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# Defending Battered Women: Everything She Says May Be Used Against Them

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# DEFENDING BATTERED WOMEN: EVERYTHING SHE SAYS MAY BE USED AGAINST THEM

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This article discusses practical techniques for presenting "battered woman syndrome" evidence in the courtroom on behalf of women who have killed their mates. Most of the theoretical literature on this subject argues that battered woman syndrome should not be considered as a defense by itself but should be used to support "self-defense" as a justification for the homicidal act.[1] To use such evidence otherwise (*e.g.*, to claim excuse or diminished mental capacity), it is argued, perpetuates age-old stereotypes of women as "crazy," "weak," "dominated," and in need of protection by the legal system.[2]

It is the thesis of this article that promotion of historical stereotypes may very well be an immediate consequence. The problem is that hard-headed insistence that diminished capacity defenses not be used may seriously limit the kinds of evidence the court will allow and may cost individual women now on trial ten, twenty or thirty years in prison and, in some cases, life.[3]

A reading of the 130 or more reported appellate cases that have developed in the past thirteen years since battered woman syndrome evidence was first presented in the American courtroom[4] reveals appalling injustices to women, because the closet of clothes that makes up the wardrobe of family violence cannot, in some judges' minds, be made to fit into one straightjacket of tradi-

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1. CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE 159-60 (1989) ("[T]here is no such thing as a 'battered woman defense' to a homicide charge. The sole purpose of such testimony is to help the jury to understand why the woman reasonably believed she had to act as she did to defend herself.").

2. Elizabeth M. Schneider, 9 WOMEN'S RTS. L. REP. 195, 214- 15 (1986).

3. *See, e.g.*, Martin v. State, 501 So. 2d 1313 (Fla. Dist. Ct. App. 1986); Chapman v. State, 386 S.E.2d 129 (Ga. 1989); State v. Anderson, 785 S.W.2d 596 (Mo. Ct. App. 1990); State v. Martin, 666 S.W.2d 895 (Mo. Ct. App. 1984); State v. Clark, 377 S.E.2d 54 (N.C. 1989); State v. Jackson, 435 N.W.2d 893 (Neb. 1989); State v. Kelly, 655 P.2d 1202 (Wash. Ct. App. 1982); State v. Leaphart, 673 S.W.2d 870 (Tenn. Ct. App. 1983); State v. Wickline, 399 S.E.2d 42 (W. Va. 1990); State v. Feltrop, 803 S.W.2d 1 (Mo. 1991).

4. Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979), *appeal after remand*, 455 A.2d 893 (D.C. 1983). The *Ibn-Tamas* trial court excluded proferred expert testimony on battered woman syndrome. On appeal, the court of appeals remanded the case, since the record was not clear whether the trial court properly analyzed the proferred testimony. Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979). On remand, the trial court stated that it had considered all pertinent factors. The case was then affirmed on appeal. Ibn-Tamas v. United States, 455 A.2d 893 (D.C. 1983).

tional self-defense law.[5]

"Battered woman syndrome" refers to a set of common characteristics unique to women who are physically or psychologically abused by their mates.[6] It does not appear as a separate category of mental illness in current diagnostic criteria developed by the American Psychiatric Association.[7]

The most commonly quoted and widely accepted explanation of the common characteristics making up the syndrome is that of Dr. Lenore Walker.[8] Dr. Walker's "cycle of violence" theory consists of three phases: a tension-building phase, a release through acute battering, and a final cycle of apparent contrition and remorse by the batterer.[9]

After *Ibn-Tamas v. United States*,[10] which contained Dr. Walker's initial postulation of the battered woman syndrome, American courts, with varying degrees of understanding, struggled to apply the concept to difficult cases in which battered women had killed their mates. In *State v. Kelly*,[11] the Supreme Court of New Jersey condensed Dr. Walker's work, setting forth the various stages faced by the battered woman in the cycle of violence.[12] According to Dr. Walker, during the "tension-building stage," the battered woman attempts to placate the battering male to avoid escalating violence.[13] The second stage of the battering cycle, the "acute battering incident," occurs following a "triggering event," often provoked by some event in the battering male's life.[14] A characteristic of the third stage is "extreme contrition and loving behavior" on the battering male's behalf. During this stage the male will ask for forgiveness and promise repentance. How-

5. *See, e.g.*, Clenny v. State, 344 S.E.2d 216 (Ga. 1986); Fultz v. State, 439 N.E.2d 659 (Ind. Ct. App. 1982); State v. Norman, 378 S.E.2d 8 (N.C. 1989); State v. Aucoin, 756 S.W.2d 705 (Tenn. Ct. App. 1988); Strong v. State, 307 S.E.2d 912 (Ga. 1983); Chapman v. State, 367 S.E.2d 541 (Ga. 1988); State v. Torres, 393 S.E.2d 535 (N.C. Ct. App. 1990).

6. LENORE E. WALKER, THE BATTERED WOMAN xiv-xv (1979).

7. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM III) (3d ed. rev. 1987). However, the syndrome has been recognized as a subcategory of post-traumatic stress disorder. For a brief discussion of an ongoing battle between feminist mental health professionals and the American Psychiatric Association concerning diagnostic criteria for battered women syndrome, see LENORE E. WALKER, TERRIFYING LOVE 48 n.* (1989).

8. LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 75-85 (1984).

9. *Id.* at 95-96.

10. 407 A.2d 626 (D.C. 1979), *appeal after remand*, 455 A.2d 893 (D.C. 1983).

11. 478 A.2d 364 (N.J. 1984).

12. State v. Kelly, 478 A.2d 364, 371-72 (N.J. 1984).

13. *Id.* at 371. At this stage, the male behavior is typified by "minor battering incidents and verbal abuse." *Id.*

14. *Id.* While the serious violence is usually triggered by an event in the male's life, it may be provoked by the woman, who "can no longer tolerate or control her phase one anger and anxiety." *Id.*

ever, the common progression following this phase, which may last several months, is re-initiation of stage one of the violence cycle.[15]

Dr. Walker asserts that the "cyclical nature" of the violence explains the failure of the battered woman to seek a new life.[16] The apparent devotion of the violent male perpetuates hope in the battered woman for eventual success in the relationship.[17]

Moreover, the battered woman may perceive the violence as "normal," comparing the battering cycle to her own childhood.[18] Other women, according to Dr. Walker, "sink into a state of psychological paralysis" finding their situation unalterable.[19] Lack of material resources and a belief in the "omnipotence" of the battering male combine to create in the battered woman a sense that there is "no place to go."[20] In addition, there is a typical unwillingness to confide in the outside world.[21]

Dr. Walker states that the following traits are exhibited by the battered woman: "low self-esteem, traditional beliefs about the home, the family, and the female sex role, tremendous feelings of guilt that their marriages are failing, and the tendency to accept responsibility for the batterer's actions."[22] These traits, combined with the tendency in battered women to be "trapped by their own fear," constitute the battered woman syndrome.[23]

Battered women kill because there comes a time when it appears no other remedy will save their lives. The problem for the defense in such cases is that this *point* in time is often not coincidental with the stage when severe beatings occur. The repeatedly battered woman may sense during the tension-building stage that a severe beating is imminent and that the consequences to her or members of her family will be life-threatening. After a beating is over, even if the batterer lies in bed sleeping,[24] the battered woman may be convinced that the beatings will most assuredly come again and that next time she will not survive.

All traditional laws of self-defense require, as one element,

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15. *Id.*
16. *Id.* at 371-72.
17. *Kelly*, 478 A.2d at 371-72 (citing ROGER LANGLEY & RICHARD C. LEVY, WIFE BEATING: THE SILENT CRISIS 112-14 (1977)).
18. *Id.* at 372 (citing BATTERED WOMEN, A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE 60 (Maria Roy ed. 1977); DEL MARTIN, BATTERED WIVES 60 (1981)).
19. *Id.*
20. *Id.* (citing LENORE E. WALKER, THE BATTERED WOMAN 75 (1979)).
21. *Id.* Women may be unwilling to confide in outsiders "either out of shame and humiliation, fear of reprisal by their husbands, or the feeling they will not be believed." *Id.*
22. *Kelly*, 478 A.2d at 372.
23. *Id.*
24. *See, e.g.*, State v. Leidholm, 334 N.W.2d 811 (N.D. 1983).

that the defendant prove she killed because serious bodily injury or death was "imminent" to herself or another for whom she feels responsible.[25] Most of the cases in which the defense has failed have been the result of a failure to satisfy this requirement of "imminence" of the threat. Sometimes the homicidal act seems so far removed from any imminent threat that the court will not even allow self-defense instructions which could promote a possible jury acquittal.[26] In other cases, the jury is simply unable to accept that an act of killing so *seemingly* remote in time should ever be allowed to satisfy the right to self-defense.

A reading of the reported battered woman cases reveals just how difficult it is to get a battered woman's story told.[27] In the usual defense, an expert is employed. *If* the expert's testimony is allowed, it is used to overcome historical and stereotypical notions of duty to retreat: she should have left; there were courts, community resources and law enforcement personnel that could have helped; she lied to the first officer on the scene; she seemed to lack remorse; there really was not an imminent threat; and a host of

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25. North Dakota's self-defense statute provides:

> A person is justified in using force upon another person to defend himself against danger or imminent unlawful bodily injury, sexual assault, or detention by such other person except that:
> 1. A person is not justified in using force for the purpose of resisting arrest, execution of process, or other performance of duty by a public servant under color of law but excessive force may be resisted.
> 2. A person is not justified in using force if:
>  a. He intentionally provokes unlawful action by another person to cause bodily injury or death to such other person; or
>  b. He has entered into a mutual combat with another person or is the initial aggressor unless he is resisting force which is clearly excessive in the circumstances. A person's use of defensive force after he withdraws from an encounter and indicates to the other person that he has done so is justified if the latter nevertheless continues or menaces unlawful action.

N.D. CENT. CODE § 12.1-05-03 (1985).

Section 12.1-05-07 of the North Dakota Century Code sets out "limits on the use of force." N.D. CENT. CODE § 12.1-05-07 (1985). In summary, the section states that only such force as is necessary may be used. Deadly force is permitted when authorized by law, when used for self-defense or defense of others, to prevent commission of a felony in a dwelling or workplace under the actor's control, to prevent escapes of persons in custody, and when used by physicians under prescribed conditions. *Id.*

26. *See* Fultz v. State, 439 N.E.2d 659, 663 (Ind. Ct. App. 1982); State v. Norman, 378 S.E.2d 8, 13-14 (N.C. 1989); State v. Torres, 393 S.E.2d 535, 539-40 (N.C. Ct. App. 1990); State v. Anderson, 785 S.W.2d 596, 599-600 (Mo. Ct. App. 1990); State v. Walker, 700 P.2d 1168, 1173 (Wash. Ct. App. 1985).

27. A case illustrating the confusion, misunderstanding and stereotypical male response to horrendous facts of battering is State v. Norman, 378 S.E.2d 8 (N.C. 1989). The *Norman* court appears to have been unable to grasp the concept of how battering husbands kill their mates on the installment plan and that there comes a day when some battered women first realize the final installment is coming due. Other courts seeming unable to grasp the concept include State v. Torres, 393 S.E.2d 535 (N.C. Ct. App. 1990); Norris v. State, 295 S.E.2d 321 (Ga. 1982); Fielder v. State, 683 S.W.2d 565 (Tex. Ct. App. 1985).

other obstacles that seem to point to motive, anger, revenge, cover-up and murder. Mostly, the expert is used to tell the woman's story. The leading authority in the field has written:

> Once battered women are allowed to speak, they will be able to tell their own stories. And to know a battered woman's story is to understand, without a doubt, why she has killed.[28]

This article suggests one inexpensive and effective way to get a battered woman's story told in the courtroom. It is not without controversy or risk. It has been used in a number of state and federal courtrooms in North Dakota, in all instances successfully.

The procedure suggested here has some bothersome departures from traditional defense lawyering in that it suggests an abandonment of the Fifth Amendment right to remain silent, and it places defense cards face up on the table so as to provide maximum opportunity for rebuttal and preparation by the prosecution. In return, all that can be said is that the procedure suggested here works. Dr. Walker has argued that there should be "special legal procedures for battered women . . . legitimized [to] . . . recognize and validate the world view of women as well as of men . . . ."[29] This author agrees, but until such time as those procedures are developed, one must consider that which works and which in fact overcomes evidence- limiting rulings and narrow jury instructions that far too often result in serious felony convictions.

Not every lawyer will defend a battered woman during her legal career. Not doing so, however, is more apt to be by choice than from lack of opportunity. Domestic violence is the single largest cause of injury to women in the United States today.[30] It contributes more injury to women than all of the automobile accidents, muggings and rapes combined.[31] Major efforts are being made by shelters and rights organizations to raise public consciousness and outrage, but the causes of domestic violence seem deeply imbedded in our psyches and in our institutions. The male violence that thrives from century to century seems nurtured by a pervasive and insidious belief by both sexes that it is the nature of things that males dominate and females submit. Ninety-five per-

28. LENORE E. WALKER, TERRIFYING LOVE 14-15 (1989).

29. *Id.* at 14.

30. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, FAMILY VIOLENCE: AN OVERVIEW, Jan. 1991, at 5 [hereinafter FAMILY VIOLENCE].

31. *Id.*

cent of the victims of domestic violence are women.[32]

Societal and governmental response to "crime" has become a central core of political debate. The "war on drugs" commands a cabinet level "czar." Domestic violence does not receive the same attention, even though virtually every incident of domestic violence is a crime, frequently a felony.

Violence occurs at least once in two-thirds of all marriages.[33] After analyzing data from many sources, Pagelow concluded that twenty-five to thirty percent of all women are beaten at least once in the course of their intimate relationships.[34] Domestic violence exists in all levels of community, wealth, education, occupation and status, with strong evidence that it is somewhat higher among middle and upper-income groups.[35] Estimates by the FBI indicate that only one out of ten incidents ever gets reported.[36]

One-third of all women slain in this country are killed by their husbands or partners.[37] It is estimated that between three and four-million American women are battered each year by their husbands or partners.[38] Of these, more than a million seek medical attention.[39] Twenty percent of all women presenting themselves to hospital emergency rooms do so as a result of injuries sustained in family violence.[40] As many as eighty percent of all women filing for divorce list physical abuse as one of their complaints.[41]

North Dakota is not immune from these harsh statistics. In the first six months of 1991, 2532 incidents of domestic violence were reported to eighteen crisis intervention centers.[42] Of these, 1352 were victims reporting for the first time.[43] This level of violence represented a twenty-nine percent increase over the

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32. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION ON CRIME AND JUSTICE, THE DATA, Oct. 1983, at 21.

33. THE ABUSIVE PARTNER, AN ANALYSIS OF DOMESTIC BATTERING 259 (Maria Roy ed., 1982).

34. FAMILY VIOLENCE, *supra* note 30, at 4-5.

35. Jeanne-Marie Bates, Comment, *Expert Testimony on the Battered Woman Syndrome in Maryland*, 50 MD. L. REV. 920, 926 n.35 (1991).

36. J. ROSENBERG, 911-FAMILY VIOLENCE: HELPING THE VICTIM 65 (1986).

37. FAMILY VIOLENCE ,*supra* note 30, at 5.

38. National Clearinghouse on Domestic Violence, *Wife Abuse in the Medical Setting: An Introduction for Health Personnel*, Monograph Series No. 7, Washington, D.C., U.S. Govt. Printing Office vii (Apr. 1981).

39. Evan Stark & Anne Flitcraft, *Medical Therapy as Repression: 'The Case of Battered Women'* HEALTH & MED., Summer/Fall 29-32 (1982).

40. Evan Stark, et al., *Medicine and Patriarchal Violence: "The Social Construction of a Private Event,"* 9(3) INTL. J. OF HEALTH SERVS. (1979).

41. Laura Crites & Donna Coker, 27 THE JUDGES' J., Spring 1988, at 9-10.

42. North Dakota Council on Abused Women's Services, 10(1) THE DAKOTAH CASSANDRA, September 1991, at 1.

43. *Id.*

reported incidents for the first six months of 1990.[44] Of this total, less than fifteen percent apply to the courts for protective orders.[45]

In defending battered women who have killed, expert testimony must first teach the jury insights of the type Dr. Walker taught the New Jersey Supreme Court in *Kelly*. The second step, however, is to demonstrate that this particular defendant historically had experienced the components making up the battered woman syndrome and, accordingly, acted logically, reasonably and legally in taking a life to preserve her own.

If the battleground to be chosen by the defense is a biographical and psychological profile, what counsel will almost always encounter is a mine field. There will always be a rich inventory of information helpful to the defense, but there will also be incidents seeming to point to guilt and nonconforming psychological glitches that threaten to blow up and dismember the defense with each step it takes.

It is in the very nature of battered families that there will have been a multitude of dysfunctional incidents. The defendant may have waited until her spouse or lover was asleep. There may be evidence that she threatened, stabbed, assaulted or shot someone before. She may have a previous criminal record. She may have been on drugs or alcohol. She may have been told by the police to call if she needed help. When she signed a complaint on previous occasions, her husband was arrested and convicted, so why didn't she call the police this time? There may have been a substantial insurance policy. She may have had an affair. She may have told someone she was going to kill him. The story she told the police immediately after her arrest may have varied substantially from what she is saying now. The story she told immediately following her arrest may be difficult to fit into the physical facts developed by the police investigator. She may have hired someone else to do it for her. There may be a seeming lack of remorse. She may have signed statements in the past at police stations which gave some explanation other than beatings to explain blackened eyes or broken arms. There may be "histories" taken by doctors explaining in great detail the causes of the prior injuries—all inconsistent with what she now says really happened on those occasions. Children loyal to Dad (or angry over his death) deny that Mother is telling

44. *Id.*

45. *See id.* (Of the 2532 incidents reported, only 377 protective order petitions were filed.).

the truth (she didn't have to go that far). She may be physically larger than he was.

But the story must be told and it must be told completely and fairly. How do you do this without becoming bogged down in endless pre-trial and trial battles over (1) differences between what is a justification and what is an excuse; (2) is this self-defense or diminished mental capacity; (3) is this a mental defense or just a claim of having a state of mind not capable of committing the crime; (4) was this duress;[46] and (5) did the Castle Doctrine[47] obviate her duty to retreat? The only important thing is to get her story told and to educate the jury on the battered woman syndrome.

A majority of courts now permit expert testimony to describe the phenomenon of battered woman syndrome regardless of whether presented as support for the argument that the defendant acted reasonably in exercising self-defense, or whether presented as a post-traumatic syndrome-type defense bearing on the issue of diminished mental capacity.[48] In the only battered woman syndrome case to reach the North Dakota Supreme Court, *State v. Leidholm*,[49] it was held that such testimony is to be consid-

46. State v. Rohrich, No. 569 (N.D. Dist. Ct. Oct. 9, 1975). This case was tried to a jury in Kidder County District Court, resulted in an acquittal of murder. *Rohrich* pre-dated the battered woman syndrome theory and was defended under a claim of duress. The facts of that case fit "battered woman syndrome" theory in classic proportion. Interview with Daniel J. Chapman, Bismarck, North Dakota defense attorney (January 1992).

47. The "Castle Doctrine" proclaims that no one is required to retreat from his or her "castle" to avoid harm. The doctrine is codified in North Dakota and states as follows: "[N]o person is required to retreat from his dwelling, or place of work, unless he was the original aggressor or is assailed by a person who he knows also dwells or works there." N.D. CENT. CODE § 12.1-05-07(2)(b)(2) (1985).

48. *See* State v. Steele, 359 S.E.2d 558, 563-64 (W. Va. 1987); Terry v. State, 467 So. 2d 761, 763 (Fla. Dist. Ct. App. 1985); Hawthorne v. State, 408 So. 2d 801, 806-07 (Fla. Dist. Ct. App. 1982); Strong v. State, 307 S.E.2d 912, 913 (Ga. 1983); Smith v. State, 277 S.E.2d 678, 683 (Ga. 1981); People v. Minnis, 455 N.E.2d 209, 217 (Ill. App. Ct. 1983); State v. Stewart, 763 P.2d 572, 576 (Kan. 1988); State v. Hodges, 716 P.2d 563, 570 (Kan. 1986); State v. Anaya, 438 A.2d 892, 894 (Me. 1981); State v. Baker, 424 A.2d 171, 172-73 (N.H. 1980); State v. Kelly, 478 A.2d 364, 381 (N.J. 1984); State v. Gallegos, 719 P.2d 1268, 1273-74 (N.M. Ct. App. 1986); People v. Torres, 488 N.Y.S.2d 358, 362-63 (N.Y. App. Div. 1985); State v. Leidholm, 334 N.W.2d 811, 819 (N.D. 1983); State v. Thomas, 468 N.E.2d 763, 765 (Ohio Ct. App. 1983); State v. Hill, 339 S.E.2d 121, 122 (S.C. 1986); State v. Kelly, 685 P.2d 564, 570 (Wash. 1984); State v. Allery, 682 P.2d 312, 315-16 (Wash. 1984); State v. Felton, 329 N.W.2d 161, 165-67 (Wis. 1983); State v. Hennum, 441 N.W.2d 793, 798-99 (Minn. 1989); People v. Aris, 264 Cal. Rptr. 167, 179-80 (Ct. App. 1984); Ibn-Tamas v. United States, 407 A.2d 626, 633-35 (D.C. 1979), *appeal after remand*, 455 A.2d 893 (D.C. 1983); Chapman v. State, 367 S.E.2d 541, 543 (Ga. 1988); State v. Hundley, 693 P.2d 475, 477-78 (Kan. 1985); Commonwealth v. Craig, 783 S.W.2d 387, 389 (Ky. 1990); State v. Clay, 779 S.W.2d 673, 676-77 (Mo. Ct. App. 1989); State v. Williams, 787 S.W.2d 308, 313 (Mo. Ct. App. 1990); State v. Norman, 366 S.E.2d 586 (N.C. Ct. App. 1988), *rev'd*, 378 S.E.2d 8, 11 (N.C. 1989); State v. Koss, 551 N.E.2d 970, 973-74 (Ohio 1990); State v. Moore, 695 P.2d 985, 987-88 (Or. Ct. App. 1985); Commonwealth v. Stonehouse, 555 A.2d 772, 782-84 (Pa. 1989); State v. Leaphart, 673 S.W.2d 870, 872 (Tenn. Crim. App. 1983); Fielder v. State, 756 S.W.2d 309, 319-20 (Tex. Crim. App. 1988).

49. 334 N.W.2d 811 (N.D. 1983).

ered as it bears on the reasonableness of the defendant's belief that force was necessary. More importantly, the court stated that the issue of "reasonableness" was to be "viewed from the standpoint of a person whose mental and physical characteristics are like the accused's and who sees what the accused sees and knows what the accused knows."[50]

In order to see what a battered woman sees and to know what a battered woman knows, her life must be re-created in the courtroom. A number of major obstacles stand in the way of accomplishing this task:

1. The defendant is depressed, angry and oftentimes uncommunicative.
2. The defense lawyer is afraid to let the whole story be told because the defendant has said and done things that seem indicative of guilt in order to survive in a dysfunctional setting.
3. If the facts on their face seem to contradict traditional self-defense or diminished capacity scenarios, the trial judge may not even let the story be told.

## HOW TO GET THE STORY TOLD

The standard for proving lack of criminal responsibility in North Dakota is set out in North Dakota Century Code section 12.1-04.1-01. The likelihood of acquittal on such grounds in *any* case that goes to trial is highly improbable.[51] Nevertheless, when a defendant gives notice of intent to raise such a defense,[52] certain procedural steps are implemented.[53] Once the defendant has given notice, the prosecution moves, pursuant to its statutory authority, to have the defendant examined by a mental health pro-

50. State v. Leidholm, 334 N.W.2d 811, 818 (N.D. 1983) (citation omitted).

51. This author conducted a somewhat cursory inquiry approximately five years ago and could find only three North Dakota cases, tried by juries, where there was a finding of not guilty by reason of a mental condition.

52. Required by N.D.R. CRIM. P. 12.2. The Century Code requires that a defendant give notice to the prosecution if he intends to assert lack of criminal responsibility as a defense or if he intends to introduce expert testimony on lack of required state of mind. N.D. CENT. CODE § 12.1-04.1-03 to -04 (1985). In *State v. Vogel*, the court refused to allow expert testimony on Ms. Vogel's "state of mind" but received in chambers an extensive "offer of proof" from a defense psychologist. State v. Vogel, No. 7276 (N.D. Dist. Ct. Nov. 8, 1989). Ms. Vogel was convicted of murder and received a 10-year deferred imposition of sentence. The case was not defended as either self-defense or diminished capacity, but rather as an accidental shooting during a threat meant to scare.

53. Under § 12.1-04.1-05 of the North Dakota Century Code, the prosecutor may request and insist upon an examination of the defendant by a mental health professional once the defendant has given notice of her intent to rely upon a diminished capacity defense. N.D. CENT. CODE § 12.1-04.1-05 (1985).

fessional. The scope of such examinations, and use thereafter, is also delineated in North Dakota by statute.[54] The law requires an exchange of reports by any experts either side expects to call.[55] The reports of any mental health professional or other expert furnished by the defendant may not be used at trial unless the mental health professional, or other expert who prepared the report, has been called to testify by the defendant.[56]

When you first meet a battered woman who has killed, she won't say much. You are likely to see her in a hospital room or a jail cell. Her eyes will be directed to the floor, and you can feel in her nonresponsiveness, "How can any lawyer help me now?" She feels the police have not helped her, the social service people have not, her clergyman did not, and neither did her family, friends or neighbors. She thinks: I killed him. I loved him, but I killed him. That's it.

Sometimes law enforcement reaction to domestic violence borders on bizarre. In one recent spouse-killing case in North Dakota, *State v. Vogel*,[57] the defendant was taken first to the hospital, then to the police station. After interrogation and extraction of some admissions, she was released. She stumbled down the darkened streets toward her home some three miles away. It was 4:00 a.m. She was alone. She had just killed her husband and was in a state of shock, yet she was let out the front door of the police station unattended.

Battered women do act logically, but it does not appear so. This is what the defense of battered women is all about. Since jurors think about self-defense in traditional male stereotypes of when self-defense is justified, the defense of a battered woman involves an effort to engineer a quantum leap in juror consciousness in just a few short hours of actual courtroom testimony.

After the defendant has given notice of her intention to raise a diminished mental capacity defense, the usual procedure in North Dakota is for the court to order that the defendant be committed to the North Dakota State Hospital for at least thirty days for purposes of a state-conducted examination.

During this time, a standard procedure is followed that includes: (1) a complete physical examination to determine whether there is organic brain damage or other physiological

54. N.D. CENT. CODE §§ 12.1-04.1-07 to -10 (1985).
55. N.D. CENT. CODE § 12.1-04.1-11 (1985).
56. N.D. CENT. CODE § 12.1-04.1-12 (1985).
57. State v. Vogel, No. 7276 (N.D. Dist. Ct. Nov. 8, 1989).

cause, (2) a psychological interview and battery of tests, (3) a social history interview usually by a social worker, (4) a psychiatric interview by a staff psychiatrist, (5) observation in the ward during daily living routine—recorded in staff shift notes, (6) a conference in which the defendant meets with the psychiatrist and representatives of the various sections within the institution, (7) a staffing conference in which there are staff discussions and recommendations concerning the report that will be returned to the court, and (8) a final report by the psychiatrist to the court.

Before the defendant presents herself to these health care workers, she needs to be fully prepared so that she understands the procedure to be followed and how the material will be used after it has been gathered and organized. She needs to know that everything she says may be used against them.

Unless the defense counsel also holds degrees in psychology and psychiatry, he would be wise to retain the assistance of mental health professionals in this early stage of the procedure. Indeed, when working with someone who has a long history of being battered, it may take months for her to be able to freely discuss the experiences she has just come through. It would be foolish for a defense lawyer to think he can muster in a few jail interviews such powers of persuasion as to overcome the psychological scars that have been inflicted. With assistance of professionals and many hours of patient interview, a picture will emerge which will give direction and clues to the multitude of other resources and custodians of essential defense information.

It will also prepare the defendant for a more complete debriefing when she arrives at the state hospital. This historical picture leads to a wealth of information from neighbors, friends, family, in-laws, military personnel, former spouses, law enforcement personnel and files, battered women shelters, clergy, schools, hospitals, treatment centers, support groups and others who have had contact with the defendant and the deceased. Written reports and interviews and the files of all these sources need to be obtained and compiled into a presentation for the state's mental health professional as well as for the defendant's own retained expert. At the state hospital, the task of summarizing this information usually falls upon a social worker who compiles the state's version of the "social history." All of the underlying information submitted to the state hospital becomes a part of the patient file.

The terrible concern expressed in *State v. Hennum*[58] for pre-trial Fifth Amendment rights to remain silent should be considered and discussed with the defendant, but it may very well be that in a majority of battered woman murder cases, that right should be abandoned.

When the psychiatrist from the clinic or state hospital comes to court to testify, one can usually expect the testimony will be that the patient does not lack substantial capacity to comprehend the harmful nature or consequence of her conduct and that her conduct was not the result of any loss or serious distortion of her capacity to recognize reality.[59] Rule 705 of the North Dakota Rules of Evidence then permits cross-examination, and a subpoena will bring the patient's entire state hospital file into the courtroom.

If the state's expert is asked whether she relied upon the physical or medical examination, she will tell you yes. If you ask why, you will be told of the importance of ruling out organic causes for the defendant's behavior.

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58. 441 N.W.2d 793 (Minn. 1989).

59. Section 12.1-04.1-01 of the North Dakota Century Code defines the standard for lack of criminal responsibility in North Dakota as follows:

> 1. An individual is not criminally responsible for criminal conduct if, as a result of mental disease or defect existing at the time the conduct occurs:
>  a. The individual lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality; and
>  b. It is an essential element of the crime charged that the individual act willfully.
> 2. For purposes of this chapter, repeated criminal or similar antisocial conduct, or impairment of mental condition caused primarily by voluntary use of alcoholic beverages or controlled substances immediately before or contemporaneously with the alleged offense, does not constitute in itself mental illness or defect at the time of the alleged offense. Evidence of the conduct or impairment may be probative in conjunction with other evidence to establish mental illness or defect.

N.D. CENT. CODE § 12.1-04.1-01 (1985). Section 12.1-02-02 of the North Dakota Century Code defines the words of culpability used in the diminished capacity statute as follows:

> 1. For the purposes of this title, a person engages in conduct:
>  a. "Intentionally" if, when he engages in the conduct, it is his purpose to do so.
>  b. "Knowingly" if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so.
>  c. "Recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct, except that, as provided in section 12.1-04-02, awareness of the risk is not required where its absence is due to self-induced intoxication.
>
> . . . .
>
>  e. "Willfully" if he engages in the conduct intentionally, knowingly, or recklessly.

N.D. CENT. CODE § 12.1-02-02 (1985).

The state's expert will also acknowledge the essential and vital nature of the psychological examination and testing. She will tell you that without the social history, the examination would be deficient and challengeable and that it is an extremely important, integral and mandatory part of any valid comment on mental condition. She will attest to the importance of the observations made by the ward nurses and staff as they observed the defendant "in group" and in routine living during the thirty-day period of the examination. Of course, the expert will support the importance of her own examinations and of the "give and take" obtained from the entire staff in the staffing conference prior to preparation of a written report for the court.

Rule 705 of the North Dakota Rules of Evidence provides that on cross-examination the defendant is entitled to elicit the bases and information upon which an expert arrives at a final opinion.[60] Since the expert has already explained to the jury the importance of the social history and has certified that she heavily relied upon the information contained in that social history, the entire social history becomes available, together with all underlying data supplied to the social worker who prepared the summary for the staff.

Nothing can be more effective on behalf of a battered defendant than to have the state's psychiatric expert forced on the witness stand to relate the biographical and background history of the defendant, which converts her from a heartless, cold-blooded killer of a husband to the tragic figure sitting before them. She was once abused as a child. She lost siblings to drowning or fire. She experienced mental torture and repeated physical beatings, illnesses, and hospitalizations. She sought the help of every conceivable community resource before arriving at the decision that she was being murdered by her lover on the installment plan, and she must do it now, even as he sleeps, because she has reached the last installment.

The expert for the state will tell the jury no certifiable mental illness could be found. But the social history is what interests the jurors. Unless the state's expert provides this history fairly, she appears biased against the defendant. She is not some hired gun for the defense telling the jurors these things. She is the state's

60. Rule 705 of the North Dakota Rules of Evidence provides as follows:

> The expert may testify in terms of opinion or inference and give reasons therefor without previous disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

N.D.R. EVID. 705.

expert telling the jurors these things so heavily relied upon in arriving at the final opinion.

It is harmful to the prosecution if its expert acknowledges reviewing and reading all this information but says it was not used. Could a jury ever rely upon the conclusions of a psychiatrist who first says the social history is imperative and then attempts to ignore it, explain it away, or claim it was not significant.

## CONCLUSION

If the defendant is truly a "battered woman," her biographical information most certainly contains a wealth of incidents which, as a composite, make her perception of the need to take action to preserve her own life understandable.

In the defense of such persons, one must be concerned that the Fifth Amendment right to remain silent is explained and preserved, but ultimately the defense is based on speaking and not on silence. Usual concerns about showing one's hand to the opposition in advance may not apply, and the use of the state's own witnesses to present massive biographical, medical and social history is a tried, tested and proven vehicle for gaining acquittals for battered women who have killed. The important part of any such defense is getting the story told. Great obstacles are created by a culture and a legal system oriented to a historically male view of self-defense. One should not be too sensitive to academic objections of diminished capacity as a defense in some quest for theoretical purity. In the real world, jurors will decide not whether she was mentally ill but whether or not the defendant got a raw deal in life and had the right to do what she did.