Senate Bill 629 Testimony 25 February 2021 for Sen

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Position: FAV

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REPLY TO ATTENTION OF:

February 22, 2021

HEARING TESTIMONY FOR SENATE BILL 629

NOTE: This testimony is not intended as an official statement on behalf of the United States Army, the Department of Defense or the United States Government, but is limited to the personal opinions of the author.

I am writing in support of Senate Bill 629, entitled: “Intercepted Communications – Penalties and Admissibility of Evidence”. This bill will benefit victims of domestic violence, among others.

I have had clients who are victims of domestic violence who have asked whether they would be permitted to record their abusers using "one party consent" (their own consent when they agree to make a recording). I have had to advise them that under the current "two party consent" rule in the Maryland Wiretapping statute, they cannot because the recording would be inadmissible and they could be charged with a felony for making the recording if the abuser did not know about or consent to the recording.

Unfortunately, the military is not immune from domestic violence, although the frequency of incidents is significantly less than in the general civilian population. In 2020, there were 71 Army and Air Force domestic violence cases at Fort Meade and 5542 cases Army-wide.

As you are probably aware, crimes such as domestic violence often take place in the home where third-party adult witnesses are absent. Allowing victims to create recordings of their abuse and permitting these recordings to be admitted in Maryland courts in criminal prosecutions would go a long way towards protecting victims while bringing their abusers to justice. Under the current "two party consent" requirement, it is a miscarriage of justice that not only would the recorded evidence of abuse be inadmissible but the victim could actually be charged with a felony for recording their abuser. Saying it another way, abusers should have their “safe harbor” to perform abusive conduct eliminated and domestic violence survivors should instead receive a “safe harbor” to make and admit recordings of their abuse.

Maryland is currently in the minority of jurisdictions that require two-party consent for audio recordings. The Federal Wiretapping statute and Military Rules of Evidence along with thirty-eight (38) states and the District of Columbia currently have one-party consent laws. It is long overdue that in cases of domestic violence, one-party consent recordings should be admissible.

Although not perfect, SB629 is a strong step in the right direction to help military victims of domestic violence present credible corroborating evidence against the offenders. I therefore conclude that SB629 will benefit military families.

Thank you for your attention.

Yosefi Seltzer
Yosefi Seltzer, Esq.
Legal Assistance Supervisory Attorney

Fort George G. Meade, Maryland, is an installation dedicated to providing quality support to service members, Department of Defense civilian employees, family members, and military retirees. Fort Meade strives to be the Nation's Preeminent Center for Information, Intelligence and Cyber.

Every day, more than 100,000 people seek the services Fort Meade offers. Its primary mission is to provide a wide range of services to more than 119 partner organizations from the Army, Navy, Air Force, Marines and Coast Guard, as well as to several federal agencies including the National Security Agency, Defense Media Activity, Defense Information Systems Agency, the Defense Courier Service and the U.S. Cyber Command.

The installation lies approximately five miles east of Interstate 95 and one-half mile east of the Baltimore-Washington Parkway, between Maryland State routes 175 and 198. Fort Meade is located near the communities of Odenton, Laurel, Columbia and Jessup, and is home to approximately 62,000 employees, both uniformed and civilian. Nearly 11,000 family members reside on-post. Fort Meade is Maryland's largest employer and is the second-largest workforce of any Army installation in the U.S. In response to the military's Base Realignment and Closure plan, construction of new facilities has now been completed for Defense Adjudication Activities, the Defense Information Systems Agency and the Defense Media Activity.

The **Legal Assistance Division** provides free legal services to Active-Duty service-members, retirees and spouses in a wide variety of areas including tax assistance, domestic relations, estate planning, consumer law, military administrative appeals and the like.

Mr. Seltzer served for more than four years on Active Duty at the Third Infantry Division (Mechanized) and the U.S. Army Legal Services Agency's Environmental Law Division of the Headquarters, Department of the Army and has served as a Legal Assistance Attorney since 2008 at Fort Meade and Fort Belvoir, Virginia, and has served as a Supervisory Attorney since 2018. Mr. Seltzer is licensed to practice law in Maryland, Washington, D.C., Georgia and New York. He is an active member of the Maryland State Bar Association's Veteran's Affairs and Military Law Committee, is a graduate of the George Washington University (1993) and the University of Maryland School of Law (1999) and is a native of Silver Spring.

SB 629 - Intercepted Communications.pdf
Uploaded by: Shellenberger, Scott
Position: FAV

Bill Number: SB 629
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 SENATE BILL 629
INTERCEPTED COMMUNICATIONS – PENALTIES AND ADMISSIBILITY OF EVIDENCE

I write in support of Senate Bill 629 that updates an out of date law concerning the recording of oral communications particularly over the telephone. Maryland Wire Tap Statute is found at Court and Judicial Proceedings (CJ) §10-406. It is an out of date vestige of a past time when switch boards were the mode of communication.

Maryland is a two party consent state when it comes to the recording of oral communications especially through the telephone. Thirty-eight States are one party consent states that require only one party to a conversation "consent" to the recording. Maryland has long had a statutory scheme in which law enforcement, under a judges supervision, are permitted to record telephone conversations when they have probable cause to believe telephones are being use to commit crimes.

Because CJ is a vestige of the past, recording someone orally both over the telephone and in person has been labeled a felony punishable up to 5 years in jail. Recording visually has never been against the law.

In today's reality people record everything both visually and orally. Most people are unaware when they break out their phones and hit camera/record they are breaking the law in Maryland.

Senate Bill 629 does not change Maryland to a one party consent State. But what it does do is bring us into this decade. Changing audio recording from a felony to a misdemeanor makes logical sense in today's world. It keeps it a crime preserving Maryland's decision to be two party consent State but brings it to a more reasonable penalty in a time when everyone more readily accepts audio recording.

Most importantly, Senate Bill 629 eliminates the ban on using the recording when prosecutors want to introduce it into evidence when prosecuting a crime of violence or a domestically related crime.

My office has had countless cases of domestic abuse where a victim will have an audio recording of the crime or a confession and we not only are unable to play it but we have to tell the victim not to do it again because it is a crime.

Senate Bill 629 outlines the careful steps prosceutors must go through to prove the materiality, probativeness, and justice in the reason for admitting the recording into

evidence. The disclosure requirements assure that a Defendant will have time to prepare for trial.

Senate Bill 629 is a bill whose time is long overdue and brings Maryland into the reality of this decade. I urge a favorable report.

SB629FWAOSPl.pdf
Uploaded by: David, Sarah
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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

2021-02-25 SB 629 (Support with Amendment).pdf
Uploaded by: Jung, Roy
Position: FWA

State of Maryland
Office of the Attorney General

February 25, 2021

TO:	The Honorable William C. Smith, Jr., Chair, Judicial Proceedings Committee
FROM:	Carrie J. Williams, Assistant Attorney General
RE:	Attorney General's Support for SB 629 with Amendments

The Attorney General urges the Judicial Proceedings Committee to add a perfecting amendment and then report favorably on Senate Bill 629. The suggested amendment would exclude from criminal liability the disclosure and use of an intercepted communication when that disclosure and use is related to an attempt to admit the communication in a court proceeding.

Senate Bill 629 reduces the crime of willfully intercepting, disclosing, or using an unlawfully intercepted communication from a felony to a misdemeanor, and reduces the maximum penalty from five years' to 90 days' incarceration. It also provides for the admission of an unlawfully intercepted communication in certain proceedings.

The Attorney General supports the reduction in the penalty for intercepting communications and believes that the contents of these communications should be admissible under certain circumstances. In modern society, nearly everyone has a recording device on their person at all times. A recorded communication can be highly probative of a defendant's guilt or innocence in a criminal case or of liability in a civil proceeding. Yet, under current law, that extremely probative evidence is not admissible if the recording was made in violation of the Wiretap Act. This bill would allow the contents of a recording communication, and evidence derived from that communication, to be admitted into evidence in certain proceedings.

As the bill is currently written, the disclosure of an intercepted communication by an attorney to opposing counsel or the court, and the use of the intercepted communication in a court proceeding would constitute a violation of Courts & Judicial Proceedings Article, Section 10-402. In order for attorneys to seek

admission of an intercepted communication without running afoul of the law, the Attorney General respectfully suggests that Senate Bill 629 be amended to exempt from liability the use and disclosure of intercepted communications where that use and disclosure is related to a court proceeding. The Attorney General urges the Judicial Proceedings Committee to adopt this amendment and issue a favorable report on Senate Bill 629.

cc: Members of the Committee

Myers_John_CaliforniaEavesdroppingLawEndangersDVvi
Uploaded by: Lee, Susan
Position: FWA

The John Marshall Journal of Information Technology & Privacy Law

Volume 31 | Issue 1 Article 3

Fall 2014

California's Eavesdropping Law Endangers Victims of Domestic Violence, 31 J. Marshall J. Info. Tech. & Privacy L. 57 (2014)

John E.B. Myers

CALIFORNIA'S EAVESDROPPING LAW ENDANGERS VICTIMS OF DOMESTIC VIOLENCE

JOHN E.B. MYERS*

Nancy and Ken met in San Diego while Ken was waiting to be discharged from the Navy.[1] They started dating, and soon were living together; within a year, they were married. Ken got a job driving a delivery truck and Nancy continued her career as a nurse. Before long, the happy couple welcomed a daughter, Ann.

When Ann was three, Ken started drinking to excess several times a week and lost his job because he showed up for work drunk. Unemployed, sitting at home with nothing to do, and struggling with alcoholism, Ken became increasingly irritable. He complained to Nancy that she didn't make enough money, and didn't take proper care of the home, Ann, or him. One night, Ken's anger erupted, and he hit Nancy in the face with his fist, knocking her to the floor. He straddled her on the floor and choked her with both hands. As Nancy felt she was losing consciousness, three-year-old Ann jumped on Ken's back, yelling, "Daddy, stop hurting mommy! Stop! Bad daddy." Ken threw Ann against a wall and stormed out of the house.

This wasn't the first incident of domestic violence, but it was the most severe, and Nancy decided she'd had enough. While Ken was gone, Nancy packed a few suitcases, put Ann in the car seat, and drove to her parent's home in Fresno. Nancy filed for divorce. The couple litigated custody, with Ken denying any domestic violence, and accusing Nancy of fabricating the domestic violence story to alienate him from his daughter and gain an advantage in court. Eventually, the family court granted a divorce, with joint legal custody, and primary physical custody to Nancy. Ken was awarded parenting time and was ordered to pay child support.

Nancy remained in Fresno. She remarried and had a child with her new husband, John. Ken remained in San Diego. He got his alcohol

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1. The following scenario is a hypothetical.

problem under control, and went back to UPS.

Ken was constantly late with child support payments, accumulating an arrearage of more than $30,000. He was regularly hauled into court by the department of child support services. On three separate occasions, Ken returned to family court seeking full custody of Ann, each time the court refused to change custody. Ken told Nancy, "I will never give up until I have full custody of my daughter." From Nancy's point of view, the constant litigation over support and custody was a way for Ken to punish her, from Ken's perspective, he was seeking justice.

When Ann was thirteen, she was spending a week with Ken in San Diego. Late one night, Ann texted Nancy, "Mom. I want to come home. I hate it here. Dad won't let me do anything. He won't even let me talk to my friends. Please please please please come get me."

After Ann fell asleep, Ken picked up her cell phone and read the text to Nancy. He was furious. He yelled at Ann, "You are a clone of your mother! You don't care about anybody but yourself. You are a selfish little brat. If you want to go home so bad, pack your fucking suitcase. I'll drive you home tonight."

Ken called Nancy just after midnight. When Nancy saw it was Ken calling, she smelled trouble, and decided to record the conversation. With the recorder going, Nancy answered the phone and got an earful, "I'm bringing Ann home tonight. I'll be in Bakersfield by six in the morning. Be at the Starbucks where we usually exchange custody. If you aren't there, I'll leave her and she can find her own way home. You are such a fucking bitch. You ruined our daughter. You turned her into a selfish whore just like you. I don't want anything more to do with her. I should have killed you when I had the chance a long time ago. I should kill you now for ruining my life. Be at Starbucks at six, and fuck you very much."

Nancy woke her husband and told him what happened. They took their child to his grand parents' and set out for Bakersfield. On the way, Nancy said she was afraid to confront Ken. He seemed out of control, and John said he would do the exchange. They agreed to record the exchange, in case of any trouble.

Nancy and John pulled into Bakersville at 5:30 a.m., and parked across the street from Starbucks. Before long, Ken pulled into the Starbucks parking lot. John turned on the audio recorder, put it in his pocket, got out of the car, and walked across the street toward Ken's car. Ken emerged from his car, walked aggressively toward John, and stopped a few feet from him on the sidewalk. Ken said, "Fuck you, John.

Fuck you. You are supposed to be normal, but you let her mother twist her mind. She's fucked up, she's mentally ill, she's fucking psychotic, thanks to Nancy; and you just let it happen. What kind of a man are you? Fuck you." As Ken was speaking, Ann got out of Ken's car and ran crying to Nancy's car. She heard what her father said, and sobbed on the way home, until she fell asleep.

Once home, Nancy decided she needed protection from Ken, whom she viewed as dangerous. After all, he threatened to kill her for "ruining [his] life." She filed the paperwork for a temporary domestic violence restraining order (DVRO), which was granted the same day. The temporary order named Nancy and Ann as "protected persons," and prohibited Ken from contacting, abusing, or harassing them. The sheriff served the temporary restraining order on Ken at his workplace in San Diego. The papers informed Ken there would be a hearing in two weeks on Nancy's request for a permanent DVRO. Ken retained counsel, who filed a response denying any domestic violence. The matter was set for trial. Nancy's attorney informed Ken's attorney that Nancy would offer the two audio recordings in evidence: The audio of the telephone call in which Ken threatened to kill Nancy, and Ken's angry words directed to John in front of Starbucks. Ken's attorney objected, arguing that the audio recordings violated California's eavesdropping law and were inadmissible in evidence. Ken's attorney added that if the recordings were offered, he would contact the local prosecutor and ask that Nancy be prosecuted for violating the eavesdropping law, and Ken would sue Nancy for violating his privacy, as well.

CALIFORNIA'S STATUTORY FRAMEWORK FOR DOMESTIC VIOLENCE RESTRAINING ORDERS

California has a comprehensive statutory framework for domestic violence protective orders. Protective orders can be issued under the Family Code – DVRO[2]; the Penal Code – criminal protective order (CPO)[3]; and the Code of Civil Procedure – civil harassment order.[4] Under the Family Code, DVROs are available to the following victims: spouses, former spouses, cohabitants, former cohabitants, persons who dated abusers, persons having a child in common with an abuser, persons related by consanguinity or affinity within the second degree to an abuser, and children of abuse victims.[5] "Abuse" includes intentionally or recklessly causing or attempting to cause bodily injury, sexual assault, placing a person in reasonable apprehension of imminent serious bodily

2. *See* CAL. FAM. CODE §§ 6200-6409 (2014).
3. CAL. PENAL CODE §§ 273.5(j), 646.91 (2014).
4. CAL.CODE OF CIV. PRO. § 527.6 (2014).
5. FAM. § 6211.

injury, stalking, and threatening.[6]

DVRO practice under California's Family Code is accomplished through forms provided by the Judicial Counsel.[7] Although the forms are lengthy, the staff at the Judicial Counsel does an admirable job of simplifying the forms so lay persons can understand them. Simplicity is vital because most litigants seeking DVRO protection have neither an attorney nor the experience to navigate complex legal forms.

The first step in the DVRO process is filing the form requesting an *ex parte* temporary restraining order (TRO).[8] The request is reviewed by a judge the same day it is filed for the day following.[9] The judge then grants or denies the request, and sets the matter for a short cause hearing, if necessary.[10] The alleged abuser must be personally served with any TRO and given notice of the hearing.[11] The alleged abuser may file a response.[12]

If an alleged abuser was properly served, but fails to appear at the hearing, or appears but does not contest the matter, the court typically grants a Restraining Order After Hearing (DVRO), lasting up to five years.[13] If the alleged abuser files a response and denies the abuse, the matter is typically set for a long cause trial.[14]

CALIFORNIA'S EAVESDROPPING STATUTE

California's eavesdropping law was enacted in 1967, as part of a comprehensive legislative reform designed to protect privacy.[15] For pre-

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6. *Id*. at § 6203, 6320.

7. *Id*. at § 6221(c).

8. Request for Domestic Violence Restraining Order, Cal. Form DV-100 (2014), *available at* http://www.courts.ca.gov/documents/dv100.pdf.

9. *Domestic Violence*, CALIFORNIA COURTS, http://www.courts.ca.gov/selfhelp-domesticviolence.htm (last visited Sept. 14, 2014).

10. Temporary Restraining Order, Cal. Form DV-110 (2014), *available at* http://www.courts.ca.gov/documents/dv110.pdf.

11. Notice of Court Hearing, Cal. Form DV-109 (2012), *available at* http://www.courts.ca.gov/documents/dv109.pdf.

12. Response to Request for Domestic Violence Restraining Order, Cal. Form DV-120 (2014), *available at* http://www.courts.ca.gov/documents/dv120.pdf.

13. *Domestic Violence*, *supra* note 9.

14. *Respond to a Restraining Order*, CALIFORNIA COURTS, http://www.courts.ca.gov/1265.htm (last visited Sept. 14, 2014).

15. CAL. PENAL CODE §§ 630-638 (2014). In Section 630, the Legislature stated its intention "to protect the right of privacy of the people of this state." *See* Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 928 (Cal. 2006) ("In 1967, the California Legisla-

sent purposes, the key provision is Section 632, which provides in part:

> (a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of…telephone, or other device,… shall be punished.[16]

Subsection (c) defines "confidential communication" as any communication that occurs in circumstances that reasonably indicate that "any party to the communication desires it to be confined to the parties…."[17] A communication is not confidential if it occurs at a public gathering or under conditions "in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."[18] The recording of a confidential communication in violation of Section 632 is not admissible in court.[19]

The Legislature realized that some confidential communications constitute powerful evidence of crime,[20] indeed, some communications are themselves criminal.[21] With this in mind, Penal Code Section 633.5 allows one party to a confidential communication to record the communication in order to preserve evidence that the other party is committing or has committed extortion, kidnapping, bribery, or "any felony involving violence against the person."[22] This portion of Section 633.5 applies to face-to-face communications and communications by phone and other media.[23]

Section 633.5 also allows the recording of telephone calls intended by one party to annoy the other party, and in which the offending party uses obscene language or threatens to injure the other party or the party's family.[24] This portion of 633.5 does not extend to face-to-face en-

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ture enacted a broad, protective invasion-of-privacy statute in response to what it viewed as a serious and increasing threat to the confidentiality of private communications resulting from advances in science and technology that had led to the development of new devices and techniques for eavesdropping upon and recording such private communications.").

16. PENAL § 632(a).

17. *Id*. at § 632(c).

18. *Id*.

19. *Id.* at § 632(d).

20. *See* People v. Parra, 165 Cal. App. 3d 874 (1st Dist.1985).

21. *See* PENAL § 518; PENAL § 519 (extortion); PENAL § 701 (criminal threats); PENAL § 646.9 (stalking); CAL. FAM. CODE § 6320 (2014) (domestic violence threats).

22. CAL. PENAL CODE § 633.5 (2014).

23. *Id*.

24. *Id.*

counters.[25]

Section 633.6 authorizes a judge issuing a DVRO to permit the victim to record communications from the abuser that would normally violate Section 632.[26] This provision is useful *after* a DVRO is granted, but does nothing to help a victim prove the violence that entitles her to protection.

CASE LAW INTERPRETING SECTION 632

There is surprisingly little case law interpreting Penal Code Section 632. Most appellate cases arose in the commercial context – *e.g.*, businesses recording telephone calls from customers – rather than from communication between individuals.[27] There appear to be no California cases interpreting 632 in the context of domestic violence. The Supreme Court's decision in *Flanagan v. Flanagan*[28] is the leading authority defining when communication is "confidential." The court ruled that a conversation is confidential when a party to the interaction has an objectively reasonable expectation that the conversation is private.[29]

In *Kearney v. Salomon Smith Barney, Inc.*,[30] the Supreme Court clarified that California law requires the consent of both parties to record a confidential communication. The court wrote that Section 632 "does not absolutely preclude a party to a telephone conversation from recording the conversation, but rather simply prohibits such a party from secretly or surreptitiously recording the conversation, that is, from recording the conversation without first informing all parties to the conversation that the conversation is being recorded."[31]

One Court of Appeals decision sheds light on recording conversations in the domestic violence context. In *People v. Parra*,[32] the court interpreted sections 632 and 633.5. Kay Parra was a long-time client of

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25. *Id*.

26. *See* Request for Domestic Violence Restraining Order, Cal. Form DV-100 (2014), *available at* http://www.courts.ca.gov/documents/dv100.pdf; Restraining Order After Hearing (Order of Protection), Cal. Form DV-130 (2014), *available at* http://www.courts.ca.gov/documents/dv130.pdf. The recording must still comply with the federal eavesdropping statute. *See* PENAL § 633.6(a).

27. *See, e.g.,* Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914 (Cal. 2006).

28. Flanagan v. Flanagan, 41 P.3d 575 (Cal. 2002).

29. *Id.* at 575.

30. Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 914 (Cal. 2006).

31. *Id*. at 929.

32. People v. Parra, 165 Cal. App. 3d 874 (1st Dist. 1985).

attorney Lloyd Haines. Parra had worked in various capacities for Haines, including painting his house.[33] Haines returned from vacation to find his home burglarized. He called the police and also contacted Parra, thinking Parra might be able to locate the stolen property.[34] Haines gave Parra $4,000 to buy back the stolen property. Parra did not return the money, and avoided Haines' efforts to contact her. Eventually, Parra sent a letter accusing Heines of a robbing and battering Parra, and threatening Heines with violence.[35] Finally, a call was placed to Parra, the conversation was recorded, during which Parra admitted receiving the $4,000 from Haines, Parra was charged with theft of the $4,000.[36]

The prosecutor offered the recording of the telephone call, in which Parra admitted receiving the money, and Parra objected based on Section 632.[37] The trial court admitted the recording, and the appellate court affirmed.[38] The Court of Appeals began by noting that under Section 632, "It is settled in California that the intentional electronic recording of a confidential telephone communication without the consent or knowledge of all parties to such communication is illegal…."[39] The facts of this case, however, met the requirements of Section 633.5, which allows surreptitious recording "for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of…any felony involving violence against the person…." In her letter to Haines, Parra threatened violence, thus authorizing Walker to record his call to Parra, in order to obtain evidence related to the violence.[40]

A victim of domestic violence who surreptitiously records a conversation with an abuser can rely on *People v. Parra* and Section 633.5 to justify the recording when she reasonably believes recording is necessary to obtain evidence of any violent felony against her. A history of domestic violence supplies the necessary reasonable belief.

FEDERAL AND STATE EAVESDROPPING LAWS

Congress has passed a plethora of laws dealing with wiretapping

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33. *Id.* at 876.

34. *Id.* at 877.

35. *Id.*

36. People v. Parra, 165 Cal. App. 3d 879 (1st Dist. 1985).

37. *Id.* 878.

38. *Id.*

39. *Id.* at 878.

40. At trial, Walker testified that he recorded the call to Parra because she had threatened him with violence. *Id.* at 877.

and eavesdropping.[41] Most federal laws concern conduct by law enforcement and national security officials. One provision, however, 18 U.S.C. § 2511, forbids eavesdropping by private citizens.[42] Under the federal eavesdropping law, an individual who is not acting under color of law, *i.e*., a private individual, who is a party to a communication, may record the communication without consent of the other party. Section 2511(2)(d) specifies that it is not a violation of the federal eavesdropping statute for one side of a communication to record the communication.[43] Thus, the federal eavesdropping statute is a one-party consent statute: only one party needs to consent to the recording.[44]

All states have some type of eavesdropping law, and like the federal law, the majority of states have one-party consent laws.[45] As the California Supreme Court put it in *Kearney v. Salomon Smith Barney, Inc.*,[46] "Privacy statutes in a majority of states (as well as the comparable federal provision)…prohibit the recording of private conversations except with the consent of one party to the conversation."[47] California, like a handful of other states, is a two-party consent state:[48] In Califor-

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41. *See,* CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING & EAVESDROPPING: SURVEILLANCE IN THE INTERNET AGE (3d ed. 2012).

42. 18 U.S.C. § 2511 (2014).

43. 18 U.S.C. § 2511(2)(d) provides: "It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State."

44. *See,* People v. Otto, 831 P.2d 1178, 1183 (Cal. 1992) (referring to the federal law, the California Supreme Court wrote, "[O]ne party may record a conversation without the knowledge or consent of the other party, or may authorize another to do so.").

45. *See* KRISTEN RASMUSSEN, JACK KOMPERDA, & RAYMOND BALDINO, REP. COMM. FOR FREEDOM OF THE PRESS, REPORTER'S RECORDING GUIDE: A STATE-BY-STATE GUIDE TO TAPING PHONE CALLS AND IN-PERSON CONVERSATIONS 2 (2012), *available at* http://www.rcfp.org/rcfp/orders/docs/RECORDING.pdf. ("Thirty-eight states and the District of Columbia permit individuals to record conversations to which they are a party without informing the other parties that they are doing so.").

46. Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914 (Cal. 2006).

47. *Id*. at 932.

48. *See* Rasmussen et al., *supra* note 45 ("Twelve states require, under most circumstances, the consent of all parties to a conversation. Those jurisdictions are California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington.").

Illinois is a two-party consent state. In *People v. Coleman*, the Illinois Supreme Court wrote:

nia, both sides of the communication must consent to recording.[49]

CALIFORNIA'S EAVESDROPPING LAW ENDANGERS VICTIMS OF DOMESTIC VIOLENCE

In many domestic violence cases, the most powerful evidence of abuse is the angry telephone call or the heated face-to-face confrontation, where the abuser thinks the only one listening is the victim.[50] It is in these circumstances that the full extent of the abuser's fury is on display.

In court, the victim is free to repeat what the abuser said, but if the abuser denies it – which they will – it is the victim's word against the abuser's. The victim needs the recording to prove what really happened. A recording is far and away the best evidence, yet, if the recording violates the eavesdropping law, it is inadmissible. This dilemma does not arise under federal eavesdropping law because the federal law requires only one party to consent to recording, nor does it arise in states following the federal model. The dilemma is acute and potentially deadly in California, where both parties must consent to record confidential communications.

Return to Nancy and Ken, and consider the impact of Penal Code Section 632 on Nancy's quest for a DVRO. As you recall, Nancy recorded two communications with Ken, the late-night telephone call, in which Ken said, "I should kill you now for ruining my life," and the profanity-laced confrontation with Nancy's husband in front of Starbucks. Ken's lawyer would argue that both violate Section 632 and are inadmissible.

Nancy must somehow shoehorn the recordings into the eavesdropping law. As for the telephone call, Nancy has two arguments, both from Section 633.5. First, Section 633.5 allows recording of a confidential communication to obtain evidence reasonably believed to relate to a felony involving violence.[51] A threat to kill certainly qualifies. Moreo-

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> Congress intended to pre-empt this area, but specifically permitted concurrent state regulation… That is, states may adopt standards more stringent than those in title III…The Illinois General Assembly has enacted a rigorous eavesdropping statute, which prohibits recording conversations unless all the parties consent or one party consents and prior judicial authorization is obtained.

People v. Coleman, 882 N.E.2d 1025, 1029 (Ill. 2008).

49. CAL. PENAL CODE § 632(a) (2014). *See* People v. Windham, 145 Cal. App. 4th 881, 883 (1st Dist. 2007)(the California privacy law differs from federal law "in that it forbids wiretapping . . . unless *all* parties to a communication consent, while [federal law] permits a conversation to be intercepted or recorded where only *one* person has consented.")(emphasis in original).

50. The abuser's words may themselves constitute abuse (*e.g.,* threats – "I'll kill you"). Often, the abuser's words corroborate the victim's testimony, lending support for her testimony describing physical or other abuse.

51. PENAL § 633.5.

ver, the fact that Ken physically abused Nancy in the past – he punched and choked Nancy and threw three-year-old Ann against a wall – is relevant to the reasonableness of Nancy's belief in the need to record the call.

Nancy's second argument is Section 633.5's language allowing recordation to gather evidence of a violation of Section 653m. Section 653m criminalizes telephone calls made with the intent to annoy, and employing obscene language or threats to injure the person called or members of the person's family.[52] Again, the threat to kill suffices.

In the end, Nancy should succeed against Ken's Section 632 challenge to the phone call. However, the early morning confrontation in front of Starbucks is another story. Section 653m does not apply because it only concerns phone calls.[53] Nancy's best argument under Section 632 is that the Starbucks encounter was not confidential because it occurred on a public street. Further, thirteen-year-old Ann was present, and the presence of third parties generally destroys any expectation of confidentiality. Ken can counter that he spoke so as not to be overheard by others, and, given the early hour, there were no passersby to listen in. The court will have to resolve this factual dispute. Interestingly, the best way to resolve the issue is to listen to the recording.

Nancy should not have to go through these machinations to get the recordings into evidence, nor should other victims. In domestic violence litigation – civil and criminal – recordings that are relevant to proving domestic violence should *always* be admissible.[54] The California Legislature needs to amend the eavesdropping statute to this end. The next section suggests ways to accomplish this goal.

AMENDING CALIFORNIA'S EAVESDROPPING LAW

There are several ways to amend the eavesdropping law to better protect victims of domestic violence. Any amendment should pave the way for recordings that are relevant to proof of domestic violence. One option is adding the following subsection to Section 632:

(g) This section does not apply to any recording, whether audio, visual,

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52. *Id.* at §§ 633.5, 653m.

53. The relevant language states, "Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another…." *Id.* at § 653m.

54. "Always" is pretty strong, so let's temper "always" with, unless some rule of evidence or constitutional provision requires exclusion.

> or both, made by or at the request of a person who is or who becomes the complaining party or victim in civil or criminal litigation regarding allegations of domestic violence as defined in Section 6211 of the Family Code.

The proposed subsection is simple: It lifts recordings by domestic violence victims out of the eavesdropping statute. The proposal is narrowly tailored so as not to undermine the eavesdropping statute outside the context of domestic violence.

The language "or at the request of a person" is necessary because cases arise where victims need someone else to make the recording, because it may not be safe for the victim to meet face-to-face with the abuser. Allowing the victim to designate another to push "record" enhances victim safety. Recall Nancy and Ken, on the way to Starbucks in Bakersfield. Nancy asked her husband to record the exchange with Ken because Ken "seemed out of control."

Another solution is to adopt one-party consent for the recording of communications relevant to domestic violence, while retaining two-party consent for other communications. The following language would accomplish this end:

> § 632. Eavesdropping on or recording confidential communications
>
> (a) Except as provided in subdivision (g), every person who intentionally and without the consent of all parties to a confidential communication…
>
> (g) It shall not be unlawful under this section, or under any other provision of law, for a person who is or who becomes the complaining party or victim in civil or criminal litigation regarding allegations of domestic violence as defined in Section 6211 of the Family Code, to record one or more communications that the person reasonably believes to be relevant to the domestic violence of which the person is a victim. The person may designate another person to make the recording or recordings authorized by this subsection.[55]

WHILE YOU'RE AT IT, ADOPT THE VICARIOUS CONSENT RULE

Gearing up to improve California's privacy law, as described above, affords an excellent opportunity to kill two birds with one stone. The Legislature should adopt the "vicarious consent rule" approved by many courts.[56] The vicarious consent rule (VCR) creates an exception to the

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55. The federal eavesdropping law approves such authorization. *See* People v. Otto, 831 P.2d 1178, 1183 (Cal. 1992) (referring to the federal law, the California Supreme Court wrote, "[O]ne party may record a conversation without the knowledge or consent of the other party, or may authorize another to do so.").

56. *See, e.g.*, Commonwealth v. F.W., 986 N.E.2d 868 (Mass. 2013); State v. Whitner, 732 S.E.2d 861 (S.C. 2012).

federal wiretapping law, allowing parents to surreptitiously record communications between their children and third parties. Without VCR, such recording would violate federal law. The United States District Court for the District of Utah was the first to articulate VCR with its decision in *Thompson v. Dulaney*.[57] The District Court explained:

> [A]s long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory duty to act in the best interests of the children.[58]

Can anyone argue that adoption of VCR would not be good public policy for California?

CONCLUSION

California's eavesdropping law was enacted in 1969 for the laudable purpose of protecting privacy. The Legislature's primary focus was curbing abuses by law enforcement and commercial enterprises.[59] The 1960s preceded the national awakening to the prevalence and seriousness of domestic violence, an awakening that gained traction in the 1970s. It is fair to say that domestic violence was not on the minds of legislators crafting the original eavesdropping law.[60] As a consequence, the original law often disserves the interests of victims and the search to truth in domestic violence litigation. The Legislature can remedy this problem with the simple "fix" suggested above, all without compromising the overall goal of protecting privacy.

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57. Thompson v. Dulaney, 838 F. Supp. 1535 (D. Utah 1993).

58. *Id.* at 1544.

59. *See* Lee Ashley Smith, Note, *The Admissibility of Tape Recordings in Criminal Trials Involving Domestic Disputes: California's Proposition 8 and Title III of the Federal Omnibus Crime Control and Safe Streets Act*, 15 HASTINGS WOMEN'S L. J. 217, 218 (2004).

60. The author, Ms. Smith, observed, "Familial and other domestic cases of eavesdropping and wiretapping pose a special problem to sets of laws that were initially designed to govern police misconduct or occasional political and business-related espionage." *Id.* at 219.

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February 25, 2021

Senate Judicial Proceedings Committee

Senate Bill 629 - Intercepted Communications - Penalties and Admissibility of Evidence

Senate Bill 629 maintains Maryland as a two-party consent state but provides an exception to allow evidence of an audio recording to be presented in court under specific conditions that the crime is domestic violence related or a crime of violence. This change allows a particularly vulnerable group, domestic violence survivors, to provide evidence of their abuse. The current wiretap law is written for a bygone era, and technology has surpassed the law's sphere of impact. In fact, it is harmful and prevents important evidence from reaching the ears of fact finders. In many circumstances it even prevents victims of crime from attaining justice or safety.

Currently 38 other states, including Virginia, Delaware, as well as the District of Columbia and military courts have single-party consent laws. Notably, the federal government has a one-party consent provision. Under those laws, there would be no need for this legislation, because any individual party to the conversation could record and use that evidence in court. In addition to Maryland, there are 10 other states with "two-party consent." But many states provide exceptions to the rule to protect victims of crime. We want to protect victims in Maryland.

Our bill is similar to carve-outs in other two-party consent states where there are criminal or emergency circumstances. For instance, our neighbor to the north is also a two-party consent state, but Pennsylvania has a carve out if a person is "under a reasonable suspicion that the intercepted party is committing, about to commit or has committed a crime of violence and there

is reason to believe that evidence of the crime of violence may be obtained from the interception."

California has a larger carve out for domestic violence that crosses into civil proceedings as well. Washington state provides that "wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) which relate to communications by a hostage holder or barricaded person … may be recorded with the consent of one party to the conversation." Both California and Washington are not only two-party consent states, they both have constitutional amendments for privacy. This bill does not infringe privacy. It simply clarifies an outdated law written for archaic technology, and in response to police misconduct. The technology that every American now has access to was entirely unforeseen when the law was passed and replicated.

Unique to Maryland, we have built this legislation on the existing hearsay exceptional circumstances of Maryland's Rule 5-803(b)(24). Mirroring the rule, this legislation would allow the admissibility of a one-party consent recordings under exceptional circumstances if it has equivalent circumstantial guarantees of trustworthiness. Then the court must separately turn to whether it is more probative than prejudicial and promotes the interests of justice. A statement may not be admitted under this exception unless the proponent of it provides notice meeting specified criteria to the adverse party. Unlike the bill I sponsored last year, this legislation would merely reduce jail time associated with unlawful recording of the other party to a maximum 90 day misdemeanor, from a 5 year felony. Those victims of crime could become states evidence and get immunity for prosecution if they bring evidence of a serious crime forward.

Domestic violence survivors particularly benefit from this legislation. Evidence of their abuse may be recorded and offered as evidence in proceedings against their abuser. No longer will fresh bruises and scrapes be the only means of proof. In a 24-hour period, over 500 calls were made to DV hotlines in MD. With such a staggering number of DV survivors, we must give them every tool possible to allow for the prosecution of their abusers if they so choose. This bill as filed was intended to apply to civil proceedings, but there is a problem with granting immunity in those cases, so we want to limit this to only those civil cases that occur with the same evidence that was already admitted during a prior criminal proceeding. We are willing to work with the committee and counsel to fine-tune this approach, but it would be an injustice to prohibit audio evidence of child abuse in a child custody proceeding for instance, if there was already a criminal prosecution where that specific audio capturing the abuse was admitted. The other civil proceedings where this could be helpful will have to be reviewed at a later date.

For these reasons, we respectfully request a favorable report on SB 629, as amended.

SB 629 - Intercepted Communications - Penalties an
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Women's Law Center of Maryland
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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 brutally 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

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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.