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POSITION ON PROPOSED LEGISLATION

BILL: HB 1046 - Criminal Procedure - Facial Recognition Technology - Requirements, Procedures, and Prohibitions

FROM: Maryland Office of the Public Defender

POSITION: Favorable with Amendments

DATE: 2/18/2022

The Maryland Office of the Public Defender respectfully requests that the Committee issue a favorable report on House Bill 1046 with the bill amended as below.

We would first like to thank and acknowledge Senator Sydnor for his persistence and determination in grappling with this issue over the last few years. This bill is an important first step in regulating the use of Facial Recognition Technology. The restriction of its use to the most serious crimes and the prohibition of its use at trial, will help to curtail the use of a potentially quite invasive technology. The Maryland Office of the Public Defender was involved in the workgroup assembled for this bill, and we support its purpose. After discussing the bill with others, however, certain shortcomings in the bill language became apparent. The understanding of certain provisions, while clear to the drafters, may not be so clear to later readers. To that end, we offer the following amendments.

First, to ensure transparency and to protect a criminal defendant's rights to due process and a fair trial it is imperative that a defendant is provided the results and supporting data whenever FRT is used. While Section 2-504 clearly states that the state shall disclose 'in accordance with the Maryland Rules regarding discovery.' In order to make clear that Facial Recognition Technology is addressed by the Maryland Rules of Discovery, it is our suggestion that a sentence be added to the end of the definition of Facial Recognition Technology at 2-501(B)(1) clarifying that Facial Recognition Technology is considered electronic surveillance for purposes of the rule.

Second, there appears to be agreement among all parties that the results generated from this technology should be used as an investigative lead and not introduced at trial under any circumstances. While there is language to this effect at the end of Section 2-503, it is our position that similar language should be added to the end of Section 2-502. Doing so would ensure that the use of this highly prejudicial, yet not quite generally accepted, technology would not be admitted at trial against an individual.

Additionally, under 2-506, in additional to posting the name and version of the Facial Recognition Software approved for use, DPSCS, should also post any developmental and internal validation studies conducted on that software so that communities can fully evaluate the technology. There is a large amount of mistrust around the misuse of surveillance technologies, and the use of them should be as transparent as possible.

Finally, it is important to recognize that this technology is new and is not as well understood as other technologies currently in use. Our understanding of the limits of this technology as well as of the ability of individuals to recognize faces accurately is not great. As our understanding of this area of science grows and standards are developed and accepted by the field, this legislation will almost certainly need to be revisited to incorporate these developments.

Nevertheless, this bill is an important first step to regulate this area of technology that has the potential to be highly invasive. We will tender to both sponsors amendments that we believe address the concerns that we have set forth above.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue a favorable report on the bill with the proposed amendments.

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