

**First Set of Questions and Answers for Washington State Clerks of Court  
Regarding State v. Blake**

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Prepared by

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**BACKGROUND**

In *State v. Blake*, 2021 WL 728382 (Feb. 25, 2021) Washington's strict liability drug possession statute, [RCW 69.50.4013](#), was declared unconstitutional by the Washington Supreme Court because it violates due process and exceeds the State's police power. The decision was 5-1-3; the three opinions are available here: <https://www.courts.wa.gov/opinions/pdf/968730.pdf>

Since the early 1970s, tens of thousands of cases have been filed for violations of RCW 69.50.4013 and its predecessor statutes. In each case, the defendants may plead guilty or are convicted, and they are sentenced. It is anticipated that defendants who have been convicted during the operation of the statute, and its predecessor statutes, will seek a court order vacating their sentence and seek refund of all amounts paid because of the conviction.

Orders of dismissal and/or vacation of sentence and/or resentencing will occur at the same court that made the original sentence, typically the Superior Court. When the court order is entered, the clerks of the court are expected to handle the orders of the superior court like any other order in a criminal case.

Steps will need to be taken by the law enforcement, the parties, and the Clerk of the Court in response to an order vacating a sentence pursuant to *Blake*. Ideally the steps taken by clerks will be taken in consultation with the presiding judge, so that the judges are aware of the way that legal and financial obligations ("LFOs") are being handled by the clerk. In general, it is our belief that due process requires a refund of all paid LFOs with minimal administrative burden placed upon defendants. *Nelson v. Colorado*, 137 S. Ct 1249 (2017).

**QUESTIONS AND ANSWERS**

**Question 1: Is the decision in Blake precedential in other cases now or only after the mandate is issued?**

**Answer:** In our judgment, the clerks and others should act in response to the *Blake* decision now. The case became the "law of the land" when it was filed with the Supreme Court Clerk's Office. The court's decision and the three opinions in the case

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were issued on Thursday, February 25, 2021. A mandate is typically issued 20 days later unless a motion for reconsideration is made to the appellate court. As of the date of this writing, we are in a stage where the case is post-decision but pre-mandate. While the decision and the opinions in *Blake* are subject to revision until the mandate is issued, this power to revise does not alter the precedential value of the decision for other defendants who have been convicted of violation of RCW 69.50.4013.<sup>2</sup>

**Question 2: Will the court be likely to apply the decision in *Blake* retroactively, and, if so, how far back?**

**Answer:** The rule regarding retroactive application states that when the new decision is (1) a new rule (2) of constitutional magnitude (3) that is substantive, then it will be applied retroactively. *Matter of Ali*, 196 Wn.2d 220, 236, 474 P.3d 507, 515 (2020). Although there are differences of opinion on this topic, we believe that for planning purposes of the clerk of the court, a retroactive application of the law to the date of first enactment (early 1970s) should be used. This conclusion is made because the *Blake* decision holds the simple possession statute to be void from its inception, due to its failure to include a mental element necessary to make the crime constitutional. It has never included this mental element in Washington in any of its iterations making the decision retroactive to all prior convictions under previous versions of the same statute since 1971. The prior statutes are:

- RCW 69.50.4013 - post July 1, 2004 (Laws of 2003, ch. 53, sec. 334);
- RCW 69.50.401(d) from March 21, 1979 until June 30, 2004 (Laws of 1979, ch. 67 and Laws of 2003, ch. 53, sec. 334); and
- RCW 69.50.401(c) from May 21, 1971 through March 20, 1979 (Laws of 1971, ex. sess. ch. 308, secs. 69.50.401 and 69.50.607) and Laws of 1979, ch. 67)

**Question 3: For pending and unresolved cases involving a charge under RCW 69.50.4013, what actions should the clerk of the court take?**

**Answer:** In pending cases, you can expect orders of dismissal to come in quickly, usually initiated by the prosecuting attorney. Some will be with prejudice some will be without prejudice. The documents should be filed promptly, and law enforcement should be notified of the action taken so that they can show the same in their records. If required by the order, bail will be exonerated and paid back in the usual fashion. In reviewing these orders, the clerk of the court should be careful to show that the action taken applies only to the charge of violation of RCW 69.50.4013, and not other charges that may also be part of the case.

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<sup>2</sup>To clarify, the term “decision” refers to an appellate court's opinion that sets out the legal reasoning for its chosen outcome. The term “mandate,” however, refers to a formal order from an appellate court to a lower court that constitutes the actual final judgment on the case. Both the decision and the mandate must be issued before either takes official effect with respect to the parties involved in the case.

**Question 4: What is the procedure for notifying law enforcement of the vacation of sentence?**

**Answer:** Notice to law enforcement must be done “immediately” after the order of vacation is entered. Regarding notice to law enforcement, we understand that the clerks email each order of vacation to the WSP @ [crimhis@wsp.wa.gov](mailto:crimhis@wsp.wa.gov). We understand this is done because there is no data exchange between the AOC and WSP. This immediate transmittal is done pursuant to RCW 9.96.060(7) and RCW 10.97.045.

**Question 5: For completed cases in which a conviction has occurred and LFOs were assessed and are being paid, what action should the clerk of the court take?**

**Answer:** If a payment is made on an LFO that is attributed *solely* to RCW 69.50.4013, then the payment should be receipted and deposited to a “SUSPENSE ACCOUNT” or something similar so that you can track the money and easily return it to the offender. Some clerks have stated they want to return the payment to the payor. We consider the choice of these procedures a matter of local option.

If an amount remains due because of the violation of RCW 69.50.4013 conviction, we advise clerks to halt or suspend all future collection efforts, but only as to the amounts that are attributable to the violation of RCW 69.50.4013. We believe for cases in which there is only one charge, this should be straight forward. Where there are multiple charges or multiple defendants, each payment will need to be examined carefully to determine the amount that remains owing. If you have a question about an individual case, please ask your prosecuting attorney for guidance and if you have further questions of a general nature, please let us know.

**QUESTION 6: If collections for the LFOs is being done by a collection agency or something similar, what action should be taken by the clerk of the court?**

**Answer:** The clerk should take the same action to suspend collections whether the collection is done by the clerk or whether collection has been delegated to an outside collection agency. If the collection agency is unable or unwilling to adjust their practices due to the decision in *Blake* and the instructions from the clerks, the clerks may wish to recall those cases from the collection agency to avoid further collections attributable solely to RCW 69.50.4013. Clerks who make this decision should review their contract with the collection agency to see if a court order or other process is required to recall a matter from the collection agency.<sup>3</sup>

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<sup>3</sup> Under *State v. Gaines*, 479 P.3d 735 (2021), in which the court held that the superior court has authority to exercise its discretion in considering whether to remove a LFO account from a collection agency, a question may arise as to whether a court order is necessary to recall the account from collections. A good understanding with the collection agency and good communication with the collections agency would be very important.

**QUESTION 7: What information will prosecutors and offenders need after an order vacating a conviction has been entered?**

**Answer:** We expect in most cases, the order to vacate sentence will not include the amount of the refund because of the difficulty in calculating that amount and the desire to get the conviction vacated right away. The clerks of the court will have the best information regarding the following details: 1) amounts paid, 2) date paid, 3) how the funds were applied, and 4) remaining balance, if any. A sample report is found at the end of this document. In addition, the clerk may also know whether the offender has obligations in other counties subject to having funds applied to those accounts pursuant to RCW 9.94A.7606. To refund amounts paid for LFOs, a report will need to be made of the amount and how the costs of the refund will be shared with each county and the State of Washington. Many details remain to be resolved. Until that occurs, it will be helpful for the clerks to work with the software provider at AOC and others to find out what reports can be produced for cases going back to the early 1970s. We ask that you share sample reports so that prosecutors know what to expect.

**Question 8: Does the clerk need to be proactive in assisting defendants or others in refunding the money?**

**Answer:** Like any other case, the clerk of the court will respond after directed to do so by court order. It is incumbent on the attorneys, defendants and courts to provide the order vacating the conviction and providing direction on the steps needed to implement each court order. Hopefully, each clerk will be able to affirm amounts actually paid (including interest paid), the date paid, and how the funds were applied. In some counties it may be necessary to seek help from the county treasurer or county auditor to obtain this information. Every clerk will need to work with the prosecuting attorney to prepare a report for each case that provides the information needed to establish the amount of the refund. To the extent that the clerks have access to the information regarding payments, that information should be shared with prosecutors and attorneys for the offender. We hope and believe Clerks need not remit the funds to individual defendants and instead refund payments will be made through a central state-wide "refund bureau". We anticipate refunds will occur after the Order has been entered and the duties of the County and State and made clear. We are closely examining the standard language for proposed orders so that it will not direct the clerks to make the refund. County Clerks may be able to assist in estimating the number of cases, amounts paid on the possession of controlled substances charge and other items that will assist the County legislative body in budgeting for this liability.

**QUESTION 9: How will the refunds of LFOs be made by the County or State?**

**Answer:** We are working on the answer to this question. If you have ideas for streamlining the process, please share them with the President of the Clerks Association. At this point in time, we hope that the refund will not be the obligation of the Clerk of the Court.

## **START OF LIST OF QUESTIONS FOR NEXT REPORT**

- **If partial payment is received or a refund is ordered, can the clerk of the court use the procedures of RCW 9.94A.7606 to apply the funds to a different cause for which funds are due and owing?**
- **Will the refund amount include collection fees charged by the clerk of the court pursuant to a statute?**
- **Who will be updating address information and how will that be done?**
- **Will this guidance apply to misdemeanor cases for drug possession that may be in superior court or district court?**
- **Is the Clerk fee for service an LFO that is subject to refunding?**
- **When a case has multiple charges with one drug possession charge, who will provide guidance on how to separate out the drug possession financial charges? Can the clerk continue to accept payments for the other charges that have been assessed?**
- **Will allowable charges include a VUCSA Fine and LOCAL DRUG FUND based on the drug charge?**
- **What action is needed if the clerk has received funds pursuant to a bail forfeiture on a simple drug possession charge?**

## SAMPLE SCREEN SHOT SHOWING INFORMATION NEEDED FOR REFUNDS

BALANCES						
Fee Category	Charges	Payments	Credits	Balance	Disb	Escrow
<b>Collection Costs</b>	<b>800.00</b>	<b>700.00</b>	<b>100.00</b>	<b>0.00</b>	<b>700.00</b>	<b>0.00</b>
Reimbursement, Collection Costs	800.00	700.00	100.00	0.00	700.00	0.00
<b>Fines (A/R) Criminal</b>	<b>800.00</b>	<b>800.00</b>	<b>0.00</b>	<b>0.00</b>	<b>800.00</b>	<b>0.00</b>
... Crime Lab Analysis	95.00	95.00	0.00	0.00	95.00	0.00
... Crime Victims Fund Fee	173.54	173.54	0.00	0.00	173.54	0.00
... State General Fund 40	160.00	160.00	0.00	0.00	160.00	0.00
Fee, Crime Lab	5.00	5.00	0.00	0.00	5.00	0.00
Fee, Public Defender Recoup	196.50	196.50	0.00	0.00	196.50	0.00
Penalty, Crime Victim (Pre 6/7/2018)	169.96	169.96	0.00	0.00	169.96	0.00
<b>Interest-LFO</b>	<b>520.18</b>	<b>520.18</b>	<b>0.00</b>	<b>0.00</b>	<b>520.18</b>	<b>0.00</b>
LFO Interest, Crt Curr Expnse 11-90 (Interest	130.05	130.05	0.00	0.00	130.05	0.00
LFO Interest, JIS Account Fee 80-90 (Interest	130.05	130.05	0.00	0.00	130.05	0.00
LFO Interest, Revenue (Interest Use Only)	130.03	130.03	0.00	0.00	130.03	0.00
LFO Interest, State Gen Fund 40 40-90 (Intere	130.05	130.05	0.00	0.00	130.05	0.00
<b>Totals</b>	<b>2,120.18</b>	<b>2,020.18</b>	<b>100.00</b>	<b>0.00</b>	<b>2,020.18</b>	<b>0.00</b>