IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No.: 79,222

MICHELLE L. HICKSON,

Respondent.

RESPONDENT'S ANSWER BRIEF ON MERITS

LAW OFFICE OF
ELIA & FALLIS, P.A.

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ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS (cont)

TABLE OF CITATIONS

TABLE OF CITATIONS (cont)

OTHER AUTHORITES

PRELIMINARY STATEMENT

Respondent, **MICHELLE L. HICKSON**, petitioner in the case below and defendant in the trial court will be referred to in this brief as the defendant. Petitioner, the State of Florida, respondent in the case below and the prosecuting authority in the trial court will be referred to in this brief as the State.

References to the opinion of the First District contained in the attached appendix will be noted by the symbol "A".

STATEMENT OF THE CASE AND FACTS

The Respondent adopts the statement of the case and facts in Petitioners initial brief.

SUMMARY OF ARGUMENT

The First District correctly decided the case on its merits in a well reasoned opinion that clearly distinguished the insanity defense from that of self defense based in the battered woman syndrome, and concluded that a compelled examination would violate Respondents Fifth Amendment Rights.

The Court noted that in the case at bar there was no per se waiver and for the purpose of this case the certified question need not be determined. Consequently this case is not ripe for adjudication.

If the Court decides to go to the merits of the case it should follow the decision of the First District and answer the certified question in the negative.

ARGUMENT

ISSUE I

IS THE DEFENDANT'S CONSTITUTIONAL PRIVILEGE AGAINST TESTIMONIAL EXAMINATION WAIVED WHEN A DEFENSE PSYCHOLOGIST TESTIFIES "ABOUT THE CIRCUMSTANCES GIVING RISE TO THE ALLEGED BATTERED-SPOUSE SYNDROME" BASED IN PART ON DEFENDANT'S STATEMENTS TO SUCH WITNESS WHICH HAVE BEEN FULLY DISCLOSED TO THE PROSECUTION BEFORE TRIAL?

A.

The First District correctly decided that relying on the defense of Battered Spouse Syndrome does not constitute a per se waiver of constitutional testimonial immunity under the Federal or Florida Constitutions.

1. A compelled examination would violate the defendant's constitutional right against self-incrimination.

The prosecution's motion to "evaluate" the defendant is quite simply a request for an order to require **MICHELLE L. HICKSON** to submit to questioning by an agent of the State and in effect give a deposition. The relief sought would, therefore, easily satisfy the three prong test that defines the privilege against self-incrimination: the evidence sought will be compelled, testimonial and incriminating. See United States v. Doe, 465 U.S. 605 (1984).

The "compulsion" prong is met by the court order to submit to questioning. Such an order is indistinguishable from a subpoena to answer questions before a grand jury, Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964), or a subpoena to produce documents, United States v. Doe, 465 U.S. 605, which have been held to constitute compulsion within the historical meaning of the privilege.

The "testimonial" prong is met by the fact that the evidence sought is the content of the defendant's thoughts. She is not being asked to speak merely to identify her voice, United States v. Wade, 388 U.S. 218 (1967), or being asked to submit to a physical examination, cf. Schmerber v. California, 384 U.S. 757 (1966). Rather, the prosecution seeks to compel her to reveal information to use in its case against her.

The "incrimination" prong is satisfied because of the intended use of the defendant's statements. When the State seeks an examination order to elicit statements for the purpose of convicting or punishing a defendant, the examination's purpose is incriminating.

Like Estelle v. Smith, 451 U.S. 454 (1981), the purpose of the examination in the case at bar is clearly incriminating. In Estelle, the State argued that the opinion of its psychiatrist as to the defendant's dangerousness based on an interview with the defendant was not incriminating because his testimony was "used only to determine punishment after conviction". Estelle, 451 U.S. at 462. The Court disagreed, holding that the privilege applies to both conviction and punishment.

> The essence of this basic constitutional principle is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labors of it officers, not by the simple, cruel expedient of forcing it from his own lips" Culombe v. Connecticut, 367 U.S. 568, 581-582 (1961) (opinion announcing the judgment) [further citations omitted].

Ibid. (emphasis in original).

In the case at bar, the defendant has neither been found guilty by reason of insanity nor convicted. For the State to be allowed to compel her to make statements about the offense charged would be clearly incriminating.

The statements are no less incriminating because of the State's position that the statements are inadmissible on the issue of guilt. The State's position is that evidence derived from such an evaluation can be used only to rebut the defense's expert testimony and cannot be used as substantive evidence of the defendant's guilt in the State's case-in-chief.

This position ignores the reality that any statements made would obviously bear on the defendant's guilt and be substantive evidence thereof however they are presented to the jury. All evidence will be before the jury by the time it starts deliberating.

A more fundamental flaw in the State's argument is that the State is contending its expert testimony would not be used to prove an element of the charged offense of second degree murder. If that were true, then the converse would also be true that Defendant's defense of battered spouse syndrome/self defense, does not rebut an element of the crime. However, self-defense does rebut an element of second degree murder, that being the depraved mind element. See Martin v. Ohio, 107 S.Ct. 1098, 1102 (1987). Furthermore, as the First DCA correctly reasoned in the case below, Hickson v. State, 589 So.2d 1366, 1367 (Fla. 1st DCA 1991), the battered spouse syndrome is relevant as to the issue of self-

defense. The court used Hawthrone v. State, 408 So.2d 801 (Fla. 1st DCA 1982) in reaching that conclusion and specifically stated:

> The courts recognize that the syndrome in question does not involve insanity, mental disability, or diminished capacity, and that it bears instead on the self-defense issue of the reasonability of defendant's belief of imminent danger of serious injury. Id at 1367. (Emphasis added).

Thus the state's expert testimony would be offered to satisfy their burden of proving an element of the crime. In effect the prosecution here will use its expert to prove the absence of self-defense and the presence of depraved mind. This is contrary to numerous cases ordering a psychiatric examination of the defendant which have recognized that her statements cannot be used on the issue of guilt, State v. Whitlow, 210, A.2d 763 (N.J. 1965); People v. Martin, 182 N.W.2d 741, 743 (Mich. Ct. App. 1970), but that such evidence can be used in determining insanity, State v. Seehan, 258 N.W.2d 374 (Iowa 1977), or diminished capacity, People v. Danis, 107 Cal.Rptr. 675 (cal. Ct. App. 1973); United States v. Halbert, 712 F.2d 388 (9th Cir. 1983), cert denied, 465 U.S. 1005 (1984).

In the case at bar, no jury instruction will operate to make the expert's testimony admissible on an issue other than guilt. Telling the jury that the expert's opinion is only admissible on the issue of self-defense goes directly to guilt or innocence. This permits the jury to use the expert's opinion as well as the facts elicited from the defendant which support that opinion in deciding whether the prosecution has met its burden. Estelle recognized that the privilege prohibits such use of either the

expert's opinion or the underlying facts.

> [The psychiatrist's] prognosis as to future dangerousness rested on statements respondent made, and remarks he omitted, in reciting the details of the crime. The Fifth Amendment privilege, therefore, is directly involved here because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination.

451 U.S. at 464-5 (footnote omitted).

Here, too, the State wants to use the substance of the defendant's disclosures to support its expert's opinion on self-defense. Any instruction that affirmatively describes the probative value of the expert's testimony will necessarily tell the jury to consider it on the issue of guilt. Indeed, the many courts that have upheld the admission of expert evidence on battered woman syndrome have done so because the testimony is helpful to the jury on the self-defense issue. See e.g., State v. Anaya, 438 A.2d 892, 894 (ME. 1981); State v. Allery, 682 P.2d 312 (Wash. 1984). The prosecution is, therefore, attempting to compel the defendant to make statements that will be used to determine her guilt.

2. By relying upon the defense of self-defense based on battered woman syndrome and introducing psychological testimony with respect to that syndrome, the defendant has not waived her right against self-incrimination.

As a general rule, the privilege against self-incrimination precludes the prosecution from obtaining a court order to question the defendant about her involvement in criminal activity. To overcome the privilege, the prosecution here relies on theories of waiver, and necessity, and fundamental fairness. These theories

draw support from cases where a defendant has raised the insanity defense, in which cases these theories are favored for two reasons.

First, unlike a claim of self-defense, a defense based solely on insanity admits all the elements of the crime charged. Having admitted all the elements, there is no danger that the defendant's statements in a pretrial evaluation will help the prosecution prove the offense charged.

Second, the insanity defense and other similar defenses (e.g. diminished capacity) concern only the defendant's mental state, not the reasonableness of her actions.

In contrast, self-defense based on the battered woman syndrome does not admit every element of the crime, there are no procedural safeguards available and the defendant's subjective mental state is not the focus of the defense.

The defendant denies that she acted with premeditation or depraved mind. The major issue before the jury is guilt - the reasonableness of the defendant's actions. See Hawthorne, 408 So.2d at 806-7. She relies on the "defense" of extreme emotional disturbance due to provocation which also denies premeditation or depraved mind. She contends that because of the battered woman syndrome she was justified or at least reasonably provoked to act, and in either case, did not act with the mens rea charged.

Unlike the insanity defense, the defense relied on depends for its success on the establishment of objective standards: i.e., was it reasonable for the defendant to fear for her life? Was it reasonable for the defendant to be provoked under the

circumstances? This is in stark contrast to an insanity defense which in this State is purely subjective - Did this defendant suffer from a mental illness which caused the crime?

In insanity cases, experts testify predominantly about the peculiar characteristics of an individual, whereas, an expert on the battered woman syndrome, a psychologist, testifies mainly about "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 . . ." Hawthorne v. State, 408 So.2d 801, 805 (Fla. Dist. Ct. App. 1982), further review denied by 415 So.2d 1361 (Fla. 1981). [quoting Smith v. State, 277 S.E.2d 678, 683 (Ga. 1981)]. The focus is on the syndrome and not the defendant.

Insanity-type defenses consider only the defendant's mental state. Self-defense based on battered woman syndrome and extreme emotional disturbance with provocation deal with the reasonableness of the defendant's thoughts and actions. In the latter cases, the defendant must not only prove that she thought certain things but also that her thoughts and actions were reasonable. The expert's testimony on battered woman syndrome helps the jury understand what was reasonable conduct in the situation.

In insanity cases, waiver is premised on the fact that that defense is in effect a confession of guilt to the offense charged. See United States v. Hinckley, 525 F.Supp. 1342 (D.D.C. 1981), opinion clarified and reh'g denied, 529 F.Supp. 520 (1982), aff'd, 672 F.2d 115 (D.C. Cir. 1982). The defendant has either admitted

or a jury has found that the State has proven beyond a reasonable doubt all elements of the crime. Cf. State v. Vosler, 345 N.W.2d 806, 813 (Neb. 1984).

Unlike cases involving insanity where the jury can be instructed to consider the expert evidence only on the sanity issue, there is no separate verdict in a self-defense case. There is no implicit admission of guilt.

> [As opposed to insanity defenses], a person who introduces evidence of his mental condition to rebut the presumption that the act he performed was coupled with requisite intent makes no admission of the crime. Such evidence is offered to show only that the crime alleged was not committed. It carries with it no concession of the State's case and does not interject an issue foreign to the State's burden of proof. Throughout the proceedings, the State is contending that the Defendant committed the crime, and the defendant is contending he did not. In such a situation the fifth amendment requires that the State prove its case without compelling the defendant to submit to interview by those in its employ. Volser, 345 N.W.2d at 813.

Such is the case when self-defense is claimed - the defendant does not admit guilt and in most cases denies an element of the charge - depraved mind. Compare Hinckley, 525 F.Supp. 1342. Without a finding or admission of guilt, a limited waiver is impossible to find. There is simply no waiver in self-defense cases and the waiver that the State asks this Court to find cannot be properly limited in such a way as to protect the defendant's rights.

The Court below properly applied these principles of law when it held that:

> Disclosure by defendant of an examining expert witness in support of the defense should not, accordingly, constitute a per se waiver of constitutional testimonial immunity under the Federal or Florida Constitutions. Hickson v. State, 589 So.2d at 1369.

The Court further and properly distinguished Henry v. State, 574 So.2d 66 (Fla. 1991), an insanity case, both on a factual and constitutional level because

> The battered spouse syndrome in relation to self defense does not place in issue a defective mental state on the part of the accused. Nor does the defense necessarily rest on any subjective mental state disclosures by defendant. Id at 1368. (Emphasis added).

The First DCA also properly distinguished the case at bar from State v. Myers, 239 N.J. Super. 158, 570 A.2d 1260 at 1266 (1990). The Court held that in a battered spouse syndrome case, such as the case at bar,

> A psychological witness' effort should properly be to illuminate the general syndrome or pattern of typical reactions as that pattern may relate to circumstances in evidence, and not, as referenced in Myers, supra, to provide "insight into the operations of defendant's mind, which defendant seeks to illuminate and explain through the testimony of experts who have had the opportunity to examine her." Id at 1368, 1369.

The First DCA properly used the applicable law in a well reasoned and thought out opinion when it held that a defendant does not waive her right against self-incrimination when she relies on battered spouse syndrome/self defense, since there are clear distinctions between an insanity defense and the self defense issue, and as such the Court below should not be reversed.

3. The defendant's constitutional privilege against testimonial examination is not waived when a defense psychologist's and his testimony about the circumstances giving rise to the battered-spouse syndrome are disclosed to the prosecution before trial even though defendant's statements were disclosed to the prosecution and used in the expert's diagnosis and evaluation.

In order for any waiver of constitutional rights to be valid, it must be freely and voluntarily made.

In this case there has been no valid waiver of the right against self incrimination since the defendant was obligated to disclose the defense psychologist under the rules of discovery. See Florida Rules of Criminal Procedure 3.220(d). Furthermore, once disclosed, the prosecution has an absolute right to depose the expert and to inquire as to the basis of his opinion. Also, the Defendant must produce to the prosecution:

> Reports, statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons. (See Florida Rules of Criminal Procedure 3.220(d)(2)(ii).

The defense cannot object to the expert giving such a deposition or have the right to limit the expert's testimony at the deposition. Such objections would be tantamount to tampering with a witness and impeding the investigatory power given to the state by the Florida Rules of Criminal Procedure 3.220(i) and exposing defense counsel to disciplinary action by the court. Said action includes but is not limited to contempt of Court, fines and penalties. A less draconian punishment includes the sanction of excluding the expert witness, thus depriving the defendant of her

entire theory of defense.

In any event the defense production of the expert witness and his testimony to the prosecution is compelled by the Florida Rules of Criminal Procedure and cannot be held to constitute a free and voluntary waiver of the constitutional right against self incrimination. Should this Honorable Court find in favor of the State that reliance on the battered spouse syndrome and production of defense expert with his testimony and reports constitutes a waiver, then defendant respectfully requests that said finding be made applicable prospectively, since Defendant in good faith relied on existing law that her actions would not constitute a waiver.

4. The State has shown no overriding necessity for such an intrusive invasion of the defendant's constitutional rights in light of the many alternatives provided by the rules and by the defendant.

The State also argues that as insanity cases, the State is put at an unfair disadvantage if the defense is permitted to use a psychologist who has interviewed the defendant and the State's expert cannot interview her.

To the extent that the defense expert will attempt merely to educate the jury about the battered woman syndrome, the State's expert is at no disadvantage if he has not interviewed the defendant. To the extent that the defense expert uses information provided by the defendant, the State's expert is disadvantaged only if this information is unavailable from other sources.

Here, however, alternative sources are legion. The State has already deposed defendant's expert witness Dr. Krop, and has

elicited statements of the defendant, friends, and relatives that witnessed signs of abuse on the defendant's body, as well as test results that led to his findings.

The State has the option of allowing its expert to sit during trial and listen to the testimony of both the expert and the defendant and later offer any rebuttal at the proper time. This has been the practice in this jurisdiction as well as the State of Florida. The State may interview friends, relatives, and neighbors and depose the same, which it has already done, and offer that testimony.

The defendant in this case has already given the police an account of the stabbing.

Estelle stated that without being able to examine the defendant, the prosecution "may [be] deprive[d] . . . of the only effective means" to rebut the defense. 451 U.S. at 465 (emphasis added). Clearly, the case at bar is not such a case.

> In short, this case is not one in which the State was bereft or resources, absent a mental examination, to dispute the defendant's claim . . . Volser, 345 N.W.2d at 812.

Any contention by the State that these alternatives are not adequate is as yet untested - the State has neither exhausted these alternatives nor shown how on a theoretical level they are per se inadequate. To the minimal extent that these broad alternatives are insufficient, their minimal inadequacy is simply insufficient to require the overcoming of a constitutional right. Necessity may suffice to overcome a mere statutory privilege between a

psychiatrist and patient, but constitutional rights deserve more protection - not only is necessity required but so is a valid waiver. As discussed above, there is no waiver in this case and any analogy to "purely mental" defense in which guilt is admitted or proven independently is inapposite.

> Invocation of a fairness doctrine to overcome a properly invoked Fifth Amendment right, absent any foundation for waiver or estoppel, would erode and could potentially destroy the right.

United States v. Malcolm, 475 F.2d 420, 425 (9th Cir. 1973).

In short, there is no fairness exception to the privilege against self-incrimination where the defense is self-defense and the defendant intends to introduce psychological testimony on that issue.

In its opinion, the First D.C.A. stated that a defendant may not voluntarily employ a psychological witness wholly to negate the waiver that his direct introduction of personal testimony would otherwise effect. The Court found that the Defendant in this case was not using the expert in such a way. The State's attempt to use the insanity cases in order to get to the defendant is a veiled effort to undetermine the constitutional protection of every citizen of the State of Florida.

The State is concealing its intent, which is to strip the defendant of the only protection she has, the once durable shield of the constitution. This Court should not force the defendant to lower the shield and in the process diminish or destroy the shield for every battered woman in the State of Florida.

5. There is no express authority in the Criminal Rules for the examination of the defendant by a state psychiatrist under the circumstances of this case: This Court should not amend the Discovery Rules by deciding this case.

The Respondent agrees with and adopts the amicus brief on this issue.

B.

Certiorari was an appropriate vehicle to review the pretrial order compelling Appellant to submit to a psychiatric examination.

The Respondent agrees with and adopts the amicus brief on this issue.

C.

The issues presented by the certified question are not currently ripe for adjudication.

The Respondent agrees with and adopts the amicus brief on this issue.

CONCLUSION

For the reason previously stated based on the cited legal authorities, the Respondent respectfully requests this Honorable Court to:

1. Decline to answer the certified question.

2. Or in the alternative, if the Court wishes to address the merits it shall affirm the opinion of the First District and answer no to the certified question.

DATED this 19 day of May, 1992.

Respectfully submitted,

LAW OFFICE OF
ELIA & FALLIS, P.A.

By: _____

THOMAS G. FALLIS
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the above foregoing has been furnished to the Office of the Attorney General, Gypsy Bailey, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050, by Federal Express Mail, and James T. Miller, Esq., for the Florida Association of Criminal Defense Lawyers, Duval County Courthouse, Jacksonville, FL 32202, by U.S. Mail, this 19 day of May, 1992.

THOMAS G. FALLIS
Florida Bar No.: 0699233

APPENDIX

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MICHELLE L. HICKSON,

Petitioner,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

v.

CASE NO. 91-2800

STATE OF FLORIDA,

Respondent.

_____/

Opinion filed November 13, 1991.

A Petition for Writ of Certiorari.

Thomas G. Fallis of Elia & Fallis, P.A., Jacksonville, for Petitioner.

Robert A. Butterworth, Attorney General; Charles T. Faircloth, Jr., Assistant Attorney General, Tallahassee, for Respondent.

WENTWORTH, Senior Judge.

Petitioner Hickson, a defendant charged with murder in the second degree, challenges a pre-trial order granting the State's motion for psychiatric evaluation by "its examining psychiatrist." We conclude that the petition has merit in the circumstances presented here, and involves an issue of first impression in this jurisdiction. Because the order granting discovery may cause material injury through subsequent proceedings for which review on plenary appeal would be

inadequate, we grant certiorari and quash the order, certifying the constitutional issue framed below pursuant to Fla.App.R. 9.030(a)(2)(A)(v), and Sec. 3(b)(4), Art. V, Fla. Const.

The State's motion to compel psychiatric examination of defendant was filed in August 1991, a month preceding her scheduled trial date, after notice in March that defendant would offer testimony of an examining psychologist in support of her defense of self defense involving battered spouse syndrome. Her psychologist, Dr. Krop, had been deposed by the prosecution in April, testifying fully as to defendant's statements to him.

The order compelling defendant's attendance and participation in the examination and denying her asserted privilege against self incrimination under Florida and federal constitutions, Amendment V, is based squarely on the view that defendant's privilege would be waived by her psychologist's testimony as to "her statements about the circumstances giving rise to the alleged battered-spouse syndrome, thus waiving her Fifth Amendment privilege." (e.s.) The court relied on recent decisions in other states essentially equating such syndrome testimony with an insanity defense and holding that "the management of the constitutional implications of defendant's statements to the examining experts should be essentially the same." State v. Myers, 570 A.2d 1260 at 1266 (N.J. Super.A.D. 1990); State v. Briand, 547 A.2d 235 (N.H. 1988); and State v. Nizam, 771 P.2d 899 (Hawaii App. 1989). The courts recognize that the syndrome in question does not involve insanity, mental

disability, or diminished capacity, and that it bears instead on the self-defense issue of the reasonability of defendant's belief of imminent danger of serious injury. Accord Hawthorne v. State (Fla. 1st DCA 1982), 408 So.2d 801, 806:

> In this case, a defective mental state on the part of the accused is not offered as a defense as such. Rather, the specific defense is self-defense which requires a showing that the accused reasonably believed it was necessary to use deadly force to prevent imminent death or great bodily harm . . . The expert testimony would have been offered to aid the jury in interpreting the surrounding circumstances as they affected the reasonableness of her belief. . . . Appellant did not seek to show through the expert testimony that the mental and physical mistreatment of her affected her mental state so that she could not be responsible for her actions; rather, the testimony would be offered to show that because she suffered from the syndrome, it was reasonable for her . . . at the pertinent time, to have believed that her life and the lives of her children were in imminent danger.

Due to the clear distinctions between an insanity defense and the self defense issue in the present case, we are unable to agree with the trial judge's reliance on Henry v. State, 574 So.2d 66 (Fla. 1991), as "constitutionally similar." In Henry a divided court did conclude that the insanity defense was properly struck when defendant refused compliance with a pre-trial order for examination by the prosecution's designated expert.[1] The opinion states:

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[1] However, Henry was allowed to use his own experts to demonstrate lack of capacity for premeditation, indicating a distinction in this respect between an insanity plea and other defenses. Henry's objection was solely to the prosecution's expert examination, conceding authority for a third court appointed examining doctor.

> It is undisputed that parties in a civil case can require another party to submit to a medical or psychiatric examination, so long as the examination is pertinent to an issue in the suit. See Fla.R.Civ.P. 1.360. We see no reason why, as a party, the state should not have the same right. . . . If a defendant seeks to pursue an insanity defense, the state should have an equal opportunity to obtain evidence relevant to that issue. The fact that the court-appointed doctors would testify that Henry was sane at the time of the offense did not necessarily make examination by the state's expert unnecessary. The defense's expert or experts may have much more impressive credentials than the court-appointed expert, or may have done additional examinations that the state was entitled to have done by its expert, as well. Under the circumstances of this case, we conclude that the trial judge did not abuse his discretion in striking the defense of insanity upon Henry's failure to cooperate with the psychiatrist.

We would distinguish Henry from the present case, both factually and constitutionally, because the battered spouse syndrome in relation to self defense does not place in issue a defective mental state on the part of the accused. Hawthorne, supra. Nor does the defense necessarily rest on any subjective mental state disclosures by defendant.[2] A psychological

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[2] Appellant's argument elaborates in part as follows:

> First, unlike a claim of self-defense, a defense based solely on insanity admits all the elements of the crime charged. Having admitted all the elements, there is no danger that the defendant's statements in a pretrial evaluation will help the prosecution prove the offense charged.
>
> Second, the insanity defense and other similar defenses (e.g. diminished capacity) concern only the defendant's mental state, not the reasonableness of her actions.
>
> In contrast, self-defense based on the battered woman syndrome does not admit every element of the

witness's effort should properly be to illuminate the general syndrome or pattern of typical reactions as that pattern may

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> crime, there are no procedural safeguards available and the defendant's subjective mental state is not the focus of the defense.
>
> The defendant denies that she acted with premeditation or depraved heart. . . . She contends that because of the battered woman syndrome she was . . . reasonably provoked to act, and in either case, did not act with the mens rea charged.
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> * * *
>
> Unlike insanity cases where experts testify predominantly about the peculiar characteristics of an individual, an expert on the battered woman syndrome . . . testifies mainly about "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 . . ." Hawthorne v. State, 408 So.2d 801, 805 (Fla. Dist. Ct. App. 1982) . . .
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> * * *
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> A more fundamental flaw in the State's contention is that the defense does not rebut an element of the crime. In most cases, self-defense rebuts an element of second degree murder, depraved heart. See Martin v. Ohio, 107 S.Ct. 1098, 1102 (1987).
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> * * *
>
> In the case at bar, no jury instruction will operate to make the expert's testimony [applicable to] an issue other than guilt. Telling the jury that the expert's opinion is only admissible on the issue of self-defense goes directly to guilt or innocence. This permits the jury to use the expert's opinion as well as the facts elicited from the defendant which support that opinion in deciding whether the prosecution has met its burden. Estelle recognized that the privilege prohibits such use of either the expert's opinion or the underlying facts. . . . 451 U.S. at 464-5 (footnote omitted).

relate to circumstances in evidence, and not, as referenced in Myers, supra, to provide "insight into the operations of defendant's mind, which defendant seeks to illuminate and explain through the testimony of experts who have had the opportunity to examine her." 570 A.2d 1266.

Disclosure by defendant of an examining expert witness in support of the defense should not, accordingly, constitute a per se waiver of constitutional testimonial immunity under the federal or Florida constitutions. And neither the motion nor order before us states facts sufficient to show that defendant's intended use of Dr. Krop's testimony can be characterized like that in Briand, supra, as a mere subterfuge, i.e., a defendant may not "voluntarily employ a psychological witness wholly to negate the waiver that his direct introduction of personal testimony would otherwise effect." 547 A.2d 239. Accord Isley v. Dugger, 877 F.2d 47 (11th Cir. 1989).[3]

The parties agree that some months before its motion the State had already deposed defendant's expert witness Dr. Krop, eliciting statements of defendant as well as test results that led to his findings. Appellant asserts she has already given the police an account of her stabbing of her husband while being beaten by him, following a history of abuse. Although the argument is not in any event dispositive of the constitutional

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[3] We need not, of course, determine in this proceeding whether or under what different circumstances a waiver of a defendant's constitutional rights might occur.

issue, appellant contends that the prosecution's expert would not be disadvantaged by denial of the motion even if the defense expert uses information provided by defendant, because in this case such information is available from other sources. Therefore, a denial of the motion to compel would not preclude or prejudice the prosecution's use of its psychiatric testimony as to viability of appellant's asserted defense based on her disclosed statements to Dr. Krop.

Where there was no fifth amendment issue, the opinion in State v. Rhone, 566 So.2d 1367 (Fla. 4th DCA 1990), stated the applicable standard for psychiatric interview of a victim (by defense instead of prosecution), and the court indicated the movant "must demonstrate extreme and compelling circumstances" which implicate due process if the examination is not allowed. In contrast, Henry, supra, in deciding the issue in a murder prosecution, references the civil "good cause" standard under Fla.R.Civ.P. 1.360 for requiring psychiatric examination of another party relative to a "condition in controversy." The opinion, however, as noted above, expressly confines and conditions its ruling on a plea of insanity:

> If a defendant seeks to pursue an insanity defense, the state should have an equal opportunity to obtain evidence relevant to that issue. . . . The defense's expert or experts may have much more impressive credentials than the court-appointed expert, or may have done additional examinations that the state was entitled to have done by its expert, as well. (e.s.)

574 So.2d 70.

Because the same "condition," legally and factually, is not here in controversy, and because we have an abiding concern with the proliferation of expert witness usage in criminal prosecutions, we decline to extend the Henry rationale beyond its stated terms. We conclude, however, that the question is one of great public importance and so certify to the Supreme Court of Florida pursuant to Fla.App.Rule 9.030(a)(2)(A)(v), and Sec. 3(b)(4), Art. V., Fla. Const., as follows:

> Is the defendant's constitutional privilege against testimonial examination waived when a defense psychologist testifies "about the circumstances giving rise to the alleged battered-spouse syndrome" based in part on defendant's statements to such witness which have been fully disclosed to the prosecution before trial.

We conclude that the court in this case improperly compelled a psychiatric interview by the State's expert in the circumstances presented. The writ of certiorari is accordingly issued, the order is reversed, and the cause remanded for further consistent proceedings.

SMITH and MINER, JJ., CONCUR.