IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2174

CLOTILDE ESTELA MENNA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent,

_______________________________/

PETITIONER'S INITIAL BRIEF ON THE MERITS

MICHAEL J. SNURE of
KIRKCONNELL, LINDSEY,
SNURE AND YATES, P.A.
1150 Louisiana Ave., Suite 1
P.O. Box 2728
Winter Park, FL 32790-2728
Telephone: (407) 644-7600
Florida Bar No. 363235

Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 8

ARGUMENT 10

CONCLUSION 24

CERTIFICATE OF SERVICE 25

CERTIFICATE OF COMPLIANCE 26

TABLE OF AUTHORITIES

CITATIONS:

Combs v. State, 436 So.2d 93, 96 (Fla. 1983) 11

Herring v. State, 501 So.2d 19
(Fla. 3rd DCA 1987) 3-8, 10-11, 13-22

Hoggins v. State, 718 So.2d 761, 770-771 (Fla. 1998) . . . 17

Occhicone v. State, 570 So.2d 902, 908 (Fla. 1990) 6, 16-19, 21

cert. denied 500 U.S. 938 (1991) 16

South Dakota v. Neville, 459 U.S. 553 (1983) 19

State v. Taylor, 648 So.2d 701 (Fla. 1995) . . 4-6, 17, 21-22

State v. Burns, 661 So.2d 842 (Fla. 5th DCA 1995) 6, 16-17, 20-21

rev. denied, 676 So.2d 1366 (Fla. 1996) 6, 16

State v. Sowers, 442 So.2d 239 (Fla. 5th DCA 1983) 6, 16-17, 19

State v. Esperti, 227 So.2d 416 (Fla. 2nd DCA 1969) . . . 4-5

State v. Menna, 793 So.2d 1029 (Fla. 5th DCA 2001) 10

State v. Pettis, 520 So.2d 250, 253 (Fla.1988) 10

Wilson v. State, 596 So.2d 775 (Fla. 1st DCA 1992) 16, 19-21

AUTHORITIES:

Fla. R. App. P. 9.030(a)(2)(vi) 10

Fla. Stat. s. 90.401 15

Fla. Stat. s. 90.402 15

Fla. Stat. s. 90.403 . . . . 3, 12, 15

Fla. Stat. s. 316.1932 21

Florida Constitution, Article I, Section 9 17

Florida Constitution, Article V, Section 3(b)(4) 10

United States Constitution, Fourth Amendment 17

United States Constitution, Fifth Amendment 17

United States Constitution, Fourteenth Amendment 17

STATEMENT OF THE CASE AND FACTS

The Petitioner/Defendant, CLOTILDE ESTELA MENNA, is presently under indictment in Orange County, Florida for first-degree premeditated murder. (R 83-84) She has yet to be tried due to litigation over the legal correctness of a trial judge's order suppressing evidence of her failure to submit to gunshot residue testing.

In the early evening hours of January 21, 2000, the Petitioner's husband, a medical doctor named Glauco Menna, received a fatal gunshot wound. (R 5,9,10) The shooting occurred outside Dr. Menna's office at approximately 6:30 P.M. (R 9,10,86,95) A witness named Eddie Wood told investigating officers that upon hearing the shot he (Wood) immediately looked over and saw a red-haired, thin woman about 6' tall walking away from the scene of the shooting. (R 67-69) Within the next hour or so, Wood was physically accompanied by one or more officers to where he could observe the Petitioner, Mrs. Menna, clearly and at close proximity. (R 67-69) He specifically told the accompanying officer(s) that Mrs. Menna was <u>not</u> the woman he had seen leaving the area; and, further, explained that the person he had seen earlier was red-haired, older than Mrs. Menna, and dressed differently. (R 10,11,68,69)

After this investigative one-person show-up, Mrs. Menna (who was neither under arrest nor considered to be in custody) went to Orlando Regional Medical Center (ORMC) where her husband had been taken. (R9-11) Upon her arrival, between 8:30 P.M. and 9:00 P.M., she was informed by the hospital's chaplain that her husband was dead. (R 11,28) Detective Thomas McCann, who was also at the hospital, then began asking Mrs. Menna questions related to the shooting of her husband. (R 11) Prior to his bringing up the subject of her submitting to a gunshot residue test, Mrs. Menna indicated she was having intestinal difficulties and excused herself at least a couple of times to go to the restroom. (R 12,17) It appeared to McCann that Mrs. Menna would wash her hands after using the restroom. (R 12) From the hospital, Mrs. Menna made efforts to contact her sons who were in graduate school outside the country; and also met privately with the chaplain. (R 29)

Somewhat later and while still at the hospital, detectives McCann and Richard Lallement asked Mrs. Menna if she would submit to gunshot residue testing. (R 13,16,25) She declined, stating that she first wanted to speak to her lawyer. (R 16) Without success, she tried a couple of times to reach her lawyer. (R 16) When the detectives later returned to the subject of gunshot residue testing, she again

declined to submit to testing. (R 16,17,25) Just as she had done earlier in the evening (prior to any request for testing), Mrs. Menna would excuse herself occasionally to go to the restroom. (R 12,17) Again, it seemed to Detective McCann that she washed her hands while in the restroom. At no point was she told that she was under any obligation to submit to testing. (R 17,18,21,29) At no point was she warned of a single adverse consequence that could result from refusing to take the test. (R 17,25)

On February 18, 2000, the State brought an indictment against Mrs. Menna charging her with first-degree premeditated murder in the shooting death of her husband. (R 83)

Mrs. Menna subsequently filed a pre-trial in limine motion seeking the exclusion of evidence and argument that she had refused to submit to gunshot residue testing. (R 84) Relying principally on Herring v. State, 501 So.2d 19 (Fla. 3rd DCA 1987), the gravamen of Mrs. Menna's "exclusion argument" was that her decision to not submit to testing lacked probative value (when it came to showing consciousness of guilt) since she: (1) had no reason to believe she was obligated to take the test; and, (2) had no warning that her refusal could somehow be used against her. (R 87-92) She also pointed out that at the time she declined the officers'

invitation to take the test she was not under arrest; not charged with a crime; under no legal obligation to take the test; and that she was simply making a decision well within the ambit of her right to privacy, as guaranteed by Article I, Section 23 of the Florida Constitution. (R 91) Alternatively, she maintained, under Fla. Stat. s. 90.403, that even if her refusal did have some slight probative value, its probative value was substantially outweighed by its capacity to inject unfair prejudice and confusion into her trial. (R 93) The State thereafter filed a responsive pleading in support of its contention that it was entitled to introduce testimony about Mrs. Menna's refusal for the express purpose of having the jury consider her refusal as circumstantial evidence that she was guilty of murdering her husband. (R 95-96)The gravamen of the State's argument was that Herring v. State, supra, and State v. Esperti, 227 So.2d 416 (Fla. 2nd DCA 1969), had been overruled, sub silentio, by State v. Taylor, 648 So.2d 701 (Fla. 1995). (R 97)

An evidentiary motion hearing was held before Orange County Circuit Judge Maura T. Smith on October 9, 2000. (R 0-81) It was Detective McCann's testimony that Mrs. Menna would from time to time, throughout the evening of January 21, 2000, excuse herself to go to the hospital's restroom. (R 12,17)

When she would emerge, it seemed to him that she had washed her hands while in the restroom. (R 12,17) It was his testimony that some of Mrs. Menna's visits to the restroom occurred before his first request that she submit to gunshot residue testing; and some of her restroom visits occurred afterward. (R 12,17) He couched his testing requests to her as if testing was an optional decision for her to make; and never told her about <u>any</u> adverse consequence which could accompany a refusal. (R 17,18) Detective Lallement likewise testified that he never told Mrs. Menna that she was under any obligation to take the test; and he had no recollection of warning her of any adverse consequence that might result from refusing the test. (R 25,29)

On January 26, 2001, the trial court issued an [amended] order granting the defense motion in limine. Therein, the trial court concluded that, just as in <u>Herring v. State</u>, <u>supra</u>, Mrs. Menna's refusal to submit to gun powder residue testing occurred under circumstances that were not probative of her consciousness of guilt due to the total absence of any warning of adverse consequences and the lack of evidence indicating "… that Ms. Menna had any inkling that the refusal to take the test was anything other than a safe harbor." (R 105,106) The circuit court was of the view that neither

Herring v. State, supra, nor State v. Esperti, supra, were overruled in any respect by State v. Taylor, supra. (R 106)

After filing a Notice of Appeal on January 29, 2001, the State was subsequently permitted to proceed forward on a certiorari petition filed in the Fifth District Court of Appeal in April of 2001. Although acknowledging it did not dispute any of the lower court's factual findings contained in the in limine order, the State contended that the circuit court had departed from the essential requirements of law in relying on Herring v. State, supra. Mrs. Menna filed a Response to the Petition for Writ of Certiorari. In her Response she contended that the trial court had correctly found Herring, supra, to be legally and factually dispositive; that the analysis and result seen in Taylor v. State, 648 So.2d 701 (Fla. 1995), was not inconsistent with Herring, supra, [because Mr. Taylor, unlike Mr. Herring, was factually aware that refusal was not a safe harbor]; and that the circuit court's ruling did not constitute a departure from the essential requirements of law.

On July 13, 2001, the Fifth District granted the State's certiorari petition, quashed the in limine order excluding evidence of Mrs. Menna's failure to submit to gunshot residue testing, and certified conflict with Herring, supra. In its

certiorari ruling the Fifth District declared that the correct "applicable law" governing the evidentiary admissibility of Mrs. Menna's refusal consisted of Justice Grimes' special concurring opinion in Occhicone v. State, 570 So.2d 902, 908 (Fla. 1990); State v. Burns, 661 So.2d 842 (Fla. 5th DCA 1995), rev. denied, 676 So.2d 1366 (Fla. 1996); and State v. Sowers, 442 So.2d 239 (Fla. 5th DCA 1983). Notwithstanding the trial court's well-supported and undisputed fact findings that: (1) Mrs. Menna was never warned of any adverse consequences which could attach to her refusal, and (2) there was no evidence suggesting that she had any reason to believe that her refusal was not a safe harbor — the Fifth District expressed its contrary view that Mrs. Menna's refusal was accompanied by knowledge that adverse consequences could flow from her refusal.

Mrs. Menna filed a timely Motion for Rehearing, or alternatively, Motion for Rehearing En Banc on July 30, 2001. The Fifth District denied this motion on September 14, 2001.

On or about September 26, 2001, Petitioner Menna filed an Amended Notice to Invoke Discretionary Jurisdiction of this Court on the basis of the certified direct conflict involving Herring v. State, supra. On October 17, 2001, this Court issued an Order postponing its decision on jurisdiction and

directing the Petitioner to serve her initial brief on the merits by November 13, 2001.

This appeal follows.

SUMMARY OF ARGUMENT

The appellate court below committed legal, reversible error in granting the State's certiorari petition inasmuch as the circuit court did not depart from the essential requirements of law when it relied on Herring v. State, 501 So.2d 19 (Fla. 3rd DCA 1987), to exclude non-probative, yet extremely prejudicial evidence that Petitioner Menna declined to submit to gunshot residue testing.

It is Petitioner's contention that Herring, Id., was and is "good law"; and that the circuit court correctly determined that Herring, Id., was legally and factually dispositive of her motion when the undisputed evidence before the court showed that (1) detectives presented their testing request(s) as if testing was an optional decision for her to make; and (2) the Petitioner was never warned of a single adverse consequence that might result from refusing the test.

Herring, Id., indeed directly conflicts with the Fifth District's certiorari decision quashing the circuit court's ruling in the case at bar. Contrary to the Fifth District's certiorari decision, Herring, Id., has not been implicitly overruled. Contrary to the Fifth District's factual assertion, there is no record evidence that Mrs. Menna received any warning that any adverse consequences could flow

from her refusal to take the test. Even assuming, arguendo, the existence of some minor legal error by the circuit court, the Petitioner contends that no error occurred which was serious enough to justify the grant of certiorari relief requested by the State.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN GRANTING THE STATE'S CERTIORARI PETITION WHEN THE TRIAL COURT'S APPROPRIATE RELIANCE ON HERRING V. STATE, 501 SO.2D 19 (FLA. 3RD DCA 1986), FELL FAR SHORT OF CONSTITUTING A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW.

Jurisdictional Basis

This Court's jurisdictional basis for discretionary review of the Fifth District's decision in State v. Menna, 793 So.2d 1029 (Fla. 5th DCA 2001), is furnished by the Fifth District's certification of direct conflict with Herring v. State, 501 So.2d 19 (Fla. 3rd DCA 1986), in accordance with Article V, Section 3 (b)(4)of the Florida Constitution, and Fla. R. App. P. 9.030(a)(2)(vi).

Standard of Review Applicable to Court Below

District courts of appeal, unquestionably, have the ability to entertain State petitions for certiorari to review pre-trial evidentiary orders in criminal cases. State v. Pettis, 520 So.2d 250, 253 (Fla.1988). Even so, this Court has emphasized in Pettis, Id. at 252-254, that the writ of certiorari is an extraordinary remedy to be reserved or limited for those relatively few instances where the petitioner can meet the heavy burden of showing that a clear

departure from the essential requirements of law has resulted. The district courts of appeal are to grant certiorari relief only when a clearly established principle of law has been violated, leading to a miscarriage of justice. Combs v. State, 436 So.2d 93, 96 (Fla. 1983). Even when a petitioner does establish a clear departure from the essential requirements of law, the reviewing court still maintains the discretion to refuse to grant the petition. Combs v. State, Id. at 96.

General Analysis

In the case at bar, Petitioner Menna submits that the pre-trial evidentiary ruling made by the circuit court was not a departure from the essential requirements of law, and, therefore, the order should not have been quashed by the Fifth District's granting of the State's certiorari petition.

Mrs. Menna's pre-trial in limine motion sought to preclude the State from putting on "refusal" evidence, and from engaging in argument designed to portray her failure to submit to testing as circumstantial evidence that she was guilty of murdering her husband. (R 87-92) Relying on Herring v. State, supra, she contended that her refusal was inadmissible for lack of probative value (for the purpose of

showing consciousness of guilt and, ultimately, guilt itself) because she was given the impression that the test was optional versus compulsory; and because she received no warning whatsoever that her refusal to take the test could be used against her in some fashion. Her in limine motion alternatively contended, based on Fla. Stat. s. 90.403, that any probative value that could arguably be assigned to the refusal evidence was slight and substantially outweighed by its capacity to inject unfair prejudice and confusion into her trial. (R 93)

At the very start of the evidentiary hearing held before Judge Smith, Mrs. Menna emphasized her motion before the court was rooted in the premise that the State's "refusal" evidence and argument was inadmissible by reason of the rules of evidence. (R 7) She explicitly stated she was not claiming any constitutionally-based right of refusal. (R 7) Detective McCann's hearing testimony clearly established that he had presented his testing requests to Mrs. Menna as if her taking the test was an optional decision for her to make. (R 17,18) Just as clearly, he testified that he never said anything to Mrs. Menna which would have suggested that her refusal to take the test could be used against her in some fashion. (R 17,18) Similarly, Detective Lallement testified he never told Mrs.

Menna that she was under any obligation to take the test; and he had no recollection of warning her of any adverse consequence that might result from electing not to take the test. (R 25,29)

Given the above-described testimony by detectives McCann and Lallement, the circuit court ultimately issued an amended order finding Herring v. State, supra, to be legally and factually dispositive, and granting Menna's motion in limine. (R 105,106)

In Herring, supra, the defendant was asked, following his arrest, if he would submit to a hand swab test for gunshot residue. He was not told that he was required by law to take the test. Nor was he told that his refusal to do so could be used against him in some way. At Herring's first degree murder trial, over defense objection, the State put on testimony about Herring's refusal to submit to testing. Thereafter, the prosecutor's closing argument hammered on the theme that Herring's refusal to cooperate with the officer's request to submit to gunshot residue testing was clear evidence of his guilt. Herring was ultimately convicted of second degree murder. On review, the Third District held that Herring's right to a fair trial had been violated by the wrongful admission and use of evidence that he had refused to

submit to the gunshot residue testing. Herring v. State, supra at 22. In so holding, the Herring Court explained:

> In the present case, because Herring was not told that his refusal to submit to the hand swab test would have consequences adverse to him (or even given the less specific, but certainly intimidating, warning that he had no right to refuse), he had no motivation to submit and his refusal … was indeed a safe harbor. It being quite natural for a person to proceed to safe harbor, it cannot be said that the defendant's decision to do so is circumstantial evidence probative of his consciousness of his guilt.
>
> *** *** *** *** ***
>
> The State argues, however, that because the test was in fact compulsory, the defendant's refusal is admissible. [footnote omitted] The simple answer to this argument is that the fact that the test legally could have been compelled is not relevant in determining the probative value of the defendant's refusal to take the test or the unfairness of admitting evidence of the refusal. Thus, the compulsory nature of the test is relevant only if there is evidence that the defendant was aware of its compulsory nature. The failure to communicate to Herring that the test was compulsory carried with it, we think, the implicit suggestion that the test was permissive and that he thus had a right to refuse. Consequently, even if the refusal had some arguable probative value, its admission would be unfair where the police may have led the defendant to believe that he had a right to refuse. In such a case, the State may, through its implicit promise to the defendant that he has a right to refuse, dissuade the defendant from taking a test — the results of which might prove

> exculpatory — and thereafter enjoy the fruit of the dissuasion, that is, the introduction of evidence of the defendant's refusal. Such a result is unacceptable. [footnote omitted]

Herring, supra at 21.

Herring, supra, is really a simple decision which turned on the application of the most basic of evidentiary principles, namely: evidence is rendered inadmissible when it either lacks probative value, i.e., relevance; or when any comparatively modest probative value it might have is substantially outweighed by its capacity to cause unfair prejudice and mislead a jury. See, Fla. Stat. ss. 90.401, 90.402, 90.403. Under its rationale, the evidentiary quality and admissibility of "refusal" evidence (as circumstantial evidence of guilt), is decided on a case-by -case basis by looking to see if: (1) the officer(s) requesting the test may have explicitly or implicitly led the individual to believe that taking the test was an optional matter; and (2) the individual was put on notice that a refusal to take the test could be used against him in some fashion. In the case sub judice, Judge Smith ultimately decided that Herring, supra, was dispositive of Mrs. Menna's in limine motion, after hearing the testimony of the detectives and considering legal argument. At the motion

hearing, the State did not point the trial court to a single reported decision where a defendant's refusal to submit to seemingly optional testing, particularly gunshot residue testing, was admitted for the purpose of demonstrating guilt —- in the complete absence of record evidence that the defendant had been duly warned (or otherwise knew) that refusing the test could be used against him or her in some fashion. Plainly, the trial court did not depart from the essential requirements of law and cause a miscarriage of justice by foregoing the distinction of being the first court in Florida to essentially rule that refusal evidence is admissible against a defendant who was never apprised that adverse consequences might result from her refusal to take an optional test.

In its certiorari decision, the Fifth District ruled the circuit court had departed from the essential requirements of law by not recognizing that Herring, supra, had been silently and effectually overruled by Occhicone v. State, 570 So.2d 902 (Fla.1990), cert. denied 500 U.S. 938 (1991) — most notably Justice Grimes' separate concurring opinion therein; as well as rejected by its decisions in State v. Burns, 661 So.2d 842 (Fla. 5th DCA 1995), rev. dismissed 676 So.2d 1366 (Fla. 1996); and State v. Sowers, 442 So.2d 239 (Fla. 5th DCA 1983). The

Fifth District also noted that the reasoning in Herring, supra, had been questioned by the First District in Wilson v. State, 596 So.2d 775 (Fla. 1st DCA 1992).

Though it is true that Herring, supra, has been distinguished at times and occasionally criticized, it does not follow that it has been overruled and is no longer "good law". In particular, Herring, supra, has not been implicitly overruled by the legally and factually distinguishable cases of Occhicone, supra; Burns, supra; or Sowers, supra, -- as the Fifth District asserts in the case at bar. This Court specifically addressed Herring in the magistrate opinion in Occhicone, supra at 905, choosing to distinguish facts in Herring from those in Occhicone, but never as much as calling the Herring decision into question. This Court has never overruled Herring and no legitimate claim to the contrary can be made. In fact, this Court's treatment of Herring in Occhicone is tantamount to approval of Herring.

There is also no evidentiary basis and merit to the Fifth District's factual assertion that Mrs. Menna's refusal was accompanied by fair warning that adverse consequences could attach to her refusal.

One material distinction common to Occhicone, supra; Burns, supra; and Sowers, supra, is that those cases [unlike

Herring, supra and the case sub judice] all involved various defense arguments asserting that the state or federal constitutions precluded the State from using refusal evidence against the defendants. The Fifth District's unwarranted reliance on these cases has lost sight of two (2) important considerations. First, the decision in Herring, supra, had nothing to do with a constitutional challenge to the admissibility of the refusal evidence. Second, it is entirely possible, from a legal analysis standpoint, for the State to find itself precluded by the rules of evidence from using certain evidence at a criminal trial —- even if the use of such evidence does not violate any constitutional standard. See, Hoggins v. State, 718 So.2d 761, 770-771 (Fla. 1998), (recognition that the Florida Evidence Code would independently preclude the use of defendant's post-arrest, pre-Miranda silence for impeachment purposes—-even assuming the Florida Constitution did not forbid such use). See also, State v. Taylor, 648 So.2d 701 (Fla. 1995), (this Court employed a free-standing, separate analysis of whether Taylor's refusal to perform pre-arrest field sobriety exercises was admissible under the Florida Evidence Code, after determining that use of the refusal evidence did not offend the Fourth, Fifth, and Fourteenth Amendments to the

United States Constitution; or offend Article I, Section 9 of the Florida Constitution).

Apart from the fact that Occhicone, supra; Sowers, supra; and Burns, supra, concern legal challenges substantively different from the evidentiary issue decided in Herring, supra, -- these cases are distinguishable on other lines as well. In Occhicone, supra, the issue before the Court was whether the defendant's refusal to submit to an atomic absorption test was admissible for the evidentiary purpose of refuting Occhicone's claim of diminished capacity arising from an asserted state of constant intoxication. The majority opinion in Occhicone, supra, ruled that the defendant's reliance on Herring, supra, was misplaced since the State was not seeking to introduce the refusal evidence as proof of his guilt. Secondarily, the majority opinion rejected Occhicone's argument as not being properly preserved for appellate review. In Justice Grimes' separate concurring opinion, he makes the point that Herring, supra, was "inapplicable" since Occhicone was not given any misleading assurance pertaining to whether he could refuse the hand-swab test. Supra at 908. He expresses disagreement with the majority opinion insofar as it stated that Herring, supra, was inapplicable since the refusal evidence came in to demonstrate diminished capacity rather

than guilt. Occhicone, supra at 908. Justice Grimes does use the words "erroneous premise" in the same sentence as the word "Herring," but his concurring opinion does not elaborate on whether he is asserting that Herring, supra, was wrongly decided, or whether he is asserting that Occhicone's reliance on Herring, supra, was misplaced when Occhicone was never led to believe he had the option of refusing the hand-swab test. At any rate, the majority decision in Occhicone, supra, certainly didn't overrule Herring, supra, as a consequence of holding it inapplicable to Occhicone. Nor can it reasonably be said that Justice Grimes' concurring opinion had the legal effect of abrogating or overruling Herring, supra.

State v. Sowers, supra, is a bare-boned, single-page opinion which predates Herring, supra, by nearly seven (7) years. There, the Fifth District relied on South Dakota v. Neville, 459 U.S. 553 (1983), to reject Mr. Sowers' claim that the state and federal constitutions prohibited the introduction of evidence that he refused to submit to a blood-alcohol test after being pulled over or arrested for drunk driving. Again, there is nothing in the Sowers opinion that supports the Fifth District's assertion that Herring, supra, has been overruled.

Wilson v. State, supra at 778, is a First District decision which is critical of Herring, supra. The Wilson Court cites to Occhicone, supra; indicates its acceptance of what it calls "Justice Grimes' view of Herring"; and then goes on to suggest that what Justice Grimes really meant was that evidence of a defendant's refusal has "significant probative value" (and is therefore admissible), unless the defendant's refusal is based on his exercise of a constitutional right. Wilson, supra at 778. The Wilson Court further acknowledged that Mr. Wilson wasn't entitled to appellate relief, under Herring, supra, in any event, since the facts showed that he was well aware at the time of his refusal that there was a written order requiring him to provide handwriting exemplars.

First, Petitioner Menna submits that the Wilson Court's expression of "Justice Grimes' view of Herring" is not legally correct—-assuming that the First District is indeed suggesting that the provisions of the Florida Evidence Code play no role in determining whether a given individual's refusal to submit to testing is logically and legally relevant, and, therefore, admissible into evidence. Secondly, she submits that the First District's expression of "Justice Grimes' view of Herring" is, at best, simply dictum that was wholly unnecessary to support the eventual holding that Herring,

supra, did not control the appeal result because Mr. Wilson refused to submit handwriting exemplars under factual circumstances probative of guilt.

The Fifth District also relied on State v. Burns, supra, to support its conclusion that the circuit court below departed from the essential requirements of law by relying on Herring, supra. In Burns, supra, the defendant was pulled over in a routine traffic stop because of some irregular driving. After Mr. Burns, the driver, exited the vehicle, the officer reportedly observed certain indicia of impairment such as the odor of alcohol, slurred speech, and bloodshot eyes. Following his DUI arrest, Mr. Burns refused to perform field sobriety tests on camera, and refused the breath test. Mr. Burns raised a number of constitutionally-based challenges to the admissibility of the refusal evidence. The Fifth District found Mr. Burns' refusal to submit to breath testing clearly admissible by operation of Fla. Stat. 316.1932 [this statute, as part of the implied consent law, mandates that the requesting officer inform the arrestee that his or her driver's license will be suspended if the test is refused, and specifically provides that the refusal is admissible – thus there would be no "safe harbor" in this circumstance], and further found that the admission of such evidence did not

violate any constitutional provision. The Fifth District also held Burns' refusal to perform post-arrest field sobriety exercises to be admissible — citing to Justice Grimes' special concurring opinion in Occhicone, supra; and Wilson v. State, supra; State v. Burns, supra at 848-849. In Burns, supra, there is no discussion of Herring, supra. Nor does it appear that Mr. Burns was challenging the admissibility of the refusal evidence on the basis that the evidence was not probative of guilt; and, furthermore, was unduly prejudicial.

Lastly, Petitioner Menna notes that this Court's analysis in State v. Taylor, supra is entirely consistent with the holding in Herring, supra, even though the factual circumstances in Taylor, supra, did permit the State to introduce evidence of Taylor's refusal before the jury. Unlike Herring, supra, the record in Taylor, supra at 704, was determined to contain evidence that Mr. Taylor's refusal to submit to pre-arrest field sobriety exercises occurred under circumstances where he was adequately warned of possible adverse consequences flowing from his refusal. Mr. Taylor was warned an arrest decision was imminent; the evidentiary record at the trial court level included judicial notice of his prior two (2) DUI convictions; and just after being stopped, Mr. Taylor had informed the investigating officer that he intended

to follow previously-obtained legal advice by not performing any field sobriety exercises. Based on those case-specific facts, this Court held that Taylor's refusal was not a "safe harbor", and thus was relevant to show consciousness of guilt.

For the reasons expressed above, Petitioner Menna submits that the circuit court properly relied on Herring, supra, as legal authority for the granting of her motion in limine; that Herring, supra was and is "good law"; that even assuming there to be any error committed by the circuit court—it was not error of such a magnitude to warrant the granting of the State's certiorari petition; and that the Fifth District committed reversible error when it granted certiorari relief on the ground that the circuit court's in limine ruling was a departure from the essential requirements of law.

CONCLUSION

Based on the foregoing argument and authorities, the Petitioner requests this Court to reverse the certiorari decision of the Fifth District Court of Appeal, with directions to reinstate the circuit court's amended order granting the defense motion in limine.

Respectfully submitted,

____

MICHAEL J. SNURE
KIRKCONNELL, LINDSEY, SNURE
AND YATES, P.A.
1150 Louisiana Ave., Suite 1
Post Office Box 2728
Winter Park, FL 32790-2728
Telephone: (407) 644-7600
Florida Bar No. 363235

Attorneys for Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Petitioner's Initial Brief on the Merits was furnished by Federal Express delivery to The Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, FL 33299-1927, and a copy of the foregoing document was furnished by U.S. Mail to Assistant Attorney General Belle B. Schumann, Office of the Attorney General, 444 Seabreeze Blvd. 5th Floor, Daytona Beach, FL 32118, this _____ day of November, 2001.

____

MICHAEL J. SNURE
KIRKCONNELL, LINDSEY, SNURE
AND YATES, P.A.
1150 Louisiana Ave., Suite 1
Post Office Box 2728
Winter Park, FL 32790-2728
Telephone: (407) 644-7600
Florida Bar No. 363235
Attorneys for Petitioner.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition is submitted in Courier New 12-point font and thereby complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

____

MICHAEL J. SNURE
KIRKCONNELL, LINDSEY, SNURE
AND YATES, P.A.
1150 Louisiana Ave., Suite 1
Post Office Box 2728
Winter Park, FL 32790-2728
Telephone: (407) 644-7600
Florida Bar No. 363235
Attorneys for Petitioner.