

SENATE BILL REPORT

ESHB 1140

As of March 15, 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: Passed House: 3/2/21, 56-41.

Committee Activity: Human Services, Reentry & Rehabilitation: 3/16/21.

Brief Summary of Bill

- Requires individuals under the age of 18 be provided access to an attorney for consultation before the individual waives any constitutional rights when contacted by law enforcement, under certain requirements.

SENATE COMMITTEE ON HUMAN SERVICES, REENTRY & REHABILITATION

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Background: Constitutional Rights. Individuals are generally protected by a series of constitutional rights when they interact with law enforcement officers such as the right to remain silent and the right to counsel.

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

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administer *Miranda* warnings.

Miranda requires 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 an individual invokes their right to remain silent, police may not continue the interrogation or make repeated efforts to wear down the individual.

The Right to Counsel. In a custodial interrogation, the right to counsel is 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.

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.

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 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; and
- 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 when evaluating whether these requirements are met.

Washington Superior Court Criminal 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 Individuals Under 18. When evaluating whether a waiver of constitutional right

was voluntary, knowing, and intelligent, the court may consider an individual's maturity, intelligence, education, and experience. In Washington State, the rights of individuals age 11 and younger may only have their rights be waived by a parent, guardian, or custodian; and those age 12 through 17 may waive their own rights.

Office of Public Defense. Created in 1996 as an independent agency within the judicial branch, the Office of Public Defense (OPD) was established to implement the constitutional and statutory guarantees to counsel for indigent persons and to ensure effective and efficient delivery of state-funded public defenses services.

Summary of Bill: Attorney Access for Individuals Under 18. Law enforcement must provide individuals under the age of 18 access to an attorney for consultation before the individual waives any constitutional rights if a law enforcement officer:

- questions a juvenile after providing a Miranda warning;
- detains a juvenile based on a reasonable suspicion of involvement in criminal activity;
- or
- 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 required attorney consultations may not be waived and it can be conducted in person, by telephone, or by video conference.

Statements made by the individual after being contacted by a law enforcement officer under these requirements are not admissible in juvenile or adult criminal court proceedings, unless:

- the individual under the age of 18 has been provided with access to an attorney for consultation; and the individual provides an express waiver knowingly, intelligently, and voluntarily made by the individual after the individual has been fully informed of the rights being waived;
- the statement is for impeachment purposes; or
- 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 amended to recognize the requirements of this act and to exclude evidence obtained in violation of the requirements of this act.

Exceptions to the Attorney Access Requirements for Individuals Under 18. The consultation required may not be waived. A law enforcement officer may question an individual under the age of 18 without following the requirements if:

- the law enforcement officer believes the juvenile is a victim of trafficking; however, any information obtained from the individual by law enforcement cannot be used in any prosecution of that individual;

- the law enforcement officer believes the information sought is necessary to protect an individual's life from an imminent threat;
- a delay to allow legal consultation would impede the protection of an individual's life from an imminent threat; and
- 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.

Miranda Warning. "Miranda warning" means a verbal warning provided by a law enforcement officer advising the individual they have 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.

Office of Public Defense Authority. OPD's director must provide access to attorneys for juveniles contacted by a law enforcement officer for whom a legal consultation is required.

Subject to the rules of discovery, OPD is authorized to collect identifying information for any youth who speaks with a consulting attorney, provided such records are exempt from public disclosure.

Appropriation: The bill contains a null and void clause requiring specific funding be provided in an omnibus appropriation act.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill takes effect on January 1, 2022.