

Department of Legislative Services
Maryland General Assembly
2006 Session

FISCAL AND POLICY NOTE

Senate Bill 969 (Senator McFadden)
Judicial Proceedings

**Criminal Procedure - Electronic Video and Audio Recording of Witnesses in
Murder and Manslaughter Investigations**

This bill authorizes a State's Attorney to make an electronic video and audio recording of the questioning of a witness to a homicide. The recording is admissible as evidence against a defendant accused of homicide, if the witness is unavailable to testify at trial due to the witness's death, incapacity, or absence, and certain other conditions are met.

Fiscal Summary

State Effect: General fund expenditures by the Office of the Public Defender (OPD) for additional staff and panel attorneys could increase, perhaps significantly, to the extent the questioning of witnesses is recorded pursuant to this bill.

Local Effect: Potential increase in local expenditures if State's Attorneys have to transcribe recordings for use by judges, jurors, or defense counsel.

Small Business Effect: None.

Analysis

Bill Summary: An oral, written, or sign language statement of a witness made as a result of questioning by a State's Attorney is admissible as evidence against a defendant in a homicide trial if the following conditions are met:

- an electronic video and audio recording of the statement is made;

- the recording includes statements advising the witness of the right to refuse to self incriminate, the right to remain silent, and the right to have an attorney present;
- the recording includes the witness's oath, under penalty of perjury, that the responses are accurate;
- an attorney from OPD is present who may cross-examine or impeach the credibility of the witness;
- the recording is accurate and has not been altered;
- the recording has been preserved and maintained in a documented chain of custody;
- the recording has been made available to the defendant and defendant's legal counsel; and
- the witness is unavailable to testify at the trial due to death or incapacity, or the witness cannot be reasonably located.

The bill covers witnesses to murder, attempted murder, and manslaughter, including manslaughter by vehicle or vessel.

The bill cannot be construed to affect or limit a witness's right to refuse to testify on the grounds of self-incrimination, as guaranteed by the Fifth Amendment to the U.S. Constitution and Article 22 of the Maryland Declaration of Rights.

Current Law: The Maryland Rules permit any deposition to be recorded by videotape or audiotape. They specify identifying information that must be included on the recording, as well as how objections are treated.

Article 21 of the Maryland Declaration of Rights guarantees the right of any person accused of a crime to confront and examine the witnesses against the person. However, the Maryland Rules authorize the following types of hearsay statements to be admitted into court if the person who made them is unavailable to testify:

- former testimony;
- statements under belief of impending death;
- statements against interest;
- statements about the declarant's own birth and family history;
- similar statements about the declarant's family members; and
- other statements that are offered as evidence of a material fact, if the court finds that a statement is more probative on the point for which it is offered than any

other evidence that could reasonably be procured, and the interests of justice will best be served by its admission.

In addition, child victims of sexual abuse may testify by closed circuit television, or their out-of-court statements may be admitted into evidence under certain circumstances.

Background: Killing material witnesses to homicides has become an increasing concern in recent years. It is believed that admitting dead witnesses' taped testimony into evidence at a homicide trial could reduce such killings.

According to the *2004 Uniform Crime Report*, the last year for which statistics are available, there were 521 homicides in Maryland.

State Fiscal Effect: OPD advises that the bill's requirement that a public defender be present during the questioning of all homicide witnesses could require the hiring of additional staff attorneys at a significant cost. In addition, the presence of a public defender while a witness is being questioned could create a conflict of interest at a subsequent criminal trial, especially in multi-defendant trials or where more than one witness is questioned in connection with the same homicide. When such a conflict occurs, the office hires outside "panel" attorneys to handle the case.

Additional Information

Prior Introductions: Identical bills HB 707/SB 310 of 2005, received unfavorable reports from the House Judiciary Committee and Senate Judicial Proceedings Committee, respectively. SB 421 of 2004, also an identical bill, received an unfavorable report from the Senate Judicial Proceedings Committee.

Cross File: HB 1485 (Delegate C. Davis) – Judiciary.

Information Source(s): State's Attorneys' Association, Judiciary (Administrative Office of the Courts), Office of the Public Defender, Department of Legislative Services

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