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Bill Number: HB803
Scott D. Shellenberger, State's Attorney for Baltimore County
Support

WRITTEN TESTIMONY OF SCOTT D. SHELLENBERGER,
STATE'S ATTORNEY FOR BALTIMORE COUNTY,
IN SUPPORT OF HOUSE BILL 803
INTERCEPTED COMMUNICATIONS

I write in support of House Bill 803 which will modernize Maryland's antiquated wiretap statute and will no longer criminalize the collection of evidence in a criminal case.

For decades Maryland's wiretap statute has remained virtually unchanged. The intent behind the original statute was to protect the privacy of people and prevent law enforcement from eavesdropping and recording telephone conversations of potential Defendants without a court order. When originally drafted, and for much of its life, the ability of citizens to audio record was fairly limited. Changes in social attitudes about audio recording and the advancement of technology forces all party consent States like Maryland to criminalize socially accepted behavior.

Maryland is an all-party consent state. It requires notice to and consent by all parties to an audio recording. Because of this law, we had to amend the wiretap statute to launch body cameras in this state. Maryland is in the minority among states as 38 states are one party consent states who do not have this modern problem.

Now is the time to bring Maryland into the modern age. House Bill 803 does two important things:

1. It takes away the criminal penalty for something ordinary citizens do every day without realizing they are violating the law and;
2. Creates standards which will allow a court to rule on the admissibility of audio recordings in a criminal case.

Let me give you two very real examples that have occurred in my jurisdiction.

On May 28, 2017 a woman reported to the Baltimore County Police Department that she had been raped by her husband from whom she was separated. It took a few interviews for the victim to reveal the full extent of the crime. During one of the interviews, she turned over to the Detective a video and audio recording of the rape. She had surreptitiously recorded part of the incident with her cell phone.

When she audio recorded the rape, she committed a felony. A wiretap violation under Courts & Judicial Proceedings Article 10-402.

When she gave that recording to the Detective, she committed another felony.

When the Detective gave the audio to my prosecutor, he committed a felony.

When the prosecutor gave the audio to me she committed a felony.

If I hit play right now, I would be committing a felony.

Why are we living in the past? Why can't I play the best evidence in a case in a criminal trial? A Judge ruled we could not play that audio in court under §10-405.

We lost the case. Not guilty. As the audio of the rape sat in a drawer, inadmissible. The cries of the victim never heard by the jury. The number of times she said no never heard by the jury. The number of times she said stop never heard.

But it is not just prosecutors who want this evidence. The antiquated law works both ways.

In the second example, it is Defense Counsel who would like to use the audio and video that CJ §10-405 says cannot be used in court. Last year a young woman reported to the Baltimore County Police that she was with four young males at a restaurant. She believed that one of the men slipped her some type of drug. The woman alleged that she was taken to a hotel and raped by all four of them. She claimed she was unconscious and unable to move during the rape.

All four males were arrested. They were all under the age of 25. Two Defendants were in jail and two Defendants were on home detention. All four were detained for several days.

Then, on a Friday at 2:00p.m., Defense Counsel provided my office the cell phone of one of the Defendants. My prosecutors and I watched a video and audio recording of part of the "rape". The victim was not unconscious and was, in fact, an active participant in some of the acts. While I did not and do not condone the actions of these four men and I did not and do not believe the victim made her statements out of malice, the case was not what we thought it was.

That Friday afternoon, the two jailed Defendants were immediately released. Early the next week, the two Defendants on home detention were released. No date rape type drugs were found in the victim's urine test. After further investigation, all charges were dropped.

Had we proceeded to trial that audio would have been inadmissible in evidence. What is more when Defense Counsel handed that phone to my prosecutor, he committed a felony. When that prosecutor brought that video and audio to me, she committed a felony. If I played that audio for you right now, I would be committing a felony.

Let us not forget nanny cameras and doorbell cameras. Many models record video and audio. While they often come with a sticker that is supposed to alert people they are being recorded, many people do not post these warnings. In Maryland if you have audio recording and there is no implied consent by posting the warning you are violating the law.

Now is the time to bring Maryland into the modern age. Now is the time for our law to catch up with the society we all live in today. Now is the time to have the ability

to bring the best evidence into criminal court. This should be so whether we are a prosecutor or defense attorney.

I urge a favorable report of House Bill 803.