

**STATE V. CURLEY: MODERNIZING  
BATTERED WOMAN’S SYNDROME  
IN LOUISIANA**

I. INTRODUCTION.....223

II. FACTS AND HOLDING.....225

III. LEGAL BACKGROUND OF THE *CURLEY* DECISION ....229

    A. BATTERED WOMAN’S SYNDROME AS A DEFENSE ..... 229

        1. THE BATTERED WOMAN: AN OVERVIEW .....230

        2. TREATMENT OF BATTERED WOMAN’S SYNDROME  
           IN LOUISIANA: LOUISIANA CODE OF EVIDENCE  
           ARTICLE 404 AND *STATE V. RODRIGUE* .....234

        3. OTHER STATES’ TREATMENT OF BATTERED  
           WOMAN’S SYNDROME.....236

    B. INEFFECTIVE ASSISTANCE OF COUNSEL: *STRICKLAND*  
        *V. WASHINGTON*..... 237

IV. THE COURT’S DECISION .....239

    A. BATTERED WOMAN’S “SYNDROME” IS NOT INDICATIVE  
        OF A “MENTAL DISEASE OR DEFECT” ..... 240

    B. CURLEY RECEIVED INEFFECTIVE ASSISTANCE OF  
        COUNSEL .....242

    C. JUSTICE WEIMER’S DISSSENT .....244

V. ANALYSIS: *CURLEY*’S MIXED CONSEQUENCES ..... 245

    A. THE POSITIVE: BATTERED WOMEN ADVANCE WITH  
        *CURLEY*.....245

    B. THE NEGATIVE: *CURLEY* ADDS TO EXISTING BURDENS  
        ON DEFENSE ATTORNEYS AND COURTS ..... 247

VI. CONCLUSION .....248

**I. INTRODUCTION**

The admissibility of “battered woman’s syndrome” (BWS) evidence and related expert testimony has been the subject of nationwide debate, particularly with respect to insanity defenses.<sup>1</sup> This debate has focused mainly on the word

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1. See generally Mary Ann Dutton, *Understanding Women’s Responses to*

“syndrome,” which seems to suggest that a defendant relying on the defense in any given criminal case is suffering from an actual, discernable mental illness.<sup>2</sup>

The admissibility of such evidence was at the heart of the Louisiana Supreme Court’s opinion in *State v. Curley*.<sup>3</sup> Prior to this decision, Louisiana courts treated the admissibility of BWS evidence in a nonuniform manner, where some courts admitted it absent an insanity plea,<sup>4</sup> while other courts expressly forbade it.<sup>5</sup> In *Curley*, the court held, once and for all, that pursuant to Louisiana Code of Evidence article 404(A), BWS evidence and related expert testimony are permissible in cases in which the defendant pleads insanity<sup>6</sup> or self-defense, not just the former.<sup>7</sup> The defendant in *Curley* was ultimately awarded a new trial at which evidence of past abuse she suffered at the hands of her husband, the murder victim, was allowed to come in.<sup>8</sup> *Curley* is significant because it clarified the important role of BWS evidence in trials of abused women who are accused of committing violent crimes against their abusers.

Part II of this Note details the facts of Curley’s crime and the

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*Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993) (calling for a complete overhaul of BWS to better reflect the realities of abused women); see also Richard J. Bonnie, *Excusing and Punishing in Criminal Adjudication: A Reality Check*, 5 CORNELL J.L. & PUB. POL’Y 1, 7–8 (1995) (cautioning that admission of BWS evidence has the potential to upset the balance between jury as neutral fact-finders and jury as sympathetic listeners).

2. See Bonnie J. Campbell, *Foreword* to U.S. DEP’T OF JUSTICE ET AL., THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT, at ii (1996), <https://www.ncjrs.gov/pdffiles/batter.pdf>; see also Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 WIS. WOMEN’S L.J. 75, 82 (1996).

3. See *State v. Curley*, 2016-1708 (La. 6/27/18); 250 So. 3d 236.

4. See *State v. Rodrigue*, 98-1558 (La. 4/13/99); 734 So. 2d 608.

5. The trial court and the court of appeal involved in this case did *not* admit BWS evidence absent an insanity plea. See *Curley*, 2016-1708, pp. 6, 9; 250 So. 3d at 240, 242 (discussing the lower courts’ holdings that BWS evidence is not admissible absent an insanity plea (NGBRI)).

6. In Louisiana, to plead insanity, a defendant must plead “[n]ot guilty and not guilty by reason of insanity.” See LA. CODE CRIM. PROC. ANN. art. 552 (2019).

7. *Curley*, 2016-1708, p. 15; 250 So. 3d at 246.

8. *Id.* at pp. 21–22; 250 So. 3d at 250. Following her new trial, Curley was found not guilty. Heather Nolan, *Judge Finds Catina Curley, Recently Granted New Trial for Killing Husband in 2005, Not Guilty*, NOLA.COM (Mar. 1, 2019), <https://www.nola.com/crime/2019/03/judge-finds-catina-curley-recently-granted-new-trial-for-killing-husband-in-2005-not-guilty.html>.

inadequate defenses presented at trial. Part III sets forth both the psychological underpinnings and legal background of BWS and its use in Louisiana case law, as well as its treatment in other states. Part III also discusses the elements a defendant must prove to receive post-conviction relief based on ineffective assistance of counsel. Part IV examines the Louisiana Supreme Court's reasoning in admitting BWS evidence in a non-insanity defense context. Additionally, Part IV addresses why the court concluded that Curley's defense counsel failed to provide effective assistance to his client by not presenting any BWS-related evidence. Finally, Part V presents an analysis of both the positive and negative impacts *Curley* may have on the use of BWS evidence in the future.

## II. FACTS AND HOLDING

Catina Curley had been married to Renaldo Curley for almost ten years when she shot and killed him.<sup>9</sup> Curley's husband (hereinafter referred to as the "victim") was an abusive man.<sup>10</sup> At trial, Curley recounted several violent incidents that left her with broken noses, bruises, black eyes, and dislocated shoulders.<sup>11</sup> Several witnesses also testified about the victim's violent behavior toward Curley.<sup>12</sup>

On March 30, 2005 (the date of the incident), Curley and the victim were temporarily living apart "to avoid any violence."<sup>13</sup> At that time, Curley lived with her mother and the victim remained in their home with their five children.<sup>14</sup> Curley called the house to check on the children and learned that a cousin and a female neighbor were visiting, so she decided to return home, ostensibly to retrieve some of her clothes.<sup>15</sup> Once there, she demanded that the two guests leave before she went upstairs to her bedroom to pack.<sup>16</sup> The victim followed her, angry that she had kicked out

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9. *State v. Curley*, 2016-1708, p. 1 (La. 6/27/18); 250 So. 3d 236, 238.

10. *See id.* at p. 3; 250 So. 3d at 239 (describing the years of "physical abuse the victim perpetrated upon [the] defendant").

11. *Id.* at p. 4; 250 So. 3d at 239. Catina also stated that the victim had allegedly attempted to push her out of a moving vehicle. *Id.*

12. *See id.* at pp. 3-4; 250 So. 3d at 239.

13. *State v. Curley*, No. 2008-KA-1157, 2010 WL 8966072, at \*7 (La. App. 4 Cir. May 12, 2010).

14. *Id.*

15. *Id.* at \*8. Curley asserted that she was not angry at the woman's presence, but she found it "disrespectful" that the female neighbor was at her house while Curley was absent. *Id.*

16. *Curley*, 2016-1708, p. 2; 250 So. 3d at 238.

his guests.<sup>17</sup> A physical and verbal altercation followed during which the victim allegedly threw a soda can at Curley and threatened her before he left the bedroom and returned downstairs.<sup>18</sup> Immediately afterward, Curley retrieved the victim's handgun from beneath a mattress and headed back downstairs.<sup>19</sup> She later "testified that she needed the weapon to protect herself."<sup>20</sup> She did not immediately exit the house.<sup>21</sup> The events that followed were disputed at trial.<sup>22</sup> Curley testified that she always kept the gun pointed at the ground.<sup>23</sup> Curley's daughter stated that the victim kept advancing on Curley, despite Curley's pleas for him to back away.<sup>24</sup> Curley's stepson testified that the victim was putting on his shoes to leave the house when Curley came downstairs with the gun, stood in front of the front door, and pointed the gun at the victim.<sup>25</sup> It was undisputed at trial that a shot was fired from the gun and struck the victim, who died shortly thereafter from a bullet wound to the chest.<sup>26</sup>

Curley was subsequently arrested and charged with second-degree murder under § 14:30.1(A)(1) of the Louisiana Revised Statutes.<sup>27</sup> Her original defense attorney submitted pleas of not guilty and not guilty by reason of insanity (NGBRI), but her trial was delayed by Hurricane Katrina.<sup>28</sup> After the storm, Curley was assigned a new attorney, who withdrew her dual pleas in favor of a single plea of not guilty without first consulting Curley.<sup>29</sup> At

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17. *State v. Curley*, 2016-1708, p. 2 (La. 6/27/18); 250 So. 3d 236, 238.

18. *Id.*

19. *Id.* It was disputed at trial whether the gun was already loaded or whether Curley loaded it herself. *See State v. Curley*, No. 2008-KA-1157, 2010 WL 8966072, at \*8 (La. App. 4 Cir. May 12, 2010). She stated that the gun was already loaded; the police, however, found discarded bullets on the bedroom floor when they arrived, which she could not explain. *Id.*

20. *Curley*, 2016-1708, p. 2; 250 So. 3d at 238.

21. Curley acknowledged that she could have left the house "unimpeded," but she did not want to leave her car keys, which she had allegedly left on a table in the living room. *Curley*, 2010 WL 8966072, at \*8.

22. *Curley*, 2016-1708, p. 2; 250 So. 3d at 238.

23. *Curley*, 2010 WL 8966072, at \*8. Her second trial attorney theorized that the gun might have accidentally discharged. *Curley*, 2016-1708, p. 3; 250 So. 3d at 239.

24. *Curley*, 2010 WL 8966072, at \*6.

25. *Id.* at \*4. The stepson, Reynaldo Boykin, also maintained that the victim was not abusive towards Curley or himself. *Id.*

26. *Curley*, 2016-1708, p. 2; 250 So. 3d at 238.

27. *Id.* at p. 3; 250 So. 3d at 238.

28. *Id.*

29. *Id.* at pp. 3, 6; 250 So. 3d at 238, 240.

trial, Curley was found guilty and sentenced to life imprisonment.<sup>30</sup>

Curley later filed a pro se application for post-conviction relief, arguing that she had received ineffective assistance of counsel.<sup>31</sup> Specifically, she alleged that her attorney's decision to "withdraw[] the NGBRI plea without first having [her] psychologically evaluated," and his failure "to educate the jury on the effects of domestic violence, particularly BWS," had deprived her of her Sixth Amendment right to effective assistance of counsel.<sup>32</sup>

At Curley's post-conviction hearing, her trial attorney testified about the decisions he made during the trial.<sup>33</sup> He confirmed that he did not seek Curley's input or consent before withdrawing her original pleas and entering the single plea of not guilty.<sup>34</sup> The attorney testified that, at that time, he thought that an NGBRI plea was "suggestive" of a defendant who was a "paranoid schizophrenic or whatever," and that it was not an appropriate defense for an abused woman.<sup>35</sup> He further admitted that he was unaware of certain evidentiary prohibitions in the absence of an NGBRI plea<sup>36</sup> and "thought that the NGBRI plea was 'inappropriate for a self-defense defense.'"<sup>37</sup> He "confessed to 'ignorance'" of important aspects of BWS evidence.<sup>38</sup> Specifically, the attorney was unaware of how an expert in BWS could not only testify about the effects of BWS on abused women before the jury but also how such an expert could guide his own defense preparations.<sup>39</sup>

At the post-conviction hearing, the trial judge ultimately found in favor of Curley and granted a new trial, finding that her Sixth Amendment right to effective assistance of counsel had been violated.<sup>40</sup> On appeal, however, this decision was reversed,

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30. *State v. Curley*, 2016-1708, p. 5 (La. 6/27/18); 250 So. 3d 236, 240.

31. *Id.*

32. *Id.*

33. *See id.* at p. 6; 250 So. 3d at 240.

34. *Id.*

35. *Curley*, 2016-1708, p. 6; 250 So. 3d at 240 (internal quotation marks omitted).

36. *See* LA. CODE CRIM. PROC. ANN. art. 651 (2019) ("When a defendant is tried upon a plea of 'not guilty', evidence of insanity or mental defect at the time of the offense shall not be admissible.").

37. *Curley*, 2016-1708, p. 6; 250 So. 3d at 240.

38. *Id.*

39. *See id.*

40. *Id.*

and Curley's conviction was reinstated.<sup>41</sup> The court of appeal found that the attorney's decisions were "strategic" and that those decisions had not "prejudice[d]"<sup>42</sup> or materially affected the outcome of her trial and subsequent murder conviction.<sup>43</sup>

Curley subsequently appealed, and the Louisiana Supreme Court granted her writ application.<sup>44</sup> The issues on appeal were: (1) whether BWS evidence and related expert testimony were admissible in a criminal case in which the defendant had *not* pleaded insanity;<sup>45</sup> and (2) whether Curley had received ineffective assistance of counsel based on her previous attorney's decisions not to factor BWS evidence and testimony into his trial defense strategy.<sup>46</sup> Neither side presented a clear argument as to the first issue, and the court instead addressed it *sua sponte*.<sup>47</sup> The court explained that while the trial court had correctly awarded Curley a new trial, both it and the court of appeal had failed to properly conclude that BWS evidence was perfectly admissible without an NGBRI plea.<sup>48</sup>

As to the second issue, Curley argued that she was denied effective assistance of trial counsel because her attorney had both withdrawn her NGBRI plea without first consulting a BWS expert and "failed to consider the applicability" of BWS evidence to Curley's defense strategy.<sup>49</sup> Curley maintained that these mistakes were unreasonable and that she was entitled to a new trial because both mistakes had prejudiced the ultimate outcome of her trial.<sup>50</sup> In response, the State argued that defense counsel's

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41. State v. Curley, 2016-1708, p. 6 (La. 6/27/18); 250 So. 3d 236, 241.

42. *Id.*

43. *See id.* at pp. 7–8; 250 So. 3d at 241 (discussing the requirements for proving ineffective assistance of counsel); *see also* Strickland v. Washington, 466 U.S. 668, 694 (1984) (defining "prejudice," one of the requirements for demonstrating ineffective assistance of counsel, as the "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

44. *Curley*, 2016-1708, p. 7; 250 So. 3d at 241.

45. *See id.* at p. 15; 250 So. 3d at 246.

46. *Id.* at p. 1; 250 So. 3d at 237.

47. *See id.* at p. 15; 250 So. 3d at 246.

48. *See id.* ("It is not clear why the trial court and the court of appeal in this case myopically focused on trial counsel's withdrawal of the NGBRI plea and failed to review the ineffectiveness claim in the context of self-defense [and] the domestic battery exceptions of the Code of Evidence . . .").

49. Brief in Support of Writ Application Filed on Behalf of Defendant-Applicant, Catina Curley at 6, State v. Curley, 250 So. 3d 236 (La. 2018) (No. 2016-1708), 2018 WL 2246088, at \*6.

50. *Id.* at 11–12.

decisions to withdraw the NGBRI plea and not to use any BWS expert testimony were “strategic.”<sup>51</sup> The State further argued that there was “no reasonable probability [Curley] would have been acquitted or found guilty of a lesser charge had [her defense counsel] called an expert” or presented general BWS evidence to the jury.<sup>52</sup> As such, the State contended that Curley had failed to carry the burden of her ineffective assistance of counsel claim.<sup>53</sup>

The Louisiana Supreme Court held that BWS evidence was admissible in non-insanity defense cases<sup>54</sup> and that Curley’s defense attorney provided ineffective assistance of counsel when he failed to include such evidence in his client’s defense.<sup>55</sup>

### III. LEGAL BACKGROUND OF THE *CURLEY* DECISION

The extent to which BWS evidence can be used in a criminal defense has long been underestimated by defense attorneys.<sup>56</sup> It is not surprising that BWS was the basis for an ineffective assistance of counsel claim in *Curley*. The following sections provide a general overview of BWS, its role in criminal defenses, and the United States Supreme Court’s decision in *Strickland v. Washington*, which defined the elements necessary to maintain a successful claim for ineffective assistance of counsel.<sup>57</sup>

#### A. BATTERED WOMAN’S SYNDROME AS A DEFENSE

Domestic violence is a prevalent problem among “intimate partners” in the United States.<sup>58</sup> The Office on Women’s Health, an agency of the United States Department of Health and Human Services, defines an intimate partner as “a person with whom [a victim of BWS has] or had a close personal or sexual

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51. Original Brief of the State of Louisiana, Respondent at 9, *State v. Curley*, 250 So. 3d 236 (La. 2018) (No. 2016-1708), 2018 WL 2246088, at \*9.

52. *Id.* at 13.

53. *Id.* at 14.

54. *State v. Curley*, 2016-1708, p. 15 (La. 6/27/18); 250 So. 3d 236, 246.

55. *Id.* at p. 1; 250 So. 3d at 237–38.

56. See Dutton, *supra* note 1, at 1196 (discussing the difficulty “in attorneys’ efforts to effectively present and challenge [BWS] testimony”).

57. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

58. See SHARON G. SMITH ET AL., CTR. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2015 DATA BRIEF – UPDATED RELEASE 7 (2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf> (“About 1 in 4 women and 1 in 10 men experienced contact sexual violence, physical violence, and/or stalking by an intimate partner . . . during their lifetime.”).

relationship.”<sup>59</sup> According to a national survey conducted by the Center for Disease Control and Prevention (CDC), approximately 30.6% of women and 31% of men have experienced some form of physical violence from intimate partners in their lifetime.<sup>60</sup> These figures are even worse in Louisiana, particularly for women, who “are at an increased risk of domestic violence.”<sup>61</sup> According to a 2015 study conducted by the Violence Policy Center, “53 females were murdered by males in Louisiana in 2015.”<sup>62</sup> Of those, 60% were murdered by their intimate partners.<sup>63</sup>

The psychological effects produced by domestic violence against women have been explained—with varying degrees of success—by the advent of BWS.<sup>64</sup> This “syndrome,” as it has been called, “can elicit hostage-like levels of fear, isolation, entrapment, and retaliatory violence” in abused women.<sup>65</sup> But what is a “battered woman”? The following sections of this Note discuss the characteristics of the battered woman archetype, criticisms of BWS, and how criminal defense in Louisiana and elsewhere engages with BWS.

## 1. THE BATTERED WOMAN: AN OVERVIEW

One psychologist has defined a “battered woman” as one “who is repeatedly subjected to any forceful physical or

59. *Domestic or Intimate Partner Violence*, OFF. ON WOMEN’S HEALTH, <https://www.womenshealth.gov/relationships-and-safety/domestic-violence> (last visited Apr. 3, 2019).

60. SMITH ET AL., *supra* note 58, at 8–9.

61. ARKADI GERNEY ET AL., CTR. FOR AM. PROGRESS, AMERICA UNDER THE GUN: A 50-STATE ANALYSIS OF GUN VIOLENCE AND ITS LINK TO WEAK STATE GUN LAWS (2013), <https://www.americanprogress.org/wp-content/uploads/2013/04/AmericaUnderTheGun-3.pdf>.

62. VIOLENCE POL’Y CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2015 HOMICIDE DATA 13 (2017), <http://www.vpc.org/studies/wmmw2017.pdf>.

63. *Id.*

64. See Lenore E. A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 334 (1992) (“Since the introduction of what is often called the ‘battered woman self-defense’ defense . . . many more women are receiving a fair trial.”); see also Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 999 (1995) (describing the many ways in which BWS “offers enormous insight into the battering experience” for courts). *But see* Bonnie, *supra* note 1, at 8 (“[T]he risk of admitting [BWS] evidence is that the jury’s sympathy for the defendant and distaste for the victim will erode the objective standard, or will provoke outright nullification of the governing law.”).

65. Stark, *supra* note 64, at 975.

psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights.”<sup>66</sup> The battered woman’s relationship with her abuser has been described as a cyclical one in which the woman is repeatedly “beaten and then blamed [by society] for not ending [her] beatings.”<sup>67</sup> Psychologists have attempted to refute the common mistaken belief that these women do not leave their abusive relationships because they are “masochistic”<sup>68</sup> and enjoy being mistreated.<sup>69</sup> Rather, these women are trapped by their “debilitating” sense of “helplessness,” which has been reinforced by repeated, abusive interactions with their batterer.<sup>70</sup>

The idea of a woman’s passivity in the face of violence has been explained through the theory of “learned helplessness.”<sup>71</sup> Despite a battered woman’s repeated attempts to prevent or even mitigate the extent of her abuse, she comes to understand that her batterer’s violent tendencies will continue, no matter what she does.<sup>72</sup> Ultimately, the battered woman is unable to leave the relationship because she is stuck in a violent “battering cycle,” which is comprised of a “tension-building phase,” followed by an “explosion,” and finally, a “calm, loving respite.”<sup>73</sup> To manage this cycle of abuse, “women concentrate . . . on [their] survival and employ denial, numbing, or in extreme cases, proactive violence.”<sup>74</sup> BWS evidence and related expert testimony are used to explain the use of this “proactive violence”<sup>75</sup>—that is, why a battered woman “saw no other way out of her predicament” than to become the batterer herself and gravely harm or kill her abuser.<sup>76</sup>

BWS alone is not an affirmative defense to criminal charges.<sup>77</sup> Instead, expert testimony about an abused woman’s

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66. LENORE E. WALKER, *THE BATTERED WOMAN*, at xv (1979).

67. *Id.* at 15.

68. *See id.* at 20.

69. *Id.* at 43.

70. *See id.* at 48.

71. WALKER, *supra* note 66, at 43.

72. *Id.* at 47.

73. *Id.* at 55.

74. Stark, *supra* note 64, at 998; *see also* *People v. Emick*, 481 N.Y.S.2d 552, 559 (App. Div. 1984) (“[The battered woman] lives her life from one beating to the next and her thoughts relate solely to her efforts to avoid the next beating.”).

75. Stark, *supra* note 64, at 998.

76. Bonnie, *supra* note 1, at 7.

77. Campbell, *supra* note 2, at ii.

state of mind and evidence of her past abusive experiences can be used to support her claims of “self-defense, duress, and insanity.”<sup>78</sup> Such testimony has been used in criminal trials “since the late 1970s.”<sup>79</sup> Experts can “testify about battering and its effects to help jurors and judges understand the experiences, beliefs, and perceptions of women who are beaten by their intimate partners—information that the common lay person usually does not possess.”<sup>80</sup>

However, invoking an abused woman’s BWS as the cause of her violent actions does not always lead to acquittal or even mitigation of her sentence.<sup>81</sup> Indeed, BWS has received a fair amount of criticism. It has been called both an “imprecise” and “misleading” term.<sup>82</sup> It has also been mistaken as an affirmative defense to a violent crime.<sup>83</sup> Additionally, the use of the word *syndrome* worries some, as it may “carr[y] implications of a malady or psychological impairment” that otherwise may not be diagnosed as such in a professional medical setting.<sup>84</sup> Some have also decried its use in criminal trials, calling it an “abuse excuse”<sup>85</sup> and arguing that it gives an abused woman a “license to kill” without regard to the rule of law.<sup>86</sup>

In response to these criticisms, legal scholars have called for an overhaul of the term and its meaning.<sup>87</sup> Some have suggested that a battered woman’s response to her abuse is more than just her “psychological reaction” and that the term BWS is simply too

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78. U.S. DEP’T OF JUSTICE ET AL., THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT 20 (1996), <https://www.ncjrs.gov/pdffiles/batter.pdf>.

79. *Id.* at 21.

80. Parrish, *supra* note 2, at 80.

81. *Id.* at 86 (“This is strong evidence that the defense’s use of or the court’s awareness of expert testimony on battering and its effects in no way equates to an acquittal on the criminal charges lodged against a battered woman defendant.”).

82. U.S. DEP’T OF JUSTICE ET AL., *supra* note 78, at 7 (referring to the term BWS as “imprecise” and “misleading”).

83. Parrish, *supra* note 2, at 78 (“There is no such thing as a ‘battered women’s defense.’”).

84. Campbell, *supra* note 2, at ii.

85. Bonnie, *supra* note 1, at 2.

86. *Id.* But see Parrish, *supra* note 2, at 79 (“Supporting the introduction of [BWS] expert testimony does not promote vigilantism; it promotes fair trials.”).

87. See, e.g., Campbell, *supra* note 2, at i–ii (“the term ‘battered woman syndrome’ does not adequately reflect the breadth or nature of the scientific knowledge now available concerning battering and its effects”).

narrow.<sup>88</sup> Scholars have also suggested that other pertinent “factors” to consider at trial—aside from the woman’s psychological reaction—might include “her prior responses to violence, the outcome of those responses, and the context within which those responses were made.”<sup>89</sup> Another argument advanced in favor of reforming BWS terminology is that no two battered women are perfectly alike.<sup>90</sup> In its current state, BWS is ill-equipped to “accurately reflect[] the diverse realities of battered women’s experiences.”<sup>91</sup>

Despite these criticisms, BWS evidence and related expert testimony have performed an important function in the defense of battered women accused of violent crimes.<sup>92</sup> During the last few decades, courts and state lawmakers have begun to adopt more favorable views regarding the admissibility of BWS evidence in criminal trials.<sup>93</sup> Nevertheless, women still find it difficult to present this evidence at trial, often because their defense attorneys fail to comprehend how such evidence could benefit their clients’ defense strategies.<sup>94</sup>

Under Louisiana law, the question of whether to admit evidence of a victim’s abuse of the defendant begins with examining the “domestic violence exceptions” to article 404 of the Louisiana Code of Evidence.<sup>95</sup> These exceptions dictate when evidence of the victim’s violent nature is admissible at trial as

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88. Dutton, *supra* note 1, at 1195–96.

89. *See* Dutton, *supra* note 1, at 1196.

90. *Id.* (“The psychological realities of battered women do not fit a singular profile—in fact, they vary considerably from each other.”).

91. *See id.* at 1197; *see also* U.S. DEP’T OF JUSTICE ET AL., *supra* note 78, at viii (“[BWS] implies that a single effect or set of effects characterizes the responses of all battered women . . .”).

92. *See* U.S. DEP’T OF JUSTICE ET AL., *supra* note 78, at 19–20 (“evidence and testimony on battering and its effects serves an important function in assisting the factfinder to consider the context of a battered woman’s actions”).

93. *See* Parrish, *supra* note 2, at 80.

94. *See id.* Some have even speculated that a battered woman’s attorney is the first person to undermine or discredit the woman’s value as a “witness” to her own abuse. *See* Stark, *supra* note 64, at 1011 (“Ironically, the disqualification of battered women as credible courtroom witnesses to their experience often begins in the client’s encounter with her attorney.”).

95. *See* LA. CODE EVID. ANN. art. 404 (2019); *see also* *State v. Rodrigue*, 98-1558, pp. 4–5 (La. 4/13/99); 734 So. 2d 608, 610–11 (discussing the applicability of the domestic violence exceptions to LA. CODE EVID. ANN. art. 404 (2018)); *State v. Curley*, 2016-1708, p. 10 (La. 6/27/18); 250 So. 3d 236, 243 (referring to the exceptions instead as the “domestic battery exceptions”).

part of the defendant's trial strategy,<sup>96</sup> they were at issue in *State v. Rodrigue*,<sup>97</sup> a case cited several times by the Louisiana Supreme Court in *Curley*.

## 2. TREATMENT OF BATTERED WOMAN'S SYNDROME IN LOUISIANA: LOUISIANA CODE OF EVIDENCE ARTICLE 404 AND *STATE V. RODRIGUE*

Louisiana law permits character evidence of a victim's violent tendencies against the criminal defendant—here, BWS evidence—under limited circumstances, which are explicitly laid out in article 404.<sup>98</sup> Pursuant to this article:

Evidence of a [victim's] character or a trait of his character . . . is not admissible in a civil or criminal proceeding for the purpose of proving that he acted in conformity therewith on a particular occasion, except: . . . [1] when the accused pleads self-defense[,] and [2] there is a history of assaultive behavior between the victim and the accused[,] and [3] the accused lived in a familial or intimate relationship such as, but not limited to, the husband-wife, parent-child, or concubinage relationship . . . .<sup>99</sup>

Under this exception, the defendant may also present “an expert's opinion as to the effects of the prior assaultive acts on the accused's state of mind.”<sup>100</sup> Similarly, under article 404(B), the accused may also present evidence of the victim's “other crimes, wrongs, or acts”<sup>101</sup> against the defendant, as long as the same criteria discussed above are met.<sup>102</sup> Despite article 404's somewhat overt language, there still exists some confusion about its application, particularly with regards to how one can procedurally plead self-defense in a criminal trial.<sup>103</sup> *Rodrigue* addressed this issue and informed much of the court's decision in *Curley*, specifically as to the admissibility of BWS evidence and related expert testimony.<sup>104</sup>

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96. See LA. CODE EVID. ANN. art. 404 (2019).

97. See *Rodrigue*, 98-1558; 734 So. 2d 608.

98. See LA. CODE EVID. ANN. art. 404 (2019).

99. LA. CODE EVID. ANN. art. 404(A)(2) (2019).

100. *Id.*

101. LA. CODE EVID. ANN. art. 404(B) (2019).

102. See LA. CODE EVID. ANN. art. 404(B)(2) (2019).

103. LA. CODE EVID. ANN. art. 404(A)(2) (2019).

104. See *State v. Curley*, 2016-1708, pp. 14–15 (La. 6/27/18); 250 So. 3d 236, 245–46.

In *Rodrigue*, the defendant, a woman, and the victim, her ex-boyfriend, got into an argument outside of the victim's home.<sup>105</sup> During this altercation, the victim "forcibly dragged" Rodrigue into the house, where he kept her captive for "several hours" and beat and raped her.<sup>106</sup> Rodrigue managed to arm herself with a knife, stab the victim in the chest, and escape.<sup>107</sup> At trial, the issue was whether Rodrigue could "present evidence of the victim's violent character"<sup>108</sup> under the domestic violence exceptions, despite the fact that she and the victim were no longer in an "intimate relationship" at the time of the victim's death.<sup>109</sup> The court held that it was not necessary for Rodrigue and the victim to have been in a relationship at the time of the act and that the exception applied.<sup>110</sup>

*Rodrigue* was important to the *Curley* decision in two ways. First, *Rodrigue* clarified exactly how a defendant can plead self-defense, one of the three elements required to qualify for either of the two domestic battery exceptions.<sup>111</sup> This confusion stemmed from the fact that article 552 of the Louisiana Code of Criminal Procedure only allows for "four kinds of pleas" in criminal proceedings, none of which are self-defense.<sup>112</sup> To resolve this difficulty, the *Rodrigue* court found that the exceptions would apply as long as the defendant "rel[ie]d . . . on self-defense as a defense to the prosecution."<sup>113</sup> Second, *Rodrigue* presented a specific case in which the court permitted BWS evidence in a non-insanity defense case, as the defendant had pleaded not guilty<sup>114</sup> and was arguing a justification defense.<sup>115</sup> In this way, *Rodrigue's* fact pattern mirrored that in *Curley*.

105. See *State v. Rodrigue*, 98-1558, p. 2 (La. 4/13/99); 734 So. 2d 608, 609.

106. See *State v. Rodrigue*, 98-1558, p. 2 (La. 4/13/99); 734 So. 2d 608, 609.

107. *Id.* at pp. 1–2; 734 So. 2d at 609.

108. *Id.* at p. 2; 734 So. 2d at 610.

109. *Id.* at p. 3; 734 So. 2d at 610.

110. See *id.* at pp. 7–8; 734 So. 2d at 612.

111. LA. CODE EVID. ANN. art. 404(A)(2), (B)(2) (2019); see also *Rodrigue*, 98-1558, pp. 5–6; 734 So. 2d at 611.

112. LA. CODE CRIM. PROC. ANN. art. 552 (2019) ("There are four kinds of pleas to the indictment at the arraignment: (1) Guilty; (2) Not guilty; (3) Not guilty and not guilty by reason of insanity; or (4) Nolo contendere . . .").

113. *Rodrigue*, 98-1558, p. 6; 734 So. 2d at 611.

114. See generally *Rodrigue*, 98-1558; 734 So. 2d 608; see also *State v. Rodrigue*, 97-1517, p. 2 (La. App. 1 Cir. 5/15/98); 714 So. 2d 203, 205.

115. *Rodrigue*, 98-1558, p. 2; 734 So. 2d at 609; see also LA. STAT. ANN. § 14:20(A) (2019) ("A homicide is justifiable . . . (1) When committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger.").

### 3. OTHER STATES' TREATMENT OF BATTERED WOMAN'S SYNDROME

Other states have statutes comparable to article 404(A) and the domestic violence exceptions. Massachusetts, for example, permits:

- (a) evidence that the defendant is or has been the victim of acts of physical, sexual, or psychological harm or abuse; [and]
- (b) expert testimony regarding the common pattern in abusive relationships; the nature and effects of physical, sexual or psychological abuse and typical responses thereto . . . ; the relevant facts and circumstances which form the basis for such opinion; and evidence [of] whether the defendant displayed characteristics common to victims of abuse.<sup>116</sup>

This Massachusetts statute does not require that the defendant first affirmatively prove her status as a battered woman before she is able to present such evidence and testimony,<sup>117</sup> nor does it require that she plead insanity.<sup>118</sup> “Instead, the statute merely requires that the defendant assert certain specified defenses”<sup>119</sup>—such as self-defense, defense of another, duress, or accidental harm<sup>120</sup>—before she can present BWS evidence and related expert testimony.<sup>121</sup>

Wyoming similarly requires that the defendant merely plead self-defense before she can “introduce expert testimony that [she] suffered from [battered woman’s] syndrome” as part of her defense.<sup>122</sup> Like other states that have adopted specific statutes to address domestic violence crimes, the Wyoming statute “does not create a separate defense” specifically for battered women.<sup>123</sup> Rather, it simply “permits the introduction of expert testimony on

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116. MASS. GEN. LAWS ANN. ch. 233, § 23F (West, Westlaw through ch. 9 of the 2019 First Ann. Sess.).

117. See *Commonwealth v. Asenjo*, 82 N.E.3d 966, 973 (Mass. 2017) (“Nothing in § 23F requires that a defendant proffer evidence of abuse in order to present expert witness testimony, where certain specified defenses are asserted.”).

118. See MASS. GEN. LAWS ANN. ch. 233, § 23F (West, Westlaw through ch. 9 of the 2019 First Ann. Sess.).

119. *Asenjo*, 82 N.E.3d at 974.

120. MASS. GEN. LAWS ANN. ch. 233, § 23F (West, Westlaw through ch. 9 of the 2019 First Ann. Sess.).

121. *Asenjo*, 82 N.E.3d at 974.

122. WYO. STAT. ANN. § 6-1-203(b) (West, Westlaw through 2019 Gen. Sess.).

123. *Witt v. State*, 892 P.2d 132, 143 (Wyo. 1995).

the battered woman[’s] syndrome when the affirmative defense of self-defense is raised,”<sup>124</sup> with no requirement that the defendant plead insanity before she can invoke the statute.<sup>125</sup>

Some state statutes expressly permit the admission of BWS evidence under either an insanity or self-defense defense; Indiana is one such example.<sup>126</sup> Indiana courts have recognized that BWS evidence can be “use[d] to explain the impact of past violence by the victim upon the defendant’s behavior at the time of the crime,” as long as she relies on “the defenses of insanity or self-defense.”<sup>127</sup> In this way, Indiana has essentially accepted BWS as an “affirmative defense” to criminal prosecution.<sup>128</sup>

#### B. INEFFECTIVE ASSISTANCE OF COUNSEL: *STRICKLAND V. WASHINGTON*

A claim for ineffective assistance of counsel is examined under the two-pronged test enumerated by the United States Supreme Court in *Strickland v. Washington*.<sup>129</sup> In order to bring a successful *Strickland* claim, the defendant must prove: (1) “that counsel’s performance was *deficient*,” and (2) “that the deficient performance *prejudiced* the defense.”<sup>130</sup> This two-pronged test was adopted by the Louisiana Supreme Court in *State v. Washington*.<sup>131</sup>

As to the first criterion, defense attorneys in criminal matters are expected to provide “reasonably effective assistance”

124. Witt v. State, 892 P.2d 132, 143 (Wyo. 1995).

125. See WYO. STAT. ANN. § 6-1-203(b) (West, Westlaw through 2019 Gen. Sess.).

126. See IND. CODE ANN. § 35-41-3-11(b) (West, Westlaw through 2019 First Reg. Sess.). This Indiana state statute provides:

This section applies under the following circumstances when the defendant in a prosecution raises the issue that the defendant was at the time of the alleged crime suffering from the effects of battery as a result of the past course of conduct of the individual who is the victim of the alleged crime: (1) The defendant raises the issue that the defendant was not responsible as a result of mental disease or defect . . . rendering the defendant unable to appreciate the wrongfulness of the conduct at the time of the crime[, or] (2) The defendant claims to have used justifiable reasonable force . . . .

*Id.*

127. Green v. State, 65 N.E.3d 620, 632 (Ind. Ct. App. 2016). The Indiana Supreme Court has criticized the statute’s wording as being too vague because “[i]t does not explicitly limit the use of battered women’s syndrome evidence to the self-defense and insanity theories.” Marley v. State, 747 N.E.2d 1123, 1127 (Ind. 2001).

128. Green, 65 N.E.3d at 632.

129. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

130. *Id.* (emphasis added).

131. *State v. Washington*, 491 So. 2d 1337, 1338 (La. 1986); see also *State v. Curley*, 2016-1708, p. 7 (La. 6/27/18); 250 So. 3d 236, 241.

to their clients.<sup>132</sup> An attorney must “make reasonable investigation” into a client’s defense strategy.<sup>133</sup> Anything less may be a violation of the defendant’s right to effective assistance of counsel, guaranteed in the Sixth Amendment to the United States Constitution.<sup>134</sup> The reasonableness of a defense attorney’s actions must be construed in favor of the attorney, and “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance”<sup>135</sup> and that the attorney’s actions constituted “sound trial strategy.”<sup>136</sup> Additionally, the deficiency inquiry has both an objective and subjective component.<sup>137</sup> As to the former, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.”<sup>138</sup> For the latter, a court must examine the challenged attorney’s conduct in light of the facts, “viewed as of the time of counsel’s conduct.”<sup>139</sup>

As to the second prong of prejudice, a defense attorney’s unreasonable decisions and insufficient efforts to conduct a client’s defense will not matter unless they had a material effect on the outcome of the case.<sup>140</sup> To carry this burden of proof, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>141</sup> A reasonable probability is one “sufficient to undermine confidence in the outcome.”<sup>142</sup> When considering this criterion, courts must examine “the totality of the evidence [that was] before the judge or jury” to determine whether prejudice exists.<sup>143</sup>

With respect to this second prong of prejudice, some case law outside of Louisiana has indicated that “[a] defendant cannot meet her burden of proof under *Strickland* simply by alleging

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132. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

133. *Id.*

134. U.S. CONST. amend. VI; *see also Strickland*, 466 U.S. at 685 (“An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”).

135. *Strickland*, 466 U.S. at 689.

136. *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

137. *See id.* at 688, 690.

138. *Id.* at 688.

139. *Id.* at 690.

140. *Strickland*, 466 U.S. at 691.

141. *Id.* at 694.

142. *Id.*

143. *Id.* at 695.

that her counsel *might* have been able to call an unidentified expert.”<sup>144</sup> Instead, a defendant must state with specificity the name of the expert witness and the subject of the expert’s testimony.<sup>145</sup> The defendant must also “demonstrate that the witness was available to testify and would have done so” and “that the testimony would have been favorable to a particular defense.”<sup>146</sup> Without this confirmation that a named expert would have been both available and helpful to the defense, this non-Louisiana case law indicates that a prejudice claim under *Strickland* would fail.<sup>147</sup>

*Strickland* was important to the *Curley* decision because its two-pronged test formed the basis of Curley’s claim. In her brief, Curley argued that her defense attorney’s failure to consider utilizing BWS evidence and related expert testimony in her trial defense and his decision to withdraw the NGBRI plea were unreasonable, unfairly prejudicing the outcome of Curley’s trial and resulting in her guilty verdict.<sup>148</sup> The court addressed this claim and concluded that Curley’s defense attorney had failed to make the necessary “reasonable investigation” into how BWS evidence and related expert testimony could have benefited Curley’s defense.<sup>149</sup>

#### IV. THE COURT’S DECISION

The Louisiana Supreme Court held that (1) BWS evidence

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144. Original Brief of the State of Louisiana, Respondent, *supra* note 51, at 10. The Louisiana Supreme Court apparently declined to adopt this requirement, as it did not directly address it in *Curley*. See *State v. Curley*, 2016-1708, p. 18 (La. 6/27/18); 250 So. 3d 236, 248 (“[W]e otherwise decline to set rigid foundational requirements [for expert testimony], instead leaving those to the sound discretion of the trial court on a case-by-case basis.”).

145. Original Brief of the State of Louisiana, Respondent, *supra* note 51, at 10 (citing *United States v. Fields*, 761 F.3d 443, 461 (5th Cir. 2014)).

146. *Id.*

147. See, e.g., *Muhammad v. Warden of Sussex I State Prison*, 646 S.E.2d 182, 194 (Va. 2007) (holding that defendant had not carried his burden of proof for his *Strickland* claim because he had “failed to proffer the names of any experts he contend[ed] counsel should have consulted and fail[ed] to proffer any expert affidavits to demonstrate what information these experts could have provided at trial”).

148. See Brief in Support of Writ Application Filed on Behalf of Defendant-Applicant, Catina Curley, *supra* note 49, at 11 (stating that the outcome of Curley’s trial could have been different “had trial counsel maintained her NGBRI plea, conducted meaningful inquiry into her mental state, and presented the necessary expert evidence”).

149. *Curley*, 2016-1708, p. 18; 250 So. 3d at 248.

and related expert testimony are admissible in criminal cases in which the defendant has not pleaded NGBRI,<sup>150</sup> and (2) a defense attorney's failure to present such evidence on behalf of a battered client constitutes ineffective assistance of counsel.<sup>151</sup> Section A describes the court's reasoning in regard to the admissibility of BWS evidence in non-insanity defense cases. Section B discusses the court's conclusion that Curley's defense attorney failed to make a reasonable investigation into his client's defense and how that failure prejudiced the outcome of Curley's case. Finally, Section C examines Justice Weimer's dissent.

**A. BATTERED WOMAN'S "SYNDROME" IS NOT INDICATIVE OF A  
"MENTAL DISEASE OR DEFECT"<sup>152</sup>**

Although Curley's NGBRI plea was withdrawn before trial,<sup>153</sup> the Louisiana Supreme Court held that evidence of the "syndrome" from which she suffered after years of domestic abuse was admissible under the domestic violence exceptions to article 404 of the Louisiana Code of Evidence.<sup>154</sup> This decision may have been due in part to changing perceptions about BWS.<sup>155</sup> Many no longer consider it a diagnosable "psychological condition."<sup>156</sup> In the *Curley* opinion, the court seemed to agree with this sentiment, as it referred to the term as "inartful" and "outdated."<sup>157</sup>

Despite its criticism of BWS, the court did not discount the use of BWS evidence and related expert testimony to support the defenses of abused women in criminal cases. The court recognized that a BWS expert could "testify about battering and its effects to help jurors and judges understand the experiences, beliefs, and perceptions of women who are beaten by their intimate partners—information that the common lay person usually does not possess."<sup>158</sup>

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150. *State v. Curley*, 2016-1708, p. 15 (La. 6/27/18); 250 So. 3d 236, 246.

151. *Id.* at p. 1; 250 So. 3d at 237–38.

152. *Id.* at p. 14; 250 So. 3d at 245.

153. *Id.* at p. 3; 250 So. 3d at 238; *see also* LA. CODE CRIM. PROC. ANN. art. 651 (2019).

154. *See Curley*, 2016-1708, p. 15; 250 So. 3d at 246.

155. *See* U.S. DEP'T OF JUSTICE ET AL., *supra* note 78, at 19 (BWS "is an inadequate term to represent the scientific and clinical knowledge concerning battering and its effects.").

156. *See id.*

157. *Curley*, 2016-1708, p. 12; 250 So. 3d at 244.

158. *Id.* at p. 16; 250 So. 3d at 247 (quoting NAT'L ASS'N OF WOMEN JUDGES, MOVING BEYOND BATTERED WOMEN'S SYNDROME: A GUIDE TO THE USE OF EXPERT

The court admonished both the trial court and the court of appeal for “myopically focus[ing] on trial counsel’s withdrawal of the NGBRI plea” as the reason that BWS evidence and related expert testimony were not admissible in Curley’s case.<sup>159</sup> Although the trial court came to the correct conclusion that Curley was entitled to a new trial because of her defense attorney’s ineffective assistance, the Louisiana Supreme Court found the trial court’s line of reasoning to be incorrect.<sup>160</sup> Both the trial court and the court of appeal “effectively presuppos[ed] that BWS is only relevant in the ‘insanity context,’” which the Louisiana Supreme Court stated was an “error.”<sup>161</sup>

To refute this mistaken assumption, the court examined article 404.<sup>162</sup> The court noted that the domestic violence exceptions to article 404 apply only “when the accused pleads self-defense.”<sup>163</sup> Self-defense, of course, is not an acceptable formal plea to a criminal charge.<sup>164</sup> The court reconciled this irregularity in the article’s language by referring to its decision in *State v. Rodrigue*, in which the court held that a defendant must simply “rel[y] on ‘self-defense as a defense to the prosecution’” in order to use one of the exceptions.<sup>165</sup> Because the domestic violence exceptions apply only when the defendant pleads self-defense as a justification for her actions, article 404 “therefore contemplate[s] . . . the introduction of domestic battery evidence in a self-defense context” without requiring an NGBRI plea by the defendant.<sup>166</sup> Following this logic, the court concluded that BWS evidence—evidence of domestic violence—is permissible under the exceptions.<sup>167</sup>

Based on *Rodrigue*, the Louisiana Supreme Court found that

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TESTIMONY ON BATTERING AND ITS EFFECTS, at iv (1995)).

159. *State v. Curley*, 2016-1708, p. 15 (La. 6/27/18); 250 So. 3d 236, 246.

160. *Id.* at p. 6; 250 So. 3d at 240 (“The trial judge . . . reason[ed] that BWS evidence [was] only admissible to refute specific intent only when raised under a[n] NGBRI plea.”). The court of appeal came to a similarly convoluted conclusion when it found “that Louisiana has not historically considered psychological evidence absent an insanity defense.” *Id.* at p. 9; 250 So. 3d at 242.

161. *Curley*, 2016-1708, p. 9; 250 So. 3d at 242.

162. *See id.* at p. 10; 250 So. 3d at 242.

163. *Id.* at p. 11; 250 So. 3d at 243 (quoting LA. CODE EVID. ANN. art. 404(A)(2), (B)(2) (2018)).

164. *See* LA. CODE CRIM. PROC. ANN. art. 552 (2019).

165. *Curley*, 2016-1708, p. 12; 250 So. 3d at 244 (quoting *State v. Rodrigue*, 98-1558, p. 6 (La. 4/13/99); 734 So. 2d 608, 611).

166. *Id.*

167. *See id.*

it had never “solely consider[ed] BWS to be a ‘mental disease or defect.’”<sup>168</sup> Because BWS evidence is not strictly limited to cases in which a defendant has pleaded NGBRI, the court found that Curley should not have been precluded from presenting evidence of the victim’s abuse under her plea of not guilty.<sup>169</sup> To prevent any future confusion, the court “expressly [held] that BWS evidence is admissible in a justification/self-defense case, and not solely in the insanity [defense] context.”<sup>170</sup> With that established, the court turned to Curley’s ineffective assistance of counsel claim to determine whether her defense attorney’s failure to present BWS evidence at trial had affected Curley’s trial and subsequent conviction.

### B. CURLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

As to Curley’s ineffective assistance of counsel claim, the Louisiana Supreme Court first held that her defense attorney had “rendered deficient performance” when he failed to make “any reasonable investigation into how to present a BWS defense of self-defense.”<sup>171</sup> Under *Strickland*, a defense attorney must undertake reasonable efforts to investigate anything which might be relevant to a client’s defense strategy.<sup>172</sup> The court recognized that Curley’s attorney failed to discover how an expert in BWS could inform his own investigation.<sup>173</sup> Further, he was willfully ignorant as to how a BWS expert and evidence of Curley’s abuse could be presented to her advantage at trial.<sup>174</sup> The court found that the defense attorney failed to make even a minimal investigation into the circumstances of his client’s prolonged abuse at the hands of the victim, simply because he thought the effects of the trauma she had suffered were “obvious.”<sup>175</sup>

An attorney’s “deficient performance,” however, does not

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168. *State v. Curley*, 2016-1708, p. 14 (La. 6/27/18); 250 So. 3d 236, 245 (quoting Parrish, *supra* note 2, at 2). This sentiment reflects the evolving perception of BWS throughout the country over the last few decades—namely, that BWS is *not* an actual, diagnosable medical condition. *See, e.g.*, U.S. DEPT OF JUSTICE ET AL., *supra* note 78, at viii (describing concern that “the word ‘syndrome’ [in the phrase] . . . may create a false perception that the battered woman ‘suffers from’ a mental defect”).

169. *See Curley*, 2016-1708, p. 12; 250 So. 3d at 244; *see also* LA. CODE CRIM. PROC. ANN. art. 651 (2019).

170. *Curley*, 2016-1708, p. 15; 250 So. 3d at 246.

171. *Id.* at p. 20; 250 So. 3d at 249.

172. *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

173. *Curley*, 2016-1708, pp. 19–20; 250 So. 3d at 249.

174. *Id.*

175. *Id.* at p. 20; 250 So. 3d at 249.

alone necessitate reversal of a defendant's conviction.<sup>176</sup> The defendant must also demonstrate that the deficient performance had a material effect on the outcome of the trial.<sup>177</sup> The court specifically found that the defense attorney's failure to consult an expert, either to inform his defense strategy or to testify at trial, had prejudiced Curley's trial because she had not been afforded the opportunity to present an adequate defense.<sup>178</sup> The court noted that, in Curley's case, expert testimony could have helped the fact-finder understand Curley's "state of mind" when she killed the victim.<sup>179</sup> The court also stated that an expert could have described the effect that years of abuse can have on a battered woman<sup>180</sup> and how that sort of trauma can manifest itself into "proactive violence."<sup>181</sup> Lastly, the court pointed out that, at the very least, an expert could have aided in reducing Curley's conviction from second-degree murder to manslaughter.<sup>182</sup>

The court emphasized that there need only be "the reasonable probability of a different result" to prove prejudice and "not the reasonable probability of an acquittal."<sup>183</sup> This language indicates that the court viewed the *Strickland* prejudice standard as reasonably achievable in Curley's instance.<sup>184</sup> Indeed, the court held that Curley had met this standard because her defense attorney had "made no investigation whatsoever" into BWS evidence and its relevance to her defense.<sup>185</sup> Thus, because Curley carried her burden of proof for both prongs of the *Strickland* test, the court found her ineffective assistance of counsel claim to be successful.<sup>186</sup> As a result, the court reversed Curley's conviction and granted her a new trial.<sup>187</sup>

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176. *Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment . . .").

177. *Id.* at 692 ("[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.").

178. *See State v. Curley*, 2016-1708, p. 21 (La. 6/27/18); 250 So. 3d 236, 250.

179. *Id.* at p. 20; 250 So. 3d at 250.

180. *See id.*

181. Stark, *supra* note 64, at 998.

182. *Curley*, 2016-1708, p. 21; 250 So. 3d at 250.

183. *Id.*; *see also Strickland*, 466 U.S. at 694.

184. *See Curley*, 2016-1708, p. 21; 250 So. 3d at 250 ("Because *Strickland* requires *only* the reasonable probability of a different result . . .") (emphasis added).

185. *Id.* at p. 19; 250 So. 3d at 249.

186. *See id.* at p. 21; 250 So. 3d at 250.

187. *See id.* at p. 22; 250 So. 3d at 250. The court declined to speculate about whether Curley's defense would be successful at her new trial. *See id.* at p. 21; 250

## C. JUSTICE WEIMER'S DISSENT

Justice Weimer's dissent did not address the admissibility of BWS evidence in a non-insanity defense context.<sup>188</sup> Instead, it contended that Curley failed to prove the *Strickland* prejudice component.<sup>189</sup> The dissent concluded that her trial would not have ended differently if her defense attorney had presented BWS evidence to the jury.<sup>190</sup> The dissent noted that most of the evidence that Curley's defense attorney presented at trial pertained to the years of domestic abuse his client had suffered at the hands of the victim.<sup>191</sup> Consequently, "the jury . . . was free to accept or reject the theory that the defendant killed her husband as a self-defense response to being abused," with or without the presentation of actual BWS evidence or related expert testimony.<sup>192</sup> At trial, Curley presented "two potentially contradictory explanations for the shooting (accidental gun discharge and justification from abuse)."<sup>193</sup> Because of these conflicting alternate defenses and the State's success in refuting both, the dissent concluded that the jury had ample evidence on which to base its guilty verdict.<sup>194</sup>

The dissent cited the Fifth Circuit to argue that even if Curley had presented sufficient evidence to support either defense theory, her *Strickland* claim would have failed because she did not specifically "name the witness" who would have been

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So. 3d at 250.

188. See *State v. Curley*, 2016-1708, pp. 1-5 (La. 6/27/18); 250 So. 3d 236, 251-53 (Weimer, J., dissenting).

189. See *id.* at p. 2; 250 So. 3d at 251.

190. *Id.* at pp. 4-5; 250 So. 3d at 253.

191. *Id.* at p. 2; 250 So. 3d at 251.

192. *Id.*

193. *Curley*, 2016-1708, pp. 4-5; 250 So. 3d at 253 (Weimer, J., dissenting). In contrast to the dissent (where it was referenced several times), the majority mentioned this accidental discharge theory only once in passing. See *id.* at p. 3; 250 So. 3d at 239 (majority opinion) ("trial counsel presented alternative theories of justification and accidental discharge").

194. See *id.* at pp. 2-3; 250 So. 3d at 251 (Weimer, J., dissenting). The dissent noted:

[T]he jury was presented with eyewitness testimony from the decedent's son that the defendant had not been abused and had pointed the gun at the decedent. Additionally, forensic evidence established that the bullet entered the decedent at an angle that was not the result of a ricochet and that, in the room where the shooting occurred, no evidence was ever found of the bullet striking anything other than the decedent.

*Id.*; see also *id.* at p. 4; 250 So. 3d at 252 ("[Curley] was described as angry when she arrived" at the house shortly before shooting the victim.).

available to assist in her defense.<sup>195</sup> It also cited *State v. Jenkins*,<sup>196</sup> a Louisiana court of appeal decision, in which the court stated: “A petitioner, claiming that certain evidence should have been introduced or discredited, needs to attach that evidence to his application for the district court’s review.”<sup>197</sup> The dissent cited no Louisiana Supreme Court authority for this additional requirement for ineffective assistance of counsel claims.

## V. ANALYSIS: *CURLEY’S* MIXED CONSEQUENCES

*Curley* served to reinforce the court’s ruling in *Rodrigue*, a decision which has caused strife among Louisiana courts. In holding that evidence of a battered woman’s abuse is not precluded by her (or her attorney’s) failure to plead NGBRI, the Louisiana Supreme Court effectively modernized the state’s approach to cases involving domestic violence. Consistent with the current views of legal scholars and other states, *Curley* recognized that BWS is not a discernable mental illness. Rather, this overly broad term must now “encompass[] the full spectrum of cognitive, emotional, behavioral, and physiological reactions to violence” that an abused woman might experience.<sup>198</sup>

### A. THE POSITIVE: BATTERED WOMEN ADVANCE WITH *CURLEY*

Louisiana, of course, is not the first state to adopt this new perspective and permit BWS evidence absent an insanity plea. Several other states already allow evidence of domestic violence in criminal trials without requiring the accused to plead insanity.<sup>199</sup> This widespread relaxing of evidence restrictions has arguably allowed for greater justice for domestic violence survivors. In deciding *Curley*, the Louisiana Supreme Court advanced Louisiana to a position akin to that of other states.<sup>200</sup>

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195. *State v. Curley*, 2016-1708, p. 4 (La. 6/27/18); 250 So. 3d 236, 252 (Weimer, J., dissenting) (internal quotation marks omitted) (quoting *United States v. Fields*, 761 F.3d 443, 461 (5th Cir. 2014)).

196. See generally *State v. Jenkins*, 14-1148 (La. App. 4 Cir. 5/6/15); 172 So. 3d 27.

197. *Curley*, 2016-1708, p. 4; 250 So. 3d at 253 (Weimer, J., dissenting) (quoting *Jenkins*, 14-1148, p. 17; 172 So. 3d at 40).

198. Dutton, *supra* note 1, at 1197.

199. See *supra* Section III.A.3.

200. Despite criticism of BWS, many states have recognized its utility in the defense of battered women. See *supra* Section III.A.3. The Louisiana Supreme Court’s recognition of BWS as a viable defense strategy *in the absence of an insanity plea* puts Louisiana on equal footing with these states by extending more protection to battered women.

*Curley* ultimately serves to expand both the understanding of and accessibility to BWS as a defense in Louisiana criminal prosecutions. Although Louisiana Code of Evidence article 404 has permitted evidence of the victim's acts of domestic violence against the defendant since 1989,<sup>201</sup> this 2018 decision, almost thirty years later, cements the admissibility of such evidence in criminal proceedings. Because of the court's explicit holding,<sup>202</sup> there should no longer be any confusion at the bench or bar about the admissibility of BWS evidence and related expert testimony in non-insanity defense cases.

*Curley* also substantially assists battered women defendants seeking post-conviction relief under ineffective assistance of counsel claims. These claims are already difficult to argue, as a defendant must overcome both the court's "strong presumption" that a defense attorney performed their job correctly<sup>203</sup> and the "hurdle" of "the prejudice prong."<sup>204</sup> By providing a concrete basis on which a battered woman can succeed in her *Strickland* claim against her ineffective defense attorney, *Curley* has significantly advanced the prospects for winning relief for future defendants in similar situations. Enforcing a higher standard of representation for attorneys defending battered women theoretically means that these women are more likely to receive a fair trial, or a new trial,

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201. See LA. CODE EVID. ANN. art. 404 (2019). See generally Gerard A. Rault, Jr., *An Overview of the New Louisiana Code of Evidence—Its Imperfections and Uncertainties*, 49 LA. L. REV. 697, 697 (1989) (describing the first codification of Louisiana evidence law, enacted on January 1, 1989).

202. See *State v. Curley*, 2016-1708, p. 15 (La. 6/27/18); 250 So. 3d 236, 246 ("To the extent it may have been unclear before, we now expressly hold that BWS evidence is admissible in a justification/self-defense case, and not solely in the insanity context.")

203. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); see also *U.S. v. Cronin*, 466 U.S. 648, 658 (1984) (noting that in ineffective assistance of counsel claims, "the burden rests on the accused to demonstrate a constitutional violation"); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1088–89 (2006) ("In practice the [*Strickland*] test is nearly impossible to meet.")

204. See Backus & Marcus, *supra* note 203, at 1089; see also *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting). The dissent in *Strickland* noted:

[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.

*Id.*

if an attorney fails to adhere to this standard.

**B. THE NEGATIVE: *CURLEY* ADDS TO EXISTING BURDENS ON DEFENSE ATTORNEYS AND COURTS**

Unfortunately, *Curley* may also have negative consequences for an already overburdened state criminal justice system. As to public defense attorneys, this decision inspires a *Strickland* standard that already overworked and underfunded defense attorneys may find difficult to meet. Louisiana's public defenders are stretched thin.<sup>205</sup> The financial resources available to them to pay for experts on BWS are limited.<sup>206</sup> It is well-documented that indigent defendants sometimes receive "ineffective, inefficient, poor quality, unethical, conflict-ridden representation"<sup>207</sup> and are treated like "numbers on dockets, faceless ones to be processed and sent on their way."<sup>208</sup> The Louisiana Supreme Court undoubtedly came to the correct legal conclusion when it granted *Curley* a new trial because of her counsel's ineffective representation.<sup>209</sup> However, because of limited resources and heavy caseloads that result in little to no time to focus on individual cases, public defenders might exhibit the same deficiencies as *Curley*'s attorney. The prospect that defendants will file more ineffective assistance of counsel claims based on *Curley* may well increase the already burdensome caseload of the court system.

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205. See Debbie Elliott, *Public Defenders Hard to Come by in Louisiana*, NPR (Mar. 10, 2017, 5:29 PM), <https://www.npr.org/2017/03/10/519211293/public-defenders-hard-to-come-by-in-louisiana>; see also LA. PUB. DEF. BD., 2016 ANNUAL BOARD REPORT 1 (2017), <https://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/2016%20LPDB%20Annual%20Report.pdf> ("[P]ublic defense in Louisiana has been persistently underfunded since its inception.").

206. See Eli Hager, *Louisiana Public Defenders: A Lawyer With a Pulse Will Do*, THE GUARDIAN (Sept. 8, 2016, 7:13 AM), <https://www.theguardian.com/us-news/2016/sep/08/louisiana-public-defender-crisis> ("Louisiana continues to provide insufficient, unreliable funding for the legal representation of the poor" and "rarely offers funds for hiring investigators or expert witnesses."); see also *State v. Touchet*, 92-2839, p. 6 (La. 9/6/94); 642 So. 2d 1213, 1216 (establishing the extensive requirements an indigent criminal defendant must meet before the state will pay for an expert witness).

207. NAT'L LEGAL AID & DEF. ASS'N, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES IN LOUISIANA 40 YEARS AFTER *GIDEON* 56 (2004), [http://www.nlada.net/sites/default/files/la\\_nladaavoyelles03-2004\\_report.pdf](http://www.nlada.net/sites/default/files/la_nladaavoyelles03-2004_report.pdf).

208. Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1435 (1999) (citations omitted).

209. See *State v. Curley*, 2016-1708, p. 22 (La. 6/27/18); 250 So. 3d 236, 250.

*Strickland* claims are already common,<sup>210</sup> but courts will likely face even more following *Curley*. As it stands now, “when prejudicial error is made [by counsel] that clearly impairs a defendant’s constitutional rights, the burden of a new trial must be borne by the prosecution, the courts, and the witnesses; the Constitution permits nothing less.”<sup>211</sup> An increased number of these claims may create a corresponding increase in the court system’s caseload.<sup>212</sup> Although *Curley* certainly advances the rights of battered women defendants in Louisiana, it nevertheless creates the risk of greater burdens on the courts and the attorneys who try criminal matters.

## VI. CONCLUSION

Despite a potential increase in court dockets and caseloads, a balancing of all of *Curley*’s potential gains and consequences weighs heavily in favor of concluding that the Louisiana Supreme Court made the right decision. *Curley*’s constitutional right to a fundamentally fair trial was upheld. Although courts and attorneys alike may experience an increased financial burden following *Curley*, those consequences are negligible. One cannot assign a monetary value to fairness in criminal proceedings.

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210. Paul J. Kelly, Jr., *Are We Prepared to Offer Effective Assistance of Counsel?*, 45 ST. LOUIS U. L.J. 1089, 1092 (2001) (“In virtually every post-conviction proceeding, a defendant will allege ineffective assistance of counsel.”); *see also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 114 (2008) (“Studies of postconviction filings show that ineffective assistance of counsel is the most commonly raised claim during appeals.”).

211. *Morris v. Slappy*, 461 U.S. 1, 14 (1983).

212. *See id.* at 15 (finding that ineffective assistance of counsel claims following standard trials and appeals essentially result in “repeated trials,” which are a “misus[e] of judicial resources”).