STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP845-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MEDFORD B. MATTHEWS, III,

Defendant-Respondent.

ON APPEAL FROM AN ORDER ENTERED IN
KENOSHA COUNTY CIRCUIT COURT,
THE HONORABLE BRUCE E. SCHROEDER PRESIDING

PLAINTIFF-APPELLANT'S BRIEF AND APPENDIX

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ISSUE PRESENTED FOR REVIEW

The Kenosha County district attorney charged Medford B. Matthews, III, with seven crimes: four counts of exposing intimate parts, two counts of child enticement, and one count of sexual intercourse with a child age 16 or older.

Exposing intimate parts and child enticement are felonies. Sexual intercourse with a child age 16 or older is a misdemeanor.

On March 19, 2018, the Kenosha County circuit court dismissed the six felony charges on Matthews's motion, leaving only the misdemeanor charge for trial. The court called the district attorney's application of the felony charges to this case–and his decision to charge the felonies–abusive and absurd.

Did the circuit court err in dismissing the six felony charges?

The circuit court implicitly answered "no."

This Court should answer "yes."

INTRODUCTION

"Absurdity, like beauty, sometimes lies in the eye of the beholder."[1]

We have that here.

The beholders in this case—Matthews and the circuit court—believe the district attorney overcharged Matthews. The court acted on this belief by dismissing the six felony charges. In so doing, the court improperly usurped the district attorney's charging authority, and improperly

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[1] *Maine Medical Center v. Burwell*, 841 F.3d 10, 22 (1st Cir. 2016).

applied the absurdity doctrine to facilitate that effort. This Court should rectify the situation by reversing the dismissal order, and remanding the case to permit prosecution on all seven charges.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument appears unnecessary. The parties' briefs should adequately develop the relevant legal arguments. Publication may clarify the proper roles of the district attorney and the circuit court in the charging of criminal cases, and the proper judicial application of the absurdity doctrine. Wis. Stat. § (Rule) 809.23(1)(a)1.

RELEVANT STATUTES

A person commits the Class I felony offense of exposing intimate parts under Wis. Stat. § 948.10(1) when, for purposes of sexual arousal or gratification, he causes a child to expose intimate parts, or exposes his intimate parts to the child. A convicted defendant faces a possible three-and-one-half-year prison sentence.

A person commits the Class D felony offense of child enticement with intent to expose intimate parts under Wis. Stat. § 948.07 when, with intent to violate Wis. Stat. § 948.10(1), he causes or attempts to cause a child to go into any vehicle, building, room, or secluded place. A convicted defendant faces a possible 25–year prison sentence.

A person commits the Class A misdemeanor offense of sexual intercourse with a child age 16 or older under Wis. Stat. § 948.09 when he has nonmarital sexual intercourse with the child. A convicted defendant faces a possible nine–month sentence.

STATEMENT OF THE CASE

The State appeals from the March 19, 2018, order dismissing six felony counts from the amended complaint, leaving one misdemeanor count for trial. (R. 21; A-App. 125–28.) The criminal behavior the State attributes to Matthews in this brief is alleged, not yet established at trial.

The amended complaint charged Matthews with four counts of exposing intimate parts (Counts One, Three, Five, and Six), two counts of child enticement (Counts Two and Four), and one count of sexual intercourse with a child age 16 or older (Count Seven). (R. 16:1–7; A-App. 101–07.) The charges stem from physical and sexual activity involving the 28-year-old Matthews, a supermarket manager, and his 17-year old employee, MJH, at the beginning of September, 2017. (R. 16:2–6; A-App. 102–06.)

The first exposure of intimate parts occurred September 3, 2017, when Matthews removed MJH's clothing. (R. 16:3; A-App. 103.) The second occurred September 11, 2017, when Matthews again removed MJH's clothing. (R. 16:3–4; A-App. 103–04.) The third and fourth occurred September 18, 2017, when Matthews again removed MJH's clothing, as well as his own. (R. 16:4; A-App. 104.)

The first child enticement occurred September 11, 2017, when Matthews drove MJH to his brother's house and engaged in sexual behavior. (R. 16:3–4; A-App. 103–04.) The second occurred September 18, 2017, when Matthews drove MJH to his own residence and again engaged in sexual behavior. (R. 16:4; A-App. 104.)

Finally, the sexual intercourse occurred September 18, 2017, when Matthews inserted his finger into MJH's vagina. (R. 16:4; A-App. 104.)

On December 11, 2017, Matthews filed a motion to dismiss Counts One through Six–the felony charges of exposing intimate parts and child enticement. (R. 12; A-App. 108–113.)

Matthews led with a subjective assertion: "The worst act the defendant is accused of committing is sexual contact with a finger—which the legislature has defined as "intercourse"—with a seventeen-year-old. Nonetheless, the [district attorney] has drafted a complaint that exposes the defendant to nearly *65 years* of imprisonment and a *quarter million dollars* in fines." (R. 12:2; A-App. 109.) Matthews followed with challenges to venue and jurisdiction as to Counts Two and Three, double jeopardy challenges to Counts Two, Four, Five, and Six, and challenges to the factual sufficiency of Counts Two and Four. (R. 12:2–4; A-App. 109–111.)

Matthews also asked the circuit court to dismiss Counts One through Six based on the "doctrine of absurdity." (R. 12:4–5; A-App. 111–12.) He repeated his subjective assertion that the "worst act" alleged against him was the act of misdemeanor sexual intercourse. (R. 12:4; A-App. 111.) He also accused the district attorney of "stacking" felony charges against him to increase the maximum possible penalty. (R. 12:4; A-App. 111.)

He then argued that a court may consider a clear, unambiguous statute absurd if, by applying it literally, the result is absurd and unreasonable. (R. 12:4–5; A-App. 111–12.) He argued that, "in our case, the [district attorney] is charging *serious* felonies for *routine* acts—i.e., going into a house and undressing—that are necessary predicate acts to sexual intercourse. This leads to an absurd result." (R. 12:5; A-App. 112.) He noted a previous Kenosha County case where a circuit court apparently applied the absurdity doctrine. (R. 12:5; A-App. 112.)

The district attorney opposed Matthews' motion. (R. 15.) As to the absurdity doctrine claim, the district attorney noted that the seven charges—and the three crimes specified in the charges—were legally and factually distinct, and the legislature had determined that each crime addressed different types of criminal conduct. (*Id*. at 3–4.)

A Kenosha County court commissioner passed the double jeopardy and absurdity doctrine claims to the circuit court for decision, and denied the remaining claims. (R. 28:2–5.)

The circuit court held a hearing on Matthews' motion on February 21, 2018, (R. 29; A-App. 114–124.) The court began by confirming it had, in fact, considered a similar motion in a different case. (R. 29:5; A-App. 118.)

The circuit court then posited a possible outcome in Matthews' case—convictions for misdemeanor sexual intercourse with a child age 16 or older and felony child enticement, if the intercourse occurred as the result of Matthews causing MJH to go to a place outside of public view with the intent to expose intimate parts. (R. 29:5, 7–8; A-App. 118, 120–21.) The court suggested that, if the sexual intercourse had occurred in public, Matthews would only face the misdemeanor conviction. The court challenged the district attorney: "Do you think that is absurd?" (R. 29:6; A-App. 119.)

The circuit court thought it was absurd, and an abusive charging decision by the district attorney: "I think this is abusive. I really do. You know, the district attorney may well be disgusted with certain conduct, which if it's true, it's loathsome. It's a very serious matter. It doesn't change the fact that the statutes have to be applied in a fashion that makes it non-absurd." (R. 29:8; A-App. 121.) The court also considered it absurd for the district attorney to charge the crimes of exposing intimate parts and sexual

intercourse with a child age 16 or older in combination because it was impossible to engage in sexual intercourse without exposing intimate parts. (R. 29:8–9; A-App. 121–22.)

On March 19, 2018, the circuit court entered a written order dismissing the six felonies. (R. 21; A-App. 125–28.) The court reasoned as follows:

First, Wisconsin law once made it a felony for an adult male defendant to have nonmarital sexual intercourse with a female child age 16 or older. (R. 21:1–2, A-App. 125–26.)

Second, the legislature later created section 948.09, which made it a misdemeanor for an adult defendant to have nonmarital sexual intercourse with a child age 16 or older. (R. 21:2; A-App. 126.)

Third, by creating section 948.09, the legislature expressed its "obvious" intent that a completed act of nonmarital sexual intercourse between an adult defendant and a child age 16 or older should result only in a misdemeanor conviction for the adult. (R. 21:2; A-App. 126.) The court cited no legislative history or other legal authority to support this conclusion.

Fourth, the district attorney "reads the statutes to require that the sexual contact occur without either party exposing his or her genitals to the other," and fails to adequately explain how an act of misdemeanor sexual intercourse with a child age 16 or older may occur under section 948.09 without the simultaneous commission of a felony exposure of intimate parts under section 948.10(1). (R. 21:2–3; A-App. 126–27.)

Fifth, the district attorney's decision to charge Matthews with violating both section 948.09 and section 948.10 was absurd because Matthews could not have sexual intercourse with MJH without causing her to expose her intimate parts, or without exposing his own intimate parts: "Since it would be impossible for intercourse to occur without

exposing a sex organ of at least one of the participants, the district attorney's charging decision is an absurd one, which has the effect of defeating the intent of the Legislature. To read the statutes in this manner leads to an absurd result." (R. 21:3; A-App. 127.)

Sixth, the district attorney's decision to charge Matthews under both section 948.09 and section 948.07(3) (child enticement with intent to violate section 948.10) was absurd because, if Matthews and MJH had had sexual intercourse in a public area, the district attorney could not have charged Matthews with the felony offense of child enticement. (R. 21:3; A-App. 127.)

And seventh, the circuit court considered the district attorney's charging decision in this case a "very serious matter, because the bringing of the these felony charges puts improper pressure on a defendant to plead guilty to a crime which he may not have committed. A charge brought deliberately for that purpose would constitute an abuse of power." (R. 21:4; A-App. 128.) The court deemed the district attorney's felony charges "absurd," and dismissed them. (R. 21:4; A-App. 128.)

The district attorney requested reconsideration, arguing (1) that a single act by a defendant can result in the commission of more than one crime; (2) that the charged crimes each address separate social interests; (3) that the statutes establishing the charged crimes contain no language limiting their application; (4) that the statutes contain no express statement of legislative intent preventing the district attorney from charging them simultaneously; (5) that courts cannot interpret statutes based on their personal, subjective notions of good public policy; (6) that the absurdity doctrine applies only when a disposition results that no reasonable person could intend, and only where the absurdity can be rectified solely by correcting a technical or ministerial error in the drafting of the statute; (7) that

district attorneys enjoy wide latitude in charging decisions, free from judicial interference; and (8) that the circuit court lacked authority to dismiss the six felony counts with prejudice, in the absence of a constitutional speedy trial violation. (R. 22:1–6; A. App. 129–135.)

The circuit court held hearings on the reconsideration request. (R. 30; 31; A-App. 136–58.) The court said it did not believe the statutes themselves were absurd, but asked the district attorney again how a defendant could commit an act of misdemeanor sexual intercourse with a child age 16 or older without also committing an exposure of intimate parts. (R. 30:3–4; A-App. 138–39.) The district attorney pointed out that one act may violate more than one criminal statute, analogizing to a sexual assault between siblings that also constituted incest. (R. 30:5; A-App 140.)

The circuit court chose to discuss the issue of lawful consent to sexual activity, and again asked why a public act of nonmarital sexual intercourse between an adult and a child over the age of 16 should only expose a defendant to a misdemeanor conviction, when the same act could lead to an additional felony conviction for child enticement if the defendant lured the child to a private place to have sex. (R. 31:4–9; A-App. 147–152.) The court challenged the district attorney: "Tell the court of appeals you don't think that is absurd. Tell the court of appeals you don't think that is absurd." (R. 31:9; A-App. 152.)

The district attorney reminded the circuit court that the statutes themselves contained no limitation on the district attorney's broad charging discretion. (R. 31:10; A-App. 153.)

While the circuit court saw no indication that the district attorney brought the original charges against Matthews for improper purposes, *see* R. 31:12–13, A-App.

155–56, it did not alter its March 19, 2018, written order. The State appeals from that order.

STANDARD OF REVIEW

The scope of a circuit court's authority to act in a particular area, statutory construction, and a statute's applicability to a set of facts all present questions of law, reviewed de novo. *See DWD v. LIRC*, 2016 WI App 21, ¶ 7, 367 Wis. 2d 609, 877 N.W.2d 620; *Pulera v. Town of Richmond*, 2017 WI 61, ¶ 12, 375 Wis. 2d 676, 896 N.W.2d 342.

ARGUMENT

The circuit court erred in dismissing the six felony charges.

A. Principles of law governing a district attorney's charging authority.

A circuit court cannot substitute its judgment—directly or indirectly—for the district attorney's judgment on which charges to bring in a criminal case. Absent statutes that provide for judicial involvement, the responsibility for charging a case rests with the executive branch of government, that is, the district attorney. *State ex rel. Unnamed Petitioners v. Connors,* 136 Wis. 2d 118, 124, 401 N.W.2d 782 (1987), *rev'd on other grounds sub nom., State v. Unnamed Defendant*, 150 Wis. 2d 352, 358, 441 N.W.2d 696 (1989). *See also Flynn v. DOA*, 216 Wis. 2d 521, 545, 576 N.W.2d 245 (1998) ("The doctrine of separation of powers is implicitly found in the tripartite division of government [among] the judicial, legislative, and executive branches.").

District attorneys "have primary responsibility and wide discretion" in charging criminal offenses. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 27, 271 Wis. 2d 633, 681 N.W.2d 110. *See also* Wis. Stat.

§ 978.05(1). If probable cause exists to believe the defendant has committed a crime defined by statute, then the district attorney decides whether and what to charge, subject to constitutional limitations not present here. *See United States v. Batchelder*, 442 U.S. 114, 124 (1979); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Sears v. State*, 94 Wis. 2d 128, 133–34, 287 N.W.2d 785 (1980).

Even when the constitution is involved, the circuit court's authority to dismiss is circumscribed: "[W]e hold that the [circuit] courts of this State do not possess the power to dismiss a criminal case with prejudice prior to the attachment of jeopardy except in the case of a violation of a constitutional right to a speedy trial." *State v. Braunsdorf*, 98 Wis. 2d 569, 586, 297 N.W.2d 808 (1980).[2]

The district attorney does not answer to any other state officers, including the circuit court, who may disagree with his charging decisions. *State v. Johnson*, 74 Wis. 2d 169, 174, 246 N.W.2d 503 (1976); *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 378–79, 166 N.W.2d 255 (1969). He answers to the electorate. *Kurkierewicz*, 42 Wis. 2d at 378. A circuit court's disagreement with the district attorney's charging choices does not justify dismissal: "Prosecutors are given wide discretion in their charging decisions and, although some may disagree—as the trial judge apparently did—with the prosecutor's decision to [charge] [here], it is a decision which must be lived with."

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[2] The order in this case does not specify whether the circuit court dismissed the charges with or without prejudice. (R. 21:4; A-App. 128.) But the circuit court's reasoning—and the tone in which the court expressed that reasoning—leaves little doubt that it will not permit reinstatement of the charges at some later point, unless this Court intervenes.

United States v. Malik, 16 F.3d 45, 52 (2nd Cir. 1994) (footnote omitted).

As to the charges brought, the district attorney "may select among related crimes and determine which of them will be charged." *Unnamed Petitioners*, 136 Wis. 2d at 125. If a defendant's conduct violates more than one criminal statute, the district attorney may charge violations of each statute. "Except as provided in s. 948.025(3), if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions." Wis. Stat. § 939.65.

B. Principles of law governing the application of criminal statutes to specific fact situations.

The fact that the legislature may not have contemplated the application of a criminal statute to a given fact situation does not mean the district attorney cannot charge the crime. Statutory provisions should apply to all situations fairly included within their terms, absent language in the statute to the contrary. *State v. Badzmierowski,* 171 Wis. 2d 260, 263–64, 490 N.W.2d 784 (Ct. App. 1992). "If the language of a statute reasonably covers a situation, the statute applies irrespective of whether the legislature ever contemplated that specific application." 2B Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction,* § 54:5 (7th ed. 2016).

C. Principles of law governing application of the absurdity doctrine.

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon [of judicial construction] is also the last:

judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations and quotations omitted).

The absurdity doctrine applies to unambiguous statutes. Where the plain language interpretation of a statute would lead to an absurd outcome which the legislature could not have intended, a court may employ the doctrine to avoid the absurd result. *Resolution Trust Corp. v. Westgate Partners, Ltd.*, 937 F.2d 526, 529 (10th Cir. 1991). It is an exception to the rule of statutory construction that the plain, ordinary meaning of a statute controls.

But it is also a doctrine sharply limited in scope and applicability:

> [I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.

Sturges v. Crowninshield, 17 U.S. 122, 202–03 (1819).

It must be "unthinkable" for the legislature "to have intended the result commanded by the words of the statute." *Robbins v. Chronister*, 435 F.3d 1238, 1241 (10th Cir. 2006). "It is not enough for a court to find that upon application of the plain meaning of a statute, a given outcome is foolish. Instead, a court so finding must be convinced that the result is so absurd that [the legislature], not the court, could not have intended such a result." *Resolution Trust Corp.*, 937 F.2d at 529.

Wisconsin courts recognize a variant of the doctrine. "[A] statute should not be construed to work an absurd result, even when the language seems clear and unambiguous." *Dombeck v. Chicago, M., St. P. & P. R. Co.*,

24 Wis. 2d 420, 438, 129 N.W.2d 185 (1964). But Wisconsin courts have also limited its applicability by cautioning that "[j]udicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute." *Kalal*, 271 Wis. 2d 633, ¶ 44.

Recent United States Supreme Court decisions have further limited the absurdity doctrine's applicability. Those decisions treat the doctrine as "linguistic rather than substantive," "draw[ing] a line between poor exposition and benighted substantive choice; the latter is left alone, because what judges deem a 'correction' or 'fix' is from another perspective a deliberate interference with the legislative power to choose what makes for a good rule." *Jaskolski v. Daniels*, 427 F.3d 456, 462 (7th Cir. 2005) (discussing cases). This limitation preserves the respective roles of the judiciary and the legislative branches, and prevents courts from declaring statutes "absurd" to advance their subjective views of proper public policy. *See also Sutherland Statutes and Statutory Construction*, § 45.12 at 122 (application of absurdity doctrine "entail[s] the obvious risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said.").

If the text of a statute parses—if there is no "linguistic garble"—the doctrine does not apply. *United States v. Logan*, 453 F.3d 804, 806 (7th Cir. 2006). "The canon is limited to solving problems in exposition, as opposed to the harshness that a well-written but poorly conceived statute may produce . . . . Otherwise judges would have entirely too much leeway to follow their own policy preferences by declaring that the legislative choice is harsh or jarring." *Id*.

Two respected legal commentators concur. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, § 37 at 234–39 (2012). After reviewing the

relevant legal authority, Scalia and Garner conclude that "error-correction for absurdity can be a slippery slope. It can lead to judicial revision of public and private texts to make them (in the judge's view) more reasonable." *Id.* at 237. They support applying the doctrine only to situations where (1) the absurdity consists of a disposition that no reasonable person could intend, and (2) the absurdity "must be reparable by changing or supplying a particular word or phrase whose inclusion or omission was obviously a technical or ministerial error . . . . The doctrine does not include substantive errors arising from a drafter's failure to appreciate the effect of certain provisions." *Id.* at 237–38.

In sum, "[t]he Supreme Court insists that statutes be enforced as written even when they seem mistaken or pointless—for it is exactly then that the temptation to substitute one's judgment for the legislature's is strongest . . . . Laws are not 'harsh' or 'pointless' in any value-free framework; they seem harsh or pointless by reference to a given judge's beliefs about how things ought to work, which is why a claim of power to revise 'harsh' or 'pointless' laws elevates the judicial over the legislative branch and must be resisted." *Logan*, 453 F.3d at 806, *citing Dodd v. United States*, 545 U.S. 353 (2005), *Chapman v. California*, 500 U.S. 453 (1991), and *Tyler v. Cain*, 533 U.S. 656 (2001).

D. The circuit court improperly dismissed the six felony counts because the court usurped an executive power that vests exclusively in the district attorney—the power to decide whether to charge a defendant, and what charges to bring.

The Kenosha County District Attorney is part of the executive branch of Wisconsin government. He exercises executive powers. He has the duty to prosecute the criminal actions within his prosecutorial unit. That necessarily

includes deciding which crimes to charge, if any, in a given case. He does not answer to the circuit court for his decisions. *Johnson*, 74 Wis. 2d at 174; *Kurkierewicz*, 42 Wis. 2d at 378–79.

Regrettably, the Kenosha County Circuit Court improperly tried to make the Kenosha County District Attorney answer to him. The court impermissibly exercised powers belonging to the executive branch when it dismissed the six felony charges lawfully brought by the district attorney. The court did so because it subjectively labeled the district attorney's charging decision "abusive" and "absurd." The court also appears to have accepted Matthews' subjective assertion that the district attorney impermissibly "stacked" felony charges to increase the maximum penalties Matthews faced upon conviction. (R. 29:8; A-App. 121.)

But placing those pejorative labels on the district attorney's charging decision does not give the circuit court legal authority to trump that decision.

Charging decisions that violate the constitution may warrant judicial relief. But there is no evidence to suggest—much less prove—that the district attorney's charging decision here violated either the state or federal constitution.

And because we have no speedy trial violation in this case, and jeopardy has not attached, *Braunsdorf* forecloses dismissal of any of the six felony charges with prejudice. 98 Wis. 2d at 586.

Certainly the legislature may draft a criminal statute that, by its terms, limits the circumstances under which the district attorney may charge the crime. But nothing in section 948.10(1) (exposing intimate parts), section 948.07 (child enticement), or section 948.09 (sexual intercourse with a child age 16 or older) expressly or impliedly limits a district attorney's authority to charge these offenses simultaneously, if probable cause exists for each offense. No

irreconcilable inconsistencies exist between the three statutes.

A statute may also grant the circuit court authority to participate in the criminal charging process. But no such statute applies to this case.

The legislature knows how to draft criminal statutes that circumscribe a district attorney's charging authority in certain situations. *See, e.g.,* Wis. Stat. § 939.75 (Death or harm to an unborn child). The legislature also knows how to draft criminal statutes that give a circuit court a role to play in a criminal charging decision. *See, e.g.,* Wis. Stat. § 968.26 (John Doe proceeding).

But the legislature has not done that in a manner affecting the district attorney's ability to bring the charges he brought in this case. The statutes apply to Matthews' conduct in this case; the charges were permissible. *Badzmierowski,* 171 Wis. 2d at 263–64; *Sutherland Statutes and Statutory Construction* at § 54:5 (7th ed. 2016).

Here, the circuit court tried to fill the legislative silcence by making the *ipse dixit* pronouncement that, by creating section 948.09, the legislature expressed its "obvious" intent that a completed act of nonmarital sexual intercourse between an adult defendant and a child age 16 or older should result in only a misdemeanor conviction for the adult. (R. 21:2; A-App. 126.) But the court cited no legislative history or other legal authority to support this conclusion. If the legislature truly harbored this "obvious" intent, authority should exist to prove it. Matthews and the court have not provided such authority.

To reiterate—the statutes setting forth the charged crimes contain no language limiting their applicability, or a district attorney's ability to charge all of them in a single case. No statute grants the circuit court the authority to

participate, directly or indirectly, in the district attorney's decisions whether and what to charge in this case.

The circuit court cannot rewrite those statutes. Neither can this Court. The checks and balances that accompany the separation of powers "stay [your] hands from the pen." *State v. Lasky*, 2002 WI App 126, ¶ 31, 254 Wis. 2d 789, 646 N.W.2d 53. "We are not at liberty to disregard the plain words of the statute and we will not attempt to improve the statute by adding words not chosen by the legislature." *St. Croix Cnty. DHHS v. Michael D.*, 2016 WI 35, ¶ 17, 368 Wis. 2d 170, 880 N.W.2d 107.

The circuit court should have lived with the district attorney's charging decision in this case. *Malik*, 16 F.3d at 52. It should not have done what it did here—impose its personal views regarding charging policies and practices by an act of judicial fiat. Reversal of the order dismissing the six felony charges is an appropriate remedy.

E. The circuit court improperly invoked the absurdity doctrine to justify dismissing the six felony charges in this case.

Matthews and the circuit court have never contended that, as written, the statutes—section 948.10(1) (exposing intimate parts), section 948.07 (child enticement), and section 948.09 (sexual intercourse with a child age 16 or older—*cannot* apply to the facts of this case. The statutes are plain and unambiguous. On their face, they cover Matthews' behavior.

Rather, Matthews and the circuit court contend that the felony statutes *should not* apply to the facts of this case. To apply the felony statutes here, they say, would lead to absurd results that the legislature *could not* have intended.

They are wrong.

Proper application of the absurdity doctrine forecloses judicial tinkering with the application and interpretation of statutes, unless a plain-language interpretation leads to a genuinely absurd outcome which the legislature clearly could not have intended. And even then, the cause of the absurdity must be reparable by changing or supplying a word or phrase erroneously included or excluded as a technical or ministerial error. *Jaskolski*, 427 F.3d at 462; *Logan*, 453 F.3d at 806; *Reading Law*, § 37 at 234–39.

The circuit court misapplied the absurdity doctrine when it dismissed the six felony charges in this case. The court never fully explained why construing the statutes in this case to permit simultaneous charging of exposing intimate parts, child enticement, and sexual intercourse with a child age 16 or older leads to a genuinely absurd outcome. The court never fully explained why the legislature clearly could not have intended this outcome. And the court never identified a technical or ministerial error that caused the absurdity, and never proposed a correction.

All the circuit court did was label the district attorney's reading of the statutes—and his resulting decision to charge the crimes—abusive and absurd. The court disagreed with the charging decision, and sought to scuttle it in any way possible.

But there is no absurdity in the district attorney's reading and application of the statutes, and his resulting charging decision.

First, sections 948.10(1) (exposing intimate parts), 948.07 (child enticement), and 948.09 (sexual intercourse with a child age 16 or older) all parse. There is no linguistic garble. The statutes contain no apparent drafting errors of commission or omission. There is no ambiguity to reconcile. Their meaning is readily apparent from the legislature's choice of language.

Second, as discussed *supra*, the statutes contain no language that expressly or impliedly limits a district attorney's ability to bring the charges simultaneously in a single case, if probable cause exists to believe the defendant committed the acts constituting the crimes.

Third, section 939.65 expressly provides statutory authority to issue all of the charges: "Except as provided in s. 948.025(3), if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions." The only express limitation on the applicability of section 939.65 involves Wis. Stat. § 948.025(3), a statute not in play here.

Fourth, courts may only apply the absurdity doctrine "when it would have been unthinkable for [the legislature] to have intended the result commanded by the words of the statute—that is, when the result would be 'so bizarre that [the legislature] could not have intended it." *Robbins*, 435 F.3d at 1241, *quoting Demarest v. Manspeaker*, 498 U.S. 184, 190–91 (1992).

There is nothing inherently absurd, foolish, unthinkable, or bizarre about charging a defendant with sexual intercourse with a child age 16 or older, as well as with other felonies that the district attorney alleges occurred during the course of conduct between the defendant and the child. This is so even if the commission of one offense necessarily involved the commission of another offense.

The circuit court made much of the fact that Matthews could only have committed the charged misdemeanor offense of sexual intercourse with a child over the age of 16 by first committing the charged felony offense of exposing intimate parts. (R. 21:3; A-App. 127.) But that is not an absurd result, nor is it particularly unique in the criminal law.

A felon who commits a crime with a handgun may face a charge on the underlying crime, and also a charge of felon-

in-possession. In the context of sexual misconduct, a defendant who has nonmarital sexual intercourse with a child age 16 or older who is also a sibling could potentially face both the misdemeanor charge, as well as a felony charge for incest under Wis. Stat. § 944.06. The district attorney made this point in his argument for reconsideration; the court did not specifically address it. (R. 30:5–6; A-App. 140–41.)

And there is nothing inherently absurd, foolish, unthinkable, or bizarre about charging—as the district attorney did here—multiple offenses that each protect and serve a different societal interest, consistent with the State's general responsibility to protect children. *State v. Fisher*, 211 Wis. 2d 665, 674, 565 N.W.2d 565 (1997).

The crime of exposing intimate parts is intended to "protect children in both private and public settings" from exposure to genitalia, regardless of whether the exposure is indecent or not. *See State v. Stuckey*, 2013 WI App 98, ¶ 14, 349 Wis. 2d 654, 837 N.W.2d 160. The crime of child enticement is intended to prevent the social evil of isolating a child from the public view—and public protection—and so deny the criminal an opportunity to exercise force and control over the child for sexual purposes. *See State v. Hanson*, 182 Wis. 2d 481, 487, 513 N.W.2d 700 (1994). And the crime of nonmarital sexual intercourse with a child age 16 or older is to protect minors between the ages of 16 and 18 from the consequences of sexual intercourse, including the dangers and problems associated with pregnancy, damage to reproductive organs, and sexually transmitted diseases. *See Fisher*, 211 Wis. 2d at 674.

The district attorney's charging decision well-served all of these societal interests. Such charging options provide district attorneys with the opportunity to protect children, punish offenders, and deter future offenses. That the reach of the statutes in this case extends beyond Matthews'

partisan charging preferences and the circuit court's estimation of good policy does not matter—"the reach of a statute often exceeds the precise evil to be eliminated." *Brogan v. United States*, 522 U.S. 398, 403 (1998).

It is temptingly easy for a circuit court to label the district attorney's application of a statute to a given fact situation "absurd," and so alter his exercise of charging discretion. By employing that technique here, the court not only infringed upon the district attorney's broad charging discretion, but also short-circuited the legislative process by an act of judicial fiat. Reversal is a manifestly appropriate remedy.

CONCLUSION

This Court should reverse the circuit court's March 19, 2018 dismissal order, and remand the case to permit prosecution on all seven charges.

Dated at Madison, Wisconsin, this 13th day of September, 2018.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,665 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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GREGORY M. WEBER
Assistant Attorney General

Appendix

State of Wisconsin v. Medford B. Matthews III

Case No. 2018AP845-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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GREGORY M. WEBER
Assistant Attorney General

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