

# SENATE BILL REPORT

## SB 5536

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As of February 6, 2023

**Title:** An act relating to justice system and behavioral health responses for persons experiencing circumstances that involve controlled substances, counterfeit substances, legend drugs, and drug paraphernalia.

**Brief Description:** Concerning controlled substances, counterfeit substances, and legend drug possession and treatment.

**Sponsors:** Senators Robinson, Lovick, Rolfes, Mullet, Dhingra, Billig, Hasegawa, Keiser, Kuderer, Lias, Lovelett, Nobles, Randall, Stanford, Wellman and Wilson, C..

**Brief History:**

**Committee Activity:** Law & Justice: 2/06/23.

**Brief Summary of Bill**

- Requires knowing possession of prohibited substances.
- Creates a pretrial diversion program for individuals charged with possession of prohibited substances.
- Provides for vacating possession convictions contingent on the individual completing substance use disorder treatment.
- Expands access to substance use disorder treatment programs in under-served and rural areas.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Staff:** Joe McKittrick (786-7287)

**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

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*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.*

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 unconstitutional. The court reasoned that the Legislature's criminalization of passive conduct, with no requirement to prove criminal intent, violated due process.

In response to the *State v. Blake* decision, the Legislature passed ESB 5476 which in part modified statutes for the possession of controlled substances, possession of counterfeit substances, possession of legend drugs, and possession of 40 grams or less of cannabis, to prohibit the knowing possession of the prohibited substances. These offenses are classified as misdemeanor crimes, punishable by up to 90 days in jail, a \$1,000 fine, or both. Prosecutors are encouraged to divert such cases for assessment, treatment, and other services. The modifications to these possession statutes are set to expire on July 1, 2023.

The legislation also provided that, in lieu of booking individuals arrested for simple possession in jail, prosecutors and law enforcement must offer the individual a referral to assessment and treatment for the individual's first two arrests and may, but are not required, to continue to offer a referral to assessment and treatment for any subsequent arrest for simple possession.

**Summary of Bill:** Simple Possession. The simple possession statutes that take effect July 1, 2023, are amended to prohibit the knowing possession of the prohibited substances. Law enforcement officers are encouraged to offer any individual arrested for simple possession a referral to assessment, treatment, or other services in lieu of booking the individual in jail and referring the case for prosecution. Possession of a controlled substance and possession of a counterfeit substance are classified as gross misdemeanor crimes and carry a potential maximum sentence of 364 days in jail, a \$5,000 fine, or both. Possession of a legend drug and possession of 40 grams or less of cannabis remain misdemeanor crimes and carry a maximum sentence of 90 days in jail, a \$1,000 fine, or both.

Pretrial Diversion. A pretrial diversion program for individuals charged with simple possession is created. The program consists of the defendant agreeing to engage in, and successfully completing, a substance use disorder treatment program in exchange for the state dismissing the simple possession charge. At arraignment on a charge of simple possession, the judge must advise the individual of the availability and process of the pretrial diversion program.

Upon the motion of the defendant, and an agreement to waive their right to a speedy trial, and trial by jury if granted pretrial diversion, the court may grant the motion, continue the hearing, and refer the defendant for a substance use disorder evaluation from an approved substance use disorder treatment program. The treatment program must make a written report to the court, which must also be provided to the prosecutor and the defendant or the defendant's attorney, outlining its findings and treatment recommendations.

After receiving the treatment report, the court must hold a hearing to determine if the defendant consents to participating in pretrial diversion, and if the defendant should be granted diversion.

If granted pretrial diversion, the defendant must comply with the recommended treatment. The program will last between 12 and 18 months, however, may be extended for good cause. If it appears to the prosecuting attorney, the court, or the probation department that the defendant is performing unsatisfactorily, the defendant is convicted of an offense that reflects the defendant's propensity for violence, or the defendant is convicted of a felony, the prosecutor, the probation department, or the court may make a motion to terminate pretrial diversion.

If the defendant successfully completes pretrial diversion, including all treatment requirements, the court must dismiss the charge or charges.

Vacation of Simple Possession Convictions. An individual convicted of simple possession who subsequently completes an approved substance use disorder treatment program, and who files proof of completion with the court, may petition the court to vacate the conviction. If the court verifies the individual successfully completed the substance use disorder treatment, the court must vacate the conviction.

Drug Paraphernalia. The prohibition against giving or permitting drug paraphernalia to be given is eliminated. Selling or permitting drug paraphernalia to be given remains a class I civil infraction. The prohibitions related to drug paraphernalia do not apply to the legal distribution of injection syringe equipment or smoking equipment through public health and community-based HIV prevention programs and pharmacies. Cities, towns, and counties or other municipalities are preempted from enacting laws and ordinances relating to drug paraphernalia that are not specifically authorized by state law or are inconsistent with state law.

Substance Use Disorder Treatment Program Rural Access and Expansion. By December 31, 2023, the Department of Health must adopt rules allowing a substance use disorder treatment program to establish off-site medication units located as free-standing facilities, collocated in a community setting such as a hospital or pharmacy, or mobile medication units.

The comprehensive growth management plan of each county and city must include a process for identifying and siting essential public facilities. Essential public facilities include those that are typically difficult to site, including substance use disorder treatment programs including both mobile and fixed-site medication units, recovery residences, and harm reduction programs, excluding safe injection sites, that emphasize working directly with people who use drugs to prevent overdose and infectious disease transmission, improve the physical, mental, and social well-being of those served, and offer low-threshold options for accessing substance use disorder treatment and other health care services.

Counties and cities may require a conditional use permit with reasonable conditions for siting opioid treatment programs only to the extent that such reasonable conditional use requirements applied to opioid treatment programs are similarly applied to other essential public facilities and health care settings. No city or county legislative authority may impose a maximum capacity for an opioid treatment program. The requirement that the Department of Health hold a public hearing in the community where the essential public facility is to be located is eliminated.

Subject to appropriations, a program is established in the Department of Health to fund the construction costs necessary to start up substance use disorder treatment programs in regions of the state that currently lack access to such programs. The funding must be used to increase the number of substance use disorder treatment programs in underserved areas such as central and eastern Washington and rural areas.

Miscellaneous. The statute requiring law enforcement and prosecutors to offer a referral to assessment and treatment for an individual's first two arrests for simple possession is repealed.

**Appropriation:** None.

**Fiscal Note:** Available.

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

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: The current response to drug possession is not working. Drug possession should be a gross misdemeanor, and any legislation should focus on diversion options for those charged with possession. Cities and counties will need more resources to get these programs off the ground. Pretrial diversion incentivizes treatment, by allowing the charge to be dismissed if treatment is completed. The use of drugs propagates other crimes such as burglaries and theft. This bill will help break the vicious cycle of addiction. The best path for individuals to receive treatment is with an incentive through the courts. Leaving people in the spin-cycle of addiction will not help. The path to recovery should be accompanied by a dismissal of the charges, but there should also be consequences for the person's failure or refusal to do treatment. Focusing intervention on pretrial diversion is much cheaper and will have the greatest impact for communities. It generally costs around \$5,000 to \$10,000 to prosecute a gross misdemeanor. We have seen that recidivism is much less when individual's cases are processed through therapeutic courts rather than the traditional adversarial courts. Evidence has shown that courts and jails are not effective settings for addressing substance abuse issues. What we need now is a legal framework that shifts the focus to providing treatment rather than punishment. This bill authorizes and supports pre-booking intervention as well

as incentivizing those charged with possession to get into treatment. This is the best policy because it aligns with therapeutic court models already in place in many courts. It also provides clarity and guidance for law enforcement to help individuals with substance use disorders. This bill should be amended to clarify that cities will not need to cover the cost of providing treatment services to indigent individuals who are not covered by insurance.

This bill is a good start as it focuses on treatment rather than punishment, however it is too focused on treatment. The legislation seems to be aimed at first-time offenders or low-risk offenders. However, this does not address repeat offenders or offenders who commit other crimes along with drug possession. Officers have made referrals to treatment, but most refuse. We need to support our communities as well as those with substance use disorders. The revolving door of arrest, prosecute, jail, release, and repeat is simply not effective. Criminalizing drug possession has had a disproportionate effect on people of color. This bill prioritizes and incentivizes treatment using the criminal justice system to address those who refuse or abandon treatment. This takes a significant step towards addressing substance abuse issues in our communities by reestablishing accountability and addressing the need for treatment. Cities and counties must have continued input on the siting of treatment facilities to ensure there is not a conglomeration of these facilities in underserved communities.

CON: If this bill passes, we are putting the solution in the same category as the problem. Classifying cannabis and other medicinal plants like fungi is harmful to those who need these medicines. For millennia, indigenous people have honored these medicines, but criminalizing these plants prohibits their use. Classifying possession as a gross misdemeanor will not help save lives, and increased investment in notoriously biased drug courts will only disparage black and brown people. Diversion is useful, but the state needs pre-booking diversion as well. Going to jail is a traumatic experience and adding trauma to the trauma individuals with substance use disorders suffer will only exacerbate the situation. Drug use can be devastating, but so to can the response. These policies will disproportionately increase police contacts with black and brown communities.

OTHER: This bill needs to address the potential immigration consequences of drug charges. People with immigration issues are doubly punished because they face consequences in criminal court which may lead to deportation or the person not being able to proceed with their immigration case. Vacating a conviction will not work because the definition of vacation in immigration courts is different than the state definition. All diversion is not created equal, and if this does not include immigration-safe language this could be a recipe for failure for noncitizens. The criminal system should not be used to achieve public health policy. Drug use is a health crisis not a legal crisis. Many people in rural areas of the state currently do not have access to substance use treatment. This needs to include investments in community health services. Without this investment those individuals sent to diversion in rural areas will not be able to access treatment. While this bill is a good start, it should also address those who are arrested for possession and other, often more serious, crimes. Whatever the solution, it should be data-driven. This must be accompanied by continued

funding to allow the courts to address these issues. We need to institutionalize the sequential intercept model.

**Persons Testifying:** PRO: Senator June Robinson, Prime Sponsor; David Hayes, Washington Council of Police and Sheriffs; Breean Beggs, Spokane City Council President; Jim Ferrell, Mayor, City of Federal Way; Amy Ockerlander, Mayor, City of Duvall & Association of Washington Cities; Mary Lou Pauly, Mayor, City of Issaquah; Armondo Pavone, Mayor, City of Renton; Dan Templeman, Police Chief, City of Everett; James McMahan, WA Assoc Sheriffs & Police Chiefs; Barbara Tolbert, Mayor, City of Arlington; Jon Nehring, Mayor, City of Marysville; Celia Jackson, Office of King County Exec; Mayor Victoria Woodards, City of Tacoma.

CON: Lauren Feringa; Don Julian; Malika Lamont, VOCAL-WA; Adam Palayew; Jude Ahmed, Urban League of Metropolitan Seattle & Tacoma.

OTHER: Lisa Daugaard, Public Defender Association; Chad Enright, Kitsap County Prosecutors; Matt McCourt, Washington State Narcotics Investigators Association; Judge Kevin Ringus, District & Municipal Court Judges Association; Larry Jefferson, Office of Public Defense; Jason Schwarz, WA Defender Assn/WA Assn of Criminal Defense Lawyers; Sarah Hudson, WA Defender Assn/WA Assn of Criminal Defense Lawyers; David Larson, Federal Way Municipal Court.

**Persons Signed In To Testify But Not Testifying:** No one.