IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	S093980
Plaintiff-Respondent,	)	No. 3 Crim. C030923
v.	)	Sacramento County Superior Court
NETTIE REAY,	)	No. 96F08291
Defendants-Appellants.	)	

BRIEF OF AMICI CURIAE NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, et al., IN SUPPORT OF APPELLANT NETTIE REAY

From the Judgment of the Court of Appeal,
Third Appellate District, Reversing the Judgment
Of Conviction by the Sacramento County Superior Court
Hon. James L. Long, Presiding

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1. INTRODUCTION AND SUMMARY OF ARGUMENT

Domestic violence against women is a serious problem, the effects of which pervade our society. Estimates of the number of women assaulted by their intimate partners each year range upwards from one million. A 1998 survey showed that 76% of women who are raped and/or physically assaulted are attacked by a current or former spouse, cohabitating partner, or date. (Tjaden & Thoennes, Prevalence, Incidence and Consequences of Violence Against Women (Nat'l Inst. of Justice 1998), pp. 7-8.)[1]

The effects of domestic violence do not limit themselves to tidy situations in which a woman, acting under threat of imminent harm, finally strikes back in self-defense at her long-time abuser. Unfortunately, women victimized by domestic violence are placed frequently in untenable situations, and sometimes commit crimes because their batterer coerces them, using the threat of immediate violence. Studies indicate that approximately one-half of all women inmates have been victims of battering. (Dore, Downward Adjustment and the Slippery Slope:

[1] Estimates from the National Violence Against Women (NVAW) Survey, which was jointly sponsored by the National Institute of Justice (NIJ) and the Centers for Disease Control and Prevention (CDC), suggest that approximately 1.3 million women in the U.S. were physically assaulted by an intimate partner in the 12 months preceding the survey. Further, 22.1% of surveyed women reported being physically assaulted by a current or former intimate partner at some time in their lifetime. The survey was conducted between November 1995 to May 1996 of a representative sample of 8,000 women and 8,000 men in the U.S. (Tjaden & Thoennes, Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey (Nat'l Inst. of Just. 2000) NCJ 181867, p.10.)

The Use of Duress in Defense of Battered Offenders (1995) 56 Ohio St. Law J. 665, 676-77 & fn. 43-46, 49.) In order to treat battered women defendants with the same degree of fairness as other defendants, the law must recognize the relationship between evidence of battering (and its effects) and defenses such as duress. Moreover, having sought to treat battered women defendants fairly by admitting relevant evidence concerning battering and its effects, the law must ensure adequate instructions which enable the jury to assess whether there is a link between the evidence of battering and available defenses.

Nettie Reay is a seriously battered woman who participated in a homicide because her batterer and codefendant coerced her into doing so.[2] At the time of the homicide, she had been involved with Travis Reay for several months and he had abused her almost from the outset of the relationship. For Nettie Reay, this relationship was a continuation of the abuse she had suffered throughout her life, having been battered in a previous relationship, and having suffered severe abuse as a child.

This Court now has the opportunity to address adequately the relationship between the duress defense and evidence of battering and its effects. While all of the parties in this case recognized that evidence of battering and its effects was relevant to Ms. Reay's intent and credibility, the trial court

failed to recognize the relevance of this evidence to the defense of duress. The lay and expert testimony concerning battering and its effects, including her lengthy history of being physically abused, was highly relevant to show both that her fear of the batterer was genuine and reasonable, and that the threat of death and/or great bodily injury from the batterer was immediate. These are the only two elements of California's duress defense. She was therefore entitled to an opportunity to have the jury consider that defense.

In addition, this Court has the opportunity to address the question whether evidence of battering and its effects can operate to reduce the defendant's culpability, much as evidence of unreasonable self-defense or heat of passion does. Evidence that a defendant committed a criminal act, while in fear for her life or the lives of her family, must be considered in determining whether the defendant formed the requisite intent to commit the crime. Accordingly, regardless whether the question is viewed as an affirmative defense out of "imperfect duress" or simply evidence on the question whether the defendant had the requisite intent to be convicted of murder, instructions must be given to allow the jury to consider properly how evidence of battering and its effects affected the defendant's belief of danger and ensuing conduct.

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[2] The degree of her participation is subject to dispute.

2. DESPITE LAWS REQUIRING THE ADMISSION OF EVIDENCE OF BATTERING AND ITS EFFECTS, COURTS STILL FAIL TO COMPREHEND THE RELATIONSHIP BETWEEN EVIDENCE OF BATTERING AND AFFIRMATIVE DEFENSES TO CRIMES.

When a battered defendant is charged with a crime, both lay evidence about the abuse and expert testimony on battering and its effects are relevant to enable the trier of fact to evaluate properly the conduct and state of mind of a battered woman defendant.[3] This principle is well-established in California: in 1991, the state legislature adopted a statute directing the admissibility of evidence of "battered woman syndrome."[4] The

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[3] The parties and the trial court apparently understood that evidence of battering was relevant to questions of the defendant's fear of her co-defendant/batterer and therefore, to her intent. Evidence of battering was admitted in this case to establish her belief that she would be harmed if she did not participate in the crime. The court's (and the state's) analysis failed on the subject of the relevance of this evidence to the duress defense.

[4] At the outset, it is important to explain the terminology used in this brief. Amici use the term "battering and its effects" to describe the substance of lay and expert testimony regarding abuse. However, Cal. Evid. Code § 1107, as well as the parties and prior courts in this case refer to such evidence as "battered woman syndrome," a term coined in the late 1970s. *See* Lenore E. Walker, The Battered Woman (1979). During the last 25 years, extensive research has been done focusing on battering and its effects upon women and children. As the professional literature has grown, the term "battered woman syndrome" has become less and less adequate to describe accurately and fully the current body of knowledge about battering and its effects. Many domestic violence experts now agree that the term "battered woman syndrome" is too limiting as it does not properly convey the range of behavioral and psychological responses that battered women exhibit, instead incorrectly implying that all women who experience abuse react in exactly the same way. (See Dutton, Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome (1993) 21 Hofstra L. Rev. 1191, 1196 (hereafter cited as "Dutton, Understanding Women's Responses"); People v. Humphrey (1996), 13 Cal.4th 1073, 1083 fn.3.) Many experts and social scientists have replaced "battered woman syndrome" with the term "battering and its effects" to describe the experiences, beliefs, perceptions, and realities of battered women's lives. *See, e.g.,* NAT'L INST. OF JUSTICE, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT (May 1996) NCJ 160972 (hereinafter referred

purpose of such evidence is to enable the trier of fact adequately to evaluate the conduct and state of mind of a battered woman defendant.

In California, evidence of battering and its effects is generally understood to be admissible in any criminal proceeding. (People v. Humphrey (1996) 13 Cal.4th 1073, 1081–82, 1087.) California, unlike some states, provides for the admission of such evidence as part of its general evidentiary rules, not in the context of a particular defense. Rather, section 1107, which authorizes admission of evidence of battered woman syndrome," makes such evidence broadly admissible in any criminal case.[5] (E.g. ibid.; People v. Williams (2000) 78 Cal.App.4th 1118, 1129 [disagreeing with one appellate division's limitation on admission of evidence of battered women's syndrome under § 1107: "There is nothing in Evidence Code section 1107 to

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to as NIJ); Dutton, Understanding Women's Responses, supra, and Stark, Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control, (1995) 58 Alb. L. Rev. 973, 975–76 . The term "battering and its effects" is increasingly being used in legal and scholarly treatises, *see e.g.,* NIJ, supra, Dutton, supra, and Stark, supra), as well as in statutes, *e.g.,* LA. CODE EVID. ANN. art. 404(A)(2) (West 1989), MASS. GEN. LAWS ANN. ch. 233, §23E (West 1994), NEV. REV. STAT. §48.061 (1993), and OKLA. STAT. ANN. tit. 22, 40.7 (West 1992). This Court previously recognized the problematic nature of the term "battered woman syndrome," in Humphrey, 13 Cal.4th at p. 1083, fn.3.

[5] Evidence Code section 1107, adopted in 1991, effective January 1, 1992. (Stats. 1991, ch. 812, § 1.), provides in pertinent part:

(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.

suggest that the Legislature intended that a batterer get one free episode of domestic violence before admission of evidence to explain why a victim of domestic violence may make inconsistent statements about what occurred and why such a victim may return to the perpetrator."].)[6]

Despite the wide scope of section 1107, confusion abounds regarding the relevance of evidence of battering and its effects.[7] While evidence of battering and its effects may be supportive of several different defenses, courts routinely fail to grasp the relationship between evidence of battering and underlying defenses, including those which have the defendant's actual and/or reasonable belief as a component. In addition, certain courts have confused evidence of battering and its effects with a diminished mental capacity defense. (E.g. People

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[6] Even before the enactment of § 1107, California was in the forefront in protecting battered women's rights in admitting evidence of battering on the question whether the battered woman defendant had a genuine belief that her life was in imminent danger. (See e.g. People v. Day (1992) 2 Cal.App.4th 405, 414–15, overruled in part by People v. Humphrey, supra, 13 Cal.4th 1073; People v. Aris (1989) 215 Cal.App.3d 1178, 1186 [recognizing that evidence of battering and its effects was relevant to whether the defendant held a genuine belief that she was in imminent danger], overruled in part by Humphrey, supra, 13 Cal.4th 1073.)

[7] That confusion is illustrated by People v. Gomez (1999) 72 Cal.App.4th 405, 417, in which the court of appeal ruled that evidence of battered woman syndrome was irrelevant unless the party offering the evidence could show that the woman was battered more than once. (But see People v. Williams, supra, 78 Cal.App.4th at p. 1129.)

v. Erickson (1997) 57 Cal.App.4th 1391, 1402.)[8] Other courts, including the trial court in this case, fail to grasp the relationship between evidence of battering and its effects and the duress defense. However, no defendant, let alone a battered woman defendant, receives a fair trial when relevant evidence is admitted, but jury instructions regarding the defense theory as to which the evidence is most probative are denied. After all, "battered woman syndrome" is not itself a defense to a crime, nor would Amici argue that it should be.[9] The evidence was admissible because it was relevant to a statutory theory of defense.

This case exemplifies confusion frequently present in cases in which evidence of battering is proffered or admitted. Although the trial court realized that the evidence of battering and its effects was admissible under section 1107, the court failed to understand how and why the lay and opinion testimony

[8] See also State v. Mott (Ariz.) 931 P.2d 1046, cert. den (1997) 520 U.S. 1234; State v. Copeland (Mo. 1996) 928 S.W.2d 828, cert. den. (1997) 519 U.S. 1126.

[9] See generally, Maguigan, Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals (1991) 140 U.Pa.L.Rev.379 [hereafter "Myths & Misconceptions"]; United States v. Homick (9th Cir. 1992) 964 F.2d 899, 905. Unfortunately, many courts and commentators historically have incorrectly viewed evidence of battering as presentation of a separate "battered woman defense." (See, e.g., Meeks v. Bergen (6th Cir. 1984) 749 F.2d 322 [counsel not ineffective for asserting a claim of self defense rather than a "battered wife defense"]; Commonwealth v. Tyson (Pa. Super. Ct. 1987) 526 A.2d 395, 397 [referring to counsel's failure to raise defense of "battered woman's syndrome"]; Larson v. State (Nev. 1988) 766 P.2d 261, 262 [referring to the availability of the "battered wife defense"].) Some commentators even sought to exploit this confusion to arouse public sentiment

was relevant to and supportive of the proposed duress defense. The court did not comprehend how evidence of battering and its effects supported both prongs of the duress defense. The court's lack of understanding resulted in its refusal to provide a jury instruction on the affirmative defense of duress on the ground that there was no evidence of an immediate threat. (Compare R.T. 797 with R.T. 1250.) The court's ruling is characteristic of many of the common misconceptions which triggered the enactment of section 1107. When the evidence of battering and its effects presented in this case is properly understood, it becomes apparent that evidence of battering is relevant to both prongs of the duress defense and that there was ample evidence to require that a duress instruction be provided.

A. Evidence Of Battering And Its Effects Is Highly Probative Of The Elements Of The Duress Defense.

Evidence of battering and its effects is highly relevant to the defense of duress. (United States v. Word (11th Cir. 1997) 129 F.3d 1209, 1212-13; United States v. Homick (9th Cir. 1992) 964 F.2d 899, 905; McMaugh v. State (R.I. 1992) 612 A.2d 725; Hale v. State (Tenn. App. 1969) 453 S.W.2d 424.) In pertinent part, Penal Code section 26 provides:

> All persons are capable of committing crimes except those belonging to the following classes:

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against battered women and their supporters. (E.g., Dershowitz (1994) The Abuse Excuse and Other Cop-Outs, Sob Stories and Evasions of Responsibility.)

> (6) Persons (unless the crime be punishable by death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

California's duress defense, codified at id., contains two judicially construed elements: the defendant must show that the act was committed under the threat or menace of harm such that she had (1) an actual belief she was facing immediate death or great bodily injury and (2) reasonable cause for such belief. (People v. Heath (1989) 207 Cal.App.3d 892, 900; People v. Condley (1977) 69 Cal.App.3d 999, 1012, cert. den. (1977) 434 U.S. 988.)

The impulse for self-preservation is the fundament of the duress defense. (See Hill, A Utilitarian Theory of Duress (1999) 84 Iowa L. Rev. 275, 319-20, 329-30.) The rationale for the defense is that the person being threatened lacks the time or appropriate conditions to formulate either a "reasonable and viable course of conduct nor to formulate criminal intent." (Condley, supra, 69 Cal.App.3d at p. 1012.)[10]

[10] Intermediate appellate courts seem to have confused the rationale for the affirmative defense of duress with a notion that duress operates exclusively by negating the intent element of the offense. For example, the Condley court stated that a successful duress defense results in "the unlawful acts of the person under duress are attributed to the coercing party who supplies the requisite mens rea . . .," Condley, supra, 69 Cal.App.3d 999, 1012; accord Heath, supra, 207 Cal.App.3d at pp. 891, 900-01. Such statements confuse the affirmative defense of duress with the elements of an offense that must be proved by the prosecution. (See also People v. Graham (1976) 57 Cal.App.3d 238, 240 [ruling that because duress defense tends to negate an

The language of section 26 shows that the nineteenth century drafters of the Penal Code viewed duress as an issue of capacity or responsibility for criminal conduct, akin to infancy or insanity. Modern legal scholars view duress as an excuse, in which the defendant's action is not morally justified, but, because of the circumstances punishment is not merited. (See Dressler, Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits (1989) 62 S.Cal.L.Rev. 1331, 1347–49 [distinguishing necessity from duress]; id. at 1356–67 [arguing that duress is better understood as an excuse, not a justification]; Reed, Duress and Provocation As Excuses to Murder, supra, 6 J.Transnat'l Law & Pol. at pp. 52, 57–58.) While some intermediate appellate courts and legal scholars have classified California's duress defense as a justification defense, see e.g., Heath, supra, 207 Cal.App.3d at pp.900–01, this conclusion is mistaken. (See People v. Otis (1959) 174 Cal.App.2d 119, 125 [referring to duress as an excuse]; accord

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element of the offense, defendant need only raise a reasonable doubt].) The affirmative defense of duress is distinct from a defense oriented toward showing that a defendant may not have possessed the requisite intent to commit the crime charged. The question whether all of the elements of a crime are present may indeed be negated by evidence that a defendant was coerced into committing the charged crime. Thus, even if a defendant cannot perfect a duress defense, the defendant's evidence of coercion may negate the intent element of the crime charged and thus result in acquittal anyway. In contrast, a defendant may have a valid duress defense when she possesses the requisite intent to commit the crime charged, but genuinely and reasonably believed she needed to commit the crime, because her life was in immediate danger. In short, the same evidence may give rise to either or both of the two theories of defense.

People v. Saunders (1927) 82 Cal.App.778,785.) The defense of duress is based on the principle that even though an actor cannot be deemed morally justified in injuring or killing an innocent third party, even to save his or her own life, such action is excusable (i.e., not one society should punish) when it occurs under an immediate threat of death or great bodily injury that an ordinary person could not be realistically expected to resist. (See Dressler, id., at pp. 1356-67.) In other words, the law does not expect or require ordinary persons to behave heroically.

The fact that the penal code section in which the duress defense appears is one dealing with matters of capacity to commit a crime and includes matters such as infancy, unconsciousness and insanity, further supports a conclusion that duress should be analyzed as an excuse. (Pen. Code § 26.) It is not that the actor's behavior is justifiable, but that such persons will not be held legally responsible because of extenuating circumstances. What the defendant did, although awful, is what anyone might have done if exposed to the same nightmare scenario. Only with this in mind can the Court reach proper conclusions in applying the statute. In particular, the defendant does not lose the benefit of the defense because we as a society cannot say that she did the right thing under the circumstances. Rather, given the exceptional circumstances, her

actions are not criminally punishable because, based on her experience, she actually and reasonably perceived herself to be in immediate danger.

Although duress should be viewed as being akin to an excuse rather than as a justification, the elements of duress are similar in important respects to the elements of self-defense, a justification defense. Both defenses require the defendant to have genuinely and reasonably believed that she was facing an immediate threat of great bodily injury or death.[11] The difference is that in self-defense, the defendant has killed or injured her attacker, while in duress, the defendant has killed, injured, or committed some other crime against a presumptively innocent third party. Nevertheless, the similarities between the elements of the defenses require a similar conclusion as to the relevance of evidence of battering and its effects.

Even before this Court's decision in Humphrey, it was well-established that evidence of battering and its effects was relevant to whether a defendant genuinely believed that her life was threatened. (See People v. Aris (1989) 215 Cal.App.3d 1178, 1195-97, overruled in part by Humphrey, supra, 13 Cal.4th at p. 1086; People v. Day (1992) 2 Cal.App.4th 405, 414-15, overruled in part by Humphrey, id. at p. 1086; accord Witkin, Cal. Evid.

[11] The term used in self-defense cases is "imminent." (See post at pp. 15-16.)

(3d ed. 1997 supp.) § 493A, pp 175-76.) The question whether a defendant's belief is genuine is identical for the defenses of self-defense and duress. Thus, at least as to the prong of the defense which requires a genuine belief in immediate danger, evidence of battering and its effects is pertinent.[12]

Evidence of battering and its effects also is relevant to the prong of duress that requires the defendant's belief in immediate danger be reasonable or well grounded. The requirement that the defendant act in response to a present, as opposed to future, threat, is premised on the assumption that during any lapse in time, a person may retreat to a position of safety, and thereby avoid having to perform the criminal act. A battered woman's assessment of her ability to escape danger, however, and the reasonableness of that assessment, is integrally related to her experiences of abuse with the batterer. (See, e.g., Humphrey, supra, 13 Cal.4th at p. 1086["[D]r. Bowker testified that the violence can escalate and that a battered women can become increasingly sensitive to the abuser's behavior, *testimony relevant to determining whether*

[12] Evidence of battering and its effects also is relevant to the general issue of criminal intent. Evidence that a woman acted in fear for her life, because of her involvement with a batterer tends to show that the battered woman did not intend to commit the crime. Therefore, at a minimum, a trial court should instruct the jury that evidence of battering and its effects is admissible on the genuineness of the defendant's belief that she was in immediate danger.

defendant reasonably believed when she fired the gun that this time the threat to her life was imminent."](emphasis added).)

Acknowledging this reality, this Court ruled in Humphrey that evidence of battering and its effects was relevant to and admissible on the question whether the defendant reasonably believed she faced an imminent threat of great bodily injury or death. (Ibid.)[13] This Court recognized that reasonableness for a battered woman can only be assessed with reference to her history of abuse. Among the "relevant circumstances" is the fact that a battered woman defendant can read the batterer's cues and accurately predict violence; this conclusion can affect jury's assessment of reasonableness of her fear. (13 Cal.4th at p. 1086; see also State v. Allery (Wash. 1984) 682 P.2d 312, 314 ["The jurors must understand that, in considering the issue of self-defense, they must place themselves in the shoes of the defendant and judge the legitimacy of her act in light of all that she knew at the time."]. Thus, because the defense of duress, like self-defense, contains a requirement that the defendant be reasonable in her belief of harm, evidence of battering and its effects is directly relevant. (Heath, supra,

[13] "' [F]rom the perspective of the battered woman, danger is perpetually imminent.' Unfortunately, a battered woman lives in the cycle of violence, a world where she knows the real capabilities of her batterer to severely abused her because he has done so many times before. Because the battered woman has lived through possibly hundreds of cycles, she possesses a heightened sense of perception regarding impending violence and battering

207 Cal.App.3d at p. 201.) Accordingly, just as evidence of battering and its effects is highly relevant to the concept of imminence in a self-defense case, such evidence is directly apposite to the question of immediacy in a duress case.

The difference between this element of the two defenses is minimal and in fact, the terms are used interchangeably in California case law. (E.g. People v. Scroggins (1869) 37 Cal. 676, 683; People v. Lo Cicero (1969) 71 Cal.2d 1186, 1190-91; People v. Otis, supra, 174 Cal.App.2d at p.125, disapproved on other grounds, People v. Caldwell (1973) 9 Cal.3d 651, 657-58; People v. Condley (1977) 69 Cal.App.3d 999, 1011-12["Because of the immediacy requirement, a person committing a crime under duress has only the choice of imminent death or executing the requested crime…." "Duress requires an imminent threat to one's life."]; Aris, supra, 215 Cal.App.3d at pp. 1187-88 [upholding definition of "imminent" which includes the term "immediate"], overruled in part by Humphrey, supra, 13 Cal.4th 1073;.) Self-defense likewise requires that the defendant reasonably believe she faces "imminent" danger. (Humphrey, supra, 13 Cal.4th at pp. 1082-83.) Duress requires "immediate" danger. (Pen. Code § 26.) The similarity of these two definitions supports similar treatment of the two defenses in regard to the admissibility of

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incidence." Comment: Supporting A Defense of Duress: The Admissibility Of Battered Woman Syndrome (1997) 70 Temple L. Rev 699, 725-26.

evidence regarding both the defendant's perception of danger and the reasonableness of her perception. (See also American Heritage Dictionary of the English Language (Houghton Mifflin, 3d ed. 1992) [defining immediate as "1. Occurring at once; instant; 2. Of or near the present time," and imminent as "About to occur; impending"].)

Additionally, evidence of battering and its effects is relevant to the reasonableness prong of the duress defense, because it tends to dispel misconceptions regarding battered women, under which they are viewed as inherently unreasonable. Common misconceptions about battered women include that they are mentally ill, insane, or masochistic, remaining in a battering relationship because they prefer a life of violence. (Merlo, Charting a Course for the Future, in Women, Law, and Social Control (1995) at p. 257 ["In the same way that jurors in rape trials are influenced by myths claiming that the victim was somehow responsible for the rape, victims of domestic violence are perceived as masochistic or deserving of the abuse…"]; Commonwealth v. Stonehouse (Pa. 1989) 555 A.2d 772, 783–84 & fn.10; State v. Kelly (N.J. 1984) 478 A.2d 364, 370–71; see also United States v. Marenghi (D. Me. 1995) 893 F.Supp. 85, 86.)[14]

[14] "The phenomenon of repeated victimization, indisputably real, calls for great care in interpretation. For too long psychiatric opinion has simply reflected the crude social judgment that survivors 'ask for' abuse. The earlier concepts of masochism and the more recent formulations of addiction to trauma imply that the victims seek and derive gratification from repeated

Such misconceptions frequently result in a conclusion that the battered woman defendant's behavior cannot be reasonable.[15]

Rather than being unreasonable, social science research shows that battered women are often eminently reasonable, both in their assessment of danger and their ensuing conduct. Research supports the notion that "battered women utilize an impressive array of strategies for attempting to stop the violence, strategies which include efforts to escape, avoid and protect themselves and others from violence and abuse of their intimate partners." (Dutton, Understanding Women's Responses, supra, 21 Hofstra L. Rev. at p. 1227).

Battered women's coping strategies are active problem solving efforts to stop or reduce violence, ranging from

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abuse. This is rarely true….More commonly, repeated abuse is not actively sought but rather passively experienced as a dreaded by unavoidable fate and is accepted as the inevitable price of relationship." Herman, Trauma and Recovery (1992) at p. 112.

[15] There is a widespread fallacy that battered women suffer from a mental disease or defect, or are insane. Some of this confusion has been prompted by the terminology "battered woman syndrome" which connotes a sickness or malady and has been criticized for that reason. (See NIJ, supra at p. 19 ["[T]he term 'battered woman syndrome' evokes a stereotypic image of battered women as pathological or maladjusted."]; see also, Humphrey, supra, 13 Cal.4th at p. 1083, fn. 3.) Of course, viewed in this way, a battered woman can never be reasonable; rather, she acts due to her "condition." The fact is, however, that experiencing abuse does not usually make one legally insane or otherwise mentally impaired. Often, a battered woman is acting *reasonably* in response to an *unreasonable situation*, and her learned strategies for coping with abuse are reasonable responses. (See, e.g., NIJ, id. at p. 19 ["While psychological trauma associated with battering may be central to [explaining a battered woman's behavior], the battered woman's greater acuity in detecting danger from an abusive partner, in some cases, is the more salient factor."].) Of course, that is not to say that no battered women suffer from mental illness. Some battered women suffer from mental health conditions (such as post-traumatic stress disorder, depression or other mental illness)

compliance with the batterer's demands to avoidance to fighting back. (See id. at pp. 1227–1228; Campbell, Rose, Kub & Nedd, Voices of Strength and Resistance: A Contextual and Longitudinal Analysis of Women's Responses to Battering (1998) 13 J. of Interpersonal Violence No.6 at pp. 753–754 [interviews with 32 battered women revealed that, "most often, women used a combination of strategies designed to decrease the abuse in the relationship. The strategies were chosen through an active, conscious, evaluative process of decision making, revising, and choosing new strategies when old ones failed. The women monitored the effects on their partners, their children, and themselves…. A group of strategies that emerged in terms of women working to achieve nonviolence were categorized as active problem solving, in direct response to the abuse..."]; Gelles and Cornell, Intimate Violence in Families (2nd ed. 1990) at pp. 78–79; Schneider, Battered Women and Feminist Lawmaking (2000) at p. 84 ["Women who are battered may be unable to bring a battering relationship to an end, but they may be constantly planning and asserting themselves – strategizing, in ways that are carefully hidden from the batterer, to contribute to their own safety and to that of their children".].)

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which may vary in the degree it is related to the experiences of abuse, and may or may not rise to the level of legal insanity.

Battered women choose their coping strategies based partly on their ability to predict violence. Research confirms that battered women of necessity become experts at recognizing when they are in danger of being battered. They develop an ability to predict violence from their partner, including the degree of violence threatened. (See Weisz, et al., Assessing the Risk of Severe Domestic Violence: The Importance of Survivors' Predictions (January 2000) Journal of Interpersonal Violence, pp. 75-90; Hart, Beyond the 'Duty to Warn': A Therapist's 'Duty to Protect' Battered Women and Children (1988) in Yllo and Bograd, Feminist Perspectives on Wife Abuse, p. 240.) Battered women learn to read cues from the batterer and understand the difference between a serious threat and one that is less serious. (Langford, Predicting Unpredictability: A Model of Women's Processes of Predicting Battering Men's Violence ("hereinafter Predicting Unpredictability")(1996) Scholarly Inquiry for Nursing Practice: An International Journal vol. 10, no. 4, pp. 371-385.) One study of 30 battered women revealed that they "…developed sophisticated knowledge about and response patterns to their partners' violent behaviors. They identified specific changes in their partners' eyes, speech, and tone of voice and described specific situations that served as warning signs of potential violence. Once able to identify warning signs, women responded with strategies of avoidance, engagement,

fleeing, and enlisting the help of others to avert or delay violent incidences..." (Id. at p. 371.) Moreover,

> "Repeated instances of violence enable and cause battered women to develop a continuum along which they can 'rate' the tolerability or survivability of episodes of their husband's violence (Browne 1985, 1987). Thus, signs of unusual violence are detected. For battered women, this response to the ongoing violence of their situations is a survival skill. Research shows that battered women who kill experience especially severe and frequent violence, relative to battered women who do not kill (Blackman 1987; Browne 1985; Walker 1984). They know which sorts of danger are familiar and which are novel. They have had myriad opportunities to develop and hone their perceptions of their husbands' violence. And, importantly, they can say what made the final episode of violence different from the others. They can name the features of the last time that enabled them to know that this episode would result in life-threatening action by the abuser." (Blackman, Intimate Violence: A Study of Injustice (New York, NY: Columbia University Press. 1989) pp. 196-197.)

Such evidence supports a conclusion that, rather than being inherently unreasonable, a battered woman may accurately assess the degree of danger she is facing, and accordingly, remain in the situation or with the batterer, comply with his demands, or otherwise appease the batterer, even to the point of participating in a crime. Courts routinely admit this type of evidence in self-defense cases on an analogous point, to "show that because she suffered from the syndrome [battered woman syndrome], it was reasonable for her to have remained in the home and, at the pertinent time, to have believed that her life

and the lives of her children were in imminent danger." Hawthorne v. State (Fla. 1992) 408 So.2d 801, 807. Similarly, in the context of a duress defense, evidence of battering is significant, offering an explanation why a woman might have remained in a battering relationship and appeared to participate voluntarily in a crime. (See McMaugh, supra, 612 A.2d at pp. 733-34 [defendant entitled to new trial where evidence of abuse and domination not presented to jury.]; Dunn v. Roberts (10th Cir. 1992) 963 F.2d 308; United States v. Ramos-Oseguera (9th Cir. 1996) 120 F.3d 1028, cert. den. (1998) 522 U.S. 1135 (1998), overruled in part on other grounds by United States v. Nordby (9th Cir. 2000) 225 F.3d 1053.)

The court below, the Court of Appeal for the Third Appellate District, recognized that evidence concerning a battered woman's ability to assess the degree of danger from her partner is highly relevant to the reasonableness requirement of duress and required the provision of duress instructions. The battered woman who reasonably interprets her batterer's behavior as an immediate threat of death may not have heard the precise words "Do this or I will kill you." Rather, her experience teaches her when she must comply with the batterer's demands in order to survive. A jury needs to hear this evidence, and to receive instructions on how to use it.

B. California's Strong Policy in Favor of Admitting Evidence of Battering and its Effects Would be Thwarted by a Ruling that Concludes Such Evidence is Either Irrelevant to Duress or Is Fundamentally Insufficient for the Purpose of Determining Whether an Instruction on the Theory is Warranted.

As expressed in section 1107, and explained in People v. Humphrey, supra, California policy supports admission of evidence of battering and its effects in any criminal proceeding so long as the evidence is relevant. A fundamental reason for admitting evidence of battering in criminal trials is to provide the jury with an understanding of the defendant's fear of the batterer – her honest and reasonable belief of imminent or immediate harm -- and how that fear affected her conduct. The law in this area, dating from the earliest battered women self-defense cases, is premised on the need for expert testimony on battering to explain the validity or reasonableness of the defendant's fear, and to dispel misconceptions that would otherwise interfere with the jury's proper assessment of that fear. (See State v. Kelly, supra, 478 A.2d at pp. 375-378 [discussing relevance of expert testimony on battering to honest and reasonable belief of harm]; Stonehouse, supra, 558 A.2d at p. 785 [absence of expert testimony permitted the jury to assess defendant's claim of life-threatening danger on basis of misconceptions].)

A court must provide instructions under which a jury is given definitions it can use to understand the pertinence of the relevant evidence of battering and its effects. Otherwise, the jury is left only with the definition of the elements of the offense and common misconceptions about battered women. Admitting evidence of battering and its effects, while denying the defendant a jury instruction on the very defense as to which the evidence is most probative, thwarts California's policy as expressed in section 1107. It is fundamentally unfair merely to admit evidence of battering and its effects while withholding from jurors the tools to properly consider the evidence. Without instructions about defendant's honest and reasonable belief of danger, the jury in this case was effectively prevented from considering the evidence on precisely the issues on which section 1107, this Court, and California public policy mandate that evidence of battering be considered.

Common misconceptions about battered women were present in this case, making complete instructions especially necessary. The defense presented evidence regarding the effect of battering on Nettie Reay. The district attorney also argued that the murder resulted from the relationship between Travis and Nettie, which was "driven by powerful emotions… the same kind of emotions that drive their relationship are the same kind of emotions that cause people to go into a feeding frenzy." (R.T.

1270.) The district attorney thus asserted an argument which embodied a common myth about battered women: that they enjoy violence. The district attorney also argued that even though Travis may have beaten Nettie, she was not a battered woman, because she had an affair during their relationship, and this fact showed she did not fit the "pattern" for battered women. (R.T. 1299.)[16] Again, this argument reflects the myth that all battered women fit one pattern.

Similarly, the Attorney General has embraced a simplistic argument that the expert testimony did not support the duress defense, because if the defendant acted while in a dissociative state, she could not have behaved reasonably. (State Op. Br. at 23.)[17] Rather, the Attorney General contends that the evidence at most showed that she had a fear in her mind of Travis Reay.

These arguments miss the mark. The district attorney's arguments minimized the substantial evidence that Nettie Reay had been severely abused before the murder, both by Travis Reay, and by a prior batterer, and essentially argued that she did not fit the pattern of a battered woman, and that she enjoyed

[16] The district attorney further argued that if Nettie was willing to risk an affair, she could have walked away from the murder. (R.T. 1300.)

[17] Amici refer to the state's opening brief as "State Op. Br." and the reply brief as "State Reply Br," for purposes of clarity. While the state refers to itself as "respondent," in reality, Ms. Reay is the respondent in the proceedings before this Court, while the state is the petitioner.

violence.[18] The Attorney General's arguments also fail. A defendant can suffer from psychological disorders as the result of years of battering, yet reasonably believe she is in immediate danger from her batterer. Even persons suffering from diagnosable mental illnesses may be reasonable in perceiving immediate danger. Dissociative responses are not inconsistent with fear or active efforts to avoid danger. (Bloom & Reichert, Bearing Witness: Violence and Collective Responsibility (1998) at p. 129 ["The dissociative splitting occurs in the first place because of a perceived threat to life. It occurs because of the implicit dangers involved in the prolonged experience of overwhelming fear…."]; Foa and Hearst-Ikeda, Emotional Dissociation in Response to Trauma: An Information-Processing Approach in Michelson & Ray, Handbook of Dissociation: Theoretical, Empirical, and Clinical Perspective (1996) at p. 209 [discussing research which proposed that "on exposure to trauma-related information, victims first mobilize effortful strategies to avoid the arousal associated with the traumatic memories."].) The Attorney General's argument falls into one of the many common misconceptions regarding battered women: that they are mentally ill, and as such, are inherently unreasonable.

[18] Of course, these arguments reflect fundamental misconceptions about battered women. (See supra at pp. 16-17.)

The instruction on "battered woman syndrome" provided by trial court did not cure the problems created by the lack of a duress instruction. The instruction on "battered woman syndrome" permitted the jury to consider the evidence of battering and its effects on the issue whether Nettie Reay formed the mental state necessary for murder and on her credibility. (C.T. 421.) This instruction, however, offered no method by which the jury could assess Nettie Reay's conduct in light of her history of battering, both by Travis Reay and by others.[19] Nor did the instruction provide any method by which the jury could conclude, based on Travis Reay's actions at the scene, combined with his history of abusing Nettie, that she may have reasonably acted to save her own life, rather than "wrongfully to take the life," of another person. (Pen. Code § 188.) In other words, as a result of the duress she reasonably perceived, she acted without either a "base, antisocial motive" or "wanton disregard for human life." In re Christian S. (1994) 7 Cal.4th 768,780.)

More specifically, under the "battered woman syndrome" instruction provided, even if the jury concluded that Nettie Reay acted reasonably in response to an immediate threat of harm, the jury still lacked a theory by which to find that she

[19] Notably, the argument by the district attorney increased the harm from lack of adequate instructions; the district attorney wrongly identified "Battered Woman's Syndrome" as respondent's defense. (R.T. 1313.)

lacked the requisite intent for second-degree murder. In California, a defendant is guilty of second-degree murder if she acted with malice and either intended to kill the victim or performed an inherently dangerous act with disregard for its consequences. (Pen. Code § 187; see People v. Lasko (2000) 23 Cal.4th 101,104; People v. Blakeley (2000) 23 Cal.4th 82,87-88.) California recognizes two types of malice: express and implied. Express malice is defined as "a deliberate intention unlawfully to take away the life of a fellow creature." (Pen. Code § 188.) Implied malice is shown when "the defendant for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death." In re Christian S. (1994) 7 Cal.4th 768,780. Here, it was undisputed that Nettie Reay inflicted one or more stab wounds on the victim. Her actions, viewed in isolation, arguably exhibited both express and implied malice. Absent jury instructions on the affirmative defense to the crime, including the relationship between the defense and evidence of battering, which instructions explained why and how the defendant might not be guilty of the charged offenses, the jury had to conclude that the requisite criminal intent was present.

Here, no instructions explained that if Nettie Reay genuinely and reasonably believed she was acting under an immediate threat of death or great bodily injury, the requisite

intent was attributed to the coercer, thereby eliminating the presence of the criminal intent required for a conviction of second-degree murder.[20] Only with adequate instructions, explaining the nature of the duress defense and its relationship to evidence of battering, could the jury understand that Ms. Reay may have lacked the requisite wrongful intent – express or implied malice. Here, the lack of instructions on the duress defense thwarted the fundamental purpose for which the evidence of battering and its effects was admitted.

3. THE COURT OF APPEAL CORRECTLY RULED THAT THE EVIDENCE PRESENTED IN THIS CASE REQUIRED AN INSTRUCTION ON THE DEFENSE OF DURESS. INDEED, THE STATE HAS MISFRAMED THE ISSUE, BECAUSE THERE WAS CONSIDERABLE EVIDENCE SHOWING THAT DEFENDANT NETTIE REAY WAS IN IMMEDIATE DANGER, INCLUDING THE LAY AND EXPERT TESTIMONY ON BATTERING, AND HER OBSERVATIONS OF THE BATTERER AT THE TIME OF THE CRIME.

The Court of Appeal correctly understood and interpreted the evidence of record in this case, including why such evidence supported a duress instruction. As explained supra at pp. 12-21, lay and expert testimony regarding battering and its effects is relevant to the two elements of the defense of duress, whether the defendant honestly believed in immediate danger, and whether her belief was reasonable. In this case, there was

[20] Nor did any instructions provide that if she intentionally acted to kill or injure the victim, while genuinely and reasonably believing she was facing an immediate threat of death, she was nonetheless excused from criminal liability.

ample evidence on each element of duress, such that a jury instruction on the defense theory should have been provided.

Nettie Reay met Travis Reay in January, 1993, only three months after her horrific victimization by Ace Gage ended.[21] They began to live together immediately and within two months Travis was beating her. (RT 755-756.) According to Ms. Reay, Travis beat her "only" two to four times a month. (RT 769.)[22] The beatings continued all through the time when Dixon was killed and until they separated. (RT 756-757, 764.) Notably, the state's impermissible assertion that Ms. Reay was only beaten twice before the homicide ignores her own testimony. (State Op. Brief at p. 23.)[23] The state's view of the evidence assumes that the only substantial evidence of the battering by Travis Reay is that testified to by the expert witnesses. Of course, that is mistaken: defendant's testimony must be considered in deciding whether there was "substantial evidence"

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[21] Nettie Reay was therefore approximately 18 or 19 years old when she became involved with Travis Reay and involved in the current offense.

Amici regret the parties' use of the word "relationship" to describe what went on between Nettie Reay and Ace Gage; the term is an offensive euphemism. Sexual relations between a 12-year old girl and an 18 year old man are appropriately described as an unprosecuted offense. At a minimum, their "relationship," constituted a pattern of repeated statutory rapes, offenses in addition to the numerous unprosecuted assaults and batteries that Ace Gage inflicted on Nettie Reay.

[22] Thus, he beat her for five to six months before the homicide.

[23] While the state may disbelieve respondent's testimony, it nonetheless provides a valid basis for a jury instruction on her defense theory.

to support a defense instruction. (People v. Barraza (1979) 23 Cal.3d 675, 691.)

The state has suggested that at most, only abuse by the defendant's present partner is relevant to a duress defense. (State Op. Br. at p. 23, fn. 11.) This reflects a fundamental misunderstanding of the significance of evidence of a defendant's history of abuse. At a minimum, a battered woman's history of abuse is relevant to the prong of the duress defense that requires an actual belief. However, because a battered woman can only be fairly assessed from her own perspective, her history of abuse is relevant to the reasonableness prong of the duress defense as well. (Humphrey, supra, 13 Cal.4th at p. 1086.) A battered woman's experience with the present batterer as well as with prior abusers inform her knowledge as to the probable danger she faces. (See Blackman, Intimate Violence, supra, at pp. 196-97.)[24] All of this evidence is relevant to

[24] See also, Dutton, Empowering and Healing the Battered Woman: A Model for Assessment and Intervention (1992) at pp. 83-84: [("S)ubsequent traumatic events may not only produce their own effects, but may also trigger dormant responses from previous traumas. In such a case, the victim reexperiences the impact of a previous trauma, sometimes for the first time since the original event, simultaneously with experiencing the current trauma, creating a compounded traumatic response. For example, one battered woman who had left a previous relationship in which her husband was severely abusive was exposed to verbal abuse by a new partner in a subsequent relationship. This verbal abuse triggered a fear reaction that was probably far more severe than what might have been expected from the verbal abuse alone."].)

whether she genuinely and reasonably believed that she was in immediate danger from her batterer.)[25]

The state's framing of the issue also disregards the relationship between evidence of battering and whether Ms. Reay reasonably believed she faced immediate danger. In the state's (and the trial court's) view, the evidence consisted exclusively of a "hard look" from codefendant Travis Reay. The state's view is faulty for several reasons. First, as stated above, the state ignores other evidence that Travis Reay severely abused Nettie. Second, the state's perspective fails to acknowledge the relationship between Nettie's lengthy history of severe abuse by Reay and other men and her resulting understanding of nonverbal signals. The state thus ignores a vast body of research showing that battered women have a keen sense of awareness of danger from their batterer, because their lives depend upon it. A renowned researcher on battered women wrote:

> "Many women describe a certain 'look in the eye' that signals extreme danger. For a number of women, it was that look that triggered a self-defensive reaction. They had come to know that the look meant violence was inevitable and imminent. Unless one were to understand the patterning within previous incidents, when 'that look' preceded the violent rape, the choking to

[25] Indeed, one defense expert, Dr. Barnard, explicitly testified in this case that battered woman syndrome was not specific to a partner, but that respondent likely had it before she became involved with Ace Gage, and that it continued on afterward. (R.T. 987.)

> unconsciousness, or the severe beating, it would make little sense why a woman might respond with such terror at simply 'a look in the eye.' When learned with precision, the cues given by the batterer that signal danger to the battered woman comprise a language whose subtlety defies meaning for those not familiar with it." (Mary Ann Dutton, Empowering and Healing the Battered Woman: A Model for Assessment and Intervention (1992) p. 6).

(Accord Langford, Predicting Unpredictability, supra, 10 Scholarly Inquiry for Nursing Practice: An International Journal, no. 4 at pp.371–385 [study revealed battered women developed sophisticated knowledge about and response patterns to their partners' violent behaviors]; Davies, Lyon, and Monti-Catania, Safety Planning with Battered Women: Complex Lives, Difficult Choices (1998), p.99; Hart, Beyond the 'Duty to Warn': A Therapist's 'Duty to Protect' Battered Women and Children, supra, at p. 240 ["Each battered woman also has a wealth of practice in recognizing how the batterer's life experiences, emotions, and behaviors interrelate. From this gestalt, she can often identify signs of enhanced danger. This is not to say that she can modify or reduce the risks of lethality; but that she can frequently recognize periods where violence or terrorism is likely to erupt."].) This Court previously acknowledged the relevance and admissibility of such evidence in Humphrey. (13 Cal.4th at p. 1086.)

Moreover, there was evidence to support a conclusion that Nettie's extensive history of battering bore directly on her state of mind at the time of the offense. Indeed, here, Nettie testified to seeing a telltale look in Travis Reay's eye, that she had seen before being beaten on prior occasions, when he handed her the knife and ordered her to stab the victim. (R.T. 797.) Dr. Linda Barnard explained that battered woman syndrome was not specific to a partner, but that Nettie Reay had it before she became involved with Travis Reay. (R.T. 976, 987, 989-990.) Dr. Barnard further testified that her primary coping skill with Travis Reay was compliance. (R.T. 968.) Dr. Barnard's testimony, coupled with Nettie Reay's testimony regarding the "look" in Travis Reay's eye, was sufficient to require a duress instruction.

Third, and perhaps most glaring, the state's framing of the issue disregards the overall circumstances present at the time of the homicide. Nettie Reay was in an open field with Travis Reay who was armed with two knives, and who had already stabbed the victim. Nettie saw Travis Reay standing above her with a bloody knife in his hand. (R.T. 927.) He handed her another knife, while ordering her to stab the victim. (Ibid.) She testified that she believed Travis Reay might stab her because he had just a killed a girl. (R.T. 928.) It was her experience that if she resisted Travis while he was beating her, the

beatings worsened. (Ibid.) Furthermore, the only other person present, Scott DeGraff, was located in an automobile some distance away, and he was too afraid of Travis Reay even to intervene on the victim's behalf when she ran to the car and begged for his help. DeGraff was in a far better position than Nettie to assist the victim, because he was in the car and could have driven away with her. He also had not previously suffered abuse at Travis Reay's hands. His reaction and behavior, too, suggests that Nettie may have genuinely and reasonably feared for her life.

An assessment that the only evidence of duress was a "hard look," can be reached only based upon a disregard and lack of understanding of the evidence presented. Nettie Reay's prior experiences with her batterer provided her with additional information which the jury could have considered in deciding whether she reasonably feared for her life and therefore obeyed the batterer, given that she was alone in a field with the victim and Travis Reay, who was armed with a knife and had just stabbed the victim, and that the other codefendant was too fearful of Reay to assist the victim.

The state's argument that Ms. Reay failed to establish the element of duress, that she had no adequate alternative to participate in the homicide and did not contribute to the situation, is not well-founded. (State Op. Br. at pp. 25-26).

Even if these are additional, non-statutory elements of the duress defense in California, Amici note that the defense evidence did concern the "elements" mentioned by the state.

The state's argument is based on fundamental misconceptions about domestic violence. Even if "no reasonable alternative" is an element of the duress defense in California, there was an evidentiary dispute about the answer that required jury instructions on duress. The question whether a defendant had a reasonable alternative to participation in the crime is tantamount to the question frequently asked in self-defense cases: "why didn't she leave?" Evidence of battering and its effects provides an answer to the question whether Nettie had a reasonable alternative to participating in the crime, because it tends to show that a reasonable person might have believed she was in immediate danger, based on her history with Reay and other abusers. She certainly lacked the ability to escape the scene safely, since she was alone in a field with Travis Reay. At a minimum, there was sufficient evidence to require the question whether Nettie had a reasonable alternative to go to the jury. Indeed, in comparison to the conduct of the immunized male codefendant, who not only failed to assist the victim, but even failed to leave the scene, although he was alone in the car, all because he feared Travis Reay, her conduct appears quite reasonable. Certainly, even if the lack of a reasonable

alternative is an element of the duress defense, there still was ample evidence to support submission of the defense to the jury.

Finally, the state has suggested that the defendant was ineligible for a duress instruction because she contributed to the situation, by accompanying Travis in the first place. (State's Op. Brief at p. 26.) This suggestion is similar to suggestions made in self-defense cases that a woman defendant contributed to the situation by failing to leave or by returning to the home after a previous beating. At best, the state's contention amounts to a matter of fact for the jury, which should have been given the opportunity to decide whether Nettie failed to establish a duress defense, because she participated in the initial beating of the victim. Moreover, the evidence of battering was equally pertinent as evidence tending to show that she both lacked a reasonable alternative to participation and did not substantially contribute to the situation that led up to the homicide.

In this case, Nettie Reay's experience with Travis Reay and with her prior abuser should have been considered in determining whether she reasonably viewed the threat to her life as immediate, despite the apparent lack of a precise verbal threat, and therefore, whether she qualified for a duress instruction. The record shows that Travis Reay did not need to verbally menace Nettie Reay with death or great bodily injury in order to

instill that fear in her. Rather he conveyed an unspoken message that must be assessed with reference to his prior conduct toward respondent and her ability to read that conduct.[26] Reay's prior conduct toward Ms. Reay, combined with his vicious assault on the victim in her presence, and his orders to Ms. Reay, was the functional equivalent of holding a gun to her head. She was entitled to a duress instruction. The Court of Appeal correctly ruled that trial court's failure to provide one deprived her of a fair trial.

4. BARRING THE DURESS DEFENSE IN ALL HOMICIDE CASES, OR EVEN IN ALL CASES IN WHICH FIRST-DEGREE MURDER IS CHARGED, WOULD HAVE A DISPROPORTIONATELY ADVERSE IMPACT ON BATTERED WOMEN.

The state has proposed that the defense of duress is unavailable in all cases in which murder is charged. (Op. Br. at pp. 16–20, Reply Br. at pp. 2,4.) Amici recognize that this Court may conclude that the defense of duress is not available under Penal Code section 26(6) for charges of first-degree murder, because it is a capital offense.[27] Amici encourage this

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[26] Her ability to interpret Reay's behavior arose both from their relationship and sadly, from her involvement with prior batterers.

[27] The State's argument that duress is not a defense to second-degree murder is insupportable (Rep. Br. at pp. 2,4), given the explicit language of section 26(6) and unavailability of death as a punishment for second-degree murder. Of course, if duress is not available to a defendant charged with first-degree murder, but is available for lesser charges, trial courts still must instruct the jury that duress is available as a defense to lesser-included charges of first-degree murder, including second-degree murder and

Court, in deciding whether the defense of duress is unavailable to all charges of first-degree murder, to consider the impact of such a rule on battered women. Moreover, in the event this Court concludes that the duress defense is unavailable in all cases in which first degree murder is charged, evidence of duress must nonetheless remain admissible as evidence tending to either show a lack of malice or to reduce the defendant's culpability. (See LaFave & Scott, Substantive Criminal Law (West 1986) § 5.3(d), p.625 [duress may eliminate the ability to deliberate or premeditate]; id., § 7.11(c), p.274 [negation of malice by imperfect duress].)[28]

Women prison inmates have an extremely high rate of past victimization by intimates. In 1991, the percentage of United States female prisoners reporting abuse before incarceration exceeded male prisoners reporting abuse by three to four times. (Harlow, Comparing Federal and State Prison Inmates, 1991 (September 1994), Bureau of Justice Statistics: Washington, DC,

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manslaughter. The fact that a defendant is charged with first-degree murder cannot itself preclude the availability of a defense.

[28] Respondent and the appellant in the companion case have briefed the questions whether there is a defense of imperfect duress in California. (See e.g., Anderson Op. Br. at 32, 34-35 & fn. 20.) The parties have used the terms "perfect duress," and "imperfect duress" to discuss the question whether evidence of duress may constitute a partial defense to a crime, such that it negates malice or possibly premeditation, reducing a first-degree murder verdict to second-degree murder or second-degree murder to voluntary manslaughter. From Amici's perspective, the important issue is not terminology, but whether the jury is given specific instructions enabling it to consider the defendant's honest and reasonable belief of danger in assessing her culpability, based on her experience of battering, both as to outright acquittal or a lessening of her culpability.

NCJ-145864, p. 16 [surveying 13,986 state prisoners and 6,572 federal prisoners].) About 22% of women in federal prisons and 43% in state prisons reported being physically or sexually abused in the past, compared to five percent of men in federal prisons and 12% in state prisons. (Ibid.) Other studies are in accord. (See Bloom, Why Punish the Children: A Reappraisal of the Children of Incarcerated Mothers in America (1992) National Council on Crime and Delinquency 5 (cited in Exhibits, Statement of Position National Association of Women Judges (Nov/Dec. 1995) 8 Fed. Sen. Reptr. 176 ["53% of female inmates had been physically abused at one time."]); Development in Law (1998) 111 Harv. L. Rev. 1921, 1925 ["43% of women inmates reported that they had been physically or sexually abused prior to their current incarceration, with the first instance of abuse most often occurring before the age of eighteen."]; National Association of Women Judges, Statement of Position, 8 Fed. Sent. Rep. 176, 177.) According to a report by the Center on Juvenile and Criminal Justice, over half (60%) of the women in California's prisons reported physical abuse as an adult, primarily perpetrated by spouses or partners. (Bloom, Chesney Lind & Owen (1994) Women in California Prisons: Hidden Victims of the War on Drugs in Center on Juvenile and Criminal Justice Report at p.3.) Whatever figure is chosen, it is apparent that women inmates have been victimized by physical and sexual abuse at a rate substantially

higher than the general prison population. It follows that female defendants have the greater need for duress and similar defenses at trial.

Furthermore, many women convicted of crimes have been coerced into doing so. While there are few studies on the subject, a study by the Missouri Department of Human Services of women prisoners at the Renz Correctional Center found that 80% of the women were incarcerated as a result of their affiliation with abusive males (Immarigeon, Few Diversion Programs Are Offered Female Offenders (Summer 1987) 11 National Prison Project Journal, p. 10.) Interviews with battered women at a Colorado State Prison found most of the women claimed to have committed the crimes for which they were presently imprisoned at the demand of an angry batterer. Chillingly, many said they preferred prison to living in fear of another. (Lenore Walker, The Battered Women Syndrome (1984) p. 208.)

Women charged with crimes thus are unusually likely to have been battered, and many of these women may have acted under duress from a partner. Given the high number of women offenders who have been victimized by domestic violence, a rule barring duress as a defense to first-degree murder in which special circumstances are not charged, would unfairly impact all defendants, but especially battered women.

Similarly, a rule concluding that evidence of duress cannot constitute a partial defense to a homicide would unfairly and substantially affect battered women defendants.[29] (See supra at pp. 21–24.) Battered women defendants, like other defendants, sometimes act reasonably and sometimes do not. However, frequently, they act out of genuine terror, instilled in them by their batterer(s). Genuine fear and the instinctive desire for self–preservation are often the defendant's overriding intention, rather than a wrongful intent to kill, or a base or antisocial motive. A person acting under a genuine belief that she will be killed or harmed if she does not herself participate in a homicide lacks the wrongful intent associated with malice, but rather kills only because her life is threatened. (Regina v. Gotts (1992) 2 App. Cas. 412, 418 [dis. opn. of Lord Keith].) Indeed, a battered woman defendant acting under the domination of her batterer does not voluntarily break the criminal law. (See Reed, Duress and Provocation as Excuses to Murder, supra, 6 Transnat'l Law & Pol. at p.61.) Furthermore, in some cases, battered women may be disabled to some degree by overwhelming fear. (Dressler, supra, 62 So.Cal.L.Rev. at p.1338 fn.35.) In such a case, this Court should allow evidence that the defendant

[29] Nettie Reay requested, but did not receive, an instruction on "imperfect duress," under which, if the jury found she had an actual but unreasonable belief that she was in immediate danger, that belief could negate the intent element of murder, thereby reducing a verdict of murder to one of voluntary manslaughter.

acted out of genuine fear rather than malice to be considered by the jury under section 26(6) in determining whether the defendant is guilty of murder or of some lesser offense. (Dunn v. Roberts (10th Cir. 1992) 963 F.2d 308, 313-14; Ohio v. Robbins (1979) 388 N.E.2d 755.)

Amici neither urge nor oppose establishment of a defense of imperfect duress, akin to imperfect self-defense. Rather, Amici submit that regardless of label, it remains critical for battered women defendants to be able to present evidence regarding battering and its effects upon them both for the purposes of presenting a complete defense and for purposes of reducing their culpability.

CONCLUSION

Based on the foregoing arguments, Amici Curiae respectfully request that the Court affirm the judgment of the Court of Appeal, reversing the judgment against defendant Nettie Reay.

Dated: January 10, 2001

Respectfully submitted,

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KAREN L. LANDAU
Attorney for Amici Curiae

PROOF OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States, over the age of 18 years and not a party to the within cause; my business address is P.O. Box 13082 Oakland, CA 94661—0082.

On January 11, 2002, I served one copy of the attached

Brief of Amici Curiae National Clearinghouse for the Defense of Battered Women, et al.,

upon the interested parties herein, by causing a true and correct copy of said documents to be enclosed in a sealed envelope and deposited in the United States mail at San Francisco, California, addressed as follows:

Ruth M. Saavedra
Office of the Attorney General
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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 11, 2002.

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Karen L. Landau