

Department of Legislative Services

Maryland General Assembly

2020 Session

FISCAL AND POLICY NOTE

First Reader

Senate Bill 271

(The President, *et al.*) (By Request - Administration)

Judicial Proceedings

Crimes - Victim and Witness Intimidation - Penalties and Procedures

This Administration bill (1) expands the applicability of an exception to the hearsay rule relating to witness intimidation and (2) prohibits a person from causing serious physical injury or death as a result of violations pertaining to victim, witness, or related intimidation. The bill establishes criminal penalties for violations of the new prohibitions.

Fiscal Summary

State Effect: General fund expenditures increase, beginning in the out-years, due to the bill's penalty provisions, as discussed below. Revenues are not affected.

Local Effect: The bill is not anticipated to materially affect local government finances or operations.

Small Business Effect: The Administration has determined that this bill has minimal or no impact on small business (attached). The Department of Legislative Services concurs with this assessment.

Analysis

Bill Summary:

Expanded Application of an Existing Exception to the Hearsay Rule

While evidentiary rules generally exclude hearsay from being admitted into evidence, there are exceptions. Under § 10-901 of the Courts and Judicial Proceedings Article, a statement

is not excluded by the hearsay rule and is admissible during the criminal trial of a defendant charged with 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 if the statement is offered against a party that has engaged in, directed, or conspired to commit wrongdoing that was intended to and did render the witness unavailable. The bill removes the limited application of this exception to felony drug crimes and crimes of violence. Thus, under the bill, the exception would apply in any criminal case.

Prohibition on Causing “Serious Physical Injury” to Another during the Commission of Witness Intimidation Offenses

The bill establishes several new criminal offenses. The offenses prohibit causing “serious physical injury” to another person or causing the death of another person as a result of a violation of § 9-302 (Inducing False Testimony or Avoidance of a Subpoena), § 9-303 (Retaliation for Testimony), or § 9-305 (Intimidating or Corrupting a Juror, Witness, or Court Officer) of the Criminal Law Article. “Serious physical injury” is a physical injury that creates a substantial risk of death or causes permanent or protracted serious (1) disfigurement or (2) functional loss or impairment of any bodily member or organ.

Each of these new offenses is a felony and carries a penalty of imprisonment for up to 15 years (causing serious physical injury) or up to 25 years (causing death). A sentence imposed for any of these offenses may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation.

Current Law:

Exception to the Hearsay Rule

Before admitting a statement under the exception to the hearsay rule established in § 10-901 of the Courts and Judicial Proceedings Article, the court must hold a hearing outside the presence of the jury at which the Maryland Rules of Evidence are strictly applied. The court must find by clear and convincing evidence that the party against whom the statement is offered has engaged in specified activities that rendered the witness unavailable. A statement entered under this exception 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.

As soon as practicable after learning that the declarant is unavailable, the party offering the statement must 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 (1) is 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.

Witness Intimidation

Sections 9-302, 9-303, and 9-305 of the Criminal Law Article refer to witness intimidation offenses. Generally, a person convicted of any of the following offenses is guilty of a misdemeanor and subject to imprisonment for up to 10 years and/or a maximum fine of \$5,000. However, if the offense is related to a felony controlled dangerous substance offense, the commission of a crime of violence under § 14-101 of the Criminal Law Article, or a conspiracy or solicitation to commit one of these offenses, the person is guilty of a felony and subject to imprisonment for up to 20 years. A sentence for witness intimidation may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the witness intimidation violation.

§ 9-302 – Inducing False Testimony or Avoidance of a Subpoena

A person may not harm another, threaten to harm another, or damage or destroy property with the intent to (1) influence a victim or witness to testify falsely or withhold testimony or (2) induce a victim or witness to avoid the service of a subpoena or summons to testify, to be absent from an official proceeding to which the victim or witness has been subpoenaed or summoned, or not to report the existence of facts relating to a crime or delinquent act. A person is also prohibited from soliciting another person to commit these prohibited acts.

§ 9-303 – Retaliation for Testimony

A person may not intentionally harm another, threaten to harm another, or damage or destroy property with the intent of retaliating against (1) a victim or witness for giving testimony in an official proceeding or reporting a crime or delinquent act; (2) a juror for any reason relating to the performance of the juror’s official duties in a pending or completed case; or (3) an officer of the court for any reason relating to the performance of the officer’s official duties in a pending or completed case. A person is also prohibited from soliciting another person to commit these prohibited acts.

§ 9-305 – Intimidating or Corrupting a Juror, Witness, or Officer of the Court

A person may not use threat, force, or corrupt means to try to influence, intimidate, or impede a juror, a witness, or an officer of the court in the performance of the person's official duties. A person is also prohibited from soliciting another person to engage in these prohibited acts.

Background:

Violent Crime

The surge in violent crime in Baltimore City has been the subject of extensive discussion and media coverage in recent years. The city experienced a total of 344 homicides in 2015, a 63% increase over the 211 homicides recorded the previous year. In 2016, 2017, and 2018, there were 318, 343, and 309 homicides, respectively. Baltimore ended 2019 with 348 killings, the second-highest on record. Prosecutors have often remarked that the “stop snitching” culture and extensive witness intimidation in Baltimore City impede their ability to prosecute cases. This bill is part of the Governor's legislative package to address violent crime, including initiatives to increase penalties for witness intimidation.

Federal Hearsay Exception for Unavailable Declarant and Forfeiture by Wrongdoing

Federal Rule of Evidence 804(b)(6) establishes an exception to the hearsay rule for a “statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the declarant's unavailability as a witness, and did so intending that result.”

Forfeiture by wrongdoing is an exception to the hearsay rule and the right of criminal defendants to confront the witnesses against them. Forfeiture by wrongdoing typically occurs when a defendant intentionally or wrongfully makes the declarant of a statement unavailable to testify. The doctrine of forfeiture by wrongdoing is often mentioned in connection to witness intimidation.

Witness Intimidation Violations and Convictions

The Judiciary advises that during fiscal 2019, 66 violations were filed in the District Court and 84 violations were filed in the circuit courts for felony witness intimidation, resulting in 12 guilty dispositions. According to the Maryland State Sentencing Guidelines Database, 15 individuals were sentenced in the State's circuit courts during fiscal 2019 for felony witness intimidation.

The Division of Correction (DOC) advises that it had seven intakes with one or more offenses for felony witness intimidation that pertain to the Criminal Law Article during

fiscal 2019. The division does not have detailed information about the nature of the intimidation committed by this population. In fiscal 2019, the Division of Parole and Probation received 18 people on supervision for intimidation (7 of a juror, 11 of a witness).

State Expenditures: General fund expenditures increase as a result of the bill's incarceration penalties due to people being committed to State correctional facilities for longer periods of time. Any such effect is likely to begin in the out-years, as individuals convicted under the bill finish serving sentences imposed for other crimes.

While not every instance of witness intimidation involves serious physical injury or death, the potential for consecutive sentences imposed under the bill affects the amount of time individuals spend in State facilities and as a result, cumulative State incarceration expenditures. The magnitude of the bill's impact on State expenditures depends on the frequency and length of consecutive sentences imposed under the bill, which is within judicial discretion.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$3,700 per month. Excluding overhead, the average cost of housing a new State inmate (including health care costs) is about \$1,015 per month. Excluding all health care (which is a fixed cost under the current contract), the average variable costs total \$191 per month.

For illustrative purposes only, assuming that individuals convicted of felony witness intimidation under existing statute are the individuals most likely to be convicted of an offense established under the bill, if each of the seven DOC intakes for felony witness intimidation during fiscal 2019 were subject to a consecutive 15-year sentence under the bill, it would result in 105 years of additional time in State correctional facilities for each annual cohort of felony witness intimidation inmates. Assuming the variable inmate costs of \$191 per month excluding health care, State costs could increase by more than \$240,000 for each annual cohort of inmates.

This estimate does not account for the effect of the bill's expansion of the existing hearsay exception. Given the number of variables involved in a successful prosecution, the effect of that provision on convictions and incarcerations cannot be reliably estimated.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 357 (The Speaker, *et al.*) (By Request - Administration) - Judiciary.

Information Source(s): Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Department of Public Safety and Correctional Services; *The Baltimore Sun*; Federal Rules of Evidence; Department of Legislative Services

Fiscal Note History: First Reader - January 31, 2020
md/aad

Analysis by: Hillary J. Cleckler

Direct Inquiries to:

(410) 946-5510

(301) 970-5510

ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Crimes - Victim and Witness Intimidation - Penalties and Procedures

BILL NUMBER: HB357

PREPARED BY: Governor's Legislative Office

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS

OR

WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS