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POSITION ON PROPOSED LEGISLATION

TO: The Honorable Luke Clippinger, Chair, Judiciary Committee

BILL: HB 1346 – Criminal Procedure – Evidence – Protecting the Admissibility of Creative Expression (PACE Act)

FROM: Hannibal Kemerer, Chief of Staff, Maryland Office of the Public Defender

POSITION: Favorable

DATE: March 11, 2025

The Maryland Office of the Public Defender (“OPD”) urges the Judicial Proceedings Committee to issue a favorable report on House Bill 1346, Delegate Amprey’s legislation to limit the use of creative expression in adult criminal or juvenile proceedings except in limited circumstances. Under the bill, in order for the creative expression to be admissible, the trial court must find by “clear and convincing”¹ evidence that “(1)(i) the defendant or respondent intended the creative expression to be literal, rather than figurative or fictional; **or** (ii) if the creative expression is derivative, the defendant intended to adopt the literal meaning of the creative expression as their own; (2) the creative expression refers to the specific facts of the alleged offense; (3) the creative expression is relevant to a disputed issue of fact; **and** (4) the creative expression has probative value that cannot be provided by other admissible evidence.”²

We support HB 1346 as a suitable and strong effort to codify the common law test laid out by the Maryland Court of Appeals in *Montague v. State of Maryland*³ and *Hannah v. State of Maryland*,⁴ two decisions evaluating the admissibility of rap lyrics in criminal cases. If enacted, the rule codified in HB 1346 would protect our clients’ First Amendment rights to free expression, while also permitting prosecutors to admit the creative expression in a trial against the artist *if* there’s a strong *temporal* and *factual nexus* between the crime charged and the creative expression. It would not, however, permit the wholesale introduction of prejudicial and irrelevant creative

¹ Such evidence is less than that required to prove a matter “beyond a reasonable doubt” but greater than a mere “preponderance of the evidence.” Maryland courts have determined that the “clear and convincing” standard of evidence is “necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with ‘a significant deprivation of liberty’ or ‘stigma.’” *Coleman v. Anne Arundel County Police Dept.*, 369 Md. 108, 145 (quoting *Santosky v. Kramer*, 455 U.S. 745, 756-57 (1982)).

² See Proposed Section 10-926(b)(1), *et seq.*

³ 471 Md. 657 (2020).

⁴ 420 Md. 339 (2011).

expression that has nothing to do with the underlying crime alleged. That saving grace will serve to ensure that our clients are not improperly prejudiced in a proceeding against them by the introduction of creative expression consistent with their First Amendment rights. In short, HB 1346 protects both due process and freedom of speech rights while also permitting the introduction of relevant evidence.

For these reasons, we urge the Judiciary Committee to favorably report HB 1346.

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

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