

Senate Judiciary Committee
SB324 – INTERCEPTED COMMUNICATIONS – PENALTY
Position: Favorable

Dear Chair Smith, Vice-Chair Waldstreicher, and Members of the Committee:

I write as a Co-Chair of the Montgomery County chapter of Our Revolution Maryland, but also as an attorney who has had several opportunities to consider aspects of § 10-402, which criminalizes unauthorized intercepts of communications. I expect that the proposed amendment arises from the prosecution of a teenaged activist, a member of the Our Revolution Maryland community, who live-streamed during a sit-in protest at the offices of U.S. Rep Andy Harris.

Had I known prior to his guilty plea that Mr. Burdett had been charged with a felony violation of the statute, I might have advised Mr. Burdett to plead Not Guilty. It is my understanding of the statute that his conduct is not covered by the statute's terms. The statute is aimed primarily at electrical intercepts of electronic communications. As it also criminalizes unauthorized recording by one of the participants to such communications, it has been understood as a 2-party or all-party consent rule. Not uniquely so in the U.S., but in the minority of states. Only ten percent of the states are considered to require consent to recordings.

Maryland's law is not limited entirely to electronic communications, as by its terms it also applies to at least some "oral communication." I believe the law is not nearly so broad as to have been correctly applied to Mr. Burdett's actions. § 10-401 defines "Oral communication" as "any conversation or words spoken to or by any person in private conversation."

The circumstances of Mr. Burdett's conviction clearly involved no "private conversation." It was extremely public, involving the kind of public demonstration that is the essence of the people's right to free speech. Calling that private conversation strains credulity. Circumscribing the right to record and broadcast it or the responses of public officials does great violence to protections of the 1st Amendment. I believe the statute was improperly applied, even unconstitutionally deployed to punish Mr. Burdett. I hold hope that his conviction may yet be vitiated.

My biggest hope is that the General Assembly will consider a modification which will clearly express the legislative intent not to reach public conversations. Imagine a reporter being prosecuted for recording or broadcasting their impromptu questions and answers by politicians or other public figures or even suspected criminals. Mr. Burdett's prosecution makes clear there's an imperative to spell out the limits of the statute as well as generally outline the kinds of conduct that is protected, regardless of whether someone has expressly consented to a recording or even note-taking.

However, Mr. Burdett's particular situation points out the great risks of challenging prosecutorial overreach like this. The Judge in this case saw no problem in pronouncing a felony sentence for innocent behavior. Mr. Burdett chose to accept a plea offer to avoid any prison time, but still faces real consequences, and continued risks which limit his free expression now.

Failing a modification which will spell out limits to the 2-party consent for public conversations, the legislature should empower a defendant to seek protection and raise a defense for 1st Amendment protected activity. Redefining a violation of the statute as a misdemeanor will remove the threat of the most serious consequences and enable a defendant to pursue all legal defenses. There seems little justification for continuing to treat violations of the statute as felonies. Much of the statute is aimed at preventing police abuses of wiretaps, It is ironic that the statute is now being used in a way which can only be seen as prosecutorial overreach.

The majority of states do not even criminalize such intercepts. It almost beggars belief that it continues to be a felony in Maryland. Please do not miss this opportunity to make important changes to prevent other abuses by prosecutors in the future, penalizing those engaged in conduct most states understand to be protected activity.

For Our Revolution Maryland, and for myself, I ask for a favorable report.

Respectfully submitted,

A handwritten signature in black ink, reading "Edward Fischman". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Edward Fischman, Esquire
Our Revolution Maryland State Organizing Committee.