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February 27, 2019

TO: Senate Judicial Proceedings Committee (JPR)

Senator Bobby A. Zirkin, Chair

Senator William C. Smith, Jr., Vice Chair

FROM: Lily Rocha

Associate Director of Policy & Advocacy

The Joyful Heart Foundation

RE: Testimony for Senate Bill 767—Support with Amendments

The Joyful Heart Foundation supports S.B. 767 with amendments designed to ensure all rape kits associated with an open investigation are tested swiftly in accordance with best practices.

The Joyful Heart Foundation's mission is to transform society's response to sexual assault, domestic violence, and child abuse, support survivors' healing, and end this violence forever. Since 2010, Joyful Heart has made the elimination of the rape kit backlog—hundreds of thousands of untested rape kits across the nation—our top advocacy priority. We work directly with survivors, stakeholders, and jurisdictions to achieve this goal. Our staff and partners have substantial expertise in rape kit reform efforts. We have been instrumental in passing state-level rape kit reform legislation in several states, including Arizona, California, Florida, Georgia, Hawai'i, Kentucky, Massachusetts, Nevada, New Mexico, New York, Texas, and Utah, and we have collaborated with local and state agencies to provide support during the implementation process. With this expertise and legislative track record, we respectfully submit testimony supporting S.B. 767 with amendments described below.

The Problem

Every 98 seconds, someone is sexually assaulted in the United States. In the immediate aftermath of a sexual assault, a victim may choose to undergo a medical forensic examination to collect evidence left behind during the assault. A doctor or nurse will conduct the four-to-six hour examination and will preserve this evidence in what is commonly called a "rape kit." Survivors who undergo this exhaustive and invasive forensic exam do so because they have been told this evidence could help law enforcement hold their offender accountable.

When tested, the DNA evidence from rape kits can be a powerful tool to

solve and prevent crimes. DNA evidence can affirm the victim's account, identify unknown assailants, link crimes together, and exonerate the wrongfully convicted. Too often, however, these rape kits languish untested for years—even decades—in storage facilities.

There are hundreds of thousands of untested rape kits in storage across the country. We do not know the true extent of the backlog nationwide because many states do not require police departments to count or track the kits in their possession. Too often, the number of untested kits in a particular jurisdiction is unknown until legislators, journalists, survivors, or advocates step in to investigate.

Why Testing Rape Kits Matters

Joyful Heart joins experts in endorsing the federal government's best practice recommendation to submit every rape kit connected to a reported sexual assault to a crime lab for DNA analysis. In 2017, the U.S. Department of Justice's National Institute of Justice released *National Best Practices for Sexual Assault Kits: A Multidisciplinary Approach*, which includes 35 recommendations for victim-centered approaches for responding to sexual assault cases. Elected officials, law enforcement leaders, lab professionals, prosecutors, and advocates in jurisdictions across the country have embraced this approach.

It is important to understand that every single rape kit represents a survivor whose body has become a crime scene and has reported the crime to police, likely because they seek justice and rightfully expect the criminal justice system to hold the offender accountable.

Testing rape kits solves and prevents future crimes, and provides survivors with a path to justice and healing. Rape kits can yield DNA evidence that can be entered into local, state, and national DNA databases containing DNA from offenders. By testing every kit connected to a reported crime, more DNA profiles will be uploaded into these databases, potentially linking crimes and revealing serial rapists, who assault both acquaintances and strangers as recent research has shown. Even more, offenders who commit sexual assault are often engaged in other crimes, such as burglary and homicide. DNA from rape kits can match DNA from other crime scenes and provide leads for investigators to follow. As more sexual assault cases are pursued, more offenders are apprehended, and future crimes are averted.

By requiring every sexual assault kit to be swiftly submitted and tested, Maryland can send a powerful message to survivors that they—and their cases—matter. Testing every kit also sends a message to perpetrators that law enforcement will employ every available tool to apprehend and prosecute them. Essentially, it is the pathway to a more effective criminal justice system and safer communities across the country.

Rape Kit Reform in Maryland

Maryland has previously enacted commendable rape kit reforms. In 2015, Maryland enacted legislation requiring law enforcement agencies to conduct a one-time inventory of untested rape kits. In January 2017, the Maryland Sexual Assault Evidence Kit Policy and Funding Committee ("Committee") in the Attorney General's Office released a report that found 3,736 untested rape kits statewide. In January 2019, the Committee released a report citing over 6,000 untested rape kits in the state, an increase largely attributed to previously unidentified

backlogged kits.

In 2015, Maryland also enacted a law requiring health care professionals to provide victims with the investigating agency's contact information to allow them to inquire about the status of their case. The law additionally requires law enforcement to inform a victim about the status of the rape kit testing and all available results, upon the victim's request.

In 2017, Maryland enacted further victims' rights legislation, granting survivors the right to receive information of the location and status of their kits within 30 days of request. This law also requires law enforcement and other agencies to preserve all newly collected rape kits for 20 years following collection. Additionally, it requires law enforcement to notify survivors at least 60 days before planned kit destruction, and keep kits for longer, upon written request.

The next year, Maryland enacted a law requiring the Committee to develop recommendations on creating and operating a statewide rape kit tracking system accessible to victims of sexual assault. The Committee released their recommendations in their April 2018 report. The Joyful Heart Foundation was thankful for the opportunity to provide suggestions and resources for this report.

Most recently, Maryland has been awarded a federal grant to continue work on the rape kit backlog. In 2018, the U.S. Department of Justice's Bureau of Justice Assistance awarded the Maryland Governor's Office of Crime Control & Prevention \$2,620,408 to test kits, investigate and prosecute cases, and re-engage survivors in the criminal justice system. Maryland legislators, elected officials, advocates, law enforcement leaders, prosecutors, medical professionals, and crime lab leaders have asserted a strong commitment to reform the response to sexual assault in the state.

Reforms in S.B. 767

S.B. 767 incorporates recommendations from the Committee's January 2019 report. This bill would require rape kits to be submitted to a lab unless there is clear evidence disproving the allegation, the kit contains an insufficient amount of evidence for forensic analysis, or the suspect's DNA profile is already in the Combined DNA Index System (CODIS) and the suspect admitted to consensual sex with the victim. Law enforcement would be required to submit all other kits for analysis within 30 days of receipt from a medical facility, and a lab would be required to test kits within 150 days of receipt from law enforcement. All eligible DNA results would be required to be entered into CODIS. Survivors would be given the option to consent to submitting their rape kit for DNA analysis without having to engage in the criminal justice system. Lastly, the Committee would establish an independent process to review and make recommendations regarding law enforcement decisions not to test kits.

Joyful Heart Recommendations: Thorough Investigations and Survivor Participation

The Joyful Heart Foundation applauds Maryland's commitment to establishing explicit time frames to submit rape kits to a lab and test them. These time frames are necessary to ensure rape kits are processed in a timely manner and prevent a backlog from occurring again. To

ensure S.B. 767 fully embraces a survivor-centered approach, the Joyful Heart Foundation respectfully recommends four amendments. First, the bill calls for all kits to be tested except those for which “there is clear evidence disproving the allegation of the sexual assault,” which would render the case “unfounded,” meaning it is either “false”—an investigation proves the incident did not occur—or “baseless”—there is insufficient evidence to meet the elements of a crime. The Committee notes in their January 2019 report that they have “decided not to test kits where the allegations are determined to be false or baseless because these types of cases are ineligible for CODIS and thus, cannot be used to identify offenders.”

The Committee is correct to assert that a DNA profile derived from rape kits can only be eligible for CODIS entry if there is documentation that a crime was committed. If a case has been cleared as unfounded, this documentation does not exist, so any resulting DNA profile cannot be uploaded into CODIS.

However, in the past few years, there have been local and national concerns about the practices leading to clearing cases as unfounded. A December 2016 *Baltimore Sun* report found that “jurisdictions across Maryland have relatively high rates at which sexual assaults are deemed unfounded. Police departments in the state collectively concluded that 14 percent of all sexual assault cases were unfounded in 2014—a rate that was twice the national average.” Some agencies argued that they were constrained by Maryland’s law at that time, which required not only a lack of consent but also “force or the threat of force.” In February 2017, Baltimore County officials announced that from an independent review of unfounded cases, none of the 124 cases in the review could be prosecuted under the current law, “but that 30-40 percent could be prosecuted if the law was changed to include all nonconsensual sex.” In April 2017, Governor Larry Hogan signed legislation that no longer requires survivors to prove that they fought back against their assailant in order to press charges.

This is a remarkable step forward, but according to a 2016 U.S. Department of Justice report on the Baltimore Police Department (BDP) it was not simply statutory constraints that led to closing cases as unfounded. The report stated: “Although we do not, at this time, find reasonable cause to believe that BPD engages in gender-biased policing in violation of federal law, the allegations we received during the investigation, along with our review of BPD files, suggests that gender bias may be affecting BPD’s handling of sexual assault cases. We found indications that officers fail to meaningfully investigate reports of sexual assault, particularly for assaults involving women with additional vulnerabilities, such as those who are involved in the sex trade.” Even though the Federal Bureau of Investigation (FBI) defines unfounded, the application of this label is subject to an individual law enforcement officer’s bias or lack of understanding of the impact of trauma on victim behavior and memory.

The Joyful Heart Foundation reiterates our support and acknowledgment of the concrete and meaningful steps Maryland and local jurisdictions have taken since 2015 to ensure all sexual assault allegations are handled swiftly and appropriately. To demonstrate a continued commitment to survivors to improve practices, **we recommend S.B. 767 be amended by striking “there is clear evidence disproving the allegation of a sexual assault” and inserting “a thorough investigation with clear and convincing evidence disproves the allegation of sexual assault.”** This language will send a message to survivors that all law enforcement agencies in the state will fully investigate all sexual assault allegations. For future consideration, we recommend the state fully fund trauma-informed law

enforcement training to enhance law enforcement's understanding of the impact of trauma on victim behavior and memory, leading to improved investigative techniques and a reduction in victim retraumatization.

Secondly, we are heartened to see that S.B. 767 contains language calling for the establishment of an independent process to review cases in which law enforcement has decided not to test a kit. To ensure that survivors' voices inform any resulting review process, **we recommended amending S.B. 767 by inserting: "The process to review cases and make recommendations shall be developed by a subcommittee consisting of at least one survivor of sexual assault, one victim advocate, and the relevant subject matter experts."** This language ensures that survivors would be integral in establishing a multidisciplinary review process to review cases in which kits have not been sent for testing.

Joyful Heart Recommendation: Labs Analyze Evidence

The Joyful Heart Foundation has concerns with language exempting a rape kit from submission for analysis if the kit "contains an insufficient amount of forensic evidence to enable an analysis to be performed." While the intention of this provision may be to minimize the time the crime lab spends assessing submitted evidence, it asks law enforcement to perform a task that is nearly impossible to execute without the appropriate crime lab equipment and proper DNA analysis training. Determining if a rape kit contains enough evidence to merit analysis is a task that should be performed exclusively by trained forensic scientists at accredited crime labs. **We recommend amending S.B. 767 by striking "the kit contains an insufficient amount of forensic evidence to enable an analysis to be performed."**

Joyful Heart Recommendation: Test All Kits with A Reported Crime

The Joyful Heart Foundation is further concerned with language that requires kits to be submitted for analysis unless "the suspect's profile is in [CODIS] and the suspect admitted to consensual sex with the victim during the incident that led to the forensic examination." This language is intended to minimize expenditures, but these kits should be tested. In addition to identifying serial offenders through linked cases, DNA evidence in a rape kit can corroborate the victim's account of the incident and aid law enforcement in creating a timeline and history of the suspect, and also help prosecutors build their case. Should the defendant change their account, a rape kit could yield evidence to confirm a sexual encounter. Testing rape kits can also demonstrate to a jury a commitment from law enforcement and prosecutors to process all the evidence in the case and ensure due diligence, strengthening public trust in the criminal justice system. Moreover, federal best practices on rape kit processing recommend submitting every rape kit with a reported crime to a crime lab for analysis. Not testing any subset of kits associated with a police report goes against these federally issued recommendations. Lastly, but equally important, these kits should be tested because the survivor has the expectation that their kit will be tested. Medical forensic examinations are four to six hours long, during which the survivor is prodded, swabbed, photographed, and thoroughly examined. Many survivors undergo this strenuous process after a traumatizing assault because they are told this evidence could help them find justice. Without a doubt, their kits must be tested. **We recommend amending S.B. 767 by striking "the**

suspect's profile is in [CODIS] and the suspect admitted to consensual sex with the victim during the incident that led to the forensic examination."

The Need for Kit Submission and Testing Time Frames

With the adoptions of these amendments, S.B. 767 will be truly effective legislation. The lack of clear rape kit handling and testing protocols has been one of the main contributing factors of the rape kit backlog. Establishing statewide policies regarding rape kit collection, submission, and analysis will set standard operating procedures across the state. Standardization will remove biased individual decision-making on whether or not a kit should be tested, and rape kits will be handled uniformly, like evidence from any other crime.

Resources Are Necessary

Ending the rape kit backlog will take a coordinated effort and a deep commitment throughout the state. This work takes political will, but it also takes significant resources. On average, it costs between \$500 and \$1,500 to test one rape kit. Lack of essential funding at multiple levels is often a factor in why law enforcement makes the decision to put a rape kit on the shelf. Public crime laboratories throughout the country have struggled to obtain sufficient funding and personnel, especially as technology advances and the demand for DNA testing grows. Implementation of state rape kit reform laws often depends on whether law enforcement, crime labs, and prosecutors receive additional resources and funding to address the backlog and pursue leads that come from testing.

As jurisdictions enact legislation and policies to reform law enforcement practices around rape kit testing, the need for funding to implement a multidisciplinary response will increase. These laws will expand our knowledge about the true extent of the number of untested rape kits and will result in thousands of additional cases for law enforcement to investigate and prosecute. The Joyful Heart Foundation calls for sufficient funding throughout the criminal justice system to ensure survivors are engaged and supported and law enforcement, prosecutors, and victim advocates have the resources necessary to investigate cases, support survivors, and prosecute offenders. **We urge the Maryland legislature to appropriate the necessary funding to carry out S.B. 767 with amendments.**

Investing in testing rape kits today will yield savings tomorrow; research has demonstrated how testing rape kits saves communities money. In 2016, the Begun Center for Violence Prevention Research and Education at Case Western Reserve University analyzed the cost of testing backlogged rape kits in Cuyahoga County, Ohio. Factoring in the cost of testing kits and other related expenses, the study calculated the overall cost effectiveness of testing 4,347 unsubmitted kits and following through with any leads. The study found that Cuyahoga County saved \$38.7 million by testing 4,437 backlogged kits, investigating every case, prosecuting offenders, and preventing them from committing future crimes.

The Road Ahead

The Joyful Heart Foundation is grateful for the dedication of Maryland's local advocates, survivors, legislators, and the engaged participants in the Committee to overhaul the rape kit handling process and support survivors. We thank Senator Will Smith for leading on this bill,

as well as Delegate Shelly Hettleman for her tireless work to improve the criminal justice system.

We urge the Senate Judicial Proceedings Committee to report S.B. 767 favorably with the amendments outlined here. The Joyful Heart Foundation looks forward to supporting ongoing local efforts to enact comprehensive rape kit reform and provide a path to healing and justice for survivors in Maryland.

With gratitude,

A handwritten signature in black ink that reads "Lily Rocha". The signature is written in a cursive, flowing style.

Lily Rocha
Associate Director of Policy & Advocacy
The Joyful Heart Foundation
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**18 (E) A SEXUAL ASSAULT EVIDENCE COLLECTION KIT SHALL BE SUBMITTED
19 TO A FORENSIC LABORATORY FOR ANALYSIS UNLESS:**

**20 (1) ~~THERE IS CLEAR EVIDENCE DISPROVING THE ALLEGATION OF
21 SEXUAL ASSAULT; A THOROUGH INVESTIGATION WITH CLEAR AND CONVINCING EVIDENCE
22 DISPROVES THE ALLEGATION OF SEXUAL ASSAULT;~~**

**22 (2) THE FACTS ALLEGED, IF TRUE, COULD NOT BE INTERPRETED TO
23 VIOLATE A PROVISION OF TITLE 3, SUBTITLE 2, TITLE 3, SUBTITLE 3, TITLE 3,
24 SUBTITLE 6, OR TITLE 11, SUBTITLE 3 OF THE CRIMINAL LAW ARTICLE; OR**

**25 (3) ~~THE KIT CONTAINS AN INSUFFICIENT AMOUNT OF FORENSIC
26 EVIDENCE TO ENABLE AN ANALYSIS TO BE PERFORMED;~~**

**27 (4) THE VICTIM FROM WHOM THE EVIDENCE WAS COLLECTED
28 DECLINES TO GIVE CONSENT FOR ANALYSIS.;OR**

**29 (5) ~~THE SUSPECT'S PROFILE IS CONTAINED IN THE COMBINED DNA
30 INDEX SYSTEM (CODIS) MAINTAINED BY THE FEDERAL BUREAU OF
31 INVESTIGATION AND THE SUSPECT ADMITTED TO CONSENSUAL SEX WITH THE
32 VICTIM DURING THE INCIDENT THAT LED TO THE FORENSIC EXAMINATION.~~**

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1 exams for alleged victims of sexual assault;

2 (v) reducing the shortage of forensic nurse examiners;

3 (vi) increasing the availability of information to sexual assault

4 victims regarding:

5 1. criminal prosecutions of sexual assault crimes;

6 2. civil law remedies available to victims of sexual assault;

7 3. sexual assault evidence collection kits; and

8 4. victim rights; [and]

9 (vii) creating and operating a statewide sexual assault evidence

10 collection kit tracking system that is accessible to victims of sexual assault and law

11 enforcement; **AND**

12 **(VIII) ESTABLISHING AN INDEPENDENT PROCESS TO REVIEW AND**

13 MAKE RECOMMENDATIONS REGARDING A DECISION OF A LAW ENFORCEMENT

14 AGENCY NOT TO TEST A SEXUAL ASSAULT EVIDENCE COLLECTION KIT.

**1. THE PROCESS TO REVIEW CASES AND MAKE RECOMMENDATIONS SHALL BE
DEVELOPED BY A SUBCOMMITTEE CONSISTING OF AT LEAST ONE SURVIVOR OF SEXUAL ASSAULT,
ONE VICTIM ADVOCATE, AND THE RELEVANT SUBJECT MATTER EXPERTS.**