

Blake issue | Senate Bill 5536 | Drug possession, paraphernalia and treatment

Background

- In February 2021, the state Supreme Court ruled in [State v. Blake](#) that Washington’s felony drug possession statute was unconstitutional because it criminalized possession even when a person did not knowingly have drugs.
- Two months after the Blake decision, [Senate Bill 5476](#) was passed. The measure reduced the criminal penalty for possessing an illegal drug like fentanyl, heroin and methamphetamine from a felony to a misdemeanor.
 - This provision expires on July 1, 2023.
 - There will be no criminal penalty in state law for possession of drugs unless the Legislature acts.
 - In the absence of a state law, local jurisdictions could adopt local ordinances.

Messaging: Accountability and compassion are needed to address our state’s drug crisis

- Our state is experiencing a drug crisis that began many years before the Blake decision in 2021.
- The current approach is failing. Individuals and communities need help.
 - People are tragically dying on our streets, families are being devastated and crime is running rampant.
- We are playing catch up because of the failed policies and inaction of Democrats and Gov. Jay Inslee.
 - The drug crisis is so bad the Department of Health created an Opioid and Drug Overdose Data [dashboard](#).
- Our state needs both policies and infrastructure to help people break free of drug addiction and save lives.
- State policies need to be adaptive and flexible for our communities, treatment providers and criminal justice system.
 - These policies should have **accountability** for repeat offenders and **compassion** for those seeking treatment.
 - The operating budget, capital budget and Senate Bill 5536 include substantial investments in substance abuse services, housing programs and diversion services. But it will take time for the infrastructure and workforce development to catch up with the policies.

What happened on the last day of the 2023 legislative session

- House Republicans united in opposition and joined 15 House Democrats to vote down (43-55) [Senate Bill 5536](#).
- Democrats are in the majority and had two years to address this issue. They waited until day 105 and failed.
- House Republicans made their policy priorities clear before, during and after the debate on Senate Bill 5536.
 - Floor [debate](#) | [Letter](#) to the governor and legislative leaders | [Op-ed](#) in the Seattle Times

Key issues and why House Republicans opposed Senate Bill 5536 – [conference committee report](#)

- It would not have helped people recover from drug addiction. In fact, it would have perpetuated problems.
 - It would have led to more substance abuse, more tragedies, more homelessness, and less local control.
- While it would have made drug possession a gross misdemeanor on paper, its lenient jail-diversion process would have led to a revolving door of offenses in practice – without the necessary treatment, supervision or accountability.
- It would have preempted (prevented) local governments from passing local restrictions on drug paraphernalia.
- It would have mixed individuals in recovery with individuals actively using drugs in recovery residences.
- It would have allowed children to be present in new health engagement hubs where adults actively use drugs.
- It would have allowed the siting of opioid treatment facilities in communities without requiring a public hearing.

What happened on the key issues in the [final version](#) of Senate Bill 5536 – special session

Establishing the crimes of “knowingly possesses” and “knowingly uses in a public place.”

- Republicans wanted and created a definition of use.
- **Result:** There is a crime for knowing possession and knowing use in a public space.

Criminal penalties and diversion processes

- Republicans wanted to increase criminal penalties to a gross misdemeanor or felony. We wanted to limit 180-day maximum to the first two convictions, with third and subsequent convictions reverting to existing state laws on a gross misdemeanor with a maximum of 364 days.

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- **Result:** The bill increases criminal penalties to a gross misdemeanor. It caps the maximum penalty for possession or public use at 180 days in jail for the first two convictions and 364 days for the third and subsequent convictions. In addition:
 - Greater prosecutorial control of subsequent diversions to hold criminals accountable.
 - Flexibility to the court and prosecutor to fashion appropriate consequences for knowing possession, knowing use in a public space, and allows for charges of other crimes in addition to possession and use crimes.

Drug paraphernalia

- Republicans wanted local governments and communities to have more control on drug paraphernalia policies.
- **Result:** The bill allows cities, towns and counties to enact laws/ordinances “relating to the establishment or regulation of harm reduction services concerning drug paraphernalia.”

Recovery residences

- Republicans wanted individuals seeking treatment in recovery residences to be separated from individuals who are actively using drugs.
- **Result:** The bill removes requirements that recovery residences have space for those who are actively using drugs.

Health engagement hubs

- Republicans wanted assurance children would not be present at health engagement hubs when adults are actively using drugs.
- **Result:** The bill removes the provision health engagement hubs are intended to be open to youth as well as adults.

Siting opioid treatment facilities

- Republicans wanted mandatory public hearings so members of the communities have a voice in the decisions.
- **Result:** The bill requires the Department of Health to “provide public notice to all appropriate media outlets in the community in which the facility is proposed to be located that states the applicant is proposing a facility in the community.” Local communities are not restricted from holding mandatory public hearings upon notices.

Reasons to support final version of Senate Bill 5536 in the special session

- Crimes of knowing possession and knowing use in a public place of a controlled or counterfeit substance will now be gross misdemeanors. This is stronger than the current criminal penalties of a misdemeanor.
- It requires prosecutor consent in motions for a pretrial diversion.
- It establishes new treatment and recovery programs and services and modifies the scope of existing programs and services. But it will take time for the infrastructure and workforce development to catch up with the policies.
- It does not preempt local governments from enacting laws/ordinance relating to the establishment or regulation of harm reduction services concerning drug paraphernalia.
- It gives law enforcement a clear path to engage criminal behavior and people facing drug addiction.
- Democrats reached out to Republicans to negotiate. This is how the development of public policy should work.
 - Republicans improved this bill. Those battling drug addiction and our communities will be better off for it.
 - Drug addiction is not partisan. We will need more bipartisan work in the future.

Reasons to oppose final version of Senate Bill 5536 in the special session

- The infrastructure and workforce development that are needed to make this bill work are not in place to ensure the envisioned treatment-based system is successful.
- This bill is not strong enough, including the criminal penalties and sentencing.
 - Crimes of knowing possession and knowing use in a public place should be felonies.
 - Court procedures established in the bill are too prescriptive and do not provide prosecutors and courts enough flexibility.
 - It will take too long to enforce the gross misdemeanor. Many individuals will refuse opportunities for treatment, delay treatment and game the system.
- Republicans moved this bill in the right direction. But more bipartisan work on this issue will be needed in the future.

Comparisons: Senate Bill 5536 | Conference committee report vs. special session bill

Issue/Section(s)	Conference Committee	Special Session
Establishing crime of "knowingly possesses and use" a controlled substance or counterfeit substance (Sec. 1, 2 & 4)	Unlawful for any person to: (a) Create or deliver a controlled substance; (b) Knowingly possess a controlled substance; or (c) Knowing possess and use a controlled substance in a public place by injection, inhalation, ingestion, or any other means.	Separates knowing possession and knowing use in a public place and adds the following definition of use: "to introduce the substance into the human body by injection, inhalation, ingestion, or any other means."
Criminal Penalties and Sentencing (Sec. 1, 2 & 4)	Establishes crimes noted above as gross misdemeanor . There was no maximum jail time or fine in bill; therefore, sentencing would be according to existing law/sentencing guidelines for gross misdemeanor (i.e. max of 364 days). <i>Note: Bill as passed by Senate did include 364 days and \$5,000 max.</i>	Maintains gross misdemeanor, but caps max penalty for possession or public use at 180 days in jail for first two convictions . Third and subsequent convictions would revert to existing state laws on gross misdemeanor max of 364 days. Also, max fine of \$1,000 for all convictions. Prohibits charging both possession and public use for the same course of conduct. Does not prohibit charging other crimes committed during the knowing possession or knowing possession and use in a public space.
Paraphernalia Preemption (Sec. 8)	State preemption for the entire field of drug paraphernalia, and can only adopt local laws/ordinances relating to drug paraphernalia that are specifically authorized by state law and consistent with RCW 69.50 (Controlled Substances Act).	Adds exception to state preemption related to drug paraphernalia to allow cities, counties, towns and other municipalities to enact laws/ordinances "relating to the establishment or regulation of harm reduction services concerning drug paraphernalia."
Prosecutor Consent for Diversion (Sec. 9)	No prosecutor consent requirement.	Requires prosecutor consent in motions for a pretrial diversion.
Public Hearing for Opioid Treatment Center Siting (Sec. 14)	Removes requirement to hold one public hearing in the community in which the facility is proposed to be located.	Requires DOH to "provide public notice to all appropriate media outlets in the community in which the facility is proposed to be located that states the applicant is proposing a facility in the community." Does not restrict local municipalities and counties from creating mandatory public hearing ordinances if notice is received of the siting of a facility in the community.
Recovery Residences (Sec. 17)	Requires that residences have space for those who have returned to using and need place to stay while negotiating return to stable housing.	Removes requirement.
Youth at Health Engagement Hubs (Sec. 26)	Includes provision that health engagement hubs are intended to be open to youth as well as adults.	Removes requirement.