

SENATE BILL REPORT

SHB 2457

As of February 25, 2010

Title: An act relating to pro se defendants in criminal cases questioning victims of sex offenses.

Brief Description: Placing restrictions on pro se defendants when questioning witnesses.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Williams, Campbell, Chase, Simpson, Ormsby and Moeller).

Brief History: Passed House: 2/10/10, 97-0.

Committee Activity: Judiciary: 2/17/10.

SENATE COMMITTEE ON JUDICIARY

Staff: Karen Campbell (786-7448)

Background: Under both the United States and Washington constitutions, persons accused of crimes have an absolute right to the assistance of counsel for their defense. The United States Supreme Court has found that a defendant also has the right to waive representation by counsel and represent themselves regardless of the crime charged. This is referred to as proceeding pro se. As a general rule, courts cannot force counsel upon a pro se defendant against the defendant's will. The courts have held that standby counsel can be appointed to aid a pro se defendant if the defendant requests help and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. A court can appoint standby counsel, over a defendant's objection, to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of the defendant's own clearly indicated goals.

A standby counsel's role is not to represent the pro se defendant. Instead, a standby counsel is to provide the pro se defendant with technical information. The defendant's right to self-representation encompasses the right to question witnesses. The right to self-representation is eroded if standby counsel is allowed to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance. *McKaskle v. Wiggins*, 465 U. S. 168, 178, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984). The United States Supreme Court has held that if a court does appoint standby counsel over the defendant's objection, the defendant must still retain actual control over the case and standby counsel's actions must not destroy the jury's perception that the defendant is defending himself. *Id.*

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

The Washington State Constitution distributes the government's authority into three branches: the legislative authority, executive power, and judicial power. Each branch wields only the power it is given, and a violation of the separation of powers occurs when one branch of government invades the province of another branch. The rules of evidence govern proceedings in Washington State courts. Evidence Rule 611 provides that the trial court must exercise control over the mode and order of cross examination of a witness. There is no published court decision in the state of Washington that has yet considered if, or to what degree, a court can force a defendant acting pro se to accept the assistance of counsel when questioning a witness who is the alleged victim in the crime charged.

Summary of Bill: A judge must appoint standby counsel to question an alleged victim in a prosecution for a sex offense where the defendant is proceeding pro se if the following criteria are met.

1. The prosecuting attorney must make a motion to the trial court to prohibit a pro se defendant from cross examining the alleged victim.
2. The alleged victim's testimony must describe a sexual act or attempted act performed with or on the alleged victim by the defendant.
3. The court must find by substantial evidence that requiring the alleged victim to be questioned directly by the defendant will cause the alleged victim to suffer serious emotional or mental distress that will prevent him or her from reasonably communicating at trial.
4. There will be a hearing, held outside the presence of the jury, to determine this fact.

The court must enter its findings in writing. If the court does appoint standby counsel to question the alleged victim, the court must employ the following procedure.

1. The defendant must be allowed to prepare the questions and prepare any follow-up questions.
2. The standby counsel must ask the alleged victim witness the questions as prepared by the defendant.
3. The court must allow the defendant to communicate with standby counsel during the questioning of the alleged victim witness and allow for follow-up questions to be provided by the defendant to standby counsel.
4. The court must explain to the jury that the defendant is continuing to represent him or herself and that the defendant composed the questions asked by standby counsel.

If the court does not appoint standby counsel, the court may employ other procedures for questioning of the alleged victim such as prohibiting the defendant from approaching the alleged victim during the defendant's questioning and ordering the defendant to remain seated during the questioning.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Victims can be traumatized when questioned by a pro se defendant. A defendant can use this process to further victimize their accuser. The procedures set forth in this bill reflect those already used by the courts. It is very difficult for victims of sexual assault cases to be put in the position of having to relay intimate details of abuse visited upon them by the perpetrator. From a legal perspective, it is better to have a standby attorney question an alleged victim rather than a judge. A judge is a neutral party.

CON: Requiring a defense attorney to represent a pro se defendant against his or her will puts the defense attorney in a very awkward position. It exposes him or her to potential liability under the rules of professional conduct. It is likely that an attorney in this position would have to ask poorly chosen questions that might hurt the pro se defendant. This is particularly troubling because these questions would be put to what is usually the most important witness in the case.

OTHER: The courts already have several procedures available to assist them in controlling an abusive defendant. These include limiting where the defendant can sit or stand, what questions he or she may ask, having the judge question the alleged victim, and imposing sever sanctions upon a defendant who is unwilling to observe proper courtroom procedures and follow judicial directives. A defendant in a criminal case has rights to self representation and to confront their accusers. There is no court case which has sanctioned the Legislature instructing a court how to proceed in these types of situations. There is a concern that a law of this kind might be unconstitutional.

Persons Testifying: PRO: Representative Williams, prime sponsor; Lonnie Johns-Brown, Washington Coalition of Sexual Assault; Tom McBride, Washington Association of Prosecuting Attorneys.

CON: Kimberly Gordon, Washington Association of Criminal Defense Attorneys, Washington Defender Association.

OTHER: Steve Warning, Superior Court Judges Association.