



Maryland Sexual Assault Evidence Kit
Policy and Funding Committee

**NEW CRITERIA FOR TESTING SEXUAL ASSAULT EVIDENCE KITS IN
MARYLAND EFFECTIVE JANUARY 1, 2020**

FREQUENTLY ASKED QUESTIONS

Earlier this year, the Maryland General Assembly enacted [Chapter 34 \(2019\)](#) setting forth the criteria to be applied by all law enforcement agencies when determining whether to submit a sexual assault evidence kit (“SAEK”) to a forensic laboratory for analysis. Under the new law, which becomes effective January 1, 2020, a SAEK shall be submitted for testing unless:

- A. There is clear evidence disproving the allegation of sexual assault;
- B. The facts alleged, if true, could not be interpreted to violate a provision of Title 3, Subtitle 2, Title 3, Subtitle 3, Title 3, Subtitle 6, or Title 11, Subtitle 3 of the Criminal Law Article of the Maryland Annotated Code;
- C. The victim from whom the evidence was collected declines to give consent for analysis; or
- D. The suspect’s profile has been collected for entry as a convicted offender for a qualifying offense in the Combined DNA Index System (CODIS) maintained by the Federal Bureau of Investigation and the suspect has pleaded guilty to the offense that led to the sexual assault evidence collection kit.

The Sexual Assault Evidence Kit Policy and Funding Committee (“SAEK Committee”) issues the below guidance to assist law enforcement agencies and other stakeholders in successfully implementing the new law. If you have additional questions regarding the new testing criteria, please contact Zenita Wickham Hurley, SAEK Committee Chair at zhurley@oag.state.md.us.

1. To which SAEKs does the new testing criteria apply?

The new testing criteria applies to any SAEK in the possession of a law enforcement agency (“LEA”) as of January 1, 2020 for which no decision has yet been made regarding whether the kit should be tested. While this unquestionably includes any SAEK received by an LEA after January 1, 2020, it may also include SAEKs received prior to that date. Although the law does not require agencies to revisit SAEKs that they previously determined should not be tested, the SAEK Committee recommends that agencies do so to promote equal access to justice for all victims of



sexual assault.¹ Recognizing that implementation of the new testing criteria could result in increased expenditures for some jurisdictions, the legislature established a SAEK Testing Grant Fund. See <http://goccp.maryland.gov/grants/programs/sakt/> for more information.

2. What is meant by “clear evidence disproving the allegation”?

This term is meant to capture a case that would be designated as “false” under the Federal Bureau of Investigation’s (FBI) Uniform Crime Reporting (UCR) Program’s definition of “unfounded.” According to that standard, a case may only be designated as false if it is determined through investigation that no crime occurred or was attempted. For example:

A woman claimed a man attempted to rape her in his automobile. When law enforcement personnel talked to both individuals, the complainant admitted she had exaggerated and the man did not attempt to rape her. This case may be properly designated as unfounded due to false allegations.

The FBI’s UCR definition also makes clear that “the refusal of the victim to cooperate with prosecution, or the failure to make an arrest does not unfound a legitimate offense.”²

3. What is meant by “the facts alleged, if true, could not be interpreted to violate [a provision] of the Criminal Law Article”?

This term is meant to capture a case that would be designated as “baseless” under the FBI’s UCR Program’s definition of “unfounded.” Distinct from the false designation, a case is baseless when the facts alleged do not meet the elements of a crime of sexual assault. Like the false designation, a case should only be designated as baseless if it is determined through investigation that no crime occurred or was attempted. Again, a victim’s refusal to cooperate or a decision not to make an arrest or prosecute a case does not render that case unfounded.³ Law enforcement officers should work closely with their state’s attorney’s office to ensure that they understand the elements of each crime of sexual assault and stay abreast of recent changes to Maryland law (e.g., that evidence of physical resistance is no longer required to prove rape).⁴

¹ Untested SAEKs in an agency’s possession as of April 2018 are covered by the State’s 2018 federal Sexual Assault Kit Initiative (“SAKI”) grant. The testing protocol developed for SAKI kits requires that they be re-evaluated under the State’s new testing criteria. See *Annual Report*, SAEK Committee (January 2020), at 24–25.

² *Criminal Justice Information Services (CJIS) UCR Program Summary Reporting System User Manual*, U.S. Department of Justice, FBI (2013) at p. 111. The false case example has been excerpted directly from this manual.

³ *See Id.*

⁴ MD ANN. CODE, Crim. Law, §3-319.1(a) (West 2017).



4. *How does a law enforcement agency determine that no crime occurred? Does that determination need to be documented in writing?*

Law enforcement officers should be trained in using victim-centered and trauma-informed techniques to interview victims and in conducting thorough investigations to evaluate the evidence and determine the facts of each case.⁵ Importantly, “[a]ll reports of sexual assault should be actively investigated, regardless of the circumstances of the incident, the status of the victim, or the status of the suspect.”⁶ If, after an active and thorough investigation, a law enforcement agency determines that no crime occurred, the agency’s findings should be documented in writing in the case files. Although such documentation is not directed by law, newly proposed regulations require agencies to inform victims (upon request) whether their SAEKs will be tested and establish a process for victims to seek an independent review of an agency’s decision not to test a kit.⁷ Having a well-documented record of an unfounded determination will aid in this review process.

5. *Does the new law require the testing of Jane Doe kits?*

No. “Jane Doe” or “Anonymous” kits are those kits for which the victim declines to give consent for analysis. These kits are expressly exempted from testing under the new law. See Md. Ann. Code, Criminal Procedure Article, §11-926(e)(3).

6. *Does the language “victim declines to give consent” mean that law enforcement must always obtain consent for analysis?*

No. Maryland law does not require law enforcement to obtain a victim’s consent for testing prior to submitting a SAEK for analysis. However, Section 11-926(b) requires a health care provider to provide a victim with “information describing the laws and policies governing the testing, preservation, and disposal of a sexual assault evidence collection kit.” Consistent with this mandate, all victims receiving a SAEK exam should be made aware that Maryland’s law requires that a SAEK be submitted for testing unless they decline to consent for analysis or the case falls under one of the other three enumerated testing exceptions.

⁵ See *Preliminary Recommendations*, SAEK Committee (April 2018) at p. 1.

⁶ *National Best Practices for Sexual Assault Kits: A Multidisciplinary Approach*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, (August 2017) at p. 47 (USDOJ SAEK Best Practices Report), available at <https://www.ncjrs.gov/pdffiles1/nij/250384.pdf>. For more best practices in conducting investigations of sexual assault crimes see USDOJ SAEK Best Practices Report, Chapter 4; and *Sexual Assault Incident Reports: Investigative Strategies*, International Association of the Chiefs of Police, (August 2018), (IACP Report) available at <https://www.theiacp.org/sites/default/files/all/s/SexualAssaultGuidelines.pdf>.

⁷ *Annual Report*, SAEK Committee (January 2020), at Appendix C. Chapter 34 (2019) directed the SAEK Committee to establish an independent process for reviewing any determination by a law enforcement agency not to test a kit.

7. *Does the new law require that the SAEK be tested if the suspect admits the presence of DNA, but claims it was consensual?*

Yes. The only exceptions to testing are outlined expressly in the statute. However, the new law provides an exemption for testing a SAEK in certain circumstances where the suspect's DNA is already in (or in the process of being uploaded to) CODIS. Specifically, a law enforcement agency is not required to submit a SAEK for testing if the suspect's profile has already been collected for entry as a convicted offender for a qualifying offense in CODIS and the suspect has pled guilty to the offense that led to the collection of the SAEK.

8. *What about cases closed by exception? Or cases with arrests or convictions that have been expunged? Should the SAEKs related to those cases still be tested?*

Again, the criteria for testing a SAEK is clear. Unless the case was closed or expunged for reasons that constitute an exception under the statute, the SAEK should be tested. For example, if a case was expunged because it was determined that the underlying allegations of sexual assault were false, that case should be designated "false" (unfounded) and thus is not required to be tested. In comparison, a case closed by exception due to a victim's failure to cooperate does not render a case unfounded, and thus does not fall into a testing exemption. The SAEK in that case should still be tested unless the victim has explicitly declined to consent to testing and the agency has documented this decision.⁸

⁸ Agencies are cautioned, however, that they should not pressure victims to sign waivers declining prosecution, particularly in the early stages of the investigation. *See e.g., IACP Report* at p. 5.