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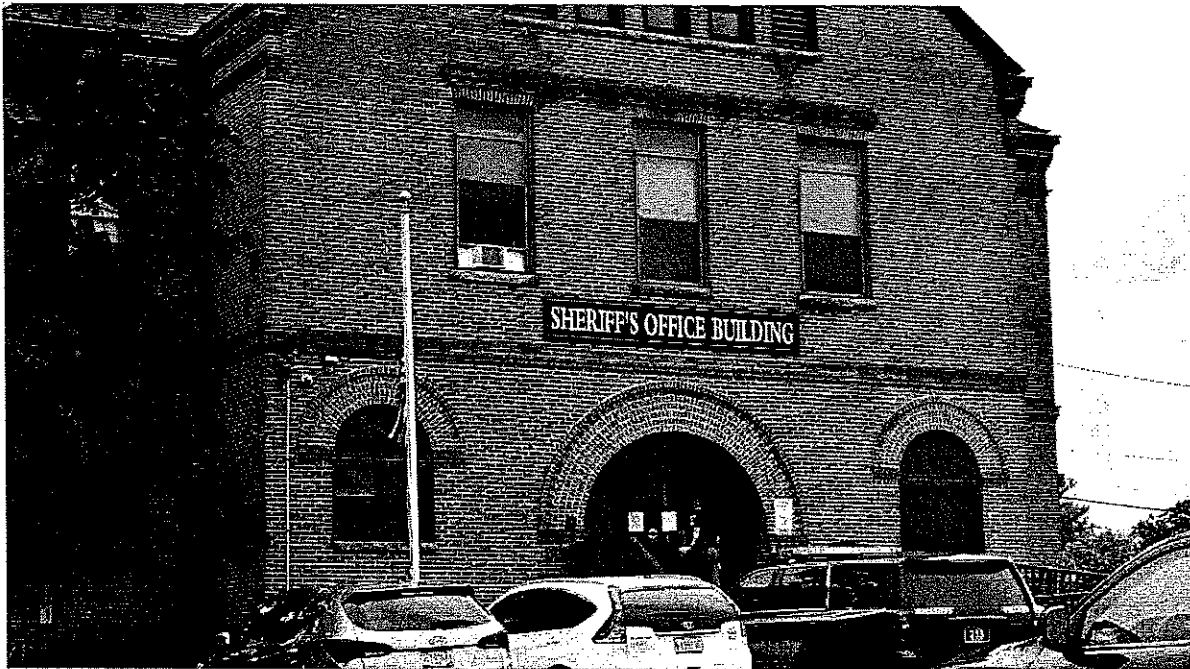


EAVESDROPPING IN MAINE JAILS ([HTTPS://WWW.THEMAINEMONITOR.ORG/CATEGORY/PROJECTS/EAVESDROPPING-IN-MAINE-JAILS/](https://www.themainemonitor.org/category/projects/eavesdropping-in-maine-jails/))

Maine lawmakers, defense attorneys say jails 'must stop' recording and listening to attorney calls

Gov. Janet Mills instructs the Department of Corrections to work with lawmakers to protect attorney-client privilege in jails and prisons.

BY SAMANTHA HOGAN ([HTTPS://WWW.THEMAINEMONITOR.ORG/AUTHOR/SAMANTHAHOGAN/](https://www.themainemonitor.org/author/samanthahogan/)) | MARCH 2, 2022



Aroostook Sheriff's Office. Photo by Samantha Hogan.

Maine county jails "must stop" recording and listening to calls that inmates make to their attorneys, Maine lawyers and lawmakers said this week. Gov. Janet Mills instructed the Department of Corrections to work with legislators on a solution.

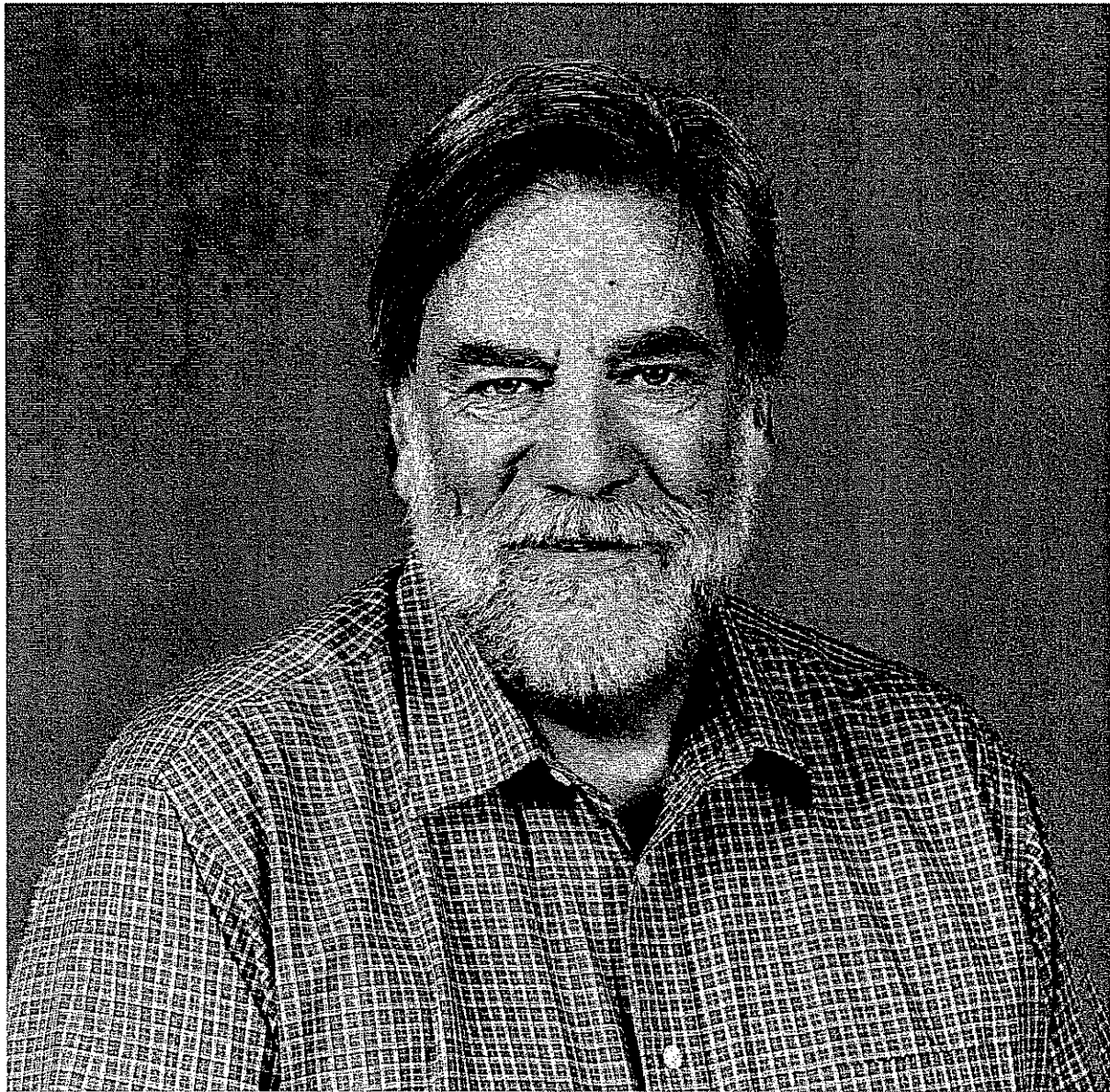
Troubled by a months-long investigation (<https://www.themainemonitor.org/eavesdropping-in-maine-jails/>) by The Maine Monitor that found jails routinely recorded attorney calls, and shared some with prosecutors and law enforcement, state lawmakers are considering a bill (<http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1451&item=1&snum=130>) that would penalize a person who "knowingly eavesdrops" on a conversation between an attorney and a person in custody.

Prosecutors asked lawmakers to reject the bill, which would remove them from cases and potentially expose them to felony charges if they listen to a jail recording of an attorney-client conversation. ^

Yet the state risks systematically depriving jailed defendants of their constitutional right to counsel by continuing to allow jails to record calls with their attorneys unchecked, said Justin Andrus, the executive director of the Maine Commission on Indigent Legal Services, who proposed the bill.

"Gov. Mills believes that Maine state prisons and county jails must protect the confidentiality of privileged communications between an inmate and their legal counsel, a right afforded to them under the Constitution," Lindsay Crete, press secretary for the governor, wrote in a statement to The Maine Monitor.

Mills asked the Department of Corrections to work with the bill sponsor "to ensure that the legislation properly protects these privileged communications without unduly hampering the department's ability to protect its facility staff and other residents," Crete said.



Rep. Thom Harnett

Rep. Thom Harnett (D-Gardiner), who is sponsoring the bill and chairs the state Judiciary Committee, had not heard from the department as of Tuesday. The committee was scheduled to discuss the bill on Wednesday.

"Doing nothing is not an option. It is simply not acceptable to have the specter of attorney-client calls being recorded by the state, because one has no control over what happens to them after that occurs," Harnett said.

Three murder suspects awaiting trial in Maine jails were recorded speaking to their attorneys, and some calls were shared and partially listened to by Maine State Police, a Maine Monitor investigation revealed (<https://www.themainemonitor.org/jailed-defendants-expected-private-attorney-calls-they-didnt-always-get-them/>). The detectives heard enough to recognize the attorneys but not the substance of the conversations, police and prosecutors said.

The bill as drafted would stop investigators and prosecutors who were given attorney calls, "whether or not the person has reviewed the substance of the document, recording or information," from continuing to work on the investigation or prosecution. Eavesdropping on attorney-client conversations would be a felony and punishable with a \$10,000 civil fine.

Assistant Attorney General Megan Elam, the prosecutor assigned to the three murder cases identified by The Maine Monitor, strongly opposed parts of the bill during a recent meeting of the Criminal Law Advisory Commission that advises the Legislature.

"You're criminalizing inadvertent behavior. You're making it a crime when someone gets information that they had every reason to believe didn't include confidential communications and the second they hear the confidential communication they stop listening. That seems wrong to me," Elam said.

Elam previously told The Maine Monitor she did not listen to the attorney calls in the three open murder investigations.

The Maine Prosecutors Association, on behalf of the state's district attorneys, said it supported the intent of the bill but not the penalties.

"All jail phone calls are recorded," said Andrew Robinson, the District Attorney for three Maine counties. "... It's not because the jails are targeting the discussions between an attorney and their client. It's because everybody who calls into the jails, their calls are recorded."

Prosecutors already have an ethical obligation to alert defense lawyers and the court if they receive privileged material, Robinson said. The Maine Monitor found that the state attorney general's office and many district attorney's offices did not have written policies on what to do when recordings of attorney calls are discovered.

"Eavesdropping on phone calls between legal counsel and an incarcerated individual should be against the law. Shame on the Maine Prosecutors for opposing it," said Rep. Jeff Evangelos (I-Friendship).

'Scope of the problem'

Nearly 1,000 attorney calls were recorded (<https://www.themainemonitor.org/attorney-calls-recorded-by-maine-jails/>) by Androscoggin, Aroostook, Franklin and Kennebec county jails between June 2019 and May 2020 — affecting nearly 200 defendants and 46 law firms, records obtained by The Maine Monitor show. Court records in other counties show the monitoring dates to at least 2014.

The number is almost certainly much higher: Eight county sheriffs who operate jails did not cooperate with The Maine Monitor and denied multiple right-to-know requests for data.

"We're never going to understand the scope of the problem if we don't look at what's occurred in the past," Harnett said.

He also was concerned by the lack of transparency and inconsistency in the counties' response to The Maine Monitor's requests for records of recordings of attorney calls.

Many defendants were recorded by jails while calling their court-appointed attorneys, data and court records show. Maine is obligated to provide a lawyer at the state's expense to any person who cannot afford to hire their own attorney. Andrus, the head of indigent legal services in the state, said he was "disappointed and horrified," by The Maine Monitor's recent reporting.



Justin Andrus, the executive director of the Maine Commission on Indigent Legal Services.

"We need a legislative solution, and if we cannot have that then someone needs to obtain a judicial solution," Andrus said.

The fear is not that a prosecutor will try to use a recording of a privileged call as evidence at trial, but that information from the conversation will be used to advance an investigation.

The Maine Association of Criminal Defense Lawyers, a professional organization for members of the state's private defense bar, supports the legislation and said it gave "teeth" to rules and laws that already prohibit listening to their calls with jailed clients. The bill would also improve access for lawyers and clients to review documents together in jail.

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Civil rights lawyers also support the bill. Meagan Sway, policy director of the ACLU of Maine, said despite decades of decisions by the U.S. Supreme Court interpreting that defendants have the right to privately communicate with counsel, "jails in Maine and the for-profit phone companies they contract with are not obeying the constitution."

Both groups recommended the bill not make it a felony to eavesdrop on conversations because it could be broadly applied, and they oppose the expansion of the criminal code.

Notably absent was any comment from the Maine Sheriffs Association. Sheriffs are in charge of operating Maine's 15 jails and contract for phone services from private companies.

"I think silence can speak loudly sometimes," Harnett said. "I can't speak for what they are going to convey with their silence. Again, you have prosecutors, you have legislators, you have the head of (the) indigent legal services statewide program all saying, 'We have a problem here.' It's not helpful when the place where that problem exists to the largest degree chooses not to weigh in."

The Maine Sheriffs Association did not respond to multiple requests for comment.

Sheriffs have previously said the surveillance of inmates' phone calls and mail helps prevent drugs from entering the jails, and stops the harassment of victims and witnesses of crimes. In domestic violence cases, calls are monitored to ensure court orders that no contact be followed.

The legislation as written would require jails to look back several years and determine if their phones recorded attorney calls.

Defendants would then have two years to file a post-conviction review in response to learning their attorney-client calls were recorded by a jail. All other post-conviction reviews have a one-year limit. Prosecutors have asked lawmakers to amend the bill to say defendants must show the recordings had a "substantive impact on the outcome of the defendant's case."

Lawyers are having a difficult time figuring out if they were recorded by a jail, let alone gathering enough information to suppress evidence that may have been gleaned from those calls. Several defense attorneys said they learned they were recorded by a jail when a Maine Monitor reporter contacted them.

Even when an attorney is alerted to recordings, there is no simple way to get a case dismissed.

Steven Clarke has been fighting for five years to undo a guilty plea (<https://www.themainemonitor.org/one-man-fights-to-undo-plea-deal-due-to-jail-recording-of-attorney-calls/>). He said he did not understand that by accepting a plea deal, the court would stop reviewing whether his charges should be dismissed because the Somerset County Jail recorded and shared with prosecutors the 79 calls he had with his defense team, The Maine Monitor reported.

The recording and distributing of attorney calls has a chilling effect on communication between jailed defendants and their attorneys, Andrus said.

"It needs to be very, very costly for law enforcement or a prosecutor's office to make this mistake," Andrus said.



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