

Appeal No. 19-CF-914

IN THE
District of Columbia Court of Appeals

DIANA Y. LALCHAN,
Appellant,
v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

***AMICI CURIAE* BRIEF OF
ORGANIZATIONS AGAINST DOMESTIC VIOLENCE
IN SUPPORT OF DIANA Y. LALCHAN**

CINDENE PEZZELL*
NCDBW
990 Spring Garden St.
Suite 703
Philadelphia, PA 19123
(267) 416-8903
cindene@ncdbw.org
* *Not barred in D.C.*

WILLIAM C. PERDUE
SEAN A. MIRSKI
Counsel of Record
ARNOLD & PORTER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
Sean.Mirski@arnoldporter.com

July 14, 2021

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to D.C. Court of Appeals Rule 29(a)(4)(A), counsel for the National Clearinghouse for the Defense of Battered Women, the Battered Women's Justice Project, and the D.C. Coalition Against Domestic Violence discloses that all three organizations have no corporate parent or subsidiaries. Counsel also sets forth the following list of parties, *amici curiae*, and their counsel.

Diana Y. Lalchan
c/o Daniel Gonen
Public Defender Service
633 Indiana Avenue, NW
Washington, DC 20004

The United States of America
c/o Chrisellen R. Kolb
Chief of the Appellate Division
Office of the United States Attorney
555 4th Street, NW
Washington, DC 20530

The National Clearinghouse for the
Defense of Battered Women
The Battered Women's Justice Project
The D.C. Coalition Against Domestic
Violence
c/o Sean A. Mirski
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, NW
Washington, DC 20001

/s/ Sean A. Mirski
Sean A. Mirski

TABLE OF CONTENTS

	Page
RULE 26.1 DISCLOSURE STATEMENT.....	i
STATEMENTS OF INTEREST.....	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Evidence of Battering and Its Effects Is Relevant and Reliable.....	4
II. Evidence of Battering and Its Effects Is Uniquely Complex and Prone to Misunderstandings.....	10
III. Jury Instructions Are Necessary to Dispel These Misunderstandings	14
CONCLUSION	20
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Arcoren v. United States</i> , 929 F.2d 1235 (8th Cir. 1991)	12
<i>Bechtel v. State</i> , 840 P.2d 1 (Okla. Crim. App. 1992).....	16
<i>Boykins v. State</i> , 995 P.2d 474 (Nev. 2000).....	15, 16
<i>Commonwealth v. Stonehouse</i> , 555 A.2d 772 (Pa. 1989).....	15
<i>Dunn v. Roberts</i> , 963 F.2d 308 (10th Cir. 1992)	12
<i>Ibn-Tamas v. United States</i> , 407 A.2d 626 (D.C. App. 1979)	6, 7
<i>People v. Humphrey</i> , 921 P.2d 1 (Cal. 1996)	5, 16
<i>Richardson v. United States</i> , 98 A.3d 178 (D.C. 2014)	6
<i>Smith v. State</i> , 486 S.E.2d 819 (Ga. 1997)	15
<i>State v. Elzey</i> , 244 A.3d 1068 (Md. 2021)	16
<i>State v. Eng</i> , No. 14015, 1994 WL 543277 (Ohio Ct. App. Sept. 30, 1994).....	16
<i>State v. Hodges</i> , 716 P.2d 563 (Kan. Ct. App. 1986)	13
<i>State v. Kelly</i> , 478 A.2d 364 (N.J. Sup. Ct. 1984)	13

<i>State v. Koss</i> , 551 N.E.2d 970 (Ohio 1990)	13
--	----

<i>United States v. Nwoye</i> , 824 F.3d 1129 (D.C. Cir. 2016).....	6, 7, 8
--	---------

Jury Instructions

Ralph K. Anderson Jr., <i>South Carolina Request to Change – Criminal</i> , Defenses, SCJI CRIM § 6-17 (2d ed. 2012).....	18
--	----

<i>Georgia Suggested Pattern Jury Instructions, Vol. II: Criminal Cases</i> , GAJICRIM § 3.10.14 (4th ed. 2021).....	18
---	----

Howard Leventhal, 1 <i>Charges to Jury & Requests to Charge in</i> <i>Criminal Case in New York</i> § 5:45 (2020)	18
--	----

<i>Judicial Council of California Criminal Jury Instructions, CALCRIM</i> Nos. 850-51 (2021 ed.)	18
---	----

2 Maryland <i>Criminal Jury Instructions and Commentary</i> § 8.13(G) (2020).....	17
--	----

<i>New Jersey Model Criminal Jury Charges, NJ-JICRIM Non 2C</i> Charges, Battered Woman Syndrome – Defenses (2021).....	18
--	----

<i>Ohio Jury Instructions, Criminal, OJI-CR 417.43 Battered Person</i> Syndrome (Rev. Apr. 13, 2019).....	18
--	----

Vernon’s Okla. Forms 2d, <i>Oklahoma Uniform Jury Instructions</i> , <i>Criminal, OUJI-CR 8-47</i> (Apr. 2020 Update).....	18
---	----

11 <i>Washington Practice, Pattern Jury Instructions Criminal, WPIC</i> 17.02 (5th ed. April 2021 Update).....	18
---	----

1-11 William Cooper & Donald P. Cetrulo, <i>Kentucky Instructions to</i> <i>Juries (Criminal)</i> §§ 11.06, 11.07A (6th ed. 2020).....	18
---	----

Other Authorities

Mary Ann Dutton, <i>Understanding Women’s Responses to Domestic</i> <i>Violence: A Redefinition of Battered Woman Syndrome</i> , 21 Hofstra L. Rev. 1191 (1993).....	5
--	---

Mary Ann Dutton, <i>Update of the “Battered Woman Syndrome” Critique</i> , VAWnet (Aug. 2009), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_BWSCritique.pdf	5
Kathleen J. Ferraro & Noël B. Busch-Armendariz, <i>The Use of Expert Testimony on Intimate Partner Violence</i> , VAWnet (Aug. 2009), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_ExpertTestimony.pdf	11
Kit Kinports, <i>Deconstructing the “Image” of the Battered Woman: So Much Activity, So Little Change: A Reply to the Critics of Battered Women’s Self-Defense</i> , 23 St. Louis U. Pub. L. Rev. 155 (2004).....	9
Steven E. Perkel & Benjamin Perkel, <i>Jury Instructions: Work in Progress</i> , 27 The Jury Expert 1 (May 2015)	12
Cindene Pezzell, <i>The Use of Expert Testimony on Battering and Its Effects in Criminal Cases: Examining Case Law from 1994-2016</i> (Dec. 2018), https://www.ncdbw.org/publications-by-author	19
Regina A. Schuller et al., <i>The Impact of Expert Testimony in Trials of Battered Women Who Kill</i> , 11 Psychiatry, Psych. & L. 1 (2004).....	12
Evan Stark, <i>Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control</i> , 58 Alb. L. Rev. 973 (1995).....	5
U.S. Dep’t of Justice & U.S. Dep’t of Health and Human Services, <i>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</i> , NCJ No. 160972 (May 1996), https://nij.ojp.gov/library/publications/validity-and-use-evidence-concerning-battering-and-its-effects-criminal-trials	5
Lenore E. A. Walker, <i>The Battered Woman</i> (1979)	4
Lenore E. A. Walker, <i>The Battered Woman Syndrome</i> (1984)	4
Lenore E. A. Walker, <i>Battered Women Syndrome and Self-Defense</i> , 6 Notre Dame J.L. Ethics & Pub. Pol’y 321 (1992).....	8

STATEMENTS OF INTEREST

For over 30 years, the **National Clearinghouse for the Defense of Battered Women** (NCDBW) has been working to secure justice for victims of battering charged with crimes. NCDBW provides customized assistance and technical expertise to victim defendants, defense attorneys, anti-domestic violence advocates, expert witnesses, and others. It has worked on thousands of cases, helping defense teams ensure that factfinders understand the ways in which evidence of defendants' experiences of abuse support affirmative defenses, explain behavior, reduce culpability, and mitigate punishment.

The **Battered Women's Justice Project** (BWJP) is a national technical assistance center that provides training and resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice system response to intimate partner violence. The BWJP promotes systemic change within the civil and criminal justice systems to ensure an effective and just response to victims and perpetrators of intimate partner violence, as well as the children exposed to this violence. The BWJP serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. In an effort to promote more safe and just results for women and their children, the BWJP works at state, national, and international levels to engage court systems in methods

of accurately assessing the effects of intimate partner violence on women and children and to fashion safe outcomes that hold batterers accountable.

The **D.C. Coalition Against Domestic Violence** is the federally recognized statewide coalition of domestic violence programs, organizations, and individuals organized to ensure the elimination of domestic violence in the District of Columbia. The Coalition is a resource for the thousands of adults and children experiencing domestic violence in the District each year, as well as the local organizations that serve them.

Amici have an important stake in ensuring that the ultimate decision in this case, like that in any case involving a victim defendant, is the product of a properly informed and instructed jury. The outcome of this case is critically important not only for this particular defendant, but also for all victims charged with crimes whose experiences of abuse are relevant to the crimes for which they are charged, and for whom particularized jury instructions on battering and its effects are absolutely essential in ensuring the proper evaluation of their defenses.

All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Battering, sometimes referred to as “intimate partner violence” or “domestic violence,” harms millions of Americans each year. Its impact goes far beyond physical injury and trauma—experiencing battering increases the risks of addiction,

poverty, and even criminalization and incarceration. One of battering's most insidious consequences, however, occurs when the victims of battering are forced to defend themselves against their abusive partners and are subsequently charged with crimes for having done so. At best, their fates are in the hands of factfinders who labor under near-ubiquitous ignorance about battering and its effects. At worst, these factfinders have adopted harmful myths and misconceptions about battering and those who experience it. When juries are not given the information and instruction they need to accurately assess the evidence before them, victim-defendants have little hope for fair and just outcomes in court.

Appellant Diana Lalchan was convicted of manslaughter after the trial court expressed a clear misunderstanding of the relevance of evidence of battering and its effects and then failed to properly instruct the jury on the use of that evidence. The jury thus had no guidance about how to properly apply the evidence of domestic violence that was presented to them. As a result, the defendant was deprived of a fair trial.

ARGUMENT

Evidence of battering and its effects is relevant to the objective reasonableness prong of a self-defense claim. The trial court thus deprived Ms. Lalchan of proper consideration of her self-defense claim by refusing to instruct the jury clearly that in assessing all elements of self-defense it should consider her circumstances, including

her abuse and its effects at the hands of the decedent, as presented through lay and expert witnesses.

I. Evidence of Battering and Its Effects Is Relevant and Reliable

In the late 1970s, Dr. Lenore Walker coined the term “battered woman syndrome” to describe the psychological and behavioral traits common to women who are exposed to severe, repeated domestic abuse. Her early work focused on some of the phenomena she identified in her research on women accused of killing their abusive partners, such as the “cycle of violence,” which refers to a repeating pattern commonly seen in abusive relationships: a “honeymoon” stage, followed by a tension building phase, followed by an abusive incident, and finally, remorse by the abusive partner. *See generally* Lenore E. A. Walker, *The Battered Woman* (1979); Lenore E. A. Walker, *The Battered Woman Syndrome* (1984). While “battered woman syndrome” provided a framework for victim defendants to introduce the impact of their experiences of abuse into evidence, it did not adequately capture the experiences, beliefs, perceptions, and realities of victims’ lives.

Over time, the field has trended away from using the term “battered woman syndrome” and toward the term “battering and its effects,” which *amici* uses throughout this brief to describe the substance of lay and expert testimony regarding the abuse described above. As a phrase, “battered woman syndrome” is still deeply embedded in legal literature, but it is an outdated and somewhat inaccurate framework

for understanding the impact of battering. Many domestic violence experts now agree that the phrase is too limiting, and that it incorrectly implies all women who experience abuse react in the exact same way and suffer from a common “syndromic” malady. See Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1196 (1993); *People v. Humphrey*, 921 P.2d 1, 7 n.3 (Cal. 1996). Far from being “abnormal,” however, the variety of responses displayed by victims of battering are generally normal and reasonable responses to highly *unreasonable* situations. Partly for that reason, experts and researchers now generally prefer the term “battering and its effects” to describe the experiences, beliefs, perceptions, and realities of the lives of battered women (and men and children). See, e.g., Mary Ann Dutton, *Update of the “Battered Woman Syndrome” Critique*, VAWnet (Aug. 2009), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_BWSCritique.pdf; Dutton, *Women’s Responses*, *supra*; U.S. Dep’t of Justice & U.S. Dep’t of Health and Human Services, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act*, NCJ No. 160972 (May 1996), <https://nij.ojp.gov/library/publications/validity-and-use-evidence-concerning-battering-and-its-effects-criminal-trials>; Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 975-76 (1995).

Whatever the label, evidence of battering and its effects is now universally recognized as being relevant to claims of self-defense. *See United States v. Nwoye*, 824 F.3d 1129, 1138 (D.C. Cir. 2016) (Kavanaugh, J.) (“virtually all courts accept” that “battered woman syndrome can be relevant to prove self-defense”). Self-defense claims, as this Court has explained, have both a subjective and an objective prong: the defendant must have (1) “honestly believed that . . . he [or she] was in imminent danger of serious bodily harm or death, and that he [or she] had to use lethal force to save himself [or herself] from that harm; and (2) . . . both beliefs [must have been] objectively reasonable.” *Richardson v. United States*, 98 A.3d 178, 187 (D.C. 2014). Courts have recognized the relevance of evidence on battering and its effects to properly understanding both prongs.

In *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. App. 1979), for example, this Court held that expert testimony on battering and its effects was relevant to the both prongs of self-defense. The trial court had incorrectly concluded that such testimony would “invade [] the province of the jury, who are the sole judges of the facts and triers of the credibility of the witnesses, including the defendant.” *Id.* at 631. But this Court clarified that the subject matter of battering and its effects was “so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman,” *id.* at 632, and that the jury thus could have benefitted from evidence explaining “why the mentality and behavior of [battered]

women are at variance with the ordinary lay perception of how someone would be likely to react to a spouse who is a batterer,” *id.* at 634. Expert testimony on battering, this Court noted, could help explain the defendant’s perceptions and reactions to the threat, which would provide “background data to help the jury” determine whether the defendant “actually and reasonably believed” she was in imminent danger of bodily harm when she committed the alleged offenses. *Id.* at 632.

Or take the case of *United States v. Nwoye*, 824 F.3d 1129 (D.C. Cir. 2016). Although *Nwoye* considered battering and its effects in the context of a duress defense, then-Judge Kavanaugh drew a direct parallel to self-defense, observing that “[t]he elements of self-defense are similar to the elements of duress” insofar as both have a requirement of imminent harm and no reasonable alternative. *Id.* at 1138. He noted that testimony on battering and its effects was relevant not only as to the defendant’s subjective beliefs about both requirements, but about the objective reasonableness of those beliefs as well. *See id.* at 1136-37. “Reasonableness,” he explained,

is 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. The circumstances that juries have historically considered in assessing reasonableness have been factors “that differentiate the actor from another, like his size, strength, age, or health,” as well as facts known to the defendant at the time in question, such as the defendant’s knowledge of an assailant’s violent reputation. On the other hand, courts have typically precluded juries from considering factors such as the defendant’s particular “psychological incapacity” or her “clarity of

judgment, suggestibility or moral insight.” 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 1137 (citations omitted).

Judge Kavanaugh then provided examples of how evidence of battering and its effects can influence both the imminent-harm and the no-reasonable-alternative requirements. As to the imminent-harm requirement, defendants “in battering relationships are often ‘hypervigilant to cues of impending danger and accurately perceive the seriousness of the situation before another person who had not been repeatedly abused might recognize the danger.’” *Id.* (quoting Lenore E. A. Walker, *Battered Women Syndrome and Self-Defense*, 6 Notre Dame J.L. Ethics & Pub. Pol’y 321, 324 (1992)). Expert testimony on battering and its effects can thus help the jury understand how “[r]emarks or gestures that may seem harmless to the average observer might be reasonably understood to presage imminent and severe violence when viewed against the backdrop of the batterer’s particular pattern of violence.” *Id.* As for the no-reasonable-alternative requirement, Judge Kavanaugh explained that “[e]xpert testimony on [non-obvious] impediments to separation can help explain why a battered woman did not take advantage of an otherwise reasonable-sounding opportunity to avoid committing the alleged crime.” *Id.* at 1138.

Scholars have taken similar approaches. In *Deconstructing the “Image” of the Battered Woman: So Much Activity, So Little Change: A Reply to the Critics of Battered Women’s Self-Defense*, for example, Professor Kit Kinports explains that

under conventional self-defense doctrine, the objective element of the defense asks whether a reasonable person in the defendant’s circumstances would have believed she was in imminent danger of death or serious bodily harm. For example, the criminal law has traditionally permitted defendants to introduce evidence of the decedent’s violent history or reputation to support their claim that they both honestly—and reasonably—believed the decedent posed a threat to them. . . . A battered woman’s history and pattern of battering are among the circumstances relevant in evaluating what a reasonable person in her situation would have believed. As one court explained, self-defense law “requires the jury to place itself figuratively in the defendant’s shoes and to determine the reasonableness of the defendant’s belief from the facts and circumstances as the defendant perceived them,” and “[i]n order to determine what constituted ‘defendant’s shoes,’ the jury must know whether or not a defendant is a battered person (emphasis added).” In fact, this evidence is no different from the evidence of the decedent’s violent actions or propensities that has long been admitted in support of self-defense claims.

23 St. Louis U. Pub. L. Rev. 155, 164-65 (2004) (citations omitted).

As this consensus demonstrates, the relevance of evidence of battering and its effects to a jury’s determination of both subjective belief *and* objective reasonableness is not in question.

II. Evidence of Battering and Its Effects Is Uniquely Complex and Prone to Misunderstandings

On its own, presenting evidence of battering and its effects can often do a defendant more harm than good. Part of the problem is that such evidence can be easily misunderstood by juries absent proper guidance.

First, evidence of battering and its effects has different valences in different contexts. Not only will the evidence's valence differ depending on the proponent's individual circumstances, but it will also be relevant to differing aspects of a given case. For example, a prosecutor may introduce expert testimony on the narrow issue of why a recanted allegation of abuse does not necessarily indicate that the complainant lied to the police at the scene of an alleged crime. When used to support affirmative defenses, however, evidence of battering and its effects may assist jurors in accurately assessing danger levels, or in otherwise evaluating the objective reasonableness of the actions of a defendant who claims self-defense or duress. Evidence of battering and its effects may also be relevant to the elements of criminal charges, such as state of mind or intent. Such evidence can also help the jurors interpret puzzling victim behavior and remedy misconceptions about battering and its effects that may be in play. Jurors may thus have knowledge of battering and its effects in some of these contexts but not others, making it easy for them to misapply their knowledge to new contexts.

Second, evidence of battering and its effects is often misunderstood because lay people typically believe they already understand everything they need to know about the dynamics of violence within an intimate relationship, and thus may view expertise about battering and its effects differently than other categories of evidence. For instance, jurors appreciate that they may not be able to interpret the reading from a mass spectrometer without being given the proper information and direction; with battering and its effects, however, they are likely to confidently rely on their own “common sense,” which, when based on detrimental misinformation, results in inaccurate conclusions and unjust verdicts.

Several reasons explain this overconfidence. To start, lay people may not realize that many of their beliefs and assumptions about domestic violence are erroneous. Battering “is a complex phenomenon that is not easily understood or encapsulated in a syndrome or psychological diagnosis,” and “in cases involving survivors . . . the facts often diverge from common sense understanding and from what the general public believes about survivors of abuse.” Kathleen J. Ferraro & Noël B. Busch-Armendariz, *The Use of Expert Testimony on Intimate Partner Violence*, VAWnet 1 (Aug. 2009), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_ExpertTestimony.pdf. (citations omitted). In other words, lay people often mistakenly think they already know what they need to know about the impact of abuse, and they will evaluate evidence without consideration of the ways

in which a victim's circumstances are factually different than a non-victim's. Relatedly, "jurors are likely to substitute common sense, prior experiences, easier questions, stereotypes and cognitive shortcuts to facilitate their decision-making. While these adaptive responses to complexity and poor communication are useful in everyday life, they become a problem for jurors because they may or may not be consistent with the law and facts as they were given to them." Steven E. Perkel & Benjamin Perkel, *Jury Instructions: Work in Progress*, 27 *The Jury Expert* 1, 3 (May 2015) (citations omitted); *see also* Regina A. Schuller et al., *The Impact of Expert Testimony in Trials of Battered Women Who Kill*, 11 *Psychiatry, Psych. & L.* 1, 1-12 (2004) (finding based on a mock jury simulation that victim-defendants who present expert testimony on battering and its effects fare better than those who do not).

One of the most common lay misunderstandings is that evidence of battering and its effects is relevant only to what the defendant actually *believed* at the time of the incident, and not to the objective reasonableness of that belief. That misunderstanding traces back to the common misconception that evidence of battering is evidence of a malady or pathology—the kind of evidence that is only relevant to prove the defendant suffered from diminished capacity or was otherwise mentally infirm. *See generally Dunn v. Roberts*, 963 F.2d 308, 314 (10th Cir. 1992); *Arcoren v. United States*, 929 F.2d 1235, 1239-41 (8th Cir.), *cert. denied*, 502 U.S.

913 (1991); *State v. Kelly*, 478 A.2d 364, 378 (N.J. Sup. Ct. 1984); *State v. Koss*, 551 N.E.2d 970, 972 (Ohio 1990); *State v. Hodges*, 716 P.2d 563, 570 (Kan. Ct. App. 1986), *overruled on other grounds*, *State v. Stewart*, 763 P.2d 572, 579 (Kan. 1988). But, as explained above, that is incorrect—evidence of battering and its effects can help inform the jury not only of what the defendant believed, but also whether those beliefs were objectively reasonable.

Unfortunately, the trial court itself fell prey to this particular misunderstanding. The court misunderstood and mischaracterized the nature of battering and its effects as relating only to evidence of “diminished capacity,” that is, the *subjective* prong of self-defense:

So if somebody suffered from PTSD, if somebody was a battered spouse, those things may all be very relevant to whether a person actually believed, the subjective prong, actually believed that the person was in imminent danger of death or serious bodily injury. But I don't believe that our law, with respect to PTSD or trauma or some of the other things that you wanted me to put into the instruction says that we factor in a reasonable person who is suffering from those problems, because I think that's about diminished capacity. And so it's relevant to the subjective prong. I don't believe, given the law about diminished capacity, that it is what we mean by “the circumstances as they appear to the person.”

3/1/19 Tr. 35-36.

While evidence of battering and its effects may be relevant in cases involving allegations of diminished capacity, that is not the purpose for which it was proffered by trial counsel here. Contrary to what the trial judge said at the hearing, this

evidence is highly relevant to *objective* reasonableness when considering the “circumstances as they appeared to the person” in a self-defense case.

III. Jury Instructions Are Necessary to Dispel These Misunderstandings

If left to fester, misinformation about battering and its effects can and does actively undermine a battered defendant’s case. Prosecutors can exploit harmful misinformation about battering and its effects—unintentionally or intentionally—to undermine a victim-defendant’s credibility and falsely magnify his or her culpability. Characteristics and behaviors that experts on battering and its effects recognize as evidence of trauma may be misinterpreted by the trier of fact as a lack of veracity; use of a weapon may be inaccurately characterized as use of disproportionate force. Or jurors may assume, as the trial court did here, that the evidence they heard was only relevant to their finding of what the defendant actually believed at the time of the incident—and not to the objective reasonableness of a defendant’s actions.

In short, jurors cannot accurately assess the facts presented unless they are given accurate and specific guidance on where and how they may consider evidence of battering and its effects. For these reasons, particularized jury instructions on the use of evidence of battering and its effects are crucial in a victim-defendant’s case.

Courts around the country have recognized this necessity for particularized jury instructions on battering and its effects. Some have long reasoned that the

specialized nature of evidence of battering and its effects requires a precise jury instruction that explains the purpose for which battering evidence is admitted. For example, the Pennsylvania Supreme Court has found counsel ineffective for failing to request a jury instruction requiring the jury to consider the abuse suffered by defendant in assessing the reasonableness of the defendant's fear of imminent danger. *See Commonwealth v. Stonehouse*, 555 A.2d 772, 781-82 (1989) (“[T]he jury should have been apprised of the fact that the abuse appellant suffered for three years was to be considered by the jury with respect to the reasonableness of appellant's fear of imminent danger of death or serious bodily injury . . .”).

Georgia's Supreme Court has also required jury instructions on battering and its effects:

We take this opportunity to announce the rule that when a battered person syndrome self-defense claim has been properly established, the court should give specific jury instructions on justification by self-defense which are tailored to explain how the defendant's experiences as a battered person affected that defendant's state of mind at the time of the killing.

Smith v. State, 486 S.E.2d 819, 823 (Ga. 1997).

In *Boykins v. State*, 995 P.2d 474 (Nev. 2000), the Nevada Supreme Court went so far as to direct the trial court about what instruction they should give at trial regarding the application of battering evidence. The Court said:

[T]he trial court failed to properly instruct the jury on [the plaintiff's] theory that battered woman syndrome should be considered by the jury not only as to the reasonableness of [the plaintiff's] conduct, but as to

her state of mind at the time of the shooting. Therefore, the case must be reversed and remanded for a new trial. At the new trial, the court should give the following instruction:

You have heard expert testimony concerning the effect of domestic violence on the beliefs, behavior, and perception of a woman who may be suffering from battered woman syndrome. The defendant asserts that she was suffering from battered woman syndrome at the time of the killing. This, in itself, is not a legal defense. However, if you believe that the defendant was suffering from battered woman syndrome, you may consider such evidence when determining the defendant's state of mind at the time of the killing and whether she acted in self-defense. You may also consider such evidence as to the defendant's credibility and the reasonableness of her belief that she was about to suffer imminent death or great bodily harm and the need to slay an aggressor.

Id. at 479; *see also State v. Elzey*, 244 A.3d 1068, 1090 (Md. 2021); *State v. Eng*, No. 14015, 1994 WL 543277, at *6 (Ohio Ct. App. Sept. 30, 1994); *People v. Humphrey*, 921 P.2d 1, 9-11 (Cal. 1996); *Bechtel v. State*, 840 P.2d 1, 11 (Okla. Crim. App. 1992).

Similarly, several states have pattern jury instructions that reflect the need for particularized guidance in cases involving battered defendants. For example, the Maryland pattern self-defense instruction suggests the following in cases involving battered defendants:

You have heard evidence that the defendant was a victim of repeated physical and psychological abuse by _____ (*insert name of victim*). You have also heard from an expert witness that a person who is a victim of repeated physical and psychological abuse by a [spouse] [former spouse] [child] [(cohabitant) (co-occupant)] [former (cohabitant) (co-occupant)] may suffer from a psychological condition called “Battered [Spouse] [Woman] [Child]

Syndrome.” [Also, you heard expert testimony that the defendant exhibits the characteristics consistent with “battered [spouse] [woman] [child] syndrome”.]

You may consider this evidence for the purpose of explaining _____’s (*insert name of defendant*) motive or state of mind, or both, and [her] [his] beliefs and perceptions at the time of the commission of the alleged offense in order to determine whether the requirements of self-defense exist. Specifically, you may consider this evidence in determining the degree to which it:

(1) explains whether _____ (*insert name of defendant*) actually believed in the necessity to use deadly force to defend [herself] [himself] against imminent or immediate danger of serious bodily harm or death;

(2) sheds light on the reasonableness of _____’s (*insert name of defendant*) belief that [she] [he] was in imminent or immediate danger of serious physical harm or death. In assessing reasonableness, the issue is whether a reasonable person in the defendant’s circumstances would have perceived or seen a threat of serious physical harm or death;

(3) helps explain the reasonableness of the force used by _____ (*insert name of defendant*) in response to the perceived threat....

2 Maryland *Criminal Jury Instructions and Commentary* § 8.13(G) (2020).

California also has a particularized pattern jury instruction for cases involving victim defendants:

You have heard testimony from _____<*insert name of expert*> regarding the effect of (battered women’s syndrome/intimate partner battering/_____<*insert other description used by expert for syndrome*>).

_____’s <*insert name of expert*> testimony about (battered women’s syndrome/intimate partner battering/_____<*insert other description*

used by expert for syndrome>) is not evidence that the defendant committed any of the crimes charged against (him/her). You may consider this evidence only in deciding whether the defendant actually believed that (he/she) needed to defend (himself/herself) against an immediate threat of great bodily injury or death, and whether that belief was reasonable or unreasonable.

When deciding whether the defendant's belief was reasonable or unreasonable, consider all the circumstances as they were known by or appeared to the defendant. Also consider what conduct would appear to be necessary to a reasonable person in a similar situation with similar knowledge.

Judicial Council of California Criminal Jury Instructions, CALCRIM Nos. 850-51 (2021 ed.); *see also Ohio Jury Instructions, Criminal*, OJI-CR 417.43 Battered Person Syndrome (Rev. Apr. 13, 2019); *Georgia Suggested Pattern Jury Instructions, Vol. II: Criminal Cases*, GAJICRIM § 3.10.14 (4th ed. 2021); 1-11 William Cooper & Donald P. Cetrulo, *Kentucky Instructions to Juries (Criminal)* §§ 11.06, 11.07A (6th ed. 2020); *New Jersey Model Criminal Jury Charges*, NJ-JICRIM Non 2C Charges, Battered Woman Syndrome – Defenses (2021); Howard Leventhal, 1 *Charges to Jury & Requests to Charge in Criminal Case in New York* § 5:45 (2020); Vernon's Okla. Forms 2d, *Oklahoma Uniform Jury Instructions, Criminal*, OUJI-CR 8-47 (Apr. 2020 Update); Ralph K. Anderson Jr., *South Carolina Request to Change – Criminal*, Defenses, SCJI CRIM § 6-17 (2d ed. 2012); 11 *Washington Practice, Pattern Jury Instructions Criminal*, WPIC 17.02 (5th ed. April 2021 Update).

Given the obvious importance of clear instructions on battering issues, it should come as no surprise that problematic jury instructions are the most frequently raised issue on appeal in criminal cases involving expert evidence of battering and its effects, as well as the most common ground for reversal. *See* Cindene Pezzell, *The Use of Expert Testimony on Battering and Its Effects in Criminal Cases: Examining Case Law from 1994-2016*, at 20 (Dec. 2018), <https://www.ncdbw.org/publications-by-author>.

Here, the trial jury was not given the tools it needed to understand and evaluate Ms. Lalchan's defense theory. The jury heard complicated evidence without any explanation as to its relevance to the key issues in the case. Because the jury was not directed to use the evidence they heard to evaluate the reasonableness of Ms. Lalchan's apprehension of imminent danger and her response, the jury may have dismissed the evidence of abuse from consideration all together. To avert that risk, this Court should rule in Ms. Lalchan's favor and instruct that if this case is retried, the trial court should issue an accurate, particularized jury instruction on the application of evidence of battering and its effects.

CONCLUSION

The Court should reverse the convictions.

Dated: July 14, 2021

Respectfully Submitted,

/s/ Sean A. Mirski

WILLIAM C. PERDUE (Bar #995365)

SEAN A. MIRSKI (Bar #1657436)

Counsel of Record

ARNOLD & PORTER LLP

601 Massachusetts Avenue NW

Washington, DC 20001

(202) 942-5000

Sean.Mirski@arnoldporter.com

CINDENE PEZZELL*

NCDBW

990 Spring Garden St., Suite 703

Philadelphia, PA 19123

(267) 416-8903

cindene@ncdbw.org

* *Not barred in D.C.*

CERTIFICATE OF SERVICE

I certify that on July 14, 2021, this brief was served through this Court's electronic filing system to:

Samia Fam
Mikel-Meredith Weidman
Daniel Gonen
Public Defender Service
Counsel for Appellant

Chrisellen R. Kolb
Chief of the Appellate Division
Office of the United States Attorney
Counsel for Appellee

/s/ Sean A. Mirski
Sean A. Mirski