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OF WISCONSIN

IN SUPREME COURT

Appeal No. 2011AP2680-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

PATRICK J. LYNCH,

Defendant-Respondent.

On Review of the Order of the Wisconsin Court of Appeals, District IV

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Rules and Statutes

Other Authorities

ISSUES PRESENTED FOR REVIEW

1. Whether this Court should yet again reject the state's request that it overrule the long-established standard for balancing and protecting the privacy interests of witnesses and the criminal defendant's right to a fair trial as set forth and approved in ***State v. Shiffra***, 175 Wis.2d 600, 499 N.W.2d 719 (Ct. App. 1993); ***State v. Green***, 2002 WI 68, 253 Wis.2d 356, 646 N.W.2d 298, and numerous other cases.

The state failed to raise this issue in the lower courts.

2. Whether the Court should overrule the long-established remedy of exclusion of any evidence from a witness who chooses not to disclose privileged information despite a court finding that the information likely is necessary to a fair determination of guilt or innocence or is material to the defense of the accused.

The lower courts acknowledged that established law required exclusion under these circumstances.

3. Whether the Court should overrule long-established law and permit a circuit court to use Wis. Stat. §146.82(2)(a)4 to allow the

state to circumvent a witness's assertion of the therapist-patient privilege and avoid the remedy of exclusion of any evidence from that witness.

The lower courts acknowledged that established law required rejection of this argument.

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2011AP2680-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

PATRICK J. LYNCH,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

The state here once again seeks to either overrule or undermine the long-established standard for those rare cases in which it is necessary to balance and protect the privacy interests of witnesses, the criminal defendant's right to a fair trial, and the truth-seeking function of the trial as set forth and approved in ***State v. Shiffra***, 175 Wis.2d 600, 499 N.W.2d 719 (Ct. App. 1993); ***State v. Green***, 2002 WI 68, 253 Wis.2d 356, 646 N.W.2d 298, and numerous other cases. The state has abandoned the application argument it made below and does not here dispute that the lower courts properly held that Lynch has satisfied the ***Shiffra/Green*** standards for *in camera* review. That potential issue accordingly is not before the Court. *E.g.*, ***State v. McDonald***, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971) ("a deliberate choice of strategy, even if it back fires, amounts to a waiver binding upon the defendant and this court.").

STATEMENT OF THE CASE

Background

When A.M. was approximately eight years old, in the spring of 1992, she was hospitalized at a psychiatric hospital in Madison, Wisconsin following a suicide attempt (R92:5; *see also* R1:1). That same spring, her father was charged with sexually assaulting her, based in part upon statements she made during her hospital stay (R92:5). He was convicted in 1993, following a jury trial (*id*.:6).

Approximately 19 years after the alleged abuse occurred and 17 years after the father's conviction, Patrick Lynch was charged with one count of sexually assaulting A.M. sometime in the summer or early fall of 1989, contrary to Wis. Stat. §948.02(1). (R1).[1]

A.M. testified at the preliminary hearing in this case. (R31). She contended that Lynch began sexually abusing her approximately six months to a year after her father began doing so and that Lynch did so during the same time period and when her father was home (*id*.:4). She also claimed to have told the prosecutor in her father's case, some detectives, and a counselor about Lynch's alleged assaults (*id.*:7). She insisted that the prosecutor and police told her that they would first deal with her father and then "come back to [Lynch] later" (*id*.). In addition, she claimed to have told her counselor (*id.*).

The Motion Seeking A.M.'s Mental Health Treatment Records

Lynch moved for an *in camera* review of A.M.'s treatment records dating back to 1993, particularly her mental health treatment records from two psychological treatment providers. (R48). He offered factual assertions and documents supporting his theory that A.M.'s treatment records contain probative, noncumulative evidence that bears on the reliability of her allegations because: (1) A.M. exhibits ongoing symptoms associated with post-traumatic stress disorder that affect her

[1] He also was charged with three counts of stalking, contrary to Wisconsin Statutes §940.32(2) (R1). In the information filed after the preliminary hearing, the state added two more charges of sexual assault (R27)

memory; (2) she did not report Lynch's alleged assaults to any treatment providers as a child; and (3) she has "sociopathic personality disorder," which has as a symptom "an ability to lie on a pathological level" (*Id*.; R60).

The state's responses argued that:

(1) Lynch failed to make the showing required for an *in camera* review; and

(2) if Lynch did make the showing, Wisconsin Statutes §146.82(2) provides an alternative remedy to that in *Shiffra* which allows the circuit court to order the release of the records without A.M.'s authorization so the court need not exclude her testimony if she refused to authorize release of them.

(R51; R58:5-6; R81).

As the Court of Appeals correctly described, Lynch's offer alleged:

- In 1992, around the time that A.M.'s father was charged, A.M. was admitted to a hospital because of an apparent suicide attempt.
- A.M.'s family physician at that time made a referral to Dr. Sionag Black for stress reduction therapy.
- Dr. Black treated A.M. for psychological symptoms stemming from the trauma of sexual abuse and the trauma of reporting the sexual abuse committed by her father.
- During A.M.'s father's 1993 trial, A.M.'s family physician testified that A.M. had been treated by "child psych," that A.M. had faked symptoms, and that most of A.M.'s symptoms were stress-related.
- A.M. continued in treatment with Dr. Black after A.M.'s father's trial.

- Dr. Black prepared a letter in 1993 that was addressed to the circuit court for A.M.'s father's sentencing. The letter stated that Dr. Black "carefully assess[e] the possibility of any other person who might [have] been involved" and that A.M. "identified no one." The letter also stated that A.M. was "very clear" in repeatedly identifying her father as the perpetrator.
- Dr. Black's 1993 letter further stated that A.M. became suicidal after reporting the sexual assaults committed by her father, and that A.M. exhibited symptoms characteristic of PTSD. Dr. Black said that she had never before "witnessed a child this afraid and this traumatized by the act of reporting abuse."
- At some point after treatment with Dr. Black, A.M. began treatment with another psychologist, Dr. Rachel Heilizer.
- A.M. continued in counseling for more than 15 years, with the majority of treatment through at least 2009 being provided by Dr. Heilizer.
- In a March 2009 interview with investigators, A.M. reported that Lynch performed repeated acts of sexual intercourse with her during 1990 and 1991.
- In a subsequent March 2009 interview with investigators, A.M. said that, during her high school years, she spoke with Dr. Heilizer regarding A.M.'s allegations against Lynch.
- In a 2009 interview with investigators, A.M.'s ex-husband said that he no longer trusted A.M., in part because of lies A.M. has told.
- In a 2010 interview, A.M.'s half-sister told defense counsel that she ended her friendship with A.M., in part because of experiences showing that A.M. is not trustworthy and is not believable.
- When the prosecutor from A.M.'s father's case was interviewed by investigators in Lynch's case, the prosecutor denied that A.M. told the prosecu-

tor about Lynch, contrary to A.M.'s preliminary hearing testimony.

- Other witnesses stated that A.M. told them–in one instance as early as 1999 or 2000–that Lynch had sexually assaulted her, although the details of A.M.'s allegations varied.
- The defense psychological expert, Dr. Bev Wolfgram, opined in a January 2011 report that there is a reasonable likelihood that A.M. continues to suffer from PTSD.
- Dr. Wolfgram further opined that there is a reasonable liklihood that A.M. has "Sociopathic Personality Disorder which is also classified as Antisocial Personality Disorder," a disorder that, according to Wolfgram, is associated with "manipulati[on] and conning," "pathological lying," and "unreliability."

(Pet-Ap. 107-08; *see* R48; R60).

The circuit court, the Honorable Andrew P. Bissonnette presiding, agreed that there was a reasonable likelihood that A.M.'s records contained information that would be highly damaging to A.M.'s credibility because there was a reasonable likelihood that the records would show both:

(1) that A.M. continued to experience symptoms associated with PTSD and that it affected her ability to remember and describe key events; and

(2) that A.M. failed to report to treatment providers that Lynch sexually assaulted her, despite her claims of doing so.

(R96; Pet-Ap. 129-44).

The trial court then ordered that, A.M. identify all treatment providers who provided counseling to her since January 1, 1990 and that she sign a release of records authorizing the circuit court to obtain the records for *in camera* review. The order further provided that the

court would make an *in camera* review and disclose any "pertinent information relevant to the issues" subject to the terms of a protective order. Finally, the order provided that A.M.'s testimony at trial would be barred if she refused to allow the circuit court access to her records. (R96:14 -15; Pet-Ap. 142-43).

Following the state's unsuccessful attempt to seek leave to appeal, ***State v. Patrick J. Lynch***, Appeal No. 2011AP002167-CRLV, the circuit court received a letter from A.M. which indicated that she did not want her health records released "[u]nless and until" the circuit court's order was reviewed by another court on appeal or the prosecutor declined to appeal (R97). Based upon the accompanying letter from the state, the circuit court interpreted this letter as a refusal to consent to release of the records. (R110:2; Pet-Ap. 126). The court then ordered, based upon the refusal, that A.M. be barred from testifying at trial (R110:3; Pet-Ap. 127).

The state then appealed, arguing solely that Lynch failed to make the showing required for an *in camera* review and that, in any event, Wis. Stat. §146.82(2) provides an alternative remedy which allows the circuit court to order the release of the records without A.M.'s authorization so the court need not exclude her testimony if she refused to authorize release of them. *See* State's Court of Appeals Brief; State's Court of Appeals Reply.

The court of appeals affirmed the circuit court's orders, agreeing with that court that Lynch had made the showing required for *in camera* review and that, given the witness's refusal to consent to that review, settled law mandated exclusion of her testimony (Pet-Ap. 101-24).

By order dated March 3, 2015, this Court granted review of the issues raised in the state's petition which essentially track those set forth in its brief and did not challenge the lower courts' holdings that Lynch satisfied the requirements for *in camera* review.

ARGUMENT

I.

THE COURT SHOULD YET AGAIN REJECT THE STATE'S MISGUIDED REQUEST TO OVERRULE THE *SHIFFRA/GREEN* ANALYSIS FOR BALANCING AND PROTECTING THE PRIVACY INTERESTS OF WITNESSES AND THE FAIR TRIAL RIGHTS OF CRIMINAL DEFENDANTS

In 1993, the Court of Appeals decided ***State v. Shiffra***, 175 Wis.2d 600, 499 N.W.2d 719 (Ct. App. 1993), establishing a process for balancing and protecting the privacy interests of witnesses, the fair trial rights of criminal defendants, and the truth-seeking function of the trial. Over the past 20+ years since that decision, the state has repeatedly sought to overrule or undermine it, with the appellate courts as repeatedly rejecting those attempts while tweaking and reaffirming the analysis. *E.g.*, ***State v. Green***, 2002 WI 68, ¶21 n.4, 253 Wis.2d 356, 646 N.W.2d 298. *See generally* Section I,B, *infra*.[2] Undeterred, the state here yet again raises the same arguments that this Court and the Court of Appeals have repeatedly rejected. State's Brief at 7-32.

"We need finality in our litigation." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). *Stare decisis* "further[s] fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case." ***Johnson Controls, Inc. v. Employers Ins. Of Wausau***, 2003 WI 108, ¶95, 264 Wis. 2d 60, 665 N.W.2d 257. Adherence to precedent is "fundamental to the rule of law," and existing precedent should "not be abandoned lightly" or without "special justification." ***Id.*** ¶94.

The state's most recent attempt to overrule the ***Shiffra/Green***

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[2] While the state only asks this Court to overrule ***Shiffra***, State's Brief at 1-2, granting its request would require overruling all of these authorities, along with many of the published decisions from the past 20+ years that have approved and applied the ***Shiffra/Green*** analysis, *see, e.g.*, ***State v. Johnson***, 2013 WI 59, ¶2 & n.2, 348 Wis.2d 450, 832 N.W.2d 609, *rehearing granted on other grounds*, 2014 WI 16, 353 Wis.2d 119, 846 N.W.2d 1, and cases cited therein, as well as ***State v. S.H.***, 159 Wis.2d 730, 465 N.W.2d 238 (Ct. App. 1990), and ***In re K.K.C.***, 143 Wis.2d 508, 422 N.W.2d 142 (Ct. App. 1988), on which ***Shiffra*** relied.

analysis is virtually identical to that which this Court rejected just two years ago in ***State v. Johnson***, 2013 WI 59, ¶2, 348 Wis.2d 450, 832 N.W.2d 609, *reconsideration granted on other grounds*, 2014 WI 16, 353 Wis.2d 119, 846 N.W.2d 1. *See* State's Brief in ***State v. Samuel Curtis Johnson***, 2011AP2864-CR, at 9-18 (available at https://acefiling.wicourts.gov/documents/show_any_doc?appId=wsca&docSource=EFile&p%5bcaseNo%5d=2011AP002864&p%5bdocId%5d=92830&p%5beventSeqNo%5d=60&p%5bsectionNo%5d=1).

The state fails to suggest any reason why the Court should reach a different decision now than it has repeatedly reached in the past.[3] "A mere change in the personnel of the bench, and of individual opinions of judges, is not sufficient." ***French Lumbering Co. v. Theriault***, 107 Wis. 627, 83 N.W. 927, 929 (1900).

A. The *Shiffra/Green* Analysis Properly Balances the Privacy Interests of Witnesses and the Fair Trial Rights of the Defendant

The state cites no reason to change a process for balancing and protecting the defendant's right to a fair trial, the truth-seeking function of the trial, and the witness's right to privacy of therapy records that this Court acknowledged just last year has worked well over the past 20+ years. ***Johnson***, 2014 WI 16, ¶12 ("Circuit courts and counsel have functioned well using the ***Shiffra/Green*** analysis for many years."). Wisconsin's appellate courts repeatedly have recognized the ***Shiffra/Green*** analysis as providing the proper balance between those competing interests. *E.g.*, ***State v. Solberg***, 211 Wis.2d 372, 387, 564 N.W.2d 775 (1997). Indeed, the courts use the same type of analysis in many other circumstances requiring similar balancing of interests. *E.g.*, ***Lane v. Sharp Packaging Systems, Inc.,*** 2002 WI 28, ¶¶52-56,

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[3] ***Johnson Controls*** identifies the following as possible grounds for rejecting *stare decisis*: (1) changes or developments in the law that have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) the precedent has become detrimental to coherence and consistency in the law; (4) the prior decision is unsound in principle; (5) the prior decision is unworkable in practice; and (6) whether reliance interests are implicated. 2003 WI 108, ¶¶ 98-99. As this Court has concluded repeatedly, none remotely applies here. *E.g.*, ***Johnson***, 2013 WI 59, ¶2; ***Green***, 2002 WI 68, ¶21 n.4.

251 Wis.2d 68, 640 N.W.2d 788 (*in camera* review required to determine what attorney-client privileged records should be released under exception to the privilege).

Under the ***Shiffra/Green*** procedure, a defendant seeking access to a witness's privileged treatment records not in the possession of the state must first "set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." ***Green***, 2002 WI 68, ¶34.[4] "[A] defendant must undertake a reasonable investigation into the [witness's] background and counseling through other means first before the records will be made available." ***Id.***, ¶33; *see* ***id.***, ¶35.

Information is "necessary to a determination of guilt or innocence" if it "tends to create a reasonable doubt that might not otherwise exist." ***Id.***, ¶34. "This test essentially requires the court to look at the existing evidence in light of the request and determine . . . whether the records will likely contain evidence that is independently probative to the defense." ***Id.***

If the defendant satisfies this standard, the trial court reviews the records *in camera*, but only if the witness consents to the review. ***Solberg***, 211 Wis.2d at 386-87; ***Shiffra***, 175 Wis.2d at 612.[5] If the witness does not consent, there is no *in camera* review and evidence from the witness is excluded. ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2005 WI 114, ¶73, 283 Wis.2d 384, 700 N.W.2d 27; ***Shiffra***, 175

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[4] This standard for *in camera* review is slightly more restrictive than that originally set in ***Shiffra*** in light of the "strong public policy favoring protection of the counseling records." ***Green***, 2002 WI 68, ¶32.

[5] The Court of Appeals has held that, when the records are in the possession of the state and thus available for the state's use at trial, it is sometimes appropriate for the trial court to review those records *in camera* to protect the defendant's right to present a defense and to disclosure of exculpatory evidence despite the defendant's inability to meet the ***Shiffra/Green*** standard for *in camera* review of privately held records. ***State v. Darcy N.K.***, 218 Wis.2d 640, 653-55, 581 N.W.2d 567 (Ct. App. 1998).

Wis.2d at 612.

When the witness does consent to disclosure for *in camera* review, "the circuit court must determine whether the records contain any relevant information that is 'material' to the defense of the accused." ***Solberg***, 211 Wis.2d at 386-87, quoting ***Ritchie***, 480 U.S. at 58. Again, because a materiality standard focusing on whether "the information probably would change the outcome of the defendant's trial . . . is impossible to meet pretrial," ***Shiffra***, 175 Wis.2d at 608; *see* ***Green***, 2002 WI 68, ¶¶31-32, the information to be released need only "'tend[] to create a reasonable doubt that might not otherwise exist.'" ***Id.***, ¶34 (citation omitted).

Despite the court's materiality finding, the information cannot be released to the defense absent consent to that disclosure by the witness. ***Solberg***, 211 Wis.2d at 386-87. Absent such consent, the evidence from the witness once again is excluded. *See, e.g.*, ***Shiffra***, 175 Wis.2d at 612.

"A circuit court may always defer ruling on such a request or require a defendant to bring a subsequent motion if the record has not had time to develop." ***Green***, 2002 WI 68, ¶35. Moreover, the court has a continuing obligation to reassess the decisions whether to grant *in camera* review or to require disclosure (subject to exclusion in the event the witness refuses to disclose) in light of new information and evidence at trial. *E.g.*, ***Pennsylvania v. Ritchie***, 480 U.S. 39, 59-60 (1987); ***State v. Mainiero***, 189 Wis.2d 80, 91 & n.2, 525 N.W.2d 304 (Ct. App. 1994).

This procedure was established to balance and protect both the truth-seeking functions of the trial and the defendant's rights to a fair trial, on the one hand, and the witness's privacy interests on the other. In ***Solberg***, 211 Wis.2d at 387, this Court observed that

> [s]uch a procedure strikes an appropriate balance between the defendant's right to be given a meaningful opportunity to present a complete defense and the policy interests underlying the Wis. Stat. §904.05(2) privilege. . . . We believe that giving the defendant an opportunity to have the circuit court

> conduct an *in camera* review of the privileged records, while still allowing the patient to preclude that review, addresses both the interests of the defendant and the patient.

Solberg, 211 Wis.2d at 387 (footnote omitted). *See also* ***State v. Rizzo***, 2002 WI 20, ¶53, 250 Wis.2d 407, 640 N.W.2d 93 (noting that ***Shiffra*** "specifically balanced the victim's interest in confidentiality against the constitutional rights of the defendant"); ***State v. Behnke***, 203 Wis.2d 43, 55, 553 N.W.2d 265 (Ct. App. 1996) ("these decisions attempt to strike a balance between the witness's right to privacy, which is embodied in the health care provider privileges, and the truth-seeking function of our courts, which is rooted in the Due Process Clause of the Fourteenth Amendment" (citations omitted)).

Moreover, it has succeeded in that purpose. The required showing for *in camera* review insures that the witness is not required to make the choice between the release of privileged materials or not testifying unless there is ample reason to require that choice. While denying the defendant the right to an "advocate's eye" review of the materials, the courts have held that *in camera* review of the documents insures that the defendant's access to information necessary to the right to present a defense is protected while simultaneously insuring that the witness's privacy interests are protected from unnecessary disclosure.[6] The witness's right to object to disclosure, whether to the court for *in camera* review or to disclosure of such material to the defense following such review, protects the witness's privacy rights, while the remedy of exclusion of evidence from the non-consenting witness protects both the defendant's right to a fair trial and the truth-seeking function of the trial by barring the introduction of evidence by a witness who has chosen to conceal information necessary to a fair assessment of the witness's allegations.

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[6] Contrary to the state's suggestion, State's Brief at 45, a witness's consent to *in camera* review of privileged materials does not waive the privilege in those materials beyond that necessary for such review. *E.g.*, ***United States v. Zolin***, 491 U.S. 554, 563-70 (1989) (discussing parallel provisions of Fed. R. Evid. 104(a); proponents of privilege "free" to request *in camera* review of privileged information without waiving it); *see* ***Solberg***, 211 Wis.2d at 386-87 (no release of information reviewed *in camera* absent further consent by witness).

The Courts repeatedly have asserted their confidence in the circuit courts' ability to properly apply these standards in light of the competing interests involved. *E.g.*, ***Green***, 2002 WI 68, ¶35; ***Behnke***, 203 Wis.2d at 57; ***Shiffra***, 175 Wis.2d at 611.

That confidence is well-placed. As the state concedes, the circumstances in which the defense has satisfied the restrictive requirements under ***Shiffra/Green*** for review and disclosure have been "rare." State's Brief at 45. Adding to that rarity is the fact that the ***Shiffra/Green*** analysis is simply irrelevant concerning records in a large group of cases since the mandatory reporting law regarding evidence of abuse or neglect of a child under Wis. Stat. §§48.981(2) & (3)(a) results in there being no therapist-patient privilege regarding counseling that discloses alleged child abuse and thus no need for a balancing of interests. ***State v. Denis L.R.***, 2005 WI 110, ¶¶36-58, 283 Wis.2d 358, 699 N.W.2d 154. Under those circumstances, *in camera* review is neither necessary nor appropriate; rather, the parties are free to obtain the information directly from the service provider. ***Id.***, ¶57.

Finally, state law reinforces the proper application of the ***Shiffra/Green*** standard by appellate review, as in this case, providing an extra level of protection for the rights of all concerned.

B. The State Repeatedly Has Raised, and This Court Repeatedly Has Rejected, the Same Grounds for Overruling the *Shiffra/Green* Analysis Raised Here.

In asking this Court to abandon an analysis that has worked so well over the past 20+ years, the state's primary complaint appears to be the same one it has raised repeatedly and unsuccessfully since before ***Shiffra*** was decided. That is its insistence that the ***Shiffra/Green*** analysis for review of privately held therapy records is not mandated by ***Pennsylvania v. Ritchie***, 480 U.S. 39 (1987), because the records in ***Ritchie*** were held by a government agency. State's Brief at 16-17. As the state notes, however, this has not always been its position. In ***State v. S.H.***, 159 Wis.2d 730, 733, 465 N.W.2d 238 (Ct. App. 1990), the state conceded that ***Ritchie's*** analysis properly applied to records in the possession of a private counseling center. *See* State's Brief at 9

(citation omitted).

The state nonetheless changed its position and first raised that objection in ***Shiffra*** itself. The Court there dismissed the state's argument, noting:

> We are bound by Wisconsin precedent, which clearly makes ***Ritchie*** applicable to cases in which the information sought by the defense is protected by statute and is not in the possession of the state.

175 Wis.2d at 606-07, *citing* ***In re K.K.C.***, 143 Wis.2d 508, 511, 422 N.W.2d 142 (Ct. App. 1988); ***S.H.***, 159 Wis.2d at 736.[7]

Three years later, the state renewed its attack on Wisconsin's application of ***Ritchie's*** balancing test to private records. *See* ***State v. Speese***, 199 Wis.2d 597, 610 n.12, 545 N.W.2d 510 (1996). This Court did not adopt the state's argument, instead finding any error in failing to disclose the records harmless. *Id.* at 604-06.

That same year, the state unsuccessfully made the same complaint again in ***State v. Behnke***, 203 Wis.2d 43, 55, 553 N.W.2d 265 (Ct. App. 1996). The ***Behnke*** Court explained that the state's argument "misconstrues the reasoning of ***Ritchie*** and ***Shiffra***," *id.* at 55, explaining that

> these decisions attempt to strike a balance between the witness's right to privacy, which is embodied in the health care provider privileges, and the truth-seeking function of our courts, which is rooted in the Due Process Clause of the Fourteenth Amendment.

Id. at 56, citing ***Shiffra***, 175 Wis.2d at 605 & n. 1; ***Ritchie***, 480 U.S. at 56; and The Supreme Court, 1986 Term—Leading Cases, 101 HARV.L.REV. 119, 130–31 (1987).

The state raised the same argument yet again the following year

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[7] In ***Shiffra***, as here, the state complained that ***K.K.C.*** and ***S.H.*** were non-binding *dicta*. State's Brief at 9-10. The ***Shiffra*** court rejected the state's complaints, noting that "[b]oth cases unequivocally adopted ***Ritchie*** as the law in Wisconsin even when the records are not in the State's possession." 175 Wis. 2d at 607. Subsequent decisions have not disputed this observation.

in ***State v. Solberg***, 211 Wis.2d 372, 564 N.W.2d 775 (1997). *See* State's Opening Brief in ***Solberg*** at 15-20, available at http://libcd.law.wisc.edu/~wb_web/will0049/3b9b632a.pdf.

This Court nonetheless rejected that argument, approved ***Shiffra's*** *in camera* process, and noted that

> Such a procedure strikes an appropriate balance between the defendant's due process right to be given a meaningful opportunity to present a complete defense and the policy interests underlying the Wis. Stat. § 904.05(2) privilege. . . . We believe that giving the defendant an opportunity to have the circuit court conduct an in camera review of the privileged records, while still allowing the patient to preclude that review, addresses both the interests of the defendant and the patient.

Solberg, 211 Wis.2d at 387 (footnote omitted).

In 2002, the state revived this argument yet again in ***Green***. *See* State's Brief in ***Green*** at 8-10, available at http://libcd.law.wisc.edu/~wb_web/will0087/487727ae.pdf.

This Court once again unanimously rejected it:

> The State contends that the holding in ***State v. Shiffra***, . . . was in error because it relied on ***Pennsylvania v. Ritchie***, ... The State argues that ***Ritchie*** was distinguishable and therefore inapplicable because it involved a situation, unlike here, where the records were in the government's possession. The ***Shiffra*** court, however, specifically rejected this argument, concluding that it was bound by Wisconsin precedent, which clearly made ***Ritchie*** applicable in cases where the information sought by the defense is not in the possession of the state. ***Shiffra***, 175 Wis.2d at 606-07, . . . (citing ***State v. S.H.***, . . ., and ***In re K.K.C.***, . . .). This court recognized the validity of ***Shiffra*** in ***State v. Solberg***, 211 Wis.2d 372, 386-87, 564 N.W.2d 775 (1997), and in ***State v. Rizzo***, 2002 WI 20, ¶53, 250 Wis.2d 407, 640 N.W.2d 93. *We will not depart from this precedent.*

2002 WI 68, ¶21, n.4 (emphasis added).

In ***State v. Johnson***, 2013 WI 59, 348 Wis.2d 450, 832 N.W.2d 609, *reconsideration granted*, 2014 WI 16, 353 Wis.2d 119, 846

N.W.2d 1, the state yet again sought to overrule ***Shiffra*** with virtually identical arguments to those raised here. *See* State's opening brief in ***Johnson*** at 9-18, available at https://acefiling.wicourts.gov/documents/show_any_doc?appId=wsccca&docSource=EFile&p%5bcaseNo%5d=2011AP002864&p%5bdocId%5d=92830&p%5beventSeqNo%5d=60&p%5bsectionNo%5d=1.

The Court once again rejected those arguments:

> A majority of the court would not overrule ***Shiffra***. Chief Justice Abrahamson, Justice Bradley, Justice Crooks, and Justice Ziegler conclude that ***Shiffra*** should not be overruled, observing that this court has reaffirmed or applied ***Shiffra*** in a number of cases.

2013 WI 59, ¶2 (footnote omitted).

Although the state cites and quotes from out-of-state cases that interpret ***Ritchie*** as inapplicable to privileged records not in the possession of the state, State's Brief at 13-15, it fails to mention that this Court already has rejected the very arguments it raises here on at least three separate occasions.

C. The State's Private/Public Distinction Is One Without A Difference

The state's argument that the ***Shiffra/Green*** analysis conflicts with United Supreme Court precedent by authorizing review of privileged records held in the hands of private entities, State's Brief at 16-18, misreads both ***Ritchie*** and the many Wisconsin authorities approving that analysis.

The state is correct that the due process rationale of ***Brady v. Maryland***, 373 U.S. 83 (1963), only requires the disclosure of material exculpatory evidence in the possession or knowledge of the state and its investigative agencies. *Id.* at 87-88; *see* ***Kyles v. Whitley***, 514 U.S. 419, 437-38 (1995) (obligation extends to police agencies as well as prosecutor); *see* ***Wold v. State***, 57 Wis.2d 344, 349, 204 N.W.2d 482 (1973) (prosecutor's duty to disclose encompasses duty "to obtain all evidence in the possession of investigative agencies of the state"). It also is correct that ***Ritchie*** itself addressed a situation in which the

confidential records were held by a state investigative agency. 480 U.S. at 42-43.

However, the United States Supreme Court has not yet addressed whether due process may apply, as ***Shiffra***, ***Green***, and a multitude of other Wisconsin cases hold, to disclosure of a witness's records necessary to a fair trial that are held in private hands. Accordingly, nothing bars states like Wisconsin from concluding that its courts should seek to balance and protect the truth-seeking function of the trial and the defendant's right to a fair trial on one side and the witness's privacy interests on the other, regardless whether that determination is based on federal due process, state due process, state statute, or public policy. *See, e.g.*, ***People v. Stanaway***, 446 Mich. 643, 521 N.W.2d 557, 574-75 (1994):

> [O]ur review of the jurisprudence of other states, along with our own precedent in dealing with discovery and evidentiary principles, coupled with a prudent need to resolve doubts in favor of constitutionality, prompts us to hold that in an appropriate case there should be available the option of an in camera inspection by the trial judge of the privileged record on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense.

Wisconsin is not alone in holding that ***Ritchie's*** balancing rationale applies equally to privileged records in the hands of private entities as to those possessed by state investigative agencies:

> ***Gagne*** did not distinguish between the privileged records of a State agency and the privileged records of a private organization. The rationale in ***Gagne***, balancing the rights of a criminal defendant against the interests and benefits of confidentiality, applies equally in both cases. A record is no less privileged simply because it belongs to a State agency. Likewise, a defendant's rights are no less worthy of protection simply because he seeks information maintained by a non-public entity.

State v. Cressey, 137 N.H. 402, 628 A.2d 696, 703-04 (1993), *citing* ***State v. Gagne***, 136 N.H. 101, 612 A.2d 899 (1992).

> Although the United States Supreme Court relied on the prosecutorial obligation to disclose material evidence as part of its rationale for requiring in camera review of privileged records in [***Ritchie***], there is little justification for applying a different analysis when privileged records are held by private entities rather than by the government. "[A] defendant's rights are no less worthy of protection simply because he seeks information maintained by a non-public entity."

State v. Rehkop, 180 Vt. 228, 908 A.2d 488, 494-95 (2006), quoting ***Cressey***, 628 A.2d at 704.

Moreover, although ignored by the state, a number of courts have approved procedures regarding pre-trial disclosure similar to the ***Shiffra/Green*** analysis without regard to whether the records were in the hands of state investigative agencies. *See, e.g.*, ***In re Robert H.***, 199 Conn. 693, 509 A.2d 475, 482-85 (1986); ***People v. Stanaway***, 446 Mich. 643, 521 N.W.2d 557 (1994); ***State v. Duffy***, 300 Mont. 381, 6 P.3d 453, 458 (2000); ***State v. Cardall***, 982 P.2d 79, 85-86 (Utah 1999) (school records).[8]

Wisconsin is free to determine that its constitutional due process provision is more protective of the truth-seeking function of the trial and the defendant's right to a fair trial than that recognized by the United States Supreme Court regarding the federal constitution. *E.g.*, ***State v. Doe***, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977); *see* ***United States v. Hach***, 162 F.3d 937, 947 n.5 (7th Cir. 1998) (interpreting ***Shiffra*** as being based on state law). For instance, in light of the due process right to "a meaningful opportunity to present a complete defense," this Court has held that "a defendant has a right to post-conviction discovery when the sought-after evidence is relevant to an issue of consequence," ***State v. O'Brien***, 223 Wis.2d 303, 320-21, 588 N.W.2d 8 (1999), even though there was then no Supreme Court decision creating such a right.

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[8] Other states have imposed procedures less protective of the witness, allowing direct access to privileged records by the attorneys upon a proper showing before trial without a prior *in camera* review. *E.g.*, ***Com. v. Barroso***, 122 S.W.3d 554, 561–62 (Ky.2003); ***Com. v. Stockhammer***, 409 Mass. 867, 570 N.E.2d 992 (1991).

Moreover, the real issue here is not *whether* the balancing test will be performed but *when*. State's Brief at 8-15; *see, e.g.*, ***Goldsmith v. State***, 337 Md. 112, 651 A.2d 866, 870-71 (1995). The rights to compulsory process and to present a defense necessarily entitle the defendant to subpoena relevant therapy providers to trial. Indeed, even the court quoted by the state as rejecting application of ***Ritchie*** to records in private hands imposes a ***Shiffra/Green***-type analysis to disclosure of such records at trial. ***State v. Johnson***, 440 Md. 228, 102 A.3d 295, 301-03 (2014), distinguishing ***Goldsmith***, *supra* on these grounds.

The end result likely would be a pretrial assessment in any event. Any therapist subpoena likely would provoke a motion to quash that generally would be heard prior to trial under Wis. Stats. §906.11 to avoid delay and inconveniencing the jury. *E.g.*, ***State v. McClaren,*** 2009 WI 69, ¶3, 318 Wis.2d 739, 767 N.W.2d 550 ("Foreseeing potential obstacles to a smoothly run trial and taking the necessary steps to avoid them is manifestly within the inherent power of a circuit court").

Finally, this Court already has imposed a ***Shiffra/Green*** type analysis in many other contexts on purely public policy grounds even where the right to present a defense does not apply. In ***Johnson v. Rogers Memorial Hosp., Inc.***, 2005 WI 114, ¶¶58-76, 283 Wis.2d 384, 700 N.W.2d 27, this Court held that, given the significant harm caused by being falsely accused of child sexual abuse, public policy and the balancing of interests requires a limited exception to therapist-patient privilege. A ***Shiffra/Green***-type analysis and *in camera* review procedure is justified where the victims of alleged negligence by a therapist in implanting and reinforcing false memories of physical and sexual abuse sue the therapist. *See also* ***Lane***, 2002 WI 28, ¶¶52-56 (*in camera* review required for materials that may be subject to attorney-client privilege).

In camera review also can occur when courts need to determine if records (such as prison conduct reports) should be released under an open record request, *see, e.g.*, ***George v. Knick***, 188 Wis. 2d 594, 525

N.W.2d 143 (Ct. App. 1994), whether confidential prison personnel records should be released, ***State v. Navarro,*** 2001 WI App 225, 248 Wis.2d 396, 636 N.W.2d 481, whether juvenile records should be released in civil cases, ***In re Termination of Parental Rights to Caleb J.F.,*** 269 Wis.2d 709, 676 N.W.2d 545 (Ct. App. 2004), and whether the defendant's juvenile records should be released in criminal cases, ***State v. Moore,*** 295 Wis.2d 514, 721 N.W.2d 725 (Ct. App. 2006).

D. The *Shiffra/Green* Analysis Does Not Conflict With Supreme Court Authority

As it did unsuccessfully in ***Johnson***, the state again attempts to argue that the ***Shiffra/Green*** analysis somehow conflicts with United States Supreme Court authority recognizing a federal psychotherapist-patient privilege under Fed. R. Evid. 501 and two pre-***Ritchie*** Supreme Court decisions holding that generally there is no due process right to pretrial discovery. State's Brief at 16-20, citing ***Jaffee v. Redmond***, 518 U.S. 1 (1996); ***Weatherford v. Bursey***, 429 U.S. 545 (1977); and ***Wardius v. Oregon***, 412 U.S. 470 (1973).

As the Court recognized in summarily rejecting the same claim two years ago, ***Johnson***, 2013 WI 59, ¶2, the state's argument fails.

First, the Supreme Court's recognition of a federal privilege in ***Jaffee*** cannot control interpretation and application of a state evidentiary privilege or state criminal procedure. ***State v. Gary M.B.***, 2004 WI 33, ¶17, 270 Wis. 2d 62, 676 N.W.2d 475 ("while decisions of the Supreme Court interpreting the Federal Rules of Evidence may be persuasive authority, they are not binding on this court." (Citation omitted)).

More importantly, however, the ***Shiffra/Green*** analysis is set up to protect both the defendant's right to a fair trial and the witness's privacy rights, with the decision whether to waive the privilege remaining entirely in the witness's hands. There is no conflict because the ***Shiffra/Green*** analysis does not force disclosure of privileged information since the witness can refuse consent. As the Supreme Court has recognized, moreover, *in camera* review preserves the privilege by

preventing unwarranted disclosures of privileged information; consent to such review does not waive the privilege for other purposes. ***United States v. Zolin***, 491 U.S. 554, 563-70 (1989); *see* ***Solberg***, 211 Wis.2d at 386-87 (no release of information reviewed *in camera* absent further consent by witness).

Finally, as the state acknowledges, ***Jaffee*** itself recognized that the privilege must sometimes give way, noting as an example when "a serious threat of harm . . . can be averted only by means of a disclosure by the therapist." 518 U.S. at 18; *see* State's Brief at 16. Under any reasonable standard, the threat of a conviction resulting from a witness's concealment of information that likely is necessary to a fair determination of guilt or innocence or is material to the defense of the accused is a serious threat of harm. *See* ***Johnson v. Rogers Mem'l Hosp.***, 2005 WI 114, ¶¶64-65 (noting "seriousness of being falsely accused a child abuser"); ***id.***, ¶80 (Prosser, J., Concurring) (same).

Second, contrary to the state's mistaken premise, the ***Shiffra*** Court did not hold that ***Ritchie*** mandated the analysis this Court has since approved. Rather, ***Ritchie*** provided guidance on how to appropriately balance and protect the rights of both the defendant and the witness. The holding in ***Shiffra*** was not that ***Ritchie*** mandated the analysis in this particular situation, but that "[p]ublic policy and the history of our judicial system require that Wisconsin's courts embrace ***Ritchie*** *in the manner prescribed by our court* in ***K.K.C.*** and ***S.H.***" 175 Wis.2d at 612 (emphasis added).

The courts in ***Shiffra***, ***Green***, and the many other cases that have applied the ***Shiffra/Green*** standard over the past 20+ years were confronted with a conflict between the "goals of confidential privilege and the right to put on a defense." *See* ***Shiffra***, 175 Wis.2d at 611-12. They chose to address that conflict in a way that balanced and protected the defendant's right to a fair trial, the truth-seeking function of the trial, and the witness's rights to privacy. As already noted, *supra*, the same need for balancing would occur at trial, as the state's own authority acknowledges, ***Goldsmith***, 651 A.2d at 874-77, and it was perfectly rational for Wisconsin's courts to decide as a matter of public

policy that it makes more sense to address the issues prior to trial than to cause delay and inconvenience to the parties and the jury by deferring the balancing until mid-trial. *See* Section I,C, *supra*.

Accordingly, there is no conflict between the ***Shiffra/Green*** analysis and any United States Supreme Court decision.

E. The *Shiffra/Green* Standard Provides No Unfair Advantage to Some Defendants but Not Others

The state's assertion that the ***Shiffra/Green*** analysis somehow is unfair is puzzling. State's Brief at 20-21. It is true that, as the state notes, *id.* at 45, it is the "rare" defendant who satisfies that standard by showing that the information sought likely is necessary to a fair determination of guilt or innocence or is material to the defense of the accused. However, the criminal justice system is rife with situations in which a particular defendant has better counsel, can afford experts, has serendipitously discovered evidence undermining the state's case, or the like. Neither the law nor common sense supports the state's theory that such defendants must be handicapped so they do not have a greater chance of a fair trial and acquittal than others who do not have those benefits. *Cf.* ***State v. Jones***, 2010 WI 72, ¶14, 326 Wis.2d 380, 797 N.W.2d 378 (indigent defendants, unlike other defendants, have no constitutional right to counsel of choice).

II.

THIS COURT SHOULD REJECT THE STATE'S ATTEMPT TO UNDERMINE THE CAREFUL BALANCING OF INTERESTS REFLECTED IN THE *SHIFFRA/GREEN* ANALYSIS BY OVERRULING THE ESTABLISHED EXCLUSION REMEDY

In ***Shiffra***, the Court of Appeals recognized that, in circumstances where the witness chooses to assert the privilege to prevent disclosure for *in camera* review of information the court finds likely is necessary to a fair determination of guilt or innocence, the only appropriate remedy is to exclude evidence from that witness at trial. 175 Wis.2d at 612. The same remedy applies where the assertion of privilege prevents the subsequent disclosure to the defense of informa-

tion the court deems material to the defense of the accused. *E.g.*, ***Johnson***, 2014 WI 16, ¶¶4-5.

As a fall-back argument to its attempt to overrule the ***Shiffra/Green*** standard altogether, the state suggests that the Court should overrule that portion of the standard which requires exclusion of evidence from a witness who seeks to conceal information necessary to a fair assessment of that witness's testimony. State's Brief at 23-33. In its place, the state seeks to impose a squishy, case-by-case balancing test. *Id.* at 23-29.

The state's argument fails for a number of reasons. First, as this Court noted in the rehearing decision in ***Johnson*** where it rejected the same argument, "[t]he decision to produce and the consequence of whether testimony is allowed cannot be separated." 2014 WI 16, ¶5, citing ***Green***, 253 Wis.2d 356, ¶37; ***Shiffra***, 175 Wis.2d at 612; *see id.* ¶4. Each prong of the ***Shiffra/Green*** standard - restrictive conditions for ordering *in camera* review and for releasing any privileged information following that review, the witness's right to bar disclosure of privileged information, and the exclusion remedy necessary to protect the truth-seeking function of the trial and the defendant's rights to present a defense should the witness exercise that right - is necessary to achieve the goal of the standard to protect *all* of those interests. Lopping off any of those prongs undermines one or more of those interests.

Second, the only alternative to exclusion the state proposed in the lower courts here was involuntary disclosure under Wis. Stat. §146.82(2)(a)4. *See* State's Court of Appeals Brief at 2, 25-33. (R81:6-7). Although the state still does not suggest any other alternative in its opening brief, it therefore has forfeited any argument seeking some other alternative to the exclusion remedy. *See* ***Tatera v. FMC Corp.***, 2010 WI 90, ¶19 n.16, 328 Wis.2d 320, 786 N.W.2d 810 ("Arguments raised for the first time on appeal are generally deemed forfeited.").

Third, the state repeatedly posits the wrong question by mistakenly assuming that the witness's privilege and the defendant's right to fair trial conflict. The ***Shiffra/Green*** standard and its exclusion

remedy insures that there is no conflict between the defendant's fair trial rights and the witness's privacy rights by guaranteeing that the witness always has the final say in whether private counseling records are disclosed. The witness's rights are protected by both the strict showing required for *in camera* review and for subsequent disclosure and by the witness's ability to bar disclosure. At the same time, the defendant's rights and the truth-seeking function of the trial are protected by the exclusion of evidence from that witness should he or she refuse to disclose the information the court had found likely is necessary to a fair determination of guilt or innocence or is material to the defense of the accused.

Thus, this Court need not consider, as the state erroneously suggests, *see* State's Brief at 29, whether the defendant's right to a fair trial "should trump the witness's privilege" or "the State's interest in enforcing evidentiary privileges." Similarly, this Court need not consider whether the defendant's right "must be subordinated to the witness's right to privacy." *Id*. at 32.

Fourth, the state's argument for application of a separate balancing test after application of the ***Shiffra/Green*** standard overlooks the fact that that standard itself resulted from exactly such a balancing of interests, rendering any additional balancing redundant. In developing the analysis for assessing a request for *in camera* review, the courts balanced the defendant's right to present a defense, the fact that the defendant necessarily could not know what in fact is in privileged documents, the witness's right to the privilege, and the limited nature of disclosure merely for *in camera* review. *See, e.g.*, ***Green***, 2002 WI 68, ¶¶31-35; ***Solberg***, 211 Wis.2d at 387; ***Shiffra***, 175 Wis.2d at 608-10. In developing the analysis of whether to disclose any or all of the information reviewed to the defense, the courts similarly took into account the defendant's need for the information to present a complete defense and the witness's right to prevent disclosure of unnecessary information. ***Solberg***, 211 Wis.2d at 386-87. All the while, the standard protects the witness's right to the privilege by granting him or her the ability to prevent any disclosure and protects the defendant's rights and the truth-seeking function of the trial by excluding evidence from the

witness who chooses to exercise that right. *See generally* Section I,A, *supra*.

In fact, each of the three "factors" identified by the state as relevant to its proposed balancing test, State's Brief at 29-33, is either irrelevant or already accounted for in creating the ***Shiffra/Green*** analysis. "Whether the defendant has access to non-privileged evidence that would support his defense," State's Brief at 29-30, already is accounted for by ***Green's*** requirement that cumulative evidence must not be disclosed. 2002 WI 68, ¶¶33-34. Whatever alleged trauma that may result "from review of the records without consent," State's Brief at 30-31, is irrelevant to the ***Shiffra/Green*** analysis because any review of those records would never be "without consent." Under ***Shiffra/Green***, the witness retains the absolute right not to consent to the release of privileged documents. Finally, 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," State's Brief at 31-32, already is fully accounted for in the court's assessment of whether the information: (1) likely is necessary to a fair determination of guilt or innocence, as required for *in camera* review, or (2) is material to the defense of the accused, as required for disclosure to the defense following such review. *See*, *e.g.*, ***Shiffra***, 175 Wis.2d at 607. Relevance and probative value are the essence of these assessments.

Fifth, the state's proposed post-***Shiffra/Green*** rebalancing test is unworkable in practice, at least where the witness refuses to disclose privileged information for *in camera* review. If the defense meets the restrictive standard for *in camera* review but the witness refuses to disclose the information for such review, neither the court nor the parties have any additional information to "balance" beyond what already led the court to hold that the concealed records likely contain non-cumulative information "necessary to a determination of guilt or innocence." ***Green***, 2002 WI 68, ¶34. The state fails to suggest how the court is to determine, in essence, that the concealment of information it already has determined likely is necessary to a fair determination

of guilt or innocence is nonetheless harmless.[9]

In the end, the state also leaves undeveloped any argument regarding what the result of its proposed post-***Shiffra/Green*** re-balancing should be beyond compelled disclosure over the witness's assertion of privilege. As the ***Shiffra*** Court explained in rejecting any alternative but exclusion, and the state here does not dispute, contempt is inappropriate because the witness is not obligated to consent to the disclosure and an adjournment is of no benefit because the undisclosed information would still be unavailable. 175 Wis.2d at 612.

The state understandably does not affirmatively argue that the witness merely should be left free to testify while simultaneously undermining the defendant's right to a fair trial and distorting the truth-seeking function of the trial by concealing information which the court has determined likely is necessary to a fair determination of guilt or innocence or is material to the defense of the accused. Again, the state does not dispute the logic of the ***Shiffra*** Court's rejection of a similar argument:

> The state suggests that one solution would be to allow Pamela to testify despite her continuing assertion of her confidentiality privilege, but to allow the defendant to tell the jury that she has refused to allow access to her records. We hold that this is no solution at all. The jury will know only that the witness has exercised her privilege not to divulge her personal mental history. A reasonable juror might well consider this decision to be a reasonable exercise of her right to privacy rather than an attempt to hide something material to the credibility of her testimony. While the state terms the allowing of a comment by the defense to be a "sanction against" the complaining witness, it is reasonable to believe that the jury will instead consider the witness' choice with favor. The state's suggestion has no merit.

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[9] Of course, the court will know the substance of the information once the witness consents to *in camera* review. However, it is difficult to imagine a circumstance in which a court could conclude that information which it has determined after such a review to be material to the defense in the sense that it is necessary to a fair determination of guilt or innocence would nonetheless be so insignificant as to permit a testifying witness to bar its use at trial.

175 Wis.2d at 612 n.4. *See also* Wis. Stat. §905.13 (1) (other than in a civil case with regard to the privilege against self-incrimination, "[t]he claim of privilege . . . is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.").

Indeed, the federal right underlying ***Brady*** and ***Ritchie*** derives from the line of Supreme Court authority emphasizing the due process right that the jury not be misled by the state, such that the prosecutor has an obligation not to present evidence or argument that it knows or should know is untrue, and in fact must act to correct any such evidence. *E.g.*, ***Giglio v. United States***, 405 U.S. 150, 153-54 (1972); ***Miller v. Pate***, 386 U.S. 1 (1967) (prosecutor violated due process by arguing to jury that shorts were stained with blood when he knew that it was paint). It is hardly consistent with that line of cases to permit the state to call a witness to testify and to base its case on such testimony when it knows that witness has chosen to conceal information that the court has determined likely is necessary to a fair determination of guilt or innocence or is material to the defense of the accused.

The only purpose of the state's proposed post-***Shiffra/Green*** rebalancing thus appears to be to assess whether the remedy should be compelled disclosure as opposed to exclusion. *See* State's Brief at 32-33. This was the sole alternative remedy sought by the state below. State's Court of Appeals Brief at 2, 25-33 (R81:6-7). Lynch addresses the state's attempt to legitimize infringement of the witness's privilege in the following section.

III.

GIVEN THE LONG-STANDING REMEDY OF EXCLUSION, COMPELLED DISCLOSURE OF THE WITNESS'S PRIVILEGED INFORMATION IS NEITHER NECESSARY NOR LEGALLY JUSTIFIED

The state is correct that *if* a conflict exists between a defendant's due process right to present a defense and a witness's privilege, then the privilege must yield. State's Brief at 42-46; *see* ***State v. Johnson***, Appeal No. 2011AP2864-CRAC, slip op. at ¶25 (Ct. App. 4/18/12) (Brown, C.J., dissenting) (Pet-Ap.154-55). Indeed, the Victim's Rights

amendment to the Wisconsin Constitution recognizes as much even when the witness is also the alleged victim. Wis. Const. Art. I, §9m ("Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law."). Accordingly, *if* the Court were to hold that exclusion is no longer the required remedy when a witness refuses to consent to release of privileged information as directed by a court for *in camera* review or for release to the defendant after such review pursuant to the ***Shiffra/Green*** analysis, then the state is correct that the only permissible alternative is to compel disclosure under Wis. Stat. §146.82(2)(a)4 over the witness's assertion of privilege. A witness cannot be granted veto power over a defendant's right to present a defense.

The problem with the state's analysis is not in its conclusion but in its premises. Although the state frames this as a conflict between the defendant's due process right to present a defense and the witness's rights to the privilege, there simply is no conflict between those rights *unless* the witness is permitted to testify while simultaneously concealing information that is likely or actually necessary to a fair assessment of the witness's testimony. By (1) requiring disclosure only to the limited extent necessary to protect the defendant's right to a fair trial, (2) granting the witness the power to prevent disclosure of privileged information, and (3) requiring exclusion of evidence from a witness who chooses to exercise that power, the ***Shiffra/Green*** standard fully protects *both* the defendant's due process right to present a defense *and* the witness's interests in the privilege. *See* Section I,A, *supra*. Only by lopping off one of those protections would the Court create a conflict between those two interests and require the privilege to yield.

The state thus once again is asking the wrong question. The issue is not whether the defendant's constitutional right to a present a defense would trump the witness's statutory privilege in the case of a direct conflict, because no such conflict exists as long as the remedy is exclusion of any evidence from the non-consenting witness. The witness's privilege rights are protected by the restrictive standards that must be met before disclosure can be granted, the *in camera* review itself, and the right to refuse disclosure, while the defendant's rights are

protected by the opportunity for *in camera* review and the exclusion of evidence from a non-consenting witness.

The witness's possible desire to testify while simultaneously concealing the information necessary to a fair assessment of that testimony does not change the analysis. The desire to testify without fear of contradiction or cross-examination is neither a right protected by law nor one worthy of weight in our adversarial system. The witness's only protectable interest is in preserving the privilege and, under the ***Shiffra/Green*** standard as it stands, protection of that privilege already is entirely in the hands of the witness.

The real question raised by the state is whether its interest in prosecuting a particular case trumps the witness's therapist-patient privilege. *See* State's Brief at 34-41 (complaining that ***Shiffra/Green*** standard does not protect state's interest in prosecution).[10] Essentially, the state is arguing that, even though the ***Shiffra/Green*** standards balance and protect the truth-seeking function of the trial, the defendant's right to present a defense, and the witness's right to the privilege, it short-changes the prosecution's interest in a conviction, such that the witness's privilege must give way. *Id.*

Having clarified the proper question, Lynch does not have a dog in the fight over whether the proper remedy for the refusal to consent

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[10] The Court of Appeals in ***Behnke*** properly responded to the state's similar argument there regarding the "costs" to the state of the defendant's rights to a fair trial and the witness's privilege as balanced under the ***Shiffra/Green*** standard:

> We further acknowledge that the "costs" of the health care provider privileges are principally shifted to the State. In a few circumstances, the State may have to completely forgo a case when one of its witnesses refuses to turn over the information. . . Nonetheless, the Due Process Clause guarantees the defendant a right to a trial based on truth seeking which can only be accomplished by allowing him or her to present a complete defense. The Due Process Clause thus prevents the State from shifting the costs associated with the health care provider privileges to criminal defendants. If the State sees a problem with these privileges, it should lobby the legislature for a change in the law.

203 Wis.2d at 56.

to disclosure required by the ***Shiffra/Green*** standards should be exclusion of evidence from the witness or compelled disclosure in violation of the witness's privilege. Although one or the other is required, either remedy protects the defendant's rights to due process and to present a defense under the circumstances here.[11]

Nonetheless, Lynch has found no other circumstance in which the state's desire for evidence trumped a person's privilege not to provide that evidence. *See, e.g.*, ***State v. Spaeth***, 2012 WI 95, 343 Wis.2d 220, 819 N.W.2d 769 (excluding evidence compelled in violation of the privilege against self-incrimination);[12] ***State v. Meeks***, 2003 WI 104, ¶¶40, 54, 263 Wis.2d 794, 666 N.W.2d 859 (excluding evidence falling within attorney-client privilege); ***State v. Lock***, 177 Wis.2d 590, 599-607, 502 N.W.2d 891, 897 (Ct. App. 1993) (reversing based on improper admission of statements in violation of therapist-patient privilege); ***State v. Richard G.B.***, 2003 WI App 13, ¶9, 259 Wis.2d 730, 656 N.W.2d 469 (regarding spousal privilege). Moreover, this Court's observation long ago that "a hardship of the prosecution . . . does not justify disregard of the rights of the defendant in order to overcome the state's difficulty," ***Pleau v. State***, 255 Wis. 362, 366, 38 N.W.2d 496 (1949), presumably would apply equally to the rights of witnesses.

Finally, contrary to the state's unexplained assertion, State's Brief at 34, 40-41, nothing about ***Crawford v. Washington***, 541 U.S. 36 (2004), suggests either that the ***Shiffra/Green*** standard is wrong or that the state should now be entitled to compel disclosures in violation

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[11] The one circumstance in which the exclusion remedy may not be adequate to protect the defendant's rights is where the information necessary to present a defense is protected from disclosure to the defense by a privilege owned by someone not on the state's witness list. For instance, exclusion would not protect the right to present a defense where the information required rebuts or discredits, not the testimony of the privilege holder, but the allegations of one or more other witnesses. That situation is not presented here.

[12] Although the state may compel testimony in the face of the self-incrimination privilege by granting immunity providing equivalent protections, *e.g.*, ***Murphy v. Waterfront Commission***, 378 U.S. 52 (1964), no equivalent alternative protection exists for the therapist-patient privilege.

of a privilege in order to build its case. ***Crawford*** merely recognized that, consistent with the defendant's right to confrontation, certain requirements must be met before testimonial hearsay may be admitted at trial. 541 U.S. at 53-54. The state appears to argue that ***Crawford*** makes it more difficult for a prosecutor to circumvent ***Shiffra/Green's*** exclusionary remedy by presenting evidence of the excluded witness's testimonial hearsay.

However, the state suggests no rational basis for concluding that testimonial or other hearsay evidence of a witness not subjected to cross-examination should be admitted at trial when the court already has decided that the defendant's right to present a defense requires exclusion of that same witness's in-court testimony. If disclosure of privileged information is necessary to a fair determination of guilt or innocence were the witness to testify in court subject to cross-examination, the same necessarily applies when evidence from that witness is proffered without subjecting the witness to cross-examination.

CONCLUSION

The Wisconsin Courts repeatedly have held over the past 20+ years that the ***Shiffra/Green*** standards properly balance the relevant interests and this Court repeatedly has rejected the state's attempts to overrule those standards. Those standards protect the defendant's due process right to present a defense and the truth-seeking function of the trial while likewise fully protecting the witness's right to control over privileged information. Just last year, this Court recognized that "[c]ircuit courts and counsel have functioned well using the ***Shiffra/Green*** analysis for many years," ***Johnson***, 2014 WI 16, ¶12. The state's repeated attacks on that analysis seek to change all of that, unnecessarily impinging on the rights of the defense or the witness or undermining the fairness of the trial for the sole purpose of obtaining a perceived advantage for the prosecution.

For the reasons stated, the Court should yet again reject that effort and affirm the decisions of the lower courts.

Dated at Milwaukee, Wisconsin, August 19, 2015.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,125 words.

Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

_____
Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 19th day of August, 2015, I caused 22 copies of the Brief of Defendant-Respondent Patrick J. Lynch to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____
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