

# The Washington State Criminal Sentencing Task Force

March 23, 2021

Governor Jay Inslee

Lt. Governor Denny Heck  
President of the Senate

Representative Laurie Jinkins  
Speaker of the House

Senator Christine Rolfes  
Chair, Ways and Means

Senator Jamie Pedersen  
Chair, Law and Justice

Senator Manka Dhingra  
Vice Chair, Law and Justice

Senator Jeannie Darneille  
Chair, Human Services, Reentry, Rehabilitation

Representative Timm Ormsby  
Chair, Appropriations Committee

Representative Roger Goodman  
Chair, Public Safety

Representative Drew Hansen  
Chair, Civil Rights and Judiciary

## ***Re: State v. Blake Supreme Court Decision***

Dear Governor Inslee, Senators, and Representatives,

On behalf of the Washington State Criminal Sentencing Task Force, we (the non-Legislative Co-Chairs of the Task Force) provide the following memo in response to issues raised by the State Supreme Court *State v. Blake* decision.

In 2019, the Legislature established the Washington State Criminal Sentencing Task Force to review state sentencing laws and develop recommendations for the purpose of reducing sentencing implementation complexities and errors, improving the effectiveness of the sentencing system, and promoting and improving public safety. In December 2020, the Task Force submitted its second report, which contained 47 consensus recommendations to address these three policy goals. While these recommendations promise to improve our sentencing system, much work remains to simplify the system and reduce disparities in adult felony sentencing. Therefore, the Task Force has continued meeting to engage in a “top to bottom” review of the felony sentencing grid.

The Task Force has discussed the potential impacts of the *State vs. Blake* decision, understanding that many unanswered questions remain. Discussing in detail in the attached memorandum (Attachment A.), the Task Force at its March 18th meeting reached ***consensus on four recommendations for the Legislature and Governor to consider in addressing State v. Blake:***

**Recommendation 1** (Unanimous Support<sup>1</sup>): Action (if any) taken by the Legislature to address the consequences of the *State v. Blake* decision should consider the meaningful input of relevant stakeholders who should be at the table in deciding the proper policy responses to the decision.

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<sup>1</sup> See Attachment B. for Task Force’s definition of consensus and descriptions for consensus levels of support.

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**Recommendation 2** (General Support): The Legislature should task the Sentencing Guidelines Commission with reviewing the implications of the *State v. Blake* decision as part of a broader analysis of Washington's drug laws and report back to the legislature before the next session.

**Recommendation 3** (Strong Support): The Legislature should also task and fund Washington State Institute for Public Policy (WSIPP) or another appropriate research body with researching the impacts of the *State v. Blake* decision. That research should examine at a minimum how the decision may impact:

1. 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.
2. 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 *State v. Blake* by race and ethnicity.
- The fiscal impact of the decision including potential cost-savings from reduced incarceration and potential impacts on recidivism.
- The impacts of *State v. Blake* on public safety (both in its traditional sense but also linked to enforcement and demographics).
- The geographic implications of the drug possession statute (RCW 69.50.401).

**Recommendation 4:** (General Support) 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.

As the non-Legislative Co-Chairs of the Task Force, we want to convey that the Task Force believes it critical that Legislative discussions to address *State v. Blake* be informed by and include input and involvement of key stakeholders along with accurate data and research.

We appreciate your thoughtful consideration and look forward to your response to this memo.

Sincerely,

**Co-Chair, Lydia Flora Barlow**  
Statewide Reentry Council Representative

**Co-Chair, Jon Tunheim**  
Washington Association of Prosecuting Attorneys

Attachments:

- A. Memo re: Washington State Supreme Court in *State v. Blake*
- B. Definition of Consensus and Levels of Consensus Support

## Attachment A.

Washington State Criminal Sentencing Task Force

**Memo:** State Supreme Court in *State v. Blake*

March 19, 2021

### State v. Blake Overview

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 knowing 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 *State v. 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.

### Task Force Discussions on *State v. Blake*

The Task Force and its Grid Subgroup discussed the impacts and potential consequences of the *State v. Blake* decision, understanding that there are still many unanswered questions at this point. Some of the potential impacts and concerns identified by members 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.
- 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 in diversion programs or other court-ordered treatment based on 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. This has stakeholders worried that people may be dropped from (or withdraw from) chemical dependency programs, leading to other collateral consequences from 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. These concerns include that youth cannot lawfully possess 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 *State v. Blake* to adopt new drug possession ordinances and that those ordinances could be "preempted" 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

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through some process. It is difficult to precisely determine how many people this affects because a number of considerations must 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 soon be eligible for release or the end of community supervision as a result of *State v. Blake*. This urgency, with a few exceptions, is not as great to address prior possession convictions for people not currently under supervision by Department of Corrections or a local jurisdiction.

- Counties, courts, and the state will face some costs associated with re-sentencings/ recalculations. These include the costs of the process and personnel required. In addition, there may be an obligation to refund Legal Financial Obligations (LFOs) that people have paid because of simple possession convictions. It is difficult to know with any certainty precisely what those costs may be (estimates range widely depending on the assumptions used as a basis for the estimate). The lack of readily available information also makes it difficult to determine with any certainty yet 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 must be additional investments into behavioral health resources that are not dependent on involvement with the justice system. *State v. Blake* gives additional impetus to efforts to expand services and resources.
- *State v. Blake* gives policymakers an opportunity to fundamentally evaluate how and whether to criminalize substance use.

**The Task Force sees four general areas that the Legislature is currently grappling with when it comes to *State v. Blake*:**

- How to address the sentences of people impacted by the *State v. Blake* decision and the financial ramifications 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 negatively impact individuals and communities.
- How to address the resource needs of the behavioral health system to accommodate *State v. Blake*
- Whether to reinstate simple possession as a charge and, if so, what that crime should entail.

The Task Force discussed that while these four areas are related, there are independent considerations related to each. Also, the urgency related to each differs.

## Consensus Recommendations

**Recommendation 1** (Unanimous Support<sup>2</sup>): Action (if any) taken by the Legislature to address the consequences of the *State v. Blake* decision should consider the meaningful input of relevant stakeholders who should be at the table in deciding the proper policy responses to the decision.

**Recommendation 2** (General Support): The Legislature should task the Sentencing Guidelines Commission with reviewing the implications of the *State v. Blake* decision as part of a broader analysis of Washington's drug laws and report back to the legislature before the next session.

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<sup>2</sup> See Attachment B. for Task Force's definition of consensus and descriptions for consensus levels of support.

**Recommendation 3** (Strong Support): The Legislature should also task and fund Washington State Institute for Public Policy (WSIPP) or another appropriate research body with researching the impacts of the *State v. Blake* decision. That research should examine at a minimum how the decision may impact:

1. 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.
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Such research should also cover:

- The impacts of *State v. Blake* by race and ethnicity.
- The fiscal impact of the decision including potential cost-savings from reduced incarceration and potential impacts on recidivism.
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- The geographic implications of the drug possession statute (RCW 69.50.401).

**Recommendation 4:** (General Support) 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.

## Attachment B.

Washington State Criminal Sentencing Task Force

### Consensus Definition and Levels of Consensus Support

The Washington State Criminal Sentencing Task Force operates under the following definition of consensus:

Consensus means that each Task Force member can say: (1) I was a respected member of the group that considered the decision; (2) my ideas (opinions, knowledge, concerns, beliefs, hopes) were listened to; (3) I listened to the ideas (opinions, knowledge, concerns, beliefs, hopes) of others; and (4) I can support the decision of the group, even though I might have made a different decision had I acted alone.

Consensus is conveyed via a thumbs up (*I support this option*), thumbs sideways (*I can live with this option for the good of the group and the process*) or thumbs down (*I cannot live with this option*).

When seeking consensus, the Task Force considers a range of definitions of support and the goal is for all members to be in unanimous, strong, or general support.

**Unanimous support:** full agreement with all aspects of the decision/recommendation – all members present were thumbs up.

**Strong support:** support for all or most aspects of the decision/recommendation and no fundamental disagreements with any aspect of the proposal – no more than two members present are thumbs sideways.

**General support:** support for most aspects of the decision/recommendation and no fundamental disagreements, however there may be unanswered questions, aspects in need of information not available, etc. There is a mix of thumbs up and thumbs sideways.

**Weak support:** Significant disagreement with one or more aspects of the decision/recommendation, however, all members present can live with the proposal (i.e. overall, the decision/recommendation is better than leaving things as they are now or doing nothing) – the majority of members present are thumbs sideways.

**Fundamental disagreement and no consensus:** Significant disagreement with the decision/recommendation. One or more members cannot support or live with the proposal. Member(s) have suggested alternatives that legitimately attempts to achieve the interest of the constituency they are representing, and the interests of the other members, however, after dialogue and deliberation, there is still no consensus – One or more thumbs down.

**Abstention:** At times, a decision/recommendation may be infeasible for a member to weigh in on.