



DEFENSE

NATIONAL DEFENSE CENTER
FOR CRIMINALIZED SURVIVORS

EVIDENCE OF BATTERING AND THE DEFENSE OF DURESS

By Dale Grayson, Esq. and Jill Spector, Esq. with contributions from
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I. Introduction and Background

Lay and expert evidence on battering and its effectsⁱ is often relevant to support a claim of duress or coercion. The defendant's fear of imminent harm at the hands of her abuser may explain why she committed, participated in, or assisted her abuser and/or others in the commission of a wide variety of crimes, such as drug distribution, theft or fraud offenses, robbery, sexual or other abuse of her children, and murder (in jurisdictions that allow duress as a defense to murder). As in any other area where specialized knowledge is needed to help educate judge and jury (e.g., ballistics, eyewitness identification), a domestic violence expert is often needed in cases involving victim defendants asserting duress.

Evidence concerning the defendant's experiences of abuse is relevant to a duress defense in much the same way as it is relevant to self-defense. In duress, as in self-defense, evidence of abuse is relevant to the reasonable person analysis.

Self-defense and duress involve similar inquiries:

- Was the defendant reasonable in her belief that she was in imminent danger?
- Was the response to that danger reasonable?
- How does the history of abuse relate to the issues of reasonableness, imminence, and ability to escape?

Lay evidence that would support self-defense similarly supports the defense of duress. Such evidence includes, for example, eyewitnesses to the abuse or to injuries, medical records, prior reports of the abuse to authorities or others, protection from abuse orders, and any other witnesses or documents that corroborate her accounts of the abuse. Likewise, an expert evaluation, consultation, and presentation of expert testimony on battering and its effects is often critical to support a duress defense.

While substantive duress law varies among jurisdictions, duress generally requires the existence of an impending threat that: (1) would induce a well-grounded fear of death or serious bodily injury if the defendant did not commit the otherwise criminal act, and (2) a person of reasonable firmness in the same situation as the defendant would be unable to

resist. It is generally implied or expressly required that the defendant had no reasonable opportunity to escape or otherwise avoid committing the act. Some statutes and cases also require that the defendant must not have “recklessly placed” herself in the situation she faced nor “contributed” to her predicament in any way.

The vast majority of battered defendants’ cases in which duress is or should be presented do not neatly meet all these criteria. There is often no explicit threat or show of violence at the time of the crime. In many situations, the crime takes place over a series of days, or even years, during which the defendant appears to have had plenty of opportunities to escape. Such opportunities may be viewed by the court as evidence that she was under no imminent threat, had other alternatives to committing the crime, or was reckless or otherwise responsible for her own predicament.

Accordingly, battered defendants’ duress claims can often pose significant challenges for the defense. It is incumbent upon the defense to make sure that the court fully understands the relevance and need for both lay and expert testimony on battering and its effects to support the duress claim.

This memorandum discusses the relevance of the history of abuse to duress claims, the need for expert assistance, common barriers encountered by the defense, and relevant case law.

II. General Relevance of Evidence of Battering and Its Effects to Duress

Evidence of battering and its effects is relevant to and probative of each element of the duress defense. The crux of the defense is that the defendant’s response was her only reasonable alternative to a threat that was imminent and from which there was no reasonable opportunity to escape.

The law requires, either explicitly or implicitly, that the threat be *imminent*.ⁱⁱ

Common assumptions about how someone who is under duress should behave can be problematic for a battered defendant presenting a duress defense. For example, jurors and judges may believe that without an explicit threat, escape is possible for the person being threatened, or that if there is a lapse in time between the threat and its accomplishment, the person can retreat to a position of safety. Such “common sense” assumptions, however, may not be applicable in the case of a battered defendant and can operate unfairly to defeat her duress claim. A person who is unfamiliar with the realities of victims’ lives might not be able to comprehend the degree of ongoing risk victims face even during what appears to an outsider to be a lull in the violence. The fact is that when a woman tries to leave – to escape the violence – the danger and risk of violence to her and to her children often increases.ⁱⁱⁱ If a woman has turned to the police and courts for assistance in the past, and they have not been helpful, or if

she has experienced escalating violence when she tried to leave in the past, she will have learned that leaving could mean death for her and, sometimes, her children.

A defendant's prior experiences and particular circumstances are critical factors in assessing her reasonableness, and expert testimony is often needed to help the factfinder understand this important context. For example, without expert assistance, a court or jury might incorrectly conclude that if the defendant did not literally have a gun to her head throughout the crime, she fails the test for duress because the harm was not imminent. In reality, the ongoing effects of the violence a victim of battering experiences at the hands of her batterer can keep her in *a constant and unrelenting state of terror* no different from having the barrel of a gun at her temple. The expert can clarify that domestic violence is an ongoing pattern, rather than a series of discrete and random violent incidents, a pattern that perpetuates the batterer's power and control despite seeming lapses in the physical violence.^{iv}

As in self-defense cases, the defendant's **reasonableness** cannot be assessed without fully understanding her history and experiences of abuse. Rather than being unreasonable, her actions or apparent inaction may be reasonable coping strategies; active problem-solving efforts to reduce or stop the violence. Victims get very good at assessing the degree of danger they are facing; they learn to anticipate their batterer's violence, including the degree of violence threatened.^v They learn to read cues of potential danger that help inform their responses in a given situation.^{vi} An expert can help the jury to understand that a victim defendant may be accurately assessing the danger and not acting unreasonably in remaining in the situation, complying with the batterer's demands, or otherwise appeasing him, even to the point of participating in a crime.

The inquiry of whether a defendant **recklessly placed** herself in the situation brings the focus directly to the defendant's staying with a known abuser. In essence, the judge or jury may conclude the victim recklessly placed herself in the situation by not leaving or even returning to her abusive partner. Understanding why victims of battering cannot leave an abusive relationship or situation requires education of the trier of fact about misconceptions about victims of battering. Research shows that many people falsely believe that victims of battering stay or return because they like the violence, and that they could easily leave if they really wanted to.^{vii} Without proper information, a jury might naturally conclude that by staying in or returning to a situation where she was previously forced to do things against her will or even commit crimes, she was reckless, or at the very least, should take some responsibility for her actions.

In sum, the assistance of an expert on domestic violence can prevent the unjust foreclosure of a defendant's claim of duress as a result of lack of information or misconceptions that the judge or jury hold regarding victims of battering and their behavior. However, at minimum, expert evaluation and consultation is generally necessary to explore the potential defense of duress, and often to convince the court to permit the defense to be presented. Because of the particular requirements of most duress standards which call into play the most common

misconceptions about victims of battering (e.g., the obligation that she leave or “escape” her abusive partner rather than acquiesce to the threat; or that she not be in the abusive situation in the first place) duress claims are particularly complex for battered defendants.

III. Duress as a Trial Defense

While the law on the admissibility of evidence of battering and its effects as related to duress defenses is not as well developed as it is in the self-defense context, in recent years courts have begun to recognize the relevance of expert testimony to support a duress defense.

When considering a duress defense counsel should review:

- The jurisdiction's statutory and common law requirements for duress,
- Any case law interpreting duress requirements,
- The pattern jury instruction on duress,
- Cases involving battered defendant's self-defense claims that can be used to establish the jurisdiction's policy in favor of admitting evidence of battering, analogized to duress claims,
- Cases involving admission of evidence of battering and its effects in any other contexts, which might be analogous to admission in the duress context.

Recent duress decisions in federal and state courts support admitting both lay and expert testimony on battering. In federal court, duress is a common law defense, and the courts are not constrained by statutory language. Many of the circuits look to the Model Penal Code for guidance. In the state courts, the defense of duress is often codified by statute.

In the federal circuits, there is especially favorable law in the D.C., First, Sixth, Seventh and Ninth circuits, which is discussed in greater detail below. It is worth noting that with the exception of the Fifth Circuit, none of the circuits have issued decisions that bar a victim defendant from presenting lay and expert evidence of abuse to support a duress defense.^{viii} Even the circuits that have not explicitly recognized the relevance of evidence of battering to a duress defense leave the door open to the admissibility of such evidence.

A. Federal Duress Cases – Reasonableness Assessed as to Imminence of Threat and Ability to Escape

In *United States v. Dingwall*, 6 F.4th 744 (7th Cir. 2021) the Seventh Circuit held that evidence of abuse is relevant and admissible to support a duress defense. Marjorie Dingwall, a battered woman who committed a series of armed robberies over the course of a few days after being coerced into doing so by her abusive boyfriend, was charged with multiple counts of robbery, and asserted a duress defense. She filed a pre-trial motion to introduce an expert on battering and its effects, but the trial court denied the motion, holding that the evidence on

battering didn't meet the Seventh Circuit's requirements for a duress defense because the batterer was not physically present when she robbed the stores, and he didn't specifically tell her to commit the robberies. Rather, he pressured her to act through his demands to get him money. On appeal the Seventh Circuit reversed Dingwall's conviction and remanded to the district court so that she could withdraw her plea.

The Seventh Circuit noted that while Dingwall may have a hard time actually making out a duress defense, these are questions for a jury, and the court cites cases from the Sixth, Ninth and DC circuits, discussed below. The court emphasizes multiple times in the decision, that the batterer does not have to be physically present for the threat of harm to be imminent. "We agree with the District of Columbia, Sixth, and Ninth Circuits in *Nwoye II*, *Dando*, and *Lopez* and reject a strict physical proximity test to establish a reasonable fear of imminent violence." *Dingwall*, 6 F.4th at 757. The Seventh Circuit also explained why an expert may be needed in a battered woman's duress case:

We agree with *Lopez*, *Nwoye II*, and *Dando* that expert testimony on battering and its effects may be offered in support of a duress defense because it may help a jury understand the objective reasonableness of a defendant's actions in the situation she faced, which included the history of violent and psychological abuse. As those opinions explain, the questions of reasonableness posed by the duress defense are not asked and answered in the abstract. The judge or jury must consider the defendant's situation, and the reasonableness of her actions and choices may be considered in light of what is known about the objective effects of such violent and psychological abuse, not on the particular defendant but more general. *Id.* at 754.

In addition, the Seventh Circuit called out the government for using experts on battering when it helps the prosecution to explain behavior of a battered complaining witness, but trying to exclude expert testimony when it explains a battered victim defendant's behavior. The court made it clear that "the government cannot have it both ways: admitting such evidence to explain its own witnesses' behavior but excluding the evidence when it is helpful to an accused defendant." *Id.* It is also worth noting that the decision distinguishes battering duress cases from duress cases involving gang members or prison cases, where the threats of violence are general and there is no history of abuse from an intimate partner.

The D.C. Circuit made a similar ruling on the admissibility of expert testimony on battering and its effects in duress cases. In 2016, in *United States v. Nwoye*, the D.C. Court of Appeals noted their agreement with "the majority of the courts, that expert testimony on battered woman syndrome can be relevant to the duress defense. The reason, put simply, is that the duress defense requires a defendant to have acted reasonably under the circumstances, and expert testimony can help a jury assess whether a battered woman's actions were reasonable." *United States v. Nwoye*, 824 F.3d 1129, 1136 (D.C. Cir. 2016).

Nwoye was a survivor who was forced to take part in an extortion scheme that stretched out over a number of months. At trial she testified that she had been coerced into participating through physical abuse and threats by her intimate partner. Her trial attorney did not present expert testimony on domestic violence, and the trial court refused to give a duress instruction, finding that Nwoye had not presented sufficient evidence to show that she had no reasonable alternative but to participate in the crime (the second prong of duress). *Nwoye*, 824 F.3d at 1132. The appellate court affirmed, reasoning that Nwoye had numerous reasonable alternatives, including calling the police, telling friends or co-workers when she was at school or work, or when the abuser who was coercing her was travelling out of state. Nwoye then filed a claim for ineffective assistance of counsel, arguing that her attorney was ineffective for failing to introduce expert testimony. The D.C. Circuit agreed, holding that the expert testimony would have allowed Nwoye to meet the evidentiary standard for a jury instruction on duress, and that, coupled with the expert testimony, would have created a reasonable probability of the jury having a reasonable doubt as to Nwoye's guilt. *Id.* at 1135. The D.C. Circuit noted:

Reasonableness is the touchstone of a duress defense...Reasonableness under both the imminence prong and the no reasonable alternative prong are not assessed in the abstract. Rather, any assessment of the reasonableness of a defendant's actions must take into account the defendant's "particular circumstances" at least to a certain extent...Thus, whether expert testimony on battered woman syndrome is relevant to the duress defense turns on whether such testimony can identify any aspects of the defendant's "particular circumstances" that can help the jury assess the reasonableness of her actions. *Id.* at 1136 – 37.

Regardless of the fact that the extortion took place over the course of months, and that Nwoye went to school and work on her own (which seemingly offered her opportunities to notify the police or escape), the court found that the ability to avoid the criminal act must be understood within the context of Nwoye's experiences of abuse and the threats and danger she reasonably believed she faced.

In *Dando v. Yukins*, 461 F.3d 791 (6th Cir. 2006), another ineffective assistance of counsel case, a survivor defendant took a plea to a string of robberies in Michigan state court. She committed the robberies with her abusive boyfriend, and although she told her trial attorney that she had a long history of violent sexual and physical abuse, counsel failed to investigate this, informing Dando that it would be too expensive, even though she would have been legally entitled to an expert at the state's expense under *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985).

On appeal she claimed ineffective assistance of counsel for this failure to investigate the abuse and asked to have an expert on battering and its effects appointed. The appellate court denied

the request. When she filed for federal habeas the district court denied her writ on the grounds that duress would not have been a viable defense, since she had several opportunities to escape (during the crime spree Dando was alone with one of the victims before he was robbed, she entered the store alone prior to the robbery, and she also waited in the truck by herself during the robberies.) The Sixth Circuit however, noted that evidence of abuse could have been relevant to explain why Dando may have felt that she could not escape the situation, and disagreed with the lower court's conclusion that evidence of battering is not relevant to a duress defense under Michigan law. In noting that the evidence of battering is relevant to assessing reasonableness in a self-defense claim under Michigan state law, because it relates to the question on whether the defendant reasonably believed her life was in danger, the court held that the evidence was also relevant to all elements of a duress defense under Michigan law:

[T]he theory of Battered Woman's Syndrome is not at odds with a reasonableness requirement — if anything, evidence of Battered Woman's Syndrome can potentially bolster an argument that a defendant's actions were in fact reasonable. Although those of us who are not so unfortunate to have to live with constant, imminent threats of violence might look at the actions of a defendant in Dando's situation from the relative comfort of a judge's chambers or a jury box and wonder what reasonable person would have facilitated Doyle's shocking crime spree, evidence of Battered Woman's Syndrome can explain why a reasonable person might resort to such actions given a history of violent abuse and the imminent violent threats. Additionally, as the Wilson court noted, this evidence is relevant to show why a defendant did not leave the company of her abuser. For these reasons, we believe that evidence of Battered Woman's Syndrome could potentially have been relevant to all of the elements of a duress defense under Michigan law.

Dando, 416 F.3d at 801. The 7th Circuit observed that with the assistance of an expert on battering, Dando could have introduced evidence to support all the elements of a duress defense. *Id.* at 802.

The Ninth Circuit has also recognized the relevance and importance of battering to the reasonableness inquiry in a duress defense. In *United States v. Lopez*, 913 F. 3d 807 (9th Cir. 2019), the court vacated the conviction of a battered defendant who made a straw purchase of a gun for her abusive ex-boyfriend, even though she herself had a felony conviction and was barred from purchasing the gun. She put on a duress defense, and the court excluded the battering expert. The Court of Appeals for the Ninth Circuit reversed, noting that the majority of federal and state courts now admit evidence of battering in duress cases. They held that expert testimony could be used to support the defendant's duress defense as well as to rehabilitate her credibility, and that the exclusion of such evidence was in error and prejudiced her defense. Citing to *Nwoye*, the court compared the reasonableness component of duress to that of self-defense, and noted that a defendant's prior experiences and

particular circumstances are critical factors in assessing reasonableness: “[t]he question is still whether or not a ‘person of reasonable firmness’ in *[the defendant’s] situation* would have been unable to resist” *Lopez*, 913 F.3d at 821-22. The court clarified that the evidence of abuse informs the reasonable person analysis; it does not alter it. By looking beyond the immediate circumstances that surround the crime to the broader context of the defendant’s situation, a fuller picture emerges of the dynamics between the victim and her abusive partner that allows the fact finder to more accurately assess reasonableness.

The idea that it is important to look at the bigger picture of a defendant’s particular circumstances is one that has support in the First Circuit as well, “testimony about the long-term effects of being battered or domestic violence in general could well be relevant in a case where a defendant claimed that she engaged in criminal activity only because she was forced to by an abusive domestic partner.” *Lopez-Correa v. United States*, No. 18-1930 (GAG) at *37 (D.P.R. Aug. 27, 2020) (citations omitted). In noting the probative value of expert testimony, *Lopez-Correa* cites to *United States v Marengi*, 893 F. Supp. 85 (D. Me. 1995), a drug distribution case where the crime occurred over a long period of time and the court admitted expert testimony to support the duress defense. The court in *Marengi* focused on having a full understanding of the defendant’s experiences of abuse in order to accurately assess her reasonableness:

[P]roviding the jury with information of specific incidents of abuse while providing no information about how such treatment can, over time, establish a dynamic where *the threat of abuse hovers over every interaction between the individuals, even if such threat is not always articulated*, would give the jury only half the story. In effect, this expert testimony may be characterized as explaining how a reasonable person can nonetheless be trapped and controlled by another at all times even if there is no overt threat of violence at any given moment. *Marengi*, 893 F. Supp. at 95.

Duress is not limited to situations where someone quite literally has a gun to their head, “the long-term effects of being battered or domestic violence in general could well be relevant in a case where a defendant claimed that she engaged in criminal activity only because she was forced to by an abusive domestic partner” *United States v. Navedo-Ramirez*, 781 F.3d 563, 567 (1st Cir. 2015). As discussed above, evidence of battering does not alter “the duress defense’s reasonable person standard;” rather it properly informs it. The inquiry looks beyond a single snapshot of the crime and instead looks to the wider context in which it took place, and asks why the defendant believed she had no reasonable alternative but to commit the crime.

Lopez also touches on the importance of expert testimony in buttressing a defendant’s credibility. Expert testimony may be needed even when there is lay testimony because lay testimony on its own might not be enough to support duress. “To effectively present the situation as perceived by the defendant, and the ‘reasonableness of her fear’ a defendant must

often ‘overcome stereotyped impressions about women who remain in abusive relationships. It is appropriate that the jury be given a professional explanation...through the use of expert testimony.’” *Lopez* 3 F.3d at 823 (citations omitted).

B. Duress Defense in States Where the Defense is Codified by Statute

Unlike the federal courts, states often have statutes on duress. Since these statutes vary across jurisdictions, it is critical to carefully examine the particular statute and any case law interpreting it. The language of some duress statutes may make it easier to introduce evidence of battering. For example, in Massachusetts, MA. Gen. Laws Ch. 233 § 23F states that a defendant who is charged criminally with using force against another, and who is asserting either self-defense or duress, *shall* be allowed to introduce both lay and expert testimony on battering to support their reasonableness. See *Id.* (emphasis added). In *State v. Richter*, 245 Ariz. 1, 424 P.3d 402 (2018) a battered woman charged with child abuse alleged that she acted under duress from her abusive husband’s ongoing threats of harm over a three-month period. Although the State argued that allowing evidence of abuse would transform an objective inquiry about reasonableness into a subjective one, the court disagreed, pointing out that the plain language of the statute requires that a duress claim be evaluated from the perspective of a reasonable person *in the defendant’s situation*, and the jury should have heard and considered the evidence of abuse. The statute in Arizona asks whether the threat is one “which a reasonable person in the situation would not have resisted” Arizona Revised Statutes § 13-412(A). The Arizona Supreme Court found that an ongoing threat of harm can qualify as a threat of immediate physical force under the statute, “even when the threat precedes the illegal conduct by several days,” and even when the person making the threats is “physically removed from the defendant.” *Richter*, 245 Ariz. at 20. Other states that have similar language in their statutes and have interpreted them in a similar manner include Delaware, *Wonnum v. State*, 942 A.2d 569, 572 (Del. 2007) (“[a] reasonable person in the defendant’s situation would have been unable to resist.”); New Jersey, *State v. B.H.*, 183 N.J. 171, 188-89, 870 A.2d 273, 283-83 (2005) (“which a person of reasonable firmness in his situation would have been unable to resist,” and commenting that the standard in the Code encompasses consideration of the defendant’s situation).

Some of the most common legal issues that arise in duress cases include preclusion of expert testimony; refusal to instruct the jury on duress; and ineffectiveness of trial counsel for failing to investigate and/or present possible duress claims. Arguments on how to address these issues are explained below.

C. Misconception that Expert Testimony Is Never Admissible Except in Self-Defense Cases

In jurisdictions where there is a statute governing the admissibility of evidence of battering, some courts have held, or parties have argued, that expert testimony on battering and its effects is admissible only in self-defense cases, and inadmissible in duress and every other context.^{ix} This argument is sometimes based on the fact that the statute regarding

admissibility of evidence of battering explicitly refers to self-defense or is contained in the self-defense section of the general criminal statutes. In many cases, a close analysis of the statute at issue will show that, although it discusses self-defense, it does not explicitly limit evidence of battering to self-defense cases. See, e.g., Mo. Rev. Stat. § 563.033, cited in *State v. Copeland*, 928 S.W.2d 828, 838 (Mo. 1996). The legislative history may also confirm that by allowing the evidence in one type of case, the statute was not necessarily meant to prohibit that evidence in all other cases.

If expert testimony on battering and its effects is allowed in self-defense cases by virtue of decisional law (rather than a statute), there is often no definitive basis to preclude it in duress cases. Self-defense and duress standards often have similar key elements. Pennsylvania's statutory scheme illustrates this principle. In that state, both self-defense and duress claims require that the factfinder consider the circumstances faced by the defendant in assessing her subjective belief of danger and the reasonableness of that belief. The analogous components of these standards – the defendant's "situation" for duress, and her "surrounding circumstances" for self-defense – require a full consideration of her history of abuse at the hands of her attacker or coercer.^x

Similarly, in *Linn v. State*, the Supreme Court of Iowa held that "BWS testimony is relevant to both the subjective and objective components of a self-defense claim." *Linn v. State*, 929 N.W. 2d 717, 753 (Iowa 2019). The court cited to *State v. Kelly*, 97 N.J. 178, 478 N.2d 364, 378 n.13 (N.J. 1984) (collecting cases holding that evidence of battering is relevant to both the objective and subjective components of self-defense). It may therefore be helpful to note the similarities between self-defense and duress and focus on how they both require assessing the defendant's reasonableness.

Whether the case involves self-defense or duress, the expert's role is the same: to provide the jury with the "social framework" necessary to understand, and therefore fully consider the defendant's experiences of abuse. In both instances, the expert provides "a social and psychological context in which the trier can understand and evaluate claims about the ultimate fact...." National Institute of Justice, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials*.^{xi}

The argument that expert testimony on battering and its effects is limited to self-defense claims may also be challenged by showing that the jurisdiction allows the evidence for other non-self-defense purposes. For instance, in many jurisdictions, expert testimony proffered by the prosecution has been held admissible to help elucidate the behavior of a recanting witness or other victim.^{xii} Evidence of battering and its effects has also been admitted by the defense to support theories other than self-defense, such as to help explain behavior of the defendant that might otherwise seem to support her specific intent or guilt.^{xiii} If evidence of battering is allowed in these non-self-defense contexts, there is no basis to argue that it should be precluded in a duress case because the case does not involve self-defense.

D. Misconception That Evidence of Battering is “Subjective” and Therefore Not Admissible to Support the Objective Reasonable Person Inquiry of Duress

In some cases, it has been argued that admission of expert testimony on battering and its effects would transform the “objective” duress inquiry into a subjective one and is therefore inappropriate. The leading case usually cited for this proposition is *United States v. Willis*, 38 F.3d 170, 175 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 2585 (1995) (where a battered defendant claimed duress by abusive boyfriend as defense to carrying firearm, expert on battering was properly restricted from expressing opinion that defendant suffered from “battered woman syndrome” since that testimony was “inherently subjective;” the testimony was being used to explain why the particular defendant succumbed to a threat when a “reasonable” non-battered person would not).^{xiv}

There is often no substantive distinction between the objective reasonableness required for duress and that generally required by self-defense standards, for which expert testimony on battering is routinely admitted. Duress is similar to self-defense in that both defenses “require a defendant to demonstrate that she acted reasonably in response to a reasonable fear of death or bodily injury” *Marengi*, 893 F. Supp at 95. “As with duress, ‘objective reasonableness’ for self-defense ‘must view the situation from the *defendant’s perspective*.’” *Lopez* 913 F.3d at 821(citations omitted). This does not involve changing the standard from objective to subjective, however it does require taking into consideration the defendant’s individual situation and knowledge. *Id.* If expert testimony on battering and its effects were “inherently subjective,” it would be as irrelevant to the reasonableness component of self-defense as it would be to duress. If expert testimony does not transform self-defense into a purely subjective standard, then it does not transform duress into a subjective standard either.

In many situations, arguments about the “subjectivity” of expert testimony on battering and its effects are grounded in misunderstandings about the actual content, goal, and purpose of that testimony. The confusion often stems from the misconception that the expert provides “mental health or defect” evidence that relates only to the defendant’s subjective psychological state. In reality, expert evidence on battering and its effects usually is presented not to establish a mental health excuse for a defendant’s conduct, but rather to provide social framework and context within which to understand her experiences and responses. National Institute of Justice, *The Validity and Use of Evidence* at 21.^{xv}

Though psychological responses to abuse may be one aspect of expert testimony, experts can explain far more than the “inner workings” of a victim’s mind. See Mary Ann Dutton, *Understanding Women’s Responses*, 21 Hofstra L. Rev. at 1195.

Typically, the testimony offered in forensic cases is not limited to the psychological reactions or sequelae of domestic violence victims, and this has led to confusion about what is encompassed by the term ‘battered woman syndrome.’ Expert witness testimony may also be offered to explain the nature

of domestic violence in general, to explain what may appear to be puzzling behavior on the part of the victim, or to explain a background or behavior that may be interpreted to suggest that the victim is not the ‘typical’ battered woman or that she herself is the abuser.”

Among the many different purposes for expert testimony are, for example, to explain: general dynamics of domestic violence, common behaviors of victims of battering and common misconceptions about their behavior, the particular dynamics of the relationship at issue, the victim’s strategies for coping with the violence, and the cumulative effects of the violence on her behavior and state of mind.

E. Misconception that Duress is Not Available Because Defendant Was at Fault in Creating the Situation or Had Ample Opportunity to Escape

As discussed earlier, an assessment that a defendant is responsible for putting herself in the situation where a crime occurred– either for “recklessly” or otherwise failing to escape or leave it – can be fatal to her claim of duress. In some cases, the defendant is precluded as a matter of law from presenting evidence on duress or getting duress instructions for this reason. See, e.g., *Commonwealth v. Berger*, 417 Pa. Super. 473, 612 A.2d 1037 (Pa. Super. Ct. 1992) (defendant considered to be “reckless” for remaining with abuser in situation that later resulted in his murdering third person; therefore, she forfeited her right to claim duress).

When the defendant is not even given an opportunity to establish her evidence of duress, she is put in an untenable “catch-22” dilemma: she needs expert testimony to establish why she did not recklessly place herself in the situation, yet she is prevented from making that showing. As discussed throughout this memorandum, the misconceptions about domestic violence survivors and dynamics inherent in such rulings must be corrected as a factual matter.

Some victims who are facing challenges by the prosecution that they have “recklessly placed” themselves in the situation, may be able to distinguish their circumstances from those that the “recklessly placed” exception was intended to cover. For example, the Commentary to the Model Penal Code explains the type of situation meant to bar duress on the basis that the defendant “recklessly” placed himself in the situation in which it was probable he would be subject to duress:

[The recklessness exception] ... will have its main room for operation in the case of persons who connect themselves with criminal activities, in which case it would be very difficult to assess claims of duress. Model Penal Code and Commentary § 2.09.

The Commentary goes on to highlight a single example of recklessness, that of a person who agrees to participate in a felony with others while armed, but who then claims duress as a defense to the resulting murder. Model Penal Code and Commentary § 2.09 n. 48. This history

shows that the exception was meant to apply to a class of defendants who agreed to participate in criminal activity from the outset. By contrast, victims of battering who are coerced into criminal activity generally do not “agree” in a non-coercive setting to assist with a crime; they are under the batterer’s control and coercion long before any hint of criminality. The defendant is often deemed “reckless” for remaining in the situation by the court – not because she agreed to any crime – but because she was in a relationship with someone she knew to be an abuser. This is not the kind of situation envisioned by the exception and should not operate to defeat a victim-defendant’s claim of duress. It seems reasonable that a result as extreme as barring a defense altogether is – and should be – reserved for very narrowly defined behavior, which may be wholly distinguishable from that of a victim-defendant.

F. Use of Evidence of Battering for Duress-Like Purposes, Such as Why the Defendant Participated, Acquiesced, or Complied

Even where a formal duress defense is not available^{xvi} or asserted, evidence on battering and its effects may be relevant to show the defendant’s reasons for seemingly participating in or acquiescing in the batterer’s criminal scheme. Much of the same evidence and argument relevant to a formal duress theory would be similarly relevant to show that she acted out of fear and/or coercion, though short of a legal duress defense. In this way, the evidence of abuse might explain conduct that would otherwise make her appear to have willingly participated in the charged conduct. Jurisdictions vary as to the admissibility of evidence of battering to explain behavior in this way, and thereby rebut the state’s evidence of guilt, intent, or other elements of the crime or sentence.

IV. Claims of Duress/Coercion at Sentencing

Regardless of the presentation or success of a duress claim at trial, duress is highly relevant to sentencing and may be grounds for a downward departure under federal sentencing guidelines and state sentencing schemes. See *Johnson*, 956 F.2d 894; *Willis* 38 F.3d 170; *United States v. Jamison*, 996 F.2d 698 (4th Cir. 1993); *United States v. Whitetail*, 956 F.2d 857 (8th Cir. 1992); *United States v. Cheape*, 889 F.2d 477 (3rd Cir. 1989); *United States v. Gaviria*, 804 F. Supp. 476 (E.D.N.Y. 1992). With respect to specific grounds for departure, see also *United States v. Portman*, No. 99-1251, 1999 U.S. App. LEXIS 32822 (10th Cir. Dec. 17, 1999) (unpub. op.).

During the sentencing phase, the factfinder will have many of the same questions and misconceptions about the defendant as a jury would: Why didn’t she leave, report the abuse, contact law enforcement, and/or escape from the scene? A full investigation and evaluation by an expert on battering are often essential parts of sentencing preparation, even if evidence of abuse was not explored at trial.

V. Conclusion

Presenting a duress defense is challenging regardless of the facts of the case. But for victims who are charged with crimes, some of the most important and impactful evidence the defense must present is at risk of being dismissed, disbelieved, or misunderstood by the fact finder, even when the court agrees to hear the evidence. Getting experts involved early, anticipating common issues that arise in defense cases, and applying a nuanced, creative approach to developing and presenting the defense are crucial components to a well-prepared duress defense.

VII. Appendix

MATERIALS ADDRESSING EVIDENCE OF BATTERING AND DURESS

Litigation Materials

The National Defense Center for Criminalized Survivors has briefs and other pleadings relevant to arguments that evidence of battering should be admitted to support the theory of duress. Two comprehensive briefs on the subject are summarized here.

Commonwealth v. Beth Markman, Amicus Brief (11/03) and Reply Brief (3/04) (Supreme Court of Pennsylvania)

The *amicus* brief in this direct capital appeal is extremely comprehensive. It focuses primarily on two guilt phase issues: the denial of a jury instruction on duress, and the preclusion of expert testimony on battering and its effects. Ms. Markman and her co-defendant/batterer were jointly convicted and sentenced to death. At trial, Ms. Markman presented evidence of continuing physical and sexual abuse and threats by her co-defendant, which escalated during the period immediately prior to the killing. Ms. Markman was precluded from presenting expert testimony at the guilt phase and was denied a jury instruction on duress. The brief emphasizes the court's legal error in finding that Ms. Markman was "reckless" in placing herself in the situation and therefore forfeited her defense as a matter of law. It analyzes in great detail the court's factual misconceptions, such as its assumption that she could have "just left" to a place of safety during any lapse in the physical violence rather than complying with her batterer's demands. The brief provides extensive legal and social science support.

The brief also discusses in detail the court's misunderstanding of the relevance, content and purpose of the proffered expert testimony. It explains why the testimony was essential for the

jury to accurately understand Ms. Markman's experiences of abuse and how they impacted on her forced compliance. The brief also argues that the defendant's prior experiences of abuse with persons other than the batterer were relevant to her duress claim and should have been admitted.

Finally, it includes a single, compelling penalty phase issue: the trial court's blanket refusal to permit Ms. Markman to question the co-defendant's penalty evidence, which directly contradicted her accounts of abuse and duress.

People v. Nettie Reay, Amicus Brief (1/01) (Supreme Court of California)

In this case, the defendant was charged as a conspirator with her batterer in the killing of a third person. She was permitted to present lay and expert testimony regarding battering and its effects to support a claim of duress but was denied jury instructions. The intermediate appellate court reversed, holding that the evidence was sufficient for duress instructions. On direct appeal by the state, the California Supreme Court accepted the case for review and this brief was submitted in support of the defendant.

The brief focuses primarily on the relevance of evidence of battering and its effects to duress, and the need for jury instructions to give effect to that evidence. It also discusses the relevance of evidence of battering to a theory of "imperfect" duress, e.g., a finding that the defendant's fear was honest, but unreasonable.

Ultimately, the California high court did not address the merits of these issues, but instead remanded the case back to the intermediate court in light of its holding in the companion case, *People v. Anderson*, 28 Cal. 4th 767, 50 P.3d 368 (Cal. 2002), that duress is not a defense to non-felony murder in California. *People v. Reay*, No. 030923, 2003 Cal. App. LEXIS 7957 (Cal. Ct. App. Aug. 21, 2003) (unpub. op.). On remand, the intermediate court held that since duress was no longer a defense to murder, it did not need to reach the instructional issues. The court further held that *Anderson* compelled it to reject the defense argument for instructions on imperfect duress. *People v. Reay*, No. 030923, 2003 Cal. App. LEXIS 7957 (Cal. Ct. App. Aug. 21, 2003) (unpub. op.).

II. Cases

The following compilation is intended as a quick reference list of cases involving the use of evidence of battering and its effects to support a duress defense. This list is a work-in-progress, as we will attempt to add and/or modify it as the law continues to evolve.¹ Please note that this list is not exhaustive and should be used only as a starting point for legal research.

Federal Cases

United States v. Dingwall, 6 F.4th 744 (7th Cir. 2021) (The Court held that evidence of abuse is relevant and admissible to support a duress defense – see in-depth discussion in section A. Federal Duress Cases above).

Lopez-Correa v. United States, No. 18-1930 (GAG) at *37 (D.P.R. Aug. 27, 2020) (In a case where the battered defendant was charged along with her abusive partner with creating child pornography, the court held that “testimony about the long-term effects of being battered or domestic violence in general could well be relevant in a case where a defendant claimed that she engaged in criminal activity only because she was forced to by an abusive domestic partner”).

United States v. Lopez, 913 F. 3d 807 (9th Cir. 2019) (The court vacated the conviction of a battered defendant who made a straw purchase of a gun for her abusive ex-boyfriend, even though she herself had a felony conviction and was barred from purchasing the gun. She put on a duress defense, and the court excluded the battering expert. The Court of Appeals for the Ninth Circuit reversed, noting that the majority of federal and state courts now admit evidence of battering in duress case).

United States v. Nwoye, 824 F.3d 1129, 1136 (D.C. Cir. 2016) (The D.C. Court of Appeals noted their agreement with “the majority of the courts, that expert testimony on battered woman syndrome can be relevant to the duress defense. The reason, put simply, is that the duress defense requires a defendant to have acted reasonably under the circumstances, and expert testimony can help a jury assess whether a battered woman’s actions were reasonable”).

United States v. Navedo-Ramirez, 781 F.3d 563, 567 (1st Cir. 2015) (Duress is not limited to situations where someone quite literally has a gun to their head, “the long-term effects of being battered or domestic violence in general could well be relevant in a case where a defendant claimed that she engaged in criminal activity only because she was forced to by an abusive domestic partner”).

Hernandez v. Ashcroft, 345 F.3d 824 (9th Cir. 2003) (Here the court found that the batterer’s violence constituted “extreme cruelty” justifying suspension of battered woman’s deportation even though physical abuse occurred in Mexico. The decision reviews at length dynamics of domestic violence, which may be relevant to duress claims, including fact that violence is a continuing pattern reinforced by batterer’s non- physical tactics of coercion and control).

Gumangan v. United States, 254 F.3d 701 (8th Cir. 2001) (The court found that counsel was not ineffective for failing to explore a duress defense to a charge of stealing and forging checks, since defendant engaged in some transactions without the batterer’s knowledge and therefore a duress claim was unlikely to have succeeded).

Horton v. Massie, 203 F.3d 835 (10th Cir. 2000) (unpub. op) (Counsel was found ineffective for failing to request duress instructions where the defendant testified she participated in the crime because she feared her abusive partner would shoot her if she did not. The fact that she was in physical control of the car when she drove the victim to the location of the murder did not negate the defense).

United States v. Rouse, 168 F.3d 1371 (D.C. Cir. 1999) (In a case where the defendant claimed evidence of abuse was newly discovered and would have supported a duress defense to fraud charges, the court agreed such claim could be grounds for relief but denied the claim here since the trial court made a credibility determination).

United States v. Smith, 113 F. Supp. 2d 879 (E.D. Va. 1999) (The court held that “battered woman syndrome” evidence relies on subjective feelings of the defendant, and therefore it is not relevant to the trial issue of duress although the court found that it was relevant to sentencing).

United States v. Nelson, 966 F. Supp. 1029 (D. Kan. 1997) (The court found that trial counsel was not ineffective for failing to pursue a duress defense or get an evaluation for “battered woman syndrome,” because evidence of duress was presented, a duress instruction was given, and counsel declared that he was familiar with this evidence and did not think it was appropriate in this case).

United States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997), *rev’d on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (In this case the defendant asserted duress as a defense to a lengthy drug conspiracy with her batterer, and expert testimony was admitted and duress instructions were given. The defense claim for more specific instructions tying the evidence of battering to the duress claim was denied by the court because the requested instruction was improper under settled law. The court left open the possibility that such a specific instruction could be warranted in an appropriate case).

United States v. Brown, 891 F. Supp. 1501 (D. Kan. 1995) (The court granted a post-trial motion based on newly discovered evidence of battering which supported the defense of duress/compulsion to drug charge).

United States v. Marengi, 893 F.Supp. 85 (D.Me. 1995) (In ruling on a motion to exclude expert testimony on battering, the court found that evidence of battering is relevant to duress, and analyzed the relevance of evidence of battering to duress claims).

United States v. Willis, 38 F.3d 170 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 2585 (1995) (A battered woman defendant was charged with carrying a firearm and asserted a duress defense alleging that she feared her boyfriend. The Fifth circuit held that the court did not err in precluding the expert from testifying that defendant was “suffering from the battered woman syndrome,” holding that such testimony is “inherently subjective” in that it explains

why the particular defendant succumbed to a threat when a “reasonable” non-battered person would not).

Note: For an excellent discussion and contrast of the *Willis* and *Johnson* decisions, with the conclusion that evidence on battering is not *per se* subjective nor inadmissible in duress cases, see *United States v. Marengi*, 893 F. Supp. 85, 91-97 (D. Me. 1995). See also Kelly Grace Monacella, *Supporting a Defense of Duress: The Admissibility of Battered Woman Syndrome*, 70 Temple L. Rev. 699, 728-41 (1997).

United States v. Johnson, 956 F.2d 894 (9th Cir. 1991) (At a trial on federal drug charges the court found that battering is relevant to duress claims, although the jury rejected duress here. The court held that the evidence of battering must be considered at sentencing).

United States v. Sixty Acres in Etowah County, 930 F.2d 857 (11th Cir. 1991) (A battered defendant asserted duress in a forfeiture case, and the court found that “battered wife syndrome” evidence was not admissible since, despite substantial evidence of abuse, the danger was not sufficiently immediate. The court found that the defendant had a “generalized fear” of her batterer, and that she could have escaped or contacted law enforcement).

State Cases

State v. Richter, 245 Ariz. 1, 424 P.3d 402 (2018) (A victim-defendant who was charged with child abuse alleged that she acted under duress from her abusive husband’s ongoing threats of harm over a three-month period. The court ruled that the plain language of the statute requires that a duress claim be evaluated from the perspective of a reasonable person *in the defendant’s situation*, and the jury should have heard and considered the evidence of abuse).

Wonnum v. State, 942 A.2d 569, 572 (Del. 2007) (The state supreme court reversed the trial court after it excluded the expert and refused to give a duress instruction in a case where the defendant alleged that she participated in a robbery because of threats from her abusive boyfriend. The state supreme court found that the expert report explained why the defendant would have legitimately perceived her boyfriend to be a threat, and offered an explanation as to why she did not recklessly place herself in the situation. The court found that the defendant’s own testimony and the expert report supported a duress instruction. (“[a] reasonable person in the defendant’s situation would have been unable to resist.”).

Dando v. Yukins, 461 F.3d 791 (6th Cir. 2006) (In a case where the battered defendant participated in a series of robberies, the court found that the evidence of abuse could have been relevant to explain why the defendant may have felt that she could not escape the situation. The court concluded that the evidence of battering is relevant to a duress defense under Michigan state law).

State v. B.H., 183 N.J. 171, 188-89, 870 A.2d 273, 283-83 (2005) (A battered defendant was convicted at trial for child sex abuse after putting on a duress defense. The state supreme court affirmed the appellate court's reversal of the trial court's judgment of conviction, finding that the trial court impermissibly limited the expert testimony, and that the trial court should charge the jury that expert testimony on the battered woman syndrome was relevant to the subjective component of the duress defense and her credibility, but was not to be considered regarding the objective component of that defense, the reasonableness of her conduct).

People v. Reay, No. 030923, 2003 Cal. App. LEXIS 7957 (Cal. Ct. App. Aug. 21, 2003) (unpub. op.) (Although the court concluded that the battered defendant should have received an instruction on duress, the conviction was affirmed based on an intervening change in the law prohibiting duress as a defense to non-felony murder).

Commonwealth v. DeMarco, 570 Pa. 263, 272, 809 A.2d 256, 262 (Pa. 2002) (The court found that in considering a defendant's "situation" for the purpose of deciding "reasonable firmness" in resisting a threat for duress, the jury must consider the defendant's history of abuse).

Campbell v. State, 999 P.2d 649 (Wyo. 2000) (The court found that a statute permitting expert testimony on "battered woman syndrome" is limited to cases involving self-defense. The battered defendant who asserted a duress defense to charges of failing to get medical treatment for her child was limited to establishing common law elements of duress which the court found the defendant here did not do. Therefore, the court found that there was no error in the refusal to instruct on duress).

Commonwealth v. Pike, 431 Mass. 212, 726 N.E.2d 940 (Mass. 2000) (The court found that evidence of abuse disclosed post-trial could be considered newly discovered evidence and support a defense of duress to a battered woman's involvement in the killing of a third person, but here the trial judge did not believe the abuse claims).

Graham v. State, 239 Ga. App. 429, 521 S.E.2d 249 (Ga. Ct. App. 1999) (A battered defendant and her abusive partner were charged with molesting her children, and the appellate court found that the lower court did not err in refusing to allow her to introduce both evidence of abuse by her co-defendant and expert testimony on battering since self-defense was not at issue. The defendant was able to testify about abuse and duress instructions were given).

State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (Wash. 1997) (Defendant was entitled to a duress instruction in a welfare fraud case where the court found that the evidence of battering was relevant to her subjective belief and the reasonableness of her belief).

Spunaugle v. State, 1997 OK CR 47, 946 P.2d 246 (Okla. Crim. App. 1997) (In a case where a battered defendant claimed duress as defense to murder, the court erred in precluding her statement that she participated due to co-defendant's threats).

State v. Copeland, 928 S.W.2d 828 (Mo. 1996) (In a case where a battered defendant was convicted as a conspirator with her batterer in the killing of several people, the court held that testimony on battering would not have been admissible to support a duress defense since the state statute permitting expert testimony on battering limits it to self-defense cases).

Commonwealth v. Berger, 417 Pa. Super. 473, 612 A.2d 1037 (Pa. Super. Ct. 1992) (The court found that a battered defendant was “reckless” for remaining with the abuser in a situation that later resulted in his murdering a third person. As a result, she forfeited her right to claim duress).

People v. Romero, 26 Cal. App. 4th 315 (Cal. Ct. App. 1992), *rev’d on other grounds*, 8 Cal. 4th 728, 883 P.2d 388 (1994) (The court found trial counsel ineffective for failing to present expert testimony on “battered woman syndrome” in a case where a battered defendant was charged with robbery and claimed duress. The court notes that the rule permitting expert testimony in self-defense cases applies equally to duress cases).

State v. Lambert, 173 W. Va. 60, 312 S.E.2d 31 (W.Va. 1984) (In a case where a battered defendant was charged with welfare fraud the appellate court found that it was reversible error to fail to instruct on coercion despite an instruction as to intent).

ⁱThe term “battering and its effects” describes lay and expert evidence regarding a defendant’s experiences of abuse, including “the nature and dynamics of battering, the effects of violence, battered women’s responses to violence, and the social and psychological context in which the violence occurs.” Osthoff, S., & Maguigan, H. (2005). Explaining without pathologizing: Testimony on battering and its effects. The term “battering and its effects” is a more accurate and inclusive term for what was initially labeled “battered women’s syndrome.” Despite this evolution in language and understanding, “battered women’s syndrome” still appears frequently in statutes and case law. Dutton, M. A. (2009, August). Update of the “Battered Woman Syndrome” Critique. Harrisburg, PA: VAWnet, a project of the National Resource Center on Domestic Violence/Pennsylvania Coalition Against Domestic Violence. Retrieved 1/6/2023, from: <http://www.vawnet.org>.

ⁱⁱThe specific language describing the temporal proximity of the threatened harm varies among jurisdictions, e.g., whether the threat must be “imminent” or “immediate” or “present.” Some jurisdictions have no explicit requirement that the threat be “imminent” or otherwise close in time to the danger See, e.g., MODEL PENAL CODE § 2.09. Regardless of the specific standard at issue, the reality is that if the court or jury concludes that the danger was not close enough in time to the threat, it is likely that the duress claim will be defeated by application of at least one explicit criterion. For example, under the Model Penal Code standard, though there is no “imminence” requirement, the threat must be one that a person of reasonable firmness could not resist, and the defendant

must not have recklessly placed herself in the situation. These express elements would likely be defeated if the threat is not considered to be impending.

ⁱⁱⁱSee, e.g., Manoney, M. (2019), *Misunderstanding Judy Norman: theory as cause and consequence*, Connecticut Law Review, 51, 671; *Hernandez v. Ashcroft*, 345 F.3d 824, 837 (9th Cir. 2003) (“Significantly, research also shows that women are often at the highest risk of severe abuse or death when they attempt to leave their abusers.”); *State v. Reyes*, 172 N.J. 154, 164, 796 A.2d 879, 884 (2002) (“Often victims are at greatest risk when they leave their abuser because the violence may escalate as the abuser attempts to prevent the victim’s escape.”)

^{iv}See, e.g., Dutton, M.A. (1993), *Understanding women’s responses to domestic violence: a redefinition of battered woman syndrome*, Hofstra Law Review, 21, 1191, 1208. (“To negate the impact of the time period between discrete episodes of serious violence—a time period during which the woman may never know when the next incident will occur, and may continue to live with ongoing psychological abuse – is to fail to recognize what some battered women experience as a continuing ‘state of siege.’...The ‘state of siege’ can begin with the first identifiable act of violence or abuse in the relationship, and may merely be punctuated by the discrete acts of violence or abuse that follow...”); Dutton, M.A., & Goodman, L.A. (2005). *Coercion in intimate partner violence: Toward a new conceptualization*. *Sex Roles*, 52, 743.

^vSee, e.g., Heckert, D. A., & Gondolf, E. W. (2004). *Battered women’s perceptions of risk versus risk factors and instruments in predicting repeat reassault*. *Journal of Interpersonal Violence*, 19(7), 778–800.

^{vi}See, e.g., Cattaneo, L.B., Bell, M.E., Goodman, L.A. et al. *Intimate Partner Violence Victims’ Accuracy in Assessing their Risk of Re-abuse*. *J Fam Viol* 22, 429–440 (2007).

^{vii}Mechanic, M.B. (2022) *Battered Women Charged with Homicide: Expert Consultation, Evaluation, and Testimony*, *Journal of Aggression, Maltreatment & Trauma*, DOI: [10.1080/10926771.2022.2068393](https://doi.org/10.1080/10926771.2022.2068393) Schuller, R. A., & Rzepa, S. (2002). *Expert testimony pertaining to battered woman syndrome: Its impact on jurors’ decisions*. *Law and Human Behavior*, 26(6), 655–673.

^{viii}See, *United States v. Willis*, 38 F.3d 170, 175(5th Cir. 1994) (holding that evidence of battering is “inherently subjective” and therefore incompatible with the objective reasonable person standard).

^{ix}See, e.g., *State v. Copeland*, 928 S.W.2d 828 (Mo. 1996) (where battered woman defendant convicted as conspirator with her batterer in killing of several people; testimony on battering would not have been admissible to support duress defense since state statute permitting expert testimony on battering was interpreted as limited to self-defense cases); *Campbell v. State*, 999 P.2d 649 (Wyo. 2000) (statute permitting expert testimony on “battered woman syndrome” limited to cases involving self-defense; defendant asserting duress defense to charges of failing to get medical treatment for her child is limited to establishing common law elements of duress which defendant here did not do; therefore no error in refusal to instruct on duress).

^x*Compare Commonwealth v. DeMarco*, 570 Pa. 263, 272, 809 A.2d 256, 262 (Pa. 2002) (in considering defendant’s “situation” for purpose of deciding “reasonable firmness” in resisting threat for duress, jury must consider history of abuse) with *Commonwealth v. Stonehouse*, 521 Pa. 41, 59-66, 555 A.2d 772, 781-85 (Pa. 1989) (in deciding the “surrounding circumstances” for purpose of self-defense, jury must consider history of abuse).

^{xi}See also Mechanic, M.B. (2022) *Battered Women Charged with Homicide: Expert Consultation, Evaluation, and Testimony*, *Journal of Aggression, Maltreatment & Trauma*, DOI: [10.1080/10926771.2022.2068393](https://doi.org/10.1080/10926771.2022.2068393)

^{xiii}Pezzell, C., *The Use of Expert Testimony on Battering and Its Effects in Criminal Cases: Examining Case Law from 1994-2016*, accessed at https://drive.google.com/file/d/1Zxkg5MHXxqFmV_jxvfs7XFL6t-hgHAXV/view

^{xiv}Though *Willis* is often cited as authority for precluding expert testimony in duress cases, it does not compel that result. For example, the court in *Willis* relied heavily on the earlier case of *United States v. Johnson*, 956 F.2d 894 (9th Cir. 1999). Arguably, *Willis* incorrectly relied on *Johnson* for a *per se* exclusion of expert testimony. In fact, the *Johnson* decision is primarily about evidence of battering to support duress at sentencing. The *Johnson* court did not hold or even imply that such a claim should be precluded at trial. Two of the defendants actually did present duress claims (one with expert testimony), which simply were not believed. The third defendant, the court held, was properly denied a duress instruction only because she, unlike the other defendants, had not factually established a *prima facie* case of duress. See *Johnson*, 956 F.2d at 888-903. It is also important to note

that in *Willis* itself, the expert actually did testify at trial about the defendant's prior experiences of abuse and the jury received full duress instructions. Given these facts, *Willis* is arguably not persuasive authority for wholly precluding expert testimony or denying duress instructions.

^{xv}BWS terminology connotes the ideas that the defendant is "crazy," pathological, "suffering" from a mental disease of some kind. See note 1. This adds to confusion about the goal and purpose of expert testimony. See Dutton, *Understanding Women's Responses*, 21 Hofstra L. Rev. at 1191, 1226-27; *Humphrey*, 13 Cal.4th at 1083, n. 3, 921 P.2d at 7, n. 3. In reality, while some who are battered also suffer from mental illness, which might (or might not) be exacerbated by the trauma of abuse, the reactions of many survivors are rational responses to irrational situations. *Id.*

^{xvi}In many jurisdictions, duress is not available as a defense to the charge of murder (except felony murder where duress may be a defense to the predicate felonies). In these jurisdictions, the defendant could presumably still be found guilty of the murder even if she were coerced into participating. See, e.g., *People v. Reay*, No. 030923, 2003 Cal. App. LEXIS 7957 (Cal. Ct. App. Aug. 21, 2003) (unpub. op.) (even though defendant should have received instruction on duress, on remand her conviction was affirmed based on intervening change in law prohibiting duress as defense to non-felony murder). It is especially important in these situations to understand the relevance of lay and expert testimony on battering to help explain why she seemingly complied or participated, and therefore to challenge inferences of guilt and/or intent relied upon by the state.



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