

HOUSE BILL REPORT

HB 1492

As Reported by House Committee On:
Civil Rights & Judiciary

Title: An act relating to providing relief for persons affected by *State v. Blake*.

Brief Description: Providing relief for persons affected by *State v. Blake*.

Sponsors: Representatives Simmons, Peterson, Santos, Doglio, Pollet, Macri and Reed.

Brief History:

Committee Activity:

Civil Rights & Judiciary: 1/25/23, 2/17/23 [DPS].

Brief Summary of Substitute Bill

- Establishes procedures and requirements for vacating convictions, resentencing, and refunding legal financial obligations (LFOs) and other costs pursuant to the decision in *State v. Blake*.
- Requires the Administrative Office of the Courts (AOC) to develop lists for each court of all qualifying convictions subject to vacation and qualifying nonconvictions eligible for a refund of LFOs and other costs.
- Requires prosecutors to review the lists and take certain actions, including filing ex parte motions to vacate qualifying convictions and to refund LFOs and other costs for qualifying convictions and qualifying nonconvictions.
- Sets forth required contents and effect of a vacation order.
- Defines LFOs and other costs entitled to reimbursement, creates rules for determining refund amounts, and requires the AOC to establish a refund bureau to provide direct refunds to persons entitled to refunds.
- Allows persons to challenge the amount of any refund, or to bring their own motion to vacate a qualifying conviction or seek a refund of LFOs and other costs for a qualifying nonconviction.

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.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Hansen, Chair; Farivar, Vice Chair; Entenman, Goodman, Peterson, Thai and Walen.

Minority Report: Without recommendation. Signed by 4 members: Representatives Walsh, Ranking Minority Member; Graham, Assistant Ranking Minority Member; Cheney and Rude.

Staff: Edie Adams (786-7180).

Background:

Prior to 2021, possession of a controlled substance under the Uniform Controlled Substances Act was a strict liability offense, meaning that no mens rea (guilty state of mind) element had to be proven in order to convict a person of the offense. In *State v. Blake*, the Washington Supreme Court held that the strict liability nature of the offense exceeds the state's police power and violates the due process clauses of the state and federal constitutions. The Washington Supreme Court invalidated the portion of the statute creating the simple possession crime.

The ruling in *State v. Blake* applies retroactively, and as a result, all convictions under the statute are void going back to the law's original enactment in 1971. Persons convicted of the offense are entitled to have their convictions vacated. There is no automatic process for vacating the convictions; for each void conviction a motion must be brought in the sentencing court to vacate the conviction and refund legal financial obligations (LFOs) paid as a result of the conviction. Vacation of a conviction record releases the person from all penalties and disabilities resulting from the offense, and the person may state that they have never been convicted of the offense. A vacated conviction is not included in the person's criminal history when calculating an offender score for any subsequent conviction.

The Legislature has provided funding to the Administrative Office of the Courts (AOC) and other entities to assist with implementation of the *State v. Blake* decision. The AOC received funding to assist cities and counties with the costs of resentencing and vacating the sentences of defendants whose convictions or sentences are affected by *State v. Blake*. The AOC must work with superior court clerks and district and municipal court administrators to prepare comprehensive reports, based on available court records, of all cause numbers impacted by *State v. Blake* going back to 1971. Funding was also provided to create a pool to refund LFOs previously paid by defendants whose convictions or sentences are affected by *State v. Blake*, and to establish a centralized process for refunding LFOs, including a process to locate and notify individuals of available refunds and how to apply for refunds. The AOC is in the process of establishing a refund bureau to provide direct refunds to persons certified by courts as entitled to a refund of LFOs.

The Office of Public Defense (OPD) received funding to assist with public defense services for clients whose convictions or sentences are affected by the *State v. Blake* decision, and to create a *State v. Blake* triage team to provide statewide support to the management and flow of hearings for individuals impacted by *State v. Blake*. In addition, the Office of Civil Legal Aid (OCLA) received funding to assist clients in resolving civil matters surrounding LFOs and vacate sentences that are a result of the *State v. Blake* decision.

Summary of Substitute Bill:

A new chapter is created that provides standards and requirements for the vacation of criminal convictions and refund of LFOs in light of the Washington Supreme Court decision in *State v. Blake*. A person with a qualifying conviction is eligible to have the conviction vacated by the sentencing court, and a person with a qualifying conviction or qualifying nonconviction is eligible for a refund of all LFOs, collection costs, and document-verified collateral costs paid as a result of the qualifying conviction or qualifying nonconviction.

"Qualifying conviction" means a conviction or juvenile adjudication of:

- any of the following offenses where possession of a substance is criminalized without proof of knowing possession: possession of a controlled substance; possession of narcotics; possession of less than 40 grams of marijuana; possession of legend drugs; possession of counterfeit substances; and use of drug paraphernalia to inject, ingest, inhale, or otherwise introduce a controlled substance into the human body;
- any municipal code offense that criminalizes possession of a controlled substance, legend drug, or counterfeit substance or drug paraphernalia without proof of knowing possession;
- any attempt, conspiracy, or solicitation to commit any of the above offenses;
- unlawful possession of a firearm predicated on a conviction for any of the above offenses; and
- any offense that the Washington Supreme Court rules unconstitutional in light of *State v. Blake*.

"Qualifying nonconviction" means a charge for a qualifying offense that was dismissed or not filed following successful completion of a diversion program, deferred prosecution, therapeutic court, or similar program. A charge for a qualifying offense does not constitute a qualifying nonconviction if the person was participating in the diversion program, deferred prosecution, therapeutic court, or other program, for multiple charges on an indictment, information, or affidavit, where one or more charged offenses were not qualifying offenses.

"Legal financial obligation" means a sum of money ordered by a court for LFOs, which may include restitution to the victim, court costs, county or interlocal drug funds, court-

appointed attorneys' fees, accrued interest, costs of defense, fines, and any other financial obligation assessed on the defendant as a result of a qualifying conviction or nonconviction.

"Document-verified collateral costs" means any fee or cost paid for a person's participation in a program or activity resulting from a qualifying conviction or nonconviction, the payment of which is verified by documentation carrying sufficient indicia of reliability per guidance issued by the AOC, including costs or fees for electronic home monitoring, work release, drug evaluations and treatment, probation, or jail time in lieu of LFOs.

Reports of Qualifying Convictions and Qualifying Nonconvictions.

The AOC must work with clerks in superior, district, and municipal courts to develop reports of all persons with qualifying convictions or qualifying nonconvictions. The reports must be based on available court records and list qualifying convictions and nonconvictions chronologically by cause number in a searchable and sortable format, and must include specified information for each cause number.

The AOC must prioritize cases in the following order: (1) the person is incarcerated due to a qualifying conviction; (2) the person is incarcerated and has a qualifying conviction in the person's criminal history score; (3) the person is under active or inactive supervision due to a qualifying conviction; and (4) the person has a past qualifying conviction or qualifying nonconviction. Reports covering the first three categories must be completed by January 1, 2024, and for the fourth category reports must be completed by July 1, 2024.

The AOC must provide completed installments of the report to clerks, the OPD, and the OCLA. Upon receipt, clerks must send the reports to local prosecutors, and the OPD and the OCLA may provide the reports to local public defense entities. The reports are exempt from disclosure under the Public Records Act.

Duties of Prosecuting Authorities and Clerks.

Upon receipt of a report from the clerk, the prosecuting authority must review the qualifying convictions and qualifying nonconvictions within the jurisdiction and must:

- coordinate with the clerk and other appropriate entities to develop a list of all LFO and readily ascertainable collection cost amounts paid as a result of the qualifying conviction or qualifying nonconviction; and
- determine whether the person is serving a sentence for any offense under the supervision of the Department of Corrections (DOC), and if so, notify the OPD that the person may be eligible for resentencing.

For each qualifying conviction the prosecuting authority must file an ex parte motion with the applicable sentencing court to dismiss and vacate the conviction, and for each qualifying nonconviction where LFOs and readily ascertainable collection costs were paid the prosecuting authority must file an ex parte motion with the applicable sentencing court to refund those amounts. A motion may include documentation of the amounts paid by the person as a result of the qualifying conviction or nonconviction. The prosecuting authority

is not required to notify the defendant of the motion, and the court must consider the motion without requiring the presence of the parties or counsel. These motions must be filed by January 1, 2026.

Whether or not a prosecuting authority is expected to file a motion, a person may apply to the court for a vacation of a qualifying conviction and refund of LFOs, collection costs, and document-verified collateral costs, or for a refund of these amounts paid pursuant to a qualifying nonconviction. The person must set the motion for hearing no sooner than 30 days from filing. For a motion for a refund, the prosecutor must provide the applicant with the amount of LFOs and readily ascertainable collection costs paid by the applicant 14 court days prior to the hearing, and the person may also demonstrate payment by submitting copies of records demonstrating payment and by sworn declaration. The prosecutor may object to an application to vacate only on the grounds that the conviction is not a qualifying conviction.

The clerk must conduct an objectively reasonable search for collection cost records and nonconviction LFO records. In conducting an objectively reasonable search for collection cost records, the clerk must search the clerk's own records and issue a written request to any current or past contracted collection agency to provide all records and allocations of payments made under qualifying convictions or nonconvictions. After issuing a written request, the clerk must also make substantial efforts to obtain the requested records from the collection agency.

Vacation of Qualifying Convictions.

Upon determining to vacate a qualifying conviction, the court must set aside each guilty plea or verdict, dismiss with prejudice the count or counts in the information, indictment, complaint, or citation that relates to the qualifying conviction or convictions, and vacate the judgment and sentence. The person is released from all penalties and disabilities resulting from the qualifying conviction, and the conviction may not be included in the person's criminal history. A person whose qualifying conviction is vacated may state for all purposes that the person was never convicted of the crime, and the vacated conviction may not be disclosed by the Washington State Patrol, prosecutor, or local law enforcement agency.

The prosecuting authority may not refile any charges for acts alleged in the original indictment, information, or affidavit of probable cause filed in relation to the qualifying conviction, and may not file new or additional charges based on acts alleged in any law enforcement report from which the qualifying conviction arose.

The court must direct the clerk to cancel any unpaid LFO balances and order the AOC to refund any LFOs, collection costs, and document-verified collateral costs paid as a result of the qualifying conviction. The clerk must transmit a certification and documentation regarding the certified amount to the AOC refund bureau.

A person may file a motion to be resentenced if the vacation of a qualifying conviction affects a sentence imposed for a separate conviction by altering the person's criminal history. A person who is serving a current or pending sentence under the supervision of the DOC has a right to court-appointed counsel for resentencing proceedings, consistent with standards for appointment of counsel based on indigency. A prosecuting authority may not file or refile previously dismissed charges contained in any indictment, information, or affidavit of probable cause filed in relation to the conviction for which the person qualifies for resentencing, and may not file new or additional charges based on acts alleged in any law enforcement report from which the resentenced conviction arose.

Qualifying Nonconvictions.

Upon determination of a valid motion to refund LFOs for a qualifying nonconviction, the court must: direct the clerk to cancel any unpaid LFO balances; provide the clerk with an itemized and totaled amount of documented LFOs, collection costs, and document-verified collateral costs to be refunded; and order the AOC to refund those amounts paid as a result of the qualifying nonconviction. The clerk must transmit the certification to the AOC refund bureau.

Legal Financial Obligations.

Within three years of issuance of a refund from the refund bureau, a person may challenge the amount of the ordered refund by bringing a motion in the court that issued the order. A person may also move to amend the refund amount to include document-verified collateral costs paid as a result of the qualifying conviction or nonconviction. Any motion to challenge or amend the refund amount must include documentation to support additional amounts sought. A person who is indigent may request the services of counsel, subject to funding appropriated for this specific purpose to the OCLA or the OPD, to review the refund determination and assist in bringing a motion to amend the refund amount.

Legal financial obligations ordered refunded as a result of a vacated qualifying conviction must not be reallocated to any other LFOs the person is required to pay under other cause numbers or for other convictions under the same cause number.

When the only crime of conviction under a cause number is a qualifying conviction, the court must vacate all LFOs imposed under the conviction and order the refund of any documented LFO, collection cost, and document-verified collateral cost amounts paid. If the person has multiple convictions under the cause number, standards are provided for determining the allocation of LFO, collection cost, and document-verified collateral cost amounts, and the amount to be refunded under the vacated qualifying conviction.

The AOC must establish and administer a refund bureau to provide direct refunds to persons entitled to a refund of LFOs, collection costs, and document-verified collateral costs paid under a qualifying conviction or qualifying nonconviction. The refund bureau must also provide direct refunds to persons who made payments to the DOC towards the costs of supervision as a result of a qualifying conviction based on a list certified by the DOC.

The AOC must notify persons of their right to the refund, the process for applying for the refund, the right to bring a motion to amend a refund amount they believe is inaccurate, and that if the person is indigent, that the person may request publicly funded counsel, subject to funding for this purpose, to assist in reviewing and bringing a motion to amend the refund amount. The AOC must also create a searchable online database to allow persons to determine whether they have had a qualifying conviction vacated and whether they are entitled to a refund.

Legal financial obligations reimbursed to a person who is in custody in a correctional facility are exempt from provisions requiring mandatory inmate deductions from the inmate's funds.

Substitute Bill Compared to Original Bill:

The substitute bill revises the definition of "qualifying offense" to: remove certain offenses predicated on a qualifying offense; separate collection costs and document-verified collateral costs from the definition of LFO and define these terms; and establish standards for when collection costs and nonconviction LFOs are readily ascertainable. Clerks must conduct an objectively reasonable search for collection cost records and nonconviction LFO records.

A prosecutor must determine collection costs that are "readily ascertainable," and is not required to determine amounts paid to nonpublic agencies and the DOC. A person may seek a refund of document-verified collateral costs through any motion to vacate a qualifying conviction or refund nonconviction LFOs and other costs, or through a motion to amend a refund amount.

Specific procedures and requirements are established to govern when and how a person files a motion for a vacation or refund of LFOs and other costs. A person has three years from issuance of a refund to challenge the refund amount, and the person must provide documentation to support additional amounts sought. The provision of a court-appointed attorney to assist an indigent person in bringing a motion is subject to funding provided for this purpose, and court-appointed counsel for persons entitled to resentencing is provided consistent with standards for appointment of counsel based on indigency.

The substitute bill removes provisions that required clerks to: identify all LFO refund amounts ordered up to the effective date of the act and determine whether there are any additional LFOs that are entitled to be refunded; and identify LFO amounts that have been reallocated to other counts or cause numbers, and for those amounts to be refunded to the person with the vacated qualifying conviction. The requirement that prosecutors file reports on the status of all filed motions is also removed.

Standards for determining refund amounts when there are multiple convictions under a

cause number are revised by: removing the provisions governing costs of a court-appointed attorney and the public education and safety assessment; removing the \$250 flat rate for refunding evaluation and treatment costs, and instead allowing a refund of document-verified collateral costs associated with evaluation and treatment; and providing standards for a proportional refund of accrued interest and collection costs.

The AOC refund bureau will provide direct refunds of supervision fees paid to the DOC based on a certified list from the DOC, which must be provided by January 1, 2024. The requirement for the AOC to develop pattern forms for pro se motions is removed.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available. New fiscal note requested on February 19, 2023.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The focus of this bill is clearing up the estimated 260,000 cases affected by *State v. Blake* to allow people impacted by the decision to have their records vacated and their LFOs refunded so that they can move forward with their lives. The decades-long war on drugs, along with discriminatory policing and prosecution, has caused great harm to people and their families and communities. These harms have been disproportionately felt by people of color, those suffering with mental health and substance abuse issues, and those living in poverty or homelessness. These convictions continue to inflict harm daily through the denial of access to housing, employment opportunities, and education funding. The bill is an important step in mitigating the harm of these unconstitutional convictions.

Since the *State v. Blake* decision, counties and courts across the state have varied dramatically in their vacate procedures and the scope of relief provided. These inconsistencies necessitate defenders and civil legal aid attorneys to ensure full relief and this comes at a cost to efficiency. Disputes over the scope of relief have delayed progress and consumed limited system resources. These inconsistencies have also led to the problem of justice by geography. Where a person lives is determining whether the person gets justice or not, and how fast justice is provided.

This bill would clarify many unanswered questions, provide explicit direction to criminal system actors, and create a more equitable and consistent response to *State v. Blake* across Washington. In the current landscape, obtaining relief is difficult and cumbersome even for experienced attorneys. It is near impossible for nonlawyers to navigate this process on their own, and many people do not even know they are entitled to relief. The bill takes the

burden off of the affected person and jump-starts the vacate process in a prosecutor-led effort. The bill preserves a right to counsel where there may have been omissions or errors and for resentencing proceedings, which the OPD is equipped to handle.

There is a concern that allowing these cases to be handled through ex parte orders deprives persons of notice, which can have negative immigration consequences.

(Opposed) There is agreement with the desire to streamline and make the process more cost-effective and efficient, but the bill has a number of areas of concern. The expanded definition of LFOs includes private entities who have received money that the clerks and courts will have no ability to determine. Requiring prosecutors to find that information is not feasible and will require an enormous amount of additional work. The expansion of eligible cases is far beyond what is covered by the *State v. Blake* decision, and it is questionable whether the Legislature has the constitutional ability to make those determinations.

The bill will create a huge new system within our courts that will result in a substantial increase in workload for courts, clerks, and prosecutors across the state. This will have significant financial ramifications for state taxpayers.

The counties have worked diligently to create a new process to handle these cases working with an already backlogged court system. The *State v. Blake* decision also impacts municipal cases, and vacations and LFO refunds are being handled in municipal courts. The bill expands the scope of *State v. Blake*, and these expansions are not covered in the funding provided last session. It will be costly to go back and revisit all the cases that have already been processed. If the bill is passed, additional funding must be provided to counties, cities, and the court system to accomplish this task.

(Other) There is a significant concern with the expansion of the qualifying offenses and the broad definition of LFOs, especially the inclusion of LFOs paid to third parties. The clerks can provide reports or cancel unpaid balances only for data in their records or fees paid through their offices, not for any other agency or third parties. The AOC has been refunding amounts included in a court order or clerk certification. Including LFOs that exist outside of the court system creates a heightened concern about fraud and the ability to verify documentation. It is unclear how information on LFOs paid to DOC will be provided to the courts.

Removing fees in proportion to the charges in the case would be a monumental task. Some counties have reallocated LFOs and they have the authority to do so, but under the bill counties could not be reimbursed for this, so counties will be left holding the bag. This might be considered a gift of public funds. The bill talks about assistance of counsel, but it is unclear if that means appointing counsel and whether indigency standards apply. Sideboards are needed around the ability of a person to appeal the LFO refund amount.

Persons Testifying: (In support) Representative Tarra Simmons, prime sponsor; Grace O'Connor, Washington State Office of Public Defense; Camerina Zorroza, The Way to Justice; Teresa Groves, Civil Survival Project; Ali Hohman, Washington Defender Association; and Scott Ketterling, King County Department of Public Defense.

(Opposed) Russell Brown, Washington Association of Prosecuting Attorneys; Juliana Roe, Washington State Association of Counties; Candice Bock, Association of Washington Cities; and Julie Barrett.

(Other) Sharon Swanson, Administrative Office of the Courts; and Lisa Henderson, Washington Association of County Clerks.

Persons Signed In To Testify But Not Testifying: None.