Maryland Sexual Assault Evidence Kit
Policy and Funding Committee

March 3, 2020

TO: The Honorable Luke Clippinger
Chair, House Judiciary Committee

FROM: The Maryland Sexual Assault Evidence Kit Policy and Funding Committee, together with the Office of the Attorney General

RE: House Bill 1096: Evidence – Chain of Custody – DNA Profile (SUPPORT)

The Office of the Attorney General submits this position paper in support of House Bill 1096. The proposed statute would add a standard "Notice and Demand" provision covering DNA reports, similar to the one already in place for Controlled Dangerous Substance reports in Courts Article 10-1001 *et seq*.

Under current law, the State is required to call a series of witnesses from the forensic lab to testify to routine, uncontested matters in order to admit a DNA report. This requirement creates a strain on lab resources and contributes to backlogs. It also requires the State to produce a string of witnesses whose testimony does very little to assist the jury in the search for truth. Instead, it creates lengthy pretrial delays, as the parties have to coordinate the schedules of additional witnesses. It prolongs trial unnecessarily, by forcing a parade of very brief witnesses with little of substance to add to the proceedings. It also confuses jurors, by drowning useful information in a stream of chain-of-custody testimony, about which there is often no dispute.

The use of DNA to solve "cold cases" that occurred years, and sometimes decades, in the past has exacerbated this problem. A person who handled a sexual assault evidence kit ("SAEK")

twenty years ago and who has since died, retired, or moved can suddenly become a crucial chain of custody witness even though she/he had nothing to do with either the collection of the evidence or the DNA test that has, at long last, identified a suspect.

Consider for example the case of Robert Armstrong White.[1] White is a serial rapist who, among others, attacked two women in Montgomery County in 1979. Forensic examinations were conducted with these two women but, in the pre-DNA era, no suspect was developed.

White's DNA profile was eventually added to the national database after his conviction for other crimes, and when the SAEKs from 1979 were finally subjected to DNA testing decades later, the DNA extracted from those kits matched White's. He was charged with the two crimes.

The serologist who handled the SAEKs in 1979 was, by this time, retired and living in Arizona. Moreover, she suffered from a severe medical condition which limited her travel. Nonetheless, because she was considered a critical chain-of-custody witness, the State flew her from Arizona to testify in the first of White's trials. Her testimony took only moments and she was subjected to very little cross-examination, none of it substantive; the crucial testimony against White was from the DNA analyst, not from the serologist whose involvement with the case had ended 30 years earlier.

When it came time for White's second trial, the serologist's medical condition had deteriorated to the point where her doctor wrote a letter recommending against any further airplane travel for her. This was potentially fatal to the State's case against White. Fortunately, the prosecutor was able to persuade the court that the serologist should be allowed to testify by two-

[1] *White v. State*, 223 Md. App. 353 (2015).

way video conferencing, allowing her to see and be seen by the jurors and the parties as she was questioned in real time by the State. Once again, her testimony was brief and subjected to brief, non-substantive cross-examination. Nonetheless, the very fact that she had testified by video conference instead of appearing live in the courtroom generated a viable Sixth Amendment challenge. The Court of Special Appeals ultimately ruled that the video testimony was acceptable, but reiterated that the waiver of the live presence of a witness should be authorized only under narrow circumstances and only when there were no other viable alternatives.

It seems counterproductive to allow such scenarios to interfere with the prosecution of violent crime. There is no statute of limitations for rape in Maryland. Yet the absence of a notice-and-demand statute serves as a barrier to prosecutions of cold cases for reasons that have nothing to do with the strength of the evidence.

Moreover, the new laws governing the collection and testing of SAEKs,[2] and the federal grant money recieved to test previously untested SAEKs is sure to exacerbate the problem in two ways. First, there will be a greater demand for, and strain on, the resources of forensic labs. Second, there will be an increase in the prosecution of cold cases. The problems that arise from both results can be alleviated, at least slightly, by the adoption of this law.

To be sure, as with the similar CDS statute, the statute allows for the opposing party – typically the defense – to insist on the presence of the witnesses necessary to establish the chain of custody of the DNA report. Furthermore, the law does not interfere in any way with the Sixth Amendment confrontation rights of the accused. The Supreme Court has explicitly held that

[2] *See* MD. CODE, Crim. Proc. § 11-926(e)(1)–(4) (2020).

notice-and-demand statutes are a sound, constitutionally acceptable method of limiting the strain on human resources that might otherwise arise from its more recent, expansive view of the Confrontation Clause.[3]

Further, the law does not relieve the State of the requirement that it call the substantive "witness against" the accused. The analyst who compares DNA profiles and forms an opinion as to whether there is a "match" must still testify. In this scenario, the lab loses the services of one person for the day, not three. The presentation of DNA evidence takes an hour of the jury's time, not two. The trial was also not delayed to coordinate the schedules of additional witnesses who were not, in the scheme of things, necessary to determine the guilt or innocence of the accused.

This law has no meaningful downside, as our decades of experience with the similar CDS statute has shown. While it will not, by itself, alleviate the increased demand for both laboratory and trial resources that will follow an improved system for handling SAEKs, it is one of a series of steps that will help address those problems. The Office of the Attorney General supports the passage of this bill.

[3] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).