STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No.: 2022AP2228-CR
Milwaukee County Circuit Court
Case No.: 2019 CF 2917

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

KEITH C. KENYON,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

On Appeal From an Order Granting Defendant-Respondent's Motion to Dismiss, The Honorable David L. Borowski, Presiding

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Respectfully Submitted,

BUTING, WILLIAMS & STILLING, S.C.
Jerome F. Buting, SB #1002856
Dudley A. Williams, SB #1005730
Attorneys for Defendant-Respondent

Address:
P.O. Box 1039
Brookfield, WI 53008
(262) 821-0999
jbuting@bwslawfirm.com
dwilliams@bwslawfirm.com

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STATEMENT OF THE ISSUES PRESENTED

I. Is § 948.02(1) unconstitutionally vague as applied to Kenyon in violation of Fourteenth Amendment Due Process because of the district attorney's decision to charge § 948.02(1)(b) in this case, with its mandatory minimum 25-year prison sentence, rather than the alternative subsection in the statute, §948.02(1)(e), which requires no minimum mandatory sentence for the very same conduct, when the statute provides no constraints on arbitrary and discriminatory enforcement by the prosecution in choosing which Class B felony to charge, and the record shows arbitrary application of the statute by the Milwaukee County District Attorney's Office in this case?

Answer by Circuit Court: **Yes**

II. Does the State's decision to charge § 948.02(1)(b) in this case constitute an invasion of a core judicial power by predetermining the sentence, which violates the state constitutional separation of powers and thwarts the judicial branch from imposing a rational and fair sentence guided by the three sentencing factors the Wisconsin Supreme Court has repeatedly held are to control sentencing. *State v. Gallion*, 2004 WI 42, ¶ 44, 270 Wis. 2d 535, 678 N.W.2d 197; *State v. Stenklyft*, 2005 WI 71, ¶ 98-99, 281 Wis. 2d 484, 697 N.W.2d 769.

Answer by Circuit Court: **Yes**

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

Answer by Circuit Court: Yes

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Counsel believes that the parties' briefs will adequately address the issues raised in this appeal, and that the Court will therefore deem oral argument to be unnecessary. Because the appeal involves an issue which arises routinely, publication is warranted to give guidance in future cases.

STATEMENT OF THE CASE

The defendant was charged in a criminal complaint filed in Milwaukee County Circuit Court on July 15, 2019, with a single count of first degree sexual assault of a child who has not attained the age of 12, a Class B felony, contrary to Sec. 948.02(1)(b). (R.1). The complaint noted the provisions of Sec. 939.616(1r), which requires the court to impose a bifurcated sentence with a term of confinement of 25 years. (*Id*.). Following a preliminary hearing, Kenyon entered a plea of not guilty to the one count in the Information charging a violation of 948.02(1)(b), with a mandatory minimum period of initial confinement of 25 years upon conviction. (R. 12).

Kenyon then filed a motion to dismiss the Information as an unconstitutional violation of procedural due process. (R.21). He noted that the legislature created two subsections of first degree sexual assault of a child which cover the same conduct alleged in his complaint and have the same maximum penalty, however one has no mandatory minimum penalty, §948.02(1)(e). The other, that was charged in Kenyon's case, §948.02(1)(b), carries a mandatory minimum of 25 years imprisonment. Kenyon argued there is no guidance in the statutory scheme to inhibit a prosecutor's arbitrary and discriminatory enforcement of one subsection versus the other, in violation of the procedural due process prohibition against vagueness. The subsection which *mandates* the imposition of a 25-year minimum sentence was presumably intended by the legislature to be applied to only the most egregious facts and defendant history, not an individual like Kenyon with no prior arrest and alleged conduct which barely fit within the elements of § 948.02(1)(b). Kenyon argued that his procedural due process rights were violated by the lack of any constraints on the arbitrary and discriminatory charging decision by the prosecutor in his case.

Kenyon also argued that the State applied the statutory scheme in such a way that it unconstitutionally violates the separation of powers doctrine. The State's application of the statute allows the executive branch – the prosecutor

– to usurp the legislature's constitutional role of establishing the penalty for proscribed conduct and the judiciary's constitutional power to determine an appropriate sentence by preordaining the sentence the defendant will serve upon conviction. Kenyon also argued that the decision to charge the subsection mandating a minimum of 25 years imprisonment under these circumstances deprived him of his due process right to be sentenced by a neutral magistrate with the full power to fashion an appropriate sentence after applying all the factors repeatedly recognized by the Wisconsin Supreme Court as critical to a just and fair sentence. (R. 45).

The State responded that *United States vs. Batchelder*, 442 U.S. 114, 123-24 (1979), affirmed that a prosecutor has the sole discretion to decide what charge to file in any case. (R.24). The State also argued that the legislature can establish mandatory minimum sentences under any circumstance without violating the separation of powers doctrine and the District Attorney's power to commence a prosecution against a defendant is "almost limitless." (R. 47: 3).[1]

Kenyon replied that the State's reliance on *Batchelder* was misguided because that case concerned a prosecutor's charging decision between two

[1]The State initially also complained that Kenyon had not notified the Wisconsin Attorney General's office of his constitutional challenge, pursuant to *Kurtz v. City of Waukesha*, 91 Wis 2d. 103, 116-17 (1979). However, this was rendered moot when Kenyon thereafter notified the Wisconsin Attorney General who then declined to participate. (R. 58; R. 60).

statutes with different *maximum* penalties versus the issue here where the application of a severe mandatory minimum is challenged. Kenyon argued that *Batchelder* actually supported his constitutional challenge because the United States Supreme Court recognized that a prosecutor's decision to charge an offense with a greater *maximum* penalty actually increases the court's discretion when imposing a sentence, rather than limiting it. Here, Kenyon argued, the mandatory minimum effectively eliminates virtually all discretion the court has in imposing a sentence. (R. 28).

Following multiple rounds of briefing and oral arguments, Milwaukee County Circuit Court Judge David Borowski issued a decision granting Kenyon's motion and dismissed the case on November 18, 2022. (R. 79). Judge Borowski found that the charging decision in Kenyon's case violated his right to procedural due process. The court found that §948.02(1) contains two provisions encompassing the exact same conduct and carrying the same maximum penalty but one with a mandatory minimum of twenty five years, and that the "total absence of standards to govern the prosecutorial decision [as to which subsection of § 948.02(1) to charge] results in an arbitrary charging standard and deprives the court of the discretionary authority to consider mitigating factors and impose a sentence of less than 25 years of initial confinement." (R. 79:3).

Judge Borowski further found that by charging under 948.02(1)(b) with its mandatory minimum of 25 years, the prosecutor has "effectively stripped the court of its authority and discretion." (R. 79: 9). The court held that the charging decision in this case prevented the court from exercising its sentencing power to impose what certainly would have been significantly less than 25 years given all the facts and circumstances of the case and the court's extensive familiarity with sentences imposed in the hundreds of child sexual assault cases he had handled previously and the sentences imposed in Milwaukee County by his fellow judges.[2] Referring to his experience over the years presiding over very serious cases, he found that "the average homicide defendant does not serve [twenty five years] upfront time" and "the offense in this case does not call for anywhere near 25 years." (R. 79:12-13). The court also noted that the State tendered a plea offer in this case to recommend five to seven years incarceration upon a plea to an amended charge of §948.02(1)(e). (R. 79:12). The court recognized that the legislature has the authority to set mandatory minimum sentences for certain offenses, but he

[2]Judge Borowski has been a circuit court judge in Milwaukee County for twenty years. He has spent over a decade handling serious felony matters and has presided over hundreds of cases with defendants charged with violations of child sexual assault pursuant to the provisions at issue here. CCAP data establishes that Judge Borowski has been assigned to over 200 cases charging over 300 counts of violations of 948.02 between 2008 and his last felony rotation in 2022. The court's decision obviously took into account his experience in presiding over hundreds of child sexual assault offenses.

found that the legislature "must do so in a reasonable and rational manner if they seek to limit a sentencing court's discretion." (R:79:10). He concluded:

> The court recognizes that the prosecution has wide discretion in making charging decisions; however, the prosecution's decision to charge the defendant in this case under § 948.02(1)(b), rather than § 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.

Id. at 11.

The State appealed to this Court. (R. 80).

STATEMENT OF FACTS

The criminal complaint referred to a forensic interview of the alleged victim, eight-year-old Leah,[3] in which she said Kenyon is her uncle and that on February 15, 2019, after a Disney on Ice show she spent the night at his house. The complaint alleged that Leah pretended to be asleep so her uncle would carry her to her cousin's room. He picked her up, carried her into the room, unzipped her onesie pajama and licked her vagina. The complaint alleged (incorrectly as the forensic interview later showed the court) that Leah

[3]The Defendant uses the same pseudonym for the alleged victim that the State utilizes in its brief.

said she told her mother four months later about the incident because her mother was going to take Leah to "her uncle's house for another sleep over" on that day. (R. 1).

Additional details about the allegation were revealed to the court and parties during a preliminary hearing (R. 23). At the preliminary hearing, the police forensic interviewer testified that Leah said she and her cousin were at her cousin's house and they fell asleep while watching a movie. She said her uncle picked up her cousin first and took her into the bedroom, then came back and picked Leah up and carried her into the same bedroom. (R. 23: 16). According to the officer, Leah said he unzipped her pajamas, moved her panties aside,[4] wiped her with a cloth and licked her one time on her vagina (*Id*. at 12, 15). He then stopped and zipped her back up. Leah's six-year old cousin was laying in bed right next to her when this went on. (*Id*. at 10).[5] The officer did not ask Leah to clarify what she meant by her vagina and did not use terms like vulva or clitoris or use a diagram or doll or have her point to where she was contacted on her own body. (*Id*. at 7-9).

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[4]At the *Daubert* hearing, a review of the transcript and video showed that Leah initially said "he took off my underwear, then he took some cloths he wiped it and then he licked it and left." R. 42: 10. However, taking her underwear off would have been impossible without completely removing her leg and foot from the foot-enclosed onesie pajama. The police officer apparently recognized this problem in her story and got her to change her story to say he just moved the panties aside. (*Id*. at 11).

[5]The defendant is deaf but his daughter has no hearing impairment which would have affected her ability to hear or sense activity.

Further details about the girl's story were revealed to the court in *Daubert* motion hearings, when the State challenged the admissibility of defense expert Dr. Jacqueline Bashkoff, a nationally renowned expert in child forensic interviews. (R. 39). A transcript of the forensic interview of Leah (R. 42) and the video recording of that interview (R. 89, transmitting Exhibit 3 of motion hearing on March 9, 2021) were admitted as evidence.

According to the videotape of the interview, Leah told the police officer that when her uncle picked her up from the chair in the TV room she pretended to be asleep and kept her eyes closed because she wanted Kenyon to carry her into the bedroom as he had done with her cousin. (R. 42: 15-16). She said that Kenyon carried her into her cousin's bedroom and placed her down on the bed next to her six-year-old cousin. Leah alleged that with her eyes closed she felt Kenyon unzip her onesie pajama, and that he "took off" her underwear, cleaned her vagina with some kind of wet wipe and then "licked it" on the "outside" one time. (R. 42:10-11, 15). She said that Kenyon then zipped her back up and immediately left the room to join his wife where she was reading in their bedroom across the hall with the door open. Leah said Kenyon did not touch her anywhere else during the incident and did not communicate anything to her before or after it. (*Id*. at 12-13).

Leah told the police interviewer that after that overnight visit in

February she had at least two additional play dates at her cousin's house before she told anyone of her allegation that her uncle had assaulted her. (R. 42:12). The criminal complaint was in error when stating that she reported the incident four months later "because her mom was going to take her to her uncle's house for another sleep over." (R. 1). Leah was *not* going to her uncle's house on the day she reported the assault and was not going to see him at all. The forensic interview shows that she told the officer that she was going to her grandmother's house and that she knew the defendant and his wife would not be there. R. 42: 12.

The prosecutor's error[6] about the circumstances of disclosure is important, because the true facts do not support the claim that Leah disclosed the abuse when she did because she was afraid she was going back to the defendant's house[7] for another sleep over. This same factual error about the possible motive for her late disclosure was repeated by the State in its brief to this Court. In its Statement of the Case, the State wrongly asserts again that the disclosure by Leah came because her mother told that she was going to be

[6]The record suggests the charging prosecutor was misinformed or misunderstood the circumstances of disclosure. It wasn't until her cross-examination of Dr. Bashkoff at the *Daubert* hearing that the prosecutor learned (by simply reading the investigating police officer's report, apparently for the first time) that on the day of the disclosure to her mother, Leah was to go to her grandmother's house for a sleep over, not the defendant's house. (R. 46: 65-67).

[7]In fact, she had been back to Kenyon's house twice since the Disney On Ice evening and never complained about his conduct during the sleep over. (R:42:12).

sleeping over at the Kenyon's home. (State's Brief at 9). This is simply not true and reflects careless repetition of inaccuracies.

The trial court heard many factual details about the State's case and the defendant's background before concluding that the mandatory minimum as applied in this case violates Kenyon's constitutional rights.

At the *Daubert* hearing, Dr. Bashkoff testified she has been a practicing psychologist for 39 years and is very familiar with the national and Wisconsin guidelines for CFI. (R. 46: 6, 20). These were developed over many years to reduce the risk of interviewer bias and suggestion that could taint the child interview. (R. 46: 20-26). Children are particularly susceptible to suggestion and tend to change their story after repeated questions inform them that their first answer was "incorrect." (*Id*. at 34).

Dr. Bashkoff testified that she reviewed the video and transcript of Leah's interview in this case and found numerous issues. (R. 46: 26-45; R. 38: 2-4). She noted that the police officer's questions were leading, suggestive and repetitive and the officer revealed her confirmatory bias by failing to explore any other hypothesis for the child's story, such as a possible dream or transference from another perpetrator to the defendant, who is deaf and more vulnerable to a false accusation. (R. 46: 41).

Dr. Bashkoff noted evidence in the child's interview of source

misattribution and negative indoctrination, demonstrating that the child has spoken to many other individuals about the allegations and may have adopted the other adult's language and negative feelings about the defendant. (R. 38; R. 46: 24-25, 45, 62). Dr. Bashkoff also explained the role of a "practice narrative event" at the beginning of a forensic interview, where the child is asked to tell about something that happened at school or in their lives unrelated to the allegation in the case. (R. 46: 35-36). This is done to determine the child's developmental level and ability to use language to supply details about an event. (*Id.*). Dr. Bashkoff noted that Leah gave a practice narrative about a school field trip that contained elaborate and highly descriptive details. In contrast, her discussion of the alleged assault at the sleep over was notably "impoverished," with little to no details. (R. 46: 35-36, 46, 49, 69-70; R. 83: 2).

Dr. Bashkoff also explained how the CFI interviewer's "repetitive questioning alters the child's responses." She explained that the child initially said that her uncle took her underwear off. But, this would require taking off her entire onesie to be able to get the child's underwear off. Because this did not fit with the police officer's hypothesis she asked the child again if he took her underwear off "or down, or something else?" This leading and suggestive question was enough to get the child to change to a different answer by saying

"he just moved the part, he moved it a little." (R. 83:2).

After two days of *Daubert* hearings and briefing, Judge Borowski ruled Dr. Bashkoff was eminently qualified to testify about these opinions at trial and twice denied the State's motion to exclude or limit her testimony under *Daubert*. R. 59; R. 70.

The record establishes that Kenyon has always vehemently denied Leah's allegations that he sexually assaulted her. Kenyon is 47 years old and has been deaf since birth. He has absolutely no prior criminal record or police contacts. He has a loving and supportive spouse and comes from a close and loving family.[8] The development of the facts in the evidentiary hearings allowed the trial court to grasp the same point the State concedes in its brief to this Court: "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." State's Brief at 31.

ARGUMENT

I. The circuit court properly dismissed the information as unconstitutionally applied to the defendant.

The State concedes that Kenyon raised an as-applied constitutional challenge and that the circuit court dismissed the information because the

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

application of the statute denied his constitutional right to due process. But, the State argues that Kenyon's claims are "largely facial challenges" for which a defendant must show the statute cannot be constitutionally enforced in any hypothetical circumstance. State's Brief at 18. The State is wrong. This is and was an "as-applied" challenge, as the trial court clearly understood. Yet, the State devotes nearly all of its argument to this inaccurate claim that this case involves a facial challenge, devoting only two pages to address the as-applied challenge that Kenyon actually raises. State's Brief at 18-30; 30-32

The United States Supreme Court has observed "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331, 130 S. Ct. 876, 893, 175 L. Ed. 2d 753 (2010). Rather, the distinction "goes to the breadth of the remedy employed" by a court. *Id.* The "distinction between facial and as-applied challenges informs only the choice of remedy... a court may construe a challenge as applied or facially, as appropriate." *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 803 (7th Cir. 2016). *See also*, Kreit, Alex, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill Rts. J. 657 (2010). Kenyon does not and did not seek a remedy declaring the statute

unconstitutional in all circumstances, and the court did not so hold. The circuit court's decision simply declared that § 948.02(1) was unconstitutionally applied by the State in this case. R. 79: 3.

Statutes are construed to save their constitutionality whenever feasible, *State v. Hall*, 207 Wis.2d 54, 82, 557 N.W.2d 778 (1997); *Baird v. La Follette*, 72 Wis. 2d 1, 5, 239 N.W.2d 536, 538 (1976). Thus, an as-applied challenge is intended to permit a more limited remedy than striking the entire statute. The Wisconsin Supreme Court explained the difference: "[I]n an as-applied challenge, we assess the merits of the challenge by considering the facts of the particular case in front of us, "*not* hypothetical facts in other situations," as the State argues. *State v. Hamdan*, 2003 WI 113, ¶ 43, 264 Wis.2d 433, 665 N.W.2d 785 (emphasis added). Under an as-applied challenge, the challenger must show that his or her constitutional rights were actually violated. "If a challenger successfully shows that such a violation occurred, the operation of the law is void as to the party asserting the claim." *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 337, 780 N.W.2d 63, 71. Importantly, while statutes are generally presumed constitutional, when the challenge is not to the statute itself, but to how it is applied, this presumption is not relevant to the decision. *Soc'y Ins. v. LIRC*, 2010 WI 68, ¶ 27, 326 Wis. 2d 444, 786 N.W.2d 385 ("While we presume a statute is constitutional, we do not presume that the

State applies statutes in a constitutional manner."). In an as-applied challenge the court decides only whether the state applied the statute in a constitutional manner. Therefore, "neither the challenger nor the enforcer of the statute face a presumption in an as-applied challenge." *Id.*

Section 948.02(1) was unconstitutionally applied in Kenyon's case.

A. The circuit court properly ruled that § 948.02(1) as applied to Kenyon is unconstitutionally vague.

The State correctly notes that there are two prongs to the question of vagueness with respect to constitutional due process. The void for vagueness doctrine requires "that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage *arbitrary and discriminatory enforcement*." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (emphasis added); *Bachowski v. Salamone*, 139 Wis. 2d 397, 406, 407 N.W.2d 533, 537 (1987). It is the arbitrary and discriminatory enforcement that is at issue in Kenyon's case. Indeed, most courts have held that restraining arbitrary enforcement by officials is more important than the fair notice requirement of due process. *Smith v. Goguen*, 415 U.S. 566, 574 (1974); *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 54, 363 Wis. 2d 1, 51. Importantly, the Supreme Court has repeatedly referred specifically to prosecutors as among those the vagueness doctrine is supposed to constrain.

See Sessions v. Dimaya, 138 S. Ct. 1204, 1212, 1228 (2018) (the "doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." . . . "Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions.").

The State argues *Sessions* is "inapt here" because the statutory scheme is "plain on its face." State's Brief at 24. But, as argued below, it is not at all plain to a prosecutor looking at the statute to determine which of the dramatically different penalties to charge, given the very same conduct. This vague statute encourages arbitrary charging.

Recent Supreme Court decisions emphasize that due process does not allow prosecutors to apply vague sentencing enhancements. In *Johnson v. United States*, 135 U.S. 2551 (2015), the Court struck down the prosecution's use of the residual clause in the Armed Career Criminal Act to require a judge to impose a mandatory minimum term of 15 years against a defendant who had three or more prior violent felonies. The defendant's prior felonies would fit the Act's requirement only if a state conviction for possession of a sawed off shotgun was included, which the government argued fit a residual clause in the law that violent felonies included any crime that "otherwise involves conduct

that presents a serious potential risk of physical injury to another." *Id*. at 2556. The Supreme Court ruled that the vagueness doctrine applies "not only to statutes defining elements of crimes, but also statutes fixing sentences." *Id.* at 2557.

A core due process problem in the State's charging decision in Kenyon's case is the lack of guidance in its decision to charge the non-mandatory minimum or the mandatory minimum statute, given overlapping statutes that cover the same conduct. His alleged conduct would fit either statute, but the State, without guidance or checks from the statute, arbitrarily chose the more punitive option when far more aggravated cases were charged with no mandatory minimum sentence. *See infra* at Section I.B. The statutory scheme gives the State "unfettered" discretion, and the record reflects no evidence that the Milwaukee County District Attorney had policies to constrain arbitrary enforcement. When discussing overlapping statutes where identical conduct can be charged with different penalties, Professor LaFave explained:

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

LaFave, § 13.7(a) Duplicative and overlapping statutes, 4 Crim. Proc. § 13.7(a)

(4th ed.) (emphasis added).

Due process requires *some* factors to constrain the discriminatory and arbitrary application of the law. *See, Batchelder*, 442 U.S. at 125 ("Selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints."). The current statutory scheme provides no guidance to prosecutors on when they should charge the minimum 25-year mandatory incarceration under Wis. Stat. § 939.616(1r), instead of charging the same conduct under Wis. Stat. §948.02(1)(e), with no mandatory minimum sentence. The very fact that the State chose to charge the draconian 25-year minimum prison sentence statute for someone like Kenyon under the factual allegations raised in this case is evidence of this lack of constraints in the statute and the charging decision.

The conduct alleged in this particular case is not so aggravated that the legislature would have mandated such an extreme mandatory minimum penalty. Indeed, the legislature included sexual intercourse as conduct in §948.02(1)(e) that could result in no prison at all. Kenyon is alleged to have licked the outside of an eight-year old girl's vagina on one occasion for a matter of seconds. This conduct is as minimal as one can imagine to meet the statute's definition of "intercourse." There is no allegation of digital or penile penetration or display of his genitals, no allegation of pain or injury, no force

or threat of force alleged, no repeated episodes and no threat about the consequences of disclosure. Kenyon completely denies the allegation. However, if Kenyon were to be convicted at trial, but for the mandatory minimum, the sentencing court would certainly choose to exercise its sentencing discretion by imposing a much less severe penalty than 25 years imprisonment. The State's unfettered discretion, lacking any guidelines to constrain the arbitrary and discriminatory charging in this case, violates due process.

The State argues that this degree of unfettered and arbitrary power by a prosecutor was approved by the Supreme Court in *United States. v. Batchelder*, 442 U.S. 114 (1979). This is not accurate and the State ignores the United States Supreme Court's warning about the limits of prosecutorial discretion. In *Batchelder*, the prosecution charged the defendant with a crime that had a 5-year maximum sentence instead of an overlapping identical crime with a 2-year maximum sentence. *Id*. at 116–17. The Supreme Court upheld the defendant's conviction but warned that the prosecution's exercise of discretion was not "unfettered" because it was "subject to constitutional constraints." The court also observed that the government's choice of statutes in that case did not empower the prosecution to "predetermine ultimate criminal sanctions. Rather, it merely enables the sentencing judge to impose

a longer prison sentence" for one statute versus the other. *Id.* at 125. Thus, the prosecution's choice in *Batchelder* "merely enables the sentencing judge," not the prosecution, "to impose a longer prison sentence," if appropriate. *Id.* This is not the case in Kenyon's prosecution. As the circuit court noted in its decision:

> However, *Batchelder* does not control the instant case, which involves different concerns because of the mandatory minimum penalty. When a prosecutor elects to charge an offense with a significant maximum penalty, the court retains its discretion to apply a sentence below that maximum if mitigating factors lend themselves to a lesser sentence. Here, the court would be forced to impose 25 years of initial confinement as its starting point. This restricts the court's ability to weigh mitigating factors in determining a sentence, and if this case were to proceed to sentencing on only the facts currently in the record, some of which were mentioned above in footnote 7, mitigating factors abound.

(R. 79: 9).

Therefore, *Batchelder* did not address Kenyon's procedural due process challenge in this case. The State is correct that under *Batchelder*, the government has discretion to elect charges with heavier *maximum* penalties. This is because the prosecutor's choice in charging a statute which allowed imprisonment "not more than five years" rather than the one providing for imprisonment "not more than two years" had simply *added* to the judge's sentencing discretion. However, *Batchelder* did not address the issue of overlapping statutes with no guidelines to prevent arbitrary enforcement of a

draconian mandatory minimum, versus no minimum penalty at all for the same conduct, and therefore does not control the issue in this case.

B. The record contains no evidence of any constraints or guidelines to prevent the arbitrary and discriminatory charging decision by the district attorney in this case.

Judge Borowski found that the "total absence of standards to govern the prosecutorial decision results in an arbitrary charging standard and deprives the court of the discretionary authority to consider mitigating factors and impose a sentence of less than 25 years of initial confinement". (R. 79: 3). The court recognized all the mitigating factors in the case and asked:

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

(R. 79: 8). The State offered no evidence to establish that it used a non-arbitrary or non-discriminatory process when it made the decision to charge either the 25-year mandatory minimum or the non-mandatory minimum in this case. The absence of any criteria in the Milwaukee County DA's Office to guide the charging decision, together with the failure of the statute itself to provide any constraints, "encourages arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A review of CCAP records related to the history of the charging decisions involving a

choice between §948.02(1)(b) and § 948.02(1)(e) demonstrates that the Milwaukee DA's office applied the statutes in a manner that resulted in an arbitrary and discriminatory decision to charge 948.02(1)(b) in Kenyon's case.

The legislature clearly intended to provide the 25-year minimum penalty for the worst child sexual offenders. Judge Borowski found "the offense in this case does not call for anywhere near 25 years." (R. 79:10, 12-13). The State also knew the facts and circumstances of Kenyon's case did not warrant a sentence close to the 25 years required as a mandatory minimum sentence. In fact, the State acknowledged this when it offered to amend the charge here to allow the defendant to escape the 25-year minimum and even agreed to recommend five to seven years of initial confinement if the defendant pled to an amended charge of 948.02(1)(e). (R. 73: 20 (Exhibit 2).The Attorney General's Office also agrees that the facts alleged in Kenyon's case and his character "do not appear fit those of the worst child sex offenders." State's Brief at 31.

As shown below, the allegations in Kenyon's case are clearly the least aggravated of any of the cases issued in Milwaukee County as a violation of 948.02(1)(b). The charging decision in Kenyon's case is an aberration and unsupportable when compared to other decisions made by that office involving charging either 948.02(1)(b) or 948.02(1)(e). The record here establishes that

the decision to charge Kenyon with the 25 year mandatory minimum offense was arbitrary and discriminatory.

Kenyon provided the court with a chart compiled from CCAP data[9] showing all thirty-four cases where the Milwaukee County District Attorney's Office charged a violation of 948.02(1)(b), from January 1, 2018, to July 1, 2022, which had been concluded as of the date the chart was filed. (R. 73: 8-19; S-APP 3-14). A review of all those thirty-four criminal complaints establishes that the factual basis alleged against Kenyon in this case is clearly less aggravated than that in all thirty-four cases. None of those complaints charging the 25-year mandatory minimum alleged a single isolated incident without any kind of penetration, as alleged here. All involved instances of the defendant inserting his penis into the child's mouth and/or acts of oral, digital or penile penetration. Many involved insertion of the defendant's penis into the anus or vagina of the victim. Some involved ejaculation. Most involved repeated incidents. Many involved children who were as young as four to six years of age. (*See* S-APP 3-14).

[9]A court may take judicial notice of the case information referenced from CCAP. *State v. Bonds*, 2006 WI 83, ¶6, 292 Wis. 2d 344, 717 N.W.2d 133;*Kirk vs, Credit Acceptance Corp*, 2013 WI App 32 P5, n. 1, 346 Wis 2d. 635,641, 829 N.W. 2d 522. Further, a court must take judicial notice when, as material here: (1) the fact for which judicial notice is requested is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"; and (2) a party asks the court to take judicial notice and gives the court "the necessary information." 902.01(2)(b) & (4). Data from CCAP reflects case information entered by court staff, a source whose accuracy cannot be questioned.

Thirty of the thirty-four cases were amended pursuant to plea negotiations from 948.02(1)(b) to offenses which carry no mandatory minimum penalty. Of those, one defendant received probation, five were sentenced to three-seven years incarceration, thirteen received between eight and twelve years, five received between thirteen and fifteen years, and three received sixteen to twenty-two years of imprisonment. Again, these are the "worst offenders" who the State initially charged with a violation of 948.02(1)(b) carrying the mandatory minimum 25 years incarceration.

Review of additional Milwaukee County charging data further confirms the arbitrariness of the application of the mandatory minimum charge in Kenyon's case. Cases with facts more aggravated than those alleged in this case were routinely charged as violations of § 948.02(1)(e), with no mandatory minimum penalty. Attached at S-APP 15-33 is a chart of the flip side of the CCAP data that Judge Borowski reviewed. That chart includes all of the eighty-nine cases charged as violations of 948.02(1)(e), between January 1, 2018 and December 31, 2022, with victims younger than age twelve.[10]

The chart attached at S-APP 15-33 reveals that as many as one-half of the

[10]Judicial notice may be taken at any stage of the proceeding, including on appeal. *Sisson v. Hansen Storage Co.*, 2008 WI App 111, 313 Wis. 2d 411, 756 N.W.2d 667. *Massachusetts v. Westcott*, 431 U.S. 322, 323 n. 2, 97 S.Ct. 1755, 52 L.Ed.2d 349 (1977) (per curiam); *Sengstock v. San Carlos Apache Tribe*, 165 Wis.2d 86, 95, 477 N.W.2d 310, 314 (Ct.App.1991).

cases which the Milwaukee County DA elected to charge as violations of 948.02(1)(e) involved conduct constituting intercourse with a victim less than 12 years old which could have been charged under 948.02(1)(b) with the 25-year mandatory minimum.[11] Attached at S-APP 34-86 are the criminal complaints in twenty-one of those cases. Those complaints allege penis to vagina intercourse, mouth to penis intercourse, penis to anus intercourse and/or digital penetration or insertion of objects into the anus or vagina. Almost all involved repeated assaults, some with more than one victim. There is no disputing that the conduct in every one of those twenty-one cases alleged intercourse with a victim less than twelve years old and was substantially more aggravated than the allegations against Kenyon, yet the Milwaukee County DA's office did not charge any of them with the mandatory minimum offense Kenyon faced.

For example, just a couple months after charging Kenyon, where the only allegation was that he on one occasion licked the outside of the vagina of his eight-year old niece for a matter of seconds while she pretended to be asleep, the Milwaukee County DA's office charged another defendant with violations of 948.02(1)(e), with no mandatory minimum, when the victim

[11]A small number of the defendants charged with at least one violation of 948.02(1)(e) between 2018 and 2022 were also charged with violations of 948.02(1)(b) and others were alleged to have assaulted victims twelve to thirteen years old. Those cases are not included in the chart.

alleged that the defendant bribed her and licked her vagina repeatedly over five years beginning when she was five years old, and also on one occasion inserted his penis into her "butt."(S-APP 45-46, *State v. Javier Castro-Aguilar*, 2019CF4725). Immediately thereafter, the Milwaukee County District Attorney's office charged another defendant with a violation of 948.02(1)(e), after the eight-year old victim stated in her forensic interview that the defendant "got on top of her and moved up and down" until he ejaculated and the defendant admitted he had inserted his penis into her vagina. There was no mandatory minimum penalty applied. (S-APP 47-48, *State v. Jonquel Moton*, 2019CF4742). In yet another case, the district attorney charged a defendant with a violation of 948.02(1)(e) which involved the forced penile penetration of an eleven-year old victim during a home invasion by an unknown burglar. Again, there was no mandatory minimum. (S-APP 59-62, *State v. Desmond Givens*, 2020CF3009).

The balance of the twenty-one complaints in the supplemental appendix allege repeated incidents of intercourse clearly chargeable as violations of 948.02(1)(b). Those cases all allege facts significantly more aggravated than alleged against Kenyon, yet none of those defendants was charged with a violation of 948.02(1)(b) with the mandatory minimum. In more than two dozen additional cases listed in S-APP 15-33, the allegations involved conduct

characterized as skin to skin "humping," "rubbing," "fondling," "digging" or "touching" with either the penis or finger which would presumably have satisfied the Chapter 948 definition of intercourse as any "intrusion, however slight," and thus was chargeable as a violation of 948.02(1)(b) with the mandatory minimum of 25 years prison.[12]

The record establishes a history of the Milwaukee District Attorney's office charging violations of 948.02(1)(e) without the mandatory 25 year prison sentence in a significant percentage of cases where intercourse with a child less than 12 years old is alleged with facts much more aggravated than alleged against Kenyon here. The State has not even attempted to explain a basis for the arbitrary and discriminatory decision to charge Kenyon so inconsistently with other cases. Given Judge Borowski's experience in presiding over hundreds of child sex offense cases, his findings standing alone as to the arbitrariness of the charging decision should be given great weight. The charging data in the record here, together with Judge Borowski's findings, conclusively establish that the decision to charge a violation of §948.02(1)(b) in Kenyon's case was infected by the "total absence of standards to govern the

[12]948.01(6) defines intercourse as follows: "Sexual intercourse" means vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

prosecutorial decision" and denied Kenyon his right to due process of law. (R. 79: 3,8).

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

The State's brief utterly fails to address Kenyon's separation of powers challenge raised in the trial court.

First, the State mischaracterizes Kenyon's challenge in its claim that Kenyon's only complaint is that the legislature's enactment of the 25-year minimum mandatory penalty in § 948.02(1)(b) unduly burdened the judicial branch by severely limiting a sentencing court's discretion. State's Brief at 27. To rebut that straw man the State relies on two cases, *State v. Sittig*, 75 Wis. 2d 497, 499-500, 249 N.W.2d 770 (1977) and *State v. Lindsey* 203 Wis. 2d 423, 429, 554 N.W.2d 215 (1996), for the general proposition that a court has no inherent authority to absolutely determine punishment and that a legislature has the power to set sentencing ranges. In *Sittig*, the court rejected the defendant's argument that a statute mandating one year in jail for operating a motor vehicle after revocation of license violated separation of powers. 75 Wis. 2d at 499. In *Lindsey*, the court rejected the defendant's argument that Wisconsin's "three strikes" law mandating a life sentence for third-time serious felonies violated separation of powers by granting "sole sentencing discretion to the prosecution." 203 Wis. 2d at 439. However, in neither case

did the court consider the question raised by Kenyon, where the legislative scheme used here by the district attorney gave the executive branch the *choice* of a 25-year minimum mandatory prison term or no imprisonment at all for the *very same* criminal conduct. Such a scheme abdicates the legislature's role to prescribe the penalty for conduct by delegating that power to the executive and it invades the power of the judicial branch by giving the prosecution – a party in a criminal case – the ability to preordain the sentence of a defendant by its arbitrary charging decision. As argued below, the statutory scheme applied in this case is unique among all of the criminal laws of this state.

The State also complains that Kenyon's separation of powers argument "relied heavily on the concurring opinions of two justices," in recent cases, *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900 and *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856. The State argues those opinions expressed "a different approach to separation of powers that might, if adopted by the Wisconsin Supreme Court, warrant reconsideration of some past decisions applying long-held separation of powers doctrine." State's Brief at 30. This statement is inaccurate because Kenyon relies on long-established principles of the separation of powers doctrine in Wisconsin.

One of the fundamental principles of the American constitutional

system is that "governmental powers are divided among the three departments of government, the legislative, the executive, and judicial, and that each of these departments is separate and independent from the others except as otherwise provided by the constitution." *Goodland v. Zimmerman*, 243 Wis. 459, 466-67, 10 N.W.2d 180 (1943). The constitutional powers of each branch of government fall into two categories: exclusive powers and shared powers. Each branch has exclusive core constitutional powers into which other branches may not intrude. *State ex rel Friedrich v. Dane County Cir. Court*, 192 Wis.2d 1, 13, 531 N.W.2d 32 (1995) (citing *State ex rel. Fiedler v. Wisconsin Senate*, 155 Wis.2d 94, 100, 454 N.W.2d 770 (1990)). Shared powers lie at the intersection of these exclusive core powers. *Id.* at 14. "The branches may exercise power within these borderlands but no branch may unduly burden or substantially interfere with another branch." *Id.*

"Sentencing a defendant is an area of shared responsibility, and, broken down to its component parts, requires each of the three branches of government to exercise a core power. The legislature prescribes the penalty and the manner of its enforcement. The courts impose the penalty (the sentence). The executive branch decides what criminal charges to file, carries out the court-imposed sentence, and grants pardons." *State v. Stenklyft*, 2005 WI 71, ¶ 91, 281 Wis. 2d 484, 534–35, 697 N.W.2d 769, 794. The legislature

– not the executive branch – has the authority to determine the scope of the sentencing court's discretion. But, in exercising that authority "the legislature is prohibited from unduly burdening or substantially interfering with the judicial branch." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 35, 376 Wis. 2d 147, 173, 897 N.W.2d 384, 397, quoting *State v. Holmes*, 106 Wis.2d 31, 68, 315 N.W.2d 703 (1982). "The sentencing court has discretion, within that legislatively-determined scope, to fashion a sentence based on the nature of the criminal offense, the need to protect the public and the need to rehabilitate the defendant." *State v. Horn*, 226 Wis. 2d 637, 646, 594 N.W.2d 772, 777 (1999).

In addition, the separation of powers doctrine forbids one branch to abdicate a core power and delegate it to another branch just as much as it protects one branch from encroachment by another. "It is also fundamental and undeniable that no one of the three branches of government can effectively delegate any of the powers which peculiarly and intrinsically belong to that branch." *Rules of Court Case*, 204 Wis. 501, 503, 236 N.W. 717, 718 (1931).

Thus, the separation of powers doctrine does not permit the legislature to abdicate its power to prescribe the penalty for a defendant's conduct by granting unfettered and unguided authority to the prosecution to determine punishment. Yet, by enacting two statutes that proscribe the very same conduct of sexual assault of a child less than 12 years of age, one of which has no

minimum punishment and the other of which, under § 939.616(1r), imposes a mandatory 25 years in prison, the legislature improperly delegated to the prosecution the power to "prescribe the penalty and manner of its enforcement." *Stenklyft*, 2005 WI 71, ¶ 91. The prosecution exercised that unlawfully delegated power by charging Kenyon in this case with the mandatory 25-year minimum sentence penalty.

As mentioned above, in an important way §948.02(1)(b) and §948.02(1)(e) are unique in our criminal code. Other mandatory minimums have been prescribed by the legislature for various kinds of conduct. *See e.g.,* § 939.617 (minimum three years prison for possession of child pornography, §948.12, and minimum five years in prison for sexual exploitation of a child §948.05, or use of a computer to facilitate a child sex crime, § 948.075). However, those statutes don't permit a prosecutor to choose between a mandatory minimum or no minimum penalty for the very same conduct, as the State can do in cases involving sexual intercourse with a child under 12 years of age. A prosecutor always has the discretion to charge a different *type* of offense to avoid a mandatory minimum. But if, for instance, one commits the crime of possession of child pornography, the State has no discretion to determine a lesser penalty for that offense than the legislatively prescribed penalty of a minimum three years prison. Yet, for the conduct of sexual

intercourse with a child under 12 years of age the legislature has abdicated its role to "prescribe the penalty" and delegated that power to the prosecution by permitting the charging of *either* the mandatory or nonmandatory minimum section for the very same conduct.[13] That abdication of its legislative role violates the doctrine of separation of powers. *Wisconsin Legislature v. Palm*, 2020 WI 42, at ¶ 99.

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

In addition, the statutory scheme invades the power of the judicial branch and places it in the hands of the prosecution, also in violation of the doctrine of separation of powers. The two statutes, subsections (b) and (e) of

[13]As noted earlier, Section I.A., the legislature also failed to provide any guidance to constrain a prosecutor from arbitrary and discriminatory enforcement in the choice, which also violates procedural due process. *See Sessions v. Dimaya*, 138 S.Ct. 1204, 1212, 1228 (2018).

§948.02(1), work together to give the prosecutor full control in charging and plea bargaining and also, for subsection (b), mandates a minimum 25 years imprisonment without any court involvement. Since in reality, "criminal justice today is for the most part a system of pleas, not a system of trials," *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), this puts unbridled power in the hands of the prosecution. However, giving the prosecution the power to prescribe the ultimate sentence, by choosing to charge § 948.02(1)(b) instead of §948.02(1)(e), is a violation of the separation of powers. It also gives the State the power to coerce pleas and impose a "trial penalty," as the CCAP data shows it did in 30 of the 34 cases where it charged § 948.02(1)(b), on any defendant who chooses to exercise their constitutional right to a trial. (R. 73: 8-19). The legislative scheme applied in Kenyon's case consolidates all power in the prosecutor, contrary to the very core principles of our American tripartite system of government.

Given that there are two available charges that punish the same conduct, the prosecution in this case chose to employ one that ties the court's hands completely so that it has no discretion whatsoever at sentencing. It's worth noting that the floor is so high – a minimum mandatory 25 years in prison – that the punishment the court must impose is more severe than all of Wisconsin's homicide laws except first degree intentional homicide, and even

that offense presumes eligibility for release after 13 years and 4 months, barely halfway into this mandatory minimum. *See* §973.015 (requiring specific judicial determination to establish release longer than that starting point). Nevertheless, if the legislature decided to require a more severe punishment than first degree intentional homicide for all defendants who commit sexual intercourse with a child under 12 years of age, it would be within their shared power to "prescribe the penalty." But the legislature did not do that here. Instead – for the very same criminal conduct – the prosecutor, not the court, requires some defendants to serve a draconian penalty of 25 years imprisonment. Thus, the legislature's power has been delegated to the executive to predetermine the sentence in some cases but not others for the very same conduct without any standards to guide the charging decision.

Nor can the judicial branch permit such an encroachment on its core judicial function. The power "to decide an individual case is an exclusive core judicial power, and any invasion of the exclusive core constitutional powers of the judiciary violates the doctrine of separation of powers under our state constitution. The legislature cannot compel a circuit court to decide a case in a particular way." *State v. Stenklyft*, 2005 WI 71, ¶¶ 98-99, 281 Wis. 2d 484, 538–39, 697 N.W.2d 769, 796. Neither can the executive branch compel the judicial branch to decide a case in particular way. *Town of Holland v. Vill. of*

Cedar Grove, 230 Wis. 177, 190, 282 N.W. 111 (1938) ("the judicial power vested by the constitution in the courts cannot be exercised by administrative or executive agencies.");" *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶4, 376 Wis. 2d 147, 897 N.W.2d 384 (striking law whereby legislature unconstitutionally conferred power on executive to "impair...judiciary's exercise of its constitutional duties"). The statutory scheme employed here "interferes with the impartial administration of justice by delegating judicial power to one of the parties in the litigation." *State v. Stenklyft*, 2005 WI 71, ¶ 86, 281 Wis. 2d 484, 532, 697 N.W.2d 769, 792–93. "If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 81, 391 Wis. 2d 497, 553, 942 N.W.2d 900, 928 (R. Bradley, J., concurring), quoting Neil Gorsuch, *A Republic If You Can Keep It*, 87 (Crown Forum ed., 1st ed. 2019).

A decision by this Court overruling Judge Borowski's dismissal of the charge would be counter to a number of long standing principles governing sentencing in Wisconsin. The State's argument that a charging DA has unfettered discretion in choosing what subsection under 948.02 to charge, and that neither Judge Borowski nor this Court has any authority to remedy any injustice that results, implicates every notion of fairness and due process that

govern criminal prosecutions. As the Wisconsin Supreme Court has said, a statute which allows a circuit court's deliberative process and judgment to be circumvented by a party in the litigation, here the district attorney, "unconstitutionally impairs the judiciary's duty to administer justice impartially, as well as being violative of the separation of powers doctrine." *State v. Stenklyft*, 2005 WI 71, ¶ 106, 281 Wis. 2d 484, 542, 697 N.W.2d 769, 797–98

In *Gallion,* the court required courts to articulate on the record the reasoning behind a sentence so that a reviewing court can determine whether the discretion provided the court was not abused. To allow a district attorney unfettered discretion to predetermine a sentence completely eliminates the important protection provided by the discretion of a trial judge to impose a sentence on "a rational and explainable basis" and effectively eliminates the opportunity for an appellate court to assure the same end. The statutory scheme applied to Kenyon unduly burdens the judicial branch, including this Court, and substantially interferes with the judicial branch's duty to individualize sentences.

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

The use of the mandatory minimum sentence to charge Kenyon in this

case constitutes sentencing by the prosecutor, not the court. Once the State chose to charge Kenyon under § 948.02(1)(b) and § 939.616(1r), the court had no discretion to impose anything less than 25 years. In other words, the prosecutor, not a neutral magistrate, decided that 25 years was to be the minimum sentence no matter how disproportionate the sentence.

The United States Supreme Court has held that procedural due process demands a neutral hearing tribunal. *See Black v. Romano*, 471 U.S. 606, 612 (1985) (probationer entitled to "neutral hearing body"); *Wolff v. McDonnell*, 418 U.S. 539, 571 (1974) (prison disciplinary board with power to revoke good time was "sufficiently impartial to satisfy the Due Process Clause"); *Morrisey v. Brewer*, 408 U.S. 471, 489 (1972) ("minimum requirements of due process" include a "neutral and detached hearing body"); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (repeating *Morrisey* formula). Prosecutors are not neutral entities. The Court recently held that a prosecutor who authorized seeking a death penalty against a homicide defendant violated due process by sitting – even decades later – on an appellate court hearing that defendant's postconviction remedies. *Williams v. Pennsylvania*, 579 U.S. 1, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016).

Contrary to the State's assertion, the United States Supreme Court has renounced a system of justice with the power the prosecution employed in

Kenyon's case. In *United States v. Booker*, 543 U.S. 220 (2005), the court struck down mandatory sentencing guidelines which cloaked prosecutors with too much power by virtue of the charging decision and denied federal courts any discretion in fashioning a sentence. In *Booker*, the Court severed the unconstitutional portion of the mandatory guidelines because otherwise it would be "the prosecutor, not the judge, [who] would control the sentence." *Id*. at 257. The Court rejected a system which granted prosecutors the power vested in judges: "the power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment." *Id*. The Court noted that prosecutors would usurp the power of judges if a system depended entirely on a prosecutor's charging decision to control the sentence for the *same* conduct of two similar defendants. For example, it could result in disparate punishment for similar defendants who engaged in similar conduct involving similar amounts of unlawful drugs, creating "particularly troublesome consequences with respect to prosecutorial power." *Id.* at 257.

As noted above, *Batchelder* approved of broad prosecutorial discretion in charging so long as the sentencing court still maintains its role as a neutral magistrate in determining the appropriate sentence based on the individualized facts and circumstances of each case. Otherwise, "the prosecutor, not the judge, would control the sentence." *Booker*, 543 U.S. at 257. Kenyon's

challenge is precisely about the prosecution's usurpation of the judge's role at sentencing, when the State is being empowered to predetermine the ultimate criminal sanction in this matter by charging the 25-year mandatory minimum.

The concerns raised here were noted by Professor Wayne LaFave's Criminal Procedure §13.7(a), "Duplicative and overlapping statutes", 4 Crim. Proc. § 13.7(a) (4th ed., 2019 Update), which posed the question "…what if, for example, one statute *permitted* imprisonment up to ten years and the other made ten years the *mandatory* minimum?" (emphasis added). This is exactly the problem with § 948.02 (1)(e), which permits imprisonment up to 60 years while §948.02(1)(b) also permits imprisonment up to 60 years, but carries a 25-year mandatory minimum imprisonment required by § 939.616(1r). Professor LaFave addressed the very issue posed in Kenyon's case head on:

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

§ 13.7(a) Duplicative and overlapping statutes, 4 Crim. Proc. § 13.7(a) (4th ed.) (citations omitted).

The State's charging decision here is a extreme expansion of prosecutorial powers that erodes the court's function as a neutral sentencing

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

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

imprisonment in one instance or the potential for probation in another.[14] As the circuit court noted, because of the tortured evolution of §948.02, the legislature has decided that the same conduct is punishable by **either** 25 years minimum mandatory imprisonment **or** no mandatory imprisonment whatsoever. (R.79: 7-8). "It **all** depends on which subsection is charged." *Id.* (emphasis in original). By charging Kenyon under § 948.02(1)(b) the prosecution is unconstitutionally empowered "to predetermine ultimate sanctions." *Batchelder* 442 U.S. at 125. This is a violation of Kenyon's right to due process.

CONCLUSION

For all of the foregoing reasons, the defendant respectfully requests that this Court affirm the circuit court's order dismissing the information.

Dated this 19th day of February, 2024.

Respectfully submitted,

BUTING, WILLIAMS & STILLING, S.C.

By: Electronically signed by Jerome F. Buting
Jerome F. Buting
State Bar No: 1002856
Dudley A. Williams
State Bar No: 1005730

ADDRESS:

[14] As noted above Section I.B., CCAP records prove the arbitrariness of the Milwaukee County District Attorney's Office which routinely charged the non-mandatory subsection on facts much more egregious than Kenyon's alleged conduct.

P.O. Box 1039
Brookfield, WI 53008
(262) 821-0999
jbuting@bwslawfirm.com
dwilliams@bwslawfirm.com

CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b), and (bm) and (c) for a brief. The length of this brief is 10,131 words.

CERTIFICATION OF SUPPLEMENTAL APPENDIX

I hereby certify that filed as a separate document with this brief is a supplemental appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court (not included in this Supplemental Appendix as it is found in the State's Appendix); (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

Dated this 19th day of February, 2024.

Electronically signed by Jerome F. Buting
Jerome F. Buting
State Bar No: 1002856

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