STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeals Nos. 2024AP554
2024AP556

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CHRISTOPHER J. SYRRAKOS,
KRISTYN A. SHATTUCK,

Defendants-Respondents.

ON APPEAL FROM AN ORDER OF DISMISSAL ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM J. DOMINA, PRESIDING

RESPONSE BRIEF OF DEFENDANTS-RESPONDENTS

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STATEMENT CONCERNING ORAL ARGUMENT

This case concerns an important area of the law—especially as it relates to those in the Hemp industry. While the defense believes that the plain language of the text controls and is obvious, understanding and working through the nuance (and changes) in the law can be taxing and confusing. To clarify certain points that could be lost in the briefs and to make sure that the Court has a precise understanding of the issues and the law, the defense respectfully submits that this is an appropriate case for oral argument.

STATEMENT CONCERNING PUBLICATION

Given the importance of this issue and the effect it will have on the hemp industry, the defense respectfully submits that the decision should be published.

QUESTION PRESENTED

> Matters of statutory interpretation begin and end with the text. Here, the text provides that a prosecution under Chapter 961 *may not* take place *unless* there has been a referral by the Department of Agriculture. Syrrakos and Shattuck are charged under that chapter and there was no referral. The Circuit Court held that the language was clear and without a referral it was not competent to hear the case. Did it err?

I. Introduction

This case is about Christopher Syrrakos and Krystin Shattuck and the protections the Legislature has promised to all those engaged in the hemp industry. In particular, it's about the State's ability to prosecute violations of the hemp regulations without a referral from the Department of Agriculture, Trade and Consumer Protection, which for the brevity's sake is simply referred to throughout the brief as the Department of Agriculture or the Department. These protections are, of course, grounded in the statutes the Legislature has passed and the rules and regulations that the Department has promulgated. And while the statutory language is sometimes dense, the protections provided are clear and absolute.

In three pages, this is the essence of the case and the entire analysis that is unpacked below. A Circuit Court is without competence to hear a case when the State hasn't complied with statutory prerequisites.[1] Here, the Legislature has provided that no one can be charged with a crime under Chapter 961 (the chapter devoted to controlled-substances offenses) for a violation of Wis. Stat. § 94.55 or the regulations promulgated under § 94.55 *unless* there has been a referral by the Department of Agriculture.[2] The Legislature directed the Department to promulgate those regulations.[3]

Those regulations provide that the Department can issue licenses to growers and processors of hemp.[4] Syrrakos has a processor license. With it, he can "store, handle, and convert hemp into a marketable form under Wisconsin law."[5] The license also comes with lots and lots of reporting requirements and obligations.[6] This includes: if the hemp fails a test—that is, if it registers above the THC limit—it must be destroyed or retested or remediated.[7] And as a licensed processor, Syrrakos cannot "acquire or

[1] *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 7, 370 Wis. 2d 595, 882 N.W.2d 738; *State v. R.A.M. (In re P.M.)*, 2024 WI 26, ¶ 19, 412 Wis. 2d 285, 8 N.W.3d 349.

[2] Wis. Stat. § 961.32(3)(c).

[3] 2017 Wis. Act. 100; 2019 Wis. Act 68.

[4] ATCP 22.03(1)–(3) (first became effective March 2, 2018 with EmR1807; most recent revisions became effective May 3, 2021 with EmR2111).

[5] ATCP 22.03(1)(a).

[6] *E.g.*, ATCP 22.04(2)(a); 22.05(1)(b); 22.05(2).

[7] ATCP 22.10(3)–(10).

process harvested unprocessed hemp without acquiring a legible copy of all fit for commerce certificates . . . specific to the hemp purchased."[8] That is all to say, as a licensed processor Syrrakos has to make sure that he is only dealing with product that falls within the Department's prescribed standards.[9] Fail to do that and he can be fined, his product can be seized, and he can be referred for criminal prosecution.[10] That is the system the Legislature created.

To ensure uniformity in the hemp industry, the Legislature had the Department of Agriculture oversee every aspect of the law.[11] Importantly, the Department also oversees when a licensee's conduct warrants a criminal referral.[12] There are three factors the Department considers:

> (1) Whether voluntary compliance can be achieved;
>
> (2) Where voluntary compliance cannot be achieved, reliance on progressive enforcement to gain permanent compliance;
>
> (3) For willful or dangerous violations, refer for prosecution to protect citizens and law-abiding competitors.[13]

And, to be clear, all of that is set out in the Department's regulations passed pursuant to § 94.55.

Knowing the power and responsibility that was vested in the Department, the Legislature guarded against local law enforcement threatening the industry and prosecuting potential violations of the hemp regulations *without* a referral. The language is clear:

> A person who violates § 94.55 or *a rule promulgated under § 94.55* may not be prosecuted under § 94.55 or this chapter *unless the person is referred to the district attorney for the county in which the violation occurred* or to the department of justice by the department of agriculture, trade and consumer protection.[14]

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[8] ATCP 22.13(2).
[9] ATCP 22.13.
[10] ATCP 22.16.
[11] *E.g.*, ATCP 22.12(2); ATCP 22.05.
[12] ATCP 22.16(5).
[13] *Id.*
[14] Wis. Stat. § 961.32(3)(c) (emphasis added).

That language, of course, sets a familiar condition precedent for law enforcement to act. Just as it is with election law, the Legislature has limited a local district attorney's authority to prosecute potential violations until (and unless) there has been a referral from the regulatory agency.[15] Just as we don't want political prosecutions to run unchecked without a referral from the Wisconsin Elections Commission, we also don't want the hemp industry upended (and entrepreneurs threatened with prison) unless there has been a referral by the Department of Agriculture. And just as the Wisconsin Elections Commission has precise criteria to decide when a referral should be made, so too does the Department of Agriculture.[16] Put plainly and simply, certain areas of the law are too important to entrust to local prosecutors without the expertise and guidance of the overseeing agency providing an initial check.

Here, Syrrakos had his business raided and products seized. Upon testing, some of it fell outside the legal limits. When he faced criminal charges, he argued that the law entitled him to certain protections—namely, there had to be a referral.[17] Yet rather than waiting for a referral, the State persisted. And so, for the past three years, there has been a fight over whether the plain reading of the text—*may not be prosecuted unless there's been a referral*—means what it says.

After all, there's no question Syrrakos was (and is) a licensed processor. The State's brief says it.[18] There's no question that the Department's regulations were promulgated under § 94.55.[19] There's also no question that those regulations governed *all* of Syrrakos's conduct as a licensed processor and that having product *above* those limits violated those regulations.[20] Thus, Syrrakos is being prosecuted for conduct that violates those regulations, which can only happen when—consistent with the Legislature's explicit command in Wis. Stat. § 961.32(3)(c)—there has been a

[15] *See* Wis. Stat. § 11.1401(2).
[16] *Compare* ATCP 22.16(5) with Wis. Stat. § 5.05(2m).
[17] Wis. Stat. § 961.32(3)(c).
[18] Br. Pltf-App. at 8.
[19] Wis. Stat. § 99.55(3w); ATCP 22.
[20] Wis. Stat. §§ 94.55(2)(a), 94.55(2)(g)(a)3., 94.55(3m). *See* ATCP 22.03(3), (11); ATCP 22.10(3).

referral.[21] And without that referral, the Circuit Court was not competent to hear this case.

That's the case. What follows sets out the story of this case, the statutory scheme (including the regulations), and the critical canons of statutory interpretation that confirm Judge Domina got it right when he held: "The statute prohibits unambiguously any prosecution, whether civil or criminal until and unless a referral is made by the designated government agency."[22] To be clear, in arriving at that conclusion Judge Domina employed slightly different reasoning than what the Defendants argued below. But the conclusion is the same: the Legislature's referral command cannot be ignored. And without that referral the case cannot proceed.

[21] Wis. Stat. § 961.32(3)(c).

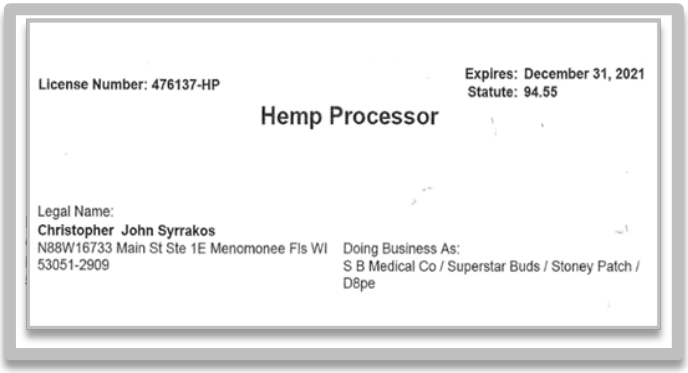
[22] R.77 at 10.

II. Statement of the case.

This case turns on statutory interpretation. As such, the analysis is controlled by the familiar canons and the principle that when the Legislature has set out procedures for *what* must take place before criminal charges can be brought, failure to comply with those procedures robs the court of competence. The facts of this case aren't as important as the law. So while it's worth pausing to stress a point or two about the record—confirming and illustrating how the law operates in *this* particular case—most of what follows focuses on the development of the law and how it informed the Circuit Court's decision dismissing the case.

A. Shortly after hemp was legalized in Wisconsin, Syrrakos received a license to process Hemp.

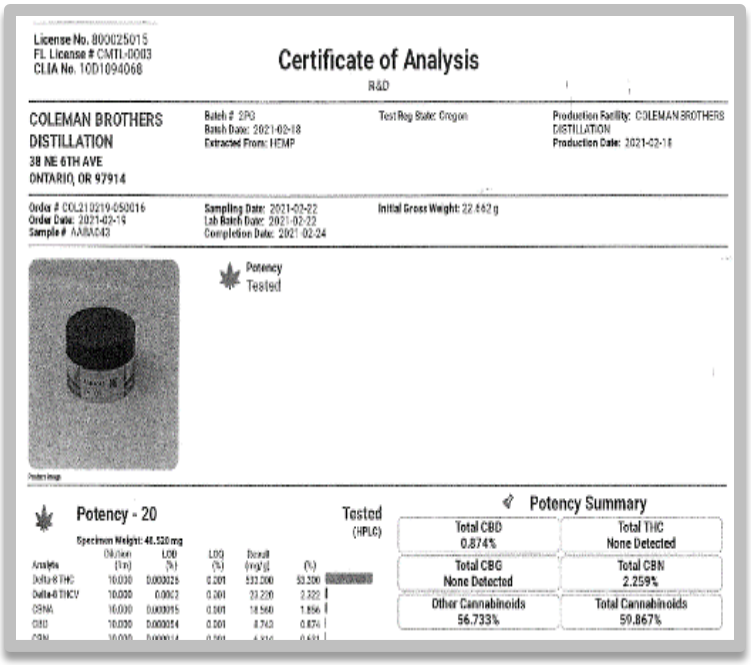
In 2017, the Legislature passed a groundbreaking bill that recognized the distinction between hemp and marijuana and provided a system for entrepreneurs to participate in the hemp industry. The next year, Syrrakos became a licensed hemp processor.[23] As a licensee, he has to renew his license every year. This is the license issued for 2021:


License Number: 476137-HP
Expires: December 31, 2021
Statute: 94.55
Hemp Processor
Legal Name:
Christopher John Syrrakos
N88W16733 Main St Ste 1E Menomonee Fls WI 53051-2909
Doing Business As:
S B Medical Co / Superstar Buds / Stoney Patch / D8pe

With that license, he was able to purchase products from other processors (in and out of state) and also licensed growers (in and out of state).[24] As a licensed processor and consistent with the regulations, all the product he purchased had to have a certificate of analysis from a registered testing laboratory.[25] These certificates ensured that when the product left the processor or grower it was within the legal limits.[26]

[23] R.1 Syrrakos Aff. at 1.
[24] ATCP 22.02(10); ATCP 22.13(2).
[25] ATCP 22.13.
[26] *Id.*; ATCP 22.02(10).

When Shattuck came under investigation, he produced the certificates showing that the product had tested within the prescribed limits. Here are some of those certificates submitted in the Circuit Court.[27]



License No. 800025015
FL License # CMTL-0003
CLIA No. 10D1094068

Certificate of Analysis

R&D

COLEMAN BROTHERS DISTILLATION
38 NE 6TH AVE
ONTARIO, OR 97914

Batch # 2PG
Batch Date: 2021-02-18
Extracted From: HEMP

Test Reg State: Oregon

Production Facility: COLEMAN BROTHERS DISTILLATION
Production Date: 2021-02-18

Order # COL210219-050016
Order Date: 2021-02-19
Sample # AAIA043

Sampling Date: 2021-02-22
Lab Batch Date: 2021-02-22
Completion Date: 2021-02-24

Initial Gross Weight: 22.662 g

Potency Tested

Potency - 20

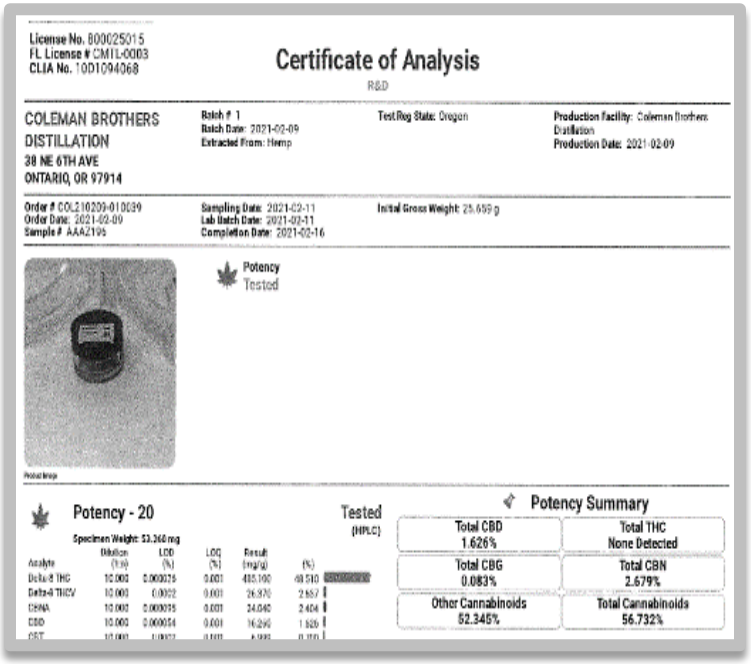
Specimen Weight: 48.520 mg

Tested (HPLC)

Analyte	Dilution	LOD (%)	LOQ (%)	Result (mg/g)	(%)
Delta-8 THC	10.000	0.000026	0.001	532.200	53.220
Delta-9 THCV	10.000	0.0002	0.001	23.220	2.322
CBNA	10.000	0.000035	0.001	18.560	1.856
CBD	10.000	0.000054	0.001	8.740	0.874
CBN	10.000	0.000014	0.001	6.816	0.681

Potency Summary

Total CBD 0.874%	Total THC None Detected
Total CBG None Detected	Total CBN 2.259%
Other Cannabinoids 56.733%	Total Cannabinoids 59.867%



License No. 800025015
FL License # CMTL-0003
CLIA No. 10D1094068

Certificate of Analysis

R&D

COLEMAN BROTHERS DISTILLATION
38 NE 6TH AVE
ONTARIO, OR 97914

Batch # 1
Batch Date: 2021-02-09
Extracted From: Hemp

Test Reg State: Oregon

Production Facility: Coleman Brothers Distillation
Production Date: 2021-02-09

Order # COL210209-010039
Order Date: 2021-02-09
Sample # AAA2195

Sampling Date: 2021-02-11
Lab Batch Date: 2021-02-11
Completion Date: 2021-02-16

Initial Gross Weight: 25.659 g

Potency Tested

Potency - 20

Specimen Weight: 53.360 mg

Tested (HPLC)

Analyte	Dilution	LOD (%)	LOQ (%)	Result (mg/g)	(%)
Delta-8 THC	10.000	0.000026	0.001	485.100	48.510
Delta-9 THCV	10.000	0.0002	0.001	26.870	2.687
CBNA	10.000	0.000035	0.001	24.040	2.404
CBD	10.000	0.000054	0.001	16.260	1.626
CBT	10.000	0.000012	0.001	6.830	0.683

Potency Summary

Total CBD 1.626%	Total THC None Detected
Total CBG 0.083%	Total CBN 2.679%
Other Cannabinoids 52.345%	Total Cannabinoids 56.732%

The Department of Agriculture may have looked at those certificates and concluded—with its expertise overseeing this industry—that there was no willful or even negligent violation by Syrrakos. Local law enforcement, of course, lacks that statewide expertise in how *everyone* must trust the labs and the certificates. Despite providing those certificates, Syrrakos and Shattuck (Syrrakos's fiancée who worked at the store and with whom he has two children) were charged with eleven counts all under Chapter 961. Here they are all laid out in a helpful table.

[27] R.41, Ex. G–H.

Count	Charged against	Charges under Chapter 961
1	Syrrakos	Manufacture/Deliver THC § 961.41(1)(h)1
2	Syrrakos	Manufacture/Deliver THC § 961.41(1)(h)1
3	Syrrakos	Manufacture/Deliver THC § 961.41(1)(h)1
4	Syrrakos	Manufacture/Deliver THC § 961.41(1)(h)1
5	Syrrakos	Manufacture/Deliver THC § 961.41(1)(h)1
5	Syrrakos	Manufacture/Deliver THC § 961.41(1)(h)1
6	Syrrakos	Manufacture/Deliver THC § 961.41(1)(h)1
7	Syrrakos	Maintain Drug Trafficking Place § 961.42(1)
8	Syrrakos	Possessing THC § 961.41(3g)(e)
9	Syrrakos	Possession with Intent to Deliver THC
10	Syrrakos	Maintaining Drug Trafficking Place § 961.42(1)
11	Syrrakos	Possession of THC § 961.41(3g)(e)
12	Shattuck	Maintaining Drug Trafficking Place § 961.42(1)

In response to the charges, Syrrakos and Shattuck moved to dismiss, citing the Legislature's promise that "a person who violates § 94.55 or *a rule promulgated under § 94.55* may not be prosecuted under § 94.55 or this chapter *unless the person is referred* to the district attorney for the county in which the violation occurred or to the department of justice by the department of agriculture."[28] The motion was initially denied.[29] But then it was given a fresh look by Judge Domina and a new round of briefing ensued.[30]

Before addressing that decision, it's worth *briefly* pausing to give a little background on how the statutory scheme regulating hemp has developed in Wisconsin. That background informs why the Legislature would demand a referral by the Department before criminal charges could issue.

[28] Wis. Stat. § 961.32(3)(c).
[29] R.77:11.
[30] *Id.*

B. The story of hemp in Wisconsin and how the Legislature has sought to promote and protect the industry.

At one time, Wisconsin was the top hemp-growing state in the country.[31] That all stopped in 1970, when the federal government effectively halted its production.[32] Then after forty years of intense lobbying, Congress passed the 2014 Farm Bill.[33] Enthusiastic about the return of a crop that once thrived in Wisconsin, the Legislature provided that the Department of Agriculture would regulate the hemp industry "only to the extent required under federal law, and in a manner that allows the people of this state to have the *greatest possible opportunity to engage in those activities*."[34]

Wisconsin's pilot program defined hemp as "a variety of cannabis with a THC concentration of not more than 0.3 percent on a dry weight basis or the maximum concentration allowed under federal law up to 1 percent, whichever is greater."[35] And, in line with the Controlled Substances Act, hemp was still on the "state list of controlled substances, meaning the use of hemp outside the program [was] still illegal."[36] That, of course, created problems in the industry, where people were obviously wary of potential criminal prosecutions.

To ease those worries and combat the chilling effect the threat of prosecution can bring, the Legislature created a safe-harbor provision.[37] It immunized "Planting, growing, cultivating, harvesting, processing, or transporting hemp that contains a delta−9−tetrahydrocannabinol concentration of the crop of not more than 0.7 percent above the permissible limit for industrial hemp on a dry weight basis *or* that is grown from industrial hemp seed."[38] In addition, possessing hemp with a delta-9 THC level above the permissible level was covered when "the possessor had no

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[31] R.77 at 3; Dirk Hildebrandt, *Hemp: Wisconsin's Forgotten Harvest*, Wisconsin Magazine of History 12 (2017).

[32] Ryan LeCloux, *Regulating Wisconsin's Hemp Industry*, Wisconsin Policy Project vol. 2 no. 9 at 4 (April 2019), https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_policy_project/wisconsin_policy_project_2_9.pdf.

[33] *Id.*; R.77 at 3.

[34] 94.55(2)(b)2. (2017–18).

[35] R.77 at 3; Wis. Stat. § 94.55(1) (2017–18).

[36] LeCloux, *supra* note 31, at 5; R.77:3.

[37] Wis. Stat. § 961.32(3)(b) (2017–18).

[38] Wis. Stat. § 961.32(3)(b)1. (2017–18) (emphasis added).

reason to believe at that time that the certification was incorrect."[39] Further, the Legislature provided that a person violating Wis. Stat. § 94.55 or an attendant regulation could not be prosecuted under "unless the person is referred to the district attorney for the county in which the violation occurred by the department of agriculture, trade and consumer protection."[40] The Legislature also directed the Department to establish factors guiding when they would refer a person for prosecution.[41]

In 2019, the Legislature expanded the program to reflect significant changes from the 2018 Farm Bill.[42] By then, the Controlled Substances Act removed hemp from the definition of "marihuana" and Wisconsin followed suit.[43] And it expanded the safe-harbor provisions, adding direction for what to do with negligent violations of the hemp regulations—they are not to be criminally prosecuted.[44] And it added protection for hemp processors who possessed cannabis "during the normal course" of processing.[45] The new statutory provisions for negligent violations applied to hemp "producers"—a term that was not statutorily defined.[46] But the Department interpreted the negligent-violations provision as applying to "licensees," which it (in its expertise) has defined as both growers and processors.[47] To be clear, and this is very important to note: there are only two types of hemp licenses available in Wisconsin—growers and processors.[48] And to be very, very clear, there is no such thing as a "producer license."[49] The State's brief makes much of that point.

Throughout all those years of change (and even now), uncertainty persisted about the testing threshold for hemp.[50] Noncompliant hemp, called "hot hemp," tested above 0.3% delta-9-THC by dry weight.[51] During Wisconsin's first growing season, many crops had to be destroyed for noncompliance; and over the years, those problems have persisted.[52] The

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[39] Wis. Stat. § 961.32(3)(b)4. (2017–18).
[40] Wis. Stat. § 961.32(3)(c) (2017–18).
[41] Wis. Stat. § 94.55(2)(b)6.
[42] LeCloux, *supra* note 31 at 7.
[43] *Id.;* Wis. Stat. § 961.01(14).
[44] Wis. Stat. § 961.32(3)(b)4m.
[45] Wis. Stat. § 961.32(3)(b)4m.
[46] *See* Wis. Stat. § 94.55(2g).
[47] ATCP 22.16; ATCP 22.02(17).
[48] *See* ATCP 22.
[49] *See* Wis. Stat. § 94.55.
[50] R.77: 4.
[51] *Id.*
[52] LeCloux, *supra* note 31 at 7; Hope Kirwan, *Wisconsin Hemp Growers Call On DATCP To Change Regulation After*

fear that product could be destroyed because it tests as "hot hemp" proved a significant financial risk.[53] To address this, additional regulations were promulgated.[54] No one wants valuable product to be tossed because of a bad test or when less costly means of remediation could solve the problem. But the real risk of hot hemp—jail—was taken care of by the Legislature's promise that *no* criminal charges under § 94.55 or Chapter 961 could be brought by a prosecutor without first obtaining a referral.[55]

C. The Circuit Court correctly saw that the referral provision is critical to the statutory scheme and dismissed the case.

That was a relatively *brief* history of hemp in Wisconsin. The big takeaway is this: it's a highly and purposefully regulated industry. From farmers in the field to the processors in the storefront and everyone in between, the Legislature has set out guidance and strong protections for the industry. This includes guidance that the Department would regulate the hemp industry "only to the extent required under federal law, and in a manner that allows the people of this state to have the *greatest possible opportunity to engage in those activities*."[56] Among those regulations was (and is) a licensing scheme that the Department has bifurcated between growers and processors.

For both, the Legislature has provided certain assurances: they will not be prosecuted unless there has been a referral.[57] Those protections are central to the statutory scheme and have been since the beginning.[58] After all, few entrepreneurs would venture into the industry if their livelihood and freedom were at risk for "hot hemp."[59] The Legislature has only strengthened those protections over time.[60]

Testing Delays, Wis. Pub. Radio (Oct. 14, 2019).

[53] LeCloux, *supra* note 31 at 7; Krishna Ramanujan, *Hemp Goes 'Hot' Due to Genetics, Not Environmental Stress*, Cornell Chronicle (July 28, 2021).

[54] R.77:4; ATCP 22.

[55] Wis. Stat. § 961.32(3)(b)–(c).

[56] 2017 Wis. Act 100 § 2.

[57] Wis. Stat. § 961.32(3)(b)–(c).

[58] 2017 Wis. Act 100 § 9.

[59] Kirwan, *supra* note 52.

[60] Wis. Stat. §§ 94.55(2g), (2m), (3m).

Consistent with that history and text, the Circuit Court rejected the State's argument that as soon as the substance went above the threshold it was no longer hemp and could be prosecuted as marijuana without a referral.[61] The Circuit Court found: "the statute prohibits unambiguously any prosecution, whether civil or criminal until and unless a referral is made by the designated government agency."[62] And it added: "It is clear that the legislature intended that a governmental agency chosen by the legislature act as a clearinghouse for individuals operating under licenses issued under Section 94.55, Wis. Stat. *Doing so avoids inconsistent interpretation of the criminal intent required for a criminal prosecution amongst 72 Wisconsin counties*."[63] Finally, it stressed an important point that resonates here: "Further, [the referral protocol] eliminates the potential of fact-fights brought before juries impaneled to hear criminal matters over the hemp license process and the rights and limitations of licenses."[64] With that proper understanding of the law, the Circuit Court dismissed the case.[65] And the State's appeal followed.

Since this whole case turns on a matter of statutory interpretation concerning the Circuit Court's competency over an issue, this Court's review is *de novo*.[66]

[61] R.77 at 11.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 6, 370 Wis. 2d 595, 882 N.W.2d 738.

III. Without a referral from the Department of Agriculture, the Circuit Court lacks competence to hear this case.

This whole case turns on two critical questions: First, under the plain language of the statute, must there be a referral from the Department of Agriculture before a criminal prosecution can proceed? Second, does the prosecutor's failure to abide by the statute's plain language mean the Circuit Court lacked competence to hear the case? In answering both, the analysis begins and ends with the statute's text.[67] To be fair, the second question does demand some discussion of the Wisconsin Supreme Court's seminal cases on competence, but all of the real analysis lies with whether the referral provision is critical to the statutory scheme.[68] It is.

A. The canons of statutory construction provide clear guidance for deciding this case.

All statutory interpretation centers on giving the law "its full, proper, and intended effect."[69] And that process begins by giving the words in the statute their common and ordinary meaning.[70] Courts cannot disregard statutory commands, so if the text of the statute is clear the inquiry stops there.[71] Of course, context and structure are also critical to ascertaining the plain meaning.[72] Certain words, ambiguous on their own, may become clear when read within the overall statutory scheme.[73] As *Reading Law* observes: "Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the

[67] *State ex rel. Kalal v. Cir. Ct. for Dane Cty*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110.
[68] *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 10, 273 Wis. 2d 76, 681 N.W.2d 190.
[69] *State ex rel. Kalal*, 2004 WI at ¶ 44.
[70] *Id.* ¶ 45.
[71] *Banuelos v. Univ. of Wis. Hosps. & Clinics Auth.*, 2023 WI 25, ¶ 16, 406 Wis. 2d 439, 988 N.W.2d 627.
[72] *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶ 11, 400 Wis. 2d 417, 970 N.W.2d 1.
[73] *Id.*

entire text, in view of its structure and of the physical and logical relation of its many parts."[74] Put simply, the court "read[s] the statute as a whole."[75]

Relatedly, statutory language cannot render other portions superfluous.[76] Instead, "[s]tatutes relating to the same subject matter should be read together and harmonized when possible."[77] And in interpreting a statute, the court may also take guidance from the statute's purpose.[78] Through it all, the court uses these tools of statutory interpretation in order to determine what the text precisely means.[79]

B. The canons of statutory interpretation establish that the referral provision cannot be ignored.

Here, the plain meaning of the text provides that before a person can be charged, the Department of Agriculture must issue a referral. The key provision provides (for a second time):

> A person who violates § 94.55 or *a rule promulgated under § 94.55 may not be prosecuted under § 94.55 or this chapter* ***unless*** the person is *referred to the district attorney* for the county in which the violation occurred or to the department of justice by the Department of Agriculture.[80]

While it should be clear what the words mean—particularly what *may not* and *unless* do in this context – the next two pages walk through it step by step.

Applying the plain, ordinary meaning of this language, a person cannot be criminally prosecuted under Chapter 961 for violating a § 94.55 regulation without Department referral.[81] The term "may not be

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[74] *Id.* ¶ 13, quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012).
[75] *Cath. Charities Bureau, Inc. v. State Lab. & Indus. Review Comm'n*, 2024 WI 13, ¶ 44, 411 Wis. 2d 1, 3 N.W.3d 666.
[76] *Cook v. Industrial Com.*, 31 Wis. 2d 232, 239–40, 142 N.W.2d 827 (1966).
[77] *Hubbard v. Messer*, 2003 WI 145, ¶ 9, 267 Wis. 2d 92, 673 N.W.2d 676.
[78] *Id.*; *Brey*, 2022 WI at ¶ 20.
[79] *State ex rel. Kalal*, 2004 WI at ¶ 38.
[80] Wis. Stat. § 961.32(3)(c) (emphasis added).
[81] *Id.*

prosecuted" provides a certain and definite protection. Consistent with how people normally read the phrase "may not," the Supreme Court of Wisconsin has had no problem deciphering what it means: "'May not' is a negative term. Where statutory restrictions are couched in negative terms, *they are usually held to be mandatory*."[82] As in, there may not be a prosecution—period.

But here, the statute does not create an absolute but a conditional bar by qualifying the term "may not" with: "*unless* the person is referred to the district attorney" by the Department of Agriculture. In ordinary usage, the term "unless" provides a conditional statement that introduces conditions that must be present before the exception can take place.[83] Not surprisingly in dealing with statutes, courts have no problem interpreting the meaning of "unless": "The word 'unless' ordinarily means 'except if.' Replacing the word 'unless' with the words 'except if' where the word 'unless' appears in the statute may run into grammatical issues, but it helps make the meaning of the statute clear."[84] So too here; adding "except if" into the relevant text reads this way:

> A person who violates a rule promulgated under § 94.55 may not be prosecuted under this chapter **except if** the person is referred to the district attorney by the Department of Agriculture.[85]

The plain language is pellucid. A person who violates § 94.55's regulations may not be prosecuted under Chapter 961 *except if* the person is referred to the district attorney by the Department of Agriculture. And that should be the end of it. But because Syrrakos's and Shattuck's liberty hang in the balance, it's worth walking through the *other* the applicable canons that confirm what the plain meaning of "may not" and "unless" make clear: the State needs a referral before it can bring these charges.

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[82] *In re P.M.*, 2024 WI 26, ¶ 19.
[83] *Wis. Dep't of Workforce Dev. v. Wis. Labor & Indus. Review Comm'n*, 2018 WI 77, ¶ 19, 382 Wis. 2d 611, 914 N.W.2d 625.
[84] *Id.*
[85] *See* Wis. Stat. § 961.32(3)(c).

The purpose and context of the statutory scheme is to protect individuals operating in the hemp industry from criminal prosecutions for hot hemp.[86] As the hemp industry has expanded over the years, so too have these protections.[87] Under the statute and regulations *all* aspects of the hemp industry are overseen by the Department of Agriculture.[88] The Department provides what is supposed to happen when there are negligent or willful violations.[89]

In this highly regulated industry, the Legislature wants to ensure that *before* criminal charges stifle the industry, the agency it put in charge has adjudged the violation. As the Circuit Court observed, this "clearinghouse" is important to the statutory scheme for a few reasons: it standardizes the criminal intent required for a criminal referral; it permits remediation opportunities to bring noncompliant products into compliance; and it prevents jury fights over the hemp-licensing process.[90] In other words, by having a clearinghouse, the Legislature has ensured uniformity and protection. Violators will still be prosecuted, but only after there has been a referral. That's not escaping justice, it's ensuring that justice is uniform.

C. Syrrakos and Shattuck are covered by the referral provision.

Under the statute's plain language, before the State can issue charges under Chapter 961 there must be a referral. The question then is: whether Syrrakos and Shattuck are covered by the statute?

No one disputes that Syrrakos has a processing license. And here is how Syrrakos as a licensed processor fits under the regulatory scheme and why his alleged violations trigger the referral protections.

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[86] *See supra* notes 30–54 and accompanying text.
[87] *Id.*
[88] Wis. Stat. § 961.32(3).
[89] *Id.*
[90] R.77:11.

Conduct	Statute or Regulation
The Department of Agriculture can issue licenses for processing hemp.	Wis. Stat. § 94.55
As a licensee Syrrakos must comply with all regulations and other laws.	ATCP 22.15
He must destroy or remediate any product that fails a test.	ATCP 22.10(3), (6) ATCP 22.12
Failure to do as the regulation prescribes can entail different sanctions.	ATCP 22.16
For a negligent violation he will have a corrective action plan from the Department.	ATCP 22.16(3)
A willful violation that falls within these three criteria will be referred for prosecution.	ATCP 22.16(5)

As a licensed processor, Syrrakos must comply with all laws and regulations.[91] This includes not having any product above the legal limit.[92] If he does, he must destroy or remediate it.[93] And in doing so, he must give notice to the Department.[94] Thus, Syrrakos possessing and distributing product that exceeds .3% violates those regulations.[95] The question for the Department of Agriculture would then be whether the violation was negligent or willful.[96]

Put differently and succinctly, it's clear that Syrrakos's allegedly criminal conduct all falls under the Department's regulations. Since he's a licensee covered by those regulations and since his alleged conduct violates those regulations, his conduct cannot be charged under Chapter 961 unless (read: except if) there has been a referral.[97] There has been no referral, so he cannot be criminally charged. That's the whole analysis.

[91] Wis. Stat. § 961.32(1m)(a); ATCP 22.15.
[92] Wis. Stat. § 961.32(3)(b)(4.).
[93] ATCP 22.10(3), (6); ATCP 22.12.
[94] ATCP 22.12(1)(a).
[95] Wis. Stat. § 961.32(1m)(a); ATCP 22.15.
[96] Wis. Stat. § 961.32(3)(b)–(cm).
[97] *See Wis. Dep't of Workforce Dev.*, 2018 WI 77, ¶ 19.

D. The State's three counter arguments are unavailing and should be rejected.

In response to that analysis, the State has three counter arguments. First, the "negligent violations" provision only applies to individuals with "producer licenses" and Syrrakos doesn't have one.[98] To be clear, the State's argument about the *negligent violation* provision does not in *any* way change *how* the *referral* provision must be read. Ultimately, the only thing that matters is whether the referral provision applies. Second, the State argues that any hemp above the limit is automatically illegal marijuana. But the State's argument would render much of § 94.55 and the attendant regulations superfluous if *anything* above the limit ("hot hemp") automatically became ripe for prosecution *without* a referral. Indeed, if the State's reading were correct, the referral provision would be a nullity. And third, the State argues that Shattuck cannot get the benefit of the referral provision and that any violation of the regulations at Syrrakos's house falls outside the referral provision. That argument is not supported by the statute's text, which applies to "a person" and not just a licensee. Those three arguments were rejected by the Circuit Court and should be here.

i. The State incorrectly equates the negligent violation provision with the referral provision—they are distinct.

The majority of the State's brief argues that Syrrakos does not fall under the negligent-violation provision because that applies to hemp producers. But whether the State's analysis of § 94.55(2g) is correct doesn't matter because § 961.32(3)(c) applies to any violation of § 94.55 *or § 94.55's regulations*.[99] Again (for the third time) here's the text with the relevant words in bold:

[98] Wis. Stat. § 961.32(3)(cm); Wis. Stat. § 94.55(2g)(a).
[99] Wis. Stat. § 961.32(3)(c).

> A person who violates § 94.55 or ***a rule promulgated under § 94.55*** *may not be prosecuted under § 94.55 or this chapter unless the person is referred to the district attorney* for the county in which the violation occurred or to the department of justice by the Department of Agriculture.[100]

And the regulations are what Syrrakos allegedly violated by having product in excess of the prescribed amount.

In addition and contrary to the State's position, the regulations *expand* the negligent-violation provisions to licensees.[101] That is, to be clear, while there is tension between the statutory text using the term "producers," when there are no "producer" licenses, the Department of Agriculture has (in its expertise) provided that the negligent violation provision reaches: "growers and processors." Here's the text of the regulations:

Negligent violations:	*A licensee* who negligently violates this chapter or § 94.55, Stats., as defined by § 94.55 (2g), Stats., shall comply with a corrective action plan approved by the department.[102]
Licensee defined as:	Licensee means a person possessing a grower license or *processor license*.[103]

So the statutory ambiguity that the State's brief does so much to address doesn't matter because the regulations apply to "processor licenses."[104]

What's more—and this is *very* important to note and make clear—the referral provision isn't exclusive to negligent violations. Again, all of Syrrakos's allegedly criminal conduct violates the regulations.[105] And prosecution for a violation of those regulations under Chapter 961 cannot proceed without a referral. That's the clear import of the law and the Defense's position on how the statute must be read.

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[100] Wis. Stat. § 961.32(3)(c) (emphasis added).
[101] ATCP 22.16(3)(a); ATCP 22.02(17).
[102] ATCP 22.16(3)(a).
[103] ATCP 22.02(17).
[104] *Id.*
[105] *See supra* p. 20.

ii. Excluding "hot hemp" from the statute's protections renders the statutory text and regulations superfluous.

The State also argues that any hemp above the threshold is automatically illegal marijuana.[106] The problem with that argument is two-fold. For one, it would undercut the carefully constructed regulatory scheme intended to combat hot hemp. The State's theory would give authority to the Department for hemp within the safe harbor provision—defined as between .3% and 1% THC—but above 1% it would (under the State's theory) be eligible for prosecution *without a referral*.

That reading flies in the face of the statute's text and the other provisions that the legislature set out. The text of § 961.32(3)(b) and the safe-harbor provisions provide a *no-exceptions* list of what cannot be prosecuted.

> A person who is not otherwise violating s. 94.55 or rules promulgated by the department of agriculture, trade and consumer protection under s. 94.55 *may not be prosecuted for a criminal offense under this chapter*, or under an ordinance enacted under s. 59.54 (25) or 66.0107 (1) (bm), for any of the following:[107]

And then it lists lots and lots of hemp-related conduct, including "processing cannabis that contains a delta-9-tetrahydrocannabinol concentration of the crop of not more than 0.7 percent above the permissible limit for hemp on a dry weight basis."[108] That is, the safe-harbor provides an absolute ban on prosecution within those limits; the referral provision, which appears in the very next section, provides a ban on prosecutions, but then lists the exception: "*unless* there has been a referral."[109] The two provisions have to be read in harmony and they do not in any shape or form somehow limit the reach of the referral provision.

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[106] Br. Pltf-App. at 24.
[107] Wis. Stat. § 961.32(3)(b).
[108] Wis. Stat. § 961.32(3)(b)1.
[109] *Id.* § 961.32(3)(c).

What's more, the State's argument that product above the limit is automatically illegal mis-reads the plain language of the statutory scheme and how these substances are defined. The statute carefully defines "cannabis," as opposed to "hemp," as the "plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not," with no specific delta-9-THC threshold.[110] The safe-harbor provision insulates possessing *cannabis*, not just "hemp" as defined in § 94.55(1). That is, the legislature didn't limit the protections it offered the hemp industry to the safe-harbor provision's absolute ban, it expanded them with the referral provision to ensure that a creative spin by a local prosecutor could not threaten a statewide industry.

Indeed, the Legislature was just as clear in its statutory commands as it was in its promise: "only to the extent required under federal law, and in a manner that allows the people of this state to have the *greatest possible opportunity to engage in those activities*."[111] To ensure that promise, it provided the statutory framework whereby violations of the statute *and* regulations would be policed by the Department of Agriculture. The State's reading would upend that balance and render much of the statutory scheme superfluous and fraught with problems.

After all, it's not until testing (and then likely re-testing) that anyone would know how close to the line any substance came and what happens if after retesting, the substance comes back as .03% though it originally tested at .4% or at 1%—does the testing become a jury fight? Does competence turn on a contested factual determination? Nonsense—competence is the first question, not the last.

Instead of that impossible scenario, the Legislature made it simple: the Department of Agriculture can look at it all, consider it all, and if the violation accords with the three factors *it* considers for a criminal referral, make sure one is made. While the State argues that this reading would mean a person with a license could sell "bales and truckloads" of marijuana with

[110] Wis. Stat. § 961.32(3)(a)
[111] Wis. Stat. § 94.55(2)(b)2. (2017–18).

impunity, that's hardly the case. The good people at the Department of Agriculture would not tolerate such abuse, take the appropriate steps, and make the referral and the case would be prosecuted. Put another way, everything that is simple and straightforward within the Statute's commands becomes complicated and impractical if a .01% one way or another would change whether a court has competency. Thus, the plain reading of the referral provision is not just the most honest reading of the statute, it's the one that makes the most sense and avoids the most problems. And it should be the one that this Court upholds.

iii. The referral provision is not geographically limited to Syrrakos's business.

The State adds two final tertiary points to salvage some of its case. First, it argues that the charges related to Syrrakos's home aren't covered.[112] It offers no case law or analysis on that point and it should be deemed waived.[113] It also wasn't what was argued below.[114] But more to the point, the referral provision pertains to conduct that violates the regulations, not just conduct at the licensee's business. Indeed, as a processor, Syrrakos could process or store the product at his house or a storage locker and it wouldn't change that he's still operating as a licensee. Indeed, as a licensee he is entitled to transport the product, which, by its very nature, must be done *away* from the business's four walls. Thus, there is no basis to find that the allegations against Syrrakos inside his home are not covered by the referral provision.

Second, the State argues that Shattuck alone could be charged since she didn't have a license.[115] It's true that she didn't have a license; however, that is not the operative question. The issue is whether this *conduct* falls under § 94.55's regulations—as established above, it does. And that conduct does not (again) relate only to the four walls of Syrrakos's business but also to where he's free to conduct his business—namely, his home. Just as the

[112] Br. Pltf-App. at 27.
[113] *See id.* at 26–27.
[114] *See* R.30, 60.
[115] Br. Pltf-App. at 26.

State couldn't charge Syrrakos's employees as parties to a crime to escape the referral provisions, it can't charge his fiancée to escape the need for a referral. And that's all because there is no limitation in the referral provision: it applies to *persons*. Here, (for the fourth and last time) is the operative language in bold.

> **A person** who violates § 94.55 or ***a rule promulgated under § 94.55*** *may not be prosecuted under § 94.55 or this chapter unless the person is referred to the district attorney* for the county in which the violation occurred or to the department of justice by the Department of Agriculture.[116]

The Circuit Court saw it correctly when it held: "[D]espite the claims that this issue relates solely to one co-defendant and not the other, this Court finds that the relevant questions regarding potential liability relate *both to products held for sale or maintained as stock to hold for sale and to the processing of such products, regardless of material location*. Therefore, the Court concludes that both co-defendants are entitled, in the interest of justice, to the Court's reconsideration and analysis."[117] The same logic applies here.

IV. Without a referral from the Department of Agriculture, the Circuit Court was without competence to hear the case.

The last 25 pages have all led to this point: harmonizing this statutory scheme, and rendering nothing superfluous, requires interpreting Wis. Stat. § 94.55 as instructions for the Department of Agriculture to create a licensing scheme and oversee *all* aspects of the hemp industry. And it also requires interpreting Wis. Stat. § 961.32 as instructions for prosecutors: conduct dealing with those regulations cannot be criminally prosecuted without a referral. All of that is clear. Since there was no referral, the only question that remains is what that means for this prosecution.

Here, the Circuit Court lacked competence to hear the case.[118] As the Supreme Court of Wisconsin has put it, "when the failure to abide by a

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[116] Wis. Stat. § 961.32(3)(c) (emphasis added).
[117] R.77 at 11 (emphasis added).
[118] *In re P.M.*, 2024 WI 26, ¶¶ 20–21.

statutory mandate is central to the statutory scheme of which it is a part," then the Circuit Court loses competence to proceed.[119] Whether a mandate is central to a statutory scheme essentially "treat[s] competency as a question of legislative purpose."[120]

In *Mikrut,* the Supreme Court provided a clear test: the question is whether the defect is "fundamental or technical."[121] And it noted: "The legislative purpose of the statutory scheme must be determined and a decision made about whether it could be fulfilled, without strictly following the statutory directive."[122] What doesn't fit in that category are minor "technical" deviations.[123] But statutory deadlines and "conditions precedent" are usually deemed central to the Legislature's purpose and scheme.[124]

For instance, in *Cepukenas,* the court was clear that "[b]ecause the conditions in [the statute] have not been met, we affirm the trial courts order that it was without authority to act."[125] There was a condition precedent and it wasn't fulfilled. That condition precedent wasn't a petty technical deviation, but one that was (at its heart) fundamental to the entire structure of the Act.[126] And in *In Interest of B.J.N,* the Court noted that certain time limits were meant "to implement major United States Supreme Court decisions and assure the constitutional rights of children."[127] Thus, failure to abide by the "mandatory time limitations" left the Court without competence to proceed.[128] Those are helpful guideposts in deciding this case.

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[119] *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 1, 273 Wis. 2d 76, 681 N.W.2d 190.
[120] *Id.* ¶ 11.
[121] *Id.*
[122] *Id.* (internal quotations omitted).
[123] *Id.* ¶ 15.
[124] *Id.* ¶ 15, citing *Cepukenas v. Cepukenas*, 221 Wis. 2d 166, 170, 584 N.W.2d 227 (Ct. App. 1998).
[125] *Cepukenas*, 221 Wis. 2d at 168.
[126] *Id.*
[127] *In Int. of B.J.N.*, 162 Wis. 2d 635, 654, 469 N.W.2d 845 (1991).
[128] *Id.*

As set out above, the Legislature has set out deliberate procedures to ensure that the hemp industry is regulated "only to the extent required under federal law, and in a manner that allows the people of this state to have the *greatest possible opportunity to engage in those activities*."[129] To that end, it has ensured that one clearinghouse makes criminal referrals for violations of the hemp regulations. That check is central to the statutory scheme—in just the same way conditions precedent were central in *Cepukenas* and time limits were central in *In Interest of B.J.N.* Here, the referral provision is not a take-it-or-leave-it aspiration that can be ignored. Rather, it's essential to abide by—both here and in every case. Failure to do so undercuts the very statutory scheme that the Legislature has created. Thus, the failure to abide by those procedures means the Circuit Court was not competent to proceed, and the case against Syrrakos and Shattuck was properly dismissed.

V. Conclusion

This is not a hard case, especially for an appellate court. The words "may not" and "unless" are pretty easy to decipher. The first prohibits, the other sets a limited set of conditions excluded from the prohibition. Reading a contract or any other document and the answer would be plain and it should be here—absent a referral from the Department of Agriculture, Syrrakos and Shattuck cannot be charged under Chapter 961. The failure to get that referral means the Circuit Court lacked competence to hear the case and it was properly dismissed. In five sentences, that's the case. And no other principle of law counsels a different reading. Thus, the Circuit Court's decision dismissing this case was correct and it must be affirmed.

[129] Wis. Stat. § 94.55(2)(b)2.

Dated at Madison, Wisconsin, December 11, 2024.

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