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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No.: 79,222

MICHELLE L. HICKSON,

Respondent.

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PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
SUMMARY OF THE ARGUMENT	2
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?

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? 3

CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Hawthorne v. State,</u> 408 So.2d 801 (Fla. 1st DCA 1982)	4
<u>Schneider v. Lynaugh,</u> 835 F.2d 570 (5th Cir. 1988)	5
<u>State v. Briand,</u> 547 A.2d 235 (N.H. 1988)	5
<u>State v. Myers,</u> 239 N.J. Super. 158, 570 A.2d 1260 (1990)	4
<u>Terry v. State,</u> 467 So.2d 761 (Fla. 4th DCA 1985)	4

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PETITIONER'S REPLY BRIEF ON THE MERITS

Preliminary Statement

Petitioner, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Respondent, MICHELLE L. HICKSON, the defendant in the trial court and appellant below, will be referred to in this brief as respondent. References to the record on appeal will be noted by the symbol "R," and will be followed by the appropriate page numbers in parentheses.

## 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?

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Respondent's misapprehension of the instant issue is evident at page 10 of her answer brief, where she states: "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. . . .'" In the present case, such a statement is wholly inaccurate. Respondent's expert, Dr. Krop, made clear in his deposition that his opinion was based strictly upon what respondent related to him. Thus, when Dr. Krop testifies, his testimony will be solely predicated on respondent's statements, thereby introducing these statements into evidence.

Florida case law has held that the battered spouse syndrome defense is not the equivalent of an insanity defense for the purposes of proof, i.e., with insanity, the defendant is seeking to introduce evidence that she was unable at the time of the incident to distinguish right from wrong or unable to comprehend the wrongness of the act committed, whereas with battered spouse syndrome, the defendant offers evidence to show that, because of the prior conduct of the victim toward her, she reasonably believed that danger was imminent and that there was a real necessity for the taking of life. See Terry v. State, 467 So.2d 761 (Fla. 4th DCA 1985); Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA 1982).

However, regardless of the type of defense, when an expert witness relies on a defendant's statements in rendering his opinion, it seems only fair that the state have the same opportunity as the defendant to have an expert examine the defendant and her statements. 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."); State 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."); 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.'"). Accordingly, the state should be permitted to have its own expert examine respondent, so that this expert may be called only when and if Dr. Krop testifies about what respondent told him or renders an expert opinion based on personal examination.

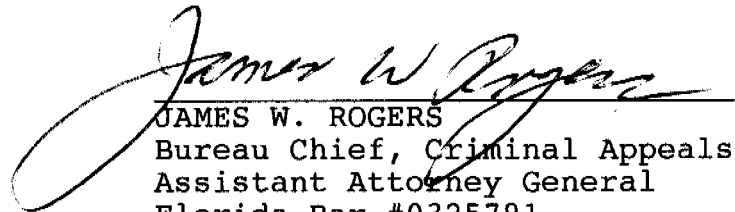


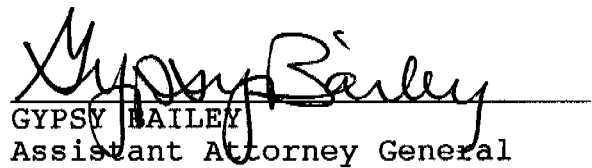
CONCLUSION

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,

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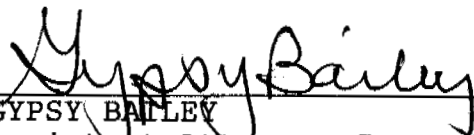
  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded 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 15<sup>th</sup> day of June, 1992.

  
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