

To: Kathryn Leathers, WSBA Legislative Liaison  
From: Jennifer Grant, Chair,  
WSBA Criminal Law Section Executive Committee  
Date: January 25, 2011  
Re: SB 5114

The Executive Committee of the Criminal Law Section opposes SB 5114 as proposed. In order to take this position, the Section Executive Committee is required to have a two thirds vote of its equally divided Board membership between prosecutors and defense counsel. The vote to oppose SB 5114 was unanimous by all prosecutors and all defense counsel members of the Executive Committee. This opinion is an expression of the position of the Criminal Law Section of the Washington State Bar Association and does not represent a formal position for the State Bar Association itself. We are concerned because this bill makes substantive and procedural changes to competency evaluation and the restoration process of misdemeanor offenders. As currently written, the bill leaves many questions unanswered.

First, the bill would eliminate competency restoration for misdemeanor offenses. The bill would require individuals in custody at the time of their dismissal of certain serious misdemeanor charges as a result of being found incompetent to stand trial to be detained in jail for up to 72 hours for evaluation for civil commitment pursuant to RCW Chapter 71.05. Under current law, those evaluations now take place at Western State Hospital (WSH). We are concerned that SB 5114 increases jail time for individuals whose criminal charges have been dismissed. It is unclear what the legal authority would be for detaining these individuals in jail for an additional 72 hours after their criminal charges have been dismissed. Local jails are not defined evaluation and treatment facilities for purposes of RCW Chapter 71.05 civil commitment evaluation and treatment. In addition, we are concerned that shifting the burden of civil commitment evaluations from WSH to local mental health professionals would result in undue delay in completing these evaluations. It is unclear whether local mental health systems would have the capacity to absorb this increased workload. It is also unclear whether an incarcerated defendant would remain in the detention facility or be placed in an evaluation and treatment facility while the 90 day petition is resolved.

Second, the bill would require one evaluator instead of two for purposes of determining competency and eliminates the requirement that the evaluator render an opinion as to whether the defendant is a substantial danger to others or to public safety. This bill is not required to resolve the issue regarding the number of evaluators because a judge already can simply order one evaluator instead of two. In addition to being unnecessary, however, the bill's elimination of the evaluator's need to render an opinion as to the defendant's substantial danger to others or to public safety raises serious concerns.

When an evaluator renders an opinion regarding a defendant's dangerousness, he or she is providing prosecutors, defense attorneys, the court, and treatment providers a more comprehensive assessment of the defendant than simply the charges that individual was alleged to have committed. If an evaluator renders an opinion that a defendant is dangerous, all involved in the criminal justice and mental health profession take note, and that opinion often becomes a pathway to further treatment. It is certainly an important factor that should be considered by

any mental health professional who is determining whether to file a 90-day civil commitment petition on a dangerous defendant. Eliminating the requirement of such an opinion puts any mental health professional who must determine whether to file a civil commitment petition at huge disadvantage. Shifting the responsibility to the local mental health professional without such an opinion also increases public safety risk of future serious offenses.

Finally, we are concerned that the revisions being proposed are simply being instituted as cost saving measures for WSH. The new procedures however don't eliminate costs but rather transfer costs to the local jurisdictions. Aside from issue of costs, this proposed legislation would undo the work accomplished since 1997 when Stanley Stevenson, a retired firefighter was killed by a mentally ill offender. Legislative changes were put in place to address the needs of the mentally ill population and protect public safety. Now that we find ourselves in an economic crisis this legislation as proposed seems to willing to abandon those efforts.