

No. 26-

IN THE
Supreme Court of the United States

KEITH C. KENYON,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
WISCONSIN COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Hunter v. United States*, 608 U.S. __ (2026), 146 S.Ct. 1702, 1718, writing for three concurring justices, Justice Gorsuch criticized this Court’s silence on issues relating to plea bargaining which had contributed to a “conveyor belt of plea bargains” where prosecutors use “extortionate” pressure — threatening decades of imprisonment — to penalize defendants for exercising their right to a jury trial. In *Hunter*, the Court began to “correct course,” limiting some excesses by restricting compelled appeal waivers as a condition of plea bargaining when manifest injustice results. This case addresses the most coercive plea bargain abuse: the prosecutorial practice of overcharging defendants using statutes containing extreme mandatory minimum penalties to extort the waiver of their right to trial. This trial penalty punishes innocent defendants who choose to exercise a right which the law plainly guarantees, a due process violation of the highest sort. The experience of the past fifty years since the court legitimized plea bargaining in *Brady v. United States*, 397 U.S. 742, 749-53 (1970), shows that it is now necessary for this Court to further “correct course” and establish vital guardrails on prosecutorial charging discretion to preserve the fundamental right to trial. The questions presented are:

- I. Whether a prosecutor’s practice of overcharging a defendant with an offense which carries an extreme mandatory minimum sentence, which is decades longer than he would otherwise receive, solely with the intent to force a guilty plea to a charge with identical elements but no mandatory minimum, violates the Due Process Clause by

presenting a choice so coercive that it functionally obliterates the Sixth Amendment right to a jury trial?

- II. Whether a statutory scheme violates the Due Process Clause when it allows the prosecutor to choose between two identical statutory provisions prohibiting the exact same conduct - one mandating a 25-year minimum prison term and the other imposing no mandatory minimum - and provides no guidelines to constrain the arbitrary or discriminatory enforcement of the statute, and empirical evidence shows a practice of prosecutors imposing a multi-decade trial penalty on defendants for asserting innocence?
- III. Whether it is a violation of the Due Process Clause and the separation of powers doctrine for a legislature to delegate unbridled and unguided authority to the prosecution to choose between identical offenses that grant the prosecution the power to predetermine the sentence in a case, thereby invading the core judicial function of sentencing?

PARTIES TO THE PROCEEDING

Petitioner is Keith C. Kenyon, defendant-respondent below. Respondent is the State of Wisconsin, the plaintiff-appellant below.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case:

In the trial court, *State of Wisconsin v. Keith C. Kenyon*, Milwaukee County Case No. 2019CF2917;

In the Wisconsin Court of Appeals and the Wisconsin Supreme Court, *State of Wisconsin v. Keith C. Kenyon*, Case No. 2022AP2228-CR, reported at 418 Wis. 2d 390, 2025 WI App 60, *review denied*, 2026 WI 30, 2026 WL 2374874 (Table).

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OPINIONS BELOW

In a judgment entered on November 17, 2022, the Milwaukee County Circuit Court dismissed the information against the defendant in *State of Wisconsin v. Keith C. Kenyon*, Milwaukee County Case No. 2019CF2917. The circuit court decision and order appear at pages 1a - 17a of the appendix.

The opinion of the Wisconsin Court of Appeals in *State of Wisconsin v. Keith C. Kenyon*, Appeal No. 2022AP2228-CR, dated September 16, 2025, appears at pages 18a — 38a of the appendix. The opinion was ordered published and is reported at 2025 WI App 60, 418 Wis.2d 390, 27 N.W.3d 207.

The Supreme Court of Wisconsin order denying review, dated June 16, 2026, appears at page 39a of the appendix. The order was published and reported at 2026 WI 30, 2026 WL 2374874 (Table).

JURISDICTION

The Wisconsin Supreme Court denied Kenyon's petition for review on June 16, 2026. This Court has jurisdiction to decide the federal constitutional due process and Sixth Amendment issues presented by this case pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states, in part:

In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the State and district wherein the crime shall have been committed...

Section 1 of the Fourteenth Amendment to the United States Constitution states, in part:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kenyon was charged with one count of first-degree sexual assault of a child, a violation of Wis. Stats. § 948.02(1)(b). In pertinent part, the statute reads as follows:

948.02 Sexual assault of a child.

(1) First degree sexual assault.

(b) Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony.

...

(e) Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony.

Further, while both subsections relevant here are Class B felonies and have the same maximum sentence of 60 years, only a conviction under 948.02(1)(b) mandates a minimum 25-year prison sentence:

939.616 Mandatory minimum sentence for child sex offenses and child trafficking.

(1r) If a person is convicted of a violation of s. 948.02 (1) (b) . . . the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 25 years.

STATEMENT OF THE CASE

Child sexual assault in Wisconsin is a violation of Wis. Stats. § 948.02(1). § 948.02(1)(b) proscribes sexual intercourse with a person less than 12 years old and has a maximum penalty of 60 years with a mandatory minimum of 25 years — a determinate sentence with no parole.¹ § 948.02(1)(e) also proscribes sexual intercourse with a person who has not attained the age of 13 and has the same 60-year maximum penalty but no mandatory minimum. The statutes provide no guidance to the prosecutor in choosing which of the identical charges is appropriate when the alleged victim of an act of intercourse is younger than 12, as the eight-year-old alleged victim is in this case.

¹ Under Wisconsin's determinate sentencing structure, individuals convicted of a Class B felony cannot be paroled or otherwise serve anything less than the mandatory sentence, in this case a minimum of 25 years in prison, due to § 939.616(1r). There is no good time or parole to reduce the length of the mandatory minimum sentence.

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, contrary to § 948.02(1)(b). (R.1). The complaint noted the provisions of § 939.616(1r), which requires the court to impose a bifurcated sentence with a term of confinement of “at least” 25 years (*Id.*).

The criminal complaint referred to a forensic interview of the alleged victim, eight-year-old Leah,² in which she said Kenyon is her uncle and that on February 15, 2019, after a Disney on Ice show she spent the night with Kenyon’s six-year-old daughter, her cousin, at his home. An accusation was first made by Leah four months later. The complaint alleged that Leah pretended to be asleep so her uncle would carry her to her cousin’s room where she was going to sleep. Kenyon is alleged to have picked her up, carried her into her cousin’s room, laid her in bed next to her cousin, unzipped her onesie pajama, wiped her with some kind of wet cloth and then licked her vaginal area one time for a matter of seconds. Under Wisconsin law, any oral contact with the vagina constitutes “intercourse,” so Kenyon’s alleged brief contact minimally qualifies as meeting the statute’s definition of “intercourse.”³ There was 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.

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

³ Wis. JI 2101B

Additional details about the offense were revealed at the pretrial hearings, including many mitigating facts and an expert's opinion that the police interviewer tainted the child's statement by leading and suggestive questioning. Kenyon has always vehemently denied Leah's allegations that he sexually assaulted her. The trial court noted that due to the prosecution's charging decision Kenyon would effectively receive a life sentence and spend more time in prison than most homicide defendants in the county. The court also observed that Kenyon has been deaf since birth and does not speak, yet he has always been gainfully employed, is married, in his 40's, has no prior criminal record or police contacts and poses no risk to the community. (R. 49: 60, 63).

Kenyon challenged the prosecution's decision to charge him under the subsection carrying the 25-year mandatory minimum sentence, rather than the non-mandatory minimum section of the same statute. Kenyon moved to dismiss the charge, alleging it violated federal constitutional due process because the statute failed to constrain arbitrary and discriminatory prosecution, and that it violated the separation of powers doctrine by allowing the executive branch to predetermine the sentence.

To support his challenge, Kenyon submitted extensive court data spanning three years revealing a clear pattern of arbitrary, discriminatory and vindictive charging practices exposing a trial penalty related to the 25-year minimum offense by the Milwaukee County District Attorney's Office. This empirical evidence demonstrated that the prosecution systematically penalized defendants who asserted their rights to a jury trial by subjecting

them to the mandatory minimum 25-year penalty. The data established that over the three years preceding the charging in Kenyon’s case, the Milwaukee County District Attorney’s Office had charged thirty-four defendants with violating § 948.02(1)(b) with the mandatory minimum penalty.⁴ Thirty of those thirty-four cases were amended to an offense with no mandatory minimum in exchange for the defendant’s agreement to enter a guilty plea. One defendant received probation and most of the rest received less than 10 years. The remaining four defendants refused to plead guilty and asserted their constitutional right to trial and faced the 25-year mandatory minimum upon conviction, as would Kenyon.

The trial court granted Kenyon’s motion to dismiss, rendering a final judgment. Relying on its decades of judicial experience in serious criminal matters, the court determined that “the offense in this case does not call for anywhere near 25 years,” which the State acknowledged by proposing a plea offer of five to seven years of imprisonment if Kenyon agreed to plead to an amended charge under § 948.02(1)(e) without any mandatory minimum. Although the court acknowledged the legislature’s authority to enact mandatory minimum sentences, it stressed that due process requires such statutes to be structured rationally and reasonably to prevent arbitrary prosecutorial enforcement. The court ruled that the “total absence of standards to govern the prosecutorial decision [as to which subsection of § 948.02(1)

⁴ Undisputedly, all 34 complaints in those comparable cases charged under 948.02(1)(b) involved far more aggravated facts than those alleged against Kenyon — such as repeated incidents, threats of harm if disclosed, full penetration, and, in several instances, ejaculation.

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.” (APP 4a).⁵

The State conceded that Kenyon’s conduct as charged and his profile does not “match those of the worst child sex offenders”.⁶ The trial court reasoned that if the mitigating circumstances in Kenyon’s case failed to justify charging under the nonmandatory minimum option — which retained the same maximum sentence — no set of facts ever would. Ultimately, the court concluded that the charge served merely as a “tactical measure to strong-arm the defendant into accepting a plea” to avoid a wholly disproportionate mandatory minimum penalty. (APP 17a).

The State appealed. In a published opinion, the Wisconsin Court of Appeals reversed because it felt bound by precedent protecting broad prosecutorial discretion. However, the court expressed deep concern that the record supports the merits of Kenyon’s claims and the circuit court’s conclusion, stating that “the decision to charge Kenyon under [the 25-year mandatory minimum subsection] was made exclusively because Kenyon insisted

⁵ Intercourse in § 948.02(1) prosecutions is defined in 948.01(6) as “any 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.” This all-encompassing definition would include every act from penile penetration to a single finger touch of the vulva and fuels the potential for arbitrary and inconsistent charging decisions.

⁶ State’s Ct App. Brief at 31.

on going to trial” and was “not motivated by legitimate concerns for the public welfare.” (APP 20a).

The Wisconsin Supreme Court denied review on June 16, 2026. (APP 39a). This petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

I. Introduction.

With a robust factual and empirical record establishing years of vindictive charging patterns in the prosecutor’s office, this case offers a clear vehicle to address the constitutional limits of prosecutorial discretion which left unchecked threatens the foundation of an accused’s constitutional right to a trial.

Kenyon established a damning record of arbitrary and discriminatory charging practices by the Milwaukee County District Attorney’s Office which punishes the class of defendants who choose to exercise their right to a trial in sexual assault prosecutions by charging an extreme minimum mandatory penalty while amending the charges to a nonmandatory subsection of the same offense only if they agree to plead guilty, just as the prosecutor employed in Kenyon’s proposed plea bargain.

Although the court of appeals expressed concern over the record showing that the State’s decision to pursue the 25-year mandatory minimum charge was aimed at coercing Kenyon to forego his right to a jury trial and relinquish his claim of innocence — rather than being “motivated by legitimate concerns for the public welfare” (APP 20a) — it ultimately concluded that Kenyon’s case

could not be distinguished from established precedent upholding broad prosecutorial discretion. As noted by the concurrence in *Hunter*, such broad discretion has grown out of control in recent decades and now threatens the fundamental constitutional right to a trial.

This case will allow the Court to provide meaningful guardrails to reduce the risk of innocent defendants being coerced into accepting plea bargains to avoid a wholly disproportionate penalty.

II. The Court should establish guardrails and limitations on prosecutorial charging discretion to prevent coercive plea bargaining which induces defendants to forego their constitutional right to a trial regardless of their factual guilt or innocence.

As common as plea bargaining is today, the use of threats of punishment or offers of leniency to induce a plea of guilty in a criminal prosecution was not permitted pursuant to United States and English common law prior to the twentieth century. *See e.g., Bram v. United States*, 168 U.S. 532 (1897); *Rex v. Warickshall*, 168 Eng. Rep. 234 (1783). This Court was historically skeptical of plea bargaining, but the Court took a dramatic turn in the 1970's, declaring that plea bargaining was "inherent in the criminal law." *Brady v. United States*, 397 U.S. 742, 751 (1970). As one legal scholar observed, the court's decision in *Brady* was a compromise "necessitated by strains on the criminal justice system ... and the crushing and ever-increasing number of criminal prosecutions in America." The court swallowed concerns about the unfettered discretion of prosecutors resulting in coercive and vindictive charging decisions "in hopes plea

bargaining would alleviate pressures on the system while simultaneously benefitting *clearly guilty* defendants willing to reap an advantage in return for an admission of guilt.” Dervan, Lucian E., *Bargained Justice: Plea-Bargaining’s Innocence Problem and the Brady Safety Valve*, Utah Law Review, Vol. 2012, Number 1 at 56. (emphasis added).

Several years after *Brady*, this court in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), approved of a prosecutor enhancing charges against a defendant who insisted on exercising his right to a jury trial by increasing the defendant’s exposure from a maximum of 10 years to mandatory life. The court in *Bordenkircher* cited to *Brady* and found that plea bargains are an “important component” of the criminal justice system that benefit all concerned and that sufficient safeguards existed in the right to counsel and the requirement that a plea be knowingly and voluntarily entered to eliminate any concerns about vindictiveness, coercion or reliability. *Id.* at 361-62.

The acceptance of plea bargaining and the almost unfettered discretion given to prosecutors in their charging decisions were in part based on the assumption that plea bargaining reflects a “mutuality of advantage” because “relatively equal bargaining power” exists between the defendant and the prosecution. However, in today’s world there is not the “mutuality of advantage” in plea bargaining that the court in *Brady* envisioned. This is because now there are broad and overlapping statutes with severe mandatory minimum sentences for the same conduct available to charge, which give prosecutors tremendous leverage and virtually eliminates

any bargaining power the defendant has in the plea-bargaining process. Defendants who dare choose to exercise their constitutional right to trial automatically face massive disproportionate mandatory sentences with no judicial discretion to tailor the penalty to the defendant and his conduct.

Justice Gorsuch wrote in his *Hunter* concurrence that the *Bordenkircher* ruling would have been “unthinkable” only a few decades earlier and, unsurprisingly, “prosecutors quickly began taking full advantage of this new judicial latitude,” by threatening “layers of additional charges and decades of additional prison time if defendants dared to exercise their right to trial by jury.” 608 U.S. ___, 146 S.Ct. 1702, 1718. In the five decades since the Supreme Court sanctioned the coercive prosecution tactics in *Bordenkircher*, both state and federal prosecutors have frequently employed extortion-like methods during plea bargaining. These practices challenge the fundamental premise of *Brady* and *Bordenkircher*, that negotiated pleas are inherently reliable, and there has been a dramatic decline in trials ever since. By 2012, this Court recognized that plea bargaining was so dominant that the American legal system had transformed into “for the most part a system of pleas, not a system of trials.” *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

The coercive use of the kind of mandatory minimum sentence utilized by the prosecutor against Kenyon is one of the primary sources contributing to the undermining of the constitutional right to a jury trial. The plea process becomes exploitative of a defendant’s lack of bargaining power when he is faced with the choice of relinquishing his right to trial to avoid the risk of decades in prison, even

for defendants who may be truly innocent of the charges. In *Hunter*, Justice Gorsuch observed the dramatic effect in recent decades of this Court’s approval of overly broad prosecutorial discretion in charging:

Together with this Court’s approval of aggressive negotiating tactics, developments like these have made it easier than ever for prosecutors to cajole defendants into pleading guilty. So much so that perhaps 95 percent of convictions now come by way of plea bargains. See R. Barkow, *Justice Abandoned* 74–75 (2025). These days, plea bargaining is not just “some adjunct to the criminal justice system; it is the criminal justice system.” R. Scott & W. Stuntz, *Plea Bargaining as Contract*, 101 *Yale L. J.* 1909, 1912 (1992).

Hunter, 146 S.Ct. at 1718⁷

Brady and *Bordenkircher* also assumed that a guilty plea was a reliable indicator of guilt and that innocent defendants represented by counsel would not be coerced into pleading guilty. See *Brady*, 397 U.S. at 758. In *Brady* the court observed that a defendant “demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation” and stated that it would “have serious doubts about this case if the encouragement of guilty pleas by offers of leniency

⁷ The Federal Sentencing Commission found 98% of federal criminal prosecutions ended with a guilty plea in 2025. Federal Sentencing Commission Annual Report 2025, at 16.

substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves.” *Brady*, 397 U.S. 753, 758. However, over the last 50 years since *Brady* legitimized plea bargaining, we now know, in part due to DNA exonerations, that a guilty plea or conviction is not always a reliable indicator of actual guilt.

The statistics are startling. For example, one researcher found that almost 75% of defendants who were convicted of murder and later exonerated by DNA evidence of that murder had pled guilty to a homicide offense for which they were factually innocent. In addition, 70% of those had also falsely confessed. See *Plea Bargain Task Force Report*, American Bar Association, Criminal Justice Section, fn17 (https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/reports/plea-bargain-tf-report.pdf, last visited September 1, 2026). The National Registry of Exonerations found that 49% of individuals convicted of manslaughter who were later exonerated had entered a guilty plea and also that 13% of individuals who plead to a child sexual assault and were later exonerated had entered a plea pursuant to negotiations. See Table 1 at https://exoneratiregistry.org/sites/exoneratiregistry.org/files/documents/NRE.Guilty%20Plea%20feature.rev.11.18.15OriginalDate.pdf?utm_. See also American Bar Association, *The Cost of Plea Bargains: Reflections and Recommendations from the ABA Plea Bargain Task Force* (Lucian E. Dervan, Russell D. Covey and Thea Johnson, eds., 2024).

Research studies have also demonstrated that even when represented by counsel, innocent people can be persuaded to plead guilty. See Wilford, Miko M. & Wells,

Gary L., *Bluffed by the Dealer: Distinguishing False Pleas from False Confessions*, 24 *Psychology, Public Policy and Law* 158, 166 (2018). One researcher examining the role of counsel in the plea process found that 58 percent of study participants falsely pleaded guilty when an advocate participated and recommended pleading guilty. See Henderson, Kelsey S. & Levett, Lora M., *Investigating Predictors of True and False Guilty Pleas*, 42 *Law and Human Behavior* 427, 437 (2018) (“findings suggest that innocent individuals may be more vulnerable to the effects of social influence when considering advice from an advocate compared with guilty individuals.”). A survey of defense lawyers in nine states revealed that almost 90 percent said they had been involved in a case where a client chose to plead guilty despite maintaining their innocence. See Helm, R. K., Reyna, V. F., Franz, A. A., Novick, R. Z., Dincin, S., & Cort, A. E., *Limitations on the ability to negotiate justice: attorney perspectives on guilt, innocence, and legal advice in the current plea system*. *Psychology, Crime & Law*, (2018) 24(9), 915–934.

To safeguard the integrity of the constitutional right to a jury trial, this Court must re-examine the flawed assumptions underlying *Brady*, *Bordenkircher*, and their progeny — particularly when prosecutors utilize coercive tactics such as threatening or imposing severe mandatory minimum sentences. The belief held during the pre-DNA exoneration era that guilty pleas serve as dependable indicators of guilt has been thoroughly disproven.⁸

⁸ The National Registry of Exonerations compiled at the University of Michigan currently lists “3,856 exonerations and more than 36,117 years lost since 1989.” (<https://exonerationregistry.org/>, last visited September 1, 2026). In addition, tens of thousands of convictions have been dismissed in several high-profile crime lab

Modern evidence revealing the fallibility⁹ of the American criminal justice system highlights the urgent need to establish reasonable safeguards against extortionate plea-bargaining strategies. Broad prosecutorial discretion in charging decisions threatens to diminish the right to a jury trial, penalizing defendants who assert their innocence and eroding public confidence in the judicial process.

Reasonable safeguards could include requiring legislatures to establish guidelines for enforcement of identical statutes with different penalty provisions, particularly those with harsh and extreme mandatory minimum penalties, so that prosecutors cannot arbitrarily or vindictively use the more serious offense simply to

scandals involving fraudulent forensic science analysts who were later criminally prosecuted, some of which went on undetected for years. (e.g. Massachusetts: approximately 60,000 cases involving crime lab analysts Annie Dookhan and Sonya Farak, New Jersey: more than 20,000 breath tests in thousands of cases deemed unreliable due to analyst fraud); *see also* Justice Scalia's recognition of flawed forensic evidence in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009) ("Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that "[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.").

⁹ Most analysts accept estimates on the number of wrongly convicted inmates in America range from 1-5%, which even at the lower end means tens of thousands of innocent people in a country with approximately 2 million incarcerated. *Cf.*, Innocence Project, 1% estimate (<https://innocenceproject.org/news/how-many-innocent-people-are-in-prison/>) and Dan Simon, *In Doubt: The Psychology of the Criminal Justice Process*, p.226, n.4 (Harvard University Press 2012) ("a possible upper boundary of 5%").

punish a defendant who goes to trial. Prosecutors offices should also establish standards to guide individual prosecutors in their selection of charges.

Most importantly, this Court should recognize a presumption of vindictiveness in pretrial charging similar to that which applies when a harsher penalty is imposed after a successful appeal. In both instances the prosecutor penalizes a defendant by filing or adding charges mandating harsher punishment in direct response to a defendant exercising a constitutional right.

In *United States v. Goodwin*, 457 U.S. 368, 372 (1982), this Court reiterated that penalizing a defendant for exercising a lawful right constitutes “a due process violation of the most basic sort.” Although the Court in *Goodwin* reaffirmed that a presumption of prosecutorial vindictiveness applies when an increased penalty follows a successful appeal, it relied on *Bordenkircher* to hold that no such presumption automatically exists in a pretrial context. The Court reasoned that the rationale for the presumption stems not from the potential deterrence of a defendant’s legal rights, but from the risk that the State might actively retaliate against the accused. As noted, the evidence now suggests that innocent defendants often are retaliated against for exercising their constitutional right to a jury trial, especially when faced with a massive “trial penalty” that exists between decades in prison on a mandatory minimum offense versus none if they waive their rights and plead guilty. The empirical evidence presented in Kenyon’s case establishes that prosecutors do retaliate in pretrial charging against those who assert their right to a trial.

In Kenyon's case, the court of appeals questioned the pretrial/post-appeal distinction, noting

It is difficult to understand why such a presumption would attach after a defendant's successful appeal and not during pretrial plea negotiations. We see very little practical difference in a prosecutor increasing the severity of the charges after a successful appeal and a prosecutor increasing the severity of the charges based on a defendant's refusal to plead guilty and insistence on taking the case to trial.... In both instances, it appears that the prosecutor penalizes a defendant by filing charges authorizing harsher punishment in direct response to a defendant exercising a constitutional right.

APP 37a. Given the plea bargaining excesses we now know have occurred since *Bordenkircher* was decided, this Court should revisit whether a distinction between pretrial and post-appeal charging practices remains justified.

However, even absent a pretrial presumption of vindictiveness, the *Goodwin* Court chose to leave open the possibility of a challenge to a prosecutor's pretrial charging. The court emphasized its holding "does not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for something that the law plainly allowed him to do." *Id.* at 384. This Court should reaffirm that objective evidence of a trial penalty is a violation of due process

and cannot be condoned by courts. Here, the trial court explicitly found that the prosecutor's charging actions imposed an improper trial penalty. Concurring with these findings, the court of appeals observed that the decision to pursue an extreme mandatory minimum charge was made exclusively because Kenyon asserted his trial rights, rather than out of any legitimate public welfare considerations. (APP 20a). Furthermore, extensive charging history in the record demonstrates a systematic jurisdictional practice: prosecutors routinely overcharge defendants with mandatory minimum offenses, leveraging those charges to demand jury waivers in exchange for amendments to lesser offenses that restore judicial sentencing discretion.

The record in Kenyon's case provides this Court with a clear foundation to confirm that vindictive pretrial charging — designed to coerce an innocent defendant into surrendering his right to a jury trial — is just as offensive to due process as post-appeal retaliation. This Court should recognize a presumption of vindictiveness in a pretrial charging case when a trial penalty is imposed and it is objectively established that a prosecutor was motivated only by a desire to coerce a defendant to plead guilty to an offense he steadfastly denies.¹⁰ At minimum, this Court should reaffirm that the kind of vindictiveness objectively established by the record here, where the prosecutor used the threat of an excessive mandatory minimum sentence which guaranteed a decades longer

¹⁰ A prosecutor could overcome that presumption of such a due process violation upon a showing of aggravated facts or other circumstances justifying an extremely harsh mandatory minimum. Despite repeated inquiries from the trial judge in Kenyon's case, the prosecutor refused to do so.

sentence than any sentencing judge would impose if Kenyon was convicted after a trial, is a “due process violation of the most basic sort” and that Kenyon should not have been foreclosed from relief simply because the vindictiveness occurred pretrial.

III. To penalize Kenyon for exercising his constitutional right to a trial, prosecutors took advantage of an unconstitutionally vague statutory scheme to vindictively charge an offense with a mandatory minimum sentence of 25 years — a widespread practice designed to coerce guilty pleas.

The due process 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). It is the arbitrary and discriminatory enforcement that is at issue in Kenyon’s case. Indeed, many courts have held that restraining arbitrary enforcement by officials is more important than the fair notice requirement of due process. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 574 (1974).

This Court has repeatedly referred to prosecutors as among those the vagueness doctrine is supposed to constrain. *See Sessions v. Dimaya*, 584 U.S. 148 (2018). *Dimaya* held that the vagueness doctrine “guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.” *Id.* at 156. The court also warned that vague laws “threaten

to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions." *Id.* at 182. *See also, Johnson v. United States*, 576 U.S. 591, 596 (2015) (vagueness doctrine applies "not only to statutes defining elements of crimes, but also statutes fixing sentences," including minimum mandatory terms.)

A core due process problem that plagued the prosecution's charging decision in Kenyon's case is the legislature's lack of guidance as to when it is appropriate to prosecute with the non-mandatory minimum or the mandatory minimum statute, given the two statutes cover the exact same conduct. The facts alleged in Kenyon's case could fit either statute, but the state, without guidance or checks from the statute, arbitrarily chose the more punitive option even though it was "wholly disproportionate" to the conduct alleged. (App.17a) Indeed, Wisconsin's highest court has characterized Wis. Stats. § 948.02(1) as "bizarre," noting its complex and tortured legislative history.¹¹ The statute was amended three times due to inconsistent provisions between 2005 when it created the 25-year mandatory minimum and 2007.¹² In 2013 the legislature amended 948.02(1)(e) to encompass

¹¹ *State v. Thompson*, 2012 WI 90, ¶ 27, 342 Wis. 2d 674, 685, 818 N.W.2d 904, 910 ("The legislative history of the applicable statutes is so bizarre that it raises legitimate questions about whether the mandatory minimum sentence applies in this case").

¹² 2005 Wisconsin Act 30 (changing the age for the sexual-intercourse offense from under 13 to under 12, creating a sexual-contact offense involving a child under 13, and creating the 25-year mandatory minimum), 2005 Wisconsin Act 437 (passed days after Act 30 to rectify inconsistencies), and 2007 Wisconsin Act 80 (created the (a) thru (e) structure of the act).

sexual intercourse with a child under 13 without adding any mandatory minimum to that violation, evidencing its recognition that not every allegation of intercourse with a child under twelve warrants the 25-year mandatory minimum penalty.¹³

The timing of these enactments and the length the legislature has gone in purposely maintaining both subsections implies that the legislature wanted 948.02(1)(b)'s mandatory minimum only applied to the most aggravated cases and added § 948.02(1)(e) without a mandatory minimum for mitigated offenses such as that alleged against Kenyon. The record of this case clearly establishes the inconsistent and arbitrary prosecutorial decisions that have resulted when charging violations of § 948.02(1) due to the absence of any legislative or other guidelines. The conduct alleged in Kenyon's case is as mitigated an act of intercourse as could be and it would be hard to believe that the legislature would have intended that 948.02(1)(b) with its extreme mandatory minimum penalty be charged in this case.

If the legislature had intended that all cases involving claims of intercourse be charged with the mandatory minimum offense, however mitigated the factual circumstances, it would never have added subsection (e) where a defendant would be sentenced by a judge based on all controlling sentencing factors. Notably, the legislature included sexual intercourse as conduct in § 948.02(1)(e) that could even result in probation. The trial court recognized all the mitigating factors in Kenyon's case and asked: "Indeed, if the mitigating factors currently in the

¹³ 2013 Wisconsin Act 167.

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? (App. 12a).

This lack of legislative guidance is unfortunately common with overlapping statutes where identical conduct can be charged with different penalties, Professor LaFave explained:

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 United States v. Batchelder*, 442 U.S. 114, 125 (1979) (“Selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints.”). The Wisconsin statutory scheme under § 948.02(1) provides none.

The court of appeals in Kenyon's case primarily relied upon this Court's decision in *Batchelder*, which

affirmed the prosecution's discretion to decide which statute to charge when the conduct violates more than one statute. However, *Batchelder* did not involve two statutes proscribing identical conduct with the same maximum penalty where one has a *mandatory minimum* penalty and the other has no mandatory minimum penalty, an issue this Court has never confronted. In *Batchelder*, the prosecution charged the defendant with a crime that had a 5-year maximum sentence instead of an overlapping identical crime with a 2-year maximum sentence. *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.” *Batchelder* did not address the issue of statutes with no guidelines to prevent arbitrary enforcement of a draconian mandatory minimum and, therefore, does not control the issue in Kenyon's case.

The absence of any evidence of criteria in the Milwaukee County DA's Office to guide the charging decision, together with the failure of the statute itself to provide any constraints, “encourages arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The entirety of the record here, including the lack of any guidelines and the charging history, established that the decision to charge Kenyon was the product of an arbitrary and discriminatory application of the statutes, which was vindictively employed solely to coerce him to relinquish his constitutional right to a jury trial despite his professed innocence.

IV. The statutory scheme employed by the prosecution violates due process and the doctrine of separation of powers by allowing the prosecution to predetermine the ultimate sanction.

Finally, enacting identical criminal statutes that differ solely in their prescribed penalties — without providing criteria to guide prosecutorial discretion — constitutes an impermissible delegation of legislative authority to the executive branch, violating the doctrine of separation of powers. This Court has held that the due process void-for-vagueness doctrine “is a corollary of the separation of powers — requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.” *Sessions v. Dimaya*, 584 U.S. at 156. Vague laws “threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute’s contours through their enforcement decisions.” *Id.* at 182 (Gorsuch, J., concurring), citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis”). Granting the prosecution such unchecked discretion directly undermines fundamental fairness and violates due process, which dictates that sentences must be rendered by a neutral and detached magistrate rather than predetermined by prosecutors.

In Kenyon’s case, the legislature enacted identical criminal statutes that differed solely in their penalties. By doing so without providing any guidance on when an extreme mandatory minimum should apply, the legislature improperly delegated its authority to the executive branch without governing standards and

infringed upon the core judicial function of sentencing. Although a legislature possesses the authority to establish mandatory minimum penalties for criminal offenses, it cannot shirk its duty by allowing the prosecution to apply that power arbitrarily, vindictively, or discriminatorily. Yet, this is precisely what has occurred here. This Court has not yet considered how such a delegation of broad prosecutorial charging discretion impermissibly usurps both legislative and judicial duties by allowing the executive to unconstitutionally “predetermine ultimate criminal sanctions.” *Batchelder*, 442 U.S. at 125.

In *Batchelder*, the court recognized the serious constitutional implications of cases like Kenyon’s where the prosecutor’s charging decision actually predetermines the sentence, which would invade a core judicial function. But, in *Batchelder* the prosecutor’s charging decision merely increased the *maximum* sentence that could be imposed, it did not impose an extreme *minimum* sentence and thereby preclude the court from the exercise of its judicial discretion in fashioning a sentence. Therefore, the court observed that the government’s choice between statutes in *Batchelder* “did not empower the prosecution to predetermine the ultimate criminal sanctions”. Rather, it increased the court’s discretion by allowing the sentencing judge to impose a longer prison sentence. *Id.* at 125.

Given the absence of any legislative guidance and the failure of the district attorney to adopt any guidelines for charging violations of § 948.02(1), it is no surprise that the State throughout the litigation of this challenge in both the trial court and the court of appeals never once offered a justification for charging the mandatory minimum offense against Kenyon. When the legislature delegates

its obligation to establish penalties to the prosecution — empowering prosecutors to dictate decades-long prison sentences — it encroaches upon a fundamental judicial function, given that prosecutorial decisions lack the appellate review to which judicial rulings are subject. In contrast, when a trial judge imposes sentence he/she must state on the record the reasons for that sentence to confirm it properly accounts for the severity of the offense, the defendant’s character, public protection, and rehabilitative needs. *See Rita v. United States*, 551 U.S. 338, 357 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *McCleary v. State*, 49 Wis. 2d 263, 280–81, 182 N.W.2d 512 (1971) (“In all Anglo–American jurisprudence a principal obligation of the judge is to explain the reasons for his actions. His decisions will not be understood by the people and cannot be reviewed by the appellate courts unless the reasons for decisions can be examined”).

In *United States v. Booker*, 543 U.S. 220 (2005), this 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 which is : “the power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment.” *Id.* Put another way: “If the separation of powers means anything, it must mean that the prosecutor isn’t allowed to define the crimes he gets to enforce.” *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 81, 391 Wis. 2d 497,

553, 942 N.W.2d 900, 928 (R. Bradley, J., concurring), quoting Neil Gorsuch, *A Republic If You Can Keep It*, 87 (Crown Forum ed., 1st ed. 2019).

The 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. The prosecution exercised that unlawfully delegated power in this case by choosing between two identical statutes and charging Kenyon with the one carrying the disproportionate mandatory 25-year minimum sentence penalty with the sole purpose of extorting Kenyon into entering a plea to a charge he vehemently denies.

CONCLUSION

For all of the foregoing reasons, the defendant requests this Court to grant this certiorari petition and review the case.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — DECISION AND ORDER
GRANTING MOTION TO DISMISS OF THE
WISCONSIN CIRCUIT COURT OF MILWAUKEE
COUNTY, BRANCH 12, FILED NOVEMBER 18, 2022**

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY
Branch 12

Case No. 2019CF002917

STATE OF WISCONSIN,

Plaintiff,

vs.

KEITH C. KENYON,

Defendant.

Filed November 18, 2022

**DECISION AND ORDER GRANTING
MOTION TO DISMISS**

The defendant was charged by criminal complaint with one count of first-degree sexual assault of a child (sexual intercourse, child <12 years of age), contrary to WIS. STAT. § 948.02(1)(b). The complaint alleges that the defendant licked his eight-year-old niece's vagina on one occasion. First-degree sexual assault of a child under

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the age of 12 is a Class B felony carrying a maximum possible penalty of 60 years of imprisonment. WIS. STAT. § 939.50(3)(b). In addition, if the defendant is convicted of the offense as charged, WIS. STAT. § 939.616(1r)¹ requires the court to impose a bifurcated sentence, and the term of confinement in prison portion shall be at least 25 years.

On November 11, 2019, the defense filed a motion to dismiss the Information, arguing that the 25-year mandatory minimum penalty violates the defendant's federal and state constitutional rights to procedural due process. The parties have developed their respective positions in several rounds of written briefing and over the course of multiple hearings on this and other pretrial matters.² Pursuant to WIS. STAT. § 806.04(11), the Attorney

1. WISCONSIN STAT. § 939.616(1r) provides that, "If a person is convicted of a violation of s.948.02(1)(b) or (c) or 948.025(1)(b), the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 25 years. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement."

2. After the defense filed their motion to dismiss the Information as an unconstitutional violation of procedural due process on November 11, 2019, the court (at that time, the Honorable Jeffrey A. Wagner, presiding), set a briefing schedule to allow the State to file a written response and the defense to file a written reply. The State filed its initial response to the motion to dismiss on January 15, 2020. On March 5, 2020, the defense filed its reply brief. On August 1, 2020, the matter transferred to this court due to judicial rotation. On March 9, 2021, the parties appeared before this court for a motion hearing regarding a potential defense expert witness. This court noted the motion to dismiss that had been previously filed, and observed the motion had not yet been ruled on. The parties

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General's office was furnished with a copy of the pleadings and responded by letter filed on October 5, 2021 that their office would not appear at this stage of the proceedings.

The defense argues that its motion should be granted for three reasons: first, because the State's decision to charge the defendant under § 948.02(1)(b) and the corresponding mandatory minimum violates procedural due process "because it amounts to 'sentencing by charging' and deprives the defendant of his right to be sentenced by a neutral tribunal;" second, because the defendant's procedural due process rights are violated where § 948.02(1) contains no constraints on the arbitrary and discriminatory enforcement by the prosecution in

agreed to set another date to address that motion. On April 7, 2021, the defense filed an amended motion to dismiss the Information. The State filed its second response on May 5, 2021. On May 27, 2021, the parties returned for a continuation of the motion hearing regarding the potential defense expert witness, and to address the motion to dismiss. The parties argued their respective positions during the May 27, 2021 hearing. (Tr. 5/27/21 pp. 50-69). Due to the lateness of the hour and complexity of the issue, the court set the matter over for decision. The parties reconvened on June 24, 2021 regarding the motion to dismiss. The court indicated it intended to issue a written decision due to the significance of the issue. As discussed at the May 27, 2021 hearing, the Attorney General's office was notified on the constitutional challenge by letter on September 20, 2021, and the defense filed their second reply on October 5, 2021. The parties again discussed the motion to dismiss at a hearing held on May 20, 2022. Thereafter, on July 1, 2022, the defense submitted supplemental Milwaukee County charging information in support of its motion to dismiss the Information.

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choosing whether to charge § 948.02(1)(b) versus (1)(e),³ and third, because proceeding under § 948.02(1) constitutes an invasion of a core judicial power and violates the state constitutional separation of powers as it unconstitutionally empowers the prosecution to predetermine the sentence. *See* 4/7/21 Amended Motion to Dismiss Information p.2.

After extensive consideration of the parties' arguments, the court grants the defense motion to dismiss the Information because it finds that the statutory scheme violates the defendant's constitutional right to procedural due process. The court makes this decision because WIS. STAT. § 948.02(1), as applied in this case, gives the State unfettered discretion to choose between a prosecution under § 948.02(1)(b), which requires imposition of the mandatory minimum of 25 years of initial confinement under WIS. STAT. § 939.616(1r), and § 948.02(1)(e), which has no mandatory minimum term of confinement. The total absence of standards to govern the prosecutorial decision results in an arbitrary charging standard and deprives the court of its discretionary authority to consider mitigating factors and impose a sentence of less than 25 years of initial confinement.

3. WISCONSIN STAT. § 948.02(1)(e) provides that, "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." The mandatory minimum under WIS. STAT. § 939.616(1r) does not apply to convictions under § 948.02(1)(e). In contrast, WIS. STAT. § 948.02(1)(b) provides that, "Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony."

*Appendix A***The tortured evolution of section 948.02**

The court finds it necessary to show how the current statutory scheme of WIS. STAT. § 948.02 has evolved from a hodgepodge of amendments. Prior to June 6, 2006, first-degree sexual assault of a child provided as follows:

948.02 Sexual assault of a child.

(1) FIRST DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of one of the following:

(a) If the sexual contact or sexual intercourse resulted in great bodily harm to the person, a Class A felony.

(b) If the sexual contact or sexual intercourse did not result in great bodily harm to the person, a Class B felony.

On May 22, 2006, the legislature enacted 2005 Wis. Act 430. Section 948.02, as amended by the Act, provided:

948.02 Sexual assault of a child.

(1) First degree sexual assault

(a) In this subsection, “sexual intercourse” means vulvar penetration as well as cunnilingus, fellatio, or anal intercourse between persons or

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any intrusion of any inanimate object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

(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 with a person who has not attained the age of 13 years is guilty of a Class B felony.

2005 Wis. Act 430 also created WIS. STAT. § 939.617, which implemented a mandatory minimum term of initial confinement for a violation of sub. (1)(b).⁴ Notably, at the time the mandatory minimum was enacted, sub. (1)(e) only proscribed sexual *contact* with a person under the age

4. The mandatory minimum was later renumbered as WIS. STAT. § 939.616.

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of 13. On the same date the legislature enacted Act 430, it also enacted 2005 Wis. Act 437, which gave different treatment to § 948.02(1):

948.02 Sexual assault of a child.

(1) FIRST DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of one of the following:

(a) If the sexual contact or sexual intercourse resulted in great bodily harm to the person, a Class A felony.

(b) If the sexual contact or sexual intercourse did not result in great bodily harm to the person, a Class B felony.

Faced with inconsistent language, the legislature enacted 2007 Wis. Act 80 on March 12, 2008, repealing section 948.02(1), as affected by 2005 Wis. Acts 430 and 437.

948.02 Sexual assault of a child.

948.02 (1) 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.

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(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 with a person who has not attained the age of 13 years is guilty of a Class B felony.

The amendments did not end there. On March 27, 2014, the legislature enacted 2013 Wis. Act 167, adding “sexual intercourse” to WIS. STAT. § 984.02(1)(e) for the reasons explained in 2013 A.B. 563, “‘Sexual contact’ is defined in current law so that it includes ‘sexual intercourse.’ For clarity, this bill specifies that whoever has sexual contact or sexual intercourse with a person who is under 13 years of age is guilty of a Class B felony.”

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Section 948.02, in its current form, reads as follows:

948.02 Sexual assault of a child.

(1) 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.

*Appendix A***The charging and penalty scheme is arbitrary**

The decisions to prosecute and what charges to bring are typically left to prosecutorial discretion. *U.S. v. Batchelder*, 442 U.S. 114, 124 (1979). However, “a prosecutor’s discretion to choose . . . is not ‘unfettered.’ Selectivity in the enforcement of criminal law is, of course, subject to constitutional constraints.” *Id.* at 124-125. The United States Supreme Court held that if overlapping criminal provisions clearly define the prohibited conduct and the punishment, the notice required by the due process clause is met. *Id.* at 3; *see also State v. Muehlenberg*, 118 Wis. 2d 502, 507, 347 N.W.2d 914 (Ct. App. 1984) (In analyzing whether a particular statute is void for vagueness, two prongs must be considered. First, “[a] criminal statute must be sufficiently definite to give a person of ordinary intelligence who seeks to avoid its penalties fair notice of conduct required or prohibited.” a Second, the “statute must also provide standards for those who enforce the laws and those who adjudicate guilt.”).

The statutes at issue in the instant case define the prohibited conduct and punishment as required by the due process clause’s notice requirement. Nevertheless, the statutes fail to provide guidance to a prosecutor in choosing which statute to charge. *See Sessions v. Dimaya*, __ U.S. __, 138 S.Ct. 1204, 1212 (2018) (the void-for-vagueness doctrine “guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.”). One problem with vagueness in the law is the threat that legislative power is transferred “to police and prosecutors,

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leaving to them the job of shaping a vague statute's contours through their enforcement decisions." *Id.* That seems to be precisely the scenario before this court.

To illustrate, consider the differences between § 948.02's subsections (1)(b) and (1)(e): sub. (1)(b) criminalizes sexual intercourse with "a person who has not yet attained the age of 12 years" while sub. (1)(e) criminalizes sexual intercourse *or* sexual contact with "a person who has not yet attained the age of 13 years." WISCONSIN STAT. § 939.616(1r)'s 25-year mandatory minimum only applies to sub. (1)(b) and not to sub. (1)(e). As pointed out above, at the time the mandatory minimum was enacted, sub. (1)(e) only proscribed sexual contact—not intercourse—with a person under the age of 13. In the statutes' current versions, there is no guidance to prosecutors—from the statutes themselves or from the legislation which gave rise to these sections—in choosing which charge is more appropriate when an alleged victim of an act of sexual intercourse is younger than twelve years old, where both sub. (1)(b) and (1)(e) are applicable, resulting in the possibility of unfettered and arbitrary decision-making.

In its supplemental response, the State attempts to recast the defendant's position as "arguing this statu[t]e violates due process because the prosecutor chooses the charge that fits the facts of the case. The *legislature* decided that when one is convicted of engaging in sexual intercourse with a child under 12, that crime should carry a sentence *of at least 25 years of confinement*. The Court decides the ultimate sentence and it is not unheard of for

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[a] court to sentence defendants to above the mandatory minimum.” (5/5/21 State[']s second response to Defense motion to dismiss p.1). One initial and glaring problem with the State’s response is that the legislature did indeed decide that when one is convicted of engaging in sexual intercourse with a child under the age of 12, that crime should carry a sentence of at least 25 years of initial confinement.⁵ However, by nature of the existence of sub. (1)(e), the legislature *also* decided that when one is convicted of engaging in sexual intercourse with a child under the age of 13 (which, of course, includes children under the age of 12), there is no mandatory minimum at all. It all depends on which subsection is charged.

Indeed, if the mitigating factors currently in the record⁶ 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 § 939.616(1r) does not apply—what does?⁷ Under what circumstances does

5. Another problem with the State’s argument is that its suggestion that the court “decides the ultimate sentence” ignores the fact that the court is deprived of all discretion to decide the “ultimate sentence” when a defendant is convicted under sub. (1)(b), as charged in this case. This is addressed in more detail in the sections that follow.

6. The court recognizes that additional facts would likely be introduced from both parties if this case proceeded to trial or sentencing.

7. For example, the defendant’s supplement in support of its motion to dismiss notes, “The defendant in this case is alleged to have licked the outside of the eight-year-old girl’s vagina one time.

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the State charge § 948.02(1)(e)? Based on the compilation appended to the defendant's July 1, 2022 supplement in support of its motion to dismiss, sub. (1)(e) appears to exist as a bargaining chip to motivate defendants charged under sub. (1)(b) and staring down the guarantee of 25 years in prison—minimum—to waive their right to a trial. *See* 7/1/22 Supplement to Motion to Dismiss, pp.5-6 and Exhibit 1.

The State relies on this court's previous decision in *State v. Heidke*, affirmed by the Wisconsin Court of Appeals, in which constitutional arguments were made regarding the mandatory minimum penalty for using a computer to facilitate a child sex crime. *State v. Heidke*, 2016 WI App 55, 370 Wis. 2d 771, 883 N.W.2d 162. The State fails to mention that this court highlighted the fact that the legislature offered its reasoning for the mandatory minimum in the Assembly Committee on Criminal Justice & Corrections' Testimony on A.B. 209. The Court of Appeals agreed and stated, "The testimony and resulting legislation provides a rational basis for the mandatory minimum sentence." *Heidke*, 370 Wis. 2d at ¶12. Here, the court is unaware of any testimony or basis for the application of the mandatory minimum to (1)(b) but not to (1)(e).

No penetration of the vagina with his tongue is alleged. There is no allegation of digital or penile penetration or display of his private parts. There is no threat about the consequences of disclosure alleged either. And he has no prior criminal record." *See* 7/1/22 Supplement in Support of Motion to Dismiss, pp.4-5.

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Considering the facts of this case, this court reaches the conclusion that it cannot discern a plausible policy reason for the classification drawn between WIS. STAT. § 948.02(1)(b) and WIS. STAT. § 948.02(1)(e) where the impact of 939.616(1r) is so disproportionate. The court finds that the irrational interplay between sub. (1)(b), (1)(e), and 939.616(1r) denies the defendant his right to due process as there are no perceptible constraints on arbitrary and discriminatory enforcement by the prosecution in deciding whether to charge an offense of sexual intercourse with a child under the age of 12 under sub. (1)(b) or sub. (1)(e).

**The mandatory minimum amounts to
sentencing by charging**

Next, sentencing discretion lies within the purview of the court. In charging the defendant with § 948.02(1)(b), which carries a 25-year mandatory minimum term of initial confinement, as opposed to charging the defendant with § 948.02(1)(e), the prosecutor has effectively stripped the court of its sentencing authority and discretion. In this case, the mandatory minimum unduly burdens the court by preventing it from exercising its sentencing power.

As this court noted during arguments at the May 27, 2021 motion hearing, 25 years of initial confinement is “an enormous penalty. I’m confident, as a judge who presides over homicides and cases like this, that the average homicide defendant in Milwaukee County does not serve that much upfront time.” (Tr. 5/27/21 p.60). To illustrate its point, the court described a case it had recently presided

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over involving two counts of second-degree reckless homicide, in which it followed the State's recommendation and imposed 15 years of initial confinement. (Id. p.61).

The State argues that the United States Supreme Court in *Batchelder* held that prosecutors have the discretion to choose between overlapping offenses with more significant *maximum* penalties. 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. Even the State is cognizant of the mitigating aspects involved in this case, as it has offered to recommend **5-7 years of initial confinement**, among other terms, *if* the defendant forgoes his right to a trial and pleads guilty to an amended charge of first-degree sexual assault of a child-sexual contact (i.e., subsection (1)(e)). (See 7/1/22 Supplement in Support of Motion to Dismiss, Ex. 2).

Violation of the constitutional separation of powers

Last, while it has been “acknowledged that some legislative actions affecting courts do not contravene

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the separation of powers, ‘the legislature is prohibited from unduly burdening or substantially interfering with the judicial branch.’” ***Gabler v. Crime Victims Rights Bd.***, 2017 WI 67, ¶35, 376 Wis. 2d 147, 897 N.W.2d 384; *quoting State v. Holmes*, 106 Wis. 2d 31, 68, 315 N.W.2d 703 (1982). The court will strive to maintain its integrity as a constitutional institution “when the exercise of administrative and legislative power . . . invade[s] the judicial field as to embarrass the court and impair its proper function.” ***Holmes***, 106 Wis. 2d at 69.

The court in no way disputes the legislature’s authority to set mandatory minimum sentences, but the legislature must do so in a reasonable and rational manner if they seek to limit the court’s sentencing discretion. *See State v. Borrell*, 167 Wis. 2d 749, 763, 482 N.W.2d 883 (1992); *see also State v. Stenklyft*, 2005 WI 71, 281 Wis. 2d 484, 697 N.W.2d 769.⁸ And as applied to the facts of this case,

8. In ***State v. Stenklyft***, 2005 WI 71, ¶¶82-83, 281 Wis. 2d 484, 697 N.W.2d 769, a majority concluded the sentence adjustment statute, Wis. STAT. § 973.195 would be interpreted, “to save its constitutionality,” such that a circuit court has discretion to consider, but is not bound by, a district attorney’s objection to a petition for sentence adjustment. Joined by three other justices in concurring in part and dissenting in part, then-Chief Justice Shirley Abrahamson explained that, as written, the statute “allows a circuit court’s deliberative process and judgment to be circumvented by one of the parties involved in the litigation: the district attorney . . . and unconstitutionally impairs the judiciary’s duty to administer justice impartially as well as being violative of the separation of powers doctrine. We know of no other instance in the law in which a party to a judicial proceeding can unilaterally determine the outcome of the proceeding on its merits.” ***Id.***, ¶¶106-108.

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the legislature has created a statutory scheme 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 and the State's own acknowledgement by its plea offer of five to seven years of confinement that the offense in this case does not call for anywhere close to 25 years.

Conclusion

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.

SO ORDERED.

**APPENDIX B — DECISION OF THE COURT
OF APPEALS OF THE STATE OF WISCONSIN,
FILED SEPTEMBER 16, 2025**

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

Appeal No. 2022AP2228-CR
Cir. Ct. No. 2019CF2917

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KEITH C. KENYON,

Defendant-Respondent.

APPEAL from order of the circuit court for Milwaukee
County: DAVID L. BOROWSKI, Judge. *Reversed and
cause remanded for further proceedings.*

Before Colón, P.J., Donald, and Geenen, JJ.

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¶1 GEENEN, J. The State alleges that Keith C. Kenyon had sexual intercourse with his eight-year-old niece, Leah.¹ WISCONSIN STAT. § 948.02(1)(b) (2023-24)² states: “[w]hoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony.” Section 948.02(1)(e) states: “[w]hoever 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.” Both statutes are classified as Class B felonies and carry a maximum of 60 years of imprisonment, but only § 948.02(1)(b) imposes a mandatory minimum sentence, specifically, a mandatory minimum of 25 years of initial confinement. WIS. STAT. § 939.616(1r).

¶2 Kenyon was charged in an information for violating WIS. STAT. § 948.02(1)(b), and therefore, he faced a mandatory 25 years of initial confinement if convicted, even though his alleged conduct necessarily violated § 948.02(1)(e), which carries no mandatory minimum. He moved to dismiss the information, arguing that the statutory scheme was unconstitutional as applied to him.

1. We use the pseudonym “Leah” to refer to the victim in this case. We also note that the parties’ briefs on appeal differ with respect to Leah’s age at the time of the alleged sexual assault, with the State writing that she was ten years old and Kenyon writing that she was eight years old. This disagreement has no effect on the issues presented on appeal, but we observe that the record supports the conclusion that Leah was eight years old at the time of the alleged sexual assault.

2. Because the relevant statutes have not changed between the date of the alleged offense and the release of this opinion, all references to the Wisconsin Statutes are to the 2023-24 version.

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Specifically, he asserted that the statutory scheme violated due process, equal protection, and separation of powers because the statutes unconstitutionally allow prosecutors to determine the defendant's sentence and enable the arbitrary enforcement of the law. Kenyon also contrasted the facts of his case with over 30 other cases charged in Milwaukee County under § 948.02(1)(b) to support his argument that he is being arbitrarily and inconsistently charged as compared to significantly more aggravated cases. The circuit court agreed with Kenyon, dismissed the information, and the State appealed.

¶3 Kenyon raises important constitutional questions. In particular, we are concerned that the record in this case lends merit to Kenyon's argument and the circuit court's conclusion that the decision to charge Kenyon under Wis. STAT. § 948.02(1)(b) was made exclusively because Kenyon insisted on going to trial and was not motivated by legitimate concerns for the public welfare. *See State v. Edwardson*, 146 Wis. 2d 198, 203, 430 N.W.2d 604 (Ct. App. 1988). Nonetheless, Kenyon does not adequately distinguish his case from the overwhelming weight of controlling authority that has previously considered and rejected Kenyon's arguments in similar contexts. Examining other instances of overlapping and identical criminal statutes with different penalty schemes, the United States Supreme Court, the Wisconsin Supreme Court, and this court have rejected arguments identical to those Kenyon makes now, and we are bound to apply those cases here. Accordingly, we reverse the circuit court's order granting Kenyon's motion to dismiss the information and remand the cause for further proceedings.

*Appendix B***BACKGROUND**

¶14 The criminal complaint alleges that Leah stayed the night at Kenyon’s house after he took her to a Disney on Ice show. She pretended to be asleep so that he would carry her to her cousin’s room. Kenyon picked her up, carried her into the room, and laid her on the bed. Kenyon then unzipped Leah’s onesie pajamas, moved her underwear to the side, wiped her vagina with a cloth, and licked her vagina. A few months later, after Leah’s mother told Leah about plans for another sleepover at Kenyon’s house, Leah disclosed the assault to her mother and then to police.

¶15 The State filed an information charging Kenyon with one count of first-degree sexual assault of a child, sexual intercourse with a person who has not attained the age of 12. WIS. STAT. § 948.02(1)(b). Kenyon filed a motion to dismiss the information, arguing that § 948.02(1) was unconstitutional as applied to him. He observed that the legislature created two subsections of first-degree sexual assault of a child which cover the same conduct alleged in the complaint and have the same maximum penalty, but only § 948.02(1)(b) carries a mandatory minimum penalty. Kenyon argued that the statutory scheme violated his due process right to be sentenced by a neutral magistrate because the statutory scheme amounted to “sentencing by prosecutor.” Once the prosecutor decided to charge Kenyon under § 948.02(1)(b), the circuit court was deprived of the discretion to impose anything less than 25 years of incarceration regardless of the presence of mitigating factors and the absence of aggravating factors. Kenyon

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also argued that the statutes were unconstitutionally vague because there was no guidance in the statutory scheme that would prevent a prosecutor's arbitrary and discriminatory enforcement of one subsection versus the other.

¶6 The State argued that *United States v. Batchelder*, 442 U.S. 114, 123-24, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979), confirmed that when a defendant's conduct violates more than one criminal statute, the State has the discretion to decide under which statute to charge the defendant, even if the two offenses have identical elements but carry different penalties. In his reply brief, Kenyon argued that none of the cases cited by the State, including *Batchelder*, dealt with a statutory scheme where one of the two overlapping statutes carried a mandatory minimum penalty. Kenyon claimed that when two criminal statutes overlap and one carries a mandatory minimum penalty, due process requires the legislature to establish "*some* factors to constrain the discriminatory and arbitrary application of the law." The circuit court did not immediately decide Kenyon's motion, and the parties litigated other matters.

¶7 Before the circuit court decided his motion, Kenyon filed an amended motion to dismiss, adding a third argument. Kenyon asserted that the statutory scheme violated the separation of powers doctrine under the Wisconsin Constitution. He observed that the legislature has established mandatory minimum sentences for other crimes, but none of those offenses permit a prosecutor to charge the same conduct under a different statute that does

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not carry a mandatory minimum penalty. He claimed that by enacting two statutes that proscribe the same conduct, one of which carries a mandatory minimum of 25 years in prison and the other carrying no mandatory minimum at all, the legislature unconstitutionally delegated to the executive branch its exclusive power to set the penalty for the crime and its manner of enforcement. Additionally, Kenyon argued that the statutory scheme encroaches on a core function of the judiciary by delegating the court's sentencing power to prosecutors. He argued that by granting prosecutors the power to prescribe the ultimate sentence by its charging decision, the legislature also empowered prosecutors to coerce plea agreements and impose penalties on defendants who choose to exercise their constitutional right to a trial.

¶18 The State, in opposition, highlighted that statutes establishing mandatory minimum sentences are not unlawful. In fact, the State pointed out that in *State v. Lindsey*, 203 Wis. 2d 423, 440-41, 554 N.W.2d 215 (Ct. App. 1996), this court held that even when the legislature sets a particular punishment for a crime, e.g., life without parole, the statute still does not violate the constitutional separation of powers, even though it entirely eliminates a circuit court's sentencing discretion.

¶19 Prior to the circuit court's ruling on the motion, Kenyon filed a chart he compiled from CCAP³ data

3. Wisconsin's Consolidated Court Automation Programs are commonly known as CCAP. The term is used to refer to the internal electronic system used by the courts and clerks, the electronic filing system used by the lawyers and litigants, and the website of court

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showing all 34 cases where the Milwaukee County District Attorney's Office charged a violation of WIS. STAT. § 948.02(1)(b) between January 1, 2018, and July 1, 2022. Kenyon asserted that the facts of his alleged crime were the least aggravated of any of the cases charged under § 948.02(1)(b). For example, he states that all 34 cases involved penetration of some kind (e.g., digital or penile penetration of the victim's mouth, vagina, or anus, or involving penetration of those areas by an object), many cases involved children as young as four to six years of age, and some involved ejaculation by the defendant. Thirty of the 34 cases were amended pursuant to a plea agreement to offenses that carried no mandatory minimum, and of those 30 cases, one defendant received probation, five were sentenced to three-to-seven years of imprisonment, 13 defendants received between eight and 12 years, five received between 13 and 15 years, and three received 16 to 22 years.

¶10 In contrast to these cases, Kenyon is alleged to have licked the outside of his eight-year-old niece's vagina on one occasion for a matter of seconds. In short, Kenyon argued that the facts alleged in the criminal complaint are the least aggravated of all the cases detailed in the chart he filed, and no rational basis exists to explain why Kenyon is being charged inconsistently as compared to the other cases.

records accessible to the general public. "The online website reflects information entered by court staff." *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶15 n.1, 346 Wis. 2d 635, 829 N.W.2d 522. We may take judicial notice of the CCAP records. *Id.*

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¶11 The circuit court granted Kenyon’s motion to dismiss, concluding that the statutory scheme violated due process and separation of powers. It highlighted the amendments to WIS. STAT. § 948.02(1) over the past 20 years, noting that § 948.02(1)(e) did not explicitly include “sexual intercourse” at the time § 948.02(1)(b) and WIS. STAT. § 939.616(1r) were created, and the court concluded that the current version of § 948.02(1), as applied to Kenyon, “gives the State unfettered discretion to choose between a prosecution under § 948.02(1)(b), which requires imposition of the mandatory minimum of 25 years of initial confinement under [§] 939.616(1r), and § 948.02(1)(e), which has no mandatory minimum term of confinement.” It stated that “[t]he total absence of standards to govern the prosecutorial decision results in an arbitrary charging standard and deprives the court of its discretionary authority to consider mitigating factors and impose a sentence of less than 25 years of initial confinement.”

¶12 Further, the circuit court took issue with the State’s decision to charge Kenyon under WIS. STAT. § 948.02(1)(b) given the significant mitigating factors in the case, observing that no penetration of Leah’s vagina is alleged, Kenyon did not expose his private parts, no threats were made, and Kenyon has no prior criminal record. It asserted that even the State was aware of the presence of mitigating factors because it offered to recommend a sentence of five-to-seven years of initial confinement if Kenyon agreed to forego his right to a trial and plead guilty to a charge under § 948.02(1)(e). The circuit court believed that the State uses the statutory scheme “as a bargaining chip to motivate defendants

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... to waive their right to a trial” and therefore “avoid a wholly disproportionate mandatory minimum penalty.” The circuit court distinguished ***Batchelder***, noting that ***Batchelder*** dealt with two overlapping statutes with different *maximum* penalties, whereas here, the two overlapping statutes have different *minimum* penalties.

¶13 The State appeals.

DISCUSSION

¶14 Although framed as a challenge to due process, equal protection, and separation of powers, the issues presented on appeal can be distilled to the following question: whether the legislature can create two or more criminal statutes that prohibit the same conduct but only one of which carries a mandatory minimum penalty, and if so, what guidelines (if any) must the legislature include to limit a prosecutor’s discretion to charge a violation of one statute as opposed to the other.⁴ Kenyon argues that the legislature cannot establish such a scheme, at least without providing meaningful guidance to help prosecutors determine when it is appropriate to charge the offense

4. The Pennsylvania Supreme Court correctly observed that “[w]here it is alleged that a statute fails to provide sufficient guidelines to limit a prosecutor’s discretion in enforcing the statute, there is frequently much overlap between the various constitutional challenges that are typical in such cases, i.e., equal protection, due process/vagueness, and improper delegation.” ***Com. v. Parker White Metal Co.***, 512 Pa. 74, 515 A.2d 1358, 1366 n.11 (Pa. 1986). Thus, our analysis of any one of those three constitutional challenges will be relevant and applicable to the others.

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with the mandatory minimum and when to charge the offense without the mandatory minimum. To the extent such guidance exists, Kenyon argues that the decision to charge him under WIS. STAT. § 948.02(1)(b) violates both the legislative guidance and Milwaukee County’s historical charging practices.

¶15 The seminal case on this issue is *United States v. Batchelder*. Presented in *Batchelder* were two overlapping provisions of the Omnibus Crime Control and Safe Streets Act of 1968. *Id.*, 442 U.S. at 115. Although not identical in every respect, both provisions prohibited convicted felons from receiving firearms, but one provision carried a maximum sentence of two years of imprisonment while the other carried a maximum sentence of five years of imprisonment. *Id.* at 116-18. The defendant argued that the statutes: (1) offended due process and equal protection interests by affording excessive prosecutorial discretion, (2) were void for vagueness, and (3) constituted an impermissible delegation of congressional authority. *Id.* at 122-23. ¶16 With respect to vagueness, the Supreme Court acknowledged that “vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.” *Id.* at 123. However, it concluded that the two provisions “unambiguously specify the activity proscribed and the penalties available upon conviction.” *Id.* The Supreme Court reasoned that “[a]lthough the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments.” *Id.* Thus, “[s]o long as

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overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied.” *Id.*

¶17 With respect to equal protection, the Supreme Court reiterated the well-established rule “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.* at 123-24. It rejected the argument that the statutory scheme at issue granted “unfettered” discretion to prosecutors because “[s]electivity in the enforcement of criminal laws is, of course, subject to constitutional constraints,” e.g., if the enforcement is “based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Id.* at 124-25, 125 n.9 (citation omitted). The Court also observed that a decision to prosecute under the five-year-maximum statute did not empower prosecutors “to predetermine ultimate criminal sanctions” because the decision to charge under the five-year-maximum statute “merely enables the sentencing judge to impose a longer prison sentence” than the two-year-maximum statute would allow. *Id.* at 125. In other words, in *Batchelder*, the power to determine the ultimate criminal sanctions still rested with the sentencing judge, and in fact, prosecuting under the five-year-maximum provision allowed *more* sentencing discretion, not less.

¶18 Finally, the Supreme Court concisely rejected the argument that the statutory scheme impermissibly delegated to the executive branch the legislature’s responsibility to fix criminal penalties. *Id.* It explained:

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The provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose. In light of that specificity, the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws. Having informed the courts, prosecutors, and defendants of the permissible punishment alternatives available under each Title, Congress has fulfilled its duty.

Id. at 126.

¶19 Wisconsin courts have both followed *Batchelder* and expanded it. In *State v. Karpinski*, the Wisconsin Supreme Court dealt with challenges to a statutory scheme where the same conduct was prohibited under both a state criminal statute and a civil municipal ordinance. *Id.*, 92 Wis. 2d 599, 601, 285 N.W.2d 729 (1979). The court observed that this was not a situation similar to *Batchelder* because the county district attorney did not have the option of choosing between criminal and civil enforcement. *Karpinski*, 92 Wis. 2d at 612-14. Rather, if the district attorney chose to proceed with a criminal prosecution, the case would remain with the district attorney. *Id.* at 612. If the district attorney chose not to prosecute, the case would be referred to the municipal city attorney, who would then independently determine whether there should be a prosecution under the city ordinance. *Id.* at 613. Thus, the defendant's argument related to prosecutorial discretion was inapposite. However, the court cited favorably to *Batchelder* in its

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decision, reaffirmed the well-settled rule “that when an act violates overlapping, but not identical, criminal statutes the government may prosecute under either criminal statute so long as there is no discriminatory prosecution,” and quoted WIS. STAT. § 939.65 which states: “If an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions.” *Karpinski*, 92 Wis. 2d at 610-11.

¶20 In *State v. Cissell*, our supreme court expanded the analysis in *Batchelder* to situations in which the criminal statutes are identical, not just overlapping, and concluded that the reasoning in *Batchelder* applied to the Wisconsin Constitution as well as the United States Constitution. *State v. Cissell*, 127 Wis. 2d 205, 218-24, 378 N.W.2d 691 (1985). The court reasoned that although the two statutes at issue in *Batchelder* were overlapping and not identical, the focus of the decision was on the parts that overlapped, i.e., the parts that were identical. It explained: “[T]he fact that the statutes were identical at the point of overlap and as applied to the facts of that case was decisive. The issues considered by the Supreme Court, including vagueness, excessive prosecutorial discretion, and impermissible delegation, all focused on the point of identity between the statutes.” *Cissell*, 127 Wis. 2d at 219. “Overlapping statutes thus present the same issues as identical statutes because the point of overlap essentially creates an identical statute situation.”⁵ *Id.*

5. The dissent in *Cissell*, written by Justice Shirley Abrahamson, acknowledged that “broad prosecutorial discretion is an accepted part of our criminal justice system,” but concluded “that the legislature’s adoption of criminal statutes identical except for

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¶21 In *State v. Lindsey*, the defendant was convicted of second-degree sexual assault of a child as a persistent repeater. *Id.*, 203 Wis. 2d at 429-31. Being charged as a persistent repeater exposed the defendant to Wisconsin’s “three-strikes” law, which mandated life imprisonment without parole for third-time serious felony offenders. *Id.* at 429-30. The defendant argued that the persistent

penalty is an unlawful delegation of power to the executive branch of government contrary to the separation of powers doctrine encompassed in the Wisconsin Constitution.” *State v. Cissell*, 127 Wis. 2d 205, 227, 378 N.W.2d 691 (1985) (Abrahamson, J. dissenting). “[R]esting such unbridled discretion in the prosecuting attorney violates our concept of fundamental fairness and equal protection of the laws.” *Id.* Justice Abrahamson criticized the majority for permitting “the legislature to adopt two or more criminal statutes identical in every respect except for the penalty provision without establishing criteria to guide the prosecutor in deciding under which statute an accused should be prosecuted.” *Id.* She described such a statutory scheme as “delegation running riot.” *Id.* at 230 (quoting *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553, 55 S. Ct. 837, 79 L. Ed. 1570 (1935) (Cardozo, J. concurring)).

Justice Abrahamson also criticized the majority on equal protection grounds, stating that the majority incorrectly discusses equal protection “as though the constitutional command protects only against discriminatory prosecution based upon race, gender, or other suspect classification.” *Cissell*, 127 Wis. 2d at 231 (Abrahamson, J. dissenting). “The equal protection guarantee is broader than the majority acknowledges,” she says, because “[e]qual protection shields persons not only from ‘suspect classifications’ but from classifications that are not rational.” *Id.* Justice Abrahamson concluded that the statutes at issue in *Cissell* violated equal protection because the legislature did not set forth in those statutes any rational basis to guide the prosecutor in determining when to charge one statute over the other. *Id.* “[F]airness requires that people should not arbitrarily be treated differently.” *Id.*

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repeater penalty enhancement statute violated the separation of powers and equal protection doctrines. *Id.* at 429-31. This court rejected the defendant's arguments.

¶22 With respect to separation of powers, the defendant claimed that the persistent repeater statute “remov[ed] all trial court sentencing discretion” in violation of the doctrine. *Id.* at 439. However, we observed that “[i]t is within the legislative power to give the courts discretionary powers, when certain conditions have been judicially determined to exist, *or to direct the court’s action in the premises without discretion.*” *Id.* at 441 (quoting *Jones v. Manesewitz*, 267 Wis. 625, 633, 66 N.W.2d 732 (1954)) (emphasis in *Lindsey*).⁶ Thus, where the legislature has prescribed a specific punishment for a crime, the doctrine of separation of powers not only permits, but requires that the court sentence the defendant accordingly. *Lindsey*, 203 Wis. 2d at 441.

¶23 With respect to equal protection, we explained that the Equal Protection Clause “does not deny a state the power to treat persons within its jurisdiction differently ... so long as the classifications have a reasonable basis.” *Id.* at 443. The defendant in *Lindsey* was not claiming that it was unreasonable for the legislature to prescribe more severe punishments for repeat offenders, but instead, complained that the prosecutor had sole discretion to decide whether

6. *But see Oehler v. State*, 202 Wis. 530, 536, 232 N.W. 866 (1930) (asserting that the legislature cannot fully divest a court of its sentencing discretion); *State v. Radke*, 2002 WI App 146, ¶16 n.12, 256 Wis. 2d 448, 647 N.W.2d 873 (acknowledging the tension between *Lindsey* and *Oehler*).

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to charge a defendant as a persistent repeater without meaningful guidance about when to do so. *Id.* at 444. We rejected the defendant's argument, explaining:

[T]he prosecutor had the discretion to charge Lindsey as a persistent repeater, as a repeater, without the repeater enhancers, or with no crime at all. Just as there is no equal protection violation where prosecutors have the discretion to charge a defendant as a repeater ... there is no equal protection violation where prosecutors have the discretion to choose which repeater statute to charge. In the absence of any allegation that the prosecutor in Lindsey's case exercised his discretion under circumstances that would constitute an abuse of discretion or discriminatory prosecution, we reject Lindsey's equal protection challenge.

Id. at 445-46.

¶24 In our view, Kenyon has not distinguished these cases from his own. Although one could argue about whether WIS. STAT. § 948.02(1)(b) and (1)(e) are overlapping or identical crimes given that it is impossible to violate § 948.02(1)(b) without violating § 948.02(1)(e), *Cissell* held that it does not matter whether the challenged statutes are identical; *Batchelder* still controls. *Cissell*, 127 Wis. 2d at 218-24.

¶25 As we explained above, all of Kenyon's arguments have been previously considered and rejected

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in functionally identical contexts. WISCONSIN STAT. § 948.02(1) cannot be unconstitutionally vague because it “clearly define[s] the conduct prohibited and the punishment authorized[.]” **Batchelder**, 442 U.S. at 123. “Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments.” *Id.* Section 948.02(1) cannot be held unconstitutional for violating the separation of powers doctrine when, in **Lindsey**, we acknowledged that the legislature is allowed to eliminate entirely a circuit court’s sentencing discretion by setting forth a fixed punishment for a crime. *Id.*, 203 Wis. 2d at 441. **Cissell** and **Batchelder** likewise prohibit the conclusion that § 948.02(1) constitutes an unconstitutional delegation of legislative power to the executive branch because “there is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements.” **Cissell**, 127 Wis. 2d at 217 (quoting **Batchelder**, 442 U.S. at 125).

¶26 With respect to his equal protection argument, Kenyon relies heavily on the chart he filed in the circuit court detailing 34 recent cases where the Milwaukee County District Attorney’s Office charged a violation of WIS. STAT. § 948.02(1)(b). On appeal, Kenyon included a supplemental chart detailing 89 cases charged as violations of § 948.02(1)(e) between January 1, 2018 and December 31, 2022, where the victim was younger than

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12 years old. Approximately half of those cases could have been charged as violations of § 948.02(1)(b) because they involved sexual intercourse with a victim under 12, and in 21 of those cases, penetration was alleged. Almost all of these cases involved repeated assaults, and several involved more than one victim.

¶127 From these 89 cases, Kenyon highlighted three to illustrate the inconsistent and arbitrary decision to charge him under WIS. STAT. § 948.02(1)(b). In one case charged under § 948.02(1)(e), the defendant bribed the victim, licked her vagina repeatedly over five years beginning when she was five years old, and penetrated her anus with his penis. In another case charged under § 948.02(1)(e), the defendant “got on top” of the eight-year-old victim and “moved up and down” until he ejaculated. The defendant in that case also admitted to penetrating the victim’s vagina with his penis. Finally, the third case involved the forced penile penetration of an 11-year-old victim during a home invasion.

¶128 These comparisons notwithstanding, Kenyon does not argue that the charging decision was made based on a suspect classification. *Cissell* made clear “that overlapping criminal statutes with different penalty schemes do not violate constitutional principles unless the prosecutor selectively bases the charging decision upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Id.*, 127 Wis. 2d at 215; *see also id.* at 222. The record contains no evidence of discriminatory prosecution.

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¶129 Instead, Kenyon argues that the Milwaukee County District Attorney’s Office is using the discretion granted to it by the statutory scheme in order to impose “trial penalties” on defendants like Kenyon who refuse to plead guilty and instead choose to exercise their constitutional rights. There is very little controlling authority discussing what constitutes a “trial penalty.”⁷ In *United States v. Jackson*, the Supreme Court examined the Federal Kidnapping Act, which imposed the death penalty “only to those defendants who assert[ed] the right to contest their guilt before a jury.” *United States v. Jackson*, 390 U.S. 570, 581, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). It opined that “[t]he inevitable effect of any such provision, is of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial,” and “[i]f the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.” *Id.* (footnote omitted).

¶130 This case is not like *Jackson*, which involved a statute with a trial penalty set forth explicitly in the text of the statute. Instead, we find guidance in *State*

7. The National Association of Criminal Defense Lawyers defines a “trial penalty” as “the discrepancy between the sentence offered during plea negotiations and the sentence a defendant will face after trial[.]” *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, NACDL (July 10, 2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf>.

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v. Edwardsen. In *Edwardsen*, we acknowledged that factors other than “legitimate concerns for the public welfare” might motivate a vindictive prosecutorial response to a defendant’s exercise of a constitutional right—in Edwardsen’s case, exercising his right to appeal and obtaining a retrial on previously decided issues. *Id.*, 146 Wis. 2d at 203. We recognized that “to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” *Id.* Accordingly, we stated “that a presumption of vindictiveness attaches to a prosecutor who increases charges when, as in the instant case, the [S]tate is pursuing a second conviction for the same course of conduct following a defendant’s successful appeal.” *Id.*

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

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¶32 We do not have a satisfactory answer as to why a prosecutor’s decision to increase the severity of the charges after a successful appeal would carry a presumption of vindictiveness while the same motivation (i.e., avoiding trial) would not carry this presumption if it was done prior to the first trial. Nonetheless, we find no case that stands for or even implicitly supports the proposition that a trial penalty is imposed when the State chooses to charge a defendant under the harsher of two identical or overlapping statutes prior to trial. This conclusion appears to contradict the overwhelming number of cases that hold that prosecutors have absolute discretion to decide what charge to bring when a defendant’s alleged conduct violates two or more identical or overlapping criminal statutes. Accordingly, we must reject Kenyon’s equal protection argument.

CONCLUSION

¶33 For the foregoing reasons, we reverse the circuit court’s order granting Kenyon’s motion to dismiss the information. We remand the cause for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

Recommended for publication in the official reports.

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**APPENDIX C — ORDER OF THE SUPREME
COURT OF WISCONSIN, FILED JUNE 16, 2026**

SUPREME COURT OF WISCONSIN

No. 2022AP2228-CR
L.C. #2019CF2917

STATE,

v.

KENYON,

Filed June 16, 2026

The Court has entered the following order:

A petition for review pursuant to WIS. STAT. § 808.10
having been filed on behalf of defendant-respondent-
petitioner, Keith C. Kenyon, and considered by this court;

IT IS ORDERED that the petition for review is
denied, without costs.

Samuel A. Christensen
Clerk of Supreme Court