

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 636

INTRODUCER: Criminal Justice Committee and Senator Benacquisto

SUBJECT: Evidence Collected in Sexual Assault Investigations

DATE: January 26, 2016

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------|
| 1. | Cellon | Cannon | CJ | Fav/CS |
| 2. | | | ACJ | |
| 3. | | | AP | |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 636 creates s. 943.326, F.S., which addresses the collection and processing of evidence in sexual offense investigations that may contain DNA evidence.

The bill requires that a sexual offense evidence kit collected in a sexual offense investigation be submitted to the statewide criminal analysis laboratory system for forensic testing within 30 days after the evidence is received by a law enforcement agency if a report of the sexual offense is made to the agency, or when the victim or his or her representative requests that the evidence be tested.

Testing of the sexual offense evidence kit must be completed no later than 120 days after submission to a member of the statewide criminal analysis laboratory system.

A collected sexual offense evidence kit must be retained in a secure, environmentally safe manner until the prosecuting agency approves the kit's destruction.

The victim, or his or her representative, shall be informed of the purpose of testing and of his or her right to demand testing. The victim shall be informed by either the medical provider conducting the physical forensic examination for purposes of evidence collection for a sexual offense evidence kit or, if no kit is collected, a law enforcement agency that collects *other* DNA evidence associated with the offense.

By January 1, 2017, FDLE and each lab within the statewide criminal analysis laboratory system, in coordination with the Florida Council Against Sexual Violence, must adopt and disseminate guidelines and procedures for the collection, submission, and testing of DNA evidence obtained in connection with an alleged sexual offense.

The guidelines and procedures must include:

- Standards for packaging evidence for submission to the laboratories for testing;
- What evidence must be submitted for testing, which would include a collected sexual offense evidence kit and possibly other evidence related to the crime scene;
- Timeframes for evidence submission including the 30 day deadline for collected sexual offense evidence kits as set forth in the bill;
- Timeframes for evidence analysis including the bill's requirement that testing of sexual offense evidence kits must be completed no later than 120 days after submission; and
- Timeframes for evidence comparison to DNA databases.

The bill becomes effective July 1, 2016.

II. Present Situation:

Forensic Evidence Collection in Sexual Assault Cases, Submission for DNA Testing

A sexual assault kit (SAK), 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 ch. 794, F.S., or a lewd or lascivious offense as defined in ch. 800, F.S. 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

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 Section 960.28(2), F.S.

³ Section 960.28(4), F.S.

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 SAK upon completion of the exam and indicate that the SAK 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 SAK 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}

Generally, law enforcement agencies in Florida submit SAKs 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

In some cases, a law enforcement agency may not submit a SAK for DNA analysis and may instead retain the SAK in evidence storage. Reasons for not analyzing a SAK include: (a) the victim did not want to file a police report regarding the assault (non-reporting victim); (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.¹⁰

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, SAKs 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 Section 943.32, F.S.; *see also* Florida Department of Law Enforcement, *Biology Screening of Sexual Assault Evidence Kits*.

¹⁰ 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.

According to information provided by the FDLE, DNA analysis of a SAK requires on average approximately 26.25 hours of crime analyst and supervisor time.¹¹

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.¹²

National Backlog of SAKs Not Submitted for DNA Testing

To better understand the issue of SAKs 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.¹³ Both entities conducted a census of untested SAKs:¹⁴

- 6,663 untested SAKs were found in storage at the Houston Police Department.¹⁵ Each of these SAKs 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.¹⁶
- 8,707 untested SAKs were found in Detroit.¹⁷ Of these SAKs, approximately 2,000 were analyzed. The analyses resulted in 760 matches identifying the perpetrator, the identification of 188 serial offenders, and 15 convictions.¹⁸

In July of 2015 the USA TODAY newspaper released the results of its own nationwide inventory of untested SAKs. The records of 1,000-plus law enforcement agencies, including some agencies in Florida, showed at least 70,000 untested SAKS.¹⁹ Many police agencies have no idea how many untested SAKs they have in their property rooms.²⁰

¹¹ Florida Department of Law Enforcement, *supra* note 9, at 7.

¹² *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). Note that a profile developed from a non-reporting victim's SAK is not currently eligible to be loaded into the national database according to FBI standards. *Florida Department of Law Enforcement Sexual Assault Kit Assessment*.

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

¹⁴ 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).

¹⁵ *Id.*

¹⁶ 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>.

¹⁷ National Institute of Justice, *supra* note 16.

¹⁸ The White House, *supra* note 1, at 2.

¹⁹ The USA TODAY report covers a fraction of the 18,000 police agencies in the country suggesting a potential for untested SAKs in the hundreds of thousands may exist. <http://www.floridatoday.com/longform/news2015/07/16/unttested-rape-kits-evidence-across-usa/299021>.

²⁰ Samara Martin-Ewing, *#TesttheKits: Thousands of rape kits go untested*, WUSA9 TV, <http://www.wusa9.com/story/news/local/2015/07/16/testthekits-unttested-rape-kits/30230447/>.

Some states have adopted legislation requiring audits to be conducted of the untested SAKs in the possession of law enforcement agencies and reports of such audits to be filed with the state.²¹

In other states, legislation has been adopted which specifies requirements, such as procedures and timeframes, for SAK 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 SAKs 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.²²
- 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.²³
- Ohio adopted legislation effective March 23, 2015, which requires law enforcement agencies to forward the contents of a SAK 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.²⁴

SAKs Not Submitted for DNA Testing in Florida

At the direction of the Legislature, the Florida Department of Law Enforcement has conducted a statewide assessment of SAKs that have not been submitted for DNA analysis by law enforcement.²⁵ Agencies had access to the online survey from August 15 – December 15, 2015.²⁶

Sixty-nine percent of Florida's police departments responded to the survey and 100 percent of the sheriff's offices responded.²⁷ These 279 law enforcement agencies represent 89 percent of the state's population.²⁸

²¹ 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).

²² COLO. REV. STAT. §24-33.5-113 (2015).

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

²⁴ OHIO REV. CODE ANN. §2933.82 (2015).

²⁵ *Florida Department of Law Enforcement Sexual Assault Kit Assessment*, <http://www.fdle.state.fl.us/docs/SAKResults.pdf>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Survey responses indicate that there are 13,435 unsubmitted SAKs in law enforcement evidence storage statewide.²⁹ Of the 13,435 unsubmitted SAKs, the agencies indicated that 9,484 of them should be submitted for DNA testing.³⁰ Individual agency guidelines, not state law, dictate which SAKs should be submitted for testing.³¹

The FDLE statewide survey did not specifically request the responding agencies to do a case-by-case analysis of the reasons why all reported SAKs being held in evidence were not submitted for testing.³² Agencies were asked to identify from a list of five possible reasons (and an “other” category) provided in the survey why a SAK may not have been submitted.³³ Among the reasons a SAK may not have been submitted was that the victim was a non-reporting victim.³⁴

The survey asked (and the agencies responded):

Please indicate the reasons for not submitting sexual assault kits (mark all that apply):

41% - victim decided not to proceed

31% - case not being prosecuted by State Attorney’s Office

20% - suspect pled guilty/no contest

18% - non-reporting victim

A summary of “other reasons” written in by agencies included: allegation unfounded, recanted; no issue of identification; suspect convicted on other charges; did not recognize the evolution of DNA testing; victim deceased.³⁵

FDLE Plan for Analyzing Backlog of Unsubmitted SAKs

Part of the report by FDLE on the SAK Assessment includes alternatives for analyzing and uploading the results of the unsubmitted SAK backlog. It should be remembered that FDLE’s crime labs are only part of the statewide criminal analysis laboratory system. The entire system consists of six laboratories operated by 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. The Indian River lab is a regional lab which provides forensic services to Indian River, Martin, Okeechobee, and St. Lucie counties.³⁶ The FDLE alternative plans regarding the SAK backlog relate only to those cases that should come to an FDLE lab, not those that will be analyzed by local labs.

FDLE suggests that a comprehensive business plan which incorporates DNA analysis of the backlog of untested SAKs should consider:

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*; (Note: There was an attempt by the survey to gather specific numbers from the agencies as to how many SAKs were being held in evidence only because the victim was a non-reporting victim, but the accuracy of this quantification by some of the agencies is somewhat unclear based upon other responses given by the agencies and the wording of the survey.)

³⁵ *Id.*

³⁶ Section 943.35, F.S.

- The recent bulk submission of 2,000 older SAKs;
- The remaining 6,600 untested backlog of SAKs within FDLE lab jurisdiction accounted for in the survey of law enforcement agencies;
- Current incoming casework;
- Increasing biology/DNA evidence submissions anticipated by FDLE over time;
- Issues regarding getting and keeping qualified lab personnel;
- The acquisition of equipment that can make the lab process more efficient;
- Increased lab capacity; and
- FDLE's ability to outsource selected cases.

Additionally, FDLE suggests that agencies should be encouraged to develop formal policies and standardized procedures for collecting, submitting, and tracking SAKs in order to limit the impact to the statewide lab system.³⁷

III. Effect of Proposed Changes:

The bill creates s. 943.326, F.S., which addresses the collection and processing of evidence in sexual offense investigations which may contain DNA evidence. The bill states that the timely submission and testing of sexual assault evidence kits is a core public safety issue.

The bill requires that a sexual offense evidence kit collected in a sexual offense investigation be submitted to the statewide criminal analysis laboratory system for forensic testing within 30 days after the evidence is received by a law enforcement agency if a report of the sexual offense is made to the agency, or when the victim or his or her representative requests that the evidence be tested.

Testing of the sexual offense evidence kit must be completed no later than 120 days after submission to a member of the statewide criminal analysis laboratory system. The testing requirement is met when a member of the statewide criminal analysis laboratory system tests the contents of the kit in an attempt to identify the foreign DNA attributable to a suspect.

A collected sexual offense evidence kit must be retained in a secure, environmentally safe manner until the prosecuting agency approves the kit's destruction.

The victim, or his or her representative, shall be informed of the purpose of testing and of his or her right to demand testing. The victim shall be informed by either the medical provider conducting the physical forensic examination for purposes of evidence collection for a sexual offense evidence kit or, if no kit is collected, a law enforcement agency that collects *other* DNA evidence associated with the offense.

If probative information is obtained from testing the sexual offense evidence kit then the examination of other evidence directly related to the crime scene should be based upon the potential evidentiary value to the case as cooperatively determined by the investigating agency, laboratory, and the prosecutor.

³⁷ Florida Department of Law Enforcement Sexual Assault Kit Assessment, <http://www.fdle.state.fl.us/docs/SAKResults.pdf>.

By January 1, 2017, FDLE and each lab within the statewide criminal analysis laboratory system, in coordination with the Florida Council Against Sexual Violence, must adopt and disseminate guidelines and procedures for the collection, submission, and testing of DNA evidence obtained in connection with an alleged sexual offense.

The guidelines and procedures must include:

- Standards for packaging evidence for submission to the laboratories for testing;
- What evidence must be submitted for testing, which would include a collected sexual offense evidence kit and possibly other evidence related to the crime scene;
- Timeframes for evidence submission including the 30 day deadline for collected sexual offense evidence kits as set forth in the bill;
- Timeframes for evidence analysis including the bill's requirement that testing of sexual offense evidence kits must be completed no later than 120 days after submission; and
- Timeframes for evidence comparison to DNA databases.

The newly-created s. 943.326, F.S. does not create a cause of action or create rights for a person to challenge the admission of evidence or create an action for damages or relief for a violation of the new section of law.

The bill becomes effective on July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

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 or exceptions. 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 18,801,310.³⁸ 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 SAK submission to laboratories may require the expenditure of funds by the counties where the five local laboratories are located if state funding for these laboratories is not available. Currently, such expenditures are indeterminate.

One of the exceptions to the application of Section 18(a), Article VII, Florida Constitution, is a law that applies to all persons similarly situated, including state and local governments. It is anticipated that FDLE will also see increased evidence testing

³⁸ U.S. Census Bureau, 2010 Census Interactive Population Search, <http://www.census.gov/2010census/popmap/ipmtext.php?fl=12> (last visited Nov. 30, 2015).

costs so it appears as if the bill meets the exception, and the only other Constitutional requirement is that the Legislature determines the bill fulfills an important state interest. The bill contains a finding of important state interest on lines 59-61.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

FDLE submitted its Bill Analysis of SB 636 in October 2016. The bill analysis did not include any fiscal analysis.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 943.326 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on January 25, 2016:

- Creates or modifies timeframes within which sexual offense evidence kits must be submitted for testing (30 days) and have the testing completed (120 days), which are triggered by the alleged victim making a report with law enforcement or requesting testing;
- Requires safe storage of collected sexual offense evidence kits;

- Collected kits are required to be retained until the prosecuting agency approves their destruction;
- Eliminates rule-making by FDLE for handling sexual offense evidence kits and substitutes a collaboration between FDLE, local labs in the statewide system, and the Florida Council Against Sexual Violence to adopt and disseminate guidelines and procedures;
- Specifies minimum requirements for the guidelines and procedures;
- Eliminates the reporting requirement of FDLE by the original bill;
- Provides for the handling of other evidence related to the alleged crime scene; and
- Specifies that the bill does not create a cause of action or any individual rights or other relief for a violation of the new section of law.

B. Amendments:

None.