

SB324 - Intercepted Communications - Penalty.pdf

Uploaded by: Doyle Niemann

Position: FAV

To: Members of The Senate Judicial Proceedings Committee

From: Doyle Niemann, Chair, Legislative Committee, Criminal Law and Practice Section

Date: February 4, 2022

Subject: **SB324 – Intercepted Communications - Penalty**

Position: **Support**

The Legislative Committee of the Criminal Law & Practice Section of the Maryland State Bar Association (MSBA) **Supports SB324 – Intercepted Communications - Penalty.**

This bill simply changes the classification of the offense of illegal interception of a vocal communication from a felony to a misdemeanor.

This is a useful change in what is often call the “wiretap law,” but which has far broader application.

The Committee believes that the felony classification, if it does anything, impedes successful prosecution – especially for what might be considered minor offenses. This is backed up by the fiscal note that indicates there were no convictions for this offense.

The felony classification carries with it significant long-term, even life-long, consequences. These are frequently far in excess of any individual sentence that may be imposed and affect an individual’s ability to find housing and employment and even their immigration status. It is not justified in this case.

Given the stated penalties that remain, changing the classification should have no material impact on the ability of prosecutors to pursue worthwhile cases.

For the reasons stated, we **Support SB324 – Intercepted Communications - Penalty**

If you have questions about the position of the Criminal Law and Practice Section’s Legislative Committee, please feel free to address them to me at 240-606-1298 or at doyleniemann@verizon.net.

Intercepted Comms Written Testimony.pdf

Uploaded by: Edward Fischman

Position: FAV

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 electronic 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 line extending from the end of the name.

Edward Fischman, Esquire
Our Revolution Maryland State Organizing Committee.

SB 324 Written Testimony.pdf

Uploaded by: Scott Shellenberger

Position: FAV

Bill Number: SB 324

**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 324
INTERCEPTED COMMUNICATIONS – PENALTIES

I write in support of Senate Bill 324 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 324 does not change Maryland to a one party consent State. But what it does do is bring us closer to 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.

Senate Bill 324 is a bill whose time is long overdue and brings Maryland into the reality of this decade. I urge a favorable report.

SB324_SenLee_jpr_fav.pdf

Uploaded by: Susan Lee

Position: FAV

SUSAN C. LEE
Legislative District 16
Montgomery County

MAJORITY WHIP

Judicial Proceedings Committee

Joint Committee on
Cybersecurity, Information Technology,
and Biotechnology

Chair
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THE SENATE OF MARYLAND ANNAPOLIS, MARYLAND 21401

February 8, 2022

Sponsor Testimony - FAVORABLE - SB 324 – Intercepted Communications - Penalty

SB 324 is a simple bill to make the violation of criminal eavesdropping with a maximum 5 year penalty, a misdemeanor. As a stark comparison, SB 326 highlights a strange divergence in our values where currently video surveillance of a prurient interest is not even a felony. Classifying eavesdropping as a felony in the 21st century is out of step with the harm other felonies may cause, and the common use of audio recording devices today. The collateral consequences of a felony are serious, and there are many circumstances where that classification would be inappropriate with the elements of this current crime. Everyone in this room has likely violated this law, but you are not felons because the law is draconian and only enforced selectively. That is the problem.

The severity of the law reflects the intended purpose, to prevent police misuse. There are examples in our history when government went too far and was guilty of serious misconduct. A five year penalty and other consequences should cover these crimes, but common use of recording devices does not rise to the level of harm intended with labeling crimes felonies.

The Baltimore County States Attorney testified in favor of this bill in the House hearing. He says this bill will help to bring us closer to the modern age. He noted the majority of states are one party consent states, and that evidence can be admitted into evidence. This bill does not allow evidence to be admitted or even carve out any exceptions to record without permission. It simply removes the label of felony.

Another witness highlights his high profile case in 2019, when he live-streamed a protest without consent of his staffers. He was facing 10 years and 2 felony charges. He avoided jail-time by taking a PBJ, but having a felony charge on his record has followed him around in his adult life. There is a lot of stigma around the word “felon”

and it precludes many employment opportunities because of automated hiring practices that don't look into the details of the charge.

For these reasons, I respectfully request a favorable report on SB 324.