No. 99374-2
consolidated with 99379-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

I.A.S,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

PETITIONER'S SUPPLEMENTAL BRIEF

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Statutes

Court Rules

Other Authorities

A. INTRODUCTION.

The legislature encourages children to enter deferred dispositions as part of the rehabilitative goal of juvenile court. In a deferred disposition, the court dismisses and seals a case when a child completes court-imposed conditions.

Ignoring these foundational legislative aims, the Court of Appeals ruled that children who enter deferred dispositions are provisionally convicted of crimes, so they must immediately provide DNA samples to the State under a statute requiring people convicted of certain offenses to submit their DNA to the police for permanent entry into a genetic database.

The Court of Appeals decision misconstrues the DNA collection statute. It undermines the legislature's efforts to protect children's privacy and encourage their rehabilitation. It unnecessarily stigmatizes children. It furthers racial disparity in the criminal legal system. This Court should hold that children who enter deferred dispositions are not required to submit their DNA to the police unless they do not successfully complete the deferral and a final disposition is entered against them.

B. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED.

Are children obligated to submit their genetic profile to the State for permanent entry into a police database when they agree to a deferred disposition in juvenile court, without regard to whether the temporarily entered disposition will be vacated and dismissed with prejudice in the near future?

C. STATEMENT OF THE CASE.

I.A.S., a 17 year-old Black teenager, entered an agreed deferred disposition in juvenile court. RP 3, 9; CP 1, 20. The judge told I.A.S. a deferred disposition "is designed for a young man just like yourself, to give you the opportunity to comply with some conditions so that you can put this behind you, as if these matters were not pled guilty or committed." RP 18. The juvenile probation officer supported the deferred disposition and recommended waiving the DNA fee and testing during the deferred disposition. RP 11-12. The prosecutor joined in this recommendation. RP 15.

When the court entered the deferred disposition, the judge said "there will have to be a $100 DNA fee and the collection of

DNA." RP 19. The judge told I.A.S. he must submit to this collection "[e]ven though this is a deferred disposition." *Id*.

The prosecutor asked "for clarification," because his position had been the DNA and related fee would not be collected "unless there's a failure" of the deferred disposition. RP 20-21. Defense counsel also objected "to the taking of DNA," because it is required if a deferred disposition is revoked, "but not at the time of entry of the deferred." RP 22.

I.A.S. ask the court to reconsider. The prosecution acknowledged other judges in Spokane County had reached different conclusions on the applicability of DNA collection for children in deferred dispositions. CP 32. It attached rulings from Judges Neal Rielly and Michael Price in other cases, who did not require children to submit a DNA sample unless the deferred disposition was unsuccessful, and a contrary ruling from Judge Ellen Clark who ruled the DNA sample is mandatory when a person enters a deferred disposition. CP 42-43, 46, 60.

Although Judge Anderson had previously stayed DNA collection in other deferred disposition cases, she reversed her position in I.A.S.'s case. She ruled that a deferred disposition is

labeled a "conviction" when entered even if it will be vacated and the records sealed if the terms of the deferred disposition are completed. CP 81.

The prosecutor noted "reasonable minds can reach differing legal conclusions" on the DNA collection requirement. CP 32. He concluded that "ultimately an appellate court's going to have to . . . make some decisions" on this issue. RP 28. The court agreed to stay the requirement that I.A.S. submit a DNA sample for purposes of appealing the court's order. CP 81.

The Court of Appeals ruled that a deferred disposition involves a provisional adjudication of guilt, which is the equivalent of a conviction and subjects a child to DNA collection under RCW 43.43.754(1)(a). State v. *I.A.S.*, 15 Wn. App. 2d 634, 639, 476 P.3d 614 (2020), *rev. granted*, 197 Wn.2d 1002, 483 P.3d 770 (2021). This Court granted review and consolidated this case with *M.Y.G.*,[1] raising the same issue. 483 P.3d at 771.

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[1] *State v. M.Y.G.*, 15 Wn. App. 2d 641, 642, 476 P.3d 1052, *rev. granted*, 197 Wn.2d 1002 (2021).

D. ARGUMENT.

A child's DNA should not be collected and entered into a DNA database for criminal offenders at the time they enter deferred dispositions in juvenile court.

1. Children are treated differently than adults throughout criminal law.

Because "children are different" from adults, a host of distinct considerations and protections apply when children face criminal convictions. *In re Pers. Restraint of Ali*, 196 Wn.2d 220, 225–26, 474 P.3d 507, 510 (2020), *cert. denied sub nom. Washington v. Ali*, 20-830, 2021 WL 1163869 (2021) (quoting *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017); *Miller v. Alabama*, 567 U.S. 460, 480, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)).

The criminal legal system has long recognized the difference between children and adults. "From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles." *In re Gault*, 387 U.S. 1, 14, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

"[C]hildren possess lessened culpability, poorer judgment, and greater capacity for change than adults," due to the developmental state of their brains. *Ali*, 196 Wn.2d at 225-26. This capacity for change underscores the rehabilitative focus of juvenile court proceedings. "Criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham v. Florida*, 560 U.S. 48, 76, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

The legislature "has long recognized that the differences between children and adults require that our justice system treat children and adults differently." *State v. M.S.*, _ Wn.2d _, _ P.3d __, 96894-2, 2021 WL 1418885, at *10 (2021) (Stephens, J., concurring in part).

In contrast to the adult-based sentencing scheme, the Juvenile Justice Act is designed to address a child's individual circumstances by holding the child accountable while also responding to the child's rehabilitative needs. *Id.*, *see* RCW 13.40.0357; RCW 9.94A.010. Also unlike adult convictions, a court order "adjudging a child a juvenile offender ... shall in no case be deemed a conviction of crime." RCW 13.04.240; *see also*

RCW 13.04.030(1) (explaining juvenile "adjudication" means a conviction "only for the purposes of sentencing under chapter 9.94A RCW").

In addition, juvenile court records are treated "as distinctive and deserving of more confidentiality than other types of records," due to the rehabilitative focus of juvenile court proceedings. *State v. S.J.C.*, 183 Wn.2d 408, 417, 422, 352 P.3d 749 (2015); RCW 13.50.050(3) ("All records other than the official juvenile court file are confidential and may be released only" under a few narrow statutes).

Due to children's recognized privacy interests, they are entitled to have their initials used in a case caption even when they are found guilty and sentenced for criminal offenses. RAP 3.4. Their adjudication records are sealed when they turn 18 years old, unless they were sentenced for certain serious offenses. RCW 13.50.260(1)(a). Children who complete deferred dispositions are entitled to immediate sealing when they satisfy the terms of a deferred disposition, without waiting until they turn 18. *State v. H.Z.-B.*, 1 Wn. App. 2d 364, 367, 405 P.3d 1022 (2017).

These privacy protections apply to children due to the legislative and judicial recognition that children should not be permanently marked by their misdeeds when young.

2. Collecting and preserving genetic profiles of children when they enter deferred dispositions is contrary to purpose of the DNA database.

Under RCW 43.43.754, people convicted of a felony or specified misdemeanor must submit to the collection of their biological material so the State may enter their genetic profile into a DNA database.

DNA databases were created to aid the government in solving past crimes and deterring future ones. *State v. Surge*, 160 Wn.2d 65, 77, 80, 156 P.3d 208 (2007); *State v. Olivas*, 122 Wn.2d 73, 92, 856 P.2d 1076 (1993) ("establishing a DNA data bank will be a deterrent to recidivist acts").

Children are less likely to have committed prior crimes needing DNA identification. Kevin Lapp, *Compulsory DNA Collection and A Juvenile's Best Interest*, 14 U. Md. L.J. Race, Religion, Gender & Class 50, 80 (2014). They are less deterrable than adults. *Roper v. Simmons*, 543 U.S. 551, 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) ("the same characteristics that

render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence").

Children who are prosecuted for crimes are also disproportionately likely to be members of vulnerable populations, including indigent people and racial minorities. Kerry Abrams & Brandon L. Garrett, *DNA and Distrust*, 91 Notre Dame L. Rev. 757, 804 (2015). "[S]o long as minorities remain disproportionately subject to arrest as well as conviction, it is minorities that are most likely to be included in DNA databanks." *Id*. As these statistics bear out, I.A.S. is a Black child. CP 1.

"DNA databases, like stop, arrest and conviction databases, can reflect racially based policing practices, which are likewise reproduced when police access and act upon database information. Abrams, 91 Notre Dame L. Rev. att 778-79. Once DNA profiles are entered into a database, they are rarely ever expunged and "remain in government hands." Wayne A. Logan, *Government Retention and Use of Unlawfully Secured DNA Evidence*, 48 Tex. Tech L. Rev. 269, 280 (2015); *see* WAC 446-75-070 (expunging DNA from database has strict

procedural requirements and is limited to court-ordered reversals, not dismissal after deferred sentence).

Collecting the DNA profiles of children "is a permanent consequence that enmeshes a young person in the criminal justice apparatus." Lapp, 89 Tul. L. Rev. at 443. "It signals prior wrongdoing, presumes future criminality, and is justified on demonstrably false notions of juveniles' rationality and deterrability." *Id.*

This Court has upheld the constitutionality of compelling adults to supply a sample of their DNA to law enforcement without a warrant only after conviction, based on their diminished privacy interests following a conviction. *Surge*, 160 Wn.2d at 74. No such diminished privacy interest applies to a person based on their arrest or a pending prosecution. *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). For children like I.A.S. who enter a deferred disposition, this temporary adjudication is not the equivalent of a final conviction. It does not justify the immediate warrantless seizure of their DNA for permanent entry into a DNA database.

3. Collecting and storing DNA profiles of children at the time they enter a deferred disposition is not required by statute and undermines the legislature's intent to protect childrens' privacy interests and encourage rehabilitation.

The opportunity to enter a deferred disposition is uniquely available to children in juvenile court. RCW 13.40.127. When entering a deferred disposition, the child admits the police report supports a finding of guilt. RCW 13.40.127(3). In return, the court will "defer the finalization of [the] case" for a period of time while the child participates in community supervision. RP 5; RCW 13.40.127(5). Once the child satisfies the conditions of community supervision, the court must vacate the provisionally entered conviction and dismiss the case with prejudice. RCW 13.40.127(9)(b). The case file must be sealed. *H.Z.-B.*, 1 Wn. App. 2d at 371. If the child does not successfully complete the terms of the deferred disposition, the court enters an order of disposition and the conviction becomes final. RCW 13.40.127(9)(c).

The legislature encourages courts to enter deferred dispositions for all eligible children by mandating a "strong

presumption that the deferred disposition will be granted" in all cases when a child is eligible. RCW 13.40.127(2).

A deferred disposition is not a "disposition" in terms of finally settling a criminal case. *State v. M.C.*, 148 Wn. App. 968, 972, 201 P.3d 413 (2009). Instead, "the actual disposition will occur at some future time, depending on the juvenile's future conduct." *Id.*

The deferred disposition statute does not direct juvenile courts to collect a biological sample for DNA testing when entering the deferral. As the court acknowledged here, the statute is "silent" regarding the seizure of the child's DNA as a condition of the deferred disposition. CP 81.

The authority to compel a person to give their DNA profile to the State stems from RCW 43.43.754. Under RCW 43.43.754(1), a person is required to provide a biological sample to the State for DNA testing when convicted of a felony or certain misdemeanors. RCW 43.43.754(1)(a) says that a "biological sample must be collected" for DNA analysis "from" a "juvenile convicted of a felony" or other specified offenses.

This statute further directs this biological sample "shall be collected in the following manner." RCW 43.43.754(5). The manner of collecting DNA is based on *where* the person is serving a term of confinement, following the imposition of a sentence. *Id.*

For a person serving a term of confinement in a prison or jail, that facility "shall be responsible for obtaining the biological sample." RCW 43.43.754(5)(a), (c). When the person does not "serve a term of confinement" in either a state prison or jail facility as part of the sentence, the local police department is responsible for collection. RCW 43.43.754(5)(b).[2] While the statute explains the manner of collection, it does not mandate that collection occur at the time of conviction. Instead, it relies on the type of sentence imposed to determine when and how the DNA will be collected. RCW 43.43.754(5).

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[2] Under an amendment to the statute enacted in 2020, if a person is not sentenced to a term of confinement and the local law enforcement authorities have "a protocol for collecting the biological sample in the courtroom" the court may also order a person to provide the biological sample immediately to the local police or sheriff "before leaving the presence of the court." Laws of 2020, ch. 26, § 7; RCW 43.43.754(5)(d) (2020). Presumably, this collection occurs at the time of sentencing since it rests on the nature of the sentence imposed.

A separate statute directs the court to order a person pay a fee for collecting DNA and maintaining the database. RCW 43.43.7541. This fee is imposed at the time of sentencing. *Id.*

The Court of Appeals reasoned that RCW 43.43.754(1) directs DNA collection for a juvenile convicted of certain offenses, and I.A.S.'s deferred disposition is an adjudication "albeit on a provisional basis, of a qualifying crime." *I.A.S.*, 15 Wn. App. 2d at 639. It insisted this provisionally entered adjudication is a conviction for purposes of the DNA collection statute and refused to treat the statute as directing the actual collection and retention of a child's DNA sample only once the disposition is final.

Penal statutes are construed narrowly. *State v. Weatherwax*, 188 Wn.2d 139, 155, 392 P.3d 1054 (2017). If the language is susceptible to two possible constructions, the rule of lenity requires the court to construe the statute in favor of the defendant and against the State. *State v. Parent*, 164 Wn. App. 210, 213, 267 P.3d 358 (2011). Statutes are also reviewed "along with all related statutes as a unified whole with an eye toward

finding a harmonious statutory scheme." *State v. Bigsby*, 189 Wn.2d 210, 216, 399 P.3d 540 (2017).

RCW 43.43.754 is a penal statute, subject to strict construction. It requires certain people submit genetic profiles to the State as a consequence of conviction, and makes it a crime for a person to refuse to comply. RCW 43.43.754(12).[3] In construing its application to children in juvenile court, it is interpreted harmoniously with the laws governing treatment of children convicted of crimes.

The statutes governing the DNA database show the legislature intended this obligation to be part of a person's sentence. Collection occurs at the place of confinement or by local law enforcement, depending on the sentence imposed. RCW 43.43.754(5). The court imposes a fee for collecting DNA at the time of sentencing. RCW 43.43.7541.

The legislature also intended a child's entry of a deferred disposition in juvenile court to be temporary, unlike an

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[3] When RCW 43.43.754 was amended in 2020, this provision was renumbered to (11) with no substantive change. Laws of 2020, ch. 26 §7.

adjudication of guilt following a trial or guilty plea. It becomes a final conviction and disposition only if the child does not comply with the conditions imposed by the court. RCW 13.40.127(9)(c). If the child satisfies the court's conditions, the disposition will be vacated and the case sealed immediately. *H.Z.-B.*, 1 Wn. App. 2d at 367 (construing RCW 13.50.260(2) as requiring the court "to seal a record of a deferred disposition immediately if the court has dismissed the case with prejudice").

RCW 43.43.754 does not expressly require children who enter a deferred disposition to immediately supply the State with their genetic profiles and authorize their entry into a DNA database. The statute must be construed narrowly while giving effect to the legislature's intent to prioritize rehabilitation in juvenile court while avoiding the stigma and societal consequences of a criminal conviction.

Interpreting the entry of a deferred disposition as the mandatory trigger for collecting and retaining children's DNA samples creates a permanent record that is contrary to the purposes of the deferred disposition statute and the broader goals of the juvenile justice system.

It is also inconsistent with the narrow constitutional premise of warrantless DNA collection for people convicted of crimes. A child whose adjudication will be vacated and sealed within a short period of time does not have the same diminished privacy interests as person whose conviction is not temporary or provisional.

The legislature did not direct or intend the State to take a child's DNA profile during a provisional, temporarily entered adjudication. Instead, the intent of the governing statutory schemes is to store the identity of people who are convicted of crimes. For children, this seizure should occur only after a deferred disposition is concluded. When unsuccessful, the child's conviction is entered and the State may collect the child's DNA sample. But when the deferred disposition succeeds, and the child's adjudication is dismissed and the case vacated, the child's DNA should not be seized and entered into a DNA database.

4. The temporarily entered finding of guilt involved in a juvenile court deferred disposition does not constitute a conviction authorizing seizure of a child's DNA profile and its entry into a police database.

The Court of Appeals misconstrued the governing statutes and misinterpreted the legislative schemes at issue. Recognizing the transitory immaturity that causes children to engage in criminal behavior, the legislature encourages their rehabilitation and protects their privacy. It undermines this legislative purpose to demand children supply the police with biological samples of their DNA simply because they have entered a deferred disposition. Children who successfully complete the requirements of a deferred disposition should not be subject to the mandatory collection and permanent seizure of their DNA in a police database.

E. CONCLUSION.

I.A.S. respectfully requests this Court hold that children who begin a deferred disposition in juvenile court are not mandated to immediately submit their DNA to law enforcement that the State will permanently retain in a DNA database.

DATED this 14th day of May 2021.

Respectfully submitted,

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Petitioner
nancy@washapp.org
wapofficemail@washapp.org

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☒ respondent Larry Steinmetz
[lsteinmetz@spokanecounty.org]
[SCPAappeals@spokanecounty.org]
Spokane County Prosecuting Attorney

☒ petitioner

☒ Andrea Burkhart - Attorney for other party
[Andrea@2arrows.net]

MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 14, 2021
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