

**MARYLAND OFFICE OF THE PUBLIC DEFENDER- FORENSICS DIVISION**  
**Suggested Revisions of Senate Bill 187**  
**Criminal Procedure – Forensic Genetic Genealogical DNA Analysis,**  
**Searching, Regulation, and Oversight**

We express our gratitude to Senator Sydnor and Delegate Shetty for their foresight in recognizing that the use of Forensic Genetic Genealogical Searches (FGGS) must be carefully and comprehensively regulated in a way that ensures policies and practices properly reflect a commitment to respect individual privacy and civil liberties. We believe that it is imperative that both law enforcement agencies and non-state actors use FGGS in a manner consistent with the requirements and protections of the Constitution and other legal authorities. Moreover, the information and data derived from FGGS must be handled in accordance with applicable laws, regulations, policies, and procedures. We have, therefore, drafted certain revisions and additions to the bill that we believe will both strengthen the law and provide the protections that the citizens of Maryland deserve whenever a powerful new law enforcement technology like FGGS is introduced.

First, to ensure transparency and to protect a criminal defendant's rights to due process and a fair trial it is imperative that a defendant is provided the results and supporting data whenever a FGGS is conducted. As currently drafted, law enforcement agencies are not required to disclose to the defendant in a criminal proceeding when FGGS was conducted. If the past is any guide, whenever a new forensic technology is adopted by law enforcement, some agencies tend to hide the fact that it's been used. It is imperative that the use of this type of data be disclosed any time it is sought, and that all police reports, court documentation, and forensic case files be tendered to the defense. We believe that a defendant's constitutional rights to due process and to present a defense require that a proper balance be struck between those rights and any confidentiality concerns. Therefore, we propose adding specific disclosure requirements when a FGGS leads to criminal charges against an individual.

Second, the statute as drafted permits third party investigators working for post-conviction defendants to surreptitiously collect DNA under court supervision. Since these investigators are not State actors, the constitutional protections afforded to criminal defendants – including the 4th Amendment's prohibition against unreasonable searches and seizures – do not apply. This creates a potential end run around the constitution if the post-conviction investigation then implicates another person. Because these investigators would be acting in a quasi-law enforcement capacity (their actions may lead to the arrest and charging of individuals), we propose that they be treated as such. If the collection of evidence using FGGS would violate the State or Federal constitutions if conducted by a State actor rather than an investigator under this statute, it should not be used for the determination of probable cause and should be inadmissible in any proceeding against that individual.

Third, FGG examines more than half a million single nucleotide polymorphisms ('SNPs'), which replace the STR DNA markers analyzed in traditional forensic DNA typing. These SNPs span the entirety of the human genome, and can reveal physical characteristics such as race and ethnicity through a technique called forensic DNA phenotyping ('FDP'). Although not explicitly the focus of FGG, the fact that this technology grants law enforcement access to such sensitive information is incredibly concerning. Because this technology can, among other things, be used to generate new forms of racial profiling, this bill must specifically prohibit FDP, in the same way that it prohibits the use of this data to determine predisposition for disease, medical conditions, or psychological traits.

Fourth, since the Office of the Public Defender (OPD) most likely be representing a majority of defendants arrested and charged pursuant to FGG investigations we believe that provision establishing an oversight panel should require that representative(s) of the OPD be assigned to this panel. We also believe that the panel's charge must be broadened to include more than simply reviewing the annual report to include policy recommendations and revisiting this statute as necessary.

This bill is an important first step to regulate this area of science that has the potential to be highly invasive. We have tendered to both sponsors amendments that we believe address the concerns that we have set forth above. Our official position is that we support the bill with amendments.