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Commentary: Women Accused of Homicide — The Use of Expert Testimony on the Effect of Battering on Woman — a Trial Judge's Perspective

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WOMEN ACCUSED OF HOMICIDE: THE USE OF EXPERT TESTIMONY ON THE EFFECT OF BATTERING ON WOMEN—A TRIAL JUDGE'S PERSPECTIVE.

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I. INTRODUCTION

During my career as a circuit court judge, I have presided over many cases in which abused women were accused of killing their abusers.[1] In this Commentary, I plan to discuss two of those cases. In both cases, the deceased was killed in a manner and under such circumstances that the State's Attorney in my jurisdiction, Alexander Williams, Jr.,[2] decided to prosecute the defendants for first-degree premeditated murder and all lesser degrees of homicide legally included in that charge. Mr. Williams was very aware of and sensitive to the dynamics of domestic violence during that time period.

I was a district court judge from August 1986 to May 1990, and I have been a circuit court judge since May 1990. I have lost count of the vast number of criminal and civil domestic-violence-protective-

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† I am a circuit court judge for the Seventh Judicial Circuit of Maryland, sitting in Prince George's County. This Commentary is a compilation of my experience and observations on the use of expert testimony on the effect of battering on women in spousal abuse cases.

I wish to acknowledge the following members of my staff:

(1) Sarah N. Qureshi, my law clerk, for her assistance in editing this Commentary;

(2) Martha Folea, my administrative assistant, for her typing and encouragement;

(3) Barbara Flynn, my courtroom clerk, who is always my conscience in the courtroom; and

(4) Debbie Callahan, for encouraging me to write this Commentary and to participate in the Women Judges' Fund for Justice Roundtable Discussion Conference, out of which this Commentary was born.

Several other people whose help was invaluable are acknowledged in the body and footnotes of this Commentary.

1. Although I have presided over three of these cases, I will only discuss two of them in this Commentary. The third case involved no expert testimony because the defendant pleaded guilty to voluntary manslaughter after rulings on pretrial motions. That case does not, therefore, merit description in this context.

   The only one of the cases over which I presided that was subject to appellate review was State of Maryland v. Annabel E. Elias, No. 1705, slip op. (Md. App. Aug. 2, 1994) (affirming the conviction of Ms. Elias for second degree murder).

2. Alexander Williams, Jr. is now a United States District Court Judge.

order cases that I have presided over in which individuals with extensive histories of abusive behavior were charged with felonious and/or severe misdemeanor assaults and batteries on their co-habitants. I am sure, however, that the number exceeds two hundred throughout my entire judicial career to date.[3]

II. PERSPECTIVE

In this section, I will recount the pertinent facts and dispositions of the two cases that were tried before me in which abused women were accused of killing their abusers in a homicidal manner. To allow readers of this Commentary to formulate their own informed judgments about the biases that may have contributed to the conclusions that I reached while presiding over these cases, I will explain the premise for this Commentary.

My experience is purely anecdotal, but it is extensive. My conclusions result from reflecting on my experiences and discussing them with others whose perspective may have been different but who played primary roles in those courtroom experiences. I then supplemented those thoughts with perspectives of other nationally recruited experts[4] who participated in a Roundtable Discussion Conference

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3. During my five years on the Circuit Court for Prince George's County, I have presided over two cases in which men with an extensive history of abusing their female victims ultimately killed them and were also charged with first degree premeditated murder and all lesser included degrees of homicide. In this Commentary, however, I plan to discuss two cases in which female victims ultimately killed their male (husband) abusers.

4. The "experts" to whom I respectfully refer are: Hon. LaDoris Cordell, Chair, Project Planning Committee; Mary Ann Dutton, Ph.D., Project Editor and Writer, expert witness, legal lecturer, author of numerous articles on battered women; Mary Morgan, Esq., moderator, former clinical law professor, Domestic Violence Project; Hon. Margarita Bernal, retired, municipal court magistrate judge, Tucson, Arizona, instructor of Domestic Violence class, National Judicial College; Julie Blackman, Ph.D., expert social psychologist witness; Sarah Buel, Esq., survivor of domestic violence, prosecutor, speaker, writer; Janet Carter, Project Director, Domestic Violence Project, Assistant Director, Family Violence Prevention Fund; Rolanda Pierre Dixon, Esq., prosecutor, Santa Clara County, California; David Dorsey, Esq., writer of paper on battered women and the duress defense, formerly an attorney with National Clearinghouse for the Defense of Battered Women; Thea DuBow, service provider, speaker, domestic violence survivor, formerly imprisoned; Anne Ganley, Ph.D., psychologist, works with batterers, expert on domestic violence, Planning Committee member; Hon. Kathy Gearin, Chair, WJFJ Project Development Committee, Planning Committee member; Hon. Cindy Lederman, Administrative Judge, Domestic Violence Department, Dade County, Florida; Jayne Lee, Esq., diversity expert; Hon. Stephen M. McNamee, federal judge and former United States Attorney, experience with domestic violence and sexual assault cases; Holly Maguigan, Esq., former defense attorney,

under the auspices of the Women Judges' Fund for Justice, the United States Department of Justice and the State Justice Institute. The conference was held in Washington, D.C., on April 29 and 30, 1995. These perspectives were expressed in working papers and were presented orally at the Conference.

I have also discussed my conclusions with certain colleagues,[5] after ascertaining the nature and extent of their experiences in arguably analogous cases, to determine whether any conclusions that they have reached regarding these issues were different than mine and, if so, to what extent. Based on those discussions, I discern no significant difference between either the experiences themselves or the conclusions reached by those judicial colleagues whose counsel I sought and received for this Commentary.

I also wish to place an additional caveat on my opinions about the impact of expert testimony on the effect of battering on women accused in criminal cases. I have not attempted to set forth in detail the cases and statutes that governed my decisions on evidentiary issues and jury instructions in these cases. These cases and statutes establish the parameters of the fact-finding processes as well as the substantive law of the case, whether the factfinder is a jury or a judge.[6]

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clinical law professor, author, expert in subject; Mary Murguia, Deputy Chief, Criminal Division, supervises violent crimes section, experience with sexual assault and domestic violence cases on Indian reservations; Susan Osthoff, Director, National Clearinghouse for the Defense of Battered Women, Planning Committee member; Janet Parrish, Esq., National Clearinghouse for the Defense of Battered Women, legal researcher, author of *Trend Analysis*; Beth Richie, Ph.D., professor of sociology, author on race, gender and crime; Mark Schlakman, Esq., Special Counsel to Florida Governor Lawton Chiles, counsel to Florida clemency panels; Donald Wolff, Esq., criminal defense attorney, Family Violence Project, National Council of Juvenile & Family Court Judges.

5. These colleagues prefer to remain anonymous.
6. The parameters of the fact-finding process have already been established in Maryland. Banks v. Maryland, 92 Md. App. 422, 608 A.2d 1249 (1992); *see* Jeanne-Marie Bates, Comment, *Expert Testimony on the Battered Woman Syndrome in Maryland*, 50 MD. L. REV. 920 (1991); Maryland Criminal Pattern Jury Instructions, 4:17.2 (Michie 1991); MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (Supp. 1994). Section 10-916 provides:

> (a) *Definitions.* — (1) In this section the following words have the meanings indicated.
>
> (2) "Battered Spouse Syndrome" means the psychological condition of a victim of repeated physical and psychological abuse by a spouse, former spouse, cohabitant, or former cohabitant which is also recognized in the medical and scientific community as the "Battered Woman's Syndrome."
>
> (3) "Defendant" means an individual charged with:
>
> (i) First degree murder, second degree murder, manslaughter, maiming, or attempt to commit any of these crimes; or

Finally, my opinions have been influenced by my observations of judges' and jurors' reactions to expert testimony in other kinds of cases and on other issues that are, in many instances, seemingly unrelated to those under scrutiny here. During my nine years on the bench, which were preceded by ten years as a litigator and two years as a judge's clerk, I have observed expert testimony and factfinders' reactions to it in hundreds of cases, including domestic, personal injury and criminal cases. I believe that these experiences have shaped my opinion on the issues addressed in this paper. Therefore, I believe that I would be remiss if I did not put these experiences before any reader as a possible source of bias to consider when evaluating the propositions set forth below.

III. EXPERIENCE

The two cases that I presided over in which an abused woman was accused of killing her abuser, under such circumstances that she was prosecuted for first degree murder and all lesser included degrees of homicide, resulted in very different dispositions. In each case, my rulings on evidentiary and procedural issues were the same. Those rulings reflected my belief, which was later codified in Maryland,

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(ii) Assault with intent to murder or maim.

(b) *Admissibility of evidence.* — Notwithstanding evidence that the defendant was the first aggressor, used excessive force, or failed to retreat at the time of the alleged offense, when the defendant raises the issue that the defendant was, at the time of the alleged offense, suffering from the Battered Spouse Syndrome as a result of the past course of conduct of the individual who is the victim of the crime for which the defendant has been charged, the court may admit for the purpose of explaining the defendant's motive or state of mind, or both, at the time of the commission of the alleged offense:

(1) Evidence of repeated physical and psychological abuse of the defendant perpetrated by an individual who is the victim of a crime for which the defendant has been charged; and

(2) Expert testimony on the Battered Spouse Syndrome. (1991, ch. 337).

I must say, with admiration, that this research has also been done nationally, in a more thorough and comprehensive manner than I would attempt here, by other Roundtable participants. For an especially helpful discussion, see Janet Parish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, National Clearinghouse for the Defense of Battered Women, (Nov. 1994); *see also* Holly Maguigan, *A Defense on Battered Women Charged with Homicide: The Expert's Role During Preparation for and Conduct of Trials*, (Working Paper, Apr. 1995); Robert F. Schopp, Barbara J. Sturgis & Megan Sullivan, *Battered Woman Syndrome, Expert Testimony and the Distinction Between Justification and Excuse*, 1994.1 U. ILL. L. REV. 45 (1994).

that

> the court may admit *for the purpose of explaining the defendant's motive or state of mind, or both,* at the time of the commission of the alleged offense:
>
> (1) Evidence of repeated physical and psychological abuse of the defendant perpetrated by an individual who is the victim of a crime for which the defendant has been charged, and
> (2) Expert testimony on the Battered Spouse Syndrome.[7]

A. The First Case—Defendant A

The first case that I shall discuss in which the defense of "Battered Spouse Syndrome" was utilized was tried in the fall of 1990, prior to the passage of the statute mandating the admission of expert testimony and evidence of the history of abuse. In this case, the defendant was acquitted by a jury. The verdict was reached after the jury had heard the testimony of the defendant and others about the defendant's physical and psychological abuse by her deceased cohabitant over an extended period of time. The jury also heard a psychologist testify as to the psychological effects of the abuse inflicted on the defendant. All of this evidence was admitted over the objection of the prosecutor, whose position was that this evidence was irrelevant in the absence of a statute declaring its relevance and mandating its admission. There was, depending on whose testimony one believed, anywhere from a ten-minute to no-minute interlude between the last act of physical abuse by the deceased abuser and the defendant's homocidal act. I do not specifically recall the gender breakdown of the jury, but I do recall that it was mixed.

More importantly, there was very little dispute of fact except as to the length of the brief time interval between the last instance of abuse and the stabbing of the abuser by the defendant. The defendant's theory was that her actions were in self-defense. This was supported by her testimony that the deceased, "on the attack," looked for her in their home for the purpose of inflicting further beatings upon her. It was under these stressful circumstances, the defendant testified, that she stabbed the victim to keep him from beating her. The defense expert simply explained how the defendant's actions were "reasonable" under these circumstances, although that term was obviously neither intended nor understood as a clinical or legal term.

The State offered no alternative to the defendant's own explanation of her motive for her actions. The State, after the presentation

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7. MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (Supp. 1994) (emphasis added).

of its case in chief, chose not to prosecute the first degree premeditated murder charge. Instead, the State's theory was that what had occurred was second degree murder because the defendant's version of what occurred, particularly the time sequence, was not credible. The prosecution's theory was, very simply, that the jury should not believe that the defendant was defending herself or even that she could reasonably think that she was defending herself under the circumstances of the case. For that reason the State posited that, even conceding the history of abuse of the defendant by her deceased victim, there was no legal justification or even mitigation for her homicidal act.

This put the prosecution in the untenable position of, in effect, advocating that the jury reject the defense expert's logical explanation of what had occurred in the case without being provided with any alternative theory that could coherently replace it. The unsteady course of the State's argument resulted in the following dilemma for the jurors: In order to accept the prosecution's theory of the case, the jurors would have been required to work harder intellectually than if they had simply accepted both the defendant's version of what had occurred and her expert witness's explanation of why her actions in stabbing her abuser were reasonable under the circumstances.

The jurors in this case chose the less intellectually rigorous course. They accepted the abused woman's version of what occurred and her expert's explanation of why her conduct was reasonable. The jurors avoided the more intellectually taxing path of trying to determine for themselves the facts and the reasonableness of the defendant's actions.

B. The Second Case—Defendant B

The opposite result was reached in the second case, which was tried in 1993 before a jury of eleven women and one man. The jury was selected after numerous, mostly unsuccessful, *Batson*[8] challenges by the prosecutor, who challenged the defense tactic of striking male jurors simply because they were male. The largely female jury convicted the abused woman defendant of second degree murder.

In both the first case and this case, there had been a long history of physical and sexual abuse of each of the abused women defendants

8. Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the government's privilege to exercise peremptory challenges is subject to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution); Georgia v. McCollum, 505 U.S. 42 (1992) (holding that the defendant's privilege to exercise peremptory challenges is subject to the Equal Protection Clause); Tyler v. State, 330 Md. 261, 623 A.2d 648 (1993) (adopting *Batson* and its progeny to prohibit peremptory challenges based on gender).

by the individuals that they killed. These histories were admitted into evidence in both cases and were not seriously disputed in either case. In both cases, there was also expert testimony that the defendants were suffering from the effects of abuse at the time they killed their respective abusers.[9] In both cases, the jury was instructed in exactly the same manner:

> You have heard evidence of repeated physical and psychological abuse of the [d]efendant, (name of defendant), by the alleged victim in this case, (name of deceased). You also heard evidence, expert evidence, testimony on the subject of the Battered Spouse Syndrome.
>
> You may consider this evidence for the purpose of explaining the [d]efendant's motive, or state of mind, or both at the time of the commission of the alleged offense. Battered spouse syndrome means the psychological condition of a victim of repeated physical and psychological abuse by a spouse, former spouse, cohabitant or former co-habitant which is also recognized in the medical and scientific community as the "Battered Women's Syndrome."[10]
>
> The defendant is charged with the crime of murder. This charge in this case includes second degree murder and voluntary manslaughter.
>
> Second degree murder is the killing of another person, without legal justification or mitigation, and with either the intent to kill or the intent to inflict such serious bodily harm that death would be the likely result. Second degree murder does not require premeditation or deliberation. In order to convict the defendant of second degree murder, the State

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9. Section 10-916 uses the word "Syndrome," which arguably limits the admission of expert testimony to defining that term as it applies to the condition of a particular defendant in a particular case. However, in a preceding section entitled "Definitions," the statute defines the term very broadly. In fact, the statute reduces the significance and, therefore, the limiting effect of the later statutory language by rather pointedly avoiding a clinical definition of "Syndrome," *i.e.*, as a disease, mental illness or even mental defect. Rather, it is defined as a "psychological condition of a victim" caused by a "spouse, former spouse, cohabitant or former cohabitant."

   Interestingly, the statute, therefore, defines the defendant as a "victim" whose condition as a victim can be statutorily attributed to any one of a number of potential targets of her crime. The significance of the term "Battered Woman Syndrome" is further minimized by the statute's reference to it as a term utilized in the "medical and scientific community" to describe this condition.

10. The first two paragraphs of these jury instructions were written by me but were drafted to track the language of Maryland's "Battered Spouse Syndrome" statute. MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (Supp. 1994).

must prove:

(1) that the conduct of the defendant caused the death of (victim);

(2) that the defendant engaged in the deadly conduct either with the intent to kill or with the intent to inflict such serious bodily harm that death would be the likely result;

(3) that the killing was not justified; and

(4) that there were no mitigating circumstances.

Voluntary manslaughter is a killing that would otherwise be murder, but with the presence of a mitigating circumstance. A mitigating circumstance is not a complete defense that results in a verdict of not guilty, but is a partial defense that reduces the level of guilt from murder to manslaughter.

You have heard evidence that the defendant killed (victim) in self-defense. You must decide whether self-defense is a complete defense, a partial defense or no defense in this case.

In order to convict the defendant of murder, the State must prove that the defendant did not act in a complete or partial self-defense. Otherwise, a complete self-defense requires a verdict of not guilty, while a partial self-defense will result in a verdict of guilty of voluntary manslaughter and not guilty of murder.

Self-defense is a complete defense and you are required to find the defendant not guilty if all of the following four factors are present:

(1) the defendant was not the aggressor and did not raise the fight to the deadly force level;

(2) the defendant actually believed that [she] was in immediate and imminent danger of death or serious bodily harm;

(3) the defendant's belief was reasonable; and

(4) the defendant used no more force than was reasonably necessary to defend [herself] in light of the threatened or actual force.

In order to convict the defendant of murder, the State must prove that self-defense does not apply in this case. This means that you are required to find the defendant not guilty unless the state has persuaded you, beyond a reasonable doubt, that at least one of the four factors of self-defense was absent.

Even if you find that the defendant did not act in what has been defined as complete self-defense, the defendant may still have acted in partial self-defense. A partial self-defense is a mitigating circumstance. The difference between

> voluntary manslaughter and murder is the presence or absence of a mitigating circumstance. The presence of a mitigating circumstance will not relieve the defendant of guilt, but it will result in a verdict of voluntary manslaughter rather than murder.
>
> If the defendant actually believed that she was in immediate and imminent danger of death or serious bodily harm, even though a reasonable person would not have so believed, the defendant's actual, though unreasonable, belief is a partial self-defense and results in a verdict of voluntary manslaughter rather than murder. If the defendant used greater force than a reasonable person would have used, but the defendant actually believed that the force used was necessary, the defendant's actual, though unreasonable, belief is a partial self-defense and results in a verdict of voluntary manslaughter rather than murder.
>
> In order to convict the defendant of murder, the State must prove that the defendant did not act in a complete or partial self-defense. Otherwise, a complete self-defense requires a verdict of not guilty, while a partial self-defense will result in a verdict of guilty of voluntary manslaughter and not guilty of murder.[11]

The major difference between the two cases was that in the second case, where the defendant was convicted, the prosecution presented a more credible alternative theory to the defendant's version of the pertinent events than in the first case, in which the defendant was aquitted. In the second case, the eleven female jurors and one male juror seemed not to believe that the defendant killed her abuser because she continued to fear for her life during the three hour interim that passed after his last physically abusive contact with her. The prosecution reinforced the portrait of the decedent abuser as a truly reprehensible human being through the use of State's witnesses, clever cross-examination of defense witnesses and the testimony of the defendant herself. The prosecutor then added a further dimension of evil to the courtroom portrait of the deceased abuser by painting him as a compulsive womanizer who constantly taunted and angered his abused wife with tales of his sexual exploits with other women, even while he was sexually and physically abusing her.

The prosecution then invoked the age-old stereotype of the "jealous wife," going so far as to suggest, during closing arguments to the jury, that the jurors remember in their deliberations that

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11. The paragraphs that follow the first two paragraphs were adapted from Maryland Institute for Continuing Professional Education of Lawyers, Inc., Maryland Criminal Pattern Jury Instructions, 4:17.2, 227-29 (Michie 1991).

"[h]ell hath no fury like a woman scorned." The prosecution further suggested that the jury consider the evidence that supported the stereotype to explain why the defendant killed her husband while he sat in a chair watching television some three hours after he last abused her.

The jury, by convicting the defendant of second degree murder in the second case, obviously rejected her version of what had occurred, her description of her fear of death or serious bodily harm at the time she stabbed her husband and her expert psychologist's explanation of why that fear was both real and reasonable. Instead, the jury apparently found it easier and more satisfying, both intellectually and emotionally, to accept the prosecution's soap opera/"Murder She Wrote"/"Columbo" type theory of the case.

I am convinced that the conviction of defendant B for second degree murder, as distinguished from the acquittal of the similarly abused defendant A tried before me two years earlier, was caused by the factors listed below.[12]

First, in defendant B's case, the evidence established that there was a one to three hour interlude between the last instance of physical or sexual abuse of the defendant by her deceased abuser. By contrast, in defendant A's case, the relevant interlude was, at most, only ten minutes. The experts in both cases omitted a direct discussion of the effect that the battering of the respective defendant would have had on her state of mind or fear of her abuser within the relevant time frame.

In defendant A's case, given the resulting acquittal, the time lapse was neither critical nor controlling, and such expert testimony was, therefore, not needed. In defendant B's case, however, the jury was left to its own devices to fill the void created by the lack of expert testimony. With no testimony as to why defendant B would

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12. The following are a few of my general insights regarding jurors: Jurors will usually adopt the theory of the case that seems to them most consistent with their own personal experience. If they have no common frame of reference in their own personal experience, they will rely on what they observe on television or in movies about how similar situations play out. Jurors will generally choose case theories that are easy to understand over theories that are more cumbersome to piece together. Jurors welcome the suggested theories of attorneys if they make sense and do not require a vast amount of intellectual handiwork to implement.

Likewise, the credibility given by jurors to lawyers and to witnesses, particularly expert witnesses, is very much affected by the manner in which they address jurors. Jurors tend to be more receptive when lawyers and witnesses demonstrate their knowledge and avoid "talking down" to jurors, thereby showing them proper respect. The credibility accredited to a witness, expert or attorney varies directly with the empathy the individual establishes with the jury.

kill her abuser hours after he had ceased any physical contact with her, the jury apparently fell back on female stereotypes and television scenarios to explain defendant B's actions. This was fatal to the defense.

Second, in neither case did the expert testimony deal with misconceptions of the term "Battered Woman Syndrome" or any other general stereotypes about women that might be invoked to explain the abused women's actions. Again, this was obviously not critical to defendant A's case, which resulted in her acquittal, because no misconceptions were proffered by the prosecution or even suggested to the jury as an explanation for the defendant's actions. However, in defendant B's case, myths and misconceptions were critical. The defense failed to put these myths and other misconceptions to rest through the use of expert testimony. The defense's failure to encourage the jurors to make an informed rejection of such misconceptions and stereotypes made it much easier to convict the defendant of murder than it would have been if such a rejection were accomplished through the use of expert testimony.

Third, the amount of emphasis placed on the jury's gender composition influenced the outcome of each case. In the first case, both the customary illegal racial and gender stereotyping and other, legally permissible, stereotyping by both the prosecutor and the defense counsel took place in the jury selection process, but the defense neither had as its goal, nor did it get, an all female jury. In the second case, however, it was obvious that the defense attorney was attempting to have as many women placed on the jury as possible. In fact, he succeeded beyond even his expectations in that he obtained, although not without a fight, an almost all female jury. In making gender his paramount priority, however, the defense counsel lost a number of opportunities to have perhaps more sympathetic jurors. A number of younger and/or more educated jurors were lost, including some whose professions (if one is willing to invoke further stereotypes) would arguably have indicated their greater potential, as a result of their own broader education and experience, to understand the defendant's experience and point of view. Perhaps most importantly, the rejected jurors might have been more receptive to expert testimony that would have explained the abused woman's actions in terms more complex than a television mystery show.

The fourth factor is the manner in which the counsel in each case managed to relate prior battering to the defendants' fear and subsequent actions in the cases at bar. In defendant A's case, the expert psychologist first testified that the defendant was suffering from "Battered Woman Syndrome" and then explained how the effects of battering affected her state of mind at the time of the incident. The thrust of the expert testimony was that, in light of her condition *and the specific circumstances of the case* at the time of

her stabbing, her belief that she was in danger of death or serious bodily harm was real and reasonable.

In defendant B's case, which resulted in conviction, there was extensive testimony indicating that the defendant suffered from "Battered Spouse Syndrome" at the time of the stabbing, but there was no attempt to *relate* the effects of her prior battering to her actions. There was no attempt by defense counsel, through his expert's testimony, to explain how this condition could cause a defendant to reasonably fear that she was in danger of death or serious bodily harm from an abuser who was sitting in a chair and watching television for three hours prior to his stabbing. For that reason, and because defense counsel's requested jury instruction did not accurately state the law of Maryland,[13] I refused to instruct the jury as follows:

> The State has the burden of proving beyond a reasonable doubt that the defendant was not suffering from the Battered Woman Syndrome at the time of the killing and that the death was not connected to the Battered Woman Syndrome.

As grounds for refusing to give the aforementioned jury instruction, I stated, on the record:

> I do not believe, so the record is clear, and I think this is where we disagree, that the legislature, by that statute, has set up the Battered Spouse Syndrome as an absolute defense, or even partial self-defense. They have, rather, said that it can be considered in conjunction with both of those [absolute or partial self-defense], and that's what I've told them.[14]

My decision in defendant B's case was affirmed by the Court of Special Appeals of Maryland.[15] Because I refused to give the proposed jury instruction, the defense could not argue the principal tenet of its defense to the jury. The testimony of the expert was, therefore, placed in a legal context where it appeared to be offered to excuse the defendant's homicidal act rather than to explain it. The result was a conviction of the most serious homicide charge available to the jury—second degree murder.

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13. *See supra* note 7.
14. In fact, defendant B offered expert testimony that his condition was far more serious than that of defendant A. Specifically, defendant A's expert psychologist testified that defendant A suffered from moderate depression and post traumatic stress disorder. In defendant B's case, the expert psychologist testified that defendant B suffered from Battered Woman Syndrome, depression, dysthymia (a chronic mild to moderate depression), post traumatic stress disorder and dependent personality disorder at the time of her homocidal act.
15. Unreported Opinion No. 93-1705, filed Aug. 2, 1994.

IV. SUGGESTIONS FROM THE BENCH

From my experience in the two trials described above, I have reached the following conclusions: Expert testimony on the "effects of battering" in cases where a woman is charged with murdering her abuser should encompass the broadest possible, intellectually honest definition of the experience of what it is to be a "battered woman," as well as a "batterer." It should also articulate what that total experience and relationship does to change the nature of the social conduct, contact and expectations between the battered woman and her batterer. The expert testimony should then, if possible, place into the context of that experience and relationship the legal terms that the judge will use to instruct the jury as to how to apply the law to the facts of the case. The terms that the expert should incorporate include, but are not limited to, the following: "aggressor," "reasonable belief of immediate or imminent danger of death or serious bodily harm," and "necessary force" or "undue force."

The information described above should then be reinforced by either the expert, in his testimony, the counsel in closing arguments, or both and should be related specifically to the facts of the case on trial, using the same terminology that the judge will use in his instructions to the jury.

Furthermore, the testimony of an expert in a case where the battered woman is accused of killing or initiating a violent attack on her abuser should include an element of "debunking" myths and misconceptions about the term "Battered Woman Syndrome" and/or women in general, particularly if the prosecution or defense is presenting such a misconception as a part of its theory of the case.

Additionally, the substance of the testimony of either the prosecution's or the defense's expert concerning the effects that battering has on an abused woman should be disclosed and discussed as part of the plea negotiation process so that a just disposition can be discussed in good faith prior to trial.

Finally, defense counsel should check the jurisdiction in which the battered woman will be tried to see if any judges in that jurisdiction have recently received multi-disciplinary judicial education on the issues associated with such cases. Defense cousel should attempt to ascertain whether the particular presiding judge would, in the opinion of members of the local bar who know him, be likely to absorb such multi-disciplinary education and to apply it in the case. If the answer is in the affirmative, serious consideration should be given to waiving trial by jury and electing a court trial.

V. CONCLUSION

In this Commentary, I have attempted to put forth a trial judge's perspective and observations. It is my hope that practitioners will

find it useful to reflect upon my descriptions of these two scenarios: one in which expert testimony was effectively utilized to secure the acquittal of the defendant and one in which expert testimony was not so utilized. For the benefit of practitioners, I have suggested several ways to maximize the value of such expert testimony in cases in which the accused is a battered woman facing potential murder charges. In essence, I would suggest to every practitioner trying such cases that the most important use of expert testimony is to ensure that the jury, in reaching a fair verdict, can make truly informed decisions about what it has heard at trial without relying on television antics about the "drama" of the courtroom.