

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 211 (Senator Lee)
Judicial Proceedings

Evidence - Causing Unavailability of Witness - Standard of Proof

This bill alters, from clear and convincing evidence to a preponderance of evidence, the standard of proof needed to admit evidence under a limited exception to the hearsay rule in a case involving a felony violation of Title 5 of the Criminal Law Article (controlled dangerous substances) or a crime of violence under § 14-101 of the Criminal Law Article when the statement is offered against a party who, through wrongdoing, has caused the unavailability of the witness who made the statement.

Fiscal Summary

State Effect: The bill is procedural and does not materially affect State finances.

Local Effect: The bill is procedural and does not materially affect local finances.

Small Business Effect: None.

Analysis

Current Law: Before admitting a statement under this exception to the hearsay rule, the court must hold a hearing outside the presence of the jury at which the Maryland Rules of Evidence are strictly applied, and find by clear and convincing evidence, that the party against whom the statement is offered has engaged in, directed, or conspired to commit the wrongdoing that rendered the witness unavailable.

A statement may not be introduced into evidence unless it was made under oath and subject to the penalties of perjury at a proceeding or in a deposition, was written and signed by the declarant, or was recorded at the same time the statement was made. Additionally, after

learning that the declarant is unavailable, the party offering the statement must, as soon as practicable, notify the adverse party of its intention to offer the statement, the particulars of the statement, and the identity of the witness through whom the statement will be offered.

Maryland Rule 5-804 specifies that the “unavailability of a witness” includes situations in which the declarant is (1) exempted by a court ruling of privilege from testifying; (2) refuses to testify despite a court order to do so; (3) testifies to a lack of memory of the subject matter of the declarant’s statement; (4) is unable to be present or testify because of death or then existing illness or infirmity; or (5) is absent from the hearing and the party offering the statement has been unable to procure the declarant’s attendance by process or other reasonable means.

Related Crimes

The crimes of inducing false testimony or avoidance of a subpoena, retaliation for testimony, and intimidating or corrupting a juror are misdemeanors which subject a violator to imprisonment for up to 10 years and/or a \$5,000 maximum fine. However, if the applicable testimony or evidence relates to a felony violation of Title 5 of the Criminal Law Article (controlled dangerous substances), a crime of violence under § 14-101 of the Criminal Law Article, or a conspiracy or solicitation to commit a crime of violence, the offense is a felony, punishable by imprisonment for up to 20 years. A sentence imposed for any of these crimes may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation.

Background: The evidentiary standard known as “preponderance of the evidence” has been described as requiring evidence sufficient to establish that a fact is “more likely true than not true,” “more probable than not,” or that amounts to at least 51% of the evidence. “Preponderance of the evidence” is the standard applicable in most civil cases. “Clear and convincing evidence” is more than a preponderance of the evidence and less than is required for the standard “beyond a reasonable doubt.”

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State’s Attorneys’ Association; Department of Legislative Services

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Analysis by: Amy A. Devadas

Direct Inquiries to:
(410) 946-5510
(301) 970-5510