STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP2680-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

PATRICK J. LYNCH,

Defendant-Respondent.

ON REVIEW OF A DECISION OF THE COURT APPEALS, DISTRICT IV, AFFIRMING AN ORDER BARRING TESTIMONY, ENTERED IN THE CIRCUIT COURT FOR DODGE COUNTY, THE HONORABLE ANDREW P. BISSONNETTE PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER, STATE OF WISCONSIN

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ISSUES PRESENTED FOR REVIEW

1. Should this court overrule *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), because it erroneously held that the Due Process Clause as interpreted in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), mandates the pretrial in camera review and potential disclosure of

privileged, privately held mental health records whenever a criminal defendant makes a preliminary showing of materiality?

The State did not present this issue to the lower courts because they are bound by *Shiffra*.

2. *Shiffra* held that under the circumstances there, barring the complainant from testifying was the only way to protect Shiffra's right to a fair trial following her refusal to submit her records for in camera review after Shiffra made a preliminary showing of materiality.

Assuming this court affirms *Shiffra*'s due-process holding, should it clarify that witness preclusion is not automatic whenever a witness refuses to waive her privilege under Wis. Stat. § 905.04 after the defendant has made the showing required by *Shiffra*, as modified by *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298?

The lower courts found that *Shiffra* left them no choice but to preclude A.M. from testifying based on her refusal to submit her records for in camera review, and the court of appeals declined the State's request to certify the issue to this court.

3. May a circuit court use Wis. Stat. § 146.82(2)(a)4. to require production of privately held privileged records regardless of whether the privilege-holder consents?

The lower courts found themselves bound by language in *Shiffra* that they believe forecloses this remedy, and the court of appeals declined the State's request to certify the issue to this court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, both oral argument and publication of the court's opinion are warranted.

STATEMENT OF THE CASE AND FACTS

In a criminal complaint filed December 22, 2010, Patrick J. Lynch was charged in Dodge County Circuit Court with first degree sexual assault of a child, contrary to Wis. Stat. § 948.02(1), and three counts of stalking, contrary to Wis. Stat. § 940.32(2) (1:2-3). The sexual assault charge in count one and the stalking charge in count two involved the same alleged victim, A.M.[1]

A.M. reported that Lynch had put his penis and fingers into her vagina during the summer of 1989, when she was just seven years old (*id.*:4). Lynch was a law enforcement officer (31:19, 32) and "good friends" with A.M.'s father (*id.*:27), who was convicted of sexually assaulting

[1] A.M. is identified as "A" in the complaint (1:4-5), but the State in its brief will refer to her by both of her initials, as it did in the court of appeals and as that court did in its opinion.

A.M. on multiple occasions in the early 1990's (96:2; Pet-Ap. 130).

The stalking charge in count two was based on alleged conduct that occurred during 2007 and 2008, while A.M. was employed as a teller at a bank in Beaver Dam (1:4-5).

Following a preliminary hearing[2] on February 1, 2011 (31), Lynch was bound over for trial. An information charging him with three counts of first degree sexual assault of a child and three counts of stalking was filed February 17, 2011 (27). All of the sexual assault counts and one stalking count involve A.M. (95:1-2).[3]

Lynch filed a motion seeking an in camera inspection of "all psychiatric, psychological, counseling, therapy and clinical records" of A.M. compiled by Dr. Sionag Black, Dr. Rachel Heilzer, or "others" from 1993 to 2011 (48:2). He claimed that "failure to conduct the *in camera* review being requested would deny the defendant his constitutional right to present a defense guaranteed by the Sixth Amendment of the United States Constitution, and Article I Section 7 of the Wisconsin Constitution" (*id.*:3).

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[2] Only that portion of the preliminary hearing containing A.M.'s testimony has been transcribed (*see* 31:1-48).

[3] The trial court on September 6, 2011, granted Lynch's motion to sever counts five and six, both of which involve a victim other than A.M. *See* 95:3-4, 13. The court ordered that the counts involving A.M. be tried first. *Id.*:13.

The State gave Lynch a portion of what he requested, turning over hundreds of pages of discovery to him. As part of that disclosure, the State provided Lynch with formerly privileged therapy and medical records of A.M. that are no longer privileged because they were released in connection with the trial of her father (47; 51:1). The State objected to Lynch's motion for in camera review of other therapy records that remained privileged, however, on the ground that Lynch failed to establish a constitutional right to review (*see generally* 51).

The circuit court granted Lynch's motion for in camera review (96; Pet-Ap. 129-44). It ordered A.M. to "identify for the Court the names and addresses of all of her treatment providers since January 1, 1990" and to "sign a release of records authorizing the Court to obtain such records for the specific purpose of an *in camera* review by the Court" (96:14; Pet-Ap. 142). The circuit court stated that "if A.M. refuses to allow the Court access to her records, her testimony shall be barred at trial" (96:15; Pet-Ap. 143).

A.M. notified the prosecutor that she would not release her therapy records "[u]nless and until" the circuit court's order is reviewed by another court or the prosecution declines to appeal (97). Based on her decision, the circuit court entered an order barring A.M. from testifying at Lynch's trial (110:2-3; Pet-Ap. 126-27).

The State appealed the order to the Wisconsin Court of Appeals. After the parties' briefs-in-chief were filed, the appellate court on May 24, 2012, stayed the appeal until this court had either denied the petition for review in *State v. Johnson*, No. 2011AP2864-CRAC or, having granted review, issued a decision in that case.

This court issued a per curiam opinion in *Johnson* on July 3, 2013. *State v. Johnson*, 2013 WI 59, 348 Wis. 2d 450, 832 N.W.2d 609 (*Johnson I*). Both parties moved for reconsideration. Eight months later, this court granted Johnson's motion for reconsideration and issued a second per curiam opinion. The court declared that because it had deadlocked, the court of appeals' decision remained the law of the case. *State v. Johnson*, 2014 WI 16, 353 Wis. 2d 119, 846 N.W.2d 1 (*Johnson II*).[4]

On August 8, 2013, the court of appeals lifted its stay, and the State shortly thereafter filed its reply brief. On November 6, 2014, the court of appeals affirmed the circuit court's order barring A.M. from testifying and remanded for further proceedings. The State filed a petition for review, which this court granted on March 16, 2015.

[4] Pursuant to the court of appeals' decision, the complainant in *Johnson* was barred from testifying at his trial. *State v. Johnson*, No. 2011AP2864-CRAC, slip op. ¶¶2, 17, 19 (Wis. Ct. App. Apr. 18, 2012) (Pet-Ap. 147, 151, 152).

ARGUMENT

I. *Shiffra* Erroneously Held That *Pennsylvania v. Ritchie* Applies To Privately Held Privileged Records The Government Has Never Possessed, Thereby Creating A Due-Process Right To Pretrial Discovery In Conflict With Supreme Court Jurisprudence.

In *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), the court upheld a pretrial order suppressing the testimony of an alleged sexual assault victim because she refused to allow an in camera inspection of her mental health treatment records. The court framed the first issue as "whether an *in camera* inspection is warranted under *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)." *Id.* at 602. The court of appeals said a defendant would be entitled to in camera review if he could "make a preliminary showing that the sought-after evidence is relevant and may be helpful to the defense or is necessary to a fair determination of guilt or innocence." *Id.* at 608. In adopting this standard, the court analogized to cases in which a defendant seeks disclosure of a government informant's identity, such as *Roviaro v. United States*, 353 U.S. 53 (1957). *Shiffra*, 175 Wis. 2d at 608. The court found that in both situations, it was required "to balance the defendant's constitutional right to a fair trial against the state's interest in protecting its citizens by upholding a

statutorily created privilege." *Shiffra*'s holding is based solely on due process. *See id.* at 605 n.1.

Later modified by *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, *Shiffra* has been the law in Wisconsin for over twenty years. During that time, the State has periodically urged this court to find that *Shiffra* was wrongly decided, largely because of what the State perceives to be its misplaced reliance on *Ritchie*, where the investigative files at issue were in the government's possession. The State's most recent attempt was in *Johnson II*, which culminated in a five-justice[5] per curiam opinion that did not resolve the merits of the underlying issues. *See* 353 Wis. 2d 119.

As in *Johnson*, the State begins by asking this court to revisit and overrule *Shiffra*.

> A. *Shiffra* failed to explain why *Ritchie*, a case premised on the government's obligation under *Brady* to disclose evidence in its possession that is favorable to the defense, logically should apply to privately held records to which the government has no access.

In *Shiffra*, the State argued that one reason the complainant's mental health records were not subject to in camera review under *Ritchie* was that they were not in the

[5] Justices Prosser and Gableman did not participate in the *Johnson* appeal.

possession of the prosecution or any other state agency. 175 Wis. 2d at 606. In rejecting this argument, the court of appeals declared itself bound by Wisconsin precedent which "makes *Ritchie* applicable to cases in which the information sought by the defense . . . is not in the possession of the state." *Id.* at 606-07. The precedent cited was *In Interest of K.K.C.*, 143 Wis. 2d 508, 422 N.W.2d 142 (Ct. App. 1988), and *State v. S.H.*, 159 Wis. 2d 730, 465 N.W.2d 238 (Ct. App. 1990). *See Shiffra*, 175 Wis. 2d at 607.

While *Shiffra* was technically correct in saying that *K.K.C.* did not involve records in the State's possession, *K.K.C.* did involve government records, i.e., records of the Rock County Department of Social Services. Because the records in *K.K.C.* were not privately held, that decision hardly supports *Shiffra*'s application of *Ritchie* to privately held mental health treatment records.

As for *S.H.*, neither the appellant nor the guardian for the minor children even cited *Ritchie* in their respective briefs-in-chief. *See Appendices and Briefs*, 159 Wis. (2D) 694-747, Tab 5.[6] Only the State cited *Ritchie*, taking the position it applied to records that admittedly were in the possession of a private counseling center. *S.H.*, 159 Wis. 2d at 733. Because there was no dispute as to *Ritchie*'s relevance, the court of appeals did not question its applicability but simply

[6] *Appendices and Briefs* can be found in the State Law Library.

accepted the State's assertion. But regardless of whether the *S.H.* court gave much consideration to whether *Ritchie* should apply in the context of privately held records, the court's adoption of *Ritchie* was dicta because it found that S.H. had abandoned the *Ritchie* issue on appeal. *Id.* at 738. *See American Family Mut. Ins. Co. v. Shannon*, 120 Wis. 2d 560, 565, 356 N.W.2d 175 (1984) ("dictum is a statement not addressed to the question before the court or necessary for its decision"). Because the court's adoption of *Ritchie* was dicta, the *Shiffra* court erred in believing itself bound by *S.H. State v. Matson*, 2003 WI App 253, ¶ 24, 268 Wis. 2d 725, 674 N.W.2d 51 ("we are not bound by statements that are dicta").

But even if *S.H.'s* application of *Ritchie* to privately held records did bind the court of appeals in *Shiffra*, *S.H.*'s. conclusion that *Ritchie* applies to privately held counseling records does not bind this court. *Shiffra* rests on the erroneous premise that *Ritchie* supports a constitutional due-process right to pretrial discovery of privately held privileged records, and this shaky foundation should itself prompt this court to revisit and overrule that decision. But the fact *Shiffra* is at odds with the well-settled principle that there is no due-process right to pretrial discovery is another reason to re-examine *Shiffra*. The State discusses each reason below.

The Supreme Court framed the issue in *Ritchie* as "whether and to what extent a State's interest in the confidentiality of its investigative files concerning child abuse must yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence." 480 U.S. at 42-43. During pretrial discovery in his criminal prosecution for sex crimes against his minor daughter, Ritchie had served a subpoena on a protective service agency established by the State to investigate cases of suspected child mistreatment and neglect. The subpoena ordered the agency, Children and Youth Services (CYS), to turn over records relating to the charges against Ritchie, as well as earlier records compiled when CYS had investigated a separate report that his children were being abused. CYS refused to comply, claiming the records were privileged under a Pennsylvania statute which provides that all CYS records must be kept confidential, subject to eleven specific exceptions. One exception allowed the agency to disclose reports to a "'court of competent jurisdiction pursuant to a court order.'" *Id.* at 44 (citing a Pennsylvania statute). After reviewing a portion of the CYS files, the trial judge refused to order CYS to disclose the files. Ritchie was ultimately convicted on all counts.

The Pennsylvania Supreme Court eventually vacated Ritchie's convictions, ruling that his rights to confrontation and compulsory process had been violated by the trial court's

refusal to order CYS to disclose its files to defense counsel. 480 U.S. at 45-46. The Supreme Court granted Pennsylvania's petition for a writ of certiorari.

In examining Ritchie's claim that withholding the file violated his right to compulsory process, the Court – after concluding that the Due Process Clause of the Fourteenth Amendment offers no lesser protection than that conferred by compulsory process – adopted a due-process analysis. 480 U.S. at 56.[7] The Court began its discussion by citing three cases dealing with the government's duty to disclose evidence within its possession: *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976); and *Brady v. Maryland*, 373 U.S. 83 (1963). 480 U.S. at 57.

Just as the CYS files were in the possession of a state agency, the evidence at issue in *Brady*, *Agurs* and *Bagley* was in the possession of the state (*Brady*) or the federal government (*Agurs* and *Bagley*). Unlike the situation in which a testimonial privilege belongs to a witness, the conflict between Ritchie's constitutional rights and the privileged character of the records he sought was not a conflict between a defendant and a private party. Rather, the privilege belonged to the Commonwealth of

[7] A four-member plurality summarily rejected Ritchie's confrontation claim, finding that the right to confrontation does not compel the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987).

Pennsylvania rather than a private citizen. The Court's focus on the Commonwealth as privilege-holder is clear from its references to "the State's interest in confidentiality" (480 U.S. at 59) and "the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations" (*id.* at 61).

Nothing in *Ritchie* even hints that the High Court thought its rulings would apply to privileged records neither created by nor in the possession of the government. In fact, the plurality cited approvingly the declaration in *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977), that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." 480 U.S. at 59-60. Despite this language, *Shiffra* relied on *Ritchie* in creating a due-process right to pretrial discovery in a criminal case that is untethered from the government's obligation under *Brady* to disclose to the defense favorable evidence within the government's possession.

Applying a standard developed against the backdrop of the government's duty to disclose *Brady* evidence to privately held privileged records inaccessible to the government represented a quantum leap from *Ritchie* to *S.H.* and *Shiffra.* That quantum leap was ill-advised because, as numerous courts outside Wisconsin have recognized, *Ritchie*'s due-process analysis does not apply to records not within the government's possession. Moreover,

as will be discussed in section I.C., the underlying premise in *Shiffra* conflicts with Supreme Court decisions like *Weatherford* and *Wardius v. Oregon*, 412 U.S. 470 (1973).

The year after *Ritchie*, the Vermont Supreme Court in *State v. Percy*, 548 A.2d 408, 415 (Vt. 1988), declared that "[t]he pretrial discovery right set out in *Ritchie* applies solely to information in the hands of the State." Since then, a host of other courts – state and federal – have reached the same conclusion. *See*, *e.g.*, *United States v. Hach*, 162 F.3d 937, 947 (7th Cir. 1998)[8] ("While we have our doubts that the defendant can meet his burden of showing that the information in Richardson's records is material . . . his attempt to bootstrap onto *Ritchie* suffers from a graver problem—the evidence is not and never was in the government's possession."). *See also United States v. Shrader*, 716 F.Supp.2d 464, 473 (S.D.W.V. 2010) (*Ritchie*'s *Brady* analysis inapplicable where records are not in possession of the government or a government agent); *People v. Hammon*, 938 P.2d 986, 991-93 (Cal. 1997) (refusing to extend *Ritchie* to grant pretrial discovery of a witness's privileged psychotherapy records); *State v. Famiglietti*, 817 So.2d 901, 907 (Fla. Dist. Ct. App. 2002) (*Ritchie* is not

[8] Because it is convinced that *Ritchie* applies only to evidence in the government's possession, the Seventh Circuit in *United States v. Hach*, 162 F.3d 937, 947 n.5 (7th Cir. 1998), erroneously concluded that Wisconsin cases like *Shiffra* are based on state law rather than the federal constitution.

authority for proposition that due process clause authorizes invasion of a generally accepted testimonial privilege); *In re Subpoena to Crisis Connection, Inc.*, 949 N.E.2d 789, 799-802 (Ind. 2011) (*Ritchie*'s due-process analysis based on government's *Brady* obligation and does not apply to victim-advocate privilege, which excludes from its protection disclosure by persons affiliated with the State); *Goldsmith v. Maryland*, 651 A.2d 866, 873 (Md. 1995) ("Neither due process, compulsory process nor the right to confront adverse witnesses establishes a pre-trial right of a defendant to discovery review of a potential witness's privileged psychotherapy records").

In the words of the *Goldsmith* court,

> [T]he psychotherapist-patient privileged records at issue in the instant case were not kept by a state agency or required to be kept by a state agency. Therefore no disclosure is required under *Brady*. Thus, not only does [a Maryland statute] prohibit discovery of the privileged records requested by Goldsmith, but nothing in *Ritchie* . . . would constitutionally require the pre-trial discovery sought by Goldsmith of a private psychotherapist's records which are "shielded from all eyes," state or defense.

651 A.2d at 873.

B. *Jaffee v. Redmond* strongly suggests that the Supreme Court would not extend *Ritchie* to records covered by an absolute privilege that are inaccessible to the government.

Subsequent to *Ritchie*, the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996), recognized a psychotherapist-patient privilege under Rule 501 of the Federal Rules of Evidence. In doing so, the Court rejected the view that the privilege should be balanced against the need for evidence in a given case:

> We reject the balancing component of the privilege implemented by [the Seventh Circuit] and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. . . . [I]f the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

Jaffee, 518 U.S. at 17-18 (footnote and citation omitted).

While the *Jaffee* Court in a footnote acknowledged that there are situations in which the privilege must give way, the only example the Court gave was "if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." 518 U.S. at 18 n.19. Disclosure in that situation, however, would be much narrower than the wholesale in camera review of years'

worth of therapy records that would occur here, assuming A.M. were to waive her privilege or this court were to hold that review without her consent is legally supportable. *See* argument III., *infra*.

Some federal courts have pointed to *Jaffe* as proof that the Supreme Court did not intend *Ritchie* to apply to privileged therapy records.

In *Shrader*, 716 F.Supp.2d at 472, the court rejected the defendant's argument that *Jaffee* should be limited to the civil context in which it was decided, finding that "the emphatic language used by the *Jaffee* court regarding the fallacy of a balancing test demonstrates that the court intended for the privilege to apply in all circumstances, civil and criminal." In rejecting Shrader's contention that he was entitled to in camera review of the alleged victim's psychological records, the court explained why *Ritchie* did not support that entitlement:

> Given that *Ritchie* was a predecessor to *Jaffee,* the latter case can be seen as determining what the result would have been in the former case had the subpoenaed records been subject to the psychotherapist-patient privilege. The possibility of *in camera* review under *Ritchie* is also inappropriate in this case because, unlike in *Ritchie,* the VCS records are not in possession of the government or a government agent; *Ritchie*'s *Brady* analysis is inapplicable here.

Shrader, 716 F. Supp.2d at 473.

Similarly, the Eighth Circuit in *Johnson v. Norris*, 537 F.3d 840, 845-47 (8th Cir. 2008), rejected the habeas petitioner's claim that *Ritchie* created a rule that a State's

psychotherapist-patient privilege must yield to an accused's desire to use such information in defense of a criminal case. The court found that it was not unreasonable for the state court to have relied on *Jaffe* for the proposition that the psychotherapist privilege was more important than Johnson's need for probative evidence.

The foregoing cases support the State's contention that *Shiffra* and its forerunner, *S.H.*, rest on the erroneous premise that the due-process right to pretrial in camera review and potential disclosure of the state investigative files at issue in *Ritchie* extends to privately held privileged records that the government did not create and has never possessed. But if the foregoing cases themselves do not persuade this court to overrule *Shiffra*, its conflict with Supreme Court jurisprudence – as detailed below – should convince this court that *Shiffra* was wrongly decided.

C. *Shiffra* conflicts with Supreme Court jurisprudence establishing that there is no due-process right to pretrial discovery outside the *Brady* line of cases.

The net result of *Shiffra* and its progeny is the creation of a federal due-process entitlement to pretrial discovery. The *Shiffra* line of cases therefore conflicts with *Weatherford*, 429 U.S. 545, and *Wardius*, 412 U.S. 470, both of which leave no doubt that apart from evidence the prosecution is duty-bound to disclose under *Brady*, the Due

Process Clause does not afford criminal defendants a right to pretrial discovery.

In *Weatherford*, the Court determined that *Brady's* prohibition on the prosecutor's concealment of evidence favorable to the accused does not mean the prosecutor must reveal pretrial the names of all witnesses who will testify unfavorably. *See* 429 U.S. at 559. And in *Wardius*, after noting the absence of statutory provisions requiring the State to reveal the names and addresses of witnesses it planned to call to refute the defendant's alibi, the Court rejected any suggestion that "the Due Process Clause of its own force requires Oregon to adopt such provisions." 412 U.S. 475.

Consistent with *Weatherford* and *Wardius*, courts have almost uniformly held that, absent a state statute or court rule to the contrary, an accused is not entitled to take pretrial depositions of potential witnesses. *See generally* Romualdo P. Eclavea, Annotation, *Accused's Right to Depose Prospective Witnesses Before Trial in State Court,* 2 A.L.R.4th 704, 711-22 (1980 and June 2014 Supp.).

Representative of those courts, the Seventh Circuit recently cited *Weatherford* for the proposition that the Constitution does not create an entitlement to pretrial discovery. *Young v. Holder*, 462 Fed. Appx. 626, 628 (7th Cir. 2012). Similarly, the Maryland court in *Yearby v. State*, 997 A.2d 144, 151 n.8 (Md. 2010), invoked *Weatherford* as

support for the statement that "*Brady* disclosure thus is fundamentally distinct from discovery rules, which . . . are not grounded in either the Federal or State Constitution." *Id.* at 151.

Shiffra and its progeny do not attempt to reconcile the creation of a due-process right to pretrial discovery of privately held records with *Weatherford* or *Wardius*, even though this court has in other contexts cited those cases for the principle that there is no general constitutional right to pretrial discovery in a criminal case. *See State v. Ruiz*, 118 Wis. 2d 177, 196 n.4, 347 N.W.2d 352 (1984); *State v. Humphrey*, 107 Wis. 2d 107, 116 n.4, 318 N.W.2d 386 (1982). Nor is the State aware of any case outside Wisconsin that attempts to reconcile this tension.

The conflict between *Shiffra* and Supreme Court jurisprudence presents another reason for this court to overrule it. The Supremacy Clause arguably requires this result.[9] Additionally, recognizing a due-process right to in camera review of a victim's privileged therapy records has given an unintended advantage to defendants like Lynch and Johnson, both of whom were quite familiar with their alleged victims and their respective counseling histories. In contrast to Lynch and Johnson, a defendant charged with

[9] *See State v. Jensen*, 2011 WI App 3, ¶ 26, 331 Wis. 2d 440, 794 N.W.2d 482 (Supremacy Clause compels adherence to United States Supreme Court precedent on matters of federal law, although it means departing from state supreme court decisions).

sexually assaulting a complete stranger normally will have no prior knowledge of her mental health history and will not be positioned to bring a successful *Shiffra* motion. And because such a defendant has no right to a pretrial deposition of the complainant to explore whether she has a history of mental health treatment, he may never discover that information. At the same time, a defendant who is familiar with his victim prior to an assault will often have at his disposal information outside of privileged records that can be used to undermine the victim's credibility, whereas a defendant who assaults a stranger will not.

Thus, this Court's holding in *Shiffra* unintentionally provides a significant tactical advantage to defendants charged with sexually assaulting loved ones and acquaintances that defendants charged with assaulting strangers do not enjoy. The former class of defendants often have enough knowledge of their victims that they can make the showing required by *Shiffra*/*Green* and, if the victim refuses to submit her records for in camera review, escape prosecution. In contrast, defendants lacking prior familiarity with their victims are less likely to satisfy *Shiffra*/*Green* and to potentially escape prosecution as a result. This unintended byproduct of *Shiffra* is another reason to question its legal soundness.

In asking this court to overrule *Shiffra*, the State is mindful that this Court generally "adheres to stare decisis to maintain confidence in the reliability of court decisions, promote evenhanded, predictable, and consistent development of legal principles, and contribute to the actual and perceived integrity of the Wisconsin judiciary." *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 93, 295 Wis. 2d 1, 719 N.W.2d 408 (citation omitted). Thus, this Court does not overturn precedent unless there is a strong justification to do so. *State v. Outagamie County Board of Adjustment*, 2001 WI 78, ¶ 29, 244 Wis. 2d 613, 628 N.W.2d 376 (citation omitted).

Despite this general rule, this Court has recognized that "[s]tare decisis is neither a straightjacket nor an immutable rule." *Johnson Controls v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 100, 264 Wis. 2d 60, 665 N.W.2d 257. One criterion for assessing whether to depart from precedent is whether the decision is unsound in principle. *Id.* at ¶ 99. That is the situation with *Shiffra* and for that reason, this court should be willing to depart from the *Shiffra* line of cases.

II. Even If This Court Declines To Overturn *Shiffra*, Witness Preclusion Should Not Be Automatic Whenever A Witness Refuses To Waive Her Privilege Under Wis. Stat. § 905.04 After The Trial Court Determines That The Defendant Has Made The Showing Required By *Shiffra*/*Green*.

A. In other contexts, this court has used a balancing test to determine on a case-by-case basis whether a defendant's constitutional right to present evidence trumps other competing interests in the criminal trial process.

Even if this court affirms *Shiffra*'s holding that there is a due-process right to pretrial in camera review of a witness's privileged treatment records, this court should overrule *Shiffra* insofar as it has been construed to hold that witness preclusion is always required whenever a defendant satisfies *Shiffra*/*Green* but the alleged victim withholds consent to review of her privileged records. Instead, this court should hold that when trial courts confront that situation, they should balance the defendant's constitutional rights against the witness's right to privacy in her privileged records. Whether the witness is allowed to testify will depend on the outcome of that balancing.

In *Johnson I*, two members of this court, the Chief Justice and Justice Bradley, expressed the view that the seventeen-year-old complainant could testify at trial even though she refused to waive her privilege after Johnson had

met the *Shiffra/Green* showing. *See Johnson I*, 348 Wis. 2d 450, ¶ 4. These justices agreed with the circuit court's determination that under the circumstances there, suppression of the privilege-holder's testimony was "neither required nor appropriate as a sanction." *Id.* While they did not explain how they arrived at this conclusion, there is ample case law that indirectly supports their view.

One such case is *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), which pitted the rape-shield statute, Wis. Stat. § 972.11(2), against Pulizzano's rights to confrontation and compulsory process.

The *Pulizzano* court found that the defendant had "established a constitutional right to present evidence of the prior sexual assault [the victim] experienced." 155 Wis. 2d at 653. The court explained that the existence of the constitutional right did not mean Pulizzano could necessarily present the desired evidence, however:

> [I]t remains to be determined whether the State's interests in prohibiting the evidence nonetheless requires that it be excluded. In an appropriate case, *even though a defendant's right to present certain evidence is constitutionally protected, that right may have to "bow to accommodate other legitimate interests in the criminal trial process."*

Id. (emphasis added and citations omitted).

Pulizzano adopted a balancing test, pursuant to which "there must be compelling state interests to overcome the defendant's constitutional rights." 155 Wis. 2d at 654. After examining the State's interest in enforcing the rape-shield

law, as well as Pulizzano's need to present evidence that the child-victim had suffered prior sexual assaults by another person, this court concluded that Pulizzano's rights prevailed. *Id.* at 655. Nevertheless, the court stressed that it was not holding that the defendant's constitutional rights would *always* trump the statute: "Whether the statute is unconstitutional as applied to other instances is to be resolved on a case-by-case basis." *Id.*

Pulizzano is not alone in supporting the proposition that some alleged victims should be allowed to testify despite refusing to submit their privileged records to an in camera inspection. *State v. St. George*, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777, provides another example of this court's recognition that even when a defendant has established a constitutional right to present evidence, that right is not absolute and may have to be balanced against, and possibly yield to, other competing interests.

In *St. George*, the circuit court had excluded a defense expert whose proposed testimony was designed to rebut a prosecution witness's testimony about recantation and another prosecution witness's testimony that the cognitive graphic interview technique was reliable. *St. George*, 252 Wis. 2d 499, ¶¶ 30-34. In deciding whether the trial court had erroneously exercised its discretion in barring the defense doctor from testifying, this court held that "[f]or the defendant to establish a constitutional right to the

admissibility of the proffered expert witness testimony . . . [he] must satisfy a two-part inquiry, similar to the inquiry this court has developed in determining whether the application of the rape shield statute excluding certain evidence deprives an accused of constitutional rights to present a defense." *Id.* ¶ 53. Under the first part of the two-part inquiry, the defendant must satisfy four factors "to establish a constitutional right to present the expert testimony." *Id.* ¶ 55.

Following the path it had forged in *Pulizzano*, this court decided that establishing a constitutional right to present the expert testimony is insufficient to guarantee its admission. Instead, this court held that after the defendant has established a constitutional right to present the testimony, the trial court would then have to "determin[e] whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence." *St. George*, 252 Wis. 2d 499, ¶ 55 (footnote omitted).

Although this court decided that the State's concern that the defense expert's testimony would mislead the jury was not a compelling reason for excluding the evidence, 252 Wis. 2d 499, ¶¶ 70-72, *St. George* supports the State's view that even when a defendant establishes a constitutional right to in camera review of privileged records, there may be

situations where that right must yield to the witness's right to privacy in her privileged records.

This court recently applied the two-part *St. George* test in *State v. Fischer*, 2010 WI 6, 322 Wis. 2d 265, 778 N.W.2d 629. There Fischer argued that the exclusion of expert opinion testimony that rested in part on the results of a preliminary breath test (PBT) violated his constitutional right to present a defense. Based on the PBT result, a later blood-test result, and typical absorption rates, Fischer's expert would have testified that when Fischer was stopped by police, his blood-alcohol concentration was below the legal limit. *Id.* ¶ 1.

This court assumed, without deciding, that Fischer had satisfied the four factors that constitute the first part of the *St. George* inquiry. 322 Wis. 2d 265, ¶ 29. Despite assuming that Fischer had demonstrated a constitutional right to present the expert's opinion, this court determined that the State had a compelling interest in excluding expert testimony based on PBT results, and that this compelling interest outweighed Fischer's right to present evidence. *Id.* ¶ 32. More specifically, the court found that the State has a compelling interest in arresting and prosecuting drunk drivers and that making PBT results inadmissible would further this interest by eliminating any disincentive a driver might have to consent to the PBT. *Id.*

This triad of cases – *Pulizzano*, *St. George* and *Fischer* – recognizes that there are situations in which a defendant's constitutional rights must be balanced against, and occasionally yield to, other important interests in the criminal justice system. Those "other important interests" include the State's interest in protecting a sexual-assault complainant from prejudice and irrelevant inquiries by enforcing the rape-shield law, and the State's interest in removing drunk drivers from the road by excluding expert testimony that is based in part on PBT results.

The State recognizes that the evidence at issue in those cases was within the defendant's possession, and therefore known to him, whereas in the *Shiffra*/*Green* context the defendant is seeking to discover evidence outside his possession. But the principles established in *Pulizzano*, *St. George* and *Fischer* should apply with equal force where a defendant's constitutional right to pretrial discovery clashes with a witness's right to privacy in her privileged therapy records and the State's interest in enforcing the rule of privilege. In either situation, the defendant's constitutional right should not always supersede the State's or the witness's competing interest, whether that interest arises from a statute or the common law rather than the Constitution. Rather, the determination of whether the defendant's constitutional right or the competing State

interest prevails should be made on a case-by-case basis, as this court recognized in *Pulizzano*, 155 Wis. 2d at 655.

In deciding in a given case whether the defendant's constitutional right to in camera review of a witness's privately held records should trump the witness's privilege and right to privacy, as well as the State's interest in enforcing evidentiary privileges, a trial court should consider a number of factors. Those non-exhaustive factors should include the defendant's access to evidence outside the sought-after records that supports his defense to the charges; the trauma the witness would experience if her records were subject to in camera review without her consent; and the time period encompassed by the records compared to the dates of the charged crimes and the date the witness reported.

The State explains below why it believes each factor is relevant in balancing the defendant's constitutional rights against the witness's and the State's interests.

B. Factors a trial court should consider in deciding whether a witness will be allowed to testify despite refusing to consent to in camera review of her records, after the defendant satisfies the *Shiffra*/*Green* showing.

Whether the defendant has access to non-privileged evidence that would support his defense is of major importance in deciding whether his right to in camera review should trump the privilege codified in § 905.04. For

example, a defendant charged with sexually assaulting an adult may claim that she consented to sexual contact but is a pathological liar, and he may seek her treatment records for statements supporting that defense. If the defendant has at his disposal multiple witnesses who would testify that the complainant has falsely accused them of sexual assault after engaging in consensual sex, that would lessen the defendant's need for information contained in treatment records that would also support this defense, such as a diagnosis of a mental illness that has pathological lying as one possible symptom.

Likewise, the degree of trauma that would result from review of the records without consent should factor into the trial court's decision. Because Wis. Stat. § 950.04(1v)(ag) gives a crime victim the right "[t]o be treated with fairness, dignity, and respect for his or her privacy by public officials," the extent to which an alleged victim will be traumatized by the invasion of privacy that occurs when a stranger is allowed to examine her records is a necessary ingredient in the balancing test.

Not all victims of sexual assault and/or domestic violence are equally resilient. Nor do all such victims share the same treatment history. The reason for seeking therapy and the length of time the therapy continued may influence whether the privilege-holder feels strongly about keeping her records private. Certainly a privilege-holder who has

been victimized by multiple assailants over a course of years and subjected to horrific abuse will likely be more traumatized by nonconsensual release of her records – even if only to a judge – than would a privilege-holder whose treatment records span only a few sessions and contain no salacious details. To illustrate, a teenaged male whose treatment records document sexual assaults by same-sex family members is more likely to experience humiliation and feel re-victimized by having those records examined than would an adult with a short treatment history centered on bouts of depression triggered by the death of a loved one.

The time frame encompassed by the records compared to the dates of the charged crimes and the date on which the witness reported the crime should also be factored into the balancing test. If the treatment records are temporally remote from both the date of the charged crimes and the date of reporting, the presumption should be that the records will have less probative value than records generated around the time the charged crime occurred or near the time it was reported. Just as the nearness in time between other-acts evidence and the charged crime affects the probative value of the former,[10] the temporal proximity between counseling records and the charged offense and/or the date the complainant reported is a relevant factor in

[10] *See State v. Hunt*, 2003 WI 81, ¶ 64, 263 Wis. 2d 1, 666 N.W.2d 771.

deciding whether a witness's right to privacy in privileged records should have to yield to a defendant's due-process right to present a defense. Where the records being sought were generated long before the charged crime occurred, this factor should favor a determination that the witness's privilege in those records should trump the defendant's constitutional right.

Considerations additional to the ones discussed above may also be relevant to the balancing test. Assuming this court adopts the State's argument that in place of automatic witness preclusion, circuit courts should determine on a case-by-case basis whether a witness's right to privacy in her privileged records should trump a defendant's right to present a defense, those additional factors can evolve through case law. For now, the State submits that the three factors identified above should be part of the balancing test in every case.

In summary, if this court rejects the State's call to overrule *Shiffra*, it should find that witness preclusion is not required whenever the defendant satisfies *Shiffra*/*Green* but the witness refuses to consent to in camera review of her records. Instead, this court should direct trial courts to use a balancing test to determine on a case-by-case basis whether the defendant's constitutional right to in camera review of privileged records must be subordinated to the witness's right to privacy in those records. Only if the trial court

decides that the defendant's constitutional rights trump the witness's interests in a given case should the court order the records produced for in camera review without the privilege-holder's consent pursuant to Wis. Stat. § 146.82(2)(a)4. The State discusses the court's authority to do so in argument III. below.

III. Where The Trial Court After Conducting A Balancing Test Determines That The Defendant's Right To Due Process Supersedes The Witness's Right To Privacy In Her Privileged Records, It Should Order The Records For Production Under § 146.82(2)(a)4.

If this court adheres to *Shiffra*'s holding that a defendant has a due-process right to pretrial in camera review of privileged records, then it is imperative to overrule *Shiffra*'s holding that a witness can be barred from testifying as a sanction for refusing to release her records.[11] As the State will demonstrate below, the remedy of witness preclusion was flawed from its inception because it ignores the public's substantial interest in the fair and effective

[11] In *State v. Speese*, 199 Wis. 2d 597, 613, 545 N.W.2d 510 (1996), this court indicated that the issue "whether the sanction of witness preclusion represents an appropriate sanction when the holder of the privilege refuses to waive the privilege and allow an *in camera* inspection" remains unresolved. Presumably, the court meant that *it* had not resolved the question. Both the trial court and the court of appeals in this case read *Shiffra* to mandate witness preclusion when the privilege-holder refuses to consent to in camera review after the defendant makes the showing required by *Shiffra*/*Green*.

administration of criminal justice. Moreover, the negative effects of witness preclusion have been magnified by *Crawford v. Washington*, 541 U.S. 36 (2004), which makes it more difficult to prosecute sexual assault and other crimes absent the victim's live testimony than it was when *Shiffra* was decided.

A. Standard of review.

Whether a witness's interest in enforcing her privilege under § 905.04 must yield to a defendant's constitutional right to in camera review, such that a circuit court may order privileged therapy records to be released for inspection without the privilege-holder's consent, is a question of law for this court's independent review. *See Green*, 253 Wis. 2d 356, ¶ 20.

B. Suppressing testimony as a remedy for a witness's refusal to waive her privilege under § 905.04 ignores the substantial public interest in the fair and effective prosecution of crime.

Shiffra cited no authority for its conclusion that witness preclusion is the only feasible remedy for a witness's refusal to consent to in camera review of her privileged records. 175 Wis. 2d at 612. Nevertheless, other state courts have also adopted witness preclusion as the sanction for a witness's refusal to waive a statutory privilege instead of ordering production of the records without the witness's consent, after finding that a criminal defendant has established a constitutional right to their production and

potential disclosure. *See* Clifford A. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 2007 Or. L. Rev. 1, 18-19 (2007). Fishman cites Connecticut, Michigan, Nebraska, New Mexico and South Dakota as examples. *Id.*

Shiffra and the out-of-state cases endorsing witness preclusion all suffer from the same defect, however. They fail to factor in the huge stake the public has in the effective administration of the criminal justice system, acting as if the only interests worthy of consideration belong to the defendant and the witness.

For example, in *State v. Trammell*, 435 N.W.2d 197, 201 (Neb. 1989), the court in finding inadmissible the testimony of a witness who refused to waive the physician-patient privilege said this was "the only method by which both the right of the witness and the right of the defendant may be accommodated." Like the *Shiffra* court, the Nebraska court did not mention the public's interest in convicting criminal offenders and preventing them from committing future crimes against future victims.

Similarly, when the Michigan court in *People v. Stanaway*, 521 N.W.2d 557, 577 (Mich. 1994), decided that "suppression of the complainant's testimony is the appropriate sanction," it did not acknowledge – let alone discuss – the deleterious effect suppression would have on the citizenry's interest in effective prosecution.

Nor did the New Mexico court in *State v. Gonzales*, 912 P.2d 297, 303 (N.M. App. 1996), even advert to the public's interest when it cited *Shiffra* as its sole authority for suppressing the testimony of a victim who refused to produce her medical and psychotherapy records for in camera inspection.

Unlike the courts in the above cases, the Kentucky Supreme Court concluded more than a decade ago that the public interest must be considered in fashioning an appropriate remedy:

> If, as here, the witness is the victim of the crime without whose testimony the prosecution could not prove its case, must the case be dismissed if the victim refuses to waive the privilege? If so, what of "the fair administration of justice" and the aim "that guilt shall not escape"? *Nixon,* 418 U.S. at 708–09[.] . . . Our conclusion . . . that a defendant's constitutional right to compulsory process prevails over a witness's statutory claim of privilege obviates the need to further complicate the procedure by placing the fate of the prosecution in the hands of a witness.

Commonwealth v. Barroso, 122 S.W.3d 554, 565 (Ky. 2003).

Consistent with the *Barroso* court's sentiments, Professor Fishman has warned that there is "a serious problem" with suppressing a witness's testimony if the witness refuses to waive a privilege: "[I]n essence [it] gives the witness the legal authority to preclude the prosecution of a dangerous predator." 2007 Or. L. Rev. 1, 24.

A canvass of reported Wisconsin cases reveals that a defendant's attempt to obtain privileged treatment records almost invariably arises in the context of a sexual assault

prosecution where the victim's records are the subject of the desired disclosure. *See*, *e.g.*, *Green*, 253 Wis. 2d 356; *State v. Rizzo*, 2002 WI 20, 250 Wis. 2d 407, 640 N.W.2d 93; *State v. Solberg*, 211 Wis. 2d 372, 564 N.W.2d 775 (1997); *State v. Robertson*, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 105; *State v. Walther*, 2001 WI App 23, 240 Wis. 2d 619, 623 N.W.2d 205; *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996); *State v. Munoz*, 200 Wis. 2d 391, 546 N.W.2d 570 (Ct. App. 1996); and *Shiffra*, 175 Wis. 2d 600. The only exception is *State v. Richard A.P.*, 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998). While *A.P.* was also a sexual assault prosecution, it involved the defendant's successful attempt to obtain in camera review and partial disclosure of mental health records of his step-daughter, the five-year-old victim's mother. *Id.* at 781, 783-84.

That these cases most often involve a sexual assault defendant's attempt to secure his accuser's mental health records should convince this court that adhering to *Shiffra*'s suppression remedy poses a significant danger to the public. Allowing a sexual assault victim to effectively determine whether the prosecution of her assailant can proceed runs the risk that some sexual offenders will escape conviction and be free to prey on other victims. Such a result is certainly inimical to the public's interest, but in particular to future victims of the defendant who remains at liberty

because the victim he assaulted refused to waive her privilege.

In determining whether victims should continue to wield veto power over criminal prosecutions, this court cannot ignore those instances in which a sexual assault victim's refusal to waive her privilege is influenced, if not dictated, by the defendant. A victim of domestic violence who is sexually assaulted by her partner is just one example. It is common knowledge that victims of domestic violence are often reluctant to press charges or testify against their attackers. This could be because the attacker is the father of the victim's children, provides financial support to them, or has threatened retaliation if the victim continues her efforts to have him prosecuted. Regardless of the victim's motivation, however, courts should not be unwittingly complicit in a defendant's efforts to stymie the prosecution by giving the victim an easy way out, i.e., by letting her say "no" to an in camera inspection of her records. After all, the inability to prosecute a domestic-violence sexual abuser will often result in the perpetrator's continued presence in the household where the victim resides and his continued role in her life. Certainly this is not a situation this court wants to foster, but it will by continuing to sanction witness preclusion in response to a victim's refusal to waive her § 905.04 privilege.

While the charges in *State v. Johnson* did not arise in the domestic-violence context, the victim in *Johnson* likely experienced some of the same pressures faced by victims of domestic violence. Johnson was charged with the repeated sexual assault of his teenaged stepdaughter, T.S., when she was between twelve and fifteen.[12] Because Johnson is her stepfather, the teenaged T.S. must have realized that her testimony could tear apart her family, particularly the marital relationship between Johnson and her mother. After this court ultimately decided that the court of appeals' decision remained the law of the case, meaning T.S. could not testify against Johnson at trial, he was allowed to plead guilty to fourth degree sexual assault and disorderly conduct, for which he was sentenced to four months in jail. *See* "history and details of Charge(s)/Sentence(s)" on CCAP in Racine County Circuit Court Case No. 2011CF376. In contrast, had Johnson been tried and convicted of repeated sexual assault of a child – the charge he faced before T.S.'s refusal to waive her privilege prevented her from testifying – his potential exposure would have been a maximum of forty years. *See* Wis. Stat. §§ 948.025(1)(e) and 939.50(3)(c).

The aftermath of the court of appeals' decision in *Johnson* illustrates that *Shiffra*'s remedy of witness preclusion often comes at the expense of the criminal justice

[12] *See State v. Johnson*, No. 2011AP2864-CRAC, slip op. at ¶ 3 (Wis. Ct. App. Apr. 18, 2012) (Pet-Ap. 147).

system. Regardless of whether a jury would have convicted Johnson on the original charges, the drastic reduction in exposure that occurred when T.S. refused to testify undoubtedly undermined the public's confidence in the system, given the high profile of the case.

Apart from the fact *Shiffra* and cases from other state courts endorsing suppression of a witness's testimony ignore the public's stake in effective prosecution of crimes, particularly sexual assault, the sea change in confrontation law triggered by *Crawford* should also cause this court to reconsider *Shiffra*'s holding.

Under *Crawford* and its progeny, some of a victim's statements that were formerly admissible at trial even if the victim was unavailable to testify are now inadmissible. For example, when *Ohio v. Roberts*, 448 U.S. 56 (1980), governed confrontation analysis, this court in *State v. Bauer*, 109 Wis. 2d 204, 222, 325 N.W.2d 857 (1982), held that admission of the deceased victim's preliminary hearing testimony satisfied the Confrontation Clause. In *State v. Stuart*, 2005 WI 47, ¶ 3, 279 Wis. 2d 659, 695 N.W.2d 259, however, this court recognized that post-*Crawford*, admission of a non-testifying declarant's preliminary hearing testimony would violate the defendant's right to confrontation.

Crawford therefore makes it less likely now than it was at the time of *Shiffra* (1993) or *Green* (2002) that the State will be able to continue a prosecution after the alleged

victim is barred from testifying. This court must face that reality in deciding whether to retain that portion of *Shiffra* requiring suppression of a victim's testimony as a sanction for her refusal to waive her § 905.04 privilege. In making that decision, this court should be mindful that, almost without exception, a defendant who has had sexual contact or intercourse with a child[13] will escape prosecution because that child decides not to consent to in camera review of her records.

For the above reasons, this court should hold that witness preclusion is not the appropriate remedy when a victim refuses to consent to in camera review of her privileged records, following a determination that the accused has a constitutional entitlement to such review. Rather, as explained below, in those circumstances the court should use Wis. Stat. § 146.82(2)(a)4. to compel production of the records.

[13] The State recognizes that Lynch – unlike the now-convicted Johnson – still enjoys the presumption of innocence.

C. Section 146.82(2)(a)4. provides a mechanism for ordering the production of privileged records when the privilege-holder does not consent to their release.

The *Johnson* case revealed disagreement within this court regarding whether a circuit court can order production of privately held treatment records after a criminal defendant makes the showing required by *Shiffra/Green*, but the privilege-holder refuses to consent to in camera review of the records.

This court's original per curiam opinion indicated that the Chief Justice and Justice Bradley agreed that the circuit court could order production of the alleged victim's records for in camera review despite the alleged victim's refusal to consent. *Johnson I*, 348 Wis. 2d 450, ¶ 4. The opinion also indicated that Justice Crooks did not share this view, *see id.*

The disagreement within this court also exists within the court of appeals, as that court's decision in *Johnson* reveals. Significantly, Chief Judge Richard Brown – author of the *Shiffra* opinion – accepted the State's argument in *Johnson* that pursuant to § 146.82(2)(a)4., the circuit court could compel release of an alleged victim's privileged records without consent:

> I do not, however, agree that *Shiffra* necessarily requires suppression of T.S.'s testimony. I am convinced that, if an alleged victim refuses to release medical or counseling records to the court for in camera inspection, the court may compel release anyway, pursuant to Wis. Stat. § 146.82(2)(a)4. No case binds me to an opposite

> conclusion—not *Shiffra*, nor *Green*[,] nor *Speese* nor any other case cited by Johnson.
>
> Wisconsin Stat. § 146.82(1) establishes the state of Wisconsin's policy that medical records are confidential and that records may not be released without informed consent. However, § 146.82(2) lists specific instances where records may be released without consent. One of those instances is § 146.82(2)(a)4., which explicitly allows release without consent "[u]nder a lawful order of a court of record." I acknowledge that, generally, this statute cannot trump Wis. Stat. § 905.04, known in Wisconsin as the "physician-patient privilege" (even though it covers other kinds of medical providers). But I agree with the State that, when the defendant has established a *constitutional right* to an in camera review, the constitution trumps the privilege and the court may lawfully order release of the records for that limited purpose.

Johnson, slip op. at ¶¶ 24-25 (Brown, C.J., dissenting) (footnote omitted) (Pet-Ap. 154-55).

Judge Brown was correct. While § 146.82(2)(a)4. does not itself prevail over § 905.04, if this court determines that Lynch and other defendants sometimes have a constitutional right to in camera review of privileged records, then an order compelling production of the records for in camera inspection becomes "a lawful order of a court of record" under § 146.82(2)(a)4. In other words, a constitutional exception becomes grafted onto § 905.04.

Case law supports the proposition that § 905.04 must on rare occasions yield to other important public interests. For example, in *Schuster v. Altenberg*, 144 Wis. 2d 223, 249-50, 424 N.W.2d 159 (1988), this court held that § 905.04 "must yield" if a patient poses an imminent threat to himself

or others. As the court of appeals observed in *State v. Agacki*, 226 Wis. 2d 349, 359, 595 N.W.2d 31 (Ct. App. 1999), the "dangerous patient exception" adopted in *Schuster* is not among the enumerated exceptions to the privilege this court promulgated[14] in § 905.04, yet it trumps the patient's privilege to confidentiality.

More recently, three members of this court in *Johnson v. Rogers Memorial Hospital, Inc.*, 2005 WI 114, 283 Wis. 2d 384, 700 N.W.2d 27, declared that "public policy requires creating an exception to therapist-patient confidentiality and privilege where negligent therapy is alleged to have caused accusations against parents for sexually or physically abusing their child." *Id.* ¶ 71. That segment of the court decided that even if the privilege-holder did not consent to an in camera review of her records, the civil plaintiff could compel their production without her consent. *Id.* ¶ 75.

That § 905.04 may give way to public policy exceptions adopted by this court supports the State's argument that it may also yield to a defendant's constitutional rights and the public's interest in the effective prosecution of crime. In those situations, § 146.82(2)(a)4. authorizes a court to obtain privileged records without the patient's consent.

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[14] As the court of appeals clarified, the rules of evidence – including § 905.04 – were promulgated by this court rather than the legislature. *State v. Agacki*, 226 Wis. 2d 349, 359 n.8, 595 N.W.2d 31 (Ct. App. 1999).

As a final matter, the State notes that in one important respect, a witness who is compelled to produce her records receives more protection than a witness forced to choose between voluntary disclosure and suppression of her testimony. As the Kentucky Supreme Court has observed, "a witness whose privileged information is compelled by court order has not disclosed it voluntarily. Thus, the privilege remains intact for purposes other than the criminal proceeding in which it was compelled." *Barosso*, 122 S.W.3d at 565.

Under Wis. Stat. § 905.11, A.M. would waive her therapist-patient privilege if she decided to surrender her records for in camera review because that decision would be regarded as voluntary. In contrast, a court order requiring the production of her records without her consent would not constitute a waiver, and A.M.'s privilege would remain intact for purposes apart from this criminal prosecution. This difference is another reason that production without consent is preferable to the forced choice between "voluntary" disclosure and being barred from testifying.

In summary, if this court adheres to *Shiffra*, it should hold that in those rare instances where in camera review is constitutionally mandated, witness preclusion is not the remedy where a witness refuses to consent to review of her records. Rather, the circuit court should be able to compel

production of the records under § 146.82(2)(a)4. without the witness's consent.

CONCLUSION

The State first asks this court to overrule *Shiffra*'s holding that an accused has a due-process right to in camera review of privately held privileged records under *Pennsylvania v. Ritchie* any time he makes the showing of materiality required by *Shiffra*/*Green*.

Alternatively, this court should clarify that under *Shiffra*, witness preclusion is not automatic whenever a defendant satisfies *Shiffra*/*Green* but the alleged victim withholds consent to review of her privileged records. Instead, this court should direct trial courts to balance the defendant's constitutional rights against the witness's right to privacy in her privileged records and decide on a case-by-case basis whether the witness will be allowed to testify despite her refusal.

Finally, this court should hold that where the defendant's right to due process is determined to supersede the witness's privilege, the trial court can compel production of the witness's records without her consent under § 146.82(2)(a)4.

Dated this 30th day of April, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9883 words.

_____
Marguerite M. Moeller
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 30th day of April, 2015.

_____
Marguerite M. Moeller
Assistant Attorney General