State of Maryland
Office of the Attorney General

January 25, 2022

TO: The Honorable Luke Clippinger, Chair, Judiciary Committee

FROM: Carrie J. Williams, Assistant Attorney General

RE: Attorney General's Support for HB 153

The Attorney General urges the Judiciary Committee to report favorably on House Bill 153. House Bill 153 repeals Criminal Law Article, Section 3-318, which provides that, with exceptions, a person cannot be charged for sexually assaulting his or her legal spouse.

Under current law, a person can engage in non-consensual "sexual contact" with his or her spouse without fear of prosecution. Likewise, a person can have vaginal intercourse or engage in a "sexual act" with his or her spouse, even if the spouse is substantively cognitively impaired, mentally incapacitated, or physically helpless, and the State cannot prosecute that act.

Concerns that a repeal of the "marriage defense" could result in a husband being prosecuted for touching his wife without asking permission first are misplaced. The law in Maryland is clear that, in order for the State to prove a lack of consent when the victim is competent and conscious, "mere passivity on the victim's part" is not enough. *Travis v. State*, 218 Md. App. 410, 424 (2014). There must be evidence of: 1) an express denial of consent; or 2) an implicit denial of consent via resistance or a rational fear of resisting. *Id*.

As in any other case involving non-consensual sexual contact, in cases involving spouses the State would have to prove that one spouse touched the other's "genital, anal, or other intimate area," and that the spouse expressly denied consent, resisted the contact, or the circumstances established that a reasonable person in the spouse's position would have been afraid to resist the contact.

What is more, if prosecutions based upon familiar, intimate touching without prior express consent were feasible, there would be examples amongst unmarried

couples, where the marriage defense does not apply. These prosecutions do not (because they cannot) occur between unmarried couples and will not (because they cannot) occur between married couples if the "marriage defense" is repealed.

"Spousal defense" laws are archaic. They stem from the 18th century belief that "marriage constituted permanent consent that could not be retracted."[1] That belief has since been rightly rejected. People do not sacrifice their bodily autonomy when they marry. Being married to the victim should not be a defense to sexual assault. The Attorney General urges the Judiciary Committee to report favorably on House Bill 153.

cc: Members of the Committee

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[1] Rothman, Lily, "When Spousal Rape First Became a Crime in the U.S.", *Time Magazine*, July 28, 2015, available at time.com/3975175/spousal-rape-case-history/ (last visited Jan. 29, 2020).