

Winter 2016

## No Less a Victim: A Call to Governor Nixon to Grant Clemency to Two Missouri Women

Kristen L. Stallion

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### Recommended Citation

Kristen L. Stallion, *No Less a Victim: A Call to Governor Nixon to Grant Clemency to Two Missouri Women*, 81 Mo. L. Rev. (2016)  
Available at: <http://scholarship.law.missouri.edu/mlr/vol81/iss1/23>

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## LAW SUMMARY

# No Less a Victim: A Call to Governor Nixon to Grant Clemency to Two Missouri Women

KRISTEN L. STALLION\*

### I. INTRODUCTION

Approximately one in three women in the United States will fall victim to domestic violence in her lifetime.<sup>1</sup> In recent years, an intimate partner killed approximately thirty-nine percent of female homicide victims in the United States;<sup>2</sup> an intimate partner only killed 2.8% of male homicide victims.<sup>3</sup> Battered Woman Syndrome (“BWS”) has received broad recognition in an effort to help factfinders better understand how battered women perceive their relationships, and opportunities for escape from abuse, as well as reactions to the cycle of violence. Before the introduction of expert testimony regarding BWS was admissible at trial, women who killed their partners were unable to plead self-defense and often pled guilty or claimed an impaired mental state defense.<sup>4</sup>

Today, the majority of states recognize the necessity of BWS expert testimony and permit expert testimony regarding battering and its effects.<sup>5</sup> Missouri first codified the use of BWS evidence to bolster a woman’s claim of self-defense in 1987 with the passage of Missouri Revised Statutes Section 563.033.<sup>6</sup> Since that time, many women sought to introduce BWS evidence in support of a theory of self-defense. Two of these women included Donna Biernacki and Amelia Bird, Missouri inmates who were unable to present

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\* B.S., Missouri State University, 2012; J.D. Candidate, University of Missouri School of Law, 2016; Editor in Chief, *Missouri Law Review*, 2015–2016. I am grateful to Professor Mary Beck for her insight, guidance, and support and the *Missouri Law Review* for its assistance in the writing and editing of this Note.

1. Shannan Catalano et al., *Female Victims of Violence*, BUREAU JUST. STAT. 1, 2 (Oct. 23, 2009), <http://www.bjs.gov/content/pub/pdf/fvv.pdf>.

2. SHANNAN CATALANO, BUREAU OF JUSTICE STAT., INTIMATE PARTNER VIOLENCE: ATTRIBUTES OF VICTIMIZATION, 1993–2011, at 1, 3 (Nov. 2013), <http://www.bjs.gov/content/pub/pdf/ipvav9311.pdf>.

3. *Id.*

4. *Developments in the Law: Legal Responses to Domestic Violence, V. Battered Women Who Kill Their Abusers*, 106 HARV. L. REV. 1574, 1577–78 (1993) [hereinafter *Battered Women Who Kill Their Abusers*].

5. *Id.* at 1592.

6. MO. ANN. STAT. § 563.033 (West 2016).

BWS evidence in order to mitigate their harsh sentences after killing their abusers.<sup>7</sup>

While expert testimony regarding BWS should serve as a benefit to battered women, its admissibility is subject to the trial judge's vast discretion and the jury's perception. Several women, like Donna and Amelia, have received harsh sentences for retaliation against their abusers; the BWS testimony that actually was presented on their behalf provided no mitigation. Clemency, an executive power that allows the governor to mitigate disparities in criminal punishment, is a proper exercise of executive discretion to counteract the wrongs of Missouri trial courts. Governor Nixon should grant Donna and Amelia, as well as many unnamed others, clemency for both the judiciary's misunderstanding of the admissibility of BWS evidence and its neglect to treat battered women as victims of domestic violence.

## II. LEGAL BACKGROUND

While psychologist Lenore Walker first defined BWS in 1979, many courts did not immediately admit expert testimony regarding BWS.<sup>8</sup> Section 563.033 was not adopted until 1987 and was infrequently utilized by trial court judges. Trial court judges' discretion, in turn, led to the need for governors to exercise clemency in order to mitigate battered women's harsh prison sentences.

### A. *The History and Recognition of Battered Woman Syndrome*

The theory of BWS was first developed in the late 1970s and early 1980s.<sup>9</sup> The psychological theory is often credited to Lenore Walker, a clinical and forensic psychologist whose book, *The Battered Woman Syndrome*, coined the term.<sup>10</sup> Walker conducted a large empirical study to identify whether certain patterns or behaviors were present in abusive relationships.<sup>11</sup> Walker was able to identify several common factors in abusive relationships and developed BWS as a means of defining the behavioral traits of women who suffer from continued abuse.<sup>12</sup> Studies regarding BWS and battering

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7. See *infra* Part III.A; see also *infra* Part III.B.

8. See generally LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* (1st ed. 1979).

9. Jessica Savage, *Battered Woman Syndrome*, 7 *GEO. J. GENDER & L.* 761, 761 (2006).

10. LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* (3d ed. 2009); see Lauren Champaign, *Battered Woman Syndrome*, 11 *GEO. J. GENDER & L.* 59, 60 (2010).

11. PATRICIA GAGNÉ, *BATTERED WOMEN'S JUSTICE: THE MOVEMENT FOR CLEMENCY AND THE POLITICS OF SELF-DEFENSE* 18 (1998).

12. *Id.* at 19.

relationships have provided an explanation as to why some women choose to remain with their abusive partners.<sup>13</sup>

In defining BWS, Walker encapsulated the signs and symptoms of 400 women who were surveyed after having been “physically, sexually, and/or psychologically abused in an intimate relationship.”<sup>14</sup> Walker’s tension-reduction theory identified three distinct phases in the “Cycle Theory of Violence” of battering relationships.<sup>15</sup> The first of these cycles, the “tension-building” phase, occurs when a woman experiences a minimal amount of physical and verbal attacks from her partner.<sup>16</sup> Because she views the attacks as relatively minor, the woman tends to minimize the significance of the attacks and attempts to conciliate her attacking partner.<sup>17</sup> The woman often blames herself for the abuse and may take it upon herself to rationalize the acts of her partner.<sup>18</sup> The “tension-building” phase may last for a number of years while the woman continues to rationalize the acts of her partner and begins to behave in a way that she believes will help her avoid future attacks.<sup>19</sup> Tension will gradually escalate and increase friction in the relationship.<sup>20</sup>

Next comes the “acute battering incident” phase.<sup>21</sup> The severity of the attacks will intensify as the tension in the first phase of the cycle results in an uncontrollable discharge of violence.<sup>22</sup> The minor incidents at the onset of the “tension-building phase” become more frequent and intensify to the point that the woman can no longer appease her partner.<sup>23</sup> As the cycle repeats, the woman may be able to predict the approach of the acute battering phase and take steps to shield herself from verbal or physical barrages.<sup>24</sup> The violence may become so severe that the woman begins to fear substantial physical injury or even death.<sup>25</sup>

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13. Champaign, *supra* note 10, at 59.

14. WALKER, *supra* note 10, at 41–42.

15. *Id.* at 91.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *See id.* at 94.

22. *Id.*

23. Champaign, *supra* note 10. A woman’s partner often commits “psychological battering” in the battering phase. Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1205–07 (1993). Psychological battering may consist of isolation and intimidation, as well as attempts to control the woman by using her children or by economic means. *Id.* at 1205–06.

24. WALKER, *supra* note 10, at 94.

25. Champaign, *supra* note 10, at 61.

The third stage in the cycle of violence occurs immediately after the acute battering phase and is known as the “honeymoon phase.”<sup>26</sup> The woman’s partner begins to show remorse, as well as what Walker identifies as “contrite loving behavior.”<sup>27</sup> Her partner will beg her for forgiveness, promise to never hurt her physically or verbally again, and will resolve to change his ways forevermore.<sup>28</sup> He will be charming and apologetic and eventually convince the woman that he is indeed a changed man.<sup>29</sup> He may make an effort to convince her that his promises are sincere by temporarily giving up alcohol or by looking into counseling or anger management classes.<sup>30</sup> The woman’s partner essentially models himself into the man the woman wants him to be and gives her genuine hope that he will change.<sup>31</sup> By the time the woman begins to realize her partner has made a series of empty promises, it is too late – the cycle of violence has restarted its course.<sup>32</sup> As the relationship continues, the time spent in the “tension-building” phase increases, and the period of loving contrition in the “honeymoon phase” decreases.<sup>33</sup>

And thus the (almost) never-ending cycle of a battering relationship. Walker argued that the repetition of the cycle of violence allows women to develop “learned helplessness.”<sup>34</sup> Psychologist Martin Seligman first introduced learned helplessness as a psychological state of mind that may help explain why some women do not leave their abusive partners.<sup>35</sup> Walker reformed this definition to describe a woman losing “the ability to predict that what [she does] will make a particular outcome occur.”<sup>36</sup> Walker stated that, after being harmed and lied to time after time, women might begin to believe they lack any sort of control in their relationship and in the abuse they often become subject to.<sup>37</sup> Because the woman feels as if there is no way out of her situation, “the woman becomes increasingly passive, and her motivation and the will to get out of the relationship diminish.”<sup>38</sup> This feeling, along with her partner’s continued efforts to control and isolate the woman, may lead her to circumvent her support system or to become willfully blind to avenues of escape.<sup>39</sup> Eventually, the woman will feel as if it is impossible to escape her abusive partner.<sup>40</sup>

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26. *Id.*

27. *Id.*

28. *See id.*; *see, e.g.*, Savage, *supra* note 9, at 762.

29. *See* Champaign, *supra* note 10, at 61.

30. *See, e.g.*, WALKER, *supra* note 10, at 94–95.

31. GAGNÉ, *supra* note 11, at 19.

32. *See id.*

33. *See* WALKER, *supra* note 10, at 98.

34. *Id.* at 8–9, 44, 69–84.

35. Savage, *supra* note 9, at 762.

36. WALKER, *supra* note 10, at 69.

37. Savage, *supra* note 9, at 762.

38. *Id.*

39. *Id.*

40. Champaign, *supra* note 10, at 61.

### B. Battered Woman Syndrome and Self-Defense in Missouri

Evidence of BWS may be introduced at a trial to: (1) support the woman's credibility by eliminating commonly held misconceptions about battered women and abusive intimate relationships; (2) prove the woman honestly feared imminent death or great bodily injury; and (3) show that the woman's behavior was reasonable.<sup>41</sup> Evidence of BWS demonstrates to judges and juries the major impact continuous abuse has on the woman's state of mind and helps to explain how actions that do not appear to coincide with traditional confrontational self-defense may in fact be justifiable.<sup>42</sup>

#### 1. Codification of Battered Woman Syndrome

Presently, every state permits expert testimony on BWS to support a woman's claim of self-defense against her abusive partner.<sup>43</sup> Several states, including Missouri, have codified its use.<sup>44</sup> Prior to the passage of Section 563.033, the majority of women who killed their batterers had no self-defense claim.<sup>45</sup> Many women who killed their abusers pled guilty or asserted some sort of mental deficiency defense, such as insanity or diminished capacity.<sup>46</sup>

In Missouri, a person is permitted to use physical force against another when, and to the extent, she reasonably believes such force to be necessary to defend herself from what "she reasonably believes to be the use or imminent use of unlawful force by [another] person."<sup>47</sup> Self-defense instructions resulted in little relief to women because few factfinders appreciated the imminence of unlawful force – battered women "often perceive an immediate threat where a factfinder, uninformed about the dynamics of abuse, would be unlikely to see the threat as urgent."<sup>48</sup>

Section 563.033 was adopted in 1987 in an effort to allow battered women to present evidence of battered spouse syndrome, a synonym of BWS, at trial in order to support their claim of self-defense.<sup>49</sup> The sponsor of the bill, Representative Michael Davis, noted that one intention of the bill was to

41. Savage, *supra* note 9, at 763.

42. Lenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 321 (1992).

43. Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 156 (2004).

44. *See id.*; *see also* MO. ANN. STAT. § 563.033 (West 2016). The majority of states leave the admissibility of BWS expert testimony to judicial discretion. *Battered Women Who Kill Their Abusers*, *supra* note 4, at 1585.

45. *See* Bridget B. Romero et al., *The Missouri Battered Women's Clemency Coalition: A Collaborative Effort in Justice for Eleven Missouri Women*, 23 ST. LOUIS U. PUB. L. REV. 193, 216 (2004).

46. *Battered Women Who Kill Their Abusers*, *supra* note 4, at 1578.

47. MO. REV. STAT. § 563.031.1 (Cum. Supp. 2013).

48. Romero et al., *supra* note 45.

49. § 563.031.1.

remove “the decision whether to admit expert testimony on ‘battered spouse syndrome’ from the trial judge’s discretion where the defendant raises the claim of self-defense.”<sup>50</sup> Pursuant to Section 563.033, a woman must file written notice with the trial court if she chooses to present expert testimony regarding BWS.<sup>51</sup> Section 563.033 makes evidence that a woman was “suffering from battered spouse syndrome . . . admissible upon the issue of whether the [woman] lawfully acted in self defense . . . .”<sup>52</sup>

In the years after its passage, Section 563.033 was infrequently used.<sup>53</sup> In 1992, the General Assembly passed a resolution urging trial courts to properly incorporate and implement the statute.<sup>54</sup> The resolution stated that expert evidence concerning BWS should be admissible so that factfinders can better understand the woman’s behavior.<sup>55</sup> Despite its codification for nearly thirty years, Section 563.033 has had a delayed effect in the mitigation of prison sentences battered women receive.

## 2. Case Law Implementing Section 563.033

While Section 563.033 was passed with the intent to remove the trial court’s discretion in determining whether to admit BWS testimony in support of a self-defense claim, trial court judges often elected to not implement the statute. This is apparent in *State v. Williams* and *State v. Edwards*, where the respective trial court judges declined to admit BWS expert testimony to support two battered women’s self-defense claims.

### a. *State v. Williams*, 787 S.W.2d 308 (Mo. Ct. App. 1990)

In 1990, three years after Section 563.033 was signed into law, the Missouri Court of Appeals for the Eastern District reversed Donna F. Williams’s twenty-year sentence.<sup>56</sup> Donna killed Joel Robinson by running him over with her car as she fled from her boyfriend, Louis Teague.<sup>57</sup> At trial, Donna’s defense counsel presented evidence of Donna and Louis’s ongoing relationship.<sup>58</sup> The relationship was marked by as many as seventeen occasions where Louis beat Donna, including a kick to Donna’s stomach while she was

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50. Kathee Rebernak Brewer, Note, *Missouri’s New Law on ‘Battered Spouse Syndrome:’ A Moral Victory, a Partial Solution*, 33 ST. LOUIS U. L.J. 227, 239–40, 239 n.98 (1988).

51. MO. ANN. STAT. § 563.033.2 (West 2016).

52. *Id.* § 563.033.1.

53. See Romero et al., *supra* note 45, at 217.

54. *Id.*

55. *Id.* (citing H.R. 89, 102d Cong. (Mo. 1992)).

56. *State v. Williams*, 787 S.W.2d 308, 309 (Mo. Ct. App. 1990).

57. *Id.* at 310.

58. *Id.* at 309.

pregnant with Louis's child.<sup>59</sup> Several of the beatings required medical treatment and police were called on multiple occasions.<sup>60</sup>

On April 22, 1988, Donna went to Joel's home looking for Louis after discovering Louis did not pick up their daughter from the babysitter.<sup>61</sup> When Donna arrived at Joel's home, she and Louis began to argue.<sup>62</sup> Louis hit Donna in the face and knocked her down the front steps of Joel's home.<sup>63</sup> He then hit her again while she lay on the ground.<sup>64</sup> The strikes knocked Donna's glasses off of her face.<sup>65</sup>

Without putting her glasses back on, Donna ran to her vehicle, hysterical and crying.<sup>66</sup> While Donna was attempting to back out of Joel's driveway, Louis charged her vehicle.<sup>67</sup> Donna pulled out of the driveway, hit the vehicle in front of her, and then noticed a body lying in the street.<sup>68</sup> Donna, recalling Louis's statement that he would kill her if she ever hurt him, made a U-turn and drove over the body to prevent whom she thought was Louis from following through with his threat.<sup>69</sup> Unbeknownst to Donna, Joel had run into the street as she pulled out of the driveway.<sup>70</sup> Joel then stumbled into the street and died after Donna drove over his body.<sup>71</sup>

Before trial, Donna filed a notice of intent to offer evidence that she suffered from BWS and acted in self-defense.<sup>72</sup> The trial court refused Donna's request, finding that evidence of BWS was inadmissible because Donna was not Louis's spouse.<sup>73</sup> The trial court did accept that Donna suffered from BWS; however, it did not offer an instruction on self-defense or manslaughter.<sup>74</sup>

In its analysis, the Missouri Court of Appeals for the Eastern District noted that although Section 563.033 refers to a battered "spouse," application of the statute was not dependent on the marital status of the defendant seeking to utilize it.<sup>75</sup> The statutory language of Section 563.033 refers to an actor "suffering from the battered spouse syndrome[.]" . . . *a specific medical or*

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59. *Id.*

60. *Id.*

61. *Id.* at 309–10.

62. *Id.* at 310.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* This notice was filed pursuant to Section 563.033. *Id.* (citing MO. REV. STAT. § 563.033 (Supp. 1989)).

73. *Id.*

74. *Id.*

75. *Id.* at 311.



*emotional condition* bearing certain identifiable characteristics and arising from a specific source.”<sup>76</sup> When evidence of BWS is presented, it noted, “the evidence is to be weighed by the jury in light of how the *reasonable battered woman* would have perceived and reacted in view of the prolonged history of physical abuse.”<sup>77</sup> The court held that “[t]o the degree that [a defendant’s] ‘battered syndrome’ constitutes a consideration in a self-defense defense claim it applies equally whether [the defendant] is married or not.”<sup>78</sup>

b. *State v. Edwards, 60 S.W.3d 602 (Mo. Ct. App. 2001)*

In 2001, the Missouri Court of Appeals for the Western District reversed Larna Edwards’s conviction for voluntary manslaughter, because the trial court erroneously instructed the jury on self-defense and the impact of BWS.<sup>79</sup> Larna’s husband verbally and physically abused her since their marriage in 1953.<sup>80</sup> Coworkers, family members, and acquaintances of Larna testified at trial that they often saw her with black eyes and bruises on her face and arms.<sup>81</sup>

On July 23, 1996, Larna and her husband purchased a vehicle at a car dealership.<sup>82</sup> The two argued about the purchase.<sup>83</sup> Larna’s husband pushed her and struck her with a solid object.<sup>84</sup> Larna feared her husband would kill her.<sup>85</sup> The next morning, Larna’s husband again argued about the vehicle purchase at their store.<sup>86</sup> Larna’s husband struck her arm with a lead pipe.<sup>87</sup> The look in his eyes made Larna certain he would kill her.<sup>88</sup> Larna picked up a handgun that was kept under the store counter for security, shot, and killed her husband.<sup>89</sup>

In its opinion, the Missouri Court of Appeals for the Western District highlighted the four elements of self-defense under Missouri Revised Statutes Section 563.031: (1) absence of provocation or aggression on the part of the defender; (2) the defender has a reasonable belief that deadly force was necessary to protect herself against an immediate danger of death; (3) the defender has reasonable cause for that belief; and (4) an attempt by the defender

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76. *Id.* (emphasis added) (quoting § 563.033.2).

77. *Id.* at 312–13 (emphasis added) (*Commonwealth v. Stonehouse*, 555 A.2d 772 (Pa. 1989)).

78. *Id.* at 312.

79. *State v. Edwards*, 60 S.W.3d 602, 618 (Mo. Ct. App. 2001).

80. *Id.* at 605.

81. *Id.* at 606.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 607.

to do all within her power, consistent with her own personal safety, to avoid danger and the need to take a life.<sup>90</sup> The court recognized that BWS had gained substantial scientific acceptance in the last twenty years.<sup>91</sup> “While evidence of the battered spouse syndrome is not in and of itself a defense to a murder charge,” it noted, “its function is to aid the jury in determining whether a defendant’s fear and claim of self-defense are reasonable.”<sup>92</sup>

The *Edwards* court corrected the Eastern District’s “reasonable battered woman” standard in *Williams* and held that if a jury believes a defendant is suffering from BWS, “it must weigh the evidence in light of how an otherwise reasonable person who is suffering from battered spouse syndrome would have perceived and reacted in view of the prolonged history of physical abuse.”<sup>93</sup> The court highlighted that a reasonable and prudent person does not act and react in the same way as a person suffering from a prolonged history of physical abuse.<sup>94</sup>

### C. Clemency Power in Missouri

Clemency is a broad term that refers to the ability of an executive official to exercise his or her discretion in mitigating disparities in criminal punishment.<sup>95</sup> Clemency may take several forms, including: amnesty,<sup>96</sup> commutation,<sup>97</sup> pardon,<sup>98</sup> remission of fines and forfeitures,<sup>99</sup> and reprieve.<sup>100</sup> Clemency is a power given to the President of the United States and to governors of the states as one of the checks and balances on the other branches of government: the executive has the ability to mitigate the effects of an inflexible or harsh law passed by the legislature or to correct mistakes that may have

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90. *Id.* at 612.

91. *Id.* at 612–13.

92. *Id.* at 613.

93. Compare *id.* at 615 (emphasis added), with *State v. Williams*, 787 S.W.2d 308, 312–13 (Mo. Ct. App. 1990).

94. *Edwards*, 60 S.W.3d at 615.

95. See generally Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor’s Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL’Y 1, 25–28 (1994).

96. *Id.* at 25. Amnesty is an act of forgiveness to a class of persons guilty of a political offense. *Id.*

97. *Id.* Commutations reduce a defendant’s original sentence to a lesser degree of punishment. *Id.*

98. *Id.* Pardons either completely forgive the defendant of the crime and consequences of her conviction or require certain conditions be met before or after the pardon is granted. *Id.*

99. *Id.* A remission of fines and forfeitures releases someone from their debts. *Id.*

100. *Id.* Reprieves postpone scheduled executions. *Id.*

been made by the judiciary.<sup>101</sup> While the number of women incarcerated for killing their batterer in self-defense is unknown, it has been estimated that at least 124 battered women from twenty-three states, including Missouri, have received some form of clemency since 1978.<sup>102</sup> The majority of these women received a grant of clemency after 1990.<sup>103</sup>

Article IV, Section 7 of the Missouri Constitution empowers the governor with the ability to “grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment.”<sup>104</sup> The Board of Probation and Parole first investigates all clemency applications and then refers its findings and a nonbinding recommendation to the governor.<sup>105</sup> The decision whether to grant or deny clemency is left entirely to the discretion of the governor.<sup>106</sup>

The five Missouri governors prior to the Nixon administration collectively granted clemency 160 times.<sup>107</sup> Eleven of the 160 grants were to incarcerated survivors of domestic violence.<sup>108</sup> Governor Nixon has granted clemency fifteen times in his two-term administration – when he commuted the death sentence of Richard Clay to life in prison in 2011 and when he granted pardons to nine non-violent offenders in December 2014, as well as five other non-violent offenders in May 2015.<sup>109</sup>

101. See U.S. CONST. art. II, § 2, cl. 1; Linda L. Ammons, *Why Do You Do the Things You Do? Clemency for Battered Incarcerated Women, A Decade’s Review*, 11 AM. U. J. GENDER SOC. POL’Y & L. 533, 542 (2003).

102. See *Battered Women Who Have Received Clemency*, NAT’L CLEARINGHOUSE FOR DEF. BATTERED WOMEN (2002), <http://www.cybergrrl.com/planet/dv/stat/statbwkill.html>; see also Carol Jacobsen et al., *Battered Women, Homicide Convictions, and Sentencing: The Case for Clemency*, 18 HASTINGS WOMEN’S L.J. 31, 56 (2007).

103. See Jacobsen et al., *supra* note 102.

104. MO. CONST. art. IV, § 7.

105. Romero et al., *supra* note 45, at 214–25.

106. See *Roll v. Carnahan*, 225 F.3d 1016, 1018 (8th Cir. 2000).

107. Jennifer S. Mann, *New Coalition Urges Clemency for 14 Missouri Women in Prison*, ST. LOUIS POST-DISPATCH (Oct. 28, 2014, 11:15 PM), [http://www.stltoday.com/news/local/crime-and-courts/new-coalition-urges-clemency-for-missouri-women-in-prison/article\\_66311de9-549b-5f51-90a6-10811a19bd8b.html](http://www.stltoday.com/news/local/crime-and-courts/new-coalition-urges-clemency-for-missouri-women-in-prison/article_66311de9-549b-5f51-90a6-10811a19bd8b.html). The five governors before Governor Nixon include: Matt Blunt, Bob Holden, Roger Wilson, Mel Carnahan, and John Ashcroft. See *Missouri: Past Governors Bios*, NAT’L GOVERNORS ASS’N (2011), [http://www.nga.org/cms/home/governors/past-governors-bios/page\\_missouri.html](http://www.nga.org/cms/home/governors/past-governors-bios/page_missouri.html). They are both Democrats and Republicans. *Id.*

108. Victoria Law, *It’s Time to Bring Domestic Violence Survivors Like Barbara Sheehan Home from Prison*, NATION (Dec. 24, 2014), <http://www.thenation.com/article/193809/its-time-bring-domestic-violence-survivors-barbara-sheehan-home-prison#>.

109. See Mann, *supra* note 107; *Gov. Nixon Grants Pardons to Nine Non-Violent Offenders*, OFF. MO. GOVERNOR JAY NIXON (Dec. 29, 2014), <https://governor.mo.gov/news/archive/gov-nixon-grants-pardons-nine-non-violent-offenders>; *Gov. Nixon Grants Pardons to Five Non-Violent Offenders*, OFF. MO. GOVERNOR JAY NIXON

In 2007, the Supreme Court of Missouri issued writs of mandamus to Shirley Lute and Lynda Branch after Governor Holden granted the two women clemency in 2004.<sup>110</sup> Shirley and Lynda were each convicted of murdering their abusive husbands and received sentences of life in prison without the possibility of parole.<sup>111</sup> The Missouri Board of Probation and Parole denied parole to the women, arguing that “[r]elease at [that] time would depreciate the seriousness of the . . . offense.”<sup>112</sup>

Shirley Lute’s son killed Shirley’s husband on February 6, 1978.<sup>113</sup> Shirley was arrested and charged for the murder, yet continuously maintained her innocence.<sup>114</sup> Over the course of their marriage, Shirley’s husband continuously struck her, bit her breasts, bent her fingers back so that she would comply with his sexual demands, and put a dog collar on her and made her bark like a dog.<sup>115</sup> Virtually no evidence was presented regarding the long history of abuse Shirley suffered, and no BWS expert testimony was presented at trial.<sup>116</sup>

Lynda Branch shot her husband two times after she told him she was leaving him.<sup>117</sup> After an evening of intense arguing with her husband, Lynda was finally able to fall asleep.<sup>118</sup> When she awoke, she saw her husband pointing a gun at her while he slept.<sup>119</sup> Lynda struggled for the gun and her husband awoke.<sup>120</sup> As the two struggled, the gun went off and shot her husband.<sup>121</sup> Her husband was shot again as Lynda tried to remove the gun from under the sheets of their bed.<sup>122</sup> A jury found Lynda guilty of murder in the first degree after a trial where Lynda’s defense counsel did not introduce evidence of her horrific abuse.<sup>123</sup> Prior to this evening, Lynda’s husband caused her to suffer a miscarriage after an attack, shot at her, cut her with a knife on

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(May 22, 2015), <https://governor.mo.gov/news/archive/gov-nixon-grants-pardons-five-non-violent-offenders-commutes-jeffrey-mizanskey> (Governor Nixon stated, “The executive power to grant clemency is one I take with a great deal of consideration and seriousness.”).

110. *State ex rel. Lute v. Mo. Bd. of Probation & Parole*, 218 S.W.3d 431, 437 (Mo. 2007) (en banc).

111. *Id.* at 432–33.

112. *Id.* at 433–34.

113. *Id.* at 433.

114. *Id.*

115. *Id.*

116. *Id.* Section 563.033 was enacted six years after Lute’s conviction on June 11, 1981. *Id.* (citing MO. REV. STAT. § 563.033 (Supp. 1989) (enacted 1987)).

117. *Id.* at 434.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 435.

numerous occasions, cracked her ribs, locked her in closets, and put a lit candle in her vagina.<sup>124</sup>

In issuing its writs of mandamus, the Supreme Court of Missouri noted that the governor, as head of the executive branch, has the power to commute and pardon criminal convictions.<sup>125</sup> In interpreting the governor's commutations, courts are to give effect to the governor's intent.<sup>126</sup> Because the power to grant clemency is a "matter of grace," the governor can exercise "upon such conditions and with such restrictions and limitations as he may think proper," deference is given to the governor.<sup>127</sup> Governor Holden filed sworn affidavits in both women's cases, eliminating any doubt as to his intent in granting clemency.<sup>128</sup> The court reasoned that Governor Holden would not have recommended the two women for parole, after considering the facts of their cases, if he considered the offenses to be too serious to warrant clemency.<sup>129</sup>

Perhaps one of the most notable events for incarcerated domestic violence survivors in Missouri came in 2010 when Vicky Williams, Roberta Carlene Borden, and Ruby Jamerson were granted clemency and released from prison on parole.<sup>130</sup> The Missouri Battered Women's Clemency Coalition argued for the women's release for over a decade, arguing that the women only killed their husbands after suffering from years of horrific abuse.<sup>131</sup> At the time the women were incarcerated, the Coalition argued, evidence of domestic violence was rarely presented at trial and was not well understood by juries or judges.<sup>132</sup> The Board of Probation and Parole granted the women a parole hearing after Missouri Revised Statutes Section 217.692.1 was passed in 2007.<sup>133</sup> Section 217.692.1 allows a prisoner serving a sentence of life with no parole for fifty years or serving life without parole to be parole-eligible after serving fifteen years of their sentence.<sup>134</sup> The prisoner must also have a "history of being a victim of continual and substantial physical or sexual domestic violence that was not presented as an affirmative defense at trial."<sup>135</sup>

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* (quoting *Ex parte Reno*, 66 Mo. 266, 273 (1877)).

128. *Id.* at 436.

129. *Id.*

130. Stephen Deere, *Three Missouri Women Who Killed Husbands to be Paroled*, ST. LOUIS POST-DISPATCH (Sept. 13, 2010, 12:01 PM), [http://www.stltoday.com/news/local/crime-and-courts/three-missouri-women-who-killed-husbands-to-be-paroled/article\\_36d9e322-bf5d-11df-8bbf-0017a4a78c22.html](http://www.stltoday.com/news/local/crime-and-courts/three-missouri-women-who-killed-husbands-to-be-paroled/article_36d9e322-bf5d-11df-8bbf-0017a4a78c22.html).

131. *Id.*

132. *Id.*

133. *Id.*

134. MO. REV. STAT. § 217.692.1 (Cum. Supp. 2013).

135. *Id.*

### III. RECENT DEVELOPMENTS

In October 2014, the newly-formed Community Coalition for Clemency petitioned Governor Nixon to grant clemency to fourteen incarcerated women convicted of various crimes.<sup>136</sup> Each of the fourteen women has a history of abuse as children or adults and has no history of crime before their convictions.<sup>137</sup> The coalition includes former Governor Bob Holden, former appellate judge James R. Dowd, the St. Louis University Legal Clinic, the WILLOW<sup>138</sup> project at Webster University, and several lawmakers and private attorneys.<sup>139</sup> Of the fourteen women who clemency is petitioned for, nine had no direct involvement in the violent crimes they were accused of committing, and the five other women only acted after years of egregious abuse.<sup>140</sup> Two of these women are Donna Biernacki and Amelia Bird.

#### A. Donna Biernacki

On December 2, 2004, Donna Biernacki left her home with a loaded gun in hand, intending to commit suicide after days of fighting with her husband.<sup>141</sup> Donna was abused throughout her marriage – her husband choked her, pulled her around the house by her hair, and persistently hit her with his fists.<sup>142</sup> Additionally, Donna’s husband sexually abused her and her four daughters.<sup>143</sup> Donna eventually returned home on December 2.<sup>144</sup> When she returned, her husband revealed that he would place her in total isolation – Donna’s mother and father could not visit their home, their fifteen-year-old daughter would be forced to move out, and he would control every cent of the family’s finances.<sup>145</sup> Donna put the loaded gun up to her own head and prepared to kill herself.<sup>146</sup> Donna’s husband encouraged her threatened suicide

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136. Mann, *supra* note 107.

137. *Id.*

138. *Id.*; The Women Institute Legal Lifelines for Other Women (“WILLOW”) Project is a nonprofit organization that provides legal assistance to women. *The WILLOW Project*, WEBSTER U., <http://www.webster.edu/arts-and-sciences/affiliates-events/willow-project.html> (last visited Jan. 10, 2016).

139. Mann, *supra* note 107.

140. *Id.*

141. Stephanie Francis Ward, *Working for Free: Lawyers Incorporating Pro Bono Into Their Lives Talk About its Rewards, Challenges*, A.B.A. J. (Feb. 1, 2013), [http://www.abajournal.com/magazine/article/working\\_for\\_free/](http://www.abajournal.com/magazine/article/working_for_free/).

142. *Id.*

143. Jessica Lussenhop, *After Years in Prison, Angel Stewart and Other Victims of Violence Ask for Mercy*, RIVERFRONT TIMES (Mar. 11, 2015, 7:00 AM), [http://blogs.riverfronttimes.com/dailyrft/2015/03/after\\_years\\_in\\_prison\\_angel\\_stewart\\_and\\_other\\_victims\\_of\\_violence\\_ask\\_for\\_mercy.php?page=all](http://blogs.riverfronttimes.com/dailyrft/2015/03/after_years_in_prison_angel_stewart_and_other_victims_of_violence_ask_for_mercy.php?page=all).

144. *Id.*

145. Ward, *supra* note 141.

146. *Id.*

and told her, “Go ahead, I could use the money.”<sup>147</sup> Donna turned the loaded gun on her husband, believing he would kill her if she did not kill herself.<sup>148</sup>

At trial, a psychologist testified that Donna exhibited the psychological effects of spousal abuse, and Donna’s public defender argued that the murder was the result of years of abuse.<sup>149</sup> Despite the psychologist’s testimony, multiple orders of protection Donna took out against her husband and several police reports were excluded as evidence by the trial judge.<sup>150</sup> After forty hours of deliberation, a Greene County jury found Donna guilty of murder in the second degree and armed criminal action.<sup>151</sup> Donna was sentenced to twenty years in the Chillicothe Correctional Center.<sup>152</sup>

### B. Amelia Bird

Amelia Bird was sixteen at the time of her parents’ shooting in 2005.<sup>153</sup> Amelia confided in her ex-boyfriend, Chad Brantley, prior to the shooting and revealed that she had been suffering extensive physical and sexual abuse at the hands of her father and brother.<sup>154</sup> One night, Chad entered Amelia’s home while everyone was sleeping and shot Amelia’s parents.<sup>155</sup> The shots killed Amelia’s mother and seriously wounded her father.<sup>156</sup>

The State charged Chad with first-degree murder and sought the death penalty against him.<sup>157</sup> Amelia was charged as a co-conspirator in the death of her mother,<sup>158</sup> and she was certified and charged as an adult.<sup>159</sup> Out of fear that the State would seek the death penalty against her as well, Amelia pled guilty to murder in the second degree and assault in the first degree.<sup>160</sup> She

147. *Id.*

148. *Id.*

149. Associated Press, *Springfield Woman Found Guilty of Killing Husband*, HERALD-TRIB., Dec. 24, 2006, at 2A, <https://news.google.com/newspapers?nid=1906&dat=20061224&id=h30jAAAIAIBAJ&sjid=F9kEAAAIAIBAJ&pg=3763,7004172&hl=en>.

150. *Id.*

151. Associated Press, *supra* note 149.

152. Ward, *supra* note 141.

153. *Amelia Bird, Charged in Mother’s Murder, To Trial in February 2009*, HOUS. HERALD (Feb. 13, 2008) [hereinafter *Amelia Bird Charged*], [http://www.houstonherald.com/news/amelia-bird-charged-in-mother-s-murder-to-trial-in/article\\_02bd08ad-c568-554d-b779-b1c2ea274663.html](http://www.houstonherald.com/news/amelia-bird-charged-in-mother-s-murder-to-trial-in/article_02bd08ad-c568-554d-b779-b1c2ea274663.html).

154. Rachel Lippmann, *Coalition Calls on Nixon to Ease Sentences of Abuse Victims*, ST. LOUIS PUB. RADIO (Oct. 28, 2014), <http://news.stlpublicradio.org/post/coalition-calls-nixon-ease-sentences-abuse-victims>.

155. *Id.*

156. *Amelia Bird Charged*, *supra* note 153.

157. *Id.*

158. *Id.*

159. *Id.*

160. Kathee Baird, *Amelia Bird And Chad Brantley Sentenced To Consecutive Life Sentences For The Death Of Bird’s Mother*, CRIME SCENE, <http://crimescene>

was sentenced to two consecutive life sentences.<sup>161</sup> Because Amelia pled guilty and did not stand trial, she was unable to present evidence of the sexual and physical abuse she had endured for years or BWS expert testimony to demonstrate how that abuse had affected her.<sup>162</sup>

#### IV. DISCUSSION

BWS, and Walker's work to define and better understand it, is an important contribution to criminal law and the understanding of a battered woman's psyche.<sup>163</sup> Expert witnesses are now able to aid judges and juries in understanding how battered women act and how they perceive imminent danger – observations that may not be apparent to a factfinder.<sup>164</sup> Expert testimony assists judges and juries in implementing BWS and finding that, given the attributes of BWS, the woman actually killed her abuser in self-defense. Expert testimony regarding BWS faces many limitations – the trial court judge's discretion in determining whether the evidence is admissible and the jury's ability to find that a battered woman acted reasonably in the face of imminent danger. These limitations have caused unjust and excessive sentences to battered women, such as Donna Biernacki and Amelia Bird, who were unable to benefit from Section 563.033.

##### A. *The Necessity of Expert Testimony Regarding Battered Woman Syndrome*

Self-defense law is posited on the idea that one who is unlawfully attacked should be able to defend herself by reasonable means.<sup>165</sup> Self-defense is meant to apply to everyone equally, no matter his or her gender, yet traditional self-defense was not created with battered women in mind.<sup>166</sup> Section 563.031 does not contemplate the cycle of violence of battering relationships and a battered woman's reasonable belief that there is always a threat that her partner will use unlawful force.<sup>167</sup> Traditional self-defense developed with two scenarios, based on the experiences of men, in mind: where a stranger suddenly attacks a person and where two people, of proximate size and

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investigations.blogspot.com/2009/02/amelia-bird-and-chad-brantley-sentenced.html (last visited Feb. 5, 2016).

161. *Id.*

162. Note that Section 563.033 does not require that a battered woman be a spouse of the batterer. *State v. Williams*, 787 S.W.2d 308, 311 (Mo. Ct. App. 1990). Therefore, Amelia was still eligible to present BWS expert testimony at trial.

163. *See generally* Dutton, *supra* note 23, at 1194–95.

164. *Id.*

165. Cheryl A. Terrance et al., *Expert Testimony in Cases Involving Battered Women Who Kill: Going Beyond the Battered Woman Syndrome*, 88 N.D. L. REV. 921, 926 (2012).

166. *See id.* at 926–27.

167. *See* MO. REV. STAT. § 563.031.1 (Cum. Supp. 2013).



strength, get into some sort of brawl.<sup>168</sup> Section 563.033 was passed into law so that battered women could avail themselves of self-defense, despite its traditional, male-centered criteria.

In most states, including Missouri, a woman is justified in using deadly force if she reasonably believes the force is necessary to prevent a threat of force or the use of unlawful deadly force.<sup>169</sup> Because of the reality of domestic violence and BWS, many battered women face difficulty in successfully asserting each element of self-defense.<sup>170</sup> Traditional self-defense does not apply to situations where a woman responds with physical force several hours after a physical attack, when her abusive partner is sleeping, or when he has turned his back in retreat from an attack.<sup>171</sup> Even if a woman is able to jump the hurdle that is the imminence requirement of self-defense, “she must still convince the jury that her belief of imminent danger or serious injury, and her response to that danger, was reasonable.”<sup>172</sup>

When expert testimony is admitted, judges and jurors become better equipped to evaluate the perspective of a battered woman and determine whether, in light of BWS, it was reasonable for her to respond with deadly force. In nonconfrontational circumstances, where a factfinder is less likely to see the threat or use of deadly force, experts can explain why the woman had a different view of imminence and appropriate force. Sometimes, behaviors contrary to what laypeople would expect of a battered woman represent a common response in the cycle of violence.<sup>173</sup> In short, “[E]xpert testimony helps explain how and why the battered woman fits into traditional self-defense doctrine.”<sup>174</sup> While BWS is not a defense to homicide, it, with the help of expert testimony, can encapsulate and give context to self-defense in the terms and experiences of a battered woman.

Despite the help expert testimony offers to factfinders, the decision of whether to admit expert testimony is dependent on the trial judge’s discretion. This is contrary to the stated purpose of Section 563.033.<sup>175</sup> Trial courts have excluded BWS expert testimony on the grounds that it is irrelevant, that it “invades the province of the jury by speaking to matters in which the jury is as competent as the expert,” and that scientific knowledge of BWS is not

168. *Battered Women Who Kill Their Abusers*, *supra* note 4, at 1575–76; see Terrance et al., *supra* note 165.

169. See *Battered Women Who Kill Their Abusers*, *supra* note 4, at 1576.

170. Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 711 (1994).

171. Susan R. Estrich, *Defending Women Justifiable Homicide: Battered Women, Self-Defense and the Law*, 88 MICH. L. REV. 1430, 1433 (1990).

172. Terrance et al., *supra* note 165, at 929.

173. *Id.* at 952–53.

174. *Id.* at 933.

175. See Brewer, *supra* note 50 (stating the legislative intent in passing Section 563.033 was “to remove the decision whether to admit expert testimony on ‘battered spouse syndrome’ from the trial judge’s discretion”).

sufficiently developed.<sup>176</sup> For example, in 2003, the U.S. Court of Appeals for the Eighth Circuit held that BWS expert testimony was inadmissible because the defendant, who had been repeatedly sexually assaulted by her father, was the initial aggressor and did not meet the required elements of self-defense.<sup>177</sup> Had BWS expert testimony been admitted at her trial, the jury could have considered the abuse and determined that the defendant was in fact acting in self-defense.<sup>178</sup>

Additionally, judges may view BWS expert testimony “through the lens of their own common assumptions” and may be more likely to exclude BWS expert testimony when a woman commits a nonconfrontational act of self-defense.<sup>179</sup> Even if the trial judge decides to admit some evidence of BWS, a jury must believe the woman is suffering from BWS before weighing the evidence “in light of how an otherwise reasonable person who is suffering from [BWS] would have perceived and reacted.”<sup>180</sup>

### B. Redefining Battered Woman Syndrome

Although Section 563.033 was passed into law nearly three decades ago in an effort to aid battered women in their self-defense claims, whether the statute is actually a benefit to battered women remains unclear.<sup>181</sup> BWS was created to describe the common characteristics of a battering relationship, but BWS is not a one-size-fits-all explanation of the effects of battering.<sup>182</sup> Many scholars are of the opinion that BWS inadequately captures the complex dynamics of domestic violence and the cycle of violence.<sup>183</sup>

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176. *Battered Women Who Kill Their Abusers*, *supra* note 4, at 1582–85.

177. *See generally* Lannert v. Jones, 321 F.3d 747 (8th Cir. 2003).

178. Governor Matt Blunt commuted the defendant’s life without parole sentence in 2009. Matt Sanders, *Blunt Commutes Sentence of Convicted Scott County Murderer*, *SOUTHEAST MISSOURIAN* (Jan. 11, 2009), <http://www.semissourian.com/story/1492444.html>.

179. ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 109 (2008); *see also* *Battered Women Who Kill Their Abusers*, *supra* note 4, at 1577; Thomas H. Limbrick, Note, *Lactation Intolerance: Trivializing the Struggles of Working Mothers & the Need for a More Diverse Judiciary*, 80 *MO. L. REV.* 1189, 1201–02 (2015) (quoting Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 *ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS* 278, 300 (2014), [http://www.stmaryslawjournal.org/pdfs/7Negowetti\\_Final\\_Germano\\_Clean.pdf](http://www.stmaryslawjournal.org/pdfs/7Negowetti_Final_Germano_Clean.pdf)) (“Ideally, judges use the facts and evidence of a case before them, in the context of legal precedent, to reach their decisions; however, ‘Regardless of conscious or avowed biases and prejudices, most people . . . harbor some implicit biases.’”).

180. *State v. Edwards*, 60 S.W.3d 602, 615 (Mo. Ct. App. 2001).

181. *See* Brewer, *supra* note 50; *see also* Terrance et al., *supra* note 165, at 935.

182. *See* Irvin B. Nodland, *Defending Battered Women: Everything She Says May Be Used Against Them*, 68 *N.D. L. REV.* 131, 132 (1992).

183. Terrance et al., *supra* note 165, at 941.

BWS suggests that battered women only act pursuant to a rigid cycle of three phases and that an alternative reaction is outside the scope of BWS and may be due to the woman's will or a mental deficiency, not the learned helplessness she has developed after years of abuse.<sup>184</sup> When evidence of BWS is presented, juries may be faced with a stereotypical paradigm of who a battered woman is and how she is expected to act according to the cycle of violence.<sup>185</sup> Because abuse does not affect all battered women in the same way and does not always incorporate the attributes of Walker's BWS, factfinders may decline to find self-defense when a battered woman was indeed acting as a reasonable battered woman in her situation would.

Additionally, there is concern that reference to Battered Woman Syndrome leads factfinders to view a battered woman as pathological; however, BWS is not meant to present some sort of mental disease or defect defense.<sup>186</sup> While expert testimony regarding BWS is meant to aid a jury in understanding why a battered woman acted the way that she did, general testimony regarding a woman's inability to leave an abusive relationship or her feeling of imminent danger may depict a woman as too mentally unstable or impaired to act as an "otherwise reasonable person" suffering from BWS would act.<sup>187</sup> In a jury simulation study, researchers discovered that mock jurors, utilizing expert testimony regarding BWS in a case where a woman killed her abusive partner, did not return different verdicts than mock jurors who were not presented with expert testimony.<sup>188</sup> The mock jurors who were presented with expert testimony "viewed the defendant as 'having less capacity for responsible choice and as being more distorted in her thinking.'"<sup>189</sup> The jury simulation study found that "if the defendant does not depict the typical/passive battered woman, then the defendant's use of expert testimony regarding the syndrome may not be a successful strategy."<sup>190</sup>

Expert testimony regarding BWS should focus on the particular behavioral traits and signs and symptoms of physical, sexual, or psychological abuse as it relates to a particular battered woman defendant – not all battered women in general. Because BWS is not a one-size-fits-all explanation of the traits of battered women, expert testimony should reflect how the battered woman on trial acted and reacted, as well as why these events were a reason-

184. *See id.*

185. *Id.* at 945.

186. *See id.* at 941, 943; *see also* Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 170 (2004) ("[U]se of the term 'syndrome' has clinical connotations and is therefore prone to generate confusion.").

187. Krause, *supra* note 170, at 716.

188. Terrance et al., *supra* note 165, at 942.

189. *Id.* (citing Norman J. Finkel et al., *The Self-Defense Defense and Community Sentiment*, 15 LAW & HUM. BEHAV. 585, 598 (1991)).

190. *Id.* at 946–47 (quoting Brenda L. Russell & Linda S. Melillo, *Attitudes Toward Battered Women Who Kill: Defendant Typicality and Judgments of Culpability*, 33 CRIM. JUST. & BEHAV. 219, 239 (2006)).

able response to the abuse *she* suffered. Such an explanation gives better effect to the standard announced in *State v. Edwards* and allows juries to evaluate how an otherwise reasonable woman suffering from BWS would have reacted in the accused battered woman's circumstances. Such a subjective offering of expert testimony avoids juries' misconceptions and stereotypes.

### C. Clemency Is an Appropriate Remedy for Convicted Battered Women

Clemency is necessary to right the wrongs of Missouri trial courts in applying and giving effect to Section 563.033. Professor Elizabeth M. Schneider argues clemency "will continue to be necessary as long as individuals are denied rights to present an adequate defense at trial and until society responds adequately to the problem of woman abuse."<sup>191</sup> Clemency is meant to remedy unjust sentences as a sign of mercy from the governor. Clemency should not be counted on as the cure for all battered women who are convicted at trial, but should instead be exercised when a battered woman's status as a victim of extensive domestic violence does not mitigate her sentence.

Clemency has become a very political means of intervention, and the number of petitions for clemency granted has declined in the past two decades.<sup>192</sup> Several studies have revealed that conviction and incarceration rates are higher for female domestic violence victims than all others charged with homicide.<sup>193</sup> Additionally, female victims of domestic violence face longer sentences.<sup>194</sup> These studies reflect the fact that judges and juries do not necessarily view a battered woman as a victim who is deserving of a mitigated sentence. Instead, several battered women are treated more harshly – either because they did not fit the narrow BWS definition of a battered woman or because the factfinder was unable to view the woman's actions as reasonable and as a result of an imminent threat.

Although trial courts have increasingly admitted expert testimony regarding BWS and past governors have commuted life sentences of battered women, "progress has not . . . been linear."<sup>195</sup> Several women have fallen through the cracks of the criminal justice system, including Donna Biernacki and Amelia Bird.

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191. Ammons, *supra* note 101, at 535 (quoting ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 145 (2000)).

192. Carol Jacobsen & Lora Bex Lempert, *Institutional Disparities: Considerations of Gender in the Commutation Process for Incarcerated Women*, 39 SIGNS 265, 265 (2013).

193. *Id.* at 267.

194. *Id.*

195. *Id.*

Amelia's ex-boyfriend decided to take matters into his own hands in an act of vigilante justice.<sup>196</sup> While Amelia had no role in the murder, and it has never been suggested that she in fact committed the murder, her defense counsel advised her to plead guilty because of the threat of death.<sup>197</sup> Amelia was threatened with the death penalty as a sixteen-year-old girl – a penalty that would have been mitigated if Amelia went to trial and presented BWS expert testimony.

Donna was disadvantaged by the immense amount of discretion practiced by the trial court judge. The judge excluded several pieces of evidence – past protective orders and a number of police reports – that were crucial for the jury to determine whether Donna suffered from BWS.<sup>198</sup> Additionally, expert testimony regarding BWS was brief and did not speak to the perceptions and reactions of a woman suffering from BWS.<sup>199</sup> Although some evidence of BWS was presented at Donna's trial, the exclusion of other relevant BWS evidence restricted the jury's ability to fully understand Donna's actions in light of the battering she experienced throughout her marriage. Donna and Amelia's status as victims, or rather survivors, of domestic violence did not mitigate the harsh sentences they received. It is within Governor Nixon's power to right this wrong.

## V. CONCLUSION

BWS has long been recognized as a psychological theory that aids battered women in making a claim of self-defense. The importance of BWS testimony in Missouri was recognized in 1987 with the passage of Section 563.033, but it has not appeared to benefit many battered women. The admissibility of BWS evidence is subject to the vast discretion of the trial court and the scrutiny of the jury, who must look past the stereotypical battered woman paradigm in order to understand why the battered woman defendant perceived and reacted in the way that she did.

Expert testimony regarding BWS should focus on the battered woman who is facing trial, detailing *her* reactions to the abuse she has suffered. To group the traits of all battered women into one single definition is to deprive other women, who similarly faced horrendous abuse, of the ability to claim self-defense. BWS should not be a one-size-fits-all explanation, and it is imperative that an expert present evidence as to why a particular battered woman acted in the particular way that she did.

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196. See Lippmann, *supra* note 154.

197. See *BREAKING: Bird Pleads Guilty, Receives Two Life Sentences*, HOUS. HERALD (Oct. 9, 2008), [http://www.houstonherald.com/news/breaking-bird-pleads-guilty-receives-two-life-sentences/article\\_6407cb62-e093-5aee-ab46-49124e5c6540.html](http://www.houstonherald.com/news/breaking-bird-pleads-guilty-receives-two-life-sentences/article_6407cb62-e093-5aee-ab46-49124e5c6540.html).

198. Liz Ramsey, *Petitioning Governor Jeremiah Nixon, Grant Clemency for 14 Women in Missouri Prisons*, CHANGE.ORG, <https://www.change.org/p/jeremiah-nixon-grant-clemency-for-14-women-in-missouri-prisons> (last visited Mar. 16, 2016).

199. Associated Press, *supra* note 149.

Section 563.033 is, no doubt, meant to benefit battered women, but its delayed implementation has caused many women – who would have been able to successfully plead a case of self-defense with the help of BWS expert testimony – to receive harsher sentences than others convicted of similar crimes. Governor Nixon has the ability to mitigate these harsh sentences by granting clemency, a power only he can exercise. Donna Biernacki, Amelia Bird, and several unnamed others should have been able to present BWS expert testimony at trial and successfully plead a case of self-defense. Judges and juries failed to treat these women as victims and for that, justice demands Governor Nixon’s mercy.



