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**PORTER V. STATE: APPROPRIATELY PUSHING THE LIMITS OF THE  
BATTERED SPOUSE SYNDROME STATUTE**

Joy Dodge\*

INTRODUCTION

In *Porter v. State*, the Maryland Court of Appeals determined whether a woman who employed a hit man to kill her abusive husband could use the Battered Spouse Syndrome statute to justify a jury instruction on imperfect self-defense.<sup>1</sup> The court held that a woman who produced evidence that she suffered from Battered Spouse Syndrome was entitled to an imperfect self-defense jury instruction, even though she hired a man to kill her husband.<sup>2</sup> The court reached the correct conclusion in this case because it not only recognized the realities of Battered Spouse Syndrome, but it also aligned with the self-defense law's low threshold for raising jury issues.<sup>3</sup> The court struck a delicate balance by avoiding overstepping or creating a new defense to murder and harmonizing the legislative history, precedent, and self-defense law into a coherent whole.<sup>4</sup> This case note will begin by describing the facts of the case in Part I,<sup>5</sup> followed by a discussion of legal history in Part II,<sup>6</sup> the Maryland Court of Appeals' analysis in Part III,<sup>7</sup> and an analysis of the court's decision in relation to precedent and social science research in Part IV.<sup>8</sup>

I. THE CASE

Karla Louise Porter, the petitioner-defendant in this case, was a long-time sufferer of domestic violence.<sup>9</sup> Ms. Porter testified during her trial that her husband, William Raymond Porter, had inflicted the following injuries on her:

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<sup>1</sup> *Porter v. State*, 166 A.3d 1044 (Md. 2017).

<sup>2</sup> *Id.* at 1061.

<sup>3</sup> *See infra* Part IV.

<sup>4</sup> *Id.*

<sup>5</sup> *See infra* Part I.

<sup>6</sup> *See infra* Part II.

<sup>7</sup> *See infra* Part III.

<sup>8</sup> *See infra* Part IV.

<sup>9</sup> *Porter v. State*, 148 A.3d 1, 4–5 (Md. Ct. Spec. App. 2016), *rev'd and remanded*, 166 A.3d 1044 (Md. 2017).

[Mr. Porter had] beaten her on her back and legs with a belt; on various occasions hit her with a rake, a board, his fists, and a tool box; stabbed her in the abdomen with a drill; pushed her head into a grave marker; smeared dog excrement on her; threatened to kill her on several occasions, at least once while pointing a gun at her[;] . . . and forced her to stand at their kitchen sink and drink water until she urinated on herself.”<sup>10</sup>

Moreover, about a week before her husband passed away, Ms. Porter’s husband allegedly “held a gun to Ms. Porter’s head . . . [and said] ‘I should just kill you now.’”<sup>11</sup> Also within the week of his death, Mr. Porter hit Ms. Porter across her back with a crutch when she failed to sympathize with his boredom.<sup>12</sup> Throughout her marriage, which began in 1986, Ms. Porter suffered abuse at the hands of her husband.<sup>13</sup> Ms. Porter testified at trial that she “knew it was a matter of time before he killed [her].”<sup>14</sup>

From June 2009 to January 2010, Ms. Porter tried unsuccessfully to solicit someone to kill her husband for her.<sup>15</sup> Eventually, Ms. Porter’s nephew introduced her to Walter Bishop, who volunteered to kill her husband after hearing about the abuse she endured.<sup>16</sup> The evening before her husband’s death, Ms. Porter called Mr. Bishop.<sup>17</sup> Mr. Bishop agreed to shoot Mr. Porter at the gas station that the Porter’s owned the following morning.<sup>18</sup> On March 1, 2010, Mr. Bishop shot Mr. Porter and staged the incident to look like a robbery.<sup>19</sup> Ms. Porter was arrested on March 6, after one of the previous people

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Porter v. State*, 148 A.3d 1, 5 (Md. Ct. Spec. App. 2016), *rev’d and remanded*, 166 A.3d 1044 (Md. 2017).

<sup>15</sup> *Id.* at 6

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 6–7. Ms. Porter called Mr. Bishop and her brother, who was driving Bishop to the gas station, over fifty times before the shooting.

<sup>19</sup> *Porter v. State*, 148 A.3d 1, 7 (Md. Ct. Spec. App. 2016), *rev’d and remanded*, 166 A.3d 1044 (Md. 2017).

she solicited to kill her husband called the police.<sup>20</sup> Ms. Porter eventually confessed that she hired Mr. Bishop to beat up her husband.<sup>21</sup>

At trial, Dr. Neal Blumberg, an expert witness, testified that in the year before her husband's death, Ms. Porter "became increasingly anxious and fearful for her life and safety," "felt . . . helpless to extricate herself," and suffered from Battered Spouse Syndrome,<sup>22</sup> as defined in Section 10-916 of the Maryland Courts and Judicial Proceedings Article.<sup>23</sup>

The jury received instruction on imperfect self-defense. The jury was, in part, told that

[i]f the Defendant actually believed that she was in immediate danger of death or serious bodily harm, even though a reasonable person would not have so believed, and the Defendant used no more force than was reasonably necessary to defend herself in light of the threatened or actual force, and that retreat from the threat was unsafe, and that she was not the aggressor, the Defendant's actual, though unreasonable belief, is a partial self-defense and the verdict should be guilty of voluntary manslaughter rather than murder.<sup>24</sup>

The jury found Ms. Porter guilty of "murder in the first degree, use of a handgun in the commission of a crime of violence, conspiracy to

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 7.

<sup>22</sup> *Id.* at 8-9.

<sup>23</sup> MD. CODE ANN., CTS. & JUD. PROC. § 10-916(b) (West 2018) ("Notwithstanding evidence that the defendant was the first aggressor, used excessive force, or failed to retreat at the time of the alleged offense, when the defendant raises the issue that the defendant was, at the time of the alleged offense, suffering from the Battered Spouse Syndrome as a result of the past course of conduct of the individual who is the victim of the crime for which the defendant has been charged, the court may admit for the purpose of explaining the defendant's motive or state of mind, or both, at the time of the commission of the alleged offense: (1) Evidence of repeated physical and psychological abuse of the defendant perpetrated by an individual who is the victim of a crime for which the defendant has been charged; and (2) Expert testimony on the Battered Spouse Syndrome.").

<sup>24</sup> *Porter v. State*, 148 A.3d 1, 17 (Md. Ct. Spec. App. 2016), *rev'd and remanded*, 166 A.3d 1044 (Md. 2017).

commit murder in the first degree, and three counts of solicitation to commit murder.”<sup>25</sup>

On appeal, the Maryland Court of Special Appeals held that, although the jury instruction had erroneously stated that retreat had to be unsafe and the defendant could not have been the aggressor to find imperfect self-defense, the court nevertheless found that this was a harmless error, since Ms. Porter was not eligible for the imperfect self-defense instruction.<sup>26</sup> The court noted that, in order to be entitled to an imperfect self-defense instruction, the defendant must have “honestly, albeit subjectively, believed that she was in imminent, that is to say, immediate, danger of death or serious bodily harm.”<sup>27</sup> Moreover, Battered Spouse Syndrome can be used to “support both the *subjective* honesty of the defendant’s perception of imminent harm and the *objective* reasonableness of such a perception.”<sup>28</sup> The court reasoned that, although there was evidence of imminent fear in the weeks prior to Mr. Porter’s death, there was a lack of evidence of Ms. Porter’s fear of imminent danger “at the time that Mr. Porter was shot[; thus,] there was insufficient evidence to generate a jury instruction on self-defense.”<sup>29</sup>

Judge Friedman dissented.<sup>30</sup> Judge Friedman pointed out that the “some evidence”<sup>31</sup> standard to raise a jury issue can be satisfied even with the introduction of only “the uncorroborated testimony of the defendant.”<sup>32</sup> Moreover, Judge Friedman cited *Wright v. State*,<sup>33</sup> which stated that a defendant is entitled to a jury instruction even if the defense is “well-nigh incredible as a matter of fact.”<sup>34</sup> Judge Friedman also argued that the question of imminence is not for the judge to decide.<sup>35</sup>

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<sup>25</sup> *Id.* at 11.

<sup>26</sup> *Id.* at 24.

<sup>27</sup> *Id.* (citing *State v. Faulkner*, 483 A.2d 759, 761 (Md. 1984)).

<sup>28</sup> *Id.* at 22 (quoting *State v. Smullen*, 844 A.2d 429, 439 (Md. 2004)).

<sup>29</sup> *Porter v. State*, 148 A.3d 1, 24 (Md. Ct. Spec. App. 2016), *rev’d and remanded*, 166 A.3d 1044 (Md. 2017).

<sup>30</sup> *Id.* at 24.

<sup>31</sup> *Porter v. State*, 166 A.3d 1044 (Md. 2017).

<sup>32</sup> *Id.* at 34 (Friedman, J., dissenting) (citing *Arthur v. State*, 24 A.3d 667, 675 (Md. 2011)).

<sup>33</sup> *Id.* (citing *Wright v. State*, 522 A.2d 401 (Md. 1987)).

<sup>34</sup> *Wright*, 522 A.2d at 402 (citing *Howell v. State*, 468 A.2d 688, 691 (Md. Ct. Spec. App. 1983)).

<sup>35</sup> *Porter*, 148 A.3d at 35 (citing *State v. Smullen*, 844 A.2d 429 (Md. 2004)).

Thus, Judge Friedman believed that Ms. Porter established a pattern of abuse and should be entitled to a self-defense jury instruction.<sup>36</sup> Lastly, Judge Friedman argued that the use of a contract killer is not relevant, in the absence of the statute specifically stating that its scope is limited to certain types of homicides.<sup>37</sup>

The Maryland Court of Appeals granted certiorari on the question of whether the trial court's erroneous instruction on imperfect self-defense constitutes harmless error.<sup>38</sup>

## II. LEGAL BACKGROUND

### A. *Self-Defense in General*

*State v. Faulkner*<sup>39</sup> set forth the difference between perfect self-defense and imperfect self-defense in Maryland:

Perfect self-defense requires not only that the killer subjectively believed that his actions were necessary for his safety but, objectively, that a reasonable man would so consider them. Imperfect self-defense, however, requires no more than a subjective honest belief on the part of the killer that his actions were necessary for his safety, even though, on an objective appraisal by a reasonable man, they would not be found to be so. If established, the killer remains culpable and his actions are excused only to the extent that mitigation is invoked.<sup>40</sup>

A claim of imperfect self-defense negates malice, the mens rea element of murder.<sup>41</sup> Imperfect self-defense is not a complete defense; rather, a successful claim merely mitigates a murder charge to manslaughter.<sup>42</sup> When a defendant presents evidence of a subjective belief that the force used was necessary to prevent imminent danger, the court noted that

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<sup>36</sup> *Id.* at 34.

<sup>37</sup> *Id.* at 36.

<sup>38</sup> *Porter v. State*, 166 A.3d 1044 (Md. 2017).

<sup>39</sup> *State v. Faulkner*, 483 A.2d 759 (Md. 1984).

<sup>40</sup> *Id.* at 768–69 (quoting *Faulkner v. State*, 458 A.2d 81, 82 (Md. Ct. Spec. App. 1983)).

<sup>41</sup> *Id.* at 761.

<sup>42</sup> *Id.*

“the defendant is entitled to a proper instruction on imperfect self-defense.”<sup>43</sup>

*State v. Marr* reaffirmed *State v. Faulkner*'s explanation of self-defense.<sup>44</sup> *Marr* noted that imperfect self-defense involves the defendant actually believing that she is in “apparent imminent danger of death or serious bodily harm from the assailant, requiring the use of deadly force,” but does not require an objectively reasonable belief.<sup>45</sup> What the defendant unreasonably, but actually believes may be “the perception of imminent danger or the belief that the force employed is necessary to meet the danger.”<sup>46</sup> A defendant whose acts meet this definition of imperfect self-defense “does not act with malice” and thus cannot be guilty of murder, but rather manslaughter.<sup>47</sup>

*Wilson v. State* further clarified the requirements for asserting imperfect self-defense in Maryland.<sup>48</sup> The court quoted *Dykes v. State* and made clear that the defendant need only produce “some evidence” on the issue of self-defense to create a jury issue.<sup>49</sup> “Some evidence” need not rise to a preponderance of the evidence standard.<sup>50</sup> Moreover, “[t]he source of the evidence is immaterial; it may emanate solely from the defendant” and may be “overwhelmed by evidence to the contrary.”<sup>51</sup> The court made clear that “[i]f there is any evidence relied on by the defendant which, if believed would support his claim that he acted in self-defense, the defendant has met his burden.”<sup>52</sup> The court emphasized that it was up to the jury to evaluate the defendant's trustworthiness, and that it was not appropriate for the court to weigh the veracity of the defendant's statements, even when the defendant's statements were “overwhelmed by evidence to the contrary.”<sup>53</sup>

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<sup>43</sup> *Id.* at 769.

<sup>44</sup> *State v. Marr*, 765 A.2d 645 (Md. 2001).

<sup>45</sup> *Id.* at 648.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Wilson v. State*, 30 A.3d 955 (Md. 2011).

<sup>49</sup> *Id.* at 960 (quoting *Dykes v. State*, 571 A.2d 1251, 1256 (Md. 1990)).

<sup>50</sup> *Id.* (quoting *Dykes*, 571 A.2d at 1257).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Wilson*, 30 A.3d at 960.

*B. Battered Spouse Syndrome*

Section 10-916 of the Maryland Courts and Judicial Proceedings Article sets forth the Battered Spouse or Battered Woman's Syndrome Statute, which was signed into law in 1991.<sup>54</sup> In part, Section 10-916 of the Maryland Courts and Judicial Proceedings Article states that:

Notwithstanding evidence that the defendant was the first aggressor, used excessive force, or failed to retreat at the time of the alleged offense, when the defendant raises the issue that the defendant was, at the time of the alleged offense, suffering from the Battered Spouse Syndrome as a result of the past course of conduct of the individual who is the victim of the crime for which the defendant has been charged, the court may admit for the purpose of explaining the defendant's motive or state of mind, or both, at the time of the commission of the alleged offense: (1) Evidence of repeated physical and psychological abuse of the defendant perpetrated by an individual who is the victim of a crime for which the defendant has been charged; and (2) Expert testimony on the Battered Spouse Syndrome.<sup>55</sup>

The Senate Judicial Proceedings Floor Report on House Bill 49, which became Section 10-916 of the Maryland Courts and Judicial Proceedings Article stated, after a discussion of the difference between perfect and imperfect self-defense, that "[t]his bill would clarify that the court has discretion to admit evidence of repeated physical and psychological abuse of the defendant by the alleged victim and expert testimony on the Battered Spouse Syndrome."<sup>56</sup> The Floor Report also articulated the appropriate standard that the legislature foresaw being used under this statute.<sup>57</sup> It made clear that Section 10-916 of the Maryland Courts and Judicial Proceedings Article was originally intended to be discretionary.

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<sup>54</sup> MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (West 2018).

<sup>55</sup> *Id.*

<sup>56</sup> S. JUDICIAL PROCEEDINGS COMM., FLOOR REP. H.B. 49, 401st Sess., at 2 (Md. 1991).

<sup>57</sup> *Id.*

Included in the bill file for House Bill 49 is a letter from House of Ruth Attorney Judith A. Wolfer.<sup>58</sup> She stated that “[e]xpert testimony is crucial to help explain how a battered spouse becomes an expert in anticipating her partner’s abuse, why she was unable to leave the battering situation, why she perceived herself to be in imminent harm that moment, and why her action appeared to be the only viable choice left to her.”<sup>59</sup> Moreover, Wolfer dispelled several myths about the law, including: that the bill requires the court to admit evidence in every case, that this is a license to kill, that Battered Spouse Syndrome is not commonly accepted in the medical and legal community, and that Battered Spouse Syndrome will become a new defense to murder.<sup>60</sup> The letter also made clear that this “bill only ensures a fair trial, not an acquittal.”<sup>61</sup>

*Banks v. State*<sup>62</sup> is a case about hearsay, but it was the first case to comment on Section 10-916 of the Maryland Courts and Judicial Proceedings Article. *Banks v. State* provided that Section 10-916 of the Maryland Courts and Judicial Proceedings Article is not a new defense to murder.<sup>63</sup> Rather, Battered Spouse Syndrome “is offered to prove the honesty and reasonableness of the defendant’s belief that he or she was in imminent danger at the time of the offense.”<sup>64</sup>

In *State v. Smullen*, the Maryland Court of Appeals shed light on the Battered Spouse Syndrome statute.<sup>65</sup> The court reasoned that

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<sup>58</sup> Letter from Judith A. Wolfer, House of Ruth, to House Judiciary Comm. (Feb. 27, 1991) (on file with the University of Maryland Francis King Carey School of Law Thurgood Marshall Law Library). The House of Ruth is an organization founded in 1977 to provide a safe haven for victims of domestic violence and their children. *About House of Ruth*, HOUSE OF RUTH MD., <http://www.hruth.org/about-us/> (last visited Apr. 12, 2018).

<sup>59</sup> Letter from Judith A. Wolfer, House of Ruth, to House Judiciary Comm. (Feb. 27, 1991) (on file with the University of Maryland Francis King Carey School of Law Thurgood Marshall Law Library).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> 608 A.2d 1249 (Md. Ct. Spec. App. 1992).

<sup>63</sup> *Id.* at 1253.

<sup>64</sup> *Id.*

<sup>65</sup> 844 A.2d 429, 449–51 (Md. 2004) (holding that, although battered child syndrome is within the purview of Section 10-916 of the Maryland Courts and Judicial

evidence of Battered Spouse Syndrome explains, “why and how, in light of that pattern of abuse, the defendant could honestly, and perhaps reasonably, perceive an imminent threat of immediate danger.”<sup>66</sup> The statute provides for a “more careful and sophisticated look at the notion of imminent threat” and recognizes “that certain conduct that might not be regarded as imminently dangerous by the public at large *can* cause someone who has been repeatedly subjected to and hurt by that conduct before to honestly, even if unreasonably, regard it as imminently threatening.”<sup>67</sup> The court explained in a footnote that Section 10-916 of the Maryland Courts and Judicial Proceedings Article is not in actuality discretionary:

[i]f, because an adequate foundation for it has been established, syndrome evidence is relevant and is properly offered, the court *must* admit it, first, because Maryland Rule 5-402 makes clear that, unless rendered admissible by other law, all relevant evidence is admissible, and second, because a defendant has a Due Process Constitutional right to . . . have considered relevant and admissible evidence in support of . . . [her] defense.<sup>68</sup>

The court cautioned, however, that Battered Spouse Syndrome is not intended to become an independent defense to murder.<sup>69</sup> For example, the defendant in *State v. Smullen* was not entitled to a jury instruction on imperfect self-defense because he only testified to unclear events of abuse that did not cause serious injury or attract the notice of third parties.<sup>70</sup> Absent the defendant providing an evidentiary basis to support a claim of imperfect self-defense, the court cautioned that Section 10-916 of the Maryland Courts and Judicial Proceedings Article would become an independent defense to murder.<sup>71</sup>

In *State v. Peterson*, the Maryland Court of Special Appeals reviewed a case where the trial court declined an imperfect self-defense

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Proceedings Article, Mr. Smullen did not present evidence of repeated physical abuse sufficient to be entitled to an imperfect self-defense jury instruction).

<sup>66</sup> *Id.* at 453.

<sup>67</sup> *Id.* at 439.

<sup>68</sup> *Id.* at 445 n.8.

<sup>69</sup> *Id.* at 439.

<sup>70</sup> *Smullen*, 844 A.2d at 453.

<sup>71</sup> *Id.*

jury instruction in a case of non-confrontational homicide.<sup>72</sup> Although an expert witness testified that the victim in the case believed that she was in imminent danger when she shot her husband, the expert witness was not asked about Battered Spouse Syndrome in particular.<sup>73</sup> The court held that there was sufficient evidence of abuse, including corroboration from the victim's son, such that the victim should have been afforded expert testimony on Battered Spouse Syndrome.<sup>74</sup> The court held that the failure to introduce evidence of Battered Spouse Syndrome was ineffective assistance of counsel because "[i]t is reasonably probable" that had the evidence been introduced, "the result of the proceeding would have been different."<sup>75</sup>

*C. Third-Party Assisted Homicide and Battered Spouse Syndrome in Other Jurisdictions*

No Maryland court prior to *Porter* has dealt with the interplay between self-defense law and contract killings in the context of domestic violence.<sup>76</sup> However, other jurisdictions have addressed this issue. In *People v. Yaklich*,<sup>77</sup> the Colorado Court of Appeals held "that a self-defense instruction is not available in a contract-for-hire situation, even though the accused presents credible evidence that she is a victim of the battered woman syndrome."<sup>78</sup> The court rested its decision on the fact that, in Colorado, Battered Spouse Syndrome is not a defense to murder, rather, it can merely be considered in the self-defense context.<sup>79</sup> The defendant in this case could not prove imminent danger to be entitled to a self-defense jury instruction.<sup>80</sup> The court decided that allowing Battered Spouse Syndrome to become a defense to murder in contract killings would undermine self-defense law and contravene

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<sup>72</sup> *State v. Peterson*, 857 A.2d 1132, 1136 (Md. Ct. Spec. App. 2004).

<sup>73</sup> *Id.* In addition to being physically abused, Ms. Peterson's husband made clear that his threats to kill her were "promises." *Id.* at 1137.

<sup>74</sup> *Id.* at 1151–52.

<sup>75</sup> *Id.* at 1154.

<sup>76</sup> *Porter v. State*, 166 A.3d 1044, 1062 (Md. 2017) ("We acknowledge that three other jurisdictions faced with this question have declined to allow a self-defense jury instruction when a woman hires a third party to kill her abusive partner.").

<sup>77</sup> 833 P.2d 758 (Colo. 1991).

<sup>78</sup> *Id.* at 760.

<sup>79</sup> *Id.* at 761.

<sup>80</sup> *Id.* at 763 (noting that the defendant planned her husband's death over an eight-month period).

public policy to allow the defendant to escape punishment while letting the hired killer face a murder conviction.<sup>81</sup>

The Court of Criminal Appeals of Tennessee at Nashville in *State v. Leaphart*<sup>82</sup> held that the defendant was not entitled to a jury instruction on self-defense, where she could not prove imminent fear at the time of the killing.<sup>83</sup> Tennessee law defines imminent fear as fear “*at the time of the killing*” and the defendant could not meet this threshold.<sup>84</sup>

In *State v. Anderson*,<sup>85</sup> the Missouri Court of Appeals held that the trial court properly excluded evidence that the defendant suffered from Battered Spouse Syndrome. Missouri has a statute dealing with Battered Spouse Syndrome,<sup>86</sup> but the statute requires that self-defense already be independently established in the case before admitting evidence of Battered Spouse Syndrome.<sup>87</sup> The defendant in this case could not establish imminent fear, where she planned her husband’s homicide for three months; thus, she was not entitled to a self-defense jury instruction.<sup>88</sup>

### III. THE COURT’S REASONING

The Maryland Court of Appeals began its analysis in the *Porter* case by discussing the law of self-defense.<sup>89</sup> Judge Adkins, writing for the majority, noted that, according to *State v. Smullen*, imperfect self-defense merely requires a showing that the defendant actually believed she was in danger, no matter whether or not the belief was reasonable.<sup>90</sup> Moreover, the court explained that the defendant need only show that

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<sup>81</sup> *Id.*

<sup>82</sup> 673 S.W.2d 870 (Tenn. Crim. App. 1983).

<sup>83</sup> *Id.* at 873.

<sup>84</sup> *Id.* (quoting *State v. Wilson*, 556 S.W.2d 232, 234 (Tenn. 1977)).

<sup>85</sup> 785 S.W.2d 596 (Mo. Ct. App. 1990).

<sup>86</sup> MO. REV. STAT. § 563.033 (2017)).

<sup>87</sup> *Anderson*, 785 S.W.2d at 600.

<sup>88</sup> *Id.*

<sup>89</sup> *Porter v. State*, 166 A.3d 1044, 1053 (Md. 2017).

<sup>90</sup> *Id.* (citing *State v. Smullen*, 844 A.2d 429, 439 (Md. 2004)).

she actually believed that retreat was unsafe and the “force used was necessary.”<sup>91</sup>

The court then engaged in an extensive discussion of Battered Spouse Syndrome.<sup>92</sup> It explained that domestic violence is pervasive and that nearly half of murdered women were killed by an intimate partner.<sup>93</sup> The court quoted Dr. Lenore Walker’s findings that “[b]attered spouse syndrome is characterized by two main phenomena: a cycle of intimate partner violence and the development of ‘learned helplessness.’”<sup>94</sup> The court then connected Battered Spouse Syndrome to imperfect self-defense.<sup>95</sup> Specifically, the court stated that the testimony of experts as to how Battered Spouse Syndrome influences a woman’s decision to use force against her abuser is vital for self-defense claims.<sup>96</sup> The expert testimony can explain both why the woman did not leave her abuser and how seemingly innocuous events could be perceived as threatening to a woman undergoing repeated cycles of abuse.<sup>97</sup>

The opinion then returned to a discussion of self-defense in general.<sup>98</sup> To be entitled to a jury instruction on self-defense, the defendant need only produce “some evidence.”<sup>99</sup> Moreover, the court, after examining cases from other states, clarified that the defendant need only show that she feared imminent or immediate death or serious bodily harm, “not both.”<sup>100</sup> The court noted that, in order to avoid redundancy in the definition of imperfect self-defense, the two words

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<sup>91</sup> *Porter*, 166 A.3d at 1053 (citations omitted).

<sup>92</sup> *Id.* at 1054–55. The Court noted that the majority of the victims of intimate partner violence are women and that about one in four women will experience intimate partner violence at some point. *Id.* at 1054.

<sup>93</sup> *Id.* (citing BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ 236018, HOMICIDE TRENDS IN THE UNITED STATES 1980–2008, at 18 (2011), <https://www.bjs.gov/content/pub/pdf/htus8008.pdf>).

<sup>94</sup> *Porter v. State*, 166 A.3d 1044, 1054 (Md. 2017) (quoting Lenore E. A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 330 (1992)).

<sup>95</sup> *Id.* at 1054–55.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (citing *State v. Smullen*, 844 A.2d 429, 451 (Md. 2004)).

<sup>98</sup> *Id.* at 1055–56.

<sup>99</sup> *Porter*, 166 A.3d at 1056 (quoting *Wilson v. State*, 30 A.3d, 955, 960 (Md. 2011)).

<sup>100</sup> *Id.* at 1059.

cannot be defined synonymously.<sup>101</sup> The court made clear that “an imminent threat is not dependent on its temporal proximity to the defensive act.”<sup>102</sup>

Furthermore, connecting self-defense to Battered Spouse Syndrome, the court opined that “[i]f we were to hold that a battered spouse who kills in a non-confrontational setting is not entitled to a self-defense instruction, we would render all or some of the evidence admissible under the Battered Spouse Syndrome statute irrelevant.”<sup>103</sup> Moreover, absent a jury instruction on imperfect self-defense, entering evidence of Battered Spouse Syndrome “would be pointless.”<sup>104</sup> Entering evidence of Battered Spouse Syndrome is imperative to preserving a claim of imperfect self-defense.<sup>105</sup> In the case of non-confrontational homicides, providing expert testimony about how an abused “woman might actually fear imminent danger during a break between violent episodes” can help a jury understand the situation.<sup>106</sup> The court not only pointed out that Ms. Porter presented evidence that she feared imminent danger, but also noted that “[i]n a cyclical, abusive relationship the threatened violence *will* come to fruition – it is often only a matter of when.”<sup>107</sup>

The Maryland Court of Appeals allowed Ms. Porter to claim imperfect self-defense, holding that a woman who suffers from Battered Spouse Syndrome need not be abused within “hours of her defensive action to be entitled to an instruction on imperfect self-defense.”<sup>108</sup> Acknowledging that extending the definition of imminence recognizes “the reality of intimate partner violence,” the court also noted that

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Porter*, 166 A.3d at 1059.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* Research indicates that, in the case of non-confrontational homicides, during the cycle of violence, a woman’s fear of being “unable to defend herself when the next attack comes” builds and so she “finally ‘defends’ herself at her only opportunity [] during a lull in the violence.” *Id.* (quoting David L. Faigman and Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 73 (1997) (footnotes omitted)).

<sup>107</sup> *Id.* at 1061.

<sup>108</sup> *Id.*

“[i]mperfect self-defense negates the element of malice, not premeditation.”<sup>109</sup> The court highlighted that “[t]he means by which a woman takes defensive action against her abuser does not affect whether she actually believed she was in imminent danger at the time of the killing.”<sup>110</sup> Thus, even a woman who hired a hit man can claim imperfect-self-defense.<sup>111</sup> The court acknowledged that its decision was not in line with holdings from three other jurisdictions that have addressed this question, but pointed out that none of the other states had a statute that allowed evidence of Battered Spouse Syndrome to support a claim of imperfect self-defense.<sup>112</sup> Moreover, Missouri, the only state with a battered spouse statute that addressed this question, only allowed its use in cases of perfect self-defense, rather than imperfect self-defense.<sup>113</sup> The opinion also boldly stated that contract killings should not be treated differently from other non-confrontational killings, with or without a Battered Spouse Syndrome statute.<sup>114</sup>

Judge Greene dissented, arguing that planned killings cannot be in response to an imminent threat.<sup>115</sup> The majority criticized Judge Greene’s dissent for showing a lack of understanding of the realities of domestic violence.<sup>116</sup> Namely, the majority rebuked the notion that a threat must be contemporaneous with the defensive action for the victim to be entitled to a claim of imperfect self-defense.<sup>117</sup> The majority opinion states that the dissent improperly conflates reasonable fear and actual fear.<sup>118</sup> The court then explained that Ms. Porter satisfied the “some evidence” requirement for being entitled to an imperfect self-defense jury instruction.<sup>119</sup> The evidence that Ms. Porter feared

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<sup>109</sup> *Porter*, 166 A.3d at 1059 (citing *State v. Faulkner*, 483 A.2d 759, 769 (1984)).

<sup>110</sup> *Id.* at 1062.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* (citing *State v. Anderson*, 785 S.W.2d 596, 600 (Mo. Ct. App. 1990)).

<sup>114</sup> *Porter*, 166 A.3d at 1062.

<sup>115</sup> *Id.* at 1065 (Greene, J., dissenting).

<sup>116</sup> *Id.* at 1062 (majority opinion).

<sup>117</sup> *Id.* The Court noted that “only about half of nonfatal instances of intimate partner violence are reported to police, in part because women fear reprisal or believe the police will be unable to help them,” thus, the dissent’s opinion is out of touch with the reality of intimate partner violence by assuming women could leave instead of planning defensive action.

<sup>118</sup> *Id.* at 1063.

<sup>119</sup> *Porter*, 166 A.3d at 1063.

imminent danger on the day her husband was killed included Ms. Porter's testimony that in the month before his death, Mr. Porter threatened to kill Ms. Porter while pointing a gun at her head and that Ms. Porter "knew he was going to kill [her] at any point."<sup>120</sup> Thus, despite using a third party to kill her husband, the court held that Ms. Porter was entitled to a jury instruction on imperfect self-defense.<sup>121</sup>

#### IV. ANALYSIS

In *Porter v. State*, the Maryland Court of Appeals held that a woman who had produced evidence that she suffered from Battered Spouse Syndrome was entitled to an imperfect self-defense jury instruction even though she hired a man to kill her husband.<sup>122</sup> The Maryland Court of Appeals made the correct decision in *Porter*. The court harmonized social science research, the legislative history of Section 10-916 of the Maryland Courts and Judicial Proceedings Article, precedent, and self-defense law into a coherent whole, while avoiding creating a new defense to murder. *Porter* expanded the Section 10-916 of the Maryland Courts and Judicial Proceedings Article precedent to allow Battered Spouse Syndrome evidence to be used to explain imminent fear in imperfect self-defense, even when the woman hired a hitman.<sup>123</sup> Although the court went further than prior court decisions on Section 10-916 of the Maryland Courts and Judicial Proceedings Article, the court's reasoning is squarely in line with self-defense precedent that calls for a low threshold for evidence required to generate a jury instruction.<sup>124</sup> Allowing this defense in hired gun cases, although stretching the statute to the limit and exceeding legislative intent, recognizes the realities of Battered Spouse Syndrome, while still respecting *stare decisis*. The court's decision remained within the

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* The Court finished its discussion of this case with a brief discussion of the crime of conspiracy, stating that the crime requires malicious intent to kill, which an imperfect self-defense claim negates. *Porter v. State*, 166 A.3d 1044, 1065 (2017). Thus, if the jury believed Ms. Porter's imperfect self-defense claim, she could not be found guilty of conspiracy to commit murder. *Id.*

<sup>122</sup> *Id.* at 1065.

<sup>123</sup> *Id.*

<sup>124</sup> *Wilson v. State*, 30 A.3d 955, 960 (Md. 2011); *Dykes v. State*, 571 A.2d 1251, 1256 (Md. 1990).

bounds of precedent, but expanded the doctrine to reflect societal realities, as many courts have done before.<sup>125</sup>

The language of Section 10-916 of the Maryland Courts and Judicial Proceedings Article and the Senate Floor Report on House Bill 49 is unambiguous; the entry of Battered Spouse Syndrome evidence was originally designed to be discretionary.<sup>126</sup> Moreover, Section 10-916 of the Maryland Courts and Judicial Proceedings Article was never designed to be a new defense to murder.<sup>127</sup> However, Section 10-916 of the Maryland Courts and Judicial Proceedings Article is a recognition that evidence of Battered Spouse Syndrome is relevant to the issue of self-defense.<sup>128</sup> Since Section 10-916 of the Maryland Courts and Judicial Proceedings Article makes clear that evidence related to Battered Spouse Syndrome is relevant, the reality is that judges do not actually have the discretion to admit this evidence. As the Court of Appeals in *State v. Smullen* noted and *Porter v. State* recognized in making its decision, Section 10-916 of the Maryland Courts and Judicial Proceedings Article must be considered in concert with other Maryland law.<sup>129</sup> The result is that the court must admit evidence of Battered Spouse Syndrome because the court is required to admit relevant evidence under Maryland Rule 5-402, minus a few well-defined exceptions.<sup>130</sup> Moreover, since the evidence is relevant and must be admitted, once the evidence is presented, it follows that the jury must receive an instruction on the issue. Recognizing long-standing self-defense law, the Maryland Court of Appeals correctly emphasized the fact that the defendant need only produce some evidence going to the issue of self-defense to be entitled to a self-defense jury instruction.<sup>131</sup>

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<sup>125</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (deciding to overturn precedent while considering changes in society at large); see also *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing the right to privacy, although there was no explicit right to privacy in the Constitution).

<sup>126</sup> See *supra* Section II.B.

<sup>127</sup> See *supra* Section II.B.

<sup>128</sup> See *supra* Section II.B.

<sup>129</sup> *State v. Smullen*, 844 A.2d 429, 439–50 (Md. 2004) (discussing § 10-916 in the context of Battered Woman Syndrome and Battered Child Syndrome); *Porter v. State*, 166 A.3d 1044, 1059 (Md. 2017) (exploring § 10-916 in the context of self-defense).

<sup>130</sup> *Smullen*, 844 A.2d at 445 n8.

<sup>131</sup> *Porter v. State*, 166 A.3d 1044, 1059 (Md. 2017); *Wilson v. State*, 30 A.3d 955, 960 (Md. 2011); *Dykes v. State*, 571 A.2d 1251, 1256 (Md. 1990).

Thus, based on the law of evidence and self-defense, the court correctly decided to require a jury instruction on the issue of self-defense in Ms. Porter's case, where at least some evidence of Battered Spouse Syndrome was introduced at trial.<sup>132</sup>

The Maryland Court of Appeals correctly applied Section 10-916 of the Maryland Courts and Judicial Proceedings Article to non-confrontational homicide, comporting with both legislative history and precedent.<sup>133</sup> The Senate Floor Report on House Bill 49, as well as *State v. Peterson* and *State v. Smullen* acknowledged that Section 10-916 of the Maryland Courts and Judicial Proceedings Article applies equally to cases of confrontational and non-confrontational homicides.<sup>134</sup> The Maryland Court of Appeals, however, expanded this line of reasoning beyond the traditional non-confrontational homicide, where the abused spouse is the one who commits the homicide, to one where the abused spouse hires a hit man. The court argued that it did not matter how the defensive action was taken, rather, it is imminent fear that matters.<sup>135</sup> It is evident from the Judith A. Wolfer's letter that neither the legislature nor the court in *Banks v. State* or *State v. Smullen* intended Section 10-916 of the Maryland Courts and Judicial Proceedings Article to be stretched so far that it would become a new defense to murder.<sup>136</sup> Nevertheless, the Court of Appeals in *Porter* recognized that it was expanding the definition of imminence, so that abuse no longer had to occur within hours of the homicide.<sup>137</sup>

Only those who suffer from Battered Spouse Syndrome can use Section 10-916 to mitigate a charge of murder to manslaughter. This does not, however, mean that people who truly suffer from Battered Spouse Syndrome should be barred from using Section 10-916 of the Maryland Courts and Judicial Proceedings Article. Thus, Ms. Porter,

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<sup>132</sup> *Porter*, 166 A.3d at 1063.

<sup>133</sup> *Id.* at 1059; *State v. Peterson*, 857 A.2d 1132, 1136 (Md. Ct. Spec. App. 2004); *Smullen*, 844 A.2d at 449.

<sup>134</sup> *Peterson*, 857 A.2d at 1136; *Smullen*, 844 A.2d at 449.

<sup>135</sup> *Porter*, 166 A.3d at 1061. *Peterson*, 857 A.2d at 1136; *Smullen*, 844 A.2d at 449.

<sup>136</sup> Letter from Judith A. Wolfer, House of Ruth, to House Judiciary Comm. (Feb. 27, 1991) (on file with the University of Maryland Francis King Carey School of Law Thurgood Marshall Law Library); *Banks v. State*, 608 A.2d 1249, 1253 (Md. 1992); *Smullen*, 844 A.2d at 439.

<sup>137</sup> *Porter*, 166 A.3d at 1061.

who demonstrated that she was a genuine sufferer of Battered Spouse Syndrome could use Section 10-916 of the Maryland Courts and Judicial Proceedings Article.<sup>138</sup> Moreover, Section 10-916 of the Maryland Courts and Judicial Proceedings Article, does not expressly limit the manner in which defensive action can be taken.<sup>139</sup> The fact that Ms. Porter planned her method of self-defense does not automatically preclude an argument that she experienced “imminent fear.”<sup>140</sup>

Furthermore, *Porter* was correct in its decision because the court took into account the realities of Battered Spouse Syndrome.<sup>141</sup> Battered Spouse Syndrome has been characterized in the past by a cycle of violence including tension building, battering, and calm phases.<sup>142</sup> While it has since been shown that not all women experience every phase in the cycle of abuse, “many battered women experience a psychological battering, a wearing down and wearing away of the spirit.”<sup>143</sup> Battered Spouse Syndrome was also characterized by learned helplessness, according to Dr. Lenore Walker.<sup>144</sup> Learned helplessness suggested that “women believe that they lack all control over their abusive situation and feel it is impossible to escape” resulting in the woman becoming “increasingly passive.”<sup>145</sup>

The term “learned helplessness” has also been criticized in recent scholarship.<sup>146</sup> The belief is now that abused women who kill their abusive partners do so “when they have no other alternative” because “they have been prevented from leaving” and it is now “kill-or-

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<sup>138</sup> *Id.* at 1065.

<sup>139</sup> MD. CODE ANN., CTS. & JUD. PROC. § 10-916(b) (West 2018).

<sup>140</sup> *Porter*, 166 A.3d at 1061–62.

<sup>141</sup> *Id.* at 1062; Marina Angel, *The Myth of Battered Woman Syndrome*, 24 TEMP. POL & CIV. RTS. L. REV. 301, 303 (2015) (criticizing Walker’s theory for leaving out psychological and financial abuse).

<sup>142</sup> Walker, *supra* note 94, at 330.

<sup>143</sup> Bennett Capers, *On Violence Against Women*, 13 OHIO ST. J. CRIM. L. 347, 359 (2016).

<sup>144</sup> See Walker, *supra* note 94, at 330 (describing learned helplessness theory as an “attempt[] to demonstrate how a seemingly normal functioning woman loses the ability to predict that what she does will have an impact upon her safety.”).

<sup>145</sup> Jessica Savage, *Battered Woman Syndrome*, 7 GEO. J. GENDER & L. 761, 762 (2006) (citing LENORE E. WALKER, *THE BATTERED WOMAN* 45 (1980)).

<sup>146</sup> Angel, *supra* note 141, at 303–04.

be-killed.”<sup>147</sup> This new scholarship actually better supports the argument underlying the Battered Spouse Syndrome defense than the prior learned helplessness framework. For example, it is believed that a woman may react during a lull in the violence because she is physically incapable of successfully fighting back unless her partner is incapacitated.<sup>148</sup> Moreover, leaving an abusive relationship is not always an option, as it is the most dangerous time in the relationship.<sup>149</sup> This helps explain why, instead of leaving, some women resort to violence. By allowing Ms. Porter to use the Battered Spouse Syndrome defense in this case, the court, although using outdated language, recognized that domestic violence can lead women to choose violence during a period of calm as a means of extricating herself from her abusive situation.<sup>150</sup>

Moreover, the court’s decision is in line with Battered Spouse Syndrome and its relation to imminence.<sup>151</sup> Battered Spouse Syndrome helps explain the actual imminence experienced by these women, even when there is no abuse occurring at the moment, as “battered women are more sensitive than the non-battered woman in perceiving the imminent danger to which they respond.”<sup>152</sup> Evidence suggests that in times of stress, women are more likely to draw on social support.<sup>153</sup> Thus, the Maryland Court of Appeals’ decision to allow battered women to use Section 10-916 of the Maryland Courts and Judicial Proceedings Article even when they employ hit men recognized the realities of domestic violence and the help-seeking that may follow victimization. With this psychological background in mind, it is evident that a woman may ask for help in dealing with her abusive situation in a way that would not jeopardize her safety, as leaving an abusive relationship is incredibly dangerous.<sup>154</sup> Moreover, the Maryland Court of Appeals’ decision acknowledges the social science research surrounding the influence of Battered Spouse Syndrome on imminence and expanded the legal definition to comport with the realities of the

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<sup>147</sup> *Id.* at 304.

<sup>148</sup> *Id.*

<sup>149</sup> Walker, *supra* note 94, at 333.

<sup>150</sup> Porter v. State, 166 A.3d 1044, 1061 (Md. 2017); Angel, *supra* note 141, at 304.

<sup>151</sup> Porter, 166 A.3d. at 1061.

<sup>152</sup> Walker, *supra* note 94, at 333.

<sup>153</sup> Savage, *supra* note 145, at 768.

<sup>154</sup> Angel, *supra* note 141, at 304.

syndrome.<sup>155</sup> Thus, the court's decision recognizes that, in order to have an effective Battered Spouse Syndrome statute, it must take into account how the syndrome actually presents itself in real life.

#### CONCLUSION

In *Porter v. State*, the Court of Appeals held that a woman who had produced evidence that she suffered from Battered Spouse Syndrome was entitled to an imperfect self-defense jury instruction, even though she hired a man to kill her husband.<sup>156</sup> The court reached the correct conclusion in this case because it not only recognized the realities of Battered Spouse Syndrome, but its decision also aligned with self-defense law's low threshold for raising jury issues.<sup>157</sup> The court harmonized social science research with the legislative history, precedent, and self-defense law of the State.<sup>158</sup>

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<sup>155</sup> *Porter*, 166 A.3d at 1059.

<sup>156</sup> *Id.* at 1061.

<sup>157</sup> *See supra* Part IV.

<sup>158</sup> *See supra* Part IV.