

HOUSE BILL REPORT

ESHB 2400

As Amended by the Senate

Title: An act relating to sentence enhancement for sex crimes against minors.

Brief Description: Providing enhanced penalties for sex crimes against children.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives McMahan, Carrell, Mielke, Talcott, Crouse, Bush, Ahern, Newhouse, G. Simpson, Woods and Orcutt).

Brief History:

Committee Activity:

Criminal Justice & Corrections: 2/13/04 [DP];
Appropriations: 2/28/04, 3/1/04 [DPS].

Floor Activity:

Passed House: 3/4/04, 93-2.
Senate Amended.
Passed Senate: EnterDate, EnterVote.

Brief Summary of Engrossed Substitute Bill

- Makes changes to the Special Sex Offender Sentencing Alternative.
- Requires the Washington Institute for Public Policy to perform an analysis and evaluation of sex offender sentencing.

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority Report: Do pass. Signed by 7 members: Representatives O'Brien, Chair; Darneille, Vice Chair; Mielke, Ranking Minority Member; Ahern, Assistant Ranking Minority Member; Kagi, Pearson and Veloria.

Staff: Jim Morishima (786-7191).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 27 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Sehlin, Ranking Minority Member; Pearson, Assistant Ranking Minority Member;

Alexander, Anderson, Boldt, Buck, Chandler, Clements, Cody, Conway, Cox, Dunshee, Grant, Hunter, Kagi, Kenney, Kessler, Linville, McDonald, McIntire, Miloscia, Ruderman, Schual-Berke, Sump and Talcott.

Staff: Bernard Dean (786-7130).

Background:

I. Rape of a Child

Rape of a child, also known as statutory rape, occurs when an adult, who is a certain number of months older than the victim, has sexual intercourse with a child under 16 years of age. For purposes of this crime, it is not necessary to prove lack of consent on the part of the victim. It is generally not a defense to this crime that the defendant did not know the victim's age or believed that the victim was older (unless the defendant reasonably believed the victim to be older based on declarations made by the victim).

The punishment for rape of a child depends on the age of the offender and the age of the victim:

- If the victim is less than 12 years old and the offender is at least 24 months older than the victim, the offender is guilty of rape of a child in the 1st degree, which is a class A felony with a seriousness level of XII. Rape of a child in the 1st degree is a two strikes offense.
- If the victim is at least 12 years old, but less than 14 years old, and the offender is at least 36 months older than the victim, the offender is guilty of rape of a child in the 2nd degree, which is a class A felony with a seriousness level of XI. Rape of a child in the 2nd degree is a two strikes offense.
- If the victim is at least 14 years old, but less than 16 years old, and the offender is at least 48 months older than the victim, the offender is guilty of rape of a child in the 3rd degree, which is a class C felony with a seriousness level of VI. Rape of a child in the 3rd degree is not a two strikes offense.

II. The Special Sex Offender Sentencing Alternative

The Special Sex Offender Sentencing Alternative (SSOSA) is an alternative to standard sentencing wherein the court suspends the offender's sentence in exchange for treatment and other conditions.

A. Eligibility for SSOSA

An offender is eligible for a SSOSA sentence if he or she:

- Is convicted of a sex offense other than a serious violent offense or rape in the second degree;
- Has no prior conviction for a sex offense; and

- Has a standard sentence range that includes the possibility of imprisonment for 11 years or less.

B. Deciding Whether to Grant a SSOSA

Prior to ordering a SSOSA, the court orders the offender to be examination. The examiner must submit a report of the examination and a proposed treatment plan to the court. After receipt of the report, the court must consider:

- Whether the offender and the community would benefit from the use of SSOSA; and
- The opinion of the victim.

C. Terms of a SSOSA Sentence

If a court decides to grant a SSOSA disposition, it enters a sentence and suspends its execution. The court must impose the following conditions of the suspended sentence:

- Treatment for any period up to three years; and
- A term of community custody.

Also, the court has the option to impose a variety of conditions of the suspended sentence, including up to six months of confinement (not to exceed the sentence range for the offense), crime-related prohibitions, and community restitution.

D. Supervision of SSOSA Offenders

Offenders who receive SSOSA sentences are supervised in the community by the Department of Corrections (DOC). During the term of treatment, the treatment provider must provide quarterly reports to the court. If a violation of the terms of the suspended sentence happens during community custody, the DOC may handle the violation administratively or refer the violation to the court. The court may revoke the suspended sentence if the offender violates any of the conditions of suspension or does not make satisfactory progress in treatment.

E. Treatment Termination

When imposing a SSOSA sentence, the court must set a treatment termination hearing for three months prior to the end of treatment. Prior to the hearing, the treatment provider and the DOC report to the court and the parties regarding the offender's compliance with the conditions of his or her sentence and recommendations regarding treatment termination. Either party may request another evaluation, which the court has the option to grant. The offender must pay for the second evaluation unless the court finds him or her to be indigent, in which case the state pays. After the treatment termination hearing, the court may modify the conditions of community custody, terminate treatment, or extend treatment for up to the remaining term of community custody.

Summary of Engrossed Substitute Bill:

I. Rape of a Child

The seriousness level of rape of a child in the first degree is increased from XII to XIII. The seriousness level of rape of a child in the second degree is increased from XI to XIII. The increases do not apply to juveniles tried as adults.

II. The Special Sex Offender Sentencing Alternative

Changes are made to SSOSA that do not apply to juveniles tried as adults.

A. Eligibility for SSOSA

The eligibility criteria for SSOSA are expanded. The following persons are ineligible for SSOSA:

- Persons with adult convictions for violent offenses committed within five years of the current offense;
- Persons who caused substantial bodily harm to the victim; and
- Persons who had no connection with the victim other than the offense itself.

B. Deciding Whether to Grant a SSOSA

The proposed treatment plan must identify behaviors or activities that are precursors to the offender's offense cycle.

The court must consider the following factors when deciding whether to grant a SSOSA sentence:

- Whether the offender had multiple victims;
- Whether the offender is amenable to treatment. An admission to the offense, by itself, does not constitute amenability to treatment;
- The risk the offender poses to the community, the victim, or persons similarly situated to the victim; and
- Whether the alternative is too lenient in light of the extent and circumstances of the offense.

The court must give great weight to the victim's opinion. If the court orders a sentence that is contrary to the victim's opinion, the court must state its reasons in writing.

C. Terms of a SSOSA Sentence

As a condition of the suspended sentence, the court must impose a term of incarceration of up to 12 months or the maximum of the standard range, whichever is less. The court may increase this term of incarceration up to the statutory maximum sentence for the crime for aggravating circumstances. The term may not be reduced by earned release

credits and may be served in partial confinement. The court must also order prohibitions and affirmative conditions regarding known behaviors or activities that serve as precursors to the offender's offense cycle.

The maximum for the initial treatment term is increased from three years to five years. The treatment provider that provided the offender's initial examination may not be the same provider that provides treatment to the offender during the SSOSA sentence, unless the court has entered written findings that such treatment is in the best interests of the victim and that successful treatment of the offender would otherwise be impractical (this provision is the only SSOSA change that applies to juveniles tried as adults).

D. Supervision of SSOSA Offenders

The court must conduct a hearing on the offender's progress in treatment at least once a year. The court must provide notice and the opportunity to be heard at the hearing to the victim. The court may modify community custody terms, including crime-related prohibitions and affirmative conditions relating to behaviors or activities that serve as precursors to the offender's offense cycle, or revoke the suspended sentence at the hearing.

Upon a second violation of a prohibition against precursor behaviors or activities, the DOC must refer the offender back to the court and recommend revocation of the suspended sentence.

E. Treatment Termination

The court must provide notice and the opportunity to be heard at the treatment termination hearing to the victim. The court must order another evaluation prior to the hearing, which must be performed by a treatment provider other than the one who provided treatment to the offender. The provision allowing the state to pay for the evaluation if the offender is indigent is removed. After the treatment termination hearing, the court may extend treatment in two year increments.

III. Miscellaneous

The Washington Institute for Public Policy must perform a comprehensive analysis and evaluation of the impact and effectiveness of current sex offender sentencing policies, including SSOSA, DOC treatment programs for incarcerated offenders, and the validity of the risk assessment tool used by the End of Sentence Review Committee. The analysis must examine whether changes to sentencing policies and sex offender programming can increase public safety.

As part of the evaluation of SSOSA, the institute must examine the following issues:

- Eligibility for SSOSA;

- Minimum terms of incarceration;
- Appropriate conditions or restrictions that should be placed on SSOSA offenders; and
- Standards for SSOSA revocation.

The institute must report its results and recommendations to the Legislature no later than December 31, 2004.

EFFECT OF SENATE AMENDMENT(S):

Changes intent language. Reenacts without amendment current law with respect to the seriousness levels of felonies (including sex offenses) and "determinate plus" sentencing for certain sex offenders. Removes provisions increasing the seriousness levels for rape of a child in the first and second degrees. Removes the provisions that exempted juveniles tried as adults from coverage under the act. Adds affirmative conditions to the crime-related prohibitions and clarifies that they are to be imposed, to the extent known, at the time of sentencing, and may be modified at annual reviews. Removes the provisions that required the prosecutor to agree to the SSOSA for certain offenses. Requires, as part of a SSOSA sentence, up to 12 months of incarceration (instead of exactly 12 months of incarceration). Removes the requirement that a second evaluation be ordered prior to the treatment termination hearing, but leaves it as an option. Allows the same treatment provider that provided treatment to the offender to conduct the second evaluation if the court has entered written findings that such an evaluation is in the best interests of the victim and that a successful evaluation of the offender would otherwise be impractical. Requires the Sentencing Guidelines Commission, instead of the Washington State Institute for Public Policy (WSIPP), to study possible changes to SSOSA. Requires the WSIPP to study the impact of SSOSA on victims. Change the effective date to July 1, 2005 (instead of July 1, 2004). Makes technical corrections and clarifications.

Appropriation: \$1,850,000.

Fiscal Note: Requested on February 28, 2004. Available on original bill.

Effective Date: The bill takes effect July 1, 2004.

Testimony For: (Criminal Justice & Corrections) Children depend on us to keep them safe. There is no more essential duty for the Legislature than the protection of lives and the administration of justice. Persons guilty of victimizing our children must serve time. A message must be sent for the sake of children “ if you do the crime, you do hard time. This bill will give families and victims justice. As for the costs of the bill, the safety of our children is priceless. Everything possible should be done to protect children. Use of SSOSA has led to sentences for these crimes dramatically below the standard range. People get much more severe punishment for less serious crimes. The persons evaluating an offender’s fitness for SSOSA are often the same persons who are contracted to give the offender treatment services. These treatment providers therefore have financial

incentive to recommend an offender to SSOSA. Offenders should get treatment in prison, not in the community.

(Concerns) There have been many changes to the sentencing laws over the last 20 years. We do not know what the effect of these changes has been. Before we change sentencing again, we should take a step back and look at the effect of these changes. We need to get more of these cases reported and into the courts. The problem with SSOSA is that it is all or nothing. However, there is an appropriate role for SSOSA. SSOSA helps to encourage victims to come forward and can help prosecutors get convictions in tough cases. The problem with SSOSA has existed for years. The program should be tightened, not eliminated.

Testimony For: (Appropriations) (Striking amendment) This legislation should focus on the child victims and not on the criminal. Children trust adults to keep them safe from harm. The government should fund justice for the victims and their families--this is the most essential duty of government. Victims should not have to live in daily fear of running into the predators who attacked them. We cannot put a price on a child's innocence. The striking amendment represents an appropriate compromise, under which class A felonies receive time in prison, and these most severe crimes should not be eligible for suspension with treatment. The proposed sentences in the striking amendment are light compared to the lifetime of suffering caused to the victims. The proposed substitute focuses on rehabilitation for the criminal, but the striking amendment focuses on justice for the victims.

(Substitute bill) This bill establishes harsher sentences for sex crimes against children by increasing the seriousness level of these crimes and increasing the minimum time served for persons going into the SSOSA program. We need to change these laws. However, if you eliminate SSOSA, defendants will go to trial and in many cases, be acquitted because of the inability of the young witness to testify against them.

The problem with the original bill is that the enhancements would make sex offenders ineligible for SSOSA. Rape of a child has to be the most terrible crime that someone can commit, but the original bill would have resulted in fewer convictions and would have resulted in these offenders walking the streets and continuing to victimize children.

SSOSA was originally designed for victims to try to get cases into court that would not be there, if not but for the sentencing alternative. SSOSA has been an important and narrowly used option for victims. The substitute puts great weight on victim input and narrows the pool of eligible persons.

The majority of sex crimes against children are committed by people who have a relationship with the child. For those kids and their parents, you have to have the SSOSA option available. If the treatment option is eliminated, people will go underground. There should not be a mandatory one year jail term for SSOSA and there

are practical problems with having the treatment provider be separate from the provider giving the evaluation.

(With concerns) This bill would significantly impact the county jails, which already have capacity issues. Currently, about 27 out of 37 county jails are overcapacity on a daily basis. There would also be increased prosecution and defense costs for more offenders going to trial.

The issue isn't prison or SSOSA. We don't care about the costs. The issue is about getting the victim to cooperate. It's about getting victims out of an abusive relationship. It is rare for a case to go to trial without having the victim testify. It is difficult to keep these children together at trial. We're not in support of either bill. Neither bill is ready to go.

Testimony Against: (Criminal Justice & Corrections) SSOSA can help to decrease the occurrence of sex offenses. However, this bill would effectively eliminate SSOSA, which would discourage the reporting and prosecution of sex offenses. Many sex offenses occur in the family context. Family members are often reluctant to report sex offenses if they feel the perpetrator will get a lengthy prison sentence. Treatment in prison is often less effective than treatment under SSOSA. SSOSA offenders get treatment for a long time and have incentives to participate given the lengthy suspended sentence imposed by the program.

Testimony Against: (Appropriations) If we get rid of the SSOSA program, there will be no flexibility for these cases. Without the treatment program, there will be many families that do not disclose the criminal behavior. It would result in having an unregistered sex offender in the community who is not receiving any treatment.

This bill shifts costs to the counties for jail confinement and for the court reporting and evaluation requirements. For instance, if an offender is indigent, the county must pay for the evaluation costs. There would also be litigation costs for hearings. Additionally, while the bill states that offenders may serve their sentence in partial confinement, Pierce County does not allow partial confinement for sex or violent offenders.

Persons Testifying: (Criminal Justice & Corrections) (In support) Representative McMahan, prime sponsor; Jim Hines and Theresa Gibbs, Friends and Neighbors of Theresa Gibbs; Shawna Peterson, victim and aunt of victim; Patricia Gibbs, grandmother; Michele Clute, Safe Haven; Lisa Lockwood, parent and spokesperson of Whatcom County; and Lane McNitt, grandfather of victim.

(Concerns) Suzanne Brown-McBride, Washington Coalition of Sexual Assault Programs.

(Opposed) David Marshall, Washington Association of Criminal Defense Lawyers and Washington Defenders Association.

(Comments) Tom McBride, Washington Association of Prosecuting Attorneys.

Persons Testifying: (Appropriations) (In support of striking amendment) Representative McMahan, prime sponsor.

(In support of substitute bill) Representative O'Brien; Representative Lovick; Suzanne Brown McBride, Washington Coalition of Sexual Assault Programs; Rebecca Roe; and Kevin Glacken-Coley, Children's Alliance.

(With concerns) Sophia Byrd, Association of Counties; and Tom McBride, Washington Association of Prosecuting Attorneys.

(Opposed) Richard Peregrin; and John Hill, Department of Assigned Council.

Persons Signed In To Testify But Not Testifying: (Criminal Justice & Corrections) (Concerns) Representative Eickmeyer, Sound Institute; and Kevin Glacken-Coley, Children's Alliance.

(Opposed) Richard Packard, Washington Association for the Treatment of Sexual Abusers; Linda Rutledge; and Ron Rogers.

Persons Signed In To Testify But Not Testifying: (Appropriations) None.