§ 3.5. Reasonable versus unreasonable belief in threat

Cases:

In assessing whether a defendant has established sufficient grounds to mount a duress defense, courts do not examine the defendant's subjective perceptions about whether the threat was likely to be acted upon or whether escape was possible; rather, the inquiry hypothesizes a defendant of ordinary firmness and judgment and asks what such a defendant was likely to have experienced or how such a defendant was likely to have acted. U.S. v. Castro-Gomez, 360 F.3d 216 (1st Cir. 2004); West's Key Number Digest, Mandamus Key Number38.

The defense of duress is the same as self-defense. In both, the key issue is whether the defendant reasonably and honestly believed he or she was in imminent danger of great bodily harm or death. To establish duress, a defendant must raise a reasonable doubt that he or she acted in the exercise of free will by showing the defendant committed the charged crime under threats or menaces sufficient to create a good faith, objectively reasonable belief that there was an imminent threat of danger to his or her life. Fear of great bodily harm is sufficient and, except as to homicide, duress is available as a defense to any crime. People v Romero (1992, 2nd Dist) 20 Cal App 4th 1189

Trial court did not err in failing sua sponte to instruct the jury that honest but unreasonable belief as to duress could negate specific intent necessary for robbery and felony murder based on robbery; trial court instructed jury that honest but unreasonable belief as to duress could negate malice, but even though defendant may have committed crimes to protect himself, that did not negate specific intent to commit those acts. People v King (1991, 3rd Dist) 1 Cal App 4th 288, 2 Cal Rptr 2d 197, 91 Daily Journal DAR 14477.

Evidence failed to establish duress in prosecution for fleeing and eluding law enforcement officer; although defendant testified that cousin "flipped out" when officer turned on lights in attempt to stop vehicle, defendant did not mention gun or any use of force until cousin told him to turn onto another street, evidence was equivocal as to whether threat of harm was real when he eluded police for eight blocks, his testimony regarding gun was not consistent, threat came from cousin who allegedly pulled gun on him, yet he refused to divulge his name or this danger to officers when he finally did stop, because his cousin was "blood," his explanation that he would not divulge name of someone who threatened his life and was capable of inflicting mortal harm simply because he was relative was less than reasonable, and officer contradicted defendant's testimony as officer testified that defendant did not stop before he turned corner to second street, while defendant testified he did stop. Turner v. State, 29 So. 3d 361 (Fla. Dist. Ct. App. 4th Dist. 2010).

In prosecution for kidnapping and aggravated assault of 2 prison counselors, trial court did not abuse its discretion in refusing to permit physician/psychiatrist's testimony about inmate's subjective belief about danger, where testimony was irrelevant given that apprehension must be reasonable; trial court did not err in refusing inmate's instructions about duress and coercion, where inmate presented no evidence that (1) he was faced with specific threat of death, forcible sexual attack, or substantial bodily injury in immediate future, (2) there was not time for complaint to authorities, or that such complaint would have been futile, and (3) there was no

opportunity to resort to courts to redress grievances. Amin v State (1991, Wyo) 811 P2d 255.

[Top of Section]

[END OF SUPPLEMENT]

§ 4. Necessity that person be unable to avoid commission of criminal act

[Cumulative Supplement]

In addition to establishing that he was faced with an imminent and immediate threat of death or serious bodily injury, the defendant must also establish that he had no reasonable opportunity to avoid committing the criminal act without undue exposure to death or serious bodily harm. The danger to him must have been continuous throughout the time of the commission of the act. Thus, if the defendant has an opportunity to escape but does not, or if he does not cease the illegal activity at the earliest possible moment but continues the commission of the act after the danger ceases, he may not rely on duress as a defense.[FN20]

CUMULATIVE SUPPLEMENT

Cases:

Opportunity to escape: Defendant who, after allegedly being asked for a second time to pilot a boat out to sea to pick up cocaine that would be dropped from an airplane, went to meet the people who had previously forced him to pilot the same boat in a failed attempt to pick up the cocaine, was not entitled to raise an affirmative defense of duress in his prosecution on charges arising out of his subsequent arrest while returning to the U.S. with the cocaine; defendant had an opportunity to escape participating in the crimes. U.S. v. Castro-Gomez, 360 F.3d 216 (1st Cir. 2004); West's Key Number Digest, Mandamus Key Number38.
Defendant's assertions that she did not seek police intervention because she believed the authorities would not listen to her about threats to kill her and her family if her husband's drug debts were not repaid and because she was reluctant to give evidence against her husband failed to support jury instruction on duress or coercion, in prosecution for conspiracy to possess and distribute cocaine. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846. U.S. v. Gonzalez, 407 F.3d 118 (2d Cir. 2005); West's Key Number Digest, Criminal Law Key Number38.
To extent charges against defendant require government to prove that criminal acts were done with criminal intent, government should from outset bear burden of disproving duress beyond reasonable doubt once defendant has introduced sufficient evidence concerning each element of defense; there is, however, no constitutional bar to placing burden upon defendant to prove affirmative defense of duress by preponderance of evidence where crime charged contains no requirement of mens rea. United States v Santos (1991, CA3 Pa) 932 F2d 244, petition for certiorari filed (Aug 1, 1991).

Defendant was not entitled to duress jury instruction, in prosecution for conspiracy to deliver 500 or more grams of a mixture or substance containing methamphetamine; although defendant testified that she set up methamphetamine deals for dealer because she was relentlessly threatened by dealer due to a drug debt her former boyfriend owed to dealer, and that she feared future violence if the debt was not paid off, there was no evidence that defendant reasonably feared immediate death or serious bodily harm unless she participated in the conspiracy, and the evidence showed that defendant had a reasonable opportunity to seek protection from law enforcement, and that she did not cease committing the crime when the threats had passed. U.S. v. Sawyer, 558 F.3d 705 (7th Cir. 2009).
To establish the defense of necessity, defendant must show an underlying evidentiary foundation for each of the following elements: (1) that he was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury, (2) that he had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to commit a criminal act, (3) that he had no reasonable, legal alternative to violating the law, and (4) that a direct causal relationship may be reasonably anticipated between the commission of the criminal act and the avoidance of the threatened harm. U.S. v. Bonilla-Siciliano, 643 F.3d 589 (8th Cir. 2011).
Defendant presented insufficient evidence that he had no reasonable legal alternative to violating law to warrant instruction on defense of justification, in prosecution for being felon in possession of firearm, where he testified only that he had been victim of prior violent incidents in and around his neighborhood and that when he returned home on day of his arrest to find back door open, he feared intruder was inside, and that he first grabbed knife to defend himself but then decided to get gun because he feared for his life. 18 U.S.C.A. § 922(g), (g)(1). U.S. v. El-Alamin, 574 F.3d 915 (8th Cir. 2009).
Defendant failed to proffer evidence showing he lacked a reasonable opportunity to escape threatened harm, and, thus, evidence did not support jury instruction on defense of duress, where he did not provide specific factual bases to conclude that contacting law enforcement would be futile; rather, he simply alleged in general terms that police would have been unable or unwilling to protect him. U.S. v. Beckstrom, 647 F.3d 1012 (10th Cir. 2011).
To support a duress defense, the unlawful threat of death or serious injury must be both grave and so immediate as to preclude any reasonable, legal alternative to committing the crime. U.S. v. Nwoye, 663 F.3d 460 (D.C. Cir. 2011).
Defendant, who contended that he escaped from detention facility to seek medical care for his heart condition, failed to show that he had no reasonable, legal alternative to violating law, as would support necessity defense in prosecution for knowingly escaping from custody while serving criminal sentence; defendant might have sought relief prior to resorting to escape, if not by further resort to grievance procedures available to him, then by seeking writ of mandamus, filing Bivens action, or, possibly, seeking writ of habeas corpus. 28 U.S.C.A. § 2241; 18 U.S.C.A. § 751(a). U.S. v. Capozzi, 747 F. Supp. 2d 846 (E.D. Ky. 2010).
No reasonable, legal alternative: Defense of duress will fail if there was a reasonable, legal alternative to violating the law, or, in other words, a chance both to refuse to do the criminal act and also to avoid the threatened harm. D'Amario v. U.S., 403 F. Supp. 2d 361 (D.N.J. 2005); West's Key Number Digest, Criminal Law Key Number38.
Defense of duress requires that, at the time of the conduct constituting the offense, the actor suffers an impairment of his ability to control his conduct such that he cannot properly be held

accountable for it. Arkansas Code § 5-2-208. Barr v. State, 336 Ark. 220, 984 S.W.2d 792 (1999); West's Key Number Digest, Criminal Law Key Number38.
Even assuming that defense of duress was available for charge of first degree murder, evidence did not warrant a duress instruction in defendant's first degree murder trial, though defendant testified that he complied with accomplice only because accomplice threatened to beat him and accomplice was bigger than him; it was not clear whether defendant feared that accomplice would kill him, rather than just beat him up, and any belief that accomplice would kill him appeared unreasonable in light of wording of threat and surrounding circumstances. West's Ann.Cal.Penal Code § 26; California Jury Instructions Criminal (6th ed.) No. 4.40. People v. Anderson, 102 Cal. Rptr. 2d 245 (App. 1st Dist. 2000), review granted and opinion superseded, 105 Cal. Rptr. 2d 790, 20 P.3d 1085 (Cal. 2001); West's Key Number Digest, Homicide Key Number297.
Defendant was not entitled to his requested jury instruction on duress as a defense at a trial for assault with intent to kill while armed (AWIKWA) and other offenses, even though a witness who was a member of defendant and codefendant's group testified that codefendant threatened to punish any member who did not participate in a revenge venture and that the witness believed that codefendant would kill him if he did not go and that he went along in the venture only out of fear of codefendant; evidence gave every indication that defendant was a willing participant in planning and executing the plan for revenge, and evidence was utterly lacking that, inter alia, defendant had no reasonable alternative but to participate in the venture. McCrae v. U.S., 980 A.2d 1082 (D.C. 2009).
An "imminent" danger is one which cannot be guarded against by calling for the protection of the law; thus, the defense of duress does not apply where a defendant has an opportunity to escape the compulsion without committing the crime. Turner v. State, 29 So. 3d 361 (Fla. Dist. Ct. App. 4th Dist. 2010).
Defendant charged with statutory rape was not entitled to jury instruction on defense of coercion based on claim that 12-year old victim threatened that she would tell her father that she and defendant were having sex if defendant did not comply with her demand to have sex with her; implied threat of harm to defendant from victim's father was future-oriented, rather than present and immediate, and victim could not have stopped defendant from leaving rather than committing the offense. West's Ga.Code Ann. § 16–3–26. Rodriguez v. State, 306 Ga. App. 169, 702 S.E.2d 10 (2010).
Robbery defendant was not entitled to duress instruction because she had a reasonable opportunity to resist the alleged coercion; defendant stated that she robbed the bank because her acquaintance threatened to shoot her if she did not, but once defendant's acquaintance had dropped defendant off at bank and she was no longer exposed to his threat, it was reasonable to have expected defendant not to follow through with the robbery, but to seek help from bank personnel or the police, and absent any indication that the acquaintance posed such a far reaching threat that defendant could not escape it with help, no rational juror could fail to find that defendant had a reasonable alternative to the robbery. KRS 501.090(1). Lawless v. Com., 323 S.W.3d 676 (Ky. 2010).
In prosecution for attempted armed robbery, defense of duress did not apply, where evidence revealed that defendant voluntarily became involved with drug organization, it was unrefuted that defendant borrowed money from drug organization's leader, defendant made drug runs of his own volition in order to pay off his debt, and defendant's prior conduct in becoming involved

with drug organization contributed substantially to predicament in which he later found himself—needing to commit armed robbery in order to pay off his debt. Williams v State (1994) 101 Md App 408, 646 A2d 1101.
For purposes of affirmative defense of duress, if there is a reasonable and legal alternative to violating the law, it must be used. Davis v. State, 18 So. 3d 842 (Miss. 2009).
Defendant was not entitled to instruction on defense of duress to charge of driving while intoxicated, based on evidence that he got into his truck and drove away to flee assailants who were waiting for him armed with baseball bats outside bar, where defendant could have avoided altercation either by staying inside bar or by going back into bar once he was outside and saw people with baseball bats. State v Greer (1994, Mo App) 879 SW2d 683.
Society's legitimate expectations of moral strength: The normative component of duress assures that the coerced actor demonstrated the degree of fortitude expected of a member of the morally responsible community; in other words, even though the legally coerced actor failed to do the right thing, his or her act is nevertheless tolerated because he or she attained society's legitimate expectations of moral strength. N.J.S.A. 2C:2-9, subd. a. State v. B.H., 183 N.J. 171, 870 A.2d 273 (2005); West's Key Number Digest, Criminal Law Key Number38.
Defendant relying upon duress as defense to escape charge must show either that there was no time to complain to or seek reprieve from governmental authorities, or that, under the circumstances, it would have been futile for him or her to complain to or seek reprieve from governmental authorities. SCRA 1986, Crim.UJI 145132. Reed v. State ex rel. Ortiz, 1997 NMSC 55, 947 P.2d 86 (N.M. 1997).
A police informant convicted of escape from police enroute to detention after arrest on a disorderly charge was entitled to have the jury at the escape trial instructed on the availability to the escapee of the defense of necessity; the escapee was able to offer at least some evidence indicating that he had reason to fear for his safety if incarcerated due to his known status as a police informant, and that he had no alternative under the circumstances but to seek escape to avoid harm. State v Harkness (Huron Co) 75 O App 3d 7, 598 NE2d 836, dismd, motion overr 63 OS3d 1404, 585 NE2d 426.
In prosecution for murder, robbery, and abduction, defense of duress was available to defendant who claimed he participated in the crimes based on codefendant's threats that he would go straight to defendant's home and kill anybody he found there if defendant did not assist him in abduction and robbery, where defense of duress was applicable to cases involving threats of imminent harm to defendant's family members, and where codefendant was capable of carrying out threat and could do so as soon as he could drive to defendant's home; however, trial court properly refused to instruct jury on duress, where evidence showed that defendant had reasonable opportunity to avoid any further participation in crimes and to obtain aid from police or warn his family before codefendant could carry out his threat. Sam v Commonwealth (1991) 13 Va App 312, 411 SE2d 832.

[Top of Section]

[END OF SUPPLEMENT]

§ 5. Burden of proof and evidence

[Cumulative Supplement]

The defense of duress is generally considered to be an affirmative defense.[FN21] However, there is some disagreement as to the burden of proof on the issue of duress. In some jurisdictions the defendant must establish the defense of duress by a preponderance of the evidence, and some states have statutory provisions to that effect.[FN22] In support of such a requirement, it has been said that since the defendant admits participation in an otherwise criminal act, the burden should be on him to prove his exculpatory claim of duress.[FN23]
Other jurisdictions, however, have considered it unreasonable to impose such a burden on the defendant, holding that once evidence of duress is introduced, the defendant need only raise a reasonable doubt in the minds of the jury as to whether his participation in the crime was voluntary or coerced.[FN24]
What acts are sufficient to constitute coercion or duress is for the jury's determination under proper instructions,[FN25] and failure properly to instruct the jury on the defense may constitute reversible error.[FN26]
Since the essence of the jury question is whether the defendant, under all the circumstances present, reasonably believed that he was faced with imminent danger of death or bodily harm at the time he committed the criminal act, any evidence relevant to a determination of that question is admissible. Thus, for example, evidence that the defendant had been told of alleged outrages committed by night riders and that he would be in danger if he did not commit the criminal act charged was admissible, not to show that such outrages had actually occurred, but to show that the defendant acted under duress in committing the criminal act.[FN27] Also, evidence that the defendant was under the control of a gang of men who previously had beaten him and had made several threats against him, his mother, and sister, was held sufficient to raise the defense of duress.[FN28] Similarly, evidence that the defendant committed a robbery at the direction of two men who exerted great control over him, and who had threatened him, his wife, and son, if believed, was sufficient to show a well-grounded fear of imminent death.[FN29] And evidence indicating that the defendant, a teen-ager, was tricked into participating in a robbery by older acquaintances was held, under the circumstances of the case, to clearly establish duress.[FN30]

CUMULATIVE SUPPLEMENT

Cases:

Evidence during prosecution for being a felon in possession of a firearm was sufficient to warrant an instruction on the justification defense; defendant's partner returned to their shared apartment acting erratically and walking and talking strangely, defendant realized partner had a gun in his hand and defendant hit the gun out of his partner's hand, defendant then picked up the gun and removed the clip throwing the pieces in different directions, partner ran out of apartment and drove away, after partner left defendant retrieved gun and clip and placed pieces on top of dresser under clothes in bedroom, and after leaving bedroom defendant went to living room and watched television until partner and police arrived at apartment. 18 U.S.C.A. § 922(g)(1). U.S. v. Ricks, 573 F.3d 198 (4th Cir. 2009).

Because a duress defense does not involve refutation of any of the elements of the offense, the burden is on the defendant to prove the defense by a preponderance of the evidence. U.S. v. Verduzco, 373 F.3d 1022 (9th Cir. 2004), cert. denied, 2004 WL 2231874 (U.S. 2004); West's Key Number Digest, Mandamus Key Number330.
Exclusion of evidence regarding defendant's state of mind was proper since defendant failed to establish prima facie case that he acted under duress, hence his proposed state of mind testimony would not have been relevant since it related solely to that defense. United States v Moreno (1996, CA9 Hawaii) 102 F3d 994, 96 CDOS 9009, 96 Daily Journal DAR 14922.
Placing burden of proof for duress defense on defendant did not violate his due process rights, where prosecution was still required to establish beyond reasonable doubt that defendant knew he was importing cocaine, even if his behavior might be excused by duress. United States v Meraz-Solomon (1993, CA9 Cal) 3 F3d 298, 93 CDOS 5886, 93 Daily Journal DAR 10081.
Defendant who claimed she was physically abused and threatened by her coconspirator was not entitled to jury instruction on duress defense, in prosecution for conspiracy to commit extortion, although coconspirator allegedly told the defendant he worked for the FBI, where defendant had ample opportunities to notify law enforcement authorities about the extortion or to extricate herself from the conspiracy, since she was physically separated from her coconspirator on multiple occasions, while she attended school and worked, on a few occasions when she met with the victim alone, and during a two-week vacation with her family. U.S. v. Nwoye, 663 F.3d 460 (D.C. Cir. 2011).
To assert a defense of justification, the defendant must produce evidence that would permit the jury to conclude that (1) the defendant was under an unlawful and present threat of death or serious bodily injury, (2) she did not recklessly place herself in a situation where she would be forced to engage in criminal conduct, (3) the defendant had no reasonable legal alternative to both the criminal act and the avoidance of the threatened harm, and (4) there existed a direct causal relationship between the criminal action and the avoidance of the threatened harm. U.S. v. Holbrook, 613 F. Supp. 2d 745 (W.D. Va. 2009).
Because a duress defense seeks to excuse a defendant's criminal act rather than negate any element of it, the trial court did not err in refusing to give defendant's requested jury instruction that the state bore the burden of disproving her duress defense beyond a reasonable doubt. State v. Jeffrey, 203 Ariz. 111, 50 P.3d 861 (Ct. App. Div. 2 2002); West's Key Number Digest, Criminal Law Key Number772(6).
Evidence warranted instruction on duress, in prosecution for attempted aggravated robbery and crime of violence; defendant testified that he had participated in accomplice's plan to rob victim only because accomplice had threatened to hurt defendant and his younger brother if he did not do so, and that he was afraid of accomplice and afraid for his brother because accomplice had previously pointed a gun at him and had threatened to kill him and because he had personal knowledge that accomplice had injured and assaulted people in the past. West's C.R.S.A. § 18–1–708. People v. Speer, 216 P.3d 18 (Colo. App. 2007), as modified on denial of reh'g, (Mar. 27, 2008) and cert. granted, 2008 WL 5207295 (Colo. 2008).
Even if testimony of shooting victim's sister on issue of duress had been admitted into evidence in accessory to second degree murder prosecution under residual hearsay exception, evidence would not have justified giving of defense of duress jury instruction; testimony about sister's own fear would have had only tenuous connection to defendant's claim that he acted under duress in concealing identity of killer, and sister's testimony about shootings at victim's funeral would not

have indicated defendant had no reasonable means of escaping threat at time he was interrogated a week before funeral occurred. West's C.R.S.A. § 18-1-708; Rules of Evid., Rule 807. People v. Preciado-Flores, 66 P.3d 155 (Colo. Ct. App. 2002), cert. denied, (Apr. 14, 2003); West's Key Number Digest, Homicide Key Number1493.
Circumstantial evidence was sufficient to exclude armed robbery defendant's hypothesis of innocence and support his conviction; defendant testified that accomplice did not have a gun or mask visible after leaving gas station, got into defendant's car, took gun from under his shirt and threatened to kill defendant if he did not drive, witness testified that he saw accomplice exiting the store with a gun in his hand and a mask on and saw him get into the car after defendant opened the door from inside of the vehicle, defendant testified he kept bag with two guns in it in the trunk of his car, but bag was found in backseat of defendant's car with robbery money and only one gun in it, and second gun was found under passenger seat with accomplice's mask. (Per opinion of Rothenberg, J., with one judge concurring in the result and one judge concurring in part.) Diaz v. State, 958 So. 2d 377 (Fla. Dist. Ct. App. 3d Dist. 2007); West's Key Number Digest, Robbery Key Number24.20.
Law and fact questions: An instruction on defense of duress is proper unless the evidence is such that the trial court can decide, as a matter of law, that the defendant could not reasonably believe that the danger was real or impending, and even if one had reasonable grounds to believe that the danger was real, but, as a matter of law, could not reasonably believe that the danger was impending, then the instruction is not required. Pflaum v. State, 879 So. 2d 93 (Fla. Dist. Ct. App. 4th Dist. 2004); West's Key Number Digest, Mandamus Key Number772(6).
Threatened prostitute: Trial court's finding that defendant failed to establish duress by a preponderance of the evidence was not clearly erroneous, in trial for prostitution, though defendant testified that undercover officer who posed as customer was loud and demanding and that she only agreed to officer's request for a "handjob" because she felt threatened; defendant conceded on cross-examination that officer had not blocked her egress from hotel room, that officer was not holding a weapon when he asked her about a "blowjob," that officer never told her that she could not leave the room, and that she never attempted to use the phone or walk out of the room. HRS §§ 702-231, 712-1200(1). State v. Romano, 114 Haw. 1, 155 P.3d 1102 (2007), as amended, (Mar. 30, 2007); West's Key Number Digest, Criminal Law Key Number569.
Defendant has burden of generating fact question on defense of compulsion. I.C.A. § 704.10. State v. Walker, 671 N.W.2d 30 (Iowa Ct. App. 2003); West's Key Number Digest, Criminal Law Key Number330.
Evidence was sufficient to support conviction as a principal to armed robbery of a bank; although defendant testified that he was not a willing participant in crime, and codefendant jumped into defendant's back seat, put a gun to his head, and ordered him to drive away, codefendant testified that he and defendant planned robbery, and codefendant denied that he ever threatened or forced defendant to participate in robbery, and although codefendant made a plea bargain with State which defendant claimed gave codefendant motivation to lie, jury was made aware of plea agreement, codefendant's relationship with defendant, and his extensive criminal record, and officer, who was parked behind defendant's car outside of bank, did not see codefendant place a gun to defendant's head. LSA-R.S. 14:24, 14:64. State v. Dauzart, 844 So. 2d 159 (La. Ct. App. 5th Cir. 2003); West's Key Number Digest, Robbery Key Number24.20.
Expert testimony is not required to raise the issue of lack of criminal responsibility.

Commonwealth v Johnson (1996) 422 Mass 420. 663 NE2d 559.
Post-arrest conduct: When evidence is presented regarding defendant's post-arrest conduct in response to a claim of duress, a limiting charge should be given that should inform the jury that (1) the defendant has the right to remain silent, and (2) no inference of guilt should be drawn from his exercise of that right; stated differently, the trial court should, at a minimum, instruct the jury that such evidence should be limited to assessing defendant's credibility and may not be used in determining whether defendant is guilty or not guilty. U.S.C.A. Const.Amend. 5; N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 503. State v. Elkwisni, 190 N.J. 169, 919 A.2d 122 (2007); West's Key Number Digest, Criminal Law Key Number673(3).
Statute governing affirmative defense of duress places the burden on the defendant to come forward with some evidence of the defense and the burden of proof on the State to disprove the affirmative defense beyond a reasonable doubt. N.J.S.A. 2C:2-9. State v. Romano, 355 N.J. Super. 21, 809 A.2d 158 (App. Div. 2002); West's Key Number Digest, Criminal Law Key Number330.
Evidence did not support instruction on defense of duress, in prosecution for second degree murder, kidnapping, and other offenses; co-defendant's beating of defendant with gun and kidnapping of victim by defendant and co-defendant happened close together in time, but defendant failed to establish that defendant hit him with the gun to coerce him into escaping, and there was no testimony that co-defendant threatened defendant with violence if he did not get into victim's van, defendant appeared to have willingly followed co-defendant after the beating in order to avoid capture at scene of accident, and defendant participated in kidnapping of victim with no signs of coercion or fear. State v. Perry, 2009-NMCA-052, 207 P.3d 1185 (N.M. Ct. App. 2009).
Defendant was not entitled to have jury instructed on affirmative defense of duress, in prosecution for second-degree robbery; no reasonable view of evidence supported finding that defendant was subjected to use or threatened imminent use of unlawful physical force upon him, and evidence clearly established that defendant voluntarily put himself into position where he could be subjected to any alleged duress. McKinney's Penal Law § 40.00. People v. Morson, 42 A.D.3d 505, 839 N.Y.S.2d 229 (2d Dep't 2007); West's Key Number Digest, Criminal Law Key Number772(6).
Post-crime threats exluded: In first degree robbery prosecution in which defendant claimed duress by accomplice, court properly limited evidence concerning accomplice's postcrime-threatening conduct; threats and violence emanating from accomplice after robbery were irrelevant to duress defense because they could not have affected defendant's state of mind at time of robbery. People v Cornwell (1990, 3d Dept) 160 AD2d 1175, 555 NYS2d 188.
Defendant's PTSD: Although evidence of posttraumatic stress syndrome suffered by the defendant after witnessing the victim's murder might have been consistent with the defense theory that the defendant was an unwilling participant in the murder and may have corroborated the defense's explanation concerning why the defendant continued to associate with a co-conspirator after the murder, the trial court could have found that such evidence, offered as circumstantial proof of the defendant's innocence, would have acted to confuse the issues or mislead the jury; thus, the trial court did not abuse its discretion in excluding the testimony concerning the defendant's posttraumatic stress syndrome. State v McCray (1995, Medina Co) 103 Ohio App 3d 109, 658 NE2d 1076, dismd, motion overr 73 OS3d 1450, 654 NE2d 986.
Evidence was sufficient to support finding that murder defendant did not act under duress in the

beating and stabbing death of co-defendant's girlfriend where, under defendant's version of events, he had ample opportunity to flee the scene, several witnesses testified that defendant and co-defendant were best friends and that they saw no indication that co-defendant abused or controlled defendant in any way, another witness testified that defendant and co-defendant spent the night after the murder at his house without any apparent discord between them, and another witness testified that she saw defendant and co-defendant walking side by side on day after murder with shopping bags full of clothes they had purchased together. 18 Pa.C.S.A. §§ 309, 2502(a). Com. v. Bozic, 2010 PA Super 114, 997 A.2d 1211 (2010).
Evidence was insufficient to establish that defendant was under duress to start fire so as to support conviction for arson; threats by ex-boyfriend that he would burn down house if defendant did not, made about six months before she set fire, were too remote in time, on day before fire, defendant slipped into her aunt and uncle's house, while there, she took six guns and pawned two of them, she also pawned some electronics and took their computer, defendant's children, whom she said ex-boyfriend threatened to kidnap, were nearly grown and ex-boyfriend did not have easy access to them, and defendant admitted she burned motor home about three days before she burned her aunt and uncle's house. V.T.C.A., Penal Code §§ 8.05, 28.02(a)(2)(A). McDowell v. State, 235 S.W.3d 294 (Tex. App. Texarkana 2007); West's Key Number Digest, Criminal Law Key Number569.
In prosecution for aggravated robbery, trial court did not err in shifting burden of production and persuasion to defendant who asserted affirmative defense of duress, where statute provided that affirmative defense shifted both burden of production and persuasion to defendant and where such shift did not violate substantive due process given that voluntariness was not element of offense. Alford v State (1991, Tex App Dallas) 806 SW2d 581, petition for discretionary review gr (Jul 3, 1991).
Duress is an affirmative defense that must be established by a preponderance of the evidence. State v. Dow, 253 P.3d 476 (Wash. Ct. App. Div. 2 2011).
Trial court's refusal of defendant's duress instruction, based on its erroneous determination that any threat was required to be explicit, was not harmless error in prosecution for unlawful delivery of cocaine; jury could have found defendant not guilty on the basis of duress because he testified that he reasonably perceived buyer's requests for drugs as an implicit threat, buyer's testimony substantiated important facts underlying defendant's testimony, and whether defendant's fear was reasonable and whether he would have sold cocaine to buyer absent his fear was at the heart of the parties' contest below. West's RCWA 9A.04.110(27), 9A.16.060(1). State v. Harvill, 234 P.3d 1166 (Wash. 2010).
In prosecution for delivery and possession of cocaine, trial court did not err by instructing jury that defendant had burden of proving duress by preponderance of evidence, where although both defendant and state agreed that defendant had burden of proof, defendant argued that she had to prove defense only to extent that it created reasonable doubt in minds of jurors as to her guilt—this, defendant argued, was lower standard than "preponderance of evidence"—but duress was affirmative defense and successful duress defense did not create reasonable doubt that defendant did crime charged, but, rather, condoned defendant's admittedly unlawful conduct, and any burden of proof for duress which literally relied on ability of defendant to create reasonable doubt would be impossible to meet, since duress defense necessarily allowed for no doubt that defendant did acts charged. State v Riker (1994) 123 Wash 2d 351, 869 P2d 43.
Misleading instruction re burden of proof: In prosecution for first degree robbery, trial court

committed prejudicial error in instructing jury on defendant's claim of duress. Defendant testified that some acquaintances to whom he owed money had threatened him and his girl friend; that they displayed gun and straight-edge razor and advised defendant that they knew his address, implying that his girl friend, who was home sleeping, would be harmed if debt was not immediately paid; that they drove to store, gave defendant steak knife, and told him to "go in and get the rest of the money"; that they said they were sending someone to guard his home while robbery was taking place; and that he believed guard would hurt his sleeping girl friend, and he robbed store acting on this fear. Although instruction properly instructed jury that defendant had burden of proof, it was misleading and confusing as to quantity of proof required to satisfy that burden and defendant was prejudiced thereby. State v McAlister (1993) 71 Wash App 576, 860 P2d 412).

[Top of Section]

[END OF SUPPLEMENT]

U.S. v. Bailey
585 F.2d 1087
C.A.D.C.,1978.
July 12, 1978 (Approx. 43 pages)

FN29. Most of the arguments and evidence presented by appellants do not fit within the standard definition of a "duress" or "necessity" defense. **The duress defense normally requires a defendant to establish that he engaged in criminal conduct only because he was compelled to do so by another person's unlawful threat which caused him reasonably to believe that he must commit the crime to avoid imminent death or serious bodily harm to himself or a third person.** See W. LaFave & A. Scott, Supra note 11, at 374-381. Only appellant Cooley's claim that Walker and Bailey forced him to leave the jail fits this classic model comfortably. The standard necessity defense is available when "(t)he pressure of natural physical forces * * * confronts a person in an emergency with a choice of two evils" and when choosing the lesser of the two evils requires the person to violate the criminal law. Id. at 381, 382-388. Since appellants' evidence involves human threats and forces, rather than natural physical ones, it does not establish a classic necessity defense. Courts and commentators have recognized the difficulties created, particularly in prison escape cases, by exculpatory evidence falling in between the traditional duress and necessity defenses and have proposed various solutions. See, e. g., United States v. Michelson, supra note 17; People v. Lovercamp, supra note 24; People v. Unger, supra note 11; People v. Luther, supra note 11; People v. Harmon, supra note 11; Gardner, The Defense of Necessity and the Right to Escape from Prison, 49 So.Cal.L.Rev. 110 (1975); Comment, Escape: The Defense of Duress and Necessity, 6 San Fran.L.Rev. 430 (1972); Note, Duress and the Prison Escape: A New Use for an Old Defense, 45 So.Cal.L.Rev. 1062 (1972); Casenote, People v. Harmon, 53 Mich.App. 482, 220 N.W.2d 212 (1974), 43 U.Cin.L.Rev. 956 (1974); Annot., Supra note 24.