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**DRUG LAWS IN WISCONSIN:
OFFENSES AND PENALTIES**

Information Memorandum 92-6

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Information Memorandum 92-6*

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OFFENSES AND PENALTIES**

INTRODUCTION

This Information Memorandum sets forth the major offenses, and penalties for those offenses, under the Controlled Substances Act [ch. 161, Stats.] and related provisions. The Memorandum describes: (1) current prohibitions relating to manufacture, delivery, possession with intent to deliver and possession of controlled substances; (2) controlled substances violations and sanctions applicable to children (i.e., persons under 18 years of age); (3) asset seizure and forfeiture for controlled substances violations; (4) offenses and penalties relating to the possession, sale or use of drug paraphernalia, including separate drug paraphernalia sanctions applicable to children; and (5) other miscellaneous offenses and sanctions under ch. 161, Stats., and other statutes.

This Memorandum includes relevant laws enacted through the 1991-92 Legislative Session.

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A. OVERVIEW OF UNIFORM CONTROLLED SUBSTANCES ACT

The primary Wisconsin statutes governing drug-related crimes are contained in ch. 161, Stats., the Uniform Controlled Substances Act. That Act is a uniform state law developed for consideration and possible enactment by the individual states by the National Conference of Commissioners on Uniform State Laws. Chapter 161 is the Uniform Act as amended and enacted in Wisconsin.

1. Classification of Substances

Subchapter II of chapter 161 classifies all controlled substances into five different categories, or "schedules," according to: (a) each substance's potential for abuse; (b) the existence of any accepted medical use for the substance in treatment; and (c) the potential that abuse of the particular substance may lead to psychological or physical dependence.

Schedules I and II include substances which have a high potential for abuse. For example, Schedule I includes lysergic acid diethylamide (LSD), phencyclidine (PCP), heroin and tetrahydrocannabinols (THC, the hallucinogenic contained in marijuana). Examples of substances listed in Schedule II include opium, codeine, morphine, cocaine, methadone and amphetamines. Schedules III, IV and V contain substances with lower potentials for abuse for which there is a currently accepted medical use.

The Wisconsin Controlled Substances Board may add, delete or reschedule substances enumerated in the five schedules, by administrative rule. The statutes direct the Controlled Substances Board to use the following criteria in placing substances in each of the five schedules.

a. Schedule I

- (1) The substance has high potential for abuse; and
- (2) The substance has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision [ss. 161.13 and 161.14, Stats.].

b. Schedule II

- (1) The substance has high potential for abuse;
- (2) The substance has currently accepted medical use in treatment in the United States or currently accepted medical use with severe restrictions; and
- (3) Abuse of the substance may lead to severe psychic or physical dependence [ss. 161.15 and 161.16, Stats.].

c. Schedule III

- (1) The substance has a potential for abuse less than the substances listed in Schedules I and II;
- (2) The substance has currently accepted medical use in treatment in the United States; and
- (3) Abuse of the substance may lead to moderate or low physical dependence or high psychological dependence [ss. 161.17 and 161.18, Stats.].

d. Schedule IV

- (1) The substance has a low potential for abuse relative to substances in Schedule III;
- (2) The substance has currently accepted medical use in treatment in the United States; and
- (3) Abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances in Schedule III [ss. 161.19 and 161.20, Stats.].

e. Schedule V

- (1) The substance has low potential for abuse relative to the controlled substances listed in Schedule IV;
- (2) The substance has currently accepted medical use in treatment in the United States; and
- (3) The substance has limited physical dependence or psychological dependence liability relative to the controlled substances listed in Schedule IV [ss. 161.21 and 161.22, Stats.].

2. General Prohibitions

Subchapter III of chapter 161 generally prohibits the manufacture, distribution, dispensing and use of controlled substances by any person, except:

- a. A person who is registered under federal law to possess, manufacture, distribute, dispense or use the substances in Wisconsin and the person's agents or employees;
- b. A common or contract carrier or warehousekeeper, or employe thereof, whose possession of any controlled substance is in the course of business or employment;
- c. A medical practitioner;
- d. A person to whom controlled substances have been prescribed;

e. A person authorized to use controlled substances in research, instruction and other specialties; or

f. A person who is otherwise authorized to possess such substances under federal law [s. 161.32, Stats.].

3. "Presumptive" Minimums: Court's Authority to Deviate from Mandatory Minimum Sentences

Current law provides that any minimum sentence under ch. 161, Stats., is a "presumptive" minimum. A court may impose a sentence which is less than a "presumptive" minimum or place the person on probation only if it finds that the best interests of the community will be served and the public will not be harmed and if it places its reasons on the record. Thus, the minimum penalties are not, in fact, mandatory minimums, but presumptive minimums [s. 161.438, Stats.].

4. Probation Permitted for Crimes with Mandatory Minimums

Under current law, in general, if a crime is punishable by a mandatory minimum period of imprisonment, the offender is not eligible for probation [s. 973.09 (1), Stats.; State v. Medaugh, 148 Wis. 2d 204, 435 N.W. 2d 269 (Ct. App. 1988)]. However, current law creates an exception to this rule by specifying that, if a person commits a crime that is punishable by a mandatory or presumptive minimum period of imprisonment of one year or less, the court may place the person on probation if the court orders, as a condition of probation, that the person be confined in a county jail or Huber facility for at least the mandatory minimum period. A person confined under this provision is eligible to earn good time [s. 973.09 (1) (d), Stats.].

5. Drug Abuse Program Improvement Surcharge

1987 Wisconsin Act 339 created a surcharge equal to 1/2 of the amount of any fine imposed for the crimes of possession, manufacture, delivery and possession with intent to manufacture or deliver a controlled substance and conspiracy to engage in any of these activities. The surcharges are deposited with the Department of Health and Social Services (DHSS) to be expended on alcohol and other drug abuse prevention, intervention and treatment programs. This provision became effective on April 28, 1988, and applies only to violations occurring after that date [s. 161.41 (5), Stats.].

6. Determining Amount of Controlled Substance for Purpose of Applying Appropriate Penalty

Current law provides that, for the purpose of determining the appropriate penalty where the amount of the controlled substance is significant, the amount includes the weight of the controlled substance together with any compound, mixture, diluent or other substance mixed or combined with

the controlled substance (e.g., sugar). Current law also specifies that the amount of THC (the chemical in marijuana) includes the weight of any marijuana [s. 161.41 (1r), Stats.].

B. PENALTIES FOR THE MANUFACTURE, DELIVERY OR POSSESSION OF CONTROLLED SUBSTANCES

1. Cocaine Offenses

Table 1, below, sets forth the penalty structure for cocaine first offenses, as revised by the Act. For cocaine and other major controlled substances, as described in succeeding sections of this Memorandum, any applicable minimum and maximum fines and minimum and maximum periods of imprisonment are doubled if: (a) it is the person's second or subsequent offense; or (b) the cocaine was distributed by a person 18 years of age or older to a person under 18 years of age who is at least three years his or her junior.

Note that, in the tables in this Memorandum, unless otherwise specified by "may," the penalties cited must be imposed by the court, subject to the concept of "presumptive" minimums described in Section A, 3, above.

TABLE 1

PENALTIES FOR ILLEGAL MANUFACTURE OR DELIVERY OF,
POSSESSION WITH INTENT TO MANUFACTURE OR DELIVER, OR POSSESSION OF COCAINE
[ss. 161.41 (1) (c), (1m) (c) and (3m), Stats.]

OFFENSE	AMOUNT	PENALTY* (FINE/PERIOD OF IMPRISONMENT)**
A. MANUFACTURE OR DELIVERY OF COCAINE	10 grams or less	\$1,000 to \$200,000 (may be imprisoned up to 5 years)
	More than 10 grams but not more than 25 grams	\$1,000 to \$250,000 (6 months to 5 years)
	More than 25 grams but not more than 100 grams	\$1,000 to \$500,000 (1 to 15 years)
	More than 100 grams but not more than 400 grams	\$1,000 to \$500,000 (3 to 15 years)
	More than 400 grams but not more than 800 grams	\$1,000 to \$500,000 (5 to 15 years)
	More than 800 grams	\$25,000 to \$1,000,000 (10 to 30 years)

<i>OFFENSE</i>	<i>AMOUNT</i>	<i>PENALTY* (FINE/PERIOD OF IMPRISONMENT)**</i>
B. POSSESSION OF COCAINE WITH INTENT TO MANUFACTURE OR DELIVER	10 grams or less	May be imprisoned up to 5 years and must be fined \$1,000 to \$100,000
	More than 10 grams but not more than 25 grams	\$1,000 to \$250,000 (6 months to 5 years)
	More than 25 grams but not more than 100 grams	\$1,000 to \$500,000 (1 to 15 years)
	More than 100 grams but not more than 400 grams	\$1,000 to \$500,000 (3 to 15 years)
	More than 400 grams but not more than 800 grams	\$1,000 to \$500,000 (5 to 15 years)
	More than 800 grams	\$25,000 to \$1,000,000 (10 to 30 years)
C. POSSESSION OR ATTEMPTED POSSESSION OF COCAINE	--	\$250 to \$5,000 (<u>may</u> be imprisoned up to one year in county jail)

* Unless otherwise specified, a violator must be fined and imprisoned at least the minimum amounts and periods set forth in the Table (but see Section A, 3, above, on "presumptive" minimums).

** Upon a second or subsequent offense, the minimum and maximum fines and periods of imprisonment are doubled.

2. "Crack" (Cocaine Base) Offenses

Current law establishes a separate penalty structure for offenses involving cocaine base. The penalty structure is shown in Table 2, below.

TABLE 2

PENALTIES FOR ILLEGAL MANUFACTURE OR DELIVERY OF,
 POSSESSION WITH INTENT TO MANUFACTURE OR DELIVER,
 OR POSSESSION OF COCAINE BASE ("CRACK")
 [s. 161.41 (1) (cm), (1m) (cm) and (3m), Stats.]

<i>OFFENSE</i>	<i>AMOUNT</i>	<i>PENALTY* (FINE/PERIOD OF IMPRISONMENT)**</i>
A. MANUFACTURE OR DELIVERY OF COCAINE BASE	3 grams or less	\$1,000 to \$500,000 (1 to 15 years)
	More than 3 grams to 10 grams	\$1,000 to \$500,000 (3 to 15 years)
	More than 10 grams to 40 grams	\$1,000 to \$500,000 (5 to 30 years)
	More than 40 grams	\$25,000 to \$1,000,000 (10 to 30 years)
B. POSSESSION OF COCAINE BASE WITH INTENT TO MANUFACTURE OR DELIVER	3 grams or less	\$1,000 to \$500,000 (1 to 15 years)
	More than 3 grams to 10 grams	\$1,000 to \$500,000 (3 to 15 years)
	More than 10 grams to 40 grams	\$1,000 to \$500,000 (5 to 30 years)
	More than 40 grams	\$25,000 to \$1,000,000 (10 to 30 years)
C. POSSESSION OR ATTEMPTED POSSESSION OF COCAINE BASE	--	\$250 to \$5,000 (<u>may</u> be imprisoned not more than one year in county jail)

* Unless otherwise specified, a violator must be fined and imprisoned at least the minimum amounts and periods set forth in the Table (but see Section A, 3, above, on "presumptive" minimums).

** Upon a second or subsequent offense, the minimum and maximum fines and periods of imprisonment are doubled.

3. Heroin, PCP, Amphetamine and Methamphetamine Offenses

Under current law, whoever illegally manufactures or delivers, or possesses with intent to manufacture or deliver, heroin, PCP, amphetamine or methamphetamine is subject to penalties that vary depending upon the amount of the substance involved. Current law establishes four separate penalty ranges for offenses involving more than 10 grams of heroin, PCP, amphetamine or methamphetamine. The penalty ranges are set forth in Table 3, below.

TABLE 3

PENALTIES FOR ILLEGAL MANUFACTURE AND DELIVERY OF,
 POSSESSION WITH INTENT TO MANUFACTURE OR DELIVER,
 OR POSSESSION OF HEROIN, PCP, AMPHETAMINE OR METHAMPHETAMINE
 [s. 161.41 (1) (d) to (h), (1m) (d) to (h),
 (2r), (3n) and (3r), Stats.]

OFFENSE	AMOUNT	PENALTY* (FINE/PERIOD OF IMPRISONMENT)**
A. MANUFACTURE OR DELIVERY OF HEROIN	3 grams or less	\$1,000 to \$200,000 (may be imprisoned up to 15 years)
	More than 3 grams to 10 grams	\$1,000 to \$250,000 (6 months to 15 years)
	More than 10 grams to 50 grams	\$1,000 to \$500,000 (1 to 15 years)
	More than 50 grams to 200 grams	\$1,000 to \$500,000 (3 to 15 years)
	More than 200 grams to 400 grams	\$1,000 to \$500,000 (5 to 15 years)
	More than 400 grams	\$1,000 to \$1,000,000 (10 to 30 years)
B. MANUFACTURE OR DELIVERY OF PCP, AMPHETAMINE OR METHAMPHETAMINE	3 grams or less	\$1,000 to \$200,000 (may be imprisoned up to 5 years)
	More than 3 grams to 10 grams	\$1,000 to \$250,000 (6 months to 5 years)
	More than 10 grams to 50 grams	\$1,000 to \$500,000 (1 to 15 years)
	More than 50 grams to 200 grams	\$1,000 to \$500,000 (3 to 15 years)
	More than 200 grams to 400 grams	\$1,000 to \$500,000 (5 to 15 years)
	More than 400 grams	\$1,000 to \$1,000,000 (10 to 30 years)

OFFENSE	AMOUNT	PENALTY* (FINE/PERIOD OF IMPRISONMENT)**
C. POSSESSION OF HEROIN WITH INTENT TO MANUFACTURE OR DELIVER	3 grams or less	\$1,000 to \$100,000 (<u>may</u> be imprisoned up to 15 years)
	More than 3 grams to 10 grams	\$1,000 to \$200,000 (6 months to 15 years)
	More than 10 grams to 50 grams	\$1,000 to \$500,000 (1 to 15 years)
	More than 50 grams to 200 grams	\$1,000 to \$500,000 (3 to 15 years)
	More than 200 grams to 400 grams	\$1,000 to \$500,000 (5 to 15 years)
	More than 400 grams	\$1,000 to \$1,000,000 (10 to 30 years)
D. POSSESSION OF PCP, AMPHETAMINE OR METHAMPHETAMINE WITH INTENT TO MANUFACTURE OR DELIVER	3 grams or less	\$1,000 to \$100,000 (<u>may</u> be imprisoned up to 5 years)
	More than 3 grams to 10 grams	\$1,000 to \$200,000 (6 months to 5 years)
	More than 10 grams to 50 grams	\$1,000 to \$500,000 (1 to 15 years)
	More than 50 grams to 200 grams	\$1,000 to \$500,000 (3 to 15 years)
	More than 200 grams to 400 grams	\$1,000 to \$500,000 (5 to 15 years)
	More than 400 grams	\$1,000 to \$1,000,000 (10 to 30 years)
E. POSSESSION OR ATTEMPTED POSSESSION OF HEROIN	--	<u>May</u> be fined up to \$5,000 (<u>may</u> be imprisoned up to 1 year) (or both)
F. POSSESSION OR ATTEMPTED POSSESSION OF PCP, AMPHETAMINE OR METHAMPHETAMINE	--	<u>May</u> be fined up to \$5,000 (<u>may</u> be imprisoned up to 1 year) (or both)

* Unless otherwise specified, a violator must be fined and imprisoned at least the minimum amounts and periods set forth in the Table (but see Section A, 3, above, on "presumptive" minimums).

** For items A to D, upon a second or subsequent offense, the minimum and maximum fines and periods of imprisonment are doubled. For items E and F, upon a second or subsequent offense, the offender may be fined or imprisoned, or both, up to twice the amount for a first offense.

4. Other Controlled Substances Offenses, Including Marijuana and LSD

Table 4, below, sets forth the penalty structure for manufacture, delivery or possession of controlled substances not covered by Tables 1 to 3, above, including those penalties applicable to THC, the chemical found in marijuana, and LSD.

TABLE 4

PENALTIES FOR ILLEGAL MANUFACTURE OR DELIVERY OF,
POSSESSION WITH INTENT TO DELIVER, OR POSSESSION OF
CONTROLLED SUBSTANCES NOT COVERED BY TABLES 1 TO 3

[s. 161.41 (1) (a), (b), (f), (g) and (h), (1m) (a),
(b), (f), (g) and (h), (2r), (3), (3n) and (3r), Stats.]

OFFENSE	AMOUNT	PENALTY* (FINE/PERIOD OF IMPRISONMENT)
A. MANUFACTURING OR DELIVERING A CONTROLLED SUBSTANCE		
1. Other Schedule I or II narcotics	--	\$1,000 to \$200,000 (may be imprisoned up to 15 years)
2. LSD	One gram or less	\$1,000 to \$200,000 (may be imprisoned up to 5 years)
3. LSD	More than 1 gram to 5 grams	\$1,000 to \$250,000 (6 months to 5 years)
4. LSD	More than 5 grams	\$1,000 to \$500,000 (1 to 15 years)
5. Psilocin or Psilocybin	100 grams or less	Same as penalty under A, 2, above
6. Psilocin or Psilocybin	More than 100 grams to 500 grams	Same as penalty under A, 3, above
7. Psilocin or Psilocybin	More than 500 grams	Same as penalty under A, 4, above
8. THC (chemical in marijuana)**	500 grams or less, or 10 marijuana plants or less	\$500 to \$25,000 (may be imprisoned up to 3 years)
9. THC**	More than 500 grams to 2,500 grams, or more than 10 marijuana plants to 50 marijuana plants*	\$1,000 to \$50,000 (3 months to 5 years)
10. THC**	More than 2,500 grams or more than 50 marijuana plants*	\$1,000 to \$100,000 (1 to 10 years)
11. Other Schedule I or II non-narcotics	--	May be fined up to \$15,000 (may be imprisoned up to 5 years) (or both)
12. Schedule III	--	\$0 to \$15,000 (may be imprisoned up to 5 years)

<i>OFFENSE</i>	<i>AMOUNT</i>	<i>PENALTY* (FINE/PERIOD OF IMPRISONMENT)</i>
13. Schedule IV	--	<u>May</u> be fined up to \$10,000 (may be imprisoned up to 3 years) (or both)
14. Schedule V	--	<u>May</u> be fined up to \$5,000 (may be imprisoned up to 2 years) (or both)
B. POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO MANUFACTURE OR DELIVER		
1. Other Schedule I or II narcotics	--	<u>May</u> be fined up to \$25,000 (may be imprisoned up to 15 years) (or both)
2. LSD	One gram or less	\$1,000 to \$100,000 (may be imprisoned up to 5 years)
3. LSD	Over one gram and up to 5 grams	\$1,000 to \$200,000 (6 months to 5 years)
4. LSD	Over 5 grams	\$1,000 to \$500,000 (1 to 15 years)
5. Psilocin or Psilocybin	100 grams or less	Same as penalty under B, 2, above
6. Psilocin or Psilocybin	Over 100 grams and up to 500 grams	Same as penalty under B, 3, above
7. Psilocin or Psilocybin	Over 500 grams	Same as penalty under B, 4, above
8. THC (chemical in marijuana)**	500 grams or less, or 10 marijuana plants or less	\$500 to \$25,000 (may be imprisoned up to 3 years)
9. THC**	Over 500 grams and up to 2,500 grams, or more than 10 marijuana plants to 50 marijuana plants	\$1,000 to \$50,000 (3 months to 5 years)
10. THC**	Over 2,500 grams, or more than 50 marijuana plants	\$1,000 to \$100,000 (1 to 10 years)
11. Other Schedule I, II or III non-narcotics	--	<u>May</u> be fined up to \$15,000 (may be imprisoned up to 5 years) (or both)
12. Schedule III	--	<u>May</u> be fined up to \$15,000 (may be imprisoned up to 5 years) (or both)
13. Schedule IV	--	<u>May</u> be fined up to \$10,000 (may be imprisoned up to 3 years) (or both)
14. Schedule V	--	<u>May</u> be fined up to \$5,000 (may be imprisoned up to 1 year) (or both)

<i>OFFENSE</i>	<i>AMOUNT</i>	<i>PENALTY* (FINE/PERIOD OF IMPRISONMENT)</i>
C. UNLAWFUL POSSESSION OR ATTEMPTED POSSESSION OF CONTROLLED SUBSTANCES		
1. Other Schedule I or II narcotics	--	<u>May</u> be fined up to \$5,000 (<u>may</u> be imprisoned up to 1 year) (or both)
2. LSD, PCP, Amphetamine, Methamphetamine, Psilocin or Psilocybin	--	<u>May</u> be fined up to \$5,000 (<u>may</u> be imprisoned up to 1 year in county jail) (or both)
3. THC (chemical in marijuana)	--	<u>May</u> be fined up to \$1,000 (<u>may</u> be imprisoned up to 6 months) (or both)
4. Other Schedule I or II non-narcotics	--	<u>May</u> be fined up to \$500 (<u>may</u> be imprisoned up to 30 days) (or both)
5. Schedule III, IV or V	--	Same as penalty under C, 4, above
D. CONSPIRACY TO MANUFACTURE, DELIVER OR POSSESS WITH INTENT TO MANUFACTURE OR DELIVER CONTROLLED SUBSTANCES [s. 161.41 (1x), STATS.]		
1. Cocaine	--	Same as penalties applicable to manufacturing, delivering or possessing with intent to manufacture or deliver cocaine, by weight
2. Substances other than cocaine	--	Same as penalties applicable to manufacturing, delivering or possessing with intent to manufacture or deliver the controlled substance

* For items A, 2 to 10; B, 2 to 10; and C, 2 and 3, upon a second or subsequent offense, the minimum and maximum fines and periods of imprisonment are doubled. For other items in this Table, upon a second or subsequent offense, the offender may be fined or imprisoned, or both, up to twice the amount for the first offense.

** Unless otherwise specified, a violator must be fined and imprisoned at least the minimum amounts and periods set forth in the Table (but see Section A, 3, above, on "presumptive" minimums).

*** If different penalty provisions apply to a person depending on whether the weight of THC or the number of marijuana plants is considered, the greater penalty provision applies [s. 161.41 (1q), Stats.].

TABLE 5

PENALTIES FOR SELECTED OFFENSES IN CH. 161

OFFENSE	PENALTY*
A. DISTRIBUTION OF CONTROLLED SUBSTANCES BY PERSON 18 YEARS OF AGE OR OLDER TO A MINOR THREE OR MORE YEARS YOUNGER [S. 161.46, STATS.]	
1. Cocaine and "Crack" Cocaine	Minimum and maximum fines and prison terms applicable to manufacture and delivery of cocaine <u>must be doubled</u> .
2. Heroin, PCP, LSD, Psilocin, Psilocybin, Amphetamine, Methamphetamine and THC	Minimum and maximum fines and prison terms applicable to manufacture and delivery of the controlled substance <u>must be doubled</u> .
3. All Controlled Substances Other Than Those Under 1 and 2, above	Same fine applicable to manufacture or delivery of substance; up to twice the prison term; or both.
B. DISTRIBUTION OF CONTROLLED SUBSTANCES TO PRISONERS [S. 161.465, STATS.]	
1. Cocaine and "Crack" Cocaine	Minimum and maximum fines and prison terms applicable to manufacture and delivery of cocaine <u>must be doubled</u> .
2. Heroin, PCP, LSD, Psilocin, Psilocybin, Amphetamine, Methamphetamine and THC	Minimum and maximum fines and prison terms applicable to manufacture and delivery of the controlled substance involved <u>must be doubled</u> .
3. All Controlled Substances Other Than Those Under 1 and 2, above.	Same fine applicable to manufacture or delivery of substance; or up to twice the prison term; or both.
C. DISTRIBUTION OF A CONTROLLED SUBSTANCE ON OR WITHIN 1,000 FEET OF CERTAIN PREMISES** [S. 161.49, STATS.]	
1. Heroin, PCP, LSD, Psilocin, Psilocybin, Amphetamine, Methamphetamine, Any Form of THC	Maximum term of imprisonment applicable to distribution of particular substance increased by 5 years.
2. Other Schedule I or II Controlled Substances, Except Under 3, below	Term of imprisonment imposed on offender <u>must be at least</u> 3 years; not eligible for parole for at least 3 years.
3. Not More Than 25 Grams of THC	Term of imprisonment imposed on offender <u>must be at least</u> 1 year; not eligible for parole for at least 1 year.

<i>OFFENSE</i>	<i>PENALTY*</i>
D. POSSESSION OR ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE ON OR WITHIN 1,000 FEET OF CERTAIN PREMISES** [SS. 48.34 (7M) AND 161.495, STATS.]	
Any Schedule I or II Controlled Substance***	Additional penalty of 100 hours of community service work <u>must</u> be imposed on offender. If a child is adjudicated delinquent for this offense, the child is required to participate in a supervised work program or 100 hours of other community service.

* Upon a second or subsequent offense, the offender may be fined or imprisoned, or both, up to twice the amount for the first offense.

** The premises listed in the relevant statutes are: (1) private or public school premises; (2) a school bus; (3) a state, county, city, village or town park; (4) a swimming pool open to members of the public; or (5) a youth center or community center.

*** If different penalty provisions apply to a person depending on whether the weight of THC or the number of marijuana plants is considered, the greater penalty provision applies.

5. Using a Child for Illegal Drug Manufacture or Delivery

Current law prohibits the use of a child to manufacture or deliver controlled substances. Under current law, any person who has attained the age of 18 years who knowingly solicits, hires, directs, employs or uses a person under the age of 18 years for the manufacture or delivery of any controlled substance may be fined not more than \$50,000 or imprisoned not more than 10 years, or both. The knowledge requirement does not require proof of knowledge of the age of the child and it is not a defense that the violator mistakenly believed that the child had attained the age of 18 years.

This penalty, created in 1989 Wisconsin Act 121, replaces the current criminal solicitation penalties in s. 939.30, Stats., for the covered offenses.

Any individual convicted of using a child to manufacture or deliver controlled substances may also be prosecuted and convicted for manufacture and delivery of a controlled substance based on the same conduct [s. 161.455, Stats.].

6. Use of Public Transit Vehicles to Transport Certain Controlled Substances

Current law establishes a penalty enhancer applicable to use of public transit vehicles to transport Schedule I or II controlled substances. Under current law, if a person violates s. 161.41 (1) or (1m), Stats. (relating to manufacture or delivery of a controlled substance or possession of a controlled substance with intent to deliver), under all of the following circumstances, the maximum period of imprisonment for the violation may be increased by not more than five years:

a. The violation involves the delivery of, or the possession with intent to deliver, any controlled substance included in Schedule I or II. In general, Schedule I substances are defined as having a high potential for abuse and no accepted medical use; Schedule II substances are considered to have a high potential for abuse, but may have a currently accepted medical use with severe restrictions.

b. The person knowingly uses a public transit vehicle during the violation. "Public transit vehicle" is defined to mean any vehicle used for providing transportation services to the general public, including the transportation of either persons or property [s. 161.41 (1p), Stats.].

C. PENALTIES AND LICENSE SANCTIONS FOR, AND OTHER PROVISIONS APPLICABLE TO, CONTROLLED SUBSTANCES OFFENSES COMMITTED BY CHILDREN

Current law specifies that, in addition to the general dispositions provided for delinquency under ch. 48, Stats. (the Children's Code), the court may impose the following forfeitures and, for certain offenses, license sanctions on children who violate the controlled substances laws, ch. 161, Stats.

1. Suspension or Revocation of Motor Vehicle Operating Privilege

Under current law, if the child is found to have violated ch. 161, Stats., the judge must either suspend or revoke the child's motor vehicle operating privilege (i.e., driver's license) for not less than six months nor more than five years. The court must immediately take possession of any suspended or revoked license and forward it to the Department of Transportation (DOT) together with the notice of suspension or revocation clearly stating that the suspension or revocation is for a violation of ch. 161. This provision does not apply to violations under s. 161.573 (2), 161.574 (2) (manufacture or delivery of drug paraphernalia by a child) or 161.575 (2) (delivery of drug paraphernalia by a child to another child), Stats., or a local ordinance that strictly conforms to one of those statutes.

2. Manufacture, Delivery or Possession of Controlled Substances

a. Manufacture, Delivery or Possession with Intent to Deliver

Under current law, in addition to the license sanction described in item 1, above, other dispositions available for delinquency, illegal manufacture or delivery of controlled substances, or possession of controlled substances with intent to manufacture or deliver the substance, subjects a child to the following penalties:

(1) For a first violation, a forfeiture of not less than \$250 nor more than \$500.

(2) For a violation committed within 12 months of a previous violation, a forfeiture of not less than \$300.

(3) For a violation committed within 12 months of two or more previous violations, a forfeiture of \$500.

b. Possession

Under current law, in addition to the license sanction described in item 1, above, and other dispositions available for delinquency, the illegal possession or attempted possession of controlled substances subjects a child to the following penalties:

(1) For a first violation, a forfeiture of not more than \$50.

(2) For a violation committed within 12 months of a previous violation, a forfeiture of not more than \$100.

(3) For a violation committed within 12 months of two or more previous violations, a forfeiture of not more than \$500.

If this offense is committed on or within 1,000 feet of certain premises, the additional penalty set forth in Table 5, item D, above, applies.

c. Stay of Order; Assessment, Education or Treatment

Under current law, the court is authorized, with the agreement of the child, to stay the execution of this order and enter an order requiring the child to do any of the following: (1) submit to an alcohol and other drug abuse assessment at an approved treatment facility; (2) participate in an outpatient alcohol or other drug abuse treatment program, if the assessment recommends treatment; or (3) participate in a court-approved alcohol or other drug abuse education program. If the child elects not to obtain the assessment, education or treatment or does not comply with these options, the court must order the original disposition [s. 48.34 (4s) (a) to (e) and (7m), Stats.].

3. Juvenile Court Orders Applicable to Adults

Under current law, a juvenile court may make orders with respect to the conduct of any adult if it appears that the adult has been guilty of contributing to, encouraging or tending to cause a child to be delinquent or in need of protection or services. These may include orders determining the ability of the person to provide for the maintenance or care of the child. The adult may not be subject to an order unless he or she has first been given an opportunity to be heard in court. Failure to comply with the court's order may subject the adult to proceedings for contempt of court [s. 48.45, Stats.].

Under current law, in any proceeding in which a child has been adjudicated delinquent or in need of protection or services for the use or abuse of a controlled substance or alcohol beverage and the court has ordered the child to participate in outpatient alcohol or drug treatment or

education, the juvenile court judge may order the child's parent, guardian or legal custodian to do any of the following:

- a. Participate in an approved outpatient alcohol and other drug abuse treatment program;
- or
- b. Participate in a court-approved alcohol or drug education program.

The parent must be given an opportunity to be heard in court before the order is issued.

Current law specifies that:

- a. Any person who fails to comply with the court order may be subject to contempt of court proceedings; and
- b. If a child accepts voluntary participation in a court-approved drug abuse education program as an alternative to immediate imposition of a penalty (see Section C, 1, c, above), the court may order the child's parent, guardian or legal custodian to also participate in a court-approved education program [s. 48.45, Stats.].

D. ASSET FORFEITURE AND RELATED ISSUES

I. Asset Forfeiture Proceedings Under the Uniform Controlled Substances Act or the Criminal Code

Under subch. V of ch. 161, certain items related to violations of the Controlled Substances Act may be seized by a law enforcement officer or a Pharmacy Examining Board employe and are subject to forfeiture. The items which are subject to seizure and forfeiture include:

- a. All controlled substances which have been manufactured, distributed, dispensed or acquired in violation of the Act.
- b. All raw materials, products and equipment used in manufacturing or delivering any controlled substance in violation of the Act.
- c. All property used or intended for use as a container for the substances or products described under a and b, above.
- d. All vehicles used to transport any of the above-described items.
- e. All books, records and research products which are used or intended for use in violation of the Act.
- f. All real and personal property, including money, derived from or realized through the commission of any crime under the Act [s. 161.55 (1), Stats.].

Under the Act, the property listed above may be seized upon process issued by a court. In addition, the property may be seized, without process, if any of the following apply:

- a. The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative warrant.
- b. The property has been the subject of a prior judgment in a criminal injunction or forfeiture proceeding under the Act.
- c. The officer or employe has probable cause to believe that the property is dangerous to health or safety.
- d. The officer or employe has probable cause to believe that the property was used or is intended to be used in violation of the Act, that the property was derived from or realized through a crime under the Act or that the property is a vehicle which was used to transport a controlled substance in violation of the Act.

The Act specifies proceedings which must be followed to allow persons having claims to the seized property to assert those claims. The Act also specifies what the seizing agency may or shall do with the various types of property seized.

Current law provides that in an action to cause forfeiture of property under the Act, the court may render judgment either: (a) in rem (i.e., against the property); or (b) against a party personally. This means that a court may order the forfeiture of property which is not physically located in the county within which the court is located if the court has jurisdiction over the owner of the property.

In addition, current law provides that if the property subject to forfeiture cannot be located, has been transferred or sold to a third party, has diminished in value while not in the custody of the law enforcement agency or has been commingled with other property that cannot be easily divided, the court may order the forfeiture of any other property of the defendant up to the value of property found by the court to be subject to forfeiture [ss. 161.55 and 161.555, Stats.].

2. Criminal and Civil Asset Forfeiture Procedures Under the Wisconsin Organized Crime Control Act

Wisconsin's Organized Crime Control Act (WOCCA) is patterned, in part, after the Federal Racketeer Influenced and Corrupt Organizations (RICO) law. Under the WOCCA, criminal penalties are provided for persons engaging in either a pattern of racketeering activity or a continuing criminal enterprise. The WOCCA also authorizes various civil penalties, including civil forfeiture to the state of property associated with the criminal activity [ss. 946.80 to 946.87, Stats.].

Current law establishes a procedure for criminal forfeiture to the state of property used in or derived through with the criminal activity. Under current law, when a district attorney or the

Attorney General brings a criminal action under the WOCCA, he or she must specify in the criminal complaint what property is sought under the criminal forfeiture procedure. At trial, the trier of fact (the jury or the judge, as applicable) is required to return a special verdict finding what property is subject to criminal forfeiture. If any property included in the special verdict is unreachable, the court may order forfeiture of other property of the defendant.

As in the WOCCA's provisions regarding civil forfeitures, discussed below, current law: (a) provides that all such forfeitures or dispositions must be made with due provision for the rights of innocent persons; and (b) provides that any injured party has a right to forfeited property, or proceeds thereof, superior to the right of the state.

With reference to civil forfeitures under the WOCCA, the state must show that conduct had resulted in a conviction for violation of the WOCCA in order to obtain a civil forfeiture, unless the defendant is released on bail, pending the criminal trial, and fails to appear in court regarding the criminal proceeding. In that case, the property used in or derived through the violation may be forfeited without a conviction. Before issuing an order for civil forfeiture of the property, the court must determine that the party bringing the action can prove that the person committed the violation which forms the basis for the forfeiture [ss. 946.87 and 946.88, Stats.].

E. SUSPENSION OR REVOCATION OF MOTOR VEHICLE OPERATING PRIVILEGE

Under current law, except as provided in Section C, 1, above, relating to children, if a person is convicted of any violation of the Controlled Substances Act, the court must, in addition to any other penalties that may apply to the crime, suspend or revoke the person's motor vehicle operating privilege, for not less than six months nor more than five years. The court must immediately take possession of any suspended or revoked license and forward it to the DOT together with the record of conviction and notice of the suspension or revocation. If required by s. 345.54 (1), Stats., the court or judge must impose an automatic reinstatement assessment of \$50. The person is eligible for an occupational license as follows:

1. For the first such conviction, at any time.
2. For a second conviction within a five-year period, after the first 60 days of the suspension or revocation period.
3. For a third or subsequent conviction within a five-year period, after the first 90 days of the suspension or revocation period.

For purposes of counting the number of convictions under this provision, convictions under the law of a federally recognized American Indian tribe or band in this state, federal law or the law of another jurisdiction for any offense therein which, if the person had committed the offense in this state and been convicted of the offense under the laws of this state, would have required suspension or revocation of such person's operating privilege under this provision, must be counted and given the effect specified in items 1 to 3, above. The five-year period under this provision

must be measured from the dates of the violations which resulted in the convictions [s. 161.50, Stats.].

F. DRUG PARAPHERNALIA: OFFENSES AND PENALTIES

I. Possession, Sale or Use of Drug Paraphernalia

a. Prohibitions and Penalties

1989 Wisconsin Act 121 created new offenses relating to drug paraphernalia, based on the Model Drug Paraphernalia Act developed by the Drug Enforcement Administration of the U.S. Department of Justice. These offenses are found in subch. VI of ch. 161, Stats. [ss. 161.571 to 161.577, Stats.].

Current law establishes prohibitions relating to the use, possession with the sole intent to use, manufacture, delivery, sale and advertisement of drug paraphernalia. "Drug paraphernalia" is defined to mean equipment, products and materials of any kind that are used or designed for use or primarily (defined to mean "chiefly or mainly") intended for use to grow, produce, package, store, test or use controlled substances. In addition, "drug paraphernalia" includes, but is not limited to, various statutorily specified items, such as roach clips and water pipes.

Current law provides that "drug paraphernalia" does not include: (1) hypodermic syringes, needles and other objects used or intended for use in parenterally (e.g., intravenously) injecting substances into the human body; and (2) any items, including pipes, papers and accessories, that are designed for use or primarily intended for use with tobacco products.

In determining whether an object is drug paraphernalia, a court or other authority must consider, in addition to all other legally relevant factors, the following:

- (1) Statements by an owner or by anyone in control of the object concerning its use.
- (2) The proximity of the object, in time and space, to a direct violation of ch. 161, Stats., the Uniform Controlled Substances Act.
- (3) The proximity of the object to controlled substances.
- (4) The existence of any residue of controlled substances on the object.
- (5) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he or she knows intend to use the object to facilitate a violation. The innocence of an owner, or of anyone in control of the object, as to a direct violation of the Uniform Controlled Substances Act, does not prevent a finding that the object is designed for use or primarily intended for use as drug paraphernalia.

- (6) Instructions, oral or written, provided with the object concerning its use.
- (7) Descriptive materials accompanying the object that explain or depict its use.
- (8) Local advertising concerning its use.
- (9) The manner in which the object is displayed for sale.
- (10) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.
- (11) The existence and scope of legitimate uses for the object in the community.
- (12) Expert testimony concerning its use.

Current law specifies that:

- (1) In determining whether an item is designed for a particular use, a court or other authority must consider the objective physical characteristics and design features of the item.
- (2) In determining whether an item is primarily intended for a particular use, a court or other authority must consider the subjective intent of the defendant.

The drug paraphernalia offenses and penalties are summarized in Table 6, below.

TABLE 6
PENALTIES FOR SALE, USE, MANUFACTURE OR ADVERTISEMENT
OF DRUG PARAPHERNALIA

<i>OFFENSE</i>	<i>FINE*</i>	<i>IMPRISONMENT*</i>
Use of drug paraphernalia or possession with primary intent to use illegally	Not more than \$500	Not more than 30 days
Manufacture or delivery of drug paraphernalia knowing it will be primarily used illegally	Not more than \$1,000	Not more than 90 days
Delivery of drug paraphernalia to a minor 3 or more years younger than the defendant	Not more than \$10,000	Not more than 9 months
Advertising drug paraphernalia	Not more than \$500	Not more than 30 days

* A violator is subject to a fine or imprisonment, or both.

In addition to the penalties summarized in Table 6, current law provides that drug paraphernalia are subject to seizure and forfeiture under the provisions of current law that provide for the forfeiture of illegally used controlled substances. [See Section D, 1, above.]

b. Limited Municipal Authority to Enact Drug Paraphernalia Ordinances

Under current law, a city, village or town is authorized to enact a drug paraphernalia ordinance that prohibits the same conduct prohibited under the provisions in current law relating to: (1) use, or possession with the primary intent to use, drug paraphernalia by a person under 18 years of age; (2) delivery, possession with intent to deliver, or manufacture with intent to deliver, drug paraphernalia by a person under 18 years of age; and (3) delivery of drug paraphernalia by a person over 18 years of age to a person under 18 years of age who is at least three years younger than the violator [s. 161.577, Stats.].

2. Drug Paraphernalia Offenses Committed by Children

Under current law, there is a citation and disposition system for handling certain juvenile offenses related to drug paraphernalia or alcohol beverages. Law enforcement officers may initiate a juvenile court proceeding by issuing citations similar to traffic citations.

Under current law, if a juvenile court finds that a child has committed an offense relating to possession, manufacture or delivery, possession with intent to deliver or delivery of drug paraphernalia to a child, the court must suspend or revoke the child's motor vehicle operating privilege for not less than six months nor more than five years and, in addition, must order one of the following penalties:

- (1) For a first violation, a forfeiture of not more than \$50 or participation in a supervised work program, or both.
- (2) For a violation committed within 12 months of a previous violation, a forfeiture of not more than \$100 or participation in a supervised work program, or both.
- (3) For a violation committed within 12 months of two or more previous violations, a forfeiture of not more than \$500 or participation in a supervised work program, or both.

Current law specifies that:

- (1) Whenever a court suspends or revokes a child's operating privilege under this provision, the court must immediately take possession of any suspended or revoked license and forward it to the DOT, together with the notice of suspension or revocation clearly stating that the suspension or revocation is for a specified drug paraphernalia violation.

(2) With the agreement of the child, the court may stay the execution of the penalty order for a first offense as well as a second or subsequent offense if the child submits to an alcohol or other drug abuse assessment; or participates in an alcohol or other drug abuse treatment or program; or participates in a court-approved alcohol or other drug abuse education program [s. 48.344 (2e) and (2g), Stats.].

G. OTHER CONTROLLED SUBSTANCES OFFENSES AND THEIR PENALTIES

1. "Len Bias" Provision; First-Degree Reckless Homicide

The current Criminal Code includes a provision, commonly known as the "Len Bias" provision, which specifies that whoever causes the death of another human being under any of the following circumstances is guilty of a Class B felony (punishable by imprisonment not to exceed 20 years):

a. By manufacture or delivery of a controlled substance classified in Schedule I or II under ch. 161, Stats., in violation of s. 161.41, Stats. (i.e., prohibitions against manufacture or delivery of controlled substances) which another human being uses and dies as a result of that use. This provision applies:

(1) Whether the human being dies as a result of using the controlled substance by itself or with any compound, mixture, diluent or other substance mixed or combined with the controlled substance.

(2) Whether or not the controlled substance is mixed or combined with any compound, mixture, diluent or other substance after the violation of s. 161.41, Stats., occurs.

(3) To any delivery described in this provision, regardless of whether the delivery is made directly to the human being who dies. If possession of the controlled substance classified in Schedule I or II under ch. 161, Stats., is transferred more than once prior to the death as described in this paragraph, each person who delivers the controlled substance in violation of s. 161.41, Stats., is guilty under this provision.

b. By administering or assisting in administering a controlled substance classified in Schedule I or II under ch. 161, without lawful authority to do so, to another human being and that human being dies as a result of the use of the substance. This provision applies whether the human being dies as a result of using the controlled substance by itself or with any compound, mixture, diluent or other substance mixed or combined with the controlled substance [s. 940.02 (2), Stats.].

2. Other Offenses in Ch. 161

The Appendix to this Information Memorandum sets forth the statutory text of other offenses under the Controlled Substances Act, which includes the penalties for commission of those offenses.

H. DISCIPLINARY SANCTIONS OF POST-SECONDARY STUDENTS

1. Background

Prior to the enactment of 1989 Wisconsin Act 121, the statutes did not specify any of the reasons for which students could or were required to be expelled from the University of Wisconsin (UW) System or the Vocational, Technical and Adult Education (VTAE) System.

Currently, the Board of Regents of the UW System must promulgate rules governing student conduct and procedures for dealing with violations. The Board may delegate the power to expel or suspend students for misconduct or for other cause prescribed by the Board [s. 36.35 (1), Stats.]. The statutes give district VTAE boards the authority to establish written policies on "district matters" [s. 38.12 (7), Stats.].

All of these institutions are subject to prohibitions against discrimination on certain bases such as race, sex, national origin and religion.

2. Current Law

As a result of Act 121, current law provides that any UW System student who engages in an activity, on a campus or at an event sponsored by a UW center or institution or the UW System, that constitutes a violation of ch. 161, Stats., is subject to nonacademic misconduct disciplinary sanctions, as provided by the Board of Regents, by rule. In determining the appropriate sanctions for such violations, the Board or its designee must consider those penalties, including suspension or expulsion, which will contribute most effectively to maintaining a center, institution and system environment free from controlled substances [s. 36.11 (21), Stats.].

Current law, as affected by Act 121, contains a similar provision applicable to VTAE districts [s. 38.12 (10), Stats.].

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APPENDIX

OTHER OFFENSES UNDER THE CONTROLLED
SUBSTANCES ACT [CH. 161, STATS.]

In addition to the offenses and penalties above, ch. 161 defines the following offenses and penalties for their commission:

161.38 PRESCRIPTIONS. (1) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, no controlled substance in schedule II may be dispensed without the written prescription of a practitioner.

(2) In emergency situations, as defined by rule of the pharmacy examining board, schedule II drugs may be dispensed upon oral prescription of a practitioner, reduced promptly to writing and filed by the pharmacy. Prescriptions shall be retained in conformity with rules of the pharmacy examining board promulgated under s. 161.31. No prescription for a schedule II substance may be refilled.

(3) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, a controlled substance included in schedule III or IV, which is a prescription drug, shall not be dispensed without a written or oral prescription of a practitioner. The prescription shall not be filled or refilled except as designated on the prescription and in any case not more than 6 months after the date thereof, nor may it be refilled more than 5 times, unless renewed by the practitioner.

(4) A controlled substance included in schedule V shall not be distributed or dispensed other than for a medical purpose.

(5) No practitioner shall prescribe, orally or in writing, or take without a prescription a controlled substance included in schedule I, II, III or IV for the practitioner's own personal use.

161.41 (2) [Counterfeit Substances] Except as authorized by this chapter, it is unlawful for any person to create, deliver or possess with intent to deliver, a counterfeit substance. Any person who violates this subsection with respect to:

(a) A counterfeit substance classified in schedule I or II which is a narcotic drug, may be fined not more than \$25,000 or imprisoned not more than 15 years or both;

(b) Any other counterfeit substance classified in schedule I, II or III, may be fined not more than \$15,000 or imprisoned not more than 5 years or both;

(c) A counterfeit substance classified in schedule IV, may be fined not more than \$10,000 or imprisoned not more than 3 years or both;

(d) A counterfeit substance classified in schedule V, may be fined not more than \$5,000 or imprisoned not more than one year or both.

161.41 (2m) [Delivery of Substance Which Is Not a Controlled Substance] It is unlawful for any person to agree, consent or offer to lawfully manufacture, deliver or dispense any controlled substance to any person, or to offer, arrange or negotiate to have any controlled substance unlawfully manufactured, delivered or dispensed, and then manufacture, deliver, or dispense or offer, arrange or negotiate to have manufactured, delivered, or dispensed to any such person a substance which is not a controlled substance. Any person who violates this subsection may be fined not more than \$500 or imprisoned not more than 6 months or both.

161.42 PROHIBITED ACTS B--PENALTIES. (1) It is unlawful for any person knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for manufacturing, keeping or delivering them in violation of this chapter.

(2) Any person who violates this section may be fined not more than \$25,000 or imprisoned not more than one year or both.

161.43 PROHIBITED ACTS C--PENALTIES. (1) It is unlawful for any person:

(a) To acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge;

(b) To make, distribute or possess any punch, die, plate, stone or other thing designed to print, imprint or reproduce the trademark, trade name or other identifying mark, imprint or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as:

1. To counterfeit a drug; or
2. To duplicate substantially the physical appearance, form, package or label of a controlled substance.

(2) Any person who violates this section may be fined not more than \$30,000 or imprisoned not more than 4 years or both.

161.435 SPECIFIC PENALTY. Any person who violates s. 161.38 (5) [see above] may be fined not more than \$500 or imprisoned not more than 30 days or both.