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DEAF JUSTICE?: BATTERED WOMEN UNJUSTLY IMPRISONED PRIOR TO THE ENACTMENT OF EVIDENCE CODE SECTION 1107

Scott Gregory Baker

Geneva Love's husband was in the military; they lived in a military town. Her husband beat her. Geneva Love was pregnant with their second child. When she tried to leave the abusive relationship her husband confronted her with more violence; she was forced to kill him. The importance of evidence concerning Battered Women's Syndrome was not understood by Geneva Love's trial attorney. Geneva Love, an African-American woman, was convicted by an all-white jury of her husband's peers. Geneva Love was denied justice. Geneva Love petitioned for clemency. Clemency was denied. Geneva Love was denied compassion, and again justice was denied. Geneva Love remains in prison; where is her justice?

I. INTRODUCTION

On March 5, 1993, Assembly Bill 2295 (hereinafter AB 2295) was introduced by Assembly Member Barbara Friedman.¹

¹ Golden Gate University School of Law, Class of 1995. I thank my wife, Susanne Baker, for her patience, love, and support. I thank my editors Donna Kotake and Rebecca Weisman, for their help and support during this project; and Christina Cordoza and Bridget Ford, for providing me with research materials and insights I would not have found elsewhere. I thank Professor Roberta Simon for her comments and suggestions regarding organization and style. Special thanks to Professor Susan Rutberg for challenging me during this project and for providing me with critical substantive law editing.


2. The Honorable Barbara Friedman is the Assembly Member for the Fortieth Assembly District, California Legislature.
On October 11, 1993, the Governor of the State of California vetoed AB 2295. Assembly Bill 2295 was designed to provide a fair and even application of the law to those individuals affected by the issue of battered woman syndrome (hereinafter BWS). Battered women charged with criminal activity after January 1, 1992 are permitted to present battered woman syndrome expert testimony at their trials pursuant to Evidence Code Section 1107. Battered women convicted prior to this date remain unjustly imprisoned because they have been denied the opportunity to present this crucial evidence, and there is seemingly no viable avenue of relief. AB 2295 was developed to provide a remedy to these individuals.

Assembly Bill 2295 proposed to give individuals whose convictions for killing their abusive partners became final before January 1, 1992 a chance for review of their original trial through a writ of error coram nobis or writ of error coram vobis. Assembly Bill 2295 would have only affected individuals whose cases at trial would have been bolstered by the admission of battered woman syndrome evidence pursuant to Evidence Code Section 1107.

4. Veto Message regarding AB 2295 from The Honorable Pete Wilson, Governor of California, to The Members of the California Assembly, dated October 11, 1993 [hereinafter Veto]. As of the date this article went to press, AB 2295 was in the process of being re-introduced in the California Assembly for the 1994-95 Regular Session. The form and content of the re-introduced bill are as yet unknown.
5. The term Battered Woman Syndrome [hereinafter BWS] is used to describe an individual's reactions, experiences, and feelings under conditions of repeated violence and abuse. BWS is not a separate defense. It is an expert's description of a psychological condition that results from intense trauma. It is useful in explaining to a jury why a particular battered woman's response to a violent situation was reasonable, and how her perception of imminence differs from that of a non-battered person.
7. A writ of error coram nobis is addressed to the court where the petitioner was convicted. If the judgment was affirmed by an appellate court the writ of error coram nobis must be brought in the appellate court which affirmed the judgment. CAL. PENAL CODE § 1265 (West Supp. 1993). If there was no appeal, the writ of error coram nobis is addressed to the trial court.
8. A writ of error coram vobis petition is addressed to a court other than the trial court, usually an appellate court. The appellate court then directs a writ of error to the original trial court. Therefore a writ of error coram vobis is only an avenue for relief if no appeal was taken from the judgment. See Cal. Assembly Committee on Public Safety, Committee Analysis, May 18, 1993 hearing date; People v. Welch, 394 P.2d 926, 929 (Cal. 1964).
This article will explain why Assembly Bill 2295 was and still is necessary to provide relief for battered women convicted prior to the enactment of Evidence Code Section 1107, and includes discussions of: BWS theory; use of BWS testimony in California Courts; Evidence Code Section 1107; and an analysis of Assembly Bill 2295.

The article will discuss the problem presented by Evidence Code Section 1107, and critique the only purported "avenue of relief" available for a battered woman convicted of killing her abusive partner prior to January 1, 1992, namely executive clemency. The article will include a discussion of Geneva Love's case, which provides a compelling example of the need for an alternative to clemency, such as AB 2295. The article will outline Governor Wilson's concerns regarding AB 2295. The article will then respond to Governor Wilson's stated bases for rejecting the Bill. This will include an argument in support of a version of AB 2295 modified to address Governor Wilson's concerns with AB 2295, which will provide a procedure for battered women convicted of killing their abusive partners prior to the enactment of Evidence Code Section 1107 to benefit by the provisions of Evidence Code Section 1107.

II. WHY LEGISLATION LIKE ASSEMBLY BILL 2295 IS NECESSARY

A. DEVELOPMENT OF THEORY OF BATTERED WOMAN SYNDROME

Battered woman syndrome is a description of how a battered woman feels and reacts under conditions of repeated violence and abuse. BWS testimony is of critical importance because it educates the jury as to how a battered person will likely react in a particular situation.

Dr. Lenore Walker defines BWS as a pattern of psychological and behavioral symptoms found in women living in relation-

9. The Governor may grant clemency, including reprieves, pardons, or commutations after sentence, except in cases involving impeachment. CAL. CONST. art. V, § 8.
Dr. Walker's research found the occurrence of a three phase "cycle of violence" in many of the cases of the battered women she interviewed in her early research.

The first phase is a tension-building phase which includes verbal abuse and minor battering incidents. The woman reacts by attempting to placate the batterer to prevent an escalation of violence. These placatory efforts also legitimize the batterer's belief that he has the right to abuse the woman. As the cycle progresses, these placatory attempts become less effective and the tension grows. Many battered women say the worst aspect of the tension-building phase is the psychological anguish, and some even provoke an acute incident "to get it over with."

The second phase occurs when the violence and verbal abuse erupt into an acute battering incident, involving brutal violence, injury, and sometimes death. The battered woman cannot predict when the acute battering incident will occur, but knows it is inevitable. Living in constant fear of injury and subject to attack at any moment results in a heightened perception of danger in a battered woman.

The final phase of the cycle involves a tranquil period of loving contrition in which the batterer exhibits apologetic and loving behavior. The absence of tension and violence creates an overwhelming feeling of relief. The battered woman believes that her batterer is sincere when he promises that the violence will "never happen again."

Constant subjection to chronic abuse permanently affects the psyche of the victim. The battered woman's reactions are

11. See DR. LENORE E. WALKER, TERRIFYING LOVE 4-5 (1989). Dr. Lenore E. Walker is a clinical and forensic psychologist, and a nationally recognized authority on battered women. Dr. Walker developed her theory of BWS through research, funded by the National Institutes of Mental Health (hereinafter NIMH), conducted at the Battered Woman Research Center (hereinafter BWRC) in Denver, Colorado from 1978-81. This research involved interviews with 400 battered women, concerning 1600 battering incidents. Dr. Walker's books concerning BWS include: THE BATTLERED WOMAN (1979); THE BATTLERED WOMAN SYNDROME (1984); and TERRIFYING LOVE (1989).
12. WALKER, supra note 11, at 42.
13. See id. at 42-43.
14. WALKER, supra note 11, at 42-43.
15. Id. at 26.
16. Id. at 43-45.
thus substantially different than a non-battered person’s reactions. The failure to understand this leads to one of the most common, albeit natural, misconceptions concerning the battered woman, namely, “why does she stay, why not just leave?” Three theories concerning human behavior help explain why battered women do not leave the battering relationship:17 the social-learning theory of intermittent reinforcement,18 Post Traumatic Stress Disorder,19 and “learned helplessness.”20

17. Walker, supra note 11, at 47.

18. In the social-learning theory of “intermittent reinforcement,” behavioral psychologists have found that behavior which has been intermittently reinforced is the behavior which is the most difficult to stop. For a battered woman, the batterer’s random behavior and unpredictable violence are his main source of power. This random, unpredictable violence, combined with intermittent periods of loving contrition confuse the battered woman psychologically. From one moment to the next, she does not know whether she will be faced with her “good” husband or her “bad” husband. The result is that the battered woman is left psychologically scarred; she can only cling to the hope that her good husband will return and the violence will end. Walker, supra note 11, at 47.

19. The experiencing of a significant trauma may result in a psychological diagnosis known as Post Traumatic Stress Disorder [hereinafter PTSD]. Although PTSD-like symptoms have been diagnosed for over a hundred years, PTSD did not gain prominence until after the Vietnam War. PTSD symptoms include: (1) a re-experiencing of the trauma, where the sufferer is unable to stop thinking about the traumatic event; (2) distancing behavior, including invoking the defense mechanisms of denial, repression, suppression, and disassociation; and (3) effects on the nervous system, including difficulty sleeping, irritability or outbursts of anger, difficulty concentrating, hypervigilence, exaggerated startle response, and physiological reactivity. Other traumatic events or feelings of overwhelming helplessness may cause a recalling of the prior trauma, evoking the feelings and symptoms of the original trauma. The suffering of the traumatic event which triggers PTSD results in a changed view of the world. The sufferer is more “on guard” or hypervigilant. PTSD is legally significant because it is a biological and psychological condition which may obliterate free will. Indeed, PTSD is more complex and severe when the trauma is prolonged or severe, as in the case of battered women. See Nancy Kaser-Boyd, Post-Traumatic Stress Disorders in Children and Adults: The Legal Relevance, 20 W. Sr. U. L. Rev. at 1601, 1611-16 (forthcoming 1993)[hereinafter Kaser-Boyd]; see Steven R. Balash and Nancy Kaser-Boyd, Battered Women in Criminal Cases, Defending Battered Women in Criminal Cases (ABA)(1993), at 2-4 [hereinafter Balash & Kaser-Boy]. BWS is a subcategory of PTSD, and will be classified as such by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders [hereinafter DSM], version DSM-IV. See Susan Rutberg, Not Guilty By Reason of Victimization, Forum (Dec. 1993).

20. “Learned helplessness” is a theory which was developed by Dr. Martin Seligman, a psychologist at the University of Pennsylvania. To understand learned helplessness, one must focus on an individual’s beliefs regarding the situation they are in. As in the case of PTSD, if a person believes they do not have control over a situation, he will be more likely to respond with coping responses rather than by trying to escape. As applied to a battered woman, she does not attempt to leave because she cannot predict her own safety; she believes that nothing can be done, by her or by anyone else, which will change her situation. A battered woman is unable to predict the consequences of her actions, because there is no relationship between her conduct and the frequency of abuse.
A batterer uses intermittent reinforcement by sometimes indulging the battered woman and other times displaying physical and psychological cruelty. This random and unpredictable behavior by the batterer affects the battered woman psychologically, leaving her hoping that the next time will be different.

Experiencing severe trauma can trigger Post Traumatic Stress Disorder which may result in certain psychological symptoms including: persistent sense of threat, denial, emotional "numbing," dissociation, or "self-medicating" with drugs and alcohol. The persistent sense of threat can stifle a battered woman’s ability to make decisions. Denial causes the battered woman to sense she is in a dangerous relationship but renders her incapable of admitting that her spouse will kill her.

“Learned helplessness” occurs when the battered woman cannot predict her own safety because regardless of her conduct she is faced with the batterer’s random and unpredictable abusive behavior. Although a battered woman does not necessarily learn to be helpless, she often discovers that she is unable to predict the effect her behavior will have. “Learned helplessness” causes a person to choose “behavioral responses which will have the highest predictability of an effect within the known, or familiar, situation; they avoid responses - like escape, for instance - that launch them into the unknown.”

Dr. Walker’s research was limited to situations involving severe violence over extended periods of time, and concerned bat-
tered women who did not fight back. One problem which arises is that prosecutors have been using BWS theory to impeach a battered woman witness' testimony because she may not fit neatly into Dr. Walker's categorical definition of BWS. Subsequent research has demonstrated that BWS characteristics also may be found in situations where less severity is involved and when the person does fight back. In fact, BWS is neither an actual clinical diagnosis of a disorder nor a mental illness, but rather a description of how a normal person responds to chronic abuse or traumatic stress.

B. USE OF BWS TESTIMONY IN CALIFORNIA COURTS

Prior to the enactment of Evidence Code Section 1107, the courts of California had not treated the admissibility of BWS testimony consistently. In fact, the application of BWS evidence to a self-defense claim was not decided in a California appellate court case until 1989 in People v. Aris. In the case of a battered woman who claims self-defense in killing her abuser, self-defense is analyzed as having two requirements:

(1) the defendant's acts causing the victim's death were motivated by an actual (also referred to as "genuine" or "honest") belief or perception that (a) the defendant was in imminent danger of death or great bodily injury from an unlawful attack or threat by the victim and (b) the defendant's acts were necessary to prevent the injury; and (2) a reasonable person in the same circumstances would have had the same perception and done the same acts.

29. Cal. Senate Committee on Judiciary, Committee Analysis regarding AB 2273, June 16, 1992 hearing date [hereinafter AB 2273].
30. See id.
31. Id.; see Dutton, supra note 10; see Balash & Kaser-Boyd, supra note 19, at 6.
32. See AB 2273, supra note 29; see Balash & Kaser-Boyd, supra note 19, at 2, 10; see Dutton, supra note 10, at 11.
33. People v. Aris, 264 Cal. Rptr. 167 (Ct. App. 1989). The court held that the exclusion of expert testimony regarding BWS was error, but harmless error in the context of the case because the defendant had shot her batterer while he slept. Therefore, there was nothing in his behavior indicating the existence of an imminent danger as that term is defined by California law, and it is not reasonably probable that BWS testimony would convince the jury that, nevertheless, the defendant honestly perceived an imminent danger resulting in a different verdict.
34. Id. at 172.
Under the California Penal Code, the classification for a homicide committed in self-defense is a justifiable homicide, as opposed to an excusable homicide.85 Excuses for homicide include accident, misfortune, sufficient provocation, insanity and provocation, and a genuine, but unreasonable, belief in the need for self-defense.86 Justification declares the allegedly criminal act legal, while excuse admits the act's criminality but declares the allegedly criminal actor not to blame.87

Two types of self-defense exist in California: perfect self-defense and imperfect self-defense.88 Perfect self-defense89 requires both subjective honesty and objective reasonableness, and completely exonerates the accused.40 Subjective honesty evaluates the defendant's state of mind.41 Objective reasonableness questions whether a reasonable person would have believed and acted as the defendant did.42 Imperfect self-defense requires only subjective honesty and negates malice aforethought, reducing the homicide to voluntary manslaughter.48 Both perfect and imperfect self-defense require an honest belief that the killer is in imminent danger of death or great bodily injury from the victim.44

BWS expert testimony is useful in the defense of battered women accused of killing their abusive spouses because it can explain why a particular battered woman subjectively believed that her self-defense was necessary. Because BWS can illustrate why a particular battered woman had an honest belief of imminent danger,41 it should be used in the objective reasonableness test to show why a battered woman believed and acted as she did.

In Aris, the defendant, a battered woman, appealed a sec-

36. See Aris, 264 Cal. Rptr. at 178; Cal. Penal Code § 195.
37. Aris, 264 Cal. Rptr. at 178-79.
38. See id. at 172.
39. Perfect self-defense is also referred to as "reasonable" or "complete" self-defense. Id. at 172.
40. Id. at 172.
41. Id. at 179.
42. Aris, 264 Cal. Rptr. at 179.
43. Id.
44. Id. at 171.
ond degree murder conviction because the trial court excluded BWS expert testimony which would have revealed that BWS affected her mental condition at the time of the killing. On the night of the killing, Brenda Aris' abusive husband beat her and threatened that he did not think he would let her live until the next morning. When her husband fell asleep she went next door for some ice for her injuries. She found a gun and took it for protection. She thought that when she returned home she would again be beaten. Aris went to the bedroom, sat on the bed, and shot her sleeping husband five times in the back.

In Aris, the court held that expert BWS testimony about a defendant's state of mind was not relevant to the objective reasonableness of the defendant's actions in self-defense. The court found that the defendant presented no substantial evidence that a reasonable person under the same circumstances would have perceived an imminent danger and a need to kill in self-defense. The court believed no reasonable jury could conclude that a sleeping victim presents an imminent danger of great bodily harm, especially when the defendant left the bedroom and subsequently returned to shoot the victim. Nevertheless, the court also held that it was error not to permit an expert to testify about the defendant's particular experiences as a battered woman and its effect on her perceptions of danger, its imminence, and what actions were necessary to protect herself. The court found that the error was harmless because Aris' own testimony showed that there was nothing in the victim's behavior indicating the existence of imminent danger.

Relying on the expert testimony of Dr. Lenore E. Walker, the court stated that a woman who has been battered and then threatened with more abuse is more likely to perceive the danger

46. Aris, 264 Cal. Rptr. at 171.
47. Id.
48. Id.
49. Id.
50. Id.
51. Aris, 264 Cal. Rptr. at 171.
52. Id. at 180.
53. Id. at 176.
54. Id.
55. Id.
56. Aris, 264 Cal. Rptr. at 181.
involved faster than one who has not been abused. The court found that a battered woman accurately senses when an abusive episode is not yet over. However, the court cautioned that the jury may misuse BWS evidence to establish the reasonableness requirement for perfect self-defense. Upon request by the prosecution, the judge should instruct the jury that self-defense testimony is relevant only to prove the honest belief requirement for both perfect and imperfect self-defense, not to prove the reasonableness requirement for perfect self-defense.

Two years after Aris was decided, another court held that failure to present evidence of BWS constituted ineffective assistance of counsel. In People v. Day, the court reversed a judgment convicting a battered woman of involuntary manslaughter and assault with a deadly weapon. Valoree Day was living with Steve Brown, an abusive partner. On the night of the killing they argued, he battered her, and she locked herself in the bedroom. Day testified that Brown opened the door and attacked her with a knife. A struggle ensued and Brown was mortally injured; Day fled. Day’s appeal was based on ineffective assistance of trial counsel. Day’s trial counsel admitted that he was unaware of the existence of BWS before and during trial and never considered investigation, research, or presentation of expert witness testimony regarding BWS. The Day court followed the Aris court, holding that expert testimony regarding BWS is not relevant to the reasonableness of the accused’s actions in self-defense, but held that BWS evidence was admissible to rehabilitate the defendant’s credibility before the jury. In presenting its case, the prosecution used many of the stereotypes and commonly held misconceptions about battered

57. Id. at 177.
58. Id.
59. Id. at 180-81.
60. Id. at 181.
62. Id.
63. Id. at 917-18.
64. Id. at 919.
65. Id.
66. See Day, 2 Cal. Rptr. 2d at 919.
67. Id. at 916-17.
68. Id. at 920.
69. Id. at 922.
women, such as the stereotype and misconception that battered women can easily leave their batterers. The prosecution used this basic misconception to challenge the defendant's credibility before the jury by asking the question, "why did she not simply leave?" In fact, the defense counsel characterized the defendant's relationship with her batterer as "mutual combat."

The misconception about battered women is that they all behave in the same way and if a woman dares to fight back she removes herself from the category of women for whom BWS is available as a defense.

On appeal, a psychologist and authority on BWS submitted an affidavit supporting appellant's motion for a new trial. The affidavit dispelled many myths associated with BWS which were used by the prosecution to question defendant's credibility during the trial. The affidavit established that battered women do employ active self-defense as a strategy. The court held that evidence explaining BWS informs the jury that how they think the average reasonable person would behave and how the jury thinks they personally would behave are not necessarily the same way that people who have been battered in fact behave.

The court understood that when deciding a case where a battered woman kills her batterer, the jury will ask "what would I do in that situation?" Most people who are unaware of BWS would naturally answer this question, "I would just leave." BWS testimony helps explain why the battered woman does not leave and helps a jury understand the psychological effects battering has on a battered woman. BWS theory explains how a battered woman can accurately sense that danger still exists and why her subjectively honest belief is that she must act to save her life.

The legislature realized that the general public lacks a thor-
though understanding of the issue of domestic violence and therefore BWS expert testimony should play an important role in a criminal action where the defendant asserts a plea of self-defense. 79

C. CALIFORNIA EVIDENCE CODE SECTION 1107

California Evidence Code Section 1107 was enacted on January 1, 1992. 80 Evidence Code Section 1107 permits expert testimony concerning BWS to be admitted in a criminal action. 81 In pertinent part, Section 1107 states: "In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence." 82

The purpose of the Bill was to ensure that the courts admit BWS evidence in criminal cases. 83 Existing law held that BWS testimony was relevant to show that the defendant genuinely believed she was in imminent danger of serious bodily injury. 84 Where a defendant's own testimony establishes facts tending to show there was nothing in the victim's behavior indicating the existence of an imminent danger, 85 there is no reasonable probability that BWS testimony would convince the jury that nevertheless the defendant honestly perceived an imminent danger. 86

The legislature envisioned use of Evidence Code Section 1107's provisions in the defense of a battered woman who has killed or seriously wounded her abuser. In this context, the BWS expert testimony would be used to support a claim of self-

80. See id.
82. See id.
84. Id.
85. As defined by California law, an imminent danger is one that, from appearances, must be instantly dealt with. Aris, 264 Cal. Rptr. at 172-73.
86. This is exemplified in the situation where the battered woman kills her batterer while he sleeps; e.g., the situation in Aris. See Aris, 264 Cal. Rptr. at 176.
To date, only one Court of Appeal has published a decision which mentions Section 1107. In People v. Romero, the court interpreted the language of Section 1107 to make expert testimony admissible in any criminal case regardless of the charges or defenses. However, expert testimony cannot be used to prosecute a batterer for his acts using the BWS evidence to prove the occurrence of the acts.

In Romero, the defendant had been charged with one count of second degree robbery and four counts of attempted robbery. She raised the defense of duress, but the jury convicted her as charged. Her petition for a writ of habeas corpus was based on the fact that her trial lawyer failed to present expert testimony explaining BWS. The court found that the key issue in the defenses of duress and self-defense is whether the defendant reasonably and honestly believed she was in imminent danger of great bodily harm or death. The court held that the rule permitting expert BWS testimony in a self-defense case necessarily permits it in a case where duress is claimed as a defense. BWS evidence was relevant to the woman's credibility and to support her testimony that she had a good-faith, objectively reasonable, and honest belief that her act was necessary to prevent an imminent threat of greater harm. Evidence of BWS explains a behavior pattern that might otherwise appear unreasonable to jurors by explaining how a battered woman might think, react, or behave, and placing the behavior in an understandable light. Apparently, the California Supreme Court agrees with this holding.

87. AB 785, supra note 83.
89. Id. at 338 n.9.
90. Id.
91. Id. at 333.
92. Id.
93. Romero, 13 Cal. Rptr. 2d at 333.
94. Id. at 338.
95. Id. at 339.
96. Id.
97. Id. at 341.
98. See generally People v. Romero, 17 Cal. Rptr. 2d 120 (Cal. 1993)(granting petition for review limited to whether a writ of habeas corpus or an order to show cause must
The legislature enacted Evidence Code Section 1107 realizing the importance of BWS expert testimony. However, Evidence Code Section 1107 only applies to cases where the defendant's trial occurred after January 1, 1992. An unanswered question remains: What is to be done for battered women convicted of killing their abusive partners prior to January 1, 1992? AB 2295 is not concerned with the importance of BWS expert testimony; this is a given in light of Section 1107's enactment. Rather, AB 2295 seeks to cure the inequity Section 1107 creates by only applying the provisions allowing BWS expert testimony from January 1, 1992 forward.

D. Analysis of Assembly Bill 2295

AB 2295 proposed to give individuals whose convictions became final before January 1, 1992, the date when the legislature enacted Evidence Code Section 1107, a chance for review of their original trial through a writ of error coram nobis or writ of error coram vobis. The basis for AB 2295 was to apply justice to all people similarly situated in an equal manner. AB 2295 passed the Senate and the Assembly concurred, sending it to enrollment on September 10, 1993. The Governor vetoed AB 2295 on October 11, 1993. As of the date this article went to press, AB 2295 was in the process of being re-introduced in the California Assembly.

1. Modification Of Writs Of Error Coram Nobis And Error Coram Vobis Under AB 2295

The distinction between a writ of error coram nobis and a writ of error coram vobis is that coram nobis is addressed to the court where the petitioner was convicted, and coram vobis is...
typically directed to an appellate court.\textsuperscript{106} If the judgment was affirmed by an appellate court, the writ of error coram nobis must be filed in the appellate court which affirmed the judgment.\textsuperscript{106} A writ of error coram vobis is only an avenue for relief if no appeal was taken from the judgment. As the writs of error coram nobis and error coram vobis are essentially identical,\textsuperscript{107} this article will only discuss the process in terms of a writ or error coram nobis.

A writ of error coram nobis is the equivalent of a motion to vacate the judgment.\textsuperscript{106} In \textit{People v. Shipman}, the California Supreme Court set forth three requirements necessary for the granting of a writ of coram nobis: (1) petitioner must show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented, would have prevented the rendition of the judgment; (2) petitioner must show that the newly discovered evidence does not go to the merits of issues tried; and (3) petitioner must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ.\textsuperscript{106}

The requirements for the granting of a writ of error coram nobis are very strict.\textsuperscript{110} In \textit{People v. Esquibel}, an order granting a petition for writ of error coram nobis was reversed when the court found that: (1) the new evidence raised related to the merits of the issues tried, and (2) even if it had been known at the time of trial it was not such that it would have resulted in a different verdict.\textsuperscript{111}

AB 2295 sought to amend the Penal Code requirements for

\textsuperscript{105} See generally \textit{People v. Esquibel}, 118 Cal. Rptr. 748, 750 (Ct. App. 1975) (finding jurisdiction for a writ of error coram nobis to exist in the trial court because the final judgment had not been appealed); see Cal. Assembly Committee on Public Safety, Committee Analysis, May 18, 1993 hearing date.

\textsuperscript{106} \textsc{Cal. Penal Code} \textsection{} 1265.

\textsuperscript{107} See \textit{People v. Welch}, 394 P.2d 926, 929 (Cal. 1964).

\textsuperscript{108} \textit{People v. Shipman}, 397 P.2d 993, 994 n.2 (Cal. 1965).

\textsuperscript{109} See \textit{id.} at 995.

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} See generally \textit{Esquibel}, 118 Cal. Rptr. at 750 (concerning whether defendant intentionally hit officer with his truck, the new evidence was that defendant was looking back when the truck struck the officer).
a writ of error coram nobis and writ of error coram vobis in cases involving BWS. The major change AB 2295 proposed concerning writs of error coram nobis was from the standard that petitioner must show some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment. The proposed standard under AB 2295 was a "reasonable probability" that the result would have been different had the evidence of BWS been presented, sufficient to undermine the confidence in the judgment of conviction. This only involves evidence that would have been admitted pursuant to Evidence Code Section 1107.

The standard of "reasonable probability" comes from Strickland v. Washington, a case involving a claim of ineffective assistance of counsel. The Strickland Court stated that a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The Strickland court stated that a claim of ineffectiveness of counsel is an attack on the fundamental fairness of the proceeding whose result is challenged.

The reasonable probability standard was chosen for use in AB 2295 because the basis of a petition for a writ under AB 2295 was that BWS testimony was not admitted at trial. This standard admits that the reason the evidence was not admitted or offered during the trial was because the attorney or judge did not understand the critical importance of BWS testimony to the case. The claim is most certainly an attack on the fundamental fairness of the proceeding whose result is challenged. In most cases, it is reasonably probable that had BWS testimony been admitted it would have affected the outcome of the case.

112. Shipman, 397 P.2d at 995 (emphasis added).
113. AB 2295, supra note 1.
114. Id.
116. Id. at 694.
117. Id.
118. Id. at 697.
mission of BWS testimony would not necessarily result in an acquittal, but possibly a reduced sentence, and perhaps most importantly, the battered women presently incarcerated would be judged under the same law as women who had the opportunity to use Evidence Code Section 1107.

2. **Requirements For The Petition For Writ Of Error Coram Nobis Or Writ Of Error Coram Vobis Under AB 2295**

AB 2295 would have required a court to grant a verified petition for a writ of error coram nobis or writ of error coram vobis if: (1) the petitioner's judgment of conviction for killing her abuser resulted from a plea or trial that commenced before January 1, 1992, and petitioner is imprisoned at the time of filing the verified petition; (2) the foundational requirements of Evidence Code Section 1107 are met,\(^{120}\) based on facts set forth in the verified petition; (3) any material evidence that would have been admissible pursuant to Evidence Code Section 1107 was not admitted, and the facts established on a hearing of the writ show that had the evidence of BWS been presented, there was a reasonable probability that the result of the proceedings would have been different, sufficient to undermine confidence in the judgment of conviction; and (4) the BWS evidence related to the battering of the petitioner by the victim of the homicide.\(^{121}\)

AB 2295 would have required that the court consider whether any evidence of abuse existed in the record, or whether the underlying facts of abuse alleged by the petitioner were asserted by the petitioner prior to conviction or were corroborated by other evidence.\(^{122}\) Corroborating evidence includes, but is not limited to, medical records, verified witness statements, and court records from any other proceeding.\(^{123}\) This language was added to assuage the concerns that AB 2295 would create a flood of petitions for writs of error coram nobis or coram vobis, wherein some petitioners would fabricate claims that they were

\(^{120}\) The proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. CAL. EVID. CODE § 1107 (West Supp. 1993).

\(^{121}\) AB 2295, supra note 1.

\(^{122}\) Id.

\(^{123}\) Id.
sufferers of BWS in order to seek reduced sentences or release from prison.\footnote{124}{Notes from Assemblywoman Barbara Friedman concerning AB 2295 as amended Sept. 8, 1993.}

3. \textit{Procedural Options Available To Court Reviewing Petitions Under AB 2295}

AB 2295(d) would have provided the court with the options found in Penal Code Sections 1260, 1261, and 1262 in handling petitions for writs of error coram nobis or coram vobis under AB 2295.\footnote{125}{AB 2295, \textit{supra} note 1.}

Penal Code Section 1260 provides:

\begin{quote}
The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.\footnote{126}{\textit{CAL. PENAL CODE} § 1260 (West 1982).}
\end{quote}

Section 1261 requires a new trial, if ordered, to be had in the court of the county from which the appeal was taken.\footnote{127}{Section 1262 directs that if a judgment is reversed, it will be deemed an order for a new trial, unless the appellate court directs otherwise. Should the appellate court direct a final disposition in defendant's favor, it must direct defendant to be discharged from custody, if defendant is in custody. These options grant the court wide discretion in dealing with petitions under AB 2295, and should provide sufficient safeguards against abuse by fraudulent petitions.} Section 1262 directs that if a judgment is reversed, it will be deemed an order for a new trial, unless the appellate court directs otherwise. Should the appellate court direct a final disposition in defendant's favor, it must direct defendant to be discharged from custody, if defendant is in custody. These options grant the court wide discretion in dealing with petitions under AB 2295, and should provide sufficient safeguards against abuse by fraudulent petitions.

\footnote{128}{\textit{CAL. PENAL CODE} § 1262 (West 1982). Section 1262 also deals with issues such as return of bail posted, and fines paid. \textit{Id.}}

\footnote{129}{\textit{Id.}}
III. SHORTCOMINGS OF EVIDENCE CODE SECTION 1107

A. EVIDENCE CODE SECTION 1107 ONLY APPLIES PROSPECTIVELY

Evidence Code Section 1107 only applies to battered women whose trials occurred after January 1, 1992. Battered women convicted prior to this date were convicted without the opportunity to admit BWS expert testimony provided for by Evidence Code Section 1107. These women are unjustly imprisoned because they have been denied this critical opportunity. AB 2295 sought to provide a remedy to this injustice.

B. CLEMENCY IS NOT A REALISTIC AVENUE FOR RELIEF

Presently, the only avenue of relief open to battered women convicted of killing their abusers prior to January 1, 1992 is to petition the Governor of California for clemency. Clemency is defined as "[k]indness, mercy, leniency...[and] describe[s an] act of [a] governor of [a] state when he commutes [a] death sentence to life imprisonment, or grants a pardon." The Governor may grant a reprieve, pardon, and commutation after sentence, except in cases of impeachment. In considering clemency requests, the Governor consults with the Board of Prison Terms and the judge of the court of conviction or the district attorney regarding the facts of the case and recommendations as to propriety of clemency.

Regrettably, Governor Wilson has been slow to take action on the clemency petitions filed by battered women serving state prison sentences for killing their abusive partners, and when

133. The Board of Prison Terms periodically recommends a pardon or commutation on the basis of good conduct, disproportionate sentencing, or other good cause. CAL. PENAL CODE § 4801 (West 1982); Cal. Committee Analysis regarding AB 2373 for the Senate Committee on Judiciary, June 16, 1992 hearing date.
134. CAL. PENAL CODE § 4803 (West 1982).
135. See Minouche Kandel, Wilson Doesn't Get It - Governor Misses the Point About Battered Women, DAILY J., June 17, 1993, at 4. Governor Wilson has taken two years to review the petitions of 33 women who filed for clemency. In the two cases in which he granted clemency Wilson expressly stated that he was basing his decision on factors other than that the women were justified in defending themselves against their abusive partners. Id.
he has taken action it has not been encouraging. In fact, under Governor Wilson clemency does not appear to be a viable avenue of relief for battered women convicted prior to the enactment of Evidence Code Section 1107.

C. GENEVA LOVE'S CASE AS EXAMPLE OF GOVERNOR WILSON'S "UNDERSTANDING" OF THE ISSUES CONCERNING BWS

One case in particular provides both an example of Governor Wilson's approach to clemency and the basis for a compelling argument in support of the necessity of AB 2295. Geneva Love is a battered woman who is serving a sentence of 17 years to life for killing her abusive husband, Azell, during an acute battering incident set off by her attempt to leave the relationship. The jury convicted her of second degree murder. At the time of the killing, in 1988, Geneva Love was the mother of a 2 ½ year old son, and was pregnant with her second child. She had been repeatedly battered and emotionally abused by her husband for years. She endured this violence and abuse because she loved her husband and, like most battered women, believed him when he would apologize and promise that he would never hurt her again. Azell Love was in the military, stationed at Fort Ord. He was a heavy drinker and a physically powerful man.

Two days before the killing, the Loves began arguing about whether their young son should sleep with them. Mr. Love shoved Geneva Love to the floor. As she rose, he came at her, pushing her in the chest with his forearm; again she fell to the

136. See generally Hallye Jordan, Killers Could Seek Retrial for Syndrome, DAILY J., August 17, 1993 at 1, 7. To date, Wilson has granted two petitions and rejected 14 others out of 33 filed.
137. Letter from Christina G. Cordoza, Esq., to The Honorable Barbara Friedman 1 (June 15, 1993)[hereinafter Cordoza](on file with author). Cordoza is Geneva Love’s post-conviction counsel.
138. See supra note 135.
139. Cordoza at 1.
140. Id.
141. Id.
142. Id.
143. Id.
145. Id.
Geneva Love grabbed a slat from the bed frame in order to protect herself. Mr. Love grabbed the board and again knocked Geneva Love to the ground. For the next half hour, Mr. Love repeatedly punched Geneva Love in the face and the rest of her body, and threw her across the room, knowing she was pregnant. Mr. Love threw Geneva Love against a piece of furniture; the corner hit her in the rib cage. Mr. Love threw her against the closet with such force that the door split in half. Each time Geneva Love fell to the floor, Mr. Love continued to deliver blows to her face and body with his fists. Finally, Mr. Love rammed Geneva against the bedroom door, smashing her head against the metal hinges.

When Geneva Love did not get up, Mr. Love threatened to hurt their young son. Geneva Love did not believe Mr. Love would hurt his own son. Mr. Love picked up their son by the collar, causing his head to fling backward unsupported. Geneva Love then heard the sound of Mr. Love hitting their son. Geneva Love immediately went to get her son.

After this beating, Geneva Love began packing, determined to leave the relationship. She begged her husband to buy her and their son bus tickets so they could leave, and he agreed. Mr. Love left the house, purportedly to purchase the tickets, but did not return until the next morning. When he did return, he threw the ticket at Geneva Love and told her the bus left in thirty minutes. When Geneva Love questioned him about the

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146. Id. at 429-30.
147. Id. at 430.
148. Id. at 431-32.
150. Id. at 428-29.
151. Id.
152. Id.
153. Id.
155. Id.
156. Id.
157. Id.
158. Id. at 434.
159. Cordova at 1.
160. Id.
161. Id.
162. See Cordova at 1-2.
delay Mr. Love became angry and violent. Fearing that the inevitable beating she would receive would be worse than the prior day's, she called the military police for help. The officer who answered decided her call was not one of "distress" and told her to call the city police because she was out of his jurisdiction. As she tried to call the city police, Mr. Love charged at her, twisting his arm around her neck while he disabled the phone. He told her she could not leave and that he would kill her before she jeopardized his job. Geneva Love believed his threat; terrified and fearing for the safety of her young son and herself, she ran to the bedroom to get her husband's gun. Geneva Love pointed the gun at her husband and begged him to leave. Rather than leave, Mr. Love turned on his wife in a manner that made her believe he was going to immediately lunge at her. Geneva Love was forced to fire the gun, the bullet striking her husband in the neck. Geneva Love's actions were not designed to kill her husband. This is evidenced by the fact that she tried to stop the bleeding and to obtain emergency help. Nevertheless, Mr. Love later died.

Geneva Love, an African-American, was tried by an all-white jury. Seven of the jurors had family in the military; the judge was himself a retired military man, and Geneva Love's husband was a soldier with a good record. Monterey County, the trial venue, is a "military town," home to Fort Ord, Fort Hunter-Liggett, the Presidio of Monterey, the Defense Language Institute, and the Naval Postgraduate School. These factors alone are demonstrative of the hostile and insensitive climate
Geneva Love must have faced during her trial.\textsuperscript{178} However, most important, Geneva Love's trial counsel did not explore the facts regarding BWS with Geneva Love and decided not to introduce expert testimony regarding BWS.\textsuperscript{179} Instead, her attorney decided to rely on what he deemed an extremely strong case of self-defense.\textsuperscript{180}

In a letter supporting Geneva Love's petition for clemency, her trial attorney stated that he feared that BWS evidence would confuse the issues or might not be accepted by the jury or the judge.\textsuperscript{181} In hindsight, her trial attorney now believes he should have introduced BWS evidence in Geneva Love's case.\textsuperscript{182} He believes that BWS testimony could have rehabilitated Geneva Love's credibility on the witness stand in the eyes of the jury.\textsuperscript{183} BWS testimony would explain to the jury why Geneva Love's testimony may have appeared reserved and cold.\textsuperscript{184} After all, BWS expert testimony could explain to a jury that victims of battering relationships do not react in the same way that someone who has not been battered would react.\textsuperscript{185}

After reviewing her Application for Executive Clemency, the trial judge wrote a letter supporting the Application.\textsuperscript{186} The trial judge concluded that if evidence of BWS had been presented at the trial, "it is very likely that there would have been an acquittal instead of a conviction."\textsuperscript{187} He believed that justice would be served by a grant of Executive Clemency in Geneva Love's case.\textsuperscript{188}

Governor Wilson denied Geneva Love's petition for clemency on May 27, 1993.\textsuperscript{189} In his decision, he acknowledged his

\begin{itemize}
\item \textsuperscript{178} See \textit{id.}
\item \textsuperscript{179} \textit{Id.}
\item \textsuperscript{180} \textit{Id.}
\item \textsuperscript{181} Rosen at 2.
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} See \textit{id.}
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} \textit{Day}, 2 Cal. Rptr. 2d at 925.
\item \textsuperscript{186} Letter from The Honorable Robert M. Hinrichs, Judge of the Superior Court of the State of California for the County of Monterey, to The Honorable Pete Wilson, Governor of California 1 (Dec. 21, 1992)\textsuperscript{(hereinafter Hinrichs)(on file with author).}
\item \textsuperscript{187} \textit{Id.} (emphasis added).
\item \textsuperscript{188} \textit{Id.}
\item \textsuperscript{189} Decision, In the Matter of the Clemency Request of Petitioner A, at 4 (May 27,
Wilson claimed that he is now, and always has been, committed to the cause of victims of domestic violence. He pointed out that the clemency process is not a continuation of the judicial process of a criminal defendant. He argued that without the safeguards and sanctions available to the court, he is not in a position to retry criminal cases or to speculate as to what might have been if different evidence had been before a jury. Governor Wilson did not address the trial judge's letter supporting Geneva Love's application for clemency.

Wilson stated that the exercise of his clemency power requires him to balance a concern for objective justice against a claim for compassion based on facts which may mitigate the penalty for the crime. Although moved by the personal factors of Geneva Love's case, Wilson stated that:

[T]he test of whether clemency should be considered in cases where BWS is asserted, either as a defense or mitigation, for the petitioner's deliberate taking of the abuser's life must be: Did petitioner have the option to leave the abuser, or was the homicide realistically her only chance to escape him, and further serious physical abuse?

It is astonishing that someone who claims to have a "broad commitment to the cause of battered women" could formulate a test such as Wilson's. He ignores the symptoms and behavior of a battered woman. BWS helps explain why battered women do not have the same "option to leave the abuser" as someone in a non-battering relationship. The unpredictable, yet inevitable brutality which battered women suffer at the hands of their batterers results in symptoms of "learned helplessness," and an inability to leave.

190. Id. at 1.
191. See id.
192. Id. at 3.
193. Id.
194. Denial, supra note 189.
195. Id. (emphasis added).
196. See supra text accompanying notes 21-28; see Balash & Kaser-Boyd, supra note 19, at 14, 18; see Day, 2 Cal. Rptr. 2d at 924.
197. See AB 2273, supra note 29.
The answer to the second part of Wilson’s question: “[W]as the homicide realistically her only chance to escape him, and further serious physical abuse?” is more than likely a yes in most battered women’s cases. However, “realistically” needs to be defined through the eyes of a battered woman. Failure to consider BWS in defining “realistically” will result in the use of misconceptions concerning battered women to compare a battered woman’s conduct against the perceptions and experiences of someone who has never been abused. BWS testimony is critically important because it educates the jury as to how a battered person will likely react in a particular situation.

Not only is Governor Wilson’s test for clemency fundamentally flawed in asking if the battered woman could leave, but when this test is applied to Geneva Love’s case, it is applied incorrectly. Geneva Love was psychologically incapable of leaving her abuser. When she did in fact muster the bravery to attempt to leave she was physically confronted by her abusive husband and rendered physically incapable of leaving. In Geneva Love’s case it appears that killing her abusive husband was her only chance to escape him and further serious physical harm. She did not want to shoot; she was forced to shoot.

Furthermore, although Governor Wilson argued that he is not in a position to retry a criminal case, he nevertheless applies the same legal test a trial court would have applied prior to the enactment of Evidence Code Section 1107 by ignoring the role BWS evidence should play in a review of a petition for clemency. BWS evidence will help explain a particular battered woman’s reactions to the situation she was confronted with when she killed her abusive spouse. Without weighing the effects of BWS, Governor Wilson is unnecessarily restricting his exercise of the clemency power.

One might interpret Governor Wilson’s denial of Geneva Love’s clemency as a message to the Legislature that the remedy for women convicted of killing their abusive partners prior to the enactment of Evidence Code Section 1107 will not be found

198. See Balash & Kaser-Boyd, supra note 19, at 16-18; see Dutton, supra note 10, at 12.

in the Governor's office. In fact, the executive director of the California District Attorneys Association, a supporter of Governor Wilson's test for clemency, admits that "[j]ustice is only served if a woman's assertion of BWS is supported by the facts of her case and there is overwhelming evidence that the homicide was the result of the abuse." The implied message is that a remedy should come from the enactment of a law setting up a procedure to give these women an opportunity for a new trial based on fairness and justice.

IV. GOVERNOR WILSON'S REASONS FOR VETO OF AB 2295

Governor Wilson's veto of AB 2295 was based essentially on three areas of concern. Governor Wilson stated that although the Bill "is obviously well intended," he and "[s]everal elected District Attorneys in the state" believe it is an inappropriate solution.

Governor Wilson's first concern is that he does not believe a generally applicable writ process should be modified for particular types of psychological defenses. He is concerned that AB 2295 could establish a precedent for recognizing and providing special requirements for "other novel defenses" which may develop or gain greater acceptability after a defendant's trial is over.

Second, Governor Wilson believes that a defendant who believes an impropriety occurred at trial has other legal alternatives available.

Finally, Governor Wilson believes that the presumption favoring the finality of convictions and judgments is so strong in

200. Michael W. Sweet is the executive director of the California District Attorneys Association.
201. See Michael W. Sweet, Esq., Legal Test Prevents License to Kill by Battered Women, St. B. Bull., July 28, 1993, 1, 3.
202. Veto Message regarding AB 2295 from the Honorable Pete Wilson, Governor of California, to the Members of the California Assembly, dated October 11, 1993.
203. Id.
204. Id. at 1-2.
205. Id. at 2.
206. Id.
cases where a defendant openly admits his or her own culpability that no collateral challenge should be allowed.\textsuperscript{207} He is concerned that AB 2295 would allow the re-litigation of guilty pleas which would be extremely difficult for a reviewing court to handle.\textsuperscript{208}

V. RESPONSE TO GOVERNOR WILSON'S VETO MESSAGE

The concerns Governor Wilson expressed in his veto message of AB 2295 appear assuagable. Many District Attorneys did oppose AB 2295 when it was first introduced on March 5, 1993.\textsuperscript{209} However, when AB 2295 was sent to the Governor, the California District Attorneys Association (hereinafter CDAA) wrote Governor Wilson's office that it would no longer oppose the Bill.\textsuperscript{210} The CDAA letter stated that AB 2295 had been narrowed considerably to prevent abuse and therefore provided sufficient safeguards.\textsuperscript{211}

First, Governor Wilson's concern with modifying the error coram nobis and error coram vobis writ process for BWS is unfounded for two reasons. One, the importance of BWS testimony has already been recognized by the Legislature, and therefore Governor Wilson's description of BWS as a "novel defense" is incorrect. The Legislature's purpose in enacting Evidence Code Section 1107 was to ensure that the courts would admit BWS evidence in criminal cases.\textsuperscript{212} Governor Wilson must have understood the significance of BWS expert testimony; he did sign Section 1107 into law. Two, the law must change to accommodate scientific and social progress or people will lose confidence in the law. The law is not a stagnant body of rules. Our system of government is built on the idea that if change need occur, the legislature as the representative of the people shall enact new laws. This very process was exemplified in the enactment of Evidence

\textsuperscript{207} See id. at 2.
\textsuperscript{208} See id.
\textsuperscript{209} See AB 2295, supra note 1.
\textsuperscript{210} See letter from Michael W. Sweet, California District Attorneys Association, Legislative Advocate, to the Honorable Pete Wilson, Governor of California 1-2 (Sept. 27, 1993)[hereinafter Sweet](on file with the author).
\textsuperscript{211} See id.
\textsuperscript{212} See AB 785, supra note 83.
Code Section 1107. The problems of domestic violence and its widespread effect on society are only recently being addressed.\(^\text{213}\) The importance of BWS, a defense which had gained acceptability, was recognized and codified by the legislative and executive branches of California state government.\(^\text{214}\)

Second, Governor Wilson's claim that a defendant has other available legal alternatives wholly misses the point of AB 2295's purpose, namely to remedy the injustice of permitting battered women tried after January 1, 1992 to use BWS expert testimony while prohibiting those convicted prior to this date from benefitting by the provisions of Evidence Code Section 1107. AB 2295 was legislation designed specifically to correct this inequity. Other legal alternatives\(^\text{215}\) are not the issue here since AB 2295 sought to provide a special avenue applicable to only a limited section of the prisoner population because the Legislature realized that other remedies were insufficient.\(^\text{216}\)

Third, Governor Wilson's concern regarding the application of AB 2295 to cases involving guilty pleas is baseless for two reasons. One, Governor Wilson based his denial of Geneva Love's petition for clemency, in part, on the fact that applications for clemency are not processed with the safeguards and sanctions available in the courts.\(^\text{217}\) Governor Wilson obviously recognizes that the complicated legal implications surrounding BWS are best handled by the courts. AB 2295 provided safeguards for a judge's review of petitions. If the requirements for the petition were not satisfied; e.g., if the necessary corroborating evidence was not shown, the judge would not grant a new trial. The CDAA letter withdrawing opposition to AB 2295 conceded that it contained sufficient safeguards.\(^\text{218}\) This provides strong support in favor of giving deference to the courts to exercise their discretion in reviewing petitions under AB 2295. Two, a plea of guilty does not necessarily mean the defendant is factually guilty. The decision to plea may have resulted from weighing the

\(^{213}\) See Balash & Kaser-Boyd, supra note 19, at 6-7; Assembly Concurrent Resolution 10, Cal. Senate, 1993-94 Reg. Sess.

\(^{214}\) See CAL. EVID. CODE § 1107 (West Supp. 1993).

\(^{215}\) Such as petitions for writs of habeas corpus. See CAL. PENAL CODE §§ 1473 et seq.

\(^{216}\) See AB 2295, supra note 1.

\(^{217}\) See Denial, supra note 189, at 3.

\(^{218}\) Sweet at 1.
evidence at the time of trial against any defenses available. Of critical importance in this decision-making process is the defendant and her attorney’s belief concerning whether or not BWS testimony would provide a defense. If BWS testimony was not likely to be admitted or was not admitted, a plea of guilty based on a plea bargain may have been the least severe option available. Also, although trial testimony will likely be absent in cases involving guilty pleas, evidence should exist in the district attorney’s file. This generally includes police reports, witness statements, and other relevant evidence.\(^{219}\) Furthermore, the issue should not be decided based on the difficulties and costs involved in administering a remedy such as AB 2295 when a person’s freedom and liberty are at stake.

It would appear that even Governor Wilson, at some level, recognizes the importance of BWS expert testimony. After all, he personally signed Section 1107 into law. Nevertheless, the question as to what will be done for battered women convicted prior to the enactment of Evidence Code Section 1107 remains.

The scrutiny that a bill undergoes while making its way through the legislative process is sufficient to assure that any precedent established by passing a re-introduced AB 2295, for recognizing and providing special standards for particular types of psychological defenses, will be carefully examined.\(^{220}\) The Governor may always exercise the veto power when legislation is deemed inappropriate. The Legislature could then act to address the Governor’s concerns in the next session. This process will guarantee that as new defenses are recognized, the legislative and executive branches will be able to weigh the appropriateness of recognition and codification.

The following modifications are suggested to address the concerns Governor Wilson enumerated in his veto message. Specifically, language should be added to AB 2295 which provides that: (1) BWS is not a “novel defense,” and (2) “other legal alternatives” available to battered women convicted prior to the enactment of Evidence Code Section 1107 remains.

\(^{219}\) See Barbara Marmor, *When Domestic Violence Supports a Defense to Homicide*, *California District Attorneys Association Prosecutor’s Notebook*, Volume XI at 9, 11.

\(^{220}\) At the time this article went to press, AB 2295 was in the process of being re-introduced in the California Assembly.
enactment of Evidence Code Section 1107 are not sufficient to remedy the inequity discussed in this article. Also, language setting forth the judge's discretion and important role in safeguarding against fraudulent or inadequate petitions should be added. This would address Governor Wilson's concern regarding the treatment of guilty pleas. By far the most important reason for re-introducing AB 2295 with language addressing Governor Wilson's concerns is to provide the battered individuals convicted of killing their abusive partners prior to the enactment of Evidence Code Section 1107 the same opportunities to offer BWS evidence as those whose trials came after January 1, 1992.

VI. CONCLUSION

AB 2295 was designed to provide a fair and even application of the law to those individuals affected by the issue of BWS. Battered women charged with criminal activity after January 1, 1992 are permitted to present BWS expert testimony at their trial pursuant to Evidence Code Section 1107. Battered women convicted prior to this date remain unjustly imprisoned with seemingly no viable avenue of relief. AB 2295 was developed to provide a remedy to these individuals.

AB 2295 was based on the belief that justice should be applied equally. AB 2295 contained the necessary safeguards to guarantee that the modified writ process would not be abused by fraudulent claims.

The issue regarding AB 2295 is not one of administrative difficulties, costs, or economy; it is a question of what is fair and just. The battered women convicted prior to January 1, 1992 and unjustly imprisoned in California's penal system have been denied a fair trial because they lacked the opportunity to present all relevant evidence. These women should not be subject to the further deprivation of their rights and liberty simply because the present Governor appears to have: (1) closed clemency as an avenue of relief while implying that the issue is one for the courts to address, and (2) vetoed the legislature's only response to solving the inequity presented by Evidence Code Section 1107.
AB 2295 would add and repeal Chapter 5 (commencing with Section 1266) of Title 9 of Part 2 of, the Penal Code, as follows:

CHAPTER 5. WRIT OF ERROR REGARDING BATTERED WOMAN SYNDROME

1266. (a) The Legislature hereby finds and declares that a unique circumstance exists today that necessitates remedial legislation with regard to victims of battered woman syndrome. In this regard, a small number of individuals are currently serving terms of imprisonment substantially longer than would persons charged today of identical offenses. These individuals, victims of domestic violence, were convicted of killing their abusers prior to the courts appreciating the relevance of battered woman syndrome expert testimony to issues of self-defense or heat of passion. Battered woman syndrome expert testimony is critical to understanding a battered person’s actions and beliefs which may appear unreasonable to the average person. A remedy to this circumstance should be provided in the courts where procedural safeguards and sanctions are available.

It is therefore the intent of the Legislature in enacting this section to extend a writ of error coram nobis or writ of error coram vobis to those individuals convicted before January 1, 1992, who would have benefited by the admission of battered woman syndrome evidence pursuant to Section 1107 of the Evidence Code. It shall not be a basis for denial of the writ if issues relevant to self-defense, sudden quarrel, or heat of passion were introduced at time of trial. This section is not intended to change the elements of any crime. It is only intended to make changes with respect to the writ of error coram nobis with respect to evidence as it relates to battered woman syndrome.

(b) If a petition for a writ of error coram nobis or writ of error coram vobis is brought to procure a vacation of a judgment and the verified petition for the writ satisfactorily shows that all of the following conditions are met, the court shall grant
the writ of error coram nobis or writ of error coram vobis:
(1) The petitioner's judgment of conviction for a violation of Section 187 resulted from a plea or trial that commenced before January 1, 1992, the date Section 1107 was added to the Evidence Code, and the petitioner is imprisoned at the time of filing the verified petition.
(2) The foundational requirements of Section 1107 of the Evidence Code would be met, based on facts set forth in the verified petition.
(3) Any material evidence that would have been admissible pursuant to Section 1107 of the Evidence Code was not admitted; and the facts established on a hearing of the writ show that had the evidence of battered woman syndrome been presented, there is a reasonable probability that the result of the proceedings would have been different, sufficient to undermine confidence in the judgment of conviction.
(4) The battered woman syndrome evidence relates to the battering of the petitioner by the victim of the homicide.
(c) In determining whether to issue the writ, the court shall take both of the following into consideration:
(1) The state of the record and the evidence.
(2) Whether there is any evidence of abuse in the record, or whether the underlying facts of abuse alleged by the petitioner were asserted by the petitioner prior to conviction or are corroborated by other evidence. Corroborating evidence includes, but is not limited to, medical records, verified witness statements, and court records from any other proceeding.
(d) Sections 1260, 1261, and 1262 shall apply to the granting of a writ of error coram nobis or writ of error coram vobis.
1267. This chapter shall remain in effect only until January 1, 1998, and as of that date is repealed.\textsuperscript{321}

\textsuperscript{321} 221. AB 2295, supra note 1.