

**TESTIMONY OF SUSAN FRIEDMAN,
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BEFORE THE MARYLAND HOUSE JUDICIARY COMMITTEE
ON SENATE BILL 848
March 10, 2020**

Thank you, Chair Smith, Vice Chair Waldstreicher, and honorable members of the Senate Judicial Proceedings Committee for your consideration of SB 848. 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 proactively discussing the regulation of forensic genetic genealogy (FGG). We respectfully submit the following testimony to urge the Committee to both enhance its oversight of genetic genealogy and differentiate it from traditional uses of the State DNA databases by formulating a bill that focuses exclusively on the regulation of this powerful tool and to consider a set of amendments that will achieve the intent of the proposal while assuring FGG may be used under a proper regulatory scheme. Given the complexity of this issue, the Innocence Project will work on a proposed set of amendments for consideration by this Committee, and remains available to work with all interested parties to craft a proposal that serves the shared interests and values of the criminal justice community.

Presently, genetic genealogy for criminal investigative purposes is applied in the absence of legislative, professional, or judicial oversight throughout the United States. There is often a distinction between the use of investigative methods and technologies compared to methods and technologies that are introduced as evidence in court. However, the Innocence Project believes that the ethical and just application of forensic evidence extends 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, powerful tools like genetic genealogy have the capacity to exonerate the innocent, but their application can negatively impact privacy interests and civil liberties. Already, news reports have publicized how law enforcement officers have obtained DNA samples for genetic genealogical use

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 almost half of the 367 wrongfully convicted people in the United States who have been exonerated by DNA testing, and a quarter of the over 2,000 people who were exonerated by DNA or by other means.

through deception.² Stories like this can not only rupture a community's trust in police but can also negatively impact a community's willingness to partner with law enforcement to assist in solving even the most serious crimes. However, to date we've also seen how FGG has been instrumental in exonerating two innocent people who have suffered decades of unjust incarceration and identified for victims and their families individuals who have now been charged with homicides.³

Thanks to the leadership of Senator Syndor and Delegate Shetty, Maryland is on a path to becoming a leader in ensuring that proper regulation of FGG becomes a national reality. SB 848 wisely anticipates that FGG has the capacity to solve crimes but needs to be carefully controlled to prevent misuse of this powerful tool. The genetic information utilized in FGG searches should be controlled with great care and concern for the privacy and dignity of all involved. An FGG search has the potential to expose family secrets concerning paternity, maternity, familial relationships, and adoption as well as sensitive health information. The Innocence Project recognizes any public disclosure that someone is a suspect in a serious criminal investigation, or related to a suspect, can inflict unfair financial and emotional hardship on individuals and families not to mention loss of liberty.

In order to treat this powerful tool with the deference it deserves, the Innocence Project recognizes the legislature has to balance respect for the genetic privacy and dignity of the people of Maryland against the need to identify those who commit crimes, establish closure for victims of crime, and the exoneration of innocent people wrongfully convicted of crime. Accordingly, we propose that SB 848 provide a clear, separately described search warrant procedure whereby police, prosecutors, criminal defendants, and individuals seeking post-conviction relief obtain FGG testing and genealogy searches that directly addresses the unique sensitive privacy issues raised by this procedure. The U.S. Department of Justice (DOJ) has also recognized the need to provide special oversight for the use of FGG searches and released an interim policy in September 2019.⁴ In a recent opinion piece in *Science Magazine*, 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

² 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).

³ 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).

⁴ 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>.

undermined.”⁵ The Innocence Project believes DOJ’s interim policy is a good starting point and we adopt virtually all its recommendations in our proposal. We believe, however, that the “interim policy” can be significantly improved by one simple fix -- greater use of judicial supervision to resolve difficult and unpredictable privacy issues that can arise, especially in obtaining “informed consent” to obtain DNA reference samples from innocent people who might be related to someone who committed a violent crime as well as the need to perform covert collection of DNA samples in the course of a FGG search. To this end, the Innocence Project recommends the following policies to guide the focused, dignified, and ethical application of FGG testing:

- **Case Criteria -- Qualifying Crime and Crime Scene Evidence Needed to Apply for an FGG Search Warrant.** We agree with the DOJ that a FGG search should be performed “when the case involves a violent crime”(a homicide or a sex crime, not burglaries) and the “candidate forensic sample is “reasonably believed” to come from a person who deposited the “candidate forensic sample” during, or incident to, the commission of the violent crime.”⁶ Most importantly, we agree with DOJ that FGG testing should only be undertaken in cases where the “forensic sample” from the crime scene has produced an STR DNA profile that was uploaded into the CODIS DNA database and did not produce a “hit” to a known individual. In fact, the FGG search warrant is best understood as a “search” using genetic genealogy Single Nucleotide Polymorphism (SNP) testing, and genealogy searches of public records, to identify the “John Doe” or “Jane Doe” STR DNA profile obtained from the “forensic sample” recovered at the crime scene.⁷ The FGG search warrant procedure begins with the unidentified STR DNA profile from the crime scene and ends with a collection (invariably a “covert collection”) of DNA from a suspect identified through the FGG search whose STR DNA profile matches the STR DNA profile from the crime scene “forensic sample.” The DOJ “interim policy” does not require that a search warrant be obtained until an FGG SNP DNA test is about to be performed after a “covert collection” of a reference sample. The Innocence Project believes the entire FGG search process – obtaining informed consent from innocent parties to provide their DNA samples and the “covert collection” of reference samples -- should be under judicial supervision. All the difficult and unpredictable privacy issues raised by obtaining samples from innocent relatives through “informed consent,” the potential for unduly intrusive invasions of privacy in the genetic genealogy search of records and the covert collection of DNA samples should be decided by “a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” *Johnson v. United States*, 333 U.S. 10, 14 (1948). An FGG warrant procedure as outlined here would be a model for the nation and would ensure that FGG testing and searching is carried out in a manner that protects privacy interests, limits unduly intrusive searches, and ensures the integrity of the process.

⁵ Thomas F Callaghan, *Responsible genetic genealogy*, 366 SCIENCE 2 (2019).

⁶ U.S. Department of Justice, *supra*, at 4. DOJ also recommends that FGG testing be done “when a case involves what is reasonably believed by investigators to be the unidentified remains of a homicide victim...” We agree.

⁷ It has been an accepted practice for decades to permit an indictment against a “John Doe” DNA profile in a sexual assault case to toll the statute of limitations. See, *New York v. Martinez*, 855 NYS 2d 522 (2008).

- **Judicial Supervision.** If a determination is made that crime scene evidence satisfies the requirements above, then a party seeking to perform FGG should seek a search warrant to identify the donor of the STR profile left at the crime scene. FGG should only be conducted under judicial supervision and approval.

Judges faced with FGG requests from law enforcement or district attorneys for open investigations or cold cases must ensure the following:

- The crime is murder or violent felony;
- A DNA match would provide probative evidence of guilt of the donor of the STR profile;
- The laboratory official at the laboratory who produced the STR DNA profile must determine if the forensic profile is suitable for FGG and have advised the investigative agency of any reasonable scientific alternatives to FGG given the nature and condition of the candidate forensic sample, and the availability of the other DNA technologies or techniques.⁸
- A showing should be made that the investigative agency “pursued reasonable investigative leads”⁹;
- The FGG search is only authorized in a genetic genealogy database that “provide[s] explicit notice to their service users and the public that law enforcement may use their service sites to investigate crimes or to identify unidentified human remains.”¹⁰
- In the event that a DNA reference sample is needed from a third party, informed consent should be obtained from that individual and appropriately documented unless doing so would compromise the integrity of the investigation. Those engaged in obtaining informed consent should be trained by experts with a background in forensic genealogy, genetic counseling, adoption services or other relevant disciplines. The information to be provided in obtaining informed consent should not be misleading and should be approved by the court.
- If a determination is made that a covert sample must be collected then the court must be notified prior to the covert collection of the DNA sample and a showing be made why a covert collection is necessary. Covert collection may be necessary in instances where seeking informed consent would compromise the integrity of the investigation. This typically arises near the end of the investigation where seeking a DNA reference sample from a relative could tip off the target of an investigation. The second instance occurs when a third party declines to provide a DNA reference sample. Courts should seek to minimize the number of covert samples collected in the execution of a FGG search.
- In any instance where a covert collection will occur, investigative authorities should make a proffer to the court explaining how they plan to conduct the covert collection in a manner that avoids unduly intrusive surveillance of individuals or invasions of their privacy.

⁸ U.S. Department of Justice, *supra* note 4 at 5.

⁹ U.S. Department of Justice, *supra* note 4 at 5.

¹⁰ U.S. Department of Justice, *supra* note 4 at 6.

- Law enforcement, district attorneys, and any other relevant parties should report every 30 days to inform the court about the progress of the FGG search and receive explicit permission under court supervision to continue its efforts for the next 30 days;
 - At the completion of the FGG search, the FGG service shall destroy the biological material (including extracts and amplicons) and all FGG profiles of all those investigated as a result of the genetic genealogy but whose DNA does not match the crime scene evidence and remove all account information from their database.¹¹ Any genetic profiles of people who are not the individual identified as the person who committed the crime must not be uploaded to CODIS, SDIS, or any other DNA database maintained by a State or local agency and must be destroyed at the conclusion of the judicial process;
 - Genetic genealogists and law enforcement will destroy the family trees compiled as a result of the genetic genealogy search if the investigation does not lead to the identification of an individual or after the completion of the judicial process;
 - All genetic genealogical work product, including family trees and public records extracted in the investigative process, must be destroyed upon the conclusion of the judicial process or at the end of the investigative process whether or not the process led to the identification of an individual;
 - No biological samples subjected to FGG – either the forensic sample or third party samples – shall be used to determine the sample donor’s genetic predisposition for disease or any other medical condition or psychological trait; and
 - The opportunity to seek an FGG warrant should be available to defendants in a criminal case and applicants seeking post-conviction DNA testing.
- **Documentation of the Investigative Process.** In order to ensure due process and facilitate discovery practices, the use of FGG must be well documented.
 - All leads utilizing the genetic genealogy databases are documented and are conducted by genetic genealogists with demonstrated capacity to accurately and reliably utilize the database with a high degree of quality and security;
 - All leads using genealogical or public records investigation are documented, including the process in which a suspect is identified.
- **Transparent Data Collection of the use of Genetic Genealogy for Criminal Justice Purposes.** The use of genetic genealogy must be accompanied by proactive data collection, record maintenance, and public reporting to ensure that policymakers and the people of Maryland are able to comprehend the impact of the use of FGG in their state. The FGG bill should sunset in two to three years to allow lawmakers to take the appropriate action for the future use of FGG based on how the criminal justice system has implemented it. The following datapoints would provide a foundation for evidence-based decisions:

¹¹ U.S. Department of Justice, *supra* note 4 at 7.

- the number of requests for genetic genealogy searches (and the documentation related thereto);
- the number of times granted;
- the basis of each grant or denial;
- the number of potential suspects identified through a genetic genealogy search;
- the methods used to narrow the pool of suspects and resulting pool size;
- the detail regarding the quantity and type of methods used to investigate leads (scientific, public, non-forensic) to evaluate whether they meet the “pursued reasonable investigation leads” threshold;
- the costs of those investigations;
- the race of those identified as suspects in the culled suspect pool;
- the number of times a third party reference sample was requested and collected;
- the manner in which DNA samples were collected (informed consent versus covert collection) and the number of subsequent DNA tests performed;
- the number of requests made by defendants and post-conviction lawyers;
- whether the search ultimately resulted in arrests and/or convictions of a people identified through the genetic genealogy search.

In conclusion, we are deeply appreciative that Senator Syndor and Delegate Shetty have proposed the regulation of FGG in Maryland and that the Judiciary 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.