

HOUSE BILL REPORT

ESHB 1140

As Passed House:

March 2, 2021

Title: An act relating to juvenile access to attorneys when contacted by law enforcement.

Brief Description: Concerning juvenile access to attorneys when contacted by law enforcement.

Sponsors: House Committee on Civil Rights & Judiciary (originally sponsored by Representatives Johnson, J., Frame, Entenman, Sells, Taylor, Santos, Stonier, Ormsby, Lekanoff, Davis, Hackney, Macri, Callan, Chopp, Pollet, Ryu, Goodman, Berg, Ramos, Bergquist, Gregerson, Wicks, Peterson, Thai, Dolan, Bateman, Simmons, Fitzgibbon and Valdez).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 1/20/21, 2/5/21 [DPS];

Appropriations: 2/17/21, 2/18/21 [DPS(CRJ)].

Floor Activity:

Passed House: 3/2/21, 56-41.

Brief Summary of Engrossed Substitute Bill

- Requires law enforcement to provide juveniles with access to an attorney prior to any waiver of the juvenile's constitutional rights when law enforcement: (1) questions a juvenile after providing a *Miranda* warning; (2) detains a juvenile based on reasonable suspicion; or (3) requests that the juvenile provide consent to an evidentiary search of the juvenile or the juvenile's property, dwellings, or vehicles under the juvenile's control.
- Provides that the consultation with an attorney may not be waived.
- Establishes that statements made by a juvenile during or after the foregoing scenarios are inadmissible, unless: (1) the juvenile is provided

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with access to an attorney for consultation and the juvenile makes a valid waiver of the juvenile's rights; (2) the statement is for impeachment purposes; or (3) the statement was made spontaneously.

- Establishes exceptions to the attorney-consultation requirement if law enforcement believes the juvenile is a victim of trafficking, or believes the information sought is necessary to protect an individual's life from an imminent threat.
- Requires the Office of Public Defense to provide access to attorneys for juveniles when required by this act.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Hansen, Chair; Simmons, Vice Chair; Davis, Entenman, Goodman, Kirby, Orwall, Peterson, Thai, Valdez and Walen.

Minority Report: Do not pass. Signed by 2 members: Representatives Walsh, Ranking Minority Member; Klippert.

Minority Report: Without recommendation. Signed by 4 members: Representatives Gilday, Assistant Ranking Minority Member; Graham, Assistant Ranking Minority Member; Abbarno and Ybarra.

Staff: John Burzynski (786-7133).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Civil Rights & Judiciary be substituted therefor and the substitute bill do pass. Signed by 19 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Chopp, Cody, Dolan, Fitzgibbon, Frame, Hansen, Johnson, J., Lekanoff, Pollet, Ryu, Senn, Springer, Stonier, Sullivan and Tharinger.

Minority Report: Do not pass. Signed by 5 members: Representatives Boehnke, Chandler, Dye, Hoff and Schmick.

Minority Report: Without recommendation. Signed by 9 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Caldier, Harris, Jacobsen, Rude and Steele.

Staff: Yvonne Walker (786-7841).

Background:

Constitutional Rights.

Individuals, whether they are adults or juveniles, are generally protected by a series of constitutional rights when they interact with law enforcement officers.

The Right to Remain Silent.

The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." To counteract the inherent compulsion of custodial interrogation, police must administer *Miranda* warnings. *Miranda* requires that the defendant be warned prior to any questioning that they have the right to remain silent, that anything they say can be used against them in a court of law, that they have the right to the presence of an attorney, and that if they cannot afford an attorney one will be appointed for them prior to any questioning if they so desire. Once a suspect invokes their right to remain silent, police may not continue the interrogation or make repeated efforts to wear down the suspect.

The Right to Counsel.

The Right to Counsel in a Custodial Interrogation: When an individual is taken into custody and subjected to questioning, the privilege against self-incrimination is implicated. Procedural safeguards are employed to protect the privilege. The individual must be warned they have a right to the presence of an attorney, and an opportunity to exercise this right must be afforded throughout the interrogation.

The Right to Counsel in Adversarial Proceedings: A criminal defendant is entitled to the assistance of counsel at critical stages of litigation. A critical stage is one in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.

The Right to Appointment of Counsel: Individuals subject to custodial interrogation or criminal prosecution who are unable to afford counsel have a constitutional right to have counsel appointed for them at public expense.

Waiver of Constitutional Rights.

An individual can waive their rights by, e.g., agreeing to speak with law enforcement without consulting with an attorney.

A waiver of a constitutional right is valid only if it is voluntary, knowing, and intelligent. A waiver is voluntary if it is the product of a free and deliberate choice rather than intimidation, coercion, or deception. A waiver is knowing and intelligent if it is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Courts consider the totality of the circumstances in evaluating whether these requirements are met.

Washington Court Rules.

The Washington Superior Court Criminal Rules extend the right to counsel beyond the constitutional minimums. The rules provide that the right to a lawyer extends to all criminal proceedings for offenses punishable by loss of liberty. The right to a lawyer accrues as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest. The court rules provide that, unless the right is waived, a lawyer must be provided to any person who is financially unable to obtain one without causing substantial hardship.

Rights of Juveniles.

Courts may consider an individual's maturity, intelligence, education, and experience when evaluating whether a waiver of a constitutional right was voluntary, knowing, and intelligent. In Washington, the rights of a juvenile under 12 years old may only be waived by a parent, guardian, or custodian. A juvenile at least 12 years old may waive their own rights.

Summary of Engrossed Substitute Bill:

Juvenile Access to An Attorney.

Law enforcement must provide a juvenile with access to an attorney, in person or by phone or video, before the juvenile waives any constitutional rights if a law enforcement officer:

1. questions a juvenile after providing a *Miranda* warning;
2. detains the juvenile based on reasonable suspicion of criminal activity; or
3. requests the juvenile provide consent to an evidentiary search of the juvenile or the juvenile's property, dwellings, or vehicles under the juvenile's control.

The consultation may not be waived.

"*Miranda* warning" is defined as a verbal warning provided by a law enforcement officer advising the individual that the individual has the right to remain silent, the right to consult with legal counsel and have legal counsel present during questioning, and the right to have legal counsel appointed if the individual cannot afford legal counsel.

Statements made by a juvenile after the juvenile is contacted by law enforcement in any of the above scenarios are inadmissible in juvenile or adult court proceedings, unless:

1. the juvenile is provided with access to an attorney for consultation; and makes an express, knowing, intelligent, and voluntary waiver after being fully informed of their rights;
2. the statement is for impeachment purposes; or
3. the statement was made spontaneously.

Any assertion of constitutional rights by the juvenile through legal counsel must be treated by a law enforcement officer as though it came from the juvenile.

The Juvenile Justice Act is modified to recognize the requirements of this act, and to exclude evidence obtained in violation of the requirements of this act.

Exceptions to the Juvenile-Access-to-an-Attorney Requirement.

A law enforcement officer may question a juvenile without providing access to an attorney when:

- a. the law enforcement officer believes the juvenile is a victim of trafficking as defined in RCW 9A.40.100; however, any information obtained from the juvenile by law enforcement pursuant to this subsection cannot be used in any prosecution of that juvenile; or
- b. (i) the law enforcement officer believes that the information sought is necessary to protect an individual's life from an imminent threat; (ii) a delay to allow legal consultation would impede the protection of an individual's life from an imminent threat; and (iii) questioning by the law enforcement officer is limited to matters reasonably expected to obtain information necessary to protect an individual's life from an imminent threat."

Provision of Access to Counsel.

The Director of the Office of Public Defense is required to provide access to attorneys for juveniles consistent with the requirements of this act.

Subject to the rules of discovery, the Office of Public Defense is authorized to collect identifying information for any youth who speaks with a consulting attorney pursuant to this act. Such records are exempt from public disclosure.

Null and Void.

If specific funding for the purposes of this act, referencing this act by bill or chapter number, is not provided by June 30, 2021, in the omnibus appropriations act, this act is null and void.

Effective Date.

This bill takes effect on January 1, 2022.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on January 1, 2022. However the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony (Civil Rights & Judiciary):

(In support) The need for counsel at the time of police interactions with juveniles is urgent in light of adolescent development, youth's limited understanding of their rights and the

consequences of waiving their rights, and youth prioritization of short-term consequences over long-term consequences. Police interactions are affected by racism and minority youth feel compelled to defer to law enforcement. Children are vulnerable to being pressured into making false confessions, acting against their interests, and making statements they believe law enforcement want to hear. Current protections for juveniles are inadequate to counter police coercion because they come into play when a case proceeds in court, but most cases end in plea deals. The threat of additional charges deters juveniles from seeking to vindicate their rights. Earlier access to counsel will help children protect their rights and obtain help for additional services if needed.

(Opposed) This bill will make it harder for police to protect communities. There are logistical problems with providing juveniles with immediate access to counsel prior to arrest. Additional problems may arise if the juvenile does not want to confer with counsel, if a suspect is intoxicated, and in emergencies. The scene of a potential crime is dynamic and may contain suspects and witnesses. In practice, this bill will incentivize police to arrest more juveniles instead of speaking with juveniles at the scene to gain a better understanding of events. Forcing police to operate subject to defense counsel's availability is impractical. Smaller counties cannot afford to provide defense counsel for consultations. Courts already have an adequate process to determine if waivers of rights are knowing, intelligent, and voluntary. Forcing juveniles to confer with counsel may be unconstitutional. This bill takes away a youth's ability to come forward and admit wrongs.

(Other) This is good policy but may need further work to implement. The Office of Public Defense assumes it will be responsible for providing access to counsel and would contract with a call service to provide access to attorneys on a 24/7 basis. Funding may come from the state or counties. Responsibility for costs should be addressed in the bill. Counties have limited sources of funding and some will need to cut services if responsible for funding attorney consultations for juveniles.

Staff Summary of Public Testimony (Appropriations):

(In support) This bill further protects the constitutional right to counsel for our young people. It requires law enforcement officers to provide young people with access to an attorney and will solve numerous procedural justice issues that lead to false confessions and prosecutions. Similar laws in other jurisdictions have resulted in fewer youths being booked in jail, thus routing them to alternative support, and subsequently produces fiscal savings for counties.

(Opposed) There is a concern that this bill will result in less efficient policing. Detaining a person based on suspicious activity is common and this bill requires that law enforcement notify an attorney and cease further activity until that attorney has been contacted. This is time that could be spent determining probable cause and moving on to other activities. In addition, there is concern that the funding requested in the fiscal note is insufficient to contact numerous attorneys—especially when more than one youth is involved.

Furthermore, the bill requires that a youth have access to an attorney if detained during a Terry stop. This is a step where officers are trying to confirm or dispel a belief that a crime has been committed. This seems to be too early in the process for law enforcement to be required to contact an attorney. In other states where similar measures have been implemented, the right to an attorney is only triggered after a Miranda warning has been provided or after custodial interrogation. Under this bill, the state will be paying for an attorney in situations where they are not required to do so in other states. This is unnecessary and expensive.

(Other) The Office of Public Defense (OPD) has analyzed the bill and plans to contract with attorneys statewide to ensure legal consultation is provided to youth. If for some reason the estimated fiscal impact is not sufficient to cover the costs of the bill, the OPD plans to address this issue next year in the supplemental budget.

Persons Testifying (Civil Rights & Judiciary): (In support) Representative Johnson, prime sponsor; Kelsey Hamlin; Stephan Thomas; Katherine Hurley, King County Department of Public Defense; Sean Goode, CHOOSE 180; Lara Zarowsky, Washington Innocence Project; Stephan Thomas; Kristin Henning; Antoinette Kavanaugh; Zubin Abraham-Ahmed; Au’Juleigh Howard; Leah Nwizugbo; and Kendrick Washington, American Civil Liberties Union of Washington.

(Opposed) James McMahan, Washington Association of Sheriffs and Police Chiefs; Russell Brown, Washington Association of Prosecuting Attorneys; and Scott Runge, Benton County Sheriff’s Office.

(Other) Sophia Byrd McSherry, Washington State Office of Public Defense; and Juliana Roe, Washington State Association of Counties.

Persons Testifying (Appropriations): (In support) Representative Johnson, prime sponsor.

(Opposed) Sanjay Walvekar, Washington Association of Sheriffs and Police Chiefs; and Russell Brown, Washington Association of Prosecuting Attorneys.

(Other) Sophia Byrd McSherry, Washington State Office of Public Defense.

Persons Signed In To Testify But Not Testifying (Civil Rights & Judiciary): None.

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