Comments

EVIDENCE

State v. Rainey—An Analysis of Limitations Governing Criminal Jury Instructions on Presumptions

Over the years, the law of presumptions has been the source of much confusion and controversy.[1] Yet, with careful study, evidence law reveals relatively clear guidelines for understanding and applying presumptions. This Comment will explore a small area of the law of presumptions: the extent to which a court may instruct a jury on presumptions and inferences in a criminal trial.

Although courts often blur the distinction between presumptions and inferences, they have generally reached a consensus on when a criminal jury may be instructed on such matters.[2] The Oregon Supreme Court case of *State v. Rainey*[3] represents a substantial deviation from that consensus. At Rainey's trial, the judge instructed the jury that "proof of unlawful delivery of a controlled substance is prima facie evidence of knowledge of its character."[4] The jury found Rainey guilty of delivery of a controlled substance. The Oregon Court of Appeals reversed and remanded for a new trial on the ground that the above instruction was error since no rational connection existed between the fact of delivery and knowledge of the nature of the substance delivered.[5] The Oregon Supreme Court affirmed, finding the challenged instruction improper in a criminal trial because it constituted a presumption against the defendant.[6] Moreover, the court stated *in dictum* that instructions on inferences should also be prohibited. A court adopting the *Rainey* analysis could never instruct the criminal jury on inferences or presumptions, because a rational jury could interpret even a permissive inference as a mandate to find against the defendant.[7]

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1. One commentator has said: "Every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness and left it with a feeling of despair." Morgan, *Presumptions*, 12 WASH. L. REV. 255, 255 (1937).
2. *See infra* notes 18-46 and accompanying text for discussion of the current law in this area.
3. 298 Or. 459, 693 P.2d 635 (1985).
4. *Id.*, at 462, 693 P.2d at 637.
5. State v. Rainey, 60 Or. App. 302, 307, 653 P.2d 584, 586 (1982).
6. *Rainey*, 298 Or. at 465-66, 693 P.2d at 639-40.
7. *Id.* at 466-67, 693 P.2d at 640-41. The ultimate holding of the case was that the instruction constituted a presumption, and for that reason was invalid. Nevertheless, the dictum regarding inferences seems to be an important consideration in the court's decision to interpret the instruction in this way.

The Oregon Supreme Court makes a compelling argument for its radical approach in *Rainey*. The purpose of this Comment is to show that, upon closer analysis, the *Rainey* court's dramatic departure from the general trend in other jurisdictions does not seem justifiable nor likely to have a major effect on the law of presumptions.

DEFINING PRESUMPTIONS AND INFERENCES

A presumption is created when a rule of law allows for the finding of one element of the case through the proof of others.[8] When one set of facts is proven, another set of facts may be presumed. One of the basic functions of presumptions is to add to the fairness of the trial by helping to correct imbalances resulting from one party's superior access to the proof.[9] Presumptions are sometimes created to avoid an impasse in reaching a result, to further some social policy, or simply to save time when the assumed fact is very probable upon proof of the basic fact.[10] Presumptions are created through the common law[11] and by statute.[12]

Presumptions can have a particularly powerful effect upon a case when the trial judge instructs the jury as to their existence. At the trial level, presumptions are classified as either mandatory or permissive, depending on whether the jury has discretion in deciding their effect on the outcome of the case.[13] The jury instruction contains a mandatory presumption when the

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8. E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, § 342 at 965 (3rd ed. 1984) (a presumption is "a standardized practice under which certain facts are held to call for uniform treatment with respect to their effects as proof of other facts").

9. *Id.* § 343 at 968.

10. *Id.* § 343 at 969.

11. *See, e.g.*, Thomas v. Consolidated Gas Utilities Corp., 300 U.S. 55, 69 (1937) (regulations of administrative board presumed to be supported by justifying facts); Franklin Life Insurance Co. v. Brantley, 231 Ala. 554, 556, 165 So. 834, 836 (1936) (letter properly mailed presumed to have been delivered to addressee).

12. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1805(B) (1980): "Any person who knowingly conceals upon himself or another person unpurchased merchandise of any merchantile establishment while within the merchantile establishment shall be presumed to have the necessary culpable mental state [for shoplifting]"; Or. Rev. Stat. § 167.238(1) (1977): "Proof of unlawful manufacture, cultivation, transportation or possession of a controlled substance is prima facie evidence of knowledge of its character."

13. Stumbo, *Presumptions - A View at Chaos*, 3 WASHBURN L.J. 182, 187-90 (1964). A third category of presumptions, called conclusive or irrebuttable presumptions, will not be considered in this note. Professor Wigmore has said:

> "In strictness, there cannot be such a thing as a 'conclusive presumption.' Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, . . . the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence . . . The term has no place in the principles of Evidence . . . and should be discarded."

9 Wigmore, *Evidence*, § 2492, at 292 (1940).

The term "mandatory presumption" is often used interchangeably with the term "presumption," while the term "permissive presumption" is frequently substituted by the word "inference." Stumbo, *supra*, at 191. Stumbo states that many courts consider a presumption to be mandatory, while they consider permissive presumptions and inferences in the same manner because these latter two have the same procedural effect. *Id.*

For the purposes of this discussion, the words "mandatory presumption" and "inference" will be used to describe the effect of jury instructions, while the term "presumption" will refer to the

judge instructs the jury that the existence of one fact is necessarily presumed if the existence of another fact is proven.[14] An instruction which constitutes an inference simply informs the jury that it is permitted to draw a certain conclusion from the facts proven, but is not compelled to do so.[15] After basic fact A is introduced, the jury may or may not infer the existence of fact B should it find fact A exists.[16]

PRESUMPTIONS AND INFERENCES IN CRIMINAL LAW

The due process clauses of the fifth and fourteenth amendments guarantee that the accused not be convicted of a crime "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[17] This constitutional right may be infringed when an instruction constituting an inference or presumption has the effect of allowing the jury to convict a defendant in a case in which the prosecution has otherwise failed to meet its burden of proof. To protect the defendant, courts generally have limited the use of inferences while they have prohibited the use of presumptions in criminal jury instructions.[18] Courts have developed various tests to determine whether the use of an inference or presumption under the circumstances of a given case meets constitutional requirements.

A line of relatively recent Supreme Court cases discussed these tests and, in doing so, substantially defined the constitutional limitations on the use of inferences and presumptions in criminal cases. The Court decided the first of these cases in 1943. In *Tot v. United States*,[19] the Court held that the jury may only be permitted to make an inference if the statutory presumption on which that inference is based has a rational connection to the basic facts giving rise to it. If those proven facts do not rationally lead to the presumed fact, then the inference is arbitrary and offends due process.[20]

The next two cases, both decided in 1965, help to illustrate the fine line distinguishing a constitutionally valid statutory presumption (and subsequent permissive inference instruction) from an unconstitutionally arbitrary

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statutory creation. The term "basic fact" will refer to the underlying proven fact which leads one to the presumed fact. Some authorities cited in this Comment may use alternate terms. *See* May, *Attacking Presumptions in the Criminal Trial*, 55 FLA. B.J. 325 (1981) ("The Supreme Court of the United States has never been precise in its use of the terms 'inference' and 'presumption.' What the Court called a 'statutory presumption' in [Tot v. United States, 319 U.S. 463 (1943)], it characterized as an 'inference' in [Barnes v. United States, 412 U.S. 837 (1973)]").

14. *See, e.g.*, Legille v. Dann, 544 F.2d 1, 5-6 (D.C. Cir. 1976) (delivery may be presumed when proper mailing is proved).

15. *Id.* at 5 n. 24.

16. Stumbo, *supra* note 13, at 189.

17. *In re* Winship, 397 U.S. 358, 364 (1970).

18. The writings of both Professors Lilly and McCormick illustrate the general acceptance of this view by explaining that, in criminal cases, the judge will instruct the jury that it *may* infer the existence of one fact from the proof of another, but is not required to. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 16, at 50-51 (1978); CLEARY, *supra* note 8, § 346(2), at 988.

19. 319 U.S. 463 (1943).

20. *Id.* at 467-68. The presumption relied upon in *Tot* was created in a provision of the Federal Firearms Act. It stated that a person previously convicted of a violent crime who now possesses a firearm is presumed to have received it through interstate commerce in violation of the Act. In holding this presumption unconstitutional, the *Tot* Court found no rational connection between the proven facts of being a violent felon in possession of a firearm and the presumed fact that the firearm was received through interstate commerce.

presumption. In *United States v. Gainey*,[21] the statute involved provided that mere presence at the site of an illegal still created a presumption that the defendant was guilty of the crime of carrying on an illegal distilling business.[22] In *United States v. Romano*,[23] however, the statutory presumption was that the defendant was guilty of possession of the illegal still if he were present at the site.[24]

The Court applied the rational connection test of *Tot* and found it was satisfied by *Gainey* because the crime of "carrying on" an illegal business is very broad, and could involve any act connected to the business. The Court noted that Congress created the presumption because it understood that anyone who is allowed to be present at such an isolated and secret site will rarely be a stranger to the crime.[25]

Gainey can be interpreted as simply allowing Congress to codify a natural inference.[26] But the Court found no such natural inference in *Romano* such that unexplained presence at the still would lead to the conclusion of possession of the still. Instead, this presumption was found to be an arbitrary violation of due process because there was no rational connection between presence at the site and ownership.[27]

In *Leary v. United States*,[28] the Court set forth a slightly more stringent standard than *Tot*'s rational connection test. *Leary* held that the presumed fact must not only be rationally connected to the proven fact, but must also

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21. 380 U.S. 63 (1965).

22. 26 U.S.C. § 5601(b)(2) (1958) (amended 1976, 1979):

> Whenever on trial for violation of subsection (a)(4) [carrying on the business of distiller without a bond] the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without a jury).

23. 382 U.S. 136 (1965).

24. 26 U.S.C. § 5601(b)(1) (1958) (amended 1976, 1979).

> Whenever on trial for violation of subsection (a)(1) [possession, custody, or control of unregistered still or distilling aparatus], the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without a jury).

25. 380 U.S. at 67-68. The *Gainey* Court went further than just testing the validity of the statutory presumption. It also examined the instruction itself, and found it permissible because the jury was clearly informed that it was free to decide the case without the aid of the presumption. The instruction, therefore, constituted an inference and not a mandatory presumption. The instruction read in part:

> Now this does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict the defendant.... It simply means that a jury may, if it sees fit, convict upon such evidence, as it shall be deemed in law sufficient to authorize a conviction, but does not require such a result.

380 U.S. at 70.

26. CLEARY, *supra* note 8, § 347, at 992.

27. *Romano*, 382 U.S. at 141.

28. 395 U.S. 6 (1969). Timothy Leary and his family drove from Mexico into Texas. A customs officer searched their car and found marijuana. 21 U.S.C. § 176(a) (1956) (repealed 1970) established the presumption that:

> Whenever on trial for a violation of this subsection [transporting marijuana into the United States], the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

more likely than not exist if the proven fact exists. The statutory presumption in *Leary*, that a person who possesses marijuana knows that it was illegally imported, did not meet the requirements of this stricter test and, therefore, violated due process.[29] One year later, in *Turner v. United States*,[30] the Court faced a similar presumption yet applied an even stricter standard, one that has not since found favor. The *Turner* Court required that the presumed fact be inevitably connected to the basic fact beyond a reasonable doubt.[31]

Finally, in 1973, the Court decided *United States v. Barnes*,[32] which modified the extreme view taken in *Turner*. The Court in *Barnes* eliminated the requirement of an inevitable connection and instead relied solely on the more flexible beyond a reasonable doubt standard.[33]

Although these cases put forth different standards and tests as to the constitutional validity of presumptions, they are in accord on two major rules regarding how to instruct the jury on those presumptions. First, as long as the underlying statutory presumption is constitutional, the jury is permitted to hear an instruction regarding that presumption. Second, the instruction given to the jury in a criminal trial can not be in the form of a mandatory presumption, but instead has to be in the form of an inference, informing the jury that it *may*, but is not required to, infer the presumed fact upon finding proof of the basic fact.[34]

In 1979, the Supreme Court, for the first time, departed from these traditional rules. In *County Court of Ulster County v. Allen*,[35] the Court

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29. *Leary*, 395 U.S. at 52-54.

30. 396 U.S. 398 (1970). As in *Leary*, the statute presumed knowledge of illegal importation based on possession, except in *Turner* the drugs were heroin and cocaine instead of marijuana. The Court held that the presumption regarding heroin could be upheld, but not the presumption as to cocaine, because a larger percentage of heroin is imported than cocaine. 396 U.S. at 419.

31. *Turner* is often discussed in tandem with *In re* Winship, 397 U.S. 358 (1970), which held that the standard of proof in all criminal cases must be 'beyond a reasonable doubt' to insure due process.

32. 412 U.S. 837 (1973). The Court upheld the constitutionality of the underlying presumption that unexplained possession of recently stolen property can lead to the inference that the defendant knew it was stolen, and affirmed the conviction because the trial judge avoided a mandatory presumption and instructed the jury properly in explaining the inference.

33. 412 U.S. at 843. *See infra* notes 35-38 and accompanying text for a discussion of County Court of Ulster County v. Allen, 442 U.S. 140 (1979), in which the Court developed a new standard not accepted by a majority of courts because of its extremely lenient position.

34. In Sandstrom v. Montana, 442 U.S. 510 (1979), the jury was instructed as to a presumption that a person intends the ordinary consequences of his voluntary acts. The Supreme Court reversed the conviction, holding that a jury could have interpreted the instruction as creating a conclusive presumption.

> Devitt and Blackmar advocate this federal jury instruction of presumptions in criminal cases: As applied to this case, the law declares that you may regard proof of (the presence of the defendant at a still) as sufficient evidence that (he is engaged in the business of distilling). The law, however, does not require you to so find. You are the sole judge of the facts. Since proof (that the defendant is engaged in distilling) is an essential element of the offense charged in the indictment, as defined elsewhere in these instructions, you may not find the defendant guilty unless you find beyond a reasonable doubt that the defendant (is engaged in distilling without having given bond).

1 DEVITT AND BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 11.05 at 213 (2d ed. 1970).

35. 442 U.S. 140 (1979). *Allen* involved a conviction for illegal possession of handguns. The defendants were in a car with a 16-year-old girl who had the guns in her purse. A New York statute stated that presence of a firearm in an automobile was presumptive evidence of its illegal possession

applied the *Tot* standard and specifically held that the trial judge's instructions created a permissive inference, requiring that the jury only find a rational connection between the proven and presumed facts.[36] The Court went on to state, however, that even if the instruction had amounted to a mandatory presumption, it still could have been allowed in a criminal trial as long as a rational jury could have found that the proven fact led to the presumed fact beyond a reasonable doubt.[37] Prior to *Allen*, it was never contemplated that a trial judge could instruct a jury in a criminal case to make a mandatory presumption against the defendant, regardless of the strictness of the standard applied.[38]

Few cases have adopted the *Allen* Court's extreme view that mandatory presumptions will be allowed in criminal trials. The Ninth Circuit, in *United States v. Hester*,[39] recently upheld a mandatory presumption of intent in a child molestation case. Citing *Allen*, the court found that a jury instruction on mandatory presumption did not violate the due process clause of the Fifth Amendment because the connection between the proven fact and the presumed fact of intent satisfied the beyond a reasonable doubt standard.[40] Nonetheless, the presence of mandatory presumptions in criminal jury instructions does not appear to be a growing trend. In fact, virtually all state and federal courts still follow the traditional approach: jury instructions may permit the jury to make inferences, but not require them to make presumptions against the defendant.[41] In Arizona, for example, the Arizona Supreme Court recently upheld an instruction[42] that allowed intent to be inferred from proof that the defendant acted voluntarily, as long as the instruction created a permissive presumption (an inference) and a rational connection existed between the basic facts and the presumed facts.[43] Other

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by all the occupants. The questioned jury instruction was based on this presumption. 442 U.S. at 142-3.

36. *Id.* at 165-67. The trial judge instructed the jury that "they were entitled to infer possession from the defendants' presence in the car." *Id.* at 145. The rational connection must be more likely than not. *Id.* at 165.

37. *Id.* at 166-67.

38. *See supra* note 18 and accompanying text.

39. 719 F.2d 1041 (9th Cir. 1983). The presumption stemmed from Arizona law. The court held that ARIZ. REV. STAT. ANN. § 13-1410 (1985) allows a presumption that a defendant who touched the private parts of a child was motivated by unnatural or abnormal sexual interest or intent.

40. 719 F.2d at 1044. The earlier Ninth Circuit case of McGuinn v. Crist, 657 F.2d 1107 (9th Cir. 1981), did not go so far as to hold that a mandatory presumption is permissible in a criminal case, yet it showed a growing tolerance for the idea by holding that the instruction which created a presumption was only harmless error since no reasonable jury could have doubted the existence of the presumed fact (intent is presumed when a person voluntarily causes the death of another). 657 F.2d at 1108-09.

41. *See infra* notes 42-47 and accompanying text.

42. *See, e.g.*, State v. Spoon, 137 Ariz. 105, 669 P.2d 83 (1983). The instruction stated in part:

> The state must prove that the defendant has done an act which is forbidden by law and that he intended to do it. You may determine that the defendant intended to do the act if he did it voluntarily. The state does not have to prove that the defendant knew the act was forbidden by law.

137 Ariz. at 109, 669 P.2d at 87.

43. *Id.* at 110, 669 P.2d at 88. The court also stated that the word "may" in the instruction established its permissive character. The court applied the *Tot* "rational connection" test in deciding whether a presumption is initially constitutional.

Arizona cases,[44] and virtually all other states[45] and federal courts[46] similarly allow such instructions on inferences, but not on mandatory presumptions.

Oregon has traditionally followed this approach, although it has been a bit more strict than many other courts in determining when an instruction on even a permissive presumption would be permitted.[47] The Oregon Rules of Evidence[48] relied on by the *Rainey* trial judge allow the use of inferences in a criminal trial, but do not permit mandatory presumptions. The Rules set forth a strict, two-prong standard that must be met before the jury may be allowed to make the inference: i) a reasonable jury could find that the facts giving rise to the presumed fact have been established beyond a reasonable doubt; and, ii) the presumed fact follows more likely than not from the established facts.[49]

Despite these existing safeguards, the Oregon Supreme Court in *Rainey* indicated in dictum that not only may a trial court never instruct the jury to find a mandatory presumption against the defendant in a criminal case, it should also never instruct the jury to use a permissive inference if it involves an element of the case against the defendant.

THE *RAINEY* CASE

Analysis of the Decision

Rainey was charged with knowingly delivering several packages of marijuana.[50] In order to convict the defendant of this crime, the prosecution needed to prove two elements: delivery and knowledge that what the defendant delivered was a controlled substance.[51] The defendant admitted at

44. *See, e.g.*, State v. Grilz, 136 Ariz. 450, 666 P.2d 1059 (1983) (instruction on presumption of sanity allowed since it simply placed an evidentiary burden of production on defendant, and did not create a conclusive presumption); State v. Lopez, 134 Ariz. 469, 657 P.2d 882 (1982) (instruction that defendant is presumed to intend an act which he does voluntarily was not error because it was phrased permissively, and because there is a rational connection between voluntarily doing an act, and intending it); State v. Oppenheimer, 138 Ariz. 120, 673 P.2d 318 (Ct. App. 183) (an instruction on the presumption of intent is allowed if it does not require the jury to make the inference); State v. Moya, 138 Ariz. 12, 672 P.2d 964 (Ct. App. 1983) (an instruction on presumption of intent is constitutional if it leaves the jury free to accept or reject the inference).

45. *See, e.g.*, Walker v. State, 652 P.2d 88 (Alaska 1982); People v. Hawkins, 192 Colo. 535, 560 P.2d 833 (1977); People v. Stein, 469 N.Y.S. 2d 243, 97 A.D.2d 859 (1983).

46. *See, e.g.*, Potts v. Zant, 734 F.2d 526 (5th Cir. 1984); Hardy v. U.S., 691 F.2d 39 (1st Cir. 1982); U.S. v. Ross, 626 F.2d 77 (9th Cir. 1980).

47. No cases prior to *Rainey* had indicated that when an instruction on a constitutionally permissible presumption is clearly phrased as an inference it would not be allowed. *See, e.g.*, State v. Nichols, 236 Or. 521, 388 P.2d 739 (1964) (instruction that intent to murder is presumed from deliberate use of a deadly weapon resulting in death is allowed, as long as care is taken not to tell the jury that the presumption is conclusive); State v. Flack, 58 Or. App. 330, 648 P.2d 857 (Ct. App. 1982) (no error to instruct on presumption of intent, since it did not unconstitutionally shift the burden of proof to defendant).

48. OR. REV. STAT. § 40.125, Rule 309 (1981).

49. *Id.* at 2(a) & (b).

50. *Rainey*, 298 Or. at 461, 693 P.2d at 637.

OR. REV. STAT. § 475.992(2)(a) (1979) states: "Any person who delivers marijuana for consideration is guilty of a Class B felony."

51. *Rainey*, 298 Or. at 461, 693 P.2d at 637.

OR. REV. STAT. § 161.095(2) (1971) states that "a person is not guilty of an offense unless the person acts with a culpable mental state with respect to each material element of the offense that necessarily requires a culpable mental state."

trial that he delivered the packages, but claimed that he did not know they contained marijuana. The jury convicted Rainey after being instructed by the trial judge that "proof of unlawful delivery is prima facie evidence of knowledge of its character, . . . [where] prima facie means . . . evidence . . . sufficient to establish a given fact and which if not rebutted or contradicted will remain sufficient."[52]

The *Rainey* court found this instruction to be reversible error for two reasons. First, the instruction related to a presumption or inference impermissibly used to prove an element of the crime against the defendant. Second, even if such an instruction were not, on its face, error, the reference to "prima facie" evidence noted above stated a rebuttable presumption against the defendant and, thus, unlawfully denied the defendant the right to be convicted only upon proof of guilt beyond a reasonable doubt.[53] The court found that the instruction constituted an impermissible mandatory presumption against the defendant.

The court went on in dictum to state that not only may a judge never instruct the jury to find a mandatory presumption in a criminal case, a judge should also never instruct the jury about an inference.[54] Prior to *Rainey*, no recognized authority had implied that a jury could not be informed that it is allowed to draw at least an inference against a criminal defendant when the prosecution had met its burden regarding the underlying facts. The Oregon Court cited only an Oregon Rule of Civil Procedure prohibiting a judge from commenting on the evidence[55] to support this view.

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52. *Rainey*, 298 Or. at 463, 693 P.2d at 638. The court noted that the trial judge most likely based his instruction on OR. REV. STAT. § 167.238(1) (1977) which provides: "Proof of unlawful manufacture, cultivation, transportation or possession of a controlled substance is prima facie evidence of knowledge of its character." This statute, however, does not expressly include delivery as a fact which is prima facie evidence of knowledge of a controlled substance. 298 Or. at 463 n.3, 693 P.2d at 638 n.3.

53. *Rainey*, 298 Or. at 468, 693 P.2d at 641.

54. *Id.* at 466-67, 693 P.2d at 640-41.

55. OR. R. CIV. P., 59(E) (1985). This Rule states it is also applicable to criminal cases. The court cited Sandstrom v. Montana, 442 U.S. 510 (1979), but only for the proposition that placing the burden of persuasion on the defendant is inconsistent with the presumption of innocence.

Even if the *Rainey* court had attempted to cite existing authority for its strict formulation of the law of presumptions, it would have found very little. The only case using an analysis similar to *Rainey*'s is the Supreme Court case of Bailey v. Alabama, 219 U.S. 219 (1910). The case has, however, long since been rejected by that Court. *See supra* notes 19, 21, 23, 28, 30, and 32, and accompanying text.

Bailey involved a presumption encompassed in the Code of Alabama that stated that a breach of an employment contract upon which salary advances had been received was presumptive evidence that the employee intended to defraud his employer. The court held that the jury should not be authorized to make any presumptions when it is not convinced by the evidence of the defendant's guilt, irrespective of whether the jury is told the presumption is permissive.

This case, however, is clearly distinguishable from *Rainey*, since the Court was motivated by other factors. The type of debt involved in *Bailey* affected only farm laborers, virtually all of whom were black. As such, it was held to constitute a form of peonage which violated the thirteenth amendment, 219 U.S. at 240-45.

Justice Black's dissent in United States v. Gainey, 380 U.S. 63, 74 (1965) (Black, J. dissenting) is another example of an analysis analagous to that of the *Rainey* court. Black argued that it is not the role of Congress to be the fact finder in a criminal case, for the Constitution states that this role may not be taken from the jury. 380 U.S. at 76 (Justice Black stated that Art. III, § 2 and the sixth amendment guarantee the right to trial by jury, and that the fifth amendment guarantees due process of law, "which includes the right to be tried for a crime in a court according to the law of the land without any interference with that court's judicial function by Congress"). He added that even when

The court reasoned that, on the one hand, in order for the instruction to be concrete enough to be of help to the jury, it would necessarily amount to a comment on the evidence. On the other hand, if the instruction were sufficiently vague so as to satisfy that requirement, it would simply confuse the jury. Therefore, the court concluded, no instructions on inferences regarding an element of the crime should be given by the trial judge at all. The advocate may comment on the inference, but may not refer to its being derived from a statute.[56] The Oregon Court would only allow inferences or presumptions in a criminal trial to serve the purposes of affording the prosecutor a theoretical basis for argument and informing the trial judge's decision on a motion for judgment of acquittal.[57] In its discussion of prima facie evidence, the court used a sequence of arguments to support its holding that the words "prima facie" in an instruction transform that instruction into an impermissible presumption. The court stated first that the use of the word "presumption" is not allowed in Oregon against a criminal defendant, even when other language in the instruction is permissive. The court relied on *State v. Stilling*,[58] the first Oregon case to bar the use of the word. *Stilling*, however, cited no authority for its holding which contradicted the vast majority of federal and state cases.[59]

The court next explained that although the trial judge never actually used the word "presumption," his use of the words "prima facie evidence" had the same effect.[60] As a result, since "prima facie" implies "presumption," and use of the word "presumption" might lead the jury to believe the defendant had the burden of persuasion, the instruction constituted a denial of the defendant's right to be convicted only upon proof of guilt beyond a reasonable doubt.[61]

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phrased in a permissible way, an instruction on a presumption made by Congress would lead jurors to believe it was their duty to convict. 380 U.S. at 87-88.

This view, however, has not been followed in a majority opinion. In fact, the Court's discussion in County Court of Ulster County v. Allen, 442 U.S. 140, 166-67 (1979), demonstrates that even a mandatory presumption could be constitutional in certain circumstances. *See supra* notes 35-38 and accompanying text.

56. *Rainey*, 298 Or. at 467, 693 P.2d at 640.

57. *Id.* at 467-68, 693 P.2d at 641.

58. 285 Or. 293, 590 P.2d 1223, *cert. denied*, 444 U.S. 880 (1979). The instruction in *Stilling* stated: "There is a disputable presumption that a person intends the ordinary consequences of his voluntary acts and that an unlawful act was done with an unlawful intent. You may infer intent in accordance with this rule."

Most cases hold that the word 'presumption' can act as an inference as long as it is phrased properly. *See, e.g.*, Giordano v. Fair, 697 F.2d 14 (1st Cir. 1983); U.S. v. Franklin, 568 F.2d 1156 (8th Cir. 1978), *cert. denied*, 435 U.S. 955; U.S. v. Tarig, 521 F. Supp. 773 (D.C. Md. 1981); State v. Myrick, 228 Kan. 406, 616 P.2d 1066 (1980); State v. Sunday, 187 Mont. 292, 609 P.2d 1188 (1980).

59. *See supra*, notes 18-46 and accompanying text.

60. The opinion cited Oregon cases which state that 'prima facie evidence' has come to mean 'presumption.' U.S. National Bank v. Lloyd's, 239 Or. 298, 324-25, 396 P.2d 765, 773-74 (1964); State v. Kline, 50 Or. 426, 432, 93 P. 237, 240 (1907). The probative value of these cases is questionable. Neither stated that prima facie means presumption. *Kline* defined "prima facie" evidence to be "that degree of proof which, unexplained or uncontradicted, is alone sufficient to establish the truth of a legal principle asserted by a party." 50 Or. at 432, 93 P. at 240. *Lloyd's*, though not using the words 'prima facie,' used the word presumption in this general sense. 239 Or. at 324-25, 396 P.2d at 773-74.

61. *Rainey*, 298 Or. at 465, 693 P.2d at 639.

Scope of the Decision

The *Rainey* court seemed reluctant to apply its own analysis of the issues to the *Rainey* case itself. The opinion went out of its way to hold that the instruction given by the trial court was actually a presumption and not an inference, despite its clearly permissive language.[62] By finding that the instructions constituted a mandatory presumption, the court avoided having to hold explicitly that even an inference is impermissible.

As articulate as the *Rainey* court is, it failed to consider that many statutory presumptions are extremely helpful to the jury. They are not simply reached through common sense. The particular legislature has usually performed extensive research and investigation before promulgating a statutory presumption.[63] A jury cannot independently acquire this type of valuable knowledge, and it seems reasonable and helpful to allow the jury the opportunity to benefit from the Legislature's efforts.[64]

The *Rainey* court's solution, to allow the prosecutor to raise the inference in argument, is of minimal help, especially since reference to its statutory source is precluded. The jury might be distrustful and view the inferences as the suspect statements of an interested party. The trial judge, whom the jury trusts to be impartial, should relay this information in order to take full advantage of the Legislature's findings.

The assertion in *State v. Rainey*, that the jury should not be allowed to make an inference against a criminal defendant, is contrary to virtually all of the case law and authority in this area. Even in the case where the United States Supreme Court adopted its strictest standard with respect to the inclusion of an inference in a jury instruction,[65] it did not come close to prohibiting the use of proper inferences in all situations. These deeply set ideas are not likely to be changed as a result of one state court's opinion.

The Oregon Supreme Court will, no doubt, soon be faced with a case involving a clearly permissive jury instruction on a constitutionally acceptable statutory presumption. Such a case may compel the court to retract its statement regarding all inferences in general. It is likely that it will find

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62. The instruction read in part:

> I'm sure you know the fact that I'm instructing you in regard to any of these areas is not intended by me to be a suggestion of how I think you should decide this case or any part of this case. You people are the sole and exclusive judges of the facts. Your findings as to the facts are binding and final.

Rainey, 298 Or. at 461, 693 P.2d at 637.

> As the dissent pointed out in the Court of Appeals decision of this case:
> The instructions taken as a whole . . . clearly informed the jury that it had the sole responsibility to decide the case, that defendant was presumed innocent, that the entire burden of proof was on the state to prove the ultimate facts beyond a reasonable doubt and that it was not incumbent on defendant to prove or disprove anything.

State v. Rainey, 60 Or. App. 302, 311, 653 P. 2d 584, 588 (Van Hoomissen, J., dissenting) (1982).

63. As the United States Supreme Court stated in *Gainey*: "The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it . . . ." United States v. Gainey, 380 U.S. 63, 67 (1965).

64. Another argument in favor of presumptions is based on one party having superior access to the proof. *See supra* note 8 and accompanying text.

65. Turner v. United States, 396 U.S. 398 (1970).

instead that courts must be permitted to instruct on inferences in some situations.

The *Rainey* case does not represent the beginning of a new trend. On the contrary, if any trend does exist it is in the opposite direction, toward standards that will ease the burden on the prosecution. Several Ninth Circuit cases, in choosing to accept the lenient standards of *Allen*, demonstrate this trend.[66] The *Rainey* reasoning will no doubt be useful to defense attorneys arguing the presumption issue. Nonetheless, it seems clear that an argument urging *Rainey*'s strict position on the subject of criminal jury instructions on presumptions will be rejected.

CONCLUSION

The Oregon Supreme Court's opinion in *State v. Rainey* held, in line with existing authority, that jury instructions regarding mandatory presumptions are impermissible in a criminal trial. In a striking departure from previous cases and commentary, the court noted in dictum that an instruction on a permissive inference, as well as one on a mandatory presumption, constitutes a comment on matters of fact and shifts the burden of proof to the criminal defendant, and consequently should be prohibited. Virtually all other jurisdictions allow instructions on permissible inferences, and it seems unlikely that the *Rainey* position will draw support in the future. The *Rainey* court's strict standard is inconsistent with the recent trend toward relaxing restrictions on inferences or presumptions in criminal jury instructions.

Sheila Gladstone

66. *See, e.g.*, United States v. Hester, 719 F.2d 1041 (9th Cir. 1983); McGuinn v. Crist, 657 F.2d 1107 (9th Cir. 1981). *See also* notes 39 and 40 and accompanying text.