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

* * * * * * * * * * * * *

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this 24th day of September, 2007, three copies of the Respondent/Cross-Petitioner's Reply Brief in the captioned case were delivered to

Sarah Page Pritzlaff
Assistant Attorney General
Criminal Appeals Division
Office of the Attorney General
200 Saint Paul Place, 17th Floor
Baltimore, Maryland 21202

Lisae C. Jordan, Esquire
Sexual Assault Legal Institute
Maryland Coalition Against Sexual Assault
P.O. Box 8782
Silver Spring, MD 20907

_____
Michael R. Malloy

**IN THE**
**COURT OF APPEALS OF MARYLAND**

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**SEPTEMBER TERM, 2007**

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**NO. 14**

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**MAOULOUD BABY,**

**Petitioner**

**v.**

**STATE OF MARYLAND,**

**Respondent**

---

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

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# RESPONDENT/CROSS-PETITIONER'S REPLY BRIEF

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**NANCY S. FORSTER**
**Public Defender**

**MICHAEL R. MALLOY**
**Assistant Public Defender**

**Office of the Public Defender**
**Appellate Division**
**6 Saint Paul Street, Suite 1302**
**Baltimore, Maryland 21202**
**(410) 767-8528**

**Counsel for Respondent/Cross-Petitioner**

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## ARGUMENT

### III. THE LOWER COURT ERRED IN ADMITTING THE TESTIMONY OF ANN BURGESS ON "RAPE TRAUMA SYNDROME."

In this brief, Petitioner, the State of Maryland, will be referred to as "Petitioner." The State's briefs will be referred to as "Petitioner's Brief" and "Petitioner's Reply Brief," respectively. Respondent Maouloud Baby will be

referred to as "Respondent." His prior brief will be referred to as "Respondent's Brief."

Petitioner claims that: "…Baby's defense was based in large part on popular rape mythology…." (Petitioner's Reply Brief at 20). That is inaccurate. Respondent's defense was based on his testimony that he was not present in the complainant's car when whatever happened between her and Mike Wilson took place and that, when he entered the car, she gave him permission to have intercourse with her and that he withdrew as soon as she wanted him to.

**Admissibility of Rape Trauma Syndrome Evidence**

In its Petitioner's Reply Brief, the Petitioner not only asks this Court to rule that rape trauma syndrome (RTS) evidence is admissible, but also asks this Court to permit the use of rape trauma syndrome evidence in three unprecedented ways.

***First***, Petitioner asks this Court to approve the admission of a rape trauma syndrome expert's testimony about behavior occurring before and during the alleged rape even though the expert had testified that rape trauma syndrome begins after the victim has suffered the rape. In her testimony, Dr. Burgess identified, as consistent with rape trauma syndrome, behavior exactly like that of the complainant before, during, and after the alleged rape. As Petitioner notes in its brief:

> The prosecutor then posed questions to Dr. Burgess about whether it was "consistent or inconsistent" with rape trauma syndrome for a victim to exhibit various behaviors before, during, and immediately after the rape…. (Petitioner's Reply Brief at 19).

Indeed, at Respondent's trial, the prosecutor questioned Dr. Burgess about actions like those of the complainant before and during the alleged rape. For example, the prosecutor asked the following question:

> [Q] Assume now that she found herself alone in a parked car with these two young men. Assume please that she was tricked into going in the backseat of the car, supposedly to have a conversation, look at a book or magazine. However, assume that instead of having that conversation, the two men grabbed her, held her down and forced her to submit to multiple sexual acts, including sexual intercourse.
>
> Would the fact that she didn't violently resist that type of attack be consistent with the rape trauma syndrome?
>
> A That's consistent. (E. 341-42).

During the defense cross-examination of Dr. Burgess, she volunteered that behavior before the rape was consistent with rape trauma syndrome:

> Q Well, in the hypothetical she says she went in the back seat because it was easier to talk.
>
> A Okay.
>
> Q And she wanted to show the boys a book, a car accessory book.
>
> A Right. That would be consistent with rape trauma syndrome. (E. 372).

This testimony that rape trauma syndrome includes behavior before and during the alleged rape contrasts with Dr. Burgess's earlier testimony that rape trauma syndrome describes events occurring after the alleged rape. She testified

as follows that rape trauma syndrome begins immediately following the alleged rape (E. 320):

> We saw three stages [of the rape trauma syndrome]. One was the initial impact, exactly what was going on with the young, of the, whatever the age of the person when they came into the emergency room. So we call that the impact phase.

See Gafney, *PTSD, RTS, and Child Abuse Accommodation Syndrome: Therapeutic Tools or Fact-finding Aids*, 24 PACE L. REV. 271, 282 (2003) (Rape trauma syndrome begins with "the impact reaction occurring immediately after the assault.").

Consistent with Dr. Burgess's testimony, the New York Court of Appeals has stated that an expert's opinion about the complainant's actions during an alleged rape was not rape trauma syndrome evidence and that, to seek its admission for a limited purpose, the prosecution would have to prove that it "has the requisite scientific foundation." People v. Bennett, 79 N.Y.2d 464, 472, 593 N.E.2d 279, 284 (1992). The Court ruled as follows, id.:

> In this case, a large part of the expert evidence concerned the victim's behavior as the sexual attack unfolded, rather than after it. Dr. [Ann W.] Burgess opined that the hypothetical woman, and women generally, when threatened by an armed authority figure would submit, without resistance, to the sexual attack described, as a means of self-preservation. Thus, defendant correctly notes that the first two hypotheticals were not concerned with the rape trauma syndrome evidence described in Taylor [where the Court had approved limited use of rape trauma syndrome evidence], which related to post-rape behavior.
>
> That this portion of Dr. Burgess' testimony is not precisely the type of testimony discussed in Taylor does not

> mean that such evidence would necessarily be inadmissible. It is sufficiently distinct from the kind of evidence we considered in Taylor, however, that our holding in that case does not govern its admissibility here. Assuming such expert evidence is again offered, and the objection lodged that is now before us, the court should determine at retrial whether the expert's opinion has the requisite scientific foundation. (footnote omitted).

In the instant case, Dr. Burgess established no basis for testifying that actions before and during the alleged rape were consistent with rape trauma syndrome because she testified that rape trauma syndrome described only behavior observed after the alleged rape. Therefore, the Court erred in admitting rape trauma syndrome testimony with reference to behavior before and during the alleged rape.

***Second***, although Petitioner does not claim on appeal that rape trauma syndrome is a subset of post-traumatic stress disorder (PTSD), Petitioner asks this Court to condone the prosecution's assertion below that rape trauma syndrome was a subset of PTSD.

Dr. Burgess indicated below that rape trauma syndrome was a subset of PTSD (E. 329):

> Q [prosecutor] Does post-traumatic stress disorder and its subset of rape trauma syndrome, does that affect the victim's memory in any way?
>
> A Yes….

Petitioner claims in its brief that: "In this case, Dr. Burgess testified about rape trauma syndrome and about PTSD, but did not overlap the two terms…."

(Petitioner's Reply Brief at 28). However, Petitioner also argues: "Indeed, to the extent that Dr. Burgess was not clear about the distinction between RTS and PTSD, Baby has not been prejudiced because Dr. Burgess did not testify that J.L.'s symptoms constituted a diagnosis of either PTSD or RTS." (Petitioner's Reply Brief at 29, note 20).

The prejudice to Respondent lay in Dr. Burgess's conflation of a diagnosable psychiatric disorder (post-traumatic stress disorder) with rape trauma syndrome, which is not a psychiatric disorder but was developed by nurses and others to describe behaviors often seen in women who report that they have been raped.[1] Thus, Dr. Burgess's testimony that rape trauma syndrome was a subset of

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[1] It is clear that rape trauma syndrome is not a medical diagnosis. As one professor of nursing writes:

> If one considers the use of the word "syndrome" in the context of a person's medical condition, it is a description, list or pattern of otherwise unrelated symptoms or characteristics (physical or behavioral) associated with a particular medical or behavioral state….
>
> Clinical syndromes such as Rape Trauma Syndrome … are not medical diagnoses but guides to clinical practice. A syndrome does not require a set of symptoms in order to make a diagnosis. It is a set of behaviors that is associated with a condition or event that more fully described what the patient may be experiencing. (footnotes omitted).

Gafney, *PTSD, RTS, and Child Abuse Accommodation Syndrome: Therapeutic Tools or Fact-finding Aids*, 24 PACE L. REV. 271, 281 (2003). Dr. Gafney states that the North American Nursing Diagnosis Association recognizes a diagnosis of rape trauma syndrome, which has seventeen subjective defining characteristics such as anxiety, revenge, or change in relationships, and eighteen objective defining characteristics including confusion, mood swings, or

the psychiatric disorder PTSD claimed an unwarranted medical certainty for her attribution of rape trauma syndrome to behavior like that of the complainant in the instant case. Dr. Burgess made clear that she was claiming such certainty for her opinions about rape trauma syndrome (E. 348):

> Q [prosecutor] All right. Doctor, the opinions that you've stated today, do you hold them to a reasonable degree of medical certainty?
>
> A Yes.

This Court should not allow the prosecutor to convey incorrectly to the jury that rape trauma syndrome is a diagnosable psychiatric disorder attributable to the trauma of having been raped.

***Third***, Petitioner seeks the privilege of being able to introduce expert rape trauma syndrome testimony as "hypothetical" and then to argue to the jury that it proves the defendant's guilt of rape. While much of Dr. Burgess's testimony was nominally labeled hypothetical, the extensive detail of the hypothetical questions paralleling the complainant's story, combined with Dr. Burgess's testimony that she had studied the materials about the case and was familiar with them (E. 315, 356, 361), made clear to the jury that she was rendering an opinion that the complainant was suffering from rape trauma syndrome. The prosecutor made just that argument to the jury in closing:

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aggression. Id. at 290-91. See State v. Alberico, 116 N.M. 156, 861 P.2d 192, 212 (1993) ("We hold that expert testimony concerning RTS is inadmissible mainly because it is not part of the specialized manual DSM III-R like PTSD is ….").

> …The only conclusion that you can reach from that [the rape trauma syndrome evidence] is that she suffers from rape trauma syndrome and she suffers from it because she was raped. We know who raped her: Michael Wilson and Maouloud Baby. (T. 12/20/2004 p. 231).

And Petitioner contends in its brief that such argument was proper (Petitioner's Reply Brief at 25):

> In any event, the prosecutor's closing argument was properly based on reasonable inferences from the evidence.…Likewise, based on the reasonable inference from the evidence that J.L.'s behavior during and immediately after the rapes was consistent with rape trauma syndrome, the jury could conclude that J.L. was raped…. (emphasis added).

This Court should not authorize prosecutors to proffer that rape trauma syndrome evidence will not be offered to prove that the defendant raped the victim and then to argue the opposite to the jury.[2]

## Use of the Term, "Rape Trauma Syndrome"

Petitioner claims that this Court's language in State v. Allewalt, 308 Md. 89, 517 A.2d 741 (1986) and Hutton v. State, 339 Md. 480, 663 A.2d 1289 (1995) condemning use of the term "rape trauma syndrome" was limited to the use of the term as a substitute for the term PTSD. Petitioner argues: "…The concern noted in Allewalt and Hutton was that the term 'rape trauma syndrome' as a substitute for

[2] In addition, the prosecutor's argument that the rape trauma syndrome evidence proved that the complainant had been raped by Respondent would not be allowed by any of those appellate courts that have ruled rape trauma syndrome evidence admissible. See Gaines, *Rape Trauma Syndrome: Toward Proper Use in the Criminal Trial Context*, 20 AM. J. TRIAL ADVOC. 227, 232-33 (1997).

PTSD may itself be prejudicial because it equates the PTSD exclusively with the stressors of rape, thus leading to the conclusion that the PTSD was caused by rape…." (Petitioner's Reply Brief at 27). However, this Court's analysis was not so limited. This Court's concern in Allewalt was that the term rape trauma syndrome was prejudicial because it equates "the syndrome exclusively with rape." State v. Allewalt, 308 Md. at 108 (emphasis added). In Hutton, this Court stated that: "…The use of such terms [as rape trauma syndrome] may themselves be prejudicial…." Hutton v. State, 339 Md. at 492 n. 9. This Court did tie not the potential for prejudice exclusively to use of the term "rape trauma syndrome" as a substitute for PTSD. See State v. Huey, 145 Ariz. 59, 699 P.2d 1290, 1293 (1985) (Expert never used the term, "rape trauma syndrome."); State v. Taylor, 663 S.W.2d 235, 240 (Mo.1984) ("[T]here are inherent implications from the use of the term 'rape trauma syndrome,' for it suggests that the syndrome may only be caused by rape ….")

Petitioner additionally argues that: "…As Dr. Burgess's testimony about rape trauma syndrome was not offered as a diagnosis and she did not opine that the victim in this case suffered from rape trauma syndrome, the expert's use of the term did not prejudice Baby…." (Petitioner's Reply Brief at 28-29). This argument does not meet this Court's point in Allewalt and Hutton that use of the term is inherently prejudicial because it implies that the behavior of the complainant at issue was caused by being raped by the defendant.

Moreover, if it were true that Dr. Burgess did not convey to the jury her opinion that the complainant suffered from rape trauma syndrome or suffered symptoms consistent with rape trauma syndrome, there would be absolutely no justification for use of the term by Dr. Burgess. The existence of rape trauma syndrome or post traumatic stress disorder are preeminently the type of expert conclusions that cannot be left to the jury. The jurors have no expertise in the area of medical and psychological evaluation of persons reporting that they have been raped. If the State's expert does not opine that the complainant suffered from rape trauma syndrome or suffered from symptoms consistent with rape trauma syndrome, the State cannot ask the jurors to draw that conclusion on their own.

This Court surely would not approve the practice of having a medical examiner testify hypothetically about pathology principles that might apply to the decedent and then ask the jurors to reach the pertinent medical conclusions on their own. See Sippio v. State, 350 Md. 633, 649-55, 714 A.2d 864 (1998) (Medical examiner's expert testimony that the manner of death was homicide was admissible and helpful to the jury who, as laypersons, probably could not have understood the medical examiner's report). Nor should this Court permit a prosecutor to invite a jury to determine for itself that the complainant suffers from rape trauma syndrome where no prosecution expert has offered that opinion. See Rodriguez v. Clarke, 400 Md. 39, 71, 926 A.2d 736 (2007) (In medical malpractice actions, this Court has repeatedly recognized that "expert testimony is required to establish negligence and causation."); Franch v. Ankney, 341 Md. 350,

357, 670 A.2d 951 (1996) (In legal malpractice case, trial court correctly voided jury verdict in favor of client because client "had failed to produce any admissible expert testimony establishing the relevant standard of care."); Wood v. Toyota Motor Corp., 134 Md.App. 512, 516-17, 760 A.2d 315 (2000) (Expert testimony is "required when the subject of the inference is so particularly related to some science or profession that it is beyond the ken of the average layman."); see also State v. Allewalt, supra, 308 Md. at 95, 109 (Trial court did not err by admitting expert testimony that victim suffered from post-traumatic stress disorder); Acuna v. State, 332 Md. 65, 68-69, 71, 629 A.2d 1233 (1993) (Trial court did not err by admitting expert testimony that victim suffered symptoms consistent with post-traumatic stress disorder); compare Hutton v. State, supra, 339 Md. at 488, 504-05 (Trial court erroneously admitted expert testimony that victim suffered from post-traumatic stress disorder).

Where no State's expert witness claims that the complainant suffered from rape trauma syndrome or symptoms consistent with rape trauma syndrome, the prosecution cannot argue to the jury that the complainant suffered from rape trauma syndrome. And in such a case, the jury would have no need to hear the term rape trauma syndrome. Its use would serve no purpose other than to mislead the jurors and prejudice them against the defendant.[3]

[3] Respondent is not suggesting that an expert should be allowed to opine that a complainant was subject to rape trauma syndrome. The nursing diagnosis of rape trauma syndrome has not been accepted as proving that a complainant's

Respondent also points out that Petitioner misstated the argument on this issue that is set forth in his Respondent's Brief. Petitioner quoted part of a paragraph from the Respondent's Brief but deleted the first two sentences and the last sentence of the paragraph without indicating the deletions by ellipses, thereby distorting Respondent's argument. Respondent's point was that, assuming some testimony about the behavior of an alleged rape victim were admissible, use of the term "rape trauma syndrome" would still be inadmissible. Petitioner makes it appear that Respondent is conceding that such behavior testimony is admissible. (Petitioner's Reply Brief at 29 referring to Respondent's Brief at 58-59).

Finally, Petitioner contends that two points in Respondent's argument about rape trauma syndrome are not preserved for appeal. First, Petitioner correctly points out that Respondent did not object to the prosecutor's closing jury argument that the rape trauma syndrome evidence proved that the complainant had been raped by Respondent. (Petitioner's Reply Brief at 24). Even so, the jury argument is pertinent to the issue of the admissibility of the rape trauma syndrome evidence because it illustrates the purpose and effect of the evidence. Second, Petitioner states that Respondent did not object to the rape trauma syndrome evidence on the ground that it is not accepted by a specific scientific community as valid.

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"defining characteristics" show that she was raped and use of the emotionally charged term would be unduly prejudicial.

(Petitioner's Reply Brief at 29-30). While it is true that Respondent did not make this argument explicitly below, it was implicit in his objections that the evidence was speculative, irrelevant, went beyond the facts of this case, invaded the province of the jury to decide factual issues, and was highly prejudicial.

## IV. THE LOWER COURT ERRED BY REFUSING TO REMOVE A JUROR FROM THE JURY AT THE POINT WHEN THE JUROR ADMITTED THAT HE HAD READ A NEWSPAPER ARTICLE ABOUT RESPONDENT'S CASE.

Petitioner claimed the following about the juror who had read the newspaper article:

> …Moreover, the only information from the article that juror number 100 remembered was that the case was being retried …. (Petitioner's Reply Brief at 41).

This claim is not supported by the record.

Juror No. 100 admitted that he had read the *Gazette* article. The article stated, not just that Respondent was being retried, but also that the "first trial ended in a mistrial after two and a half days of deliberation." The article further revealed that co-defendant Michael Wilson had pled guilty and faced "a five year cap on any time he may serve." It reported, by contrast, that Respondent faced a life sentence. In fact, the article was headlined, "Teen charged with rape faces life in prison in new trial".[4] The article also briefly summarized the complainant's

[4] The computer generated story printed at E. 181-82 of the Record Extract was from a different edition of the *Gazette* and does not contain the headline that the juror actually read.

"tearful testimony" at the prior trial, as well as the testimony of a forensic nurse examiner. (E. 180).

Although Juror No. 100 said, in response to the Court's question whether he could be fair and impartial, that the article "didn't give any additional information", that statement was plainly wrong. It is likely that the juror was trying to minimize his misconduct in having failed to obey the Court's order not to expose himself to media coverage of the case. The claim that he was unable remember what was said in an article that he had just read about a case where he was a sitting juror defies belief.

Therefore, the trial judge's refusal to immediately strike Juror No. 100 was prejudicial error.

## CONCLUSION

For the foregoing reasons, and those stated in *Respondent's Brief,* Respondent respectfully requests that this Court reverse the judgment of the court below.

Respectfully submitted,

Nancy S. Forster
Public Defender

Michael R. Malloy
Assistant Public Defender

Counsel for Respondent

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