

No. 99-8491

*IN THE
SUPREME COURT OF THE UNITED STATES*

EVELYN CECELIA BOZON PAPPA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

=====

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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**BRIEF OF AMICI CURIAE
NATIONAL CLEARINGHOUSE FOR THE
DEFENSE OF BATTERED WOMEN, et al.,
IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Does a federal criminal defendant have a right to present expert testimony on battering and its effects to assist the jury in understanding and evaluating both prosecution evidence of purportedly knowing and intentional conduct by the defendant, and defense evidence of violent abuse of the defendant by the principal conspirator, her husband?

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DEFENSE OF BATTERED WOMEN, et al.,
IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT**

THE NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN (NCDBW) and five other organizations file this amicus brief pursuant to this Court's Rule 37.2(a) in support of Evelyn Bozon's petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Pursuant to Rule 37.2(a), both petitioner and respondent have granted consent to the filing of this brief.¹

INTERESTS OF THE AMICI

Amici curiae are nonprofit battered women's and criminal defense organizations. These organizations represent the interests of battered women and children, and of persons accused of crimes.

Amici have firsthand knowledge about the physical, emotional, and psychological effects of domestic violence on victims of abuse. Based on their collective experience, *amici* understand that when a history of abuse is relevant to the issues in a criminal case, including the defendant's conduct and state of mind, the jury must fully understand that history, the cumulative effects of the abuse, and its relationship to the legal issues. Otherwise, as happened in this case, the jury does not have the necessary contextual information with which to evaluate the evidence presented, and cannot reach a fair or reliable determination of guilt or innocence.

¹ No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than NCDBW made any monetary contribution to its preparation or submission. Letters of consent by the parties have been mailed to the Clerk of this Court for filing; copies are enclosed with this brief.

The National Clearinghouse for the Defense of Battered Women, founded in 1987, works to increase justice for battered women charged with crimes where the history of abuse is relevant to their legal claim or defense. The National Clearinghouse provides technical assistance and information to battered women defendants, defense attorneys, battered women's advocates, expert witnesses, and other professionals and members of the community. The Clearinghouse works on a wide variety of cases, including those involving self-defense/defense of others, coercion and duress, crimes of omission (such as failing to protect one's children from a batterer's violence), and cases where the history and impact of the abuse help to explain the defendant's behavior and/or rebut a *mens rea* element.

The National Clearinghouse does not advocate any special legal rules for battered women defendants, but rather works to ensure that they have the same rights and protections as all other criminal defendants. Among the most fundamental is the right to have the jury consider *all* relevant evidence, including all evidence necessary to challenge the state's case. In the case of a battered woman, this evidence often includes expert and lay testimony about the abuse that the defendant suffered at the hands of her batterer, the dynamics of the abuse experienced in the relationship, and the cumulative psychological effects of the abuse.

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in

ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice.

The National Legal Aid and Defender Association (NLADA), a non-profit organization incorporated in the District of Columbia, is the largest national association dedicated to ensuring access to justice for the poor in the nation's civil and criminal justice systems. NLADA's more than 2000 members are confronted day-to-day with the harsh realities facing victims of domestic abuse across the nation. Civil legal services and criminal indigent defense providers regularly face the consequences of domestic violence, both in representing victims to ensure their safety and capacity to live independent of the violence, and in dealing with the all too common criminal consequences related to domestic abuse. On behalf of all of our membership, NLADA has a profound interest in ensuring that jurors deciding criminal matters involving battered women have before them expert testimony that is essential to understanding and resolving the issues in a manner that comports with fundamental fairness.

The National Coalition Against Domestic Violence (NCADV) is a private nonprofit formed in 1978 that represents a network of over 2000 local domestic violence programs. NCADV provides technical assistance, information and referrals, community awareness campaigns and public policy work at the national level.

The National Network to End Domestic Violence (NNEDV) is a not-for-profit organization incorporated in the District of Columbia in 1995. NNEDV is a network of state anti-domestic violence coalitions, representing over 2000 member programs nationally. NNEDV's mission is to end domestic violence through public policy and education.

The Florida Coalition Against Domestic Violence (FCADV), a 22-year-old nonprofit organization incorporated in Florida, serves as the professional association for the state's 38 certified domestic violence centers and as the primary representative of battered women and their children in the public policy

arena. FCADV members share the goal of ending domestic violence through community education, public policy development, and services for victims. FCADV is gravely concerned about the biases and misunderstandings that continue to inform legal decisions regarding battered women charged with crimes in the state and federal courts of Florida. Of particular concern is the exclusion of expert testimony which is often essential to aid juries in understanding the dynamics of domestic violence so that defenses asserted on behalf of battered women may be considered in their proper context.

SUMMARY OF ARGUMENT

A criminal defendant cannot receive a fair trial if evidence is excluded from the jury's consideration which is necessary in order to understand the true significance of other admissible evidence. This is particularly true of expert testimony explaining the experiences of battered women, whose circumstances are poorly understood by the general public. When necessary information is beyond the ken of lay jurors, Federal Rule of Evidence 702 ensures that a proffered expert will be allowed to explain. Unless that testimony would express an opinion on the ultimate question whether the defendant had the mental state required for the commission of the offense, Rule 704(b) does not exclude that expert testimony. Indeed, the exclusion of expert testimony which occurred in petitioner's case had the effect of denying her constitutional right to present a valid defense -- the raising of a reasonable doubt as to her specific intent to commit any of the drug or money laundering conspiracy offenses with which she was charged.

The decision below conflicts with the great weight of state and federal authority on this question, which is of vital importance to the protection of battered women from unjust condemnation as criminal conspirators. Experts know, and can explain to juries, that when battered women act in concert with their abusers, their conduct does not necessarily imply agreement. A compliant manner is often induced by the intimate violence these women have endured, or it may be consciously (or uncon-

sciously) adopted as the strategy most likely to protect themselves and their children from deadly harm. Without the aid of expert testimony, jurors may wrongly draw the ordinary inference of conspiracy. The petition for certiorari should be granted; the judgment below must be reversed.

AMICI'S BRIEF IN SUPPORT OF PETITIONER

The question presented is of exceptional importance in the administration of federal criminal justice for battered women. The Eleventh Circuit's opinion is inconsistent with both the Federal Rules of Evidence and the Constitution, as explained in this Court's precedent and decisions of other courts.

Petitioner Evelyn Cecelia Bozon Pappa ("petitioner" or "Bozon") was convicted of federal drug and money laundering charges and sentenced to life imprisonment after a trial at which expert testimony she needed to explain her situation to the jury was excluded from consideration.

1. The Pervasive Social Problem of Domestic Violence Has Tragic Consequences for Numerous Women.

Principles of criminal law and evidence must not be based on misconceptions about surrounding social realities, nor, to the extent possible, should jury verdicts be permitted to reflect such misapprehensions. Petitioner Bozon's case, for example, must be approached with an awareness that violence against women is an enormous problem throughout the United States.² Estimates of the number of women assaulted by their intimate partners each year range upwards from one million. A 1998 survey show that 76% of women who are raped and/or physically assaulted are attacked by a current or former spouse, cohabiting partner, or date.³

² The great majority of victims of serious domestic violence and sexual assault are women. In over 90% of the violence by intimates recorded in the National Crime Victimization Survey from 1987 to 1991, the victim was female. Bur.J.Stat., Violence Between Intimates, NCJ-149259 (DoJ, Nov. 1994).

³ Patricia Tjaden & Nancy Thoennes, *Prevalence, Incidence, and*

The high rate of abuse is correlated with an alarming high rate of murder of women. A 1996 study based upon the Federal Bureau of Investigation's Supplemental Homicide Report found that female murder victims were more than 12 times as likely to have been killed by a man they knew as by a male stranger. In over half of these cases, the victims were wives or other intimates of their killers. Often, injuries extend to the woman's children, or those of the murderer.⁴ The problems confronting the battered woman are obviously exacerbated when she finds that her intimate partner is involved in secretive and dangerous criminal activity, as with petitioner.

2. Expert Testimony About Battering and its Effects Is Frequently Necessary in Criminal Cases To Aid the Jury in Understanding a Battered Woman's Conduct and State of Mind at the Time of the Offense.

Courts and legislatures have long recognized that when a battered defendant is charged with a crime, lay evidence about the abuse is often relevant. In the last three decades, innumerable courts have also recognized that lay testimony is frequently not enough; rather, jurors need the assistance of an expert on battering and its effects⁵ to enable them properly to evaluate the conduct and state of mind of a battered woman defendant.⁶

_____ (footnote continued)

Consequences of Violence Against Women 7-8 (Nat'l Inst. of Just. 1998).

⁴ Violence Policy Center, *When Men Murder Women: An Analysis of 1996 Homicide Data 3* (1998).

⁵ *Amici* use the term "battering and its effects" to describe the substance of lay and expert testimony regarding abuse. See Pet. at 4 n.2, and sources cited.

⁶ *Commonwealth v. Crawford*, 429 Mass. 60, 706 N.E.2d 289 (1999); *Nixon v. United States*, 728 A.2d 582 (D.C. 1999); *State v. Janes*, 121 Wash.2d 220, 850 P.2d 495 (1993); *Ex parte Haney*, 603 So. 2d 412 (Ala. 1992); *State v. Borrelli*, 227 Conn. 153, 629 A.2d 1105 (1993); *Ibn-Tamas v. United States*, 407 A.2d 626

The lay and expert testimony together provide the *context* neces-

_____ (footnote continued)

(D.C. 1979); *Terry v. State*, 467 So.2d 761 (Fla.App. 4th Dist. 1985), *rev. denied*, 476 So.2d 675 (Fla. 1985); *State v. Cababag*, 9 Haw.App. 496, 850 P.2d 716 (1993), *cert. denied*, 74 Haw. 652, 853 P.2d 542 (1993); *People v. Minnis*, 118 Ill. App.3d 345, 455 N.E.2d 209 (1983); *People v. Fleming*, 155 Ill. App.3d 29, 507 N.E.2d 954 (1987), *app. denied*, 116 Ill.2d 566, 515 N.E.2d 116 (1987) (*overturned sub nom. U.S. ex rel. Fleming v. Huch*, 924 F.2d 679 (7th Cir. 1991)); *State v. Crawford*, 253 Kan. 629, 861 P.2d 791 (1993); *State v. Clements*, 244 Kan. 411, 770 P.2d 447 (1989); *State v. Stewart*, 243 Kan. 639, 763 P.2d 572 (1988); *State v. Anaya*, 438 A.2d 892 (Me. 1981); *Commonwealth v. Rodriguez*, 633 N.E.2d 1039 (Mass. 1994); *State v. Hennum*, 441 N.W.2d 793 (Minn. 1989) (*en banc*); *State v. Hess*, 252 Mont. 205, 828 P.2d 382 (1992); *State v. Baker*, 120 N.H. 773, 424 A.2d 171 (1980); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984); *State v. Gallegos*, 104 N.M. 247, 719 P.2d 1268 (1986); *In re Nicole V.*, 71 N.Y.2d 112, 518 N.E.2d 914 (1987); *State v. Koss*, 49 Ohio St. 3d 213, 551 N.E.2d 970 (1990); *Bechtel v. State*, 840 P.2d 1 (Okla.Crim.App. 1992); *State v. Moore*, 72 Ore.App. 454, 695 P.2d 985 (1985); *State v. Hill*, 287 S.C. 398, 339 S.E.2d 121 (1986); *Fielder v. State*, 756 S.W.2d 309 (Tex.Crim.App. 1988); *State v. Allery*, 101 Wash.2d 591, 682 P.2d 312 (1984); *State v. Bednarz*, 179 Wis.2d 460, 507 N.W.2d 168 (1993). This consensus is not limited to the state courts. See *Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992); *United States v. Winters*, 729 F.2d 602 (9th Cir. 1984); *Fennell v. Goolsby*, 630 F.Supp. 451 (E.D.Pa. 1985). Legislatures have followed suit, enacting statutes expressly providing for the admissibility of lay and/or expert testimony about abuse in criminal trials. For a detailed survey of rulings on the admissibility of expert testimony and on statutes involving evidence on battering, see Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, Wis. Women's L.Rev. 75 (Summer 1996) (also found in Nat'l Inst. of Justice, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act, NCJ 160972* (DoJ, May 1996), Section II (hereinafter referred to as "NIJ"), and in Nat'l Ass'n of Women Judges, *Moving Beyond Battered Women's Syndrome: A*

sary for the jury to understand and evaluate the battered woman's legal claim, whatever that may be in the case at hand.⁷

Expert evidence on battering and its effects first evolved in the context of self-defense, as courts recognized that this testimony was needed to help the jury assess a defendant's asserted belief that she faced deadly danger.⁸ Initially, some courts (and some defense counsel as well) demonstrated confusion in the self-defense cases as to whether the defendant was asserting a unique or novel "battered woman defense," that is, a theory of justification or excuse based on the mere fact that she was battered.⁹

_____ (footnote continued)

Guide to the Use of Expert Testimony on Battering and Its Effects (1999)).

⁷ See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U.Pa.L.Rev. 379, 426 (1991) (expert testimony on battering and its effects is introduced in criminal trials to "show the trier of fact the context of a defendant's actions.") Recently, in response to passage of the Violence Against Women Act (Pub.L. 103-322, Title IV), the National Institute of Justice, part of the U.S. Department of Justice, reported on and confirmed the validity and importance of evidence about battering in criminal trials. NIJ, Section I. This report concluded, in part, that "[e]vidence and testimony about battering and its effects provide information germane to factfinders' deliberations in criminal cases involving battered women." NIJ, Section I, at 22. In particular, "an extensive body of scientific and clinical knowledge" strongly supports the validity and relevance of battering as a factor in the reactions and behavior of victims of domestic violence. NIJ, Foreword, at ii.

⁸ See, e.g., *Commonwealth v. Stonehouse*, 521 Pa. 41, 555 A.2d 772 (1989); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984).

⁹ See generally Maguigan, *supra* note 7 (analyzing assumptions underlying the misperception that traditional self-defense doctrine cannot accommodate the claims of battered women who kill); *Meeks v. Bergen*, 749 F.2d 322 (6th Cir. 1984) (counsel

Meeks v. Bergen, 749 F.2d 322 (6th Cir. 1984), typifies the conceptual difficulty among courts and practitioners that once prevailed in relating evidence of battering to a self-defense claim. In *Meeks*, a proceeding for federal habeas corpus relief alleging ineffectiveness of counsel, the court accepted trial counsel's explanation that he chose a self-defense claim **instead** of a "battered wife defense" in part because he believed that a "battered wife defense" was more appropriate in a non-confrontational type of self-defense situation. *Id.* at 328. The court analyzed counsel's failure to present expert testimony on battering as a separate ground of error. *Id.* Neither the federal courts nor counsel understood the expert testimony on battering in that case as legally relevant precisely because it supported the otherwise-recognizable self-defense claim.

Gradually, however, courts and commentators have come to recognize that evidence of battering is not offered to replace a self-defense or other legal claim or defense, but rather to support it.¹⁰ Moreover, by understanding expert testimony on

_____ (footnote continued)

not ineffective for asserting a claim of self defense rather than a "battered wife defense"); *Commonwealth v. Tyson*, 526 A.2d 395, 397 (Pa.Super. 1987) (referring to counsel's failure to raise defense of "battered woman's syndrome"); *State v. Scott*, 1989 WL 90613 (Del.Super. July 19, 1989) (defense refers to self-defense claim as the "battered woman's defense"); *Larson v. State*, 766 P.2d 261, 262 (Nev. 1988) (referring to the availability of the "battered wife defense"); *Commonwealth v. Ely*, 578 A.2d 540, 541 (Pa.Super. 1990). Some commentators even sought to exploit this confusion in order to arouse public sentiment against battered women and their supporters. E.g., Alan M. Dershowitz, *The Abuse Excuse and Other Cop-Outs, Sob Stories and Evasions of Responsibility* (1994).

¹⁰ See Peter Arenella, *Demystifying the Abuse Excuse: Is there One?*, 19 Harv.J.L. & Pub.Pol. 703, 704 (1996) ("[T]he critics are attacking a strawman[,] because the criminal law has not endorsed abuse excuse defenses that absolve victims from blame for their criminal acts. ... There is no such thing as an 'abuse excuse' defense in the substantive criminal law."); *Smith*

battering as evidentiary support, rather than as a claim or defense in itself, courts and legislatures have gradually understood that it may be relevant not only in support of self-defense claims, but also in many different types of criminal cases, and many different contexts. While confusion about the assertion of a separate "battering defense" was more egregious in the past, that confusion still persists today in cases not involving self-defense, like petitioner Bozon's.

Courts have recognized the relevance of expert testimony to explain the battered woman defendant's reactions and behavior in a wide variety of situations. It has been admitted to support defenses against a wide variety of charges (from assault and homicide to fraud and tax evasion, drugs, guns, and child abuse) and for many different purposes.¹¹ Such testimony may

_____ (footnote continued)

v. State, 486 S.E.2d 819 (Ga. 1997); *Commonwealth v. Miller*, 634 A.2d 614 (Pa.Super. 1993), *app. denied*, 646 A.2d 1177 (Pa. 1994); *State v. Daws*, 662 N.E.2d 805 (Ohio App. 2d Dist. 1994); *State v. Crawford*, 861 P.2d 791 (Kan. 1993); NIJ, *supra* note 9. For a thorough compilation of cases, see Erin M. Masson, Annot., *Admissibility of Expert or Opinion Evidence of Battered Woman Syndrome on Issue of Self-Defense*, 58 ALR 5th 749 (1998).

¹¹ See, e.g., *United States v. Ramos-Oseguera*, 120 F.3d 1028 (9th Cir. 1997) (expert testimony on battering admitted in federal drug case to support battered woman defendant's duress claim); *United States v. Brown*, 891 F.Supp. 1501 (D.Kan. 1995) (after-discovered evidence of battering warranted new trial since it would have explained defendant's state of mind and supported her compulsion defense in federal drug case); *People v. Romero*, 13 Cal.Rptr.2d 332 (Cal.App. 2d Dist. 1992) (expert testimony on battering was relevant to duress defense of battered woman defendant convicted of second-degree robbery with abusive boyfriend), *rev'd on other grounds*, 35 Cal.Rptr.2d 270, 883 P.2d 388 (1994); *State v. Williams*, 937 P.2d 1052 (Wash. 1997) (expert testimony supported battered woman's duress claim in welfare fraud case); *United States v. Johnson*, 956 F.2d 894 (9th Cir. 1992) (in federal drug case, evidence of battering relevant

support not only a justification or an excuse -- such as self-defense, duress, mental impairment, or mental illness -- but also to explain the defendant's state of mind, the significance of her behavior, or even to help determine if a defendant possessed the specific intent for the crime.¹² It has also been admitted when asked for by the state in the prosecution of batterers.¹³

_____ (footnote continued)

to defendants' duress claims at trial, but if complete duress defense fails, then evidence of battering to support incomplete duress must be taken into consideration by sentencing court in making downward departure under sentencing guidelines).

¹² See, e.g., *Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992) (denial of funds for expert on battering violated due process since battering was relevant to negate the specific intent element of the aiding and abetting statute); *United States v. Marenghi*, 893 F.Supp. 85 (D.Me. 1995) (in drug prosecution, evidence of "battered woman syndrome" could be admissible to negate *mens rea* element of the crime); *Barrett v. State*, 675 N.E.2d 1112 (Ind.App. 1996) (in child neglect case, expert testimony on "battered woman syndrome" was admissible to rebut state's evidence and support battered woman's claim that she did not possess requisite specific intent), *transfer denied* (5/22/97); *State v. Lambert*, 173 W.Va. 60, 312 S.E.2d 31 (1984) (defendant was entitled to present evidence of battering to negate criminal intent element of welfare fraud charge); *State v. Cababag*, 9 Haw.App. 496, 850 P.2d 716 (1993), *cert. denied*, 74 Haw. 652, 853 P.2d 542 (1993) (expert testimony on battering admissible to explain seemingly "bizarre" conduct of domestic violence victims, including minimization of the abuse and other related behaviors, which is beyond knowledge of ordinary juror); *Minnis*, 455 N.E.2d 209 (Ill. 1983) (expert testimony admissible to explain battered woman defendant's conduct, not only at time of homicide, but also afterwards in dismembering abuser, to rebut state's interpretation as showing consciousness of guilt). See also NIJ, Section I, at 2-4.

¹³ See Annot., Cynthia L. Barnes, *Admissibility of Expert Testimony Concerning Domestic-Violence Syndromes to Assist Jury in Evaluating Victim's Testimony or Behavior*, 57 ALR 5th

As with other types of expert testimony, expert testimony on battering is admitted because it covers areas beyond the jurors' ken. It is designed to explain aspects of battered women's experiences and the dynamics of domestic violence about which jurors might have misconceptions, some of them so commonly held as to constitute "conventional wisdom," that otherwise could cause the jurors to misunderstand either her state of mind or her conduct, or both.

In particular, courts have recognized that expert testimony on battering may cover: (a) general information on the dynamics of domestic violence¹⁴; (b) explanations of the behavior of a battered woman that may seem inconsistent with her being battered¹⁵; (c) discussion of common myths and misconceptions about battered women¹⁶; (d) common reactions

_____ (footnote continued)

315 (1998); see also *United States v. Peralta*, 941 F.2d 1003 (8th Cir. 1991) (expert testified to reactions of hostage who developed positive feelings for captor; admissible to explain victim's conduct after kidnaping); *Arcoren v. United States*, 929 F.2d 1235 (8th Cir. 1991) ("battered woman syndrome" evidence admissible by state to explain battered woman's recantation of abuse claimed in her original police report); *State v. Slade*, 168 Wis.2d 358, 485 N.W.2d 839 (1992) (in sexual assault, battery, and false imprisonment case, state expert's testimony regarding victims in abusive relationships relevant to provide alternative explanation for battered woman's conduct in not making greater efforts to resist or escape defendant).

¹⁴ Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 Women's Rts. L.Rep. 195, 202 (1986); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L.Rev. 1191, 1195 (1993).

¹⁵ Dutton, *Understanding Women's Responses*, *supra* note 14, 21 Hofstra L. Rev. at 1195.

¹⁶ Schneider, *Describing and Changing*, *supra* note 14, 9 Women's Rts. L.Rep. at 202.

that women have to battering¹⁷; (e) a discussion of the particular facts in the case, to show how they are consistent with a battering relationship¹⁸; (f) the particular experiences of the battered woman defendant, including her own strategies for stopping the violence, her psychological responses to battering, and the cumulative effects of the battering on her behavior and state of mind.¹⁹

Expert testimony on battering is sometimes misunderstood as being solely concerned with the individual psychology of the battered woman, the "inner workings" of her mind. In reality, expert testimony on battering always covers much more:

Typically, the testimony offered in forensic cases is not limited to the psychological reactions or sequelae of domestic violence victims, and this has led to confusion about what is encompassed by the term "battered woman syndrome." Expert witness testimony may also be offered to explain the nature of domestic violence in general, to explain what may appear to be puzzling behavior on the part of the victim, or to explain a background or behavior that may be interpreted to suggest that the victim is not the "typical" battered woman or that she herself is the abuser.

¹⁷ Schneider, *Describing and Changing*, *supra* note 14, 9 Women's Rts.L.Rep. at 202; Martha Mahoney, *Images of Battered Women: Redefining the Issue of Separation*, 90 Mich.L.Rev. 1, 36 (1991).

¹⁸ Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 Women's Rts.L.Rep. 227, 228 (1986); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364, 378 (1984); *State v. Richardson*, 189 Wis.2d 418, 525 N.W.2d 378 (1994).

¹⁹ Dutton, *Understanding Women's Responses*, *supra* note 14, 21 Hofstra L. Rev. at 1215-40.

Dutton, *Understanding Women's Responses*, *supra* note 14, 21 Hofstra L. Rev. at 1195. Courts have recognized that, absent expert testimony on battering in areas such as these, jurors may make critical decisions about the defendant's culpability and credibility based on their own ideas about domestic violence and battered women.

One federal judge has explained this particularly well:

Courts permit [evidence on battering and its effects] to be admitted to expand the common sense and general knowledge that all jurors are presumed to bring with them into the jury room. ... Without an understanding of how battered woman syndrome instills in an abused person a continuing sense of being trapped and of constant fear, the juror's review of a defendant's allegations that she was in fear of immediate bodily injury will be incomplete and irrelevant to the reality of the situation.

In effect, bringing the discussion and understanding of intrafamily violence out into the open places a scenario long considered a closely-guarded "private family matter" on the same footing as other forms of violence leading to criminal acts See, e.g., ... *State v. Allery*, 101 Wash.2d 591, 682 P.2d 312, 316 (1984) ("We find that expert testimony explaining why a person suffering from the battered woman syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself would be helpful to the jury in understanding a phenomenon not within the competence of an ordinary lay person.")

United States v. Marenghi, 893 F.Supp. 85, 96 (D.Me. 1995).

Scholarly literature confirms the persistence of these misconceptions: that battered women can easily leave these inhumane situations, and that women are responsible for their

failure to leave²⁰; that battering is a series of discrete events rather than a continuing state of siege²¹; that battered women are passive and meek²²; and that battered women are blameworthy.²³ Unfortunately, despite the best public education efforts of such groups as the *amici* filing this brief, social science research confirms that the misinformation and misconceptions about battered women that led to the need for expert testimony in the first place persist to this day. Recent research shows that lay persons still differ significantly from experts in their understanding of the dynamics of battering.²⁴

As the New Jersey supreme court explained, in a leading homicide case involving a claim of self-defense:

The expert could clear up these myths, by explaining that one of the common characteristics of a battered wife is her *inability* to leave despite such constant beatings; ... her lack of anywhere to go; her feeling that if she tried to leave she would

²⁰ Mahoney, *Images of Battered Women*, *supra* note 17, 90 Mich.L.Rev. 1; see also Regina A. Schuller, Vicki L. Smith & James M. Olson, *Jurors' Decisions in Trials of Battered Women Who Kill: The Role of Prior Beliefs and Expert Testimony*, 24 J. Applied Soc. Psych. 316 (1994)

²¹ Dutton, *Understanding Women's Responses*, *supra* note 14, 21 Hofstra L.Rev. at 1208; see also Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb.L.Rev. 973, 980-81 (1995).

²² Mahoney, *Images of Battered Women*, *supra* note 17, 90 Mich.L.Rev. at 44.

²³ Elizabeth M. Schneider, *Equal Rights to Trial for Women*, 15 Harv.Civ.R.-Civ.Lib.L.Rev. 623, 625 (1980); *State v. Hodges*, 716 P.2d 563, 567 (Kan. 1986); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364, 370 (1984).

²⁴ Schuller, Smith & Olson, *Jurors' Decisions*, *supra* note 20, 24 J. Applied Soc. Psych. at 317.

be subjected to even more merciless treatment; her belief in the omnipotence of her battering husband; and sometimes her hope that her husband will change his ways.

The ... expert's testimony ... is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge. ...

State v. Kelly, 97 N.J. 178, 205-06, 478 A.2d 364, 377-78 (1984) (emphasis original); accord, e.g., *Bechtel v. State*, 840 P.2d 1, 8 (Okla.Crim.App. 1992); *State v. Hodges*, 239 Kan. 63, 68-69, 716 P.2d 563, 567 (1986) (citing half a dozen other states).

Many of these misconceptions are based on an assumption that all battered women fit (or should fit) a particular profile. In reality, battered women face diverse circumstances, and employ an impressive array of strategies for coping with abuse, all of which may require explanatory expert testimony.²⁵

When presented for a purpose other than supporting a mental health defense, evidence on battering is like many other forms of expert testimony that are routinely admitted in federal court, often at the behest of the government. It satisfies Fed.R.Evid. 702 because it is based on "scientific [and] specialized knowledge," and because it is helpful to the jury in understanding the events testified about by the lay witnesses. It "will assist the trier of fact to understand the evidence" accurately, the core function of expert testimony under the Rule. *Id.* The expert may be a specially trained social or clinical psychologist, psychiatrist, or clinical social worker, or a

²⁵ Dutton, *Understanding Women's Responses*, *supra* note 14, 21 Hofstra L.Rev. at 1196, 1225-30; Jill Davies, Eleanor Lyon & Diane Monti-Catania, *Safety Planning With Battered Women: Complex Lives/Difficult Choices* 78 (1998).

lay counselor who is "qualified ... by knowledge, skill [and] experience." *Id.* The expert testimony explains things that average lay persons either do not know, or about which their "common sense" would lead them to incorrect conclusions. In this regard, it is no different from testimony of a federal agent that suspects speaking in a wiretapped conversation are really talking about a drug transaction, even though they seem to be talking about jewelry or clothing or some other code, or of a sociological expert who can explain the meaning of conduct in an alien culture. See 3 Weinstein's Evidence ¶702[02] (collecting cases).

In this case, the jury was asked to infer petitioner Bozon's specific intent from testimony about her conduct. This is, after all, the standard way that juries are able to find intent in criminal cases. Yet, as this Court has forcefully held, intent cannot be presumed from acts; a correct inference always depends on the facts of the particular case. See generally *Sandstrom v. Montana*, 442 U.S. 510 (1979). It thus follows that the jury is entitled to have the benefit of testimony that will protect it against readily anticipated misunderstandings of that conduct testimony. In this case, the jury also heard testimony about petitioner's cruel mistreatment by her husband, the principal conspirator (and a fugitive). The jury had no way to relate those two forms of testimony. It could not understand the significance of the lay testimony about abuse without also hearing the expert.

The proffered expert clinical psychologist's testimony did not run afoul of 18 U.S.C. § 17(a), because petitioner did not attempt to mount a defense based on "[m]ental disease or defect." It did not violate Fed.R.Evid. 704(b), because the defense did not propose to use the expert to offer an opinion whether petitioner did or did not actually have the mental state (specific intent) required to establish the charged offenses. The expert evidence could have raised a reasonable doubt about the logical validity, in this case, of the inference that the government would have the jury draw about petitioner's specific intent from the evidence of her acts, by

helping the jury understand the range of reasons why certain people in special circumstances -- in this case, battered women -- behave as they do.

To review the arbitrary exclusion of helpful, indeed necessary, expert testimony in this case, in contrast with the overwhelming weight of authority in state and federal courts, *amici* urge this Court to grant the writ of certiorari.

3. *The Writ Should Be Granted to Confirm the Due Process Right to Present Necessary, Relevant Expert Testimony About Battering and its Effects, as Affirmed by Other Courts.*

The decision of the court below conflicts with the great weight of state and federal authority on the question whether an accused defendant has a due process right to present helpful expert testimony needed to explain other evidence in the case. The trial court erroneously and illogically excluded the testimony based on a confusion between the offer and a view of particular affirmative defenses.²⁶ The ruling was all the more illogical because the expert, when asked a patently improper question by the court itself, in violation of Fed.R.Evid. 704(b), would not flatly (and unprofessionally) declare that petitioner acted unintentionally. Pet. App. A3, C20-21.

The exclusion of expert testimony which occurred in petitioner's case had the effect of denying her constitutional right to present a valid defense -- the raising of a reasonable

²⁶ Ironically, this ruling confronts battered women in the Eleventh Circuit with a classic Catch-22: had the same expert testimony been offered to establish an affirmative defense of duress, it might have been deemed inadmissible as well. See *United States v. Willis*, 38 F.3d 170 (5th Cir. 1994) (expert on battering not allowed in support of duress defense); cf. *United States v. Sixty Acres in Etowah County*, 930 F.2d 857 (11th Cir. 1991) (rigidly enforcing "immanence" requirement of duress defense, raised by abused wife to support "innocent owner" claim against civil forfeiture).

doubt as to her specific intent to commit any of the drug or money laundering conspiracy offenses with which she was charged. This Court has long recognized that the exclusion of logically relevant evidence which is necessary to present a defense may violate the due process clause. *Rock v. Arkansas*, 483 U.S. 44 (1987); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Webb v. Texas*, 409 U.S. 95 (1972) (per curiam); *Washington v. Texas*, 388 U.S. 14 (1967). These same principles required the trial court to allow the expert testimony in this case. See Erich Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 Ohio St. L.J. 363 (1992).

There is no special, historical, common law justification excluding psychosocial evidence explaining behaviors (so long as it steers clear of opining on the defendant's mental state), akin to that pertaining to alcohol intoxication. Compare *Montana v. Egelhoff*, 518 U.S. 37 (1996) (plurality). Nor can a federal judge's evidentiary ruling be characterized as clarifying the contours of a jurisdiction's definition of *mens rea*, as a state supreme court can do. *Id.* at 56-58 (Ginsburg, J., concurring, joined by plurality, see *id.* at 50 n.4). Neither in this case, nor generally, has any claim been made that the proffered evidence, by its nature, is too confusing or prejudicial to be allowed. Compare *Scheffer v. United States*, 525 U.S. 303 (1998) (polygraph).

Because of the prevalence of popular misconceptions of their circumstances, the opportunity to present expert testimony, in conjunction with lay evidence, is vitally important to the protection of battered women from unjust condemnation as criminal conspirators. Such testimony thus protects their fundamental right to a fair trial. Experts know, and can explain to juries, that when battered women act in concert with their batterers, they are not necessarily evidencing an agreement with them. A compliant manner is often coercively induced by the intimate violence these women have endured, or it may be consciously (or unconsciously) adopted as the strategy most likely to protect themselves and their children

from deadly harm. Without the aid of expert testimony, jurors may wrongly draw the ordinary inference of conspiracy.

The constitutional dimension of the exclusion of expert testimony on this subject, overlooked by the court below, has been the basis of favorable decisions by other federal courts. See *Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992); *Morgan v. Krenke*, 72 F.Supp.2d 980 (E.D.Wis. 1999); *Fennell v. Goolshy*, 630 F.Supp. 451 (E.D.Pa. 1985); cf. *Thomas v. Arn*, 728 F.2d 813, 815 (6th Cir. 1984) (Jones, J., concurring).²⁷

For these reasons, as well as those discussed by petitioner, the petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, complementing those presented in the petition itself, this Court should grant the writ of certiorari. After full briefing and argument, this Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit and remand the case with directions to allow petitioner a new trial.

Respectfully submitted,

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²⁷ This Court granted certiorari and affirmed in *Thomas* on a procedural point, 474 U.S. 140 (1985), thus avoiding the constitutional question presented in the instant case.