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STATE OF WISCONSIN
IN THE SUPREME COURT

Case No: 2022AP2228-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KEITH C. KENYON

Defendant-Respondent-Petitioner.

**PETITION FOR REVIEW
AND APPENDIX**

Respectfully Submitted,

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Does the present statutory scheme in § 948.02 violate due process and equal protection where there are no guidelines or constraints on arbitrary and discriminatory enforcement by the prosecution as to when to charge the mandatory 25-year minimum prison offense in §948.02(1)(b) and when to charge §948.02(1)(e) with no mandatory minimum penalty for the same conduct, and where the record shows an arbitrary and discriminatory application of the statute by the Milwaukee County District Attorney's Office in this case?

Answer by Circuit Court: Yes

Answer by the Court of Appeals: No

II. Does the State's decision to charge the minimum mandatory 25-year offense in this case violate procedural due process because it amounts to "sentencing by the prosecutor" by predetermining the sentence and deprives the defendant of his right to be sentenced by a neutral tribunal?

Answer by Circuit Court: Yes

Answer by the Court of Appeals: Did not answer.

III. Does the State's decision to charge § 948.02(1)(b) in this case constitute an invasion of a core judicial power by predetermining the sentence, which violates the state constitutional separation of powers and thwarts the judicial branch from imposing a rational and fair sentence guided by the factors the Wisconsin Supreme Court has repeatedly held are to control sentencing?

Answer by Circuit Court: Yes

Answer by the Court of Appeals: No

INTRODUCTION

This case involves a pretrial constitutional challenge by Kenyon to the prosecution's decision to charge him with a subsection of first degree sexual assault of a child which requires a mandatory minimum 25-year prison term, rather than a subsection of the same statute which contains no mandatory minimum for the very same conduct. Kenyon also challenges the state's arbitrary, discriminatory and vindictive prosecution of the case.

Kenyon challenged the 25 year mandatory minimum subsection of 948.02(1) as a violation of his right to due process, equal protection and his right to be sentenced by a neutral judge as well as a violation of separation of powers. Drawing upon his decades of experience presiding over very serious cases, the circuit court judge found that "the offense in this case does not call for anywhere near 25 years," while noting the State admitted as much by tendering a plea offer in this case to recommend five to seven years incarceration upon a plea to an amended charge of another subsection of the same statute, §948.02(1)(e). (R.79:10-11). The court recognized the legislature's ability to set mandatory minimum sentences, but noted that "it must do so in a reasonable and rational manner if it seeks to limit a sentencing court's discretion." (*Id.* at 11).

Kenyon established a damning record of arbitrary and discriminatory charging practices by the Milwaukee County District Attorney's Office which punishes the class of defendant's who choose to exercise their right to a trial by charging the minimum mandatory 25-year penalty while amending the charges to the nonmandatory subsection only for those who pleaded guilty, just as the prosecutor employed in Kenyon's proposed plea bargain.

The court of appeals was troubled by the record presented below, stating “we are concerned that the record in this case lend’s merit to Kenyon’s argument and the circuit court’s conclusion that the decision to charge Kenyon under Wis. Stat. § 948.02(1)(b) was made exclusively because Kenyon insisted on going to trial” and that the charging decision was “not motivated by legitimate concerns for the public welfare.” (APP 103, ¶ 3). However, the court ultimately ruled that Kenyon’s case was indistinguishable from a number of cases that maintain broad prosecutorial discretion. As argued below, those cases, including *United States vs. Batchelder*, 442 U.S. 114 (1979), and *State v. Cissell*, 127 Wis. 2d 205, 378 N.W.2d 691 (1985), are distinguishable given the record presented in Kenyon’s case. In addition, one of them, *State v. Cissell*, a 4-3 decision that departed from prior Wisconsin precedent at the time, is ripe for reconsideration by this Court.

This case presents a thorough and complete factual record, both as to the basis for the trial court’s decision to dismiss the charge as a violation of Kenyon’s constitutional rights, as well as years of data as to the charging and dispositions of all Milwaukee County cases where the district attorney’s office charged either 948.02(1)(b) or 948.02(1)(e). The record will enable this Court to evaluate the important legal issues presented and provide meaningful guidance to courts, prosecutors and defendants.

This Court should accept review for the following reasons.

REASONS FOR GRANTING REVIEW

- 1. The case presents real and significant questions of state and federal constitutional law, Wis. Stat. (Rule) §809.62(1r)(a).**

The court of appeals recognized that “Kenyon raises important constitutional issues,” (APP 103, ¶ 3) including the petitioner’s right to due process and equal protection and to the exercise his right to trial without coercion from the prosecution, and the right to sentencing by a neutral magistrate.

The factual record demonstrating an arbitrary and discriminatory charging decision and then imposing it as a “trial penalty” is well developed in this case and the issue well-briefed so it is ripe for review by this Court. Indeed, the State conceded the importance of this case in a motion to delay briefing in the court of appeals, noting the case was of “statewide importance that should be resolved in a published opinion by this Court and/or the Wisconsin Supreme Court.” (State’s Motion 3-31-2023 at p. 8).

The record clearly established that, given “the significant (and multiple) mitigating factors” present in the case, (R.79: 11; APP 130), Kenyon would not be sentenced by any judge in Milwaukee County to anywhere near the 25 year minimum sentence mandated by the prosecutor’s charging decision. Once the State chose to charge Kenyon under §948.02(1)(b) the court had no discretion to impose anything less than 25 years. This court should clarify that while a prosecutor has broad discretion in making a charging decision, that discretion is not limitless and courts will not sanction arbitrary and oppressive application of the law.

The court of appeals did not address Kenyon’s claim that the charging in his case amounts to “sentencing by the prosecutor,” in violation of his due process right to a neutral magistrate, but this Court should review this issue as well. As argued below, the United States Supreme Court has long upheld the constitutional requirement of a neutral judge for sentencing and rejected a system whereby “the prosecutor, not the judge, would control the sentence.” *United States v. Booker*, 543 U.S.

220, 257 (2005). Kenyon’s challenge is precisely about the prosecution’s usurpation of the judge’s role at sentencing, whereby the State is being empowered to predetermine the ultimate criminal sanction.

2. Review is also appropriate to clarify a question of law likely to recur unless resolved by this Court. Wis. Stat. (Rule) § 809.62(1r)(c)(3).

This Court is a law developing court, *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246, 255 (1997). This is a case of first impression in Wisconsin. This Court should accept review to provide guidance to litigants and lower courts on the important questions of constitutional due process and equal protection presented. The Court should formulate a rule to apply when the defendant establishes a record of pretrial prosecution decisions that have no rational basis other than to coerce a defendant’s guilty plea when he maintains his innocence and demands the right to a trial. This Court should circumscribe prosecutorial discretion within proper constitutional limits to avoid “arbitrary, discriminatory or oppressive results.” *State v. Karpinski*, 902 Wis. 2d 599, 608, 285 N.W.2d 729 (1979).

This Court should also accept review to clarify a question about the separation of powers doctrine in this state that is likely to recur. Wisconsin courts have frequently been called upon to answer questions about the separation of powers doctrine, but not where the legislature has so thoroughly abdicated its power to prescribe a criminal penalty by giving unfettered and unguided authority to the prosecutor to determine punishment. The statutory scheme employed here also invades the power of the judicial branch and places it in the hands of the prosecution and thereby encroaches upon a core judicial function – the power to decide an appropriate sentence in an individual case.

The court of appeals failed to recognize that the cases it cited as controlling, like *Batchelder*, *Cissell*, and *State v. Lindsey*, 203 Wis. 2d 423, 429, 554 N.W.2d 215 (1996), do not involve the legislature abdicating its responsibility to prescribe the penalty for conduct and instead delegating that power entirely to the prosecution in a criminal case.

Moreover, while the court of appeals quoted extensively from part of Justice Abrahamson's dissent in the 4-3 decision in *Cissell*, (APP 112, ¶ 20, n. 5), which supported Kenyon's arguments, the court lacked the authority to reconsider the majority decision in that case. This Court should do so in Kenyon's case and heed Justice Abrahamson's admonitions.

In *Cissell*, Justice Abrahamson acknowledged that "broad prosecutorial discretion is an accepted part of our criminal justice system," but concluded "that the legislature's adoption of criminal statutes identical except for penalty is an unlawful delegation of power to the executive branch of government contrary to the separation of powers doctrine encompassed in the Wisconsin Constitution." 127 Wis. 2d at 227. She warned that "resting such unbridled discretion in the prosecuting attorney violates our concept of fundamental fairness and equal protection of the laws." *Id.* The Chief Justice criticized the majority for permitting the legislature to create a scheme of "delegation run riot." *Id.* at 230. In enacting identical criminal statutes except for the penalty, "the legislature has delegated its power to the executive branch without establishing standards for the exercise of the power." *Id.* at 229. Justice Abrahamson also noted that *State v. Roggensack*, 15 Wis.2d 625, 633, 113 N.W.2d 389, 114 N.W.2d 459 (1962) was still good law. That case held that if two statutes make the same conduct criminal, "their coexistence would violate constitutional requirements of due process of law and of equal protection of the laws because of vagueness and uncertainty and the delegation to an administrative agency the choice of either section without any

legal standards to govern the choice.” *Cissell*, 127 Wis. 2d at 232. Justice Abrahamson concluded that “*Roggensack* protects our citizens from arbitrary prosecutorial discretion. I see no reason why this court should not follow this state's established precedent.”

This Court should accept review, and recognize that this case is distinguishable from *Batchelder* and *Cissell*. Alternatively, this Court should reconsider *Cissell* and accept Justice Abrahamson’s warnings and reestablish the proper limits of the separation of powers in Wisconsin criminal statutes.

3. The question presented is a novel one, the resolution of which will have statewide impact. Wis. Stat. (Rule) § 809.62(1r)(c)2.

This is also a case of first impression in Wisconsin because this statutory penalty scheme has not been challenged since the statute’s tortured evolution over the last two decades has resulted in the hugely disparate penalties that exist today.¹ Section 948.02(1)(b) and §948.02(1)(e) encompass the exact same conduct and a district attorney must choose between the two subsections whenever the allegation involves sexual intercourse with a victim less than 12 years old. The statutory scheme as evolved gives the district attorney unfettered discretion and provides no guidelines as to when to charge the draconian mandatory 25-year minimum prison offense and when to charge the offense without the mandatory minimum.

Importantly, both subsections are Class B felonies with the same maximum sentence, but only § 948.02(1)(b) includes a mandatory 25-year minimum. As the circuit court noted, “it **all** depends on which subsection is charged.” (R. 79: 7-8) (emphasis

¹The circuit court described in detail how the present §948.02 “evolved from a hodgepodge of amendments.” *See* APP 122-124.

in original). Thus, the statutory scheme delegates to the prosecutor the power to “predetermine the ultimate sanctions,” and to punish certain defendants who exercise their constitutional right to trial, in violation of due process. *Batchelder*, 442 U.S. at 125.

The court of appeals bemoaned the paucity of controlling authority discussing what constitutes a “trial penalty” and struggled as it recognized an apparent inconsistency in the law. When a prosecutor charges a more severe charge after a successful appeal, a presumption of vindictiveness attaches that the prosecutor is unfairly punishing a person “because he has done what the law plainly allows him to do.” Yet, the law does not seem to discourage a prosecutor’s similar punishment pretrial for those who exercise their right to trial. (APP 116-117, ¶ 30, citing *State v. Edwardsen*, 146 Wis. 2d 198, 203, 430 N.W.2d 604 (Ct. App. 1988)). The court of appeals is correct and this Court should clarify that there is no rational basis for such a distinction for a practice that in both instances “chill[s] the assertion of constitutional rights by punishing those who choose to exercise them.” *United States v. Jackson*, 390 US 570, 581 (1968).

STATEMENT OF THE CASE

The defendant was charged in a criminal complaint filed in Milwaukee County Circuit Court on July 15, 2019, with a single count of first degree sexual assault of a child who has not attained the age of 12, a Class B felony, contrary to Sec. 948.02(1)(b). (R.1). The complaint noted the provisions of Sec. 939.616(1r), which requires the court to impose a bifurcated sentence with a term of confinement of “at least” 25 years. (*Id.*).

Kenyon filed a motion to dismiss the Information as an unconstitutional violation of procedural due process. (R.21). He argued that his procedural due process rights were violated by

the lack of any constraints on the arbitrary and discriminatory charging decision by the prosecutor in his case. He also contended that the statutory scheme unconstitutionally violates the separation of powers doctrine. He also argued that the decision to prosecute the mandatory minimum 25 years imprisonment under these circumstances deprived him of his due process right to be sentenced by a neutral magistrate. (R. 45).

The State relied upon *Batchelder*, 442 U.S. at 123-24, which upheld a prosecutor's discretion to decide what charge to file in a case. (R.24). Kenyon replied that *Batchelder* actually supported his constitutional challenge because the Court recognized that a prosecutor's decision to charge an offense with a greater *maximum* penalty actually increases the court's discretion when imposing a sentence, rather than limiting it. Here, Kenyon argued, the mandatory minimum effectively eliminates virtually all discretion the court has in imposing a sentence. (R. 28).

Milwaukee County Circuit Court Judge David Borowski issued a decision granting Kenyon's motion and dismissed the information. (R. 79). The court found that §948.02(1) contains two provisions encompassing the exact same conduct and carrying the same maximum penalty but one with a mandatory minimum of 25 years, and that the "total absence of standards to govern the prosecutorial decision [as to which subsection of §948.02(1) to charge] results in an arbitrary charging standard and deprives the court of the discretionary authority to consider mitigating factors and impose a sentence of less than 25 years of initial confinement." (R. 79:3).

Judge Borowski further found that by charging under 948.02(1)(b) with its mandatory minimum of 25 years, the prosecutor has "effectively stripped the court of its authority and discretion." (R. 79: 9). The court held that the charging decision

prevented the court from exercising its sentencing power to impose less than 25 years given all the facts and circumstances of the case and the court's extensive familiarity with sentences imposed in the hundreds of child sexual assault cases handled by Milwaukee County judges. The court also noted that the State tendered a plea offer in this case to recommend five to seven years incarceration upon a plea to an amended charge of §948.02(1)(e). (R. 79:10-11). He concluded that while the prosecution has wide discretion in making charging decisions, the prosecution's decision in this case appears to be "nothing more than a tactical measure to strong-arm the defendant into accepting a plea to the lesser offense in order to avoid a wholly disproportionate mandatory minimum penalty." (*Id.* at 11).

The State appealed. In an opinion recommended for publication, the court of appeals reversed while expressing its concern that the record supports the merits of Kenyon's claims. (APP 103, ¶ 3). Kenyon submits this Court should accept review.

STATEMENT OF FACTS

The criminal complaint referred to a forensic interview of the alleged victim, eight-year-old Leah,² in which she said Kenyon is her uncle and that on February 15, 2019, after a Disney on Ice show she spent the night with Kenyon's six-year old daughter, her cousin, at his home. The complaint alleged that Leah pretended to be asleep so her uncle would carry her to her cousin's room where she was going to sleep. Kenyon is alleged to have picked her up, carried her into her cousin's room, laid her in bed next to her cousin, unzipped her onesie pajama and licked her vagina one time for a matter of seconds.

²The Defendant uses the same pseudonym for the alleged victim that the the court of appeals used in its opinion.

Additional details about the offense were revealed at the pretrial hearings, including many mitigating facts. Kenyon's alleged conduct is as minimal as one can imagine to meet the statute's definition of "intercourse." There is no allegation of oral, digital or penile penetration or display of his genitals, no allegation of pain or injury, no force or threat of force alleged, no repeated episodes and no threat about the consequences of disclosure.

Kenyon has always vehemently denied Leah's allegations that he sexually assaulted her. He is 47 years old and has been totally deaf since birth and does not speak. He communicates with sign language. He has absolutely no prior criminal record or police contacts. He has always been gainfully employed. He has a loving and supportive spouse and daughter and comes from a close and loving family.³

ARGUMENT

- I. The circuit court properly dismissed the information as unconstitutional.**
 - A. Section 948.02(1) is unconstitutionally vague by failing to contain any guidelines to prevent arbitrary and discriminatory charging by the district attorney.**

The void for vagueness doctrine requires "that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage *arbitrary and discriminatory enforcement*." *Kolender v. Lawson*, 461 U.S.

³There is no evidence the defendant poses any risk to the community and, given his inability to hear or talk, a false conviction with 25 years in prison would be especially cruel in this case.

352, 357 (1983) (emphasis added); *Bachowski v. Salamone*, 139 Wis. 2d 397, 406, 407 N.W.2d 533, 537 (1987).

It is the arbitrary and discriminatory enforcement that is at issue in Kenyon's case. Indeed, most courts have held that restraining arbitrary enforcement by officials is more important than the fair notice requirement of due process. *Smith v. Goguen*, 415 U.S. 566, 574 (1974); *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 54, 363 Wis. 2d 1, 51. The Supreme Court has repeatedly referred to prosecutors as among those the vagueness doctrine is supposed to constrain. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1212, 1228 (2018). *Dimaya* held that the vagueness doctrine “guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.” The court also warned that vague laws “threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions.” *Id.* *See also, Johnson v. United States*, 135 U.S. 2551, 2557 (2015) (vagueness doctrine applies “not only to statutes defining elements of crimes, but also statutes fixing sentences,” including minimum mandatory terms.)

A core due process problem that plagued the State's charging decision in Kenyon's case is the lack of guidance for its decision whether to prosecute with the non-mandatory minimum or the mandatory minimum statute, given two statutes that cover the same conduct. Kenyon's alleged conduct would fit either statute, but the State, without guidance or checks from the statute, arbitrarily chose the more punitive option when far more aggravated cases were charged with no mandatory minimum sentence. *See infra* at Section I. B. The statutory scheme gives the State “unfettered” discretion, and the record reflects no evidence that the Milwaukee County District Attorney had policies to constrain arbitrary enforcement. When

discussing statutes where identical conduct can be charged with different penalties, Professor LaFave explained:

It is likely to be a consequence of legislative carelessness, and even if it is not such a scheme serves no legitimate purpose. There is nothing at all rational about this kind of statutory scheme, as it provides for different penalties without any effort whatsoever to explain a basis for the difference. It cannot be explained in terms of giving assistance to the prosecutor. *Where statutes are identical except for punishment, the prosecutor finds not the slightest shred of guidance.*

LaFave, § 13.7(a) Duplicative and overlapping statutes, 4 Crim. Proc. § 13.7(a) (4th ed.) (emphasis added).

Due process requires *some* factors to constrain the discriminatory and arbitrary application of the law. *See, Batchelder*, 442 U.S. at 125 (“Selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints.”). The current statutory scheme provides none. The very fact that the State chose to charge the draconian 25-year minimum prison sentence statute in Kenyon’s case, despite the comparatively mitigated factual allegations in his case, is evidence of the lack of constraints in the statute.

The court of appeals in Kenyon’s case primarily relied upon *Batchelder*, and *Cissell*, which affirmed the prosecution’s discretion to decide which statute to charge when the conduct violates more than one statute. However, neither of those cases involved statutes with different mandatory *minimum* penalties for identical conduct, an issue this Court has never confronted.

In *Batchelder*, the prosecution charged the defendant with a crime that had a 5-year maximum sentence instead of an overlapping identical crime with a 2-year maximum sentence. 442 U.S. at 116–17. The Supreme Court upheld the defendant’s conviction but warned that the prosecution’s exercise of discretion was not “unfettered” because it was “subject to constitutional constraints.” The court also recognized the serious constitutional implications of a prosecutor actually determining the sentence, but observed that the government’s choice of statutes in that case did not empower the prosecution to “predetermine ultimate criminal sanctions. Rather, it merely enables the sentencing judge to impose a longer prison sentence.” *Id.* at 125. The court based its decision on the fact that “the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws.” *Id.* at 126. *Batchelder* did not address the issue of statutes with no guidelines to prevent arbitrary enforcement of a draconian mandatory minimum, versus no minimum penalty at all for the same conduct, and therefore does not control the issue in Kenyon’s case.

Likewise, *Cissell* involved statutes with different maximum penalties for the same conduct, not a statutory scheme that allowed a hugely disparate mandatory minimum or no minimum penalty. *Cissell* involved statutes which could make child support abandonment either a misdemeanor or a felony. 127 Wis. 2d at 209-210. The majority in *Cissell* noted *Batchelder*’s warning that prosecutorial discretion in charging would be unconstitutional if “the prosecutor discriminates on the basis of unjustifiable criteria.” The court said *Cissell* did not claim “impermissible discrimination” and the court could “readily see legitimate bases for exercising prosecutorial discretion.” *Id.* at 222. But, in Kenyon’s case, the record established that no rational basis existed for the prosecutor’s decision to charge Kenyon with the 25 year mandatory

minimum offense and could not withstand constitutional scrutiny.

B. The record shows arbitrary, discriminatory and vindictive application of the minimum mandatory sentence as a trial penalty against Kenyon and others.

Judge Borowski found that a “total absence of standards to govern the prosecutorial decision results in an arbitrary charging standard.” (R. 79: 3). The conduct alleged in Kenyon’s case is not so aggravated that the legislature would have mandated such an extreme mandatory minimum penalty. Indeed, the legislature included sexual intercourse as conduct in §948.02(1)(e) that could even result in probation. The court recognized all the mitigating factors in the case and asked:

Indeed, if the mitigating factors currently in the record do not warrant the State charging the defendant with sub (1)(e), which carries *the very same maximum possible penalty as sub. (1)(b)* - yet leaves intact the court’s sentencing discretion because [the twenty five year mandatory minimum] does not apply - what does?

(R. 79: 8).

The absence of any evidence of criteria in the Milwaukee County DA’s Office to guide the charging decision, together with the failure of the statute itself to provide any constraints, “encourages arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A review of CCAP records of other charging decisions involving a choice between §948.02(1)(b) and § 948.02(1)(e) demonstrates that the Milwaukee DA’s office applied the statutes in a manner that

resulted in an arbitrary and discriminatory charging decision Kenyon's case.

Kenyon provided the court with a chart compiled from CCAP data showing all thirty-four cases where the Milwaukee County District Attorney's Office charged a violation of 948.02(1)(b), from January 1, 2018, to July 1, 2022, which had been concluded as of the date the chart was filed. (R. 73: 8-19; Court of Appeals S-APP 3-14). A review of those thirty-four criminal complaints shows that the facts alleged against Kenyon are clearly less aggravated than all the others. None of the other complaints charging the 25-year mandatory minimum alleged only a single isolated incident without any kind of penetration, as alleged here. All involved instances of the defendant inserting his penis into the child's mouth and/or acts of oral, digital or penile penetration. Some involved ejaculation. Most involved repeated incidents. Many involved children who were as young as four to six years of age.

Thirty of the thirty-four cases were amended pursuant to plea negotiations from 948.02(1)(b) to offenses which carry no mandatory minimum penalty. Of those, one defendant received probation, five were sentenced to between three and seven years incarceration, thirteen received between eight and twelve years, five received between thirteen and fifteen years, three received sixteen to twenty-two years of imprisonment and only one, who had prior sex offense convictions, received more than the minimum mandatory sentence. Again, these are the "worst offenders" who the State initially charged with the mandatory minimum 25 years incarceration offense. Only the four defendants who exercised their right to a trial were forced to face a mandatory minimum twenty-five year prison sentence if convicted.

Additional Milwaukee County charging data further confirms the arbitrariness of the mandatory minimum charge in

Kenyon's case. Cases with much more aggravated facts were routinely charged as violations of § 948.02(1)(e), with no mandatory minimum penalty. A chart in the Supplemental Appendix in the court of appeals includes all of the eighty-nine cases charged as violations of 948.02(1)(e), between January 1, 2018 and December 31, 2022, with victims younger than age twelve.

The chart reveals that as many as one-half of the cases which the Milwaukee County DA elected to charge with no mandatory minimum involved conduct constituting intercourse with a victim less than 12 years old which could have been charged under 948.02(1)(b) with the 25-year mandatory minimum. Also attached in the Supplemental Appendix are the criminal complaints in twenty-one of those cases. Those complaints allege penis to vagina intercourse, mouth to penis intercourse, penis to anus intercourse and/or digital penetration or insertion of objects into the anus or vagina. Almost all involved repeated assaults, some with more than one victim. There is no disputing that the conduct in every one of those twenty-one cases was substantially more aggravated than the allegations against Kenyon, yet the Milwaukee County DA's office did not charge them with the mandatory minimum offense Kenyon faced. And, unlike them, Kenyon suffers a "trial penalty" because he is forced to risk 25 years in prison if he exercises his right to a trial.

Throughout the proceedings in both the trial court and court of appeals, the State never attempted to justify the decision to charge Kenyon with the 25 year mandatory minimum sentence which the record established is completely out of line with all other prosecutions under the same statutory scheme. Judge Borowski noted that "the average homicide defendant in Milwaukee County does not serve [25 years] upfront time." (R. 49: 60). Given Judge Borowski's experience in presiding over hundreds of child sex offense cases, his findings standing alone

as to the arbitrariness of the charging decision should be given great weight. The State conceded in its brief to the court of appeals that Kenyon's "conduct charged in this case and his profile do not appear to match those of the worst child sex offenders." State's Brief at 31.

This Court has said that generally "the prosecuting attorney is answerable to the people of the state and not to the courts or the legislature as to the way in which he exercises power to prosecute complaints."⁴ However, this Court has also reiterated "the charging decision of a district attorney is not unlimited; it has bounds." *State v. Karpinski*, 92 Wis. 2d 599, 608, 285 N.W.2d 729, 734–35 (1979). This Court warned:

In the criminal justice system there is at one and the same time the need for encouraging prosecutorial discretion to achieve flexibility and sensitivity and the need for circumscribing prosecutorial discretion to avoid arbitrary, discriminatory or oppressive results.

Id. The entirety of the record here, including the lack of any guidelines and the charging history, clearly established that the decision to charge Kenyon was the product of an arbitrary and discriminatory application of the statutes.

The court of appeals rejected Kenyon's equal protection claim stating that there was no evidence of discriminatory prosecution because the charging decision was not based on a "suspect classification." (APP 115, ¶ 28). This restrictive

⁴However, nowadays there are few options for voters to make prosecutors answer at the ballot box. One study found 85% of incumbent prosecutors in America run unopposed. See Ronald F. Wright, "How Prosecutor Elections Fail Us," *Ohio State Journal of Criminal Law* 6, no. 581 (2009): 592.

interpretation is counter to *Batchelder* and *Cissell*, which state that a prosecutor may not selectively base a charging decision on “unjustified” standards such as “race, religion or *other arbitrary classification*” *Batchelder*, 442 US at 125, n.9; *Cissell*, 127 Wis. 2d at 215. (emphasis added).

The record here shows the discriminatory use of the mandatory minimum 25-year penalty against Kenyon and a class of others to coerce a plea and thereby give up their right to a trial. Defendants who insist that they are innocent and assert their constitutional right to a jury trial should be recognized as an “arbitrary classification” which undermines the constitutionality of the charging decision that resulted. The court of appeals quoted extensively from Justice Abrahamson’s dissent in the 4-3 decision in *Cissell*, where she argued “equal protection shields persons not only from suspect classifications but from classifications that are not rational.” The court of appeals in Kenyon’s case failed to identify any rational basis for the Milwaukee County District Attorney’s Office to penalize Kenyon and other’s charged with § 948.02(1)(b) who maintain their innocence and exercise their basic due process right to a trial.

In *State v. Edwardsen*, the court of appeals held a rebuttable presumption of vindictiveness applies after a successful appeal results in increased charges. 146 Wis. 2d 198, 204-06, 430 N.W.2d 604, 606 (Ct. App. 1988). The court ruled that a prosecutor may overcome the presumption if she “makes an adequate showing of legitimate concerns regarding appropriate punishment sufficient to overcome the presumption of vindictiveness.” *Id.* at 207. But the court noted “[a]nother rule may well apply to pretrial prosecutorial decisions, but that issue is not before us.” *Id.* at 203, n.1

In Kenyon’s case, the court of appeals could discern no justification for treating the punishment of a defendant’s

exercise of his right to trial differently before trial than after. The court said:

It is difficult to understand why such a presumption would attach after a defendant's successful appeal and not during pretrial plea negotiations. We see very little practical difference in a prosecutor increasing the severity of the charges after a successful appeal and a prosecutor increasing the severity of the charges based on a defendant's refusal to plead guilty and insistence on taking the case to trial. There is no readily apparent reason why a presumption of vindictiveness would attach when a prosecutor increases the severity of charges based on a defendant's successful appeal and not during the original prosecution, where the threat of a harsher punishment for the same conduct is used to leverage a guilty plea. In both instances, it appears that the prosecutor penalizes a defendant by filing charges authorizing harsher punishment in direct response to a defendant exercising a constitutional right.

(APP 117-118, ¶31). The court of appeals lamented the paucity of controlling authority discussing what constitutes a "trial penalty." (APP 116, ¶ 29). Nonetheless, the court of appeals found no case finding "that a trial penalty is imposed when the State chooses to charge a defendant under the harsher of two identical or overlapping statutes *prior* to trial." (APP 117, ¶ 32) (emphasis added).

This Court should accept review on this novel question and prevent the application of a trial penalty on the class of defendants who profess their innocence and demand a trial. The

American criminal justice system has become “for the most part a system of pleas, not a system of trials.” *Lafler v. Cooper*, 566 U.S. 156, 170, 132 S. Ct. 1376, 1388, 182 L. Ed. 2d 398 (2012). Where 97% of cases are resolved by plea bargaining, a prosecutor’s discretion has greater potential for abuse.⁵ There is an especially heightened risk of coercing the innocent to plead guilty to avoid the risk of a severe punishment after trial, effectively a life sentence without parole in Kenyon’s case.

C. The State’s use of the mandatory minimum in this case violates due process by constituting sentencing by the prosecutor, rather than a neutral magistrate.

The use of the mandatory minimum sentence to charge Kenyon in this case constitutes sentencing by the prosecutor, not the court. Once the State chose to charge Kenyon under §948.02(1)(b) and § 939.616(1r), the court had no discretion to impose anything less than 25 years. In other words, the prosecutor, not a neutral magistrate, decided that 25 years was to be the minimum period of initial confinement no matter how disproportionate that sentence. The court of appeals did not address Kenyon’s claim that the charging violates his due process right to a neutral magistrate.

The United States Supreme Court has held that procedural due process demands a neutral hearing tribunal. *See Black v. Romano*, 471 U.S. 606, 612 (1985); *Wolff v. McDonnell*, 418 U.S. 539, 571 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (“minimum requirements of due process” include a “neutral and detached hearing body”); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). Prosecutors are not neutral entities. The Court has held that a prosecutor who authorized

⁵See Alkon, Cynthia, “Hard Bargaining in Plea Bargaining: When Do Prosecutor’s Cross the Line?”, 17 Nev.L.J 401, 424 (2017).

seeking a death penalty against a homicide defendant violated due process by sitting – even decades later – on an appellate court hearing that defendant’s postconviction challenges. *Williams v. Pennsylvania*, 579 U.S. 1, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016).

The United States Supreme Court has renounced a system of justice with the power the prosecution employed in Kenyon’s case. In *United States v. Booker*, 543 U.S. 220 (2005), the Court struck down mandatory sentencing guidelines which cloaked prosecutors with too much power by virtue of the charging decision and denied federal courts any discretion in fashioning a sentence, because otherwise it would be “the prosecutor, not the judge, [who] would control the sentence.” *Id.* at 257. Prosecutors would usurp the power of judges if a system authorized a prosecutor’s charging decision to control the sentence creating “particularly troublesome consequences with respect to prosecutorial power.” *Id.* at 257.

As noted above, *Batchelder* approved of broad prosecutorial discretion in charging so long as the sentencing court still maintains its role as a neutral magistrate in determining the appropriate sentence based on the individualized facts and circumstances of each case. Kenyon’s challenge is precisely about the prosecution’s usurpation of the judge’s role at sentencing, when the State is being empowered to predetermine the ultimate criminal sanction by choosing to charge an offense with a mandatory minimum over an identical statute with no mandatory minimum.

The concerns raised here were noted by Professor Wayne LaFave’s Criminal Procedure §13.7(a), “Duplicative and overlapping statutes”, 4 Crim. Proc. § 13.7(a) (4th ed., 2019 Update), which posed the question “...what if, for example, one statute *permitted* imprisonment up to ten years and the other made ten years the *mandatory* minimum?” (emphasis added).

This is exactly the problem with § 948.02 (1)(e), which permits imprisonment up to 60 years while §948.02(1)(b) also permits imprisonment up to 60 years, but carries a 25-year mandatory minimum imprisonment. Professor LaFave addressed the very issue posed in Kenyon’s case head on:

It has been forcefully argued that in such a case, where the prosecutor actually “makes a sentencing decision, without either sentencing information or expertise in sentencing,” this “sentencing aspect of the prosecutor's choice distinguishes the prior cases and is the strongest support for the equal protection argument.” And in a related context it has been held that the prosecutor's discretion must sometimes be restrained for “protection of the sentencing authority reserved to the judge.”

Id. (citations omitted).

To be clear, Kenyon is not challenging *all* mandatory minimums as unconstitutional. Some mandatory minimums may be short enough that a court could legitimately exercise its discretion and impose more than the minimum in a given case. But here, the draconian 25-year minimum, as applied to Kenyon, greatly exceeds the punishment any court would likely impose on a defendant such as him under the alleged facts in this particular case. And, unlike any other statute in Wisconsin’s criminal code, the power to predetermine the sentence vests solely with the prosecutor, by selecting §948.02(1)(b) in some cases instead of § 948.02(1)(e) for the same conduct.⁶

⁶Importantly, both § 948.02(1)(b), with its mandatory minimum of 25 years, and § 948.02(1)(e), with no mandatory minimum, are Class B felonies with a 60 year maximum sentence and up to 40 years initial confinement. The State would not be prejudiced in any way by prosecuting under

This is not simply a matter of the legislature's decision to determine a mandatory sentence for certain conduct, such as the mandatory life sentence that the Wisconsin legislature imposed for first degree intentional homicide. A conviction for that offense requires separate and additional elements than lesser degrees of homicide for which no mandatory minimum applies. In this case, the very *same* conduct that could have been charged with no mandatory minimum was instead charged with a 25-year mandatory minimum penalty. No other criminal statute in Wisconsin governs the very same conduct in two subsections and yet leaves in the prosecution's control the unfettered and unguided decision whether to mandate a draconian mandatory imprisonment in one instance or the potential for probation in another.

The State's charging decision here is an extreme expansion of prosecutorial powers that erodes the court's function as a neutral sentencing body and unconstitutionally empowers the prosecutor "to predetermine ultimate sanctions." *Batchelder* 442 U.S. at 125. When a circuit court imposes a sentence it must set forth its reasons and the judgment is subject to appellate review. The circuit court's discretion is "established by the legislature, regulated and guided." *See Cissell*, 127 Wis.2d at 231 (Abrahamson, J., dissent). But when a prosecutor predetermines the sentence as in Kenyon's case, the prosecutor "functions without regulation or guidance by the legislature or the court." *Id.* This is a violation of Kenyon's right to due process.

§948.02(1)(e) because it could always recommend the defendant serve 25 years after conviction if that is the sentence it believes is consistent with the *Gallion* factors.

II. The statutory scheme employed by the State violates the doctrine of separation of powers under the Wisconsin State Constitution.

Wisconsin courts frequently have been called upon to consider the separation of powers doctrine. One of the fundamental principles of the American constitutional system is that “governmental powers are divided among the three departments of government, the legislative, the executive, and judicial, and that each of these departments is separate and independent from the others except as otherwise provided by the constitution.” *Goodland v. Zimmerman*, 243 Wis. 459, 466-67, 10 N.W.2d 180 (1943). The constitutional powers of each branch of government fall into two categories: exclusive powers and shared powers. Each branch has exclusive core constitutional powers into which other branches may not intrude. *State ex rel Friedrich v. Dane County Cir. Court*, 192 Wis.2d 1, 13, 531 N.W.2d 32 (1995). Shared powers lie at the intersection of these exclusive core powers. *Id.* at 14. “The branches may exercise power within these borderlands but no branch may unduly burden or substantially interfere with another branch.” *Id.*

Sentencing a defendant requires each of the three branches of government to exercise a core power. “The legislature prescribes the penalty and the manner of its enforcement. The courts impose the penalty (the sentence). The executive branch decides what criminal charges to file, carries out the court-imposed sentence, and grants pardons.” *State v. Stenklyft*, 2005 WI 71, ¶ 91, 281 Wis. 2d 484, 534–35, 697 N.W.2d 769, 794. The legislature – not the executive branch – has the authority to determine the scope of the sentencing court's discretion. But, in exercising that authority “the legislature is prohibited from unduly burdening or substantially interfering with the judicial branch.” *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 35, 376 Wis. 2d 147, 173, 897 N.W.2d 384, 397,

quoting *State v. Holmes*, 106 Wis.2d 31, 68, 315 N.W.2d 703 (1982).

In addition, the separation of powers doctrine forbids one branch to abdicate a core power and delegate it to another branch just as much as it protects one branch from encroachment by another. *Rules of Court Case*, 204 Wis. 501, 503, 236 N.W. 717, 718 (1931). Thus, the legislature cannot abdicate its power to prescribe the penalty for a defendant's conduct by granting unfettered and unguided authority to the prosecution to determine punishment. Yet, by enacting two statutes that proscribe the very same conduct of sexual assault of a child less than 12 years of age, one of which has no minimum punishment and the other of which imposes a mandatory 25 years in prison, the legislature improperly delegated to the prosecution the power to "prescribe the penalty and manner of its enforcement." *Stenklyft*, 2005 WI 71, ¶ 91. That abdication of its legislative role violates the doctrine of separation of powers. *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 99, 391 Wis. 2d 497, 942 N.W.2d 900.

The Wisconsin Supreme Court long ago explained "a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the legislature." *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N.W. 738, 741 (1896). The law enacted by the legislature in §948.02(1) was far from "complete" because it delegated to the whim of the executive, the prosecutor, the penalty a defendant would face for sexual intercourse with a child under the age of 12. This abdication of its legislative function violates the separation of powers.

In addition, the statutory scheme invades the power of the judicial branch and places it in the hands of the prosecution, also in violation of the doctrine of separation of powers. Since

criminal justice today is “a system of pleas, not a system of trials,” *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), this puts unbridled power in the hands of the prosecution. It also gives the State the power to coerce pleas and impose a “trial penalty” on any defendant who chooses to exercise their constitutional right to a trial, as the CCAP data shows Milwaukee County did in the 34 cases where it charged § 948.02(1)(b). (R. 73: 8-19). The legislative scheme consolidates all power in the prosecutor, contrary to the very core principles of our American and Wisconsin tripartite system of government.

The judicial branch cannot permit such an encroachment on its core judicial function. The power “to decide an individual case is an exclusive core judicial power, and any invasion of the exclusive core constitutional powers of the judiciary violates the doctrine of separation of powers under our state constitution.” *State v. Stenklyft*, 2005 WI 71, ¶¶ 98-99, 281 Wis. 2d 484, 538–39, 697 N.W.2d 769, 796. The executive branch cannot compel the judicial branch to decide a case in particular way. *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶4, 376 Wis. 2d 147, 897 N.W.2d 34. “If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce.” *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 81, 391 Wis. 2d 497, 553, 942 N.W.2d 900, 928 (R. Bradley, J., concurring), quoting Neil Gorsuch, *A Republic If You Can Keep It*, 87 (Crown Forum ed., 1st ed. 2019).

The court of appeals in Kenyon's case relied on *State v. Lindsey* 203 Wis. 2d at 429, 554 N.W.2d 215 (1996), for the general proposition that a court has no inherent authority to absolutely determine punishment and that a legislature has the power to set sentencing ranges. In *Lindsey*, the court rejected the defendant's argument that Wisconsin's “three strikes” law mandating a life sentence for third-time serious felonies violated separation of powers by granting “sole sentencing discretion to the prosecution.” 203 Wis. 2d at 439.

However, *Lindsay* did not consider the question raised by Kenyon, where the legislative scheme requires the executive branch to choose between the 25-year minimum mandatory prison term or no mandatory imprisonment at all for the *very same* criminal conduct. Such a scheme abdicates the legislature's role to prescribe the penalty for conduct by delegating that power to the executive and it invades the power of the judicial branch by giving the prosecution – a party in a criminal case – the ability to preordain the sentence of a defendant by its arbitrary charging decision. As this Court has said, a statute which allows a circuit court's deliberative process and judgment to be circumvented by a party in the litigation, here the district attorney, "unconstitutionally impairs the judiciary's duty to administer justice impartially, as well as being violative of the separation of powers doctrine." *State v. Stenklyft*, 2005 WI 71, at ¶ 86, ¶ 106

For all of these reasons, the statutory scheme violates separation of powers. This Court should reestablish the judicial power improperly delegated to the prosecution in its application of 948.02(1)(b) against Kenyon.

CONCLUSION

For all of the foregoing reasons, the defendant requests the Court to grant this petition and review the case, then reverse the court of appeals and affirm the circuit court's order dismissing the information.

Dated this 13th day of October, 2025.

Respectfully submitted,
BUTING, WILLIAMS, & STILLING, S.C.

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Sec. 809.19(8)(b), and (bm) for a brief and Sec. 809.62(4) for a petition for review. The length of this petition for review is 7977 words.

I further certify that filed with this Petition for Review, as a separate document, an appendix that complies with Sec. 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the judgments, orders, findings of fact, conclusions of law and memorandum decision of the circuit court necessary for an understanding of the petition; (4) any other portions of the record necessary to an understanding of the petition; and (5) a copy of any unpublished opinion cited under Sec. 809.23(a) or (b).

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 first names and last initials instead of full names of persons, 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.

I further certify that a copy of this certificate has been served with this appendix filed with the court and served on all parties either by electronic filing or by paper copy.

I further certify that the content of the electronic copy of the petition and appendix are identical to the content of the paper copy of the petition and appendix.

Electronically signed by Jerome F. Buting
Attorney Jerome F. Buting

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