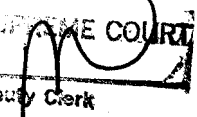


IN THE SUPREME COURT OF FLORIDA

FILED

SEP 32 1988

CLERK, SUPREME COURT  
By   
Deputy Clerk

MICHAEL J. WILHELM, :  
Petitioner, :  
vs. :  
STATE OF FLORIDA, :  
Respondent.

Case No. 74,345

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

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT  
FLORIDA BAR NO. 0143265

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PRELIMINARY STATEMENT

This Brief is filed on behalf of the Petitioner, Michael J. Wilhelm, in reply to the Brief of the Respondent, the State of Florida. References to the record on appeal are designated by "R" and the page number.

ARGUMENT

THE TRIAL COURT VIOLATED **THE** DUE  
PROCESS CLAUSE OF THE FOURTEENTH  
AMENDMENT BY INSTRUCTING THE JURY TO  
APPLY A MANDATORY REBUTTABLE  
PRESUMPTION ON THE ISSUE OF  
PETITIONER'S INTOXICATION.

Contrary to the Respondent's suggestion, Brief of Respondent on Merits, p. 2 n.1, the trial court's act of giving the standard jury instructions on presumption of innocence, burden of proof, and reasonable doubt (R377, 378) was insufficient to cure the mandatory rebuttable presumption contained in the chemical test instruction. (R377) General instructions on the State's burden of persuasion and the defendant's presumption of innocence do not dissipate the error in giving the jury an unconstitutional mandatory rebuttable presumption instruction. *Francis v. Franklin*, 471 U.S. 307, 319-20, 105 S.Ct. 1965, 85 L.Ed.2d 344, 356-57 (1985).

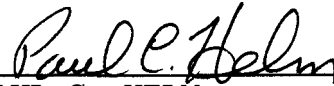
Respondent's assertion that the District Court of Appeal, Second District found the error in giving the chemical test instruction harmless, Brief of Respondent on Merits, p. 3, does not satisfy the State's burden to show that the error was harmless.

See State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). Because the State's evidence of intoxication was disputed by the defense at trial, the State cannot demonstrate that the unconstitutional, burden-shifting chemical test instruction had no affect upon the jury's determination of guilt.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 20th day of September, 1989.

Respectfully submitted,



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