

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 64

(Senator Lee)

Judicial Proceedings

Judiciary

Criminal Procedure - Evidence - Causing Unavailability of Witness

This emergency bill alters a limited exception to the hearsay rule in a criminal case involving specified felony drug crimes or a “crime of violence” when a statement is offered against a party who, through wrongdoing, has caused the unavailability of the witness who made the statement. The bill (1) expands the application of this hearsay exception to all felony criminal cases and (2) lowers, from clear and convincing evidence to a preponderance of the evidence, the standard of proof needed to admit evidence under the exception.

Fiscal Summary

State Effect: The bill is procedural in nature and does not directly affect State finances, as discussed below.

Local Effect: The bill is procedural in nature and does not directly affect local finances, as discussed below.

Small Business Effect: None.

Analysis

Current Law: 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. Maryland Rule 5-801(a) defines a “statement” as (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

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. 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.

Related Crimes

The crimes of inducing false testimony or avoidance of a subpoena, retaliation for testimony, and intimidating or corrupting a juror are misdemeanors that 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 such a crime, 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: 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.

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 evidence that the contention is highly probable. The burden that must be met for the clear and convincing evidentiary standard is greater than a preponderance of the evidence but less than evidence that is “beyond a reasonable doubt.” Federal courts and courts in several states use the preponderance of the evidence standard in cases involving forfeiture by wrongdoing.

State/Local Fiscal Effect: While the bill’s provisions aid prosecutors in pursuing cases in which witnesses are unavailable to testify, given the number of variables involved in a successful prosecution, the isolated effect of the bill’s expansion and alteration of an exception to the hearsay rule on convictions and incarcerations cannot be reliably estimated.

Additional Information

Prior Introductions: SB 211 of 2019, a similar bill, received an unfavorable report from the Senate Judicial Proceedings Committee. Its cross file, HB 1303, was referred to the House Rules and Executive Nominations Committee, but no further action was taken.

Designated Cross File: HB 40 (Delegate Barron, *et al.*) - Judiciary.

Information Source(s): Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State’s Attorneys’ Association; *Black’s Law Dictionary*; *University of Baltimore Law Review*; *The Baltimore Sun*; Department of Legislative Services

Fiscal Note History: First Reader - January 14, 2020
rh/jkb Third Reader - March 13, 2020
Revised - Amendment(s) - March 13, 2020
Enrolled - April 2, 2020
Revised - Amendment(s) - April 2, 2020

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