

Department of Legislative Services  
Maryland General Assembly  
2018 Session

FISCAL AND POLICY NOTE  
Enrolled - Revised

Senate Bill 270

(Senator Brochin, *et al.*)

Judicial Proceedings

Judiciary

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Courts – Evidence of Sexually Assaultive Behavior – Admissibility (Repeat  
Sexual Predator Prevention Act of 2018)

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This bill authorizes a court, in a prosecution for specified sexual offenses, to admit evidence of “sexually assaultive behavior” by the defendant that occurred before or after the offense for which the defendant is on trial in accordance with the bill’s provisions. The bill establishes procedural requirements for the introduction of such evidence by a State’s Attorney and hearings by a court on the admissibility of the evidence. **The bill takes effect July 1, 2018.**

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**Fiscal Summary**

**State Effect:** The bill is procedural and can be implemented with existing resources. No effect on revenues.

**Local Effect:** The bill is procedural and can be implemented with existing resources. No effect on revenues.

**Small Business Effect:** None.

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**Analysis**

**Bill Summary:** The bill defines “sexually assaultive behavior” 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.

The State must file a motion of intent to introduce evidence of sexually assaultive behavior at least 90 days before trial or at a later time if authorized by the court for good cause. The motion must include a description of the evidence. The State must provide a copy of the motion to the defendant and include any other information required to be disclosed under Maryland Rule 4-262 or 4-263.

The court must hold a hearing outside the presence of a jury to determine the admissibility of evidence of sexually assaultive behavior.

The court may admit evidence of sexually assaultive behavior if the court finds and states on the record that (1) the evidence is being offered to prove lack of consent or rebut an express or implied allegation that a minor victim fabricated the sexual offense; (2) the defendant had an opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior; (3) the sexually assaultive behavior was proven by clear and convincing evidence; and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

**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.

Maryland Rule 4-262 governs discovery and inspection in the District Court. Discovery is available in the District Court in actions that are punishable by imprisonment. Maryland Rule 4-263 governs discovery and inspection in a circuit court. Maryland Rule 4-262 contains an extensive list of information and/or material a State's Attorney must provide to the defense either without a request or upon request. Maryland Rule 4-263 contains an extensive list of information and/or material a State's Attorney must provide to the defense without the necessity of a request.

**Background:** Under Federal Rule of Evidence (FRE) 404(b), evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the alleged character. However, this evidence may be used for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

As part of the Violent Crime Control and Law Enforcement Act of 1994, Congress passed FRE 413 and 414. Under FRE 413, in a criminal case in which a defendant is accused of a sexual assault, as defined under the rule, a court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant. Under FRE 414, in a criminal case in which the defendant is accused of child molestation, as defined under the rule, a court may admit evidence that the defendant committed any other child molestation. Both rules contain disclosure requirements.

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### **Additional Information**

**Prior Introductions:** The bill is similar to bills introduced during previous sessions. HB 369 of 2017 received a hearing in the House Judiciary Committee, but no further action was taken. Its cross file, SB 316, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. SB 235 of 2016 passed the Senate as amended and was referred to the House Rules and Executive Nominations Committee, but no further action was taken.

**Cross File:** HB 301 (Delegate Atterbeary, *et al.*) - Judiciary.

**Information Source(s):** Maryland State’s Attorneys’ Association; Office of the Public Defender; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); U.S. Congress; Department of Legislative Services

**Fiscal Note History:** First Reader - January 26, 2018  
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