

**Department of Legislative Services**  
Maryland General Assembly  
2016 Session

**FISCAL AND POLICY NOTE**  
**First Reader**

House Bill 218  
Judiciary

(Delegates B. Wilson and Rosenberg)

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**Courts - Evidence of Prior Sexual Offense - Admissibility**

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This bill prohibits, in a prosecution for specified sexual offenses, a court from barring the introduction of otherwise admissible evidence that the defendant committed a “prior sexual offense” on the ground that the evidence is unfairly prejudicial to the defendant unless the court makes a specific finding on the record after considering specified factors. The bill also contains provisions pertaining to procedural requirements for the introduction of such evidence by a State’s Attorney, hearings by a court on the admissibility of the evidence, and announcement of a court’s decision on the evidence.

The bill’s provisions do not limit the admission or consideration of evidence under any Maryland Rule or other provision of law.

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**Fiscal Summary**

**State Effect:** The bill’s changes can be implemented with existing resources. No effect on revenues.

**Local Effect:** The bill’s changes can be implemented with existing resources. No effect on revenues.

**Small Business Effect:** None.

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**Analysis**

**Bill Summary:** The bill defines a “prior sexual offense” as an act that would constitute (1) a sexual crime under Title 3, Subtitle 3 of the Criminal Law Article; (2) sexual abuse of a minor; (3) sexual abuse of a vulnerable adult; (4) a violation of 18 U.S.C.

Chapter 109A (federal sexual abuse statutes); or (5) a violation of a law of another state, the United States, or a foreign country that is equivalent to these offenses.

In a criminal trial for offenses (1) through (3) listed above, a court may not bar the introduction of otherwise admissible evidence that the defendant committed a prior sexual offense on the ground that the evidence is unfairly prejudicial to a defendant unless the court makes a specific finding on the record after considering specified factors. A court may not find that the evidence is unfairly prejudicial solely because the evidence involves a prior sexual offense.

A prosecutor may not introduce evidence of a defendant's commission of a prior sexual offense unless the prosecutor disclosed the evidence to the defendant at least 30 days before the trial or later, if authorized by the court for good cause shown.

Evidence of a prior sexual offense may not be disclosed to a jury or introduced at trial unless:

- the court first holds a closed hearing and determines that the evidence of the prior sexual offense was proven by clear and convincing evidence;
- the court uses the balancing test required under Maryland Rule 5-403; and
- the court considers the following factors – the similarity between the prior sexual offense and the sexual offense for which the defendant is on trial, the closeness in time of the prior sexual offense and the sexual offense for which the defendant is on trial, the presence or lack of intervening events between the prior sexual offense and the sexual offense for which the defendant is on trial, the need for the evidence, and any other factor the court considers relevant.

After the court concludes its hearing, the court must state the reasons for its decision on the record in open court and outside the presence of the jury.

**Current Law:** The common law “propensity rule,” which dates back to the seventeenth century, prohibits the use of character evidence to show a person’s propensity to act in accordance with his or her character traits or prior acts. Its proponents reason that the rule is necessary to ensure that a defendant receives a fair trial because, if the evidence is admitted, juries may overvalue the probative force of the prior conduct or may punish for a prior act rather than for the charged crime. There is substantial support in Maryland case law for the propensity rule. See, *e.g.*, *Behrel v. State*, 151 Md. App. 64 (2003); *Weiland v. State*, 101 Md. App. 1 (1994); *Acuna v. Maryland*, 332 Md. 65 (1993).

However, Maryland courts have also accepted a “sexual propensity” exception to the general rule against admission of evidence of prior bad acts when a defendant is being prosecuted for a sexual crime and “...the prior illicit sexual acts [of the defendant] are

similar to the offense for which the accused is being tried and involve the same victim.” *Vogel v. State*, 315 Md. 458, 466 (1989). *See also State v. Westpoint*, 404 Md. 455 (2009) (evidence of defendant’s prior bad acts which resulted in defendant being convicted of third-degree sexual offense were admissible under the sexual propensity exception to Maryland Rule 5-404(b) since the acts were similar and the victim was the same).

Under Maryland Rule 5-404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with those prior acts. However, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Under Maryland Rule 5-403, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None designated. However, SB 235 (Senator Brochin, *et al.* – Judicial Proceedings) is identical.

**Information Source(s):** Judiciary (Administrative Office of the Courts), Office of the Public Defender, State’s Attorneys’ Association, Department of Legislative Services

**Fiscal Note History:** First Reader - February 4, 2016  
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