STATE OF WISCONSIN

IN SUPREME COURT

Case No. 94-2848-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRYL J. HALL,

Defendant-Appellant-Petitioner.

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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I. WHETHER WISCONSIN'S TAX ON CONTROLLED SUBSTANCES, WIS. STAT. §139.87-139.96 VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 8 OF THE WISCONSIN CONSTITUTION ON THE FOLLOWING GROUNDS:

A. The requirement that a "dealer" of controlled substances purchase tax stamps or other evidence of payment compels him to make incriminating testimonial communications.

B. The requirement that a "dealer" of controlled substances affix and display tax stamps or other evidence of payment on his controlled substances compels him to make incriminating testimonial communications.

Mr. Hall argued in the Court of Appeals that both the payment provisions as implemented and the "affix and display" provisions of the drug tax stamp law are unconstitutional.

The Court of Appeals ruled that the payment procedures implemented by the Department of Revenue did not violate Mr. Halls' right to be free from compelled self-incrimination.

The Court of Appeals agreed with Mr. Hall that the tax stamp law's "affix and display" requirement would unconstitutionally compel self-incrimination if the fact of Hall's compliance could be used against him in a criminal proceeding. The Court also agreed that the plain language of the law did not prohibit the use of such evidence against a dealer in a criminal proceeding. The Court nonetheless construed the law to contain such a limitation. The Court ruled that, given this "saving construction", the law did not violate Mr. Hall's Fifth Amendment rights.

II. **WHETHER MR. HALL'S CONSTITUTIONAL RIGHT NOT TO BE PLACED TWICE IN JEOPARDY FOR THE SAME OFFENSE WAS VIOLATED WHEN HE WAS CONVICTED AND SENTENCED ON TWO COUNTS OF DELIVERY OF COCAINE BASE IN ADDITION TO TWO TAX STAMP COUNTS BASED UPON THE SAME DELIVERIES.**

Mr. Hall maintained in the Court of Appeals that his conviction for violating both the controlled substance statute and the tax stamp law was an unconstitutional violation of his right to be free from double jeopardy. The Court of Appeals held that conviction and sentencing on both the drug charges and the tax stamp charges did not violate the constitutional prohibition on double jeopardy.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

When granting review, this Court indicated that both oral argument and publication are warranted.

STATEMENT OF THE CASE

On July 2, 1993, Darryl J. Hall, made his initial appearance in Dane County Circuit Court on two counts of delivery of cocaine base. (R3). Following bindover after a preliminary hearing an information was filed adding two counts of tax stamp violations. (R12). A trial was conducted on October 1, 1993 and the jury found Hall guilty on all counts. (R65-397-99).

On December 3, 1993, the trial court sentenced Hall to two consecutive thirty year sentences for the two convictions of delivery of cocaine base. (R66-58-59). The trial court also sentenced Hall to two consecutive three year sentences for the two tax stamp convictions but made that portion of the sentence concurrent to the two thirty year terms. (R66-59).

On appeal, Mr. Hall challenged his convictions on several grounds. He argued that Wisconsin's drug tax scheme

compels statutorily defined "dealers" to incriminate themselves in violation of the Fifth Amendment of the United States Constitution, and Article I, Section 8 of the Wisconsin Constitution.

Mr. Hall further challenged his conviction of both the delivery charges and drug tax stamp charges on the grounds that conviction of both the drug offenses and the tax stamp violations involving the same deliveries subjected him to multiple punishments for the same offense in violation of the state and federal constitutional prohibitions against double jeopardy.[1]

The Court of Appeals affirmed his convictions. (App. 1-27). Mr. Hall timely filed a Petition for Review by this Court on

[1] Mr. Hall raised additional challenges that are not addressed in this brief, as discussed in the Court of Appeals opinion. (App. 17-18, 23-27)

October 12, 1995. This Court granted review by its Order dated January 16, 1996.

ARGUMENT

I. THE WISCONSIN TAX ON CONTROLLED SUBSTANCES, BOTH AS WRITTEN AND AS APPLIED, VIOLATES THE FIFTH AMENDMENT.

Chapter 139, Subchapter IV, of the Wisconsin Statutes imposes an "occupational tax" on "dealers" of controlled substances. Wis. Stats. § 139.88. "Dealer" is defined to include "a person who in violation of Ch. 161 possesses, manufactures, produces, ships, transports, delivers, imports, sells or transfers to another person", certain quantities of controlled substances. Wis. Stats. § 139.87(2). In order to comply, the dealer must purchase stamps or other evidence of payment issued by the Department of Revenue. Wis. Stats. § 139.89. The dealer must also affix and display on the controlled substances the stamp or other evidence that the tax has been paid. *Id.* Failure to pay the

tax and affix and display the evidence of payment is a felony, subjecting the dealer to a fine of up to $10,000.00 and imprisonment for up to 5 years. Wis. Stats. §139.95(2).

Mr. Hall was convicted of two tax stamp counts for delivering cocaine base which did not bear evidence the controlled substance tax had been paid. Mr. Hall submits that the constitutional privilege against self-incrimination provides a complete defense to these charges because in order to comply with the drug tax law he would have been compelled to incriminate himself twice: (1) when he paid the tax, and (2) when he affixed and displayed evidence of payment.

A. The Applicable Legal Standards

Under the Fifth Amendment's self-incrimination clause, "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. *See also* Wis. Const., Art. I. §8(1). This privilege protects a person "against

being incriminated by his own compelled testimonial communication." *Fisher v. United States*, 425 U.S. 391, 409 (1976) (citations omitted).

The privilege against compulsory self-incrimination "protects against any disclosure that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). The statement need only "furnish a link in the chain of evidence" against the defendant, *Hoffman v. United States*, 341 U.S. 479, 486 (1951), or an "investigatory lead," *Kastigar*, 406 U.S. at 460.

Although the unlawfulness of an activity does not prevent the activity from being taxed, a statute imposing a tax on unlawful activity cannot be sustained when the methods of collecting the tax are in conflict with the constitutional right not to incriminate oneself. *See Marchetti v. United States*, 390 U.S.

39, 44 (1968). Where compliance with the requirements of a statute necessarily would result in self-incriminating communications, "a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions" under such statutes. *Haynes v. United States*, 390 U.S. 85, 100 (1968). *See also Leary v. United States*, 395 U.S. 6 (1969); *Grosso v. United States*, 390 U.S. 62 (1968).

The statutory requirement that "dealers" purchase drug tax stamps, both on its face and as implemented by the Department, plainly fails the applicable constitutional standard set forth in *Marchetti*, as does the separate statutory requirement that a "dealer" affix to any controlled substance and display evidence that he has paid the tax. *See* Sections B-D, *infra*.

The constitutionality of a statute is reviewed *de novo* on appeal. *E.g.*, *State v. McManus*, 152 Wis. 2d 113, 447 N.W.2d 654, 660 (1989).

B. The Statutory Requirement That "Dealers" Pay a Controlled Substance Tax Violates The Privilege Against Compelled Self-incrimination.

In *State v. Heredia*, 172 Wis.2d 479, 493 N.W.2d 404, 406-07 (Ct. App. 1992), the court of appeals held that the statutory requirement that dealers pay the drug tax did not, on its face, compel self-incrimination. Stating that "it is *payment* of the occupational tax that is compelled--*not the giving of information*," the court held that any incrimination

> would flow from information *voluntarily* supplied; as noted, section 139.91 specifically provides that "[d]ealers may not be required to provide any identifying information in connection with the purchase of stamps." The statute thus both contemplates and permits the anonymous payment of the tax. Accordingly, any "identifying information [disclosed] in connection with the purchase of stamps" evidencing payment, sec. 139.91, is disclosed voluntarily.

493 N.W.2d at 407 (emphasis in original).

Contrary to the *Heredia* court's assumption, the Fifth Amendment bars compelled self-*incrimination*, not self-*identification*. Disclosure of one's identity is not itself incriminating. *See California v. Byers*, 402 U.S. 424, 432 (1971) (plurality opinion) ("Disclosure of name and address is an essentially neutral act"). "It identifies but does not by itself implicate anyone in criminal conduct." *Id.* at 434. Rather, disclosure of one's identity merely affects the availability for use by the prosecuting authorities of *other*, incriminating disclosures. *Id.* The *Heredia* court never answered the real question of whether the statute compels self-incrimination. If it had, it would have reached the opposite result.

The applicable test under *Marchetti* to determine whether a tax law violates the Fifth Amendment privilege was well summarized in *Sisson v. Triplett*, 428 N.W.2d 565 (Minn. 1988):

> The [United States Supreme] Court identified the following criteria for determining the constitutionality of a tax statute challenged on fifth amendment grounds: (1) whether the regulated activity is in an area "permeated with criminal statutes," and the tax aimed at individuals "inherently suspect of criminal activities," (2) whether an individual is required, under pain of criminal prosecution, to provide information which the individual might reasonably suppose would be available to prosecuting authorities, (3) whether such information would prove a significant link in a chain of evidence tending to establish guilt. The Court noted that "[t]he central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination."

Sisson, 428 N.W.2d at 571 (citations omitted). Application of these criteria demonstrates that the payment requirement of Wisconsin's drug tax law violates the privilege against compelled self-incrimination.

1. Inherently suspect

Wisconsin's drug tax law plainly meets the first *Marchetti* criterion. State and federal law is "permeated with criminal statutes" addressing the issue of controlled substances. *Leary*, 395 U.S. at 16-18; *Briney v. State Dept. of Revenue*, 594 So.2d 120, 122 (Ala. Ct. App. 1991); *see, e.g.*, 21 U.S.C. §801, *et seq.*; Wis. Stat. §§161.01, *et seq.* Moreover, the tax is imposed only upon those who fall within the definition of "dealer," Wis. Stat. §139.88, a group "inherently suspect of criminal activities," as it is limited to those who violate Wisconsin's drug laws, *see* Wis. Stat. §139.87(2).

2. Incriminating

Application of the third criterion is equally straightforward. The question essentially is whether any information provided by the dealer would be incriminating, *i.e.*, whether it

would provide a "link in the chain" of evidence against him or provide an investigatory lead. *Kastigar*, 406 U.S. at 460.

The requirement that a dealer purchase tax stamps compels the dealer to incriminate himself by telling the government that he is a drug dealer. Requesting tax stamps in the amount required of a dealer is itself an admission that one possesses drugs illegally or intends to do so. Only persons violating Chapter 161 are required to purchase the tax stamps. Wis. Stat. §§139.87(2), 139.88. In addition, the purchase expresses the dealer's involvement with at least the quantity of controlled substance commensurate with the number of stamps purchased. The fact that an individual applies for the number of controlled substance tax stamps required of a dealer also necessarily indicates his or her knowledge of the nature of the substance possessed and of the fact of possession.

Compliance with the purchase requirement thus clearly involves the admission of crucial elements of the crimes of possession of controlled substances, *see* Wis. Stat. §161.41(3), and of possession with intent to deliver, *see* Wis. Stat. §161.41(1m). Indeed, such intent may be inferred, *inter alia*, from evidence of the quantity of the substance possessed. *Id.* Knowledge of the nature of the substance also is a necessary element for conviction under either provision. *See* Wis. J.I.--Crim. 6000 (Note); 6035. Compliance also may admit crucial elements of manufacturing or delivery of a controlled substance. *See* Wis. Stat. §139.87(2); §161.41(1). The implicit testimonial admission of the purchaser at the time of buying the tax stamps that "I am a drug dealer" thus plainly is incriminating.

It is, of course, irrelevant that the purchaser may never give this information verbally. Actions as well as speech may

be testimonial under the Fifth Amendment. *See, e.g., Doe v. United States*. 487 U.S. 201, 210 (1988) ("[T]he Fifth Amendment privilege against self-incrimination applies to acts that imply assertions of fact").

See also Fisher, supra, in which the Supreme Court acknowledged that the act of producing physical evidence in response to a subpoena has communicative aspects of its own because "[c]ompliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena." 425 U.S. at 410. The act of purchasing tax stamps similarly discloses the taxpayer's knowledge and intent.

3. Compelled and available for use by prosecutor

The only substantive issue seriously disputed by the state below focused on the second *Marchetti* criterion:

> whether an individual is required, under pain of criminal prosecution, to provide information which the individual might reasonably suppose would be available to prosecuting authorities.

Sisson, 428 N.W.2d at 571, citing *Marchetti*, 390 U.S. at 48. This question actually presents two separate inquiries: (1) is the information "compelled," and (2) would the dealer "reasonably suppose" that such information would be available for use by the prosecutor? Once again, the drug tax law fails both of these tests.

Compelled.--The incriminatory communication is compelled, first of all, because the statute mandates that a dealer purchase the stamps upon pain of criminal punishment, Wis. Stat. §139.95(2), *see Heredia*, 493 N.W.2d 407 ("it is the

payment of the occupational tax that is compelled" (emphasis in original)), but the only legal means of purchasing them necessarily result in incriminating testimonial communication. Indeed, as explained above, it is the compelled physical act of purchasing the tax stamps itself which is the first incriminating testimonial communication.[2]

Available for state use (identification).--This is where the *Heredia* court went wrong. The issue of what identifying information, if any, a dealer must provide in complying with the drug tax law is part and parcel of the question whether the dealer reasonably could believe that the incriminating disclosures compelled by the drug tax law could be used by the prosecutor. *See, e.g., State v. Davis*, 787 P.2d 517, 522 (Utah App. 1990) (anonymity issue addressed in terms of danger "that information

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[2] The other, of course, is the required "affix and display" of evidence that the tax has been paid. *See* Section D, *infra*.

gathered as a result of defendant's compliance with the statute would reach prosecuting authorities"). If the statute in fact provides total anonymity, then police agencies would be unable to connect the dealer to the purchase and concomitant incriminating disclosures. Those disclosures thus could not be used against the dealer and any danger of actual incriminating use of them would be "trifling and imaginary" rather than substantial. *See id. But see State v. Smith*, 813 P.2d 888, 890 (Idaho 1991) (drug tax statute lacking confidentiality provision violated Fifth Amendment despite anonymity requirement).

Under Wisconsin law, however, the purchase necessarily provides the state with the information necessary to discover the "dealer's" identity, and therefore to use the taxpayer's compelled self-incriminating statements against him or her. The dealer must purchase the tax stamps personally because "[n]o person

may transfer to another person a stamp or other evidence of payment." Wis. Stat. §139.89. *Compare*, *Cliffi v. Indiana Dept. of State Revenue*, 1995 WL 758944 (Ind. Sup. Ct. Dec. 27, 1995) (Court upheld constitutionality of similar drug tax statute because law provided that stamps could be purchased by an agent other than the "dealer", thereby insulating the dealer from incriminating disclosure). Applying by mail requires a dealer to supply his or her name or otherwise identifying "nom de plume" and address to which the Department can send the stamps. To apply in person, the dealer must physically present himself or herself and request the stamps from a clerk who could later identify him or her.

Once again, the provision of identifying information is not the compelled incriminating disclosure, *Byers, supra*; it is merely the means by which the state may put the compelled

incriminating disclosures to use against the defendant. The drug tax law simply does not provide total anonymity, and thus does not legally calm the dealer's reasonable fears that incriminating disclosures inherent in complying with the drug tax law would be put to use by the police.

Confidentiality.--The "confidentiality" provision of Wis. Stat. §139.91 likewise does not save the tax. Of course, "the privilege against self-incrimination may not properly be asserted if other protection is granted which 'is so broad as to have the same extent in scope and effect' as the privilege itself." *Marchetti*, 390 U.S. at 58 (citation omitted). Under those circumstances, the taxpayer would not reasonably suppose that the incriminating information would be available for use by the prosecuting authorities.

Section 139.91, labeled "Confidentiality," in fact combines an anonymity provision ("Dealers may not be required to provide any identifying information in connection with the purchase of stamps") with something resembling a more traditional confidentiality requirement barring disclosure and providing limited use immunity:

> **139.91 Confidentiality.** The department may not reveal facts obtained in administering this subchapter, except that the department may publish statistics that do not reveal the identities of dealers. Dealers may not be required to provide any identifying information in connection with the purchase of stamps. No information obtained by the department may be used against a dealer in any criminal proceeding unless that information has been independently obtained, except in connection with a proceeding involving possession of schedule I controlled substances or schedule II controlled substances on which the tax has not been paid or in connection with taxes due under s. 139.88 from the dealer.

Wis. Stat. §139.91.

This so-called "confidentiality" provision fails to provide immunity "coextensive with the scope of the privilege" against self-incrimination, *see Kastigar*, 406 U.S. at 449, for at least two reasons. First, the scope of the privilege against self-incrimination requires immunity from derivative use as well as from direct use. *Kastigar*, 406 U.S. at 453. Any dealer reading the statute would reasonably conclude, however, that it bars only the direct use of the information against a dealer in a criminal prosecution, not derivative use of the information: "[n]o information obtained by the department may be used against a dealer in any criminal proceeding ...." Wis. Stat. § 139.91.

This language is virtually identical to that which the United States Supreme Court has struck down as providing only "use immunity." *See Albertson*, 382 U.S. at 79-80 & n. 10

(statute providing that "[t]he fact of the registration of any person ... as an officer or member of any Communist organization shall not be received in evidence against such person" in any criminal prosecution insufficient as providing protection only against direct use of the disclosures, not derivative use); *Arndstein v. McCarthy*, 254 U.S. 71, 73 (1920) (statute providing that "[n]o testimony given by him shall be offered in evidence against him in any criminal proceeding" granted only use immunity); *Counselman v. Hitchcock*, 142 U.S. 547, 564 (1892) (statute providing that no "evidence obtained from a party or witness by means of a judicial proceeding ... shall be given in evidence or in any manner used against him ... in any court of the United States ..." "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him"). *See also Kastigar*, *supra*.

The language is also directly at odds with the language chosen by other states which have sought to bar derivative as well as direct use of drug tax information. *See* Idaho Code §63-4206(3) (Michie 1989) (information obtained from taxpayer may not be used against taxpayer "in any criminal proceeding or for investigatory purposes leading to other evidence of a crime...."); Ind. Stat. §6-7-3-9 (Burns 1994 Supp.) ("confidential information acquired by the department may not be used to initiate or facilitate prosecution for an offense other than an offense based on a violation of [the controlled substance excise tax]"); Nev. Rev. Stat. Ann. §372A.080(2) (1993) (prosecution may not be initiated on the basis of evidence derived from information submitted to the department).

Perhaps most striking is the contrast between the mere "use" language applied in §139.91 and the language which the

legislature itself used in the same enactment when it intended immunity from both use and derivative use:

> Immunity from criminal or forfeiture prosecution under [listed provisions] provides immunity only from the use of the compelled testimony or evidence in subsequent criminal or forfeiture proceedings, *as well as immunity from the use of evidence derived from that compelled testimony or evidence.*

Wis. Stat. §972.085 (emphasis added), created by 1989 Wis. Act. 122 §79q.

Second, the breadth of the immunity exception in §139.91 creates a real hazard that the information will be used in situations in which taxes are not at issue. Section 139.91 allows the use of information "in connection with a proceeding involving possession of schedule I controlled substances or schedule II controlled substances on which the tax has not been paid" as well as "in connection with taxes due under s. 139.88

from the dealer." Wis. Stat. §139.91. Thus, in a prosecution only for possession with intent to deliver cocaine, for instance, any information gleaned from a defendant who had paid the tax on *other* cocaine could be used against him as long as he had paid no tax on the cocaine directly involved in the possession charge. *Cf. State v. Anderson*, 176 Wis.2d 196, 500 N.W.2d 328, 330-31 (Ct. App. 1993) (defendant's statements concerning prior involvement with marijuana "highly probative" and admissible to show knowledge and ability to identify marijuana).

Similarly, information gleaned from the purchase of stamps by someone who buys stamps for some but not all of his or her controlled substances could still be used against the taxpayer in prosecutions for possession of the untaxed substances. If a dealer possesses 25 grams of cocaine but buys

tax stamps only for 15 grams, nothing in §139.91 would bar the tax stamps clerk from identifying the dealer as having admitted, by application for the stamps, to possession of 15 grams of cocaine, and thus knowledge and intent. *See Anderson, supra*; Wis. Stat. §904.04(2).

This ability of law enforcement personnel to use the information obtained even when the payment of taxes is not at issue distinguishes the Wisconsin statute from every statute which has been upheld in other states. *Compare* Wis. Stat. §139.91 *with* Ala. Code §40-17A-13(a) (1993); Ind. Stat. §6-7-3-9 (Burns 1994 Supp.); Iowa Code Ann. §453B.10 (1995 Supp.) (previously §421A10); Kan. Stat. Ann. §79-5206 (1989); Minn. Stat. Ann. §297D.13(1) (1991); Neb. Rev. Stat. §77-4315 (1994 Supp.); Okla. Stat. Ann. tit.68. §450.4© (1992); and Texas Tax Code Ann. §159.005 (1992).

It also renders irrelevant every case which has upheld such drastically different confidentiality provisions. *See Briney v. State Dept. of Revenue*, 594 So.2d 120, 122-23 (Ala. Civ. App. 1991); *Cliffi v. Indiana Dept. of State Revenue*, 641 N.E.2d 682, 686-89 (Ind. Tax Ct. 1994), aff'd in part, reversed in part, 1995 WL 758944 (Dec. 27, 1995); *State v. Godberson*, 493 N.W.2d 852 (Iowa 1992); *State v. Durrant*, 769 P.2d 1174 (Kan.). *cert. denied sub nom. Dressel v. Kansas*, 492 U.S. 923 (1989); *Sisson v. Triplett*, 428 N.W.2d 565 (Minn. 1988); *State v. Garza*, 496 N.W.2d 448, 452-55 (Neb. 1993); *White v. State*, 900 P.2d 982 (Okla. Crim. App. 1995); *Lopez v. State*, 837 S.W.2d 863, 867 (Tex. App. 1992).

Indeed, of the 17 states which currently have drug tax laws similar to Wisconsin's and provide for some statutory level of confidentiality for tax payment information, not one includes

an exception even vaguely resembling Wisconsin's exception for possession prosecutions. *See* Ala. Code §40-17A-13(a) (1993); Conn. Gen. Stat. Ann. §12-659 (1993); Ga. Code Ann. §48-15-10(a) (1994 Supp.); Idaho Code §63-4206(3) (Michie 1989); Ill. Comp. Stat. Ann. ch.35, §520/13 (Smith Hurd 1993); Ind. Stat. §6-7-3-9 (Burns 1994 Supp.); Iowa Code Ann. §453B.10 (1995 Supp.); Kan. Stat. Ann. §79-5206 (1989); La. Stat. Ann. ch.47 §2605 (1995 Supp.); Minn. Stat. Ann. §297D.13(1) (1991); Neb. Rev. Stat. §77-4315 (1994 Supp.); Nev. Rev. Stat. Ann. §372A.080 (1993); N.C. Gen. Stat. §105-113.112 (1992 & 1994 Supp.); Okla. Stat. Ann. tit.68, §450.4© (1992); R.I. Gen. Laws §44-49-14(1) (1994 Supp.); Texas Tax Code Ann. §159.005 (1992); and Utah Code §59-19-105(4) (1994).[3]

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[3] North Dakota recently repealed its drug tax law. The confidentiality provision of that state's law, like those identified in the text, had no exception similar to Wisconsin's for possession (continued...)

These confidentiality provisions generally track that of Minnesota:

> **Disclosure prohibited.** Notwithstanding any law to the contrary, neither the commissioner nor a public employee may reveal facts contained in a report or return required by this chapter or any information obtained from a tax obligor; nor can any information contained in such a report or return or obtained from a tax obligor be used against the tax obligor in any criminal proceeding, unless independently obtained, *except in connection with a proceeding involving taxes due under this chapter from the tax obligor making the return.*

Minn. Stats. Ann. §279D.13(1) (1991) (emphasis added).

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[3](...continued)
prosecutions. *See* N.D. Cent. Code Ann. §57-36.1-14 (1993) (repealed).

Two other states have similar tax statutes but without an apparent confidentiality provision. *See* Ariz. Rev. Stat. §§42-1201 *et seq.* (1991 & 1995 Supp.); Colo. Rev. Stat. Ann. §39-28.7-101 *et seq.* (1990 & 1995 Supp.). These statutes, apparently have not been challenged on self-incrimination grounds. Statutes from Montana and New Mexico, which recently were repealed, likewise contained no confidentiality provision but had not been challenged on those grounds. *See* Mont. Code Ann. §15-25-101 *et seq.* (1993); N.M. Stat. Ann. §7-18A-1 *et seq.*

Unlike Wisconsin's, the other states' statutes allow the use of information *only* if independently discovered or in a (non-criminal) proceeding involving taxes due. In Wisconsin alone, the state may use the information in other criminal proceedings so long as the tax was not paid on the drugs directly involved in the charged offense.

Moreover, the legislative history of this section supports the plain meaning of the statute's language. 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. Although the Legislative Reference Bureau file on that enactment covers 9 microfiche, nothing in that file suggests either a reason for Wisconsin's unique exception to confidentiality or its genesis.

A review of the legislative history of other drug tax bills introduced during the preceding two legislative sessions, however, reveals the source and meaning of that exception. In 1989, three drug tax bills were introduced in the Wisconsin Legislature with nearly identical language, all of which included the unique confidentiality provision. *See* 1989 Sen. Bill 295; 1989 Sen. Bill 356; 1989 A. Bill 633. The drafting file of one of those bills, 1989 Sen. Bill 356, indicates its source as 1987 A. Bill 519.

The drafting file for 1987 A. Bill 519, excerpts of which are included in the Appendix at p. 32-50, reveals Wisconsin's current drug tax law was derived from a bill then pending in the Illinois legislature. The unique confidentiality exception for use in cases involving possession of untaxed drugs was not

contained in the Illinois bill; it was added when Assembly Bill 519 was drafted (*see* App. 48).

That drafting file also demonstrates that the legislature fully intended that information compelled from dealers be used against them. The drafting request form defines the problem to be addressed as "hav[ing] no control over drug dealers *or knowledge of who they are*," and proposes the drug tax as a solution (App. 42 (emphasis added)). That form also refers to an attached memo which discusses the confidentiality issue:

> A drug dealer, according to the bill, can go to the Department of Revenue and obtain a stamp and the information has to be kept confidential. They cannot call the police and tell them that so and so has a drug tax stamp. It gives them 5th amendment protection. It does <u>not</u> legalize possession. *If a dealer is caught selling a drug the law enforcement people can then contact the revenue department and obtain any information on file.* The idea behind the bill is to get at the dealers....

(App. 43 (underlining in original; emphasis added)).

That file also contains a memorandum in which a representative from the Department expresses concerns about the adequacy of the confidentiality provision:

> The confidentiality provision (page 3) should clearly specify how the rules for the controlled substances tax differ from the general confidentiality rules for the department under s. 71.11(44). Under the general confidentiality rules for other state taxes, law enforcement officials can request access to the department's records.

(App. 40). That memo also noted the probability of a Fifth Amendment challenge to the law (*Id.*). The legislature nonetheless failed to act on these concerns.

The legislative intent of the untaxed drugs exception thus is fully consistent with the statutory language. Far from seeking to protect the confidentiality of compelled disclosures, the legislature sought to exploit them in order to convict the

"dealer." A dealer confronted with the decision whether to comply with the statute reasonably would believe that the provision does not provide immunity coextensive with the Fifth Amendment; and this is exactly what *Marchetti* says provides the dealer with a defense to criminal charges for failing to comply with the drug tax statute.

The State may urge this Court to "cure" the constitutional defects in the confidentiality provision by interpreting a constitutionally adequate confidentiality provision into the law. However, such legislation by this Court would be wholly improper. It would require the Court to construe the unambiguous language of the Statute contrary to its plain meaning and to insert words that are not in the statute. As already discussed, such a judicial construction would be contrary to legislative intent. Further, as discussed more fully

in part I.D.3 below, application of any such judicial construction retroactively to Mr. Hall to remove a defense he had to the drug tax charge at the time it was committed would violate his right to due process.

4. Conclusion

Wisconsin's drug tax law operates in an area "permeated with criminal statutes," is aimed at those "inherently suspect of criminal activities," and compels the provision of incriminating testimonial communications which the dealer reasonably could conclude would be available to prosecuting authorities for use against him. As the Supreme Court explained in *Marchetti* and its progeny, such a statutory scheme violates the privilege against self-incrimination. Accordingly, "a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions" under this statute. *Haynes*, 390 U.S. at

100; *See, e.g., Florida Dept. of Revenue v. Herre*, 634 So.2d 618, 620-21 (Fla 1994) (striking statute similar to Wisconsin's due to insufficient confidentiality provision); *State v. Smith*, 813 P.2d 888, 890 (Idaho 1991) (striking statute similar to Wisconsin's but without confidentiality provision; anonymity requirement alone insufficient under Fifth Amendment); *State v. Roberts*, 384 N.W.2d 688 (S.D. 1986) (state drug tax act violates Fifth Amendment by requiring disclosure of incriminating evidence and permitting use of that evidence by police); *Zissi v State Tax Comm'n of Utah*, 842 P.2d 848, 857 (Utah 1992) (statute similar to Wisconsin's facially unconstitutional under *Marchetti*, but saved by construing confidentiality provision as providing full use and derivative use immunity--civil case); *cf. People v. Duleff* 183 Colo. 213, 515 P.2d 1239 (1973) (statutory licensing requirement for cultivation

of marijuana violates Fifth Amendment, where taxpayer must disclose information useful to criminal investigation). *See also Leary v. United States*, 395 U.S. 6 (1969) (Federal Marijuana Tax Act violates privilege against self-incrimination).

C. The Requirement That "Dealers" Pay a Controlled Substance Tax, as Implemented by the Department, Violates The Privilege Against Compelled Self-incrimination

Even if *Heredia* were correct that "[t]he statute ... both contemplates and permits the anonymous payment of the tax," 493 N.W.2d at 407, the Department of Revenue's **implementation** of the purchase requirement of that statutory scheme does not. The Department's Drug Tax Purchase Order form specifically directs the dealer to "[p]rovide all the information requested when completing your purchase order," although it does require the dealer to "[c]omplete the name and address area only if stamps are to be mailed" (App. 30). To

apply in person, the dealer himself must go to the Wisconsin Department of Revenue office in Madison and request the stamps from a clerk who could later identify him. (App. 30-31). Again, the dealer is himself required to purchase the stamps because Wis. Stats. §139.89 expressly prohibits the transfer of tax stamps from one person to another.

Thus, under the procedures established by the Department of Revenue, the dealer who wishes to comply with the law must provide an address that could later be connected to him or appear in person before a clerk who could later identify him. Under this scheme an incriminating testimonial communication is compelled. The actual procedures implemented by the Department of Revenue negate even the limited protection offered by the "confidentiality" provision of § 139.91. In short, there is simply no way that a "dealer" can

purchase drug tax stamps anonymously given the Department's implementation of the statute.

The Court of Appeals observed that the Drug Tax Purchase Order form was not a part of the record, although it was appended to Hall's appellate brief (App. 14)[4]. However, a form promulgated by a state agency and that agency's "generally known" procedures are matters of which a court may appropriately take judicial notice. *See Tyler v. State Department of Public Welfare,* 19 Wis. 2d 166, 169, 119 N.W.2d 460, 463 (1962) (Supreme Court takes judicial notice of a parole board procedure and practice manual); *Hiegel v. Labor & Industry Review Comm.*, 121 Wis. 2d 205, 213, 359 N.W.2d 405, 409 (1984) (holding it was permissible for Circuit Court to take

[4] A certified copy of the Wisconsin Department of Revenue "Drug Tax Purchase Order" in use during May of 1993, when the offenses occurred in Hall's case, is appended to this brief as well, at App. 30-31.

judicial notice of "generally known" procedures of DILHR regarding preparation of discrimination complaints).

A certified copy of the Drug Tax Purchase Order form is an appropriate subject for judicial notice since it is "not subject to reasonable dispute" because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned". Wis. Stats. § 902.01(2). The Court may take judicial notice at any stage of the proceeding. Wis. Stats. § 902.01(6). This Court should take judicial notice of the Drug Tax Purchase Order form and the procedures that the Department of Revenue implemented pursuant to its authority under Wis. Stats. § 139.89.

Although the Court of Appeals did not consider the Drug Tax Purchase Order as part of the record, the court nevertheless went on to review the constitutionality of the procedures

outlined in the form. The Court of Appeals wrongly concluded that the form did not "require the applicant to provide any identifying information, such as the applicant's name, address or social security number." (App. 14-15). To the contrary, the form expressly requires the dealer to provide his name and address if the stamps are to be mailed. Even if the dealer supplies someone else's address, this address could be linked to him at a later time. For a testimonial communication to be incriminating, it need not directly establish guilt. Rather, it need only establish a link in the chain of evidence establishing guilt *Hoffman*, 341 U.S. at 486, or provide a lead. *Kastigar*, 406 U.S. at 460.

It is true that a dealer who purchases stamps in person need not supply a name or address, but his mere personal presence and purchase could later be used against him. A dealer

who appears in person presents himself to a clerk who could later identify him as a person who designated himself a drug dealer. The Fifth Amendment protects the dealer from being compelled to disclose information he reasonably believes could be used in a criminal prosecution or lead to evidence which might be so used. *Id.* It is eminently reasonable for a dealer who is contemplating walking into a state agency and declaring himself a drug dealer to believe that this information might be used against him.

D. The Requirement That a "Dealer" Affix and Display "Evidence That the [Drug Tax] Has Been Paid" Violates the Dealer's Right to Be Free from Compelled Self-incrimination and Provides Mr. Hall with a Complete Defense to the Drug Tax Count.

1. The affix and display requirement compels the dealer to incriminate himself.

The affixing and display of a tax stamp as required by §139.95(2) is an independent incriminating testimonial communication. Displaying "evidence that the tax under s.139.88 has been paid" constitutes evidence of illegal dealing in a relatively large quantity of controlled substance because possession of the stamps says, "I am a dealer in at least the amount of drugs indicated on the stamps." Possession of the stamp also signifies the possessor's knowledge of the nature of the substance he or she possesses and intent to deliver that substance. *See* Iijima, Ann L., *The War on Drugs: The Privilege Against Self-Incrimination Falls Victim to State Taxation of Controlled Substances,* 29 Harv. Civ. R.-Civ. Lib L. Rev. 102, 124-27 (1994).

In *Marchetti, supra,* the United States Supreme Court struck down the federal wagering tax law on self-incrimination grounds. This conclusion was based in part on the recognition

that evidence of possession of a federal wagering tax stamp is highly incriminating testimonial evidence:

> Section 6806(c) obliges taxpayers either to post the revenue stamp "conspicuously" in their principal places of business, or to keep it on their persons, and to produce it on demand of treasury officers. Evidence of the possession of a federal wagering tax stamp, or of payment of the wagering taxes, has often been admitted at trial in state and federal prosecutions for gambling offenses; such evidence has doubtless proved useful even more frequently to lead prosecuting authorities to other evidence upon which convictions have subsequently been obtained.

390 U.S. at 47-48 (footnotes omitted).

The "affix and display" requirement here has exactly the same "direct and unmistakable consequence of incriminating" any dealer who complies with the law. *Id.* at 49. *See also Zissi*, 842 P.2d at 857 (requirement that a drug dealer purchase and affix tax stamps to illicit drugs facially violates Fifth

Amendment because such acts show knowledge that the items are controlled substances).

As with the purchase requirement, therefore, *see* Section B, *supra*, the legal requirement that dealers affix and display drug tax stamps on their wares is in an area "permeated with criminal statutes," and the tax is aimed at those "inherently suspect of criminal activities." *Marchetti*, 390 U.S. at 47; *see Leary*, 395 U.S. at 16-18. The dealer is compelled, under pain of criminal prosecution, to affix and display the stamps which are themselves strong evidence of guilt. Thus, Hall's assertion of the privilege against self-incrimination here is a complete defense unless some preexisting statutory confidentiality or immunity provision provides protection equivalent to that of the Fifth Amendment. *See, e.g., Marchetti*, 390 U.S. at 58.

No such provision exists here. For the reasons already stated, the limited confidentiality provision in Wis. Stat. §139.91

simply is not "'so broad as to have the same extent in scope and effect' as the privilege itself." *Marchetti*, 390 U.S. at 58 (citation omitted). More importantly, however, §139.91 by its terms applies *only* to the confidentiality of information in the possession of the Department of Revenue: "The department may not reveal ...;" "No information obtained by the department may be used.. ."

The statute simply does not bar any use of evidence that a defendant had a drug tax stamp on his or her marijuana or cocaine at the time of its seizure and that he thus was a dealer in such substances and knew what they were. Indeed, the statute is directly to the contrary. "Acquisition of stamps or other evidence of tax under s. 139.88 has been paid does not create immunity for a dealer from criminal prosecution." Wis. Stat. §139.90. *Compare* 26 U.S.C. §4424(c)(1) (post-*Marchetti* provision barring use of wagering tax stamp as evidence against

the taxpayer); Iowa Code Ann. §453B.10 (1995 Supp.) (barring use of drug stamp against taxpayer in criminal proceeding); Minn. Stat. Ann. §297D.13(4) (1991) (same); Neb. Rev. Stat. Ann. §77-4315 (1994 Supp.) (same); N.C. Gen. Stat. §105-113.112 (1994 Supp.) (same); Okla. Stat. Ann. tit.68, §450.4(D) (1992) (same).

For these reasons, the requirement of the controlled substance tax statute that a dealer affix the tax stamp to his or her marijuana or other drugs compels incriminating testimonial communication in violation of the privilege against self-incrimination.

2. The Court of Appeals invaded the province of the legislature when it gave the provision a "saving construction".

The Court of Appeals agreed with Hall's analysis of the statute and correctly noted that the affix and display provision compels a dealer to criminate himself under the *Marchetti*

analysis. (App. 10). The court further observed that the presence of the tax stamp on the defendant's drugs would be "readily available to assist the State in establishing that the defendant knew that the substance in his or her possession was a controlled substance." (App. 10). The Court concluded that "the affix and display provision would violate a defendant's right against compelled self-incrimination if the tax stamps affixed to a stamp purchaser's drugs may be used as evidence against him or her in a criminal prosecution." (App. 10).

The Court of Appeals acknowledged that the statute does not contain any provision to prohibit the state from using such evidence. However, the appellate court upheld the statute by judicially amending it to create a prohibition against any use of such evidence. (App. 12). This legislative act by the Court of Appeals under the guise of statutory construction is improper.

The Court of Appeals cited *State v. Bertrand*, 162 Wis. 2d 411, 415, 469 N.W.2d 873, 875 (Ct. App. 1991) in support of its decision. *Bertrand* simply recites the well-established maxim that "There is a strong presumption that statutes are constitutional, and the Court of Appeals will construe a statute to preserve its constitutionality if it is at all possible to do so." *Id.* However, in this case it is **not** possible to do so except by creating by judicial fiat that which does not exist.

Statutory construction is not appropriate in the first instance unless there is some ambiguity in the statutory language. *In Re Recall Petition of Carlson*, 147 Wis. 2d 630, 635, 433 N.W.2d 635 (Ct. App. 1988) "[A]bsent ambiguity, judicial issues of construction are not permitted, and [the court] must give the words of the statute their obvious and intended meaning." *Id., see also Bindrim v. Colonial Ins. Co.*, 181 Wis. 2d 799, 512 N.W.2d 209 (Ct. App. 1994).

In this case, the statutory language is crystal clear. Purchase of tax stamps "does not create immunity for a dealer from criminal prosecution." Wis. Stats. § 139.90. The only limited protection the tax stamp law offers does not by any stretch of its language apply to the use of tax stamps affixed to drugs as evidence in a criminal prosecution. Wis. Stat. § 139.91. There is no provision in the law that can be interpreted as providing any such protection. In fact, the Court of Appeals did not assert that there was any ambiguity in the statute to justify judicial reconstruction. Because there is no ambiguity in the language of the tax stamp law, it was improper for the appellate court to resort to legislative intent to "construe" its meaning. *Voss v. City of Middleton*, 162 Wis. 2d 737, 749, 470 N.W.2d 625, 629 (1991).

Even if it were permissible for the court to embark upon an examination of legislative intent, the Court of Appeals'

reasoning was faulty. The legislature specifically declared that purchase of tax stamps does not create immunity. Wis. Stat. § 139.90. The legislature enacted a provision only limiting the use of "information obtained by the Department." Wis. Stat. § 139.91. The only reasonable inference is that if the legislature had intended to protect the dealer from **any** use of tax stamps on his drugs as evidence against him, it certainly would have enacted such a provision.

Moreover, the Court of Appeals did not **construe** the law, but instead **amended** it to include additional protections necessary to render it constitutional. It is well established that:

> [W]here the language used in a statute is plain, the court cannot read words into it that are not found therein either expressly or by fair implication even to save its constitutionality because this would be legislation and not construction.

Mellen Lumber Co. v. Industrial Comm, 154 Wis. 114, 120, 142 N.W. 187 (1913) (citing *Rogers-Ruger Co v. Murray*, 115 Wis. 267, 91 N.W. 657 (1902).

3. Even if the Court of Appeals' construction of the law were proper, it cannot be applied retroactively to Mr. Hall.

The privilege against compelled self-incrimination was implicated when Mr. Hall was called upon to decide whether or not to comply with the tax stamp law, including the "affix and display" provision. The protection created by the Court of Appeals was not in place at that time. Yet, the Court of Appeals improperly applied its new construction to Mr. Hall retroactively.

When Mr. Hall chose not to comply with the law, he had only the plain language of the law to guide him. Of course, that language contained no hint of any protection from the use of

affixed tax stamps in a criminal prosecution. Under these circumstances it was reasonable for a person in Mr. Hall's position to believe that evidence of his compliance could be used against him. The Fifth Amendment protected Mr. Hall from being compelled to disclose information he "reasonably believe[d] could be used in a criminal prosecution or lead to other evidence which might be so used." *Kastigar*, 406 U.S. at 460.

Compelling a person to incriminate himself "cannot be justified by the subsequent exclusion of the compelled testimony". *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262 (1983). The state, likewise, cannot constitutionally require Mr. Hall to incriminate himself first and then rely on a later objection or motion to suppress in the hope of preventing incriminating evidence from being used against him. *Maness v. Meyers*, 419 U.S. 448, 461-462 (1975). In other words, the state could not

compel him to let the cat out of the bag "with no assurance whatever of putting it back". *Id.*

Yet, this would be precisely the effect of applying the Court of Appeals' construction retroactively to Mr. Hall. The Constitution does not permit the state to require Mr. Hall to incriminate himself first and then rely on the Court of Appeals to invent new protections.

Moreover, if the Court of Appeal's construction is applied retroactively to Mr. Hall, the result will be a violation of the principles of the *ex post facto* clause contained in Art. I, §10 of the United States Constitution. The *ex post facto* clause prohibits the application of a law that has removed a defense that was available to the defendant at the time he committed a crime. *Collins v. Youngblood*, 497 U.S. 39, 41-43 (1990); citing *Beazell v. Ohio*, 269 U.S. 167 (1928).

Although the *ex post facto* clause is a limitation on legislative power that does not directly apply to judicial decisions, the principle on which *ex post facto* is based is contained within due process protections which do apply to judicial decisions. *Marks v. United States*, 430 U.S. 190, 191 (1977).

Thus, the Court has held:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, §10, of the Constitution forbids. . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964).

Applying the Court of Appeals' construction of the tax stamp law retroactively to Mr. Hall would remove the *Marchetti* defense that was available when he elected not to

purchase and affix tax stamps. Application of this new construction to Mr. Hall would therefore have "precisely the same result" as an *ex post facto* law, and would be a violation of due process. See *State v. Kurzawa*, 180 Wis.2d 502, 510-13, 509 N.W.2d 712, 715-17 (1994), *cert. denied*, 114 S.Ct. 2712 (1994).

II. MR. HALL'S CONSTITUTIONAL RIGHT NOT TO BE PLACED TWICE IN JEOPARDY FOR THE SAME OFFENSE WAS VIOLATED WHEN HE WAS CONVICTED AND SENTENCED ON TWO COUNTS OF DELIVERY OF COCAINE BASE IN ADDITION TO TWO TAX STAMP COUNTS BASED UPON THE SAME DELIVERIES.

The constitutional proscription against double jeopardy contained in the Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The test for whether two charges involve the same offense for

double jeopardy purposes is whether each charge requires proof of an additional fact or element which the other does not. *Blockburger v. United States*, 284 U.S. 299 (1932). Multiple punishments are permissible if each offense requires proof of an additional element or fact which the other offense or offenses do not.

The *Blockburger* test, commonly known as the "elements only" test, has been codified in section 939.66(1), Stats., which provides that a defendant "may be convicted of either the crime charged or an included crime, but not both" and goes on to state that an "included crime" is one "which does not require proof of any fact in addition to those which must be proved for the crime charged". Thus, under the "elements only" test:

> [A]n offense is a "lesser included" one only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the "greater" offense. ...Conversely an offense is not a lesser

> included one if it contains an additional statutory element.

State v. Hagenkord, 100 Wis. 2d 452, 481, 302 N.W.2d 421, 436 (1981)(citations omitted). If one offense is an included offense of the other under the *Blockburger* analysis, then the Fifth Amendment prohibits multiple punishment absent a clearly expressed legislative intent to allow it. *State v. Gordon*, 111 Wis. 2d 133, 330, N.W.2d 564 (1983).

Here, Mr. Hall's constitutional right to be free from double jeopardy was violated because the crime of delivery of cocaine base is an included offense of the tax stamp violation, and there is no express legislative authorization of multiple punishments for these offenses.[5]

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[5] There is no clearly expressed legislative intent to allow multiple punishment for both delivery of a controlled substance and the tax stamp violation. That the two statutes exist does not provide a sufficient basis to support the conclusion that there is a "clear legislative intent to allow two convictions and two sentences when (continued...)

Section 139.95(2) states:

> A dealer who possesses a Schedule I controlled substance or schedule II controlled substance that does not bear evidence that the tax under s. 139.88 has been paid may be fined not more than $10,000 or imprisoned not more than 5 years or both.

Thus, a necessary element is that the individual be a dealer. The statutory definition of "dealer" is found in section 139.87, Stats.. which states in pertinent part:

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[5](...continued)
the same criminal conduct violates both statutes." *Gordon,* 111 Wis. 2d at 139. Wis. Stat.§ 939.66 (1) (a) is a clear and express statement of the legislature's intent to **prohibit** multiple punishment for included crimes. *Id.* at 145. In the case of the drug tax statutes, had the legislature intended to exempt delivery from its "otherwise clear policy of no multiple punishment," the legislature could easily have adopted language in the statute to express this intent. *Id.*

The Court of Appeals in this case reversed the test for determining legislative intent in this area. The court found "no indication that the legislature did not intend to permit cumulative punishments for both offenses. (App. 17). To the contrary, §939.66 (1) (a) expresses a prohibition against cumulative punishments, and there is no indication the legislature intended otherwise here.

> "Dealer" means a person who in violation of c. 161 possesses, manufactures, produces, ships, transports, delivers, imports, sells or transfers to another person more than . . . 7 grams of any other . . . schedule II controlled substance.

Thus, while nominally the second element of the tax stamp violation is that the individual be a dealer, the dealer element can be established by a number of alternative means. Mr. Hall fell within the statutory definition of "dealer" only because he delivered the controlled substance in violation of Chapter 161. Because this is precisely the offense of delivery of controlled substance, that crime is an included offense of the tax stamp violation.

The Court of Appeals concluded that "delivering cocaine base is not a lesser included offense of the tax stamp violation," because the "dealer" element of the tax stamp violation conceivably could be proved by mere possession. Thus, the

Court concluded the delivery charge contains an element not included in the tax stamp charge. (App. 16).

It is true that hypothetically the "dealer" element of the tax stamp violation could be proved by mere possession of a minimal level of controlled substance. However, Mr. Hall fell within the statutory definition of "dealer" and was convicted of the tax stamp violation **only** because of his delivery of cocaine base. In this case, the charge of delivery of controlled substance was, in fact, an included offense of the tax stamp violation.

The United States Supreme Court addressed an analogous situation in *Harris v. Oklahoma, 433 U.S. 682 (1977).* The Court held that double jeopardy barred a defendant's conviction for armed robbery when he had already been convicted of felony murder arising out of the same incident, and the state had satisfied the felony element of the felony murder charge by

proving the armed robbery. The felony murder statue did not facially require proof of an armed robbery. The felony element could **hypothetically** have been satisfied by the proof of a number of alternative felonies. But the Court looked beyond that to the felony that was **actually** used as proof in that case. Several years later the Supreme Court explained its reasoning in *Harris* as follows:

> We did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, [the Court] treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense.

Illinois v. Vitale, 447 U.S. 410, 420 (1980).

Because the state, in actuality, relied on the armed robbery to prove the felony element of felony murder, the armed robbery was a "species of lesser-included offense", and conviction on both charges violated double jeopardy. *Id.*

This Court reached the same conclusion when it applied the *Blockburger* analysis to the felony murder and kidnaping statutes. *State v. Gordon*, 111 Wis. 2d 133, 330 N.W.2d 564 (1983). Although the element of felony murder theoretically could have been proven by other means, the Court looked to the crimes actually charged and concluded that kidnaping was a lesser included offense of felony murder. *Id.* at 136, 330 N.W.2d at 565.

Harris has since been upheld in *U.S. v. Dixon,* 113 S.Ct. 2849, 2857, 2861 (1993). In Part III A of his opinion in *Dixon*, Justice Scalia held that when the defendant had previously been prosecuted for criminal contempt, by violating a condition of release by committing a criminal offense, and the criminal offense that formed the basis of this charge was a drug offense, double jeopardy barred prosecution of the defendant for the drug

offense. Although the contempt did not facially require proof of a drug offense. Justice Scalia applied *Harris* and found that the drug offense was a "species of lesser-included offense." *Dixon*, 113 S.Ct. At 2857. (Citing *Vitale*, 447 U.S. at 420).

A majority of justices in *Dixon* agreed with Justice Scalia's conclusion that Dixon's drug violation was a lesser-included offense of the criminal contempt charge. Justices Kennedy, White, Stevens, and Souter further agreed that Justice Scalia's application of the *Blockburger* test would be the appropriate test in a case involving multiple punishments arising from a single prosecution, such as this case. This Court has also agreed with Justice Scalia's analysis and his conclusion that *Harris*reflected a *Blockburger* type analysis, *Kurzawa*, 180 Wis. 2d at 518, 509 N.W.2d at 719.

Justices Rehnquist, O'Connor, and Thomas dissented from Part III A of Justice Scalia's opinion, concluding that

Dixon's drug violation was not a lesser-included offense of the criminal contempt charge. *Dixon*, 113 S.Ct. 2865. However, even their analysis would lead to the conclusion that double jeopardy occurred in Mr. Hall's case. Justices Rehnquist, O'Connor and Thomas did not assert that *Harris* should be overruled, but merely advocated limiting the application of *Harris* to crimes that are truly "analogous to lesser included offenses." Id. at 2865. These Justices described *Harris* as follows:

> Though the felony murder statute in Harris did not require proof of an armed robbery, it did include as an element of proof that the defendant was engaged in the commission of *some* felony. We construed this generic reference to some felony as incorporating the statutory elements of the various felonies upon which the felony murder conviction could rest. The criminal contempt provision involved here, by contrast, contains no such generic reference which by definition incorporates

> the statutory definition of assault or drug distribution.

Id. at 2867

Justices Rehnquist, O'Connor and Thomas went on to express their fundamental disagreement with Justice Scalia's application of *Harris* as follows:

> Taking the facts of Harris as an example, a defendant who commits armed robbery necessarily has satisfied one of the statutory elements of felony murder. The same can not be said, of course, about this case: a defendant who is guilty of possession with intent to distribute cocaine or assault has not necessarily satisfied any statutory element of criminal contempt. Nor, for that matter, can it be said that a defendant who is held in criminal contempt has necessarily satisfied any element of those substantive crimes. In short, the offenses for which Dixon and Foster were prosecuted in this case cannot be analogized to greater and lesser included offenses; hence, they are separate and distinct for double jeopardy purposes.

Id. at 2868.

The objections of Justices Rehnquist, O'Connor and Thomas to Justice Scalia's application of *Harris* do not apply to this case. Although the tax stamp violation does not facially require proof of delivery, it does require proof of the defendant's status as a "dealer." The statute enumerates the ways in which this status might be proven, including delivery in violation of Chapter 161, much the same way as the felony murder statute at issue in *Harris* required proof of a felony and incorporated the various felonies upon which a felony murder conviction might rest. A defendant who commits *delivery* of the requisite amount of cocaine base *does* necessarily satisfy the "dealer" element of the tax stamp violation. Thus, even under the more restrictive analysis employed by the dissenting Justices in *Dixon*, the offenses in this case are analogous to greater and lesser included offenses, and punishment for both offenses results in double jeopardy.

Despite the United States Supreme Court's decisions to the contrary in *Harris* and *Dixon*, the Court of Appeals in this case seemed to engage in an inquiry into whether there is any conceivable set of facts which constitute the greater offense, but not the lesser. Such an inquiry has never been countenanced by this Court. If it had, this Court would never have held, in *State v. Gordon*, that kidnapping was a lesser included offense of felony murder, since it is hypothetically possible to commit felony murder without committing kidnapping. Rather, this Court has recognized that a statute which contains a number of alternative elements calls for an approach that focuses on the crimes as they have actually been charged. *State v. Carrington*, 134 Wis. 2d 260, 270-271, 397 N.W.2d 484, 489, citing *State v. Hagenkord*, 100 Wis. 2d 452, 302 N.W.2d 421 (1981). This Court has stated:

> In *Hagenkord*, the court recognized that when a statute establishes alternative elements for a single crime, the court will, for purposes of the elements only test, treat the greater offense as two or more crimes, each being defined as containing one of the alternative elements.

Carrington, 134 Wis. 2d at 270-71, 397 N.W.2d at 489.

In *Hagenkord* the crime of injury by conduct regardless of life contained the element of great bodily harm, while the crime of first degree sexual assault contained the alternative elements of great bodily harm or pregnancy. This Court focused on the specific alternative element actually charged in that case. Although the crime of first degree sexual assault hypothetically could be proven without proof of great bodily harm, this Court concluded that this did not prevent the crime of injury by conduct regardless of life from being considered a lesser included offense of first degree sexual assault, since it was great bodily harm, and not pregnancy that was actually charged in that

case. *Carrington*, 134 Wis. 2d at 270-71, citing *Hagenkord*, 100 Wis. 2d at 482-83 n. 8.

The tax stamp violation in this case contains a number of alternative elements. The dealer element can be established by several alternative means, including possession, manufacture, production, shipping, transport, delivery, import, sale, or transfer of more than seven grams of the controlled substance in violation of Chapter 161. Wis. Stat. § 139.87. Although the dealer element hypothetically could be proven by alternative means, the state *in actuality* relied on Mr. Hall's delivery of cocaine base in order to prove the "dealer" element. Thus, the delivery charge was a "species of lesser-included offense" of the tax stamp violation. Conviction of both is barred by the double jeopardy clause.

A recent decision of the Court of Appeals in this area requires comment. In *State v. Harris*, 190 Wis. 2d 718, 528

N.W.2d 7 (Ct. App. 1994), the Court of Appeals faced a fact situation very similar to the one discussed in Part III A of Justice Scalia's opinion in *Dixon*. In *State v. Harris*, the defendant had been convicted in the same prosecution of child abuse as well as bail jumping based on the same act of child abuse. The court found that there was no double jeopardy violation. Although the court recognized the factual similarity to *Dixon*, the court, oddly, concluded that Dixon was "not controlling." Id. at 724, 528 N.W.2d at 9. The court reasoned that"[W]isconsin law does not support the incorporation analysis discussed in a concurring opinion in *Dixon*." *Id.* at 724, citing *Kurzawa*, 180 Wis. 2d at 515, 509 N.W.2d at 717. The court incorrectly interpreted the portion of this Court's decision in *Kurzawa* wherein this Court simply stated that the *Blockburger* analysis is the appropriate test for determining when two offenses are the same for double jeopardy purposes. The Court of Appeals overlooked this

Court's agreement with Justice Scalia's application of *Harris* in *Dixon*. *Kurzawa*, 180 Wis. 2d at 518, 509 N.W.2d at 719.

In *State v. Harris*, the Court of Appeals misunderstood that Justice Scalia did no more than apply a *Blockburger* analysis when he concluded that the drug charge was a species of lesser-included offense. The Court of Appeals should have applied *Dixon* in *State v. Harris* and concluded that a double jeopardy violation had occurred. The decision in *State v. Harris* was poorly reasoned and provides no guidance to this Court in this case.

The Indiana Supreme Court recently confronted the very same double jeopardy issue here in *Collins v. State*, 1995 WL 758926 (Dec. 27, 1995). Collins was charged with dealing cocaine, which required proof that he knowingly and intentionally manufactured, financed the manufacture of, delivered, or financed the delivery of cocaine or a narcotic drug.

Id. at 5-6, citing Ind. Code Ann. § 35-48-4-1. He was also charged with violating Indiana's Controlled Substance Excise Tax law. The elements of that offense are that the defendant "knowingly and intentionally delivers, possesses or manufactures a controlled substance without having paid the tax due." *Id.* at 6, citing Ind. Code Ann. § 6-7-3-11 (b).

The court concluded that the dealing charge was a lesser included offense of the tax violation. The court noted that the charges against Collins were in actuality based upon the *delivery* of cocaine and failure to pay the tax on cocaine. *Id.* at 4-5. It was immaterial to the court's analysis that the Controlled Substance Excise Tax law did not on its face require the proof of delivery or manufacture and that the tax violation could theoretically have been proven by mere possession of the controlled substance.

The precedents of this Court and the United States Supreme Court mandate that this Court examine the statutory elements in light of the way the crimes were actually charged and proven in this case. This approach leads to the inescapable conclusion that Mr. Hall was subjected to double jeopardy.

CONCLUSION

The Wisconsin Tax on Controlled Substances, both as written and as implemented, unconstitutionally compels self-incrimination. Mr. Hall respectfully asks this Court to declare the statute unconstitutional, reverse the decision of the Court of Appeals, and vacate the judgments of conviction for two tax stamp violations. Further, Mr. Hall's right not to be twice placed in jeopardy for the same offense was violated by his conviction of both the delivery charges and the tax stamp violations. When a defendant is convicted of both an offense and an included offense, the appropriate remedy is that the

conviction and sentence on the included offense be vacated. *Gordon*, 111 Wis. 2d at 146, 330 N.W.2d at 570. Thus Mr. Hall respectfully requests this Court also vacate the judgments of conviction for the delivery offenses, which are included offenses of the tax stamp offenses.

Dated at Brookfield, Wisconsin, this 16 day of February, 1996.

Respectfully submitted,

DARRYL HALL, Defendant-Appellant-Petitioner

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Sec. 809.19(8)(b) and (c)or a brief and appendix produced with a proportional serif font. The length of this brief is 10,737 words.

Dated this 14th day of February, 1996.

Jerome F. Buting

jfb:feb:hallsup1.brf (JLC & disk)

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 94-2848-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DARRYL J. HALL,

Defendant-Respondent-Petitioner.

APPENDIX

COURT OF APPEALS
DECISION
DATED AND RELEASED

September 14, 1995

NOTICE

No. 94-2848-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRYL J. HALL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Dykman, Sundby, and Vergeront, JJ.

VERGERONT, J. Darryl Hall appeals from a judgment convicting him of two counts of delivering cocaine base within 1,000 feet of school premises,

second or subsequent offense, contrary to §§ 161.41(1)(cm)4,[1] 161.48 and 161.49, STATS., and two counts of failing to comply with Wisconsin's drug tax stamp law, contrary to §§ 139.87--139.95, STATS.

Hall raises the following issues on appeal: (1) whether the "affix and display" provision of the drug tax stamp law violated his right against compelled self-incrimination guaranteed by the Wisconsin and United States Constitutions; (2) whether the "payment" provision of the drug tax stamp law, as implemented by the Wisconsin Department of Revenue, violated his right against compelled self-incrimination guaranteed by the Wisconsin and United States Constitutions; (3) whether his convictions for both the delivery of cocaine base counts and the drug tax stamp counts violated his constitutional right to be free from double jeopardy; (4) whether the term "premises" in the penalty-enhancing provisions of § 161.49(1), STATS., is unconstitutionally vague; (5) whether the statutory disparity in potential penalties for cocaine base and cocaine powder offenses that existed at the time of Hall's sentencing violated his right to equal protection under the Wisconsin and United States Constitutions; (6) whether his due process rights were violated by the delay between his first offense and when he was charged; (7) whether the pretrial photographic identification procedure was impermissibly suggestive; and (8) whether

[1] All references to § 161.41(1)(cm)4, STATS., are to the 1991-92 statutes unless otherwise indicated.

the trial court erroneously exercised its discretion in allowing testimony of Hall's threat to kill a police officer. We reject each of Hall's arguments and affirm the judgment of conviction.

BACKGROUND

The charges against Hall arose out of two purchases of cocaine base from Hall by Wayne Strong, a City of Madison police officer working undercover in the Town of Madison. Strong was working under the supervision of Detective Tim Ritter. At some time prior to May 11, 1993, Strong met with Ritter to discuss an individual, known on the street as "Charlie Brown," who was suspected of dealing drugs. Charlie Brown was an alias used by Hall. Ritter informed Strong that Hall was a short, stocky, light-skinned black male approximately 25 years of age.

At some time after 7:00 p.m. on May 11, 1993, Strong and a confidential informant went to a townhouse in the Town of Madison to set up an undercover purchase of cocaine base from Hall. The townhouse was within 1,000 feet of a school property line. After stationing himself in an upstairs bedroom of the townhouse, Strong instructed the informant to look for Hall. Hall eventually arrived at the townhouse and, with the informant's assistance, Strong purchased two ounces of cocaine base from Hall. Strong turned the cocaine base over to Detective Ritter later that evening.

The following day, Strong met with Ritter. Ritter showed Strong a single mug shot of Hall and asked Strong if he recognized the person in the photograph. Strong stated that it was the person from whom he had purchased cocaine base the previous evening.

On the evening of June 3, 1993, Strong returned to the townhouse in the Town of Madison and, with the informant's assistance, purchased another two ounces of cocaine base from Hall. At some point during the purchase, Hall asked Strong whether he was a "cop" and insisted that Strong lift up his shirt so he could check for a wire. Strong refused to lift up his shirt. Strong testified, over defense counsel's objection, that Hall stated that if he discovered Strong were a police officer, Strong would be murdered or killed. After the purchase, Strong returned the cocaine base to Ritter. Criminal charges were issued against Hall on June 21, 1993.

Following a jury trial, Hall was convicted on all counts. The trial court sentenced Hall to two consecutive thirty-year prison terms for the two counts of delivering cocaine base within 1,000 feet of school premises, second or subsequent offense, and to two consecutive three-year prison terms for the two drug tax stamp counts, to run concurrent with the two thirty-year terms. Further facts will be stated below as necessary.

"AFFIX AND DISPLAY" PROVISION OF THE TAX STAMP STATUTE

Hall contends that Wisconsin's drug tax stamp statute violates his right against compelled self-incrimination by requiring a dealer of controlled substances to affix and display tax stamps on his or her controlled substances as evidence of payment of the tax. He argues that the act of affixing and displaying the tax stamps is an incriminating testimonial communication that he or she is knowingly and intentionally dealing in a particular quantity of unlawful drugs.

Under the drug tax stamp statute, an occupational tax is imposed on drug dealers,[2] to be paid immediately upon acquisition or possession of a controlled substance. Section 139.88, STATS. The tax is paid by purchasing stamps from the Department of Revenue (the "payment provision"). The tax stamps must then be affixed to and displayed on the drugs (the "affix and display provision") as evidence of payment of the tax. Section 139.89, STATS. Failure to pay the tax exposes the

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[2] The term "dealer" is defined under § 139.87(2), STATS., as follows:

> "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 5 marijuana plants, more than 14 grams of mushrooms containing psilocin or psilocybin, more than 100 milligrams of any material containing lysergic acid diethylamide or more than 7 grams of any other schedule I controlled substance or schedule II controlled substance. "Dealer" does not include a person who lawfully possesses marijuana or another controlled substance.

dealer to a possible five-year prison term, a fine of not more than $10,000, or both. Section 139.95(2), STATS.

Acquisition of tax stamps does not create immunity for a dealer from criminal prosecution. Section 139.90, STATS. However, dealers are not required to provide any identifying information in connection with the purchase of the stamps. Section 139.91, STATS. Moreover, no information obtained by the department may be used against a dealer in any criminal proceeding unless that information has been independently obtained, except in connection with a proceeding involving possession of a schedule I or schedule II controlled substance on which the tax has not been paid or in connection with taxes due. *Id.*

Both the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution prohibit compelled self-incrimination. Whether or not a statute violates these constitutional provisions presents a question of law that we review *de novo*. *See State v. McManus*, 152 Wis.2d 113, 129, 447 N.W.2d 654, 660 (1989).

The United States Supreme Court addressed the right against compelled self-incrimination in the context of the government's ability to tax illegal conduct in *Marchetti v. United States*, 390 U.S. 39 (1968). There, the defendant was convicted of violating federal wagering statutes which required persons engaged in professional

gambling to pay an occupational tax and to register with the Internal Revenue Service. The defendant sought to arrest judgment on the ground that these statutory obligations violated his Fifth Amendment right against self-incrimination because they significantly enhanced the likelihood that those who complied with the provisions would be successfully prosecuted for violating state and federal anti-gambling laws.

The Court first stated that wagering is "an area permeated with criminal statutes" and that those engaged in wagering "are a group inherently suspect of criminal activities." *Marchetti*, 390 U.S. at 47. Then, relying on the fact that information obtained as a consequence of the federal wagering tax statutes was readily available to assist the efforts of state and federal authorities in prosecuting gambling violations, the Court concluded:

> In these circumstances, it can scarcely be denied that the obligation to register and to pay the occupational tax created for petitioner "real and appreciable," and not merely "imaginary and unsubstantial," hazards of self-incrimination. Petitioner was confronted by a comprehensive system of federal and state prohibitions against wagering activities; he was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant "link in a chain" of evidence tending to establish his guilt.

Marchetti, 390 U.S. at 48 (citations omitted; footnote omitted). The Court held that the defendant's plea of the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers as required by the statutes. *Id.* at 61.

In *State v. Heredia*, 172 Wis.2d 479, 493 N.W.2d 404 (Ct. App. 1992), *cert. denied*, 113 S. Ct. 2386 (1993), we distinguished *Marchetti* in holding that the payment provision of Wisconsin's drug tax stamp statute, on its face, does not violate a defendant's constitutional right against compelled self-incrimination. *Id.* at 485, 493 N.W.2d at 407. We concluded that, unlike in *Marchetti*, the drug tax stamp statute "both contemplates and permits the anonymous payment of the tax," *id.* at 485, 493 N.W.2d at 407, and, therefore, "does not subject those who comply with its provisions to compelled self-incrimination," *id.* at 484, 493 N.W.2d at 407. In so concluding, we relied on § 139.91, STATS., which provides that "[d]ealers may not be required to provide any identifying information in connection with the purchase of stamps." *Id.* at 485, 493 N.W.2d at 407. In *Heredia*, we did not address the statute's affix and display provision. We do so now.

As an initial matter, we address the State's assertion that Hall does not have standing to challenge the constitutionality of the affix and display provision of the tax stamp statute. A party has standing to challenge a statute if the statute causes that party injury in fact and the party has a personal stake in the outcome of the action. *Racine Steel Castings v. Hardy*, 144 Wis.2d 553, 564, 426 N.W.2d 33, 36-

37 (1988). The State takes the position that because there is no evidence that Hall ever purchased any tax stamps, he cannot argue that he was injuriously affected by the law. We disagree.

The crux of Hall's position is that compliance with the provisions of the tax stamp statute will provide the State with evidence that will be used to facilitate a tax stamp purchaser's conviction for a controlled substance-related offense. Hall was left with two alternatives: (1) comply with the statute's provisions and incriminate himself, or (2) not comply with the statute's provisions and be punished for exercising his right against self-incrimination. Either alternative would result in injury in fact.

In *Leary v. United States*, 395 U.S. 6 (1969), the Court rejected a similar standing argument made in the context of a Fifth Amendment challenge to the Federal Marijuana Tax Act. The Court stated:

> The aspect of the self-incrimination privilege which was involved in *Marchetti*, and which petitioner asserts here, is ... the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act.... His admission at trial that he had indeed failed to comply with the statute was perfectly consistent with the claim that that omission was excused by the privilege. Hence, it could not amount to a waiver of that claim.

Leary, 395 U.S. at 28. *See also Marchetti*, 390 U.S. at 51 ("Petitioner is under sentence for violation of statutory requirements which he consistently asserted at and after trial to be unconstitutional; no more can here be required.").

Following the reasoning of *Leary* and *Marchetti*, we conclude that because Hall was prosecuted for a tax stamp violation, and maintains that his failure to comply with the tax stamp statute's provisions stemmed from his fears of self-incrimination, Hall has standing to challenge the affix and display provision of the statute.

We conclude that the affix and display provision would violate a defendant's right against compelled self-incrimination if the tax stamps affixed to a stamp purchaser's drugs may be used as evidence against him or her in a criminal prosecution. First, like the federal wagering tax statutes in *Marchetti*, the drug tax stamp statute affects "an area permeated with criminal statutes" and is aimed at individuals "inherently suspect of criminal activities," as only those dealing in controlled substances are exposed to the statute. *See Marchetti*, 390 U.S. at 47. Second, dealers are required, on pain of criminal prosecution, to affix and display tax stamps upon acquisition of a controlled substance. *See id.* at 48. Third, tax stamps would be readily available to assist the State in establishing that the defendant knew that the substance in his or her possession was a controlled substance. Under our controlled substances statutes, the State must prove that the defendant knew or believed that the substance was a controlled substance. *See* WIS J I--CRIMINAL 6000 (NOTE ON THE KNOWLEDGE REQUIREMENT IN CONTROLLED SUBSTANCE CASES). While § 139.91, STATS., prohibits the use of information obtained by the Department of Revenue in administering the tax, the presence of affixed tax stamps is not "information obtained by the department." The statute does not contain any provision

prohibiting the State from using the tax stamps to prove a taxpayer's knowledge of the nature of the controlled substance. *See Marchetti*, 390 U.S. at 47 ("Evidence of the possession of a federal wagering tax stamp ... has often been admitted at trial in state and federal prosecutions for gambling offenses.").

The State argues that since § 139.91, STATS., prohibits the use of any identifying information obtained by the department in a criminal prosecution, the fact that stamps are affixed to the drugs does absolutely nothing to prove to whom the drugs belonged or who purchased and affixed the stamps. However, while the State may not be able to prove who purchased the stamps,[3] the State does not explain why the presence of an affixed stamp cannot nevertheless be used to establish the defendant's knowledge of the nature of the controlled substance.

Although the affix and display provision is unconstitutional if read to permit the State to use a drug tax stamp as evidence in a criminal proceeding, it is well established that we will construe a statute to preserve its constitutionality if it is at all possible to do so within the intent of the legislature. *See State v. Bertrand*, 162 Wis.2d 411, 415, 469 N.W.2d 873, 875 (Ct. App. 1991). In *Marchetti*, the Court refused to preserve the constitutionality of the wagering statutes by placing restrictions

[3] While under § 139.91, STATS., the State may not be able to prove who purchased the tax stamps using information obtained by the Department of Revenue, we note that under § 139.88, STATS., the tax is due upon acquisition or possession of the controlled substance and that, under § 139.89, STATS., "[n]o person may transfer to another person a stamp or other evidence of payment." Thus, it appears that nothing would prevent the State from asking the jury to infer from the presence of affixed stamps on discovered drugs that it was the defendant who purchased the stamps in compliance with the law.

on the use of information required by the statutes. The Court reasoned that doing so would violate one of the central purposes of the statutes--providing information to prosecutors. Here, however, the legislature clearly did not enact the drug tax stamp statute to provide prosecutors with assistance in prosecuting dealers. In *Heredia*, we interpreted the statute as contemplating anonymity. Therefore, placing restrictions on information gained through compliance with the drug tax stamp statute will not contradict the legislative intent. We will construe the drug tax stamp statute to preserve its constitutionality by interpreting § 139.91, STATS., to preclude the State from using *any* information gained as a result of a tax stamp purchaser's compliance with the statute, including the presence of affixed tax stamps, as evidence in a subsequent drug prosecution. With this construction, the affix and display provision of the drug tax stamp statute does not violate Hall's right against compelled self-incrimination.

This approach has been adopted in other jurisdictions. In *Zissi v. State Tax Comm'n*, 842 P 2d 848, 857 (Utah 1992), the petitioner argued that compliance with Utah's drug tax stamp statute would require him to provide evidence against himself in violation of his federal and state rights against compelled self-incrimination in two ways: (1) by requiring a dealer who complies with the statute to provide incriminating information that may be turned over to the state or local prosecutor; and (2) by providing vital evidence in a prosecutor's case against a dealer who complies with the statute and affixes stamps to his illicit drugs because such acts show knowledge that the items are controlled substances. *Zissi*, 842 P.2d at 857.

The *Zissi* court held that the statute was facially unconstitutional under *Marchetti* because the stamp purchaser would reasonably suppose that compliance would make information available to prosecuting authorities and that the information would provide a link in a chain of evidence to establish the individual's guilt of a drug-related offense. *Zissi*, 842 P.2d at 857. However, the court concluded:

> [W]e are mindful of our power to save a statute from unconstitutionality by imposing on it a limiting construction. This power permits us to uphold an otherwise questionable statute by tailoring it to conform to the Constitution, which is what we must presume the legislature intended.... [W]e hold that the statute must be read to preclude prosecutors from using any information gained as a result of a stamp purchaser's compliance with the tax statute to establish a link in the chain of evidence in a subsequent drug prosecution. With such a reading, the scope of the resulting immunity is broad enough to satisfy the requirements of the Fifth Amendment.

Zissi, 842 P.2d at 857 (citations omitted). *See also State v. Durrant*, 769 P.2d 1174, 1183 (Kan.), *cert. denied*, 492 U.S. 923 (1989); *State v. Davis*, 787 P.2d 517, 523 (Utah Ct. App. 1990); *State v. Garza*, 496 N.W.2d 448, 454 (Neb. 1993).[4]

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[4] We note that Congress cured the constitutional deficiencies of the federal wagering tax statutes by enacting 26 U.S.C. § 4424 subsequent to the United States Supreme Court's decision in *Marchetti v. United States*, 390 U.S. 39 (1968). *See Sisson v. Triplett*, 428 N.W.2d 565, 572 n.7 (Minn. 1988); *United States v. Jeffers*, 621 F.2d 221 (5th Cir. 1980). In *Marchetti*, the Court noted that evidence of the possession of a federal wagering tax stamp has often been admitted at trial in state and federal prosecutions for gambling offenses. *Marchetti*, 390 U.S. at 47. 26 U.S.C. § 4424(c)(1) now provides in part that "any stamp denoting payment of the special tax under this chapter ... shall not be used against such taxpayer in any criminal proceeding."

We agree with the rationale of these jurisdictions and hold that the affix and display provision of the drug tax stamp statute, as construed, does not violate a defendant's right against compelled self-incrimination.

PAYMENT PROVISION OF THE TAX STAMP STATUTE AS IMPLEMENTED

Hall contends that the payment provision of the drug tax stamp statute, as implemented by the Department of Revenue, violates his right against compelled self-incrimination guaranteed by the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution.

In *Heredia*, we held that the payment provision of the drug tax stamp statute, on its face, does not violate a defendant's constitutional right against compelled self-incrimination because it contemplates and permits anonymous payment. *Heredia*, 172 Wis.2d at 485-86, 493 N.W.2d at 407. Hall has not presented any evidence to show that the statute is implemented by the Department of Revenue in a manner that is inconsistent with that contemplated by the statute on its face. Although Hall attached a Department of Revenue form entitled "Drug Tax Purchase Order" to his brief, he does not state that this was part of the record and we have not found it in the record. Even if it were part of the record, the form, which apparently is to be filled out by a purchaser of tax stamps, does not require the applicant to provide any identifying information, such as the applicant's name, address or social security

number. We therefore reject Hall's challenge to the payment provision of the drug tax stamp statute.

DOUBLE JEOPARDY

Hall claims that the crime of delivering cocaine is a lesser included offense of the tax stamp violation and, therefore, he was exposed to multiple punishments for the same offense in violation of his constitutional right to be free from double jeopardy.

Whether a defendant's convictions violate his or her double jeopardy rights under the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution is a question of law that we decide *de novo*. *State v. Sauceda*, 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992).

The double jeopardy language in both constitutions is designed, in part, to protect against multiple punishments for the same offense. *Sauceda*, 168 Wis.2d at 492, 485 N.W.2d at 3. In Wisconsin, we engage in a two-part analysis to determine whether multiple punishments may be imposed upon the defendant. *Id.* First, we apply the "elements only" test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). This test was codified under § 939.66(1), STATS. It provides that if each charged offense is not considered a lesser included offense of the other,

then we should presume that the legislature intended to permit cumulative punishments for both offenses. The second part of the analysis involves an inquiry into other factors which evidence a contrary legislative intent. *Sauceda*, 168 Wis.2d at 495, 485 N.W.2d at 5.

An offense is a lesser included offense if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the greater offense. *State v. Eastman*, 185 Wis.2d 405, 413 n.2, 518 N.W.2d 257, 260 (Ct. App. 1994).

We conclude that delivering cocaine base is not a lesser included offense of the tax stamp violation. The crime of delivering cocaine base requires the State to prove that the defendant actually delivered what he or she knew or believed to be cocaine base. *See* WIS J I-CRIMINAL 6020. The tax stamp statute, by contrast, only requires the State to prove that the individual is a "dealer" within the meaning of § 139.87(2), STATS., and that the individual has not paid the appropriate tax on the controlled substance. The term "dealer" under § 139.87(2) includes an individual who possesses seven grams or more of a schedule I or schedule II controlled substance. Because the delivery offense requires a showing of delivery and the tax stamp offense does not, the delivery offense is not a lesser included offense of the tax

stamp offense, and we presume the legislature intended to permit cumulative punishments for both offenses.

There is no indication that the legislature did not intend to permit cumulative punishments for both offenses and Hall does not point to any factor that would suggest otherwise. Accordingly, Hall's right to be free from double jeopardy was not violated.

PENALTY ENHANCER--VOID FOR VAGUENESS CHALLENGE

Hall contends that § 161.49, STATS.,[5] which sets out enhanced penalties for distribution of a controlled substance if the crime occurs within 1,000 feet of any private or public school premises, is void for vagueness. Specifically, Hall argues that a person of ordinary intelligence seeking to avoid the statute's penalties would not know whether the term "premises" means the school building itself or includes the land on which the school building is located. At trial, Detective Ritter testified that the Lincoln School property line is 970 feet from the front door of the townhouse in which the delivery of cocaine base took place.

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[5] Section 161.49(1), STATS., provides in part:

> If any person violates s. 161.41(1)(cm) ... by distributing ... a controlled substance ... while on or otherwise within 1,000 feet of any private or public school premises ... the maximum term of imprisonment prescribed by law for that crime may be increased by 5 years.

The void for vagueness concept rests upon the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. *State ex rel. Hennekens v. City of River Falls Police & Fire Comm'n*, 124 Wis.2d 413, 420, 369 N.W.2d 670, 674 (1985). Before a criminal statute may be invalidated for vagueness, we must be convinced beyond a reasonable doubt that there is some uncertainty or ambiguity in the description of the conduct prohibited that prevents a person of ordinary intelligence who wants to obey the statute from determining what is prohibited conduct *State v. Corcoran*, 186 Wis.2d 616, 632, 522 N.W.2d 226, 232 (Ct. App. 1994).

The term "premises" is not defined in the statute. However, a person of ordinary intelligence is well apprised of its meaning. The AMERICAN HERITAGE COLLEGE DICTIONARY 1080 (3d ed. 1993) defines "premises" to include "land and the buildings on it." BLACK'S LEGAL DICTIONARY 1180 (6th ed. 1990) defines "premises" to include "land with its appurtenances and structures thereon." We conclude that the statute provides fair warning that the region contemplated by the statute begins at the school property line.[6]

[6] Hall also argues that § 161.49, STATS., does not adequately guard against arbitrary and discriminatory enforcement of the statute by police officers because no standards exist to tell police officers what is included in the definition of "premises." However, because we have concluded that a person of ordinary intelligence knows what is meant by the term "premises," we reject this argument.

EQUAL PROTECTION

Hall argues that the disparity in potential sentences for defendants convicted of dealing cocaine base and defendants convicted of dealing cocaine powder that existed at the time of his sentencing violates his right to equal protection under the Wisconsin and United States Constitutions.[7] Hall, who is an African-American, alleges that the disparity in sentences has a disparate impact on African-Americans. The trial court denied Hall's motion to dismiss on this ground.

The constitutionality of a statute is a question of law that we review *de novo*. *See State v. McManus*, 152 Wis.2d 113, 129, 447 N.W.2d 654, 660 (1989). Statutes are presumed to be constitutional. *State v. Bertrand*, 162 Wis.2d 411, 415, 469 N.W.2d 873, 875 (Ct. App. 1991). Hall must prove the statute's unconstitutionality beyond a reasonable doubt. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis.2d 32, 46, 205 N.W.2d 784, 792 (1973).

At the time of Hall's sentencing, the potential penalty for delivery of more than 40 grams of cocaine base was a fine of between $25,000 and $1,000,000 and a period of incarceration of between 10 and 30 years. Section 161.41(1)(cm)4, STATS., 1991-92. At the same time, the potential penalty for delivery of more than

[7] The Wisconsin Constitution's equal protection clause is the substantial equivalent of its federal counterpart. *State v. McManus*, 152 Wis.2d 113, 130, 447 N.W.2d 654, 660 (1989).

40 grams of cocaine powder was a fine of between $1,000 and $500,000 and a period of incarceration of between 1 and 15 years. Section 161.41(1)(c), STATS., 1991-92. This disparity was eliminated by 1993 Wis. Act 98, effective December 25, 1993. Section 161.41(1)(cm)4 currently provides that the potential penalty for delivery of more than 40 grams of either cocaine base or cocaine powder is a fine of not more than $500,000 and a term of imprisonment not to exceed 30 years.

Hall argues that the sentencing dichotomy should be subject to a strict scrutiny analysis because the classifications are based on race. However, to invoke strict scrutiny, Hall must prove the existence of purposeful racial discrimination. ***Personnel Adm'r of Massachusetts v. Feeney***, 442 U.S. 256, 272 (1979). Absent such a purpose, the existence of a differential impact of a law upon one race is subject to the rational basis analysis. ***Rogers v. Lodge***, 458 U.S. 613, 617 n.5 (1982).

Hall has not presented any evidence to show that the legislature was motivated by a discriminatory purpose in creating the sentencing distinction between cocaine powder and cocaine base. While Hall cites a comparison by the Wisconsin Sentencing Commission of conviction rates for cocaine base-related offenses which demonstrates that African-Americans are disproportionately exposed to the harsher penalties for cocaine base-related offenses, numerical impact alone will not establish

discriminatory intent in a facially neutral law. *See, e.g.*, ***United States v. Angulo-Lopez***, 7 F.3d 1506, 1509 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1563 (1994); ***United States v. Reece***, 994 F.2d 277, 278 (6th Cir. 1993).

In the absence of evidence indicating a discriminatory intent, we subject the legislative sentencing scheme to a rational basis analysis. Under that analysis, the classification will be upheld if there is any rational basis to support it. ***State v. Roling***, 191 Wis.2d 755, 765, 530 N.W.2d 434, 438 (Ct. App. 1995).

The circuits of the federal court of appeals have consistently upheld a distinction in penalties for cocaine base and cocaine powder offenses at the federal level.[8] The distinction is justified on the grounds that cocaine base is more addictive, more dangerous, highly potent, and can be sold in smaller quantities with lower unit prices than cocaine powder. We join these jurisdictions and conclude that a rational basis existed for imposing harsher penalties for engaging in the delivery of cocaine base than for delivery of cocaine powder.

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[8] *See, e.g.*, ***United States v. Lewis***, 40 F.3d 1325, 1344-45 (1st Cir. 1994); ***United States v. Collado-Gomez***, 834 F.2d 280, 281 (2d Cir. 1987), *cert. denied*, 485 U.S. 969 (1988); ***United States v. Jones***, 979 F.2d 317, 319 (3d Cir. 1992); ***United States v. Thomas***, 900 F.2d 37, 39-40 (4th Cir. 1990); ***United States v. Avant***, 907 F.2d 623, 627 (6th Cir. 1990); ***United States v. Lawrence***, 951 F.2d 751, 755 (7th Cir. 1991); ***United States v. Buckner***, 894 F.2d 975, 978 (8th Cir. 1990); ***United States v. Malone***, 886 F.2d 1162, 1166 (9th Cir. 1989); ***United States v. Angulo-Lopez***, 7 F.3d 1506, 1509 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1563 (1994); ***United States v. King***, 972 F.2d 1259, 1260 (11th Cir. 1992); ***United States v. Cyrus***, 890 F.2d 1245, 1248 (D.C. Cir. 1989).

Hall's reliance on *State v. Russell*, 477 N.W.2d 886 (Minn. 1991) is incorrect. In *Russell*, the Supreme Court of Minnesota held that a statutory distinction drawn between a quantity of crack cocaine possessed and cocaine powder possessed violated the equal protection guarantee of the Minnesota Constitution. However, the rational basis test under the Minnesota Constitution differs from the rational basis test under the United States Constitution and the Wisconsin Constitution. The Minnesota Constitution requires a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals. *Russell*, 477 N.W.2d at 889. The *Russell* court held that the testimony before the legislature did not establish a substantial and genuine distinction between those inside and outside the class. In contrast, under the United States Constitution and the Wisconsin Constitution, it is the court's obligation to locate or construct a rationale that might have influenced the legislature and we need not find that evidence supporting the rationale was presented to the legislature. *Bertrand*, 162 Wis.2d at 418, 469 N.W.2d at 876.

Hall contends that the fact that the legislature eliminated the disparity in potential sentences for cocaine base and cocaine powder is an indication that the disparity that existed at the time Hall was sentenced lacked a rational basis. We disagree. The fact that 1993 Wis. Act 98 made the penalties for offenses relating to cocaine base and cocaine powder the same does not mean that a distinction between

cocaine base and cocaine powder was irrational. The State has wide discretion to create classifications. *State v. Hermann*, 164 Wis.2d 269, 283, 474 N.W.2d 906, 911 (Ct. App. 1991).

DELAY IN CHARGING

According to Hall, the delay between the commission of his first criminal offense on May 11, 1993, and the filing of criminal charges on June 21, 1993, violated his constitutional right to due process. We disagree.

When a defendant seeks to avoid prosecution based on prosecutorial delay, the defendant must show actual prejudice arising from the delay and that the delay arose from an improper motive or purpose such as to gain a tactical advantage over the accused. *State v. Wilson*, 149 Wis.2d 878, 904-05, 440 N.W.2d 534, 544 (1989) (no due process violation in sixteen-year delay between date of offense and filing of complaint).[9]

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[9] Hall concedes that under *United States v. Marion*, 404 U.S. 307, 324 (1971), a defendant must establish both actual prejudice and intentional delay to gain a tactical advantage in order to establish a due process violation. However, Hall argues that states are free to grant greater due process protection than the minimum established by the United States Supreme Court and asserts that we have done so in *State v. Strassburg*, 120 Wis.2d 30, 36, 352 N.W.2d 215, 218 (Ct. App. 1984). It is true that in *Strassburg*, we stated the two-part test in the disjunctive--prejudice *or* intentional delay to gain a tactical advantage. However, in *State v. Wilson*, 149 Wis.2d 878, 904-05, 440 N.W.2d 534, 544 (1989), the Wisconsin Supreme Court, consistent with *Marion*, stated that a defendant must establish both parts of the two-part test in order to establish a due process violation. We are bound by decisions of the Wisconsin Supreme Court. *State v. Kircher*, 189 Wis.2d 392, 398, 525 N.W.2d 788, 790 (Ct. App. 1994).

Assuming for purposes of argument that Hall was prejudiced by the delay,[10] Hall's due process argument fails because he has not made any showing that the delay arose from an improper motive or purpose. Hall speculates that "there is no other reason for the State to have instituted a second undercover sting absent a desire to increase the potential penalties against Hall." However, he does not offer proof of this, nor does he explain why a delay due to an ongoing narcotics investigation is impermissible in the first place.

PHOTOGRAPHIC IDENTIFICATION PROCEDURE

Hall argues that the pretrial photographic identification procedure under which Officer Strong identified him was impermissibly suggestive. The test for determining whether an out-of-court photographic identification is admissible or, on review, whether the out-of-court identification was properly admitted involves a two-part test. *Powell v. State*, 86 Wis.2d 51, 65, 271 N.W.2d 610, 617 (1978). First, the court must determine whether the identification procedure was impermissibly suggestive. *Id.* Second, it must decide whether, under the totality of the circumstances, the out-of-court identification was reliable despite the suggestiveness of the procedures. *Id.* Once the defendant meets his or her burden of showing that

[10] Hall contends that he was prejudiced because he committed additional crimes after the date of his first offense and because the informant who acted as the middleman in the drug transactions was not available to him after he was charged.

the identification was the product of an impermissibly suggestive procedure, the burden shifts to the State to show the identification was nonetheless reliable under the totality of the circumstances. *Id.* at 65-66, 271 N.W.2d at 617.

A single photo array is not *per se* impermissibly suggestive. ***Kain v. State***, 48 Wis.2d 212, 219, 179 N.W.2d 777, 782 (1970). Each case must be examined in light of its facts. *Id.* The *Kain* court stated that "convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.*

Even if the single photograph procedure were impermissibly suggestive, the totality of the circumstances indicates that Strong's identification of Hall was reliable. Officer Strong testified that he viewed Hall during both drug transactions. With respect to the first drug transaction, Strong viewed Hall when Hall entered the townhouse and proceeded up the stairs to confirm that the informant knew Strong. After leaving briefly, Hall came back upstairs and stopped at the top of the stairway and made some remark about the substance being crack cocaine. At this point, the cocaine base was delivered directly from Hall to Strong in exchange for $2,000. Strong and Hall conversed for approximately three to four minutes.

Strong testified that he is nearsighted and usually wears glasses. Strong also testified that he did not identify a particular feature of Hall. However, he also

testified that the transaction took place shortly after 8:00 p.m. on May 11, that there was sunlight coming from the bedroom window, that the light was on in the bedroom and, at least for two or three minutes, Hall was only 15-20 feet away. Strong also testified that although he could not identify one particular feature of Hall, there was no one feature that told him this was Hall because "it was evident to me that it was ... the same person."

Strong was shown a single photograph of Hall the following day and, according to his testimony, immediately recognized the person in the photograph as the person from whom he had purchased the cocaine base. We conclude that the trial court did not err in admitting the out-of-court identification.

EVIDENCE OF HALL'S THREAT TO KILL A POLICE OFFICER

During direct examination of Officer Strong regarding the June 3, 1993 drug transaction, Strong testified that after he went downstairs to retrieve $100 he had overpaid Hall, Hall asked him if he was a police officer. Defense counsel anticipated that Officer Strong was going to repeat his assertion, made at the hearing on the motion to suppress the out-of-court identification, that Hall had threatened to kill Strong if he was a "cop." Defense counsel requested a sidebar and argued that this testimony was inadmissible on the ground that its probative value was substantially outweighed by its unfair prejudicial effect. The trial court denied defense counsel's request, reasoning that the testimony could establish Strong's heightened apprehension which, in turn, could bolster his identification testimony.

The admission of evidence is a matter within the trial court's discretion. *State v. Roberson*, 157 Wis.2d 447, 452, 459 N.W.2d 611, 612 (Ct. App. 1990). Under § 904.03, STATS., relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Evidence is unduly prejudicial when it threatens the fundamental goals of accuracy and fairness of the trial by misleading the jury or by influencing the jury to decide the case upon an improper basis. *State v. DeSantis*, 155 Wis.2d 774, 791-92, 456 N.W.2d 600, 608 (1990).

We conclude that the trial court did not erroneously exercise its discretion in admitting this testimony. A central issue in the case was whether Officer Strong correctly identified Hall as the seller in the drug transaction. The trial court could reasonably decide that the testimony of Hall's threat was highly probative of Strong's level of attention during the drug transaction. *See Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (one factor to consider in assessing reliability of identification is the witness's degree of attention). Strong's testimony was presumably damaging. But we cannot conclude that the trial court erroneously exercised its discretion in determining that the testimony's probative value was not substantially outweighed by its prejudicial effect.

By the Court.--Judgment affirmed.

Recommended for publication in the official reports.

WISCONSIN | CIRCUIT BRANCH # 6 | DANE COUNTY

State of Wisconsin, Plaintiff
-vs-
Darryl J. Hall aka Darryl Brown, Defendant
1-5-67
Defendant's Date of Birth

TYPE OF CONVICTION (Select One)
X Sentence to Wisconsin State Prisons
___ Sentence Withheld, Probation Ordered
___ Sentence Imposed & Stayed, Probation Ordered

COURT CASE NUMBER 93 CF 1023

The defendant entered plea(s) of: [ ] Guilty [X] Not Guilty [ ] No Contest

The [ ] Court [X] Jury found the defendant guilty of the following crime(s):

CRIME(S)	WIS STATUTE(S) VIOLATED	FELONY OR MISDEMEANOR (F OR M)	CLASS (A-E)	DATE(S) CRIME COMMITTED
Counts 1 and 3: Prohibited Acts A-Penalties Distribution of or Possession with intent to deliver a controlled substance on or near certain places second or subsequent offenses.	161.41(1)(cm)4; 161.49; 161.48	F		Count 1: 5-11-93 Count 3: 6-3-93
Counts 2 and 4: Imposition Penalties (Tax Stamp Violation)	139.88 139.95(2)	F		Count 2: 5-11-93 Count 4: 6-3-93

IT IS ADJUDGED that the defendant is convicted on 10-1-93 as found guilty and:

[XX] on 12-3-93 is sentenced to prison for See other side.

[ ] on _____ is sentenced to intensive sanctions for _____

[ ] on _____ is sentenced to county jail/HOC for _____

[ ] on _____ is placed on probation for _____

CONDITIONS OF SENTENCE/PROBATION

Obligations: (Total amounts only)

Fine (includes jail assessments; drug assessments; penalty assessments) $ _____

Court costs (Includes service fees; witness fees; restitution surcharge; domestic abuse fees; subpoena fees; automation fees) $ _____

Attorney fees $ _____

Restitution $ 4,200.00

Other $ _____

Mandatory victim/witness surcharge(s)
felony _____ counts $ _____
misdemeanor _____ counts $ _____

Jail: To be incarcerated in the county jail/HOC for _____

Confinement Order For Intensive Sanctions sentence only - length of term: _____

Miscellaneous
Restitution to be paid to the Dane County Narcotics Enforcement Team. Court imposed fine and costs on count 1 of: $50,000fi+$10,000 +$30,000dg+$50vw+$20fe+$500ja and on count 3 of $50,000fi+$10,000pa+$30,000dg+$50vw+$500ja.

IT IS ADJUDGED that _____ days sentence credit are due pursuant to s. 973.155 Wis. Stats. and shall be credited if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the City of Waupun, Dodge Correctional Institute.

NAME OF JUDGE
Richard J. Callaway

DISTRICT ATTORNEY
Judy Schwaenle

DEFENSE ATTORNEY
Mark Eisenberg

BY THE COURT:
Donna McCartney
Circuit Court Judge/Clerk/Deputy Clerk

12-6-93
Date Signed

PARTMENT OF CORRECTIONS

latutes, Sections 939.50

JUDGMENT OF C

Count 1 and 3:

30 years prison each count consecutive to each other, commencing forthwith.
With credit for 155 days served.
Counts 2 and 4:

3 years prison each count consecutive to each other and concurrent to counts 1 and 3.

Wisconsin Department of Revenue

DRUG TAX PURCHASE ORDER

Walk-in address:

4638 University Avenue
(at the intersection of Segoe Road)
Madison, Wisconsin

Mailing address:

Wisconsin Department of Revenue
P.O. Box 8905
Madison, WI 53708-8905

The Wisconsin Department of Revenue certifies that this drug tax purchase order form was in use during the month of May 1993.

Commission expires 4-14-96

NOTE: Complete the name and address area only if stamps are to be mailed.

NAME		
STREET OR P.O. BOX		
CITY	STATE	ZIP

Complete Columns C and D showing the quantity and total cost of the stamps being purchased.

Line #	(Column A) Tax Stamp Description	(Column B) Value Per Stamp	(Column C) Total Number of Stamps Ordered	(Column D) Value of Stamps Ordered
1.	One gram of marijuana	$3.50		$
2.	One gram of psilocin/psilocybin mushrooms	$10.00		$
3.	100 milligrams LSD	$100.00		$
4.	One gram of schedule I or schedule II controlled substances	$200.00		$
5.	One marijuana plant	$1,000.00		$
			AMOUNT DUE (Add lines 1-5 in Col. D)	$

See reverse side for general information and important stamp application instructions.

For department receipt

Check Method of Payment:

☐ Cash

☐ Check (stamps will be held 10 working days)

ALL SALES ARE FINAL
NO REFUND FOR UNUSED STAMPS

DT-001 (R. 8-92)

GENERAL INFORMATION

Wisconsin imposes a tax on dealers of marijuana or other controlled substances. No dealer may possess any marijuana or any controlled substance unless the tax imposed has been paid on it, as evidenced by stamps issued by the Department of Revenue.

"Dealer" means a person who in violation of chapter 161 possesses, manufactures, produces, ships, transports, delivers, imports, sells or transfers to another person more than 42.5 grams of marijuana, more than 5 marijuana plants, more than 14 grams of mushrooms contain psilocin or psilocybin, more than 100 milligrams of any material containing lysergic acid diethylamide or more than 7 grams of any other schedule I controlled substance or schedule II controlled substance. "Dealer" does not include a person who lawfully possesses marijuana or another controlled substance.

ACQUISITION OF STAMPS DOES NOT CREATE IMMUNITY FOR A DEALER FROM CRIMINAL PROSECUTION.

PURCHASING STAMPS VIA CASH, OR PERSONAL CHECK — Dealers may purchase stamps with cash, or checks. Make your checks payable to the Wisconsin Department of Revenue. Stamps will be released immediately if paid for by cash. Stamps paid for with checks will be held until the check has cleared the bank (usually ten working days). In this instance the stamps will not be mailed to the purchaser until after the waiting period.

SUBMITTING YOUR STAMP ORDER — Provide all the information requested when completing your purchase order. Stamp orders received through the U.S. mail or other common carrier are generally filled the following work day and mailed first class (excluding orders paid by check). The department will return a copy of the order form marked paid along with your stamps. Walk-in orders will be receipted paid and a copy returned with the stamps.

ASSISTANCE — For additional information on ordering tax stamps, call (608) 266-1158.

IMPORTANT APPLICATION DIRECTIONS FOR TAX STAMPS

Tax stamps of the proper denomination must be affixed to individual drug containers or marijuana plants so that when the drug containers are opened or the marijuana plants processed, the tax stamps are broken and rendered unusable.

1. Dip the stamps into a pan of water for 20-25 seconds.
2. Lay the wet stamps on a wet cloth.
3. After the stamp paper has been properly moistened, the paper will have absorbed all of the water so that there will not be any drops of water remaining on the paper.
4. With a very light touch, pull the stamps from the backing paper and apply the stamps. Repeat that process until the correct amount of stamps are applied.
5. After the stamps have been applied, wipe off any water that might be accumulated and allow the stamps to air dry.
6. The water used for the immersion of the stamps should be changed often.
7. **CAUTION:** Store unused stamps in a cool, dry area.

519

AN ACT to amend chapter 77 (title); and to create subchapter VII of chapter 77 of the statutes, relating to imposing a tax on controlled substances and providing a penalty.

Analysis by the Legislative Reference Bureau

This bill creates a tax on controlled substances that applies to those substances possessed or acquired by dealers. The rate is $5 per gram of cannabis, $50 per gram of other controlled substances and $10,000 per 5 dosage unit. Payment of the tax will be demonstrated by a stamp or other type of evidence, which may be purchased at face value upon completion of a return. Possession of unstamped controlled substances subjects a dealer to a fine of not less than $5,000 nor more than $10,000, imprisonment for not less than 2 years nor more than 5 years or both in addition to a penalty equal to the tax. Information from a return is confidential and may not be used in any criminal proceeding except those related to the tax itself.

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

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

SECTION 1. Chapter 77 (title) of the statutes is amended to read:

CHAPTER 77

TAXATION OF FOREST CROPLANDS;

REAL ESTATE TRANSFER FEES; SALES AND USE TAXES; PROPERTY TAX DEFERRAL; COUNTY SALES AND USE TAXES; MANAGED FOREST LAND; TAX ON CONTROLLED SUBSTANCES

SECTION 2. Subchapter VII of chapter 77 of the statutes is created to read:

CHAPTER 77

SUBCHAPTER VII

TAXATION OF CONTROLLED SUBSTANCES

77.92 DEFINITIONS. In this subchapter:

(1) "Controlled substance" has the meaning under s. 161.01 (4) and includes a counterfeit substance, as defined in s. 161.01 (5).

(2) "Dealer" means a person who in violation of ch. 161 manufactures, produces, ships, transports, imports, sells or transfers to another person more than 30 grams of cannabis or more than 5 grams of any other controlled substance or, if the substance is not sold by weight, 5 or more dosage units of a controlled substance.

("Department" means the department of revenue.

77.93 IMPOSITION. There is imposed on dealers, upon acquisition or possession in this state, a tax at the following rates:

(1) Per gram or part of a gram of cannabis, $5.

(2) Per gram or part of a gram of other controlled substances, $50.

(3) Per 5 dosage units of a controlled substance, $10,000, if the substance is not sold by weight.

77.94 PROOF OF PAYMENT. The department shall create a uniform system of providing, affixing and displaying stamps, labels or other evidence that the tax under s. 77.93 has been paid. Stamps or other evidence of payment shall be sold at face value and upon completion and submission of

a return. No dealer may possess any cannabis or other controlled substance unless the tax under s. 77.93 has been paid on it, as evidenced by a stamp or other official evidence issued by the department.

77.96 NO IMMUNITY. Acquisition of stamps or other evidence that the tax under s. 77.93 has been paid does not create immunity for a dealer from criminal prosecution for possession of a controlled substance.

77.97 CONFIDENTIALITY. The department may not reveal facts contained in a return required under s. 77.94. No information contained in such a return may be used against the dealer in any criminal proceeding, unless that information has been independently obtained, except in connection with a proceeding involving possession of untaxed controlled substances or taxes due under s. 77.93 from the dealer making the return.

77.98 EXAMINATION OF RECORDS. For the purposes of determining the correctness of any return, determining the amount of tax that should have been paid, determining whether or not the dealer should have made a return or paid taxes or collecting any taxes under s. 77.93, the department may examine, or cause to be examined, any books, papers, records or memoranda that may be relevant to making those determinations, whether the books, papers, records or memoranda are the property of or in the possession of the dealer or another person. The department may require the attendance of any person having knowledge or information that may be relevant, compel the production of books, papers, records or memoranda by persons required to attend, take testimony on matters material to the determination, and administer oaths or affirmations. Upon demand of the department or any examiner or investigator, a circuit court shall issue a subpoena for the attendance of a witness or the production of books, papers, records and memoranda. Disobedience of subpoenas issued under this section is punishable by the circuit court which issued the subpoena.

77.99 PENALTIES. (1) Any dealer who possesses a controlled substance that does not bear evidence that the tax under s. 77.93 has been paid shall pay, in addition to the tax under s. 77.93, a penalty equal to the tax due.

(2) Any dealer who possesses a controlled substance that does not bear evidence that the tax under s. 77.93 has been paid may be fined not less than $5,000 nor more than $10,000 or imprisoned not less than 2 years nor more than 5 years or both.

SECTION 3. EFFECTIVE DATE. This act takes effect on the first day of the 4th month after publication.

(End)

LRB

FISCAL ESTIMATE

☒ ORIGINAL ☐ UPDATED
☐ CORRECTED ☐ SUPPLEMENTAL

Subject
Controlled Substances Tax

Fiscal Effect See Text of Fiscal Note

State ☐ No State Fiscal Effect
Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.
☐ Increase Existing Appropriation ☐ Increase Existing Revenues
☐ Decrease Existing Appropriation ☐ Decrease Existing Revenues
☐ Create New Appropriation

☐ Increase Costs – May Be Possible to Absorb Within Agency's Budget ☐ Yes ☐ No
☐ Decrease Costs

Local ☒ No local government costs
1. ☐ Increase Costs ☐ Permissive ☐ Mandatory
2. ☐ Decrease Costs ☐ Permissive ☐ Mandatory
3. ☐ Increase Revenues ☐ Permissive ☐ Mandatory
4. ☐ Decrease Revenues ☐ Permissive ☐ Mandatory
5. Types of Local Governmental Units Affected: ☐ Towns ☐ Villages ☐ Cities ☐ Counties ☐ Others _____

Fund Sources Affected: ☒ GPR ☐ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEG-S
Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

This proposal creates an occupational tax on dealers of controlled substances based on the amount of controlled substances the dealer produces or brings into the state. A tax on controlled substances could likely be imposed only after controlled substances have been seized from dealers as a result of criminal investigations.

No information is available on the total amount (by weight) of controlled substances seized in the state. Thus, it is not possible to accurately estimate the revenues which would result from the proposed tax on controlled substances.

In many instances, the assets of persons charged with being dealers of controlled substances are confiscated in the course of prosecuting the persons. The criminal penalties generally include substantial fines. Based on these actions, it is unlikely that most of the persons subject to the controlled substances tax will have the financial resources to pay the tax and penalties due.

Thus, it is likely that that the amount of revenue from the tax would be very small.

The proposal would result in increased administrative costs to the department. However, due to a lack of information on the number of taxpayers involved, it is not possible to accurately estimate the amount of these increased administrative costs.

Long-Range Fiscal Implications

Agency Prepared by: (Name & Phone No.)
Wisconsin Department of Revenue
John Tuohy 266-7817

Authorized Signature/Telephone No. 266-2700
Yeargy Bean

Date
6/17/87

1987 Session

FISCAL ESTIMATE WORKSHEET
Detailed Estimate of Annual Fiscal Effect
AD-MBA-22(Rev. 10/80)

☐ ORIGINAL ☐ UPDATED
☐ CORRECTED ☐ SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.	Amendment No.
3930/2	

Subject
Controlled Substances Tax

I. One-time Costs or Revenue Fluctuations for State and/or Local Government (do not include in annualized fiscal effect):

II. Annualized Costs: Note: Treat fiscal costs like a "checkbook": increased costs reduce available funds (-); decreased costs increase available funds (+).	Annualized fiscal impact on State funds from: Increased Costs	Decreased Costs
A. State Costs by Category	$ -	$ +
Salaries and Fringes	-	+
Staff Support Costs	-	+
Other State Costs	-	+
Local Assistance	-	+
Aids to Individuals or Organizations	$ -	$ +
TOTAL State Costs by Category	Increased Costs	Decreased Costs
B. State Costs by Source of Funds	$ -	$ +
GPR	-	+
FED	-	+
PRO/PRS	-	+
SEG/SEG-S	Increased Pos. + ( )	Decreased Pos. - ( )
C. FTE Position Changes	Decreased Rev.	Increased Rev.
III. State Revenues—Complete this only when proposal will increase or decrease state revenues, such as taxes, license fees, etc.	$ -	$ +
GPR Taxes	-	+
GPR Earned	-	+
FED	-	+
PRO/PRS	-	+
SEG/SEG-S	$ -	$ +
TOTAL State Revenues		

Net Annualized Fiscal Impact on State & Local Funds

State	Annual Increases	Annual Decreases
Total Costs	$ -	$ +
Total Revenues	+	-

Local	Annual Increases	Annual Decreases
Total Costs	$ -	$ +
Total Revenues	+	-

NET Impact on State Funds $ (+) or (-) See Text of Fiscal Note

NET Impact on Local Funds $ (+) or (-) None

Agency Prepared by: (Name & Phone No.)
Wisconsin Department of Revenue
John Tuohy, 266-7817

Authorized Signature/Telephone No. 266-2700
[signature]
Date 6/17/87

MEMORANDUM

June 17, 1987

TO: Jack Stark
Legislative Reference Bureau

FROM: Eng Braun
Department of Revenue

SUBJECT: Technical Memorandum for LRB 3930/2, Relating to a Tax on Controlled Substances

1. Rates of Tax

The rate on controlled substances sold in 5 dosage units could be difficult to enforce since dealers could claim that their controlled substances are sold by weight if the per gram or part of a gram rate results in a lower tax liability. An alternative would be to revise the rate on controlled substances other than cannabis such that it would apply per gram or part of gram or per dose if not sold by weight.

2. Imposition Language

The imposition language (page 2) specifies that the tax is an occupational tax on dealers imposed at the time that a dealer acquires or possesses controlled substances. There are problems with this imposition language.

The proof of payment provision (page 2) implies that the tax is due upon the first taxable event occurring in the state. This would be similar to the state cigarette tax where the first person receiving cigarettes in the state is responsible for paying the tax and affixing proof of payment (i.e. tax stamps). Under the cigarette tax this person is defined as the distributor. The distributor sells the cigarettes to jobbers who in turn sell the cigarettes to retailers for sale to the consumer. Since distributors must pay the cigarette tax, jobbers and retailers are not liable for the regular cigarette tax if they are found to be in possession of untaxed cigarettes. In such cases, the cigarettes may be seized and the jobber or retailer can be penalized, or there is a use tax under s. 139.33 which may be imposed on untaxed cigarettes as an alternative to seizure.

The imposition language for the controlled substances tax implies that any dealer in possession of untaxed controlled substances is subject to the tax. Thus, dealers who are the equivalent of jobbers or retailers are subject to the tax as well as the dealers who are the equivalent of distributors. This is somewhat contrary to the implication of the proof of payment provision.

The imposition of the tax should be clarified to specify exactly which persons are responsible for paying the tax. The vagueness of the current language could make it difficult for the department to enforce the tax. In addition, it should be clarified whether dealers other than the designated taxpayers are liable for a use tax if untaxed controlled substances are acquired from the designated taxpayers or other sources.

3. Proof of Payment

The legislation requires that proof of payment of the controlled substances tax must accompany all controlled substances or the dealer in possession of the substances is in violation of the law. For practical purposes, dealers must be allowed to acquire and temporarily possess untaxed controlled substances in order to affix the proof of payment. Thus, it is recommended that language similar to s. 139.32(8) for cigarettes be created for the controlled substances tax.

The legislation requires that proof of payment (i.e. tax stamps) can only be purchased following submission of a tax return. A return for an occupational tax is ordinarily filed after the goods subject to tax have been acquired. However, in order to avoid violating the law, a dealer would want to have a supply of tax stamps on hand before acquiring any controlled substances. To resolve this problem, the following changes are recommended:

-- Dealers should be required to obtain a permit from the department to purchase tax stamps. Permits are required for the other occupational or excise taxes imposed by the state. The department should have the authority to revoke this permit for violations of the controlled substances tax law.

-- After having obtained a permit, dealers could then purchase tax stamps from the department.

-- All permittees should be required to file a return on a regular basis. This return requirement could be patterned after the requirement under s. 139.38 for cigarettes.

4. Transfers, Refunds and Assessments

The legislation should specify that the tax stamps or other proof of payment cannot be transferred between dealers.

The legislation should allow for some method of refunds in the event that the proof of payment is destroyed or becomes unusable.

The legislation should provide a cross-reference to the procedures for making an assessment of tax in cases where the dealers do not pay the tax voluntarily. Assuming that voluntary compliance is unlikely, it is important that these procedures and the procedures for taxpayers to contest assessments be specified clearly.

Due to the likelihood that the department would incur costs in collecting the controlled substances tax from dealers, the legislation should specify that dealers must pay such costs in addition to any other penalties.

Confidentiality

The confidentiality provision (page 3) should clearly specify how the rules for the controlled substances tax differ from the general confidentiality rules for the department under s. 71.11(44). Under the general confidentiality rules for other state taxes, law enforcement officials can request access to the department's records.

It should be noted that it would be difficult to maintain confidentiality with regards to a person's activities as a dealer. Any final assessments and hearings associated with enforcement of the controlled substances tax would normally be a matter of public record. Assuming that dealers would not pay the tax voluntarily, the department would routinely have to seek judgements against dealers to collect the amount of tax and penalties due. These judgements would be a matter of public record.

The difficulty in maintaining confidentiality could result in dealers claiming that the requirement to pay the controlled substances tax violates their constitutional right against self-incrimination. There have been successful challenges of similar taxes on illegal activities in both state and federal courts.

EB:lt
R1932166

1987

DRAFTING REQUEST

Extra Copies: JJ 1 LRB -2930

Wanted: Soon   Drafter: JS

Date rec'd: 5-21   Received by: JJ

Jt.Res.   Res.   Sub.Amdt.   Amdt.

1 Bill

SUBJECT: drug dealer taxes

FOR: Foti   BY/Representing:

This file MAY BE SHOWN to any legislator: (Signature)

BILL INDEX: Tax

MAY CONTACT:

INSTRUCTIONS:

Work/O	/P1	/P2	/P3		5-22 1st	6-1 2nd	3rd	4th	5th
				Drafted	JJ	JJ			
				Reviewed	5/26	6/1			
				Typist		6/1			
				Proofed		6/1			
Original to drafter				Submitted	5/26	6/1			
					FE-S/L PURDES RETIRE TAXEXM	FE-S/L PURDES RETIRE TAXEXM	FE-S/L PURDES RETIRE TAXEXM	FE-S/L PURDES RETIRE TAXEXM	FE-S/ PURDE RETIR TAXEX

All "/P" copies: give to drafter

FE sent for: 5-28, 6-10

Requested ORIGINAL draft: (Please sign below)

Received JACKET:

[rev:07/23/86 1987DF01(fo

[redacted]

STATE OF WISCONSIN -- LEGISLATIVE REFERENCE BUREAU

1987 BILL DRAFT REQUEST FORM

USE FOR BILL REQUESTS ONLY

You may hand in this form at the LRB front desk or deliver it to the appropriate LRB attorney.

Your name (please print or type): Barvyn Ableman

Your phone number: 266-8551 Date: May 21, 1987

Legislator, agency or other body requesting this draft: Rep. Foti

IF YOU NEED MORE SPACE FOR THE FOLLOWING INFORMATION ATTACH ADDITIONAL PAGES.

Describe the problem, including any helpful examples: We have no control over drug dealers or knowledge of who they are.

How do you want to solve the problem? Make them pay a tax on their drugs. See the attached information.

If you know of any statute sections that you think must be affected, list them or provide a marked-up (not retyped) copy:

You may attach a marked-up (not retyped) copy of any LRB draft on this subject, or provide its number (e.g., 1985 LRB-2354/2 or 1985 AB-53):

Attach a copy of any correspondence or similar material that may help us.

Provide names and phone numbers of persons we may contact for more information (including other legislators, if appropriate): Sen. Berkhausen, State of Illinois.

Should we give this request priority over other drafts this legislator, agency or body has requested?

Do you consider this request urgent? _____ If so, please indicate why:

This request is confidential unless you state otherwise. May we tell people we are working on this issue for you? _____ If yes: Anyone who asks! _____ Any legislator?
Or only the following persons:

Thank you. We will contact you if we need more information. [1987DFOILES(fm)]

5/20/87 217-782-0065

I talked to Mark Harnsing, Legislative Assistant to Sen. Barkhausen in Illinois about the drug bill. He said it is now in the Senate and he expects a vote on it this week and expects it to pass. He also expects it to pass in the House. The Democrats outnumber the Republicans in both houses by about the same percentage as we have and, of course, they have a Republican Governor. He said it is a bill that is pretty hard to vote against. The only real objection anyone had to it was its constitutionality but they have gotten around that. A drug dealer, according to the bill, can go to the Department of Revenue and obtain a stamp and the information has to be kept confidential. They cannot call the police and tell them that so and so has a drug tax stamp. It gives them 5th amendment protection. It does not legalize possession. If a dealer is caught selling a drug the law enforcement people can then contact the revenue department and obtain any information on file. The idea behind the bill is to get at the dealers. They are not concerned with an individual who has drugs in his possession because it would fill up the courts. An arendment would make the cost of the stamps 4 times the face value of each stamp instead of 100%. He said if you have any questions to call him.

Berwyn

Also it is a way of getting at the drug proceeds through the tax. Besides the charge of not having a tax stamp the dealer also has a criminal charge levied against him.

1987 LRB 3970/1

RELATING and Sec. 1 Date (time) needed Soon

II

BILL

Bill: ... Substitute Amdt ...

Topic (optional):

AN ACT [generate using "cmpl'cat"] to repeal ...; to renumber ...; to consolidate and renumber ...; to renumber and amend ...; to consolidate, renumber and amend ...; to amend ...; to repeal and recreate ...; and to create ... of the statutes, relating to imposing a tax on controlled substances and providing a penalty

Analysis ......

The people ....

SECTION 1. Chapter 77 (title) of the statutes is amended to read:

CHAPTER 77

TAXATION OF FOREST CROPLANDS; REAL ESTATE TRANSFER FEES; SALES AND USE TAXES; PROPERTY TAX DEFERRAL; COUNTY SALES AND USE TAXES; MANAGED FOREST LAND; TAX ON CONTROLLED SUBSTANCES

SECTION . Subchapter VII of chapter 77 of the statutes is created to read:

CHAPTER 77

SUBCHAPTER VII

TAXATION OF CONTROLLED SUBSTANCES

[rev:07/30/86 1947D603(fm)]

ANALYSIS

This bill creates a tax on controlled substances that applies to those substances possessed or acquired by dealers. The rate is $5 per gram of cannabis, $200 per gram of other controlled substances and $1,000 per dosage unit. Payment of the tax will be demonstrated by a stamp or other type of evidence which may be purchased at face value upon completion of a return. Possession of unstamped controlled substances subjects a dealer to penalties. Information from a return is confidential and may not be used in any criminal proceeding except those related to the tax itself.

FISEST-5

a fine of not
more than $10,000
imprisonment not
more than 5 years or
both, in addition
to a penalty
to the tax.

SB1154

AN ACT to impose a tax on cannabis and controlled substances.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. This Act shall be known and may be cited as the "Cannabis and Controlled Substances Tax Act".

Section 2. As used in this Act:

"Cannabis" has the same meaning specified in Section 3 of the Cannabis Control Act.

"Controlled substance" means a drug, substance, or immediate precursor specified in Article II of the Illinois Controlled Substances Act and includes counterfeit substance as defined in Section 102 of the Illinois Controlled Substances Act.

"Person" means any individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other entity.

"Department" means the Department of Revenue.

"Director" means the director of the Department of Revenue.

"Dealer" means a person who in violation of the Illinois Controlled Substances Act or the Cannabis Control Act manufactures, produces, ships, transports, imports, sells or transfers to another person more than 30 grams of cannabis or more than 5 grams of any other controlled substance or dosage units of a controlled substance.

Section 3. The Director shall administer this Act. Payment of taxes and penalties required by this Act must be made in the form and manner required by the Department. The Department shall collect all taxes and penalties imposed by this Act.

Section 4. The Department shall promulgate rules necessary to enforce this Act. The Department shall adopt

Section 5. Imposition. There is imposed on dealers, upon acquiring or possessing in this State, a tax at the following rates:

(1) For each gram or part of a gram of cannabis, $3.

(2) For each gram or part of a gram of other controlled substances, $10,000; if

(3) For each unit of a controlled substance

uniform system of providing, affixing and displaying

uniform stamps, labels, or other official indicia

for cannabis and controlled substances on which the tax is

imposed pursuant to this Act.

Section 6. No dealer may possess any cannabis or

controlled substance upon which a tax is imposed by this Act

unless the tax has been paid on the cannabis or controlled

substance as evidenced by a stamp or other official indicia

issued by the Department.

Section 6. Nothing in this Act may in any manner provide

immunity for a dealer from criminal prosecution pursuant to

Illinois law.

Section 7. Nothing in this Act requires persons registered under the Illinois Controlled Substances Act or otherwise lawfully in possession of cannabis or a controlled substance to pay the tax required under this Act.

Section 8. For the purpose of calculating the tax under this Act, a gram of cannabis or other controlled substance is measured by the weight of the substance in the dealer's possession.

Section 9. A tax is imposed on cannabis and controlled substances at the following rates:

(1) on each gram of cannabis, or each portion of a gram, $5;

(2) on each gram of controlled substance, or portion of a gram, $250;

(3) on each 50 dosage units of a controlled substance that is not sold by weight, or portion thereof, $2,000.

Section 10. Penalties. Any dealer violating this Act is subject to a penalty of 100% of the tax in addition to the tax imposed by this Act. In addition to the tax and penalty imposed, a dealer distributing or possessing cannabis or controlled substances without affixing the required stamps, labels, or other indicia is guilty of a Class 4 felony.

Section 11. Official stamps, labels, or other indicia to

be affixed to all cannabis or controlled substances shall be purchased from the Department. The purchaser shall pay 100% of face value for each stamp, label, or other indicia at the time of the purchase. The Department shall make the stamps, labels, or other indicia in denominations in multiples of $5.

Section 12. When a dealer purchases, acquires, transports, or imports into this State cannabis or controlled substances on which a tax is imposed and if the stamps, labels or indicia evidencing the payment of the tax have not already been affixed, the dealer shall have them permanently affixed on the cannabis or controlled substance immediately after receiving the substance. Each stamp, label or other official indicia may be used only once.

Taxes imposed upon cannabis or controlled substances by this Act are due and payable immediately upon acquisition of possession in this State by a dealer.

reveal facts contained in a return required by this Act, the information contained in such a return may be used against the dealer in any criminal proceeding, unless the information has been independently obtained, except in connection with a proceeding involving taxes due under this Act from the person making the return.

For the purposes of determining the correctness of any return, determining the amount of tax that should have been paid, determining whether or not the dealer should have made a return or paid taxes, or collecting any taxes under this Act, the Director may examine, or cause to be examined, any books, papers, records, or memoranda that may be relevant to making such determinations, whether the books, papers, records, or memoranda are the property of or in the possession of the dealer or another person. The Director may require the attendance of any person having knowledge or information that may be relevant, compel the production of books, papers, records, or memoranda by persons

required to attend, take testimony on matters material to the determination, and administer oaths or affirmations. Upon demand of the director or any examiner or investigator, a circuit court shall issue a subpoena for the attendance of a witness or the production of books, papers, records and memoranda. Disobedience of subpoenas issued under this section is punishable by the circuit court which issued the subpoena.

department

that does not bear evidence that the tax under ... paid

77.99 PENALTIES (1) Any dealer who possesses for a controlled substance shall pay, in addition to the tax under s. 77.93, a penalty equal to the tax due.

(2) Any dealer who possesses a controlled substance may be fined not more than $ or imprisoned not more than 5 years or both

Nonstat File Sequence: 666

1987 LRB ______/__

NONSTAT EFF.DATE ______/__

>'-affdate <: use for simple delayed "effective date" section v1=type :ent
---

SECTION ___ SLD EFFECTIVE DATE. This act takes effect on *the first day of the 4th month after publication.*

(End)

>'-affdate[<: use for "effective date w/[exceptions" section v1=text of sub.(1)

SECTION ___. SLD EFFECTIVE DATES. This act takes effect on the day after publication, except as follows:

(1)

>'-affdate[<: use for all "effective date in [compiled bill" sections v1=$title
v2=Ptitle (for budget: v3=3204) For LONG titles, use "special"

SECTION ___ [3204]. SLD EFFECTIVE DATES. This act takes effect on the day after publication, except as follows:

( ) ....

( ) ____

The treatment of sections

of the statutes takes effect on

[rev:07/30/86 1987effdate(fn)]

[illegible] Section 78.11, as it applies to wholesalers of motor fuel, applies to persons liable for the tax under this subchapter.

History: 1989 a. 122.

139.87 Interest and penalties. (1) The interest and penalties under s. 139.44 (2) to (7) and (9) to (12) apply to this subchapter.

(2) If a person fails to file any return required under s. 139.77 (1) by the due date, unless the person shows that that failure was due to reasonable cause and not due to neglect, the department shall add to the amount of tax required to be shown on that return 5% of the amount of the tax if the failure is for not more than one month and an additional 5% of the tax for each additional month or fraction of a month during which the failure continues, but not more than 25% of the tax. For purposes of this subsection, the amount of tax required to be shown on the return shall be reduced by the amount of tax that is paid on or before the due date and by the amount of any credit against the tax that may be claimed on the return.

History: 1991 c. 20; 1987 a. 399; 1991 a. 39.

139.88 Prosecutions by attorney general. Upon request by the secretary of revenue, the attorney general may represent this state or assist a district attorney in prosecuting any case arising under this subchapter.

History: 1985 a. 302.

SUBCHAPTER IV

TAX ON CONTROLLED SUBSTANCES

139.97 Definitions. In this subchapter:

(2) "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 5 marijuana plants, more than 14 grams of mushrooms containing psilocin or psilocybin, more than 100 milligrams of any material containing lysergic acid diethylamide or more than 7 grams of any other schedule I controlled substance or schedule II controlled substance. "Dealer" does not include a person who lawfully possesses marijuana or another controlled substance.

(3) "Department" means the department of revenue.

(4) "Marijuana" has the meaning under s. 161.01 (14).

(5) "Schedule I controlled substance" means a substance listed in s. 161.14.

(6) "Schedule II controlled substance" means a substance listed in s. 161.16.

History: 1989 a. 122; 1991 a. 39, 206.

139.98 Imposition. There is imposed on dealers, upon acquisition or possession by them in this state, an occupational tax at the following rates:

(1) Per gram or part of a gram of marijuana, whether pure or impure, measured when in the dealer's possession, $3.50.

(1d) Per marijuana plant, regardless of weight, counted when in the dealer's possession, $1,000.

(1g) Per gram or part of a gram of mushrooms or parts of mushrooms containing psilocin or psilocybin, whether pure or impure, measured when in the dealer's possession, $10.

(1r) Per 100 milligrams or part of 100 milligrams of any material containing lysergic acid diethylamide, whether pure or impure, measured when in the dealer's possession, $100.

(2) Per gram or part of a gram of other schedule I controlled substances or schedule II controlled substances, possession, $200.

History: 1989 a. 122; 1991 a. 39, 189, 206.

139.89 Proof of payment. The department shall create a uniform system of providing, affixing and displaying stamps, labels or other evidence that the tax under s. 139.88 has been paid. Stamps or other evidence of payment shall be sold at face value. No dealer may possess any schedule I controlled substance or schedule II controlled substance unless the tax under s. 139.88 has been paid on it, as evidenced by a stamp or other official evidence issued by the department. The tax under this subchapter is due and payable immediately upon acquisition or possessing of the schedule I controlled substance or schedule II controlled substance in this state, and the department at that time has a lien on all of the taxpayer's property. Late payments are subject to interest at the rate of 1% per month or part of a month. No person may transfer to another person a stamp or other evidence of payment.

History: 1989 a. 122; 1991 a. 39.

139.90 No immunity. Acquisition of stamps or other evidence that the tax under s. 139.88 has been paid does not create immunity for a dealer from criminal prosecution.

History: 1989 a. 122.

139.91 Confidentiality. The department may not reveal facts obtained in administering this subchapter, except that the department may publish statistics that do not reveal the identities of dealers. Dealers may not be required to provide any identifying information in connection with the purchase of stamps. No information obtained by the department may be used against a dealer in any criminal proceeding unless that information has been independently obtained, except in connection with a proceeding involving possession of schedule I controlled substances or schedule II controlled substances on which the tax has not been paid or in connection with taxes due under s. 139.88 from the dealer.

History: 1989 a. 122; 1991 a. 39.

139.92 Examination of records. For the purposes of determining the amount of tax that should have been paid, determining whether or not the dealer should have paid taxes or collecting any taxes under s. 139.88, the department may examine, or cause to be examined, any books, papers, records or memoranda that may be relevant to making those determinations, whether the books, papers, records or memoranda are the property of or in the possession of the dealer or another person. The department may require the attendance of any person having knowledge or information that may be relevant, compel the production of books, papers, records or memoranda by persons required to attend, take testimony on matters material to the determination, issue subpoenas and administer oaths or affirmations.

History: 1989 a. 122.

139.93 Appeals, presumption, administration. (1) The taxes, penalties and interest under this subchapter shall be assessed, collected and reviewed as are income taxes under ch. 71.

(2) If the department finds that the collection of the tax under this subchapter is jeopardized by delay, the department may issue, in person or by registered mail to the last-known address of the taxpayer, a notice of its intent to proceed under this subsection, may make a demand for immediate payment of the taxes, penalties and interest due and may proceed by the methods under s. 71.91 (5) and (6). If the taxes, penalties and interest are not immediately paid, the department may seize any of the taxpayer's assets. Immediate seizure of assets

does not nullify the taxpayer's right to a hearing on the department's determination that the collection of the assessment will be jeopardized by delay, nor does it nullify the taxpayer's right to post a bond. Within 5 days after giving notice of its intent to proceed under this subsection, the department shall, by mail or in person, provide the taxpayer in writing with its reasons for proceeding under this subsection. The warrant of the department shall not issue and the department may not take other action to collect if the taxpayer within 10 days after the notice of intent to proceed under this subsection is given furnishes a bond in the amount, not exceeding double the amount of the tax, and with such sureties as the department of revenue approves, conditioned upon the payment of so much of the taxes as shall finally be determined to be due, together with interest thereon. Within 20 days after notice of intent to proceed under this subsection is given by the department of revenue, the person against whom the department intends to proceed under this subsection may appeal to the department the department's determination that the collection of the assessment will be jeopardized by delay. Any statement that the department files may be admitted into evidence and is prima facie evidence of the facts it contains. Taxpayers may appeal adverse determinations by the department to the circuit court for Dane county.

(3) The taxes and penalties assessed by the department are presumed to be valid and correct. The burden is on the taxpayer to show their invalidity or incorrectness.

(4) The department may request the department of administration to sell, by the methods under s. 125.14 (2) (f), all assets seized under sub. (2).

(5) No court may issue an injunction to prevent or delay the levying, assessment or collection of taxes or penalties under this subchapter.

(6) The department shall enforce, and the duly authorized employes of the department have all necessary police powers to prevent violations of, this subchapter.

History: 1989 a. 122

139.94 Refunds. If the department is determined to have collected more taxes than are owed, the department shall refund the excess and interest at the rate of 0.75% per month or part of a month when that determination is final. If the department has sold property to obtain taxes, penalties and interest assessed under this subchapter and those taxes, penalties and interest are found not to be due, the department shall give the former owner the proceeds of the sale when that determination is final.

History: 1989 a. 122

139.95 Penalties. (1) Any dealer who possesses a schedule I controlled substance or schedule II controlled substance that does not bear evidence that the tax under s. 139.88 has been paid shall pay, in addition to the tax under s. 139.88, a penalty equal to the tax due. The department shall collect penalties under this subchapter in the same manner as it collects the tax under this subchapter.

(2) A dealer who possesses a schedule I controlled substance or schedule II controlled substance that does not bear evidence that the tax under s. 139.88 has been paid may be fined not more than $10,000 or imprisoned for not more than 5 years or both.

(3) Any person who falsely or fraudulently makes, alters or counterfeits any stamp or procures or causes the same to be done or who knowingly utters, publishes, passes or tenders as true any false, altered or counterfeit stamp or who affixes a counterfeit stamp to a schedule I controlled substance or schedule II controlled substance or who possesses a schedule I controlled substance or schedule II controlled substance to which a false, altered or counterfeit stamp is affixed may be fined not more than $10,000 or imprisoned for not less than one year nor more than 10 years or both.

History: 1989 a. 122; 1991 a. 39.

139.96 Use of revenue. The department of revenue shall deposit the taxes, penalties and interest collected under this subchapter in the appropriation under s. 20.505 (6) (hm).

History: 1989 a. 122