99374-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

M.Y.G., PETITIONER

Consolidated with 99379-3

STATE OF WASHINGTON, RESPONDENT

v.

I.A.S., PETITIONER

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Is a juvenile felony deferred disposition, while active, a conviction for the purposes of RCW 43.43.754 which triggers the requirement of a DNA sample?

2. Is a juvenile who enters a deferred disposition for a felony crime required to submit a DNA sample upon the court's acceptance of the deferred disposition agreement, or only upon revocation?

II. STATEMENT OF THE CASE

State v. M.Y.G.

On September 27, 2019, M.Y.G. was charged with two counts of theft of a motor vehicle. MYG CP[1] 1. M.Y.G. requested a deferred disposition on his case, as authorized by RCW 13.40.127. MYG CP 19. Spokane County Superior Court, Juvenile Division, Judge Anderson, granted the defendant's motion and entered a finding of guilty on the amended charges, with disposition to be deferred until September 4, 2019. MYG CP 25-26. Defendant objected to collection of DNA and the court stayed collection pending appeal. MYG CP 28.

M.Y.G. successfully completed the requirements of the deferred disposition and an order dismissing his case was entered on October 12, 2020. *See,* No. 372405-III, October 21, 2020, Ruling Granting State's 7.2(e)

[1] Reference to clerk's papers for *State v. M.Y.G.*, Court of Appeals No. 372405-III, will be "MYG CP." Reference to clerk's papers for *State v. I.A.S.,* Court of Appeals No. 37166-2-III *I.A.S.*, will be simply "IAS CP."

Motion to Authorize Spokane County Superior Court to Enter Order Dismissing Deferred Disposition. The Court of Appeals heard M.Y.G.'s appeal, despite technical mootness, and affirmed the trial court, finding that juvenile felony deferred dispositions are convictions for the purposes of the DNA collection statute. *State v. M.Y.G.*, 15 Wn. App. 2d 641, 476 P.3d 1052 (2020).

State v. I.A.S.

On July 30, 2019, I.A.S. was charged with theft of a motor vehicle, DUI, and failure to remain at the scene of an accident. IAS CP 5. The State subsequently amended the information, adding a single count each of second degree burglary and second degree theft. CP 10. I.A.S. requested a deferred disposition on his case, as authorized by RCW 13.40.127. IAS CP 19. Spokane County Superior Court, Juvenile Division, Judge Anderson, granted the defendant's motion and entered a finding of guilty on the amended charges, with disposition to be deferred until October 1, 2020. IAS CP 25-26. After objection and motion for reconsideration, Defendant was ordered to submit a DNA sample in accordance with RCW 43.43.754. IAS CP 80. Collection of DNA was stayed pending appeal. IAS CP 81.

I.A.S. was unable to successfully complete the deferred disposition and a revocation order was entered on July 6, 2020.[2] The Court of Appeals heard I.A.S.'s appeal and affirmed the trial court's order requiring a DNA sample be collected from I.A.S., finding that the statute was not ambiguous. *State v. I.A.S.*, 15 Wn. App. 2d 634, 476 P.3d 614 (2020).

III. ARGUMENT

A. THE COURT OF APPEALS CORRECTLY INTERPRETED THE PLAIN MEANING OF THE STATUTE TO REQUIRE A DNA SAMPLE FROM JUVENILES ENTERING A DEFERRED DISPOSITION

This case is one of statutory interpretation. While additional issues regarding the rehabilitation of juvenile offenders are raised by petitioners, those issues are not relevant to the instant case because the legislature, through the statutes it has enacted, has been clear. It is presumed that "the legislature says what it means and means what it says." *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). Barring future legislative action to the contrary, the legislature has spoken, and done so clearly to require that "[a] biological sample must be collected for purposes of DNA identification analysis from… [e]very adult or juvenile individual convicted of a felony." RCW 43.43.754.

[2] The order was entered under Spokane County Superior Court No. 19-8-00481-32 on July 6, 2020. Pursuant to RAP 7.2(f), authorization by the Court of Appeals was not necessary and therefore not a part of this record.

The Court of Appeals correctly ruled that, upon entry into a deferred disposition, a juvenile has been "convicted" of a felony so as to trigger the DNA sample requirement of RCW 43.43.754. Because the clear language of that statute requires every adult or juvenile "convicted" of a felony to provide a sample, and because "conviction" is defined in RCW to include an adjudication of guilt pursuant to Title 10 or 13 RCW; a finding of guilty; or an acceptance of a plea of guilty, such as occurs upon entry of a juvenile deferred disposition, the statute is unambiguous and the plain meaning controls.

1. A deferred disposition, while active, is a "conviction" for the purposes of RCW 43.43.754, even if subsequently vacated.

The Juvenile Justice Act of 1977 (JJA) was intended to keep juvenile offenders accountable for their actions, while also providing for rehabilitation and reintegration of juvenile offenders, and protecting the citizenry from criminal behavior. RCW 13.40.010. Furthering these goals, qualifying juvenile offenders may avail themselves of a deferred disposition for certain criminal offenses. RCW 13.40.127. "When a deferred disposition is granted, the respondent is found guilty upon stipulated facts, and disposition is deferred pending satisfaction of conditions of supervision that the court specifies. If the juvenile completes all supervision conditions,

the conviction will be vacated and the case dismissed with prejudice." *State v. D.P.G.*, 169 Wn. App. 396, 399, 280 P.3d 1139 (2012).

While a juvenile offender may successfully complete the requirements of the deferred disposition agreement and subsequently receive a vacation of their conviction, until that process occurs, their conviction exists. A "conviction" includes a finding of guilt, plea of guilty, or adjudication of guilt. RCW 9.94A.030(9). This definition applies to both adult defendants and juvenile respondents. *See State v. J.H.*, 96 Wn. App. 167, 179, 978 P.2d 1121 (1999). The deferred disposition statute itself acknowledges the existence of the conviction, stating: "A deferred disposition shall *remain* a conviction unless the case is dismissed and the conviction is vacated pursuant to (b) of this subsection or sealed pursuant to RCW 13.50.260." RCW 13.40.127(9)(c) (emphasis added).

The Court of Appeals agreed with this, finding "the trial court found M.Y.G. guilty of the two charged felony offenses. This constitutes a 'conviction' within the meaning of RCW 9.94A.030(9). M.Y.G. was thus 'convicted' when the trial court found him guilty and entered the deferred disposition order." *M.Y.G.*, 15 Wn. App. 2d at 645.

Petitioner M.Y.G. argues the Court of Appeals erred because it "applied an adult criminal definition of 'conviction' to a juvenile proceeding without conducting any evaluation whether the purposes of the

JJA and the SRA were consistent in defining convictions." Pet. for Review of M.Y.G. at 6. In support, M.Y.G. cites RCW 13.04.240 for the proposition that "within the juvenile system, an adjudication of guilt is not to be deemed a conviction of a crime." *Id.*

The citation to RCW 13.04.240 is inapposite because that statute is located in chapter 13.04 RCW, the Basic Juvenile Court Act, and the section itself states that "[a]n order of court adjudging a child a juvenile offender or dependent under the provisions of *this chapter* shall in no case be deemed a conviction of crime." RCW 13.04.240 (emphasis added). By its own terms, the cited statute does not apply to the deferred disposition statute, RCW 13.40.127, located in chapter 13.40 RCW (The Juvenile Justice Act), nor does it apply to RCW 43.43.754 or RCW 9.94A.030. Were this Court to construe RCW 13.04.240 as Petitioners posit, then a DNA sample would not be required even after a failed deferred disposition; nor could a juvenile conviction be able to be counted for scoring purposes under the Sentencing Reform Act (SRA), as it could not be considered a "conviction" under RCW 9.94A.030. *See State v. Johnson*, 118 Wn. App. 259, 76 P.3d 265 (2003).

M.Y.G.'s claim that it was the Court of Appeals that applied the adult criminal definition of conviction to a juvenile proceeding is also incorrect. It was the legislature that did so, by drafting RCW 43.43.754 as

it did. The Court of Appeals simply "g[a]ve effect to the legislature's intent." *Costich*, 152 Wn.2d at 470. It is clear that the legislature considered juveniles in its drafting of RCW 43.43.754 because it referred to them explicitly in an inclusive list of those to whom the law applied ("[e]very adult or juvenile"). RCW 43.43.754(1)(a). In fact, RCW 43.43.754 mentions juveniles no fewer than 11 times in its various subsections. It also specifically states "convicted of a felony, or any of the following crimes (or equivalent juvenile offenses)." RCW 43.43.754(1)(a).

The legislature is presumed to both know the law in the area in which it is legislating and know the definitions of words used in statutes. *State v. Torres*, 151 Wn. App. 378, 385, 212 P.3d 573 (2009). When it passed the Juvenile Justice Act, the legislature did not include an alternate definition of "conviction" within that law. *See* RCW 13.40.020. Had the intent been for RCW 43.43.754 to treat "findings of guilty" differently when made under the JJA, despite the plain language of RCW 9.94A.030, and considering the fact that juveniles were taken into account in RCW 43.43.754, then presumably the legislature would have said so. It did not, and so the plain reading by the Court of Appeals is correct.

2. A conviction triggers the requirement of a DNA sample.

Petitioner M.Y.G claims that "[t]he governing statute directs the actual collection of the biological sample for DNA analysis only after a person has been sentenced, not at the time the conviction is entered, even though the obligation to provide a sample is triggered by the conviction." Pet. for Review of M.Y.G. at 10. However, this is an assumption, and not supported by the cited law. M.Y.G. cites provisions of RCW 43.43.754 that direct the method of collection and the fact that a DNA fee is only authorized as part of sentence in support of the proposition. The Court of Appeals correctly noted that "[t]he conviction triggers the [DNA] requirement… The sentencing triggers the fee." *M.Y.G.*, 15 Wn. App. 2d at 646.

M.Y.G. also argues that the provision of RCW 43.43.754 which allows individuals who will not be required to serve a term of confinement to report, for the taking of a DNA sample, to a local law enforcement location "within a reasonable period of time" can be interpreted to mean that the sampling should be delayed during the term of the deferred disposition. Amendments to statutes may be used to derive the intent of the legislature in their interpretation. *PeaceHealth St. Joseph Med. Ctr. v. Dep't of Revenue*, 196 Wn.2d 1, 468 P.3d 1056 (2020). In 2020, the legislature updated RCW 43.43.754 to add a provision stating that, for individuals not

serving a term of confinement, "if the local police department or sheriff's office has a protocol for collecting the biological sample in the courtroom, [the court shall] order the person to immediately provide the biological sample to the local police department or sheriff's office before leaving the presence of the court." Laws of 2020, ch. 26, § 7. This provision shows clearly that M.Y.G.'s interpretation of "reasonable period" is not shared by the legislature and that the intent of RCW 43.43.754 is that the sample be collected at "the earliest time it *can* be collected" *I.A.S.*, 15 Wn. App. 2d at 639 (emphasis in original). The Court of Appeals correctly found that "[c]onsidering all that the legislature has said in the statute, it is absurd to construe 'reasonable time' as meaning a period of time as long as nine months or a year." *Id.*

3. The statute is not ambiguous.

Statutory interpretation is a question of law. *State v. Keller*, 143 Wn.2d 267, 19 P.3d 1030 (2001). If a statute is clear on its face, the meaning is derived from its plain language. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). "A statute is unclear if it can be reasonably interpreted in more than one way. However, it is not ambiguous simply because different interpretations are conceivable." *Id.* at 954-55. An unambiguous statute is not subject to judicial construction. *Id.* at 955. A reviewing court will not "insert words into a statute where the language,

taken as a whole, is clear and unambiguous." *Id.* "For a statute to be ambiguous, two reasonable interpretations must arise from the language of the statute itself, not from considerations outside the statute." *Cerrillo v. Esparza*, 158 Wn.2d 194, 203-04, 142 P.3d 155 (2006).

"A biological sample must be collected for purposes of DNA identification analysis from…[e]very adult or juvenile individual convicted of a felony." RCW 43.43.754(1)(a). Conviction "means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." RCW 9.94A.030(9). To allow a juvenile a deferred disposition, a court enters "a finding or plea of guilt." RCW 13.40.127(4). By the plain meaning of the relevant statutes, a juvenile undergoing a deferred disposition has been convicted, however temporarily.

Petitioners argue that RCW 43.43.754 is ambiguous and ask this Court, through appeal to the rule of lenity, to effectively insert additional language into the law. Pet. for Review of I.A.S. at 13. Where the statute says "conviction," Petitioners' arguments invite the court to read "final conviction" or "conviction after [deferred] disposition." To conceptually add such language when the plain meaning is different and unambiguous would be inappropriate. If the legislature wishes to adopt Petitioner's position, it need only amend the statute. Barring that, the plain meaning

controls. Until, and unless, a vacation of the conviction occurs, a juvenile undergoing a deferred disposition has still been convicted of a felony and is subject to the requirement of a DNA sample.

B. DNA INCLUSION INTO AN IDENTIFICATION DATABASE WHICH IS NOT PUBLICLY ACCESSIBLE IS NEITHER PUNITIVE NOR HARMFUL TO REHABILITATION.

Petitioners' arguments invite this Court to find ambiguity in RCW 43.43.754 based, in part, on public policy concerns regarding juveniles. While these concerns may be laudable generally, they do not apply here because, "[w]here the language of a statute is unambiguous, we discern legislative intent from the statutory text alone and give effect to the plain meaning." *In re Martinez*, 171 Wn.2d 354, 365, 256 P.3d 277 (2011). When the legislature has spoken, so long as the law is within its constitutional power, "the wisdom, necessity or expediency of the particular legislative enactment is not subject to judicial review." *State v. Scheffel*, 82 Wn.2d 872, 877, 514 P.2d 1052 (1973). While this Court should not consider policy aspects germane to its review of the instant case, even were it to do so, Petitioners' arguments fail.

1. Inclusion in the DNA database is not punitive.

Petitioner I.A.S. claims that "as part of the sentence, the court must order an eligible person to submit to a seizure of their DNA for purposes of DNA analysis." Pet. for Review of I.A.S. at 9. While the obligation to

submit a DNA sample under RCW 43.43.754 is triggered by a conviction, the requirement is not actually part of the imposed sentence. As the Court of Appeals notes, it is "an independent requirement imposed on convicted individuals." *M.Y.G.*, 15 Wn. App. 2d at 646. Much like the fingerprinting or photographing that occurs at booking, this process simply adds information to a database in an administrative fashion. This Court has previously compared the collection of DNA to the collection of fingerprints, stating that "[i]t is a well established practice of government to collect fingerprints from convicted felons for identification purposes. We find no distinction between that practice and the collection of DNA." *State v. Surge*, 160 Wn.2d 65, 74, 156 P.3d 208 (2007).

A DNA sample takes nothing substantive from the individual, as a fine does, nor does it impose any additional restriction or disability after the taking of the sample. No additional affirmative actions are required from the person, once the sample is taken, and there are no further constraints on behavior as a result of the DNA sample requirement. Because of this, viewing the DNA requirement as punitive is misguided. Were this Court to do so, and considering the finding by this Court in *Surge* that DNA sampling is equivalent to fingerprinting, it would necessarily follow that fingerprinting is punitive as well. This would be an absurd result.

The uses to which the DNA database are put are not wholly negative to the interests of those whose samples are contained within it. The legislature outlines its thinking in this regard by finding, "DNA analysis has also played a crucial role in absolving wrongly suspected and convicted persons and in providing resolution to those who have tragically suffered unimaginable harm." Laws of 2019, ch. 443, § 2. The database samples "shall be used solely for the purpose of providing DNA or other tests for identification analysis and prosecution of a criminal offense or for the identification of human remains or missing persons." RCW 43.43.754(6). Identification, in and of itself, is the type of usage which is agnostic to culpability. While DNA samples may be used to match prior offenders to future crimes, they may equally be used in an exculpatory fashion to exclude someone from suspicion. The identification of human remains or a missing person, by use of samples in the DNA database, serves an important public interest wholly aside from any criminal justice goals.

That a DNA sample requirement is not punitive can also be shown by examples of other contexts in which mandatory samples are compiled for identification purposes. For instance, The United States Department of Defense (DoD) requires that all service members, civilian employees, and contractors who deploy provide a DNA specimen, which is kept on file by the Armed Forces Medical Examiner System. *See* U.S. Department of

Defense, DoD Instruction 5154.30, "Armed Forces Medical Examiner System (AFMES) Operations," at §§ 2.4-2.5 (2017).[3] The purpose of this collection is to enable the performance of forensic pathology investigations and identify remains of individuals. *Id*. This requirement is imposed on all service members, and is not contingent upon any conviction. *Id*.

Because DNA collection, although imposed as part of a criminal conviction, puts no additional onus on the juvenile who provides it, and because the uses of the DNA database may be beneficial to the juvenile, it should not be considered a punitive requirement.

2. The privacy interests at concern for rehabilitation of juveniles are not implicated by DNA collection under the current schema.

Petitioners argue that the taking of a DNA sample from a juvenile is an "imposition of permanent consequences for juvenile misbehavior" and that the "purpose of a deferred disposition in juvenile court is for children to avoid the lasting consequences of a criminal conviction." Pet. for Review of M.Y.G. at 6; Pet. for Review of I.A.S. at 5. The State agrees that the legislature has decided that, because of the rehabilitative goals of the JJA, juveniles are entitled to additional privacy with regard to their criminal record. However, Petitioners have not made any showing that inclusion in

[3] *See*, Attach. A hereto, at pp. 6-8.

a DNA database to which there is no public access frustrates rehabilitation and reintegration.

a. The DNA database is not public.

DNA samples "shall be used solely for the purpose of providing DNA or other tests for identification analysis and prosecution of a criminal offense or for the identification of human remains or missing persons." RCW 43.43.754(6). The Court of Appeals acknowledged this, while recognizing the importance of protecting a juvenile's privacy, stating, "[w]e are not convinced the legislature intended to exempt juveniles with deferred felony dispositions from DNA collection, given that the DNA database is not public and is used solely for identification purposes." *M.Y.G.*, 15 Wn. App. 2d at 646. Because the DNA samples, unlike court records, are not publicly accessible records, their existence has no impact on rehabilitation.

b. Evading detection of future crimes is not the sort of privacy interest promoted by the JJA.

The intent by the legislature of the JJA includes "the rehabilitation and reintegration of juvenile offenders," but also "[making] the juvenile offender accountable for his or her criminal behavior," and "[protecting] the citizenry from criminal behavior." RCW 13.40.010(2). These goals are equally important. *Id.* The "legislature has always treated juvenile court records as distinctive and as deserving of more confidentiality than other

types of records. This court has always given effect to the legislature's judgment in the unique setting of juvenile court records." *State v. S.J.C.*, 183 Wn.2d 408, 417, 352 P.3d 749 (2015). This is because "[t]he primary goal of the Washington state juvenile justice system is the rehabilitation and reintegration of former juvenile offenders." Laws of 2014, ch. 175, § 1. With this goal in mind, the legislature tells us exactly what harms it is endeavoring to prevent, finding that "when juvenile court records are publicly available, former juvenile offenders face substantial barriers to reintegration, as they are denied housing, employment, and education opportunities on the basis of these records." *Id.* It is not the records themselves that are the issue, it is the public availability of those records, and the sequelae of that public availability.

The DNA database at issue here is not public and "shall be used solely for the purpose of providing DNA or other tests for identification analysis and prosecution of a criminal offense or for the identification of human remains or missing persons." RCW 43.43.754(6). For the purposes of the harms with which the legislature is concerned, this is equivalent to the sealing of records and extra privacy afforded them under Washington's system. Because the DNA samples, or their existence in the database, are not public, they do not prevent the rehabilitation or reintegration of the juveniles in question. Given the purposes of the database, the only negative

effect to a juvenile from inclusion would be detection of a future crime. Evading detection of future crimes is not a goal of the JJA. Indeed, the legislature made clear that "[t]he public has a compelling interest in the rehabilitation of former juvenile offenders and their successful reintegration into society as active, *law-abiding*, and contributing members of their communities." Laws of 2014, ch. 175, § 1 (emphasis added).

Petitioners' claim that the taking of a DNA sample from a juvenile upon entry of a deferred disposition is discordant with the purposes of the JJA is not based on the intent of the law, as outlined by the legislature itself. Indeed, it may help "[p]rotect the citizenry from criminal behavior." RCW 13.40.010(2)(a). Because of this, the claim that such sampling is at odds with the JJA lacks merit and should be discounted by this Court.

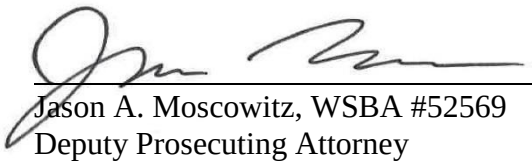
IV. CONCLUSION

Because the plain reading of RCW 43.43.754 requires juveniles convicted of a felony to submit a DNA sample, and because conviction is defined in RCW 9.94A.030 so as to include a finding of guilty such as a trial court makes when a juvenile enters a deferred disposition, this Court should affirm the ruling of the Court of Appeals. Even considering Petitioners' argument regarding the purposes of the JJA in this context, because a DNA sample which is not publicly available does not hinder

rehabilitation or reintegration of juveniles into society, this Court should deny their claim of error.

Dated this 14 day of May, 2021.

LAWRENCE H. HASKELL
Prosecuting Attorney



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ATTACHMENT A

DoD Instruction 5154.30

Armed Forces Medical Examiner System (AFMES) Operations

Originating Component:	Office of the Under Secretary of Defense for Personnel and Readiness
Effective:	December 29, 2015
Change 1, Effective:	December 21, 2017
Releasability:	**Cleared for public release.** This instruction is available on the Directives Division Website at http://www.esd.whs.mil/DD/.
Reissues and Cancels:	DoD Instruction 5154.30, "Armed Forces Institute of Pathology Operations," March 18, 2003
Incorporates and Cancels:	DoD Directive, 5154.24, "Armed Forces Institute of Pathology (AFIP)," October 3, 2001 Directive-type Memorandum, 12-001, "Department of Defense Executive Agent (DoD EA) for the Armed Forces Medical Examiner System (AFMES) and the National Museum of Health and Medicine (NMHM)," March 8, 2012, as amended
Approved by:	Brad Carson, Acting Under Secretary of Defense for Personnel and Readiness
Change 1, Approved by:	Edward J. Burbol, Chief, Directives Division, Washington Headquarters Services

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Purpose: This issuance:

- Establishes policy, assigns responsibilities, and provides direction for forensic medicine activities throughout DoD In accordance with the authority in DoD Directive (DoDD) 5124.02.

- Provides for the continued operation and governance of AFMES, a component of the Defense Health Agency (DHA) under DoDD 5136.13, in carrying out assigned functions, including those under Section 1471 of Title 10, United States Code (U.S.C.).

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SECTION 1: GENERAL ISSUANCE INFORMATION

1.1. APPLICABILITY. This issuance applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this issuance as the "DoD Components").

1.2. POLICY.

a. DoD maintains forensic medicine capabilities to support DoD and other external stakeholders.

b. The AFMES is established as a subordinate element of the DHA to:

(1) Perform forensic pathology investigations in accordance with Section 1471 of Title 10, U.S.C.

(2) Exercise DoD scientific authority for the identification of remains of DoD-affiliated personnel in deaths from past conflicts and other designated conflicts as provided in Section 1509 of Title 10, U.S.C.

c. DoD maintains expertise and capabilities in current and emerging forensic medicine disciplines, including but not limited to, forensic pathology, forensic anthropology, forensic odontology, DNA sciences, forensic toxicology, and mortality surveillance.

1.3. SUMMARY OF CHANGE 1. The changes to this issuance are administrative and update organizational titles and references for accuracy.

SECTION 2: RESPONSIBILITIES

2.1. UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)). The USD(P&R)):

a. Establishes policy and provides overall guidance for the AFMES.

b. Develops, in coordination with the Under Secretary of Defense for Policy, identification and laboratory policy in accordance with the AFMES and Section 1509 of Title 10, U.S.C.

c. Develops, in coordination with the Under Secretary of Defense for Acquisition, Technology, and Logistics, forensic medicine policy in accordance with DoDD 5205.15E.

2.2. ASSISTANT SECRETARY OF DEFENSE FOR HEALTH AFFAIRS (ASD(HA)). Under the authority, direction, and control of the USD(P&R), the ASD(HA):

a. Develops policy for, provides policy oversight of, and monitors the implementation of this issuance to ensure effective and efficient forensic medicine activities throughout DoD.

b. Directs that forensic medicine activities are appropriately reflected in the Defense Medical Programming Guidance and in the DoD budget.

c. Receives technical advice from the Armed Forces Medical Examiner (AFME) through the Director, DHA, and advises the USD(P&R) on execution of the responsibilities for forensic medicine disciplines.

2.3. DIRECTOR, DHA. Under the authority, direction, and control of the USD(P&R) through the ASD(HA), the Director, DHA:

a. Exercises authority, direction, and control over the AFME.

b. Monitors daily operations, provides administrative support, and maintains operational and functional oversight, including responsibility to administer the budget, personnel, information technology, facilities, and other resources required to support the missions and functions of the AFMES.

c. Appoints a forensic pathologist certified by the American Board of Pathology as the AFME from among nominees from the Army, Navy, and Air Force.

d. Appoints a forensic pathologist certified by the American Board of Pathology to the Defense POW/MIA Accounting Agency (DPAA) to:

(1) Exercise scientific identification authority as provided in Section 1509 of Title 10, U.S.C.

(2) Establish identification and laboratory procedures in accordance with the AFMES.

(3) Advise the DPAA Director on forensic science disciplines.

e. Assures the ability of the AFME to carry out authorities under Section 1471 of Title 10, U.S.C.

f. Coordinates with the DoD Component heads to identify requirements for forensic medicine activities.

2.4. AFME. Under the authority, direction and control of the Director, DHA, the AFME:

a. Serves as:

(1) The Chief, AFMES, and leads the AFMES organization.

(2) The DoD scientific authority for the identification of remains of DoD-affiliated personnel in current deaths and of other deceased individuals for whom a death certificate has not been issued.

(3) The DoD scientific authority for the identification of remains of DoD-affiliated personnel in deaths from past conflicts and other designated conflicts, in accordance with Section 1509 of Title 10, U.S.C.

b. Delegates his or her authority under Section 1471 of Title 10, U.S.C., to the Deputy Armed Forces Medical Examiner, Deputy Medical Examiners, Regional Medical Examiners, and other board-certified forensic pathologists under the cognizance of the AFME when professional credentials are verified.

c. Develops and establishes appropriate standards, processes, and procedures to fulfill requirements for forensic medicine disciplines in accordance with DoDDs 1300.22E, 5205.15E, 6490.14; and Department of Defense Instruction (DoDI)) 5505.10, and 1300.18.

d. Develops, establishes, and maintains laboratory accreditation; training and professional certification; and research, development, test and evaluation programs.

e. Ensures the medical examiner whose primary duties include identification of remains in support of DPAA for past conflicts and other designated conflicts in accordance with Section 1509 of Title 10, U.S.C., is fully informed in order to establish identification and laboratory policy consistent with the AFMES.

f. Oversees:

(1) The identification of remains in accordance with Title 10, U.S.C., and DoDD 1300.22E.

(2) The operation of the central forensic toxicology laboratory for the DoD Drug Testing Program in accordance with DoDIs 1010.01 and 1010.16.

(3) The operation of the Armed Forces DNA Identification Laboratory (AFDIL) to perform DNA testing for identification of human remains from peacetime casualties and from current and past conflicts and other designated conflicts. As authorized by the Director, DHA or ASD(HA), the AFDIL may perform DNA testing for other federal agencies on a reimbursable basis.

(4) The operation of the Armed Forces Repository of Specimen Samples for the Identification of Remains (AFRSSIR) in accordance with DoD Directive 5400.11 and DoD 5400.11-R to collect and store specimen samples for the identification of the human remains of any Service member, DoD civilian employee, or contractor personnel supporting military forces in accordance with this instruction.

(5) The operation of a DoD medical mortality registry to archive pertinent medical records, autopsy reports, and investigative reports on every Service member death. The AFME identifies medical, circumstantial, epidemiologic, and prevention issues for military deaths, and makes recommendations for improvements in personnel protective equipment. Military mortality information is reviewed annually with the Director, DHA.

(6) Forensic pathology investigative services rendered to non-DoD entities on a cost reimbursable basis and in accordance with DoDD 1100.20 and DoDI 3025.21.

(7) Consultation (including, as required, diagnostic and consultative services and medico-legal opinions, testimony, and evidence) on medico-legal investigations and related matters to the judge advocates and criminal investigative agencies of the Military Services and other federal agencies.

(8) Medico-legal investigations, including autopsies and DNA studies for identification, to support eligible organizations outside DoD, in accordance with Section 2012 of Title 10, U.S.C. and DoDD 1100.20. Such support is provided on a reimbursable basis, unless providing support serves a valid military training purpose and the support is incidental to the training, in accordance with DoDD 1100.20.

g. Reviews at least annually, with the Director, DHA, the AFMES accomplishments, mission and organization changes, and budget execution.

h. Issues and maintains federal death certificates in cases subject to AFME's authority under Section 1471 of Title 10 and for all cases requiring an overseas death certificate.

i. Maintains an official seal and attests to the authenticity of official records under that seal.

2.5. DOD COMPONENT HEADS.

The DoD Component heads:

a. Annually review the forensic medicine services provided by the AFMES for effectiveness and efficiency in meeting their requirements and make appropriate recommendations for improvement to the Director, DHA.

b. Ensure a DNA reference sample is sent to the AFRSSIR from individuals entering Military Service and all Service members have a sample on file with the AFRSSIR.

c. In accordance with DoDIs 3020.41, 6025.19, and 6490.03, require that Service members, DoD civilian employees, and contractor personnel who accompany military forces are not deployed without collection of a DNA reference specimen, collected in accordance with applicable procedures, to be used for identification of remains. The specimen will be forwarded to the AFRSSIR. No duplicate specimen samples will be held separately from the AFRSSIR.

d. Notify the AFME of the deaths of all Service members on active duty and inactive duty for training, including those retired due to disability within 120 days of death, if the death was the result of an injury or illness incurred while such a member was on a period of active duty. Allow the AFME to review all pertinent medical and dental records, investigative reports, photographs, evidence, x-rays, and retained pathologic materials on any autopsy performed in a DoD medical facility. Medical, casualty, mortuary, law enforcement, and other similar personnel of the DoD Component shall expeditiously report all such deaths to the AFME.

2.6. SECRETARIES OF THE MILITARY DEPARTMENTS. The DoD Component heads: In addition to the responsibilities in Paragraph 2.5., the Secretaries of the Military Departments each nominate a forensic pathologist certified by the American Board of Pathology to serve as the Armed Forces Medical Examiner as requested.

SECTION 3: OPERATIONS

3.1. FORENSIC PATHOLOGY INVESTIGATIONS AND AUTOPSIES

a. Authority. Under the authority, direction, and control of the AFME and in accordance with Section 1471 of Title 10, U.S.C., a medical examiner may conduct a forensic pathology investigation to determine the cause or manner of death of a deceased person if such an investigation is determined to be justified under circumstances described in Paragraph 3.1.b. The investigation may include an autopsy of the decedent's remains.

b. Basis for Investigation. A forensic pathology investigation of a death under this Section is justified if at least one of the circumstances in Paragraph 3.1.b.(1) and one of the circumstances in Paragraph 3.1.b.(2) exist:

(1) Justification under this Paragraph is a circumstance under which:

(a) It appears the decedent was killed or that the cause of death was unnatural;

(b) The cause or manner of death is unknown;

(c) There is reasonable suspicion the death was caused by unlawful means;

(d) It appears the death resulted from an infectious disease or from the effects of a hazardous material that may have an adverse effect on the military installation or community involved; or

(e) The identity of the decedent is unknown.

(2) Justification under this Paragraph is a circumstance under which:

(a) The decedent was found dead or died at an installation garrisoned by units of the Military Services that is under the exclusive jurisdiction of the United States;

(b) The decedent was a Service member on active duty or inactive duty for training;

(c) The decedent was recently retired in accordance with Chapter 61 of Title 10, U.S.C., as a result of an injury or illness incurred while a member on active duty or inactive duty for training;

(d) The decedent was a civilian dependent of a Service member and was found dead or died outside of the United States;

(e) In any other authorized DoD investigation of matters which involves the death, a factual determination of the cause or manner of the death of the decedent is necessary; or

(f) In any other authorized investigation being conducted by the Federal Bureau of Investigation, the National Transportation Safety Board, or any other federal agency, an

authorized official of such agency with authority to direct a forensic pathology investigation requests the AFME conduct such an investigation.

(3) Consent of the next-of-kin is not required for any forensic pathology investigation carried out under Paragraph 3.1.b.(2) or any other applicable compulsory authority.

c. Determination of Justification.

(1) Subject to Paragraph 3.1.c.(2), the determination that a circumstance exists under Paragraph 3.1.b.(1) will be made by the AFME.

(2) A commander may, after consultation with the AFME, make the determination that a circumstance exists under Paragraph 3.1.b.(1) and require a forensic pathology investigation under this Section without regard to a determination made by the AFME if:

(a) In a case involving circumstances described in Paragraph 3.1.b.(2)(a), the commander is the commander of the installation where the decedent was found dead or died; or

(b) In a case involving circumstances described in Paragraph 3.1.b.(2)(b), the commander is the commander of the decedent's unit at a level in the chain of command exercising summary court-martial convening authority.

d. Limitation in Concurrent Jurisdiction Cases.

(1) The exercise of authority under this Section is subject to the exercise of primary jurisdiction for the investigation of a death:

(a) In the case of a death in a State (including for this purpose the District of Columbia, the Commonwealth of Puerto Rico, and Guam), by the State or a local government of the State; or

(b) In the case of a death in a foreign country, by that foreign country under any applicable treaty, status of forces agreement, or other international agreement between the United States and that foreign country.

(2) Paragraph 3.1.d.(1) does not limit the authority of the AFME to conduct a forensic pathology investigation of a death that is subject to the exercise of primary jurisdiction by another sovereign nation if the investigation by the other sovereign nation is concluded without a forensic pathology investigation that the AFME considers complete. A forensic pathology investigation is incomplete if the investigation does not include an autopsy of the decedent.

e. Processes. For a forensic pathology investigation under this Section, the AFME will:

(1) Designate one or more qualified pathologists to conduct the investigation.

(2) To the extent practicable and consistent with responsibilities under this Section, give due regard to any applicable law protecting religious beliefs.

(3) As soon as possible, notify the decedent's person authorized to direct disposition of human remains (PADD), as defined in DoDI 1300.18, if known, that the forensic pathology investigation is being conducted.

(4) As soon as practicable after the completion of the investigation, authorize release of the decedent's remains to the person authorized to direct disposition of human remains, if known.

(5) Promptly report the results of the forensic pathology investigation to the official responsible for the overall investigation of the death.

f. Other Forensic Pathology Cases. In other cases in which the AFME does not have jurisdiction under Paragraph 3.1.b., but where the AFME believes a medico-legal investigation is needed with respect to a death for which DoD has an interest in a forensic pathology investigation, the AFME will seek the assistance and cooperation of authorities who exercise jurisdiction for conducting such investigation. In all aircraft mishap investigations where the local medico-legal authority has retained jurisdiction, OAFME may provide assistance as requested by the investigation board.

3.2 AFRSSIR. The AFRSSIR will:

a. Be operated under rules and procedures that ensure, in accordance with DoDD 5400.11 and DoD 5400.11-R, the protection of privacy of the specimen samples and any DNA analysis of those samples.

b. Maintain specimens in accordance with applicable standards. Specimen samples maintained by the AFRSSIR may only be used for:

(1) The identification of human remains.

(2) The identification of any member of the Military Services, DoD civilian employee, or contractor personnel supporting military forces, who is suspected of being missing in action, a prisoner of war, unaccounted for, or detainee, and any other purpose for the benefit of such a member or person as authorized by the ASD(HA).

(3) Internal QA activities to validate processes for collection, maintenance and analysis of samples.

(4) A purpose for which the donor of the sample, a surviving primary next-of-kin as defined in DoDI 1300.18, or, in the case of a contractor or other civilian personnel, the legal next-of-kin, provides consent.

(5) A purpose as provided in Section 1565a of Title 10, U.S.C., when all of the following conditions are met:

(a) The responsible DoD official has received a valid order of a federal court or military judge. For this purpose, the Chief of the Trial Judiciary of each of the Military Departments is the military judge authorized to issue such an order.

(b) The specimen sample is needed for the investigation or prosecution of a felony or any sexual offense.

(c) The specimen sample can be provided in a manner that does not compromise the ability of the AFRSSIR to maintain a sample for the purpose of identification of remains.

(d) No other source for obtaining a specimen for DNA profile analysis is reasonably available.

c. Establish and maintain a procedure for destruction of samples. A routine destruction schedule will be followed, under which samples will be retained for not more than 50 years.

(1) Individual specimen samples will be destroyed at the request of the donor following the conclusion by the donor of completed military service or other applicable relationship to DoD.

(2) On receipt of such a request, the AFRSSIR will destroy the sample within 180 calendar days and send notification to the donor.

(3) If the donor is deceased, destruction may be requested by the applicable primary or legal next-of-kin.

3.3. OTHER AFMES FUNCTIONS. Consultation (including, as required, diagnostic and consultative services and medico-legal opinions, testimony, and evidence) on medico-legal investigations will, absent extraordinary circumstances as determined by the AFME, be provided under the standard operating procedures of the AFMES.

a. Consultation will include accession of the material into the AFMES case repository as a Government medical record, internal QA review, and the availability of the consulting pathologist to all interested parties with a need to know or authorization for access.

b. AFMES pathologists are normally unavailable for nomination or assignment by convening authorities or military judges as defense consultants or members of the defense team, or other position requiring protection of communications and submitted case materials as privileged attorney-client communications.

GLOSSARY

G.1. ACRONYMS.

AFDIL	Armed Forces DNA Identification Laboratory
AFME	Armed Forces Medical Examiner
AFMES	Armed Forces Medical Examiner System
AFRSSIR	Armed Forces Repository of Specimen Samples for the Identification of Remains
ASD(HA)	Assistant Secretary of Defense for Health Affairs
DHA	Defense Health Agency
DNA	deoxyribonucleic acid
DoDD	DoD Directive
DoDI	DoD Instruction
DPAA	Defense POW/MIA Accounting Agency
QA	quality assurance
U.S.C.	United States Code
USD(P&R)	Under Secretary of Defense for Personnel and Readiness

G.2. DEFINITIONS.

These terms and their definitions are for the purpose of this issuance.

autopsy. An examination and dissection of a dead body by a physician for the purpose of determining the cause, mechanism, or manner of death, or the seat of disease, confirming the clinical diagnosis, obtaining specimens for specialized testing, retrieving physical evidence, identifying the deceased or educating medical professionals and students.

completed military service. Includes active duty service, all service as a member of the Selected Reserve, the Individual Ready Reserve, the Standby Reserve, the Retired Reserve, or the Retired Regular Permanent.

forensic medicine disciplines. Those forensic disciplines supporting the DoD's medical missions. They include but are not limited to, forensic pathology, forensic anthropology, forensic odontology, DNA sciences, forensic toxicology, and mortality surveillance.

forensic pathology. The branch of medicine concerned with determining the cause and manner of death and identifying the deceased through medical and scientific means, including the autopsy process.

forensic pathology investigation. A systematic process of gathering, recording, and preserving evidence and information for purposes of positive identification of the deceased, documentation of trauma and preexisting conditions, and investigative correlations to include an interpretation of injury patterns. The goal of a forensic pathology investigation is to determine a cause and

manner of death compatible with the scene of death, terminal events, and the background of the deceased and to assist with criminal and safety-board investigations. For the purposes of this instruction, the terms forensic pathology investigation and medico-legal death investigation are synonymous.

person authorized to direct disposition of human remains. Defined in DoDI 1300.18.

REFERENCES

DoD Directive 1100.20, "Support and Services for Eligible Organizations and Activities Outside the Department of Defense," April 12, 2004
DoD Directive 1300.22E, "Mortuary Affairs Policy," October 30, 2015, as amended
DoD Directive 5124.02, "Under Secretary of Defense for Personnel and Readiness (USD(P&R))," June 23, 2008
DoD Directive 5136.13, "Defense Health Agency (DHA)," September 30, 2013
DoD Directive 5205.15E, "DoD Forensic Enterprise (DFE)," April 26, 2011, as amended
DoD Directive 5400.11, "DoD Privacy Program," October 29, 2014
DoD Directive 6490.14, "Defense Suicide Prevention Program," June 18, 2013, as amended
DoD Instruction 1010.01, "Military Personnel Drug Abuse Testing Program (MPDATP)," September 13, 2012, as amended
DoD Instruction 1010.16, "Technical Procedures for the Military Personnel Drug Abuse Testing Program (MPDATP)," October 10, 2012, as amended
DoD Instruction 1300.18, "Department of Defense (DoD) Personnel Casualty Matters, Policies, and Procedures," January 8, 2008, as amended
DoD Instruction 3020.41, "Operational Contract Support," December 20, 2011, as amended
DoD Instruction 3025.21, "Defense Support of Civilian Law Enforcement Agencies," February 27, 2013
DoD Instruction 5505.10, "Criminal Investigations of Noncombat Deaths," August 15, 2013
DoD Instruction 6025.19, "Individual Medical Readiness (IMR)," June 9, 2014
DoD Instruction 6490.03, "Deployment Health," August 11, 2006, as amended
DoD 5400.11-R, "Department of Defense Privacy Program," M ay 12, 2007
United States Code, Title 10

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. M.Y.G. Petitioner.	NO. 99374-2 Consol. w/99379-3 CERTIFICATE OF MAILING
STATE OF WASHINGTON, Respondent, v. I.A.S., Petitioner.	

I certify under penalty of perjury under the laws of the State of Washington, that on May 14, 2021, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
andrea@2arrows.net

Gregory Link and Nancy Collins
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5/14/2021 **(Date)** Spokane, WA **(Place)** **(Signature)**

SPOKANE COUNTY PROSECUTOR

May 14, 2021 - 2:29 PM

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