IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 79,222

MICHELLE L. HICKSON,

Respondent.

_____/

PETITIONER'S SUPPLEMENTAL BRIEF

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 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 SUPPLEMENTAL BRIEF

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.

STATEMENT OF THE CASE AND FACTS

The state relies on the statement of the case and facts supplied in its brief on the merits, except to note that this supplemental brief is filed pursuant to this Court's February 4, 1993, order, which is set out below:

> 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.

Although the state moved for reconsideration and clarification of this order, this Court advised undersigned counsel telephonically on March 5, 1993, that this motion had been denied.

SUMMARY OF THE ARGUMENT

The decision of the First District is erroneous in two regards. First, in finding that certiorari was appropriate, that court overlooked long-standing principles that certiorari lies only where there exists a clear violation of established law and an inadequate remedy on appeal. Neither of these principles is applicable in this case, because (1) no violation of established law has occurred yet, 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 a conviction, respondent may direct appeal the issue of battered spouse syndrome to the First District.

Second, as rephrased, the answer to the certified question must be affirmative. As noted in the well reasoned order of the trial court, should the defense call Dr. Krop to relate respondent's version of events, as told to him by respondent in a personal interview, the state is entitled to have its own expert examine respondent and testify based on that interview.

ARGUMENT

Issue

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?

Initially, the state reiterates its position, with which *amicus curiae* apparently agrees, that the issue upon which supplemental briefing has been ordered is not ripe for review. Florida law makes unequivocally clear that all evidentiary determinations rest upon a determination of relevance by the trial courts. **Fla. Stat. §** 90.402 (1991). Relevance necessarily depends upon the particular case, and the evidence and theories of both parties. Thus, it is not possible for the state to address with any particular cogency the admissibility of evidence under various nonspecific hypotheticals. Nevertheless, because this Court has ordered supplemental briefing, the state offers the following hypothetical observations and discussion of the two cases cited in this Court's order.

First, under any circumstances, it is clear that Dr. Krop may not testify as a subterfuge for the introduction of testimony by respondent without her taking the stand. State

v. Briand, 547 A.2d 235, 239 (N.H. 1988). While *amicus curiae* agreed with this proposition at oral argument, the position of respondent is unclear.

Provided Dr. Krop's testimony is not a subterfuge for admitting respondent's statements, Florida law appears to permit an expert to relate facts which are otherwise inadmissible under the evidence code,[1] if the facts or data upon which the expert relies are of a type reasonably relied upon by experts in the area to support the opinion expressed.[2] **Fla. Stat.** § 90.704 (1991). See also Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied 117 L.Ed.2d 122 (1992); Barber v. State, 576 So. 2d 825 (Fla. 1st DCA 1991); Burnham v. State, 497 So. 2d 904 (Fla. 2d DCA 1986); Bender v. State, 472 So. 2d 1370 (Fla. 3d DCA 1985). Thus, at trial, if defense counsel can prove the relevance of expert opinion testimony; if counsel can show that respondent's statements to a psychiatric expert are the type of facts reasonably relied upon by experts in the area of battered spouse syndrome; and if counsel can provide an adequate factual predicate for the expert opinion, then the

---

[1] At oral argument, *amicus curiae* opined that respondent's statements to Dr. Krop could not be related by Dr. Krop because they would be inadmissible hearsay.

[2] Of course, there must be other independent evidence of battered spouse syndrome before an expert may testify about the statements made by respondent. See **Fla. Stat.** § 90.702 (1991); Johnson v. State, 478 So. 2d 885 (Fla. 3d DCA 1985); argument supra.

trial court could permit an expert to relate what respondent told him.

However, it is the state's unqualified position that Dr. Krop should not be permitted to testify as an expert on battered spouse syndrome because his opinion would be based upon a personal interview with respondent. The experts in the above cited cases, while permitted to testify as to evidence which was otherwise inadmissible, did not glean the evidence from personal interviews with the accused. See Capehart, 583 So. 2d at 1009 (expert relied on autopsy report which was not admitted into evidence); Barber, 576 So. 2d at 825 (expert should have been permitted to relate what the defendant told him about the amount of alcohol he consumed on the night of the murder, because the expert based his opinion regarding blood alcohol level on such information); Burnham, 497 So. 2d at 904 (experts relied on tests not in record); Bender, 472 So. 2d at 1370 (expert relied on C.A.T. scan which was not in record). Nevertheless, if Dr. Krop is permitted to testify as an expert, it is clear that the state must be afforded the opportunity to have its own expert examine respondent for the purposes of rebuttal.

In Briand, the state sought interlocutory relief from a pretrial order denying the state's motion requesting an expert of its own choosing to evaluate Briand for battered

spouse syndrome. Briand first argued that the trial court could not force her to submit to psychiatric examination by the state's expert because there was no statute in place granting it the authority to so order. The New Hampshire Supreme Court disposed of this claim, noting that trial courts have the inherent authority to authorize compelled examinations not only when a defendant pleads insanity, but when a defendant raises defenses which are distinct from insanity but typically require psychiatric evidence.

The New Hampshire Supreme Court then recognized that, despite this authority, a trial court may order such an examination only when it is consistent with the defendant's state and federal constitutional rights against self incrimination. The Court noted that many courts order such examinations on the principle that, when a defendant voluntarily submits to psychiatric examination by defense experts and introduces resulting psychiatric testimony at trial, he or she waives the constitutional right both to refuse a similar examination by the state's expert and to prevent the introduction of the results of such an examination in rebuttal. The Court also observed that others courts permitted such examinations on a general fairness principle: "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." 547 A.2d at 238.

The New Hampshire Supreme Court decided to follow the waiver theory, finding that authority relevant because it viewed "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 [constitutional] privilege." Id. The Court continued:

> A defendant performs a functionally similar voluntary act when he calls a psychologist or psychiatrist to testimony on his behalf, based on a personal interview with him. 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. Presumably, the witness would lack an adequate foundation to form and express such an opinion, and would therefore be barred from giving one, without the defendant's account of the relevant events of his own history and state of mind. 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, and opening the door to the introduction of resulting State's evidence, as the State requests here, to the extent that he introduces comparable evidence on his own behalf. 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 direct introduction of personal testimony would otherwise effect.

Id. at 239.

Briand also contended that, even if a finding of waiver were appropriate in other cases, it was not in her case because self defense based on battered spouse syndrome differed from most other defenses which relied on expert psychiatric testimony. Briand claimed that, unlike insanity where a defendant admits guilt, battered spouse syndrome showed the absence of premeditation or proved self defense. Thus, Briand argued that the state's psychiatric evidence based on personal interviews in rebuttal would used her compelled statements to prove a substantive element of the case.

The New Hampshire Supreme Court found this argument without merit, holding that, regardless of the type of defense, psychiatric testimony ultimately goes to the guilt or innocence of the defendant. While the privilege against

self incrimination precluded the state from proving guilt with evidence "'wrested from a defendant,'" it did not prevent the state from examining the defendant to rebut evidence she presents on an issue she has introduced. Id. at 240 (citation omitted).

Thus, the Briand Court concluded that: (1) the state could only use this evidence in rebuttal "on matters covered by the expert for the defense"; (2) if the defense offered its expert's testimony for a limited purpose, the trial court must instruct the jury to limit its consideration of the testimony accordingly; and (3) upon request from defense counsel, the trial court must instruct the jury that testimony on the same subject from the state's expert must be considered only for that same limited purpose. Finally, due to the absence of a statute and court rule addressing the issue, the Court opined:

> We believe a statute and rules of this kind would aid the trial court in future cases of this nature. As there is now no requirement that defendants give notice of the intention to introduce psychiatric testimony generally, legislation in this regard would be helpful. For the purpose of this trial, however, the trial court may take such actions as are necessary to allow the parties to obtain necessary expert witnesses.

Id. at 241.[3]

Thus, although Briand supports the state's primary position in this case -- if respondent is permitted to call Dr. Krop to testify that, in his opinion, respondent suffers from battered spouse syndrome, then, in fairness, the state

---

[3] This passage addresses Chief Justice Barkett's concerns at oral argument about the absence of a Florida criminal rule of procedure addressing compelled examinations in this context. Although this Court could certainly refer a question to the rules committee, see State v. Hennum, 441 N.W.2d 793, 800 n.4 (Minn. 1989), it should not answer the certified question as suggested by *amicus curiae* at oral argument, e.g., that, because there is no statute or rule which addresses the instant scenario, it should not be permitted. *Amicus curiae*'s reliance on Burns v. State, 16 Fla. L. Weekly S389, S392 n.7 (Fla. May 16, 1991), for its position is flawed. There, this Court addressed the claim that the trial court erred in allowing the state's expert to remain in the courtroom during the defense psychologist's testimony in the penalty phase of Burns's trial. This Court noted that the trial court permitted the state's expert to remain because it had denied the state's request to have Burns examined by its own expert. This Court then "pass[ed] on [the question of] whether the trial court erred in denying the state's request" and brought the matter to the attention of the rules committee. Thus, Burns does not support *amicus curiae*'s argument that this Court should pass on addressing the merits because there is no statute or rule. In fact, it appears more likely that the issue of whether the trial court erred in denying the state's request was not squarely before this Court in Burns, that issue being more appropriately addressed in a proper cross-appeal by the state.

As the court did in Hennum, this Court must address the issue on the merits so that a fair trial may be conducted in this case. Because compelled examinations may be permitted based on the trial court's inherent authority, this Court may so hold, while suggesting the need for a statute and rules as the Briand court did. Alternatively, this Court may limit battered spouse syndrome evidence strictly to general characteristics of the syndrome, thereby obviating the need for a statute and rules to address the issue, as the Hennum court did.

must be permitted to do the same -- it does not squarely address the issue of whether respondent's statements to Dr. Krop will be admissible through him. In fact, the Briand Court specifically noted: "[T]he exact nature of the psychologist's anticipated testimony [was] not a matter of record before [the court]. Suffice it to say that [the court] ha[d] no occasion to rule on its admissibility, as the State does not challenge it at this time." 547 A.2d at 236 (emphasis supplied). See also id. (at the time of the appeal, the Court had "no account of what the defendant mean[t] by 'battered woman's syndrome . . . .'"). This holding is equally applicable in this case, as argued by the state in its motion for reconsideration and clarification. The issue of admissibility is not squarely before this Court, as the State has not challenged it at this time. Accordingly, the state asks this Court to be as circumspect as the Briand court in not ruling on issues not presented to it at this juncture, but nevertheless addresses the point as ordered.

In State v. Hennum, 441 N.W.2d 793 (Minn. 1989), the Minnesota Supreme Court fashioned a different solution to the issue at hand. There, in a pretrial order, the trial court authorized a compelled psychiatric examination of the defendant by a state expert for the purpose of rebutting Hennum's battered spouse syndrome/self defense claim. At

trial, the defense expert described the profile of a battered woman and then stated that, in her opinion, Hennum was a battered woman suffering from the syndrome. Specifically, the expert referred to Hennum's feelings on the night of the shooting, which the expert had discussed with Hennum. Hennum also took the stand and testified about the incident. The jury convicted Hennum of second degree felony murder.

The Minnesota Supreme Court held that battered spouse syndrome evidence was admissible with some limits:

> 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. 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. This restriction will remove the need for a compelled adverse medical examination of the defendant. Since the expert will only be allowed to testify as to the general nature of battered woman syndrome, neither side need conduct an examination of the defendant.

In Hennum, the Court also addressed the absence of a statute and rules addressing compelled examinations, holding

that the trial court had no authority to compel an adverse medical examination of the defendant:

> We affirm the rationale behind our decision in Olson that questions as to the nature and scope of adverse medical examinations are best answered by legislative enactment, rather than by the courts on an ad hoc basis. Olson, 274 Minn. at 231, 143 N.W.2d at 73-74. However, we also note that allowing the defense to produce expert testimony based on a medical examination of a defendant without providing the state an opportunity to conduct a similar examination denies the state a fair chance to rebut the expert testimony of the defense. Our decision today will prevent such a situation from arising with regard to expert testimony on battered woman syndrome. In future battered woman syndrome cases, expert medical examination of a defendant will not be necessary since we hold today that expert testimony as to the ultimate fact of whether a particular defendant suffers from the syndrome will be inadmissible. It will be up to the trier of fact to make that finding or conclusion. Therefore, no compelled adverse medical examination, which could possibly jeopardize a defendant's constitutional rights, will be required to insure fairness for the state.

Id. at 800. See footnote 3 infra.

Thus, the issue of admissibility squarely before it, the Hennum Court, faced with the prospect of permitting an expert to render an ultimate conclusion and possibly infringing on a defendant's constitutional rights, opted to limit battered spouse syndrome evidence strictly to that

which generally describes the syndrome. This approach is feasible under Florida's evidence code, if the circumstances of the case show that expert opinion testimony is relevant.

Section 90.702, Florida Statutes (1991), permits the introduction of expert testimony if it will aid the jury in understanding the evidence, if and only if such testimony "can be applied to evidence at trial." In other words, a predicate must be provided before Dr. Krop or any expert's testimony concerning the general characteristics of battered spouse syndrome would be admissible. Ladd v. State, 564 So. 2d 587 (Fla. 2d DCA 1990), cert. denied, 114 L.Ed.2d 722 (1991); Faulk v. State, 296 So. 2d 614 (Fla. 1st DCA 1974).

Further, in Florida, "[n]ot even an expert witness may offer an opinion as to the ultimate issue in a criminal case." Brockington v. State, 600 So. 2d 29, 30 (Fla. 2d DCA 1992). See also Glendening v. State, 536 So. 2d 212 (Fla. 1988), cert. denied, 492 U.S. 907 (1989); Holliday v. State, 389 So. 2d 679 (Fla. 3d DCA 1980); Gibbs v. State, 193 So. 2d 460 (Fla. 2d DCA 1967); Branch v. State, 96 Fla. 307, 118 So. 13 (1928). Were Dr. Krop or any expert to testify that, in his opinion, respondent suffered from battered spouse syndrome at the time of the stabbing, he would be offering an opinion as to an ultimate issue, e.g., whether respondent had a "reasonable belief" that her conduct was necessary to defend herself against her husband's imminent use of unlawful force. See **Fla. Stat. §** 776.012 (1991).

Along with these positions on nonspecific hypotheses, this Court should evaluate this defense as one more appropriately entitled "battered person's syndrome." From a jury's perspective, it is unquestioned that women, both single and married, may be battered in relationships. But juries comprised of ordinary people also capably understand that battering occurs in, and has effects on, many other contexts -- a strong willed woman and a weak man; a big heavy man and a smaller man; a big brother or sister and a little brother or sister; etc. Thus, two things become clear. First, women are not the only battered persons. And second, having only a battered "spouse" syndrome which applies to women is unrepresentative of the population in which such a syndrome may occur.

Prior to Hawthorne v. State, 408 So. 2d 801 (Fla. 1st DCA 1982), and the judicial acceptance of the battered spouse syndrome, defendants claiming self defense generally had no need for experts. Instead, they typically called as witnesses family members and friends who had witnessed the defendant's relationship with the victim and who could attest to previous threats and altercations, and whether the defendant feared the victim. Defendants seemingly trusted that juries were fully capable of understanding that, if the victim had always picked on the defendant, chances were good that the defendant feared the victim on a given occasion and acted in a reasonable belief that harm was imminent.

Battered spouse syndrome did not change the basic premise of self defense. A person claiming that she suffered from the syndrome is claiming, in effect, that, because her husband had abused her repeatedly, she committed a violent act against him on this occasion, reasonably believing that, if she did not, the husband would have killed her. Thus, the phrase "battered spouse syndrome" is nothing more than a scientific moniker placed upon a straightforward defense which needs no such specialized title. Experts seem unnecessary when the theory of self defense has not been changed by giving it another name.[4]

Accordingly, the state suggests that reevaluation of Hawthorne is required.[5] As the state pointed out at oral argument, this Court should keep the demarcation between the defenses of insanity and self defense clear. The creation of a specialized version of self defense, e.g., battered spouse syndrome, by the Hawthorne court has caused self defense to take on characteristics of a mental defense.

---

[4] *Amicus curiae* appears to agree with this general proposition, as it opined at oral argument that experts are not necessary in this case.

[5] Reevaluation of Hawthorne at this point in the proceedings appears inappropriate for the same reason that the admissibility of respondent's statements to Dr. Krop seems inappropriate -- the issue is not ripe and not squarely before the Court for review. However, if this Court is nevertheless going to address the admissibility of such evidence, it should consider the theoretical underpinnings of this type of evidence as well.

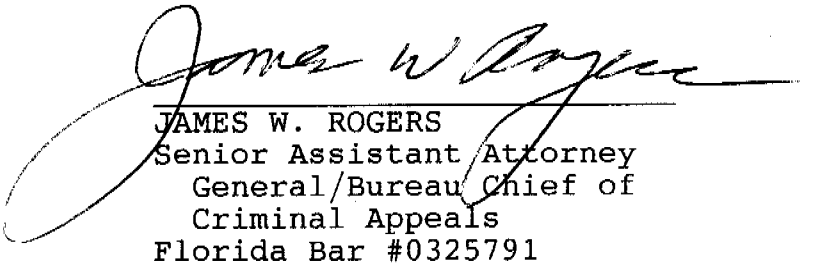
This is both unwarranted and unprecedented under Florida law. See Chestnut v. State, 538 So. 2d 820, 825 (Fla. 1989).

CONCLUSION

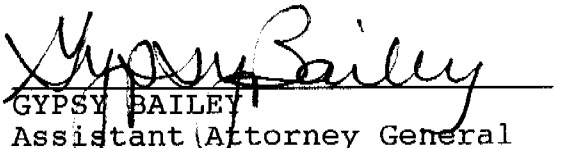
Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to: (1) find that certiorari was inappropriately granted in this case; and (2) answer the certified question as rephrased by the state in the affirmative.

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 #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 JON R. PHILLIPS, Assistant State Attorney, Special Prosecution Division, 421 West Church Street, Suite 814-21, Jacksonville, Florida 32202-4157; THOMAS G. FALLIS, ESQ., of ELIA & FALLIS, P.A., 343 East Bay Street, Jacksonville, Florida 32202; and JAMES T. MILLER, ESQ., for THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, 407 Duval County Courthouse, 330 East Bay Street, Jacksonville, Florida 32202, this 8th day of March, 1993.

GYPSY BAILEY
Assistant Attorney General