



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

REPLY TO
ATTENTION OF:

March 9, 2023

HEARING TESTIMONY FOR SENATE BILL 749

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 749, entitled: "Crimes- Interception of Wire, Oral, or Electronic Communications- Exception for Imminent Danger and Admission as 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 2022, there were 41 Army domestic violence cases at Fort Meade.

The current all-party consent statutory requirement to make audio recordings in Maryland results in the automatic exclusion of evidence – **often, the best accurate evidence available in domestic violence cases** -- even if the proponent could otherwise meet all of the evidentiary admissibility requirements. Judges, Juries, Commissioners, Magistrates and Grand Juries are currently barred from hearing the recordings when they perform their duty to reach the truth and ensure justice.

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 recorded 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 seven (7) states requiring all-party consent for audio recordings that do not authorize exceptions such as for imminent danger. The Federal Wiretapping statute and Military Rules of Evidence along with thirty-five (35) states and the District of Columbia currently have one-party consent laws. Three (3) other all-party consent states have exceptions that make audio recordings at civil protective order hearings or in emergency situations admissible and three (3) other all-party consent states allow recordings when the sole consenting party is the recorder who is present during the conversation. It is long overdue that in cases of domestic violence, a victim's recordings should be legal and admissible when they are in imminent danger, are being stalked or seek to prove a violation of an existing protective order.

Furthermore, **the all-party consent requirement is not a constitutional protection, but merely a statutory one.** Admitting audio recordings made by a participant to a conversation does not implicate the 4th Amendment: the U.S. Supreme Court ruled that such recordings are legal under a “misplaced trust” theory. A criminal does not have a constitutional right to a reasonable expectation of privacy in conversations they voluntarily have with someone who was invited in by the criminal (no trespass or surreptitious entry) who unbeknownst to them is recording the conversation. United States v. White, 401 U.S. 745 (1971). The court added that for 4th amendment constitutional purposes, there is no difference between an agent instead of immediately reporting and transcribing her conversations with the defendant, either simultaneously recording them with electronic equipment she carries (cell phone) or transmitting the conversation to recording equipment located elsewhere or to other individuals monitoring the conversation. That’s why the federal rules of evidence, military rules of evidence and majority of states deem recordings legal and admissible.

As well, the U.S. Supreme Court added that such audio recordings provide the most reliable evidence possible of the conversation and do not see nor hear more than the individual who was a party to the conversation. See Lopez v. United States, 373 U.S. 427, 438-439 (1963). The Court added that to bar the recording affords the defendant the right to rely on flaws in the witness’ memory or to challenge their credibility without being beset by the corroborating evidence (recording). There is no other argument to exclude an accurate recorded version of a conversation that the witness can legally testify to from memory. Lopez at 439. The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained compels the formulation of a rule excluding its introduction in court. Lopez at 440.

To be clear: **this bill will not make Maryland a “one-party consent” state, nor does it fast-track admissibility of audio recordings. SB749 create a limited exception that would enable domestic violence victims** and others to legally make audio recordings when they reasonably believe they are in imminent danger of a violent crime, stalking, crime of domestic violence or violation of a protective order, in compliance with the referenced Code Sections. The terms “reasonably believes” and “imminent danger” are clearly defined terms in the Maryland Code and Maryland Appellate Court jurisprudence and would therefore present no difficulties in interpretation and application. Moreover, anyone seeking to introduce such imminent danger recordings would still need to comply with all of the existing evidentiary requirements before they would be admitted in a Maryland hearing or court proceeding: authentication, foundation, relevance, probative value outweighs prejudice, hearsay protocols, etc. Maryland judges would be the final arbiters as to whether the evidence meets all of these requirements and should be admissible in Maryland court proceedings and protective order hearings. The opponent of the recordings would always have the opportunity to challenge the evidence as to admissibility and cross-examine the proponent in contested hearings and court proceedings, the same as in all other hearings and court proceedings.

The General Assembly can easily and immediately remedy this statutory exclusionary rule by enacting the provisions contained in SB749. Although not perfect, SB749 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 SB749 will benefit military families.

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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 domestic relations, domestic violence, estate planning, consumer law, tax assistance, military administrative appeals and the like. The Fort Meade office was awarded the Army's Chief of Staff Award for excellence in Legal Assistance three of the last four 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 from 2018 to 2021. He is a former federal and state prosecutor. Mr. Seltzer is licensed to practice law in Maryland, Washington, D.C., Georgia and New York. He is a 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 (35+ DC)

Alabama	New Mexico
Alaska	New York
Arizona	North Carolina
Arkansas	North Dakota
Georgia	Ohio
Hawaii	Oklahoma
Idaho	Rhode Island
Indiana	South Carolina
Iowa	South Dakota
Kansas	Tennessee
Kentucky	Texas
Louisiana	Utah
Maine	Vermont
Minnesota	Virginia
Mississippi	Washington, DC
Missouri	West Virginia
Nebraska	Wisconsin
New Jersey	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 if Recorder is a Participant, Otherwise All Party Consent (3)

Colorado (if the recorder is not present, must have consent from at least one party who is present)
Connecticut
Michigan (per Court of Appeals)

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

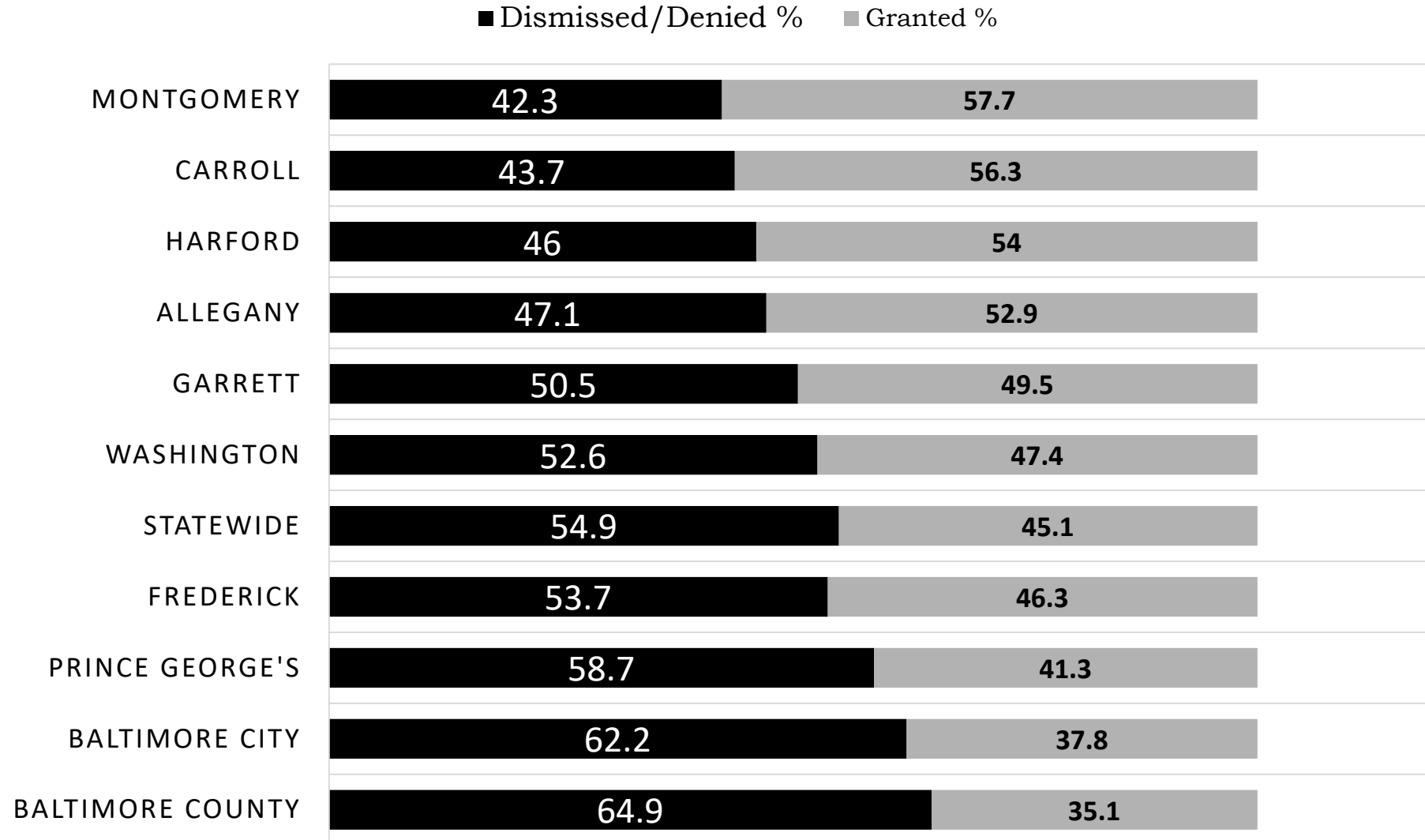
Delaware

All Party Consent Required, No Exceptions (7)

Illinois
Maryland
Massachusetts
Montana
New Hampshire¹
Oregon
Pennsylvania

¹Felony to intercept without consent of all parties; misdemeanor if recorder was a party to the recording.

CIVIL PROTECTIVE ORDERS DISMISSED/DENIED VS. GRANTED BY MARYLAND JURISDICTION (2022)



Civil Protective Order Dismissed/Denied vs. Granted Cases in Maryland (2022)

Jurisdiction	Dismissed/Denied # and %	Granted # and %
Montgomery	1073 (42.3%)	1469 (57.7%)
Carroll	214 (43.7%)	276 (56.3%)
Harford	417 (46%)	489 (54%)
Allegany	145 (47.1%)	163 (52.9%)
Garrett	55 (50.5%)	54 (49.5%)
Washington	428 (52.6%)	386 (47.4%)
STATEWIDE	12,828 (54.9%)	10,550 (45.1%)
Frederick	484 (53.7%)	418 (46.3%)
Prince George's	2864 (58.7%)	2016 (41.3%)
Baltimore City	1782 (62.2%)	1085 (37.8%)
Baltimore County	2061 (64.9%)	1117 (35.1%)

REPRESENTATION IN CIVIL PROTECTIVE ORDERS BY MARYLAND JURISDICTION (2022)

