SEATTLE CITY COUNCIL
CENTRAL STAFF

June 1, 2023

M E M O R A N D U M

To: Seattle City Council
From: Asha Venkataraman, Analyst, Greg Doss, Community Safety & Health Team Lead
Subject: CB 120586: Knowing possession or use in a public place of unprescribed or illegal controlled substances

On June 6, 2023, the City Council will discuss and possibly vote on Council Bill (CB) 120586, co-sponsored by Councilmembers Nelson and Pedersen, which would adopt by reference portions of a newly passed state law to make a gross misdemeanor the knowing possession or use in a public place of unprescribed or illegal controlled substances. State law also (1) establishes for first or second convictions a penalty that is lower than the maximum statutory penalty; and (2) encourages diversion and treatment for charged individuals. Incorporation of the state law would allow the City Attorney's Office (CAO) to prosecute these cases. This memo provides background, a description of the bill, issues for the Council's consideration, and potential options.

The sponsors' intent in introducing this legislation is to empower the Seattle City Attorney to work with the Seattle Police Department (SPD) to interrupt the upstream supply of highly addictive and deadly drugs coming into our community; curb the street sales and use of these drugs; and increase on-demand treatment options - these three critical activities allowing the city to address public safety, disorder and health risks associated with public drug use.

Background

Until February 2021, Washington State criminalized as a felony the possession of an unprescribed or illegal controlled substance. Because felonies are not within the jurisdiction of CAO, the City was not involved in prosecution or adjudication of possession crimes. Public use of a controlled substance was not a crime at the felony or misdemeanor levels, but as possession encompasses use, could be prosecuted as a subset of a felony possession charge.

The Washington Supreme Court ruled the felony possession law unconstitutional in *State v. Blake*, 197 Wash.2d 170 (2021), on the grounds that it criminalized "unknowing" possession, which exceeded the State's police power and violated the due process clauses of the state and federal constitution. As a result, crimes under this statute could no longer be prosecuted. In response, in May 2021, the Washington State Legislature passed Engrossed Senate Bill (ESB) 5476. Among other things, ESB 5476 made knowing possession of controlled substances without a proper prescription or as allowed by law a simple misdemeanor; required that law enforcement refer to assessment and treatment for an individual's first two arrests; and encouraged prosecutors to divert cases. The City did not adopt this temporary measure into its code, leaving the King County Prosecuting Attorney's Office (KCPAO) to prosecute these simple misdemeanors Countywide.

ESB 5476 will expire on July 1, 2023. The state legislature did not pass a replacement bill before the end of the 2023 legislative session on April 23, 2023. During the May 2023 special legislative session, the Legislature passed and the Governor signed the second engrossed second substitute Senate bill 5536 (2E2SSB 5536), effective July 1, 2023.

State law mandates the criminal justice responsibilities of counties, cities, and towns. RCW 39.34.180 says that "Each county, city, and town is responsible for the prosecution, adjudication, sentencing, and incarceration of misdemeanor and gross misdemeanor offense committed by adults in their respective jurisdictions" and that each county, city, and town must carry out the responsibilities through their own courts and staff or by entering into contract or interlocal agreement.

State Legislation: 2E2SSB 5536

Among other things,[1] 2E2SSB 5536 amends the felony possession law in RCW 69.50.4013 to make knowing possession or use in a public place of unprescribed or illegal controlled substances a gross misdemeanor. 2E2SSB 5536 also provides that no individual can be charged for both possession and use relating to the same conduct. The bill also adds definitions of "public place" and "use a controlled substance."

For a first or second offense, the maximum penalty is imprisonment for up to 180 days or a maximum fine of $1,000, or both. However, if an individual has two or more prior convictions for knowing possession or use after July 1, 2023, the maximum penalty can increase to 364 days, and can be combined with a maximum fine of $1,000.

Law enforcement officers are encouraged to offer referrals to assessment and services instead of jail booking and referral to prosecutors. These services may include arrest and jail alternative programs, law enforcement assisted diversion programs, or the recovery navigator program. Prosecutors are encouraged to divert cases for assessment, treatment, or services.

2ES2SSB 5536 creates two new sections of RCW 69.50. The first describes pre-trial diversion and the second states that in sentencing, the court is encouraged to use resolution of the charges or supervision that "suit the circumstances of the defendant's situation and advance stabilization, recovery, crime reduction, and justice." Please see Attachment A for a longer description of the pretrial diversion section.

[1] CB 120586 only incorporates some, but not all, sections of the state bill, which are the focus of this memo. A description of all the provisions of the state bill can be found in a final bill report, and differences from previous versions can be found in a side-by-side comparison.

CB 120586

This legislation would adopt the provisions described in the previous section (RCW 69.50.4013(1), (2), (7), and (8) and the new RCW 69.50 sections created in 2E2SSB 5536, sections 9 and 10) in the Seattle Municipal Code by reference. In addition, it would also adopt the following existing state law sections:

- RCW 69.50.101: definitions section (except cannabis is not included as part of "controlled substances"); and
- RCW 69.50.204, .206, .208, .210, .212: controlled substances included in Schedules I-V (except cannabis is not included in Schedule I).[2]

CB 120586 does not adopt the remaining provisions in 2ESB 5536 into the Seattle Municipal Code.[3]

Analysis

In passing 2E2SSB 5536, the State Legislature adopted a policy to criminalize knowing possession or use in a public place of unprescribed or illegal controlled substances as a gross misdemeanor. The Council does not have the legislative authority to prescribe different penalties from what the State Legislature has decided, nor can it compel the City Attorney or Chief of Police to use diversion. The decision in front of the Council is limited to whether to adopt the RCW provision into the Seattle Municipal Code to give CAO the authority to prosecute. The following sections compare enforcement as between KCPAO and CAO.

Prosecution

Passing CB 120586 will be the first time the City has had the choice to criminalize knowing possession or use of illegal or controlled substances at the municipal level.[4] For the City to prosecute these cases represents a shift in how it approaches drug use and possession, as it is both a shift for drug possession to be criminalized at the misdemeanor level (post-*Blake)* and for the City to become involved in drug possession prosecutions.

If the City does not pass CB 120586 to include the provisions of 2E2SSB 5536 in the Seattle Municipal Code or does not pass the bill to be effective by July 1, 2023, SPD will still have the authority to arrest, but CAO will not have authority to prosecute cases.[5] In this circumstance KCPAO would have the jurisdiction to prosecute gross misdemeanors that occur inside city limits. As previously mentioned, KCPAO currently has the jurisdiction to prosecute simple misdemeanors under ESB 5476.

[2] Please see Attachment B for a description of the schedules.
[3] Sponsoring Councilmembers Pedersen and Nelson indicate that CB 120586 as proposed would incorporate only select provisions because some of the other provisions are felonies, over which the City has no jurisdiction; it is work that SPD and CAO are not focused upon; and some are provisions related to cannabis possession, which is outside of the intended focus on harmful illegal drugs such as fentanyl and methamphetamines.
[4] While the City previously criminalized drug traffic loitering, there were so few cases prosecuted that the City repealed the law in 2020 in Ordinance 126098.
[5] The Seattle Municipal Court would have the jurisdiction to handle these cases regardless of the filing authority. While KCPAO could file RCW cases in Seattle Municipal Court, this is not a current practice.

There is no definite way to determine how many cases either prosecutorial authority would charge, and specifically, how many cases KCPAO would charge as compared to the CAO. However, due in part to low referral counts,[6] King County's recent focus has been on drug distribution cases rather than simple possession cases—for example, during the effective period of ESB 5476, King County indicated that KCPAO charged only two cases of simple possession Countywide, both associated with felonies.[7] In addition, due to King County's capacity, caseloads, and focus on felony level cases,[8] the preference of current King County Prosecutor is that the City take responsibility for prosecution of gross misdemeanor possession and use cases in Seattle. The King County Prosecutor has indicated that:

> *"It does not make sense to have Seattle's misdemeanor work split between the Seattle City Attorney's Office and PAO. This approach would be cumbersome, impractical, and cause significant confusion."* Additionally, that "*The PAO does not have the staff or resources necessary to take on a new body of misdemeanor and gross misdemeanor cases." And "if the PAO chose to dedicate new resources to take on a new body of misdemeanor and gross misdemeanor cases, hiring and onboarding is a lengthy process. The City Attorney's Office is better equipped to handle these cases immediately with available and offered resources if the Seattle City Council approves the necessary ordinance."*

CAO has indicated that it has not yet developed any policies under which it would decline to file charges (e.g., threshold amounts), only that it would not file charges for trace amounts of drugs. The City Attorney has indicated that the City should prosecute both dealers and users.[9] Given these indications, it may be reasonable to conclude that CAO would prosecute more cases than KCPAO, should the latter be charged with that authority. But CAO has not explicitly stated how they would act upon the authority to charge knowing possession or use of illegal or controlled substances. CAO has not provided clarity regarding: (1) volume of cases they anticipate pursuing; (2) the resources they would need to expend in pursuit of these cases; (3) the diversion opportunities they would make available to those charged; nor (4) which communities would be impacted by or the focus of the CAO.

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[6] The Seattle Police Department (SPD) and other law enforcement agencies have indicated that tracking the number of drug arrests proved impractical and that enforcement of the temporary law was difficult. This may have affected how many cases were referred for prosecution.

[7] KCPAO provided the following breakout of referrals containing one or more misdemeanor possession counts: 21 (2021), 61, (2022) 9, (2023). KCPAO staff indicated that the cases were potentially miscoded by officers and were actually filed as fentanyl possession with intent to deliver. Two cases were filed under the misdemeanor possession law, each of which was also tied to a felony case.

[8] The King County Prosecuting Attorney's Office indicates that it "prosecutes drug dealers because this behavior is illegal and causes great harm to individuals and to communities. We file more than 30 charges, on average, each month, and nearly 70% of those cases involve fentanyl or methamphetamine. While filing these types of cases provides necessary accountability to those who prey upon addicts and other vulnerable individuals, it does not provide necessary treatment to those who need it, nor does it fully address the needs of our communities."

[9] *See* Sarah Grace Taylor, "Seattle city attorney wants to prosecute drug cases after state law passes," Seattle Times (May 19, 2023), *available at* https://www.seattletimes.com/seattle-news/politics/seattle-city-attorney-wants-to-prosecute-drug-cases-after-state-law-passes/.

Law Enforcement

Seattle Municipal Court indicates that case filings are increasing back to pre-pandemic levels. Its preliminary estimate of referrals from SPD under the new state legislation is between 700 and 870, based on historical filings before the COVID-19 pandemic.[10] It is unclear whether referrals will increase or decrease from the estimated range, though there are several factors that may have an effect.

First, the number of referrals may differ based on the number of officers, of which there were more in 2019 than at present. Second, while law enforcement may find enforcement easier than it was under ESB 5476, arrests can also depend on the filing priorities of the prosecutor, both jurisdictionally and as relates to the official elected to office. Third, SPD has indicated that it believes arresting individuals on these charges provides a meaningful opportunity to divert rather than default to jail.

If SPD diverts arrested individuals rather than referring cases for prosecution, it would affect how many cases a prosecutor could consider for charging. However, given that 2E2SSB 5536 states that officers are "encouraged to offer referrals to assessment and services instead of jail booking and referral to prosecutors" but does not require it, how many cases would be diverted is unclear. Arrest or diversion would be within the discretion of each officer. The availability of programs for officers to refer to is also unclear. In the short-term, while King County jail is under booking restrictions, officers may be more inclined to divert or cite without arrest. If booking restrictions are lifted, it is possible that more arrests will be referred for charging. All of these factors could affect how many more or fewer arrests will result in referral for prosecution.

Diversion

The new state law (2E2SSB 5536) encourages: (1) prosecutors to divert encompassed cases for assessment, treatment, or other services; and (2) police, in lieu of jail booking and referral to the prosecutor, to offer a referral to assessment and services provided in lieu of legal system involvement, which may include, but are not limited to, arrest and jail alternative programs, law enforcement assisted diversion programs and recovery navigator programs.

If CB 120586 passes, and the City prosecutes these cases, Seattle Municipal Court will hear the cases. Given that the City has not prosecuted drug cases before, it may need to develop further infrastructure for both prosecution and diversion. For example, the City does not currently have a drug court like King County does, so it may need to develop such a court, or other therapeutic

[10] The state's judicial impact fiscal note estimates that enforcing sections of the state bill would mean an increase of in caseload of 12,000 cases statewide. Given that Seattle has about ten percent of the State's population, a rough calculation indicates that if Seattle were adopting all provisions of 2E2SSB 5536, it would increase caseload by a maximum of 1,200 cases. Because CB 120586 only adopts some portions of the state bill, a proportional decrease might indicate a caseload closer to Seattle Municipal Court's referral estimates.

courts. The city does, however, maintain a longstanding relationship with the LEAD program (Let Everyone Advance with Dignity), which helps to coordinate legal system involvement to maximize LEAD participants and community health and safety. This program could be brought to scale to meet the increased demand associated with any increased referrals.

While King County has preexisting infrastructure to handle drug cases and diversion as well as responsibility for behavioral health programs, the City does not receive commensurate levels of funding such as MIDD or levy funds, and County programs are not required to accept referrals from the City. Additionally, KCPAO already works closely with the Department of Community and Health Services for diversion programs. Building out the needed infrastructure to be able to address root causes of these issues and get individuals into treatment and services may require time and resources.

Finally, the preclusion from Community Court for those who are prosecuted; CAO's withdrawal from Community Court as of May 26, 2023; will have impacts on those who would have received specialized treatment in lieu of traditional legal system involvement.

Fiscal Responsibility and Impact

The number of cases charged would be the primary driver of costs, and the decision whether to charge a case lies within the discretion of the prosecuting authority. The more cases charged, the more costs are likely to increase. CB 120586's summary and fiscal note states that "[t]he legislation will increase the number of crimes filed in Municipal Court. At a certain point, the City Attorney's Office, the Municipal Court, and the contract [sic] Public Defenders (King County Office of Public Defense) may need additional resources to process the increased number of cases." If the County were prosecuting, KCPAO and the King County District Court would be the parties needing additional resources, funded by the City.

The state's judicial impact fiscal note for 2E2SSB 5536 states that "impact to the courts is difficult to accurately estimate. This judicial impact note makes a best estimate of the number of cases that would shift from superior courts to courts of limited jurisdiction based upon superior court caseload data." In creating an estimate, the fiscal note accounts for four types of additional impact to courts: cost of additional cases, cost of additional pretrial diversion hearings per case, cost of pretrial diversion programs, and cost of post sentencing compliance hearing. It states that "cases are expected to take more court time because additional hearings would be needed in each case."

If CB 120586 does not pass, or for whatever period after July 1, 2023, in which CAO does not have jurisdiction, King County would have the authority to charge these cases. RCW 39.34.180 makes cities fiscally responsible for prosecution, adjudication, sentencing, and incarceration of

misdemeanor and gross misdemeanor offenses.[11] In practice, CAO indicates that KCPAO currently handles a small number of cases that the City would otherwise be responsible for prosecuting, for example, when CAO is conflicted out of representation or for certain RCW crimes not adopted into the Seattle Municipal Code (hazing cases under RCW 28B.10.901 and unauthorized receipt of telephone records under RCW 9.26A.140(1)(d)).

If the City does not give the CAO and Municipal court the authority to prosecute and adjudicate these cases, the City remains fiscally responsible and King County could compel the City to take responsibility for the cost of those cases in some way, including, but not limited to, a new interlocal agreement, direct fiscal reimbursement, or adjustment of other contracts the City and County hold in many other areas of partnership.

King County has indicated it does not have sufficient resources to take on a large volume of cases in District Court on behalf of the City. The City and County have never entered an interlocal for the purposes of prosecution of misdemeanors or gross misdemeanors before and it is not clear that the County would agree to one for this purpose. It may take a significant amount of time to negotiate and agree on an interlocal agreement, for King County to receive additional resources, hire appropriate personnel and build out infrastructure for these cases, and figure out how to align the practice of splitting out charges between the City and County.

Lastly, if arrests substantially affect average daily population (ADP), once booking restrictions are lifted, there could be a potential increase to the amount of the City's jail contract with King County.

Racial Equity Impacts

The fiscal note for CB 120586 states that "[t]his legislation may have implications for the Race and Social Justice Initiative" but does not provide any further analysis or indicate that a racial equity toolkit or other racial equity analysis was conducted on this policy shift. CAO indicated that no racial equity toolkit or other analysis had been completed. It is well established that the criminal legal system disproportionately impacts communities of color, especially Black and Indigenous communities. In general, the state's decision to increase criminalization of the knowing possession or use in a public place of unprescribed or illegal controlled substances from a simple to a gross misdemeanor will have disproportionate impacts on those communities. As related to enforcement, the more cases that are prosecuted by either the City or County prosecutors, the more likely it is that communities of color will experience disproportionate impacts. Given the shortage of substance use treatment and services, even if parties in the criminal legal system wanted to divert cases, there may not be anywhere to divert.

[11] *See City of Auburn v. Gauntt*, 174 Wn.2d 321 (2012) (holding that "[r]ead in context, the word 'responsible' in RCW 39.34.180(1) refers only to the fiscal responsibility for the prosecution of misdemeanor offenses in respective jurisdictions. It does not confer executive authority on municipalities to prosecute violations of state law."

In addition, the Vera Institute of Justice has found "substantial evidence shows that incarceration is associated with an increased risk of overdose death due to a loss of tolerance to opioids, limited access to harm reduction and treatment services, and disruptions in health care and social support during and after periods of incarceration."[12] It is Black and Indigenous communities, as well as other communities of color who suffer disproportionately from the harms of the criminal legal system and lack of access to health care, and Black and Latinx individuals who are disproportionately represented in jails and prisons, leaving these populations subject to the harms of criminalizing drug use and possession.[13]

Attachments

A. Pre-trial Diversion
B. Drug Schedules

cc: Esther Handy, Director
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[12] Taylor, A., Miller, C., Tan de Bibiana, J., Beck, Jackson, *Overdose Deaths and Jail Incarceration, available at* https://www.vera.org/publications/overdose-deaths-and-jail-incarceration/national-trends-and-racial-disparities.
[13] *Id.*

Attachment A: Section 9 of 2E2SSB 5536 – Pretrial Diversion

If the prosecuting attorney consents, a defendant can try to resolve their charges through therapeutic courts or other alternatives to prosecution. The defendant, prosecutor, or court may resolve these charges through alternative resolution or supervision that "suit the circumstances of the defendant's situation and advance stabilization, recovery, crime reduction, and justice."

For jurisdictions with arrest and jail alternative programs, law enforcement assisted diversion programs, or the recovery navigator program, a defendant can make a motion to participate in pretrial diversion and waive their right to a speedy trial. The court's ability to grant the motion is contingent on the prosecutor's agreement to diversion, which the bill strongly encourages, and is described as follows:

- The court must grant the motion, continue the hearing, and refer the defendant to pre-trial diversion if the defendant is only charged with a violation of specific enumerated crimes,[1] and has not been convicted of any other offenses after the effective date of the bill; or
- The court may grant the motion, continue the hearing, and refer the defendant to pre-trial diversion if the defendant does not meet the circumstances described in the first bullet.

The prosecutor may also divert additional charges related to substance use disorder for nonfelony offenses that are not crimes against persons.

Before granting a motion for pre-trial diversion, the court must inform the defendant and their counsel about the following:

- All procedures associated with pre-trial diversion;
- Roles and authority of probation, the prosecutor, the court, and the diversion programs;
- The court can grant pre-trial diversion related to the specific enumerated offenses if the defendant pleads not guilty, waives the right to a speedy trial, and upon completion of diversion, and motion of the defendant, prosecuting attorney, court, or probation department, the court must dismiss the charges;
- If the defendant has not made substantial progress with treatment or services provided that are appropriate to the defendant's circumstances or, if applicable, community service, the prosecuting attorney may make a motion to terminate pretrial diversion and schedule further proceedings;

[1] RCW 69.50.4011(1)(b) or (c) (knowing use in a public place of counterfeit substances or knowing possession of counterfeit substances), 69.50.4013 (knowing use in a public place of controlled substances without a proper prescription or knowing possession of controlled substances without a proper prescription), 69.50.4014 (knowing possession of 40 grams or less of cannabis), or 69.41.030(2) (b) or (c) (knowing use in a public place or knowing possession of a legend drug without proper medical authorization). Seattle would only prosecute crimes pursuant to RCW 69.50.4013(1), (2), (7), and (8).

- Criminal record retention and disposition resulting from participation in pretrial diversion and the defendant's rights relative to answering questions about his or her arrest and pretrial diversion following successful completion; and
- Under federal law it is unlawful for any person who is an unlawful user of or addicted to any controlled substance to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

If the court does grant the motion for pretrial diversion, the appropriate diversion program must provide the court with written confirmation of completion of the assessment and whether the defendant will be enrolled or not. Those statements would be sealed by the court, with copied only to the prosecutor, the defendant, and the defendant's counsel, and exempt from disclosure.

Subject to funding availability, pretrial diversion should be at no cost for indigent defendants. If the assessment includes a referral to treatment or services, the service provider must provide the court with regular written status updates on the defendant's progress, at least monthly, on a schedule acceptable to the court. Updates would be sealed by the court, with copies only to the prosecutor, the defendant, and the defendant's counsel, and exempt from disclosure. If the assessment does not include a referral to treatment or services, the defendant must instead complete an amount of community service as determined by the court, maximum 120 hours, to complete pretrial diversion.

Admissions made by defendants in pretrial diversion programs may not be used against them by the prosecution.

Participation in pretrial diversion does not constitute a conviction, stipulation of facts, or admission of guilt for any purpose.

If it appears to the prosecutor from the written status update that the defendant's is not substantially complying with recommended treatment or services, the prosecutor may make a motion to terminate pretrial diversion. In that case, after notice to the defendant, the court must hold a hearing to decide whether to terminate pretrial diversion. Before the hearing, the defendant and defendant's counsel must be advised about the nature of alleged non-compliance and provided discovery for evidence supporting the allegation. At the hearing, the court must consider:

- The nature of the alleged noncompliance; and
- Any mitigating circumstances such as defendant's efforts and due diligence, the availability of services in the area, and the treatment and services offered to the defendant.

If the court finds substantial noncompliance with recommended treatment or services and terminates pretrial diversion, it must state the reasons in the record and provide the prosecutor, the defendant, and defendant's counsel with a written order.

If the defendant does complete pretrial diversion, the charges must be dismissed. If the assessment recommended treatment or services, completion could include having either 12 months of substantial compliance with progress towards recovery goals as reflected by the written status updates, or successful completion of the recommended treatment or services, whichever occurs first. If the assessment did not include recommended treatment or services, successful completion of community service and submitting proof to the court also qualifies as completion.

Beginning January 1, 2025, diversion programs must submit information about whether pretrial diversion resulted in completion or termination; demographic information about defendants; and other information as deemed appropriate by a health care authority.

Attachment B: Drug schedules

	Potential for abuse?	Currently accepted medical use in treatment in US?	What abuse can lead to	Examples
Schedule I	High	None. And lack accepted safety for use in treatment under medical supervision.	NA	• Heroin • LSD • Mescaline
Schedule II	High	Yes, or currently accepted medical use with severe restrictions	Severe psychological or physical dependence	• Codeine • Cocaine • Methamphetamine
Schedule III	Less than I and II	Yes	Moderate or low physical dependence or high psychological dependence	• Ketamine • Specific dosages of narcotics
Schedule IV	Low, relative to III	Yes	Limited physical dependence or psychological dependence relative to the substances included in Schedule III	• Alprazolam (brand name Xanax) • Clonazepam (brand name Klonopin)
Schedule V	Low, relative to IV	Yes	Limited physical dependence or psychological dependence relative to the substances included in Schedule IV	• Specific dosages of narcotics