

**Second 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*, Washington Supreme Court No.96873-0 (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. 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 likely 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).

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QUESTIONS AND ANSWERS

(Questions 1-9 Answered on 3/09/2020)

Question 10: Where should clerks send orders to vacate convictions for persons in DOC custody?

Answer: Court orders can be emailed to docamendedorders@doc1.wa.gov.

Question 11: If an LFO payment is received from a third party under the procedures of RCW 9.94A.7606, like a payment from an employer pursuant to a garnishment, on a case with a conviction solely for simple possession, can those funds be applied to amounts owed by the same defendant if he/she owes LFOs for a different case?

Answer: As previously discussed, payments a clerk accepts on cases involving only possession charges should be placed in a “suspense account”.² This advice would apply as well to payments accepted from third parties made pursuant to RCW 9.94A.7606. We suggest that clerks terminate their withhold and deliver orders under that statute on these cases so that future payments will not be made.

How the accepted payments ultimately will be disbursed is still under consideration. Ultimately, for defendants that owe LFOs on other criminal cases, we are going to have to determine whether the funds paid for simple possession LFOs can be retained and applied to amounts owed on those other cases. That determination has not yet been made, however.

Question 12: Are persons who have their convictions for simple possession under RCW 69.50.4013 vacated also entitled to a refund of the clerk’s collection fee authorized and imposed under RCW 9.94A.760 and RCW 9.94A.780(3)?

Answer: Yes, if a clerk’s collection fee was imposed and collected on a case involving only a vacated charge under RCW 69.50.4013, then that defendant would be entitled to a refund of that fee. That is because “[w]hen a criminal conviction is overturned by a reviewing court, the State is obliged to refund fees, court costs, and restitution exacted from the defendant as a consequence of that conviction.” *State v. Hecht*, 2 Wn.App. 2d 359, 368, 409 P.3d 1146, 1151 (2018)(citing *Nelson v. Colorado*, 137 S. Ct. at 1252(2017)). “The State no longer has a legal claim to this property.” *Id.* at 368 (citing *Nelson*, 137 S. Ct. at 1257-58)(requiring repayment of a fee paid by defendant for a court ordered class). It is not only payments designated as LFOs that must be returned. Therefore, it does not matter that the clerk’s collection fee is deemed a fee for service instead of an LFO.

However, if someone is convicted of multiple charges in one case and the clerk’s collection fee is imposed on a per case basis and not a per charge basis, then the

² We appreciate that some clerks have elected not to accept such payments at all.

defendant should not be entitled to a refund of the clerk's collection fee, because it was validly imposed based on the conviction of the other charges in the same case.

Question 13: Does the *Blake* case apply to misdemeanor cases of marijuana possession by persons 18-20 years old under RCW 69.50.4013(5)?

Answer: We believe that the answer is "Yes". While some of these cases may have been adjudicated in Superior Court causing the clerks to have a role in potential refunds, the majority of these cases will have been adjudicated in district courts.

Question 14: How will it be determined what refund amount is owed to persons convicted on multiple charges in one case, where only one of the charges is for simple drug possession?

Answer: LFOs are generally assessed against the defendant on a case basis and not a charge by charge basis. A case may result in convictions on multiple criminal charges. Most LFOs are not specific to a particular criminal charge, and therefore in cases with a conviction for simple possession as well as other charges on which a defendant is convicted, most LFOs would have been imposed even without the conviction for simple possession. In those instances, defendants would not be entitled a refund of those general LFOs and fees that would have been imposed even if the defendant were never convicted of simple possession in that case.

There are some LFOs that may be specific to a certain criminal charge. We also realize that the LFO statutes have been revised over the past 50 years and that some have been repealed and new ones adopted. In many instances, particularly with respect more recent convictions, the clerk's office will know whether any particular LFO would have been imposed due to conviction on other charges even without a conviction on the simple possession charge. No refund of LFOs under these circumstances should be necessary.

However, we realize that there are some LFOs that clerks will not readily know if they were imposed specifically because of the simple possession conviction. If the clerks could compile a list of LFOs that they believe might be specific to a simple possession conviction or that they do not know whether the other charges in a case would have warranted a particular LFO, and therefore are refundable despite the conviction on other charges in a case, we can look at those LFOs and the statutes authorizing them to assist in determining if those amounts must be refunded.

Ultimately, the answer to this question is going to take some work and cooperation between the clerks and deputy prosecutors.

Currently, based on the preliminary work of this group, the following appear to be a list of potential fines, fees, or costs that may be related solely to a *Blake*-vacated conviction when the defendant was also convicted of other charges:

1. The CVPA paid under RCW 7.68.035 might be partially refundable, depending on the amount paid and the year of judgment;
2. The VUCSA fine under RCW 69.50.430;
3. This DNA fee paid under RCW 43.43.7541;
4. This state crime lab fee paid under RCW 43.43.690;
5. The local drug fund fee paid under RCW 9.94A.030 and .760 is technically permitted for any crime, but may be refundable in the interests of justice; and
6. Any punitive fine amount attributed in the judgment and sentence specifically to the simple possession conviction that is vacated.

Question 15: Can the clerk continue to accept payments for the other charges that have been assessed in a case involving a conviction for simple possession under RCW 69.50.4103?

Answer: Yes. However, we recommend that LFOs paid on cases that include a simple possession conviction and conviction on other charges be deposited into a “suspense account” until the analysis described above can be completed so that it can be determined which portion, if any, of the payment must be refunded. Certainly, payments made by defendants for other criminal cases that do not involve simple possession convictions can continue to be accepted and distributed, so long as it is clear the payments are for a different criminal case.

Question 16: Should the county clerk coordinate with county treasurer or county auditor to start arranging for refunds?

Answer: No, it is premature to start those conversations. While we appreciate everyone trying to help sort this out, who is going to pay the refunds and what that process will be is still being discussed. No decisions have been made.

Question 17: Should vacate orders include the amount of refund that a defendant is entitled to receive?

Answer: This is undetermined at this point, as it will likely depend on the method used to refund payments made. We are still working on the best form for the vacate orders, including whether they should include refund amounts. Including the amount of the refund likely will be helpful if we decide that these refunds should be paid by the State through a claims process, because that process (or the sundry claims process) will require a court order of the amount owed.

Question 18: Will bail jump convictions that resulted from bail jumping charges stemming from a case involving simple possession need to be vacated as well?

Answer: Probably not. If the case included charges in addition to simple possession, then certainly the bail jumping conviction should stand. Even if the underlying case only included a charge of simple possession, we believe the bail jumping charge should still stand. See *State v. Downing*, 122 Wn.App. 185, 193 (2004)(holding that even though the underlying charges of unlawful issuance of bank

checks were invalid due to double jeopardy, bail jumping conviction could stand because the validity of the underlying offense is not an implied element of bail jumping), see also, *State v. Gonzales*, 103 Wn.2d 564 (1985)(escape conviction valid despite invalidity of underlying felony conviction).

The final say on this issue will be determined by criminal prosecutors, however, on a case by case basis.

List of Potential Questions for Next Report

- **What can/should the clerks say to people who do not know how to obtain the money on an order that requires a refund?**
- **Can payments made by a defendant or by someone else on behalf of defendant on a simple possession case be applied as an offset to LFOs owing on an unrelated case?**
- **Who will be updating address information and how will that be done in order to issue refunds?**
- **How will credits/refunds be shown and handled by Odyssey?**
- **What should clerks tell persons that inquire about vacation of prior convictions for simple possession and/or refunds of money paid pursuant to those convictions?**
- **What action should be taken by a clerk that has received bail forfeiture funds on a case with a simple drug possession charge?**
- **Should vacate orders include the amount of any potential refund?**
- **Someone asked “Will allowable charges include a VUCSA Fine and LOCAL DRUG FUND based on the drug charge?” We will need clarification on this question in order to answer it.**