

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 179 Evidence Collected in Sexual Offense Investigations

SPONSOR(S): Criminal Justice Subcommittee; Adkins and others

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

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|---------------------|-----------|--|
| 1) Criminal Justice Subcommittee | 12 Y, 0 N, As CS | White | White |
| 2) Justice Appropriations Subcommittee | | McAuliffe | Lloyd |
| 3) Judiciary Committee | | | |

SUMMARY ANALYSIS

Sexual offense evidence kits (SOEKs), also referred to as “rape kits,” are medical kits used to collect evidence from the body and clothing of a victim of rape or other sexual offense during a forensic physical 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 SOEKs 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 SOEKs 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 SOEKs or which specifies requirements for the use, submission, and analysis of SOEKs.

Currently, Florida statute does not specify requirements regarding the testing of SOEKs. Proviso adopted as part of the 2015-2016 General Appropriations Act directed the Florida Department of Law Enforcement (FDLE) to conduct a statewide assessment of untested SOEKs, including both kits that have been submitted to a laboratory for analysis and those that have not been submitted. The FDLE reported its findings January 1, 2016.

The bill creates s. 943.326, F.S., to require a SOEK, or other DNA evidence if such kit is not collected, to be submitted to a member of the statewide criminal analysis laboratory system for forensic testing within the earlier of 30 days after:

- Receipt of the evidence by a law enforcement agency if a report of the sexual offense is made to the agency; or
- A request to have the evidence tested is made by the alleged victim or a specified representative of the victim.

The bill further requires that an alleged victim or certain representatives of the victim be informed of the purpose for and right to demand testing of such evidence. It also requires the FDLE and others to adopt guidelines for the collection, submission, and testing of DNA evidence and specifies that the section does not create certain causes of action or rights.

The bill will not have a significant fiscal impact on state or local governments.

The bill takes effect July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Sexual Offense Evidence Kits; Forensic Physical Examinations; DNA Analysis

A sexual offense evidence kit (SOEK), 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 other sexual offense during a forensic physical 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 certain sexual offenses may have a forensic physical examination conducted by a healthcare provider for free regardless of whether the victim reports the offense to law enforcement authorities. Pursuant to s. 960.28(2), F.S., up to \$500 for expenses for a forensic physical 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), F.S.³

According to protocols developed by the DLA, healthcare providers conducting the forensic physical 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 physical examination for the preservation of evidence of a sexual offense.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 offense 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 offense 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 SOEK upon completion of the exam and indicate that the SOEK 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 SOEK of 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).

Generally, law enforcement agencies in Florida submit SOEKs 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 SOEK 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 SOEK for DNA analysis and may instead retain the SOEK in evidence storage. Reasons for not analyzing a SOEK 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 According to FDLE, DNA profiles may not be uploaded into CODIS if there is no crime such as in the case of a non-reporting victim

SOEK Analysis Backlogs

National Backlog

In March 2015, the federal government estimated that a backlog of hundreds of thousands of untested SOEKs exists in crime labs throughout the United States (U.S.). As used by the federal government, the term "backlog" refers to SOEKs that were submitted to a crime laboratory for testing more than 90 days ago.¹³ Additionally, there are an unknown number of SOEKs 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 SOEKs 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 SOEKs:¹⁶

- 6,663 untested SOEKs were found in storage at the Houston Police Department.¹⁷ Each of these SOEKs 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 Chief Frank Fabrizio, who represents the Florida Police Chiefs Association, testified at a Florida Senate hearing that in Orange and Volusia Counties, SOEKs for non-reporting victims are stored by a law enforcement agency, but are not submitted to a crime 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.*

- 8,707 untested SOEKs were found in Detroit.¹⁹ Of these SOEKs, approximately 2,000 were analyzed. The analyses resulted in 760 matches identifying the perpetrator, the identification of 188 serial offenders, and 15 convictions.²⁰

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 offense cases resulting from evidence found in SOEKs 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) the Miami-Dade Police Department Forensic Services Bureau which received \$1,968,246; and (c) the Tallahassee Police Department which received \$163,939.²¹

Florida's Backlog Assessment

Proviso adopted as part of the 2015-2016 General Appropriations Act, appropriated \$300,000 in nonrecurring general revenue funds to FDLE to conduct statewide assessment of SOEKs that have not been analyzed. The proviso required 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

In August 2015, FDLE, in cooperation with the Florida Sheriff's Association and the Florida Police Chiefs Association, developed and conducted a survey of all of this state's law enforcement agencies. This survey asked the agencies to identify the number of SOEKs that have not been submitted for analysis, the number of SOEKs that should be submitted for analysis, and the number of SOEKs that are from victims who chose to not report their sexual offenses to law enforcement.

The submitted report indicated that 212 local law enforcement agencies (69 percent) and all of the state's sheriff's offices responded to the survey, which represents 89 percent of this state's population. These survey responses indicate that 13,435 SOEKs have not been submitted for analysis.²³ Of this total, 6,774 kits are housed in jurisdictions served by county forensic laboratories and 6,661 are housed in jurisdictions served by FDLE crime laboratories.

The survey also required law enforcement agencies to indicate why the SOEKs have not been submitted for analysis and provided the following selections for such reasons: (a) the victim no longer wants the investigation to proceed; (b) the SOEK 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. Respondents were allowed to choose more than one answer to this question.

Forty-seven percent of the responding jurisdictions reported they had no untested kits. Of the remaining 53 percent of the jurisdictions that reported having untested kits the survey found that:

- 77 percent of the respondents (jurisdictions) reported that one of the reasons they did not submit the SOEK was because the victim did not want to proceed with the investigation.
- 58 percent of the respondents reported that one of the reasons they did not submit the SOEK is that the State Attorney's Office declined to prosecute.
- 38 percent of the respondents reported that one of the reasons they did not submit the SOEK is that the suspect pled guilty.

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>.

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, *Assessment of Unsubmitted Sexual Assault Kits*, 12/30/2015.

- 34 percent of the respondents reported that one of the reasons they did not submit the SOEK is that it was collected from a non-reporting victim.

In addition to the above responses, other reasons why SOEKs were not submitted included: the allegation was unfounded; victim deceased; collection preceded analysis technology; sexual contact is admitted by perpetrator and the case hinges on consent; suspect convicted on other charges, SOEKs not needed; and environmental damage to packaging.

The survey only measured what percent of the respondents reported that one or more of the selections on the survey as a reason they did not submit all of their SOEKs for analysis. There is no way to tell how many of the 13,435 SOEKs that have not been submitted for analysis are from non-reporting victims. The survey only tells you the percentage of the respondents (jurisdictions) that said it was one of the reasons they did not submit the SOEK.

State Regulation of SOEK Analyses

Like Florida, some states have adopted legislation requiring audits to be conducted of the untested SOEKs in the possession of law enforcement agencies and reports of such audits to be filed with the state.²⁴

In other states, legislation has been adopted which specifies requirements, such as procedures and timeframes, for SOEK 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 offense 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 SOEKs 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.²⁵
- Illinois enacted legislation effective September 1, 2010, which requires law enforcement agencies to submit sexual offense evidence collected in connected 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.²⁶
- Ohio adopted legislation effective March 23, 2015, which requires law enforcement agencies to forward the contents of a SOEK 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.²⁷

Effect of Bill

The bill creates s. 943.326, F.S., to require a SOEK, or other DNA evidence if such kit is not collected, to be submitted to a member of the statewide criminal analysis laboratory system²⁸ for forensic testing within the earlier of 30 days after:

²⁴ See Arkansas House Bill 1208 (2015) (requiring annual audits of untested SOEKs 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 SOEKs 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).

²⁵ COLO. REV. STAT. §24-33.5-113 (2015).

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

²⁷ OHIO REV. CODE ANN. §2933.82 (2015).

²⁸ 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. 943.32, F.S.

- Receipt of the evidence by a law enforcement agency if a report of the sexual offense is made to the 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 or a specified representative of the victim be informed of the purpose for submitting evidence for testing and the right to request testing by:

- A medical provider conducting a forensic physical examination for purposes of a sexual offense evidence kit; or
- A law enforcement agency that collects other DNA evidence associated with the sexual offense if a kit is not collected.

The bill also requires FDLE and each laboratory within the statewide criminal analysis laboratory system, in coordination with the Florida Council Against Sexual Violence, to adopt and disseminate guidelines and procedures for the collection, submission, and testing of DNA evidence obtained in connection with an alleged sexual offense. Such guidelines and procedures must include the requirements of the section, standards for how evidence is to be packaged for submission, what evidence must be submitted to the a member of the statewide criminal analysis laboratory system, and timeframes for when the evidence must be submitted, analyzed, and compared to DNA databases.

The bill specifies that:

- The section's testing requirements are satisfied when a member of the statewide criminal analysis laboratory system tests the contents of the SOEK in an attempt to identify the foreign DNA attributable to a suspect.
- If a SOEK is not collected, the laboratory may receive and examine other items directly related to the crime scene, such as clothing or bedding or personal items left behind by the suspect.
- If probative information is obtained from the testing of the SOEK, the examination of other evidence should be based on the needs of the case and determined through cooperation among the investigating agency, the laboratory, and the prosecutor.

Finally, the bill states that the section does not create a cause of action or create any rights for an individual to challenge the admission of evidence or create a cause of action for damages or any other relief for a violation of the section.

The bill takes effect July 1, 2016.

B. SECTION DIRECTORY:

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

Section 2. 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 also requires FDLE and each laboratory within the statewide criminal analysis laboratory system, in coordination with the Florida Council Against Sexual Violence, to adopt and disseminate

guidelines and procedures for the collection, submission, and testing of DNA evidence obtained in connection with an alleged sexual offense. FDLE will be able to comply with this requirement within existing resources and reports this bill will not have a fiscal impact on the department.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not authorize rules; instead, it requires FDLE and specified others to adopt guidelines and procedures relating to the collection, submission, and testing of DNA evidence that is obtained in connection with an alleged sexual offense.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The term "rule" is defined as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule."²⁹ The bill requires FDLE and specified others to adopt guidelines and procedures that address items including standards for how evidence is to be packaged for submission, what evidence must be submitted to the a member of the statewide criminal analysis laboratory system, and timeframes for when the evidence must be submitted, analyzed, and compared to DNA databases. These items appear to be a description of the procedure requirements of an agency. As such, it may be desirable to amend the bill so that it requires the adoption of rules, rather than guidelines and procedures.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 1, 2015, the Criminal Justice Subcommittee adopted a strike all amendment and reported the bill favorably as a committee substitute. The amendment:

²⁹ s. 120.52(16), F.S.

- Removed the bill's requirements for "any" DNA evidence collected in a sexual assault investigation to be analyzed.
- Increased the number of days within which a SOEK must be submitted for testing under certain circumstances from 21 to 30.
- Specified that medical providers and law enforcement agencies must provide certain information to victims or their representatives regarding SOEK testing under certain circumstances.
- Added provisions indicating when the section's testing requirements are deemed satisfied and when other DNA evidence may be considered.
- Provided that the section does not create certain causes of action or rights.
- Removed the bill's requirements for FDLE to adopt rules and submit a plan to analyze the untested sexual assault forensic evidence currently held in the statewide criminal analysis laboratory system by a certain date.

This analysis is drafted to the committee substitute as adopted by the Criminal Justice Subcommittee.