

Docket No. 10-50253

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENIA MUNGUIA,

Defendant-Appellant.

On Appeal from the Judgment and Conviction in
District Court Case No. CR 08-767-PSG
In the United States District Court for the Central District of California
(Philip S. Gutierrez, U.S.D.J., Presiding)

**BRIEF OF AMICI CURIAE
CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE
ET AL. – IN SUPPORT OF REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Fed. R. App. P. 29(c), *Amicus Curiae* National Association of Criminal Defense Lawyers states that it is a nonprofit corporation organized under the laws of the District of Columbia. *Amicus Curiae* National Clearinghouse for the Defense of Battered Women is a nonprofit corporation organized under the laws of the Commonwealth of Pennsylvania. Neither has any parent corporation, and no publicly held corporation owns 10% or more of its stock.

s/ Sheryl Gordon McCloud

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STATEMENT OF INTEREST

The California Partnership to End Domestic Violence (“CPEDV”) is a statewide membership-based coalition of nearly 200 California organizations, agencies, and individuals working to end domestic violence at local, state, and national levels. CPEDV has a 30-year history of providing a united voice for California’s domestic violence advocates and the survivors they serve.

CPEDV has firsthand knowledge about the physical, emotional, and psychological effects of domestic violence on victims of abuse. CPEDV understands that when a history of abuse is relevant to other issues in a criminal case, including the defendant’s conduct and state of mind, a 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 operates without the necessary contextual information with which to evaluate the evidence presented. Therefore, the jury is unable to reach a fair or reliable determination of guilt or innocence.

To this end, CPEDV’s predecessor organizations, California Alliance Against Domestic Violence (CAADV) and the Statewide California Coalition for Battered Women (SCCBW), were instrumental in passage of AB 785, which added California Evidence Code § 1107 to allow “battered women’s syndrome”

testimony to be introduced in criminal actions. In 2004, CPEDV's predecessors again worked to pass AB 1385 to replace "battered women's syndrome" with "intimate partner battering and its effects" in California Evidence Code § 1107.

CPEDV's predecessor, CAADV, filed an amicus brief in People v. Humphrey, 13 Cal.4th 1073 (1996), the landmark case describing the appropriate use of expert testimony on domestic violence in criminal cases. The California Supreme Court quoted from this brief in its decision.

CPEDV does not advocate for special legal rules for battered women defendants. Rather, CPEDV seeks 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 evidence necessary to challenge the state's case. In the case of a battered woman, this often includes expert and lay testimony about the intimate partner abuse, the dynamics of the abuse experienced in the relationship, and the cumulative psychological impact of the abuse as it pertains to the facts of the case.

The National Clearinghouse for the Defense of Battered Women, founded in 1987, works to increase justice for battered women charged with crimes when 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 National 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 in which 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 during 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 the promotion of the proper administration of justice.

Pursuant to Fed.R.App.P. 29(a), amici certify that all parties have consented to the filing of this brief.

SUMMARY OF AMICI'S ARGUMENT

A criminal defendant cannot receive a fair trial if the trial court excludes testimony that is necessary for the jury to understand the true significance of the evidence presented by the government. This is particularly true of expert testimony explaining the experiences of battered women,¹ because their circumstances are often poorly understood by the general public, including typical jurors.

Expert testimony on battering and its effects is necessary in criminal cases to help the jury understand a battered defendant's conduct and state of mind. The reason is simple: jurors often harbor myths and misconceptions about domestic violence.

As appellant Munguia's case demonstrates, expert testimony on battering and its effects is of vital importance to the protection of battered women from unjust condemnation as criminal conspirators. Expert testimony on battering

¹ Although men can also be the victims of domestic violence, this brief refers to "battered women" given that the overwhelming majority of domestic violence involves men abusing women. 92.6 percent of surveyed women reported they were physically assaulted by a current or former spouse, cohabitating partner, boyfriend, girlfriend, or date in their lifetime, while only 7.4 percent of men reported such abuse. Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Just., NCJ 183781, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey* (2000).

and its effects can explain that when a battered woman acts in concert with her abuser, her conduct does not necessarily imply agreement. A compliant manner is often induced by the intimate violence endured. In addition, it may be consciously or unconsciously adopted as the strategy most likely to protect the battered woman and her children, if any, from harm. Without the aid of expert testimony and the proper context, however, jurors are likely to draw an inaccurate inference based on their own preconceived notions or mere “conventional wisdom,” which often leads to a wholly mistaken conclusion.

ARGUMENT OF AMICI IN SUPPORT OF APPELLANT

A jury convicted appellant Munguia of possession of a listed chemical knowing, or having reasonable cause to believe, that it would be used to manufacture a controlled substance, and conspiracy to aid and abet the manufacture of methamphetamine. This trial violated her due process rights because the jury was denied the opportunity to assess or understand the circumstances of her situation. The exclusion of the defense-proffered expert testimony violated both the Constitution and the Federal Rules of Evidence.

The questions presented in this case are of exceptional importance in the administration of federal criminal justice for battered women. An estimated 80-85 percent of women in prison are incarcerated as a result of their affiliation

with an abusive partner, many for federally prosecuted, drug-related offenses.

Elizabeth M. Schneider, *BATTERED WOMEN AND FEMINIST LAWMAKING* 264 n.8

(2000); See Shelby Moore, *Understanding the Connection Between Domestic*

Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women

From Leaving Abusive Relationships, 12 *Tex. J. Women & L.* 451 (2003)

(noting that the number of women prosecuted for drug crimes has dramatically increased above all other crimes).

I. EXPERT TESTIMONY ABOUT BATTERING AND ITS EFFECTS IS NECESSARY IN CRIMINAL CASES TO AID THE JURY IN UNDERSTANDING A BATTERED WOMAN'S CONDUCT AND STATE OF MIND

In the last three decades, numerous courts have recognized that in cases involving domestic violence, lay testimony is frequently inadequate to convey sufficient information to allow the jury to understand the facts and circumstances at issue. Rather, jurors need the assistance of an expert on battering and its effects to enable them to fairly evaluate the defendant's conduct and state of mind. This testimony is necessary because of the pervasive social problem of domestic violence, the myths and misconceptions harbored by many jurors, and the ways in which expert testimony can dispel myths and aid in understanding the context of abuse.

A. Domestic Violence Is a Pervasive Social Problem

Principles of evidence and criminal law cannot operate outside surrounding social realities, particularly those that are among the most pervasive and destructive in our society. Domestic violence is one such problem.

Relatively speaking, any acknowledgement or understanding of domestic violence by the criminal justice system is a new phenomenon. For centuries, society tacitly condoned domestic violence. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *Yale L. J.* 2117, 2118-2120 (1996). Awareness of the realities of domestic violence has evolved dramatically since the first studies done in the 1970s. *See* Joan Zorza, *Woman Battering: High Costs and the State of the Law*, special issue 1994 *Clearinghouse Review* 383 (1994) (reprinted in *Domestic Violence Law*, Lemon, 11 (3d. Ed. 2009)).

Two decades ago, the United States Supreme Court acknowledged a different picture of this pervasive social problem. In *Planned Parenthood v. Casey*, 505 U.S. 833, 891 (1992), the Court cited recent statistics associated with physical and sexual abuse. The Court acknowledged the epidemic of domestic violence again in 2000, noting that “[w]ith respect to domestic violence, Congress received evidence for the following findings:

- Three out of four American women will be victims of violent crimes sometime during their life.
- Violence is the leading cause of injuries to women ages 15 to 44[.]

- As many as 50 percent of homeless women and children are fleeing domestic violence.
- Since 1974, the assault rate against women has outstripped the rate for men by at least twice for some age groups and far more for others.
- Battering is the single largest cause of injury to women in the United States.
- An estimated 4 million American women are battered each year by their husbands or partners.
- Over 1 million women in the United States seek medical assistance each year for injuries sustained [from] their husbands or other partners.
- Between 2,000 and 4,000 women die every year from [domestic] abuse.
- Arrest rates may be as low as 1 for every 100 domestic assaults.
- Partial estimates show that violent crime against women costs this country at least 3 billion -- not million, but billion -- dollars a year.
- Estimates suggest that we spend \$5 to \$10 billion a year on health care, criminal justice, and other social costs of domestic violence.”

United States v. Morrison, 529 U.S. 598, 631-632 (2000) (internal citations omitted).

Partner abuse also has fatal consequences in an alarmingly high number of cases. Thirty-three percent of all U.S. female homicide victims were killed by an intimate partner, and a 1996 study based upon the Federal Bureau of Investigation’s Supplemental Homicide Report found that female murder victims, in contrast with male victims, were more than 12 times as likely to have been killed by a man they knew than by a male stranger. *See* Violence Policy Center, *When Men Murder Women: An Analysis of 1996 Homicide Data* (1998).

Notwithstanding the progress made, official response remains woefully inadequate. One study found that forty percent of women who initially pursue protection orders are unable to progress beyond the first step in the process, and even those who are able to endure the process are met with system challenges to adequate enforcement of such orders. Joanne Belknap, *THE INVISIBLE WOMAN: GENDER, CRIME, AND JUSTICE* 348 (3d ed. 2007). Of criminal prosecutions of battering, one third of all cases that reached court (regardless of disposition) were associated with revictimization within twelve months following verdict or dismissal. *Id.*

Despite the most commonly asked question associated with domestic violence, “Why doesn’t she just leave?,” the practical and psychological barriers to leaving, particularly for poor women, can be daunting. *See* Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a. Why Abuse Victims Stay*, 28(10) *The Colorado Lawyer* 19 (1999). These include economic restrictions, such as lack of available housing, transportation, the abuser’s control over finances or refusal to allow the battered partner to engage in certain employment, and job loss due to court dates, medical care, and hiding from the abuser. Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 *Yale J. of Law & Feminism* 75, 93 (2008). The needs of children, manipulation of reproductive rights, cultural barriers, threats regarding immigration status, and

hopelessness stemming from futile attempts to seek state intervention all contribute to the difficulty victims face in leaving. *Id.*

In fact, many battered women do leave. However, a woman's risk of being killed by an intimate partner increases sixfold when she leaves. Jennifer L. Hardesty, *Separation Assault in the Context of Postdivorce Parenting* 8(5) *Violence Against Women* 597, 600-601 (2002).

Despite the research documenting the nature of domestic violence, there remains a deep societal resistance to integrating an understanding of abuse and addressing its consequences. Emily J. Sack, *The Role of Power in Domestic Violence Relationships: From the Right of Chastisement to the Criminalization of Domestic Violence: A Study in Resistance to Effective Policy Reform*, 32 *T. Jefferson L. Rev.* 31, 32 (2009). "Whether from the public as a whole - as represented by our juries - or from our legislatures or the highest ranks of the judiciary, this resistance is difficult to name and to address. However, it has had an enormously negative impact on our ability to achieve effective domestic violence reform." *Id.* at 32.

When the criminal justice system turns a blind eye to domestic violence, it enables jury verdicts to reflect such misapprehensions, perpetuating the consequences on accused women, their children, and society as a whole.

Constitutional rights are not protected in a vacuum, and it is unjust for courts to operate in ignorance of this pervasive ill.

B. Jurors Often Harbor Myths and Misconceptions About Domestic Violence

Lay jurors often harbor numerous myths and misconceptions regarding domestic violence. People v. Brown, 94 P.3d 574, 583 (Cal. 2004); *see generally* Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. Cal. Rev. L. & Women's Stud. 219, 235 (1992). Studies have explored the ways in which the substantive criminal law leaves jurors in domestic violence cases with an inadequate basis for understanding the true story of the parties. These studies demonstrate jurors' tendency to treat the case with apathy if they are informed that a relatively minor confrontation was an isolated incident in an otherwise nonviolent relationship. Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552, 573-574 (2007).

The research notes how difficult it can be to establish a battered defendant's credibility with a jury when the law forces her to focus only on a single incident. *Id.* "Without the ability to provide a coherent narrative about the dynamics between her and the offender in their intimate relationship, a [battered

woman's] allegations about a single incident may sound irrational or far-fetched." *Id.* at n. 122 ("[s]tories about being battered are often disregarded as a product of the victim's psyche, rather than seen as a retelling of the truth"). Where the violence victim in question is the defendant on trial, due process considerations come into play that do not exist when the victim at issue is the complainant.

Extensive social science research has documented the social and public construction of the battered woman as "pure victim." Belknap, *supra*, at 324. This common stereotype is characterized by a battered woman who is (1) not herself violent unless in self-defense, (2) has "experienced extreme physical violence separated by periods of emotional abuse," (3) suffers abuse in a pattern in which it escalates in severity and frequency over time unless someone intervenes, and (4) is terrified by the abuse. *Id.* at 325.

Notwithstanding the evolution of this "stock narrative," many women do fight back, especially those with the fewest options for addressing abuse, such as those with cultural or language barriers, lack of resources, or a history of severe trauma. *Id.*, at 77. Others, however, cope and survive in other ways, including acquiescing in the batterer's demands that she participate in his criminal activity. A jury cannot be expected to comprehend the reality of a variety of responses without expert assistance.

A layperson's notions of the impact and dynamics of intimate partner abuse therefore differ significantly from those of an expert. *See* Regina A. Schuler, Vicki L. Smith & James Olson, *Jurors' Decisions in Trials of Battered Women Who Kill: The Role of Prior Beliefs and Expert Testimony*, 24 J. Applied Soc. Psych. 316, 317 (1994). Because this abuse has historically been closeted, and because research about the true realities of intimate partner abuse is relatively new, jurors often lack sufficient knowledge. However, when combined with legal hurdles and systemic bias, that lack of knowledge amounts to a "deep societal resistance to perceiving the circumstances of battered women." *See* Schneider, *supra*, at 113.

When a battered woman is on trial, prosecutors may inadvertently (or perhaps at times strategically) perpetuate these misconceptions in their presentation of the case, knowing that juries are more likely to convict a defendant who does not fit the paradigmatic stereotype. Carol Jacobsen, Kammy Mizga and Lynn D'Orio, *Battered Women, Homicide Convictions, and Sentencing: The Case for Clemency*, 18 Hastings Women's L.J. 31, 41 (2007). Judges are not immune from adhering to the stock narrative either, as they come to the bench with a "lifetime of exposure to the same [mistaken] myths that shape [and bias] the public's attitudes," including the "ever-expanding scope of the mass media [resulting] in the wider and more pervasive presence of these

contaminating myths.” Phyliss Craig-Taylor, *Lifting the Veil: The Intersectionality of Ethics, Culture, and Gender Bias in Domestic Violence Cases*, 32 Rutgers L. Rec. 31, ¶17 (2008).

Regrettably, research demonstrates that years of judicial education on domestic violence dynamics has yielded minimal results in terms of changes in rulings, and many judges still come to the bench with little or no training on the subject. *See* Goodmark at 124; Craig-Taylor at ¶17. A 1991 survey of 223 appellate cases involving battered defendants led the researcher to conclude that “the major obstacle to due process is that judges, vested with the power to make credibility determinations on the sufficiency of defense evidence, unjustly apply the law [through the exclusion of evidence, the denial of self-defense instructions, and/or the repudiation of instructions to the jury on the relevance of a battered woman's evidence], and essentially deny battered women fair trials.” Jacobsen, Mizga and D'Orio, *supra*, at 40.

Overcoming this implicit and explicit bias often necessitates a combination of lay and expert testimony to provide jurors with the context necessary to understand and evaluate the battered woman’s circumstances. The legal system must acknowledge that response to domestic violence is not formulaic or predictable across a spectrum, particularly given that such violence pervades society at epidemic proportions.

C. Lay Jurors Need Experts to Dispel Myths and Aid in Understanding the Context of Intimate Partner Abuse

Expert testimony is crucial to dispel these myths and misconceptions, particularly to assist the in understanding how a woman's experience of being battered influences her state of mind, including her understanding of the level of danger she faces. Schneider, *supra*, at 124. Courts have recognized that expert testimony on battering may be necessary or relevant to cover (1) general dynamics on the impact of domestic violence, (2) explanations of the behavior of a battered woman that may seem inconsistent with being battered, (3) the common myths and misconceptions about battered women, (4) common reactions that women have to battering, (5) discussion of the particular facts of the case, to show how they are consistent with a battering relationship, and (6) 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. *See id.* at 123; Burke, *supra*, at 608; Sack, *supra*, at 42.

D. The Right to Present Necessary, Relevant Expert Testimony About Battering and Its Effects Is Protected by the Fifth and Sixth Amendments to the United States Constitution

The Supreme Court has long recognized that the exclusion of logically relevant evidence necessary to present a defense (including a foundation for

reasonable doubt) may violate the protections of the due process clause and the Sixth Amendment. Holmes v. South Carolina, 547 U.S. 319 (2006); Gilmore v. Taylor, 508 U.S. 333 (1993); 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); Washington v. Texas, 388 U.S. 14 (1967).

A battered defendant has a right to raise a reasonable doubt as to her specific intent to commit any of the offenses with which she was charged. This is the key question for the jury in many cases involving battered defendants.

Ellen Leesfield & Mary Ann Dutton-Douglas, *“Faith and Love”*: Use of Battered Women’s Syndrome to Negate Specific Intent, 13 Champion Magazine, Apr. 1989, at 9; see generally Erich Anderson & Anne Read-Anderson, *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). Such testimony protects the fundamental right to a fair trial given that experts can explain to juries that when battered women act in concert with their batterers, they are not necessarily evidencing agreement with them.

Ironically, although the public and criminal legal system view intimate partner battering as losing control, the opposite is typically true, as a key aspect of domestic violence often is the abuser's desire for and practices in control of his victim. *See Belknap, supra*, at 333. Abusers typically use threats to control their victims, and when threats do not work, they often resort to violence. *Id.* Studies identify the many ways that abusers control their partner's living spaces, humiliate them, and socially control them. *Id.*

Victims often demonstrate a compliant manner resulting from the coercive control they have endured from the abuser, which may be consciously or unconsciously adopted as the strategy most likely to actually protect themselves or their children. This compliant manner is not always manifested with passivity or fear, but often can appear calm to an outside observer.

Furthermore, expert testimony on battering and its effects cannot be deemed inadmissible simply because the battered defendant is not asserting a duress defense. *See generally Dixon v. United States*, 548 U.S. 1 (2006). As will be discussed below, the prosecution in this case inaccurately argued that because the term "coercion" is used synonymously with the term "duress" in the Ninth Circuit, and that appellant was not asserting a duress defense, the expert testimony must be excluded because Dr. Whiting referred to the words "coercion" and "coerced" in his report. In light of the District Court's

subsequent unexplained ruling, this argument may have carried the day. If so, the error of the District Court is clear.

Expert testimony on battering and its effects serves as evidentiary support for a jury's assessment of a point otherwise validly in issue; it is not a claim or defense in itself. Experts speak in the language of their own fields of knowledge, not in legal terminology. A battered defendant cannot be put in the Catch-22 position of having to pursue what may be a legally inapt duress defense simply to lessen the chance that her proffered expert testimony will be claimed improper, irrelevant, or prejudicial because of the expert's professional vocabulary.

Regardless of whether a battered defendant is pursuing a legal defense of duress, which negates voluntariness and not intent, it would be virtually impossible for an expert witness to testify about battering and its effects without using the word coercion. While it was coined long ago, the term "coercive control" has gained traction in the last decade as a more accurate phrase describing dynamics of abuse in the social science, legal, and medical contexts. *See generally* Evan Stark, *COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* (2007). An expert should not have to avoid the use of this term based on an outdated and narrow view of battering and its effects as only relevant in the context of one particular affirmative defense.

II. LAY JURORS NEED EXPERTS TO DISPEL MYTHS, PARTICULARLY IN LIGHT OF THE PROBLEMATIC NATURE OF THE TERM “BATTERED WOMEN’S SYNDROME”

The term “Battered Women’s Syndrome” is not appropriate to describe the experience and effects of battering. In fact, the nationwide trend is to move away from this term.

A. Evolution of the Term “Battered Women’s Syndrome”

First conceptualized in the 1970s by psychologist Lenore Walker, the term “battered women’s syndrome” (hereinafter “BWS”) is often used to describe reactions that individuals have to being victimized by domestic violence.

Jacobsen, Mizga and D’Orio, *supra*, at 38; Meghan Condon, *Bruise of a Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence*, 17 *Geo. J. Poverty Law & Pol’y* 487, 494 (2010). Dr.

Walker, who did not intend to coin a legal term, described BWS as created by the “cycle of abuse,” which resulted in a state of “learned helplessness.” *See id.*

While Dr. Walker’s work was groundbreaking in the 1970’s and early 1980’s, the understanding of intimate partner battering has evolved greatly since then.

Notwithstanding, the concept of learned helplessness persists and it perpetuates a notion that women in abusive relationships are submissive or powerless to leave their batterer, and always exhibit a particular set of irrational personality traits. *See Anne M. Coughlin, Excusing Women*, 82 *Calif. L. Rev.* 1, 80-81

(1994). Worse, it may create the impression that women who do not exhibit all the features of the syndrome as described by Dr. Walker cannot, in truth, have experienced behavior-changing battering.

Expert testimony regarding this concept was first admitted 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. *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). 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.² Some commentators exploited this confusion to arouse public sentiment against

² *See generally* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U.Pa.L.Rev. 379 (1991) (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 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"); 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).

battered women and their supporters. *See e.g.*, Alan M. Dershowitz, *The Abuse Excuse and Other Cop-Outs, Sob Stories, and Evasions of Responsibility* (1994).

B. The Resulting Victim-Agent Dichotomy

There is not, nor has there ever been, an “abuse excuse.” An unintended consequence of using the term “BWS” in courts and in common parlance is the resulting victim-agent dichotomy.

The victimization-agency dichotomy contributes significantly to the confusion about appropriate legal defense strategies for women. A battered woman supposedly cannot be victimized if she has acted in any way that suggests agency or if she is a survivor; in contrast, if she is a victim, she cannot be considered reasonable...[] But women who are battered [] are simultaneously victims and agents: they are abused but also act to protect themselves...[I]t is the very complexity of their situations that makes these cases so difficult to perceive and adjudicate.

Schneider, *supra*, at 120.

It is this same complexity that makes expert testimony so crucial to explain matters about which laypersons either do not know, or about which their “common sense” tends to result in mistaken conclusions. In this regard, the testimony of an expert on battering 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 clothing or auto parts, or of a sociological expert who can speak to the meaning of conduct in an alien culture. *See* 3 Weinstein’s Evidence § 702[02].

In appellant's case as in many others, expert testimony on battering and its effects must be understood as evidentiary support, rather than as a claim or defense in itself. In the many contexts beyond homicide, in which such testimony is now widely recognized as relevant and admissible, such as in cases of fraud, tax evasion, drugs, guns, and child protection, it is important to understand that the danger of the victim-agent dichotomy is similarly at play, leading to a lack of comprehension or bias against an "abuse excuse."³

C. The National Trend Is a Movement Away from the Term "Battered Women's Syndrome"

As more research surrounding the realities and dynamics of domestic violence emerges, the national trend has been to abandon the term "Battered

³ See, e.g., United States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997) (expert testimony 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 because 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 to defendant's duress claims at trial, but if complete duress defense fails, evidence of battering to support incomplete duress must be taken into consideration by sentencing court in making downward departure under sentencing guidelines.). See generally, Cynthia Lynn Barnes, *Admissibility of expert testimony concerning domestic-violence syndromes to assist jury in evaluating victim's testimony or behavior*, 57 A.L.R.5th 315.

Woman Syndrome” or “BWS.” In 1996, the California Supreme Court recognized several critiques of this term on the ground that it tended to pathologize battered women:

(1) [I]t implies that there is one syndrome which all battered women develop, (2) it has pathological connotations which suggest that battered women suffer from some sort of sickness, (3) expert testimony on domestic violence refers to more than women’s psychological reactions to violence, (4) it focuses attention on the battered woman rather than on the batterer’s coercive and controlling behavior and (5) it creates an image of battered women as suffering victims rather than as active survivors.

People v. Humphrey, 13 Cal.4th 1073, 1083 n. 3 (1996) (quoting brief of amici curiae California Alliance Against Domestic Violence *et al.*).

The California Supreme Court noted that many experts preferred to use “battering and its effects” instead of “BWS.” *Id.* at 1083 n.3. The same year, the U.S. Department of Justice, the National Institute of Justice, the U.S. Department of Health and Human Services, and the National Institute of Mental Health, issued a report entitled “The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials” [hereinafter Report]. The report recommended the replacement of the term BWS, “no longer useful or appropriate,” with “evidence concerning battering and its effects.” Report at iii, vii.

This report noted a “strong consensus among the researchers, and also among the judges, prosecutors, and defense attorneys interviewed for the

assessment [of the effects of abuse on criminal trials], that the term ‘battered woman syndrome’ does not reflect the scientific knowledge now available regarding battering and its effects, implies a psychological impairment, and suggests a single pattern of response to battering.” Report at i-ii.

Subsequently, this Court agreed with the California Supreme Court’s recognition of the problems associated with BWS. “We recognize, as the California Supreme Court did in [Humphrey], that the use of the terminology ‘Battered Women’s Syndrome’ is not an accurate description of the psychological, physical, and emotional consequences of battery and abuse that the word was intended to capture.” McNeil v. Middleton, 344 F.3d 988, 990 n.1 (9th Cir. 2003), rev’d on other grounds, Middleton v. McNeil, 541 U.S. 433 (2004).

D. Inaccuracy and Consequences of Pathologizing Battered Women

1. Imposing the Necessity of a “Diagnosis” Is Under-Inclusive

The unintended consequences of outdated research about intimate partner abuse have broad implications. In the fifteen years since the NIJ published its report, commentators have stressed the need to discontinue use of the term BWS for “its failure to mention men and transgendered persons, its implied monolithic application to all female victims of domestic violence, and its connotations of mental disorder.” Jill E. Adams, *Unlocking Liberty: Is California's Habeas Law*

the Key to Freeing Unjustly Imprisoned Battered Women? 19 Berkeley Women's L.J. 217, 224 (2004).

This notion of BWS as dependent solely on the concept of “learned helplessness” also disproportionately excludes women of color, because BWS “relies on stereotypes of femininity that harm women who are too assertive, aggressive, or insufficiently remorseful.” Jacobsen, Mizga and D'Orio, *supra*, 41-42; Condon, *supra*, at 494.

In contrast to this passive victim are the stereotypes often associated with minority women...[] Because of racial stereotyping, minority women are seen as too powerful or too uncontrollable to be dominated by anyone[;] they are barred from sharing in that legal identity.
Condon, *supra*, at 494.

2. Battering and Its Effects Cannot Be Considered Solely as a Subcategory of Post Traumatic Stress Disorder

Recent research on battering and its effects demonstrates the inadequacy of limiting consideration of battering solely to those cases where it results in the psychological diagnosis of post traumatic stress disorder (“PTSD”). Jacobsen, Mizga and D'Orio, *supra*, at 41-42. Such a restriction excludes women who do not seem to suffer from these “disorders.” *See id.*

The reality is that some battered women have diagnosable psychological impairments, and some do not, as demonstrated by appellant’s case.

Furthermore, those battered women who do in fact have a related DSM-IV

diagnosis may not all be diagnosed with PTSD. For example, multiple studies report that intimate partner abuse increases a woman's likelihood of suffering from depression and suicide attempts, and that these impacts can be long-term. Belknap, *supra*, at 359. One study of women exiting a domestic violence shelter found that 83 percent had experienced serious depression. *Id.*

Limiting the admission of expert testimony concerning battering and its effects to cases in which defendant also suffers a particular DSM-IV illness unduly limits the number of situations in which jurors are exposed to the particular truth about the case. Relevance and helpfulness, not artificial boundaries imposed by controversial diagnostic labels, should be the touchstone in court.

III. APPELLANT'S CASE DEMONSTRATES THE NEED FOR EXPERT TESTIMONY ABOUT BATTERING AND ITS EFFECTS

Appellant Ms. Munguia's case demonstrates that jurors need further explanation about the ways in which survivors of domestic violence become entangled in illegal activities, and particularly why Ms. Munguia may not have fit the paradigmatic view of a battered woman. Her case also demonstrates how exclusion of expert testimony on battering and its effects as lacking an underlying PTSD "diagnosis" is under-inclusive.

A. Appellant’s Case Demonstrates That Expert Testimony on Battering and its Effects Is Necessary to Aid the Jury in Understanding a Battered Woman’s Conduct and State of Mind

By suggesting that Ms. Munguia did not fit the stereotype of a battered woman, the prosecution successfully persuaded the District Court that Ms. Munguia’s characterization of the abuse to Dr. Whiting offered no guarantee of trustworthiness, and that “[b]ecause these statements offer nothing but an attempt to bolster the [appellant]’s version of the story, through the testimony of a doctor, the prejudice of these statements is great.” Government’s Motion to Preclude Defendant’s Proffered Expert Testimony 10 (hereinafter, “Government’s Motion”).

Through the exclusion of expert testimony on battering and its effects, the jury heard a “he-said,” “she-said,” account regarding whether Ms. Munguia knowingly joined the charged conspiracy. Alas testified that appellant was his “equal” and willingly participated in the conspiracy, that her participation was motivated by greed, and that he did not abuse her other than one drunken slap. ER 128, 184-85, 188.

Alas’ assertions blaming Ms. Munguia and minimizing the abuse were unaccompanied by expert testimony. The jury did not hear that abusers tend to minimize the frequency and seriousness of their violence. *See* Belknap, *supra*, at

325. Numerous studies of abusers found that batterers tend to use excuses and justifications when confronted with their culpability, which flies in the face of the prosecution's argument that Alas had nothing to gain through his testimony because he had already accepted a plea. *See id.*

Testimony from two police officers furthered the prosecution's characterization excluding Ms. Munguia from the victim side of the victim-agent dichotomy. The officers testified that, during surveillance, Ms. Munguia appeared to be a normal shopper and did not appear confused or frightened. 2 RT 66-67; 2 RT 172-173.

Ms. Munguia, on the other hand, testified that Alas used multiple forms of violence against her, including slapping, hair pulling, verbally abusing, and threatening her and her family. ER 225-226. Her sister corroborated one instance of this conduct, testifying that the sister called 911 after witnessing Alas punch appellant and drag her out of the house. ER 184, 188.

Ms. Munguia's sister testified about only one incident of violence, and stated that she did not go out regularly with Ms. Munguia. This is consistent with many studies indicating that batterers typically intentionally isolate victims from their family members and friends, in order to control their partner by cutting off social interactions. Margot Mendelson, *The Legal Production of*

Identities: A Narrative Analysis of Conversations with Battered Undocumented

Women, 19 Berkeley Women's L.J. 138, 163 (2004); see generally Ola W.

Barnett, *Why Battered Women do not Leave, Part 2: External Inhibiting Factors*

- *Social Support and Internal Inhibiting Factors*, 2 Trauma, Violence & Abuse

3, 5 (2001).

Ms. Munguia testified to having her finances controlled, ER 233-242, and buying the cold pills at Alas' direction, claiming that he took her where she needed to go and told her what to do. ER 230, 233-242. When she asked what the pseudoephedrine pills were for, Alas not only lied, but also told her it was "better" for her "not to know." ER 230.

The expert testimony in this case would have provided the jury with insight into Ms. Munguia's fear associated with being told that it was "best for her not to know," and why in protecting herself she might not attempt to discern the real purpose of buying the pills. Her circumstances, including battering and its effects, are relevant both to whether she subjectively knew what the pseudoephedrine was intended for, and whether a person in her circumstances would have objectively appreciated that the legally purchased cold pills were going to be used to manufacture methamphetamine.

However, without expert testimony on battering and its effects, the prosecution was able to play on stereotypes in asking jurors to evaluate Ms. Munguia's reasonableness without the necessary context. During closing argument, the prosecution admonished Alas for what the prosecution conceded was unacceptable abusive behavior, but at the same time, blamed Ms. Munguia as the one who chose to be in the abusive relationship in the first place. The prosecution further argued that Ms. Munguia knew what the pills were being used for, and that a reasonable person in her shoes would have known this. ER 276-280.

This characterization of Ms. Munguia as not reasonable demonstrates the difficulty faced by a jury in evaluating facts and deciphering credibility in the absence of proper context. The exclusion of expert testimony on battering and its effects rigged the credibility contest before it even began. Alas' testimony as to Ms. Munguia's intent was not refuted by evidence about the dynamics of the relationship, including why Ms. Munguia tolerated his abuse, why she complied with his directives (even when he was not present), and why she threatened to call 911 yet never did.

There was also no expert testimony on battering and its effects to explain that Alas' testimony that Ms. Munguia attempted to slap him would not necessarily refute the coercive control present in the relationship. *See* ER 128.

The expert could have explained to the jury the research indicating that many women do fight back, particularly those with a lack of resources, cultural or language barriers, and a history of severe trauma – all descriptions fitting the appellant.

B. Appellant’s Case Demonstrates That Admissibility of Necessary Expert Testimony on Battering and Its Effects Cannot Be Dependent on the Battered Defendant’s Pursuit of an Affirmative Defense of Duress

The prosecution argued that appellant was not asserting, nor had she established, a duress defense, making expert testimony improper because of Dr. Whiting’s use of the term “coercion.” *See* Government’s Motion at 6-7. The District Court appears to have accepted this argument. Exclusion of expert testimony on battering and its effects on this basis demonstrates an infringement of appellant’s due process rights. The prosecution argued that because the term “coercion” is used synonymously with the term “duress” in the Ninth Circuit, and Petitioner had “failed to establish the requisite prima facie case [of duress],” the expert testimony must be “excluded as irrelevant.” *Id.* at 8, citing United States v. Moreno, 102 F.3d 994, 998 (9th Cir. 1996) for the proposition that “[e]vidence of duress is not relevant if the defendant fails to present evidence of a prima facie case of the affirmative defense.”

Expert testimony on battering and its effects was offered as evidentiary support for a reasonable doubt as to Ms. Munguia's specific intent, not to negate the voluntariness of her actions through the affirmative defense of duress. In conveying this information, it would be virtually impossible for Dr. Whiting to testify about Ms. Munguia's experience of battering at the hands of Alas without using the words "coerced" or "coercion." This is a key concept in understanding battering and its effects. *See Stark, supra*. Exclusion of necessary and relevant expert testimony on battering and its effects on this basis denied appellant her constitutional right to present a valid defense.

C. Appellant's Case Demonstrates That Admissibility of Expert Testimony on Battering and its Effects Cannot Be Dependent on a Diagnosis of Post Traumatic Stress Disorder

Appellant Ms. Munguia's case also demonstrates that exclusion of expert testimony on battering and its effects as lacking an underlying "diagnosis" of PTSD is inaccurate and under-inclusive. Dr. Whiting's opinion that appellant suffered from the effects of battering was not a diagnosis of appellant.⁴

Nonetheless, the prosecution successfully excluded the expert testimony by

⁴ Dr. Whiting's report stated: "BWS is described by a cycle where there is a buildup of tension within the relationship, violence occurs, and then there is a 'honeymoon period' where the perpetrator may apologize, may promise that violence will not recur, and/or will exhibit caring or even neutral behavior toward the woman. The battered woman does not leave the relationship, and in many cases, refuses to participate in the prosecution of the abuser. The answer to the question, 'why doesn't she leave?' is answered by understanding that these women are traumatized by the violence and yet, are bonded to their abusers."

arguing that “[b]ecause Dr. Whiting concludes that defendant does not meet the clinical criterion for a PTSD diagnosis, [appellant] necessarily cannot be – and is not, in fact – diagnosed with BWS.” Government’s Motion at 13-14.

The claim that BWS is merely a subcategory of PTSD is fallacious, making the prosecution’s logic incorrect. Notably, in making this argument, the prosecution cited outdated sources, such as Dr. Lenore Walker’s work. In fact, the prosecution also relied on multiple law review articles that purportedly supported the prosecution’s argument, yet in actuality these articles argued against the prosecution’s unduly restricted view of evidence of battering and its effects. Jacobsen, Mizga and D’Orio, *supra*, at 41; Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 Mich. J. Gender & L. 275, 285 (2006) (stating that many, but not all, battered women suffer from PTSD).

Furthermore, the court appears to have relied on the prosecution’s characterization of Dr. Whiting’s DSM-IV diagnosis of depression and his discussion of Ms. Munguia’s lengthy history of suicide attempts as irrelevant and prejudicial. Despite the prosecution’s flawed assertion that “understanding why [appellant] stayed in a relationship with Alas is of no import,” understanding of such dynamics, as informed by this relevant diagnosis, is

exactly what the jury needed to understand whether Ms. Munguia had the requisite intent to commit the crimes charged. *See* Government's Motion at 14.

CONCLUSION

Scholarly literature confirms the persistence of myths and misconceptions about battered women harbored by jurors, such as that victims of abuse are passive, weak, and responsible for their failure to leave. In actuality, battered women face diverse circumstances, and employ many strategies for coping with abuse, all of which may require explanatory expert testimony.

Without the aid of necessary expert testimony on battering and its effects to dispel myths and aid in understanding the context of intimate partner abuse, jurors are likely to draw an inaccurate inference, particularly when the battered defendant does not fit within persistent stereotypes. Because Ms. Munguia's

conviction was based on the unconstitutional exclusion of expert testimony essential to a fair trial, amici respectfully encourage this Court to reverse.

Respectfully submitted,

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DATED: April 11, 2011

/s/ Heather B. Warnken
Counsel for Amici Curiae

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I hereby certify that on this 11th day of April, 2011, I caused this Brief of Amicus Curiae to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Counsel for Appellant Counsel for Appellee

DATED: April 11, 2011

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