Case No. S192644

SUPREME COURT OF THE

STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TARE NICHOLAS BELTRAN,

Defendant and Appellant.

First Appellate District, Division Four, Case No. A124392
San Francisco County Superior Court, Case Nos. 175503, 203443
The Honorable Robert L. Dondero, Judge

APPLICATION OF SAN FRANCISCO DOMESTIC VIOLENCE CONSORTIUM, CALIFORNIA WOMEN LAWYERS, CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE, QUEEN'S BENCH BAR ASSOCIATION, AND WOMEN LAWYERS OF SACRAMENTO TO FILE AMICI CURIAE BRIEF IN SUPPORT OF THE PEOPLE OF THE STATE OF CALIFORNIA; AND AMICI BRIEF

BAY AREA LEGAL AID
Minouche Kandel (SBN 157098)
1035 Market Street, 6th Floor
San Francisco, California 94103
Telephone: (415) 982-1300
Facsimile: (415) 982-4243
E-Mail: mkandel@baylegal.org

GREINES, MARTIN, STEIN & RICHLAND LLP
Cynthia E. Tobisman (SBN 197983)
Kent J. Bullard (SBN 176194)
Lara M. Krieger (SBN 218801)
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-Mail: ctobisman@gmsr.com
E-Mail: kbullard@gmsr.com
E-Mail: lkrieger@gmsr.com

Attorneys for Prospective Amici Curiae
SAN FRANCISCO DOMESTIC VIOLENCE CONSORTIUM, CALIFORNIA WOMEN LAWYERS, CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE, QUEEN'S BENCH BAR ASSOCIATION, AND WOMEN LAWYERS OF SACRAMENTO

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES **Page**

TABLE OF AUTHORITIES

STATE CASES **Page**

TABLE OF AUTHORITIES

STATE CASES **Page**

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

FOREIGN CASES

STATE STATUTES AND RULES

TABLE OF AUTHORITIES

STATE STATUTES AND RULES

ARTICLES

TABLE OF AUTHORITIES

ARTICLES **Page**

TABLE OF AUTHORITIES

TREATISES, BOOKS, AND ESSAYS

OTHER AUTHORITIES

APPLICATION OF SAN FRANCISCO DOMESTIC VIOLENCE CONSORTIUM, CALIFORNIA WOMEN LAWYERS, CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE, QUEEN'S BENCH BAR ASSOCIATION, AND WOMEN LAWYERS OF SACRAMENTO TO FILE AMICI CURIAE BRIEF IN SUPPORT OF THE PEOPLE OF THE STATE OF CALIFORNIA

San Francisco Domestic Violence Consortium, California Women Lawyers, California Partnership to End Domestic Violence, Queen's Bench Bar Association of San Francisco Amicus Briefs Committee, and Women Lawyers of Sacramento (collectively, Prospective Amici) request permission to file the attached Amici Curiae Brief pursuant to California Rules of Court, rule 8.520(f).

Prospective Amici seek to share their knowledge about and insights into intimate-partner abuse and the legal, practical, and public policy issues central to this case:

San Francisco Domestic Violence Consortium (DVC) is a coalition of 18 anti-violence agencies that collaborate to provide services to domestic violence survivors in San Francisco. The DVC works to maximize resources, break isolation, transcend turf issues, and build a cohesive, diverse network of resources and a broader response beyond any one agency alone. DVC services are coordinated to meet the diverse needs of all survivors of domestic violence in all communities in San Francisco. The DVC also participates in various efforts to prevent domestic violence and enhance the response of public and private agencies to victims and perpetrators of abuse.

California Women Lawyers (CWL) represents a broad range of lawyers throughout California. Throughout its 30-year history, CWL has promoted its mission of advancing women's interests, extending universal equal rights, and eliminating bias. In pursuing its values of social justice and gender equality, CWL often joins amici briefs challenging discrimination, weighs in on proposed California and federal legislation, and implements programs fostering the appointment of women and other qualified candidates to the bench.

The California Partnership to End Domestic Violence (Partnership) is the federally recognized State Domestic Violence Coalition for California. The Partnership has 182 members across the state, including 123 organizations that provide shelter or other services to domestic violence survivors. The Partnership has a 30-year history of providing statewide leadership, and has successfully passed over 100 pieces of legislation to ensure safety and justice for domestic violence survivors and their children. The Partnership's mission and work are focused on protecting the safety of domestic violence victims and their children and holding batterers fully accountable.

Queen's Bench Bar Association of San Francisco Amicus Briefs Committee (Queen's Bench Bar Association) seeks to advance the interests of women in law and society, and plays an integral part in furthering the progress of women in the legal profession. Among other things, Queen's Bench Bar Association writes and/or signs on to amicus briefs on major issues affecting women and gender equality.

Women Lawyers of Sacramento (WLS), formed in 1962, is premised on the belief that women deserve equal rights, respect, and opportunities

in the workplace and in society at large. To that end, WLS strives, among other things, to eliminate all forms of violence against women.

Prospective Amici seek leave to file the attached brief because they believe that the time has come for this Court to reevaluate the profound societal consequences of allowing habitual abusers who kill their intimate partners to escape full criminal culpability by raising the provocation defense.

Specifically, Prospective Amici ask the Court to reconsider its decision in *People v. Berry* (1976) 18 Cal.3d 509, which engrafted outdated notions of intimate-partner relationships and gender prejudices onto California criminal law. The Amici Curiae Brief explores two paths by which the Court should reevaluate—and repudiate—*Berry*'s implicit assumptions:

First, the animating principle behind the provocation defense is the notion that the law should mitigate the culpability of a homicide committed under circumstances that might provoke a "reasonable man" to lose control. The standards by which we make such value judgments reflect prevailing community mores—and mores evolve over time. And so it is with views on intimate-partner abuse. Accordingly, this Court should reevaluate whether California citizens accept that even reasonable men might sometimes lose control and kill when confronted with perceived intimate-partner disputes.

Second, the empirical evidence is in, and it shows that habitual domestic abusers do *not* assault their intimate partners in the midst of a momentary "loss" of self-control. This is important because the traditional rationale for the provocation defense is that, where a defendant honestly lost control and killed in the heat of passion, the law will

sometimes temper the full weight of criminal culpability. But that doesn't happen with habitual domestic abusers. Instead, habitual abusers consciously and strategically brutalize their intimate partners to exercise control. Given the empirical evidence, the courts should not allow such defendants to argue that a current or former intimate partner provoked her own murder.

Prospective Amici also join the Attorney General's argument that any error in the provocation instruction was harmless, given the overwhelming evidence that defendant did not kill in the heat of passion. To the contrary, the evidence is indisputable: Defendant was a habitual abuser who repeatedly brutalized his ex-girlfriend Claire Joyce Tempongko before stabbing her to death in front of her young children.

Prospective Amici have read the briefs submitted by the parties and believe that the arguments set forth in the accompanying Amici Curiae Brief will assist the Court in deciding the enormously important issues presented by this case. Accordingly, Prospective Amici respectfully request this Court's leave to file the accompanying brief.

No party or counsel for any party in the pending appeal authored the attached brief or made any monetary contribution to its preparation. (Cal. Rules of Court, rule 8.520(f)(4)(A), (B).)

Dated: April 20, 2012

Respectfully submitted,

BAY AREA LEGAL AID
MINOUCHE KANDEL

By: _____
Minouche Kandel

Attorneys for Prospective Amici Curiae San Francisco Domestic Violence Consortium and California Partnership to End Domestic Violence

GREINES, MARTIN, STEIN & RICHLAND LLP
CYNTHIA E. TOBISMAN
KENT J. BULLARD
LARA M. KRIEGER

By: _____
Lara M. Krieger

Attorneys for Prospective Amici Curiae California Women Lawyers, Queen's Bench Bar Association, and Women Lawyers of Sacramento

AMICI CURIAE BRIEF

INTRODUCTION

The provocation defense allows some murderers to avoid the full weight of society's collective judgment that murderers should be dealt with as harshly as the law allows. As a concession to "human weakness," the provocation defense tempers criminal culpability for those who kill in a fit of passion. The defense embodies the notion that even the most reasonable of "reasonable men" might sometimes lose control.

The problem is that many who benefit from this defense are men who, before finally killing their intimate partners, had already habitually abused their victims. In those circumstances, the law effectively sanctions the long-standing but discredited excuse of domestic abusers: "She made me do it."

That is just what happened in this case: Throughout their relationship, defendant repeatedly abused his ex-girlfriend Claire Joyce Tempongko. The pace and brutality of the abuse escalated, and within the 18 months before the murder, defendant had beaten, choked, imprisoned, and stalked her—despite being arrested and violating his probation and Ms. Tempongko's protective orders. Then, weeks after Ms. Tempongko ended their relationship, defendant burst into her apartment and stabbed her 17 times with a kitchen knife in front of her two young children. After living in hiding in Mexico for six years, defendant was finally tried. The jury returned with a second-degree murder conviction. The Court of Appeal reversed.

Amici support the Attorney General's request that this Court reverse and reinstate the jury's conviction, but we go one step further: We urge the Court to take this opportunity to reevaluate its precedents holding that perceived intimate-partner disputes may constitute legally adequate provocation—that is, provocation that might cause a "reasonable man" to lose control. More specifically, we ask the Court to repudiate the parts of its decision *People v. Berry* (1976) 18 Cal.3d 509, that cemented the gender prejudices attendant to allowing habitual abusers to successfully raise the provocation defense.

The provocation defense should not shield habitual domestic abusers because, contrary to the assumptions underlying the defense, they do not kill in a tragic momentary loss of self-control. The empirical evidence shows that habitual abusers consciously and intentionally deploy a campaign of violence to control their intimate partners. The evidence in this case shows that the defendant here typifies this profile.

Accordingly, the Court should take this opportunity to bring the provocation defense into line with both contemporary mores and the current understanding of intimate-partner abuse and abusers.

ARGUMENT

I.

THIS COURT SHOULD REEVALUATE AND REPUDIATE AUTHORITIES ALLOWING THE USE OF THE PROVOCATION DEFENSE TO PARTIALLY EXCUSE INTIMATE-PARTNER MURDERERS WITH A HISTORY OF HABITUAL DOMESTIC ABUSE.

The keystone of California's provocation defense is the hypothetical "reasonable man": Our criminal justice system assigns reduced culpability to those who kill in response to provocation that might cause any "reasonable man" to lose control.

In delineating the boundaries of objective "reasonableness," courts and juries necessarily reflect the prevailing normative conventions—and hold defendants morally and criminally accountable for breaching those conventions. Thus, just as prevailing mores and values evolve over time, so too must the "reasonable man" standard.

But that recalibration hasn't happened when it comes to assigning criminal culpability to those who respond with lethal force to perceived slights by intimate partners. To the contrary, case law—led by this Court's decision *People v. Berry* (1976) 18 Cal.3d 509—has perpetuated the inherently unequal, gendered rationale for and consequences of the

provocation defense.[1] *Berry* held that the defendant was sufficiently "provoked" to kill his wife because she had sexually teased and taunted him over the previous two weeks. In essence, *Berry* judicially sanctioned the excuse offered by habitual abusers who kill their intimate partners: "She made me do it."

Berry and its progeny reflect the mores of a long-ago era marked by insidious and pervasive gender inequities. The time has come for this Court to bring the provocation defense in line with prevailing societal constructs and our current understanding of intimate-partner violence by expressly disavowing the discredited gender prejudices embedded in *Berry*. The current case presents just that opportunity.

A. California's Provocation Defense Is Meant As A Concession To Ordinary "Human Weakness."

1. The provocation defense evaluates whether the killer was subjectively provoked under circumstances that might objectively provoke a "reasonable man."

Because the broad strokes of the provocation doctrine are familiar, we only briefly summarize them here:

An unlawful killing "upon a sudden quarrel or heat of passion"—including a killing allegedly provoked by the victim—constitutes voluntary

---

[1] Many academics have explored the gender inequities at play when an abuser invokes the provocation defense. Two of the most influential law review articles are Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense* (1997) 106 Yale L.J. 1331 (hereafter *Passion's Progress*), and Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill* (1992) 2 S. Cal. Rev. L. & Women's Stud. 71 (hereafter *Heat of Passion and Wife Killing*).

manslaughter, not murder. (Pen. Code, § 192, subd. (a); *People v. Lee* (1999) 20 Cal.4th 47, 59.) The law reduces criminal culpability for an adequately provoked killing as a concession to "human weakness." (*People v. Hurtado* (1883) 63 Cal. 288, 292, affd. on other grounds (1884) 110 U.S. 516.)

Courts and juries use both subjective and objective benchmarks when weighing whether the defendant killed in response to "adequate provocation." (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253.)

The subjective component is simple: The "defendant must actually, subjectively, kill under the heat of passion." (*Id.* at p. 1252.)

By contrast, the objective component requires consideration of complex and nuanced social values: To "reduce the offense to manslaughter the provocation must at least be such as would stir the resentment of a reasonable man." (*People v. Hurtado*, *supra*, 63 Cal. at p. 292.) This objective "reasonable man" standard is meant to ensure that "no defendant may set up his own standard of conduct" such that "no man of extremely violent passion could so justify or excuse himself if the exciting cause be not adequate." (*People v. Logan* (1917) 175 Cal. 45, 49.)[2]

2. The objective prong of the provocation defense reflects society's normative conventions.

By definition, the "reasonable man" standard reflects the normative conventions by which we order our lives—and a recognition that, under certain circumstances, even reasonable men might lose control with fatal

---

[2] Generally, courts and scholars now refer to the provocation defense's objective component as the "reasonable person"—not "reasonable man"—standard. In this brief, however, we refer to the "reasonable man" standard because it more accurately reflects the genesis of the defense and its inherently gendered jurisprudential underpinnings.

consequences. (See, e.g., Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard* (1995) 85 J. Crim.L. & Criminology 726, 753 [the reasonable man is, "unfortunately, just like other *ordinary* human beings," original italics].)

This recognition of human weakness is why we partially excuse criminal conduct that conforms with accepted norms of what a "man" can "reasonably" bear before breaking. But reduced culpability "for provoked killers is only an objective manifestation of a societal belief that such actors should be treated leniently. It does not tell us why this attitude exists." (Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale* (1982) 73 J. Crim.L. & Criminology 421, 423 (hereafter *Rethinking Heat of Passion*).)

B. Since Its Inception Hundreds Of Years Ago And Continuing Up Until Today, The Provocation Defense Has Perpetuated Gender Biases And Sheltered Men Who Kill Their Intimate Partners.

The provocation defense codifies notions of gender inequality that are out of step with contemporary values. Understanding the historical context is the first analytical hurdle in dismantling this calcified doctrine allowing domestic abusers to escape full criminal culpability by blaming the murder victim.

* * * * *

The modern provocation defense evolved from two distinct theoretical strands, both of which were grounded on societal constructs relegating women to second-class status. And the defense cannot be

divorced from the centuries-old, entrenched assumption that even the most reasonable of "reasonable men" might be provoked into killing his adulterous wife or her lover. (See generally Horder, Provocation and Responsibility (1992) pp. 5-42, 72-110 (hereafter Horder) [detailed history of the genesis of the provocation defense].)

1. The early incarnation of the provocation defense partially justified killings "provoked" by a wife's infidelity because courts deemed adultery to be the highest invasion of a man's property.

During the seventeenth century, courts reduced a murder charge to manslaughter if the defendant acted under a subjective heat of passion in circumstances that were deemed to objectively warrant reduced culpability. (Horder, *supra*, at pp. 23-24.) There were only four circumstances that objectively warranted the reduction—the most egregious of which was a man witnessing his wife in the act of adultery. (*Id.* at pp. 23-25; *R v. Mawgridge* (1707) 84 Eng.Rep. 1107, 1114-1115.) Criminal culpability for the killing was reduced from murder to manslaughter because the then-prevailing norms recognized that a husband could be expected to "retaliate *in anger*" to such an affront. (Horder, *supra*, at p. 27, original italics.)

The earliest case to so recognize was *Manning's Case* (1617) 83 Eng.Rep. 112, which held that the defendant was guilty of "but manslaughter" for killing his wife's lover "because there could not be greater provocation than this."

Almost a century later, the English courts elaborated that a cuckold was liable for "bare manslaughter" because "jealousy is the rage of the man,

and *adultery is the highest invasion of property.*" (*R v. Mawgridge*, *supra*, 84 Eng.Rep. at p. 1115, italics added.)

2. Later, the provocation defense partially excused killings "provoked" by a wife's infidelity because courts assumed that adultery might cause even "reasonable men" to lose control.

The rationale articulated for the provocation doctrine shifted during the eighteenth and nineteenth centuries: Courts reduced criminal culpability for killings committed under circumstances that could objectively provoke a reasonable man to lose self-control. (Horder, *supra*, at pp. 87-89; see generally *id.* at pp. 72-110.) Current California law has picked up on this rationale.

Once again, adultery played a starring role: Courts assumed that a man coming upon "his wife in the act of committing adultery" would be seized to kill her "under an impulse so violent that he could not resist it." (*R v. Kelly* (1848) 175 Eng.Rep. 342; Horder, *supra*, at p. 88.)

The courts simultaneously retained the earlier notion that a husband enjoys a proprietary right to his wife's fidelity. That concept undoubtedly underlies cases holding that a "reasonable man" might be provoked to kill his adulterous *wife*, but not his adulterous fiancée or common-law wife. (*Rex v. Greening* (1913) 3 K.B. 846; *Rex v. Palmer* (1913) 2 K.B. 29.) *Rex v. Greening* summed up the gendered unequal balance of power: "It is a gross offence against a husband that his wife should commit adultery, but there is no such offence against a man if a woman not his wife, although he may be living with her, chooses to commit such an act. *In the latter case the man has no such right to control the woman as a husband has to control*

his wife." (3 K.B. at p. 849, italics added.) Accordingly, "[o]nly the sudden discovery of *the gravest possible offence which a wife can commit against her husband* has given rise to this particular case of provocation." (*Ibid.*, italics added.)

* * * * *

With this historical context, we now explore the consequences of California's present-day enforcement of a defense theory built on centuries of gender inequality.

C. The Provocation Defense Has Been Misused To Sanction The Abhorrent, After-The-Fact Rationalization Offered By Those Who Kill Their Intimate Partners: "She Made Me Do It."

1. California law continues to partially excuse killings "provoked" by an intimate partner's withdrawal of affections.

California courts still conceptualize the provocation defense as a means to partially excuse reasonable men who lose control "'out of forbearance for the weakness of human nature.'" (*People v. Lasko* (2000) 23 Cal.4th 101, 109, quoting *People v. Freel* (1874) 48 Cal. 436, 437.)

And that's not all: California's "reasonable man" of today loses his self-control much like England's "reasonable man" of yore. (See *Rethinking Heat of Passion*, *supra*, 73 J. Crim.L. & Criminology at p. 430 [the "reasonable American is much like his English counterpart"]; cf. 2 LaFave, Substantive Criminal Law (2d ed. 2003) § 15.2 (hereafter LaFave) [noting a "growing realization that what might or might not cause a loss of self-control in a reasonable Englishman of a century ago might not

necessarily produce the same reaction in the reasonable Anglo-American of today"].)

Even more, our courts reach back through time to recognize that an objectively reasonable "human weakness" includes killing an unfaithful wife: As recently as 1987, a California appellate court explained that "[a]t least as early as *Manning's Case* (1793) 83 Eng.Rep. 112,[3] an archetypical illustration of adequate provocation sufficient to invoke the common law heat-of-passion theory for voluntary manslaughter has been the defendant's discovery of his wife in bed with another man." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 249 [reversing convictions for murder of wife and attempted murder of wife's lover because of erroneous heat-of-passion jury instruction].) Since then, courts have held that any number of other intimate-partner disputes may constitute adequate provocation as *a matter of law*. (See, e.g., *Passion's Progress*, *supra*, 106 Yale L.J. at pp. 1332-1333.)

This rubric has profound consequences: Current law encourages domestic abusers to insinuate their "blame-the-victim" rationalizations into the evidentiary mix to be considered by courts and juries.

2. California courts—led by this one—have historically embraced abusers' "blame-the-victim" rationalization, as exemplified by *People v. Berry*.

Several troubling California cases on intimate-partner homicide arise from the facile alignment between the provocation defense and abusers' "blame-the-victim" rationalization. (See pp. 21-26, *post*.) For our purposes, we focus on the most problematic one: *People v. Berry* (1976)

---

[3] *Manning's Case* was decided in 1617, not 1793.

18 Cal.3d 509. In reversing the jury's first-degree murder conviction, this Court gave its imprimatur to the most insidious prejudices against domestic violence victims.

The underlying facts in *Berry* are egregious: A few days before the homicide, the 46-year old defendant choked his 20-year old wife (Rachel) into unconsciousness, and then waited two hours before calling a taxi to take her to the hospital. (18 Cal.3d at pp. 513-514.) Rachel survived. (*Id.* at p. 514.) Three days later, defendant went to their apartment and waited there for 20 hours until Rachel returned. (*Ibid.*) After defendant said that he was there to kill her, Rachel screamed, and defendant strangled her to death with a telephone cord. (*Ibid.*)

Berry concluded that those facts didn't add up to murder because Rachel was a tease whose sexual taunting provoked her husband to lie in wait for 20 hours before strangling her to death. (*Id.* at pp. 512-516.) This Court explained: "Defendant's testimony chronicles a two-week period of provocatory conduct by his wife Rachel that *could arouse a passion of jealousy, pain and sexual rage in an ordinary man of average disposition* such as to cause him to act rashly from this passion." (*Id.* at p. 515, italics added.)[4] *Berry* held that Rachel's startled and frightened scream (*id.* at pp. 514, 516) was sufficient "provocation" to incite

---

[4] *Berry* summarized the facts: "[Defendant] testified that upon her return from Israel, Rachel announced to him that while there she had fallen in love with another man, one Yako, and had enjoyed his sexual favors, that he was coming to this country to claim her and that she wished a divorce. Thus commenced a tormenting two weeks in which Rachel alternately taunted defendant with her involvement with Yako and at the same time sexually excited defendant, indicating her desire to remain with him." (18 Cal.3d at p. 513.)

defendant's "uncontrollable rage," and that his "passion was the result of the long course of provocatory conduct by Rachel" (*id.* at p. 516).

This Court's more recent case law precludes the conclusion that Rachel's scream sufficiently provoked defendant. Under now-settled law, a victim's "predictable" response to the aggressor's violence cannot—as a matter of law—constitute legally sufficient provocation. (*People v. Rich* (1988) 45 Cal.3d 1036, 1112 [victim's resistance to stranger rape].)

Nonetheless, *Berry* does not stand alone. Several other of this Court's cases apply a different—and lower—standard to men who kill their intimate partners than to other murderers. (See, e.g., *People v. Bridgehouse* (1956) 47 Cal.2d 406, 413 [unfaithful wife's romantic teasing constituted adequate provocation as *a matter of law*], abrogated in part on other grounds by *People v. Lasko*, *supra*, 23 Cal.4th at pp. 109-110; *People v. Borchers* (1958) 50 Cal.2d 321, 329 [defendant killed unfaithful fiancée "in (a) wild desperation induced by (her) long continued provocatory conduct," sufficient to provoke any "reasonable man"].)

These cases cemented the notion that, in California, some "reasonable men" cannot help but lose control in the face of insults from an unfaithful intimate partner. Courts of appeal (and secondary authorities) routinely cite these cases—as does defendant here. (See, e.g., Ans. Br., pp. 5, 32-33, 37, 61; *People v. Le* (2007) 158 Cal.App.4th 516, 529 [wife's verbal taunting "simply served as the spark that caused this powder keg of accumulated provocation to explode"]; CALCRIM No. 570 (2011).)

In sum, with *Berry* at the helm, these cases collectively legitimize the vestigial and abhorrent "blame-the-victim" rationalization that domestic abusers regularly invoke. Even more insidiously, the cases perpetuate the

eighteenth-century notion that "reasonable men" cannot always control their rage when "provoked" by an intimate partner's adultery or taunting—an anathema to our contemporary community norms. *Berry*'s discredited assumptions cannot be harmonized with California's current views on gender equality and intimate-partner relationships. Accordingly, the Court should disavow the gender prejudices animating *Berry* and similar cases.

3. Insulting or taunting words do not constitute legally adequate provocation—except when it comes to intimate-partner murders.

Berry is also inconsistent with the overwhelming body of case law holding that mere insults, taunts, or other verbal altercations *cannot* constitute adequate provocation.

It is true that, in theory, the victim's incendiary words may constitute adequate provocation. (*People v. Valentine* (1946) 28 Cal.2d 121, 136-144.) But in practice, words alone rarely make the grade: This Court has recently and repeatedly held that "taunting words," insults, or some other verbal exchange cannot constitute provocation. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826-827; see, e.g., *People v. Thomas* (2012) 53 Cal.4th 771, 813 [taunts of "you don't know who I am either" insufficient]; *People v. Enraca* (2012) 53 Cal.4th 735, 759-760 [taunt of "Fuck you slobs" insufficient]; *People v. Manriquez* (2005) 37 Cal.4th 547, 586 ["mother fucker" epithet and other verbal taunting insufficient provocation]; see also *People v. Rivera* (2011) 201 Cal.App.4th 353, 365-367 [sexual partner's disclosure of HIV status insufficient] review den. Feb. 22, 2012, S198644; *People v. Najera* (2006) 138 Cal.App.4th 212, 226

["faggot" epithet insufficient]; *People v. Lucas* (1997) 55 Cal.App.4th 721, 739 [name-calling, smirking, or staring insufficient]; *People v. Dixon* (1961) 192 Cal.App.2d 88, 91 [insulting words or gestures insufficient]; see also *People v. Wells* (1938) 10 Cal.2d 610, 623 [defendant cannot invoke defense if killing was precipitated by conduct "of slight and trifling character"], overruled in part on other grounds by *People v. Holt* (1944) 25 Cal.2d 59, 87-88.)

Yet, inexplicably, the same does not hold in the context of intimate-partner homicide. Instead, our courts routinely hold that the victim's mere words were sufficient to provoke her partner's lethal reaction. Virtually all of these cases involved a wife's actual or perceived infidelity or sexual taunting. (See, e.g., *People v. Berry*, *supra*, 18 Cal.3d at pp. 512-516; *People v. Borchers*, *supra*, 50 Cal.2d at p. 329; *People v. Le*, *supra*, 158 Cal.App.4th at p. 529.)

This case law is strikingly inconsistent with the precedents that overwhelmingly hold that, as a practical matter, insults or taunts cannot constitute adequate provocation. More to the point, we could not locate *any* case arising in *any* other context where a defendant successfully argued that the victim's insults or taunts constituted legally adequate provocation. There is no sound reason why intimate-partner murderers should be held to a lower standard than any other defendant.

D. This Court Should Reevaluate And Repudiate The Aspects Of *People v. Berry* Legitimizing Gender Prejudices That No Longer Reflect California's Prevailing Societal Values, Including Norms Regarding Intimate-Partner Violence.

1. Our conception of "reasonableness" necessarily evolves to conform to changing community norms.

"[W]hen it was first introduced into the law of provocation, the reasonable man test was a device for delivering to the jury, in its role as the conscience of the community, the normative or value judgment as to the degree of moral culpability to be assigned to a particular offender." (Donovan & Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation* (1981) 14 Loy. L.A. L.Rev. 435, 448; see also Ashworth, *The Doctrine of Provocation* (1976) 35 Cambridge L.J. 292, 298-299 [seminal article regarding provocation defense].) The "reasonable man" continues to serve as a proxy for society's normative values. After all, "'[p]rovocations' do not label themselves as 'manslaughter worthy' or not; we do." (Finkel, *Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction* (1995) 74 Neb. L.Rev. 742, 796.)

Accordingly, by definition, the objectively "reasonable man" is an avatar of our "(perhaps unarticulated) community norms." (*People v. Czahara* (1988) 203 Cal.App.3d 1468, 1478.) We project onto the "reasonable man" a societal judgment of whether the defendant's reaction qualifies as a "type such that the law is willing to declare his acts less culpable." (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.) Put

differently, the "reasonableness of a reaction is left to the jurors precisely so that they may bring their common experience and their own values to bear on the question of whether the provocation partially excused the violence." (*People v. Czahara*, *supra*, 203 Cal.App.3d at p. 1478; *id.* at p. 1477 [expert psychiatric testimony regarding "objective adequacy of the provocation" properly excluded]; *People v. Wells*, *supra*, 10 Cal.2d at p. 627 ["reasonableness" generally presents a jury question].)

The elastic quality of the defense's objective prong is analogous to other doctrines that also temper criminal culpability. As the U.S. Supreme Court has recognized, we use such doctrines as yardsticks "to assess the moral accountability of an individual for his antisocial deeds" by reflecting the "constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man." (*Powell v. Texas* (1968) 392 U.S. 514, 535-536 [88 S.Ct. 2145, 20 L.Ed.2d 2145]; see also Keiter, *How Evolving Social Values have Shaped (and Reshaped) California Criminal Law* (2009) 4 Cal. Legal Hist. 393, 394 [the "law (governing criminal liability) mirrors evolving societal values"].)

And the provocation defense couldn't work without some kind of objective touchstone: "As members of society, each of us is constantly in contact with family members, friends, acquaintances and strangers under countless circumstances. No social interaction is so placid as to be utterly devoid of interpersonal stress and friction including, we speculate, monastic existence short of becoming a hermit." (*People v. Ogen* (1985) 168 Cal.App.3d 611, 622.) Given the rough-and-tumble of real life, an objective marker of sufficient provocation is essential to ensure that

"no man of extremely violent passion could so justify or excuse himself if the exciting cause be not adequate." (*People v. Logan*, *supra*, 175 Cal. at p. 49; *People v. Ogen*, *supra*, 168 Cal.App.3d at p. 622 ["society has a strong interest in deterring violent and homicidal conduct by not allowing individuals to justify their acts by their own standard of conduct"].)

The efficacy of the "reasonable man" standard, however, depends on courts and juries robustly policing the outer limits of legally adequate provocation. Linedrawing between what is and what is not deemed adequate provocation reflects embedded social, normative, and cultural values because "[t]o find the provocation adequate is to find that the defendant's behavior, while still reprehensible, is *an understandable product of common human weakness*, and therefore partly excusable." (*People v. Czahara*, *supra*, 203 Cal.App.3d at p. 1478, italics added; Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense* (1986) 33 UCLA L.Rev. 1679, 1696 [by partially excusing a provoked killing, we telegraph that "although (defendant's) act was wrong, he is not entirely blameworthy"].)

2. Our criminal justice system must account for the cultural paradigm shifts transforming our normative judgments about gender and violence.

Profound implications flow from the criminal justice system's recognition of adultery or some other perceived intimate-partner dispute as legally adequate "provocation." Current law—as a practical matter—authorizes courts and juries to find that California's community norms recognize and tacitly accept that lethal rage against intimate partners is sometimes an "understandable product of common human weakness." (*People v. Czahara*, *supra*, 203 Cal.App.3d at p. 1478.) But that is just not

true. California does not concede that intimate-partner battery and homicide reflect immutable "human weaknesses." (See pp. 21-26, *post.*)

3. The Court should explicitly repudiate the portions of *People v. Berry* that perpetuate the notion that "ordinary human weakness" might cause a "reasonable man" to use lethal force in response to a perceived intimate-partner dispute.

As discussed above, *People v. Berry*, *supra*, 18 Cal.3d 509, cemented into the criminal justice system some of the most pernicious prejudices regarding gender and sexuality. Now, more than 35 years later, this Court should expressly disavow those prejudices and hold that they are irrelevant to meting out criminal culpability in intimate-partner homicides.

This reevaluation of *Berry* is part of the organic process that continually refines criminal law to reflect prevailing community norms. (See, e.g., 2 LaFave, *supra*, § 15.2 [a modern-day American might not be provoked by the same circumstances as the fictitious Englishman of centuries ago].) As one court of appeal explained, Supreme Court precedents "are discarded, if ever, because of altered social circumstances or new societal values. '[T]he ideas of the community and of the social sciences, whether correct or not, as they win acceptance in the community, control legal decisions.' [Citation.]" (*In re Javier A.* (1984) 159 Cal.App.3d 913, 974.)[5]

---

[5] Stare decisis does not preclude this Court from revisiting *Berry*: "Court-made error should not be shielded from correction." (*People v. King* (1993) 5 Cal.4th 59, 78.) "This is especially so when, as here, the error [in the prior opinion] is related to a 'matter of continuing concern' to the community at large. [Citation]." (*Moradi-Shalal v. Fireman's Fund Insurance Cos.* (1988) 46 Cal.3d 287, 296, original alteration.)

Toward that end, this Court has already started chipping away at *Berry*'s routinized assumptions. In *People v. Cole* (2004) 33 Cal.4th 1158, 1216-1217, the Court recognized that some intimate-partner disputes might give rise to *subjective* heat of passion, but fall short of satisfying the defense's *objective* component. *Cole* found that defendant's five-year relationship with his girlfriend was marked by habitual, excessive drinking and violent fights, and so it was on the night that he murdered her by setting her on fire. (*Ibid.*) This Court concluded that the following facts did not warrant a heat-of-passion manslaughter instruction: "defendant was intoxicated and jealous, and [in] his taped statement to the police [he said] that he went 'berserk' after [his girlfriend] said that she would put a 'butcher knife in your ass.'" (*Id.* at p. 1216.)

In addition, some courts of appeal have set the stage for this Court's reevaluation of *Berry*. Those courts recognize that intimate-partner homicides are often preceded by an outsized jealousy that does not necessarily satisfy the subjective and objective components of the provocation defense. (See, e.g., *People v. Hach* (2009) 176 Cal.App.4th 1450, 1459 [defendant's "smoldering jealousy" cannot reduce murder to manslaughter, citing *People v. Hudgins* (1967) 252 Cal.App.2d 174]; *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1412-1415 [defendant who obsessively stalked estranged wife could not satisfy either the provocation defense's subjective or objective components]; *People v. Hyde* (1985) 166 Cal.App.3d 463, 473 [distinguishing between jealousy as a motive for defendant's killing his ex-girlfriend's new boyfriend and jealousy as an intense emotion constituting a recognized "passion" to reduce the crime to voluntary manslaughter, and rejecting defendant's "suggestion that (the

victim's) mere dating of (defendant's former girlfriend) after she broke up with (defendant) constitutes provocation"].)

Even so, *Cole* did not go far enough, and the courts of appeal cannot ignore *Berry*'s holding or its rationale. (See *People v. Letner* (2010) 50 Cal.4th 99, 197-198 [lower courts bound by Supreme Court precedent].) Only this Court can correct *Berry*'s endorsement of the vestigial notion that, in California, a man's murderous rage against his female intimate partner sometimes results from unavoidable "human weaknesses" to which even "reasonable men" might succumb—a notion that has been soundly rejected by our current community norms.

There is also a practical reason for this Court to reevaluate *Berry*'s underlying assumptions. *Berry* concluded that the victim's "two-week period of provocatory conduct" toward her husband "could arouse a passion of jealousy, pain and sexual rage in an ordinary man of average disposition." (18 Cal.3d at p. 515.) That conclusion was largely grounded on junk science: the so-called "expert" testimony from psychiatrist Dr. Martin Blinder. (*Id.* at pp. 514, 516.)[6] This is the same Dr. Blinder who is better known for coming up with the now-discredited "Twinkie Defense." (*People v. White* (1981) 117 Cal.App.3d 270; Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform* (2010) 100 J. Crim.L. & Criminology 33, 79, fn. 226.) At the very least, *Berry*'s

---

[6] For example, Dr. Blinder diagnosed Rachel (postmortem and without meeting her) as a "depressed, suicidally inclined girl" with a death wish. (18 Cal.3d at p. 514.) Dr. Blinder opined that Rachel "sexually arous[ed] him and taunt[ed] him into jealous rages in an unconscious desire to provoke [defendant] into killing her and thus consummat[ed] her desire for suicide." (*Ibid.*)

reliance on Dr. Blinder's suspect opinions warrants a second look by this Court.

Any methodical reevaluation of *Berry* can lead to only one conclusion: Its outdated rationale partially excusing abusive men who kill their intimate partners cannot stand. Only this Court can repudiate *Berry*'s assumption that "reasonable men" cannot always control their violent rage when confronted with the withdrawal of affections by a wife or girlfriend. And that is what the Court should do now.[7]

II.

THE COURT SHOULD REEVALUATE THE PROVOCATION DEFENSE IN LIGHT OF EMPIRICAL EVIDENCE DEMONSTRATING THAT INTIMATE-PARTNER HOMICIDE IS PRIMARILY THE CULMINATION OF A LONG-STANDING ABUSIVE PATTERN, NOT A MOMENTARY LOSS OF SELF-CONTROL.

The Court should reevaluate *Berry* and similar case law for an additional reason: The empirical evidence does not bear out the claim that abusers kill their intimate partners in a momentary fit of rage and loss

---

[7] We do not suggest that the Court should repudiate the provocation defense when it comes to all intimate-partner homicides. We argue only that the defense should not find purchase when *habitual abusers* seek to blame their murderous rages on their victims. By contrast, we believe that the *victims* of intimate-partner abuse may properly rely on the provocation defense to demonstrate that a persistent cycle of violence might provoke a "reasonable" person to use lethal force. (See Comment, *Killing One's Abuser: Premeditation, Pathology, or Provocation?* (2010) 59 Emory L.J. 769, 804 [a "battered woman can argue that she acted as any ordinary person would, given the years of abuse and terror endured at the hands of her abuser"].)

of self-control. The exact opposite is true. Abusers methodically, intentionally, and strategically deploy violence as a means of controlling their partners.

A. Domestic Abusers Consciously Use Violence To Control Their Intimate Partners.

The provocation defense comes into play only if the defendant affirmatively demonstrates that the victim provoked him into losing control—with fatal consequences. (See *People v. Thomas*, *supra*, 53 Cal.4th at p. 813.) That principle dovetails with the rationale offered by domestic abusers: They often explain away their violence in those same terms, attributing the abuse to an uncontrollable loss of self-control.

But the empirical evidence belies that apologia. (See, e.g., Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation* (1991) 90 Mich. L.Rev. 1, 57 (hereafter *Legal Images of Battered Women*).) The evidence shows that abusive men beat their intimate partners to solidify their power and control over the victims, not because of an overpowering loss of self-control. (See, e.g., Dutton & Waltz, *Domestic Violence: Understanding Why it Happens and How to Recognize It* (Winter 1995) 17 Fam. Advoc. 14; Burke, *Domestic Violence as a Crime of Pattern and Intent* (2007) 75 Geo. Wash. L.Rev. 552, 555; *Heat of Passion and Wife Killing*, *supra*, 2 S. Cal. Rev. L. & Women's Stud. at p. 85.) Even the abusers explain that their "violence is deliberate and warranted." (Ptacek, *Why Do Men Batter Their Wives?* in Feminist Perspectives on Wife Abuse (Yllo & Bograd edits., 1988) p. 153 (hereafter Ptacek).)

Research shows that, more than any other class of violent criminals, domestic abusers are fueled by a crusade to control their intimate

partners—a concept known as the "control motive." (See Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims* (2009) 87 Tex. L.Rev. 857, 867, citing Felson & Messner, *The Control Motive in Intimate Partner Violence* (2000) 63 Soc. Psychol. Q. 86, 91.)

The control motive explains the phenomenon of "separation assaults"—that is, the escalation of violence when the victim attempts to sever the abuser's control over her by leaving the relationship. (*Legal Images of Battered Women*, *supra*, 90 Mich. L.Rev. at p. 58.) Evidence shows that many intimate-partner homicides come on the heels of the abused woman's attempt to end the relationship, or after she already ended the relationship. (See, e.g., Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond* (1996) 69 S. Cal. L. Rev. 1463, 1499-1500; Wilson & Daly, *Spousal Homicide Risk and Estrangement* (1993) 8 Violence & Victims 3, 8; Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder* (1982) Bull. Am. Acad. Psychiatry & L. 271, 274, table 2.)

That is exactly what happened here: According to defendant himself, he had moved out of Ms. Tempongko's apartment a month before he killed her. (13 RT 1517:22-1518:14; Ans. Br., p. 17.) During trial, he testified that he and Ms. Tempongko "mutually decided to take a timeout to kind of reevaluate our relationship." (13 RT 1518:4-6; see also Ans. Br., p. 17 ["They were having their ups and downs"].)

This Court should take the lead from the Legislature, which has already addressed some of the concerns driving California's public policies regarding domestic violence. The Legislature explicitly recognized that domestic abuse is unlike other violent crime: "Not only is there a great

likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked. If we fail to address the very essence of domestic violence, we will continue to see cases where perpetrators of this violence will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner." (Assem. Com. on Public Safety, Rep. on Sen. Bill No. 1876 (1995-1996 Reg. Sess.) June 25, 1996, pp. 3-4, quoted by *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1028.) Given the realities of domestic violence, the Legislature modified the Evidence Code to allow the introduction of a defendant's domestic violence history to show his propensity for such violence. (Evid. Code, § 1109; cf. Evid. Code, § 1101 [general evidentiary rule excludes character evidence].)

This Court should draw on the Legislature's insights into the dynamics of domestic abuse when evaluating the consequences of allowing abusers to minimize their culpability for murder by claiming a loss of self-control.

B. The Ultimate Form Of Domestic Abuse Is Murder.

Empirical evidence also demonstrates that intimate-partner murder is just the final piece of a long-running abusive pattern, and the foreseeable consequence of the abuser's drive to control his partner. (See, e.g., Campbell, *If I Can't Have You, No One Can: Power and Control in Homicide of Female Partners* in Femicide: The Politics of Woman Killing (Radford & Russell edits., 1992) p. 111.)

For example:

• One study showed that 90% of domestic homicides were preceded by an average of five police "domestic disturbance" calls. (Kleck, *Policy Lessons from Recent Gun Control Research* (1986) 49 Law & Contemp. Probs. 35, 41.)

• A U.S. Department of Justice study of spousal killers showed that 70% of the male murderers had a prior arrest or conviction. (Langan & Dawson, Bureau of Justice Statistics, U.S. Dept. of Justice, Spouse Murder Defendants in Large Urban Counties (Sept. 1995) table 35, p. 21.)

• And yet another study reported that a full 45% of all murders of women committed by men occur when the woman either actually ended the relationship or intended to do so. (Dutton & Golant, The Batterer: A Psychological Profile (1995) p. 15.)

The current case bears out this empirical evidence: Before killing Ms. Tempongko, defendant had been arrested three times for either assaulting or stalking her (1 CT 152, 175, 196), had been convicted of felony domestic violence (13 RT 1602), and had his probation revoked (6 CT 1585-1586).

Recently, the courts have begun to explore the nexus between the real-life pattern of domestic abuse and prosecutions of intimate-partner murderers. For example, last year, the Fifth District Court of Appeal observed that, sometimes, "'murder is the ultimate form of domestic violence.'" (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1237.)

This Court should go one step further by critically evaluating the intersection of domestic abuse with the provocation defense.

C. The Provocation Defense Allows Abusive Murderers To Escape Full Criminal Culpability By Blaming The Victim.

There is an uneasy but undeniable symbiosis between the provocation defense and the "loss-of-control" excuse cited by men who kill their intimate partners. (See, e.g., *Heat of Passion and Wife Killing*, *supra*, 2 S. Cal. Rev. L. & Women's Stud. at pp. 71-72 & fn. 3-4; *id.* at pp. 94-103.) The two share a fundamental premise: The victim bears some responsibility for her own murder. (Cf. *People v. Verdugo* (2010) 50 Cal.4th 263, 294 [provocation defense available only as to the killing of the individual who allegedly provoked defendant].) And under *Berry*, we currently allow abusers to exploit this intersection by resorting to the outdated and discredited "blame-the-victim" rationalization.

Even more, *Berry*'s reasoning is out of step with California's prevailing public policies that preclude a domestic abuser from excusing his violence by blaming the victim. Domestic violence is a crime. (E.g., Pen. Code, §§ 243, subd. (e) & 273.5.) Women can apply for civil protective orders against abusers. (Fam. Code, § 6200.) These statutory schemes do not contemplate reducing an abuser's liability based on his claim that the victim "provoked" him to beat her up. (Cf. Ptacek, *supra*, at p. 144 [abusers frequently claim that violence was provoked by partner's aggressive words]; accord, Jacobson & Gottman, When Men Batter Women (1998) p. 46; Buzawa & Buzawa, Domestic Violence: The Criminal Justice Response (2003) p. 35.)

Yet that's exactly what happens through the provocation defense. That should not be—and this Court should recognize that abusive murderers cannot escape full criminal liability by blaming their victims.

D. This Case Vividly—And Tragically—Illustrates The Problem: Defendant Escaped Full Criminal Liability By Blaming The Victim For Her Own Murder.

The defendant here personifies the empirical evidence described above. He repeatedly and viciously beat Ms. Tempongko to assert control and power over her, and his quest for control culminated in her murder. Defendant's track record of abuse exemplifies the inequities that result when intimate-partner abusers successfully raise the provocation defense. This case therefore presents the Court with an ideal vehicle to consider the problems with the provocation defense.[8]

Consider the following:

Within the 18 months leading up to the October 2000 homicide, defendant repeatedly beat, choked, imprisoned, and stalked Ms. Tempongko—and she called the police for help again and again:

- In April 1999, defendant broke a window to get into her apartment (11 RT 1198), and then grabbed her and threw her to the ground, and pulled her by her hair down a hallway (11 RT 1202-1203).
- In May 1999, while celebrating their six-month anniversary at a club, defendant became jealous when other men talked about dancing with her. (12 RT 1404:12-27.) Later that evening, while visiting a friend's apartment, defendant grabbed Ms. Tempongko to leave and ignored her requests

[8] In this section, we demonstrate that defendant's habitual abuse and ultimate murder of Ms. Tempongko exemplify the empirical data discussed above. To provide the Court with a more complete picture of defendant's conduct, we cite evidence that was admitted both at trial and during sentencing.

that he stop; she finally laid down on the floor begging defendant's friend to stop him. (12 RT 1414.) This episode led to defendant's June 1999 domestic violence conviction. (13 RT 1602.) He was put on probation. (13 RT 1515-1516; 6 CT 1565.)

- In November 1999, while celebrating their one-year anniversary, defendant grabbed Ms. Tempongko by the hair and pulled her back—violating his probation. (12 RT 1307; 6 CT 1585.) After Ms. Tempongko called her mother for help, defendant held her hostage in the bedroom until the police freed her. (12 RT 1302, 1307-1308.)
- Defendant excused away the November 1999 savage attack by saying that he was "very sorry for not being able to control his temper." (1 CT 181 & 6 CT 1574 [December 1999 supplemental probation report admitted during sentencing].) But the probation officer concluded that defendant was still a "serious threat" to Ms. Tempongko because, "[a]lthough the defendant appeared to be remorseful and admitted culpability for his violent behavior towards the victim, existing documentation reveals that *he has made the same kind of statements in the past with no positive results*." (1 CT 182A & 6 CT 1576, italics added.)
- On September 1, 2000, defendant tried to choke Ms. Tempongko by forcing his fingers down her throat, and then started to strangle her by grabbing her neck with both of his hands. (6 CT 1590 [police report admitted during

sentencing].) She was bleeding out of her mouth by the time the police arrived. (*Ibid.*) She received an emergency protective order. (*Ibid.*)

- On September 7, 2000—just a month and a half before the homicide—defendant violated the emergency protective order that Ms. Tempongko had received the week before. (12 RT 1431.) The police responded to her panic-stricken call and found defendant "lurking" in the shadows outside her apartment building. (12 RT 1425-1431.)

And when defendant finally killed Ms. Tempongko in October 2000, he acted like many other intimate-partner abusers: He killed her just weeks after she had ended their relationship and started dating another man. (11 RT 1121-1122, 1135-1142; see also Ans. Br., p. 17.)[9]

In sum, defendant's pattern of abusing Ms. Tempongko was just that: a pattern. He didn't "lose control" when he finally stabbed her to death. To the contrary, he simply continued his 18-month campaign of violence to control and terrorize her. No reasonable jury could find otherwise. Accordingly, there was no error warranting reversal, and this Court should reinstate the jury's second-degree murder conviction. (Cf. *People v. Clayton* (1967) 248 Cal.App.2d 345, 348, 351-352 [no instructional error

---

[9] Also troubling are defendant's actions after stabbing Ms. Tempongko to death: He didn't call for help, and he made sure that nobody else could get help by disabling her home phone and stealing her cell phone. (6 RT 464, 471, 510-511, 514-515, 533, 535, 543-544; 7 RT 572, 578; 12 RT 1348-1349, 1353-1355; 13 RT 1528.) He then ran away with the murder weapon (6 RT 431-432), and soon fled to Mexico, where he lived in hiding for six years (8 RT 785-787; 12 RT 1438). This conduct bears the hallmarks of deliberation, not a momentary loss of control.

because no reasonable person would have been provoked by taunt "white son of a bitch"].)

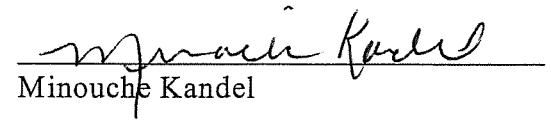
CONCLUSION

Over the past 30 years, California has led the nation in creating community resources and legal safeguards for victims of domestic abuse and also holding abusers criminally liable. The public policies driving those initiatives should inform this Court's jurisprudence regarding the availability of the provocation defense to intimate-partner murderers. This Court should recognize, at long last, that domestic abusers can no longer minimize their culpability by blaming the victim. The current case presents this Court with the ideal opportunity to accomplish this goal, by repudiating the portions of *People v. Berry* that cemented gender biases into our criminal law and sanctioned the insidious "she-made-me-do-it" excuse routinely invoked by intimate-partner murderers.

Dated: April 20, 2012

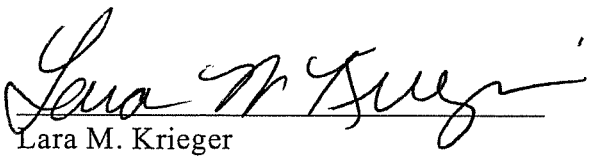
Respectfully submitted,

BAY AREA LEGAL AID
MINOUCHE KANDEL

By: 
Minouche Kandel

Attorneys for Prospective Amici Curiae San Francisco Domestic Violence Consortium and California Partnership to End Domestic Violence

GREINES, MARTIN, STEIN & RICHLAND LLP
CYNTHIA E. TOBISMAN
KENT J. BULLARD
LARA M. KRIEGER

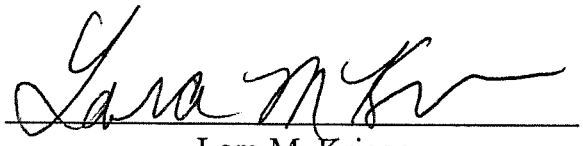
By: 
Lara M. Krieger

Attorneys for Prospective Amici Curiae California Women Lawyers, Queen's Bench Bar Association, and Women Lawyers of Sacramento

CERTIFICATION

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that this AMICI CURIAE BRIEF IN SUPPORT OF THE PEOPLE OF THE STATE OF CALIFORNIA, is in 13-point proportionally spaced font, and contains 6,998 words, not including the tables of contents and authorities, application for leave to file the amici brief, caption page, signature blocks, or this Certification page.

Dated: April 20, 2012



Lara M. Krieger

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **April 20, 2012**, I served the foregoing document described as **APPLICATION OF SAN FRANCISCO DOMESTIC VIOLENCE CONSORTIUM, CALIFORNIA WOMEN LAWYERS, CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE, QUEEN'S BENCH BAR ASSOCIATION, AND WOMEN LAWYERS OF SACRAMENTO TO FILE AMICI CURIAE BRIEF IN SUPPORT OF THE PEOPLE OF THE STATE OF CALIFORNIA; AND AMICI BRIEF** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

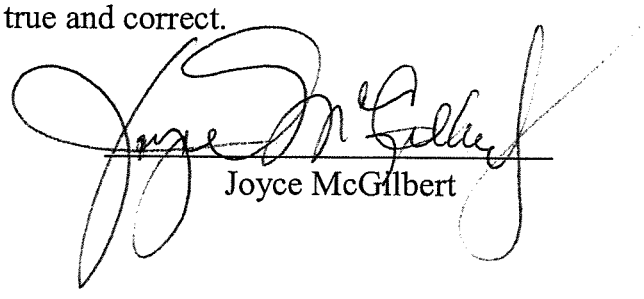
SEE ATTACHED SERVICE LIST

(X) By Envelope - by placing a true copy thereof enclosed in sealed envelopes addressed per the attached service list and delivering such envelopes:

(X) By Mail: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **April 20, 2012**, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Joyce McGilbert

The People of the State of California v. Tare Nicholas Beltran
Supreme Court Case No. S192644

SERVICE LIST

Jeffrey M. Laurence
Deputy Attorney General
Office of the Attorney General
State of California
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004

The Honorable George Gascon
District Attorney
San Francisco County District
Attorney's Office
850 Bryant Street, Room 325
San Francisco, CA 94103

Linda M. Leavitt
Attorney at Law
PMB No. 312
5214-F Diamond Heights Boulevard
San Francisco, CA 94131-2118

First Appellate District, Division Four
California Court of Appeal of the
State of California
350 McAllister Street
San Francisco, CA 94102-3600

County of San Francisco
Hall of Justice
Superior Court of California
850 Bryant Street
San Francisco, CA 94103

Attention: Executive Director
First District Appellate Project
730 Harrison St., Room 201
San Francisco, CA 94107