

County Court, Jefferson County, Colorado Court address: 100 Jefferson County Parkway Golden, Colorado 80401-6000 Phone Number:	
<b>People of the State of Colorado,</b>  v.  Defendant: <b>SAMPLE DEFENDANT</b>	
Attorney or Party Without Attorney (Name and Address): Vincent C. Todd 12600 W COLFAX AVE C400 LAKEWOOD CO 80215 Phone Number: (303) 980-0922 E-mail: vincent.todd@coloradowrits.com FAX Number: (303) 223-3206 Atty.Reg.: 12955	
<b>MOTION TO DECLARE § 42-4-1301 (6) (F), COLORADO REVISED STATUTES, UNCONSTITUTIONAL AS A VIOLATION OF SAMPLE DEFENDANT’S RIGHT TO DUE PROCESS OF LAW PURSUANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE II, SECTION 25, CONSTITUTION OF COLORADO</b>	

Defendant, SAMPLE DEFENDANT, by and through Counsel, VINCENT C. TODD, submits his MOTION TO DECLARE § 42-4-1301 (6) (F), COLORADO REVISED STATUTES, UNCONSTITUTIONAL AS A VIOLATION OF SAMPLE DEFENDANT’S RIGHT TO DUE PROCESS OF LAW PURSUANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE II, SECTION 25, CONSTITUTION OF COLORADO and as grounds therefore would show the Court:

1. Section 42-4-1301 (6) (f), COLORADO REVISED STATUTES, purports to remove the requirement for live testimony to lay the foundation for the analysis of a person’s blood in a prosecution pursuant to § 42-4-1301, COLORADO REVISED STATUTES.

(f) Chemical test--admissibility. Strict compliance with the rules and regulations prescribed by the department of public health and environment shall not be a prerequisite to the admissibility of test results at trial **unless the court finds that the extent of noncompliance with a board of health rule has so impaired the validity and reliability of the testing method**

**and the test results as to render the evidence inadmissible. In all other circumstances, failure to strictly comply with such rules and regulations shall only be considered in the weight to be given to the test results and not to the admissibility of such test results.**

Section 42-4-1301 (6) (f), COLORADO REVISED STATUTES. (Emphasis added.) This has generally been interpreted to require that the defense present some proof that the reliability of the evidence has been compromised, rather than the constitutionally mandated requirement that the government present competent evidence that the result has not been compromised.

2. Article II, Section 25, CONSTITUTION OF COLORADO, guarantees,

No person shall be deprived of life, liberty or property, without due process of law.

Article II, Section 25, CONSTITUTION OF COLORADO. (Emphasis added.)

3. The Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES guarantees,

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment Fourteen, § 1, CONSTITUTION OF THE UNITED STATES. (Emphasis added.)

4. The prosecution bears the burden of proving each and every element of the charged crime beyond a reasonable doubt, and no presumption can alter the state's burden.

The Due Process Clause protects a defendant against conviction unless every element of the crime for which the defendant is charged is

proved beyond a reasonable doubt. *People v. Clark*, 214 P.3d 531, 540-41 (Colo.App.2009). The prosecution bears the burden of proving each element of the crime, and a defendant may not be called upon to prove that he or she did not commit a crime. *Id.* **"Accordingly, the prosecution cannot place upon a criminal defendant the burden of proving innocence through the testing of evidence."** *Id.*

*People v. Santana*, — P.3d —, 2009 WL 2182596, at \*4 (Colo. App. July 23, 2009). Likewise, assuming *arguendo* that strict Compliance with Colorado Department of Public Health and Environment regulations, adopted after full compliance with § 24-4-105, COLORADO REVISED STATUTES, can presumptively validate a chemical test, absent specific regulatory findings as to effect of deviations from the protocols required by rule, no presumption or inference can attach where there is less than strict compliance.

5. Where a statute or a rule established a “presumption” implicating a Defendant’s rights in a criminal case, that pronouncement does nothing more than establish a permissible inference.

Conclusive presumptions "relieve[ ] the prosecution of its burden of persuasion by removing the presumed element from the case entirely when the prosecution proves the predicate fact on which the presumption is based." *Jolly v. People*, 742 P.2d 891, 896 (Colo.1987). Conclusive presumptions violate the due process rights of defendants because they "can reasonably be interpreted by the factfinder as a mandate to find the presumed element of the crime upon proof of the predicate fact, and thus clash [ ] directly with the presumption of innocence and the constitutional requirement of prosecutorial proof beyond a reasonable doubt." *Jolly, supra*, 742 P.2d at 897; *see also People v. Felgar*, 58 P.3d 1122, 1124 (Colo.App.2002). "The critical consideration in determining the validity of [the instruction] is whether a reasonable jury could have understood the instruction as relieving the state of its burden of persuasion on an essential element of the crime." *Jolly, supra*, 742 P.2d at 898. The focus of this analysis "must be on the specific language of the instruction itself." *Jolly, supra*, 742 P.2d at 898.

*People v. Stanley*, 170 P.3d 782, 793 (Colo. App. 2007).

Initially, we find it difficult to accept the prosecution's argument that the phrase "shall be presumed" has a "plain meaning" that we can divine from the face of the statute. The term "presumption" is one of the most ambiguous terms in the legal lexicon. Over the years, the term has been used to describe a variety of evidentiary devices with different meaning and effects, fostering, in the process, a "welter of loose language and discordant decisions." *See, e.g., County Court of Ulster County v. Allen*, 442 U.S. 140, 156-59, 99 S.Ct. 2213, 2224-26, 60 L.Ed.2d 777 (1979); *State v. Dacey*, 138 Vt. 491, 418 A.2d 856 (1980). Recent attempts to clarify some of the confusion describe two major classifications of presumptions: mandatory and permissive. *Ulster County*, 442 U.S. at 157-58, 99 S.Ct. at 2224-26. As analyzed under these classifications, a mandatory presumption shifts to the party against whom it operates either the burden of producing evidence or the burden of persuasion, and if that party fails to satisfy this burden, the trier of fact must accept the presumed fact provided it finds the basic fact. On the other hand, a permissive presumption-more commonly described as a permissive inference-shifts no burden to the opposing party, but merely allows the trier of fact to find the inferred fact from the basic fact. *Ulster County*, 442 U.S. at 157-59, 99 S.Ct. at 2224-26. *See also State v. Dacey*, 138 Vt. 491, 418 A.2d 856 (1980).

In criminal cases, the use of presumptions raises serious concerns because these evidentiary devices potentially conflict with the basic principles that a defendant is presumed innocent and the prosecution must prove guilt beyond a reasonable doubt. *Ulster County*, 442 U.S. at 156, 99 S.Ct. at 2224; *Hendershott v. People*, 653 P.2d 385, 390-91 (Colo.1982), *cert. denied*, 459 U.S. 1225, 103 S.Ct. 1232, 75 L.Ed.2d 466 (1983). Permissive presumptions-because they leave the jury free to credit or reject the inference and do not shift the burden of proof-do not violate due process principles unless "under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Ulster County*, 442 U.S. at 157, 99 S.Ct. at 2224. A mandatory presumption, however, is a "far more troublesome evidentiary device." *Ulster County*, 442 U.S. at 157, 99 S.Ct. at 2224. Due process prohibits the prosecution from resting its case entirely on a mandatory presumption "unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." *Ulster County*, 442 U.S. at 167, 99 S.Ct. at 2229-30. Further, a mandatory presumption may

not be constitutionally used against a criminal defendant if a reasonable jury could construe it as conclusive or shifting the burden of persuasion on an essential element of a crime. *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

As a result, to avoid implicating these constitutional limitations, presumptions in criminal cases are ordinarily construed to raise only permissive inferences. *See, e.g., People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 361-62 (Colo.1985); *Wells v. People*, 197 Colo. 350, 592 P.2d 1321 (1979); 1 C. Torcia, *Wharton's Criminal Evidence* § 32, at 124 (14th ed. 1985). Indeed, even where statutory language appears to create a mandatory presumption in criminal cases, courts commonly read the statute as creating only a permissive inference. *See, e.g., United States v. Gainey*, 380 U.S. 63, 64, 85 S.Ct. 754, 756, 13 L.Ed.2d 658 (1965) (presumption was permissive inference although statute provided that basic fact "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such [basic fact]...."); *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 361-62 (Colo.1985) (presumption was permissive although statute used the phrase "is presumed.").

*Barnes v. People*, 735 P.2d 869, 872–873 (Colo. 1987) (en banc). (Footnote omitted.)

6. Presumptions established by criminal statutes are themselves Constitutionally suspect.

The due process clause requires that a defendant be convicted only after proof beyond a reasonable doubt of every element of the crime charged. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *People v. Mattas*, 645 P.2d 254 (Colo.1982). Well-established principles of law proscribe the use in criminal cases of statutory presumptions that improperly shift the burden of proof, *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), or that conclusively presume an element of the offense. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Thus, it is clear that the presumption challenged here must be classified as permissive to comply with constitutional requirements. It must be construed to allow, but not to require, the trier of fact to infer the presumed fact (intent to promote) from the proven fact (possession of six or

more identical obscene materials) and, of course, the jury must be properly instructed as to this effect.

[The power of the legislature to create statutory presumptions is limited by the due process clause. *Brown v. District Court*, 197 Colo. 219, 591 P.2d 99 (1979). The constitutional validity of a permissive presumption depends upon the existence of a rational connection between the fact to be inferred and the proven fact. *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943). Due process requires, at a minimum, that a criminal presumption satisfy the following test: "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional, unless it can 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." *Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57 (1969). See also *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970); *People v. McClendon*, 188 Colo. 140, 533 P.2d 923 (1975).

*People ex rel. Tooley v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 362 (Colo. 1985) (en banc).

WHEREFORE, the Defendant prays the Court find § 42-2-1301 (6) (f), COLORADO REVISED STATUTES, void and unconstitutional and, as to any evidence of testing offered by the prosecution direct that admissible evidence of scientific validity be required as a foundational prerequisite.

Respectfully submitted:

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VINCENT C. TODD

Attorney for SAMPLE DEFENDANT

### **CERTIFICATE OF MAILING**

I hereby certify that I have served a copy of the foregoing MOTION TO DECLARE § 42-4-1301 (6) (F), COLORADO REVISED STATUTES, UNCONSTITUTIONAL AS A VIOLATION OF SAMPLE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW PURSUANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE

MOTION TO DECLARE § 42-4-1301 (6) (F), COLORADO REVISED STATUTES, UNCONSTITUTIONAL AS A VIOLATION OF SAMPLE DEFENDANT'S RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE II, SECTION 16, CONSTITUTION OF COLORADO, 2010CR1010

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UNITED STATES AND ARTICLE II, SECTION 25, CONSTITUTION OF COLORADO upon the People by placing a true and accurate copy of same in the United States mails, postage prepaid, addressed to:

Office of the District Attorney  
500 Jefferson County Parkway  
Golden, Colorado 80401-6020

Office of the Attorney General  
Department of Law  
1525 Sherman ST, 7<sup>th</sup> Floor  
Denver, CO 80203

on Wednesday, July 7, 2010.

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