

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 569 (Senator Lee)
Judicial Proceedings

Intercepted Communications - Penalties and Admissibility of Evidence

This bill (1) eliminates the incarceration penalties for violations of the State's wiretap law and (2) adds an exception to the prohibition on receipt into evidence of communications intercepted lawfully in another state that are offered as evidence in a criminal proceeding, including notification requirements.

Fiscal Summary

State Effect: Potential minimal decrease in general fund incarceration expenditures due to the bill's repeal of incarceration penalties. Revenues are not affected.

Local Effect: Potential minimal decrease in local incarceration expenditures due to the bill's repeal of incarceration penalties. Revenues are not affected.

Small Business Effect: None.

Analysis

Bill Summary/Current Law:

Interception of a Communication

Except as otherwise provided in statute, it is unlawful for a person to:

- willfully intercept, endeavor to intercept, or procure any other person to intercept a wire, oral, or electronic communication;

- willfully disclose, or endeavor to disclose, to any other person the contents of a wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through an illegal intercept; or
- willfully use, or endeavor to use, the contents of a wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through an illegal intercept.

Violators are guilty of a felony, punishable by imprisonment for up to five years and/or a \$10,000 maximum fine. The bill removes the incarceration penalty for this violation and repeals its classification as a felony.

One specified exception is the interception of a communication where the interceptor is a party to the communication and all of the parties to the communication have given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of State or federal law.

Divulging Contents of a Communication

With specified exceptions, a person or entity providing an electronic communication service to the public may not intentionally divulge the contents of any communication (other than to the provider of the service or an agent of the provider) while in transmission on that service to any person or entity other than an addressee or intended recipient of the communication or an agent of the addressee or intended recipient.

Violators are guilty of a misdemeanor, punishable by imprisonment for up to five years and/or a \$10,000 maximum fine. However, lesser penalties of imprisonment for up to one year and/or a \$1,000 maximum fine apply to a first offense involving a disclosure that is not for a tortious or illegal purpose or for purposes of commercial advantage or private commercial gain, so long as the communication meets specified criteria. The bill removes the incarceration penalties for these violations.

Admission of Evidence Obtained through an Intercepted Communication

Whenever any wire, oral, or electronic communication has been intercepted, no part of the contents of the communication and no evidence derived from the communication may be received in evidence in any trial, hearing, or other proceeding if the disclosure of that information would be in violation of the State's wiretap and electronic surveillance laws.

However, if the communication is one that was lawfully intercepted in another jurisdiction but would be considered illegally intercepted if made in the State, the contents of the communication and evidence derived from the communication may be received in evidence in any trial, hearing, or other proceeding if (1) at least one of the parties to the

communication was outside the State during the communication; (2) the interception was not made as part of or in furtherance of an investigation conducted by or on behalf of law enforcement officials of this State; and (3) all parties to the communication were co-conspirators in a crime of violence under § 14-101 of the Criminal Law Article.

The bill adds an additional exception for communications intercepted lawfully in another state that are offered as evidence in a criminal proceeding. Under the bill, the communication may be received into evidence if a court determines that (1) the contents of the communication and the evidence derived from it are offered as evidence of a material fact in a criminal proceeding and are more probative on the applicable point than alternative evidence that can be reasonably procured and (2) admission of the communication and evidence is in the interest of justice. If this exception is to be used, the proponent of the communication/evidence must notify the adverse party in advance of the proceeding, as specified in the bill.

The bill's exception is similar to Maryland Rule 5-803(b)(24), which establishes that, under exceptional circumstances, a statement not specifically covered by another exception to the hearsay rule under Rules 5-803 and 5-804 is not excluded if it has equivalent circumstantial guarantees of trustworthiness, and the court makes determinations that are similar to the required determinations in the bill. A statement may not be admitted under this exception unless the proponent of it provides notice meeting specified criteria to the adverse party.

Background: According to the Maryland Sentencing Guidelines Database, the Maryland State Commission on Criminal Sentencing Policy received information for two individuals sentenced to two total counts of unlawful interception of communications under § 10-402(a) of the Criminal Law Article in the State's circuit courts during fiscal 2019. No individuals were sentenced for divulging the contents of a communication under § 10-402(d) of the Criminal Law Article in the State's circuit courts during that time. The Department of Parole and Probation advises that it did not conduct any intakes during fiscal 2019 for interception of a communication or disclosure/use of a wiretap.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 803 (Delegates Dumais and Crutchfield) - Judiciary.

Information Source(s): Baltimore City; Kent, Montgomery, and Worcester counties; City of Westminster; towns of Bel Air and Leonardtown; 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; Department of Legislative Services

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