

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

House Bill 116

(Delegate Mitchell, *et al.*)

Judiciary

Judicial Proceedings

**Courts and Judicial Proceedings - Interception of Communications - Abuse or
Neglect of Vulnerable Adult and Medicaid Fraud**

This bill adds abuse or neglect of a vulnerable adult and offenses relating to Medicaid fraud under the Criminal Law Article to the list of crimes for which evidence may be gathered during a criminal investigation through the interception of oral, wire, or electronic communications. The bill also adds these offenses to the list of crimes for which a judge may grant an order authorizing the interception of wire, oral, or electronic communications.

Fiscal Summary

State Effect: Increase in general fund revenues from fines imposed in District Court cases and civil penalties in Medicaid fraud cases. Minimal increase in general fund expenditures if the availability of wiretaps under the bill results in more convictions for the applicable offenses.

Local Effect: Minimal increase in local revenues from fines imposed in circuit court cases. Minimal increase in local incarceration expenditures if the bill results in additional convictions for the applicable offenses.

Small Business Effect: Potential meaningful impact on small business health care providers that are penalized for Medicaid fraud as a result of the wiretaps authorized under the bill.

Analysis

Current Law:

Wiretapping: 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; and
- 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.

However, it is lawful for law enforcement officers and persons acting with the prior direction and under the supervision of law enforcement officials to intercept communications as part of a criminal investigation to provide evidence of the commission of the following crimes:

- murder;
- kidnapping;
- rape;
- sexual offense in the first or second degree;
- child abuse in the first or second degree;
- child pornography;
- gambling;
- robbery;
- arson and related felonies;
- bribery;
- extortion;
- dealing in a controlled dangerous substance;
- fraudulent insurance act;
- manufacture or possession of destructive device;
- human trafficking;
- sexual solicitation or abuse of a minor;
- obstruction of justice;
- a theft scheme or continuing course of conduct involving an aggregate value of property or services of at least \$10,000; or
- a conspiracy or solicitation to commit any of the above crimes.

Wiretapping is also authorized if a person has created a barricade situation and there is probable cause to believe a hostage or hostages may be involved.

The exception applies so long as the interceptor is a party to the communication or one of the parties to the communication has given prior consent to the interception.

The Attorney General, State Prosecutor, or any State's Attorney may apply to a judge of competent jurisdiction to grant an order authorizing interception of wire, oral, or electronic communications by investigative or law enforcement officers when the interception may provide or has provided evidence of the commission of specified crimes. However, no application or order is required if the interception is lawful under the general wiretap provisions.

Abuse or Neglect of a Vulnerable Adult: A caregiver, a parent, or other person who has permanent or temporary care or responsibility for the supervision of a vulnerable adult may not cause abuse or neglect of the vulnerable adult that results in death, causes serious physical injury, or involves sexual abuse. The same prohibition applies to a household or family member.

A violator is guilty of the felony of abuse or neglect of a vulnerable adult in the first degree and subject to maximum penalties of 10 years imprisonment and/or a fine of \$10,000. A sentence imposed under this section must be in addition to any other sentence imposed for a conviction arising from the same facts and circumstances unless the evidence required to prove each crime is substantially identical.

Under the second degree prohibition, a caregiver, a parent, or other person who has permanent or temporary care or responsibility for the supervision of a vulnerable adult may not cause abuse or neglect of the vulnerable adult. A household or family member may not cause abuse or neglect of a vulnerable adult. A violator is guilty of a misdemeanor and subject to maximum penalties of imprisonment for five years and/or a \$5,000 fine. A sentence imposed under this section must be in addition to any other sentence imposed for a conviction arising from the same facts and circumstances unless the evidence required to prove each crime is substantially identical. The second degree prohibition does not apply to sexual abuse of a vulnerable adult.

Medicaid Fraud: As Medicaid program administrators, states are required under federal regulations to implement certain measures and procedures aimed at preventing fraud and abuse, including: (1) verification of the eligibility of providers to participate in federal health care programs; (2) procedures to verify that recipients actually received billed services; (3) procedures to identify suspected fraud cases; and (4) methods for investigating fraud cases, including procedures for referring suspected fraud cases to law enforcement officials and state Medicaid fraud control units.

Violations of the Medicaid fraud portion of the Criminal Law Article include (1) defrauding or attempting to defraud Medicaid in connection with the delivery or payment for a health care service; (2) making false representations to obtain anything of value in connection with Medicaid services or benefits; (3) converting a Medicaid payment or benefit to a use that is not for the authorized beneficiary; (4) offering bribes, kickbacks, or referral rebates in connection with Medicaid; (5) making false representations to qualify for Medicaid reimbursement; (6) obtaining Medicaid benefits by fraud; and (7) unauthorized possession of a benefit card.

Maximum criminal penalties for violations include (1) life imprisonment and/or a \$200,000 fine (if the violation results in death – felony); (2) imprisonment for up to 20 years and/or a \$100,000 fine (if the violation results in serious injury – felony); (3) imprisonment for up to five years and/or \$100,000 if the value of the money, goods, or services involved is \$500 or more in the aggregate (felony); and (4) imprisonment for up to five years and/or a \$50,000 for all other violations (misdemeanor). A “business entity” that violates the Medicaid fraud provisions is subject to a maximum fine of \$250,000 for each felony and \$100,000 for each misdemeanor.

In addition to any other penalties provided by law, a health care provider that violates a provision of the Medicaid fraud part of the Criminal Law Article is liable to the State for a civil penalty of not more than triple the amount of the overpayment.

Background: The Maryland State Commission on Criminal Sentencing Policy reports that, in fiscal 2011, there were three convictions in the circuit courts for first degree abuse of a vulnerable adult, with an average sentence of 8.3 years of incarceration. There were also three convictions for second degree abuse of a vulnerable adult, with an average sentence of 21.7 days of incarceration. In fiscal 2012, there were seven convictions for first degree vulnerable adult abuse and seven convictions for second degree vulnerable adult abuse in the circuit courts.

In fiscal 2010, there were three convictions in the circuit courts for first degree elder abuse and seven convictions for second degree elder abuse. One of the convictions for first degree elder abuse resulted in incarceration, with a sentence of six years. Three of the second degree elder abuse convictions resulted in incarceration, with an average sentence of 3.8 years. In fiscal 2009, there were two convictions in the circuit courts of second degree elder abuse and one conviction of first degree elder abuse. The two individuals convicted of second degree elder abuse received an average sentence of 15 months imprisonment. The person convicted of first degree elder abuse was sentenced to 10 years imprisonment.

The Office of the Attorney General (OAG) advises that like child abuse cases, vulnerable adult abuse cases are often reported well after the alleged incident(s) occurred and after physical evidence of the crime has disappeared. These cases often involve victims who

are unable to communicate sufficiently to be effective witnesses in court. OAG advises that in over 20 years of prosecuting these cases, it can recall only one victim of vulnerable adult abuse who has ever testified in court.

Medicaid Fraud: The federal government requires each state to have a Medicaid Fraud Control Unit or obtain a waiver from the Secretary of the U.S. Department of Health and Human Services. In Maryland, the Medicaid Fraud Control Unit (MFCU) within OAG investigates and prosecutes provider fraud in State Medicaid programs.

MFCU investigates and prosecutes health care provider fraud in the Medicaid program, prosecutes resident abuse and neglect in health care facilities receiving Medicaid funding, and is authorized to review and prosecute complaints of the misappropriation of residents' private funds in facilities receiving Medicaid funding. MFCU does not handle cases involving recipient fraud, financial exploitation of senior citizens, abuse or neglect in private residences or nursing homes that do not receive Medicaid funding, and criminal prosecutions of unlicensed assisted living facilities or unlicensed individuals delivering health care (unless a State health plan nexus can be established). Those cases are handled by other State entities.

In fiscal 2012, MFCU handled 130 fraud complaints and 215 patient abuse complaints. During that same year, MFCU completed 243 investigations and had a total of 22 indictments.

In fiscal 2012, MFCU collected \$9.7 million in fines, collections, restitution, and overpayments. The unit estimates that it will collect \$16.0 million in fiscal 2013. These figures include State and federal collections, including collections under multi-state cases and false claims statutes, which are not covered under this bill.

With respect to Medicaid fraud cases, OAG advises that many of its cases rely on information provided by employees of allegedly fraudulent providers. Many of these employees are willing to assist with investigations and participate in monitored telephone calls with their employers to gather incriminating evidence of the alleged fraud.

The Maryland State Commission Sentencing Policy reports that there was one conviction for defrauding a State health plan in the State's circuit courts during fiscal 2012. There were no convictions for the other Medicaid fraud crimes during that time.

State Revenues: General funds increase if the bill results in increased criminal fines for both applicable offenses and civil penalties for Medicaid fraud. There is insufficient data to estimate the magnitude of the increase, as it depends on the magnitude of the fraud involved in cases where the availability of a wiretap results in successful prosecutions and fines/penalties are imposed and collected.

State Expenditures: If the availability of wiretaps under the bill increases the number of individuals convicted of vulnerable adult abuse and/or Medicaid fraud, then general fund expenditures increase minimally due to more people being committed to State correctional facilities and increased payments to counties for reimbursement of inmate costs. The number of people convicted of crimes as a result of this bill is expected to be minimal.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$2,900 per month. This bill alone, however, should not create the need for additional beds, personnel, or facilities. Excluding overhead, the average cost of housing a new State inmate (including variable medical care and variable operating costs) is about \$370 per month. Excluding all medical care, the average variable costs total \$180 per month.

Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the sentence be served at a local facility or a State correctional facility. Prior to fiscal 2010, the State reimbursed counties for part of their incarceration costs, on a per diem basis, after a person has served 90 days. Currently, the State provides assistance to the counties for locally sentenced inmates and for inmates who are sentenced to and awaiting transfer to the State correctional system. A \$45 per diem grant is provided to each county for each day between 12 and 18 months that a sentenced inmate is confined in a local detention center. Counties also receive an additional \$45 per day grant for inmates who have been sentenced to the custody of the State but are confined in a local facility. The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in State correctional facilities. The Baltimore City Detention Center, a State-operated facility, is used primarily for pretrial detentions.

Local Revenues: If the bill results in more convictions, then local revenues increase minimally due to increased application of current monetary penalty provision from cases heard in the circuit courts.

Local Expenditures: Expenditures increase minimally as a result of the expanded application of current incarceration penalties. Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. A \$45 per diem State grant is provided to each county for each day between 12 and 18 months that a sentenced inmate is confined in a local detention center. Counties also receive an additional \$45 per day grant for inmates who have been sentenced to the custody of the State but are confined in a local facility. Per diem operating costs of local detention facilities have ranged from approximately \$60 to \$160 per inmate in recent years.

Additional Information

Prior Introductions: None.

Cross File: SB 267 (Senator Raskin) – Judicial Proceedings.

Information Source(s): Office of the Attorney General, Judiciary (Administrative Office of the Courts), Maryland State Commission on Criminal Sentencing Policy, Department of State Police, Department of Budget and Management, Department of Legislative Services

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