

Supreme Court No. 99374-2  
Consolidated with Supreme Court No. 99379-3

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,  
Respondent,  
v.  
I.A.S.,  
Petitioner,

and

STATE OF WASHINGTON,  
Respondent,  
v.  
M.Y.G.,  
Petitioner.

---

BRIEF OF AMICI CURIAE  
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE,  
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON,  
WASHINGTON DEFENDER ASSOCIATION, ASIAN COUNSELING  
AND REFERRAL SERVICE, CENTER FOR CHILDREN AND  
YOUTH JUSTICE, CHOOSE 180, COLLECTIVE JUSTICE,  
COMMUNITY PASSAGEWAYS, CREATIVE JUSTICE, THE  
COUNCIL ON AMERICAN-ISLAMIC RELATIONS WASHINGTON  
CHAPTER, ELECTRONIC FRONTIER FOUNDATION, JUVENILE  
LAW CENTER, KENT BLACK ACTION COMMISSION, LA  
RESISTENCIA, THE LEAGUE OF EDUCATION VOTERS, LEGAL  
COUNSEL FOR YOUTH AND CHILDREN, LOOK2JUSTICE, THE  
MOCKINGBIRD SOCIETY, MOTHERS FOR POLICE  
ACCOUNTABILITY, ONEAMERICA, REAL CHANGE,  
TEAMCHILD, AND URBAN LEAGUE OF METROPOLITAN  
SEATTLE

---

<p><b>King County Department of Public Defense</b>  Katherine Hurley, WSBA No. 37863  La Rond Baker, WSBA No. 43610  710 Second Avenue, Suite 200  Seattle, WA 98104  Phone: (206) 477-8744  katherine.hurley@kingcounty.gov  lbaker@kingcounty.gov</p>	<p><b>ACLU of Washington Foundation</b>  Julia Mizutani, WSBA No. 55615  Nancy Talner, WSBA No. 11196  Jasmin Rezaie, Legal Intern  P.O. Box 2728  Seattle, WA 98111  Phone: (206) 624-2184  jmizutani@aclu-wa.org  talner@aclu-wa.org</p>
<p><b>Washington Defender Association</b>  Cindy Arends Elsberry, WSBA No. 23127  110 Prefontaine Place South,  Suite 610  Seattle, WA 98104  Phone: (206) 623-4321  cindy@defensenet.org</p>	

*Attorneys for Amici Curiae*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	INTEREST OF AMICI.....	1
III.	STATEMENT OF THE CASE.....	1
	A. The Criminal Legal System Must Not Saddle Children with Lifetime Consequences for Youthful Actions .....	1
	B. Deferred Dispositions Aim to Provide Youth a Pathway Away from Lifelong Criminalization Through Dismissal of the Case, a Vacated Adjudication, and Sealing .....	5
	C. Collecting DNA After Entry of a Deferred Disposition Undermines the Purported Goals of the Juvenile Legal System.....	8
	1. DNA collection is invasive and implicates young people’s privacy interests.....	8
	2. DNA collection has an overly broad purpose that can lead to indefinite, nationwide surveillance.....	10
	3. DNA collection from youth is stigmatizing and signals a more punitive juvenile legal system.....	14
	D. Collection of DNA for Deferred Dispositions Disproportionately Impacts Black, Indigenous and Other Washingtonians of Color.....	17
	E. DNA Disproportionately Harms BIPOC Washingtonians .....	19
IV.	CONCLUSION.....	20

**TABLE OF AUTHORITIES**

**Cases**

*Barr v. Snohomish County Sheriff*, 193 Wn.2d 330, 440 P.3d 131 (2019) ..... 6

*Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) ..... 4

*J.D.B. v. North Carolina*, 564 U.S. 261, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011)..... 3

*Johnson v. Texas*, 509 U.S. 350, 113 S. Ct. 2658, 125 L. Ed. 2d 290, *reh’g denied*, 509 U.S. 941, 114 S. Ct. 15, 125 L. Ed. 2d 767 (1993) ..... 3

*Matter of Domingo-Cornelio*, 196 Wn.2d 255, 474 P.3d 524 (2020), *cert. denied*, 141 S. Ct. 1753, 209 L. Ed. 2d 515 (2021) ..... 4

*Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) ..... 3

*Nelson v. State*, 120 Wn. App. 470, 85 P.3d 912 (2003) ..... 6

*Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260 (9th Cir. 1998)..... 8

*Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L.Ed. 2d 1 (2005) ..... 3

*State v. Chavez*, 163 Wn.2d 262, 180 P.3d 1250 (2008)..... 2

*State v. E.J.J.*, 183 Wn.2d 497, 354 P.3d 815 (2015) ..... 2

*State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017) ..... 1, 4

*State v. I.K.C.*, 160 Wn. App. 660, 248 P.3d 145 (2011)..... 16

*State v. J.A.*, 105 Wn. App. 879, 20 P.3d 487 (2001) ..... 6, 7

*State v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015) ..... 2

*State v. Posey*, 161 Wn.2d 638, 167 P.3d 560 (2007)..... 3

*State v. S.G.*, 11 Wn. App. 2d 74, 451 P.3d 726 (2019)..... 6

*State v. S.J.C.*, 183 Wn.2d 408, 352 P.3d 749 (2015)..... 2, 7, 18

*State v. S.M.G., Jr.*, 9 Wn. App. 2d 340, 444 P.3d 46 (2019) ..... 7

**Statutes**

Juvenile Justice Act of 1977 (“JJA”), RCW Chap. 13.40..... 2, 7, 15  
RCW 13.40.010 ..... 2  
RCW 13.40.127 ..... 5, 6  
RCW 43.43.754 ..... 8, 10, 14

**Other Authorities**

Administrative Office of the Courts, *Juvenile Deferred Disposition Data from 1/1/18-7/31/21* (2021)..... 11  
Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing, Fiscal Year 2020* (2021)..... 6  
*Convicted Offender DNA Collection*, Washington State Patrol CODIS Laboratory (Feb. 2018) ..... 8  
D.C. Code § 22–4151(b) ..... 12, 20  
Douglas R. Hares, *Expanding the CODIS core loci in the United States*, 6 *Forensic Sci. Int. Genet.* e52 (2012) ..... 19  
Edward Mulvey, Office of Juvenile Justice and Delinquency Prevention, *Highlights from Pathways to Desistance: a longitudinal study of serious adolescent offenders* (2011)..... 4  
Elster, Naomi, *DNA Evidence Can Lead to Wrongful Convictions*, *JSTOR Daily* (Dec. 6, 2017) ..... 19  
Erin Murphy and Jun H. Tong, *The Racial Composition of Forensic Databases*, Vol. 108, No. 6 *Calif.*, 1847, 1910 (2020) ..... 20  
*Frequently Asked Questions on CODIS and NDIS*, FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> ..... 8, 9  
Genetic Information Nondiscrimination Act of 2008 (GINA), Pub. L. No. 110-233, § 2, 122 Stat. 881 (2008), as amended Pub. L. No. 111–256, § 2(j), 124 Stat. 2643 (2010) ..... 10  
Haumann, Elizabeth, Office of Performance, King County Office of Strategy and Budget, *King County Juvenile Legal System Statistics Comparison of 2019 and 2020* (Feb. 2021)..... 18

Heather D. Evans & Steven Herbert, The University of Washington and Office of Public Defense, <i>Juveniles Sentenced as Adults in Washington State</i> , 2009-2019, 1, (2021).....	17
Jaehee Kim et al., <i>Statistical Detection of Relatives Typed with Disjoint Forensic and Biomedical Loci</i> , 175 Cell 848, 852 (2018).....	9
Janeen Buck Willison, Daniel P. Mears and Jeffrey A. Butts, Chapter 10 <i>The U.S. Juvenile Justice Policy Landscape</i> , In U.S. Criminal Justice Policy: A Contemporary Reader, 211, 225, (Karim Ismaili, ed., 2010).....	14
Jason Silverstein, <i>The Dark Side of DNA Evidence</i> , The Nation (April 15, 2013).....	20
Julie E. Samuels, et. al, <i>Collecting DNA from Juveniles</i> , iv (Jan. 2012) .....	13, 14
Kevin Lapp, <i>As Though They Were Not Children: DNA Collection from Juveniles</i> , 89 Tulane Law Review 435, 441 (2014) .....	15
Kevin Lapp, <i>Compulsory DNA Collection and a Juvenile’s Best Interests</i> , 14 U. Md. L. J. Race Relig. Gender & Class 53, 54 (2014).....	14, 15
Md. Code Ann., Pub. Safety § 2–506(d).....	12, 20
Michael D. Edge, Bridget F.B. Algee-Hewitt, Trevor J. Pemberton, Jun Z. Li, & Noah A. Rosenberg, <i>Linkage Disequilibrium Matches Forensic Genetic Records to Disjoint Genomic Marker Sets</i> , Proceedings of the National Academy of Sciences of the United States of America 114, 5671-5676 (May 15, 2017).....	9
Natalie Ram, <i>DNA by the Entirety</i> , Columbia L.Rev., <a href="https://columbialawreview.org/content/dna-by-the-entirety-2/">https://columbialawreview.org/content/dna-by-the-entirety-2/</a> .....	10, 12
Niedzwiecki, Emily, Debus-Sherill, Sara, and Field, Michael B., Office of Justice Programs, <i>Understanding Familial DNA Searching: Coming to a Consensus on Terminology</i> (Aug. 2017).....	12
Patrick McCarthy et al., National Institute of Justice, <i>The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model. New Thinking in Community Corrections Bulletin</i> (2016).....	5
Peter A. Chow-White and Troy Duster, <i>Do Health and Forensic DNA Databases Increase Racial Disparities?</i> , PLoS Med. (2011) .....	19
Spencer S. Hsu, <i>FBI Notifies Crime Labs of Errors Used in DNA Match Calculations Since 1999</i> , WASH. POST (May 29, 2015).....	19

U.S. Census Bureau, <i>State Characteristics: Population Estimates</i> <i>Table “SC-EST2019-ALLDATA6”: Annual State Resident</i> <i>Population Estimates for 6 Race Groups (5 Race Alone Groups and</i> <i>Two or More Races) by Age, Sex, and Hispanic Origin: April 1,</i> <i>2010 to July 1, 2019</i> .....	11
Wash. State Caseload Forecast Council, 2020 Washington State Juvenile Disposition Guidelines Manual § 3 .....	7
<i>Washington State Partnership on Juvenile Justice 2017 Annual</i> <i>Report to the Governor and State Legislature (2017)</i> .....	18
Washington Supreme Court, <i>Members of the Judiciary and Legal</i> <i>Community</i> (June 4, 2020).....	18
<b>Regulations</b>	
WAC 446-75-070.....	13

## **I. INTRODUCTION**

Through a deferred disposition, an eligible youth can avoid some of the long-lasting harms of a juvenile adjudication by obtaining a dismissal of their case, a vacated adjudication, and administrative sealing. After a deferred disposition is completed and the underlying adjudication is vacated and the case is sealed, it becomes as though the case never occurred. The promise that a deferred disposition will not have a permanent, negative impact on a young person's life is broken when the government compels a youth to turn over their genetic code.

## **II. INTEREST OF AMICI**

The identity and interest of Amici Curiae are set forth in the accompanying Motion for Leave to File an Amicus Curiae Brief.

## **III. STATEMENT OF THE CASE**

Amici adopt Petitioner's statement of the case.

### **I. ARGUMENT**

#### **A. The Criminal Legal System Must Not Saddle Children with Lifetime Consequences for Youthful Actions**

The Court has held that the criminal legal system must treat young people differently than adults. *See, e.g., State v. Houston-Sconiers*, 188 Wn.2d 1, 34, 391 P.3d 409, 426 (2017) (holding that because children are different a trial court must have complete discretion when sentencing youth as adults in the adult criminal legal system); *State v. O'Dell*, 183 Wn.2d



680, 358 P.3d 359 (2015) (holding that age should be considered as a possible mitigating factor at sentencing); *State v. S.J.C.*, 183 Wn.2d 408, 352 P.3d 749 (2015) (upholding sealing of juvenile court records). *See also State v. E.J.J.*, 183 Wn.2d 497, 528, 354 P.3d 815 (2015) (González, J., concurring) (noting that young people are not capable of making decisions in the same manner as adults).

In fact, Washington’s juvenile legal system has always recognized that youthfulness matters: “[t]he history of juvenile justice [in Washington] is a history of bringing together long-standing tenets of common law with continuously evolving notions of criminology and the nature of juvenile development.” *S.J.C.*, 183 Wn.2d at 417. The Court has made clear that “juvenile court is not intended to restrain criminals to the end that society may be protected and the criminal perchance reformed; it is to prevent the making of criminals.” *Id.* at 416.

This is not surprising as the purpose of the Juvenile Justice Act of 1977 (“JJA”), RCW Chap. 13.40, is not purely punitive. RCW 13.40.010. “[W]hile punishment is the paramount purpose of the adult criminal system, the policies of the JJA are twofold: to establish a system of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders, and to hold juveniles accountable for their offenses.” *State v. Chavez*, 163 Wn.2d 262, 267-68, 180 P.3d 1250 (2008)

(citing *State v. Posey*, 161 Wn.2d 638, 645, 167 P.3d 560 (2007)). *See also* *S.J.C.*, 183 Wn.2d at 416.

This is consistent with developmental research which shows that young people’s brains are not fully developed until at least the age of twenty-five. Due to their “lack of maturity” and “underdeveloped sense of responsibility,” youth are prone to “impetuous and ill-considered actions and decisions.” *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290, *reh’g denied*, 509 U.S. 941, 114 S. Ct. 15, 125 L. Ed. 2d 767 (1993)). This echoes what “any parent knows”—youth is a “time and condition of life” marked by behaviors, perceptions, and vulnerabilities that are biologically driven and change with age. *Roper*, 543 U.S. at 569 (internal quotation marks omitted). Indeed, driven by the fact that young people’s brains and decision-making skills are not fully developed, the United States Supreme Court has consistently held that youthfulness must be deemed a mitigating factor in matters that have lasting impact on the young person—*i.e.*, sentencing. *See Miller v. Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (barring mandatory life without possibility of parole of juvenile offenders); *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S. Ct. 2394, 2397, 180 L. Ed. 2d 310 (2011) (requiring a child’s age to be part of the *Miranda* analysis);

*Graham v. Florida*, 560 U.S. 48, 82, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (barring “the imposition of life without parole sentence on a juvenile offender who did not commit homicide”); *Roper v. Simmons*, *supra* (barring states from imposing the death penalty on juvenile offenders). This Court has similarly recognized that “[c]hildren are different.” *Matter of Domingo-Cornelio*, 196 Wn.2d 255, 259, 474 P.3d 524, 526 (2020), *cert. denied*, 141 S. Ct. 1753, 209 L. Ed. 2d 515 (2021). *See also Houston-Sconiers*, 188 Wn.2d at 8.

Research further shows that the majority of young people age out of these behaviors and pitfalls of youthfulness as they mature, cognitive skills develop, and independence grows. *See* Edward Mulvey, Office of Juvenile Justice and Delinquency Prevention, *Highlights from Pathways to Desistance: a longitudinal study of serious adolescent offenders* (2011), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/highlights-pathways-desistance-longitudinal-study-serious>. Additionally, an increase in healthy relationships and community support helps stabilize the impulsivity of youth and counter the impacts of unhealthy family and community environments thereby enabling different decision-making. *See* Patrick McCarthy et al., National Institute of Justice, *The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model. New Thinking*

*in Community Corrections Bulletin* (2016),  
<https://www.ojp.gov/pdffiles1/nij/250142.pdf>.

The research regarding the transitory nature of detrimental youthful behaviors has led community organizations, like Creative Justice, to ask that systems recognize the “power of young people of color, youth from low-income families, and LGBTQA youth” and to demand that the criminal legal system “view[s] our youth through a wider lens, . . . trust[s] the community to address its own needs, and . . . celebrate[s] the strengths and creativity of young people navigating a complex world.” Creative Justice, *Statement of Purpose*,  
<https://www.creativejusticenw.org/about-cj>.

**B. Deferred Dispositions Aim to Provide Youth a Pathway Away from Lifelong Criminalization Through Dismissal of the Case, a Vacated Adjudication, and Sealing**

A youth with no prior felony criminal history and no more than one prior misdemeanor adjudication is eligible for a deferred disposition in juvenile court—as long as the youth is not charged with a sex offense or a violent offense. RCW 13.40.127(1). “In all cases where the juvenile is eligible for a deferred disposition,” juvenile courts are required to apply “a strong presumption that the deferred disposition will be granted.” RCW 13.40.127(2). In exchange for giving up their right to trial and to stipulating to the police report, youth are promised that their case will be dismissed,

and their conviction will be vacated if they “completed the terms of supervision.”<sup>1</sup> RCW 13.40.127(9)(a),(b). In addition, a case that results in a deferred disposition is administratively sealed when a youth turns 18—as long as there is no restitution outstanding to an individual victim.<sup>2</sup> RCW 13.40.127(10)(a)(i), (ii). Furthermore, the case is administratively sealed when a youth turns 18 and functionally ceases to exist because the conviction has been both vacated and sealed. *State v. S.G.*, 11 Wn. App. 2d 74, 82, 451 P.3d 726, 730 (2019) (citing *Barr v. Snohomish County Sheriff*, 193 Wn.2d 330, 339, 440 P.3d 131 (2019) (sealing juvenile court record is not expungement of the offense); *Nelson v. State*, 120 Wn. App. 470, 481, 85 P.3d 912 (2003)).

With a deferred disposition, a youth is promised a second chance, a clean slate, a future where their potential is not undermined by the harsh consequences of a juvenile court adjudication. A “deferred disposition [is]

---

<sup>1</sup> According to the Caseload Forecast Council’s 2020 report on juvenile dispositions, the vast majority of dispositions (3,433 or 95.3 percent) were the result of guilty pleas; only 75 (or 2.1 percent) of dispositions involved offenders adjudicated guilty following a juvenile court hearing. See Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing, Fiscal Year 2020*, at 6 (2021), available at [https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Juvenile\\_Disposition\\_Summary\\_FY2020](https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Juvenile_Disposition_Summary_FY2020). The remaining dispositions (93 or 2.6 percent) were revoked deferred and “Alford” pleas. *Id.*

<sup>2</sup> Notably, RCW 13.40.127(7) grants a juvenile court discretion to determine what constitutes lack of compliance with the conditions of a deferred disposition order.” *State v. J.A.*, 105 Wn. App. 879, 887, 20 P.3d 487, 492 (2001).

an attractive option for many juveniles” because of the ability to dismiss, vacate, and seal criminal offenses that occur during a person’s youth. *See* Wash. State Caseload Forecast Council, 2020 Washington State Juvenile Disposition Guidelines Manual § 3, at 35 [http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Juvenile\\_Disposition\\_Manual\\_2020.pdf](http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Juvenile_Disposition_Manual_2020.pdf) . This clean slate is critical because: “[a] publicly available juvenile court record has very real and objectively observable negative consequences, including denial of ‘housing, employment, and education opportunities.’” *S.J.C.*, 183 Wn.2d at 432.

In keeping with the statutory structure and purpose of deferred disposition, Division I of the Court of Appeals recently found that it is “inconsistent with the purpose of the deferred disposition statutory scheme to automatically include a deferred disposition in the juvenile’s criminal history[.]” *State v. S.M.G., Jr.*, 9 Wn. App. 2d 340, 348, 444 P.3d 46, 50 (2019). In *S.M.G.*, the court held that “the State’s argument that the deferred disposition counted as criminal history ignores the purpose of the JJA.” *Id.* In doing so, the court noted that “[a]lthough the JJA seeks a balance between the poles of rehabilitation and retribution, the purposes of accountability and punishment are tempered by and at times must give way to the purposes of responding to the needs of the juvenile.” *Id.* (quoting *J.A.*, 105 Wn. App. at 886).

**C. Collecting DNA After Entry of a Deferred Disposition Undermines the Purported Goals of the Juvenile Legal System**

**1. DNA collection is invasive and implicates young people's privacy interests.**

DNA samples include an individual's entire genetic blueprint, as well as insight into their entire family ancestry and medical conditions. DNA is unique and immutable, and in the event of a data breach, misuse, or unauthorized disclosure it cannot be changed.<sup>3</sup> "One can think of few subject areas more personal and more likely to implicate privacy interest than that of one's health or genetic make-up." *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998).

Washington State Patrol enters the DNA analysis not only into a statewide database, but into the national FBI Combined DNA Index System (CODIS). *See* RCW 43.43.754; *see also* *Convicted Offender DNA Collection*, Washington State Patrol CODIS Laboratory (Feb. 2018) [http://www.wsp.wa.gov/forensics/docs/crimelab/conv\\_off\\_dna\\_ppt.pdf](http://www.wsp.wa.gov/forensics/docs/crimelab/conv_off_dna_ppt.pdf).

The National DNA Index System (NDIS), the part of CODIS at the national level, "contain[s] the DNA profiles contributed by federal, state, and local participating forensic laboratories." *Frequently Asked Questions*

---

<sup>3</sup> If the unauthorized disclosure of DNA data in the National database were to occur it is only subject to a criminal penalty "not to exceed \$250,000." *Frequently Asked Questions on CODIS and NDIS*, FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>.

on CODIS and NDIS, FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>.<sup>4</sup> The National DNA Index contains over 14,541,796 “offender” profiles, and 1,103,683 forensic profiles.<sup>5</sup> *CODIS-NDIS Statistics*, FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics>. Washingtonians make up 308,439 “offender” profiles. *Id.*

The twenty markers that CODIS uses to create a DNA profile are meant in theory to be limited. However, a 2017 study demonstrated that even a small number of markers can be matched to similar datasets in other databases, such as health-research databases, which creates serious privacy concerns.<sup>6</sup> Michael D. Edge, Bridget F.B. Algee-Hewitt, Trevor J. Pemberton, Jun Z. Li, & Noah A. Rosenberg, *Linkage Disequilibrium Matches Forensic Genetic Records to Disjoint Genomic Marker Sets*, *Proceedings of the National Academy of Sciences of the United States of America* 114, 5671-5676 (May 15, 2017).

---

<sup>4</sup> “All 50 states, the District of Columbia, the federal government, the U.S. Army Criminal Investigation Laboratory, and Puerto Rico [use] NDIS.” *Id.*

<sup>5</sup> Statistical information current as of April 2021.

<sup>6</sup> At the time of the study CODIS only used 13 markers. However, the privacy risk has now increased because CODIS now uses 20 markers. *See Id.*; *Frequently Asked Questions on CODIS and NDIS*, FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>. *See also* Jaehee Kim et al., *Statistical Detection of Relatives Typed with Disjoint Forensic and Biomedical Loci*, 175 Cell 848, 852 (2018).



The potential harm implicates serious privacy concerns not only for individuals in the event of a data breach or misuse, but for all genetic relatives.<sup>7</sup> DNA has often been treated as an individualistic marker, like a fingerprint, however it is far from being individualistic. As noted previously, DNA is shared between relatives. It creates privacy risks involuntarily for that person’s close genetic relatives, not only the individual. This is a key concern that has been ignored when decisions in the past were made regarding privacy interests. *See* Natalie Ram, *DNA by the Entirety*, Columbia L.Rev., <https://columbialawreview.org/content/dna-by-the-entirety-2/>.

**2. DNA collection has an overly broad purpose that can lead to indefinite, nationwide surveillance.**

Biological samples are collected from individuals who have been “convicted of felony offenses and other crimes” for “purposes of DNA identification analysis.” RCW 43.43.754. According to the Administrative Office of the Courts, at least 1,609 youth have been ordered to provide their

---

<sup>7</sup> Unauthorized access to health and genetic information could lead to genetic discrimination from employers or insurance companies. Concerns about abuse of biological information are not unfounded, as the United States has demonstrated a history of genetic discrimination and forced sterilization against Black communities, as recognized by Congress. *See* Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 2, 122 Stat. 881 (2008), as amended Pub. L. No. 111-256, § 2(j), 124 Stat. 2643 (2010).

DNA pursuant to a Deferred Disposition between 1/1/18-7/31/21—due to reporting issues King County data is not included. Administrative Office of the Courts, *Juvenile Deferred Disposition Data from 1/1/18-7/31/21* (2021) (on file with Amici). Of the youth—not including King County youth—whose DNA was collected between 1/1/18-7/31/21, 237 were twelve or thirteen years old when the case was charged, 626 were fourteen or fifteen years old, and 729 were sixteen or seventeen years old. *Id.* Even though some of the race and ethnicity data is “unknown”, at least 14% of the youth ordered to submit to DNA collection on a deferred disposition between 1/1/18-7/31/21 were Black youth even though they only comprise 4% of the Washington’s population.<sup>8</sup> *Id.*

In Washington, DNA samples may only be used for “purposes related to criminal investigation, identification of human remains or missing persons, or improving the operation of the system authorized...” RCW 43.43.753. While Washington has set some limits on the use of DNA samples, criminal investigative purposes can be quite broad. Indeed, in some states criminal investigative purposes have been expanded to allow

---

<sup>8</sup> See also U.S. Census Bureau, *State Characteristics: Population Estimates Table “SC-EST2019-ALLDATA6”*: Annual State Resident Population Estimates for 6 Race Groups (5 Race Alone Groups and Two or More Races) by Age, Sex, and Hispanic Origin: April 1, 2010 to July 1, 2019 <https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-detail.html>.

searches of DNA databases to perform “familial searches” or “partial match searches[.]” Familial searches in DNA databases are already explicitly authorized in nearly a dozen states, and only two states, Maryland and the District of Columbia, expressly forbid them. Md. Code Ann., Pub. Safety § 2–506(d); D.C. Code § 22–4151(b). Because DNA databases are racially disproportionate and Black communities are especially dramatically overrepresented, familial searches ensure that primarily Black and Latinx families and communities will be regularly surveilled. This disparate impact only compounds over time because DNA profiles are retained indefinitely and the racial dragnet from familial searches will continue to expand as more generations are added given that DNA is inherited, thereby implicating—and subjecting to DNA searches—entire families and communities across generations.<sup>9</sup> While Washington may have limits on the use of DNA, we upload Washingtonians’ DNA samples to a national database where we have no control over how other

---

<sup>9</sup> A familial or partial-match search is used when DNA is recovered from a crime scene and there is no match in the system. Some states authorize use of the DNA database to search for a partial or familial match for criminal investigations. Through this process investigators are able to identify a relative in the system whose DNA partially matches any DNA profiles that are in the database. See Natalie Ram, *DNA by the Entirety*, Columbia L Rev. <https://columbialawreview.org/content/dna-by-the-entirety-2/>. From there investigators are able to narrow down potential suspects by investigating potential relatives of an unknown DNA profile. *Id.* See generally, Niedzwiecki, Emily, Debus-Sherill, Sara, and Field, Michael B., Office of Justice Programs, *Understanding Familial DNA Searching: Coming to a Consensus on Terminology* (Aug. 2017) <https://www.ojp.gov/pdffiles1/nij/grants/251080.pdf>.

jurisdictions use this personal information and certainly no means of requiring that any such usage comport with Washington’s privacy priorities regarding DNA samples or Washington’s policies regarding the juvenile legal system.<sup>10</sup>

Instead, when a DNA profile is uploaded into the nationwide database, it is compared with other DNA in the system to see if there is a “hit”—or an exact match for a past crime—and will be permanently retained in the system and subject to search indefinitely. Thus, collection of DNA is meant to partially act as a deterrent. However, “[t]here is little empirical evidence . . . that compulsory DNA collection deters people from committing crimes or fosters their rehabilitation . . . [and w]hatever specific deterrence DNA databasing may achieve is certainly diminished with respect to juveniles, who are less deterrable than adults.” Kevin Lapp,

---

<sup>10</sup> Once in the DNA database, expungements from the database are extremely rare, and the burden falls on the individual to request expungement. Julie E. Samuels, et. al, *Collecting DNA from Juveniles*, iv (Jan. 2012), <https://www.ojp.gov/pdffiles1/nij/grants/237193.pdf>; WAC 446-75-070. Under Washington’s statute, only individuals who can show that a conviction was vacated based on “reversal of the conviction”—not dismissed after a deferral—is eligible for expungement. WAC 446-75-070. If a conviction is vacated, DNA expungement is not automatic but instead the individual must then mail or deliver an application containing certified copies of final court orders vacating and reversing the conviction to the Washington State Patrol Crime Laboratory Division Headquarters. *Id.* Because of these high barriers, once collected, a youth’s DNA is likely stay in the statewide and national database indefinitely.

*Compulsory DNA Collection and a Juvenile's Best Interests*, 14 U. Md. L. J. Race Relig. Gender & Class 53, 54 (2014).

Yet, Washington's DNA collection practices do not distinguish between youth and adults.<sup>11</sup> See RCW 43.43.754. Similarly, many states do not treat youth differently with respect to DNA collection and use policies, despite privacy measures taken for youth within the juvenile legal system. See generally Julie E. Samuels, et. al, *Collecting DNA from Juveniles*, (Jan. 2012) (<https://www.ojp.gov/pdffiles1/nij/grants/237193.pdf>).

**3. DNA collection from youth is stigmatizing and signals a more punitive juvenile legal system.**

Some researchers point to youth DNA collection and use as an example of the trend toward a more punitive juvenile legal system. Janeen Buck Willison, Daniel P. Mears and Jeffrey A. Butts, Chapter 10 *The U.S. Juvenile Justice Policy Landscape*, In *U.S. Criminal Justice Policy: A Contemporary Reader*, 211, 225, (Karim Ismaili, ed., 2010) available at <https://jeffreymbutts.files.wordpress.com/2010/09/buck2011.pdf>. “DNA collection from juveniles is a permanent consequence that enmeshes a young person in the criminal justice apparatus. It signals prior wrongdoing,

---

<sup>11</sup> Moreover, any refusal to submit DNA is a gross misdemeanor. See RCW 43.43.754.

presumes future criminality, and is justified on demonstrably false notions of juveniles' rationality and deterrability[.]” Kevin Lapp, *As Though They Were Not Children: DNA Collection from Juveniles*, 89 *Tulane Law Review* 435, 441 (2014). *See also* Kevin Lapp, *Compulsory DNA Collection and a Juvenile's Best Interests*, 14 *U. Md. L. J. Race Relig. Gender & Class* 53, 54 (2014).

The order and collection of DNA undermines the purposes of a deferred disposition, which provides a pathway for a case to “be treated as though it never occurred” and the JJA since “DNA collection from juveniles ignores their childhood and it rejects the values that childhood protects. It is punitive, permanent, and stigmatizing, and does nothing to deter future offending or promote moral development. It gives the government a long memory of youthful mistakes and makes those subject to it, and their families, members of a pool of future usual suspects.” *Lapp, supra*, at 489.

Further, the process of DNA collection itself is stigmatizing for young people. Although the practices vary county by county throughout Washington State, all jurisdictions that responded to an informal inquiry indicated that DNA is collected upon the entry of a deferred disposition. In some counties, DNA is collected in a secure juvenile detention facility. When this occurs, the young person is escorted by detention officers from

the courtroom to a processing or intake area within the secure juvenile detention facility. Youth are escorted to detention even though the youth is not being ordered to a jail term and, in fact, cannot be ordered to serve a jail term on the deferred disposition. *State v. I.K.C.*, 160 Wn. App. 660, 669, 248 P.3d 145, 149 (2011) (holding that the plain language of RCW 13.40.127 does not allow juvenile courts to impose detention as a condition of community supervision for deferred dispositions). There, detention officers order the young person to open their mouth and then use a swab to collect the court-ordered DNA sample. In other counties, the DNA is not collected immediately upon entry of the deferred disposition. Instead, the youth is instructed to contact a third-party criminal legal system actor to schedule an appointment for the DNA collection.<sup>12 13</sup>

Prior to the Court of Appeals decisions at issue, courts did not uniformly or routinely require young people to submit their DNA as a result of the entry of a felony deferred disposition. In fact, King County Superior Court judges routinely refused to order DNA collection from

---

<sup>12</sup> In King County, DPD staff report that youth are ordered to schedule an appointment for DNA collection with the King County Sheriff's Office by a law enforcement officer or by an employee of the King County Prosecuting Attorney's Office.

<sup>13</sup> Further, DPD staff and community organizations have witnessed how upsetting DNA collection is to both youth and their parents. For example, one mother—upon hearing that a DNA sample was being ordered by the Court from her son, a 14-year old Native American youth—reacted with horror and became very upset at the thought of the government forcibly taking another piece of her family's identity.

young people who entered into a deferred disposition. However, after the opinion in this matter came down, DPD staff report that judges shifted their practice and now routinely order young people to submit their DNA.

**D. Collection of DNA for Deferred Dispositions Disproportionately Impacts Black, Indigenous and Other Washingtonians of Color**

Black and Indigenous youth, youth of color generally, and their families and communities, are disproportionately impacted by a requirement to submit to DNA collection in a deferred disposition. This is because BIPOC youth are disproportionately in contact with the juvenile legal system. We know that to be true because:

One of the most consistent findings in the research on the juvenile justice system is that race matters. . . . The key finding of this report is that children of color are disproportionately over-represented in Washington's juvenile justice system.

Heather D. Evans & Steven Herbert, The University of Washington and Office of Public Defense, *Juveniles Sentenced as Adults in Washington State*, 2009-2019, 1, (2021) [https://www.opd.wa.gov/documents/00866-2021\\_AOCreport.pdf](https://www.opd.wa.gov/documents/00866-2021_AOCreport.pdf). In fact, from 2009-2019 Washington State data shows that:

Latinx children are convicted at a rate that is **1.7 times** the rate of White children (or that the rate of Latinx children being convicted is **68% higher** than the rate for White children.) American Indian children are convicted at a rate that is **2.6 times** that of White children, and Black children are convicted at a rate **4.1 times** that of White children.



*Id.* at 15.

This is consistent with the Court’s position that the harms of a juvenile court record frequently fall on youth of color who “face disproportionately high rates of arrest and referral to juvenile court.” *See S.J.C.*, 183 Wn.2d at 432-34. Further, this is not surprising, as the Court has previously confirmed “racialized policing and the overrepresentation of [B]lack Americans in every stage of our criminal and juvenile justice systems.” Washington Supreme Court, *Members of the Judiciary and Legal Community* (June 4, 2020) <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>. These racial disparities exist—and seem to be increasing—in Washington, even as overall numbers of young people in the system decrease.<sup>14</sup> And the deferred disposition landscape is equally racially disproportionate.<sup>15</sup>

---

<sup>14</sup> *Washington State Partnership on Juvenile Justice 2017 Annual Report to the Governor and State Legislature*, (2017) available at <https://www.dcyf.wa.gov/sites/default/files/pdf/18-1271-Juv-Justice-Report-w-DataSection.pdf>.

<sup>15</sup> For example, in King County, there were seventy-seven (77) deferred dispositions in 2019 and forty-five (45) in 2020. Haumann, Elizabeth, Office of Performance, King County Office of Strategy and Budget, *King County Juvenile Legal System Statistics Comparison of 2019 and 2020* (Feb. 2021). In 2019, 73% of post-filing dispositions—which includes deferred dispositions—involved BIPOC youth, and in 2020, 65.2% of the post-filing dispositions involved BIPOC youth. *Id.* These numbers are in stark contrast to the racial makeup of King County’s population—51.8% of youth are white. *Id.*

### **E. DNA Disproportionately Harms BIPOC Washingtonians**

For many years, DNA was viewed as the “gold standard” of evidence, but it is not infallible. Errors are not only a problem of the past because as DNA technology develops, so too does the risk of error.<sup>16</sup> For example, researchers have found that, as the number of profiles in the DNA databases increases, the likelihood that two profiles will be the same or similar also increases, thereby increasing the possibility of adventitious and false matches. *See* Douglas R. Hares, *Expanding the CODIS core loci in the United States*, 6 *Forensic Sci. Int. Genet.* e52 (2012).

The over representation of BIPOC communities in these databases reflects and perpetuates the systemic policing of these communities. A 2011 study found that “forensic DNA databases are growing to mirror racial disparities in arrest practices and incarceration rates. Individuals from African American and Latino groups are overrepresented in forensic from health DNA databases.”<sup>17</sup> Noting that, “[t]his increase has been

---

<sup>16</sup> *See* Spencer S. Hsu, *FBI Notifies Crime Labs of Errors Used in DNA Match Calculations Since 1999*, WASH. POST, (May 29, 2015) [https://www.washingtonpost.com/local/crime/fbi-notifies-crime-labs-of-errors-used-in-dna-match-calculations-since-1999/2015/05/29/f04234fc-0591-11e5-8bda-c7b4e9a8f7ac\\_story.html?utm\\_term=.4b82a3fec292](https://www.washingtonpost.com/local/crime/fbi-notifies-crime-labs-of-errors-used-in-dna-match-calculations-since-1999/2015/05/29/f04234fc-0591-11e5-8bda-c7b4e9a8f7ac_story.html?utm_term=.4b82a3fec292). *See also* Elster, Naomi, *DNA Evidence Can Lead to Wrongful Convictions*, JSTOR Daily (Dec. 6, 2017), <https://daily.jstor.org/forensic-dna-evidence-can-lead-wrongful-convictions/>.

<sup>17</sup> Peter A. Chow-White and Troy Duster, *Do Health and Forensic DNA Databases Increase Racial Disparities?*, PLoS Med. (2011) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3186804/>.

accompanied by a dramatic shift in its racial composition as many African Americans and Latinos are incarcerated because they reside in communities where police systematically practice ‘buy and bust’ operations.” *Id.* As such, the errors and “false positives” are skewed to who is primarily represented in the databases.<sup>18</sup> By some estimations, by 2011, Black Americans made up approximately 40% of all CODIS profiles despite comprising less than 15% of the population. Jason Silverstein, *The Dark Side of DNA Evidence*, *The Nation* (April 15, 2013). <https://www.thenation.com/article/archive/dark-side-dna-evidence/>.<sup>19</sup>

#### IV. CONCLUSION

Amici request that the Court protect young Washingtonians from DNA collection after entry of a deferred disposition.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of August 2021.

*s/Katherine Hurley*  
Katherine Hurley, WSBA No. 37863  
La Rond Baker, WSBA No. 43610  
King County Department of Public Defense

---

<sup>18</sup> Familial searches in DNA databases are already explicitly authorized in nearly a dozen states, and only two states, Maryland and the District of Columbia, expressly forbid them. Md. Code Ann., Pub. Safety § 2–506(d); D.C. Code § 22–4151(b). Because DNA databases are racially disproportionate and Black communities are especially dramatically overrepresented, familial searches ensure that primarily Black and Latinx families and communities will be regularly surveilled while white families and communities will not.

<sup>19</sup> Erin Murphy and Jun H. Tong, *The Racial Composition of Forensic Databases*, Vol. 108, No. 6 Calif., 1847, 1910, (2020) <https://29qish1lqx5q2k5d7b491joo-wpengine.netdna-ssl.com/wp-content/uploads/2020/12/4-Murphy-Tong-FINAL.pdf>.

710 Second Avenue, Suite 200  
Seattle, WA 98104  
Phone: (206) 477-8744  
Email: katherine.hurley@kingcounty.gov  
Email: lbaker@kingcounty.gov

*s/Julia Mizutani*  
Julia Mizutani, WSBA No. 55615  
Nancy Talner, WSBA No. 11196  
ACLU of Washington Foundation  
P.O. Box 2728  
Seattle, WA 98111  
Phone: (206) 624-2184  
Email: jmizutani@aclu-wa.org  
Email: ntalner@aclu-wa.org

*s/Cindy Arends Elsberry*  
Cindy Arends Elsberry, WSBA No. 23127  
110 Prefontaine Place South, Suite 610  
Seattle, WA 98104  
Phone: (206) 623-4321  
Email: cindy@defensenet.org

*Attorneys for Amici Curiae*

## CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2021, I filed the foregoing brief via the Washington Court Appellate Portal, which will serve one copy of the foregoing document by email on the following:

Gregory Link  
Nancy Collins  
Washington Appellate Project  
wapofficemail@washapp.org  
greg@washapp.org  
nancy@washapp.org

Jason Moscovitz  
Larry Steinmetz  
Spokane County Prosecutor's Office  
scaappeals@spokanecounty.org  
jamoscovitz@spokanecounty.org  
lsteinmetz@spokanecounty.org

Andrea Burkhart  
Two Arrows, PLLC  
andrea@2arrows.net

s/Katherine Hurley  
Katherine Hurley, WSBA No. 37863  
King County Department of Public Defense  
710 Second Avenue, Suite 200  
Seattle, WA 98104  
Phone: (206) 477-8744  
Email: katherine.hurley@kingcounty.gov