LAW ENFORCEMENT DIGEST
May 2022

COVERING CASES PUBLISHED IN MAY 2022

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Cases in the Law Enforcement Digest are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges. Each month's Law Enforcement Digest covers court rulings issued by some or all of the following courts:

- **Washington Courts of Appeals**. The Washington Court of Appeals is the intermediate level appellate court for the state of Washington. The court is divided into three divisions. Division I is based in Seattle, Division II is based in Tacoma, and Division III is based in Spokane.
- **Washington State Supreme Court**. The Washington Supreme Court is the highest court in the judiciary of the U.S. state of Washington. The court is composed of a chief justice and eight justices. Members of the court are elected to six-year terms.
- **Federal Ninth Circuit Court of Appeals.** Headquartered in San Francisco, California, the United States Court of Appeals for the Ninth Circuit (in case citations, 9th Cir.) is a federal court of appeals that has appellate jurisdiction over the district courts in the western states, including Washington, Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada and Oregon.
- **United States Supreme Court:** The Supreme Court of the United States is the highest court in the federal judiciary of the United States of America.

TOPIC INDEX

CASES

WASHINGTON LEGAL UPDATES

The following training publications are authored by Washington State legal experts and available for additional caselaw review:

- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** - WA Association of Prosecuting Attorneys [2018-2021] | [2022]

QUESTIONS?

- Please contact your training officer if you want this training assigned to you.
- If you have questions/issues relating to using the ACADIS portal, please review the FAQ site.
- Send Technical Questions to lms@cjtc.wa.gov or use our Support Portal.
- Questions about this training? Linda J. Hiemer, JD| Program Administration Manager Legal Education Consultant/Trainer | lhiemer@cjtc.wa.gov

GENERAL BACKGROUND for *State of Washington v. M.Y.G.* and *I.A.S. and State of Washington v. Booker*

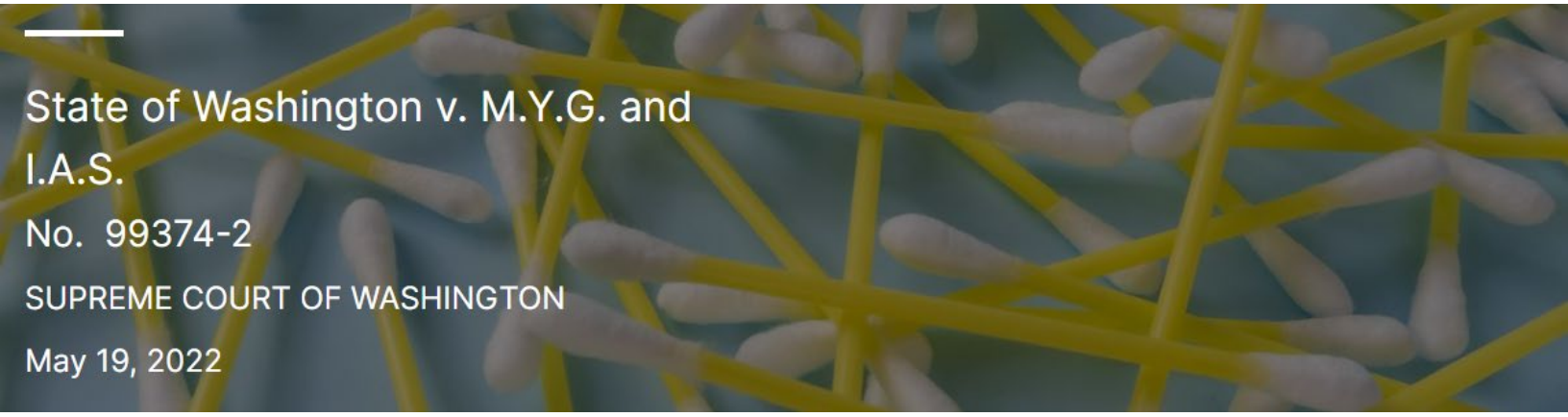
In 1999, the Washington State Legislature created the Washington State Forensic Investigations Council[1]. The council oversees and, in consultation with the Washington State Patrol, controls the operations of the Washington State Patrol Forensic Laboratory Services Bureau.[2]

The Washington State Patrol Crime Laboratory System has been accredited by the American Society of Crime Laboratory Directors since 1983 and performs a suite of forensic science services[3]. Among those services is the maintenance of a Combined DNA Index System, or CODIS.

A DNA sample must be collected from every adult or juvenile individual convicted of a felony or any of 11 sex crime misdemeanors or their equivalent juvenile offenses.[4]

- [1] **RCW 43.43.670**
- [2] **RCW 43.103.030**
- [3] **WSP FLSB Recruitment Material Doc ID 3000-210-020 4/17**
- [4] **RCW 43.43.754**

> **The materials contained in this course are for training purposes. All officers should consult their department legal advisor for guidance and policy as it relates to their particular agency.**



Factual Background

TOPIC: DNA Collection and Juveniles

This appeal involves two cases where the defendant was a juvenile.

In the first case, M.Y.G. was 15 years old when he stole two cars. He was charged with **theft of a motor vehicle**. M.Y.G. was granted a deferred disposition but objected to providing a DNA sample. The judge overruled the objection but stayed (stopped) the collection of the DNA pending M.Y.G.'s appeal. The appeals court affirmed the trial court's order to collect the DNA sample and M.Y.G. sought the review of the Washington State Supreme Court.

In the second case, I.A.S. was 17 years old and drunk when he stole a truck, crashed it into a tree, and ran from the scene. I.A.S. was charged with **second-degree burglary, theft of a motor vehicle, second-degree theft, driving under the influence, and failure to remain at the scene of an accident**. I.A.S. was also granted a deferred disposition and objected to providing a DNA sample. The judge overruled the objection but stayed the collection pending appeal. The court of appeals affirmed the trial court's ruling and I.A.S. sought review from the Washington State Supreme Court.

Review was granted to both parties and the cases were consolidated.

> **What is a deferred disposition?** Unless a juvenile has been charged with a sex or violent offense, has a criminal history that includes any felony, has two or more adjudications, or has a prior deferred disposition, the court may continue their case for not more than one year from the date they are found guilty. During that period, the juvenile must not violate the law and attend any court ordered therapy or classes. After the continuance, the court will determine whether the juvenile is entitled to dismissal of the deferred disposition. There is a strong presumption that a juvenile qualifies for a deferred disposition.

Analysis of the Court

The court considered two related issues. The first issue was whether a deferred disposition is a conviction under the DNA collection statute (RCW 43.43.754). Second, if a deferred disposition is a conviction under the DNA collection statute, were the two juveniles in these cases required to provide a DNA sample?

A deferred disposition is a conviction for the purposes of the DNA collection statute.

The court began by addressing the question of whether a deferred disposition was a conviction for the purposes of the DNA collection statute. When interpreting a statute, the court's fundamental objective is to ascertain and carry out the Legislature's intent. The courts give effect to a statute's plain meaning. If unavailable, it looks to the context of the statute, related provisions, and the statutory scheme. Definitions provided within a statute are controlling. If none are provided, the court may rely on the legislature's definition of that term in another statute. If the legislature does not define a word, courts may look to an applicable dictionary.

The DNA collection statute does not define "conviction," but the Sentencing Reform Act (SRA) does. Under the SRA, a "conviction" is **"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."** This indicated to the court that the legislature viewed a finding of guilt under Title 13, which governs juvenile adjudications, as a conviction. The court also noted that this is consistent with the common understanding of the word conviction.

Perhaps most persuasively, the deferred disposition statute, RCW 13.40.127, refers to a deferred disposition as a conviction seven times. One example, RCW 13.40.127(9)(c), reads, "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." The court found the phrase, "remain a conviction," necessarily implied that a deferred disposition is a conviction unless it is vacated.

But the petitioners did not hinge their arguments on the definition of conviction. Instead, they argued that RCW 13.04.240 prohibited treating a deferred disposition as a conviction

altogether or until a final disposition is entered. RCW 13.04.240 reads, "an 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 a crime." The court disagreed with the petitioner's interpretation, **reading the statute as a bar against treating a juvenile adjudication as a conviction of a *crime***. This speaks to the general principal that juveniles commit offenses, not crimes. The court reasoned that the distinction between offenses and crimes reflects the difference between how juveniles and adults are treated in the criminal justice system – particularly sentencing. A juvenile cannot be convicted of a felony under Title 13, they can be convicted of an offense.

The court found that RCW 13.04.240 posed no bar to the collection of M.Y.G and I.A.S.'s DNA because the collection is not contingent solely on a felony conviction. Rather, **the DNA collection statute provides that every juvenile convicted of a juvenile offense equivalent to the crimes listed in RCW 43.43.754(1)(a) must provide a DNA sample.** ***This means that a juvenile's conviction for an offense triggers the DNA sample requirement.***

Accordingly, the court held that a juvenile is convicted for DNA collection purposes when they enter a deferred disposition, and the juvenile court finds them guilty based on the stipulated facts contained in the police reports.

The DNA collection statute only applies to juveniles convicted of a felony offense in superior court or convicted of a juvenile offense equivalent to any of the 11 crimes listed in RCW 43.43.754(1)(a)(i)-(xi).

Having determined that a deferred disposition constitutes a conviction, the court turned to whether M.Y.G. and I.A.S. were required to provide a DNA sample. To defining the scope of the DNA collecting statute, the court looked at the text. The statute provides, "a biological sample must be collected for purposes of DNA identification analysis from … every adult or juvenile individual convicted of a felony, or any of the following crimes (or equivalent juvenile offenses)[5]."

The statute then lists 11 sexual or violent crimes. The court determined that juveniles are required to submit a DNA sample in only two scenarios:

(1) when they are convicted in superior court of a felony criminal offense, or

(2) when they are convicted in juvenile court of a juvenile offense equivalent to one of the 11 criminal offenses listed in RCW 43.43.754(1)(a)(i)-(xi).

The statute does not apply to juveniles who are convicted of offenses equivalent to felony criminal offenses.

Accordingly, **the court held that RCW 43.43.754 does not apply in cases of theft or property damage**, like those M.Y.B. and I.A.S. were convicted of, and neither juvenile had to provide a DNA sample.

[5] **RCW 43.43.754(1)(a)(i)-(xi)**

Training Takeaway

This case affirmed that any person convicted of a felony or sex crime misdemeanor must provide a DNA sample. This includes juveniles. For the purposes of the DNA collection statute, a deferred disposition is a conviction.

Typically, juveniles are not charged with felonies, they are charged with equivalent offenses. A juvenile convicted of an offense has not been convicted of a felony. Juveniles convicted of offenses equivalent to a felony have not been convicted of a felony and do not have to provide their DNA to the WSPCL.

Based on the majority ruling, juveniles are required to submit a DNA sample in only two scenarios:

1) When they are convicted in superior court of a felony criminal offense, or

2) When they are convicted in juvenile court of a juvenile offense equivalent to one of the 11 criminal offenses listed in RCW 43.43.754(1)(a)(i)-(xi):

   i. Assault in the fourth degree where domestic violence… was pleaded and proven
   ii. Assault in the fourth degree with sexual motivation
   iii. Communication with a minor for immoral purposes

iv. Custodial sexual misconduct in the second degree
v. Failure to register
vi. Harassment
vii. Patronizing a prostitute
viii. Sexual misconduct with a minor in the second degree
ix. Stalking
x. Indecent exposure
xi. Violation of a sexual assault protection order

EXTERNAL LINK: View the Court Document

Factual Background

TOPIC: DNA Collection and Law Enforcement Discretion

On June 7, 2018, Donica Denise Booker shot Saryi Thomas. Booker pleaded guilty to first degree assault with no firearm enhancement. On April 2, 2021, Booker was sentenced to 102 months' confinement and ordered to "have a biological sample collected for purposes of DNA identification analysis and … fully cooperate in the testing…" Booker was told that she must, "cooperate with [law enforcement] in providing a biological sample." The $100 DNA collection fee was waived because she had two previous felony convictions.

Booker appealed, arguing that the court made an error when it ordered her to "have a biological sample collected" for DNA analysis because her "felony history assures that her DNA sample is already in the database." The State responded by arguing that Booker's appeal was moot because the Department of Corrections collected Booker's DNA after sentencing.

Analysis of the Court

An issue is moot if the court can no longer provide effective relief for a claim. However, a court may still consider a moot issue if it presents an issue of continuing and substantial public interest. The court exercised this discretion and agreed to consider Booker's appeal because it "raise[d] an issue likely to reoccur, and to give helpful guidance to public officers.

The court then turned to the DNA collection statute and considered whether the trial court exceeded its authority when it required Booker to provide a DNA sample when she had already provided one.

Booker argued that the sentencing court should not have ordered her to provide a biological sample because the Washington State Patrol Crime Laboratory (WSPCL) already had her DNA. When reviewing issues of statutory interpretation, the courts look to the plain language and meaning of the statute to determine legislative intent

Under the DNA collection statute, RCW 43.43.754(1)(a). **"[a] biological sample must be collected for purposes of DNA identification analysis from … [e]very adult or juvenile individual convicted of a felony"** or other qualifying offense. The statute directs law enforcement agencies to collect DNA samples from these individuals and submit them to the WSPCL. WSPCL tests and adds the samples to a DNA database.

The court noted that the DNA collection statute served as a directive to law enforcement to collect a DNA sample, and only contemplates action from the court when sentencing an out-of-custody individual by directing the court to **"order the person to report to the local police department or sheriff's office"** to provide the required biological sample and **"inform the person that refusal to provide a biological sample is a gross misdemeanor."**

The law enforcement agency responsible for collecting the DNA sample is determined by the individual's custody status

- If the individual is in custody or sentenced to serve a term of confinement in a *city or county jail*, *the city or county detention facility* must collect the DNA sample.
- If the individual is in the custody or sentenced to serve a term of confinement in the *Department of Corrections (DOC)* then *the DOC facility holding the individual* must collect the DNA sample.
- If an individual is *out of custody* and *will not serve a custodial sentence*, then *the local police department or sheriff's office* must collect the DNA sample.

The court noted that under RCW 43.43.754(4), **if WSPCL "already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted."** But **an agency is not prohibited from doing so**. Legislative history supports this conclusion – the house bill report on what would become RCW 43.43.754(4) showed that the legislature intended the provision to expand the DNA database and alleviate the burden placed on WSPCL and local governments that were testing multiple samples from the same

individuals. It read, in part, "If a DNA sample already exists from the offender in question, another biological sample does not have to be collected…" and, "once law enforcement submits a sample to WSPCL, the lab may exclude "duplicate biological samples from testing."

The court observed that the purpose of RCW 43.43.754(4) was to relieve the government of its burden to collect and test duplicate biological samples, but that nothing in the language or legislative history of the provision prohibited law enforcement agencies from collecting duplicate DNA samples or relieves an individual from providing a biological sample on a lawful request.

The court concluded that RCW 43.43.754 **directs law enforcement agencies to collect DNA on conviction of a qualifying offense** and **vest the law enforcement agencies**, not the court, **with the discretion whether to collect duplicate biological samples.**

The sentence imposed by the trial court was affirmed.

Training Takeaway

This case was primarily concerned with the DNA collection statute, RCW 43.43.754. Under RCW 43.43.754(1) a biological sample must be collected for purposes of DNA identification analysis from:

a) Every adult or juvenile individual convicted of a felony, or any of the following crimes (or equivalent juvenile offenses):

i. Assault in the fourth degree where domestic violence as defined in RCW 9.94A.030 was pleaded and proven (RCW 9A.36.041, 9.94A.030);
ii. Assault in the fourth degree with sexual motivation (RCW 9A.36.041, 9.94A.835);
iii. Communication with a minor for immoral purposes (RCW 9.68A.090);
iv. Custodial sexual misconduct in the second degree (RCW 9A.44.170);
v. Failure to register (chapter 9A.44 RCW);
vi. Harassment (RCW 9A.46.020);
vii. Patronizing a prostitute (RCW 9A.88.110);
viii. Sexual misconduct with a minor in the second degree (RCW 9A.44.096);
ix. Stalking (RCW 9A.46.110);

x. Indecent exposure (RCW 9A.88.010);

xi. Violation of a sexual assault protection order granted under chapter 7.105 RCW or former chapter 7.90 RCW; and

b) Every adult or juvenile individual who is required to register under RCW 9A.44.130.

It **is the responsibility of the law enforcement agency that has custody of the individual to collect the DNA sample** and submit it to WSPCL. If the individual required to provide a biological sample is out of custody and will not serve a custodial sentence, then the local police department or sheriff's office is responsible for collecting the sample.

Under RCW 43.43.754(4), *if* the Washington State Patrol Crime Laboratory already has a DNA sample from an individual for a qualifying offense, **a subsequent submission is not required to be submitted**. However, the law enforcement agency that is required to collect the sample has the ***discretion*** to do so, even if one already exists in the WSPCL database.

EXTERNAL LINK: View the Court Document

Factual Background

TOPIC: Confrontation Clause: Out of Court Statement and Testimonial Statements

On January 26, 2016, a group of young men wearing masks and dark clothing entered the homeless encampment known as the "Jungle," in Seattle. The young men went to a section of the Jungle known as the "Cave," where people were known to sell and use crack and heroin. After asking to purchase heroin, the young men began shooting occupants of the encampment. Two people were killed, and three others were injured.

The next day, an individual known as "Lucky" contacted the police and claimed that his 17-year-old nephew had admitted to being the shooter. Lucky and another relative went to the Seattle Police Department headquarters where he agreed to attempt to obtain a secret video recording, which was granted by a superior court judge.

On January 30, 2016, Lucky wore a wire and recorded his visit with his nephews: 17-year-old James Ta'afulisia, 16-year-old Jerome Ta'afulisia (the appellant), and 13-year-old J.K.T. During the visit, Lucky told the brothers that they needed to sit down and talk. James discussed going to the "Cave" and shooting people there. J.K.T. laughed and mimed a shooting, saying, "it was like this: Tap, tap, tap, tap, tap." Lucky told the boys that Phat Nguyen survived the shooting, to which James responded, "Jerome shot him two times in the neck. And then the other guy, popped him in his chest."

The discussion took place outside in a chaotic and loud environment. The Ta'afulisia brothers walked in and out of the meandering conversation. Lucky lectured the Ta'afulisia brothers throughout the conversation, telling them they need to change, that they were his blood, and referring to them as his "little nephews."

James and Jerome were charged with two counts of felony murder in the first degree predicated on robbery and three counts of assault in the first degree. Before trial, Jerome moved to exclude

the video from evidence, arguing that his brothers' recorded statements were testimonial since neither would testify at trial and admission of the video violated his Confrontation Clause rights. The trial court ruled that given the casual environment, the brothers' relationship with their uncle, and the nature of the conversation, the statements were not testimonial and thus did not fall within the scope of the Confrontation Clause.

After a third jury trial, James and Jerome were convicted as charged. Jerome appealed.

Analysis of the Court

The Confrontation Clause guarantees an accused the right to confront the witnesses against them[6]. Jerome asserts that his brothers' utterances recorded in the video implicated the Confrontation Clause, and that since he had no opportunity to cross-examine his brothers, the admission of the recording violated his Confrontation Clause rights. Jerome's best argument was that the statements made to Lucky by his brothers were "testimonial in nature."

The United States Supreme Court has explained that the admission of an out-of-court statement by an unavailable declarant violates the Confrontation Clause when the statement is testimonial, and the witness has not been subject to previous cross-examination. In Crawford v. Washington, the U.S. Supreme Court reasoned that the Confrontation Clause applies to "'witnesses' against the accused – in other words, those who 'bear testimony.' **'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"** Accordingly, the Confrontation Clause would give Jerome the right to confront those who make testimonial statements against him. The U.S. Supreme Court did not define "testimonial," but did note that, at a minimum, testimonial statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and… police interrogations."

The Appeals Court noted that subsequent U.S. Supreme Court cases refined this approach, stating that, "Courts must evaluate challenged statements in context, and part of that context is the questioner's identity." **Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to testimonial than statements given to law enforcement.**

In another case, the U.S. Supreme Court held that "statements made unwittingly to a

government informant" were "clearly nontestimonial." And "even when interrogation exists, it is the final analysis of the declarant's statements, not the interrogators question, that the Confrontation Clause requires us to evaluate[7]." The Appeals Court noted that every federal circuit court that has dealt with statements unwittingly made by coconspirators, codefendants, or accomplices to informants or undercover agents has reached the conclusion that **"these statements are not testimonial because, viewed objectively, they are not made under circumstances that would lead an objective witness to a reasonable belief that the declarant's statements would be available for later use at trial."** In the end, **the question is whether, considering all the circumstances, viewed objectively, the "primary purpose" of the conversation was to create an out-of-court substitute for trial testimony.**

The Court of Appeals concluded that **when the primary purpose test is applied to the utterance knowingly made by a coconspirator, codefendant, or accomplice to an informant, the informant's secret purpose in gathering or recording evidence for possible use at a later trial does not transform such an utterance into "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."** Lucky's purpose in asking the questions does not control the analysis. Instead, the authority is uniform that **an objective viewer, aware of all the circumstances, would reasonably credit the utterer's motives as having greater weight than the conflicting motives of the others.**

The video at issue demonstrated that the conversation was extraordinarily casual and took place outdoors in a homeless encampment in which James, Jerome, and J.K.T. lived. Other people entered and left the area. As far as J.K.T. and James knew, the questions were coming from their uncle, a trusted older family member there to counsel and reprimand them, not an agent of law enforcement. The only challenged statements were those made by J.K.T. and James, who clearly did not have a purpose of creating a record for trial.

The Court of Appeals concluded that the statements at issue – J.K.T.'s and James's utterances regarding the shootings – were not testimonial.

The Court of Appeals affirmed the trial court's Confrontation Clause ruling.

[6] **U.S. CONST. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 42, 51 (2004)**
[7] ***Davis v. Washington*, 547 U.S. 813, 821 (2006)**

Training Takeaway

The constitutional right to confrontation applies to out-of-court statements by witnesses who have not been subject to previous cross-examination. **The Confrontation Clause only applies when challenged statements are testimonial in nature.** A statement is testimonial, for purposes of the Confrontation Clause, **when its primary purpose is to create an out-of-court substitute for trial testimony.** The primary purpose of an encounter in which a challenged out-of-court statement was made is discerned by objectively evaluating all the pertinent circumstances, including not only the motivations of the speaker but also of other participants.

When a court determines the testimonial nature of an unavailable declarant's statement for the purposes of the Confrontation Clause, when the purpose test is applied to utterances unknowingly made by coconspirator, codefendant, or an accomplice to an informant, **the informant's secret purpose in gathering or recording the evidence for possible use at a later trial does not transform the utterance into a solemn declaration or affirmation made for the purpose of establishing or proving some fact**, and the interrogator's purpose in asking questions does not control the analysis. Instead, **it is how an objective viewer, aware of all circumstances, would reasonably credit the utterer's motives as having greater weight than the conflicting motives of the others.**

In this case, the defendant's brothers' out-of-court statements were non-testimonial because the conversation between the brothers and the informant (Lucky) was extraordinarily casual. It took place outdoors in a homeless encampment in which the defendant and his brothers lived. Various other people entered and left the area. As far as the brothers knew, the questioner was a trusted older family member who was there to counsel and admonish them, not an agent of law enforcement.

EXTERNAL LINK: View the Court Document

Law Enforcement Digest – May 2022

TOPICS

- DNA Collection and Juveniles
- DNA Collection and Law Enforcement Discretion
- Confrontation Clause: Out of Court Statement and Testimonial Statements

CASES

1. State of Washington v. M.Y.G. and I.A.S. (May 19, 2022)
2. State v. Booker (May 16, 2022)
3. State of Washington v. Ta'afulisia (May 9, 2022)

FOOTNOTES

1	RCW 43.43.670	Bureau of forensic laboratory services
2	RCW 43.103.030 WSP FLSB Recruitment Material Doc	Council created—Powers and duties. Washington State Patrol Forensic Laboratory Services
3	ID 3000-210-020 4/17	Bureau
4	RCW 43.43.754	DNA identification system
5	RCW 43.43.754(1)(a)(i)-(xi)	
6	U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 42, 51 (2004)	
7	Davis v. Washington, 547 U.S. 813, 821 (2006)	