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BILL: House Bill 802 and House Bill 132 – Wiretap

FROM: Maryland Office of the Public Defender

POSITION: Informational

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The Office of Public Defender asks this Committee to consider the following information during its contemplation of House Bill 802 and House Bill 132. Maryland’s two-party consent provision is an intentional measure to provide greater privacy protections than available under federal law. *Mustafa v. State*, 323 Md. 65, 74 (1991). “The requirement of consent by all parties for the recording of a telephone conversation by a private individual has been a fundamental part of Maryland law since at least 1956,” and protects the privacy interests of all individuals, even when accused of serious crimes. *Perry v. State*, 357 Md. 37, 61 (1999) (reversing murder conviction that relied on wiretap by co-conspirator). Current exceptions authorizing interceptions, procurements, disclosures, or use of communications in Courts and Judicial Proceedings § 10-402(C) are extremely limited in order to ensure that privacy interests retain as much protection as possible.

For example, § 10-402(C)(6), which authorizes “law enforcement personnel to utilize body wires to intercept oral communications in the course of a criminal investigation if there is reasonable cause to believe that a law enforcement officer's safety may be in jeopardy,” does not allow for these communications to be recorded or used against a defendant in a criminal proceeding. These bills seek to permit electronic communication if the contents of the communication and evidence derived from the communication are:

- (i) are offered as evidence of a material;
- (ii) offered in a proceeding regarding a crime committed against at least one individual (or a Hate Crime); [under HB 132, not HB 802]
- (iii) not intercepted as part of or in furtherance of an investigation conducted by or on behalf of law enforcement officials of this state; and
- (iv) more probative than any other evidence that can be procured through reasonable efforts; and

(v) going to serve the interest of justice by being admitted.

We encourage the Committee to consider further restrictions on the admissibility of this evidence. One example of honing in this erasure of the two party consent law would be limiting the admissibility of evidence only to particular cases. Another example would be ensuring that no law enforcement are involved in the interception, not merely Maryland State law enforcement. We would be happy to discuss potential amendments further with the sponsor and the Committee.

For these reasons, the Maryland Office of the Public Defender urges this Committee to consider limiting amendments for House Bill 802 and House Bill 132.

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