

SENATE BILL REPORT

E2SSB 5536

As Amended by House, April 11, 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: Senate Committee on Ways & Means (originally sponsored by Senators Robinson, Lovick, Rolfes, Mullet, Dhingra, Billig, Hasegawa, Keiser, Kuderer, Liias, Lovelett, Nobles, Randall, Stanford, Wellman and Wilson, C.).

Brief History:

Committee Activity: Law & Justice: 2/06/23, 2/09/23 [DPS-WM, DNP, w/oRec].

Ways & Means: 2/18/23, 2/23/23 [DP2S, DNP, w/oRec].

Floor Activity: Passed Senate: 3/3/23, 28-21.

Passed House: 4/11/23, 54-41.

Brief Summary of Engrossed Second Substitute Bill

- Increases the penalty for knowing possession of a controlled substance or counterfeit substance to a gross misdemeanor.
- Creates a pretrial diversion program for individuals charged with possession of prohibited substances.
- Requires courts to impose minimum jail sanctions on defendants convicted of possession who refuse substance use disorder (SUD) treatment or who willfully abandon treatment or consistently fail to comply with treatment.
- Requires courts to vacate convictions of possession for defendants who successfully complete required SUD treatment and file proof with the court.

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.

- Enacts recommendations of the Substance Use and Recovery Services Advisory Committee expanding SUD treatment and harm reduction programs and related services.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5536 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Kuderer, Pedersen, Salomon and Valdez.

Minority Report: Do not pass.

Signed by Senators Padden, Ranking Member; McCune, Torres and Wilson, L..

Minority Report: That it be referred without recommendation.

Signed by Senator Wagoner.

Staff: Joe McKittrick (786-7287); Kevin Black (786-7747)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 5536 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Rolfes, Chair; Robinson, Vice Chair, Operating & Revenue; Mullet, Vice Chair, Capital; Wilson, L., Ranking Member, Operating; Gildon, Assistant Ranking Member, Operating; Schoesler, Ranking Member, Capital; Billig, Braun, Conway, Hunt, Keiser, Van De Wege and Wellman.

Minority Report: Do not pass.

Signed by Senators Dhingra, Hasegawa and Saldaña.

Minority Report: That it be referred without recommendation.

Signed by Senators Rivers, Assistant Ranking Member, Capital; Warnick, Assistant Ranking Member, Capital; Boehnke, Muzzall, Nguyen, Pedersen, Torres and Wagoner.

Staff: Corban Nemeth (786-7736)

Background: *State v. Blake Decision*. In 2021, the Washington State Supreme Court decided the case of *State v. Blake*, which struck down Washington's criminal statute prohibiting possession of a controlled substance. Prior to the *Blake* decision, possession was a class C felony. The court reasoned that the lack of a requirement to prove knowledge of possession did not force the state to prove criminal intent, violating the defendant's right to

due process.

In response to the *State v. Blake* decision, the Legislature passed ESB 5476 which in part modified statutes prohibiting the possession of a controlled substance, counterfeit substance, legend drug, or 40 grams or less of cannabis, to require proof of 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.

The Substance Use Recovery Services Advisory Committee. ESB 5476 also created a Substance Use Recovery Services Advisory Committee (SURSAC). The 26 members appointed to SURSAC started meeting in December 2021, with the charge to develop a substance use recovery plan. The committee and its four subcommittees met a total of 65 times, and submitted a final plan with 16 recommendations to the Legislature in January 2023.

The Law Enforcement Assisted Diversion Program. The Law Enforcement Assisted Diversion program (LEAD program) is a national model program started in Seattle in which police officers exercise discretionary authority at point of contact to divert individuals to a community-based, harm-reduction intervention for law violations driven by unmet behavioral health needs. Washington State funds LEAD programs as a pilot program in which funds are provided subject to appropriation for two or more geographic areas in the state of Washington to receive technical assistance to develop a LEAD program with fidelity to the model.

Arrest and Jail Alternative Program. The Arrest and Jail Alternative Program is a grant program administered by the Washington Association of Sheriffs and Police Chiefs to support local initiatives to identify persons with SUDs and other behavioral health needs and engage them with therapeutic interventions and other services. Programs with a prebooking diversion focus are preferred.

Probation in Courts of Limited Jurisdiction. In courts of limited jurisdiction, the deferral of a criminal sentence, or suspension of execution of sentence may be revoked if the defendant violates or fails to carry out any of the conditions of the deferral or suspension. Upon revocation of the deferral or suspension, the court may impose the sentence previously suspended or any unexecuted portion thereof. In any event, the court may not impose a sentence greater than the original sentence, with credit given for time served and money

paid on fines and fees. At any time before entering an order terminating probation, the court may revoke or modify its order suspending the imposition or execution of the sentence. The court may terminate the period of probation and discharge the defendant whenever the ends of justice will be served or when termination is warranted by the reformation of the defendant.

Summary of Engrossed Second Substitute Bill: Possession of a Controlled Substance, Counterfeit Substance, Cannabis, or a Legend Drug. The statutes prohibiting simple possession of prohibited substances that take effect July 1, 2023, are amended to prohibit the knowing possession of the prohibited substances. The expiration date of the current possession statutes are amended to expire on the effective date of this act. Law enforcement officers are encouraged to offer any individual arrested for simple possession a referral to assessment, treatment, or other services, such as arrest and jail alternatives and law enforcement assisted diversion programs, 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 an ounce or more of cannabis, or possession of any amount of cannabis for individuals under 21 years of age, remain misdemeanor crimes and carry a maximum sentence of 90 days in jail, a \$1,000 fine, or both.

Testing of Suspected Drugs in Criminal Cases. The Washington State Patrol Bureau of Forensic Laboratory Services must aim to complete the necessary analysis of suspected drugs in simple possession cases within 45 days of receipt of the request for analysis. The Washington State Patrol Bureau of Forensic Laboratory Services' failure to meet the 45 day guideline does not constitute grounds for dismissal of a criminal charge.

Pretrial Diversion. A pretrial diversion program for individuals charged with simple possession is created. The program consists of the defendant agreeing to meaningfully engage in a substance use disorder (SUD) 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, including informing the individual that under federal law it is unlawful for any person addicted to controlled substances to possess firearms. The creation of the pretrial diversion program does not preclude the defense or prosecution from seeking to resolve possession charges through available therapeutic courts or other alternatives to prosecution.

Upon the motion of the defendant, and an agreement to waive their right to a speedy trial, if granted pretrial diversion, the court may grant the motion, continue the hearing, and refer the defendant for a SUD evaluation from an approved SUD treatment program. The state must make resources available to assist the defendant in obtaining the SUD evaluation within seven days of the defendant's agreement to participate in the diversion program. The SUD evaluation must be provided at no expense to defendants who qualify for public defense services or who are found to be indigent by the court. The evaluation must be

provided at a location that is accessible to the defendant, and the court must provide the defendant with transportation assistance if such assistance is necessary to make the evaluation accessible to the defendant, and the state must reimburse local courts associated with travel related to obtaining the SUD evaluation. The court may contract with a third party to provide SUD assessments and services, which may be collocated at the court or be provided at alternative locations. 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. If it appears to the prosecuting attorney that the defendant is not substantially complying with the recommended treatment or services, the defendant is convicted of an offense that reflects the defendant's propensity for violence, the defendant is subsequently charged with possession, or the defendant is convicted of a felony, the prosecutor may make a motion to terminate pretrial diversion.

If the defendant successfully completes pretrial diversion, including meaningful engagement with treatment or services, the court must dismiss the charge or charges.

Sentencing for Simple Possession. In courts of limited jurisdiction, an individual convicted of a possession of a controlled substance or possession of a counterfeit substance who agrees as a condition of probation to submit to an SUD assessment and to comply with the recommended treatment must be sentenced to 364 days in jail, all of which must be suspended for a period not to exceed two years. An individual convicted of possession of a legend drug who agrees as a condition of probation to submit to an SUD assessment and to comply with the recommended treatment must be sentenced to 90 days in jail, all of which must be suspended for a period not to exceed one year.

If an individual is convicted of possession of a controlled substance, counterfeit substance, or a legend drug that is classified as a schedule II substance, substances that have a high potential for abuse, who refuse to submit to SUD treatment as a condition of probation must be sentenced to a term of confinement of no less than 21 days in jail.

Individuals who agree to SUD treatment as a condition of probation must obtain an SUD assessment by an SUD treatment program licensed or certified by the Department of Health (DOH). Once the SUD assessment is filed with the court, if the report indicates the individual has a SUD, the court must inform the individual that under federal law the individual may not possess firearms, and the court must then sign an order of ineligibility to possess firearms.

Once engaged in treatment, any agency that provides treatment must report to the court or the appropriate probation department where applicable, any noncompliance with the conditions of the individual's ordered treatment. If it appears to the prosecutor, or the court that the sentenced individual is performing unsatisfactorily in treatment the prosecutor, or the court must make a motion for a hearing to consider sanctions or revocation of the individual's suspended sentence is warranted. If it appears to the court that the individual has made reasonable efforts to comply but cannot comply either due to a lack of available treatment or a lack of funding for treatment for individuals found to be indigent, no sanction for a failure to comply with treatment may include jail. The court may not sanction an individual for failing to comply with the recommended treatment if the court finds the sentenced individual has made reasonable efforts to comply with treatment but cannot either due to a lack of available treatment, or, for sentenced individuals found to be indigent by the court, due to a lack of funding for treatment.

For a defendant's first instance of being sentenced under this act for possession of a controlled substance or possession of a counterfeit substance who have agreed to treatment as a condition of probation, if at any point the court finds by a preponderance of the evidence that the individual has willfully abandoned treatment or demonstrated a consistent failure to comply with treatment, the court may use its discretion in determining the appropriate amount of time of the individual's suspended sentence to reinstate given the facts and circumstances of the particular case.

For a defendant's second instance of being sentenced under this act for possession of a controlled substance or possession of a counterfeit substance who have agreed to treatment as a condition of probation, if at any point the court finds by a preponderance of the evidence that the individual has willfully abandoned treatment or demonstrated a consistent failure to comply with treatment, the court must reinstate a term of imprisonment of no less than 21 days of the individual's suspended sentence to be served in total confinement.

For a defendant's third or subsequent instance of being sentenced under this act for possession of a controlled substance or possession of a counterfeit substance who have agreed to treatment as a condition of probation, if at any point the court finds by a preponderance of the evidence that the individual has willfully abandoned treatment or demonstrated a consistent failure to comply with treatment, the court must reinstate a term of imprisonment of no less than 45 days of the individual's suspended sentence to be served in total confinement.

When an individual successfully completes the required treatment as a condition of probation and files proof with the court, upon verifying the successful completion, 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. Drug testing and analyzing equipment is removed from the definition of

drug paraphernalia. The prohibitions related to drug paraphernalia do not apply to distribution or use of public health supplies, including syringe equipment, smoking equipment, or testing equipment, through public health programs and community-based HIV prevention programs and pharmacies. Public health and syringe service program staff are exempt from arrest and prosecution for taking samples of substances and using drug testing equipment to analyze substances or detect substances.

Law Enforcement Assisted Diversion Program. The Law Enforcement Assisted Diversion Program (LEAD program) is a grant program instead of a pilot program. Geographical and numerical limitations on the LEAD program are removed. Sufficient funds must be allocated for the LEAD Program to provide technical assistance to all implementing jurisdictions.

Opioid Treatment Program Rural Access and Expansion. Opioid treatment programs (OTPs), mobile or fixed-site medication units within OTPs, recovery residences, and harm reduction programs including syringe service programs, are recognized as essential public facilities for the purpose of local land-use regulations. Counties and cities may only impose such reasonable conditional use requirements as are similarly applied to other essential public facilities and health care settings. Cities and counties are prohibited from imposing a maximum capacity on OTPs.

Appropriations. Appropriations are made to the Health Care Authority (HCA) as follows:

- \$36.6 million from the state general fund to expand efforts to provide opioid use disorder (OUD) medication in city, county, regional, and tribal jails;
- \$7 million from the state general fund to provide support for new and established clubhouses throughout the state;
- \$3.2 million from the state general fund to establish and expand 23-hour crisis relief centers distributed to an equivalent number of crisis services providers in Western Washington and Eastern Washington;
- \$2.5 million from the state general fund—\$5 million total funds—to provide ongoing grants to LEAD programs; and
- \$1.8 million from the state general fund—\$3.6 million total funds—to provide ongoing grants for Arrest and Jail Alternative programs.

An appropriation of \$1.2 million is made from the state general fund to the Washington State Patrol to complete analysis for any evidence submitted for a suspected violation of the possession statutes within 45 days of receipt.

Providing Counsel for Parents Affected by Substance Use Disorders in Dependency and Child Custody Cases. A court may appoint counsel for a child's parent, guardian, or custodian if the court determines the parent, guardian, or custodian is affected by SUDs, mental health, or behavioral health concerns such that they are unable to represent their own interests or their parental rights may be restricted. If appropriate, counsel must have understanding of the Indian Child Welfare Act and knowledge about Tribal child welfare

systems. The court may appoint counsel or a guardian ad litem for the child.

Establishing Health Engagement Hubs. HCA must develop payment structures by January 1, 2025, for health engagement hubs (hubs), defined as all-in-one locations where people who use drugs can access a range of medical, harm reduction, treatment, and social services. Hubs must be open to youth and adults, provide referrals or access to methadone and other medications for opioid addiction, and function as a patient-centered medical home by offering cost-effective patient-centered care including wound care, provide harm reduction services and supplies, and provide linkages to housing, transportation, and support services. Hubs may not provide supervised injection services. HCA must direct Medicaid managed care organizations to adopt a value-based bundled payment methodology in contracting with hubs and other opioid treatment programs, to the extent permitted by federal law.

HCA must make sufficient funding available to ensure that a hub is available within a two-hour drive for all communities, and that there is one health engagement hub available per 200,000 residents in Washington State.

Funding, Promotion, and Training for Recovery Residences. Real and personal property owned, rented, or leased by a nonprofit organization to maintaining a registered recovery residence is exempted from taxation if the charge for the housing does not exceed the actual cost of operation and maintenance.

The HCA must make sufficient funding available to establish an adequate and equitable stock of recovery residences in each region of the state, including by expanding the revolving fund program to make loans or grants available to recovery residence operators to use for necessary capital expenses, subject to funding. HCA must establish a voucher program to allow accredited recovery housing operators to hold bed space for individuals waiting for treatment or who have returned to substance use and need a place to stay while negotiating a return to stable housing. HCA must conduct outreach to underserved and rural areas to support the development of recovery housing, including adequate resources for women, LGBTQIA+ communities, and youth.

HCA must develop a training for housing providers by January 1, 2024, to assist them with providing appropriate services to LGBTQIA+ communities, including consideration of topics like harassment, antiracism, diversity, and gender affirming behavior, and to ensure that applicants for grants or loans related to recovery residences receive access to the training.

Training for Parents of Children with Substance Use Disorders and Caseworkers Within the Department of Children, Youth, and Families. HCA in consultation with the Department of Children, Youth, and Families (DCYF) must develop a training for parents of children and transition-age youth by June 20, 2024, providing education on SUDs, adaptive and functional communication strategies with a person with a SUD, self-care, and how to obtain and use opioid overdose reversal medication. HCA and DCYF must make the training

available and DCYF must promote it to licensed foster parents and caregivers, including any tribally-licensed foster parents and Tribal caregivers.

DCYF must make opioid overdose reversal medication available to case workers and employees who may encounter individuals experiencing overdoses and make appropriate training available.

Data Support and Effectiveness Studies for Recovery Navigator Programs. HCA must develop a data integration platform by June 30, 2024, to serve as a common database for diversion efforts across the state, to serve as a data collection and management tool for practitioners, and to assist in standardizing definitions and practices.

HCA is to contract with the Washington State Institute for Public Policy (WSIPP) to conduct a study of the long-term effectiveness of the recovery navigator program over 15 years with reports due in 2028, 2033, and 2038.

HCA must establish an expedited pre-approval process by August 1, 2023, allowing requests for the use of data to be forwarded to the Washington State Institutional Review Board without delay when the request is made by WSIPP for the purpose of completing a study that has been directed by the Legislature.

Creating Education and Employment Pathways. HCA must establish a grant program for programs designed to provide persons recovering from SUDs with employment opportunities, with priority given to programs that engage with Black, Indigenous, persons of color, and other historically underserved communities.

Providing a Statewide Directory of Recovery Services. Subject to funding, HCA must collaborate with DOH and the Department of Social and Health Services to expand the Washington Recovery Helpline and the Recovery Readiness Access Tool to provide a dynamically updated, statewide behavioral health treatment and recovery support services mapping tool, including a robust resource database and referral system, to facilitate the connection between individuals and facilities which are currently accepting new referrals.

Streamlining Substance Use Disorder Treatment Intakes. HCA must convene a work group to recommend changes to intake, screening and assessment for SUD services by December 1, 2023, with goal of shortening the intake process and broadening the workforce capable of processing SUD intakes. HCA must include providers, payors, and people who use drugs in the work group, and other individuals recommended by HCA.

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.

When a police officer takes an individual to available treatment and services in lieu of jail

booking or referring a case for prosecution, if the individual subsequently violates the terms of the provided treatment or services, the behavioral health or service provider must inform the referring law enforcement agency of the violation if consistent with applicable law. The original charge may be filed or referred to the prosecutor, and the matter may proceed accordingly.

Appropriation: The bill contains appropriations totaling \$51.1 million from the state general fund.

Fiscal Note: Available.

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

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony on Original Bill (Law & Justice): *The committee recommended a different version of the bill than what was heard.* 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 (Law & Justice): 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 (Law & Justice): No one.

Staff Summary of Public Testimony on First Substitute (Ways & Means): *The committee recommended a different version of the bill than what was heard.* PRO: This bill creates opportunities to provide cost effective substance use disorder services. Law Enforcement Assisted Diversion (LEAD) and Alternatives to Arrest and Jail (AJA) programs work and we would like to see distinct funding in the bill for these programs. This is the most important issue you will tackle this session. Please allocate funding for pretrial diversion programs and make investments for opioid treatment more flexible for all substance use disorder programs. We have seen an increase in police response to drug infractions. Providing sufficient resources is critical and we encourage options that get individuals into treatment. The Legislature needs to ensure expanded efforts are funded on behalf of cities. This bill promotes compassion, accountability, and community. Please ensure funding so local programs in the bill are successful. We support pre-booking diversion and are glad to see its inclusion in this bill. This bill does a good job balancing accountability and treatment. Please consider stronger focus on incentives for treatment as you move this bill forward.

CON: The SURSA committee voted on decriminalization and I agree with that view. I encourage an approach that is more compassionate. This bill is weakened from the version heard in policy committee. There is less incentive for individuals to get help. This is both a public health and criminal justice problem.

OTHER: The Legislature needs to fund treatment through drug courts and the criminal justice treatment account. The faster that treatment is provided, the more successful the intervention is. The Substance Use Recovery Services Advisory (SURSA) Committee recommendations in this bill could result in an uptake of service delivery. Individuals want to obtain treatment and do not need coercion to do so. This bill has a concerning focus on accommodating drug use. The threat of punishment generally does not help get individuals into treatment. LEAD and AJA programs need to be modified and expanded. The State Patrol Crime Lab turn-around time will be a barrier to the intent of this bill. Misdemeanor testing can take up to a year to be completed. We can't coerce people into treatment. If you criminalize possession, then you need to fully fund public defense. We don't want to make employment for attorneys, which is what criminalization does. Absent legislation, drugs

become legal on July 1st of this year. We support leveraging the consequences of the criminal justice system to get individuals into treatment. Constitutional defense for criminal drug possession is a cost not reflected in the fiscal note. We need 40 additional defenders plus support staff to meet the demand in the bill.

Persons Testifying (Ways & Means): PRO: Senator June Robinson, Prime Sponsor; T. Scott Brandon, Olympic Peninsula Community Clinic; Dana Ralph, Mayor of the City of Kent; Armondo Pavone, Mayor, City of Renton; Candice Bock, Association of Washington Cities; Nancy Backus, City of Auburn, Mayor; Michael Held, Snohomish County Prosecuting Attorney's Office; Todd Morrell, Burien Police Department; Dan Templeman, Police Chief, City of Everett; Carolina Hershey, Arrest & Jail Alternatives, Olympia; Mayor Sean Kelly, City of Maple Valley; Michael Transue, WA Fraternal Order of Police.

CON: Don Julian; Gretchen McDevitt.

OTHER: Bob Cooper, WA Association of Drug Courts; Caleb Banta-Green, University of Washington- Addictions, Drug & Alcohol Institute; Anne Anderson, Washington State Narcotics Investigators Association; Vanessa Martin; Lisa Daugaard, Public Defender Association; Malika Lamont; Chad Enright, Kitsap County Prosecutor; Larry Jefferson, Washington State Office of Public Defense; James McMahan, WA Assoc Sheriffs & Police Chiefs; Adán Espino, WA Defender Assn/WA Assn of Criminal Defense Lawyers.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.

EFFECT OF HOUSE AMENDMENT(S):

- Reclassifies the offenses of possession of a controlled substance and possession of a counterfeit substance as misdemeanors, rather than gross misdemeanors.
- Establishes the offenses of knowing possession and use of a controlled substance, counterfeit substance, or legend drug in a public place as misdemeanors, subject to certain exceptions.
- Encourages prosecutors to divert applicable drug offenses for assessment, treatment, or other services, through a recovery navigator program (RNP) or a comparable program.
- Exempts the distribution of certain supplies by outreach, shelter, and housing programs from the prohibition on selling or permitting the sale of drug paraphernalia and removes smoking equipment from the list of public health supplies that are exempt from the civil infraction for selling or permitting the sale of drug paraphernalia under certain circumstances.
- Prohibits local governments from establishing regulations on drug paraphernalia that are inconsistent with state law by preempting the field.
- Expands the circumstances when pretrial diversion (PTD) is available to include when a person is charged with knowing possession and use of a controlled substance, counterfeit substance, or legend drug in a public place.
- Requires the court to grant a motion for PTD in circumstances when the defendant is only charged with an applicable drug offense, and the defendant has not been convicted of any

offenses committed after July 1, 2023.

- Eliminates the requirement that the state make resources available to assist an applicable defendant with obtaining a substance use disorder (SUD) evaluation, assisting the defendant with transportation to the evaluation, allowing the court to contract with a third party to provide SUD assessments and services, and requiring state reimbursement of associated costs.
- Requires an applicable program, rather than a treatment program, make a written report to the court stating its findings and recommendations based on a biopsychosocial assessment and provide written status updates at least monthly, and that such report and updates must be filed under seal with the court, with copies given to certain parties.
- Defines an "applicable program" for purposes of PTD and probation to mean RNPs, law enforcement assisted diversion (LEAD) programs, or arrest and jail alternative programs.
- Defines "substantial compliance" for the purposes of PTD and probation to mean a defendant actively engaging with or making himself or herself available to treatment and services, and that the defendant is not in substantial compliance if he or she willfully abandons treatment and services.
- Requires the defendant complete community service not to exceed 120 hours if the applicable program's written report does not recommend any treatment or services.
- Limits when the prosecuting attorney may make a motion for termination from pretrial diversion to when it appears that the defendant is not substantially complying with the recommended treatment or services, or, if applicable, the community service.
- Requires the court to consider certain factors at a hearing on a motion to terminate PTD.
- Requires the prosecutor, at a hearing on a motion to terminate PTD, to establish by clear and convincing evidence that the noncompliance was willful, and that the defendant should be terminated from pretrial diversion.
- Requires the prosecuting attorney, beginning January 1, 2024, to input certain data and information about applicable cases in the statewide pretrial diversion tracking and reporting system.
- Requires defendants to have six months of substantial compliance with recommended treatment or services and progress toward recovery goals, or, if applicable, completion of community service to successfully complete PTD.
- Eliminates the provisions requiring the court to grant a person credit for all confinement time served presentencing for applicable drug offenses when such confinement was solely in regard to the offense for which the person is being sentenced.
- Eliminates the 21-day mandatory minimum sentences for persons convicted of applicable drug offenses who refuse to obtain a SUD assessment and recommended treatment or services as a condition of probation.
- Eliminates the provision requiring all individuals providing assessments to implement a specific integrated and comprehensive screening and assessment process for co-occurring SUDs and mental health disorders.
- Requires the court to determine whether an applicable person, based on the person's biopsychosocial assessment, must be required to complete sustained services from a licensed behavioral health care provider, peer counseling program, or other case management program, rather than complete intensive treatment in an approved treatment

program.

- Requires the court to order up to 120 hours of community service if the biopsychosocial assessment does not recommend any treatment or services.
- Requires the applicable program to provide written status updates at least monthly, filed under seal with the court and exempt from the PRA, with copies given to certain parties.
- Requires the prosecuting attorney, rather than the prosecuting attorney or the court, to make a motion for a hearing to consider sanctions when it appears that an applicable person is not substantially complying with treatment or services, or, if applicable, not completing court-ordered community service.
- Requires the court to consider certain factors at a hearing on a motion for sanctions.
- Requires, at a hearing on a motion for sanctions, the prosecutor must establish by clear and convincing evidence that a person's noncompliance was willful, and that the person should be sanctioned.
- Eliminates the mandatory minimum sanctions that the court must impose if it finds that an applicable person has willfully abandoned or demonstrated a consistent failure to meaningfully participate in treatment or services.
- Requires the court to terminate probation and enter an order vacating an applicable person's conviction upon verification that the person had six months of substantial compliance with the recommended treatment or services and progress toward recovery goals, or if applicable, that the person completed the court-ordered community service.
- Requires the court to terminate probation and enter an order vacating an applicable person's conviction if the individual has not been arrested, charged, or convicted in the two years following the person's conviction.
- Requires the Administrative Office of the Courts (AOC) to collect data and information, and submit an annual report, relating to the recidivism rate for persons who participate in pretrial diversion or agree to obtain a biopsychosocial assessment and participate in treatment, and the utilization and outcomes of specific forms of pretrial diversion, sentencing, and postconviction relief for drug offenses.
- Requires AOC to establish and maintain a statewide pretrial diversion tracking and reporting system by January 1, 2024.
- Requires the Department of Commerce, subject to the availability of funds, to fund the construction costs of recovery housing in underserved regions.
- Eliminates direction to the Health Care Authority (HCA) to make loans or grants available for capital expenses related to recovery residences out of the revolving fund.
- Expands HCA's outreach requirements for recovery residence training to include Black, indigenous, and people of color communities, and immigrant communities.
- Removes requirement for the Department of Health (DOH) to hold a community public hearing before licensing or certifying an opioid treatment program.
- Removes requirement for behavioral health or service providers to inform law enforcement of violations of diversion program terms if such report is inconsistent with the terms of the local diversion program or LEAD program.
- Removes section granting a right to court-appointed counsel in certain parenting plan or child custody proceedings.
- Modifies requirements for HCA and the Department of Children, Youth, and Families

(DCYF) to develop a training for parents by including information on suicide prevention training and requiring incorporation in existing training programs.

- Changes description of staff to whom DCYF must provide opioid overdose reversal medication and training to staff whose job duties require in-person service or case management for child welfare or juvenile rehabilitation clients.
- Enacts new provisions extensively modifying RNP requirements by directing HCA to revise program requirements by December 31, 2023, to achieve greater fidelity to LEAD Bureau core principles, including by requiring each RNP to be governed by a policy coordinating group comprised of local officials, providing civil immunity absent bad faith or gross negligence, and directing the Criminal Justice Training Commission to assess fidelity of RNP implementation to core principles of LEAD and report to the Governor and the Legislature by December 1, 2023.
- Reduces health engagement hub initiative to a pilot program with at least two sites, removes direction for HCA to develop payment structures or bundled payment methodology for the hubs, and removes requirement to fund at least one site per 200,000 residents (about 39 hubs).
- Eliminates appropriations to HCA totaling \$49.3 million for opioid use disorder medication in jails, clubhouses, 23-hour crisis relief centers, Arrest and Jail Alternative programs, and LEAD programs.
- Allows remote dispensing sites to dispense medications used for the treatment of an opioid use disorder which are not approved by the U.S. Food and Drug Administration using technology owned by either the pharmacy or the remote dispensing site.
- Creates data reporting requirements for HCA relating to the prevalence of SUDs, interactions by persons with SUDs with treatment, first responders, and others, and creating annual reports from 2023-2008.
- Adds a severability clause and null-and-void clause.
- Modifies intent language.