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Battered Spouse Syndrome: Testing the Traditional Limits of South Carolina Law

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BATTERED SPOUSE SYNDROME:[1] TESTING THE TRADITIONAL LIMITS OF SOUTH CAROLINA LAW

I. INTRODUCTION

Since the first studies on battered spouse syndrome (BSS or the syndrome) were conducted two decades ago,[2] commentary surrounding BSS has become prevalent in both the popular press and America's court systems. Within the legal context, evidentiary and causal issues have slowly taken shape. South Carolina first recognized that expert testimony on BSS is relevant to a claim of self-defense in 1986, when the supreme court decided *State v. Hill*.[3] The court, in dicta, later expanded its views on the compatibility of BSS and self-defense claims, in *Robinson v. State*.[4] South Carolina's most recent word on the subject came from the legislature when it enacted section 17-23-170.[5] This statute essentially codifies *Hill* and *Robinson's* dicta[6] and adds to the substance of prior case law by allowing expert testimony on BSS to support a defense of duress, necessity, and defense of another. The statute also allows lay testimony concerning a batterer's prior acts as foundation evidence prior to expert testimony.[7] The South Carolina Supreme Court has yet to address each of these defenses as they relate to BSS. This article begins with a discussion of BSS and continues with a discussion of South Carolina's possible treatment of section 17-23-170.

Dr. Lenore Walker[8] estimates that as many as half the women currently

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1. For the purposes of this article, "battered spouse syndrome" is used interchangeably with "battered wife's syndrome" and "battered woman's syndrome." *See infra* notes 33-37 and accompanying text.

2. Dr. Lenore Walker, a noted expert on BSS and originator of the phrase "battered woman," claims that the first epidemiological study on battered women was conducted in 1976. LENORE E. WALKER, THE BATTERED WOMAN 20 (1979).

3. 287 S.C. 398, 339 S.E.2d 121 (1986).

4. 308 S.C. 74, 417 S.E.2d 88 (1992).

5. S.C. CODE ANN. § 17-23-170 (Law. Co-op. Supp. 1995). Written notice must be filed with the court prior to trial if BSS evidence is intended to be offered. *Id.* § 17-23-170(E).

6. *See Robinson*, 308 S.C. at 78-80, 417 S.E.2d at 91-92; *Hill*, 287 S.C. at 399-400 S.E.2d at 122.

7. S.C. CODE ANN. § 17-23-170(C) (Law. Co-op. Supp. 1995).

8. Dr. Walker is often quoted by courts, including the *Robinson* court, and is widely noted as a leading expert in the field. Dr. Walker, however, does have her critics. *See* David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 632-43 (1986) (stating that Walker's view of the cyclical nature of BSS possesses significant "methodological and interpretative flaws" and that her learned helplessness theory is inadequate because it does not account for the behavior of women who remain in

in prison committed their crimes to avoid further beatings from their spouses.[9] The acts that the women committed include "[f]orging checks to pay his bills, stealing food or other items that he denied the children, selling drugs to keep his supply filled, [and] hurting someone else so he didn't hurt her."[10] Dr. Walker further contends that "[f]ew of these women received an appropriate defense for their acts."[11] In recognition of the plight of battered women, the sometimes drastic measures to which they resort, and the incompatibility of BSS evidence with traditional defenses, courts and legislatures have relaxed the rules.[12]

II. BATTERED SPOUSE SYNDROME FUNDAMENTALS

All women that are beaten are not classified as battered women. Dr. Walker defines a 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. . . . [T]o be classified as a battered woman, the couple must go through the battering cycle at least twice.[13]

Dr. Walker's, "battering cycle" consists of three phases "which vary in both time and intensity for the same couple and between different couples."[14] The first phase is termed the "tension building phase;" it consists of minor instances of abuse that create tension between the parties.[15] During this phase the woman "lets the batterer know that she accepts his abusiveness as legitimately directed toward her" and in effect employs the psychological defense of denial.[16] The violence escalates in the second phase, which is appropriately labeled the "acute battering incident."[17] A brief expression of rage and the batterer's releasing his built up tension characterize this phase.[18]

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battering relationships); Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1 U. ILL. L. REV. 45, 53-64 (1994) (concluding that Walker's data does not support a claim that battering relationships produce a regular pattern identifiable as BSS).

9. LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 142 (1984).

10. *Id.*

11. *Id.*

12. *See* S.C. CODE ANN. § 17-23-170 (Law. Co-op. Supp. 1995); Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992).

13. WALKER, *supra* note 2, at xv.

14. *Id.* at 55.

15. *Id.* at 56.

16. *Id.*

17. *Id.* at 59.

18. *Id.* at 60. This phase usually lasts "from two to twenty-four hours, although some women

The battered spouse does not generally seek help after this phase unless the injuries are so severe that medical attention is necessary.[19] The third phase, termed "kindness and contrite loving behavior," brings a pause in the violence as the batterer seeks forgiveness for his actions.[20] During the third phase the batterer tries to convince the victim of his sincerity and that the beatings will not happen again.[21] After a while the cycle begins anew.

The cyclical nature of BSS and the general refusal of the battered spouse to seek help has caused some courts and analysts to state that the battered victim suffers from "'learned helplessness' as the 'repeated batterings, like electrical shocks, diminish the woman's motivation to respond.'"[22] This learned helplessness "stems from the battered woman's belief that her batterer is more powerful than he actually is[] and her fear of retaliation if she summons help."[23] Comprehension of learned helplessness is one reason courts have altered the traditional standards that govern defenses employed by battered women.[24]

In particular, BSS has had an impact on a battered woman's claim of self-defense. Early in the syndrome's legal existence, opposing sides debated the admissibility of expert testimony on BSS to support claims of self-defense in situations where traditional notions of self-defense would preclude such evidence. For the most part, supporters of the admissibility of such testimony won the debate.[25] Most states, through court decision, now admit expert testimony on BSS.[26] South Carolina is, in fact, one of six states that have passed a statute specifically allowing the admission of expert testimony on BSS in a self-defense claim.[27] Thus, the debate over evidentiary issues surrounding BSS has shifted. The focus is now on the limitations, if any, that should be imposed on the admissibility of such evidence.

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have reported a steady reign of terror for a week or more." *Id.*

19. *Id.* at 63.

20. *Id.* at 65.

21. *Id.* at 65-66.

22. Robinson v. State, 308 S.C. 74, 77, 417 S.E.2d 88, 90 (1992) (quoting WALKER, THE BATTERED WOMAN SYNDROME 7 (1984)).

23. *Id.* at 77, 417 S.E.2d at 90 (citing People v. Day, 2 Cal. Rptr. 2d 916 (1992)).

24. *Id.* at 77, 417 S.E.2d 88.

25. *See* Schopp et al., *supra* note 8, at 59 (stating that "courts and commentators have accepted [BSS] testimony as well established").

26. For a list of several of the decisions involving the admissibility of expert testimony on BSS, see Amy M. Taheri, Note, *Criminal Law-Wyoming's Battered Woman Syndrome Statute—How Far Can an Expert go to Support a Battered Woman's Self—Defense Claim?* Witt v. State, 892 P.2d 132 (Wyo. 1995), 31 LAND & WATER L. REV. 249, 253, n.33 (1996).

27. *See* CAL. EVID. CODE § 1107 (Deering 1995); MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (1994); MO. REV. STAT. § 563.033 (1994); OHIO REV. CODE ANN. § 2945.392 (Anderson 1994); S.C. DOE ANN. § 17-23-170 (Law. Co-op. Supp. 1996); WYO. STAT. ANN. § 6-1-203 (Michie Supp. 1995).

III. SOUTH CAROLINA'S APPROACH

The South Carolina Supreme Court has addressed the admissibility of BSS evidence directly in only two cases. The question first came before the court in 1986 in *State v. Hill*,[28] in which the court held that evidence which established a defendant's suffering from BSS was relevant to a claim of self-defense. The *Hill* court stopped short of recognizing BSS as a separate defense.[29] In *Robinson v. State* the court, attempting to "provide some guidance to members of the bench and bar," discussed, in dicta, the "relationship between the battered woman's syndrome and the law of self-defense as it is defined in South Carolina."[30] Due to the apparent incompatibilities of BSS and the legal concept of self-defense, the court, in its guidance, demonstrated how the traditional elements of self-defense could be relaxed and how expert testimony on BSS could be used to satisfy defendant's burden.[31] The legislature continued the courts' work by passing section 17-23-170, which became effective without the Governor's signature on January 12, 1995. This section essentially codifies *Hill* and the dicta in *Robinson*. The statute provides: "Evidence that the actor was suffering from the battered spouse syndrome is admissible in a criminal action on the issue of whether the actor lawfully acted in self-defense, defense of another, defense of necessity, or defense of duress."[32]

At first blush this statute appears to represent the legislature's willingness to treat BSS as a special category of persons with special evidentiary privileges. Indeed, the legislature phrased the statute in terms of the "battered *spouse* syndrome."[33] Reasonably, one could conclude that the statute covers only married individuals. However, close inspection of BSS in other legal literature and analyses indicates a broader definition.[34] For example, the Missouri Court of Appeals has interpreted language identical to South Carolina's statute[35] to include unmarried lovers.[36] Because the Missouri case was decided before the South Carolina General Assembly enacted section 17-23-170, one might assume that the General Assembly was aware of the decision and impliedly adopted its reasoning. Finally, although most cases

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28. 287 S.C. 398, 339 S.E.2d 121 (1986).

29. *Id.* at 400, 339 S.E.2d at 122.

30. 308 S.C. 74, 78-80, 417 S.E.2d 88, 91-92 (1992). For an analysis of this case, see Cara Yates, Case Note, 45 S.C. L. REV. 127 (1993).

31. *See Robinson*, 308 S.C. at 78-80, 417 S.E.2d at 91-92.

32. S.C. CODE ANN. § 17-23-170(A) (Law. Co-op. Supp. 1996).

33. *Id.* (emphasis added).

34. *See supra* note 12 and accompanying text.

35. *Compare* S.C. CODE ANN. § 17-23-170 (Law. Co-op. Supp. 1995) *with* MO. REV. STAT. § 563.033 (1987).

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

involve a battered woman, the statute does not expressly limit the applicability of the statute to women.[37]

IV. BATTERED SPOUSE SYNDROME EVIDENCE: SEARCHING FOR LIMITATIONS OF SCOPE

A. Regarding Claims of Self-Defense

As previously mentioned, South Carolina's statute appears to be a straight codification of decisional law.[38] Importantly, the *Robinson* decision, which is presumably the primary source and impetus for section 17-23-170, admits to being a "cursory"[39] stab at the subject. Together, the statute and the *Robinson* decision left unanswered the question of appropriate limitation on the admissibility of BSS testimony in self-defense cases. More precisely, what behavior did the General Assembly envision as "lawfully acted in self-defense?"[40]

In *Robinson*, the court stated that a battered woman may be characterized as "the victim of a continuing assault" and that "the first element of self-defense may be satisfied even though the battered woman acts at a time when the batterer is not physically abusing her."[41] The court relaxed the imminent danger requirement by stating that "battered women can experience a heightened sense of imminent danger arising from the perpetual terror of physical and mental abuse" that often "does not wane, even when the batterer is absent or asleep."[42] The third element (approval of the self-defender's actions from a third-party perspective) was altered from the viewpoint of a

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37. The statute is phrased in the gender neutral term actor. *See* S.C. CODE ANN. § 17-23-170 (A) (Law. Co-op. Supp. 1995).

38. *See supra* note 52 and accompanying text.

39. Robinson v. State, 308 S.C. 74, 80, 417 S.E.2d 88, 92 (1992).

40. *See id.*

41. *Robinson*, 308 S.C. at 79, 417 S.E.2d at 91. The supreme court actually announced the four elements of self-defense in *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

42. *Robinson*, 308 S.C. at 79, 412 S.E.2d at 91.

reasonably prudent person of ordinary firmness to one that accounts for the circumstances of a battered woman facing interminable torture and impossible escape.[43] The court also relaxed the fourth element of self-defense by recognizing that "a battered woman who is held hostage by her batterer may have no other means of avoiding a battering than to kill [him] in self-defense."[44]

In the end, the *Robinson* decision overlooks the possibility that a battered woman is not suffering from BSS or has available to her avenues of help short of homicide.[45] The ruling inserts without exception the psychological processes of a battered woman who feels she cannot escape. The court's approach in *Robinson* sets up a relaxed standard that has few if any limitations on the admission of BSS evidence in a self-defense claim.

Perhaps there should be some limitation based on the manner and setting of the alleged self-defense—a requirement that the defendant demonstrate some indicia of momentary passion. After all, not every battered woman kills her husband during a battering episode. Indeed, such cases have even included murder-for-hire style executions of the batterer. The following three scenarios further illustrate the different means by which battered spouses kill their batterers. First, after a day of intense beating, the batterer pins down his wife and begins choking her. Several times, he threatens to kill her. She manages to get to a gun and shoot her husband. In a case resembling these facts the wife was found not guilty.[46] Second, a woman, after years of abuse, retaliates and shoots her husband while he sleeps.[47] Third, as alluded to above, driven to submission and fear a woman after years of abuse, unwilling or unable to face her batterer, hires a third party to kill her husband for her. Each of the women upon whose actions the above scenarios are based claimed self-defense to justify her actions.[48]

Courts typically admit BSS testimony when the murder occurs during a battering episode because this generally falls within the classic definition of

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43. *Id.* This change in standards, coupled with the ruling in *State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978) (providing that defendant was entitled to jury instructions that took into consideration the defendant's size, sex, and age) can be used to obtain jury instructions fashioned in terms of the "reasonable battered woman." *See id.* WILLIAM S. MCANINCH & W. GASTON FAIREY, THE CRIMINAL LAW OF SOUTH CAROLINA 488 (3d ed. 1996).

44. *Robinson*, 308 S.C. at 79-80, 417 S.E.2d at 92.

45. Possible avenues of help that the battered spouse could take include seeking out police, family, or friends or simply leaving the batterer. Of course, the essence of the learned helplessness theory is an effective diminution of the battered spouse's ability to end the abusive relationship through traditional avenues.

46. Metropolitan Life Ins. Co. v. Fogle, 309 S.C. 64, 67, 419 S.E.2d 825, 827 (Ct. App. 1992).

47. *See Robinson*, 308 S.C. 74, 417 S.E.2d 88; State v. Norman, 378 S.E.2d 8 (N.C. 1989).

48. *See* Anderson v. Goeke, 44 F.3d 675 (8th Cir. 1995); Haney v. Alabama, 603 So. 2d 412 (Ala. 1992); People v. Yaklich, 833 P.2d 758 (Colo. Ct. App. 1991).

self-defense. Indeed, under the present state of South Carolina law there is little, if any, doubt that such evidence is admissible.[49]

All courts are not in agreement on the admissibility of evidence when a battered spouse kills her sleeping batterer.[50] In such cases, the imminence requirement is strained at best, as a sleeping person poses no objective immediate threat. In *State v. Norman*, the North Carolina Supreme Court in just such a case "decline[d] to expand [North Carolina] law of self-defense beyond the limits of immediacy and necessity which have heretofore provided an appropriately narrow but firm basis upon which homicide may be justified."[51] In *Robinson*, which also involved a woman who killed her husband while he slept, the South Carolina Supreme Court disagreed with the North Carolina court, citing Judge Martin's dissenting opinion several times with approval.[52] The South Carolina Supreme Court stated that a battered spouse can satisfy the imminence requirement "even though her batterer is not physically abusing her when she acts."[53] South Carolina's BSS statute, coming on the heals of the *Robinson* decision, strengthens this interpretation of what it means to have "lawfully acted in self-defense."[54]

Courts are least reluctant to exclude expert testimony on BSS in murder-for-hire cases.[55] Of all the situations in which a battered spouse could kill her batterer, hiring a third party to do the deed is furthest removed from the imminence requirement of traditional self-defense. Unfortunately, the South Carolina Supreme Court has not addressed the admissibility of expert testimony on BSS in a murder-for-hire case. There are, however, two Missouri cases, where the evidentiary statute is identical to South Carolina's,[56] that are somewhat illuminating.[57] The two opinions are split on the admissibility of

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49. *See* S.C. CODE ANN. § 17-23-170(A) (Law. Co-op. Supp. 1995); *Robinson*, 308 S.C. 74, 417 S.E.2d 88; State v. Hill, 287 S.C. 398, 339 S.E.2d 121 (1986).

50. The admissibility of expert testimony on BSS to support a claim of self-defense when battered spouses kill their batterers has been recognized in the following cases: People v. Beasley, 622 N.E.2d 1236 (Ill. App. Ct. 1993); Chapman v. State, 386 S.E.2d 129 (Ga. 1989). The following courts reached the opposite conclusion: State v. Grant, 470 S.E.2d 1 (N.C. 1996); California v. Aris, 264 Cal. Rptr. 167 (1989); State v. Norman, 378 S.E.2d 8 (N.C. 1989); State v. Stewart, 763 P.2d 572 (Kan. 1988).

51. 378 S.E.2d at 16. The North Carolina Supreme Court has recently refused to overrule *Norman* under a similar set of facts. *Grant*, 470 S.E.2d 1.

52. Robinson v. State, 308 S.C. 74, 76, 417 S.E.2d 88, 89 (1992).

53. *Id.* at 79, 417 S.E.2d at 91. The court justified this assertion because a battered woman "can experience a heightened sense of imminent danger arising from the perpetual terror of physical and mental abuse" that often "does not wane, even when the batterer is absent or asleep." *Id.*

54. S.C. CODE ANN. § 17-23-170(A) (Law. Co-op. Supp. 1995).

55. *See infra* note 57.

56. *See supra* note 35.

57. *See* Anderson v. Goeke, 44 F.3d 675 (8th Cir. 1994); Martin v. State, 712 S.W.2d 14

BSS evidence, yet in both cases, the defendants were convicted and received long sentences.[58] Most of what can be said regarding the BSS evidentiary issue in these cases is that there was large deference given to the trial judges, one of whom made a rather effective conditional ruling as to admissibility.[59] Conditional rulings seem to be a logical solution to extreme claims (like the murder-for-hire scenarios) that test the outer limits of self-defense. For one thing, denying admission of BSS evidence until a prima facie self-defense claim is made out prevents an undeserving defendant from exploiting juror passions. Perhaps contemplating such a dilemma, the *Robinson* court acknowledged that the imminence requirement would ultimately depend on the facts of each case.[60] In the end, it seems likely that South Carolina courts would also give great deference to trial judge discretion in the murder-for-hire context.

B. In Defense of Another

Closely related to self-defense is the defense of another. Both defenses are used to justify the assault or killing of an aggressor. South Carolina has adopted the alter ego rule as the definitive test for defense of another.[61] Under this rule the intervener has the same privilege to act as the person for whom he intervenes.[62] Therefore, if the person the intervener acted for had the right of self-defense then the intervener is similarly protected. The intervener's reasonable belief that the person he was acting for was in danger is irrelevant. This position protects against the use of inappropriate force prompted by misleading appearances.[63] For instance, someone screaming and resisting arrest by undercover police officers does not have the right of self-defense under normal circumstances. However, an observer could form a reasonable belief that the person was in danger and choose to intervene. By linking the rights of the victim to the rights of the intervener the law provides protection to innocent individuals such as the undercover police officers in the previous example. Consider the following scenario in which the defense of another is likely to arise in connection with BSS: A woman killed her husband after he grabbed their son and made threats that he would kill the child. Although her

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(Mo. Ct. App. 1986).

58. *Anderson*, 44 F.3d at 677 (life imprisonment without possibility of parole); *Martin*, 712 S.W.2d at 15 (life imprisonment without parole for fifty years).

59. *See Anderson*, 44 F.3d at 680-81.

60. Robinson v. State, 308 S.C. 74, 79, 417 S.E.2d 88, 91 (1992).

61. State v. Cook, 78 S.C. 253, 59 S.E. 862 (1907) (per curiam).

62. *Id.*

63. State v. Woodham, 162 S.C. 492, 160 S.E. 885 (1931). *But see* N.Y. PENAL LAW § 35.15 (McKinney 1987) (statute that reversed New York's common law alter ego rule and inserted the rule of reason test).

husband had fired a gun at her moments before, she did not shoot her husband until after he grabbed and threatened their son. After years of suffering both physical and mental abuse at the hands of her husband, the woman believed that her husband was going to kill their son. In a case involving just these facts a woman was charged with murder. She later pled guilty to manslaughter and was released to be reunited with her son.[64]

Under South Carolina's traditional alter ego rule it is questionable whether the woman in the above scenario could successfully raise the defense of another unless her son would have been justified to act in self-defense. South Carolina Code section 17-23-170(A)[65] appears to carve out an exception to the alter ego rule. A woman is allowed to introduce exculpatory evidence pertaining to her own state of mind. The statute effectively shifts the focus from the perceptions of the intended victim to the perceptions of the abused intervener.

Having grasped the statutory entitlement to plead defense of another, the BSS victim faces additional obstacles. First, the same requirement of retreat that is applied to the intended victim is placed on the intervener.[66] In practice this will most likely not be a problem because a person has no duty to retreat if originally in her own home.[67] In the above scenario this limitation would not pose a problem as the events occurred at the home of the child.[68] The second limitation requires the intervener to cease hostilities when the adversary withdraws.[69] This limitation is more likely to cause problems in BSS cases. In the above scenario, it is not difficult to imagine that the father threatened the child and may have briefly punished the child. As soon as any hostilities ceased, or the father withdrew, the privilege of defense of another would cease as well. The BSS statute may, however, lessen the impact of the duty to cease hostilities. Indeed, the statute is words without substance unless the legislature intended to make an exception to both the alter ego rule and the rule of withdrawal.[70]

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64. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 131-36, 187 (1987).

65. *See* S.C. CODE ANN. § 17-23-170(A) (Law. Co-op. Supp. 1995).

66. State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985).

67. State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984) (per curiam).

68. BROWNE, *supra* note 64, at 131-36, 187.

69. State v. Cook, 78 S.C. 253, 59 S.E. 862 (1907).

70. Recall that the South Carolina Supreme Court dealt with self-defense and BSS in *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992). Because self-defense and the defense of another are similar, the logic employed in *Robinson* should apply to defense of another creating an expansive interpretation of this defense as well.

C. In Instances of Duress and Necessity

The relationship between BSS and the defenses of duress and necessity also wants for exploration. The defenses of duress[71] and necessity are very similar in South Carolina.[72] Both defenses are based on the proposition that the only way to prevent a greater harm is to act in a manner that will result in a lesser harm. The two defenses differ, however, regarding the focus on the actor. Duress focuses on the actor's reaction to external threats or coercion, but the defense of necessity focuses on the actor's reaction to a set of circumstances put in motion either by a third party or by nature.[73] As a result of this distinction, duress is the more likely ally of the battered spouse.

Because the underlying justification for duress is to prevent a greater harm by causing a lesser harm, duress is not a defense to murder and cannot be used to mitigate murder to voluntary manslaughter.[74] Although such a rule would seem to preclude the use of BSS evidence in capital murder cases, there are several situations in which BBS evidence would be appropriate.[75] Consider the following two scenarios in which the defense of duress is likely to arise and bring to bear BSS evidence: (1) A woman contended she was brainwashed through sexual and physical torture by her husband. The woman further contended that she kidnapped and killed a thirteen year old girl at the direction of her husband due to her brainwashing. She was convicted of capital murder and kidnapping and sentenced to death;[76] (2) A woman was convicted of welfare fraud even after presenting evidence that her husband had beaten and

71. For a further analysis of duress and BSS, see Meredith Blake, *Coerced Into Crime: The Application of Battered Woman Syndrome to the Defense of Duress*, 9 WIS. WOMEN'S L.J. 67 (1994); Beth I.Z. Boland, *Battered Women Who Act Under Duress*, 28 NEW ENG. L. REV. 603 (1994). Laurie Kratky Doré, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665 (1995); Susan D. Appel, Note, *Beyond Self-Defense: The Use of Battered Woman Syndrome in Duress Defenses*, 4 U. ILL. L. REV. 955 (1994).

72. In State v. Worley, 265 S.C. 551, 220 S.E.2d 242 (1975), the court treated both defenses the same.

73. *See* WILLIAM S. MCANINCH & W. GASTON FAIREY, THE CRIMINAL LAW OF SOUTH CAROLINA 537-38 (3d ed. 1996).

74. State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993). The availability of the duress defense to one charged with murder as an accomplice was raised but not resolved in *State v. Robinson*, 294 S.C. 120, 363 S.E.2d 104 (1987). For a discussion of how other states handle the ability to claim duress in a homicide prosecution, see Laurie Kratky Doré, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 704-08, nn.154-60 and accompanying text (1995).

75. Duress has been held to be a defense to kidnapping and criminal sexual conduct. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991).

76. Neeley v. State, 494 So. 2d 669, 670-71, 677 (Ala. Crim. App. 1985), *aff'd*, 494 So. 2d 697 (Ala. 1986).

threatened her after he learned of her desire to tell the welfare department that he was employed.[77]

In the first scenario, expert testimony on BSS would not be admitted into evidence (to contest the homicide charge) since duress is not a defense to murder. The second scenario and the kidnapping charge presented in the first scenario, however, are likely candidates for admission of expert testimony on BSS.

The BSS statute expands the common law defense of duress. In a typical case involving a battered spouse claiming duress, the proverbial "gun to the head" is absent. Instead there is a constant threat of future beatings coupled with the subdued will of the battered spouse. In light of the language in *Robinson*,[78] South Carolina courts will likely view duress broadly, giving a wide definition to the phrase "lawfully acted."[79]

The South Carolina Supreme Court has fashioned a three part test for the defense of necessity.[80] Because of the similarities between duress and necessity, this test can be expected to affect future interpretations of duress in contexts which involve BSS testimony. To establish a necessity defense a defendant must show first, that there is an immediate emergency not of the actor's own making; second, that the emergency is of such a nature to create a reasonable belief of death or serious bodily harm if the act is not done; and third, that no reasonable alternative exists other than committing the crime.[81] Analogizing this three part test to a duress defense, a South Carolina court would likely use the *Robinson*[82] standard for immediacy to satisfy the first element of duress. That is, the immediate emergency requirement could be distilled from the "perpetual terror of physical and mental abuse" that a battered spouse suffers.[83]

Likewise, the *Robinson* court's interpretations of what constitutes a reasonable apprehension of death or harm and whether any alternative to crime exists can be expected to affect a ruling as to duress. The court stated that "[w]here torture appears interminable and escape impossible, the belief that only the death of the batterer can provide relief may be reasonable."[84] If

77. West Virginia v. Lambert, 312 S.E.2d 31 (W. Va. 1984).

78. Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992).

79. S.C. CODE ANN. § 17-23-170(A) (Law. Co-op. Supp. 1995).

80. State v. Cole, 304 S.C. 47, 49-50, 403 S.E.2d 117, 119 (1991) (citing the duress case of State v. Robinson, 294 S.C. 120, 121-22, 363 S.E.2d 104, 104 (1987)).

81. *Id.*

82. *Robinson*, 308 S.C. at 79, 417 S.E.2d at 91 (the imminence requirement of self-defence may be satisfied by looking to the facts of each case to determine whether the battered spouse experienced a "heightened sense of imminent danger arising from the perpetual terror of physical and mental abuse.") *Id.*

83. *Robinson*, 308 S.C. at 79, 417 S.E.2d at 91.

84. *Robinson*, 308 S.C. 79, 417 S.E.2d 91.

courts follow this dicta in *Robinson* and thereby lessen the standard of reasonableness for duress to that which is reasonable for a battered woman, BSS evidence will be readily admissible in a wide variety of cases.

V. CONCLUSION

The debate over admissibility of expert testimony regarding BSS is, for the most part, over in South Carolina. The South Carolina General Assembly laid this basic question to rest when it followed the South Carolina Supreme Court's decisions of *State v. Hill*[85] and *State v. Robinson*[86] and enacted Code section 17-23-170.[87] All that remains is a determination of the limits, if any, that will apply.

The General Assembly gave the courts wide berth to determine these limits. As such, it is likely that the courts will continue on the path set forth in *Robinson* and give an expansive interpretation to the term "lawfully acted" found in section 17-23-170.[88] Killing a sleeping batterer will no doubt be treated as within the scope of the statutory language for this was the case in *Robinson* itself. Murder-for-hire, on the other hand, will likely be found beyond the scope of section 17-23-170. Further, the courts seem ready to interpret section 17-23-170 as altering the common law alter-ego rule for defense of another from an objective to a subjective standard. Such an interpretation will extend the traditional scope of defense of another. Finally, given the opportunity, South Carolina courts will likely expand the common law defenses of duress and necessity to accommodate the constant threats associated with BSS.

BSS is a terrible plight that affects a growing segment of society. Unfortunately, the actions taken by BSS sufferers do not fit neatly into the traditional notions of the available defenses to those actions. The South Carolina Supreme Court and the South Carolina General Assembly have modified these traditional limits in an effort to recognize the plight of BSS sufferers. Only time will tell whether the modifications will restore balance.

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85. 287 S.C. 398, 339 S.E.2d 121 (1986).
86. 308 S.C. 74, 417 S.E.2d 88 (1992).
87. S.C. CODE ANN. § 17-23-170(A) (Law. Co-op. Supp. 1995).
88. *Id.*