ATTACHMENT M

July 16, 2020

To the Honorable Senate and House of Representatives,

Pursuant to Article LVI, as amended by Article XC, Section 3 of the Amendments to the Constitution of the Commonwealth of Massachusetts, I am returning to you for amendment Sections 74 and 119 of House Bill No. 4002, “An Act Making Appropriations for the Fiscal Year 2021 for the Maintenance of the Departments, Boards, Commissions, Institutions and Certain Activities of the Commonwealth, for Interest, Sinking Fund and Serial Bond Requirements and for Certain Permanent Improvements.”

These sections provide funding to the state crime laboratory to test previously untested sexual assault evidence kits and to upload those findings when appropriate to the CODIS and state DNA databases on the condition that all such evidence kits are tested within 180 days from July 1, 2021.

Unfortunately, the definition of previously untested sexual assault evidence kits used in these sections captures some 6,000 kits, including kits associated with cases that have already been adjudicated and kits where the evidentiary sample is so small that testing will result in the complete exhaustion of the testable material.

Testing kits associated with cases that have already been adjudicated raises significant concerns over the rights of the accused and the interests of the survivor. For this reason there is a statutory process set forth in chapter 278A of the General Laws that carefully balances these interests, and the language in these sections supersedes those existing provisions and disrupts that balance. Furthermore, testing such kits is unlikely to add any new information to the CODIS and state DNA databases because any individual convicted of a sexual assault is already required to provide a DNA sample, and if an individual has been acquitted or if a case was dismissed for lack of evidence then, CODIS requirements may prohibit the sample from being eligible for upload into those databases.

Testing samples even when the quantity of the sample is so limited that it will be destroyed during testing raises constitutional concerns about destruction of evidence. To address those concerns the state crime laboratory promulgated regulations that balance an accused’s right to have such testing observed with the need to solve cases. Those regulations require the state crime laboratory to work with District Attorney’s offices to determine when testing is appropriate. Under the sections I am returning, the state crime laboratory would be required to test kits regardless of whether or not testing would destroy the sample, without the guidance of prosecuting agencies or, where appropriate, observation by a representative of the accused.

Not only do these sections fail to account for the complexities inherent in these different categories of previously untested evidence kits, they impose a legislative deadline that is impossible to meet given the time, technology, and expertise needed to properly test an individual kit. The state crime laboratory currently tests all sexual assault evidence kits it receives within 30 days. This is the fastest turnaround time anywhere in the country. The state crime laboratory hired 34 additional staff, spent over a year training new analysts on the scientific elements required by accreditation standards, and updated its testing workflow to enable it to meet this 30-day requirement. These costly and substantive changes made it possible for the state crime laboratory to process approximately 900 kits in 12 months. This section would require that more than 6,000 kits be tested in just 180 days.

This timeframe is unworkable whether the kits are tested by the state crime laboratory or sent out to private laboratories. First, there are a limited number of private laboratories in the country, and only some of those laboratories meet state standards and have the capacity to do the testing. Even those private laboratories with the necessary qualifications and the available capacity cannot begin large-scale testing immediately. Given the very high demand, nationwide, for testing by private laboratories, those testing facilities are scheduled months in advance, meaning that the large blocks of laboratory time needed to test the kits under this section would have to be reserved months ahead of time. As a point of reference, the state crime laboratory’s primary private laboratory contractor has already provided an estimated timeline of 3 years to complete testing of these 6,000 kits.

Accordingly, the most appropriate approach to testing previously untested evidence kits is one that accounts for kits associated with previously adjudicated cases and kits where the evidentiary sample is so small that nothing will remain after testing is completed, and that provides sufficient time for the state crime laboratory to ensure that these kits can be tested with appropriate scientific rigor.

For these reasons, I recommend that Section 74 be amended by striking out the section and inserting in place thereof the following section:-

SECTION 74. Section 2A of chapter 5 of the acts of 2019 is hereby amended by striking out item 8100-1014, as amended by section 40 of chapter 142 of the acts of 2019, and inserting in place thereof the following item:-

8100-1014. For costs associated with the collection and testing of all previously untested investigatory sexual assault evidence kits by the crime laboratory within the department of state police or by an accredited private crime laboratory designated by the secretary of public safety and security; provided further that the testing of the sexual assault evidence kit shall be in accordance with the state police crime laboratory regulations for exhaustive testing; provided further, that no post-conviction sexual assault evidence kit shall be tested and such evidence kits shall instead be tested only in accordance with and subject to the requirements of chapter 278A of the General Laws; provided further, that for the purposes of this item, “previously untested investigatory sexual assault evidence kits” shall mean any sexual assault evidence kit or additional evidence collected contemporaneously with such kit, prior to April 13, 2018 that has not been subjected to a forensic DNA analysis intended to develop an autosomal DNA profile that is eligible for entry into CODIS, as defined in section 1 of chapter 22E of the General Laws, and the state DNA databases; and provided further, that any unexpended funds in this item shall not revert but shall be made available for the purposes of this item until June 30, 2022…………………………………………………………………………………..$8,000,000

And I further recommend that Section 119 be amended by striking out the section and inserting in place thereof the following section:-

SECTION 119. All previously untested investigatory sexual assault evidence kits provided for under item 8100-1014 of section 2A of chapter 5 of the acts of 2019 shall be sent for testing not later than June 30, 2022.

Respectfully submitted,

Charles D. Baker

 Governor