
BILL NO: Senate Bill 629
TITLE: Intercepted Communications - Penalties and Admissibility of Evidence
COMMITTEE: Judicial Proceedings
HEARING DATE: February 25, 2021
POSITION: **Information**

Senate Bill 629 creates an exception to the hearsay rule in criminal matters for audio that was recorded by one party without the consent of the other party, in violation of Maryland's wiretap laws. Because, as currently drafted, it pertains to criminal trials or other criminal proceedings, the Women's Law Center is not taking a position but offers some information to clarify the issues.

Most importantly for the WLC, during conversations with various stakeholders about this bill, it appears there is a perception that this will enable the use of one-party consent audio recordings in civil matters, specifically civil protection order cases and custody cases. This perception is flawed for a variety of reasons.

First, procedurally and timing-wise, the cases do not occur in a manner that would allow the audio to be admitted into a civil protection order case. A protection order case occurs as soon as 7 days after the alleged crime has occurred. If charges are filed (we understand there are amendments that this law would apply to crimes articulated in the Public Safety Article), that case will eventually make its way to a possible trial, but not until long after the protection order case. Any competent lawyer could not advise a client to use one-party obtained audio in the protection order case. It would be malpractice, and subject the client to possible criminal charges. There is no immunity possible in this context.

Further, there is a perception that after the evidence is entered into the criminal matter, then a person would be free to use it in any subsequent case where it is relevant. We can conceive of one-party audio obtained at the time of commission of a crime under the Public Safety Article having some sort of relevance in, for example, a custody case. However, the bill does not explicitly state this, so that may still be violative of criminal law.

One-party audio recording in a criminal matter may at times be the best evidence for a category of victims who are often not believed, victims of domestic abuse or sexual assault, victims of police brutality and the like, or cases where there is no other evidence to prove the crime other than their own testimony. Prosecutors can offer immunity for providing this recording, and a court would determine whether to allow it to be admitted into evidence. This can be advantageous in certain cases.

But, *most cases never proceed to trial*, and the recording would never actually be entered into evidence. In all those cases, the slight possibility of using it in a subsequent civil matter is nonexistent without violating our two-party consent wiretap law.

Finally, while the State's Attorneys can use this evidence, so can defense counsel. The prosecutor does not have to offer immunity for someone who seeks to use one-party audio recording which

violates Maryland's wiretapping law. This bill would reduce the illegal use from a felony to a misdemeanor, although the fine can be as high as \$10,000.

Thank you for your consideration.

The Women's Law Center of Maryland is a private, non-profit, membership organization that serves as a leading voice for justice and fairness for women. It advocates for the rights of women through legal assistance to individuals and strategic initiatives to achieve systemic change.