

SB382_FAV_Lee_2022.pdf

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Position: FAV

SUSAN C. LEE
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Montgomery County

MAJORITY WHIP

Judicial Proceedings Committee

Joint Committee on
Cybersecurity, Information Technology,
and Biotechnology

Chair Emeritus
Maryland Legislative Asian American
and Pacific Islander Caucus

President Emeritus
Women Legislators of the
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THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

February 10, 2022

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.

Seltzer, Yosefi Senate Bill 382 Favorable Testimon

Uploaded by: Yosefi Seltzer

Position: FAV



REPLY TO
ATTENTION OF:

**DEPARTMENT OF THE ARMY
US ARMY INSTALLATION MANAGEMENT COMMAND
OFFICE OF THE STAFF JUDGE ADVOCATE
4217 MORRISON STREET
FORT GEORGE G. MEADE, MARYLAND 20755-5030**

February 10, 2022

HEARING TESTIMONY FOR SENATE BILL 382

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 382, entitled: "Intercepted Communications – Admissibility of Evidence". This bill will benefit victims of domestic violence, among others.

I have had clients who are victims of domestic violence ask 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 "all 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 2021, there were 57 Army and Air Force domestic violence cases at Fort Meade.

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. The current "all party consent" requirement creates a safe harbor for abusers by rendering recording evidence of abusive behavior inadmissible, while exposing the victim to felony charges. This bill helps reverse that miscarriage of justice by instead offering domestic violence survivors the safe harbor to make and admit recordings of their abuse.

Maryland is currently in the minority of ten (10) states requiring all-party consent for audio recordings. The Federal Wiretapping statute and Military Rules of Evidence along with thirty-seven (37) states and the District of Columbia currently have one-party consent laws. Three (3) other states have exceptions that make audio recordings at civil protective order hearings or in emergency situations admissible. It is long overdue that in cases of domestic violence, one-party consent recordings should be admissible.

Although not perfect, SB382 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 SB382 will benefit military families.

Thank you for your attention.

Yosefi Seltzer, Esq.
Attorney Advisor
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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 dependents in a wide variety of areas including tax assistance, domestic relations, estate planning, consumer law, military administrative appeals and the like. It was awarded the Army's Chief of Staff Award for excellence in Legal Assistance two of the last three years.

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. He served as a Legal Assistance Attorney at Fort Meade and Fort Belvoir, Virginia from 2008 to 2018, and as the Chief of Legal Assistance at Fort Meade beginning in 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.

Wiretapping Consent Jurisdictional Survey

One Party Consent States (37+ DC)

Alabama	Nebraska
Alaska	New Jersey
Arizona	New Mexico
Arkansas	New York
Colorado	North Carolina
Connecticut	North Dakota
Washington, D.C.	Ohio
Georgia	Oklahoma
Hawaii	Rhode Island
Idaho	South Carolina
Indiana	South Dakota
Iowa	Tennessee
Kansas	Texas
Kentucky	Utah
Louisiana	Vermont
Maine	Virginia
Minnesota	West Virginia
Mississippi	Wisconsin
Missouri	Wyoming

Additional One Party Consent Jurisdictions (2)

Federal Rules of Evidence
Military Rules of Evidence

All Party Consent, but One Party Consent Exceptions for Civil Protective Order Hearings or Emergency Cases (3)

California
Nevada
Washington

All Party Consent, but One Party Consent Exceptions for Child Abuse and Proving a Violation of a Protective Order (1)

Florida

One Party Consent but State Privacy Law Requires All Party Consent (1)

Delaware

All Party Consent Required, No Exceptions (8)

Illinois

Maryland

Massachusetts

Michigan

Montana

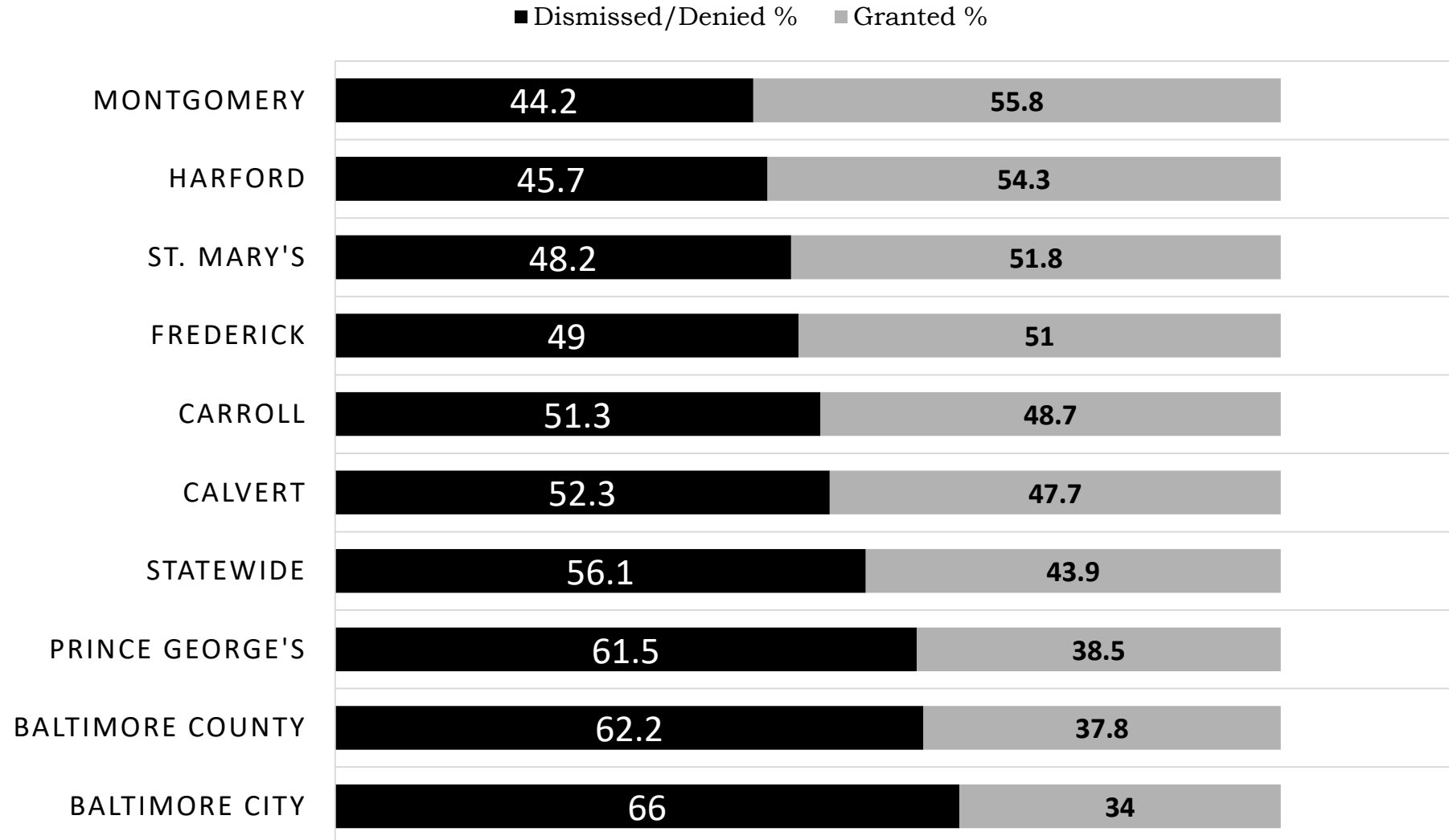
New Hampshire*

Oregon

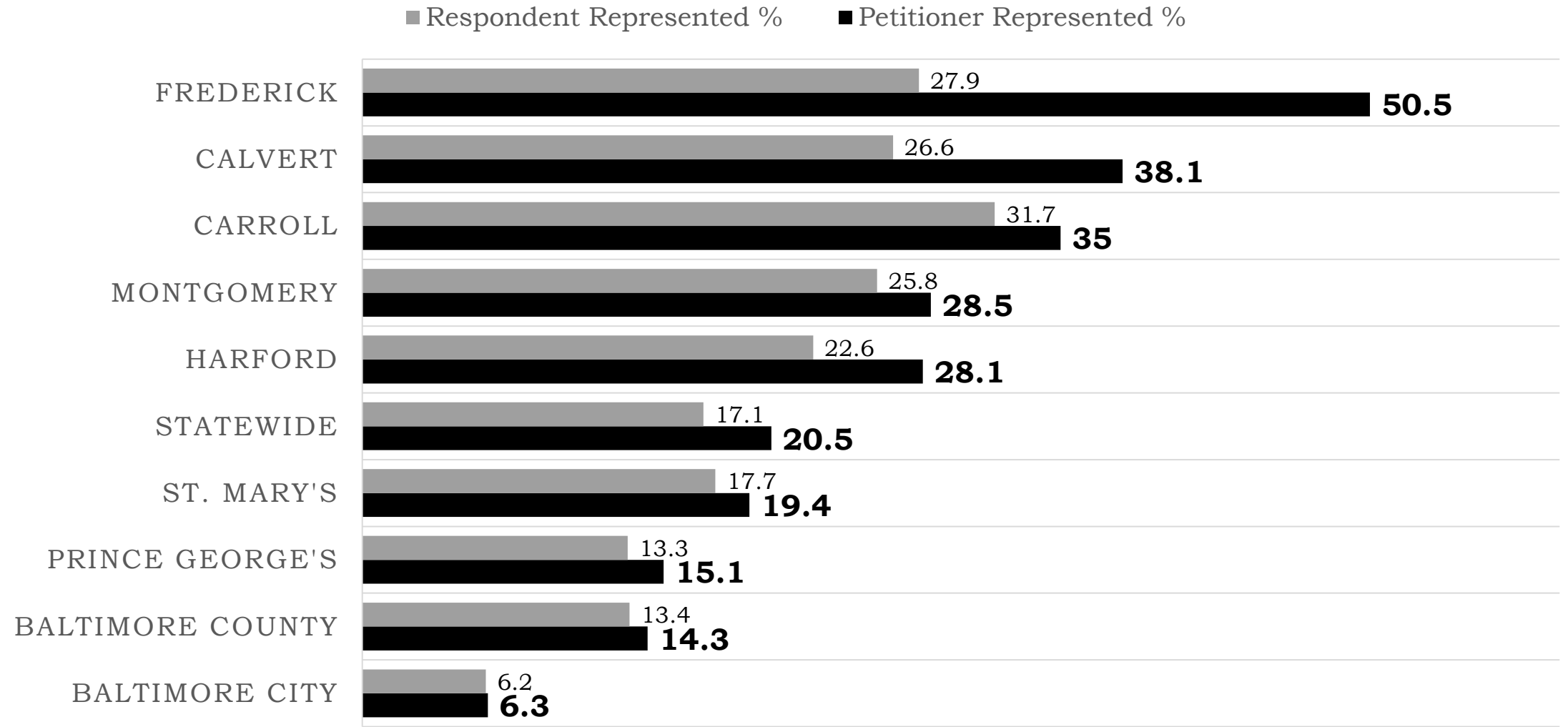
Pennsylvania

* Felony to intercept without consent of all parties; misdemeanor if recorder was a party to the recording.

CIVIL PROTECTIVE ORDERS DISMISSED/DENIED VS. GRANTED IN 2021 BY MARYLAND JURISDICTION



REPRESENTATION IN CIVIL PROTECTIVE ORDERS IN 2021 BY MARYLAND JURISDICTION



MOPD oppose SB 0382.pdf

Uploaded by: Elizabeth Hilliard

Position: UNF



PAUL DeWOLFE
PUBLIC DEFENDER

KEITH LOTRIDGE
DEPUTY PUBLIC DEFENDER

MELISSA ROTHSTEIN
DIRECTOR OF POLICY AND DEVELOPMENT

KRYSTAL WILLIAMS
DIRECTOR OF GOVERNMENT RELATIONS DIVISION

ELIZABETH HILLIARD
ASSISTANT DIRECTOR OF GOVERNMENT RELATIONS DIVISION

POSITION ON PROPOSED LEGISLATION

BILL: SB 382 - Intercepted Communications - Admissibility of Evidence

FROM: Maryland Office of the Public Defender

POSITION: Unfavorable

DATE: 02/07/2022

The Maryland Office of the Public Defender respectfully requests that the Judiciary Committee issue an unfavorable report on Senate Bill 382.

The bill adds an exception to the general prohibition, under Courts and Judicial Proceedings Article, § 10-405, against the admissibility of any intercepted wire, oral, or electronic communication in a legal proceeding in the State. Expanding the evidentiary rules to permit the admission of evidence obtained in violation of the wire-tap statute into trial if the contents are more probative on the point for which they are offered than any other evidence changes the current standard for the admissibility of evidence. It is now in the purview of the court to determine whether evidence is relevant or probative, in doing so, it determines the admissibility of that evidence. Once the court determines the admissibility of evidence, the trier of fact is tasked to decide what weight to accord that evidence. This suggested new standard would have the court determine the weight of evidence to decide if the evidence is “more probative on the point for which they are offered than any other evidence,” and remove that critical duty from the trier of fact.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue a unfavorable report on SB 0382.

Submitted by: Government Relations Division of the Maryland Office of the Public Defender.

SB 382 - UNF - Women's Law Center of MD.pdf

Uploaded by: Laure Ruth

Position: UNF

BILL NO.: Senate Bill 382
TITLE: Intercepted Communications - Admissibility of Evidence
COMMITTEE: Judicial Proceedings
DATE: February 10, 2022
POSITION: **OPPOSE**

Senate Bill 382 would create an exception to using unlawfully obtained audio recordings in certain circumstances. The Women's Law Center (WLC) opposes this bill as it creates a potential to cause criminal charges to be brought against victims of domestic violence or other crimes.

Senate Bill 382 seeks to create exceptions in Maryland's wiretap statute that would allow otherwise unlawfully obtained evidence in violation of state wiretap law, to be admissible in limited circumstances, including cases that are crimes of violence, stalking, or violation of a protective order. However, this bill would create untenable quandaries for both victims and attorneys. How are attorneys to advise their clients when they are told the client has unlawfully obtained audio recording, even if it would help their case? They may have ethical obligations as officers of the court. They may incur the anger and perhaps worse, if they advise a client to use the evidence, and subsequently the client is charged criminally. How should clients who are victims with a protective order be advised on whether to unlawfully record potential crimes of violence or violations of a protective order?

Like other service providers who have to manage recordings that would give rise to potential charges if those recordings were used *now* under current law, we welcome an opportunity to examine the wiretap statute in Maryland as a whole, a better approach than carve outs that create these complicated problems for both attorneys and litigants. Addressing finite aspects of the law and carving out exceptions could result in unintentional harm to victims of violence.

Thus, the Women's Law Center of Maryland urges an unfavorable report on SB 382.

The Women's Law Center of Maryland is a private, non-profit, legal services 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, working to ensure physical safety, economic security, and bodily autonomy for women in Maryland.

SB 382_MNADV_OPP.pdf

Uploaded by: Melanie Shapiro

Position: UNF



BILL NO: Senate Bill 382
TITLE: Intercepted Communications - Admissibility of Evidence
COMMITTEE: Judicial Proceedings
HEARING DATE: February 10, 2022
POSITION: **OPPOSE**

The Maryland Network Against Domestic Violence (MNADV) is the state domestic violence coalition that brings together victim service providers, allied professionals, and concerned individuals for the common purpose of reducing intimate partner and family violence and its harmful effects on our citizens. **MNADV urges the Senate Judiciary Committee to issue an unfavorable report on SB 382.**

Senate Bill 382 seeks to create exceptions in Maryland's wiretap statute that would allow unlawfully obtained evidence obtained in violation of state wiretap law be admissible in limited circumstances including cases that are crimes of violence, stalking, or violation of a protective order. This bill creates numerous quandaries for both victims and attorneys. For attorneys who learn of an unlawful but potentially admissible recording, what is their obligation to disclose as an officer of the court. Is the client subject to arrest for the unlawful recording? How should clients who are victims with a protective order be advised on whether to unlawfully record potential crimes of violence or violations of a protective order? For victims, are they subject to prosecution for felony wiretap violations if they provide an unlawfully obtained recording?

MNADV would welcome an opportunity to examine the wiretap statute in Maryland as a whole. Addressing finite aspects of the law and carving out exceptions could result in unintentional harm to victims of violence.

For the above stated reasons, the **Maryland Network Against Domestic Violence urges an unfavorable report on SB 382.**

sb382.pdf

Uploaded by: Sara Elalamy

Position: UNF

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Joseph M. Getty
Chief Judge

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO: Senate Judicial Proceedings Committee
FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523
RE: Senate Bill 382
Intercepted Communications – Admissibility of Evidence
DATE: February 2, 2022
(2/10)
POSITION: Oppose, as drafted

The Maryland Judiciary opposes Senate Bill 382, as drafted. This bill amends section 10-405 of the Courts Article by adding new a subsection (c) making the contents of an illegally intercepted communication and derivative evidence admissible, if a court makes certain determinations specified in the bill, in a proceeding that involves a crime of violence (under the CR § 14-101 crimes of violence definition), stalking, or a violation of a protective order.

While the Judiciary takes no position on the policy aims of the bill, the bill needs clarification. On page two, the bill allows for the contents of the communication and evidence to be received in evidence in any grand jury proceeding or other proceeding which could include a bond proceeding. It is unclear how the court could determine whether or not the contents of the communication and evidence derived from the communication are more probative on the point for which they are offered in these types of proceedings. In addition, grand jury proceedings are confidential. It is unclear how a court would make this finding prior to a grand jury proceeding.

The bill also does not indicate in which court a proponent is to petition for use of the illegally intercepted communication and derivative evidence if the proponent seeks to have the evidence received in a nonjudicial proceeding, as contemplated in the bill.

Finally, the bill does not indicate who an adverse party would be, for purposes of subsection (d), in the non-adversarial proceedings listed in subsections (b) and (c).

cc. Hon. Susan Lee
Judicial Council
Legislative Committee
Kelley O'Connor