OA 2-3-93 017

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 79,222

STATE OF FLORIDA,

Petitioner,

vs.

MICHELLE L. HICKSON,

Respondent.

SUPPLEMENTAL AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL) ON BEHALF OF RESPONDENT

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PRELIMINARY STATEMENT

On February 4, 1993, this Court issued the following Order:

> "In order to assist the Court in its resolution of this appeal, the Court requests the parties to file a supplemental brief on what matters, facts or opinions an expert may testify about in reference to the battered spouse syndrome. Compare the holdings of State v. Hennum, 441 N. W. 2d 793 (Minn. 1989), with State v. Briand, 547 A. 2d 235 (N. H. 1988). As part of the foregoing, please discuss whether statements made by a defendant to such an expert are admissible or may be considered by the expert in any opinion he or she may render."

Consequently, FACDL will address only the issues delineated in the Court's Order and will frame the issues of this Supplemental Brief pursuant to the questions in the Order.

STATEMENT OF THE CASE AND FACTS

FACDL relies on the Statement of the Case and Facts contained in the previously filed briefs. During the Argument section of this Supplemental Brief, FACDL will refer to relevant facts where necessary.

SUMMARY OF ARGUMENT

This Court should decide that a compelled examination of Respondent is not necessary because the defense expert cannot give an opinion based upon an interview with Respondent. This Court should decide that, under Florida law, an expert can describe the general characteristics of battered spouse syndrome and give an opinion, based upon a hypothetical, that a person would suffer from the syndrome, if there is other independent evidence in the record which would support such an opinion. This approach would eliminate the problems associated with and the need for a compelled examination of the defendant because the defense expert could not testify based upon a personal interview.

The Minnesota Supreme Court used this general approach in State v. Hennum, 441 N. W. 2d 793 (Minn. 1989). FACDL urges this Court to use this approach as adopted by Hennum, supra, and further modified by the arguments in this Supplemental Brief. This view will clarify the law on battered spouse syndrome in Florida and avoid the troublesome constitutional problems with the possible violation of the right against self-incrimination associated with a compelled psychiatric examination of a defendant.

ARGUMENT

ISSUE I

THE MATTERS, FACTS OR OPINIONS AN EXPERT MAY TESTIFY ABOUT IN REFERENCE TO THE BATTERED SPOUSE SYNDROME.

A. The state of the law in Florida.

This Court must review the current state of the law concerning the battered spouse syndrome to decide the issues presented by this case. The resolution of this cause depends upon the parameters of the battered spouse syndrome in Florida. Consequently, FACDL will first review Florida Law and then law from other jurisdictions to enable this Court to determine the extent of the battered spouse syndrome defense and how it relates to the issues of this cause.

In Hawthorne v. State, 408 So. 2d 801 (Fla. 1st DCA 1982), the First District Court of Appeal decided that expert testimony concerning the battered spouse syndrome was admissible to support a self-defense claim in a second-degree murder case. After a review of case law from other states, the First District decided that expert testimony was admissible because: 1) a jury would not ordinarily understand why a person suffering from battered-woman's syndrome would not leave her mate, would not inform police or friends and would fear increased aggression against herself; 2) such evidence would aid the jury in interpreting the surrounding circumstances which affected the reasonableness of the defendant's claim of self-defense. 408 So. 2d at

806-07. The Hawthorne court specifically noted that the battered spouse syndrome was not a defense of a defective mental state, but a part of self-defense. 408 So. 2d at 806.

The Hawthorne court did not directly address the questions posed by this Court: What matters, facts or opinions may an expert testify about in reference to the battered spouse syndrome. Indirectly, the Hawthorne court did limit the opinions in this area by noting that the defense was not a defense of defective mental state. Therefore, an expert could not testify that a person suffered from the syndrome and lacked the requisite intent to commit a certain crime. The battered spouse syndrome is not a defense of avoidance based upon a mental state which relieves a person of criminal responsibility, it is evidence which helps explain a claim of self-defense.

Under this Court's decision in Chestnut v. State, 538 So. 2d 820 (Fla. 1989), such evidence of a diminished or defective mental state (short of a claim of insanity) would not be admissible. Therefore, the rationale of Hawthorne, supra, and Chestnut, supra, imply that the expert may not testify about the exact state of mind of a person claiming a battered spouse syndrome - self-defense: i.e., the expert could not testify that on the date in question the defendant suffered from the syndrome and because of that state of mind committed the crime in question (and should be legally relieved of criminal responsibility).

The opinion in Hawthorne does not describe the evidentiary extent of the expert's opinion nor does the opinion describe how the expert may testify: May the expert opine that the

defendant suffers from battered spouse syndrome and the crime in question was caused by that syndrome (self-defense based upon the syndrome)?; May the expert describe the characteristics of the syndrome and then, based upon a hypothetical (based upon facts in evidence), opine that the defendant suffered from the syndrome without giving an opinion that the instant case is a case of self-defense based upon battered spouse syndrome?; may the expert merely describe the characteristics of the syndrome and give no other opinion on whether the defendant suffers from such a syndrome and whether the instant case is a case of self-defense based upon the syndrome?

Florida law does not directly answer the above questions and does not delineate how an expert may testify in a battered spouse syndrome case. FACDL submits that this Court should review the decisions from state jurisdictions to answer these questions. FACDL will review how other states have answered them. The FACDL will then discuss State v. Hennum, supra, and State v. Briand, supra, as requested by the Court. FACDL will next propose its solution to this problem as it relates to the certified question in this cause.

B. The law from other states on the extent of an expert opinion in a battered spouse syndrome - self-defense case.

The states which allow evidence of the battered spouse syndrome have a wide range of differing degrees of expert testimony. See generally 18 ALR 4th 1153, Admissibility of Expert

or Opinion Testimony on Battered Wife or Battered Woman Syndrome. FACDL assumes this Court will permit some type of evidence on the battered spouse syndrome. The State has not argued that this Court should overrule Hawthorne.

In Georgia, the expert may testify on the syndrome and the ultimate issue in the case: the defendant suffered from the syndrome and the crime in question was self-defense caused by the syndrome. Smith v. State, 277 S. E. 2d 678 (Ga. 1981). Kentucky permits an opinion that the defendant suffered from the syndrome (with a general explanation of the syndrome), but not an opinion on whether the crime in question was a result of the syndrome. Commonwealth v. Craig, 783 S. W. 2d 387 (Ky. 1990). Washington, Texas, South Carolina, California, and Kansas use this approach. See State v. Kelly, 655 P. 2d 1202 (Wash. 1982); Fielder v. State, 756 S. W. 2d 309 (Tex. Crim. App. 1988); State v. Wilkins, 407 S. E. 2d 670 (S. C. App. 1991); People v. Aris, 215 Cal. App. 3d 1178 (Cal. 4th Dist. 1989); State v. Hundley, 693 P. 2d 475 (Kan. 1985). Some states allow expert testimony about the general characteristics of battered women, if the defendant establishes that she is such a battered woman. See Commonwealth v. Stonehouse, 555 A. 2d 772 (Pa. 1989), (general testimony about battered women); State v. Anaya, 438 A. 2d 892 (Me. 1981).

Other jurisdictions have generally established 3 types of expert testimony on battered spouse syndrome: 1) testimony on the syndrome, the fact that the defendant suffered from the syndrome and that the crime in question was a result of the syndrome; 2) testimony on the syndrome and the fact that the

defendant suffered from the syndrome, but no opinion that the crime in question was a result of the syndrome (this issue being a jury question); and 3) testimony only on the general characteristics of the syndrome - the jury would decide whether the defendant suffered from the syndrome and whether the crime in question was a result of the syndrome.

This Court must decide what type of expert testimony should be admissible in Florida generally and in this case in particular. The State of Florida in its Supplemental Brief did not address this question except to argue that: 1) the expert in this case should not be used as a subterfuge for the introduction of testimony by Respondent without her testifying (FACDL completely agrees with the State on this issue); and 2) the expert in this case should not be allowed to testify about the battered spouse syndrome because his opinion would be based upon the interview of Respondent.

FACDL suggests that this Court adopt the following evidentiary rule concerning the admissibility of battered spouse syndrome in connection with the issues in this case, if the Court decides it must determine whether the State can compel the psychiatric examination of Respondent: This Court should adopt the method used in Kentucky, Washington, Texas, South Carolina, California and Kansas (based on a hypothetical): <u>The expert may testify about the syndrome and give an opinion on whether the defendant suffered from the syndrome, if there is other evidence in the record which supports such a finding that the defendant was a battered spouse and there is a claim of self-defense</u>. <u>See</u>

Pruitt v. State, 269 S. E. 2d 795 (Ga. App. 1982), (expert testimony inadmissible because of no evidence of self-defense or that defendant was a battered spouse); see also Commonwealth v. Moore, 514 N. E. 2d 1342 (Mass. App. 1987).

If this Court adopts this approach, an expert would give an opinion on whether the defendant suffered from the syndrome, in the form of a hypothetical, based upon facts from testimony by the defendant or other witnesses. Under this scheme, the expert could not base any opinions on what was said by the defendant during an interview. Therefore, the expert in this case could testify because his opinion would not be based upon his interview with Respondent, but upon facts established at trial by Respondent or other witnesses. If such facts were not established, then the expert could not testify. This approach would solve the problem of whether the State had the right to compel an examination of the defendant because the defense could not use the results of such an examination. Under this approach such examinations would not be necessary. Therefore, it would be unnecessary for the State to have its own independent examination. In connection with this problem, this Court specifically asked the parties to compare State v. Hennum, supra, and State v. Briand, supra. FACDL will now address those cases in relation to the issue before the Court and the cases described above.

C. State v. Hennum compared with State v. Briand.

In State v. Hennum, supra, the Minnesota Supreme Court faced the same issue presented by this cause: May the state compel an adverse mental examination of a defendant (after an examination of the defendant by a defense expert) claiming self-defense as a result of the battered spouse syndrome? The Hennum court decided in that particular case it was not error to compel the examination of Hennum. (Hennum was examined by the state expert and the expert testified in rebuttal. Hennum was convicted.) The Hennum court reasoned that the trial court lacked the authority to order such an examination because there was no statutory authority for compelled examinations by the State. (If the Court decides not to reach this issue, FACDL suggests now, as it did in its brief and at oral argument, that the Court rule that the trial court lacked the authority to compel an examination of Respondent. The Criminal Rules of Procedure would have to be amended to permit such an examination.) However, it was not error in that case because Hennum's constitutional right to remain silent was not violated because she waived her right by her prior testimony and the testimony of the defense expert.

To avoid such problems in the future, the Hennum court established limits to expert testimony on battered spouse syndrome. The court stated:

> "We hold that in future cases expert testimony regarding battered woman syndrome will be limited to a description of the general syndrome and the characteristics which are present in an individual suffering from the syndrome. The expert should not be allowed to testify as to the ultimate fact that the particular defendant actually suffers from battered woman

> syndrome. This determination must be left to the trier of fact." 441 N. W. 2d at 799.

The Hennum court further noted that each side may present witnesses who may testify to characteristics possessed by the defendant which are consistent with those found in someone suffering from battered woman syndrome. 441 N. W. 2d at 799. Chief Justice Popovich wrote that this restriction would remove the need for either side to conduct an examination of the defendant. Id.

In State v. Briand, 547 A. 2d 235 (N. H. 1988), the New Hampshire court addressed the problem before this Court in a different manner than the Hennum court. As in this case, there was evidence that a psychologist had interviewed the defendant and might present testimony to prove that the defendant suffered from battered woman's syndrome. However, there was no evidence before the New Hampshire Supreme Court as to the exact nature of the anticipated testimony. Consequently, the New Hampshire Supreme Court did not rule upon its admissibility because the State did not challenge the evidence at that time.

The New Hampshire Court addressed only the issue of whether the State could compel an examination and whether such an examination would violate Briand's right against self-incrimination. The Briand court first decided that a trial court had inherent authority to order such an examination, even in the absence of a statute or rule authorizing examinations. The Briand court then considered whether a compelled examination violated constitutional principles. According to the Briand court, the

compelled examination would not violate the right against self-incrimination because the use of the defense expert (through an interview with the defendant where the expert recounts what the defendant said) was a waiver of the privilege against self-incrimination. The key to Briand is the assumption by the New Hampshire Supreme Court that the expert would relate to the jury what the defendant said during the interview:

> "...we view the defendant's anticipated reliance on expert evidence as a mechanism for introducing her own account of the facts, which should carry the accepted consequence of waiving her Article 15 (self-incrimination provision of New Hampshire Constitution) privilege." 547 A. 2d at 238.

The Briand court further assumed that an expert could not offer an opinion without an interview which contained the defendant's account of the events in question and state of mind. 547 A. 2d at 239. On this subject, the court noted:

> "Because the expert's testimony is thus predicated on the defendant's statements, the latter are explicitly or implicitly placed in evidence through the testimony of the expert during his direct and cross-examination. Since a defendant would waive his privilege against compelled self-incrimination if he took the stand and made those same statements himself, his decision to introduce his account of relevant facts indirectly through an expert witness should likewise be treated as a waiver obligating him to provide the same access to the state's expert that he has given to his own." 547 A. 2d at 239.

The foundation for the Briand decision is the assumption that the defense would introduce the defendant's version of the events through an expert, without testimony from the defendant.

This testimony would be a waiver of the right against self-incrimination. Therefore, the State should have the same access to the defendant as the defense expert had. FACDL agrees that if this Court decides that Florida law permits an expert to give such an opinion based upon a personal interview, without testimony by the defendant, then the State should be able to compel an examination of the defendant. However, FACDL strongly urges this Court to not adopt this position. FACDL will discuss below how this Court can avoid the problem of possible violations of the right against self-incrimination (by compelled examinations).

D. FACDL's proposed solution to the problems posed by this case.

If this Court adopts the following view of the battered spouse defense, then the possible myriad problems of a compelled examination (the use of derivative evidence gained through the examination of defendant; the problems which will arise if his defense of battered spouse syndrome is abandoned at trial or ruled inadmissible) could be avoided. FACDL suggests a solution between the holdings of Briand, supra, and Hennum, supra. This Court need not follow Briand because this Court should not decide that an expert can relate the defendant's version of the events without accompanying testimony by the defendant. FACDL agrees with the State that such evidence should not be admissible. Briand decided

only that a defendant waived the right against a compelled examination when the expert so testified.

The Minnesota Supreme Court in Hennum decided that it could avoid the possible problems with the compelled examination by holding that an expert could only testify about the general characteristics without an opinion on whether the defendant suffered from the battered spouse syndrome. FACDL respectfully suggests that Hennum is too narrow under the Florida Evidence Code. See Section 90.702, Florida Statutes. Under Section 90.702, if the expert can relate the opinion to evidence at trial, an opinion on whether the defendant suffered from the syndrome would be admissible. FACDL suggests a middle ground between Hennum and Briand. In this case and in all future cases, the expert could not testify based upon a personal interview with the defendant. The expert could not testify that "the defendant told me this and based upon that, I conclude or opine...". The expert could describe the general characteristics of the battered spouse syndrome and then give an opinion on whether a person suffered from the syndrome, based upon a hypothetical which related to other evidence introduced in the trial.

This approach would accomplish several goals. First, it would eliminate the need for compelled examinations and the "Pandora's Box" of constitutional problems discussed by the Briand court and the cases cited in it. See 547 A.2d at 238-41; Buchanan v. Kentucky, 483 U. S. 402, 107 S. Ct. 2906 (1987); Estelle v. Smith, 451 U. S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). Secondly, it would eliminate the possibility of an expert being a

conduit for otherwise inadmissible evidence (expert testifies to what the defendant said without any testimony by the defendant). Thirdly, this approach will comply with Section 90.702 because the expert will relate the opinion to other evidence introduced in the trial, i.e., evidence from the defendant or other witnesses.

The State erroneously argues that the expert in this case could testify as to inadmissible evidence (hearsay statements made by the defendant) under Section 90.704, Florida Statutes. The State overlooks the fact that Section 90.704 is dependent on Section 90.702 - the opinion must be related to other evidence in the trial. This Court should hold that the opinion in this area is not admissible until there is other evidence of the syndrome introduced in the trial. Therefore, the expert must relate the opinion to other evidence which is independent of the opinion. (The State seems to acknowledge this fact in footnote 2 of page 5 of the Supplemental Brief.)

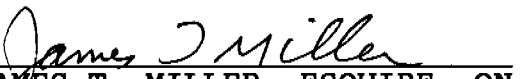
FACDL suggests that the way the expert should relate the opinion is through a hypothetical based upon independent facts in evidence. If this Court rejects this position, it should, at least, adopt the holding of the Minnesota Supreme Court in Hennum:

> "No compelled examinations of the defendant because the expert can only generally describe the characteristics of the syndrome. No opinion on whether the defendant actually suffers from the battered spouse syndrome." See 441 N. W. 2d at 800.

CONCLUSION

If this Court ultimately decides that it must determine the extent of the battered spouse syndrome (to determine whether the trial court erred in this cause), it should decide that a compelled examination of Respondent is not necessary because the defense expert cannot give an opinion based upon an interview of Respondent, but only give an opinion based upon a hypothetical which is based upon other facts in evidence.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished, by mail, to the Assistant Attorney General Gypsy Bailey, at the Office of the Attorney General, Department of Legal Affairs, The Capitol Building, Tallahassee, Florida 32399, Counsel for Petitioner, and, by hand, to Thomas G. Fallis, Esquire, 343 E. Bay Street, Jacksonville, FL 32202, Counsel for Respondent, this 19th day of March, 1993.

JAMES T. MILLER, ESQUIRE, ON BEHALF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS