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RE: SUPPORT WITH AMENDMENTS OF SB 629 Intercepted Communications – Penalties and Admissibility

Dear Mr. Chairman and Members of the Judicial Proceedings Committee:

We are writing to express the Office of the State Prosecutor’s support with amendments to SB 629, Intercepted Communications – Penalties and Admissibility of Evidence, which would first, reclassify the crime of intercepting and disclosing certain communications from a felony to a misdemeanor; second lower the maximum sentence of a violation from five years to ninety days; and lastly, would allow a judge to decide whether or not to admit recordings by one party if it would serve the interests of justice. We have recommended the legislation be amended to be restricted to criminal proceedings. This would allow the evidence to be used by victims of crimes of violence who use recording as a mechanism to obtain evidence in situations where they are concerned for their safety and concerned about a power disparity between them and their attacker.

Under current Maryland law, if a police officer turns off his body camera and engages in a crime of violence against a victim and the victim creates an audio recording of that crime, the victim’s recording cannot be admitted. This bill would change that. The State should have every tool available to prosecute perpetrators of criminal behavior and allow victims the opportunity to present evidence of a crime against them.

The Office of the State Prosecutor

The Office of the State Prosecutor is an independent agency within the Executive Branch of government. The Office is tasked with ensuring the honesty and integrity of state government and elections by conducting thorough, independent investigations and, when appropriate, prosecutions of criminal conduct affecting the integrity of our state and local government institutions, officials, employees and elections.

Reclassification of Offense

Under current Maryland law, any person who intercepts and/or discloses communications without the consent of all parties in the recording is guilty of a felony and can be sentenced up to five years in prison. This bill would reclassify the offense from a felony to a misdemeanor and would reduce the maximum jail-time to ninety days. Importantly, this bill does not make Maryland a one-party consent state. Instead, it merely reduces the punishment to more proportionately reflect the severity of the conduct, while still dissuading individuals from engaging in illegal recordings.

When the wiretap statute was drafted, the only entities that were envisioned to have the capacity to violate the statute were law enforcement or very sophisticated operational entities. But now, with the advent of personalized cell phones, recording a conversation without the knowledge of another party is literally just a click away, and can be used by nearly everyone, including victims of violent crimes.

Exclusionary Rule

Currently all illegal wiretaps, or recordings without the consent of both parties, are inadmissible in court. This bill would amend that exclusionary rule, so that a judge may decide to admit evidence obtained from a surreptitious recording if it met certain criteria, similar to provisions in Maryland law allowing the admission of certain hearsay evidence.

The language for this part of the bill, borrowed as noted from existing Maryland law, places the decision to admit such evidence in the hands of a judge, in the same way a judge would make a determination on a hearsay issue. The language for the bill mirrors that of Maryland's "residual hearsay" rule. Hearsay is defined as an out-of-court statement that is offered for its truth. Normally, hearsay is inadmissible in court. There are, however a litany of exceptions. One exception, outlined in Rule 5-803(b)(24), directs judges to evaluate and admit evidence that does not fit into one the enumerated hearsay exceptions, but which has equivalent guarantees of trustworthiness. The rationale for the language from the "residual hearsay" rule coincides with the interests of admitting illegal recordings because recordings are inherently more trustworthy and reliable than other forms of hearsay. While we want to continue to dissuade their general admissibility, we want to make sure there is a mechanism for them to be admitted in special contexts.

It is important to note that this bill does not allow for all recordings to automatically be admitted. Pursuant to the bill, the recording can only be admitted once a judge makes a determination based on a showing by the moving party that: (1) the evidence is offered as evidence of a material fact in the criminal proceeding; (2) the contents of the recording are more probative than other available evidence; (3) the interests of justice will be best served by the recording being entered into evidence; and (4) the recording must be disclosed to the opposing party sufficiently in advance of the trial date. And of course, all evidence, including recordings, are subject to the other rules of evidence.

Amendment

The current language of the bill allows evidence to be entered in any proceeding but mandates that the recording be evidence of a crime of violence or domestically related crime. The language also allows a judicial analysis only if the evidence is offered in a criminal proceeding. The current language is confusing and does not reconcile with the timing of the other proceedings where a victim might seek to admit such evidence. For example, if someone wanted to pursue a protective order, they would not be able to use a recording until after the criminal case (if there even was one) was litigated (as the criminal issue cannot be separately litigated within a civil proceeding, grand jury, legislative hearing, or other related hearings).

The Office of the State Prosecutor believes providing an exception to the exclusion of illegal wiretaps is valid and needed, but urges a clear delineation of when and how the evidence can be admitted.

Conclusion

The most significant impact of this bill would be the ability to admit into evidence a victim's recording of a violent crime, yet still dissuade individuals generally from engaging in illegal recordings of private communications.

To that end, we would encourage a favorable report from the Judiciary Committee on SB 629 if the bill is amended to be admissible in a criminal proceeding.

Sincerely,

Charlton T. Howard, III
Maryland State Prosecutor