IN THE SUPREME COURT OF FLORIDA

RICHARD MARCOLINI,
and MERCEDES ACOSTA,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

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

REPLY BRIEF OF PETITIONERS

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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

Petitioners Richard Marcolini and Mercedes Acosta rely on the Statement of the Case and Facts as found in their Initial Brief.

ARGUMENT

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

Due process requires the prosecutor to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In Re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072-1073 (1970). In criminal cases, the prosecution is often aided by procedural devices which "require (in case of presumption) or permit (in case of inference) the trier of fact to conclude that the prosecution has met its burden of proof with respect to the presumed or inferred fact by having satisfactorily established other facts." *Mullaney v. Wilbur*, 421 U.S. 684, 702 n. 31, 95 S. Ct. 1881, 1891-1892 n.31 (1975). Since these devices shift the burden of proof to the defendant by requiring him or her to present some evidence contesting the otherwise presumed or inferred fact, these devices must satisfy certain due process requirements. *Id.*

A primary question presented by the instant appeal is whether the phrase "shall be prima facie evidence" contained in § 812.14, *Fla. Stat.* (1993) is mandatory or permissive. Respondent-State and Amicus have argued to this court that said statutory presumption is merely permissive, relying almost exclusively upon this Court's decision in *Rolle v. State*, 560 So. 2d 1154, 1157 (Fla. 1990). Notwithstanding this court's decision on a similar statutory presumption in *Rolle*, Petitioners submit that said statutory presumption is a mandatory rebuttable presumption. Several factors compel this conclusion.

A. Statutory Construction of Section 812.14, Fla.Stat.

The statutory presumption in Section 812.14, *Fla. Stat.* provides in pertinent part that "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...*shall* be prima

facie evidence of the *violation of this section* by such person." [Emphasis Supplied]. This statutory presumption unambiguously provides that it "*shall* be prima facie evidence," *not* "*may* be prima facie evidence" of the violation of this section.

The cardinal rule of statutory construction is that a statute should be construed so as to ascertain and give effect to the intention of the legislature as expressed in the statute. *City of Tampa v. Thatcher Glass Corp.*, 445 So. 2d 578 (Fla. 1984). If the language of the statute is clear and unambiguous, legislative intent must be derived from words used without involving rules of construction or speculating as to what the legislature intended. *Aetna Casualty & Surety Co. v. Huntington National Bank*, 609 So. 2d 1315 (Fla. 1992); *Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992). To determine legislative intent, courts will look to the plain language of the statute. *Green v. State*, 604 So. 2d 471 (Fla. 1992); *Thayer v. State*, 335 So. 2d 815 (Fla. 1976); *Overman v. State Board of Control*, 62 So. 2d 696 (Fla. 1953).

What is the ordinary or natural meaning of the term "shall?"

This court in *State v. Goodson*, 403 So. 2d 1337 (Fla. 1981), carefully explaining how the word "shall" is to be construed in a statute:

> In deciding whether the word "shall" should be construed as being mandatory or directory, we should look to the context in which it is found and the intent of the legislature as expressed in the statute. *S.R. v. State*, 346 So. 2d 1018 (Fla. 1977). Within section 958.04, there are two types of statutory prerequisites: the eligibility requirements in subsection (1) and the disqualification requirements in subsection (2). If a person meets the eligibility requirements in subsection (1), the trial court "may" classify that person as a youthful offender. In comparison, if a person meets those requirements and is not disqualified by the requirements in subsection (2), the statute states that the trial court "shall" classify that person as a youthful offender. To interpret subsection (2) as being directory would render those requirements meaningless since the trial judge already as discretion to classify a defendant as a youthful offender under subsection (1). Thus in the context the word "shall" is clearly meant to be mandatory. *Barnhill*

v. State, 393 So. 2d 557 (Fla. 4th DCA 1980); *Killian v. State*, 387 So. 2d 385 (Fla. 2d DCA 1980).

Id. at 1330.

In *Fowler v. State*, 255 So. 2d 513 (Fla. 1971), this court found the verb "shall" in the context of the criminal rule to be mandatory not permissive. Further in *Tascano v. State*, 393 So. 2d 540, 541 (Fla. 1980), this Court interpreted a criminal rule that a trial judge "shall charge the jury..." to be mandatory not permissive, "because to interpret the rule otherwise would mean that the amendment was meaningless and accomplished nothing."

At bar, Respondent-State and Amicus have asked this Court to ignore the plain meaning of Section 812.14, *Fla. Stat.* They want this Court to either ignore the word "shall" or redraft the legislation to replace "shall" with "may." This court has repeatedly stated that its function is to interpret or construe penal statutes, not draft, limit, or add words to the statutes. *Chastee v. Miami Transfer Co.*, 288 So. 2d 209 (Fla. 1974); *Atlantic Coast Line R. Co. v. Boyd*, 102 So. 2d 709 (Fla. 1958). Such a practice would constitute judicial legislation, a practice neither our constitution not this court allows. *Brown v. State*, 629 So. 2d 841, 843 (Fla. 1984).

It must be assumed that the legislature knows the plain and ordinary meanings of words, and that the word "may" when given its ordinary meaning, denotes a *permissive* term rather than the mandatory connotation of the word "shall." *Harper v. State*, 217 So. 2d 591, 592 (Fla. 4th DCA 1968), *writ discharged*, 224 So. 2d 684 (Fla. 1969); *Brooks v. Anastasin Mosquito Control District*, 148 So. 2d 64, 66 (Fla. 4th DCA 1963).

The United States Supreme Court has held that where the word "shall" appears in a statutory directive, "Congress could not have chosen stronger words to express its intent that [the specific action] be mandatory..." *United States v. Monsanto*, 491 U.S. 607, 109 S.

Ct. 2657 (1989). See also *Plunt v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1490 (6th Cir. 1993); *United States v. Kravitz*, 738 F.2d 102, 104 (3d Cir. 1984).

The New Mexico Supreme Court in *State v. Matamoros*, 89 N.M. 125, 547 P. 2d 1167, 1169 (1976) held that the word "shall" as used in a statute providing that any person who willfully conceals merchandise on his person shall be prima facie presumed to have concealed it with the intent of converting it without paying for it is mandatory. See also *State v. Sorenson*, 758 P. 2d 466 (Utah Ct. Appl. 1988); *Hunter v. State*, 740 P. 2d 1206 (Okla. Cir. 1987).

Hence, on the basis of fundamental principles of statutory construction delineated by this Court, "shall be prima facie evidence" is a mandatory rebuttable presumption.

B. Rolle v. State, 560 So. 2d 1165 (Fla. 1990)

In *Rolle*, the trial judge instructed the jurors pursuant to the statutory presumption contained in section 316.1934(2)[1], *Fla. Stat.* as to blood alcohol levels. This court held that there was no constitutional error in the challenged jury instruction based on a verbatim recitation of the statute. This court found:

> We also find that section 316.1934(2)(c), Florida Statutes, creates a permissive inference, not an unconstitutional presumption. Paragraph (a) clearly creates a presumption by its terms ("shall be presumed"). Paragraph (b) expressly authorizes only that a blood-alcohol level of 0.05-0.10 percent be admissible as evidence relevant to impairment ("may be considered with other competent evidence"), but states that no presumption arises from such evidence. The legislature clearly understood the language of presumptions but chose to use

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[1] (a) If there was at that time 0.05 percent or less by weight of alcohol in the person's blood, *it shall be presumed* that the person was not under the influence of alcoholic beverages to the extent that his normal faculties were impaired.

(b) If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, *such fact shall not give rise to any presumption* that the person was or was not under the influence of alcoholic beverages to the extent that his normal faculties were impaired, *but such fact may be considered with other competent evidence* in determining whether the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired.

> different language in paragraph (c) ("shall be prima facie evidence"). That difference is crucial. In *Allen*, the United States Supreme Court stated that with a permissive inference, "the basic fact may constitute *prima facie* evidence of the elemental fact." 442 U.S. at 157, 99 S. Ct. at 2224. Further, this Court has interpreted the language "shall be prima facie evidence" in other contexts as creating an inference. *See State v. Waters*, 436 So. 2d 66 (Fla. 1983)(burglary); *State v. Ferrari*, 398 So. 2d 804 (Fla. 1981)(misappropriation of construction funds), *contra*, *Miller v. Norvell*, 775 F.2d 1572 (11th Cir. 1985), *cert. denied*, 476 U.S. 1126, 106 S. Ct. 1995, 90 L. Ed. 2d 675 (1986); *Fitzgerald v. State*, 339 So. 2d 209 (Fla. 1976)(auto theft). We see no reason to interpret such language differently in this context, especially as the statute expressly encourages the introduction of evidence besides blood-alcohol level.

Id. at 1157 [Footnote omitted].

Petitioners respectfully submit that this finding by the court should be limited solely to that statute. To randomly apply it to other statutes as Respondent seeks would violate fundamental principles of statutory construction delineated by this Honorable Court.

Second, Petitioners note that the ultimate holding of the *Rolle* decision, that the statutory presumption is constitutional, can be upheld on the alternative basis that it is a *mandatory* rebuttable presumption that meets the "beyond a reasonable doubt" or "more likely than not" test. The blood-alcohol presumption is more akin to other statutory presumptions that have passed constitutional muster such as knowledge arising from possession of recently stolen property, *Edwards v. State*, 381 So. 2d 696, 697 (Fla. 1980) or an intent to commit offense by stealthy entry. *State v. Waters*, 436 So. 2d 66 (Fla. 1983). Thus, the presumption in *Rolle* even if classified as mandatory could be a constitutional presumption on this alternative basis which does not alter or rewrite the plain, ordinary, and unambiguous meaning of the statute as drafted by the Florida legislature.

This proposition seems evident from this court's subsequent decision in *Wilhelm v. State*, 568 So. 2d 1 (Fla. 1990) wherein the court revisited a blood-alcohol jury instruction with the identical "prima facie evidence" language. This court held that a jury instruction based upon Section 316.1934(2)(c), *Fla. Stat.* created an *unconstitutional* mandatory rebuttable presumption because the words "prima facie" in a jury instruction would not be understood by the average juror. And more importantly, the jurors may have understood the instruction to be a non-rebuttable *mandatory* presumption. *Id.* at 3. Thus, the *Wilhelm* decision firmly supports Petitioners' position that the instant statutory presumption is mandatory rather than permissive.

Third, Justice Barkett in the *Rolle* case issued a concurring opinion joined by Justice Kogan indicating that it was unnecessary for the *Rolle* court to even reach the jury instruction issue because the jury was properly instructed on an alternative theory. *Id.* at 1157. Nevertheless, Justice Barkett wrote:

> I believe that the district court correctly concluded that the statutory presumption of impairment under the alternative DUI theory, and the corresponding jury instruction, shifted the burden of proof to the defendant in violation of due process rights. *See Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979); *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1976, 85 L. Ed. 2d 344 (1985); and *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).

Petitioners concede that this court in *State v. Ferrari*, 398 So. 2d 804 (Fla. 1981), held that the phrase "shall constitute prima facie evidence of intent to defraud" was permissive. However, the Eleventh Circuit which had the benefit of the U.S. Supreme Court's decision in *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1976, 85 L. Ed. 2d 344 (1985), which was rendered subsequent to the *Ferrari* decision held that this same statutory presumption, § 713.34(3), *Fla. Stat.* (1979) created an unlawful mandatory rebuttable presumption of intent and was unconstitutional, both on its face and as applied

to the defendant. See *Miller v. Norvell*, 775 F.2d 1572 (11th Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986).

Justice Sundberg in his dissent in *Ferrari*, cogently stated the applicable law as to statutory presumption:

> Although the precedents setting the appropriate standard for testing criminal presumptions are unclear in Florida, I submit that the presumption utilized in section 713.34(3), *Florida Statutes* (1979), meets neither of the tests heretofore articulated.
>
> The United States Supreme Court in setting standards for statutory presumptions began with a rational connection test in *Tot v. United States*, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943), proceeded to a "more likely than not" test in *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), and culminated in an ambiguous combination of "more likely than not" with "beyond a reasonable doubt" standard in *Barnes v. United States*, 412 U.S. 837, 93 S. Ct. 2357 (37 L. Ed. 2d 380 (1973). Florida has examined the issue in *MacMillan v. State*, 358 So. 2d 547 (Fla. 1978), and *Fitzgerald v. State*, 339 So. 2d 209 (Fla. 1976). *MacMillan* applied the "more likely than not" test, though it equated it to the rational connection standard. That case did not need to reach the reasonable doubt standard since the statute did not meet the lower "more likely than not" standard. *Fitzgerald* apparently applied a reasonable doubt standard, interpreting *Barnes* to require satisfaction if this highest standard.
>
> It is clear to me that in the course of human experience it is neither "more likely than not" not "beyond a reasonable doubt" that a contractor intends to defraud simply because material and labor costs remain unpaid after an advance of contract funds by the owner.

Id. at 808.

Our Constitutional commitment to the presumption of innocence requires careful scrutiny of criminal statutes embodying presumptions so favorable to the state. The instant presumption does not merely establish an element of the criminal offense, it constitutes the entire offense. Where an inference is the *sole* evidence of guilt, the inference must not only satisfy the "more likely than not" test but also must satisfy the "beyond a reasonable doubt" test. See *County Court of Ulster Court v. Allen*, 442 U.S.

140, 167, 99 S. Ct. 2313, 2230 (1979); *Miller*, 775 F.2d at 1575. The instant statutory presumption is a mandatory not a permissive presumption that does not meet the "beyond a reasonable doubt" standard. In criminal litigation, only a permissive presumption may be supplied, i.e., a presumption which allows the jury to find the presumed facts once the basic fact is proven but does not require such a finding by the jury. Application of other types of presumptions, such as mandatory or conclusive, would substitute the proof of the basic fact for that of the presumed fact, and the proof of the basic fact would be the only issue tried. Therefore, this Honorable Court should hold that Section 812.14(3) creates a mandatory presumption that is unconstitutional under the due process clause.

Petitioners concede that if this Court holds Section 812.14(3), the statutory presumption, unconstitutional, the trial court erred in dismissing this cause. Respondent should have the benefit of proceeding to trial without the benefit of the statutory presumption because said provision is severable from the remainder of the statute. *See MacMillan v. State*, 358 So. 2d 547, 550 (Fla. 1978).

CONCLUSION

Based on the arguments contained in Petitioners' Initial Brief on the Merits and the instant brief, Petitioners respectfully request this Court to declare Section 812.14(3), *Fla. Stat.* unconstitutional on its face.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Myra Fried, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401 by courier and to Robert E. Stone, Counsel for Florida Power & Light, P.O. Box 029100, Miami, FL 33102-9100 by U.S. Mail this 20th day of June, 1995.

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