STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2022AP2228-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KEITH C. KENYON,

Defendant-Respondent.

STATE'S APPEAL FROM AN ORDER GRANTING A MOTION TO DISMISS THE INFORMATION, THE HONORABLE DAVID L. BOROWSKI, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 294-2907 (Fax)
wittwerjj@doj.state.wi.us

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INTRODUCTION

The State charged Defendant-Respondent Keith Kenyon with first-degree sexual assault of a child under the age of 12, contrary to Wis. Stat. § 948.02(1)(b), for performing cunnilingus on his ten-year-old niece. A conviction under this statute carries a 25-year mandatory minimum period of confinement. An overlapping offense—first-degree sexual assault of a child under the age of 13 by sexual contact or intercourse, contrary to Wis. Stat. § 948.02(1)(e)—does not.

On Kenyon's motion, the circuit court dismissed the Wis. Stat. § 948.02(1)(b) charge on the ground that its mandatory minimum penalty of 25 years of confinement violated procedural due process and separation of powers. Specifically, the court concluded that the statutory scheme created by sections 948.02(1)(b), 948.02(1)(e), and Wis. Stat. § 939.616(1r) (establishing 25-year minimum confinement for conviction under section 948.02(1)(b)) was unconstitutionally vague because it did not provide guidance to prosecutors in determining when to charge section 948.02(1)(b), and when to charge section 948.02(1)(e). The court also concluded that, where the Legislature authorized prosecutors to charge an offense carrying a steep mandatory minimum instead of an overlapping offense without a minimum penalty, the statutory scheme denied Kenyon's right to be sentenced by a neutral tribunal and violated separation of powers.

The circuit court erred. The Legislature determines crimes and the appropriate penalties for violations, and statutes are presumed to be constitutional and are not unconstitutional until proven so beyond a reasonable doubt. The district attorney has broad discretion in charging offenses, and it is undisputed that Kenyon's alleged conduct satisfied the elements of Wis. Stat. § 948.02(1)(b)—and multiple other sexual offenses in the statutes.

Kenyon cannot show that the statutory scheme and charge under Wis. Stat. § 948.02(1)(b) violated procedural due process facially or as applied. To wit, the statutory scheme is plain and easily understood; it is not unconstitutionally vague. The prosecutor acted within her discretion in charging Wis. Stat. § 948.02(1)(b), and neither Kenyon nor the circuit court cited any authority for the novel proposition that a charge carrying a lengthy mandatory minimum sentence may violate a defendant's right to be sentenced by a neutral tribunal. Finally, the statutory scheme at issue mandating a minimum sentence and thereby restricting the discretion of the sentencing court does not violate separation of powers because the Legislature determines the scope of sentencing courts' discretion in our system.

This Court should reverse and remand with instructions to reinstate the Information charging Kenyon with violating Wis. Stat. § 948.02(1)(b).

ISSUE PRESENTED

Can Kenyon prove beyond a reasonable doubt that the charge or statutory scheme under which he was charged violates procedural due process, either facially or as applied?

The circuit court answered yes.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests publication. The constitutionality of the statutory scheme created by the enactment of two overlapping offenses for first-degree sexual assault of a child, Wis. Stat. § 948.02(1)(b) and Wis. Stat. § 948.02(1)(e), and the 25-year minimum confinement term associated with the former but not the latter, is an issue of substantial public interest. *See* Wis. Stat. § (Rule) 809.23(1)(a)5. Though not

requested, the State welcomes oral argument if the Court believes that it would be helpful.

STATEMENT OF THE CASE

The offense and charge

In February 2019, Keith Kenyon took his ten-year-old niece Leah[1] to see Disney on Ice, and Leah stayed at Kenyon's for a sleepover. (R. 1:1.) That night, as she later told a forensic interviewer, Leah pretended to be asleep so that Kenyon would carry her to her cousin's room. (R. 1:1; 23:4.) Kenyon picked Leah up, carried her into the room, and laid her on the bed. (R. 1:1; 23:4.) Keyon then unzipped her onesie pajamas, moved 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 Kenyon's, Leah disclosed the assault to her mother and then to police. (R. 1:1; 21:3.)

In July 2019, the State charged Kenyon with one count of first-degree sexual assault of a child 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.)

The motion to dismiss and statutory scheme

In November 2019, Kenyon filed a motion to dismiss the Information as a violation of the right to procedural due process under the federal and state constitutions. (R. 21:1–8.) Kenyon's claim challenged the prosecutor's decision to charge him with an offense that carries a mandatory minimum confinement provision instead of a similar offense under the

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

same section that does not carry a minimum penalty. (R. 21:1–8.)

Wisconsin Stat. § 948.02(1) identifies the prohibited acts constituting the crime of first-degree sexual assault of a child. Kenyon was charged with violating section 948.02(1)(b), which provides: "Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B. felony." The allegations against Kenyon also constituted a violation of section 948.02(1)(e), which 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."[2]

As Class B felonies, both offenses 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 a violation of section 948.02(1)(b) also carries a mandatory minimum term of 25 years of initial confinement, pursuant to Wis. Stat. § 939.616(1r). Wisconsin Stat. § 948.02(1)(e) has no mandatory minimum penalty.

Kenyon argued that, by charging him with the offense carrying the mandatory minimum sentence instead of the offense without a minimum penalty, the State violated his rights to procedural due process in two ways. (R. 21:1–8.) First, he contended that the State's charge denied his due process right to be sentenced by a neutral hearing tribunal by compelling the court to sentence him to at least 25 years of initial confinement, no matter the specifics of his case. (R. 21:4–5.) Second, he maintained that the statutory scheme was void for vagueness because it provides no factors to prevent the State from charging in an arbitrary manner the offense carrying the lengthy mandatory sentence instead of the

[2] The full text of Wis. Stat. § 948.02(1) is provided in the Argument section.

offense without a minimum penalty. (R. 21:5–7.) Kenyon argued that it was unfair to charge him with the offense carrying the mandatory minimum because he had no criminal record, and the offense was not aggravated. (R. 21:4.)

The State filed a response opposing the motion. (R. 24:1–3.) The State argued that the United States Supreme Court has long recognized that, when an act violates more than one criminal statute, the State has the discretion to decide under which statute to charge the defendant. (R. 24:1.) The State observed that this rule holds even when the two offenses have identical elements but carry different penalties, citing *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979). (R. 24:1–2.) Kenyon filed a reply brief that sought to distinguish *Batchelder*. (R. 28:1–7.)

The court did not immediately act on the motion, and the parties litigated additional matters. These included the admissibility of both expert testimony and a recording of the child forensic interview. (R. 35:1–6; 38:1–4; 46:1–85; 48:1–16; 49:1–72; 50:1–14; 59:1; 65:1–5; 75:1; 102:1–15.)

In April 2021, Kenyon filed an amended motion to dismiss the Information, adding a third argument. (R. 45:1–8.) He argued that the statutory scheme also violated the doctrine of separation of powers under the Wisconsin Constitution. (R. 45:2.)

Kenyon asserted that the statutory scheme the Legislature created with the enactment of Wis. Stat. §§ 948.02(1)(b) and (1)(e) violated separation of powers by "abdicating to the executive branch, the prosecution, the legislature's constitutional role of establishing the penalty for proscribed conduct" and "by invading the power of the judicial branch by giving the prosecution . . . the ability to preordain the sentence of a defendant." (R. 45:2.)

The State filed a response opposing the amended motion. (R. 47:1.) The State noted that Wisconsin courts have

rejected separation of powers challenges to statutes imposing mandatory minimum penalties and the penalty enhancer of life-without-parole for persistent repeat offenders, citing *State v. Sittig*, 75 Wis. 2d 497, 500, 249 N.W.2d 770 (1977) (mandatory minimum penalties), and *State v. Lindsey*, 203 Wis. 2d 423, 440–41, 554 N.W.2d 215 (Ct. App. 1996) (life-without-parole enhancement for persistent repeat offenders). (R. 47:1–4.) The State noted that the supreme court had previously rejected Kenyon's apparent view that the judicial branch alone decides the penalty for illegal conduct, citing *Sittig*, 75 Wis. 2d at 499–500. (R. 47:4.)

In July 2022, Kenyon filed a supplement to his motion to dismiss. In the supplement, Kenyon asserted that there were 34 Milwaukee County cases in which the District Attorney's office had charged a violation of Wis. Stat. § 948.02(1)(b) carrying the 25-year mandatory minimum since January 2018, and Kenyon provided a brief summary of the facts and disposition of each case. (R. 73:5, 8–19.) Kenyon then asserted that his was "easily the least aggravated of all the 34 cases reviewed." (R. 73:5, 8–19.) He also asserted that, because "[i]n virtually every case when Wis. Stat. § 948.02(1)(b) was initially charged, including this case, the State agreed to amend the charge to another sex offense without the 25 year minimum penalty," the State "arbitrarily charges" section 948.02(1)(b). (R. 73:4.)

Kenyon also provided a copy of a November 2019 written plea offer the State made to Kenyon. (R. 73:6, 20.) The offer allowed Kenyon to plead guilty to a charge of first-degree sexual assault of a child under the age of 13 by sexual contact, contrary to Wis. Stat. § 948.02(1)(e), with a recommendation of five to seven years of initial confinement and seven years of extended supervision. (R. 73:6, 20.)

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, A-App. 3–13.) Adopting Kenyon's arguments, the court held that the statutory scheme violated Kenyon's constitutional right to procedural due process and separation of powers. (R. 79:3, A-App. 5.)

First, the court said that the statutes violated due process because the scheme is 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, A-App. 8–11.)

Second, the court said that the statutory scheme was unconstitutional because the charge under Wis. Stat. § 948.02(1)(b) and not Wis. Stat. § 948.02(1)(e) constituted "sentencing by charging." (R. 79:9–10, A-App. 11–12.) The court appeared to conclude that this defect denied Kenyon his right to be sentenced by a neutral tribunal and prevented the court from considering mitigating factors that might warrant imposing less than 25 years of confinement in Kenyon's case. (R. 79:9–10, A-App. 11–12.) The court said that the State itself was aware of these mitigating factors when it offered to recommend five to seven years of initial confinement in exchange for a guilty plea to violating section 948.02(1)(e). (R. 79:9–10, A-App. 11–12.)

Third, and related to the second point, the court said that the statutes at issue contravene separation-of-powers principles. (R. 79:10–11, A-App. 12–13.) "[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, A-App. 12–13.)

The court concluded by criticizing the State's decision to charge Kenyon with a violation of Wis. Stat. § 948.02(1)(b), calling it a "strong-arm" tactic meant to pressure Kenyon into resolving his case by a plea:

> [T]he prosecution's decision to charge the defendant in this case under [section] 948.02(1)(b), rather than [section] 948.02(1)(e), despite the significant mitigating circumstances, 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. The court cannot sanction this practice when it is based upon an arbitrary enforcement of the law, strips the court of its authority to consider mitigating factors, and places sentencing decisions in the hands of the prosecution. For these reasons, the court grants the defense motion to dismiss the Information.

(R. 79:11, A-App. 13.)

The State appeals.

ARGUMENT

Kenyon cannot prove that the statutory scheme mandating a 25-year minimum term of confinement for a conviction under Wis. Stat. § 948.02(1)(b) but not Wis. Stat. § 948.02(1)(e) is unconstitutional.

A. Standard of review

The constitutionality of a statutory scheme is a question of law subject to *de novo* review. *State v. Barbeau*, 2016 WI App 51, ¶ 29, 370 Wis. 2d 736, 883 N.W.2d 520.

B. Legal principles

1. Relevant statutes

As noted, Wis. Stat. § 948.02(1) identifies the prohibited acts constituting the crime of first-degree sexual assault of a child.[3] 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."

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. As noted, a violation of section 948.02(1)(b) carries a mandatory minimum term of 25 years of initial confinement, pursuant to Wis. Stat.

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[3] Wisconsin Stat. § 948.02(1) provides in full:

> **First degree sexual assault**. (am) Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years and causes great bodily harm to the person is guilty of a Class A felony.
>
> (b) Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony.
>
> (c) Whoever has sexual intercourse with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony.
>
> (d) Whoever has sexual contact with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony if the actor is at least 18 years of age when the sexual contact occurs.
>
> (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.

§ 939.616(1r). A violation of section 948.02(1)(e) carries no mandatory minimum penalty.

2. Challenges to the constitutionality of a statute

"Every legislative enactment is presumed to be constitutional." *Barbeau*, 370 Wis. 2d 736, ¶ 29. 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, 684, 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.

A party raising either a facial or as-applied challenge must meet a heavy burden to overcome the presumption of a statute's constitutionality, and they must prove beyond a reasonable doubt that the statute is unconstitutional. *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63. This Court resolves any reasonable doubt in favor of upholding the statute. *State v. O'Brien*, 2014 WI 54, ¶ 17, 354 Wis. 2d 753, 850 N.W.2d 8. "Every presumption to sustain the law if at all possible will be indulged, and if any doubt exists about the constitutionality of a statute, that doubt will be resolved in favor of constitutionality." *Barbeau*, 370 Wis. 2d 736, ¶ 29.

Though the presumption of a statute's constitutionality holds true in an as-applied challenge, courts do not presume that the State has applied the statutes in a constitutional manner. *Soc'y Ins. v. Lab. & Indus. Rev. Comm'n*, 2010 WI 68, ¶ 27, 326 Wis. 2d 444, 786 N.W.2d 385. "Because the legislature plays no part in enforcing our statutes, 'deference to legislative acts' is not achieved by presuming that the statute has been constitutionally applied." *Id.* (citation omitted).

3. The prosecutor's charging discretion

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); *see also State v. Lindsey*, 203 Wis. 2d 423, 440, 554 N.W.2d 215 (Ct. App. 1996); *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 378, 166 N.W.2d 255 (1969).

When two statutes have similar, or even identical, elements, but different penalties, a prosecutor is free to choose the statute under which to prosecute 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." *State v. Cissell*, 127 Wis. 2d 205, 215, 378 N.W.2d 691 (1985); *see also United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979).

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

C. Kenyon cannot prove that the charge under Wis. Stat. § 948.02(1)(b) and the statutory scheme mandating a 25-year minimum confinement term for violating this statute but not Wis. Stat. § 948.02(1)(e) is unconstitutional facially or as applied.

Kenyon's arguments in the circuit court challenged the constitutionality of the statutory scheme under which he was charged with violating Wis. Stat. § 948.02(1)(b) on their face and as applied to him. Granted, Kenyon characterized his constitutional claim as an as-applied challenge, and the circuit court likewise declared the statutory scheme at issue in this case unconstitutional "as applied in this case." (R. 79:3, A-App. 5.) But, as shown below, Kenyon's arguments, adopted in full by the circuit court, are largely facial challenges to the constitutionality of the charge and the statutory scheme created by the enactment of sections 948.02(1)(b), 948.02(1)(e), and 939.616(1r).

The State addresses the constitutionality of the statutory scheme both on its face and as applied. Kenyon cannot meet his burden to show that the statute is unconstitutional on its face or as applied.

1. Kenyon cannot prove that the statutory scheme and charge are unconstitutional on their face.

Kenyon's constitutional challenge in the circuit court alleged that the State's charge of violating Wis. Stat. § 948.02(1)(b) and the statutory scheme mandating a 25-year minimum term of confinement for a conviction under section 948.02(1)(b) but not section 948.02(1)(e) violated his rights to

procedural due process under the state and federal constitutions.[4]

Specifically, Kenyon maintained that the statutory scheme created by the enactment of Wis. Stat. §§ 948.02(1)(b), 948.02(1)(e), and 939.616(1r) was unconstitutionally vague (R. 45:2), a claim grounded in the procedural due process requirement of fair notice. *State v. Nelson*, 2006 WI App 124, ¶ 35, 294 Wis. 2d 578, 718 N.W.2d 168. Kenyon also contended that the State's decision to charge him with violating section 948.02(1)(b) amounted to "sentencing by charging," which, Kenyon asserted, violated his due process right to be sentenced by a neutral tribunal. *See State v. Goodson*, 2009 WI App 107, 320 Wis. 2d 166, 771 N.W.2d 385 (defendant has a due process right to be sentenced by an impartial judge). Finally, apart from Kenyon's due process claims, he argued that the statute was unconstitutional because it violated separation of powers principles.

These are facial challenges to the constitutionality of the statutory scheme that could be brought by any person charged with violating Wis. Stat. § 948.02(1)(b) whose conduct also violates Wis. Stat. § 948.02(1)(e). While Kenyon certainly focused on mitigating facts in his own cases when making his constitutional arguments, the challenges above assert reasons why the statutory scheme is unconstitutional whenever a defendant's conduct constitutes a violation under both (1)(b) and (1)(e). *See Forrett*, 401 Wis. 2d 678, ¶ 5. To prevail on these claims, Kenyon must therefore show that the

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[4] In general, Wisconsin courts have construed the rights to procedural due process provided in article I, section 8 of the state constitution to be coterminous with those provided in the Due Process Clause of the Fourteenth Amendment. *See County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999). Kenyon's arguments in the circuit court did not rely on a more expansive understanding of due process protections in the state constitution.

statutory scheme is unconstitutional beyond a reasonable doubt. He cannot meet this burden, as shown below.

a. The statutory scheme is not unconstitutionally vague under established law.

Courts apply a two-part analysis for determining whether a statute is void for vagueness. *State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654 (1989). "[F]irst, the statute must be sufficiently definite to give persons of ordinary intelligence who seek to avoid its penalties fair notice of the conduct required or prohibited." *Id.* A statute is void for vagueness under this first prong only when it is "so ambiguous that one who is intent upon obedience cannot tell when proscribed conduct is approached." *State v. Smith*, 215 Wis. 2d 84, 92, 572 N.W.2d 496 (Ct. App. 1997).

"Second, the statute must provide [objective] standards for those who enforce the laws and adjudicate guilt." *McManus*, 152 Wis. 2d at 135. A statute is vague under this section "only if a trier of fact"—or the prosecutor in bringing a charge in this case—"must apply its own standards of culpability rather than those set out in the statute." *Smith*, 215 Wis. 2d at 92.

To sum up these two requirements, "[a] criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation." *State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976) (quoting *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952)). Kenyon cannot show that the statutory scheme under which he was charged is unconstitutionally vague under either prong of the analysis.

First, Kenyon's charge and the statutory scheme satisfies the requirement of fair notice. The relevant statutes plainly give fair notice of the conduct prohibited and the

penalties associated with each offense. *See Smith*, 215 Wis. 2d at 92.

The offenses are plain and easily understood. Wisconsin Stat. § 948.02(1)(b) proscribes "sexual intercourse with a person who has not attained the age of 12 years." Wisconsin Stat. § 948.02(1)(e) proscribes "sexual contact . . . with a person who has not attained the age of 13 years."

The penalties for violating each offense are equally plain. The statutes provide that both offenses are Class B felonies carrying 60-year maximum prison terms with no more than 40 years of initial confinement. Wis. Stat. §§ 939.50(3)(b); 948.02(1)(b) and (e); 973.01(2)(b)1. A conviction for violating (1)(b) carries a 25-year mandatory minimum term of confinement, but a conviction under (1)(e) carries no mandatory minimum penalty. *See* Wis. Stat. § 939.616(1r).

Of course, Wis. Stat. §§ 948.02(1)(b) and 948.02(1)(e) overlap but are not identical; a person who violates (1)(b) necessarily violates (1)(e). A person who has only sexual contact with a child under the age of 13 or sexual intercourse with a 12-year-old child violates (1)(e) but not (1)(b).

But the fact that the statutes overlap and carry different penalties does not create a fair notice problem, or otherwise render the scheme unconstitutionally vague. As the United States Supreme Court and state supreme court have long held, "overlapping statutes with different penalties provide sufficient notice." *Cissell*, 127 Wis. 2d at 217 (discussing *Batchelder*, 442 U.S. at 123). "So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied." *Batchelder*, 442 U.S. at 123; *Cissell*, 127 Wis. 2d at 217.

Likewise, contrary to Kenyon's arguments, the statutory scheme satisfies the second requirement by

affording the prosecutor standards for making a charging decision. *See Smith*, 215 Wis. 2d at 92. Again, the statutes at issue are plain; no prosecutor would be confused as to what conduct satisfies each offense, and the penalties associated with each. The prosecutor would not need to substitute their own "standards of culpability" in determining whether to prosecute under either Wis. Stat. § 948.02(1)(b) or Wis. Stat. § 948.02(1)(e)—the statutes themselves provide those standards. *Smith*, 215 Wis. 2d at 92.

Kenyon's argument in the circuit court appears to be that the "standards" a statutory scheme must include to avoid unconstitutional vagueness would provide *additional* guidance beyond the elements of the offenses themselves for determining which offense to charge when the defendant's conduct violates multiple statutes. Indeed, this is the lynchpin of Kenyon's vagueness argument: "[T]he statute provides no factors to constrain the arbitrary and discriminatory application of the minimum mandatory 25 year prison sentence against him, instead of the alternative Class B felony that has no minimum mandatory sentence." (R. 21:7.) "Lacking any standards to govern prosecutors," he continues, "the statute violates due process under the void-for-vagueness doctrine." (R. 21:7.)

The United States Supreme Court specifically rejected Kenyon's position in *Batchelder*.

There, the Supreme Court determined that a statutory scheme with overlapping criminal statutes and different penalties was not unconstitutionally vague for not providing guidance to prosecutors as to which offense to charge. *Batchelder*, 442 U.S. at 123–24. Writing for a unanimous Court, Justice Thurgood Marshall treated the issue of overlapping charges as a matter of prosecutorial discretion: "This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute[ ] under either so long as it does not discriminate

against any class of defendants." *Id*. Likewise, this generally accepted principle is reflected in the Wisconsin statutes: "[I]f an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions," subject to double jeopardy protections. Wis. Stat. § 939.65.

The Court in *Batchelder* explained that "overlapping criminal statutes with different penalty schemes do not violate constitutional principles," unless the prosecutor bases the charging decision on the defendant's race, religion, or other arbitrary classification. *Cissell*, 127 Wis. 2d at 215 (*discussing Batchelder*, 442 U.S. at 125 n.9).

Batchelder "also rejected the argument that overlapping criminal statutes create unfettered prosecutorial discretion." *Cissell*, 127 Wis. 2d at 217 (discussing *Batchelder*, 442 U.S. at 124). "[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," the Supreme Court explained, "and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context." *Batchelder*, 442 U.S. at 125.

Finally, *Batchelder* recognized that "[t]he prosecutor may be influenced by the penalties available upon conviction" when deciding among multiple offenses to charge, "but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause." *Batchelder*, 442 U.S. at 125. "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.*

Like Kenyon, the circuit court erred in concluding that the statutes at issue are void-for-vagueness because they "fail to provide guidance to a prosecutor in choosing which statute to charge." (R. 79:6, A-App. 8.) As shown, the prosecuting attorney has broad discretion to determine what offense, if any, to charge in any given situation, and the fact that conduct violates multiple, overlapping criminal statutes with different penalties does not raise a constitutional issue. *Batchelder*, 442 U.S. at 123–24. And language the circuit court cited in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018), in support of its conclusion is inapt here. (R. 79:6, A-App. 8.) It is certainly true that actual vagueness in the law unconstitutionally transfers legislative power "to police and prosecutors leaving to them the job of shaping a vague statute's contours through their enforcement decisions." (R. 79:6, A-App 8.) But this statutory scheme is plain on its face and is not vague in any manner recognized by law.

Finally, the State notes that the circuit court, while concluding that the statutory scheme was unconstitutionally vague, labels the charging and penalty scheme "arbitrary" and "irrational." (R. 79:6–9, A-App. 8–11.) These characterizations follow the court's discussion of the "tortured" statutory history of the Legislature's enactment of Wis. Stat. §§ 948.02(1)(b), 948.02(1)(e), and 939.616(1r). (R. 79:3–5, A-App. 5–7.)

The State regards the circuit court's use of "arbitrary" and "irrational" as supporting its conclusions that the statute is unconstitutionally vague and violates separation of powers. However, the use of these terms to describe the statutory scheme at least suggests equal protection analysis. *See Blake v. Jossart*, 2016 WI 57, ¶ 32, 370 Wis. 2d 1, 884 N.W.2d 484. But the circuit court's decision includes little or no discussion of equal protection principles, and Kenyon did not challenge the statute on equal protection grounds. To the extent the court's decision suggests the statutory scheme violates equal

protection, the State opposes this ground for relief and reserves the right to address the issue further in its reply brief, as necessary.

Kenyon cannot meet his heavy burden to prove that the statutory scheme under which he was charged with violating Wis. Stat. § 948.02(1)(b) is unconstitutionally vague.

b. The charge and statutory scheme did not deny Kenyon's right to be sentenced by a neutral tribunal.

Kenyon argued in the circuit court that the State's decision to charge a violation of Wis. Stat. § 948.02(1)(b) carrying a minimum of 25 years of initial confinement, Wis. Stat. § 939.616(1r), and not the overlapping offense of Wis. Stat. § 948.02(1)(e), constituted "sentencing by charging" or "sentencing by the prosecutor." (R. 21:5; 45:2.) He asserted that the charge denied him his due process right to be sentenced by a neutral tribunal because the State is a party to the case. (R. 45:2.) Like Kenyon's void-for-vagueness argument, Kenyon's position here is contrary to established law.

In our system, the Legislature defines what conduct constitutes a crime and the appropriate penalties, subject to constitutional limitations, including the protection against cruel and unusual punishment, as well as guarantees of due process and equal protection. *State v. Radke*, 2003 WI 7, ¶ 29, 259 Wis. 2d 13, 657 N.W.2d 66. The Legislature classifies criminal offenses and sets the maximum penalties for each class, granting circuit courts broad discretion to impose sentences within the range it has set. *State v. Harris*, 119 Wis. 2d 612, 624, 350 N.W.2d 633 (1984). As discussed in the next section, the Legislature may also restrict that discretion or even remove it altogether by establishing mandatory minimum sentences or requiring a particular sentence.

District attorneys, for their part, determine whether and what offense to charge. *See Kalal*, 271 Wis. 2d 633, ¶ 27. "Wisconsin case law has repeatedly held that the discretion whether to charge and how to charge vests solely with the district attorney." *Lindsey*, 203 Wis. 2d at 440–41. "[S]o 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*, 434 U.S. at 364.

Here, it is undisputed that Kenyon's alleged conduct of performing cunnilingus on a 10-year-old satisfied the elements of first-degree sexual assault of a child under the age of 12 by sexual intercourse, contrary to Wis. Stat. § 948.02(1)(b). *See* Wis. Stat. § 948.01(6) (defining "sexual intercourse" to include cunnilingus). Consistent with the circuit court's decision to bind Kenyon over for trial following the preliminary hearing (R. 23:18), probable cause existed to believe that Kenyon committed the charged offense. The State had the authority to charge him with violating section 948.02(1)(b)—or Wis. Stat. § 948.02(1)(e), or any of the multiple other sexual offenses in Chapters 940 and 948 that the conduct alleged satisfied.

That Wis. Stat. § 948.02(1)(b) carries a mandatory minimum penalty of 25 years of initial confinement did not deny the district attorney the authority to charge this offense. The Legislature determines offenses and penalties, and the district attorney may charge any offense for which probable cause exists. *See Lindsey*, 203 Wis. 2d at 440–41. As noted, the fact that the district attorney "may be influenced by the penalties available upon conviction . . . standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause." *Batchelder*, 442 U.S. at 125.

Neither Kenyon nor the circuit court cite any authority, and the State is aware of none, for the novel proposition that

charging an offense carrying a lengthy mandatory minimum sentence upon conviction violates a defendant's due process right to be sentenced by a neutral tribunal and amounts to "sentencing by charging" or "sentencing by prosecutor." In the circuit court, Kenyon cited cases showing only that the general right to a neutral tribunal exists. (R. 21:5.) Without more, Kenyon cannot meet his heavy burden of showing that the statutes and charge in this case are unconstitutional on this ground.

Of course, Kenyon, if convicted of violating Wis. Stat. § 948.02(1)(b) or any other criminal offense, will be sentenced by "a neutral tribunal." To Kenyon's point that, if he is convicted under section 948.02(1)(b), the court's discretion will be severely limited to imposing a sentence of no less than 25 years of confinement, appellate courts have consistently upheld Legislative acts that restrict or deny altogether a trial court's sentencing discretion against separation of powers and other constitutional challenges, as discussed in the next section.

c. The statutory scheme is constitutional and does not violate separation of powers.

Kenyon argued in the circuit court that the statutory scheme authorizing a charge carrying a steep mandatory minimum penalty also violated separation of powers. (R. 45:2–8.) He argued that the Legislature, by enacting Wis. Stat. § 948.02(1)(b) and Wis. Stat. § 939.616(1r)'s 25-year mandatory confinement term, unduly burdened the judicial branch by severely limiting a sentencing court's discretion when imposing sentence for a violation of section 948.02(1)(e). This argument is contrary to well-established law, and the circuit court erred in granting Kenyon relief on this ground as well. (R. 79:11, A-App. 13.)

"The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, 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) (citation omitted). "The constitutional powers of each branch of government fall into two categories: exclusive powers and shared powers." *Id.* "When there exists a sharing of powers, . . . 'one branch of government may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's role and powers.'" *Martinez v. Dep't of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d 687, 696, 478 N.W.2d 582 (1992) (citation omitted).

"It is well established that Wisconsin's system of sentencing is an area of shared responsibility among the separate branches of government." *State v. Borrell*, 167 Wis. 2d 749, 767, 482 N.W.2d 883 (1992).

In *Borrell*, the Wisconsin Supreme Court made clear that, while courts have the discretion to fashion criminal sentences, the Legislature ultimately determines the scope of that discretion. The court explained:

> The legislature has made the public policy determination that sentencing courts should use discretion in fashioning a sentence that is based on the nature of the criminal offense, the public's need for protection and the rehabilitative needs of the convicted defendant. The legislature continues to retain the power and authority to determine the scope of the sentencing court's discretion.

Borrell, 167 Wis. 2d at 768–69.

Consistent with these principles, Wisconsin courts have held that Legislative acts restricting a sentencing court's discretion or even mandating a particular sentence are not unconstitutional and do not unduly burden the judicial branch. *See State v. Sittig*, 75 Wis. 2d 497, 499–500, 249 N.W.2d 770 (1977); *Lindsey*, 203 Wis. 2d at 440–41.

In *Sittig*, the Wisconsin Supreme Court upheld a mandatory minimum sentencing provision against equal protection and separation of powers challenges. 75 Wis. 2d at 499–500. It rejected the defendant's view that the judiciary had "some inherent power . . . to absolutely determine" punishment, and that the statute's mandatory minimum sentence of imprisonment usurped that power. *Id.* "No such judicial power has been recognized in this state," the court explained. *Id.* at 500. In fact, "a court's refusal to impose a mandatory sentence . . . constitutes an abuse of discretion by the court and also the usurpation of the legislative field." *Id.*

Further, in *Lindsey*, this Court upheld the constitutionality of Wisconsin's "three-strikes" law mandating a sentence of life imprisonment without the possibility of parole for certain repeat violent offenders. *Lindsey*, 203 Wis. 2d at 429–30. Rejecting the defendant's separation of powers claim, the Court concluded that a statute mandating that the court impose the most extreme sentence available under Wisconsin law without regard to mitigating factors in a given case did not unduly burden the judicial branch because the Legislature has the power to prescribe sentences, citing *Sittig*.

Kenyon's separation of powers argument in the circuit court relied heavily on the concurring opinions of two justices in *Fabick v. Evers*, 2021 WI 28, ¶¶ 46–73, 396 Wis. 2d 231, 956 N.W.2d 856 (Bradley R., J. concurring), and *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 87, 391 Wis. 2d 497, 942 N.W.2d 900 (Kelly, J., concurring). Kenyon argued that these opinions—Justices Rebecca Bradley and Kelly each wrote separately to voice their support for a separation of powers doctrine with fewer "shared powers" and more clearly delineated lines between the branches—"signaled a return to the fundamental principles of separation of powers followed in the early years of the state." (R. 45:5.) This is not so.

A concurring opinion that takes issues with the well-established legal principles applied in the majority opinion is not the law. Justice Rebecca Bradley's and former Justice Kelly's concurring opinions represent a different approach to separation of powers that might, if adopted by the Wisconsin Supreme Court, warrant reconsideration of some past decisions applying the current, long-held separation of powers doctrine. But each of these concurring opinions was joined by exactly one other justice. The State doubts that the outcome would be any different if this alternative view of separation of powers were the law. But it is not, and Kenyon's separation of powers claim fails under well-established law.

In sum, Kenyon cannot meet his burden of showing that the charge under Wis. Stat. § 948.02(1)(b) and statutory scheme mandating a 25-year term of confinement for a conviction for violating this statute are facially unconstitutional as violations of procedural due process and separation of powers.

2. Kenyon cannot prove that the statutory scheme and charge are unconstitutional as applied.

Because, as discussed earlier, the thrust of Kenyon's challenges attacked the validity of any prosecution under Wis. Stat. § 948.02(1)(b) when the defendant's conduct also violates Wis. Stat. § 948.02(1)(e), the State addressed Kenyon's constitutional claims as facial challenges. However, the State believes that, whether Kenyon's attacks on the statute are viewed as facial or as applied challenges, the outcome would be the same: Kenyon cannot prove that the statutory scheme is unconstitutional beyond a reasonable doubt. *See Wood*, 323 Wis. 2d 321, ¶ 15 (beyond a reasonable doubt standard of proof applies to as applied and facial challenges to constitutionality of a statute).

Of course, Kenyon argued in his briefs the facts of his own case in making his constitutional challenges. Kenyon emphasized mitigating factors, including, among others: (1) his offense consisted of one act of cunnilingus; (2) he has no prior criminal history; and (3) there was no threat against the victim for disclosure. (R. 73:5.) Kenyon also presented case data that he asserts account for all 34 cases filed in Milwaukee County charging first-degree sexual assault of a child under Wis. Stat. § 948.02(1)(b) from January 1, 2018, to July 1, 2022. (R. 73:5.) Kenyon then asserts that his case "is easily the least aggravated of all the 34 cases reviewed." (R. 73:5.) He also notes that the State made him a plea offer in November 2019 for Kenyon to plead guilty to first-degree sexual assault of a child under Wis. Stat. § 948.02(1)(e) with a recommendation of 5 to 7 years of initial confinement—showing that prosecutors did not believe the 25-year minimum term of confinement was required in his case. (R. 73:20.)

The State acknowledges Kenyon's point: His conduct charged in this case and his profile do not appear to match those of the worst child sex offenders. That said, the circumstances of Kenyon's case are very disturbing. If true, Kenyon assaulted a prepubescent member of his extended family then in his care, and he did so in a strangely deliberate manner. (R. 1:1.)

But taking full account of these facts in relation to his particular constitutional claims, Kenyon cannot meet his heavy burden to prove that the statutory scheme under which he was charged violates procedural due process or separation of powers, whether as applied or on its face. The Legislature, within its broad authority, established the crimes in Wis. Stat. § 948.02(1) and the penalties, including Wis. Stat. § 939.616(1r)'s 25-year mandatory minimum applicable to some, but not all, offenses under section 948.02. As shown, this scheme is not unconstitutionally vague, it does not violate

the right to be sentenced by a neutral tribunal, and it does not violate separation of powers principles. Kenyon did not and cannot prove his claims.

To the extent Kenyon's claim is viewed, at its core, as a challenge to the prosecutor's decision to charge Kenyon with violating Wis. Stat. § 948.02(1)(b) and not another statute, it must fail. Again, it is undisputed that Kenyon's conduct as alleged in the complaint satisfies the elements of section 948.02(1)(b). Because the prosecutor had probable cause to believe that Kenyon violated section 948.02(1)(b), she had the discretion to charge him under this section. *See Bordenkircher*, 434 U.S. at 364; *Kalal*, 271 Wis. 2d 633, ¶ 29. As Justice Marshall wrote in *Batchelder*: "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." 442 U.S. at 125.

For these reasons, Kenyon cannot prove beyond a reasonable doubt his claims that the statutory scheme under which he was charged violates procedural due process or separation of powers, whether on its face or as applied to him. Accordingly, this Court should reverse.

CONCLUSION

The order dismissing the Information should be reversed and the matter remanded to the circuit court with instructions to reinstate the Information.

Dated this 6th day of November 2023.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 294-2907 (Fax)
wittwerjj@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,357 words.

Dated this 6th day of November 2023.

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 6th day of November 2023.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General