



**Maryland Sexual Assault Evidence Kit
Policy and Funding Committee**

**FREQUENTLY ASKED QUESTIONS
15-DAY EXPANDED REIMBURSEMENT & VICTIM'S RIGHT TO A
SEXUAL ASSAULT FORENSIC EXAM**

During the 2020 legislative session, the General Assembly enacted [House Bill 425, Chapter 204 \(2020\)](#),¹ which ensures that health care providers are reimbursed for sexual assault forensic exams (“SAFEs”) that are conducted up to 15 days after the sexual assault and expands privacy protections for victims of sexual assault. The enactment of this new law has generated questions regarding: (1) the parameters of a SAFE that is conducted after 5 days, but prior to 15 days after the sexual assault; (2) an Anonymous victim’s right to obtain an exam; and (3) a victim’s right to unilaterally obtain a SAFE. Additional questions have been raised since the creation of this document regarding: (4) the victim’s right to request that the investigation of their case be suspended, and what protocols should be considered to determine the next steps in testing the associated sexual assault evidence kit (“SAEK”). Those protocols are now outlined in the last section of this document.

The Sexual Assault Evidence Kit Policy and Funding Committee (“SAEK Committee”) issues the below guidance to assist law enforcement agencies (“LEAs”), forensic nurse examiners, and other stakeholders in successfully implementing the new law. If you have additional questions, please contact Carisa Hatfield, SAEK Committee Counsel, at chatfield@oag.state.md.us.

SUMMARY OF TOPICS COVERED IN THIS DOCUMENT

This document covers the following topics:

- (a) Limitations on evidence collection between 5-15 days after sexual assault;
- (b) The victim’s right to collection of a SAEK, even if they do not wish to participate in the criminal justice process;
- (c) The victim’s right to collection of a SAEK without law enforcement approval;
- (d) The victim’s right to request a review of their SAEK in the event that an LEA determines that the SAEK should not be tested; and
- (e) Additional questions a law enforcement agency should ask a victim if they request that the investigation into their sexual assault be suspended or closed.

¹ House Bill 425, Chapter 204 (2020) was codified under MD. CODE ANN., Crim. Proc. § 11-1007 (West 2020).



Maryland Sexual Assault Evidence Kit Policy and Funding Committee

1) If a victim presents more than 5 days, but less than 15 days after the sexual assault, is the SAFE limited to the collection of only cervical swabs?

The new law does not specifically provide for the collection of only cervical swabs if the victim presents more than 5 days after the assault.² The legislation states that health care providers will be reimbursed for “a physical and sexual assault forensic examination...when the examination is conducted within 15 days of the alleged crime or a longer period as provided by regulation[.]”³ Based on its plain language, a SAFE could include only cervical swabs, but is not explicitly limited to cervical swabs.

The sexual assault forensic exam is an examination by a health care provider who has specialized education and clinical experience in the collection of forensic evidence and treatment of sexual assault victims.⁴ The scope of a SAFE is typically based on the victim’s medical history and the victim’s narrative of the sexual assault. For example, if a victim reports sexual contact that did not involve vaginal touching or penetration and indicates that the suspect did not come in contact with the vaginal area, it is unlikely that the examiner will collect vaginal swabs unless there are other relevant circumstances present.

The new legislation stems from recent advancements in forensic science, which has found that DNA can be collected from a victim’s cervix at least nine days after the assault and potentially up until the victim’s next menstrual cycle.⁵ Prior to the new law, health care providers were only reimbursed for exams that were collected within 5 days after the assault.⁶ The new legislation was drafted broadly and does not place parameters on exams that are conducted beyond 5 days.

Since the law does not specifically restrict an exam conducted more than 5 days after the assault, the SAEK Committee recommends that health care providers exercise their clinical discretion to determine the parameters of a SAFE if the victim presents more than 5 days after the sexual assault, but before the 15-day deadline. The SAFE should at minimum include cervical swabs, if the victim reports sexual contact involving vaginal contact or penetration and may be expanded based on the specific information provided by the victim. Furthermore, like the current practice when a victim presents within 5 days, the examiner should base the scope of the exam on the victim’s medical history and narrative of the assault.

Regardless of when a victim reports for an exam, whether it is 5 days or 15 days after the sexual assault, examiners should always document the victim’s narrative of the assault, provide a complete

² Under the current Maryland State Police Forensic Sciences Division’s (“MSP”) policy, the entire kit will only be accepted for testing if the kit was collected within 7 days of the sexual assault. If the kit is collected more than 7

³ Crim. Proc. § 11-1007(c)(1).

⁴ Sexual Assault Forensic Examiner Technical Assistance, <https://www.safeta.org/page/369#:~:text=The%20sexual%20assault%20medical%20forensic,%E2%80%8B> (last visited Dec. 17, 2020).

⁵ PATRICIA SPECK & JACK BALLANTYNE, POST-COITAL DNA RECOVERY STUDY 77–80 (2015), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/248682.pdf>.

⁶ See COMAR 10.12.02.03(B)(1)(a).



**Maryland Sexual Assault Evidence Kit
Policy and Funding Committee**

physical exam, and offer immediate medical care in accordance with the normal standard of care, by treating injuries, conducting appropriate labs, and offering information and treatment for sexually transmitted infections and pregnancy.

2) Is a victim of a sexual assault entitled to a SAFE even if they do not want to participate in the criminal justice process?

Yes, victims of sexual assault are entitled to receive a SAFE even if they do not wish to report the sexual assault to law enforcement for criminal investigative purposes. Maryland is a recipient of the Services, Training, Officers, and Prosecutors (STOP) Violence Against Women's Act ("VAWA") Formula Grant.⁷ As a recipient of STOP VAWA, Maryland must provide exams to victims free of charge and "without regard to whether the victim participates in the criminal justice system or cooperates with law enforcement."⁸ Consistent with VAWA, Maryland law provides that a physical exam in conjunction with a sexual assault forensic examination "shall be provided without charge to the individual."⁹ This means that victims who choose to remain anonymous and decide not to report the sexual assault to law enforcement for criminal investigative purposes are entitled to a free exam.

3) Is law enforcement approval required before a sexual assault victim may obtain a SAFE?

No. The decision of whether to obtain a sexual assault forensic exam rests solely with the victim. Evidence of a sexual assault should be collected as soon as possible after the assault to maintain the best chance to preserve possible DNA evidence.¹⁰ Requiring law enforcement approval before a sexual assault victim may obtain an exam could prolong the process of collecting evidence and cause critical evidence to be lost. Allowing law enforcement to intervene to prevent a victim from obtaining a SAFE would indefinitely prevent potential evidence from being collected and ultimately preclude victims from obtaining justice.

This includes case scenarios where the victim reports the sexual assault to law enforcement and law enforcement classifies the case as "unfounded" prior to the victim obtaining a SAFE. The process of classifying a sexual assault case as "unfounded" has been widely criticized due to its historic misuse and inconsistent application.¹¹ Cases should not be classified as "unfounded" until

⁷ Governor's Office of Crime Prevention, Youth, & Victim Services, *STOP (Services * Training * Officers * Prosecutors) Violence Against Women Formula Grant Program (STOP VAWA)* <http://goccp.maryland.gov/grants/programs/vawa/> (last visited Dec. 17, 2020).

⁸ 34 U.S.C.A. § 10449(d)(1) (West 2017).

⁹ See Crim. Proc. § 11-1007(b)-(c). Prior to this legislation, the General Assembly enacted Section 11-925 of the Criminal Procedure Article of the Maryland Code which states that all "[a]pplicable health care services shall be given without charge to a victim of sexual abuse."

¹⁰ See Rape, Abuse & Incest National Network, *What Is a Sexual Assault Forensic Exam?* <https://www.rainn.org/articles/rape-kit> (last visited Dec. 17, 2020).

¹¹ See Alex DeMetrick, Changing the Culture of Rape Investigation, THE BALTIMORE SUN (Jan. 4, 2017),



Maryland Sexual Assault Evidence Kit Policy and Funding Committee

a thorough investigation has been completed. A thorough investigation should consider all available evidence, including the forensic analysis of a SAEK when one is available. Therefore, if a victim requests a SAFE, the victim is entitled to receive an exam. The results of testing their SAEK could produce vital evidence for the investigation. Furthermore, a SAFE includes not only evidence collection services, but also provides the victim with medical care. To deny a victim of sexual assault the ability to receive a SAFE is a violation of their rights to receive medical forensic care regardless of their involvement with law enforcement.

Additionally, Maryland gives victims of sexual assault the right to request a review of their case, if law enforcement decides not to test their kit—this is known as an “Untested Kit Review.”¹² After the Untested Kit Review by either the local Sexual Assault Response Team or the SAEK Committee, a recommendation may be made to test the kit. Preventing a victim from obtaining a SAFE violates the victim’s right to contest a decision not to submit their kit for analysis and directly hinders Maryland’s goal to test all SAEKs that contain potential DNA evidence that is eligible for submission into the FBI’s Combined DNA Index System (“CODIS”), which is commonly used for offender identification and prosecution.

There are no statutory constraints placed on a victim’s right to obtain a SAFE. Therefore, LEAs may not prevent victims from obtaining a SAFE.¹³

4) Does the victim have the right to request suspension of the investigation of their case at any time? If so, are there additional questions a law enforcement agent should consider when a victim requests the suspension of their investigation?

Yes, a victim has the right to request suspension of the investigation of their case at any time. When a victim requests that the criminal investigation related to their sexual assault be suspended or closed, a law enforcement agent should ask a victim whether they still wish to have their kit tested even though they are suspending their investigation. The suspension or termination of an investigation is not an exemption to testing under Maryland law.¹⁴

If a victim does want their kit tested, law enforcement should inquire whether the victim wants to be notified once testing is complete. Options should be offered to the victim: do they want to be

<http://www.baltimoresun.com/news/opinion/editorial/bs-ed-rape-kits-20170104-story.html> (explaining that “individual police agencies in Maryland appear to differ widely in how often they consider cases “unfounded.”).

¹² COMAR 2.08.03.03(A).

¹³ We also note that allowing law enforcement to serve as the gate keepers of sexual assault forensic exams would also likely deter reporting. Sexual assault crimes are already underreported, in part because some victims fear that they will not be believed and the police will not do anything to help them. Giving LEAs authority over a victim’s access to a SAFE would further this belief and undermine the State’s commitment to a victim-centered and trauma- informed response to sexual assault.

¹⁴ See Md. Code Crim. Procedure 11-925 (e)(1-4).



Maryland Sexual Assault Evidence Kit Policy and Funding Committee

contacted regardless of results, or only if there is DNA or a hit on the kit? Do they want to be notified if the law enforcement agency wants to take further investigative steps? Or does the victim want no notification at all? If the victim wants to be contacted, the victim should be allowed the opportunity to decide who contacts them (a victim advocate, law enforcement, or both) and how they are contacted. This should include discussing what methods of communication are safe, the best time of day for contact, and if messages can be left. If the victim elects not to receive notification, the case should be submitted for testing regardless.

It should be reinforced with the victim that regardless of how they proceed with their case, they have the right to change their mind at any time. If a victim requests that the investigation into their case be suspended, they may choose to have their kit tested at any time up to 75 years after the collection of their kit. A victim may also request the suspension of the investigation or the testing of their kit at any point in the process. Law enforcement should consider offering the Maryland Coalition Against Sexual Assault (MCASA) “Your Sexual Assault Evidence Kit: Know Your Rights” brochure to the victim so they understand their rights related to the SAEK.



**Maryland Sexual Assault Evidence Kit
Policy and Funding Committee**