
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 3118 **Hearing Date:** June 26, 2018
Author: Chiu
Version: May 25, 2018
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Sexual Assault: Investigations*

HISTORY

Source: Alameda County District Attorney
Joyful Heart Foundation

Prior Legislation: AB 41 (Chiu), Chapter 694, Stats. 2017
AB 1312 (Gonzalez Fletcher) Chapter 692, Stats. 2017
AB 1848 (Chiu) Held Senate Appropriations 2016
AB 1517 (Skinner), Chapter 874, Stats. 2014
AB 322 (Portantino) Vetoed 2011
AB 558 (Portantino) Vetoed 2010
AB 1017 (Portantino) Vetoed 2009

Support: California District Attorneys Association; California National Organization for Women; California Statewide Law Enforcement Association; Center for Community Solutions; City and County of San Francisco, the San Francisco Department on the Status of Women; Courage Campaign; Crime Victims United of California; Equal Rights Advocates; Human Rights Watch; Investigative Lead; NCJWSF; Peace over Violence; Santa Barbara Women's Political Committee; the Village Family Services; the Women's Foundation of California; Senator Diane Feinstein; Congresswoman Karen Bass; Congresswoman Julia Brownley; Congressman Tony Cardenas; Congresswoman Judy Chu; Congressman Mark DeSaulnier; Congresswoman Anna Eschoo; Congressman John Garamendi; Congressman Jimmy Gomez; Congressman Ro Kahanna; Congressman Steve Knight; Congressman Ted Lieu; Congresswoman Zoe Lofgren; Congressman Alan Lowenthal; Congresswoman Grace Napolitano; Congresswoman Lucille Roybal-Allard; Congressman Ed Royce; Congressman Adam Schiff; Congressman Brad Sherman; Congresswoman Jackie Speier; Congressman Eric Swalwell; Congressman Mark Takano; Congressman Mike Thompson; Congressman Norma Torres; Congresswoman Mimi Walters; Fiona Ma, State Board of Equalization

Opposition: California Association of Crime Lab Directors

Assembly Floor Vote: 77 - 0

PURPOSE

The purpose of this bill is to require 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 Department of Justice (DOJ), as specified

Existing law establishes the Sexual Assault Victims' Bill of Rights, which provides victims of sexual assault the following rights:

- 1) To be informed whether or not a deoxyribonucleic acid (DNA) profile of the assailant was obtained from the testing of forensic evidence in their case;
- 2) To be informed whether or not the DNA profile of the assailant that was developed from forensic evidence has been entered into the DOJ Data Bank of case evidence; and
- 3) To be informed about a match occurring between the DNA profile of the assailant, as it was developed from forensic evidence testing, and a DNA profile contained in the DOJ's Convicted Offender DNA Data Base, provided that informing the victim would not impede or compromise an ongoing conviction. (Penal Code § 680 (c)(2).)

Existing law requires an adult arrested for or charged with a felony and a juvenile adjudicated for a felony to submit DNA samples. (Penal Code § 296.)

Existing law requires law enforcement officers or medical providers to provide a sexual assault victim with a card, as developed by the applicable local law enforcement agency, which comprehensibly explains the victim's rights. (Penal Code § 680.2.)

Existing law encourages law enforcement agencies to submit sexual assault forensic evidence within 20 days of booking it into evidence, or to establish a rapid DNA turnaround program which would ensure that sexual assault evidence collected at a medical facility goes directly to a crime lab within 5 days. (Penal Code § 680 (b)(7)(A).)

Existing law encourages a crime lab, upon receiving sexual assault evidence, to process such evidence and upload it into CODIS no later than 120 days after receiving it, or to transmit such evidence to another crime lab within 20 days of receiving it. (Penal Code § 680 (b)(7)(B).)

Existing law requires law enforcement agencies to report information regarding rape kit evidence, within 120 days of the collection of the kit, to the DOJ's Sexual Assault Forensic Evidence Tracking (SAFE-T) database. Specifies that information shall include, among other things:

- 1) If biological evidence samples were submitted to a DNA laboratory for analysis;
- 2) If a probative DNA profile was generated; and,
- 3) If evidence was not submitted, the reasons for not submitting the kit for processing. (Penal Code § 680.3 (a).)

Existing law provides that, if a public DNA laboratory does not process a sexual assault kit within 120 days, it must explain the reasons for the status in the SAFE-T database, as specified. (Penal Code § 680.3 (b).)

Existing law states that a law enforcement agency shall give a victim of a specified sexual assault offense written notification if the agency intends to discard a sexual assault kit. Law enforcement agencies are prohibited from discarding forensic evidence from unsolved sexual assault cases for 20 years, or if the victim was under 18 at the time of the offense, before the victim's 40th birthday. (Penal Code § 680 (e).)

Existing law provides that a victim must be given written notification at least 60 days prior to the forensic evidence being discarded. (Penal Code § 680 (f).)

Existing law requires the DOJ, in consultation with law enforcement agencies and crime victims groups, to establish a process to inform victims of sexual assault regarding the location and information about their sexual assault kits upon the victim making an inquiry. (Penal Code § 680.1.)

Existing law states, notwithstanding any other limitation of time described, prosecution for a specified felony sex offense shall be commenced within 10 years after the commission of the offense. (Penal Code § 801.1 (b).)

Existing law states that, six months prior to the applicable statute of limitations ending, a law enforcement agency that has not analyzed DNA evidence must inform the sexual assault victim that the statute of limitations deadline is going to end. (Penal Code § 680 (d).)

This bill provides that each law enforcement agency, crime lab, medical facility, or other facility that receives or stores sexual assault kit evidence must conduct an audit of all untested kits in their possession and, by July 1, 2019, report to the DOJ all of the following:

- 1) The total number of untested kits in their possession.
- 2) For each kit reported, the following information, as applicable:
 - a) Whether or not the assault had been reported to a law enforcement agency.
 - b) The date the kit was collected.
 - c) The date a law enforcement agency had picked the kit up, for each agency which has taken custody of the kit.
 - d) The date the kit was delivered to a crime lab.
 - e) The reason a kit has not been tested, if applicable

This bill requires the DOJ to submit a report to the Legislature summarizing the above information by July 1, 2020.

COMMENTS

1. Need for This Bill

According to the author:

In recent years, the federal government identified hundreds of thousands of rape kits that have gone unanalyzed, commonly referred to as the “rape kit backlog.” Because most jurisdictions do not have systems for tracking or counting rape kits, we do not know the total number.

In many cases, survivors of sexual assault experience re-traumatization when undergoing the forensic evidence collection process. The neglect of these kits with no explanation why they were not analyzed simply adds to the trauma ensured by the survivors seeking justice.

In California, we know there is partial count of our backlog with a minimum of over 13,00 kits- but we don’t know how long they’ve been sitting on the shelf, or if there were or were not legitimate reasons why they were not tested. To get at the crux of the backlog problem, we need to know how many kits are sitting untested on shelves across the state.

Last year, the legislature passed an Governor Brown signed AB 41 (Chiu) which requires local agencies to track all rape kits collected from survivors on or after January 1, 2018.

While this was an important step moving forward, there is still an unmown number of existing untested kits sitting on shelves across the state.

Additionally, in 2014, the federal government created the Sexual Assault Kit Initiative (SAK), a Department of Justice program that provides local communities with the resources to test backlogged kits in their police storage facilities. Congress has thus far approved \$131 million for this unique program, and the FY18 budget includes an additional \$5 million.

There is ample federal funding available to address backlogged kits. To apply for those funds, local jurisdictions should know the number of kits they have sitting on their shelves.

AB 3118 would require all agencies and facilities that receive, maintain, store, or preserve sexual assault evidence kits to conduct an audit of all kits in their possession and report the data to DOJ. DOJ would then be required to prepare and submit a report on the submitted data to the legislature.

2. Unsubmitted Sexual Assault Kits

California law does not require any agency to send a sexual assault kit to a crime lab, although recently, legislation has been enacted that encourages such transfers. (Penal Code § 680 (b)(7)(A).) The California Legislature has recently enacted a statute requiring law enforcement agencies to submit information regarding sexual assault kits into the state Department of

Justice's Sexual Assault Forensic Evidence Tracking (SAFE-T) database. Such information includes: if forensic evidence samples were sent to a crime lab, whether such evidence generated a probative DNA profile, and, if forensic evidence was not submitted to a crime lab, the reason(s) for not submitting the kit for processing. (Penal Code, § 680.3 (a).) However, that statute is not retroactive and does not cover kits gathered prior to the law becoming operative.

There are a number of reasons why law enforcement authorities do not submit a kit to a crime lab. A reason might be the fact that the issue may have been consent rather than not knowing the identity of the suspect, or that the charges might have been dropped, or a guilty plea entered. (U.S. DOJ's National Institute of Justice. (2011). *The Road Ahead: Unanalyzed Evidence in Sexual Assault Cases*. <<https://www.ncjrs.gov/pdffiles1/nij/233279.pdf>> [Apr. 5, 2018].) A victim may also request that the kit not be submitted to law enforcement.

A 2014 report by the California State Auditor found that law enforcement agencies rarely document reasons for not analyzing sexual assault evidence kits. (California State Auditor. (2014) *Sexual Assault Evidence Kits*. <<https://www.bsa.ca.gov/pdfs/reports/2014-109.pdf>> [Apr. 5, 2018].) 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.”

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 as 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. (National Institute of Justice. (2016). *National Sexual Assault Kit Initiative (SAKI): FY 2017 Competitive Grant Announcement*. <<https://www.bja.gov/funding/SAKI17.pdf>> [Apr. 5, 2018].)

California, which passed Proposition 69 in 2004, requires all persons arrested or charged of a felony to submit DNA samples and thus testing an untested kit may result in a match. (Penal Code § 296) However, for cases where a kit is not tested because a person is in custody or convicted for the offense, under Proposition 69 that person's DNA will already have been collected and submitted a DNA sample to the data bank so matches to other offenses where the kit was tested could be connected through that sample.

3. Data on untested kit

This bill would collect data on untested kits. Having this information will help determine what the reason for untested kits is as well as where funding should be directed to address any backlog. Why a kit has not been tested is very relevant in this discussion. A kit that has not been tested because the victim has opted not to prosecute or where the suspect is in known is very different than a kit that has not been tested in a timely manner because of a shortage of lab resources or other issue. This bill should give us that information.

4. Author's Amendments to be Offered in Committee

In some response to some concerns raised about giving information on kits when the victim has chosen not to prosecute the author is taking the following amendments:

a) Each law enforcement agency, medical facility, crime laboratory, and any other facility that receives, maintains, stores, or preserves sexual assault evidence kits shall conduct an audit of all-untested sexual assault kits in their possession and shall, no later than July 1, 2019, submit a report to the Department of Justice containing the following information:

(1) The total number of untested sexual assault kits in their possession.

(2) For each kit, the following information:

(A) Whether or not the assault was reported to a law enforcement agency.

(B) ***For kits where the victim has expressed an interest in pursuing prosecution, the following dates, as applicable:***

(i) The date the kit was collected.

(ii) The date the kit was picked up by a law enforcement agency, for each law enforcement agency that has taken custody of the kit.

(iii) The date the kit was delivered to a crime laboratory.

(iv) The reason the kit has not been tested, if applicable.

(C) For kits where the victim has chosen not to pursue prosecution at the time of the audit, only the number of kits need be disclosed.

(b) The Department of Justice shall, no later than July 1, 2020, prepare and submit a report to the Legislature summarizing the information received pursuant to subdivision (a).

(c) The report required by subdivision (b) shall be submitted in compliance with Section 9795 of the Government Code.

(d) Pursuant to Section 10231.5 of the Government Code, this section is repealed on July 1, 2024.

5. Argument in Support

According to the Alameda County District Attorney:

In my own county, several years back I embarked on the task of identifying all untested SAKs. We discovered that 1,900 untested SAKs sitting in police evidence rooms. Today, there are no untested SAKs, including the 1,900. Many of those SAKs produced a DNA profile linked to the perpetrator which has now been uploaded into the California database and CODIS.

Clearly, this was not just an Alameda County issue. Nationally, it has been estimated that as many as 500,000 SAKs were untested, sitting in police evidence rooms across the country. I am proud to have been instrumental in securing more than \$180 million in federal dollars, including in the current budget, for law enforcement across the country to test those previously untested SAKs. However, the first step to determining the number of untested SAKs is to conduct an inventory of SAKs. California has never conducted an audit. We cannot address the problem if we don't know the extent of it.

Why test SAKs? Victim/Survivors consent to an intrusive post sexual assault forensic examination. A sexual assault kit is completed as part of the exam and any potential forensic evidence, such as body fluid of the perpetrator(s), is captured and placed in the SAK for later scientific examination. After undergoing this intrusive examination, Victim/Survivors fully expect that the SAKs will be tested. DNA is an amazing forensic tool allowing law enforcement. Through testing of the SAKs across America, sexual assault crimes have been solved and offenders removed from society. Serial offenders and serial crimes are linked. And, DNA has exonerated those wrongfully convicted or identified. However, across California, too many sexual assault survivors are not receiving equal access to justice.

6. Argument in Opposition

According to the California Association of Crime Lab Directors:

On behalf of the California Association of Crime Laboratory Directors (CACLD), we must respectfully continue to oppose Assembly Bill 3118, unless amended. This bill mandates an audit to be submitted to the legislature by the Department of Justice (DOJ) of untested kits, while collecting superfluous data which law enforcement agencies, medical facilities, and forensic laboratories may or may not have.

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