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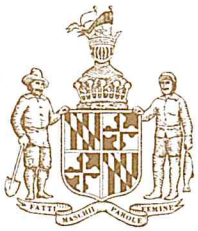

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February 25, 2020

The Honorable William C. Smith, Jr.
Maryland Senate
2 East Miller Senate Office Building
Annapolis, Maryland 21401

***Re: Senate Bill 230 – "Criminal Law – Sexual Crimes – Repeal of Spousal Defense"***

Dear Senator Smith:

You have inquired how the lack of consent is demonstrated for the purposes of establishing "sexual contact with another without the consent of the other" as a fourth-degree sexual offense under § 3-308(b)(1) of the Criminal Law Article ("CR"). You also asked whether a court would consider prior interactions between the alleged offender and victim in determining whether the sexual contact was consensual.

Evidence of a lack of consent is necessarily fact-driven in individual cases, but courts have discussed various circumstances that a fact-finder may consider in determining a lack of consent. Among those factors include evidence of the nature of prior interactions between an alleged offender and victim.

Section 3-308(b)(1) of the Criminal Law Article prohibits a person from engaging in "sexual contact with another without the consent of the other[.]" "Sexual contact" is defined as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." CR § 3-301(e)(1). "Sexual contact" does not include "a common expression of familial or friendly affection[,]" or "an act for an accepted medical purpose." CR § 3-301(e)(2). A violation of CR § 3-308(b)(1) requires the State to prove beyond a reasonable doubt that the defendant intentionally touched the victim's genital, anal, or intimate area without the victim's consent, for either sexual arousal or gratification or abuse.

The phrase "without the consent" is not defined in statute. In *Travis v. State*, 218 Md. App. 410, 424 (2014), the Court of Special Appeals explained circumstances under which the State could demonstrate a lack of consent when the victim is competent and conscious.[1] In such a

[1] Fourth degree sexual offense does not involve sexual contact with a victim who is substantially cognitively impaired, mentally incapacitated, or physically helpless, which

situation, "[c]onsent may, of course, be lacking because it was expressly denied. Consent may also be lacking because it was implicitly denied, the denial being evidenced by either some degree of resistance or by a rational fear of resisting." *Id.* "[I]n the case of a conscious and competent victim, mere passivity on the victim's part will not establish the absence of consent." *Id.* at 428.

For the purposes of factually determining whether there is a lack of consent by a competent and conscious person to an intimate partner's sexual contact of the person, in my view a court is likely to examine whether evidence demonstrates that the person has previously consented to the actor's sexual contact, and if so, whether that consent may be continuous and ongoing or whether such consent has been withdrawn by the person.

While Maryland courts have "specifically reject[ed] any notion that once consensual sex has been shown, any subsequent sexual activity, *ipso facto*, implies consent," they recognize that "[t]he sensitive question of the relevancy of the victim's past sexual conduct with the defendant must be decided on an ad hoc basis." *Testerman v. State*, 61 Md. App. 257, 264 (1985). While specific instances of prior consensual sexual conduct between a complainant and accused may be relevant to establish a consent defense, the Court of Appeals has required the "[p]roffered evidence of past sexual conduct must contain a direct link to the facts at issue in a particular case before it can be admitted." *White v. State*, 324 Md. 626, 638 (1991).

Courts in other states have suggested that the nature and history of the intimate relationship may be relevant to determining consent or the lack thereof. In *State v. Salazar*, 114 P.3d 1170, 1172 n.3 (Utah 2005), the Court of Appeals in Utah recognized that language in one of that state's sex offense statutes that outlines a lack of consent by an unconscious victim who "has not consented," "appears to refer to a lack of previously given, continuing consent to sexual contact such as might exist in a marriage or other intimate relationship." *See also Commonwealth v. Colon*, 106 N.E.3d 1125, 1128 (Mass. 2018) (evidence of existing relationship between accused and victim relevant to determine "indecent touching" under sexual assault law).

Of course, under current Maryland law, the foregoing analysis involving evidence of lack of consent for proving a violation of CR § 3-308(b)(1) applies only to sexual contact of another without consent involving intimate partners who are *not* married to each other in the absence of

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constitutes a third degree sexual offense prohibited under CR § 3-307(a)(2). With respect to "legally incompetent or unconscious [including sleeping] victims, ... the lack of consent does not have to be established independently by showing either resistance or fear of resistance but is automatically established, as a matter of law, by the status of the victim." *Travis*, 218 Md. App. at 428-29.

the use or threat of force.[2] Under existing CR § 3-318, in pertinent part, a person may not be prosecuted for a violation of CR § 3-308(b)(1) against a victim who was the person's legal spouse at the time of the offense, unless the person engages in sexual contact without consent *and* uses force or threat of force. If this prohibition were repealed, as proposed in Senate Bill 230, this analysis would appear to apply to any individuals who are intimate partners, including spouses.

I hope this is responsive to your request. If you have any questions or need any additional information, please feel free to contact me.

Sincerely,

Jeremy M. McCoy
Assistant Attorney General

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[2] Despite the spousal defense in existing CR § 3-318 to a prosecution of CR § 3-308(b)(1), nonconsensual touching of a spouse may still be prosecuted as second degree assault under CR § 3-203.