HOUSE BILL REPORT
ESB 5222

As Reported by House Committee On:
Judiciary

Title: An act relating to the insanity defense.

Brief Description: Changing provisions relating to the insanity defense.

Sponsors: Senators Esser and Doumit.

Brief History:
Committee Activity:
Judiciary: 3/29/05, 3/31/05 [DPA].

Brief Summary of Engrossed Bill
(As Amended by House Committee)

- Removes a defendant's statutory privilege against self-incrimination during an insanity defense mental examination; and
- Prevents a defendant's mental condition expert from testifying at trial if the defendant fails to cooperate during an insanity defense mental examination.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 10 members: Representatives Lantz, Chair; Flannigan, Vice Chair; Williams, Vice Chair; Priest, Ranking Minority Member; Rodne, Assistant Ranking Minority Member; Campbell, Kirby, Serben, Springer and Wood.

Staff: Bill Perry (786-7123).

Background:

A criminal defendant who pleads not guilty by reason of insanity has the burden of proving by a preponderance of the evidence that because of a mental disease or defect at the time of the crime he or she was unable to perceive the nature and quality of the act charged or was unable to tell right from wrong with respect to the act.

The insanity defense is not a negation of any element of the crime charged. It is not a defense that is designed to raise a reasonable doubt about the prosecution's required proof of those elements. The insanity defense represents a determination that, because of his or her mental illness, a person should not be held criminally liable, even though he or she did commit the

crime. However, a person acquitted of crime because of insanity may be subject to involuntary commitment to a mental hospital if he or she is found to be dangerous.

Under statutorily prescribed procedures, whenever a person pleads not guilty by reason of insanity, the court is to appoint at least two experts to examine the defendant's mental condition. At least one of the experts must be approved by the prosecution. The defendant is entitled to an attorney during the examination and may refuse to answer any question he or she believes may tend to be incriminating.

The Washington State Supreme Court has held, however, that neither the state nor federal Constitution's privilege against self-incrimination applies to these mental examinations. In a very recent case, *State v. Carneh*, 153 Wn.2d 274 (2004), the Court held that the statutory right to refuse to answer questions creates a privilege against self-incrimination different from and in addition to any right under either Constitution.

Either the defendant or the prosecution may engage experts to testify at trial, but an expert who has not personally examined the defendant cannot offer an opinion about the defendant's mental state at the time of the charged offense.

Summary of Amended Bill:

An insanity plea defendant's privilege against answering questions in a mental examination is removed. Such a defendant who refuses to answer questions during an examination may not present his or her own expert's testimony at trial.

These changes apply to mental examinations performed on or after the effective date of the act.

Amended Bill Compared to Original Bill:

The amendment explicitly retains the privilege against self-incrimination in the case of examinations for competency. The amendment also removes an explicit requirement that the defendant's participation in an examination be in good faith.

Appropriation: None.

Fiscal Note: Not requested.

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

Testimony For: If a defendant claims insanity and wants to present his or her own expert's testimony on the question, he or she should have to cooperate in an examination of his or her mental condition by the prosecution's expert as well. This is just a matter of simple fairness. Courts have already held that a defendant waives his or her privilege against self-incrimination

when he or she asserts the insanity defense. Until the recent state Supreme Court decision, it was almost universally believed by practitioners that a defendant who asserts the insanity defense has waived the privilege against self-incrimination. Furthermore, statements made during an examination are not introduced as evidence in the trial in chief. The statements are only used if the defendant has asserted the insanity defense, and then the statements are used as evidence to refute the defendant's burden of proof on the defense.

Testimony Against: The engrossed bill removes the right to refuse to answer both in insanity plea cases and in competency hearings. The privilege against self-incrimination should remain in competency hearings. The "good faith" requirement in the engrossed bill is vague and inappropriate. The prosecutor's expert should not be allowed to testify that the defendant failed to answer in good faith. The engrossed bill goes farther than it needs to. It is not a good idea to allow these kinds of judgments to be made about the admissibility of evidence. There should be a bright line - did the defendant answer the question or not? The jury should decide about the defendant's cooperation.

Persons Testifying: (In support) Senator Esser, prime sponsor; and Roger Davidheiser, King County Prosecutor's Office and Washington Association of Prosecuting Attorneys.

(Opposed) Louis Frantz, Washington Association of Criminal Defense Lawyers.

Persons Signed In To Testify But Not Testifying: None.