
Civil Rights & Judiciary Committee

2SSB 5046

Brief Description: Concerning postconviction access to counsel.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Saldaña, Nguyen, Trudeau, Wilson, C., Dhingra, Frame, Kuderer, Nobles, Pedersen and Valdez).

Brief Summary of Second Substitute Bill

- Authorizes the Office of Public Defense (OPD) to provide access to counsel for indigent persons to file and prosecute a first, timely personal restraint petition and requires the OPD to establish eligibility criteria to prioritize access to counsel for youth and certain adult petitioners.
- Authorizes the OPD to appoint counsel if the Legislature or a final decision of an appellate court creates an ability to petition the sentencing court or to challenge a conviction or sentence.
- Requires the OPD to examine and evaluate barriers to providing postconviction counsel to file and prosecute a collateral attack and report findings and recommendations to the Legislature.

Hearing Date: 3/15/23

Staff: Yelena Baker (786-7301).

Background:

Right to Counsel on Appeal and in Collateral Attack Proceedings.

Counsel must be provided at state expense to an adult offender convicted of a crime and to a juvenile offender convicted of an offense when the offender is indigent, or indigent and able to contribute, and the offender:

- files an appeal as a matter of right;

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- responds to an appeal as a matter of right or responds to a motion for discretionary review or petition for review filed by the state;
- prosecutes a motion or petition for review after the Supreme Court or a Court of Appeals has accepted discretionary review of a decision of a court of limited jurisdiction; or
- prosecutes a motion or petition for review after the Supreme Court has accepted discretionary review of a Court of Appeals decision.

Additionally, provision of counsel at state expense may be required to file and prosecute a postconviction motion or petition for collateral attack on a judgment or sentence. A "collateral attack" means any form of postconviction relief other than a direct appeal and includes: a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

If the indigent offender is under a sentence of death, counsel at state expense must be appointed to file and prosecute a motion or petition for a first collateral attack on a judgment and sentence. Under certain circumstances, counsel may be provided at public expense to file or prosecute a second or subsequent collateral attack on the same judgment and sentence.

If the indigent offender is not under a sentence of death, state law does not require provision of counsel at state expense to file a petition for a first collateral attack. Instead, counsel at state expense must be appointed to prosecute a first collateral attack after the offender has filed a motion or petition for collateral attack and the Chief Judge of the appellate court has determined that the issues raised by the petition are not frivolous. Counsel may not be provided at public expense to file or prosecute a second or subsequent collateral attack on the same judgment or sentence.

For the purpose of providing counsel at state expense on appeal and in collateral attack proceedings, "indigent" means a person who, at any stage of a court proceeding, is:

- receiving certain types of public assistance;
- involuntarily committed to a public mental health facility;
- receiving an annual income, after taxes, of 125 percent or less of the current federally established poverty level; or
- unable to pay the anticipated cost of counsel because the person's available funds are insufficient to pay any amount for the retention of counsel.

"Indigent and able to contribute" means a person who, at any stage of a court proceeding, is unable to pay the anticipated cost of counsel because the person's available funds are less than the anticipated cost of counsel but sufficient for the person to pay a portion of that cost.

Personal Restraint Petitions.

In the context of criminal proceedings, a personal restraint petition is a type of collateral attack on the conviction or sentence. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability

resulting from a judgment or sentence in a criminal case.

Rules of Appellate Procedure (RAP) of Washington State Court Rules govern the process for filing and obtaining relief on personal restraint petitions and require that a personal restraint petition set forth specified information, including:

- the place where the petitioner is held in custody, if confined, or the judgment, sentence, or other order or authority upon which the petitioner's restraint is based and any appeals taken from that judgment, sentence, or order;
- a statement of any other petitions or collateral attacks filed in federal court or state court with regard to the same allegedly unlawful restraint; and
- grounds for relief, including a statement of the facts upon which the claim of unlawful restraint is based, the evidence available to support the factual allegations, and why the petitioner's restraint is unlawful for one or more of the specified reasons.

Legal argument and authorities may be included in the petition, or submitted in a separate brief. Additionally, if some of the evidence supporting the factual allegations is contained in the files of a trial or appellate court, the petition should identify the documents needed for review and the case numbers under which they can be found.

Personal restraint petitions, like other collateral attacks, must be filed within one year after a judgment becomes final. This time limit does not apply to petitions based solely on one or more of the specified grounds, such as existence of newly discovered evidence or there has been a significant change in the law, which is material to the conviction or sentence and applies retroactively to the conviction or sentence.

Relief on a personal restraint petition may be granted if the appellate court finds the petitioner's restraint unlawful for one or more of the reasons specified in the RAP, including that:

- the conviction was obtained or the sentence was imposed in violation of state law, the state Constitution, or the Constitution of the United States;
- material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding; or
- there has been a significant change in the law, which is material to the conviction or sentence, and sufficient reasons exist to require retroactive application of the changed legal standard.

Office of Public Defense.

The Office of Public Defense (OPD) was established by the Legislature in 1996 as an independent agency of the judicial branch to implement the constitutional and statutory guarantees to counsel for indigent persons. The OPD does not provide direct representation of clients and instead administers all state-funded services in several specified program areas, including appellate indigent defense.

Summary of Bill:

Subject to availability of funds appropriated for this specific purpose, the OPD must provide access to counsel for indigent persons incarcerated in a juvenile rehabilitation or adult correctional facility to file and prosecute a first, timely personal restraint petition. The OPD must establish eligibility criteria that prioritize access to counsel for:

- youth under the age of 25 years;
- youth or adults with sentences in excess of 120 months;
- youth or adults with disabilities; and
- youth or adults with limited English proficiency.

Subject to the availability of funds appropriated for this specific purpose, the OPD must:

- appoint counsel to petition the sentencing court if the Legislature creates an ability to petition the sentencing court; and
- appoint counsel to challenge a conviction or sentence if a final decision of an appellate court creates an ability to challenge a conviction or sentence.

These provisions do not create an entitlement to counsel at state expense to file a personal restraint petition or to petition the sentencing court.

The OPD must examine and evaluate barriers to providing postconviction counsel to file and prosecute collateral attacks, and report findings and recommendations to the appropriate legislative committees by December 1, 2024.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on January 1, 2024.