

IOWA STAMPS ON DRUGS: A CONSTITUTIONAL ANALYSIS OF IOWA CODE CHAPTER 453B

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I. INTRODUCTION

A new weapon in the struggle to combat illegal drugs was introduced in September 1990 when it became mandatory for drug dealers to purchase drug tax stamps in Iowa.¹ Iowa Code chapter 453B, entitled Excise Tax on Unlawful Dealing in Certain Substances, requires dealers to purchase and permanently affix excise tax stamps to illegally sold controlled substances.² A dealer's failure to comply with chapter 453B results in harsh civil sanctions in the form of taxes and penalties and is punishable as a class D felony.³

1. IOWA CODE § 453B.3 (1993). In the revision of titles and subtitles in the 1993 Code, Chapter 421A was transferred in its entirety to chapter 453B. All references in this Note will be to the 1993 Code.

2. *Id.* §§ 453B.1, 453B.3.

3. *Id.* § 453B.12.

Chapter 453B was enacted "to take the profit out of drugs by making the business of selling drugs more expensive to the dealer."⁴ Forfeiture statutes already empower authorities to confiscate property used for violating drug laws or to seize items purchased with profits from illegal drug sales,⁵ but the drug tax stamp differs—it is an excise tax on the transfer of illegal drugs—making drug dealing an even more unattractive endeavor.⁶ The United States Supreme Court has held states have the power to tax an illegal activity without recognizing the legitimacy of the activity being taxed.⁷

This Note begins by examining the provisions of chapter 453B,⁸ and then discusses constitutional issues regarding the chapter's enforcement. The discussion includes constitutional issues regarding chapter 453B already decided by the Iowa Supreme Court,⁹ as well as potential constitutional questions not yet raised.¹⁰

The constitutional significance of the drug tax stamp is illustrated by the fact that since December 1992, the Iowa Supreme Court has issued seven opinions discussing constitutional aspects of chapter 453B.¹¹ The challenges raised in Iowa include double jeopardy concerns,¹² Fifth Amendment attacks,¹³ and alleged due process violations.¹⁴ A survey of the judicial history of similar statutes in

4. Ruth Gatti & Linda Banger, *Where Do You Buy Drug Stamps?*, DES MOINES REG., Apr. 28, 1993, at N8. The quote is from Tom Seib, program coordinator of the Iowa Department of Revenue and Finance. *Id.* The Department of Revenue is in charge of administering the drug tax stamp. IOWA CODE § 809.1 (1993).

5. IOWA CODE § 809.1 (1993).

6. Because there have been only two purchasers of stamps, it is clear the tax was not passed for revenue raising purposes. Gatti & Banger, *supra* note 4, at N8.

7. *Marchetti v. United States*, 390 U.S. 39, 44, 51 (1968) (upholding federal tax on illegal wagering).

8. *See infra* part II.

9. *See infra* part III.

10. *See infra* part IV.

11. *State v. Welch*, 507 N.W.2d 580 (Iowa 1993); *State v. Butler*, 505 N.W.2d 806 (Iowa 1993); *State v. Ryan*, 501 N.W.2d 516 (Iowa 1993); *State v. Gallup*, 500 N.W.2d 437 (Iowa 1993); *State v. Franzen*, 495 N.W.2d 714 (Iowa 1993); *State v. Lange*, 495 N.W.2d 105 (Iowa 1992); *State v. Godbersen*, 493 N.W.2d 852 (Iowa 1992).

12. *See State v. Butler*, 505 N.W.2d at 810 (holding acquittal on charge of possession of marijuana with intent to distribute collaterally estopped relitigation of the possession issue in prosecution for failure to affix drug tax stamp); *State v. Gallup*, 500 N.W.2d at 443 (holding Iowa legislature authorized multiple punishments under chapter 453B); *State v. Franzen*, 495 N.W.2d at 717 (holding possession of marijuana is a lesser included offense of failure to affix drug tax stamp); *State v. Lange*, 495 N.W.2d at 108 (holding manufacture of controlled substance is a lesser included offense of failure to affix drug tax stamp).

13. *See State v. Godbersen*, 493 N.W.2d at 857 (resolving self-incrimination objections concerning chapter 453B).

14. *See State v. Ryan*, 501 N.W.2d at 518 (holding chapter 453B not void for vagueness); *State v. Gallup*, 500 N.W.2d at 445 (holding chapter 453B did not impose additional punishment for criminal conduct).

other states, however, reveals other constitutional issues concerning the drug tax stamp that are not yet resolved in Iowa.¹⁵

Drug tax stamp statutes have become increasingly popular since Arizona first enacted a controlled substance tax in 1983.¹⁶ In 1990, Iowa became the twenty-first state to legislate a drug tax stamp,¹⁷ and currently twenty-eight states tax controlled substances by mandating the purchase of drug tax stamps.¹⁸ Some states that have enacted drug tax stamp laws have based their statutes on laws in other states that had previously passed constitutional muster.¹⁹ Iowa's statute is based on Minnesota's drug tax stamp law,²⁰ which was the first state to have the constitutionality of its drug tax stamp law challenged and upheld.²¹

II. OVERVIEW OF CHAPTER 453B

The Director of Finance and Revenue is responsible for the administration and imposition of all fines and civil penalties under chapter 453B.²² The Department of Revenue and Finance offers dealers three different excise stamps at three different rates: stamps for marijuana are five dollars per stamp for each gram of marijuana possessed;²³ stamps for taxable substances other than marijuana, which are sold by weight and are \$250 per stamp for each gram possessed;²⁴ and stamps for each ten dosages of any taxable substance not sold by weight are \$400.²⁵ Stamps are issued in any denomination, but there is a \$215

15. See, e.g., *Zissi v. State Tax Comm'n*, 842 P.2d 848, 859 (Utah 1992) (holding the Utah drug tax stamp statute was not cruel and unusual punishment); *Sims v. Collection Div. of Utah State Tax Comm'n*, 841 P.2d 6, 10 (Utah 1992) (holding drug tax proceedings subject to state exclusionary rule); *State v. Clark*, No. 65,327, 1991 Kan. App. LEXIS 529, at *3 (Kan. Ct. App. July 19, 1991) (holding the requirement of "immediately" affixing drug tax stamp does not make compliance with the law impossible).

16. ARIZ. REV. STAT. ANN. § 42-1204 (1993).

17. Gatti & Banger, *supra* note 4, at N8.

18. ALA. CODE § 40-17A-1 (1993); ARIZ. REV. STAT. ANN. § 42-1203.01 (1993); COLO. REV. STAT. § 39-28.7-101 (1994); IDAHO CODE § 63-4201 (1993); ILL. ANN. STAT. ch. 120, para. 2162 (Smith-Hurd 1994); IOWA CODE § 453B (1993); KAN. STAT. ANN. § 79-5204 (1993); ME. REV. STAT. ANN. tit. 36, § 4433-36 (West 1994); MINN. STAT. § 279D (1990); NEB. REV. STAT. § 77-7602-16 (1990); NEV. REV. STAT. § 372A.010-.150 (1993); N.M. STAT. ANN. § 7-18A-3 (Michie 1994); N.C. GEN. STAT. § 105-113.108 (1994); N.D. CENT. CODE § 57-36.1-01 to 36.1-04 (1993); OKLA. STAT. ANN. tit. 68, § 450.4 (West 1994); TEX. TAX CODE ANN. § 159.102 (West 1994); UTAH CODE ANN. § 59-19-105 (1994); WIS. STAT. ANN. § 139.88 (West 1993).

19. See *Zissi v. State Tax Comm'n*, 842 P.2d at 858-59 (discussing the similarity of taxes and penalties among states with drug tax stamp statutes).

20. Gatti & Banger, *supra* note 4, at N8; see MINN. STAT. § 279D (1990).

21. *Sisson v. Triplett*, 428 N.W.2d 565, 574 (Minn. 1988). For an analysis of *Triplett* and a discussion of the Minnesota drug tax stamp, see Christina Joyce, Note, *Expanding the War Against Drugs: Taxing Marijuana and Controlled Substances*, 12 HAMLINE J. PUB. L. & POL'Y 231 (1991).

22. IOWA CODE § 453B.2 (1993).

23. *Id.* § 453B.7.

24. *Id.*

25. *Id.*

minimum purchase.²⁶ The stamp must be "permanently affixed on the taxable substance immediately after receiving the taxable substance," but the chapter does not specify how or where the stamp is to be attached.²⁷

A dealer is defined in section 453B.1 as

any person who ships, transports, or imports into this state or acquires, purchases, possesses, manufactures, or produces in this state any of the following:

- a. Seven or more grams of a taxable substance other than marijuana, but including a taxable substance that is a mixture of marijuana and other taxable substances.
- b. Forty-two and one-half grams or more of a substance consisting of or containing marijuana.
- c. Ten or more dosage units of a taxable substance which is not sold by weight.²⁸

This definition of dealer exempts persons who possess small amounts of controlled substances, regardless of whether they intend to sell it.²⁹ It is not an intent to sell controlled substances that classifies an individual as a dealer, rather the designation is triggered by possession of a certain quantity of drugs determined by the statute.³⁰

The civil and criminal penalties for violation of this chapter are significant. The tax owed under section 453B.7 is subject to a penalty of one hundred percent of the amount owed plus interest at two percent above the prime rate calculated from the date of assessment.³¹ A dealer caught without drug tax stamps is also guilty of a class D felony for non payment of the tax.³² A class D felony carries a five year maximum sentence and risks a fine of not more than \$7500.³³ Because chapter 453B pertains only to civil sanctions for violators, the chapter "does not provide in any manner a defense or affirmative defense to or immunity for a dealer from criminal prosecution pursuant to Iowa law."³⁴ Therefore, a criminal prosecution based on the same act for which the dealer was prosecuted under chapter 453B.12 is not precluded.³⁵

The Director of the Department of Revenue and Finance assesses the tax, interest, and penalties.³⁶ This assessment is based on "knowledge or information

26. *Id.* § 453B.8.

27. *See id.* § 453B.3.

28. *Id.* § 453B.1(3).

29. *Id.*

30. *Id.* A possible loophole in the law is that dealers might avoid the tax if they never have more than small amounts of drugs in their possession.

31. *Id.* §§ 453B.9, 422.30.

32. *Id.* § 453B.12.

33. *Id.* § 902.9(4).

34. *Id.* § 453B.5.

35. *Id.* For a discussion of the significance of § 453B.5 in the multiple punishment context of double jeopardy, see *infra* text accompanying notes 113-19.

36. IOWA CODE § 453B.9 (1993).

available to the director"³⁷ and may be imposed without an arrest or conviction of a taxpayer on drug charges.³⁸

Section 453B.9 allows tax assessments made pursuant to the chapter to be jeopardy assessments.³⁹ A jeopardy assessment authorizes the Department of Revenue and Finance to assess payment for all drug taxes, penalties, and interest owed by the dealer and obtain a distress warrant or lien to hasten collection if the assessment is not immediately paid.⁴⁰ Assessments made by the Department are presumed valid, with the burden on the dealer to prove the assessment invalid or incorrect.⁴¹ Assessment or collection of taxes imposed under section 453B.7 may not be enjoined, so dealers must rely on post-tax-collection relief to correct mistakes.⁴²

To protect dealers' Fifth Amendment right against self-incrimination, all information obtained by the Department from the dealers purchasing drug tax stamps must be kept strictly confidential.⁴³ The Department may not reveal any information about the drug tax stamp purchaser to law enforcement authorities,⁴⁴ and a Department employee breaching the strict confidentiality requirement is guilty of a simple misdemeanor.⁴⁵ As additional safeguards to the anonymity of dealers, purchasers are not required to identify themselves when purchasing stamps, and purchasers and dealers need not be the same individuals.⁴⁶

III. CONSTITUTIONAL CHALLENGES TO CHAPTER 453B

Challenges to the constitutionality of the Iowa drug tax stamp have thus far not been unique when judged by the challenges mounted to similar statutes in

37. *Id.*

38. This is an important distinction between Iowa's law and the Montana drug tax stamp, which was recently held unconstitutional on double jeopardy grounds by the United States Supreme Court. See *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1947-48 (1994). See *supra* text accompanying notes 193-204.

39. IOWA CODE § 453B.9 (1993).

40. *Id.* § 422.30.

41. *Id.* § 453B.9.

42. *Id.* It is too early to tell what changes in Iowa's jeopardy tax assessments will result from the Supreme Court's ruling in *United States v. Good Real Property*, 114 S. Ct. 492, 497 (1993), which held due process requires seizure be preceded by notice and hearing in federal civil forfeiture cases.

43. IOWA CODE § 453B.10 (1993). For an explanation of the role of § 453B.10 in protecting the chapter from Fifth Amendment attacks see *infra* text accompanying notes 151-66.

44. IOWA CODE § 453B.10 (1993); see Alan David Gould, *Criminal Law and the Fifth Amendment: Taxation of Illegal Drugs*, 1989 ANN. SURV. AM. L. 541, 548-50 (1991) (discussing the effect of state disclosure prohibitions on federal grand jury investigations). The Supremacy Clause of the United States Constitution requires compliance with federal grand jury subpoenas even if a state statute bars disclosure. *Id.* at 549.

45. IOWA CODE § 453B.10 (1993); See *infra* text accompanying notes 165-66.

46. IOWA ADMIN. CODE r. 701-91.2 (1991). "[P]ersons (including dealers) purchasing stamps are not required to provide identification such as their name or address when purchasing stamps." *Id.*; see, e.g., *State v. Godbersen*, 493 N.W.2d 852, 857 (Iowa 1992) (holding chapter 453B does not require dealers to incriminate themselves).

other states.⁴⁷ Double jeopardy concerns,⁴⁸ Fifth Amendment attacks,⁴⁹ and alleged due process violations⁵⁰ have all been raised in other states. An examination of how the Iowa Supreme Court has dealt with these challenges illustrates how the court's interpretation of the statute is developing and what avenues constitutional litigation might take in Iowa.

A. Statutes In Iowa Presumed Constitutional

Constitutional challenges place a heavy burden of proof upon the individual challenging the constitutionality of a statute.⁵¹ This is because statutes are presumed constitutional,⁵² and the court engages in any reasonable construction to uphold a statute against a constitutional challenge.⁵³ "Thus, a statute will not be declared unconstitutional unless it clearly, palpably and without a doubt, infringes the constitution."⁵⁴ The Iowa Supreme Court applied these maxims when examining the constitutionality of chapter 453B.⁵⁵

B. Double Jeopardy Challenges to Chapter 453B

The Double Jeopardy Clause of the Fifth Amendment provides no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."⁵⁶ The Iowa Constitution merely provides "[n]o person shall after acquittal, be tried for the same offense."⁵⁷ However, the Double Jeopardy Clause is applicable to state criminal trials through the Due Process Clause of the Fourteenth Amendment.⁵⁸ "The same constitutional standards for determining when jeopardy attaches must be applied equally in both federal and state courts."⁵⁹

47. See *infra* text accompanying notes 48-50.

48. E.g., *State v. Riley*, 479 N.W.2d 234, 236 (Wis. Ct. App. 1991) (holding drug tax stamp was not a punishment within the meaning of either state or federal double jeopardy protection).

49. E.g., *State v. Roberts*, 384 N.W.2d 688, 690-91 (S.D. 1986) (holding state drug tax stamp statute unconstitutional because dealers were not protected from self-incrimination).

50. E.g., *State v. Davis*, 787 P.2d 517, 524 (Utah 1990) (holding state drug tax stamp statute not void for vagueness).

51. *Kelly v. Sinclair Oil Corp.*, 476 N.W.2d 341, 348 (Iowa 1991).

52. *Id.*

53. *State v. Mehner*, 480 N.W.2d 872, 878 (Iowa 1992).

54. *Id.*

55. *State v. Ryan*, 501 N.W.2d 516, 517 (Iowa 1993); *State v. Gallup*, 500 N.W.2d 437, 441 (Iowa 1993); *State v. Godbersen*, 493 N.W.2d 852, 856 (Iowa 1992); see *State v. Butler*, 505 N.W.2d 806, 807-08 (Iowa 1993); *State v. Franzen*, 495 N.W.2d 714, 716 (Iowa 1993).

56. U.S. CONST. amend. V. The Double Jeopardy Clause includes imprisonment and monetary penalties, even though it mentions only "life or limb." See, e.g., *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1941 n.1 (1994).

57. IOWA CONST. art. 1, § 12.

58. E.g., *State v. Franzen*, 495 N.W.2d at 715.

59. *Id.* at 715-16.

The double jeopardy arguments challenge chapter 453B primarily on the basis that the state takes "two bites of the same apple" by making persons charged with drug offenses guilty of a second felony.⁶⁰ This argument alleges that chapter 453B allows multiple prosecutions and punishments for the same offense, thereby constituting double jeopardy.⁶¹ Proponents of this argument believe criminal charges of possession of a controlled substance and delivery of a controlled substance are lesser included offenses of a failure to affix drug tax stamps.⁶²

A second, closely related double jeopardy objection is based on the doctrine of collateral estoppel. This doctrine protects defendants acquitted in one trial from relitigating "ultimate facts" in a second trial on different criminal charges.⁶³ Collateral estoppel is discussed after an analysis of the lesser included offense argument because even though collateral estoppel "is viewed as one of the protections encompassed by the Double Jeopardy Clause, the federal courts agree that it is an entirely separate claim that mandates a separate analysis."⁶⁴

1. *Lesser Included Offense Analysis*

The Iowa Supreme Court recognizes that the Double Jeopardy Clause embodies three protections for defendants: "It protects against a second prosecution for the *same offense* after acquittal. It protects against a second prosecution for the *same offense* after conviction. And it protects against multiple punishments for the *same offense*."⁶⁵ It is obvious that deciding what is the "same offense" precedes the determination of whether double jeopardy principles have been offended.

i. *State v. Lange* ⁶⁶

The first decision the Iowa Supreme Court handed down concerning a double jeopardy issue in chapter 453B was *State v. Lange*. Lange claimed his guilty plea to manufacture of a controlled substance precluded—on double jeopardy grounds—his prosecution for failure to affix a drug tax stamp.⁶⁷ Police found two marijuana plants growing in Lange's closet and under section

60. *State v. Gallup*, 500 N.W.2d 437, 441 (Iowa 1993).

61. *Id.*

62. *Id.* at 441-42. For the lesser included offense analysis see *infra* text accompanying notes 65-95.

63. *State v. Butler*, 505 N.W.2d 806, 808-09 (Iowa 1993).

64. *Id.* at 809. For the collateral estoppel analysis, see *infra* text accompanying notes 137-150.

65. *State v. Butler*, 505 N.W.2d at 807 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (emphasis added)), *overruled on other grounds* by *Alabama v. Smith*, 490 U.S. 794 (1989). These protections emanate from the United States Constitution and apply to state criminal trials through the Due Process Clause of the Fourteenth Amendment. *Id.*

66. *State v. Lange*, 495 N.W.2d 105 (Iowa 1992).

67. *Id.* at 106.

124.401⁶⁸ charged him with manufacturing a controlled substance and with failure to affix a drug tax stamp, in violation of section 453B.12.⁶⁹ The court held the manufacture charge was a lesser included offense of failure to affix a drug tax stamp, and successive prosecution of the charges violated the Double Jeopardy Clause.⁷⁰

As it did in *State v. Goff*,⁷¹ the court in *Lange*⁷² applied the test from *Blockburger v. United States*.⁷³ This test states: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."⁷⁴

Without offering an explanation of what elements constituted each charged violation, the court in *Lange* summarily concluded:

All the essential legal elements of the manufacture offense are included in the legal elements of the drug stamp offense. In addition, the prosecution of the tax stamp offense will involve proof of conduct that was established in the manufacture case. As such, successive prosecutions would violate the Fifth Amendment prohibition against double jeopardy.⁷⁵

The court explained how to determine when one offense is a lesser included offense of the other: "If the greater offense cannot be committed without committing the lesser offense, the lesser offense is legally an included offense. On the contrary, if the greater offense can be committed without committing the lesser offense, the lesser offense is not legally an included offense."⁷⁶

Though the case was ultimately decided against the defendant on other grounds,⁷⁷ the court recognized that the manufacture of a controlled substance is

68. In the revision of titles and subtitles in the 1993 Code, § 204.401, Controlled Substances, Offenses and Penalties, was transferred in its entirety to § 124.401. All references in this Note are to the 1993 Code.

69. *State v. Lange*, 495 N.W.2d at 106.

70. *Id.* at 107.

71. *State v. Goff*, 342 N.W.2d 830, 835 (Iowa 1983).

72. *State v. Lange*, 495 N.W.2d at 106-07.

73. *Blockburger v. United States*, 284 U.S. 299 (1932).

74. *State v. Lange*, 495 N.W.2d at 106 (quoting *Blockburger v. United States*, 284 U.S. at 304).

75. *Id.* at 107.

76. *Id.* at 106-07 (quoting *State v. Goff*, 342 N.W.2d at 835). *Goff* required a lesser included offense to be both "factually" and "legally" included in the greater offense. *State v. Goff*, 342 N.W.2d at 835. The factual test requires enough evidence be introduced at trial to support a jury instruction on a lesser included offense. *Id.* The legal test is the language quoted above. *Id.*

77. *State v. Lange*, 495 N.W.2d 105, 108 (Iowa 1992). The issue upon which the appeal was decided was whether *Lange* waived his right against subsequent prosecution by choosing to have the two charges tried separately. *Id.* at 107. The court held that when *Lange* resisted the State's motion of consolidation for a single trial he waived his right to the double jeopardy

a lesser included offense of failure to affix a drug tax stamp, and subsequent prosecutions of the crimes violated the Double Jeopardy Clause.⁷⁸

ii. *State v. Franzen*⁷⁹

The court analyzed section 124.401(3), possession of marijuana, as a lesser included offense of section 453B.12, failure to affix a drug tax stamp, in *State v. Franzen*. *Franzen* consolidated four appeals taken by the State from dismissals of drug tax stamp violations.⁸⁰ The charges were dropped because the defendants pled guilty to possession of marijuana charges.⁸¹ The appeals were consolidated because they involved the same issue: "Does a guilty plea to a lesser included offense in a multicount criminal information raise a double jeopardy bar to prosecution on the greater offense?"⁸² The court held that while possession was a lesser included offense of a failure to affix a drug tax stamp, a guilty plea to possession did not prevent a trial on the drug tax stamp charge.⁸³ Double jeopardy protection is only available as a shield and not a sword.⁸⁴

The court determined that while the Double Jeopardy Clause protects the accused from multiple prosecutions and multiple punishments, these protections serve different purposes.⁸⁵ The subsequent protection serves as a restraint on the courts and prosecutors because it prevents the state from retrying defendants on different charges based on the same facts.⁸⁶ Protecting the accused from multiple

protection a single trial afforded him. *Id.* at 108. "There is no violation of the double jeopardy clause when the defendant elects to have charges on a greater offense and a lesser offense tried separately and persuades the court to honor the election." *Id.*

The protection in the Double Jeopardy Clause is personal and the defendant's voluntary actions and choices may waive it. *Jeffers v. United States*, 432 U.S. 137, 151-54 (1977). This basic tenant of procedural double jeopardy prevents defendants from avoiding prosecution of the greater offense by pleading guilty to the lesser offense before the greater offense is tried. *See id.*

78. *State v. Lange*, 495 N.W.2d at 107.

79. *State v. Franzen*, 495 N.W.2d 714, 715-16 (Iowa 1993).

80. *Id.* at 715.

81. *Id.*

82. *Id.*

83. *Id.* at 717.

84. *Id.* at 718. As in *Lange*, the ultimate disposition of *Franzen* depended on procedural double jeopardy protections. *Id.* The court held the State's position was supported by IOWA CODE § 701.9 (1993), which provides:

No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter a judgment of guilty of the greater of the offenses only.

State v. Franzen, 495 N.W.2d 714, 719 (Iowa 1993) (quoting IOWA CODE § 701.9 (1993)). The court ruled § 701.9 barred conviction of the lesser included offense only if the defendant is convicted of the greater offense first. *Id.* It did not preclude prosecution for the greater offense upon conviction of the lesser offense. *Id.*

85. *Id.* at 716 (citing *North Carolina v. Pearce*, 395 U.S. 711, 714 (1969)), *overruled on other grounds* by *Alabama v. Smith*, 490 U.S. 794 (1989).

86. *Id.* The court gave the following rationale for double jeopardy protection:

The constitutional prohibition against double jeopardy was "designed to protect an individual from being subjected to the hazards of trial and possible conviction

punishments stemming from the same act is a matter of statutory construction; the legislature determines what sanctions accompany criminal convictions.⁸⁷

The court concluded the double jeopardy issue in *Franzen* related to multiple prosecutions and not multiple punishments.⁸⁸ Thus, as in *Lange*, application of the *Blockburger* test was appropriate to determine whether the Double Jeopardy Clause barred further prosecution.⁸⁹ Unlike *Lange*, however, the court in *Franzen* explained its elemental analysis of the two sections in controversy, sections 124.401(3) and 453B.12.⁹⁰

The court found the State's argument that possession of marijuana was not a lesser included offense of possession of marijuana did not stand up under analysis.⁹¹

Subsection [124].401(3) provides: "[i]t is unlawful for any person knowingly or intentionally to possess a controlled substance. . . ." Subsection [124].401(1) provides: "it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance" Although this subsection does not expressly require that the defendant "knowingly or intentionally" possess a controlled substance, the state is required to prove both that the defendant knowingly or intentionally possessed a controlled substance, and that the defendant knew the substance he or she possessed was a controlled substance in the prosecution of charges under either subsection [124].401(1) or subsection [124].401(3).⁹²

In rejecting the State's argument that possession is not a lesser included offense, the court pointed to the requirement in section 453B.1(3) that a dealer "*possess [f]orty-two and one-half grams or more of a substance consisting of or containing marijuana.*"⁹³ The court concluded its analysis by noting:

It would indeed be strange if conviction of possession of marijuana, a misdemeanor, would require proof of knowledge or intention, while conviction of failure to affix a drug tax stamp upon marijuana that a dealer possesses, a felony, would not require such proof. We conclude each defendant's

more than once for an alleged offense." It is based upon the principles of finality and the prevention of prosecutorial overreaching. The principle reflects a concern that a state should not be allowed to make repeated attempts to convict an individual for an alleged offense.

Id. (citations omitted).

87. *Id.*; *State v. Gallup*, 500 N.W.2d 437, 445 (Iowa 1993); *see infra* text accompanying notes 96-136.

88. *State v. Franzen*, 495 N.W.2d at 718.

89. *Id.* at 716.

90. *Id.* at 716-17.

91. *Id.*

92. *Id.* at 717 (citations omitted).

93. *Id.* (emphasis added).

possession of marijuana is a lesser included offense of failure to affix a drug tax stamp.⁹⁴

The court held it would violate the double jeopardy protection against trying defendants twice for the same crime if the State moved to prosecute the offenses separately.⁹⁵

2. Multiple or Cumulative Punishment Analysis

i. State v. Gallup⁹⁶

Three months after *Franzen* was decided, the court handed down another opinion concerning a double jeopardy challenge to chapter 453B. In *State v. Gallup*, the defendant was convicted in a single trial of violating section 124.401(1)(b)(5), delivery of lysergic acid diethylamide (LSD), and section 453B.12, failure to purchase drug tax stamps.⁹⁷ The district court imposed concurrent sentences for each crime.⁹⁸ Gallup complained in his appeal that chapter 453B offended the Double Jeopardy Clause because it allowed multiple punishments for the same offense.⁹⁹

The court's analysis in *Gallup* extends beyond its analysis in *Lange* and *Franzen*. In *Lange* and *Franzen*, the issue was whether a section 124.401 violation was a lesser included offense of chapter 453B.¹⁰⁰ In *Gallup*, the court scrutinized the section and the applicable statutes to determine whether the legislature intended multiple or cumulative punishments.¹⁰¹

The *Gallup* court gave a clear explanation of why delivery of LSD is a lesser included offense of a drug tax stamp violation.¹⁰² Using the legal elements test from *Blockburger*,¹⁰³ the court set out the essential elements of each offense as:

Iowa Code section [124].401(1)(b)(5)

(1) intentional manufacture, delivery, or possession of

(2) not more than ten grams of a mixture or substance containing a detectable amount of LSD.

Iowa Code section [453B].12

(1) unlawful possession, distribution or offer to sell

94. *Id.*

95. *Id.* This did not mean double jeopardy was offended if the defendant moved to try the crimes separately. See *supra* notes 77, 84.

96. *State v. Gallup*, 500 N.W.2d 437 (Iowa 1993).

97. *Id.* at 439.

98. *Id.* at 441.

99. *Id.*

100. See *supra* text accompanying notes 66-95.

101. *State v. Gallup*, 500 N.W.2d 439, 441-43 (Iowa 1993).

102. *Id.* at 441-42.

103. See *supra* text accompanying notes 71-74.

- (2) ten or more dosage units of LSD
- (3) without a stamp, label or other official indicia evidencing that the tax imposed by chapter [453B] has been paid.¹⁰⁴

In finding that the emphasized words of section 124.401(1)(b)(5) correspond with the emphasized words in 453B.12, the court held delivery of LSD to be a lesser included offense of the drug tax stamp violation.¹⁰⁵ The fact the lesser included offense carries a higher penalty than the greater offense makes no difference in the analysis.¹⁰⁶ The controlling factor is "the greater offense cannot be committed without committing the lesser offense."¹⁰⁷ The court thus determined, consistent with *Lange* and *Franzen*, failure to affix drug tax stamps is a lesser included offense of delivery of a controlled substance.¹⁰⁸

The *Gallup* court, however, found the legal elements test of *Blockburger* to be "determinative of double jeopardy only when legislative intent is not clearly expressed by statute."¹⁰⁹ In other words, if the Iowa Code specifically authorized additional punishment for a lesser included offense, the *Blockburger* test does not apply.¹¹⁰ The court based this view of *Blockburger* on *Missouri v. Hunter*,¹¹¹ which held:

simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction . . . is not a constitutional rule requiring courts to negate clearly expressed legislative intent Legislatures, not courts, prescribe the scope of punishments.¹¹²

Thus, imposition of *cumulative* punishments for violating different statutes describing essentially the same crime does not violate double jeopardy protections.¹¹³ Cumulative punishment in a single trial is distinct from multiple punishments that arise from different trials.¹¹⁴

104. *State v. Gallup*, 500 N.W.2d at 442.

105. *Id.*

106. *Id.* Delivery carries a twenty-five-year indeterminate sentence. IOWA CODE §§ 124.401(1)(b)(5), 902.9(1) (1993). The drug tax stamp violation carries a five-year indeterminate sentence. *Id.* §§ 453B.12, 902.9(4).

107. *State v. Gallup*, 500 N.W.2d 437, 441 (Iowa 1993).

108. *Id.* at 442.

109. *Id.* at 443.

110. *Id.* at 442-43.

111. *Missouri v. Hunter*, 459 U.S. 359 (1983).

112. *State v. Gallup*, 500 N.W.2d 437, 442 (Iowa 1993) (quoting *Missouri v. Hunter*, 459 U.S. at 368).

113. *Id.* (citing *Missouri v. Hunter*, 459 U.S. at 368).

114. *Id.* (citing *Missouri v. Hunter*, 459 U.S. at 368-69).

Under *Hunter*, cumulative punishment is allowed if the legislature specifically provides for it.¹¹⁵ The task for the court in *Gallup* was to determine "whether the legislature intended that a person convicted under section[s] [124].401(1)(b)(5) and [453B].12 be punished for each offense."¹¹⁶ In deciding this question the court found the language in section 453B.5 indicative of legislative intent: "This chapter *does not prove in any manner a defense or affirmative defense* to or immunity for a dealer from criminal prosecution pursuant to Iowa law."¹¹⁷ In discussing section 453B.5 the court held:

Clearly, the main thrust of section [453B].5 is that compliance with the requirements of chapter [453B] does not insulate a dealer who distributes a taxable substance like LSD from prosecution or conviction under Iowa law. But section [453B].12 accomplishes more than this. Section [453B].12 authorizes conviction and punishment for failure to attach the drug tax stamp. Because chapter [453B] does not insulate one from criminal prosecution under Iowa law and because chapter [453B] contains its own penal provision under section [453B].12, we construe section [453B].5 to mean that prosecution under section [453B].12 was not intended to bar additional prosecution under Iowa law.¹¹⁸

The court concluded section 453B.12 would not have been enacted to provide for punishment in addition to penalties under section 124.401 unless the legislature specifically intended cumulative punishment.¹¹⁹

The court also concluded that "[h]aving authorized additional conviction, surely the legislature also intended that additional punishment could be imposed."¹²⁰ It is meaningless to gain a conviction if there is no sentence.¹²¹ In support of this conclusion, the supreme court instructed the district courts to try the cases in a single proceeding, but to submit the two counts to a jury separately and render separate sentences on each count if the defendant is convicted.¹²²

ii. *State v. Butler*¹²³

Three months after *Gallup*, the court held intent to deliver was not a lesser included offense of failure to affix a drug tax stamp, and therefore, separate trials for the offenses were not precluded on double jeopardy grounds.¹²⁴ The issue in *State v. Butler* was whether the State could prosecute Butler for failure to affix a

115. *Missouri v. Hunter*, 459 U.S. at 368.

116. *State v. Gallup*, 500 N.W.2d at 443.

117. *Id.*

118. *Id.* (citation omitted).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 445. The court notes that double jeopardy concerns require the prosecutor to bring both charges in one trial. *Id.* at 443 (citing *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983)).

123. *State v. Butler*, 505 N.W.2d 806 (Iowa 1993).

124. *Id.* at 808.

drug tax stamp after a jury had already acquitted him of charges of possession with intent to deliver.¹²⁵

The *Butler* court based its lesser included offense analysis on *United States v. Dixon*,¹²⁶ which expressly overruled *Grady v. Corbin*.¹²⁷ *Grady* added to the "same elements" double jeopardy analysis of *Blockburger* by barring subsequent prosecution when "the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."¹²⁸ By overruling this expansion of the *Blockburger* test, the Supreme Court returned double jeopardy protection to merely "whether each provision requires proof of a fact which the other does not."¹²⁹

Comparing the essential elements of intent to deliver with failure to affix drug tax stamps, the court in *Butler* decided that the two charges contained separate elements requiring proof of different facts:

The essential elements of the possession with intent to deliver charge are that (1) Butler knowingly possessed a controlled substance, (2) with intent to deliver. The essential elements of the drug tax stamp charge are that (1) he is a dealer who knowingly possessed a taxable substance, (2) without a stamp. . . . The definition of a dealer includes a person who possesses a certain quantity of a controlled substance.¹³⁰

The court found that proving nonpayment of the tax and proving an intent to deliver required different proofs, and, therefore, the two counts were not the same offense.¹³¹

The holding in *Butler* appears to overrule the earlier lesser include offense decisions in *Lange*, *Franzen*, and *Gallup*, but as a practical matter, *Butler* changes little. There is, however, a slight advantage to prosecuting defendants in

125. *Id.* at 806-07. The charges had been severed on the defendant's motion. *Id.* at 807. For discussion of the collateral estoppel issues raised by the case see *infra* text accompanying notes 137-50.

126. *United States v. Dixon*, 113 S. Ct. 2849 (1993).

127. *Id.* at 2852; see *Grady v. Corbin*, 495 U.S. 508 (1990), overruled by *United States v. Dixon*, 113 S. Ct. 2849 (1993).

128. *Grady v. Corbin*, 495 U.S. at 521.

129. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); see *State v. Butler*, 505 N.W.2d 806, 808 (Iowa 1993) (applying the same elements test to determine whether one charged offenses require proof of a fact that the other does not).

130. *State v. Butler*, 505 N.W.2d at 808. *Butler* was charged with intent to deliver in violation of IOWA CODE §§ 124.401(1)(d), 124.204(4) (1993), and failure to affix a drug tax stamp in violation of IOWA CODE §§ 453B.12, 453B.1(3), 453B.3, 453B.7 (1993). *Id.* at 807.

131. *Id.* It is interesting to note how the two statutes, which are essentially the same, were analyzed three months apart with different results. See *supra* text accompanying notes 94-100. The *Butler* court fails to mention the contrary lesser included offense holdings from *Lange*, *Franzen*, or *Gallup*.

separate trials when *Gallup* already interprets chapter 453B to allow cumulative sentencing in a single trial.¹³²

The unfortunate consequence of *Butler* is that defendants and prosecutors are offered no instruction by the court as to whether *Lange*, *Franzen* and *Gallup* remain good law. While *Gallup*'s decision, which precludes separate trials for a drug tax stamp violation and an intent to deliver charge,¹³³ appears overruled by *Butler*, the court neglects to say so. Even less clear is whether possession of marijuana¹³⁴ or manufacture of a controlled substance¹³⁵ remain lesser included offenses of the failure to affix drug tax stamps.

There is no doubt the United States Supreme Court's ruling in *Dixon* altered the lesser included offense analysis in Iowa; however, the Iowa Supreme Court declined in both *Butler* and *State v. Welch*¹³⁶ to explicitly declare that violations under chapter 124.401 are no longer considered lesser included offenses under chapter 453B. In order to prepare for trial, and prevent unnecessary litigation, prosecutors and defendants require guidance on how violations of chapter 453B ought to be charged and tried.

3. Collateral Estoppel Doctrine

The collateral estoppel doctrine "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."¹³⁷ While encompassed in the Double Jeopardy Clause, collateral estoppel is a separate claim.¹³⁸ In *State v. Butler*, the court held collateral estoppel was not co-extensive with double jeopardy because collateral estoppel "only applies in criminal cases when double jeopardy does not."¹³⁹ If two offenses are not the same under a double jeopardy or lesser included offense analysis, a successive prosecution may still be barred if the second prosecution requires relitigation of the ultimate factual issues resolved in the first proceeding.¹⁴⁰

132. See *supra* text accompanying notes 101-14. Additionally, *Butler* holds that the collateral estoppel doctrine precludes multiple trials by preventing relitigation of ultimate facts. *State v. Butler*, 505 N.W.2d at 810.

133. See *supra* text accompanying note 113-14.

134. Possession of marijuana—IOWA CODE § 124.401(3) (1993)—was the lesser included offense in *Franzen*. *State v. Franzen*, 495 N.W.2d 714, 715 (Iowa 1993).

135. Manufacture of a controlled substance—IOWA CODE § 124.401(1)(d) (1993)—was the lesser included offense in *Lange*. *State v. Lange*, 495 N.W.2d 105, 106 (Iowa 1992).

136. *State v. Welch*, 507 N.W.2d 580 (Iowa 1993). Without discussion, the court summarily dismissed the defendant's double jeopardy argument by stating that *Butler* is controlling. *Id.* at 584.

137. *State v. Butler*, 505 N.W.2d 806, 808 (Iowa 1993) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)).

138. *Id.* at 809.

139. *Id.* at 810.

140. See e.g., *State v. Stergion*, 248 N.W.2d 911, 912-13 (Iowa 1976) (applying the doctrine of collateral estoppel when double jeopardy was not a bar to successive prosecutions).

The importance of the collateral estoppel doctrine for prosecutions under the drug tax stamp law became apparent in *Butler*.¹⁴¹ The defendant had been acquitted in a previous trial on the charge of intent to deliver, but the *Butler* court held that successive prosecutions were not barred on double jeopardy grounds because possession with intent to deliver is not a lesser included offense of failure to affix a drug tax stamp.¹⁴² The court did, however, bar a subsequent trial on collateral estoppel grounds.¹⁴³

The court concluded that because *Butler* was acquitted of the possession with intent to deliver charge, "the jury must have necessarily found he did not possess marijuana. Therefore, the State is estopped from proving an essential element of the drug tax offense, *i.e.*, possession of marijuana, because this issue has already been decided in *Butler's* favor by the jury verdict."¹⁴⁴ The court agreed with *Butler's* assertion that possession is an essential element of the drug tax stamp offense: "In finding the State failed to prove *Butler* guilty of possession of marijuana, the jury must have grounded its verdict upon the very issue essential in the second count. Under these circumstances, collateral estoppel will bar a trial on the drug tax charge."¹⁴⁵

The court was also faced with the issue of whether *Butler* waived his right to a collateral estoppel defense when he filed the motion to sever the charges.¹⁴⁶ In *Lange*, the court held the defendant could waive the double jeopardy protection if the defendant "elects to have charges on a greater offense and a lesser offense tried separately and persuades the court to honor the election."¹⁴⁷ In *Butler*, however, the court opined that application of waiver to a collateral estoppel defense defeats the purpose of the doctrine—to prevent the state from having "the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through trial."¹⁴⁸ Because they are not the same offense for double jeopardy purposes, collateral estoppel does not prevent the state from prosecuting the offenses separately and winning convictions in both.¹⁴⁹

The court summed up the case by stating:

Although *Butler* certainly waived his right to protest a second prosecution under double jeopardy, we find no reason to conclude collateral estoppel is likewise waived. *Butler* is not attempting to use collateral estoppel as a sword to prevent the State from having its one full opportunity to prosecute, but rather as a shield to prevent the State from having the opportunity to

141. *State v. Butler*, 505 N.W.2d at 808-10.

142. *Id.* at 808.

143. *Id.* at 810.

144. *Id.* at 809.

145. *Id.*

146. *Id.*

147. *State v. Lange*, 495 N.W.2d 105, 108 (Iowa 1993).

148. *State v. Butler*, 505 N.W.2d 806, 810 (Iowa 1993) (quoting *Ohio v. Johnson*, 467 U.S. 493, 501-02 (1984)).

149. *Id.* (citing *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993)).

relitigate the issue of possession which was decided in the prior trial. We believe the State had a full and fair opportunity to try the possession charges. Therefore, the State is estopped from proceeding to trial on the second count. To hold otherwise would violate our notions of fundamental fairness and deny Butler the full benefits of the protections embodied in the Double Jeopardy Clause.¹⁵⁰

C. Fifth Amendment Challenges to Chapter 453B

Arguably, the most obvious challenge to chapter 453B is under the Fifth Amendment on self-incrimination grounds. How do dealers avoid incriminating themselves when they are required to notify a state agency of their illegal activities by purchasing drug tax stamps? The Fifth Amendment protects people from being compelled to incriminate themselves.¹⁵¹

In *Leary v. United States*,¹⁵² *Marchetti v. United States*,¹⁵³ and *Grosso v. United States*,¹⁵⁴ the Supreme Court considered the impact of tax laws on the guarantee against self-incrimination. In each case, the Court affirmed the rule that Congress can tax an illegal activity as long as the tax's purpose is not to furnish information to prosecutors.¹⁵⁵

*State v. Godbersen*¹⁵⁶ is the seminal case in Iowa concerning the Fifth Amendment and the drug stamp tax.¹⁵⁷ In *Godbersen*, the court applied the three-part test from *Marchetti*.¹⁵⁸ This test is applied to determine the constitutionality of a tax challenged on Fifth Amendment grounds:¹⁵⁹

(1) whether the tax is aimed at individuals "inherently suspect of criminal activities," and whether the tax activity is in "an area permeated with criminal statutes;" (2) whether an individual is "required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities;" (3) whether such information "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt." The Court noted "[t]he central standard for the privi-

150. *Id.*

151. U.S. CONST. amend. V.

152. *Leary v. United States*, 395 U.S. 6, 27 (1969) (holding the federal marijuana tax act (since repealed) required the defendant to incriminate himself).

153. *Marchetti v. United States*, 390 U.S. 39, 60-61 (1968) (holding the defendant's assertion of privilege against self-incrimination constituted a complete defense to prosecution).

154. *Grosso v. United States*, 390 U.S. 62, 67 (1968) (holding payment of excise tax on gambling would have obliged the defendant to incriminate himself).

155. *Leary v. United States*, 395 U.S. at 26, 27; *Marchetti v. United States*, 390 U.S. at 60-61; *Grosso v. United States*, 390 U.S. at 66.

156. *State v. Godbersen*, 493 N.W.2d 852 (Iowa 1992).

157. In other cases containing Fifth Amendment challenges to chapter 453B, the court summarily upheld the chapter by merely citing *Godbersen*. See e.g., *State v. Gallup*, 500 N.W.2d 437, 443-44 (1993).

158. *State v. Godbersen*, 493 N.W.2d at 856.

159. *Id.*

lege's application has been whether the claimant is confronted by substantial and 'real', and not merely trifling or imaginary, hazards or incrimination."¹⁶⁰

The court held chapter 453B passed the *Marchetti* test for constitutionality.¹⁶¹ In support of its decision, attention was focused on the confidentiality provision in section 453B.10.¹⁶² Section 453B.10 assures anonymity to dealers purchasing drug tax stamps and prohibits information obtained from dealers in compliance with the law from being released or used against the dealer in criminal prosecutions.¹⁶³ The court noted the Iowa Administrative Code also prohibits Department of Revenue employees from revealing any information obtained from a stamp purchaser.¹⁶⁴ Because the criminal penalty for a department employee revealing information is a misdemeanor, the anonymity for the stamp purchaser is further assured.¹⁶⁵ The court was satisfied that the purpose of chapter 453B was not to furnish information to prosecutors, and chapter 453B did not violate the right against self-incrimination.¹⁶⁶

160. *Id.* (citations omitted).

161. *Id.* at 857.

162. *Id.*

Notwithstanding any law to the contrary, the director or an employee of the department shall not reveal any information obtained from a dealer, nor shall information obtained from a dealer be used against the dealer in any criminal proceeding, unless the information is independently obtained, except in connection with a proceeding involving taxes due under this chapter from the dealer against whom the tax was assessed.

A person who violates this section is guilty of a simple misdemeanor.

This section does not prohibit the director from publishing statistics that do not disclose the identity of the dealers.

A stamp, label, or other official indicia denoting payment of the tax imposed under this chapter shall not be used against a taxpayer in a criminal proceeding, except when such information may be used against the taxpayer in connection with the administration or civil or criminal enforcement of the tax imposed under this chapter or any similar tax imposed by another state or local unit of government.

IOWA CODE § 453B.10 (1993).

163. *State v. Godbersen*, 493 N.W.2d 852, 857 (Iowa 1992); IOWA CODE § 453B.10 (1993).

164. *State v. Godbersen*, 493 N.W.2d at 857; IOWA ADMIN. CODE r. 701-91.2 (1991).

165. *State v. Godbersen*, 493 N.W.2d at 857. It is interesting to note that the United States Supreme Court, in both *Marchetti* and *Grosso*, did not require Congress to include criminal punishment in nondisclosure provisions of federal law designed to reduce the risk of self-incrimination. See *Marchetti v. United States*, 390 U.S. 39, 54 (1968); *Grosso v. United States*, 390 U.S. 62, 66-67 (1968).

166. *State v. Godbersen*, 493 N.W.2d at 857. Other state courts have likewise construed similar statutes. See e.g., *State v. Davis*, 787 P.2d 517 (Utah Ct. App. 1990); *State v. Durrant*, 769 P.2d 1174 (Kan. 1989) *cert. denied sub nom. Dressel v. Kansas*, 492 U.S. 923 (1989); *Sisson v. Triplett*, 428 N.W.2d 565 (Minn. 1988); cf. *State v. Roberts*, 384 N.W.2d 688 (S.D. 1986) (striking down South Dakota's drug tax statute on Fifth Amendment grounds because the law allowed for the release of tax information to police, thus creating a real risk of self-incrimination).

D. Due Process Challenges to Chapter 453B

The Iowa Supreme Court has discussed two due process challenges to chapter 453B. In *State v. Ryan*,¹⁶⁷ the court quickly and easily dispatched the claim that chapter 453B was void for vagueness.¹⁶⁸ In *State v. Gallup*,¹⁶⁹ the court rejected the claim that the tax and its penalty are actually disguised criminal penalties.¹⁷⁰

1. Void for Vagueness

In *Ryan*, the defendant asserted that chapter 453B was void for vagueness because "he had no way of knowing how to comply with the law."¹⁷¹ The claim resulted from the absence of administrative rules to enforce the chapter.¹⁷² Section 453B.2 instructs the Director of the Department of Revenue and Finance to "adopt a uniform system of providing, affixing, and displaying official stamps, labels, or other official indicia for taxable substances."¹⁷³ These rules had not yet been formulated, and without them, Ryan claimed the law was too vague. The court, however, disagreed.¹⁷⁴

A statute is void for vagueness under the Due Process Clause of the Fourteenth Amendment if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."¹⁷⁵ For a criminal statute to pass this test, it "must give a person of ordinary intelligence fair warning of what is prohibited, and, in order to avoid discriminatory enforcement, it must provide an explicit standard for those who apply it."¹⁷⁶

The court was not persuaded that the administrative enforcement rules were necessary to provide an explicit warning of prohibited behavior.¹⁷⁷ The court noted section 453B.3 prohibits a dealer from possessing a taxable substance unless the tax is paid, section 453B.7(1) fixes the amount of tax due, and section

167. *State v. Ryan*, 501 N.W.2d 516 (Iowa 1993).

168. *Id.* at 518. The court also briefly discussed whether the statute was overly broad, even though the court decided Ryan waived any overbreadth challenges. *Id.* at 517-18. For a successful overbreadth challenge to chapter 453B, the defendant must demonstrate the statute "attempts to achieve a governmental purpose to control or prevent activities constitutionally subject to state regulation by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Id.* at 517 (quoting *City of Maquoketa v. Russell*, 484 N.W.2d 179, 181 (Iowa 1982)). An overbreadth analysis is limited to a denial of First Amendment rights. *Id.* at 518.

169. *State v. Gallup*, 500 N.W.2d 437 (Iowa 1993).

170. *Id.* at 444-45.

171. *State v. Ryan*, 501 N.W.2d at 518.

172. *Id.*

173. IOWA CODE § 453B.2 (1993).

174. *State v. Ryan*, 501 N.W.2d 516, 518 (Iowa 1993).

175. *Id.* (quoting *State v. Lee*, 315 N.W.2d 60, 62 (Iowa 1982)).

176. *Id.* (quoting *State v. Speck*, 242 N.W.2d 287, 290 (Iowa 1976)).

177. *Id.*

453B.8 requires payment of the tax to the Department of Revenue and Finance.¹⁷⁸ The court held "the Iowa Code provision[] sketched out above did provide . . . such knowledge [of prohibited behavior]. We see no constitutional infirmity based on vagueness in chapter [453B]."¹⁷⁹

2. *Taxes Under Chapter 453B Are Not Additional Criminal Sanctions*

In *State v. Gallup*,¹⁸⁰ the defendant challenged chapter 453B under the Due Process Clause of the Fifth Amendment, which prevents individuals from being deprived of their property "without due process of law."¹⁸¹ Gallup claimed the tax in chapter 453B is so disproportionate to the value of the drugs, that it is not a tax, but additional punishment for which he is denied criminal due process.¹⁸²

The court, relying on *United States v. Sanchez*,¹⁸³ rejected Gallup's claim.¹⁸⁴ *Sanchez* upheld the federal marijuana tax statute (now repealed)¹⁸⁵ against a Fifth Amendment challenge,¹⁸⁶ and the *Gallup* court found the reasoning in *Sanchez* persuasive:

One, a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed, even though the revenue obtained is obviously negligible or the revenue purpose of the tax is secondary. . . .

And, two, the tax levied under the statute was not conditioned upon the commission of a crime. The tax was on the transfer of the marijuana. The taxing statute did not per se make such a transfer a crime; the failure to pay the tax gave rise to the liability. For that reason the tax was considered a civil, rather than a criminal, sanction.¹⁸⁷

The court noted section 453B.7(2) imposes an excise tax, and, under section 453B.7, a dealer who does not pay the tax must pay a penalty equal to the amount of tax owed.¹⁸⁸ Section 453B.9 further provides a civil procedure for tax collection.¹⁸⁹ Because the legislature was properly exercising its legitimate taxing power, the above sections were "indicative of legislative intent to treat the tax

178. *Id.*

179. *Id.*

180. *State v. Gallup*, 500 N.W.2d 437 (Iowa 1993).

181. *Id.* at 444.

182. *Id.* A criminal fine is not permissible without a judicial proceeding to prove the defendant's guilt beyond a reasonable doubt. *See generally In re Winship*, 397 U.S. 358 (1970).

183. *United States v. Sanchez*, 340 U.S. 42 (1950).

184. *State v. Gallup*, 500 N.W.2d at 444-45.

185. Marijuana Tax Act of 1937, ch. 553, 50 Stat. 551 (1937) (repealed 1970).

186. *United States v. Sanchez*, 340 U.S. at 45.

187. *State v. Gallup*, 500 N.W.2d 437, 444 (Iowa 1993) (citing *United States v. Sanchez* 340 U.S. at 44-45).

188. *Id.*

189. *Id.*; *see supra* text accompanying notes 31-34.

and penalty as a civil sanction.”¹⁹⁰ Following the *Sanchez* test, the *Gallup* court found the tax was imposed not due to a commission of a crime, but due to a transfer of a controlled substance.¹⁹¹

Because chapter 453B is a valid exercise of the legislature’s taxing power, and the drug tax stamp is not conditioned on committing a crime, the court upheld chapter 453B.¹⁹²

IV. POTENTIAL CONSTITUTIONAL CHALLENGES TO CHAPTER 453B

The preceding discussion centered on challenges already made to Iowa’s drug tax stamp law. There are, however, constitutional issues pertaining to drug taxes which have not yet been raised in Iowa. The following survey examines several cases raising issues which could conceivably be litigated in Iowa courts.

A. Department of Revenue v. Kurth Ranch¹⁹³

Department of Revenue v. Kurth Ranch is the only Supreme Court case discussing the constitutionality of a state law imposing taxes on illegal drugs. Even though there are significant differences between the Montana law and Iowa’s drug tax stamp law, examination of the case illustrates why Iowa’s law is not susceptible to similar constitutional attacks.

Montana’s Dangerous Drug Tax Act¹⁹⁴ differed from Iowa Code chapter 453B because the Montana tax was imposed only after the taxpayer was arrested on drug charges.¹⁹⁵ Under Montana law, the taxpayer’s obligation to file a return was triggered solely by being arrested.¹⁹⁶ This provision led the Supreme Court to observe:

190. *State v. Gallup*, 500 N.W.2d at 445. *But see* *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994). In *Kurth Ranch*, the Supreme Court analyzed Montana’s drug tax statute and found the tax to be an additional criminal sanction. *Id.* The Court stated the legislative description of a statute as a civil remedy does not foreclose the possibility that it has a punitive character. *Id.*

191. *Id.*; *see* *United States v. Sanchez*, 340 U.S. 42, 45 (1950).

192. *State v. Gallup*, 500 N.W.2d 437, 445 (Iowa 1993). One of the reasons the Supreme Court invalidated Montana’s drug tax stamp was that the obligation to pay the tax did not arise unless the taxpayer was arrested for possession of illegal drugs. *Department of Revenue v. Kurth Ranch*, 114 S. Ct. at 1947. In *Kurth Ranch*, the Supreme Court noted that *Sanchez* upheld the federal marijuana tax precisely because it was not based on criminal conduct, but rather on the transfer of marijuana. *Id.*

193. *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994).

194. MONT. CODE ANN. §§ 15-25-101 to 15-25-123 (1987). The 1987 Code was the edition in effect at the time the defendants were arrested and is the edition to which this Note refers.

195. *Id.* § 15-25-113(1); *see* IOWA CODE § 453B.9 (1993).

196. *Id.* § 15-25-113. Under Iowa Code § 453B.9 the Director of the Department of Revenue levies the tax based on his knowledge and belief. IOWA CODE § 453B.9 (1993). The taxpayer does not have to be arrested before the tax is levied. *Id.*

[T]his so-called tax is conditioned on the commission of a crime. That condition is "*significant of penal and prohibitory intent rather than the gathering of revenue.*" . . . In this case, the tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place.¹⁹⁷

The court also noted that neither an obvious deterrent purpose or a high rate of taxation¹⁹⁸ automatically transformed the tax into a form of punishment, but these factors were "at least consistent with a punitive character."¹⁹⁹

A third characteristic the Court found exceptional was that the tax purported to be a property tax, yet was levied on property that was neither owned nor possessed by the taxpayer when the tax was imposed.²⁰⁰ "A tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character. This tax, imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment."²⁰¹

The Court concluded that, taken as a whole, Montana's tax on illegal drugs was "a concoction of anomalies, too far-removed in crucial aspects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis."²⁰² The decision that the tax was a second punishment, "and therefore must be imposed during the first prosecution or not at all,"²⁰³ did not preclude the State from collecting the tax in the same proceeding that resulted in a criminal conviction.²⁰⁴

B. Cruel and Unusual Punishment

In *Zissi v. State Tax Commission*,²⁰⁵ the defendant argued that Utah's drug tax stamp amounted to cruel and unusual punishment because the tax resulted in

197. *Department of Revenue v. Kurth Ranch*, 114 S. Ct. at 1947 (citation omitted) (emphasis added). Because the defendant had been arrested for a criminal offense, the Court felt it unnecessary to pass on the issue of whether a civil proceeding designed to inflict punishment bars a subsequent criminal proceeding. *Id.* at 1947 n.21. Because the case involved separate sanctions imposed in different trials, the Court declined to discuss the permissibility of multiple punishments imposed in the same trial. *Id.*

198. The tax was 10% of the assessed market value or a specified amount depending on the drug, whichever was higher. MONT. CODE ANN. § 15-25-111(2) (1987).

199. *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1946 (1994).

200. *Id.* at 1948. The Court assumed the drugs were destroyed by the State before the tax was assessed. *Id.*

201. *Id.*

202. *Id.* The Court noted the tax's purpose could be accomplished by increasing the fine after conviction. *Id.* at 1947.

203. *Id.* at 1948.

204. *Id.* at 1945.

205. *Zissi v. State Tax Comm'n*, 842 P.2d 848 (Utah 1992).

an excessive fine.²⁰⁶ Relying on the criteria established in *Solem v. Helm*²⁰⁷ for determining whether a punishment is disproportionate to a crime, the court upheld the tax.²⁰⁸

The court found the penalty of 100% of the unpaid tax was not unique in Utah tax statutes, nor dissimilar to drug tax stamp penalties in other states.²⁰⁹ In addition, the court found the gravity of harm to society from illegal drug trafficking was not disproportionate to the tax and the fines.²¹⁰ The court therefore rejected the defendant's eighth amendment contentions and held the drug stamp act was constitutional.²¹¹

C. Equal Protection

There was also an equal protection challenge asserted in *Zissi*.²¹² The defendant claimed that the tax discriminated against him because he was taxed at a higher rate for possession of a drug in tablet form than someone who possessed the same drug in powder form.²¹³ The court held the tax statute was purely an economic regulation and the classifications would be sustained if "'facts [could] reasonably be conceived which would justify the distinctions or differences in state policy . . . as between different persons.'" ²¹⁴ The court found ample reason to treat dealers different from nondealers²¹⁵ and legitimate reasons to tax dosage units differently.²¹⁶ The state's legislative classification easily met its burden of reasonableness, and the statute was upheld.²¹⁷

206. *Id.* at 857.

207. *Solem v. Helm*, 463 U.S. 277 (1983), *overruled by* *Harmelin v. Michigan*, 501 U.S. 957 (1991). The United States Supreme Court relied on "objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292.

208. *Zissi v. State Tax Comm'n*, 842 P.2d at 859.

209. *Id.* The court examined drug stamp taxes in Alabama, Idaho, Kansas, and Minnesota. *Id.* at 859; *see* ALA. CODE §§ 40-17A-8, -9(a) (Supp. 1991); IDAHO CODE §§ 63-4203, -4207(1) (Supp. 1992); KAN. STAT. ANN. §§ 79-5202(a), -5208 (1989 & Supp. 1991); MINN. STAT. ANN. §§ 297D.08, 297D.09 subd. 1 (1990 & Supp. 1991).

210. *Zissi v. State Tax Comm'n*, 842 P.2d 848, 858 (Utah 1992). "Though *Zissi* argues that the \$44,000 penalty greatly exceeded the actual street value of the drug, he makes no attempt to convince us that the penalty is not commensurate with the social and economic harm inflicted on the state of Utah." *Id.*

211. *Id.* at 859.

212. *Id.* at 855.

213. *Id.* at 856. The statute taxes all drugs sold by weight at one uniform rate, and all drugs sold in units at a second uniform rate. *Id.*

214. *Id.* at 855 (citations omitted).

215. *Id.* at 856. The court observed that persons who possess large amounts of controlled substances are more likely to be dealers who participate in drug trafficking, which drains government resources. *Id.*

216. *Id.* The court noted that amphetamines sold in tablet form and crystal amphetamines are distinct substances. *Id.*

217. *Id.*

D. Exclusionary Rule

*Sims v. Collection Division of Utah State Tax Commission*²¹⁸ held evidence of illegally seized drugs was subject to the exclusionary rule.²¹⁹ In an action brought under Utah's Illegal Drug Tax Stamp Act,²²⁰ the court stated:

The Act at issue in this case is similar to the criminal law in its objectives. It seeks to punish and deter those in possession of illegal drugs. . . . The Commission asserts that the objective of the Act is to raise revenue, but the assessment scheme and penalty provisions are far too onerous to justify such a conclusion. The fact that section 59-19-106(1) requires those who violate the Act to pay a 100 percent penalty in addition to the base tax reveals that one objective of the Act is to punish and deter those in possession of illegal drugs. The fact that the legislature has chosen to obtain this result by what it terms a "tax" and a "penalty" does not change the character of the result.²²¹

The "quasi-criminal nature" of the Act was illustrated by the fact that enforcement was connected to proof of criminal conduct.²²² A violation of the Act necessarily involved criminal conduct, and compliance by purchasing drug tax stamps evidenced knowledge that criminal laws were being violated.²²³ The court held "[g]iven that an essential element of a criminal offense must be established by either violation of or compliance with the Act, we are convinced that enforcement proceedings under the Act must be viewed as quasi-criminal and the exclusionary rule should therefore apply."²²⁴

A provision of the drug tax stamp statute provided that 60% of the revenue collected was to be distributed to the law enforcement agency conducting the investigation.²²⁵ The court suggested that "[i]n view of the financial motivation given to local law enforcement agencies to acquire evidence of tax violations, the application of the exclusionary rule to drug stamp tax proceedings is likely to

218. *Sims v. Collection Div. of Utah State Tax Comm'n*, 841 P.2d 6 (Utah 1992).

219. *Id.* at 13. The decision was based on the state's exclusionary rule, not the Fourth Amendment. *Id.* The court noted that the trend in state courts is to use their own constitutions to construct search and seizure law independent of federal law. *Id.* at 11.

220. UTAH CODE ANN. §§ 59-19-101 to -107 (1993).

221. *Sims v. Collection Div. of Utah State Tax Comm'n*, 841 P.2d at 13-14 (citations omitted).

222. *Id.* at 14.

223. *Id.* "'It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the [civil] proceeding, requiring determination that the criminal law has been violated, the same evidence would be admissible.'" *Id.* (quoting *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701 (1965)).

224. *Id.*

225. *Id.*

provide a significant and substantial additional deterrent to unconstitutional seizures."²²⁶

V. CONCLUSION

The Iowa drug tax stamp has survived the major constitutional challenges, and barring unforeseen developments, it is here to stay. The Iowa Supreme Court has held chapter 453B is not violative of double jeopardy protections because the Iowa Legislature intended cumulative punishments. The court also opined that because the tax and penalty are civil remedies, its operation does not deprive defendants of their property without the due process of law. Perhaps the biggest constitutional hurdle was cleared when the nondisclosure provisions of chapter 453B protected the law from self-incrimination attacks. Having passed constitutional muster on these major issues, the drug tax stamp is likely to weather other inevitable constitutional challenges.

Drug tax stamps statutes nationwide have survived many constitutional tests to become a popular weapon in the war on drugs. The popularity of drug tax statutes appears to be spurred by a desire to win the war by exposing drug dealers to additional punishment, rather than to raise revenue or regulate drug sales through the sale of drug tax stamps. While most drug taxes are constitutionally sound, they do raise two concerns.

The first concern is whether legislatures enact the laws under the guise of taxes in an attempt to avoid constraints under criminal due process. The second concern is that with the availability of forfeiture statutes, tax evasion proceedings, and criminal prosecutions, there is a real possibility that the laws violate the drug dealers constitutional rights against excessive punishment.

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226. *Id.* The court held that the financial motivation was an "independent reason" to apply the exclusionary rule. *Id.*

