IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2007

NO. 14

STATE OF MARYLAND,

Petitioner

v.

MAOULOUD BABY,

Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF PETITIONER AND APPENDIX

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BRIEF OF PETITIONER

STATEMENT OF THE CASE

Maouloud Baby was charged in the Circuit Court of Montgomery County, case number 99087, with two counts of first degree rape, first degree sexual offense, attempted first degree sexual offense, and 2 counts of third degree sexual offense. (E. 1).[1] Baby's first trial ended when the trial court

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[1] As access to the record in this case has been restricted, and in an abundance of caution, the State has deleted references in the Record Extract (continued...)

declared a mistrial on September 1, 2004, because the jury was hung. (E. 17). On December 13-17 and 20-21, 2004, Baby was again tried by a jury in the Circuit Court for Montgomery County, the Honorable Louise G. Scrivener presiding. On December 21, 2004, the jury returned guilty verdicts on the charges of first degree rape, first degree sexual offense, and two counts of third degree sexual offense. (E. 23). On February 17, 2005, the court imposed concurrent terms of 15 years with all but 5 years suspended on the first degree rape conviction; 15 years with all but 5 years suspended on the first degree sexual offense conviction; 10 years with all but 5 suspended for each third degree sexual assault conviction; and 5 years probation on release. (E. 25).

Baby noted an appeal from the judgment to the Court of Special Appeals on March 15, 2005. In a reported opinion filed on October 30, 2006, all of Baby's convictions were reversed by the Court of Special Appeals. Prior to the issuance of the mandate, the State filed a Motion for Reconsideration, Clarification, and Stay of Mandate (which was later replaced by an Amended Motion), and a Supplement to Amended Motion for Reconsideration, Clarification, and Stay of Mandate. On February 5, 2007, the Court of Special Appeals issued an Order granting in part and denying in part the Amended

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[1](...continued)
to victim J.L.'s first and last names, and to the surnames of J.L.'s mother and her best friend, Lacie. Transcript references that are not in the Record Extract will be cited by the date of the transcript.

Motion and Supplement thereto.[2] On February 9, 2007, the Court of Special Appeals issued a reported opinion. (App. 1-25; E. 29-53).

On February 23, 2007, the State filed a Petition for Writ of Certiorari, raising two questions for review. The Maryland Coalition Against Sexual Assault and The Women's Law Center of Maryland, Inc., filed a motion to file a brief of *amici curiae* in support of the State's Petition and a Memorandum. On March 12, 2007, Baby filed an Answer and Conditional Cross-Petition, raising two additional issues. In an Order dated May 9, 2007, this Court granted the Petition and Conditional Cross-Petition, and granted the motion of the Maryland Coalition Against Sexual Assault and The Women's Law Center of Maryland, Inc. for permission to file a brief of *amici curiae* in support of the Petition.

QUESTIONS PRESENTED

1. If a woman initially consents to vaginal intercourse, withdraws consent after penetration, and then is forced to continue intercourse against her will, is she a victim of rape?

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[2] The State also filed a Motion and/or Request to Limit Inspection of Case Record to protect the victim's privacy, in part because the case has attracted national media attention. On January 11, 2007, the Court of Special Appeals issued an Order that the record not be made available to the public absent notice and opportunity for the parties to respond to the request, and the issuance of an Order of the Court.

2. Regardless whether the trial court erred in its answers to the jury's questions, did the Court of Special Appeals err in reversing Baby's convictions for first degree sexual offense and third degree sexual offense, which were unrelated to the subject matter of the jury's questions?

STATEMENT OF FACTS[3]

On December 13, 2003, the victim ("J.L.") picked up her long-time friend, Lacie, in order to spend the evening together. (E. 78-79, 80, 183). J.L. had just turned 18 years old in July; she lived at home and was in her first semester at a local college. (T. 12/16/04 at 6-7). She owned a car that she had recently received as a high school graduation present, a 1999 two-door Chevrolet Cavalier that seats five. (E. 80; T. 12/14/04 at 33-34, 63; T. 12/16/04 at 9). The two young women went to Best Buy and bought some CDs, and then decided to go to a McDonald's located in Montgomery Village. (E. 80-81, 183-84). Inside the McDonald's restaurant, they saw Lacie's 16-year-old brother and some of his friends, including Respondent Baby and Michael Wilson, the other participant in the crimes.[4] (E. 84-87, 185-87). The victim recognized Baby from seeing him at the high school she previously attended, but she did not otherwise know him. (E. 187).

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[3] The Brief of Petitioner includes only those facts relevant to the two issues presented herein. Facts relating to the two issues raised by Baby's Cross-Petition will be included in the State's Brief of Cross-Respondent.

[4] Wilson pleaded guilty to second degree rape prior to Baby's trial.

J.L. and Lacie decided to leave. They went outside and got into the victim's car. Baby and Wilson went out to the car and asked for a ride to a party. (E. 188-90). J.L. agreed, and allowed Baby, Wilson, and an unknown "Hispanic boy" to climb into the back seat. (E. 188-89). On the way, Baby told J.L. to stop at a gas station. (E. 90-91, 190). Baby and the Hispanic boy got out, but the Hispanic boy did not return. (E. 190).

When Baby returned to the car, the four continued driving. (E. 192). Once at the location of the party, Baby and Wilson decided not to go. J.L. planned to take them back to the McDonald's. During the return trip, Baby told J.L. to turn into a development and directed her to a particular parking spot. Baby and Wilson were rolling "blunts" (putting marijuana in cigars) in the back seat. (E. 192-93). J.L. told them they were not allowed to smoke in the car. (E. 193). They left the development and Baby directed J.L. to park in a neighborhood across the street from McDonald's. (E. 92). They all got out of the car, and Baby and Wilson smoked one of the blunts. (E. 93-95, 195). Neither J.L. nor Lacie participated in smoking marijuana. (E. 94, 195).

The conversation turned to whether Lacie and J.L. went to college, and where. (E. 96). Baby said that college girls are "freaks," *i.e.*, promiscuous girls who will do anything. (E. 96-97, 197). J.L. tried to explain that they were not "freaks" just because they were in college. (E. 197-98). Baby also talked about how they could get a hotel room because J.L. and Lacie were 18

years old. (E. 196). Both girls dismissed the talk as the blustering of teen-aged boys. (E. 99-101, 198). Baby also pulled two attached condom packets from his pocket. (E. 100). The girls again thought it was just another joke. (E. 101).

After about 10 to15 minutes, the four returned to McDonald's. (E. 100, 199). Lacie got out of the car to see someone she knew. (E. 199). Baby and Wilson did not want to get out of the car, and asked J.L. to take them somewhere to "chill" for about 10 minutes. (E. 200). J.L. thought she was going to drive them somewhere so that Baby and Wilson could smoke more marijuana. (E. 200). Baby told Lacie, "[W]e'll be back in 10 minutes, 15 minutes [at] most." (E. 105). Feeling uneasy, Lacie gave the victim her cell phone. (E. 105-06, 201). J.L. was not afraid of Baby and Wilson because Lacie told her that she had given them a ride before, and because they were friends with Lacie's younger brother. (E. 198). J.L. thought that Baby was about 16 years old, and that Wilson was only about 14 or 15 years old. (E. 239). At sixteen, Baby was already six feet tall and weighed 175 pounds; he also played a defensive position in football. (E. 508; T. 3/25/04 at 38).

As J.L. drove out of the McDonald's parking lot, Baby and Wilson remained in the backseat. Baby directed J.L. to a parking space along a road in a quiet neighborhood near an elementary school. (E. 202-05). After parking the car, J.L. sat there for a second and Baby said, "[W]hy don't you

come back and talk to us[?]" Wilson "was like, yeah." (E. 205). J.L. responded, "[W]ell why don't one of you come up here and then I'll talk to you." (E. 205-06). Baby said that both of them would not be able to talk to her, presumably because the car's head rests would block eye contact with the person in the back seat. (E. 206).

J.L. climbed over the center console into the back seat and sat between Baby and Wilson. She took off her jacket because it was getting warm in the car, "and that's when [Baby] started putting his hands between my legs and then [Wilson] was trying to put my hand down his pants." (E. 206-07). Baby was on one side telling her to "flash" him, and Wilson was on the other side telling her "to just lick it." (E. 207). The situation escalated when Baby pulled J.L.'s bra off to the side and grazed her breast while she was trying to extricate her hand from Wilson's pants. (E. 207-08). The victim insisted that she had to leave, that "[t]he 10 minutes are up." (E. 208). Baby and Wilson replied, "[N]o, just 10 more minutes." (E. 208).

J.L. ended up on her back. Baby was trying to take off her pants and Wilson was sitting on her chest trying to force his exposed penis into her mouth. (E. 208-09). J.L. said, "[N]o, I'm not like that. I don't do things like that." (E. 209-10). She told them to stop. (E. 210). Wilson was unable to get his penis into her mouth because J.L. clenched her mouth shut. (E. 210).

Baby and Wilson then switched places. Baby sat on the passenger's side of the car. He held J.L.'s arms while her upper body lay on his lap. (E. 210-12). J.L.'s knees were on the floor of the car. Wilson positioned himself behind J.L., and, attempting vaginal intercourse, he put his penis in her rectum. (E. 210-11). When J.L. cried out in pain, Baby and Wilson laughed. (E. 211-12). After that, Baby rolled up the passenger window, which had been cracked open. (E. 212).

With J.L. now on her back, Wilson tried to "put it in," but could not. He told Baby, "[W]ell, if I can't put it in, then you're not going to be able to fit in. And that's when [Baby] stuck his fingers in [the victim's] vagina." (E. 213). J.L. again cried out in pain and pulled back while Baby continued to push his fingers inside her vagina. (E. 213).

Baby got out of the car. Wilson continued trying to put his penis in her vagina, and he also pushed his fingers into her vagina. (E. 213-14). J.L. refused to help him "put it in," as Wilson asked. (E. 214). Wilson eventually got his penis into the victim's vagina and the victim believed he ejaculated. (E. 214, 218).

Wilson exited the car "and that's when [Baby] came in and was like well it's my turn now. And he came in and sat down." (E. 215). After sitting in silence for a couple of seconds Baby said, "[S]o are you going to let me hit

it[?]" J.L. did not respond. Baby "was like I don't want to rape you." (E. 215).

Wilson and Baby had earlier told J.L. that she could not leave until she had finished "whatever they told me to do" and so she did not "really" feel she had a choice. (E. 215, 216). After enduring the multiple sexual assaults up to this point, J.L. testified that "[s]omething just clicked off"; she was tired, and she just wanted to go home. (E. 215-16). J.L. told Baby "that as long as he stops when I tell him to" he could, as Baby put it, "hit it." (E. 215). J.L. testified that Baby "got on top of me and he tried to put it in and it hurt." The victim "yelled stop, that it hurt," and tried to push Baby off of her by pushing against his legs and knees. (E. 216-17, 291). J.L. testified that Baby nevertheless continued to push his penis into her vagina for about five or ten seconds before he finally got off of her. (E. 216-17, 291). She did not think that Baby had ejaculated. (E. 218).

On cross-examination, J.L. further explained that although Baby had said he did not want to rape her, it was only "after the fact that he pulled my pants down and stuck his fingers up my vagina, yeah, he said he didn't want to rape me." (E. 290). When asked if Baby stopped when she told him to stop, J.L. unequivocally answered, "No." (E. 291). Under defense counsel's questioning, she specified that Baby was not "going back and forth" when she told him to stop, he was "pushing." (E. 292).

During the various sexual assaults, Lacie repeatedly called J.L. from a payphone, worried because 10 minutes had turned into an hour and 15 minutes. (E. 113). The phone was set for "vibrate," and J.L. recalled feeling it vibrate and seeing the lights flash four or five different times during the assaults. (E. 222-23). J.L. wanted to answer the phone, but Baby and Wilson prevented her from doing so. (E. 223).

After Baby got off J.L., Wilson opened the door and sat in the driver's seat, starting the car with keys that were still in the ignition, and ignoring J.L.'s protests that he could not drive her car. (E. 217-19). Baby, who was still in the backseat, asked J.L. to "jack him off" and she refused. (E. 209). On the ride back to McDonald's, Baby had to remind J.L. that she needed to put her pants back on. (E. 220). Baby asked for J.L.'s phone number. (E. 219). Caught off guard and unable to think quickly enough to make up a number, J.L. gave Baby her correct home telephone number. (E. 295-96). Baby then gave J.L. Lacie's cell phone and allowed her to "talk to her friend." (E. 220). Lacie testified that J.L.'s voice sounded "dead" over the phone. (E. 114).

Wilson parked in the neighborhood across from McDonald's out of sight of the restaurant. (E. 221). Wilson wrapped his arms around J.L., but J.L. did not hug him back. (E. 221). Baby said, "[W]e'll call you if we want to have some more fun[.]" (E. 221). They told her not to tell Lacie "about

what happened[.]" (E. 221). J.L. got into her car and started crying, and then drove to the McDonald's to pick up Lacie. (E. 223-24).

When Lacie entered the car, she immediately noticed that J.L.'s hair and clothing were disheveled, and that her sweater and belt were off. (E. 115). When Lacie asked J.L. if she was OK, J.L. started crying hysterically and screamed, "I told them to stop, and they wouldn't." (E. 116, 118). J.L.'s mother called and asked the girls to meet her at a grocery store to shop. (E. 226). On the way, J.L. stopped to buy Visine for her red eyes, and water to drink and pour over her face. (E. 157). Once at the store, J.L. tried to hide what had happened from her mother because she felt embarrassed, but later that evening she confided in Lacie's mother, who called the police. (E. 226-29).

J.L. was taken to the hospital, where a physical examination revealed that she suffered a one and one-half centimeter laceration to the base of the vagina, and a one centimeter laceration in the peri-anal area. (T. 12/15/04 at 80-82). J.L. also presented with active bleeding 6 hours after the events occurred, consistent with forced vaginal and anal penetration. (T. 12/14/04 at 221-22, 227-31; T. 12/15/04 at 27-29, 37, 40). In addition, J.L.'s vagina was too swollen and painful to allow an internal examination, even using a pediatric speculum the approximate size of a popsicle stick. (T. 12/15/04 at 84). The pediatric emergency room doctor who performed the examination

deemed J.L.'s injuries to be "significant," and noted that only a small portion of rape cases result in injury to the genitals. (T. 12/15/04 at 80, 82).

Baby testified at trial and denied taking any role in any of the sexual assaults that lead up to the act of vaginal intercourse with J.L. According to his testimony, up until the time that he exited the car so that Wilson could have intercourse with J.L., he had not touched J.L. in any way. (E. 424). Baby said that when Wilson got out of the car, he told him he had "just hit that." (E. 425). When Baby entered the car, J.L. was dressed in only her shirt. (E. 425). According to Baby, he asked, "Are you going to let me hit that?" and J.L. answered that he could "as long as I stop when she says to. And then I said, 'I'm not going to rape you.'" (E. 426). J.L. lay on the backseat and Baby unzipped his pants, put on a condom, and got between her legs and "tried to put it in." (E. 427-28). Baby testified that "it wouldn't go in, and I tried a couple more times and it wouldn't go in." (E. 428). Then, Baby said, J.L. "sat up. She was like, 'It's not going to go in,' and that's when, after she sat up and said 'It's not going to go in,' that's when I took off the condom and I put it in my pocket and then knocked on the window for Michael to come in." (E. 428-29). Baby specified that J.L. never said, "Stop," she just sat up. (E. 429). He also denied that he had achieved any penetration into the victim's vagina at all, and that he did not "thrust," he was just "trying to look for it." (E. 482-83, 492, 554). In addition, Baby testified that he did not recall that J.L. was

bleeding, even though her blood was later recovered from the front of the black t-shirt he was wearing that night. (E. 525-27, 533).

Baby was impeached with his testimony from the first trial, in which he admitted penetrating the victim's vagina. (E. 483-84). He also acknowledged that he lied repeatedly in a prior statement to the police, during which he denied knowing the victim or having any sexual contact with her. (E. 487-501, 505-08). Baby was also cross-examined about letters he wrote to Wilson while they were awaiting trial, which told Wilson that he was going to change his "story" to match the statement Wilson had given police. (E. 535-39).

The trial court instructed the jury on first degree rape using the pattern instructions that were then in effect. *See* Maryland State Bar Ass'n, Inc., *Maryland Criminal Pattern Jury Instructions* 4:29, at 361-62 (2003), and 4:29.1, at 367-68 (2003). Each juror was given a typed set of instructions as well as a copy of the verdict sheet. (T. 12/20/04 at 197, 304). The first degree rape instruction that the trial judge gave the jury was as follows:

> . . . Rape is unlawful vaginal intercourse with a female by force or threat of force and without her consent. In order to convict the defendant of second-degree rape, the State must prove that the defendant had vaginal intercourse with [the victim], that the act was committed by force or threat of force, and that the act was committed without the consent of [the victim].
>
> Vaginal intercourse means the penetration of the penis into the vagina. The slightest penetration is sufficient. An emission of semen is not required. The amount of force

> necessary depends upon the circumstances. No particular amount of force is required, but it must be sufficient to overcome the resistance of the victim. You must be satisfied that the victim either resisted and that this resistance was overcome by force or threat of force or that the victim was prevented from resisting by force or threat of force. She must have resisted to the extent of her ability at the time unless her resistance or will to resist was overcome by force or fear that was reasonable under the circumstances.
>
> Finally, consent means actually agreeing to the act of intercourse rather than merely submitting as a result of force or threat of force.
>
> The actual charge is first-degree rape, and in order to convict the defendant, the State must prove all of the elements of forcible, second-degree rape, which I have just gone through with you, and must also prove that the defendant committed the offense aided and abetted by one or more additional persons. A person aids and abets the commission of a crime when he knowingly and intentionally associates with the criminal venture with the intent to help commit the crime and seeks, by some act, to make the crime succeed.

(E. 556-57).

During deliberations, the jury asked the following question:

> "If a female consents to sex initially and, during the course of the sex act to which she consented, for whatever reason, she changes her mind and the . . . man continues until climax, does the result constitute rape?"

(E. 559). After discussion with the parties, the trial court responded, as follows:

> I am unable to answer this question as posed. Please reread the instructions as to each element and apply the law to the facts as you find them[.]

(E. 561).

The following morning, the jury sent out the following question: "If at anytime the woman says stop, is that rape?" (E. 563). The trial judge answered, "This is a question that you as a jury must decide. I have given you the legal definition of rape which includes the definition of consent." (E. 565).

The jury found Baby guilty of first degree rape (being aided and abetted by co-perpetrator Wilson in an act of vaginal penetration); first degree sexual assault (by aiding and abetting Wilson in an act of anal penetration); and two counts of third degree sexual offense (by touching the victim's vagina and her breast without her consent). The jury found Baby not guilty of first degree rape (by aiding and abetting Wilson in an act of vaginal penetration); not guilty of attempted first degree sexual offense (by aiding and abetting Wilson in an act of attempted fellatio); and not guilty of conspiracy to commit first degree rape.

ARGUMENT

I.

IF A WOMAN INITIALLY CONSENTS TO VAGINAL INTERCOURSE, WITHDRAWS CONSENT AFTER PENETRATION, AND THEN IS FORCED TO CONTINUE INTERCOURSE AGAINST HER WILL, SHE IS A VICTIM OF RAPE.

By statute, the crime of rape is committed when a person (1) engages in vaginal intercourse with another, (2) by force or the threat of force, and (3) without the consent of the other. *See* Md. Code Ann., Crim. Law Art., § 3-304(a)(1) (2002). It is the concurrence of these three elements that constitutes the crime of rape. The rape statute does not provide that the withdrawal of consent must occur prior to vaginal penetration. Rather, it states that the concurrence of the three named elements constitutes the offense of rape.

The Court of Special Appeals, however, has declared that if a woman initially consents to vaginal intercourse, the continuation of intercourse by force or threat of force and without her consent is not rape. (App. 15-17, 18-19; E. 43-45, 46-47). In reaching this conclusion, the lower appellate court relied upon dicta in *Battle v. State*, 287 Md. 675 (1980), a case decided by this Court over a quarter of a century ago. *See* App. 12-17; E. 40-45. Alternatively, the Court of Special Appeals held that, even if the language in *Battle* is dicta, the same result obtains under the common law that existed in England, which was adopted by Maryland, "on the fourth day of July,

seventeen hundred and seventy-six." *See* App. 15-17 (citing Article 5 of the Maryland Declaration of Rights); E. 43-45.

As discussed below, the Court of Special Appeals' decision should be reversed. It is based on tenuous grounds, and is inconsistent with current Maryland rape law. Moreover, of the other states that have considered the issue, most with rape statutes similar to Maryland's, all but one have soundly rejected the limited definition of rape framed by the Court of Special Appeals. This Court should likewise hold that, under Maryland law, rape occurs whenever vaginal intercourse is by force or the threat of force, regardless whether consent was withdrawn before or after penetration. The jury's verdict finding Baby guilty of first degree rape should be upheld.

A. This Court's decision in *Battle* does not support the Court of Special Appeals' conclusion that a woman loses her right to withdraw consent after penetration.

In reaching its holding, the Court of Special Appeals recognized that the only Maryland cases that even mention post-penetration withdrawal of consent are *Hazel v. State*, 221 Md. 464 (1960), and *Battle*. The lower appellate court agreed with the State's position that *Hazel* does not control the issue that is now before this Court.[5] (App. 13; E. 41).

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[5] In *Hazel*, this Court upheld a common law rape conviction where the victim was robbed at gunpoint and in the presence of her children, and she (continued...)

Battle is likewise not dispositive of the issue presented by this case because the language it employed, and upon which the Court of Special Appeals relied, was dicta. The facts of *Battle* are as follows. The victim testified that she agreed to drive Battle home and accepted his invitation to go up to his room to examine a radio he wanted to sell. 287 Md. at 677. Once upstairs, Battle struck the victim, threatened her with a screwdriver, and ordered her to take her clothes off. The victim testified that she complied because she was scared, and that Battle thereafter vaginally penetrated her but did not ejaculate. *Id.* When Battle left the bedroom to answer the door downstairs, the victim called for help out of a window. Battle caught her, struck her, and dragged her back into his bedroom. When Battle left to respond to another knock at the door, the victim's efforts to attract attention from the window were successful, and the police came. At trial, Battle testified that the victim invited him to have sexual intercourse, that he found her disrobed in his bedroom, and that there had been no sexual contact between the two of them. *Id.* at 677-78.

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[5](...continued)
testified that she did not struggle against the defendant during two acts of vaginal intercourse because she was afraid for her life. The *Hazel* Court recognized that the same kind of evidence may establish both force and non-consent. 221 Md. at 467-68.

During deliberations, the jury asked: "'When a possible [underlined] consensual relationship becomes non-consensual for some reason, during the course of the action can the act then be considered rape?'" *Id.* at 678. The attorneys disagreed regarding what the jury meant by "the course of the action," with defense counsel interpreting the phrase to mean "during the intercourse," and the prosecutor questioning whether the jurors meant "'the whole chain of events'" or after the parties "'got in the bedroom or maybe after they had sex.'" *Id.* at 679-80. The trial judge said she was not certain she understood the question, but interpreted it as "'where the original act of sex is by consent whether it is then possible the circumstances could change because of the victim's lack of consent after the original situation began as a consensual one[.]'" On inquiry, the jury stated that the trial court's interpretation was correct.

The trial court then instructed the jury: "'Yes, that it is possible for a situation to start out as consensual and then become a non-consensual one in the course of the event.'" *Id.* at 678. The trial judge also quoted from the decision in *Hazel*, stating: "With respect to the presence or absence of the element of consent, it is true, of course, that however reluctantly given, consent to the act at any time prior to the penetration deprives the subsequent intercourse of its criminal character. There is, however, a wide difference between consent and a submission to the act. Consent may involve

submission, but submission does not necessarily imply consent. Furthermore, submission to a compelling force, or as a result of being put in fear, is not consent." *Id.* at 679. The trial judge also added instructions about fear and resistance. On appeal, this Court reversed, holding that "the combination of the ambiguous question, ambiguously clarified by the trial judge, and the answer create sufficient confusion in this case to warrant reversal and a remand for a new trial." *Id.* at 685.

In the course of its opinion, this Court, noting that there was "little discussion" in the cases, discussed at some length authority stating that if a woman does not consent to intercourse but thereafter consents during the act, the belatedly-given consent (or condonation) does not vitiate the rape. *Id.* at 681-82. The *Battle* Court, noting that there was "[b]ut little discussion" in the cases on the withdrawal of consent prior to penetration, continued: "Given the fact that consent must precede penetration, it follows in our view that although a woman may have consented to a sexual encounter, even to intercourse, if that consent is withdrawn prior to the act of penetration, then it cannot be said that she has consented to sexual intercourse." *Id.* at 683-84. This Court then added the language upon which the Court of Special Appeals relied: "On the other hand, ordinarily if she consents prior to penetration and withdraws the consent following penetration, there is no rape." *Id.* at 684.

As the error upon which the *Battle* Court reversed was based upon its holding that the trial judge gave an ambiguous answer to an ambiguous question posed by the jury, the single sentence cited above pertaining to post-penetration withdrawal of consent was not necessary to its holding, and was therefore merely dicta. *Accord State v. Siering*, 644 A.2d 958, 963 n.8 (Conn. App.) (noting that discussion of post-penetration withdrawal of consent in *Battle* "is arguably dicta and thus will not be addressed here."), *cert. denied*, 648 A.2d 158 (Conn. 1994); *State v. Robinson*, 496 A.2d 1067, 1070 (Me. 1985) (noting that the research of court and counsel revealed only one North Carolina case on the subject, even though *Battle* had already been decided); *No Means No: Weakening Sexism in Rape Law by Legitimizing Post-Penetration Rape*, 49 St. Louis U.L.J. 1229, 1233 (2005) (stating only that *Battle* "implied" that post-penetration withdrawal of consent does not constitute rape). Accordingly, the Court of Special Appeals erred in relying on *Battle* for the proposition that, under Maryland law, consent cannot be withdrawn once penetration is achieved.

B. To the extent that the common law of rape does not criminalize the forceful continuation of sexual intercourse after the victim has withdrawn her consent, it should be rejected.

Even assuming that the language in *Battle* is not dicta but was an accurate restatement of the common law, or that, as the *Baby* court alternatively held, the common law as adopted by Maryland in 1776 defines

Maryland's modern rape law, that aspect of the common law crime of rape that is at issue here should be rejected. The common law on the subject provides little guidance, and is, in any event, based upon archaic views of women and rape that are out of sync with society's contemporary understanding of the crime of rape, as well as other aspects of current Maryland rape law.

1. Common law does not provide a firm foundation for the position that the forceful continuation of sexual intercourse after the woman has withdrawn consent is not rape, and, in any event, it is based upon an obsolete view of women and rape.

As this Court in *Battle* noted, the body of common law on post-penetration withdrawal of consent is itself sparse. *See Battle*, 287 Md. at 683; *accord Robinson*, 496 A.2d at 1070 (refusing to rely on "limited precedent"). This may be explained, in part, by examining the context in which rape law arose.

The common law of rape developed during a time when all heterosexual intercourse outside of marriage was considered to be unlawful, and fornication and adultery were routinely prosecuted crimes. Anne M. Coughlin, *Sex and Guilt*, 84 Va. L. Rev. 1, 26-29 (1998). When a case of sexual intercourse came before a judge, "the task was to decide whether the encounter involved a rape, for which the man was solely to blame; fornication or adultery, for which both the man and the woman shared criminal responsibility; or marital intercourse, for which neither participant would be punished." *Id.* at 27. Both parties were

put on trial, since she was guilty by her own account of a crime (by engaging in sexual intercourse outside of marriage), and the rape complaint had to be examined to see if it was "a defensive maneuver by a woman trying to exonerate herself from a charge of unlawful intercourse[.]" *Id.* at 34.

Thus, early common law was focused primarily on a woman's attempt to exonerate herself from a sexual crime, and was not concerned with punishing acts of sexual violence. This context explains the common law's peculiar focus upon the behavior of the victim and its insistence on nonconsent and force as elements of rape, and may explain why withdrawal of consent after penetration was never or rarely at issue. *See id.* at 40-46.

Moreover, the body of common law on the subject is not uniform. A Vermont case decided in 1874 held that there is "no rule upon the subject, of universal application" as to when a victim may withdraw consent. *See State v. Niles*, 47 Vt. 82 (1874). There, the court considered a rape conviction where the defendant entered into sexual intercourse with "a female above the age of consent" (a 12-year-old girl),[6] who initially consented but then withdrew her consent, after which the defendant forcibly continued intercourse after having knowledge of her dissent. *Niles*, 47 Vt. 82. The court upheld the jury charge that recognized this fact pattern as constituting rape, and rejected the

[6] The age of consent under English common law was 10 years old until 1885. Richard A. Posner, *Sex and Reason*, 396 (Harvard U. Press 1992).

Respondent's argument that the "essence" of rape "consists in the outrage to the woman's feelings, and in the forcible entry upon her person without consent," and that withdrawal of consent after the man's "animal passions" have been "roused" is not rape. Thus, it appears that there is little law and no clear rule to be drawn from early common law cases regarding whether rape may be prosecuted where consent is withdrawn after penetration.

In any event, the archaic stereotypes of women and rape upon which common law rape is apparently premised are obsolete. The Court of Special Appeals held that Maryland "adheres" to a definition of rape "rooted in ancient laws," upon which English common law developed. (App. 15-17; E. 43-45). As the lower appellate court noted, the common law crime of rape is based upon the concept, rooted in ancient law, that "the initial 'de-flowering' of a woman" was the "real harm or insult." "The damage was done[]" at penetration because "a woman could never be 're-flowered[.]'" *Id.* Moreover, the loss of a woman's chastity was considered to be an injury to her father or husband, as chastity was a commodity that rape devalued; redress was therefore made not to the rape victim, but to the "owner" of her chastity. *See id.*; Comment, *Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-Penetration Rape Should Be a Crime in North Carolina*, 82 N.C. L. Rev. 1258, 1266-67 & n. 55-58 (2004).

Similarly, in *People v. Vela*, 172 Cal. App.3d 237 (1985), which was later overruled in another decision by the California Supreme Court, the lower appellate court, relying on both statutory and common law, refused to recognize post-penetration rape, stating:

> [T]he essence of the crime of rape is the outrage to the person and feelings of the female resulting from the nonconsensual violation of her womanhood. When a female willingly consents to an act of sexual intercourse, the penetration by the male cannot constitute a violation of her womanhood nor cause outrage to her person and feelings. If she withdraws consent during the act of sexual intercourse and the male forcibly continues the act without interruption, the female may certainly feel outrage because of the force applied or because the male ignores her wishes, but the sense of outrage to her person and feelings could hardly be of the same magnitude as that resulting from an initial nonconsensual violation of her womanhood. It would seem, therefore, that the essential guilt of rape . . . is lacking in the withdrawn consent scenario.

172 Cal. App.3d at 243.

The California Supreme Court criticized the reasoning in *Vela* as "unsound," noting that there is no way of measuring the level of outrage a victim might suffer from continued forcible intercourse, and also pointing out that nothing in California's rape statute conditions rape "on the degree of outrage of the victim." *In re John Z.*, 60 P.3d 183, 186 (Cal. 2003).

The theoretical underpinnings of the common law of rape discussed by the Court of Special Appeals below and referred to by the *Vela* court may well have contributed to the focus of common law rape upon initial penetration with

force and without consent, and the devaluing of continued forced penetration without consent. *See* Comment, 82 N.C. L. Rev. at 1267-68. "As feminist scholars, medical practitioners, and victims have observed," however, "the harm of rape is about more than penetration – it is about the loss of autonomy, dignity, and control that arises from being a target of intimate violence, power, and rage." *Id.* at 1268.

Thus, even if there is a body of common law that did not recognize the crime of rape where the woman initially consented to penetration, it should be rejected. The theoretical basis for the common law position is unsound and contrary to our present-day thinking about women and the crime of rape.

2. The view that a woman loses her right to withdraw consent once penetration is accomplished is inconsistent with existing Maryland law on rape.

The limited definition of rape advanced by the Court of Special Appeals is inconsistent with the crime of rape as it presently exists in Maryland. Rape was a common law crime in Maryland until 1976, when the legislature enacted a statutory scheme pertaining to sexual offenses. *Battle*, 287 Md. at 680. An earlier version of the rape statute required "'vaginal intercourse with another person by force against the will and without the consent of the other person,'" which, as this Court noted, was "an outgrowth of the definitions of rape at common law," *e.g.*, "Rape is the having of unlawful carnal knowledge, by a man of a woman, forcibly and against her will.'" *Id.* at 680-81 (citations

omitted). This Court later recognized that "against the will" and "without consent" are synonymous terms, and the statutory elements of rape are presently vaginal intercourse, by force or threat of force, without the consent of the other. *See State v. Rusk*, 289 Md. 230, 241 (1981); Crim. L. Art., § 3-304(a) (1). While some of the terms used in the sexual crimes subtitle, such as "vaginal intercourse," are explicitly defined by statute, *see* Crim. L. Art., § 3-301, Section 3-302 provides that "an undefined word or phrase that describes an element of common-law rape retains its judicially determined meaning, except to the extent it is expressly or impliedly changed in this subtitle."

There are a number of reasons why the Court of Special Appeals' definition of rape is inconsistent with current Maryland law. The crime of rape is statutorily defined, in pertinent part, as "engag[ing] in vaginal intercourse with another." *See* Md. Code Ann., Crim. Law Art. §§3-303(a) & 3-304(a) (2002, 2005 Supp.). While at common law, "it was the act of penetration that was the essence of the crime of rape[,]" that is no longer true. The statutory definition of vaginal intercourse, which supercedes the common law definition, is "genital copulation whether or not semen is emitted"; vaginal intercourse "*includes* penetration, however slight, of the vagina." *See* Md. Code Ann., Crim. Law Art., § 3-301(g) (2002) (emphasis added); Crim. Law Art., § 3-302 (2002) (an undefined word or phrase retains its judicially determined meaning it is expressly or impliedly changed by statute).

Moreover, former Article 27, Section 461(g), provides that "'[v]aginal intercourse' has its *ordinary meaning* of genital copulation." *See* Md. Code Ann., Art. 27, § 461(g) (1996 Repl Vol.) (emphasis added). Thus, penetration is not synonymous with vaginal intercourse, it is merely the minimum showing that must be made to prove the element of vaginal intercourse.

In addition, Maryland case law has long held that the only penetration required for rape is penetration of the *labia majora*, not entry within the walls of the vagina itself. *See Craig v. State*, 214 Md. 546, 547 (1957); *accord Wilson v. State*, 132 Md. App. 510, 519 (2000). Clearly, the ordinary meaning of vaginal intercourse is not limited solely to penetration of the vulva. *See Richmond v. State*, 326 Md. 257, 262 (1992) (in interpreting statute, court gives language its natural and ordinary meaning). To hold otherwise leads to the untenable conclusion that, where a woman consents to sexual activity that includes entry of the man's penis only into the *labia majora*, but withdraws consent before the man penetrates within the walls of the woman's vagina, the man may, by force or threat of force, continue with vaginal intercourse with impunity. This result runs contrary even to the common law, which sought in part to protect a woman's virginity.

Thus, if initial penetration (with force and without consent) constitutes rape, continuing penetration (with force and without consent) should likewise constitute rape. Cases from other jurisdictions have employed this reasoning.

See, *e.g.*, *McGill v. State*, 18 P.3d 77, 84 (Alaska App. 2001) (holding that Alaska statute does not limit penetration to the moment of initial penetration); *Siering*, 644 A.2d at 962 (construing reference to penetration in Connecticut statute as establishing the minimum evidence required, not that initial penetration constitutes intercourse, as that "would mean that the act that commences intercourse is also the act that simultaneously concludes intercourse"); *Robinson*, 496 A.2d at 1070 n.2, 1070-71 ("in either everyday or legal parlance *any* continuing presence of the male sex organ in the female organ constitutes sexual intercourse"; applying "common sense" to find that statute does not prohibit post-penetration rape); *State v. Bunyard*, 133 P.3d 14, 28 (Kan. 2006) ("ordinary meaning and understanding of sexual intercourse . . . includes the entire sexual act").

The view that consent cannot be withdrawn once penetration occurs also runs contrary to current Maryland law that rape does not require physical resistance from victims. *See Rusk*, 289 Md. at 243-44 (physical resistance by the victim is not required where the defendant used actual force or placed the victim in reasonable fear of force). Under the Court of Special Appeals' view, however, if intercourse is continued by force after the victim withdraws consent, it would not constitute rape unless the victim is able to struggle against her attacker and manages to displace the male organ, however briefly, followed by an act of re-penetration by the defendant. *See Robinson*, 496 A.2d

at 1070-71 (discussed in Comment, 82 N.C.L.Rev. at 1271-72). The victim's ability to fight off her attacker is not, of course, an element of rape under Maryland law. *See also Siering*, 644 A.2d at 962-63 (noting "absurdity of this construction" and fact that it protects a defendant whose physical force is great enough to avoid a momentary displacement of the male organ). Indeed, a new element would have to be added to the crime of rape if this Court were to require that, after a woman withdraws her consent, penetration must be accomplished again.

As previously discussed, many of the common law views of women and rape have changed over the years, and these changes are reflected in Maryland decisional law as well. As a woman's complaint of rape was once viewed with suspicion because she was a participant in unlawful sexual intercourse, the actual force used by the man, and the extent of the woman's resistance to the vaginal intercourse, were critical elements.[7] Coughlin, 84 Va. L. Rev. at 26-40. In *Rusk*, 289 Md. at 245-47, however, this Court reversed the Court of

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[7] The Court of Special Appeals's decision seems to perpetrate the view that the victim may be to blame for the rape. The lower appellate court's suggestion that J.L. should not have gotten into the backseat of her car after Baby and Wilson had made suggestive comments about sex and after she "had abandoned the security provided by Lacey's presence" is reminiscent of the dissent in *Rusk*, when it observed that when the victim submitted to the man's request to accompany him to his room, "[s]he certainly had to realize that they were not going upstairs to play Scrabble." *See* App. 12; E. 40; *Rusk*, 289 Md. at 258 (Cole, J., dissenting).

Special Appeals' en banc decision, and held that the element of force was met where the victim submitted to vaginal intercourse out of fear, even where there was no evidence of actual force by the defendant or physical resistance by the victim, a holding at variance with early common law.

In keeping with society's evolving attitudes towards women and rape, this Court should continue to develop the body of rape law to the extent that it is not already defined by statute. Certainly, Article 5 of the Maryland Declaration of Rights confers upon this Court the power to do so. *See* C. Christopher Brown, *A Search for Clarity and Consistency in Judicial Process: The Maryland Court of Appeals Decides Whether to Change Common-Law Rules*, 62 Md. L. Rev. 599, 646-47 (2003) ("[I]t is inherently consistent with the constitutional division of powers that each determination of what the common law should be 'is a question that comes within the province of the Courts of justice, and is to be decided by them.'") (quoting *State v. Buchanan*, 5 H. & J. 317, 365-77 (Md. 1821)).

"Assuming the legislature has not preempted judicial action, it then must be asked when the court should exercise its discretionary Article 5 power to change the common law." Brown, 62 Md. L. Rev. at 605. As this Court observed in *Ireland v. State*, 310 Md. 328, 331 (1987): "Because of the inherent dynamism of the common law, we have consistently held that it is subject to judicial modification in the light of modern circumstances or

increased knowledge." *Accord Skok v. State*, 361 Md. 52, 77 (2000) (holding that broadening scope of common law coram nobis remedy "is justified by contemporary conditions and public policy"); *State v. Wiegmann*, 350 Md. 585, 604 (1998) (and cases cited therein). In *Moxley v. Acker*, 294 Md. 47, 48, 52 (1982), for example, this Court held in a common-law forcible detainer action that the use or threat of force was no longer a necessary element of the offense, as the reason for its existence had long disappeared. Similarly, in *Boblitz v. Boblitz*, 296 Md. 242, 275 (1983), this Court abrogated the common law rule of spousal immunity in negligence actions. *See also* Brown, 62 Md. L. Rev. at 609-10 (discussing *Moxley*, *Boblitz*, and other cases).

Nothing in current Maryland statutory or case law supports the Court of Special Appeals' conclusion that a man is entitled to persist in intercourse once the victim withdraws her consent. Thus, either because the legislature's definition of rape excludes the notion that there is no post-penetration rape under Maryland law, or because the legislature has not addressed the issue and it is left to common law development, this Court should hold that, under Maryland law, rape is vaginal intercourse (which, by statute, encompasses the entire act of genital copulation), by force or threat of force, without the consent of the woman, regardless whether consent was withdrawn before the moment of penetration or afterwards.

3. The overwhelming majority of states that have considered the issue have rejected a definition of rape that excludes the continuation of vaginal intercourse by force or threat of force and without consent, and the reasoning of these decisions is persuasive.

Of the state courts that have squarely considered the issue, all but one have held that a woman who initially gives consent to vaginal intercourse, withdraws consent during intercourse, and then is forced to continue intercourse, is a victim of what has been termed post-penetration rape. *See McGill v. State*, 18 P.3d 77, 84 (Alaska App. 2001); *In re John Z.*, 60 P.3d 183, 186-87 (Cal. 2003); *State v. Siering*, 644 A.2d 958, 961-63 (Conn. App. 1994); *State v. Bunyard*, 133 P.3d 14, 27-29 (Kan. 2006); *State v. Robinson*, 496 A.2d 1067, 1070-71 (Me. 1985); *State v. Crims*, 540 N.W.2d 860, 865 (Minn. App. 1995); *State v. Jones*, 521 N.W.2d 662, 672 (S.D. 1994). Illinois lawmakers, in order to avoid the three-year-long conflict among the lower appellate courts in California, which culminated in the California Supreme Court's decision in *In re John Z.*, cited above, crafted a bill "popularly known as the 'No Means No'" law.[8] *See* Comment, 49 St. Louis U.L.J. at 1243 (discussing 720 Ill. Comp. Stat. 5/12-17 (2003), which provides that a person

[8] Theoretically, the new statute was unnecessary because a person could have been charged under the existing Illinois rape statute with post-penetration rape. As Senator Dan Rutherford stated at the time, "the goal was not to change Illinois law as it pertains to sexual assault, but more simply to clarify what most people believe the law says." Note, *"Initial Consent" Rape: Inherent and Statutory Problems*, 53 Clev. St. L. Rev. 161, 167-68 (2005-06).

who initially consents to penetration is not deemed to have consented to any conduct occurring after the person withdraws consent). Even the dissenting judges in *Bunyard* and *In re John Z.* agreed with their respective majority opinions that rape can occur post-penetration. *See Bunyard*, 133 P.3d at 34-35 (McFarland, C.J., dissenting & Luckert, J., dissenting); *In re John Z*, 60 P.3d at 764 (Brown, J., dissenting); Notes and Comment, *The Collusion of Consent, Force, and Mens Rea in Withdrawal of Consent Rape Cases: The Failure of In re John Z.*, 26 Whittier L. Rev. 225, 234 (2004).

The only decision that supports the Court of Special Appeals' view (aside from its dubious reliance on *Battle*) is *State v. Way*, 254 S.E.2d 760 (N.C. 1979). Aside from being dated, it fails to explain its position or cite any direct authority for the concept that withdrawal of consent "ordinarily applies . . . to those situations in which there is evidence of more than one act of intercourse" between the victim and defendant. *Id.* at 761. As a result, the decision has been widely criticized. *See Robinson*, 496 A.2d at 1070 ("*ipse dixit* conclusion" of *Way* avoided any relevant analysis because the court ignored the compulsion element of rape); *McGill*, 18 P.3d at 82-84 (criticizing both *Way* and *Battle*, and referring to theory that rape is based on outrage to woman as an outmoded social convention).

Persuasive authority from other jurisdictions compels the conclusion that post-penetration rape is either already included within Maryland rape law,

or it should be. Moreover, the following discussion illustrates why some of the criticisms that have been lodged against the California Supreme Court's decision in *In re John Z.*, and the Illinois "No Means No" statute, are not problematic under Maryland law.

(i) Force or the threat of force is an element of post-penetration rape.

Both *In re John Z*, in which the California Supreme Court upheld a post-penetration rape conviction, and the Illinois "No Means No" statute have been criticized for seeming to minimize the importance of the element of force, thus leaving the determination whether post-penetration rape has occurred to hinge solely on the withdrawal of consent.[9] *See In re John Z.*, 60 P.3d at 188, 190 (Brown, J., dissenting) (majority failed to identify or define force); Notes & Comments, 26 Whittier L. Rev. at 234 (same); Note, *A Critical Exercise in Effectuating "No Means No" Rape Law*, 29 Vt. L. Rev. 215, 236-37 (2004)

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[9] The majority opinion in *In re John Z.* has also received criticism on grounds that it failed to adequately address whether the victim in fact communicated her withdrawal of consent to the juvenile. *See* 26 Whittier L. Rev. at 234 (discussing *In re John Z.*, 60 P.3d at 188 (Brown, J., dissenting)). Under Maryland law, the State is, of course, required to show that the victim communicated her withdrawal of consent, whether the withdrawal occurs before or after penetration. Otherwise, a man could be convicted of rape even if he did not know that the woman was not consenting to the vaginal intercourse, thus negating the requisite wrongful intent on the part of the man. *See* 26 Whittier L. Rev. at 249-50 (general criminal intent for rape is wrongful intent).

(suggesting revising the statute by including use of force or threat of force). Maine's rape statute, like Maryland's, clearly requires vaginal intercourse to be by compulsion as well as without the consent of the woman. Thus, in *Robinson*, the Maine Supreme Court stressed that compulsion is a critical element of post-penetration rape, stating:

> *We emphasize that the ongoing intercourse*, initiated we here assume with the prosecutrix's consent, *did not become rape merely because she revoked her consent.* It became rape if and when the prosecutrix thereafter submitted to defendant's sexual assault only because "physical force, a threat of physical force or a combination thereof . . . [made her] unable to physically repel the [defendant] or . . . produce[d] in [her] a reasonable fear that death, serious bodily injury or kidnapping might be imminently inflicted upon [her]." . . . *As in any rape case, the State must prove beyond a reasonable doubt a whole lot more than mere absence of consent.*

496 A.2d at 1070 (quoting 17-A M.R.S.A. § 252(1)(B) (1983)) (brackets in original; emphasis added).

Likewise, under Maryland law, force or the threat of force is an element of rape that must be proven by the State, and the force required must be greater than or different from the force needed to accomplish the sex act itself. *See* Comment to *MPJI-Cr* 4:29, at 363 (2005). Thus, sexual intercourse does not become rape just because a woman changes her mind. Rather, the State must prove beyond a reasonable doubt that the woman withdrew consent after penetration, communicated that to the defendant, and the defendant

nevertheless continued intercourse by force or the threat of force. *See* Notes and Comments, 26 Whittier L. Rev. at 236 (citing *In re John Z.*, 60 P.3d at 190 (Brown, J., dissenting)).

(ii) The time within which a man must react to a withdrawal of consent is a question of fact for the jury.

Other courts have considered an issue raised by the Court of Special Appeals as to how much time a man has to respond once a woman communicates her withdrawal of consent.[10] This is quintessentially a question of fact for the jury to decide. As the *Robinson* court observed: "The determination of when ongoing sexual intercourse is transformed from a consensual joint exercise to unilateral action by one party forced upon an unwilling partner is little different from the determination that has to be made" in the context of "date rape," where the initial sexual activity may have been consensual, but the penetration was not. 496 A.2d. at 1071.

Likewise, in a post-penetration scenario, the jury must find that the man was notified that the woman no longer consented to vaginal intercourse, *and*

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[10] The Court of Special Appeals' opinion states that the issue of "the interval between [the victim's] command to stop and [Baby's] acquiescence" was "apparently of concern to the jury." (App. 19; E. 47). The jurors' questions, however, related solely to whether rape was committed where the victim initially consents to sex but later withdraws her consent and the man nevertheless "continues," and were not directed towards how *long* a man may "continue" in intercourse without being guilty of rape.

that he continued intercourse by force greater than that necessary to engage in the sex act, or by threat of force. It is the continuance of intercourse by compulsion that determines whether he had the requisite wrongful intent, and the existence of force is already a question of fact under settled law. *See Rusk*, 289 Md. at 246 ("Just where persuasion ends and force begins in cases like the present is essentially a factual issue, to be resolved in light of the controlling legal precepts.").

Trying to quantify a "reasonable" amount of time during which a man may continue intercourse by force and without consent would be flawed for several reasons. First, specifying any particular amount of time grants a man permission to forcibly continue intercourse without a woman's consent, which is contrary to Maryland rape law. The "unstoppable male theory, whereby a man is deemed physically incapable of controlling himself once aroused, has been called "[o]ne of the oldest and most scientifically unsound rape myths[,]" even though "[n]o evidence exists . . . to corroborate the assertion that sexual arousal cannot be stopped or that desire is uncontrollable." Comment, 49 St. Louis U.L.J. at 1256. Moreover, Maryland law does not recognize an "unstoppable male" theory. If it did, a man would not be required to stop if a woman withdraws her consent prior to penetration, even though she has consented to other sexual activity preceding the point of penetration and the man is in a state of arousal.

Finally, as the circumstances are often complex in rape cases, it is best to task the jury with determining whether the elements of rape have been met. *See* Comments, *No Means No?: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 J. of Crim. L. & Criminology 277, 308-09 (2004). The Kansas Supreme Court's discussion of the issue in *Bunyard* is instructive:

> In the case of consensual intercourse and withdrawn consent, we agree that the defendant should be entitled to a reasonable time in which to act after consent is withdrawn and communicated to the defendant. However, we conclude that the jury should determine whether the time between the withdrawal of consent and the interruption of intercourse was reasonable. This determination must be based upon the particular facts of each case, taking into account the manner in which consent was withdrawn. We believe this conclusion balances our rejection of the primal urge theory per se with our recognition of the unique facts and circumstances of each individual case.

133 P.3d at 30.

Thus, the decisions of other jurisdictions demonstrate that the judges who have considered the issue almost uniformly accept that rape can occur post-penetration. In addition, as is the case in other jurisdictions, Maryland's requirement that the State prove beyond a reasonable doubt that a woman withdrew her consent to vaginal intercourse (whether that occurs before or after penetration), that her withdrawal of consent was communicated to the man, and that the man nevertheless continued the intercourse by force greater

than that necessary to engage in the act, or by the threat of force, describes rape in the context of both pre-penetration withdrawal of consent, as well as post-penetration rape, a result that is fully consonant with current Maryland law.

4. This Court should affirm the jury verdict finding Baby guilty of first degree rape because the pattern instructions used by the jurors in reaching their verdict accurately reflect Maryland law that rape is vaginal intercourse, by force or threat of force, and without consent, regardless whether consent is withdrawn before or after penetration.

Maryland Rule 4-325(a) provides in pertinent part: "The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate." Thus, the decision to supplement jury instructions and the extent of supplementation are matters left to the sound discretion of the trial judge, and will not be reversed on appeal in the absence of a clear abuse of discretion. *See Lovell v. State*, 347 Md. 623, 657 (1997); *accord Higginbotham v. State*, 104 Md. App. 145, 146, *cert. denied*, 339 Md. 288 (1995) (citing *Howard v. State*, 66 Md. App. 273, 284, *cert. denied*, 306 Md. 288 (1986)). If the trial court elects to reinstruct, the instructions must state the law correctly. *Higginbotham*, 104 Md. App. at 156-57. The court's reinstruction will be deemed an abuse of discretion only if it is ambiguous, misleading, or confusing. *Battle*, 287 Md. at 685. Similarly, an instruction will be deemed

error "when a trial court inaccurately supplies or omits, in a jury instruction, an element of a charged offense." *State v. Brady*, 393 Md. 502, 509-10 (2006).

The crime of rape in Maryland includes post-penetration rape in the same way that other states have held it to be included within their existing definitions of rape. *See*, *e.g.*, *Robinson*, 496 A.2d at 1069 (holding that the trial court correctly answered jury question regarding post-penetration rape under existing statute); *Siering*, 644 A.2d at 178, 185 (same); *McGill*, 18 P.3d at 84 (same but in plain error context); *cf. Crims*, 540 N.W.2d at 864-65 (in answer to jury's question, trial court's response to reread rape instruction already given was not plain error; the jury resolved the question by re-reading the instructions and properly found defendant guilty of post-penetration rape); *State v. Crain*, 946 P.2d 1095, 1098-99 (N.M. Ct. App.) (in post-penetration rape case, no plain error where court responded to jurors' question by telling them that it was unable to answer the question and directing them to reread rape instruction already given), *cert. denied*, 944 P.2d 274 (N.M. 1997); *Jones*, 521 N.W.2d at 672 (upholding trial court's refusal to give defense's requested instruction based on *Vela*, that initial consent forecloses rape prosecution as contrary to current statute); *see also State v. Maizeroi*, 760 A.2d 638, 642-43 (Me. 2000) (observing that instruction given by trial judge in *Robinson* relative to post-penetration rape was authorized but not required in post-penetration rape cases). Thus, the trial judge did not err in telling the jury that it could not

answer its question, and that it should review the rape instruction already given and apply the facts as they found them.

Certainly, there was sufficient evidence in this case to support a conviction for both pre-penetration withdrawal of consent and post-penetration rape. J.L. testified that she told Baby he could have sex with her if he stopped when she told him to only because she had just endured multiple sexual assaults by both Baby and Wilson, including being raped by Wilson, and she wanted to be allowed to leave. (E. 215-16, 290). J.L. testified that Baby "got on top of me and he tried to put it in and it hurt"; she "yelled stop, that it hurt"; she physically fought to push him away, but he continued to push his penis into her vagina for a period of about five or ten more seconds. (E. 216-17, 291). The victim's extensive physical injuries -- including lacerations near her vagina and anus, internal swelling of her vagina, and active bleeding some 6 hours later – also served to establish that the vaginal intercourse with Baby was by force and was not consensual. (T. 12/14/04 at 221-22, 227-31; T. 12/15/04 at 27-29, 37, 40).

The lower appellate court declared: "The testimony of the complainant and appellant regarding the interval between her command to stop and his acquiescence was surprisingly consistent; she said that he stopped after five or ten seconds and he said that he withdrew 'without any delay at all.'" (App. 19; E. 47). This is incorrect. In fact, Baby testified that he *never* penetrated the

victim's vagina, and that the victim never said, "Stop," she simply sat up and said, "'It's not going to go in.'" (E. 427-29, 482-83, 492, 554). From Baby's perspective, there was no "command" to stop, and the only thing he "stopped" was trying to penetrate the victim. In any event, as previously discussed, whether Baby continued intercourse by force or threat of force was a question of fact properly resolved by the jury.

The jury in this case asked two questions. First, it asked, "If a female consents to sex initially and, during the course of the sex act to which she consented, for whatever reason, she changes her mind and the . . . man continues until climax, does the result constitute rape?" (E. 559). The question sent out by the jury the following morning asked: "If at anytime the woman says stop, it that rape?" (E. 561). The trial judge found these hypothetical questions to be ambiguous and inconsistent with both the evidence and the parties' theories of the case. (E. 559-62, 563-66). *See Brogden v. State*, 384 Md. 631, 648 (2005) (trial court has no duty to reply to jury questions which have nothing to do with the case as it was presented). The reference in the jury's question to the man continuing until "climax" was confusing because neither Baby nor the victim testified that Baby had ejaculated, and both denied that Baby was engaging in any sort of "back and forth" motion. (E. 218, 292, 429, 432). Moreover, the defense theory was that the victim consented to penetration but that Baby stopped prior to penetration

when J.L. sat up and said it would not fit. (T. 12/20/04 at 240-42, 260-62). The State argued that the victim had not consented to the initial penetration, and that even after penetration, she asked Baby to stop, but he continued to force his penis into her injured vagina, despite her active resistance. (T. 12/20/04 at 213-17, 222-23, 230-31, 282-84).

The trial judge therefore elected to answer the first question: "I am unable to answer this question as posed. Please reread the instructions as to each element and apply the law to the facts as you find them[.]" (E. 561). The court gave a similar reinstruction to the jury in answer to its second question: "This is a question that you as a jury must decide. I have given you the legal definition of rape which includes the definition of consent." (E. 565-66).

These supplemental instructions properly directed the jury to return to its pattern instructions on the elements of first degree rape, which included definitions of various terms, and apply the facts as it found them. The instructions informed the jury, in pertinent part, that "[r]ape is unlawful vaginal intercourse with a female by force or threat of force and without her consent." (E. 556; *MPJI-Cr* 4:29). The instructions also explained that "[t]he amount of force necessary depends upon the circumstances," and defined consent as "actually agreeing to the act of intercourse, rather than merely submitting as a result of force or threat of force." (E. 556; *MPJI-Cr* 4:29). By following the pattern instructions given by the trial court, the jury necessarily

found, beyond a reasonable doubt, all the elements necessary to support a rape conviction, regardless of whether they believed the victim withdrew consent before or after penetration. As the court's instructions to the jury accurately stated the elements of rape, and its answers to the jury's questions were not misleading or confusing, its proper exercise of discretion should be upheld.

Directing the jurors to the pattern instructions was error only if Maryland does not recognize post-penetration rape. In other words, even if the trial judge had specifically answered that if all the other elements of rape are met it does not matter when consent was withdrawn, the result would have been the same, *i.e.*, the jury would find Baby guilty of rape where the victim initially consented but withdrew her consent after penetration. *See Bunyard*, 133 P.3d at 33 (disagreeing with reversal because jurors' guilty verdict "demonstrates that even in the absence of additional instruction the jurors were able to, and did, resolve the issue consistent with the rule announced by the majority") (MacFarland, C.J., dissenting). Thus, assuming that this Court agrees that post-penetration rape is a crime under Maryland law, there is no basis for reversal of this case.

In sum, the trial court's instructions to the jury were correct and complete, *i.e.*, rape is accomplished whenever there is vaginal intercourse by force and without consent, whether the victim communicates her withdrawal of consent before or after penetration. This Court should therefore affirm the

jury's verdict, based upon ample evidence, finding Baby guilty of first degree rape.

II.

REGARDLESS WHETHER THE TRIAL COURT ERRED IN ITS ANSWERS TO THE JURY'S QUESTIONS, THE COURT OF SPECIAL APPEALS ERRED IN REVERSING BABY'S CONVICTIONS FOR FIRST DEGREE SEXUAL OFFENSE AND THIRD DEGREE SEXUAL OFFENSE, WHICH WERE UNRELATED TO THE SUBJECT MATTER OF THE JURY'S QUESTIONS.

In his Answer to the State's Petition for Writ of Certiorari, Baby argued that the Court of Special Appeals correctly reversed his convictions for first degree and third degree sexual offenses because "[t]he question of [Baby's] guilt or innocence was closely contested below." Baby added that "the jurors' questions showed that they were in need of guidance from the trial judge about the law in order to decide the case fairly. They did not receive that guidance." This argument ignores the fact that the jury's questions were solely about the law of rape, and that the only evidence adduced at trial regarding consent being withdrawn was as to the rape.

The jury's questions were (1) "If a female *consents to sex* initially," "she *changes her mind*," *and the* "*man continues until climax*, does the result constitute *rape*?"; and, (2) "If at any time the *woman says stop*, is that *rape*?" (E. 559, 563) (emphasis added). The court's answers were to state that it could

not answer the question, and to refer the jury to the rape instruction it had already been given. (E. 561, 565-66).

The jury was clearly not asking about the law as to first and third degree sexual offense. For the first degree sexual offense, the jury was instructed that it had to find that Baby aided and abetted Wilson in committing anal intercourse with the victim and that the act was committed by force or threat of force and without consent. (T. 12/20/05 at 205-06, 208); *see MPJI-Cr* 4:29.4, at 375 (2005); 4:29.5, at 379 (1995). The two third degree sexual offenses required the jury to find that Baby intentionally touched the victim's vagina and her breast against her will and without her consent, while aided and abetted by Wilson. (T/ 12/20/05 at 206-08); *see MPJI-Cr* 4:29.7, at 385-86.1 (1995).[11] The acts constituting the first and third degree sexual offenses arose immediately after the victim climbed into the backseat of the car, and took place while Baby, Wilson, and the victim were together. After this series of offenses ended, Baby exited the car, leaving the victim and Wilson in the backseat. After Wilson raped the victim, he exited the car, and Baby re-entered the backseat. It was at this point that Baby testified that there had been initial consent.

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[11] The verdict sheet specified both the type of sexual conduct, and whether it was based on aiding and abetting another, for each of the charges.

There was no evidence that consent was withdrawn regarding the first and third degree sexual offenses. The victim testified that the sexual offenses were committed without her consent. Baby denied ever engaging in any of the acts that constituted the basis for the first and third degree sexual offense charges. Nor can the claim be made that once the jury concluded that Baby was guilty of rape, they found him guilty of all the other charges against him, as they returned a not guilty verdict on attempted first degree sexual offense (by aiding and abetting Wilson in the act of attempted fellatio), as well as first degree rape (by aiding and abetting Wilson) and conspiracy to commit first degree rape. In short, there is no basis upon which to hold that Baby's sexual offense convictions were affected by an error in the trial court's answer to the jury's questions. Baby's first and third degree convictions should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the judgment of the Court of Special Appeals.

Respectfully submitted,

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Article 27, § 461. Definitions.

(a) *In general*. — In this subheading, the following words have the meanings indicated.

(b) *Mentally defective*. — "Mentally defective" means (1) a victim who suffers from mental retardation, or (2) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or resisting the act of vaginal intercourse, a sexual act, or sexual contact, or of communicating unwillingness to submit to the act of vaginal intercourse, a sexual act, or sexual contact.

(c) *Mentally incapacitated*. — "Mentally incapacitated" means a victim who, due to the influence of a drug, narcotic or intoxicating substance, or due to any act committed upon the victim without the victim's consent or awareness, is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse, a sexual act, or sexual contact.

(d) *Physically helpless*. — "Physically helpless" means (1) a victim who is unconscious; or (2) a victim who does not consent to an act of vaginal intercourse, a sexual act, or sexual contact, and is physically unable to resist an act of vaginal intercourse, a sexual act or sexual contact or communicate unwillingness to submit to an act of vaginal intercourse, a sexual act, or sexual contact.

(e) *Sexual act*. — "Sexual act" means cunnilingus, fellatio, anilingus, or anal intercourse, but does not include vaginal intercourse. Emission of semen is not required. Penetration, however slight, is evidence of anal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body if the penetration can be reasonably construed as being for the purposes of sexual arousal or gratification or for abuse of either party and if the penetration is not for accepted medical purposes.

(f) *Sexual contact*. — "Sexual contact" as used in §§ 464B and 464C, means the intentional touching of any part of the victim's or actor's anal or genital areas or other intimate parts for the purposes of sexual arousal or gratification or for abuse of either party and includes the penetration, however slight, by any part of a person's body, other than the penis, mouth, or tongue,

into the genital or anal opening of another person's body if that penetration can be reasonably construed as being for the purposes of sexual arousal or gratification or for abuse of either party. It does not include acts commonly expressive of familial or friendly affection, or acts for accepted medical purposes.

(g) *Vaginal intercourse.* — "Vaginal intercourse" has its ordinary meaning of genital copulation. Penetration, however slight, is evidence of vaginal intercourse. Emission of semen is not required.

(1996 Repl. Vol.)

Criminal Law Article, § 3-301. Definitions.

(a) *In general.* — In this subtitle the following words have the meanings indicated.

(b) *Mentally defective* individual. — "Mentally defective individual" means an individual who suffers from mental retardation or a mental disorder, either of which temporarily or permanently renders the individual substantially incapable of:

(1) Appraising the nature of the individual's conduct;

(2) Resisting vaginal intercourse, a sexual act, or sexual contact; or

(3) Communicating unwillingness to submit to vaginal intercourse, a sexual act, or sexual contact.

(c) *Mentally incapacitated individual.* — "Mentally incapacitated individual" means an individual who, because of the influence of a drug, narcotic, or intoxicating substance, or because of an act committed on the individual without the individual's consent or awareness, is rendered substantially incapable of:

(1) Appraising the nature of the individual's conduct; or

(2) Resisting vaginal intercourse, a sexual act, or sexual contact.

(d) *Physically helpless individual.* — "Physically helpless individual" means an individual who:

(1) Is unconscious; or

(2)(i) Does not consent to vaginal intercourse, a sexual act, or sexual contact; and

(ii) Is physically unable to resist, or communicate unwillingness to submit to, vaginal intercourse, a sexual act, or sexual contact.

(e) *Sexual act.* — (1) "Sexual act" means any of the following acts, regardless of whether semen is emitted:

(i) Analingus;

(ii) Cunnilingus;

(iii) Fellatio;

(iv) Anal intercourse, including penetration, however slight, of the anus; or

(v) An act:

1. In which an object penetrates, however slightly, into another individual's genital opening or anus; and

2. That can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party.

(2) "Sexual act" does not include:

(i) Vaginal intercourse; or

(ii) An act in which an object penetrates an individual's genital opening or anus for an accepted medical purpose.

(f) *Sexual contact.* — (1) "Sexual contact", as used in §§ 3-307 and 3-308 of this subtitle, means an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party.

(2) "Sexual contact" includes an act:

(i) In which a part of an individual's body, except the penis, mouth, or tongue, penetrates, however slightly, into another individual's genital opening or anus; and

(ii) That can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party.

(3) "Sexual contact" does not include:

(i) A common expression of familial or friendly affection; or

(ii) An act for an accepted medical purpose.

(g) *Vaginal intercourse.* — (1) "Vaginal intercourse" means genital copulation, whether or not semen is emitted.

(2) "Vaginal intercourse" includes penetration, however slight, of the vagina.

(2002 Vol.)

Criminal Law Article, § 3-302. Construction of subtitle.

In this subtitle an undefined word or phrase that describes an element of common-law rape retains its judicially determined meaning, except to the extent it is expressly or impliedly changed in this subtitle.

(2002 Repl. Vol.)

Criminal Law Article, § 3-303. Rape in the first degree.

(a) A person may not:

(1) engage in vaginal intercourse with another by force, or the threat of force, without the consent of the other; and

(2)(i) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;

(ii) suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;

(iii) threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping;

(iv) commit the crime while aided and abetted by another; or

(v) commit the crime in connection with a burglary in the first, second, or third degree.

(b)(1) Except as provided in paragraph (2) of this subsection, a person who violates this section is guilty of the felony of rape in the first degree and on conviction is subject to imprisonment not exceeding life.

(2) A person who violates this section is guilty of the felony of rape in the first degree and on conviction is subject to imprisonment not exceeding life without the possibility of parole if:

(i) the person is convicted in the same proceeding of violating § 3-503(a)(2) of this title and the victim was a child under the age of 16 years; or

(ii) the defendant was previously convicted of violating this section or § 3-305 of this subtitle.

(c) If the State intends to seek a sentence of imprisonment for life without the possibility of parole under subsection (b)(2) of this section, the State shall notify the person in writing of the State's intention at least 30 days before trial.

(2002 Vol.)

Criminal Law Article, § 3-304. Rape in the second degree.

(a) *Prohibited.* - A person may not engage in vaginal intercourse with another:

(1) By force, or the threat of force, without the consent of the other;

(2) If the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual; or

(3) If the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim.

(b) *Penalty.* - A person who violates this section is guilty of the felony of rape in the second degree and on conviction is subject to imprisonment not exceeding 20 years.

(2002 Vol.)

STATE OF MARYLAND,	*	IN THE
Petitioner	*	COURT OF APPEALS
v.	*	OF MARYLAND
MAOULOUD BABY,	*	September Term, 2007
Respondent	*	No. 14

* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of July, 2007, three copies of the Brief of Petitioner and Appendix and one copy of the Record Extract each were hand-delivered to Michael R. Malloy, Assistant Public Defender, Office of the Public Defender, Appellate Division, William Donald Schaefer Tower, 6 Saint Paul Centre, Suite 1302, Baltimore, Maryland 21202, and mailed by first class postage prepaid to Lisae C. Jordan, Esquire, Sexual Assault Legal Institute, P.O. Box 8782, Silver Spring, Maryland 20907.

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