

SENATE BILL REPORT

SHB 2177

As Reported by Senate Committee On:
Judiciary, February 23, 2012

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

Brief Description: Protecting children from sexual exploitation.

Sponsors: House Committee on Public Safety & Emergency Preparedness (originally sponsored by Representatives Ladenburg, Dammeier, Jinkins, Zeiger, Darneille, Dahlquist, Seaquist, Angel, Kelley, Wilcox, Hurst, McCune, Kirby, Appleton, Green, Ryu, Warnick and Finn).

Brief History: Passed House: 2/11/12, 92-0.

Committee Activity: Judiciary: 2/22/12, 2/23/12 [DPA].

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended.

Signed by Senators Kline, Chair; Harper, Vice Chair; Pflug, Ranking Minority Member; Carrell, Hargrove, Kohl-Welles, Padden, Regala and Roach.

Staff: Aldo Melchiori (786-7439)

Background: Discovery, the mandatory pretrial disclosure of evidence, is governed by court rules. In criminal proceedings, 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 the defendant's 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

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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.

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 Bill (Recommended Amendments): 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 must not be copied, photographed, duplicated, or otherwise reproduced, so long as the property or material is made reasonably available to the parties. Material that constitutes a depiction of a minor engaged in sexually explicit conduct is deemed reasonably available to the parties 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 of the property or material at a law enforcement facility or a neutral facility approved by the court upon petition by the defense.

The 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.

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 remains 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 set the terms and conditions necessary to protect the rights of victims, to document the chain of custody, and to protect physical evidence.

The clerk of court must store any exhibit of a depiction of a minor engaged in sexually explicit conduct 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.

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 ten 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.

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

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.

EFFECT OF CHANGES MADE BY JUDICIARY COMMITTEE (Recommended Amendments): Material that constitutes a depiction of a minor engaged in sexually explicit conduct is deemed reasonably available to the parties 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 of the property or material at a law enforcement facility or a neutral facility approved by the court upon petition by the defense.

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 as Heard in Committee: PRO: Imagine if images of your child were copied and abused. Every copy of child pornography is a new instance of abuse. The bill does not interfere with access, just copying. The bill seeks to prevent revictimization when prosecutors are forced to copy child pornography. The restrictions apply to prosecutors and defenders. The Legislature defines what is contraband, and that is substantive law.

CON: Defenders are aware of the damages that reproduction may cause, and they do what they can to protect the evidence. Regulating attorney access goes too far. Protective orders are already available to restrict access to this material. Attorneys need access to the material to determine whether the First Amendment may apply to some of it.

Persons Testifying: PRO: Representative Ladenburg, prime sponsor; Mark Lindquist, Pierce County Prosecuting Attorney; Tom McBride, WA Assn. of Prosecuting Attorneys.

CON: Amy Muth, WA Defenders Assn., WA Assn. of Criminal Defense Lawyers.