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**SUBSTITUTE SENATE BILL 5046**

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**State of Washington 68th Legislature 2023 Regular Session**

**By** Senate Law & Justice (originally sponsored by Senators Saldaña, Nguyen, Trudeau, C. Wilson, Dhingra, Frame, Kuderer, Nobles, Pedersen, and Valdez)

AN ACT Relating to postconviction access to counsel; amending RCW 2.70.020 and 10.73.150; creating new sections; and providing an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  The legislature recognizes that Washington authorizes personal restraint petitions to challenge potentially unjust criminal judgments and sentences, a procedural safeguard dating back to medieval common law. The legislature further recognizes that recent statutory amendments and Washington supreme court decisions allow thousands of persons impacted by injustices in the criminal legal system to pursue resentencing.

The legislature observes that wealthy people retain attorneys to represent them in these complex, high-stakes postconviction legal proceedings. However, at least 80 percent of persons charged with felonies are indigent and cannot afford to hire a lawyer. In addition, nearly 40 percent of incarcerated persons have a cognitive or physical disability that would limit their capacity to access or understand critical legal documents, draft required petitions, or otherwise effectively represent themselves pro se in legal proceedings. Up to 70 percent of persons in prison cannot read above a fourth-grade level.

The legislature finds that the criminal legal system disproportionately incarcerates people of color, and that most people in prison are poor and the poorest are women and people of color. The legislature further finds that current law may have the effect of limiting access to counsel to initiate legitimate claims for postconviction relief. The legislature believes this situation perpetuates and exacerbates the disparate impacts of the criminal legal systems on poor persons and persons of color.

The legislature therefore declares that indigent persons must have access to public defense counsel to advise, initiate, and execute certain postconviction procedures. In addition, the legislature finds that the state should fund and administer access to counsel for certain types of postconviction procedures through the Washington state office of public defense. This act is intended to: Provide appointment of state-funded public defense counsel for indigent adults and juveniles to file and prosecute one, timely personal restraint petition; petition a sentencing court when the legislature creates an opportunity to do so; and challenge a conviction or sentence if a final decision of an appellate court creates an opportunity to do so.

**Sec.**  RCW 2.70.020 and 2021 c 328 s 3 are each amended to read as follows:

The director shall:

(1) Administer all state-funded services in the following program areas:

(a) Trial court criminal indigent defense, as provided in chapter 10.101 RCW;

(b) Appellate indigent defense, as provided in this chapter and RCW 10.73.150;

(c) Postconviction indigent defense to file and prosecute a first, timely personal restraint petition as authorized by RCW 10.73.150(4) and for proceedings as authorized by RCW 10.73.150 (9) and (10);

(d) Representation of indigent parents qualified for appointed counsel in dependency and termination cases, as provided in RCW 13.34.090 and 13.34.092;

((~~(d)~~)) (e) Extraordinary criminal justice cost petitions, as provided in RCW 43.330.190;

((~~(e)~~)) (f) Compilation of copies of DNA test requests by persons convicted of felonies, as provided in RCW 10.73.170; and

((~~(f)~~)) (g) Representation of indigent respondents qualified for appointed counsel in sexually violent predator civil commitment cases, as provided in chapter 71.09 RCW; ((~~and~~

~~(g)~~)) (2) Provide access to attorneys for juveniles contacted by a law enforcement officer for whom a legal consultation is required under RCW 13.40.740;

((~~(2)~~)) (3) Submit a biennial budget for all costs related to the office's program areas;

((~~(3)~~)) (4) Establish administrative procedures, standards, and guidelines for the office's program areas, including cost-efficient systems that provide for authorized recovery of costs;

((~~(4)~~)) (5) Provide oversight and technical assistance to ensure the effective and efficient delivery of services in the office's program areas;

((~~(5)~~)) (6) Recommend criteria and standards for determining and verifying indigency. In recommending criteria for determining indigency, the director shall compile and review the indigency standards used by other state agencies and shall periodically submit the compilation and report to the legislature on the appropriateness and consistency of such standards;

((~~(6)~~)) (7) Collect information regarding indigent defense services funded by the state and report annually to the advisory committee, the legislature, and the supreme court;

((~~(7)~~)) (8) Coordinate with the supreme court and the judges of each division of the court of appeals to determine how appellate attorney services should be provided.

The office of public defense shall not provide direct representation of clients.

**Sec.**  RCW 10.73.150 and 1995 c 275 s 2 are each amended to read as follows:

Counsel shall 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 as those terms are defined in RCW 10.101.010 and the offender:

(1) Files an appeal as a matter of right;

(2) Responds to an appeal filed as a matter of right or responds to a motion for discretionary review or petition for review filed by the state;

(3) Is under a sentence of death and requests counsel be appointed to file and prosecute a motion or petition for collateral attack as defined in RCW 10.73.090. 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 court determines that the collateral attack is not barred by RCW 10.73.090 or 10.73.140;

(4) Is not under a sentence of death and requests counsel to file or prosecute a ((~~collateral attack after the chief judge has determined that the issues raised by the petition are not frivolous, in accordance with the procedure contained in rules of appellate procedure 16.11~~)) first, timely personal restraint petition. Counsel ((~~shall not~~)) may be provided at public expense to file or prosecute a second or subsequent ((~~collateral attack~~)) personal restraint petition on the same judgment and sentence if the court determines the personal restraint petition is not barred by RCW 10.73.090 or 10.73.140;

(5) Is not under a sentence of death and requests counsel to prosecute a motion for collateral attack other than a personal restraint petition, after the court has determined that the issues raised by the petition establish grounds for relief. Counsel may be provided at public expense to file or prosecute a second or subsequent collateral attack other than a personal restraint petition on the same judgment and sentence if the court determines the collateral attack is not barred by RCW 10.73.090 or 10.73.140;

(6) 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;

((~~(6)~~)) (7) 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~~

~~(7)~~)) (8) Prosecutes a motion or petition for review after the supreme court has accepted discretionary review of a court of appeals decision;

(9) Requests counsel be appointed to petition the sentencing court if the legislature creates an ability to petition the sentencing court; or

(10) Requests 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.

NEW SECTION. **Sec.**  The office of public defense shall:

(1) Examine and evaluate barriers to providing postconviction counsel at the request of indigent persons seeking to file and prosecute one, timely motion for collateral attack other than for a personal restraint petition. Barriers to be examined and evaluated include issues related to statutes, state and local court rules and practices, availability of qualified attorneys, and any other issues that may come to the attention of the office of public defense;

(2) Identify resources and reforms to overcome the barriers;

(3) Report findings and recommendations to the appropriate fiscal and policy committees of the legislature not later than December 1, 2024.

NEW SECTION. **Sec.**  This act takes effect January 1, 2024.

**--- END ---**