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MAJORITY WHIP

Judicial Proceedings Committee

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THE SENATE OF MARYLAND  
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Senate Judicial Proceedings Committee  
**Senate Bill 64 - Criminal Procedure – Evidence – Causing Unavailability of  
Witness**

Senate Bill 64 is a timely bill that seeks to tackle the urgent matter of witness intimidation. The intimidation of witnesses has eroded the effectiveness and credibility of our justice system across the state of Maryland, and has been particularly acute in Baltimore City. The bill brings Maryland's hearsay exception rule involving witness intimidation in line with the far more reasonable existing federal standard. The Governor will be introducing a bill to expand the list of crimes that fall under Maryland's current hearsay exception, and while our bill retains the existing list of crimes, it adjusts the burden threshold for serious and violent crimes.

Currently, under § 10-901 of the Courts and Judicial Proceedings Article, a statement is only admissible during the criminal trial of a defendant charged with a felony violation of 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.

SB 64 broadens the hearsay exception when a witness is made unavailable through wrongful actions or acquiescence. The bill brings our standard in-line with the federal standard of "preponderance of the evidence." Currently, Maryland has a high standard of clear and convincing evidence, which is hard to prove in many of the relevant circumstances when the intimidation of witnesses might be subtle or out of sight. The preponderance standard is sufficient to obtain a civil verdict in Maryland, and it should also be a sufficient threshold to

allow credible evidence to be considered when the context involves likely court manipulation. The validity of that evidence can then be challenged in court, along with the credibility of the declarant and the witness.

Federal Rule of Evidence 804(b)(6) provides for the exception to hearsay when 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.” This hearsay exception is widely known as “forfeiture by wrongdoing” and is often mentioned in correlation with witness intimidation. Federal courts and courts in several states use the preponderance of the evidence standard, or “more likely true than not true” threshold with the forfeiture by wrongdoing hearsay exception.

The admissibility of evidence is not the same as the credibility of evidence. The trier of fact can ascertain whether they believe the statement or not, based on the credibility of the witnesses and the ability for defense counsel to impeach the credibility of both the declarant and the witness providing the hearsay exception testimony. The ability to hear this evidence is crucial to prevent injustices against both the underlying victims, and those victims created by the witness intimidation or wrongful acts that make the declarant unavailable to testify in court.

We face serious problems in our criminal justice system, and this bill is not a silver bullet, but we are fighting criminal enterprises that must be held accountable for their crimes, especially crimes like witness intimidation that erode the integrity and effectiveness of our entire system of justice. If police are not trusted and witnesses are intimidated, limited justice will be available in the courts and people will seek their own solutions, only exacerbating violence across the State.

This legislation is a balanced approach to fighting crime and witness intimidation. Once this policy becomes law, there will be less cause to intimidate witnesses, because their out of court statements would be allowed into evidence and their unavailability wouldn’t achieve their intended goal of silencing the relevant testimony. We not only want to convict dangerous criminals who are accused of committing crimes of violence or felony CDS offenses, we also want to dis-incentivize witness intimidation all together.

For these reasons, I respectfully request a favorable report on SB 64.