

SHB 2177 - S COMM AMD
By Committee on Judiciary

ADOPTED 03/01/2012

1 Strike everything after the enacting clause and insert the
2 following:

3 "Sec. 1. RCW 9.68A.001 and 2010 c 227 s 1 are each amended to read
4 as follows:

5 The legislature finds that the prevention of sexual exploitation
6 and abuse of children constitutes a government objective of surpassing
7 importance. The care of children is a sacred trust and should not be
8 abused by those who seek commercial gain or personal gratification
9 based on the exploitation of children.

10 The legislature further finds that the protection of children from
11 sexual exploitation can be accomplished without infringing on a
12 constitutionally protected activity. The definition of "sexually
13 explicit conduct" and other operative definitions demarcate a line
14 between protected and prohibited conduct and should not inhibit
15 legitimate scientific, medical, or educational activities.

16 The legislature further finds that children engaged in sexual
17 conduct for financial compensation are frequently the victims of sexual
18 abuse. Approximately eighty to ninety percent of children engaged in
19 sexual activity for financial compensation have a history of sexual
20 abuse victimization. It is the intent of the legislature to encourage
21 these children to engage in prevention and intervention services and to
22 hold those who pay to engage in the sexual abuse of children
23 accountable for the trauma they inflict on children.

24 The legislature further finds that due to the changing nature of
25 technology, offenders are now able to access child pornography in
26 different ways and in increasing quantities. By amending current
27 statutes governing depictions of a minor engaged in sexually explicit
28 conduct, it is the intent of the legislature to ensure that intentional
29 viewing of and dealing in child pornography over the internet is
30 subject to a criminal penalty without limiting the scope of existing

1 prohibitions on the possession of or dealing in child pornography,
2 including the possession of electronic depictions of a minor engaged in
3 sexually explicit conduct. It is also the intent of the legislature to
4 clarify, in response to *State v. Sutherby*, 204 P.3d 916 (2009), the
5 unit of prosecution for the statutes governing possession of and
6 dealing in depictions of a minor engaged in sexually explicit conduct.
7 It is the intent of the legislature that the first degree offenses
8 under RCW 9.68A.050, 9.68A.060, and 9.68A.070 have a per depiction or
9 image unit of prosecution, while the second degree offenses under RCW
10 9.68A.050, 9.68A.060, and 9.68A.070 have a per incident unit of
11 prosecution as established in *State v. Sutherby*, 204 P.3d 916 (2009).
12 Furthermore, it is the intent of the legislature to set a different
13 unit of prosecution for the new offense of viewing of depictions of a
14 minor engaged in sexually explicit conduct such that each separate
15 session of intentionally viewing over the internet of visual depictions
16 or images of a minor engaged in sexually explicit conduct constitutes
17 a separate offense.

18 The decisions of the Washington supreme court in *State v. Boyd*, 160
19 W.2d 424, 158 P.3d 54 (2007), and *State v. Grenning*, 169 Wn.2d 47, 234
20 P.3d 169 (2010), require prosecutors to duplicate and distribute
21 depictions of a minor engaged in sexually explicit conduct ("child
22 pornography") as part of the discovery process in a criminal
23 prosecution. The legislature finds that the importance of protecting
24 children from repeat exploitation in child pornography is not being
25 given sufficient weight under these decisions. The importance of
26 protecting children from repeat exploitation in child pornography is
27 based upon the following findings:

28 (1) Child pornography is not entitled to protection under the First
29 Amendment and thus may be prohibited;

30 (2) The state has a compelling interest in protecting children from
31 those who sexually exploit them, and this interest extends to stamping
32 out the vice of child pornography at all levels in the distribution
33 chain;

34 (3) Every instance of viewing images of child pornography
35 represents a renewed violation of the privacy of the victims and a
36 repetition of their abuse;

37 (4) Child pornography constitutes prima facie contraband, and as

1 such should not be distributed to, or copied by, child pornography
2 defendants or their attorneys;

3 (5) It is imperative to prohibit the reproduction of child
4 pornography in criminal cases so as to avoid repeated violation and
5 abuse of victims, so long as the government makes reasonable
6 accommodations for the inspection, viewing, and examination of such
7 material for the purposes of mounting a criminal defense. The
8 legislature is also aware that the Adam Walsh child protection and
9 safety act, P.L. 109-248, 120 Stat. 587 (2006), codified at 18 U.S.C.
10 Sec. 3509(m), prohibits the duplication and distribution of child
11 pornography as part of the discovery process in federal prosecutions.
12 This federal law has been in effect since 2006, and upheld repeatedly
13 as constitutional. Courts interpreting the Walsh act have found that
14 such limitations can be employed while still providing the defendant
15 due process. The legislature joins congress, and the legislatures of
16 other states that have passed similar provisions, in protecting these
17 child victims so that our justice system does not cause repeat
18 exploitation, while still providing due process to criminal defendants.

19 NEW SECTION. Sec. 2. A new section is added to chapter 9.68A RCW
20 to read as follows:

21 (1) In any criminal proceeding, any property or material that
22 constitutes a depiction of a minor engaged in sexually explicit conduct
23 shall remain in the care, custody, and control of either a law
24 enforcement agency or the court.

25 (2) Despite any request by the defendant or prosecution, any
26 property or material that constitutes a depiction of a minor engaged in
27 sexually explicit conduct shall not be copied, photographed,
28 duplicated, or otherwise reproduced, so long as the property or
29 material is made reasonably available to the parties. Such property or
30 material shall be deemed to be reasonably available to the parties if
31 the prosecution, defense counsel, or any individual sought to be
32 qualified to furnish expert testimony at trial has ample opportunity
33 for inspection, viewing, and examination of the property or material at
34 a law enforcement facility or a neutral facility approved by the court
35 upon petition by the defense.

36 (3) The defendant may view and examine the property and materials

1 only while in the presence of his or her attorney. If the defendant is
2 proceeding pro se, the court will appoint an individual to supervise
3 the defendant while he or she examines the materials.

4 (4) The court may direct that a mirror image of a computer hard
5 drive containing such depictions be produced for use by an expert only
6 upon a showing that an expert has been retained and is prepared to
7 conduct a forensic examination while the mirror imaged hard drive
8 remains in the care, custody, and control of a law enforcement agency
9 or the court. Upon a substantial showing that the expert's analysis
10 cannot be accomplished while the mirror imaged hard drive is kept
11 within the care, custody, and control of a law enforcement agency or
12 the court, the court may order its release to the expert for analysis
13 for a limited time. If release is granted, the court shall issue a
14 protective order setting forth such terms and conditions as are
15 necessary to protect the rights of the victims, to document the chain
16 of custody, and to protect physical evidence.

17 NEW SECTION. **Sec. 3.** A new section is added to chapter 9.68A RCW
18 to read as follows:

19 (1) Whenever a depiction of a minor engaged in sexually explicit
20 conduct, regardless of its format, is marked as an exhibit in a
21 criminal proceeding, the prosecutor shall seek an order sealing the
22 exhibit at the close of the trial. Any exhibits sealed under this
23 section shall be sealed with evidence tape in a manner that prevents
24 access to, or viewing of, the depiction of a minor engaged in sexually
25 explicit conduct and shall be labeled so as to identify its contents.
26 Anyone seeking to view such an exhibit must obtain permission from the
27 superior court after providing at least ten days notice to the
28 prosecuting attorney. Appellate attorneys for the defendant and the
29 state shall be given access to the exhibit, which must remain in the
30 care and custody of either a law enforcement agency or the court. Any
31 other person moving to view such an exhibit must demonstrate to the
32 court that his or her reason for viewing the exhibit is of sufficient
33 importance to justify another violation of the victim's privacy.

34 (2) Whenever the clerk of the court receives an exhibit of a
35 depiction of a minor engaged in sexually explicit conduct, he or she
36 shall store the exhibit in a secure location, such as a safe. The
37 clerk may arrange for the transfer of such exhibits to a law

1 enforcement agency evidence room for safekeeping provided the agency
2 agrees not to destroy or dispose of the exhibits without an order of
3 the court.

4 (3) If the criminal proceeding ends in a conviction, the clerk of
5 the court shall destroy any exhibit containing a depiction of a minor
6 engaged in sexually explicit conduct five years after the judgment is
7 final, as determined by the provisions of RCW 10.73.090(3). Before any
8 destruction, the clerk shall contact the prosecuting attorney and
9 verify that there is no collateral attack on the judgment pending in
10 any court. If the criminal proceeding ends in a mistrial, the clerk
11 shall either maintain the exhibit or return it to the law enforcement
12 agency that investigated the criminal charges for safekeeping until the
13 matter is set for retrial. If the criminal proceeding ends in an
14 acquittal, the clerk shall return the exhibit to the law enforcement
15 agency that investigated the criminal charges for either safekeeping or
16 destruction.

17 NEW SECTION. **Sec. 4.** A new section is added to chapter 9.68A RCW
18 to read as follows:

19 Any depiction of a minor engaged in sexually explicit conduct, in
20 any format, distributed as discovery to defense counsel or an expert
21 witness prior to the effective date of this section shall either be
22 returned to the law enforcement agency that investigated the criminal
23 charges or destroyed, if the case is no longer pending in superior
24 court. If the case is still pending, the depiction shall be returned
25 to the superior court judge assigned to the case or the presiding
26 judge. The court shall order either the destruction of the depiction
27 or the safekeeping of the depiction if it will be used at trial. It is
28 not a defense to violations of this chapter for crimes committed after
29 December 31, 2012, that the initial receipt of the depictions was done
30 under the color of law through the discovery process."

ADOPTED 03/01/2012

1 On page 1, line 1 of the title, after "exploitation;" strike the
2 remainder of the title and insert "amending RCW 9.68A.001; and adding
3 new sections to chapter 9.68A RCW."

EFFECT: Clarifies that property or material shall be deemed to be 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.

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