

# SENATE BILL REPORT

## SB 5035

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As of February 6, 2023

**Title:** An act relating to possession of controlled substances.

**Brief Description:** Concerning possession of controlled substances.

**Sponsors:** Senators Padden, Fortunato, Short, Wilson, J., MacEwen, Boehnke, Schoesler, Warnick, Dozier, Wagoner, Holy, McCune, Torres and Wilson, L..

**Brief History:**

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

### Brief Summary of Bill

- Classifies possession of a counterfeit substance as a class C felony.
- Encourages prosecutors to divert an individual's first charge of possession of a counterfeit substance or 40 grams or less of cannabis to substance use disorder services.
- Repeals the requirement that law enforcement officers offer a referral to substance use disorder services for an individual's first two arrests for possession of prohibited substances.

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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 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 found this statute unconstitutional. The court reasoned that the Legislature's criminalization of passive conduct, with no requirement to prove criminal

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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.*

intent, violated due process.

In response to the *State v. Blake* decision, the Legislature passed ESB 5476 which in part modified the possession of controlled substances, possession of counterfeit substances, possession of legend drugs, and possession of 40 grams or less of cannabis statutes 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, and were removed from the felony drug offense seriousness level table. 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.

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:** The bill as referred to committee not considered.

**Summary of Bill (Proposed Substitute):** The expiration date of the 2021 amendments to the possession of controlled substances, possession of counterfeit substances, possession of legend drugs, and possession of 40 grams or less of cannabis statutes are repealed. Possession of a counterfeit controlled substance is classified as a class C felony, punishable by up to five years in prison, a \$10,000 fine, or both. Prosecutors are encouraged to divert an individual's first charge of possession of a counterfeit substance or possession of a controlled substance for assessment, treatment, or other services. Possession of controlled substances, possession of legend drugs, and possession of 40 grams or less of cannabis remain classified as misdemeanors.

The statute requiring law enforcement officers to offer a referral to substance use disorder services for an individual's first two arrests for possession of prohibited substances is repealed. The amendments to the felony drug offense seriousness level tables are also 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 On Proposed Substitute:** PRO: This bill restores consequences for those who possess controlled substances. The current law requiring officers divert someone's first two charges for possession essentially created a defacto

decriminalization of possession. The current law has led to the open use of substance. There must be consequences. Many people who commit property crimes are suffering from substance use disorders. Locking these people up for possession will not solve the problem. We need to break the cycle and providing treatment will help accomplish that goal. The felony option in this bill is preferable. Our experiment with effectively decriminalizing drug possession has failed. The number of those accessing treatment is down while the number of overdose deaths are rising. It is neither humane nor compassionate to leave those suffering from addiction to their own devices.

OTHER: 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.

**Persons Testifying:** PRO: Senator Mike Padden, Prime Sponsor; Rod Higgins, Deputy Mayor, City of Spokane Valley; James McMahan, WA Assoc Sheriffs & Police Chiefs; Mark Johnson, Washington Retail Association.

OTHER: Chad Enright, Kitsap County Prosecutor; Larry Jefferson, Director, Washington State Office of Public Defense.

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