

# SENATE BILL REPORT

## SB 5046

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As Reported by Senate Committee On:  
Law & Justice, January 19, 2023  
Ways & Means, February 14, 2023

**Title:** An act relating to postconviction access to counsel.

**Brief Description:** Concerning postconviction access to counsel.

**Sponsors:** Senators Saldaña, Nguyen, Trudeau, Wilson, C., Dhingra, Frame, Kuderer, Nobles, Pedersen and Valdez.

**Brief History:**

**Committee Activity:** Law & Justice: 1/12/23, 1/19/23 [DPS-WM, w/oRec].  
Ways & Means: 1/31/23, 2/14/23 [DP2S, DNP, w/oRec].

**Brief Summary of Second Substitute Bill**

- Provides limited authority to the Office of Public defense to appoint counsel for personal restraint petitions for youth under age 25, youth or adults with sentences in excess of 120 months, youth or adults with disabilities, and youth or adults with limited English proficiency.
- Tasks the Office of Public Defense to study the barriers to providing postconviction counsel to indigent persons.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** That Substitute Senate Bill No. 5046 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Kuderer, Pedersen, Salomon, Valdez and Wagoner.

**Minority Report:** That it be referred without recommendation.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.*

Signed by Senators Padden, Ranking Member; McCune, Torres and Wilson, L..

**Staff:** Ryan Giannini (786-7285)

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## SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** That Second Substitute Senate Bill No. 5046 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Rolfes, Chair; Robinson, Vice Chair, Operating & Revenue; Mullet, Vice Chair, Capital; Billig, Conway, Dhingra, Hasegawa, Hunt, Keiser, Nguyen, Pedersen, Saldaña, Wagoner and Wellman.

**Minority Report:** Do not pass.

Signed by Senators Schoesler, Ranking Member, Capital; Rivers, Assistant Ranking Member, Capital; Warnick, Assistant Ranking Member, Capital; Boehnke and Muzzall.

**Minority Report:** That it be referred without recommendation.

Signed by Senators Wilson, L., Ranking Member, Operating; Gildon, Assistant Ranking Member, Operating; Braun and Torres.

**Staff:** Mahnur Khan (786-7437)

**Background:** Office of Public Defense. The Office of Public Defense (OPD) was created in 1996 as an independent agency within the judicial branch to implement the constitutional and statutory guarantees to counsel for indigent persons and to ensure effective and efficient delivery of state-funded public defenses services. The director of OPD administers state-funded services for indigent defense, including appellate indigent defense.

Right to Counsel on Appeal. Counsel is 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;
- 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;
- is under a sentence of death and requests counsel be appointed to file and prosecute a motion or petition for collateral attack, or file or prosecute a second or subsequent collateral attack on the same judgment and sentence if the court determines that the second or subsequent collateral attack is not barred by the statute of limitation or the offender has not previously filed a petition for personal restraint on similar grounds;
- is not under a sentence of death and requests counsel to prosecute a collateral attack if the chief judge determines the issues raised by the petition are not frivolous;
- responds to a collateral attack or responds to or prosecutes an appeal from a collateral attack filed by the state;
- prosecutes a motion or petition for review after the Supreme Court or 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.

Definitions. "Indigent" means a person who, at any stage of a court proceeding:

- is receiving certain types of public assistance;
- is involuntarily committed to a public mental health facility;
- has household income of 125 percent or less of the federal poverty guidelines; or
- is unable to retain counsel because of insufficient funds.

"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.

"Collateral attack" means any form of postconviction relief other than a direct appeal. Collateral attack includes, but is not limited to, 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.

In the context of criminal proceedings, a personal restraint petition is a collateral attack on the judgement and sentence that is only available after the defendant has exhausted all forms of direct appeal. Personal restraint petitions in a criminal case, like other collateral attacks, must be filed within one year after a judgment becomes final, unless the petition is based on certain circumstances, such as newly discovered evidence or significant changes in the law.

**Summary of Bill (Second Substitute):** The director of OPD to administer all state-funded services for appellate indigent defense, and postconviction indigent defense related to a first, timely personal restraint petition; when the Legislature creates an ability to petition the sentencing court; or when a final decision of an appellate court creates the ability to challenge a conviction or sentence.

Counsel shall be appointed for indigent persons incarcerated in a juvenile rehabilitation or adult correctional facility to file and prosecute a personal restraint petition.

OPD will study the barriers to providing postconviction counsel to indigent persons seeking to file and prosecute one, timely motion for collateral attack other than for personal restraint petitions, and report its findings to the Legislature by December 1, 2024.

**EFFECT OF CHANGES MADE BY WAYS & MEANS COMMITTEE (Second Substitute):**

- Provides limited authority to the office of public defense to appoint counsel for personal restraint petitions for youth under age 25, youth or adults with sentences in

excess of 120 months, youth or adults with disabilities, and youth or adults with limited English proficiency.

**EFFECT OF CHANGES MADE BY LAW & JUSTICE COMMITTEE (First Substitute):**

- Restores existing statutes related to appointment of counsel for indigent offenders under a sentence of death.
- Requires appointment of counsel for an offender not under a sentence of death who requests counsel to prosecute a motion for collateral attack, other than a personal restraint petition, if the court has determined that the issues raised by the petition establishes grounds for relief.
- Allows appointment of counsel for an offender not under a sentence of death for a second or subsequent personal restraint petition or collateral attack other than a personal restraint petition on the same judgment and sentence if the court determines that the petition is not barred by the statute of limitations or if the offender has not previously filed a personal restraint petition or collateral attack on similar grounds.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

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

**Staff Summary of Public Testimony on Original Bill (Law & Justice):** *The committee recommended a different version of the bill than what was heard.* PRO: This bill would give people who remain incarcerated an opportunity to seek remedies for mistakes and to receive equity and justice. The changes would ensure that people across the state have access to counsel. This would help provide geographic equity. The current process forces people to adjust to life in prison and file a petition on their own. Incarcerated peoples do not have the ability to have an attorney assist them or to ensure that the process was truly fair. Many people, particularly people with disabilities, people who had barriers accessing education, people in solitary, and people with language barriers, face obstacles in accessing the courts. The easiest way to cure inequities that exist in sentencing outcomes is to provide meaningful access to counsel. Appointment of counsel will make everyone's jobs, including prosecutors, easier.

OTHER: There are a finite number of resources. At the trial level, there are not enough public defenders or prosecutors. Public defenders do not have enough capacity to represent individuals. There are also enormous challenges regarding competency proceedings. In order to establish access to postconviction counsel, a person must establish that their claim is not frivolous. This bar is not particularly high and judges often grant counsel. What this

bill would do would change who verifies that the claim is not frivolous. Determining new guidelines would require more attorneys and expand the costs. The prosecutors and court of appeals' workloads would increase and require more resources. There are a lot of things at the trial level that, if not properly funded, would result in more issues at the appellate level.

**Persons Testifying (Law & Justice):** PRO: Senator Rebecca Saldaña, Prime Sponsor; Larry Jefferson, Director, Washington State Office of Public Defense; Jeffrey Ellis, Seattle Clemency Redemption Project; Greg Link, WDA/WACDL; Rachael Seevers, Disability Rights Washington.

OTHER: Russell Brown, WA Association of Prosecuting Attorneys.

**Persons Signed In To Testify But Not Testifying (Law & Justice):** No one.

**Staff Summary of Public Testimony on First Substitute (Ways & Means):** *The committee recommended a different version of the bill than what was heard.* PRO: This bill decides that when people are no longer serving the right sentence, they will have access to counsel. This will give people a onetime consideration to have their case reviewed by counsel. Counsel is supposed to be a guaranteed right, but only people with resources and wealth can afford it. Youth and underserved populations need access to this. They have no adequate education to know their rights or represent themselves in court.

OTHER: There is not currently capacity to assist everyone who needs help. This should be subject to appropriations, need to be mindful of costs.

**Persons Testifying (Ways & Means):** PRO: Senator Rebecca Saldaña, Prime Sponsor; Jeffrey Ellis, Redemption Project of WA; Larry Jefferson, Director, Washington State Office of Public Defense; Jason Schwarz, Washington Defender Association; Vidal Vincent; Gregory Link, Washington Appellate Project.

OTHER: Juliana Roe, Washington State Association of Counties; Russell Brown, WA Association of Prosecuting Attorneys.

**Persons Signed In To Testify But Not Testifying (Ways & Means):** No one.