

Sexual Assault Kit Testing & Senate Bill 22

SUMMARY

Forensic identification analysis is a powerful law enforcement tool for identifying and prosecuting sexual assault offenders. Thousands of Sexual Assault Kits (SAK) collected as evidence by numerous California Law Enforcement Agencies (LEAs) went untested until the state-wide backlog was estimated to exceed 13,000 kits. In response, California Senate Bill 22 (SB 22), known as the “Sexual Assault Victims’ DNA Bill of Rights” passed in October 2019, requires LEAs to conduct more “timely” DNA analysis of SAKs. However, SB 22 did not mandate funding to reimburse LEAs for this higher level of service. The 2021/2022 San Diego County Grand Jury investigated this situation and recommends:

- The San Diego County Sheriff and the San Diego City Chief of Police request the County Board of Supervisors and the City Council, respectively, lobby the State Assembly for state reimbursement to county and city crime laboratories for the increased costs of the forensic evidence testing required by SB 22.
- The San Diego County Sheriff and the San Diego City Chief of Police request, from their respective governing bodies, increased budgetary appropriations for current and future needs in forensic science staff, training and equipment.

INTRODUCTION

There is an increasing reliance upon forensic science in solving crimes. The Federal Bureau of Investigation believes that DNA testing and profiling, entered into the Department of Justice Convicted Offender DNA Database via the Combined DNA Index System (CODIS), is one of the most successful investigative tools available to law enforcement.¹

It is standard procedure in cases involving sexual assault to collect bodily fluids from victims for DNA testing. The results of this procedure, which is performed by specially trained medical personnel, is then packaged in SAKs and submitted to a laboratory for testing and possible DNA matching to suspects.

Untested SAKs, some dating back to 2015 and before, were stored at various LEA laboratories and medical facilities. The state-wide backlog was estimated to exceed 13,000 kits. Public outrage over the backlog prompted legislators to introduce new legislation to address the problem, resulting in SB 22 being passed.

¹ FBI National Press Office release, “Combined DNA Index System (CODIS) Hits Major Milestone,” May 2021, <https://www.fbi.gov/news/pressrel/press-releases/the-fbis-combined-dna-index-system-codis-hits-major-milestone>.

To prevent a future accumulation of untested Sexual Assault Kits, SB 22 requires:²

- “Timely” DNA analysis of SAKs
- LEAs to submit sexual assault forensic evidence to crime labs within 20 days of booking, and/or ensure that a rapid turnaround DNA program is in place
- Crime Labs to process this forensic evidence, create DNA profiles, and upload qualifying profiles into CODIS no later than 120 days after receiving the evidence
- LEAs, upon the request of a sexual assault victim, to inform the victim of the status of the SAK DNA testing, if a DNA profile was developed, and whether there is a match (hit) in the Department of Justice Convicted Offender DNA Data Base, provided that disclosure would not impede or compromise an ongoing investigation.

METHODOLOGY

The Grand Jury:

- Attended an in-person presentation from the San Diego County District Attorney’s (DA) office
- Studied DA press releases and webpages
- Studied the California Attorney General’s Report, “Statewide Audit of Untested Sexual Assault Forensic Evidence Kits 2020”
- Toured the San Diego County Sheriff’s (SDSD) Regional Crime Lab
- Toured the San Diego Police Department’s (SDPD) Crime Lab
- Interviewed and obtained data from current and former personnel of both the County and City crime labs

DISCUSSION

According to the San Diego County DA’s office, at any given point in time, there are approximately 4,500 registered sex offenders in San Diego County. Approximately 50% of those have committed crimes against children.³ Evidence from SAKs is often a key factor in obtaining justice for survivors/victims of sexual assault.

The 2020 California Attorney General’s (AG) Statewide Audit of Untested Sexual Assault Forensic Evidence Kits found that California had no comprehensive data on the total number of SAKs that remained untested. Available data reported to the CA Department of Justice, for the AG’s Audit Report, indicated that San Diego County had the highest number of untested SAKs state-wide. “Ample financial resources are required for evidence testing. DNA analysis, in particular, is a costly service to provide.”⁴

² Senate Bill 22, op. cit.

³ San Diego County District Attorney webpage, “Sex Offender Monitoring and the Law,” <https://www.sdca.org/preventing/sex-offenders/>. This webpage notes the numbers change daily.

⁴ Office of the Attorney General Report, “Statewide Audit of Untested Sexual Assault Forensic Evidence Kits 2020 Report,” <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/ag-rpt-audit-usasfe-kits-2020.pdf>.

As a result of SB 22, the AG’s audit, and the San Diego County DA office’s attention to this matter, a priority was put on reducing the county-wide backlog of untested SAKs. In response, the SDSD and SDPD crime labs assessed their number of untested SAKs and expedited the testing of this “historical” backlog. To comply with mandated testing timelines, but without the benefit of additional staff, the SDSD and SDPD crime labs used, and in the case of SDPD continues to use, an outside resource, Bode Cellmark Forensics, a testing lab in Lorton, Virginia. As of August 2019, the San Diego County backlog of untested SAKs was estimated at 2,030 consisting of SAKs from the County Sheriff’s Department, eight contract Police Departments, and three University Police Departments. By May 2021, and at a cost of \$1.6 million, Bode Labs completed the testing – resulting in 485 kits with ‘foreign’ DNA detected. ‘Foreign’ DNA is DNA other than the victim’s DNA.

These results were uploaded into CODIS by the originating LEA crime lab. CODIS data produced 219 hits including 167 new offender hits and 52 case-to-case hits (when a DNA profile from one case matches to a DNA profile from a different case). Case-to-case hits can lead to an investigation. One hundred of those uploaded suspect/offender profiles were conviction matches (their DNA was already in the database). Criminal charges were filed in a new case where a 13-year-old girl was the victim.⁵

As of August 2019, the total number of SDPD untested SAKs was estimated at 1,800. SDPD also chose Bode Labs to test their historical backlog – processed in batches of about 75 SAKs per month – at a cost of \$885/kit, for a total cost of approximately \$1.6 million. As of February 2022, all historical SAKs have been submitted for testing. The SDPD went beyond the SB 22 requirements—to test kits dated between January 1, 2016 through December 31, 2019—and voluntarily submitted all SAKs dated back to 1990. The results as of February 2022: 519 kits with DNA profiles uploaded to CODIS, revealing 247 offender/arrestee hits. SDPD continues to use Bode Labs, contracted through 2022, for current DNA testing at a cost of \$1,975/kit – twice the cost per backlogged kit—in order that Bode can provide SDPD crime lab level services.⁶

In a decision on a test claim filed by the City of San Diego (claimant), the California Commission on State Mandates determined that ensuring a rapid turnaround DNA program is in place is a mandated cost, but other SB 22 requirements were not.⁷ One-time-only allocations from the General Fund, funds from the San Diego City Council and the San Diego County DA’s Operating Budget, as well as state grants were used to cover the costs of outsourcing historical SAKs to a third-party testing lab. However, those revenues and grants were limited in the amount of funding and were primarily applicable to backlog testing. To meet SB 22 mandated SAK testing

⁵ San Diego County District Attorney June 2021 press release, “DA Announces All Rape Kit Testing Completed,” https://www.sdca.org/content/office/newsroom/tempDownloads/27ef4657-6cc6-46c8-b1ed-edcff9f012d7_SAK%20Rape%20Kit%20Testing%20Update%20News%20Release%2006-09-21.pdf.

⁶ SAK Testing Statistics from SDPD Crime Lab.

⁷ State of California, Commission on State Mandates, SB 22 Trial Determination, Case No 20-TC-01 <https://csm.ca.gov/decisions/20-TC-01-072321.pdf>.

timeframes for new SAKs, without mandated funds for additional staff and equipment, crime labs have shifted priorities and personnel away from other areas, such as: homicides, gang shootings, child abuse, property crimes, narcotics and firearms testing.

In December 2020, Assembly Bill 18 (AB 18)⁸ was introduced to amend Penal Code section 680, and consequently SB 22, as follows: extend the timeframes for testing historical SAKs; give crime labs more latitude in choosing which swabs of a SAK to test on a case-by-case basis; and reimburse local agencies for certain costs to provide this higher level of service – if the Commission on State Mandates determines that this act contains costs mandated by the state. However, AB 18 failed to pass in the State Legislature’s Appropriations Committee despite being supported by Assembly Representatives and the California Sexual Assault Forensic Examiners Association (CalSAFE).

During the investigation, the Grand Jury learned that crime labs in the city and county would need to double the current number of Forensic Biology positions to meet the increasing reliance upon forensic evidence to solve crimes. The added positions would include criminalist-level crime scene specialists, lab technicians, criminalist aids and other support staff. Added staff requires additional equipment. Technology in forensic laboratory equipment continues to advance the science of evidence extraction.

Although the use of an outside service such as Bode Labs provided a means to test thousands of backlogged SAKs, that historical testing was not as thorough as current in-house law enforcement agency crime labs, nor did it provide the flexibility in choosing which SAK swabs to test, nor are they authorized to upload to CODIS. CODIS entries can only be done by LEA personnel. The current Bode contract with SDPD provides similar testing standards and services to those of the SDPD crime lab.

FACTS AND FINDINGS

Fact: SB 22, known as the “Sexual Assault Victims’ DNA Bill of Rights,” modified Penal Code sections 680, 680.3, 13823.14 and requires Law Enforcement Agencies (LEAs) to conduct more “timely” DNA analysis of Sexual Assault Kits.

Fact: SB 22 requires a higher level of service from LEAs but comes with added costs and unintended consequences.

Fact: CODIS entries can only be done by LEA personnel – not by an outside testing resource.

Finding 1: As a result of funding shortfalls, crime labs are understaffed and under-equipped to meet SB 22 requirements.

⁸ Assembly Bill 18 Language, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB18.
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Fact: To meet SB 22 mandated SAK testing timeframes without funds for additional staff and equipment, crime labs have shifted priorities and personnel away from other areas, such as: homicides, gang shootings, child abuse, property crimes, narcotics, and firearms testing.

Fact: Ample financial resources are required for prioritized DNA evidence testing, because analysis is a costly service.

Fact: The SDPD Crime Lab outsourced the testing of 1,806 backlogged SAKs to Bode Labs at a cost of \$885/kit, for a total cost of approximately \$1.6 million.

Fact: SDPD continues to use Bode Labs for current SAK testing throughout 2022 at a new contracted price of \$1,975/kit – over twice the original cost to test historical kits.

Finding 2: Availability of resources is often a limiting factor in the processing of Sexual Assault Kits (SAKs). Any concerted effort to process SAKs in a timely manner must include adequate staffing and financial resources.

RECOMMENDATIONS

The 2021/2022 San Diego County Grand Jury recommends that the San Diego County Sheriff requests that:

22-19: The Chief Administrative Officer for the County of San Diego lobby the California State Assembly for reintroduction of AB 18, or similar legislation, mandating reimbursement for the increased costs incurred by county police crime labs for the forensic evidence testing requirements of SB 22.

22-20: The San Diego County Board of Supervisors increase budgetary appropriations to address the future needs in staff, training, and equipment for the San Diego County Sheriff's Crime Lab to comply with the mandates of SB 22.

The 2021/2022 San Diego County Grand Jury recommends the San Diego Police Department Chief of Police requests that:

22-21: The Government Affairs Department for the City of San Diego lobby the California State Assembly for reintroduction of AB 18, or similar legislation, mandating reimbursement for the increased costs incurred by city police crime labs forensic evidence testing requirements of SB 22.

22-22: The San Diego City Council to increase budgetary appropriations that will address the future needs in staff, training, and equipment for the San Diego Police Department Crime Lab to comply with the mandates of SB 22.

REQUIREMENTS AND INSTRUCTIONS

The California Penal Code §933(c) requires any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the agency. Such comment shall be made *no later than 90 days* after the Grand Jury publishes its report (filed with the Clerk of the Court); except that in the case of a report containing findings and recommendations pertaining to a department or agency headed by an elected County official (e.g. District Attorney, Sheriff, etc.), such comment shall be made *within 60 days* to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, California Penal Code §933.05(a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

- (a) As to each grand jury finding, the responding person or entity shall indicate one of the following:
 - (1) The respondent agrees with the finding
 - (2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.
- (b) As to each grand jury recommendation, the responding person or entity shall report one of the following actions:
 - (1) The recommendation has been implemented, with a summary regarding the implemented action.
 - (2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
 - (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the grand jury report.
 - (4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.
- (c) If a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the grand jury, but the response of the Board of Supervisors shall address only those budgetary or personnel matters over which it has some decision making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with the Penal Code §933.05 are required from the:

Responding Agency	Recommendations	Date
San Diego County Sheriff's Dept	22-19, 22-20	8/22/22
San Diego Police Department	22-21, 22-22	9/21/22