

# SENATE BILL REPORT

## SB 5476

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As of April 5, 2021

**Title:** An act relating to addressing the State v. Blake decision.

**Brief Description:** Addressing the State v. Blake decision.

**Sponsors:** Senators Dhingra, Hasegawa, Hunt, Kuderer, Lovelett, Nguyen, Pedersen, Rivers, Robinson, Saldaña and Wellman.

**Brief History:**

**Committee Activity:** Ways & Means: 4/05/21.

### Brief Summary of Bill

- Establishes personal use amounts for controlled substances.
- Removes criminal penalties for the possession of a controlled or counterfeit substance or a legend drug that does not exceed the personal use amount.
- Authorizes law enforcement to refer individuals possessing a personal use amount of a controlled substance, counterfeit substance, or legend drug to a forensic navigator for the purpose of evaluation and treatment.

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## SENATE COMMITTEE ON WAYS & MEANS

**Staff:** Kayla Hammer (786-7305)

**Background:** Uniform Controlled Substances Act. The Uniform Controlled Substances Act regulates the manufacture, distribution, and dispensation of controlled substances. It also criminalizes certain conduct related to controlled substances and counterfeit substances. The criminal penalties for violating the Uniform Controlled Substances Act depend upon the nature of the violation and the type of substance.

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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.*

A "controlled substance" means, a drug or substance included in Schedules I through V, with some exceptions. Drugs and substances are placed on schedules based on their potential for abuse, medical use, and safety. Substances in Schedule I are the most tightly controlled, while those in Schedule V are the least tightly controlled. A "counterfeit substance" means a controlled substance that has been altered to look like a substance produced or distributed by a manufacturer, distributor, or dispenser. Related provisions regulate legend drugs—prescription drugs.

Among others, crimes contained in the Uniform Controlled Substances Act and related provisions include:

- possession of a controlled substance, unless authorized by law or obtained through a valid prescription, which is a class C felony;
- possession of 40 grams or less of marijuana, unless authorized by law, which is a misdemeanor;
- possession, manufacture, or distribution of a counterfeit substance unless authorized by law, which is a class B or class C felony depending on the substance;
- possession, sale, or delivery of any legend drug, except pursuant to a prescription, which is a class B felony if the offense involves sale, delivery, or possession with intent to deliver, or a misdemeanor for a simple possession offense; and
- use, delivery, or possession or manufacture with intent to deliver, drug paraphernalia, which is generally a misdemeanor, but becomes a gross misdemeanor if the drug paraphernalia is delivered to a minor at least three years younger than the defendant.

It is a class 3 civil infraction to use marijuana in view of the general public or in a public place. A class 3 civil infraction carries a penalty of \$50.

*State v. Blake.* Washington's statute governing possession of a controlled substance is a strict liability offense. That is, a person can be found guilty of possession without proof that the defendant knew they possessed the substance. In February of this year, the Washington Supreme Court found this statute to be unconstitutional, holding that the Legislature's criminalization of passive conduct with no requirement to prove criminal intent is a violation of due process. This decision invalidated any Washington sentence for simple possession of a controlled substance.

Forensic Navigators. When an individual is referred by the court for a competency to stand trial evaluation, or ordered to receive outpatient competency restoration, an impartial forensic navigator may be assigned. Forensic navigators are employed or contracted by the Department of Social and Health Services to assist an individual in accessing treatment and other support services and to collect information about the individual for the prosecuting attorney, defense attorney, and court.

**Summary of Bill:** A personal use amount of a controlled substance is defined as an amount that does not exceed:

- 40 units of methadone;

- 40 pills of oxycodone;
- one gram of heroin;
- one gram or five pills of MDMA;
- two grams of cocaine;
- two grams of methamphetamine;
- 40 units of LSD; or
- 12 grams of psilocybin.

It is unlawful for a person to knowingly possess more than a personal use amount of a controlled substance or counterfeit substance. It is unlawful for a person under the age of 21 to knowingly possess a controlled substance or counterfeit substance of any amount. Unless the use is subject to a valid prescription, it is unlawful for a person to knowingly possess more than a personal use amount, or for a person under the age of 21 to knowingly possess any amount, of a legend drug. A person who possesses a personal use amount of a controlled substance, counterfeit substance, or legend drug may be referred to a forensic navigator for evaluation and services.

A person under the age of 21 who is guilty of possession of a controlled substance is guilty of a gross misdemeanor, previously a class C felony.

Using or manufacturing drug paraphernalia is not illegal to the extent the drug paraphernalia is for personal use. A class 3 civil infraction is established for opening a package or using a controlled substance or counterfeit substance in view of the general public or a public place. A class 3 civil infraction is subject to a maximum penalty of \$125.

A forensic navigator may be used as a resource for law enforcement to serve as a care coordinator for substance use disorder resources. When a forensic navigator receives information alleging a person was in possession of a personal use amount of a controlled substance, counterfeit substance, or legend drug, the forensic navigator must attempt to contact the individual to provide resources for evaluation, treatment, recovery, and support.

The *State v. Blake* reimbursement account is created in the state treasury. All receipts from the new class 3 civil infraction created by this act must be deposited into the account. Moneys in the account may be spent only after appropriation. Expenditures must be used for state and local government costs resulting from the Supreme Court's decision in *State v. Blake*.

**Appropriation:** The bill contains a section or sections to limit implementation to the availability of amounts appropriated for that specific purpose.

**Fiscal Note:** Requested on March 24,2021.

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

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:** PRO: The war on drugs has harmed families of color for decades and having a minimum statewide standard for treatment of possession cases will be beneficial. The current drug court system is punitive and can create financial hardships. Having a treatment-based system in place will be a better path forward. Prisons and jails do not do anything to support substance use treatment. Going to jail to detox for a few days and then getting turned back out on the streets does nothing to help people. Substance use disorder is a medical and mental health issue and should be addressed as such in a therapeutic manner versus punitive. Drugs will always be around and investments in community-based treatment options should be considered. Generally support the decriminalization of personal use amounts in the bill but it does not fully solve the issue. It is important to not rush and really dig into what is needed for all communities across Washington.

CON: This bill is not a fix. It essentially is the legalization of the distribution of legend drugs and victimizes users. This bill does not stop distribution and there are major concerns about the personal use amount specifically for Fentanyl. The criminalization of drugs does not work. The current laws are designed to hurt people of color. The legal system is not an approach to treating people with substance use disorders. The issue of substance use disorder should be treated as a public health issue and not a criminal issue. The use of Forensic Navigators does not seem appropriate since they are tied to the courts systems and the bill does not establish criteria for the role of the navigators. Creating a gross misdemeanor for individuals under the age of 21 creates a local financial burden.

OTHER: Support maintaining the class C felony for possession and support the juvenile charges but perhaps requiring a mandatory diversion may be better than establishing a personal use amount. Recriminalization to felony level may be better than what is currently proposed in the bill because felonies can be good leverage to get people into treatment. Most possession charges are currently diverted to drug courts, and this bill does not address that, perhaps personal use amounts could just be a misdemeanor. The bill should address a centralized state portal for refunding of LFOs and other expenditure related to the Blake decision. Some areas lack treatment options and it is unclear what the role of the state is in regard to funding. A stable identified funding source is needed for success as well as capital budget investments in community treatment centers. The creation of the account in the bill does not make clear what the Legislature's intent is in regard to supporting concerns about the Blake decision, and LFOs may not be the best way to fund an account since it can be an unreliable revenue source.

**Persons Testifying:** PRO: Senator Manka Dhingra, Prime Sponsor; Lisa Daugaard, Public Defender Association/Care First Coalition; Jerri Clark, MOMI—Mothers of the Mentally Ill; Stephen Eisler, Washington Recovery Alliance; Kurtis Robinson, I Did The Time/Revive Center For Returning Citizens; Tatiana Quintana, Decrim Nature Seattle; Victor Mendez; Malika Lamont, VOCAL-WA/LEAD Washington Expansion; Arthur Rizer, Civil

Survival; Carmen Pacheco-Jones, Health & Justice Recovery Alliance; Sybill Hyppolite, Washington State Labor Council, AFL-CIO; Stacy Hamlin, Olympia Bupe Clinic—Capital Recovery Center.

CON: Brian Luedtke, Washington State Narcotics Investigators Association; Willy Jefferson Jr., Washington Association for Criminal Defense Lawyers—Washington Defender Association; Darya Farivar, Disability Rights Washington; Dana Parnello, Deputy Mayor, City of Maple Valley; Erin Weaver, Council Member, City of Maple Valley; Patricia Taraday, City Attorney, City of Maple Valley.

OTHER: Sharon Swanson, Association of Washington Cities; Michele Walker, City of Kent; James McMahan, Washington Association of Sheriffs & Police Chiefs; Juliana Roe, Washington State Association of Counties; Ruben Alvarado, City of Pasco, Councilmember; Judge J Wesley Saint Clair, Sentencing Guidelines Commission; Russell Brown, Washington Association of Prosecuting Attorneys; Andy Miller, Benton County Prosecutor; Mary Robnett, Pierce County Prosecutor; Greg Banks, Island County; Emijah Smith.

**Persons Signed In To Testify But Not Testifying:** PRO: Bob Cooper, Washington Association of Drug Courts; Lucinda Grande, Olympia Bupe Clinic—Capital Recovery Center; Everett Maroon, Blue Mountain Heart to Heart.

CON: C Davis, Washingtonians to Recall Inslee; Anita Khandelwal, King County Department of Public Defense; Anne Anderson, Toyer Strategic Advisors—Washington State Narcotics Investigators Association; Laurie Layne.

OTHER: Laura Van Tosh, Self employed; Celia Jackson, King County; Sophia McSherry, Washington State Office of Public Defense; Carollynn Zimmers, Concerned Citizen; Antonio Ginatta, Columbia Legal Services.