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HB 255: Reform Related to Georgia's Sexual Assault Protocol

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CRIMINAL PROCEDURE

Searches and Seizures: Amend Chapter 24 of Title 15 of the Official Code of Georgia Annotated, Relating to Sexual Assault Protocol, so as to Require Certain Certifications to be Filed; Amend Article 4 of Chapter 5 of Title 17 of the Official Code of Georgia Annotated, Relating to Investigating Sexual Assault, so as to Provide for the Retention of Evidence of Sexual Assault When the Victim Chooses Not to Immediately Report the Assault; Provide for Reports; Amend Chapter 1 of Title 35 of the Official Code of Georgia Annotated, Relating to General Provisions Regarding Law Enforcement Officers and Agencies, so as to Require Law Enforcement Agencies to Enter Certain Information into the Violent Criminal Apprehension Program Established and Maintained by the Federal Bureau of Investigation; Provide for the Removal of Information from Such Program; Provide for Hearing; Provide for a Definition; Provide for Applicability; Provide a Short Title; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes.

CODE SECTIONS:	O.C.G.A. §§ 15-24-2 (amended), 17-5-4 (amended), 35-1-23 (amended)
BILL NUMBER:	HB 255
ACT NUMBER:	251
GEORGIA LAWS:	2021 Ga. Laws 567
SUMMARY:	The Act includes various amendments to Georgia's sexual assault protocol. First, the Act creates a statewide tracking system for sexual assault kits. The system will track the location and status of kits through the investigative process and allow sexual assault victims to track or receive updates. Second, the Act requires that law enforcement agencies investigating a homicide or attempted homicide thought to be serial, random, or sexually motivated input

information into a national database maintained by the Federal Bureau of Investigation.

EFFECTIVE DATE: July 1, 2021

History

Between 2002 and 2005, more than a dozen women were sexually assaulted by the same man, Dandre Shabazz.¹ After they were assaulted, each woman went to Grady Memorial Hospital in downtown Atlanta to receive medical treatment and a physical exam to collect evidence for a sexual assault kit (often referred to as a “rape kit”).² The evidence in the sexual assault kit is then supposed to be turned over to law enforcement for testing and subsequent use in finding the offender. But those crucial steps rarely happen; for example, the sexual assault kits of the women raped by Shabazz remained untested and untouched for more than a decade.³ And these women’s sexual assault kits were not the only kits that were left untested for years.⁴ An investigation by the Atlanta Journal Constitution in 2015 revealed that law enforcement never picked up, let alone processed, more than 1,300 sexual assault kits collected at Grady Memorial Hospital.⁵ In response to this failure, the following year, Representative Scott Holcomb (D-81st) introduced a bill, Senate Bill (SB) 304, requiring law enforcement to pick up all sexual assault kits within ninety-six hours.⁶ After some political controversy, the bill ultimately passed in 2016.⁷

In April 2017, the Georgia Bureau of Investigation (GBI) contacted the Fulton County District Attorney to inform him that Shabazz’s

1. Asia Simone Burns, *Serial Rapist Convicted of a Dozen Assaults Gets 12 Life Sentences*, ATLANTA J.-CONST. (Mar. 3, 2020), <https://www.ajc.com/news/crime—law/serial-rapist-convicted-dozen-assaults-gets-life-sentences/h0xvhdmzNWTP6u3EMbUyFL/> [<https://perma.cc/7SRW-ZXVQ>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Rebecca A. Dickinson & Alessandra T. Palazzolo, *HB 282 - Preservation of Sexual Assault Evidence*, 36 GA. ST. U. L. REV. 51, 52–53 (2019).

7. *Id.*; Greg Bluestein, *Rape Kit Bill That Was Nearly Blocked Now Set to Become Georgia Law*, ATLANTA J.-CONST. (Apr. 25, 2016), <https://www.ajc.com/news/state—regional-govt—politics/rape-kit-bill-that-was-nearly-blocked-now-set-become-georgia-law/0iyPXNB9768b4iB5kWyITN/> [<https://perma.cc/QG27-LDQT>].

DNA was found on twelve sexual assault kits.⁸ Shabazz's trial and subsequent conviction was a direct result of the passage of SB 304.⁹ Shabazz was ultimately sentenced to serve twelve life sentences.¹⁰

Representative Holcomb's advocacy in proposing legislation to enhance the rights of crime victims, especially sexual assault victims, did not end with the passage of SB 304. In 2019, he introduced House Bill (HB) 282, which extended the length for preserving evidence in sexual assault kits to fifty years.¹¹ Prior to HB 282, Georgia law only required preserving sexual assault kits for ten years before being discarded.¹² Now, advances in DNA testing can lead to positive DNA identification well beyond ten years and can provide information to solve cases that have been unresolved for decades.¹³

In 2020, Representative Holcomb introduced legislation that would later become HB 255.¹⁴ The legislation that Representative Holcomb drafted was included in HB 720, a bill introduced by Representative Steven Sainz (R-180th), among other representatives.¹⁵ After the legislative session was underway, however, the COVID-19 pandemic swept across the United States, bringing the legislative session to a halt.¹⁶

In 2021, Representative Holcomb reintroduced the legislation as HB 255, the "Sexual Assault Reform Act of 2021."¹⁷ This legislation creates a statewide tracking system for all sexual assault kits, which allows victims, law enforcement agencies, and medical facilities to track the status of kits as they move through the investigative

8. Burns, *supra* note 1.

9. *Id.*

10. *Id.*

11. Dickinson & Palazzolo, *supra* note 6. Senator Renee Unterman (R-45th) sponsored the bill in the Senate. *Id.*

12. Dickinson & Palazzolo, *supra* note 6.

13. Interview with Rep. Scott Holcomb (D-81st) (May 21, 2021) (on file with the Georgia State University Law Review) [hereinafter Holcomb Interview].

14. *Id.*

15. *Id.*; Wes Wolfe, *Legislators Hit Ground Running on First Day of 2020 Session*, BRUNSWICK NEWS (Jan. 14, 2020), https://thebrunswicknews.com/news/local_news/legislators-hit-ground-running-on-first-day-of-2020-session/article_1a84d4b4-f2d4-5ff8-acd6-cf3c7894a4ae.html [https://perma.cc/TA79-VUG3].

16. Doug Richards, *2020 General Assembly Crawls to a Close*, 11 ALIVE, <https://www.11alive.com/article/news/politics/2020-georgia-general-assembly-closes/85-67127405-97a8-4abb-9cb8-882fdece9728> [https://perma.cc/55PR-NU2S] (June 26, 2020, 7:32 PM).

17. Holcomb Interview, *supra* note 12.

process.¹⁸ Other bill sections address equally important sexual assault reform, such as requiring Georgia law enforcement agencies to participate in a federal program to track particularly violent criminals, holding judicial circuits accountable for establishing or failing to establish a sexual assault protocol and committee, and changing the language of existing Georgia Code Sections.¹⁹

Bill Tracking of HB 255

Consideration and Passage by the House

Representative Scott Holcomb (D-81st) sponsored HB 255 in the House.²⁰ The House read the bill for the first time on February 3, 2021, and referred the bill to the House Judiciary Non-Civil Committee.²¹ On March 5, 2021, the House Judiciary Non-Civil Committee partly amended the bill and favorably reported it by offering three changes.²²

First, the Committee replaced “immediately” with “at the time of evidence collection” to clarify the precise time the law enforcement agency is obligated to maintain physical evidence.²³

Second, in Section 3, lines 33–34, the Committee removed “investigating” from “investigating law enforcement agency” and inserted “with jurisdiction” after “law enforcement agency.”²⁴ This change makes the law enforcement agency with jurisdiction responsible for maintaining physical evidence collected in response to an alleged sexual assault if the victim chooses not to file a report.²⁵

Finally, Sections 6–9 were removed from the final bill to streamline the process of passing the Sections related to preserving physical evidence collected from sexual assault kits.²⁶ Section 6 attempted to create a Forensic Medical Examination Advisory Committee tasked

18. Georgia General Assembly, HB 255, Bill Tracking [hereinafter HB 255, Bill Tracking], <https://www.legis.ga.gov/legislation/59249>.

19. Holcomb Interview, *supra* note 12.

20. HB 255, Bill Tracking, *supra* note 17.

21. State of Georgia Final Composite Status Sheet, HB 255, May 13, 2021.

22. *Id.*

23. HB 255 (HCS), § 3, p. 33, 2021 Ga. Gen. Assemb.; Holcomb Interview, *supra* note 12.

24. HB 255 (HCS), § 3, pp. 33–34, 2021 Ga. Gen. Assemb..

25. Holcomb Interview, *supra* note 12.

26. *Id.*

with regulating the certification criteria for sexual assault nurse examiners in Georgia.²⁷ Section 7 permitted the Georgia Composite Medical Board to refuse granting a license to an applicant or to suspend or revoke the existing license of a physician who sexually assaulted a patient.²⁸ Section 8 required a health care professional to report a physician suspected of sexually assaulting a patient.²⁹ Section 9 added to the annual report the number of physicians that the board has investigated for committing an act of sexual assault.³⁰

HB 255, including these amendments, passed in the House on March 8, 2021, by a vote of 174 to 0.³¹

Consideration and Passage by the Senate

Senator John Albers (R-56th) sponsored HB 255 in the Senate.³² On March 9, 2021, the Senate read HB 255 for the first time and referred the bill to the Senate Public Safety Committee.³³ On March 25, 2021, the Committee favorably reported the bill, and HB 255 was read to the Senate for the second time.³⁴ Then, on March 29, 2021, the Senate tabled HB 255, took the bill from the table, and read it for the third time.³⁵ That same day, the Senate passed HB 255 by a vote of 49 to 0.³⁶

On April 6, 2021, the House sent the bill to Governor Brian Kemp (R).³⁷ Governor Kemp signed the bill into law on May 6, 2021.³⁸ HB 255 went into effect on July 1, 2021.³⁹

27. HB 255, as introduced, 2021 Ga. Gen. Assemb.

28. *Id.*

29. *Id.*

30. *Id.*

31. State of Georgia Final Composite Status Sheet, HB 255, May 13, 2021.

32. HB 255, Bill Tracking, *supra* note 17.

33. State of Georgia Final Composite Status Sheet, HB 255, May 13, 2021.

34. *Id.*

35. *Id.*

36. Georgia Senate Voting Record, HB 255, #336 (Mar. 29, 2021).

37. State of Georgia Final Composite Status Sheet, HB 255, May 13, 2021.

38. *Id.*

39. *See generally* 2021 Ga. Laws 467.

The Act

The Act amends the following portions of the Official Code of Georgia Annotated: Chapter 24 of Title 15, relating to sexual assault protocol; Article 4 of Chapter 5 of Title 17, relating to investigating sexual assault; and Chapter 1 of Title 35, relating to general provisions regarding law enforcement officers and agencies.⁴⁰ The Act's purpose is to require certain certifications to be filed, to provide for the retention of sexual assault evidence when the victim chooses not to report at the time of evidence collection, to provide for a sexual assault case tracking system, and to require law enforcement agencies to enter certain information into the Violent Criminal Apprehension Program maintained by the Federal Bureau of Investigation.⁴¹

Section 3 clarifies which law enforcement agency is required to take custody of the unreported kits.⁴² Section 4 requires the Georgia Criminal Justice Coordinating Council to establish a sexual assault kit tracking system, which will “track the location and status of sexual assault kits throughout the justice process, including the initial collection in sexual assault forensic examinations performed at medical facilities, receipt and storage at law enforcement agencies, receipt and analysis at forensic laboratories, and storage and any destruction after completion of analysis”⁴³ Section 4 also requires that all law enforcement agencies with custody of sexual assault kits register for and fully participate in the tracking system by July 1, 2022.⁴⁴ Additionally, Section 4 requires the Georgia Criminal Justice Coordinating Council to submit an annual report of the sexual assault kit tracking system, which includes: (1) the number of sexual assault kits that collection sites use in medical evaluations, (2) the number of sexual assault kits collected for medical evaluation for which a sexual assault has been reported to law enforcement, (3) the average time it takes a law enforcement agency to pick up the kits from collection sites, (4) the number of kits submitted to a laboratory for forensic

40. See generally 2021 Ga. Laws 467.

41. *Id.*

42. 2021 Ga. Laws 467, § 3, at 467-68.

43. O.C.G.A. § 17-5-74(c)(1) (2019).

44. *Id.* § 17-5-74(d).

testing, (5) the number of sexual assault kits for which forensic testing has been completed, and (6) the number of sexual assault kits for which a sexual assault kit has not been reported to law enforcement.⁴⁵

Section 5 mandates every law enforcement agency in the state to obtain access to the Federal Bureau of Investigation's (FBI) Violent Criminal Apprehension Program (ViCAP) database.⁴⁶ The Department of Justice originally established the FBI's ViCAP database in 1985.⁴⁷ The ViCAP database serves as a free repository for behavioral and investigative information related to violent crimes that law enforcement agencies across the nation can access.⁴⁸ As a federal program, the ViCAP is simply a robust crime analysis tool that state law enforcement can use as a resource if they choose to do so.⁴⁹ Section 5 of HB 255 requires every law enforcement agency in Georgia to gain access to the FBI's ViCAP database for the purpose of investigating and reporting crimes that have specific characteristics, including:

[A] homicide or attempted homicide in which the actions of the perpetrator are known or suspected to be serial in nature or are random or sexually oriented; a rape, aggravated sodomy, or aggravated assault with the intent to rape in which the actions of the perpetrator are known or suspected to be serial in nature or in which the assault was committed by a stranger; a missing person case in which the circumstances indicate a strong possibility of foul play; or a case involving unidentified human remains from a known or suspected homicide⁵⁰

45. *Id.* § 17-5-74(e).

46. O.C.G.A. § 35-1-23(b) (Supp. 2021).

47. U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, VIOLENT CRIMINAL APPREHENSION PROGRAM (ViCAP) BROCHURE, [hereinafter ViCAP BROCHURE], <https://centerforimprovinginvestigations.org/wp-content/uploads/2018/04/ViCAP-Brochure.pdf> [<https://perma.cc/D4A5-4PSY>].

48. *Id.*

49. *Id.*

50. O.C.G.A. § 35-1-23(c) (Supp. 2021).

Once a crime is entered into the database, the federal ViCAP uses advanced algorithms to process the details of the case and identify potential similarities between it and other crimes previously entered into the system.⁵¹ The ViCAP's analytics also creates timelines, maps, and other methods to disseminate information to facilitate communication among law enforcement agencies across the country.⁵²

Analysis

Although Code section 17-5-71 already provided language for unreported sexual assault kits, Section 3 of the Act made crucial changes to the language of this Code section.⁵³ An unreported sexual assault kit “means a sexual assault kit collected from a victim who has consented to the collection of the sexual assault kit but who has not reported the alleged crime to law enforcement.”⁵⁴ For a variety of reasons, many victims are initially unsure about reporting but still want to preserve the evidence in case they wish to report the assault in the future.⁵⁵ In particular, victims may hesitate to report sexual assault when the perpetrator is a spouse, a significant other, or a family member.⁵⁶ The sexual assault reporting process and the subsequent criminal investigation can take a huge emotional toll on victims and their families, so allowing victims to request an unreported sexual assault kit is an important recognition of victims' rights.⁵⁷

Although Georgia law previously recognized a victim's right to have an unreported kit collected, the provision contained problematic language. A victim who requested an unreported kit was described as a “victim . . . [who was] not cooperat[ing] with law enforcement in the investigation or prosecution of an alleged assault.”⁵⁸ This language portrayed victims of sexual assault who did not wish to immediately

51. ViCAP BROCHURE, *supra* note 46.

52. *Id.*

53. Compare O.C.G.A. § 17-5-71 (Supp. 2020), with 2021 Ga. Laws 467, § 3, at 467-68.

54. 2021 Ga. Laws 467, § 4(a), at 468; *see also* Interview with Dr. Marni Dodd & Trisha Sheridan (May 21, 2021) (on file with the Georgia State University Law Review) [hereinafter Dodd & Sheridan Interview].

55. *Id.*; Holcomb Interview, *supra* note 12.

56. Dodd & Sheridan Interview, *supra* note 53; Holcomb Interview, *supra* note 12.

57. Holcomb Interview, *supra* note 12.

58. O.C.G.A. § 17-5-71 (Supp. 2020).

report as uncooperative and difficult.⁵⁹ Therefore, modifying the language in this Code section to reflect the victim's choice to delay reporting at the time of evidence collection supports a victim-centered approach to rape kit reform.⁶⁰

Sexual Assault Kit Tracking

With the help of previous sexual assault response legislation, the GBI revealed in the December 2020 Sexual Assault Kit Report that the backlog of untested sexual assault kits had been cleared.⁶¹ As of June 30, 2020, every sexual assault kit with incident dates before 2015 had been tested, except for the 1,996 remaining kits from ongoing investigations.⁶² Until the passage of HB 255, victims had no feasible way of knowing the status of their sexual assault kits after their collection.⁶³ This, among other factors, contributed to the initial backlog of sexual assault kits in Georgia.⁶⁴ Untested kits sat on a shelf for years while law enforcement investigated other crimes and victims tried to move on.⁶⁵ The sexual assault tracking section addressed this concern by requiring the Criminal Justice Coordinating Council to be responsible for each and every sexual assault kit as it moves through the forensic and investigative process so that victims can keep track of their kit and follow up on its status.⁶⁶ Tracking each kit also increases law enforcement accountability and provides sexual assault victims with information that was previously unavailable.⁶⁷

Violent Criminal Apprehension Program (ViCAP)

Although the media colloquially referred to HB 255 as the “rape kit bill,” the bill’s substance includes much more than the section on

59. Dodd & Sheridan Interview, *supra* note 53; Holcomb Interview, *supra* note 12.

60. Dodd & Sheridan Interview, *supra* note 53; Holcomb Interview, *supra* note 12.

61. GA. BUREAU OF INVESTIGATION DIV. OF FORENSIC SCIS., DEC. 2020 REPORT (2020), <https://dofs-gbi.georgia.gov/dofs-sexual-assault-kits-report> [https://perma.cc/85LE-K5DY].

62. *Id.*

63. Holcomb Interview, *supra* note 12.

64. *Id.*

65. *Id.*

66. *Id.*; O.C.G.A. § 17-5-74(c)(1) (Supp. 2021).

67. See Holcomb Interview, *supra* note 12.

tracking sexual assault kits.⁶⁸ Section 5 is one of the less publicly discussed sections of HB 255, but it is likely to have a serious impact on reducing crime.⁶⁹ Most crimes involving sexual assault are committed by someone who has an existing relationship to the victim.⁷⁰ In some cases, however, strangers commit these crimes—strangers who may be likely to commit similar crimes in the future.⁷¹ Accordingly, Section 5 allows analyzing the behaviors of those violent criminals who commit crimes against strangers.⁷² If a criminal is a serial offender, the details of their crime can be made available to law enforcement agencies across the nation.⁷³ This section of HB 255 allows Georgia to be a part of a larger, national database and network to track and identify violent criminals more easily.⁷⁴ As of 2021, Georgia is one of few states with legislation mandating participation in the federal ViCAP.⁷⁵ Other states that have passed similar ViCAP legislation include New Jersey and Texas.⁷⁶

Future Legislation

To ensure that current legislation continues to serve victims of sexual assault, additional legislation is needed.⁷⁷ For example, although the sexual assault kit tracking is a step in the right direction for supporting victims, the Georgia Criminal Justice Coordinating Council is now tasked with tracking sexual assault kits at 658 law enforcement agencies throughout the state—a monumental task.⁷⁸

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. 2021 Ga. Laws 567, § 5, at 569.

73. *Id.*; ViCAP BROCHURE, *supra* note 46.

74. Holcomb Interview, *supra* note 12; 2021 Ga. Laws 567, § 5, at 469; O.C.G.A. § 35-1-23 (Supp. 2021).

75. Holcomb Interview, *supra* note 12; O.C.G.A. § 35-1-23 (Supp. 2021).

76. 2021 Ga. Laws 567, § 5, at 569; *Violent Criminal Apprehension Program (ViCAP)*, N.J. ST. POLICE, <https://www.njsp.org/division/investigations/vicap.shtml> [<https://perma.cc/468A-SWB3>]; *Violent Criminal Apprehension Program (ViCAP)*, TEX. DEP'T OF PUB. SAFETY, <https://www.dps.texas.gov/section/crime-records-service/vicap-violent-criminal-apprehension-program> [<https://perma.cc/AF6M-SMYF>].

77. Holcomb Interview, *supra* note 12.

78. BRIAN A. REAVES, BUREAU OF JUST. STATS., CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008 15 (2011), <https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/cs1lea08.pdf>

Further, some counties have outdated storage facilities, and sexual assault kits are often damaged due to leaks, pests, and lack of temperature control.⁷⁹ So, legislation establishing regional or statewide repositories for sexual assault kits would not only make it easier to track the kits but also ensure that once a kit can be tested, or once a victim is ready to report their original unreported kit, the kit is in good condition for testing.

Additionally, the definition of rape under Georgia law currently only recognizes females as victims.⁸⁰ By excluding victims who are male or transgender, this definition severely limits who can report the crime of rape to law enforcement.⁸¹ Although victims who are not female can report sexual assault under Code section 16-6-2 (addressing sodomy), this disparity in the law prohibits charging any perpetrator who sexually assaults a non-female victim with the crime of rape.⁸² This antiquated, damaging definition fails to recognize some sexual assault victims as rape victims and is inconsistent with the federal law's definition of rape.⁸³

Thus, future legislation should include revisions to Code section 16-6-1 to expand who can be legally recognized as a rape victim. Supporters of legislation to change the definition of rape might anticipate pushback, mainly from prosecutors and attorneys who are concerned that changing the law will disturb prior case law or render such case law entirely inapplicable.⁸⁴

An additional, murkier area of legislation to be addressed involves jurisdictional issues with the collection of sexual assault kits from hospitals in Georgia. A sexual assault kit is most likely collected at a hospital, and hospital staff are primarily focused on providing medical care to patients, including sexual assault victims.⁸⁵ Once the staff

[<https://perma.cc/8D4U-L4JK>].

79. Holcomb Interview, *supra* note 12.

80. O.C.G.A. § 16-6-1 (2019).

81. Holcomb Interview, *supra* note 12.

82. § 16-6-1; O.C.G.A. § 16-6-2 (2019); Holcomb Interview, *supra* note 12.

83. U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2013 (2014), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/rape-addendum/rape_addendum_final.pdf [<https://perma.cc/52EN-45JL>] (discussing the federal definition of rape).

84. Holcomb Interview, *supra* note 12.

85. *Id.*

collects a sexual assault kit from the patient, the onus is often on the hospital to determine which law enforcement agency to contact.⁸⁶ Confusion can occur when the victim or hospital staff are unsure where the crime occurred or which law enforcement agency has jurisdiction, especially considering the vast number of law enforcement agencies in Georgia.⁸⁷ Therefore, creating a clearer process for determining which agency has jurisdiction over a sexual assault kit requires ongoing conversations with healthcare agencies, law enforcement agencies, and sexual assault protocol experts.⁸⁸

Conclusion

Sexual assault kit reform not only provides immeasurable value to victims and but also saves communities millions of dollars by preventing future sexual assaults.⁸⁹ Although there is still much more to be done, legislators who have sponsored sexual assault kit reform and other legislation supporting victims have undoubtedly moved the needle on Georgia's sexual assault response and prevention.

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86. *Id.*

87. *Id.*

88. *Id.*

89. Rachel Lovell, Lihong Yang & Joanna Klingenstein, *Testing Sexual Assault Kits Saves Money and Prevents Future Sexual Assaults*, TRANSLATIONAL CRIMINOLOGY, Winter 2019, at 15.