IN THE

COURT OF APPEALS OF MARYLAND

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SEPTEMBER TERM, 2007

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NO. 14

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STATE OF MARYLAND,

Petitioner,

v.

MAOULOUD BABY,

Respondent.

_____

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS

_____

SECOND BRIEF OF AMICUS CURIAE

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The Maryland Coalition Against Sexual Assault (MCASA), the Women's Law Center of Maryland, Inc., the National Alliance to End Sexual Violence and the National Crime Victim Law Institute, by their undersigned attorneys, file this brief *amicus curiae* in support of the petitioner, State of Maryland.

This case involves a challenge to admission of expert testimony about rape

trauma and the experience, reactions, and behavior of sexual assault victims. This issue is important in the majority of sexual assault cases and the Court's decision will have impact far beyond the facts of this case. *Amici* believe that expert testimony is necessary to help ameliorate common myths about rape and to give jurors the information they need to make fair decisions in rape cases.

QUESTION PRESENTED

The Respondent/Cross-Petitioner raises the issue, reworded by *amici*: [1]

Did the trial court err in permitting expert testimony about rape trauma syndrome and post-traumatic stress disorder in a sexual assault case in which the defense attempted to exploit common rape myths and raised a defense of consent?

STATEMENT OF INTEREST

The Maryland Coalition Against Sexual Assault (MCASA) is the statewide collective voice advocating for accessible, compassionate care for survivors of sexual assault and abuse, and accountability for all offenders. Established in 1982 as a private, not-for-profit 501(c)(3) organization, MCASA works closely with local, state, and national organizations to address issues of sexual violence in Maryland. It is a membership organization that includes the state's nineteen rape crisis centers, health care personnel, attorneys, law enforcement, other allied

[1] Respondent/Cross-Petitioner also raised and was granted certiorari on the question of whether the trial court erred when it delayed excusing a certain juror. *Amici* do not address this issue.

professionals, concerned individuals, survivors of sexual violence and their loved ones. MCASA includes the Sexual Assault Legal Institute (SALI), which provides legal services for sexual assault and abuse survivors.

The Women's Law Center of Maryland, Inc. is a nonprofit, membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, violence against women, workplace issues and family law. Established in 1971, the Women's Law Center achieves its mission through direct legal services, hotlines, research, policy analysis, legislative initiatives, education and implementation of innovative legal services programs to facilitate systemic change.

The National Alliance To End Sexual Violence, organized in September of 1995, is a national 501(c) 4 not for profit organization which works to end sexual violence and ensure services for victims. The NAESV Board of Directors consists of leaders of state sexual assault coalitions and national law, policy, and tribal experts who promote the organization's mission to advance and strengthen public policy on behalf of state coalitions, individuals, and other entities working to end sexual violence. Most importantly, the NAESV advocates on behalf of the victim/survivors—women, children and men—who have suffered the serious trauma of sexual violence and envisions a world free from sexual violence.

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School, in Portland,

Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI actively participates as amicus curiae in cases involving crime victims' rights nationwide.

On February 26, 2007, MCASA and the Women's Law Center of Maryland filed a Motion for permission to file a brief *amicus curiae* in support of the petition. This Court granted the motion on May 9, 2007. A motion by the National Alliance to End Sexual Violence and the National Crime Victim Law Institute to join as *amici* was granted on July 3, 2007. An *amicus* brief addressing other issues presented by this case was filed on July 2, 2007. On July 12, 2007, the Court granted a motion to permit *amici* to file a second brief *amicus curiae* addressing issues raised by Respondent's cross-petition, specifically regarding rape trauma syndrome, post-traumatic stress disorder, and related issues.

FACTS AND PROCEDURAL HISTORY

Amici adopt the facts and procedural history set forth in their previous brief, supplemented by the history recited by the State and by the following. Additional facts are included as needed in the argument below.

J.L. was a victim[2] of gang-rape by two young men who were known to her and were acquaintances of her friends. She was subjected to *multiple* sexual

[2] Many anti-sexual assault advocates prefer the term "survivor" to "victim," however, during the point in time at issue in this case, J.L. was clearly a victim as well as a survivor, so *amici* use both terms.

assaults and attempted sexual assaults, including being held down by her arms with her upper body in the Respondent's lap while the other perpetrator, Wilson, anally raped her; attempted forced fellatio by Wilson (who was sitting on her chest at the time); being vaginally raped by Wilson; digitally penetrated by Baby, and – after Wilson was done assaulting her – raped again by Baby. Baby was found guilty by the jury of first degree sexual offense for his role in helping Wilson anally rape J.L., third degree sexual offense, as well first degree rape for the "post-penetration rape" addressed in the previous brief. Wilson pled guilty to rape in the 2nd degree.

At trial, the defense asserted that J.L. consented to sexual interactions with the Respondent. To support his consent defense, he attempted to portray J.L.'s actions and experience as inconsistent with that of a rape victim. Dr. Ann Burgess testified for the State as an expert in rape trauma. Dr. Burgess holds a doctorate in nursing science, is on the faculty at Boston College and has received numerous recognitions for her work with sexual assault and abuse survivors. Her extensive background includes having authored 10 books, 120 professional articles, and approximately 30 chapters and monographs. She has experience testifying as an expert witness several hundred times in twenty-eight states and the Virgin Islands. She has testified for both the State and defense and been qualified as an expert in rape, trauma, rape in a trusted relationship, sexual abuse of children, offender topology, crime classification, and post-traumatic stress disorder. (E.307-314).

Dr. Burgess did not testify that J.L. had been sexually assaulted, nor did she

testify that she believed J.L. to be credible – in fact, she had never interviewed the victim. She did, however, respond to hypothetical questions about whether the behavior J.L. exhibited was consistent with the behavior of rape victims following their assault. Dr. Burgess also testified about the conduct of rapists and categorized methods they use. (E.337-338, 360). Dr. Burgess framed her testimony with the concept of rape trauma syndrome and discussed post-traumatic stress disorder. Defense counsel fully availed himself of the opportunity for cross-examination, (E.353-387), asking about a range of issues from the state of J.L.'s underwear to her lack of bruising, (*e.g.*, E.373). Dr. Burgess made it clear that the basis for her testimony was not limited to academics, but based on her interviews of rape survivors numbering in the thousands, (E.318-319), and accumulated knowledge over 32 years of working in the field of sexual assault. (E. 356). On cross-examination, she clarified that her testimony and opinions were based on generalities regarding victims and not specific to the individuals in the current case. (E.359).

DECISION OF THE COURT OF SPECIAL APPEALS

The Court of Special Appeals, relying on *Hutton v. State*, 339 Md. 480, 504, 663 A.2d 1289 (1995) and *State v. Allewalt*, 308 Md. 89, 109-10, 517 A.2d 741 (1986), found that the trial properly denied the motion *in limine* to exclude Dr. Burgess's testimony. The Court of Special Appeals held,

[T]he facts presented in the case *sub judice* are quintessentially the

> circumstances contemplated by Maryland authorities which have considered the rape trauma syndrome. Obviously, it strains credulity that one who later claims to have been raped would be compliant during the sexual encounter, fail to immediately report the sexual assault and, most confounding, give her alleged attacker her home telephone number. Unlike *Bohnert v. State*, 312 Md. 266, 539 A.2d 657 (1988) and *Hutton*, the evidence was neither employed to establish the happening of the criminal event or the victim's credibility, nor was it outside the bounds of the expert's area of expertise, nor did it invade the province of the jury. Finally approved by the Court of Appeals in *Hutton*, *Acuna* [*v. State*, 332 Md. 65, 629 A.2d 1233 (1993)] and *Allewalt* [*v. State*, 308 Md. 89 (1985)], Dr. Burgess properly relied on material supplied by the court and statements as part of the hypothetical foundation upon which she based her opinion. *Baby v. State*, 172 Md.App. 588, 631-32, 916 A.2d 410 (2007).

The Court of Special Appeals was correct.

BACKGROUND - SEXUAL ASSAULT

The effects and context of rape are described in *amici's* previously filed brief on the issue of post-penetration rape. It bears repeating, however, that rape is the least reported, least indicted, and least convicted felony in the United States.[3] Yet rape is all too prevalent: one of every eight adult women in Maryland are victims of forcible rape in their lifetime.[4] Rape can be perpetrated against either

[3] *See, e.g.*, Bonnie S. Fisher et al., U.S. Department of Justice, *The Sexual Victimization of College Women* 23 (2000), available at http://www.ncjrs.gov/pdffiles1/nij/182369.pdf; U.S. Department of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey* (1994); D.G. Kilpatrick, C.N. Edmunds & A.K. Seymour, *Rape in America: A Report to the Nation*, Arlington, VA, National Center for Victims of Crime; Charleston SC, Medical University of South Carolina (April 1992).

[4] Kilpatrick, D.G. & Ruggiero, K.J., *Maryland: A Report to the State*, Charleston, SC, National Violence Against Women Prevention Research Center, Medical University of South Carolina (2003).

gender, but women are far more frequently victims.[5] In 2005, 1,266 forcible rapes were reported to police in Maryland,[6] and the State's rape crisis and recovery centers served over 3200 sexual assault survivors in 2006.[7] However, only 16 to 32% of rape victims report the crime to law enforcement.[8] Studies have found that only 2-4% of complainants falsely alleged that rape occurred, the same rate of false reports found for other crimes.[9] [10] Of reported cases, only approximately 25% result in an indictment and 12.5% in a conviction.[11] This means an estimated 75% of reported rapes are never prosecuted.[12]

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[5] U.S. Bureau of Justice Statistics, *Special Report: Violence Against Women: Estimates from the Redesigned Survey* (NCJ-154348), August 1995.
[6] 2 *Crime in Maryland*, 2005 Uniform Crime Report.
[7] Maryland Department of Human Resources Office, Victims Statistical Services Data, 2006.
[8] Fisher et al., *supra* note 3, U.S. Department of Justice, Bureau of Justice Statistics *supra* note 3, Kilpatrick et al., *supra* note 3.
[9] Katz & Mazur, Understanding the Rape Victim (1979).
[10] Respondent's Brief at footnote 8, cites a study that found a higher false report rate. This study involved requiring the complainant to submit to a polygraph test. Kanin, *False Rape Allegations*, 23 Archives of Sexual Behavior 81 (1994). Use of polygraphs on rape survivors has been widely criticized as unwarranted and inaccurate. Sloan, *Revictimization by Polygraph: The Practice of Polygraphing Survivors of Sexual Assault*, 14 International Journal of Medicine and Law 255 (1995). It is unclear but appears likely that the women who recanted their allegations in the Kanin study did so to avoid a distrustful and demeaning test following the trauma of rape.
[11] Cassia Spohn & Julie Horney, Rape Law Reform: A Grassroots Revolution and Its Impact 73 (1992).
[12] Victim Rights Law Center & Susan H. Vickers et. al, *Beyond the Criminal Justice System: Transforming Our Nation's Response to Rape* 1-3 (2003).

ARGUMENT

I.

MYTHS AND STEREOTYPES ABOUT RAPE AND RAPE VICTIMS EXIST AND WILL MISLEAD JURIES IF THEY ARE NOT ADDRESSED.

Allegations of rape and other sexual assaults have traditionally been viewed with suspicion. Myths surrounding the issue of sexual assault are well documented.[13] One of the most common myths is that most rapists are strangers who attack women from behind bushes or in a dark alley; to the contrary, most rapes are committed by someone known to the victim. U.S. Department of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* (1997) (seventy-seven percent of completed rapes are committed by someone known to the victim). But whether a factual scenario fits the "stranger attack" mold or not, jurors and other members of the public believe that victims are to blame. Victim blame arises with "several themes: victim masochism (e.g. she enjoyed it or wanted it), victim participation (e.g. she asked for it; it only happens to certain types of women), and victim fabrication (e.g. she lied or exaggerated)."[14]

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[13] *See, e.g.*, Torrey, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, 2 Wm. & Mary J. Women & L. 35, 37 (1995); Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implication for Expert Psychological Testimony*, 69 Minn.L.Review 395, 402-406 (1985); Wilk, *Expert Testimony on Rape Trauma Syndrome: Admissibilty and Effective Use in Criminal Rape Prosecution*, 33 Am.U.L.Rev. 417 (1984); Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtoom*, 77 Colum.L.Rev. 1 (1977); *see generally*, Brownmiller, Against Our Will (1975) (feminist perspective on rape prior to legal reforms).

[14] Ben-David & Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-*

These stereotypes of rape survivors direct that a good and virtuous woman would do anything in her power – perhaps even die – in order to preserve her virtue. A "real victim," therefore, would have injuries sustained during the expected struggle. Women with sexual experience or who consented to some level of interaction with a man, such as going to his room or getting into a car with him were seen as having consented to sex or at least to being beyond the protection of laws against rape. Similarly, a woman's sexual history (or child or man's sexual history) was viewed as highly relevant to whether she was raped. A victim's clothing, including her underwear, was also seen as indicative of her willingness to have sex and, consequently, the likelihood that she was "really raped."[15]

The law supported rape myths. Until relatively recently victims throughout the country faced having their own sexual history exposed. Courts required rape victims to use "utmost resistance" to prove non-consent. Marital rape exemptions were the norm.[16] As discussed in *amici's* first brief, Maryland made a series of major reforms to sexual assault laws in the 1970s, 80s, and continuing into the present. The 1976 and 1977 sessions of the General Assembly included comprehensive reforms of Maryland's sexual assault law, allowing a sex crime

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Perpetrator Acquaintance, 53 Sex Roles 385 (Sept. 2005).

[15] *See, e.g.*, Torrey, *supra*, Massaro, *supra*, Wilk, *supra*, Berger, *supra*; *see generally*, Brownmiller, *supra*, (feminist perspective on rape prior to legal reforms).

[16] *See, e.g.*, Berger, *supra*, Brownmiller, *supra*, (feminist perspective on rape prior to legal reforms); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Cal.L.Rev. 1373 (2000).

conviction for something other than vaginal penetration with a penis, creating some protection for rape victims by enacting a rape shield act, and eliminating marriage as a defense in limited circumstances.[17] It is notable that a bill to forbid use of "Lord Hale's instructions"[18] or their variant was introduced that session, but did not pass until 9 years later in 1987 when the General Assembly finally forbid courts from using instructions to jurors to view rape allegations (and the women who made them) with skepticism. Md.Code, Crim.Law Art. §3-320.[19]

Unfortunately, laws are easier to change than prejudice. The stereotypes and misperceptions that existed prior to the legal reforms continue to exist. Jurors – members of the public – bring these views with them into the courtroom. Without expert information about the actual experiences and behaviors of rape

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[17] J. William Pitcher, *Legislation: Rape and Other Sexual Offense Law Reform in Maryland, 1976-1977*, 7 Balt.L.Rev. 151, 152 (1977).

[18] Lord Hale was a 18th century jurist who developed jury instructions stating, in summary, that "rape is…. an accusation easily made and hard to be proved and harder to be defended by the party accused through never so innocent." The jury instructions reflected a fundamental suspicion of women (who comprised all rape victims in Lord Hales' time) and the rejection of this philosophy was a major victory for rape victims.

[19] In a criminal prosecution under §§ 3-303 through 3-312, § 3-314, or § 3-315 of this subtitle, a judge may not instruct the jury:

(1) to examine the testimony of the prosecuting witness with caution, solely because of the nature of the charge;

(2) that the charge is easily made or difficult to disprove, solely because of the nature of the charge; or

(3) to follow another similar instruction, solely because of the nature of the charge.

victims, jurors do not have the context to accurately and fairly make judgments about what occurred in a sexual assault case.[20]

II.

DEVELOPMENT AND USE OF "RAPE TRAUMA SYNDROME".

"Rape Trauma Syndrome" was coined as a phrase by Drs. Ann Burgess and Lynda Holmstrom in 1974 to describe the reactions and coping strategies of sexual assault survivors. Since that time, research on Rape Trauma Syndrome (RTS) has taken two separate but related paths. One body of work continues to address the effects of rape and reactions of survivors. This research can provide jurors with valuable information about the context of rape generally and is important to help the dispel rape myths that can lead to unjust verdicts. The second path of RTS work involves diagnosis of survivors with a psychological disorder. In this research, RTS is often described as a subset of post-traumatic stress disorder. An individual survivor may or may not have PTSD, but this would not negate the applicability of the other descriptive RTS information to the survivor's case.

A. Rape Trauma Syndrome as a Description

The original construct of RTS was developed by Burgess and Holmstrom

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[20] Frazier & Borgida, *Juror Common Understanding and the Admissibility of Rape Trauma Syndrome Evidence in Court,* 12 Law and Human Behavior 101 (June 1988); Feild & Bienen, Jurors and Rape (1980); Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implication for Expert Psychological Testimony,* 69 Minn.L.Review 395, generally and 402-406 (1985); Ben-David & Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance,* 53 Sex Roles 385 (Sept. 2005).

based on their observations of rape victims who presented at a Boston emergency room. Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am.J.Psychiatry 981 (1974). The term was described in one of 11 articles and 3 books the authors developed out of their 6 year longitudinal studies.[21] They described RTS with two phases: an "acute phase and [a] long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape. This syndrome of behavioral, somatic, and pychological reactions is an acute stress reaction to a life-threatening situation." Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am.J.Psychiatry 981, 982 (1974).

Two types of outward reactions were identified: express and controlled. In an express reaction, "feelings of fear, anger, and anxiety shown through such

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[21] Burgess & Holmstrom, Rape: Crisis and Recovery (1979); Burgess & Holmstrom, Rape: Victims of Crisis (1974); Burgess & Holmstrom, *Rape Typology and the Coping Behavior of Rape Victims*, in The Rape Crisis Intervention Handbook 27-40 (Sharon L. McCombie ed., 1980); Holmstrom & Burgess, The Victim of Rape: Institutional Reactions (1978); Burgess & Holmstrom, *Adaptive Strategies and Recovery From Rape*, 136 Am. J. Psychiatry 1278 (1979); Burgess & Holmstrom, *Coping Behavior of the Rape Victim*, 133 Am. J. Psychiatry 413 (1976); Burgess & Holmstrom, *The Rape Victim in the Emergency Ward*, 73 Am. J. Nursing 1741 (1973); Burgess & Holmstrom, *Recovery From Rape and Prior Life Stress*, 1 Res. in Nursing & Health 165 (1978); Burgess & Holmstrom, *Rape: Its Effect on Task Performance at Varying Stages in the Life Cycle*, in Sexual Assault: The Victim and the Rapist 23-34 (Marcia J. Walker & Stanley L. Brodsky eds., 1976); Burgess & Holmstrom, *Rape: Sexual Disruption and Recovery*, 49 Am. J. Orthopsychiatry 648 (Oct. 1979); Holmstrom & Burgess, *Assessing Trauma in the Rape Victim*, 75 Am. J. Nursing 1288 (Aug. 1975); Holmstrom & Burgess, *Rape: The Husband's and Boyfriend's Initial Reactions*, 28 Family Coordinator 321 (1979); Holmstrom & Burgess, *Rape: The Victim and the Criminal Justice System*, 3 Int'l J. Criminology & Penology 101 (1975).

behavior as crying, sobbing, smiling, restlessness and tenseness" are observed. In a controlled reaction, the survivor's feelings are "masked or hidden and a calm, composed or subdued affect" is observed. *Id.* Note that this second type of observed reaction is contrary to the rape myth that a victim will be screaming or sobbing after a rape. Defense attorneys can and do use a victim's calm demeanor following a rape to argue the victim had not been assaulted. The acute phase also may include somatic symptoms such as bruising, soreness, sleeplessness, stomach pains, vaginal or anal pain, headaches and fatigue. Internal emotional reactions during this phase include fear, anger, shame and embarrassment. Many victims blame themselves, particularly if they made mistakes in judgment that contributed to their vulnerability. *Id.* at 983. This can feed into rape myths that blame victims for the rape, particularly when victims articulate their self-doubt (*e.g.*, by wondering outload if "maybe I led him on" or should not have worn a particular item of clothing).

During the reorganization phase, victims try to cope with the trauma they experienced by taking actions such as changing phone numbers, moving, and visiting supportive family and friends. *Id.* at 983-983; Burgess & Holmstrom, *Adaptive Strategies and Recovery from Rape*, 136 Am. J.Psychiatry 1278 (1979). Nightmares about victimization and helplessness, rape, or being in control are all typical during this phase. Burgess, *Rape Trauma Syndrome*, 1 Behav.Sci. & L. 97, 103 (1983). Finally, some victims were observed to developed phobias in reaction to the rape. Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am.J.Psychiatry

981, 984 (1974). At the time that the term "rape trauma syndrome" was coined, the term "post-traumatic stress disorder" was not yet used, so these phobias were described as "traumaphobias." This aspect of some rape survivors' experience grew into the use of RTS to describe a type of post-traumatic stress disorder (described below).

RTS research encompassed not only the victim's reaction, but also the context of the rape and the victim's strategies for coping. This included analysis of the period just prior to the rape, during the rape itself, and the period immediately following the rape. Among other things, they found that while some victims yelled and screamed, others talked to the rapist during the attack to "avoid additional violence" and needed to reassure their attackers that they were enjoying themselves. Burgess & Holmstrom, *Coping Behavior of the Rape Victim*, 133 Am. J. Pyschiatry 413 (1976). Again, this is a valuable type of information for a jury to have when considering the facts of a rape case. While assuring an assailant of enjoyment does not prove a rape did occur, it is important for a jury to also understand that it does not prove that a rape did *not* occur.

Two types of rape were observed and labeled. "Blitz" attacks are sudden attacks, often by strangers. "Confidence" attacks describe situations where the victim willingly has some interaction with the assailant prior to the sexual assault, such as going on a date or riding in a car. Burgess & Holmstrom, Rape: Victims of Crisis, 4-11 (1974). The identification of confidence attacks contributed to awareness of what is often referred to as "date rape" or "acquaintance rape." As

mentioned previously, contrary to popular ideas, most rapes are committed by assailants who are known to the victim.[22]

Clinical researchers continued to study the effects of rape and sexual assault on survivors in the time since Drs. Burgess and Holmstrom's groundbreaking study, and a large body of published work has developed.[23] Researchers confirmed that rape survivors experience more depression, fear, social anxiety, and sexual dysfunction than other women. *See, e.g.*, Resick, *The Psychological Impact of Rape,* 8 Journal of Interpersonal Violence 223 (1993). Some refined the stages observed by Burgess & Holmstrom.[24] Sutherland & Scherl, *Patterns of Response Among Victims of Rape,* 20 Am. J. Orthopsychiatry 503 (1979) (adding an interim phase of "pseudoadjustment" followed by depression). Other researchers also replicated early findings that there are two types of rape "blitz" (sudden attacks) and "confidence" (where some level of trust or acquaintance is exploited). *See, e.g.*, Sally Bowie *et al., Blitz Rape and Confidence Rape: Implications for Clinical Intervention,* 44 Am. J. Psychotherapy 181 (Apr. 1990); Silverman *et al., Blitz Rape and Confidence Rape: A Typology Applied to 1,000*

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[22] U.S. Department of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* (1997)(seventy-seven percent of completed rapes are committed by someone known to the victim.); *see also,* Mary P. Koss & Sarah L. Cook, *Facing the Facts: Date and Acquaintance Rape Are Significant Problems for Women*, in Issues in Intimate Violence 147-56 (Raquel K. Bergen ed., 1998).

[23] Burgess and Holmstrom also continued to work in this field and refine their early work.

[24] At trial, Dr. Burgess was the expert witness. She herself refined the original two stages into three by adding "impact stage" to describe what was happening immediately after and during the rape. (E.320.)

Consecutive Cases, 145 Am. J. Psychiatry 1438 (Nov. 1988). This research continued to describe the reactions, behaviors and experience of sexual assault survivors. The presence of symptoms described by RTS can help counselors determine treatment approaches. For clinicians working with a patient who displays symptoms, but does not disclose sexual assault, the presence of RTS symptoms can prompt an inquiry about whether assault has occurred. This is especially important because so many rape victims do not disclose they have been sexually assaulted. RTS does not, however, conclusively establish that someone has been raped.

B. Rape Trauma Syndrome and Post-traumatic Stress Disorder

The term "rape trauma syndrome" has also been used to describe the experience of a subset of rape victims who develop post-traumatic stress disorder (PTSD). Post-traumatic stress disorder was formally recognized in 1980 when it was first included in the DSM-III. Diagnostic and Statistical Manual of Mental Disorders: DSM-III 308.30 (American Psychiatric Ass'n, 1980). Prior to this time, this disorder was know by other names, often as shell shock or combat fatigue. Its inclusion in the DSM was prompted partly in response to returning Vietnam war veterans. PTSD continues to be a recognized psychological diagnosis. Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR (American Psychiatric Ass'n, 2000)[25] Rape is one of the traumatic events that is

[25] The *DSM-IV-TR* Criteria for PTSD are:

A. The person has been exposed to a traumatic event in which both of the following were present:

1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others.

2) the person's response involved intense fear, helplessness, or horror.

B. The traumatic event is persistently reexperienced in one (or more) of the following ways:

1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions

2) recurrent distressing dreams of the event

3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated)

4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:

1) efforts to avoid thoughts, feelings, or conversations associated with the trauma

2) efforts to avoid activities, places, or people that arouse recollections of the trauma

3) inability to recall an important aspect of the trauma

4) markedly diminished interest or participation in significant activities

5) feeling of detachment or estrangement from others

6) restricted range of affect (e.g., unable to have loving feelings)

7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

1) difficulty falling or staying asleep

2) irritability or outbursts of anger

3) difficulty concentrating

4) hypervigilance

5) exaggerated startle response

recognized as causing PTSD. *Id.* Other causes include war combat, natural disasters, child sexual abuse, and victimization by other types of violent crime. While there are several potential causes of PTSD, the symptoms manifest in ways that generally distinguish between causes. For instance, PTSD sufferers often experience nightmares or flashbacks. A war veteran's flashbacks, however, will often be to combat experiences, while a rape victim's flashbacks will often be to the sexual assault. When RTS is used in its "diagnostic version" it generally refers to both the descriptive form of RTS outlined above and to rape-related-PTSD. Perhaps because of its roots in "combat fatigue," PTSD by itself fails to fully capture rape victims' experiences. In the courtroom, one way of addressing the limits of PTSD is to present expert testimony on both RTS and PTSD, generally as overlapping rather than distinct concepts. This is what occurred in the present case.

E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than 1 month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

III.

RAPE TRAUMA SYNDROME PROVIDES VALUABLE INFORMATION THAT ASSISTS JURIES BY DISPELLING MYTHS AND MISPERCEPTIONS ABOUT RAPE

Courts across the country have recognized that expert testimony can help dispel rape myths and help give jurors an accurate context to make decisions in. *See e.g.*, *People v. Bledsoe*, 681 P.2d 291 (Cal. 1984) (RTS testimony not admissible to conclusively prove that a rape occurred, but "expert testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths.") Defense strategies typically exploit rape myths in an effort to lead the jury to a not guilty verdict. Rape trauma syndrome evidence helps prevent juries from being misled by preconceived notions and allow them to make informed judgments. This can, of course, work in both directions – an accurately informed jury will be better able to return both guilty and not-guilty verdicts.

In the case before this Court, defense counsel's strategies appeared to include taking advantage of prevalent misconceptions about rape. For instance, there was no dispute that the Respondent provided the condoms that he and Wilson used. Defense counsel, however, repeatedly asked about an empty condom box in J.L.'s purse even though it had no relevance to the case. (*See e.g.*, E. 245, questioning victim about condom box in her purse and what she did with

the condoms; 12-14-2004, T. 72; E. 460). Defendant not only asked about the empty condom box in her purse, he asked if she had ever bought condoms before or had consensual sex before. (E.245-246). This suggested that the jury should consider the victim's level of sexual experience when assessing whether she consented to sex with two men in the back of a car.

Defense asked insidious questions regarding what J.L. was wearing. This included whether her belt was a woman's belts or "a rock star's belt." (12-14-2004, T. 66; *see also*, E.243-244, questioning the victim about what she was wearing). J.L.'s underwear was also mentioned repeatedly, including its color, style and decoration. (*E.g.*, E. 244, questioning victim regarding underpants; E. 367, hypothetical posed to Dr. Burgess, later excluded after objection). Again, this appears designed to exploit archaic myths suggesting that a woman's clothing is relevant to whether she consented to sexual activity.

Questioning brought out that clothing was not torn and defense hypothetical framed this as "not a stitch out of place." (E.373; *see also, e.g.*, 12-15-2004, T. 59, cross-examination of Officer Tanzi). Much was made of the assailants' use of the word "freaks" and, implicitly the victim's failure to leave the assailants after they used that (common) term. (*See e.g.*, E. 259). The defense argued that there were no visible bruising or markings on J.L., (*e.g.*, 12-15-2004, T. 59, cross-examination of Officer Tanzi), and that J.L. did not scream or try to get away when being assaulted by two large men in the back of a car. (E374). To be absolutely clear – cross-examination is important and no one is suggesting that a

defendant should not be able to vigorously defend himself. At the same time, no one should be able to benefit from archaic stereotypes. Expert testimony about rape trauma syndrome helps create a justice system that incorporates the experience of rape survivors by diminishing the influence of misconceptions that lead to bias against rape survivors.

It is clear that expert testimony was needed in this case. The Court of Special Appeals itself observed this in its opinion, stating, "Obviously, it strains credulity that one who later claims to have been raped would be compliant during the sexual encounter, fail to immediately report the sexual assault and, most confounding, give her alleged attacker her home telephone number." *Baby v. State*, 172 Md.App. 588, 632 (2007). It is this "obvious strain" on "credulity" that must be addressed – not so the jury will convict, but so the jury will be able to make a decision free from prejudice.

In the instant case, Dr. Burgess's testimony directly addressed issues that could mislead the jury. Defense counsel suggested that because J.L. delayed reporting that she had been raped by Baby and Wilson, she must not be telling the truth. (*E.g.*, 12-20-2004, T. 243). Dr. Burgess provided expert opinion regarding whether victims delay disclosing that they have been sexually assaulted. Dr. Burgess explained that most victims do not tell the first person they come into contact to. (E.325). She did not simply state that this is consistent with RTS, she explained the reasons for delayed reports:

> What we see is, and there are various reasons for it, but they often will not say anything to anybody until they kind of mentally go through what, are they safe? You know, what would happen? Who should they tell? Is that person, there's this whole kind of paranoia about who may be part of this so that there is a whole of questions that victims have said go through their mind and they're trying to make a decision.
> Don't forget, they've been through a very upsetting situation, so their ability to think clearly and to make good decisions is going to be impaired. (E. 325).

Dr. Burgess did not mention J.L. specifically, but provided the information the jury needed to apply this information in her case.

Other states have addressed the admissibility of expert testimony about RTS and the issue of delayed reporting. In *People v. Coffman*, 96 P.3d 30, 93 (Cal. 2004), the Court held, "we have held that a psychological expert may not testify about rape trauma syndrome … in order to prove that a rape actually occurred, although such testimony is admissible to rehabilitate the credibility of the complaining witness against a suggestion that her behavior after the assault -- such as a delay in reporting it -- was inconsistent with her claim of having been raped." *See also*, *People v. Hampton*, 746 P.2d 947, 952-53 (Colo. 1987) (RTS admissible to address delay in reporting); *State v. Ali*, 660 A.2d 337, 351-52 (Conn. 1995) (same). Without this testimony, jurors do not have important information about how rape survivors react after the assault. With this expert testimony, they have the information they need to make an informed decision one way or the other.

After she was assaulted by the Respondent and Wilson, J.L. drove back to McDonald's and picked up her girlfriend, Lacie, who described her as

"emotionless" and "just blank." J.L. made an attempt at normalcy by going grocery shopping with her mother as they routinely did. (E.226-227). Dr. Burgess provided information about victims appearing calm immediately after a rape and engaging in routine activities such as going to the gas station or grocery shopping:

> [O]ne of the first things that people do in any kind of bad situation is try to pretend like it didn't happen and try to think that they can get through it. So rape victims are no different. It's like I'm just going to go about my normal, whatever I had to do.
>
> It can be, that is one explanation and then a second explanation, of course, is the shock that they're in. There is a whole shock to the system when someone has been overpowered and raped. So that you really have two possible explanations for someone just going about their ordinary business. I have certainly seen that in cases. (E. 328).

Rape victims often react in this manner after a rape, contrary to common expectations. Addressing this issue, the Wisconsin Supreme Court upheld admission of testimony where an expert testified that it was not unusual for a rape victim to exhibit little emotion after the assault. That Court found that expert testimony was helpful in "disabusing the jury of some widely held misconceptions about sexual assault victims." *State v. Robinson*, 431 N.W.2d 165, 173 (Wisc. 1988). New York courts also addressed this factual scenario and found that patterns of responses of rape victims are beyond the common understanding of jurors and that expert testimony is admissible to provide this information. *People v. Taylor*, 552 N.E.2d 131 (N.Y. 1990) (expert testimony admissible to explain lack of emotion after assault). This type of testimony is critical to rebut the widely

held misconception that a "real victim" would be "hysterical" or extremely emotional after an assault.

J.L.'s initial reports had minor inconsistencies. This included confusion of whether it was Mike Wilson or the Respondent who forced his finger inside her vagina, (12-15-2004, T. 56), and omitting that she was anally raped when she was interviewed by a male detective shortly after the assault. (12-15-2004, T. 69). Without question, inconsistencies of this type can be the subject of fruitful cross-examination. However, these types of inconsistencies are also typical in reporting by rape victims.

The State asked Dr. Burgess for information about whether a rape survivor might tell different people slightly different versions of what happened. Again, Dr. Burgess did not simply answer that this was consistent with RTS, she provided the jury with the information they needed to make an informed decision. She explained that the gender of the interviewer, how the question is asked and how the victim interpreted it, and whether there was a bond or rapport between the interviewer and victim, all can affect what information is disclosed. (E. 330). The location of injuries and the orifice that was penetrated can also effect the scope of a rape victim's disclosure. (E. 327-329). Indiana's courts were confronted with the issue of inconsistent statements and upheld introduction of RTS testimony. *Simmons v. State*, 504 N.E.2d 575, 579 (Ind.1987) (admitting evidence demonstrating victim's behavior was consistent with RTS was proper when victim gave inconsistent statements).

Other factual scenarios that are vulnerable to being misconstrued by prejudice have also led courts to admit evidence of RTS. *See*, *People v. Thompson*, 699 N.Y.S.2d 770, 772 (N.Y. App. Div. 2000) ("[W]e are unpersuaded that [the] Supreme Court improperly denied defendant's motion to preclude expert testimony regarding rape trauma syndrome. Despite the fact that the expert did not examine or interview the victim, the testimony was admissible as it was limited in scope to explaining 'behavior that might appear unusual to a lay juror not ordinarily familiar with the patterns of response exhibited by rape victims' and particularly addressed the reasons a victim may be reluctant to initially identify a sexual attacker.") *People v. Smith*, 779 N.Y.S.2d 853, 854 (N.Y. App. Div. 2004) (allowing RTS testimony presented to explain the victim's behavior during underlying incidents); *People v. Nelson*, 837 N.Y.S.2d 697, 698 (2007) (recognizing that admitting RTS testimony to explain behavior of victim was proper); *State v. Kinney*, 762 A.2d 833, 842 (Vt. 2001) (holding RTS evidence admissible to aid the jury in evaluating evidence and for responding to arguments alleging victim behavior was inconsistent with rape where defendant's parents were close by when the sexual contact took place but heard no signs of a struggle, victim appeared to be sleeping peacefully in defendant's bed the next morning, and victim did not immediately tell her boyfriend she had been raped); *State v. McQuillen*, 721 P.2d 740, 742 (Kan. 1986) (permitting expert testimony regarding the symptoms and behaviors outlined in literature as being consistent with rape trauma syndrome); *State v. Staples*, 415 A.2d 320, 322 (N.H. 1980) (using RTS to

show memory loss was not unusual in rape victims was proper, where defense theory was memory loss and fabrication).

The range and variety of issues presented by these cases also indicate the need for detailed hypothetical questions. While some of the issues presented in this case and addressed by Dr. Burgess have been addressed by courts before, others apparently have not. J.L. providing the assailants with her phone number provides a clear example of why an experienced expert is need. This issue is one that the Court of Special Appeals referred to as "most confounding," *Baby* at 632, and one that a jury could easily be confused by. Dr. Burgess, however, had encountered this phenomena before. She explained that,

> [t]here is a certain type [of rapist] that will ask for name, address, phone number and the victims are torn with should I tell the truth or should I give a false, you know, false information and more likely than not, this is what they say, they give the right information because they're afraid that if they find out, if the offender finds out that they have lied, that it's going to be, get them into more difficulty and, in fact, I can give you cases where it has, where the offender will pull out the wallet and say you lied to me and that will inflict more aggression on them. So victims are very conflicted over that and as I said, more likely than not will give out their name and number. (E. 344-345).

Testimony that responds to hypothetical questions and the facts and circumstances present by each case are crucial to providing jurors with the information they need in a system of justice.

IV.

THE DECISION ABOUT WHETHER J.L. SUFFERED FROM RAPE TRAUMA SYNDROME AND WHETHER A RAPE OCCURRED WAS PROPERLY LEFT TO THE JURY

The cases discussed above provide strong support for admitting expert testimony about rape trauma syndrome to help dispel myths. It should be acknowledged, however, that RTS was never meant as a litmus test to conclusively prove whether or not a particular rape or sexual assault occurred. The *Bledsoe* case cited above and by the Respondent/Cross-Petitioner (Brief at 53), provides an example of how the courts of recognized the distinction between RTS as a descriptive and explanatory tool and as a diagnosis that conclusively shows that someone was raped or was raped at a certain time by a certain person. *People v. Bledsoe*, 681 P.2d 291, 301 (Cal. 1984) (RTS not allowed to prove rape occurred, but admission was harmless error and RTS "may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims"). *See also, State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (while agreeing that rape trauma syndrome is generally accepted as a common reaction to sexual assault, the trial court erred in allowing a psychiatrist to testify the victim suffered from rape trauma syndrome as a result of the defendant's actions); *People v. Pullins*, 378 N.W.2d 502, 505 (Mich. Ct. App. 1985) (RTS inadmissible to prove rape occurred).

This Court has also articulated this distinction in *Hutton v. State* holding that:

> Expert testimony describing PTSD or rape trauma syndrome may be admissible … when offered for purposed 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 … . 339 Md. 480, 504 (1995).

Amici believe *Hutton* should be reconsidered in the future and that the analysis by Judge Rodowsky in his concurrence is correct. This concurrence observed that medical opinions frequently rely about patient statements and history when making a diagnosis. It recognized the possibility that a diagnosis may be error because of patient fraud or malingering, but found this "goes to the weight of the opinion, not its admissibility, and is properly the subject of cross-examination of the expert." *Id.* at 509. Under this analysis, a diagnosis of PTSD including opinions about its etiology should be admissible as tending to prove that a rape occurred.[26] This issue is not before the Court in this case, however, because Dr. Burgess's testimony was not offered "simply to establish that the offense occurred."

Dr. Burgess never offered any opinion about a diagnosis of J.L. Instead she provided information about RTS, including symptoms, experiences and coping mechanisms of rape victims. (E.319-348). She discussed PTSD and how rape

[26] *See*, Maryland Rule 5-704(a) states "testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact."

can cause this disorder. She responded to hypothetical questions based on the State's theory of the case. The defense fully exercised his right of cross-examination. Neither the prosecution nor the defense solicited a diagnosis of J.L. from Dr. Burgess. In fact, this issue was discussed at a bench conference prior to Dr. Burgess's cross-examination where counsel and the Court agreed that Dr. Burgess would *not* be asked if she thought J.L. was raped. (E.352).

The ultimate conclusion that J.L. suffered RTS or PTSD was left to jury. This followed *Hutton's* direction that "[w]here PTSD is involved, the jury's responsibility to determine whether the abuse occurred involves making the connection between the existence of symptoms consistence with PTSD and the stressor … that is alleged by the State to caused the victim to suffer PTSD." *Hutton* at 502. Closing argument of both the State and the defense made this clear. The State argued to the jury that "[t]he only conclusion that *you can make* is that [J.L.] suffers from rape trauma syndrome and that she suffers it because she was raped." (T. 12-20-2004, p. 231, emphasis added). In making this argument, the State was relying not only on expert testimony, but also on two other witnesses. The victim's father testified that after his daughter was raped, she was crying and hysterical the next day. He also told the jury that J.L. then became depressed, but that counseling was helping her recover. (12-17-2004, T.82-84) The victim-witness coordinator for the State's attorney's offices testified about her observations of J.L., including that she began sobbing after leaving a courtroom and was quiet and had difficulty making eye contact. (12-16-2004, T. 232, 235-

239). Moreover, the defense presented competing expert testimony for the jury to choose from. Dr. Tuegel acknowledged that rape trauma syndrome is recognized in the field. (12-17-2004, T.151-152). He provided the jury with his opinion that the tears in J.L.'s anus and vagina were small but painful and simply consistent with sexual intercourse. (12-17-2004, T.142, T.139). It was left to the jury to decide which testimony to credit and whether or not the evidence presented supported the State's argument about rape trauma syndrome and whether rape occurred.[27]

Jury instructions and closing arguments also helped ensure that the jury understood that it was their duty to decide whether the Respondent had raped and committed sexual offenses against J.L. and that they were free to give Dr. Burgess's testimony whatever weight they deemed appropriate. The trial judge gave the jury the general instruction, "[i]t is your duty and responsibility to decide the facts and apply the law in this case." (12-20-2004, T. 197). Addressing expert testimony specifically, the Court instructed, "You should give expert testimony the weight and value that you believe it should have. You are not required to accept any expert's opinion." (12-20-2004, T. 201). Defense counsel reminded the jury

[27] The jury could have – and may have – decided whether the charged offenses occurred without labeling J.L.'s experiences as rape trauma or post-traumatic stress disorder. They could and did decide that the Respondent was guilty of five of the charged counts, but not two others (conspiracy to commit rape or first degree rape, aiding and abetting Michael Wilson in the act of vaginal penetration). Clearly this jury was capable of accepting some testimony and argument while rejecting others.

of these instructions during closing argument: "Remember the experts, the Judge told you, the experts, you can accept what they say, you can reject it, it is up to you. Part of it you can reject, part you can accept, all of it you can reject, all of it you can accept. It is up to you. You are the experts because you will decide if he raped this girl or if they had consent." (12-20-2004, T. 240). The State supported this on rebuttal, reminding the jury, "[i]t is up to you, the jury, to decide the facts …" (12-20-2004, T. 300). The Court and the attorneys, as well as the expert, were all clear that the jury must decide whether or not J.L. was raped.

V.

USE OF THE TERM "RAPE TRAUMA SYNDROME" WAS PROPER

Respondent suggests that it would have been permissible for Dr. Burgess to testify about rape trauma syndrome (e.g. that victims do not resist, do not immediately report rape, etc.) without using the clinically accepted term. Respondent's Brief at 58-59. Had the State imposed this restriction on Dr. Burgess, it could have avoided the possibility that the jury would determine that J.L. did not have RTS or PTSD and therefore must not have been raped. This may have been a prudent strategy, but imposition of this type of restriction would have been largely artificial. This was a rape case. The State alleged rape. Lay and expert witnesses testified about rape and sexual assault. There was testimony by a "sexual assault forensic examiner" and about "sexual assault forensic exams" at a "Sexual Assault and Abuse Center." (12-14-2004, 191; 12-15-2004, T79-80, 89).

There were photographs from a sexual assault exam. (12-15-2004, T79-80; State's Exh. 56 and 57, vaginal and anal injuries). In this context, use of the term "rape trauma syndrome" is not prejudicial, it is unremarkable -- particularly where the witness did not apply the term to the specific victim in the case.

CONCLUSION

Defense counsel in this case attempted to discredit J.L. in a variety of ways. This is, of course, his right and duty, but justice is not served by allowing any party to benefit from prejudice and misconceptions. Justice is served by providing juries with the information they need to make fair decisions. Expert testimony about rape trauma syndrome dispels myths and gives jurors the context they need to fulfill their duties in our justice system.

For the reasons above, *amici* urge this Court to affirm the holding of the Court of Special Appeals regarding admission of expert testimony about rape trauma syndrome and post-traumatic stress disorder and, for these reasons and the reasons in the previously filed *amicus* brief, urge the Court to uphold the conviction of the Respondent.

Respectfully submitted,

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