

## EVIDENCE

### Evidence: Gunpowder Residue Tests

*Menna v. State*,  
846 So. 2d 502 (Fla. 2003)

The State may not use a defendant's refusal to submit to a gunpowder residue test against him or her at trial when the refusal is susceptible to a prima facie explanation for the defendant's behavior other than the defendant's consciousness of guilt.

#### FACTS AND PROCEDURAL HISTORY

Clotilde Estela Menna arrived at a hospital shortly after her husband arrived with a fatal gunshot wound. After his death, a law enforcement officer asked Menna to submit to a noninvasive, "hand swab examination to test for gunpowder residue." *Menna*, 846 So. 2d at 503. The officer did not indicate whether the test was permissive or mandatory, and the officer did not explain that her refusal to take the test could be used against her in court. Menna declined to take the test until after she spoke with her attorney but could not reach the attorney at that time.

Later, another officer asked Menna to take the same test and also failed to indicate whether the test was permissive or mandatory. The second officer could not remember whether he informed Menna that a refusal could be used against her in court. As before, Menna declined to take the test until her attorney advised her to do so.

The State charged Menna with her husband's murder. Before trial, she filed a motion in limine to exclude from evidence her refusals to submit to the gunpowder residue test. The trial court granted the motion, and the State petitioned the Fifth District Court of Appeal for a writ of certiorari. The Fifth District granted the petition and quashed the trial court's finding. Menna appealed to the Florida Supreme Court for relief. The Florida Supreme Court overruled the Fifth District and remanded the case to the trial court for further proceedings.

## ANALYSIS

In *Menna*, the Florida Supreme Court considered the issue of whether a defendant's "refusal to submit to . . . gunshot residue testing was sufficiently probative to show her consciousness of guilt to allow its admission into evidence, while considering its potential prejudicial effect." *Id.* at 504. In making its determination, the Court considered two Florida cases with similar facts.

In *State v. Esperti*, law enforcement officers told the defendant that he had no choice but to submit to a gunpowder residue test. 220 So. 2d 416, 417 (Fla. 2d Dist. App. 1969). The defendant responded by physically resisting the test and attempting to taint the results. The Second District Court of Appeal found that the defendant's actions were "susceptible of no prima facie explanation except consciousness of guilt." *Menna*, 846 So. 2d at 504. Therefore, the defendant's actions were relevant and material, and the court held that his refusal to take the test should be allowed into evidence.

Similarly, in *Herring v. State*, police asked the defendant to take a gunpowder residue test. 501 So. 2d 19, 20 (Fla. 3d Dist. App. 1986). However, in *Herring*, law enforcement's request implied that the test was permissive and could be refused. The trial court found that the defendant's refusal to take the test was convincing evidence of his consciousness of guilt. On appeal, the Third District Court of Appeal disagreed. The Third District held that because the defendant refused based upon the belief that the test was permissive, any probative value would be outweighed by unfair prejudice. According to the court, "[a] defendant's behavior is circumstantial evidence probative of his consciousness of his guilt, and ultimately guilt itself, only when it can be said that the behavior is 'susceptible of no prima facie explanation except consciousness of guilt.'" *Id.* at 20 (quoting *Esperti*, 220 So. 2d at 418).

In *Menna*, the Florida Supreme Court adopted *Herring's* reasoning. The Court noted that *Menna* was unaware of any adverse consequences from a refusal to submit to testing and that law enforcement officials led her to believe that the test was optional. Further, the Court noted that *Menna* was not under arrest, not a suspect, and not in custody. Additionally, she was "motivated by a cautious desire to speak with her attorney." *Menna*, 846 So. 2d at 507. Thus, the Court found that *Menna's* decision stemmed from her belief that a refusal to submit to a gun powder residue test

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was a “safe harbor.” *Id.* Accordingly, Menna’s behavior was susceptible to at least one explanation other than consciousness of guilt, and could not be used against her.

#### SIGNIFICANCE

For a defendant’s refusal to submit to a non-invasive gun-powder residue test to be used against him or her at trial, the court must not be able to find another prima facie explanation beyond the defendant’s consciousness of guilt. From a practical perspective, for the State to use a defendant’s refusal in court, law enforcement officers should inform the defendant that the test is required and that refusal can be used against the defendant at trial. This action would remove the apparent “safe harbor” in refusing and make it more likely that the defendant’s subsequent statements and actions would be admissible at trial.

#### RESEARCH REFERENCES

- 14A Fla. Jur. 2d *Criminal Law* § 1007 (2001 & Supp. 2004).

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#### **Evidence: Written Hearsay**

***Hernandez v. State,***  
863 So. 2d 484 (Fla. 4th Dist. App. 2004)

An address on an envelope is not a hearsay statement if it is offered to prove that the sender of the envelope believed that its intended recipient resided at the address listed. Similarly, an addressed envelope is non-hearsay if it is offered as circumstantial evidence to prove that the recipient had control over the address’s physical premises.

#### FACTS AND PROCEDURAL HISTORY

The police arrested Luis Hernandez for possession of cannabis, cocaine, and LSD after a valid search of his girlfriend’s apartment. During the search, the police found an envelope addressed to Hernandez in the bedroom of the apartment. The State attempted to admit the envelope into evidence at trial, and Her-

nandez objected to its admission. He argued that the envelope was inadmissible hearsay because the State offered it to prove the truth of the matter asserted, that Hernandez lived at his girlfriend's apartment. The trial court overruled his objection and admitted the evidence. The jury later convicted Hernandez, who appealed to Florida's Fourth District Court of Appeal on the grounds that the trial court erred when it admitted the envelope into evidence. The Fourth District affirmed the lower court's ruling and upheld Hernandez's conviction.

### ANALYSIS

For purposes of hearsay classification, Florida statutes define a hearsay statement as "an oral or written assertion" or the "non-verbal conduct of a person if it is intended by the person as an assertion." Fla. Stat. § 90.801(1)(a) (2001). The Fourth District Court reasoned that the envelope did not qualify as a written assertion because the sender did not assert that the recipient in fact resided at the address. Instead, when the sender wrote the name and address on the envelope, the sender simply acted on his or her belief that the intended recipient lived at the specified address and would likely receive the letter. The court believed that the drafters of Florida's Evidence Code did not intend to exclude such evidence on hearsay grounds because such nonverbal conduct is inherently reliable. Therefore, the court held that an address on a postal envelope should not be excluded based on hearsay.

Furthermore, for a statement to qualify as hearsay, it must be offered as evidence to prove the truth of the matter asserted. If the State offered the envelope to prove that Hernandez lived at his girlfriend's apartment, then the State's use of the envelope would have been considered hearsay. However, the Fourth District found that the State offered the envelope as circumstantial evidence tending to prove that Hernandez stored personal property in the bedroom and had control over the room and the contraband found therein.

### SIGNIFICANCE

Under *Hernandez*, postal envelopes and similar correspondence that may otherwise appear to be inadmissible hearsay are excluded from the definition of hearsay because the sender's con-

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duct in addressing the envelope is inherently reliable. Because the *Hernandez* rule shifts the court's focus to the sender's belief and non-verbal conduct, future courts employing similar reasoning may extend the rule to admit other written statements as nonverbal acts.

## RESEARCH REFERENCES

- 23 Fla. Jur. 2d *Evidence and Witnesses* § 277 (2004).

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