IN THE SUPREME COURT OF PENNSYLVANIA

NO. 371 CAPITAL APPEAL DOCKET

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE
V.
BETH ANN MARKMAN,
APPELLANT

BRIEF FOR *AMICUS CURIAE* NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, et. al.

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STATEMENT OF JURISDICTION

Amici adopt the Statement of Jurisdiction set forth in the Amended Brief for Appellant.

SCOPE OF REVIEW AND STANDARD OF REVIEW

Amici adopt the Scope of Review and Standard of Review set forth in Amended Brief for Appellant.

ORDER OR OTHER DETERMINATION IN QUESTION

Amici adopt the statement of Order or Other Determination in Question as set forth in Amended Brief for Appellant.

INTERESTS OF *AMICI*

Amici are nonprofit local, state, and national battered women's and women's legal organizations. *Amici* have first-hand knowledge about the physical, emotional, and psychological effects of battering. *Amici* collectively work with thousands of battered women each year, including women who are charged with crimes that result from their experiences of abuse. *Amici* are committed to ensuring that battered women defendants, like all defendants, receive the full benefit of rights and protections designed to ensure fair trials, verdicts, and sentences.

Based on their collective experience, *amici* understand that, when a history of abuse is relevant to the issues in a criminal case, the jury must fully understand that history, the cumulative effects of the abuse, and its relationship to the legal issues in the case. *Amici* also understand that all too often, battered women are misunderstood and perceived as responsible for their victimization. Such misconceptions often interfere with the ability of the criminal justice system to treat battered women fairly and according to the legal rules applicable to all defendants. *Amici* believe that it is essential, particularly where a battered defendant's liberty and life are at stake, that both the judge and jury base their decisions on accurate information about battered women's experiences, free of misconceptions and stereotypes. Otherwise, as happened in this case, the jury does not have the necessary tools and contextual information with which to evaluate the evidence presented, and cannot reach a fair or reliable determination of guilt.

Finally, in a capital case, a battered woman defendant, like all other defendants, is entitled to a penalty proceeding that comports with fundamental notions of justice, including an

opportunity to confront the evidence against her, to present all relevant mitigation, and to be protected from inadmissible and prejudicial evidence.

Unless criminal processes contain the same rights and protections for battered women defendants as for all defendants, victims of domestic violence will be further victimized by the system itself.

Therefore, *Amici* respectfully urge this Court to REVERSE Ms. Markman's conviction and sentence.

National Clearinghouse for the Defense of Battered Women

The National Clearinghouse for the Defense of Battered Women, founded in 1987, works to ensure justice for battered women charged with crimes, where a history of abuse is relevant to the woman's legal claim or defense. We provide technical assistance to battered women defendants, defense attorneys, battered women's advocates, expert witnesses, and other members of the community. Our legal team assists on a wide variety of cases, including those involving self-defense/defense of others, coercion and duress, crimes of omission (such as failing to protect one's children from a batterer's violence), and cases where the history and impact of the abuse help to explain the defendant's behavior and/or rebut the *mens rea* element of the crime.

The National Clearinghouse does not advocate any special legal rules for battered women defendants. Battered women are entitled to the same rights and protections as all other criminal defendants, and we are committed to safeguarding those rights and protections. To this end, the National Clearinghouse seeks to educate those involved in the criminal legal system about battering and its effects, so that legal decisions affecting battered women defendants are not based on misconceptions.

Among the most fundamental rights of any criminal defendant are the right to have the jury instructed on the theory of defense and the right to present the jury with all relevant evidence. When a battered woman is charged with a crime against a third person, and there is record evidence that she was subject to violence and threats from her batterer/codefendant, which a person of reasonable firmness in her situation could not resist, she is entitled to receive proper jury instructions on her duress theory of defense. Further, in deciding whether to bar the instruction based on a conclusion that she "recklessly placed" herself in the situation, the trial court must fully consider the record evidence of her situation as a battered woman, free from faulty assumptions and judgments about battered women's experiences. Finally, to have a meaningful opportunity to defend against the charges, she must be able to present expert testimony on domestic violence and lay testimony about her prior abusive experiences, as that testimony is often critical in helping the jury understand her claim of duress. Otherwise, as happened in this case, she is effectively deprived of her right to present a meaningful defense.

When a battered woman defendant faces the ultimate penalty of death, she, like all criminal defendants, must have the opportunity to confront all evidence against her, including that which contradicts her claims of abuse and duress. Her sentencing jury must be permitted to consider all relevant mitigation evidence and only those aggravating factors permitted by law. Without these safeguards, her sentence of death is inherently unreliable and fundamentally unjust.

Accordingly, we urge this Court to REVERSE the conviction and sentence of Ms. Markman.

National Coalition Against Domestic Violence

The National Coalition Against Domestic Violence (NCADV), a nonprofit organization founded in 1978 and incorporated in the state of Oregon, provides a national network for over 2,000 local programs serving battered women and their children. We offer technical assistance, general information and referrals, community awareness campaigns, public policy advocacy, and sponsor a national conference every two years. NCADV is extremely concerned about battered women charged with crimes and their right to a fair trial.

NCADV joins the brief of *amicus curiae* to assist the Supreme Court of Pennsylvania in its consideration of the *Markman* case, and Ms. Markman's defense as a battered woman. In order to avoid punishing battered women further, courts must make every effort to get beyond the myths and misconceptions of abuse and understand the power and control that an abuser can have over his victim. In a capital case such as this, where Ms. Markman offered expert testimony relevant to her claim of duress due to domestic violence, such evidence should be admissible to ensure her right to a fair trial.

As a national voice on behalf of victims of domestic violence, NCADV is aware of many of the myths and misconceptions that work as barriers and result in injustice for battered women. In this case, it is clear that misinformation in regards to Ms. Markman interfered with her right to a fair trial. NCADV urges the Court to reverse her conviction in the interest of justice.

National Network to End Domestic Violence

The National Network to End Domestic Violence (NNEDV), a membership and advocacy association made up of forty-eight State and Territory domestic violence coalitions, was founded in 1991 and incorporated in the District of Columbia as a nonprofit organization. NNEDV is working to create a social, political and economic environment in which violence

against women no longer exists. Our member coalitions represent more than 2000 local battered women's programs and domestic violence shelters. Our mission is to ensure that public policy is responsive to the needs of battered women and their children, and to enhance the capacity of those who provide direct services to victims. NNEDV has played a critical role in development and implementation of the Violence Against Women Act over the past decade.

Our member coalitions and local programs work with battered women and their children every day, and are acutely aware of the common misperceptions about the causes and impact of domestic violence. Battered women are often blamed for the abuse they are experiencing, and the reality of the violence they are experiencing is frequently ignored. Many of our member programs have participated in fatality review teams designed to review domestic violence homicides. These teams consistently find that the most dangerous time for a victim is when she is trying to separate from an abuser. During this risky period, the perpetrator often escalates the physical, sexual and emotional abuse they are in inflicting, making it impossible for the victim to escape the violence.

We are deeply concerned about the case of *Commonwealth v. Markman*, because it shows the further victimization battered women experience when misinformation about domestic violence interferes with their right to a fair trial. It is critical that expert testimony about the severe and escalating nature of domestic violence be heard in such cases, and that juries be instructed to determine if a battered woman acted under duress. Without the presentation of critically important evidence and jury instructions, battered women will not be treated fairly within the criminal justice system. We urge you to reverse the conviction of Ms. Markman.

National Domestic Violence Hotline

The National Domestic Violence Hotline, a nonprofit organization and project of the Texas Council on Family Violence, provides comprehensive services to battered women and their children by operating a 24-hour, 7-day a week National Hotline. NDVH is extremely concerned about battered women charged with crimes and their right to a fair trial.

Through our work, we know that battered women face many injustices as a result of myths and misconceptions about their experiences of abuse. We speak to women on a daily basis that have their assaults, injuries, and lives minimized by representatives of the justice system who still speak to domestic violence as only a "family" issue. What we know from talking to battered women is that an educated legal system provides for greater safety for her and a higher level of accountability for those who choose to abuse.

We are deeply concerned when misinformation interferes with a battered woman's right to a fair trial. We know how important expert testimony can be in countering myths and misconceptions about domestic violence. We are particularly concerned that Ms. Markman was prevented from presenting expert testimony on battering and its effects which was admissible and relevant to her claims. Further, as in this case, when a battered woman presents sufficient evidence of duress by her batterer, she should be allowed to have the jury instructed on that defense. We believe Ms. Markman was denied a fair trial. Therefore, we respectfully urge you to reverse her conviction.

Pennsylvania Coalition Against Domestic Violence

The Pennsylvania Coalition Against Domestic Violence, Inc. (PCADV) is a not-for-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of providing services and advocacy on behalf of victims of domestic violence and their minor children.

PCADV is a membership organization of 64 shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, and transitional housing projects for battered women and their dependent children in the Commonwealth. For over twenty years, PCADV has provided training and technical assistance to domestic violence programs, attorneys, the courts, and law enforcement agencies on issues of domestic violence.

PCADV is deeply concerned about battered women charged with crimes and their right to a fair trial. PCADV is also concerned about the many injustices that result from the myths and misconceptions regarding the abusive experiences that battered women face, particularly as it affects their ability to obtain a fair trial. In this instance, Ms. Markman offered expert testimony relevant to her claims, testimony that is admissible under the Rules of Evidence, and that should have been permitted. In addition, Ms. Markman was wrongly precluded from presenting evidence of duress by her batterer and was denied the opportunity to present such evidence in tandem with a jury instruction on that defense. These actions denied Ms. Markman a fair trial; a trial that should have allowed her the opportunity to fully present viable defenses to the crime for which she was charged. In the interest of justice and fairness, we respectfully urge that Ms. Markman's conviction be reversed.

PCADV joins the brief of *amicus curiae* to assist the Supreme Court of Pennsylvania in its consideration of the critical issues surrounding this appeal.

Women Against Abuse

Women Against Abuse is a nonprofit organization founded in 1975 and incorporated in the state of Pennsylvania. Women Against Abuse provides comprehensive services to battered women and their children by offering a 24-hour hotline, Emergency Shelter Services, Legal

Advocacy and Representation, and Transitional Housing. Women Against Abuse is extremely concerned about battered women charged with crimes and their right to a fair trial.

Women Against Abuse is deeply concerned when misinformation interferes with a battered woman's right to a fair trial, especially when legal decisions are based upon this misinformation. When a battered woman offers expert testimony, as Ms. Markman did, that is admissible and relevant to her claim, she should be permitted to present it. Further, as in this case, when a battered woman presents sufficient evidence of duress by her batterer, she should be allowed to have the jury instructed on that defense. We believe Ms. Markman was denied a fair trial. Therefore, we respectfully urge you to reverse her conviction.

Women's Center & Shelter of Greater Pittsburgh

The Women's Center & Shelter of Greater Pittsburgh, a non-profit organization founded in 1974 and incorporated in the State of Pennsylvania, provides comprehensive services to battered women and their children. Women's Center & Shelter is extremely concerned about battered women charged with crimes and their right to a fair trial.

Through our work, we know that battered women face many injustices as a result of myths and misconceptions about their experiences of abuse. Women's Center & Shelter believes that the trial court erred in failing to instruct the jury on duress and in precluding the expert on domestic violence at the guilt phase. This case presents a tragic injustice for a battered woman, resulting in the death penalty.

We believe Ms. Markman was denied a fair trial and we urge you to reverse her conviction. Misinformation and misinterpretation on expert testimony on "battered women syndrome" denied the jury the opportunity to hear information that could have explained how the abuse affected Ms. Markman and to counter challenges to her claims of being battered.

Women's Center & Shelter of Greater Pittsburgh respectfully urges you to reverse her conviction.

Women's Law Project

The Women's Law Project (WLP) is a non-profit public interest legal center dedicated to improving the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. WLP has offices in Philadelphia and Pittsburgh, Pennsylvania and engages in national advocacy on a wide variety of issues. Since its founding in 1974, the Law Project has engaged in extensive activities challenging gender discrimination in employment, education, insurance, and in family matters relating to custody, support, domestic violence and divorce. Assisting women who are victims of domestic violence, in particular, has been a major focus of both the telephone counseling service, which handles more than 5,000 inquiries a year, and the Law Project's litigation efforts, which include both original litigation and participation as *amicus curiae.* WLP joins in the brief of *amicus curiae* in support of Ms. Markman to urge the court to reverse her conviction based on critical evidence about the effects of domestic violence.

STATEMENT OF THE QUESTIONS ADDRESSED BY *AMICI*

I. THE TRIAL COURT'S REFUSAL TO GIVE A DURESS INSTRUCTION, DESPITE RECORD EVIDENCE SUPPORTING A DURESS DEFENSE, WAS CONTRARY TO APPLICABLE LAW AND BASED ON MISCONCEPTIONS ABOUT THE REALITIES OF MS. MARKMAN'S EXPERIENCES AND THE EXPERIENCES OF BATTERED WOMEN GENERALLY.

A. The Record Evidence of Housman's Violence and Threats Against Ms. Markman Required an Instruction on Duress.

1. The Record, Viewed in the Light Most Favorable to Ms. Markman, Created a Question for the Jury as to Whether She was Subject to Duress Pursuant to 18 Pa.C.S. § 309(a).

2. The Record, Viewed in the Light Most Favorable to Ms. Markman, Created a Question for the Jury as to Whether she "Recklessly Placed Herself in the Situation" Pursuant To 18 Pa.C.S. § 309(b).

B. The Trial Court's Rulings Barring the Duress Defense were Based on Incorrect Factual Assumptions about the Realities of Ms. Markman's – and other Battered Women's – Experiences.

1. The Assumption that by Failing to Leave or Call Police, Ms. Markman was Responsible, as a Matter of Law, for her Subsequent Victimization, Ignores the Complexity and Realities of Her Experiences as a Battered Woman and is Contrary to Precedent, Policy and Social Science Research.

2. Faulting Ms. Markman for Not Leaving Ignores the Stark Reality that Battered Women Often Face Increased Violence or Death when they Attempt to Separate, and Ignores the Record Evidence Showing that Housman's Violence Did Increase When She Tried to Separate.

3. Faulting Ms. Markman for Not Attempting to Leave or Get Help During Momentary Lapses in Housman's Physical Violence Ignores the Reality that Housman's Abuse was a Pattern of Coercion and Control which Kept Ms. Markman in an Ongoing State of Terror.

II. THE PRECLUSION OF EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS, BASED ON A MISUNDERSTANDING OF THE CONTENT AND PURPOSE OF THAT TESTIMONY AND A MISAPPLICATION OF APPLICABLE LAW, SEVERELY PREJUDICED THE DEFENSE AND REQUIRES REVERSAL.

A. Expert Testimony On Battering and Its Effects is Relevant and Admissible to Support a Claim of Duress.

B. The Trial Court's Rulings Precluding Expert Testimony Were Based On a Fundamental Misunderstanding of the Content and Purpose of Expert Testimony on Battering and Its Effects.

C. The Proffered Expert Testimony Was Critical For a Proper Assessment of Ms. Markman's Claims, and Its Preclusion Constitutes Reversible Error.

III. THE TRIAL COURT REVERSIBLY ERRED BY PRECLUDING MS. MARKMAN'S TESTIMONY REGARDING HER PRIOR EXPERIENCES OF ABUSE, WHICH WAS RELEVANT AND NECESSARY TO SUPPORT HER DURESS CLAIM.

IV. THE ABSOLUTE BAN ON CROSS-EXAMINATION OF HOUSMAN'S PENALTY PHASE WITNESSES WHO ATTESTED TO HIS NONVIOLENCE, VIOLATED MS. MARKMAN'S RIGHTS TO CONFRONTATION AND TO PRESENT ALL RELEVANT MITIGATION, AND LEFT HER UNABLE TO CONFRONT NONSTATUTORY AGGRAVATION, RESULTING IN AN UNRELIABLE DEATH SENTENCE.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in Amended Brief for Appellant at 9-14. Additionally, given the importance of particular facts with respect to the issues raised by *Amici* in this brief, it is necessary for *Amici* to recite in some detail certain facts relating to these issues, as set forth below.[1]

Testimony of Ms. Markman, Corroborated by Lay Witnesses and Documentary Evidence, Regarding Housman's Escalating Abuse of Ms. Markman in the Months and Weeks Prior to the Incident.

Ms. Markman met Housman approximately two years before the incident and, shortly thereafter, he began to physically abuse her. Initially, his abuse included pushing, shoving, grabbing, and throwing her on the floor, N.T. 890-900, progressing to a point where she considered being grabbed around the neck and pushed against a wall as "light stuff." N.T. 901-02. The abuse worsened to include hitting, punching her about the face and body, and choking her. N.T. 903-08, N.T. 698-99 (corroboration by Chris Moffit who witnessed Housman beat and throw her to the floor). On at least one occasion, Housman told her to "shut the fuck up" and that if she did not be quiet he would snap her neck. N.T. 906, 903-08. When Ms. Markman called the police, they said they could not do anything "unless he actually did something." N. T. 909, 166.

The abuse escalated in the months leading up to the killing, which occurred in early October 2000. In August 2000, Housman hit her on the head causing a lump the "size of a golf ball," giving her black eyes, and causing her to become dizzy, have headaches and lose balance. N.T. 909-10. She went to Carlisle Hospital for treatment for these symptoms, N.T. 673-77, 910; Defense Exhibit 9, Records from Carlisle Hospital Emergency Room, and told the nurse that she

[1] The prosecution disputed Ms. Markman's version of both the prior abuse as well as the incident itself. The facts recited here are based on the evidence presented or relied upon by the defense.

was in a car accident because she was afraid of getting Housman in trouble if she told the truth. N.T. 913.

Housman's escalating abuse was corroborated by other witnesses who saw more frequent and severe bruising than usual on Ms. Markman in the months leading up to the incident. N.T. 709-11, 809-10. Witnesses saw her black eyes, N.T. 684, and the large lump on her head. N.T. 709-11. Her neighbor testified to seeing bruises across her bust, body, face, and neck with eyes so black that Housman referred to her as a "raccoon," during the summer just prior to the incident, when "it seemed like everything exploded." N.T. 743-45. Ms. Markman's employer corroborated the existence of black eyes and black and blue marks on her arms in the months preceding the incident, including what appeared to be a handprint. N.T. 734-36. The abuse was further corroborated by the trailer park manager who was a Commonwealth witness. She testified that around August 2000, she saw Ms.Markman's dark black and blue eyes; that Ms. Markman said Housman hit her; that Ms. Markman wanted to get him off the lease; and that she had dark bruising on her arms twice between August and September. N.T. 157-59, 177.

Approximately one month prior to the incident, Ms. Markman tried to get an emergency protection order against Housman, fearing he would be angry because she had "put him out." N.T. 949-50. She called the domestic violence hotline, telling them about some of the more recent incidents of abuse, and how he had damaged her car and broke back into her trailer. N.T. 950-52; Defense Exhibit 16, Domestic Violence Hotline Intake Form showing call from Ms. Markman on September 1, 2000. She scheduled an interview for the protection order but ultimately did not show up because she feared that he would get angry at her "and find a way to get a hold of me." N.T. 952. She feared Housman especially when he was angry: "[W]hen he got mad and really angry is when the hitting got worse." N.T. 950, 952-53. After a brief

separation, Housman moved back into the trailer but the abuse began again. N.T. 925-26, 953-54.

Approximately a week before the incident, Ms. Markman tried to separate from Housman telling him that he could have "everything" but to just let her leave. N.T. 956. He told her she wasn't going anywhere, and when she tried to leave toward the kitchen, he pinned her between the ferret cage and the wall and, as she tried to get away, he grabbed her with a wire around her throat and pulled her down to the couch. N.T. 956-57. He told her she "wasn't fucking going nowhere" holding his hand on her throat, ordered her to the bedroom, N.T. 957, and forced her to have sex while she was crying and shaking. N.T. 958. During the rest of that week, Housman's abuse continued, including covering her mouth and nose with his hand and pushing down harder on her mouth as she screamed louder. N.T. 959.

Several days before the incident, Ms. Markman again attempted to evict Housman from the trailer. N.T. 967-69. She called him at his job, told him that she had caught him in more lies, and that he was out for good. N.T. 968. She then called her friend, Jessica Wahl, to come over and sit with her because she was scared of what Housman would do to her when he got home. N.T. 969. That afternoon, she also spoke with the trailer park manager, Sandra Kautz, to tell her that there might be problems when Housman returned. N.T. 970-71. Kautz told her that she could stay in the trailer, but this time Housman had to be out for good. *Id.*, 163-64, 178.

Despite Ms. Markman's demand to Housman to leave, he was there at the trailer when she later returned. N.T. 972, 713. Ms. Markman told him he had to get out and went to the back bedroom to avoid a confrontation with him. N.T. 973, 713. She and her friend then discovered that he was doing something under the hood of Ms. Markman's car and Ms. Markman called the police. N.T. 974. When the police arrived, she told them she was putting Housman out, and she

feared he was pulling wires off of her car to disable it, as he had done in the past. N.T. 975. She also told the police about how he had hit her and was abusive. N.T. 976. The police officer spoke with Housman and then told Ms. Markman that he couldn't make Housman leave and that the trailer park manager, would have to evict him. N.T. 977. The park manager told Housman that he would have to leave or face a trespassing charge. N.T. 181.

Despite being ordered to leave, Housman remained near the trailer and Ms. Markman again told him he had to get out. N.T. 978-79. Housman called her a bitch and a whore and left the trailer. N.T. 979. She remained in the trailer with her friend, knowing at one point that Housman was back on the front porch, and did not say anything further to him "[c]ause it wouldn't have did any good…[c]ause he was going to do what he wanted to do anyhow." N.T. 979-81. Later, after her friend had to leave, Ms. Markman also left the trailer, chaining the front door, and leaving through the back door in the hope that Housman would assume, as he always did, that the back door was locked. N.T. 981-82, 719.

Evidence of Housman's Extreme Abuse and Coercion in the 48 Hours Preceding and During the Incident.

Ms. Markman described in detail the horrific abuse that she experienced over the next 48 hours that led up to and included the incident. When she returned to the trailer between approximately 12:30 or 1:00 a.m. on October 3, 2000, she found Housman in the trailer. N.T. 983-84. He grabbed her by the throat and pushed her into the counter. Ms. Markman testified that Housman started asking "where the fuck I had been" and "tapping on my crotch area, telling me, who you been with? And he just kept squeezing." N.T. 984. She then saw he had a knife *Id*. Housman held the knife against her throat, cut off her shirt and bra and told her to undress. N.T. 984-85. He got on top of her, had the knife against her throat, and said, "you think you are getting away with all of this." He then told her she was going to "take care of him," sliding the

knife down her throat in between her breasts. He threatened to cut her throat if she didn't write a note to Leslie White (the victim) saying she (Ms. Markman) was in Virginia (as he had previously told Leslie White). N.T. 985-86. He moved the knife down to her stomach and slapped it against her face. He held the knife to her and raped her. N.T. 986. He walked her to the bathroom and stayed by the door until she came out. He then grabbed her as she came out and slammed her against the sink. N.T. 986-87. He told her that if she didn't do what he wanted, he would kill her that night and that he had nothing to lose because she had messed up his only chance with White. N.T. 987. When Housman left Ms. Markman to go to the bathroom, he tied her hands and feet, and stuffed underwear in her mouth. N.T. 987. Housman's abuse and restraint continued through the night and into the next day. N.T. 988.

The following day he untied her and had her make him something to eat. N.T. 988-89. When Ms. Markman's friend, Baker, came over that afternoon, he ordered Ms. Markman to dress. He threatened that if Ms. Markman told anyone what went on that night, he would put a .45 to her head. N.T. 989-90. Ms. Markman went to Baker's trailer, told her what was going on, and showed Baker the marks on her stomach. N.T. 991-93. Baker corroborated the presence of cut marks on Ms. Markman's chest, stomach, and legs, N.T. 843-44, but was precluded from testifying about what Ms. Markman told her. N.T. 825. Baker and other witnesses corroborated that Ms. Markman was crying and sobbing while at Baker's trailer. N.T. 825, 1175-88.

Ms. Markman told Baker not to call the police because Houseman said "he would come back and put a .45 in my head." Ms. Markman described what she told Baker about the "look" in Housman's eyes that night; that "he just looked pure evil," and had a look she had never seen before. N.T. 993. Baker then came down to the trailer with Ms. Markman. At that point, Ms.

Markman thought Housman was going to leave because he would have thought Baker called the police. N.T. 994-95. Housman told Baker he was in fact leaving, *Id*., and Baker left the trailer.

Rather than leaving, however, Housman continued to abuse Ms. Markman. He made Ms. Markman undress, raped her again, and kept the knife beside him. N.T. 995-96. Ms. Markman testified that "the sex would be rough…him holding me by my throat, holding me by my hair…." N.T. 997. When she awoke the following afternoon, the day of the homicide, Housman still had the knife. Ms. Markman testified:

> After everything he had did, I wasn't about to try and do anything…[t]ry to leave the trailer…I didn't even want to argue with him. I sat there with my mouth closed."

N.T. 999.

Housman told her to drive him in the car to Sheetz (a place to make a phonecall) and she complied. N.T. 1000. He still had the knife, *Id*., even during the time he made the telephone call to Leslie White. He told Ms. White that his father had died (which was not true) and asked her to come to the trailer. Ms. Markman did not know he was going to call Ms. White. N.T. 1001-02.

When they returned to the trailer, Housman pushed the knife into Ms. Markman's side and told her to "get the fuck back in the trailer." N.T. 1004. Once in the trailer, Ms. Markman tried to run to the back door to get out but Housman grabbed her and hit her in the mouth with his fist. N.T. 1006. When she tried to run to the front door, he grabbed her hair, put the knife to her throat, and said, "[I]f you don't do what I tell you to do, I'm going to send you home in pieces to your daughter." N.T. 1006. Ms. Markman believed he meant it. *Id.*

Housman ordered Ms. Markman to the back bedroom, and she remained there when Leslie White arrived. N.T. 1007-08. Subsequently, Ms. Markman came out of that room

because she could not breathe. N.T. 1008. Housman whispered in Ms. Markman's ear, "you are going to help me. Remember what I told you before." N.T. 1009.

Housman ordered Ms. Markman to tie up Leslie White. Ms. Markman complied because she recalled what Housman had threatened:

> …[that] if I didn't do what he said, that he would send me home in pieces to my daughter…[a]nd after what I had just been through the past couple days with him, I believed what he said. I didn't want to do it.

N.T. 1012.

She also complied with his order to gag Leslie White knowing Housman still had the knife. She tied the gag loosely hoping that White could get it off. N.T. 1014. She obeyed Housman when he told her to go outside with him while White was inside and tied up. She complied because he still had the knife and she was scared. N.T. 1013-16. Ms. Markman did not try to run or yell for help because:

> I thought he would have got a hold of me before I even tried to go anywhere. And I thought he would have did something to me then. And I didn't know what he was going to do to her [White] either.

N.T. 1016.

Subsequently, back in the trailer, Ms. Markman went to get White some water, when she heard White scream and saw Housman choking her. N.T. 1016. He ordered Ms. Markman to pull the gag up, which she did. N.T. 1016. After White got her hand up under the speaker wire, Housman got behind White and "put her up in the crook of his arm." N.T. 1016-17.

Ms. Markman did not try to stop Housman. She testified that, "I thought he was going to kill me. He was sitting there killing somebody else. So why wouldn't I think he could do me next?" N.T. 1018. After witnessing Housman kill Ms. White, Ms. Markman was terrified. She complied with Housman's further directions, N.T. 1018-20, and was not thinking of trying to get

away because she was so afraid. N.T. 1022. Her terror was reinforced by Housman's warped directions to her to feel the corpse. N.T. 1027-28.

Before speaking with police, Housman told her to remember what he had told her, "that the only way she was ever leaving him was in a body bag." N.T. 1037. She lied to the officer because she was afraid, N.T. 1039, and told them things to deflect blame and attention from Housman. N.T. 1040. Ms. Markman testified:

> "He had told me a number of things any number of times. The main one was you aren't going nowhere unless you're in a body bag. He knew people in South Carolina from this supposed gang that he used to run with. He knew where my daughter was. He knew where my parents were."

N.T. 1040.

Ms. Markman testified that there were times she was away from Housman but that she did not tell anyone about what he had done or what was going on because she was scared, N.T. 1049, and she did not feel that she could escape him. N.T. 1057. Ms. Markman testified that she participated in the crime out of fear that Housman would kill her, a fear that was based on Housman's escalating violence. e.g., "William Housman holding a knife to my neck…days before that keeping me tied up in my house, raping me, torturing me." N.T. 1057. Ms. Markman did not feel that she could escape him. *Id*.

Proffered Expert Testimony on Battering and its Effects.

The trial court precluded the testimony of forensic psychologist, Dr. Dawn Hughes, who would have offered detailed testimony about the nature and dynamics of domestic violence generally, and Ms. Markman's experiences specifically, and how those experiences might be relevant to claim of duress. This testimony was set forth in Dr. Hughes' report, Defense Exhibit 15, accepted in full for the purpose of the proffer. N.T. 945-46, 1197. Dr. Hughes would have testified *inter alia,* regarding the general concept of domestic violence as a pattern of power and

control, that includes many different forms of abuse; the specific forms of abuse and control to which Ms. Markman was subject; the many coping strategies that Ms. Markman used to try to survive and reduce Housman's violence including, primarily, acquiescence and compliance; how Ms. Markman's experiences of prior abuse informed her behaviors and perceptions; and the probability that Ms. Markman was at high risk for recurrent, serious or lethal violence at the time of the incident. She would have testified very specifically regarding how an individual subject to intimate violence may become a victim of coerced compliance, and how the pattern of abuse experienced by Ms. Markman, with its rapid escalation leading up to the incident, might be relevant to a determination of coerced compliance at the time of the coerced act. Defense Exhibit 15 at 13-20.

Proffered Evidence of Ms. Markman's Prior Abusive Experiences

The trial court also precluded testimony from Ms. Markman regarding her prior abusive experiences by persons other than Housman, which was contained in the report by Dr. Dawn Hughes. Defense Exhibit 15; N.T. 892-94. Ms. Markman would have testified, *inter alia*, to a long history of physical, sexual, and other abuse, including being physically abused by her stepfather; witnessing her stepfather's frequent and severe abuse of her brother; being taken against her will to a hospital, put to sleep, and forced to have an abortion; being beaten by different men in two successive relationships; being beaten, raped and mugged when she was a prostitute; and later being forced to prostitute, and physically and emotionally abused by her husband. *See* Defense Exhibit 15 at 3, "Trauma History."

Housman's Confession and Other Evidence Admitted at the Penalty Phase

The Commonwealth's evidence included Housman's confession, a tape of which was played to the jury, and presented with an accompanying transcript, and which was admitted into

evidence at the guilt and penalty phases. N.T. 438, 441, 613-14, 1277. The confession, redacted at trial to substitute for Ms. Markman's name, stated, *inter alia,* that Housman had never abused Ms. Markman; that it was her idea to kill White; that she ordered Housman to strangle White; and that Housman complied for fear that she would kill him by hitting him with a hammer. *See* Commonwealth Exhibits 83A, 83C; Amended Brief for Appellant at 44-47.

Additional evidence presented at the penalty phase by Housman included his sister who said that there was no fighting or abuse in any of Housman's prior relationships, N.T. 1293, and a psychologist who testified that after investigation and evaluation, he found that Housman had no history of violence or "acting out" behaviors, and that Housman was insecure and lacked initiative. N.T. 1308, 1311-12.

The trial court prohibited Ms. Markman from questioning any of the witnesses or evidence presented by Housman at the penalty phase. N.T. 1279.

SUMMARY OF ARGUMENT

Amici contend that the trial court erred by failing to instruct the jury on duress despite abundant record evidence, including testimony from Ms. Markman, corroborated by other lay and documentary evidence of abuse, that she was subject to duress as defined by applicable law. The court further erred by precluding expert testimony on battering and its effects[2] which would have provided information needed to understand Ms. Markman's experiences of abuse and fairly assess her claims, unencumbered by misconceptions about battered women. The trial court also improperly precluded Ms. Markman from testifying about her prior abusive experiences, which were directly relevant to the elements of her duress claim.

The penalty phase proceedings were fraught with dire constitutional error, including a bizarre ruling by the trial court banning Ms. Markman from any cross-examination of Housman's witnesses, including his lay and expert witness attesting to his nonviolence. The

[2] At the outset, it is important to explain the terminology used in this brief. *Amici* use the term "battering and its effects" to describe the substance of expert testimony regarding abuse. However, such evidence is sometimes referred to as "battered woman syndrome" evidence, an idea first conceptualized in the late 1970s and coined as a term by psychologist Lenore Walker in the early 1980s. *See* Lenore E. Walker, The Battered Woman (1979) and The Battered Woman Syndrome (1984). During the last 25 years, extensive research has been done focusing on battering and its effects upon women and children. As the professional literature has grown, the term "battered woman syndrome" has become less and less adequate to describe accurately and fully the current body of knowledge about battering and how battering affects its victims. Many domestic violence experts now agree that the term "battered woman syndrome" is too limiting in that it fails to account for the diversity of both battering situations and women's responses. *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*, 13 Cal. 4th 1073, 1083 n.3, 921 P.2d 1, 7 n.3 (1996); *McNeil v. Middleton*, 344 F.3d 988, 990 n.3 (9th Cir. 2003). Experts and social scientists now are replacing the term "battered woman syndrome" with "battering and its effects" in legal and scholarly treaties to better describe the experiences, beliefs, perceptions, and realities of battered women's lives. *See, e.g.*, National Institute of Justice, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trial;* Report Responding to Section 40507 of the Violence Against Women Act, NCJ 160972 (1996); Mary Ann Dutton, *Understanding Women's Responses*; Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 975-76 (1995). *E.g.*, LA. CODE EVID. ANN. ART. 404(A)(2) (West 1989); MASS. GEN. LAWS ANN. CH. 233, § 23E (West 1994); NEV. REV. STAT. 48.061 (1993); OKLA. STAT. ANN. TITS. 22, 40.7 (West 1992). Courts have also recognized the problematic nature of the term "battered woman syndrome," and the desirability of using more expansive terms to describe

penalty evidence also included Housman's confession that accused Ms. Markman of being the kingpin and coercer, cutting to the heart of her mitigation and biasing the jury to sentence her to death. This confession, purportedly redacted at trial, was accompanied by summation by Housman's counsel that, in effect, exposed Ms. Markman as the other person to which the confession referred.

This case starkly illustrates the tragic injustice that results when legal decisions affecting basic criminal rights are based on misinformation. Beth Markman is a severely battered woman who was coerced into participating in a homicide by her batterer/codefendant, William Housman. During the course of their two-year relationship, Ms. Markman was the victim of extreme brutality at the hands of Housman. In the 48 hours prior and leading up to the incident, Housman's violence escalated to include unlawful restraints and repeated rapes and beatings. Housman also threatened Ms. Markman with death and dismemberment if she did not comply with his orders to participate in the homicide.[3]

Given the record evidence of duress presented, the trial court had no factual or legal basis for its drastic findings that Ms. Markman was not subject to duress, and had "recklessly placed" herself in the situation *as a matter of law*. These conclusory findings were based largely on the court's own incorrect assumptions that by remaining with, returning to, and failing to leave Housman and the situation at hand, Ms. Markman was at fault as a matter of law, and therefore "reckless" within the meaning of the statute. Yet, decisional law permitting a judicial finding of "recklessness" involves defendants who can in no way be likened to Ms. Markman, such as the felon or the drug dealer who agrees to rob but is forced to murder. To even compare a battered

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battered womens' experiences. *See, e.g.*, *Humphrey*, 13 Cal. 4th at 1083 n.3, 921 P.2d at 7 n.3; *McNeil*, 344 F.3d at 990 n.3.

[3] *See* Statement of the Case.

woman who returns to her batterer, unknowing of his criminal scheme and under threat of death and dismemberment, to a willing criminal who returns to his cohorts to assist with a crime, shows a grave misunderstanding of the plight of battered women and the complexities of the age-old question, "why don't battered women just leave?"

The trial court's rulings are based largely on myths about battered women that have been repudiated by this Court. These myths include that battered women are "free to leave" the relationship or the situation at anytime, and the judgment that they are "blameworthy" because they brought the abuse on themselves, or were otherwise responsible for the abuse. *Commonwealth v. Watson*, 494 Pa. 467, 472, 431 A.2d 949, 951-52 (1981); *Commonwealth v. Dillon*, 528 Pa. 417, 429-30, 598 A.2d 963, 969-70 (1991); *Commonwealth v. Stonehouse*, 521 Pa. 41, 61-65, 555 A.2d 772, 783-85 (1989) (plurality). This Court has been vigilant in ensuring that such misconceptions and incorrect judgments about battered women do not interfere with a jury's assessment of their defenses. *Stonehouse*, 521 Pa. at 61-65, 555 A.2d at 783-85. It is arguably even more egregious when misinformation interferes, not with a jury verdict, but rather with the trial court's threshold decisions of whether evidence or a defense even gets to jury in the first place.

The trial court's preclusion of expert testimony on battering and its effects resulted in the prosecutor and codefendant's lawyer being able to exploit these same repudiated myths that Ms. Markman was "free to leave" at anytime and blameworthy for returning to Housman. The trial court misapprehended the nature and content of expert testimony on battering and its effects which was admissible under Pennsylvania law and necessary to counter precisely those "erroneous battered woman myths upon which the Commonwealth built its case." *Stonehouse*, 521 Pa. at 65, 555 A.2d at 784-85.

Tragically, Ms. Markman now stands before this Court convicted of capital murder and condemned to die having been wholly deprived of any meaningful right to defend. In keeping with this Court's precedent, and the axiom that principles of criminal law must never be based on misconceptions about surrounding social realities, *Amici* respectfully urge the Court to REVERSE both the conviction and the sentence of death.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO GIVE A DURESS INSTRUCTION, DESPITE RECORD EVIDENCE SUPPORTING A DURESS DEFENSE, WAS CONTRARY TO APPLICABLE LAW AND BASED ON MISCONCEPTIONS ABOUT THE REALITIES OF MS. MARKMAN'S EXPERIENCES AND THE EXPERIENCES OF BATTERED WOMEN GENERALLY.

A. The Record Evidence of Housman's Violence and Threats Against Ms. Markman Required an Instruction on Duress.

The record contains abundant evidentiary support for the defense of duress and, therefore, required an instruction on that defense. *Commonwealth v. Weiskerger*, 520 Pa. 305, 312-13, 554 A.2d 10, 14 (1989). Ms. Markman presented evidence of her experiences of threats and violence and of her forced participation in the crime. This evidence far exceeded the quantum of evidence required for a duress instruction under state law. In a case where the record evidence supporting the defense was clear and plentiful, the trial court's extreme measure of barring the defense as a matter of law, violated this Court's precedent and deprived Ms. Markman of her constitutional right to present a defense.

Pennsylvania Standard for Duress and Instructional Rulings

In order to prove duress pursuant to 18 Pa.C.S. § 309, there must be evidence that:

> (1) there was a use of, or threat to use, unlawful force against the defendant or another person; and (2) the use of, or threat to use, unlawful force was of such a nature that a person of reasonable firmness in the defendant's situation would have been unable to resist it ….

Commonwealth v. DeMarco, 570 Pa. 263, 272, 809 A.2d 256, 261 (2002).

This same standard governs whether the accused "recklessly placed" him/herself in a situation where it was probable s/he would be subject to duress, and therefore forfeits the right to the defense pursuant to 18 Pa.C.S. § 309(b):

> [L]ike the test for determining whether the defendant was subject to duress, the test for determining whether a defendant acted recklessly under Section 309 is a hybrid

> objective-subjective one (citations omitted). The trier of fact must decide whether the defendant disregarded a risk that involves a gross deviation from what an objective "reasonable person" would observe if he was subjectively placed "in the [defendant's] situation."

18 Pa.C.S. § 309(b)(3).

In determining whether there was evidentiary support requiring a duress instruction, the trial court was bound to view the evidence in the light most favorable to Ms. Markman, *Commonwealth v. Black*, 474 Pa. 47, 372 A.2d 627 (1977), and forbidden from itself making credibility judgments about that evidence. *Commonwealth v. Lightfoot*, 538 Pa. 350, 354-55, 648 A.2d 761, 764 (1994); *Commonwealth v. Kyslinger*, 506 Pa. 132, 136, 484 A.2d 389, 391 (1984); *Commonwealth v. Brown*, 491 Pa. 507, 512, 421 A.2d 660, 662 (1980); *DeMarco*, 570 Pa. at 271, 809 A.2d at 261.

1. The Record, Viewed in the Light Most Favorable to Ms. Markman, Created a Question for the Jury as to Whether She was Subject to Duress Pursuant to 18 Pa.C.S. § 309(a).

A correct application of the standards for duress and for instructional review compels the conclusion that an instruction was required. Ms. Markman presented lay evidence of the abuse she suffered at the hands of Housman through her own testimony. This evidence was corroborated by a number of witnesses and documentary evidence. *See* Statement of Case. She testified specifically about the severe violence she experienced just prior to and during the time that she was ordered by Housman to participate in the crime. *Id.* She unequivocally testified that she participated only because she was forced to and that she had no advance knowledge of Housman's criminal scheme. Based on her history with Housman and his escalating abuse during the days leading up to the incident, she believed she had no alternative but to follow Housman's orders that she participate. Even if there was evidence directly contradicting these

facts, *which there was not*, she would still be entitled to a duress instruction, viewing the evidence in this case in the light most favorable to her.

The primary reasoning of the trial court in precluding the instruction was that Ms. Markman failed to avail herself of "reasonable opportunities" to escape prior to, during, and even after the incident. Trial Court Opinion (hereafter "Opinion") at 79-83. The court found that, because Ms. Markman failed to take advantage of what it deemed reasonable opportunities to escape, she was not in imminent danger. It concluded that even if Ms. Markman met the test for duress as defined in 18 Pa.C.S.§ 309(a), she recklessly placed herself in the situation within the meaning of 18 Pa.C.S.§ 309(b). Opinion at 83.

This Court has required duress instructions pursuant to 18 Pa.C.S. § 309(a) based on record evidence far less supportive of the defense than the evidence in this case. In *Commonwealth v. Kyslinger*, the Court reversed based on the trial court's failure to instruct on duress. In that case, the defendant was charged with writing a bad check. The evidence of duress was that defendant's creditors visited him from out of state, demanded immediate payment for a period of two-hour, and said "if we go home [to another state], you're going with us." *Kyslinger*, 506 Pa. at 136, 484 A.2d at 391.

In *Kyslinger*, there was not even an explicit threat that the defendant would be hurt if he did not comply but, rather, only an implication that he would be harmed. The Court cited defendant's own testimony of his interpretation of these threats ("the only way they were going to leave town or let me out of their sight was if I gave them a check."). *Id*. By contrast, in the instant case, the record is replete with evidence of Housman's *actual* use of violence and his *explicit* threats of death or dismemberment. There was also evidence of Ms. Markman's belief that if she did not comply she would be killed. *See* Statement of Case. If the defendant in

Kyslinger was entitled to a duress charge then, *a fortiori*, Ms. Markman was also entitled to one. This Court's reasoning in *Kyslinger* requiring duress instructions is even more compelling in this case: "Where there is evidence to support a claimed defense, it is 'for the trier of fact to pass upon that evidence and improper for the trial judge to exclude such consideration by refusing to charge.'" *Kyslinger*, 506 Pa. at 136, 484 A.2d at 391 (quoting *Brown*, 491 Pa. at 512, 421 A.2d at 662).[4]

In *DeMarco*, where this Court recently clarified Pennsylvania duress law, the record evidence of duress requiring an instruction was far less compelling than the evidence here. In *DeMarco*, the defendant was charged with perjury for testifying at trial differently from his preliminary hearing testimony and from his prior statements to police. He claimed he changed his story because he was under duress due to threats and violence from his roommate. The defendant testified that his roommate shot him with a BB gun, choked him, and threatened to deprive him of his social security checks or kill him if he did not testify as instructed. *DeMarco*, 570 Pa. at 274-75, 809 A.2d at 263. He also presented evidence that he suffered from a mental impairment and seizures, and lived with his coercer with no transportation or money to try to find other housing. *Id.*

The record in *DeMarco* was found to be "clearly sufficient" to create a jury question on duress under 18 Pa.C.S. § 309(a), i.e., whether the defendant was subject to force and threats that a person of reasonable firmness in his situation would have been unable to resist. *Id*. If that

[4] *Compare Commonwealth v. Santiago*, 462 Pa. 216, 340 A.2d 440 (1975) (duress not available as a matter of law where record contained *no* evidence that defendant's drug possession and concealment was at direction or control of another person, and the defendant relied solely on outdated common law presumption that wife's actions were coerced by husband); *Commonwealth v. Hilburn*, 746 A.2d 1146 (Pa. Super. 1999) (duress unavailable as a matter of law where the only evidence supporting claim of duress was mental health evidence suggesting emotional disturbance).

record was "clear" for the purpose of a jury instruction, then the record here, which contains far more evidence of threats, violence, and fear, is clearly sufficient to warrant an instruction.

2. The Record, Viewed in the Light Most Favorable to Ms. Markman, Created a Question for the Jury as to Whether she "Recklessly Placed Herself in the Situation" Pursuant To 18 Pa.C.S. § 309(b).

Given that Ms. Markman met the test for duress pursuant to 18 Pa.C.S. § 309(a), she was entitled to an instruction unless she "recklessly placed [herself] in the situation in which it was probable she would be subject to duress," within the meaning of 18 Pa.C.S. § 309(b). The essence of the trial court decision was that she was "reckless" because she returned to the abusive relationship with Housman, and did not leave prior to, during or, after the killing. Opinion at 79-83.

Statutory and decisional law shows that a judicial finding of "recklessness" as a matter of law, resulting in the extreme measure of barring the duress defense entirely, has been found appropriate only in circumstances where the defendant's culpability in bringing about the situation is clear. *See, e.g., Commonwealth v. Pelzer,* 531 Pa. 235, 612 A.2d 407 (1992) (recklessness of the accused in bringing about the situation in which he was later subject to duress was "obvious" (see discussion below)). Such circumstances include, for example, where the defendant freely and willingly participates in a criminal plan or scheme that later turns awry, i*d.*, or connects himself with known criminal activity that involves conscious creation of a risk of duress. *Commonwealth v. Knight,* 416 Pa. Super. 586, 596-600, 611 A.2d 1199, 1205-06 (1992) (citations omitted).

The Model Penal Code, from which the Pennsylvania duress statute is derived, 18 Pa.C.S. § 309 Official Comment (1972), is instructive on the issue of recklessness. The Commentary to Model Penal Code, § 2.09(2), (which is identical to 18 Pa.C.S. § 309(b)) states:

> [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 COMMENTARIES, Pt. I § 2.09 at 379.

The Commentary goes onto highlight an 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 COMMENTARIES, Pt. I § 2.09 at 379, n.48 cmt. *See also Knight,* 416 Pa. Super. at 597-99, 611 A.2d at 1205-06 (concluding that the term "recklessly" as defined in the Model Penal Code was meant to have "a particular meaning that was obviously more than negligence" and requires that "a criminal defendant has to consciously create the risk of becoming subject to duress" such as where the defendant connects himself with the criminal activity, and had a "full opportunity to avoid coercion," citing Sheldon S. Toll, *A Practitioner's Guide to Defenses Under the New Pennsylvania Crimes Code*, 12 Duq. L. Rev. 849, 857 (1974)).

This Court's decision in *Commonwealth v. Pelzer* is consistent with the Model Penal Code interpretation of when recklessness may be found as a matter of law. The facts of *Pelzer*, where this Court held that the exception applied, are strikingly similar to the single example of recklessness identified by the Model Penal Code and recited above. The defendant in *Pelzer* admitted to freely and willingly planning and implementing a scheme in which he would help to kidnap and rob the victim. During that scheme, he was ordered by one of his cohorts to murder the victim, and he defended the murder on the basis of duress. *Compare* MODEL PENAL CODE AND COMMENTARIES, Pt. I § 2.09 at 379, n.48 cmt. The record evidence of duress in *Pelzer* was defendant's own statement showing that he had left and returned to the crime-in-progress many times before he was ever threatened with any violence. *Pelzer*, 531 Pa. at 247-48, 612 A.2d at

414. This Court held that Pelzer's recklessness was "obvious" and therefore duress was barred as a matter of law:

> The emphasized portions of the [defendant's] statement make it abundantly clear that appellant had frequent opportunities to withdraw from the conspiracy if that had been his intent, but he repeatedly returned voluntarily to continue the criminal operation. His self-serving statement also implies that throughout the episode he was being coerced into participating in brutal acts which were repugnant to his kinder nature. Nothing, however, can be more obvious than that he knowingly placed himself a situation in which it was probable that he would be subjected to duress. As a matter of law, then, the defense of duress was not available to appellant. His own assertions defeated any claim of duress, and there was no other evidence supporting the defense, so it was proper for the trial court to refuse to charge the jury on duress.

Id. at 248, 612 A.2d at 414.

In stark contrast to *Pelzer*, the record in this case, when viewed most favorably to Ms. Markman, shows that she did not agree to, or willingly help Housman with his scheme; rather, her "participation" was coerced and forced from the outset. She did not even *knowingly* (let alone recklessly or even "negligently") connect herself with criminal activity. Rather, Ms. Markman was herself the victim of Housman's criminal activity and his crimes against White occurred long after Ms. Markman was already subject to his intense violence and brutality.

Moreover, the evidentiary support for Pelzer's duress claim was paltry in comparison to that of Ms. Markman. Pelzer offered only his "self-serving" statement that *implied* he did not want to participate in the crimes leading up to the alleged coercion at gunpoint. By contrast, Ms. Markman presented abundant evidence, through her own testimony as well as documents and lay witnesses, that she suffered actual violence at the hands of Housman and was subject to his continuing abuse and threats of harm if she did not comply.

Pelzer's claim of duress, which exemplifies the kind of claim that the duress statute seeks to bar based on the recklessness exception, is simply incongruous with Ms. Markman's claim of duress. The case of a willing felon who, in the midst of his felonious scheme, finds himself

subject to a threat he did not anticipate, can in no way be compared to that of a woman who enters into, not a criminal enterprise, but rather an intimate relationship that turns into a nightmare of physical and psychological brutality.[5]

This Court's decision in *DeMarco* further compels the conclusion that the trial court erred in finding recklessness as a matter of law. With respect to the specific issue of whether DeMarco was barred from claiming duress under this exception, this Court held that despite "apparent" opportunities to "escape," (e.g., being physically capable of leaving his coercer, and not going to the police even when he was in court in police presence), he was still entitled to have the jury decide that issue. The Court stated:

> While these factors may call into question whether Appellant recklessly placed himself in a situation where it was probable that he would be subject to duress, we do not find that they made it completely obvious, as in Pelzer, that that was the case. This is particularly so in light of the evidence of Appellant's situation…

DeMarco, 570 Pa. at 275-76, 809 A.2d at 263-64.

[5] Curiously, the trial court recites the facts of *Pelzer* in support of its conclusion in this case, omitting mention of the glaring distinction that Mr. Pelzer freely, and under no threat of harm, agreed to and returned to the criminal operations with his armed cohorts. *See* Opinion at 83-84. The trial court also omits discussion of the facts of the other leading decision of this Court, *DeMarco*, 570 Pa. 263, 809 A.2d 256, which, as explained in the text, supports Ms. Markman's position. Instead, the trial court relies on lower court decisions which are inapposite. The case it relied on, *Commonwealth v. Baskerville,* involved a sufficiency claim where, unlike in this case, *the duress instruction was given,* and `in any event, as in *Pelzer*, the defendant admitted to joining his conspirators knowing that they were about to rob the victim. *Commonwealth v. Baskerville*, 452 Pa. Super. 82, 86-87 n.1, 90-91, 681 A.2d 198, 198 n.1, 200-01 (1996). *Commonwealth v. Berger*, 417 Pa. Super. 473, 612 A.2d 1237 (1992), likewise does not squarely address the issue in this case since it involved an ineffectiveness challenge. Unlike this case, where all factual inferences must be resolved in favor of Ms. Markman, and reversal is necessary if there is any evidentiary support for her claim, Ms. Berger had the burden to prove ineffectiveness and the lower court decision had to be affirmed unless it was not supported by the record. Moreover, the *Berger* decision, on the merits, is inconsistent with this Court's precedent. It is distinguishable from *Pelzer* in that Ms. Berger was coerced by her abuser from the outset and did not freely and willingly enter into a criminal enterprise. It is inconsistent with *DeMarco* in that the court failed to properly consider Ms. Berger's situation as required by *DeMarco* and, factually, *Berger* is at least as compelling as *DeMarco* in creating a jury question about recklessness.

Likewise, while the trial court here might have believed that Ms. Markman's "apparent" opportunities to escape were factors that "called into question" whether she recklessly placed herself in the situation, those factors were far less indicative of "recklessness" than the factors in *DeMarco,* found by this Court insufficient to bar duress as a matter of law. [6]

On the instant record, the only way for a trial court to reach the drastic conclusion that duress was barred as a matter of law was to overlook binding precedent of this Court and to engage in a factfinding[7], rather than a reviewing, function.

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[6] Other state and federal decisions support the right of a battered defendant to a duress instruction when she presents evidence of abuse leading to forced participation in a crime. *See, e.g., United States v. Ramos-Oseguerra*, 120 F.3d 1028 (9th Cir. 1997), *rev'd on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (duress instruction given where battered woman claimed duress as defense to drug charges over lengthy conspiracy; while not required in this case, more specific instruction directly tying battering evidence to duress defense could be warranted); *State v. B.H.*, 2003 N.J. Super. LEXIS 352 (Nov. 17, 2003) (approved for publication) (where battered woman claimed duress from abusive codefendant/batterer as defense to charge of sexually assaulting stepson, she received full duress instructions, and trial court should have given more explicit instructions directing jury to consider expert testimony as to all elements of her duress claim); *State v. Lambert*, 173 W. Va. 60, 312 S.E.2d 31 (1984) (where battered woman claimed she was coerced by abusive husband into participating in welfare fraud scheme, trial court committed reversible error in failing to give proper instruction on coercion which, in this jurisdiction, would have negated intent); *State v. Williams*, 132 Wash. 2d 248, 937 P.2d 1052 (1997) (battered woman defendant entitled to duress instruction in welfare fraud case; evidence of battering relevant to subjective belief and reasonableness and trial court erred in finding no immediate harm); *Horton v. Massie*, 203 F.3d 835 (10th Cir. 2000) (unpublished opinion) (counsel ineffective for failing to request duress instruction since evidence sufficient for instruction where battered defendant testified she participated in crime because she feared batterer would otherwise shoot her; fact that she was in physical control of car when she drove victim to location of the murder did not negate the defense); *United States v. Nelson*, 966 F. Supp. 1029 (D. Kan. 1997) (duress instruction given where battered defendant claimed duress; court addresses issues of expert evidence on battering); *United States v. Rouse*, 168 F.3d 1371 (D.C. Cir. 1999) (on claim of newly discovered evidence of abuse supporting duress defense, court acknowledges such claim could be grounds for relief but here trial court made credibility determination).

[7] The record is replete with examples of how the court inappropriately resolved issues of fact. By way of a few examples, the court draws its own conclusion that although Ms. Markman "claims" to have kicked him out, she "consistently" let Housman return. Opinion at 79. This is a characterization that necessarily required the trial court to weigh the evidence, by, for example, discounting Ms. Markman's testimony about the times Housman refused to leave. *See* N.T. 956-58; 967-69; 972, 978-79; 983-84. The trial court even goes so far as to fault her for being with two men during a time period in which she kicked Housman out, an obvious value judgment on the court's part. Opinion at 80. The ultimate conclusion that she "passed up multiple opportunities to flee the scene," Opinion at 81, presumes as a factual matter that such "opportunities" existed, even though, in light of her history with Housman, they arguably did not.

B. The Trial Court's Rulings Barring the Duress Defense were Based on Incorrect Factual Assumptions about the Realities of Ms. Markman's – and other Battered Women's – Experiences.

In deciding whether Ms. Markman met the standard for duress, or was barred because she "recklessly" placed herself in the situation, the trial court had to assess the record evidence regarding what a reasonable person would have done, if subjectively placed in Ms. Markman's "situation" and taking into account salient "situational" factors. *DeMarco,* 570 Pa. at 274, 809 A.2d at 263. In this case, those situational factors consisted of the circumstances surrounding Ms. Markman's experiences of abuse at the hands of Housman, ultimately leading up to the circumstances she faced at the time of the killing.

In finding that Ms. Markman failed to take advantage of opportunities to escape, and was therefore "reckless" within the meaning of the duress statute, the trial court failed to properly consider her "situation" as a victim of Housman's violence, and instead relied largely on classic misconceptions about battered women generally, and judgments about Ms. Markman specifically. For example, as demonstrated below, the court's reasoning implies that Ms. Markman had a duty to leave the relationship with Housman since he was a known abuser, long before the incident itself; that she could have left during any temporary reprieves in the physical violence, regardless of the intensity or severity of Housman's threats, or his warnings of increased danger; that help was just around the corner, if only she would have yelled out, ran away, or called the police; and that if she did finally leave during any of these moments, she would have been safe from Housman.

Correspondingly, Ms. Markman's seeming inaction by failing to take these steps is considered by the trial court to be proof of her "recklessness." *See, e.g.,* Opinion at 83, 85-87. This reasoning is grounded in the judgment that she was "blameworthy" and therefore

responsible for her subsequent victimization by Housman including, ultimately, his coercing her into participating in the killing.

Such incorrect assumptions about Ms. Markman and her predicament as a battered woman interfered with the trial court's assessment of the record evidence of duress and lead to its erroneous conclusion that the instruction was barred as a matter of law.

1. The Assumption that by Failing to Leave or Call Police, Ms. Markman was Responsible, as a Matter of Law, for her Subsequent Victimization Ignores the Complexity and Realities of Her Experiences as a Battered Woman and is Contrary to Precedent, Policy and Social Science Research.

The idea that a battered woman has a duty to leave the abuser and the situation, and that she can do so safely, is one of the most pervasive and damaging misconceptions about battered women. As explained by one leading commentator:

> Perhaps the most commonly asked question about the battered woman (especially in the forensic context) is, Why didn't she leave? The question, to some extent, suggests that the battered woman, by remaining in (or returning to) an abusive relationship, is deviant, odd or blameworthy in some way. Further, the question assumes not only that there are viable options for alternative behavior, but that she should have employed them, and that doing so would have lead to her safety.

Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1226-27 (1993).

Social science research confirms the persistence of beliefs by laypersons that if a battered woman "stays" she is either exaggerating the extent of the abuse, and/or is responsible for the abuse. *See* Diane R. Follingstad, Margaret M. Runge, April Ace, Robert Buzan & Cindy Helff, *Justifiability, Sympathy Level, and Internal/External Locus of the Reasons Battered Women Remain in Abusive Relationships*, 16 Violence and Victims 621, 622 (2001) ("…[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…); Charles Patrick Ewing & Moss Aubrey, *Battered Woman and Public Opinion: Some Realities*

Abuse the Myths, 2 Journal of Family Violence 257, 263 (1987) ("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."); Tracy Bennett Herbert, Roxane Cohen Silver & John H. Ellard, *Coping with an Abusive Relationship: How and Why do Women Stay?*, 53 Journal of Marriage and the Family 311 (1991) (even if they believed she did not provoke the abuse, observers still believed battered women were responsible for finding a solution to it, such as leaving).

The decision to bar the duress instruction in this case rested precisely on the incorrect factual assumptions that Ms. Markman could and should have "just left" and because she did not, she was responsible. The court faulted her for not leaving before, during, and after the incident. The court stated: "[E]ven though Markman claims to have kicked Housman out of the trailer...she consistently allowed him to return, resuming their relationship....[She also]...chose not to attend [a Protection from Abuse interview] ... Markman failed to call the police when she was allegedly being abused ...." Opinion at 79-80. As to the day of the killing, the court reasoned that Ms. Markman presumably could have escaped or yelled for help to people in the area while Housman was making the call to White, and had plenty of opportunity to escape while White was at the trailer. Opinion at 80-82.

A finding that a battered woman such as Ms. Markman is responsible for her subsequent victimization by remaining with, returning to, or being unable to leave her abuser is inconsistent with the enlightened decisions of this Court and others which recognize the dilemmas faced by

battered women. This Court has been in the forefront of the effort to understand the reality of battered women's experiences, and the fallacy of blaming them for not leaving. In *Commonwealth v. Watson*, decided nearly twenty years before the instant trial, this Court ruled that the fact finder should consider the history of abuse in deciding whether a defendant acted reasonably in self-defense. *Watson*, 494 Pa. 467, 431 A.2d 949. In so doing, this Court directly repudiated any inference that by failing to leave, she is somehow to blame for subsequent violence that occurs. The Court stated:

> A woman whose husband has repeatedly subjected her to physical abuse does not, by choosing to maintain her family relationship with that husband and their children, consent to or assume the risk of further abuse.

Watson, 494 Pa. at 472, 431 A.2d at 951-52.

In *Stonehouse*, a plurality decision, the Court discussed in detail the "myths that ultimately place the blame for battering on the battered victim." *Stonehouse*, 521 Pa. at 62-63, 555 A.2d at 783. In particular, the Court explained how both the prosecutor and the lower court in that case had relied on the myth that "if appellant had truly been an innocent victim she could have put an end to the relationship" and that her claim of self-defense was unreasonable because of the "continued relationship" with her batterer. *Id*.

In *Dillon*, this Court again discussed the obstacles faced by battered women, again repudiating as "erroneous" the belief that battered women "can easily escape victimization by leaving their tormentors…." *Dillon*, 528 Pa. at 429, 598 A.2d at 969 (Cappy, J., concurring). Justice Cappy noted that many jurors believe myths about battered women and thus are often unable to understand "either why a woman failed to leave her husband or why she did not contact the police for assistance." *Id*. at 431, 598 A.2d at 970. *See also Hernandez v. Ashcroft*, 345 F.3d 824, 836 (9th Cir. 2003) (reviewing battered woman's request for suspension of

deportation under Violence Against Women Act of 2000, Pub. L. No. 106-386, based on her husband's violence, court notes: "Congress recognized that lay understandings of domestic violence are frequently comprised of 'myths, misconceptions, and victim blaming attitudes' and that background information regarding domestic violence may be crucial to understand its essential characteristics and manifestations," quoting H.R. REP. NO. 103-395 at 24 (1993)); *Weiand v. State*, 732 So. 2d 1044, 1053-54 (Fla. 1999) (extending duty to retreat to cohabitants would adversely impact battered women and legitimize the "common myth that the victims of domestic violence are free to leave the battering relationship any time they wish to do so, and that the beatings could not have been too bad for if they had been, she certainly would have left, "citations omitted); *State v. Kelly*, 97 N.J. 178, 205-6, 478 A.2d 364, 377-78 (1984) ("…[O]ne of the common characteristics of a battered wife is her *inability* to leave despite such constant beatings…," emphasis in original); *State v. Allery*, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984) (discussing need for expert testimony to help explain why a battered woman would not leave her mate); *State v. Hodges*, 239 Kan. 63, 68, 716 P.2d 563, 567 (1986) (expert testimony "would help dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time.").

When judgments about battered women are based on myths, the focus usually remains on the blameworthiness of the battered woman rather than on the brutality and culpability of the batterer, where it should rightly be. "It is indeed curious that our society instinctively blames the battered woman for not leaving or getting help rather than blame the man who abuses her." *Dillon*, 528 Pa. at 432 n.9, 598 A.2d at 971 n.7 (Cappy. J., concurring). The assumption that she could have simply left or received protection from the batterer, grossly oversimplifies her

predicament as a battered woman and the complexities of why she might have remained in a given situation. As this Court recognized nearly fifteen years before the instant trial:

> '[B]lame the victim' myths [such that if the battered defendant had been truly innocent she would have left, and that she was unreasonable for continuing her relationship with the batterer] enable juries to remain oblivious to the fact that battering is not an acceptable behavior and such myths do not begin to address why battered women remain in battering relationships.…

Stonehouse, 521 Pa. at 63, 555 A.2d at 783.

Social science research confirms that myths about battered women often lead to misplaced blame and an oversimplification of battered women's true experiences:

> The assumptions underlying [the] beliefs [that battered women should just leave] are likely to fail to account for the complexity of the battered woman's situation while also placing much 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. Focusing on whether battered women remain in the relationship with the batterer often diverts attention from where it might be more appropriately aimed—determining why the men abuse the women…

Diane R. Follingstad, Margaret M.Runge, April Ace, Robert Buzan & Cindy Heff, *Justifiability, Sympathy Level, and Internal/External Locus* at 622.

Battered women's responses to their victimization cannot be reduced to a simple dichotomy between either 1) "leaving" and reporting abuse to authorities or 2) "staying" and inviting further abuse. Rather, their responses fall along a wide continuum. Battered women use complex sets of survival strategies for attempting to stop or reduce the likelihood of future or more extreme violence. What may appear as passively "staying" and "putting up" with it may, in reality, be the best way for that particular woman to survive. The fact is that the battered woman herself is often the best judge of what will or will not be most likely to help reduce the violence in a given situation. Barbara Hart, *Beyond the "Duty to Warn": A Therapist's "Duty to Protect" Battered Women and Children*, in Kersti Yllo and Michele Bograd, Feminist Perspectives on Wife Abuse 234 (1988). Further, battered women's strategies for survival are

often active, problem-solving efforts aimed at self-preservation: Jacquelyn Campbell, Linda Rose, Joan Kub & Daphne Nedd, *Voices of Strength and Resistance: A Contextual and Longitudinal Analysis of Women's Responses to Battering*, 13 Journal of Interpersonal Violence 753 (1998); Elizabeth M. Schneider, Battered Women and Feminist Lawmaking at 84 (2000) ("Women who are battered may be unable to bring a battering relationship to an end, but they may be constantly planning and asserting themselves – strategizing in ways that are carefully hidden from the batterer, to contribute to their own safety and that of their children."); Jill Davies, Eleanor Lyon & Diane Monti-Catania, Safety Planning with Battered Women: Complex Lives/Difficult Choices at 80 (1998) ("Women are active, they plan in many different ways, and their reactions to their partner's violence vary enormously.").

See also Hernandez, 345 F.3d at 837-38 (finding that batterer's violence constituted "extreme cruelty" justifying suspension of battered woman's deportation, court notes that battered women's strategies to reduce violence "may appear to be the result of passiveness or submission on the part of the victim, when in reality she has learned that these are sometimes successful approaches for temporarily avoiding or stopping the violence," quoting Anne L. Ganley, *Understanding Domestic Violence*, in Improving the Health Care Response to Domestic Violence 18, 34 (1996)).

Research shows that battered women use a variety of survival strategies, and that no single one has been identified as being the most effective in reducing violence. Strategies can range from "formal," such as calling police or seeking help from the courts, to "informal," such as talking to neighbors or friends, to "personal" strategies, such as complying with the batterer's request, avoiding confrontations, or fighting back. Mary Ann Dutton, *Understanding Women's Responses*, 21 Hofstra L. Rev. at 1227-28.

Consistent with this research, the record shows that Ms. Markman used a variety of survival strategies to help reduce the violence. At times, she tried to talk to Housman and get him to leave. N.T. 968-69. She tried to get help from friends, N.T. 969, but only insofar as she believed she could remain safe (e.g., she told Baker not to call police for fear of what he would do to her). N.T. 993. She tried to enlist the aid of others to help her make him leave. N.T. 969, 976. Rather than risk the horrible consequences threatened by Housman, Ms. Markman complied with his demands as a way to survive. N.T. 1006, 1012 ("...if I didn't do what he said, that he would send me home in pieces to my daughter..[a]nd after what I had just been through...I believed what he said."). Ms. Markman primarily tried to avoid confrontation with him, especially near the time of the incident after his violence had increased, N.T. 999, ("I didn't even want to argue with him. I sat there with my mouth closed"), during the crime itself, N.T. 1057, (responding to the question why she participated in the crime, "Because I was afraid for my own life [because of] William Housman holding a knife to my neck...keeping me tied up ... raping me, torturing me..."), and after the homicide as well, N.T. 1040-57, (regarding obeying his commands as to what to tell police).

The trial court did not recognize that Ms. Markman's compliance with Housman might have been a survival strategy for reducing violence. Rather, in deciding the threshold question of whether Ms. Markman "recklessly" placed herself in the situation, it faulted her for failing to use more formal means of seeking help, such as calling the police and following through on a protection order. Opinion at 80, 83, 85. The trial court seemed to believe that these were "better" strategies than the ones Ms. Markman employed.

As this Court has recognized, the idea that calling police is the best or only effective means for reducing violence is yet another misconception about battered women:

> Other myths commonly believed about battered women are that…the police can protect the battered woman (citations omitted.) These myths were also exploited by the prosecutor…who argued to the jury that appellant could have been rescued, if she had wanted to be rescued, by a law enforcement system ready, willing and able to protect women who are victims of domestic violence… (citations omitted).

Stonehouse, 521 Pa. at 63, 555 A.2d at 783-84.

See also Dillon, 528 Pa. at 423, 429-30 n.4, 598 A.2d at 966, 969 n.4 (Nix, C.J., concurring) (Cappy, J., concurring) (erroneous to believe that battered women should call police because police often do not protect them); *Allery*, 101 Wash. 2d at 597, 682 P.2d at 316 (expert helps explain among other things, why woman might not inform police of abuse); *United States v. Lawrence*, 263 F. Supp. 2d 953, 963 n.6 (D. Neb. 2002) (acknowledges factors that influence a battered woman's decision to not seek assistance from or cooperate with law enforcement); *Wildoner v. Borough of Ramsey*, 162 N.J. 375, 392-93, 744 A.2d 1146, 1156 (2000) (reinstating dismissal of batterer's wrongful arrest suit against police, court finds that police were justified to rely on neighbor's account of incident rather than wife's denial, reasoning: "[i]t is well documented that, for a number of reasons, victims of domestic violence often do not report their abuse to law enforcement officers…."); Marsha E. Wolf, Uyen Ly, Margaret A. Hobart & Mary A. Kernic, *Barriers to Seeking Police Help for Intimate Partner Violence*, 18 Journal of Family Violence 121, 124 (2003) ("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."); Jill Davies, Eleanor Lyon & Diane Monti-Catania, Safety Planning with Battered Women; Mary Ann Dutton, *Understanding Women's Responses*, 21 Hofstra L. Rev. at 1229[8]

[8] Likewise, Ms. Markman's failure to follow through in receiving a protection from abuse order – another "formal" strategy – is incorrectly viewed by the trial court as evidence of her reckless failure to escape. Opinion at 80. A very common characteristic in battering relationships is the victim's decision not to proceed with cases in the courts against their batterers. James Ptacek, Battered Women in The

Further, the trial court's decision that Ms. Markman *should* have called the police overlooks the record evidence of her actual experience when she *did* call the police. She testified that when she called police, she was told that "they could not do anything "unless he actually did something." N. T. 909. Only hours before Housman began his two day reign of terror and captivity of Ms. Markman, ultimately leading up to the killing, Ms. Markman had called and personally spoken to a police officer at the trailer park. Despite her telling the officer that she feared he was trying to disable her car, had abused her in the past, and she wanted him out, the officer told her that he couldn't make Housman leave, and that the park manager would have to evict him. N.T. 974-77. Such a response by the very institution charged with her protection would necessarily inform her subsequent decision as to whether to call on them again. Jill Davies, Eleanor Lyon & Diane Monti-Catania, Safety Planning with Battered Women.

The trial court seemed to conclude that leaving Housman and calling the police were the only and best ways for Ms. Markman to avoid Housman's violence. These value judgments overlook the realities of Ms. Markman's situation. Her compliance with, and avoidance of, Housman were, in themselves, active strategies that she used to survive.

2. Faulting Ms. Markman for Not Leaving Ignores the Stark Reality that Battered Women Often Face Increased Violence or Death when they Attempt to Separate, and Ignores the Record Evidence Showing that Housman's Violence Did Increase When She Tried to Separate.

To fault Ms. Markman and other battered women for not leaving blindly ignores the reality, repeatedly confirmed by social research, that s*eparation does not necessarily end violence.* On the contrary, leaving often leads to continued or escalated abuse. Jennifer L.

Courtroom: The Power of Judicial Responses (1999). In some cases, women have good reasons not to proceed, such as fear of reprisal from the batterer. National Institute of Justice, *The Validity and Use of Evidence* at 17. Just as failing to call police cannot be considered recklessly disregarding an opportunity for help, neither can failure to complete the protection order process.

Hardesty, *Separation Assault in the Context of Postdivorce Parenting: An Integrative Review of the Literature*, 8 Violence Against Women 579, 599 (2002); Ruth E. Fleury, Cris M. Sullivan & Deborah I. Bybee, *When Ending the Relationship Does Not End the Violence: Women's Experiences of Violence by Former Partners*, 6 Violence Against Women 1363, 1364 (2000); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991).

The term "separation assault" has been coined to describe this well-documented phenomenon which occurs when the batterer feels he is losing control. Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in Martha A. Fineman & Roxanne Mykitiuk, The Public Nature of Private Violence: The Discovery of Domestic Abuse 59, 79 (1994). Sadly, statistics bear out this reality. Data from national crime surveys in the United States and Canada estimate that compared with married women, separated women are about 25 times more likely to be assaulted by ex-mates and 5 times more likely to be murdered (citing Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 Violence and Victims 3 (1993)). Moreover, it is not necessarily the *act* of separating that triggers more violence, but rather the *decision* to leave, which is often seen as an attempt to challenge the batterer's control. *See* Martha R. Mahoney, *Victimization or Oppression?* at 79 (separation assault "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.*")*; Barbara Hart, *Beyond the "Duty to Warn*;" *See also Weiand*, 732 So. 2d at 1053 (holding that imposing duty to retreat from one's own home when faced with cohabitant attack would adversely impact battered women in part because retreating often increases violence: "Experts in the field explain that separation or retreat can be the most

dangerous time in the relationship for the victims of domestic violence because '[v]iolence increases dramatically when a woman leaves an abusive relationship;'" court also cites studies showing murders of battered victims are often "triggered by a walkout, a demand, a threat of separation ….Thus, the threat of separation is usually the trigger for the violence," citations omitted); *Hernandez*, 345 F.3d at 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."); *Felton v. Felton*, 79 Ohio St. 3d 34, 40, 679 N.E.2d 672, 676-77 (1997) (discussing strong policy reasons for permitting orders of protection after final divorce because "[t]he risk of assault is greatest when a woman leaves or threatens to leave an abusive relationship. Nonfatal violence often escalates once a battered woman attempts to leave the relationship," quoting Catherine Klein and Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 816 (1993)).

The record in this case illustrates the reality that Ms. Markman experienced severe, increased violence when she tried to leave, and had every reason to expect more violence if she tried again. She greatly feared what Housman would do to her if he found out she was taking steps to separate. She did not follow through with her protection order because she feared that he would be angry, and "find a way to get a hold of me," knowing that when he got angry, "the hitting got worse." N.T. 950, 952-53. On one occasion when she told him to let her leave the trailer, he responded that "she wasn't fucking going nowhere," choked her, pulled her to the couch by speaker wire around her neck, and forced her to have sex. N.T. 956-57.

Not coincidentally, it was after Ms. Markman's most serious attempt at separation that Housman's violence increased dramatically. Just days before the incident, she tried again to evict him, calling her friend to come over because she so feared what he would do, and telling both police and the trailer park manager about his abuse and her wish to make him leave. N.T. 974-79, 983-84. Only hours later did Housman lay in wait for her to return to the trailer and begin his reign of unprecedented terror for the next 48 hours up to, and during the killing, which included unlawful restraint, repeated rapes and assaults, and threats to kill and/or dismember her and her family. N.T. 993-1009.

Had Ms. Markman tried to run, hide, or otherwise take any further steps to leave, in the face of Housman's increasing anger and violence after her prior attempts, she might well have caused even more violence to herself and/or her child, or perhaps become another tragic statistic of those who have died while trying to leave.

In any event, given the record evidence of abuse and duress, it was the *jury* and not the trial judge that needed to assess this reality. Instead, the trial court itself assumed, without consideration of the very real risks of leaving, that Ms. Markman nonetheless should have left, and because she did not, she was "reckless" thus barring duress as a matter of law. Opinion at 83-86.

3. Faulting Ms. Markman for Not Attempting to Leave or Get Help During Momentary Lapses in Housman's Physical Violence Ignores the Reality that Housman's Abuse was a Pattern of Coercion and Control which Kept Ms. Markman in an Ongoing State of Terror.

To properly assess whether Ms. Markman had any reasonable alternatives to participating, the trial court needed to understand that Housman's violence was a pattern of control rather than a series of discrete incidents permitting escape between each one:

> Abusive behavior does not occur as a series of discrete events. Although a set of discrete abusive incidents can typically be identified within an abusive relationship, an understanding of *the dynamic of power and control* goes beyond these discrete incidents.

Mary Ann Dutton, *Understanding Women's Responses,* 21 Hofstra L. Rev. at 1208 (emphasis added).

See also Martha R. Mahoney, *Legal Images of Battered Women*, 90 Mich. L. Rev. at 53 ("[T]he conception of battering as about power – rather than about incidents of violence or about the psychology of women who experience violence – has been present in some of the psychological and social literature for some time."); Ellen Pence & Michael Paymar, *Education Groups for Men Who Batter: The Duluth Model* (1993).

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. Michael A. Anderson, Paulette Marie Gillig, Marilyn Sitaker, Kathy McCloskey, Kathleen Malloy & Nancy Grisby, *"Why Doesn't She Just Leave?": A Descriptive Study of Victim Reported Impediments to Her Safety*, 18 Journal of Family Violence 151 (2003). As one expert noted:

> 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.

Mary Ann Dutton, *Understanding Women's Responses*, Hofstra L. Rev. at 1208.

See also Hernandez, 345 F.3d at 837 ("The effects of psychological abuse, coercive behavior, and the ensuing dynamics of power and control mean that 'the pattern of violence and abuse can be viewed as a single and continuing entity ... thus, the battered woman's fear, vigilance, or

perception that she has few options may persist…even when the abusive partner appears to be peaceful and calm," citations omitted).

Contrary to these realities, the trial court opinion lists, as discrete, isolated "opportunities," each of the distinct times that Ms. Markman should have escaped, focusing on the times that she was physically able (e.g., when the "knife was not out," when she was "five feet from the door," when she was in the presence of other people; or when she could have gone to police). Opinion at 79-82. This reasoning overlooks the impact of the times between the discrete events of *physical* force or restraint, the continuing "state of siege" to which Ms. Markman was subject, and hence, the reality of Ms. Markman's true "opportunity" for safety. Unduly focusing on only the physical episodes of abuse trivializes a battered woman's true experiences:

> Work with battered women outside the medical complex suggests that *physical violence may not be the most significant factor about most battering relationships*. In all probability, the clinical profile revealed by battered women reflects the fact that they have been subjected to an *ongoing* strategy of intimidation, isolation and control that extends to all areas of a woman's life…Sporadic … violence makes this strategy of control effective.

Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 986 (1995) (emphasis in original).

Ms. Markman testified in detail to an escalating pattern of abuse, which progressed not only with respect to the severity of the violence, but with respect to the seriousness of the threats, culminating with threats to put her in a body bag and send the pieces home to her daughter. N.T. 1006, 1012. She testified that she was terrified, and her fear made it seem impossible to escape even if she may have been able to do so physically. N.T. 1022, 1049. Housman's overall pattern of coercion and control, including his threats, did as much to keep her in an *ongoing state of terror* as did the punctuating events of physical violence:

> Although violence is a universal method of terror, the perpetrator may use violence infrequently, as a last resort. It is not necessary to use violence often to keep the victim in a constant state of fear. The threat of death or serious harm is much more frequent than actual resort to violence. Threats against others are often as effective as direct threats against the victim….

Judith Lewis Herman, Trauma and Recovery at 77 (1992).

See also Hernandez, 345 F.3d at 839-40 (batterer's abuse amounted to "extreme cruelty" justifying suspension of battered woman's deportation even though physical abuse occurred in Mexico; batterer's nonphysical tactics of control, including inducing her to return to him through incessant calls and contrite promises to change, were part of his overall pattern of abuse).

In this particular situation, where the violence quickly escalated just prior to the killing, it is especially unrealistic to expect that she should have escaped at or near the time of the killing. Ms. Markman testified about violence in the days leading up to the homicide that was markedly different from Housman's past abuse because of its sudden increase in severity and duration. Throughout the hours just before Leslie White arrived, Housman held Ms. Markman at knifepoint, naked, raped her at will, and threatened to kill her and her family. N.T. 983-1006. These events, in the context of her past experiences with Housman, operated to heighten her terror and her reasonably based perception that the danger then was like no other.

The record shows that Ms. Markman recognized the escalation in Housman's violence just prior to the killing. Not only did she experience a clear increase in physical violence and threats, but she also recognized a "look in his eyes" of "pure evil" that she had never seen before, even during all the past instances of abuse. N.T. 993. Her ability to read his cues signaling impending danger is consistent with research showing that battered women become, of necessity, expertly adept at predicting danger. *See* Barbara Hart, *Beyond the "Duty to Warn*"; David R. Langford, *Predicting Unpredictability: A Model of Women's Processes of Predicting Battering*

Men's Violence, 10 Scholarly Inquiry for Nursing Practice: An International Journal 371 (1996); Jill Davies, Eleanor Lyon & Diane Monti-Catania, Safety Planning with Battered Women. In a recent study of how women predict men's violence, the researchers concluded that battered women become especially able to identify specific changes in the situation and the batterer's affect that served as warning signs. David R. Langford, *Predicting Unpredictability* at 376. Significantly *'[t]he eyes' were repeatedly mentioned as the telltale physical feature warning that a partner had become dangerous*…(emphasis added). *See also* Jill Davies, Eleanor Lyon & Diane Monti-Catania, Safety Planning with Battered Women ("A victim saying, 'He gives me the creeps' or 'he's gone crazy' or 'He just has that look in his eyes' … are elements for advocates to consider [along with many others] when trying to identify extreme danger.").[9]

In the context of Housman's increased violence, threats, and warnings, Ms. Markman's compliance with Housman's orders, rather than challenging him, certainly could be considered a survival strategy that was not unreasonable. In fact, avoiding the batterer, like Ms. Markman did, and complying with his demands, are precisely those strategies often used where, as here, there is a sudden increase in violence:

> Avoidance strategies were most often used for prevention when a situation escalated quickly … There were many ways of avoiding confrontation, such as suddenly becoming quiet, placating one's partner, walking away, accepting blame for something, never complaining, or doing as has been instructed.

[9] In *Stonehouse*, the defendant testified at trial that during the final violent encounter during which she killed her batterer in self-defense, she observed, "He [the batterer] was crazy. He didn't even know who I was in his eyes. I never saw him like that." This Court explained how "[e]xpert testimony would also have shown that among battered women who kill, the final incident that precipitates the killing is viewed by the battered woman as 'more severe and more life-threatening than prior incidents.'" *Stonehouse*, 521 Pa. at 55, 64, 555 A.2d at 779, 784 (1989) (quoting Elizabeth M.Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 Harv.C.R.-C.L. L.Rev 623, 625 (1980)). *See also Watson*, 494 Pa. at 473, 431 A.2d at 952 (discussing the importance of a batterer's behavior just prior to a woman's defensive action in assessing her reasonableness); *Humphrey*, 13 Cal. 4th at 1086, 921 P.2d at 8-9 ("As violence increases over time, and threats gain credibility, a battered person might become sensitized and thus able reasonably to discern when danger is real and when it is not."); *Kelly*, 97 N.J. at 207, 478 A.2d at 378 (Battered woman may be "particularly able to predict accurately the likely extent of violence in any attack on her.").

David R. Langford, *Predicting Unpredictability* (emphasis added).

Ms. Markman's testimony fully supports that she avoided confronting Housman and obeyed his orders to participate in the crime, only because she reasonably believed he was serious about his threats. *See* N.T. 999 regarding her avoidance ("I did not even want to argue with him…I just sat there with my mouth closed"; N.T. 1012-22 (testifying that she complied with his orders to gag and tie the victim, did not try to stop him, did not try to get away, because she was terrified, and believed he would do what he had threatened).

The record evidence demonstrates why Ms. Markman so profoundly feared Housman when he ordered her to participate in the homicide. This evidence should have been considered by the trial court for purposes of the duress instruction with all inferences favorable to Ms. Markman. *Black*, 474 Pa. 47, 372 A.2d 627. Yet, the trial court opinion does not differentiate between her "numerous reasonable opportunities," to escape, whether long before the crime, or during or after this dramatic increase in the duration and severity of Housman's violence. Opinion at 79-82. The expectation of the court is that she had a *continuing* duty to leave regardless of the changes in Housman's violence and the realities of her situation.

As to the killing itself, the trial court makes no distinction in her duty to leave either before the during the killing, ignoring the glaring fact that the same man ordering her to participate was then and there killing another woman in cold blood. Obviously, any direct knowledge of a batterer's ability to carry out his threats would inform a battered woman's reasonable perception of danger and her alternatives. Barbara Hart, *Beyond the "Duty to Warn."* What could be more compelling in convincing her of Housman's intention to make good on his threats than witnessing him kill another person before her eyes? Perhaps Ms. Markman summed it up best:

> I thought he was going to kill me. He was sitting there killing somebody else. So why wouldn't I think he could do me next?"

N.T. 1018.

It was for the jury to decide, under all of the circumstances, whether Housman's momentary reprieves in the physical violence, in light of his continuing pattern of coercion and control, gave Ms. Markman any greater opportunity to "escape" before or during the homicide, than when he had the knife to Ms. Markman's throat. This question was part and parcel of the jury's ultimate function: to decide whether a person of "reasonable firmness," if subjectively placed in Ms. Markman's situation, would have likewise been unable to resist Housman's threats; and whether she disregarded a risk that was a "gross deviation" from what a reasonable person would have observed if subjectively placed in her situation. *DeMarco*, 570 Pa. at 272-74, 809 A.2d at 261-63.

On this record, the trial court's preclusion of the duress instruction wholly deprived Ms. Markman of her sole defense in this case, rendering meaningless the promise of her right to defend as guaranteed by state law and the federal constitution. *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . . the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," citations and internal quotations omitted); *In re Oliver*, 333 U.S. 257, 273 (1948); *Washington v. Texas*, 388 U.S. 14, 22-23 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations ..."). *See also Bradley v. Duncan*, 315 F.3d 1091, 1099 (9th Cir. 2002) ("[T]he right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the

defense," citations omitted); *McNeil*, 344 F.3d 988 (erroneous imperfect self-defense instruction in case where battered woman killed her abuser violated constitutional rights and required habeas petition to be granted).

The fact that this error emanated from trial court rulings based largely on misconceptions about battered women, makes it especially repugnant to the policy of this Commonwealth to ensure that battered women, like all defendants, have fair trials, unencumbered by misinformation about social realities. *Stonehouse*,521 Pa. 41, 555 A.2d 772.

II. THE PRECLUSION OF EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS, BASED ON A MISUNDERSTANDING OF THE CONTENT AND PURPOSE OF THAT TESTIMONY AND A MISAPPLICATION OF APPLICABLE LAW, SEVERELY PREJUDICED THE DEFENSE AND REQUIRES REVERSAL.

The trial court precluded the testimony of Dr. Dawn Hughes, a forensic psychologist specializing in battering and its effects.[10] The trial court's rationale demonstrates confusion both as to the admissibility of such testimony in a duress case, and the nature of the testimony actually proffered. Opinion at 73-79. This testimony was essential for the jury to fairly assess the defense claim of duress.

One need look no further than the trial court rulings precluding a duress instruction to vividly demonstrate this point. As discussed in the preceding section, the trial court's review of the evidence to determine whether to instruct on duress, was based on a number of misconceptions about the nature of Ms. Markman's experiences of abuse, including the belief that she had a duty to leave, and that by failing to do so, she was responsible for the ensuing abuse and coercion.

[10] The court admitted Dr. Hughes' report in full as the defense proffer of her testimony. *See* N.T. 945-46; 1197, Defense Exhibit 15.

If a trial court, making critical rulings in a capital duress case, bases its decision on repudiated myths and commonly held value judgments about battered women, then a jury could be expected to do the same. Expert education was desperately necessary for a fair assessment of Ms. Markman's claims.[11]

A. Expert Testimony on Battering and Its Effects is Relevant and Admissible to Support a Claim of Duress.

Unquestionably, expert testimony on battering and its effects is admissible to help the jury understand the honesty and reasonableness of a defendant's belief of danger, and to dispel jurors' myths and misconceptions about battered women. *Stonehouse*, 521 Pa. at 41, 555 A.2d at 785; *Dillon*, 528 Pa. 417, 598 A.2d 963 (Nix, C.J., and McDermott, J. concurring) (Cappy, Larsen, and Papadakow, JJ., concurring); *Commonwealth v. Miller*, 430 Pa. Super. 297, 310-13; 634 A.2d 614, 620-22 (1993); *Commonwealth v. Kacsmar*, 421 Pa. Super. 64, 77-78, 617 A.2d 725, 731-32 (1992) (per curiam).[12] While expert testimony on battering and its effects evolved

[11] The preclusion of the expert testimony made it more difficult for Ms. Markman to convince the judge that the evidence warranted a duress instruction, and, in this sense, placed her in a "catch-22" type situation (e.g., the trial court felt she did not meet her burden to warrant an instruction without such testimony, yet would not permit the testimony either). *Amici* contend that, while preclusion of the expert is related to the instruction issue, the preclusion also operated as an independent error by depriving Ms. Markman of her state and federal constitutional right to present a meaningful defense under recognized state law in violation of the due process clause of the Fourteenth Amendment and the compulsory process clause of the Sixth Amendment. *Chambers*, 410 U.S. at 294 ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."); *Crane*, 476 U.S. at 690-91; *Washington*, 388 U.S. at 19, 22-23; *Davis v. Alaska*, 415 U.S. 308 (1974). *See also Depetris v. Kuykendall*, 239 F.3d 1057 (9th Cir. 2001) (trial court's preclusion of journal containing evidence corroborative of defendant's self-defense claim violated her due process right to present a defense as guaranteed by *Chambers* and *Washington*, and required federal habeas relief).

[12] Testimony about battering and its effects "is a form of social framework testimony that is now admissible in every jurisdiction in the United States." Sue Osthoff & Holly Maguigan, *The Self-Defense Claims of Battered Women* (forthcoming 2004). *See also* National Institute of Justice, *The Validity and Use of Evidence* at 3; Janet Parrish, *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*, 11 Wis. L. Rev. 75 (1996).

in the context of self-defense cases, it has been admitted as evidentiary support other types of cases and situations, including duress.[13]

It is important to note that, historically, there has been much confusion about the purpose of expert testimony on battering and its effects. Initially, some courts (and some defense counsel as well) perceived this testimony as a unique theory of justification or excuse based on the mere fact that the defendant was battered, e.g., a "battered woman defense." *See generally* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 40 U. Pa. L. Rev. 379 (1991) (analyzing assumptions underlying the misperception that traditional self-defense doctrine cannot accommodate the claims of battered women who

[13] *See* National Institute of Justice, *The Validity and Use of Evidence* at 2-4; *State v. B.H.*, 2003 N.J. Super. LEXIS 352 (expert testimony admitted to support battered woman's duress claim as defense to charge of sexual assault; trial court erred by instructing jury to consider expert testimony on battering only with respect to her recklessness in staying with the batterer, as the testimony was also relevant to her honest and reasonable belief of danger and whether person of reasonable firmness in her situation would have resisted the threats); *United States v. Marenghi*, 893 F. Supp. 85, 96 (D. Me. 1995) (in drug prosecution, expert testimony on battering relevant to battered woman's duress defense to help jury understand reasonableness of her actions, and "to [explain] 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;" court specifically notes that there is no reason to preclude expert testimony in duress cases if it is admissible in self-defense cases); *United States v. Brown*, 891 F. Supp. 1501 (D. Kan. 1995) (expert testimony on battering admissible to support duress defense to drug charges); *United States v. Rouse*, 168 F.3d 1371 (D.C. Cir. 1999) (newly discovered evidence that defendant suffered abuse from her codefendant/batterer, including expert testimony, was relevant to her defense to fraud charge but not grounds for relief here since trial court made credibility determination). For cases admitting expert testimony on battering and its effects on issues of intent similar to duress theories, *see, e.g.*, *Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992) (denial of funds for expert on battering violated due process since battering was relevant to negate the specific intent element of the aiding and abetting statute where defendant charged as conspirator with batterer in killing third person); *Mott v. Stewart*, 2002 U.S. Dist. LEXIS 23165 (2002) (battered woman's petition for habeas corpus granted where trial court erred in precluding expert on battering offered to negate intent element of child abuse offense); *People v. Minnis*, 118 Ill. App. 3d 345, 455 N.E.2d 209 (1983) (expert testimony admissible to explain battered woman defendant's conduct, not only at time of homicide, but also afterwards in dismembering abuser, to rebut state's interpretation as showing consciousness of guilt).

kill); *Meeks v. Bergen*, 749 F.2d 322 (6th Cir. 1984) (counsel not ineffective for asserting a claim of self defense rather than a "battered wife defense").[14]

Amici have never argued for a separate defense based on "battered woman syndrome" or any other "theory" unique to battered women. Rather, *Amici* simply seek fair application to battered women defendants of the evidentiary rules that apply to all criminal defendants. *Amici* do not advocate a special rule of admission for battered women that would require admission of an expert in every case. *Amici* believe that a court's rulings on admission of such evidence must be based on an accurate understanding of the applicable legal principles, as well as the content of the evidence itself. In this case, the rulings were not based either on applicable legal principles or on the content of the evidence.

Given the standard for duress in the Commonwealth, there is no logical distinction between self-defense and duress cases with respect to the admissibility of expert testimony on battering. If such testimony is admissible and necessary for fairly assessing self-defense claims, it is as least as necessary for fairly assessing claims of duress.

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. Both of 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

[14] While some Pennsylvania decisions have alluded to a "battered woman defense," *see Commonwealth v. Tyson*, 363 Pa. Super. 380, 383, 526 A.2d 395, 397 (1987) (referring to counsel's failure to raise defense of "battered woman's syndrome"); *Commonwealth v. Ely*, 381 Pa. Super. 510, 532, 578 A.2d 540, 541 (1990), it is clear that Pennsylvania law accepts expert testimony on battering and its effects as support of already existing defenses, rather than creating a new a defense. *See Dillon*, 528 Pa. at 425, 598 A.2d at 967 (Nix, C.J., concurring) ("Presently, the law of this Commonwealth does not recognize the battered woman syndrome as a separate and distinct defense, and I am not proposing that we do so now."); *Miller*, 430 Pa. Super. at 313, 634 A.2d at 622 ("The syndrome does not represent a defense to homicide in and of itself, but, rather, is a type of evidence which may be introduced….").

history of abuse at the hands of her attacker or coercer. *DeMarco*, 570 Pa. at 272, 809 A.2d at 262 (jury must consider defendant's "situation" in deciding the issues of "reasonable firmness" to resist the threat and reasonableness in disregarding a risk of probable duress; in assessing the defendant's situation, the court considered history of abuse inflicted on defendant by coercer); MODEL PENAL CODE AND COMMENTARIES, Pt. I § 2.09, 375-76 (recognizing that "long and wasting pressure may break down resistance more effectively than a threat of immediate destruction."); *United States v. Johnson*, 956 F.2d 894, 900 (9th Cir. 1992) (discussing applicability of Model Penal Code to situation of a battered woman); *Stonehouse*, 521 Pa. at 59-66, 555 A.2d at 781-85 (discussing history of abuse as "surrounding circumstances" necessary to consider in assessing self-defense).

To properly *consider* the history of abuse, the factfinder must correctly *understand* that history and how it relates to the claim, a task very difficult to do without the aid of an expert on battering and its effects. An expert can help provide provides the jury with the "social framework" necessary to understand her experiences of abuse, "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;* Report Responding to Section 40507 of the Violence Against Women Act, NCJ 160972 (1996) (citations omitted).

Providing the jury with relevant context is just as necessary in a duress claim as in a self-defense claim. As explained in the seminal report on the validity of expert testimony on battering in criminal cases, including duress cases, published by the Department of Justice:

> ...[F]or a battered woman to prove duress, she must demonstrate her reasonable belief that criminal behavior was necessary in order to avoid the batterer's violent or abusive behavior. *Describing the pattern, over the course of the relationship, of a battered woman's compliance in the context of the batterer's violence or threats [the expert] can*

> *provide a framework for jury evaluation of whether the alleged criminal conduct resulted from duress or coercion*

National Institute of Justice, *The Validity and Use of Evidence* at 3 (emphasis added). *See also* note 13, *supra*; *State v. B.H.*, 2003 N.J. Super. LEXIS at *24 ("[W]e view the duress defense as sufficiently parallel to the justification of self-defense to conclude that expert testimony respecting battered woman's syndrome is available for similar purposes in both cases."); *United States v. Marenghi*, 893 F. Supp. 85 at 96 (D. Me. 1995) ("This Court cannot envision that [expert testimony on battering and its effects] should be excluded in a duress defense when it is admitted in an overwhelming majority of state courts in self-defense cases.") .

The dangers of not presenting expert testimony and risking a verdict based on misconceptions, well-documented in the self-defense context, *see Dillon*, 528 Pa. at 432, 598 A.2d at 970-71,[15] may be even greater in the duress context. The expert in a duress case arguably has to address and combat even more misconceptions than in a self-defense case, due to the difference in the standards. The implicit assumption in a self-defense case that needs correction – that if the abuse was that bad, any reasonable person would have "just left" – is also an *explicit question* in a duress case, through the "recklessly placed" exception of 18 Pa.C.S. § 309(b). In a self-defense case, not leaving the abuser, the situation or the scene can implicitly undermine a finding of reasonableness. In a duress case, the woman's failure to leave not only

[15] In *Dillon*, this Court stated, "The danger of not presenting expert testimony in these cases is that the jury may well be predisposed to judge the actions and reactions of a woman in a position that they cannot hope to comprehend. In my view, many 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…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." *Dillon*, 528 Pa. at 432, 598 A.2d. at 970-71. *See also Stonehouse*, 521 Pa. at 61-66, 555 A.2d at 782-85; *Miller*, 430 Pa. Super. at 310-14, 634 A.2d at 620-22; *Marenghi*, 893 F. Supp. at 96 ("Without an understanding of how battered woman syndrome instills in an abused person a continuing sense of being trapped and of constant fear, the juror's review of a

implicitly undermines a finding that she was reasonable, but can also lead to a mistaken conclusion that she meets the additional *explicit* criteria that she "recklessly placed" herself in the situation, thus invoking the bar of 18 Pa.C.S. § 309(b). As the record in the instant case fully demonstrates, a battered woman's failure to leave in a duress situation, unless understood in the context of her experiences of abuse, can imply that she *voluntarily participated* and unreasonably, recklessly (or even willfully) assumed the risk of any subsequent duress.

In the *Stonehouse* decision, Justice Larsen summed up why the lack of an expert was so damaging to an assessment of appellant's reasonableness:

> …[T]he absence of such expert testimony was prejudicial to appellant in that the jury was permitted, on the basis of unfounded myths, to assess appellant's claim that she had a reasonable belief that she faced a life-threatening situation when she fired her gun at [the decedent/batterer].

Stonehouse, 521 Pa. at 65, 555 A.2d at 784.

In *Stonehouse*, the court found that expert testimony was necessary for the jury to be able to assess Carol Stonehouse's reasonable belief of danger from an abusive husband who she believed was firing at her at the time she shot him. The jury in this case needed expert testimony at least as much as did the jury in *Stonehouse.* This testimony was necessary in order for the jury to assess Ms. Markman's reasonableness in complying with Housman and her "recklessness" in bringing about the situation.[16]

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defendant's allegations that she was in fear of immediate bodily injury will be incomplete and irrelevant to the reality of the situation.").

[16] As is true with other forms of expert testimony, the admissibility of expert testimony on battering and its effects is not determined solely by the type of claim involved (e.g., self-defense vs. duress). Rather, the question is whether the proffered evidence meets the standards for admission under applicable law. Admitting expert testimony on battering and its effects in duress cases clearly does. *See* PA. R. EVID. 702 (permitting expert testimony which provides "specialized knowledge beyond that possessed by a layperson [which] will assist the trier of fact to understand the evidence or determine a fact in issue."); *Stonehouse*, 521 Pa. at 61, 555 A.2d at 782-83 (expert testimony on battering is outside of "the ordinary

B. The Trial Court's Rulings Precluding Expert Testimony Were Based on a Fundamental Misunderstanding of the Content and Purpose of Expert Testimony on Battering and Its Effects.

The trial court's primary reason for precluding the expert in this case was that it constituted testimony about "state of mind" not pertinent to a standard of "reasonableness." *See* Opinion at 74-75. ("Dr. Hughes' testimony … would have centered on the defendant's mental state at the time of the murder..." *Id*. at 77).

The trial court seemed to interpret Dr. Hughes' testimony as mental health evidence in the sense of mental capacity. *See* Opinion at 76-77 (comparing Dr. Hughes' testimony to testimony about "emotional disturbance" offered in *Commonwealth v. Hilburn*). However, the expert on battering and its effects aims not to establish a mental health excuse for a woman's conduct, but rather to provide a social framework within which to understand her experiences and responses. Expert testimony on battering and its effects "...provides information about a particular battered woman and the context in which the domestic violence occurred; it places the unique facts of a specific case in a framework of what is known in the literature about battering and its effects." National Institute of Justice, *The Validity and Use of Evidence* at 21. Expert testimony on battering and its effects is offered to explain much more than the "inner workings" of the woman's mind:

> Typically, the testimony offered in forensic cases is not limited to the psychological reactions or sequalae 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 than the victim is not the "typical" battered woman or that she herself is the abuser.

Mary Ann Dutton, *Understanding Women's Responses*, 21 Hofstra L. Rev. at 1195.

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training , knowledge, intelligence and experience of jurors."); *Commonwealth v. Pitts*, 740 A.2d 726, 733-34 (Pa. Super. 1999); *Commonwealth v. Vallejo*, 532 Pa. 558, 561, 616 A.2d 974, 976 (1992).

Expert testimony on battering and its effects may cover: (a) general information on the dynamics of domestic violence,[17] (b) explanations of the behavior of a battered woman that may seem inconsistent with her being battered, including discussion of common myths and misconceptions about battered women,[18] (d) common reactions that women have to battering,[19] (e) a discussion of the particular facts in the case, to show how they are consistent with a battering relationship,[20] (f) the particular experiences of the battered woman defendant, including

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[17] Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 Women's Rts. L. Rep. 195, 202 (1986); Mary Ann Dutton, *Understanding Women's Response*, 21 Hofstra L. Rev. at 1195.

[18] Mary Ann Dutton, *Understanding Women's Responses*, 21 Hofstra L. Rev. at 1195; Elizabeth M. Schneider, *Describing and Changing*, 9 Women's Rts. L. Rep. at 202. *See, e.g.*, *Stonehouse*, 521 Pa. 41, 555 A.2d 772; *Dillon*, 528 Pa. 417, 598 A.2d 963; *Kacsmar*, 421 Pa. Super. 64, 617 A.2d 725 (in self-defense case, expert testimony regarding defendant's abuse by his brother as well as testimony about defendant's personality disorder admissible to help explain why defendant felt he could not leave and had to accept brother's dominance and abuse).

[19] Elizabeth M. Schneider, *Describing and Changing* at 202; Martha R. Mahoney, *Legal Images of Battered Women*, 90 Mich. L. Rev. at 36.

[20] Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 Women's Rts. L. Rep. 227, 228 (1986); Kelly, 97 N.J. at 478, A.2d at 378; *State v. Richardson*, 189 Wis. 2d 418, 525 N.W.2d 378 (1994).

[21] Mary Ann Dutton, *Understanding Women's Responses*, 21 Hofstra L. Rev. at 1215-40. *See also Dillon*, 528 Pa. 417, 598 A.2d 963.

her own strategies for stopping the violence, her psychological responses to battering, and the cumulative effects of the battering on her behavior and state of mind.[21] Indeed, this Court's decisions explaining expert testimony about battering and the effects of battering markedly emphasize expert issues other than a woman's psychological state. *See Stonehouse*, 521 Pa. at 61-66, 555 A.2d at 782-85 (testimony relevant to rebut myths and misconceptions, help jury assess reasonableness).

The trial court concluded that expert testimony on battering and its effects is *only* about a woman's subjective "state of mind." If this were true, this testimony is just as irrelevant to the reasonableness component of self-defense as it is to duress in contravention of applicable decisional law. The objective reasonableness component of self-defense requires a consideration of the defendant's "surrounding circumstances," *Dillon,* 528 Pa. at 424, 598 A.2d at 966-67 (Nix, C.J., concurring). The analogous objective reasonableness requirement of the duress statute requires consideration of the defendant's "situation." *DeMarco*, 570 Pa. at 272-74, 809 A.2d at 261-63. If using an expert to help assess "surrounding circumstances" does not transform the self-defense standard into a purely subjective one, then neither does using an expert in a duress case to help assess the defendant's "situation." In both self-defense and duress cases, lay and expert testimony on battering, when relevant, is necessary to properly assess the objective components of "reasonableness." *Id*.; *Dillon*, 528 Pa. at 424, 598 A.2d at 966-67.

The trial court's reliance on *Commonwealth v. Hilburn*, 746 A.2d 1146 (Pa. Super. 2000) to preclude the expert testimony in this case is misguided. In *Hilburn*, the sum of the evidence offered by the defendant to prove duress in forging drug prescriptions was a psychiatrist who testified that due to the defendant's "emotional and psychiatric condition," she was subject to duress at the time of the forgery. The Superior Court correctly held that this evidence could, at

most, establish a "proclivity or suggestion to emotional pressure" which in itself could not establish an imminent threat of harm. *Id.* at 1148.

The evidence proffered by Hilburn to support a duress defense bears not even a slight resemblance to that proffered by Ms. Markman. Ms. Markman presented abundant lay evidence of duress that in itself warranted an instruction. The expert testimony of Dr. Hughes was not offered as a mental health excuse, nor was it offered to create a duress defense, (as Hilburn's expert was asked to do). The expert testimony was offered to explain, support, and give context to the already existing evidence of duress. By contrast, Hilburn offered no evidence whatsoever of any violence, of how she was coerced, or even of who supposedly coerced her, seemingly relying on her own mental health problems to show duress. The trial court's conclusion that *Hilburn* controls here is based on its fundamental misunderstanding of expert testimony on battering and its effects[22] and its failure to consider the content of the testimony *actually proffered* in this case.

C. The Proffered Expert Testimony Was Critical For a Proper Assessment of Ms. Markman's Claims, and Its Preclusion Constitutes Reversible Error.

The instant record illustrates precisely why expert testimony is often necessary to permit a fair assessment of a battered woman's claim and the resulting prejudice that can occur if it is

[22] Notably, even if the expert testimony offered had been purely psychiatric in nature, that testimony would still be relevant and admissible as to the subjective belief of danger. *See Commonwealth v. Light*, 458 Pa. 328, 326 A.2d 288 (1974) (preclusion of expert mental health testimony was reversible error where it supported the first prong of reasonableness test for self defense, e.g., whether the defendant held an honest belief of danger); *Pitts*, 740 A.2d 726 (expert testimony that accused suffered from post-traumatic stress syndrome was relevant and admissible to the subjective element of his self-defense claim). Since *DeMarco* expressly requires consideration of the subjective situation of the defendant in a duress case, and the subjective elements of duress and self-defense are indistinguishable, such psychiatric testimony would be equally relevant to duress as to self-defense. As explained in the text, Dr. Hughes' testimony in this case was offered for far more than just her opinions about Ms. Markman's mental health diagnoses. To the extent that Dr. Hughes would have also opined regarding Ms. Markman's psychological distress, Defense Exhibit 15 at 17, that testimony should have been admitted, at least as to the subjective determinations regarding duress.

precluded. The prosecutor and co-defendant's counsel portrayed Ms. Markman as a blameworthy woman who did not "act" like a battered woman should act, and who could have and should have escaped during any temporary lapse in the physical violence. During the trial, they both fully exploited – and may have helped amplify – many of the same misconceptions that the trial court used in making its decisions.

Dr. Hughes would have given the jury the essential information it needed to understand Ms. Markman's experiences of abuse in the context of her relationship with Housman. She would have elucidated Housman's conduct as a pattern of control and abuse which, most critically to the allegations of duress, functioned to coerce her compliance through violence and fear. Defense Exhibit 15 at 18-20, Para. 1. Dr. Hughes would have explained how Housman exerted control through not only physical violence, but also through psychological and sexual abuse. She would have explained how all these forms of abuse and control operated to increase Ms. Markman's terror and coerced her compliance. *Id*. She would have testified about his tactics of abuse and control including: coercion and threats; intimidation, stalking; isolation, subjugation; humiliation; his denial that the abuse occurred; blaming her for his use of violence; and his sexual coercion (such as insisting on sex against her will and through physical violence, and other forms of sexual control). Defense Exhibit 15 at 14–16.

Without understanding this reality of how Housman's physical violence only punctuated his overall *pattern* of abuse and control, it is quite likely that the jury perceived his abuse as only discrete physical episodes that weren't all that serious. The prosecutor and Housman's counsel fully encouraged this view by repeatedly minimizing the violence.[23]

[23] *See, e.g.*, N.T. 702 (cross-examination by Mr. Ebert of witness Chris Moffitt: "And the whole time you said you maybe saw one violent act and you may have seen other bruising, less than – five times or less"); N.T. 720-23 (cross-examination by Mr. Ebert of witness Jessica Wahl's description of bruising she witnessed); N.T. 850-51 (cross-examination by Mr. Ebert of defense witness Deb Baker: "Now the only

The prosecutor and co-defendant's counsel frequently exploited the myth that domestic violence is only physical, and they seemed intent on showing that Ms. Markman was not really battered. The prosecutor and co-defendant's counsel implied that because Ms. Markman did not behave like the weak, shy, timid, frightened stereotypical "battered woman" she was not abused by Housman. Without expert explanation, co-defendant's counsel was able to suggest to the jury that because Ms. Markman might have appeared strong, or engaged in "horseplay" with Housman, she was lying about her accounts of abuse. These suggestions again focused incorrectly on only physical aspects of abuse. Even if the jury believed Ms. Markman may have sometimes appeared like the "stronger" person in the relationship, it did not mean that she was not the victim of Housman's horrific abuse.

Housman's counsel went so far as to explicitly argue that because Ms. Markman did not fit the mold of the stereotypical battered woman, she was lying and guilty:

> Well, you are darn right nobody believed her. Her credibility is in the toilet. How many times did we hear things that were just downright lies?...*She [Ms. Markman] is not the singing nun.* Foul language has Beth Markman's picture next to it in the dictionary.
>
> ... Beth told Ginnie that she would take Will Housman on joy rides....*Now is that the statement of a shy, timid woman who is being abused?…*
>
> … Well, Beth looks at this guy [a witness] and looks at Will, [and says] he's an asshole...*Now, is this a woman who is being abused? Is this a woman who is subservient to this guy?* If this guy is ruling the roost, she doesn't get away with that stuff. She doesn't have the guts to do something like that. It's phenomenal that somebody who is so put upon would appear so aggressive and domineering....

N.T., Opening Statements and Closing Arguments, 38-41 (emphasis added).

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time you saw her with black eyes was...around August the 10th..."); N.T. 1155-56 (Mr. Gilroy questioning Ms. Markman about the incident when she called the police due to Housman's tampering with her car: "You don't have any bruises and you don't have anything wrong with you at that point that you say to the police, look at me, look at me, get this guy out of here?").

The suggestions that the abuse was not really so bad and that Ms. Markman did not "behave" like a battered woman supported the central theme of the Commonwealth's case: that if the abuse was really as bad as she claimed, she would have sought help from police and the courts, and would have escaped from Housman during any momentary reprieve whether before, during or after the homicide.

Dr. Hughes' testimony would have directly rebutted the classic myths discussed above. Dr. Hughes would have explained to the jury that, like other battered women, Ms. Markman used a variety of strategies to reduce the violence. These strategies included prior efforts to leave and to seek police and court assistance. Defense Exhibit 15 at 16. Dr. Hughes could have explained how these prior experiences informed her subsequent strategies.[24] Significantly, Dr. Hughes would have testified that Ms. Markman's primary strategies were "personal" strategies of compliance and acquiescence with Housman's demands:

> Ms. Markman primarily relied upon numerous personal strategies in an attempt to prevent her boyfriend's assaults. More specifically, she acquiesced [to] his requests, she complied with his implicit or explicit demands, and she did not stand up for herself or her rights. By remaining silent, acting passive when with him and "trying to do everything right" she believed she might not give him a reason to be violent.....

Id. at Para. 9.

In a case that basically boils down to the reasonableness of an accused's compliance, what could be more essential than expert testimony providing specialized knowledge about the dynamics of that compliance? Dr. Hughes' testimony would have directly rebutted the repeated suggestion that Ms. Markman was to blame for failing to use formal strategies such as escape and seeking help through the courts. Dr. Hughes' testimony would have explained to the jury

[24] For example, Dr. Hughes mentions in her report that Ms. Markman had tried to leave the relationship twice; had called the police and was told they could not help; had inquired about getting a protective order but was afraid to follow through. Defense Exhibit 15 at 16, Para. 10, 11.

that compliance as a strategy, especially in the context of Ms. Markman's experiences with Housman, could be considered rational and reasonable. At a minimum, Dr. Hughes' testimony could help explain why Ms. Markman's compliance was not unreasonable.

The record is replete with examples of how misconceptions were exploited and left unrebutted. For example, as to Ms. Markman's failure to call police, the prosecutor asked her these questions:

> [Y]ou were capable when you had a problem to have the Pennsylvania State Police come to your house? N.T. 1077.
>
> [Y]ou just gave us an entire litany, a big list of things that happened physically, you didn't call them on those occasions? N.T. 1078.
>
> And then the State Police go away, and then for two days you are terrorized and the State Police aren't called? N.T. 1078.

N.T. 1077-78.

As to "opportunities" for help from the courts and otherwise, consider the prosecutor's exchange with Ms. Markman:

Q. At no time during this entire course of two years did you get a PFA, did you? A protection from abuse order.
A. No, I had went – like I said before, I had started. I had called and I had started to file one, and I never went to the interview…
Q. And you say you withdraw that because you wanted to avoid embarrassment for him at work and –
A. No, not embarrassment for him at work. For the simple fact that the police could have came to his job., he would have got pissed off, and I would have got my ass beat again.
Q. But he wasn't with you at that time?
A. That doesn't matter. He took the siding, the stripping off my door, broke into it one time before. What is to stop him from doing it again?
Q. But you had that opportunity and you didn't do?
A. Right, I didn't.
Q. No matter what else happened to you , you obviously knew where to call and to get help, but it didn't happen?
A. No, it didn't.

N.T. 1080-81.

The prosecutor further continued the implication that it was her fault for failing to get help, by repeating to the jury that if Ms. Markman really wanted to get help or leave, she was certainly "able."[25] The prosecutor's suggestion that Ms. Markman should have "just left" before, during, and after the incident permeated examination of the witnesses. The prosecutor repeatedly emphasized how easy it would have been for Ms. Markman to "just leave."[26] He also questioned her on the ability to open the doors of the trailer, implying she should have ran out of or not returned to the trailer with Housman. N.T. 1008.

This repeated suggestion by the prosecutor that a simple escape was always possible would have been further rebutted by Dr. Hughes' testimony regarding the increase in violence in month or so before and leading up to the incident. Dr. Hughes would have helped the jury understand that, given the increase in frequency and severity of the abuse, Ms. Markman may have had good reason to be especially fearful. As Dr. Hughes would have testified: "These events [Housman's escalating violence] 'set the stage' demonstrating to Beth Markman that not only are the means available for coercion, but that William Housman was ready and willing to pay the cost that coercion implies." Defense Exhibit 15 at 19, Para. 22. Dr. Hughes would have given the jury the essential information it needed to understand Ms. Markman's experiences of abuse in the context of her relationship with Housman. She would have elucidated Housman's

[25] *See* N.T. 692 (cross examination of defense witness Lonnie Walker: "There were times you knew that they were capable of separating, that means they didn't live together anymore?"); N.T. 850-51 (Mr. Ebert's cross examination of witness Deborah Baker: "Q. She was certainly capable of taking her person and getting away from William Housman if she wanted to, isn't that correct? A. No; Q. She always went back with him is what you are telling us? A. Yes, she did.); N.T. 723 (cross examination of Jessica Wahl "Q. My point is that she was capable of breaking up with this guy at times, right? A. Right.").

[26] The prosecutor questioned Ms. Markman on failing to escape at the "Sheetz" store where Housman phoned the victim. *See* N. T. 1087 ("Q. [During the phone call, the knife] is not right sticking in to you at that point or anything like that? A. Not, not walking through the parking lot. Q. And there is people all around her, correct? A. Yes.). He also questioned her about her failure to escape during the homicide and just after it. N.T. 1111 ("Q. And he is here, and the victim is in front of him, and you are about, what,, five feet from the front door? A. I was close to the front door."). N.T. 1114.

conduct as a pattern of control and abuse which, most critically to the allegations of duress, functioned to coerce her compliance through violence and fear." Defense Exhibit 15 at 14, Para. 1, 18-20.

Likewise, Dr. Hughes would have explained the significance of the sudden escalation of the abuse in the 48 hours leading up to the incident itself. This marked change in the violence had a profound effect on Ms. Markman's level of fear, understanding of his power, and ultimately, her belief that she had to comply to survive. "[E]vents that transpired during the 48 hours immediately before and including the criminal act served to reinforce William Housman's power and control over Beth Markman...thereby increasing her susceptibility to coercive demands." Defense Exhibit 15 at 19, Para. 23.

The prosecution's references to Ms. Markman's actions in the days after the incident could have also been directly rebutted by Dr. Hughes. For example, Dr. Hughes would have testified that, consistent with the literature, Ms. Markman's witnessing Housman murdering Leslie White "served to strengthen, not diminish, William Housman's power and control over Ms. Markman." Defense Exhibit 15 at 20. In particular, she would have rebutted a major theme in the prosecution's examination – that because Ms. Markman acted "normally" in the days following the incident, she was not credible. Dr. Hughes would have testified:

> For individuals who have been repeatedly victimized, like Ms. Markman, it is not uncommon to return to activities of daily life after an extremely abusive event. Ms. Markman demonstrated this pattern frequently. She suffered beatings by William Housman, and did not talk to friends or coworkers about it. One time, she was strangled and lost consciousness, then raped by William Housman, and the next day, she went about her life without telling anyone. Victims of interpersonal violence often harbor feelings [of] shame and humiliation from having been victimized, and fear that they will not be believed, thus do not disclose the abuse. Such behavior does not suggest that the individual was physically or psychologically unscathed by the trauma. On the contrary, this behavior is often conceptualized in the trauma and victimization literature [as] coping mechanisms, such as denial, defensive avoidance, numbing and dissociation. These coping mechanisms were likely consciously and unconsciously motivated.

See Defense Exhibit 15 at 20, Para. 24(a).

In sum, the trial court's preclusion of Dr. Hughes' testimony in this case created a tragic paradox. On the one hand, as discussed above, the Commonwealth was permitted free reign to elicit evidence exploiting misconceptions about battered women generally and Ms. Markman specifically. On the other hand, Ms. Markman was denied the right to present essential testimony that would have directly rebutted those misconceptions. This permitted a closing argument by the Commonwealth – unchallenged by available (but precluded) defense evidence and argument to the contrary – that sarcastically emphasized precisely those myths that Dr. Hughes could have addressed. In the prosecutor's closing, he frequently – and often sarcastically – urged the jury to imagine all the ways the Ms. Markman could have escaped. He said:

> You can look at those photographs of the Sheetz [where the phonecall was made] out there on Route 11 and you say, *"Oh, my God, there is no way to get away from this"* … And, my God, the phones are right next to the door and there must be sixteen gas pumps there at business hour.

N.T., Opening Statements and Closing Arguments, 110.

> … [Y]ou are watching somebody with a piece of wire like this pulling on it and choking it and putting your arm around and that, ladies and gentlemen, is happening on the couch here, *and here is the door, and your solution is, I am going to stay in here*, I think I will watch this at close range, that says something alot. And you talk, you know, when I said, well, you have to account for the spare room, look at the nature of these doors. This one opens in. And this one means that the door latch would have been right there. You open this, you pull this, even when you're near the couch and you don't understand why an eighteen year old girl is there, and you are out the door in to the middle of the place like this where you can go to [neighbors]. Doesn't happen.
>
> … Oh my God, it would be absolutely incredible for me to run to any one of these people where I only live 39 feet away from somebody else, get some help. Do anything at this point…
>
> … And now, another decision time. Okay. I know where the State Police are...Follow me. ...Well, let me drive 300 miles...Oh, man, I couldn't possibly think about getting away at all.

Id. at 118 (emphasis added).

In addition to giving needed context to these damaging and sarcastic remarks, expert testimony on battering and its effects would have helped to counter the overall theme of the prosecutor's closing argument which was that "it takes two to tango." *See id* at 103, 127. This statement repeatedly implied that Housman and Ms. Markman were on equal footing in their relationship. Contrary to the evidence of Housman's violence and abuse directed at Ms. Markman, the prosecutor implied that Ms. Markman and Housman were equally intent on killing Leslie White and equal in culpability. Such a conclusion asked the jury to wholly disbelieve Ms. Markman's accounts of abuse and the duress to which she was subject. It seems especially unfair to preclude Ms. Markman from presenting expert testimony that would enlighten the jury about the *inequality* in her relationship with Houseman, and her *forced* participation in the crime, while at the same time permitting opposing argument suggesting a relationship of *full* equality and *willing* participation.

While *Amici* do not contend that an expert on battering and its effects is necessary in every duress case involving a battered woman defendant, the prejudice resulting from the preclusion of the expert in this case is astounding. In a case where, as here, the defense hinges on the credibility of the defendant's claims of fear and abuse; where the expert would have rebutted the very myths upon which both the prosecutor and co-defendant rested their cases; and where the expert would have provided specialized knowledge essential to assessing the statutory elements of the defense, the preclusion of that testimony deprived Ms. Markman of her defense, and requires reversal.

III. THE TRIAL COURT REVERSIBLY ERRED BY PRECLUDING MS. MARKMAN'S TESTIMONY REGARDING HER PRIOR EXPERIENCES OF ABUSE WHICH WAS RELEVANT AND NECESSARY TO SUPPORT HER DURESS CLAIM.

In addition to precluding the relevant and admissible expert testimony necessary to support Ms. Markman's duress claim, the trial court precluded critical lay testimony from Ms. Markman herself about her prior experiences of abuse. This testimony was fundamentally necessary to assessing her claim of duress.

Ms. Markman was prepared to testify about her prior experiences of abuse. These experiences informed her subjective perceptions and objective reasonableness for the purpose of duress. She would have testified about a long history of physical, sexual, and emotional abuse, the accounts of which were contained in the report prepared by Dr. Hughes and accepted as a proffer of Ms. Markman's testimony. N.T. 892-94; Defense Exhibit 15 at 3-4. In her report, Dr. Hughes details the abuse from other people in addition to Housman. Dr. Hughes' report included information that Ms. Markman was physically abused by her stepfather and witnessed her stepfather's frequent and severe abuse of her brother. When Ms. Markman was a teenager, she was taken to the hospital against her will, put to sleep, and forced to have an abortion. She described that incident as "pretty much the ending point for me."

After she left home, Ms. Markman became involved in two successive relationships with men who beat her regularly. She became involved in prostitution and had a number of abusive experiences including being raped, mugged, and threatened with weapons. She then married Steve Markman who beat her, physically assaulted her, emotionally abused her, and forced her to prostitute herself. Defense Exhibit 15 at 3-4.

All of this evidence was especially relevant to assess whether a person of reasonable firmness, *if subjectively placed in her situation*, would have been unable to resist Housman's violence and threats, and to evaluate if Ms. Markman was "reckless" in placing herself in the situation. *DeMarco*, 570 Pa. at 273-76, 809 A.2d 256 at 262-64.

Ms. Markman's prior victimization had a distinct and verifiable effect on her understanding of danger, and the reasonableness of those her understandings. Battering is not a series of isolated incidents. Rather, it is the accumulation, over time, of abuse that must be considered in assessing the impact of the battering:

> 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.

Mary Ann Dutton, Empowering and Healing the Battered Woman: A Model for Assessment and Intervention at 83-84 (emphasis added).

The prior history of abuse had an important effect on Ms. Markman's perception and reasonableness of her supposed opportunities to escape:

> Some women who have been involved in prior abusive relationships may have a perception that they lack viable alternatives, because the problem is bad or worse elsewhere. This maybe based on their own prior abusive intimate relationships, on witnessing violence in their families of origin, on recognizing violence in the homes of their friends and family members, or on knowing of violence committed by persons who would not be expected to act that way

Mary Ann Dutton, *Understanding Women's Responses*, 21 Hofstra L. Rev. at 1220.

The duress standard requires an assessment of "reasonableness" from the subjective perspective of the defendant. Without a full understanding of Ms. Markman's subjective situation that central issue could not be decided.

Admission of the prior history of abuse proffered in this case was compelled by decisional law as well as the Model Penal Code on which the Pennsylvania duress law is based. In the *DeMarco* case, the evidence presented by the defendant to establish duress included that: he suffered from seizures, was borderline mentally retarded, and had a plate in his head. *DeMarco,* 570 Pa. at 274, 809 A.2d at 263. In rejecting the Commonwealth's contention that this evidence was not admissible in determining the applicability of the duress defense, this Court stated:

> We find that the above evidence is clearly indicative of stark, tangible ways in which Appellant differs from others in terms of his health and mental capacity, which…is relevant in determining whether a defendant was subject to duress under Section 309, and therefore, it was properly admitted.

Id. at 275 n.8.

In the present case, the evidence regarding Ms. Markman's history of abuse, and its relationship to her situation at the time of the alleged duress, is at least as "stark" and "tangible" as that in *DeMarco*. The horrific experiences of abuse that Ms. Markman suffered before even meeting Housman certainly differentiate her from the norm and, like Mr. DeMarco, bore directly on her situation at the time of the alleged duress.

The Model Penal Code, as interpreted by *DeMarco,* makes clear that the hybrid objective-subjective component of duress is intended to capture these types of prior experience rather than more general differences in individual temperament. For example, the fact that a person just happens to have an agreeable temperament or a moral predisposition of a certain nature, would not suffice. *See id.* at 273, 809 A.2d at 262; MODEL PENAL CODE AND

COMMENTARIES, Pt. I § 2.09 at 375. On the other hand, the core reasoning in admitting particular "verifiable" and "tangible" characteristics of a particular person is that such characteristics are highly relevant to assessment of duress at the time of the incident itself.[27]

It was for the jury to assess whether it believed that the prior abuse had such an impact on Ms. Markman's claims of duress. At the very least, the evidence was relevant and admissible under state evidentiary rules, and was not excluded by any other rule of evidence. Therefore it should have been admitted. *See, e.g., Pitts,* 740 A.2d at 733 (discussing fundamental right of accused to present all relevant evidence not subject to exclusion under other evidentiary rules).

The prior evidence of abuse was admissible and relevant regardless and independent of the proffered expert testimony. Had the expert been permitted to testify, she would have specifically tied this evidence about the defendant's history of prior abuse to Ms. Markman's duress claim. Dr. Hughes would have testified that Ms. Markman's childhood and adult experiences of abuse placed her "at higher risk for victimization and vulnerability to William Housman's coercive tactics on the night of the incident." Defense Exhibit 15 at 17. Due to Ms. Markman's history, Housman's power and control over her was amplified from the first incident of abuse from Housman and was made worse through his abuse during the relationship: "[H]er interpersonal power relative to [Housman] was seriously compromised upon commencement of the relationship, only to be further diminished by his repeated violent assaults and personal attacks." Defense Exhibit 15 at 17. Given Ms. Markman's prior victimization and Housman's increasing violence, it follows that the defendant's ability to resist his threats at the time of the

[27] Evidence of prior abuse by others has also been admitted to support analogous self-defense elements, *See, e.g., Pitts,* 740 A.2d at 732-34 (evidence that defendant was robbed at gunpoint on two prior occasions relevant to his state of mind on the issue of self-defense).

killing, especially after being brutalized more than she ever had before, would have all profoundly impacted her "situation" for the purpose of the duress defense.

IV. THE ABSOLUTE BAN ON CROSS-EXAMINATION OF HOUSMAN'S PENALTY PHASE WITNESSES WHO ATTESTED TO HIS NONVIOLENCE, VIOLATED MS. MARKMAN'S RIGHTS TO CONFRONTATION AND TO PRESENT ALL RELEVANT MITIGATION, AND LEFT HER UNABLE TO CONFRONT NONSTATUTORY AGGRAVATION, RESULTING IN AN UNRELIABLE DEATH SENTENCE .

The sentencing proceedings in this case are replete with grievous constitutional error. After having been portrayed to the jury as a cold-hearted killer who was lying about Housman's abuse and duress, Ms. Markman was then prevented at the penalty phase from even questioning *direct testimony* that *expressly contradicted* her claim that Housman was abusive, including Housman's hearsay confession that she was the killer and coercer. The trial court banned each co-defendant from cross-examining the penalty-phase witnesses of the other, including Housman's expert witness who opined that he had no history of violence or "acting out."[28] N.T. 1279. This unchallenged, hearsay evidence directly undercut Ms. Markman's mitigation. The drastic measure not to allow cross-examination, inconsistent with bedrock principles of capital jurisprudence, permitted a death sentence against Ms. Markman that grossly violated her right to confrontation.

[28] The evidence presented by Housman included his confession to police as well as two lay witnesses and an expert who attested to his nonviolent nature. *See* N.T. 1286-88 (Housman's spiritual counselor, Mr. Collins, testified that Housman was "special" to him, and Housman cried whenever talking about praying for the victim); N.T. 1293 (Housman's sister, Cheryl Gillespie, testified that there was no fighting or abuse in Housman's prior relationships, and he had even tried to calm down a prior girlfriend who wanted to fight); N.T. 1308, 1311, 1312 (Psychologist, Dr. Schneider, testified twice that after investigation and examination of Housman, he found no evidence of a history of "acting out" in violent, hostile, aggressive, or abusive ways toward others "outside of the current instance," N.T. 1308, 1312; that he "read in the newspaper" that Housman had allegedly abused the other defendant" and that his findings were that Housman lacked initiative, was insecure and afraid of being rejected, N.T. 1311; and that he was "struggling to figure out exactly the relationship between these two co-defendants." N.T. 1312). The evidence presented by Housman at trial also included his confession. This evidence was incorporated into the penalty phase, the relevant details of which are discussed in the text.

Further, the joinder of the cases, and prohibition on cross-examination, permitted the jury to consider nonstatutory aggravating circumstance against Ms. Markman, which she was unable to counter. The net result was a death sentence that violated her right confrontation, fundamental notions of due process, and the prohibition against cruel and unusual punishment, as guaranteed by the Sixth, Eighth and Fourteenth Amendments, as well as the Pennsylvania Constitution.

A. The Ban on Cross-Examination and Introduction of Housman's Confession Violated Ms. Markman's Right To Confrontation.

The trial court refused to permit any cross examination of Housman's penalty phase witnesses, each of which contradicted Ms. Markman's claims of his violence and abuse. This ban on cross-examination violated her state and federal rights to confrontation, rights which are at least, if not more, sacrosanct where the issue is not guilt, but rather life and death. *See Ring v. Arizona*, 536 U.S. 584 (2002) (Sixth Amendment's jury trial guarantee, made applicable to the states by the Fourteenth Amendment, required that the aggravating factor determination be entrusted to the jury); *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974) (ability to expose a witness' bias through cross-examination is important component of the right of confrontation guaranteed by the Sixth Amendment); *Commonwealth v. Green*, 525 Pa. 424, 463-66, 581 A.2d 544, 563-64 (1990) (admission of hearsay statements contradicting mitigation evidence at penalty phase denied defendant of state and federal confrontation rights).

Among the most glaring violations of Ms. Markman's confrontation rights was the admission of Housman's hearsay confession to the police in which he had denied the abuse and told them that Ms. Markman coerced him into participating in the homicide. Housman's confession, redacted at trial by simply replacing Ms. Markman's name with a pronoun, *see* Amended Brief for Appellant at 45, and admitted in full over objection, Commonwealth Exhibit 83B; N.T. 435-36, was expressly reincorporated at the penalty phase. N.T. 1277, 1444, 1448-49.

This statement contained more damaging evidence against Ms. Markman than any other evidence presented by the Commonwealth. It contained the *only* evidence directly contradicting Ms. Markman's accounts of Housman's abuse and the incident itself. Essentially, the statement claimed that the killing was all Markman's idea and she wanted to do it to "get rid of the bitch and our headaches," and that Ms. Markman was the aggressor against both Housman and Ms. White.

The errors pursuant to *Bruton v. United States*, 391 U.S. 123 (1968) and *Gray v. Maryland*, 523 U.S. 185 (1998), extant at trial, *see* Amended Brief for Appellant at 44-47, were magnified to unprecedented proportions by admission of this confession at the penalty phase. In particular, Housman's counsel revealed to the jury in his penalty summation that in fact the confession *did* refer to Ms. Markman, and *should be used against her*. Commenting on Housman's brief penalty phase testimony in which Housman explained his criminal record and expressed remorse, N.T. 1279-82, Housman's counsel argued the following:

> Did anybody ask him about abuse? No. Wasn't asked about that at all. Did I think we needed to address that? No.
>
> … He has a lot to say about Beth Markman's allegations. I didn't think they were appropriate [when he testified]. I don't think it is appropriate that I need to be speaking about them now. Suffice it to say you heard the evidence, and you heard all of the facts during trial.
>
> *…I will leave it to your good judgment if you are going to accept Beth Markman's version of what happened with respect to these wild allegations of abuse. My client's position is it simply did not happen. He told that to the police. We saw no need to address that here during the penalty phase of the trial.*

N.T. 179-80 (emphasis added).

This encouragement to the jury to use Housman's confession to rebut Ms. Markman's claims of abuse erased any doubt that the "other person" to which the confession referred was

Ms. Markman. The result was exactly the kind of intolerable, uncorrectable prejudice that the United States Supreme Court warned against in *Bruton*:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. S*uch a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect . . . The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.*

Bruton, 391 U.S. at 135-36 (citations omitted) (emphasis added).

The "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross examination." *Lee v. Illinois*, 476 U.S. 530, 541 (1986). The "truthfinding function" is supreme where the issue is who shall live or die. *See, e.g*., *Ring*, 536 U.S. 584 (Sixth Amendment protections apply fully at penalty phase); *Green*, 525 Pa. 424, 581 A.2d 544.

B. The Ban on Cross Examination and Admission of Housman's Confession Prevented Ms. Markman from Fully Presenting All Relevant Mitigation Evidence.

The essence of Ms. Markman's penalty phase defense, like her trial defense, was based on her claims that Housman had severely abused her, culminating in forcing her to participate in the crime. These factual claims supported at least three of her mitigating circumstances including, extreme duress, extreme emotional disturbance, and capacity. N.T. 1443-44; Opening and Closing Arguments at 136, 166-69.

By contrast, Housman's mitigation evidence directly undercut Ms. Markman's factual claims. Housman's evidence portrayed him as a kind, sensitive, insecure, unassertive individual who never abused his girlfriends, was never accused of violence until he met Ms. Markman and, according to expert psychological opinion, was nonviolent. In his statement, he denied ever

laying a hand on Ms. Markman, claimed that it was all Ms. Markman's idea to kill White, and that he, like White, was just a victim of Ms. Markman's violence. Commonwealth Exhibit 83B at 15, 21, 24-25, 28-29, 34-36.

That picture of Housman undermined the foundation on which Ms. Markman's entire mitigation argument rested; that of a cruel, violent and abusive man who forced her to participate. Despite the fact that Housman's evidence cut away at the very core of the basis of Ms. Markman mitigation, she was unable to even question this evidence.

When the state seeks to condemn the defendant to death, the Eighth Amendment requires "precise and individualized sentencing," *Stringer v. Black*, 503 U.S. 222, 232 (1992), to ensure that "each defendant in a capital case [is treated] with that degree of respect due the uniqueness of the individual." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). In *Lockett*, the United States Supreme Court declared that the unfettered ability to consider mitigating evidence is central to the Eighth Amendment's command that a sentencer must treat the capital defendant as a unique human being:

> [t]he sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604.[29]

[29] Since *Lockett*, the Court has consistently invalidated procedures that preclude the sentencer from considering relevant mitigation. *Penry v. Lynaugh*, 492 U.S. 302 (1989) (reversing where jury precluded from considering defendant's mental retardation as mitigation); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (precluding evidence of adjustment to pretrial incarceration constituted reversible error); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (evidence of defendant's organic brain damage constituted mitigation); *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982) (sentencer's refusal to consider a defendant's youth and violent upbringing violates the Eighth Amendment); *Wiggins v. Smith*, 123 S. Ct. 2527 (2003) (Sixth Amendment violated by counsel's failure to present mitigating evidence of defendant's background). *See also Commonwealth v. Smith*, 544 Pa. 219, 675 A.2d 1221 (1996) (trial counsel ineffective for failing to investigate and present relevant mental health evidence as mitigation).

Accordingly, both the prohibition against cruel and unusual punishment as well as fundamental notions of due process require that the defendant be allowed to present any and all evidence relevant to mitigation.

Ms. Markman's inability to challenge the damning evidence presented by Housman which undermined the factual bases of her mitigation claims, in effect, prevented her from fully and fairly presenting those claims, in violation of these basic capital sentencing requirements designed to ensure factually correct, individualized and reliable verdicts.

C. The Ban on Cross-Examination and Admission of Housman's Confession Permitted the Jury to Consider Nonstatutory Aggravation Against Ms. Markman Which She Was Unable to Confront.

In sharp contrast to the wide latitude that must be afforded a defendant in presentation of mitigating evidence, that same defendant is constitutionally protected from presentation of aggravating circumstances that go beyond those specifically enumerated in 42 Pa.C.S. § 9711. *See* 42 Pa.C.S. § 9711(a)(2); *Lockett*, 492 U.S. 302; *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) (United States Supreme Court's determination that Pennsylvania's death penalty limits evidence regarding aggravation was one of the bases for finding that the statute conforms with the constitutional requirement to "establish rational criteria that narrow[s] the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet[s] the threshold [for imposing the death penalty].").

The admission of Housman's testimonial evidence and confession blatantly violated these fundamental tenets of capital jurisprudence because it amounted to devastating, nonstatutory aggravation against Ms. Markman which she was not even given the opportunity to confront. Housman's witnesses repeatedly testified about his nonviolence, thus clearly suggesting to the jury that Markman was the violent one in the relationship, not Housman. The testimony permitted a

closing by Housman's attorney that directed the jury to consider Ms. Markman's bad and violent influences on him. Housman's counsel argued: "Does it say something to you that the first time he gets involved in anything violent is when he gets involved with Beth Markman?" N.T., Opening and Closing Statements at 189.

Housman's confession was even more damaging, explicitly portraying Ms. Markman as a callous, violent killer who thought nothing of brutally killing White as a solution to the problems she had caused with Housman. *See* Commonwealth Exhibit 83B at 31. As previously described, through his confession, Housman told the jury the gruesome details of a murder that he said was Ms. Markman's idea in the first place. Housman said that Markman told him that if he loved her, he would comply; and he complied only because he "didn't want to die that night" at the hands of Ms. Markman. Commonwealth Exhibit 83B at 29.

Given the jury's ultimate function to determine whether Ms. Markman deserved to die, it is difficult to imagine evidence more prejudicial than uncontested assertions that she was a violent, evil, sadistic, ringleader, willing to kill someone to get "rid of the headaches" that person had caused. Such evidence created a "randomness" in the decision-making process and "a bias in favor of the death penalty," amounting to precisely the kind of vague aggravation indisputably forbidden by the Constitution. *See Kindler v. Horn*, 2003 U.S. Dist. LEXIS 16897 at *73 (E.D. Pa. Sept. 24, 2003) (in joint penalty phase, death sentence reversed on federal habeas grounds, where prosecutor elicited and argued evidence that was mitigating as to codefendant but prejudicial to this defendant, and therefore permitted use of a "vague, aggravating factor in the weighing process," that the defendant, as opposed to his accomplice, was "lead actor" in the crime, thereby creating "possibility not only of randomness, but also of bias in favor of the death penalty."). *See also*

Lockett, 492 U.S. 302; *Blystone*, 494 U.S. 299; *Commonwealth v. Fisher*, 545 Pa. 233, 681 A.2d 130 (1996).[30]

Ms. Markman's inability to challenge this aggravating evidence in the eyes of the jury, to question the bases of the opinions of Housman's witnesses and expert, to expose the true bias and unreliability inherent in Housman's self-serving confession to the police, left Ms. Markman truly defenseless in this battle for her life.

The ultimate consequence of the joinder of the penalty hearings in this case was that Ms. Markman was, in effect, forced to defend against a second prosecutor. Housman's counsel elicited evidence undermining Ms. Markman's pleas for mitigation and helped give the jury reason to sentence her to death. Worse, she was not even given the constitutional tools to defend herself. The antagonism between the defenses at this stage indisputably "crossed the constitutional line." *See Kindler*, 2003 U.S. Dist. LEXIS 16897 at *73.[31]

[30] Significantly, the Commonwealth sought aggravation based only on a single enumerated factor, that the killing was done during the kidnapping. N.T. 1442.

[31] There were compelling reasons to sever for the guilt phase alone, based on the antagonistic defenses and improper introduction of Housman's confession against Ms. Markman. *See* Amended Brief for Appellant at 38-41. The penalty phase consequences of both of these errors were additional exigent reasons why the cases should have been severed, and reasons that should have been fully considered by the trial court in its initial severance determination.

CONCLUSION

Ms. Markman was deprived of the quintessential right to present a meaningful and complete defense, a defense based on proper jury instructions and the presentation of all relevant lay and expert evidence.

The individual rulings resulting in a denial of these rights rested on a misapplication of law and on a grievous misunderstanding of the plight of battered women generally, and the specific experiences that Ms. Markman endured. The prosecutor and codefendant's counsel fully exploited numerous myths and misconceptions about battered women and Ms. Markman as "free to leave" and blameworthy for her subsequent abuse. These biases were reflected in many of the court's rulings. At a minimum, an expert on battering and its effects was necessary to overcome the core misconceptions and judgments that were the driving force of the case against her.

The damaging trial errors set the stage for a penalty phase that was a travesty. By the time of sentencing, Ms. Markman's credibility had already been ravished by the fallacious arguments of counsel that she was not really a battered woman, and that she should have and could have just left and avoided this whole crime. These arguments were permitted to remain unchallenged because the expert testimony which could have rebutted them during trial was not allowed.

Ms. Markman faced this penalty proceeding alongside her coercer. She was silenced in the face of damning, unreliable evidence presented by her batterer that she was a liar and brutal killer. Any remaining credibility that Ms. Markman might have had with the jury at that point, and perhaps, any final chance to be spared, most certainly was eviscerated by the damaging evidence presented by Housman and improperly used against her. Ms. Markman was finally permitted to present her expert on battering and its effects at the penalty phase. But, by that

point, it was too late to undo the damage that had been done to her credibility and to the essence of her defense.

This case is an extreme lesson of why criminal rulings must be based on accurate information rather than on misconceptions, misinformation, stereotypes, and biases. Ms. Markman, like all criminal defendants, was entitled to a judicial determination of her essential legal claims based on controlling law and free of misinformation and moralistic judgments about her situation. She was entitled to have her guilt decided by a jury properly instructed on her defense and properly informed of the realities of her situation. Ms. Markman was entitled to a fair opportunity to save her life, based on full confrontation of the evidence against her, consideration of all relevant mitigation, and only that aggravation enumerated by the Commonwealth. Instead, she had to directly compete with her codefendant, before a jury lacking the information it needed to understand that Ms. Markman was herself a *victim* of Housman's violence.

As emphasized throughout this Brief, *Amici* seek no special treatment for Ms. Markman or any other battered woman defendant. Rather, the goal of *Amici* is to ensure that the same rights guaranteed to all criminal defendants are fairly applied to Ms. Markman and other battered women charged with crimes, free of mistaken judgments about their experiences of abuse that can otherwise lead to tragically unjust, and even deadly, results.

WHEREFORE, for the foregoing reasons, and those in the Amended Brief for Appellant, *Amici* respectfully request this Court to REVERSE the conviction and sentence.

Respectfully submitted,

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