IN THE SUPREME COURT OF FLORIDA

KATHLEEN WEIAND,
Petitioner,

CASE NO. 91, 925

DISTRICT COURT OF APPEAL
2nd DISTRICT NO. 95-1121

vs.

THE STATE OF FLORIDA,
Respondent.

BRIEF IN SUPPORT OF APPELLANT KATHLEEN WEIAND, BY AMICI CURIAE CENTER AGAINST SPOUSE ABUSE (CASA), NATIONAL CLEARINGHOUSE FO THE DEFENSE OF BATTERED WOMEN, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WOMEN'S LAW PROJECT, NEW HAMPSHIRE COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE, FLORIDA PUBLIC DEFENDER ASSOCIATION, FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS MIAMI CHAPTER, AD HOC COMMITTEE OF LAW PROFESSORS WORKING IN THE FIELD OF DOMESTIC VIOLENCE, AND FLORIDA COALITION AGAINST DOMESTIC VIOLENCE

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS[1]

This case involves domestic violence, the dangers of leaving abusive relationships, the elements of self defense, and the crucial role at trial of evidence about abuse when a woman is charged with killing her abusive partner. It also involves confusion about a term, "battered-spouse syndrome," used by some experts as part of their analysis of domestic violence and its effects.

On January 23, 1994, Kathleen Weiand called her mother in Wisconsin and said she needed to leave her chronically abusive husband. The couple had argued after Kathleen came home late that evening. Her mother agreed to send money for Kathleen's return to Wisconsin (v10:T1047-1050; v11:T1162-1163; v14:1539; v15:T1662). Minutes later, when Kathleen told her husband she was leaving, he attacked her and choked her (v8:859-61; v10: 1051-1052; v11:1165-1168, 1198; v116:1663). During the ensuing confrontation, after he continued to attack her, she shot twice into a wall and a door; a bullet passed through the door and killed him (v10:1058-59; v11:1177-1178; v16:T1665, 1728).

On previous occasions, three friends had witnessed Todd Weiand's violence toward his wife or her injuries. Amy Dumond saw him attempt to choke Kathleen, then vault a six foot fence and run away, despite the fact that he had an artificial leg, and Del

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[1]This is a brief statement of the case and of the facts. Amici curiae CASA et al. generally adopt the Statement of the Case and Statement of the Facts appearing in the brief of appellant Kathleen Weiand. In the interests of economy, those statements are not reproduced here.

Charles had seen him throw Kathleen into a glass table, breaking the table (v12:1234-36, 1238; v13:T1433-1438, 1441, 1444-1445). Tracy Bowman was a neighbor who had seen injuries from abuse, including choke marks on Kathleen's neck, (v20:T2155, 2159-61, 2164, 2169-70), and heard Kathleen's account of her husband's threats and violence, including choking her. Kathleen had told Tracy that she wanted to leave but was frightened because he had threatened to kill her if she left. (v20:T2160). There were no other witnesses to these incidents. Of the defense witnesses who did testify at trial, none described having seen Kathleen's husband abuse her.

The trial court excluded the testimony of all three eyewitnesses on two different erroneous theories. Tracy Bowman was excluded as a discovery sanction, a ruling held to be completely unjustified by the Second District Court of Appeal. Although Kathleen had testified that her husband had abused her in front of Amy and Charles, the trial court held their evidence about Todd's violence and abuse not supported because Kathleen had not testified to recalling exact details of those particular incidents. The trial court also denied the request by the defense for a jury instruction on the "castle doctrine"--the privilege to defend one's life within the home without retreating. (v1:R91-114; v17: T1898-1899; v18:T2015-2034)

"Battered woman syndrome" is a frequently misunderstood term used in testimony by some experts in self-defense cases. In a decision which confused "battered-spouse syndrome" with

eyewitness testimony and the elements of the law of self defense, the Second District Court of Appeal let stand the trial court's exclusion of the three eyewitnesses. The court held that the eyewitness testimony was relevant to the "syndrome" rather than to the elements of self defense: "Because the testimony of the witnesses was relevant to the factors used in diagnosing battered spouse syndrome, it was error to exclude it." Weiand v. State, No. 95-01121, 1997 Fla. App. LEXIS 7866 *6 (July 11, 1997); corrected, reh. den. (Oct. 22, 1997). (emphasis added). In commenting on the absence of any case on point regarding the exclusion of two eyewitnesses, the court described the "syndrome" as if it were a defense in itself: "Battered-spouse syndrome is a relatively new defense," Weiand at *6. The court held the exclusion of eyewitnesses was harmless error because two psychiatrists had testified "exhaustively" about the "syndrome"--a decision replacing testimony by eyewitnesses to acts of violence with testimony by an expert on abuse. Weiand at *7. Finally, the court of appeals reworded the question certified as having great public importance to merge one form of evidence--evidence about "battered woman syndrome" admissible under State v. Hickson, 630 So.2d 172 (Fla. 1993)--with the duties imposed by criminal law on people who use deadly force in self defense.[2]

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[2]The Second District Court of Appeal reworded the question to read: "Should the rule of State v. Bobbitt, 415 So.2d 724 (Fla. 1982), be changed to allow the castle doctrine instruction in cases where the defendant relies on battered-spouse syndrome evidence (as now authorized by State v. Hickson, 630 So.2d 172 (Fla. 1994) to support a claim of self-defense against an aggressor who was a cohabitant of the residence where the incident occurred?"

Amici curiae CASA et al. respectfully urge this Court to clarify the issues regarding evidence about abuse, including eyewitness testimony and expert testimony, in establishing the elements of self defense in a criminal trial, and to address the question: "Should the cohabitant exception to the privilege of nonretreat within the home be overruled in light of current public policy, caselaw, and knowledge about domestic violence?"

ARGUMENT

I. THE DISTRICT COURT OF APPEAL ERRED BY TREATING EXPERT TESTIMONY ON DOMESTIC VIOLENCE AND ITS EFFECTS AS A SUBSTITUTE FOR EYEWITNESS TESTIMONY TO FACTS ABOUT VIOLENCE AND AS A SUBSTITUTE FOR BASIC, BLACK-LETTER ELEMENTS OF SELF-DEFENSE LAW.

The holding of the Second District Court of Appeal stood the entire logic of trial on its head. In a homicide case when a defendant claims self-defense, it is unthinkable to exclude the only eyewitness testimony which could have demonstrated that she actually, honestly, and reasonably feared that he would kill her and she must fight for her life. In holding that the error of excluding these eyewitnesses was "harmless" because two psychologists testified that the defendant suffered from a "syndrome," the court in effect created a new and different standard which applies only to victims of domestic violence. The impact of this mistake is biased both because most abuse victims are women and because this standard works to the defendant's detriment. The source of these devastating errors lies in confusion about the nature of expert testimony in the field of domestic violence.

A. Expert testimony on domestic violence and its effects is evidence relevant to a claim of self-defense, not a separate defense in criminal law.

Expert testimony on domestic violence and its consequences is a form of evidence which is admissible when relevant in many sorts of trials, including marital dissolution and custody, tort law, prosecution of batterers, and on behalf of defendants in criminal trials, including cases of duress and self defense. The term "battered woman syndrome" has been used by some experts in the field of domestic violence since the 1970s to describe both the general dynamics of an abusive relationship and the effects of abuse upon the battered partner.

While the term was first used by Lenore Walker to describe her research findings on the common reactions of battered women to abuse, see generally Lenore Walker, The Battered Woman's Syndrome (1984), today it has broader significance.[3] Depending on the framework used by the particular expert, the contents of expert testimony may include general information on the dynamics of domestic violence, discussion of common myths or misconceptions about battered women, common reactions women have to battering, explanations of behavior of a victim of battering that may seem inconsistent with her being battered, discussion of the facts in a particular case and relating these facts to

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[3] "'Battered woman syndrome' was originally a clinical description of certain psychological effects produced by the trauma of battering, most notably 'learned helplessness' resulting from the cyclical nature of woman abuse" but is used in courtrooms to describe a range of issues. Elizabeth M. Schneider, Resistance to Equality, 57 U.Pitt.L.Rev. 477, 507 (1996).

patterns in abusive relationships or to the responses of the battered woman.[4]

Experts have criticized the phrase "battered woman syndrome" because:

> (1) it 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, 921 P.2d 1, 7 n. 3 (Cal. 1996) (quoting brief of amicus curiae California Alliance Against Domestic Violence).[5]

Testimony about battering in criminal cases "is not limited

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[4]See, e.g. Mary Ann Dutton, Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome, 21 Hofstra L.Rev. 1191, 1195 (1993) (expert testimony is also offered "to explain the nature of domestic violence in general, to explain what may appear to be puzzling behavior on the part of the victim, or to explain a background or behavior that may be interpreted to suggest that the victim is not the 'typical' battered woman or that she herself is the abuser"); Elizabeth M. Schneider, Resistance to Equality, 57 U.Pitt.L.Rev. 477, 506 (1996) (testimony on "syndrome" may also include "a description of woman abuse as a larger social problem"); Elizabeth Schneider, Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering, 9 Women's Rts. L. Rep. 195, 202 (1986); Martha Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich.L.Rev. 1, 36 (1991); Julie Blackman, Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill, 9 Women's Rts.L.Rep. 227, 228 (1986).

[5]See also Schneider, Resistance to Equality, at 508-509 (term may also invoke the concept of impaired mental state). Other interpretive frameworks on battering, such as "coercive control," focus on the batterer and the relationship, avoiding an exclusive focus on the woman. Id. at 488, 508.

to the psychological reactions or sequelae of domestic violence victims, and this has led to confusion about what is encompassed by the term 'battered woman syndrome.'" Mary Ann Dutton, Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome, 21 Hofstra L.Rev. 1191, 1195 (1993). The term "syndrome" does not fully capture all the material presented through expert testimony on domestic violence.[6]

Ambiguity persists because the phrase "battered woman syndrome" has been used by some experts and in some statutes and cases to refer generally to evidence regarding domestic violence or to all expert testimony about battering and its effects.[7] "[B]ecause the term ['battered woman syndrome'] is frequently used as shorthand for 'evidence of a battering relationship' by

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[6]Schneider, Resistance to Equality, supra, at 508; Mary Ann Dutton, Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women, 3-7, in National Institute of Justice, Department of Justice,c 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).

[7]In Humphrey, the California Supreme Court used the term "battered women's syndrome" because that term was used in the California Evidence Code and in other cases, but the court noted that many experts now prefer the term "'expert testimony on battering and its effects' or 'expert testimony on battered women's experiences'" rather than "battered women's syndrome" 921 P.2d at 7 f.n. 3. A resolution passed by the U.S. Congress in 1992 urged that "expert testimony concerning the nature and effect of domestic violence, including the descriptions of the experiences of battered women, should be admissible when offered in a state court by the defendant in a criminal case to assist the trier of fact in understanding the behavior, beliefs, or perceptions of such defendant in a domestic relationship in which abuse has occurred." H.Con.Res. 89, 102nd Congress, 2nd Session (1992) (emphasis added).

judges, legislators, and legal scholars, it is not clear in any particular context what is actually meant by the use of the term. . . ." Schneider, Resistance to Equality, supra, at 506-507.

Expert testimony on domestic violence, including testimony regarding "battered woman syndrome," does not create different standards in criminal law.

> There is no such thing as a "battered women's defense." Yet the perception there is a separate defense called the "battered women's defense" or the "battered women's syndrome defense" persists. Due in large part to this misperception, many battered women's cases continue to be presented or considered as though new, unique legal rules apply.

Sue Osthoff, Director, National Clearinghouse for Battered Women, Preface to Section, Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases, at iii (emphasis added), in National Institute of Justice, Department 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).

Confusion in the field is common. Some courts and attorneys have referred to the "syndrome" as if it were a defense in itself. Schneider, Resistance to Equality, supra at 511. However, the concept of a "separate defense" has been criticized in scholarship and caselaw.[8]

In Hickson, 630 So.2d 172, 174 (Fla. 1993), this Court held

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[8] See, e.g., Schneider, Resistance to Equality, supra, at 511 ("Not only is there no separate defense, but evidence of battering experience and a history of battering, whether explained as "battered woman syndrome" or battering generally" may be relevant to a range of defenses.").

expert testimony on "battered spouse syndrome" was admissible. Hickson was a case about evidence. This Court addressed the question: "What can an expert testify to when a defendant relies on battered-spouse syndrome evidence to support a claim of self-defense?"[9] In the text of the opinion, this Court stated that written notice must be given to the state "if a defendant decides to use the battered-spouse syndrome to support a claim of self-defense." 630 So.2d at 176 (emphasis added). The opinion plainly treats expert testimony on the "syndrome" as relevant evidence offered to support a claim of self-defense, not as a defense in itself.[10]

Expert testimony on domestic violence does not replace the basic elements of the law of self-defense in Florida. Rather, it helps the jury understand the evidence and apply the law. As this Court explained in Hickson, "Allowing the defense to present expert testimony on the syndrome and the characteristics of a

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[9]This Court answered the certified question with a holding on evidence and adverse examinations:

> an expert can generally describe the syndrome and the characteristics of a person suffering from the syndrome and can express an opinion in response to hypothetical questions predicated on facts in evidence, but cannot give an opinion based on an interview of the defendant as to the applicability of the syndrome to that defendant unless notice of reliance on such testimony is given and the state has the opportunity to have its expert examine the defendant.

Hickson, 630 So.2d at 176.

[10]One footnote dealing with emergency rule of Criminal Procedure 3.201 refers twice to "the defense of battered-spouse syndrome". Hickson, 630 So.2d at 176 n.10. Read in the context of the text of the opinion, this refers to evidence to support a claim of self-defense, not to a new defense in criminal law.

battered spouse will give the jurors and judge information beyond the understanding of the average layman." 630 So.2d at 176.

Expert testimony enables jurors to "disregard their prior conclusions as being common myths rather than common knowledge" Hickson, 630 So.2d at 174 (quoting State v. Kelly, 97 N.J. 178, 478 A.2d 364, 378 (N.J. 1984). Stereotypes and myths interfere with the jury's assessment of the defendant's circumstances and the reasonableness of her perceptions and actions by making evidence appear contradictory when it actually involves common patterns. For example, jurors may discount testimony about abuse because they believe if abuse had happened the woman could have felt no further love for her partner or would already have left the relationship. Expert testimony helps the jury interpret "the surrounding circumstances as they affected the reasonableness of her belief." Terry v. State, 467 So.2d 761 (Fla. 4th DCA 1985), rev. denied, State v. Terry, 476 So.2d 675 (Fla. 1985).[11] However, expert testimony does not lessen the importance of eyewitness testimony, when eyewitness testimony is available.

B. Florida law recognizes the importance of eyewitness testimony about prior abuse in self-defense cases.

The current evidentiary law of every state permits evidence of the history of abuse between the parties. Holly Maguigan,

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[11]See also People v. Humphrey, 921 P.2d 1, 9-10 (Cal. 1996) (holding expert testimony relevant to the jury's consideration of the reasonableness of defendant's belief that she must defend herself and to the evaluation of her credibility as a witness).

Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals, 140 U. Penn. L.Rev. 379, 408 n.103 (1991). "Evidence of the 'history of abuse' is offered in the form of testimony about violent actions against the defendant or about threats to commit acts of violence" and usually admitted on the theory that it is relevant to the defendant's state of mind and to the reasonableness of fear of danger. Id. at 422.

Florida law on this point is consistent with other jurisdictions. Excluding witnesses who could testify regarding the deceased's threats and acts of violence toward the defendant is reversible error, because it "severely hamper[s] the jury's ability to evaluate the circumstances behind the shooting." Hawthorne v. State, 377 So.2d 780, 786 (Fla. 1st DCA 1979) (emphasis added). "Fear and apprehension in the mind of the defendant, and the reasonableness of that fear and apprehension, were questions for the jury to determine as bearing on the defendant's claim of self-defense." Id. See also Matthews Rodriquez v. Dugger, Case No. 87-1553-CIV-T-10-C (Slip Op., M.D. Fla., 1991) at 18 (granting writ of habeas corpus) ("The jury heard only petitioner's uncorroborated testimony [of past abuse] concerning the coercion/duress defense . . . The error [of excluding testimony of witnesses to abuse] resulted in a trial that was fundamentally unfair.")

Domestic violence happens largely in private. Elizabeth Schneider, The Violence of Privacy, 23 Conn. L. Rev. 973 (1991). Eyewitnesses are rare. The testimony of eyewitnesses to violence

is therefore particularly valuable when available in these cases. Nor was it necessary that the defendant testify to every detail of each abusive incident that happened in front of each eyewitness to make their testimony relevant. "[I]nability to adequately express the experience of having been battered [] can be one result of trauma women experience in a battering relationship. . . " Schneider, Resistance to Equality, supra, at 502 n. 97 (memory loss caused by deprivation of liberty from coercion and control as well as by trauma induced by violence). Eyewitness testimony to his abuse would have been admissible whether or not she testified at trial.

C. Confusion about "battered spouse syndrome" caused the court to substitute expert testimony for eyewitness testimony crucial to Kathleen Weiand's defense, depriving her of the opportunity to prove elements necessary for her claim of self-defense.

The introduction of expert testimony cannot render harmless the exclusion of eyewitness evidence. "Expert testimony in these cases, when introduced by the defense, should be used to support a battered woman's claim of self-defense or duress, not to replace it." Bonnie Campbell, Director, Violence Against Women Office, U.S. Department of Justice, Foreword at ii, in National Institute of Justice, Department 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) (emphasis in original). By holding that eyewitness testimony was relevant to diagnosis of a

"syndrome" and the exclusion of this testimony made harmless by the presentation of psychological "syndrome" testimony, the court below effectively made the "syndrome" central to the case. The "syndrome" then replaced the determination of the circumstances of the defendant and the reasonableness of her perceptions and actions, effectively creating a new and different standard for battered women in self defense cases.

Both expert and eyewitness testimony are relevant when appropriate on the facts of a given case. Neither form of evidence is necessary in order to make the other relevant. Some defendants who are battered women will have experts; others will not have experts; some will not need experts. "[T]he experiences of battered women are highly diverse and complex, and battered women do not all fit into the same legal mold." Schneider, Resistance to Equality, supra, at 505-6.

Eyewitness testimony about assault, battery, and injury to the defendant was vital to the jury's determination of five different aspects of the instant case, each of which was relevant to one or more of the elements of self defense: to establish her fear of leaving during the final confrontation and the reasonableness of her fears; to assess the capacity for physical abuse of a man with an artificial leg; to corroborate Kathleen's testimony about past abuse and her credibility as a witness; to allow the jury to weigh evidence and find facts without distortion by misconceptions about abuse; and to rebut improper closing argument by the prosecutor.

(1) Fear of leaving during the final confrontation: When weighing her belief that she could not leave that night, the jury should have been able to consider Tracy Bowman's testimony that Kathleen had spent nights at Bowman's apartment, afraid to go home until her husband left for work in the morning, during which she described fears of leaving him based on his threats. Kathleen described backing into the bedroom that night when her husband repeatedly emerged from the bathroom to renew the confrontation, seizing a handgun, and believing that she could not leave. Tracy Bowman's evidence went directly to the question of whether Kathleen actually and honestly feared for her life when she armed herself with the gun, and Bowman's evidence that Kathleen had reported threats long before the final confrontation was crucial to the jury's determination of whether her fears and perceptions were reasonable.

(2) Assessing the abuser's capacity for violence: The jury also faced the special problem of assessing testimony about the physical capacities of an abusive man with an artificial leg. The exclusion of the eyewitnesses deprived the jury of vital evidence regarding his physical capacity for abuse and his speed at running as well as evidence about his past violence toward his wife. Without such evidence, the jury might believe that her husband was incapable of the past abuse Kathleen described and particularly incapable of sustained and repeated assaults on the night of the shooting. Amy Dumond's excluded evidence would have provided the strongest corroboration at trial for the honesty and

the reasonableness of Kathleen's belief that she could not safely turn around and leave the apartment with her baby when her husband was only a few feet away. The exclusion of eyewitness testimony deprived the defendant of the opportunity to prove this elements of her self defense claim.

(3) Corroboration of Kathleen's testimony about past abuse and of her credibility as a witness: Two witnesses, Tracy Bowman and Amy Dumond, described seeing choke marks on Kathleen's throat or seeing her husband choke her in the past. This information was crucial because Kathleen described being choked until she woke up on the kitchen floor and then fighting back in the final confrontation with her husband. Del Charles provided the best corroboration of the explosiveness of Todd's anger and his capacity to physically dominate Kathleen, who was close to his size. Kathleen testified that her husband attacked her and beat her that night with a towel rack from the bathroom; the jury should have been able to weigh Tracy Bowman's account of feeling bumps on Kathleen's head from being beaten with a vacuum cleaner pole. The prosecution argued Todd had seized the towel rack to defend himself against an attack by Kathleen. Evidence of his prior use of a household object as an offensive weapon was important to support the credibility of the Kathleen's testimony.

(4) Rebutting misconceptions about abuse and their application to this case[12]: One popular misconception about

[12]Kathleen Weiand's case is also typical, not atypical, in that it involves a confrontational killing. Despite widespread belief that most homicides by battered women involve nonconfrontational

domestic violence involves the idea that battered women provoke or deserve the violence their partners inflict.[13] Kathleen Weiand had stayed out later than she had planned on the evening of their final confrontation. The jurors may have thought this undermined her claim to self-defense directly, if they saw her late return as provocative, or indirectly, if they believed battered women generally provoke or deserve abuse. Expert testimony helps the finder of fact by debunking the myth. However, eyewitness testimony was also crucial. The excluded witnesses provided evidence that her abusive husband had previously exploded into physical attacks during verbal confrontations. This evidence could have helped the jury see his abuse as something other than simply a response to lateness, as well as supporting the credibility of Kathleen's testimony.

Kathleen Weiand's own testimony provided another powerful example of the importance of both expert and eyewitness testimony. When asked why she returned to her husband after a one-week trip to Wisconsin during her pregnancy, Kathleen answered "Because I loved him." (T983). One widespread misconception about domestic violence is that a battered woman's statements about loving her partner contradict her statements

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situations, Professor Maguigan's survey of published cases found 75% involved confrontations; 20% were nonconfrontational; the remainder did not include the facts. Maguigan, Battered Women and Self Defense, supra, at 388-401.

[13]Lenore Walker, The Battered Woman 29 (1979); Elizabeth Schneider, Equal Rights to Trial for Battered Women: Sex Bias in the Law of Self Defense, 15 Harv. C.R.-C.L. L. Rev. 623, 629, 645 (1980); Kelly, supra, 478 A.2d at 370.

about fearing her partner. In truth, love, fear, or both may account for remaining in a violent relationship.[14] Kathleen's statement that she loved her husband enough to return while pregnant could have led the jurors to discount her account of fearing him as well. Expert witnesses can explain that love in an abusive relationship does not mean there was nothing to fear. However, eyewitness testimony regarding the abuser's past violence and the reasonableness of the defendant's fear was vital to avoid the application of the myth to the evidence in the case.

(5) Rebutting improper closing argument: The erroneous exclusion of the witnesses deprived the defense of crucial evidence that would have rebutted the prosecutor's improper closing argument.[15] The prosecutor, in argument criticized by the court below, affirmatively told the jury, "Nobody sees any injuries to her. Nobody, nobody, ever, with the exception of Phyllis Wilkes. . ."[16] (T1993) (emphasis added). The prosecutor

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[14]Martha Mahoney, Victimization or Oppression? Women's Lives, Violence, and Agency, 59, 74-74 in The Public Nature of Private Violence, (Martha Fineman and Roxanne Mykitiuk eds. 1994). "Violence and coercion are not committed by someone the woman calls a 'batterer' but by her lover, husband, or partner--often, the father of her children. Deciding whether a loved one must be redefined as a "batterer" raises questions about the deepest structures of the woman's intimate life, her safety, and the needs of her children." See also Christine A. Littleton, Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women, 1989 U. Chi. Legal Forum 23 (1989).

[15]The court below criticized the prosecutor's closing argument but found no fundamental error.

[16]Wilkes, the manager at the apartment complex where the Weiands lived, had seen bruises on Kathleen but received no explanation of the bruises. T1478, 1496.

said this even though she knew of the proffer of testimony from Tracy Bowman, who had seen injuries to Kathleen. The prosecutor also told the jury that Kathleen was not a battered woman and pointed to the absence of corroboration of abuse: "There's women . . . that are in horrible, horrible situations, women that are battered, women that are beaten, women that are abused. . . . She's not one of them. And how do we know that she's not one of them? All we have to back her up is her own statements." (T1984-85) (emphasis added). The prosecutor's statement reflected the prejudice to the defendant created by the exclusion of the eyewitnesses. The excluded witnesses provided the only direct evidence about abuse other than accounts derived from Kathleen herself.[17]

Presenting expert testimony in no way cured the prejudice to the defendant. The opposite was true: Excluding eyewitness testimony to violence made improper closing argument possible and rebuttal by the defense impossible. The prosecutor told the jury that the experts should be discredited because they had relied on what Kathleen had told them (T1988, 1991). The attack on the experts was possible precisely because no witnesses had been permitted to corroborate Kathleen's account.

Confusion about expert and eyewitness testimony caused the

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[17]The prosecutor then attacked Kathleen's account of abuse as if the lack of corroboration showed that it was not true. Of course, many battered defendants will not have corroborating eyewitness testimony available, and that does not itself prove that their own statements are not true.

court below to misapply the harmless error rule.[18] The opinion noted that the defense had put on thirty-two witnesses, and that psychologists had testified "exhaustively" about "battered spouse syndrome" and rendered opinions that the defendant suffered from the "syndrome." The court held that the exclusion of eyewitnesses was harmless. Weiand at *7. The court misunderstood harmless error because it sought to substitute expert testimony about a "syndrome" for testimony regarding eyewitness observations of abuse.

Amici urge this Court to clarify that, as stated in Hickson's certified question and answered in the Hickson opinion, expert testimony on domestic violence is evidence relevant to the claim of self-defense, but that the introduction of such testimony does not create a separate defense in criminal law. Expert testimony will help place other evidence about the facts in context. However, the introduction of such testimony cannot justify depriving the defendant abused by her partner of the opportunity to prove elements of her claim of self-defense through eyewitness testimony. The jury will want to and must be able to consider both forms of testimony where they are available in self-defense cases.

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[18]The harmless error doctrine imposes a heavy burden on the state. "The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." State v. DiGiulio, 491 So. 2d 1129, 1135 (Fla. 1986).

II. THE RULE IMPOSING A DUTY TO RETREAT WHEN ATTACKED BY A COHABITANT IS UNJUST AND DANGEROUS FOR WOMEN, FAILS TO ACHIEVE THE POLICY OF PRESERVING LIFE, AND SHOULD BE OVERRULED.

In 1982, this Court held that the privilege to use deadly force in self defense in one's own home without retreating did not apply when the assailant was a cohabitant. State v. Bobbitt, 415 So.2d 724 (Fla. 1982). The ensuing fifteen years have seen a vast expansion in social and legal understanding about domestic violence and particularly about the dangers of separating from violent relationships. Public policy in Florida--expressed by the executive, the judiciary, and the legislature--now manifests deep commitment to protecting battered women and ending domestic violence.[19] In light of current knowledge and public policy, Bobbitt should be overruled.

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[19]Executive efforts include the formation of the Governor's Task Force on Domestic Violence, See, e.g., Governor's Task Force on Domestic Violence, The First Report of the Governor's Task Force on Domestic Violence (January 31, 1994). Legislative reforms have been comprehensive, including family law and custody issues, mandatory procedures for police interventions, and improved prosecution of domestic violence offenses; many are summarized in Governor's Task Force on Domestic Violence, The Third Report of the Governor's Task Force on Domestic Violence (March 1997) 87-88, 109-137, which also shows recommendations that have been undertaken by Governor, the Cabinet, and the Task Force, 95-146. Judicial initiatives have included the organization of seven specialized domestic violence courts in Florida and improvements in judicial education. Id. at 12.

The public policy of the United States, as expressed in the Violence Against Women Act, recognizes the dangers of domestic violence including the dangers of attacks on separation. See 18 U.S.C.A. section 2261 (making it a federal crime to commit violence against an intimate partner if it occurs in the pursuit of the partner across state lines 'with the intent to injure, harass, or intimidate.'); 18 U.S.C.A. section 2262 (it is a federal crime to cross State lines to threaten, harass, or commit bodily injury in violation of a domestic violence protection order.)

The duty to retreat was an important issue in this case. Kathleen Weiand testified to ongoing conflict with her husband during which they stopped and resumed fighting several times in quick succession (multiple citations to Transcript in Statement of Facts in Brief of Appellant Kathleen Weiand). On Kathleen's account of the facts, the jury may have found it a close question whether she could have safely retreated after she picked up a gun, when he had run into a room that contained an assault rifle. The defendant herself testified that she did not know why she did not leave when he ran into that room but believed he would not let her leave (v11:T1182). The prosecutor argued that, if Kathleen's husband were really as abusive as she said, she should have left him, invoking stereotypes that women may leave violent relationships and will be safe if they do so (v18:T2003).

A. Because women fleeing violent relationships face danger to their own lives as well as to children, family members, coworkers, and police, the rule requiring retreat when attacked by a cohabitant fails to achieve the goal of preserving life.

The Bobbitt decision had two rationales for imposing a duty to retreat when attacked by a legal occupant of the home: the preservation of life, and the protection of rights to refuge in the dwelling for both residents. Bobbitt, 415 So. 2d at 726. However, the rule announced in Bobbitt serves neither objective.

In Bobbitt, this Court stated that the retreat rule did not endanger anyone because no one had to retreat if retreat increased peril: "[T]his holding does not leave an occupant of a

home defenseless against the attacks of another legal co-occupant of the premises since 'a person placed in imminent danger of death or great bodily harm to himself by the wrongful attack of another has no duty to retreat if to do so would increase his own danger of death or great bodily harm.'" 415 So. 2d at 726 (quoting Fla.Std.Jury Instr. (Crim. 2d ed., p. 64)). Since Bobbitt was decided, however, new information has made clear that imposing a duty to retreat within the home can actually place women in greater danger.

This rule works its greatest hardship on women. "The only common denominator found among domestic violence victims is their gender--the vast majority of domestic violence survivors are women." Governor's Task Force on Domestic Violence, Third Report of the Governor's Task Force on Domestic Violence vii (March 1997). "Given that most men are assaulted and killed outside their homes by strangers, while most women are assaulted and killed within their homes by male intimates, [the duty to retreat when attacked by a cohabitant] disadvantaged women." Marina Angel, Criminal Law and Women: Giving the Abused Woman Who Kills A Jury of her Peers who Appreciate Trifles, 33 Am. Crim. L. Rev. 229, 320 (1996), cited in State v. Gartland, 694 A.2d 564 (1997).

It is misleading to look at a self-defense case as a matter of formal property law when the heart of the question is self protection. "There is no rational reason for a distinction between an intruder and a cohabitant when considering the policy for preserving human life where the setting is the domicile."

State v. Thomas, 673 N.E.2d 1139 (Ohio 1997).

Separation is now recognized as the most dangerous moment in a violent relationship. "Violence increases dramatically when a woman leaves an abusive relationship." The First Report of the Governor's Task Force on Domestic Violence (January 31, 1994), supra, at 55. Even the attempt to leave heightens the risk of violence and the risk of death.[20] "One study found that 45 percent of femicides (murders of women) were generated by the man's 'rage over the actual or impending estrangement from his partner.'" Donald G. Dutton with Susan Golant, The Batterer: A Psychological Profile 14 (1995) (quoting a 1992 study by M. Crawford and R. Gartner). "Separation creates a period of unprecedented danger in battering situations," Lenore Walker, Terrifying Love (1989) 65. The dangers of separation can last at least two years after termination.[21]

Since Bobbitt was decided, much has been learned about the dangers of leaving violent relationships. The term "separation assault" was coined in 1991 to emphasize the batterer's quest for

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[20]Martha R. Mahoney, Legal Images of Battered Women, supra, at 5-6 (citing several sources). Mary Ann Dutton, Understanding Women's Responses to Domestic Violence, supra, at 1212.

[21]Lenore Walker, Battered Women Syndrome and Self-Defense, 6 Notre Dame J. Law, Ethics & Public Policy 321, 333 (1992). In one study, men who killed women most frequently described as their motive a fear of abandonment by the woman. George Barnard, Till Death Do Us Part: A Study of Spouse Murder, 10 Bull. Am. Acad. Psychiatry & L. 271, 274 (1982). Most battered women who kill in self-defense report an escalation of abuse before the incident, sometimes in response to her emotional withdrawal or preparation to separate. Walker, Battered Women and Self-Defense, supra, at 333.

power and control over his partner: "Separation assault is the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return." Mahoney, Legal Images of Battered Women, supra at 66. The lethal attacks triggered by separation may happen before or after the woman actually goes: "The most dangerous moment may come when the woman makes a decision to leave, at the moment she actually walks out, or shortly after she has left." Mahoney, Victimization or Oppression?, supra, at 79.

The focus on whether battered women leave their abusers hides the carnage produced by the batterers: children and other relatives, neighbors, friends, bystanders, coworkers, attorneys, and police, among others, are endangered by the attacks that follow separation. A sample of Florida cases decided since Bobbitt illustrates the lethal dangers to society from men pursuing the women who have left them.

Men kill when the women refuse to return. See, e.g., Cummings-El v. State, 684 So.2d 729 (Fla. 1996) (when couple separated after living together, in violation of restraining order he went to her house and stabbed her to death in front of her eight year old son, saying that if he could not have her, no one would).[22] Women die while divorce or visitation is under

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[22]See also Edwards v. State, 556 So.2d 1193 (Fla. 1st DCA 1990) (man pursued his wife after separation, shot and killed her when she refused to return); Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, Lemon v. Florida, 469 U.S. 1230, 84 L.Ed. 2d 370, 105 S.Ct. 1233 (1985) (boyfriend kills girlfriend when she tries to leave their relationship).

discussion or when divorce papers are served. See, e.g., Wright v. State, 688 So.2d 298 (Fla. 1996) (wife left husband and went to parents with children; husband came to parents' house, shot and killed wife when her family refused to let him visit children).[23] The intervening years have also seen many cases of attempted murder and aggravated assault or battery. See, e.g., Kio v. State, 624 So.2d 744 (Fla. 1st DCA 1993), rev. denied State v. Kio, 634 So.2d 627 (Fla. 1994) (attempted murder, kidnapping, sexual battery; husband goes to estranged wife's residence, rebuffed at attempted reconciliation, assaults her physically and sexually, crushes her skull, and attempts to set her on fire).[24]

The most poignant and horrible cases are those in which abusers kill children to retaliate against the woman for leaving or as part of a lethal attack on the woman herself. See, e.g., Arbalaez v. State, 626 So.2d 169 (Fla. 1993), cert. denied 511 U.S. 1115 (1994) (one day after a man's girlfriend tells him to move out, he kills her five-year-old son by throwing him off a bridge for revenge); Klokoc v. State, 589 So.2d 219 (Fla. 1991) (husband shoots and kills his nineteen-year-old daughter while

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[23]See also Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1982) (husband tries to force reconciliation with estranged wife; stabs her stepfather to death when he intervenes).

[24]See also Chapman v. State, 597 So.2d 431 (Fla. 2d DCA 1992) (attempted murder; husband stabs wife when she tells him she wants divorce); McMillian v. State, 609 So.2d 721 (Fla. 5th DCA 1992) (attempted murder) (threatened to kill estranged wife, apprehended lying in wait with loaded rifle with safety off); Coleman v. State, 491 So.2d 1206 (1st DCA 1986) (wife beaten and threatened with gun by husband trying to force reconciliation).

she slept to punish estranged wife for leaving); Henry v. State, 574 So.2d 66 (Fla. 1991) (husband kills wife and later kills stepson when she leaves him).[25] Parents and relatives of the separating woman may die or be injured. See, e.g., LaFleur v. State, 661 So.2d 346 (Fla. 3d DCA 1995) (in violation of restraining order, husband took one-year-old son and his blind father-in-law hostage with a gun and threatened to kill them if wife would not go back to him); Pooler v. State, 22 Fla. L. Weekly S697 (Fla. 1997) (man kills ex-girlfriend and shoots her brother).

People who have sought to help or shelter the separating woman also die. In one case, when a woman found shelter with a family, her husband killed five people, including that family and two children. Jackson v. State, 599 So.2d 103 (Fla. 1993) (adults were killed by shooting them; children died of smoke inhalation in burning car with bodies of adults).

Attorneys and policemen are at risk when they help separating women. See, e.g., State v. Spella, 567 So.2d 1051 (Fla. 5th DCA 1990) (man shot estranged wife, bystander, and policeman.[26] Witnesses, neighbors, and bystanders are also at

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[25]See also Goldstein v. State, 447 So.2d 903 (Fla. 4th DCA 1984) (man kills wife and young son following divorce proceedings).

[26]See also Walker, Terrifying Love, supra, at 92-95 (describing shooting of attorney). Many separation murders appear in civil cases. See, e.g., Parrotino v. City of Jacksonville, 628 So.2d 1097 (Fla. 1993) (woman with restraining order against former boyfriend killed by him shortly after he threatened her in presence of police); Simpson v. Simpson, 473 So. 2d 299 (Fla. 3d DCA 1985) (husband kills wife after separation and after she seeks restraining order but before order is granted; suit over share of

risk.[27]

Separation attacks frequently take place at the workplace, because it is often more difficult for women to change jobs than residences. Mahoney, Victimization or Oppression, supra. See, e.g., Hyer v. State, 462 So.2d 488 (Fla. 2d DCA 1984) (husband shot estranged wife at workplace in violation of restraining order.[28]

The rule in Bobbitt examined danger and life in the context of a single moment. In the years since Bobbitt was decided, the most significant shift in social and legal understanding of domestic violence has come with the recognition that the abuser's relationships are defined by systematic ongoing attempts to control his partner.[29] The dynamics in abusive relationships, including the batterer's attempts to maintain control, cannot be understood without looking at the context and dangers of the relationship as a whole, including the potential for violence after separation. Mahoney, Legal Images of Battered Women, supra.

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wife's property to go to children).

[27]See, e.g., Downs v. State, 574 So.2d 1095 (Fla. 1991) (man who shot and killed estranged wife because she refused to reconcile with him committed aggravated assaulted on witness).

[28]See also Jones v. State Farm Mutual Automobile Insurance Co., 589 So.2d 333 (Fla. 5th DCA 1991) (husband shoots and kills estranged wife after abducting her at her workplace); Williams v. State, 488 So.2d 62 (Fla. 1986) (husband attempts to kill estranged wife at her workplace; defense of insanity based on marital estrangement); Harris v. State, 650 So.2d 639 (Fla. 4th DCA 1995) (Husband threatened to kill wife if she did not return home, went to her workplace, beat her with a hammer).

[29]See Mahoney, Legal Images of Battered Women, supra.

B. The cohabitant exception to the privilege of non-retreat within the home is unjust to women.

If people engaged in deadly combat actually reflected on the incentives imposed by state law, the rule imposing a duty to retreat when attacked by a cohabitant would actually increase the danger for battered women. Women who did retreat because they feared liability would be placed in greater danger because of the commonality of attacks after separation. For abusive men, an incentive would be created to attack the woman more vigorously while she is still within the home, where her legal right to defend herself is more limited than if she has succeeded in establishing a separate residence. The consequences of legal rules such as these are not merely academic. They are a matter of life and death to women who live in fear, act in desperation, and then are judged on their actions.

Imposing the duty to retreat when attacked by a cohabitant systematically disfavors women as a class, because women are more frequently the targets of domestic violence. Therefore, the rule does not protect property rights equally in effect. The retreat requirement effectively creates stronger property rights in the partner who uses violence, because it creates a privilege in an abusive partner to force a woman from her home. The public policy of the state of Florida is to the contrary: a person who experiences violence can get a restraining order to put the abuser out of the residence. The urgent circumstances of self defense do not permit the due process that goes with evicting

either spouse. Granting stronger rights in the abuser is contrary to public policy.

In self-defense cases, the attempt to protect the property rights of both cohabitants therefore effectively creates weaker property rights in women than would a rule permitting either cohabitant to stand their ground. The policy goal of protecting the home is to protect a zone of safety in the world, not simply to recognize formalistic property rights. Under Bobbitt, a woman in a violent relationship will have no safe refuge within which she can stand and defend her life unless she has successfully achieved the dangerous task of separating. The time frame for the batterer's lethality is not confined to the brief seconds during which she must decide whether or not she can safely flee. The Bobbitt rule requires her to remain at risk and even increase her danger before she can create a haven and find a wall beyond which she need not run.

The Florida Constitution contains guarantees that, in light of current knowledge, mandate changing the rule imposing a duty to retreat when attacked by a cohabitant. The right to self defense appears in the state Constitution:

> The right to fend off an unprovoked and deadly attack is nothing less than the right to life itself, which this portion of our Constitution declares to be a basic right. Florida's Constitution states:
>
> > Basic rights.--All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty. . .

Perkins v. State, 576 So.2d 1310 (Fla. 1991) (Kogan, J., concurring specially) (emphasis in opinion). The equality before

the law of "all natural persons" is offended by a rule that systematically disfavors women, the class of persons most often attacked in the home, by limiting their capacity to defend themselves in the home. See generally Schneider, Resistance to Equality, supra, at 480-497 (discussing gender bias in the law of self defense and equal rights to trial). "Nowhere is the right to equality in treatment more important than in the context of a criminal trial, for only here can a defendant be deprived by the state of life and liberty." Traylor v. State, 596 So. 2d 957, 969 (Fla. 1992) (finding right to counsel for impoverished defendants in Florida and stating that "[t]he Equal Protection Clause of our state Constitution was framed to address all forms of invidious discrimination under the law. . . . Each Florida citizen . . . stands on equal footing with all others in every court of law throughout our state.")

The cohabitant exception to the privilege of non-retreat particularly disfavors women who have been harmed repeatedly by their partners. Some of the most troubling stereotypes and confusion in the field of domestic violence surround the issue of separation from a violent relationship. Mahoney, Legal Images of Battered Women, supra, at 61 - 71. "One of the problems in applying the retreat doctrine to the case of a battered woman is that the jurors may confuse the question of leaving the abusive partner with the duty to retreat on the occasion." Gartland, supra, citing Maguigan, Battered Woman and Self Defense, supra.

By inviting the jury to ask why the woman did not leave

during the final attack by her partner, the retreat requirement invokes the most troubling preconceptions about the question of separation. Jurors may overestimate both the safety of leaving and the likelihood that leaving would cause the violence to stop. The woman's attempt to work out the relationship (such as Kathleen's decision to return to her husband while she was pregnant) is treated as a failure to leave which is then used to discredit her perceptions of danger and the reasonableness of her beliefs. Her account of abuse may be doubted on the basis that she would have left earlier if things were really that bad, affecting her overall credibility as a witness. Mahoney, Victimization or Oppression, supra, at 73-78. The retreat inquiry therefore focuses the jury on precisely those questions about which they are known to make the most frequent errors.

C. Bobbitt is a minority rule and counter to the recent national trend.

The holding in Bobbitt brought Florida within a minority rule. Maguigan, Battered Women and Self-Defense, supra, at 419-20 (citations omitted). Most jurisdictions in the United States hold there is no duty to retreat when attacked in one's own home, regardless of whether the assailant has a right to be there. Thomas v. State, 673 N.E.2d 1339 (Ohio 1997), citing Annotation, Homicide: Duty to Retreat When Assailant and Assailed Share the

same Living Quarters, 26 A.L.R.3d 1296.[30]

Domestic violence and concerns for women's safety and equality influenced two state supreme court opinions on this issue within the past year. The Ohio Supreme Court held, in a case involving a battered woman, that there was no duty to retreat within the home when attacked by a cohabitant. State v. Thomas, 673 N.E.2d 1339 (Ohio 1997). The court noted that "in the case of domestic violence . . . the attacks are often repeated over time, and escape from the home is rarely possible without the threat of great personal violence or death." Id. at 1343.

Last spring, the New Jersey Supreme Court reviewed the duty to retreat when attacked by a cohabitant in a domestic violence case. State v. Gartland, 694 A.2d 564 (N.J. 1997). The court quoted extensive criticism of the harsh impact of this rule on battered women, including one scholarly commentator who stated

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[30]Of the states cited as imposing a duty to retreat in Annotation, Homicide: Duty to Retreat Where Assailant and Assailed Share the Same Living Quarters, 26 A.L.R.3d 1296, two states do not follow this today and another state court has criticized the rule. Pennsylvania changed its rule legislatively and now imposes no duty to retreat in one's own home. Commonwealth v. Derby, 678 A.2d 784 (Pa. Super. 1996) (battered woman defendant), citing Commonwealth v. Eberle, 379 A.2d 90 (Pa. 1977); see also Commonwealth v. Helm, 402 A.2d 500 (Pa. 1979). The South Carolina Supreme Court recently stated: "A battered woman often may be able to claim the inapplicability of th[e] element of self-defense [requiring that she have no other means of avoiding danger than to act as she did] because she acts while on her own premises, and has no duty to retreat." Robinson v. State, 417 S.E.2d 88, 92 (S.C. 1992) (emphasis added) (battered woman defendant). The New Jersey Supreme Court last month criticized the rule and urged reconsideration by the legislature. State v. Gartland, 694 A.2d 564 (1997) (discussed infra).

that it was "inherently unfair" to impose a duty to retreat on a battered woman and emphasized the "injustice and absurdity of expecting a battered woman to retreat and 'just walk away.'" Id. (quoting Maryanne E. Kampmann, The Legal Victimization of Battered Women, 15 Women's Rts.L.Rep. 101, 112-13 (1993)). Although the court noted its "grave concerns" regarding the doctrine and that much had been learned about domestic violence since the legislature codified the duty to retreat, the court held that it could not rewrite the explicit language of the statute. Noting conflicting policy concerns regarding the preservation of life, the court urged upon the legislature "consideration of the application of the retreat doctrine in the case of a spouse battered in her own home." Id.

Since the Florida retreat rule is not legislative, this Court is not constrained in reconsidering it. Because social knowledge and public policy regarding domestic violence have changed since the Bobbitt decision, and the dangers of the retreat rule are now far better understood, the law must change accordingly. To effect this change, the court should abolish the cohabitant exception.

D. Equal justice requires abolishing the cohabitant exception rather than creating a new exception for battered women.

Amici curiae CASA et al. do not advocate a separate standard on retreat for battered women. The reworded question of the Second District Court of Appeal suggested a separate standard for

defendants who introduce evidence about a "syndrome." The ambiguity in the certified question creates the risk that an exception would be created solely for defendants who introduce particular expert evidence. The introduction of psychological expertise on battering and its effects cannot in itself provide a basis for carving out an exception to the cohabitant exception to the retreat rule.

Further problems would attend the creation of a separate standard on retreat for battered women regardless of the forms of testimony introduced. Battered women cannot rationally be distinguished from other people attacked in the home by cohabitants. Rather, battered women are the example showing the general injustice of the cohabitant exception to the privilege of nonretreat within the home. This injustice can only be cured by abolishing the exception itself.

Professor Holly Maguigan, a distinguished scholar in the field of domestic violence, has criticized imposing a duty to retreat on defendants attacked by a cohabitant:

> [B]attered-women defendants are denied fair trials in the minority of jurisdictions that impose a duty to retreat and do not excempt from that duty defendnats attacked in their homes. . . . Elimination of the duty to retreat . . . will not undercut the operation of the general requirement that the defendant use deadly defensive force only when necessary. . . . At a minimum, in those jurisdictions that retain a general duty to retreat, defendants attacked in their homes should be exempted from its operation, and the exemption should not depend on the status of the attacker.

Maguigan, Battered Women and Self-Defense, supra, at 450-51. Professor Maguigan asserts that the rules of self defense law can

be effective for battered women when proper standards exist for assessing the reasonableness of the woman's perception of harm and when evidence is admitted regarding the context of battering. Maguigan, Battered Women and Self-Defense, supra.

Victims of domestic violence may actually be harmed by the creation of a separate standard. Making the application of the duty to retreat hinge on the defendant's introduction of expert testimony on battering would promote arbitrary distinctions among similarly situated defendants. Every woman attacked by an intimate partner is a victim of domestic violence. Most women who kill in self defense are battered women. Schneider, Describing and Changing, supra.

A separate standard for battered women would distinguish among domestic violence victims who kill in self defense based on whether other violent acts by the abuser preceded the attack that resulted in his death. If the abusive partner were so dangerously violent that his first physical attack was homicidal, the victim of his abuse would lack the privilege to defend her life in her home that a new exception would confer upon women labeled as "battered." A woman's safety should not turn on such a tenuous distinction.

The batterer's effort to exert power and control over his partner is at the very heart of the battering process. "Violence is a way of 'doing power' in a relationship'," an effort by the batterer to control the woman who is the victim of the violence. Mahoney, Legal Images of Battered Women, supra, at 53 (citations

omitted). Among women whose partners are obsessive, controlling, and homicidal, a separate standard for "battered women" would distinguish rights of women to defend their lives in their homes based on the form of controlling behavior that their partners had previously manifested, even if the circumstances of the attacks were otherwise identical.

In criminal law, the state defines the responsibility of its subjects. If a "castle doctrine" instruction were available only to defendants presenting "evidence of 'battered-spouse syndrome" under Hickson, then the mere decision to employ an expert witness would determine the duties imposed by the state of Florida. The production of relevant and admissible evidence is an important issue in criminal defense.[31] Context is vital. Although expert testimony is helpful and may be critical, the decision to employ an expert cannot possibly define a defendant's liability under criminal law.

The confusion of standards in the reworded certified question reflects the same confusion about the impact of expert testimony that pervades the DCA opinion. First, in the opinion, the introduction of expert testimony let the court ignore the defendant's right to offer crucial eyewitness evidence to the

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[31]For example, if five eyewitnesses could testify to seeing the homicidal attack by the abusive man whom the defendant killed in self-defense, and other witnesses had seen his previous violence against her, the defense might choose to offer their testimony but not expert testimony to the jury. On the other hand, even on these facts, expert testimony might well be helpful to explain patterns in the relationship, the effects of violence on the defendant, or other factors.

fact of past violence; in the reworded certified question, offering expert testimony would control the defendant's rights under substantive criminal law. In both instances, "the tail wags the dog"--the decision to hire an expert has replaced the more fundamental, substantive elements of the defense.

The law cannot draw meaningful distinctions in the right to use force in self defense between similarly situated women who experience violence from their partners and are forced to defend their lives. This Court should not create a separate standard in criminal law for battered women nor carve out a limited exception to the duty to retreat when attacked by a cohabitant. The injustices of the cohabitant exception must be faced directly. Every woman fighting for her life against an intimate partner is a victim of domestic violence. Amici therefore respectfully urge this Court to overrule Bobbitt to extend the privilege of self-defense within the home to all residents, including those attacked by a cohabitant.

CONCLUSION

In light of the foregoing, we ask this court to grant our motion to proceed as amici curiae, to clarify that expert testimony on domestic violence and its consequences does not replace the basic elements of self defense and cannot substitute for eyewitness testimony to acts of violence, and to overrule Bobbitt and end the cohabitant exception to the privilege of nonretreat within the home in light of public policy, current knowledge, and law.

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