

## RCW 13.40.740 YOUTH ACCESS TO COUNSEL

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### RCW 13.40.740 OVERVIEW

- If law enforcement (a) questions a juvenile during a custodial interrogation; (b) detains a juvenile based on probable cause of involvement in criminal activity; or (c) requests that the juvenile provide consent to an evidentiary search, the LEO **shall** provide a juvenile with access to an attorney for consultation **before the juvenile waives** any constitutional rights.
- The consultation **may not be waived**.
- Statements are not admissible unless (a) the juvenile has been provided with access to an attorney for consultation; and the juvenile provides an express waiver knowingly, intelligently, and voluntarily made by the juvenile after the juvenile has been fully informed of the rights being waived; (b) the statement is for impeachment purposes; or (c) the statement was made spontaneously.
- Exceptions: (a) victim of trafficking; or (b) information sought is necessary to protect an individual's life from an imminent threat AND a delay to allow legal consultation would impede the protection of an individual's life from an imminent threat AND questioning is limited to matters reasonably expected to obtain information necessary to protect an individual's life from an imminent threat.

## CONSTITUTIONAL RIGHTS

### 4<sup>TH</sup> AMENDMENT SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## 4<sup>TH</sup> AMENDMENT SEARCHES AND SEIZURES

Under the Fourth Amendment to the United States Constitution and to the Washington State Constitution, “an arrest is lawful only when supported by probable cause.”

State v. Inman, 2 Wn. App. 2d 281, 288, 409 P.3d 1138, review denied, 190 Wn. 2d 1022, 418 P.3d 797 (2018)

Probable cause exists when the arresting officer, and the time of the arrest, has knowledge of facts sufficient to cause a reasonable officer to believe that an offense has been committed.

## 4<sup>TH</sup> AMENDMENT SEARCHES AND SEIZURES

The fourth amendment applies to all seizures of the person, including seizures involving a brief detention short of traditional arrest.

Terry Stop: officer may make a brief investigatory detention if the officer has within his knowledge reliable, articulable facts and circumstances sufficient to warrant a prudent person in believing that criminal activity is afoot and a suspect may be involved in it

May stop and briefly detain the person for investigative purposes where officer has a well-founded suspicion not amounting to probable cause

## 4<sup>TH</sup> AMENDMENT - SEARCHES

- Does 4<sup>th</sup> Amendment apply:
  - Governmental conduct
  - Reasonable expectation of privacy?
- If so, must have a valid warrant, exception, or waiver/consent

## RIGHT TO REMAIN SILENT

- 5<sup>th</sup> Amendment to the United States Constitution
- Article I, Section 9 of WA State Constitution
- No person shall be compelled in any criminal case to be a witness against themselves
- Miranda decision and progeny requires that defendant be warned prior to any questioning, including 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, if they cannot afford an attorney that one will be provided for them
- Once a suspect invokes right to remain silent, LEO may not continue the interrogation or make repeated efforts to have them waive

## RIGHT TO COUNSEL IN CUSTODIAL INTERROGATION

- 5<sup>th</sup> Amendment Right to Counsel
- When individual is taken into custody and subjected to questioning, privilege against self-incrimination is implicated
- Must be Mirandized and warned they have a right to the presence of an attorney
- Also have the right to exercise the right to an attorney **throughout** the interrogation

## MIRANDA

- To safeguard a person's Fifth Amendment right against self-incrimination, before any custodial interrogation, the police must advise the person of (1) the right to remain silent, while giving notice that anything said to the police might be used against her; (2) the right to consult with an attorney prior to answering any questions and have the attorney present for questioning; (3) the right to counsel, including the appointment of counsel if she cannot afford to hire one; and (4) the right to end questioning at any time. Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S. Ct. 1602 1612, 16 L. Ed. 2d 694 (1966).
- "This constitutional privilege against self-incrimination under *Miranda* applies with equal force to juveniles." In re Gault, 387 U.S. 1, 55, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

## 6<sup>TH</sup> AMENDMENT RIGHT TO COUNSEL

A criminal defendant's Sixth Amendment right to counsel attaches when a critical stage in a criminal prosecution resulting in loss of liberty is reached.

State v. Fitzsimmons, 610 P.2d 893, 93 Wn.2d 436, 442 (1980) (citing Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972); Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Tacoma v. Heater, 67 Wn.2d 733, 409 P.2d 867 (1966), State v. Jackson, 66 Wn.2d 24, 400 P.2d 774 (1965)).

Washington State Constitution Article I, Section 22: "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

## WASHINGTON COURT RULES

### CrR 3.1- RIGHT TO AND ASSIGNMENT OF LAWYER

(b) Stage of Proceedings.

(1) The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.

### CRR 3.1- RIGHT TO AND ASSIGNMENT OF LAWYER

(c) Explaining the Availability of a Lawyer.

(1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

(2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

## JUCR 6.2 RIGHT TO CONSULT WITH A LAWYER

- (a) Advice of Right to Representation by Lawyer. A juvenile found eligible for **diversion** shall, prior to the initial interview with the diversion unit, be advised of his or her right to consult with a lawyer concerning the juvenile's decision to enter into a diversion agreement or to appear in juvenile court.
- (b) Appointment of Lawyer. The court shall appoint a lawyer for any juvenile who is financially unable to obtain a lawyer for the consultation if the juvenile does not waive that right pursuant to rule 6.3.
- (c) Retained Lawyer During Diversion Process. A juvenile may be represented by a retained lawyer during the diversion process in accordance with RCW 13.40.080(6).

### JuCR 6.3 WAIVER OF RIGHT TO LAWYER

A waiver containing the following statements and in substantially the following form shall be read by, signed by, and a copy given to a juvenile who waives the right to consult with a lawyer before an initial interview with a diversion unit:

#### Waiver of Lawyer

1. I know that I can talk to a lawyer about whether I should enter into a diversion process and will not have to pay for one if I cannot afford it.
2. I know that a lawyer can look at my police reports, tell me about the law, help me understand my rights, and help me decide whether I should enter into a diversion process or go to juvenile court.

\_\_\_\_\_  
Parent or Guardian (optional)

\_\_\_\_\_  
Juvenile

The above statement was read to the juvenile and signed by the juvenile on the date indicated.

\_\_\_\_\_  
Representative of Diversion Unit



**JUCR 9.2  
ADDITIONAL RIGHT TO REPRESENTATION  
BY LAWYER**

(d) Juvenile Offense Proceedings. The court shall provide a lawyer at public expense in a juvenile offense proceeding when required by RCW 13.40.080(10), RCW 13.40.140(2), or rule 6.2. Before appointing a lawyer for an indigent person or at the first appearance of the lawyer in the case, the court shall require the lawyer to certify to the court that he or she complies with the applicable Standards for Indigent Defense Services to be approved by the Supreme Court.

[Adopted effective July 1, 1978; Amended effective September 1, 1987; September 1, 1997; January 1, 2012; June 30, 2012]

**WAIVER OF CONSTITUTIONAL  
RIGHTS**

## WAIVER OF CONSTITUTIONAL RIGHTS

- Individual can waive their rights
- Can do so by agreeing to speak with law enforcement
- Only valid if **knowing, intelligent, and voluntary**
- Voluntary if product of a free and deliberate choice rather than intimidation, coercion, or deception
- Waiver is knowing and intelligent if made with full awareness of both nature of the right being abandoned and consequences of the decision to abandon it
- Totality of circumstances test

## JUVENILE WAIVER OF RIGHTS

RCW 13.40.140(11)

Whenever this chapter refers to waiver or objection by a juvenile, the word juvenile shall be construed to refer to a juvenile who is at least twelve years of age. If a juvenile is under twelve years of age, the **juvenile's parent, guardian, or custodian shall give any waiver** or offer any objection contemplated by this chapter.

## CAN A JUVENILE WAIVE THEIR RIGHTS?

- In Dutil v. State, 93 Wn.2d 84, 606 P.2d 269 (1980), the Washington Supreme Court declined to extend this statutory protect to juveniles over the age of 12
- In line with totality of circumstances test, would depend on the specific facts and circumstances of each juvenile interrogation
- Declined to adopt bright line rule dependent on age
- Stated that parent/guardian presence is not necessarily indicative of a knowing, voluntary, and intelligent waiver

## JUVENILE BRAIN DEVELOPMENT

'[C]hildren are different.' State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017) (quoting Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455 2470, 183 L.Ed.2d 407 (2012)).

- They have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking
- They are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.
- Psychology and brain science continue to show fundamental differences between juvenile and adult minds—for example, in parts of the brain involved in behavior control

Miller v. Alabama, 132 S. Ct. 2455, 183 L. Ed. 2d 407, 567 U.S. 460, 471 (2012) (internal quotations omitted).

## HEIGHTENED STANDARD FOR JUVENILES?

- In 2020, this argument came before the Washington Supreme Court again and the Court affirmed Dutil
- "She asks this court to require a heightened Miranda standard for juveniles under the age of 14." State v. M.P., No. 79725-5-1, 5 (Wn.App. 2020)
- "When read her Miranda rights, M.P. promptly and clearly responded, 'Yes,' that she understood her rights, and 'Yes,' that she wished to speak to the detectives."

## STATE V. M.P.

- Court looked at the totality of the circumstances and determined that her waiver was knowing, voluntary, and intelligently given
- 30-minute interview with detectives
- 13 years old
- her mother waited in the lobby
- when she did not understand something, she asked for clarification.
- M.P. admitted that she did not know the difference between a felony and a misdemeanor,
- intelligently and cogently responded to the detectives' questions; responses showed that she was following the discussion

# HOUSE BILL 1140

The Path to RCW 13.40.740

H-0016.5

## HOUSE BILL 1140

**State of Washington          67th Legislature          2021 Regular Session**

**By** Representatives J. Johnson, 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

Read first time 01/12/21. Referred to Committee on Civil Rights & Judiciary.

## ORIGINAL LANGUAGE

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 13.40  
 6 RCW to read as follows:  
 7 (1) Except as provided in subsection (2) of this section, law  
 8 enforcement shall provide a juvenile with access to an attorney for  
 9 consultation, which may be provided in person, by telephone, or by  
 10 video conference, before the juvenile waives any constitutional  
 11 rights if a law enforcement officer:  
 12 (a) Questions a juvenile after providing a Miranda warning;  
 13 (b) Requests that the juvenile provide consent to search the  
 14 juvenile or the juvenile's property, dwellings, or vehicles under the  
 15 juvenile's control; or  
 16 (c) Briefly detains a juvenile based on reasonable suspicion of  
 17 involvement in criminal activity.  
 18 (2) Statements made by a juvenile after the juvenile is contacted  
 19 by a law enforcement officer in a manner described under subsection  
 20 (1) of this section are not admissible in a juvenile offender or  
 21 adult criminal court proceeding unless:

p. 1

HB 1140

### Bill History

#### 2021 REGULAR SESSION

Jan 12 First reading, referred to Civil Rights & Judiciary. [\(View Original Bill\)](#)  
 Jan 20 Public hearing in the House Committee on Civil Rights & Judiciary at 10:00 AM. [\(Committee Materials\)](#)  
 Feb 5 Executive action taken in the House Committee on Civil Rights & Judiciary at 8:00 AM. [\(Committee Materials\)](#)  
**CRJ - Majority; 1st substitute bill be substituted, do pass.** [\(View 1st Substitute\)](#) [\(Majority Report\)](#)  
 Minority; do not pass. [\(Minority Report\)](#)  
 Minority; without recommendation. [\(Minority Report\)](#)  
 Feb 9 Referred to Appropriations.  
 Feb 17 Public hearing in the House Committee on Appropriations at 1:30 PM. [\(Committee Materials\)](#)  
 Feb 18 Executive action taken in the House Committee on Appropriations at 1:30 PM. [\(Committee Materials\)](#)  
 APP - Majority; do pass 1st substitute bill proposed by Civil Rights & Judiciary. [\(Majority Report\)](#)  
 Minority; do not pass. [\(Minority Report\)](#)  
 Minority; without recommendation. [\(Minority Report\)](#)  
 Feb 22 Referred to Rules 2 Review.  
 Mar 1 Rules Committee relieved of further consideration. Placed on second reading.  
 Mar 2 **1st substitute bill substituted (CRJ 21).** [\(View 1st Substitute\)](#)  
 Floor amendment(s) adopted.  
 Rules suspended. Placed on Third Reading.  
 Third reading, passed; yeas, 56; nays, 41; absent, 0; excused, 1. [\(View 1st Engrossed\)](#) [\(View Roll Calls\)](#)

## ARGUMENTS IN FAVOR

- Protects BIPOC youth who are disproportionately in juvenile justice system
- Rebuilds trust between communities of color and law enforcement
- Miranda rights are confusing and juvenile brains are not able to fully comprehend them and consequences of waiver
- Protects juveniles from being intimidated into confession, particularly false confessions; this ensures reliability of any confession
- Will not diminish capacity for LEO to investigate and prosecute serious crimes

## ARGUMENTS IN OPPOSITION

- Would hinder investigation of crimes
- Rural and/or smaller counties cannot afford without state funding
- Good intent but impractical:
  - What happens when juvenile doesn't want access to attorney?
  - Will detained individuals need to be taken into custody to ensure privacy?
  - What about multiple people at scene who could be suspects/witnesses?
  - What if there is no phone service?

**IN THE SENATE**

Mar 5 First reading, referred to Human Services, Reentry & Rehabilitation.  
 Mar 16 Public hearing in the Senate Committee on Human Services, Reentry & Rehabilitation at 1:30 PM. (Committee Materials)  
 Mar 19 Executive action taken in the Senate Committee on Human Services, Reentry & Rehabilitation at 10:30 AM. (Committee Materials)  
 HSRR - Majority; do pass. (Majority Report)  
 Minority; do not pass. (Minority Report)  
 Minority; without recommendation. (Minority Report)  
 And refer to Ways & Means.  
 Mar 22 Referred to Ways & Means.  
 Mar 30 Public hearing in the Senate Committee on Ways & Means at 1:30 PM. (Committee Materials)  
 Apr 2 Executive action taken in the Senate Committee on Ways & Means at 9:00 AM. (Committee Materials)  
 WM - Majority; do pass with amendment(s). (Majority Report)  
 Minority; do not pass. (Minority Report)  
 Minority; without recommendation. (Minority Report)  
 Passed to Rules Committee for second reading.  
 Apr 10 Placed on second reading.  
 Apr 11 Committee amendment(s) adopted with no other amendments.  
 Rules suspended. Placed on Third Reading.  
 Third reading, passed; yeas, 29; nays, 19; absent, 0; excused, 1. (View Roll Calls)

## SENATE AMENDMENTS

- Added “spontaneous” statement exception to exclusionary rule
- Added human trafficking exception
- Trigger is “custodial interrogation” rather than Miranda warnings
- Changed the standard from “detains the individual based on reasonable suspicion of involvement in criminal activity” to “probable cause of involvement in criminal activity”
- Added definition of “custodial interrogation” to chapter



## HB 1140

### IN THE HOUSE

- Apr 15 House concurred in Senate amendments.  
Passed final passage; yeas, 56; nays, 41; absent, 0; excused, 1. ([View Roll Calls](#))
- Apr 20 Speaker signed.

### IN THE SENATE

- Apr 21 President signed.

### OTHER THAN LEGISLATIVE ACTION

- Apr 22 Delivered to Governor. ([View Bill as Passed Legislature](#))
- May 18 Governor signed.  
Chapter 328, 2021 Laws. ([View Session Law](#))  
Effective date 1/1/2022.

## RCW 13.40.740

## RCW 13.40.740 JUVENILE ACCESS TO AN ATTORNEY

(Effective January 1, 2022.)

(1) Except as provided in subsection (4) of this section, law enforcement **shall** provide a juvenile with access to an attorney for consultation, which may be provided in person, by telephone, or by video conference, **before the juvenile waives any constitutional rights** if a law enforcement officer:

- (a) Questions a juvenile during a **custodial interrogation**;
- (b) Detains a juvenile based on probable cause of involvement in criminal activity; **or**
- (c) Requests that the juvenile provide consent to an evidentiary search of the juvenile or the juvenile's property, dwellings, or vehicles under the juvenile's control.

(2) The consultation required by subsection (1) of this section **may not be waived**.

## NEW STATUTORY DEFINITION

RCW 13.40.020(9)

"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 (Effective January 1, 2022.)

**RCW 13.40.740**  
**JUVENILE ACCESS TO AN ATTORNEY**

(3) Statements made by a juvenile after the juvenile is contacted by a law enforcement officer in a manner described under subsection (1) of this section are not admissible in a juvenile offender or adult criminal court proceeding, **unless**:

- (a) The juvenile **has been provided** with access to an attorney for consultation; and the juvenile provides an **express waiver** knowingly, intelligently, and voluntarily made by the juvenile after the juvenile has been fully informed of the rights being waived as required under RCW 13.40.140;
- (b) The statement is for **impeachment** purposes; or
- (c) The statement was made **spontaneously**.

**RCW 13.40.740**  
**JUVENILE ACCESS TO AN ATTORNEY**

(4) A law enforcement officer may question a juvenile **without following** the requirement in subsection (1) of this section if:

- (a) The law enforcement officer believes the juvenile is a **victim of trafficking** as defined in RCW 9A.40.100; however, any information obtained from the juvenile by law enforcement pursuant to this subsection cannot be used in any prosecution of that juvenile; or
- (b)(i) The law enforcement officer believes that the information sought is **necessary** to protect an individual's life from an **imminent threat**;
- (ii) A **delay** to allow legal consultation **would impede** the protection of an individual's life from an imminent threat; and
- (iii) **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.

## RCW 13.40.740 JUVENILE ACCESS TO AN ATTORNEY

(5) After the juvenile has consulted with legal counsel, the juvenile may advise, direct a parent or guardian to advise, **or direct legal counsel to advise** the law enforcement officer that the juvenile chooses to assert a constitutional right. 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 waiver of any constitutional rights of the juvenile may only be made according to the requirements of RCW 13.40.140.

## RCW 13.40.740 - DEFINITIONS



- (6) For purposes of this section, the following definitions apply:
- (a) "Juvenile" means any individual who is under the chronological age of 18 years; and
  - (b) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are defined in RCW 10.93.020, **including school resource officers** as defined in RCW 28A.320.124 **and other public officers** who are responsible for enforcement of fire, building, zoning, and life and safety codes.

# SCHOOL RESOURCE OFFICER

RCW 28A.320.124(b)

"School resource officer" means a **commissioned** law enforcement officer in the state of Washington with sworn authority to make arrests, deployed in community-oriented policing, and assigned by the employing police department or sheriff's office to work in schools to build positive relationships with students and address crime and disorder problems, gangs, and drug activities affecting or occurring in or around K-12 schools.

School resource officers should focus on keeping students out of the criminal justice system when possible and should not be used to attempt to impose criminal sanctions in matters that are more appropriately handled within the educational system.

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| <div style="text-align: center;">  <p>Spokane Public Schools<br/><i>excellence for everyone</i></p> </div> <p>Policy No. 6514<br/>Management Support</p> <hr/> <p style="text-align: center;"><b>District and Campus Safety</b></p> <p>Spokane Public Schools strives to maintain a safe and secure environment for students, staff, and members of the public. The Department of Campus Safety helps maintain school security and helps carry out certain law enforcement functions.</p> <p>The Department of Campus Safety is a separate and distinct law enforcement unit of the School District. School security personnel who work in that unit are deemed school officials for purposes of the Family Educational Rights and Privacy Act (FERPA). The City of Spokane Police Department has also granted a special law enforcement commission to certain school security personnel ("Campus Resources Officers") who work in the Department of Campus Safety.</p> <p>SPS Campus Resource Officers and Campus Response Specialists are unarmed officers. While there are both Campus Resource Officers and Campus Response Specialists who have limited commissions to enforce state and local laws through the Spokane Police Department, none of these officers working for SPS are trained or expected to engage armed subjects in the course of their duties. SPS officers are trained and expected to call for assistance from the Spokane City Police Department and the Spokane County Sheriff's Office if they believe an incident requires an armed officer to resolve the situation.</p> | <div style="text-align: center;">  <p>Spokane Public Schools<br/><i>excellence for everyone</i></p> </div> <p>Procedure No. 6514<br/>Management Support</p> <hr/> <p style="text-align: center;"><b>District and Campus Safety</b></p> <p><b>I. Purpose and Scope</b></p> <p>The Department of Campus Safety provides various services for the District, including assisting school district building staff with safety and security, working with local law enforcement, providing community caretaking functions, and helping to provide employee and volunteer background checks.</p> <p><b>II. Functions</b></p> <p>The Department of Campus Safety is responsible for the following services:</p> <ul style="list-style-type: none"> <li>Law Enforcement</li> <li>Investigations</li> <li>Exterior Key Control</li> <li>Alarm System Installation, Repair, and Monitoring</li> <li>Building and Campus Safety</li> <li>Emergency Response and Support</li> <li>Background Checks</li> <li>Fingerprinting</li> <li>Photo Identification</li> <li>Crisis Plan Training and Review</li> <li>Restitution</li> <li>Maintain Burglary, Vandalism, and Arson Files</li> <li>Civil Orders (Enforcing and Supporting School Staff)</li> <li>Incident Command Structure</li> <li>Critical Incident Planning and Preparedness</li> </ul> |
|--|---|

## WHAT DO YOU THINK?

- Are the concerns raised by HB 1140's opponents warranted?
- Could it be struck down by the WA Supreme Court as unconstitutional?
- How will law enforcement handle this new requirement?
  - Will they just not talk to the juvenile?