IN THE SUPREME COURT OF FLORIDA

RICHARD MARCOLINI AND MERCEDES ACOSTA,

Petitioners,

v.

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

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S 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 merits brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" will represent the record on appeal; and "T" will represent the transcripts of the hearing below.

STATEMENT OF THE CASE AND FACTS

The Respondent agrees with Petitioners' Statement of the Case and Facts.

SUMMARY OF ARGUMENT

The phrase "shall be prima facie evidence" creates a permissive presumption which the trier of fact is free to accept or reject. The Fourth District Court of Appeal correctly reversed the trial court's dismissal of the instant cases since the statute involved, §812.14(2)(c), Florida Statutes, is constitutional. This Honorable Court has previously determined the mandatory/permissive dichotomy in State v. Rolle, 560 So. 2d 1154 (Fla. 1990); State v. Ferrari, 398 So. 2d 804 (Fla. 1981); and Wilhelm v. State, 568 So. 2d 1 (Fla. 1990).

The statute also passes the "rational connection" and "more likely than not" tests to the reasonable doubt standard as posed by the United States Supreme Court in a number of cases.

ARGUMENT

THE STATUTORY PRESUMPTION CREATED BY SECTION 812.14(3) IS NOT UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE.

The Petitioners were charged with violating §812.14(2)(c), Florida Statutes (1991).[1] That section proscribes trespass and larceny in relation to utility fixtures or services. The trial court found that subsection 3 of that same statute created an unconstitutional mandatory presumption. The lower court thus dismissed the information, before any trial was held. Respondent maintains that contrary to the trial court's ruling, and pursuant to the Fourth District Court of Appeal's opinion, the phrase "shall be prima facie evidence" creates a permissive presumption which the trier of fact is free to accept or reject. See State v. Rolle, 560 So. 2d 1154, 1157 (Fla. 1990), cert. denied, 498 U.S. 867, 111 S.Ct. 181, 112 L.Ed.2d 144 (1990); State v. Waters, 436 So. 2d 66 (Fla. 1983); State v. Ferrari, 398 So. 2d 804 (Fla. 1981).

The Fourth District Court of Appeal found that "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." State v.

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[1] Section 812.14, Florida Statutes, was amended in 1992 to reflect the creation of §812.15, which governs the 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 §812.14, Fla. Stat. (Supp. 1992).

Marcolini, 20 Fla. L. Weekly D300 (Fla. 4th DCA February 1, 1995).

The lower appellate court referred to this Court's citation to Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 2d 1549 (1943), in the case of MacMillan v. State, 358 So. 2d 547 (Fla. 1978). The relationship between a statutory presumption and the due process clause were discussed by the United States Supreme Court as follows:

> [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.

MacMillan v. State, 358 So. 2d at 548-549. See State v. Marcolini, 20 Fla. L. Weekly at D300-301.

Next, the Fourth District considered Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969). The Leary Court referred to the rational connection test as applied in Tot, determining 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." State v. Marcolini, 20 Fla. L. Weekly at D301.

This Court held in MacMillan that §812.14(3), Florida Statutes, was facially unconstitutional. Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L. Ed. 2d 777 (1979), was decided after MacMillan. In Allen, the Court was required to determine the constitutionality of a New York statute which provided that the presence of a firearm in an automobile was "presumptive evidence of its possession by all persons occupying such automobile". Certain exceptions were allowed. State v. Marcolini, 20 Fla. L. Weekly at D301.

The United States Supreme Court found that there was a rational connection between the basic facts and the ultimate facts presumed. Allen at 2228. The Court also determined 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. Allen at 2226. The Allen Court found the provision constitutional. State v. Marcolini, 20 Fla. L. Weekly at D301.

In the Marcolini opinion, the Fourth District Court of Appeal relied upon State v. Rolle, 560 So. 2d 1154 (Fla. 1990). In Rolle, this Court held that the phrase "shall be prima facie evidence" created a permissive inference. Rolle, 560 So. 2d at 1157. As the Fourth District's opinion points out, this Court evaluated the statute in light of the record, instead of on its

face, as the MacMillan court did. In Rolle, this Court held that there was no constitutional error. "Shall be prima facie evidence" was held to be crucial to the determination that the provision created a permissive inference, not a mandatory presumption." Rolle, 560 So. 2d at 1157. State v. Marcolini, 20 Fla. L. Weekly at D301.

The Fourth District Court of Appeals discussed the rational connection test in its opinion. The appellate court also determined that State v. Ferrari, 398 So. 2d 804 (Fla. 1981), also supported the conclusion that the instant case passed the rational connection test. State v. Marcolini, 20 Fla. L. Weekly at D301-302. The Ferrari 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."

The Eleventh Circuit held the Ferrari provision unconstitutional in Miller v. Norvell, 775 F. 2d 1572 (11th Cir. 1985). However, as the Marcolini appellate court held below, the supreme court cited Ferrari as authority for its 1990 decision in Rolle, noting that Miller was contrary to Ferrari. The Fourth District Court of Appeal below stated that Miller may be of limited precedential validity in light of Defuentes v. Dugger, 923 F. 2d 801 (11th Cir. 1991). State v. Marcolini, 20 Fla. L. Weekly at 301.[2]

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[2] It should be noted that in the Slip Opinion for State v. Marcolini, the last sentence of the opinion's footnote 2 on page 10 is as follows: "Miller may be of limited precedential

The Fourth District Court of Appeal determined that this Court has overruled MacMillan in Ferrari and Rolle. Marcolini, 20 Fla. L. Weekly at D302. The Fourth District found that the Rolle court cited State v. Waters, 436 So. 2d 66 (Fla. 1983), where stealthy entry was prima facie evidence of an intent to commit burglary; Fitzgerald v. State, 339 So. 2d 209 (Fla. 1976), where the failure to return a rental car within 72 hours of the due date was prima facie evidence of auto theft; and Ferrari. The Fourth District found that although MacMillan was decided after Fitzgerald, the Rolle court did not attempt to distinguish the statute in MacMillan from the statute in Rolle.

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

This Honorable Court should affirm the Fourth District Court of Appeal's decision in both the Marcolini and Acosta cases. Respondent contends that the trial court should not have dismissed the cases as it did before a trial was held. Most of the cases cited by the trial court involved the interpretation of a jury instruction. Yates v. Evatt, ___ U.S. ___, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); United States v. Kim, 884 F.2d 189 (5th Cir. 1989); Miller v. Norvell, 775 F.2d 1572 (11th Cir. 1985), cert. denied, 476 U.S. 1126, 106 S.Ct. 1995, 90 L.Ed.2d 675 (1986). In those cases which also determine the constitutionality of the

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validity in light of Defuentes v. Dugger, 923 F. 2d 801 (11th Cir. 1991). However, the opinion, as printed in the Florida Law Weekly on page D302, appears to have omitted that sentence.

underlying statute, the reviewing court evaluates the presumption in light of the court's instructions to the jury. See Ulster County Court, 442 U.S. at 160-163, 60 L.Ed.2d at 793-795, see also Id. 442 U.S. at 157, 60 L.Ed.2d at 792, n. 16; State v. Rolle, 560 So. 2d 1154 (Fla. 1990); Wilhelm v. State, 568 So. 2d 1 (Fla. 1990).

Also, the trial court erroneously determined that the statutory presumption was unconstitutional. Inferences and presumptions are a "staple of our adversary system of factfinding." Ulster County Court v. Allen, 442 U.S. 140, 156, 99 S.Ct. 2213, 60 L.Ed.2d 777, 791 (1979). A presumption is an evidentiary device which enables the trier of fact to determine the existence of an element of the crime, an "ultimate" fact, from the existence of one or more "evidentiary" or "basic" facts. Ulster County Court, 442 U.S. at 156, 60 L.Ed.2d at 791. Such a device may be employed in a criminal case so long as the presumption does "not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." Ulster County Court, 442 U.S. at 156, 60 L.Ed.2d at 791. A permissive presumption is one which "allows - but does not require - the trier of fact to infer the elemental fact from proof by the prosecutor of the basis one and that places no burden of any kind on the defendant." Ulster County Court v. Allen, 442 U.S. 140, 157, 99 S.Ct. 2213, 60 L.Ed.2d 777, 792. In this situation, the "basic fact may constitute prima facie evidence of the elemental fact." Id. at 157, 60 L.Ed.2d at 792. Because this permissive

presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the reasonable doubt standard "only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." Id.

It is axiomatic that courts are obliged to uphold the constitutionality of statutes if possible. In State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981), this Court spoke of this obligation as follows:

> [W]e are aware of the strong presumption in favor of the constitutionality of statutes. It is well established that all doubt will be resolved in favor of the constitutionality of a statute, . . . and that an act will not be declared unconstitutional **unless** it is determined to be invalid **beyond a reasonable doubt**.

See also State v. Burch, 545 So. 2d 279, 280 (Fla. 4th DCA 1989), approved, 558 So. 2d 1, 3 (Fla. 1990).

In determining the constitutionality of a provision such as §812.14(3), the court must determine whether the challenged portion of the statute creates a mandatory presumption or merely a permissive inference. Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344, 353 (1985). A permissive inference "allows, but 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, 442 U.S. at 157, 60 L.Ed.2d at 792. In this situation, "the basic fact may constitute prima facie evidence of the elemental fact." Id. The permissive presumption "does not

relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." Francis, 471 U.S. at 314, 85 L.Ed.2d at 353. In contrast, a mandatory presumption "tells the trier of fact that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." Ulster County Court, 442 U.S. 157, 60 L.Ed.2d at 792.

Traditionally, the use of the word "shall" indicates a mandatory nondiscretionary duty. Ute Indian Tribe of Utah v. Hodel, 673 F.Supp. 619, 621 (D.D.C. 1987). A court, however, may always investigate beyond "ritualistic incantation" of this standard rule. Id.; FBI v. Abramson, 456 U.S. 615, 625 n. 7, 102 S.Ct. 2054, 2061 n. 7, 72 L.Ed.2d 376 (1982)(despite plain meaning rule, court's duty is to find interpretation most harmonious with statutory scheme and general purposes that Congress manifested).

Florida Statute §812.14(3) provides:

> 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 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, the subsection then goes on to provide that this "presumption **shall not** apply **unless**:

a) The presence of such a device or alteration can be attributed only to a deliberate act in futherance of an intent to avoid payment for utility services;

b) The person charged has received the direct benefit of the reduction of the cost of such utility services;

c) The customer or recipient of the utility services has received the direct benefit of such utility service for at least one full billing cycle.

The statutory presumption created by §812.14(3) does not arise unless and until the Respondent first establishes the three conditions set forth in the statute. Only then does the statute provide a presumption that presence of the device or diversion on property in the defendant's actual possession ". . . shall be prima facie evidence of the violation of this section" by the defendant. §812.14(3), Fla. Stat. The statute merely directs the trial judge that proof of the foregoing establishes a prima facie case sufficient to submit the case to the trier of fact for resolution. It does not require the trier of fact to accept the presumption. Nor does it require the defendant to present evidence to establish his innocence. The circumstances shown by the evidence, aided by the well-established presumption of innocence, may operate to rebut or impair the prima facie case made by the State. State v. Waters, 436 So. 2d 66, 70 n. 4 (Fla. 1983). Thus, §812.14(3) merely creates a permissive presumption which the jury is free to accept or reject.

The trial court concluded that use of the phrase "shall be prima facie evidence of the violation of this section" creates a mandatory rebuttable presumption. Section 812.14(3), Fla. Stat.

(1991). (R 67, 69) However, this Court has consistently ruled that the language "shall be prima facie evidence" creates a permissive, not a mandatory, presumption. State v. Rolle, 560 So. 2d 1154, 1157 (Fla. 1990), cert. denied, 498 U.S. 867, 111 S.Ct. 181, 112 L.Ed.2d 144 (1990); State v. Waters, 436 So. 2d 66 (Fla. 1983); State v. Ferrari, 398 So. 2d 804 (Fla. 1981).

In granting Petitioner's motion, the trial court relied on the Eleventh Circuit's decision in Miller v. Norvell, 775 F. 2d 1572 (11th Cir. 1985). Miller involved the constitutionality of §713.34, Florida Statutes, which prohibited the misapplication of funds by a building contractor and which provided that the contractor's failure to spend funds as agreed upon "shall constitute prima facie evidence of intent to defraud." An earlier Florida Supreme Court case, State v. Ferrari, 398 So. 2d 804 (Fla. 1981), had held that the presumption was permissive. The Eleventh Circuit rejected the Florida Supreme Court's determination in Ferrari and concluded that the use of the term "shall" rendered the presumption mandatory. Miller, 775 F.2d at 1575-1576.

However, the Florida Supreme Court has twice revisited the mandatory/permissive dichotomy since the Miller decision. State v. Rolle, 560 So. 2d 1154, 1157 (Fla. 1990); Wilhelm v. State, 568 So. 2d 1, 3 (Fla. 1990). Both cases concerned the constitutionality of §316.1934 (2)(c), Florida Statutes, which provides:

> If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, that fact shall be prima facie

> evidence that the person was under the influence of alcoholic beverages to the extent that his normal facilities were impaired. . . .

The Rolle Court relied upon the Supreme Court's statement in Ulster County Court that "with a permissive inference, 'the basic fact may constitute prima facie evidence of the elemental fact." (Emphasis in original.) Rolle, 560 So. 2d at 1157 (quoting Ulster County Court, 442 U.S. at 157, 99 S.Ct. at 2224). Citing its earlier cases, including the Ferrari decision, this Court reaffirmed that the language "shall be prima facie evidence" merely creates a permissive presumption. Rolle, 560 So. 2d at 1157. Later, in Wilhelm v. State, this Court again confirmed that in a statutory provision, as opposed to a jury instruction, the term "prima facie" creates a constitutionally valid permissive inference. Wilhelm, 568 So. 2d at 3.

Furthermore, the vitality of the Miller decision as it relates to statutory provisions is questionable in light of a subsequent Eleventh Circuit court decision. In Defuentes v. Dugger, 923 F. 2d 801 (11th Cir. 1991), the Eleventh Circuit considered the constitutionality of a jury instruction given pursuant to §316.1934(2)(c), Florida Statutes. However, the court held, the federal district court had no standing to declare the underlying statute unconstitutional. Defuentes, 923 F.2d at 805-806. See also Norvell v. Miller, 476 U.S. 1126, 106 S.Ct. 1995, 90 L.Ed.2d 675 (1986)(Burger, J., dissenting)(Florida Supreme Court is final expositor of Florida law and whether statute created permissive versus mandatory presumption is

question properly left to state supreme court; certiorari review of Eleventh Circuit decision should be granted).

It is well established that the only federal decisions binding on the courts of this state are those of the United States Supreme Court. Board of County Commissioners of Lee County v. Dexterhouse, 348 So. 2d 916 (Fla. 2d DCA 1977). Further, the Florida Supreme Court is the final interpreter of state statutory language. Sandstrom v. Montana, 442 U.S. 510, 516-517, 99 S.Ct. 2450, 2455, 61 L.Ed.2d 39 (1979) (Supreme Court of Montana is final authority on legal weight to be given presumption arising under Montana law). This Court has consistently held that the language "shall be prima facie evidence" creates a permissive presumption. State v. Rolle, 560 So. 2d 1154, 1157 (Fla. 1990); State v. Waters, 436 So. 2d 66 (Fla. 1983); State v. Ferrari, 398 So. 2d 804 (Fla. 1981). Accordingly, the trial court, notwithstanding the Miller decision, erroneously found that §812.14(3) creates an unconstitutional mandatory presumption.

The validity of this Court's decision in Rolle is also confirmed by review of the U.S. Supreme Court's decision in Ulster County Court v. Allen, 442 U.S. 140, 142, 99 S.Ct. 2213, 60 L.Ed.2d 777, 783 (1979). There the Court examined a New York statute which provided, with certain exceptions, that the presence of a firearm in an automobile was "presumptive evidence" of its illegal possession of all persons then occupying the vehicle. Ulster County Court, 442 U.S. at 142, 60 L.Ed.2d at 783. Based upon the jury instructions, the Court held that the

statute merely created a permissible presumption. The Court found that the jury instructions directed the jury to consider all the circumstances tending to support or contradict the inference that the occupants had possession of the guns and to decide for itself how much evidence the defendants introduced. Ulster County Court, 442 U.S. 162, 60 L.Ed.2d at 795.

Similarly, even without the benefit of the jury instructions, the statute in the instant case places no burden of any kind on the defendant. Before the statutory inference will arise under §812.14, the Respondent must show that the presence of the device "can be attributed only to a deliberate act in furtherance of an intent to avoid payment." Section 812.14(3)(a), Fla. Stat. The State must also adduce evidence showing that the defendant received the direct benefit of the reduction. Section 812.14(3)(b), Fla. Stat. Finally, the presumption does not arise unless the benefit of the utility service was received for at least one billing cycle. Section 812.14(3)(c), Fla. Stat. (1991). Furthermore, the establishment of circumstances giving rise to the presumption does not take away the defendant's presumption of innocence. See State v. Waters, 436 So. 2d 66, 70 n. 4 (Fla. 1983). The circumstances shown by the evidence, aided by this presumption of innocence, may operate to rebut or impair the prima facie case made by the State. Id. Accordingly, the statute merely creates a permissive presumption which the jury is free to accept or reject. Thus, the Fourth District Court of Appeal's decision must be affirmed.

Petitioner argues that Rolle is based upon a misapplication of pertinent federal decisions, citing Yates v. Evatt, 500 U.S. 391, 114 L.Ed. 2d 432 (1991). Yates was decided a year after Rolle and adds nothing to the standards previously set forth by the Ulster County Court decision. Also, the Florida Supreme Court's subsequent decision in Wilhelm, declaring a jury instruction based on the same statute unconstitutional, demonstrates the consistency between the Rolle and Yates decisions. The Florida Supreme Court has examined the phrase "shall be prima facie evidence" a number of times and consistently held that the language creates a permissive presumption. Rolle, 560 So. 2d at 1157; State v. Waters, 436 So. 2d 66 (Fla. 1983); State v. Ferrari, 398 So. 2d 804 (Fla. 1981); Fitzgerald v. State, 339 So. 2d 209 (Fla. 1976).

Petitioner also questions the validity of State v. Ferrari in light of the Eleventh Circuit's decision in Miller v. Norvell, 775 F. 2d 1572 (11th Cir. 1985), cert. denied, 476 U.S. 1126 (1986). However, subsequent to Miller, the Eleventh Circuit acknowledged in Defuentes v. Dugger 923 F. 2d 801 (11th Cir. 1991), that the federal court lacked standing to declare the statutory presumption unconstitutional. See Norvell v. Miller, 106 S.Ct. 1995 (1986), Rehnquist, J. dissenting. Further, it is well established that the only federal decisions binding on the courts of this state are those of the United States Supreme Court. Board of County Commissioners of Lee County v. Dexterhouse, 348 So. 2d 916 (Fla. 2d DCA 1977). The Florida Supreme court, the final interpreter of state statutory language,

has consistently held that, the language "shall be prima facie evidence" creates a permissive presumption. Sandstrom v. Montana, 442 U.S. 510, 516-517, 99 S.Ct. 2450, 2455, 61 L.Ed.2d 39 (1979)(Supreme Court of Montana is final authority on legal weight to be given presumption arising under Montana law); State v. Rolle, 560 So. 2d 1154, 1157 (Fla. 1990); State v. Waters, 436 So. 2d 66 (Fla. 1983); State v. Ferrari, 398 So. 2d 804 (Fla. 1981). Rolle was decided subsequent to both Miller and Francis and is the Florida Supreme Court's most recent pronouncement that the language "shall be prima facie evidence" creates a permissive presumption.

Also, the permissive nature of the §812.14(3) presumption is confirmed by examination of statutory presumptions held constitutional by other federal and state courts. In Ulster County Court, the New York statute provided, with certain exceptions, that the presence of a firearm in an automobile was "presumptive evidence" of its illegal possession of all persons then occupying the vehicle. Ulster County Court, 442 U.S. at 142, 60 L.Ed.2d at 783. Based upon the jury instructions, the Court held that the statute merely created a permissible presumption. The Court found that the jury instructions directed the jury to consider all the circumstances tending to support or contradict the inference that the occupants had possession of the guns and to decide for itself how much evidence the defendants introduced. Ulster County Court, 442 U.S. 162, 60 L.Ed. 2d at 795.

Similarly, in State v. Lindsey, 491 So. 2d 371 (La. 1986), the Louisiana Supreme Court held that phrases such as "shall be presumptive evidence" and "prima facie evidence" create only permissive inferences, not mandatory presumptions. Lindsey, 491 So. 2d at 374. In State v. Kriss, 654 P. 2d 942 (Ka. 1982), the Kansas Supreme Court construed the Kansas theft of electricity statute, which provided, similar to the statute at bar, that the existence of certain facts "shall be prima facie evidence of intent to violate and of the violation of this action." The Kansas Supreme Court concluded that the provision created a permissive presumption; the trier of fact remained free to consider all of the circumstances shown by the evidence, regardless by whom it is introduced, and to make the ultimate factual determination. Kriss, 654 P. 2d at 946.

B. The amended §812.14(3), satisfies the constitutional defects found to exist in the statute's predecessor by MacMillan v. State.

Upon finding that a statutory provision creates a permissive presumption, the court must then consider whether there is a rational connection between the facts proven and the presumed fact, and whether the presumed fact is "more likely than not to flow" from the former." Ulster County Court, 442 U.S. at 165, 60 L.Ed.2d at 797. The trial court concluded that, although subsequently amended, §812.14(3) did not satisfy this test based upon the Florida Supreme Court decision in MacMillan v. State, 358 So. 2d 547 (Fla. 1978). The State submits that the trial court's pretrial determination was premature. It is clear from the Ulster County Court decision that the determination of

whether this test has been satisfied is based upon evaluation of the facts actually proven. Ulster County Court, 442 U.S. at 165, 60 L.Ed. 2d at 797. Furthermore, to the extent the matter can somehow be resolved without reference to the facts, the statutory amendment clearly resolved the concerns expressed in MacMillan. Accordingly, the trial court's order declaring the presumption unconstitutional must be dismissed.

In 1978, this Court in MacMillan v. State, 358 So. 2d 547 (Fla. 1978), considered the validity of the presumption that established the predecessor of the current §812.14(3), Florida Statutes. That statute permitted the jury to infer that a defendant had committed the misdemeanor of trespass and larceny with relation to utility fixtures from proof of either one of two specified facts: The existence on property in defendant's actual possession, of a device which allowed the use of the service of a utility without registration or measurement for payment; or, the use or receipt of the direct benefits of a utility service derived from the tampering or alteration of equipment associated with the provision of that service.[3]

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[3] Section 812.14(3), Fla. Stat. (1977), provided:

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

In MacMillan, this Court held the statute unconstitutional, using the guidelines set forth in Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed.2d 1549 (1943), Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), and Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973). In Tot, the Court stated:

> [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 . . . where the influence is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.

Tot, 319 U.S. at 467-468, 63 S.Ct. at 1245. Subsequently, in Leary, the Court ruled:

> That a criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. And in the judicial assessment the congressional determination favoring the

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> 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 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.

> particular presumption must, of course, weigh heavily.

Leary, 395 U.S. at 36, 89 S.Ct. at 1548. Applying the "rational connection" and "more likely than not" tests to the reasonable doubt standard, the Court in Barnes explained:

> [I]f a statutory inference submitted to the jury as sufficient to support conviction satisfies the reaonable doubt standard (that is, the evidence necessary to invoke the inference if sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process.

Barnes, 412 U.S. at 843, 37 L.Ed.2d at 2361.

After MacMillan, the United States Supreme Court entered its decision in Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979). In upholding a permissive presumption created by a New York statute, the Court found that application of the statutory presumption to the facts of the case comported with the standards laid down in Tot and Leary. Ulster County Court, 442 U.S. at 165, 60 L.Ed. 2d at 797. In particular, the Court found that "there was a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter [was] 'more likely than not to flow from' the former." Id.

In MacMillan, this Court held that the inference created by 812.14(3), Florida Statutes (1978), was unconstitutional under the "rational connection test" or "more likely than not" test because:

> The presumed fact of intent to violate and of violation comes into play merely upon proof

> that the property wherein diversion of some sort has occurred is in the actual possession of the accused or upon proof that the accused has received direct benefit from a utility. . . such an inference is irrationally arbitrary.

This Court noted three particular aspects of the statute which could cause the jury to draw an irrational inference through the statutory presumption. First, the device or apparatus tampered with or altered to effect the larceny of the service of a utility was generally located on the outside of a building and easily accessible to anyone. MacMillan, 358 So. 2d at 550. Second, the "direct benefits" from the use of a utility service was commonly derived by any occupant of the premises in question. MacMillan, 358 So. 2d at 550. The billing, which could constitute notice of possible violation, was done no more frequently than monthly. Id. Third, there were many ways to make an alteration of a utility meter or registration device which were so simple in nature that a prankster, vandal or angry neighbor could utilize them to cause the one in possession of the premises to unknowingly receive benefits from the tampering and thereby subject a person to the effect of the presumption. Id.

Following MacMillan, the Florida Legislature amended §812.14(3) to satisfy the concerns of this Court in MacMillan. As amended, subsection (3) provides:

> 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 so as to otherwise avoid the

> reporting of use of such service for payment shall be prima facie evidence of the violation of this section by such person; however, this presumption shall not apply unless:
>
> a) The presence of such a device or alteration can be attributed only to a deliberate act in furtherance of an intent to avoid payment for utility services;
>
> b) The person charged has received the direct benefit of the reduction of the cost of such utility services; and,
>
> c) The customer or recipient of the utility services has received the direct benefit of such utility service for at least one full billing cycle.

Under this version of subsection of §812.14(3), unlike in MacMillan, mere receipt of the "direct benefit" of the diverted utility service does not constitute a fact which, if proven, justifies the drawing of an inference of violation of the substantive sections of §812.14. Rather, subsection 3 requires the State to prove a series of facts to establish a prima facie case of trespass and larceny with relation to the utility fixtures.

First, the State must show that a device or alteration of equipment allowing the use of a utility service without registration for payment was present on property in the actual possession of the defendant. Second, evidence must be adduced by the State to show that the presence of the device or alteration on the defendant's property can be attributed only to a deliberate act in furtherance of an intent to avoid payment for utility services. This requirement is clearly designed to remove conditions caused by a vandal or angry neighbor from the scope of the presumption.

Third, the State must bring forth evidence to show that the defendant was the recipient of the direct benefit of the reduction in cost of a utility service effected by the alteration condition. The purpose of this requirement is to ensure a connection between the defendant and the benefit received from the diversion.

Finally, the State must show that the accused received the direct benefit of the utility service for at least one full billing cycle. This provision was clearly included to ensure that the defendant has received "the billing which would constitute notice of possible alteration." MacMillan, 358 So. 2d at 550.

Only upon satisfaction of all of the foregoing conditions does the presumption arise that presence of the device is prima facie evidence of a violation. Thus, through evidence that the device was in place for a period of several months or more, the unlikelihood that an angry neighbor or vandal would take steps to reduce the defendant's utility bill, and/or the amount of time involved in placing and then removing the device (so as to avoid a zero bill), the statute satisfies the trial court's concern that the device could have been installed by an angry neighbor, a vandal or a prankster. See N.J. v. Curtis, 372 A. 2d 612 (N.J. App. 1977). In light of the conditions which must be met before the presumption arises, the State submits that there is clearly a rational connection between the basic facts and the ultimate fact presumed, and the latter is more likely than not to flow from the former. Ulster County Court v. Allen, 442 U.S. 140, 157, 165, 99

S.Ct. 223, 60 L.Ed.2d 777, 792, 797 (1979). Although this is apparently the first time a District Court in this State has addressed the constitutionality of the amended §812.14(3), several lower courts have found the statute constitutional. State v. Navarro, Case No. 80-237-AC (Fla. 11th Cir. 1981); State v. Dougan, Case No. 93-0032AC A02.[4]

In declaring §812.14(3) unconstitutional, the trial court below cited State v. McCoy, in which the Louisiana Supreme Court declared portions of its theft of electricity statute unconstitional. The Louisiana Statute R.S. 14:67.6B under review in McCoy provided:

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

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[4] The Fifteenth Judicial Circuit issued an opinion per curiam affirming the county court's decision that the statute was constitutional. Dougan v. State, Case No. 93-0032 AC AO2 (15th Cir. April 18, 1994).

However, McCoy itself appears no longer valid. In State v. Lindsey, 491 So. 2d 371 (La. 1986), the Louisiana Supreme Court revisited the permissive/mandatory dichotomy. Although agreeing with its constitutional analysis in McCoy, the Lindsey court questioned its determination that statutory phrases such as "presumptive evidence" or "prima facie evidence" created mandatory presumptions. Lindsey, 491 So. 2d at 374. After reconsidering the matter, the Louisiana Supreme Court held that "words such as 'shall be presumptive evidence' create only a permissive inference, not a mandatory presumption." Lindsey, 491 So. 2d at 374. Clearly this undercuts the trial court's reliance on McCoy.

Another out-of-state case, State v. Kriss, 654 P.2d 942 (Ka. 1982), construed K.S.A. 17-1921, the Kansas theft of electricity statute, which provided that the existence of certain facts "shall be prima facie evidence of intent to violate and of the violation of this action." The Kansas Supreme Court concluded that the provision created a permissive presumption. The trier of fact remained free to consider all of the circumstances shown by the evidence, regardless by whom it is introduced, and to make the ultimate factual determination. Kriss, 654 P. 2d at 946. In concluding that there was a rational connection between the facts proved and the facts presumed, the Kriss court stated:

> The alteration of an electric meter so that electrical current will flow through the meter without registering serves to benefit only one person -- the occupant of the premises served by the electric line. Such alteration of an electric meter will, while the alteration is operative, effectually

> provide the occupant of the premises served by the electric line. It is not likely that one who would receive no benefit would alter an electric meter, unless at the request of the person whose premises were being served; and it is also unlikely that the person who is receiving free electricity does not know that such is the fact -- and why. Certainly all of these suggestions may be erroneous; but they are logical and likely. We conclude that there is a natural and rational connection between the facts proved and the facts which may be presumed under the statute.

Kriss, 654 P. 2d at 946.

Respondent submits that the statute at issue in the instant case provides greater protection to the defendant than the statutes found in McCoy, Lindsey or Kriss. In fact, the Louisiana statute in McCoy is more closely akin to the version of §812.14(3), Fla. Stat. declared unconstitutional in MacMillan, where the presumption arose upon proof of mere presence of the device without requiring the State to negate other possibilities. Furthermore, under the subsequent Louisiana Supreme Court decision in Lindsey, both the McCoy statute and the instant statute would be considered to create permissive presumptions. Clearly, contrary to the lower court's ruling, §812.14(3) creates a permissive presumption. Rolle, 560 So. 2d 1154, 1157 (Fla. 1990). Furthermore, there is a rational connection and the ultimate fact presumed, and the latter is more likely than not to flow from the former. Ulster County Court, 442 U.S. at 165, 60 L.Ed.2d at 797. Accordingly, the order declaring §812.14(3) unconstitutional must be reversed.

C. Assuming arguendo that §812.14(3) is unconstitutional, the county court erred in dismissing the case.

Upon finding that §812.14(3), Florida Statutes (1991), creates an unconstitutional mandatory presumption, the trial court granted Petitioner's motion to dismiss. This was error.

Petitioner was charged with violating §812.14(2)(c), Florida Statutes (1991), which provides:

> 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.

In MacMillan v. State, 358 So. 2d 547, 550 (Fla. 1978), this Court clearly held that subsection 3 of §812.14 was severable from the remainder of the statute. That being the case, the trial court erred in dismissing the charge rather than permit the Respondent to proceed to trial without the benefit of the presumption.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court affirm the Fourth District Court of Appeal's decision.

Respectfully submitted,

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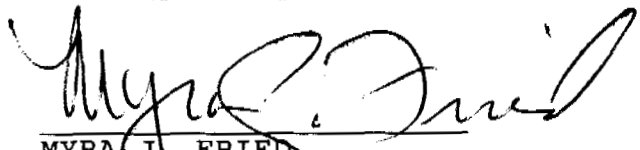

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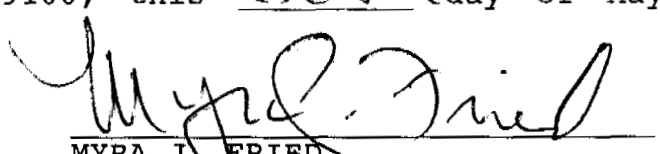
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by Courier to: Anthony Calvello, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401; and by U.S. Mail to: Robert E. Stone, Esq., Florida Power and Light Co., Legal Department, 9250 W. Flagler Street, P.O. Box 029100, Miami, Florida 33102-9100, this 30th day of May 1995.



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