

TESTIMONY OF BARRY C. SCHECK, INNOCENCE PROJECT
SUPPORT FOR HOUSE BILL 240
MARYLAND HOUSE JUDICIARY COMMITTEE
FEBRUARY 23, 2021

The Innocence Project is a nonprofit organization that exonerates the wrongfully convicted and works to reform the criminal justice system to prevent future injustice¹ and we commend the Committee for its proactive discussion of a first of its kind bill to regulate Forensic Genetic Genealogical DNA Analysis and Search (FGGS)² to ensure that its use is scientifically sound and just. We respectfully submit the following testimony to urge the Committee to affirm its support of the bill introduced by Delegate Shetty in collaboration with Senator Sydnor (SB187).

Issue in Current Policy:

Presently, the use of extraordinarily informative DNA technology to conduct genetic genealogy searches in criminal investigations in the United States is taking place without any significant scientific, legislative, professional, or judicial oversight. Some claim that as long as powerful new technologies are used “for investigative purposes only” and not introduced as evidence in court there is no need to be concerned about their impact on civil liberties, privacy, or the administration of justice. However, the Innocence Project believes the concern about the ethical and just application of forensic evidence should extend to investigative tools for two primary reasons. First, without proper safeguards, innocent people can inadvertently become the focus of investigations and wrongful convictions can occur when tunnel vision sets in. Second, absent regulation, powerful tools like genetic genealogy have the capacity to exonerate the innocent, but their application can negatively impact privacy interests and civil liberties.

¹ To date, the work of the Innocence Project, along with other innocence organizations and lawyers around the country, has led to the exoneration of hundreds of individuals based on new evidence of actual innocence, including DNA and other scientific evidence. These injustices demonstrated that the misapplication of forensic science is a leading cause of wrongful conviction, having played a role in the cases of 43 percent of the 375 wrongfully convicted people in the United States who have been exonerated by DNA testing, and nearly a quarter of the over 2,700 people who were exonerated by DNA or by other means.

² FGGS typically employs sequencing of vast regions of a person’s genome, searching those results against a direct-to-consumer genomic database, followed by an investigation using genealogical methods as well as public records and other lawful means of obtaining information.

Issue in Practice:

Already, news reports have publicized how law enforcement officers have obtained DNA samples for genetic genealogical use through deception.³ Stories like this not only rupture a community's trust in police but also negatively impact a community's willingness to partner with law enforcement to assist in solving even the most serious crimes. Dr. Thomas Callaghan, the Chief Biometric Scientist at the Federal Bureau of Investigation Laboratory, stated, "Absent best practices, use of FGG could lead to compromised cases, diminished use, or the loss of this new investigative tool. Public support for FGG could be jeopardized and confidence in forensic DNA analysis could be undermined."⁴ However, to date we've also seen how FGGS has been instrumental in exonerating two innocent people who have suffered decades of unjust incarceration and identified, for victims and their families, the individuals who have now been charged with homicides.⁵ We seek a legislative solution that can both honor the needs of public safety as well as strengthen public trust in police investigations.

Legislative Redress:

HB 240 is based on the interim FGGS policy established by the U.S. Department of Justice (DOJ) in September 2019⁶ which also recognized the need to provide special oversight for the use of FGGS. However, HB 240 surpasses the DOJ's policy by establishing the following protections:

- **Judicial Oversight.** Due to the incredibly personal nature of a person's genomic data, HB 240 ensures that FGGS is used only as a last resort in the most serious crimes. In order to pursue FGG testing, the government must obtain judicial authorization that certifies the FGG search request meets criteria established for the type of crime, the quality and probative nature of the DNA sample, and requires that all other investigative efforts be exhausted. Judicial oversight also applies when investigators seek the covert collection of DNA from the people who the FGGS has identified may have committed the crime. This requirement acknowledges the personal nature of a person's DNA information and limits its use to only well-established cases and using the least invasive method.
- **Third Party Informed Consent and Data Expungement.** FGGS requires a time intensive investigative process. When genetic genealogists need a DNA sample from a relative of a potential person of interest in order to continue building the family tree, it is critical that these private citizens, who are innocent of the crime at hand, are treated with

³ Jon Schuppe, *Police told a mother her DNA would identify a dead relative. They arrested her son instead.*, NBC NEWS, February 22, 2020, <https://www.nbcnews.com/news/us-news/they-lied-us-mom-says-police-deceived-her-get-her-n1140696> (last visited Feb 29, 2020).

⁴ Thomas F Callaghan, *Responsible genetic genealogy*, 366 SCIENCE 2 (2019).

⁵ Mia Armstrong, *In an Apparent First, Genetic Genealogy Aids a Wrongful Conviction Case*, THE MARSHALL PROJECT, July 16, 2019, <https://www.themarshallproject.org/2019/07/16/in-an-apparent-first-genetic-genealogy-aids-a-wrongful-conviction-case> (last visited Mar 1, 2020); Don Thompson, *California man Ricky Davis exonerated with DNA, genealogy websites*, February 14, 2020, <https://www.usatoday.com/story/news/nation/2020/02/14/california-man-ricky-davis-exonerated-dna-genealogy-websites/4759035002/> (last visited Mar 1, 2020).

⁶ U.S. Department of Justice, *United States Department of Justice Interim Policy: Forensic Genetic Genealogical DNA Analysis and Searching* (2019), <https://www.justice.gov/olp/page/file/1204386/download>.

the dignity and respect. For this reason, HB 240 has strong protections that require voluntary informed consent from the person who offers their genomic information to assist investigators and a rigorous process to document that the sharing of DNA was consensual. Investigators may only use direct-to-consumer or publicly available personal genomics databases that explicitly disclose their law enforcement partnerships and receive consent for the information generated from these genetic genealogy investigations may be used only for the case at hand and destroyed upon the completion of the criminal prosecution.

- **Defense Access.** The accessibility of an investigative tool to both prosecution and defense is a marker of equitable and transparent use. HB 240 makes it possible for innocent people to prove their innocence. A recent analysis by *The Atlantic* found that among the 104 murder cases solved by law enforcement use of FGGS, 89 of the victims were white and four were Black.⁷ Defense access to FGGS can support racial equity in the distribution of its use.

Lastly, HB 240 acknowledges the need for transparent data collection and reporting of the use of FGGS by calling for the Maryland Department of Public Safety and Correctional Services to produce a publicly accessible annual report that is reviewed by a panel of stakeholders who are representative of those who will use and be affected by FGGS, those who can ensure its continual application as a scientifically sound and just investigative tool, and the community of people whose lives will be impacted by the use of this tool.

In conclusion, we are deeply appreciative that Delegate Shetty and Senator Sydnor have proposed the regulation of FGGS in Maryland and that the Judicial Proceedings Committee is contemplating this issue in today's hearing. With your careful consideration, Maryland can establish a national model that demonstrates that a state can simultaneously enhance public safety, honor victims of crime, recognize the dignity of its people, proactively prevent the risk of wrongful convictions, and ensure that genetic technologies are implemented in a manner that provides not justice for some, but justice for all.

CONTACT:

Barry C. Scheck, Co-Founder & Special Counsel, Innocence Project
bscheck@innocenceproject.org

Nathaniel Erb, State Policy Advocate, Innocence Project
nerb@innocenceproject.org

⁷ Jacob Stern Zhang Sarah, *The Victims Left Behind by Genetic Genealogy*, THE ATLANTIC (2021), <https://www.theatlantic.com/science/archive/2021/01/genetic-genealogy-race/616171/> (last visited Feb 1, 2021).