ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2009-1977
Plaintiff-Appellee,	:	On Appeal from the Lawrence County Court of Appeals, Fourth Appellate District
v.	:	
MEGAN GOFF,	:	
Defendant-Appellant.	:	Court of Appeals Case No. 07CA17

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL RICHARD CORDRAY IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO

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INTRODUCTION

After a criminal defendant makes her state of mind a crucial component of her own defense, she cannot shield her mental state behind the Fifth Amendment. Rather, she has opened the door to that evidence, and the State must be allowed to follow it where it naturally leads. In some cases, such as this one, the State must be allowed to conduct a psychiatric examination of the defendant to prevent the adversarial process from turning into an invitation to perjury. The state and federal courts accordingly have agreed that compulsory examinations are proper when a defendant announces her intent to raise the affirmative defense of insanity, and this rationale applies equally to an affirmative defense relying on Battered Woman Syndrome.

Recognition of Battered Woman Syndrome is a vital part of Ohio's criminal justice system, because it protects particularly vulnerable victims of abusive, intimate relationships. But it is nonetheless a component of an affirmative defense, and it is therefore treated, for constitutional purposes, like any other affirmative defense. Battered Woman Syndrome is a fact, and the burden of proving it rests solely on the defendant. And like all facts, once a defendant marshals it to support her affirmative defense, justice demands that the State be given a fair opportunity to examine and rebut the factual predicates of the defense. The State therefore may ask for a compelled psychiatric evaluation if the defendant relies on expert psychiatric testimony to establish her defense.

This conclusion is an ordinary application of the judiciary's inherent authority to level the playing field between two adversaries. Ohio courts, like their federal counterparts, have the inherent authority to order compulsory examinations precisely because there are times when doing otherwise would subvert the court's truth-seeking function. The courts serve as gatekeepers; they balance the interest of both parties and carefully and deliberately exercise their discretion.

STATEMENT OF AMICUS INTEREST

In Ohio, Battered Woman Syndrome is a method of proving an element of the affirmative defense of self-defense; it explains both that a defendant has an earnest fear of imminent physical harm and that she does not feel free to leave. *State v. Koss* (1990), 49 Ohio St. 3d 213, 217; R.C. 2901.06(B). Ohio Attorney General Richard Cordray has a strong interest in the State's opportunity for the full and fair adversarial testing of the Battered Woman Syndrome component of the affirmative defense of self-defense.

ARGUMENT

***Amicus Curiae* Attorney General's Response to Appellant Goff's Proposition of Law No. 1:**

A defendant who asserts an affirmative defense that relies on expert psychiatric testimony may be compelled to submit to psychiatric evaluation by the State.

Recognition of Battered Woman Syndrome serves a vital role in the criminal justice system because it mitigates the criminal liability of some of Ohio's most vulnerable victims: women in abusive, intimate relationships. It recognizes the unique effect that abusive relationships have on a person's state of mind, and that long-term abuse can cause a person to fear imminent harm while feeling powerless to leave the batterer. But it does not enjoy special constitutional protection. Battered Woman Syndrome is, at its core, a component of an affirmative defense. It is a fact advanced by the defendant, and like any fact, it must be subjected to meaningful adversarial scrutiny. When a defendant invokes it in her defense, she opens the door to her state of mind and allows the State to follow where she has led.

A. Fundamental principles of fairness allow the courts to compel the examination of a defendant who interjects an affirmative defense based on mental health and the results of such an examination may be introduced to rebut psychiatric testimony introduced by a defendant.

At the heart of this case is a fairness principle: A defendant cannot interject her mental health into a trial and simultaneously hide her mental health behind the Fifth Amendment. That

is why the federal court of appeals for the District of Columbia, sitting *en banc*, rejected a similar argument in *U.S. v. Byers* (D.C. Cir. 1984), 740 F.2d 1104. In *Byers*, then-Circuit Judge Antonin Scalia—joined by then-Circuit Judge Ruth Bader Ginsburg—noted that "virtually all other circuits" had held that once a defendant has raised an insanity defense, the Fifth Amendment's privilege against self-incrimination was not violated by a compulsory psychiatric examination. *Id.* at 1111. Further, if the defendant introduced psychiatric testimony at trial, the Fifth Amendment did not prevent testimony by the psychiatrist who conducted the court-ordered examination on the issue of sanity. *Id.*

Whether labeled as "'fair state-individual balance,' . . . or as a matter of 'fundamental fairness,' . . . or merely a function of 'judicial common sense,'" the federal courts have denied the Fifth Amendment shield "because of the unreasonable and debilitating effect it would have upon society's conduct of a fair inquiry into the defendant's culpability." *Id.* at 1113 (quoting, inter alia, *United States v. Albright* (4th Cir. 1968), 388 F.2d 719, 724; *Pope v. United States* (8th Cir. 1967), 372 F.2d 710, 720; and *Alexander v. United States* (8th Cir. 1967), 380 F.2d 33, 39).

The D.C. Circuit was correct in *Byers* to be concerned with maintaining the balance between defendants and the State. Preventing Fifth Amendment abuse by the *defendant* has long been a concern of the Supreme Court, particularly because the defendant "determines the area of disclosure and therefore of inquiry." *Brown v. United States* (1958), 356 U.S. 148, 155. If defendants could obtain psychiatric expert testimony and then shield themselves from compelled evaluations, it would convert the Fifth Amendment from a safeguard against self-incrimination to "a positive invitation to mutilate the truth a party offers to tell. 'There is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.'" *Id.* at 156 (quoting *Walder v. United*

States (1954), 347 U.S. 62, 65). "The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, *and prevail* in the balance of considerations determining the scope and limits of the privilege against self-incrimination." *Brown*, 356 U.S. at 156 (emphasis added).

These principles are a fair extension of *Estelle v. Smith* (1981), 451 U.S. 454, 468, which both limited the State's power to compel examination and accepted the premise that compulsory examinations are sometimes proper. If a court could *never* compel an evaluation, the *Estelle* Court would have had no reason to hold that a defendant who does *not* initiate an evaluation may *not* be subjected to compulsory examination. *Id.*; see also *Savino v. Murray* (4th Cir. 1996), 82 F.3d 593, 604 ("[D]efendant has no Fifth Amendment protection against the introduction of mental health evidence in rebuttal to the defense's psychiatric evidence. In essence, the defendant waives his [Fifth Amendment] right to remain silent . . . by indicating that he intends to introduce psychiatric testimony."); *White v. Mitchell* (6th Cir. 2005), 431 F.3d 517, 536-37 (when a defendant initiates a psychiatric evaluation and introduces psychiatric evidence, he may have his statements used against him); *United States v. Phelps* (9th Cir. 1992), 955 F.2d 1258, 1263 (same).

The State must be given the opportunity for full and fair adversarial testing in order to prevent exactly that type of abuse. The right to remain silent "cannot be construed to include the right to commit perjury." *Harris v. New York* (1971), 401 U.S. 222, 225. And so, when a defendant voluntarily puts her state of mind into play, the State may "utilize the traditional truth-testing devices of the adversary process." *Id.* Balancing the scales by allowing both parties to evaluate the factual evidence is a traditional and appropriate use of the evidentiary system.

B. When a defendant makes her mental health an issue of fact in the trial, the Fifth Amendment does not shield her mental health from scrutiny.

Although the federal courts have disagreed on *why* a defendant may be compelled to submit to an evaluation, they have not disagreed *that* an evaluation may be compelled. See *Byers*, 740 F.2d at 1111-13 (discussing the legal justifications for compelled testimony) (citing, *inter alia*, *Pope*, 372 F.2d at 720; *United States v. Whitlock* (D.C. Cir. 1980), 663 F.2d 1094, 1107 (compelled testimony may be admitted where it is not offered to prove guilt but to disprove affirmative defense)).

Such compulsory examinations are justified not only by the equitable doctrine of the D.C. Circuit, but also by the first principles of the Fifth Amendment. The Fifth Amendment is, at its core, a "requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Estelle*, 451 U.S. at 462 (quoting *Culombe v. Connecticut* (1961), 367 U.S. 568, 581-82) (quotation marks omitted). That is precisely what the State did here. The State convicted Goff not with testimony forced from her lips, but with undisputed evidence that she murdered her husband.

It was Goff, not the State, who raised the issue of Goff's mental health. This Court has long recognized that the "elements of the crime and the existence of self-defense are separate issues. Self-defense seeks to relieve the defendant from culpability rather than to negate an element of the offense charged." *State v. Martin* (1986), 21 Ohio St. 3d 91, 94; see also *State v. Poole* (1973), 33 Ohio St. 2d 18, 19 (affirmative defenses do not contradict evidence of guilt, but rather represent an independent matter, which the defendant claims exempts him from liability.) Allowing the State to inquire into the defendant's state of mind is not the same as forcing the

defendant to be an instrument of her own conviction; rather it is putting to the test the defendant's proof on an element for which *she* carries the burden.

Indeed, because the evidence in this case was introduced solely to impeach Goff's credibility, it is the type of evidence that is, as long as it is acquired in a trustworthy manner, admissible as impeachment evidence. *Oregon v. Hass* (1975), 420 U.S. 714, 722 (evidence inadmissible in the State's case in chief may be used as impeachment evidence when the defendant testifies). Once Goff took the stand, she was obligated to testify truthfully. And the State was entitled to rebut any falsehoods with the evidence in its possession. *Walder v. United States* (1954), 347 U.S. 62, 65 (where State acquired evidence through an illegal search for impeachment after the defendant testified, the Court found that "the defendant can[not] turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.")

C. No principled distinction exists between an insanity defense and the Battered Woman Syndrome component of self-defense for the purposes of the Fifth Amendment.

1. Whether insanity and Battered Woman Syndrome are "comparable" is constitutionally irrelevant.

Goff offers no principled reason to distinguish between self-defense through Battered Woman Syndrome and insanity under the Fifth Amendment, nor could she because they are indistinguishable for constitutional purposes. In order to conclude otherwise, this Court would have to find that Battered Woman Syndrome is afforded some form of *special* Fifth Amendment protection. It is not.

Battered Woman Syndrome is not a defense; it is a fact. It is a fact that can be used to prove the existence of self-defense, R.C. 2901.06(B), or insanity, R.C. 2945.392(B). The Constitution does not treat that fact differently based on whether it is part of an insanity defense or part of a self-defense claim. If a defendant's claim of Battered Woman Syndrome as part of

an insanity defense can be subjected to compelled examination, so too can her claim of Battered Woman Syndrome as part of a self-defense claim.

Indeed, if the Fifth Amendment applies to either of the defenses, it should apply to an insanity defense because rebutting an insanity defense necessarily involves bolstering the mens rea of the offense. Rebutting self-defense, on the other hand, only attacks the defendant's attempts to justify her act, and does not bolster an element the State must prove. *Byers*, 740 F.2d at 1109. But that argument has already been rejected in the insanity context. *Id.* If the Fifth Amendment does not protect a defendant from situations where her statements are used to bolster the State's proof of an element, it surely does not protect the State's rebuttal of a "justification" defense, which is unrelated to State's burden of proof on any element.

Additionally, it is well settled in Ohio that a trial court may decline to give self-defense instructions to a jury if the defendant does not testify. *State v. Seliskar* (1973), 35 Ohio St. 2d 95, 96 ("If a defendant cannot provide evidence on the issue of self-defense other than his own testimony, then, in order to avail himself of the defense, he must testify."). When a defendant claims self defense, generally all of her evidence becomes subject to adversarial testing, including her own testimony. Goff, however, would have that end at her psychiatrist's door. But facts are facts, whether they are the recollections of the defendant or the results of an expert evaluation. The State should be given a meaningful opportunity to rebut any fact that a defendant marshals in her defense.

Even if there are some differences between self-defense and insanity, they are not constitutionally relevant because the question of whether Battered Woman Syndrome exists is the same. Goff argues that Battered Woman Syndrome (1) is not a psychopathology; (2) is a theory of justification, not excuse; and (3) does not require expert testimony. But these

arguments miss the point. Ohio law already recognizes that Battered Woman Syndrome is not an insanity defense, but rather is a fact that can bolster an insanity defense. There are no special "insanity" varieties of Battered Woman Syndrome, and Goff's attempts to distinguish the two are ultimately unavailing.

2. When a defendant receives psychiatric testing from her own expert, the courts may compel another evaluation.

Finally, Goff argues that because Battered Woman Syndrome does not *require* a psychiatric evaluation in all cases, the State can *never* compel its own evaluation. Goff Br. at 15 (citing *United States v. Davis* (6th Cir. 1996), 93 F.3d 1286). But Goff's argument defies both common sense and the cases she cites to support it.

It is true that Battered Woman Syndrome *can* be proven without expert testimony. And in such cases, the State *cannot* seek a compelled examination. *Estelle*, 451 U.S. at 468 ("A criminal defendant, who [does not] initiate[] a psychiatric evaluation . . . may not be compelled to respond to a psychiatrist if his statements can be used against him"). But it does not follow that compelled evaluations are barred in *all* cases just because the defendant does not use expert testimony in *some* cases.

The more logical approach is this: *If* a defendant uses expert testimony, the trial court *may* compel a psychiatric evaluation. A defendant claiming Battered Woman Syndrome may simply forgo a psychiatric evaluation—instead introducing evidence of the abusive relationship and witness testimony—and thereby prevent the State from even seeking a psychiatric evaluation. And even if the defendant chooses to be evaluated, the trial court may elect not to compel an additional evaluation by the State. All defendants face this choice when raising an affirmative defense: To prove the affirmative defense, they may be required to testify in order to subject their evidence to the full scrutiny of the adversarial process.

Moreover, Goff's reliance on *United States v. Davis* (6th Cir. 1996), 93 F.3d 1286, is misplaced. Goff Br. at 15. *Davis* stands for the proposition that courts should refrain from compelled examination unless there is no other meaningful way for the State to rebut the defendant's defense. While that policy statement is laudable, it is neither binding nor relevant. The *Davis* Court nonetheless concluded that a defense based on mental condition, disease, or defect "requires a case by case analysis to determine whether a psychiatric or psychological examination of the defendant will be necessary for the government fairly to rebut the defendant's expert evidence." *Davis*, 93 F.3d at 1293.

***Amicus Curiae* Attorney General's Response to Goff's Proposition of Law No. 3:**

Revised Code 2945.371 does not limit a court's inherent authority to order an evaluation of defendant for any claim other than insanity or competency.

Goff has presented virtually no argument for her proposition that Ohio courts lack the inherent authority to order a psychiatric evaluation. Rather, she suggests that the exercise of such power is curtailed because R.C. 2945.371 does not *expressly* give the courts the authority to compel an examination for Battered Woman Syndrome, and therefore, she says, the statute impliedly proscribes evaluations. Further, she argues that such evaluations would be unnecessary or unwise. Goff is wrong on all counts.

A. Revised Code 2945.371 does not limit the inherent authority of the courts.

Goff begins with a critical misapprehension of the scope of judicial authority—namely, that Ohio courts are limited to the authority expressly granted to them by statute. Goff Br. at 31 ("As far as we can tell, the only time a criminal defendant in Ohio may be compelled to undergo a psychological examination over his objection is when that defendant raises a defense of insanity or . . . competen[cy] to stand trial.") (citing R.C. 2945.371). According to Goff, because the

General Assembly has not expressly said that courts may compel evaluations, they lack the authority to do so.

But this Court has forcefully rejected any attempt by the General Assembly to circumscribe the Court's inherent authority. Put simply, Ohio courts have authority to "do *all things necessary* to the administration of justice and to protect its own powers and processes and the rights of those who invoke its processes." *State v. Pfeiffer* (1968), 13 Ohio St. 2d 133, 137 (emphasis added). The courts have a constitutional duty zealously to preserve the co-equal status of the courts with its sister branches precisely, because failure to do so would threaten the harmony of the separation of powers doctrine. *State v. Bodyke*, ___ Ohio St. 3d ___, 2010-Ohio-2424, ¶ 47.

If the Court's authority was so narrowly circumscribed by the General Assembly's acts, its decision in *State v. Nemeth* (1998), 82 Ohio St. 3d 202, would be unsound. The *Nemeth* Court considered whether expert testimony could be introduced to support a claim of Battered Child Syndrome after the General Assembly had enacted R.C. 2901.06(B), which allowed expert testimony in a Battered Spouse Syndrome claim. The Court held that "[w]hile specific legislation may be helpful in defining the parameters of a new defense" is it is not necessary. *Id.* at 214-15.

Similarly, this Court has exercised the authority to require evaluations beyond the express scope of R.C. 2945.371. In *State v. Lott*, 97 Ohio St. 3d 303, 2002-Ohio-6625, this Court required lower courts to hold hearings on whether capital defendants were exempt from execution because they were mentally retarded, but nothing in R.C. 2945.371 allows for the type of evaluations *Lott* requires. In fact, R.C. 2945.371 only allows a court to consider whether

mental retardation existed at the time of the offense. R.C. 2945.371(H). But a *Lott* evaluation looks back to the defendant's childhood and through her adult life.

Where, as here, the administration of justice requires that the State be allowed to test the validity of a defendant's affirmative claim, the General Assembly cannot circumscribe the court's authority. Indeed, if this Court accepts Goff's argument that R.C. 2945.371 *impliedly* proscribes evaluations for Battered Woman Syndrome merely because it *expressly* allows them for competency and insanity, then the courts lose their power to find the truth and achieve justice, and the courts' independence from the General Assembly would be lost. Under Goff's scheme, courts possess authority only where the General Assembly is silent or where it has expressly granted permission for the courts to act.

B. Trial courts should be trusted with the discretion to order evaluations when necessary.

Finally, Goff argues that compelling psychiatric testimony is unnecessary and unwise, Goff Br. at 35, and that it will lead to the compulsory evaluation of *witnesses*. But whether a particular decision to compel testimony is unnecessary or unwise questions the court's exercise of discretion, not its inherent authority. The courts must be trusted to decide whether a particular evaluation is necessary or wise. Indeed, that is the keystone of judicial discretion: the assumption that courts will act out of necessity with forethought and deliberation. The judicial system is better served by allowing the courts that discretion; this Court should not abolish it because defendants assert that the courts are incompetent to exercise it.

Whether a court can compel the evaluation of a *non-defendant* witnesses is not before this Court. No party has asked this Court to decide whether a witness—who is not a defendant or even a party, and who does not voluntarily put her mental health into issue—may be compelled to submit to a psychiatric examination. While it seems likely that the courts might have that

authority in appropriately rare circumstances, the Court need not, and should not, answer a question that is best left for another day. Instead, the Court should address only the question raised in this case: whether a court has the authority to compel the examination of a criminal defendant who voluntary makes her psychiatric state an essential part of her affirmative defense. The answer to that question is yes.

CONCLUSION

For the above reasons, this Court should affirm the judgment of the Court of Appeals below.

Respectfully submitted,

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I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Plaintiff-Appellee State of Ohio was served by U.S. mail this 13th day of July, 2010, upon the following counsel:

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