



State of Wisconsin  
2021 - 2022 LEGISLATURE

LRB-5281/1  
CMH&MIM:emw/wlj/amn

## 2021 SENATE BILL 790

December 17, 2021 - Introduced by Senators BERNIER and L. TAYLOR, cosponsored by Representatives SORTWELL, ORTIZ-VELEZ, BROOKS, TITTL, CABRAL-GUEVARA, KRUG, L. MYERS, MOSES, DRAKE, CONSIDINE and SUMMERFIELD. Referred to Committee on Judiciary and Public Safety.

1     **AN ACT** *to renumber* 961.571 (1) (a) (intro.), 1., 2., 3., 4., 5., 6., 8., 9. and 10.,  
2             961.571 (1) (a) 7., 961.571 (1) (a) 11. a., b., c., d., f., g., h., i., j. and m. and 961.571  
3             (1) (a) 11. e., k. and L.; *to renumber and amend* 961.41 (3g) (e) and 961.571  
4             (1) (a) 11. (intro.); *to amend* 59.54 (25) (a) (intro.), 66.0107 (1) (bm), 961.41 (3g)  
5             (c), 961.41 (3g) (d), 961.41 (3g) (em), 961.47 (1), 961.48 (3), 961.573 (title),  
6             961.574 (title) and 961.577; and *to create* 66.0108, 103.157, 778.25 (1) (a) 2m.,  
7             961.571 (1) (ac), 961.571 (1) (b) 3., 961.571 (1) (c) (intro.) and 2. (intro.), 961.572  
8             (1m), 961.573 (1m) and 961.574 (1m) of the statutes; **relating to:** penalties for  
9             possession of marijuana, employer liability for not drug testing employees and  
10            prospective employees, and providing a penalty.

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### *Analysis by the Legislative Reference Bureau*

Current law prohibits a person from possessing or attempting to possess marijuana. A person who violates the prohibition is guilty of a misdemeanor crime and may be fined not more than \$1,000 or imprisoned for not more than six months, or both, for a first conviction and is guilty of a Class I felony and may be fined not more than \$10,000 or imprisoned for not more than three years and six months, or both,

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for a repeat conviction. Under current law, a repeat conviction includes any previous conviction for a state or federal misdemeanor or felony relating to a controlled substance.

This bill reduces to a \$100 civil forfeiture the penalty for possessing or attempting to possess 14 grams or less of marijuana. The bill also eliminates counting, for the purposes of determining if a conviction is a repeat conviction, a criminal offense of marijuana possession involving 28 grams or less.

Current law also increases the penalties for possession of other controlled substances due to a prior conviction for a state or federal misdemeanor or felony relating to a controlled substance. The bill eliminates counting, as a prior conviction, a conviction for marijuana possession involving 28 grams or less.

Current law allows a local government to enact an ordinance prohibiting the possession of marijuana and to impose a forfeiture for a violation of the ordinance. The bill preempts a local government from imposing a forfeiture amount for the possession of 14 grams or less of marijuana that is less than the \$100 forfeiture amount imposed by the state or that is more than \$250. Under the bill, the court may impose, instead of the forfeiture amount, no less than 16 hours nor more than 40 hours of community service for violating an ordinance prohibiting the possession of 14 grams or less of marijuana. The bill does not change the current law that allows local governments discretion in the forfeiture amount imposed for possession of more than 14 grams of marijuana.

Current law prohibits a person from using or possessing drug paraphernalia with the intent to produce, distribute, or use a controlled substance. A person who violates the prohibition is guilty of a misdemeanor and subject to a fine of not more than \$500 or imprisonment for not more than 30 days, or both. The bill reduces the penalty to a civil forfeiture of not more than \$10 for using or possessing drug paraphernalia that relates to marijuana consumption.

The bill also specifies that a citation issued for possession of marijuana or marijuana paraphernalia must contain provisions for a deposit in lieu of a court appearance. The court may consider the deposit as a plea of no contest and enter a judgment without the person appearing in court.

The bill allows law enforcement officers discretion in how they complete processing or "booking" of a person for a violation of state law or a local ordinance prohibiting possession or attempted possession of marijuana or marijuana paraphernalia, including whether to take the person to jail, complete a booking photo, or fingerprint the person. Under the bill, however, a law enforcement officer must still obtain certain personal information from the person sufficient for identification, including at least the person's name and current address.

The bill, subject to certain exceptions, limits the liability of an employer that does not require an employee or prospective employee to submit to a test for the presence of any tetrahydrocannabinol (THC), which is the active ingredient in marijuana, synthetic cannabinoid, or a controlled substance analog to THC or a synthetic cannabinoid in his or her system (drug testing) as a condition of employment.

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The bill does not apply to the drug testing of an employee or prospective employee who is subject to drug testing under 1) any regulation promulgated by the federal Department of Transportation that requires drug testing of an employee or prospective employee or any rule promulgated by the Department of Transportation of this state adopting such a regulation for purposes of enforcing the requirements of that regulation with respect to intrastate commerce; 2) any contract entered into between the federal government and an employer or any grant of financial assistance from the federal government to an employer that requires drug testing of employees and prospective employees as a condition of receiving the contract or grant; 3) any federal statute, regulation, order, or other requirement or condition that requires drug testing of employees and prospective employees for purposes of safety or security; 4) any substance abuse prevention program under a collective bargaining agreement or under the current law that requires such programs for public works and public utility projects; 5) rules promulgated by the Law Enforcement Standards Board requiring drug testing of prospective law enforcement officers, tribal law enforcement officers, jail officers, and secure detention officers; or 6) any employer requirement that an employee be a licensed private security person and carry a firearm in the course of employment.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report.

For further information see the state and local fiscal estimate, which will be printed as an appendix to this bill.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           **SECTION 1.** 59.54 (25) (a) (intro.) of the statutes is amended to read:  
2           59.54 (25) (a) (intro.) The board may enact and enforce an ordinance to prohibit  
3 the possession of marijuana, as defined in s. 961.01 (14), subject to the exceptions in  
4 s. 961.41 (3g) (intro.), ~~and. The board may provide a forfeiture for a violation of the~~  
5 ~~ordinance; except that if. If the board provides a forfeiture, the amount for the~~  
6 possession of not more than 14 grams of marijuana may not be less than the  
7 maximum amount of the forfeiture in s. 961.41 (3g) (e) 1. nor more than \$250. If the  
8 defendant appears in court, the court may impose for each violation not less than 16  
9 nor more than 40 hours of community service in lieu of the forfeiture. If a complaint  
10 is issued regarding an allegation of possession of more than ~~25~~ 28 grams of

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1 marijuana, ~~or possession of any amount of marijuana following a conviction in this~~  
2 ~~state for possession of marijuana~~, the subject of the complaint may not be prosecuted  
3 under this subsection for the same action that is the subject of the complaint unless  
4 all of the following occur:

5 **SECTION 2.** 66.0107 (1) (bm) of the statutes is amended to read:

6 66.0107 (1) (bm) Enact and enforce an ordinance to prohibit the possession of  
7 marijuana, as defined in s. 961.01 (14), subject to the exceptions in s. 961.41 (3g)  
8 (intro.), and provide a forfeiture for a violation of the ordinance; ~~except that if~~ If the  
9 board or council provides a forfeiture, the amount for the possession of not more than  
10 14 grams of marijuana may not be less than the maximum amount of the forfeiture  
11 in s. 961.41 (3g) (e) 1. nor more than \$250. If the defendant appears in court, the court  
12 may impose for each violation not less than 16 nor more than 40 hours of community  
13 service in lieu of the forfeiture. If a complaint is issued regarding an allegation of  
14 possession of more than ~~25~~ 28 grams of marijuana, ~~or possession of any amount of~~  
15 ~~marijuana following a conviction in this state for possession of marijuana~~, the subject  
16 of the complaint may not be prosecuted under this paragraph for the same action that  
17 is the subject of the complaint unless the charges are dismissed or the district  
18 attorney declines to prosecute the case.

19 **SECTION 3.** 66.0108 of the statutes is created to read:

20 **66.0108 Discretion in processing certain marijuana violations.** (1) In  
21 this section, “law enforcement officer” has the meaning given in s. 165.85 (2) (c).

22 (2) In processing a person for possession or attempted possession of not more  
23 than 14 grams of marijuana, as defined in s. 961.01 (14), in violation of s. 961.41 (3g)  
24 (e) 1., for violation of an ordinance prohibiting the possession of marijuana under s.  
25 59.54 (25) or 66.0107 (1) (bm), or for a violation under s. 961.573 (1m) or 961.574 (1m),

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1 a law enforcement officer may exercise discretion regarding what, if any, standard  
2 procedures to complete, including determining whether or not to take the person to  
3 jail, complete fingerprinting, or have a formal police photograph taken.  
4 Notwithstanding the use of discretion otherwise permitted under this section, a law  
5 enforcement officer shall obtain sufficient personal information for identification,  
6 including at least the person's name and current address.

7 **SECTION 4.** 103.157 of the statutes is created to read:

8 **103.157 Employer nonliability for not testing for marijuana or**  
9 **synthetic cannabinoids; exceptions. (1) DEFINITIONS.** In this section:

10 (a) "Controlled substance analog" has the meaning given in s. 961.01 (4m).

11 (b) "Employer" means any person engaging in any activity, enterprise, or  
12 business employing at least one individual. "Employer" includes the state, its  
13 political subdivisions, and any office, department, independent agency, authority,  
14 institution, association, society, or other body in state or local government created or  
15 authorized to be created by the constitution or any law, including the legislature and  
16 the courts.

17 (c) "Synthetic cannabinoid" means a substance included under s. 961.14 (4) (tb).

18 (d) "Tetrahydrocannabinol" means a substance included under s. 961.14 (4) (t).

19 **(2) EMPLOYER LIABILITY.** Except as provided in sub. (3), no employer may be held  
20 liable for not requiring an employee or prospective employee to submit to testing for  
21 the presence of any tetrahydrocannabinol, synthetic cannabinoid, or controlled  
22 substance analog of a tetrahydrocannabinol or synthetic cannabinoid in his or her  
23 system as a condition of employment.

24 **(3) EXCEPTIONS.** Subsection (2) does not apply to an employer who fails to test  
25 for the presence of any tetrahydrocannabinol, synthetic cannabinoid, or controlled

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1 substance analog of a tetrahydrocannabinol or synthetic cannabinoid in the system  
2 of an employee or prospective employee if the employee or prospective employee is  
3 required to subject to drug testing under any of the following:

4 (a) Any regulation promulgated by the federal department of transportation  
5 that requires testing of an employee or prospective employee in accordance with 49  
6 CFR 40 or any rule promulgated by the department of transportation of this state  
7 adopting such a regulation for purposes of enforcing the requirements of that  
8 regulation with respect to intrastate commerce.

9 (b) Any contract entered into between the federal government and an employer  
10 or any grant of financial assistance from the federal government to an employer that  
11 requires drug testing of employees and prospective employees as a condition of  
12 receiving the contract or grant.

13 (c) Any federal statute, regulation, order, or other requirement or condition  
14 that requires drug testing of employees and prospective employees for purposes of  
15 safety or security.

16 (d) A substance abuse prevention program under s. 103.503 or under a  
17 collective bargaining agreement between an employer and a labor organization  
18 representing employees and prospective employees of the employer.

19 (e) Rules promulgated by the law enforcement standards board requiring drug  
20 testing of prospective law enforcement officers, tribal law enforcement officers, jail  
21 officers, and secure detention officers.

22 (f) Any employer requirement that an employee be a licensed private security  
23 person under s. 440.26 and that the employee carry a firearm in the course of his or  
24 her employment.

25 **SECTION 5.** 778.25 (1) (a) 2m. of the statutes is created to read:

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1           778.25 (1) (a) 2m. Under s. 961.41 (3g) (e) 1., 961.573 (1m), or 961.574 (1m) or  
2 a local ordinance under s. 59.54 (25) (a) or 66.0107 (1) (bm).

3           **SECTION 6.** 961.41 (3g) (c) of the statutes is amended to read:

4           961.41 (3g) (c) *Cocaine and cocaine base.* If a person possesses or attempts to  
5 possess cocaine or cocaine base, or a controlled substance analog of cocaine or cocaine  
6 base, the person shall be fined not more than \$5,000 and may be imprisoned for not  
7 more than one year in the county jail upon a first conviction and is guilty of a Class  
8 I felony for a 2nd or subsequent offense. For purposes of this paragraph, an offense  
9 is considered a 2nd or subsequent offense if, prior to the offender's conviction of the  
10 offense, the offender has at any time been convicted of any felony or misdemeanor  
11 under this chapter, except for a misdemeanor under par. (e) 2., or under any statute  
12 of the United States or of any state relating to controlled substances, controlled  
13 substance analogs, narcotic drugs, marijuana, or depressant, stimulant, or  
14 hallucinogenic drugs, except that, if the statute relates to marijuana possession, only  
15 felonies or misdemeanors involving more than 28 grams may be counted.

16           **SECTION 7.** 961.41 (3g) (d) of the statutes is amended to read:

17           961.41 (3g) (d) *Certain hallucinogenic and stimulant drugs.* If a person  
18 possesses or attempts to possess lysergic acid diethylamide, phencyclidine,  
19 amphetamine, 3,4-methylenedioxymethamphetamine, methcathinone, cathinone,  
20 N-benzylpiperazine, a substance specified in s. 961.14 (4) (a) to (h), (m) to (q), (sm),  
21 (u) to (xb), or (7) (L), psilocin, or psilocybin, or a controlled substance analog of  
22 lysergic acid diethylamide, phencyclidine, amphetamine,  
23 3,4-methylenedioxymethamphetamine, methcathinone, cathinone,  
24 N-benzylpiperazine, a substance specified in s. 961.14 (4) (a) to (h), (m) to (q), (sm),  
25 (u) to (xb), or (7) (L), psilocin, or psilocybin, the person may be fined not more than

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1 \$5,000 or imprisoned for not more than one year in the county jail or both upon a first  
2 conviction and is guilty of a Class I felony for a 2nd or subsequent offense. For  
3 purposes of this paragraph, an offense is considered a 2nd or subsequent offense if,  
4 prior to the offender's conviction of the offense, the offender has at any time been  
5 convicted of any felony or misdemeanor under this chapter, except for a misdemeanor  
6 under par. (e) 2., or under any statute of the United States or of any state relating  
7 to controlled substances, controlled substance analogs, narcotic drugs, marijuana,  
8 or depressant, stimulant, or hallucinogenic drugs, except that, if the statute relates  
9 to marijuana possession, only felonies or misdemeanors involving more than 28  
10 grams may be counted.

11 **SECTION 8.** 961.41 (3g) (e) of the statutes is renumbered 961.41 (3g) (e) 1. and  
12 amended to read:

13 961.41 (3g) (e) 1. If a person possesses or attempts to possess not more than  
14 14 grams of tetrahydrocannabinols included under s. 961.14 (4) (t), or a controlled  
15 substance analog of tetrahydrocannabinols, the person may be subject to a forfeiture  
16 of not more than \$100.

17 2. If a person possesses or attempts to possess more than 14 grams but not more  
18 than 28 grams of tetrahydrocannabinols included under s. 961.14 (4) (t), or a  
19 controlled substance analog of tetrahydrocannabinols, the person may be fined not  
20 more than \$1,000 or imprisoned for not more than 6 months or both.

21 3. If a person possesses or attempts to possess more than 28 grams of  
22 tetrahydrocannabinols included under s. 961.14 (4) (t), or a controlled substance  
23 analog of tetrahydrocannabinols, the person may be fined not more than \$1,000 or  
24 imprisoned for not more than 6 months or both upon a first conviction and is guilty  
25 of a Class I felony for a 2nd or subsequent offense. For purposes of this paragraph



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1 subdivision, an offense is considered a 2nd or subsequent offense if, prior to the  
2 offender's conviction of the offense, the offender has at any time been convicted of any  
3 of the following:

4 a. A felony or misdemeanor under this chapter or, except that, if the felony or  
5 misdemeanor relates to marijuana possession, only felonies or misdemeanors  
6 involving more than 28 grams may be counted.

7 b. A felony or misdemeanor under any statute of the United States or of any  
8 state relating to controlled substances, controlled substance analogs, narcotic drugs,  
9 marijuana, or depressant, stimulant, or hallucinogenic drugs, except that, if the  
10 felony or misdemeanor relates to marijuana possession, only felonies or  
11 misdemeanors involving more than 28 grams may be counted.

12 **SECTION 9.** 961.41 (3g) (em) of the statutes is amended to read:

13 961.41 **(3g)** (em) *Synthetic cannabinoids*. If a person possesses or attempts to  
14 possess a controlled substance specified in s. 961.14 (4) (tb), or a controlled substance  
15 analog of a controlled substance specified in s. 961.14 (4) (tb), the person may be fined  
16 not more than \$1,000 or imprisoned for not more than 6 months or both upon a first  
17 conviction and is guilty of a Class I felony for a 2nd or subsequent offense. For  
18 purposes of this paragraph, an offense is considered a 2nd or subsequent offense if,  
19 prior to the offender's conviction of the offense, the offender has at any time been  
20 convicted of any felony or misdemeanor under this chapter, except for a misdemeanor  
21 under par. (e) 2., or under any statute of the United States or of any state relating  
22 to controlled substances, controlled substance analogs, narcotic drugs, marijuana,  
23 or depressant, stimulant, or hallucinogenic drugs, except that, if the statute relates  
24 to marijuana possession, only felonies or misdemeanors involving more than 28  
25 grams may be counted.

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1           **SECTION 10.** 961.47 (1) of the statutes is amended to read:

2           961.47 (1) Whenever any person who has not previously been convicted of any  
3 offense under this chapter, or of any offense under any statute of the United States  
4 or of any state or of any county ordinance relating to controlled substances or  
5 controlled substance analogs, narcotic drugs, marijuana or stimulant, depressant or  
6 hallucinogenic drugs, pleads guilty to or is found guilty of possession or attempted  
7 possession of a controlled substance or controlled substance analog under s. 961.41  
8 (3g) (b), the court, without entering a judgment of guilt and with the consent of the  
9 accused, may defer further proceedings and place him or her on probation upon terms  
10 and conditions. For purposes of this subsection, a conviction does not count as a  
11 previous conviction if it was for an offense under s. 961.41 (3g) (e) 1. or 2. or, if the  
12 conviction was for marijuana possession, if the conviction involved not more than 28  
13 grams. Upon violation of a term or condition, the court may enter an adjudication  
14 of guilt and proceed as otherwise provided. Upon fulfillment of the terms and  
15 conditions, the court shall discharge the person and dismiss the proceedings against  
16 him or her. Discharge and dismissal under this section shall be without adjudication  
17 of guilt and is not a conviction for purposes of disqualifications or disabilities imposed  
18 by law upon conviction of a crime, including the additional penalties imposed for 2nd  
19 or subsequent convictions under s. 961.48. There may be only one discharge and  
20 dismissal under this section with respect to any person.

21           **SECTION 11.** 961.48 (3) of the statutes is amended to read:

22           961.48 (3) For purposes of this section, a felony offense under this chapter is  
23 considered a 2nd or subsequent offense if, prior to the offender's conviction of the  
24 offense, the offender has at any time been convicted of any felony or misdemeanor  
25 offense under this chapter, except for a misdemeanor under s. 961.41 (3g) (e) 2., or

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1 under any statute of the United States or of any state relating to controlled  
2 substances or controlled substance analogs, narcotic drugs, marijuana or  
3 depressant, stimulant or hallucinogenic drugs, except that, if the statute relates to  
4 marijuana possession, only felonies or misdemeanors involving more than 28 grams  
5 may be counted.

6 **SECTION 12.** 961.571 (1) (a) (intro.), 1., 2., 3., 4., 5., 6., 8., 9. and 10. of the  
7 statutes are renumbered 961.571 (1) (ag) (intro.), 1., 2., 3., 4., 5., 6., 7., 8. and 9.

8 **SECTION 13.** 961.571 (1) (a) 7. of the statutes is renumbered 961.571 (1) (c) 1.

9 **SECTION 14.** 961.571 (1) (a) 11. (intro.) of the statutes is renumbered 961.571  
10 (1) (ag) 11. (intro.) and amended to read:

11 961.571 (1) (ag) 11. (intro.) Objects used, designed for use or primarily intended  
12 for use in ingesting, inhaling or otherwise introducing marijuana, cocaine, hashish,  
13 or hashish oil into the human body, such as:

14 **SECTION 15.** 961.571 (1) (a) 11. a., b., c., d., f., g., h., i., j. and m. of the statutes  
15 are renumbered 961.571 (1) (ag) 11. a., b., c., d., e., f., g., h., i. and j.

16 **SECTION 16.** 961.571 (1) (a) 11. e., k. and L. of the statutes are renumbered  
17 961.571 (1) (c) 2. a., b. and c.

18 **SECTION 17.** 961.571 (1) (ac) of the statutes is created to read:

19 961.571 (1) (ac) Notwithstanding s. 961.01 (4), “controlled substance” does not  
20 include tetrahydrocannabinols or marijuana.

21 **SECTION 18.** 961.571 (1) (b) 3. of the statutes is created to read:

22 961.571 (1) (b) 3. Marijuana paraphernalia.

23 **SECTION 19.** 961.571 (1) (c) (intro.) and 2. (intro.) of the statutes are created to  
24 read:

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1           961.571 (1) (c) (intro.) “Marijuana paraphernalia” means all equipment,  
2 products and materials of any kind that are used, designed for use or primarily  
3 intended for use in planting, propagating, cultivating, growing, harvesting,  
4 manufacturing, compounding, converting, producing, processing, preparing,  
5 testing, analyzing, packaging, repackaging, storing, containing, concealing,  
6 ingesting, inhaling or otherwise introducing into the human body  
7 tetrahydrocannabinols or marijuana in violation of this chapter. “Marijuana  
8 paraphernalia” includes, but is not limited to, any of the following:

9           2. (intro.) Objects used, designed for use or primarily intended for use in  
10 ingesting, inhaling or otherwise introducing marijuana into the human body, such  
11 as:

12           **SECTION 20.** 961.572 (1m) of the statutes is created to read:

13           961.572 (1m) In determining whether an object is marijuana paraphernalia,  
14 a court or other authority shall consider, in addition to all other legally relevant  
15 factors, the following:

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

18           (b) The proximity of the object, in time and space, to a direct violation of this  
19 chapter.

20           (c) The proximity of the object to marijuana.

21           (d) The existence of any residue of marijuana on the object.

22           (e) Direct or circumstantial evidence of the intent of an owner, or of anyone in  
23 control of the object, to deliver it to persons whom he or she knows intend to use the  
24 object to facilitate a violation of this chapter; the innocence of an owner, or of anyone  
25 in control of the object, as to a direct violation of this chapter shall not prevent a

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1 finding that the object is designed for use or primarily intended for use as marijuana  
2 paraphernalia.

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

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

6 (h) Local advertising concerning its use.

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

8 (j) Whether the owner, or anyone in control of the object, is a legitimate supplier  
9 of like or related items to the community, such as a licensed distributor or dealer of  
10 tobacco products.

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

12 (L) Expert testimony concerning its use.

13 **SECTION 21.** 961.573 (title) of the statutes is amended to read:

14 **961.573** (title) **Possession of drug or marijuana paraphernalia.**

15 **SECTION 22.** 961.573 (1m) of the statutes is created to read:

16 961.573 (1m) No person may use, or possess with the primary intent to use,  
17 marijuana paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture,  
18 compound, convert, produce, process, prepare, test, analyze, pack, repack, store,  
19 contain, conceal, inject, ingest, inhale or otherwise introduce into the human body  
20 marijuana or tetrahydrocannabinol in violation of this chapter. Any person who  
21 violates this subsection may be subject to a civil forfeiture of no more than \$10.

22 **SECTION 23.** 961.574 (title) of the statutes is amended to read:

23 **961.574** (title) **Manufacture or delivery of drug or marijuana**  
24 **paraphernalia.**

25 **SECTION 24.** 961.574 (1m) of the statutes is created to read:

