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65 Glen Road, Suite 123, Garner, NC 27529

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## Sexual Assault Evidence Kit White Paper ASCLD Sexual Assault Kit Task Group May 22, 2020

The purpose of this paper is to describe the sexual assault evidence kit forensic testing process and decision points for jurisdictions when considering legislation and policy for implementation of expanded testing. When a sexual assault occurs, the victim frequently presents at a medical facility for treatment. A sexual assault medical forensic exam includes a four to six-hour collection of a medical history, a physical examination, treatment for injury, and preventative treatment for pregnancy and/or sexually transmitted diseases. If a victim consents, forensic evidence is also collected through the use of a Sexual Assault Evidence Kit, or SAEK. This exam is typically performed at a local hospital emergency room or by a Sexual Assault Nurse Examiner (SANE) Program. A SAEK is a box that contains swabs, envelopes, instructions and forms to facilitate evidence collection that may be used in further investigation of the purported crime. A sexual assault case frequently contains more items of evidence beyond what may fit into that box including clothing items, bedding, weapons and other items of evidence. For the purposes of this document, the term SAEK will be used to define the items collected from a victim at a medical facility. DNA evidence can be found in semen, saliva, hairs, or blood that may be on a victim's body or on items like clothing. This evidence may be used in the criminal investigation and prosecution. The decision to report the assault is the choice of the victim and treatment is not dependent upon reporting.

The Violence Against Women Act (VAWA) allows survivors of sexual assault to remain anonymous after having a SAEK collected, or in other words, not report the crime to police. In most jurisdictions, the collected anonymous SAEK will be preserved for a period of time to allow the survivor to consider their choice of reporting a crime to law enforcement. In most jurisdictions, if the survivor gives permission, the SAEK will be provided to the police. Police then send the SAEK to Forensic Science Service Providers (FSSPs) for testing. In some jurisdictions all kits, regardless of survivor permission, are required to be tested. This approach enables cases to potentially be linked together and provides investigative assistance, regardless of whether that particular case may be prosecutable in the future.

FSSPs are often asked if they "test all" kits in their jurisdiction, which implies that all SAEKs collected are submitted to FSSPs by investigating agencies.

Within the term “test all” there are a number of nuances that require policy considerations and choices. Many victim advocacy programs and the federal Office on Violence Against Women support a definition of “test all” that excludes anonymous kits. Some might consider excluding anonymous kits a “test most” policy. A “test most” policy might also include exclusions for a law enforcement choice not to proceed with testing the kit. Some advocate for testing every kit collected regardless of the survivor’s decision to report a crime or proceed in the criminal justice system. Others advocate for testing all kits where a survivor has consented to investigation while removing law enforcement’s choice not to proceed with testing. This approach could be considered a “test all consenting” approach.

While ASCLD does not take a position on which kits should be tested, it is important that each jurisdiction carefully consider their laws and policies related to which kits receive laboratory testing and other issues surrounding kit retention and victim notification. Further, it is important that each jurisdiction claiming to “test all kits” clearly articulate to stakeholders their definition of “all.” In addition, jurisdictions must provide clear direction to FSSPs regarding which kits must receive testing, and potentially those that should not. The FSSP should not be in a position to be the arbiter of the decision to test or not test a SAEK. However, the FSSP management should be consulted when making a jurisdictional law or policy related to kit testing so that issues like federal DNA database eligibility and resources required to process the kits are part of the consideration.

Over the past decade, much focus has been placed on the testing of SAEKs that were previously not submitted to a FSSP for analysis or returned to the investigating agency without testing completed. Many jurisdictions were asked to perform testing on all SAEKs regardless of court disposition. Tens of thousands of SAEKs were transferred from law enforcement storage and analyzed by a FSSP. Many states have moved to mandate kit submission, thereby removing any discretion from law enforcement and prosecutors to not analyze SAEKs. As a result, FSSPs have seen a large increase in the number of SAEKs submitted for analysis. FSSPs must be properly funded to provide a thorough, timely, and accurate analysis. FSSPs in most jurisdictions are struggling to appropriate turnaround times on SAEKs, and this does not take into account other evidence requiring analysis by the DNA unit or another forensic discipline (such as toxicology or trace). Policy makers should also consider if the funding provided to the FSSP is adequate to perform a thorough analysis of each kit. Each jurisdiction must consider the number of collected items in each SAEK that will be tested (i.e. all items, a certain number, only those screening positive or a fraction thereof, or case dependent) and choose from various testing methods. A significant decision includes whether body fluids will be identified through serological testing, or if only DNA will be analyzed. Of additional concern is the amount of FSSP analysts’ time required reviewing the vendor data and case review for CODIS eligibility and upload if the choice is made to outsource some or all testing. These decisions will determine the number of analysts, instruments, chemicals and supplies, laboratory space, and other resources needed. These decisions are also critical if outsourcing of kits to a private laboratory is necessary, as contracts must be negotiated for performing the testing and subsequent case handling, review, confirmatory testing and testimony needs. Many FSSPs have responded to the influx of SAEKs by increasing staffing, implementing more efficient methods, and purchasing new equipment and instrumentation when resources have been provided. New staff require training, adequate work and office space, supervision, and continuing education. New instrumentation and methods require validation. Policy makers must carefully consider these resource needs when implementing new laws and policies

related to testing of SAEKs to avoid negatively impacting the timeliness of all cases, including other violent crime cases, handled by the FSSP.

Regardless of jurisdictional law and policy, SAEKs should be submitted to the FSSP as expeditiously as possible to preserve the best evidentiary value. The ultimate purpose is to identify or eliminate potential perpetrators and provide investigative leads through the use of the national DNA database. By testing more SAEKs connected to a reported crime, more DNA profiles will be developed and uploaded to these databases, meaning more DNA from crime scenes will be linked, assailants identified, and future crimes averted. Survivors of crime, policy makers, and stakeholders should all be aware that testing more SAEKs can benefit society in many ways. For example:

- Where the offender is unknown to the victim, processing the SAEK may result in a DNA database hit that identifies the perpetrator or links to other open cases.
- If the offender is known to the victim, and the question of consent is the deciding factor for prosecution, a DNA profile obtained through testing may produce matches to a person with multiple other acquaintance assaults. This makes for a stronger chance of prosecution demonstrating this pattern of criminal behavior. Serial rapists tend to assault both acquaintances and strangers. Testing every SAEK, even if the suspect is known, will determine if the attacker's DNA matches DNA from other cases. As more sexual assault cases are pursued, more offenders are apprehended, and more future crimes are averted.
- In cases where the victim is hesitant to move forward, testing the SAEK may result in a DNA profile that hits to or solves other sexual assault cases. Learning that there are other victims with similar cases may convince the victim to support prosecution alongside the other victim(s).
- Offenders who commit sexual assault often are engaged in other crimes types including burglary and homicide. DNA from SAEKs can match DNA from other crime scenes and provide additional investigative leads.

ASCLD supports conducting an official inventory of untested sexual assault evidence in states where this has not occurred as it provides vital data to inform future decisions. Attempts at voluntary reporting and surveys conducted by FSSPs have met with little success. State legislatures are encouraged to require more formal audits conducted at a statewide level by an entity with the power of subpoena such as an Attorney General or Auditor of Public Accounts. An inventory conducted by an independent third party or by mandate will ensure a timely and accurate count occurs. Second, legislation mandating the submission of previously unsubmitted SAEKs is only verifiable when the property room has an accounting of all SAEKs in their possession and tracking can be conducted.

Finally, it is not the role of the FSSP to provide information or notification directly to the victim or any potential suspect involved in the case. While it may be appropriate for the FSSP to track information in aggregate for statistical purposes or contribute information to a sexual assault kit tracking system, it should remain the duty of law enforcement or officers of the court to provide specific case details to any individual involved in the case. Providing information directly to victims or suspects may jeopardize FSSP objectivity and thereby its accreditation.

The nation's FSSPs are committed to testing every eligible SAEK and providing timely and accurate information for survivors to investigators and officers of the court. FSSPs should be consulted in statutory and policy development, and resourced to accomplish this critical work. ASCLD commends the many FSSPs that are working hard to resolve this complex issue and advance the practice and impact of forensic science.