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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2022AP2228-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

KEITH C. KENYON,
Defendant-Respondent-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

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Plaintiff-Appellant State of Wisconsin has received Defendant-Respondent-Petitioner Keith C. Kenyon's Petition for Review in this case. Kenyon seeks review of the Wisconsin Court of Appeals' decision and order reversing a circuit court order dismissing the Information charging Kenyon with First Degree Sexual Assault of a Person under the Age of 12 by Sexual Intercourse, contrary to Wis. Stat. § 948.02(1)(b). The State has also received the non-party brief of the Wisconsin Association of Criminal Defense Lawyers ("amicus") in support of the petition.

Kenyon asserts that his petition presents novel, significant questions of state and federal constitutional law requiring resolution by this Court, citing Wis. Stat. § (Rule) 809.62(1r)(a) & (c). (Pet. 6–11.)

Kenyon's petition raises constitutional claims challenging the prosecutor's charging decision in this case. But ultimately these claims involve settled questions of law not requiring this Court's review. As the court of appeals showed in its decision, the United States Supreme Court in *Batchelder* and the Wisconsin courts in multiple cases have squarely rejected the same constitutional challenges Kenyon raises here. These cases establish that the Legislature's enactment of a statute like Wis. Stat. § 948.02(1) containing overlapping offenses with different penalties does not violate constitutional protections or separation of powers. Moreover, a novel vindictive prosecution claim the court of appeals raised *sua sponte* at the end of its opinion was never briefed and does not merit review.

Because the court of appeals properly concluded that Kenyon's constitutional claims have been rejected in decisions of this Court and the U.S. Supreme Court, his petition does not meet criteria for review and should be denied. Wis. Stat. § (Rule) 809.62(1r)(a) & (c).

STATEMENT OF THE CASE

In 2019, Keith Kenyon took his eight-year-old niece Leah¹ to Disney on Ice, and she stayed at Kenyon's for a sleepover. (R. 1:1.) That night, as alleged in the complaint, Leah pretended to be asleep so that Kenyon would carry her to her cousin's room. (R. 1:1; 23:4.) Kenyon obliged, carrying Leah into the room and laying her on a bed. (R. 1:1; 23:4.) Kenyon then unzipped Leah's onesie pajamas. (R. 1:1; 23:4.) He pulled her underwear to the side, wiped her vagina with a cloth, and licked her vagina. (R. 1:1; 23:4.) When, a few months later, Leah's mother told Leah about plans for another sleepover at Uncle Keith's, Leah disclosed the assault to her mother and, subsequently, to a forensic interviewer. (R. 1:1; 21:3.)

The State charged Kenyon with one count of First Degree Sexual Assault of a Person under the Age of 12 by Sexual Intercourse, contrary to Wis. Stat. § 948.02(1)(b). (R. 1:1.) The circuit court held a preliminary hearing and bound Kenyon over for trial upon finding probable cause to believe that Kenyon committed a felony. (R. 23:18.)

Kenyon's motions to dismiss

Kenyon filed a motion to dismiss the Information in November 2019, and an amended motion in April 2021. (R. 21:1–8.) Kenyon's arguments challenged the prosecutor's decision to charge him with violating Wis. Stat. § 948.02(1)(b) instead of a related, overlapping provision.

Kenyon's charge, Wis. Stat. § 948.02(1)(b), provides: "Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B. felony." An overlapping provision, section 948.02(1)(e), states: "Whoever has sexual contact or sexual intercourse with a person who

¹ Leah is a pseudonym. See Wis. Stat. § (Rule) 809.86(4).

has not attained the age of 13 years is guilty of a Class B felony.” Both offenses, as Class B felonies, carry up to a 60-year prison sentence with a maximum of 40 years of initial confinement. Wis. Stat. §§ 939.50(3)(b); 948.02(1); 973.01(2)(b)1. But only section 948.02(1)(b) also includes a mandatory minimum penalty of 25 years of initial confinement, pursuant to Wis. Stat. § 939.616(1r).

In the motion and amended motion, Kenyon argued that the prosecutor’s decision to charge him with violating Wis. Stat. § 948.02(1)(b) instead of (1)(e) was unconstitutional as a violation of due process, equal protection, and separation of powers. (R. 21; 45.) The State filed responses opposing Kenyon’s motion, arguing that the United States Supreme Court and Wisconsin courts had rejected similar challenges. (R. 24; 47.)

The circuit court’s decision

On November 18, 2022, the circuit court, the Honorable David Borowski, issued a decision and order granting the motion to dismiss the Information. (R. 79:1–11, Pet-App. 22–32.) Adopting all of Kenyon’s arguments, the court held that the statutory scheme violated constitutional protections and separation of powers. (R. 79:3, Pet-App. 24.)

First, the court concluded that the statutory scheme was unconstitutionally vague for providing “no perceptible constraints on arbitrary and discriminatory enforcement by the prosecution in deciding whether to charge” an act of sexual intercourse with a child under the age of 12 with a violation of Wis. Stat. § 948.02(1)(b) or Wis. Stat. § 948.02(1)(e). (R. 79:6–9, Pet-App. 27–30.)

Second, the court agreed with Kenyon that the statutory scheme amounted to “sentencing by charging” by allowing the prosecutor the discretion to charge an act of sexual intercourse with a child under the age of 12 under a provision carrying a 25-year mandatory minimum penalty

when an overlapping offense without a mandatory minimum was also available. (R. 79:9–10, Pet-App. 30–31.) The court appeared to conclude that Kenyon was therefore denied his right to be sentenced by a neutral tribunal. (R. 79:9–10, Pet-App. 30–31.)

Third, the court said that the statutes at issue contravene separation-of-powers principles. (R. 79:10–11, Pet-App. 31–32.) “[T]he legislature has created a statutory scheme,” the court stated, “whereby the scope of the court’s sentencing authority is a function of the prosecution’s charging decision under sub. (1)(b) rather than sub. (1)(e) despite significant and (multiple) mitigating factors” in Kenyon’s case. (R. 79:10–11, Pet-App. 31–32.)

The court concluded by calling the State’s decision to charge Kenyon with a violation of Wis. Stat. § 948.02(1)(b) a “strong-arm” tactic meant to pressure Kenyon into resolving his case by a plea. (R. 79:11, Pet-App. 32.) The court thus granted Kenyon’s motion to dismiss the Information.

The court of appeals’ decision

The State appealed, and the court of appeals, District I, reversed. (Pet-App. 5.) In an opinion authored by Judge Geenen and recommended for publication, the court recognized that Kenyon had raised “important constitutional questions.” (Pet-App. 5.) But it held that “the overwhelming weight of controlling authority . . . has previously considered and rejected Kenyon’s arguments in similar contexts.” (Pet-App. 5.) “Examining other instances of overlapping and identical criminal statutes with different penalty schemes,” the court continued, “the United States Supreme Court, the Wisconsin Supreme Court, and this court have rejected arguments identical to those Kenyon makes now.” (Pet-App. 5.)

The court methodically showed how due process, separation of powers, and equal protection claims closely

resembling Kenyon's were denied in *United States v. Batchelder* and in three Wisconsin cases that applied *Batchelder's* principles. (Pet-App. 10–16.)

In *Batchelder*, the Supreme Court addressed whether Congress could create two or more overlapping statutes prohibiting the same conduct (felons from receiving firearms) with different maximum penalties (five years and two years of imprisonment, respectively). (Pet-App. 10.)

First, as the court of appeals showed, *Batchelder* held that the statutes in question were not unconstitutionally vague. Despite “creat[ing] uncertainty as to which crime may be charged and therefore what penalties may be imposed,” the statutes were not unconstitutionally vague because they “unambiguously specify the activity proscribed and the penalties available upon conviction.” *United States v. Batchelder*, 442 U.S. 114, 123 (1979). (Pet-App. 11.)

Second, *Batchelder* held that when conduct violates more than one statute, the prosecutor may proceed under either statute without offending equal protection “so long as [she] does not discriminate against any class of defendants” by “race, religion, or other arbitrary classification.” *Id.* at 124–25, 125 n.9. (Pet-App. 11.) The *Batchelder* Court also held, as the court of appeals explained, that prosecutors did not “predetermine ultimate criminal sanctions” by charging the defendant under the statute with a five-year-maximum penalty instead of the statute with a two-year-maximum penalty. *Id.* at 125. (Pet-App. 11–12.)

Third and finally, *Batchelder* held that Congress did not impermissibly delegate to the executive branch the legislative branch's responsibility to set penalties where the two “provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose.” *Id.* at 126.

Turning to Wisconsin case law, the court of appeals noted that this Court in *State v. Karpinski* addressed a

scheme in which the same conduct was prohibited by a criminal statute and a civil municipal ordinance. 92 Wis. 2d 599, 601, 285 N.W.2d 729 (1979). *Karpinski* reaffirmed *Batchelder*'s rule "that when an act violates overlapping, but not identical, criminal statutes the government may prosecute under either criminal statute so long as there is no discriminatory prosecution." *Id.* at 610–11. (Pet-App. 12–13.)

Next, the court of appeals showed that this Court in *State v. Cissell* extended *Batchelder*'s analysis to cases in which the criminal statutes are identical, not just overlapping. 127 Wis. 2d 205, 218–24, 378 N.W.2d 691 (1985). (Pet-App. 13.) *Batchelder* had suggested its analysis would apply to statutes "with identical elements,"² and its reasoning focused on the overlapping, *i.e.*, identical, parts of the statute, not the points of difference. *Id.* at 219–20. The Court also held that *Batchelder*'s reasoning applied to the Wisconsin Constitution. *Cissell*, 127 Wis. 2d at 223–24.

Finally, the court of appeals observed that it rejected in *State v. Lindsey* separation of powers and equal protection challenges to Wisconsin's "three-strikes" law mandating life imprisonment for those with three serious felony convictions. See 203 Wis. 2d 423, 439–46, 554 N.W.2d 215 (Ct. App. 1996). *Lindsey* recognized that the Legislature has the authority within our system to mandate specific punishments, and the discretion afforded prosecutors to charge the three-strikes law penalty enhancer did not violate equal protection. *Id.* at 441, 445–46. "[T]he prosecutor had the discretion to charge Lindsey as a persistent repeater, as a repeater, without the repeater enhancers, or with no crime at all," without violating constitutional protections, the court explained. *Id.* at 445–46.

The court of appeals determined that the foregoing cases were dispositive of Kenyon's claims, and Kenyon had

² *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

failed to distinguish them from his own. (Pet-App. 16.) Even if Wis. Stat. § 948.02(1)(b) and (1)(e) were somehow regarded as *identical* crimes, the court explained, “*Cissell* held that it does not matter whether the challenged statutes are identical; *Batchelder* still controls.” (Pet-App. 16.) The court also specifically rejected Kenyon’s equal protection argument based on statistical materials detailing the Milwaukee County District Attorney’s Office recent charging and plea bargaining practices involving Wis. Stat. § 948.02(1)(b) and (1)(e). (Pet-App. 17.) Because the decision to charge Kenyon under Wis. Stat. § 948.02(1)(b) was not based on race or religion or some “other arbitrary classification” not then identified by Kenyon, the court concluded that the decision did not violate equal protection under *Batchelder* and *Cissell*.

At the end of the opinion, the court took the unusual step of raising *sua sponte* a novel due process claim of vindictive prosecution not briefed by the parties based on the court’s belief that the prosecutor may have imposed a so-called “trial penalty” against Kenyon for exercising his right to a trial. (Pet-App. 18–20.) The court ultimately rejected this claim on multiple grounds. But Kenyon and amicus now seize on this never-briefed claim as a basis for review—Kenyon by rolling it into a new equal protection claim, and amicus by asking the Court to take up the matter directly. As shown in the Argument, these previously unargued claims are not properly before this Court and, regardless, lack support in fact and law.

ARGUMENT

Probable cause exists to believe that Kenyon committed the felony offense with which he was charged, a fact Kenyon does not dispute. Nonetheless, Kenyon seeks dismissal of the charge, which carries a very long mandatory minimum penalty of confinement, because the prosecutor could have charged him instead with an overlapping offense not carrying

a minimum penalty. As the court of appeals showed, the United States Supreme Court and Wisconsin courts have consistently rejected such challenges to a prosecutor's charging discretion when offenses overlap, or are even identical, and the offenses carry different penalties.

Kenyon's petition largely ignores the reasoning and language of the controlling cases. He makes arguments similar to those that were rejected by a unanimous Supreme Court 50 years ago in *Batchelder* and by this Court and the court of appeals in the cases discussed above. The only novel constitutional arguments he and amicus advance stem from the so-called "trial penalty" Kenyon suffered by not accepting the State's plea. But these claims were never argued below and lack support in law or in the record. This Court should deny the petition.

I. Review is not warranted because Kenyon's preserved arguments have been rejected by the United States Supreme Court and Wisconsin courts in similar contexts, and Kenyon fails to distinguish his case from those cases.

A. Applicable legal principles

1. Wisconsin Stat. § 948.02(1)(b) and (1)(e) are overlapping offenses carrying different penalties.

Wisconsin Stat. § 948.02(1) identifies the prohibited acts constituting the crime of first-degree sexual assault of a child. Wisconsin Stat. § 948.02(1)(b) provides as follows: "Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony." Wisconsin Stat. § 948.02(1)(e) provides: "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."

The two offenses overlap but are not identical. A person who has sexual contact with a child under the age of 13

violates Wis. Stat. § 948.02(1)(e) but not (1)(b). A person who has sexual intercourse with a child who is 12 years old also violates (1)(e) but not (1)(b). But a person who has sexual intercourse with a child under the age of 12 violates both (1)(b) and (1)(e).

A Class B felony carries a maximum prison sentence of 60 years with up to 40 years of initial confinement. Wis. Stat. §§ 939.50(3)(b); 948.02(1); 973.01(2)(b)1. A violation of section 948.02(1)(b) carries a mandatory minimum term of 25 years of initial confinement, pursuant to Wis. Stat. § 939.616(1r). A violation of section 948.02(1)(e) carries no mandatory minimum penalty.

2. Kenyon bears the burden of proving the statute unconstitutional beyond a reasonable doubt.

“Every legislative enactment is presumed to be constitutional.” *State v. Barbeau*, 2016 WI App 51, ¶ 29, 370 Wis. 2d 736, 883 N.W.2d 520. The constitutionality of a statutory scheme is a question of law subject to *de novo* review. *Id.*

A facial constitutional challenge attacks the statute itself, claiming that the law “cannot be enforced under any circumstances.” *State v. Forrett*, 2022 WI 37, ¶ 5, 401 Wis. 2d 678, 974 N.W.2d 422 (citation omitted). An as-applied constitutional challenge attacks the application of the statute to the particular facts. *State v. Smith*, 2010 WI 16, ¶ 10 n.9, 323 Wis. 2d 377, 780 N.W.2d 90.

Because the court of appeals determined that Kenyon’s claims were controlled by established precedent, its analysis did not rest on a careful analysis of whether Kenyon, the party challenging the statute’s constitutionality, had met his burden of proof. Neither does this Response. Suffice to say, to prevail, Kenyon “must prove that the challenged statute is unconstitutional beyond a reasonable doubt,” whether his

challenges are deemed facial or as applied.³ *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63.

3. A prosecutor has broad discretion to charge any offense for which there is probable cause to believe that the defendant committed.

In Wisconsin, it is well established that a prosecutor enjoys “broad discretion in determining whether to charge an accused, which offenses to charge [and] under which statute to charge.” *State v. Krueger*, 224 Wis. 2d 59, 67, 588 N.W.2d 921 (1999) (footnotes omitted); *Lindsey*, 203 Wis. 2d at 440.

When two statutes have similar, or even identical, elements but different penalties, a prosecutor is free to choose which statute to charge without violating due process or equal protection, provided the choice is not based “upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Cissell*, 127 Wis. 2d at 215 (citing *Batchelder*, 442 U.S. at 125 n.9).

“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); see also *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 29, 271 Wis. 2d 633, 681 N.W.2d 110 (“The sine qua non of the charging decision is probable cause.”).

The prosecutor’s discretion to charge any offense for which probable cause exists has been codified by the Legislature. “[I]f an act forms the basis for a crime punishable under more than one statutory provision, prosecution may

³ Amicus suggests that Kenyon’s claims present a mix of facial and as-applied challenges. (Amicus Br. 5 n.2.)

proceed under any or all such provisions,” so long as double jeopardy permits. Wis. Stat. § 939.65.

B. Kenyon’s due process challenges closely resemble claims rejected by the Supreme Court in *Batchelder*.

Kenyon reasserts two due process arguments he made in the lower courts. The U.S. Supreme Court and Wisconsin courts have rejected very similar arguments, and Kenyon fails to distinguish his case from those cases.

First, Kenyon asserts that Wis. Stat. § 948.02(1)(b) and (1)(e) constitute a statutory scheme that is void for vagueness. (Pet. 14–17.) He argues that the statutes are unconstitutionally vague because, he argues, they do not provide guidance about when to charge the offense with the mandatory minimum penalty, and when to charge the offense without a minimum penalty. (Pet. 14–17.)

Kenyon peppers his vagueness argument with quotes from *Batchelder* while ignoring the language in that decision that is dispositive of his claim. Rejecting a defendant’s argument that two overlapping statutes with different penalties were unconstitutionally vague, *Batchelder* recognized that statutes may be void for vagueness “if they do not state with sufficient clarity the consequences of violating a given criminal statute.” 442 U.S. at 123. But the two provisions at issue there “unambiguously specif[ied] the activity proscribed and the penalties available upon conviction.” *Id.* *Batchelder* then rejected the suggestion that “uncertainty as to which crime may be charged and therefore what penalties may be imposed”—what Kenyon refers to as a lack of “guidance” concerning which crime may be charged—does not render a statute unconstitutionally vague. *Id.* “So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized,”

Batchelder held, “the notice requirements of the Due Process Clause are satisfied.” *Id.*

Here, each of the overlapping provisions of Wis. Stat. § 948.02(1)(b) and (1)(e) “clearly define the conduct prohibited and the punishment authorized,” and Kenyon does not argue otherwise. That the present scheme creates uncertainty as to which crime may be charged does not render the statute unconstitutionally vague. *See Batchelder*, 442 U.S. at 123.

Second, Kenyon maintains that the statutory scheme “constitut[es] sentencing by the prosecutor,” not a neutral tribunal, an argument closely related to his equal protection and separation of powers arguments. (Pet. 24–26.) Kenyon asserts that his argument does not target *all* mandatory minimums as unconstitutional—just “[s]ome,” specifically, those not “short enough that a court could legitimately exercise its discretion and impose more than the minimum in a given case.” (Pet. 26.) Again, Kenyon quotes *Batchelder* often but selectively, ignoring language in the decision and in Wisconsin cases rejecting his arguments.

Batchelder held that the prosecutor did not “predetermine ultimate criminal sanctions” by electing to charge the defendant under the statute containing greater criminal exposure. 442 U.S. at 125. Granted, *Batchelder* concerned overlapping statutes with different maximum penalties, not overlapping statutes where one carries a lengthy mandatory minimum penalty and the other does not. But *Batchelder*’s language is broad and thus applies to Kenyon’s circumstances as well.

“[T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements,” *Batchelder* explained. 442 U.S. at 125. “The prosecutor may be influenced by the penalties

available upon conviction,” the Court held, “but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause.” *Id.* “Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution neither is he entitled to choose the penalty scheme under which he will be sentenced.” *Id.*

Wisconsin courts have also consistently upheld statutes containing mandatory minimum penalties on constitutional and separation of powers challenges. Rejecting one such challenge, this Court explained that it “has consistently adhered to the view that it is within the province of the legislature as to what punishment is to be related to a particular crime.” *State v. Sittig*, 75 Wis. 2d 497, 499, 249 N.W.2d 770 (1977). Further, the Legislature may deny sentencing courts the discretion to determine sentence on a conviction for an offense and mandate that the court impose a particular sentence. *See id.* at 499–500; *Jones v. Manesewitz*, 267 Wis. 625, 633, 66 N.W.2d 732 (1954). And, contra Kenyon, Wisconsin courts have long held that a prosecutor’s discretionary decision to pursue a conviction under a provision carrying a mandatory sentence—even one as long as life without parole—does not violate constitutional protections. *See Linsdey*, 203 Wis. 2d at 445–46.

Kenyon’s due process claims are therefore contrary to established precedent and do not merit review.

C. *Batchelder* and Wisconsin case law also foreclose Kenyon’s preserved equal protection challenge to the prosecutor’s charging decision; an additional, new equal protection claim Kenyon raises in his petition is forfeited and without merit.

In his petition, Kenyon reasserts that the prosecutor’s charging decision violated equal protection. But Kenyon appears to make two claims under the equal protection umbrella—the same one he raised in the circuit court and court of appeals, and a new claim incorporating parts of the court of appeals *sua sponte* vindictive prosecution discussion. The State addresses each in turn.

Kenyon reasserts here that the prosecutor’s decision to charge him under Wis. Stat. § 948.02(1)(b), and not (1)(e), was “discriminatory” and “arbitrary” and thus violated his right to equal protection. (Pet. 18–22.) Kenyon points to statistics purportedly showing Milwaukee County’s recent history of charging violations of Wis. Stat. § 948.02(1)(b), and he asserts that the conduct in all 21 of the other cases charging the offense carrying the mandatory minimum penalty “was substantially more aggravated than the allegations against Kenyon.” (Pet. 19–20.) But the prosecutor’s charging decision is not susceptible to a challenge.

“This Court has long recognized that when an act violates more than one criminal statute,” *Batchelder* explained, “the Government may prosecute under either so long as it does not discriminate against any class of defendants.” 442 U.S. at 123–24. Later, the Court rejected the argument that the overlapping scheme granted “unfettered” discretion to prosecutors because charging decisions are “subject to constitutional constraints,” namely, enforcement “based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Id.* at 125 & n.9; *see also Cissell*, 127 Wis. 2d at 215 (discussing *Batchelder*, 442 U.S. at

125 n.9). Because Batchelder had not asserted that he was charged based on any suspect classification, he did not have an equal protection claim. *Id.*

Here, the court of appeals easily rejected Kenyon's equal protection argument because, at that time, he did not argue that the decision to charge him was based on an arbitrary classification under *Batchelder* and *Cissell*. (Pet-App. 17.) And the court correctly determined that the record contained "no evidence of discriminatory prosecution." (Pet-App. 17.)

Now, Kenyon asserts for the first time that the State *did* charge him under Wis. Stat. § 948.02(1)(b) based on an "arbitrary classification"—his membership in a group of persons alleged to have committed first degree sexual assault of a child who assert their innocence and want a trial. (Pet. 22.) This argument was not made in the court of appeals and is therefore forfeited. *See State ex rel. Thorson v. Schwarz*, 2004 WI 96, ¶ 30 n.5, 274 Wis. 2d 1, 681 N.W.2d 914. Even if not forfeited, there are several problems with this argument.

First, the State did not create this putative group by arbitrary classification. Each member determined his own eligibility for the class by his alleged criminal conduct, and prosecutors exercised their discretion under *Batchelder*, *Cissell*, and Wis. Stat. § 939.65 to charge each with violating Wis. Stat. § 948.02(1)(b). Second, the fact that most persons charged with violating Wis. Stat. § 948.02(1)(b) who ultimately resolved their cases by plea agreement pleaded to offenses not carrying the mandatory minimum is unsurprising and does not automatically "show[] the discriminatory use" of the mandatory minimum penalty "against Kenyon and a class of others to coerce a plea." (Pet. 19, 22.) It shows, rather, that a defendant who takes responsibility for his crimes and spares the victim the additional trauma of a trial often receives the benefit of pleading to an offense carrying a lesser penalty.

Finally, the Milwaukee County statistics Kenyon discusses at length do not tell a coherent story that supports his new equal protection claim. On one hand, Kenyon asserts that the data shows that Milwaukee prosecutors “routinely charged . . . violations of [Wis. Stat.] § 948.02(1)(e), with no mandatory minimum penalty” for conduct far more aggravated than Kenyon’s when they could have charged violations of Wis. Stat. § 948.02(1)(b) carrying the minimum penalty instead. (Pet. 20.) On the other, Kenyon argues that prosecutors are charging defendants under Wis. Stat. § 948.02(1)(b) to coerce defendants like him into pleading to an offense without the mandatory minimum sentence. (Pet. 22.) Well, which is it? Perhaps the real story is that Milwaukee prosecutors are exercising their discretion on a case-by-case basis in determining which offense(s) to charge based on all the relevant factors.

Kenyon’s equal protection claim—whether the version previously argued or the one asserted here—does not merit review.

D. Wisconsin cases and *Batchelder* have likewise rejected separation of powers challenges like Kenyon’s.

Kenyon next argues that the statutory scheme in Wis. Stat. § 948.02(1) violates the doctrine of separation of powers under the state constitution. (Pet. 28–31.) As the State understands it, Kenyon’s basic argument is that Wis. Stat. § 948.02(1) abdicates a core Legislative function and unduly burdens the judicial branch by allowing the executive the charging discretion to choose between overlapping offenses, one carrying a lengthy mandatory minimum penalty and the other not. (Kenyon’s Br. 35–44.)

The court of appeals correctly rejected this argument. The court noted that *Batchelder* had rejected an argument that the scheme of overlapping offenses with different

penalties “impermissibly delegated to the executive branch the legislature’s responsibility to fix criminal penalties.” See 442 U.S. at 125. (Pet-App. 12.) “[T]he power that Congress has delegated to [prosecutors] is no broader than the authority they routinely exercise in enforcing the criminal laws,” so the scheme did not violate separation of powers. *Id.* at 126. (Pet-App. 12.)

Turning to Wisconsin law, the court found *Lindsey* to be dispositive of Kenyon’s separation of powers claim. “Section 948.02(1) cannot be held unconstitutional for violating the separation of powers doctrine when, in *Lindsey*, we acknowledged that the legislature is allowed to eliminate entirely a circuit court’s sentencing discretion by setting forth a fixed punishment for a crime.” (Pet-App. 16.)

As argued in the court of appeals, Kenyon’s separation of powers’ argument relies on a more segregated view of the branches’ powers than the more flexible, shared-powers approach favored by this Court in recent decades. Earlier cases on which Kenyon relies forbade the branches from “abdicat[ing]” their core functions to another branch. See *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 503, 236 N.W. 717 (1931). But more recently, “Wisconsin courts interpret the Wisconsin Constitution as requiring shared and merged powers of the branches of government rather than an absolute, rigid and segregated political design.” *Martinez v. Dep’t of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d 687, 696, 478 N.W.2d 582 (1992) (citation omitted). “Thus, the separation of powers doctrine allows the sharing of powers and is not inherently violated in instances when one branch exercises powers normally associated with another branch.” *Id.* (citation omitted).

Based on these general principles, as well as *Lindsey* and *Batchelder*, the statutory scheme does not violate the Wisconsin’s doctrine of separation of powers. Kenyon’s contrary argument does not warrant review.

II. The court of appeals' *sua sponte* claim for vindictive prosecution does not merit review.

Having rejected all of Kenyon's claims challenging the prosecutor's decision to charge him under Wis. Stat. § 948.02(1)(b), the court of appeals raised *sua sponte* a novel due process claim of vindictive prosecution, only to reject it. (Pet-App. 18–20.) This claim was based on the court's belief that the prosecutor may have imposed a so-called "trial penalty" against Kenyon. (Pet-App. 18–20.) Recognizing that "[t]here is very little controlling authority discussing what constitutes a 'trial penalty,'" the court resorted to the following definition provided in a defense bar publication: "the discrepancy between the sentence offered during plea negotiations and the sentence a defendant will face after trial." (Pet-App. 18 & n.7.)

The court analogized Kenyon's circumstance to a case in which the prosecutor amends the Information to increase the charges following a defendant's successful appeal. (Pet-App. 18–20.) Because the increased charges suggest the prosecutor may be punishing the defendant for exercising his right to appeal, such circumstances support a claim of vindictive prosecution. *See State v. Edwardsen*, 146 Wis. 2d 198, 203, 430 N.W.2d 604 (Ct. App. 1988). (Pet-App. 18–19.)

The court expressed disbelief about why the same presumption of vindictiveness would not also attach in the present instance where the prosecutor "increas[es] the severity of the charges based on a defendant's refusal to plead guilty and insistence on taking the case to trial." "In both instances," the court continued, "it appears that the prosecutor penalizes a defendant by filing charges authorizing harsher punishment in direct response to a defendant exercising a constitutional right." (Pet-App. 19.)

The most obvious problem with this effort to extend *Edwardsen* to this situation is that the prosecutor *did not*

“increas[e] the severity of the charges” when Kenyon rejected the plea offer. She just continued to proceed on the original charge under Wis. Stat. § 948.02(1)(b). A plea offer is just that—an offer—not an amendment to the Information reducing the charge before acceptance by the defendant.

Moreover, the very idea of a claim of vindictive prosecution for charging one offense and not another when the charge is supported by probable cause is anathema to *Batchelder*, *Cissell*, and Wis. Stat. § 939.65. The court ultimately recognized this fact in rejecting its *sua sponte* claim:

[W]e find no case that stands for or even implicitly supports the proposition 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. This conclusion appears to contradict the overwhelming number of cases that hold that prosecutors have absolute discretion to decide what charge to bring when a defendant's alleged conduct violates two or more identical or overlapping criminal statutes.

(Pet-App. 19–20.)

In the end, the court correctly concluded that its novel vindictive prosecution claim alleging that the prosecutor imposed a “trial penalty” by proceeding under Wis. Stat. § 948.02(1)(b) carrying the mandatory minimum penalty and not section 948.02(1)(e) would contravene the controlling law in the area.

The court should decline amicus’s request to grant review to consider the court of appeals’ “trial penalty” claim.

CONCLUSION

For these reasons, the petition does not meet the criteria for review and should be denied.

Dated this 3rd day of December 2025.

Respectfully submitted,

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Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 5,381 words.

Dated this 3rd day of December 2025.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 3rd day of December 2025.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General