



Working to end sexual violence in Maryland

P.O. Box 8782
Silver Spring, MD 20907
Phone: 301-565-2277

For more information contact:
Lisae C. Jordan, Esquire
443-995-5544

Testimony Supporting Senate Bill 758
Lisae C. Jordan, Executive Director & Counsel
February 13, 2024

The Maryland Coalition Against Sexual Assault (MCASA) is a non-profit membership organization that includes the State’s seventeen rape crisis centers, law enforcement, mental health and health care providers, attorneys, educators, survivors of sexual violence and other concerned individuals. MCASA includes the Sexual Assault Legal Institute (SALI), a statewide legal services provider for survivors of sexual assault. MCASA represents the unified voice and combined energy of all of its members working to eliminate sexual violence. We urge the Judicial Proceedings Committee to report favorably on Senate Bill 758.

Senate Bill 758 – Consent – Voluntary Agreement

This bill changes Maryland’s sex crimes law by defining “consent” to include clear and voluntary agreement, permitting consent by words or conduct, and clarifying that consent may be withdrawn. SB758 also provides that consent may not be constituted by a prior relationship by itself, or by manner of dress. Submission as a result of fear, threat, or coercion would not constitute consent.

Rape Law in Maryland – Lack of Agreement to have Sex is Not Rape
Maryland Rape Law Imposes a Duty to Refuse

When one person has sex with someone without consent Maryland’s second degree **rape law**, Criminal Law §3-304(a)(1) requires proof of:

Lack of consent and
Force or Threat of Force

Force = Focus on Victim, not Perpetrator

It is not enough to prove lack of agreement to have sex, Maryland’s law requires more. “Force or Threat of Force” is proven by focusing on the survivor/victim and whether they resist. While physical resistance is no longer required (Criminal Law §3-319.1), rape is only proven when in addition to lack of consent, the state can prove the victim resisted or was too scared to resist. (Note that rape prosecutions based on capacity, such as intoxication, are in other parts of the law and neither consent nor force are elements.)

Force and Threat of Force

Some degree of force is inherent in physical sexual activity. However, Maryland takes the approach that in a case involving actual, non-constructive force, the minimum of physical force that would be necessary to satisfy the “force” element is “the application of force beyond that which is part of the sexual act itself.” *State v. Mayers*, 417 Md. 449, 476 (2010); *see also Martin v. State*, 113 Md. App. 190, 241 (1996) (stating that the “force” element “means more than the mere physical exertion required to engage in a sexual act ‘against the will and without the consent of the other person’”).

While force may be by threat without actual violence, it is still more than a failure to have agreement. Case law explains: constructive force, [are] “acts and threats of the defendant” that reasonably create in the mind of the victim “a real apprehension, due to fear, of imminent bodily harm[.]” *Brown v. State*, 252 Md. App. 197, 213 (2021) (quoting *Hazel v. State*, 221 Md. 464, 469 (1960)).

Maryland law fails to protect victims who freeze.

Human beings have [involuntary physical responses to traumatic situations, like rape](#). Many people have heard of the fight or flight response, but the body actually has three modes of trauma response: fight, flight, or **freeze**. The freeze response, known as tonic or collapsed immobility, is a survival reflex that is a common response by rape survivors and counselors and advocates often hear stories about wanting to scream but being unable to speak, or wanting to fight back, but being unable to move. People who have experienced past trauma, such as gun violence, child sexual abuse, other crimes against their person, or combat, often have heightened trauma responses and their fight/flight/freeze response is more easily triggered. Wilson, C., Lonsway, K.A., Archambault, J. (2020). Understanding the Neurobiology of Trauma and Implications for Interviewing Victims. End Violence Against Women International. While prosecution can proceed if an assailant made a threat of bodily harm or death, if the survivor had a freeze response and did not refuse or otherwise resist, **the law does not protect the rape victim.**

Senate Bill 758 changes the law away from force and to a focus on whether there is clear and voluntary agreement. This bill strikes “force or threat of force” from the second degree rape statute, leaving “without the consent of the other” and provides a definition of “consent”.

The **definition of CONSENT** proposed by SB758 includes:

- Clear and voluntary agreement;
- The right to withdraw consent;
- Communication through words or conduct (NOT affirmative consent) and based on the totality of the circumstances;
- Consent is not:
 - what someone is wearing,
 - a prior relationship, or

- as a result of fear, threat, or coercion;
- documentation is not required.

Senate Bill 758 does not create an affirmative consent standard. Under SB758 consent can be “INFERRED FROM WORDS OR CONDUCT AND IS BASED ON THE TOTALITY OF THE CIRCUMSTANCES” (page 2, lines 8-10). There is no mandate in SB758 to ask permission and obtain a response throughout a sexual interaction. Agreement could be given without uttering a word.

Current law does not reflect what we teach students about consent.

Maryland requires age-appropriate instruction on the meaning of “consent” and respect for personal boundaries as part of the Family Life and Human Sexuality curriculum in every grade in which the curriculum is taught in public schools in the county. “Consent” is defined in Maryland’s education law as: “the unambiguous and voluntary agreement between all participants in each physical act within the course of interpersonal relationships, including respect for personal boundaries.” Education Article §7-445.

Students feel misled when they learn that criminal law does not view lack of agreement as rape. Standards used in college student judicial conduct proceedings do not require force, they focus on whether there was agreement. A 2016 survey of institutions of higher education found 16 with affirmative consent policies (including the University of Maryland system), 32 using “knowing”, “voluntary” or both, 13 including “mutually understandable”, and even one requiring “intelligent” as part of consent.

Other states. Comparisons between state sex crimes laws are imperfect because of the variety of approaches that states use. However, at least nine states and the District of Columbia have reformed their definitions of consent to focus on agreement. These are attached as Appendix I.

Senate Bill 758 changes Maryland law to prohibit having sex with another person without their consent. This is recognition of fundamental control and autonomy a person should have over their own body and it should be the law.

**The Maryland Coalition Against Sexual Assault urges the
Judicial Proceedings Committee to
report favorably on Senate Bill 758**

Appendix I.
Examples of Consent Definitions from other states.

California. “Consent” is defined to mean positive cooperation in act or attitude pursuant to the exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. California Penal Code § 261.6.

Colorado. “Consent” means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship is not sufficient to constitute consent. Submission under the influence of fear does not constitute consent. Colorado Revised Statutes Annotated § 18-3-401(1.5).

District of Columbia. “Consent” means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent. D.C. Code § 22-3001(4).

Illinois. “Consent” means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent. 720 ILCS 5/11-0.1. A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct. 720 ILCS 5/11-1.70.

Minnesota. "Consent" means words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act. Further:

- A person who is mentally incapacitated or physically helpless as defined by this section cannot consent to a sexual act.
- Corroboration of the victim’s testimony is not required to show lack of consent.

Minn. Stat. § 609.341(4).

Montana. The term “consent” means words or overt actions indicating a freely given arrangement to have sexual intercourse or sexual contact and is further defined, but not limited by the following:

- An expression of lack of consent through words or conduct means there is no consent or that consent has been withdrawn;
- A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent; and

- Lack of consent may be inferred based on all of the surrounding circumstances and must be considered in determining whether a person gave consent.

Mont. Code Ann. § 45-5-501(1).

Oklahoma. The term “consent” means the affirmative, unambiguous and voluntary agreement to engage in a specific sexual activity during a sexual encounter which can be revoked at any time.

Consent cannot be given by an individual who:

- is asleep or is mentally or physically incapacitated either through the effect of drugs or alcohol or for any other reason, or
- is under duress, threat, coercion or force

Consent cannot be inferred under circumstances in which consent is not clear including, but not limited to:

- the absence of an individual saying “no” or “stop”, or
- the existence of a prior or current relationship or sexual activity.

Okla. Stat. tit. 21, § 113

Vermont. “Consent” means the affirmative, unambiguous, and voluntary agreement to engage in a sexual act, which can be revoked at any time. 13 Vermont Stat. Ann. §3251(3).

Washington. Consent requires that there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact at the time of the act. Wash. Rev. Code Ann. § 9A.44.010(7).

Washington. “Consent” means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact. Wash. Rev. Code Ann. § 9A.44.010(2).

Wisconsin. “Consent” means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Wis. Stat. Ann. § 940.225(4).