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January 16, 2020

**Testimony before the Senate Judicial Proceedings Committee:  
SB 64 – Criminal Procedure - Evidence – Causing Unavailability of Witness  
Submitted by Jennifer L. Morton, State's Attorney, Calvert County**

Thank you for the opportunity to comment in **support** of SB 64. I urge this Committee to issue a favorable report on SB 64. I have been a prosecutor for almost 20 years and have seen firsthand the strong motivation that criminal offenders have to ensure that the witnesses in pending cases do not testify. Often times, even while incarcerated, they orchestrate the silence of State's witnesses by ordering "hits" on the witnesses to make sure that the witnesses are not available to come to court.

Court and Judicial Proceedings, § 10-901 is based on the well-established principle of forfeiture by wrongdoing, which was first recognized over 140 years ago. Forfeiture in this context simply means that the defendant forfeits his or her Sixth Amendment right to confront the witnesses against them when that witness is unavailable to testify due to the defendant's own wrongdoing – wrongdoing that is caused or acquiesced in by the defendant for the purpose of causing the witness to be unavailable to testify at trial – such as the killing of a witness scheduled to testify against the defendant in a pending criminal case. Section 10-901 restricts the application of forfeiture by wrongdoing to those cases involving felony drug offenses and crimes of violence.

The statute is grounded on fairness: a defendant should not be allowed to undermine the judicial process and benefit from causing witnesses to be silenced. If the trial court determines that the State has met the requirements of §10-901, then certain out of court statements (hearsay) made by the witness can be admitted at trial against the defendant, but only if the prior statement was given under oath and subject to penalty or perjury at a prior trial, hearing or proceeding, or was a signed written or recorded statement by the witness. Maryland currently has one of the most stringent procedures in the nation, as Courts and Judicial Proceedings, § 10-901 requires not only a full evidentiary hearing with strict application of the rules of evidence, but also requires that the State prove the defendant's wrongdoing by clear and convincing evidence. The Court of Special Appeals has recognized that this heightened burden of persuasion makes proving forfeiture by wrongdoing more difficult in Maryland than it is in most states and in the federal courts, which rely on the lower preponderance level of persuasion.

SB 64 will lessen the standard of proof from the more rigorous standard of clear and convincing evidence (proving that it is substantially more likely than not true) to a less rigorous standard of preponderance of the evidence (that there is a greater than 50% chance that the claim is true) which is the same standard that is applicable to most other types of evidentiary hearings and preliminary questions of fact. This change will bring Maryland in line with the majority of other states who apply this same standard as well as the Federal Rules of Evidence and serves to foster the strong public policy interest in reducing the incentive for criminals to eliminate their witnesses before trial. For all of these reasons, I **urge this Committee to issue a favorable report on SB 64.**