

Appeal No. 2025AP1383-CR

Cir. Ct. No. 2023CF149

**WISCONSIN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

AARON AJ BETHKE,

DEFENDANT-RESPONDENT.

FILED

AUG 4, 2026

Samuel A. Christensen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Stark, P.J., Hruz, and Gill, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2023-24),¹ this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

Following the legalization of hemp in Wisconsin, the Wisconsin Criminal Jury Instructions Committee modified WIS JI—CRIMINAL 6030 (“Possession of a Controlled Substance—[WIS. STAT.] § 961.41(3g)”) to require the State to prove, in cases where the defendant is charged with possession of tetrahydrocannabinols (THC), that the defendant possessed a substance with a THC concentration above 0.3%. In this appeal, the State argues that the revised

¹ All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

jury instruction inaccurately states the law because the fact that a substance qualifies as hemp—i.e., has a THC concentration of 0.3% or less—is an affirmative defense that a defendant must prove in order to avoid a conviction for THC possession. Conversely, the defendant in this case, Aaron AJ Bethke, and amici curiae the Office of the State Public Defender and the Wisconsin Association of Criminal Defense Lawyers (collectively, the “SPD”), assert that the revised jury instruction is a correct statement of the law because, in order to obtain a conviction for THC possession, the State must prove all of the elements of that offense beyond a reasonable doubt, which includes the fact that the substance possessed by the defendant had a THC concentration exceeding 0.3%.

To date, no Wisconsin appellate case has addressed the issue raised in this appeal. Additionally, while the Criminal Jury Instructions Committee stated in the Comment to WIS JI—CRIMINAL 6030 that the Committee “has concluded that the [revised instruction] is an accurate statement of the law,” the Committee also acknowledged that “the law appears to be unsettled.” See WIS JI—CRIMINAL 6030 cmt. As such, this appeal raises a novel and active legal question, and one that is of statewide importance following the legalization of hemp in Wisconsin. Moreover, the issue raised in this appeal is likely to arise in future cases, such that litigants, attorneys, and lower courts throughout the state would benefit greatly from a definitive decision on the issue by the state’s highest court.² Accordingly, we certify this appeal to the Wisconsin Supreme Court.

² We are aware of two other appeals that are currently pending in this court that raise the same—or a substantially related—issue as to whether the State is required to prove in a THC possession case that the substance possessed by the defendant had a THC concentration above 0.3%. See *State v. Lewis*, No. 2025AP862-CR; *State v. Jones*, No. 2025AP1539-CR.

BACKGROUND

In June 2023, the State charged Bethke with possession of narcotic drugs, possession of THC, possession of an electric weapon, and operating a motor vehicle while intoxicated (fifth or sixth offense). The State later filed an amended information that contained an additional charge of operating a motor vehicle with a detectable amount of a restricted controlled substance in the blood (fifth or sixth offense). As relevant to this appeal, the complaint alleged that during a traffic stop, Bethke admitted that there was marijuana inside of his vehicle. An officer subsequently searched the vehicle and located, among other things, a vape pen containing a brown substance that “field tested positive for the presence of THC” and “a one hitter pipe and a green, leafy, plant-like material” that “weighed 1.77 grams and field tested positive for the presence of THC.”

Prior to Bethke’s trial, the State moved to modify the recently revised pattern jury instruction for the THC possession charge, WIS JI—CRIMINAL 6030. The State argued that the revised instruction “goes beyond the statutory requirements and constitutes an erroneous statement of the law” by “requir[ing] the State to prove (as an element of the offense) that the plant material ... is not hemp, meaning that it has a [THC] concentration above .3%,” which “wrongly plac[es] the burden of proof for an affirmative defense on the State.” In support of its position, the State relied on ***United States v. Rivera***, 74 F.4th 134 (3d Cir. 2023), *cert. denied*, 144 S. Ct. 409 (2023), a decision issued by the United States Court of Appeals for the Third Circuit. In ***Rivera***, the Third Circuit concluded that the federal Agriculture Improvement Act of 2018, “colloquially called the Farm Bill,” “carved out hemp as an exception to marijuana” but did not “create[] a new element for marijuana offenses” that the

government must prove—i.e., “[t]hat a defendant’s cannabis has more than 0.3% THC.” *Id.* at 135, 139-40.

Bethke opposed the State’s motion to modify WIS JI—CRIMINAL 6030. He argued that the pattern instruction “correctly state[d] the law” and that the State’s motion was “asking the Court to redefine what THC is, and ... asking the Court to mislead the jury in terms of what the definition actually is for this substance.”

The circuit court denied the State’s motion to modify the pattern jury instruction. The court acknowledged that there is no binding Wisconsin authority on the issue raised by the State’s motion. The court also acknowledged that *Rivera* favors the State’s position and that the Iowa Supreme Court had recently followed *Rivera* in *State v. Mumford*, 14 N.W.3d 346 (Iowa 2024), *cert. denied*, 146 S. Ct. 92 (2025). However, the court found the Indiana Court of Appeals’ decision in *Lakes v. State*, 224 N.E.3d 373 (Ind. Ct. App. 2024), more persuasive than *Rivera*. In *Lakes*, the Indiana court cited one of its prior decisions for the proposition that, following the legalization of hemp, the government is required “to prove beyond a reasonable doubt that a substance is marijuana by proving that the substance’s delta-9-THC concentration exceeds 0.3% on a dry weight basis.” *Lakes*, 224 N.E.3d at 375 (citation omitted). Based on *Lakes*, the circuit court concluded that the revised version of WIS JI—CRIMINAL 6030 is “appropriate.”

The State filed a petition for leave to appeal the circuit court’s nonfinal order denying its motion to modify WIS JI—CRIMINAL 6030. On August 22, 2025, this court granted the State’s petition and stayed further proceedings in the circuit court pending the disposition of this appeal.

DISCUSSION

I. Relevant legal authority

WISCONSIN STAT. § 961.41(3g) generally prohibits the possession of controlled substances in Wisconsin, while § 961.41(3g)(e) specifically prohibits the possession of “tetrahydrocannabinols included under [WIS. STAT. §] 961.14(4)(t).” Section 961.14, in turn, lists substances that qualify as “schedule I” controlled substances. Prior to 2019, § 961.14(4)(t) listed as a schedule I controlled substance

[t]etrahydrocannabinols, commonly known as “THC”, in any form including tetrahydrocannabinols contained in marijuana, obtained from marijuana, or chemically synthesized, except that tetrahydrocannabinols do not include any of the following:

1. Cannabidiol in a form without a psychoactive effect that is dispensed as provided in [WIS. STAT. §] 961.38(1n)(a) or that is possessed as provided in [WIS. STAT. §] 961.32(2m)(b).
2. Tetrahydrocannabinols contained in fiber produced from the stalks, oil or cake made from the seeds of a Cannabis plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of a Cannabis plant which is incapable of germination.

WIS. STAT. § 961.14(4)(t) (2017-18).

As noted above, in 2018, Congress legalized hemp via the 2018 Farm Bill. See *Rivera*, 74 F.4th at 135-36; see also Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018). “Both hemp and marijuana are the plant *Cannabis sativa L.*,” but “hemp has a [THC] concentration of 0.3%

or less.”³ **Rivera**, 74 F.4th at 136; *see also* 7 U.S.C. § 1639o(1). The 2018 Farm Bill “amended the [federal] Controlled Substances Act [(CSA)] to exclude hemp from the definition of marijuana.” **Rivera**, 74 F.4th at 135-36. Specifically, the federal CSA now provides that the term “marijuana” “do[es] not include ... hemp, as defined in” 7 U.S.C. § 1639o.⁴ 21 U.S.C. § 802(16)(B)(i). The federal CSA also states that THC is a controlled substance “except for tetrahydrocannabinols in hemp.” 21 U.S.C. § 812(c).

In 2019, the Wisconsin Legislature enacted 2019 Wis. Act 68, which “modifie[d] state law in accordance with the 2018 Farm Bill.” WISCONSIN LEGISLATIVE COUNCIL, Act Memo for 2019 Wis. Act 68 at 2 (Apr. 17, 2020), <https://docs.legis.wisconsin.gov/2019/related/lcactmemo/act068> (hereinafter, “Act Memo”). Specifically, Act 68 “modifies the definition of hemp under state law to conform to the definition created under the 2018 Farm Bill”; “removes hemp from the state CSA by creating an exception for THC contained in hemp, similar to the

³ As the SPD notes, hemp and marijuana both refer to the same plant species, *Cannabis sativa* Linnaeus. *See* eFloras.org, Flora of North America, *Cannabis sativa* Linnaeus, http://www.efloras.org/florataxon.aspx?flora_id=1&taxon_id=200006342 (last visited July 13, 2026). Our state statutes refer to that species as “*Cannabis sativa* L.” *See, e.g.*, WIS. STAT. §§ 94.55(1), 961.01(3r), 961.32(3)(a)1. *Cannabis sativa* L. is a polymorphic species, *see* eFloras.org, Flora of North America, *Cannabis sativa* Linnaeus, http://www.efloras.org/florataxon.aspx?flora_id=1&taxon_id=200006342 (last visited July 13, 2026), meaning that it is a single species with several different forms, *see Polymorphism*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/polymorphism> (last visited July 13, 2026). As such, the SPD explains that the species *Cannabis sativa* L. “contains different cultivars of the plant with varying chemical makeup, including the amount of” THC.

⁴ 7 U.S.C. § 1639o(1) defines “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 a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”

changes to the federal CSA by the 2018 Farm Bill”; and “clarifies that ... the definition of marijuana does not include hemp.” Act Memo at 2.

Accordingly, the Wisconsin Statutes now list the following as a schedule I controlled substance that a person is prohibited from possessing:

Tetrahydrocannabinols, commonly known as “THC”, in any form including tetrahydrocannabinols contained in marijuana, obtained from marijuana, or chemically synthesized, *except that tetrahydrocannabinols do not include any of the following:*

1. Tetrahydrocannabinols contained in a cannabidiol product that is dispensed as provided in [WIS. STAT. §] 961.38(1n)(a) or that is possessed as provided in [WIS. STAT. §] 961.32(2m)(b).
2. Tetrahydrocannabinols contained in fiber produced from the stalks, oil or cake made from the seeds of a Cannabis plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of a Cannabis plant which is incapable of germination.
3. *Tetrahydrocannabinols contained in hemp, as defined in [WIS. STAT. §] 94.55(1).*
4. A drug product in finished dosage formulation that has been approved by the United States food and drug administration that contains cannabidiol (2-[1R-3-methyl-6R-(1-methylethenyl)-2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol) derived from cannabis and no more than 0.1 percent (w/w) residual tetrahydrocannabinols.

WIS. STAT. § 961.14(4)(t) (emphasis added). “Hemp” is defined 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 a delta-9-tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis ... as tested using post-decarboxylation or other similarly reliable methods.

Sec. 94.55(1). Additionally, the statutes now specify that the term “marijuana” “does not include hemp, as defined in [§] 94.55(1).” WIS. STAT. § 961.01(14).

As noted above, in 2024, following these statutory amendments, the Wisconsin Criminal Jury Instructions Committee issued a revised version of WIS JI—CRIMINAL 6030, the pattern jury instruction for possession of a controlled substance. The revised instruction now provides that, in order to convict a defendant of possession of THC, the State must prove three elements beyond a reasonable doubt: (1) “[t]he defendant possessed a substance”; (2) “[t]he substance was tetrahydrocannabinol. *Tetrahydrocannabinol with a Delta-9 THC concentration above 0.3 percent is a controlled substance whose possession is prohibited by law*”; and (3) “[t]he defendant knew or believed that the substance was [tetrahydrocannabinol].” WIS JI—CRIMINAL 6030 (emphasis added; footnotes omitted). Thus, the revised jury instruction requires the State to prove beyond a reasonable doubt, as an element of the offense, that the substance possessed by the defendant had a delta-9-THC concentration above 0.3 percent.

II. The State’s arguments

The State argues that the revised version of WIS JI—CRIMINAL 6030 incorrectly states the law and that, as a result, the circuit court erred by denying the State’s motion to modify that jury instruction. Whether a jury instruction correctly states the law is a question of law that an appellate court reviews de novo. ***State v. Langlois***, 2018 WI 73, ¶34, 382 Wis. 2d 414, 913 N.W.2d 812.

The State’s reasoning in support of its claim that WIS JI—CRIMINAL 6030 incorrectly states the law is as follows. WISCONSIN STAT. § 961.14(4)(t) provides, generally, that THC is a controlled substance, but it then lists four “exceptions” to that general rule in § 961.14(4)(t)1.-4. See § 961.14(4)(t)

(stating that “[t]etrahydrocannabinols” are a controlled substance “*except that* tetrahydrocannabinols *do not include* any of the following ...” (emphasis added)). One of those “exceptions” is that THC “do[es] not include ... [t]etrahydrocannabinols contained in hemp, as defined in [WIS. STAT. §] 94.55(1).” Sec. 961.14(4)(t)3. WISCONSIN STAT. § 961.56(1), in turn, provides that

[i]t is not necessary for the state to negate any exemption or exception in this chapter in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under this chapter. *The burden of proof of any exemption or exception is upon the person claiming it.*

(Emphasis added.)

Reading these statutes together, the State asserts that WIS. STAT. § 961.14(4)(t)3. is an exception to the general rule that THC is a controlled substance and that, under WIS. STAT. § 961.56(1), it is the defendant’s burden to prove that the exception applies in a given case. In other words, the State argues that under this series of statutes, if the State shows that a defendant knowingly possessed a substance containing THC, then in order to avoid a conviction for THC possession, the defendant must prove that the substance in question was actually hemp—i.e., that it had a THC concentration of 0.3% or less.

In support of its position, the State relies heavily on the Third Circuit’s decision in **Rivera**. The State emphasizes that 2019 Wis. Act 68 “modifie[d] state law in accordance with the 2018 Farm Bill,” see Act Memo at 2, and that “[w]here a state statute is modeled on a federal statute, federal law construing the language of the federal statute is persuasive authority,” see **State v. Szarkowitz**, 157 Wis. 2d 740, 751, 460 N.W.2d 819 (Ct. App. 1990). The State

therefore suggests that we should afford “great weight” to the **Rivera** court’s decision and reasoning. See **Szarkowitz**, 157 Wis. 2d at 751-52.

Rivera involved a defendant who was convicted in federal court of possession with intent to deliver marijuana. **Rivera**, 74 F.4th at 136. The defendant “concede[d] that she possessed cannabis,” but she argued “that there was insufficient evidence to support her conviction because the government did not prove her cannabis had more than 0.3% THC, *i.e.*, that it was not hemp.” **Id.** The Third Circuit rejected the defendant’s argument, concluding that “the government did not need to prove this fact.” **Id.** The court cited 21 U.S.C. § 885(a)(1), which—similar to WIS. STAT. § 961.56(1)—states that in a drug possession case, the government need not “negative any exemption or exception set forth in this subchapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this subchapter” and that “the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.” See **Rivera**, 74 F.4th at 138 (quoting 21 U.S.C. § 885(a)(1)). The court then reasoned that “[t]he words that the [CSA] uses to describe marijuana’s relationship with hemp—‘does not include’—are plainly exception-creating words.” **Id.** at 139-40. Thus, the court concluded that under § 885(a)(1), the defendant “bore the burden of producing evidence to put the hemp exception at issue.” **Rivera**, 74 F.4th at 141.

The **Rivera** court specifically rejected the defendant’s argument that the 2018 Farm Bill “created a new element for marijuana offenses: That a defendant’s cannabis has more than 0.3% THC.” **Id.** at 139. The court explained:

If Congress wanted to make cannabis’s THC concentration an element of marijuana, it could have defined marijuana as “the plant *Cannabis sativa* L. ... with a delta-9 [THC] concentration of more than 0.3 percent.” Instead, Congress

provided a general definition of marijuana, and then established exceptions with the words “does not include.”

Id. at 140 (alteration in original). The court also reasoned that the legislative history of the 2018 Farm Bill “confirm[ed]” that Congress intended to “carve[] out hemp as an exception to marijuana” because “[a] House Conference Report expressly call[ed] the hemp provision an exemption.” *Id.*

The State emphasizes that the Iowa Supreme Court recently adopted the *Rivera* court’s analysis in *Mumford*.⁵ See *Mumford*, 14 N.W.3d at 356 (“We agree with the analysis in *Rivera*.”). The State contends that, like the Iowa Supreme Court, we should reach the same conclusion as *Rivera* when interpreting and applying the relevant Wisconsin statutes. According to the State, like the federal CSA, WIS. STAT. § 961.14(4)(t)3. uses “exception-creating” words by stating that THC is a controlled substance, “except that” THC “do[es] not include” THC contained in hemp. Similar to the *Rivera* court’s reasoning, the State argues that if the Wisconsin Legislature had “wanted to make THC concentration an affirmative requirement for the State [to prove], it could have done so when listing

⁵ The State also asserts that courts in several other states “have rejected similar challenges under the theory that hemp is an exception to a criminal offense.” See *Roman v. State*, 2022 WY 48, ¶20, 507 P.3d 453; *State v. Teague*, 2022-NCCOA-600, ¶¶62-63, 286 N.C. App. 160, 879 S.E.2d 881; *State v. Fox*, 658 S.W.3d 186, 193-94 (Mo. Ct. App. 2022); *Thompson v. Commonwealth*, 865 S.E.2d 434, 440 (Va. Ct. App. 2021).

In addition, the State argues that *Lakes v. State*, 224 N.E.3d 373 (Ind. Ct. App. 2024), the Indiana Court of Appeals decision relied upon by the circuit court, is unpersuasive. In particular, the State notes that *Lakes* contained no analysis of the relevant language in the Indiana statutes and instead simply “relied on previous decisions that concluded that the government needed to prove [a] THC concentration greater than 0.3 percent to obtain a conviction for THC possession.” See *Lakes*, 224 N.E.3d at 375 (citing *Fedij v. State*, 186 N.E.3d 696, 709 (Ind. Ct. App. 2022)). The State argues that those prior Indiana decisions failed to “meaningfully engage with the statute’s exception-creating words (‘marijuana’ ‘does not include’ hemp) and the principle that the government need not negate exceptions to criminal offenses.”

THC as a controlled substance and defining marijuana,” for instance, by “[saying] that a certain concentration of THC is a controlled substance” or by defining marijuana as “the plant *Cannabis sativa* L. ... with a delta-9 [THC] concentration of more than 0.3 percent.” (Last alteration in original.) See **Rivera**, 74 F.4th at 140.

Additionally, the State asserts that just as the legislative history of the 2018 Farm Bill supported the **Rivera** court’s conclusion that Congress had created an “exception” in the CSA for possession of hemp, the legislative history of 2019 Wis. Act 68 supports the same conclusion here. Specifically, the State cites the Legislative Council’s Act Memo for 2019 Wis. Act 68, which states that Act 68 “removes hemp from the state CSA by *creating an exception for THC contained in hemp*, similar to the changes to the federal CSA by the 2018 Farm Bill.” Act Memo at 2 (emphasis added). The State also cites the Legislative Reference Bureau’s analysis for 2019 S.B. 188, the bill that was ultimately enacted as 2019 Wis. Act 68, which stated that the bill “[e]xcludes *THC contained in hemp* from the list of Schedule I controlled substances.” See 2019 S.B. 188 at 3, <https://docs.legis.wisconsin.gov/2019/related/proposals/sb188.pdf> (emphasis added). According to the State, these documents show that the legislature intended to create an exception to the offense of possession of THC that applies when the substance that the defendant possessed was hemp, and the legislature did not intend to require the State to prove, as an element of the offense, that the

substance had a THC concentration above 0.3%—i.e., that the substance was not hemp.⁶

The State makes two additional arguments in support of its claim that WIS JI—CRIMINAL 6030 incorrectly states the law. First, the State argues that “even without [WIS. STAT. §] 961.56(1)’s clear instruction on how to treat exceptions to the [Wisconsin] CSA, principles on how to discern affirmative defenses from essential elements of a crime support the State’s reading of Wisconsin’s statutory scheme.” The State asserts that when the legislature does not clearly assign the burden of proving a statutory exception, courts should consider the following factors in assigning the burden: (1) the placement of the exception in the statutory scheme; (2) whether an offense can be described if the exception is omitted; and (3) whether the State or the defendant is better equipped to prove the exception. See *United States v. Carey*, 929 F.3d 1092, 1099-1101 (9th Cir. 2019); *United States v. Kloess*, 251 F.3d 941, 944 (11th Cir. 2001); *United States v. Haggerty*, 997 F.3d 292, 299-300 (5th Cir. 2021).

The State contends that these factors favor a conclusion that, in order to obtain a conviction for possession of THC, the State is not required to prove beyond a reasonable doubt that the substance possessed by the defendant had a THC concentration above 0.3%. The State notes that WIS. STAT. § 961.14(4)(t)

⁶ The State also emphasizes that although the Criminal Jury Instructions Committee concluded that the revised version of WIS JI—CRIMINAL 6030 was “an accurate statement of the law,” the committee acknowledged that the law appeared to be “unsettled,” specifically with respect to the interaction between WIS. STAT. §§ 961.14(4)(t)3. and 961.56(1). See WIS JI—CRIMINAL 6030 cmt. The Committee also noted that § 961.56(1) “was enacted prior to the enactment of 2019 Wisconsin Act 68.” WIS JI—CRIMINAL 6030 cmt. We observe, however, that “[t]he legislature is presumed to know the state of the law when it enacts or amends legislation.” *C & A Invs. v. Kelly*, 2010 WI App 151, ¶10, 330 Wis. 2d 223, 792 N.W.2d 644.

“lists THC as a controlled substance and then—in a distinct clause or provision set out from the first—offers four exceptions to that general rule.” “It is a ‘well-established rule of criminal statutory construction that an exception set forth in a distinct clause or provision should be construed as an affirmative defense and not as an essential element of the crime.’” *Haggerty*, 997 F.3d at 299 (citation omitted). The State also asserts that § 961.14(4)(t) “defines a perfectly cogent offense” without the exception for hemp found in § 961.14(4)(t)3. See *Kloess*, 251 F.3d at 945. Additionally, the State contends that defendants “are better positioned to know and prove that the substance possessed was hemp, not marijuana,” because “they should know where and when they obtained the legal product and may have access to financial records, commercial packaging, or (in the case of a hemp producer) a license to prove as much.” As such, the State contends that even absent WIS. STAT. § 961.56(1), the fact that a substance qualifies as hemp is an affirmative defense that the defendant must prove, not an element of the crime of THC possession that the State must prove. See *State v. Loomer*, 153 Wis. 2d 645, 651, 451 N.W.2d 470 (Ct. App. 1989) (“A state may constitutionally place a burden of proof upon a defendant with respect to a question of fact so long as the defense is affirmative and does not attack an element of the crime.”).

The State also contends that interpreting WIS. STAT. § 961.14(4)(t) to require the State to prove that the substance possessed by the defendant had a THC concentration above 0.3% would create an absurd result. See *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (“[S]tatutory language is interpreted ... reasonably, to avoid absurd or unreasonable results.”). Namely, the State posits that if the hemp exception in § 961.14(4)(t)3. is an element of the offense of THC possession, then

all four of the exceptions in § 961.14(4)(t) must be elements of the offense, because “[i]t cannot be that the same language—‘except that [THC does] not include’—means one thing for one exception and not another.” The State therefore argues that, if the Criminal Jury Instructions Committee’s interpretation of § 961.14(4)(t)3. is correct, “[t]hat would mean in every THC prosecution, the State would need to disprove all four exceptions to obtain a conviction.”

As the State notes, however, “not even the jury instruction committee believes that the State must disprove all four exceptions in [WIS. STAT. §] 961.14(4)(t)” to obtain a conviction for THC possession, given that the Comment to WIS JI—CRIMINAL 6030 expressly refers to the first exception listed in the statute as an “affirmative defense.” See WIS JI—CRIMINAL 6030 cmt.; § 961.14(4)(t)1.⁷ Thus, argues the State, “the jury instruction has created two competing burdens for exceptions under [§] 961.14(4)(t),” but the Comment to the jury instruction “offer[s] no reason why the exceptions ... should be treated differently.” The State contends that its “plain reading of the statutory scheme” avoids this unreasonable result by treating the hemp exception in § 961.14(4)(t)3. the same as the exception in § 961.14(4)(t)1. As such, the State argues that we should adopt its interpretation of the relevant statutes and “reverse the circuit court’s denial of [its] motion to modify” WIS JI—CRIMINAL 6030.

⁷ WISCONSIN STAT. § 961.14(4)(t)1. provides that THC does not include “[t]etrahydrocannabinols contained in a cannabidiol product that is dispensed as provided in [WIS. STAT. §] 961.38(1n)(a)”—i.e., dispensed by an approved pharmacy or physician as a treatment for a medical condition—“or that is possessed as provided in [WIS. STAT. §] 961.32(2m)(b)”—i.e., possessed by an individual with a certification allowing the possession of cannabidiol products to treat a medical condition.

III. Bethke's and the SPD's arguments

Unlike the State, Bethke and the SPD maintain that WIS JI—CRIMINAL 6030 correctly requires the State to prove beyond a reasonable doubt, as an element of the offense of THC possession, that the substance possessed by the defendant had a THC concentration above 0.3%.

In support of their position, Bethke and the SPD observe that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” See *In re Winship*, 397 U.S. 358, 364 (1970); see also *State v. McAllister*, 107 Wis.2d 532, 533, 319 N.W.2d 865 (1982) (“Unquestionably, the state has the burden of proving each essential element of a crime charged beyond a reasonable doubt.”). Generally speaking, the crime of possession of a controlled substance requires the State to prove three elements: (1) that the defendant possessed a substance; (2) that the substance was a controlled substance; and (3) that the defendant knew or believed that the substance was a controlled substance. See WIS JI—CRIMINAL 6030. Thus, the State is required to prove, as an element of the offense, that the substance in question was a controlled substance. The SPD asserts that, stated differently, the State must prove that the substance in question “is illegal to possess.”

The SPD emphasizes, however, that following the legalization of hemp in Wisconsin, it is no longer illegal to possess a substance that contains a THC concentration of 0.3% or less. Accordingly, the SPD argues that the State's claim that it does not need to prove that a substance had a THC concentration exceeding 0.3% is akin to an argument that the State “does not have to prove the illegality of purported THC, just that the substance *might* be illegal, *i.e.* there is

some delta-9-THC present.” The SPD contends, however, that “[e]ven after establishing the presence of delta-9-THC, the State has not proven the illegality of the substance,” which is an element of the offense. Consequently, the SPD argues that WIS JI—CRIMINAL 6030 correctly requires the State to prove, beyond a reasonable doubt, that the THC concentration in a substance exceeds the 0.3% threshold.⁸

Bethke and the SPD also dispute the State’s assertion that the fact that a substance qualifies as hemp is an “exception” or “affirmative defense” to the crime of possession of THC. According to the SPD, the State’s arguments in that regard (and the Third Circuit’s analysis in *Rivera*) “put semantics over substance” and “ignore how affirmative defenses operate.”

An affirmative defense is “a defendant’s assertion raising new facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim *even if all allegations in the complaint are true.*” *State v. Watkins*, 2002 WI 101, ¶39, 255 Wis. 2d 265, 647 N.W.2d 244 (citation omitted). As such, an affirmative defense “does not implicate proof of elements of the crime” and “does not serve to negative any facts of the crime which the State is to prove in order to convict.” *Id.*, ¶40 (citations omitted).

Accordingly, the SPD argues that “[a]ffirmative defenses generally require the State to prove a crime before the defense comes into consideration.” *See, e.g., State v. Saternus*, 127 Wis. 2d 460, 468, 381 N.W.2d 290 (1986)

⁸ Bethke similarly argues that, following the legalization of hemp, the Wisconsin Statutes “do[] not prohibit possession of a substance based upon the mere presence of THC,” and “[i]t is the concentration of delta-9 THC that distinguishes legal THC from illegal THC.”

(“Entrapment is an affirmative defense which ... comes into play to exonerate an accused only in circumstances where the accused would otherwise be found guilty because all elements of the crime have been proved beyond a reasonable doubt.”). The SPD asserts, however, that in a THC possession case, if the State fails to prove that the substance possessed by the defendant was illegal—i.e., that it had a THC concentration above 0.3%—then “there is nothing for the defendant to rebut.” The SPD therefore contends that the fact that the substance in question had a THC concentration of 0.3% or less cannot be an affirmative defense.⁹

The SPD also disputes the State’s assertion that the revised version of WIS JI—CRIMINAL 6030 creates an absurd result by treating the hemp “exception” in WIS. STAT. § 961.14(4)(t)3. as an element of the crime of THC possession but treating the “exception” in § 961.14(4)(t)1. as an affirmative defense. The SPD contends that this result is not absurd because, unlike § 961.14(4)(t)3., § 961.14(4)(t)1. actually *does* function as an affirmative defense. The SPD reasons that once the State proves all of the elements of THC possession beyond a reasonable doubt, § 961.14(4)(t)1. allows a defendant to prove that his or her possession of THC was nevertheless legal because the defendant was either authorized to dispense cannabidiol products as a treatment for a medical condition or had a certification allowing the possession of cannabidiol products for the treatment of a medical condition. In other words, according to the SPD,

⁹ Bethke argues that WIS. STAT. § 961.14(4)(t)3. cannot be an affirmative defense because “[a]ffirmative defenses are statutorily defined,” see WIS. STAT. §§ 939.42–939.49, and “the statutorily defined affirmative defenses do not include reference to hemp or to specific concentration amounts required to prove a crime occurred pursuant to § 961.14(4)(t).” We note, however, that Bethke cites no legal authority in support of the proposition that the affirmative defenses listed in §§ 939.42–939.49 are the *only* affirmative defenses recognized in Wisconsin criminal law.

§ 961.14(4)(t)1. allows the defendant to prove that he or she had “a legal justification for the otherwise criminal behavior.” Conversely, the SPD asserts that § 961.14(4)(t)3. “is not the same” because it goes to whether the substance possessed by the defendant was illegal in the first place, which is an element of the crime that the State must prove beyond a reasonable doubt.¹⁰

Finally, the SPD argues that the issue raised in this appeal is “more than a question of whose burden it is” to “[p]rove the concentration of delta-9-THC in suspected marijuana” because the State is effectively seeking to “offload[] the costs of prosecution onto defendants before conviction.” The SPD notes that, by statute, a substance qualifies as hemp when it has a THC concentration of 0.3% or less “as tested using post-decarboxylation or other similarly reliable methods.” See WIS. STAT. § 94.55(1). However, the SPD cites testimony that was provided at the defendant’s jury trial in *State v. Jones*, No. 2025AP1539-CR, another case that is currently pending before this court, in which a controlled substance analyst from the Wisconsin State Crime Laboratory in Wausau testified that her laboratory “does not currently test percentage amounts of THC” and does not “have any procedures that ... have been set up for us to be able to do that type of testing.” The SPD asserts—and we tend to agree—that

¹⁰ Notably, neither Bethke nor the SPD cites or directly addresses WIS. STAT. § 961.56(1)—which is one of the pillars of the State’s legal analysis in this case. However, in what appears to be an indirect reference to that statute, the SPD contends that “[r]egardless of what the legislative branches intended, the Constitution requires the State to prove all essential elements of a crime.” As such, the SPD appears to argue that, to the extent § 961.56(1) places the burden on a defendant to prove under WIS. STAT. § 961.14(4)(t)3. that the substance he or she possessed was hemp, the legislature’s allocation of the burden is unconstitutional.

“[t]here is a twisted irony of the State requiring specific testing [to establish a substance’s THC concentration] while not providing that testing.”¹¹

According to the SPD, the State’s “burden-shifting analysis,” combined with its “refusal to do the necessary testing,” “results in several untenable outcomes.” First, the SPD notes that under WIS. STAT. § 165.79(1), “[u]pon request of a defendant in a felony action, approved by the presiding judge,” the state crime laboratories “shall conduct analyses of evidence on behalf of the defendant.” The results of such testing are shielded from the State, see *id.*, and the SPD asserts that the testing is provided at no cost to the defendant. As the SPD notes, however, “defendants cannot utilize the crime labs for testing they do not offer”—namely, testing to determine a substance’s THC concentration.¹²

Second, the SPD asserts that “[i]t is unlikely that defendants can request independent testing outside of the” state crime laboratories. In support of this assertion, the SPD cites WIS. STAT. § 971.23(5), which states that a court “may order the production of any item of physical evidence which is intended to be introduced at the trial for scientific analysis under such terms and conditions as

¹¹ Although the analyst’s testimony in *State v. Jones*, No. 2025AP1539-CR, suggests that Wisconsin’s state crime laboratories do not currently have the capability to perform THC concentration testing, the SPD argues that this court’s recent decision in *State v. Syrrakos*, 2025 WI App 73, 419 Wis. 2d 224, 30 N.W.3d 489, suggests otherwise. In *Syrrakos*, we noted that certain items had been “tested and found to have concentrations of THC in excess of the legal limit.” See *id.*, ¶¶17, 28. According to the SPD, this demonstrates that “the State **can** perform quantitative testing [for THC], it just chooses not to.” We note, however, that the criminal complaint in *Syrrakos* specifically stated that the items in question were “taken to Accelerated Cannabis Laboratories in Milwaukee, Wisconsin for analysis,” as opposed to being tested at a state crime laboratory.

¹² The SPD also observes that the testing permitted by WIS. STAT. § 165.79(1) applies only to defendants charged with felonies, but first-offense THC possession is a misdemeanor. See WIS. STAT. § 961.41(3g)(e).

the court prescribes.” The SPD contends that the plain language of this statute typically will not permit a defendant to obtain outside testing of a substance’s THC concentration because “the State rarely introduces the actual substance[] into evidence at trial.” The SPD also asserts that under § 971.23(5), the results of any scientific testing may be disclosed to the State, and “[n]othing prevents courts from assessing costs of testing to the defendant.” The SPD argues that this cost issue “is particularly acute for public defender clients, who have demonstrated an inability to afford the testing envisioned by the State,” and is equally problematic for “individuals who do not qualify for public defender representation, but who still cannot afford an attorney.”

Third, the SPD asserts that, aside from WIS. STAT. §§ 165.79(1) and 971.23(5), “there is no statutory authority for defendants to obtain additional testing” of a substance that is alleged to contain an illegal concentration of THC. Accordingly, the SPD disputes the State’s assertion that defendants “are better positioned to prove that the substance they possessed was hemp.” The SPD explains:

While possession of materials suggesting legally purchased hemp (e.g. receipts and commercial packaging) is circumstantial evidence of legality, a jury is not required to believe a defendant who testifies the substance they were found with is the same that was legally purchased. The only way for a defendant to definitively prove legality is through scientific testing. The State does not assert that defendants are better positioned to secure such testing.

Fourth, the SPD notes that under the State’s proposed interpretation of the relevant statutes, in which “illegality [of any substance containing THC] is presumed,” “individual defendants must gamble every time they legally purchase hemp from a licensed seller.” As demonstrated by this court’s recent decision in *State v. Syrrakos*, 2025 WI App 73, ¶¶16-17, 419 Wis. 2d 224, 30 N.W.3d 489, an

item purchased from a licensed seller of hemp may, upon testing, be determined to have a THC concentration that exceeds 0.3%. As such, the SPD asserts that under the State’s proposed interpretation of the relevant statutes, “[r]ather than being able to rely on the regulation of hemp, WIS. STAT. §§ 94.55(2)(c) & (2g), and labeling of products, WIS. STAT. § 100.18(1), consumers must now fear not only prosecution for purchasing a legal product, but that they will have to prove their innocence.” We share the SPD’s concern that this result appears to be untenable, in light of the legislature’s decision to legalize hemp.

For all of these reasons, Bethke and the SPD urge this court to affirm the circuit court’s decision and hold “that the State must prove the illegality of *cannabis* by evidence probative of and demonstrating an illegal concentration of delta-9-THC.”

CONCLUSION

As the above summary of both sides’ arguments shows, this appeal raises a novel and present legal question as to which party should bear the burden of proving the THC concentration of a substance that is alleged to contain an illegal amount of THC, following the legalization of hemp in Wisconsin. The State’s argument that the defendant must prove, as an affirmative defense, that the substance has a THC concentration of 0.3% or less finds support in the plain language of WIS. STAT. §§ 961.14(4)(t)3. and 961.56(1), and in the Third Circuit’s decision in **Rivera**, which interpreted similar federal statutes. Bethke and the SPD, however, raise persuasive arguments supporting a conclusion that § 961.14(4)(t)3. does not actually operate as an affirmative defense and, instead, requires the State to prove, as an element of the crime, that the substance possessed by the defendant had a THC concentration above 0.3%. The SPD also

raises significant concerns regarding the practical effects of requiring a defendant to prove that the THC concentration of a substance did not exceed 0.3%, given the claimed current inability of the state crime laboratories to perform the requisite testing and the fact that it is unclear whether a defendant may obtain the necessary testing from an outside laboratory.

The Wisconsin Supreme Court “has been designated by the constitution and the legislature as a law-declaring court.” *State v. Grawien*, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985). “While the court of appeals also serves a law-declaring function, such pronouncements should not occur in cases of great moment.” *Id.* Given the importance of the issue raised in this appeal, the unsettled state of the law, the lack of any case-specific factual issues in this case, and the high likelihood that the issue will recur in future cases, we believe this is a case in which it would be appropriate for the supreme court, rather than the court of appeals, to render a decision.¹³ A decision by the supreme court “will help develop, clarify or harmonize the law.” WIS. STAT. RULE 809.62(1r)(c). Furthermore, “[t]he question presented is a novel one, the resolution of which will have statewide impact,” RULE 809.62(1r)(c)2., thereby providing much-needed guidance to Wisconsin litigants, attorneys, and lower courts. Accordingly, we respectfully certify this appeal to the Wisconsin Supreme Court.

¹³ We also note that if this court were to render a decision in this case, the unsuccessful party would likely seek supreme court review of our decision. As such, granting this certification, rather than allowing this appeal to proceed in the court of appeals, will expedite the resolution of the novel issue raised in this case, which will affect not only the litigants herein, but also those in many other cases.

