

# THE IMPACT OF STATE V. BLAKE: A VIEW FROM A DEPUTY PROSECUTING ATTORNEY

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# Disclaimers

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- Views expressed are mine and not necessarily those of my office
- I have attempted to be accurate, but Blake procedures are subject to change and modify nearly daily
- I apologize for boring looking slides, I am not great at Power Point.
- I have not included forms drafted for Blake hearings because they change frequently.
- I get the 8 AM spot, so I hope you have your coffee, tea, or water available to you.
- Feel free to interrupt with questions at any time.



## The Decision: State v. Blake, 197 Wn.2d 170 (February 25, 2021)

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- Ms. Blake was arrested, and a small baggie of methamphetamine was found in the coin pocket of her pants during a search at the jail. At a bench trial, she argued unwitting possession, indicating that jeans were a gift from a friend that she had received two days before she was arrested.
- At Division III Blake argued that placing the burden of proof to prove unwitting possession on a defendant violates due process. Citing prior case law, Division III rejected her claim.
- Justice Gordon-McCloud's opinion- "The key limit here is that the due process clause protections generally bar state legislatures from taking innocent and passive conduct with not criminal intent at all and punishing it as a serious crime. Unfortunately, that is exactly what RCW 69.50.4013, the strict liability felony drug possession statute, does. And it is the only statute in the nation to do so. We therefore conclude that it violates the state and federal constitutions."

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- The majority opinion also held that the unwitting possession defense “cannot make the statute comply with due process,” and found that the legislature clearly intended that the statute be strict liability, such that they could not find that a mens rea element was implied.
- The opinion noted that the legislature has the ability to enact strict liability crimes, but the simple possession statute “violates the due process clause because it criminalizes wholly innocent and passive conduct on a strict liability basis.”
- Justices Gonzalez, Yu, Montoya-Lewis, and Whitener joined in the majority decision.

## The Decision: State v. Blake, 197 Wn.2d 170 (February 25, 2021)

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- Justice Stephens concurred in part and dissented in part.
- Her opinion indicated that the main issue was whether the model drug possession statute should be read as having an implied mens rea element.
- She concluded that prior cases to the contrary were incorrect and harmful, and concurred with the result of Blake's conviction being vacated but did not find that the statute violated due process.
- Justice Johnson dissented stating, "the legislative power to enact strict liability crimes remains consistent and undiminished, and the Court of Appeals decision upholding RCW 69.50.4013(c) should therefore be affirmed." Justice Madsen and Justice Owens joined in dissent.

## The Aftermath:

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- Motion to reconsider was denied with slight amendments that did not change the outcome.
- The holding- The strict liability simple possession of a controlled substance statute is unconstitutional.
- SO NOW WHAT?

# The Aftermath: Vacating Convictions

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- Strict liability for possession of controlled substances
  - From July 1, 2004 to Blake, RCW 69.50.4013
  - From March 21, 1979 until June 30, 2004, RCW 69.50.401(d)
  - From May 21, 1971 to March 20, 1979 RCW 69.50.401(c)
- NEARLY 50 YEARS OF CASES with now unconstitutional strict liability for simple possession.

# The Aftermath: Vacating Convictions

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- If the case only involved simple possession:
  - The conviction may be vacated, set aside and dismissed.
  - The defendant should be immediately released if still in custody.
  - Any term of community custody that is still being served should be terminated.
  - The defendant is entitled to a refund of legal financial obligations that have been paid based on the offense.
- If the case involved more than just simple possession
  - Vacate, set aside and dismiss the simple possession offense
  - Determine offender score for remaining offenses
  - Is the sentence moot, is resentencing necessary, does the lack of simple possession require immediate release from custody because the time on the remaining charges would have been served?

## The Aftermath: Offender Score Calculations

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- State v. Ammons, 105 Wn.2d 175 (1986)- Convictions that are invalid on their face may not be included in the offender score.
- The exclusion of convictions for simple possession is not dependent upon the conviction being vacated.
- Simple Possession convictions should not be used to interrupt “wash out” rules under RCW 9.94A.525.
- Older cases- Offenses included in the offender score are listed on the face of the judgment and sentence, therefore, in cases where simple possession was included in the offender score, the time bar of RCW 10.73.090 for collateral attack likely does not apply to requests for resentencing due to the facial invalidity.

# RESENTENCING HEARINGS

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- Might be Moot.
  - If all consequences have already been served, resentencing on non-simple possession offenses would be moot
  - If the offender score was above 9 and will stay above 9, what division are you in?
  - Div. II, State v. McCorkle, 88 Wn.App. 485 (1997), an incorrect offender score that does not affect the standard range is not harmless error if the record did not clearly indicate that the sentencing court would have imposed the same sentence.
  - Div. I, State v. Argo, 81 Wn.App. 552 (1996), an offender score error which does not affect the standard range is harmless.
- Subsequent convictions count.
  - State v. Shilling, 77 Wn.App. 166 (1995)- a conviction entered after the original sentencing but before resentencing on remand is a prior conviction for purposes of determining the offender score at resentencing.

## RESENTENCING- Nearly Moot

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- If a defendant's corrected offender score results in a new standard range the top of which is lower than the amount of time served, RCW 9.94A.728 would still require resentencing prior to release.
- However, SB 5476, Sec. 19 amends RCW 9.94A.728 to add a section that reads “an offender entitled to vacation of a conviction or the recalculation of his or her offender score pursuant to State v. Blake, may be released from confinement pursuant to a court order if the offender has already served a period of confinement that exceeds his or her new standard range. This provision does not create an independent right to release from confinement prior to resentencing.”
- Effective May 13, 2021.

## The Aftermath: LEGAL FINANCIAL OBLIGATIONS

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- A defendant is entitled to a refund of legal financial obligations actually paid toward an unconstitutional conviction. Nelson v. Colorado, 137 S.Ct. 1249 (2017); State v. Hecht, 2 Wash.App.2d 359 (2018).
- The State does not owe interest. State v. Turner, 114 Wn.App. 653 (2002).
- Difficulties
  - Where does the money come from?
  - Are records still available going back to 1971?
  - What portions were from simple possession v. other current offenses?

## The Aftermath: LFO's- SB 5476 and SB 5092

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- \$44.5 million to reimburse counties for resentencing, fiscal year 2022.
- \$23.5 million to reimburse for counties for LFO's, fiscal year 2022.
- \$11 million for Office of Public Defense to reimburse counties for public defense
- Around \$100 million allocated for treatment services
- Section 21 of SB 5476, which would have created a reimbursement account was vetoed.
- There are still many questions regarding how reimbursement to counties will take place and how refunds should be distributed.
- Estimated cost of LFO reimbursement for King County, \$11 million, Thurston County \$8 million

# The Aftermath: Legislative Changes to Criminal Law

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- SB 5476, Section 9, Makes simple possession a misdemeanor, requiring knowledge.
  - Prosecutor is encouraged to divert cases under this section for assessment, treatment or other services
  - Section expires July 1, 2023.
- SB 5476, Section 8 makes knowing possession of a counterfeit controlled substance a misdemeanor. Same encouragement to divert and expiration.
- SB 5476, Section 11, adds knowingly to possession of legend drug. Same encouragement to divert and expiration.
- SB 5476, Section 14, modifies use of drug paraphernalia statute striking the language, (test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body) from the RCW 69.50.412. Not subject to expiration date.

# The Aftermath: Procedures

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- Collateral attacks on convictions pursuant to CrR 7.8, RAP 16.
- The right to counsel in a collateral attack is limited by RCW 10.73.150, and requires a determination that the petition/motion is not frivolous before counsel for indigent defendants may be appointed.
- State v. Hall, 162 Wn.2d 901 (2008). If the resolution was based on a plea agreement to reduced charges, there is a possibility that the plea could be set aside and the original charges reimposed. Hall recognizes that because the defendant risks doing serious additional time on greater charges, only the defendant can bring motions to vacate in these cases.
- Resentencing In DOC
  - The Department of Corrections has created procedures for virtual hearings.
  - SB 5476, Section 20 removes the fingerprint requirement following resentencing when the amended judgment and sentence references the original and the original had fingerprints affixed.

# VIEWS OF A DEPUTY PROSECUTOR

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- Workload impact
  - An estimated 500-700 Blake orders are being done each week in the State currently.
- Appeals
  - Blake has been cited in 50 times opinions so far per LEXIS. Keep in mind that Blake was decided February 25, 2021.
- Priorities- Incarcerated individuals who may be released due to Blake, defendants subject to supervision requirements due to Blake, cases where vacation of the crimes and refunds are the only remaining remedy.

# Questions?

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