



Testimony for the Senate Judicial Proceedings Committee

February 24, 2026

SB 661 – Wiretapping and Electronic Surveillance - Intercepted Communications - Admissibility of Evidence

UNFAVORABLE

DARA JOHNSON

ASSOCIATE STAFF
ATTORNEY

AMERICAN CIVIL
LIBERTIES UNION
OF MARYLAND

3600 CLIPPER MILL ROAD
SUITE 200
BALTIMORE, MD 21211
T/410-889-8555
F/410-366-7838

WWW.ACLU-MD.ORG

OFFICERS AND DIRECTORS
COREY STOTTEMYER
PRESIDENT

DANA VICKERS SHELLEY
EXECUTIVE DIRECTOR

ANDREW FREEMAN
GENERAL COUNSEL

The ACLU of Maryland opposes SB 661, which carves a wide exception to the Wiretap Act allowing private communications to be admitted as material evidence in a criminal trial or hearing before a district or circuit court, subject to minimal criteria. While there is certainly a need for adequate legal means to raise clear evidence of harm that may be captured in certain oral communications, the provisions proposed here are overly broad and do not readily offer a fair pathway to achieve this. Especially with the cost this weighs against the Wiretap Act's longstanding and valuable requirement of two-party consent to recording oral communications, the risks posed here are too significant to accept.

As a general concern, this bill proposes a judicial standard for allowing admission that goes far beyond the court's traditional role. This would have the court consider whether the communication is more probative than any other evidence the proponent can procure through "reasonable efforts." While a judge's role at this stage is normally focused on weighing the probative value of the evidence against the danger of unfair prejudice, this bill would allow the court to determine the *actual weight* of the evidence, a role typically reserved for the jury at a later stage.

This concern is compounded by the lack of safeguards to ensure this exception would be applied appropriately and without a severe risk of prejudice. This includes:

- (1) **This exception's application to any hate crime or crime against a person, regardless of how minor the allegation.** This opens the door to incentivizing surreptitious recordings to aid in the prosecution of minor offenses, which does not balance

with the major infringement of such recordings on the important personal privacy protections provided by the Wiretap Act.

- (2) **The risk of severe prejudice posed by this bill’s creation of a new hearsay exception without sufficient guardrails.** As the out-of-court communications this bill allows to establish a material fact would presumably include those offered for their truth, such statements would be considered hearsay. Hearsay is generally inadmissible in criminal trials and hearings unless it falls under an existing exception or exemption, so this bill creates a new exception that borrows language from the existing “residual hearsay” exception under Md. Rule 5-803 (b)(24). In the notes on the residual hearsay exception by the Standing Committee on Rules of Practice and Procedure, it is explicitly stated that this intended to “be used very rarely, and only in exceptional circumstances.”

As currently written, this bill lacks sufficient safeguards constraining its application to such exceptional circumstances. This includes the absence of limits on applicable criminal allegations; the lack of any included restriction on deceptive, stale, confidential, or otherwise harmful oral communications; and the failure to offer any language defining the level of “reasonable efforts” the proponent could undertake to obtain other evidence.

The limited existing exception to the Wiretap Act recognizes the need for narrower carveouts and only applies to communications between people found to be co-conspirators in a violent offense. While SB 661 is motivated by the important underlying goal of providing a viable pathway for domestic violence survivors to seek accountability, this can and must be achieved in a way that is fair and protective of the significant privacy interests secured by the Wiretap Act.

For the foregoing reasons, the ACLU of Maryland urges an unfavorable report on SB 661.