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OPEN SEASON ON BATTERERS IN GEORGIA? GEORGIA SUPREME COURT ALLOWS JURY INSTRUCTIONS ON BATTERED PERSON SYNDROME IN SELF-DEFENSE CASES: SMITH V. STATE (1997)

INTRODUCTION

The Georgia Supreme Court recently overturned years of precedent disallowing separate jury instructions regarding the relevance of battered person syndrome (BPS) in self-defense cases. Since 1981 the Georgia Supreme Court has held expert testimony as to BPS admissible in appropriate cases to help explain a battered defendant's state of mind, but the court has consistently held that the syndrome does not constitute a separate defense. Therefore, the court had refused to give a separate jury instruction regarding BPS, for fear that such an instruction would emphasize the BPS evidence to the jury. With its recent decision in Smith v. State (1997), the court reversed its stance. There, the court required a separate jury instruction if (1) the defendant makes a proper evidentiary showing of BPS and (2) the defendant properly requests a separate jury instruction regarding the relevance of that evidence to a justification defense.

2. See Smith v. State, 247 Ga. 612, 277 S.E.2d 678 (1981). Please note that in addition to the comment case, the history of battered person syndrome law in Georgia contains several unrelated cases styled "Smith v. State," including the landmark case of 1981, in which the Georgia Supreme Court held that expert testimony as to battered person syndrome was admissible to explain a battered person's state of mind. See id.; Smith v. State, 265 Ga. 495, 458 S.E.2d 347 (1995); Smith v. State, 247 Ga. 612, 277 S.E.2d 678 (1981); Smith v. State, 222 Ga. App. 412, 474 S.E.2d 291 (1996). In this Comment, to reduce the reader's confusion, the Author will refer to the various Smith cases by indicating the year of the decision.
7. See id.
This Comment analyzes the development of BPS evidence and the justification defense in Georgia, considers the holding and effect of Smith (1997), and discusses the future of battered defendants using a justification defense, still an unsettled area of the law. Part I traces the history of how courts have treated BPS evidence in Georgia. Part II states the facts and holdings of the comment case, Smith (1997). Part III examines ways in which recent statutory and case developments may have contributed to the Smith (1997) decision. Finally, Part IV considers questions left open by the Smith (1997) case and discusses uncertainties in the battered person defense that have arisen because of case law and recent Georgia legislation.

I. HISTORY OF BATTERED PERSON SYNDROME AND THE JUSTIFICATION DEFENSE IN GEORGIA

Georgia Code section 16-3-20 provides "[t]he fact that a person's conduct is justified is a defense to prosecution for any crime based on that conduct. The defense of justification can be claimed: (1) When the person's conduct is justified under Code Section 16-3-21 . . . ." Code section 16-3-21 provides:

Use of force in defense of self or others; evidence of belief that force was necessary in murder or manslaughter prosecution.

(a) A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such threat or force is necessary to defend himself . . . against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person or to prevent the commission of a forcible felony.

The justification defense in Georgia developed from a completely objective standard into a standard that considers

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8. See discussion, infra Part IV.
10. Id. § 16-3-21.
more of the defendant’s particular circumstances.\textsuperscript{11} Originally, justification in homicide cases applied only in those situations in which a “reasonable person” would fear imminent death or great bodily harm, without any provision for the special circumstances or characteristics of the defendant.\textsuperscript{12} The law of justification grew to recognize differences in defendants’ situations and to allow juries to consider the fears of a reasonable person in the defendant’s situation.\textsuperscript{13} Courts began to allow evidence of previous acts of violence the victim had committed against the defendant in determining whether the defendant reasonably believed deadly force was necessary.\textsuperscript{14}

Then, in \textit{Smith v. State} (1981),\textsuperscript{15} the Georgia Supreme Court held that expert testimony about BPS\textsuperscript{16} was admissible to explain why a battered person “would not leave her mate, would not inform police or friends, and would fear increased

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\textsuperscript{11} \textit{See Smith} (1997), 268 Ga. at 198, 486 S.E.2d at 821.
\textsuperscript{12} \textit{See id.} (citing Bivins v. State, 200 Ga. 729, 38 S.E.2d 273 (1946)).
\textsuperscript{13} \textit{See id.; see also} Chandler v. State, 261 Ga. 402, 405 S.E.2d 669 (1991) (holding that defendant using a justification defense may introduce prior acts of violence by victim against third parties if defense gives notice prior to trial); Daniels v. State, 248 Ga. 591, 285 S.E.2d 516 (1981) (holding that evidence that defendant had been knifed previously was relevant to determine whether he reasonably believed deadly force was necessary); McDonald v. State, 182 Ga. App. 509, 356 S.E.2d 264 (1987) (holding it was error, though harmless, for trial court to exclude evidence of threats the victim had made against defendant because the threats were relevant to the reasonableness of defendant’s use of force). But some cases disallowed evidence of prior violence against the defendant by third parties, not the victim, for a justification defense. \textit{See Lara v. State}, 216 Ga. App. 117, 463 S.E.2d 137 (1995) (holding that defendant could not explain his behavior by introducing evidence that he had been shot previously by a stranger); Watson v. State, 208 Ga. App. 85, 424 S.E.2d 360 (1992) (holding prior acts of violence against defendant by third parties inadmissible).
\textsuperscript{14} \textit{See Chandler}, 261 Ga. at 407-08, 405 S.E.2d at 673-74.
\textsuperscript{15} 247 Ga. 612, 277 S.E.2d 678 (1981).
\textsuperscript{16} Battered person syndrome (BPS) is a set of characteristics common to people who are physically or psychologically abused. \textit{See Smith} (1997), 268 Ga. at 198 n.2, 486 S.E.2d at 822 n.2. A BPS relationship is characterized by three phases. The first phase consists of minor battering that gradually escalates over time as the abused person passively tries to resist the batterer’s behavior. \textit{See Victoria Mikesell Mather, The Skeleton in the Closet: The Battered Woman Syndrome, Self-defense, and Expert Testimony, 39 Mercer L. Rev.} 545, 553 (1988). Second, a phase of severe battering occurs in which the battered person has no control over and cannot predict the batterer’s behavior. \textit{See id.} Finally, the batterer becomes loving and apologetic and promises to reform; the battered person wants to believe the batterer and returns to the relationship, whereupon the cycle starts again. \textit{See id.} See generally, \textit{e.g.}, Robert F. Schopp et al., \textit{Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse}, 1994 U. Ill. L. Rev. 45 (1994); Note, \textit{Battered Women Who Kill Their Abusers}, 106 Harv. L. Rev. 1574 (1993).
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aggression."17 The court recognized BPS as a scientifically established theory.18 The Smith (1981) court also adopted the rule allowing expert testimony on ultimate issues, if the expert’s conclusion is “beyond the ken of the average layman.”19 The Smith (1981) court’s holding followed Rules 702 and 704 of the Federal Rules of Evidence.20

Following Smith (1981), courts allowed BPS evidence in some, but not in all, cases and the Smith (1981) ruling did not always help defendants very much.21 Moreover, the evidence, when offered, did not go far toward convincing juries that a killing was justified, even in cases with extensive evidence that the victim previously beat the defendant.22

However, after the court’s decisions in Chapman v. State (1988)23 and Chapman v. State (1989),24 BPS cases began to

18. See id.; see also Smith (1997), 208 Ga. at 198, 486 S.E.2d at 821-22.
20. See id.; see also Fed. R. Evid. 702 (allowing expert testimony that “will assist the trier of fact”); Fed. R. Evid. 704 (allowing such expert testimony even if it “embraces an ultimate issue” of the case).
21. See Mullis v. State, 248 Ga. 338, 282 S.E.2d 334 (1981) (holding that expert testimony on BPS was properly excluded because defendant’s evidence of abuse was substantially impeached, so the relationship between the defendant and the batterer was not outside the ken of the average juror, even though defendant presented evidence that victim had beaten her and had threatened to kill her); see also Clenn v. State, 256 Ga. 116, 344 S.E.2d 216 (1986) (holding that it was proper to exclude evidence of BPS as it developed through defendant’s previous relationships); Ledford v. State, 254 Ga. 656, 333 S.E.2d 576 (1985) (holding that it was not error for court to refuse to grant defendant funds for hiring expert to testify as to BPS).
22. See Chastain v. State, 262 Ga. 178, 415 S.E.2d 629 (1992) (affirming conviction in which the jury rejected justification defense when defendant cut victim in the arm to stop him from beating her, and the victim subsequently bled to death, even though defendant introduced “abundant testimony” that the victim had beaten her often; the victim was under a restraining order to stay away from the defendant; and defendant testified that, although she had cut the victim in the past, she only did so to stop the beatings); Chapman v. State, 259 Ga. 706, 386 S.E.2d 129 (1989) (affirming conviction of murder when evidence indicated that defendant planned to kill her husband to escape after more than five years of frequent beatings and death threats, interspersed with the apologetic intervals characteristic of BPS; that husband had threatened to kill her two days before; and that husband had beaten her right before she shot him).
24. 259 Ga. 706, 386 S.E.2d 129 (1989). The two cases, Chapman (1988) and Chapman (1989), involve the trial and retrial of the same defendant. See Chapman (1989), 259 Ga. at 706, 386 S.E.2d at 130; Chapman (1988), 258 Ga. at 214, 387 S.E.2d at 542. The Chapman (1988) case went to the Georgia Supreme Court on the issue of whether defendant, who alleged that she only killed the batterer-victim because she was afraid he would kill her, could introduce evidence of the victim’s violent reputation. See
diverge from other justification defense cases as BPS became a method for escaping the requirement of imminent danger.26 The court in Chapman (1988) held that "[e]xpert testimony regarding the battered woman syndrome authorizes a jury to find that, notwithstanding any lapse in time since the husband's last assault, the defendant honestly was trying to defend herself although her husband was not at the moment physically attacking her."28 On remand, the Chapman (1988) defendant was convicted a second time, and again took her appeal to the court.27 Though the court affirmed the conviction, it held evidence of BPS admissible to show that a defendant reasonably believed force was necessary to defend himself or herself even though the actual threat was not imminent.28

Subsequent defendants in justification cases cited the court's holdings in both Chapman (1989) and Chapman (1988) and quoted their language to support requests for jury instructions on BPS.29 However, the court in Chapman (1989) explicitly rejected a requested charge on BPS, allowing only general justification charges and holding that BPS did not constitute a separate defense.30 Accordingly, later cases repeatedly held that

25. See Smith v. State, 288 Ga. 196, 488 S.E.2d 819 (1997); Chester v. State, 287 Ga. 9, 471 S.E.2d 836 (1998); Pugh v. State, 260 Ga. 874, 401 S.E.2d 270 (1991). In typical justification cases, the threat the victim posed to the defendant must have been imminent; that is, it must have been an immediate threat. See Smith (1997), 288 Ga. at 196, 488 S.E.2d at 821; see also O.C.G.A. § 16-3-21 (1996) ("[T]he threat or force is necessary to defend ... against such other's imminent use of unlawful force 

... ") (emphasis added). After the Chapman cases, defendants who made a sufficient showing of BPS could successfully assert a justification defense "although the actual threat of harm does not immediately precede the homicide." Smith, 288 Ga. at 197, 488 S.E.2d at 822 (quoting Chapman (1989), 259 Ga. at 708, 386 S.E.2d at 131).

26. 288 Ga. 214, 218, 387 S.E.2d 541, 543 (1989) (emphasis added). There, the batterer-victim was bathing when the defendant shot him. See id.


28. See id. at 707-08, 386 S.E.2d at 131.


BPS is not a separate defense and that courts should not give a separate jury instruction on BPS evidence.\textsuperscript{31} In \textit{Chester v. State},\textsuperscript{32} the Georgia Supreme Court again refused to allow a separate jury instruction in BPS cases to explain the relevance of the BPS evidence.\textsuperscript{33} However, Justice Sears, in a compelling special concurrence, argued that because BPS cases differ from ordinary justification cases, standard justification instructions alone no longer were sufficient to guide the jury in applying BPS to a self-defense claim.\textsuperscript{34} The concurrence stated that "\textit{Chapman} . . . indicates that the battered person's syndrome cannot be subsumed entirely within the defense of justification."\textsuperscript{35} Further, according to Justice Sears, because immediacy of the threat was no longer strictly required after the \textit{Chapman} holdings, and because a jury may have trouble applying the battered person's unique mental state in the context of standard justification instructions, the complicated issues presented by BPS not only merited separate instructions, but required them.\textsuperscript{36}

\section*{II. \textit{Smith v. State}(1997)}

\subsection*{A. Facts of the Case}

Vernita Smith was charged with malice murder\textsuperscript{37} and convicted of voluntary manslaughter in the shooting death of her husband.\textsuperscript{38} The defendant offered evidence at trial that her husband physically abused her during their marriage.\textsuperscript{39} Defendant's evidence showed that her husband beat her repeatedly, often held a gun to her head, and threatened to kill

\begin{itemize}
\item 287 Ga. 8, 471 S.E.2d 838 (1996).
\item \textit{See id.} at 12, 471 S.E.2d at 838.
\item \textit{See id.} at 14-18, 471 S.E.2d at 840-42 (Sears, J., concurring specially).
\item Id. at 15, 471 S.E.2d at 840.
\item \textit{See id.} at 15-16, 471 S.E.2d at 840-41. \textit{See generally} Mather, \textit{supra} note 16 (outlining characteristics of BPS and battered person's state of mind).
\item \textit{See id.} at 196, 486 S.E.2d at 820-21.
\end{itemize}
he.\textsuperscript{40} He strangled her until she was unconscious on one occasion, and on another, he strangled her with a lamp cord until her brother arrived and stopped him.\textsuperscript{41} The defendant called the police on numerous occasions and left her husband twice because of the abuse, but when he apologized and promised not to abuse her anymore, she went back to him.\textsuperscript{42}

On the day of the shooting, the defendant's husband became angry when he saw her out with friends; when she came home he confronted her and began beating her.\textsuperscript{43} He kept hitting her and held a metal can above his head in a threatening manner; she grabbed a pistol and shot him once. The bullet entered his arm and lodged in his chest.\textsuperscript{44} The defendant followed the victim outside and offered to help him get medical treatment; he responded "'Bitch, you're dead.'"\textsuperscript{45} The victim later died as a result of the gunshot.\textsuperscript{46}

At trial, the defendant's expert on domestic violence testified about the symptoms and effects of BPS and gave an opinion that the defendant suffered from the syndrome.\textsuperscript{47} The defendant requested three jury instructions regarding BPS and the application of syndrome evidence to her justification defense, all of which the trial court denied.\textsuperscript{48} The three requested jury instructions on BPS were:

[1.] Expert testimony regarding the battered woman's syndrome authorizes a jury to find that, notwithstanding any lapse of time since the husband's last assault, the defendant honestly was trying to defend herself although her husband was not at the moment physically attacking her.\textsuperscript{49}
[2.] You are authorized to consider the testimony of an expert witness as to whether or not the defendant suffered

\textsuperscript{40} See id. at 196, 486 S.E.2d at 820.
\textsuperscript{41} See id.
\textsuperscript{42} See id. at 196, 486 S.E.2d at 821. Ms. Smith's situation reflects the pattern of escalation, severe battering, and apology followed by reconciliation that typifies BPS. See id.; Mather, supra note 16.
\textsuperscript{43} See Smith, 268 Ga. at 197, 486 S.E.2d at 821.
\textsuperscript{44} See id.
\textsuperscript{45} Id.
\textsuperscript{46} See id.
\textsuperscript{47} See id.
\textsuperscript{48} See id. at 202-03, 486 S.E.2d at 825.
\textsuperscript{49} Id. at 203, 486 S.E.2d at 825 (emphasis in original).
from the battered woman syndrome to assist you in evaluating her defense [of] self-defense. In this regard, you may consider the testimony of an expert witness on the battered woman syndrome to help explain why a person suffering from the battered woman syndrome would not leave her mate, would not inform the police, family or friends of her mate’s abusive treatment and would fear aggression against herself.\textsuperscript{50}

[3.] Expert testimony regarding the battered woman syndrome \textit{authorizes a jury to find} that the defendant honestly believed her life was in imminent danger and that her husband was going to kill her.\textsuperscript{51}

Rejecting the defendant’s requested instructions, the court instead gave a pattern instruction on justification.\textsuperscript{52}

\textbf{B. The Majority’s Opinion in Smith (1997)}

The majority opinion in \textit{Smith} (1997) recognized that the trial court and court of appeals properly followed binding precedent in rejecting the requested jury instructions.\textsuperscript{53} However, in light of Code section 16-3-21(d)\textsuperscript{54} and the unique aspects of BPS as it relates to a justification defense,\textsuperscript{55} the court chose to overrule its previous holdings\textsuperscript{56} and require specific jury instructions on BPS to help the jury determine the validity of a battered person’s self-defense claim.\textsuperscript{57}

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\textsuperscript{50} \textit{Id.} at 203-04, 486 S.E.2d at 825.
\textsuperscript{51} \textit{Id.} at 204, 486 S.E.2d at 826 (emphasis in original).
\textsuperscript{52} \textit{See id.} at 197, 486 S.E.2d at 821-22. "The jury was charged that a person is justified in using force against another person ‘when and to the extent that she reasonably believes that such . . . force is necessary to defend herself or a third person against the other’s imminent use of unlawful force.’" \textit{Id.} (alteration in original).
\textsuperscript{54} 1993 Ga. Laws 1716, § 2; \textit{see infra} Part IV (discussing O.C.G.A. § 16-3-21(d) (1996)).
\textsuperscript{55} \textit{See Smith} (1997), 268 Ga. at 198-99, 486 S.E.2d at 822; \textit{see also} Chester, 267 Ga. at 14-18, 471 S.E.2d at 840-42 (Sears, J., concurring specially).
\textsuperscript{56} \textit{See Smith} (1997), 268 Ga. at 200 n.5, 486 S.E.2d at 823 n.5; \textit{see also} discussion, \textit{supra} Part I.
\textsuperscript{57} \textit{See Smith} (1997), 268 Ga. at 200, 486 S.E.2d at 823.
The court reiterated its position that BPS is not a separate defense. Nevertheless, the court stated that if a defendant presents sufficient BPS evidence and then requests an instruction explaining how that evidence relates to self-defense, an instruction should be given "[b]ecause a defendant is entitled to a charge explaining the theory of the defense." The court stated that allowing a charge related to BPS could permit juries to consider the reasonableness of the defendant's belief that force was necessary in light of the defendant's circumstances, history of abuse, and psychological condition. The court held that the issue in a BPS case is whether, "given the circumstances as [the defendant] perceived them, the defendant's belief was reasonable that the danger was imminent." Compare this issue to the court's statement of an ordinary justification defense issue: "[w]hether the circumstances were such that they would excite not merely the fears of the defendant, but the fears of a reasonable person."

The court suggested a pattern instruction that could be used in BPS cases:

I charge you that the evidence that the defendant suffers from battered person syndrome was admitted for your consideration in connection with the defendant's claim of self-defense and that such evidence relates to the issue of the reasonableness of the defendant's belief that the use of force was immediately necessary, even though no use of force against the defendant may have been, in fact, imminent. The standard is whether the circumstances were such as would excite the fears of a reasonable person possessing the same or similar psychological and physical characteristics as the defendant, and faced with the same circumstances surrounding the defendant at the time the defendant used force.

Note that Justice Carley, in his dissent, approved the language of the majority's suggested pattern instruction although he

58. See id. at 201, 486 S.E.2d at 824 (Carley, J., dissenting).
59. Id. at 198, 486 S.E.2d at 823.
60. See id. at 200, 486 S.E.2d at 823.
62. Id. at 197-98, 486 S.E.2d at 821 (quoting trial court's jury charge).
63. Id. at 200-01, 486 S.E.2d at 823.
rejected the defendant’s requested instructions as too argumentative.\textsuperscript{64}

\textbf{C. Justice Carley’s Dissent in Smith (1997)}

Justice Carley’s dissent in \textit{Smith} (1997) agreed with the majority’s holding that, when warranted, a court should instruct the jury on BPS as it relates to a justification defense.\textsuperscript{65} However, the dissent contended that, in the instant case, the requested instructions were too argumentative and not neutral enough and that the trial court properly disallowed them.\textsuperscript{66} The dissent argued that use of the phrase “authorizes a jury to find” in the defendant’s first requested charge\textsuperscript{67} was too argumentative, and that it focused too much on the syndrome rather than explaining neutral legal principles and the relevance of the evidence.\textsuperscript{68} With respect to the defendant’s second requested charge, Justice Carley said the first sentence gave a correct statement of the law,\textsuperscript{69} but the second sentence was too argumentative because it used the language “help explain” rather than neutrally stating the relevance of the evidence to the legal principles involved.\textsuperscript{70} Justice Carley also found the defendant’s third requested charge too argumentative because of its language; like the first charge, it used the phrase “authorizes a jury to find.”\textsuperscript{71}

Although Justice Carley dissented from the majority’s refusal to reject the defendant’s requested charges “in toto as argumentative,”\textsuperscript{72} he nonetheless supported the majority’s holding that, when proper instructions are submitted and proper evidence is presented, courts should give a separate jury

\textsuperscript{64} \textit{See id.} at 205, 486 S.E.2d at 826 (Carley, J., dissenting).
\textsuperscript{65} \textit{See id.} at 201, 486 S.E.2d at 824.
\textsuperscript{66} \textit{See id.} at 204-05, 486 S.E.2d at 828.
\textsuperscript{67} \textit{See supra} Part II.A for text of defendant’s requested jury instructions.
\textsuperscript{68} \textit{See Smith} (1997), 268 Ga. at 203, 486 S.E.2d at 825 (Carley, J., dissenting).
\textsuperscript{69} The first sentence of the defendant’s second requested instruction stated: “You are authorized to consider the testimony of an expert witness as to whether or not the defendant suffered from [BPS] to assist you in evaluating her defense [of] self-defense.”
\textit{Id.}
\textsuperscript{70} \textit{See id.} at 204, 486 S.E.2d at 825.
\textsuperscript{71} \textit{See id.} at 204, 486 S.E.2d at 829.
\textsuperscript{72} \textit{Id.} at 187 n.1, 486 S.E.2d at 821 n.1.
instruction on BPS. In particular, Justice Carley approved of the majority's suggested pattern charge.

III. RECENT DEVELOPMENTS IN GEORGIA STATUTES AND CASE LAW THAT MAY HAVE CONTRIBUTED TO THE SUPREME COURT'S CHANGE IN POSITION

The Georgia General Assembly amended Code section 16-3-21 in 1993 to add subsection (d), which provides that:

In a prosecution for murder or manslaughter, if a defendant raises [a justification defense], the defendant, in order to establish the defendant's reasonable belief that the use of force or deadly force was immediately necessary, may be permitted to offer:

1. Relevant evidence that the defendant had been the victim of acts of family violence or child abuse committed by the deceased . . . ; and
2. Relevant expert testimony regarding the condition of the mind of the defendant at the time of the offense, including those relevant facts and circumstances relating to the family violence or child abuse that are the bases of the expert's opinion.

Although the additions were introduced in a bill "relating to safety, health, and welfare of . . . minors and children in particular," the court in Smith (1997) relied on amended Code section 16-3-21 to justify its change in position with respect to battered spouses.

Opinions in recent cases suggest that a separate jury instruction on BPS is appropriate because of the uniqueness and complexity of the issues involved and also because jurors cannot understand how to apply the BPS evidence to the

73. See id. at 205, 486 S.E.2d at 826.
74. See id. at 200-01, 486 S.E.2d at 823, 826; see also Freeman v. State, 269 Ga. 337, 338, 496 S.E.2d 716, 718 (1998) (holding that BPS jury instruction modeled after the Smith (1997) court's pattern instruction met the requirements for a requested jury charge).
76. O.C.G.A. § 16-3-21(d) (1998); Smith (1997), 268 Ga. at 199, 488 S.E.2d at 822.
elements of the justification defense.\textsuperscript{79} As one commentator noted: "[I]t just never made sense to let [BPS] evidence in and then not give the jury any help on what to do with it."\textsuperscript{80} Further, treatment of BPS evidence in some cases suggests that BPS cases are in fact different from those involving other justification defenses; therefore, different jury instructions are warranted.\textsuperscript{81}

Justice Sears's special concurrence in \textit{Chester v. State} argued that under prior case law, BPS brought up new issues not present in a standard justification defense; therefore, a standard justification jury instruction was insufficient in a BPS case.\textsuperscript{82} Justice Sears relied on \textit{Chapman v. State} (1989) for the proposition that BPS cases differ from ordinary justification defense cases.\textsuperscript{83} According to Justice Sears, the \textit{Chapman} (1989) court held that BPS allowed defendants to assert justification in cases in which the actual threat or harm does not immediately precede the homicide, yet the defendants nevertheless reasonably believe that they are defending their lives.\textsuperscript{84} Justice Sears added that battered individuals whose perceptions change because of abuse, and whose psychological condition may prevent them from being able to objectively tell whether a threat is "imminent," should be able to use justification as a defense even when the threat of harm is not actually immediate.\textsuperscript{85} Although Justice Sears concurred in the judgment of the court because the defendant had not established that he had been battered, she nevertheless stated that it would be unfair to hold a battered person to the same justification standard as an ordinary person.\textsuperscript{86} Therefore, Justice Sears suggested that trial courts should instruct juries to consider not


\textsuperscript{82} See Chester, 267 Ga. at 15-16, 471 S.E.2d at 840 (Sears, J., concurring specially).

\textsuperscript{83} See id. at 15-16, 471 S.E.2d at 840-41.

\textsuperscript{84} See id.; see also Smith v. State, 268 Ga. 196, 199, 486 S.E.2d 819, 822 (1997) (discussing the effect of the \textit{Chester} holdings).

\textsuperscript{85} See Chester, 267 Ga. at 16, 471 S.E.2d at 841 (Sears, J., concurring specially).

\textsuperscript{86} See id. at 17, 471 S.E.2d at 842.
only whether a reasonable person would fear death or serious bodily injury under the facts of the case, but whether a reasonable person in the same circumstances as the defendant would fear death or serious bodily injury and, therefore, would be justified in using deadly force.\(^{87}\)

The *Smith* (1997) court’s opinion suggests that the court may have been influenced by Justice Sears’s well-reasoned argument.\(^{88}\) In explaining its abandonment of precedent, the *Smith* (1997) court directly quoted Justice Sears’s concurrence from *Chester*.\(^{89}\) Moreover, the *Smith* (1997) court, like Justice Sears’s *Chester* concurrence, relied heavily on the *Chapman* holdings to support the need for instructing juries on BPS evidence.\(^{90}\)

Presumably, the supreme court in *Smith* (1997) was also influenced by the court of appeals’ opinion in that case, which reluctantly affirmed Smith’s conviction but criticized Georgia’s position of refusing to charge separately on BPS in appropriate cases.\(^{91}\) The court of appeals disagreed with the position that generalized justification instructions encompass the BPS evidence and no separate instruction was needed, calling the idea “not universally embraced.”\(^{92}\) The court of appeals noted that justification instructions do not necessarily give juries enough guidance on the subject of BPS or the syndrome’s significance in a defendant’s justification defense because the instructions do not elaborate on the complexities of the battered person’s state of mind and BPS’s application to a justification defense.\(^{93}\) Instead, justification instructions rely on such language as “reasonably believe” and “imminent bodily harm” in cases in which the battered person may not have the capability to objectively determine whether harm is imminent.\(^{94}\) The court of appeals reluctantly followed binding precedent, however, and upheld the trial court’s decision not to instruct

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87. See id.
88. See *Smith* (1997), 268 Ga. at 199-200, 486 S.E.2d at 822-23.
89. See id. at 200, 486 S.E.2d at 823.
90. See id. at 198-99, 486 S.E.2d at 822.
92. Id.
93. See id.
94. Id.
separately on BPS. Perhaps the combination of critical arguments in prior cases and statutory changes contributed to the Smith (1997) court’s decision that separate jury instructions in BPS cases were needed.

IV. HOW FAR WILL BATTERING AND ITS EFFECTS GO TO REDUCE OR ELIMINATE THE CULPABILITY OF CRIMINAL DEFENDANTS?

The Smith (1997) court’s opinion opens the door for new theories and scientific evidence in justification cases. In a footnote, the court suggests that BPS may be applicable to many cases outside the scenario of the abusive husband killed by the battered wife. Specifically, the supreme court has suggested that the defense may apply to men as well as to women. The court suggested that the issue of how far the syndrome evidence may go to explain or justify a defendant’s behavior remains unresolved. “We note that in recent years, many experts and social scientists have replaced the term ‘battered woman syndrome’ with the term ‘battering and its effects,’ in response to research focusing on the effects of battering on women, men, and children.”

Moreover, the recently amended Code section 16-3-21(d) uses open language, which suggests that the uses of evidence of battering as a defense could extend beyond spouses, allowing:

(1) Relevant evidence that the defendant had been the victim of acts of family violence or child abuse committed by the deceased . . .; and
(2) Relevant expert testimony regarding the condition of the mind of the defendant at the time of the offense, including . . . facts and circumstances relating to the family

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95. See id.
97. See id.; see also Chester v. State, 287 Ga. 9, 471 S.E.2d 836 (1996) (Benham, J., concurring specially) (arguing that court should not limit syndrome evidence to cases in which history of physical abuse can be shown, but should allow room for evidence of psychological abuse and permit scientific advancements to help shape development of law in this area). But see Marc T. Treadwell, Evidence, 48 MERCER L. REV. 323, 344-345 (1996) (suggesting that Georgia courts may narrow admissibility of syndrome evidence).
99. See Smith (1997), 268 Ga. at 198 n.3, 486 S.E.2d at 822 n.3.
100. Id.
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violence or child abuse that are the bases of the expert's opinion.101

Because the legislature added the new subsection as part of a bill designed particularly to protect minors and children, courts should apply the language to cases involving minors, but, for the same reason, courts may also find the statute's purpose limited in some situations.102 The language arguably opens the door to BPS evidence in cases of more attenuated family relationships, such as between cousins or between an aunt or uncle and niece or nephew, but where will courts draw the line between "acts of family violence" and violence between unrelated individuals?103 Some cases have already limited the use by criminal defendants of evidence of battering and its effects.104

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103.  See Freeman v. State, 269 Ga. 337, 339, 496 S.E.2d 716, 719 (1998). The defendant in Freeman killed his abusive stepfather and his stepfather's friend, claiming a defense of justifcation. See id. at 337, 496 S.E.2d at 717. With respect to the stepfather, the defendant established a sufficient showing of BPS as a result of his stepfather's previous attacks. See id. However, the court refused to extend the defendant's use of BPS to his defense in the shooting of the stepfather's friend because the friend was "not a family member with a history of abusing [defendant]." Id. at 339, 496 S.E.2d at 719. The court held that Code section 16-3-21(d) "limits [BPS] to situations in which the defendant was the victim of family violence or child abuse committed by the deceased." Id. Further, in Johnson v. State, 266 Ga. 624, 469 S.E.2d 152 (1996), the court's holding that "the victim of the crime was an unrelated third party and thus not in the same category as a batterer" suggests that relatedness of the parties is a relevant factor in determining whether battering is relevant to a defense. Id. at 625, 469 S.E.2d at 153; see also Mobley v. State, 209 Ga. 738, 740, 505 S.E.2d 722, 723 (1998) (holding that "evidence of a close personal relationship between the defendant and victim" would support the minimum evidentiary showing needed to warrant a BPS instruction).
A. Use of BPS by Analogy

In *Selman v. State*, the Georgia Supreme Court rejected a defendant’s contention that expert testimony as to his mental state was relevant because, although he was not a battered person, his psychological condition resembled that of a battered woman. The defendant in *Selman* was convicted of murder for shooting the boyfriend of his longtime friend, Ms. Kilgore. The defendant had an infatuation with Kilgore and distrusted the victim, whom the defendant dreamed would hurt Kilgore. At trial, the defendant sought to admit his psychologist’s testimony that the defendant was paranoid and afraid of the victim. The defendant argued that the testimony was relevant because the defendant’s mental state made his case like a BPS case, but the court rejected his argument. The court held that BPS is a complex set of common symptoms that appear in battered women and that the defendant’s case was no way the same as a BPS case. The court held that the admission of battered syndrome evidence in some cases did not change the law regarding evidence in justification defense cases not involving BPS.

In *Johnson v. State*, the supreme court again rejected an argument like that in *Selman*. The defendant in *Johnson* walked up to the victim and shot him in the chest. The victim had made no threatening movements and was talking to the defendant’s brother. As the victim tried to drag himself away, the defendant kept firing and shot the victim at least ten times. The defendant claimed that the victim had been arguing with the defendant’s brother, and that the defendant

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106. See id. at 200-01, 475 S.E.2d at 894-95.
107. See id. at 199, 475 S.E.2d at 893-94.
108. See id. at 199, 475 S.E.2d at 893.
109. See id. at 200, 475 S.E.2d at 894.
110. See id.
111. See id. at 200, 475 S.E.2d at 894-95.
112. See id. at 200-01, 475 S.E.2d at 895.
114. See id.
115. See id. at 624-25, 469 S.E.2d at 153.
116. See id.
117. See id.
saw a chrome object in the victim's hand that he thought was a
gun.\textsuperscript{118} At trial, the defendant tried to offer expert testimony that
his actions were like those of a person exhibiting BPS, but the
trial court found the testimony irrelevant and disallowed it.\textsuperscript{119}
The supreme court upheld the trial court's ruling, holding that,
especially in light of the fact that the defendant and the victim
were unrelated, the case was not comparable to that of a
battered spouse, which is a complex and compelling area of
human behavior.\textsuperscript{120} The court refused to extend its holdings
admitting BPS evidence in certain cases to all cases raising
justification as a defense.\textsuperscript{121}

\textbf{B. Use of Evidence of Battering by Multiple Batterers to
Establish BPS}

In \textit{Clenny v. State},\textsuperscript{122} another case that limited the use of BPS
evidence, the Georgia Supreme Court rejected a defendant's
argument that abuse by former spouses was relevant to her
state of mind and the existence of BPS in her relationship with
the victim.\textsuperscript{123} The defendant shot her live-in male companion
during a fight after he tried to leave in her car and allegedly
threatened to kill her when she tried to stop him.\textsuperscript{124} The
defendant sought to introduce testimony at her murder trial
that she exhibited the symptoms of BPS because of her two
previous relationships with abusive husbands and that she
feared the defendant like she had feared her former spouses.\textsuperscript{125}
The court refused to allow her to introduce evidence of the
abuse by her former spouses,\textsuperscript{126} and only allowed evidence of
battering in the defendant's relationship with the victim.\textsuperscript{127} In
his dissent, Justice Gregory said that a history of physical and

\begin{flushleft}
\textsuperscript{118} See id. at 625, 469 S.E.2d at 153. \\
\textsuperscript{119} See id. \\
\textsuperscript{120} See id. at 626-27, 469 S.E.2d at 154. \\
\textsuperscript{121} See id. \\
\textsuperscript{122} 256 Ga. 123, 344 S.E.2d 216 (1986). \\
\textsuperscript{123} See id. at 124-25, 344 S.E.2d at 218-19; see also Freeman v. State, 269 Ga. 337, 339, 406 S.E.2d 716, 719 (1998) (refusing to extend use of BPS in defense to murder of stepfather-abuser's friend in double homicide). \\
\textsuperscript{124} See Clenny, 256 Ga. at 123-24, 344 S.E.2d at 217. \\
\textsuperscript{125} See id. at 124-25, 344 S.E.2d at 218. \\
\textsuperscript{126} See id. \\
\textsuperscript{127} See id.
\end{flushleft}
psychological abuse would be relevant to whether "she acted with the fears of a reasonable person under the circumstances." Justice Gregory stated that the defendant's history of being a battered spouse was relevant, the question being "whether or not the syndrome is present."  

C. Requirement of Sufficient Factual Showing  

In *Mullis v. State*, the defendant attempted to assert at trial that her husband (the victim) abused her, but most of her evidence was impeached, and the jury convicted her of murder. The trial court excluded expert testimony relating to BPS, and the Georgia Supreme Court upheld the exclusions, stating that "the testimony sought to be admitted related to the reasonable fears of a defendant which could be comprehended by the average juror." The *Mullis* court limited the use of BPS expert testimony because the defendant failed to make a sufficient factual showing that she was a battered spouse.  

Perhaps the court's reluctance to extend BPS to new situations reflects its attempt to balance historical inequities created by the law against the compelling interest in justice and preserving human life. Making allowances for a particular defendant's vulnerability in a self-defense case helps compensate for the law's inability to protect certain groups of people, such as battered family members. However, when the killing is not in self-defense, it is just as illegal to kill a batterer as it is any other person; so the law also seeks to prevent vigilantism and encourage abuse victims to help themselves in alternative ways. For abused women, the compelling need to adjust legal concepts to account for unique problems they

128. *Id.* at 126, 344 S.E.2d at 219 (Gregory, J., dissenting).  
129. *Id.* at 126-27, 344 S.E.2d at 219-20.  
132. *Id.* at 338-339, 282 S.E.2d at 337.  
133. *See id.*  
confront has led to an extensive body of law in a short period of time.\textsuperscript{137} However, some courts outside Georgia have declined to analogize the use of BPS in self-defense cases to a defense of duress when a battered person commits crimes under threat from the abuser.\textsuperscript{138} Moreover, courts in many states have refused to allow BPS in a justification defense for other groups of battering victims other than female spouses, such as homosexual couples or battered men or children.\textsuperscript{139}

Some authors have suggested that new scientific theories of battering and its effects should replace BPS, either because BPS is too limited and cannot accommodate circumstances beyond those of abused women, or because BPS is too unscientific and a more accurate theory should take its place.\textsuperscript{140} Georgia courts have not yet addressed any of these questions, and it remains to be seen whether expansion of the law will be curtailed, or whether the courts are ready to open a battering victims’ Pandora’s Box of theories and defenses.\textsuperscript{141}

CONCLUSION

Thanks to the Georgia Supreme Court’s decision in \textit{Smith} (1997), defendants in Georgia who claim self-defense and offer sufficient evidence of BPS may now request and receive jury instructions explaining the relevance of BPS to the justification defense.\textsuperscript{142} It remains unclear, however, exactly how far the law will expand to allow BPS evidence for different facts and circumstances because recent legislation opens the door to

\begin{footnotes}
\textsuperscript{137} See discussion, supra Part I.
\textsuperscript{139} However, Georgia Code section 16-3-20 provides that justification is “a defense to prosecution for \textit{any crime} based on that conduct.” O.C.G.A. § 16-3-20 (1998) (emphasis added).
\textsuperscript{141} See discussion, supra Part IV; see also Hawks v. State, 223 Ga. App. 890, 479 S.E.2d 186 (1996) (allowing expert testimony about “cycle of abuse” to explain why battered wife changed her story and did not want to prosecute abusive husband). See generally Faigman & Wright, supra note 140; Toffel, supra note 134.
\end{footnotes}
evidence of acts of "family violence" in a justification defense, and court opinions suggest that BPS could apply to self-defense claims in untied situations. Because courts only allow BPS instructions in cases in which the defendant's evidence warrants the charges, such as when a defendant has made an adequate showing of a history of violence inflicted by the victim and symptoms of BPS in the defendant, it may not be necessary for courts to define limits on the possible relationships in which battering could be used as a defense. In particular, what difference does the "relationship" label, familial or otherwise, make in a case when a person can show that he or she was battered to the extent of exhibiting the symptoms of BPS? As long as the court addresses the adequacy of defendant's showing of BPS, the relationship of the victim and the defendant, while perhaps helpful in a showing that a battering relationship existed in the first place, should not be dispositive as to whether a court will recognize a BPS defense.

The possible uses of battering evidence in criminal defenses are far from settled. As society increasingly recognizes and science better understands the effects of battering, the law will begin to consider circumstances beyond the traditional

143. See discussion, supra Part IV.
144. See Smith (1997), 268 Ga. at 200, 466 S.E.2d at 823; see also Freeman v. State, 280 Ga. 337, 337-38, 498 S.E.2d 716, 716-18 (1998) (holding that defendant made sufficient showing of BPS to support justification defense when evidence showed defendant's stepfather had attempted to shoot defendant, attempted to run over defendant with a tractor, and had set a mobile home on fire with defendant inside). The Georgia Supreme Court in Mobley v. State, 280 Ga. 738, 505 S.E.2d 722 (1998), held that an expert's opinion that defendant suffered from BPS would be insufficient by itself to warrant a jury instruction on BPS in justification defense cases. See id. at 740-41, 505 S.E.2d at 723-24. To illustrate, the court enumerated non-exclusive factors for courts to consider in determining whether the evidence warrants a BPS instruction: "evidence of a close personal relationship between the defendant and victim; a pattern of physical, sexual, or psychological abuse; and a reasonable apprehension of harm." Id. at 740, 505 S.E.2d at 723.
145. For an extensive discussion of the complexities of self-defense law with respect to the particular relationship of the defendant to the victim, see generally Toffel, supra note 134.
146. See Chester v. State, 207 Ga. 9, 471 S.E.2d 836 (1996) (Hunstein, J., concurring specially) ("Advancements in this area of science are not unexpected: the battered wife or battered woman syndrome . . . is now the battered person syndrome, in recognition of the fact that men, as well as women, can develop the syndrome. Perhaps the syndrome will soon be renamed, if it becomes established that assault victims as well as battery victims can develop the syndrome.")
conception of crime and self-defense.\textsuperscript{147} Does this mean that defendants will get away with murder, that it will be open season on batterers, or on violent people in general? Probably not, considering that courts still require a sufficient factual showing to support a BPS defense,\textsuperscript{148} that jury instructions must be neutral and not biased toward the battered defendant,\textsuperscript{149} and that juries still may be skeptical in cases in which it seems the defendant acted maliciously, hastily, or with premeditation.\textsuperscript{150}

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\begin{itemize}
\item[\textsuperscript{147}] See id.; Mather, supra note 16, at 547-48, 557-60; see generally Claire Cooper, \textit{Mate-Killing Cases Stretch Legal Limits}, SACRAMENTO BEE, Mar. 24, 1997, at A1; Robert P. Mosteller, \textit{Syndromes and Politics in Criminal Trials and Evidence Law}, 46 DUKE L.J. 461 (1996); Faigman & Wright, supra note 140; Toffel, supra note 134.
\item[\textsuperscript{149}] See id. at 201-02, 486 S.E.2d at 824-28 (Carley, J., dissenting).
\end{itemize}