

Date of Hearing: March 23, 2021
Counsel: Matthew Fleming

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 18 (Lackey) – As Introduced December 7, 2020

SUMMARY: Requires a law enforcement agency to submit sexual assault forensic evidence that was received prior to January 1, 2016 to a crime lab, and requires crime labs to process that kit and upload DNA profiles to the Combined DNA Index System (CODIS). Specifically, **this bill:**

- 1) Requires law enforcement agencies to submit sexual assault forensic evidence that was received prior to January 1, 2016 to a crime lab on or before January 31, 2022.
- 2) Requires crime labs to process sexual assault forensic evidence kits that was received by a law enforcement agency prior to January 1, 2016 on or before January 31, 2023.
- 3) Specifies that if a sexual assault kit would not be eligible for uploading qualifying DNA profiles into COIDS, pursuant to state and federal regulations, the crime lab is not required to process the evidence kit.
- 4) Specifies that if a victim of crime from whom a sexual assault evidence kit was collected prior to January 1, 2016, notifies the law enforcement agency or the crime lab that the victim does not want the kit tested, the crime lab is not required to test the kit.

EXISTING LAW:

- 1) Provides that in order to ensure that sexual assault forensic evidence is analyzed within the two-year timeframe required and to ensure the longest possible statute of limitations for sex offenses the following shall occur:
 - a) A law enforcement agency in whose jurisdiction a specified sex offense occurred shall do one of the following for any sexual assault forensic evidence received by the law enforcement agency on or after January 1, 2016:
 - i) Submit sexual assault forensic evidence to the crime lab within 20 days after it is booked into evidence; and,
 - ii) Ensure that a rapid turnaround DNA program is in place to submit forensic evidence collected from the victim of a sexual assault directly from the medical facility where the victim is examined to the crime lab within five days after the evidence is obtained from the victim.
 - b) The crime lab shall do one of the following for any sexual assault forensic evidence received by the crime lab on or after January 1, 2016:

- i) Process sexual assault forensic evidence, create DNA profiles when able, and upload qualifying DNA profiles into CODIS as soon as practically possible, but no later than 120 days after initially receiving the evidence; or,
 - ii) Transmit the sexual assault forensic evidence to another crime lab as soon as practically possible, but no later than 30 days after initially receiving the evidence, for processing of the evidence for the presence of DNA. If a DNA profile is created, the transmitting crime lab should upload the profile into CODIS as soon as practically possible, but no longer than 30 days after being notified. (Pen. Code, § 680, subds. (b)(7)(A) and (B).)
- 2) Specifies that crime labs do not need to test all items of forensic evidence obtained in a sexual assault forensic evidence examination. (Pen. Code, § 680, subd. (b)(7)(C).)
- 3) Specifies that a DNA profile need not be uploaded into CODIS if it does not meet the federal guidelines. (Pen. Code, § 680, subd. (b)(7)(D).)
- 4) Defines “rapid turnaround DNA program” as a program for training of sexual assault team personnel in the selection of a representative samples of forensic evidence from the victim to be the best evidence based on the medical evaluation and patient history, the collection and preservation of that evidence, and the transfer of the evidence directly from the medical facility to the crime lab, which is adopted pursuant to a written agreement between the law enforcement agency, the crime lab, and the medical facility where the sexual assault team is based. (Pen. Code, § 680, subd. (c)(2)(5).)
- 5) Establishes the Sexual Assault Victims' DNA Bill of Rights which provides victims of sexual assault with the following rights:
 - a) The right to be informed whether or not a DNA profile of the assailant was obtained from the testing of the rape kit evidence or other crime scene evidence from their case;
 - b) The right to be informed whether or not the DNA profile of the assailant developed from the rape kit evidence or other crime scene evidence has been entered into the Department of Justice (DOJ) Data Bank of case evidence; and,
 - c) The right to be informed whether or not there is a match between the DNA profile of the assailant developed from the rape kit evidence or other crime scene evidence and a DNA profile contained in the DOJ Convicted Offender DNA Data Base, provided that disclosure would not impede or compromise an ongoing investigation. (Pen. Code § 680 (c)(2).)
- 6) Provides that upon the request of a sexual assault victim, the law enforcement agency investigation of a specified sex offense shall inform the victim of the status of the DNA testing of the rape kit evidence or other crime scene evidence from the victim's case. (Penal Code § 680 (c)(1).)
- 7) Requires the following persons to provide buccal swab samples (DNA), right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological

samples, as required by law, for law enforcement identification analysis:

- a) Any person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense, or is found not guilty by reason of insanity of any felony offense, or any juvenile who is adjudicated for committing any felony offense in juvenile court;
- b) Any adult person who is arrested for or charged with any of the following felony offenses:
 - i) Any felony offense specified or attempt to commit any felony offense that imposes upon a person the duty to register in California as a sex offender;
 - ii) Murder or voluntary manslaughter or any attempt to commit murder or voluntary manslaughter;
 - iii) Any adult person arrested or charged with any felony offense; and,
- c) Any person, including any juvenile, who is required to register in California as a sex offender or arsonist because of the commission of, or the attempt to commit, a felony or misdemeanor offense, or any person, including any juvenile, who is housed in a mental health facility or sex offender treatment program after referral to such facility or program by a court after being charged with any felony offense. (Pen. Code § 296, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** "It's completely unacceptable that professionals entrusted with potentially pivotal and sacred evidence have failed to follow through. The rape kit backlog illustrates that we are not committed to helping victims of rape. The backlog has allowed countless predators to go free and continue their attacks. This bill will ensure California delivers justice to victims of sexual assault and goes after these criminals with every tool available."
- 2) **Sexual Assault Evidence Kits and the Combined DNA Index System (CODIS):** After a possible sexual assault has occurred, victims of the crime may choose to be seen by a medical professional, who then conducts an examination to collect any possible biological evidence left by the perpetrator. To collect forensic evidence, many jurisdictions provide what is called a "sexual assault evidence kit" (SAE kit). SAE kits often contain a range of scientific instruments designed to collect forensic evidence such as swabs, test tubes, microscopic slides, and evidence collection envelopes for hairs and fibers. The composition of sexual assault kits vary depending on jurisdiction. For example, according to a report from 2011, the police and sheriff's department in Los Angeles use identically arranged sexual assault kits, however, the rest of California does not. (NIJ, *The Road Ahead: Unanalyzed Evidence in Sexual Assault Cases*, May 2011, at page 2, available at: <https://www.ncjrs.gov/pdffiles1/nij/233279.pdf>, [as of Mar. 13, 2020].)

Analyzing forensic evidence from SAE kits assists in linking the perpetrator to the sexual assault. Generally, once a hospital or clinic has conducted a sexual assault kit examination, it

transfers the kit to a local law enforcement agency. From there, the law enforcement agency may send the kit to a forensic laboratory. Evidence collected from a kit can be analyzed by crime laboratories and could provide the DNA profile of the offender. Once law enforcement authorities have that genetic profile, they could then upload the information onto CODIS.

Created by the FBI in 1990, CODIS is a national database that stores the genetic profiles of sexual assault offenders onto a software program. By exchanging, testing, and comparing genetic profiles through CODIS, law enforcement agencies can discover the name of an unknown suspect who was in the system or link together cases that still have an unknown offender. The efficacy of CODIS depends on the volume of genetic profiles that law enforcement agencies submit. (FBI website, Combined DNA Index System (CODIS), available at: <https://www.fbi.gov/services/laboratory/biometric-analysis/codis>, [as of June 6, 2019].) At present, more than 190 public law enforcement laboratories use CODIS. (*Id.*)

- 3) **Untested Sexual Assault Evidence Kits:** There are a number of reasons why law enforcement authorities may not submit a SAE kit to a crime lab. For example, the identity of the suspect may never have been at issue. Often times, whether or not the victim consented to the sexual activity is the most important issue in the case, not the identity of the suspect. In other cases, charges may be dropped for a variety of reasons, or a guilty plea may be entered rendering further investigation moot. (NIJ, *The Road Ahead: Unanalyzed Evidence in Sexual Assault Cases*, May 2011, at page 3, available at: <https://www.ncjrs.gov/pdffiles1/nij/233279.pdf>, [as of May 11, 2020].)

Despite a variety of reasons why law enforcement may not have a kit tested, a 2014 report by the California State Auditor found that law enforcement rarely documents reasons for not analyzing sexual assault evidence kits. (State Auditor, *Sexual Assault Evidence Kits*, Oct. 2014, at page 17, available at: <https://www.bsa.ca.gov/pdfs/reports/2014-109.pdf>, [as of May 11, 2020].) Specifically, the report found that “[i]n 45 cases . . . reviewed in which investigators at the three agencies we visited did not request a kit analysis, the investigators rarely documented their decisions. As a result, we often could not determine with certainty why investigators decided that kit analysis was not needed.” (*Id.* at 23.)

Upon a more in-depth review of the individual cases, the report found that analysis of the kits would not have been likely to further the investigation of those cases. The “decisions not to request sexual assault evidence kit analysis in the individual cases we reviewed appeared reasonable because kit analysis would be unlikely to further the investigation of those cases. We reviewed specific cases at each agency in which investigators did not request analysis. Our review included 15 cases from each of the three agencies we visited with offenses that occurred from 2011 through 2013, for a total of 45 cases. In those cases, we did not identify any negative effects on the investigations as a result of decisions not to request analysis. We based our conclusions on the circumstances present in the individual cases we reviewed, as documented in the files for the 45 cases and as discussed with the investigative supervisors.” (*Id.*)

Although the audit found the explanations for not submitting the sexual assault kits to be reasonable, testing those kits may have identified offenders who had committed another crime for which they were never previously identified. The National Institute of Justice funded Detroit, Michigan and Houston, Texas to test their unsubmitted sexual assault kits.

The results revealed that testing unsubmitted kits can lead to convicting hundreds to thousands of serial offenders; such testing identified over 400 serial rapists in Detroit alone. (NIJ, National Sexual Assault Kit Initiative (SAKI): FY 2017 Competitive Grant Announcement, Dec. 20, 2016, available at: <https://www.bja.gov/funding/SAKI17.pdf> [as of May 11, 2020].)

It is important to note that just because a kit goes untested does not necessarily mean that the suspect's DNA profile was never uploaded to CODIS in order to potentially link the suspect to other crimes. If a suspect is convicted, or even arrested for, certain qualifying offenses, a DNA sample is collected pursuant to Penal Code section 296 and the DNA profile uploaded to the Arrestee Index or the Convicted Offender Index in CODIS. A conviction for any felony will require the collection of a DNA profile for both adults and juveniles. And an arrest or charge against an adult for any felony or any offense that would result in requiring the person to register as a sex offender, if convicted, would similarly result in the collection of a DNA profile under Penal Code Section 296. Such profiles are then regularly searched against the already-existing profiles in CODIS.

- 4) **Mandatory Testing of Sexual Assault Evidence Kits Collected in 2016 or Later:** In 2019, the Legislature passed SB 22 (Leyva) Chapter 588, Statutes of 2019. That bill required law enforcement agencies to submit sexual assault forensic evidence to a crime lab and required crime labs to either process the evidence for DNA profiles and upload them to CODIS. SB 22 applied to all sexual assault evidence that was received on or after January 1, 2016. Prior to the passage of SB 22, California law encouraged, but did not require any agency to send a sexual assault kit to a crime lab. This bill would require sexual assault evidence kits that were received prior to January 1, 2016 are also sent to a crime lab and tested.
- 5) **Audit on Untested Sexual Assault Evidence Kits:** AB 3118 (Chiu), Chapter 950, Statutes of 2018, required each law enforcement agency, crime lab, medical facility, or other facility in possession of sexual assault kits to conduct an audit of all the kits in their possession and report specified information about them to the DOJ. In turn, the DOJ was required to compile the information and submit a report to the Legislature. The information to be audited includes the date when the kits were collected, whether they were tested by a crime lab, whether the information from the test was uploaded to CODIS, etc. DOJ published its report in July, 2020, and is available on the Attorney General's public website (Statewide Audit of Untested Sexual Assault Forensic Evidence Kits, DOJ, July 2020, available at: <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/ag-rpt-audit-usafe-kits-2020.pdf> [as of Feb. 19, 2021].)

According to the DOJ, a mere 149 law enforcement agencies were responsive to the audit mandated by AB 3118. (*Id.* at p. 9.) At the time of the DOJ report, the Commission on Peace Officers Standards and Training (POST) website listed 690 law enforcement agencies in California. (POST website, <https://post.ca.gov/le-agencies>; *Id.* at 3.) Not every law enforcement agency handles SAE kits, and by the terms of AB 3118, any agency that does not handle SAE kits was not required to respond to the audit. It is therefore possible that the 541 law enforcement agencies which did not respond to the audit do not handle SAE kits, but it may also be the case that at least some agencies who do handle SAE kits were not responsive to the AB 3118 audit.

The law enforcement agencies that did respond to DOJ reported that there were 13,929 untested sexual assault kits in California. (*Id.* at 9) Approximately one third of those kits (4,834) were reportedly not tested because the survivor/victim chose not to pursue prosecution and therefore there was little incentive to process the evidence. (*Ibid.*). SAE kits that were collected in cases where the victim/survivor chose not to pursue prosecution were specifically exempted from AB 3118. Therefore, there is no further information available as to why the kits were not tested. Most of the remaining, untested kits were cases in which the survivor/victim had desired prosecution; those accounted for 5,679 untested kits. The final 3,416 untested kits were cases where the preference for prosecution of the survivor/victim was unknown or unascertainable. (*Id.* at 10).

In regards to the 9,095 untested kits where the survivor/victim either desired prosecution or the preference of the person was unknown, the reporting law enforcement agencies provided a variety of explanations for why the kits were not tested. (*Ibid.*). The three most common reasons were: 1) the case was determined to be unactionable by the prosecution, 2) testing the kit was determined to be unnecessary because the case already adjudicated, and 3) the reason for not testing the kit was simply unknown. (*Ibid.*). The last “unknown” category accounted for 2,659 kits, and was further explained as follows:

“Law enforcement agencies and crime laboratories were unable to determine the reasons why 575 kits [] had not been tested, usually because the records had been sealed or purged, were incomplete, or could not be located. Agencies listed ‘other’ with no further explanation, or provided another explanation that did not fit within the categories above, for 605 kits []. No reason was given for 1,149 [] of the reported untested sexual assault evidence kits.” (*Id.* at 11)

Additional reasons for untested kits were 1) there was an active investigation or prosecution, 2) the kit was determined to be unlikely to yield a probative DNA profile, 3) the kit was part of a “courtesy report” taken by one law enforcement agency for the benefit of another and is being held until the law enforcement agency with jurisdiction takes action, and 4) it was determined that no crime was committed or there was a crime other than sexual assault that was committed. (*Id.* at 11 – 12.) The report also contains a breakdown of where and when SAE kits were collected. Of particular relevance to this proposal is the finding that 10,232 untested SAE kits were collected prior to 2016. (*Id.* at 23).

There are ongoing efforts to compile information on untested kits and test them. AB 280 (Low) Chapter 698, Statutes of 2017 established a voluntary contribution fund for the purpose of processing untested SAE kits. In addition, budget bills in 2018 and 2019 allocated millions of dollars in order to compile information on untested SAE kits. All of these funding sources are administered as grants by the DOJ (*See Id.* at 13).

- 6) **Arguments in Support:** According to *Crime Victims United*: “We have all heard the saying “that justice delayed is justice denied.” For victims of sexual assault who have been waiting to have their rape kits tested no truer words are spoken. While SB 813 (Leyva – 2016) and SB 22 (2019) fortified avenues for victims to have rape kits tested the reality is there is still a backlog. According to the Department of Justice 2020 report there remains 13,929 kits that have not been tested through the State of California This is simply a nightmare for those victims. If this continues there is a real possibility that the DNA will degrade and not only the victims associated with those kits be denied justice prematurely, but serious and violent

rapists will be on our streets to victimize again.”

- 7) **Argument in Opposition:** According to the *California Public Defenders Association*: “If enacted, AB 18 would require crime laboratories analyze all sexual assault kits received prior to January 1, 2016, no later than January 31, 2024, regardless of whether the DNA is necessary to a prosecution, regardless of whether the suspect has already pled guilty and regardless of whether there are items of evidence from other types of cases, the results of which are necessary for a successful prosecution, that will not be tested because the lab’s resources will be devoted to testing of sexual assault evidence. The bill requires the sexual assault evidence be analyzed and the profiles be uploaded to CODIS regardless of whether the crime has been solved and the suspect convicted. This bill, if passed, will be an expensive unfunded mandate, the cost of which will need to be reimbursed by the state at a time when the state’s financial situation is of tremendous concern.

“How crime laboratories allocate limited resources should not be micromanaged by the state legislature. While the testing of DNA evidence from sexual assault cases is important, it is not more important than DNA testing on items of evidence collected in the investigation of other types of violent crime such as homicides, kidnapping or assaults. Moreover, this bill would require evidence from a sexual assault case be tested by January 31, 2024, regardless of whether conducting such testing would prevent the laboratory from testing evidence from other types of cases when the results of the DNA testing are required for prosecution. In other words, this bill might actually put prosecutions in jeopardy because of the time constraints it imposes on crime labs. Meeting the time limits imposed by this bill could also put on hold DNA testing that might tend to exonerate someone being held in custody for a crime he did not commit.”

8) **Prior Legislation:**

- a) AB 2481 (Lackey), of the 2019 – 2020 Legislative Session, was identical to this bill. AB 2481 was held in the Assembly Appropriations suspense file.
- b) SB 22 (Leyva), Chapter 588, Statutes of 2019, required law enforcement agencies to either submit sexual assault forensic evidence to a crime lab or ensure that a rapid turnaround DNA program is in place, and required crime labs to either process the evidence for DNA profiles and upload them into the Combined DNA Index System (CODIS) or transmit the evidence to another crime lab for processing and uploading.
- c) AB 3118 (Chiu), Chapter 950, Statutes of 2018, required each law enforcement agency, crime lab, medical facility, or any other facility that possesses sexual assault evidence kits to conduct an audit of all kits in their possession and report the findings to the DOJ, who is then required to submit a report to the Legislature.
- d) AB 41 (Chiu), Chapter 694, Statutes of 2017, required all local law enforcement agencies investigating a case involving sexual assault to input specified information relating to the administration of a sexual assault kit into the DOJ’s SAFE-T database within 120 days of collection. It also required public laboratories to input an explanation onto SAFE-T if they had not completed DNA testing of a sexual assault kit within 120 days of acquiring

the kit.

- e) AB 1312 (Gonzalez Fletcher), Chapter 692, Statutes of 2017, required law enforcement and medical professionals to provide victims of sexual assault with written notification of their rights. Provides additional rights to sexual assault victims, and mandates law enforcement and crime labs to complete tasks related to rape kit evidence.
- f) AB 280 (Low), Chapter 698, Statutes of 2017, established the Rape Kit Back Log Voluntary Tax Contribution Fund and allowed taxpayers to contribute their own funds to the Fund through a designation on the state personal income tax return.
- g) AB 1848 (Chiu), of the 2015-2016 Legislative Session, would have required local law enforcement agencies to conduct an audit of sexual assault kits collected during a period of time, as specified by the DOJ, and to submit data regarding the total number of kits, the amount of kits submitted for DNA testing, the amount not submitted and other information, as specified. AB 1848 was held in the Senate Appropriations Committee.
- h) AB 2499 (Maienschein), Chapter 884, Statutes of 2016, required the DOJ to, in consultation with law enforcement agencies and crime victims groups, establish a process giving location and other information to victims of sexual assault upon inquiry.
- i) SB 1079 (Glazer), of the 2015-2016 Legislative Session, would have required the DOJ to maintain a restricted access repository for tracking DNA database hits that local law enforcement agencies could use to share investigative information. SB 1079 was held in the Senate Appropriations Committee.
- j) AB 1517 (Skinner), Chapter 874, Statutes of 2014, provided preferred timelines that law enforcement agencies and crime labs should follow when dealing with sexual assault forensic evidence.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
Crime Victims United of California
Leda Health
National Association of Social Workers, California Chapter
Work Equity Action Fund

1 private individual

Oppose

California Public Defenders Association (CPDA)

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