STATE OF WISCONSIN
IN SUPREME COURT
Case No: 94 2848 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRYL J. HALL,

Defendant-Appellant-Petitioner.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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I. THE WISCONSIN TAX ON CONTROLLED SUBSTANCES, BOTH AS WRITTEN AND AS APPLIED, VIOLATES THE SELF-INCRIMINATION CLAUSE.

A. The Payment Requirement is Unconstitutional On Its Face.[1]

The state's argument that the statute does not compel taxpayers to provide identifying information, State's Brief at 6-8, is both irrelevant and inaccurate. The Fifth Amendment bars self-*incrimination*, not self-identification. *California v. Byers*, 402 U.S. 424, 432 (1971) (plurality opinion); Hall's Brief at 11.

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[1] Hall did not raise his facial challenge to the payment requirement in the lower courts because they were bound on that point by the erroneous decision in *State v. Heredia*, 172 Wis.2d 479, 493 N.W.2d 404 (Ct. App. 1992), *rev. denied*, 497 N.W.2d 130, *cert. denied*, 113 S.Ct. 2386 (1993). This Court can and should decide the issue, however, as it is in the best interests of justice to do so, as this Court determined by granting review, and because "both parties have had the opportunity to brief the issue and ... there are no factual issues that need resolution." *Laufenberg v. Cosmetology Examining Bd.*, 87 Wis.2d 175, 274 N.W.2d 618, 624 (1979).

The state's ability to identify the taxpayer goes instead to whether the incriminating admissions inherent in the purchase may be used against the taxpayer. *Id.* The state's argument is inaccurate because Wisconsin's statute, by barring transfer of stamps, ensures that the taxpayer who buys the stamps necessarily provides some type of identifying information, whether a mailing address for purchases by mail or the taxpayer's appearance for purchases in person. Hall's Brief at 19-20.

While collectors may also purchase a few stamps, State's Brief at 6, the Self-Incrimination Clause applies to "*any* disclosures that the witness reasonably believes *could be used*" against him or her. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (emphasis added). A Department clerk, or a jury, could reasonably infer that someone buying 108 cocaine stamps for $21,600.00, as Hall would have had to do here, is a dealer

rather than someone buying a few gag gifts. *See also Haynes v. United States*, 390 U.S. 85, 99 (1968) (*Marchetti* self-incrimination defense applies in prosecution for failure to register firearm, despite some circumstances in which registration is required even of those who have not violated National Firearms Act).

The state's reliance on *United States v. Jeffers*, 621 F.2d 221 (5th Cir. 1980), State's Brief at 7, is misplaced. Unlike the serious risks of self-incrimination built into Wisconsin's drug tax law, Jeffers' hypotheticals would have required violation of federal law to result in self-incrimination. While incriminating statements made in compliance with the gambling tax laws could become public if he some day were involved in a tax proceeding, the federal statute barred use of such information in criminal proceedings. *See* 621 F.2d at 224 n.2. It likewise was pure speculation that federal agents would risk imprisonment

and loss of employment by disclosing those statements in violation of law. *Id.* at 226.

The state's discussion of the so-called "confidentiality" provision of Wis. Stat. §139.91, State's Brief at 8-14, ignores a number of important points. First, the issue under the Fifth Amendment is not whether this Court could construe the statute to provide immunity coextensive with the constitutional privilege, but whether a "dealer" in Hall's position in May, 1993, reasonably would have believed that the disclosures inherent in complying with the tax statute "could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar*, 406 U.S. at 444-45. In other words, Hall was not required to incriminate himself in the hopes that some court later would suppress the incriminating statements or construe §139.91 broadly enough to provide equivalent relief. *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262 (1983).

No matter how the Court *now* construes §139.91, someone in Hall's shoes in May, 1993 reasonably could have believed that it did not provide protections coextensive with the Fifth Amendment and that compliance with the payment requirement of the drug tax law accordingly would result in self-incrimination which could be used against the taxpayer. This is and was a complete defense to the drug tax charge, *e.g.*, *Haynes*, 390 U.S. at 100, and accordingly cannot be denied by subsequent Court action. *See, e.g., State v. Kurzawa*, 180 Wis.2d 502, 509 N.W.2d 712, 716 (1994) (Due process bars Court from applying new construction of law which removes a defense that was available at the time the act was committed), *cert. denied*, 114 S.Ct. 2712 (1994).

Second, the state ignores the fact that not one of the other states with drug tax laws similar to Wisconsin's has a confidentiality exception even vaguely resembling that for

possessory offenses under §139.91. Hall's Brief at 28-29. Far from being "almost identical to Wisconsin's," State's Brief at 12, the other states' statutes allow the use of information *only* if independently discovered or in a 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.

Third, §139.91 expressly provides that otherwise confidential information may be used "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...." The state's request, State's Brief at 9, that this Court "construe" §139.91 to grant immunity coextensive with the Fifth Amendment by limiting the exception to tax offenses would require the Court to write this unambiguous language out of the statute. That clearly is inappropriate. *E.g.*,

State v. Martin, 162 Wis.2d 883, 470 N.W.2d 900, 904 (1991) (every word of statute must be given effect if possible).

Fourth, a few ambiguous and conclusory references to "confidentiality" in the legislative history, State's Brief at 10-11, do not allow this Court to ignore the statute's unambiguous language. *E.g.*, *Martin*, 470 N.W.2d at 904. Moreover, while the legislative history reflects a concern for what it terms "confidentiality," it does not define what is meant by that term. The legislature did that for itself in §139.91. The substance of the legislative history, rather than the few conclusory assertions cited by the state, supports the plain meaning of the statute's language. *See* Hall's Brief at 33-35.

B. The Payment Requirement is Unconstitutional as Implemented.

The state's standing argument, State's Brief at 15-16, borders on the frivolous. The State claims that Mr. Hall suffered

no injury as a result of the unconstitutional implementation of the tax stamp law because he never attempted to purchase tax stamps. Thus, he was never actually required to incriminate himself. State's Brief at 15. This is beside the point. Mr. Hall was left with but two alternatives, (1) comply with the statute's provisions as implemented by the Department and incriminate himself, or (2) not comply and be punished for exercising his right against self-incrimination. "Either alternative would result in injury in fact." *See State v. Hall*, 196 Wis.2d 850, 540 N.W.2d 219, 225 (Ct. App. 1995), *rev. granted.*

Mr. Hall chose the second option and was convicted and sentenced to a prison term as a result. Thus, injury in fact has been clearly established. *See, Marchetti v. United States,* 390 U.S. 39, 50-51 (1968); *see generally, State v. Iglesias*, 185 Wis. 2d 117, 132-33, 517 N.W.2d 175, 180 (1994).

C. The Statutory Requirement that a Dealer Affix and Display Incriminating Evidence Violates the Fifth Amendment.

The state's assertion that Hall lacks standing to challenge the requirement that he affix the required drug stamps because he did not comply with that requirement, State's Brief at 18-20, is misguided for the same reasons stated previously. The Supreme Court expressly rejected that argument in *Marchetti*, 390 U.S. at 50-51. *See also Hall*, 540 N.W.2d at 225-26.

The decision in *Sisson v. Triplett*, 428 N.W.2d 565 (Minn. 1988), does not hold otherwise, even if that court could somehow overrule *Marchetti*. *Sisson* was a *civil* proceeding challenging a tax assessment, not a criminal prosecution. *Id.* at 566. The issue was simply whether Sisson constitutionally could be required to pay the tax. The court found that he was. The failure to affix the tax stamp was irrelevant; Sisson was required to pay the tax regardless whether he constitutionally

could have been required subsequently to affix the tax stamps in order to avoid separate criminal penalties.

Because the issue was whether Sisson had to pay the tax, not whether he later had to affix the stamps, the Court properly held that "[t]he possession of drug stamps is not raised by the facts of the present case and Sisson's concern here is purely speculative." 428 N.W.2d at 572 n.7

The Utah Court of Appeals did extend the *Sisson* beyond the civil realm in which it was justified and applied it to a criminal charge for possession without the required tax stamps affixed. *State v. Davis*, 787 P.2d 517, 519 n.3 (Utah App. 1990) ("Defendant did not purchase stamps and thus the issue of whether evidence of posting the stamps is incriminating is not before us." (citing *Sisson, supra*)). The *Davis* court failed to explain, however, how a person would not be injured in the constitutional sense by criminal conviction and punishment for

an offense, the violation of which he could avoid only by incriminating himself.

In any event, this portion of *Davis* was effectively overruled in *Zissi v. State Tax Comm'n of Utah*, 842 P.2d 848, 857 (Utah 1992). There, the Court held that Utah's drug tax statute, as written, violates the Fifth Amendment at both the purchase stage and the affixing stage. The court thus necessarily concluded that Zissi had standing to raise the challenge, despite his not having paid the tax.

Here, Hall was charged, tried, convicted, and sentenced for a criminal offense, a specific element of which is the failure to provide incriminating testimonial evidence by affixing drug tax stamps to drugs in his possession. Hall could not have complied with the requirement of providing such evidence without directly incriminating himself. Thus the validity of that requirement is directly at issue under the facts of this case.

The state's suggestion that the possession of drug stamps affixed to drugs, as required by Wis. Stat. §139.95(2), "do[es] not provide the state with any evidence to use against him," State's Brief at 20, is just silly. The question is not, as the state appears to suggest, State's Brief at 20-21, whether the tax stamp alone would establish guilt, but whether it would "furnish a link in the chain of evidence" against the defendant. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Plainly, it would. *E.g.*, *Hall*, 540 N.W.2d at 226 ("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"); *Zissi*, 842 P.2d at 857.[2]

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[2] Contrary to the state's suggestion, State's Brief at 21, the Fifth Amendment privilege applies "in any criminal case." U.S. Const. amend. V; Wis. Const. Art. I, §8(1). Accordingly, the privilege applies even if, as the state appears to concede, the compelled disclosure incriminates the dealer only for simple drug possession. *See* Wis. Stat. §939.12 (defining "crime").

Section 139.91 is unmistakably clear and unambiguous to the extent that whatever immunity it provides applies *only* with regard to "information obtained by the department," and not to compliance with the "affix and display" requirement. Judicial amendment to create a new confidentiality provision out of thin air, as requested by the state, State's Brief at 22-23; *see Hall*, 540 N.W.2d at 226-27, is neither a proper "construction" of the statute nor reasonably foreseeable. *See Milwaukee v. Wroten*, 160 Wis.2d 207, 466 N.W.2d 861, 871 (1991) (declining to rewrite unambiguous ordinance to save its constitutionality).

Here, as in *State ex rel. Reynolds v. Smith*, 22 Wis.2d 516, 126 N.W.2d 215 (1964),

> to adopt the construction urged by the attorney general would be an act of unjustifiable judicial legislation, and would violate the firmly established doctrine that "a *casus omissus*" does not justify judicial legislation. ... This self-

> imposed rule of judicial restraint is equally applicable even where the omission was a mere oversight on the part of the legislature and where the statute would have been drawn otherwise had the legislature been cognizant of its omission. ....

Id., 126 N.W 2d at 217 (citations omitted). *See also Chapman v. United States*, 500 U.S. 453, 464 (1991) (canon that court should strive to avoid unconstitutional construction of statute is useful in close cases, but is not license for judiciary to rewrite language enacted by legislature).

While a court may insert words necessary to clarify an ambiguous statute or to avoid an absurd result, *e.g.*, *City of Milwaukee v Kilgore*, 185 Wis.2d 499, 517 N.W.2d 689, 695 (Ct. App. 1994), *aff'd*, 193 Wis.2d 168, 532 N.W.2d 690 (1995), it must give the statutory words their obvious and ordinary meaning in the absence of such ambiguity. *Martin*, 470 N.W.2d at 904, 908.

II. BECAUSE DELIVERY OF COCAINE BASE IS AN INCLUDED CRIME OF THE TAX STAMP VIOLATION, CONVICTION OF BOTH VIOLATED MR. HALL'S RIGHT NOT TO BE PLACED TWICE IN JEOPARDY FOR THE SAME OFFENSE.

Both the state and the Court of Appeals incorrectly apply the *Blockburger* "additional element" test in this case. Both conclude that delivery of cocaine base is not an included offense of the tax stamp violation because the "dealer" requirement of the tax stamp violation hypothetically could be met by a showing of possession, rather than delivery. *Hall*, 196 Wis. 2d at 871, 540 N.W.2d at 228. State's Brief at 28.

This Court has never taken such an oversimplified approach. If it had, it never would have concluded, as it did in *State v. Gordon*, 111 Wis. 2d 133, 141, 330 N.W.2d 564 , 567 (1983), that kidnaping was an included offense of felony murder. Of course the "felony" element of felony murder

hypothetically could be established by a felony other than kidnaping. *See also, Harris v. Oklahoma*, 433 U.S. 682 (1977).

This Court has recognized that in applying the "elements only" test to statutes with alternative elements, it is necessary to "treat the greater offense as two or more crimes, each crime being defined as containing one of the alternative elements". *State v. Carrington*, 134 Wis. 2d 260, 271, 397 N.W.2d 484, 489 (1986), citing *State v. Hagenkord*, 100 Wis. 2d 452, 482-83, n. 8, 302 N.W.2d 421, 440 n. 8 (1981).

Wisconsin's controlled substance tax law contains alternative elements in that the "dealer" element can be satisfied in a number of alternative ways, one of which is delivery. Wis. Stat. Sec. 139.87(2). Under the "alternative element" approach, Hall was charged with being a dealer, defined as one who delivers the requisite amount of controlled substance, who has

failed to pay the required tax. Delivery of cocaine base is an included offense of this charge.

Mr. Hall does not seek to "confuse the issue by diverting attention from the elements of the two charged crimes to the facts of his particular case." State's Brief at 27. Rather, it is the State which confuses the issue by ignoring the tax stamp law's alternative element structure. The tax stamp law is analogous to other statutes which this Court has recognized set forth alternative elements, such as theft (takes/carries away, uses, etc.) and first degree sexual assault (alternative harm elements of pregnancy or great bodily harm). *State v. Richards*, 123 Wis. 2d 1, 8, 365 N.W.2d 7, 10 (1984); *Hagenkord*, 100 Wis. 2d at 482-83, n. 8, 302 N.W.2d at 440, n.8.

Finally, the state is guilty of the very transgression of which it wrongly accuses Mr. Hall, by directing the Court's attention to the particular Information in this case. State's Brief

at 27. The state notes the Information charges Mr. Hall as a person who, "being a dealer, possess[ed] cocaine base" not bearing evidence the tax had been paid. *Id.* Presumably, the State infers the word "possess" in the information to signify Hall was charged under that alternative element of the tax stamp law, rather than delivery. However, the Information must include the word "possess" because one element of the tax stamp violation is that the dealer possess the controlled substance. Wis. Stat. § 139.95. The issue here is not the possession element under § 139.95, but the separate "dealer" element. The question is by which of the alternative means the State chose to classify Mr. Hall as a dealer. Mr. Hall's *delivery* of cocaine base put him within that definition.

Because delivery of cocaine base is an included offense of the tax stamp violation, the statutes must be construed not to authorize cumulative punishment absent a clear indication of

contrary legislative intent. *Gordon*, 111 Wis. 2d at 138, 330 N.W.2d at 566, citing *Whalen v. United States*, 445 U.S. 684 (1980). There is no clear indication of legislative intent to allow multiple punishments here. See *Hall*, Brief-in-Chief, at 60-61, n. 5. Therefore, multiple punishments for delivery of cocaine base and tax stamp violation subjected Mr. Hall to double jeopardy.

CONCLUSION

For these reasons, as well as for those set forth in Hall's brief-in-chief, the Wisconsin Tax on Controlled Substances, both as written and as implemented, unconstitutionally compels self-incrimination. Further, conviction and punishment of Mr. Hall for both delivery of cocaine base and tax stamp violation subjected him to unconstitutional double jeopardy. This Court should say so and reverse the decision of the Court of Appeals.

Dated at Brookfield, Wisconsin, March 19, 1996.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2906 words.

Dated this 19th day of March, 1996.

Jerome F. Buting