No. 13-5998

IN THE

Supreme Court of the United States

MICHELLE BYROM,

Petitioner,

v.

CHRISTOPHER E. EPPS, Commissioner,
Mississippi Department of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Clearinghouse for the Defense of Battered Women is a nonprofit educational and advocacy organization. NCDBW works to increase justice for victims of intimate partner battering who are charged with or serving sentences for crimes related to this abuse. Founded in 1987, the Clearinghouse quickly became the nation's leading resource and authority in its area of expertise and remains the only national organization that focuses exclusively on victims of battering accused of crimes. NCDBW provides technical assistance and support to battered women defendants and their attorneys, as well as to experts, battered woman's advocates and others. NCDBW also develops resources, conducts training and education programs, and advocates for legal reform. Since 1987, NCDBW has responded to over 38,000 requests for information, provided case-specific technical assistance in over 3,650 cases, and has conducted hundreds of training programs.

In recognition of its quality services and national leadership role, NCDBW was chosen in 1993 to be one of five recipients of funding from the U.S. Department of Health and Human Service as

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Petitioner and respondent, having been afforded the required notice of our intent to file, consented to the filing of this *amicus* brief; their letters of consent have been filed with the Clerk of this Court pursuant to Rule 37.3(a).

part of the Domestic Violence Resource Network. NCDBW remains an active member of the DVRN and an integral part of the national leadership of the battered women's advocacy movement.

Even today, many of problems that NCDBW sought to address when it opened its doors over twenty-five years ago remain. When victims of battering find themselves facing criminal charges, too often any understanding of their victimization disappears. Frequently, their claims of being battered are distrusted, based on assumptions that persist in "conventional wisdom" despite having been repeatedly refuted by social science research and clinical experience. In case after case, their veracity is questioned despite a gross over-representation of victims of abuse in our criminal legal system. Research indicates that between 50% and 95% of incarcerated women have experienced significant abuse either as an adult and or a child, with higher numbers among those convicted of violent crimes.[2] Compared to other women, the incarcerated are more likely to have been victims of family and other intimate violence and to have suffered more incidents of abuse, even when compared to non-incarcerated women who have sought assistance from sexual assault and domestic violence services.

NCDBW seeks to ensure that battered woman defendants, like all accused persons, receive the full benefit of the rights and protections designed to ensure fair trials, accurate verdicts, and appropriate sentences. To this end, the Clearinghouse seeks to educate those involved with the criminal justice

[2] The large variation in estimates results from differences in methodology of the studies, not their reliability.

system about battering and its effects and to combat the pervasive misconceptions and misunderstandings that can lead to erroneous and unjust outcomes at trial or sentencing, and on appeal.

STATEMENT OF THE CASE

Amicus NCDBW adopts petitioner's statement of the case.

SUMMARY OF ARGUMENT

The Mississippi Supreme Court's conclusion that Petitioner was not prejudiced by her sentencing counsel's failure to present any witness testimony in mitigation is an unreasonable application of this Court's precedent and is inconsistent with lessons learned from clinical experience and empirical research regarding battering and its effects and fair adjudication of battered women's claims. The state court allowed petitioner's death sentence to stand, despite being based on misinformation and falsehoods about battering and its effects, both generally and in this particular case.

As stated by the three dissenters from denial of state post-conviction relief:

> [I]t seems ... almost elementary that Byrom's counsel was ineffective in this case. Not only did counsel recommend that she allow the trial judge to decide punishment, they failed miserably in presenting mitigating circumstances .... And the mitigating circumstances in this case were overwhelming.

Pet.App. 64.

The substantial evidence in mitigation *not presented* included testimony corroborating and explaining the abuse that petitioner endured throughout her life, including brutal sexual violence inflicted by her husband, the decedent. Multiple lay witnesses could have corroborated this abuse, and an expert on battering and its effects was available to explain petitioner's experiences of, and responses to, the abuse. The expert also would have educated the judge about important dynamics of domestic violence, such as why battered women don't "just leave." This evidence was unquestionably relevant to a determination of whether circumstances in mitigation outweighed aggravating facts, and therefore, to the question whether petitioner should live or die.

But petitioner's counsel made the "perplexing" decision (Pet.App. 56 (majority)) to present *no testimony at all* at the penalty proceeding. Counsel opted instead to introduce two reports, both containing petitioner's self-described, uncorroborated accounts of abuse. Presented without corroboration, petitioner's accounts of abuse were attacked as self-serving and used by the State as evidence that petitioner was a manipulative schemer who fabricated the abuse and tricked her own doctors. The prosecutor also advanced as self-evident the very propositions that an expert would have debunked as myths.

Trial counsel's failure to present corroborative lay and expert testimony on battering and its effects was a complete dereliction of the obligation to advocate for their client. The suggestion that petitioner was not prejudiced is an unreasonable application of this Court's clearly established

precedent. The petition for certiorari should be granted.

ARGUMENT IN SUPPORT OF A GRANT

1. The Mississippi Court's Conclusion that Petitioner Was Not Prejudiced by Counsel's Failure to Present Any Testimony in Mitigation Is an Unreasonable Application of this Court's Precedent.

The decision of a bare majority of the Mississippi Supreme Court, that her counsel's performance did not prejudice petitioner at the penalty stage, is an unreasonable application of this Court's clearly established precedent regarding ineffective assistance. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 537-38 (2003).

To establish prejudice, the petitioner must show a reasonable probability that, absent counsel's deficient performance, the result of the proceeding would have been different. *Williams v. Taylor,* 529 U.S. 362, 373 (2000). The question for the federal courts is whether the state court's decision that petitioner was not prejudiced by her counsel's performance at the penalty stage is an unreasonable application of clearly established law. 28 U.S.C. § 2254(d)(1); *Knowles v. Mirzayance,* 556 U.S. 111, 123 (2009).

During the guilt phase, defense counsel suggested that the Byrom household was violent and chaotic. But counsel never developed a record of petitioner's abuse and its effects. In the penalty phase, counsel offered only a letter from a local physician and the report of a forensic psychiatrist,

Keith A. Caruso, M.D. Caruso's report contained mitigating evidence: it diagnosed petitioner as suffering from borderline personality disorder, depression, and Munchausen's Syndrome (factitious disorder). The report also described a history of abuse. But no corroboration for the abuse history, either through lay witnesses or from an expert, was presented to the sentencing judge, after the defense foolishly waived petitioner's right to a jury determination.

The trial record itself contains scant corroboration of petitioner's abuse history. The only direct evidence can be found in the testimony of Edward Byrom, Jr., petitioner's son, a witness *against* his mother. To avoid the death penalty, Junior pleaded guilty to murder conspiracy. Minimizing the truth to a shocking degree, he denied seeing his father strike his mother, yet conceded that occasionally the decedent "grabbed her and slung her around." RT 673. Junior testified that his father drank daily, but rarely struck or shoved him. RT 670-72. He admitted, however, that his father had struck him with closed fist a "couple of times." RT 672-73. He asserted that "manhandling" by his father was rare. *Id.*

Petitioner's son testified that his parents had heated arguments about money, involving "lots of extreme cursing," and that alcohol played a major role in these fights. RT 667-68. This testimony furthered the prosecution theory that petitioner had hired the murder for pecuniary gain. Junior testified that sometimes he attempted to intervene in his parents' fights, and his father would "jump on me for sticking my nose in it." RT 669. Junior admitted

that the house had holes in the walls and doors, because he and his father struck them. RT 670.

Junior's incomplete and inconsistent testimony nevertheless undercut petitioner's psychiatric diagnoses, as later reported by Dr. Caruso. Junior was allowed to opine about his mother's mental health, denying that she had a "mental problem." RT 692.

The lack of corroboration allowed the prosecutor to contend that petitioner was a callous woman and bad mother, who not only manipulated her son into killing his father (and thus into a long prison sentence), but also deceived both the state-hired psychologist and the defense-retained psychiatrist into concluding that she was mentally ill. There was no explanation presented of how petitioner developed her mental disorders. More important, there was no explanation for why petitioner's history and mental condition caused her to procure the murder of her abusive husband, rather than simply "divorce him," as the prosecutor suggested.

But corroboration of petitioner's version of events was available in several evidentiary forms, none of which was presented to the trier of fact. The truth of petitioner's life was 180 degrees different from the evidence presented to the sentencer.

Michelle Byrom lived a life of physical and sexual abuse so severe and persistent that she became mentally ill.

> [What] Byrom suffered from her husband was no ordinary physical abuse. Not only did she, *for years*, suffer severe physical abuse at the hand of her husband, but she

> was made by him to have sex with others while he videotaped. So severe was her abuse, in fact, that *for three years Byrom ingested rat poison* to obtain admittance to into the hospital, hoping to and [sic] escape the abuse and gain sympathy. There is no dispute that these things occurred.

Pet.App. 64 (dissent) (emphasis original).

Her husband was not the first to abuse petitioner. Michelle Byrom has been sexually and physically victimized for most of her unhappy life. Petitioner's stepfather was the first: after sexually abusing her himself, he forced her to work as a prostitute when she was barely a teen. Caruso Report 7. At 15, petitioner ran away. Lacking skills and education, she became a stripper. Petitioner soon met Edward Byrom, Sr., the decedent, who was then 31. After three "dates," and still only 15, she moved in with him.[3] Three years later, she bore a child; they married when their son was five. *Id.*

Evidence not presented to the trier of fact shows that the decedent continued to abuse petitioner throughout their marriage. Most significantly, the decedent sexually abused petitioner from the statutory rapes onward. Among other things, the decedent compelled petitioner to have sexual relations with others, which he videorecorded.

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[3] Petitioner's "relationship" with the decedent thus originated in victimization. From the start, his conduct was presumptively criminal. *See* Miss. Code Ann. §§ 11-2359 to -2360 (Recomp. 1956) ("Rape - age of consent"). Today, it would be, at minimum, statutory rape. Miss. Code Ann. § 97-3-65(1)(a) (1998 rev.).

The physically abuse extended as well to their son, who, notwithstanding minimizing the abuse at trial, later became a willing participant in the killing of his father.

Regrettably, the defense presented little evidence of this abuse at trial. Petitioner told Dr. Caruso that her husband forced her to have sex with others for his enjoyment, and that he made sexual advances to her female friends, further humiliating her. The pornographic videotape corroborated her statements. Yet, the defense neither renewed its effort to admit this recording in the penalty phase[4] nor followed up on the court's offer to consider a still made from the video.

Not only did the defense not call Dr. Caruso to testify about the effects of continued sexual and physical abuse, but counsel also failed to offer witnesses who could have corroborated Dr. Caruso's conclusion that petitioner was a battered woman. Affidavits gathered in post-conviction proceedings revealed that the decedent routinely physically abused petitioner and she attempted to conceal this abuse from others. Petitioner's two brothers confirmed that she had been sexually and physically abused by their stepfather from a young age and that she finally ran away at age 15. CA5 Appx. 228-29. One brother, Louis, and his wife, Doranna, had personal knowledge that the decedent had physically abused petitioner for years. Doranna observed petitioner's injuries, and Louis overhead violent arguments. CA5 Appx. 232, 235-37. Doranna also

[4] On motion of the State, the trier excluded the pornographic videos, even as mitigation, and counsel made no further effort to admit this evidence.

averred that petitioner attempted to hide these facts. *Id.* 232. Petitioner's niece, LeighAnne Bundy, corroborated that Edward had physically and sexually abused petitioner for years, and confirmed that petitioner tried to keep it secret out of shame. CA5 Appx. 239-40. Bundy was herself afraid of the decedent. *Id.* Finally, petitioner's sister, Helen Garnett, declared that the decedent had sexually assaulted her as well. CA5 Appx. 240.

This evidence would have provided objective mitigation and also have served as extrinsic corroboration of the information in Dr. Caruso's report. But none was provided to the sentencer.

Even presenting the live testimony of Dr. Caruso, without anything else, would have made a difference by allowing an expert explanation of how petitioner's history of sexual and physical abuse and current abusive relationship affected her and contributed to the commission of the offense. The bare report provided no explanation of why or how petitioner's history of childhood and adult abuse contributed to her development of diagnosed mental disorders. Furthermore, Dr. Caruso would have testified that petitioner tried to leave the decedent, but was unable to do so because of ongoing physical abuse and its psychological effects. He could also have explained her coerced participation in deviant sexual activities. In short, testimony from petitioner's family members and Dr. Caruso would have provided a wealth of mitigating evidence.

The damage to the defense done by counsel's failure to offer live expert testimony or corroboration is best illustrated by the State's sentencing argument. The prosecutor freely relied on the

pervasive prejudices and misconceptions about battering and its effects:

> ... There's been argument made that maybe Eddie wasn't the husband or the father that he should've been. He's not here to defend himself, your honor. He's not here to tell his side of that story. *But, your Honor, we do know this. Why didn't she just leave him? Why didn't she divorce him? Why didn't she seek sanctuary somewhere else?* Here's a person that goes to work, the testimony showed, I believe, six days a week. She had every opportunity. She wasn't working. She was at home. *She had every opportunity to seek sanctuary. She could've got her son and left. She could have filed charges, which none, as the evidence showed, was done. She could've got a lawyer and got a divorce. I think the words were scared. People are scared, your honor, all the time; but it doesn't keep them from fleeing a bad situation. Here, your Honor, there was not such a situation. She had every opportunity to leave.*

RT 1010 (emphasis added). The prosecutor contended that her failure to leave proved not only that petitioner was not really abused, but also that she had committed the murder for pecuniary gain. RT 1011.

The State's argument establishes the prejudice from counsel's ineffectiveness. Dr. Caruso could have provided evidence, based on his experience, training, and education, about the barriers to petitioner safely

leaving the decedent, as confirmed by research validating the obstacles battered women face, and the seemingly counterintuitive responses they use to survive and cope. Instead, nothing refuted the prosecutor's unsupported contentions, presented as something that "we" (presumably including the judge) simply "know."[5]

Counsel's complete failure to provide readily available corroboration left unanswered the prosecutor's contention that the petitioner was such an accomplished manipulator that she fooled a psychologist and a psychiatrist into believing that she had been abused:

> Now, Munchausen, your Honor, is a disorder for attention. ... [Y]ou manipulate, you control, you twist, you defile. ... And in this case, if she has Munchausen, she has exploited that to the nth degree. She has twisted a local doctor and has manipulated him, has fed him what she felt like was necessary to get whatever attention she could. And now she's manipulated Caruso and [state-appointed psychologist,] Criss Lott.
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> *It is very important to take notice that their reports have no corroboration whatsoever. As you are quite aware, no doctor can testify within a medical*

[5] In truth, the practical and psychological barriers to leaving can be daunting. See generally S.Buel, *Fifty Obstacles to Leaving, a.k.a. Why Abuse Victims Stay*, 28(10) THE COLORADO LAWYER 19 (1999); L.Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J. LAW & FEMINISM 75, 93 (2008).

> *reasonable certainty from evidence they have deduced strictly from their patient, particularly psychologists. None of the doctors were able to corroborate the information she has given them. So, therefore, the allegation she puts forth, particularly in her factual portions, have no bearing. That's what their results are based upon, yes. But having no corroborating evidence, it can be taken with a grain of salt at best.* Certainly, not within a medical certainty.

RT 1019-20 (emphasis added). To the contrary, Dr. Caruso could have testified how psychiatrists and psychologists reach their generally accepted, expert opinions based on interviewing techniques and clinical testing. He also could have explained how petitioner's abuse contributed to the development of Munchausen's syndrome, not as a manipulative trick to deceive, but as a desperate cry for help.

Finally, the evidence not presented at the sentencing phase would have effectively countered the State's argument that the petitioner was solely responsible for her own problems, a claim used to counter the existence of a mitigating circumstance. The prosecutor continued:

> [T]he court must determine whether the mitigating circumstances have been outweighed by the aggravating circumstances. The mitigating circumstances proposed is the fact that she has no significant criminal history and *is under some emotional extreme duress or*

> *emotional problems, emotional problems which she herself has created.*

RT 1020 (emphasis added).

This Court's jurisprudence establishes that the presentation of minimal evidence in mitigation is not sufficient to meet counsel's obligation, at least not when there is other, stronger evidence available. *Porter v. McCollum,* 558 U.S. 30, 41-44 (2009); *Rompilla v. Beard,* 545 U.S. 374, 390 (2005). Trial counsel's decisions – or lack thereof – effectively abandoned petitioner during the penalty phase. Completely missing was *any* evidence about why their client deserved to live.

Apparently believing that reversal of the conviction was certain, trial counsel failed to present any live testimony in mitigation, holding their best evidence in reserve for a retrial that never eventuated. This purported strategy was patently unreasonable; indeed, it can fairly be called reckless. Counsel's decision was not based on a strategic attempt to bar adverse evidence. *Cf. Pinholster,* 131 S.Ct. at 1404. To the contrary, petitioner had no criminal history. The affidavits obtained by postconviction counsel from petitioner's family members praise her positive characteristics, providing a basis for a sentence other than death. But trial counsel failed to present even this minimal evidence in mitigation.

The postconviction decision of the Mississippi Supreme Court, that petitioner was not prejudiced by what even that court acknowledged was a "perplexing" strategy by counsel, is an unreasonable application of this Court's clearly established precedent regarding the effective assistance of

counsel. This Court should grant the petition for certiorari.

2. Because the Subject of Battering and its Effects Is Frequently Misunderstood, and Because Battered Women Are Prone to Being Falsely Judged on the Basis of Misconceptions, Testimony Explaining the History of Abuse, Dynamics of the Battering Relationship and its Effects Upon the Victim Is Key.

The phenomenon of domestic violence (including battering) and its effects[6] has been the subject of extensive research and study over the past 35 years. *See generally* NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T 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 (May 1996).[7] The subject was in

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[6] The expression "battering and its effects" describes the substance of lay and expert evidence regarding a defendant's experiences of abuse, including "the nature and dynamics of battering, the effects of violence, battered women's responses to violence, and the social and psychological context in which the violence occurs." S.Osthoff & H.Maguigan, *Explaining Without Pathologizing: Testimony on Battering and its Effects*, in CURRENT CONTROVERSIES IN DOMESTIC VIOLENCE 225, 231 (2d ed. Loseke, Gelles & Cavanaugh 2005). Amicus uses the term "battering and its effects" because it is a more accurate and inclusive reference for what was initially labeled "battered women's syndrome." However, "battered women's syndrome" still appears frequently in statutes and case law. For a discussion of the movement away from the "syndrome" terminology, see *id.* 228-230.

[7] This report to Congress, a collaborative effort of the Department of Justice, the Department of Health and

the forefront of sociological, psychological, and jurisprudential study long before petitioner's trial. *E.g., State v. Kelly*, 478 A.2d 364, 380 (N.J. 1984).[8]

It is equally well-established that a defendant who has been subjected to horrific abuse, as a child, adolescent, and/or as an adult, is generally less deserving of the death penalty. *Wiggins v. Smith*, 539 U.S. 510, 537-38 (2003). Finally, it is generally conceded to be a circumstance in mitigation, whether as support for an enumerated factor and/or generally, that the decedent's wrongful conduct toward the defendant was a factor in provoking or

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Human Services, and others, was part of an extensive study undertaken by the National Institute of Justice to understand and improve effective responses to violence against women, as mandated by Congress in the Violence Against Women Act (hereafter "NIJ report.") Among other findings, the NIJ Report concludes that: "[e]vidence and testimony about battering and its effects provide information germane to fact finders' deliberations in criminal cases involving battered women." *Id.* § 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. *Id.* Foreword, at ii.

[8] Most courts recognize battering and its effects as a "set of psychological and behavioral reactions exhibited by victims of severe, long-term, domestic physical and emotional abuse." *E.g., United States v. Johnson*, 956 F.2d 894, 899 (9th Cir. 1992). Domestic violence can erupt in "a continuing pattern of behavior that includes physical and nonphysical manifestations of power and control." J.Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J. L. & POLICY 617, 653- 54 (2006).

otherwise contributing to the conduct that led to the ultimate homicide.

Despite decades of research, and the best efforts of Amicus and similar groups to offer public and professional education, it remains a truism that "a prosecutor or trier of fact may not believe a battered woman's account of her relationship with a spouse or companion because of misconceptions about domestic violence." *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1580-81 (1993). Judges and jurors alike are "riddled by a lifetime of exposure to the same mistaken myths that shape and bias the public's attitudes." P. Craig-Taylor, *Lifting the Veil: The Intersectionality of Ethics, Culture, and Gender Bias in Domestic Violence Cases*, 32 RUTGERS L.REC. 31, 37 (2008) (internal quotations omitted); C.P. Ewing & M. Aubrey, *Battered Woman and Public Opinion: Some Realities about the Myths*, 2 J. FAM. VIOLENCE 257 (1987) (*hereinafter "Public Opinion").*

The general acceptance of the need for expert testimony on battering and its effects is grounded largely upon these realities – that laypersons continue to require expert education and accurate information to make reasoned judgments involving battering and its effects.[9]

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[9] In recognition of these empirically based findings, the overwhelming majority of courts admit relevant expert testimony on battering and its effects in criminal trials. *See generally* J.Parrish, TREND ANALYSIS: EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS IN CRIMINAL CASES, 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 1, 5 (U.S. Dep't of Just., NCJ 160972, 1996) (analyzing state

In the death penalty context, the persistence of these misconceptions is especially dismaying. Having endured domestic violence is unquestionably mitigating and profoundly relevant to moral culpability and just deserts – essential questions in any capital sentencing. At the same time, this is precisely the type of evidence in mitigation most

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and federal cases with respect to admissibility of expert testimony).

Evidence on battering and its effects has been admitted for many purposes, on the basis that the trier needs such evidence to properly evaluate the facts and evidence at issue. *See, e.g., State v. Stewart,* 719 S.E.2d 876 (W.Va. 2011) (abuse of discretion to preclude lay witnesses and expert on battering where defendant shot her husband while he was in hospital; evidence was relevant to explain defendant's history and its effects on her "reasoning, perceptions, beliefs and conduct" and therefore could have negated premeditation); *Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992) (denial of funds for expert on battering violated due process since evidence relevant to negate specific intent); *State v. B.H.*, 183 N.J. 171, 183, 870 A.2d 273, 279 (2005) (evidence about battered women is "useful in explaining conduct exhibited by battered women toward their abusers); *People v. Brown*, 33 Cal.4th 892, 904-08, 94 P.3d 574, 756-60 (2004) (expert testimony on battering by prosecution admissible to explain complainant's recantation and other victim behaviors that might otherwise have led to incorrect assumptions); *State v. Cababag*, 9 Haw.App. 496, 850 P.2d 716 (1993) (expert testimony admissible to explain seemingly "bizarre" conduct of domestic violence victims, including minimization of the abuse and related behaviors); *People v. 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).

prone to misinterpretation. It is true in any context – but especially in the capital context – that when judicial actors rely on the commonly held, false beliefs about their circumstances and options, injustice to battered women accused and convicted of crimes will result. Nowhere is the danger graver than when a capital sentencer imposes a death sentence on the basis of such flawed judgments.

Such is the unfortunate reality in this case. The manifest prejudice to petitioner occurred, in no small measure, from misconceptions vigorously advanced by the prosecutor. Two particularly damaging misconceptions infected the sentencing: 1) that a battered woman can easily and readily leave her batterer, and 2) that the absence of corroborating evidence demonstrates that abuse did not in fact occur or was insignificant. Both of these beliefs are false, and both substantially prejudiced the petitioner.

The idea that a battered woman has a responsibility to leave the abuser, and that she can do so easily and safely, is one of the most pervasive and damaging, yet persistent, misconceptions. If the abuse really happened or was as bad as the woman claims, then she surely would have left, reported or otherwise sought help, it is said. As noted, the prosecutor relentlessly pursued this false claim:

> Why didn't she just leave him? Why didn't she divorce him? Why didn't she seek sanctuary somewhere else?

RT 1010. He continued in this vein at length.

Social science research confirms the persistence of beliefs that if a battered woman "stays" she is

either exaggerating the extent of the abuse, and/or is responsible for the abuse. *See* D. Follingstad, M. Runge, *et al*., *Justifiability, Sympathy Level, and Internal/External Locus of the Reasons Battered Women Remain in Abusive Relationships*, 16 VIOLENCE AND VICTIMS 621, 622 (2001) ("L]ay persons often search for explanations as to why the woman stays in the abusive relationship ….[T]hey may actually view her decision to stay in the relationship as an explanation for her victimization ….); *Public Opinion,* at 263 ("[A] substantial proportion of the public ... subscribes to various stereotypes or 'myths' about battered women." More than one-third of those surveyed believe that a battered woman is at least partially responsible for the battering and nearly two-thirds believe that she can 'simply leave' her batterer."); *accord* T. Herbert, R. Silver & J. Ellard, *Coping With an Abusive Relationship: How and Why Do Women Stay?*, 53 J. MARRIAGE & THE FAMILY 311 (1991).

As explained by one leading commentator:

> Perhaps the most commonly asked question about the battered woman (especially in the forensic context) is, Why didn't she leave? The question, to some extent, suggests that the battered woman, by remaining in (or returning to) an abusive relationship, is deviant, odd or blameworthy in some way. Further, the question assumes not only that there are viable options for alternative behavior, but that she should have employed them, and that doing so would have lead to her safety.

M.A. Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1226-27 (1993). Of course, it is difficult for those who have never been abused to understand why another person would endure being battered, raped, and verbally degraded.

The prosecutor's argument ignored the stark reality that many women face increased violence or death when they attempt to separate, a critical factor in the process of a battered woman's decisions about leaving. Far from ending violence, separation often results in continued and/or escalated abuse.[10] National crime surveys in the United States and Canada estimate that compared with married women, separated women are about 25 times more likely to be assaulted by ex-partners and five times more likely to be murdered. M. Wilson & M. Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE AND VICTIMS 3 (1993).[11]

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[10] J.Hardesty, *Separation Assault in the Context of Postdivorce Parenting: An Integrative Review of the Literature*, 8 VIOLENCE AGAINST WOMEN 579, 599 (2002); R.Fleury, C.Sullivan & D.Bybee, *When Ending the Relationship Does Not End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363, 1364 (2000); M. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

[11] The term "separation assault" describes this well-documented phenomenon. M.Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, *in* Fineman & Mykitiuk, THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 59, 79 (1994). It is not necessarily the *act* of separating that

This information makes credible Dr. Caruso's statement that petitioner told him that after she tried to leave her husband, he threatened to kill her or have her killed. Caruso Report, 8. This information also rebuts the prosecutor's faulting of petitioner for failing to leave. Of course, the prosecution's arguments thoroughly disregarded the reality of what happened when petitioner tried to leave. Three times she tried and three times he found her, beat her and brought her back, threatening to kill her if she tried again. *Id*.

A second and equally troubling misconception that pervaded petitioner Byrom's sentencing is that if a woman truly is being abused, there will surely be substantial amounts of independent corroborating evidence, such as the medical records of emergency room admissions, or police reports. This belief misapprehends the nature of the battering relationship and its effects upon the victim.

The psychological abuse that often accompanies domestic violence is devastating, creating long-lasting feelings of inferiority and destroying self-confidence. K. Ferraro & J. Johnson, *How Women Experience Battering: The Process of Victimization*, 30 SOC. PROBS. 325, 334 (1983). Batterers justify violence as a response to their wives' inadequacies or

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triggers more violence, but rather the *decision* to leave, which is often seen as an attempt to challenge the batterer's control. *Id.* 79. "For some women, the 'separation violence' is worse than the violence they experience while in the relationship, and for some women it is lethal." J.Davies, E.Lyon & D.Monti-Catania, SAFETY PLANNING WITH BATTERED WOMEN: COMPLEX LIVES/DIFFICULT CHOICES 83 (1998).

provocations, which leads battered women to feel that they have failed.

Victims of domestic abuse frequently hide the fact of their abuse from those who might detect it, at least in part, because they believe that they are responsible. *See id*. Battered women also deny and minimize injury and harm, because "the experience of being battered by a spouse is so discordant with their expectations" that they cannot acknowledge it. *Id*. 329. Such women may "tolerate a wide range of physical abuse before defining it as an injurious assault." *Id*.

Moreover, the experience of victimization generates negative self-perceptions, causing battered women to anticipate negative reactions from others. "[T]he potential for further humiliation makes the decision to disclose even more difficult." *Id*. 152. Women are particularly reluctant to seek help when they have been sexually abused, fearing that they will not be believed, or if believed, be blamed for the situation. R. Weingourt, *Wife Rape: Barriers to Identification and Treatment*, XXXIX AM. J. PSYCHOTHERAPY 187, 192 (1985). Victims are more willing to disclose physical violence, than to reveal violence or force in sexual relations. *Id*. 187.

All of this goes a long way toward explaining why there is frequently a lack of corroboration in the form of records, such as police reports or medical records, or eyewitnesses to battering. But, petitioner *had* witnesses willing to come forward and testify on her behalf. Sadly, the existence of corroboration did her no good. Petitioner's lawyers put her in the same position as if there had been no corroborating witnesses at all, which is to say, the position of being

disbelieved. That their performance fell below the standard of a reasonable professional cannot be denied. As a result, the State was able to fully exploit the myth that there being apparently no corroboration, the sentencer should not believe that any abuse occurred.

It is indeed a cruel irony that a report introduced by petitioner's own lawyers, uncorroborated because of counsel's foolish choice not to present available evidence or provide such to their expert, was ably used by the prosecutor against petitioner. The State effectively contended that the lack of corroboration of abuse demonstrated that petitioner was a cold and calculating sociopath, able to manipulate her own doctors, and thus, exactly the type of wicked person who deserved a death sentence. Had counsel presented the available lay and expert testimony, petitioner would have been able to present the true circumstances and effectively rebutted the state's case in aggravation.

The issues presented in this case are of enormous importance to numerous battered women facing charges or serving sentences in criminal cases throughout the country. Based on its more than 25 years' experience, Amicus NCDBW is confident there is at least a reasonable probability that defense counsel's reckless failure to present available expert testimony and corroborating fact witnesses affected the outcome of the sentencing proceeding, to petitioner's substantial prejudice. The court below erred, because the state court's contrary conclusion was an unreasonable application of this Court's precedent. Certiorari should therefore be granted,

either to place the case on the argument calendar or to issue a summary reversal.

CONCLUSION

The decision of the Mississippi Supreme Court, that petitioner was not prejudiced by what the Court acknowledged was a "perplexing" decision by counsel, is an unreasonable application of this Court's clearly established precedent regarding the effective assistance of counsel. This Court should grant the petition for certiorari, and either set the case for argument or summarily reverse the failure of the Fifth Circuit below to order federal habeas corpus relief from petitioner's sentence of death.

Respectfully submitted,

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