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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2007, three copies of the Respondent's Brief and Appendix in the captioned case were delivered to

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IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2007

NO. 14

STATE OF MARYLAND,

Petitioner

v.

MAOULOUD BABY,

Respondent/Cross-Petitioner

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

RESPONDENT'S BRIEF AND APPENDIX

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INDEX

TABLE OF CONTENTS

RSPONDENT'S BRIEF

Page

TABLE OF CITATIONS

Page

Federal Cases

State Cases

English Cases

Statutes

IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2007

NO. 14

STATE OF MARYLAND,

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v.

MAOULOUD BABY,

Respondent / Cross-Petitioner

ON CERTIORARI TO THECOURT OF SPECIAL APPEALS OF MARYLAND
RESPONDENT / CROSS-PETITIONER'S BRIEF

STATEMENT OF THE CASE

Maouloud Baby (Respondent/Cross-Petitioner, hereinafter Respondent) accepts the Statement of the Case contained on the brief of Petitioner.

QUESTIONS PRESENTED BY PETITIONER STATE OF MARYLAND

1. Did the trial Court violate the rule set forth by this Court in Battle v. State by refusing to tell the jury that, if the complainant consented to sexual intercourse but then withdrew her consent after penetration, respondent was not guilty of rape?

2. Was the error harmless as to other charges?

QUESTIONS PRESENTED BY CROSS-PETITIONER BABY

3. Did the lower Court err by denying Mr. Baby's motion in limine to exclude and objection to the testimony of Ann Burgess, a nurse who was offered by the State as an expert witness on "rape trauma syndrome"?

4. Did the lower Court err by refusing to remove a juror from the jury when he admitted that he had read a newspaper article about Mr. Baby's case?

STATEMENT OF FACTS

Maouloud Baby (Respondent) accepts the facts that were set out by the Court of Special Appeals in its opinion. Baby v. State, 172 Md.App. 588, 593-602, 622-23, 628-29, 916 A.2d 410, 413-17, 433-34 (2007); (E. 33-37, 47-48, 51), with the following addition:

Rape Trauma Syndrome Evidence

By letter dated July 23, 2004, the prosecutor notified defense counsel that Ann Burgess, who had a doctorate in nursing, would be offered as an expert witness by the State. Respondent filed a Motion In Limine objecting to Dr. Burgess's testimony on August 18, 2004. (E. 54-55). Respondent argued that Dr. Burgess's testimony would be inadmissible and that:

- It is hearsay.
- It is speculative.
- It is irrelevant to the case before the Court.
- It is highly prejudicial.
- It goes beyond the facts in the case and presents hypothetical suppositions that are not specifically supported by the facts in this case.

> - It does not appear that Dr. Burgess examined the alleged victim in this case.
>
> - The conclusions reached by Dr. Burgess are factual issues for the Jury to decide based on the testimony of the alleged victim and facts in this case only.

At a hearing on August 23, 2004, prior to Respondent's first trial, his attorney moved to exclude the testimony of Dr. Burgess. Defense counsel argued as follows (E. 56-57):

> They want to offer a doctor, who has not examined the alleged victim, to testify in a general sense as to how something like this may affect a woman and the reaction of various rape victims that are not the subject of this case.
>
> That testimony, in our view, would be hearsay, irrelevant; highly, highly, highly prejudicial, because she never participated in the examination of this particular victim.
>
> It's bolstering their argument, that Ms. L… may or may not have done or said certain things. But, again, that goes to the heart of the jury consideration. Why did Ms. L… do A, B, C, D, and E? Or why did she not do F, G, H, I, J, K? That's not for Dr. Burgess, based upon a general explanation, involving other rape victims. That's for the jury to decide.
>
> So it's hearsay. It's irrelevant, highly, highly prejudicial, and goes beyond the boundaries of the testimony and the areas that this jury should consider. On all those grounds, we would ask the Court to not allow Dr. Burgess to testify.

The lower Court denied Respondent's Motion In Limine to exclude the testimony, ruling as follows (E. 58):

> It's my belief that the case law does specifically authorize testimony on this issue, so long as is used to explain the syndrome and the behavior that's part of the syndrome, as opposed to saying "This victim was raped because she did this." That's what they can't do. But they can offer testimony as to what Post-Traumatic Stress Disorder is, what Rape

> Trauma Syndrome is, when it's relevant to certain issues in the case.

On December 13, 2004, prior to the beginning of Respondent's second trial, defense counsel renewed his Motion in Limine, arguing as follows. (E. 61):

> First, I would renew my motion in limine regarding Dr. Ann Burgess. And I know Your Honor took argument on that and we submitted written opposition at the first trial. But I renew the motion in limine regarding her testimony. Briefly, we submit it's hearsay, irrelevant. She didn't examine the alleged victim. Highly prejudicial. It's hypothetical. And her conclusions are the conclusions that should only be reached by the jury. We outlined our opposition in length at the first trial. We reiterate our motion in limine regarding Dr. Ann Burgess or anyone who would testify in substance as to that testimony.

The prosecutor argued that the trial Court should admit the evidence of "post traumatic stress disorder and it's [sic] subset, which is rape trauma syndrome...." (E. 67).

The trial Court ruled as follows (E. 75):

> I am going to continue to deny the Defense motion with respect to Dr. Burgess for the same reasons I denied it in the last trial. Just as you all incorporated your arguments, I'll incorporate my rulings.

On the fourth day of trial, the prosecutor called Dr. Ann Burgess as an expert witness. She testified that she had a doctor of nursing science degree from Boston University and was a professor of nursing at Boston College. (E. 307). Over defense objection, the trial judge accepted her as an expert in the area of "post-traumatic stress disorder" and "rape trauma syndrome." (E. 313-14).

Dr. Burgess testified that, although she had not spoken to J. L.[1], she had spent two or three hours studying the police report, the forensic nurse examiner's report, the complainant's statement, the indictment, and an audio cassette of the complainant. (E. 315, 356).

Dr. Burgess testified that post-traumatic stress disorder (PTSD) was an anxiety disorder. It was designated in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), which was "the Bible of the psychiatric community for diagnosing disorders." To make the diagnosis of PTSD, one had to see "a series of symptoms that fall into certain categories that you have to be able to identify in the person you're examining." (E. 316). A stressor causing the symptoms had to be identified. Being raped could be the stressor. (E. 316-17, 332). Rape trauma syndrome was a subset of post traumatic stress syndrome. (E. 329).

Dr. Burgess testified that, in 1974, she and her colleague had coined the term "rape trauma syndrome" after they saw the symptoms in women who came to the hospital where they worked and reported that they had been raped. She had continued research since then. There were three stages within rape trauma syndrome. The initial impact was the first. It was followed by the acute phase

[1]In this brief, the complainant is referred to as "J.L." Other youthful witnesses are called by their first names, for the most part, because that is how they were referred to in the testimony at trial.

which lasted days or weeks and, in turn, was followed by the reorganization phase which could last for an extended period of time. (E. 320-21).

She testified that it would be consistent with rape trauma syndrome for a victim to offer little resistance, to not sustain injuries, to not call for help, to not tell anyone immediately, and to engage in routine behavior like going to a gas station and supermarket after the rape. (E. 322-29). It would be consistent with post traumatic stress syndrome and rape trauma syndrome for a victim to give slightly inconsistent versions of the rape. (E. 329-30, 341).

The prosecutor offered the Dr. Burgess the first part of a "hypothetical" with facts like those contained in the alleged victim's testimony. (E. 341-42):

> Here's the hypothetical. Please, Doctor, assume that you have a young woman who was socializing with her best friend and she met two male acquaintances through other social contacts and she thought both of these people were harmless.
>
> Assume now that she found herself alone in a parked car with these two young men. Assume please that she was tricked into going into the backseat of the car, supposedly to have a conversation, look at a book or a 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.

Dr. Burgess testified that the young woman's failure to resist, failure to scream, lack of torn clothes, failure to report it immediately, her standing still while one of the assailants approached her and gave her a hug, and her giving of her home telephone number were consistent with rape trauma syndrome. (E. 342-45).

The prosecutor then asked the second part of the "hypothetical" as follows (E. 345):

> ...I'd like to add a couple more facts to the hypothetical that I've given you this afternoon, Doctor. Assume that after the two assailants attack this victim, this hypothetical victim in the backseat of a car, that one of the assailants, two of them attacked her, one gets out while the other continues to attack her and then this assailant gets out and the one who was outside goes back in and they're alone at that point.
>
> I want you to assume that the second assailant then says, in effect, I want to have sex with you, but I don't want to rape you. If she, the victim, accommodated that and allowed that second rapist to do what he wanted, would that be consistent or inconsistent with rape trauma syndrome?
>
> A That would be consistent.

The Assistant State's Attorney ended her direct examination of the witness as follows (E. 348):

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

In his closing argument to the jury, the prosecutor referred to the rape trauma syndrome evidence and argued. (T. 12-20-2004 p. 231):

> … The only conclusion that you can reach from that 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).

Additional facts will be set forth in the Arguments, infra.

SUMMARY OF ARGUMENT

1. The Court of Special Appeals was correct in holding that, under Maryland law, if a woman withdraws consent to sexual intercourse after penetration, the defendant is not guilty of rape. That common law rule was stated in Battle v. State and has not been changed or criticized by an appellate decision in this state. As Battle makes clear, the common law definitions of the basic elements of rape govern prosecutions under the Maryland rape statute and, therefore, control this case.

The common law rule is adequate and need not be changed. If it is altered, the change must be prospective and would not apply to this case.

Even if the change in the common law advocated by the Petitioner were deemed applicable to this case, the trial judge would still have committed reversible error by refusing to respond to the jury's request to be told what law governed the situation where a woman withdraws consent after penetration. The prosecutor below argued to the jury that they could convict Respondent of rape because he took five seconds to withdraw after being told to stop. It is the judge's duty to instruct the jury on the pertinent law and the court failed to do so in this case.

2. The trial judge's refusal to instruct the jury that, where consent is withdrawn after penetration, a rape conviction is not supported very likely affected the jury's deliberations on other counts in a manner adverse to Respondent.

Therefore, the error was not harmless beyond a reasonable doubt as to the other counts for which Respondent was convicted.

3. The lower Courts erred by ruling admissible the "rape trauma syndrome" testimony of an expert witness. Although the prosecutor purported to be offering the testimony to describe the typical behavior of a rape victim, the expert's testimony that she had studied this case and the use of detailed "hypothetical" questions that exactly matched the facts of this case made clear to the jurors the expert's opinion that the complainant suffered from the syndrome as a result of having been raped. The prosecutor so argued in closing argument to the jury.

4. The lower Courts erred by ruling that Respondent was not prejudiced when a juror, who had disobeyed the court's order and read a newspaper article providing irrelevant and prejudicial information about the case, was retained on the jury for four days over Respondent's objection. Excusing the juror just before the jury retired to deliberate did not adequately protect Respondent because the juror may have conveyed prejudicial information to other jurors or influenced them adversely to Respondent based on the information that he had.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE RULE SET FORTH BY THIS COURT IN BATTLE V. STATE BY REFUSING TO TELL THE JURY THAT, IF THE COMPLAINANT CONSENTED TO SEXUAL INTERCOURSE BUT THEN WITHDREW HER CONSENT AFTER PENETRATION, RESPONDENT WAS NOT GUILTY OF RAPE.

It was undisputed that Respondent and Mike, another juvenile, told the adult complainant and her adult friend that they wanted to have sex with them, that the complainant voluntarily drove the boys to a quiet area, parked, and climbed into the back seat between them.

The complainant testified that Respondent helped Mike Wilson attempt to have forcible sex with her before Respondent got out of the car. While he was outside, Wilson raped her. The complainant testified that Wilson left and Respondent entered the car, that she agreed to have sex with him if he would stop when she said so, and that he stopped five seconds after she had told him to stop.

Respondent testified that he did not help Mike assault the complainant, that he was outside the car when Mike was with her, that she consented to sex with Respondent, and that he stopped as soon as she indicated that she wanted him to stop.

Dr. Ann Burgess opined that, in a hypothetical situation where a man is trying to insert his penis in a woman's vagina, she says stop, and he continues for

five seconds before stopping, that he should have stopped at the attempt point. (E. 379-80).

In closing argument to the jury, defense counsel argued that, because Respondent stopped five seconds after the complainant told him to do so, he was not guilty of rape. (12/20/2004 T. 261).

In rebuttal argument, the prosecutor contended that Respondent did not stop immediately but continued for five seconds and therefore was guilty of rape. The prosecutor argued (12/20/2004 T. 283-84):

> She [the complainant] said, "I said, 'Stop, it hurts.'" He said she didn't say anything. "Stop it hurts," and she told you that he didn't stop, that he kept pushing his penis into her, and she said he got it into her vagina. That is what she said. And he stopped, she said, only after about five to ten seconds. Well, Mr. Shalleck keeps making it to five seconds. Think about five to 10 seconds: one thousand, two thousand, three, thousand, four thousand, five thousand. That is five seconds, approximately. So, it is that or double that, and all of that time he is pushing himself into her, into that vagina that is bleeding and cut, and he wants you to believe that she never said "Stop, it hurts," she just backed up, sat up, and said it won't fit. That is nonsense.

After deliberating for awhile, the jury sent out a note which asked (E. 559):

> "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," I think it is, "man continues until climax, does the result constitute rape?"

The prosecutor argued that "the fact is that consent can be withdrawn." (E. 560).

Respondent's attorney pointed out that jury wanted to know whether, if the woman withdraws consent after penetration, the defendant is guilty of rape and that the answer was "No." Counsel asked the Court to so instruct the jury. The court refused and instead wrote in response to the note the following: "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. 560-62).

After the jurors resumed their deliberations on the following morning, they sent out a note which read, "If at anytime the woman says stop, is that rape?" (E. 563).

Defense counsel said to the Court (E. 563):

> Because you didn't agree with me on the last note last night, what I would ask the court is to give the exact answer that you gave to the note last night.

The Court ruled as follows (E. 564-65):

> THE COURT: Right. This is the same question in simpler form or at least a variation of the same question.
>
> * * *
>
> I think what I'm going to say is this is a question that you must answer. Which is exactly a variation of what I said last night.
>
> * * *
>
> All right. Here is what I said. 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.

The prosecutor approved the Court's answer to the note. (E. 565).

The Court of Special Appeals ruled that the trial judge had erred by refusing to tell the jury that Respondent could not be convicted of rape if the complainant had withdrawn her consent after penetration had occurred. The Court stated (E. 41, 43, 47):

> More problematic for the State's position, however, is the decision of the Court of Appeals in Battle, wherein the Court said, "On the other hand, ordinarily if she consents prior to penetration, there is no rape." ….
>
> * * *
>
> The in depth analysis engaged in by the Court of Appeals in Battle negates any notion that the pronouncement that prior consent vitiates the criminal character of the post penetration sexual act was inadvertent or mere dicta. Nor have law review articles and other scholars so dismissed the decision….
>
> * * *
>
> …It [Battle] is currently a statement of Maryland law, that has neither been overruled or commented upon negatively…. Under Battle, no rape occurred if the jury found that the prosecutrix withdrew her prior consent after penetration. The trial judge was obligated to answer the jury's question and it should have been advised that, under Maryland law, the answer is "no" to the 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?"….

The Court of Special Appeals correctly held that the trial Court had erred by refusing to answer the jury's notes inquiring whether consensual sexual intercourse becomes rape if the woman changes her mind and says stop. The Court of Special Appeals pointed out that the simple direct answer to their questions was "No." Under Maryland law, Respondent would not be guilty of rape if the jurors

found that the complainant had consented and then withdrawn consent after penetration and commencement of intercourse.

A. Under Maryland law, the defendant is not guilty of rape if a woman withdraws consent to sexual intercourse after penetration.

1. This Court has so ruled.

The Court of Special Appeals pointed out that this result was required by this Court's decision in Battle v. State, 287 Md. 675, 414 A.2d 1266 (1980). In that case, the complaining witness testified that she voluntarily had gone to Battle's room. She testified that he forced her to let him insert his penis into her vagina but did not ejaculate. They were interrupted when he went downstairs to answer a knock on the door. She called for help through a window. He came back and pulled her back into bed. When he again went to answer the door, she again called for help and the police came. The defendant testified that the complaining witness invited him to have sexual intercourse and undressed in his bedroom. He denied any sexual contact. Id., 287 Md. at 677-78.

The jury retired to deliberate and, after a period of time, sent out the following written question, id. at 678:

> When a *possible* consensual sexual relationship becomes non-consensual for some reason, during the course of the action can the act then be considered rape? (Emphasis in original).

The trial judge asked the jurors and they confirmed that they wanted to know if "...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 ...." The trial judge then said, "I will answer your question by saying, '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.'" The judge added a general instruction on consent and resistance. Defense counsel objected to the answer given by the trial judge to the jury's question and pointed out: "…The question, during the course of the action, I would say during the course of the action, one, a person is having intercourse, then during the intercourse of the action the person cannot claim and start screaming rape." The prosecutor deemed the question ambiguous but recognized that the jury could be referring to the time when the parties "got in the bedroom or maybe after they had sex." Id., at 679-80.

On appeal to this Court, Battle argued that:

> …[T]he jury's question was not clear and the jury may have had something else in mind other than what the court assumed. The jury may have been unsure about whether consent could be withdrawn while sexual intercourse (penetration) was taking place. The answer to that would have been "no." Hazel v. State, 221 Md. 464, 469 (1960). Therefore, the instruction may have misled the jury and prejudiced Appellant…. (Appellant's Brief at 12).

In its Brief of Appellee, the State gave several grounds for rejecting Appellant's argument but agreed that, if consent were withdrawn in the middle of intercourse, the defendant could not be convicted of rape:

> …The [trial] court correctly stated the applicable law with regard to the element of consent. (Apx. 18-20). Consent to intercourse at any time prior to penetration will deprive the subsequent intercourse of its criminal character. Hazel v. State, 221 Md. at 469. Through this instruction, the court made clear

> to the jury that one could not "scream rape" in the middle of sexual intercourse…. (Brief of Appellee at 32-33).

In analyzing the meaning of the jury's note, this Court considered two possibilities, first, that the jury had wanted to know whether consent withdrawn before penetration supported a conviction for rape and, second, that the jurors were inquiring whether consent withdrawn after penetration could support a rape conviction. With respect to the first possibility, this Court stated, id., at 684:

> 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….

Regarding the second possibility, this Court concluded: "…On the other hand, ordinarily if she consents prior to penetration and withdraws the consent following penetration, there is no rape." Id., at 684. See also Lane v. State, 348 Md. 272, 279, 703 A.2d 180 (1997) (Consent to sexual intercourse at any time prior to penetration deprives the subsequent intercourse of its criminal character.); Hazel v. State, 221 Md. 464, 469, 157 A.2d 922 (1960) ("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 penetration deprives the subsequent intercourse of its criminal character…."). Thus, this Court recognized that both the jury's question and the trial judge's summation of the jury's question could be read as encompassing the question whether consent withdrawn after

penetration allows a rape conviction and that, if so read, the answer to that question should have been "no" and not "yes."

In the instant appeal, Petitioner argues that the rule stated in Battle is mere dictum because this Court resolved the case as follows, "We hold 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.

However, the rule in Battle was more than dictum. It was essential to this Court's holding. If the jury's question in Battle could not be interpreted as inquiring whether it was rape if the complaining witness had withdrawn consent after penetration, there would have been no reason for this Court to have reversed Battle's conviction. In other words, if it were clear that the trial judge in Battle had not conveyed to the jury that it was rape if the consent was withdrawn after penetration, the trial Court's instruction, though ambiguous, would not have been incorrect. If the instruction had only told the jurors that Battle could be convicted of rape if the complaining witness had withdrawn consent at some time prior to penetration, there would have been no prejudice. Thus, this Court's statement in Battle that "…ordinarily if she consents prior to penetration and withdraws the consent following penetration, there is no rape" was the basis for the reversal of Battle's conviction. See State v. Bunyard, 31 Kan.App.2d 853, 857, 75 P.3d 750, 755 (Kan.App.2003) (refers to this Court's ruling on withdrawal of consent as "the Battle holding.").

2. This Court's ruling in Battle was consistent with the common law.

Petitioner claims that the rule set forth in Battle is illegitimate, first, because it developed during a time when the common law did not concern itself with punishing rape and, second, because it is inconsistent with the common law in other jurisdictions.

Petitioner's first claim is based on dubious history. Petitioner asserts that a woman alleging rape under the early common law could be convicted by the same judge for adultery or fornication if her rape accusation was disbelieved. According to Petitioner, the "early common law was focused primarily on a woman's attempt to exonerate herself from a sexual crime [fornication or adultery], and was not concerned with punishing acts of sexual violence." (Brief of Petitioner at 23).[1]

However, this assertion ignores the fact that the early common law courts had no jurisdiction over fornication and adultery, which could be tried only in ecclesiastical courts. Harold Berman, Law and Revolution: The Formation of the Western Legal Tradition 260-61 (Harvard University Press 1983); Sir Matthew

[1] Petitioner relies for this proposition on Anne M. Coughlin, *Sex and Guilt*, 84 Va.L.Rev. 1, 26-29 (1998), which in turn relies on anecdotal material from the Puritan era in colonial New England, where religious and criminal offenses were tried by the same court and religious offenses were treated much more harshly than they were in the religious courts that co-existed with the secular courts in England. See, e.g., Blackstone, Commentaries on the Law of England, Book 4, Chapter 4 at 64 (1769) (The prosecution of adultery has been "left to the feeble coercion of the spiritual court according to the rules of canon law; a law which has treated the offence of … adultery itself, with a great deal of tenderness and lenity…. The temporal courts therefore take no cognizance of the crime of adultery otherwise than as a private injury.").

Hale, The History of the Common Law of England 21-22 (C.M. Gray, ed., 1991) (1713).

At common law, adultery was not even a crime. Cole v. State, 126 Md. 239, 94 Atl. 913, 914 (1915); Shafer v. Ahalt, 48 Md. 171, 30 Am. Rep. 456 (1878) ("Now, adultery was a spiritual offense cognizable by the spiritual courts, and the punishment was confined to the infliction of penance pro salute animæ."); Adultery is a statutory crime in Maryland under Criminal Law Article, § 10-501, carrying a fine of ten dollars, but that fact has never diminished the aggressive prosecution of rape in this state. In fact, rape was a capital offense until 1972, when Maryland's death penalty was invalidated. Maryland Code (1957, 1971 Repl.Vol.), Article 27 § 461; Bartholomey v. State, 267 Md. 175, 184, 297 A.2d 696 (1972), applying Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); see Evans v. State, 396 Md. 256, 914 A.2d 25 (2006) (A study showed that, between 1936 and 1961, seventy-one persons were sentenced to death for murder and thirty-six were executed while fifty-one men received capital punishment for rape and twenty-one were put to death, with twenty remaining on death row at the end of the study); Dyson v. State, 238 Md. 398, 411, 209 A.2d 609 (1965) (Death penalty for rape was not cruel and unusual punishment).

Thus, there is no support for Petitioner's claim that the rule of Battle can be explained because the common law "was not concerned with punishing acts of sexual violence."

Petitioner avers that the rule of Battle is inconsistent with general common law principles. Petitioner cites State v. Niles, 47 Vt. 82 (1874) as providing an instance of a common law decision supporting its view. However, an examination of the facts of that case belies Petitioner's assertion. In State v. Niles, the twelve year old prosecutrix testified that her stepfather took her to a private location, got on top of her and had sexual intercourse with her. During the intercourse, she tried to get up but the defendant would not let her. Other than her attempt to get up, she did not resist. However, she never testified that she had consented to the sexual intercourse. Hers was the only testimony about what had happened during the incident. The defendant did not testify.

The trial judge instructed the jury that "if Lillian [prosecutrix], in the first instance, consented to the sexual intercourse with the respondent at the time and place alleged, and if the respondent commenced and entered upon the sexual intercourse with her consent, but she then withdrew her consent, and the respondent forcibly continued the intercourse after he had knowledge of her dissent, it would be rape."

The appellate court reversed Niles's conviction on an unrelated evidentiary ground. With regard to the instruction, the court said:

> …The exception taken to the charge of the court, has to be considered with reference to the facts developed by the evidence, and, as applicable to this case, we think it was unexceptionable. There is no rule upon the subject, of universal application; and in the adoption of a rule for this case, the court might well take into consideration the age and physical strength of the girl upon whom the rape was alleged to have

> been committed, and the relation she sustained to the respondent, and all the other circumstances disclosed by the evidence.

Given that there was no evidence at Niles's trial that the prosecutrix had ever consented to the sexual intercourse, the appellate court's failure to disapprove the instruction does not shed much light on the state of the common law at that time. Moreover, the court's reference to the victim's young age and weak physical strength reflects a concern that she was incapable of consent, a view that would be reflected in subsequent statutory rape laws.[2]

This Court has held that "Penetration is an essential element of the crime of rape at common law." Edmondson v. State, 230 Md. 66, 67, 185 A.2d 497 (1962); Smith v. State, 224 Md. 509, 511, 168 A.2d 356 (1962); Craig v. State, 214 Md. 546, 547, 136 A.2d 243 (1957) ("It is universally recognized, and conceded by the State in this case, that penetration is an essential element of the crime of rape."); see also Rivers v. State, 179 Ga. 782, 177 S.E. 564, 565 (1934); ("…[P]enetration

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[2] A similar case is Wright v. State, 23 Tenn. 194 (1843), where the court approved the following instruction: "It is no difference if the person abused consented through fear, or that she was a common prostitute, or that she assented after the fact, or that she was taken first with her own consent, if she were afterwards forced against her will." In Wright, the victim was a girl who was over ten years old. She went with Wright to fetch water and was raped by him. The opinion summarized the facts, in pertinent part, as follows: "There were some circumstances going to show that she was willing to go with him, and was willing to receive his dalliance; but her screams when violence was attempted, the bruises on her body, and her efforts to escape the assault of the prisoner, left no doubt of her unwillingness to assent to the desires of the defendant." Thus, the record made clear that the victim had never consented to intercourse. The trial judge's instruction addressed the fact that the victim's willingness to be taken away by the defendant did not preclude a rape conviction if she were afterwards forced to have intercourse against her will.

…is required to be shown in the crime of rape."); Com. v. Walter R., 414 Mass. 714, 610 N.E.2d 323 (1993) ("Common law rape is defined as 'the penetration of the female sex organ by the male sex organ, with or without emission.'"); Com. v. Lopez, 433 Mass. 722, 745 N.E.2d 961, 965 (2001) (Common law and statutory definition of rape is sexual intercourse by force or threat of force against the will of the victim and sexual intercourse is defined as "penetration of the victim, regardless of the degree.").

The American edition of a respected English treatise from the early nineteenth century indicated that lack of consent at the moment of penetration was an essential element of rape at common law. The following is stated in Chitty, Criminal Law 570 (Riley's Edition, Philadelphia 1819):

> The *offence*. Rape is the carnal knowledge of a female, forcibly and against her will, 3 Inst. 60. 4 Bla. Com. 210. The only difficulty which arises upon this definition, consists in the meaning which ought to be attributed to the words *carnal knowledge*; some judges having supposed that it is sufficient to shew penetration alone while others have contended that the offence is not complete without emission; but it seems to be agreed by all that the latter without the former will not suffice…. (emphasis by underlining added).

By stating that emission resulting from force cannot support a rape conviction where the penetration did not result from force, Chitty made clear that withdrawal of consent after penetration does not render the intercourse rape. In American jurisdictions, proof of emission was not required but proof of penetration by force was required. See White v. Commonwealth, 96 Ky. 180, 29 S.W. 340, 342 (1894) quoting Wharton, Criminal Law §§ 554, 555, (8th Ed., vol. 1) ("…[A]s the essence

of the crime is the violence done to the person and feelings of the woman, which is completed by penetration without emission, it will be sufficient to prove penetration.").

Prior to Battle, the principal case on the issue was State v. Way, 297 N.C. 293, 254 S.E.2d 760 (1979). In that case, the complainant and another woman had gone with the defendant to the apartment of a friend of the defendant. The defendant invited the complainant upstairs to a bedroom. She testified that, in the bedroom, he forced her to have intercourse. He testified that it was voluntary. They both agreed that, when she complained of stomach pains, the intercourse was stopped. Id., 254 S.E.2d at 760-61.

After the jury had begun deliberating, they returned to the courtroom and asked the judge "whether consent can be withdrawn." The judge then instructed them that "consent initially given could be withdrawn and if the intercourse continued through use of force or threat of force and that the act at that point was no longer consensual this would constitute the crime of rape." The Supreme Court of North Carolina reversed the defendant's conviction, ruling as follows:

> …Under the court's instruction, the jury could have found the defendant guilty of rape if they believed Beverly had consented to have intercourse with the defendant and in the middle of that act, she changed her mind. This is not the law. If the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape, although he may be guilty of another crime because of his subsequent actions. The court's instruction on this matter was erroneous, entitling the defendant to a new trial.

Id., at 761-62, see also State v. Pisio, 119 N.M. 252, 889 P.2d 860, 869 (N.M.App. 1994) ("A person is entitled to withdraw his or her consent or express a lack of consent to an act of criminal sexual penetration at any point prior to the act itself …."); State v. Auld, 2 N.J. 426, 435-36, 67 A.2d 175, 180 (1949) (Where the trial judge correctly instructed the jury "that consent could be withdrawn at any stage 'during the preparatory acts'", the defendant's appellate argument that the judge should also have instructed the jury that "consent may not be withdrawn during the act of intercourse" relied on correct law but the defendant was not entitled to reversal because he had not requested an instruction to that effect at trial.); People v. Vela, 172 Cal.App.3d 237,242, 218 Cal. Rpt. 161, 164 (1985), review denied by California Supreme Court (December 31, !985) (Citing Battle and Ways and relying on California case law and statutes, the court held that "…the presence or absence of consent at the moment of initial penetration appears to be the crucial point in the crime of rape.").[3]; People v. Marrs, 125 Mich. 376, 84 N.W. 284, 286 (1900) ("Consent, or failure to use the proper resistance, at any time before the act of intercourse has actually occurred, precludes conviction for rape."); Bailey v. Com., 82 Va. 107 (1886) ("…If she consent before the act, it will not be rape.");

[3] The definition of rape set forth in Vela was later changed by the California Supreme Court in In re: John Z., 29 Cal.4th 756, 128 Ca.Rptr.2d 783, 60 P.3d 183 (2003). See Fradella and Brown, Withdrawal of Consent Post-Penetration: Redefining the Law of Rape, 41 Crim.Law Bulletin 1 (Jan.-Feb. 2005) (Contrasting the common law approach taken in Vela with the approach taken in In re: John Z.).

Rex v. Hallett, 9 C&P 748 (1841) cited in The Digest Vol. 14(2) (Butterworths) (Where victim woke but did not resist until she saw a third person watching, jury would not be justified in finding the defendant guilty of rape)[4]; Note, Acquaintance Rape and Degrees of Consent: "No" Means "No" But What Does "Yes" Mean?, 117 Harv.L.Rev. 2341, 2348 (2004) ("The traditional view of rape is that the act of penetration completes the offense; therefore, the elements establishing an act of sexual intercourse as rape – lack of consent and use of force – must occur before the act of penetration.").

Commentators have recognized that the approach taken in Battle was the accepted common law rule governing withdrawal of consent to intercourse. See e.g., Fradella and Brown, Withdrawal of Consent Post-Penetration: Redefining the Law of Rape, 41 Crim.Law Bulletin 1 (Jan.-Feb. 2005) ("…But what the common law and modern rape laws shared in common until fairly recently was the requirement of a non-consensual penetration. In other words, the lack of consent on behalf of the person being penetrated at the time of the initial penetration.").

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[4] In each of the cases referred to by Petitioner as allowing a rape conviction where the woman withdrew consent after penetration, the respective appellate court relied exclusively on its interpretation of that state's sexual assault or rape statute, none of which were identical to Maryland's statute and some of which were very different from this state's statute.

None of the cases make any reference to either a prior ruling by that state's highest court stating a common law interpretation or to the existence of a statutory provision like Maryland Code, Criminal Law Article 3-302, which retains the common law meaning of terms such as consent. See State v. Rusk, 289 Md. 230, 240, 424 A.2d 720 (1981),

Thus, it is clear that this Court in Battle followed and applied the common law rule that was universally applicable at that time.

3. The common law definition of the basic elements of rape governs prosecutions under the current Maryland rape statute.

Prior to 1976, Maryland Code, Article 27, § 461 provided the penalty for rape but did not define the crime. The common law definition was used in this state. Hazel v. State, supra, 221 Md. at 468-69; State v. Merchant, 10 Md.App. 545, 556, 271 A.2d 752 (1970).

In 1976 and 1977, the General Assembly enacted statutes dealing with the crime of rape and creating sexual offense crimes. The main changes were that rape was divided into two degrees, sexual offenses were defined and delineated in four degrees, sexual crimes were defined in gender neutral terms, the admission at trial of reputation evidence of the alleged victim's chastity was banned, and evidence of prior specific sexual conduct by the alleged victim was limited. Note, Rape and Other Sexual Offense Law Reform in Maryland, 1976-1977, 7 U.Balt.L.Rev. 151, 156-62 (1977). The legislation "codified the common law definition of rape in non-gender specific terms." Id., at 159 .

In State v. Rusk, 289 Md. 230, 240, 424 A.2d 720 (1981), this Court held that, under the 1976 statute, the determination of whether the element of lack of consent was proven was to be made using the common law definitions, as follows:

> The vaginal intercourse once being established, the remaining elements of rape in the second degree under § 463(a)(1) are, as in a prosecution for common law rape (1)

> force actual or constructive, and (2) lack of consent. The terms in § 463(a)(1) "force," "threat of force," "against the will" and "without the consent" are not defined in the statute, but are to be afforded their "judicially determined meaning" as applied in cases involving common law rape. See Art. 27, § 464E.…

In Wilson v. State, 132 Md.App. 510, 518-19, 752 A.2d 1250 (2001), the Court of Special Appeals held that the 1976-77 legislation adopted the common law definition with respect to the basic elements required to prove rape and did not change them. Specifically, the Court held that, despite the use of the term "vaginal intercourse" by Article 27, §§ 262 and 263, the legislature had embraced the common law definition of rape that only penetration into the vulva was required. Judge Moylan wrote for the court, id., at 518-19:

> …[T]he element of penetration … was always a requirement of common law rape and is still, unchanged, a requirement of art. 27, § 462. In terms of its basic elements, the 1976 statute is simply declarative of the common law felony of rape. Although § 461(g) may tell us that "[p]enetration, however slight, is evidence of vaginal intercourse," it neglects the arcane, but sometimes critical, follow-up question "Penetration of what?"
>
> * * *
>
> It is a well-settled principle of rape law that the penetration that is required is penetration only of the labia majora. No penetration of or entry into the vaginal canal itself is now or has ever been required…. That basic principle was not changed by the 1976 statute, which did not undertake to alter in any way the common law meaning or definition of rape. The use of the term "vaginal intercourse" by §§ 462 and 463 does not require any penetration, even slight penetration, into the literal vaginal canal itself. The penetration required remains simply the vulvar penetration that has always been required to prove common law rape…. (emphases added) (footnote omitted).

See Funkhouser v. State, 51 Md.App. 16, 440 A.2d 1114, 1116 (1981) ("About five years ago the General Assembly enacted comprehensive legislation with respect to sexual offenses in which it recognized that there were graduations of severity in the perpetration of the common law crime of rape."); Mayes v. State, 50 Md.App. 628, 634, 440 A.2d 1093 (1982) ("Under the statutory scheme of things the legislature divided the common law crime of rape into first and second degree."); Blotkamp v. State, 45 Md.App. 64, 69, 411 A.2d 1068 (First degree forcible rape, as defined in the statute "was essentially the preexisting common law rape, almost as defined in Hazel, coupled with one or more of four aggravating circumstances."); Lucado v. State, 40 Md.App. 25, 29-30, 389 A.2d 398 (1978) (Before enacting the 1976 statute, the General Assembly explicitly declined to repeal the common law crime of rape by subsuming it within the definition of a "sexual offense."); see also Lane v. State, supra, 348 Md. at 279-89 (Common law exemption for marital rape by husband, assuming it existed in Maryland, was abrogated by the legislature in 1976 and 1989); Maryland.Ann.Code Art. 27, § 464E (1982) ('"Undefined words or phrases in ... [the 'sexual offenses'] subheading which describe elements of the common-law crime of rape shall retain their judicially determined meaning except to the extent expressly or by implication changed in this subheading."); see also State v. Jacques, 536 A.2d 535, 537 (R.I. 1988) (Because common law was embodied in sexual offense statute, every element needed to prove rape under the common law

must also be proved under the sexual assault statute and "the use or threatened use of force must occur before the penetration occurs.").

In Battle v. State, supra, this Court applied Maryland Code, Code (1957, 1976 Repl. Vol., 1977 Cum.Supp.) Article 27, § 462, which, at the time relevant to the event in Battle, read in pertinent part:

> (a) What constitutes. A person is guilty of rape in the first degree if the person engages in vaginal intercourse with another person by force against the will and without the consent of the other person and:
>
> * * *
>
> (4) The person commits the offense aided and abetted by one or more other persons.

Respondent was convicted of a violation Of Maryland Code, Criminal Law Article, § 3-303, which states in pertinent part:

> (a) A person may not:
>
> (1) engage in vaginal intercourse with another by force, or threat of force, without the consent of the other, and
>
> * * *
>
> (iv) commit the crime while aided and abetted by another….

As is evident from the above-quoted text, the 2002 reorganization of the criminal code did not effect any substantive changes to the definition of the crime of rape. The Revisor's Note stated: "This section is new language derived without substantive change from former Art. 27, § 462." (Acts 2002, c. 26). Similarly, the Revisor's Note says that the definition of "vaginal intercourse" in section 3-301(g) "is new language derived without substantive change from former Art. 27, § 461(g)."

Therefore, it is clear that the Battle court's interpretation of the rape statute in 1980 governs the interpretation of that statute today.

B. The trial court's general instruction on the crime of rape did not provide an answer to the jury's questions about the significance of withdrawal of consent after penetration.

Petitioner claims that the trial judge's use of pattern instruction on rape was adequate to satisfy the jury's questions. (Brief of Petitioner at 40).

Maryland Rule 4-325 provides the following with respect to instructions to the jury:

> (a) When Given. 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. In its discretion the court may also give opening and interim instructions.
>
> * * *
>
> (c) How Given. The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.
>
> * * *
>
> (Emphasis added).

An error in reinstruction of the jury by the trial judge can be corrected by the Appellate Court. Smith v. State, 66 Md. App. 603, 624, 505 A.2d 564 (1986); Oliver v. State, 53 Md. App. 490, 505, 454 A.2d 856 (1983). An objection to a supplemental instruction preserves the issue for appeal even where the defendant

failed to object to the initial instructions. Dawkins v. State, 313 Md. 638, 641-43, 547 A.2d 1041 (1988); Battle v. State, supra, 287 Md. at 678-79.

A trial judge must give the jury the law that they require to decide the case. State v. Hutchinson, 287 Md. 198, 205, 411 A.2d 1035 (1980). In Hutchinson, the this Court held that the trial judge had committed plain error by failing to tell the jury that "not guilty" was on verdict sheet and that they could find the defendant "not guilty," even though the judge had instructed them on the presumption of innocence and burden of proof beyond a reasonable doubt and had included "not guilty" on the verdict sheet. This Court emphasized the trial judge's duty to inform the jury of the law that is essential to their decision making, id., 287 Md. at 205:

> ...[W]hen the instructions are lacking in some vital detail or convey some prejudicial or confusing message, however inadvertently, the ability of the jury to discharge its duty of returning a true verdict based on the evidence is impaired. The responsibility for avoiding such circumstance rests with the trial judge who must advise the jury on every matter stemming from the evidence which is vital to its determination of the issues before them....

This Court ruled in Lovell v. State, 347 Md. 623, 702 A.2d 261 (1997) that, when a deliberating jury seeks specific information about the law that it needs to reach a firm verdict, the Court must provide that information. In Lovell, the twenty-four year old defendant pled guilty to first degree murder and elected to have a jury decide whether or not he should receive the death penalty. At the sentencing hearing, the judge instructed the jury that one of the mitigating circumstances that they could find was "the youthful age of the Defendant at the

time [of] the crime." After deliberating over four hours, the jurors sent out a note which requested, with respect to the term "youthful age," the following: "The jury wants to know if there is any further definition for this term or guidance the court can give the jury, relative to this term." Defense counsel requested that, since the death penalty statute had been amended to provide that only persons eighteen years old and older were eligible for capital punishment, the jury should be told that "youthful age" applied to persons in the age group above eighteen years old and that they should consider Lovell's life experiences and maturity level. The judge rejected this request and instead told the jury: "...Answer to both of your questions is 'No'. There is no further definition to the term and there is not further guidance that the Court can give the jury relative to the term ...." Subsequently, the jury returned a sentence of death finding, inter alia, that the mitigating factor of youthful age did not apply. Id., 347 Md. at 632, 653-56.

This Court noted that it had never "been presented with a claim of error based upon a decision not to instruct at all in response to a jury's question concerning a matter that the jury is required to consider." Id., at 657.

This Court quoted Justice Frankfurter's opinion in Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed. 350 (1946), where the Supreme Court ruled that the trial judge's cursory answer to a question about the law from a deliberating jury was inadequate, as follows:

> ... Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the

> required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy....

Id., 347 Md. at 658.

This Court concluded that "the jury's question indicated that one or more members of the jury were concerned about the concept of youthful age as a statutory mitigating circumstance." This Court stated that, absent clarification by the judge, there was a danger that the jury had not applied the mitigating factor fairly in deciding Lovell's sentence. The error was prejudicial given that one or more jurors had expressed concern over the mitigating factor. Id., at 659-60.

In the instant case, the trial Court refused to respond to the jurors express and repeated request for clarification about a point of law that they clearly believed was central to their decision on guilt or innocence. As in Lovell, the trial Court committed reversible error by failing to provide an answer to a jury question about the law that went to heart of the issue that they had to decide. The giving of the pattern instruction on rape by the trial judge before the jury had retired to begin deliberations had not provided the jurors with an answer. The trial judge should have told the jurors that, under Maryland law, if consent was given before penetration but withdrawn after penetration, no rape had been committed.

C. The rule of Battle is adequate and need not be changed.

In the development of the common law, there has been a preference for precision in definitions. See Pennington v State, 308 Md. 727, 730-31, 521 A.2d 1216 (1987) ("…[T]he common law picked out one particular act (or omission) or

result of an act (or omission) as vital for the determination of the place of commission (i.e. the situs) of each of the various crimes and gave jurisdiction to that state where the vital act or result occurred….").

The rule stated in Battle is a clear-cut definition that is easy to apply. The standard proposed by Petitioner is vague and uncertain and difficult to apply. See Note, The Collusion of Consent, Force, and Mens Rea in Withdrawal of Consent: The Failure of John Z., 26 Whittier Law Review 225, 240 (2004) (In Battle, "Maryland's high court embraced the 'bright line rule.'").

The Court of Special Appeals commented that: "The holding in Battle would not have been a bar to a conviction for common law assault for any continuation of the sexual act against the complainant's will after the withdrawal of consent." Baby v. State, supra, 172 Md.App. at 621. Common law assault in divided into two degrees with first degree assault being punishable by up to twenty-five years and second degree assault being punishable by up to ten years. Maryland Code, Criminal Law Article, §§ 3-201 to 3-303.

In sum, the rule stated in Battle is adequate and should be retained.

D. The rule urged by Petitioner would be defective.

The test formulated by the Petitioner provides "that the State must prove … 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 threat of force ….” (Brief of Petitioner at 39). This proposed standard is deficient in several respects.

First, any rule should explicitly provide that the man understood that the woman wanted him to stop. Evidence that she told him to stop would not be sufficient without evidence that he received that message and comprehended it.[5]

This requirement is supported by cases establishing a “good faith” defense to rape where a defendant honestly and reasonably believed the alleged victim had consented to sexual intercourse. In People v. Williams, 4 Cal.4th 354, 841 P.2d 961, 965 (1992), the California Supreme Court defined the requirements to obtain a jury instruction on the defense as follows:

> The Mayberry defense has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent.
>
> In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances…. (footnote omitted).

See In re John Z., 60 P.3d at 187; People v. Mayberry, supra, 15 Cal.3d 143, 125 Cal.Rptr. 745, 542 P.2d 1337 (1975); State v. Jones, 521 N.W.2d 662 (S.D. 1994)

[5] Communication between sexual partners can be ambiguous. See Note, “Initial Consent” Rape: Inherent and Statutory Problems, 53 Cleve.St.L.Rev. 161, 177-78 (2005), citing Allison and Wrightman, Rape: the Misunderstood Crime 78-79 (1993) (In a study, thirty-nine percent of 610 university women reported that the had offered “token resistance” to sexual intercourse by saying “no” when they really meant “yes.”).

("The jury was also instructed that if Jones had a reasonable and good faith belief that M.L. consented to engage in an act of sexual penetration he must be acquitted."). The existence of such a defense shows that actual knowledge by the defendant of the alleged victim's non-consent is required to support a conviction for rape.

Second, the Court should instruct the jurors that prosecution must prove that the intercourse was without the alleged victim's consent and that the force or threat of force used by the defendant was sufficient to overcome her resistance. Taylor v. State, 388 Md. 385, 399, 879 A.2d 1074 (2005); Robinson v. State, 151 Md.App. 384, 398, 827 A.2d 167 (2003).

Petitioner correctly states that the continuation of intercourse after withdrawal of consent is not rape if no more force is used than that involved in the sexual intercourse. See McGill v. State, 18 P.3d 77, 82 (Alaska App. 1996) (Where the jury asked, "While engaged in sexual penetration, if one or another of the parties involved says 'stop,' does consent for sex terminate at this point?", the trial court correctly reminded the jury of all the other elements necessary to prove rape); State v. Siering, 35 Conn.App. 173, 644 A.2d 958, 961 n.3 (1994) (Where the jury sent out a note asking, "If once you consent to sexual intercourse and the act has begun (penetration) and one party says to stop and the other party continues does this constitute sexual assault?", the trial court's "no" answer was correct because the question did not refer to the requirement that force be proved.); State v. Bunyard, supra, 281 Kan. 392, 133 P.3d at 25 ("The prosecutor misstated

the law during closing argument by equating the 'overcome by force or fear' element of rape with the act of sexual intercourse/penetration."); State v. Robinson, 496 A.2d 1067, 1070 (Me. 1985) ("…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]."); State v. Crims, 540 N.W.2d 860, 865 (Minn.App. 1995) (To prove rape, prosecution must demonstrate that continuance of initially-consensual sexual was forcible).

Given that proof of force or threat of force is the element that separates rape from non-criminal non-violent persistence that is tolerated by the partner who said to stop, it is important that the jury be fully informed that the force or threat of force must overcome the alleged victim's resistance or will to resist.

Finally, this Court should reject Petitioner's position that the decision whether a man withdrew quickly enough after being requested to stop should be left to the jury without any guidance from the trial judge. Petitioner notes that there is no particular "'reasonable' amount of time during which a man may

continue intercourse by force and without consent ….” (Brief of Petitioner at 39).[6] However, that is not the issue. The issue is whether the man should be allowed a reasonable time to fully understand his partner’s request and to respond appropriately to it.

Petitioner does not argue that a trial judge should instruct the jury that the man must withdraw immediately and without hesitation, correctly recognizing that such a standard is inappropriate. Nevertheless, Petitioner’s position that the matter

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[6] Petitioner knocks down a straw man with the argument that “Maryland law does not recognize the ‘unstoppable male’ theory” as a defense to rape. (Brief of Petitioner at 38). But what Petitioner avoids is the scientific evidence about the nature of sexual arousal. Studies make clear that a sexually aroused person is subject to strong physical and psychological influences. See e.g., D.L. Rowland, Neurobiology of Sexual Response in Men and Women, 11 CNS Spectrums: The International Journal of Neuropsychiatric Medicine 6 (August 2006) (“Sexual desire, arousal, and orgasm are mediated by complex … interactions of the somatic, and autonomous nervous systems, operating at cerebral, spinal, and peripheral levels.”); A. Halaris, Neurochemical Aspects of the Sexual Response Cycle, 8 CNS Spectrums: The International Journal of Neuropsychiatric Medicine 211 (March 2003); R. Levin and A. Riley, The Physiology of Human Sexual Function, 6 Psychiatry 90 (March 2007). Therefore, it is reasonable to infer that some delay in the ability to respond to a sexual partner’s change of mind would be necessary.

With respect to teenagers, the impact of sexual arousal could be augmented because they are at a stage of neurological development that limits their ability to react with maturity and self-control. Juvenile Justice Center, American Bar Association, Adolescence, Brain Development and Legal Culpability 3 (January 2004) (“[New discoveries] … shed light on the mysteries of adolescence and demonstrate that adolescents have significant neurological deficiencies that result in stark limitations of judgment.”); Mary Bekman, Crime, Culpability and the Adolescent Brain, 305 Science 599 (July 30, 2004); Ronald Dahl and Linda Spear, editors, Adolescent Brain Development: Vulnerabilities and Opportunities, Annals of the New York Academy of Sciences, Volume 1021 (June 2004).

should be left to the jury without guidance form the trial judge would allow prosecutors to make such an argument without fear of correction by the court.

A defendant charged with the rape of a woman who had invited him or agreed to have sexual relations is entitled to an instruction that the prosecution must prove that he did not withdraw in a reasonable time. The only case that has considered this issue had so ruled. State v. Bunyard, supra, 281 Kan. 392, 133 P.3d 14. In that case, the Supreme Court of Kansas reversed Bunyard's conviction because the prosecutor had told the jury in closing argument that "the force of the defendant's penis into the victim's vagina satisfied the force element of the rape charge" and because the trial judge did not instruct the jury that, if the alleged victim withdrew her consent, the defendant could not be convicted of rape if he withdrew in a reasonable amount of time. The Court ruled as follows, id., 133 P.2d at 30-31:

> 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 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.
>
> While the facts of this case may establish that the defendant's continuation of intercourse by placing the victim in fear or by forcing the victim to continue for 5 to 10 minutes was well beyond a reasonable time, we reiterate that this is a

> jury determination and not for the trial court or the appellate courts to decide. We, thus, conclude that the trial court had a duty to instruct the jury that post-penetration rape can occur under Kansas law and that the defendant has a "reasonable time" to respond to the withdrawal of consent.
>
> …A reasonable time depends upon the circumstances of each case and is judged by an objective reasonable person standard to be applied by the trier of fact on a case-by-case basis.

The Kansas court in Bunyard analyzed the Supreme Court of California's decision in In re John Z., 29 Cal.4th 756, 60 P.3d 183 (2003) and concluded that it did not offer any rationale for denying Bunyard an instruction that he must be given a reasonable time to withdraw. Id., 133 P.3d at 29. The Kansas court was correct in its analysis.

In In re John Z., id., 60 P.3d at 185, the victim testified that the intercourse continued for four or five minutes after she first told John Z. to stop. On appeal to the California Supreme Court, John Z. argued that the evidence was insufficient to sustain the delinquency finding because: "It is only natural, fair and just that the male be given a reasonable amount of time in which to quell his primal urge…." Id., at 187. The Court expressed some skepticism about "the defendant's 'primal urge' theory," but ruled as follows, id., at 187:

> In any event, even were we to accept defendant's "reasonable time" argument, in the present case he clearly was given ample time to withdraw but refused to do so despite Laura's resistance and objections…. Defendant continued the sex act for at least four or five minutes after Laura first told him she had to go home. According to Laura, after the third time she asked to leave, defendant continued to insist that he needed more time and "just stayed inside of me and kept like

> basically forcing it on me," for about a "minute, minute and [a] half."

The Court said that, because John Z. was appealing from a juvenile delinquency finding, it would not consider what instructions should be given in a jury trial. The Court explained: "…Accordingly, we do not explore or recommend instructional language governing such matters as the defendant's knowledge of the victim's withdrawal of consent, the possibly equivocal nature of that withdrawal, or the point in time at which defendant must cease intercourse once consent is withdrawn." Id., at 187-88.

The analysis in Bunyard is persuasive and, if this Court were to adopt a new rule, it should include a provision requiring a jury instruction that the defendant is not guilty of rape if he withdrew in a reasonable time after he understood that the alleged victim had withdrawn consent.

E. If this court were to adopt a new rule, it would not apply to the instant case because changes in the common law are applied prospectively.

In Williams v. State, 292 Md. 201, 438 A.2d 1301 (1981), this Court has stated:

> …[C]hanges in the common law ordinarily should have only prospective effect when considerations of fairness are present. Lewis v. State, supra, 285 Md. at 713, 404 A.2d 1073. See also Deems v. Western Maryland Ry., 247 Md. 95, 115-116, 231 A.2d 514 (1967)….

The change advocated by Petitioner would constitute a change in the elements of rape applicable when consent is withdrawn after penetration. It would convert behavior that was not rape before the change into rape after the change. It

would be a denial of due process and an ex post facto law. See Spielman v. State, 298 Md. 602, 610, 471 A.2d 730 (1984); Constitution of Maryland, Declaration of Rights, Article 17 ("We, the People of the State of Maryland, … declare: …That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal are oppressive, unjust and incompatible with liberty; wherefore, no ex post facto Law ought to be made; nor any retrospective oath or restriction be imposed, or required."); cf. United States Constitution, Article I, section 9, Cl. 3 ("No Bill of Attainder or ex post factor Law should be passed.").

F. Even if the rule urged by Petitioner would have been applicable at Respondent's trial, the trial court would still have committed reversible error.

In rebuttal argument to the jury, the prosecutor contended that Respondent was guilty of rape because he had continued for five seconds after J.L. had withdrawn consent. The prosecutor counted slowly from one to five to emphasize that five seconds had been enough time to withdraw. (12/20/2004 T. 283-84). Therefore, it was critical that the jurors receive a correct instruction about the law governing withdrawal of consent. Cf. Bayne v. State, 98 Md.App. 149, 160 632 A.2d 476 (1993) ("…[W]hen the primary evidence of sexual misconduct is penile penetration of the female genitalia… and separate charges of second degree rape and third degree sexual offense are presented to the jury, that jury must be instructed that penile penetration…cannot be used as the sole evidence to support

a guilty verdict on the third degree sexual offense."). The trial judge in this case gave the jury no guidance whatsoever. Even if the standard were that advocated by Petitioner, the jurors should have been given that information. Without it, they had no answer to their questions and no basis for fairly judging Respondent.

II. THE COURT OF SPECIAL APPEALS CORRRECTLY REVERSED RESPONDENT'S CONVICTIONS FOR FIRST DEGREE SEXUAL OFFENSE AND THIRD DEGREE SEXUAL OFFENSE.

Petitioner did not raise this issue in its Brief of Appellee in the Court of Special Appeals. In its Motion for Reconsideration in the Court of Special Appeals, Petitioner raised this issue. The Court of Special Appeals correctly rejected the Petitioner's claim.

This Court stated in Dorsey v. State, 276 Md. 638, 678, 350 A.2d 665 (1976):

> We conclude that when an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated....

Accord State v. Logan, 394 Md. 378, 382, 906 A.2d 374 (2006); Ruffin v. State, 394 Md. 355, 366, 906 A.2d 360 (2006); Archer v. State, 383 Md. 329, 361, 859 A.2d 210 (2004); Merritt v. State, 367 Md. 17, 31, 785 A.2d 756 (2001); Johnson v. State, 360 Md. 250, 269, 757A.2d 796 (2000).

The question of Respondent's guilt or innocence was closely contested below at Respondent's first trial and at his second trial, from which this appeal lies.

Respondent's first trial ended in a mistrial because the jury was hung. The jury reached a verdict on one count but could not reach a decision on the other counts. The jurors' note indicated that they had concluded that Respondent was not guilty of count six, third degree sexual offense. Defense counsel urged the court to accept the not guilty verdict. The prosecutor opposed the acceptance of a single verdict. As the prosecutor recalled prior to the second trial, "The court did not accept the verdict because the State declined to accept that procedure." The court declared a mistrial on all counts. (4-13-2007 T. 167-68, 176). Thus, the record makes clear that Petitioner took the position, at Respondent's first trial, that all the counts were interrelated and could not be separated.

In addition, the Court of Special Appeals stated that the jury's notes, at the second trial, asking about withdrawal of consent could have been referring to both the counts for "coitus or anal intercourse." Baby v. State, supra, 172 Md.App. at 606. If, as the Court of Special Appeals suggested, the jury was seeking clarification about the effect of withdrawal of consent on all the counts for which they later convicted Respondent, the Court's error was obviously prejudicial on all those counts.

At Respondent's second trial, the jury obviously had difficulty in reaching a verdict, as evidenced by its notes. In order to decide the case fairly, the jurors were

in need of guidance from the trial judge about the law governing the withdrawal of consent following penetration in a rape case. They did not receive that guidance. The trial judge's refusal to answer the jury's question likely had an influence on the jury's deliberations and caused one or more jurors to change his or her vote on the disputed counts from not guilty to guilty. Certainly, the Petitioner cannot disprove this possibility beyond a reasonable doubt. Therefore, there is no basis for concluding that none of the jurors' verdicts on the sexual offense counts was affected by trial judge's errors.

ISSUES ON CROSS-PETITION

III. THE LOWER COURT ERRED BY ADMITTING THE TESTIMONY OF ANN BURGESS, A NURSE WHO WAS OFFERED BY THE STATE AS AN EXPERT WITNESS ON "RAPE TRAUMA SYNDROME."

A. The reliability of rape trauma syndrome evidence has not been established.

No appellate court in Maryland has approved the introduction of rape trauma syndrome evidence in a criminal trial for any purpose.

At the trial below, Dr. Burgess testified about her own education and experience. She testified about her extensive research and activities concerning rape trauma syndrome. However, she did not testify that her description of rape trauma syndrome is generally accepted in a field of science or other learning.

Dr. Burgess indicated that post traumatic stress syndrome is recognized in the field of psychiatry by its inclusion in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. (E. 316). See DSM-IV-TR

463-67 (American Psychiatric Association 2000). And although she described rape trauma syndrome as a subset of post traumatic stress syndrome, she did not testify that it had been accepted by the American Psychiatric Association or any other authority in a specific field of science or other area of learning.

In Reed v. State, 283 Md. 374, 391 A.2d 364 (1978), this Court adopted the Frye standard for deciding whether proffered scientific conclusions are based on methods that are reliable enough to be the basis for admission of the conclusions into evidence. This Court stated, id., 283 Md. at 381:

> …[B]efore a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. Thus, according to the Frye standard, if a new scientific technique's validity is in controversy in the relevant scientific community, or if it is generally regarded as an experimental technique, then expert testimony based upon its validity cannot be admitted into evidence.
>
> * * *
>
> This criterion of "general acceptance" in the scientific community has come to be the standard in almost all of the courts in the country which have considered the question of the admissibility of scientific evidence.

See Clemons v. State, 392 Md. 339, 371, 896 A.2d 1059 (2006) (Comparative bullet lead analysis inadmissible because not generally accepted in the scientific community); Wilson v. State, 370 Md. 191, 209, 803 A.2d 1034 (2002) (Expert testimony on the probability of two of the defendant's children dying of sudden infant death syndrome was erroneously admitted); Smullen v. State, 380 Md. 233,

266, 844 A.2d 429 (2004) (If the legislature had not made evidence of battered spouse syndrome admissible, the Frye-Reed test would apply.

In Bloodsworth v. State, 307 Md. 164, 184, 512 A.2d 1056 (1986), this Court noted that the Frye test had been applied to rape trauma syndrome in other jurisdictions. See People v. McDonald, 37 Cal.3d 351, 373, 208 Cal.Rptr. 236, 251, 690 P.2d 709, 724 (1984) (Rape trauma syndrome cannot be used as proof of guilt); State v. Saldana, 324 N.W.2d 227, 231-32 (Minn.1982) (In first-degree criminal sexual conduct prosecution where defendant claimed consent, admission of expert testimony concerning typical post rape symptoms and behavior of rape victims, and expert's opinion that complaining witness was victim of rape and had not fantasized rape was reversible error);. State v. Taylor, 663 S.W.2d 235, 240 (Mo.1984) (Psychiatrist's "statements that the prosecutrix suffered from rape trauma syndrome and that she had been raped are not sufficiently based on a scientific technique"); cf. State v. Foret, 628 So.2d 1116, 1124-27 (La.1993) (Child psychologist's Child Sexual Abuse Accommodation Syndrome (CSAAS) based testimony was inadmissible because the evidence is of highly questionable scientific validity and fails to pass threshold test of scientific reliability); Lantrip v. Com., 713 S.W.2d 816, 817 (Ky. 1986) (Testimony about sexual abuse accommodation syndrome was inadmissible because the prosecution did not offer evidence that it was generally accepted by psychologists or psychiatrists); Com. v. Dunkle, 529 Pa. 168, 602 A.2d 830, 832 (1992) (Child abuse syndrome is not

"sufficiently established to have gained general acceptance in the particular field in which it belongs.").

Since the State did not present evidence in the Circuit Court that rape trauma syndrome was accepted by a specific scientific community as valid, Dr. Burgess's testimony about rape trauma syndrome was irrelevant and inadmissible.

B. Dr. Burgess did not clearly define the nature and limits of rape trauma syndrome.

In addition, Dr. Burgess did not clearly define what she meant by rape trauma syndrome. Her testimony on this point was ambiguous and inconsistent. At times, she indicated that rape trauma syndrome was a psychological condition, a subset of PTSD, that could be diagnosed by an expert. She further testified that a woman who had experience what J.L. had experienced and reacted like her would be suffering from the condition.

On the other hand, Dr. Burgess testified that rape trauma syndrome was a description of three stages of reaction that many rape victims go through. It consisted of the acute stage, the reaction stage, and the reorganization stage. She testified that there was variability in how individuals reacted.

In addition, she included in rape trauma syndrome behaviors that, by her own definition were not part of rape trauma syndrome. For instance, she testified that J.L.'s ignoring the statements by the Respondent and the other juvenile that they wanted to have sex, and her willingness to drive them to a quiet area, and get in the back seat were consistent with rape trauma syndrome, even though she had

testified that the first stage of the syndrome did not begin until a victim was raped. Even if this testimony about J.L.'s and respondent's behavior before the alleged rape were relevant, it clearly was not admissible as rape trauma syndrome evidence.

C. Dr. Burgess did not have an adequate basis for her opinion.

Dr. Burgess testified that rape trauma syndrome was a subset of post traumatic stress disorder. Thus, she conveyed to the jury that rape trauma syndrome was a psychological condition that could she could diagnose.

Dr. Burgess testified that, in preparation for her testimony, she had reviewed material connected to the instant case. She had spent two or three hours studying the police report, the indictment, the forensic nurse examiner's report, the complainant's statement, and an audio cassette of the complainant's statement. (E. 315). This made clear to the jury that she was not merely describing the general nature of rape trauma syndrome, but had familiarized herself with J.L.'s case and would be expressing her opinion on whether J.L. suffered from rape trauma syndrome.

The prosecutor asked Dr. Burgess a lengthy series of questions and two long "hypothetical" questions which posited detailed facts that were identical to J.L.'s description of the events. Once again, this made clear to the jurors that Dr. Burgess was expressing an opinion on whether J.L. was suffering from rape trauma syndrome. See State v. Pansegrau, 524 N.W.2d 207, 210-11 (Iowa App. 1994) (Trial judge erred in allowing the prosecutor to ask a rape trauma expert a

hypothetical question that "outlined all the events the alleged victim had testified had preceded the alleged rape" because it resulted in the expert rendering an opinion on the victim's credibility).

The Court of Special Appeals had no trouble recognizing that Dr. Burgess had directly testified that J.L. was suffering from rape trauma syndrome. The Court said: "Dr. Burgess attributed the victim's failure to resist, her failure immediately to report the incident and her voluntarily giving her home telephone number to the rape trauma syndrome." Baby v. State, supra, 172 Md.App. at 629. (E. 51).

Thus, it is clear that Dr. Burgess communicated to the jury her opinion that J.L. was suffering form rape trauma syndrome. This opinion was inadmissible because it did not have an adequate basis because she had never spoken to J.L.

Respondent's contention is supported by State v. Allewalt, 308 Md. 89, 517 A.2d 741 (1986). In Allewalt, the fact of intercourse between two adults was undisputed. Allewalt testified that the complainant had consented. The expert psychiatrist testified, as a rebuttal witness for the State, that the complainant suffered from post traumatic stress disorder and that the only reason she gave for the condition was that she had been raped. Id., 308 Md. at 92- 96. This Court pointed out that there was no attempt by the expert to certify the complainant's credibility because he testified that his opinion was based on what the complainant had told him. Id., 308 Md. at 98-99, 102-03, 108-09. By contrast, in the instant case, it was undisputed that Dr. Burgess had not spoken with the alleged victim.

(T7. 98, 100; T11. 184). Therefore, her opinion was not based on an examination of the alleged victim but was based on hearsay sources. See Bohnert v. State, 312 Md. 266, 539 A.2d 657 (1988) (This Court held inadmissible an expert's opinion that a child under the age of fourteen was the victim of child abuse because the expert had not stated an adequate ground for her opinion thereby invading the province of the jury).

In sum, the trial judge erred by allowing Dr. Burgess's opinion that J.L. suffered from rape trauma syndrome because she did not have an adequate basis to form that opinion. The testimony was irrelevant and inadmissible.

D. Dr. Burgess improperly rendered an opinion that L.J. had been raped.

In the instant case, The Court of Special Appeals asserted that Dr. Burgess's rape trauma syndrome "evidence was neither employed to establish the happening of the event or the victim's credibility …." Id., 172 Md.App. at 632. (E. 52).

The prosecutor, in closing argument, disagreed. He explained to the jurors why the State had offered the rape trauma syndrome evidence:

> …Now, she [Dr. Burgess] described a number of behaviors that are commonly seen, and I posed 35 questions to Dr. Burgess based on the facts of this case, and she said all of them were consistent with the rape trauma syndrome.
>
> Now, you add on top of that the evidence from Paula Slan (phonetic sp.), remember her, and Ivan L[…]., the victim's father. Those two witnesses were critical because they told you that J… was suffering from rape trauma syndrome in the days, in the weeks, in the months. And here it is a year later, she is

> still suffering from those symptoms. So you have proof that goes on in time of how this crime damaged her. The only conclusion that you can reach from that 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). [7]

Thus, according to the prosecutor's own words, the rape trauma syndrome evidence was offered to prove that a rape had taken place and that Respondent was the rapist. Contrary to the assertion of the Court of Special Appeals, the evidence invaded the province of the jury. Its admission violated the principles set forth in Hutton v. State, 339 Md. 480, 663 A.2d 1289 (1995), and Acuna v. State, 332 Md. 65, 629 A.2d 1233 (1993).

In Hutton v. State, this Court held inadmissible in evidence an expert opinion that the child victim was suffering from post traumatic stress disorder as a result of having been sexually abused, but said that it might be admissible where the defense asserts that the alleged victim had consented to sexual relations or to explain inconsistent behavior by the alleged victim. This Court ruled that "…we

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[7] The two prosecution witnesses to whom the prosecutor was alluding had testified as follows. Ivan L. , the father of J.L., testified that, on the day following the incident his daughter was crying and hysterical. She was depressed after that. She received counseling and was coming around. (12-17-2004 T. 82-84).

Paula Slan, a victim witness coordinator for the State's Attorney's Office, testified that, a few days after the incident, she met with J.L., her parents, and the two prosecutors. At the meeting, J.L. made virtually no eye contact with them and was uncommunicative. At one point, she cried. Two months later, J.L. met with the witness and the two prosecutors at the State's Attorney's Office. Again , she was quiet and did not make eye contact. J.L. testified at a hearing six months later. As she left the courtroom and entered a conference room , she began sobbing. (2-16-2004 T. 232, 235-39).

hold that the admission of PTSD testimony to prove sexual abuse occurred was inadmissible and clearly error." See Acuna v. State, supra, 332 Md. 65 (This Court held that the trial judge did not err in admitting expert testimony that the four year old victim had suffered from post traumatic stress syndrome where the judge refused to let the expert express an opinion on whether the child's behavior was consistent with that of other victims of child abuse and the expert did not express an opinion on the credibility of the alleged victim).

Hutton and Acuna hold that post traumatic stress disorder evidence cannot be used to prove that a particular crime had taken place or that a person was the victim of a particular crime. If rape trauma syndrome evidence were deemed admissible for some purpose, it should be limited at lest as much as post traumatic syndrome evidence.

Many cases have held that expert rape trauma syndrome evidence cannot be admitted to prove that a rape has taken place as testified by the alleged victim because the reliability of rape trauma syndrome evidence to prove rape has not been established. See, e.g., See People v. Bledsoe, supra, 36 Cal.3d 236, 681 P.2d 291, 301 (1984) (Rape trauma syndrome is not relied upon in the scientific community to prove that a rape occurred); State v. Taylor, supra, 663 S.W.2d 235, 241 (Mo.1984) ("Rape trauma syndrome should not be utilized as the instrument to establish the guilt or innocence of one accused of rape."); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983) (Allows expert testimony on rape trauma syndrome but specifically rejects allowing expert comment on truthfulness of

victim); People v. Taylor, 75 N.Y.2d 277, 552 N.Y.S.2d 883, 890, 552 N.E.2d 131, 138 (1990); ("Although we have accepted that rape produces identifiable symptoms in rape victims, we do not believe that evidence of the presence, or indeed of the absence, of those symptoms necessarily indicates that the incident did or did not occur"); cf. Frenzel v. State, 849 P.2d 741, 749 (Wyo.1993) (Child sexual abuse accommodation syndrome evidence has not reached the stage of development to make it a reliable indicator of sexual abuse); State v. Hall, 330 N.C. 808, 412 S.E.2d 883, 890 (1992); (Evidence that prosecuting witness suffered from post traumatic stress disorder following alleged sexual offense, although admissible for certain corroborative purposes, was not admissible to show that offense had in fact occurred).

The limitations of syndrome testimony are perceptively analyzed in Mark Brodin, Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic, 73 U.Cinn.L.Rev. 867, 882-87 (2005), as follows:

> …The concept of psychological syndromes was originally developed by practitioners for therapeutic and not truth-detection, purposes. Mental health professionals are trained to assist patients, not judge their credibility…. Indeed the American Psychiatric Association's own Diagnostic and Statistical Manual of Mental Disorders (DSM) warns against using these categories for forensic purposes.
>
> * * *
>
> Although sometimes confused with one another, syndromes must be distinguished from Post-Traumatic Stress Disorder (PTSD), a generally recognized anxiety disorder (with more precise contours) that has been listed in the DSM since 1980. Syndromes are not recognized in the DSM.
>
> * * *

> … Indeed, testimony from syndrome "experts" often identifies such commonplace symptoms as poor self-esteem, family problems, association with an older peer group, depression, withdrawal, leaving home without permission, and problems with school behavior and performance. [8]
>
> * * *
>
> Although the literature is somewhat more persuasive in identifying common characteristics among victims of rape and battering than of child sexual abuse, serious questions of evidentiary reliability persist. As Professor Jane Moriarty has put it, syndrome evidence essentially "requires a belief in the meaningful relationship between the criminal activity (the cause) and the observable behaviors or symptoms in the victims (the effect)." But the "empirical pillars" of that belief rest, in the words of one standard treatise, "on less than sound foundations." …
>
> * * *
>
> …Yet syndrome evidence has not been shown to be reliable under any meaningful scientific or legal standard. (footnotes omitted).

In sum, the trial judge erred by admitting Dr. Burgess's opinion testimony on rape trauma syndrome, particularly her testimony indicating her opinion that J.L. suffered from rape trauma syndrome because she had been raped.

E. The trial court erred by allowing the use of the term "rape trauma syndrome."

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[8] It would be expected to observe similar emotional problems in persons who falsely report rapes because they are usually under stress. The making of a false or erroneous report is itself stressful. State v. Black, 109 Wash.2d 336, 745 P.2d 12,16 (1987) ("Even those symptoms more especially applicable to sexual experiences may not be caused by rape.") see John McDonald, Rape: Controversial Issues 84-107 (1995); Philip Rumney, False Allegations of Rape, 65 Cambridge Law Journal 128 (2006); E.J. Kanin, False Rape Allegations, 23 Archives of Sexual Behavior 84 (1994); C.P. McDowell & N.S. Hibler, False Allegations (Chapter 11, pp, 275-99) in R.R. Hazlewood & A.W. Burgess (eds.), Practical Aspects of Rape Investigation (1987); S. Taylor & K. Johnson, Until Proven Innocent: The Duke Lacrosse Rape Case (2007); Stephen Buckley, Unfounded Reports of Rape Confound Area Police Investigators, Washington Post (June 27 , 1992).

See Note, Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony of Rape Trauma Syndrome in Criminal Proceedings, 70 Va.L.Rev. 1657 (1984).

Finally, the lower Court erred by ruling that Dr. Burgess could testify about "rape trauma syndrome."

This Court, in State v. Allewalt, supra, 308 Md. 89, where consent was an issue, approved of testimony that the alleged rape victim displayed signs of post traumatic stress disorder (PTSD). However, the Court expressly declined to approve the introduction of testimony that the alleged victim displayed signs of "rape trauma syndrome." The Court noted that: "There are inherent implications from the use of the term 'rape trauma syndrome', for it suggests that the syndrome may only be caused by 'rape' ...." Id., 308 Md. at 104, quoting State v. Taylor, 663 S.W.2d 235, 240 (Mo. 1984); see also State v. Saldana, supra, 324 N.W.2d 227, 229 (In fact, the characteristic symptoms of "rape trauma syndrome" may follow any psychologically traumatic event).

The Court emphasized in Allewalt that:

> ... Dr. Spodak never used the term "rape trauma syndrome," and avoiding that term is more than cosmetic. The concern with unfair prejudice is largely reduced when the terminology does not equate the syndrome exclusively with rape. In both his testimony and his explanation, Dr. Spodak was careful to point out that severe traumas, other than rape, can produce the disorder which warrants the diagnosis of PTSD.

Id., 308 Md. at 108. The Court expressly limited its holding to approval of the admission by the trial judge of expert testimony concerning the alleged victim's suffering from post traumatic stress disorder. Id., at 109.

The Court of Special Appeals pointed out that this Court said the following in Hutton v. State, supra, 339 Md. 480, 504:

> …Testimony by an expert that the alleged victim suffered from PTSD as a result of sexual abuse goes beyond the limits of proper expert expression. Expert testimony describing PTSD or rape trauma syndrome may be admissible, however, when offered for purposes other than simply to establish that the offense occurred. The evidence might be offered, for example, to show lack of consent or to explain behavior that might be viewed as inconsistent with the happening of the event, such as a delay in reporting or recantation by the child….

However, only testimony of post traumatic stress syndrome was offered at Hutton's trial. In addition, this Court reversed Hutton's conviction because the PTSD evidence was offered to prove that the alleged sexual abuse had occurred. Id., at 504.

The Court of Special Appeals failed to take note of this Court's warning in Hutton, id., at 492 n. 9:

> Our use of the terms "Rape Trauma Syndrome" and "Child Sexual Abuse Accommodation Syndrome" in our discussion is not intended to endorse their use by experts testifying in criminal trials, where the charged offense is rape or child abuse, sexual or physical. The use of such terms may themselves be prejudicial. We recognized that possibility in Allewalt, 308 Md. at 108, 517 A.2d at 750, just as other courts have done. See, e.g., State v. Roles, 122 Idaho 138, 832 P.2d 311, 318 n. 4 (App.1992); State v. Gettier, 438 N.W.2d 1, 6 (Iowa 1989).

And in Acuna v. State, supra, 332 Md. 65, this Court approved the admission of expert testimony that the alleged child abuse victim suffered from post traumatic stress syndrome. Evidence of "rape trauma syndrome" was not at issue.

Therefore, as Allewalt and Hutton make clear, use of the term "rape trauma syndrome" is prejudicial and should not be admitted at a criminal trial for that offense. See People v. Bledsoe, supra, 36 Cal.3d 236, 681 P.2d 291, 301 n.14 (1984) ("Even when the expert stops short of expressing an opinion on the ultimate issue of whether the complaining witness was raped and, as here, states simply that the witness is suffering from 'rape trauma syndrome,' the use of this terminology is likely to mislead the jury into inferring that such a classification reflects a scientific judgment that the witness was, in fact, raped.").

In this case, Dr. Burgess's opinion was highly prejudicial to Respondent. His first trial had ended in a mistrial. One of the issues for the jury to decide was who they found more credible, the complainant or Respondent. Dr. Burgess's testimony indicated that J.L. suffered from rape trauma syndrome, a psychological condition that could only have resulted from a rape. This amounted to a vouching for the complainant's credibility.

In addition, there was no need for Dr. Burgess to use the term "rape trauma syndrome." It was not necessary for her to inform the jury that J.L. suffered from that psychological condition and to indicate that, therefore, she must have been raped by Respondent. Dr. Burgess could have testified about her experience with

rape victims and testified that many victims do not resist, do not immediately report it, and do things like give their phone number to the perpetrator. She could have described the stages of recovery that many rape victims go through. She could have stated that such behavior does not imply that the victim had consented. The only reason for using the term rape trauma syndrome was to go beyond this type of testimony and convey that a diagnosis had been made that the complainant was raped.

Whatever probative value of Dr. Burgess's use of the term rape trauma syndrome may have had was far outweighed by its prejudicial effect on Respondent. See Maryland Rules 5-401 to 5-403: State v. Joynes, 314 Md. 113, 119, 549 A.2d 380 (1988); Cook v. State, 118 Md. App. 404, 702 A.2d 971 (1997); Lucas v. State, 116 Md. App. 559, 698 A.2d 1145 (1997);.

In sum, the lower Court erred by denying Respondent's motion to exclude the testimony of Dr. Burgess and overruling his objection to her testimony.

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 MR. BABY'S CASE.

After the jury was selected and sworn on Monday, December 15, 2004, the trial judge ordered them to ignore any press coverage of the case as follows:

> …You are the jury. Your oath is to decide the case on the testimony and the evidence in the courtroom. Not what anyone else thinks about this case. So if there should be any press coverage of the case, I not necessarily expecting any, but if

> there were I would be asking you to ignore it.… (12-13-2004 T. 156-57).

Before dismissing the jurors at the end of the day, the trial judge again warned them:

> …Should there be any press coverage of the case, I ask you please not to read any newspaper articles or if there should be anything on TV or the radio. Remember as jurors you took an oath to decide this case on the evidence in the courtroom…. (12-13-2004 T. 224).

At the beginning of the afternoon session of the third day of trial, Wednesday, December 15, Respondent's attorney told the Court that he had observed copies of the weekly Gazette newspaper stacked up in the lobby of the courthouse. An article about Respondent's trial was on page 25 of the newspaper. The article revealed that Respondent had been tried previously, was being retried and faced life imprisonment. It also revealed that Respondent's codefendant, Michael Wilson, had pled guilty. Defense counsel stated that the Gazette had been published that day and would be waiting on the juror's doorsteps when they got home. The prosecutor confirmed that the Gazette had come out that day. Defense counsel requested that the Court ask the jurors whether they had read the article and the Court agreed to do so. (E. 168-73). A copy of the article is contained in the Record Extract. (E. 180).

The Court asked the jurors; "...First of all, have any of you, by any chance, seen any press coverage of this case?" The Court told them that there was "an article in today's Gazette about this trial ...." (E. 171)

Juror No. 100 responded that he had read the article. (E. 171-72).

The Court noted that it had instructed the jurors to ignore media coverage. The Court had the jurors leave the courtroom. (E. 172).

Respondent's attorney moved to dismiss Juror No. 100 from the jury. (E. 172-74).

Juror No. 100 was recalled to the courtroom. When asked whether having read the article would affect his ability to be fair and impartial, he replied (E. 175):

> No. It didn't give any additional information. I was just intrigued with the fact that it was not the first time the case was tried.

Juror No. 100 had mentioned the article to two fellow members of the jury. He did not tell them what was in the article. To his knowledge, they did not read the article. (E. 175).

Defense counsel again requested that the juror be excused. (E. 176).

The Court noted that, although the juror had not mentioned that the article revealed that codefendant Michael Wilson had pled guilty, the juror might remember it and bring it up during jury deliberations. The Court ruled, "...I am going to grant the motion to strike the juror." (E. 177).

The prosecutor protested and said that the State had not decided whether to call Michael Wilson as a witness. (Ultimately, the State did not call Wilson). (E. 177-78).

Defense counsel pointed out that his client also would be prejudiced by the jury learning that he was being tried for the second time. (E. 179).

The Court reversed itself and decided not to excuse Juror No. 100. The Court ruled as follows (E. 179):

> THE COURT: All right. Well, what I am going to do at this point is reserve. I am going to reserve on this issue until the end of the trial and see whether, has Michael Wilson testified or not and how many jurors I have at the end of the trial, just in case there is a problem. I will admonish the jury they are not to discuss anything about the case, they are not to read any press coverage, they are not to discuss - -
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> * * *
>
> Well, what may happen is, he ends up being the alternate that is excused. That is my point.
>
> * * *
>
> Right. Well, at this point, I am just going to reserve. He is still on the jury, but he may or may not be, actually, one of the jurors that deliberates.

After the close of evidence, jury instructions, and closing arguments to the jury, the trial judge told counsel that she was going to excuse Juror No. 100. (T 13. 269-71). After the prosecutor's rebuttal argument to the jurors, the Court excused Juror No. 100. (E. 558).

The lower Court erred by refusing to dismiss Juror No. 100 when the juror first admitted that he had read the article about Respondent's trial. By allowing the juror to remain on the jury, the Court subjected Respondent to the risk that the juror would unfairly influence one or more of his fellow jurors by communicating to them information prejudicial to Respondent that was learned outside the trial.

Prior decisions of this Court and other appellate courts make clear that it is the duty of the trial judge to avoid contamination of the jury by information that was not admitted in evidence at the trial.

Respondent's contention is supported by Wright v. State, 131 Md. App. 243, 748 A.2d 1050 (2000). In that case, Wright was on trial for the murder of a sixteen year old woman who had last been seen alive in the defendant's car in Ocean City. The State relied mainly on that fact and a self incriminating statement that the defendant had made to a cellmate after his arrest for the murder. Id., 131 Md. App. at 245-49.

After the jury had begun deliberating, they sent out a note asking whether they could consider two newspaper articles about Respondent that had been sent to them by the clerk. The articles, which had been exhibits on a defense pretrial motion, stated that Wright previously had been charged with a statutory rape, a sexual offense, and a rape. In the three prior cases, he had been convicted of taking indecent liberties, a fourth degree sexual offense, and perverted practice, respectively. Id. at 249-51.

The trial judge then asked the jurors whether they had read the articles. All twelve said that they had but also said that they could decide the case without considering the articles. The Court denied Wright's motion for a mistrial and directed the jury to resume their deliberations. The jury convicted Wright of murder. Id., at 251-52.

On appeal, the Court of Special Appeals reversed, holding that, despite the jurors' assurance that they could remain impartial, the trial Court had erred by denying Petitioner's motion for a mistrial. The Court ruled, id. at 271:

> ...Although the jurors may have honestly thought that they could disregard the information in the articles, in our judgment, any doubts the jurors may have had, reasonable or otherwise, would have been resolved against Petitioner - even if only subconsciously - as a result of the information contained in the articles.

See Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); United States v. Williams, 568 F.2d 464 (5th Cir. 1978); People v. Holloway, 790 P.2d 1327 (Cal. 1990), overruled on other grounds, 889 P.2d 588 (Cal. 1995); People v. Keegan, 286 N.E.2d 345 (Ill. 1972); People v. Hrygiuk, 125 N.E.2d 61 (Ill. 1954); State v. Roman, 473 So.2d 897 (La. App. 1985); see generally A. Nadel, Juror's Reading of Newspaper Account of Trial in State Criminal Case During its Progress as Ground for Mistrial, New Trial, or Reversal, 46 A.L.R.4th 11 (1986).

A juror should not be exposed to information not provided at trial. In Allen v. State, 89 Md. App. 25, 42, 597 A.2d 489 (1991), the Court of Special Appeals emphasized that:

> ...The potency of the Sixth Amendment right to a fair trial relies on the promise that a defendant's fate will be determined by an impartial fact finder who depends solely on the evidence and argument introduced in open court.

See Turner v. Louisiana, 379 U.S. 466, 472, 85 S.Ct. 546, 13 Led.2d 424 (1965); Patterson v. Colorado, 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907).

In the instant case, the trial Court's ruling was erroneous and prejudicial to Respondent. The information in the newspaper article was clearly prejudicial to Respondent. The fact that he was being tried again could influence jurors to conclude that he must be guilty. Even more devastating was the fact that codefendant Michael Wilson had pled guilty. That information would cause the jury to conclude that Respondent was guilty.

The trial Court kept Juror No. 100 on the panel for four more days of trial before dismissing him from the jury. During these four days, Juror No. 100 had many opportunities to share with his fellow jurors what he had learned from the newspaper article and prejudice them against Respondent. See Lindsey v. State, 260 Ind. 351, 295 N.E.2d 819, 822 (1973) ("…[A]lthough there has been no showing that the news item prejudiced the jury, we nevertheless, hold that the failure of the trial judge to take remedial action at the proper time was violation of the defendant's constitutional right to a fair trial."); Com. v. Crehan, 345 Mass. 609, 188 N.E.2d 923, 924-27 (1973) (Where the trial judge declined to inquire of the jurors, on the second day of trial, whether they had read a newspaper article about Crehan's case and did not instruct them to disregard any newspaper articles until the judge's final instructions a week later, prejudice was presumed and Crehan's conviction was reversed).

A juror who had willfully disregarded the Court's initial order not to read media accounts about the case could not be relied on to obey the Court's subsequent order not to tell the other jurors what he had learned from the article.

See People v. Andrews,149 Cal.App.3d 358, 364-66, 196 Cal.Rptr. 796, 799-801 (1983) (Where some jurors read a newspaper article stating that the defendant's wife had pled guilty to the robbery charge at issue, prejudice was presumed and that presumption was not rebutted by the jurors' affidavits that their verdict had not been affected by the article.); Van Hattem v. Kmart Corp., 308 Ill.App.3d 121, 719 N.E.2d 212 (1999) ("…[T]he statement of a juror that reading a prejudicial newspaper article has not influenced him should not be considered conclusive."); State v. Caine, 134 Iowa 147, 111 N.W. 443, 446 (1907) (Affidavits of the jurors stating that they had not been influenced by reading newspaper accounts of the trial were not sufficient to justify the trial judge's denial of a mistrial because the "unconscious influence of such accounts would be far more likely to effect the result than an influence of which they were conscious, and which they might the more readily resist."); State v. Roman, 473 So.2d 897, 899-900 (La.App. 3d Cir. 1985) Even though the five jurors who had read a newspaper article revealing the defendant's prior criminal record denied that they would be affected, reversal was required because "there was a substantial possibility that the jurors who had this knowledge were unable to be impartial.").

When it dismissed Juror No. 100 from the jury after the closing arguments of counsel were finished, the trial Court failed to inquire of Juror No. 100 or any of the other jurors whether or not Juror No. 100 had revealed his exclusive information to them.

Respondent was prejudiced because the juror may have conveyed prejudicial information to other jurors or influenced them adversely to Respondent based on the information that he had. Respondent was not adequately protected from prejudice by the trial judge's excusing the juror just before the jury retired to begin deliberations.

In sum, the lower Court erred by denying Respondent's request to dismiss Juror No. 100 from the jury immediately. Respondent's convictions should be reversed.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the judgment of the Court of Special Appeals.

Respectfully submitted,

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APPENDIX

LIST OF TRANSCRIPTS

The following transcripts are contained in the record:

Date	Proceeding	Number of pages
March 25, 2004	Pre-trial hearing	(TI. 1-85);
April 8, 2004	Pre-trial hearing	(T2. 1-110);
May 12, 2004	Pre-trial hearing	(T3. 1-23);
May 24, 2004	Pre-trial hearing	(T4. 1-14);
June 28, 2004	Pre-trial hearing	(T5. 1-92);
July 15, 2004	Suppression hearing	(T6. 1-94);
August 23, 2004	First trial	(T7. 1-216);
December 13, 2004	Trial	(T8. 1-228);
December 14, 2004	Trial	(T9. 1-234);
December 15, 2004	Trial	(T10. 1-177);
December 16, 2004	Trial	(T11. 1-245);
December 17, 2004	Trial	(T12. 1-178);
December 20, 2004	Trial	(T13. 1-132);
December 21, 2004	Trial	(T14. 1-14);
February 17, 2005	Sentencing	(T15. 1-45).