STATE OF WISCONSIN

IN SUPREME COURT

Case No. 95-0314-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY R. DOWE,

Defendant-Appellant-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes and Rules

Other Authorities

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The Wisconsin Association of Criminal Defense Lawyers ("WACDL"), by undersigned counsel, respectfully submits this nonparty brief, pursuant to Wis. Stat. (Rule) 809.19(7)(b), in support of Larry R. Dowe on the question of whether possession of marijuana with intent to deliver is a lesser-included offense of being a dealer in possession of marijuana without a tax stamp upon application of the "elements only" test.

Because the general application of the "elements only" test is fully discussed in the parties' briefs, as well as in the briefs in *State v. Darryl J. Hall*, Case No. 94-2848-CR, also currently pending before this Court, this amicus brief addresses only the issue of whether an intent to deliver

is an essential element of the tax stamp offense where, as here, the defendant's status as a "dealer" subject to the controlled substance tax is based upon his or her "possession" of the substance.

ARGUMENT

WHERE THE DEFENDANT'S STATUS AS A "DEALER" IS BASED UPON HIS OR HER POSSESSION OF A CONTROLLED SUBSTANCE, INTENT TO DELIVER IS AN ESSENTIAL ELEMENT OF THE TAX STAMP OFFENSE

The core issue in this case is whether possession of a controlled substance with intent to deliver in violation of Chapter 161, Wis. Stats., is a lesser-included offense under the "elements only" test prescribed by *Blockburger v. United States*, 284 U.S. 299 (1932), and *State v. Sauceda*, 168 Wis.2d 486, 485 N.W.2d 1 (1992). "The same-elements test ... inquires whether each offense contains an element not contained in the other." *United States v. Dixon*, 509 U.S. ___, 113 S.Ct. 2849 (1993). If they do not, then the defendant cannot be convicted and punished for both offenses without violating the constitutional proscription against double jeopardy. *E.g., State v. Eastman*, 185 Wis.2d 405, 411, 518 N.W.2d 257, 259 (Ct. App. 1994).

Mr. Dowe is charged with possession of THC, the active ingredient in marijuana, with intent to deliver, in violation of Wis. Stat. §161.41(1m)(h)1 (Count 1), and with possession of the same marijuana not bearing evidence that the

Wisconsin Controlled Substance Tax had been paid, in violation of Wis. Stat. §139.95(2) (Count 2) (App:116-18). The lower courts apparently based their decisions that possession with intent is not a lesser-include offense of a tax stamp violation on the belief that intent to deliver is not an element of the tax stamp violation (R23:16; App. 103-04, 115). According to the lower courts, intent to deliver is an element of the possession count but not the tax stamp count, while possession of a minimum quantity (*i.e.*, 42.5 grams of marijuana here) and absence of a tax stamp are elements of the tax stamp violation but not the possession offense.

The lower courts, however, were wrong. For the reasons which follow, intent to deliver is an essential element of the tax stamp offense based, as here, upon a defendant's possession of a controlled substance. Accordingly, every element of the offense of possession with intent to deliver is also required for conviction in such circumstances of the tax stamp violation.

Wis. Stat. §139.88 imposes an "occupational tax" upon "dealers." Section 139.87(2) defines "dealer:"

> "Dealer" means a person who in violation of ch. 161 possesses, manufactures, produces, ships, transports, delivers, imports, sells or transfers to another person more than 42.5 grams of marijuana, more than five marijuana plants, more than 14 grams of mushrooms containing psilocin or psilocybin, more than 100 milligrams of any material containing lysergic acid diathylamide or seven grams of any other schedule I controlled sub-

> stance or schedule II controlled substance. "Dealer" does not include a person who lawfully possesses marijuana or another controlled substance.

Wis. Stat. §139.87(2). The question is whether these statutes impose the "occupational tax" upon those who possess more than 42.5 grams of marijuana for personal use, not with the intent to deliver.

Although the definition of "dealer" does not expressly state that possession must be with the intent to deliver, that *mens rea* requirement is clearly implied. This Court has recognized that, even where a criminal statute contains no words denoting *mens rea*, the state may have to prove criminal intent to obtain a conviction if the legislature so intended. *See, e.g., State v. Stoehr*, 134 Wis. 2d 66, 396 N.W.2d 177, 180 (1986); *State v. Collova*, 79 Wis. 2d 473, 255 N.W.2d 581 (1977) (crime of operating after revocation requires proof of criminal intent despite lack of *mens rea* element on face of statute); *State v. Alfonsi*, 33 Wis. 2d 469, 476, 147 N.W.2d 550 (1967) (crime of bribery requires proof of criminal intent despite lack of *mens rea* element on face of statute). The reason for looking beyond the language of the statute is that, although the legislature may create crimes in which criminal intent is not an element, "criminal intent is the rule in our criminal jurisprudence." *Stoehr*, 396 N.W.2d at 181.

Among the factors Wisconsin courts have considered

in determining whether the legislature intended to require proof of *mens rea* are the language of the statute, the legislative history of the statute, the seriousness of the penalty, the purpose of the statute, and the practical requirements of effective law enforcement. *Id.* at 180.

Other than the decision below, no reported cases have discussed the *mens rea* required to be a "dealer" under §139.87, and thus subject to the drug tax and, potentially, felony liability for failure to pay that tax. A common sense reading of the statute, however, demonstrates that it is intended to punish production- and distribution- related activities, not possession for personal use.

The statute uses the term "dealer" to identify the persons liable for the tax. In common terms, a "dealer" is not someone who possesses drugs only for personal use, but rather is someone in the drug trafficking business. *See also Black's Law Dictionary* at 208 (Abridged 5th Ed. 1983) ("dealer" defined as "one who buys to sell; not one who buys to keep or invest, or makes to sell. One who purchases goods or property for resale to final customers").

The drug-related activities, other than possession, used by the legislature to identify a "dealer" also are consistent with the intent only to tax drug dealers rather than simple users. The statute is directed at anyone who "manufactures, produces, ships, transports, delivers, imports, sells or transfers to another person" more than a certain

quantity of controlled substance. Conspicuously absent from this list are consumer activities such as uses, consumes, receives or purchases.

The common sense reading of the statute as applying to those who possess drugs only when they intend to distribute them thus conforms with the legal maxim *noscitur a sociis* (a word is known by the company it keeps), which often has been applied to avoid giving unintended breath to legislative acts. *See, e.g., Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (the term "discovery" in a statute providing relief from an excess profits tax for "[i]ncome resulting from exploration, discovery, or prospecting ... ," did not extend to income from sales of newly developed drugs or film developing process); *cf., F.W. Fitch Co. v. United States*, 323 U.S. 582, 585-86 (1945) (applying closely related maxim of *ejusdem generis*); *United States v. Chase*, 135 U.S. 255 (1890) (obscene letter did not constitute a "writing" within meaning of federal statute).

The legislature's choice of language in §139.88 also indicates it did not intend to tax those who possess marijuana or some other controlled substance for purely personal use. There, the legislature made clear that it intended to impose an "occupational tax" on dealers. Its use of the term of art, "occupational tax" demonstrates that it intended to tax only those involved in the business of drug trafficking and not the ultimate consumer.

Black's law Dictionary defines "occupation tax" as follows:

> A tax imposed upon an occupation or the prosecution of a business, trade, or profession; not a tax on property, or even the capital employed in the business, but an excise tax on the business itself; to be distinguished from a "license tax," which is a fee or exaction for the privilege of engaging in the business, not for its prosecution. *An occupation tax is form of excise tax imposed upon persons for privilege of carrying on business, trade or occupation.*

Black's Law Dictionary at 559 (emphasis added).

Imposition of the "occupational tax" in §139.88 solely upon those in the occupation of drug trafficking is consistent with the use of that term of art elsewhere in the statutes. Every other tax labeled an "occupational tax" under Wisconsin law applies only to those in a particular occupation or business and does *not* apply to mere possession of particular items of property. *See* Wis. Stat. §70.37-.396 (tax imposed upon persons engaged in mining); *id.* §70.40 (tax on persons operating an iron ore concentration dock); *id.* §70.41 (tax on persons operating grain elevators or warehouses); *id.* §70.42 (tax on persons operating coal dock); *id.* §70.421 (tax on persons operating a crude oil refinery); *id.* §70.425 (tax on persons owing or operating any domestic mink farm); *id.* §§139.02, 139.05 & 139.09 (tax imposed on brewers, bottlers and wholesalers of fermented malt beverages); *id.* §139.03 (tax

on those selling intoxicating liquor); *id.* §139.76 (tax imposed on those in the distribution of tobacco products); *id.* §563.80 (tax on those licensed to conduct Bingo games).

When the legislature wishes to tax consumers for the use or storage of items of property as opposed to distributors, it certainly knows how to do so. *Compare* Wis. Stat. §139.76(1) (imposing occupational tax on distributors of tobacco products) *with id.* §139.78(1) (imposing "use tax" on consumer's use or storage of tobacco products). *See also* Wis. Const. Art. VIII, §1 (distinguishing between personal property taxes, which must be uniform, and taxes imposed on incomes, privileges and occupations, which need not be).

Simply put, a person who possesses marijuana for personal use is not in the business of drug trafficking, is not a "dealer," and is not required to pay the "occupational tax" imposed by §139.88.

What sparse legislative history exists on this point also supports the conclusion that the legislature wanted the tax to apply to actual drug dealers, not those individuals who simply possessed over a certain amount for personal use. The drug tax was enacted during a special session of the legislature as part of 1989 Wis. Act 122, a wide-ranging amalgamation of anti-drug measures.

As originally proposed, the definition of "dealer" applied only to those who manufacture, ship, transport,

import, sell or transfer controlled substances. *See* Assembly Bill 12 (10/89 Special Session) at 32. Although the Legislative Reference Bureau file on that enactment covers 9 microfiche, it appears that only one page makes any reference to the reasons for adding possession to that list. A memorandum dated November 8, 1989 from the Department of Revenue to the Legislative Fiscal Bureau recommended the amendment with the following explanation:

> The drug tax applies to drug dealers. The term "dealer" is defined as a person who manufactures, produces, ships, transports, imports, sells or transfers controlled substances. The definition of dealer should include persons who possess controlled substances as well since many drug dealers are arrested for possession with intent to sell or deliver. Adding the word "possess" will ensure that drug tax assessments can be made against all drug dealers.

(App. 146). The provision thus was specifically intended not to impose tax and felony liability upon those who possess more than a minimal amount for personal use, but to "ensure that drug tax assessments can be made against all drug dealers," including those who possess with intent to sell or deliver, as well as those who actually are caught in the act of selling or manufacturing a controlled substance (*id.*).

Finally, interpreting the statutes as authorizing imposition of the Controlled Substances Tax upon those who possess drugs solely for personal use, and subjecting such mere users to felony conviction and potential five-year prison

terms, *see* Wis. Stat. §139.95(2), ignores the legislature's specific declaration of intent with regard to the drug laws. That declaration, as well as the legislature's choice of significantly different statutory penalties depending on whether possession is for personal use or for distribution, emphasizes the importance of distinguishing between drug traffickers, for whom punishment is paramount, and mere consumers, for whom it is not:

> **Declaration of intent.** The legislature finds that the abuse of controlled substances constitutes a serious problem for society. As a partial solution, these laws regulating controlled substances have been enacted with penalties. The legislature, recognizing a need for differentiation among those who would violate these laws makes this declaration of legislative intent:
>
> (1) Persons who illicitly traffic commercially in controlled substances constitute a substantial menace to the public health and safety. The possibility of lengthy terms of imprisonment must exist as a deterrent to trafficking by such persons. Upon conviction for trafficking, such persons should be sentenced in a manner which will deter further trafficking by them, protect the public from their pernicious activities, and restore them to legitimate and socially useful endeavors.
>
> (2) Persons who habitually or professionally engage in commercial trafficking in controlled substances and prescription drugs should, upon conviction, be sentenced to substantial terms of imprisonment to shield the public from their predatory acts. However, persons addicted to or dependent on controlled substances should, upon conviction, be sentenced in a manner most likely to

produce rehabilitation.

> (3) Upon conviction, persons who casually use or experiment with controlled substances should receive special treatment geared toward rehabilitation. The sentencing of casual users and experimenters should be such as will best induce them to shun further contact with controlled substances and to develop acceptable alternatives to drug abuse.

Wis. Stat. §161.001.

Interpreting the Controlled Substance Tax as applicable to mere users would make a mockery of the legislature's intent. If 50 grams of marijuana (or, as in this case, 3 1/2 ounces) is possessed for one's own use, that person is guilty of a six month misdemeanor for simple possession. Wis. Stat. §161.41(3r). In the absence of a tax stamp, however, that misdemeanor possession immediately becomes a five-year felony under Wis. Stat. §139.95(2) if the intent to distribute is not required. Indeed, that simple possession of untaxed marijuana for personal use results in a higher potential prison term than would be faced by an actual drug trafficker who sold less than 42.5 grams of marijuana or possessed that amount with the intent to deliver. *Compare* Wis. Stat. §139.95(2) (five years for dealer's untaxed marijuana) *with* Wis. Stat. §161.41(1m)(h)1 (three years for possession of marijuana with intent to deliver) and *id.* §161.41(1)(h)1 (three years for delivery of marijuana).

Given all of these factors, the legislature clearly

did not intend to impose the controlled substances "occupational tax" upon those who possess marijuana not for resale but for purely personal use. The term "possesses," as used in the definition of "dealer" in §139.87(2) thus must be construed as meaning "possession with intent to deliver."

CONCLUSION

Contrary to the conclusions of the lower courts, intent to deliver is an essential element of a tax stamp violation in which the defendant's status as a "dealer" required to pay the tax is based upon his or her possession of a controlled substance.

Dated at Milwaukee, Wisconsin, March 11, 1996.

Respectfully submitted,

WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Amicus Curiae

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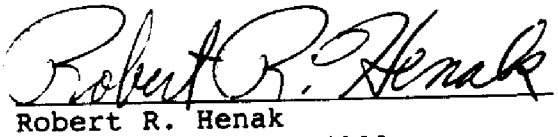

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this nonparty brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a nonparty brief produced with a mono-spaced font. The length of this brief is 12 pages.

Robert R. Henak

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