



# **Sexual Assault Kit Testing Initiatives and Non-investigative Kits**

## **White Paper**

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## Purpose

This document presents reasons why the Office on Violence Against Women (OVW) cautions against submitting sexual assault kits (SAKs) to forensic laboratories if the person from whom the kit was collected has not chosen to report a sexual assault to law enforcement and has not otherwise consented to its submission.<sup>1</sup> While terms used to describe these kits vary across jurisdictions, they are referred to as *non-investigative kits* in this document.<sup>2</sup> We summarize how testing non-investigative kits without victim consent can undermine victims' rights, weaken community trust of law enforcement, and constitute an imprudent use of finite resources.

OVW is the U.S. Department of Justice's (DOJ) lead component in developing the nation's capacity to reduce domestic and sexual violence, strengthen services for victims, and administer justice in these cases. OVW's position—which is shared by a large and diverse community of professionals working inside and outside the justice system on behalf of victims—is that any approach to addressing sexual assault must prioritize the rights and needs of those most affected by these crimes: the victims themselves.

OVW encourages law enforcement jurisdictions to make decisions about testing SAKs in a way that honors victims' rights, needs, and preferences, to include respecting a victim's decision to delay or forego reporting a sexual assault to law enforcement.

It is true that non-investigative SAKs might contain probative evidence that could potentially be used to identify serial offenders and strengthen cases. But in trying to balance public safety and victim autonomy, there are strategies that criminal justice professionals can use to encourage victims to report crimes, obtain more information about the extent of sexual assault in a jurisdiction, and identify serial offenders—none of which involve testing SAKs without victims' consent. For example, alternative reporting options can give victims ways of sharing valuable information with law enforcement, but

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<sup>1</sup> See pages 3-4 of this document for a discussion of the Violence Against Women Act (VAWA) provision ensuring that victims have access to medical forensic examinations free of charge and regardless of whether they wish to assist with an investigation. While this provision does not set forth specific protocols, many states and local jurisdictions subsequently implemented alternative reporting, "anonymous" reporting, and non-reporting options that allow victims to obtain a medical forensic exam before deciding whether to report a sexual assault to law enforcement. For more information about the VAWA provision and related reporting options, see End Violence Against Women International (EVAWI)'s resources on forensic compliance: <http://www.evawintl.org/Forensic-Compliance>.

<sup>2</sup> Alternative reporting options can include anonymous reporting, third party reporting, and non-investigative reporting and at times these terms are used interchangeably. It is important to note that currently there is no consensus on terminology for referring to kits associated with victims who have not chosen to report a sexual assault to law enforcement and participate in an investigation. "Non-investigative kit" is used in this document in reference to those kits. However, in using the term "non-investigative kits" we are **not** referring to kits associated with reports of sexual assault made to law enforcement that were subsequently considered unfounded prior to a full investigation or that were closed prematurely due to a victim reportedly being "uncooperative."

without coercing the victim to participate in the justice process.<sup>3</sup> As mentioned later in this document, End Violence Against Women International (EVAWI) offers [information on alternative reporting options](#), including the [You Have Options Program](#) which was first established by the Ashland, Oregon, Police Department and offers sexual assault victims multiple ways of reporting that generate investigative leads while not demanding any more involvement from the victim than s/he wishes to have. An important aspect of alternative reporting options, for victims who have not decided yet whether to engage with the criminal justice system, is that a victim can later choose to convert to a standard report. Furthermore, Sexual Assault Response Teams (SARTs)—which involve a coordinated response from law enforcement, victim services providers, medical forensic personnel, prosecutors, and others—can improve legal outcomes and victims’ experiences when they seek help after a sexual assault.<sup>4</sup> This can help build the victim’s confidence in the system and may prompt the victim to make a standard report to law enforcement and assist with an investigation.

## Background

Over \$100 million has been awarded over the past two years to jurisdictions across the country to support their work to reduce volumes of untested SAKs. The DOJ Bureau of Justice Assistance (BJA)’s Sexual Assault Kit Initiative (SAKI) and the Manhattan District Attorney’s Office’s Sexual Assault Kit Backlog Elimination Program are the two largest, national grant programs specifically for sexual assault, but communities are also implementing SAK initiatives with support from other local, state, federal, and private funding sources.

For example, since 2005, the National Institute of Justice (NIJ) has distributed over \$700 million in funding to state and local forensic laboratories under the DNA Capacity Enhancement and Backlog Reduction (DNA CEBR) program. Through this program, forensic laboratories have uploaded over 310,000 DNA profiles to the National DNA Index System (NDIS)<sup>5</sup> resulting in over 117,000 hits. Uploading more DNA profiles from convicted offenders, arrestees, crime scenes, and sexual assault evidence translates to a higher rate of CODIS hits. In 2016, NIJ awarded approximately \$3.3 million for its newly implemented Sexual Assault Forensic Evidence – Inventory, Tracking, and Reporting (SAFE-ITR) Program, which complements the DNA CEBR and SAKI programs by providing resources for state, local, and tribal governments to inventory, track, and report the status of all untested SAKs.

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<sup>3</sup> See, for example: Archambault, J., & Lonsway, K. (2014). *Reporting methods for sexual assault cases*. <http://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=35>.

<sup>4</sup> See, for example: Greeson, M. R., & Campbell, R. (2015). Coordinated community efforts to respond to sexual assault: A national study of sexual assault response team implementation. *Journal of Interpersonal Violence*, 30(14), 2470–2487; and Greeson, M. R., Campbell, R., Bybee, D., & Kennedy, A. C. (2015). Improving the community response to sexual assault: An empirical examination of the effectiveness of sexual assault response teams (SARTs). *Psychology of Violence*. Advance online publication.

<sup>5</sup> The Combined DNA Indexing System (CODIS) is a software platform managed by the Federal Bureau of Investigation (FBI). It has local, state and national levels where DNA profiles are stored and searched. Profiles stored at the national level are maintained in NDIS. Forensic DNA profiles are searched against other known (arrestees and convicted offenders) and unknown (forensic) DNA profiles from other cases to generate hits that are confirmed by a DNA analyst.

Law enforcement agencies, forensic laboratories, prosecution offices, and others who support this work have a shared responsibility to uphold victims' rights in deciding which SAKs to test and when. Some communities benefiting from new SAK testing initiatives are considering or actively applying an interpretation of the "test all kits" approach to mean testing literally every kit, including non-investigative kits. This would result in testing even those kits that were collected from victims who had a medical forensic examination but who have not chosen to report a crime to law enforcement and who did not otherwise consent to the submission of the kit for testing. ***It is OVW's position that submitting non-investigative SAKs to a forensic laboratory for testing, absent consent from the victim, should not be standard operating procedure for a law enforcement agency.*** Submitting a SAK for testing when a victim has neither chosen to report a crime nor expressly consented to the submission of a kit, or failing to give victims a choice about whether and when to report to law enforcement could cause victims further trauma, compromise their willingness to assist law enforcement with an investigation at some future point, and dissuade victims from seeking urgently needed medical care after they have been sexually assaulted.

It should be noted that leading advocacy organizations, including the National Center for Victims of Crime (NCVC),<sup>6</sup> discourage testing non-investigative kits. Some state laws, such as those in Michigan<sup>7</sup> and Florida,<sup>8</sup> preclude testing non-investigative kits. Notably, the United States military provides members of the Armed Forces with unrestricted and restricted reporting options, the latter being available to victims who want to confidentially disclose an assault and obtain services without automatically prompting an investigation. Kits collected from victims who choose a restricted report are not tested unless and until the victim converts her/his case to unrestricted.<sup>9</sup>

OVW applauds efforts to reexamine immense volumes of sexual assaults that were reported to law enforcement for which an associated SAK was not previously submitted to a forensic laboratory for testing. New funding enables law enforcement to test SAKs, but more important than that, it is an opportunity for communities to model approaches that engage victims in the justice process, honor victims' rights, employ a trauma-informed approach, and correct the problems that led to large numbers of untested SAKs in the first place.

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<sup>6</sup> See: <https://victimsofcrime.org/our-programs/dna-resource-center/untested-sexual-assault-kits/unreported-sexual-assault-kits>.

<sup>7</sup> Michigan Compiled Laws (MCL) 752.931 - 935, Sexual Assault Kit Evidence Submission Act of 2014, see: [http://www.legislature.mi.gov/\(S\(k5avgzow0jxfb4pollwprx2q\)\)/mileg.aspx?page=getObject&objectName=mcl-752-933](http://www.legislature.mi.gov/(S(k5avgzow0jxfb4pollwprx2q))/mileg.aspx?page=getObject&objectName=mcl-752-933).

<sup>8</sup> Florida Statutes 943.326, Evidence Collected in Sexual Offense Investigations, see: [http://www.leg.state.fl.us/Statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0900-0999/0943/Sections/0943.326.html](http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0900-0999/0943/Sections/0943.326.html).

<sup>9</sup> See DD Form 2911, available at: [http://www.sapr.mil/public/docs/miscellaneous/toolkit/dd2911\\_Sept\\_2015.pdf](http://www.sapr.mil/public/docs/miscellaneous/toolkit/dd2911_Sept_2015.pdf)

## Discussion

OVW offers three key reasons why policies favoring testing non-investigative SAKs without the consent of victims are ill-advised:

1. **Testing a kit before the victim has made a report to law enforcement undermines the victim's prerogative to decide if and when to engage with the criminal justice system.**

Federal law provides that a crime victim's rights include "the right to be treated with fairness and with respect for the victim's dignity and privacy."<sup>10</sup> In keeping with that principle, the sexual assault investigation model policy of the International Association of Chiefs of Police (IACP) states that that departments "shall respect a victim's inability, or decision not, to be involved in criminal justice proceedings and always be willing to offer continued assistance and referrals."<sup>11</sup>

Sexual assault is a uniquely personal and traumatic crime. According to the Bureau of Justice Statistics (BJS), only 33.6 percent of rapes and sexual assaults were reported to law enforcement in 2014, making these the most underreported violent crimes by a significant margin.<sup>12</sup> Victims cite many reasons for not reporting their victimizations, from feelings of shame and self-blame to fear of not being believed or of being accused of complicity in the crime.<sup>13</sup>

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<sup>10</sup> 18 U.S.C. § 3771(a)(8)

<sup>11</sup> <http://www.evawintl.org/images/uploads/Documents/IACP%20MODEL%20POLICY.pdf>

<sup>12</sup> Truman, J., & Langton, L. (September 2015). *Criminal victimization, 2014*. Washington, DC: Bureau of Justice Statistics. Available at: <http://www.bjs.gov/content/pub/pdf/cv14.pdf>.

<sup>13</sup> See, for example: Ullman, S. E. (2010). *Talking about sexual assault: Society's response to survivors*. Washington, DC: American Psychological Association.; and Du Mont, J., K. L. Miller, and T. L. Myhr. (April 2003). The role of 'real rape' and 'real victim' stereotypes in the police reporting practices of sexually assaulted women. *Violence Against Women* 9(4), 466-486.

### Combined DNA Indexing System (CODIS) Eligibility

One purpose of testing SAKs is to generate a DNA profile that is eligible for upload into CODIS and the National DNA Index System (NDIS), maintained by the Federal Bureau of Investigation (FBI). The Federal DNA Identification Act [42 U.S.C. §14132(a)(2)] governs NDIS, including the types of DNA records that can be maintained at the national level. It also authorizes the inclusion in NDIS of DNA records from "analyses of DNA samples recovered from crime scenes." [NDIS Operational Procedures](#) explain that a forensic DNA record "submitted to NDIS shall originate from and/or be associated with a crime scene; the source of which is attributable to a putative perpetrator" (Section 4.2.1.3). Putative perpetrator DNA recovered from a victim's body in a sexual assault case is considered crime scene evidence.

The evidence contained in a SAK is generally eligible for CODIS and NDIS **if there is documentation that a crime was committed and if, under circumstances in which there were any consensual partners whose DNA might also be recovered during a medical forensic exam, elimination samples have been provided by, or requested from, those individuals.**

For answers to frequently asked questions about CODIS and NDIS, see:

<https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>.

The relatively few sexual assaults that are reported are characterized by attrition, as the majority of those cases are dropped at various points in the investigation or prosecution stages. Most sexual assaults reported to law enforcement will not result in an arrest.<sup>14</sup> A 2014 study found that 80 to 89 percent of sexual assaults reported to law enforcement were not referred by police to prosecutors or were not charged by a prosecutor.<sup>15</sup> Fortunately, research funded by NIJ has found that Sexual Assault Nurse Examiner (SANE) programs and multidisciplinary Sexual Assault Response Teams (SARTs) can improve the quality of healthcare that victims receive after an assault, improve the quality of forensic evidence, and increase prosecution rates over time.<sup>16</sup>

It is important to understand that some victims may be reluctant to engage the criminal justice system. Some victims fear that doing so may come at a high cost to themselves and their loved ones, while offender accountability is not guaranteed. Reporting a sexual assault can take a considerable toll on some victims in the form of further emotional trauma, humiliation, fear or actuality of retaliation, loss of privacy, having one's personal life scrutinized, lost wages when work is missed to deal with matters related to the case, transportation and childcare costs related to participating in the legal process, and more. For some victims, seeking resolution through the criminal justice system is not a priority, when faced with other barriers and challenges. Therefore, a victim's choice whether or not to report to law enforcement is one that should be honored.

Furthermore, a victim should not have to decide whether to make a police report prior to obtaining a medical forensic exam. Someone who has suffered head trauma or strangulation during a sexual assault should be able to seek treatment for potentially life-threatening injuries—and have evidence of the sexual assault collected in the course of receiving that treatment—without having to make an immediate decision about reporting the assault to law enforcement. To that end, the Violence Against Women Act (VAWA) includes a provision<sup>17</sup> to ensure that victims have access to medical forensic examinations regardless of whether they wish at that time to assist in an investigation. Specifically, as a condition for receiving certain funding, states must certify that they do not require victims of sexual assault to participate in the criminal justice system or cooperate with law enforcement in order to be provided with a medical forensic exam free of charge.

In keeping with the spirit of this statute, many jurisdictions have implemented [alternative reporting and non-reporting options](#) that allow victims to obtain a medical forensic exam while delaying or foregoing a report to law enforcement, and offer them the opportunity to consent or decline to having their SAK

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<sup>14</sup> See, for example: Spohn, C., & Tellis, K. M. (2014). *Policing and prosecuting sexual assault: Inside the criminal justice system*. Boulder, CO: Lynne Rienner.

<sup>15</sup> Campbell, R., Bybee, D., Townsend, S. M., Shaw, J., Karim, N., & Markowitz, J. (May 2014). The impact of Sexual Assault Nurse Examiner programs on criminal justice case outcomes: A multisite replication study. *Violence Against Women*. 20(5), p. 607-625.

<sup>16</sup> Crandall, C., & Helitzer, D. (2003). *Impact evaluation of a Sexual Assault Nurse Examiner (SANE) program* (NCJ 203276). Washington, DC: National Institute of Justice; and, Campbell, R., Bybee, D., Ford, J. K., & Patterson, D. (2009). *Systems change analysis of SANE programs: Identifying the mediating mechanisms of criminal justice system impact*. (NCJ 226498). Washington, DC, National Institute of Justice.

<sup>17</sup> 42 U.S.C. § 3796gg-4(d)(1) (2005)

submitted for testing. Additionally, jurisdictions hold kits for a designated period of time in case the victims later want to make a report to law enforcement. By encouraging sexual assault victims to reach out for help and receive medical forensic and other services, as well as gather information about the criminal justice system, this could result in more victims later deciding to report the crime to law enforcement and assist in an investigation. In 2015, the Technical Working Group on Biological Evidence Preservation issued recommendations on evidence retention, and forthcoming guidance from NIJ will include recommended evidence retention periods for non-investigative kits.<sup>18</sup>

## **2. Testing a kit without the victim’s express consent either to submit the kit or to report the assault to law enforcement is not an advisable way to cultivate community trust.**

The discovery in numerous jurisdictions that many sexual assault victims had come forward to report crimes to police and had undergone medical forensic exams but their SAKs were never submitted for laboratory testing (unsubmitted kits), resulted in significantly undermining community trust. In considering whether to test non-investigative kits, stakeholders need to account for the factors that led to the accumulation of so many unsubmitted kits from victims who had reported their assaults to law enforcement. Research funded by NIJ in Detroit found that victim-blaming beliefs and behaviors by law enforcement were one of five reasons kits were not submitted for testing.<sup>19</sup> Resource shortages and limited technological and scientific capabilities at the time when many of these assaults happened also contributed to the problem of untested kits, but it must be acknowledged that large quantities of unsubmitted SAKs may be indicative of other systemic problems, including potential bias (implicit or explicit) against women and victims of sex crimes that can impact all levels of law enforcement command and extend to prosecutors, judges, and juries.<sup>20</sup>

The consequences of consistently shelving SAKs and failing to thoroughly investigate sexual assaults that were reported to the police are devastating to victims and communities and can make other victims more reluctant to engage in the criminal justice process. Indeed, some sexual assaults and murders could have been prevented if an offender had been held to account for an earlier rape when the victim initially came forward and reported it to law enforcement. It is by properly investigating and prosecuting those sexual assault cases for which the victim has reported the crime that those jurisdictions will begin to rebuild community trust and encourage more victims to engage in the criminal justice process.

Therefore, in revisiting old cases, communities engaged in SAK testing efforts should avoid approaches that could further damage community trust and create additional barriers to reporting sexual assault. Testing SAKs associated with victims who obtained medical forensic exams but who have not consented

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<sup>18</sup> See: *Biological Evidence Preservation: Consideration for Policy Makers*, Technical Working Group on Biological Evidence Preservation, U.S. Department of Commerce, April 2015; available at: <http://dx.doi.org/10.6028/NIST.IR.8048>

<sup>19</sup> Campbell, R., Fehler-Cabral, G., Pierce, S. J., Sharma, D. B., Bybee, D., Shaw, J., Horsford, S., & Feeney, H. (2015). *The Detroit Sexual Assault Kit (SAK) Action Research Project (ARP), Final Report*. Washington, DC: U.S. Department of Justice.

<sup>20</sup> In 2016, the Department of Justice issued guidance on *Identifying and Preventing Gender Bias in Enforcement Response to Sexual Assault Domestic Violence*, available at: <https://www.justice.gov/opa/file/799366/download>. For a discussion of how extra-legal factors influence decisions in the criminal justice system, see: O’Neal, E. N., Tellis, K., & Spohn, C. (2015). Prosecuting intimate partner sexual assault: Legal and extra-legal factors that influence charging decisions. *Violence Against Women*, 21(10), pp. 1237-1258.

to having the kit tested by law enforcement, can result in a sense of revictimization and can undermine community trust.

In facing the enormity of so many untested SAKs, it is incumbent on law enforcement agencies to make their best effort to rectify past wrongs and build community trust. Doing so necessitates handling evidence and conducting investigations in a way that honors victims' rights, privacy, needs, and self-determination.

### **3. Funding for testing SAKs is not unlimited, and grant funds should be directed to activities that promote accountability for offenders and justice and healing for victims.**

An effective approach to dealing with unsubmitted SAKs requires investments in victim services, investigation, and prosecution. It warrants scrutiny when a jurisdiction opts to test SAKs against some victims' express will, while work that is fundamental to administering justice and serving victims remains under-resourced.

When kits associated with victims who reported their assaults to law enforcement have not yet been tested, investigative leads in those cases have not been followed thoroughly, and victim service providers in the community have not been fully resourced to provide victims with an array of services, these issues undermine an effective coordinated community response to sexual assault. Recommended practice is to allocate resources to strengthen the coordinated community response in those cases in which victims *have* chosen to report a crime to law enforcement and have the SAK submitted for testing.

Descriptions of the approaches taken in Houston and Detroit to notifying and reengaging victims in cases associated with unsubmitted SAKs can be found in the resources listed at the end of this document. A series of brief reports available on [Houston's SAK Research website](#), including [Sexual Assault Victims' Experiences of Notification after a CODIS Hit](#), can be useful to communities that are determining when and how to contact victims as they implement SAK testing initiatives.

## Resources

The items listed below offer additional guidance, information, and perspectives on sexual assault kits and sexual assault investigation.

### **Department of Justice Resources**

- The [National Protocol for Sexual Assault Medical Forensic Examinations – Adult/Adolescent](#) (SAFE Protocol) describes a victim-centered approach to medical forensic care.
  - Technical assistance on the Protocol is available through the International Association of Forensic Nurses (IAFN)'s SAFETa website: <http://www.safeta.org/>.
- [Sexual Assault Kits: Using Science to Find Solutions](#) is a resource from NIJ that consolidates the best knowledge and resources to date on untested kits.
- The DOJ issued guidance in 2015 for [Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence](#), providing a set of principles to prevent explicit and implicit gender bias in policing.

## End Violence Against Women International (EVAWI) Resources

- [End Violence Against Women International \(EVAWI\)](#)'s free [Online Training Institute](#) (OLTI) offers knowledge and skills for investigating and prosecuting sexual assault. See in particular: [Laboratory Analysis of Biological Evidence and the Role of DNA in Sexual Assault Investigations](#).
  - EVAWI also provides [technical assistance and resources](#) on forensic compliance, meaning the VAWA provision ensuring that victims have access to medical forensic exams regardless of whether they wish to assist in an investigation.
- [Should we “test anonymous kits?” What’s wrong with this question, what should the correct question be, and what is the answer for communities seeking to implement best practices?](#)
- [Understanding the Role of DNA Evidence in Sexual Assault Investigation: Part 6, Policy Responses, Assessment, and Recommendations, for Practice](#)

## Research documenting SAK testing initiatives in Detroit and Houston

- The [final report of the Detroit Sexual Assault Kit Action Research Project](#) describes what was accomplished and what was learned through Detroit’s multidisciplinary approach to handling unsubmitted kits and improving the response in current cases.
- Documents produced through [Houston’s Sexual Assault Kit Research](#) project describe Houston’s approach to testing unsubmitted kits and related research findings.
- [Notifying Sexual Assault Victims after Testing Sexual Assault Evidence](#), published in 2016 by NIJ, summarizes how Detroit and Houston approached victim notification.

## Additional materials

- The Minnesota Coalition Against Sexual Assault (MNCASA) provides [a three-part issue brief series](#) to support administrators of VAWA formula funds as they address untested kits in their states.
- A [three-part interview](#) with Dr. Rebecca Campbell explains the neurobiological effects of trauma and implications for the criminal justice response to sexual assault.
- Webinars on victim notification and related issues are available through the [Institute on Domestic Violence and Sexual Assault](#) at the University of Texas – Austin.
- A Pulitzer Prize winning 2015 report by the Marshall Project and ProPublica, [An Unbelievable Story of Rape](#), describes how good police work by detectives in Colorado played a much larger role than DNA evidence in an investigation that led to the arrest and conviction of a serial offender.