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

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

BRAD D. SCHIMEL
Attorney General

MARGUERITE M. MOELLER
Assistant Attorney General
State Bar #1017389

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8556
(608) 266-9594 (Fax)
moellermm@doj.state.wi.us

TABLE OF CONTENTS

Page

CASES

Page

STATUTES

OTHER AUTHORITIES

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

REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER, STATE OF WISCONSIN

ARGUMENT

I. A Reflexive Application Of Stare Decisis Should Not Deter This Court From Overruling Or Modifying *Shiffra*.

In exhorting this court not to overrule or modify *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), Lynch

observes that this court has "on at least three separate occasions" rejected the same arguments the State is advancing for jettisoning *Shiffra* and urges this court to follow suit here. Lynch's brief at 15. Lynch also asserts that *Shiffra*/*Green*[1] properly balances an accused's right to a fair trial against the privacy rights of witnesses, claiming that it has accomplished its intended purpose. *See generally id.* at 8-12.

For reasons explained below, neither rationale should deter this court from holding that *Shiffra* and its progeny are doctrinally unsound and ought to be overturned or modified.

A. This court has never explicitly discussed the State's arguments for overturning *Shiffra*.

Lynch cites four supreme court decisions as having rejected (or failed to adopt) the State's challenge to *Shiffra*: *State v. Speese*, 199 Wis. 2d 597, 545 N.W.2d 510 (1996); *State v. Solberg*, 211 Wis. 2d 372, 564 N.W.2d 775 (1997); *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, and *State v. Johnson*, 2013 WI 59, 348 Wis. 2d 450, 832 N.W.2d 609 (per curiam), *clarified on reconsideration by* 2014 WI 16, 353 Wis. 2d 119, 846 N.W.2d 1 (per curiam). None of these cases, however, addresses any of the State's arguments for *why Shiffra* is unsound in principle, a reason identified as grounds for departing from stare decisis. *See Johnson Controls v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 99, 264 Wis. 2d 60, 665 N.W.2d 257.

In *Speese*, 199 Wis. 2d at 613, this court declined to address "whether the physician-patient privilege must yield to an accused's right to present a complete defense." Because the

[1] In *State v. Green*, 2002 WI 68, ¶ 32, 253 Wis. 2d 356, 646 N.W.2d 298, this court raised slightly the bar for a defendant seeking in camera review of privileged records.

trial court had reviewed the victim's medical and psychiatric records pretrial and determined that nothing in them was relevant to the defense, *id.* at 601-02, this court resolved Speese's appeal by conducting its own review and deciding that any error in withholding the records from the defense was harmless. *Id.* at 600. This court regarded as unresolved the questions presented here.

Similarly, this court in *Solberg* had no reason to consider overruling *Shiffra* because the trial court had conducted an in camera review with the victim's consent. The issues there were whether the appellate court was authorized to review the records the trial court had examined, and whether the trial court had erroneously exercised its discretion when it determined that information in the records needn't be disclosed to Solberg. *Solberg,* 211 Wis. 2d at 374. Significantly, the *Solberg* concurrence – consisting of Justice Bradley and then-Chief Justice Abrahamson – believed that *Solberg* left unanswered many questions, including whether the privilege in Wis. Stat. § 905.04 is absolute. *Id.* at 391.

As for *Green*, 253 Wis. 2d 356, ¶ 37, there this court upheld the trial court's determination that Green had failed to demonstrate an entitlement to in camera review. While this court admittedly rejected the State's argument that *Shiffra* erroneously relied on *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), for its due process analysis, it did so in a footnote suggesting it did so solely in deference to stare decisis. *Green*, 253 Wis. 2d 356, ¶ 21 n.4. Green's adherence to precedent was understandable, given that it was unnecessary to overrule *Shiffra* in order to affirm the court of appeals' decision.

Most recently, in its initial decision in *Johnson*, 348 Wis. 2d 450, ¶ 2, four of the five participating justices declined to overrule *Shiffra*. Similar to *Green*, however, that decision omitted any discussion of the State's arguments. Instead, the

court again invoked stare decisis, string-citing six cases it described as having reaffirmed or applied *Shiffra*. *Id.* at n.2. So while *Johnson* may illustrate that the State faces an uphill battle in its quest to overrule *Shiffra*, *Johnson* provides no insight into whether the court agrees with *Shiffra*'s analysis or just with the end result. This appeal affords the entire court the opportunity to weigh in on this important issue.

B. The distinction between privately held privileged records and records of a state agency is not one without a legal difference.

Lynch admits that the Supreme Court has not decided whether a due-process analysis should extend to privately held privileged records. Lynch's brief at 16. But he suggests that it does not matter how the Court would resolve that question, noting that Wisconsin is free to adopt a *Ritchie*-style balancing test based on federal due process, state due process, state statute, or public policy. *Id.*

The State has two responses: 1) *Shiffra*'s balancing test is not mandated under the federal Due Process Clause; and 2) the underlying basis for adopting the balancing test is legally significant.

Kinder v. White, No. 13-4198, 2015 WL 1812942 (4th Cir. April 22, 2015), furnishes additional support for the proposition that there is no federal due-process right to in camera review and potential discovery of privately held privileged records. *Kinder v. White* was an outgrowth of White's federal prosecution for arson-related offenses arising from the 2009 fire of a duplex White owned. White had conspired with Kinder and her husband to burn the duplex for insurance purposes, and Kinder was the government's star witness. Although it rejected White's argument that *Jaffee v. Redmond*, 518 U.S. 1 (1996), is limited to civil cases, the district court determined that the psychotherapist privilege announced in *Jaffee*

"contemplates *an exception* where necessary to vindicate a criminal defendant's constitutional rights." *United States v. White*, No. 2:12-cr-00221, 2013 WL 1404877, at *13 (S.D. W. Va. April 5, 2013). The district court held that White's Fifth Amendment right to due process entitled White to pretrial production of Kinder's privileged records over Kinder's assertion of her psychotherapist privilege. *Id.* at *16.

In reversing, the Fourth Circuit described the lower court's Fifth Amendment rationale as "demonstrably at odds" with *Jaffee*. *Kinder v. White*, 2015 WL 1812942, at *3. The appellate court explained that *Jaffee* had explicitly rejected an ad hoc balancing test because it would defeat the goal of the psychotherapist privilege by making its application uncertain. *Id.* at *4.

Although the contours of the federal psychotherapist privilege involved in *Kinder v. White* are not identical to the privilege in § 905.04, that case supports the view that *Shiffra*'s balancing test is not required by the federal Due Process Clause. *See also* Carolyn Peddy Courville, *Rationales for the Confidentiality of Psychotherapist-Patient Communications: Testimonial Privilege and the Constitution*, 35 Hous. L. Rev. 187, 220 (1998) (*Ritchie* applies only to therapists who are state actors because the defendant's rights in *Ritchie* flowed from the government's obligation to disclose exculpatory material in its possession).

While Lynch is correct that this court could retain *Shiffra*'s balancing test under alternative legal theories, he is wrong in arguing that the public/private distinction the State has long cited as distinguishing *Ritchie* doesn't matter. For example, if this court were to hold that public policy justifies retaining the *Shiffra*/*Green* test, then the legislature could decide otherwise and declare that a witness's privilege is paramount. In contrast, a state constitutional entitlement to in camera

review would not be so easily overcome by a legislative enactment.

This case offers this court the opportunity to address whether the *Shiffra*/*Green* test is mandated by the federal Due Process Clause and, if not, what other justification there is for retaining it. Contrary to Lynch's contention, identifying the source of the defendant's right to review of privileged records is critical.

C. The *Shiffra*/*Green* balancing test yields unpredictable outcomes and ignores the public's interest in the administration of justice.

Another reason Lynch proffers for retaining *Shiffra*/*Green*'s balancing test is that it has worked well, so there is no reason to tinker with it. The State disputes this rosy assessment.

Johnson revealed two shortcomings of the balancing test: 1) whether a defendant has satisfied the preliminary showing of materiality is in the eye of the beholder, so that some victims will unnecessarily be forced to choose between surrendering their privileged records and foregoing the prosecution of their assailants; and 2) mandating witness preclusion whenever a privilege-holder withholds consent to in camera review contravenes the public's interest.

This court split three to two on whether Johnson had satisfied his burden under *Green*. *Johnson*, 348 Wis. 2d 450, ¶ 3. Had one justice in the majority on this issue voted the other way, Johnson's accuser would not have faced the choice of waiving her privilege or being barred from testifying. This split demonstrates that the decision whether a defendant has made a preliminary showing of materiality is highly subjective and illustrates the unpredictability of the process. This is one shortcoming of the test.

As for the second shortcoming, the State has previously explained why the aftermath of *Johnson* – drastically reduced charges and a four-month jail term for the defendant – was not in the public interest. *See* State's brief-in-chief at 39. *Johnson* is not unique, however.

Further illustrating that the balancing test has not worked well for the public is *State v. Gerald L. Larson*, No. 2004AP2622-CR, 2005 WL 1398548 (Wis. Ct. App. June 15, 2005) (Supp-Ap. 101-05).[2] There, the State appealed the trial court's order barring the victim from testifying after her mother refused to consent to release of the victim's records for in camera review. This court affirmed the trial court's order on June 15, 2005. *Id.* Seven days later, the prosecutor dismissed all charges against Larson: three counts of first degree sexual assault of a child and one count of second degree sexual assault of a child.[3] Winnebago case no. 2003CF631:entry 6 (Supp-Ap. 106). The dismissal of such serious charges without a determination of guilt or innocence aborts the truth-seeking function of the trial and harms the public's interest in the effective administration of criminal justice.

Rather than reflexively applying the doctrine of stare decisis, this court should reexamine the underpinnings of *Shiffra* and conclude that it was wrongly decided.

---

[2] The State does not believe its reference to *Larson* violates Wis. Stat. § (Rule) 809.23(3) because it is not citing *Larson* as precedent or persuasive authority but only for illustrative purposes.

[3] Fortunately, Larson was convicted in Winnebago County case no. 2004CF116 of first degree sexual assault of a child and sentenced to life imprisonment without parole on March 1, 2005.

II. The Balancing Test The State Proposed As An Alternative To Overruling *Shiffra* Accords With This Court's Precedent And Is Neither Redundant Nor Irrelevant.

As an alternative to overturning *Shiffra*, the State argued that witness preclusion should not be automatic whenever a witness withholds consent to in camera review following a determination that the defendant has satisfied *Shiffra*/*Green*. Instead, the trial court should balance the defendant's due-process right against the competing interests of the witness and the criminal justice system on a case-by-case basis, using three nonexhaustive factors identified in the State's brief-in-chief. The State discussed three supreme court decisions supporting such a framework: *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990); *State v. St. George*, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777; and *State v. Fischer*, 2010 WI 6, 322 Wis. 2d 265, 778 N.W.2d 629.

Rather than address any of these cases, Lynch ticks off five reasons for rejecting the State's argument. None of them is persuasive.

First, Lynch says this court on rehearing in *Johnson* noted that the decision to produce privileged records and the witness's ability to testify cannot be separated. Lynch's brief at 22. What Lynch ignores is that only three members of the court assumed this position, and that would not constitute a majority of the justices participating in his appeal. More importantly, the three justices cited *Shiffra* and *Green* for this proposition, and this court is free to overrule or modify those decisions. Lynch's criticism begs this question.

Second, Lynch claims the State forfeited this argument by not raising it below. Lynch's brief at 22. Lynch is wrong; the State raised this argument in its reply brief and presented it at pages 3 and 22-28 of its petition for review. But even if Lynch

were correct, he did not oppose the petition for review and therefore cannot claim that the State forfeited the issue.

Third, Lynch contends that the State mistakenly assumes that the witness's privilege and the defendant's right to a fair trial conflict. He claims no conflict exists because the witness is never forced to surrender the privilege, and barring the witness from testifying preserves the defendant's right to present evidence. Lynch's brief at 22-23. This myopic view ignores the public's interest in the effective administration of justice, an interest that suffers under the *Shiffra/Green* regime. *See* argument I.C., *supra*. This narrow view also ignores the witness's dual interest in privacy *and* prosecution of her assailant.

Fourth, Lynch asserts that an additional balancing after the trial court determines that the defendant has made a preliminary showing of materiality is redundant, and that each factor the State identified as pertinent to the equation is either irrelevant or redundant. Lynch's brief at 23-24. In fact, the *Shiffra/Green* test determines only whether the defendant has made the necessary showing of materiality entitling him to in camera review; it then imposes witness preclusion automatically whenever the showing is satisfied but the witness invokes her privilege. The State explained why *Pulizzano*, *St. George* and *Fischer* support an additional balancing once the trial court finds a constitutional right to pretrial review. Lynch offers no reason why the rationale of those cases – that even the right to present a defense must sometimes yield to competing interests – isn't equally applicable here.

Nor is Lynch correct when he claims that the three factors the State discussed are already included in the *Shiffra/Green* analysis. The first factor – whether the defendant has access to nonprivileged evidence to support his defense – is

not the same as *Green*'s requirement that the defendant show that evidence he hopes to find in the records is cumulative to evidence already at his disposal. Cumulative evidence is the same evidence obtained from different sources. The first factor is more inclusive, extending to different evidence supporting the chosen defense.

The second factor – the trauma the privilege-holder would experience from submitting her records for review – is not irrelevant under the theory that she can avoid this trauma by withholding consent. Because victims are made aware that they must choose between in camera review and foregoing prosecution, it is inevitable that some victims will waive their privilege despite the resultant trauma.

Lastly, language in *Shiffra* makes it debatable whether the third factor – 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 – is already considered in determining a defendant's entitlement to in camera review. According to the *Shiffra* court, *S.H. and K.K.C.* suggest that "whether the records are temporally remote is not a condition precedent which must be decided prior to *in camera* inspection—only a preliminary showing of materiality is needed." *Shiffra*, 175 Wis. 2d at 607. This statement certainly implies that temporal remoteness of the records to the assault or its reporting is pertinent only to the question of disclosure. The State's proposed balancing test clarifies that temporal remoteness bears on the initial determination whether in camera review is warranted.

Finally, Lynch says the State has not explained how the additional balancing will aid the trial court in determining whether withholding the evidence in the records is "harmless." Lynch's brief at 24-25. But that is not the purpose of the test. Rather, under *Pulizzano*, *St. George* and *Fischer*, the trial court

employs the factors to decide whether in a given case, the defendant's right to present a defense must yield to other compelling state interests. Harmlessness is not part of the analysis.

III. Where The Trial Court Concludes That The Defendant Is Constitutionally Entitled To In Camera Review Of Privileged Records, It Should Order Their Production Under § 146.82(2)(a)4, Regardless Of The Privilege-Holder's Consent.

Because Lynch admits he "does not have a dog in the fight" over whether witness preclusion is a proper remedy (Lynch's brief at 28-29), the State relies on its brief-in-chief at 33-45 for its argument on this issue. Despite that admission, one of Lynch's assertions requires comment.

Lynch assumes that witness preclusion necessarily encompasses otherwise admissible out-of-court statements. Lynch's brief at 30. But language in pre-*Crawford* decisions suggests otherwise. In *State v. Behnke*, 203 Wis. 2d 43, 56, 553 N.W.2d 265 (Ct. App. 1996), the court remarked that "[i]n a few circumstances, the State may have to completely forgo a case when one of its witnesses refuses to turn over the information." Had the court envisioned wholesale exclusion of the witness's statements, it would have recognized that more than "a few" prosecutions would have to be abandoned.

Alternatively, if Lynch's assumption is correct, it further demonstrates that witness preclusion is inimical to the effective functioning of the justice system. Were the State barred from introducing *any* of the victim's statements as well as her live testimony, then whenever the defendant satisfies *Shiffra*/*Green* but the witness exercises her privilege, only sexual assaults involving eyewitness testimony and/or DNA evidence will be prosecutable.

CONCLUSION

This court should overrule *Shiffra*'s holding that an accused has a due-process right to in camera review of privately held privileged records under *Ritchie* whenever he makes the showing of materiality required by *Shiffra*/*Green*.

Alternatively, this court should clarify that witness preclusion is not automatic whenever a defendant satisfies *Shiffra*/*Green* but the privilege-holder withholds consent to review.

Alternatively, this court should hold that where the defendant's right to due process prevails over the witness's privilege, the trial court can compel production of privileged records without consent under § 146.82(2)(a)4.

Dated this 3rd day of September, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MARGUERITE M. MOELLER
Assistant Attorney General
State Bar #1017389

Attorneys for Plaintiff-
Appellant- Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8556
(608) 266-9594 (Fax)
moellermm@doj.state.wi.us

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 2,997 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 3rd day of September, 2015.

_____

Marguerite M. Moeller
Assistant Attorney General