

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE,  
AND THE HONORABLE ASSOCIATE JUSTICES OF THE  
CALIFORNIA SUPREME COURT:

Final Amicus Brief in *People v. Cornell Brown*, to Ca.  
Supreme Court.

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behalf of CAADV.

## STATEMENT OF FACTS

Amici Curiae (hereinafter “Amici”) adopt the Statement  
of Facts set forth in the brief of Respondent. (Resp’t Answer  
Br. at 1-6.)

## SUMMARY OF ARGUMENT

The primary issue in this case is whether expert  
testimony regarding battering and its effects is admissible by  
the prosecution in domestic violence cases in which there is  
one reported incident of physical abuse and the victim  
appears to be recanting. Amici concur with the Respondent  
that, under Evidence Code section 1107, the relevance of  
expert testimony regarding battering and its effects does not  
depend on a showing of prior abuse. Rather, expert testimony  
is relevant when an individual who alleges domestic violence  
displays behaviors that are known to be exhibited by victims  
of domestic violence. For example, expert testimony is  
relevant to explain why a victim may recant the initial account  
of the abuse. Moreover, pursuant to Evidence Code section  
801, expert testimony regarding battering and its effects is  
relevant to disabuse jurors of common misconceptions that

they may have because domestic violence is outside their common experience.

A rule holding that, when the victim recants, expert testimony is admissible only when there is evidence of prior abuse would be contrary to the typical dynamics of domestic violence. If courts were to require evidence of past abuse, it is unlikely that there would be such evidence despite the fact that abuse had occurred.

**First**, domestic violence is not limited only to physical abuse. Domestic violence often encompasses emotional, mental, and other types of abuse, which most often occur in the privacy of the home. Victims are highly unlikely to report incidents of emotional or mental abuse because the criminal justice system rarely recognizes such behavior as abuse.

**Second**, even when there is physical violence, victims of domestic violence are unlikely to report it in many instances. Thus, even when there is past abuse, there may be no evidence of the abuse.

**Furthermore**, a rule that would require evidence of past abuse in order to admit expert testimony when the victim recants is contrary to public policy. It is the policy of the state to discourage domestic violence and to offer protection to victims of domestic violence. A rule requiring victims to endure more than one incident of physical abuse in order to have the benefit of expert testimony at trial flies in the face of this policy and runs counter to common sense.

Even if the Court does require a showing of past abuse in order to admit expert testimony when the victim recants, the evidence of past abuse should not be limited to physical violence. Domestic violence is not limited to discrete incidents of physical abuse. The emotional, mental, and other types of abuse common in domestic violence relationships should also be considered as evidence of past abuse that lays the foundation for expert testimony to be admitted.

Finally, the term “battered women’s syndrome” is not an appropriate term to describe the nature of expert testimony commonly given in domestic violence cases, nor does it adequately describe the experiences of victims of domestic violence.

## ARGUMENT

### I. EXPERT TESTIMONY REGARDING BATTERING AND ITS EFFECTS IS RELEVANT AND ADMISSIBLE UNDER EVIDENCE CODE SECTIONS 1107 AND 801 TO DISPEL COMMON MISCONCEPTIONS

Expert testimony regarding battering and its effects does not require prior incidents of physical abuse in order to be relevant under Evidence Code section 1107. Relevance requires only, as Respondent asserts, the demonstration of behavior that is typical of domestic violence victims, such as recantation. The requirement of past incidents of abuse is nowhere found in the language of Evidence Code section 1107. That section plainly states that expert testimony is admissible regarding the effects of abuse on victims as long as it is, simply, relevant. “The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness.” Cal. Evid. Code § 1107(b) (West 2003) (emphasis added); see also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1087 (“We have found [the expert testimony] relevant; it is therefore admissible.”).

In addition to section 1107, Evidence Code section 801 permits expert testimony in order to assist the trier of fact with matters beyond common experience. “If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . .” Cal. Evid. Code § 801 (West 2003).

Behaviors typical of domestic violence victims are beyond jurors' common experience, and jurors commonly harbor misconceptions about the reasons for these behaviors. Alana Bowman, "A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of The Common Experiences of Battered Women", 2 *S. Cal. Rev. L. & Women's Stud.* 219, 234-236 (1992). Expert testimony regarding such behaviors would assist jurors by disabusing them of their common misconceptions.

Furthermore, many behaviors, not just those encompassed by "battered women's syndrome", as that term was defined over twenty years ago, are beyond jurors' common experience. See *infra* Parts I.B, III.A. Expert testimony regarding all such behaviors is admissible. See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1302 n.6 ("The evidence is of assistance to the jury even though the mental health profession has not, or not yet, formally labeled it as a "syndrome").

#### A. CALIFORNIA COURTS HAVE ADMITTED EXPERT TESTIMONY THAT DISPELS COMMON MISCONCEPTIONS IN CASES IN WHICH THE VICTIM RECANTS OR DOES NOT COOPERATE WITH THE PROSECUTION

It is common for victims of domestic violence not to cooperate with the prosecution by recanting their initial reports of the abuse. It is estimated that approximately 78% of domestic violence victims recant or become uncooperative with the prosecution after the time of their initial accounts. Maureen McLeod, "Victim Noncooperation in the Prosecution of Domestic Violence: A Research Note," 21 *Criminology* 395 (1983). This figure holds true for first-time victims of abuse as well, with about 80% of these victims also recanting their reports of the abuse. *People v. Gomez* (1999) 72 Cal.App.4th 405, 411 (citing the expert's testimony).

When a victim recants during sworn testimony, expert testimony is necessary to explain to the jury why the victim is

testifying in an apparently self-contradictory manner. Such self-contradictory testimony by a victim of domestic violence is outside the common experience of most jurors. See Bowman, *supra*, at 235 (stating that clinical studies have found domestic violence to be outside the common experience of jurors). A common misconception held by jurors is that the victim is not a trustworthy person since s/he has told two conflicting stories. *Id.* at 246-48. An additional misconception is that the abuse must not have occurred because the victim is denying under oath that it did occur. *Id.* These assumptions are often erroneous and are based on jurors' misconceptions of the realities of the experience of domestic violence. In truth, victims of domestic violence recant their initial reports of abuse for many reasons that have nothing to do with their trustworthiness or with whether the event occurred. For example, victims may fear reprisals from the batterer if the prosecution continues, due either to specific threats from the batterer or from the victim's knowledge of the batterer's general patterns of behavior. *Id.* at 248. Indeed, the initial separation of the victim from the batterer is often the time when the victim is at the greatest risk of physical violence from the batterer. Martha R. Mahoney, "Legal Images of Battered Women: Redefining The Issue of Separation," 90 *Mich. L. Rev.* 1, 5-6 (1991); see also Carolyn Rebecca Block, "The Chicago Women's Health Risk Study," Report to the National Institute of Justice 256 (2000) (stating that a woman's departure or attempt to end the relationship, where that information was available, was an immediate precipitating factor in 40% of homicides with female victims, and 13% of incidents that led to homicides committed by women); Bowman, *supra*, at 246 (reporting one study's findings that 80% of victims were divorced or in the process of divorcing their abusers when they were battered). This well-documented phenomenon is referred to as "separation assault". Mahoney, *supra*, at 6.

There is also a danger of assault following the resolution of legal proceedings or after the batterer's release from jail or prison. Karen D. Newman, "Giving Up: Shelter Experiences of Battered Women," 10 *Pub. Health Nursing* 108, 111

(1993). Due to the fear of assault, a victim may recant her story of the abuse in order to protect herself, her children, and other family members.

In addition, there are many reasons that victims of domestic violence often decide to continue the relationship with the batterer, despite a layperson's common misconception that no one would continue an abusive relationship. See Mahoney, *supra*, at 37. For example, victims who have children with the batterer may decide to keep them united with the other parent for the sake of the children or to obtain non-financial support from the parent. Lisa Goodman et al., "Obstacles to Victims' Cooperation With the Criminal Prosecution of Their Abusers: The Role of Social Support," 14 *Violence & Victims* 427, 429 (1999) (citing childcare and transportation as examples of needed non-financial support).

Furthermore, many victims lack self-confidence in their ability to survive on their own. Susan F. Turner & Constance H. Shapiro, "Battered Women: Mourning the Death of a Relationship," 9 *Soc. Work* 372, 373 (1986); Rita Weincourt, "Never to Be Alone: Existential Therapy with Battered Women," 23 *J. Psychosocial Nursing* 24, 29 (1985). This problem may be exacerbated by the fact that many batterers isolate their victims from their friends and families so the victims have fewer support persons to whom they can turn in order to leave the relationship. Cris M. Sullivan, "The Provision of Advocacy Services to Women Leaving Abusive Partners: An Exploratory Study," 6 *J. Interpersonal Violence* 41, 43 (1991).

Moreover, the victim may lack sufficient financial resources to live independently from the batterer. A. L. Ganley, "Domestic Violence: The What, Why, and Who, in When Battered Women Are Charged with Crimes" *A Resource Manual for Defense Attorneys and Expert Witnesses* (S. Osthoff & J. Spector eds., 1996); see also Lewis Okun, *Woman Abuse: Facts Replacing Myths* (1986).

In fact, it is common for victims to lack financial self-sufficiency due to the very nature of many domestic violence relationships. One common element of such relationships is the batterer's financial control over the victim. Diane R. Follingstad et al., "The Role of Emotional Abuse in Physically Abusive Relationships," 5 *J. Fam. Violence* 107, 109 (1990); see *infra* Part II.B.1. By controlling the victim's access to money and employment, the batterer creates a situation in which the victim cannot leave because s/he cannot support herself or himself. See, e.g., Follingstad et al., *supra*, at 109. The problem is amplified when the victim has children who need to be supported. For this reason, the victim may feel trapped in the relationship and may decide that it should continue. It is entirely foreseeable that victims in these situations would be likely to recant their accounts of abuse.

Additionally, victims often fear ramifications within their communities if they reveal abuse or leave a relationship. For instance, some communities, particularly communities of racial minorities and immigrants, form close bonds to support one another. Linda Ammons, "Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome," 1995 *Wis. L. Rev.* 1003, 1021; Angela Browne, "Reshaping the Rhetoric: The Nexus of Violence, Poverty and Minority Status in the Lives of Women and Children in the United States," 3 *Geo. J. on Fighting Poverty* 19, 19 (1995).

Members of these communities may view reporting the batterer to law enforcement as a betrayal of the community, and the victim may face social isolation for disclosing the abuse. Ammons, *supra*, at 1023-24 (African-Americans); Browne, *supra*, at 19-20 (Asian-Americans); Jenny Rivera, "Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials," 14 *B.C. Third World L.J.* 231, 249 (1994) (Latinos). Furthermore, the victim's religious beliefs may not encourage ending a relationship, Beverly Horsburgh, "Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community," 18 *Harv. Women's L.J.* 171, 198-99 (1995), so the victim may

fear isolation from the religious community as well, *id.* at 205. See generally Reverend Katherine Hancock Ragsdale, “The Role of Religious Institutions in Responding to the Domestic Violence Crisis,” 58 *Alb. L. Rev.* 1149 (1995).

In addition, many victims feel intense shame at having to admit to themselves, to their families, and to their communities that their relationship has “failed”. Mary Ann Dutton & Catherine L. Waltz, “Domestic Violence: Understanding Why It Happens and How to Recognize It,” in *Domestic Violence Law* 66, 72 (Nancy K.D. Lemon ed., 2001). The victim may also be in love with the batterer and may harbor some hope that the batterer will change. L. A. Foster et al., “Factors Present when Battered Women Kill,” 10 *Issues in Mental Health Nursing* 273 (1989); Claire M. Renzetti, “Violence in Lesbian Relationships: A Preliminary Analysis of Causal Factors,” 3 *J. Interpersonal Violence* 381, 396 (1988). Finally, the victim often assumes responsibility for the abuse, believing that if s/he perfects his or her behavior, then the batterer will act more peacefully. Lenore Walker, *The Battered Woman* 56-58 (1979).

While many victims of domestic violence, including first-time victims of physical violence, experience at least some of these motivations for recanting, jurors do not have an understanding of these factors through their own “common experience”. See *Cal. Evid. Code* § 801(a) (West 2003); Bowman, *supra*, at 242 (explaining that most people have not witnessed the effects of abuse on victims). Thus, in order to prevent jurors from applying their own preconceived notions regarding the reasons for recantation to the facts of the case, it is necessary for an expert to disabuse the jurors of these common misconceptions by testifying regarding the effects of abuse on the “beliefs, perceptions, or behavior of victims of domestic violence”. *Cal. Evid. Code* § 1107(a) (West 2003); Bowman, *supra*, at 247-48 (stating that expert testimony regarding recantation will help juries assess victims’ credibility and reasonableness). *Evidence Code sections 1107 and 801* expressly admit expert testimony for this purpose.



Furthermore, this Court has held that expert testimony is relevant to disabuse jurors of common misconceptions about domestic violence. See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1087-88. Specifically, this court has held that expert testimony is relevant to the victim's credibility, see *id.*, which is called into question when, as in this case, the victim recants.

Additionally, other California courts have admitted expert testimony to counter jurors' misconceptions regarding recantation specifically. See *People v. Gadlin* (2000) 78 Cal.App.4th 587, 594 (expert testimony on battered women's syndrome was properly admitted because it "speaks directly" to recantation); *People v. Williams* (2000) 78 Cal.App.4th 1118, 1129 (acknowledging the admissibility of evidence to explain why victims may make inconsistent statements about abuse); *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1215 (expert testimony was admissible to offer a motive for the victim's recantation). When a victim of domestic violence recants the original account of the abuse, regardless of whether there have been past reported incidents of physical violence, expert testimony is relevant to explain the recantation to the trier of fact.

#### B. THERE ARE EFFECTS OF DOMESTIC VIOLENCE OTHER THAN VICTIM RECONTATION FOR WHICH EXPERT TESTIMONY IS NECESSARY TO DISPEL COMMON MISCONCEPTIONS

In addition to recantation, there are other behaviors frequently exhibited by victims of domestic violence that are outside the jury's common experience. Expert testimony is relevant and admissible, therefore, to explain these behaviors to the jury even if the victim cooperates with the prosecution. Although such behaviors are not at issue in the instant case, they often arise in domestic violence cases, regardless of the number of past documented incidents of physical violence. Therefore, the admissibility of expert testimony in cases

involving these behaviors will be implicated by the Court's ruling in the present case.

**First**, many victims stay in abusive relationships even after they have experienced emotional, mental, sexual, or physical abuse. Alana Bowman, "A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of The Common Experiences of Battered Women," *2 S. Cal. Rev. L. & Women's Stud.* 219, 241-42 (1992); see also Lisa R. Eskow, "The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution," *48 Stan. L. Rev.* 677, 677-98, 703-09 (1996) (discussing spousal rape as a form of sexual abuse). In fact, victims of domestic violence leave and return an average of five times over eight years before they are ready to leave the relationship permanently. Davies et al., "Safety Planning with Battered Women" *Complex Lives/Difficult Choices* 79-80 (1998).

**Second**, many victims have experienced past incidents of abuse without reporting those incidents to the police. Patricia Tjaden & Nancy Thoennes, "Extent, Nature, and Consequences of Violence Against Women", Findings *from the National Violence Against Women Survey* 49-50 (2000) (finding that only 26.7% of female victims reported physical assaults by their partners to police); cf. *Cal. Welf. & Inst. Code* § 18290 ("[I]nstances of domestic violence are considered to be the single most unreported crime in the state.").

These behaviors are contrary to laypersons' common misconceptions that if the abuse had occurred, the victim would have left the relationship, would have refused to reunite with the batterer, and/or would have reported the abuse to the police. Bowman, *supra*, at 241-42. Another misconception is that if the victim stayed in the relationship, s/he must have enjoyed or welcomed the abuse. *Id.* at 246; Mary Ann Dutton, "Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome," *21 Hofstra L. Rev.* 1191, 1227 (1993).

If jurors hold these common misconceptions about the reasons that victims of domestic violence stay in abusive relationships, they may disbelieve that the abuse occurred. Bowman, *supra*, at 241-48. Alternatively, they may think that the victim is not credible because s/he did not behave as the jurors believe a victim would. *Id.* Expert testimony is admissible under *Evidence Code section 801* because it would assist the trier of fact by disabusing jurors of these common misconceptions. *§ 801(a)* (expert witness testimony may address “a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact”). It is also admissible under *Evidence Code section 1107* because it describes the “effects” of abuse on the “behavior of victims of domestic violence.” *§ 1107(a)*.

This Court has stated that expert testimony regarding battering and its effects is admissible to disabuse jurors of the misconception that if the abuse occurred, the victim would have left. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1087. In addition, appellate courts have held that expert testimony is admissible to disabuse jurors of the misconception that victims would not reunite with their batterers. *People v. Williams* (2000) 78 Cal.App.4th 1118, 1128 (expert testimony was appropriate to explain why the victim allowed the batterer to return to the family residence); *People v. Gadlin* (2000) 78 Cal.App.4th 587, 594 (expert testimony “speaks directly to . . . reunion by a domestic abuse victim”).

These misconceptions are not limited to cases in which there is physical abuse. Domestic violence relationships almost always involve emotional and mental abuse in addition to physical violence. Diane R. Follingstad et al., “The Role of Emotional Abuse in Physically Abusive Relationships,” 5 *J. Fam. Violence* 107, 107, 116 (1990). However, jurors may have a misconception that these non-physical elements of abuse are not serious enough to be considered domestic violence, or that they are not abuse at all. Bowman, *supra*, at

234-35. Expert testimony is relevant to disabuse jurors of these misconceptions. See *Cal. Evid. Code* § 801.

If jurors do recognize emotional and other non-physical manifestations of abuse as domestic violence, they are likely to hold the same misconceptions about a victim who endured multiple incidents of emotional abuse as a victim who endured multiple incidents of physical abuse: that is, that the victim would have left the relationship, would have refused to reunite with the batterer, would have reported the abuse (if not to the police, then to therapists, friends, or family), and/or enjoyed the abuse. See Bowman, *supra*, at 246. Thus, even when there are no documented incidents of physical abuse, but there are emotional, mental, or other non-physical incidents of abuse, expert testimony is relevant to disabuse jurors of the same misconceptions that they often hold regarding victims of physical abuse.

#### C. VICTIMS OF SINGLE INCIDENTS OF ABUSE DISPLAY THE SAME BEHAVIORS AS VICTIMS OF MULTIPLE INCIDENTS OF ABUSE

In addition to the requirement of past abuse, Appellant argues that the victim must display symptoms of “battered women’s syndrome” in order for expert testimony regarding battered women’s syndrome to be relevant. However, in assuming that only victims who have experienced multiple incidents of physical violence may exhibit behaviors commonly associated with the effects of battering, Appellant ignores the reality of the dynamics of domestic violence.

In fact, as Respondent points out, victims of one incident of physical abuse are just as likely as victims of multiple incidents of physical abuse to display behavior that is often exhibited by victims of domestic violence. Am. Psychological Ass’n, “Violence and the Family,” Report of the American Psychological Association Presidential Task Force on Violence and the Family (1996). Moreover, as Respondent observes, the fact that domestic violence victims return to abusive relationships an average of five times before leaving the

relationship, see Davies et al., “Safety Planning with Battered Women,” *Complex Lives/Difficult Choices* 79-80 (1998), indicates that victims of first-time physical violence are more likely than, for example, victims of the fifth incident of violence to remain in the relationship, thereby demonstrating behavior often associated with battering and its effects. (See Resp’t Answer Br. at 29-30.)

Thus, requiring evidence of behavior associated with battering and its effects in order to admit expert testimony does not necessitate a bright line exclusion of expert testimony from all cases in which there is only one reported incident of physical violence.

## **II. LIMITING EXPERT TESTIMONY WHEN VICTIMS RECENT TO CASES IN WHICH THERE ARE MULTIPLE INCIDENTS OF PHYSICAL ABUSE IS CONTRARY TO PUBLIC POLICY AND THE TYPICAL DYNAMICS OF DOMESTIC VIOLENCE**

### **A. REQUIRING EVIDENCE OF PAST ABUSE IS CONTRARY TO PUBLIC POLICY BECAUSE IT ENCOURAGES VICTIMS TO REMAIN IN ABUSIVE RELATIONSHIPS**

It is the public policy of the state to oppose repeated incidents of domestic violence. See *Cal. Pen. Code* § 13700, Stat. 1984 c. 1609 (“[V]iolent behavior in the home is criminal behavior and will not be tolerated . . .”); *Cal. Welf. & Inst. Code* § 18290 (“The Legislature hereby finds and declares that there is a present and growing need to develop innovative strategies and services which will ameliorate and reduce the trauma of domestic violence. There are hundreds of thousands of persons in this state who are regularly beaten.”) (emphasis added). A rule requiring a showing of past abuse in order to admit expert testimony regarding battering and its effects when victims recant could have unintended consequences that violate this policy.

Denying victims the benefit of expert testimony at trial if they recant and there are no documented prior incidents of abuse will send victims the message that they should remain in the relationship until the abuse occurs again. Moreover, such a rule would make it more difficult for victims of one incident of abuse to obtain a conviction of their batterer compared to victims of multiple incidents of abuse. This could inhibit their ability to leave the relationship, trapping them in abusive relationships until the abuse has repeated itself more than once, and possibly until physical violence has escalated to life-threatening proportions. This is an absurd result that is not related to any goal of the criminal justice system.

In addition, domestic violence imposes substantial economic costs on the state. For example, domestic violence results in health care costs, reduced work productivity, counseling costs for victims and their children, foster care costs, court costs, and law enforcement costs. Joan Zorza, “Women Battering: High Costs and the State of the Law,” in *Domestic Violence Law* 11, 11-14 (Nancy K.D. Lemon ed., 2001). Furthermore, domestic violence is the “largest cause of homelessness in America, accounting for up to half of all homeless families”. *Id.* at 12-13. A judicial rule that has the effect of keeping victims of domestic violence in abusive relationships longer than necessary, therefore, is likely to impose a severe financial burden on the state.

## B. LIMITING EXPERT TESTIMONY TO CASES IN WHICH THERE ARE MULTIPLE INCIDENTS OF ABUSE IS CONTRARY TO THE TYPICAL DYNAMICS OF DOMESTIC VIOLENCE

### 1. Domestic Violence Encompasses Emotional, Mental, and Other Non-Physical Types of Abuse

Domestic violence is not a series of discrete incidents of physical abuse. Mary Ann Dutton, “Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome,” *21 Hofstra L. Rev.* 1191, 1208 (1993) [hereinafter: Dutton, “Understanding”]. Rather, it typically

encompasses a range of behaviors, including emotional, mental, and other types of abuse in which the batterer exerts power and control over the victim. See Ellen Pence & Michael Paymar, *Education Groups for Men Who Batter: The Duluth Model* (1993); Dutton, “Understanding,” *supra*, at 1208-09. Admitting expert testimony only in those cases in which there are documented incidents of physical violence would ignore the reality that non-physical manifestations of abuse are frequently present in domestic violence relationships.

Domestic violence can encompass all of the circumstances of a victim’s life. For example, one mechanism of power and control that batterers commonly exert over victims is emotional abuse. Batterers often put victims down by making them feel bad about themselves, calling them names, telling them they are crazy, telling them they are stupid, and humiliating them. Domestic Abuse Intervention Project, “Power and Control Wheel,” in *Domestic Violence Law* 43 (Nancy K.D. Lemon ed., 2001) [hereinafter “Power and Control Wheel”]; see also Dutton, “Understanding,” *supra*, at 1205-06.

Another method of power and control that can be used is intimidation. “Understanding,” *supra*, at 1205-06; “Power and Control Wheel”. Batterers may use looks, actions, or gestures, such as destroying personal property or displaying a weapon, to intimidate their victims and make them afraid in their own homes. Mary Ann Dutton & Catherine L. Waltz, “Domestic Violence: Understanding Why It Happens and How to Recognize It,” in *Domestic Violence Law* 66, 68 (Nancy K.D. Lemon ed., 2001); “Power and Control Wheel.” Additionally, batterers often isolate their victims by controlling when and where they leave the house, to whom they speak, and what they do. Dutton & Waltz, *supra*, at 68; “Power and Control Wheel.” These actions severely limit victims’ freedom and their ability to maintain relationships with friends and family.

Moreover, many batterers use economic abuse as a method of control over their victims. Dutton, “Understanding,” *supra*, at 1205-06; “Power and Control

Wheel.” For example, batterers may prevent their victims from getting or keeping a job, or they may control victims’ access to money by taking it away, providing a limited allowance, forcing them to ask for money, or keeping sources of money a secret. “Power and Control Wheel”; see also Dutton & Waltz, *supra*, at 68. These methods ensure that the batterer has complete economic control over the household.

Batterers also may use children to obtain power and control over victims by threatening to take the children away or by using visitation to harass the victim. Dutton & Waltz, *supra*, at 68; “Power and Control Wheel”. For victims who fear nothing more than losing their children, this can paralyze them into submission to the batterer.

Finally, batterers often threaten their victims. Dutton, “Understanding,” *supra*, at 1205-06; “Power and Control Wheel”. In addition to threats of physical violence, such threats may include having the victim deported or reporting the victim to welfare authorities. “Power and Control Wheel”. For immigrant victims and poor victims, these threats have life-changing implications. Batterers may use these threats to coerce victims into performing illegal acts or dropping criminal charges against the batterer. “Power and Control Wheel”; see also Dutton & Waltz, *supra*, at 68.

These methods of power and control are every bit as abusive as physical violence itself. A judicial rule requiring prior evidence of past physical abuse in order to admit expert testimony would ignore these typical dynamics of many domestic violence relationships.

Even a rule requiring non-physical manifestations of abuse in order to admit expert testimony would be counter to the experience of domestic violence victims. Neither victims nor jurors are likely to recognize these methods of power and control as abuse. See, e.g., Lenore Walker, *The Battered Woman* 56-57 (1979) (stating that victims tend to minimize incidents that do not involve physical violence); Bowman, “A Matter of Justice: Overcoming Juror Bias in Prosecutions of



Batterers Through Expert Witness Testimony of The Common Experiences of Battered Women,” 2 *S. Cal. Rev. L. & Women’s Stud.* 219, 234-35 (1992) (noting that jurors have misconceptions that non-physical incidents of abuse do not constitute spousal abuse). Moreover, victims are unlikely to report any incidents of non-physical abuse, not only because they do not acknowledge it as such, but because the criminal justice system does not recognize it as criminal behavior. Therefore, despite the fact that non-physical abuse may have occurred in the past, it is unlikely that there would be any evidence of the abuse.

## 2. Even When There Is Prior Physical Abuse, the Victim Is Not Likely to Have Reported It

Domestic violence often manifests itself as a cycle of violence that escalates over time. See generally *Hernandez v. Ashcroft* (9th Cir. 2003) 345 F.3d 824, 827-41 (describing the cycle of violence and how it manifested itself in that case). Often, the cycle begins with the batterer exerting relatively minor manifestations of control over the victim. See, e.g., Lenore Walker, *The Battered Woman* 55-70 (1979); M. P. Johnson, “Patriarchal Terrorism and Common Couple Violence: The Forms of Violence Against Women,” 57 *J. Marriage & Fam.* 283 (1995). Over time, tension between the parties will escalate, frequently resulting in physical violence. See, e.g., Walker, *supra*, at 55-70; Geraldine B. Stahly, “The Battered Woman as Victim/Witness: Special Considerations for the Prosecutor in Partner Abuse Cases,” 13 *Prosecutor’s Brief* 7, 8 (1990).

After an abusive incident, many relationships undergo a “loving contrition” stage during which the batterer apologizes for the abuse and promises not to do it again. See, e.g., Walker, *supra*, at 55-70 (describing the stage); see also *Hernandez*, 345 F.3d at 828 (holding that a batterer’s behavior during the “contrite” phase of domestic violence may constitute extreme cruelty under immigration law). In many cases, the cycle then repeats itself, with tension

starting to build once again and leading toward another explosion of physical violence. See, e.g., Walker, *supra*, at 55-70.

Under this model, each incident of physical violence can be viewed as part of a larger pattern of power, control, and physical abuse, rather than a discrete occurrence removed from the dynamics and history of the relationship. See, e.g., *Hernandez*, 345 F.3d at 836-37 (stating that the batterer's actions were part of a larger cycle of violence).

In addition to the fact that domestic violence often manifests itself cyclically, it is the most underreported crime in the United States, see Bowman, *supra*, at 245 (citing the Federal Bureau of Investigation's and the Department of Justice's 1984 *Uniform Crime Report*), and in California, see *Cal. Welf. & Inst. Code* § 18290 (“[I]nstances of domestic violence are considered to be the single most unreported crime in the state.”).

One reason for this characteristic is that domestic violence occurs most often in the home. Karin Wang, “Comment, Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community,” 3 *Asian L.J.* 151, 155-56 (1996). As such, it is commonly perceived as a private issue that should be left to the individuals involved. Reva B. Siegel, “The Rule of Love: Wife Beating as Prerogative and Privacy,” 105 *Yale L.J.* 2117, 2153 (1996). Additionally, shame, community and religious pressures, and the other reasons discussed above, see *infra* Part I.A, cause many victims not to report physical abuse.

If the victim does not report past physical violence to the police, friends, or family, in many cases, there may be no other evidence of the past abuse. Such evidence would necessarily have to come from the victim's current statement. However, as noted above, approximately 78% of victims recant or do not cooperate with the prosecution after the time of their initial account. Maureen McLeod, “Victim

Noncooperation in the Prosecution of Domestic Violence: A Research Note,” *21 Criminology* 395 (1983). Just as these victims often minimize or deny that the current incident of abuse occurred, they may also deny that any past abuse has occurred.

Understanding these two characteristics of domestic violence, it is apparent that many victims who appear to have suffered only one incident of physical violence have actually experienced prior incidents of physical violence that they never reported to the police, friends, or family. The assumption that victims who have brought charges of first-time violence have not experienced any past abuse is often, therefore, erroneous.

Amici, of course, do not advocate curtailing the bedrock presumption that criminal defendants are presumed innocent of crimes until proven guilty. Nevertheless, a judicial rule requiring evidence of past reported abuse would overlook past unreported incidents of abuse, ignoring the reality of the typical dynamics of domestic violence and punishing victims for behaving exactly as many domestic violence victims do by failing to report past abuse.

Further, by introducing the concept of the cycle of violence, we do not suggest that the effects of abuse are dependent on repeated incidents of abuse, nor do we aver that every abusive relationship has involved multiple past incidents of abuse. Clearly, there must always be a first incident of abuse that is not preceded by another. We simply suggest that the pattern of abuse can be used to demonstrate that, although it may seem that a relationship has experienced only one incident of abuse, it is likely that past abuse has actually occurred.

C. Even If Past Abuse Is Required in Order to Admit Expert Testimony, It Should Not Be Limited to Physical Abuse

Even if the Court adopts a rule requiring a past showing of abuse in order to admit expert testimony regarding battering and its effects, the showing of past abuse should not be limited to physical abuse, but should include other types of abuse that frequently occur in domestic violence relationships. See *infra* Part II.B.1.

A rule requiring past physical abuse would deny the benefit of expert testimony to victims who have experienced only one incident of physical abuse, but who have suffered innumerable incidents of emotional, mental, financial, or other abuse. There is a high likelihood that these other forms of abuse preceded physical violence. See Am. Psychological Ass'n, "Violence and the Family," Report of the American Psychological Association Presidential Task Force on Violence and the Family (1996). These types of abuse are as much a part of domestic violence as is physical abuse. A rule requiring a showing of past physical abuse in order to admit expert testimony ignores this reality of domestic violence and the experiences of many domestic violence victims.

### III. "BATTERED WOMEN'S SYNDROME" IS NOT AN APPROPRIATE TERM TO DESCRIBE THE EXPERIENCE AND EFFECTS OF BATTERING

First conceptualized in the 1970s, the term "battered women's syndrome" (hereinafter "BWS") is often used to describe common reactions that victims have to domestic violence. BWS has been used as a shorthand reference to the body of scientific and clinical research that is relevant in domestic violence cases. Mary Ann Dutton, "Validity of 'Battered Woman Syndrome' in Criminal Cases Involving Battered Women," in *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 Part I*, 17 (U.S. Dep't of Justice, Nat'l Inst. of Justice, U.S. Dep't of Health & Human Servs., & Nat'l Inst. of Mental Health eds., 1996) [hereinafter Dutton, "Validity"].

### A. The Term Is Descriptively Inaccurate and Misleading to the Trier of Fact

Due to the extensive knowledge developed in the last twenty-five years with respect to battering and its effects, the term “BWS” is imprecise. *Id.* The term no longer adequately reflects “the breadth or nature of the scientific knowledge now available concerning battering and its effects.” U.S. Dep’t of Justice et al., “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*, at ii (1996).

An additional limitation of the term BWS is that it implies that the victim suffers from a psychological impairment or pathology. *People v. Humphrey* (1996) 13 Cal.4th 1073, 1083 n.3; Dutton, “Validity,” *supra*, at 19 (“[T]he term ‘battered woman syndrome’ evokes a stereotypical image of battered women as pathological or maladjusted.”). The pathological implication sends a message that the victim is passive or helpless in the face of abuse. Dutton, “Validity,” *supra*, at 18. This assumption is, however, contrary to current knowledge. See *id.* (“[E]mpirical evidence contradicts the view of battered women as helpless or passive victims; rather, it supports the idea that battered women continue to make active efforts to resist, escape, or avoid violence.”).

Moreover, BWS implies that all victims of domestic violence experience one common set of effects from battering. *Humphrey*, 13 Cal.4th at 1083 n.3. This implication is at odds with our current understanding of the complexity and variability of individuals’ responses to violence. See Dutton, “Validity,” *supra*, at 19. Rather than there being a set of uniform responses to violence, “scientific and clinical literature has documented a broad range of emotional, cognitive, physiological, and behavioral sequelae to traumatic events such as battering.” *Id.* The variability in responses to violence is not captured by a term that purports to label just one “syndrome.”

What is more, by using the word “woman”, the term ignores male victims of domestic violence. Approximately 8% of men are victims of domestic violence in their lifetimes. U.S. Dep’t of Justice, Nat’l Inst. of Justice, “Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women,” *Findings from the National Violence Against Women Survey 25-28* (2000), <http://www.ncjrs.org/pdffiles1/nij/183781.pdf>. Men are victims of domestic violence both in heterosexual relationships and homosexual relationships. Kathleen Finley Duthu, “Why Doesn’t Anyone Talk About Gay and Lesbian Domestic Violence?,” in *Domestic Violence Law* 191, 194 (Nancy K.D. Lemon ed., 2001) (stating that domestic violence occurs at approximately the same rate in homosexual relationships as it does in heterosexual relationships, affecting an estimated 500,000 gay men per year).

In addition to the descriptive inadequacy of the term itself, the term potentially distorts the administration of justice by the criminal justice system. The term’s limitations can be misleading to the trier of fact, who may make the assumptions described above. See Dutton, “Validity,” *supra*, at 17 (“[T]he term ‘battered woman syndrome’ . . . is imprecise and, therefore, misleading.”). Furthermore, the term turns the attention away from the batterer’s behavior, which is the prosecuted conduct, and to the mental state of the victim. See *Humphrey*, 13 Cal.4th at 1083 n.3. As a result, the trier of fact may be misled into thinking that the determinative issue in the case is whether the victim has BWS, and not whether the alleged conduct occurred.

Additionally, a limited definition of BWS may prevent the trier of fact from obtaining relevant information. For example, one construction of BWS limited the mental effects of battering to include only Post-Traumatic Stress Disorder (hereinafter “PTSD”). See Dutton, “Validity,” *supra*, at 19 (citing the American Psychiatric Association’s 1994 *Diagnostic and Statistical Manual of Mental Disorders*). Since victims’ psychological responses to battering are not limited

to PTSD, using this narrow understanding of the psychological responses that constitute BWS “excludes other potentially relevant and important information necessary for the factfinders in their deliberations.” *Id.*

Moreover, courts can misconstrue the common reactions that victims have to battering as a checklist of elements, each of which must be present in order for the victim to be considered a “battered woman” with the “syndrome.” For example, since recantation is commonly associated with current understandings of BWS, a court may think that a victim who does not recant does not have BWS and is, therefore, not a “battered woman.” This approach is incorrect since, as discussed above, victims have widely variable reactions to battering. See *id.* at 17.

Furthermore, it would undermine the achievements of domestic violence advocates, who sought to assist others in understanding domestic violence and how it fits into the law by outlining common experiences in battering relationships, if those common experiences were now misconstrued those common experiences as an absolute checklist that can be used to deny victims of domestic violence the benefit of expert testimony at their trials.

#### B. The Statewide and National Trend Is to Abandon the Term “Battered Women’s Syndrome”

In California, the statewide trend has been to attempt to abandon the term BWS. First, in 1996, this Court correctly noted that many experts preferred to use “battering and its effects” or “battered women’s experiences” instead of “BWS.” *People v. Humphrey* (1996) 13 Cal.4th 1073, 1083 n.3. This Court recognized several critiques of the phrase BWS:

- (1) [I] t implies that there is one syndrome which all battered women develop,

- (2) it has pathological connotations which suggest that battered women suffer from some sort of sickness,
- (3) expert testimony on domestic violence refers to more than women's psychological reactions to violence,
- (4) it focuses attention on the battered woman rather than on the batterer's coercive and controlling behavior and
- (5) it creates an image of battered women as suffering victims rather than as active survivors.  
*Id.* (quoting brief of amici curiae California Alliance Against Domestic Violence et al.).

Subsequently, the Ninth Circuit cited with agreement this Court's recognition of the problems associated with BWS. "We recognize, as the California Supreme Court did in *People v. Humphrey* [citation omitted], that the use of the terminology 'Battered Women's Syndrome' is not an accurate description of the psychological, physical, and emotional consequences of battery and abuse that the word was intended to capture." *McNeil v. Middleton* (9th Cir. 2003) 344 F.3d 988, 990 n.1.

In addition to the courts, the state legislature has indicated its intent to move away from the term BWS. In 2000, *Evidence Code section 1107(e)* was added to change the title of section 1107 to "Expert Witness Testimony on Battered Women's Experiences" instead of "Expert Witness Testimony on Battered Women's Syndrome." 2000 *Cal. Legis. Serv. Ch. 1001* (S.B. 1944). Following this Court's recognition in *Humphrey* of the problems associated with the term BWS, this amendment indicates the legislature's acknowledgment of the harms of BWS.

There is a similar trend on the national level to move away from the term BWS. In 1996, the U.S. Department of



Justice, the National Institute of Justice, the U.S. Department of Health and Human Services, and the National Institute of Mental Health, in conjunction with the State Justice Institute and the National Association of Women Judges, prepared a report titled “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* [hereinafter *Report*]. This report compiled three papers on the subject and concluded that there is a “strong consensus among the researchers, and also among the judges, prosecutors, and defense attorneys interviewed for the assessment [of the effects of BWS evidence on criminal trials], that the term ‘battered woman syndrome’ does not reflect the scientific knowledge now available regarding battering and its effects, implies a psychological impairment, and suggests a single pattern of response to battering.” *Report* at i-ii. Therefore, “the term ‘battered woman syndrome’ is no longer useful or appropriate.” *Report* at vii. “[A] more accurate and appropriate reference is ‘evidence concerning battering and its effects.’” *Report* at iii.

Amici respectfully encourage this Court to follow this national and statewide trend away from the term “BWS” by using “battering and its effects” or, as in *Evidence Code section 1107(e)*, “battered women’s experiences,” in the Court’s opinions.

## CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that the Court affirm the decision of the Court of Appeal.

DATED: January 5, 2004  
Respectfully submitted,

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Amici Curiae in support of Respondent

RULE 29.1(c) CERTIFICATION

I, Emberly Cross, certify that the number of words in this brief totals 8,100. In counting words, I have relied on the word count of the computer program used to prepare this document, as authorized by Cal. Rules of Court, Rule 29.1(c)(1).

I declare under penalty of perjury that the foregoing is true and correct.

DATED: January 5, 2004

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EMBERLY CROSS

The Application of California Alliance Against Domestic Violence et al. for Permission to File Brief of Amici Curiae in Support of Respondent the People of the State of California contains our respective statements of interest.

*Evidence Code section 1107* states:

- (a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.
- (b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on battered women's syndrome shall not be considered a new scientific technique whose reliability is unproven.
- (c) For purposes of this section, "abuse" is defined in Section 6203 of the Family Code and "domestic violence" is defined in Section 6211 of the Family Code or acts defined in Section 242, subdivision (e) of Section 243, or Section 262, 273.5, 273.6, 422, or 653m of the Penal Code.
- (d) This section is intended as a rule of evidence only and no substantive change affecting the Penal Code is intended.
- (e) This section shall be known, and may be cited as, *the Expert Witness Testimony on Battered Women's Experiences Section of the Evidence Code*. (West 2003).

Another way in which victims of domestic violence often do not cooperate with the prosecution, but which is not at issue in the present case, is by failing to attend and testify at preliminary hearings or trials. Maureen McLeod, "Victim Noncooperation in the Prosecution of Domestic Violence: A Research Note," *21 Criminology* 395 (1983).

It is important to recognize that every abusive relationship is unlikely to exhibit all of the elements of the

power and control model. Some relationships may not experience some or many of these characteristics. However, the elements of the power and control model represent common experiences that are present in many domestic violence relationships. See Ellen Pence & Michael Paymar, *Education Groups for Men Who Batter: The Duluth Model* (1993).

Coined by Lenore Walker in her landmark 1979 book, *The Battered Woman*, the cycle of violence paradigm has been criticized in recent years. See, e.g., Schopp et al., “Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse,” *1994 U. Ill. L. Rev.* 24. Some critics note that not all relationships experience each stage of the cycle. See, e.g., Am. Psychological Ass’n, “Violence and the Family,” *Report of the American Psychological Association Presidential Task Force on Violence and the Family* 33 (1996) (clarifying that the three phases of violence apply only to some battering relationships). For example, some relationships may not endure the “loving contrition” stage. See, e.g., Mary Ann Dutton, “Validity of ‘Battered Woman Syndrome’ in Criminal Cases Involving Battered Women,” in *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 Part I*, 18 (U.S. Dep’t of Justice, Nat’l Inst. of Justice, U.S. Dep’t of Health & Human Servs., Nat’l Inst. of Mental Health eds., 1996). They may progress from the tension-building phase to an explosion of physical violence, and then immediately back to the build-up of tension without any apologies or acts of kindness. See *id.*

Amici recognize the limitations of the cycle of violence model and concur that not all relationships experience the cycle in the same way. However, Amici believe that the cycle of violence theory demonstrates that batterers’ behavior often repeats itself over time as a pattern of behavior.