

IN THE COURT OF APPEALS OF THE STATE OF OREGON

AMY ELIZABETH TYSON,

Petitioner-Respondent,

v.

KIM BROCKAMP,

Defendant-Appellant,

Washington County Circuit Court  
Case No. C127526CV

CA A157220

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BRIEF ON THE MERITS OF *AMICI CURIAE*  
OREGON JUSTICE RESOURCE CENTER AND  
THE NATIONAL CLEARINGHOUSE FOR  
THE DEFENSE OF BATTERED WOMEN

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On Appeal from a Judgment of the Circuit Court for Washington County  
Honorable LINDA L. BERGMAN, Judge

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BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE  
RESOURCE CENTER AND THE NATIONAL CLEARINGHOUSE FOR THE  
DEFENSE OF BATTERED WOMEN

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INTRODUCTION  
AND STATEMENT OF INTEREST

*Amici curiae* are statewide and national nonprofit organizations that work to enhance the quality of legal representation to traditionally underserved communities, including victims of battering charged with crimes. *Amici* submit this brief in an effort to aid the court in analyzing the prejudicial effect of counsel's failure to present competent, informed, and prepared expert testimony on battering and its effects. By providing the court with selected social science research and findings in the field of domestic violence, *Amici* seek to help demonstrate to the court some of the various ways in which the expert witness, had he been correctly prepared by trial counsel, could have given the jury the information it needed to properly evaluate the Defendant's sole defense of duress.

*Amici* recognize that all criminal defendants are constitutionally entitled to adequate, effective representation by counsel. To provide criminal defendants with their constitutionally protected rights, criminal defense attorneys must adequately prepare for trial, including by adequately preparing any expert witnesses the defense may call to testify. This obligation is particularly important where the subject matter (here, the social science research pertaining to the effects of long-term battering) is beyond the ken of the ordinary trier of fact and, often

times, counterintuitive. Without properly preparing an expert to sufficiently explain the counterintuitive effects of battering, a jury is likely to base its decisions on myths and misconceptions rather than facts and science, leading to unjust verdicts.

*Amici* believe that this case presents issues of fundamental importance for victims of battering charged with crimes. It illustrates how the essential right to present a defense is jeopardized when trial counsel fails to present expert testimony that competently educates the jury about the dynamics of battering as relevant to the factual and legal issues in the case. *Amici* hopes to educate the court regarding the current state of the social science research pertaining to battering and its effects in order to demonstrate why Amy Tyson's ("Tyson") trial counsel's failure to adequately prepare Tyson's expert witness was prejudicial. *Amici* respectfully urge the court to affirm the post-conviction court's decision in this case.

The Oregon Justice Resource Center (OJRC) is a non-profit organization founded in 2011. OJRC works to "dismantle systemic discrimination in the administration of justice by promoting civil rights and enhancing the quality of legal representation to traditionally underserved communities." OJRC Mission Statement, [www.ojrc.info/mission-statement](http://www.ojrc.info/mission-statement). The OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and law students from Lewis & Clark Law School, where OJRC is located.

The National Clearinghouse for the Defense of Battered Women (NCDBW), founded in 1987, is a national nonprofit educational and advocacy organization which works to increase justice for victims of intimate partner battering who are charged with crimes related to their experiences of abuse. NCDBW does not advocate special legal rules for battered women charged with crimes. Rather, it believes that all defendants, including battered women defendants, should receive the full benefit of all rights and protections designed to safeguard fair trials, accurate verdicts, and proportionate sentences. To this end, NCDBW works nationally with defense attorneys, expert witnesses, and others involved in the criminal justice system to help ensure that legal decisions that affect victims of battering charged with crimes are not based on misconceptions about domestic violence and battered women.

## **QUESTION PRESENTED**

### **Question Presented**

Does defense counsel's failure to apprise his expert witness of the goal and purpose of the expert testimony as related to the legal issues, failure to ensure that the expert has all materials that the expert needs to prepare and present his testimony, and failure to inform the expert about critical facts relating to the defendant's experiences of abuse and her batterer's abusive behavior have a tendency to affect the outcome of a trial?

## Summary Answer

Yes. Thorough, accurate, and informed expert testimony on behalf of battered women asserting a duress defense is critical in assuring that a jury is given all information necessary to accurately and fairly assess the case, unencumbered by commonly-held misconceptions that would otherwise lead to unreliable results.

### SUMMARY OF ARGUMENT

Failure to present expert testimony regarding battering and its effects has the tendency to affect the outcome of trial in cases where a criminal defendant asserts a duress defense that is based on the effects of battering.<sup>1</sup> The social science research applicable to the subject is largely unknown to the average fact-finder. Unless the fact-finder is educated by an expert regarding the effects battering has on women, the fact-finder is likely to find the conduct of victims of battering to be counterintuitive. A battered woman's claim of duress is particularly difficult for jurors to grasp because, without expert elucidation, her decisions and actions might seem wrong or "reckless" and make her undeserving of a duress defense.

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<sup>1</sup> The expression "battering and its effects" is used in this brief to describe the substance of lay and expert evidence regarding a defendant's experiences of abuse. The language of "battered woman syndrome" was used by the expert and in the court below to describe the substance of such information.

Counsel must ensure that the expert is fully armed with all relevant factual and legal information so that the expert has a full picture of the defendant and the batterer. Without this complete history, the expert cannot know how to connect his or her expertise to the issues in question. Counsel's obligation is arguably even more critical when the legal issues are prone to misinterpretation, and failure of counsel to prepare the expert and ensure competent testimony is especially egregious.

Had counsel fulfilled his obligation to Tyson, the expert would have educated the jury regarding social science information directly relevant to the decision the jury was tasked with making. Such information would have included: (1) the type of coercive behavior that could lead a person to commit acts on the instruction of her abuser that the person would never commit otherwise; (2) the susceptibility of some individuals; (3) whether socio-economic, racial, ethnic, or other factors influence the prevalence of or reaction to battering; (4) the ability or ease with which victims can "just leave" the abuser and the relationship; (5) why victims would fail to alert authorities; and (6) why a battering victim remains loyal to her abuser. Failure to adequately prepare an expert witness such that he or she effectively explains the social science research to the jury constitutes prejudicial ineffective assistance of counsel because, without that evidence, the jury will base its conclusions on misconceptions unsupported by science.

## ARGUMENT

Tyson's trial counsel failed to properly prepare Tyson's trial expert, and, as a result, Tyson's trial expert failed to adequately explain the extent of the abuse Tyson suffered at the hands of Patrick Tyson ("Patrick") and the effects of that abuse on Tyson. Without proper expert testimony, jurors are likely to reach conclusions based on commonly held misconceptions. Expert testimony is necessary to explain otherwise counterintuitive victim conduct that could lead jurors to believe that the defendant is not actually the victim of battering or is otherwise a willing participant. Social science research elucidates this behavior, and a properly prepared expert educates a jury about this research. An attorney fails to provide the degree of legal assistance required by both the Oregon and Federal Constitutions when he or she fails to prepare an expert sufficient to convey this information to a jury.

### I. MISPERCEPTIONS OF BATTERED WOMEN ARE PREVALENT, AND A PROPERLY PREPARED EXPERT IS NEEDED TO EDUCATE THE JURY.

Unlike other more technical areas of expertise, domestic violence is a subject uniquely susceptible to misinformation: Laypersons often *think* they understand how victims experience abuse, whether from their own exposure to domestic violence or suppositions about how they would behave if they were victims, but, in reality, the layperson's "common sense" consists largely of misconceptions long repudiated by research in the field. As post-conviction trial

judge Bergman correctly noted below, “[t]he thinking of a battered woman makes no sense to the ordinary person who has not been in that situation.”

Respondent’s ER 3-4, Finding 16. Indeed, as Judge Bergman further correctly found, a “jury needs to understand the victim’s lack of ability to make lifesaving decisions to disclose, to get help, to leave.” *Id.*

Thus, “[i]n many cases involving battered women, it is also necessary to bring in an expert witness to testify about battering and its effects to help jurors and judges understand the experiences, beliefs, and perceptions of women who are beaten by their intimate partners - information that the common lay person usually does not possess.” J. Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 Wis. Women’s L.J. 75, 78–80 (1997); *see also State v. Borrelli*, 227 Conn 153, 167, 629 A2d 1105 (Conn. 1993) (noting that “the research data indicates that potential jurors may hold beliefs and attitudes about abused women at variance with the views of experts who have studied or had experience with abused women.”) (quoting N. Vidmar & R. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 Law & Contemp. Probs. 133, 154 (1989)); *State v. Hennem*, 441 NW2d 793, 798 (Minn 1989).

Courts have long recognized that understanding the impact and psychological complexity of intimate partner violence is beyond the ken of ordinary jurors. *See, e.g., State v. Stevens*, 147 Or App 592, 599 n.4 (1997)

(holding that battered wife syndrome or “BWS” was, at that time, an accepted psychological diagnosis and collecting cases allowing expert witness testimony on the subject while noting that “expert witness testimony about BWS has been admitted in at least 17 states and that there are numerous recent books and articles that demonstrate the general acceptance of the theory”). To understand the complex and seemingly illogical behaviors exhibited by victims of battering, jurors need expert testimony to help explain that these behaviors are not atypical among battering victims: “Without [expert] testimony, the jury is likely to find for the defendant only if they can envision themselves reacting in the same way. For a defendant whose perceptions truly are different from the norm, affected by a history of battering, the exclusion of expert testimony prevents validation of her perceptions.” S. Murphy, *Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome*, 25 Colum. J.L. & Soc. Probs. 277, 297 (1992)).

Scholarly literature confirms that laypersons have many misconceptions about domestic violence that interfere with their ability to accurately understand the issues involved. Those misconceptions include, for example, that battered women can easily leave their situations, that they are responsible for their failure to leave, that battering is a series of discrete events rather than a continuing state of siege; that battered women are passive, meek, and blameworthy for the situation in which they find themselves. *See, e.g.,* M. Mahoney, *Legal Images of*

*Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991); E. Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alberta L. Rev. 973, 980–81 (1995).

These misconceptions lead to the incorrect assumption that all battered women fit (or should fit) a particular profile. In reality, battered women face diverse circumstances and employ an array of strategies for coping with abuse, all of which may help explain a woman’s behavior in a particular situation. See E. Schneider, *Resistance to Equality*, 57 U. Pitt. L. Rev. 477, 505 (1996). Only expert testimony can present the jury with sufficient information to allow the jury to understand the psychological effects of battering and how it can cause behavior that might otherwise seem illogical on the part of the battering victim. See, e.g., *State v. Kelly*, 97 NJ 178, 206, 478 A2d 364, 378 (N.J. 1984) (describing expert testimony regarding BWS as “essential to rebut the general misconceptions regarding battered women”). As one court noted

If the jury sees the defendant’s circumstances immediately prior to commission of the crime and there is no gun held to her head or other markedly extreme duress, the jury may conclude that any fear of imminent death or violence was unreasonable. However, if the defendant is permitted to pull the camera back to provide the broader picture, so to speak, of her circumstances, the jury could learn of a pattern of violence, control, and coercion leading up to the criminal act. Expert testimony could be helpful to explain to the jury how a reasonable person reacts to repeated beatings and emotional abuse. Providing 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 of 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.

*United States v. Marengi*, 893 F. Supp. 85, (D. Me. 1995).

An expert can help provide a jury with a “social and psychological context in which the trier can understand and evaluate claims” regarding a battered woman’s experiences of abuse. National Institute of Justice, *The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials* at 21 (internal citations omitted). “The testimony of the expert is intended to refute some of the common prejudices against battered women, thus permitting the jury to have a better ability to judge the evidence rationally, rather than judge it on the basis of an erroneous prejudice.” *Pennsylvania v. Dillon*, 528 Pa 417, 432, 598 A2d 963, 968 (Pa. 1991). “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.” M.A. Dutton, *Understanding Women’s Responses*, 21 Hofstra L. Rev. 1191, 1195 (1993).

Thus, an expert is needed to give alternative explanations for and clarification of the myths about intimate partner violence for two reasons. First, domestic violence is a complex phenomenon that is not easily understood or encapsulated in a syndrome or psychological diagnosis. Second, in cases involving survivors of domestic violence, the facts often diverge from common sense understanding and from what the general public believes about survivors of abuse. See generally L. Ellison, *Closing the credibility gap: The prosecutorial use of expert witness testimony in sexual assault cases* in *The International Journal of Evidence and Proof*, 9(4), 239–68 (2005).

Failure to present such expert testimony fully is likely to affect the outcome of a trial because, without such testimony, jurors are required to rely on their own misperceptions.

II. THE RESEARCH REGARDING THE EFFECTS OF BATTERING ALIGNS WITH TYSON'S BEHAVIOR, AND THIS CONNECTION SHOULD HAVE BEEN EXPLAINED BY A PROPERTLY PREPARED DEFENSE EXPERT.

Domestic violence is about control, and in extreme cases of domestic violence, fear and degradation are employed in such a manner that the victim is rendered *unable to refuse* the requests or demands of her abuser. Such a situation presents a classic duress defense—the defendant is less blameworthy because she did not have the free will to not engage in criminal activity. Such

an extreme case of domestic violence was present in this case, but how that violence impacted Tyson was never effectively communicated to the jury.

Most courts recognize battering and its effects as a “set of psychological and behavioral reactions exhibited by victims of severe, long-term, domestic physical and emotional abuse.” *United States v. Johnson*, 956 F.2d 894, 899 (9th Cir. 1992) (superseded by statute on other grounds) (citing L. Walker, *The Battered Woman Syndrome* (1984)). Domestic violence manifests itself as “a continuing pattern of behavior that includes physical and nonphysical manifestations of power and control.” J. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J. L. & Pol’y 617, 653–54 (2006). As the Ninth Circuit recently reinforced, “domestic violence is not an isolated, individual event, but rather a pattern of perpetrator behavior used against the victim.” *United States v. Haischer*, No. 13-10392 (9th Cir. Slip. op. Mar. 25, 2015) (quoting *Hernandez v. Ashcroft*, 345 F.3d 824, 837 (9th Cir. 2003)). In turn, these physical and non-physical manifestations of power and control by the abuser cause the abused to exhibit certain behaviors necessary to survive, which may be counterintuitive to the lay person.

The science surrounding battering and its effects has enjoyed extensive attention and research over the last several decades, and we understand more about this issue now than at any point in the past. *See generally* National Institute of Justice, U.S. Dep’t of Justice, *The Validity and Use of Evidence*

*Concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act, NCJ 160972* (May 1996); E.

Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007)

(hereinafter “*Coercive Control*”). Despite this research, it remains true today that without proper appraisal of the results of that research “a prosecutor or trier of fact may not believe a battered woman’s account of her relationship with a spouse or companion because of misconceptions about domestic violence.”

*Developments in the Law: Legal Responses to Domestic Violence*, 106 Harv. L. Rev. 1498, 1580–81 (1993). Judges and jurors alike are “riddled by a lifetime of exposure to the same mistaken myths that shape and bias the public’s attitudes.”

P. Craig-Taylor, *Lifting the Veil: The Intersectionality of Ethics, Culture, and Gender Bias in Domestic Violence Cases*, 32 Rutgers L. Rev. 31, 37 (2008)

(internal quotations omitted). Unless one is exposed to the research, it is difficult to separate oneself from “a lifetime of exposure to the same mistaken myths.” *Id.* Below are a number of issues that are beyond the knowledge of the average juror and would likely affect a juror’s understanding of the mental process, and culpability, of an individual who is the victim of battering.

#### A. *Coercive control*

Only by understanding domestic violence as a *pattern* of power and control, a “strategy used to subjugate the victim for the gain of the abuser,” can a battered woman’s responses to that violence be assessed. M.A. Anderson, et

al., “*Why Doesn’t She Just Leave?*”: *A Descriptive Study of Victim Reported Impediments to Her Safety*, 18 *J. of Family Violence* 151 (2003) (hereinafter “*Why Doesn’t She Just Leave?*”). Ongoing abuse creates extreme power imbalances in which the batterer retains excessive influence and control. See E. Stark, *Commentary on Johnson’s “Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence,”* 12 *Violence Against Women* 1019, 1019–25 (2006) (criticizing the tendency to define battering based on specific incidents of violence and advocating that the focus instead be on “[d]efining battering as a form of subordination rather than violence”) (hereinafter “*Conflict and Control*”). Understanding the complexities of coercive control is critical because it can help to explain and contextualize battered women’s behavior and actions, especially those that appear illogical to outsiders.

Coercive control is a term used to describe the “on-going and gender-specific pattern of coercive and controlling behaviors that causes a range of harms in addition to injury.” Stark, *Coercive Control* at 99. As the term suggests, batterers employ (1) coercive behaviors: “the use of force or threats to compel or dispel a particular response[, which i]n addition to causing immediate pain, injury, fear, or death, coercion can have long-term physical, behavioral, or psychological consequences;” and (2) controlling behaviors: “comprised of structural forms of deprivation, exploitation, and command that compel obedience indirectly by monopolizing vital resources, dictating preferred

choices, microregulating a partner's behavior, limiting her options, and depriving her of supports needed to exercise independent judgment." Stark, *Coercive Control* at 228–29.

This is a dynamic process in which the victim is isolated and disempowered and controlled by her partner's credible threats of negative consequences in the event of non-compliance. Dutton & Goodman, *Coercion in Intimate Partner Violence: Towards a New Conceptualization*, 52 *Sex Roles* 743, 743–44 (2005) (hereinafter "*Coercion in IPV*"). "[T]he unique profile of [the victim of domestic abuse] arises as much from the deprivation of liberty implied by coercion and control as it does from violence-induced trauma." *United States v. Haischer*, No. 13-10392 (9th Cir. Slip. op. Mar. 25, 2015) (holding that evidence of abuse of the defendant was probative as to her knowledge and intent, or lack thereof, and should have been admitted) (brackets in original).

Batterers often employ violence in order to compel compliance. "Once intimate partner violence occurs, a line has been crossed and the possibility remains that it will happen again, even though a woman may try to believe that it won't." Dutton & Goodman, *Coercion in IPV*, at 747–48. But, actual or threatened acts of violence are not the only means of control employed by batterers, and, in fact, a 1999 study found that, while psychological and physical abuse had fairly independent effects on depression and self-esteem,

psychological abuse had a much stronger impact on the battering victim's fear than did physical abuse. Sackett & Saunders, *The Impact of Different Forms of Psychological Abuse on Battered Women*, 14 *Violence and Victims* 1, 105 (1999) ("Ridiculing traits, criticizing behavior, and jealous/control had the strongest relationship to fear."). Regardless of the method employed—violence, isolation, enforcement of petty rules, sexual abuse, or threats against others, to name a few—"[t]he ultimate effect of these techniques is to convince the victim that the perpetrator is omnipotent, that resistance is futile, and that her life depends upon winning his indulgence through absolute compliance." J. Herman, *Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror* 77 (1992).

A study of 525 battered women who were evaluated at a mental health center in an urban area over ten years found that 251 of those women had been coerced into committing crimes by their batterer. See Loring & Beaudoin, *Battered Women as Coerced Victim Perpetrators*, 2 *J. Emotional Abuse* 3, 3–14 (2000). As the authors of that study noted

The challenge posed by the victim-perpetrator phenomenon involves defining behaviors of the victim not as a single event, but as a part of a structural sequence of actions in a climate of terror and diminished, violated sense of self . . . . The climate of terror emanates from threats and/or the actual behaviors of the abuser, not only toward the victim-perpetrator but also toward her beloved significant others. This is a profound process of emotional abuse

where feelings of helplessness are overwhelming for a victim-perpetrator who fears harm and death to those she loves, but feels she can do little to prevent it except obey the abuser. Even obedience may not yield protection.

*Id.* One must understand these facts and findings in order to understand how even an intelligent, capable woman can be systematically isolated, controlled, and degraded to the point that she will unquestioningly comply with any orders given by her abuser, including otherwise unthinkable acts of violence or depravity.

Here, trial counsel did not provide Tyson's expert, Dr. Mowry, with the full extent of Patrick's coercive control. Counsel failed to prepare Dr. Mowry to explain how batterers use force and threaten their victims into submission so that they are controlled by the batterer. Dr. Mowry was unable to do so because counsel only provided him with two witness statements and a general explanation of the evidence through his investigator. Dr. Mowry was not present during any of the witness testimony. Thus, he never viewed the entire set of events—the horrific physical abuse, the complete change in Tyson's behavior, Patrick's constant presence with her, his requiring her to put all her calls at work on speaker phone so he knew everyone she spoke to and what she said, taking away her e-mail access, isolating her by moving to a rural area, causing her to lose her job, taking over her finances and running them into the ground, doing all the talking for her in public, requiring her to get permission to

go to the bathroom, making her sit in his truck (and within his sight) all day while he was working, making her perform oral sex every morning before she went to work, making her re-enact the sexual abuse that she suffered at her father's house, making her insert bigger and bigger dildos until he could insert his fist into her vagina, telling others in her presence to go buy a shovel so he could kill and bury her, and threatening to kill them if they told anyone. *See* Petitioner-Respondent's Answering Brief at 2–16.

B. *The susceptibility of previously abused individuals*

Individuals who have suffered previous abuse, particularly abuse as a child, are more susceptible to future abuse.

Prior victimization (i.e., childhood physical or sexual abuse, witnessing violence toward the mother, physical or sexual violence in dating relationships, rape by stranger, sexual harassment or sexual assault by someone in authority, assault by a stranger) or other forms of childhood trauma . . . may increase a woman's vulnerability to even greater negative effects of later victimization resulting from subsequent trauma (Van der kolk, 1987), including battering. The increased traumatic effects, or compounded trauma, result from the accumulation of victimization experiences that have not been addressed through effective intervention. *The compounded traumatic response may occur with subsequent occurrences of the same type of victimization (i.e., repeated episodes of battering, repeated rapes) or occurrence of multiple forms of trauma (e.g., childhood sexual abuse, rape, battering).*

[S]ubsequent traumatic events may not only produce their own effects, but may also trigger dormant

responses from previous traumas. In such a case, the victim reexperiences the impact of a previous trauma, sometimes for the first time since the original event, simultaneously with experiencing the current trauma, creating a compounded traumatic response. For example, one battered woman who had left a previous relationship in which her husband was severely abusive was exposed to verbal abuse by a new partner in a subsequent relationship. This verbal abuse triggered a fear reaction that was probably far more severe than what might have been expected from the verbal abuse alone.

M.A. Dutton, *Empowering and Healing the Battered Woman: A Model for Assessment and Intervention* 83–84 (1992) (emphasis added); see also Dutton & Goodman, *Coercion in IPV* at 743. “[C]hildren’s responses to trauma can render them simultaneously over-reactive, helpless and immobilized—whether as victims of abuse [or] witnesses to domestic and community violence . . . with the potential for long-lasting changes in brain anatomy and physiology.” W.J. Harris, et al., *In the Best Interests of Society*, 48 *J. of Child Psychology and Psychiatry* 392 (2007).

Not only does this information help to explain why some individuals are more likely to find themselves in abusive relationships, it also helps explain why the average juror may have a very difficult time identifying with or understanding how the victim-perpetrator got herself involved with an abusive partner. The average person is incapable of understanding the horror faced by the battering victim and the thought process that horror produces without

explanation by an expert. *See generally Dillon*, 528 Pa at 432, 598 A2d at 968 (Cappy, J. concurring) (“[M]any jurors who know nothing about battered women simply find the tales of abuse too incredible to believe and thus, refuse to keep an open mind about the rest of the evidence, being convinced that ‘no one would have put up with such abuse therefore it must not be true.’”). Part of the reason the average juror cannot comprehend the type of abuse at issue in these cases is because they have no personal experience of abuse. Information about the susceptibility of previous abuse victims to entering abusive relationships is vital to understanding why certain individuals are more likely, for reasons beyond their control and through no fault of their own, to find themselves in abusive relationships.

In Tyson’s case, trial counsel did not prepare Dr. Mowry to testify as to Tyson’s susceptibility as a previously abused individual. Tyson’s father abused her when she was a girl. Petitioner-Respondent’s Answering Brief at 2. As Dr. Mowry stated in his affidavit, trial counsel should have asked him to address the effects of this abuse. In this case, the effects of previous abuse are multiplied, because Patrick made Tyson re-enact the abuse with him; Patrick playing Tyson’s father and forced Tyson to play herself as a little girl. Tyson’s counsel failed to have Dr. Mowry explain the damaging and lasting effects such abuse would have had on Tyson.

C. *The demographics of domestic violence*

Another common misconception that can be dispelled by competent expert testimony is that battering is a problem only for low-income, poorly educated populations. In fact, domestic violence knows no socio-economic or educational limits. “The privileged are not exempt; women from every social class are battered, even those from moneyed, educated, and politically powerful families.” A. Goetting, *Getting Out: Life Stories of Women Who Left Abusive Men* vii (1999).

Multiple studies confirm the universality of the domestic violence scourge. See, e.g., *Encyclopedia of Women and Gender: Sex Similarities and Differences and the Impact of Society on Gender*, Vol. 1 at 178 (2001). A study of 482 female partners of male batterers court-ordered to attend batterer intervention programs in Houston, Pittsburgh, Denver, and Dallas found that 41% of the female partners had at least some college education. Further, 46% were working full time outside the home, and 16% were in administrative or management-type positions. E. Gondolf, *The Victims of Court-Ordered Batterers: Their Victimization, Helpseeking, and Perceptions*, 4 *Violence Against Women* at 659–76 (Dec. 1998).

A study of 419 cases in which police interacted with battered women in Charlotte, North Carolina, found that 36.6% of those women had attended some college and that 65.1% were employed full- or part-time. Hutchison & Hirschel,

*Abused Women: Help-Seeking Strategies and Police Utilization*, 4 *Violence Against Women* at 436–56 (Dec. 1998).

In another study, the mean educational level of the women surveyed was 13.5 years and ranged between completing fourth grade to having obtained a Ph.D. Campbell, et al., *Voices of Strength and Resistance: A Contextual and Longitudinal Analysis of Women's Responses to Battering*, 13 *J. of Interpersonal Violence* 6 (1998).

Domestic violence and battering are not problems isolated to the poor and poorly educated. However, unless a juror is exposed to the research from social scientists analyzing this issue, he or she is likely to rely on the myths and misconceptions learned from sources such as *The Honeymooners* or the nightly news, which reinforce these stereotypes.

In the present case, trial counsel failed to have Dr. Mowry explain that Tyson's demographic did not exclude her from being a victim of domestic abuse. The district attorney took the position that Tyson had a college degree and a good job, so she was too smart to be duped into a battering relationship. Petitioner-Respondent's Answering Brief at 24. Trial counsel did nothing to dispute this. Dr. Mowry could and should have been able to rebut this argument by explaining that education and intelligence have nothing to do with who falls victim to battery. Had Tyson's counsel properly prepared Dr. Mowry to explain the settled research showing battered women come from all walks of

life, the prosecutor would have been unable to exploit this misconception and improperly suggest that because Tyson was educated, she was not battered.

However, Dr. Mowry did not realize that this issue existed because he was not present at the other portions of the trial and was not adequately prepared.

D. *Victims do not and cannot “just leave.”*

Among the most common misconceptions held by the public is the belief that no woman would stay in a relationship if the abuse were as bad as claimed and that, if the abuse actually is that bad, the woman has only herself to blame if she enters into or remains in such a relationship. See D.R. Follingstad, et al., *Justifiability, Sympathy Level, and Internal/External Locus of the Reasons Battered Women Remain in Abusive Relationships*, 16 *Violence and Victims* 621, 622 (2001) (hereinafter “*Justifiability*”) (“[L]ay persons often search for explanations as to why the woman stays in the abusive relationship . . . they may actually view her decision to stay in the relationship as an explanation for her victimization.”).

[A] substantial proportion of the public (from which juries are drawn) subscribes to various stereotypes or ‘myths’ about battered women. More than one-third of those surveyed seem to believe that a battered woman is at least partially responsible for the battering she suffers and that if she remains in a battering relationship, she is at least somewhat masochistic, and probably emotionally disturbed. Moreover, nearly two-thirds of those surveyed apparently believe that a battered woman can ‘simply leave’ her batterer.

C.P. Ewing & M. Aubrey, *Battered Woman and Public Opinion: Some Realities Abuse the Myths*, 2 *J. of Family Violence* 257, 263 (1987); *see also* Herbert, et al., *Coping with an Abusive Relationship: How and Why do Women Stay?*, 53 *J. of Marriage and Family* 311 (1991) (Even among those who do not believe that a woman is responsible for provoking violence, it is a common belief that the woman is responsible for finding a solution to it, such as leaving).

While the conclusion that a battering victim should “just leave” the batterer is common and natural, it “fail[s] to account for the complexity of the battered woman’s situation while also placing much of the responsibility for ending the abuse on the shoulders of the woman being abused rather than on the individual who ultimately has control over whether or not he abuses his wife.” Follingstad, *Justifiability* at 622. Obstacles preventing battered women from leaving their abusive partners include (1) fear of retaliation; (2) lack of economic resources; (3) social isolation imposed by the abuser; (4) emotional manipulation; and (5) lack of knowledge of options. Anderson, *Why Doesn’t She Just Leave?* at 152.

First, it is important to note that separating from an abusive partner will not necessarily end the violence, and, in fact, separating or attempting to separate often leads to continued or escalated violence. J. L. Hardesty, *Separation Assault in the Context of Postdivorce Parenting: An Integrative Review of the Literature*, 8 *Violence Against Women* 579, 599 (2002); R. E.

Fleury, et al., *When Ending the Relationship Does Not End the Violence: Women's Experiences of Violence by Former Partners*, 6 *Violence Against Women* 1363, 1364 (2000). "Far from ending violence, separation often results in continued and/or escalated abuse. . . .[S]urveys . . . estimate that compared with married women, separated women are about 25 times more likely to be assaulted by ex-partners and five times more likely to be murdered." M. Wilson & M. Daly, *Spousal Homicide Risk and Estrangement*, 8 *Violence and Victims* 3 (1993).

"Separation assault," a term coined for actions designed to block a woman from leaving, retaliate for her departure, or forcibly end the separation "takes place when the batterer feels his control eroding. The most dangerous moment may come when a woman makes a decision to leave, at the moment she actually walks out, or shortly after she has left" M. Mahoney, *Victimization or oppression? Women's lives, violence, and agency*, in *The Public Nature of Private Violence: The Discovery of Domestic Abuse* at 79 (1994). Batterers' violent acts are designed to instill fear through which the batterer gains control. This is achieved through a dynamic process of conditioning in which the batterer makes demands and ensures compliance through credible threats of negative consequences and action on those threats. This perception of "being controlled" may keep many victims in the abusive relationship. Anderson, *Why Doesn't She Just Leave?* "Psychological abuse can also help to maintain abusive

relationships [by causing] self-doubt, confusion, and depression,” which can cause battered women to “have a difficult time seeing their options and marshaling the resources needed to leave the relationship.” Sackett & Saunders, *The Impact of Different Forms of Psychological Abuse on Battered Women* at 105.

Second, in many cases separation is difficult because the battering victim truly is in love with her abuser. Abusive relationships usually begin with love, romance, and passion and the violence only arises or intensifies over time and only shows itself at certain times. “In between, there may be acts of remorse, resolves to change, and acts of tenderness and kindness, which make life more complicated because if relationships were all bad, decisions to terminate them would be relatively easy.” H. Fraser, *Women, Love, and Intimacy “Gone Wrong”: Fire, Wind, and Ice*, 20 *Affilia* 10, 14 (2005). “Given that so many mixed messages are promulgated about love, especially in relation to heterosexual love relationships, it can take time for women to figure out that so-called jealous behaviors are not passionate but scary and disabling.” *Id.* at 15. Counterintuitive though it may be, “[f]or many women, having an adult intimate relationship is an essential part of life . . . [and] may feel a sense of loyalty to their partners and a responsibility to make the relationship work” even when the relationship is abusive and patently unhealthy. Davies, et al., *Safety Planning with Battered Women: Complex Lives/Difficult Choices* 38–39 (1998).

It is difficult for those that have never been abused to understand why or how another person would endure being battered, raped, and verbally degraded. The behavior is counterintuitive and illogical. Without proper explanation of the social science that shows that these are common behaviors that are not at all illogical to the women in this position, a juror is left to apply his or her common sense and conclude that the battering victim entered into or remained in the relationship because the abuse was not as bad as made out or because she is a masochist.

Trial counsel did not prepare Dr. Mowry to discuss why victims commonly do not just leave. The defense did not go into any detailed explanation of why battered women stay in the relationship. Dr. Mowry made no mention of the fear of retaliation, a fear that Tyson would have harbored after being beaten so severely and isolated in a mobile home in a rural area. There was no explanation that Patrick had drained all of her economic resources by taking over and spending all of her money. There was no explanation of the effect of the forced isolation from all of Tyson's friends. There was no mention of Patrick's manipulative behavior, including forcing Tyson to make scripted phone calls while he stood behind her to ensure she only said what he wanted her to say. *See* Petitioner-Respondent's Answering Brief at 13–14.

E. *Victims commonly do not report.*

For many of the same reasons women do not leave abusive relationships, women often do not formally report abuse. Fear of retaliation is a major obstacle to reporting. See B. Hart, *Battered Women and the Criminal Justice System*, in *Do Arrests and Restraining Orders Work?* (1996). Indeed, the likelihood of retaliation for reporting may even be higher than that associated with attempting to leave. Additionally, women who experience sexual abuse may be embarrassed or unwilling to submit to examination of intimate areas of the body. M.E. Wolf, et al., *Barriers to Seeking Police Help for Intimate Partner Violence*, 18 *J. of Family Violence* 121, 124 (2003) (hereinafter “*Barriers to Seeking Police Help*”). Victims also often believe that reporting abuse would be fruitless because they “view their batterers as very smart and manipulative in being able to convince others, including the police, that they had not committed any abuse or that the victim had been at fault.” *Id.* at 125.

The psychological abuse that often accompanies domestic violence is devastating, creating long-lasting feelings of inferiority and destroying self-confidence. Ferraro & Johnson, *How Women Experience Battering: The Process of Victimization*, 30 *Soc. Probs.* 325, 334 (1983). Victims of domestic abuse frequently hide the fact of their abuse, at least in part, because they believe that they are responsible. *Id.* Battered women also deny and minimize injury and harm because “the experience of being battered by a spouse is so

discordant with their expectations” that they cannot acknowledge it. *Id.* at 329. “Such women may tolerate a wide range of physical abuse before defining it as an injurious assault.” *Id.* The fact of the matter is that “[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions,” so it is unsurprising that women do not report. *Giles v. California*, 554 U.S. 353, 377 (2008).

The reluctance of women to report domestic violence is well documented. *See generally United States v. Lawrence*, 263 F. Supp. 2d 953, 963 n.6 (D. Neb. 2002) (acknowledging factors that influence a battered woman’s decision to not seek assistance from nor cooperate with law enforcement); *Wildoner v. Borough of Ramsey*, 162 N.J. 375, 392–93, 744 A.2d 1146, 1156 (N.J. 2000) (“It is well documented that, for a number of reasons, victims of domestic violence often do not report their abuse to law enforcement officers...”); Wolf, *Barriers to Seeking Police Help* at 124 (“Some victims who called the police expecting that the batterer would be arrested have felt that their efforts were wasted or left them in a more dangerous environment had they not called the police. As a result, they are reluctant to call again.”). So, while the failure to report may seem illogical to the layperson, it is actually a very common behavior among battered women.

In Tyson's case, trial counsel could have had Dr. Mowry explain why Tyson did not report her abuse. Tyson's counsel never had Dr. Mowry explain the effects of Patrick's sexual abuse. Dr. Mowry failed to elaborate on the abuse, or explain the effects of the abuse on Tyson. Moreover, if counsel had investigated Patrick to see if he had battered other women, he could have located Patrick's ex-wife, who Patrick claimed at trial had died in his arms. The ex-wife could have verified that Patrick also subjected her and another woman—Katrina Soukup—to sexual abuse. *See* Petitioner-Respondent's Answering Brief, pp. 34–35, 37.

As explained above, victims like Tyson often do not tell family, friends, or police about the abuse they are suffering because they know that their manipulative abusers are masters at explaining away the claims. Patrick is a perfect example of this manipulation: He testified at Tyson's trial, denied all of the abuse, and was such a good liar that the trial judge said she was not sure that Tyson had been battered at all. The judge ultimately gave Tyson a longer sentence than she gave Patrick. Tyson's counsel should have, and could have, had Dr. Mowry explain that abuse victims commonly do not report the abuse. He could have also dispelled Patrick's denial by introducing, through Dr. Mowry, descriptions of Patrick's abuse of other women, all who are hiding from him for fear of their lives.

F. *Continued loyalty to abuser*

A final example of counterintuitive behavior that is typical among battered women is continued loyalty to the abuser even after the victim is no longer subject to the direct control of the abuser. This illogical behavior is entirely common among battered women and not at all illogical or counterintuitive from their point of view. See W.S. Deaton & M. Hertica, *A Therapist's Guide to Growing Free: A manual for Survivors of Domestic Violence* 59–60 (2001) (describing the love-hate relationship victims have with their batterers as a form of “co-dependence”).

It is an unavoidable fact that “[s]ome battered women love their partners.” Davies, *Safety Planning with Battered Women: Complex Lives/Difficult Choices* at 38–39. While the love a battering victim may have for her batterer may be hard to understand by outsiders, it is a very typical phenomenon. Jurors should understand that such reactions are not atypical and that continued loyalty to a batterer, even well after the relationship has ended, is not a sign that the battering victim is fabricating her story of abuse.

In the case at bar, trial counsel failed to prepare Dr. Mowry to explain why Tyson continued to be loyal to Patrick. Tyson stood by Patrick even after they were both arrested and jailed—a fact that may influence a juror who might otherwise wonder why, when she was no longer under his direct control, she was loyal to him. Dr. Mowry could have explained that battered women love

their husbands and cling to false hope. He could have explained that Tyson's loyalty was to be expected and was consistent with the conduct of battered women. He could have explained what effect Tyson's ongoing love for Patrick had on her ability to report his actions, even after she was no longer physically with him. *See* Petitioner-Respondent's Answering Brief at 24. Tyson's counsel failed to adequately prepare Dr. Mowry to explain this social science.

There is ample social science research that is directly relevant and applicable to duress defenses like the one Tyson attempted to assert in this case. The specific facts applicable to Tyson's situation show that she exhibited many of the behaviors one might, armed with the social science knowledge, expect from a battered woman. Without expert testimony applying the science to Tyson's situation and explaining to the jury how the research explains her behavior, the jury was left to form its own conclusions. Because Dr. Mowry was not sufficiently apprised of the applicable facts to communicate that information to the jury, Tyson's trial counsel failed to adequately represent Tyson.

## **CONCLUSION**

Battering, and the coercive control exercised in battering relationships, causes battering victims to exhibit normal, but counterintuitive behaviors. Without expert testimony explaining to a jury that such seemingly illogical behaviors are not atypical, jurors are likely to come to conclusions based on

their erroneous belief that battering victims would leave if it were really that bad, would stand up to their abuser rather than do something that is against their views or beliefs, or would report their abuser to law enforcement if given a chance. Where defense counsel fails to properly prepare an expert to sufficiently understand the facts of a case such that the expert is able to dispel these misconceptions, defense counsel's failure constitutes ineffective assistance of counsel and it is highly likely to affect the outcome of trial.

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**CERTIFICATE OF COMPLIANCE  
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 9,341 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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**CERTIFICATE OF FILING AND SERVICE**

I certify that on March 30, 2015, I filed the original of this BRIEF ON THE MERITS OF *AMICI CURIAE* with the State Court Administrator by the eFiling system.

I further certify that on March 30, 2015, I served a copy of the BRIEF ON THE MERITS OF *AMICI CURIAE* on the following parties by electronic service via the eFiling system or via conventional e-mail service:

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