

Date of Hearing: March 28, 2023

Consultant: Elizabeth Potter

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

AB 1368 (Lackey) – As Introduced February 17, 2023

SUMMARY: Requires law enforcement agencies to submit and the crime lab to process sexual assault kits within specified time frames. Specifically, **this bill:**

- 1) Requires a law enforcement agency (LEA) that received sexual assault forensic evidence connected to a reported crime prior to January 1, 2016, to submit the evidence to the crime lab on or before January 31, 2025.
- 2) Provides that a LEA that received sexual assault forensic evidence connected to a reported crime prior to January 1, 2016, and submitted to the crime lab on or before January 1, 2024, the crime lab shall process the sexual assault evidence kit, create DNA profiles when able, and upload qualifying DNA profiles into Combined DNA Index System (CODIS) as soon as possible, but no later than January 31, 2026

EXISTING LAW:

- 1) Creates the Sexual Assault Victims' DNA Bill of Rights, which regulates the timing of the testing of samples taken from a sexual assault victim including duties of crime labs and how the samples shall be upload to the CODIS. (Pen. Code, § 680.)
- 2) Requires a LEA in whose jurisdiction a specified sex offense occurred to do one of the following for any sexual assault forensic evidence received by the LEA on or after January 1, 2016:
 - a) Submit sexual assault forensic evidence to the crime lab within 20 days after it is booked into evidence; or,
 - b) 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 (Pen. Code, § 680, subd. (c)(1).)
- 3) Provides that 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:
 - a) 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,
 - b) 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 shall upload the profile into CODIS as soon as practically possible, but no longer than 30 days after being notified about the presence of DNA. (Pen. Code, § 680, subd. (c)(2).)

- 4) Requires the LEA investigating the crime to 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, upon the victim's request. The LEA may, at its discretion, require that the victim's request be in writing. The LEA shall respond to the victim's request with either an oral or written communication, or by email, if an email address is available. The LEA is not required to communicate with the victim or the victim's designee regarding the status of DNA testing absent a specific request from the victim or the victim's designee. (Pen. Code, § 680 subd. (d)(1).)
- 5) States that sexual assault victims have the right to access the Department of Justice's Sexual Assault Forensic Evidence Tracking (SAFE-T) database portal for information involving their own forensic kit. (Pen. Code, § 680 subd. (d)(2).)
- 6) Provides that sexual assault victims have 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 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 Department of Justice Convicted Offender DNA Data Base, provided that disclosure would not impede or compromise an ongoing investigation. (Pen. Code, § 680, subd. (d)(3).)
- 7) Requires that, if an LEA does not analyze DNA evidence within six months prior to the established time limits, a victim of a sexual assault offense be informed, either orally or in writing, of that fact by the LEA. (Pen. Code, § 680, subd. (e).)
- 8) Provides that if an LEA intends to destroy or dispose of rape kit evidence or other crime scene evidence from an unsolved sexual assault case, the victim shall be given written notification by the LEA of that intention. (Pen. Code, § 680, subd. (f)(1).)
- 9) Specifies that an LEA shall not destroy or dispose of rape kit evidence or other crime scene evidence from an unsolved sexual assault case before at least 20 years, or if the victim was under 18 years of age at the time of the alleged offense, before the victim's 40th birthday. (Pen. Code, § 680, subd. (f)(2).)
- 10) Specifies that written notification to the victim about the destruction of the evidence in an unsolved sexual assault case shall be made at least 60 days prior to its destruction or disposal. (Pen. Code, § 680, subd. (g).)

- 11) Provides that a sexual assault victim may designate a sexual assault victim advocate, or other support person of the victim's choosing, to act as a recipient of the above information. (Pen. Code, § 680, subd. (h).)
- 12) Requires that the Department of Justice(DOJ), on or before July 1, 2022, and in consultation with LEAs and crime victims groups, establish a process that allows a survivor of sexual assault to track and receive updates privately, securely, and electronically regarding the status, location, and information regarding their sexual assault evidence kit in the department's SAFE-T database. (Pen. Code, § 680.1.)
- 13) Provides that the DOJ DNA Laboratory is to serve as a repository for blood specimens, buccal swab, and other biological samples collected and is required to analyze specimens and samples and store, compile, correlate, compare, maintain, and use DNA and forensic identification profiles and records related to the following:
 - a) Forensic casework and forensic unknowns;
 - b) Known and evidentiary specimens and samples from crime scenes or criminal investigations;
 - c) Missing or unidentified persons;
 - d) Persons required to provide specimens, samples, and print impressions;
 - e) Legally obtained samples; and,
 - f) Anonymous DNA records used for training, research, statistical analysis of populations, quality assurance, or quality control. (Pen. Code, § 295.1, subd. (c)(1)-(6).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Victim-Survivors of sexual assault experience one of the most destabilizing recovery processes – which would only be worsened by finding out that DNA collected from your body sat on a shelf for years without any action. Survivors often face fatigue when confronted with apathy as self-advocates. A victim should not be responsible for following up with detectives and district attorneys in their journey to realize justice, especially for a felony charge. Behind each untested rape kit is a person whose life has been devastatingly altered. We owe it to the survivors represented by these untested kits to help them seek justice."
- 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.

Prior to 2019, the composition of SAE kits varied throughout California. ([Audit of Untested Sexual Assault Forensic Evidence Kits: 2020 Report \(ca.gov\)](#) at p. 4 [as of March 21, 2023]) Although they were similar, the exact SAE kit used by a medical facility was determined by the crime laboratory serving that jurisdiction. (*Id.*) AB 1744 (Stats. 2016, ch. 857) required the Department of Justice’s Bureau of Forensic Services (BFS), the California Association of Crime Laboratory Directors and the California Association of Criminalists to collaborate with public crime laboratories and the California Clinical Forensic Medical Training Center (CCFMTC) to develop a standardized SAE kit to be used by all California jurisdictions. (*Id.*) The basic components were to be established by January 30, 2018, and guidelines pertaining to the use of the kit components were to be issued on or before May 30, 2019. (*Id.*) The new standardized kit was finalized and ready for production in September 2019. (*Id.*)

Analyzing forensic evidence from SAE kits assists in linking the perpetrator to the sexual assault. Generally, once a hospital or clinic has conducted a SEA 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://le.fbi.gov/science-and-lab-resources/biometrics-and-fingerprints/codis#Combined-DNA%20Index%20System%20CODIS> ,[as of March 20, 2023].) 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 March 20, 2023].)

A 2020 report by the California Attorney General Division of Law Enforcement Bureau of Forensic Service found that the backlog for analyzing sexual assault evidence kits continues:

Until 2015, California did not have a system in place for collecting comprehensive data on the number of SAE kits collected from survivors/victims of sexual assault and the status of untested kits. SAE kit records were only maintained at the agency level and were not centrally tracked or reported. In an effort to collect and centralize data regarding

the status and disposition of SAE kits in the possession of LEAs and crime laboratories, the Department created the Sexual Assault Forensic Evidence Tracking (SAFE-T) database in 2015. Access to SAFE-T is strictly limited to designated users from LEAs, public crime laboratories, and district attorneys' offices. Although strongly encouraged, LEAs and crime laboratories were not legally mandated to use SAFE-T to track their SAE kits until 2017 when AB 41 (Stats. 2017, ch. 694) went into effect. This bill required that all survivor/victim SAE kits collected as of January 1, 2018, be reported in the SAFE-T database. However, because the mandate does not extend retroactively to include kits that were collected from a survivor/victim prior to January 1, 2018, SAFE-T does not provide a comprehensive view of the current size and distribution of, or reasons for, California's SAE kit backlog.

This report is a first step in a larger effort to work with other agencies that handle SAE kits to fill the information gaps. Addressing the backlog issue requires knowing the number of untested kits across the state and understanding the reasons they remain untested.

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A wide range of reasons exist for SAE kits to remain untested. The reasons included: A victim not pursuing prosecution; A case could not be investigated or prosecuted; Testing was not necessary/case adjudicated; Unknown/other Active investigation/prosecution; An analysis was unlikely to yield DNA profile; The kit belongs to another jurisdiction; No crime/crime other than rape. ([Audit of Untested Sexual Assault Forensic Evidence Kits: 2020 Report \(ca.gov\)](#) at p.5 & p.9 [as of March 21, 2023])

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) **Argument in Support:** According to *The Joyful Heart foundation*, the Sponsor of this bill, "Every 68 seconds, someone is sexually assaulted in the United States. There are more than 15,000 reported rapes in California every year. In the immediate aftermath of a sexual assault, a victim may choose to undergo a medical forensic examination- which may take

four to six hours to collect evidence left behind by the attacker in what is commonly called a rape kit. Survivors expect that their rape kits will be tested. The public expects the same.

“DNA evidence is a powerful law enforcement tool. When tested, rape kit evidence can identify unknown assailants, link crime scenes together, reveal serial offenders, and exonerate the wrongfully convicted. Too often, however, these rape kits languish untested for years—even decades—in storage facilities. While these kits sit on shelves, dangerous offenders remain free on the streets and survivors wait for justice. To date, we don’t know how many untested rape kits are sitting on shelves in California.”

- 5) **Argument in Opposition:** According to *The California Public Defenders Association* “If enacted, AB 1368 would require crime laboratories analyze all sexual assault kits received prior to January 1, 2016, no later than January 31, 2026, 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, 2026, 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.

“This is a poorly conceived bill. Crime laboratories in this state should be permitted to prioritize their work with the guidance from prosecutors. The state legislature should not be in the business of prioritizing a crime lab’s workload. Additionally, the state should not be throwing money away to ensure evidence from one type of case is tested first regardless of the import of the evidence to a criminal prosecution.

“For these reasons, CPDA strongly opposes AB 1368 and respectfully urges your ‘NO’ vote on AB 1368 when it comes before you in the Assembly Public Safety Committee.”

6) **Prior Legislation:**

- a) AB 18 (Lackey), of the 2021-2022 Legislative Session, was nearly identical to this bill. AB 18 was held in the Assembly Committee on Appropriations Suspense File.

- b) SB 916 (Leyva), Chapter 916, Statutes of 2022, entitles a sexual assault victim to access the DOJ SAFE-T database portal for information involving their own forensic evidence kit and the status of the kit.
- c) AB 2481 (Lackey), of the 2019-2020 Legislative Session, was nearly identical to this bill. AB 2481 was held in the Assembly Committee on Appropriations Suspense File.
- d) SB 215 (Leyva), Chapter 634, Statutes of 2021, required the DOJ to establish, on or before July 1, 2022, a process that allows a survivor of sexual assault to privately, securely and electronically track and receive updates regarding the status, location and information of their sexual assault evidence kit in the DOJ SAFE-T database.
- e) AB 358 (Low), of the 2019-2020 Legislative Session, would have required DOJ, no later than July 1, 2023, to create a statewide tracking system that allows a sexual assault victim to monitor the testing and processing of the sexual assault forensic evidence collected in their case. AB 358 was held on the Assembly Committee on Appropriations Suspense File.
- f) AB 1496 (Frazier), of the 2019-2020 Legislative Session, would have required a law enforcement agency to either submit sexual assault forensic evidence to a crime lab or ensure a rapid turnaround DNA program is in place and require a crime lab to either process the evidence or transmit the evidence to another crime lab for processing within existing specified time frames. AB 1496 was held on the Assembly Committee on Appropriations Suspense File.
- g) SB 22 (Levy), Chapter 588, Statutes of 2019, requires law enforcement agencies to either submit sexual assault forensic evidence to a crime lab or ensure a rapid turnaround DNA program is in place. This law also requires crime labs to either process evidence for DNA profiles and upload them into the CODIS or transmit the evidence to another crime lab for processing and uploading.
- h) AB 41, Chapter 694, Statutes of 2017, requires local law enforcement agencies to periodically update the Sexual Assault Forensic Evidence Tracking (SAFE-T) database on the disposition of all sexual assault evidence kits in their custody.
- i) 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.
- j) AB 1744 (Chiu), Chapter 857, Statutes of 2016, requires the Department of Justice's Bureau of Forensic Services, the California Association of Crime Laboratory Directors, and the California Association of Criminalists to work collaboratively with public crime laboratories, in conjunction with the California Clinical Forensic Medical Training Center, to develop a standardized sexual assault forensic medical evidence kit, containing minimum basic components, to be used by all California jurisdictions.

Support

Joyful Heart Foundation (Sponsor)
Natasha's Justice Project (Co-Sponsor)
California District Attorneys Association
National Association of Social Workers, California Chapter
San Diegans Against Crime
San Diego County District Attorney's Office
San Diego Deputy District Attorneys Association

Oppose

California Public Defenders Association (CPDA)

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