NEW LAW RELATING TO NEW CRIMES, PROCEDURES AND PENALTIES RELATING TO CONTROLLED SUBSTANCES (1989 WISCONSIN ACT 121, AS AFFECTED BY 1989 WISCONSIN ACT 336)

INFORMATION MEMORANDUM 90-6

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INTRODUCTION

This Information Memorandum describes 1989 Wisconsin Act 121, as affected by 1989 Wisconsin Act 336, which: (a) establishes new crimes, procedures and penalties applicable to controlled substances under ch. 161, Stats. (the Controlled Substances Act); (b) provides for changes relating to required health maintenance organizations (HMO's) outpatient coverage for dependent children; (c) requires a number of studies by the Department of Health and Social Services (DHSS); and (d) makes various other changes relating to the Parole Commission and to probationers and parolees in county jail.

Act 121 is the result of the enactment of October 1989 Special Session Assembly Bill 9, introduced by the Joint Committee on Finance. The Bill was developed by the Assembly Special Committee on Drug Enforcement, Education and Treatment.

The final version of the Bill, which was subsequently enacted as Act 121, was the result of a Legislative Conference Committee consisting of four Senators (Adelman, Burke, George and Stitt) and four Representatives (Lautenschlager, Medinger, Rosenzweig and Travis). The members unanimously recommended adoption of the Report of the Conference Committee. Subsequently, the Senate adopted the Report (Ayes, 33; Noes, 0) and the Assembly concurred in the Report (Ayes, 89; Noes, 9).

Act 121 took effect on January 31, 1990, except there were delayed effective dates for the following:

a. The HMO provisions described in Section G, 1, below, are to take effect on the first day of the fourth month beginning after publication (i.e., effective May 1, 1990).

b. The drug paraphernalia provisions described in Section A, 2, below, are to take effect on the first day of the seventh month beginning after publication (i.e., effective August 1, 1990).

Provisions in 1989 Wisconsin Act 336 which affect Act 121:

a. Restore the dispositional option of motor vehicle license suspension for juveniles who commit certain first offense alcohol beverage violations. That option had been deleted by Act 121.

b. Permit the court to stay the execution of a dispositional order for certain alcohol beverage or drug violations by a juvenile and enter an order requiring the child to participate in an alcohol or other drug abuse treatment or education program. Act 121 permitted the court to enter an order for alcohol, and not drug, treatment or education.

Copies of Act 121 may be obtained from the Documents Room, Lower Level, One East Main Street, Madison, Wisconsin 53702; telephone (608) 266-2400.

This Information Memorandum is divided into the following parts:

A. NEW OFFENSES RELATING TO ILLEGAL DRUGS

1. Using a Child for Illegal Drug Manufacture or Delivery

a. Background

Under prior and current law, any person who advises another to commit a crime with the intent that a felony be committed is guilty of a Class C,

D or E felony, depending upon the severity of the crime solicited, as follows:

(1) If the crime solicited is punishable by life imprisonment, the person is guilty of a Class C felony. A Class C felony is punishable by a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both.

(2) If the crime solicited is a Class E felony, the person is guilty of a Class E felony. A Class E felony is a crime punishable by a fine not to exceed $10,000 or imprisonment not to exceed two years, or both.

(3) For soliciting any other crime, the person is guilty of a Class D felony. A Class D felony is punishable by a fine not to exceed $10,000 or imprisonment not to exceed five years, or both [s. 939.30, Stats.].

Prior and current law also set forth a variety of penalties applicable to persons involved in the illegal manufacture or delivery of controlled substances. The penalties vary based on factors such as the type and amount of the drug involved and who receives the drug [ch. 161, Stats.].

b. Act 121

Act 121 creates a new offense of using a child to manufacture or deliver controlled substances. Under the Act, 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 replaces the current solicitation penalties 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.

2. Possession, Sale or Use of Drug Paraphernalia

a. Prohibitions and Penalties

(1) Background

There were no similar drug paraphernalia prohibitions, as described in item (2), below, under prior law.

(2) Act 121

Act 121 creates 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.

The Act 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 solely 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.

The Act provides that "drug paraphernalia" does not include hypodermic syringes, needles and other objects used or intended for use in parenterally (e.g., intravenously) injecting substances into the human body.

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:

(a) Statements by an owner or by anyone in control of the object concerning its use.

(b) The proximity of the object, in time and space, to a direct violation of ch. 161, Stats., the Uniform Controlled Substances Act.

(c) The proximity of the object to controlled substances.

(d) The existence of any residue of controlled substances on the object.

(e) 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 solely intended for use as drug paraphernalia.

(f) Instructions, oral or written, provided with the object concerning its use.

(g) Descriptive materials accompanying the object that explain or depict its use.

(h) Local advertising concerning its use.

(i) The manner in which the object is displayed for sale.

(j) 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.

(k) The existence and scope of legitimate uses for the object in the community.

(l) Expert testimony concerning its use.

The offenses and penalties in Act 121 are summarized in Table 1, below.

TABLE 1

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

OFFENSE	FINE*	IMPRISONMENT*
Use of drug paraphernalia or possession with sole intent to use illegally	Not more than $500	Not more than 30 days
Manufacture or delivery of drug paraphernalia knowing it will be solely used illegally	Not more than $1,000	Not more than 90 days
Delivery of drug paraphernalia to a minor three or more years younger than the defendant	Not more than $10,000	Not more than nine 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 1, the Act 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.

b. Limited Municipal Authority to Enact Drug Paraphernalia Ordinances

Under Act 121, a city, village or town is authorized to enact a drug paraphernalia ordinance that prohibits the same conduct prohibited under the provisions in the Act relating to: (1) use, or possession with the sole 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.

c. Citation Provisions Applicable to Minors

(1) Background

Under prior and current law, there is a citation and disposition system for handling certain juvenile offenses related to alcohol beverages. Law enforcement officers may initiate a juvenile court proceeding by issuing citations similar to traffic citations. For disposition of these offenses, a judge must impose one or more penalties involving a monetary forfeiture, suspension of motor vehicle operating privileges or participation in a supervised work program [s. 48.344, Stats.; a description of these penalties is set forth in Section D, 2, below].

(2) Act 121

Act 121 makes these procedures and dispositional alternatives applicable to minors who commit the drug paraphernalia offenses described under item a, (2), above.

3. Use of Electronic Communication Devices on School Premises

a. Background

There was no similar prohibition relating to the use of electronic communication devices on school premises under prior law.

b. Act 121

Act 121 creates a new provision requiring school boards to adopt rules prohibiting pupils from using or possessing electronic communication devices (i.e., an electronic paging or two-way communication device) while on school premises. The school board's rules may provide exceptions for devices which the school board or its designee determines are used or possessed by a pupil for a medical, school, educational, vocational or other legitimate use. The school board is required to: (1) distribute copies of the rule to students annually; and (2) submit a copy of the rule to the Department of Public Instruction when it is first adopted and, thereafter, wherever any changes are made to the rule.

4. Obstructing an Officer

a. Background

Under prior and current law, any person who resists or obstructs a peace officer, or any other public officer or employe authorized to take a person into custody is guilty of a Class A misdemeanor, punishable by a fine not to exceed $10,000, imprisonment not to exceed nine months, or both. "Obstructs" is defined to include, without limitation, knowingly giving false information to the officer with intent to mislead the officer in the performance of his or her duty [s. 946.41, Stats.].

b. Act 121

Act 121:

(1) Adds to the definition of "obstructs" the placing of physical evidence with the intent to mislead the officer. Obstructing an officer under the new definition is also a Class A misdemeanor, punishable by a fine not to exceed $10,000, imprisonment not to exceed nine months, or both.

(2) Increases the penalty for obstructing an officer if the information or evidence is subsequently considered by a judge or jury at a criminal trial and the trial results in the conviction of an innocent person. A person who violates this provision is guilty of a Class D felony, punishable by a fine not to exceed $10,000, imprisonment not to exceed five years, or both.

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

a. Background

There was no similar penalty enhancement for use of public transit vehicles to transport certain controlled substances under prior law.

b. Act 121

Act 121 establishes a penalty enhancer applicable to use of public transit vehicles to transport Schedule I or II controlled substances. Under the Act, 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:

(1) 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.

(2) The person knowingly uses a public transit vehicle during the violation. The Act defines "public transit vehicle" to mean any vehicle used for providing transportation services to the general public, including the transportation of either persons or property.

B. INCREASED OR RESTRUCTURED FINES AND IMPRISONMENT; NEW COVERED SUBSTANCES

1. Cocaine Offenses

a. Background

Under prior law and Act 121, the penalties for crimes relating to manufacturing or delivering, or possessing with intent to manufacture or deliver, cocaine vary depending on the amount of cocaine involved. Table 2, on page 10, sets forth the various penalties under prior law.

b. Act 121

Act 121 revises the penalty structure for cocaine first offenses by lowering the cocaine amounts subject to all but the lowest existing

penalty ranges and by creating new penalty ranges for offenses involving more than 30 grams of cocaine. Table 2, below, sets forth the penalty structure for cocaine first offenses, as revised by the Act. As under current law, any applicable minimum and maximum fines and minimum and maximum periods of imprisonment are doubled if: (1) it is the person's second or subsequent offense; or (2) 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.

TABLE 2

PENALTIES FOR ILLEGAL MANUFACTURE OR DELIVERY OF,
OR POSSESSION WITH INTENT TO MANUFACTURE OR DELIVER, COCAINE

OFFENSE	PRIOR LAW		ACT 121	
	AMOUNT	PENALTY*	AMOUNT	PENALTY*
MANUFACTURE OR DELIVERY OF COCAINE	10 grams or less	May be imprisoned 0-5 years and must be fined $1,000 to $200,000	10 grams or less	Same as prior law
	More than 10 grams but not more than 30 grams	$1,000 to $250,000 (6 months 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 30 grams	$1,000 to $500,000 (1 to 15 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)
POSSESSION OF COCAINE WITH INTENT TO MANUFACTURE OR DELIVER	10 grams or less	May be imprisoned 0-5 years and must be fined $1,000 to $100,000	10 grams or less	Same as prior law
	More than 10 grams but not more than 30 grams	$1,000 to $200,000 (6 months 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 30 grams	$1,000 to $500,000 (1 to 15 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)

*Unless otherwise specified, a violator must be fined and imprisoned at least the minimum amounts and periods (see item 5, b, below on "presumptive" minimums) set forth in the Table.

2. "Crack" Offenses

a. Background

As shown in Tables 2 and 3, under prior law, offenses involving cocaine base ("crack") were subject to the same penalties which apply to offenses involving cocaine.

b. Act 121

Act 121 establishes a separate penalty structure for offenses involving cocaine base. The penalty structure under the Act is shown in Table 3, below.

TABLE 3

PENALTIES FOR ILLEGAL MANUFACTURE OR DELIVERY OF, OR POSSESSION WITH INTENT TO MANUFACTURE OR DELIVER, COCAINE BASE ("CRACK")

OFFENSE	PRIOR LAW		ACT 121	
	AMOUNT	PENALTY*	AMOUNT	PENALTY*
MANUFACTURE OR DELIVERY OF COCAINE BASE	10 grams or less	May be imprisoned 0-5 years and must be fined $1,000 to $200,000	3 grams or less	$1,000 to $500,000 (1 to 15 years)
	10 grams or more to 30 grams	$1,000 to $250,000 (6 months to 5 years)	More than 3 grams to 10 grams	$1,000 to $500,000 (3 to 15 years)
	More than 30 grams	$1,000 to $500,000 (1 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)
POSSESSION OF COCAINE BASE WITH INTENT TO MANUFACTURE OR DELIVER	10 grams or less	May be imprisoned 0-5 years and must be fined $1,000 to $100,000	3 grams or less	$1,000 to $500,000 (1 to 15 years)
	10 grams or more to 30 grams	$1,000 to $250,000 (6 months to 5 years)	More than 3 grams to 10 grams	$1,000 to $500,000 (3 to 15 years)
	More than 30 grams	$1,000 to $500,000 (1 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)

*Unless otherwise specified, a violator must be fined and imprisoned at least the minimum amounts and periods set forth in the Table (see item 5, b, below on "presumptive" minimums).

3. Heroin, PCP, Amphetamine and Methamphetamine Offenses

a. Background

Under prior law and Act 121, 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.

Under prior law, the same penalty applied to offenses involving any amount greater than 10 grams: the person was subject to a fine of not less than $1,000 nor more than $500,000 and imprisonment for not less than one year nor more than 15 years [s. 161.41 (1) (d) 2 and (1m) (d) 3, 1987 Stats.].

b. Act 121

Act 121 establishes four separate penalty ranges for offenses involving more than 10 grams of heroin, PCP, amphetamine or methamphetamine. The penalty ranges under the Act are set forth in Table 4, on page 13.

4. Crime of Attempted Possession Created

a. Background

Under prior law, it was not an offense to attempt to possess a controlled substance, possession of which is prohibited under ch. 161, Stats.

b. Act 121

Act 121 makes it unlawful to attempt to possess various controlled substances, possession of which is prohibited under ch. 161, Stats.

The penalties for attempted possession are the same as the current penalties for illegal possession of the controlled substance. In addition, the treatment option available under current s. 161.475, Stats., for persons found guilty of possession of a controlled substance is applicable to persons found guilty of attempted possession.

TABLE 4

PENALTIES FOR ILLEGAL MANUFACTURE AND DELIVERY
OF, OR POSSESSION WITH INTENT TO MANUFACTURE OR DELIVER,
HEROIN, PCP, AMPHETAMINE OR METHAMPHETAMINE

OFFENSE	PRIOR LAW		ACT 121	
	AMOUNT	PENALTY*	AMOUNT	PENALTY*
MANUFACTURE OR DELIVERY OF HEROIN	3 grams or less	$1,000 to $200,000 (0 to 15 years)	3 grams or less	Same as current law
	More than 3 grams but not more than 10 grams	$1,000 to $250,000 (6 months to 15 years)	More than 3 grams but not more than 10 grams	Same as current law
	More than 10 grams	$1,000 to $500,000 (1 to 15 years)	More than 10 grams but not more than 50 grams	$1,000 to $500,000 (1 to 15 years)
			More than 50 grams but not more than 200 grams	$1,000 to $500,000 (3 to 15 years)
			More than 200 grams but not more than 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)
MANUFACTURE OR DELIVERY OF PCP, AMPHETAMINE OR METHAMPHETAMINE	3 grams or less	$1,000 to $200,000 (0 to 5 years)	3 grams or less	Same as current law
	More than 3 grams but not more than 10 grams	$1,000 to $250,000 (6 months to 5 years)	More than 3 grams but not more than 10 grams	Same as current law
	More than 10 grams	$1,000 to $500,000 (1 to 15 years)	More than 10 grams but not more than 50 grams	$1,000 to $500,000 (1 to 15 years)
			More than 50 grams but not more than 200 grams	$1,000 to $500,000 (3 to 15 years)
			More than 200 grams but not more than 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)
POSSESSION OF HEROIN WITH INTENT TO MANUFACTURE OR DELIVER	3 grams or less	$1,000 to $100,000 (0 to 15 years)	3 grams or less	Same as current law
	More than 3 grams but not more than 10 grams	$1,000 to $200,000 (6 months to 15 years)	More than 3 grams but not more than 10 grams	Same as current law
	More than 10 grams	$1,000 to $500,000 (1 to 15 years)	More than 10 grams but not more than 50 grams	$1,000 to $500,000 (1 to 15 years)
			More than 50 grams but not more than 200 grams	$1,000 to $500,000 (3 to 15 years)
			More than 200 grams but not more than 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)
POSSESSION OF PCP, AMPHETAMINE OR METHAMPHETAMINE WITH INTENT TO MANUFACTURE OR DELIVER	3 grams or less	$1,000 to $100,000 (0 to 5 years)	3 grams or less	Same as current law
	More than 3 grams but not more than 10 grams	$1,000 to $200,000 (6 months to 5 years)	More than 3 grams but not more than 10 grams	Same as current law
	More than 10 grams	$1,000 to $500,000 (1 to 15 years)	More than 10 grams but not more than 50 grams	$1,000 to $500,000 (1 to 15 years)
			More than 50 grams but not more than 200 grams	$1,000 to $500,000 (3 to 15 years)
			More than 200 grams but not more than 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)

*A violator must be fined and imprisoned at least the minimum amounts and periods set forth in the Table (see item 5, b, below on "presumptive" minimums).

5. Court's Authority to Deviate from Minimum Sentences

a. Background

There were no provisions in prior law permitting a court to deviate from a mandatory minimum sentence prescribed by statute.

b. Act 121

As noted above, Act 121 changes the minimum sentences for most Schedule I or II controlled substances violations under ch. 161, Stats. The Act also states that any minimum sentence under ch. 161, Stats., is a "presumptive" minimum. Under the Act, 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.

C. ASSET FORFEITURE AND RELATED ISSUES

1. Asset Forfeiture Standards and Procedures Under the Wisconsin Organized Crime Control Act

a. Background

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., as affected by 1989 Wisconsin Act 121].

b. Act 121

Act 121 creates a procedure for criminal forfeiture to the state of property used in or derived through with the criminal activity. Under the Act, 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 new 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.

Similar to the WOCCA's provisions regarding civil forfeitures, the Act also: (1) provides that all such forfeitures or dispositions must be made with due provision for the rights of innocent persons; and (2) provides that any injured party has a right to forfeited property, or proceeds thereof, superior to the right of the state.

Act 121 also amends provisions relating to civil forfeitures under the WOCCA. Previously, the state had to show that conduct had resulted in a conviction for violation of the WOCCA in order to obtain a civil forfeiture. Act 121 retains the conviction requirement 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.

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

a. Background

Under prior law, an action to cause forfeiture of property seized under the Uniform Controlled Substances Act had to be an action in rem. That is, in order to cause forfeiture of the property, an action had to be brought in the court of the county where the property is located. A court could only order the forfeiture of property physically located within the same county as the court [s. 161.555 (1), 1987 Stats.].

In addition, an action to cause the forfeiture of any property derived from and certain vehicles used in the commission of any crime had to be an action in rem [s. 973.076 (1), 1987 Stats.].

b. Act 121

Act 121 provides that in an action to cause forfeiture of property under the Uniform Controlled Substances Act or the Criminal Code, the court may render judgment either: (1) in rem; or (2) against a party personally. As a result of this change, 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, the Act 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.

D. SANCTIONS OTHER THAN FORFEITURES, FINES AND IMPRISONMENTS

1. Disciplinary Sanctions of Post-Secondary Students

a. Background

Prior to the enactment of 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.].

Prior to the enactment of Act 121, the statutes did not specifically refer to the expulsion or suspension of students from the VTAE System. 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.

b. Act 121

Act 121 provides that UW System students who engage 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.

The Act contains a similar provision applicable to VTAE districts.

2. Offenses Committed by Minors

a. Background

Under prior law, a juvenile court was required to order one or any combination of the following penalties when it found that a child possessed or consumed intoxicating liquor or beer in violation of the law:

(1) For a first violation, a forfeiture of not more than $50, suspension of the child's operating privilege for 30 to 90 days or participation in a supervised work program.

(2) For a violation committed within 12 months of a previous violation, a forfeiture of not more than $100, suspension of the child's operating privilege for one year or participation in a supervised work program.

(3) For a violation committed within 12 months of two previous violations, a forfeiture of not more than $500, revocation of the child's operating privilege for two years or participation in a supervised work program.

The following penalties applied to children who illegally procured alcohol beverages, illegally entered premises licensed to sell alcohol beverages or falsely represented their age to obtain alcohol beverages:

(1) For a first violation, any one or combination of the following: a forfeiture of not less than $250 nor more than $500; suspension of the person's motor vehicle operating privilege for 30 to 90 days; or participation in a supervised work program.

(2) For a violation committed within 12 months of a previous violation, any one or combination of the following: a forfeiture of not less than $300 nor more than $500; suspension of the person's motor vehicle operating privilege for one year; or participation in a supervised work program.

(3) For a violation committed within 12 months of two or more previous violations, any one or combination of the following: a forfeiture of $500; revocation of the person's motor vehicle operating privilege for two years; or participation in a supervised work program [ss. 48.344 (2b) and 125.07 (4) (bs), as created by 1989 Wisconsin Act 31].

With the agreement of the child, the court could stay the execution of the penalty order for a second or subsequent offense if the child: (1) submitted to an alcohol or other drug abuse assessment at an approved treatment facility; or (2) participated in an outpatient alcohol or other drug abuse treatment or program at an approved facility if the assessment recommends treatment; or (3) participated in a court-approved alcohol and other drug abuse education program.

b. Act 121

(1) Alcohol Beverages and Drug Paraphernalia Violations

Act 121:

(a) Revises the penalties for violations of alcohol beverages procurement and possession laws to:

(i) Delete the license suspension provision (30 to 90 days) for a first offense alcohol beverage possession or consumption offense by a minor. However, this license sanction is restored in Enrolled 1989 Assembly Bill 542 (i.e., returned to prior law), the 1990 Budget Act, which is awaiting the Governor's signature.

(ii) Change the license suspension option for an offense occurring within 12 months of a previous violation from one year to up to one year and to change the license revocation option for an offense occurring within 12 months of two or more previous violations from two years to up to two years.

(b) Applies the same sanctions (i.e., forfeitures, license suspensions or revocations and participation in supervised work programs) as are applicable to alcohol beverage possession or consumption to certain drug paraphernalia offenses committed by minors (i.e., possession, manufacture or delivery, possession with intent to deliver or delivery of drug paraphernalia to a minor).

(2) Controlled Substances Violations

Act 121 specifies that, in addition to the dispositions provided under current law for delinquency under ch. 48, Stats. (the Children's Code), the court may impose forfeitures and, for certain offenses, license sanctions on minors who violate the controlled substances laws.

(a) Manufacture, delivery or possession with intent to deliver. Under the Act, in addition to 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 minor to the following penalties:

(i) For a first violation, a forfeiture of not less than $250 nor more than $500. There is no provision for suspension of the child's operating privilege for this offense.

(ii) For a violation committed within 12 months of a previous violation, a forfeiture of not less than $300 nor more than $500 or suspension of the child's operating privilege for up to one year, or both.

(iii) For a violation committed within 12 months of two previous violations, a forfeiture of $500 or revocation of the child's operating privilege for up to two years, or both.

(b) Possession. Under the Act, in addition to other dispositions available for delinquency, the illegal possession of controlled substances subjects a minor to the following penalties:

(i) For a first violation, a forfeiture of not more than $50. There is no provision for suspension of the child's operating privilege for this offense.

(ii) For a violation committed within 12 months of a previous violation, a forfeiture of not more than $100 or suspension of the child's operating privilege for up to one year, or both.

(iii) For a violation committed within 12 months of two previous violations, a forfeiture of not more than $500 or revocation of the child's operating privilege for up to two years, or both.

The Act specifies that any license suspension or revocation must run concurrently with any other license suspension or revocation imposed as a disposition under the Children's Code.

(c) Stay of order; assessment, education or treatment. Under the Act, 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: (i) submit to an alcohol and other drug abuse assessment at an approved treatment facility; (ii) participate in an outpatient alcohol or other drug abuse treatment program, if the assessment recommends treatment; or (iii) 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.

3. Juvenile Court Orders Applicable to Adults

a. Background

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.].

b. Act 121

Act 121 grants new authority to juvenile courts to make orders applicable to adults. Under the Act, 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:

(1) Participate in an approved outpatient alcohol and other drug abuse treatment program; or

(2) 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.

The Act specifies that:

(1) Any person who fails to comply with the court order may be subject to contempt of court proceedings; and

(2) 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 D, 2, above), the court may order the child's parent, guardian or legal custodian to also participate in a court-approved education program.

E. CORRECTIONS AND PROBATION

1. Assessment and Treatment of Prisoners

a. Background

There were no similar provisions in prior law.

b. Act 121

Act 121 creates a new provision requiring the Department of Corrections (DOC) to:

(1) Provide alcohol or other drug abuse assessments so that a prisoner can receive such an assessment either during his or her initial assessment and evaluation period in the state prison system or at the prison where he or she is placed after the initial assessment and evaluation period.

(2) Provide alcohol or other drug abuse treatment at each state prison except: (a) a community residential confinement program institution under s. 301.046, Stats., as affected by 1989 Wisconsin Act 31; (b) a minimum security correctional institution authorized under s. 301.13, Stats., as affected by 1989 Wisconsin Act 31; or (c) a state-local shared correctional facility established under s. 310.14, Stats., as affected by 1989 Wisconsin Act 31.

(3) Conduct drug testing of prospective parolees who have undergone treatment while in state prison.

2. Probation Permitted for Crimes with Mandatory Minimums

a. Background

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)].

b. Act 121

Act 121 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.

F. COURTS AND EVIDENCE

1. Designation of Milwaukee County Drug Courts

a. Background

Currently:

(1) In general, circuit courts are not designated to handle specific types of criminal offenses.

(2) Under Supreme Court Rule 70.23 (3), the chief judge of each judicial administrative district is required to design a plan for the rotation of judicial assignments in multi-judge circuits within the district (e.g., two years in criminal and traffic court followed by two years in civil matters).

b. Act 121

Act 121 requires the Chief Judge of the Milwaukee County judicial administrative district to designate two Milwaukee County circuit court branches as drug courts. The Act specifies that these courts will primarily handle cases that involve illegal manufacturing, delivering, dispensing or possessing of Schedule I or II controlled substances. The Chief Judge may appoint any of the current Milwaukee circuit judges to preside over the new drug courts or may appoint any newly-elected judges to preside over these courts. The "drug court" judges will not be exempt from participation in any judicial rotation within the County.

2. Admissibility of Evidence Recorded with One-Party Consent

a. Background

Under current law, a conversation or other oral, electronic or wire communication may be lawfully recorded by a person acting under color of law when one party to the communication consents to the recording. However, according to the Wisconsin Supreme Court, the contents of such a recorded communication or any evidence derived from the communication may be introduced by the state in a state criminal proceeding only if disclosure in a criminal proceeding is authorized by state law [State ex rel. Arnold v. County Court, 51 Wis. 2d 434 (1971)]. Prior to Act 121, such disclosure was not authorized by state law.

b. Act 121

Act 121 specifically authorizes the disclosure of lawfully-recorded communications intercepted pursuant to one-party consent, and the evidence derived from the communication, in a court proceeding in which a person is accused of a controlled substance felony, but only if: (1) the party who consented to the interception is available to testify; or (2) another witness is available to authenticate the recording.

If the district attorney intends to use evidence obtained as a result of a one-party consent interception, the Act requires the district attorney to notify the defendant of that intention not less than 30 days before trial. The district attorney must also permit the defendant to inspect, listen to or copy the evidence upon demand.

G. HEALTH MAINTENANCE ORGANIZATIONS

1. Required Health Maintenance Organization Coverage of Outpatient Alcoholism, Drug or Mental Illness Treatment for Dependent Children

a. Background

Health maintenance organizations are health care plans that make available to enrollees services performed by providers selected by the organization or plan. Prior and current law permit an HMO to require an enrollee to obtain a referral from a primary provider before seeing another selected provider.

Prior and current law require group or blanket insurance policies, including HMO's, to provide minimum levels of coverage of alcohol, drug or mental illness treatment. Specifically, if a policy covers inpatient hospital treatment, in any policy year, it must cover the first $6,300 for inpatient alcohol, drug or mental health services in any policy year. If the policy covers outpatient services, it must cover the first $1,000, minus a $100 copayment, for outpatient alcohol, drug or mental health services, in any policy year. However, the total value of inpatient and outpatient services covered in any policy year need not exceed $7,000. The HMO's may provide coverage for services in excess of these minimum amounts [s. 632.89, Stats.].

b. Act 121

Act 121 creates an exception to the HMO selected provider and referral restrictions for specified outpatient alcohol, drug or mental illness services provided to certain dependent students. The student must be: (1) a dependent of an enrollee under the terms of the HMO policy; and

(2) attending a school of higher education located in Wisconsin but outside the geographical service area of the HMO.

Under the Act, the following outpatient alcohol and other drug treatment services provided to such students must be covered by the HMO, even though the services are provided by a provider who does not have a provider agreement with the HMO:

(1) A clinical assessment of the student's nervous or mental disorders or alcoholism or other drug abuse problems, if the assessment is conducted by a provider who is located in Wisconsin and is in reasonably close proximity to the school in which the student is enrolled.

(2) Outpatient treatment services, if the assessment recommends outpatient services. This requirement applies to not more than five visits to an outpatient treatment facility, if the facility is: (a) located in Wisconsin; and (b) in reasonably close proximity to the school in which the dependent student is enrolled. Coverage is not required, however, if the medical director of the HMO determines that receiving this treatment will prohibit the student from attending school on a regular basis, or if the student has terminated his or her enrollment in the school. Once the five outpatient visits have been covered, the medical director of the HMO and the treating clinician must review the student's condition to determine whether continued treatment is appropriate. This review is not required if the coverage limits under the HMO policy have been exhausted. Based on this review, the medical director must make a determination regarding whether the HMO will continue to provide coverage of any further treatment for the student.

The Act also specifies that:

(1) Coverage is required only to the extent that the policy would have covered the service had it been provided to the dependent student by a provider who has a provider agreement with the HMO.

(2) An HMO may not reimburse a provider for less than the full cost of the services provided solely because the reimbursement rate for the service would have been less if provided under a provider agreement with the HMO.

(3) These requirements apply to HMO plans covering state employes.

2. Study of Milwaukee Medical Assistance Health Maintenance Organization Enrollees

a. Background

Persons in Milwaukee County who are eligible for Medical Assistance because they are categorically needy under the Aid to Families with Dependent Children (AFDC) program are enrolled in HMO's. The HMO's must provide any service that is medically necessary and is covered under the Medical Assistance program, including alcohol and other drug abuse services. The DHSS may exempt a person with alcohol and other drug abuse needs from participating in the HMO under certain circumstances. In 1988-89, the DHSS exempted 14 of the approximately 116,000 Milwaukee HMO recipients due to exceptional alcohol and other drug abuse treatment needs.

b. Act 121

Act 121 requires the DHSS to study whether persons in Milwaukee County who are enrolled in HMO's under the Medical Assistance program and who need alcohol and other drug abuse services should continue to be enrolled in HMO's for: (1) all Medical Assistance services; or (2) their Medical Assistance services except for alcohol and other drug abuse services. The Act also requires the study to include a determination of: (1) the number of Medical Assistance recipients in Milwaukee County who are enrolled in HMO's and who need alcohol and other drug abuse services; (2) the services provided by the HMO's; (3) whether there are services that these Medical Assistance recipients need, but are not receiving; and (4) the cost of providing all or some Medical Assistance benefits to these recipients outside of HMO's.

The DHSS is required to submit a report of its conclusions and recommendations to the Governor and to the Chief Clerk of each house of the Legislature on or before June 1, 1990.

H. MISCELLANEOUS

1. Authority for County Marijuana Ordinances

a. Background

Under prior law, local units of government (cities, villages and counties) were not authorized to provide civil penalties that parallel the criminal provisions under the Uniform Controlled Substances Act.

b. Act 121

Act 121 expressly authorizes cities, villages and counties to enact and enforce ordinances providing civil penalties for the possession of THC (the chemical found in marijuana) in the amount of 25 grams or less. A local governmental unit is only authorized to provide civil penalties for a first offense; second or subsequent offenses and first offenses involving larger quantities must be prosecuted under the state law.

The Act also specifies that a county ordinance will not govern in a city or village within the county if the city or village has enacted an ordinance.

2. Taking of Samples to Determine Cause of Death

a. Background

Under prior and current law, in cases of traffic fatalities in which the decedent was the operator of a motor vehicle, a pedestrian 14 years of age or older or a bicycle operator 14 years of age or older, the coroner or medical examiner of the county where the death occurred is required to draw a blood sample from the body within 12 hours after the death, if death occurred within six hours of the time of the accident. The blood sample must be forwarded to an approved laboratory for analysis of the alcoholic content of the sample. The laboratory must then notify the coroner or medical examiner of the results of each analysis; the coroner or medical examiner is then required to forward the results of each analysis to the DHSS. This information is to be used for statistical purposes only and, if made public, may not identify the individuals involved [s. 346.71 (2), Stats.].

Also, similar procedures are required when a boating accident results in the death of a person within six hours of the time of the accident [s. 30.67 (6) (b), Stats.].

b. Act 121

Act 121 creates a new requirement that, in all cases of reportable deaths where an autopsy is not performed, a coroner or medical examiner take and have analyzed any samples necessary to determine the cause of death, if requested by the decedent's spouse, parent, child or sibling and not objected to by any of these family members. The Act specifies that the samples are not admissible as evidence in any civil action against the decedent or his or her estate. Reportable deaths included in this requirement are:

(1) All deaths in which there are unexplained, unusual or suspicious circumstances.

(2) All homicides.

(3) All suicides.

(4) All deaths following an abortion.

(5) All deaths due to poisoning, whether homicidal, suicidal or accidental.

(6) All deaths following accidents, whether the injury is or is not the primary cause of death.

(7) When there was no physician, or accredited practitioner of a bona fide religious denomination relying upon prayer or spiritual means for healing, in attendance within 30 days preceding death.

(8) When a physician refuses to sign the death certificate.

(9) When, after reasonable efforts, a physician cannot be obtained to sign the medical certification.

3. Studies

a. Physical Causes of Drug Addiction

Act 121 requires the DHSS to study the physical causes of drug addiction. No later than January 21, 1991, the DHSS is required to submit a written report on the results of the study to the Chief Clerk of each house of the Legislature for distribution to the Legislature.

b. Administration of Youth Services

Act 121 requires the DHSS to complete a study regarding the most suitable state department to administer youth services. No later than February 1, 1990, the DHSS is required to submit a written report on the results of the study to the Chief Clerk of each house of the Legislature for distribution to the Legislature.

4. Restriction on Detaining Probationers and Parolees in County Jail

a. Background

There were no similar restrictions on detaining probationers and parolees under prior law.

b. Act 121

Act 121 provides that if a probationer or parolee is detained in a county jail or other county facility pending disposition of probation or parole revocation proceedings, the following conditions apply:

(1) The DOC must begin a preliminary revocation hearing within 15 working days after the probationer or parolee is detained in the jail or other facility. The DOC may extend, for cause, this deadline by not more than five additional working days upon written notice to the probationer or parolee and the sheriff or other person in charge of the facility. This provision does not apply under any of the following circumstances:

(a) The probationer or parolee has waived, in writing, the right to a preliminary hearing.

(b) The probationer or parolee has given and signed a written statement that admits the violation.

(c) There has been a finding of probable cause in a felony criminal action and the probationer or parolee is bound over for trial for the same or similar conduct that is alleged to be a violation of supervision.

(d) There has been an adjudication of guilt by a court for the same conduct that is alleged to be a violation of supervision.

(2) The Division of Hearings and Appeals in the Department of Administration must begin a final revocation hearing within 60 calendar days after the person is detained in the county jail or other county facility. The DOC may request the Division to extend this deadline by not more than seven additional calendar days, upon notice to the probationer or parolee, the sheriff or other person in charge of the facility and the Division. The Division may grant the request. This provision does not apply if the probationer or parolee has waived the right to a final revocation hearing.

If there is a failure to begin a hearing within the time requirements above, the sheriff or other person in charge of a facility must notify the

DOC at least 24 hours before releasing a probationer or parolee under this provision.

These provisions in Act 121 apply to probationers or parolees who begin detainment in a jail or other facility on or after July 1, 1990, except that this proposal does not apply to any probationer or parolee who is in the jail or other facility and serving a sentence.

5. Parole Commission

a. Background

Effective January 1, 1990, a Parole Commission consisting of five members was created in the DOC. This Commission replaced the prior law's Parole Board. Members must have knowledge of or experience in corrections or criminal justice. The members must include a chairperson who is nominated by the Governor and appointed for a two-year term and four members in the classified service appointed by the chairperson [s. 15.145 (1), Stats., as affected by 1989 Wisconsin Act 107].

b. Act 121

Act 121 revises the law relating to the Parole Commission by specifying that:

(1) The chairperson of the Parole Commission, who is nominated by the Governor, may be appointed only with the advice and consent of the Senate.

(2) The chairperson's two-year term expires on March 1 of the odd-numbered years, subject to removal by the Governor, at the Governor's pleasure.

(3) The initial term of the chairperson expires on March 1, 1991. Prior to the initial appointment of the Parole Commission chairperson, the Secretary of the DOC may exercise the Parole Commission chairperson's authority to appoint the other Parole Commission members.

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