

SENATE BILL REPORT

SB 5663

As Reported by Senate Committee On:
Law & Justice, January 27, 2022
Ways & Means, February 7, 2022

Title: An act relating to establishing streamlined procedures for compliance with the State v. Blake decision in order to improve criminal justice system coordination, create efficiencies, and reduce costs.

Brief Description: Establishing streamlined procedures for compliance with the State v. Blake decision in order to improve criminal justice system coordination, create efficiencies, and reduce costs.

Sponsors: Senators Dhingra, Hasegawa, Saldaña, Stanford and Wilson, C..

Brief History:

Committee Activity: Ways & Means: 1/13/22 [w/oRec-LAW], 2/04/22, 2/07/22 [DP2S, w/oRec].
Law & Justice: 1/25/22, 1/27/22 [DPS-WM].

Brief Summary of Second Substitute Bill

- Requires the Administrative Office of the Courts to prepare a report of all individuals convicted of simple drug possession, and those with nonconviction data due to successful completion of a diversion program regarding a charge of simple drug possession, since 1971.
- Establishes rules for vacating convictions pursuant to *State v. Blake*, resentencing individuals if necessary, and refunding legal financial obligations.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5663 be substituted therefor, and the

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substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Padden, Ranking Member; McCune, Assistant Ranking Member; Honeyford, Kuderer, Pedersen, Salomon and Wagoner.

Staff: Joe McKittrick (786-7287)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 5663 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Frockt, Vice Chair, Capital; Robinson, Vice Chair, Operating & Revenue; Wilson, L., Ranking Member; Brown, Assistant Ranking Member, Operating; Billig, Carlyle, Conway, Dhingra, Hunt, Keiser, Mullet, Pedersen, Rivers, Van De Wege, Wagoner and Wellman.

Minority Report: That it be referred without recommendation.

Signed by Senators Rolfes, Chair; Schoesler, Assistant Ranking Member, Capital; Honeyford, Ranking Minority Member, Capital; Braun, Gildon, Hasegawa, Muzzall and Warnick.

Staff: Shani Bauer (786-7468)

Background: Prior to 2021, Washington's statute prohibiting possession of controlled substances created a strict liability crime, meaning an individual could be found guilty of possession of a controlled substance without proof the person knew they possessed the prohibited substance. In 2021, the Washington State Supreme Court decided the case of *State v. Blake*, and in doing so, found this statute to be unconstitutional. The Court reasoned that the Legislature's criminalization of passive conduct, with no requirement to prove criminal intent, violated due process.

Due to the *Blake* decision, the courts must now vacate tens of thousands of convictions entered in superior, district, and municipal courts. Due process also requires the courts to refund any fines, fees, costs, and accrued interest, known as legal financial obligations, paid pursuant to convictions now subject to vacation under *Blake*.

While prosecutors, defenders, and courts have been taking steps to vacate a substantial number of convictions because of the *Blake* decision, and refund the associated legal financial obligations, it is likely the total number of convictions now subject to *Blake* exceed 150,000.

Summary of Bill (Second Substitute): Report of Convictions to be Vacated. The administrator of the Administrative Office of the Courts (AOC), in coordination with relevant superior and district court clerks and municipal court administrators, must develop

comprehensive, line-item reports of all persons with existing convictions, or nonconviction data due to successful completion of a diversion program, for simple drug possession since 1971. For sealed cases, the court clerks must develop a confidential report which will only be shared with the AOC as necessary to effectuate vacation and refunding legal financial obligations.

When compiling these reports, the relevant court clerks or administrators must prioritize cases in the following order:

- individuals currently incarcerated due to a qualifying conviction;
- individuals currently incarcerated with a qualifying conviction on the person's criminal history score;
- individuals under active or inactive supervision; and
- individuals with a prior conviction for a qualifying offense.

The timeframes for completing the report depend on the person's incarceration or supervision status and whether the person's court records are available electronically or include paper records. When available, the AOC must provide completed installments of the report to the relevant county prosecutor, the relevant public defense office, and respective court clerk or administrator. Once received, the local public defense office must conduct an initial review the report to determine whether each person's conviction is properly subject to vacation and provide an initial assessment as to case priority. The local public defense office must then provide the list to the appropriate prosecutor to file motions for vacation or other action.

Vacating Convictions. After receiving the report, if the prosecutor determines a conviction is subject to vacation pursuant to *Blake*, the prosecutor's office must file a motion on its own asking the court to vacate the individual's prior convictions for simple drug possession. By doing so, the prosecutor agrees not to file additional or new charges for the acts described in the information. The court must consider the prosecutor's motion on paper without the presence of the prosecutor.

If the court vacates a conviction for simple drug possession, the fact that the person has been convicted of the offense must not be included in the person's criminal history, and the person must be released from all penalties resulting from the offense. A person whose conviction has been vacated may state they have never been convicted of that crime, and the vacated conviction may not be disseminated or disclosed by the Washington State Patrol or local law enforcement to any person.

If the prosecutor determines that a conviction is improperly included on the report due to a clerical error because the actual conviction on the judgment and sentence is not a conviction for simply drug possession, the prosecutor must file a "Notice of *Blake* Correction " with the respective court clerk or administrator. The affected person has the right to assistance of counsel to assist in understanding the person's options for challenging the decision.

The prosecutor must take action to quash any judicial warrants based solely on underlying charges for simple drug possession or other offenses where a conviction for simple drug possession serves as an element of the crime.

Resentencing. If it is necessary to resentence an individual or amend the existing sentence in connection with a vacation, the matter will proceed under the court rules with notice to the defendant, and defense counsel shall be appointed where required by law.

Legal Financial Obligations. If the court vacates a conviction, the court must address whether legal financial obligations (LFOs) must be refunded. When the sole crime for which the individual was convicted is simple drug possession, the court must order a refund of all LFOs paid under that cause number. If a cause number includes convictions for simple drug possession and other convictions not subject to vacation, LFOs may not be refunded except where it is clear on the face of the judgment and sentence that the LFOs arose solely from the vacated conviction. The affected person has the right to assistance of counsel in reviewing the determination and in bringing a good faith challenge in the court that issued the order.

If the court determines LFOs must be refunded, the vacation order must direct the respective superior or district court clerk or municipal court administrator to cancel any unpaid LFOs. The order must further direct the respective clerk or administrator to compute all LFOs paid and certify the amount of refund due. A copy of the certification must be sent to AOC. Upon application to the court clerk or court administrator and verification of the person's identity, the court clerk or administrator may initiate payment of the refund amount out of funds appropriated by the state for this purpose.

AOC shall receive copies of certifications for LFOs and collection costs to be refunded. AOC must publicize the availability of refunds and the process for obtaining those refunds and must create a searchable online database for persons to search whether amounts may be owed to them. AOC must send notice by mail to a person who is entitled to a refund at the person's last known address.

AOC must coordinate with the court clerk and court administrators to create a model form that may be submitted to the court to request a refund. Within appropriated funds, AOC must contract with each county for reimbursement of LFOs and collection costs paid by the court.

Legal financial obligations reimbursed to a defendant who is in custody in a correctional facility are exempt from provisions requiring mandatory inmate deductions, including deductions for the crime victims' compensation account, the inmate savings account, child support, and recoupment of assessments.

The process established by this act is the exclusive means to obtain a refund of any LFOs. No civil action may be filed against the state, counties, or cities that have requested

assistance. No such action may be filed against any officials, employees, or agents of those entities seeking a refund, other damages, or any other type of relief in connection with a prior or vacated conviction.

Any person seeking a refund will have seven years from the effective date to complete an application to the refund bureau. Any refund not claimed within this period will revert to the state. The refund bureau must terminate operation seven years and one month after the effective date.

EFFECT OF CHANGES MADE BY WAYS & MEANS COMMITTEE (Second Substitute):

- Adds a definition of available court records.
- Provides court personnel specific reporting timeframes for court records available electronically and non-electronically, respectively.
- Removes reference to firearms restoration.
- Clarifies the vacation process and refunding LFOs for nonconvictions.
- Clarifies the appointment of counsel for indigent individuals.
- Exempts legal financial obligation refunds pursuant to this bill from deductions taken while the person is incarcerated.
- Exempts legal financial obligation refunds pursuant to this bill from Department of Corrections recoupment assessments.
- Removes the requirement that the Department of Revenue establish a refund bureau for issuing refunds of legal financial obligations and collection costs.
- Requires the AOC to compile certifications of persons entitled to refunds, publicize or mail, or both, notice of potential refunds to entitled persons, create a model application form for application to the appropriate court clerk or administrator for payment, and contract with each county for reimbursement of funds paid for legal financial obligations and collection costs.

EFFECT OF CHANGES MADE BY LAW & JUSTICE COMMITTEE (First Substitute):

- Defines the term nonconviction.
- Clarifies the role of the office of public defense and defense counsel.
- Expands the reporting time frames from three and six months to six and nine months respectively.
- Clarifies the role of the Department of Revenue.
- Clarifies the role of the AOC.
- Requires the refunding of legal financial obligations to be completed within seven years.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony on Proposed Substitute (Law & Justice): *The committee recommended a different version of the bill than what was heard.* PRO: Due to the *Blake* decision, we as a government have a significant obligation to comply with due process by way of vacating convictions and refunding legal financial obligations. Legislation addressing this issue needs to provide immediate relief, to provide vacations of a high volume of convictions, and to provide a 100 percent refund of costs paid. The streamlined process in this bill is followed in about 12 counties already, and it is working well.

This bill describes the current process used in King County that is working well. *Blake* has created a lot of new work for clerks' offices across the state. Clerks often bear the brunt of the administrative work for these cases, and for older cases it may mean searching through boxes of files or scanning microfilm in order to find the relevant records. This approach was developed collaboratively with input from stakeholders which has led to its success. The refund bureau process in this bill would take more work than the current process but remains the preferred process.

This bill will allow cities the vital tools they need when grappling with the *Blake* decision. However, this legislation should allow six to nine months for cities to compile the required information. Likewise, the term "available records" should be defined.

Court clerks are a key component in this process. The refund bureau streamlines this process and allows clerk to concentrate on the myriad other issues that arise in processing a case subject to *Blake*.

The *Blake* decision has created an unprecedented challenge to the state's criminal justice system and severely impacts the already backlogged court system. This bill helps the court system meet these challenges. This is a good bill that will be made better if it is fully funded in the budget.

This bill codifies the proven system that is already in place in at least a dozen counties across the state. The refund bureau in this bill is a one stop shop to refund legal financial obligations pursuant to *Blake*. The current system requires work from four different elected offices at the county level, the prosecutor, the clerk, the treasurer, and the auditor, and this work is compounded across the 39 counties in the state. This creates a system of 156 different elected officials doing this work. This bill would simplify the process by centralizing and simplifying the process.

CON: The Department of Revenue does not have the expertise to comply with the requirements of this bill. If a refund bureau is to work efficiently, doing the complex work this bill entails, it needs to be housed in the right department.

This bill, as it relates to petitions to restore firearm rights, contains unconstitutional language. If a conviction precluding the right to possess a firearm is vacated, it cannot stand as a predicate for curtailing an individual's right to possess a firearm. Thus, those individuals cannot be forced to petition to regain their rights because they should not have lost them to begin with.

This bill was created without direct input from those who are directly impacted by the *Blake* decision. It is important for attorneys to counsel those individuals and this bill does not provide for that opportunity. Likewise, there is a lack of oversight and accountability regarding the duties of prosecutors in vacating convictions and refunding legal financial obligations.

The passage of this bill would sacrifice equity and due process in the name of efficiency. This bill strips people of their right to counsel and places the remedies solely in the hands of the same prosecuting agencies that brought these unconstitutional charges in the first place. This bill leaves advocates and the individuals affected in the dark as to the availability of any remedy. This bill fails to provide assurances that refunds will actually make it into the hand of those to whom they are owed.

This bill does not do enough to provide relief to those impacted. For instance, the parents of a juvenile can be forced to pay legal financial obligations, and this bill does nothing to ensure they get reimbursed for those costs. Likewise, many people arrested under the now unconstitutional statute had property seized and auctioned off. This bill does not provide relief for those individuals.

I am an individual directly impacted by the *Blake* decision. I was released from prison due to the *Blake* decision, but I have not been able to access any information regarding the costs of that unconstitutional conviction. Fast tracking this without an equity lens and without those impacted at the table will just create more harm.

I was impacted by the *Blake* decision, my arrest and conviction impacted me mentally, and I am still paying on the fines dating back to 1994. I don't know how to go about receiving a remedy because I don't have the funds to hire an attorney. Listening to those affected by the criminal justice system will restore faith in the system.

OTHER: Defense attorneys agree that a streamlined process is needed to address *Blake*, but this bill does not provide sufficient oversight and no remedy or access to due process. The goals of this bill are laudable, but if a prosecutor does not provide relief, or does not believe that a remedy is deserved, there is no process in place for an impacted person to access counsel or a court to challenge that result. There is no enforcement mechanism to compel

prosecutor to comply with the reporting and vacating requirements of this bill. This bill does not do enough to provide those directly affected by the *Blake* decision with access to remedies and instead relies on the same prosecutor's office who sought the conviction to now vacate that conviction. This bill is not responsive to ancillary costs of facing an unconstitutional charge or conviction.

While a process to address the decades of unconstitutional convictions is needed, this bill does not include defense counsel, or the person directly affected by *Blake*, in that process. Vacating these convictions is not a straightforward process. There are scores of unaddressed consequences, and ancillary convictions that may have stemmed from a prosecution now subject to *Blake*. The criminal justice system is set up as an adversarial process, and when defense counsel is not involved the process does not work. Under this bill, there is no one involved in the process whose incentives are directly in line with those affected by the *Blake* decision. Notice to the individual affected is of vital importance to providing equity moving forward.

A streamlined process is necessary, and this bill is a start. This bill should ensure the defense's perspective is at the table in creating this process. These cases are not as simple as previously thought. There should be an oversight component to this bill to ensure each county is efficiently moving forward in vacating convictions and providing refunds.

There is a lot of good in this bill. Collaborative work is vital to the success of this process. The Legislature has worked very quickly to address the *Blake* decision and its ramifications, but there is still more work to do.

The current timelines in this legislation are too tight for courts and courts staff to comply with this bill. Likewise, defining "available records" will streamline the process greatly.

The data required to be collected and analyzed under this bill will involve both county and state level actors and will take substantial time to review. Likewise, the emergency clause of this bill, as it relates to the creation of the refund bureau, would fundamentally change the way refunding legal financial obligations is processed and would do so immediately. This could stop all the forward momentum the counties and the administrative office of the courts has been building since the *Blake* decision.

Persons Testifying (Law & Justice): PRO: Senator Manka Dhingra, Prime Sponsor; Sharon Swanson, Association of Washington Cities; David Hackett, King County Prosecutors Office; Barbara Miner, Director, Judicial Administration, King County Superior Court; Josie Delvin, Washington State Association of County Clerks; Juliana Roe, Washington State Association of Counties; Randall Gaylord, WA Association of Prosecuting Attorneys/San Juan County Prosecutor; Russell Brown, WA Association of Prosecuting Attorneys-Available for questions.

CON: Steve Ewing, Department of Revenue; Sugam Soni, Civil Survival Project; Charlie

Klein, Civil Survival; Jeremiah Bourgeois, Freedom Project WA; Julian Franco, As individual; Faraji Bhakti.

OTHER: Vitaliy Kertchen; Christopher Stanley, Administrative Office of the Courts; Judge Sean O'Donnell, Superior Court Judges' Association; Melissa Johnson, District & Municipal Court Judges Association; Jason Schwarz, Washington Defender Association and Washington Association of Criminal Defense Lawyers; Heather Carroll, Washington Defenders Association and Washington Association of Criminal Defense Lawyers; Katrin Johnson, Office of Public Defense.

Persons Signed In To Testify But Not Testifying (Law & Justice): No one.

Staff Summary of Public Testimony on First Substitute (Ways & Means): *The committee recommended a different version of the bill than what was heard.* PRO: The Blake decision poses an unprecedented challenge to the criminal justice system that was already impacted by Covid. This bill will help continue those efforts in the right direction. The refund bureau is an easy manner for people to get their LFOs refunded.

These impacts fall on cities as well. We appreciate the assistance to the municipal courts to help absorb some of the costs. We would request some parameters be specified around what an available court record is.

About a dozen counties are following this streamlined process and vacating about 100 cases per week. As we figure out efficiencies, we are hoping to increase that to 300 to 400 cases per week.

The prosecuting attorneys are unanimously in favor of this measure. Everyone has a role to play and those are properly laid out in this bill. It proposed an ex parte process to address cases as rapidly as possible. The refund bureau is a generic centralized location which will be more efficient and provide greater opportunities for oversight.

CON: The Department of Revenue (DOR) is opposed to being included in this bill. In addition to its core duties, DOR is busy with capital gains and family credit. We do not have the bandwidth to address the refund bureau. This is not the same as unclaimed property and does not conform to that process. We request that this duty be reassigned.

OTHER: Many suggested edits were accepted but the bill does not fully address the number of people that should be given representation. The Office of Public Defense is well positioned to take on this role. Its role in prioritizing cases will be extremely helpful. We believe persons should be entitled to legal assistance to challenge the LFO amount.

The courts are concerned with some of the timelines in Section 3 and 4, as much of this data is paper based. Review must involve state and county staff. There are consistency issues due to system changes over the last 40 years. We also have an issue with the emergency

clause. Changing to a centralized refund bureau would stop momentum for the current process for refunds.

Persons Testifying (Ways & Means): PRO: Juliana Roe, Washington State Association of Counties; Sharon Swanson, Association of Washington Cities; David Hackett, King County Prosecuting Attorneys Office; Russell Brown, WA Association of Prosecuting Attorneys.

CON: Steve Ewing, Dept. of Revenue.

OTHER: Katrin Johnson, Washington State Office of Public Defense; Christopher Stanley, Administrative Office of the Courts.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.