. Ogle v. Pepin, 273 So. 2d 391 (Fla. 1973). That Court also held that to establish jurisdiction over an appeal from a decision construing a provision of the state constitution, an opinion or judgment does not construe a provision of the constitution unless it undertakes to explain, define or otherwise eliminate any existing doubts which arise from the language or terms of a constitutional provision. Ogle v. Pepin, 273 So. 2d at 392.

In the case of Johnston v. State Ex Rel. Carter, 213 So. 2d 435 (Fla. 1st DCA 1968), on rehearing of a petition for writ of prohibition, the appellate court discussed the "application" versus the "construction" of a constitutional provision.

> The pertinent distinction was well stated in State ex rel. Sentinel Star co. v. Lambeth, 192 So. 2d 518 (Fla. App. 4th) when treating a similar problem, the court said:
>
> ' * * * To convey jurisdiction to the Supreme Court the trial court must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. It is not sufficient to confer jurisdiction on the Supreme Court that there was inherent in the judgment appealed the construction of a controlling provision of the constitution.'
>
> A similar distinction between 'construing' a controlling provision of the constitution and "applying' such provision was made by the Florida Supreme Court in Armstrong v. City of Tampa, 106 So. 2d 407 (Fla. 1958). There the court stated the proposition in the following manner:
>
> ' * * * In the cited cases we undertook to point out that the mere fact that a constitutional provision is indirectly involved in the ultimate judgment of the trial court does not in and of itself convey jurisdiction by direct appeal to this court. We agree with those courts which hold that in order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. That is to say, by way of illustration, that the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. It is not sufficient merely that the trial judge examine into the facts of a particular case and then apply a recognized clear-cut provision of the Constitution. * * *'
>
> * * *

Johnston v. State Ex Rel. Carter, 213 So. 2d at 440. See also Rojas v. State, 296 So. 2d 627 (Fla. 3d DCA 1974)(ruling did not involve construction of constitutional provision where the trial court merely applied provisions of Fourteenth Amendment to facts it determined existed). The Florida Supreme Court has held that "applying is not synonomous with construing; the former is not a basis for our jurisdiction, while the express construction of a constitutional provision is." Rojas v. State, 288 So. 2d 234 (Fla. 1973), cert. denied, 419 U.S. 851, 95 S.Ct. 93, 42 L.Ed.2d 82 (1974). The Court also held that in order to invoke direct appeals jurisdiction there must be a ruling which "explains, defines or overtly expresses a view which eliminates some existing doubt as to a constitutional provision in order to support a direct appeal." Rojas v. State, 288 So. 2d at 236. See also Schutz v. Schutz, 581 So. 2d 1290, 1294 (Fla. 1991)(Grimes J. concurring in part, dissenting in part); Croteau v. State, 334 So. 2d 577, 580-581 (Fla. 1976)(Hatchett J., concurring); Johnson v. State, 351 So. 2d 10, 13 (Fla. 1977)(England J., dissenting); Dykman v. State, 294 So. 2d 633, 634-635 (Fla. 1973).

Since the mere application of a constitutional principle is insufficient to invoke discretionary jurisdiction, this Court should not invoke its discretionary jurisdiction in the instant case. See Page v. State, 113 So. 3d 557 (Fla. 1959).

CONCLUSION

Based on the authorities presented herein, Respondent respectfully requests that this honorable court does not exercise its discretionary jurisdiction to review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional brief has been furnished by Courier to: Anthony Calvello, Assistant Public Defender, Criminal Justice Building, Sixth Floor, 421 Third Street, West Palm Beach, Florida 33401; and by U.S. Mail to: Robert Stone, Esq., counsel for Amicus Curiae, Florida Power and Light, Law Department, P.O. Box 029100, Miami, Florida 33102-9100, on this 20th day of March 1995.

MYRA J. FRIED
ASSISTANT ATTORNEY GENERAL

APPENDIX

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

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.