

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 179 Evidence Collected in Sexual Assault Investigations

SPONSOR(S): Adkins and others

TIED BILLS: None **IDEN./SIM. BILLS:** SB 636

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		White	White
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Sexual assault evidence kits (SAEKs), also referred to as “rape kits,” are medical kits used to collect evidence from the body and clothing of a victim of rape or sexual assault during a forensic sexual assault examination. Such kits are submitted by law enforcement agencies to crime laboratories for DNA analysis and resulting DNA profiles are uploaded to local, state, and federal DNA databases to determine whether a match identifying the perpetrator can be made.

During the past decade, the federal government has indicated that hundreds of thousands of SAEKs have been retained untested in law enforcement evidence storage facilities across the nation. Concerns about this issue have prompted the federal funding of studies in Houston, Texas and Detroit, Michigan to determine the number of untested SAEKs retained in those jurisdictions, federal grant funding to assist jurisdictions in analyzing untested kits, and legislation being adopted in some states which mandates periodic audits of untested SAEKs or which specifies requirements for the use, submission, and analysis of SAEKs.

Currently, Florida statute does not specify requirements regarding the testing of SAEKs. Proviso adopted during 2015 Special Session A directed the FDLE to conduct of a statewide assessment of untested SAEKs, including both kits that have been submitted to a laboratory for analysis and those that have not been submitted. The FDLE is required to report its findings, including reasons for delays or deferment of analysis, to the Governor and Legislature by January 1, 2016.

The bill creates s. 943.326, F.S., to require any DNA evidence collected in a sexual assault investigation to be submitted to a member of the statewide criminal analysis laboratory system for forensic testing within the earlier of 21 days after:

- The forensic evidence is received by a law enforcement agency; or
- A request to have the evidence tested is made by the alleged victim, an alleged minor victim's parent or guardian, or an alleged deceased victim's personal representative.

The bill further requires that an alleged victim be informed of the purpose of the submission of the medical forensic evidence and the right to demand the testing of such evidence. It also requires the FDLE to adopt rules for forensic medical evidence collected in connection with an alleged sexual assault.

Finally, the bill directs the FDLE to submit a plan by October 1, 2016, to the Governor and the Legislature, which sets out the plan the department will follow to analyze the untested sexual assault forensic evidence currently held in the statewide criminal analysis laboratory system by June 30, 2017.

The bill may have a positive fiscal impact on state and local governments. Please see “Fiscal Analysis & Economic Impact Statement,” *infra*.

The bill takes effect July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Sexual Assault Evidence Kits; Forensic Sexual Assault Examinations; DNA Analysis

A sexual assault evidence kit (SAEK), also referred to as a “rape kit,” is a medical kit used to collect evidence from the body and clothing of a victim of rape or sexual assault during a forensic sexual assault examination. The kit contains tools such as swabs, tubes, glass slides, containers, and plastic bags. These items are used to collect and preserve fibers from clothing, hair, and bodily fluids, which can help identify DNA and other forensic evidence left by a perpetrator.¹

In Florida, a victim of sexual assault may have a forensic sexual assault examination conducted by a healthcare provider for free regardless of whether the victim reports the assault to law enforcement authorities. Pursuant to s. 960.28(2), F.S., up to \$500 for expenses for a forensic sexual assault examination must be paid for by the Crime Victims’ Services Office within the Department of Legal Affairs (DLA) for a victim of sexual battery as defined in chapter 794 or a lewd or lascivious offense as defined in chapter 800. Such payment is made regardless of whether the victim is covered by health or disability insurance and whether the victim participates in the criminal justice system or cooperates with law enforcement.² Information received or maintained by the DLA which identifies an alleged victim who seeks payment of such medical expenses is confidential and exempt from the provisions of s. 119.07(1).³

According to protocols developed by the DLA, healthcare providers conducting the forensic sexual assault examination should complete the document entitled “Sexual Assault Kit Form for Healthcare Providers.”⁴ This document includes a consent form that requires the victim or his or her legal guardian to indicate that he or she consents to a forensic medical examination for the preservation of evidence of sexual assault.⁵ Additionally, the victim or legal guardian must select one of the following two options:

- For Reporting Victims [i.e., victims who choose to report the sexual assault to law enforcement]: I do authorize this medical facility and the examiner to perform all necessary tests, examinations, photography, and treatment, and to supply copies of all pertinent medical laboratory reports, immediately upon completion to the law enforcement agency and the State Attorney’s Office having jurisdiction.
- For Non-Reporting Victims [i.e., victims who choose to not report the sexual assault to law enforcement]: I do authorize this medical facility and the examiner to perform all necessary tests, examinations, photography, and treatment at this time.⁶

The DLA protocols provide instructions for sealing the SAEK upon completion of the exam and indicate that the SAEK must stay with the medical examiner or secured in a locked area with limited access and proper chain of custody procedures until transferred to law enforcement. For a SAEK for a non-reporting victim, the protocol states that the medical examiner should check the local area for storage procedures and that a law enforcement agency is recommended for long-term storage.^{7, 8}

¹ The White House, Office of Communications, *FACT SHEET: INVESTMENTS TO REDUCE THE NATIONAL RAPE KIT BACKLOG AND COMBAT VIOLENCE AGAINST WOMEN*, March 16, 2015, at 1.

² s. 960.28(2), F.S.

³ s. 960.28(4), F.S.

⁴ Florida Department of Legal Affairs, Division of Victim Services and Criminal Justice Programs, *Adult and Child Sexual Assault Protocols: Initial Forensic Physical Examination*, April 2015, at 13.

⁵ Florida Department of Law Enforcement, *Sexual Assault Kit Form for Healthcare Providers*, available at <http://www.fdle.state.fl.us/Content/getdoc/036671bc-4148-4749-a891-7e3932e0a483/Publications.aspx> (last visited Nov. 28, 2015).

⁶ *Id.*

⁷ Florida Department of Legal Affairs, *supra* note 4, at 21; *see also* Florida Department of Law Enforcement, *Instruction List for Forensic Exam Kit*, available at <http://www.fdle.state.fl.us/Content/getdoc/036671bc-4148-4749-a891-7e3932e0a483/Publications.aspx> (last visited Nov. 28, 2015).

⁸ Chief Frank Fabrizio, who represents the Florida Police Chiefs Association, testified at a Florida Senate hearing that in Orange and Volusia Counties, SAEKs for non-reporting victims are stored by a law enforcement agency, but are not submitted to a crime
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DATE: 11/30/2015

Generally, law enforcement agencies in Florida submit SAEKs for DNA analysis to the statewide criminal analysis laboratory system, which consists of six laboratories operated by the Florida Department of Law Enforcement (FDLE) in Ft. Myers, Jacksonville, Pensacola, Orlando, Tallahassee, and Tampa and five local laboratories in Broward, Indian River, Miami-Dade, Palm Beach, and Pinellas Counties.⁹ According to information provided by the FDLE, DNA analysis of a SAEK requires on average approximately 26.25 hours of crime analyst and supervisor time.¹⁰

DNA profiles resulting from such analyses are uploaded by the laboratory to its local DNA Index System (DIS), which then uploads the profiles to the state DNA database. From there, DNA profiles are uploaded to the Federal Bureau of Investigation's Combined DIS, referred to as CODIS, which consists of DNA profiles contributed by federal, state, and local participating forensic laboratories. DNA profiles within these local, state, and federal databases are continuously searched against one another to determine whether a match exists.¹¹

In some cases, a law enforcement agency may not submit a SAEK for DNA analysis and may instead retain the SAEK in evidence storage. Reasons for not analyzing a SAEK include: (a) the victim did not want to file a police report regarding the assault; (b) the victim no longer wants the investigation to proceed; (c) the case is not being pursued by the state attorney; and (d) the suspect has pled guilty or nolo contendere.¹²

SAEK Analysis Backlogs

National Backlog

In March 2015, the federal government estimated that a backlog of hundreds of thousands of untested SAEKs exists in crime labs throughout the United States (U.S.). As used by the federal government, the term "backlog" refers to SAEKs that were submitted to a crime laboratory for testing more than 90 days ago.¹³ Additionally, there are an unknown number of SAEKs in police evidence storage facilities throughout the nation which have not been submitted to a crime laboratory for analysis.¹⁴

To better understand the issue of SAEKs that have not been submitted for analysis, the National Institute of Justice (NIJ) awarded grants in 2011 to the Houston, Texas Police Department and Wayne County, Michigan Prosecutor's Office.¹⁵ Both entities conducted a census of untested SAEKs:¹⁶

- 6,663 untested SAEKs were found in storage at the Houston Police Department.¹⁷ Each of these SAEKs were submitted for analysis. As of February 2015, such analyses had resulted in 850 matches identifying the perpetrator and in the prosecutions of 29 offenders.¹⁸
- 8,707 untested SAEKs were found in Detroit.¹⁹ Of these SAEKs, approximately 2,000 were analyzed. The analyses resulted in 760 matches identifying the perpetrator, the identification of 188 serial offenders, and 15 convictions.²⁰

laboratory for analysis. Hearing of the Florida Senate Appropriations Subcommittee on Criminal and Civil Justice, Nov. 3, 2015, available at http://www.flsenate.gov/media/videoplayer?EventID=2443575804_2015111024.

⁹ s. 943.32, F.S.; see also Florida Department of Law Enforcement, *Biology Screening of Sexual Assault Evidence Kits* (on file with the House Criminal Justice Subcommittee).

¹⁰ Florida Department of Law Enforcement, *supra* note 9, at 7.

¹¹ *Id.* at 7-8; see also Federal Bureau of Investigation, *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, <https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Nov. 28, 2015).

¹² These reasons were provided during testimony by Jennifer Pritt, Assistant Commissioner of the Florida Department of Law Enforcement, and Chief Frank Fabrizio, representing the Florida Police Chiefs Association. Hearing of the Florida Senate Appropriations Subcommittee on Criminal and Civil Justice, Nov. 3, 2015, available at http://www.flsenate.gov/media/videoplayer?EventID=2443575804_2015111024.

¹³ The White House, *supra* note 1, at 1-2.

¹⁴ *Id.*

¹⁵ The White House, *supra* note 1, at 2.

¹⁶ National Institute of Justice, Office of Justice Programs, *Untested Evidence in Sexual Assault Cases*, <http://www.nij.gov/topics/law-enforcement/investigations/sexual-assault/Pages/untested-sexual-assault.aspx#determining> (last visited Nov. 28, 2015).

¹⁷ *Id.*

¹⁸ Katherine Driessen, *City done with lab testing of rape kit backlog*, Houston Chronicle (February 23, 2015), <http://www.chron.com/news/politics/houston/article/City-done-with-lab-testing-of-rape-kit-backlog-6096424.php>.

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More recently this year, Congress approved the National Sexual Assault Kit Initiative, a \$41 million competitive grant program administered by the Bureau of Justice Assistance within the U.S. Department of Justice to support the comprehensive reform of jurisdictions' approaches to sexual assault cases resulting from evidence found in SAEKs that have never been submitted to a crime laboratory. Grant recipients announced on September 10, 2015, included: (a) the Florida Department of Law Enforcement which received \$1,268,540; (b) Miami-Dade Police Department Forensic Services Bureau which received \$1,968,246; and (c) Tallahassee Police Department which received \$163,939.²¹

Florida's Backlog

During the 2015 Special Session A, the Florida Legislature adopted proviso appropriating \$300,000 in nonrecurring general revenue funds to FDLE for the conduct of a statewide assessment of SAEKs that have not been analyzed, including both kits that have been submitted to a laboratory for analysis and those that have not been submitted. The proviso requires FDLE to submit a report of its findings, including reasons for delays or deferment of analysis, to the Governor, President of the Senate, and Speaker of the House of Representatives by January 1, 2016.²²

To implement the proviso, FDLE conducted a survey of all of this state's law enforcement agencies. This survey requires the agencies to identify the number of SAEKs that have not been submitted for analysis, the number of SAEKs that should be submitted for analysis, and the number of SAEKs that are from victims who chose to not report their sexual assaults to law enforcement. As of October 30, 2015, each of the state's 67 sheriff's offices and 201 of the state's local law enforcement agencies have responded, which represents 84.5 percent of this state's population. These survey responses indicate that 10,900 SAEKs have not been submitted for analysis, 7,168 SAEKs should be submitted for analysis, and 612 SAEKs are from non-reporting victims.²³

The survey also requires law enforcement agencies to indicate why the SAEKs have not been submitted for analysis and provides the following selections for such reasons: (a) the victim no longer wants the investigation to proceed; (b) the SAEK was obtained from a non-reporting victim; (c) the case is not being pursued by the State Attorney's Office; (d) the suspect has pled guilty or nolo contendere; (e) the agency did not require submission; and (e) a blank text box that enables the agency to provide its own reason. This information is currently being analyzed by FDLE and will be provided in its report due January 1, 2016.²⁴

¹⁹ National Institute of Justice, *supra* note 16.

²⁰ The White House, *supra* note 1, at 2.

²¹ The New York County District Attorney's Office, *DISTRICT ATTORNEY VANCE AWARDS \$38 MILLION IN GRANTS TO HELP 32 JURISDICTIONS IN 20 STATES TEST BACKLOGGED RAPE KITS* (Sept. 10, 2015) <http://manhattanda.org/press-release/district-attorney-vance-awards-38-million-grants-help-32-jurisdictions-20-states-test->.

²² Senate Bill 2500-A (2015), Specific Appropriation 1247.

²³ Florida Department of Law Enforcement, *Sexual Assault Kit Assessment Survey*, <http://www.fdle.state.fl.us/Content/SAK/SAK-Survey.aspx> (last visited Nov. 28, 2015); *see also* Testimony by Jennifer Pritt, Assistant Commissioner of the Florida Department of Law Enforcement, Florida Senate Appropriations Subcommittee on Criminal and Civil Justice, Nov. 3, 2015, *available at* http://www.flsenate.gov/media/videoplayer?EventID=2443575804_2015111024.

²⁴ *Id.*

State Regulation of SAEK Analyses

Like Florida, some states have adopted legislation requiring audits to be conducted of the untested SAEKs in the possession of law enforcement agencies and reports of such audits to be filed with the state.²⁵

In other states, legislation has been adopted which specifies requirements, such as procedures and timeframes, for SAEK use, submission, and analysis. For example:

- Colorado enacted legislation effective June 5, 2013, which requires the state's Department of Public Safety to adopt rules that require forensic evidence to be collected when requested by a sexual assault victim, specify standards for what evidence must be submitted to an accredited crime laboratory, and specify time frames for when such evidence must be submitted, analyzed, and compared in DNA databases. The law also directed the department to adopt a plan for prioritizing the analysis of its backlog of SAEKs and to include a requirement in its rules after the backlog is resolved that evidence be submitted for analysis within 21 days after receipt by a law enforcement agency.²⁶
- Illinois enacted legislation effective September 1, 2010, which requires law enforcement agencies to submit sexual assault evidence collected in connection with an investigation within 10 business days after receipt to an approved crime laboratory and requires crime laboratories to analyze such evidence within six months.²⁷
- Ohio adopted legislation effective March 23, 2015, which requires law enforcement agencies to forward the contents of a SAEK related to an investigation initiated after the act's effective date to a crime laboratory within 30 days for analysis and directs the crime laboratory to perform the analysis as soon as possible after receipt.²⁸

Effect of Bill

The bill creates s. 943.326, F.S., to require any DNA evidence collected in a sexual assault investigation to be submitted to a member of the statewide criminal analysis laboratory system²⁹ for forensic testing within the earlier of 21 days after:

- The forensic evidence is received by a law enforcement agency; or
- A request to have the evidence tested is made by the alleged victim, the alleged victim's parent or guardian, if the alleged victim is a minor, or the alleged victim's personal representative, if the alleged victim is deceased.

The new section of law further requires that an alleged victim be informed of the purpose of the submission of the medical forensic evidence and the right to demand the testing of such evidence. It also requires the FDLE to adopt rules for forensic medical evidence collected in connection with an alleged sexual assault and specifies that the rules must include the requirements of the new section of law and standards for what evidence must be submitted to a member of the statewide criminal analysis laboratory system and timeframes for when the evidence must be submitted, analyzed, and compared to DNA databases.

Finally, the bill creates an undesignated section of law directing the FDLE to submit a plan by October 1, 2016, to the Governor, the President of the Senate, and the Speaker of the House of

²⁵ See Arkansas House Bill 1208 (2015) (requiring annual audits of untested SAEKs stored by law enforcement agencies and healthcare providers and submission of reports to the State Crime Laboratory and Legislature); Kentucky Senate Joint Resolution 20 (2015) (directing the state's Auditor of Public Accounts to study the number of untested SAEKs in the possession of law enforcement and prosecutorial agencies and to report such information to the Legislative Research Commission); Virginia Senate Bill 658 (2014) (requiring law enforcement agencies to inventory and report all untested physical evidence recovery kits to the Department of Forensic Science and requiring the Department to report to the General Assembly).

²⁶ COLO. REV. STAT. §24-33.5-113 (2015).

²⁷ 725 IL. COMP. STAT. 202/10 and 202/15 (2015).

²⁸ OHIO REV. CODE ANN. §2933.82 (2015).

²⁹ The statewide criminal analysis laboratory system consists of six laboratories operated by the Florida Department of Law Enforcement (FDLE) in Ft. Myers, Jacksonville, Pensacola, Orlando, Tallahassee, and Tampa and five local laboratories in Broward, Indian River, Miami-Dade, Palm Beach, and Pinellas Counties. s. 943.28, F.S.

Representatives, which sets out the plan the department will follow to analyze the unanalyzed sexual assault forensic evidence currently held in the statewide criminal analysis laboratory system by June 30, 2017.

B. SECTION DIRECTORY:

Section 1. Creates s. 943.326, F.S., relating to DNA evidence collected in a sexual assault investigations.

Section 2. Creates an undesignated section of law to direct FDLE to submit a plan regarding how it will analyze certain unanalyzed sexual assault forensic evidence.

Section 3. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill requires “any” DNA evidence collected in sexual assault investigations to be submitted for analysis to a member of the statewide criminal analysis laboratory system. The use of “any” results in requiring all DNA evidence collected, not only SAEKs, to be submitted. This requirement is likely to increase the volume of evidence submitted to FDLE-operated laboratories by a currently indeterminate amount. If this occurs, there will be an indeterminate positive fiscal impact on the FDLE.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

As discussed above, the bill’s requirement for “any” DNA evidence collected in sexual assault investigations to be submitted for analysis is likely to increase the volume of evidence submitted for testing. Under the bill, such evidence submissions may be made to a member of the statewide criminal analysis laboratory system, which includes five local laboratories in Broward, Indian River, Miami-Dade, Palm Beach, and Pinellas Counties. These local laboratories receive both state and local funding.³⁰ Such increased evidence submissions to these labs could result in increased expenditures for the state and five county entities.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

³⁰ s. 943.35, F.S.

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Article VII, Section 18(a), of the Florida Constitution, states that county and municipality governments are not bound by any general law requiring one or more county or municipality governments to spend funds, unless it satisfies certain exemptions. One such exemption is that the law will have an “insignificant fiscal impact.” The term “insignificant” has been defined as a matter of legislative policy as an amount not greater than the average statewide population for the applicable fiscal year times ten cents. The 2010 United States census, which contains the most recent federal census data, indicates that the Florida population is 18,801,310.³¹ A bill having a statewide fiscal impact on counties and municipalities in aggregate or in excess of \$1.88 million would be characterized as a mandate.

The bill’s requirements for evidence submission may require the counties where the five local laboratories are located to expend county funds. Currently, this amount is indeterminate, but such amount is anticipated to constitute an insignificant fiscal impact.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires FDLE to adopt rules for forensic medical evidence collected in connection with an alleged sexual assault.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill requires “any” DNA evidence collected in a sexual assault investigation to be submitted for analysis within a specified period. Use of the term “any” results in requiring not only the submission of SAEKs, but also the submission of other DNA evidence collected during the investigation, e.g., DNA evidence obtained from clothing, furniture, or other items. If the SAEK yields usable DNA evidence, it is unlikely that such additional evidence needs to be analyzed.

The bill requires that an alleged victim be informed of the purpose of the submission of the medical forensic evidence and the right to demand the testing of such evidence, but does not specify the entity responsible for providing such information.

The bill requires FDLE to adopt rules that, in part, must include timeframes for when evidence must be submitted. Such timeframes, however, are provided by the bill and, thus, do not need to be specified in rule.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

³¹ U.S. Census Bureau, 2010 Census Interactive Population Search, <http://www.census.gov/2010census/popmap/ipmtext.php?fl=12> (last visited Nov. 30, 2015).