

HOUSE BILL REPORT

HB 2177

As Reported by House Committee On:
Public Safety & Emergency Preparedness

Title: An act relating to protecting children from sexual exploitation.

Brief Description: Protecting children from sexual exploitation.

Sponsors: Representatives Ladenburg, Dammeier, Jinkins, Zeiger, Darneille, Dahlquist, Seaquist, Angel, Kelley, Wilcox, Hurst, McCune, Kirby, Appleton, Green, Ryu, Warnick and Finn.

Brief History:

Committee Activity:

Public Safety & Emergency Preparedness: 1/11/12, 1/27/12 [DPS].

Brief Summary of Substitute Bill

- Prohibits the duplication or distribution of child pornography as part of the discovery process in a criminal prosecution, so long as the material is made reasonably available to the prosecution, defense counsel, and expert witnesses.
- Allows the defendant to review such materials only in the presence of counsel or, if pro se, under supervision of a person appointed by the court.
- Provides for the sealing or destruction of such materials at the close of trial.

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Hurst, Chair; Ladenburg, Vice Chair; Pearson, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Armstrong, Goodman, Hope, Kirby and Ross.

Minority Report: Do not pass. Signed by 1 member: Representative Appleton.

Staff: Sarah Koster (786-7303).

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.

Background:

Discovery Rules in Criminal Cases.

Discovery, the mandatory pretrial disclosure of evidence, is governed by court rules. In criminal proceedings, the governing rule is Criminal Rule 4.7. Criminal Rule 4.7 is a reciprocal discovery rule that separately lists the obligations of both the prosecutor and defendant when engaging in discovery.

Rule 4.7(a)(1)(v) requires a prosecutor to disclose to a defendant any books, photographs, documents, or other tangible objects which the prosecutor intends to use during trial or which were obtained from or belonged to the defendant. Generally, materials furnished to an attorney under the discovery rules must remain in the exclusive custody of the attorney and used only for the purpose of conducting the case. However, if a prosecutor establishes cause, the court may issue a protective order further restricting disclosure of the materials. The terms of the order may not be so restrictive as to prevent a defendant's meaningful access to the trial materials. A defendant's access to trial materials is considered to be related to his rights to adequate representation and a fair trial.

Some conditions approved by the Washington Supreme Court to restrict disclosure of materials depicting a minor engaged in sexually explicit conduct include: allowing the defendant to access the evidence only under counsel's supervision, holding the defense counsel personally responsible for any unauthorized distribution of the material, and requiring a firewall between the Internet and any computer used to access the materials.

Adam Walsh Act.

The federal law on discovery in criminal cases was similar to Washington law until the passage of the Adam Walsh Child Protection and Safety Act of 2006 (Act). The Act requires, in part, that child pornography used as trial materials remain in the care, custody, and control of the government or the court. The court may not grant any requests by criminal defendants to copy or otherwise reproduce child pornography as long as the government makes the material "reasonably available" to the defendant.

The material is considered to be "reasonably available" if the defendant, the defendant's attorney, and anyone the defendant may seek to qualify to provide expert testimony at trial is allowed ample opportunity for inspection of the material at a government facility.

The Act applies only to proceedings in federal courts.

Summary of Substitute Bill:

Defendant's Access to Child Pornography.

Any material depicting a minor engaged in sexually explicit conduct must remain in the care, custody, and control of either a law enforcement agency or the court. Despite any request by

the defendant or prosecution, any property or material that constitutes a depiction of a minor engaged in sexually explicit conduct shall not be copied, photographed, duplicated, or otherwise reproduced, so long as the property or material is made reasonably available to the parties.

Such material is deemed to be reasonably available if the prosecution, defense counsel, or any individual sought to be qualified to furnish expert testimony at trial has ample opportunity for inspection, viewing, and examination at a law enforcement facility (or another agreed-upon facility). The defendant may only view the material in the presence of his or her attorney or, if pro se, under the supervision of a person appointed by the court.

Production of Mirror Imaged Hard Drive for Expert Analysis.

If the defendant has retained an expert to conduct a forensic examination of the material, the court may direct that a mirror image of a computer hard drive be produced. The mirror imaged hard drive will remain in the care, custody, and control of a law enforcement agency or the court, unless the defendant makes a substantial showing that the expert's analysis cannot be accomplished under those terms. In that case, the court may order the release of the mirror imaged hard drive to the expert for analysis, subject to a protective order. The protective order must, at minimum, limit the viewing, access, and possession of the material to specific individuals, prohibit any duplication, and require that the material remain in Washington.

Storing, Sealing, and Destruction of Exhibits Containing Child Pornography.

Exhibits which depict a minor engaged in sexually explicit conduct must be controlled in the following manner:

Storing.

The clerk of court must store any such exhibit in a secure location, such as a safe. The clerk may transfer the materials to a law enforcement agency evidence room for safekeeping, if the agency agrees not to destroy the evidence without an order of the court.

Sealing at the End of Trial.

The prosecutor must seek an order sealing the exhibit at the close of trial. If the order is granted, the exhibit must be labeled and sealed with evidence tape to prevent access or viewing.

To obtain access to the sealed exhibit, an individual must provide 10 days notice to the prosecuting attorney before seeking permission from the superior court. Appellate attorneys must be granted access, though the materials will remain in the care and custody of the court. Other persons may not be granted access unless they demonstrate to the court that their reason is important enough to justify another violation of the victim's privacy.

Destruction.

If the criminal proceeding ends in a conviction, the clerk of court shall destroy the exhibit five years after judgment. Before destroying the exhibit, the clerk must contact the prosecuting attorney and verify that there is no collateral attack on the judgment.

If the criminal proceeding ends in a mistrial, the clerk must maintain the exhibit or return it to the law enforcement agency for safekeeping.

If the criminal proceeding ends in an acquittal, the clerk will return the exhibit to the law enforcement agency that investigated the criminal charges for either safekeeping or destruction.

Materials Currently Distributed to the Defense Team.

In cases pending on the effective date, if materials depicting a minor engaged in sexually explicit conduct have been distributed through the discovery process, the materials must be returned to the superior court judge, who will order either the destruction or the safekeeping of the depictions. If the case is no longer pending, the materials must either be returned to the law enforcement agency that investigated the criminal charges or be destroyed.

For violations of the law relating to sexual exploitation of children committed after December 31, 2012, it is not a defense that the initial receipt of the materials occurred legally through discovery.

Substitute Bill Compared to Original Bill:

The substitute bill expands the restrictions on the access of discovery materials to include both prosecutors and defendants. Additionally, the substitute bill adds a requirement that, for a pro se defendant to exercise his right to review the materials, he or she may only do so under the supervision of an individual appointed by the court. Finally, the substitute bill eliminates an explicit conflict with existing court rules.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Child pornography is contraband and should be treated like all other contraband. The state should not be in the business of producing contraband. The duplication of this material revictimizes the children involved and it cannot be ensured that materials distributed through discovery are secure. These provisions limit the amount of child pornography overall.

(Opposed) The cost of defending these cases will be much greater in terms of experts costs if the material must remain in custody. Protective orders are routinely issued and more than sufficient to protect victims.

Persons Testifying: (In support) Representative Ladenburg, prime sponsor; Mark Lindquist and Kathleen Proctor, Pierce County Prosecutor's Office; Tom McBride, Washington Association of Prosecuting Attorneys; and Lonnie Johns-Brown, Washington Coalition of Sexual Assaults Programs.

(Opposed) Amy Muth, Washington Association of Criminal Defense Lawyers and Washington Defenders Association.

Persons Signed In To Testify But Not Testifying: None.