

HOUSE BILL REPORT

SHB 2457

As Passed House:
February 10, 2010

Title: An act relating to pro se defendants in criminal cases questioning victims of sex offenses.

Brief Description: Placing restrictions on pro se defendants when questioning witnesses.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Williams, Campbell, Chase, Simpson, Ormsby and Moeller).

Brief History:

Committee Activity:

Judiciary: 1/25/10, 2/1/10 [DPS].

Floor Activity:

Passed House: 2/10/10, 97-0.

Brief Summary of Substitute Bill

- Allows a court to require that a *pro se* defendant in a criminal prosecution for a sex offense question the victim through a court-appointed attorney.
- Allows a court to impose reasonable procedures upon the parties to avoid trauma to the victim.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Kelley, Kirby, Ormsby, Roberts and Ross.

Staff: Brian Kilgore (786-7119) and Trudes Tango (786-7384).

Background:

The Right of Self-Representation.

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.

Defendants in criminal trials have a constitutional right to represent themselves in court. Although the Sixth Amendment does not expressly grant the right of self-representation, the U.S. Supreme Court (Court) found that such a right is necessarily implied by the amendment's structure. However, the Court has acknowledged limits to the right of self-representation: "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." To these ends, a court may appoint standby counsel to assist a *pro se* defendant in presenting his or her case. The Court has articulated two limits to unsolicited participation by stand-by counsel during trial. First, the defendant is entitled to preserve control over the case he or she presents to the jury. Second, stand-by counsel must not destroy the jury's perception that the defendant is presenting a *pro se* defense.

Victim Protection and the Right to Confront One's Accuser.

Defendants in criminal trials have a right to confront their accusers under both the Sixth Amendment to the United States Constitution and section 22 of the Washington Constitution. The right to confront one's accuser, while a fundamental right, is not absolute. The right must occasionally give way to considerations of public policy and the necessities of the case.

Washington's statute on testimony by closed-circuit television seeks to protect child-victims from emotional harm and allow child-victims to testify honestly and effectively. This law was challenged as an unconstitutional infringement of the right to confront one's accuser face-to-face. The Washington Supreme Court held that preventing further emotional trauma to a victim and ensuring the effective communication of a victim at trial are compelling state interests which override a defendant's right to face-to-face confrontation.

Summary of Substitute Bill:

The Legislature declares that the state has a compelling interest in the physical and psychological well-being of victims of sex offenses. Additionally, courts are entitled to control the mode of witness interrogation so as to more effectively ascertain the truth.

Upon a motion by the prosecutor, a court may restrict a *pro se* defendant from directly questioning the victim if:

- the proceeding is a criminal prosecution for a sex offense allegedly committed by the defendant;
- the victim's testimony will describe a sexual act or attempted act performed with or on the victim by the defendant; and
- a court finds by substantial evidence that allowing the victim to be directly questioned by the defendant will cause the victim to suffer serious emotional or mental distress which will prevent the victim from reasonably communicating at the trial.

If a court restricts a *pro se* defendant from directly questioning the victim, a court must:

- provide a court-appointed attorney;
- allow the defendant to prepare the questions to be asked of the victim, including follow-up questions; and
- allow the defendant to communicate with the court-appointed attorney at all times during the questioning.

If a court allows a *pro se* defendant to directly question the victim, a court may impose reasonable procedures upon the parties conducting the questioning. Reasonable procedures may include, but are not limited to: prohibiting the defendant from approaching the victim during questioning or ordering that the defendant remain seated while questioning the victim.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) The bill is balanced and addresses a very grave concern. Try to imagine what it is like to be a victim of a sex crime and have to be cross examined, in detail, by your abuser. The bill balances the need to protect the victim while allowing the defendant to exercise the right of confrontation. *State v. Estabrook* was a Washington case where the court took over the questioning of the witness in a situation where the defendant was acting *pro se*. This is a situation that all parties want to avoid.

(Opposed) This bill is unconstitutional. The right to defend oneself is meaningless without the ability to cross-examine the witness against you. This bill assumes that victims are victims; it turns the presumption of innocence on its head. The bill takes control away from judges, who already have full control to limit a *pro se* defendant from traumatizing or abusing a witness. This bill would violate the rules of professional conduct. A lawyer is required to use their best judgment and provide competent representation, which is impossible in the situations the bill would force defense attorneys into.

Persons Testifying: (In support) Tom McBride, Washington Prosecutors Association; and Lonnie Johns-Brown, Washington Coalition of Sexual Assault Programs.

(Opposed) Les Richards, Washington Defender Association and Washington Association of Criminal Defense Lawyers.

Persons Signed In To Testify But Not Testifying: None.