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April 2, 2019

**TO:** Members, Joint Legislative Audit Committee

**FROM:** Ilse Knecht  
Director of Policy & Advocacy  
The Joyful Heart Foundation

**RE:** Statement for the Record on the Rape Kit Backlog in California

Assemblymember Salas, Senator Skinner, and Assemblymember Weber, thank you for giving the Joyful Heart Foundation an opportunity to provide a statement for the record on the state of the rape kit backlog in California.

As one of the leading national organizations working to end the rape kit backlog and reform policies for handling rape kits and engaging sexual assault survivors in the criminal justice system, we thank you for taking the time to examine this issue. Several members asked pointed and important questions during oral testimony, and we offer the following in response to some of those outstanding inquiries.

Since 2010, Joyful Heart has made the elimination of the national rape kit backlog our top advocacy priority. Our team, along with researchers and partners with expertise in this work, is at the forefront of identifying backlogs in cities across the country; advocating for funding to test backlogged kits and investigate cases; appealing for laws and policies to improve criminal justice responses to sexual violence; and working with jurisdictions to assist them to develop and implement survivor-centered reforms. Through [endthebacklog.org](http://endthebacklog.org), the first and only comprehensive online hub for information about the rape kit backlog in the United States, we are sharing best practices, progress on reform, and are offering a way for people to join this growing effort.

### **Defining the Backlog**

It is estimated that hundreds of thousands of rape kits sit untested in police departments and crime lab storage facilities across the country in what is known as the rape kit backlog. Each kit represents a lost opportunity to bring healing and justice to a survivor of sexual violence and safety to a community.

The rape kit backlog comprises two distinct but related problems. The first part of the backlog occurs when rape kits are collected and booked into evidence, but detectives and/or prosecutors do not request DNA analysis. These kits may remain in a police evidence storage facility indefinitely. This is often referred to as the “untested” or “unsubmitted” rape kit backlog. Joyful Heart defines an untested and/or backlogged kit as one that has not been submitted to an accredited public or private crime lab for testing within 10 days of being booked into evidence.

The second part of the backlog occurs in crime laboratory facilities, where rape kits that have been submitted for testing are awaiting DNA analysis. Many kits that are submitted to crime labs are not tested in a timely manner, creating the second part of the backlog. Joyful Heart defines a “backlogged” kit at the DNA testing lab as one that has not been tested within 30 days of receipt by the lab. Experts

agree that every rape kit booked into evidence and connected to a reported sexual assault should be submitted to a crime lab for testing, and that crime labs must commit to testing rape kit evidence in a timely manner.

### **Why the Rape Kit Backlog Exists**

The backlog of untested rape kits represents the failure of the criminal justice system to take sexual assault seriously, prioritize the testing of rape kits, protect survivors, and hold offenders accountable. There are several factors that contribute to a backlog:

- *Lack of policies and protocols for rape kit testing:* Most jurisdictions do not have clear, written policies on the testing of rape kits. This results in decisions being made on a case-to-case basis, without any guidelines, and means that individual detectives may have discretion over whether to send a kit for analysis. Several factors can affect an officer's decision, including whether the department prioritizes sexual assaults and law enforcement bias.
- *Knowledge gaps and lack of training:* A lack of training and understanding about sexual assault and the effect of trauma on survivors, the behavior of sex offenders, and the value of forensic DNA can all impact whether a rape kit is submitted for testing. This might include: a lack of understanding of the impact of trauma on memory and behavior; erroneous interpretations of victim "cooperation" used to justify not pursuing a case; a lack of training about the power of DNA and DNA databases to solve and prevent crimes; and a lack of training about sex offenders and their criminal patterns.
- *Whether the identity of the perpetrator is known:* Many jurisdictions only test kits in cases where the assailant is unknown. Recent research shows that rape kit testing, however, has significant value beyond identifying an unknown suspect. Testing rape kits can link unsolved crimes to a serial offender, confirm a suspect's contact with a victim, corroborate the victim's account of the attack, and exonerate the wrongly convicted. Acquaintance rapists may also be serial offenders, and they may have also committed crimes against people they don't know. Testing every rape kit connected to a reported crime ensures that links between crimes will be made, regardless of the relationship between the victim and the perpetrator.
- *Lack of resources:* On average, it costs between \$1,000 and \$1,500 to test one rape kit. Many kits never make it to a crime lab in the first place and instead spend years—even decades—sitting untested in police storage facilities. Lack of essential funding at multiple levels is often a factor in why kits go untested. Public crime labs throughout the country have struggled to maintain sufficient funding and personnel in recent years, as technology has advanced and the demand for DNA testing has grown. In addition to rape kit evidence, crime labs may receive DNA samples from hundreds, or even thousands, of crime scenes each year. As a result, many labs have exceedingly long turnaround times—sometimes years—for testing DNA evidence, including rape kits. Law enforcement agencies often lack the technology to track untested rape kits, as well as the personnel needed to ship or transport untested kits to a crime lab in a timely manner. Many also lack the staffing resources necessary to investigate or follow up on leads that arise from the rape kit testing.
- *Outdated or unclear lab policies:* Public crime labs across the country increasingly recognize the need to update their DNA testing policies to reflect innovations in the fields of forensic science and criminal justice. In years past, many labs had narrow submission policies, some of which prohibited the submission of rape kits for DNA testing in cases in which the identity of the perpetrator was known to the victim. As more experts advocate for the value of testing all kits, including kits linked to cases with known perpetrators, these labs are shifting their policies to accept all kits. In other jurisdictions, a lack of clear communication between crime labs and law enforcement agencies has led to misunderstandings about what types of kits can be submitted for testing.

## Untested Rape Kits in the United States

Joyful Heart has identified more than 225,000 untested rape kits sitting in police, crime lab or other storage facilities across the United States. And, with nearly 20 states remaining that have yet to count the untested rape kits in their possession, we anticipate that there could be several hundred thousand more yet to be discovered. Because most law enforcement agencies do not have systems for tracking or counting rape kits, we cannot be sure of the total number. That was true a decade ago, and sadly, it remains true today. Often times, the number of untested kits in a particular jurisdiction remains unknown until journalists, nonprofit organizations, or concerned citizens step in to investigate.

But that does not mean that we are not seeing reform. Joyful Heart has launched a national campaign to pass comprehensive rape kit reform legislation in all 50 states. Our campaign was developed in consultation with trusted experts across the country—advocates, survivors, prosecutors, investigators, and crime lab personnel—and local, state, and national leaders. The assessment formalized six essential pillars for comprehensive rape kit reform:

- *Annual statewide inventory:* Inventory all untested rape kits periodically to understand the scope of the problem and monitor progress.
- *Mandatory testing of backlogged kits:* Eliminate the existing backlog by requiring law enforcement agencies to submit all previously untested kits to the lab, and require these kits be tested in a timely manner.
- *Mandatory testing of new kits:* Prevent future backlogs by requiring law enforcement agencies to promptly submit all newly collected kits to the lab, and mandating the lab to test these kits within a specific timeframe.
- *Tracking system:* Ensure hospitals, law enforcement, and labs are using the same system to track rape kits. Build in a way for survivors to check the status of their kits throughout the process, from collection to analysis.
- *Victims' right to notice:* Grant victims the right to receive information about the status and location of their rape kits.
- *Funding for reform:* Appropriate state funding to address these issues.

While new laws will expand our knowledge about the true extent of the number of untested rape kits, they will also add to the workload of our nation's crime labs, and result in thousands of additional cases for law enforcement to investigate and prosecute. This work takes political will, but it also takes significant resources. Implementation of state laws often depends on whether law enforcement receives additional resources and funding dedicated to clearing the backlog and pursuing leads. As jurisdictions enact legislation and policies to reform practices around rape kit testing, the need for funding to implement a multi-disciplinary response will increase. This work will continue to need your oversight as well as that of additional relevant congressional bodies.

### The Accountability Project: Round 1

An initiative of Joyful Heart, The Accountability Project (TAP) uses public records requests to uncover the number of untested rape kits and to learn about kit handling policies across the country. Holding jurisdictions accountable for their untested kits brings transparency to the criminal justice system and public awareness around rape kit testing policies and practices.

In 2014, The Accountability Project issued an open records request to bring the number of untested rape kits in San Diego to light. Through this request, we uncovered a backlog of 2,873 untested kits in San

Diego. In 2015, The Accountability Project issued open records requests to Fresno, Sacramento, and San Jose.

Between December 2015 and June 2016, Joyful Heart submitted four records request letters to the Fresno Police Department (FPD). FPD did not fully respond to any of our records requests. According to the California Department of Justice, grant funding from the Manhattan District Attorney's Office was partially used to process 561 previously untested rape kits from FPD.

Through our efforts, we have learned that the Sacramento County Sheriff's Department (SCSD) submitted 62 percent of all rape kits received between 2005 and 2015 to the lab for testing. As of January 2016, SCSD reported 456 untested rape kits. Since 2013, SCSD submits all newly collected kits for testing, and they are in the process of submitting previously untested kits to the lab at this time. Sacramento Police Department (SPD) did not fully respond to our request. SPD stated that they have "no documents responsive" to the total number of kits in their custody, tested or untested. SPD took no additional measures to attempt to provide this information. As such, we were unable to ascertain the number and testing status of rape kits in the custody of SPD.

The San Jose Police Department (SJPD) has not fully responded to our request. Through our efforts, we discovered that SJPD did not have an evidence tracking system for rape kits until mid-2012, and it appears that SJPD does not know how many rape kits were received into evidence before then. SJPD did report to us that, as of January 1, 2016, the department will submit all newly collected kits to the lab for testing.

## **The Accountability Project: Round 2**

In 2017, The Accountability Project issued open records requests to eight California jurisdictions for which we had no information on the backlog: Bakersfield, Long Beach, Oxnard, Redding, San Bernardino, Santa Cruz, Shasta County, and Stockton. Our analysis of the data demonstrated that out of these eight jurisdictions, six were either not following the encouragement of the law or have no way of knowing whether they are. Current law encourages law enforcement to submit rape kits and crime labs to test kits, but 75 percent of jurisdictions we surveyed are either not complying with the intent of the submission and testing law or have no means through which to know how many kits they are receiving into evidence and submitting for testing. This inconsistency in rape kit handling across the state demonstrates the inadequacy of the current statute to encourage kit submission and testing.

From the Bakersfield Police Department (BPD), we found they received a total of 1,165 rape kits between 2003 and 2017, and submitted just 48 percent of these kits to the lab for testing. BPD stated that data provided includes rape kits collected from all offenses, including homicides.

Long Beach Police Department (LBPD) provided a table showing a total of 1,657 rape kits collected between July 1993 and August 2017. It was not clear how many of these kits were submitted to a lab for testing, and LBPD did not provide clarification. Because of this incomplete information, we have been unable to determine the extent of the backlog in Long Beach.

Based on data provided, Oxnard Police Department (OPD) received 490 rape kits between 1997 and mid-2017, and submitted 77.8 percent of these kits for testing. 88 kits were not sent to the lab, and 21 kits are unaccounted for in the data we received. OPD did not respond to our follow-up efforts, and are not following the encouragement of the law.

Redding Police Department (RPD) received 621 rape kits between 2000 and 2017, 167 of which have not been submitted to the lab for processing. RPD was unable to determine whether the 298 kits destroyed during this time were tested.

San Bernardino Police Department (SBPD) provided evidence management system records of all sexual assault kits received between 1984 and 2011. These records do not indicate whether the kits were submitted for testing. Despite follow-up efforts, we were unable to determine the extent of the backlog in San Bernardino.

The Santa Cruz Police Department (SCPD) provided a list of kits in inventory without collection date or testing status. In subsequent communication, the Deputy City Attorney stated that identifying collection date and testing status for these kits "would require a manual search of these case reports." Despite our efforts, we were unable to obtain complete information about the backlog in Santa Cruz.

Shasta County Sheriff's Office (SCSO) indicated they do not possess documentation of the number of rape kits collected, submitted for testing, or not submitted for testing. As such, we are unable to determine the extent of the backlog in Shasta County.

Stockton Police Department (SPD) received 481 rape kits between 2010 and 2017, and submitted 96 percent of these kits for testing, leaving a backlog of 19 unsubmitted rape kits.

Per the information we received from our requests, we identified a total of 881 untested rape kits in these agencies' possession as of late 2017.

### **California Sexual Assault Evidence Kits Report**

In 2014, we learned that the Oakland Police Department, San Diego Police Department, and Sacramento County Sheriff's Department all use the Sacramento crime lab. There was a total of 1,900 kits these three agencies received during 2011-2013. Only 850 were analyzed, and 140 were still in progress in lab; 910 kits went unanalyzed.

This report reviewed 45 cases in which the investigators did not request a kit analysis. Investigators rarely documented the reasons why they did not conduct analysis. None of the 15 case files at the San Diego Police Department and the Sacramento Sheriff had an explanation. Only 6 out of 15 cases reviewed from the Oakland Police Department had an explanation.

### **Rapid DNA Services program (RADS)**

In 2011, the Rapid DNA Services program (RADS) was implemented for sexual assault cases in 39 of 46 California counties; the 12 remaining counties do not typically use California Department of Justice (CALDOJ) forensic services. In a standard rape kit, a survivor reports a sexual assault to law enforcement, and the law enforcement officer meets the survivor and takes a statement. If the survivor opts into a sexual assault examination, then biological evidence from their body and clothing is collected, and evidence is sent to the investigating law enforcement agency. RADS differs, as three additional swabs of evidence are collected and sent directly to crime lab for analysis. This program decreases the time needed to analyze DNA in rape kits and increases the number of kits tested. Further, the program tests 1,200 kits a year at an estimated cost of about \$1.9 million annually.

However, the problem is that evidence to prove the effectiveness of its Rapid DNA Service Program is lacking. Even when case information is obtained it is not always accurate or complete. Some cases are unclear whether suspect was convicted. For example, in Fresno, all information regarding whether cases were still being investigated was inaccurate. In Chico, 26 percent of the information was inaccurate.

The source of this issue is that CALDOJ did not obtain case outcome information for the majority of CODIS hits. Out of 417 total RADS, 67 percent have not been followed up on. CALDOJ has failed to: notify participants that they should report this information; provide adequate training on how to report; follow up with those that do not report; regularly review data to determine with reporting agencies they should follow up with; and provide guidance on how to enter data into CHOP, creating inconsistencies on how investigations are reported.

We recommend that California require law enforcement agencies to not only test all kits but also report all case outcomes.

### **Federal Grants**

As states and local jurisdictions enact legislation and update policies to reform practices around rape kit handling and testing, the need for funding to implement a multi-disciplinary response will increase. Federal funding is currently available for jurisdictions working to eliminate their backlogs

Most jurisdictions have failed to prioritize funding for testing rape kits, which cost an average of \$1,000 to \$1,500 per kit. Rape kit reform can be costly: jurisdictions must count and test kits; expand investigation, prosecution, and laboratory capacity; implement victim notification and re-engagement protocols; and employ a multi-stakeholder approach to reform.

After years of advocacy for dedicated federal funding to assist jurisdictions seeking to clear their backlogs of untested rape kits, in 2014, Joyful Heart helped unlock significant funding—nearly \$80 million—to address the rape kit backlog nationwide. In September 2015, Joyful Heart Founder & President Mariska Hargitay stood beside United States Vice President Joe Biden, Attorney General Loretta Lynch, and Manhattan District Attorney Cyrus Vance, Jr. as they awarded these grant funds from the Department of Justice and the Manhattan District Attorney's Office to 48 law enforcement agencies in 27 states to address their backlogs of untested rape kit, including several agencies in California:

- CALDOJ was awarded \$1,606,239 to test 2,000 rape kits statewide;
- The Alameda County District Attorney's Office was awarded \$835,830 to test 1,075 rape kits;
- The Contra Costa County District Attorney's Office was awarded \$1,841,535 to test 2,400 kits; and;
- The Riverside Police Department was awarded \$433,800 to test 650 kits.

In 2016, the U.S. Department of Justice Bureau of Justice Assistance (BJA) awarded Orange County \$1,864,651 to process nearly 3,600 unprocessed kits, investigate and prosecute cases, and re-engage survivors.

In 2018, BJA awarded the City of Fresno \$1 million to test kits, investigate and prosecute cases, and re-engage survivors.

### **California's Legislative History**

In 2003, California enacted a law granting victims the right to be informed whether a DNA profile was obtained from testing their rape kit, the profile was uploaded into the DNA database, and the DNA profile matched another profile in the database. Additionally, victims have the right to know if law enforcement decides not to test a rape kit within established time limits, and must be notified 60 days prior if law enforcement intends to destroy or dispose of such evidence. Victims are also granted the right to designate a sexual assault victim advocate to receive any of the above information.

In 2014, California enacted a law that encourages law enforcement agencies to submit newly collected rape kits for testing within 20 days of being booked into evidence and instructs the crime lab to process rape kit evidence as soon as possible, but no later than 120 days after receiving it. It also requires law enforcement agencies to inform survivors, whether or not the identity of the perpetrator is known, if the law enforcement agency does not analyze the DNA evidence within certain time limits.

In 2016, California enacted a law that requires CALDOJ to establish a process for victims to request information about the location and status of their rape kits by July 2018.

In 2017, California enacted multiple rape kit reform laws:

- A.B. 41, which requires law enforcement agencies and forensic labs to use the CALDOJ SAFE-T evidence system to maintain and update information about the location and testing status of all newly collected rape kits. Additionally, the bill requires the California DOJ to submit an annual report to the legislature summarizing all rape kit data collected within the SAFE-T system the previous year.

- A.B. 1312, which includes provisions strengthening survivors' rights to notice regarding the location and status of their kits and prohibiting law enforcement agencies from destroying rape kits for at least 20 years.
- A.B. 280, which enables citizens to donate money to test rape kits while filing personal income taxes.

In 2018, California enacted a law that requires medical facilities, law enforcement agencies, and crime laboratories to conduct an audit of untested rape kits in their possession and report certain data to the CALDOJ by July 2019.

The 2018 state budget included \$1 million to conduct the inventory and \$6.5 million to test backlogged kits.

S.B. 1449, a bill that would have required law enforcement to submit rape kits to crime labs for testing within 20 days of collection and crime labs to test kits within 120 days of receipt, passed the California legislature unanimously but was vetoed by then-Governor Jerry Brown.

In December 2018, legislators introduced legislation for the 2019-2020 legislative session requiring newly collected rape kits to be submitted within 20 days for DNA analysis and tested no later than 120 days after receipt. The bill also allocates \$2 million to help local law enforcement agencies comply with these reforms. Read our [written](#) and [oral](#) testimonies in support of the bill.

## **Recommendations**

California is lagging behind Hawai'i, Kentucky, Massachusetts, New York, and Texas, all states that have reached full rape kit reform. Joyful Heart recommends enacting S.B. 22 to mandate the testing of all rape kits this year. Next steps includes requiring the testing of all previously unanalyzed kits discovered as part of the current inventory required under A.B.1312, enacted in 2018. Results are due in July 2019. California must pass an annual inventory law and ensure its rape kit tracking system is fully operational, meaning that all disciplines that touch a rape kit are entering information into the system and that survivors have a way to check the status of their kit online anonymously. California must also grant victims the right to know the status of their rape kits.

Last June, our Founder & President Mariska Hargitay spoke before the U.S. House Bipartisan Task Force to End Sexual Violence. She argued "the backlog is one of the clearest and most shocking demonstrations of how we regard these crimes in our society. Testing rape kits sends a fundamental and crucial message to victims of sexual violence: You matter. What happened to you matters. Your case matters." Eliminating the backlog and reforming rape kit policies will send this powerful message to survivors throughout the state.

## **The Road Ahead**

We look forward to the day when every backlogged rape kit has been tested and no matter their zip code, survivors' kits are tested expeditiously. We graciously offer our resources, expertise, and support to bring California to comprehensive rape kit reform. The stakes are simply too high to strive for anything less.