

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Mary Ellen Barbera
Chief Judge

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO: House Judiciary Committee
FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523
RE: House Bill 240
Criminal Procedure – Forensic Genetic Genealogical DNA
Analysis, Searching, Regulation and Oversight
DATE: January 27, 2021
(2/23)
POSITION: Oppose

The Maryland Judiciary opposes House Bill 240. This bill adds sections § 17-101 through § 17-105, “Forensic Genealogy”, to the Criminal Procedure Article. Several terms are defined in §17-101, including “Forensic Genetic Genealogical DNA Analysis and Search or FGGS”, which means “the forensic genetic genealogical DNA service to find individuals related to the source of the FGG profile and a genealogical search using public records and other lawful means to obtain information in accordance with the regulations under this title.” Another term defined is “FGG profile” which “means a genetic profile using SNPs or other sequencing methods generated from a forensic or reference sample by a laboratory for the purpose of conducting a FGGS.”

First, the bill requires at Criminal Procedure § 17-105(b) that judges participate in a panel that reviews the annual Forensic Genetic Genealogical report submitted by the Department of Public Safety and Correctional Services to the Governor. The Judiciary believes that it is inappropriate for judges to participate in such a panel and review such reports.

Second, the Judiciary believes that § 17-102(b)(1), as written, may cause confusion when courts seek to apply the bill because that subsection lists offenses for which FGGS may be initiated and it includes “murder, felony sexual assault, or an attempt to commit a violent crime other than homicide or sexual assault[.]” This wording suggests that, for example, a FGGS may be initiated for murder but not for attempted murder while, conversely, an FGGS may not be initiated for armed carjacking but could be initiated for attempted armed carjacking. This unusual categorization of covered offenses may lead to confusion and inconsistent application of the law.

Third, the bill distinguishes among the party requesting FGG profiles. Section 17-102(c) prohibits law enforcement from obtaining FGG profiles to determine if a suspect has a

particular medical or genetic condition. However, in post-conviction cases, a petitioner may obtain the FGG profiles for medical or genetic conditions under § 17-103(a)(3). The Judiciary is unclear whether this differentiation is intentional.

This bill would also be difficult to implement as it would require investigators to always notify the court before collecting a covert DNA sample which may not always be possible and could delay or prevent accurate investigations. In addition, the requirement for law enforcement to report back to the court every 30 days is impractical.

In addition, the bill states in §17-102(f)(3)(v)(2) that the DNA sample and any data obtained from it will be destroyed when the investigation or any criminal case arising from the investigation ends. Yet, in §17-102(h)(1) the bill provides that the court can issue orders to ensure all samples gathered are destroyed on completion of any criminal prosecution that may arise from the FGGS. These provisions are inconsistent and need to be defined as an individual is subject to criminal penalties for not complying with this section.

Section 17-102(b)(2) also provides that the forensic sample was collected from a crime scene, a person, an item, a location connected to the criminal event, or the unidentified human remains of a suspected homicide victim. It is unclear if this also applies to an identified victim.

Further, reasonable investigative leads typically involve google searches and cell phone data which can be slow to obtain. This bill provides, however, that FGGS may not be initiated until reasonable investigative leads have been tried and failed. This could delay the process.

It is also not clear who provides the third party notice required under §17-102(f)(3)(v). The bill also does not define “intrusive surveillance.”

This bill also dictates in §17-103 that the court will take evidence and ultimately have a trial within a trial based on the filing of an affidavit. This is unusual and problematic.

Finally, the provision requiring an explanation of need by defense counsel may be difficult to implement as counsel would have to disclose information to the court, and the State, they otherwise could keep confidential until trial.

cc. Hon. Emily Shetty
Judicial Council
Legislative Committee
Kelley O'Connor