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Sexual Assault Kits (SAKs) and the Backlog of Untested Sexual Assault Evidence: In Brief

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Sexual Assault Kits (SAKs) and the Backlog of Untested Sexual Assault Evidence: In Brief

Sexual assault kits (SAKs, also referred to as rape kits) are used by medical professionals to collect evidence during a forensic medical exam of a sexual assault victim. Generally, upon completion of the medical exam and with the victim's consent, the kit is transferred to an authorized law enforcement agency that logs it into evidence. Procedure and protocol regarding when and where kits are sent, however, vary across jurisdictions. Some law enforcement agencies automatically send the kits to forensic laboratories for testing, while others wait for varying reasons and amounts of time. In some cases, this decision depends on when a request is made for a forensic analysis of a kit. Evidence from these kits may help identify or convict an alleged offender as well as exonerate those who were wrongly convicted of sexual assaults. DNA evidence collected during a forensic medical exam may also be stored in databases for use in other cases. The backlog of untested SAKs has raised concerns that these cases are not being fully investigated and that evidence in untested kits could have been used to prevent other victimizations.

When people refer to an SAK or rape kit backlog, they are referring to the quantity of *untested* kits that are either in law enforcement possession having never been submitted to a laboratory for testing, or kits that have been submitted to crime labs but have gone untested. However, the precise definition of *backlog* varies across jurisdictions; for example, in some cases a kit is considered backlogged if it is submitted to a crime lab and remains untested for more than 30 days. Although the status and location of the kits vary, the binding element of any definition of backlogged kits is that they have never been tested.

SAKs may remain untested for reasons such as limited resources in crime laboratories, as well as law enforcement and police discretion. Law enforcement may opt not to pursue a forensic investigation for a variety of reasons, including the perception of victim cooperation or a decision that the results of testing the kit would not be pertinent to the overall investigation.

There are several federal grants to address SAK availability, analysis, and the SAK backlog. These grants include the Sexual Assault Forensic Exam Program, the Sexual Assault Kit Initiative (SAKI), and the Debbie Smith DNA Backlog Grant Program, as well as several grants authorized in the Violence Against Women Act (VAWA).

Congress may consider exploring and assessing various aspects of the SAK backlog and debating the appropriate federal response. For example, Congress could consider designing measures to prevent future backlogs through conditioning grants to states and local entities. Congress could also consider addressing issues such as the shortage of Sexual Assault Nurse Examiners (SANE) in rural areas, as these medical professionals are specially trained to collect SAKs and care for assault victims, or consider the desired level of federal support for other programs concerning the needs of sexual assault victims during the evidence collection process (e.g., grants to address language barriers).

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Policymakers have shown an interest in addressing the backlog of sexual assault kits (SAKs, also called rape kits) across the United States.¹ The backlog results from SAKs that are either unsubmitted² to a crime laboratory or untested³ following submission.⁴ Advocates and policymakers have raised concern over the backlog, particularly as it relates to the rights of sexual assault victims and the uncovering of evidence that could be used to identify a perpetrator or prevent subsequent sexual assaults.⁵ For example, a review of recent research concerning the use of sexual assault kits indicated that 25%-50% of tested SAKs generated Combined DNA Index System (CODIS)-eligible DNA profiles⁶ and 50%-60% of those profiles resulted in a hit (i.e., revealed the DNA identification of the suspect).⁷ This report provides background on forensic medical exams, the SAK backlog, and federal efforts to reduce it.

Role of Federal Government in Forensic Data Collection

The Federal Bureau of Investigation (FBI) operates and maintains CODIS, a national DNA database where federal, state, and local laboratories upload and compare DNA profiles to generate leads in criminal investigations.⁸

Forensic Medical Examinations

A forensic medical examination, sometimes called Sexual Assault Forensic Examination (SAFE), is a medical examination provided to a sexual assault victim by a medical professional, often a Forensic Nurse Examiner/Sexual Assault Nurse Examiner (SANE).⁹

Sexual Assault Nurse Examiners (SANE)

A SANE is a registered nurse with additional training in providing care for victims of sexual assault as well as collecting forensic evidence.¹⁰ They may also receive additional training in pediatric care and exams.¹¹ A SANE,

¹ The terms *untested kit* or *unsubmitted kit* refer only to the evidence collected from a victim using an SAK during a forensic exam. Non-DNA related components of a forensic exam are not included in this term.

² *Unsubmitted* is used to refer to SAKs that are in police custody but not sent to a crime laboratory for forensic testing. U.S. Department of Justice (DOJ), Office of Justice Programs (OJP), National Institute of Justice (NIJ), *Sexual Assault Kits: Using Science to Find Solutions*, <https://www.nij.gov/unsubmitted-kits/> (hereinafter, “*Sexual Assault Kits: Using Science to Find Solutions*”).

³ *Sexual Assault Kits: Using Science to Find Solutions*. In some jurisdictions, this is defined as untested for at least 30 days.

⁴ *Sexual Assault Kits: Using Science to Find Solutions*.

⁵ Joyful Heart Foundation, *Endthebacklog: Why Testing Every Kit Matters*, <http://endthebacklog.org/>.

⁶ In other words, profiles that meet FBI standards for inclusion in CODIS. For more information, see CRS Report R41800, *The Use of DNA by the Criminal Justice System and the Federal Role: Background, Current Law, and Grants*.

⁷ Gillian M. Pinchevsky, “Criminal Justice Considerations for Unsubmitted and Untested Sexual Assault Kits: A Review of the Literature and Suggestions for Moving Forward,” *Criminal Justice Policy Review*, vol. 29, no. 9 (2018).

⁸ See CRS Report R41800, *The Use of DNA by the Criminal Justice System and the Federal Role: Background, Current Law, and Grants*.

⁹ DOJ, Office on Violence Against Women (OVW), *A National Protocol for Sexual Assault Medical Forensic Examinations*, NCJ 228119, April 2013 (hereinafter “*A National Protocol for Sexual Assault Medical Forensic Examinations*”). Also defined for grant purposes in 28 C.F.R. §90.2.

¹⁰ Office for Victims of Crime (OVC), *What is a SANE?*, <https://www.ovcttac.gov/saneguide/introduction/what-is-a-sane/> (hereinafter “*What is a SANE?*”). There are individuals who have different medical training (e.g., physicians) or work in specific medical settings (e.g., military) that are given a different title but provide a similar service such as Sexual Assault Forensic Examiners, Sexual Assault Examiners, or Sexual Assault Medical Forensic Examiners.

¹¹ OVC, *History and Development of SANE programs*, <https://www.ovcttac.gov/saneguide/introduction/history-and->

“ultimately provides culturally sensitive, developmentally appropriate, trauma-informed, and patient-specific evaluation and treatment.”¹² A SANE may testify in a criminal or civil trial as either a fact or expert witness.

A forensic medical exam involves collecting a complete medical history from the victim, a full-body physical examination, documentation of biological and/or physical findings, and evidence collection.¹³ The exam may include collecting blood, urine, hair, and other body secretion samples; photo documentation of any injuries sustained during the assault; collecting the victim’s clothing, especially undergarments; and securing any possible physical evidence that may have transferred onto the victim from the crime scene.¹⁴ Non-forensic medical care may also be provided including treatment for injuries, sexually transmitted infections (STI) screening and treatment, pregnancy testing, emergency contraception, and mental health services. Additional medical staff should be admitted only with patient permission when possible.¹⁵ Patients may have a friend, family member, or other support people present.¹⁶ In some cases, victim advocates and translators may be present before, during, or after an exam.¹⁷

In most cases, information and evidence collected during an exam cannot be released to law enforcement without the victim’s permission.¹⁸ As such, it is recommended that law enforcement not be present during an exam in order to ensure that the decision to report to law enforcement is clearly separate from the choice to receive medical care and that a victim can, “speak confidentially with treating healthcare professionals.”¹⁹

The Survivors' Bill of Rights and the Cost of Forensic Medical Exams

The Survivor’s Bill of Rights²⁰ (P.L. 114-236), among other things, amended the federal criminal code to establish statutory rights for survivors of sexual assault. These include the right to “(1) not be prevented from receiving a forensic medical examination and not be charged for an examination; (2) have a sexual assault evidence collection kit (i.e., a rape kit) preserved for 20 years or the maximum applicable statute of limitations, whichever is shorter; (3) receive written notification prior to destruction or disposal of a rape kit; and (4) be informed of these rights and policies.”

In order to receive Office on Violence Against Women STOP [Services, Training, Officers, Prosecutors] formula grant funds, states and territories must certify that forensic medical exams are provided with no out-of-pocket cost to the victim regardless of whether the assault is reported to law enforcement.²¹ However, medical services for injuries sustained in an assault but not related to evidence gathering are not required to be provided at no

development-of-sane-programs/ (hereinafter, “History and Development of SANE programs”).

¹² *What is a SANE?*.

¹³ 28 C.F.R. §90.2.

¹⁴ DOJ, OJP. National Sexual Assault Kit Initiative (SAKI), *Medical History and Law Enforcement Interviews: Separate and Collaborative*, September 2018, <https://www.ojp.gov/library/publications/medical-history-and-law-enforcement-interviews-separate-and-collaborative>, p. 1; *A National Protocol for Sexual Assault Medical Forensic Examinations*.

¹⁵ *A National Protocol for Sexual Assault Medical Forensic Examinations*, p. 41.

¹⁶ *A National Protocol for Sexual Assault Medical Forensic Examinations*, p. 29.

¹⁷ *A National Protocol for Sexual Assault Medical Forensic Examinations*, p. 39.

¹⁸ *A National Protocol for Sexual Assault Medical Forensic Examinations*, p. 43. Note that there are some specific populations that cannot legally provide consent (e.g., minors or individuals with cognitive impairments).

¹⁹ *A National Protocol for Sexual Assault Medical Forensic Examinations*, p. 41.

²⁰ A similar bill, the Sexual Assault Survivor’s Rights Act, was introduced in the House and Senate during 114th Congress (H.R. 5571/S. 2566).

²¹ *A National Protocol for Sexual Assault Medical Forensic Examinations*, pp. 55-56

cost. Victims may be eligible for other federal or state financial assistance to help cover related medical expenses.²²

During the exam, potential DNA evidence is collected using an SAK.²³ The contents of a kit can vary across jurisdictions since some create their own kits and others purchase them from commercial vendors.²⁴ In general, SAKs include (1) a kit container; (2) instructions; (3) bags, sheets, and envelopes for evidence collection (e.g., clothing and other materials); (4) swabs (i.e., vaginal/cervical, penile, anal/perianal, oral, body, and buccal swabs) for collecting fluids or secretions that could contain a perpetrator's DNA; (5) a comb for collecting hair samples; (6) blood collection devices; and (7) documentation forms.²⁵ Evidence obtained with an SAK can be used for several purposes, for example, it may be used to establish elements of a crime including the time at which the attack occurred. DNA evidence collected during the forensic exam can also establish a link between two individuals, and this link may help identify or convict an alleged offender as well as exonerate those who were wrongly convicted of sexual assaults. DNA profiles developed from biological evidence may also be stored in a DNA database for use in other cases.²⁶

Informed Consent for Exam and Evidence Collection

A victim must provide informed consent separately for both medical treatment (e.g., medical care, pregnancy testing, STI testing) and evidence collection (e.g., SAK, toxicology screening).²⁷ Informed consent means a patient must be advised, in a language and at a level they understand, about the details of each procedure including possible side effects as well as any limits on confidentiality prior to providing written or verbal consent for medical and forensic procedures without coercion or judgment.²⁸ A patient must be aware that they can decline any or all parts of these procedures, and they must also be advised about the effect that declining various procedures may have for their medical care and for a criminal investigation and prosecution if they report the assault.²⁹

Outside of cases that fall under mandatory reporting laws (e.g., minors), consenting to a forensic medical exam or SAK does not equate to consenting to medical professionals sharing this information with law enforcement or the victim agreeing to report the assault to police.³⁰ The exam and SAK preserve forensic evidence should the victim choose to report the assault. In cases when a victim cannot provide consent (e.g., minors or cognitively impaired individuals), typically

²² For more information see CRS Report R42672, *The Crime Victims Fund: Federal Support for Victims of Crime*.

²³ Rape, Abuse and Incest National Network (RAINN), *What Is a Sexual Assault Forensic Exam?*, <https://www.rainn.org/articles/rape-kit> (hereinafter, "What is a Sexual Assault Forensic Exam").

²⁴ *A National Protocol for Sexual Assault Medical Forensic Examinations*, p. 7.

²⁵ International Association of Forensic Nurses, *Sexual Assault Evidence Collection Kit*, <https://www.safeta.org/page/OperationalKits>.

²⁶ For more information on DNA databases, see CRS Report R41800, *The Use of DNA by the Criminal Justice System and the Federal Role: Background, Current Law, and Grants*.

²⁷ *A National Protocol for Sexual Assault Medical Forensic Examinations*, p. 43. Note that there are some specific populations that cannot legally provide consent (e.g., minors or individuals with cognitive impairments).

²⁸ *A National Protocol for Sexual Assault Medical Forensic Examinations* p. 43.

²⁹ *A National Protocol for Sexual Assault Medical Forensic Examinations*, p. 43. For example, declining an examination may be used by defense attorneys to discredit a victim.

³⁰ *What is a Sexual Assault Forensic Exam*.

state and local laws govern from whom and how consent may be obtained.³¹ For instance, in some jurisdictions, a victim who is a minor, may be able to consent to (or decline) an exam without a parent or guardian but the results may not be kept confidential from the parent/guardian.³² There are often exceptions that allow law enforcement, a judge, or children's services representative to provide consent when the parent/guardian is the suspected offender or their location is unknown.³³

Procedure Following Forensic Medical Exam

Upon completion of a forensic medical exam and if consent is given by the victim (or their guardian or representative), SAKs are transferred to law enforcement, who log the kits into evidence.³⁴ Procedures and protocols regarding when and where kits are sent, however, vary across jurisdictions. Some law enforcement agencies automatically send the kits to forensic laboratories for testing while others remain in police custody for varying amounts of time before being sent to a forensic laboratory, in some cases depending on whether law enforcement or a prosecutor requests forensic analysis.

Laboratories vary on how items are screened, which items are tested, and the length of time taken to complete testing.³⁵ There are very little data to indicate the average turnaround time (TAT) for forensic DNA testing in crime labs across the United States. Perhaps the most comprehensive study was conducted 15 years ago, and found that in 2007 nearly three-quarters of surveyed crime laboratories in the United States reported that DNA analysis requests were completed within four months. The remaining laboratories required more than six to nine months to complete DNA analysis.³⁶ It is unknown whether these data from 15 years ago remain representative of the average TAT. Some states release reports on TAT; for example, the Wisconsin Division of Forensic Sciences found the average TAT for DNA analysis in state crime labs decreased from an average of 97 days in 2019 to 94 days in 2020.³⁷ While state level-data may not be representative of the average TAT nationally, what data are available seem to indicate that TAT varies widely.³⁸ The average TAT for biological testing in Maryland was 124 days in 2020³⁹, the average TAT for DNA analysis in Delaware was 27.1 days in 2020 (34.7 in 2019)⁴⁰, and in Montana the average TAT for DNA testing related to crimes against a person was about 275 days (about 225 in 2019).⁴¹

³¹ *A National Protocol for Sexual Assault Medical Forensic Examinations*, pp. 44-45.

³² *A National Protocol for Sexual Assault Medical Forensic Examinations*, pp. 44-45.

³³ *A National Protocol for Sexual Assault Medical Forensic Examinations*, pp. 44-45.

³⁴ *Jane Doe Kits*, or those resulting from cases in which the victim has decided not to pursue criminal charges, are typically labeled with an anonymous tracking number that may be shared with the victim should they change their mind. The policies about how these kits are stored are determined by the state.

³⁵ *Sexual Assault Kits: Using Science to Find Solutions*; Lisa Hurst and Kevin Lothridge, *2007 DNA Evidence and Offender Analysis Measurement: DNA Backlogs, Capacity and Funding*, NIJ, June 2010, <https://www.ncjrs.gov/pdffiles1/nij/grants/230328.pdf> (hereinafter, "*2007 DNA Evidence and Offender Analysis Measurement*").

³⁶ *2007 DNA Evidence and Offender Analysis Measurement*, p. 8.

³⁷ Wisconsin Department of Justice, Division of Forensic Sciences, *Annual Report 2020*, https://www.doj.state.wi.us/sites/default/files/news-media/4.15.21_Annual_Report.pdf, p. 9.

³⁸ The state level data presented here are not comprehensive. The states included are those for which data was located, and are presented merely to indicate the potential range of TATs across states.

³⁹ Maryland State Police, Forensic Science Division, *Annual Report 2020*, <https://mdsp.maryland.gov/Organization/Documents/FSD%20Annual%20Report%202020.pdf>, p. 9.

⁴⁰ Delaware Division of Forensic Sciences, *2020 Annual Report*, <https://forensics.delaware.gov/resources/contentFolder/pdfs/2020%20DFS%20Annual%20Report.pdf>, p. 38

⁴¹ Montana Department of Justice, Forensic Science Division, *Annual Report 2020*, <https://media.dojmt.gov/wp->

In many cases these reports stated that TATs were significantly affected by the COVID-19 pandemic, so these data also may not generalize to non-pandemic conditions.

The SAK Backlog

The SAK, or rape kit, backlog refers to untested kits that are either in the possession of law enforcement and never submitted to a laboratory for testing or were submitted to a crime lab but remained untested for more than 30 days.⁴² Research suggests the latter case of SAKs untested at a lab is more common.⁴³ The definition used for a backlog can vary across jurisdictions, for example by the number of days required or submission status (i.e., whether the kit is in the lab awaiting a test or unsubmitted to a lab). The binding element across these definitions is that regardless of location or specific days counted, the kits remain untested.

Why test the backlog?

Research has demonstrated that testing backlogged SAKs can lead to CODIS hits and subsequent convictions. For example, a study of 3,422 untested kits in Michigan yielded 585 CODIS hits (17%) after testing.⁴⁴ Another study of 491 untested kits in the possession of the Houston Police Department yielded 104 CODIS hits (21%) after testing, and 16 of the hits led to an arrest (15%).⁴⁵ A study of 600 untested kits in Denver, Colorado resulted in 97 CODIS hits. Among those 97 hits, in 55 (57%) cases a suspected perpetrator was arrested, and 92% of those arrested were eventually convicted.⁴⁶ However, the rate of arrests and convictions stemming from untested SAKs varies widely. A study of untested SAKs in Texas that compared rates from 9 other studies published between 2010 and 2019 found that in these jurisdictions, of the kits that returned a CODIS hit, between 0 and 57% led to an arrest and between 0 and 30% led to a conviction.⁴⁷

Testing the backlog may also help address wrongful convictions. An NIJ-funded study by the Urban Institute on wrongful convictions found that among 231 cases with a sexual assault component that had evidence sufficient for post-conviction DNA testing, 12.6% “yielded exculpatory DNA evidence that would be supportive of the convicted suspect’s exoneration.”⁴⁸

content/uploads/2020-FSD-Annual-Report.pdf, p. 29.

⁴² *Sexual Assault Kits: Using Science to Find Solutions*.

⁴³ *Sexual Assault Kits: Using Science to Find Solutions*.

⁴⁴ Rebecca Campbell et al., “A State Census of Unsubmitted Sexual Assault Kits: Comparing Forensic DNA Testing Outcomes by Geographic and Population Density Characteristic,” *Journal of Forensic Science*, vol. 64, no. 6 (2020).

⁴⁵ William Wells, Ashley K. Fansher, and Bradley A. Campbell, “The Results of CODIS-Hit Investigations in a Sample of Cases With Unsubmitted Sexual Assault Kits,” *Crime & Delinquency*, vol. 65, no. 1 (2017).

⁴⁶ Robert Davis and William Wells, “DNA testing in sexual assault cases: When do the benefits outweigh the costs?,” *Forensic Science International*, vol. 299 (2018).

⁴⁷ Robert C. Davis et al., “Investigative Outcomes of CODIS Matches in Previously Untested Sexual Assault Kits,” *Criminal Justice Policy Review*, vol. 32, no. 8 (2021). Note that one of the nine studies included in this article was the Davis and Wells article cited in footnote 46.

⁴⁸ Kelly Walsh et al., “Estimating the Prevalence of Wrongful Convictions,” *The Urban Institute*, May 2017, <https://www.ojp.gov/ncjrs/virtual-library/abstracts/estimating-prevalence-wrongful-convictions>, p. 10.

How many backlogged kits are there?

In 2016, NIJ reported that the number of unanalyzed SAKs nationwide is unknown.⁴⁹ There are many reasons for this, though a primary factor is that there is no national system for collecting and tracking SAKs in law enforcement or crime lab possession.⁵⁰ In many jurisdictions, tracking and counting SAKs is an antiquated process (often done in non-electronic formats), and the availability of computerized evidence-tracking systems has long been an issue.⁵¹

In the absence of more precise data, many researchers and advocacy organizations have attempted to estimate the size of the backlog. A study published in 2021 used data collected from 911 counties in 15 states to generate a national estimate of 300,000 to 400,000 unsubmitted SAKs between 2014 and 2018.⁵² A 2018 NIJ-funded study estimated that 200,000 untested kits remain in the custody of police departments.⁵³ The Joyful Heart Foundation, a national organization that advocates on behalf of sexual assault victims, is attempting to address the lack of complete and timely data by counting the SAK backlog through public records requests and tracking data in cities and states across the country.⁵⁴ As of January 2022, they have documented nearly 90,000 untested kits in 37 states and Washington, DC.⁵⁵

Federal Research on SAK Backlogs

NIJ has funded research to address the lack of data on the backlog and the absence of evidence-based “best practices” for addressing it.⁵⁶ For example, in 2011 NIJ funded research to conduct a census of all SAKs in the possession of law enforcement in Detroit, MI.⁵⁷ Team members manually counted approximately 11,300 SAKs collected from 1980 through November 1, 2009.⁵⁸ The census took 15 weeks and 2,365 person-hours. The team found 8,707 unsubmitted SAKs and 2,512 kits with lab numbers but indeterminate testing status. A total of 1,595 SAKs were tested and nearly half (785 SAKs) yielded CODIS-eligible DNA profiles, resulting in 455 hits, and identifying 127 serial sexual assaults.⁵⁹ NIJ reported that one of the important lessons learned from their research is the value of multidisciplinary teams that included prosecutors, medical professionals, community advocates, law

⁴⁹ DOJ, OJP, NIJ, *Untested Evidence in Sexual Assault Cases, Overview of the Issue*, March 17, 2016, <https://nij.ojp.gov/topics/articles/untested-evidence-sexual-assault-cases#overview> (hereinafter, “*NIJ SAK Overview of the Issue*”).

⁵⁰ *NIJ SAK Overview of the Issue*.

⁵¹ *NIJ SAK Overview of the Issue*.

⁵² Kevin Strom et al., “How much justice is denied? An estimate of unsubmitted sexual assault kits in the United States,” *Journal of Criminal Justice*, Volume 73 (2021).

⁵³ Rebecca Campbell et al., “Tested at Last: How DNA Evidence in Untested Rape Kits Can Identify Offenders and Serial Sexual Assaults,” *Journal of Interpersonal Violence*, vol. 33, no. 24 (2018) (hereinafter, “*Tested At Last*”).

⁵⁴ See The Joyful Heart Foundation, *Where the Backlog Exists*, <http://endthebacklog.org/backlog/where-backlog-exists>, (hereinafter, “*Where the Backlog Exists*”). It is not clear when these data were last updated and not all data are current, although sources and updates are listed for each state in some cases through 2021.

⁵⁵ *Where the Backlog Exists*. The following states are listed as unknown: Alabama, Illinois, Maine, Massachusetts, Mississippi, Nebraska, New Jersey, Ohio, Rhode Island, Tennessee, West Virginia, Wisconsin, and Wyoming.

⁵⁶ Nancy Ritter, *The Road Ahead: Unanalyzed Evidence in Sexual Assault Cases*, NIJ Special Report, May 2011, <https://www.ncjrs.gov/pdffiles1/nij/233279.pdf>, p. 4; DOJ, OJP, NIJ, *Untested Evidence in Sexual Assault Cases*, March 2016, <http://www.nij.gov/topics/law-enforcement/investigations/sexual-assault/Pages/untested-sexual-assault.aspx>.

⁵⁷ Wayne County.

⁵⁸ Rebecca Campbell, Giannina Fehler-Cabral, and Steven Pierce, et al., *The Detroit Sexual Assault Kit (SAK) Action Research Project (ARP), Final Report*, NIJ, March 2015, <https://nij.ojp.gov/library/publications/detroit-sexual-assault-kit-sak-action-research-project-arp-final-report>, pp. 282-283 (hereinafter, “*The Detroit Sexual Assault Kit (SAK) Action Research Project (ARP), Final Report*”).

⁵⁹ *The Detroit Sexual Assault Kit (SAK) Action Research Project (ARP), Final Report*, pp. 302-303.

enforcement, justice advocates, and crime lab scientists.⁶⁰ NIJ notes that solving sexual assault crimes is a complicated process—it is more than simply testing biological evidence in the SAK—and the multidisciplinary teams can help facilitate the process in a manner that is victim-centered⁶¹ and trauma-informed.⁶²

Why do some kits remain untested?

SAKs may remain untested for several reasons including limited laboratory and law enforcement resources, police discretion, or in cases of long delays, expired statutes of limitations.⁶³

Limited Resources

Some forensic laboratories face backlogs not only for SAKs, but for all DNA evidence (e.g., hair or blood samples) collected from suspects or at crime scenes. In recent years, the demand for DNA testing has greatly increased along with technological improvements and growing awareness of its potential to help solve cases. A report on federal grants that address the DNA backlog determined that in states and units of local government that were awarded DNA Capacity Enhancement and Backlog Reduction (CEBR) grants, the total requests for DNA analysis increased from about 250,000 in 2011 to about 300,000 in 2017.⁶⁴ Across the same period, crime labs also completed more DNA analysis requests, increasing from just over 200,000 completed to more than 250,000.⁶⁵ However, the backlog for crime scene DNA analysis increased from 91,000 requests to about 169,000, or 85% indicating that the demand for DNA analysis continued to outpace the analytical capacity of the labs.⁶⁶

The cost of DNA testing varies based on many factors including the type and amount of evidence tested, whether a lab is public or private, and how many perpetrators may be suspected of involvement (i.e., whether the sample contains a mix of biological evidence from two or more suspects or suspects and the victim).⁶⁷ Thus, there is no standard cost to test DNA evidence collected using an SAK; however, the National Center for Victims of Crime reports that it costs

⁶⁰ *Sexual Assault Kits: Using Science to Find Solutions*.

⁶¹ The term *victim-centered* is defined as “the victim is at the center of all decisions regarding recovery and any involvement with the criminal justice system. The victim’s choice, safety, and wellbeing is the focus, and the needs of the victim are a concern for everyone—not just the victim advocates.” *Sexual Assault Kits: Using Science to Find Solutions*, p. 19.

⁶² The term *trauma-informed* is defined as “attending to the victim’s emotional and physical safety; using resources, services, and support to increase the victim’s capacity to recover; and educating victims, service providers, first responders, and the general community about the psychological impact of trauma on the health and well-being of the victim.” *Sexual Assault Kits: Using Science to Find Solutions*, p. 19.

⁶³ For general description see <https://www.endthebacklog.org/information-survivors-survivors-rights-locating-rape-kit/statute-limitations>. For a listing of state statute of limitation laws see <https://apps.rainn.org/policy/>.

⁶⁴ U.S. Government Accountability Office, *DNA Evidence DOJ Should Improve Performance Measurement and Properly Design Controls for Nationwide Grant Program*, GAO-19-216, March 2019 (hereinafter, “DNA Evidence”).

⁶⁵ *DNA Evidence*, p. 18.

⁶⁶ *DNA Evidence*, p. 17. For more information on DNA backlogs, see CRS Report R41800, *The Use of DNA by the Criminal Justice System and the Federal Role: Background, Current Law, and Grants*.

⁶⁷ The National Center for Victims of Crime, *FAQ*, <https://victimsofcrime.org/frequently-asked-questions/> (hereinafter, “NCVC FAQ”).

between \$500 and \$1,200 to test a kit.⁶⁸ The Joyful Heart Foundation reports that it costs between \$1,000 and \$1,500 to test a kit.⁶⁹

Police Discretion

Several jurisdictions require testing for all newly collected SAKs and some require testing of all backlogged and new SAKs. National best practices state, “All SAKs that the victim has consented to reporting to law enforcement should be submitted to the laboratory for DNA analysis.”⁷⁰

However, in practice, this is not always the case. In many jurisdictions, law enforcement personnel decide whether to submit SAKs for DNA testing. One reason law enforcement may not submit SAKs for testing is resource shortages including funding, lab capacity, staffing, and equipment.⁷¹ There may also be procedural reasons, for instance there being no specific request from a prosecutor, no charges filed, uncertainty about the usefulness of the evidence, lack of a known offender sample, or the DNA evidence wasn’t needed for a conviction to be obtained.⁷²

However, several studies have indicated that a primary reason may be law enforcement’s negative perceptions of sexual assault victim’s credibility or cooperation.⁷³ Another study found that perceptions about the victim or circumstances of a reported assault also influenced the judgments of crime lab personnel regarding whether a kit should be tested.⁷⁴

Considerations for a National Strategy to Address SAK Backlogs

The existence of thousands⁷⁵ of untested SAKs has led to calls for a national effort to test every kit; however, others argue that would not be the most efficient use of resources. Several issues might be considered in developing a national strategy to address the backlog, including the following:

- **Jurisdiction:** Most SAKs are in the possession of state and local law enforcement or crime labs, rather than federal law enforcement. The federal government cannot mandate that these agencies turn over their backlogged SAKs to a federal agency nor can they mandate participation in a federal testing program or SAK database. A federal strategy to address the national backlog may

⁶⁸ *NCVC FAQ*.

⁶⁹ The Joyful Heart Foundation, *Why the Backlog Exists*, <http://www.endthebacklog.org/backlog/why-backlog-exists>.

⁷⁰ DOJ, OJP, NIJ, *National Best Practices for Sexual Assault Kits: A Multidisciplinary Approach*, August 2017, <https://nij.ojp.gov/topics/articles/national-best-practices-sexual-assault-kits-multidisciplinary-approach>, p. 46 (hereinafter “*National Best Practices for Sexual Assault Kits: A Multidisciplinary Approach*”). Even in cases when a suspect has pled guilty, DNA testing can help with solving additional cases or exonerating innocent convicted offenders.

⁷¹ Rebecca Campbell, Hannah Feeney, Giannina Fehler-Cabral, Jessica Shaw, and Sheena Horsford, “The National Problem of Untested Sexual Assault Kits (SAKs): Scope, Causes, and Future Directions for Research, Policy, and Practice”, *Trauma, Violence & Abuse*, October 2017, Vol. 18, Issue 4 (hereinafter, “*The National Problem of Untested Sexual Assault Kits*”).

⁷² *The National Problem of Untested Sexual Assault Kits*.

⁷³ Rebecca Campbell and Giannina Fehler-Cabral, “Why Police “Couldn’t or Wouldn’t” Submit Sexual Assault Kits for Forensic DNA Testing: A Focal Concerns Theory Analysis of Untested Rape Kits”, *Law & Society Review*, vol. 52, no.1 (2018); *The National Problem of Untested Sexual Assault Kits*.

⁷⁴ Rebecca Campbell and Giannina Fehler-Cabral, ““Just Bring Us the Real Ones”: The Role of Forensic Crime Laboratories in Guarding the Gateway to Justice for Sexual Assault Victims”, *Journal of Interpersonal Violence*, Online ahead of print (2020).

⁷⁵ *Where the Backlog Exists*.

seek to account for the limited power the federal government has over state and local jurisdictions.

- **Statutes of Limitations:** In some cases, even if testing an SAK identified a perpetrator, the statute of limitations may have expired. There are still reasons to test such kits, for example, to connect several cases. However, it may be more efficient to establish a triage process for untested kits that sets up timelines for testing that accounts for limited financial and lab resources as well as the relevant statute of limitations.
- **Victim Input and Notification:** In some cases, a victim may not wish to have their backlogged SAK tested. For example, they may not want to revisit the trauma associated with their assault. A national strategy may seek to address the victim's role in the process, as well as create a plan regarding how and when to notify victims about testing and any investigative leads or identifications generated from the testing.
- **Victim Services:** A national strategy may also seek to ensure the availability of victim services to cope with the psychological and other difficulties associated with sexual assault. If a perpetrator is identified, victims may also benefit from victim assistance to support their participation in the criminal justice process.
- **Resource Shortages:** A national strategy may seek to account for jurisdictions that do not have the capacity to pursue the leads that could be generated from widespread testing of backlogged SAKs. Resource shortages may necessitate additional triage plans based on factors such as the age of the kit or the relationship between the victim and offender. A triage plan may also address untested kits for cases in which a perpetrator has already been convicted. There are reasons to test these kits, for example, to address potential wrongful convictions or to determine whether an offender may be implicated in other unsolved cases; however, these cases may not be judged to have priority.⁷⁶

Federal Grants to Reduce SAK Backlogs

The federal government has several grant programs to address the SAK backlog. The bulk of these programs either focus on assisting state and local law enforcement and crime labs address their backlog or fund research about the backlog.

Debbie Smith DNA Backlog Grant Program

The largest of these grant programs is the Debbie Smith DNA Backlog Grant Program (Debbie Smith grants), which provides grants to state and local governments to improve and expand DNA collection and analysis.⁷⁷

⁷⁶ See *Tested At Last; National Best Practices for Sexual Assault Kits: A Multidisciplinary Approach*; and Joseph Peterson, Donald Johnson, Denise Herz, Lisa Graziano, and Taly Oehler. “*Sexual assault kit backlog study*”, National Institute of Justice, 2012, <https://www.ojp.gov/pdffiles1/nij/grants/238500.pdf>.

⁷⁷ For more information on the Debbie Smith program, see CRS Report R41800, *The Use of DNA by the Criminal Justice System and the Federal Role: Background, Current Law, and Grants*.

In the Sexual Assault Forensic Evidence Reporting Act of 2013 (the SAFER Act of 2013, Title X of P.L. 113-4), Congress amended the authorizing legislation for the Debbie Smith program⁷⁸ in part to address the SAK backlog.

The SAFER Act added two new purposes for which Debbie Smith grants can be used: (1) to conduct an audit of the samples of sexual assault evidence in the possession of a state or unit of local government that are awaiting testing, and (2) to ensure that the collection and processing of DNA evidence by law enforcement is carried out promptly and in accordance with the protocols and practices the FBI is required to develop under the act.⁷⁹

The SAFER Act also established a series of conditions for states or units of local government receiving a grant under the Debbie Smith program for these purpose areas. These conditions include requiring states and local governments to (1) submit a plan for performing an audit of samples, (2) provide an estimate of the number of samples, (3) complete the audit within one year of receiving the grant, and (4) submit a report to the Department of Justice (DOJ) every 60 days for at least one year after the audit is completed that provides data on the number of samples in the state's or unit of local government's possession along with data on new sexual assault evidence the state or local government receives and how those samples are being processed.

The SAFER Act also requires the FBI, in consultation with federal, state, and local law enforcement agencies, to develop protocols and practices for the accurate, timely, and effective collection and processing of DNA evidence, including protocols and practices specific to sexual assault cases. The protocols and practices are required to address (1) what evidence should be collected by law enforcement and forwarded for testing and the order in which that evidence should be tested, (2) a reasonable period of time for evidence to be forwarded to a laboratory for testing, (3) a reasonable period of time in which each stage of laboratory testing should be conducted, (4) a system to encourage communication between actors in the criminal justice system (e.g., emergency response providers, law enforcement, prosecutors, courts, defense counsel, laboratory personnel, and crime victims) about the status of evidence testing, and (5) standards for audits of sexual assault evidence in the possession of state and local governments. The SAFER Act of 2017 reauthorized and extended these provisions through FY2023 (P.L. 115-107).

The Debbie Smith Reauthorization Act of 2019 (P.L. 116-104) reauthorized the program at \$151 million per fiscal year through FY2024. For FY2021, Congress appropriated \$110 million for the Debbie Smith program.

Sexual Assault Forensic Exam Program

This program provides grants for training, technical assistance, education, equipment, and information relating to the identification, collection, preservation, analysis, and use of DNA samples and other evidence by medical personnel and those treating victims of sexual assault (this includes SANEs, SAFEs, and Sexual Assault Response Teams). The Debbie Smith Reauthorization Act of 2019 (P.L. 116-104) reauthorized the program at \$30 million per fiscal year until FY2024. In FY2021, Congress appropriated \$4 million for this program for FY2021.

⁷⁸ 34 U.S.C. §40701(a).

⁷⁹ Prior to the passage of the SAFER Act, Debbie Smith grants could only be used to test biological evidence that had been submitted to a crime laboratory for analysis and to enhance the capacity of crime laboratories to conduct DNA analysis.

Sexual Assault Kit Initiative (SAKI)

SAKI funds address both the current backlog of SAKs and efforts to prevent any future backlogs. SAKI administers competitive grants to inventory and test unsubmitted SAKs, pursue new investigations and prosecutions, support victims, create evidence-tracking systems, train law enforcement in sexual assault investigations, fund research on the outcomes of sexual assault cases, and “increase collection of offender DNA for CODIS upload purposes (in full adherence to the laws in the jurisdiction), that may lead to the identification of serious and serial sex offenders.”⁸⁰ Grants are available to state law enforcement agencies, units of local government, federally recognized Indian tribal governments, governmental non-law enforcement agencies acting as their fiscal agents, prosecutor’s offices, and in some cases small law enforcement agencies or consortia of small law enforcement agencies.⁸¹ Since the initiative’s launch in 2015, more than 136,000 SAKs have been inventoried, more than 81,000 kits have been submitted to labs for testing, and more than 72,000 have been completed.⁸² In FY2021, Congress appropriated \$48 million for this initiative.

Violence Against Women Act (VAWA)

There are several grants authorized in VAWA that may be used to address the needs of sexual assault survivors and in some cases, they include purpose areas specific to medical forensic exams and SAKs. For example, the purpose areas for the largest VAWA grant, the STOP formula grant, include the “training of sexual assault forensic medical personnel examiners in the collection and preservation of evidence, analysis, prevention, and providing expert testimony and treatment of trauma related to sexual assault.”⁸³ Other VAWA grants, such as the Sexual Assault Services Formula Program (SASP), may include funding for “accompaniment and advocacy through medical, criminal justice, and social support systems, including medical facilities, police, and court proceedings” but consider Sexual Assault Forensic Medical Examiner programs out-of-scope.⁸⁴ Another VAWA grant, the Rural Domestic Violence, Dating Violence, Sexual Assault, and Stalking Program, requires recipients to implement at least one of five strategies to address VAWA-related crimes (i.e., domestic violence, sexual assault, stalking, and dating violence). One of the listed strategies is “developing, enlarging, or strengthening programs addressing sexual assault, including sexual assault forensic examiner programs, Sexual Assault Response Teams, law enforcement training, and programs addressing rape kit backlogs.”⁸⁵

⁸⁰ DOJ, OJP, *Sexual Assault Kit Initiative (SAKI), Overview* <https://bja.ojp.gov/program/sexual-assault-kit-initiative-saki/overview> (hereinafter, “SAKI Overview”).

⁸¹ DOJ, OJP, Bureau of Justice Assistance (BJA), *FY2021 National Sexual Assault Kit Initiative (SAKI) Grant Solicitation Eligibility Information*, <https://bja.ojp.gov/funding/opportunities/o-bja-2021-94003>.

⁸² *SAKI Overview*.

⁸³ DOJ, OVW, *FY2021 STOP Formula Grant Program Solicitation*, <https://www.justice.gov/ovw/page/file/1375486/download#:~:text=The%20STOP%20Formula%20Grant%20Program,%2C%20sexual%20assault%2C%20and%20stalking.,> p. 3.

⁸⁴ DOJ, OVW, *FY2021 Sexual Assault Services Formula Program Solicitation*, <https://www.justice.gov/ovw/page/file/1388386/download>, pp. 3-4.

⁸⁵ DOJ, OVW, *FY2021 Rural Domestic Violence, Dating Violence, Sexual Assault, and Stalking Program Solicitation*, <https://www.justice.gov/ovw/page/file/1357486/download>, p. 7.

Going Forward

Congress may consider exploring and assessing various aspects of the SAK backlog and debating the appropriate federal response, or funding research to establish a national year-end count of the backlog in crime labs. The Bureau of Justice Statistics (BJS) periodically conducts a census of publicly funded crime labs. The most recent data is from 2014, and BJS expects to publish data collected during 2020 in October 2022. Congress could consider funding more frequent data collection and targeted research on capacity and turnaround times for forensic DNA analysis.

Congress could consider lowering funding or eliminating SAK related grant programs that have not resulted in significant backlog reductions. Alternatively, Congress could consider designing measures to address existing backlogs and prevent future backlogs through conditioning grants to states and local entities. Measures to address the existing backlog could include funding research to capture the true scope of the number of untested SAKs, a federal program to facilitate SAK testing that state and local law enforcement may submit kits to, or grants to aid state and local law enforcement and crime labs in creating improved SAK testing infrastructure. Congress may consider funding multidisciplinary teams, as described in NIJ research, to address existing backlogs. Congress could also consider programs to address the needs of victims who had backlogged SAKs, particularly if testing reopens a case that has been dormant for many years. Congress could act to prevent future backlogs through grants to states and local entities funding backlog prevention measures and/or conditioning grants on the requirement that states and local governments establish a set time period within which SAKs must be tested.

Congress may consider addressing issues such as the shortage of Sexual Assault Nurse Examiners (SANE) particularly in rural areas. SANEs must meet certification requirements that can often be difficult to complete in less populous areas or lower volume hospitals.⁸⁶ For example, certification by the International Association of Forensic Nurses requires 300 hours⁸⁷ of SANE-related practice.⁸⁸ Congress could also consider appropriating additional funds or adding a program area to the VAWA Rural Domestic Violence, Dating Violence, Sexual Assault, Stalking, and Child Abuse Enforcement Assistance grant to address the shortage of SANEs in these areas. Congress could also consider authorizing additional funds to address rural SANE shortages via the Sexual Assault Forensic Exam Program or creating a new grant to aid SANE trainees in completing the certification process via temporary placements in high-volume areas.

Congress could consider the desired level of federal support for other programs concerning the needs of sexual assault victims during the evidence collection process, for example, grants to address language barriers. A forensic exam can be a traumatic experience for an assault victim, and best practices often recommend limiting the number of forensic or medical personnel present.⁸⁹ SANEs who are fluent in common local languages may reduce the need for extra persons to serve as interpreters and may also reduce language barriers that can prevent victims from receiving care. Congress could consider requiring or incentivizing programs or facilities that receive federal funding to employ SANEs who are fluent in common local languages such as Spanish and American Sign Language.

⁸⁶ Elizabeth Thiede and Sheridan Miyamoto, “Rural Availability of Sexual Assault Nurse Examiners (SANEs),” *Journal of Rural Health*, vol. 37, no. 1, (January 2021), pp. 81-91.

⁸⁷ International Association of Forensic Nurses. *Frequently Asked Questions about Certification*, <https://www.forensicnurses.org/page/CertFAQs> (hereinafter, “SANE Certification”).

⁸⁸ Practice may include “Providing direct patient care as a SANE, taking on-call shifts to respond to patients as a SANE (even if not seeing a patient), teaching/precepting SANEs, consulting regarding SANE issues/cases, engaging in peer review of SANE cases.” *SANE Certification*.

⁸⁹ *National Protocol for Sexual Assault Medical Forensic Examinations*, p. 41.

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