IN THE SUPREME COURT OF FLORIDA

CLOTILDE ESTELA MENNA,

Petitioner,

CASE NO. SC01-2174

vs.

STATE OF FLORIDA,

Respondent,

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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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 Ddeparture FROM THE ESSENTIAL REQUIREMENTS OF LAW.

Page 4 of the State's Brief has stated the issue as being "[W]hether the pre-arrest refusal to submit to a gunshot residue test is admissible to demonstrate consciousness of guilt". Petitioner Menna respectfully submits that the issue before this Court is more appropriately framed as whether the trial court departed from the essential requirements of law in relying upon Herring v. State, 501 So.2d 19 (Fla. 3rd DCA 1986), to exclude refusal evidence it determined to be of little probative value, compared to its substantial ability to create unfair prejudice. The crux of Petitioner Menna's argument is that the circuit court's pre-trial in limine ruling did not involve a departure from the essential requirements of law—-such as would have legally justified the Fifth District's grant of certiorari relief to the State of Florida.

As emphasized throughout Petitioner's Initial Brief, the circuit court below was assessing the admissibility of the "refusal evidence" in the context of Mrs. Menna's assertion that her refusal occurred in circumstances too ambiguous to be probative of guilt; and her related contention that the evidence should be excluded, under Fla. Stat. s.90.403, because any marginal probative value it might have was substantially outweighed by its ability to create unfair prejudice. The reason for Petitioner's emphasis is that one of the more peculiar aspects of the Fifth District's certiorari decision in State v. Menna, 793 So.2d 1029 (Fla. 5th DCA 2001), is that the intermediate appellate court does not even acknowledge that: (1) Mrs. Menna objected to the admissibility of the refusal evidence on the grounds that it lacked logical and legal relevancy; and, (2) the circuit court's amended order (excluding the refusal evidence on the authority of Herring v. State, supra,), was the outcome of the circuit court's evidentiary rulings on Mrs. Menna's relevancy objections. When the circuit court's amended order is accurately viewed for what it is [a case-specific determination that the State's refusal evidence either lacked probative value entirely, or else possessed limited probative value that was

substantially outweighed by its potential to create unfair prejudice], it then becomes readily apparent that the trial court's ruling involved no departure from the essential requirements of law.

The "balancing test" of s.90.403 [where the trial court is required to weigh the probative value of evidence against the danger that the evidence will unfairly prejudice the accused], of course, applies across-the-board to all kinds of evidentiary offers. Pardo v. State, 596 So.2d 665, 667-668 (Fla. 1992); Diaz v. State, 747 So.2d 1021, 1024 (Fla. 3rd DCA 1999),(autopsy findings, like any other evidence, are subject to the balancing test of s.90.403, and the admissibility of the same can only be decided on a case by case basis). This Court's analysis in Taylor v. State, 648 So.2d 701, 704-705 (Fla. 1995), as well as the Third District's analysis in Herring v. State, supra at 20-22, plainly reflect that "refusal evidence", like any other evidence, is admissible (over objection) only if it has probative value, and only if it is not unduly prejudicial. However, under the State's flawed reasoning, evidentiary considerations bearing on relevance apparently serve no real role in determining the admissibility of refusal evidence. Instead, apparently,

admissibility turns exclusively on whether the citizen possessed a constitutional right to refuse the test; or on whether law enforcement officers affirmatively told the citizen she could refuse the test. The State's brief has utterly failed to respond to Petitioner's briefed assertion that the rules of evidence can and do preclude the State's use of evidence quite independently of any constitutional standards.

Moreover, the balancing test required when a s.90.403 objection is raised to an evidentiary offer necessarily involves a great deal of discretion—-and it is the trial judge who is in the best position to make this judgment call. See, Sexton v. State, 697 So.2d 833, 837 (Fla. 1997),(trial court enjoys broad discretion in determining the logical and legal relevancy of evidence); Stephens v. State, 787 So.2d 747, 759 (Fla. 2001),(the trial court is to be accorded wide discretion in determining whether evidence is unduly prejudicial); Sims v. Brown, 574 So.2d 131, 133 (Fla. 1991),(the correct standard of review is that a trial judge's s.90.403 ruling is not subject to reversal unless there is a clear abuse of discretion). Since the s.90.403 balancing test involves trial court discretion focused on the evaluation of case-specific

factors and evidence, the same item of evidence may well be correctly admitted in one case, and just as correctly excluded in another. State v. McClain, 525 So.2d 420, 422 (Fla. 1988). In the case sub judice, the Fifth District committed clear legal error by vacating the circuit court's legally sound, factually supported in limine ruling. There was no requisite departure from the essential requirements of law to justify the grant of the State's certiorari petition. Indeed, the circuit court's order would have deserved to have been left intact even if the Fifth District had been applying the far less rigorous abuse-of-discretion standard of review.

At page 11 the State's brief urges this Court to decline to accept jurisdiction on the ground that there are "significant factual differences" between Herring, supra, and the case at bar. In its related discussion, the State neglects to mention some striking similarities shared between Petitioner's case and Herring, supra, and then discusses its view of factual differences in terms largely not supported by the factual record developed in the trial court. First, both Herring, supra, and the case at bar concerned instances where individuals refused to submit to gun powder residue testing requested by officers

investigating a fatal shooting. Second, in both Herring, supra, and the instant case, the State sought to introduce evidence of the refusal as proof of guilt. Third, in both cases, the trial court was requested to exclude the evidence on the basis that the refusal occurred under circumstances not probative of guilt; or else under circumstances where admitting the refusal evidence would be unfairly prejudicial. Fourth, neither in Herring, supra, nor in the case at bar, did the requesting officer(s): (1) ever inform the defendant that he or she was required to submit to testing; or (2) ever inform the defendant that choosing not to take the test could somehow be used against him or her in some way. Though the State is correct in its observation that Mrs. Menna, unlike Mr. Herring, was told the requested test was non-invasive and painless—-that factual difference does not carry the weight or import that the State tries to assign to it. The Herring Court's ruling rests on the fact that Mr. Herring was not informed he was required to submit to testing; and was not warned that his refusal to do so could be used against him in some way. The two key or pivotal factors seen in Herring, supra, are fully present in the case at bar where law enforcement testimony was uncontroverted that the test was

presented to Mrs. Menna as if it was optional; and she was given no warning that her refusal could be accompanied by adverse consequences.

On pages 3, 5, and 11 of its brief the State contends (without any corresponding record citations), that Mrs. Menna, unlike the defendant in Herring, supra, was told the test provided "reliable" or "scientifically reliable" evidence. Neither Detective McCann nor Detective Lallement ever testified that Mrs. Menna was told the test would produce "reliable" or "scientifically reliable" evidence. Nor is there record support for the State's similar assertion (page 9 of its brief) implying that Mrs. Menna was told the test would "conclusively" eliminate her as a suspect.

On pages 2, 5 and 11, of the answer brief the State represents that Mrs. Menna was told the proposed test could "clear her from prosecution". Even though the Fifth District used this terminology [State v. Menna, 793 So.2d 1029, 1032 (Fla. 5th DCA 2001)], as it was winding its way around the circuit court's fact-findings to reach the contrary conclusion that Mrs. Menna was aware of an adverse consequence—-there is no evidentiary support for the notion that Mrs. Menna was being threatened with prosecution at

the time the testing requests were initially made and refused; or that the testing requests were couched as though her arrest or prosecution was imminent unless she submitted to testing as a means of "clearing herself". Detective McCann's testimony unmistakably indicated the testing requests were presented to Mrs. Menna as though compliance was optional; and that she was told it was a routine investigative procedure which might someday prove useful should an arrested suspect try to make an issue over whether the police did a thorough job of investigating her husband's shooting. (R 13-15, 17-18)

On page 9 of its brief the State contends that the failure of law enforcement to warn Mrs. Menna of any adverse consequences attendant to her refusal has no bearing on the admissibility of her refusal evidence, but "goes [only] to the weight…." Again, the State seems fundamentally unwilling to acknowledge that non-probative or unduly prejudicial evidence (even if probative) is inadmissible under the Florida Evidence Code.

On pages 3, 10, and 11, the State says that introducing evidence of Mrs. Menna's refusal is "just like" introducing evidence that a driver refused to submit to breath alcohol testing after being arrested for driving

while impaired. The fallacy of the State's position is that Fla. Stat. s.316.1932 requires that the arrested driver be explicitly warned that adverse consequences [suspension of driver's license] will flow from his or her refusal to submit to breath alcohol testing. If no such warning is given, no license suspension occurs; and evidence of the refusal is rendered inadmissible. Even though the undisputed evidence showed (and the circuit court so found) that Petitioner Menna wasn't advised of a single adverse consequence that might attach to her refusal to submit to an optional hand-swab test—-the State nonsensically maintains she is "[j]ust like a driver who knows that refusing to submit to a test…can result in the loss of his driver's license…".

As set forth in pages 13 through 23 of her Initial Brief, Petitioner Menna continues to submit that the Fifth District's certiorari decision cannot be reconciled with Herring v. State, supra; that Herring, supra, was legally and factually dispositive of the evidentiary issue before the circuit court below, and was correctly relied upon; that Herring, supra, was and is "good law", and thus has not been overruled; and that the Fifth District erred in quashing the circuit court's in limine ruling when the

circuit court did not depart from the essential requirements of law in determining that the State could not introduce non-probative and unduly prejudicial evidence of her refusal for the purpose of demonstrating guilt.

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief has been furnished by U.S. Mail delivery to Assistant Attorney General Belle B. Schumann, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, this ____ day of December, 2001.

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CERTIFICATE OF COMPLIANCE

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

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