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Judicial Proceedings Committee

Joint Committee on
Cybersecurity, Information Technology,
and Biotechnology

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THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

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Judicial Proceeding Committee

**SB 382 – Favorable - Sponsor Testimony – Intercepted Communications –
Admissibility of Evidence**

Senate Bill 382 is a simplified version of SB 629 from last session, that mirrors existing evidentiary rules. This version is more refined from last session, because it applies only for serious crimes under the criminal evidentiary rules, for crimes of violence under 14-101, stalking and violating a protective order. Last year the bill (SB629) expanded to violations of domestic violence related offenses as well, which could have included less serious offenses. The scope of SB 382 is focused on violent crimes that put you in imminent fear of physical harm or stalking. This is a very reasonable threshold that purposely excludes 2nd degree assault because of scenarios brought up last session, where the abuser might try to manipulate the evidence of a crime. That would be much harder to accomplish under the limited scope of SB 382. This bill does not make the recordings legal (as opposed to SB 375), but it does make them admissible for evidentiary purposes.

The OAG has suggested we include language to allow for disclosure of intercepted communication by an attorney to opposing counsel or the court and this would be a friendly amendment. Please keep in mind that this bill only applies to the admissibility of the evidence, unlike last session, where the bill also changed the penalty of the crime itself. Without the passage of the companion bill SB375, the victim of the listed crimes would still be violating the law (5 year felony) if they recorded the evidence, but could qualify for state's evidence.

All three of my three party consent bills this session complement each other, but they also stand on their own. This bill is perhaps the most nuanced of the three, because it reflects an existing balancing test in the Court's Rules – 5-803(b)(24). This is an existing standard for "other evidence" and should fit well in the context when a recording is reliable and the best

evidence. This exception directs judges to evaluate and admit evidence that is not enumerated as a hearsay exception but has equivalent guarantees of trustworthiness. This is known as the “residual hearsay rule” and serves to admit reliable forms of hearsay, such as illegal recordings. SB 382 builds on the residual hearsay rule and codifies it in the context of audio recordings in violation of two party consent – interception of communication.

Under the mechanisms to be codified under this legislation, the recording can only be admitted once a judge determines the evidence is offered as evidence of a material fact in the criminal proceedings, the contents of the recording are more probative than other available evidence, the interests of justice will be best served by the recording being entered into evidence, and the recording must be disclosed to the opposing party in advance of the trial date.

These duplicated due process protections allow for Maryland to remain a two party consent state, and still protect victims from serious crimes when they recorded their own victimization. For these reasons, I respectfully request a favorable committee report on SB 382, with our friendly amendment to ensure it extends to disclosing the evidence during court proceedings as well.