

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

House Bill 496
Judiciary

(Delegate Shetty, *et al.*)

Judicial Proceedings

Criminal Law - Sexual Crimes - Definition of Consent and Repeal of Force

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); establishes that the existence of consent, lack of consent, or withdrawal of consent must be determined based on a totality of the circumstances; and specifies other factors related to consent as an element of a sexual crime. By October 1 each year beginning in 2024, the Maryland Judiciary must report specified data regarding charges and convictions for specified sexual crimes from the preceding calendar year to the General Assembly. **The reporting requirement terminates April 30, 2029.**

Fiscal Summary

State Effect: General fund expenditures for the Judiciary increase by *at least* \$7,000 in fiscal 2025 only for information technology costs, as discussed below. General fund expenditures may also increase significantly depending on the bill’s overall effect on prosecutions, convictions, and incarcerations for second-degree rape, as discussed below. Revenues are not materially affected.

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

Small Business Effect: None.

Analysis

Bill Summary:

Consent – Title 3, Subtitle 3 of the Criminal Law Article (Sexual Crimes)

“Consent” means the clear and voluntary agreement by an individual to engage in vaginal intercourse, a sexual act, or sexual contact.

The existence of consent, lack of consent, or withdrawal of consent must be determined based on a totality of the circumstances, including the words and conduct of the victim and the defendant. The bill specifies the following additional factors related to consent as an element of a sexual crime:

- consent may be withdrawn before or during vaginal intercourse, a sexual act, or sexual contact;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;
- a current or previous dating, social, or sexual relationship by itself does not constitute consent;
- submission as a result of fear, threat, or coercion does not constitute consent if the individual alleged to have performed the prohibited act knows or reasonably should know that the victim would submit as a result of fear, threat, or coercion; and
- an individual’s manner of dress does not constitute consent.

The aforementioned provisions may not be construed to require documentation of consent.

Reporting Requirement

By October 1, 2024, and by October 1 of each year thereafter, the Maryland Judiciary must report to the General Assembly data for the preceding calendar year on the number of charges filed in the State and the number of convictions in the State for violations of §§ 3-303 through 3-308 of the Criminal Law Article (rape and sexual offenses). The data must be disaggregated by the modality by which the offense was committed, county, and offender age, race, and sex. As noted above, this statutory reporting requirement terminates April 30, 2029.

Current Law: Section 3-304 of the Criminal Law Article (second-degree rape) prohibits a person from engaging 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:

Maryland Judiciary Reporting

General fund expenditures for the Judiciary increase by *at least* \$7,000 in fiscal 2025 only for information technology costs related to reporting on data that currently exists. However, the Judiciary advises that certain offenses and subsections of the Criminal Law Article do not have separate Criminal Justice Information System (CJIS) codes, making it impossible to differentiate between these offenses without creating new CJIS codes. According to the Judiciary, if the creation of new CJIS codes is necessary to meet the bill's reporting requirement (1) the CJIS codes will only apply prospectively and (2) additional expenditures beyond what is contemplated above will be necessary.

The Judiciary also advises that further clarification of the bill's reporting requirement is necessary before it can proceed. The Judiciary notes that (1) while it does have information on a defendant's date of birth, it does not store the defendant's age at the time of the offense; (2) the term "offender" includes only individuals with a guilty disposition; and (3) the term "modality" is unclear.

Alteration of the Elements for the Crime of Second-Degree Rape

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 2023, 76 individuals were sentenced to 111 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 incarcerated individual, including overhead, is estimated at \$5,110 per month. Excluding overhead, the average cost of housing a new State incarcerated individual (including health care costs) is about \$1,244 per month. Excluding all health care (which is a fixed cost under the current contract), the average variable costs total \$336 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, one secretary, and one licensed certified social worker-clinical (known as LCSW-C) at a cost of \$476,347 in fiscal 2025 and increasing to \$654,224 by fiscal 2029. 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 2025.

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 sexual offense for which a lack of consent is the only element for the crime is sexual offense in the fourth degree under § 3-308 of the Criminal Law Article.

Additional Information

Recent Prior Introductions: Similar legislation has been introduced within the last three years. See HB 412 of 2023.

Designated Cross File: SB 758 (Senator Kelly, *et al.*) - Judicial Proceedings.

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 Legislative Services

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