



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 14, 2023

HEARING TESTIMONY FOR SENATE BILL 754

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 754, entitled: "Maryland Wiretap and Electronic Surveillance Reform Workgroup". This bill will benefit victims of domestic violence, among others.

The Maryland Wiretap Act (MWA) was first codified in 1957 and despite sporadic updates through the years, most significantly in 1977, it has been outpaced by technological advances and public safety concerns that consequently result in outdated, ambiguous and unduly restrictive results. The drafters could not have contemplated the use of mobile and satellite telephones, ring doorbells, security cameras inside and outside of buildings, computer video conference and recording capabilities, Bluetooth devices, drones with cameras and recording devices that empower individuals to protect their personal safety, particularly in domestic violence situations. This creates uncertainty and confusion when law enforcement and citizens attempt to comply with the archaic statutory language that restricts individuals from recording due to the fact that the recurring term "intercept" is defined vaguely and broadly as: "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." Courts and Judicial Proceedings Md. Ann. Code Article, Section 10-401(10).

Making matters, worse, there are eleven (11) exceptions in Section 10-402 that authorize recordings, some of which include specific enumerated crimes that law enforcement must be investigating when making recordings; or when said recordings are made with "all-party consent" and it is not a criminal or tortious act.

Confusing matters further, Section 10-405 lists other exclusions that deem recordings legal if all these conditions are met:

- 1) when the recording is intercepted outside of Maryland;
- 2) in compliance with host state laws;
- 3) the recording consists of at least one party to the communication being outside Maryland during the communication;
- 4) the interception was not made as part of or in furtherance of an investigation conducted by or on behalf of Maryland law enforcement officials; **and**
- 5) all parties were co-conspirators in a crime of violence as defined in Section 14-101 of the Criminal Law Article.

Consequently, the Maryland Appellate Courts have had their hands tied when interpreting the rigid, broad restrictions contained in the MWA. This has resulted in unjust rulings such as in Seal v. Maryland, 447 Md. 64 (2016)(reversal of a conviction of a child sex offender due to the fact that the defendant's incriminating recorded statements were deemed inadmissible because they resulted from the rape victim not having acted "under the supervision" of a detective when the detective simply handed the victim a recorder, with no instructions or limitations, to take home to West Virginia and use at his pleasure to tape conversations with defendant) and Wood v. Maryland, 290 Md. 579 (1980)(the recording made by the Defendant of a government cooperating witness was inadmissible for impeachment purposes due to the fact that the MWA does not allow such evidence to be admitted).

Another problem created by the MWA is the incongruity between Maryland's all-party consent requirement and the federal and military rules of evidence which authorize one-party consent recordings: when federal and military prosecutors seek to introduce audio recordings prepared by witnesses in federal and military courts, these witnesses run the risk of potential Maryland prosecution for violating the MWA.

The rigidity of the MWA consistently creates significant difficulties for domestic violence survivors: under the current law, the current "all party consent" rule does not contain an exception for the victims to make audio recordings of their abusers without the abusers' consent. This is enormously exasperating considering that a victim seeking to record their abuser when both parties are physically present does not constitute eavesdropping, wiretapping nor interception of a telephonic conversation. Nonetheless, such evidence is not only inadmissible at protective order hearings or criminal prosecution of the abuser, but the victim could be charged with a felony for making the recording. By maintaining the all-party consent requirement in domestic violence cases, **the General Assembly has consistently disregarded the rulings in United States v. White, 401 U.S. 745 (1971) and Lopez v. United States, 373 U.S. 427, 438-439 (1963) that make clear there is no Fourth Amendment constitutional requirement that all parties must consent to these recordings**: 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. 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 the vast majority of states (35+ Washington, D.C.) deem these recordings legal and admissible without all-party consent.

As well, in the Lopez case, 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. 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.

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. Not surprisingly, Maryland's protective order dismissal/denial rate in 2022 was 54.9% statewide due in part to the fact that domestic violence survivors were barred from introducing audio recordings to

corroborate their testimony. It goes without saying that without a protective order, these victims inevitably endure subsequent attacks by their abusers, often incurring greater injury and even death. When children in the households witness the ongoing violence, they become emotionally and psychologically scarred which often perpetuates the pattern of violence from generation to generation. Revisions to the MWA will also help to address elder abuse and neglect, human trafficking, child abuse, abuse of developmentally disabled individuals as well as exploitation of foreign-born Marylanders whose first language is not English.

Due to the fact that reform attempts have been unsuccessful for several years, it finally makes sense to gather experts on the subject and direct them to study **best practices** from other states as well as federal process and procedure. **The goal will be to reach consensus recommendations to modernize the MWA in light of rapidly evolving communication technological advances while also balancing privacy and justice considerations.** The workgroup has been carefully constructed to ensure broad representation from a wide variety of practitioners, evidence and privacy academics, prosecutors, defense attorneys, victim advocates, non-profit and private sector attorneys, judges, elected officials and other key stakeholders. One word of caution: any expansion or revision to the roster of participants should be cautiously considered to ensure a healthy balance of expertises and legal philosophies.

SB754 is a strong step in the right direction to modernize the MWA to ensure the best evidence is available for judges to consider while balancing modern communication technological advances, privacy and justice considerations.

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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.