Case No. 20-1394

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

MARJORY DINGWALL,
DEFENDANT-APPELLANT.

On Appeal From The United States District Court
For The Western District of Wisconsin
The Honorable James D. Peterson, Presiding

BRIEF OF *AMICI CURIAE* END DOMESTIC ABUSE WISCONSIN AND WISCONSIN COALITION AGAINST SEXUAL ASSAULT IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

AMY MILLER
Counsel of Record
RYAN J. WALSH
EIMER STAHL LLP
10 East Doty Street
Suite 800
Madison, WI 53703
(608) 441-5796
(608) 441-5707 (fax)
amiller@eimerstahl.com
rwalsh@eimerstahl.com

Counsel for Amici Curiae *End Domestic Abuse Wisconsin and Wisconsin Coalition Against Sexual Assault*

DISCLOSURE STATEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*

End Domestic Abuse Wisconsin is a statewide coalition led by social-policy advocates, attorneys, and experts working to support, connect, equip, empower, and lead organizations for social change to end domestic abuse. Founded in 1978 and based in Madison, End Domestic Abuse Wisconsin works on a wide array of initiatives including engaging youth, public-policy and legal-systems advocacy, outreach to under-served communities, homicide prevention, and multidisciplinary response team support.

Wisconsin Coalition Against Sexual Assault (WCASA) is a statewide coalition and membership agency dedicated to providing support and complementing the work of Wisconsin's sexual assault service provider agencies, who are working to end sexual violence and offer support, advocacy, and information to victims of sexual assault and their families. WCASA works to ensure that every survivor of sexual assault in Wisconsin gets the support that they need. WCASA also works to create the social change necessary to end all forms of sexual violence.

End Domestic Abuse Wisconsin and WCASA's interest in this case stems from their missions to advocate for the victims of domestic and sexual violence. In this case, Defendant Marjory Dingwall alleges that she was repeatedly abused by her partner and that he demanded she commit the crimes charged. Marjory seeks to raise the defense of duress, but this Court's case law arguably stands in her way. Because Marjory's abuser was not standing next to her when she committed the charged crimes, the District Court held that his beatings and threats to her if she did not do as he said did not fit the legal definition of duress. *See* Dkt. 33:3–4 (App. 10–11). The

court's failure to consider the effect of the history of abuse on the reasonableness of Marjory's perceptions was error, as at least three of this Court's sister circuits have held.

End Domestic Abuse Wisconsin and WCASA submit this brief so that victims such as Marjory may exercise their constitutional right to present a defense, and so that courts and juries might understand what a reasonable person in the shoes of a victim of chronic abuse might do when forced by her captor to commit a crime.[1]

INTRODUCTION

The modern law of duress incorporates the common law as Congress is presumed to have understood it when passing the criminal statutes. Viewed in isolation, the common-law rule of duress might seem especially demanding, requiring the defendant to show that she faced not only a grave but an *immediate* threat from which she could not escape. But this narrow formulation of the doctrine falls short, at least as applied to victims of prolonged domestic violence. A full accounting of the common law would also consider the duress rule's special treatment of *women under the control of men*. Pursuant to the doctrine of coverture, married women were mere subjects of their husbands—in every legal, economic, and social respect—to the point that husbands were entitled to "correct" their spouses through physical beatings.

[1] End Domestic Abuse Wisconsin and Wisconsin Coalition Against Sexual Assault (WCASA) submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and certify that all parties have consented to its filing. End Domestic Abuse Wisconsin and WCASA further certify that no counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money to fund preparing or submitting this brief, and no person other than the *amici curiae*, their members, or their counsel, contributed money to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

Critically, this presumption of total spousal subjugation and licensing of routine domestic violence had implications beyond coverture. It also affected the rules of criminal liability. In particular, it meant that (1) married women were presumed to act under duress *whenever* they committed a crime in their husband's presence, and that (2) "presence" not only denoted literal physical proximity but also covered any distance from which a man could exert his domineering influence. In other words, the imminence requirement of general duress theories, as it is understood today in other contexts, *simply did not apply* to a defense raised by a woman in an intimate relationship with a man.

These common-law principles entitle the victims of domestic abuse today to raise duress in cases where the defense would be unavailable to others. In many ways, present-day domestic abuse mimics in fact what coverture prescribed in law: total control of the victim's economic and social life and the maintenance of that control by physical violence. That is why some commentators have characterized modern-day domestic abuse as a kind of *de facto* coverture. That is also why many modern courts have recognized that victims of domestic abuse are uniquely vulnerable to the coercive forces of their abuser, and that this has special ramifications for victims of abuse who wish to argue they committed a crime under duress.

For these same reasons—recognizing the unique vulnerability of domestic-violence victims to their abusers—courts have allowed victims to raise the analogous affirmative defense of self-defense even where an attack is not immediately apparent. This further supports allowing a victim to raise duress when the abuser is not

immediately present, as there is no principled reason to treat self-defense and duress differently. Self-defense and duress are both common-law affirmative defenses and contain the same essential elements: imminence and lack of reasonable alternatives. Self-defense requires analyzing the defendant's actions from the standpoint of a reasonable person *in the defendant's position*, and a defendant who is the victim of domestic abuse is necessarily in a different position than one who is not. As with self-defense, the common law contemplated that courts would analyze duress based on the view of a reasonable person in the defendant's position. Thus, as with self-defense, courts should allow the victims of domestic abuse to raise a duress defense even when the abuser was not immediately present during the crime.

ARGUMENT

I. Just as an Abused Woman in Common-Law Coverture Could Argue Duress Even if Her Abuser Was Not Physically Present for the Crime, a Victim of Domestic Violence Today Should Be Entitled to Raise This Defense When She Reasonably Fears Violence for Disobeying Her Abuser

Duress is an affirmative defense that excuses a crime even when the defendant committed it with the requisite mens rea. Duress, along with self-defense and necessity, are known as "'lesser-evil' defenses [and] may justify otherwise unlawful action." *United States v. Feather*, 768 F.3d 735, 739 (7th Cir. 2014). They "rest[ ] on the belief that a person facing harm is justified in performing an act, otherwise illegal, less injurious than the impending loss." *Id.* (citation omitted). A defense of duress "excuses criminal conduct, even though the defendant engages in it with the requisite *mens rea,* because the defendant nevertheless acted under a threat of a

greater immediate harm that could only be avoided by committing the crime charged." *United States v. Sawyer*, 558 F.3d 705, 710–11 (7th Cir. 2009).

Federal courts called upon to discern the contours of the duress defense look to the common law. That is because duress has its roots in common law, *see Sawyer*, 558 F.3d at 710–11, and courts presume that Congress, when enacting criminal statutes, is "familiar with [ ] the long-established common-law rule[s]" governing affirmative defenses. *Dixon v. United States*, 548 U.S. 1, 12–14 (2006). Indeed, while Congress has not codified the duress defense, "when a congressional committee did consider codifying the [ ] defense, it would have had the courts determine the defense 'according to the principles of the common law as they may be interpreted in the light of reason and experience.'" *Id.* at 14 n.8 (quoting S. 1437, 95th Cong., 2d Sess., § 501 (1978)).

The common law permitted courts to excuse the conduct of criminal defendants when they were threatened with grave harm. "Society has always recognized that even individuals who would otherwise obey the law can be forced to commit an offense if threatened with a sufficiently grave harm." Paul H. Robinson, 2 Crim. L. Def. § 177. In such cases, "punishment serves neither the deterrent nor the condemnatory purposes of the criminal justice system." *Id.*; *accord* 4 W. Blackstone, *Commentaries on the Laws of England*, at *27 (1894) ("As punishments are [ ] only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion."). Indeed, if a man is forced to commit a crime "by the threats of evil-

doers," then "he is the victim, rather than the perpetrator, of a wrong." *People v. Pantano*, 146 N.E. 646, 647 (N.Y. 1925).

Still, common law required the defendant's fear to have been "well-grounded" to excuse a crime. For a defendant's fear to have been "just and well grounded," 4 Blackstone Commentaries, *supra*, at *30; *see also Morgan v. State,* 35 Tenn. 475, 480–81 (1856), the threatened harm usually had to "be instant and imminent," as "[f]ears of future injuries d[id] not excuse an offense." *People v. Repke*, 61 N.W. 861, 865 (Mich. 1895); *Ross v. State*, 82 N.E. 781, 781–82 (Ind. 1907) (collecting cases). Courts required immediacy because "[t]he social system would be subverted, and there would be no protection for persons or property, if the fear of man, needlessly and cravenly entertained, should be held to justify or excuse breaches of the law." *People v. Martin*, 108 P. 1034, 1037 (Cal. Ct. App. 1910) (citation omitted); *see also United States v. Vigol*, 2 U.S. 346, 347, 1 L. Ed. 409 (C.C.D. Pa. 1795).[2]

Yet while the common law ordinarily required an immediate threat to support a defense of duress, different rules applied to a woman living under the dominion of a man. Two are especially relevant here.

First, courts applied a rebuttable presumption that a woman acted under duress *whenever* she committed a crime in the presence of her husband. *See* Wayne

[2] The Seventh Circuit "follows the common law rule" governing duress and permits the defense of duress "only if the defendant reasonably feared immediate death or severe bodily injury which could be avoided only by committing the criminal act charged." *United States v. Tanner*, 941 F.2d 574, 587 (7th Cir. 1991) (citation omitted). Applying this rule, this Court has held that prisoners could not raise the defense of duress by providing evidence of only "generalized fears regarding *future* threats." *United States v. Tokash*, 282 F.3d 962, 970 (7th Cir. 2002); *United States v. Sahakian*, 453 F.3d 905, 910 (7th Cir. 2006).

R. LaFave, 2 Subst. Crim. L. § 9.7(f) (3d ed.); *State v. Davis*, 559 S.W.2d 602, 605 (Mo. Ct. App. 1977). Under the common-law doctrine of coverture, "the husband had control almost absolute over the person of the wife; he was entitled, . . . to her services, and consequently to her earnings, . . . and thus had dominion over her property and became the arbiter of her future. She was in a condition of complete dependence." *Norris v. Corkill*, 4 P. 862, 863 (Kan. 1884). Husbands were also permitted to "correct[ ]" their wives with beatings. *Id.* "Until the 20th century, our society effectively condoned family violence, following a common-law rule known as the 'rule of thumb,' which barred a husband from 'restraining a wife of her liberty by chastisement with a stick thicker than a man's thumb.'" S. Rep. No. 103-138, at 41 (1993). As a result of this "disability" on the part of the wife, *see Brown v. Commonwealth*, 115 S.E. 542, 543 (Va. 1923), the law presumed that, if a married woman committed a crime in her husband's presence, she did so under coercion or duress. *King v. City of Owensboro*, 218 S.W. 297, 298 (Ky. 1920); *State v. Williams*, 65 N.C. 398, 400 (1871) (reason for the presumption is that "the husband has actually an influence and authority over the wife, which the law sanctions, or at least recognizes"); *see also State v. Renslow*, 230 N.W. 316, 318 (Iowa 1930); *Dalton v. People*, 189 P. 37, 38 (Colo. 1920).

Second, although the husband's "presence" was a condition of the presumption, presence had a capacious, non-literal meaning, extending far beyond "physical proximity." As courts put it, the husband "need not [have] be[en] at the very spot, or in the same room, but it is sufficient if he was near enough for her to be under his

immediate control or influence." *Commonwealth v. Daley*, 18 N.E. 579, 579 (Mass. 1888); *see also Dohorty v. Madgett*, 2 A. 115, 119 (Vt. 1886) (collecting cases). Hence a woman could be under her husband's influence even when he was incarcerated. For example, in *State v. Miller,* 62 S.W. 692 (Mo. 1901), the Missouri Supreme Court held that the presumption applied to a woman whose husband directed her to bring a gun to him in jail. *Id.* at 694; *see also State v. Carpenter*, 176 P.2d 919, 920–21 & n.4 (Idaho 1947) (applying presumption when wife brought hacksaw to husband in jail). And if there was a question over whether the man was too far away to exert his influence, courts would leave it "to the jury to determine incidentally whether his presence was sufficiently immediate or direct to raise the presumption." *Daley*, 18 N.E. at 579.[3]

The very same principles animating the common-law rule of duress for women in coverture apply with equal force in the modern context of duress caused by domestic abuse. Much like the common-law wife, the victim of domestic abuse often finds herself under the all-encompassing dominion of the abuser, who enforces his rule through physical violence. After all, violence in the home "is about power and control," and it comes to dominate the victim's entire economic and social life. Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & Pol'y 237, 242 (1994). Studies have shown that "batterers frequently demand that they be given total control over their [victims'] earnings." Steffani J. Saitow, Note, *Battered Woman*

[3] As women became "emancipated" from their husbands under the law, legislatures and courts began to either eliminate this presumption or reduce its strength. *See* LaFave, 2 Subst. Crim. L. § 9.7(f) (3d ed.); *People v. Statley*, 206 P.2d 76, 80–81 (Cal. App. Dep't Super. Ct. 1949) (chronicling cases); *Brown v. Commonwealth*, 115 S.E. 542, 543 (Va. 1923); *Dalton v. People*, 189 P. 37, 38 (Colo. 1920).

Syndrome: Does the Reasonable Battered Woman Exist, 19 New Eng. J. Crim. & Civ. Confinement 329, 341 n.94 (1993) (citation omitted). "By controlling the economics of the relationship, the batterer further achieves power and control over his [ ] partner." Mullins, *supra*, at 243. Additionally, "[t]he batterer isolates the woman from friends, family, colleagues, and neighbors in an effort to maintain control." Ruth Jones, *Guardianship for Coercively Battered Women: Breaking the Control of the Abuser*, 88 Geo. L.J. 605, 616 (2000).

In the end, most victims of battery "simply feel imprisoned" by the batterer's "physical, financial, and social advantage." Saitow, *supra*, at 345 n.134.[4] "A domestic violence victim faces a fifty percent chance her income will fall below the poverty level if she leaves her batterer." Kimberly D. Bailey, *It's Complicated: Privacy and Domestic Violence*, 49 Am. Crim. L. Rev. 1777, 1794 (2012). And "[f]ifty percent of the homeless women and children in this country are fleeing domestic violence." Mullins,

[4] These unique circumstances have led to the development of the "Battered Woman Syndrome," "a psychological theory developed to explain the behavior of women who suffer abuse from their husbands, partners, or lovers." Sarah Gibbs Leivick, *Use of Battered Woman Syndrome to Defend the Abused and Prosecute the Abuser*, 6 Geo. J. Gender & L. 391, 391 (2005). Doctor Lenore Walker, who pioneered the term, "define[d] the battered woman as 'a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights.'" *Id.* (citation omitted). In court, the Battered Woman Syndrome is used "to rationalize behavior that would otherwise be difficult for jurors to understand." *Id.* at 392. According to Walker's research, "women in abusive relationships are trapped in a three-stage 'cycle of violence' and thus fail to seek help." *Id.* at 393. The three stages are the "tension-building" stage, the "battering stage," and the "honeymoon" stage. *Id.* at 393–94. These stages repeat until the "women believe they have no control over the situation and they are unable to leave the relationship." *Id.* at 394.

supra, at 237. Victims who do leave domestic abuse frequently face greater danger from their abuser as a result. "At least half of women who leave their abusers are followed and harassed or further attacked by them." Bailey, *supra*, at 1796. "This phenomenon has been termed 'separation violence.'" Mullins, *supra*, at 242 n.26. Jarringly, studies show that separating from the abuser can increase the victim's risk of being killed by the abuser *by a factor of up to 900 percent*. *See* Jacquelyn C. Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089 (2003).[5]

Finally, domestic-violence victims seeking recourse in the legal system are often stymied by various obstacles, including a lack of responsiveness from actors within the system and social and legal reprisals for revealing the abuse. To begin with, the law has long recognized the home as a private sphere, and therefore the legal system has been reticent to intercede in domestic violence. The Supreme Court has described the right of privacy in the marital relationship as "older than the Bill of Rights—older than our political parties, older than our school system." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). This societal view of the home as a private space has caused "[t]he judiciary and the legislature [to be] reluctant to interfere with domestic violence cases," seeing "domestic violence [a]s a private matter." Mullins, *supra*, at 240; *see also State v. Hundley*, 693 P.2d 475, 479 (Kan. 1985) ("Wife beating is steeped in the concept of marital privacy . . . [and]

[5] *Available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/.

the[se] traditional attitudes have made legal and actual recognition of wife beating's criminal nature slow in coming."). Indeed, beating one's wife was not made illegal in all 50 States until 1920. *See* Bailey, *supra*, at 1781 n.17.[6] And, as late as the 1990s, some States still "fail[ed] to recognize rape of a spouse as a criminal act" or "d[id] not prosecute husbands for rape unless a wife suffer[ed] 'additional degrees of violence.'" S. Rep. No. 103-138, at 42 (1993); *see also* Emily J. Sack, *From the Right of Chastisement to the Criminalization of Domestic Violence: A Study in Resistance to Effective Policy Reform,* 32 T. Jefferson L. Rev. 31, 50–51 (2009) (explaining that, even into the new millennium, some State's laws still placed limits on prosecution for marital rape, including by providing lesser punishment for marital rape than ordinary rape).

And even when the laws did change, actors within the legal and social system were reluctant to act on domestic violence and even punished victims who came forward. Congress noted when it passed the Violence Against Women Act of 1994 that "the response of the legal system to crimes against women has remained inadequate." S. Rep. No. 103-138, at 42. In the early 1990s, "law enforcement's interaction with domestic violence [wa]s scarce" and "the sanctity of the family home pervade[d] the world of law enforcement." Saitow, *supra*, at 335; *see also* Bailey, *supra,* at 1781. "[A]

[6] In the area of tort law, after the laws gave married women a right to sue, "courts maintained de facto coverture for assault, battery, [and] false imprisonment . . . claims by married women against their husbands," rejecting such claims even when they occurred outside the marriage. Camille Carey, *Domestic Violence Torts: Righting A Civil Wrong*, 62 U. Kan. L. Rev. 695, 723 (2014).

1989 study in Washington, DC, found that in over 85 percent of the family violence cases where a woman was found bleeding from wounds, police did not arrest her abuser." S. Rep. No. 103-138, at 41. Indeed, "arrest of the offender [wa]s generally seen as a last resort in domestic violence calls" and police would "frequently encourage the couple to reason with one another, often leaving the woman at the batterer's mercy." Saitow, *supra*, at 335–36; *accord* Sack, *supra*, at 33–34. Other studies showed that members of the justice system—from police officers to judges—"treated the victims of domestic violence as though their complaints were trivial, exaggerated, or somehow their own fault." S. Rep. No. 103-138, at 46. There is also evidence that "employers terminate employees based on pure prejudice against domestic violence victims." Bailey, *supra*, at 1795. And "landlords have denied housing or evicted domestic violence victims and [ ] insurance companies have denied them coverage based on prejudices." *Id.* Moreover, women have been "charged with neglect simply because their children witnessed their abuse," *id*, at 1797, and some women who fled to shelters were "viewed by courts as unable to provide a stable home for their children and are subsequently penalized during divorce and/or custody proceedings." S. Rep. No. 103-138, at 46.

Thus, modern law in many ways can leave victims of domestic abuse at the mercy of their abusers, just as the common law of coverture placed wives at the mercy of their husbands. Indeed, modern-day commentators have "suggest[ed] that law's begrudging involvement in family violence represents the de facto version of de jure coverture." *See* Phyllis Goldfarb*, Describing Without Circumscribing: Questioning the*

Construction of Gender in the Discourse of Intimate Violence, 64 Geo. Wash. L. Rev. 582, 600–01 (1996); *see also* Sack, *supra*, at 49 (discussing the modern "'marital exemption' to rape prosecution" and its roots in coverture).

Because the *de facto* dynamics of domestic abuse reflect the *de jure* features of coverture, the common law's special duress rule for women in coverture supports permitting victims of domestic violence to raise this defense when the abuser is not physically present during the crime. Recognizing the "disability" that the control and dominion of the husband placed on a wife, the common law recognized that women in such situations may be coerced in circumstances where those not so situated may not be, for example, when the husband was not directly present. *See Daley*, 18 N.E. at 579; *Miller,* 62 S.W. at 694. So too have some modern courts correctly recognized that the victim of domestic abuse may be coerced even in circumstances where those not so situated may not be. *Compare United States v. Bailey*, 444 U.S. 394, 410–15 (1980) (prisoner not entitled to duress defense for continuing offense when prisoner did not withdraw from offense at first opportunity), *with United States v. Nwoye*, 824 F.3d 1129, 1132, 1135–39 (D.C. Cir. 2016) (Kavanaugh, J.) (domestic-abuse victim entitled to duress defense for continuing offense despite no attempt to withdraw from offense); *see also United States v. Brown*, 891 F. Supp. 1501, 1502–1503, 1506–1508 (D. Kan. 1995) (expert testimony would be relevant to duress defense of domestic-violence victim involved in continuing drug offense). The economic, social, and physical control that the abuser constantly exerts over the victim changes the calculus regarding whether the victim acted under duress when compelled to commit a crime by the

threats of the abuser. Even if the abuser is not physically present, the victim may still "be under his immediate control or influence," *Daley*, 18 N.E. at 579, and therefore entitled to raise a defense of duress.

II. By The Same Logic That Justifies, as Self Defense, a Domestic-Violence Victim's Attack on an Abuser Not Presently Assaulting Her, Victims Compelled by Their Physically Remote Abusers to Commit Crimes Have the Right to Argue Duress

Like duress, self-defense has its roots in the common law. This Court therefore looks to the common law to determine its dimensions. *United States v. Waldman*, 835 F.3d 751, 754 (7th Cir. 2016). Indeed, "[u]nder the common law, self-defense . . . was one form of duress." *United States v. Jones*, 254 F. App'x 711, 720–21 (10th Cir. 2007) (unpublished). "At common law, self-defense is the use of force necessary to defend against the imminent use of unlawful force." *Waldman*, 835 F.3d at 754. Thus self-defense, like duress, requires evidence that the defendant "faced actual, imminent harm and had no reasonable legal alternatives to avoid it." *Feather*, 768 F.3d at 739.

When evaluating a self-defense claim, courts look to the circumstances as they would be viewed by a reasonable person in the defendant's situation. A "person is justified in the use of force when . . . he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force." *United States v. Jackson*, 569 F.2d 1003, 1011 n.17 (7th Cir. 1978). While this standard is objective, it requires courts to consider the circumstances as they appeared *to the defendant*. *See United States v. Ballou*, 59 F. Supp. 3d 1038, 1065 (D.N.M. 2014). So it matters whether the defendant was aware of "specific acts of conduct of the victim," such as the victim's prior acts of violence. *United States v. Smith*, 230 F.3d 300, 308

(7th Cir. 2000). The defendant's intimate relationship with the victim and any history of abuse are also very relevant. *State v. Frei*, 831 N.W.2d 70, 75 (Iowa 2013), overruled on other grounds by *Alcala v. Marriott Int'l, Inc.,* 880 N.W.2d 699 (Iowa 2016) (collecting cases); *State v. Thomas*, 673 N.E.2d 1339, 1345 (Ohio 1997) (collecting cases).[7]

Applying this rubric in the domestic-violence context, courts often permit the victims of abuse to raise self-defense to excuse an attack against the abuser *even when a threat from the abuser is not immediately apparent*, such as when the abuser is not attacking them. *See* John W. Roberts, Note, *Between the Heat of Passion and Cold Blood: Battered Woman's Syndrome As an Excuse for Self-Defense in Non-Confrontational Homicides*, 27 Law & Psychol. Rev. 135, 153 & n.205 (2003). The key to these cases is the unique nature of domestic abuse, which puts the victim under the constant control and dominion of her partner, who threatens violence to punish missteps. *See Bechtel v. State*, 840 P.2d 1, 12 (Okla. Crim. App. 1992) (the situation of a battered woman "has been analogized to the classic hostage situation in that the battered woman lives under long-term, life-threatening conditions in constant fear of another eruption of violence"); *see also Robinson v. State*, 417 S.E.2d 88, 91–92 (S.C.

[7] Every jurisdiction has "approved the use of expert testimony on Battered Woman Syndrome to support a self-defense claim." Jessica N. Heaven, *Battered Woman Syndrome*, 9 Geo. J. Gender & L. 593, 596–97 & n.24 (2008); LaFave, 2 Subst. Crim. L. § 10.4(d) & n.57 (3d ed.). "This evidence is used to explain why some women resort to violence rather than leaving their abusers or seeking help from the law enforcement system." Heaven, *supra*, at 594. "Additionally, such testimony is used to educate the jury as to whether an objective, reasonable person would have feared death or serious bodily injury in the defendant's situation because the average person is unfamiliar with the effects of domestic violence on a battered woman." *Id.* at 598.

1992). These courts have explained that "[f]or the battered woman, if there is no escape or sense of safety, then the next attack, which could be fatal or cause serious bodily harm, is imminent." *Bechtel*, 840 P.2d at 12; *Robinson*, 417 S.E. 2d at 91; *see also Porter v. State*, 166 A.3d 1044, 1056–60 (Md. 2017) (discussing imperfect self-defense and chronicling cases).

The same logic underpins the traditional principles of duress. As with self-defense, the common law allowed courts evaluating a duress defense to consider the objective circumstances surrounding the threat and the crime. For example, Blackstone explained that "in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels which would admit of no excuse in time of peace." 4 Blackstone Commentaries, *supra*, at *30; *cf.*, *United States v. Baker*, 24 F. Cas. 962, 964 (C.C.S.D.N.Y. 1861) ("[A] state of war existing between two nations, either may commission private armed vessels to carry on war against the enemy on the high seas, and the commission will afford protection, even in the judicial tribunals of the enemy, against a charge of the crime of robbery or piracy."). The Model Penal Code likewise uses this approach, explaining that that "[i]t is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness *in his situation* would have been unable to resist." Model Penal Code § 2.09 (emphasis added); *see also* LaFave, 2 Subst. Crim. L. § 9.7(a) (3d ed.).

Consistent with the common-law's parallel treatment of duress and self-defense, courts have allowed evidence regarding battering and its effects to support an affirmative defense of duress in the same way that courts have allowed such evidence to support self-defense. The defenses of self-defense and duress are "analogous." *See Nwoye*, 824 F.3d at 1138. Both contain the same elements of imminence and a lack of reasonable legal alternatives, *see Feather*, 768 F.3d at 739, and both require courts to judge the objective reasonableness of the defendant's actions based on the defendant's point of view. *See United States v. Lopez*, 913 F.3d 807, 821 (9th Cir. 2019); *United States v. Marenghi*, 893 F. Supp. 85, 94 (D. Me. 1995). Like self-defense, "the duress defense requires a defendant to have acted reasonably under the circumstances," and therefore courts "must take into account the defendant's 'particular circumstances,' at least to a certain extent." *Nwoye*, 824 F.3d at 1136–37. While purely subjective circumstances such as a defendant's "clarity of judgment, suggestibility or moral insight" are not relevant to duress, objective circumstances such as the defendant's knowledge of the batterer's violent past and the history of abuse are. *Id.* That is why "[m]ost courts that have considered the question—especially in recent years—have recognized that expert testimony on battered woman syndrome can be relevant to prove duress" for the same reasons that

such evidence is relevant to self-defense. *Nwoye*, 824 F.3d at 1136 (collecting cases); *Lopez*, 913 F.3d at 821–22. [8]

As with self-defense, consideration of the objective circumstances of domestic abuse permits the victims of abuse to raise the defense in situations where it may otherwise be unavailable. Courts permitting victims of domestic abuse to raise self-defense in non-confrontational settings have explained that it may be reasonable, given the history of abuse, for the victim to feel that harm was imminent and that there was no reasonable alternative to the action taken. *See Bechtel*, 840 P.2d at 12; *Robinson*, 417 S.E. 2d at 91. Similarly, courts permitting victims of domestic abuse to raise a duress defense to a continuing crime, during which the victim was sometimes out of the abuser's presence, have explained that because of the history of abuse, the victim may reasonably feel the harm was imminent and that there was no reasonable alternative to the action taken. *See Nwoye*, 824 F.3d at 1132, 1135–39. Thus, following the principles applied in self-defense cases, victims of domestic violence should be permitted to raise a duress defense even when the abuser was not physically present during the crime.

[8] Indeed, even the Fifth Circuit, which initially prohibited the use of expert testimony on Battered Woman Syndrome to support a duress defense, *United States v. Willis*, 38 F.3d 170, 175 (5th Cir. 1994), has since acknowledged that such testimony could be relevant to a duress defense if it focuses on the objective "typical patterns, circumstances and effects of battery within an abusive relationship." *United States v. Dixon*, 413 F.3d 520, 524 & n.3 (5th Cir. 2005), *aff'd*, 548 U.S. 1 (2006). Additionally, some States by statute allow the introduction of evidence regarding abusive relationships, including expert evidence, to support a defense of duress. *See, e.g.*, Mass. Gen. Laws Ann. ch. 233, § 23F.

CONCLUSION

This Court should reverse the decision of the district court and hold that evidence of domestic abuse is admissible to support an affirmative defense of duress, even when the abuser was not physically present during the crime.

Dated: September 25, 2020

Respectfully Submitted,

/s/ Amy Miller
AMY MILLER
Counsel of Record
RYAN J. WALSH
EIMER STAHL LLP
10 East Doty Street
Suite 800
Madison, WI 53703
(608) 442-5796
(608) 441-5707 (fax)
amiller@eimerstahl.com
rwalsh@eimerstahl.com

Counsel for Amici Curiae *End Domestic Abuse Wisconsin and Wisconsin Coalition Against Sexual Assault*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 29 because it contains 5,447 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(f).

This Brief complies with all typeface requirements of Federal Rules of Appellate Procedure and 32(a)(5)–(6) and Circuit Rule 32(b), because it has been prepared in a proportionally spaced typeface using the 2013 version of Microsoft Word in 12-point Century Schoolbook.

Dated September 25, 2020.

/s/ Amy Miller
AMY MILLER

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2020, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: September 25, 2020

/s/ Amy Miller
AMY MILLER