

SENATE BILL REPORT

ESHB 1140

As Reported by Senate Committee On:
Human Services, Reentry & Rehabilitation, March 19, 2021
Ways & Means, April 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: Passed House: 3/2/21, 56-41.

Committee Activity: Human Services, Reentry & Rehabilitation: 3/16/21, 3/19/21 [DP-WM, DNP, w/oRec].
Ways & Means: 3/30/21, 4/02/21 [DPA, DNP, w/oRec].

Brief Summary of Amended 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

Majority Report: Do pass and be referred to Committee on Ways & Means.
Signed by Senators Darneille, Chair; Nguyen, Vice Chair; Saldaña and Wilson, C.

Minority Report: Do not pass.
Signed by Senator McCune.

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

Minority Report: That it be referred without recommendation.

Signed by Senators Gildon, Ranking Member; Dozier.

Staff: Julie Tran (786-7283)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Capital; Robinson, Vice Chair, Operating & Revenue; Carlyle, Conway, Darneille, Dhingra, Gildon, Hasegawa, Hunt, Keiser, Liias, Mullet, Pedersen, Van De Wege and Wellman.

Minority Report: Do not pass.

Signed by Senators Honeyford, Assistant Ranking Member, Capital; Schoesler, Assistant Ranking Member, Capital.

Minority Report: That it be referred without recommendation.

Signed by Senators Wilson, L., Ranking Member; Brown, Assistant Ranking Member, Operating; Braun, Muzzall, Rivers, Wagoner and Warnick.

Staff: Trevor Press (786-7446)

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 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 Amended 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 during a custodial interrogation;
- detains a juvenile based on probable cause 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.

Custodial Interrogation. Custodial interrogation means express questioning or other actions or words by a law enforcement officer which are reasonably likely to elicit an incriminating response from an individual, and occurs when reasonable individuals in the same circumstances would consider themselves in custody.

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.

EFFECT OF WAYS & MEANS COMMITTEE AMENDMENT(S):

- Changes the requirement that an individual under 18 have access to an attorney for consultation if a law enforcement officer questions the individual after providing a *Miranda* warning to requiring access to an attorney for consultation during a custodial interrogation.
- Changes the evidentiary standard for when law enforcement must provide an individual under the age of 18 with access to an attorney for consultation if a law enforcement officer detains the individual based on reasonable suspicion of involvement in criminal activity to probable cause of involvement in criminal activity.
- Defines the term custodial interrogation and removes the definition of *Miranda* warning.

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.

Staff Summary of Public Testimony on Engrossed Substitute House Bill (Human Services, Reentry & Rehabilitation): PRO: This bill protects the right of individuals and places rules on what police can do when they are asking young people to waive their constitutional rights. It is a limited time to consult with a knowledgeable attorney and it is not an ongoing representation in the case. If the charges are filed, ongoing representation would continue as they do now in current statute. There needs to be an educated adult to hold police accountable to ensure their investigations are just, legal, and necessary. Known cases of wrongful conviction can tell us about the vulnerability of young people in the legal system. Reasonable suspicion is at the point where stop and frisk begins. An arrest requires probable cause and that is a higher standard than reasonable suspicion. Deciding to be silent is not enough to cause an arrest. It is clear we need a moment to pause and have our young people have access to an expert that can speak light and truth to them. We are looking down the path of establishing human rights. This is just the first step toward justice and disrupting the school to prison pipeline.

CON: The fiscal note data assumes one-third of the number of youth in juvenile rehabilitation. The number should be five to ten times that number and this will have

impact on delays for the officers' investigations. Rather than obtaining the truth, there is fear this bill would encourage the arrest of an individual and increase the likelihood of placing a young person into the juvenile justice system. This is a significant concern because there could be alternative ways to do this where we can provide benefits and greater access to an attorney without increasing the likelihood of negative impacts.

OTHER: This is a groundbreaking bill but the floor amendments passed in the House creates loopholes that can impact the youth if the police suspects them as trafficking victims and suspends protections based on those suspicions. In Washington State, youth can still be charged with prostitution, which is concerning if they can also be considered victims of trafficking.

Persons Testifying (Human Services, Reentry & Rehabilitation): PRO: Representative Jesse Johnson, Prime Sponsor; Lara Zarowsky, Washington Innocence Project; Sophia Byrd McSherry, Washington State Office of Public Defense; Katherine Hurley, King County Department of Public Defense; Leah Nwizugbo; Zubin Abraham-Ahmed; Stephan Thomas; Kendrick Washington, ACLU of Washington; Sean Goode, Choose 180.

CON: James McMahan, Washington Association of Sheriffs & Police Chiefs; Russell Brown, Washington Association of Prosecuting Attorneys.

OTHER: Lisa TL, Policy Consultant; Emi Koyama, Coalition for Rights and Safety for People in the Sex Trade.

Persons Signed In To Testify But Not Testifying (Human Services, Reentry & Rehabilitation): No one.

Staff Summary of Public Testimony on Engrossed Substitute House Bill (Ways & Means): *The committee recommended a different version of the bill than what was heard.*

PRO: This bill gives a consultation component, it does not create ongoing representation. This consultation would be quite short and is intended to give youth an understanding of their rights. Youth always have the right to not speak to an officer. This bill provides youth an ability to talk to someone to understand their rights. Youth get confused around their rights. This phone call is meant to help the youth no longer be confused, and understand their options. There is no cost that is too high for our civil liberties. It costs about \$88,000 per year to incarcerate a youth, this is much higher than other costs for youth, these savings are not accounted for in the fiscal note.

CON: Section 1(2) makes it clear that this is a requirement to consult with an attorney. An officer cannot interact with a person unless they have contacted an attorney. This fiscal note is too low, five to ten times more consultations than in the fiscal note should be expected. Reasonable suspicion is a sifting process and is extremely broad. The requirements in this bill stops investigations. There are other ways to work this out that would provide greater support. This bill does more than the original intent.

Persons Testifying (Ways & Means): PRO: Sophia McSherry, Washington State Office of Public Defense; Kendrick Washington, ACLU of Washington.

CON: James McMahan, Washington Association of Sheriffs and Police Chiefs; Russell Brown, Washington Association of Prosecuting Attorneys.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.