

IN THE SUPREME COURT OF FLORIDA

017  
FILED  
SD J. WHITE

SEP 18 1989

MICHAEL J. WILHELM,  
Petitioner,

CLERK, SUPREME COURT  
By [Signature]  
Deputy Clerk

v.

Case No. ' 74,345  
2DCA No. 87-1493

STATE OF FLORIDA,  
Respondent.

\_\_\_\_\_ /

DISCRETIONARY REVIEW OF THE DECISION OF THE  
SECOND DISTRICT COURT OF APPEAL  
SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

JOSEPH R. BRYANT  
Assistant Attorney General  
Florida Bar No. 0561444  
1313 Tampa Street, Suite 804  
Park Trammell Building  
Tampa, Florida 33602  
(813) 272-2670

COUNSEL FOR RESPONDENT

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SUMMARY OF THE ARGUMENT

Respondent contends that the defective instruction is ameliorated where it proceeds the proper instructions on the presumption of innocence and the state's burden to prove guilt beyond a reasonable doubt. Cupp v. Naughten, *infra*. Also, the Second District did not apply a new standard in finding the instruction harmless: rather, it found (citing State v. DiGuilio, *infra*) beyond a reasonable doubt that the defective instruction did not contribute to the jury's verdict.

ARGUMENT

ISSUE

WHETHER THE JURY INSTRUCTION BASED ON THE  
STATUTORY PRESUMPTION CONTAINED IN SECTION  
316.1934(2)(c), FLORIDA STATUTES (1986),  
CREATE[S] AN UNCONSTITUTIONAL MANDATORY  
REBUTTAL PRESUMPTION?

Petitioner took an appeal to the Second District Court of Appeal challenging his conviction for DUI-Manslaughter. The Second District held that the jury instruction given on the presumption of impairment created an unconstitutional mandatory rebuttal presumption, but found that the defective instruction was harmless in light of the "overwhelming" evidence adduced on the element of intoxication. The Second District certified the above-stated question to this Court as a matter of great public importance, and this appeal ensues.

Respondent herein relies on its argument recently presented to this Court in State v. Rolle, No. 72,383, on the question of whether the instruction is unconstitutional.<sup>1</sup> As for the question of whether the Second District properly found the erroneous instruction harmless, Respondent asserts that the court did not enunciate a new and less burdensome standard of review;

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<sup>1</sup> See Cupp v. Naughten, 414 U.S. 141, 94 S. Ct. 396, 38 L.Ed.2d 368 (1973) (holding that an instruction which created a mandatory rebuttal presumption ameliorated by proper instruction on the presumption of innocence and the state's duty to prove guilt beyond a reasonable doubt).

rather, it found beyond a reasonable doubt that the defective jury instruction did not effect the jury's verdict. Indeed, the Second District cited State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986), and followed this Court's dictates found therein in reaching its conclusion. The fact that the Second District also found the evidence "overwhelming" on the element of intoxication is no more than mere surplusage to its integral finding that the instruction did not effect the outcome of the trial, and Petitioner's contention to the contrary is unavailing,<sup>2</sup> and his conviction must therefore be affirmed.

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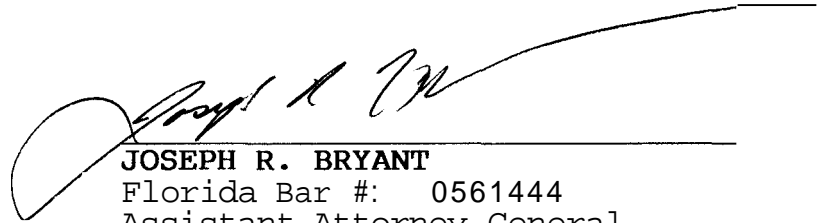
<sup>2</sup> See Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L.Ed.2d 284 (1969).

CONCLUSION

Based on the foregoing arguments and citations of authority, the Respondent respectfully requests this Honorable Court to affirm the decision of the Second District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

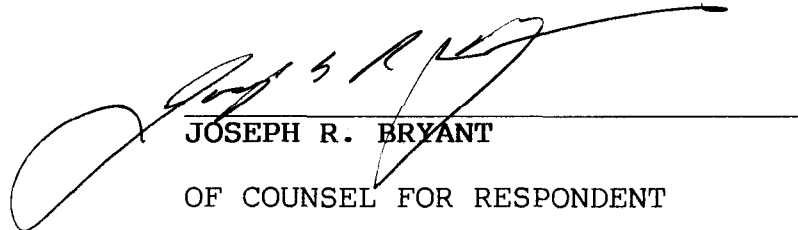


**JOSEPH R. BRYANT**  
Florida Bar #: 0561444  
Assistant Attorney General  
1313 Tampa Street, Suite 804  
Park Trammell Building  
Tampa, Florida 33602  
(813) 272-2670

OF COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to PAUL C. HELM, ESQUIRE, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830, on this 11<sup>th</sup> day of September, 1989.



**JOSEPH R. BRYANT**  
OF COUNSEL FOR RESPONDENT