STATE OF WISCONSIN

IN SUPREME COURT

Case No. 94-2542-CR

STATE OF WISCONSIN,

Plaintiff-Appellant

v.

ANTHONY HICKS,

Defendant-Respondent-Petitioner.

ON REVIEW OF A DECISION
OF THE COURT OF APPEALS

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Rules and Statutes

Other Authorities

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BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

ISSUES PRESENTED FOR REVIEW

1. Whether the Wisconsin 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 grounds that

   a. the statutory requirement that a "dealer" in controlled substances purchase tax stamps, unconstitutionally compels the provision of incriminating

testimonial communications;

b. the statutory requirement that a "dealer" in controlled substances purchase tax stamps, as implemented by the Department of Revenue, unconstitutionally compels the provision of incriminating testimonial communications; or

c. the statutory requirement that a "dealer" in controlled substances affix and display "evidence that the tax under s. 139.88 has been paid" on any controlled substances he or she may possess unconstitutionally compels the provision of incriminating testimonial communications.

The circuit court held that both the Department's procedures (Issue 1.b) and the statutory "affix and display" requirement (Issue 1.c) violate the right to be free from compelled self-incrimination. A two-member majority of the court of appeals held that Hicks lacked standing to challenge the constitutional violations. Hicks did not argue below that the *statutory* requirement that "dealers" purchase tax stamps violated his self-incrimination rights (Issue 1.a) as the court of appeals previously had held to the contrary 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). The lower courts accordingly were bound by that decision. *See In re Court of Appeals of Wisconsin*, 82 Wis.2d 369, 263 N.W.2d 149, 150 (1978).

2. Whether Mr. Hicks has standing to raise the self-incrimination challenge to the Wisconsin Tax on Controlled Substances, Wis. Stat. §§139.87-139.96.

The circuit court held that Mr. Hicks had standing to challenge the violation of his rights to be free from compelled self-incrimination. The court of appeals disagreed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

STATEMENT OF THE CASE

Anthony Hicks originally was charged in a one count criminal complaint with attempting to deliver cocaine, as party to a crime based upon his arrest on January 6, 1993 in possession of 4 bags containing about 110 grams of cocaine (R2).[1] *See* Wis. Stat.

[1] Throughout this brief, references to the record will take the following (continued...)

§§161.16(2)(b)1, 161.41(1)(c)(4) & 939.05. After Hicks challenged that charge, first successfully at the preliminary hearing (R67:33), and then unsuccessfully before the circuit court (*see* R10), the state filed an amended information on November 29, 1993, adding a charge of possessing cocaine without evidence that the controlled substance tax had been paid (R39). *See* Wis. Stat. §139.87(1) & (2), 139.88(2), 139.89, 139.95(2), 161.16(2)(b)1 & 939.05.

Hicks moved to dismiss the added tax stamp charge on several grounds, including the grounds that the charged offense violates his right to be free from compelled self-incrimination in two separate ways:

> First, given the procedures established by the Department of Revenue, the requirement that a dealer purchase the tax stamps compels the dealer to incriminate himself by identifying himself to the government as a drug dealer. Second, the statutory requirement under §139.95(2) that any controlled substance possessed by a "dealer" bear evidence that the tax has been paid independently compels the "dealer" to incriminate himself by affixing and displaying the tax stamp, thus stating his knowledge of the nature of the substance and the fact that at some point he possessed in excess of, for instance, 7 grams of cocaine.

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[1](...continued)
form: (R__:__), with the R__ reference denoting record document number and the following :__ reference denoting the page number of the document. Where the referenced material is contained in the Appendix, it will be further identified by Appendix page number as App. __.

(R44:3-4).

The factual basis for the "as implemented" motion was set forth in Hicks' supporting memorandum, which was incorporated by reference into his motion (*See* R43:2):

> A dealer may apply for tax stamps either in person or by mail. [Citing to the Drug Tax Purchase Order (R60; App. 20-21)]. . . . Applying by mail requires a dealer to supply his name and address. To apply in person, the dealer himself must go to the Wisconsin Department of Revenue office in Madison, present himself to a clerk who could later identify him, and request the stamps.

(R44:4-5).

The state filed a response to this motion (R48). That response set forth the state's legal position that the motion should be denied but did not dispute the facts alleged in support of the motion (*see id.*). Hicks subsequently filed a supplemental motion drawing the court's attention to a recent Florida decision striking that state's drug tax law (R56).

The circuit court, Hon. Stanley A. Miller, presiding, heard arguments on July 7, 1994 (R75). At the beginning of that court appearance, the court asked counsel how they wished to proceed and the state responded, in part, that "the Court either needs to hear arguments or make a ruling as to the tax count and self-incrimination

arguments that counsel raised, and I believe that is about it" (R75:2-3).

At the argument, defense counsel relied upon the previously filed documents and a brief argument (R75:18-20). The state did likewise (R75:21-23). Again, the state did not object to the factual allegations of the defendant's motion and supporting memorandum. It did, however, object to the hypothetical nature of certain *additional* allegations made by defense counsel at the argument.[2]

Following argument, the circuit court granted the motion to dismiss (R75:25-26; App. 14-15). On July 14, 1994, that court entered a written order dismissing the tax stamp count for the reasons stated in Hicks' motions and supporting memorandum (R61; App. 11-12; *see* R76).

On August 17, 1994, the state filed a motion for reconsideration of the July 14 order (R62). In that motion, the state alleged for the first time that

> the defendant did not present any evidence at this hearing and there was no basis for the court to make its decision. Additionally counsel submitted and attached to his brief two copies of two documents that were

[2] These related to the fact that nothing in the drug tax law bars narcotics officers from waiting outside the window where tax stamps are sold and observing the purchases (R75:18-19, 22). Hicks does not rely on those factual allegations on this appeal.

> never explained as to what these documents were, the purpose, or how they were used by the Department of Revenue.

(R62:3).

Judge Miller heard arguments on the motion on August 22, 1994, and denied it (R77:2-12). On August 26, 1994, the state filed its notice of appeal "from the final order entered on July 14, 1994...." (R64; App. 16-19).

On the state's interlocutory appeal, the court of appeals reversed (App. 1-10). The majority held that Mr. Hicks lacked standing to raise such a challenge unless he first incriminated himself by purchasing the drug stamps and affixing them to cocaine in his possession (App. 5-7). The dissenting judge, however, pointed out that the United States Supreme Court previously had rejected that very theory of standing (App. 8-10). *See Marchetti v. United States*, 390 U.S. 39 (1968) (defendant charged with failing to pay wagering tax entitled to defend on grounds that compliance would have incriminated himself).

Mr. Hicks timely filed a petition for review by this Court on July 26, 1995. This Court granted review by Order dated November 14, 1995.

ARGUMENT

BECAUSE THE WISCONSIN TAX ON CONTROLLED SUBSTANCES, BOTH AS WRITTEN AND AS APPLIED, VIOLATES THE FIFTH AMENDMENT, THE CIRCUIT COURT PROPERLY DISMISSED COUNT TWO ON SELF-INCRIMINATION GROUNDS

Hicks was charged with violating Wis. Stat. §139.95(2) based upon his possession of cocaine which did not bear evidence that the controlled substance tax has been paid (R39). Because he could not have complied with the requirements of that statute without incriminating himself, the circuit court correctly held that the Fifth Amendment, and Article I, Section 8(1) of the Wisconsin Constitution, provide a complete defense to that charge. This Court should reject the court of appeals' faulty standing theory and say so.

Chapter 139, Subchapter IV of the Wisconsin Statutes imposes an "occupational tax" upon any "dealer," defined to include "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... or more than 7 grams of any other Schedule I controlled substance or Schedule II controlled substance." Wis. Stat. §§139.87(2), 139.88.[3]

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[3] A copy of Subchapter IV of Chapter 139 of the Wisconsin Statutes is included in the Appendix (App. 42-43).

The occupational tax is paid by purchasing stamps or other evidence of payment issued by the Department of Revenue ("Department"). Wis. Stat. §139.89. As explained in Hicks' memorandum in the circuit court:

> A dealer may apply for tax stamps either in person or by mail. [Citing to the Drug Tax Purchase Order (R60; App. 20-21)]. . . . Applying by mail requires a dealer to supply his name and address. To apply in person, the dealer himself must go to the Wisconsin Department of Revenue office in Madison, present himself to a clerk who could later identify him, and request the stamps.

(R44:4-5). The dealer must purchase the stamps personally or have them sent to his or her own address or post-office box because "[n]o person may transfer to another person a stamp or other evidence of payment." Wis. Stat. §139.89.

Pursuant to Wis. Stat. §139.95(2),

> [a] dealer who possesses a Schedule I controlled substance or a 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 five years or both.

Wis. Stat. §139.95(2). To avoid a felony conviction under this statute, a dealer must *both* (1) pay the tax and (2) affix and display on the controlled substance the tax stamp or other evidence that the tax has been paid. *Id.*; *see* Wis. Stat. §139.89. The circuit court

correctly held that the privilege against self-incrimination provides a complete defense to this charge because, to avoid a felony conviction under §139.95(2), a "dealer" necessarily must incriminate himself at both of these steps (R61; App. 11-12).

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 defendant cannot constitutionally be convicted of violating that statute. "[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 court of appeals, however, declined to address the validity of the drug tax, choosing instead to reverse based upon a radical theory of standing expressly rejected by the United States Supreme Court over a quarter of a

century ago (App. 5-7).

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," *Marchetti*, 390 U.S. at 47, 88 S.Ct. at 702, (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, *id.* at 48, 88 S.Ct. at 702, (3) whether such information would prove a significant link in a chain of evidence tending to establish guilt. *Id.* 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." *Id.* at

53, 88 S.Ct. at 705.

Sisson, 428 N.W.2d at 571. 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 straight-forward. 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. *See* 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.[4]

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

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

law is part and parcel of the question whether the dealer reasonably could believe that his incriminating disclosures compelled by the drug tax law could be used against him 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 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. 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 him "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(c) (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); *Clifft v. Indiana Dept. of State Revenue*, 641 N.E.2d 682, 686-89 (Ind. Tax Ct. 1994); *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(C) (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).[5]

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[5] 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 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

(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).

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

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[5](...continued)
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*

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 22-41, reflects that 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. 39).

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 at "hav[ing] no control over drug dealers *or knowledge of who they*

are," and proposes the drug tax as a solution (App. 33 (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 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....

(App. 34 (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. 31). 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.

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; *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" (R60:1-2; App. 20-21). 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. (R44:4-5). 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 state correctly argued in the Court of Appeals that Hicks should have presented evidence in the circuit court to support his "as implemented" argument. Had the state timely objected on that ground, the circuit court would have been well within its power to require Hicks to present sworn testimony establishing those facts.

The fact remains, however, that the state did not timely object to Hick's failure to call witnesses to support the factual allegations set forth in his supporting memorandum. It therefore waived any objection on this ground. *E.g.*, *State v. Brown*, 96 Wis.2d 258, 291

N.W.2d 538, 541 (1980) (citations omitted); *State v. Cetnarowski*, 166 Wis.2d 700, 480 N.W.2d 790, 792 (Ct. App. 1992). Moreover, the state has *never* disputed the factual accuracy of Hick's proffer.

Given the state's failure timely to object or to raise any factual dispute, Hicks and the trial court acted reasonably in construing the state's silence as a concession that Hicks' factual allegations were accurate and acting accordingly. As the Court of Appeals has held, when a party is given notice of the factual allegations and does not object, "the trial court is entitled to proceed on the understanding that the [facts are] not in dispute." *State v. Szarkowitz*, 157 Wis.2d 740, 460 N.W.2d 819, 822 (Ct. App.) (finding failure to object the equivalent of a "stipulation" under restitution statute. Wis. Stat. §973.20), *rev. denied*, 464 N.W.2d 424 (1990). *See also Charolais Breeding Ranches v. FPC Securities*, 90 Wis.2d 97, 279 N.W.2d 493, 499 (Ct. App. 1979) (that which is not controverted is deemed conceded). The state should be held to its waiver.

The state also should be deemed to have abandoned the issue. It first raised the objection over a month after entry of the order dismissing Count Two when it filed a motion to reconsider (R62:3). The circuit court denied that motion (R77:8, 10-12). The state nonetheless appealed *only* from the initial dismissal (R64; App. 16-

19), even though it is well-settled that an appeal does not embrace orders entered after the order or judgment appealed from. *Chicago & N.W.R.R. v. Labor and Industry Rev. Comm'n,* 91 Wis.2d 462, 283 N.W.2d 603, 609 (Ct. App. 1979), *aff'd,* 98 Wis.2d 592, 297 N.W.2d 819 (1980). *See also* Wis. Stat. (Rule) 809.10(4). Because the state "fail[ed to] follow well-known state practices" by not obtaining a written order denying reconsideration and appealing that order as well, it must be deemed to have made a deliberate strategic choice to abandon the claim. *State v. McDonald,* 50 Wis.2d 534, 184 N.W.2d 886, 888 (1971).

Even if this Court could find that the state has not waived or abandoned this point, it should not simply reject Hicks' "as implemented" argument, but rather remand for an evidentiary hearing as the dissenting judge below argued (App. 10). When the *state* has erred by failing to present available evidence in the trial court, the appellate courts generally remand to give it another opportunity to present such evidence. *See State v. Sorenson,* 152 Wis.2d 471, 449 N.W.2d 280, 291 (Ct. App. 1989) (remanding for evidentiary hearing despite state's prior failure to use opportunity to make required record in trial court); *State v. Braun,* 103 Wis.2d 617, 309 N.W.2d 875, 881 (Ct. App. 1981) (same).

A criminal defendant certainly should not be treated differently. *See State v. Holt*, 128 Wis.2d 110, 382 N.W.2d 679, 687 (Ct. App. 1985) (emphasizing that waiver rule should not be applied unevenly, favoring the state over the defendant). After all, what's good for the goose is good for the gander. *E.g.*, *State v. Watkins*, 804 S.W.2d 884, 886 (Tenn. 1991) (rule applied to defendant should apply equally to state).

A timely objection by the state would have put the defendant and the circuit court on notice that there was a factual dispute to be resolved by an evidentiary hearing. To deny Hicks a hearing would only encourage the state to sandbag the defense and the lower courts. The danger would be especially acute in cases such as this in which the state does not even suggest that the unobjected-to facts are inaccurate

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 a Complete Defense to the Drug Tax Count

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." The tax is due only from those illegally possessing or manufacturing more than a certain quantity of a controlled substance. 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. Hicks' assertion of the privilege against self-incrimination here thus 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. The circuit court thus properly dismissed the charges under Count Two of the amended information on this ground as well. This Court should say so.

E. Hicks Plainly Has Standing to Challenge the Drug Tax Law as Written and as Implemented

Despite these fatal constitutional defects, the majority in the Court of Appeals held that Hicks lacks standing to challenge the drug tax law because he neither paid the tax nor affixed tax stamps to the cocaine in his possession (App. 5-7). According to the court of appeals, a "dealer" who seeks to challenge the drug tax law or implementing procedures on self-incrimination grounds lacks standing unless he or she first incriminates himself or herself by complying with the unconstitutional law or procedures. Although ignored by the majority below, the United States Supreme Court held directly to the contrary in *Marchetti*:

> Every element of these requirements would have served to incriminate petitioner; to have required him to present his claim to Treasury officers would have obliged him "to prove guilt to avoid admitting it." *United States v. Kahriger*, [345 U.S. 22, 34 (1953)] (concurring opinion). In these circumstances, we cannot conclude that his failure to assert the privilege to Treasury officials at the moment the tax payments were due irretrievably abandoned his constitutional

> protection. 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.

390 U.S. at 50-51.

The Supreme Court similarly has noted that the court of appeals' proposed requirement would raise serious waiver problems and fail to afford adequate protection for the rights at issue. *Maness v. Meyers*, 419 U.S. 449, 462 (1975). Without a sufficient grant of statutory immunity, the dealer "'would be compelled to surrender the very protection which the privilege is designed to guarantee.'" *Id.*, quoting *Hoffman*, 341 U.S. at 486.

See also Albertson v. Subversive Activities Control Board, 382 U.S. 70, 75-76 (1965), in which the Court noted the Fifth Amendment's purpose "to relieve claimants of the necessity of making a choice between incriminating themselves and risking serious punishments for refusing to do so."

The analysis cited by the court below is simply irrelevant as this is not a case in which a defendant seeks to challenge a facially valid implementation of a statute as applied unconstitutionally to one specific circumstance or person. The Department's implementation of the drug tax law is invalid not because of some constitutional

defect unique to its application to Hicks; rather, it applies unconstitutionally to every person who falls within the statute's ambit. *See* Section B-C, *infra*. The Department's implementation, like the statute itself, applies only to a group "inherently suspect of criminal activities," those who violate Wisconsin's drug laws. *See Marchetti*, 390 U.S. at 47. No person required to pay the tax may do so, under the Department's procedures, without incriminating himself or herself.

Because the Department's implementation of the statute cannot be applied constitutionally to anyone required to pay the tax, Hicks is not required to show any injury beyond the fact that he is being prosecuted for failing to pay the tax. *Marchetti*, 390 U.S. at 51. Hicks was a victim of the Department's unconstitutional implementation of the statute because it forced him either to comply, and thereby subject himself to self-incrimination, or not comply, and face criminal tax charges. Forcing him into that dilemma is injury of constitutional dimension.

Although misconstrued by the court of appeals as an "as applied" challenge (App. 5), Hicks also plainly has standing to raise his separate challenge the facial validity of the statutory requirement that a "dealer" affix to his or her drugs and display "evidence that the

tax under s.139.88 has been paid."

Once again, the decision in *Marchetti* controls here, expressly holding that Marchetti could interpose a self-incrimination defense to federal gambling tax charges, and the parallel requirement that the gambler display his tax stamp, even though Marchetti did not pay the tax required to receive the stamp. 390 U.S. at 50-51. Hicks was charged with 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. Hicks could not have complied with the requirement of providing such evidence without directly incriminating himself. Under *Marchetti*, he could not be required to do so. The court of appeals' decision to the contrary could not be more wrong.

F. Judicial Amendment of the Confidentiality Provision Cannot Save This Prosecution

The state presumably will argue here, as it suggested below, that this Court might "cure" the constitutional defects in the confidentiality provision as passed by the legislature, and the absence of any such provision immunizing the required "affix and display" of the tax stamps, by "interpreting" a valid confidentiality provision into the law. State's Ct. App. Brief at 22-29, 32-34. Such judicial legisla-

tion, however, would be wholly improper. It would require the Court not merely to construe unambiguous language already present in the statute contrary to its plain meaning, "but to insert words that are not now in the statute." *Marchetti*, 390 U.S. at 60 n. 18. Retroactive application of such a judicial amendment of the statute to Hicks would also violate his rights to due process.[6]

It is not at all clear that the legislature would approve of such a drastic alteration of its work. As already discussed, the legislature simply did not intend the more protective "use and derivative use" immunity which is constitutionally required and expressly intended to exclude possession offenses from the confidentiality requirement. Had it meant to provide the constitutionally mandated immunity from use or derivative use of the tax stamp itself, the legislature would have said so specifically, as many other states have. *See, e.g.,* Iowa Code Ann. §453B.10 (1995 Supp.).

As the *Marchetti* Court pointed out in denying a similar request, such a judicial amendment also could interfere with

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[6] Admittedly, some courts have taken this route. *See Durrant*, 769 P.2d at 1182-83; *Garza*, 496 N.W.2d at 454-55; *White, supra*; *Zissi*, 842 P.2d at 857. However, none of these cases addressed the constitutional/fairness problem of retroactive application of the new construction to deny a self-incrimination defense to a criminal defendant. Indeed, *Zissi* was a civil case so the issue was not present. Those decisions thus are of little if any help here.

enforcement of the substantive criminal law:

> Moreover, the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes; the federal requirements would thus be protected only at the cost of hampering, perhaps seriously, enforcement of state prohibitions against gambling.

390 U.S. at 59. Like the Court in *Marchetti*, this Court cannot know how the legislature would decide this issue and thus likewise "must decide that it would be improper for the Court to impose restrictions of the kind urged by the [state]." *Id.* at 60.

Perhaps even more importantly, however, the state's suggested amendment of the statute could have no legal effect in this case. On January 6, 1993, when Hicks supposedly committed this offense, the statute did not provide immunity coextensive with the Fifth Amendment privilege. The statute, as written by the legislature, at least appeared to provide only incomplete use immunity concerning purchases and placed no restriction whatsoever on the use of any tax stamp affixed to a dealer's wares. As such, any dealer confronted with the dilemma at that time of whether to comply with the statute would reasonably believe that his or her disclosures required for such compliance "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, so that the *Marchetti* defense fully applied. Any subsequent, judge-created immunity obviously could have no effect on the reasonableness of that prior belief.

Construing immunity into the statute is essentially adopting the doctrine of "constructive use immunity" specifically rejected in *United States v. Doe*, 465 U.S. 605, 616-17 (1984). Moreover, retroactively applying any such construction of the statute would violate the principle recognized in *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262 (1983), to the effect that requiring a person to incriminate himself "cannot be justified by the subsequent exclusion of the compelled testimony." *See also Maness v. Meyers*, 419 U.S. 449, 463 (1975) (compelling a witness to testify in "reliance upon a later objection or motion to suppress would 'let the cat out' with no assurance whatever of putting it back").

Most directly on point, however, is *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). There, the Court held that it would be unfair to apply a new, judicially-created use and derivative use immunity to uphold a contempt finding for refusing to answer incriminating questions because, at the time they refused to answer, petitioners had a reasonable fear, based on existing law, that their

answers could be used against them. *Id.* at 79-80.

Any attempt by this Court to now amend the statute to abolish the *Marchetti* defense also could not be applied retroactively without violating the *ex post facto* component of the Due Process Clause. *See* U.S Const. amend. XIV; Wis. Const. Art. I, §8(1).

In *Marks v. United States*, 430 U.S. 188 (1977), the United States Supreme Court was faced with the issue whether it could retroactively apply the reformulated obscenity standards it announced in *Miller v. California*, 413 U.S. 15 (1973), to the potential detriment of a defendant in a criminal case, rather than the more favorable formulation of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (plurality opinion). The Court held that, although the *ex post facto* clause directly applies only to legislative acts, its underlying principles are "fundamental to our concept of constitutional liberty." 430 U.S. at 191 (citation omitted). Thus, due process bars retroactive application of a judicial enlargement of a criminal statute where such application has the same effect as a prohibited *ex post facto* law:

> "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."

430 U.S. at 192, *quoting Bouie v. City of Columbia*, 378 U.S. 347,

353-54 (1964).

Any retroactive construction or interpretation of the statute which would expand the protections of the confidentiality provision beyond the plain meaning of its words, or which would create immunity out of thin air for possession of tax stamps, would "remove[] a defense that was available at the time [Hicks'] act was committed." *State v. Kurzawa*, 180 Wis.2d 502, 509 N.W.2d 712, 716, *cert denied*, ___ U.S. ___, 114 S.Ct. 2712 (1994), and "expose[] him to a prosecution, and therefore punishment, from which he would have been free under the law as it existed at the time of his alleged acts...," *id.*, 509 N.W.2d at 717. Such action likewise would deprive Hicks of his "'right to fair warning of that conduct which will give rise to criminal penalties.'" *Id.*, 509 N.W.2d at 716, *quoting Marks*, 430 U.S. at 192; *cf. Murphy*, 378 U.S. at 79-80. Such "an unforeseeable enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law" and violates due process. *Bouie*, 378 U.S. at 353.

The *ex post facto* component of the Due Process Clause accordingly bars such action by this Court. Whatever this Court may do now, at the time of Mr. Hicks' arrest, a "dealer" reviewing the so-called confidentiality provision reasonably could believe that it failed

to provide protections coextensive with the Fifth Amendment privilege.

Given the serious policy considerations at issue, this Court should defer to the legislature to determine how, if at all, it wants to amend the drug tax law. Given the constitutional ban on any application of a newly created judicial immunity grant in this particular case, to do otherwise would constitute nothing more than an improper advisory opinion.

CONCLUSION

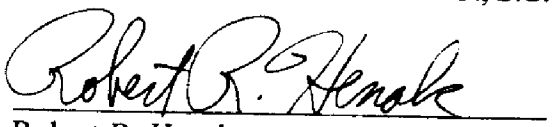
The Wisconsin Tax on Controlled Substances, both as written and as implemented, unconstitutionally compels self-incrimination. Mr. Hicks plainly has standing to assert that constitutional violation. He therefore respectfully asks that the Court declare the statute unconstitutional, reverse the decision of the Court of Appeals, and reinstate the order of the Circuit Court dismissing Court 2 of the amended information.

Dated at Milwaukee, Wisconsin, December 14, 1995.

Respectfully submitted,

ANTHONY HICKS, Defendant-Respondent-Petitioner

SHELLOW, SHELLOW & GLYNN, S.C.



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RULE 809.18(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,587 words.

Robert R. Henak

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 94-2542-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANTHONY HICKS,

Defendant-Respondent-Petitioner.

APPENDIX

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COURT OF APPEALS
DECISION
DATED AND RELEASED

June 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2542-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANTHONY HICKS,

Defendant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Reversed and cause remanded with instructions.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

WEDEMEYER, P.J. The State of Wisconsin appeals from an order, which dismissed one count of a criminal complaint charging Anthony Hicks with violating the controlled substances tax statute. The dismissal was granted on the basis

that the controlled substances tax law, as implemented, violates Hicks's protection against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Wisconsin Constitution. The State claims that the trial court erred in granting Hicks's motion to dismiss because Hicks lacks proper standing to assert that the controlled substances tax, as implemented, violates his right against compelled self-incrimination.[1] Because Hicks lacks proper standing to assert that the controlled substances tax law, as implemented, violates his constitutional rights, we reverse the order and remand this case to the trial court with instructions to deny Hicks's motion to dismiss and reinstate the controlled substances tax violation count.

I. BACKGROUND

Hicks was initially charged with one count of attempting to deliver cocaine, as party to a crime, contrary to §§ 161.16(2)(b)1, 161.41(1)(c)4, STATS., 1991-92, and 939.05, STATS. The State filed an amended information adding one count of possessing cocaine without evidence that the controlled substances tax had

[1] In the alternative, the State claims that: (1) Hicks failed to present any evidence that the Department of Revenue has taken any action to implement the controlled substances tax law; (2) the controlled substances tax law does not require the taxpayer to disclose incriminating testimony; and (3) the confidentiality provision in the controlled substances tax law provides the taxpayer protection co-extensive with the Fifth Amendment. Because we decide this case on the standing issue, however, it is not necessary for us to address any of these alternative arguments. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

been paid, contrary to §§ 139.87(1), STATS., 1989-90;[2] 139.87(2), 139.88(2), 139.89, 139.95(2),[3] 161.16(2)(b)1 and 939.05, STATS., 1993-94.

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[2] As an initial consideration, we note that the amended information listed § 139.87(1), STATS., which was repealed, effective October 1, 1991. *See* 1991 Wis. Act 39, §§ 2531-2534. Accordingly, on remand the reinstated charge should reflect this fact. Prior to repeal, § 139.87(1), STATS., 1989-90, provided:

> 139.87 Definitions. ...
>
> (1) "Controlled substance" has the meaning under s. 161.01(4) and includes a counterfeit substance, as defined in s. 161.01(5).

[3] The controlled substances tax statute is contained in §§ 139.87-139.96, STATS., 1993-94. Sections 139.87(2), 139.88(2), 139.89, and 139.95(2), provide as follows:

> 139.87 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.
>
> 139.88 Imposition. There is imposed on dealers, upon acquisition or possession by them in this state, an occupational tax at the following rates:
>
> ....
>
> (2) Per gram or part of a gram of other schedule I controlled substances or schedule II controlled substances, whether pure or impure, measured when in the dealer's possession, $200.

(continued...)

Hicks moved to dismiss the controlled substances tax violation count, alleging that it violated his right to be free from compelled self-incrimination under the procedures implemented by the Department of Revenue. The trial court heard arguments from both sides and granted Hicks's motion to dismiss. The State now appeals.

---

*(...continued)

> 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.
>
> ....
>
> 139.95 Penalties. ...
>
> (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.

II. DISCUSSION

The constitutionality of a statute is reviewed *de novo*. *State v. McManus*, 152 Wis.2d 113, 129, 447 N.W.2d 654, 660 (1989). As a preliminary consideration, we note that Hicks does not challenge the statute on its face because that issue has already been decided. *See State v. Heredia*, 172 Wis.2d 479, 484-86, 493 N.W.2d 404, 406-07 (Ct. App. 1992) (holding that the controlled substances tax statute does not violate a defendant's rights against compelled self-incrimination), *cert. denied*, 113 S. Ct. 2386 (1993).

Instead, Hicks argues that this statute is unconstitutional as implemented. Specifically, Hicks claims: (1) that the procedures established by the Department of Revenue that require a dealer to purchase the tax stamps in person compel the dealer to incriminate himself because the clerk selling the stamps could identify him or because the police could stake-out the purchase; and (2) that the procedures established by the Department of Revenue that require a dealer to affix the tax stamps to the drugs in his possession compel self-incrimination because they demonstrate the dealer's knowledge of the nature and substance of the drugs.

There is no evidence in the record, however, that Hicks ever attempted to purchase tax stamps, or that he ever affixed any tax stamps to any drugs. In other words, Hicks did not engage in the procedures that he alleges make a facially

constitutional statute unconstitutional. A party has standing to challenge the application of a statute if the application 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 (1988). The procedures that Hicks alleged were implemented by the Department of Revenue have not caused Hicks any injury because he never attempted to comply with them. Therefore, the hypotheticals that Hicks raised regarding a clerk identifying him or police staking out the area where stamps are purchased are purely speculative. Because Hicks did not purchase or affix stamps, the question of whether the statute, as implemented, is unconstitutional, must be left for another day. Hicks lacks proper standing to assert it.

Hicks claims that he has standing to attack the implementation of the statute because the statute applies unconstitutionally to every person who falls within the statute's ambit and that no person required to pay the tax may do so without incriminating himself or herself. As noted above, however, this court has previously upheld the statute, on its face, as constitutionally permissible. *See Heredia*, 172 Wis.2d at 484-86, 493 N.W.2d at 406-07. In *Heredia*, this court held that the statute "both contemplates and permits the anonymous payment of the tax" and that the statute "does not subject those who comply with its provision to compelled self-incrimination." *Id.* at 484-85, 493 N.W.2d at 407. Accepting Hicks's argument that he has proper standing because no one can pay the tax without incriminating himself

or herself, would squarely contradict our holding in *Heredia*. We are bound by that holding and therefore reject Hicks's argument. *See In re Court of Appeals of Wisconsin*, 82 Wis.2d 369, 371, 263 N.W.2d 149, 150 (1978).

Accordingly, we reverse the trial court's order dismissing the controlled substances tax violation count against Hicks, and instruct the trial court to reinstate the charge.

By the Court.—Order reversed and cause remanded with instructions.

Not recommended for publication in the official reports.

SCHUDSON, J. (*dissenting*). Hicks's argument that he has standing is premised on his assertion that "[n]o person required to pay the tax may do so, under the Department's procedures, without incriminating himself or herself." Thus, as he explains, "[b]ecause the Department's implementation of the statute cannot be applied constitutionally to anyone required to pay the tax, Hicks is not required to show any injury beyond the fact that he is being prosecuted for failing to pay the tax." Under *Marchetti v. United States*, 390 U.S. 39 (1968), Hicks is correct.

Marchetti was convicted for violations of the federal wagering tax statutes. He challenged "the statutory obligations to register and to pay the occupational tax," arguing that they violated his Fifth Amendment rights. *Marchetti*, 390 U.S. at 40-41. Although speaking in terms of "waivers" of the Fifth Amendment privilege rather than "standing" to challenge the statutes, the Supreme Court explained:

> To give credence to such "waivers" without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through "ingeniously drawn legislation." We cannot agree that the constitutional privilege is meaningfully waived merely because those "inherently suspect of criminal activities" have been commanded either to cease wagering or to provide information incriminating to themselves, and have ultimately elected to do neither.

Id. at 51-52 (citations omitted). Thus, while *Marchetti* did not talk in terms of "standing," it clearly was concerned with the principles underlying the standing issue in this case. *See id.* at 50-54; *see also Herre v. State of Florida Dep't of Revenue*, 617 So.2d 390, 395, *aff'd*, 634 So.2d 618 (Fla. 1994). *Marchetti* rejected "the premise that the [Fifth Amendment] privilege is entirely inapplicable to prospective acts" where, as here, "the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Id.* at 53 (citations omitted).

Relying on *State v. Heredia*, 172 Wis.2d 479, 493 N.W.2d 404 (Ct. App. 1992), *cert. denied*, 113 S. Ct. 2386 (1993), the majority offers a tautology:

> In *Heredia*, this court held that the statute "both contemplates and permits the anonymous payment of the tax" and that the statute "does not subject those who comply with its provision to compelled self-incrimination." Accepting Hicks's argument that he has proper standing because no one can pay the tax without incriminating himself or herself, would squarely contradict our holding in *Heredia*.

Majority slip op. at 6-7 (citation omitted). This tautology, of course, simply begs the question in this case. Clearly, *Heredia's* declaration that the statute contemplates anonymous payment does not eclipse Hicks's argument that the *implementation* of the statute, *in every case*, precludes anonymous payment and therefore violates the Fifth Amendment. Indeed, *Marchetti* overruled the very theory of "standing" the majority has attempted to revive. *See United States v. Apfelbaum*, 445 U.S. 115, 128-129

(1980) (*Marchetti* overruling *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955)). Under *Marchetti*, therefore, I conclude that Hicks has standing.

How exactly does the Department of Revenue implement the statute? Although Hicks offers strong arguments that the undisputed record answers that question and allows this court to address the Fifth Amendment issue, *Marchetti* emphasizes the need for "the most deliberate examination of the circumstances." *Id.* at 51-52. Thus, I would remand for an evidentiary hearing to develop a definitive factual record of the way in which the Department implements the statute.

Accordingly, I respectfully dissent.

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

STATE OF WISCONSIN,

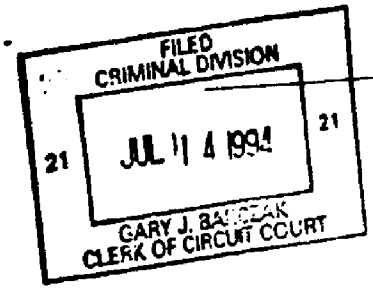
Plaintiff,

Case No. F-930079
Hon. Stanley A. Miller
Next Appearance 7/14/94

v.

ANTHONY L. HICKS,

Defendant.



DECISION AND ORDER

The defendant has moved this Court to dismiss Count 2 of the Amended Information, which charges him with the possession of at least 100 grams of cocaine without evidence that the tax thereon had been paid. He asserts that the Wisconsin Controlled Substances Tax, imposing upon a dealer in controlled substances the obligation to purchase and affix tax stamps to such substances, *see* Wis. Stat. §§139.88, 139.89 and 139.95(2), violates the self-incrimination guarantees of the Fifth and Fourteenth Amendment to the United States Constitution and Article I, §8 of the Wisconsin Constitution and has filed memoranda in support of this motion. The Court has heard argument thereon by counsel for the defendant and for the plaintiff, and is fully advised in the premises.

The Court hereby finds, for the reasons stated in the defendant's motion and supporting memoranda, that the Wisconsin Controlled Substance Tax, as implemented by the Department of Revenue, violates the defendant's constitutional

rights to be free from compelled self-incrimination.

The Court further finds, also for the reasons stated in the defendant's motion and supporting memoranda, that the requirement that a dealer in controlled substances, as defined in that statute, affix to any such controlled substance in his possession evidence that he has paid the tax likewise violates the defendant's constitutional rights to be free from compelled self-incrimination.

IT IS THEREFORE ORDERED that Count 2 of the Amended Information be and is hereby dismissed, on the grounds that the Wisconsin Statutes allegedly violated are themselves violative of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §8 of the Wisconsin Constitution.

JUL 1 4 1994

Dated at Milwaukee, Wisconsin, ~~July 7, 1994~~.

BY THE COURT:

Honorable Stanley A. Miller
Circuit Judge

Approved as to Form:

Assistant District Attorney

F:\DATA\WP60\G-I\HICKS\ALM7794.I

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

Excerpt of Transcript Setting
Forth Circuit Court's
Oral Decision Granting
Motion to Dismiss (7/7/94)
(R75:25-26)

give you the stamp." And there's a man standing there with a camera. And that's why the statute is unconstitutional not by beyond a reasonable doubt but by any doubt whatsoever.

Now, if you say, "Let us put a gloss on the statute and say that we will interpret the statute so that no law enforcement officer may ever stand anywhere near that window and observe who purchases the stamps, well, that's a possibility, that might do it. I think the legislature would be upset with such a gloss to say what the law enforcement can and cannot do, but that's quite good.

The statute's no good, and it seems to me that it's an exercise in futility for us to try to save it. Thank you.

THE COURT: Response?

MS. BEYER-ULRICH: No, Judge.

THE COURT: All right.

The Court having had an opportunity to review the briefs and memorandums in this case, the defendant having renewed his motion to dismiss count two asserting incrimination -- self-incrimination in this case, claiming that the statute in this case, referring to the tax on drugs, violates his

constitutional rights, this Court finds that it does. And accordingly, to the defense of the Fifth Amendment Section Eight of the constitution, the motion to dismiss is granted as to that count.

MR. SHELLOW: Now, shall I -- How shall we set up a schedule of this suppression then, Your Honor? If I call the court reporter on Monday, and I will, should I then call the prosecutor and give the prosecutor the information that I obtain from the court reporter and then --

THE COURT: We can --

MS. BEYER-ULRICH: Why don't we pick a date later in the week after we hear from her, because we originally had this case set originally for Monday, because we need to maintain jurisdiction over Mr. Hicks.

THE COURT: That's fine. We can just set another date.

MR. SHELLOW: We're set. Let's take it off then wherever we are.

MS. BEYER-ULRICH: The 11th?

MR. SHELLOW: The 11th, 12th, and 13th is where I had it. And why don't we come in on Friday on the chance that maybe we'll have the transcript by then.

STATE OF WISCONSIN : CIRCUIT COURT CRIMINAL DIVISION : MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

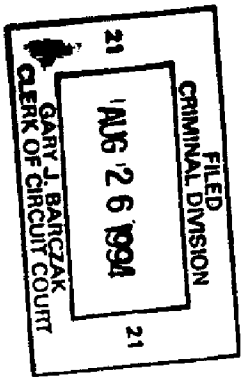
vs.

Case No. F-930079

ANTHONY HICKS,

Defendant.

NOTICE OF APPEAL



TO: MR. GARY BARCZAK
MILWAUKEE COUNTY CLERK OF COURTS
MILWAUKEE COUNTY COURTHOUSE
ROOM 104
901 NORTH NINTH STREET
MILWAUKEE, WI 53233

MS. MARILYN L. GRAVES, CLERK OF COURT
WISCONSIN COURT OF APPEALS
231 EAST CAPITOL
P.O. BOX 1688
MADISON, WI 53701-1688

MR. JAMES SHELLOW
ATTORNEY AT LAW
SHELLOW, SHELLOW AND GLYNN, S.C.
222 EAST MASON STREET
MILWAUKEE, WI 53202

NOTICE IS HEREBY GIVEN that the Plaintiff, State of Wisconsin appeals to the Court of Appeals, District One, from the final order entered on July 14, 1994, in Milwaukee County Circuit Court, the Honorable Stanley A. Miller presiding, in Milwaukee County Circuit Court Case Number F-930079, in favor of the defendant, Anthony Hicks, and against the plaintiff, State of Wisconsin, wherein the court dismissed the Failure to Pay Controlled Substance Tax Stamp, Cocaine, Count 2, against the defendant, Anthony Hicks, in an action brought by the

Plaintiff, State of Wisconsin. A copy of Judge Miller's order is hereby attached and hereby incorporated into the Notice of Appeal.

This is not an appeal within Sec. 752.31(2). This is an appeal within Sec. 974.05, Stats.

Dated at Milwaukee, Wisconsin, this 26 day of August, 1994.

E. MICHAEL MCCANN
DISTRICT ATTORNEY

Cynthia M. Beyer-Ulrich
Assistant District Attorney
State Bar Number 01005419

Attorneys for Plaintiff-Appellant

P.O. Address/Phone:
821 West State Street
Milwaukee, WI 53233
(414)278-5183

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

STATE OF WISCONSIN,

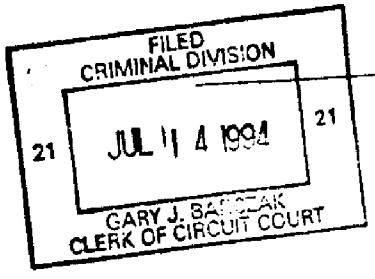
Plaintiff,

Case No. F-930079
Hon. Stanley A. Miller
Next Appearance 7/14/94

v.

ANTHONY L. HICKS,

Defendant.



DECISION AND ORDER

The defendant has moved this Court to dismiss Count 2 of the Amended Information, which charges him with the possession of at least 100 grams of cocaine without evidence that the tax thereon had been paid. He asserts that the Wisconsin Controlled Substances Tax, imposing upon a dealer in controlled substances the obligation to purchase and affix tax stamps to such substances, see Wis. Stat. §§139.88, 139.89 and 139.95(2) violates the self-incrimination guarantees of the Fifth and Fourteenth Amendment to the United States Constitution and Article I, §8 of the Wisconsin Constitution and has filed memoranda in support of this motion. The Court has heard argument thereon by counsel for the defendant and for the plaintiff, and is fully advised in the premises.

The Court hereby finds, for the reasons stated in the defendant's motion and supporting memoranda, that the Wisconsin Controlled Substance Tax, as implemented by the Department of Revenue, violates the defendant's constitutional

rights to be free from compelled self-incrimination.

The Court further finds, also for the reasons stated in the defendant's motion and supporting memoranda, that the requirement that a dealer in controlled substances, as defined in that statute, affix to any such controlled substance in his possession evidence that he has paid the tax likewise violates the defendant's constitutional rights to be free from compelled self-incrimination.

IT IS THEREFORE ORDERED that Count 2 of the Amended Information be and is hereby dismissed, on the grounds that the Wisconsin Statutes allegedly violated are themselves violative of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §8 of the Wisconsin Constitution.

JUL 1 4 1994

Dated at Milwaukee, Wisconsin, ~~July 7, 1994~~.

BY THE COURT:

Honorable Stanley A. Miller
Circuit Judge

Approved as to Form:

Assistant District Attorney

F:\DATA\WP60\G-[illegible]HICKS\ALH7794.X

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

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

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

[redacted]

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.

75-J

3/30

LRB—FILE COPY
(Return to Room 211 North)

ASSEMBLY BILL 519

3/21/77 **Introduced by Representative** Toti

Representatives Musser

Cosponsored by Senator _____

Committee on _____

By request of _____

Referred to Committee on Ways Means

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 $3 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 50 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.

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

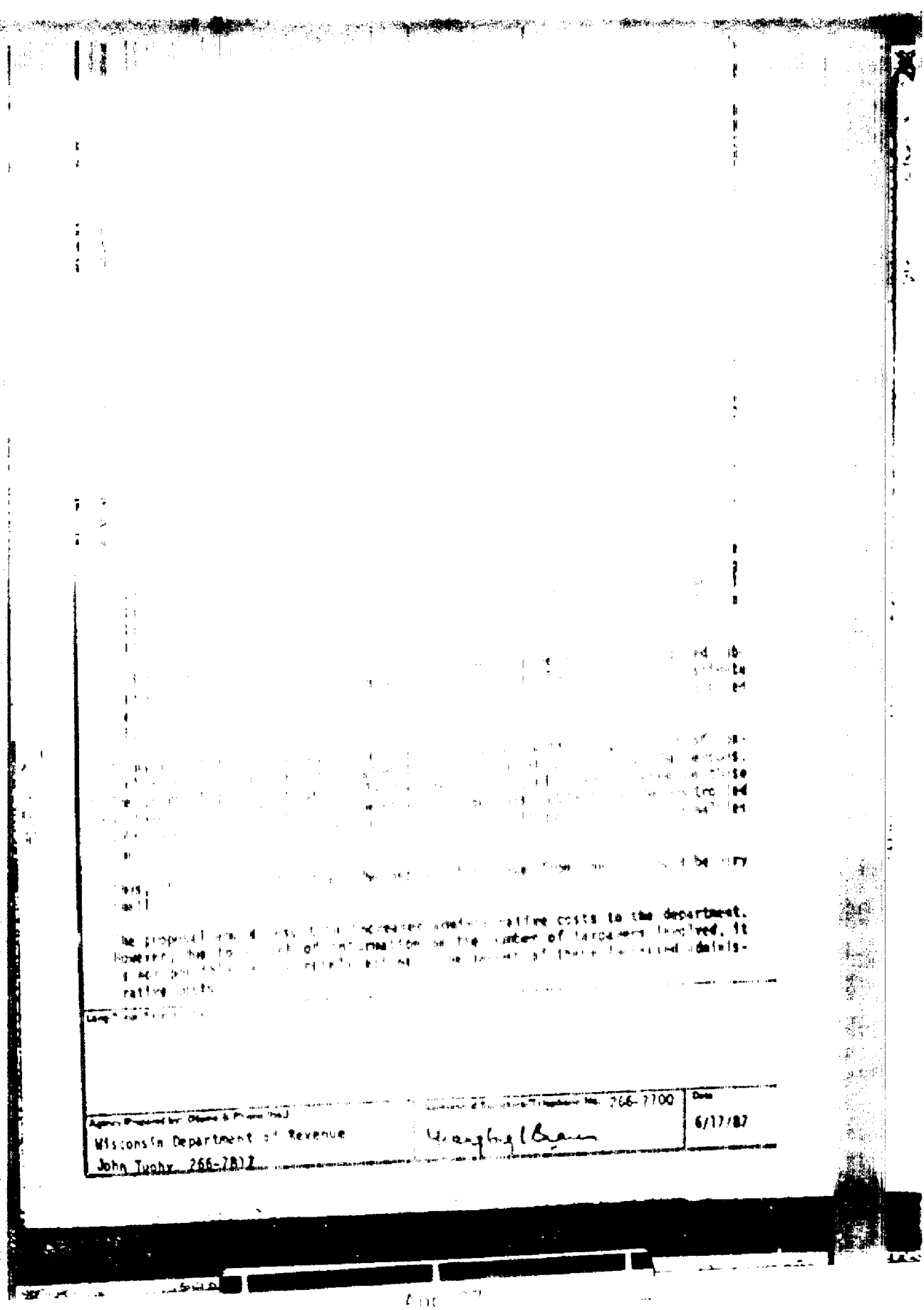
77.93 IMPOSITION. There is imposed on dealers, upon acquisition or possession in this state, a tax at the following rates:

(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



rative costs to the department.
ber of taxpayers involved. It
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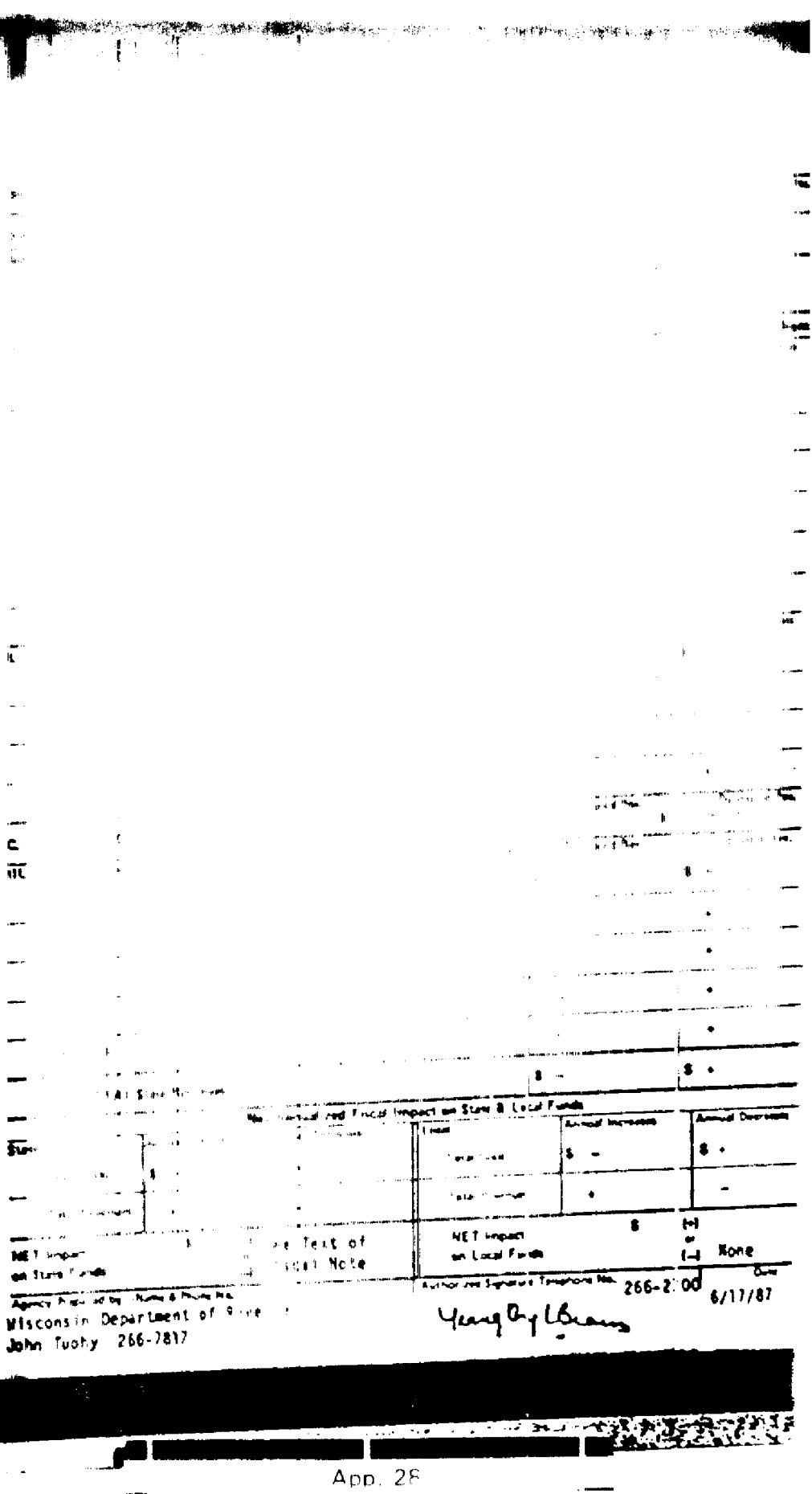
Agency Proposal for Drama & Theatre Proj.
Wisconsin Department of Revenue
John Tuohy 266-7812

266-7700

6/17/87



Misconsin Department of
John Tuohy 266-7817

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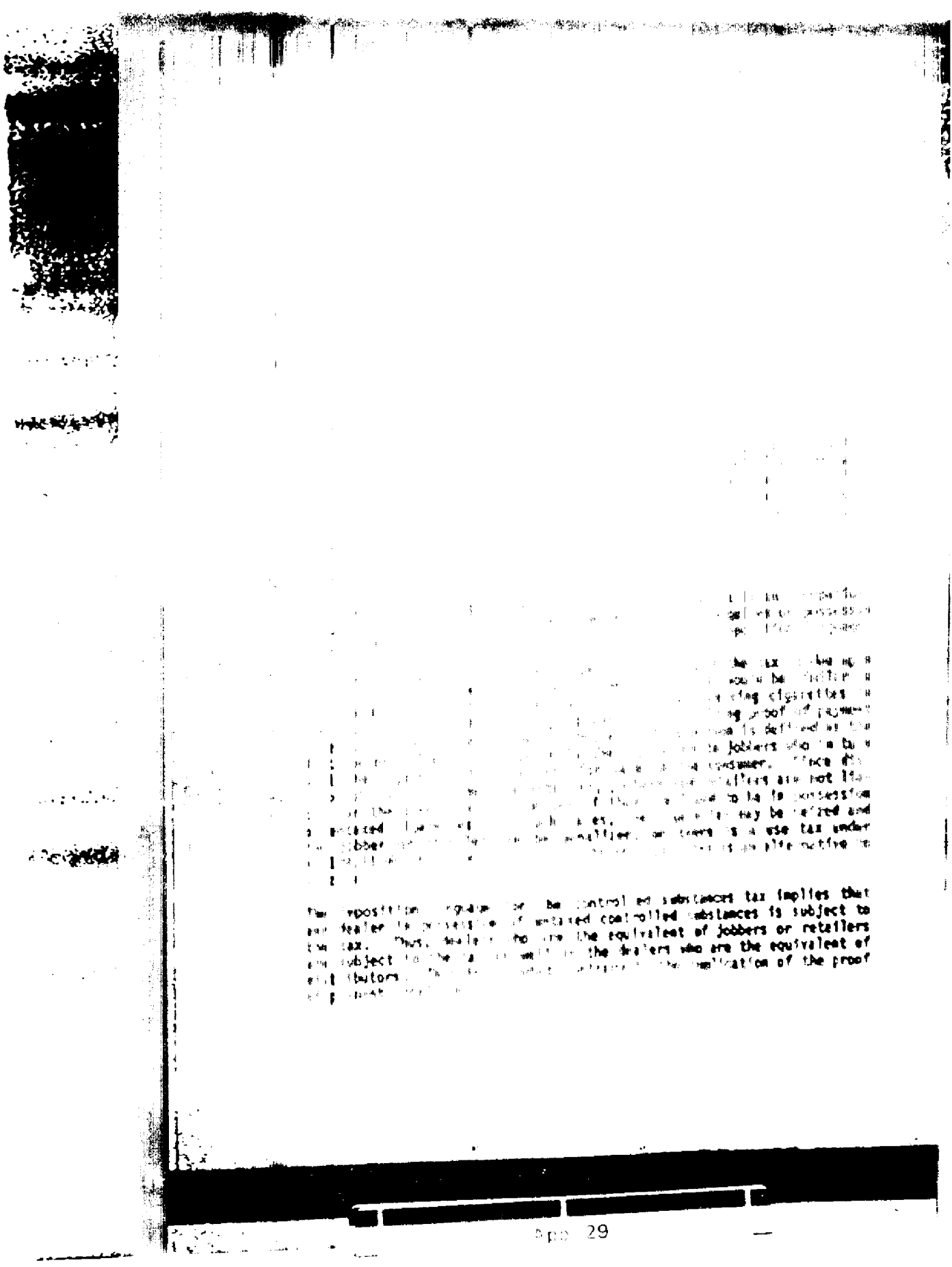

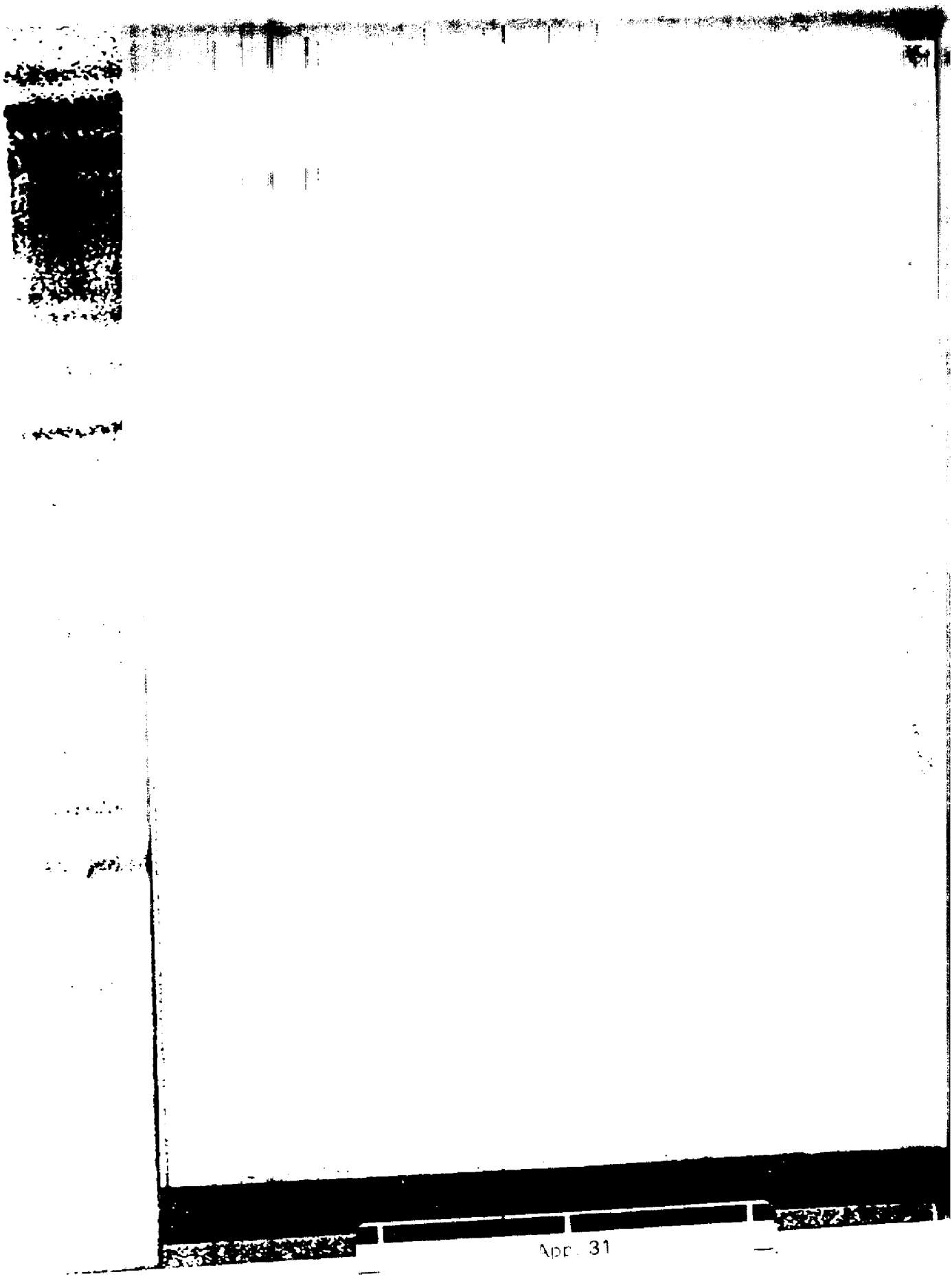

1987

DRAFTING REQUEST

Extra Copies: Hlg 1 / JJ 1

LRB 3920

Date rec'd 5-21 Received by JJ Vetoed Sess Drafter JJS

$ 0 Bill Jt.Res. Res. Sub.Amdt. Amdt.

SUBJECT drug & alcohol taxes

FOR Fin BY/Representing

BILL INDEX Tax This file MAY BE SHOWN to any legislator (Signature)

MAY CONTACT

INSTRUCTIONS:

Work/0	/P1	/P2	/P3		5-22 1st	6-1 2nd	3rd	4th	5th
				Drafted	JJ	JJ			
				Reviewed					
				Typist					
Original to drafter				Proofed					
				Submitted	5/26	6/1			
					FE-S/L PUBDES RETIRE TAXEXM	FE-S/L PUBDES RETIRE TAXEXM	FE-S/L PUBDES RETIRE TAXEXM	FE-S/L PUBDES RETIRE TAXEXM	FE-S/L PUBDES RETIRE TAXEXM

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(fa)]

STATE OF WISCONSIN

1987 [illegible]

***Use this

Your name (please print or type): B-

Your phone number: 266-8551

Legislator, agency or other body (if

IF YOU NEED MORE SPACE FOR THE FOLLO

Describe the problem, including any

drug dealers or knowledge of

How do you want to solve the problem

See the attached information.

If you know of any statute sections
vide a marked-up (not retyped) copy:

You may attach a marked-up (not retyped)
vide its number (e.g., 1985 LRB-2354/2

Attach a copy of any correspondence or

Provide names and phone numbers of p
(including other legislators, if appropri

Should we give this request priority ov
has requested? _____

Do you consider this request urgent? _____

This request is confidential unless yo
working on this issue for you? _____ If
legislator? _____
Or only the following persons: _____

Thank you. We will contact you if we need

...n. Barkhausen
... the Senate
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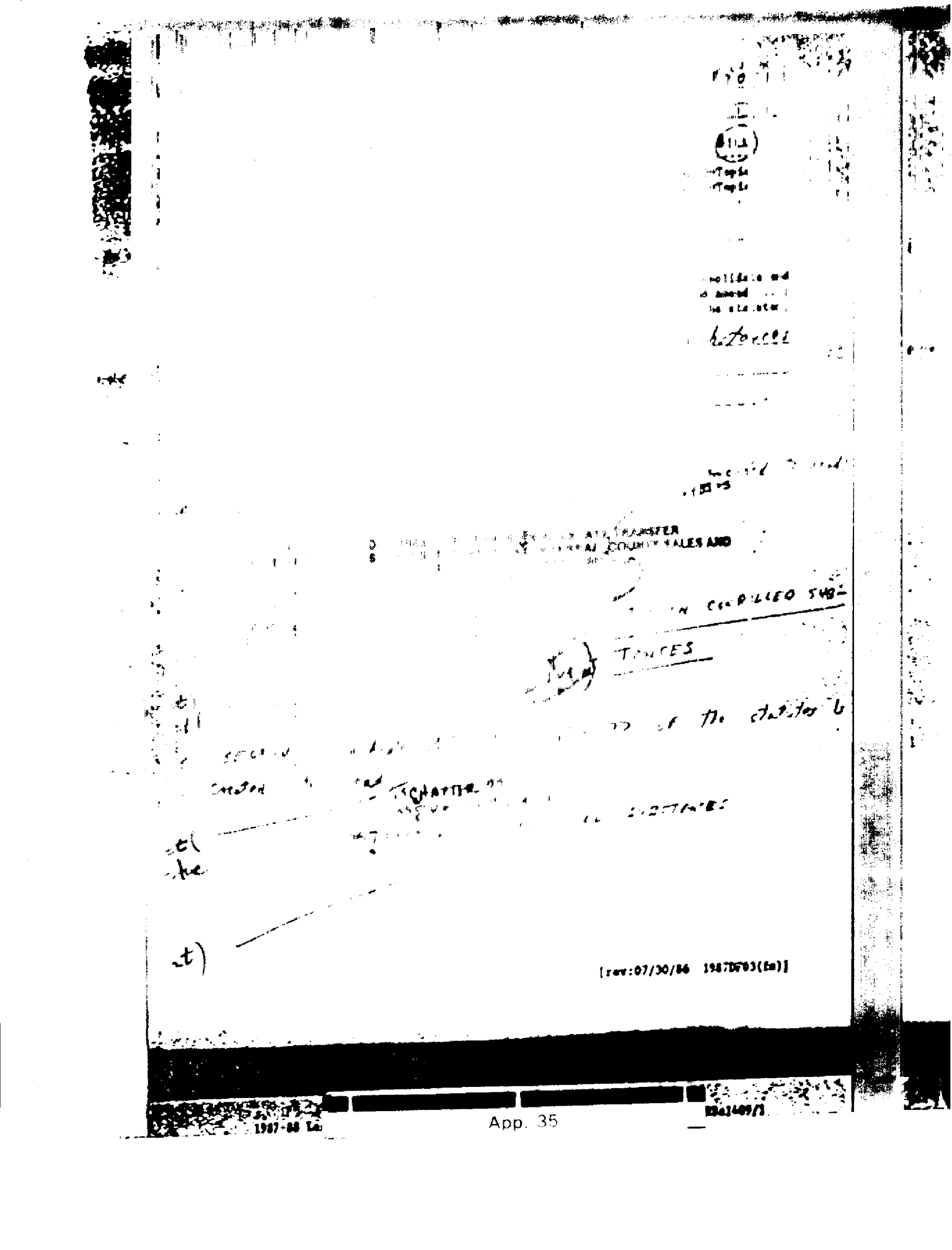

[rev:07/30/86 1987D703(Ed)]

ANALY

This bill creates a t
that applies to those subs
by dealers. The rate is
$250 per gram of other co
$2,000 per dosage unit. P
demonstrated by a stamp
which may be purchased
completion of a return
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uniform system of providing, affixing and displaying stamps, labels or other indicia for cannabis and controlled substances on which the tax 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 be construed to grant immunity for a dealer from criminal prosecution pursuant to Illinois law for possession of cannabis or a controlled substance.

Section 7. Nothing in this Act requires a person 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) at 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 or possession in this state by a dealer.

reveal facts contained in a return or return required by information contained in such a return be used against the dealer in any criminal proceeding, unless information has been independently obtained, except in connection with a proceeding involving taxes due under pursuant to the 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 the may examine, or cause to be examined, any books, papers, records or memoranda that may be relevant to making determinations, whether the books, papers, records, or memoranda are the property of or in the possession of the dealer or another person. The 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

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

History: 1985 a. 302

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: 1987 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, 208

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, whether pure or [illegible] possession, $200.

History: 1989 a. 122; 1991 a. 39, 189, 208.

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.