

FINAL BILL REPORT

ESHB 2424

C 227 L 10
Synopsis as Enacted

Brief Description: Protecting children from sexual exploitation and abuse.

Sponsors: House Committee on Public Safety & Emergency Preparedness (originally sponsored by Representatives O'Brien, Pearson, Hurst, Takko, Herrera, Chandler, Ross, Rodne, Dammeier, Condotta, Shea, Klippert, Smith, Walsh, Parker, McCune, Campbell, Johnson, Eddy, Morrell, Kelley, Short, Sullivan, Conway, Kagi, Roach, Kristiansen, Bailey, Haler, Schmick, Ericks, Warnick, Ormsby, Moeller and Hope; by request of Attorney General).

House Committee on Public Safety & Emergency Preparedness
Senate Committee on Judiciary

Background:

Offenses Related to Depictions of a Minor Engaged in Sexually Explicit Conduct.

A person is guilty of Dealing in depictions of a Minor Engaged in Sexually Explicit Conduct (Dealing) if he or she: (1) knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells any visual or printed matter depicting a minor engaged in sexually explicit conduct, or (2) possesses such matter with the intent to develop, duplicate, publish, print, disseminate, exchange, finance, attempt to finance, or sell it. Dealing is a class C felony with a seriousness level of VII.

A person is guilty of Sending or Bringing into the State Depictions of a Minor Engaged in Generally Explicit Conduct (fending or bringing into the state) if he or she knowingly sends or brings into the state for sale or distribution any visual or printed matter depicting a minor engaged in sexually explicit conduct. Sending or Bringing into the State is a class C felony with a seriousness level of VII.

A person is guilty of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct (Possession) if he or she knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct. Possession is a class B felony with a seriousness level of VI.

Unit of Prosecution.

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.

In *State v. Sutherby*, the defendant was charged with 10 counts of Possession but argued that he should be sentenced for only one count. The Washington Supreme Court agreed, holding that the proper unit of prosecution is per possession, rather than per image or per minor depicted, because the Legislature proscribed the conduct of possessing child pornography.

Affirmative Defense.

In a prosecution for Dealing, Sending or Bringing into the State, or Possession, it is an affirmative defense that the defendant was a law enforcement officer conducting an official investigation of a sex-related crime against a minor.

Aggravating Factors.

In exceptional cases, a court may impose a sentence above or below the standard range if a mitigating or aggravating circumstance exists. The Sentencing Reform Act provides a list of aggravating factors that a court may consider in sentencing. Any factor that increases the defendant's sentence above the standard range, other than the fact of a prior conviction, must be proven to a jury beyond a reasonable doubt.

Predatory Sex Offenses.

In a prosecution for Rape of a Child in the first or second degree or Child Molestation in the first degree, if there is a finding that the offense was predatory, the minimum sentence is the greater of 25 years or the maximum term in the standard sentence range.

An offense is "predatory" if:

- the perpetrator was a stranger to the victim;
- the perpetrator established a relationship with the victim, and a significant reason for doing so was the victimization of the victim; or
- the perpetrator was a:
 - teacher, counselor, volunteer, or other person of authority in a public or private school (excluding home-based instruction) where the victim was a student under the perpetrator's authority;
 - coach, trainer, volunteer, or other person of authority in a recreational activity in which the victim participated and was under the perpetrator's authority; or
 - pastor, elder, volunteer, or other person of authority in a church or religious organization where the victim was a participant under the perpetrator's authority.

Summary:

Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct.

A person is guilty of the offense of Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct (Viewing) if the person intentionally views over the Internet visual or printed matter depicting a minor engaged in sexually explicit conduct. To determine whether a person intentionally viewed such depictions, the trier of fact must consider the following: the title, text, and content of the matter; Internet history; search terms; thumbnail images;

downloading activity; expert computer forensic testimony; the number of depictions; the defendant's access to and control over the electronic device upon which the depictions were found; and the contents of the electronic device upon which the depictions were found. The government has the burden to prove beyond a reasonable doubt that the computer user initiated the viewing.

First and Second Degree Offenses and Units of Prosecution.

For the offenses of Dealing, Sending or Bringing into the State, Possession, and Viewing, a person is guilty of a first degree offense when the depiction involves intercourse, penetration, masturbation, sadomasochistic abuse, and defecation or urination for the purpose of the viewer's sexual stimulation. A person is guilty of a second degree offense when the depiction shows the genitals or unclothed pubic or rectal areas or breasts, or the touching of those areas, for the purpose of the viewer's sexual stimulation. The minor need not have known that he or she was participating in the depiction.

The unit of prosecution for Dealing, Sending or Bringing into the State, and Possession is per image for the first degree offenses and per incident for the second degree offenses. The unit of prosecution for Viewing is per Internet session, which is defined as a period of time during which an Internet user, using a specific Internet protocol address, visits or is logged into an Internet site for an uninterrupted period of time. Classifications of the crimes are established as follows:

- Dealing and Sending or Bringing into the State:
 - First degree – class B felony, seriousness level of VII
 - Second degree – class C felony, seriousness level of V
- Possession:
 - First degree – class B felony, seriousness level of VI
 - Second degree – class C felony, seriousness level of IV
- Viewing:
 - First degree – class B felony, seriousness level of IV
 - Second degree – unranked class C felony

For the offense of Viewing, paying to view over the Internet depictions of a minor engaged in sexually explicit conduct is an aggravating factor that supports a sentence above the standard.

Affirmative Defenses.

It is an affirmative defense in a prosecution for a crime related to the depiction of a minor engaged in sexually explicit conduct that the defendant had written authorization to assist a law enforcement officer in an investigation of a sex-related crime against a minor and was acting at the officer's direction.

It is an affirmative defense that the defendant was conducting research for an institution of higher education when the research was approved in advance and viewing or possession of the depictions was an essential component of the research. It is also an affirmative defense that the defendant was legislative staff conducting research requested by a legislator where

viewing or possession of the depiction was an essential component of the research, and the research was directly related to a legislative activity.

The act is not intended to impact the immunity of Internet service providers who are required by federal law to report child pornography.

Predatory Sex Offenses.

The definition of “predatory” includes a perpetrator who was a teacher, counselor, volunteer, or other person in authority providing home-based instruction where the victim was a student under the person’s authority or supervision. The definition excludes the victim’s parent or legal guardian.

Votes on Final Passage:

House	98	0	
Senate	46	0	(Senate amended)
House			(House refuses to concur)
Senate	47	0	(Senate amended)
House	97	0	(House concurred)

Effective: June 10, 2010