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

REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

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ARGUMENT

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

A. The Payment Requirement is Unconstitutional On Its Face.

Hicks did not raise his facial challenge to the payment requirement in the lower courts which were bound on that point by the erroneous decision in *State v. Heredia*, 172 Wis.2d 479, 493 N.W.2d 404 (Ct. App. 1992), *rev. denied*, 497 N.W.2d 130, *cert. denied*, 113 S.Ct. 2386 (1993). State's Brief at 6-7. This Court can and should decide the issue, however, as it is in the best interests of

justice to do so, as this Court determined by granting review, and because "both parties have had the opportunity to brief the issue and ... there are no factual issues that need resolution." *Laufenberg v. Cosmetology Examining Bd.*, 87 Wis.2d 175, 274 N.W.2d 618, 624 (1979).

The state's argument that the statute does not compel taxpayers to provide identifying information, State's Brief at 7-11, is both irrelevant and inaccurate. The Fifth Amendment bars self-*incrimination*, not self-identification. *California v. Byers*, 402 U.S. 424, 432 (1971) (plurality opinion); Hicks' Brief at 12-13, 17-18. The state's ability to identify the taxpayer goes instead to whether the incriminating admissions inherent in the purchase may be used against the taxpayer. *Id.* The state's argument is inaccurate because Wisconsin's statute, by barring transfer of stamps, ensures that the taxpayer who buys the stamps necessarily provides some type of identifying information, whether a mailing address for purchases by mail or the taxpayer's appearance for purchases in person. Hicks' Brief at 18-19.

While collectors may also purchase a few stamps, State's Brief at 12, the Self-Incrimination Clause applies to "*any* disclosures that the witness reasonably believes *could be used*" against him or her. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (emphasis

added). A Department clerk, or a jury, could reasonably infer that someone buying 111 cocaine stamps for $22,200, as Hicks would have had to do here, is a dealer rather than someone buying a few gag gifts. *See also Haynes v. United States*, 390 U.S. 85, 99 (1968) (*Marchetti* self-incrimination defense applies in prosecution for failure to register firearm, despite some circumstances in which registration is required even of those who have not violated National Firearms Act).

The state's reliance on *United States v. Jeffers*, 621 F.2d 221 (5th Cir. 1980), State's Brief at 12-14, is misplaced. Unlike the serious risks of self-incrimination built into Wisconsin's drug tax law, Jeffer's hypotheticals would have required violation of federal law to result in self-incrimination. While incriminating statements made in compliance with the gambling tax laws could become public if he some day were involved in a tax proceeding, the federal statute barred use of such information in criminal proceedings. *See* 621 F.2d at 224 n.2. It likewise was pure speculation that federal agents would risk imprisonment and loss of employment by disclosing those statements in violation of law. *Id.* at 226.

The state's discussion of the so-called "confidentiality" provision of Wis. Stat. §139.91. State's Brief at 14-22, ignores a

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

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

removes a defense that was available at the time the act was committed), *cert. denied,* 114 S.Ct. 2712 (1994).

Second, the state ignores the fact that not one of the other states with drug tax laws similar to Wisconsin's has a confidentiality exception even vaguely resembling that for possessory offenses under §139.91. Hicks' Brief at 22-26. Far from being "almost identical to Wisconsin's," State's Brief at 19, the other states' statutes allow the use of information *only* if independently discovered or in a proceeding involving taxes due. In Wisconsin alone, the state may use the information in other criminal proceedings so long as the tax was not paid on the drugs directly involved in the charged offense.

Third, §139.91 expressly provides that otherwise confidential information may be used "in connection with a proceeding involving possession of schedule I controlled substances or schedule II controlled substances on which the tax has not been paid...." The state's request that this Court "construe" §139.91 to grant immunity coextensive with the Fifth Amendment by limiting the exception to tax offenses would require the Court to write this unambiguous language out of the statute. That clearly is inappropriate. *E.g., State v. Martin,* 162 Wis.2d 883, 470 N.W.2d 900, 904 (1991) (every word of statute must be given effect if possible).

Fourth, a few ambiguous and conclusory references to "confidentiality" in the legislative history, State's Brief at 16-18, do not allow this Court to ignore the statute's unambiguous language. *E.g.*, *Martin*, 470 N.W.2d at 904. Moreover, while the legislative history reflects a concern for what it terms "confidentiality," it does not define what is meant by that term. The legislature did that for itself in §139.91 and the substance of the legislative history, rather than the few conclusory assertions cited by the state, supports the plain meaning of the statute's language. *See* Hicks' Brief at 26-29.

B. The Payment Requirement is Unconstitutional as Implemented.

The state's standing argument, State's Brief at 22-25, borders on the frivolous. Mr. Hicks was left with but two alternatives, (1) comply with the statute's provisions as implemented by the Department and incriminate himself, or (2) not comply and be punished for exercising his right against self-incrimination. "Either alternative would result in injury in fact." *See State v. Hall*, 196 Wis.2d 850, 540 N.W.2d 219, 225 (Ct. App. 1995), *rev. granted*.

The state's convoluted and ultimately ineffectual attempt to circumvent it's failure to object in a timely manner to the absence of

testimony supporting the factual basis for Hicks' "as implemented" claim would do Rube Goldberg proud. State's Brief at 25-32. The fact remains, however, that the state *never* objected to the lack of supporting testimony until its motion to reconsider the order granting dismissal, and still has never challenged the accuracy of the specific factual allegations of Hicks' motion:

> 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). Under these circumstance, the trial court and defense counsel were entitled to proceed on the understanding that the facts were not in dispute. *E.g.*, *State v. Szarkowitz*, 157 Wis.2d 740, 460 N.W.2d 819, 822 (Ct. App.); *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 assertion that the state objected at the motions hearing to the absence of supporting testimony, moreover, ignores the record. State's Brief at 27-30. The dispute at the motions hearing was not over the facts themselves but over their legal significance, with the

state arguing simply that Hicks' factual claims were not legally sufficient to show a Fifth Amendment violation (R75:21-3).

"An objection must be made with specificity so the trial court and the adversary are given an opportunity to remedy any defect." *State v. Barthels*, 166 Wis.2d 876, 480 N.W.2d 814, 818 (Ct. App. 1992), *aff'd*, 174 Wis.2d 173, 495 N.W.2d 341 (1993), citing *Champlain v. State*, 53 Wis.2d 751, 758, 193 N.W.2d 868, 873 (1972). An argument that the defendant failed to carry his burden of proving the legal point that the statute is unconstitutional, which is all the state did at the motions hearing, simply is not an objection that the defendant failed to prove specific facts, and certainly would not have placed defense counsel and the trial court on notice that there was a problem with the factual presentation or that the facts themselves were in dispute.[1]

Defense counsel's argument at the subsequent hearing on the state's motion for reconsideration likewise did not "acknowledge[] that the objection was sufficient." State's Brief at 27. The sufficiency of the objection simply was not at issue at that hearing.

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[1] The state's trial memorandum on this motion, which it expressly adopted as the basis of its argument at the motion hearing (R75:21), refers to the requisite burden of proof solely with regard to proving unconstitutionality, not facts (R48:2)

Rather, counsel's argument against reconsideration was nothing more than an accurate assertion that the state had a full and fair opportunity to argue the Fifth Amendment issue at the original motion hearing, that it apparently believed it had done so at the time, and that it should not be given another opportunity (R77:3-4). Nothing in counsel's argument supports the state's convoluted assertion that he also somehow "acknowledged that at the July 7 hearing the state had objected to the lack of evidence." State's Brief at 29.

The state's attempt to avoid the effect of its failure to appeal denial of its reconsideration motion, State's Brief at 29-30, also must fail. *Marsh v. Milwaukee*, 104 Wis.2d 44, 310 N.W.2d 615 (1981), does not hold that orders denying motions to reconsider are not appealable Rather, it holds that such a motion cannot circumvent the time for filing an appeal from a final order or judgment on the same issues. That decision does not apply where, as here, the state (1) raises an additional argument for the first time on a motion to reconsider and (2) could file a timely appeal from both orders but simply chooses not to do so.

The state had an opportunity to make a specific and timely objection which would have placed the trial court and the defense on notice of the defect it now seeks to raise in this Court. It did not do

so, leaving the trial court and the defense reasonably to conclude that the facts were not in dispute. Now, the state seeks not only to avoid the effect of its failure to object, but to bar the defense from even one fair opportunity to prove the facts upon which its motion was based. This Court should reject the state's attempt to whipsaw the trial court and the defense in this manner.

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

The state's assertion that Hicks lacks standing to challenge the requirement that he affix the required drug stamps because he did not comply with that requirement, State's Brief at 35-36, is misguided for the same reasons stated previously. *See* Hicks' Brief at 38-41. The Supreme Court expressly rejected that argument in *Marchetti v. United States*, 390 U.S. 39, 50-51 (1968). *See also Hall*, 540 N.W.2d at 225-26.

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

tax. The court found that he was. The failure to affix the tax stamp was irrelevant; Sisson was required to pay the tax regardless whether he constitutionally could have been required subsequently to affix the tax stamps in order to avoid separate criminal penalties.

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

As noted by the state, State's Brief at 35-36, the Utah Court of Appeals did extend the *Sisson* beyond the civil realm in which it was justified and apply it to a criminal charge for possession without the required tax stamps affixed. *State v. Davis*, 787 P.2d 517, 519 n.3 (Utah App. 1990) ("Defendant did not purchase stamps and thus the issue of whether evidence of posting the stamps is incriminating is not before us." (citing *Sisson, supra*)). The *Davis* court failed to explain, however, how a person would not be injured in the constitutional sense by criminal conviction and punishment for a offense, the violation of which he could avoid only by incriminating himself.

In any event, this portion of *Davis* was effectively overruled in *Zissi v. State Tax Comm'n of Utah*, 842 P.2d 848, 857 (Utah

1992). There, the Court held that Utah's drug tax statute, as written, violates the Fifth Amendment at both the purchase stage and the affixing stage. The court thus necessarily concluded that Zissi had standing to raise the challenge, despite his not having paid the tax.

Here, 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. The validity of that requirement thus is directly at issue under the facts of this case.

The state's suggestion that the possession of drug stamps affixed to drugs, as required by Wis. Stat. §139.95(2), "do[es] not provide the state with any evidence to use against the defendant," State's Brief at 36, is just silly. The question is not, as the state appears to suggest, State's Brief at 36-38, whether the tax stamp alone would establish guilt, but whether it would "furnish a link in the chain of evidence" against the defendant. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Plainly, it would. *E.g.*, *Hall*, 540 N.W.2d at 226 ("tax stamps would be readily available to assist the State in establishing that the defendant knew that the substance in his

or her possession was a controlled substance"); *Zissi*, 842 P.2d at 857.[2]

Section 139.91 is unmistakably clear and unambiguous to the extent that whatever immunity it provides applies *only* with regard to "information obtained by the department," and not to compliance with the "affix and display" requirement. Judicial amendment to create a new confidentiality provision out of thin air, as requested by the state, State's Brief at 40-41; *see Hall*, 540 N.W.2d at 226-27, thus is neither a proper "construction" of the statute nor reasonably foreseeable. *See Milwaukee v. Wroten*, 160 Wis.2d 207, 466 N.W.2d 861, 871 (1991) (declining to rewrite unambiguous ordinance to save its constitutionality).

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

> to adopt the construction urged by the attorney general would be an act of unjustifiable judicial legislation, and would violate the firmly established doctrine that "a *casus omissus*" does not justify judicial legislation. ... This self-imposed rule of judicial restraint is equally applicable even where the omission was a mere oversight on the part of the legislature and where the statute

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[2] Contrary to the state's suggestion, State's Brief at 37, the Fifth Amendment privilege applies "in any criminal case." U.S. Const. amend. V; Wis. Const. Art. I. §8(1). Accordingly, the privilege applies even if, as the state appears to concede, the compelled disclosure incriminates the dealer only for simple drug possession. *See* Wis. Stat. §939.12 (defining "crime").

> would have been drawn otherwise had the legislature been cognizant of its omission. ....

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

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

CONCLUSION

For these reasons, as well as for those set forth in Hicks' opening brief, the Wisconsin Tax on Controlled Substances, both as written and as implemented, unconstitutionally compels self-incrimination. This Court should say so, 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, January 31, 1996.

Respectfully submitted,

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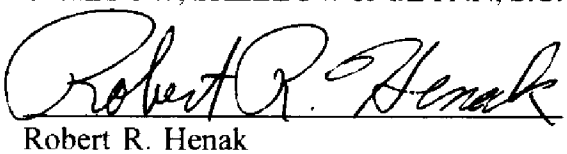

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RULE 809.18(d) CERTIFICATION

I hereby certify that this reply 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 reply brief is 2,998 words.

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