

SENATE BILL REPORT

SB 5772

As of February 4, 2022

Title: An act relating to postconviction access to counsel.

Brief Description: Concerning postconviction access to counsel.

Sponsors: Senators Saldaña, Nguyen, Dhingra, Hasegawa, Nobles and Stanford.

Brief History:

Committee Activity: Law & Justice: 1/25/22, 1/27/22 [DP-WM, DNP].

Ways & Means: 2/04/22.

Brief Summary of Bill

- Directs the Office of Public Defense to administer all state-funded services for appellate indigent defense and postconviction indigent defense to adult offenders convicted of a crime and to juvenile offenders convicted of an offense.
- Authorizes indigent offenders to obtain court appointed counsel to file and prosecute one motion or petition for collateral attack against a criminal judgment and sentence.
- Authorizes indigent offenders to obtain court appointed counsel to challenge a conviction or sentence when a decision of the Legislature or appellate court creates a cause of action.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass and be referred to Committee on Ways & Means.

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

Minority Report: Do not pass.

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, Assistant Ranking Member; Honeyford and Wagoner.

Staff: Ryan Giannini (786-7285)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Shani Bauer (786-7468)

Background: The Office of Public Defense 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 the Office of Public Defense administers all state-funded services in areas such as:

- trial court criminal indigent defense;
- appellate indigent defense;
- representation of indigent parents qualified for appointed counsel in dependency and termination cases;
- extraordinary criminal justice cost petitions;
- compilation of copies of DNA test requests by persons convicted of felonies;
- representation of indigent respondents qualified for appointed counsel in sexually violent predator civil commitment cases; and
- providing access to attorneys for juveniles contacted by a law enforcement officer for whom a legal consultation is required.

Under the right to counsel, 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 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;
- responds to a collateral attack filed by the state or responds to or prosecutes an appeal from a collateral attack that was 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.

An offender who is not under a sentence of death is not entitled to appointed counsel in order to file and prosecute a collateral attack unless the chief judge determines the issues raised by the petition are not frivolous. "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.

Summary of Bill: The director of the Office of Public Defense shall administer all state-funded services for appellate indigent defense and postconviction indigent defense to adult offenders convicted of a crime and to juvenile offenders convicted of an offense.

Counsel will be provided by the Office of Public Defense at state expense to an adult offender convicted of a crime or a juvenile offender convicted of an offense when the offender exercises their right to counsel, and the offender is indigent, or indigent and able to contribute.

Offenders who are indigent, or indigent and able to contribute, can request counsel be appointed to file and prosecute one motion or petition for collateral attack. Offenders who are indigent, or indigent and able to contribute, may also request counsel to file or prosecute a second or subsequent collateral attack on the same judgment and sentence if the court determines that the collateral attack is not barred by the statute of limitations, or the offender has not previously filed a petition for personal restraint on similar grounds. The distinctions in requests for counsel between offenders who are under a sentence of death and offenders who are not under a sentence of death are removed.

Offenders who are indigent, or indigent and able to contribute, can request counsel be appointed to petition the sentencing court if the Legislature creates an ability to petition the sentencing court.

Offenders who are indigent, or indigent and able to contribute, can request counsel be appointed to challenge a conviction or sentence if a final decision of an appellate court creates the ability to challenge a conviction or sentence.

Appropriation: None.

Fiscal Note: Available.

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

Effective Date: The bill takes effect on January 1, 2023.

Staff Summary of Public Testimony (Law & Justice): PRO: Many people remain

incarcerated because they cannot access legal counsel to help file petitions. It may be challenging due to a variety of factors for incarcerated persons to file a petition without representation. This bill would increase access to legal counsel for incarcerated persons in a geographically equitable manner. Increasing access to legal counsel for incarcerated persons would increase efficiency in the legal system.

Persons Testifying (Law & Justice): PRO: Senator Rebecca Saldaña, Prime Sponsor; Jeffrey Ellis, criminal post-conviction lawyer; Robert Boruchowitz, Defender Initiative; Gregory Link, Washington Appellate Project; Jason Schwarz, Washington Defender Assoc/Washington Association of Criminal Defense Lawyers; Jeremiah Bourgeois, Freedom Project WA; Larry Jefferson, Washington State Office of Public Defense.

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

Staff Summary of Public Testimony (Ways & Means): PRO: A personal restraint petition is the most common post-conviction process utilized. On a daily basis, the Office of Public Defense (OPD) gets letters and requests to file a petition for personal restraint. Currently only people with money can get an attorney to file a petition for review. OPD would contract with attorneys statewide. This service is well within the expertise of OPD.

CON: Collateral attacks are distinct from a trial and appeal. Once a collateral attack is filed and a judge determines the petition is not frivolous, an attorney will be appointed. Many of the personal restraint petitions that are filed are dismissed as frivolous. This bill would translate to a significant workload and cost to the prosecutors offices as they are the ones who will be required to respond to these petitions. We estimate this would result in a need for an additional 7 to 10 prosecutors across the state.

Persons Testifying (Ways & Means): PRO: Sophia Byrd McSherry, Washington State Office of Public Defense; Gregory Link, Washington Appellate Project.

OTHER: Russell Brown, WA Association of Prosecuting Attorneys.

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