

**Sentencing Grid Subgroup DRAFT Proposal for
Task Force Discussion and Deliberation:
Proposed Guidance to the Legislature after *State v. Blake*.**

Overview: Washington State Supreme Court in *State v. Blake*

On February 25th, the Washington State Supreme Court in *State v. Blake* ruled that Washington's simple drug possession statute, [RCW 69.50.4013\(1\)](#), is unconstitutional. The court reason was that the statute did not require prosecutors to prove that someone "knowingly" possessed illegal drugs in order to convict that person. It only required that prosecutors prove that someone "possessed" drugs. Unlike most other crimes, a person could be convicted of simple possession without actually being aware that they were in possession of drugs. This element is known in the law as "mens rea". The vast majority of crimes require that a prosecutor prove that someone possessed some level of a "guilty conscience" or level of intent to justify a criminal sanction. The Court ruled in *Blake* that the absence of that "mens rea" element in Washington's simple possession statute renders it unconstitutional. Therefore, because the statute is unconstitutional, every criminal conviction for violation of that statute must be vacated and can no longer be considered as part of any future sentence or charge and no one can be charged with simple possession unless and until the Legislature changes the law in some way.

Sentencing Grid Subgroup Discussions on Blake

The Grid Subgroup has been discussing the impacts and potential consequences of the *Blake* decision, understanding that there are still many unanswered questions at this point. Some of the potential impacts identified by Grid Subgroup members and discussed in Grid Subgroup meetings so far include:

- No one can be charged or convicted of simple possession at this point. Prosecutors are dismissing current charges and not charging anyone with simple possession. This charge cannot be reinstated unless and until the Legislature passes a law that changes RCW 69.50.4013 or addresses this in some other way.
- Concerns have been raised that prompt action is needed to address the ramifications of the loss of court ordered drug treatment for people who have been charged or convicted of simple possession. Those ramifications include the loss of required services which have been effective at supporting people from reengaging in drug related or other criminal activities.
- People who were subject to diversion programs or other court ordered treatment as a result of a simple possession charge or conviction are no longer obligated to attend court ordered treatment or comply with other obligations related to that charge or conviction. Stakeholders are worried that people may be dropped from chemical dependency programs or may withdraw which will then lead to other collateral consequences related to other problematic behaviors or crimes.

- Concerns have been raised that youth may be impacted by the lack of ability to charge them with this crime or even confiscate the controlled substance. That youth cannot be in possession of alcohol or cigarettes, but now can possess controlled substances such as heroin.
- There is a concern among some that local jurisdictions that have not done so in the past may be influenced by *Blake* to adopt new drug possession ordinances and that those ordinances could be “pre-empted” if the legislature acts to reinstate simple possession in some way.
- An as yet undetermined number of people will need to have their current sentences recalculated through some as yet to be fully determined process. It is difficult to fully determine how many people this may be because there are a number of considerations that need to be taken into account and it may be difficult to identify all of the people whose current sentence has been impacted in some way by a simple possession conviction. There is urgency to get people’s sentences recalculated who may now or in the very near future be eligible for release or the end of community supervision as a result of *Blake*. The urgency, with a few exceptions, is not as great to address other situations related to prior possession convictions for people who are not currently under DOC or a local jurisdiction’s supervision.
- There will be some costs associated with resentencings/recalculations that counties, courts and the state will be facing. These include the costs of the process and personnel required. In addition, there may be an obligation to refund LFOs that people have paid as a result of simple possession convictions. It is difficult to know with any certainty what those costs may actually be. Estimates range widely depending on the assumptions that are used as a basis for the estimate. The lack of readily available information also makes it difficult to determine with any certainty at this point what those costs will likely be.
- Simple possession cannot be used as a basis to determine an individual’s criminal history score going forward.
- There needs to be additional investments into behavioral health resources that are not dependent on involvement with the justice system. *Blake* gives additional impetus to efforts to expand services and resources.
- *Blake* gives policy makers that opportunity to fundamentally evaluate how and whether to criminalize substance use.

Draft Proposal for Task Force Discussion and Deliberation

The Sentencing Grid Subgroup sees there are four general areas that the Legislature is currently grappling with when it comes to *Blake*.

- How to address the sentences of people currently impacted by the *Blake* decision and the financial ramifications of *Blake* on the state, courts, counties and local jurisdictions.
- How to address circumstances where the lapse of drug treatment required as part of a sentence or charge may impact individuals and communities in negative ways.

- How to address the resource needs of the behavioral health system to accommodate *Blake*.
- Whether to reinstate simple possession as a charge and if so what that crime should entail.

The Grid Subgroup discussed that while these four areas are related, there are independent considerations related to each and the urgency related to each differs. Grid Subgroup members felt it was critical that Legislative discussions to address *Blake* be informed by and include input and involvement of key stakeholders, and accurate data and research.

Therefore, The Grid Subgroup drafted the following **potential recommendations for the Task Force to discuss and consider recommending to the Legislature:**

1. The Legislature should task the Sentencing Guidelines Commission with reviewing the implications of the *Blake* decision as part of a broader analysis of Washington's drug laws and report back to the legislature before the next session.
2. The Legislature should also task and fund WSIPP or another appropriate research body with researching the impacts of the *Blake* decision. That research should examine at a minimum how the *Blake* decision may impact:
 - a) Individuals incarcerated for possession of a controlled substance at the time of the decision and those who were subsequently eligible for having their conviction vacated and being released from incarceration.
 - b) Individuals incarcerated for a crime who had a prior conviction for possession of a controlled substance that was included in the calculation of their offender score at the time of sentencing who may be eligible for resentencing and an earlier release from incarceration.

Such research should also cover:

- The impacts of *Blake* by race and ethnicity.
 - The fiscal impact of the decision including potential cost-savings from reduced incarceration and potential impacts on recidivism.
3. The legislature should not take action on addressing RCW 69.50.4013(1) this session and should wait for the research to be done and the SGC to provide recommendations.
 4. The Legislature and other policy makers must resource Washington's behavioral health services system so that services can be provided and accessed without the need for the coercive power of the criminal justice system.
 5. The legislature should take no action on addressing the consequences of the *Blake* decision until it considers the meaningful input of relevant stakeholders who should be at the table in deciding the proper policy responses to the *Blake* decision.