

**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.)

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Prepared By: The Professional Staff of the Appropriations Subcommittee on Criminal and Civil Justice

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BILL: SB 1002

INTRODUCER: Senator Stewart

SUBJECT: DNA Evidence Collected in Sexual Offense Investigations

DATE: March 4, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Jones</u>	<u>CJ</u>	<b>Favorable</b>
2.	<u>Dale</u>	<u>Harkness</u>	<u>ACJ</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>AP</u>	_____

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**I. Summary:**

SB 1002 amends section 943.326, Florida Statutes, to require that the Florida Department of Law Enforcement (FDLE) create and begin to maintain a statewide database, the purpose of which is to track the location, processing status, and storage of sexual assault evidence kits (SAKs), from evidence collection throughout the criminal justice process. The database must be created no later than July 1, 2023, and is subject to appropriation by the Legislature.

The alleged victim, who has reported the crime to law enforcement, will have the ability to access the database and follow his or her SAK from the collection site, to law enforcement agency storage, then to the crime laboratory for forensic testing and back to law enforcement agency storage.

If there is a DNA match between the SAK evidence and a person whose DNA is stored in a local, state, or federal database and who may be a suspect or person of interest in the case, the alleged victim will be notified of the match, but not the person's identity, via the newly-created statewide database

Law enforcement agencies, medical facilities, crime laboratories, and any other facilities that collect, receive, maintain, store, or preserve the SAKs must participate in the database, as required by the FDLE.

If the alleged victim is a minor, his or her parent, guardian, or legal representative will have access to the database. If the alleged victim is deceased, his or her personal representative will have access.

The FDLE is required to ensure that each alleged victim, or his or her representative is notified of the existence of the database and provided with instruction on how to access the database.

The FDLE may phase in participation and access to the new statewide SAK tracking database at its discretion and in the manner it chooses. All entities in the chain of custody of SAKs must fully participate in the statewide database no later than one year after its creation.

The bill states that the act may be cited as “Gail’s Law.”

The bill will have a negative fiscal impact on the FDLE. See Section V. Fiscal Impact Statement.

The bill becomes effective July 1, 2021.

## II. Present Situation:

### Forensic Evidence Collection in Sexual Assault Cases

A sexual assault kit (SAK), is a medical kit used by a healthcare provider to collect evidence from the body and clothing of a victim of sexual battery 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 bodily fluids, hair, and fibers that can help identify DNA (deoxyribonucleic acid) and other forensic evidence left by a perpetrator.<sup>1</sup> SAK contents are typically very standardized and, because they are collected directly from the victim’s person, generally represent the most probative evidence.<sup>2</sup>

According to protocols developed by the Department of Legal Affairs (DLA), healthcare providers conducting the forensic physical examination should complete the document entitled “Sexual Assault Kit Form for Healthcare Providers.”<sup>3</sup> This document includes an exam 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.<sup>4</sup> The victim or his or her legal guardian will also be asked whether he or she wants to report the sexual offense to law enforcement. Non-reporting victims’ SAKs will be retained as evidence should he or she decide to report the offense at a later date, but unless there is an active criminal case, the SAK will not be tested for DNA.<sup>5</sup>

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<sup>1</sup> The White House, Office of the Press Secretary, *Fact Sheet: Investments To Reduce The National Rape Kit Backlog And Combat Violence Against Women*, March 16, 2015, available at <https://obamawhitehouse.archives.gov/the-press-office/2015/03/16/fact-sheet-investments-reduce-national-rape-kit-backlog-and-combat-viole> (last visited February 17, 2021).

<sup>2</sup> Florida Department of Law Enforcement, *Assessment of Unsubmitted Sexual Assault Kits*, Executive Summary, p. 5, available at <http://www.fdle.state.fl.us/docs/SAKResults.pdf> (last visited February 17, 2021).

<sup>3</sup> 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, pp. 12-13, available at [https://myfloridalegal.com/webfiles.nsf/WF/JFAO-77TKCT/\\$file/ACSP.pdf](https://myfloridalegal.com/webfiles.nsf/WF/JFAO-77TKCT/$file/ACSP.pdf); See also Florida Council Against Sexual Violence, *Sexual Assault Nurse Examiner Program Guidance Document, Forensic Exam: Evidence Collection*; May 29, 2018, available at <https://www.fcasv.org/sites/default/files/Evidence%20Collection%20Guidance%20Document%205.29.18%20%20FINAL.docx.pdf>; and Florida Department of Law Enforcement, *Sexual Assault/Forensic/Medical Exam*, available at <http://www.fdle.state.fl.us/Documents/SAEKrev5.aspx> (all sites last visited February 24, 2021).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* According to FDLE protocols, to test a non-reporting victim’s SAK would violate the confidentiality and privacy of the victim’s health records under the Health Insurance Portability and Accountability Act (HIPAA). Florida Department of Law Enforcement, *Sexual Assault Kit Submissions Frequently Asked Questions*, p. 1, available at [https://www.fdle.state.fl.us/Forensics/Documents/Sexual-Assault-Kit-FAQs-for-LEA\\_Final.aspx](https://www.fdle.state.fl.us/Forensics/Documents/Sexual-Assault-Kit-FAQs-for-LEA_Final.aspx) (last visited February 18,

The DLA protocols provide instructions for sealing the SAK upon completion of the exam and indicate that the SAK must stay with the examiner or secured in a locked area with limited access and proper chain of custody procedures until transferred to the proper law enforcement agency.<sup>6</sup>

### **Evidence Submission, DNA Testing, DNA Database**

A law enforcement agency must submit a SAK, or other DNA evidence if a kit is not collected, to a member of the statewide criminal analysis laboratory system for forensic testing within 30 days after:

- 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 to the medical provider or the law enforcement agency by:
  - The alleged victim;
  - The alleged victim's parent, guardian, or legal representative, if the alleged victim is a minor; or
  - The alleged victim's personal representative, if the alleged victim is deceased.<sup>7</sup>

The victim or the victim's representative must be informed of the purpose of submitting the SAK or other evidence by the law enforcement agency or the medical provider collecting the SAK.<sup>8</sup>

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.<sup>9</sup>

Testing of SAKs must be completed no later than 120 days after submission to a member of the statewide criminal analysis laboratory system.<sup>10</sup> Testing satisfies the statutory timeline when a member of the statewide criminal analysis laboratory system tests the contents of the SAK in an attempt to identify the foreign DNA attributable to a suspect.<sup>11</sup>

Evidence that may carry a suspect's DNA can be found on physical evidence such as the victim's clothing or bedding. This type of physical evidence is typically accepted for laboratory analysis

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2021). The DLA, which administers a program that pays for an alleged sexual assault victim's forensic physical exam, does not discriminate based upon whether the victim reports the crime to a law enforcement agency. Additionally, the DLA keeps the victim's identity confidential and exempt from the public records law. Section 960.28, F.S.

<sup>6</sup> *Id.* pp. 20-21. See also Florida Department of Law Enforcement, *Crime Laboratory Evidence Submission Manual*, March 2020, p. 15, available at <https://www.fdle.state.fl.us/Forensics/Documents/2020-ESM> (last visited February 18, 2021). A collected sexual offense evidence kit must be retained in a secure, environmentally safe manner until the prosecuting agency has approved its destruction. Section 943.326(3), F.S.

<sup>7</sup> Section 943.326(1), F.S.

<sup>8</sup> Section 943.326(2), F.S.

<sup>9</sup> Section 943.32, F.S.

<sup>10</sup> Section 943.326(4), F.S.

<sup>11</sup> Section 943.326(4)(b), F.S.

if no probative results are obtained from the SAK which may include a pair of underwear worn by the victim at the time of the crime or closely thereafter, and a condom, if applicable.<sup>12</sup>

The state crime laboratories perform short tandem repeats (STR)<sup>13</sup> DNA testing on evidence received from a law enforcement agency, comparing the SAK or crime scene DNA evidence to known DNA samples. The DNA samples from the SAK or other crime scene evidence that do not match the victim's DNA may be attributed to the suspect.<sup>14</sup> The suspect's DNA from the SAK or the crime scene may be submitted to the local, state or Federal Bureau of Investigation's Combined DNA Index System (CODIS) to be searched against local, state, and national casework index files and convicted offender profiles, which could reveal the identity of the perpetrator.<sup>15</sup>

## **Sexual Assault Kit Tracking**

### ***Law Enforcement Tracking***

Investigative reporting in the 2000's discovered that large cities like New York and Los Angeles, among others had large numbers of SAKs that had not been submitted to laboratories for DNA testing.<sup>16</sup> Florida was among the states that had a SAK backlog. For this reason, the 2015 Legislature required the FDLE to complete a statewide assessment of unsubmitted SAKs and report on the findings by January 1, 2016.<sup>17</sup>

Local law enforcement agencies were surveyed by the FDLE with 279 agencies responding. The survey responses showed that in 2015, there were approximately 13,435 unsubmitted SAKs of which agencies approximated 9,484 of them should be submitted (under agency guidelines) to the state crime laboratories for DNA testing. The decision to submit a SAK rested with the local law enforcement agencies.<sup>18</sup> Until s. 943.326, F.S., became effective on July 1, 2016, there were no statewide standards or expectations regarding the submission of SAKs.

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<sup>12</sup> Florida Department of Law Enforcement, *Crime Laboratory Evidence Submission Manual*, March 2020, pp. 14-15, available at <https://www.fdle.state.fl.us/Forensics/Documents/2020-ESM> (last visited February 18, 2021).

<sup>13</sup> STR (short tandem repeats) DNA testing examines thirteen different areas (markers) of DNA that have been found to be highly variable. These thirteen markers have been standardized in the United States to allow the comparison of testing results from one state to another. Florida Department of Law Enforcement, *Biology/DNA Laboratory and the DNA Investigative Database*, Rev. January 2015, available at [https://www.fdle.state.fl.us/Publications/Documents/Brochures/DNABrochureJan2015\\_1.aspx#:~:text=Biology/DNA%20Laboratory%20and%20the%20DNA%20Investigative%20Support%20Database,LAW%20ENFORCEMENT%202331%20Philips%20Road%20Tallahassee,%20Florida%2032308](https://www.fdle.state.fl.us/Publications/Documents/Brochures/DNABrochureJan2015_1.aspx#:~:text=Biology/DNA%20Laboratory%20and%20the%20DNA%20Investigative%20Support%20Database,LAW%20ENFORCEMENT%202331%20Philips%20Road%20Tallahassee,%20Florida%2032308) (last visited February 18, 2021).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> There were a reported 17,000 unsubmitted SAKs in New York City, and at least 12,669 in Los Angeles. Madeleine Carlisle, *A New System to Ensure Sexual-Assault Cases Aren't Forgotten*, *The Atlantic*, April 7, 2019, available at <https://www.theatlantic.com/politics/archive/2019/04/many-states-are-adopting-rape-kit-tracking-systems/586531/> (last visited February 23, 2021). See also Florida Department of Law Enforcement, *Assessment of Unsubmitted Sexual Assault Kits*, p. 1, available at <http://www.fdle.state.fl.us/docs/SAKResults.pdf> (last visited February 17, 2021).

<sup>17</sup> Florida Department of Law Enforcement, *Assessment of Unsubmitted Sexual Assault Kits*, Executive Summary, available at <http://www.fdle.state.fl.us/docs/SAKResults.pdf>, (last visited February 17, 2021).

<sup>18</sup> *Id.* at pp. 2-3.

The FDLE completed laboratory analysis of the previously unsubmitted SAKs with an offense date of prior to October 1, 2014, by the end of June, 2019.<sup>19</sup> DNA testing of the 8,023 SAKs resulted in 1,814 CODIS “hits” which linked the DNA from the SAKs to a possible suspect in the sexual assault and possibly other unsolved crimes throughout the country.<sup>20</sup>

### *Other States Statewide SAK Tracking Provides Victims’ Access*

In 2016, Idaho was the first state to create its own statewide SAK tracking system. Idaho has shared this system with other states free of charge. The states that have not taken Idaho up on its offer have largely contracted with one of several companies that provide services like round-the-clock technical support.<sup>21</sup>

As adopted or considered in other states, SAK tracking typically consists of a software program that provides for the upload of SAK location information by medical, law enforcement, and laboratory personnel. A secure database that contains no personal information allows victims of sexual assault to monitor the progress of the SAK for his or her case through the criminal justice system. The tracking is typically accomplished by checking a randomly assigned bar code matching the bar code used to track the evidence by law enforcement and laboratories.<sup>22</sup>

Florida does not currently possess a statewide electronic tracking system for SAKs.

### **III. Effect of Proposed Changes:**

The bill requires that, subject to appropriation by the Legislature, and no later than July 1, 2023, the FDLE create and begin to maintain a statewide database, the purpose of which is to track the location, processing status, and storage of sexual assault evidence kits (SAKs), from evidence collection throughout the criminal justice process. The database must be accessible to:

- The alleged victim of the sexual assault;
- The alleged victim’s parent, guardian, or legal representative, if the alleged victim is a minor;
- The alleged victim’s personal representative, if the alleged victim is deceased; and
- Law enforcement agencies.

The bill specifies that law enforcement agencies, medical facilities, crime laboratories, and any other facilities that collect, receive, maintain, store, or preserve the SAKs must participate in the

<sup>19</sup> See Press Release containing the Florida Department of Law Enforcement, *Sexual Assault Kit Final Progress Report*, September 2019, Hernando Sun, *FDLE completes 3-year sexual assault kit project*, September 20, 2019, available at <https://www.hernandosun.com/article/fdle-completes-3-year-sexual-assault-kit-project> (last visited February 24, 2021).

<sup>20</sup> *Id.*

<sup>21</sup> Madeleine Carlisle, *A New System to Ensure Sexual-Assault Cases Aren’t Forgotten*, The Atlantic, April 7, 2019, available at <https://www.theatlantic.com/politics/archive/2019/04/many-states-are-adopting-rape-kit-tracking-systems/586531/>. See also Barbara Sprunt, *Virginia Launches Rape Kit Tracking System To Give Control Back To Survivors*, National Public Radio, WAMU 88.5, October 4, 2019, available at <https://www.npr.org/local/305/2019/10/04/767403524/virginia-launches-rape-kit-tracking-system-to-give-control-back-to-survivors>; Nicole Nixon, *Sexual Assault Survivors in California Could Track Their Rape Kit Online Under New Bill*, CapRadio, February 2, 2021, available at <https://www.capradio.org/articles/2021/02/02/sexual-assault-survivors-in-california-could-track-their-rape-kit-online-under-new-bill/>; and Doug Richards, *New bill introduced in Georgia would create online registry to track rape kits*, 11alive.com, February 4, 2021, available at <https://www.11alive.com/article/news/politics/rape-kits-tracking-bill/85-ba8092be-0a65-4241-8d26-2182f38c420f> (all sites last visited February 19, 2021).

<sup>22</sup> *Id.*

database, as required by the FDLE. This provision appears to give the FDLE the ability to require the listed facilities to input data into the database to the extent necessary to maintain uninterrupted tracking of the SAKs.

The FDLE is required to ensure that each alleged victim, the alleged victim's parent, guardian, or legal representative, if the alleged victim is a minor, and the alleged victim's personal representative, if the alleged victim is deceased is:

- Notified of the existence of the database;
- Provided with instruction on how to access the database; and
- Informed that he or she is entitled to access information regarding the alleged victim's SAK, including:
  - Tracking information;
  - Testing status; and
  - Any DNA matches to a person deemed by investigators to be a suspect or a person of interest in the investigation.

The bill provides that notification about a DNA match should be limited to the occurrence of a match, and without any genetic or other identifying information. Such notification may be delayed for up to 180 days if the investigators are of the opinion that immediate notification would negatively affect the investigation.

The FDLE may phase-in participation and access to the new statewide SAK tracking database at its discretion and in the manner it chooses.

The bill requires that all entities in the chain of custody of SAKs fully participate in the statewide database no later than 1 year after its creation. The database must track the status of SAKs from entities in the chain of custody which include medical providers who collect the SAK evidence, the law enforcement personnel who receive, store, and send the SAK for testing, and laboratory personnel who process the SAK and return it to the law enforcement agency for storage until the prosecuting agency has approved its destruction according to s. 943.326(3), F.S.

The bill states that the act may be cited as "Gail's Law."

The bill becomes effective July 1, 2021.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill makes the creation of program subject to appropriation. However, the FDLE estimates the bill's fiscal impact in FY 2021-22 will be \$600,000 in nonrecurring funds for software purchase and customization. Beginning in FY 2022-23, the department estimates that it will need \$500,000 in recurring funds for IT maintenance and support costs, software licenses, and help desk support. The department is also requesting two FTE positions for management, training, and support of the new system, which will total \$182,266, of which \$174,476 will be recurring funds. The FDLE will also need \$150,000 annually to purchase standardized SAKs, designed to include barcodes for tracking.<sup>23</sup>

D. Technical Deficiencies:

None.

**VI. Related Issues:**

The FDLE suggests that the investigating law enforcement agency notify the alleged victim of a CODIS "hit," rather than that information being accessible through the database. This seems to be an issue of notification timing as well as the suggestion that "hit" notifications be limited to a "hit" that is a legitimate match to a potential suspect and not other types of "hits" that can occur through CODIS.<sup>24</sup>

From an investigatory standpoint, another concern regarding alleged victim access to CODIS "hit" confirmations arises under the following circumstances. If the alleged victim is a minor and, therefore, it is the parent or guardian who is entitled to database access, what might occur if the parent or guardian is actually the perpetrator and receives the identifying "hit" notification? This unintended occurrence may compromise the investigation by giving the perpetrator time to

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<sup>23</sup> 2021 FDLE Legislative Bill Analysis, SB 1002, February 19, 2021 (on file with the Senate Criminal Justice Committee).

<sup>24</sup> *Id.*

influence the alleged victim's cooperation with law enforcement and time to concoct his or her "story."

The FDLE also suggests that there is no apparent mechanism provided in the bill that would enforce compliance with the database participation requirements.<sup>25</sup>

**VII. Statutes Affected:**

This bill substantially amends section 943.326 of the Florida Statutes.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>25</sup> *Id.*