

Statewide Accounting of Untested Sexual Assault Evidence Kits in the State of Maryland

Report of the Office of Attorney General

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Introduction

Every 22 minutes, someone in the United States is sexually assaulted. Sexual assault forensic examinations (SAFEs) and sexual assault evidence kits (SAEKs) are vital to the investigation and prosecution of these sexual assaults.¹ DNA and other evidence recovered from SAEKs are an important tool used to identify perpetrators, prove sexual contact, and corroborate the victim's testimony.² The FBI's Combined DNA Index System (CODIS)—a national DNA database populated by samples submitted by participating federal, state, and local forensic laboratories—also uses SAEK evidence to identify serial perpetrators of sexual assault and exonerate innocent people accused of crimes.

Timely testing of SAEKs is critical to maximizing the value of the evidence collected. But in 2014, the White House Council on Women and Girls and the Office of the Vice President issued a report titled *Rape and Sexual Assault: A Renewed Call to Action*, which found that many evidence kits were not being submitted to the lab for testing, while others were languishing for months before being tested due to lack of resources and funding for crime labs. The report noted

¹ Sexual assault forensic examinations are performed by health care providers trained in forensic examination and evidence collection. Sexual assault evidence kits collect the evidence recovered during the SAFE exam. SAEKs typically include paperwork to document the exam, swabs and glass slides for biological evidence collection, containers for blood and urine samples, evidence bags for clothing and other large pieces of evidence, and envelopes for hair, fibers, and other trace evidence.

² The term “victim” is used throughout this report to refer to people who have experienced sexual assault because it is the term used in relevant statutes and the criminal justice system. We appreciate, however, that many people who have suffered sexual assault prefer the terms “survivor” or “victim/survivor.” We respect those preferences and mean no disrespect by our choice of language.

that requests for DNA testing continue to rise, and so long as demand continues to outpace capacity, “the rape kit backlog may continue to grow.”

Since the White House report, a nationwide effort to end the backlog of untested kits has gained momentum. The Department of Justice and the Manhattan District Attorney’s Office have awarded \$38 million in grants to state and local agencies to test backlogged kits. Thirty-five states have audited their number of untested kits and made changes to the processes for collecting, tracking, and storing SAEKs in an effort to improve the number of kits tested.

Maryland joined this effort last year when the General Assembly passed Senate Bill 498 requiring law enforcement agencies to conduct an audit of their untested kits and report the results to the Office of the Attorney General. Under that law, the OAG is required to submit a report to the General Assembly “detailing: (1) the number of untested sexual assault collection kits being stored by each agency; (2) the date that each untested sexual assault collection kit was collected; and (3) recommendations for addressing any backlog of untested sexual assault collection kits.”

To comply with the General Assembly’s mandate, the Governor’s Office of Crime Control and Prevention (GOCCP) – on behalf of the OAG – surveyed 135 law enforcement agencies and asked a number of questions about the untested kits in their possession. The survey results revealed that Maryland does not have a “backlog” of untested SAEKs in the traditional sense of the word. That is, there is no waitlist of kits that have been submitted to the lab but have not yet been tested due to a lack of staffing and resources. Rather, the law enforcement survey revealed that the vast majority of untested kits in Maryland are kits that, for various policy reasons, law enforcement have determined should not be submitted for testing. The kits are not untested because the lab is backlogged; rather, they are untested because a determination was made not to submit them to the lab for testing.

Although there is no “backlog” of kits awaiting testing, the OAG saw the survey responses as presenting a different opportunity for improvement.³ A follow-up survey was conducted to identify the criteria used when determining not to submit SAEKs for testing. The results revealed inconsistent policies among agencies regarding not only when to test SAEKs, but also how long untested kits are retained, and whether the victim is notified during different phases of the collection and testing procedure. A Working Group was assembled that included forensic nurse practitioners, prosecutors, DNA analysts, law enforcement officers, and victim advocates.⁴ The Working Group provided invaluable insight and contributed to the recommendations for best practices contained in this report.

Section I of the report explains the inventory survey and its results. Section II explains the current policies amongst agencies relating to the testing, storage, and retention of SAEKs.

³ The End the Backlog website, run by the Joyful Heart Foundation, agrees that rape kit “backlogs” are really comprised of two distinct problems: (1) “untested” or “unsubmitted” kits, which are rape kits that are “collected and booked into evidence,” but not submitted for DNA testing; and (2) “backlogged” kits which occur “where rape kits that have been submitted for testing are awaiting DNA analysis.” <http://www.endthebacklog.org/backlog-what-it/defining-rape-kit-backlog>. Maryland has kits that fall into the first category, not the second. However, adopting policies which lead to expanded or accelerated testing could create “backlogged” kits and should therefore be accompanied by sufficient funding to accommodate the increased volume.

⁴ The members of the Working Group included: **Bryan Bowen**, Baltimore Police; **Francis Chiafari**, Montgomery Cty Police, Program Admin, Crime Laboratory Director; **Donna Clarke**, Prince Georges Hospital Ctr., Program Administrator, **Rana DellaRocco**, Baltimore City Police, Director; **Elizabeth Embry**, OAG, Criminal Division, AAG –Counsel; **Pamela Holtzinger**, Frederick Memorial Hosp., Forensic Nurse Coord.; **Janice Howe**, Morgan, Lewis & Bockius LLP, Attorney; **Zenita Hurley**, OAG, Civil Rights and Legislative Affairs Chief Counsel; **Lisae Jordan**, MCASA, Executive Director; **Daniel Katz**, Maryland State Police (MSP) - Forensic Services Division, Director; **Jeffrey Kloiber**, MSP, Exec Officer; **Karen Kruger**, Md Sheriffs' Associations & Executive Director, MD Chief of Police; **Ron Levitan**, OAG, MSP, Counsel; **Kathleen McDermott**, Morgan, Lewis & Bockius LLP, Attorney; **Lynnett Redhead**, PG County Police Dept, DNA Laboratory Manager; **Robert Taylor**, OAG, Criminal Appeals AAG; **Carrie Williams**, OAG, Criminal Appeals AAG; **Elizabeth Wynkoop**, MCASA SAFE/SART, Program Coordinator; **Jeffrey Zuback**, GOCCP, Research Chief.

Section III identifies the best practices for handling SAEK kits, and discusses national and state standards. Section IV offers recommendations for further action.

I. Inventory of Untested Sexual Assault Evidence Kits

To identify the State's inventory of untested SAEKs, GOCCP surveyed 135 law enforcement agencies regarding untested SAEKs in their possession. Specifically, the survey sought information from each agency regarding: (1) The number of untested SAEKs; (2) the date that each untested SAEK was collected; (3) total number of SAEKs that are Jane Doe/Anonymous SAEKs⁵; (4) whether the agency submits Jane Doe SAEKs to a crime lab for biological analysis; and (5) recommendations for expediting the testing of SAEKs.

In response to the survey, 102 law enforcement agencies submitted responses revealing a total of approximately 3700 untested SAEKs statewide. (See Table 1.) About 60% of the kits were collected between 2009 and 2016. Five percent were collected between 1981 and 1997, and the rest were collected between 1998 and 2009. (See Table 2.) As discussed more fully below, most jurisdictions reported no backlog of untested kits because the kits were deliberately not tested due to the agency's testing policies. The key data is set forth in the following tables.

⁵ Jane Doe or Anonymous kits refer to SAEKs collected from victims who do not wish to participate in the criminal justice system. Under federal law, 42 U.S.C. §3796gg-4, to be eligible for funding under the Violence Against Women Act of 2005, states must provide forensic examinations to victims free of charge, regardless of whether the victim wishes to pursue criminal charges. All Maryland jurisdictions and the Maryland State police have complied with this federal mandate.

Table 1. Number of untested and anonymous SAEKs in Possession of Law Enforcement Agencies⁶

| Agency | # Untested SAEKs | # Anonymous SAEKs |
|---|-------------------------|--------------------------|
| Allegany County Sheriff's Office | N/A | N/A |
| Annapolis City Police Department | 36 | 3 |
| Anne Arundel County Police Department | 207 | Unknown |
| Anne Arundel County Sheriff | N/A | N/A |
| Baltimore Police Department | 871 | 0 |
| Baltimore City Community College Office of Police and Public Safety | N/A | N/A |
| Baltimore City Sheriff | N/A | N/A |
| Baltimore County Police Department | 197 | 34 |
| Baltimore County Sheriff | N/A | N/A |
| Bel Air Police Department | 0 | N/A |
| Berlin Police Department | 9 | 9 |
| Berwyn Heights Police Department | N/A | N/A |
| Bladensburg Police Department | N/A | N/A |
| Boonsboro Police Department | 1 | 0 |
| Bowie Police Department | N/A | N/A |
| Bowie State University | 0 | 0 |
| Brentwood Police Department | N/A | N/A |
| Brunswick Police Department | 0 | 0 |
| Calvert County Sheriff | 48 | 0 |
| Cambridge Police Department | 51 | 0 |
| Capitol Heights Police Department | 0 | 0 |
| Caroline County Sheriff | 0 | N/A |
| Carroll County Sheriff | 49 | 16 |
| Cecil County Sheriff | 9 | 1 |
| Centreville Police Department | 0 | 0 |
| Charles County Sheriff | 14 | 4 |
| Chestertown Police Department | 4 | 0 |
| Cheverly Police Department | 0 | N/A |
| Chevy Chase Village Police Department | N/A | N/A |
| Colmar Manor Police Department | N/A | N/A |
| Comptroller of Maryland - Field Enforcement Division | N/A | N/A |
| Crisfield Police Department | 4 | 0 |

⁶ A few of the agencies that responded "0" to the question of how many untested kits were in their possession also noted that kits collected by their officers were tested and retained by other law enforcement agencies. It is therefore possible that some agencies who responded "0" had no untested kits because they do not perform this function, and thus are more appropriately categorized under "N/A." For purposes of this report, agency responses are being reported exactly as they were submitted.

| Agency | # Untested SAEKs | # Anonymous SAEKs |
|---|-------------------------|--------------------------|
| Crofton Police Department | N/A | N/A |
| Cumberland Police Department | 0 | 0 |
| Denton Police Department | 4 | 1 |
| Dorchester County Sheriff | 0 | 0 |
| Easton Police Department | 1 | 0 |
| Edmonston Police Department | 0 | 0 |
| Elkton Police Department | 4 | 2 |
| Fairmount Heights Police Department | 0 | 0 |
| Federalsburg Police Department | 0 | 0 |
| Frederick County Sheriff | 32 | 1 |
| Frederick Police Department | 143 | 18 |
| Frostburg State University Police Department | 0 | 0 |
| Fruitland Police Department | 0 | 0 |
| Gaithersburg Police Department | 0 | 0 |
| Garrett County Sheriff's Office | 0 | N/A |
| Glenarden Police Department | 0 | 0 |
| Greenbelt Police Department | 0 | N/A |
| Greensboro Police Department | 0 | N/A |
| Hagerstown Police Department | 12 | 1 |
| Hampstead Police Department | N/A | N/A |
| Hancock Police Department | 0 | 0 |
| Harford County Sheriff | 107 | 5 |
| Havre de Grace Police Department | 13 | 1 |
| Howard County Police Department | 503 | 10 |
| Howard County Sheriff | N/A | N/A |
| Hurlock Police Department | 2 | 0 |
| Hyattsville City Police Department | 21 | 0 |
| Kent County Sheriff | 0 | 0 |
| Landover Hills Police Department | N/A | N/A |
| Laurel Police Department | N/A | N/A |
| Luke Police Department | N/A | N/A |
| Maryland Capital Park Police - PG County Division | 0 | 0 |
| Maryland State Police | 57 | 14 |
| Montgomery County Police Department | 1,165 | 80 |
| Montgomery County Sheriff | N/A | N/A |
| New Carrollton Police Department | N/A | N/A |
| North East Police Department | N/A | N/A |
| Ocean City Police Department | 0 | 0 |
| Ocean Pines Police Department | N/A | N/A |

| Agency | # Untested SAEKs | # Anonymous SAEKs |
|---|-------------------------|--------------------------|
| Pocomoke City Police Department | 2 | 0 |
| Prince George's Community College Police Department | N/A | N/A |
| Prince George's County Police Department | 99 | 91 |
| Prince George's County Sheriff | N/A | N/A |
| Queen Anne's County Sheriff | 2 | 0 |
| Ridgely Police Department | 0 | 0 |
| Riverdale Park Police Department | N/A | N/A |
| Salisbury Police Department | 46 | 0 |
| Salisbury University Police Department | N/A | N/A |
| Seat Pleasant Police Department | N/A | N/A |
| Smithsburg Police Department | 0 | N/A |
| Snow Hill Police Department | 0 | N/A |
| Somerset County Sheriff's Office | 0 | N/A |
| Spring Grove Hospital Center Police | 0 | 0 |
| St. Mary's County Sheriff | 0 | 0 |
| St. Michael's Police Department | 1 | 0 |
| Sykesville Police Department | 0 | 0 |
| Talbot County Sheriff's Office | 0 | 0 |
| Thurmont Police Department | 2 | 0 |
| Towson University Police Department | 1 | 0 |
| Trappe Police Department | 1 | 0 |
| University of Baltimore Police Department | N/A | N/A |
| University of Maryland Baltimore County Police Department | 3 | 0 |
| University of Maryland, Baltimore Police Force | N/A | N/A |
| University of Maryland Police Department | 4 | 0 |
| University Park Police Department | 0 | N/A |
| Upper Marlboro Police Department | 0 | 0 |
| Washington County Sheriff | 10 | 2 |
| Westminster Police Department | 0 | 0 |
| Wicomico County Sheriff | 1 | 1 |
| Worcester County Sheriff | 0 | 0 |

Table 2.

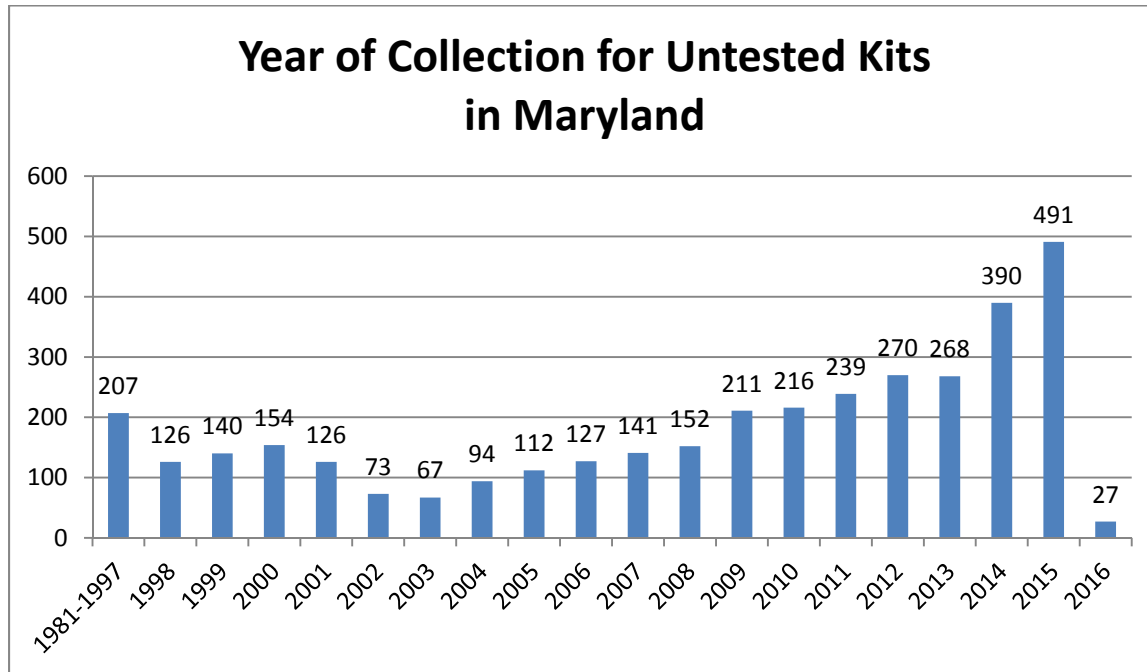
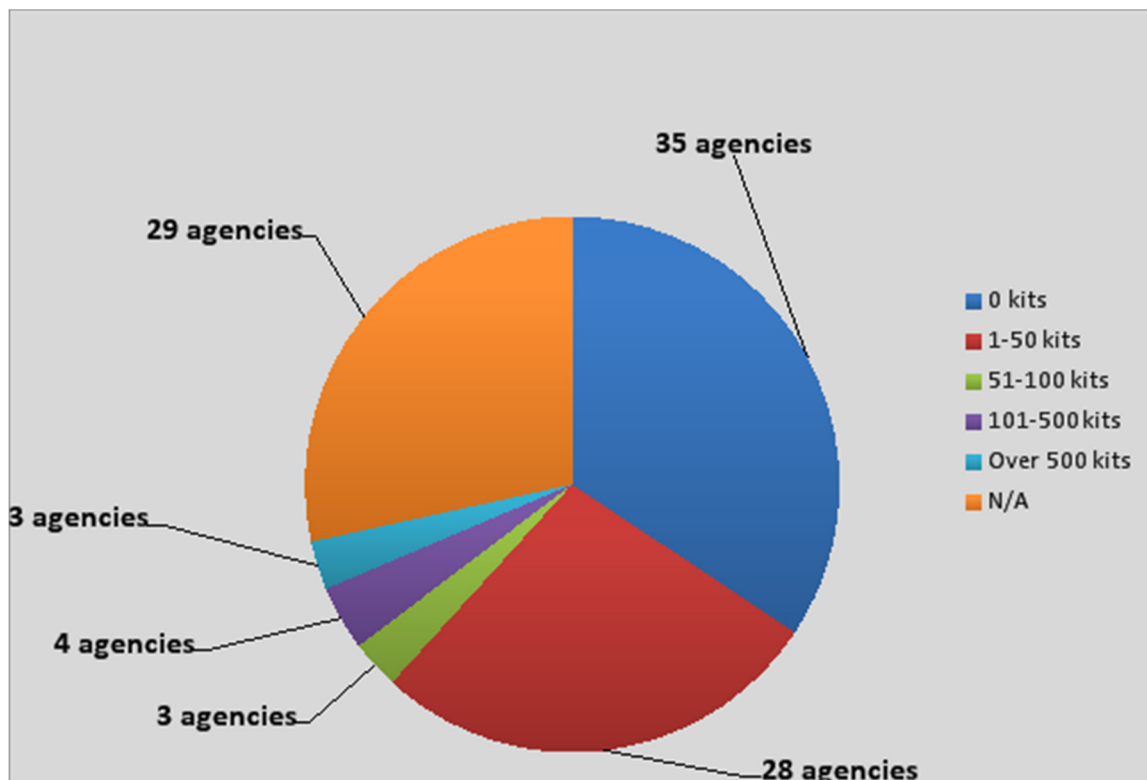


Table 3. Number of agencies broken down by range of untested kits in their possession



More than 90% of untested kits were in the custody of 13 of the 102 responding agencies. (See Table 3.) Many of these agencies serve the most populated counties or cities in Maryland, but some smaller jurisdictions also have significant numbers of untested kits. The 13 agencies with the most untested kits in their possession are: (1) the Montgomery County Police Department (1,165); (2) the Baltimore City Police Department (871); (3) the Howard County Police Department (503); (4) the Anne Arundel County Police Department (207); (5) the Baltimore County Police Department (197); (6) the Frederick Police Department (143); (7) the Harford County Sheriff's Office (107); (8) the Prince George's County Police Department (99); (9) the Maryland State Police (57); (10) the Cambridge Police Department (51); (11) the Carroll County Sheriff's Office (49); (12) the Calvert County Sheriff's Office (48); and (13) the Salisbury Police Department (46).

On their own, these numbers don't convey much about the effectiveness of an agency's SAEK testing protocols. Each jurisdiction sets its own policy for retaining untested SAEKs. And an agency with a 10-year retention policy will have many more untested kits in its inventory than an agency that destroys untested kits every 12 months. The Montgomery County Police Department, for example, reports 1,082 untested kits in its possession, the highest number of any agency surveyed. But the Montgomery County Police Department's policy is to retain all untested kits indefinitely, so many of the kits in its possession would have been destroyed years ago in other jurisdictions.

Similarly, an agency might have fewer untested kits because fewer crimes of sexual assault were reported in its jurisdiction. On the other hand, it may lack officers trained to determine when it is appropriate to collect SAEK evidence. For these reasons, no conclusions should be drawn about an agency's operations based solely on the number of untested kits reported.

This report focuses instead on the policy reasons agencies choose not to test SAEKs in their possession, and the practices surrounding SAEK collection, testing and storage. To further assess the policies and practices related to untested kits, the OAG sent a follow-up survey to agencies with 50 or more untested kits. The follow-up questions focused on the criteria used in determining not to test SAEKs. All respondents confirmed that the vast majority of untested kits in their possession were not tested pursuant to agency policy. Reasons given by agencies for not testing kits include:

- Identity of suspect known
- Allegations unfounded⁷
- Victim signed no prosecution form/refused to prosecute
- Suspect admitted to consensual sex
- State's Attorney declined prosecution
- Case held for post-conviction
- Case occurred in other jurisdiction
- Suspect pled guilty
- False Report
- Anonymous/Jane Doe kit
- Missing records
- Analysis not needed for prosecution per State's Attorney

II. Current SAEK Practices in Maryland

Maryland law does not require law enforcement agencies to collect, store, track, or test SAEKs, and no uniform standards exist to guide law enforcement agencies. As a result, many

⁷ Under the FBI's Uniform Crime Report (UCR), "unfounded" means baseless (the criminal act does not meet the legal definition of sexual assault) or false (victim fabricated the claim). However, at least one media investigation has found that law enforcement agencies mischaracterize SAEK cases as unfounded where there is no evidence the claim was baseless or fabricated. *See* "Unfounded: When Detectives Dismiss Rape Reports Before Investigating Them," Alex Campbell and Katie J.M. Baker, *Buzzfeed*, September 8, 2016. Although this report makes no conclusions about the survey respondents' kits that were marked unfounded, evidence that the term "unfounded" can be easily misused supports our recommendation in Section IV that all kits be tested unless the allegations of sexual assault were "disproven."

jurisdictions have implemented their own policies for collection, storage, and retention of SAEKs.⁸ Not surprisingly, these protocols differ amongst jurisdictions.

Practitioners from several Maryland jurisdictions were surveyed regarding their process for keeping or destroying SAEKs, whether there are any special procedures for handling anonymous SAEKs, and the procedure for notifying victims regarding the SAEK test results.⁹ The results indicated that policies for kit retention varied widely – from 90 days to indefinite retention. Retention policies for anonymous kits are equally varied. Anonymous kits are kept for 3 months in Baltimore County, 6 months in Allegany County, 12 months in Calvert and Carroll Counties, 18 months in Howard County and Baltimore City, and 2 years in Wicomico County. Montgomery

⁸ It is important to note that Sexual Assault Forensic Exams (SAFEs), from which SAEKs are collected, are not always accessible to victims for two reasons. First, not all hospitals have a SAFE program. There are 24 “SAFE Programs”, with some providing sexual assault forensic exams only to non-pediatric cases (over 13 years old) and others only to pediatric cases. Complicating this further, there is a serious shortage of forensic nurse examiners, so even when a SAFE program exists, there may not be a nurse available to perform an exam. As a result, sexual assault survivors may be shuttled from place to place, sometimes giving up and not getting an exam to collect evidence of a sex crime. Beyond preventing some victims from accessing medical care, inaccessibility of SAFE exams also jeopardizes potential criminal cases against assailants. See, Department of Health and Mental Hygiene (2015), *Report to the Governor, the Senate Finance Committee, and the House Health and Government Operations Committee Regarding Improved Access to Sexual Assault Medical Forensic Examinations in Maryland House Bill 963/Chapter 627, Section 2(g) of the Acts of 2014* (“DHMH Report”); and *Id.*, Appendix R, Testimony by the Maryland Coalition Against Sexual Assault (MCASA). We understand that earlier this year the legislature directed DHMH to report by December 15, 2016 on its efforts to establish mobile SAFE teams or other protocols to ensure that all hospitals with emergency departments have a plan so that sexual assault victims have access to SAFE exams at hospital facilities. The legislature also directed the Board of Nursing to report by October 1, 2016 on the availability of online instruction for forensic nurse examiners to become certified to perform SAFE exams. We urge the legislature to closely review the content of these reports and consider taking any other action appropriate to improve statewide access to SAFE exams.

⁹ The following agencies were surveyed about their SAEK procedures: Allegany County, Baltimore City, Calvert County, Harford County, Montgomery County, St. Mary’s County and Wicomico County. Unfortunately, because very few jurisdictions have written SAEK policies and process SAEKs across several different agencies and/or organizations, it is difficult to find one individual who can speak with authority on all stages of SAEK collection, testing and storage practices in a given region. As a result, many of the surveys were returned with incomplete responses.

County keeps anonymous kits indefinitely. In several jurisdictions, anonymous kits are the only kits that are tracked and stored for a specific period of time.

Storage methods and follow up also differ. Some kits are stored in refrigerators; others in evidence storage lockers. Although some jurisdictions have forensic nurses and victim advocates followup with victims after the kit is collected, a number of jurisdictions leave follow up to police department discretion and, consistent with current State law, require notice only upon a victim's affirmative inquiry. Some jurisdictions notify anonymous victims prior to destroying their kits, others do not.

The policy inconsistencies among jurisdictions are due in large part to the lack of statewide guidance on best practices in handling SAEKs. For example, there is no law mandating retention time or requiring victim notification or support.¹⁰ There is also no dedicated funding for testing SAEKs or focused training related to collection, storage, and testing of SAEKs.

Some experts have noted that the definition of sexual assault in federal statutes and many other jurisdictions includes but is broader than the legal definition of rape. It means any non-consensual sexual act proscribed by federal, tribal or state law, including when the victim lacks capacity to consent. *See e.g.,* Section 3772 (4)(c) of *Survivor's Bill of Rights Act of 2016*. Generally, in Maryland, policies related to untested kits may be the result of confusion and ambiguity in Maryland's current rape statute that requires a rapist use force or a threat of force as an element of the crime. The fact of an assault but the absence of physical resistance may contribute to an agency's policy decision not to pursue testing or prosecution. *See e.g.* Maryland Coalition

¹⁰ A law enacted in 2015 requires health care professionals who perform the examinations and collect the biological and other evidence to provide a victim of sexual assault with contact information of the law enforcement agency assigned to the investigation, and victims must be provided with access to information about the testing of their SAEKs upon request, but nothing requires law enforcement to initiate follow up or notice. *See* Md Code Crim. Proc. §11-926 (2015).

Against Sexual Assault, September 22, 2016 Press Release, <http://www.mcasa.org/mcasaapplaudsplanstoreintroducebill/>. Other issues, including bias, may impact the desire to pursue testing as found in the U.S. Department of Justice’s recent review of the Baltimore City Police Department.¹¹

III. Best Practices Identified From Other Jurisdictions and National Standards

Since 2014, in response to growing evidence that SAEKs were not used effectively in combatting sexual assault crime, 35 have enacted various audit and reform measures to address the systemic deficiencies in procedures and funding related to collection, tracking, testing, storage, notification, and training. Many state legislatures have also provided designated funding for untested kits, investigations and prosecutions, training and victim support. See Compilation of State Data in Appendix. Creating time mandates for collection, testing, and destruction, and providing victim’s notification rights are the most common areas of reform. Many jurisdictions have sought grant funding for SAEK testing, training, and prosecution, and a condition of grant funding may be adoption of one or more model provisions related to the timing of testing, duration of storage and victim notification rights.

¹¹ See “Investigation of the Baltimore City Police Department,” by the U.S. Department of Justice Civil Rights Division, August 10, 2016, pages 122-127, available at <https://www.justice.gov/opa/file/883366/download>, which found evidence of gender bias among other issues, including that the Baltimore City Police Department (“BPD”) persistently neglects to request lab testing of sexual assault evidence kits. The BPD, which reported over 800 untested SAEKs, recently entered into an Agreement in Principle (“Agreement”) with the United States Department of Justice on August 9, 2016 relating to its policing practices. See Agreement in Principle Between The United States and the City of Baltimore Regarding the Baltimore City Police Department, August 9, 2016, available at <https://www.justice.gov/opa/file/883376/download>. One area of mandated reform is how the agency responds to sexual assault crimes. See Agreement at p. 5

The federal government has also responded. In 2016, President Obama signed the *Survivor's Bill of Rights Act of 2016*, declaring that any federal government grant recipients must afford sexual assault victims certain rights, including: the right to be provided a forensic medical examination free of charge; the right to have his or her SAEK preserved until the statute of limitations for the sexual crime expires or 20 years, whichever is shorter; the right to receive notice of any result from a SAEK, including DNA matches; the right to be notified before kit destruction; and the right to have notice of the policies related to the collection and preservation of SAEKs. The law also directs the U.S. Department of Justice to establish a working group to develop best practices regarding the care and treatment of sexual assault victims and the preservation of forensic evidence. *Public Law 114-236 114th Congress (October 7, 2016)*.

Determining which SAEKs Should Be Tested

A number of states considering the types of SAEKs that should be tested ultimately recommend a broad presumption to test all kits with very limited exceptions. An Arizona report on the issue determined that:

“The only circumstances in which a sex crimes evidence kit should not be submitted to the laboratory for testing is if law enforcement determines the case is unfounded or a victim chooses not to report. The presumption in favor of testing ensures sex offender DNA will be uploaded into state and federal law enforcement databases for appropriate use. Sex crimes evidence kits should be tested even if the identity of the suspect is known and regardless if the case is ultimately prosecuted. Testing all kits builds trust with victims who choose to undergo the medical forensic exam and report to law enforcement. Testing all kits can identify or confirm the suspect’s identity and can link cases across jurisdictions to help identify serial and unknown offenders.”¹²

¹² See Report of the Arizona Sexual Assault Evidence Collection Kit Task Force, September 30, 2016, at p.14.
http://azgovernor.gov/sites/default/files/sexual_assault_evidence_collection_kit_task_force_report_09302016.pdf

Recent Oregon legislation mandates the testing of all rape kits except for anonymous or Jane Doe kits. (See “Melissa’s Law”, SB 1571 (2016).) Broad testing protocols ensure fair and equal treatment of victims and provide law enforcement the best tools for prosecuting crimes of sexual assault.¹³

Time Mandates for the Collection and Testing of SAEKs

States vary significantly regarding time-of-collection rules and many have structural deficiencies that may undermine the goal of timely testing. Significantly, many states do not require the tracking or testing of kits even where collection is regulated. In Oregon, for example, law enforcement is required to collect kits from hospitals within 7 days, and submit kits for testing within 14 days of collection, but there is no time limit for when the lab must test the kit. In Pennsylvania, kits must be collected from hospitals within 72 hours, submitted to the crime lab within 15 days, and tested by the crime lab within 6 months. In Idaho, the law requires “timely” testing but does not mandate any particular time. In California, law enforcement is required to submit the kit for testing within 20 days, and the crime lab must complete testing within 120 days. In Texas, law enforcement must submit kits for testing within 30 days and the crime lab must test as soon as “feasible.”

¹³ See e.g., The Detroit Sexual Assault Kit Action Research Project, November 9, 2015, pp. 173-174, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf>, which identified 785 CODIS eligible profiles, 455 CODIS hits, and 127 “serial sexual assault hits” (a DNA match across two or more kits) during its audit of 1,595 untested SAEK kits. Similarly, in Ohio’s Cuyahoga County, after testing 5,000 kits in 2013, the State Prosecutor’s office completed 2,332 follow-up investigations, indicted 527 defendants, and as of November 2016, had convicted 219 defendants. SAEK testing played an important role in obtaining many of these convictions. See <http://bigstory.ap.org/article/92a6536a8e3241c4ba1c21f27d8bab47/testing-backlogged-rape-evidence-leads-hundreds-convictions>.

The best practice identified is to require testing of kits within designated time parameters. There are two significant time periods for which parameters must be set. The first is the time for law enforcement to submit a kit for testing—best practices here appear to be between seven and 30 days. The second is the time period by which the kit must be tested by the lab. States establishing a time requirement for this period usually require that kits be tested between 30 and 90 days of submission. For example, Connecticut requires that kits be sent to the lab within 10 days of collection and be tested by the lab within 60 days. Florida requires that kits be sent to the lab within 30 days of collection and be tested within 120 days of submission to the lab. Michigan requires that kits be sent to the lab within 14 days of collection and be tested within 90 days of submission to the lab.

States implementing a mandatory-test system for the first time (*e.g.* Kentucky) have included a staggered maximum time for testing kits, for example, within 90 days by 2018, within 60 days by 2020. To ensure that any established timeframes are met, Arizona recommended establishing a tracking system that could follow the kit from issuance through its final disposition, storage or destruction. Oregon requires state and local law enforcement agencies to adopt written policies and procedures regarding the handling of kits and to also input testing results into CODIS. Pennsylvania requires law enforcement agencies to report the number of untested kits in their inventories to the Department of Health within six months of receipt, and must submit these untested kits to the law within one year of reporting.

Duration of Kit Storage and Destruction Policies

Statutory retention periods for SAEKs vary among the states that have enacted such laws. Best practices in this area include: (1) retaining kits—other than anonymous kits—for, at minimum,

the statute of limitations for the offense; (2) retaining *all* kits for, at minimum, the statute of limitations for the offense—regardless of whether a victim elects (initially) to prosecute; (3) ensuring that all kits—after testing—are retained in a police-controlled evidence storage facility, with appropriate humidity, temperature, and related environmental controls as well as chain-of-custody controls. A few jurisdictions maintain kits for significantly longer than their limitations period. The federal standard suggests that kits be preserved for 20 years. *Survivor's Bill of Rights Act of 2016*. Because there is no statute of limitations for crimes of sexual assault in Maryland, a policy to retain kits consistent with the statute of limitations would require indefinite storage.

Victim Notification Rights

Some jurisdictions have no mandated notification rights. Other jurisdictions have passive notice procedures authorizing information in the event of a survivor query. For example, law enforcement in Oregon must have at least one person within the agency to answer survivors' questions regarding the status of their kits and local law enforcement must respond within 30 days. Other states, such as Kentucky, Pennsylvania and Utah, have recently enacted affirmative notice procedures, requiring law enforcement to advise survivors of key information related to the timing of testing and database matching.

California and Idaho have the most comprehensive victim notice obligations. In California, law enforcement must tell victims if they decide not to test a rape kit within established time limits, and must notify victims 60 days prior to destroying a kit. Victims are also granted the right to designate a sexual assault victim advocate to receive any of the above information. The law also requires law enforcement agencies to inform victims if the law enforcement agency does not

analyze the DNA evidence within certain time limits, whether or not the identity of the perpetrator is known.

In Idaho, law enforcement must notify victims of the status of their rape kits including when: (1) a kit is submitted to a lab; (2) a DNA profile is uploaded to the DNA database; (3) a match occurs between the profile and another profile in the database; (4) a kit is going to be destroyed; and (5) any change in case status occurs, including the reopening of the case. In 2015, Pennsylvania passed a law requiring law enforcement to notify the victim when a kit is submitted to the lab, when a sample is entered into the DNA database, and when there is a database match. Other states providing victim notification rights include Kentucky, Oregon, and Utah.

Funding Untested Kits and Uniform Standards

States that have implemented reforms generally have received dedicated funding from their state legislatures, or grants from the federal government or other funding source. Funding is critical to ensure sufficient resources to properly test and store SAEKs, to train law enforcement and lab personnel, and to provide victim support services. The U.S. Department of Justice's Bureau of Justice Assistance and the Manhattan Office of the District Attorney are two agencies that have provided substantial funding to states and local communities to improve SAEK policies.

Training and Education

To implement uniform procedures for the collection, testing, and storage of SAEKs, and to improve victim support and notification requires training and education. At the federal level, the U.S. Department of Justice's Bureau of Justice Assistance sponsors the National Sexual Assault Kit Initiative, which provides funding and offers a National Training and Technical

Assistance Program that assists in establishing sustainable changes in policies that relate to untested SAEKs and sexual assault response. The National Training and Technical Assistance Program offers an online toolkit/resource guide that provides guidance and a source for evidence-based practices and resources.¹⁴ Other training resources exist also, including those provided by the National Sexual Violence Resource Center.¹⁵

IV. Recommendations for Further Action

The following recommendations are offered for review and consideration by the General Assembly, law enforcement agencies, victim advocacy organizations, and other interested stakeholders. Many of these recommendations can be implemented without legislation, through the adoption into the policies and general orders of law enforcement agencies. The implementation of some of these recommendations will be costly, and it will likely be necessary to supplement state resources with federal and other grant funding in order to implement these recommendations.

1. Establish a statewide policy that sexual assault evidence kits will be tested within defined time parameters unless: (1) there is clear evidence disproving the allegation of sexual assault (unfounded); or (2) the allegation, even if true, would not result in the creation of forensic evidence of sexual assault.¹⁶ In the case of a Jane Doe/anonymous kit, the victim

¹⁴ See https://www.bja.gov/ProgramDetails.aspx?Program_ID=117#horizontalTab3.

¹⁵ See <http://www.nsvrc.org/projects/eliminating-rape-kit-backlog#response>.

¹⁶ It is probable that an increase in SAEK testing will reveal a high incidence of repeat offenders and multiple sexual assaults involving the same suspect. Although beyond the scope of this report, many workgroup members felt that this information would be more valuable if Maryland joins those states which have adopted the federal rule regarding the admissibility of prior sexual assaults in a criminal prosecution. See Federal Rule of Evidence 413 (allowing evidence of a defendant's prior sexual assaults even if the victim is not the same) and FRE 414 (allowing evidence of child sexual abuse even if the victim is not the same.) There have been prior attempts to amend Maryland's law to comport with the federal rule, but they have not been successful. See e.g., House Bill 218 (2016).

should be given the explicit option to consent to testing without any commitment to further action. Where consent to test is still denied, the kit should not be tested. This same standard should be applied to the State's existing inventory of untested kits. Existing untested kits that don't fall into any of the above exceptions should be tested unless the suspect is already in CODIS, his identity is not disputed, and there has been a final conviction, with all appeals having been exhausted. Kits related to cases where a defendant is still challenging his or her conviction should be tested.¹⁷

2. Establish a fixed period of time for retaining untested kits, including anonymous kits, that is no shorter than that prescribed by federal law, which requires that kits be preserved for the statute of limitations or 20 years, whichever is shorter. At least two local jurisdictions—Harford County and Montgomery County—already store SAEKs indefinitely. Notwithstanding any other policy, all kits related to convictions for first- or second-degree rape or sexual assault must be preserved, whether tested or not, due to the mandates of the DNA Postconviction Act. (Md. Code Ann., Crim. Proc. Art. §8-201.)
3. Implement victim notification requirements that mandate that investigators notify victims when a kit is sent for testing to the crime laboratory and of the results of the test (i.e. if

¹⁷ In testing old kits, labs should seek to avoid confirmation contamination. One example would be to employ a double-blind process so that the people doing the pre-screening of known perpetrators have nothing to do with the testing, and none of the information about suspects or known perpetrators should be in the material provided to the technicians and analysts who actually do the testing and comparisons. The materials seen by the analysts should not in any way indicate that there has already been a trial or guilty plea in a case, or even that a suspect has been identified. Agencies should also be cautious in destroying old untested kits. Due to the requirements of Md. Code Ann., Crim. Proc. Art. §8-201, destroying untested old kits could lead to a person convicted of a certain offense claiming entitlement to a presumption that he would have been exonerated by the DNA sample under §8-201(j)(3).

there is a match in the database). Procedures for notifying victims about their cases should make use of community-based sexual assault victim advocates who can provide support and other services to survivors. It is also critical that protections be put in place to ensure victim privacy during notification process.

4. Develop a Model Policy with uniform standards for all jurisdictions and crime laboratories related to the collection, tracking, storage, testing, destroying, and reporting of kits. The Model Policy should include the recommendations set forth in paragraphs 1 through 3 above. In addition, it should include a standard form showing chain of custody, storage, and (where relevant) destruction. The policy should also extend to the handling and retention of evidence after conviction, in compliance with Section 8-201 of the Criminal Procedure Article.
5. Similar to the *Survivor's Bill of Rights Act of 2016*, create a Statewide SAEK Oversight Committee to develop: mandated uniform standards in a Model Policy; corresponding support for funding, training, education and survivor notification; long-term monitoring of agency compliance with the Model Policy; and policy guidance on the availability, collecting, testing and storage of sexual assault evidence kits and related issues.¹⁸

¹⁸ The *Report to the Governor, the Senate Finance Committee, and the House Health and Government Operations Committee Regarding Improved Access to Sexual Assault Medical Forensic Examinations in Maryland (House Bill 963 - 2014)* also noted concern about the lack of statewide oversight for SAFE programs. Testimony by the Maryland Coalition Against Sexual Assault encouraged policymakers to consider carefully where this oversight should be housed, noting that though “forensic exams include medical components, the purpose of a forensic examination also includes collection and preservation of evidence. ... [I]nvestigation, arrest, and prosecution rates increase when SAFE programs are effectively implemented. (Citations omitted.)

6. Provide funding for testing the current inventory of untested kits and designated funding for uniform standards and time mandates related to collection, tracking, storage, testing, and reporting of test results. Funding should also be required for any future audits of untested kits, if desired.
7. The State and local jurisdictions should pursue private and grant funding to provide training and education to support compliance with current and modified policies.
8. Amend the State's consent form for victims to authorize testing of the rape kit even if the victim does not wish to take any additional action, and specify that the victim's DNA profile will not be used for any other purpose.
9. Enact a "Notice & Demand" statute governing chain of custody and confrontation issues at trial that is modeled after Md. Code Ann., Cts. & Jud. Proc. Art. §§ 1-1001 et seq. (2013), and creates a statutory bypass that allows prosecutors to present DNA evidence without calling numerous live witnesses. Such a law would (a) allow the state to establish chain of custody by providing a chain of custody log in advance of trial, which would avoid the presentation of testimony of low-level lab technicians who may have helped process the DNA evidence, but add nothing substantive to the proceedings. The defendant can still insist on the presence of these people, but he would have to do so in writing, in advance of trial.

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Appendix

[Compilation of State SAEK Reforms](#)