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SUPREME COURT

STATE OF WISCONSIN

SUPREME COURT

Appeal No. 2022AP2228 - CR

STATE OF WISCONISN,

Plaintiff-Appellant,

v.

KEITH C. KENYON,

Defendant-Respondent-Petitioner.

On review of a Court of Appeals decision reversing an order for dismissal entered in the Milwaukee County Circuit Court, the Honorable David Borowski, presiding.

NONPARTY BRIEF OF THE WISCONISN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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INTRODUCTION

Wisconsin Stat. § 948.02(1) defines and felonizes five versions of first-degree child sexual assault. At issue are two of the five:

> **948.02 Sexual assault of a child**
>
> (1) First degree sexual assault.
>
> ....
>
> (b) Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony.
>
> ....
>
> (e) Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony.

Subsection (e) is slightly more expansive than sub. (b)—it covers both sexual contact and sexual intercourse (not just the latter) and covers such conduct with children under 13 (not just 12). But as to sexual intercourse with children under 12—the "point of overlap" at issue here—the provisions are identical. *See State v. Cissell*, 127 Wis. 2d 205, 219-20, 378 N.W.2d 691 (1985). The conduct they prohibit, and prescribe punishments for, is the same.

The applicable penalties are not.

The maximum sentence for a Class B felony—including a violation of sub. (e)—is up to 40 years' initial confinement and 20 years' extended supervision. Wis. Stat. § 973.01(2)(b), (d). A conviction under sub. (b), however, also carries a 25-year mandatory minimum term of confinement. Wis. Stat. § 939.616(1r). That's five years more than the minimum confinement served in the course of a life sentence. Wis. Stat. § 973.014(1g)(a)1.

Thus, when the State prosecutes the crime of having sexual intercourse with a child under 12, they have two options. They can charge a violation of sub. (e) and, should a conviction ensue, argue for anything from zero to 40 years' incarceration. Or they can charge a violation of sub. (b), ensuring the defendant will spend at least 25 years in prison if convicted.

Every first-degree child sexual assault is a grave crime. Yet some instances of sexual intercourse with a child under 12 are undeniably more aggravated than others; after all, the crime encompasses conduct spanning from fleeting, external contact (what's alleged here) to protracted forcible penetration. *See* Wis. Stat. § 948.01(6). Likewise, some defendants are more culpable than others; a whole body of case law stresses as much. *See State v. Gallion*, 2004 WI 42, ¶43 n.11, 270 Wis. 2d 535, 678 N.W.2d 197.

But nothing in the statute provides any guidance at all in choosing between the subs. (b) and (e). The text doesn't suggest that the mandatory-minimum version should be charged when the facts are particularly aggravated or the defendant especially culpable. Nor does it indicate that the no-minimum version should be charged when the circumstances are—for whatever reason—more mitigated.

The record, meanwhile, shows the Milwaukee County District Attorney's office uses these overlapping provisions not to ensure harsher penalties for the worst offenders or individualized sentences for mitigated cases, but—habitually—as a cudgel to coerce guilty pleas. The record reveals a pattern; Keith Kenyon's case is just one example.

But is the pattern unconstitutional, or a permissible facet of plea bargaining? Our prior case law does not answer the question. As the court of appeals took pains to point out,[1] precedent establishes a

[1] *State v. Kenyon*, Case No. 2022AP2228-CR, unpublished slip op., ¶¶31-32 (Wis. Ct. App. Sept. 16, 2025) (recommended for publication).

presumption of impermissible vindictiveness when discretionary prosecutorial decisions penalize defendants for exercising their right to *appeal*. *See State v. Edwardsen*, 146 Wis. 2d 198, 203, 430 N.W.2d 604 (Ct. App. 1988). But the court of appeals' decision here is the first to address discretionary prosecutorial decisions that penalize defendants for exercising their right to *trial.* Its analysis brings important, recurring legal issues into focus—and resolves them, in a decision recommended, in problematic ways.

WACDL urges this Court to grant review.

ARGUMENT

I. This case presents multiple significant, recurring legal issues—all revolving around the constitutionality of Wis. Stat. §§ 948.02(1)(b) and (e)—that warrant this Court's review.

Statutes are presumed constitutional. *State v. Smith*, 2010 WI 16, ¶8, 323 Wis. 2d 377, 780 N.W.2d 90. "To overcome that presumption," a litigant must prove a statute "unconstitutional beyond a reasonable doubt." *Id.* Whether that burden has been met is a question of law this Court reviews de novo. *Id.*

Kenyon's petition raises an array of constitutional challenges to subs. (b) and (e).[2] He argues that the statutes:

- are void for vagueness because an ordinary person can't discern the penalties applicable at their point of overlap;

[2] In WACDL's view, some of Kenyon's challenges are facial (like his separation-of-powers argument, which addresses the powers conferred by the statute rather than their exercise); some are as-applied (like his equal-protection argument, which addresses the reasons underlying the State's enforcement of sub. (b) here); and some might be either or both (like his vagueness argument, particularly in light of *Johnson v. United States*, 576 U.S. 591 (2015)). *See State v. Smith*, 2010 WI 16, ¶10 n.9, 323 Wis. 2d 377, 780 N.W.2d 90 (re: the facial/as-applied distinction). Given the word limit, WACDL leaves these nuances for another day.

- are void for vagueness because they do not preclude arbitrary and discriminatory enforcement, and the State is enforcing them arbitrarily and discriminatorily;
- violate due process by depriving Kenyon of his right to be sentenced by a neutral judge;
- violate equal protection because their discriminatory enforcement by the Milwaukee County DA's office lacks any rational justification; and
- violate the separation-of-powers doctrine by impermissibly delegating legislative and judicial authority to the executive branch.

WACDL submits that three of these issues are particularly deserving of this Court's review.

A. Arbitrary and discriminatory enforcement.

Under the void-for-vagueness doctrine, penal statutes must define crimes "in a manner that does not encourage arbitrary and discriminatory enforcement"—or they violate due process. *State v. Grandberry*, 2018 WI 29, ¶33, 380 Wis. 2d 541, 910 N.W.2d 214. In the context of overlapping penal statutes with different penalties, which aren't *necessarily* impermissibly vague, "the focus ... is on whether the prosecutor" selectively enforces them by "unjustifiably discriminat[ing] against any class of defendants." *Cissell*, 127 Wis. 2d at 216.

The extreme, unavoidable sanction applicable under sub. (b)—and the absence of anything similar under sub. (e)—incentivizes exploitation of their overlap in just the manner we see here: against defendants who pursue trial, as a means of extracting pleas. As the circuit court put it, the prosecutor is using sub. (b) as "a tactical measure to strong-arm [Kenyon] into accepting a plea" solely to "avoid a wholly disproportionate mandatory minimum penalty." (App. 130).

The court of appeals deemed this tactic permissible under *Cissell* and *United States v. Batchelder*, 442 U.S. 114 (1979). But those cases don't resolve the issue.

The overlapping penal statutes at issue in *Cissell* carried maximum penalties of three months' jail and two years' imprisonment, while in *Batchelder* it was two versus five years' imprisonment. Thus, neither case involved the magnitude of penalty discrepancy at issue here, where one statute carries a 25-year *mandatory minimum* and the other no compulsory confinement at all. But more importantly, neither involved any allegation of arbitrary or discriminatory enforcement. Indeed, both decisions clarify that the statutes under review posed no due process problem on their face—but *would* if enforced in an arbitrary or discriminatory manner. *Batchelder*, 442 U.S. at 215 n.9; *Cissell*, 127 Wis. 2d at 222. Like we see here.

This case picks up where prior cases left off. The State is selectively enforcing sub. (b) to inflict radically harsher penalties on defendants like Kenyon who exercise their right to trial. Neither *Cissell* nor *Batchelder* approve this practice. This Court should grant review to tackle its constitutionality head-on.

B. Equal protection.

Equal protection precludes disparate treatment of similarly situated groups absent proper justification. *State v. Post*, 197 Wis. 2d 279, 318, 541 N.W.2d 115 (1995). What constitutes proper justification varies. If "a fundamental right is implicated or ... a suspect class is disadvantaged," then strict scrutiny applies, and the disparate treatment must be narrowly tailored to serve a compelling state interest. *See Smith*, 323 Wis. 2d 377, ¶12. Otherwise, rational basis review applies: if the disparate treatment bears a "rational relationship to a legitimate governmental interest," it will be upheld. *Id.*

Here, the disparity in treatment—a 25-year mandatory minimum versus none at all—at least arguably implicates the fundamental

right to physical liberty. *See Winnebago Cnty v. Christopher S.*, 2016 WI 1, ¶37, 366 Wis. 2d 1, 878 N.W.2d 109. There's also precedent framing "the right to a jury trial ... as a fundamental right." *State v. Anderson*, 2002 WI 7, ¶10, 249 Wis. 2d 586, 638 N.W.2d 301. The applicable level of scrutiny is a question this Court can and should resolve.

Even under rational basis review, however, the disparate treatment at issue warrants careful consideration. Numerous cases indicate that dissuading a defendant from exercising a constitutional right is not a valid governmental interest. *See infra,* pp. 11-12. If that's the case, then *any* disparity in treatment geared towards that illegitimate aim should fail. Review of this issue is thus warranted regardless of whether heightened scrutiny applies.

C. Separation of powers.

The separation-of-powers doctrine "is implicit in the division of governmental powers among the judicial, legislative and executive branches." *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999). Each branch "has exclusive core constitutional powers into which other branches may not intrude." *Id.* No branch may "abdicate" its exclusive powers. *Evers v. Marklein*, 2024 WI 31, ¶31, 412 N.W.2d 525, 8 N.W.2d 395.

One exclusive power held by the legislative branch is the authority "to determine the scope of the sentencing court's discretion" in criminal cases. *Horn*, 226 Wis. 2d at 646. The judicial branch then has the exclusive power, "within that legislatively-determined scope," to fashion individualized sentences. *Id.* The executive branch, meanwhile, has exclusive authority to decide when to proceed under a particular penal statute—with its legislatively-determined range of punishment, pursuant to which the judicial branch will exercise sentencing discretion. *See State v. Lindsey*, 203 Wis. 2d 423, 440, 554 N.W.2d 215 (Ct. App. 1996).

Rather than prescribing a range of punishment for the particular criminal act of sexual intercourse with a child under 12, the legislature has partially offloaded its responsibility by delegating it to the executive branch. Subsections (b) and (e) provide prosecutors nearly unfettered discretion—subject only to the due-process and equal-protection constraints discussed above—to decide whether the crime at issue is punishable by 25 to 40 years' confinement or zero to 40 years' confinement.

Cissell and *Batchelder* do not clarify the constitutionality of conferring such authority on the executive branch. Those cases addressed statutory schemes that forced the executive branch to choose between two *modestly* different penalty ranges, with the more punitive option *increasing* the scope of the judicial branch's sentencing discretion. Here, the executive branch must choose between two *very* different penalty ranges, with the more punitive option severely *curtailing* the judicial branch's sentencing discretion. What the legislature is putting in the executive branch's hands is, as the circuit court characterized it, the power to "sentence[e] by charging." (App. 128). This Court should grant review to resolve the novel question of whether such delegation runs afoul of the separation-of-powers doctrine.

II. A core question animating the varied legal questions this case presents is whether the trial penalty at issue here is constitutional. The court of appeals' confusion and concern on this point demonstrates that this Court should grant review and provide sorely needed guidance.

There is a substantial, documented difference between the penalties imposed on defendants who plead guilty to a given crime and those convicted of the same crime at trial.[3] This discrepancy, known colloquially as "the trial penalty," has garnered attention in

[3] Am. Bar Ass'n Crim. Justice Section, *Plea Bargain Task Force Report* 17 (2023), https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/reports/plea-bargain-tf-report.pdf.

recent years for its "coercive impact on the defendant's decision to plead guilty or proceed to trial"—even in cases of actual innocence.[4] Nevertheless, trial penalties remain an underexplored topic in the case law: their legality is rarely considered, and their scope is ill-defined. This case offers the opportunity to begin filling that gap.

Trial penalties take multiple forms. Imagine a defendant faces one count of armed robbery. The State may promise to cap its recommendation at four years' confinement should the defendant plead, but six if he's convicted at trial. The judge may give weight to the prosecutor's recommendation, such that a conviction after trial results in lengthier incarceration. That's a trial penalty. But it's different—and less egregious—than the one presented here. Here, the trial penalty doesn't stem from a recommendation that *may* result in a harsher discretionary decision. Rather, it stems from the selection of a charge that carries a 25-year mandatory minimum instead of an identical charge with no minimum at all.

The impact such charging decisions have on a defendant's plea-or-trial decisionmaking is obvious—and intentional. The State wants a guilty plea; it'll amend the charge to a violation of sub. (e) if only Kenyon gives it to them. In other words, though subs. (b) and (e) proscribe Kenyon's alleged conduct in the same manner, and though Kenyon's alleged conduct is far from aggravated in the realm of first-degree child sexual assault, the State is proceeding with the mandatory-minimum charge because Kenyon is exercising his right to trial.

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[4] *Id. See also* Christina Swarns, Innocence Project, *Why the trial penalty must go* (June 1, 2023), https://innocenceproject.org/news/why-the-trial-penalty-must-go/; Nat'l Ass'n Crim. Defense Lawyers, *The trial penalty: The Sixth Amendment right to trial on the verge of extinction and how to save it* 24-30 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf.

The court of appeals reluctantly deemed the State's conduct permissible. But cases tackling analogous circumstances—other situations in which defendants suffer penalties for exercising constitutional rights—cast doubt on its analysis. Consider the following:

- A defendant has a state constitutional right to appeal. *State v. Newman*, 162 Wis. 2d 41, 46, 469 N.W.2d 394 (1991). As the court of appeals acknowledged, a prosecutor may not increase charges based on a defendant's exercise of that right, since "punish[ing] a person because he has done what the law plainly allows is a due process violation of the most basic sort." *See Edwardsen*, 146 Wis. 2d at 203.

- A defendant has a state and federal constitutional right against self-incrimination. *State v. Harmon*, 2006 WI App 214, ¶18, 296 Wis. 2d 861, 723 N.W.2d 732. A prosecutor may not "comment on the [defendant's] refusal to testify," as doing so inflicts "a penalty ... for exercising a constitutional privilege." *Griffin v. California*, 380 U.S. 609, 614 (1965).

- A defendant has a state and federal constitutional right against unreasonable searches, including warrantless blood draws. *State v. Forrett*, 2022 WI 37, ¶6, 401 Wis. 2d 678, 974 N.W.2d 422. The legislature may not prescribe harsher punishments for defendants who exercise that right. *Id.*, ¶¶8-14. Nor may a judge impose "a more severe criminal penalty" because the defendant exercised that right. *State v. Dalton*, 2018 WI 85, ¶67, 383 Wis. 2d 147, 914 N.W.2d 120. (*Dalton* observed that the State's contrary argument, "[t]aken to its logical extreme," would permit harsher penalties "because a defendant exercised the right to a jury trial." *Id.*, ¶¶61, 65. This result, per *Dalton*, would be patently unconstitutional.)

- Finally, and most relevant here, a defendant has a state and federal constitutional right to a jury trial. *Anderson*, 249 Wis. 2d 586, ¶10. The legislature may not impermissibly burden defendants' exercise of that right by prescribing harsher punishments for those who do so. *United States v. Jackson*, 390 U.S. 570, 572 (1968). Accordingly, a crime cannot be punishable by death only if the defendant goes to trial. *Id.*

What these cases teach is that a defendant may not, consistent with due process, suffer harsher criminal penalties for exercising a constitutional right. But that is precisely what the State is ensuring will happen to Kenyon if he's convicted.

What's different about the trial penalty at issue here that renders it lawful, while case law is otherwise consistent in barring the government from penalizing defendants for exercising constitutional rights? The court of appeals wasn't sure. It declared that it had no "satisfactory answer as to why a prosecutor's decision to increase the severity of the charges after a successful appeal would carry a presumption of vindictiveness while the same motivation (i.e., avoiding trial) would not carry this presumption if [the charging decision was made] prior to the first trial." *State v. Kenyon*, Case No. 2022AP2228-CR, unpublished slip op., ¶32 (Wis. Ct. App. Sept. 16, 2025) (recommended for publication). That's where this Court's input is essential: if the State's conduct here is indeed permissible, despite the many cases suggesting otherwise, Kenyon and countless defendants like him deserve "a satisfactory answer" as to why. *See id.*

* * * *

It is incumbent on the government to take every allegation of first-degree sexual assault seriously. But even in this sensitive realm, not every accused is guilty. And as the United States Supreme Court has continuously reiterated, "the injustice that results from the con-

viction of an innocent person" is the singular evil our criminal procedure was designed to prevent. *Schlup v. Delo*, 513 U.S. 298, 325 (1995). Protecting a defendant's right to trial is thus critical—not just to precluding punishment for the exercise of a constitutional right (which case law has long proscribed), but to ensuring the system has a functioning tool for ferreting out the innocent. The trial penalty at issue in this case jeopardizes those goals, raising an array of thorny constitutional questions in the process. Review is warranted.

CONCLUSION

WACDL respectfully requests that this Court grant review.

Dated this 27th day of October, 2025.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,942 words.

Dated this 27th day of October, 2025.

Signed:

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