

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Matthew J. Fader
Chief Justice

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO: House Judiciary Committee
FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523
RE: House Bill 940
Criminal Procedure – Evidence – Admissibility of Creative
Expression
DATE: February 22, 2023
(2/28)
POSITION: Oppose

The Maryland Judiciary opposes House Bill 940. This bill would provide that in any criminal proceeding or juvenile proceeding, the “creative expression” of a defendant or respondent is not admissible against the defendant/respondent unless the court finds, by clear and convincing evidence, certain things.

The Judiciary recognizes the bill’s attempt to respond legislatively to the Supreme Court of Maryland’s decision in *Montague v. State*, 471 Md. 657 (2019), but notes several concerns with this bill. In particular, in a juvenile case, especially at disposition, the child’s creative expression may be of great use to the court in understanding the child and thus crafting a response that best adheres to the purposes of the juvenile court in rehabilitating the child. See Courts Article, § 3-8A-02. Keeping the court from information about the child’s creative expression hampers the court and disadvantages the child.

Of significant concern is the overly broad definition of the term creative expression in the bill. Anything not literal appears to fall within that definition. This would preclude all manner of statement from admission – much more than songs, poems, and artistic expression. Any use of an analogy or metaphor would be disallowed as it is not literal. This would severely impinge on the ability of litigants to admit relevant evidence. Certainly, that cannot be the intention of this legislation.

The Judiciary also notes that the bill may be internally inconsistent in that it establishes a “clear and convincing” standard of proof while at the same time requiring a “strong indication” of a creative expression that refers to the facts of the alleged offense. There is no reason why this should have a clear and convincing standard rather than the same admissibility standard as all other evidence.

In addition, the bill is redundant because, under Maryland Rules 5-402 and 5-403, courts already determine whether evidence is relevant to the allegations in a case and weigh the probative value of evidence against the risk of undue prejudice it may cause.

Judges have their fingers on the pulse of trials and the evidence, but this bill would require extensive hearings, effectively trials within trials, creating an operational burden in an area—admissibility—that is quintessentially within the realm of judicial discretion.

cc. Hon. Marlon Amprey
Judicial Council
Legislative Committee
Kelley O'Connor