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THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

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Sponsor Testimony for Senate Bill 146 - Criminal Procedure - Admission of Out-of-Court Statements - Assault in the Second Degree

Mr. Chairman, Vice Chair, and Members of the Senate Judicial Proceedings Committee,

Senate Bill 146 adds second degree assault to the statute that allows prosecutors to introduce statements in a criminal trial when the witness is unavailable and when that unavailability was caused by the wrongdoing of a criminal defendant. The statute to be amended is called the "Unavailability of declarant of statement due to wrongdoing" (see Court and Judicial Proceedings §10-901) Both codify the doctrine of "forfeiture against wrongdoing" which stands for the proposition that although an accused defendant, in general, has a right to confront a witness against them (by cross-examination), a court will not suffer a party to profit by his (or her) own wrongdoing (see *Crawford v. Washington 541 U.S. 36 (2004)*, *Davis v. Washington 547 U.S. 813 (2006)*).

And while forfeiture by wrongdoing is recognized, either by statute, rule, or common law in every state, the bill sponsor could not find another federal or state jurisdiction that limits its use as only Maryland does to felonies. Rather, every else but Maryland, invokes the doctrine in any criminal case where a criminal defendant uses force, threats, persuasion, control, wrongful disclosure of information, collusion or any other behavior that creates a nexus between the defendant's acts and the unavailability of the declarant.

While SB 146 does not seek to eliminate the seemingly inexplicable difference in treatment of defendants charged with felonies and those with misdemeanors that engage in wrongdoing which results in a witness not testifying in court, it does seek recognition and equal treatment for the serious and violent charge of second degree assault for which, by its definition, is a crime of violence involving non-minor injuries and up to 10 years in prison (Criminal Law §3-203).

harm to victims and its high penalty do not match its stated category as a misdemeanor. Rather, in substance, it is analogous to a felony.

This mislabeling is also allowing a miscarriage of justice under the forfeiture by wrongdoing statute by depriving prosecutors the opportunity to go after domestic abusers as they are most often charged with second degree assault and their frequent modus operandi is to intimidate, coerce, and manipulate their victims into backing out of appearing in court to testify about the suffering and physical harm they have endured. Domestic abusers are well-aware of Maryland's loophole, so even when brave and battered women call the police desperately seeking the protection they deserve, giving law enforcement a full, recorded accounting, the abusers are often not held to account. That is because during the months it takes to bring the defendant to trial, the victims are being worn down by the defendant, and she never tells her story in court.

Without amending §10-901, the victim's previous recorded statement is barred from use at trial and another known abuser walks free. A favorable Judicial Proceedings Report on SB 146 will stop it.