## STAFF REPORT

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| **Agenda Item:** | 7 | **Name:** | Jenny Giambattista |
| **Proposed No.:** | 2021-0249 | **Date:** | July 20, 2021 |

**SUBJECT**

Proposed Ordinance 2021-0249 would appropriate $19.5 million, largely to be reimbursed by the State, to comply with recent judicial rulings and legislative changes.

**SUMMARY**

Proposed Ordinance 2021-0249 would appropriate $19.5 million of General Fund, largely to be reimbursed by the State, for King County to comply with the Washington State Supreme Court’s decision in *State v. Blake[[1]](#footnote-1)* (Blake) which found that the state’s felony drug possession law[[2]](#footnote-2) was unconstitutional. As a result of Blake, all pending possession cases must be dismissed, all warrants must be quashed, and all prior convictions impacted by Blake must be vacated. This means all King County defendants with sentences impacted by simple drug possession currently serving prison time or on probation must be resentenced and an estimated 50,000 King County defendants with past drug convictions could have their possession convictions removed from their record (vacation) and get any fines and fees (legal financial obligations or LFOs) refunded.

Of the total, Proposed Ordinance 2021-0249 would appropriate $12.7 million for the Department of Public Defense (DPD), Prosecuting Attorney’s Office (PAO), Superior Court, District Court, and the Department of Judicial Administration (DJA) to address the workload required by Blake, including assisting those who are not currently under sentence in vacating possession convictions. In addition, Proposed Ordinance 2021-0249 would also appropriate $5.6 million to refund defendants for the cost of any legal financial obligations paid related to a simple possession conviction.

Proposed Ordinance 2021-0249 also would appropriate $1.2 million to conduct resentencing in King County Superior Court related to other requirements for mandatory resentencing required by Washington State Supreme Court via *State v Ali*, *In Re Personal Restraint of Monschke* and Senate Bill 5164 passed by the Washington State Legislature.

In light of the Blake decision and the need for outreach to 50,000 King County defendants, the Council may wish to consider working with the Executive to update or reissue a Department of Community and Human Services RFP which would contract with community organizations for record clearing and LFO relief for those involved in the legal system due to marijuana related convictions. This RFP was supported by a $2.8 million appropriation in the 2021-2022 Biennial Budget[[3]](#footnote-3) entirely funded by the Marijuana Excise Tax Revenue. The Council may wish to explore opportunities to leverage this RFP to promote the broader relief available for felony drug convictions

**BACKGROUND**

In *State v. Blake* the Washington Supreme Court ruled that Washington’s simple drug possession law, commonly referred to as Violation of the Uniform Controlled Substance Act (VUCSA) was unconstitutional. The State Supreme Court’s decision requires several remedies for persons with prior convictions for simple drug possession, including a right to resentencing, vacation of the conviction and refund of all legal financial obligations paid in connection with the conviction. A “vacation” is the process for “clearing” a conviction from a person’s criminal record. The Washington State Patrol will remove a “vacated” conviction from a person’s criminal history record. This releases the person from all penalties resulting from the conviction. Once a conviction has been vacated, the person may state that they have never been convicted of that crime. However, a vacation does not erase all information about a conviction and it can still be discovered in court records. A vacation does not automatically occur. A person must file a motion with the court to vacate a conviction.

In response to Blake, the PAO dismissed all[[4]](#footnote-4) pending affected cases.

DPD is currently working to review a state Department of Corrections list of 2,337 King County defendants, about half of whom are in custody and half on probation, who may be affected by Blake. This includes individuals who were convicted and sentenced to a different crime, but their sentencing range was longer due to a prior conviction for possession of a controlled substance. This does not include defendants who were in custody on only a Possession of a Controlled Substance conviction, as they have already been released. In addition, according to DJA there are approximately 50,000 individuals who have prior Blake relevant convictions in King County Superior Court dating back to 1979 but who are not currently under sentence and will require vacation of prior convictions and LFO relief.

**State Appropriations Related to Blake.** The 2021-2023 biennial state budget[[5]](#footnote-5) includes the following appropriations for fiscal year 2022 to assist counties with the costs related to Blake:

Administrative Office of the Courts (AOC)

* $44.5 million to assist counties with the costs of resentencing and vacating the sentences of defendants whose convictions or sentences are affected by the State v. Blake decision.
* $23.5 million for a legal financial obligation aid pool to assist counties that are obligated to refund legal financial obligations previously paid by defendants whose convictions or sentences were affected by the State v. Blake ruling.

Office of Public Defense

* $5.5 million for fiscal year 2022 and $5.5 million for fiscal year 2023 to assist counties with public defense costs related to vacating the sentences of defendants whose convictions or sentences are affected by the State v. Blake decisions.

**State v. Ali.** *State v. Ali* mandated resentencing for standard-range sentences imposed in adult court on offenders who committed crimes while under the age of 18. In *Ali,* the Washington State Supreme Court ruled that standard-range sentences imposed in adult court on offenders who committed their crimes while under the age of 18 may be unlawful unless the superior court made an individualized determination that the adult sentence is constitutionally proportionate. This means that up to 56 cases will need to be resentenced before the King County Superior Court. The PAO reports that these are serious and violent and sex abuse cases often committed against other juveniles, that require special care. Each of these cases will likely require significant time and resources, including the appointment of experts on both sides.

**In Re Personal Restraint Petition of Monschke.** *In Re Personal Restraint of Monschke,* mandated resentencing of 18 to 20 year olds sentenced to mandatory life without the possibility of parole. In Monschke, the Washington State Supreme Court extended the prohibition on Mandatory Life Without the Possibility of Parole (LWOP) of juveniles to 18 and 20-year olds. The PAO reports this decision necessitates 10 resentencings of aggravated murder cases.

**Senate Bill 5164 (2021-2022).** *Senate Bill 5164 (2021-2022)[[6]](#footnote-6),* mandated resentencing for defendants sentenced to life as a “persistent offender” if one of the predictable felonies was robbery in the second degree. This law retroactively removes second-degree robbery from the list of offenses in the state’s three-strikes” statute, which imposes a life sentence without parole for “persistent offenders.”

**ANALYSIS**

Proposed Ordinance 2021-0249 would provide supplemental appropriations to each of the agencies listed in Table 1.

**Table 1**

**Proposed Ordinance 2021-0249.**

| **Appropriation Units** |  | **Amount** |  | **Proposed TLTs** |
| --- | --- | --- | --- | --- |
| **Department of Public Defense** |  | $5,703,000 |  | 36.0 |
| **Prosecuting Attorney** |  | $5,640,000 |  | 26.0 |
| **Superior Court** |  | $620,000 |  | 3.0 |
| **Department of Judicial Administration** |  | $1,019,000 |  | 8.0 |
| **District Court** |  | $936,000 |  | 6.3 |
| **Internal Support** |  | $5,600,000 |  | 0.0 |
| **TOTAL** |  | **$19,545,000** |  | **79.3** |

The appropriations will be used by each agency to support the resentencing, vacation, and LFO refund work as described below for each agency.

**Department of Public Defense ($5,703,000 and 36.0 TLTs).** The department has established a tiered system to sort the many cases, assigning cases first on behalf of people who could be released within 18 to 24 months once their “Blake points” are removed from their offender scores. After that, the department will assign cases to address those who are under community custody due to a VUCSA conviction. To determine the staffing needed to assist those people currently under sentence, DPD applied its standard staffing model formula with some minor alterations, estimating about 900 people will need resentencing and assuming each case will require less than 23 hours of work, will not require investigative resources, but does assume other support costs and will not incur assigned counsel/conflict attorney costs. To address the needs of those people who have prior Blake relevant convictions but who are not currently under sentence, DPD assumed about half (~20,000)[[7]](#footnote-7) of the individuals eligible for Blake relief will request assistance with vacation and LFO relief and each case will require 4 hours of attorney and support staff work.

DPD has posted a webpage, to go live on July 19, that provides information for those seeking Blake-related legal help, as well as a form they can complete that will be reviewed by an attorney to determine Blake related relief individuals may be able to obtain (including vacations, LFO refunds, and resentencings). DPD is also beginning an outreach campaign, in partnership with several organizations that provide direct services to indigent people that will direct people to the DPD webpage. The outreach plan includes the creation of posters, fliers, and wallet-sized cards for distribution, as well as some advertising in Real Change.

**PAO ($5,640,000 and 26.0 TLTs).** In response to Blake, the PAO dismissed all affected pending cases[[8]](#footnote-8). PAO reports they are in the process of reviewing and quashing all active warrants in both Superior and District Court. PAO reports that this is a laborious process and it is working on the most recent warrants first. However, there are warrants that go back decades. The PAO notes that for each day that goes by, the County risks arresting an individual on a warrant that should be quashed. For resentencing cases, in these instances, a prosecutor must, at a minimum, review the defendant’s criminal history, re-calculate their appropriate sentencing range, and prepare an agreed order to amend the sentence. However, PAO expects that in many cases the prosecution and defense will not reach agreement on a new sentence, so a contested resentencing will be required. PAO reports this is labor intensive work, as it requires trained prosecutors to evaluate each case, staff to run criminal history, staff to prepare and process orders, advocates to reach out to affected victims, and records staff to keep proper records of the events.

PAO has posted a webpage that provides information for those seeking vacation, victims of crime, and directs individuals to DPD for legal advice. PAO is currently assessing the options and possibilities for specific outreach efforts such as press releases and social media posts.

**Superior Court ($620,000, 3.0 TLTs).** A Superior Court TLT judge, supported by a TLT bailiff, will hear Blake resentencing motions brought by DPD and prosecuting attorneys. The judge will also review and sign agreed orders presented by prosecutors and defense presented through the Blake queue where appropriate.  The TLT judge will also review and approve orders to refund LFOs per Blake. In addition, a TLT coordinator will assist in organizing the calendar for these matters to ensure processes have been followed, paperwork is complete and all necessary data entry is done to accurately track this body of work.

**Department of Judicial Administration ($1,019,000 and 8.0 TLTs).** DJA staff will support the Superior Court TLT judge who will cover the Blake resentencing motions and hearings. DJA Blake staff will also process all documents coming from the resentencing motions, estimated to be around 1,200. DJA Blake staff will also process vacate orders and conduct research on LFO amounts paid on each case where a vacate order will also result in a refund. Case financial research includes cases that are archived and microfilmed and go back as far as 1971. Once the refund amount has been determined DJA staff will create a letter for the file, initiate the refund via Finance and Business Operations Division (FBOD) and send the letter to the defendant. To ensure the efficient and consistent handling of this work given the volume, TLTs will be dedicated to ensure timely processing, proper research is complete and all necessary data entry is done to accurately track this body of work.

**District Court ($963,000 and 6.3 TLTs)****.** One TLT position is for a pro tem judge to hear or back fill for judge(s) reviewing  existing open case files to identify impacted cases, quashing warrants related to Blake charges, reviewing open LFO’s, closing probation cases, and hearing or reviewing all motions related to Blake to vacate convictions or order refunds.  The remaining TLTs will be used for staff to support the judicial officers and process the resulting workload.  Because the District Court clerks’ office and Probation Services are part of District Court, court staff will also be responsible for all of the probation file review and financial support work related to file review, issuing refunds, financial reporting, and clean up.

In addition to State cases filed since 1971, District Court is also responsible to process all motions for all city cases filed while under District Court jurisdiction.  Currently District Court contracts with 13 cities for court services but have previously been the court for multiple other cities and will be responsible to address and process all motions related to all of the city cases while under District Court jurisdiction thus increasing the work load to District Court staff and judges.  Since Blake impacts all prior Possession of Marijuana convictions charged under the State statute, these cases could number into the thousands.

**Internal Support ($5,600,000).** This appropriation is intended to support the LFO reimbursements for both Superior and District Court cases. The Finance and Business Operations Division (FBOD) will issue LFO refunds upon DJA and District Court approval. FBOD is currently researching payment methods, including debit cards, for efficiently and equitably issuing refunds. PSB reports that they have included the funding for reimbursements in the internal support appropriation (rather than to the FBOD appropriation unit) to allow for flexibility and coordination in the reimbursement process. Additionally, FBOD can easily access the internal support appropriation through the County’s financial systems.

PSB reports that it is coordinating a workgroup to develop the overall processes and procedures to implement vacations and LFO refunds. This work will include developing an outreach plan to those who are not currently under sentence but are eligible for vacations and LFO refunds. The outreach efforts will also provide advice on avoiding scams that may arise targeting those seeking Blake refunds. DJA, DPD, and PAO currently participate in this planning group.

**Issues for Council Consideration**

Leveraging Prior Appropriation to Clear Marijuana Convictions. Prior to the Blake decision, the Council appropriated $2.8 million in the 2021-2022 biennial budget for DCHS to contract with community organizations for record clearing and LFO relief for those involved in the legal system. It was entirely funded by the Marijuana Excise Tax Revenue. The DCHS Request for Proposal (Attachment 5) for contracts was released on June 16, 2021.

As stated in the RFP:

“This funding focuses on three basic areas

* Legal aid to support people seeking to expunge marijuana convictions
* Funds to assist with collateral financial impacts resulting from criminal legal system contact related to marijuana enforcement
* Support for community-based organization(s) to address structural and systems barriers to change the conditions that lead to the overcriminalization of Black, Indigenous, Latinx and other communities of color”

As seen in the language above and throughout the RFP, the RFP appears to be heavily focused on marijuana convictions rather than language that broadly supports the remedies required by Blake for all VUCSA convictions. For example, in the questions collected section of the RFP, it specifically states, “The focus of this RFP is on mitigating the impacts of marijuana related convictions.”

With the Blake decision, there is now a need for outreach to the estimated 50,000 individuals with King County convictions impacted by Blake. Given that the RFP is still ongoing and proposals from organizations are not due until July 29, 2021, the Council may wish to consider working with the Executive to update or reissue the RFP so that it reflects State v. Blake decision and is inclusive of support related to the vacation of felony possession convictions and LFO relief.

*Level of State Funding is Not Certain.* Both the AOC and the Office of Public Defense have not yet finalized guidance for distributing the funding throughout the state. In response to questions about how likely it is that the County will receive the reimbursements assumed in this supplemental, PSB reports, “If the final funding allocation approach dedicates an amount of resources proportional to King County’s share of eligible cases, State funding should be sufficient to fully reimburse the Blake-related expenditure authority requested in the supplemental appropriation.”

**INVITED**

* Dwight Dively, Director, Office of Performance, Strategy, and Budget
* David Hackett, Senior Deputy Prosecuting Attorney, Civil Division, Prosecuting Attorney’s Office
* James (Jim) Rogers, Presiding Judge, King County Superior Court
* Daniel Satterberg, Prosecuting Attorney
* Susan Mahoney, Presiding Judge, King County District Court
* Linda Ridge, Chief Administrative Officer, King County Superior Court
* Anita Khandelwal, Director, Department of Public Defense

**ATTACHMENTS**

1. Proposed Ordinance 2021-0249
2. Transmittal Letter
3. Fiscal Note
4. Revised Crosswalk of Proposed Appropriations
5. Request for Proposals Record Expungement and Collateral Financial Consequences Relief

1. State v. Blake, 197 Wn.2d170 (2021) [↑](#footnote-ref-1)
2. Also known as Violation of the Uniform Controlled Substance Act (VUCSA) [↑](#footnote-ref-2)
3. Ordinance 19210. [↑](#footnote-ref-3)
4. PAO reports about 629 filed cases were dismissed, that includes open and active cases, cases on failure to appear status, and cases on bench warrant status. [↑](#footnote-ref-4)
5. Engrossed Substitute Senate Bill 5092 [↑](#footnote-ref-5)
6. Chapter 141, Laws of 2021. [↑](#footnote-ref-6)
7. According to the Department of Judicial Administration there are approximately 50,000 individuals who have prior Blake relevant convictions in King County Superior Court dating back to 1979 but who are not currently under sentence and will require vacation of prior convictions and LFO relief. [↑](#footnote-ref-7)
8. PAO reports about 629 filed cases were dismissed, that includes open and active cases, cases on failure to appear status, and cases on bench warrant status. [↑](#footnote-ref-8)