

Department of Legislative Services  
Maryland General Assembly  
2017 Session

FISCAL AND POLICY NOTE  
Third Reader - Revised

Senate Bill 217

(Senator Kelley, *et al.*)

Judicial Proceedings

Judiciary

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Criminal Law - Sexual Offenses - Physical Resistance

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This bill specifies that evidence of physical resistance by the victim is not required to prove that a crime under Title 3, Subtitle 3 of the Criminal Law Article was committed. However, the fact that this evidence is not required may not be construed to affect the admissibility of evidence of actual physical resistance by the victim.

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Fiscal Summary

**State Effect:** Minimal increase in general fund expenditures for the Department of Public Safety and Correctional Services if the bill results in increased incarcerations for sexual offenses. Potential significant increase in general fund expenditures to the extent that the number of evidence kits tested by the Department of State Police (DSP) increases. Revenues are not affected.

**Local Effect:** Local expenditures increase if the bill results in increased testing of sexual assault evidence kits. Revenues are not affected

**Small Business Effect:** None.

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Analysis

**Current Law:** Title 3, Subtitle 3 of the Criminal Law Article contains statutory provisions pertaining to several sexual crimes, including rape in the first and second degrees, sexual offenses in the first through fourth degrees, attempted rape, attempted sexual offense, and sexual solicitation of a minor.

While none of the statutory provisions for the sexual crimes in Title 3, Subtitle 3 of the Criminal Law Article refer to physical resistance, rape and sexual offenses in the first and second degrees involve engaging in vaginal intercourse or a sexual act by force or threat of force. Maryland's jury instructions for these offenses, which incorporate and reflect statute and case law, state that:

Force is an essential element of the crime. To justify a conviction, the evidence must warrant a conclusion either that the victim resisted and [his] [her] resistance was overcome by force or that the victim was prevented from resisting by force or by threats to [his] [her] safety. No particular amount of force is required. The amount of force required depends upon the totality of the circumstances. Force may exist without violence.

**Background:** Chapter 37 of 2015 required a law enforcement agency or other State or local agency charged with the maintenance, storage, and preservation of sexual assault kit evidence to conduct an inventory of all kits that were stored by the agency by January 1, 2016, and report the results to the Office of the Attorney General (OAG). Chapter 37 required OAG to prepare and transmit, by December 1, 2016, a report to the General Assembly detailing (1) the number of untested sexual assault collection kits stored by each agency; (2) the date that each untested sexual assault collection kit was collected; and (3) recommendations for addressing any backlog of untested sexual assault collection kits.

OAG published its report in January 2017. Among other things, the report noted that "...policies related to untested kits may be the result of confusion and ambiguity in Maryland's current rape statute that requires a rapist use force or a threat of force as an element of the crime. The fact of an assault but the absence of physical resistance may contribute to an agency's policy decision not to pursue testing or prosecution."

**State Revenues:** The bill does not materially affect State revenues. While the misdemeanor offenses under Title 3, Subtitle 3 of the Criminal Law Article are subject to fines, this analysis assumes that the bill's provisions do not affect prosecutions and conviction rates for these offenses.

#### **State Expenditures:**

*Department of State Police:* General fund expenditures for DSP increase, perhaps significantly, should the bill significantly increase the number of evidence kits submitted to DSP for testing. The extent to which this occurs as a result of the bill cannot be reliably determined at this time.

DSP does testing for itself and for approximately 140 allied law enforcement agencies. DSP does not test DNA for Baltimore City and Baltimore, Anne Arundel, Montgomery, and Prince George's counties. The Maryland Police Training Commission determines which law enforcement agencies are "allied agencies." Approximately 70% of DSP's Forensic Sciences Division's casework is for allied agencies.

According to OAG's report, the following law enforcement agencies had the five highest numbers of untested sexual assault evidence kits: (1) Montgomery County Police Department; (2) Baltimore City Police Department; (3) Howard County Police Department; (4) Anne Arundel County Police Department; and (5) Baltimore County Police Department. However, the report also noted that the number of untested kits in a law enforcement agency does not convey much information about the effectiveness of an agency's testing protocols, which can be the result of a variety of factors. The report mentioned that an agency that retains evidence for a longer amount of time will likely have a higher number of untested kits than an agency with a shorter retention time. Also, a jurisdiction that experiences a low number of reported sexual assaults will likely have fewer untested kits than a jurisdiction that experiences a higher number of reported sexual assaults.

DSP accepts and tests all submissions that meet its technical standards (*e.g.*, condition of the container, etc.), but the internal policies of allied agencies determine whether or not kits are submitted to DSP for testing. Therefore, if an allied agency does not submit evidence for testing to DSP because of the physical resistance component in State statutes, DSP is not notified of the decision not to submit the kit for testing.

DSP advises that it conducts all of its testing internally and does not bill allied agencies for services or receive reimbursement for testing costs from allied agencies. DSP received 116 sexual assault evidence kits from allied agencies in 2016. A "kit" varies by case and includes everything sent in the container submitted to DSP (*e.g.*, clothing, bedding, etc.). Thus, the cost of testing a kit varies by case. However, DSP advises that it costs at least \$4,000 to test what is traditionally regarded as a kit (*i.e.*, specimens collected during a forensic medical exam).

Accordingly, DSP expenditures increase, perhaps significantly, to the extent that the bill increases the amount of sexual assault evidence testing conducted by DSP.

*Department of Public Safety and Correctional Services:* General fund expenditures increase minimally if the bill increases the number of individuals committed to State correctional facilities.

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

\$3,600 per month. This bill alone, however, should not create the need for additional beds, personnel, or facilities. Excluding overhead, the average cost of housing a new State inmate (including variable health care costs) is about \$800 per month. Excluding all health care, the average variable costs total \$210 per month.

**Local Revenues:** The bill is not expected to materially affect local revenues. As previously stated, this analysis assumes that the bill does not affect prosecutions and conviction rates for misdemeanor offenses under Title 3, Subtitle 3 of the Criminal Law Article. All but two of the felony offenses under Title 3, Subtitle 3 of the Criminal Law Article (sexual solicitation of a minor and use of personal identifying information or the identity of another) are not subject to fines.

**Local Expenditures:** Local expenditures increase should the bill increase testing of sexual assault evidence kits by local law enforcement agencies. The impact varies by jurisdiction.

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### Additional Information

**Prior Introductions:** None.

**Cross File:** HB 429 (Delegate Dumais, *et al.*) - Judiciary.

**Information Source(s):** Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; State's Attorneys' Association; Department of Public Safety and Correctional Services; Department of State Police; *Statewide Accounting of Untested Sexual Assault Evidence Kits in the State of Maryland* (Report of the Office of the Attorney General); *Maryland Criminal Jury Instructions and Commentary – 2016 Edition*; Department of Legislative Services

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