

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 412
Judiciary

(Delegate Shetty, *et al.*)

Criminal Law - Sexual Crimes - Consent and Second-Degree Rape

This bill, by repealing force or threat of force as an element of the crime, establishes that it is second-degree rape under § 3-304 (a)(1) of the Criminal Law Article for a person to engage in vaginal intercourse or a sexual act with another person without the consent of the other person. The bill also defines “consent” for purposes of Title 3, Subtitle 3 of the Criminal Law Article (sexual crimes) and establishes factors that must be considered to determine whether a lack of consent exists when it is an element of a sexual crime.

Fiscal Summary

State Effect: As discussed below, general fund expenditures may increase significantly depending on the bill’s overall effect on prosecutions, convictions, and incarcerations for second-degree rape. Revenues are not materially affected.

Local Effect: The bill is not anticipated to materially affect local government operations or finances, including the workload of State’s Attorneys’ offices.

Small Business Effect: None.

Analysis

Bill Summary:

“Consent” means the clear and voluntary agreement by an individual to engage in vaginal intercourse, a sexual act, or sexual contact. The bill may not be construed to require documentation of consent.

The following must be considered to determine whether a lack of consent exists when it is an element of a sexual crime:

- consent, lack of consent, or withdrawal of consent may be inferred from words or conduct based on the totality of the circumstances;
- consent may be withdrawn before or during vaginal intercourse, a sexual act, or sexual contact;
- the lack of consent may be communicated through words or conduct;
- submission as a result of fear, threat, deception, or coercion does not constitute consent; and
- an individual's manner of dress does not constitute consent.

Current Law:

Second-degree Rape (Section 3-304 of the Criminal Law Article)

A person may not engage in vaginal intercourse or a sexual act with another:

- *by force, or the threat of force*, without the consent of the other;
- if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual; or
- if the victim is younger than age 14, and the person performing the act is at least 4 years older than the victim.

Second-degree rape is a felony and is generally punishable by imprisonment for up to 20 years.

However, a person at least age 18 who commits any of the aforementioned prohibited acts with a child younger than age 13 is subject to imprisonment for not less than 15 years and not exceeding life. The 15-year mandatory minimum sentence is nonsuspendable and nonparolable. The State must comply with specified notice requirements if it intends to seek the 15-year mandatory minimum sentence, and the mandatory minimum sentence does not apply if the State fails to comply with specified notice requirements.

State Expenditures: General fund expenditures *may* increase significantly *if* the bill's alteration of the second-degree rape statute results in more people being committed to State correctional facilities and significantly alters workloads for the Office of the Public Defender (OPD). The number of people convicted of second-degree rape as altered under

the bill cannot be reliably predicted at this time and is dependent upon charging, prosecuting, and sentencing practices in the State.

The Maryland State Commission on Criminal Sentencing Policy reports that for fiscal 2022, 85 individuals were sentenced to 99 total counts of second-degree rape in violation of § 3-304 (all provisions).

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$4,970 per month. Excluding overhead, the average cost of housing a new State inmate (including health care costs) is about \$1,219 per month. Excluding all health care (which is a fixed cost under the current contract), the average variable costs total \$282 per month.

The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in State correctional facilities. The Baltimore Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

OPD advises that the bill increases agency caseloads, necessitating the hiring of three additional attorneys and one licensed certified social worker-clinical (known as LCSW-C) at a cost of \$423,684 in fiscal 2024 and increasing to \$590,650 by fiscal 2028. As mentioned above, the increase in caseloads to OPD is dependent upon charging practices in the State. Thus, the Department of Legislative Services advises that without actual experience under the bill, it is difficult to determine that actual increase in the workloads for OPD. Nevertheless, general fund expenditures for OPD likely increase beginning in fiscal 2024.

Local Expenditures: The Maryland State's Attorneys' Association advises that the bill does not have a fiscal or operational effect on State's Attorneys' offices.

Additional Comments: The only other sexual offense for which a lack of consent is the only element for the crime is a sexual offense in the fourth degree under § 3-308.

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: None.

Information Source(s): Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Department of Public Safety and Correctional Services; Department of Legislative Services

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