

HOUSE BILL REPORT

2SSB 5046

As Passed House:

April 10, 2023

Title: An act relating to postconviction access to counsel.

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 History:

Committee Activity:

Civil Rights & Judiciary: 3/15/23, 3/17/23 [DP];

Appropriations: 3/30/23, 4/1/23 [DP].

Floor Activity:

Passed House: 4/10/23, 58-40.

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.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

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.

Majority Report: Do pass. Signed by 7 members: Representatives Hansen, Chair; Farivar, Vice Chair; Entenman, Goodman, Peterson, Thai and Walen.

Minority Report: Do not pass. Signed by 3 members: Representatives Walsh, Ranking Minority Member; Graham, Assistant Ranking Minority Member; Rude.

Minority Report: Without recommendation. Signed by 1 member: Representative Cheney.

Staff: Yelena Baker (786-7301).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass. Signed by 17 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Berg, Chopp, Davis, Fitzgibbon, Hansen, Lekanoff, Pollet, Riccelli, Ryu, Senn, Simmons, Slatter and Tharinger.

Minority Report: Do not pass. Signed by 10 members: Representatives Stokesbary, Ranking Minority Member; Chandler, Connors, Couture, Dye, Harris, Rude, Sandlin, Schmick and Steele.

Staff: Yvonne Walker (786-7841).

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;
- 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.

Staff Summary of Public Testimony (Civil Rights & Judiciary):

(In support) Postconviction relief is what happens after an appeal or if an appeal does not occur. It is an important process for addressing inequities in the criminal justice process, correcting unlawful sentences, and addressing governmental misconduct that has led to unlawful convictions. It has been 53 years since the Washington Supreme Court held that an individual is entitled to counsel in postconviction proceedings. Unfortunately, that right has never been fully funded, it is rarely implemented, and this bill remedies the current inequities in the process by appointing attorneys for people seeking postconviction relief.

Appointment of counsel for filing a personal restraint petition will help courts examine unfair sentences, consider newly discovered proof of innocence, and address issues that cannot be raised on appeal. There is particular concern about matters that are outside the record, where the defense attorney made a mistake, the judge made a mistake, or the prosecutor made a mistake. In one case, an incarcerated person was being deported because his lawyer assisted him in pleading guilty to a serious crime, but had neglected to tell him about the immigration consequences of pleading guilty. This is a serious deficiency on the part of the defense attorney. By allowing appointment of counsel in these cases, the bill ensures that these petitioners are not unfairly burdened with correcting potential injustices on their own.

Only a small percentage of people who file a personal restraint petition in an appellate court have an attorney appointed to them or are able to afford their own attorney. Everyone else has to do it on their own. Like much of the criminal justice system, the personal restraint petition process is difficult to navigate for pro se petitioners, especially for petitioners with

serious disabilities or little education. They must write their own petitions within a one-year deadline of their final judgment, and they must do so from prison, with limited use of library resources, no legal training, no investigator, and often no access to legal discovery. As can be imagined, most of them do not make it because they simply cannot overcome the hurdles. The bill allows the OPD to help those who cannot do it for themselves, particularly juveniles and those who are mentally disabled, have limited English capacity, or who are serving long sentences.

People who try to file a personal restraint petition on their own often end up filing multiple petitions. Once a petition is filed, whether it is frivolous or not, the court has to deal with it, resulting in wasted resources. This bill actually saves costs by increasing access to counsel in these cases and promotes efficiency within courts by reducing delays and avoiding frivolous filings.

Counties and prosecutors may complain about the increased burden on them, but they are already involved in this process. At present, most of these cases of personal restraint petitions already involve prosecutors, which results in a disparity when individuals seeking relief go up against a trained prosecutor. This bill cures that inequity.

The need for postconviction counsel is even greater now because of the sentencing reforms that emerged in 2020 and 2021. If the state does not invest in the implementation of the reforms, they will be empty.

(Opposed) None.

(Other) There is already a process for people to access counsel—after a person files a non-frivolous petition, the judge appoints an attorney. By providing access to counsel before that process, the bill takes away that gatekeeping function. Courts of Appeals estimate an increase in the hundreds of cases with this policy change.

The policy in the bill is appreciated, but the issue of limited resources needs to be highlighted. There are incredible needs throughout the criminal justice system. There are counties that do not have enough public defenders to even arraign defendants, and certain individuals are waiting up to a month after they are arrested. There are not enough prosecutors. This bill funds the cost for defense counsel for postconviction proceedings, but it does not similarly fund the cost of prosecutors' services in these cases. There will be an increase in the number of personal restraint petitions filed, which would in turn require additional prosecutor staff hours. This is not an argument against this policy of increased access to counsel in these proceedings, but the Legislature needs to make sure to include funding for the prosecutors in this bill. Counties are already facing serious costs and do not have the ability to increase taxes.

Staff Summary of Public Testimony (Appropriations):

(In support) A personal restraint petition addresses manifest injustices, such as the influence of racial bias or the abuse of prosecutorial power. Postconviction review plays an important role in the implementation of changes in the law and in addressing governmental misconduct that may have led to conviction. At present, only a small percentage of people can afford their own counsel, and everyone else is on their own. They are asked to overcome language barriers, intellectual disabilities, the fact that they are in confinement, and have only one year to do it. In one case, a formerly incarcerated person was not able to get relief from incarceration sooner because he did not have the knowledge and understanding of the process for filing a personal restraint petition.

This bill remedies the inequities in the system, and it does so at a relatively little cost. The funding provided for this bill would allow the OPD to provide quality representation for about 100 to 150 clients a year. This bill will give people a chance to review their case with an attorney to see if there was an error in the process. Public defense needs to be there at the beginning, and it needs to be there at the end.

The Legislature should use all possible resources to fund this bill because it will help individuals who are unjustly incarcerated and who lack the means or ability to file a particular petition that might get them relief. The state spends a lot of money to incarcerate individuals; it is only right to properly fund the process that ensures that individuals are not wrongfully convicted and are not unnecessarily doing time because of a mistake in the criminal justice system.

(Opposed) None.

(Other) While the bill funds the cost for postconviction public defense, it does not similarly fund the costs associated with the services provided by prosecutors in these cases. Providing individuals with counsel will increase the number of personal restraint petitions filed, which would in turn require additional prosecutor staff hours. The bill should include funding for the prosecution, in addition to the defense cost. Funding to the Court of Appeals should be increased.

Persons Testifying (Civil Rights & Judiciary): (In support) Senator Rebecca Saldaña, prime sponsor; Jeffrey Ellis; Jennifer Smith, Seattle Clemency Project; Larry Jefferson, Washington State Office of Public Defense; Kelly Vomacka, Law Office of Kelly Vomacka; Gregory Link, Washington Appellate Project, Washington Defender Association, and Washington Association of Criminal Defense Lawyers; Charlie Klein, Civil Survival Project; and Jeremiah Bourgeois, Freedom Project Washington.

(Other) Juliana Roe, Washington State Association of Counties; and Russell Brown, Washington Association of Prosecuting Attorneys.

Persons Testifying (Appropriations): (In support) Larry Jefferson, Washington State Office of Public Defense; Vidal Vincent; Jeffrey Ellis, Redemption Project of Washington;

and Gregory Link, Washington Defender Association and Washington Association of Criminal Defense Lawyers.

(Other) Juliana Roe, Washington State Association of Counties; and Russell Brown, Washington Association of Prosecuting Attorneys.

Persons Signed In To Testify But Not Testifying (Civil Rights & Judiciary): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.