047
FILED
SID J. WHITE
FEB 14 1992
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 79,222

MICHELLE L. HICKSON,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GYPSY BAILEY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0797200

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904)488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 79,222

MICHELLE L. HICKSON,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

Preliminary Statement

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. Respondent, MICHELLE L. HICKSON, petitioner in the case below and defendant in the trial court, will be referred to in this brief as respondent. References to the opinion of the First District contained in the attached appendix will be noted by the symbol "A," and references to the appendix to the petition for writ of certiorari below (the record) will be noted by the symbol "R." All references will be followed by the appropriate volume and page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The state seeks review of the decision of the First District in which that court issued a writ of certiorari and quashed the trial court's order which granted the state's motion for a psychiatric examination of respondent.

The state charged respondent with murder in the second degree for stabbing her husband to death (R 1). After receiving notice that respondent would offer testimony of Dr. Krop, an examining psychologist, in support of her defense of self defense/battered spouse syndrome, the state deposed Dr. Krop, who testified fully as to the statements made to him by respondent (R 3). The state then filed a motion to compel a psychiatric examination of respondent (R 3-4). The trial court granted this motion, observing that the case was one of first impression for Florida, but other states had permitted such discovery (R 5-6). The trial court held that respondent's fifth amendment privileges would not be violated because the state would not be permitted to introduce such evidence in its case-in-chief, and could only offer the evidence if respondent and/or Dr. Krop testified first to her statements about the circumstances giving rise to the alleged battered spouse syndrome (R 6).

Respondent sought a writ of certiorari from the First District, arguing that the order of the trial court was a departure from the essential requirements of law and that she would suffer irreparable harm for which there was not remedy on appeal. The First District found that certiorari was appropriate and quashed the trial court's order, finding that it was "based squarely on the view that [respondent]'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.'" (A 2) (emphasis in original). After analysis of case law, the First District concluded that the "[d]isclosure 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." (A 6). However, the First then observed that (1) there were not sufficient facts before it to show respondent's intended use of Dr. Krop's testimony, and (2) it was unnecessary to "determine in this proceeding whether or under what different circumstances a waiver of a defendant's constitutional rights might occur." (A 6). Because the court determined the issue to be of great public importance, it certified the following question to this Court:

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.

On December 10, 1991, the state moved for rehearing, arguing first that, because there was an adequate remedy at law, certiorari did not lie; second, that to have a "level playing field," the First District should make clear that Dr. Krop could not testify concerning facts not in evidence and that the state's expert could testify in rebuttal; and third, that the question as phrased was inaccurate. Accordingly, the state suggested the following certified question:

> IS THE STATE ENTITLED TO HAVE A REBUTTAL EXPERT EXAMINE A DEFENDANT WHO ASSERTS SELF DEFENSE BASED ON THE BATTERED SPOUSE SYNDROME AND WHO INTENDS TO INTRODUCE TESTIMONY FROM A DEFENSE EXPERT OPINING THAT THE DEFENDANT SUFFERS FROM THE SYNDROME, WHEN THE EXPERT'S OPINION IS BASED "AS A PRIMARY SOURCE" ON INFORMATION OBTAINED IN A PRIVATE EXAMINATION OF THE DEFENDANT?

On January 8, 1992, the First District denied the state's motion for rehearing. On January 13, 1992, the state filed its notice to invoke this Court's discretionary jurisdiction. On January 21, 1992, this Court postponed its decision on jurisdiction and set a briefing schedule. On January 24, 1992, the First District issued its mandate. On

January 29, 1992, the state moved this Court to recall the mandate; this motion is still pending. This brief on the merits is filed pursuant to this Court's January 21st order.

SUMMARY OF THE ARGUMENT

The decision of the First District is erroneous in two regards. First, in finding that certiorari was appropriate in the instant case, that court overlooked long-standing principles that certiorari lies only where there exists a clear violation of established principles of law and an inadequate remedy on appeal. Here, neither of these principles is applicable, because (1) no violation has yet occurred, and the trial court's ordering that respondent be examined by a state psychiatric expert is in line with pertinent case law, and (2) in the event of conviction, respondent could direct appeal to the First District and present the issue concerning the battered spouse syndrome.

Second, as rephrased, the answer to the certified is yes. As noted in the well-reasoned order of the trial court, should the defense call Dr. Krop to testify at trial concerning respondent's version of the event (related to him in a private examination), the state is entitled to have its expert testify regarding the same issue (based on a personal interview with respondent).

ARGUMENT

Issue

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. Does certiorari lie for an appellate court to review a pretrial evidentiary ruling that a state psychiatric expert would be permitted to examine respondent?

The First District erred in finding that certiorari was appropriate in this case. As this Court is well aware, certiorari is appropriate "only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." Combs v. State, 436 So.2d 93, 96 (Fla. 1983). Further, certiorari will not lie where there is an adequate remedy on appeal. Dresner v. City of Tallahasee, 164 So.2d 208, 210 (Fla. 1964). Thus, certiorari does not lie in the instant appeal for two reasons.

One, there has been no violation as of yet due to the posture of this case. Because respondent immediately "appealed" from the pretrial evidentiary ruling, she has not been examined by the state's expert, nor has the state

introduced any evidence against respondent. Thus, the First District's uncertainty as to the posture of this case is understandable:

> And neither the motion nor order before us state 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,[3] 877 F.2d 47 (11th Cir. 1989).
>
> ---
>
> [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.

(A 6).

Two, respondent has not shown that any injury she may suffer would not be adequately addressed on direct appeal to the First District, and the First District simply stated that "plenary appeal would be inadequate" without any analysis (A 2). Any error in introducing or misusing the evidence, assuming it is subsequently introduced, found to violate the fifth amendment, and found to be harmful, i.e., to cause a conviction, would be correctable on direct appeal by reversal and remand for a new trial. Because this constitutes an adequate remedy at law, certiorari does not

lie, particularly inasmuch as it places appellate courts in the untenable position of furnishing immediate review of pretrial rulings addressed to prospective or potential events.

Of course, it is not necessary that a party have a right to appeal to obtain a writ of certiorari. State v. Pettis, 520 So.2d 250 (Fla. 1988). Nevertheless, **Fla. Stat. §** 924.06 (1989), which governs the rights of defendants to appeal, clearly contemplates that appellate review will not lie until a claimed error results in actual prejudice through the entry of a criminal conviction. Again, if respondent is subsequently convicted, she may claim prejudice and seek relief in a direct appeal to the First District.

Next, the state submits that the opinion of the First District is so unclear as to provide little guidance on remand. That court itself recognized the uncertainty as to what Dr. Krop will testify. Under Weir v. State, 16 F.L.W. S749 (Fla. Nov. 27, 1991), this uncertainty must be resolved pretrial. The state cannot wait until the trial begins and then seek review or an interruption of trial while it obtains a remedy. If neither the state nor respondent can rely on information gleaned and opinions rendered from private psychiatric examinations, then the proverbial playing field is level and respondent's trial will be a

valid truth seeking mechanism. The corollary is likewise true: If both the state and respondent can rely on their experts' opinions based on equivalent psychiatric examinations, then the playing field is again level and presumably the truth will come to bear. However, if Dr. Krop is permitted to offer an opinion for the jury based primarily on his private psychiatric examination of respondent and the state is denied the same right, a heavy thumb has been placed on the scales and there can be no confidence in the jury verdict. See State v. Manning, 1991 W.L. 77171 (Ohio Ct. App. May 8, 1991); see also State v. Myers, 239 N.J. Super. 158, _____, 570 A.2d 1260, 1266 (1990) ("The reason that the State may have an expert examine [a] defendant in cases of claimed insanity or diminished capacity is to give the State the opportunity to respond to the anticipated testimony of defendant's experts on the same subject. No reason appears to us why the Battered Woman's Syndrome in its relation to self-defense should be treated any differently. . . . As in cases of insanity and diminished capacity, the State must be afforded a similar opportunity and the management of the constitutional implications of defendant's statements to the examining experts should be essentially the same.");[1] State

---

[1] The First also attempts to distinguish Myers on a tenuous basis, claiming that Myers holds that a psychological witness's effort should be to provide insight into the operations of defendant's mind, which defendant seeks to

v. Briand, 547 A.2d 235, 238 (N.H. 1988) ("There is simply no way for the State to challenge the conclusions of defense experts and no way for the finder of fact to arrive at the truth if the accused may first introduce a defense dependent on psychiatric testimony based on an interview with the defendant, and then prevent the State from obtaining and introducing evidence of the same quality.");[2] Schneider v. Lynaugh, 835 F.2d 570, 576 (5th Cir. 1988) (quotation and footnotes omitted) ("It is unfair and improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony. The principle also rests on 'the need to prevent fraudulent mental defenses.'").

---

illuminate and explain through the testimony of experts who have had the opportunity to examine her. To the contrary, the Myers court observed that the battered spouse syndrome and "the matter of insight . . . ." were both involved in that case.

[2] The First District attempts to distinguish Briand on a tenuous and erroneous basis, characterizing the expert's testimony there as "mere subterfuge" and quoting from Briand. Significantly, the First did not quote the entire passage from Briand, which is as follows: "Just as the State may not use a compelled psychological examination to circumvent the privilege against self-incrimination, neither may a defendant voluntarily employ a psychological witness wholly to negate the waiver that his introduction of personal testimony would otherwise effect." 547 So.2d at 239 (citation omitted). Thus, the Briand court did not classify the testimony of the defense expert as mere subterfuge; instead, it simply observed that neither party would be able to manipulate the admission of evidence.

Instead, the reasoned judgment of the trial court makes eminently more sense. If respondent calls Dr. Krop to testify concerning his private examination of her, then in rebuttal, and only in rebuttal, may the state introduce evidence on the same point from its own expert. In urging this position, the state recognizes that it cannot use the results of its expert examination as a sword to affirmatively prove guilt. Rather, it can only use such testimony as a shield to rebut the testimony of Dr. Krop. However, without clarification on this point,[3] remand to the

---

[3] State v. Briand, 547 A.2d 235, 240-41 (N.H. 1988), embodies such a clarification:

> The State does not claim that expert testimony resulting from such an examination should be admitted except in rebuttal, after the defendant has first presented her own psychological witness, and we confine ourselves to ruling that testimony from the State's expert is admissible under these circumstances. Because we likewise understand that the State does not seek authority to elicit testimony from its own expert except on matters covered by the expert for the defense, and for the same purposes for which the defense expert's testimony was offered, we hold only that the rebuttal testimony is admissible within these limits.
>
> If, therefore, the defense indicates that it offers its own witness's testimony only for a limited purpose, the trial judge must instruct the jury to limit its consideration of the testimony accordingly. And the court will likewise, at the defendant's request, instruct the jury that testimony on the same subject from the

trial court will inevitably result in the state filing a motion in limine concerning Dr. Krop's testimony, and if denied, seeking review by the First District via direct appeal or certiorari. There can be little doubt that, under Weir, the state would be entitled to review to such an adverse ruling by the trial court. In contrast, if during the course of the trial, respondent is permitted to introduce expert testimony based on her expert's personal examination, it would not be feasible, certainly not desirable, to interrupt the trial for an examination by a state expert or for an appeal by the state. See generally Weir, 16 F.L.W. at S749.

> **B. Rephrasing the certified question, is the state entitled to have a rebuttal expert examine a defendant who asserts self defense based on the battered spouse syndrome and who intends to introduce testimony from a defense expert opining that the defendant suffers from the syndrome, when the expert's opinion is based "as a primary source" on information obtained in a private examination of the defendant?**

The state suggests that the question as phrased by the First District misses the mark, as the state has absolutely no interest or desire in using its expert examination of petitioner as a subterfuge to improperly introduce evidence contrary to the fifth amendment. Accordingly, the state

---

> State's expert must be considered only for that same limited purpose.

suggests that the question as rephrased above presents the issue as accurately as possible based on the posture of this case. The state answers its suggested question in the affirmative.

The trial court's order in no way violates respondent's fifth amendment rights. It is clear that, if respondent chooses to take the stand, she would waive her constitutional privilege against self incrimination. Jenkins v. Anderson, 477 U.S. 231 (1980). Likewise, if the defense were to elicit from Dr. Krop respondent's account of the murder of her husband as told to Dr. Krop, respondent would again waive her privilege against self incrimination. Isley v. Dugger, 877 F.2d 47, 49 (11th Cir. 1989); State v. Hennum, 461 N.W.2d 793, 800 (Mn. 1989). "This is so because the expert witness depends upon the defendant's own statements of relevant facts as the foundation for the expert's opinion." Briand, 547 A.2d at 239.

In deposition, Dr. Krop admitted that he rendered his opinion based strictly on what respondent related to him. Thus, his testimony would be directly predicated on respondent's statements, implicitly introducing those statements into evidence. Therefore, respondent's decision at trial to introduce her account of relevant facts, either indirectly or directly through Dr. Krop, should be treated as a waiver of the privilege against self incrimination,

obligating respondent to provide the same access to the state's expert as she gave to Dr. Krop. See State v. Rhone, 566 So.2d 1367 (Fla. 4th DCA 1990) (reversal of roles; holding that it would unfair to the defendant not to allow him to psychologically examine the victim where the state intended to establish through expert testimony that the victim suffered from battered spouse syndrome); Henry v. State, 574 So.2d 66, 70 (Fla. 1990) (in the context of insanity; holding that, because the prosecution bears the burden of proving sanity beyond a reasonable doubt, it should have an "equal opportunity" to obtain evidence relevant to that issue).[4]

The state emphasizes that this is not a situation like that in State v. Vosler, 216 Neb. 461, 345 N.W.2d 806 (1984), where the state argued that it should be permitted to compel the defendant's psychiatric examination by state authorities because the defendant introduced expert psychiatric testimony concerning his ability to form the

---

[4] The First District misunderstood the trial court's citation to Henry in declining "to extend the Henry rationale beyond its stated terms." (A 8). The trial court simply cited to both Henry and Rhone in showing how similar considerations are at issue here, namely that both parties should be permitted to explore the claimed defense of self defense/battered spouse syndrome if initiated by the defendant. Cases standing for the same general proposition include: Booker v. State, 397 So.2d 910 (Fla. 1981); Roseman v. State, 293 So.2d 65 (Fla. 1974); Parkin v. State, 238 So.2d 817 (Fla. 1970); Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990).

criminal intent of first degree murder. The Nebraska Supreme Court disagreed, observing:

> When one pleads insanity and offers evidence on that issue, such a plea carries with it an implicit, although not legally operative, admission of the State's charges. Such a plea necessarily carries with it the assertion that the commission of the act, along with the intent, was the result of the defendant's inability to understand the nature and quality of the act or distinguish right from wrong.
>
> On the other hand, a person who introduces evidence of his mental condition to rebut the presumption that the act he performed was coupled with the requisite intent makes no admission of the crime. Such evidence is offered to show only that the crime charged 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 interviews by those in its employ.

Id. at _____, 345 N.W.2d at 812-13.

In the instant case, the state's expert testimony would not go to proof of an element of the charged offense of second degree murder. Instead, it goes to respondent's mental state in relation to the reasonableness of her claim of self defense. Additionally, unlike the defendant in

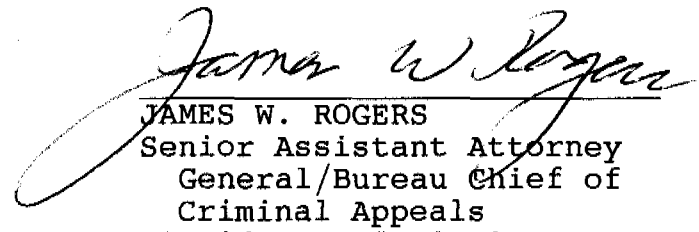
Vosler who was charged with specific intent first degree murder, respondent is charged with second degree murder, a general intent crime.

CONCLUSION

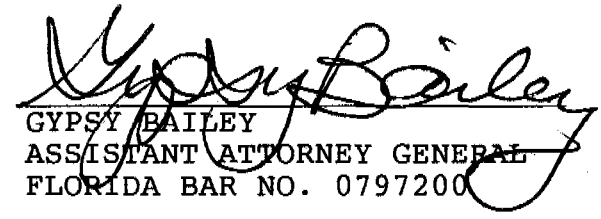
Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to: (1) find that certiorari was inappropriate in this case; and (2) answer the certified question as rephrased by the state in the affirmative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
Senior Assistant Attorney
General/Bureau Chief of
Criminal Appeals
Florida Bar #0325791



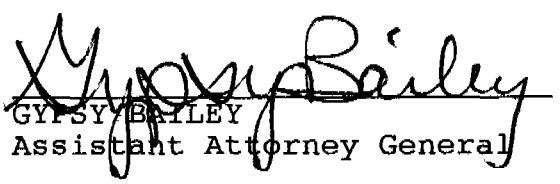
GYPSY BAILEY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0797200

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904)488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to THOMAS G. FALLIS, ESQ., of ELIA & FALLIS, P.A., 343 East Bay Street, Jacksonville, Florida 32202; JAMES T. MILLER, ESQ., for THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, 407 Duval County Courthouse, Jacksonville, Florida 32202; and JON R. PHILLIPS, Assistant State Attorney, Special Prosecution Division, 421 West Church Street, Suite 814-21, Jacksonville, Florida 32202-4157, this 14th day of February, 1992.



GYPSY BAILEY
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 79,222

MICHELLE L. HICKSON,

Respondent.

_____/

APPENDIX

Hickson v. State, Case No. 91-2800, slip opinion (Fla. 1st DCA Nov. 13, 1991)

Hickson v. State, Case No. 91-2800, order denying motion for rehearing (Fla. 1st DCA Jan. 8, 1992)

91-111680-TR

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MICHELLE L. HICKSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

CASE NO. 91-2800

Docketed 11-18-91
Florida Attorney General

RECEIVED
NOV 14 1991
Criminal Appeals
Dept. of Legal Affairs

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:

---

[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

---

[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

---

> 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.
>
> * * *
>
> 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) . . .
>
> * * *
>
> 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).
>
> * * *
>
> 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

---

[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.

Bailey

DISTRICT COURT OF APPEAL, FIRST DISTRICT

91-111680.AFF

Tallahassee, Florida 32399
Telephone No. (904)488-6151

RECEIVED

January 8, 1992

JAN 10 1992

CASE NO: 91-02800

Criminal Appeals
Dept. of Legal Affairs

Michelle L. Hickson v. State of Florida

Petitioner(s), Respondent(s).

Docketed
1-10-92
Florida Attorney General

ORDER

Motion for rehearing and/or clarification, filed December 10, 1991, is DENIED.

By order of the Court

JON S. WHEELER
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Thomas G. Fallis
Gypsy Bailey

James W. Rogers
Peter Dearing

Laurie Black
Deputy Clerk

DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FIRST DISTRICT