

**WASHINGTON DEFENDER ASSOCIATION
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE**

WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

SSB 6280: Concerning the use of facial recognition services.

WACDL, the King County Department of Public Defense, and WDA oppose SSB 6280. It is overly broad, potentially unconstitutional, lacks meaningful mechanisms for ensuring compliance and accuracy, and fails to address proven racial bias. The many issues with this bill show that this technology is too poorly understood to be systematically used by the government in ways that would have huge effects on citizens and their exercise of civil rights. There should be a moratorium on this technology until such time as these concerns are more fully understood and can be addressed. Our concerns are outlined in more detail below.

48 hours is too long to wait for a warrant. Officers are not allowed to use technology that goes beyond normal human perception without a warrant. This includes technology that enhances officers' ability to track a person's location, even if the officer could otherwise follow the person. In *United States v. Jones*, the Supreme Court found that putting a GPS on a car and tracking it was a fourth amendment search requiring a warrant. 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012). This was true even though the officers could have legally followed and observed the car themselves. Facial recognition technology presents identical concerns, enhancing officers' ability to follow a person through technology. Warrantless use of this technology is almost certainly unconstitutional.

There is also no reason it would take 48 hours to obtain a warrant. The Supreme Court has recognized that telephonic and email warrants allow officers to receive approval for warrants extremely expeditiously without interrupting police investigations. *Missouri v. McNeely*, 569 U.S. 141, 155, 133 S. Ct. 1552, 1562, 185 L. Ed. 2d 696 (2013). There is absolutely no reason it would (or should) take 48 hours to obtain a warrant and a law allowing such a delay is almost certainly unconstitutional. There is already an exigency exception to the warrant requirement. It requires the officer to get a warrant as soon as is practicable. If there are truly exigent circumstances, an officer is also always allowed to arrest someone.

Giving officers 48 hours leeway to decide who is committing or about to commit a serious offense, gives officers unbelievable (and probably unconstitutional) leeway in making that determination. This long window opens the door for unmonitored abuse. A judge should weigh in at the earliest practicable moment.

There are no consequences for failure to comply. The proposed law has no teeth to ensure compliance. It would not punish law enforcement agencies for failing to meet the reporting or community engagement requirements. An actual consequence for failure to submit these reports is necessary to make the proposed constraints in the law meaningful.

Humans are not valid checks to facial surveillance systems. Humans are notoriously bad at identifications and are overly influenced by scientific evidence.
<https://www.ncjrs.gov/pdffiles1/nij/178240.pdf>; <https://www.innocenceproject.org/forensic->

Washington Defender Association | 110 Prefontaine Pl. S, Suite 610 | Seattle, WA 98104 | 206-623-432

WDA is a non-profit organization created in 1983 to promote, assist, and encourage public defense systems which ensure that all accused persons in every court receive effective assistance of counsel

Washington Association of Criminal Defense Lawyers | 1511 Third Ave., Suite 503 | Seattle, WA 98104 | 206-623-1302

WACDL is a non-profit organization working to improve the quality & administration of justice by protecting & insuring by rule of law those individual rights guaranteed by the Washington and Federal Constitutions

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[science-problems-and-solutions/](#). In other words, an officer is likely to agree with an identification made by a computer, even if it is incorrect. The officer's natural ability to make an identification is unlikely to overcome this bias. This could result in false identifications being confirmed by faulty human identifications. For a long time, courts have not allowed police officers to identify defendants from videos unless they had significant prior contact with the defendant because: "Opinion testimony identifying individuals in a surveillance photo runs the risk of invading the province of the jury and unfairly prejudicing the defendant." State v. George, 150 Wn.App. 110, 118, 206 P.3d 697 (2009). This is especially true for cross racial identification. <https://www.innocenceproject.org/cross-racial-identification-and-jury-instruction/>. There is also strong evidence that human bias is the cause of the racial bias in these systems, making it likely that bias would be replicated. <https://www.washingtonpost.com/technology/2019/12/19/federal-study-confirms-racial-bias-many-facial-recognition-systems-casts-doubt-their-expanding-use/>

There are strong reasons to believe that a human check on these tools would be useless or worse, perpetuate false identifications.

Facial surveillance technology is racially biased. In discussions on this bill, it has come up repeatedly that this software misidentifies people of color more than white people. This means for every search involving a picture featuring a person of color, many people who are not depicted in the picture will be identified as matching the picture. This will result in the massive over-surveillance of communities of color without any judicial oversight or authority under the law. When the police put a picture depicting a face of color into these systems, it will cast a much broader net than it would for white faces. This alone should support a moratorium on the use of this technology until it can be proven that it will not result in so many false positives, especially false positives with such broad disparate impact.

Discovery of these searches should be consistent with the requirements of 4.7, not a separate reasonable timeline. We already have discovery rules. Discovery of this material should be in line with those rules.

Allowing warrantless searches for all "Crimes Against Persons" gives police too much discretion. Identity theft is a crime against persons. While identity theft is a serious crime, it is not the type of crime that should give rise to massive warrantless surveillance. The time it would take to get a warrant in such cases more than justifies the delay. This bill is not limited to the most serious offenses; rather, it covers a huge number of offenses for which officers would have free reign to surveil people. An officer could "predict" that a protester will commit the crime of assault in the fourth degree and thereby subject them to surveillance for up to 48 hours without a warrant. This would have potentially devastating effects on the civil liberties of citizens.

Methodology should be included in the public report. The technology that certifies the accuracy of this software should be open to the public. For true accountability, it would be necessary for the public to be able to see how companies are determining the effectiveness of their software. This oversight should not be left to police.

David Montes: 206 – 477 – 9151 or david.montes@kingcounty.gov
Neil Beaver: Neil Beaver, (509) 975-9550 or neil.beaver@gmail.com