IN THE SUPREME COURT OF FLORIDA

RICHARD MARCOLINI,
and MERCEDES ACOSTA,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

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

PETITIONERS' BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioners were the Defendants and Respondent was the Prosecution in the Criminal Division of the County Court of Palm Beach County, Florida.

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

The symbol "R" will denote Record on Appeal.

The symbol "T" will denote Hearing Transcripts.

STATEMENT OF THE CASE AND FACTS

Petitioner Richard Marcolini was charged by Information filed in the Fifteenth Judicial Circuit, in and for Palm Beach County, County Court Division, with the offense of theft of utilities in violation of Section 812.14(3), *Florida Statutes* (1991). He was charged with theft of electricity as a result of the discovery of a wire having been inserted in hole drilled in his electric meter. Petitioner Mercedes Acosta was charged with a similar offense.

Petitioner Richard Marcolini filed a pre-trial motion to declare Section 812.14, *Fla. Stat.* unconstitutional. R 17-32. A hearing was held on his motion. At the conclusion of the hearing, the trial court ruled that the statutory presumption contained in § 812.14(3) 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 court rejected Petitioner's alternative argument that § 812.14(2)(c) was void for vagueness. The trial court also granted Petitioner Acosta's motion to declare said statute unconstitutional.

Respondent-State of Florida appealed these rulings to the Fourth District Court of Appeal on the basis of a certified question. The Fourth District reversed the trial court's ruling that the presumption contained in § 812.14(3) was facially unconstitutional. See *State v. Marcolini*, 20 Fla. L. Weekly D300 (Fla. 4th DCA Feb. 1, 1995)[See Appendix 1]. The Fourth District also reversed the ruling of the trial court in the companion case, *State v. Acosta*, Fla. L. Weekly D298 (Fla. 4th DCA Feb. 1, 1995) [See Appendix 2].

Timely Notice of Discretionary Review was filed by Petitioners in each case. This court consolidated both causes for purposes of review.

SUMMARY OF THE ARGUMENT

The statutory presumption contained in Section 812.14(3) is unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Petitioners submit that said statute creates an unconstitutional *mandatory* presumption which infringes on their right to require the State to prove all elements of the offense necessary to establish their guilt beyond a reasonable doubt. Further, Section 812.14(3) unconstitutionally shifts the burden of proof from the prosecution to the defendant on the elements of the offense. Since the presumption is mandatory, the presumed fact must flow beyond a reasonable doubt from the underlying facts. But given the fact that numerous reasons independent of the customer's commission of the diversion of the utility services can exist, it does not follow beyond a reasonable doubt that a customer-home owner committed the offense as this statutory presumption commands.

Assuming *arguendo*, this Honorable Court finds this presumption to be "permissive," Petitioners submit that it still violates the Due Process Clause because the presumed fact does not "more likely than not" flow from the underlying facts. Hence this Honorable Court should *affirm* the order of the Trial Court declaring Section 812.14(3), *Fla. Stat.* (1991) unconstitutional.

ARGUMENT

THE STATUTORY PRESUMPTION CREATED BY SECTION 812.14(3) IS UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE.

Petitioners were both charged with violations of Section 812.14(2)(c) which proscribes trespass and larceny with relation to utility fixtures or services. Section 812.14(2)(c), *Fla. Stat.* (1991),[1] provides 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.

Section 812.14(3) creates a statutory presumption of violation of Section 812.14(2)(c), *Fla. Stat.*, which provides:

> (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;
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> (b) The person charged has received the direct benefit of the reduction of the cost of such utility services; and
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> (c) The customer or recipient of the utility services has

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[1] Section 812.14, *Florida Statutes* was amended in 1992 to reflect the creation of § 812.15 governing theft of cable television service. To the extent that the statute concerns theft of electricity, § 812.14(2)(c) and § 812.14(3) remain substantially the same. See *Florida Statutes* (Supp. 1992).

> received the direct benefit of such utility service for at least one full billing cycle.
>
> § 812.14(3) [Emphasis Supplied].

The issue before this Court is the constitutionality of this statutory presumption which can be assessed on its face without reference to possible jury instructions as this Court did in *MacMillan v. State*, 358 So. 2d 547, 549 (Fla. 1978), holding unconstitutional the statutory presumption established by Section 812.14(3), *Fla. Stat.* (Supp. 1976), a predecessor statute to Section 812.14(3), *Fla. Stat.* (1991) ("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 proven fact of possession of the premises or receipt of benefits."). See also *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532 (1969) (Statutory presumption held unconstitutional under the due process clause); *Government of Virgin Islands v. Parrilla*, 7 F. 3d 1097 (3d Cir. 1993); *Norton v. Superior Court*, 171 Ariz. 155, 829 P. 2d 345 (App. 1992).

The Due Process Clause protects the accused against a conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970). The presumption of innocence is a basic component of a defendant's fair trial and therefore, a crucial aspect of due process in the criminal justice system. *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691 (1976). These two concepts, the presumption of innocence and the requirement that the State prove each element of a crime beyond a reasonable doubt are two of the most fundamental features of our criminal justice system.

Of course, proving the elements of the crime with evidentiary or "basic" facts often calls for the trier-of-fact to make an inferential "leap" between the facts presented

to it and the element of the criminal offense that must be proven. In order to facilitate this inferential leap, the legislature has on occasion passed legislation which provides that proof of an evidentiary fact *can or may* be construed as proof of an element of the crime. The effect of such legislation is the creation of a presumption that flows from the established evidentiary fact.

In criminal prosecutions, a statutory presumption must *not* undermine the factfinder's responsibility at trial, based on evidence presented by the State to find the ultimate facts beyond a reasonable doubt. See *Ulster County Court v. Allen*, 442 U.S. 140, 156, 99 S. Ct. 1213, 2225 (1979).

The United States Supreme Court has delineated three (3) separate types of criminal presumptions: 1) permissive; 2) mandatory rebuttable; and 3) mandatory conclusive. See *Francis v. Franklin*, 471 U.S. 307, 314 & n. 2, 105 S. Ct. 1965, 1971 & n. 2, 85 L. Ed. 2d 344 (1985); *Ulster County*, 442 U.S. at 157 & n. 16, 99 S. Ct. at 2224 & n. 16. A permissive inference or presumption allows, but does *not* require, the trier of fact to infer the presumed or elemental fact from proof of the basic fact and does not shift the burden of production or persuasion to the defendant." *Ulster County*, 442 U.S. at 157, 99 S. Ct. at 2224. If the prosecution relies on a permissive presumption as one part of its case, only a "rational connection" is required between the basic facts proved and the ultimate fact presumed, and the latter must be "more likely than not"" to flow from the former. *Id.* at 165-67, 99 S. Ct. at 2228-30.

Mandatory presumptions, however, pose greater potential for constitutional problems because they may affect not only the strength of the "beyond a reasonable doubt" burden but also the *placement of that burden.* A mandatory rebuttable presumption tells the factfinder that they *must* find the presumed element upon proof of the basic fact, unless the defendant comes forward with some evidence to rebut the

presumed connection between the two facts. *Ulster County*, 442 U.S. at 157 & n. 16, 99 S. Ct. at 2224 & n. 16. Once the defendant satisfies this burden of producing evidence to rebut the presumed fact, the ultimate burden of persuasion returns to the State. Id. at 157-68 n. 16, 99 S. Ct. at 2224-26 n. 16. Although the defendant may present evidence to rebut the presumption, if the defendant chooses not to do so, the factfinder *must* accept the presumption as true, even if it is the sole evidence of an element of the offense. In such a case, "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." *Id.* at 166-67, 99 S. Ct. at 2229-30. With mandatory presumptions, the statute commands that because one fact is proven, another fact (presumed fact) must automatically follow. This court must look to the language of the statute rather than evidence at trial or jury instructions to determine the constitutional validity of the mandatory presumption. A statute creating a mandatory presumption is "[a] fat more troublesome evidentiary device" because it may "affect not only the strength of the 'no reasonable doubt' burden" but also if the presumption is rebuttable, the "placement of that burden." *Ulster County Court*, 442 U.S. at 157, 99 S. Ct. at 2225. The mandatory presumption "tells the trier that he or they *must* find the elemental fact upon proof of the basic fact..." *Id.* In effect, the prosecution is spared the burden of having to adduce evidence of the presumed fact at every trial. See *Leary*, 395 U.S. at 38, 89 S. Ct. at 1549.

More recently, in *Yates v. Evatt*, 500 U.S. 391, 111 S. Ct. 1884 (1991), the United State Supreme Court explained that:

> "[A] mandatory presumption, even though rebuttable, is different from a permissive presumption, which "does not require ... the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and ... places no burden of any kind on the defendant." *Ulster County Court*

> *v. Allen*, 441 U.S. 140, 157, 99 S. Ct. 2213, 2224, 60 L. Ed. 2d 777 (1979). A permissive presumption merely allows an inference to be drawn and is constitutional so long as the inference would not be irrational. See *Francis v. Franklin*, supra, 471 U.S. at 314-315, 105 S. Ct. at 1971."
>
> *Yates*, 111 S. Ct. at 1892 n. 7.

A. Section 812.14(3) is a mandatory presumption.

Section 812.14(3) creates the following statutory presumption: "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 a utility so as to avoid the registration of such use by or on a meter *shall be prima facie evidence* of the violation of this statute" except the presumption will not apply unless three conditions in Section 812.14(3) (a), (b), and (c). are met.[2]

Citing *State v. Rolle*, 560 So. 2d 1154, 1157 (Fla. 1990), *cert. denied*, 498 U.S. 867, 111 S. Ct. 181 (1990), the Fourth District held that the phrase "shall be prima facie evidence" creates a permissive presumption, not a mandatory presumption. In *Rolle*, this Court concluded that the statutory presumption of the DUI statute, which provides that proof of "0.10 percent or more by weight of alcohol in the person's blood .... shall be prima facie evidence" of impairments create only a permissive inference. However, Petitioners submit that the *Rolle* decision was based on a misapplication of the pertinent U.S. Supreme Court decisions including *Yates v. Evatt*, *supra*, which was decided in 1991, *after* the *Rolle* decision.

The Fourth District also cites *State v. Ferrari*, 398 So. 2d 804, 806 (Fla. 1981), in support of its position. In *Miller v. Norvell*, 775 F. 2d 1572 (11th Cir. 1985), cert. denied, 476 U.S. 1126 (1986), the Eleventh Circuit held that Section 713.34(3), *Fla. Stat.* (1979),

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[2] Although this provision contains three (3) exceptions based on the arguments, *infra*, this does not render said statutory presumption constitutional.

a criminal statute prohibiting the misapplication of funds by a building contractor which contained the following statutory presumption, that failure to spend funds as agreed upon "shall constitute prima facie evidence of intent to defraud,"[3] created an *unlawful mandatory* rebuttable presumption of intent, and was unconstitutional, both on its face and as applied to the contractor defendant. It must be noted that this Court's decision in *Ferrari*, which held this same statutory presumption to be "permissive" was decided *prior* to the United States Supreme Court's decision in *Francis v. Franklin*, *supra*. See *State v. Rolle*, 560 So. 2d 1154, 1161 (Fla. 1990) (Burkett, J. Concurring); *Wilhelm v. State*, 568 So. 2d 1, 3 (Fla. 1990); *cf Fitzgerald v. State*, 339 So. 2d 209 (Fla. 1976).

To determine whether the presumption contained in Section 812.14(3) is mandatory or permissive, this Court must look to the actual words used in the statute. The language in the statute is unambiguous: "shall be prima facie evidence of the violation of this section." It is clear that the use of the verb "shall" makes it mandatory or obligatory to apply this presumption. See generally *Fowler v. State*, 255 So. 2d 513, 515 (Fla. 1971); *State v. Gelber*, 573 So. 2d 92 (Fla. 3d DCA 1991). In *Black's Law Dictionary* (6th Ed. 1990), "shall" is defined: "as used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation." Applying the tests delineated by the Supreme Court, the presumption is clearly mandatory because the language of the statute compels the finder of fact to find intent without deliberation thereon. See *Sandstrom*.

In *Government of Virgin Islands v. Parrilla*, *supra*, the defendant was charged with assault with intent to commit mayhem. The Virgin Islands Statute defines mayhem as

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[3] "Prima Facie evidence means evidence of such nature as is sufficient to establish a fact and which, if unrebutted, remains sufficient for that purpose." *Miller*, 775 F. 2d at 1574; *Hiram Walker and Sons v. Kirk Line et. al.*, 963 F. 2d 327, 331 n. 5 (11th Cir. 1992).

follows:

> (a) Whoever willfully and with intent to commit a felony or to injure, disfigure or disable, inflicts upon the person of another any injury which -
>
> (1) seriously disfigures his person by any mutilation thereof;
>
> (2) destroys or disables any member or organ of his body; or
>
> (3) seriously diminishes his physical vigor by the injury of any member organ -
>
> shall be imprisoned not more than 15 years.
>
> (b) *The infliction of injury is presumptive evidence of the intent required by subsection (a) of this section.*

14 VIC § 1341 (1992)

The Third Circuit utilized the framework delineated in *Leary* and *Ulster County Court* to analyze the statutory presumption:

> We must first interpret the language of the statute to determine whether the presumption is mandatory or permissive. If we find the presumption is mandatory, we then go on to examine the legislature's reasoning for the presumption, to evaluate the rational connection between the proved and the presumed fact, and to investigate the extent to which the basic and elemental facts coincide. These steps will enable us to determine the constitutional validity of the mandatory presumption.

Id. at 1103.

The Court concluded that Section 1341's presumption was mandatory, *not* permissive:

> The language of Section 1341(b) states concisely: 'The infliction of injury is presumptive evidence of the intent required by subsection (a) of this section [to commit mayhem].' Applied to the facts of this case, this plain statutory language clearly sets up the following presumption: If the government establishes that Duggan's foot was injured by Parrilla's act of shooting at him (the basic fact), then the jury must presume that Parrilla *intended* to commit a felony, that is, to injure, disfigure or disable Duggan (the elemental fact), and Parrilla must be convicted of assault with intent to commit mayhem.
>
> We find that section 1341(b)'s commanding language

> imposes a mandatory presumption. The statute's presumption of intent creates an inferential strength of guilt through proof of the basic fact of injury that shifts the burden of persuasion on the elemental fact of intent into Parrilla. It does not, by contrast, merely impose a burden of production on the defendant that, if satisfied through introduction of 'any evidence,' allows the presumption to evaporate and to require the jury to convict on the strength of the remaining evidence.
>
> *Id* at 1103.

In *United States v. Kim*, 884 F. 2d 189 (5th Cir. 1989), the defendant challenged the presumption contained in 26 United States Code Section 6065 which provides:

> "The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statements or other document was actually signed by him.
>
> [Emphasis Added].

The Fifth Circuit initially held that this was a "mandatory presumption," i.e., that they must find an "ultimate fact" on proof of a "basic fact," unless the defendants present evidence to rebut the connection between the two. See *County Court of Ulster County v. Allen*, 442 U.S. 140, 157, 99 S. Ct. 2213, 2225 (1979)." *Kim*, 884 F. 2d at 194. The Fifth Circuit concluded, after applying the appropriate test to this mandatory presumption, that it was constitutional. In *Miller v. Norvell*, the Eleventh Circuit held that the phrase "shall constitute prima facie evidence" created a mandatory rebuttable presumption.

In *State v. Kipf*, 234 Neb. 227, 450 N.W. 2d 397 (1990), the Nebraska Supreme Court examined a jury instruction concerning proof for the offense of intimidation by telephone call, specifically *Neb. Rev. Stat.*, Section 28-1310(2) (Reissue 1989), which provides: "The use of indecent, lewd, or obscene language or the making of a threat or lewd suggestion shall be prima facie evidence of intent to terrify, intimidate, threaten, harass, annoy, or offend." The jury was instructed verbatim from this statute. The

Nebraska Supreme Court held that the "prima facie evidence," language used in Section 28-1310(2) actually resulted in a "mandatory and conclusive presumption of criminal intent, that is, factual establishment of the telephone call with its statutorily prohibited conduct necessarily ("shall") results in the conclusively established criminal intent of the caller." *Kipf*, 450 N.W. 2d at 410.

In *Sheriff, Clark County v. Boyer*, 637 P. 2d 832 (Nev. 1981), the defendant was charged with the embezzlement of a rented vehicle[4] which contained the following statutory presumption:

> Whenever a person who has leased a rented or leased vehicle willfully and intentionally fails to return the vehicle to its owner within 72 hours after the lease or rental agreement has expired, such person *shall be presumed to have embezzled the vehicle.*
>
> NRS 205.312

The Nevada Supreme Court found this statutory presumption to be unconstitutional:

> Applying these constitutional principles to the present case, it is clear that NRS 205.312 has the effect of relieving the state of the burden of proof enunciated in *Winship* and *Mullaney*. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)(jury instruction had effect of relieving the state of the burden of proof of the element of intent). Under this statute the mere failure to return a rental vehicle within 72 hours after expiration of the rental agreement creates a presumption of guilt, thus shifting the burden of proof to the defendant to show that he is not guilty of the offense of embezzlement. Accordingly, we hold that NRS 205.312 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.
>
> *Id.* at 833.

Hence, Petitioners submit that based on the above arguments, Section 812.14(3) creates a mandatory, *not* a permissive, presumption.

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[4] N.R.S. 205.300.

In *MacMillan*, this Court held that the predecessor statutory presumption contained in Section 812.14(3), *Fla. Stat.* (Supp. 1976) was *unconstitutional.* The statute created the following presumptions:

> The existence on property in the actual possession of the accused, of any connection, wire, conductor, meter which allowed the use of the services 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 "shall be prima facie evidence of intent to violate, and of the violation of this section by such accused."

§ 812.14(3), *Fla. Stat.* (Supp. 1976).

After surveying the applicable law, this Court decided that it need not consider whether this presumption met the "reasonable doubt standard" because it found that the presumption did not meet the lesser "rational connection standard." The *MacMillan* Court held: "We find that it cannot be said with substantial assurance that the presumed fact that defendant is guilty of violation of Section 812.14, *Fla. Stat.* (Supp. 1976), is more likely than not to flow from the proved fact of possession of the premises or receipt of benefits." *MacMillan*, 358 So. 2d at 549.

Turning to statutory presumption at bar, Petitioners note that the Florida Legislature has added in Section 812.14(3), three (3) exceptions to the statutory presumption. However, contrary to the holdings of the Fourth District Court of Appeal, none of these exceptions resolve the constitutional problem contained in the statute.

As to 3(a), the exception indicates that the presumption will apply if the "device or alteration can be attributed to a deliberate act in furtherance of an intent to avoid payment for utility services."

This exception does not necessarily apply *to the person charged* with the offense.

The State merely has to show the presence of the device that was deliberately placed on the premises as opposed to its presence there through negligence or mistake. However, the State need not *identify* who placed this device. Further, it does not resolve the inherent constitutional problems. As this Court noted in *MacMillan*:

> "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, ... 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."
>
> *Id.* at 549-550 [Emphasis Added].

Section 3(b) provides: "The person charged has received the direct benefit of the reduction of the cost of such utility service." This provision does provide that the "person charged" has to receive the direct benefit. However, as noted by this Court in MacMillan the direct benefits of utilities "are commonly derived by any occupant of the premises, including family members, business partners, associates, employees and others." Id. at 550. Thus five (5), ten (10), or hundreds can receive the "direct benefit" of the reduction of the cost of the utility in any given case. "One in actual possession of property or one receiving direct benefits would not more likely than not be the guilty person." *MacMillan*, 358 So. 2d at 550.

Section 3(c) provides that "the customer or recipient of the utility services has received the direct benefit of such utility service for at least one full billing cycle." This

one billing cycle would *not* place a reasonable person on notice of possible tampering or alteration. There are just too many variables from one particular month to the next in utility bills to be a significant gauge of Notice. There can be a voluntary reduction in use or even a vacation during any part of this one billing period. See also the trial court's ruling on this issue. T 60-61. This *cannot* be considered significant notice or knowledge of criminal conduct. Hence, this one billing cycle exception is rendered virtually meaningless.

B. Section 812.14(3) unconstitutionally shifts the burden of proof.

In *Francis v. Franklin*, *supra*, the defendant leveled his constitutional attack at the following two sentences contained in the jury charge: "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." The Supreme Court held:

> Our cases made clear that "[s]uch shifting of the burden of persuasion with respect to a fact which the State *deems so important* that it must be either *proved* or *presumed* is impermissible under the Due Process Clause." *Patterson v. New York*, 432 U.S. at 215. In *Mullaney v. Wilbur*, we explicitly held unconstitutional a *mandatory rebuttable presumption* that shifted to the defendant a burden of persuasion on the question of intent.
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> *Id.* at 317, 105 S. Ct. at 1973 [Emphasis Added].

The statutory presumption at bar, Section 812.14(3) suffers from the same constitutional affirmity as the jury instruction in *Francis v. Franklin*. Section 812.14(3) was obviously designed to unconstitutionally shift effectively the burden of proof to the defendant, once the prosecution proves that there was present a device which affects the diversion or use of the services of the utility with the above noted exceptions. No statute can constitutionally require the defendant to prove that he was not responsible. Section 812.14(3) clearly allocates the burden of proof in an *unconstitutional fashion*. To

be constitutional on its face the statutory presumption must not shift the burden of proof to the accused on any essential elements. See *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975).

In *Norton v. Superior Court*, 171 Ariz. 155, 829 P. 2d 345 (App. 1992), the defendant was charged with the offense of failure to pay reasonable child support. The defendant brought a motion to dismiss arguing that portions of the statute under which he was charged unconstitutionally shifted the burden of persuasion from the State to the defendant. The Trial Court agreed. Section 12-2458(B) provides:

> Proof of the failure by such parent to furnish reasonable support for his or her child is prima facie evidence that such failure to furnish reasonable support is willful and without lawful excuse.

The Appellate Court ruled this provision unconstitutionally shifted the burden of proof:

> Our Constitutional commitment to the presumption of innocence requires careful scrutiny of *criminal statutes embodying presumptions favorable to the State*. Analysis turns on the nature of the presumption. *See Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S. Ct. 2450, 2454, 61 L. Ed 2d 39 (1979). Conclusive or irrebuttable presumptions unconstitutionally relieve the State of its burden of proof. *See Id.* at 523, 99 S. Ct. at 2459. Permissive inferences that the trier of fact may freely disregard are acceptable, if reasonable, as they do not shift the burden of proof or the burden of persuasion. *See Francis*, 471 U.S. at 314, 105 S. Ct. at 1971; *Ulster County Court v. Allen*, 442 U.S. 140, 157, 99 S. Ct. 2213, 2225, 60 L. Ed. 2d 777 (1979). Between these poles lie mandatory rebuttable presumptions, which "violate the Due Process Clause if they relieve the State of the burden of *persuasion* on an element of an offense." *Francis*, 471 U.S. at 314, 105 S. Ct. at 1971 (emphasis added); *accord Carella v. California*, 491 U.S. 263, 265-66, 109 S. Ct. at 1432-33; *Sandstrom*, 442 U.S. at 524, 99 S. Ct. at 2459; *State v. Mohr*, 150 Ariz. 564, 567-69, 724 P. 2d 1233, 1236-38 (App. 1986); *State v. Forrester*, 134 Ariz. 444, 450, 657 P. 2d 432, 438 (App. 1982).

> The State has conceded that section 12-2458(B) unconstitutionally shifts the burden of persuasion to defendant on the crucial element of intent. By enabling the State to rest on proof of failure to furnish reasonable support, the statute requires defendant to affirmatively disprove that his failure was willful and without lawful excuse.

Id. at 347-348.

Petitioners submit that the instant statutory presumption is a mandatory *not* a permissive presumption. In order for a mandatory presumption to adequately safeguard the "beyond a reasonable doubt" standard, the evidentiary fact must be sufficient to prove the elemental fact beyond a reasonable doubt because the factfinder is denied any discretion to give its own weight to the proven evidentiary fact. *Ulster County*, supra. If the mandatory presumption required by the statute does *not* meet this standard, the provision is constitutionally defective. To hold otherwise would sanction a shift of the burden of proof to the defendant by elevating proof of an evidentiary fact *not* constituting proof of an element of the crime beyond a reasonable doubt to the status of proof beyond a reasonable doubt. The defendant would be faced with either taking a conviction upon proof of guilt not meeting the reasonable doubt test or is forced to go forward with evidence that he is *not* guilty in the absence of proof of guilt beyond a reasonable doubt.

At bar, the mandatory presumption contained in Section 812.14(3) clearly does not meet the beyond a reasonable doubt standard. Given the fact that numerous reasons independent of the customer's commission of the trespass and/or diversion of utility services exist, it does not follow beyond a reasonable doubt that a customer/home owner committed the offense as this statutory presumption commands.

The Supreme Court has repeatedly recognized the constitutional problem raised by presumptions in criminal cases. "A presumption which would permit but not require

the jury to assume intent from an isolated fact which would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence taken together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." *Morissette v. United States*, 342 U.S. 246, 275, 72 S. Ct. 240, 256 (1952). Therefore, this Honorable Court should hold that Section 812.14(3) creates a mandatory presumption that is unconstitutional.

Petitioners further submit that if this Court concludes that this statutory presumption is merely *permissive* the statutory presumption contained in Section 812.14(3) even with the three exceptions (3) (a), (b), and (c) is still unconstitutional. See *Ulster County*, 442 U.S. at 167, 99 S. Ct. at 2230; *MacMillan*; *Miller*, 775 F. 2d at 1575-1576.

Just like the predecessor statute, Section 812.14(3), *Fla. Stat.* (1991), fails to satisfy even the lesser "rational connection standard" or the "more likely than not standard." Since the device is commonly on the outside of a building, there are numerous ways vandals or pranksters could cause a home owner to receive benefits without his knowledge. As noted, the one billing cycle utterly fails to cure the knowledge requirement. Further, the exception under 3(a) does not necessarily apply to the person charged with the offense. The State merely has to show a deliberate act by someone or anyone with intent to avoid payment.

At bar, it can not be said with substantial assurance that the presumed fact is more likely than not to flow from the proved facts upon which it is made to depend. Further, the statutory presumption is prima facie evidence of a *violation* of the statute, not merely one element. Higher scrutiny should be applied to this type of statutory presumption.

The amended Section 812.14(3) fails to satisfy the concerns of this court in *MacMillan*. Hence even if this Court finds said statutory presumption to be permissive (but see argument, supra), this permissive inference still violates the Due Process Clause because the suggested conclusion is not one that reason and common sense justify merely in light of the proven fact.

CONCLUSION

Should this Court exercise its jurisdiction over this cause, Respondent requests that this Court vacate the decision of the Fourth District Court of Appeal, approve the decision of the trial court and declare Section 812.14(3), *Fla. Stat.* unconstitutional on its face.

Respectfully submitted,

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Attorney for Richard Marcolini
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joan Fowler, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by courier this 9th day of May, 1995.

Attorney for Richard Marcolini
and Mercedes Acosta

IN THE SUPREME COURT OF FLORIDA

RICHARD MARCOLINI,
and MERCEDES ACOSTA,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

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

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

trial court's jurisdiction to determine an independent and collateral claim, such as a motion for attorney's fees or costs or a motion for sanctions because they are ancillary to and do not interfere with the subject matter of the appeal and are thus incidental to the main adjudication. *McGurn*, 596 So. 2d at 1044; *see Kennedy*.

In this case, because issues in the main appeal related to the propriety of the trial court's rulings prohibiting evidence of discovery abuses are directly intertwined with the issues involved in the motion for discovery sanctions, the trial court properly declined to consider the motion during the pendency of the appeal. *Compare Ruby Mountain Constr. & Dev. Corp. v. Raymond*, 409 So. 2d 525 (Fla. 5th DCA 1982). On remand the trial court may properly consider the previously-filed motion for sanctions.

The appeal and cross-appeal are affirmed with directions to the trial court to consider the motion for sanctions upon remand. (POLEN, J., and GROSS, ROBERT M., Associate Judge, concur.)

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[1]In *Stockman v. Downs*, 573 So. 2d 835, 837 (Fla. 1991), the Florida Supreme Court determined that although proof of attorney's fees is not integral to the main cause of action and requires consideration of factors distinct from the merits of the main action, and may be adjudicated post-judgment, attorney's fees should be pled and failure to do so constitutes a waiver. The court focused on the issue of notice, expressing its concern that pleading entitlement to prevailing party attorney's fees was necessary to notify the opposing party of the claims alleged and prevent unfair surprise. The court recognized an exception when a party has notice and by its conduct recognizes, acquiesces or otherwise fails to object. *Id.* at 838.

* * *

Dissolution of marriage—Equitable distribution—Error to include a business, husband's principal asset, as asset for equitable distribution purposes where there was lack of evidence to support valuation of the business—Final judgment and judgment awarding attorney's fees reversed and remanded

DAVID R. AKINS, Appellant, v. NORMA J. AKINS, Appellee. 4th District. Case Nos. 92-1863 and 92-2290. L.T. Case No. DR 90-10123. Opinion filed February 1, 1995. Consolidated appeals from the Circuit Court for Orange County; Frank N. Kaney, Judge. Counsel: Raymond L. Goodman, Orlando, for appellant. Jon S. Rosenberg, Orlando, for appellee.

(PER CURIAM.) We review a final judgment of dissolution and a judgment awarding attorney's fees.

In arriving at an equitable distribution, the trial court distributed to the husband, as his principal asset, the business known as "Akins the Artist," the name under which he earned income as a commercial artist. However, the business had no assets other than some small accounts receivable. The $65,000 value placed on the business was based solely on the wife's unsupported opinion. The wife's estimate was arrived at arbitrarily and is simply the amount of gross yearly income. She had no independent knowledge or experience to support her opinion. There is nothing in the record to support a conclusion that the husband's earnings indicated anything other than his earning capacity. Even if minimal good will is assumed, there was no reliable basis in the evidence from which to conclude that the "business" had a value irrespective of the husband's individual reputation. Therefore, it was error to include the business as an asset for equitable distribution purposes. *See Thompson v. Thompson*, 576 So. 2d 267, 270 (Fla. 1991).

Additionally, it is undisputed that the court used incorrect mortgage figures, specified in the judgment, in computing the net value of two of the parties' properties. As to one, the correct amount was $5,000 rather than $8,000 and as to the other, $20,000 rather than $27,500.

Therefore, we reverse the final judgment and the judgment awarding attorney's fees and remand for further proceedings. (GUNTHER, BOBBY W., STONE, BARRY J. and WARNER, MARTHA C., Associate Judges, concur.)

* * *

Criminal law—Theft of utilities—Constitutionality of statute which provides that certain facts shall be prima facie evidence of violation of statute

STATE OF FLORIDA, Appellant, v. MERCEDES ACOSTA, Appellee. 4th District. Case No. 94-0055. L.T. Case No. 93-19441-MM. 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 Attorney Calvello, Assistant Public Defender, West Palm Beach, for appellee. Robert E. Stone, Miami, for Amicus Curiae-for Florida Power & Light Company.

(PER CURIAM.) The trial court dismissed this case after concluding that a statutory provision under which defendant was charged was facially unconstitutional. In a companion case, *State v. Marcolini*, No. 93-3825 (Fla. 4th DCA, February 1, 1995) [20 Fla. L. Weekly D300] we determined that the same provision was facially constitutional. We therefore reverse this case for the reasons expressed in *Marcolini*. (HERSEY, WARNER and KLEIN, JJ., concur.)

* * *

Criminal law—Cross-examination—Although defendant's testimony that he had been "jumped on by the police before" may have opened door to cross-examination regarding prior convictions, door was not opened wide enough to allow prosecutor to name prior offense and to point out that defendant had been incarcerated for it—In prosecution for resisting arrest without violence, error to instruct jury that arrest and detention of the defendant constitutes lawful execution of legal duty—Instruction given in a case-specific manner takes from jury the issue of validity of the arrest

TIMOTHY KYLE, a/k/a CECIL GERMAN, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 93-3607. L.T. Case No. 93-3463 CF10. Opinion filed February 1, 1995. Appeal from the Circuit Court for Broward County; Robert F. Diaz, Judge. Counsel: Richard L. Jorandby, Public Defender, and Mallorye G. Cunningham, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Melynda L. Melear, Assistant Attorney General, West Palm Beach, for appellee.

(KLEIN, J.) We reverse appellant's convictions for strong-arm robbery and resisting arrest without violence because the prosecutor brought out that he had previously pled guilty to battery on a law enforcement officer.

After being observed by officers who had been called to the scene of the crime, appellant first ran, but was eventually apprehended. When questioned about his flight on cross-examination, appellant said that he had "been jumped on by the police before." The prosecutor then asked him whether he had a felony conviction for battery on a law enforcement officer as a result of a guilty plea. The prosecutor followed this with "you did time for that right?"

In *Herman v. State*, 341 So. 2d 1010, 1011 (Fla. 4th DCA 1977), we said:

> The law is well settled that when a defendant testifies in his own behalf he may be asked if he has ever been convicted of a crime [citation omitted]. If he admits such conviction, he may be asked how many times he has been convicted. If he denies the conviction, the opposing party may produce the record of the conviction. *In either event, the inquiry must stop at that point. The matter may not be pursued to the point of naming the crime. Whitehead v. State*, 279 So.2d 99 (Fla. 2d DCA 1973); *Morton v. State*, 205 So.2d 662 (Fla. 2d DCA 1968); *Mead v. State*, 86 So.2d 773 (Fla. 1956). (Emphasis added).

See also Bobb v. State, 19 Fla. L. Weekly D2360 (Fla. 4th DCA Nov. 9, 1994).

In the present case, the trial court permitted the prosecutor's inquiry because he concluded that appellant had opened the door to it. We cannot agree. While appellant's statement that he had been "jumped on by police before" may have opened the door slightly, it could not possibly have opened it wide enough to

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joan Fowler, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by courier this 9th day of May, 1995.

Attorney for Richard Marcolini
and Mercedes Acosta