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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2011AP002680-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

PATRICK J. LYNCH,

Defendant-Respondent.

INTERLOCUTORY APPEAL FROM ORDER BARRING VICTIM'S TESTIMONY ENTERED IN DODGE COUNTY CIRCUIT COURT WITH THE HONORABLE ANDREW P. BISSONNETTE PRESIDING

PLAINTIFF-APPELLANT'S BRIEF AND APPENDIX

J.B. VAN HOLLEN
Attorney General

REBECCA RAPP ST. JOHN
Assistant Attorney General
State Bar #1054771

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
stjohnrr@doj.state.wi.us

TABLE OF CONTENTS

Page

Page

CASES

Page

Page

STATUTES

OTHER AUTHORITIES

STATE OF WISCONSIN

C O U R T O F A P P E A L S

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STATEMENT OF THE ISSUES[1]

Issue One

Defendants may establish a constitutional right to in camera review of therapy records privileged under Wis. Stat. § 905.04(2) by setting forth "a specific factual basis" demonstrating that records are reasonably likely to contain information both "necessary to a determination of guilt or

[1] Similar issues are presented in *State of Wisconsin v. Samuel Curtis Johnson, III,* District II, 2011AP2864CRAC.

innocence" and "not merely cumulative to other evidence available to the defendant." *State v. Green*, 2002 WI 68, ¶ 34, 253 Wis. 2d 356, 646 N.W.2d 298; *State v. Shiffra*, 175 Wis. 2d 600, 608, 499 N.W.2d 719 (Ct. App. 1993).

Did Patrick Lynch establish that he has a constitutional right to in camera review of victim A.M.'s privileged therapy records?

The circuit court ruled Lynch did.

Issue Two

The in camera review process is based on defendants' constitutional due process rights. *See Green*, 253 Wis. 2d 356, ¶ 20; *Shiffra*, 175 Wis. 2d at 605.

If Lynch established that he has a constitutional right to in camera review of A.M.'s privileged therapy record, do his constitutional rights trump A.M.'s statutory privilege such that the circuit court may lawfully order the records under Wis. Stat. § 146.82(2)(a)4.?

The circuit court refused to subpoena A.M.'s privileged therapy records. It barred A.M. from testifying at Lynch's trial as a sanction for refusing to release her privileged therapy records for in camera review.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state requests publication because this case presents two important issues that implicate defendants' due process rights, victims' privacy rights, and the state's interest in the fair administration of justice.

The first issue involves the showing defendants must make to establish a constitutional right to in camera review of privileged therapy records.

The second issue involves how privileged therapy records are secured for in camera review. It raises questions the Wisconsin Supreme Court has recognized as unresolved concerning whether (1) "the physician-patient privilege is absolute or, alternatively, must yield to an accused's constitutional right to a meaningful opportunity to present a complete defense" and (2) "a person's refusal to waive the privilege should preclude that person from testifying at trial." *State v. Speese*, 199 Wis. 2d 597, 608, 614, 545 N.W.2d 510 (1996).

STATEMENT OF THE CASE

Patrick Lynch is charged with two counts of first-degree sexual assault, in violation of Wis. Stat. § 948.02(1), and one count of stalking, contrary to Wis. Stat. § 940.32(2) (27). The victim, A.M., reported that Lynch put his penis and fingers in her vagina the summer of 1989, when she was just seven-years-old (1:4; A-Ap. 123). Lynch was a law enforcement officer and "good friends" with A.M.'s father, who was convicted in 1993 of sexually assaulting A.M. (31:3, 19, 27, 32).

A.M. testified at Lynch's preliminary hearing that Lynch sexually assaulted her six to eight times in her childhood home (31:4-5). A.M. said her father knew Lynch was sexually assaulting her and would even call her down for the sexual assaults (31:26, 31). A.M. further said Lynch "was wearing a cop uniform and he had a gun and I was terrified of what he would do" (31:26). A.M. explained that she went along with Lynch's sexual assaults: "Because I felt like I had no choice. I was scared. I was a little girl" (31:26, 30). A.M. said Lynch sat next to her father throughout her father's trial (31:8). A.M. said Lynch began showing up at places she worked as a teenager after her father's trial, always in his sheriff's uniform and sheriff's car (31:8-11). A.M. also said Lynch began coming to her work when she was an adult, staring her down and smirking at her, again in his sheriff's car and sheriff's uniform (31:11).

Lynch filed a motion seeking in camera inspection of "all psychiatric, psychological, counseling, therapy and clinical records" compiled by Dr. Sionag Black, Dr. Rachel Heilzer, or "others" of A.M. from 1993 to 2011 (48:2; A-Ap. 134). 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" (48:3; A-Ap. 135). He argued:

> While it is clear that A.M. has been in continuous mental health counseling for many, many years, the discovery materials are silent regarding her mental health history. What is known when reviewing the discovery materials created in 1992 and prior to her father's trial, the transcript of her father's trial and discovery materials compiled by DCI agents beginning in 2008 is that A.M. clearly was sexually abused by her father when she was a child. Her father admitted as much to Dodge County investigators in 1992 though he denied performing sexual intercourse on A.M. Also, from a medical exam performed on A.M. in 1992, it is known that she suffered vaginal penetration. No information regarding A.M.'s life between the years 1993 and 1998 is contained within the discovery materials. From 1998 through 2009, the materials show that A.M. has offered changing, inconsistent stories regarding claims of sexual abuse by the defendant, Patrick Lynch. On various occasions she has reported to others improper groping and fondling of her by the defendant within a bathroom; she has reported sexual intercourse performed on her by the defendant within that bathroom; she has reported drunken acts of molestation preformed upon her by her father and the defendant taking turns with her in her bedroom. In contrast, we know from her sworn testimony at the preliminary examination that any and all claims of sexual assault by Patrick Lynch were confined within a small bathroom and that her father was not present. Further, from the discovery materials made available, it is known that some who know of her conclude that A.M. is not a credible person and, also, is a person who always wants to be the center of attention.

The defendant points out that A.M. has testified that she has never forgotten the claimed sexual assaults by the defendant. Also, post 1993 and while still a minor, it appears clear that A.M. was being counseled by Dr. Black and Dr. Heilzer. Section 48.981(2) Stats. makes criminal the failure of a mental health professional to report claims of child sexual assault to law enforcement. Both Dr. Black and Dr. Heilzer are mental health professionals regulated under this statute and, as such, it can be expected that they would make referrals to law enforcement had A.M., as a minor, reported to her counselors that Patrick Lynch had sexually assaulted her. Since A.M. has never forgotten these claimed assaults, it appears that there should have been referrals if she had reported them. It then seems that A.M. did not report her claims when a minor nor, perhaps, for several years as an adult. Whether it be as a minor or as an adult, the Wisconsin Supreme Court has determined that the absence of a victim's report of sexual assault to medical officials is exculpatory. *See State v. Speese*, 345 N.W.2d 510, 513, 199 Wis.2d 597 (1996.) On this basis alone, the defendant submits that he has met his burden that would justify and [sic.] *in camera* review of the records being requested.

Further, the defendant submits that there is a reasonable likelihood that the mental health treatment records do contain additional, relevant information necessary to a fair determination of the defendant's guilt or innocence. The very knowledge that A.M. at first released these records to investigators in 2009 and then withdrew her authorization also supports this conclusion. These records may tend to show that A.M. suffers some type of psychiatric and/or psychological disorder which causes her an inability to truthfully relate facts and, also, confirm in terms of A.M. reality problems in sexual matters. These records may confirm a post-traumatic stress disorder stemming from the repeated acts of sexual assaults by her father or some other psychological disorder which would cause her inaccurate flashbacks and/or fantasies regarding phantom sexual abusers that would compromise her recollection, perception and credibility. Theserecords may indicate motivations by A.M. to deliberately fabricate stories.

(48:3-5; A-Ap. 135-37.)

The state gave Lynch some of what he asked for. It turned over hundreds of pages of discovery to Lynch. As part of that disclosure, the state gave Lynch formerly privileged therapy and medical records of A.M. that are no longer privileged because they were released for A.M.'s father's trial (47; 51:1; A-Ap. 131-32, 144). The state objected to Lynch's motion for in camera review of other therapy records that remained privileged, however, on the ground that that Lynch failed to establish a constitutional right to in camera review (51; A-Ap. 144-55).

Lynch used the discovery and an opinion he got from psychologist Dr. Bev Wolfgram to supplement his offer of proof (92; A-Ap. 198-212). He alleged:

> Jeffrey P., A.M.'s father, was charged with 5 counts of first-degree sexual assault of A.M. on April 23, 1992.
>
> That, at trial, one of the witnesses was A.M's family physician, Dr. Stanley Cupery, who had treated A. since birth. Dr. Cupery testified that A.M. had a number of emergency room admissions in 1992. He testified that A.M. was obviously histrionic. He testified that A.M. had been treating with "child psych." He testified that the symptomatology expressed did not seem consistent with what was actually found; that it was more dramatic and exaggerated. He testified that A.M. "feigned fainting," keeling over with her eyes rolled back but at the same time remaining responsive which was not in keeping with a true loss of consciousness and that A.M. was pretending. He testified that most of A.M.'s symptoms were felt to be stress-related and that a stress reduction therapist was recommended. He testified that several physicians concurred. He testified that he made a referral to Dr. Black.

The discovery materials show that in April 1992, A.M. was admitted to Parkway Hospital due to an apparent suicide attempt.

That, at trial, [another witness was Dr. Patricia Verabac Staats, a pediatric physician. She testified that she] performed a pelvic exam on A.M. on August 3, 1992. [She testified that there] were significant, abnormal signs of abuse consistent with vaginal penetration. She testified that on the day of the exam, August 3, the entire interior tissues of the vagina were "very red and irritated." She testified that such a finding would be unlikely to have been caused by activity months earlier.

That in a recorded interview of A.M. by DCI investigators taken in the office of Dr. Heilizer, A.M.'s psychologist, on March 18, 2009, A.M. was asked if there would be high school records regarding her subsequent claims of abuse by the defendant on information she may have given to high school counselors. A.M.'s response was that there would not be due to the fact that she was in treatment with Dr. Heilizer during those years and that Dr. Heilizer was the only professional she has spoken to regarding her claims.

That in Dr. Black's (attached) letter to Judge Klossner written in him February, 1993, [for A.M.'s father's sentencing] one of her conclusions was "what I have seen instead are symptoms more characteristic of posttraumatic stress disorder once she reported and began to deal directly with the abuse." Further, Dr. Black makes clear in her letter that the abuse she is referring to is sexual abuse.

That Dr. Wolfgram states that she too has read all of the above-stated materials and in her 2011 (attached) letter to defendant's counsel she states that there is a "definite reasonable likelihood" that the records being sought for review will show that A.M. continues to suffer with posttraumatic stress disorder and, further, that there is a "definite reasonable likelihood" that the records sought for review will also show that A.M. also has a Sociopathic Personality Disorder. Dr. Wolfgram outlines the basis for her belief in her correspondence and points out that one of the

> common characteristics of this mental health disorder is the ability to lie on a pathological level.

(92:2-3; A-Ap. 199-200.)

Lynch concluded based on his offer of proof that he was entitled to in camera review of A.M.'s privileged therapy records for three reasons:

> First, the defendant submits that based on all of the materials reviewed by the defendant's counsel, there is a reasonable likelihood that the records up until the time A.M. turned the age of 18 shall be silent regarding claims by A.M. that the defendant had sexual intercourse with her during 1990 and 1991. If so . . . this is exculpatory evidence to which the defendant should have a right to receive. Second, there is a reasonable likelihood that the records sought to be reviewed will show that A.M. suffers with continuing post traumatic stress disorder. If so, the defense position is that it is recognized that those who suffer with posttraumatic stress disorder and self-report childhood sexual abuse have a propensity to suffer with false memories. Third, there is a reasonable likelihood that the records requested to be reviewed will show that, besides posttraumatic stress disorder, A.M. also has a Sociopathic Personality Disorder. If so, the evidence will show that one of the characteristics regarding those who suffer with this mental health disorder is an ability to lie on a pathological level.

(92:1; A-Ap. 198.)

The circuit court granted Lynch's motion for in camera review (96; A-Ap. 105-20). 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; A-Ap. 118). It stated that "if A.M. refuses to allow the Court access to her records, her testimony shall be barred at trial" (96:15; A-Ap. 119).

The circuit court accepted Lynch's first two rationales for in camera review. It adopted Lynch's argument about A.M.'s therapists' mandatory reporter obligations, explaining: "The theory goes that if a child discloses a sexual assault to medical staff, including therapists, psychologists, psychiatrists, etc., that such providers are 'mandatory reporters' and would have been required to report the sexual assault to law enforcement, thus resulting in a criminal prosecution, such as occurred following the disclosure of sexual assault by A.M's father." (96:3; A-Ap. 107). It cited the information about A.M.'s PTSD symptoms, reasoning: "case law and medical journals indicate that PTSD and/or psychosis may well impair a witness from being able to truthfully recall and testify regarding the events that presumably resulted in the PTSD" (96:6; A-Ap. 110). The circuit court rejected Dr. Wolfgram's opinions, however, explaining that it had "difficulty following" Dr. Wolfgram's analysis because she appeared to improperly treat all A.M.'s allegations about Lynch as lies (96:7; A-Ap. 111).

A.M. notified the prosecutor that she will 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; A-Ap. 213). The circuit court entered an order barring A.M. from testifying at Lynch's trial based on her decision (110:2; A-Ap. 102).

The state appeals the circuit court's order barring A.M.'s testimony. It does so pursuant to Wis. Stat. § 974.05(1)(d)2., which authorizes it to appeal interlocutory orders that have the "substantive effect" of suppressing evidence. It maintains as its primary position that the circuit court should not have ordered in camera review because Lynch did not establish a constitutional right to in camera review. It then argues in the alternative that the proper response if Lynch had established right to in camera review would be for the circuit court to order A.M.'s privileged therapy records for in camera review.

ARGUMENT

I. LYNCH DID NOT MAKE THE *SHIFFRA/GREEN* SHOWING TO OBTAIN IN CAMERA REVIEW OF A.M.'S PRIVILEGED THERAPY RECORDS.

A. Relevant law.

1. Therapist-patient privilege.

Wisconsin Stat. § 905.04(2) establishes a therapist-patient privilege. It provides:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's podiatrist, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

The therapist-patient privilege covers "confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment." Wis. Stat. § 905.04(2). Communication and information is "confidential" if it was "not intended to be disclosed to 3rd persons other than those present to further the interest of the patient in the consultation, examination, or interview." Wis. Stat. § 905.04(1)(b); *State v. Locke*, 177 Wis. 2d 590, 605-06, 502 N.W.2d 891 (Ct. App. 1993).

Though the therapist-patient privilege is a testimonial privilege, it applies during discovery. *See* Wis. Stat. § 804.01(2)(a) ("Parties may obtain discovery regarding

any matter, not privileged, which is relevant to the subject matter involved in the pending action."); Wis. Stat. § 911.01(3) ("Chapter 905 with respect to privileges applies at all stages of all actions, cases and proceedings.").

2. The required showing to establish a constitutional right in camera review of privileged therapy records.

This court held in *Shiffra*, 175 Wis. 2d at 608, that a defendant may establish a constitutional right to in camera review of a victim's privileged therapy records by making a preliminary showing that the records are material to the defense.

This court based its decision on the in camera review procedure the United States Supreme Court approved in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). *Ritchie* involved confidential records the government possessed and had a due process obligation to disclose under *Brady v. Maryland*, 373 U.S. 83 (1963). The records at issue in *Shiffra* were not in government possession.[2] But this court reasoned: "Under the due process clause, criminal

[2] The state does not challenge the in camera review process here because this court is bound by precedent from the supreme court and this court accepting the process. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals may not overrule, modify, or withdraw language from its published opinions).

The state reserves the right to challenge the in camera review process in the supreme court, however, and invites this court to certify this case to the supreme court for consideration of that issue. The *Brady*-type due process rights at stake in *Ritchie* do not exist with records the state does not possess. Defendants do not have an unlimited right to discovery of materials that are not in state possession and not clearly exculpatory. It is unclear why defendants should have a greater right to discover privileged records than non-privileged records.

The state notes that courts in other jurisdictions have held that *Ritchie* does not apply to records the government does not possess. *See In re Subpoena to Crisis Connection, Inc.*, 949 N.E.2d 789, 799 (Ind. 2011) (collecting cases).

defendants must be given a meaningful opportunity to present a complete defense." *Shiffra*, 175 Wis. 2d at 605. This court held in line with *Ritchie*: "an *in camera* review of evidence achieves the proper balance between the defendant's rights and the state's interest in protection of its citizens." *Id.*

The Wisconsin Supreme Court clarified in *Green*, 253 Wis. 2d 356, what a defendant must demonstrate to establish a constitutional right to in camera review of privileged therapy records.

The supreme court rejected language in *Shiffra* allowing in camera review whenever evidence is "relevant and may be helpful to the defense." *Id.*, ¶ 25 (citation omitted). It held that "a defendant must show a 'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence." *Id.*, ¶ 32. It explained that "[a] motion for seeking discovery for such privileged documents should be the last step in a defendant's pretrial discovery" and that "a defendant must set forth a fact-specific evidentiary showing, describing as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense." *Id.*, ¶¶ 33, 35. It explained that a showing for in camera review must be based on more than "mere speculation or conjecture as to what information is in the records" or a "mere contention that the victim has been involved in counseling related to prior sexual assaults or the current sexual assault." *Id.*, ¶ 33. It further explained that the evidence sought "must not be merely cumulative to evidence already available to the defendant." *Id.* It summarized:

> [T]he preliminary showing for an in camera review requires a defendant to 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. We conclude that the information will be "necessary to a determination of guilt or innocence" if it "tends to create a reasonable doubt that might not otherwise exist." . . . 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., ¶ 34 (citations omitted).

3. Standard of review.

Whether a defendant established a constitutional right to in camera review of privileged therapy records is a legal question. *Green,* 253 Wis. 2d 356, ¶ 19. Appellate courts accept circuit courts' factual findings unless clearly erroneous but independently review whether a defendant made the constitutional showing. *Id.*

B. Lynch did not establish a right to in camera review of A.M.'s privileged therapy records.

Lynch brought an as-applied challenge to Wis. Stat. § 905.04(2) with his in camera review motion: he claimed he had a constitutional right to in camera review of A.M.'s privileged therapy records despite A.M.'s statutory privilege. *See State v. Richard A.P.*, 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998); *Shiffra*, 175 Wis. 2d at 605.

One is initially struck by the sheer quantity of Lynch's allegations. Lynch set forth numerous facts and opinions about A.M. Lynch's thoroughness is not surprising. Lynch had the benefit of the hundreds of pages of discovery he already has, including some formerly-privileged therapy and medical records (67-70).

Just because Lynch made lots of allegations, however, does not mean that that Lynch established a constitutional right to in camera review. The constitutional inquiry depends on the quality, not the quantity, of allegations. It does not ask whether a defendant gave some, or even many, reasons for in camera review. It instead asks whether a defendant established a genuine constitutional need for in camera review. The supreme

court made it clear in *Green* that in camera review is not a feather in the cap of extensive—and successful—discovery and investigation. In camera review is a narrow exception to the statutory privilege, only available when privileged therapy records are reasonably likely to contain information a defendant needs but cannot get elsewhere.

Lynch did not establish such need. If anything, he demonstrated the opposite with his host of allegations: he showed himself fully capable of presenting all the issues he claims he needs A.M.'s privileged records to develop.

Lynch gives three rationales for in camera review of A.M.'s privileged therapy records: (1) the mandatory reporter syllogism; (2) evidence of A.M.'s PTSD symptoms; and (3) Dr. Wolfgram's opinion that A.M. may be a pathological liar. These rationales do not provide a basis for in camera review, singularly or combined.

1. The mandatory reporter syllogism.

Lynch's first rationale for in camera review is his mandatory reporter syllogism. It goes as follows. A.M.'s therapists are mandatory reporters. They did not report that Lynch sexually assaulted A.M. So A.M. must not have disclosed the sexual assaults to them. A.M.'s failure to disclose to her therapists that Lynch sexually assaulted her is exculpatory.

Lynch's mandatory reporter syllogism fails in four important respects:

First, Lynch overstates the importance of A.M.'s possible failure to disclose the sexual assaults to her therapists. Sexual assault victims often delay disclosing sexual assault, particularly child victims sexually assaulted by a family friend and authority figure. A victim's delay in reporting is something for a defendant to explore at trial. But it does not establish something unique about a victim's therapy records or about the accuracy of a victim's allegations once she discloses.

This is especially true here. The record reveals plenty of reasons A.M. delayed disclosing—and "felt like [she] had no choice" and "was scared"—including A.M.'s young age, Lynch's position as a law enforcement officer and friend of A.M.'s father, and the fact that A.M.'s father was also sexually abusing her and facilitated Lynch's abuse of A.M. (31:30).

Second, Lynch fails to explain why he needs A.M.'s privileged therapy records to establish A.M.'s delay in reporting that he sexually assaulted her.

The record clearly shows he does not.

A.M.'s delay will certainly come up at Lynch's trial, probably as a major theme. A.M. is a grown woman, who is 30 years-old or nearly so, and Lynch is charged with sexually assaulting her over a decade ago when she was just seven (1:4; A-Ap. 123). A.M. did not disclose the sexual assaults to police until 2009, over fifteen years after they occurred and despite having plenty of opportunities to disclose them during her father's sexual assault prosecution (48:10; A-Ap. 142).

Lynch already has significant evidence of A.M.'s reporting history—including A.M.'s formerly-privileged therapy and medical records, police reports, materials from A.M.'s father's prosecution, and reports of various and somewhat differing allegations A.M. has made against him (76; A-Ap. 181-83). Lynch has never claimed that A.M.'s privileged therapy records contain information distinct or uniquely probative from the information he already has. Of particular note, Lynch has never claimed that there is anything "special" about A.M.'s possible failure to disclose in the privileged records he seeks.

Lynch claimed below that A.M.'s failure to disclose is exculpatory. Lynch relied on this court's overturned decision in *State v. Speese*, 191 Wis. 2d 205, 528 N.W.2d 63 (Ct. App. 1995). But *Speese* does not establish that "'the absence of reporting the alleged sexual

assaults to medical officials exculpatory'" (96:3; A-Ap. 107). If anything, *Speese* underscores why Lynch does *not* have a constitutional right to in camera review.

This court was quoting the defense in the passage Lynch relied upon in *Speese*, 191 Wis. 2d at 215. The supreme court later overturned that portion of this court's decision. *Speese*, 199 Wis. 2d at 605. It held that any error in denying in camera review was harmless because "evidence in the victim's medical and psychiatric records of her silence regarding the defendant's sexual abuse would have been redundant." *Id.* It recognized the defendant got a fair trial without in camera review because the sought-after records were redundant. The same redundancy argument can be made here, given the discovery Lynch already has not only about A.M.'s failure to disclose but also A.M.'s credibility.

Third, Lynch's mandatory reporter syllogism would lead to more expansive right to in camera review than Lynch acknowledges.

The mandatory reporter syllogism opens the door for in camera review *anytime* a victim received therapy without a therapist reporting suspected sexual abuse. Perhaps, too, it opens the door for in camera review *anytime* a victim has had *any* chance to disclose a sexual assault to *any* mandatory reporter—from a therapist to a teacher or principal. *See* Wis. Stat. § 48.981(2).

And that is not all.

If the absence of a report of sexual abuse by a mandatory reporter creates a right to in camera review, it is unclear why the reverse is not also true. Therapy records may be more likely to contain information useful to the defense when a therapist has reported suspected abuse. Records connected to such a report may contain inconsistencies that could be useful on cross-examination and are unavailable elsewhere.

Such expansion violates the supreme court's clear holding in *Green*, however, that a defendant cannot make the constitutional showing by "mere[ly] conten[ding] that the victim has been involved in counseling related to prior sexual assaults or the current sexual assault." 253 Wis. 2d 356, ¶ 33. *See also State v. Munoz*, 200 Wis. 2d 391, 399, 546 N.W.2d 570 (Ct. App. 1996) ("Although allegedly receiving psychiatric counseling for assaults may lead one to speculate about any number of 'mere possibilities,' standing alone it has no relevance."). It arguably paves the way for in camera review whenever a victim had attended therapy (or had an opportunity to disclose to other mandatory reporters), regardless of whether the mandatory reporter reported suspected abuse or not.

Fourth, the mandatory reporter syllogism hinges on the assumption that mandatory reporters always report child abuse allegations. But it is not clear mandatory reporters always do report child abuse allegations.

Mandatory reporters may not report allegations for a variety of reasons. A mandatory reporter may not pick up on allegations, particularly those made by a child who has difficulty communicating or makes piecemeal, out-of-context disclosures. A mandatory reporter may want to explore allegations further. A mandatory reporter may not want to jeopardize an ongoing therapeutic relationship. A mandatory reporter may believe the costs of disclosure outweigh the benefits, particularly if a patient is no longer in danger of abuse but would be devastated by disclosure. A mandatory reporter may be confused about reporting obligations, particularly in cases that fall into a gray area due to the nature of either the reporter's relationship with the child or the allegations.[3] These issues may weigh particularly heavily on a mandatory reporter because the

[3] Underscoring that mandatory reporting obligations are not always clear, the United States Department of Justice is having a webinar on February 23, 2012, in which: "Panelists will address how to handle 'gray' areas and common mistakes in making reports. *See* Reporting Child Sexual Abuse Webinar, http://mecptraining.org/ (last visited Feb. 20, 2012) (A-Ap. 343-44).

"reporting [of] abuse to the authorities under Wis. Stat. § 48.891 extinguishes [the] privilege under Wis. Stat. (Rule) § 905.04(4)(e)2." *State v. Dennis L.R.*, 2005 WI 110, ¶¶ 7, 55, 283 Wis. 2d 358, 699 N.W.2d 154.

The record hints at the possibility of such non-disclosure in this case. One of A.M.'s therapists, Dr. Black, stated in a letter she prepared for A.M.'s father's sentencing that A.M. denied being sexually abused by anyone but her father (76:2; A-Ap. 182). A.M. has allegedly said that told Dr. Black about Lynch, however, and defense counsel stated in an affidavit that A.M.'s mother reported that Dr. Black knew Lynch sexually assaulted A.M. (48:10; 76:2; A-Ap. 142, 182).

The fact that a report or lack thereof may depend as much on the mandatory reporter as on victims unhinges the assumption underlining the mandatory reporter syllogism, and by doing so, turns the mandatory reporter syllogism on its head.

2. PTSD.

Lynch's second rationale for in camera review is that A.M. displayed PTSD symptoms in 1993, after disclosing that her father sexually assaulted her. Lynch stated of the sought-after records: "These records may confirm a post-traumatic stress disorder stemming from the repeated acts of sexual assaults by her father or some other psychological disorder which would cause her inaccurate flashbacks and/or fantasies regarding phantom sexual abusers that would compromise her recollection, perception and credibility" (48:3; A-Ap. 137).

Lynch provided a variety of evidence about A.M.'s PTSD symptoms——including Dr. Cupery's testimony at A.M.'s father's trial about A.M.'s 1992 emergency room admission, discovery materials related to a 1992 suicide attempt by A.M., and Dr. Black's 1993 letter for A.M.'s father's sentencing (92:2-3; A-Ap. 199-200). Further, Lynch presented Dr. Wolfgram's opinion that there is a

definite "reasonable likelihood" A.M.'s therapy records will show A.M. continues suffering from PTSD that may contribute to "false memories" (92:1; A-Ap. 198).

Despite the quantity of his allegations, Lynch failed to make a key—required—showing: he did not link A.M. to the symptoms he cited as a basis for in camera review.

That a condition may sometimes be associated with a symptom does not establish that a particular victim's privileged therapy records are reasonably likely contain evidence necessary for a defense. If general symptoms were enough, in camera review would be justified in a sweeping number of cases without any indication that a victim suffered the symptoms cited as a basis for in camera review. Defendants would have a categorical right to in camera review of a victim's privileged therapy records anytime a victim had a condition or was suspected of having a condition sometimes associated with a symptom that could provide a basis for in camera review.

The absurdity of this is underscored by a consideration of all the conditions for which psychosis is a symptom. Defendants have been held to have a constitutional right to in camera review of privileged therapy records of victims with psychosis. *See State v. Robertson*, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 105; *Shiffra*, 175 Wis. 2d 600. Psychosis is a symptom of all sorts of conditions—from schizoaffective disorder to the flu.[4] It would be laughable, however, for a defendant to claim a right to in camera review based on a victim's having had the flu.

Taking a proper individualized look at A.M., it is clear A.M.'s particular PTSD symptoms do not provide a

[4] A list of conditions for which psychosis is a symptom is at http://en.wikipedia.org/wiki/Psychosis (last visited Feb. 23, 2012) (A-Ap. 338-41).

basis for in camera review. The record concerning A.M.'s PTSD symptoms indicates that A.M. was credible and was able to accurately recall and recount events. Dr. Black detailed A.M.'s PTSD symptoms in the letter he wrote for A.M.'s father's sentencing. Dr. Black did not describe A.M. as delusional, and indeed, noted that A.M. had clearly and credibly identified her father as her assailant.

There is no one-size-fits-all showing defendants must make to establish a constitutional right to in camera review; cases and showings evolve from the particular facts at issue. But it is notable that Lynch's use of A.M.'s PTSD symptoms is a far cry from the showing made by defendants courts have determined to have established a right to in camera review. It instead mirrors a "spread effect" theory this court has resoundingly rejected.

The defendants who established a right to in camera review made particularized showings about particular victims:

One case in which a defendant established a constitutional right to in camera review is *Shiffra*, 175 Wis. 2d 600. Shiffra sought in camera review of the victim's therapy records after the state disclosed that the victim "'has a history of psychiatric problems which may affect her ability to perceive and relate truthful information.'" *Id.* at 603. The victim had told Shiffra that she suffered from "post-traumatic stress disorder related to suffering repeated sexual assaults by her stepfather" and admitted problems with chemical abuse. *Id.* at 610. The victim had also told Shiffra about an incident in which her sister refused to testify on her behalf in a sexual harassment case out of concern that she was "'unable to distinguish between what had occurred and what would be characterized as some dream effect.'" *Id.* This court held Shiffra had a right to in camera review. It explained: "[i]t is quite probable that the *quality* and probative *value* of the information in the reports may be better than anything that can be gleaned from other

sources" and "might well serve as *confirmation* of [the victim's] reality problems in sexual matters." *Id.* at 611.

Another case in which a defendant established a constitutional right to in camera review is *Robertson*, 263 Wis. 2d 349. Robertson sought in camera review of a victim's privileged psychiatric records after he was convicted of sexual assault based on a sexual encounter that occurred in a van in November 2000. *Id.*, ¶¶ 2, 8. Robertson based his request on a letter from the victim's psychiatrist stating that the psychiatrist had been treating the victim for "'clinical depression with psychotic features'" since December 1999. *Id.*, ¶ 9. The letter further stated that the victim "'had an exacerbation of her clinical depression in the fall of 2000'" and that the "'rape happened in the midst of this exacerbation which intensified the clinical depression.'" *Id.* Robertson, who maintained that the sex was consensual, argued that the victim's psychiatric records would have helped him explain why the victim ran from the van after the encounter. *Id.*, ¶ 10. The prosecutor had argued that the victim's running bolstered her credibility that the sex was not consensual, and the defendant had not had a good response at trial. *Id.*. ¶¶ 5, 7. This court ordered in camera review. It emphasized that the victim suffered from depression with psychotic features involving delusions and hallucinations. *Id.*, ¶ 27. It also explained the information in the victim's psychiatric records about her psychotic features "could explain her behavior in a way that was not possible to do during trial." *Id.*, ¶ 28.

Lynch's PTSD rationale is nothing like the showings in *Shiffra* and *Robertson*. Lynch's glossing over of A.M.'s actual symptoms instead mirrors the "spread effect theory" this court rejected in *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996).

Behnke was charged with sexual assault based on an incident in which he hit the victim and bit her genitals, causing her to suffer bite marks on her genitals and bruising on her face, eye, and chest. *Id.* at 48. He sought

in camera inspection of privileged records related to the victim's "history of self-harm/mutilation." *Id.* at 49-50. As an offer of proof, defense counsel explained that the victim told Behnke about her history of self-abuse and showed the defendant cuts and bruises that she had inflicted on her arm a few days before the attack. *Id.* at 50. Additionally, defense counsel said the victim testified at Behnke probation revocation hearing that she inflicted the wounds on her arm. *Id.* This court held Behnke did not have a right to in camera review. It reasoned that "a history of cutting or bruising oneself on an arm does not lend itself to an inference that other forms of self-abuse, such as beating oneself about the eye and chest, might also be described in a person's medical records." *Id.* at 51. It stated that it was "troubled" by Behnke's "'spread effect theory'–that if a person is acting out in a particular fashion by abusing oneself in a certain way, it is enough of a probability that he or she is abusing herself in other ways too – thus justifying a look at his or her mental health records to make sure." *Id.* at 54.

If anything, Lynch actually makes a bigger leap than Behnke did. This court faulted Behnke for assuming that a victim who injured herself in one way would injure herself in another way. The equivalent here would be if there was evidence that A.M. had false memories in one context (which there is not) and Lynch assumed A.M. probably had false memories of his sexually assaulting her too. Lynch assumes far more. He goes from A.M. having PTSD symptoms, to assuming that A.M. has PTSD, to leaping to the conclusion that A.M. may have dreamed up that he sexually assaulted her. *Behnke* makes it clear that such unsubstantiated leaps in logic do not satisfy *Green* or establish a constitutional right to in camera review.

3. Dr. Wolfgram.

Lynch's third rationale for in camera review is Dr. Wolfgram's opinion that "there is definitely a reasonable likelihood that A.M. also has Sociopathic Personality

Disorder which is also classified as Antisocial Personality Disorder" (76:1; A-Ap. 181).

The circuit court rejected Dr. Wolfgram's opinion about A.M. possibly being a sociopath as "difficult to follow" as based on the improper assumption that everything A.M. alleged about Lynch was a lie.

The circuit court's concerns are borne out by the record. Dr. Wolfgram does not provide a balanced analysis or so much as acknowledge all the information that A.M. is credible. Of particular note, Dr. Wolfgram fails to account for the fact that A.M. accurately accused her father of sexual assault and that Dr. Black found A.M. credible (67). Dr. Wolfgram seems to assume, as the circuit court noted, that A.M. is a liar and then worked backwards, using facts to support her opinion.

Dr. Wolfgram claimed "the record demonstrates numerous 'non-truths' in relation to [A.M.'s] physical health as well as changing her stories regarding her sexual assaults" (76:2; A-Ap. 182). Most of the examples Dr. Wolfgram gives are not non-truths at all—including A.M.'s reporting of physical pain after disclosing that her father sexual assaulted her, A.M.'s delay in disclosing that Lynch sexually assaulted her, and inconsistencies in A.M.'s allegations about Lynch (that Dr. Wolfgram does not detail) (76:2; A-Ap. 182). Dr. Wolfgram gives two examples in which A.M. made statements contradicted by others: A.M.'s alleged statement that she did not report Lynch during her father's prosecution because the prosecutor told her "not to report because it was already a difficult case," which the prosecutor denied, and A.M.'s alleged statement "that Dr. Black was made aware of Mr. Patrick Lynch's sexual assault during the time of her father's investigation and trial," which contradicts Dr. Black's letter (76:2; A-Ap. 182). These examples do not definitively establish that A.M. lied. (For example, A.M. may have thought she told Dr. Black or tried to but failed to communicate effectively as a child.) Further, even if A.M. did lie, the examples do not involve anything

suggesting that A.M. has a pathological tendency to lie, let alone to falsely accuse someone of child sexual assault.

It is unnecessary to spend too much time on Dr. Wolfgram's credibility, however, because Dr. Wolfgram's opinion would not provide a basis for in camera review even if credible. Dr. Wolfgram's does not establish that A.M.'s privileged therapy records are reasonably likely to contain information Lynch needs but cannot get elsewhere. If anything, Dr. Wolfgram showed with her parade of purported "non-truths" that Lynch has everything he needs to raise the defenses he claims in camera review will help him develop.

Dr. Wolfgram's letter reads like a defense play book. It is chock full of facts that Lynch can use to try to paint A.M. as a liar or incredible, just as Dr. Wolfgram did. The only thing Dr. Wolfgram arguably adds to the facts is her "diagnostic" opinion. But a defendant cannot establish a constitutional right to in camera review based on a general diagnosis. As the state discussed above in connection with Lynch's PTSD rationale, the constitutional showing depends on particular symptoms in a particular victim. This brings us back to the facts Dr. Wolfgram set forth; facts Lynch already has.

C. The in camera review standard needs reinvigorating or at least reaffirming.

It may be tempting just to go along with the circuit court's order, figuring that in camera review is "no big deal, just confidential review by a judge." But in camera review *is* a big deal. In camera review motions and orders are the epitome of putting a victim on trial.

In camera review motions often include damning allegations about a victim's psychological state. Circuit courts give some weight to such allegations by granting such motions and ordering in camera review. Victims may not want anyone to see their privileged communications,

let alone a judge who deemed a defendant's allegations sufficient to order in camera review. Victims may also, understandably, feel a lack of control and rightly doubt whether the disclosure will really end with in camera review. Victims have no choice, however, if they want their perpetrator prosecuted. In camera review orders condition justice on victims revealing supremely personal and sensitive communications they rightly believed were made in the strictest of confidence.

Given the significant interests at stake, the state urges this court to reinvigorate or at least reaffirm the high threshold for obtaining in camera review the supreme court mandated in *Green*, 253 Wis. 2d 356, ¶¶ 33-35. The state also asks this court to reverse the circuit court's in camera review order and to explain why Lynch did not establish a constitutional right to in camera review.

II. *IF* LYNCH *HAD* ESTABLISHED A CONSTITUTIONAL RIGHT TO IN CAMERA REVIEW, THE CIRCUIT COURT SHOULD HAVE ORDERED A.M.'S PRIVILEGED THERAPY RECORDS FOR IN CAMERA REVIEW.

A. Introduction.

The state does not believe that this court should ever have to address the procedures for getting privileged therapy records for in camera review. The state maintains as its primary argument that Lynch did not come close to establishing a constitutional right to in camera review of A.M.'s privileged therapy records. The state raises the second issue in the alternative, a precaution in case this court concludes Lynch made the constitutional showing.

Though the state presents issue two in the alternative, issue two dovetails with issue one. The state's argument concerning the procedures for getting privileged

therapy records is a continuation of the state's argument concerning the showing defendants must make to establish a constitutional right to in camera review. The state submits that circuit courts may order privileged therapy records for in camera review only when—and precisely because—a defendant has established a constitutional right to in camera review. The authority to order privileged therapy records for which the state advocates therefore comes with corresponding responsibility to hold defendants to the high threshold mandated in *Green.*

Just to be clear, the state is *not* advocating that circuit courts be given *carte blanche* to order privileged therapy records for in camera review. Likewise, the state is *not* advocating a way for circuit courts and parties to make an end-run around *Green*. The state *is* advocating for an extremely limited authority to order privileged therapy records that only exists when a defendant establishes a constitutional right to in camera review. The state maintains as its primary position that the circuit court lacked authority to order A.M.'s privileged therapy records for in camera review because Lynch failed to make the constitutional showing mandated in *Green*.

B. Standard of review.

Whether Wis. Stat. § 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 in camera review, is a question of law for this court's independent review. *See Green*, 253 Wis. 2d 356, ¶ 20; *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990).

C. A circuit court may lawfully order a victim's privileged therapy records for in camera review after a defendant establishes a constitutional right to in camera review.

The circuit court ordered the state to get A.M.'s privileged therapy records for in camera review (96; A-Ap. 105-20). This plan was thwarted, however, when A.M. refused to release her records (97; A-Ap. 111).

In cases in which a defendant has established a constitutional right to in camera review, there is a more direct way to get privileged therapy records: Wisconsin's medical records statute, Wis. Stat. § 146.82.[5] Wisconsin

[5] Questions may arise about federal law. Even if Wis. Stat. § 146.82 provides a mechanism for ordering privileged medical records for in camera review, what about HIPPA? HIPPA does not preclude the state's argument. HIPPA allows health care providers to release records pursuant to a court order. It provides that a "covered entity may disclose protected health information in the course of any judicial or administrative proceeding: (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order." 45 C.F.R. § 164.512(e)(1)(i) (A-Ap. 336). The Department of Health Services explained:

> In § 164.512(e) of the final rule, we permit covered entities to disclose protected health information in a judicial or administrative proceeding if the request for such protected health information is made through or pursuant to an order from a court or administrative tribunal or in response to a subpoena or discovery request from, or other lawful process by a party to the proceeding. When a request is made pursuant to an order from a court or administrative tribunal, a covered entity may disclose the information requested without additional process. For example, a subpoena issued by a court constitutes a disclosure which is required by law as defined in this rule, and nothing in this rule is

Stat. § 146.82 allows medical records to be released without patient consent "[u]nder a lawful order of a court of record." Wis. Stat. § 146.82(2)(a)4. It does not trump Wis. Stat. § 905.04 or give courts unfettered authority to order privileged records. *See Crawford v. Care Concepts, Inc.*, 2001 WI 45, ¶ 33, 243 Wis. 2d 119, 625 N.W.2d 876. But, the state submits, it provides courts a mechanism for circuit courts to order privileged therapy records for in camera review when backed by a basis that *does* trump Wis. Stat. § 905.04: the Constitution.

An order for in camera review is not a routine discovery decision. It is a constitutional ruling. A circuit court rules that a defendant has a constitutional right to in camera review despite the statutory privilege. The constitutional import of such decisions is clear from *Shiffra* and *Green* and is reflected in the *de novo* standard of review applicable to in camera review orders.

The state, in turn, is not asking the circuit court to break new ground with the argument that the circuit court had authority to order A.M.'s privileged therapy records for the in camera review if Lynch really made the constitutional showing. The state is just taking the circuit court's in camera review order to its only logical next step given the Constitution's supremacy over statutes. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Pulizzano*, 155 Wis. 2d at 647-48. The state maintains that Lynch did not establish a constitutional right to in camera review. If the circuit court is correct that Lynch has a constitutional right to in camera review, however, it

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> intended to interfere with the ability of the covered entity to comply with such subpoena."

Federal Register, Vol. 65, No. 250 (Dec. 28, 2000), 45 CFR Parts 160 and 164, at 82529 (A-Ap. 337). *See also* U.S. Department of Health & Human Services, *Health Information Privacy, Court Orders and Subpoenas* (last visited Feb. 20, 2012) http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/courtorders.html (A-Ap. 342).

is unclear why or how Lynch's constitutional right would not trump A.M.'s statutory privilege.

The state bases its argument primarily on the constitutional rights defendants establish when they satisfy the high threshold mandated in *Green*. But defendants' rights are not the only constitutional interests at stake. Also at stake is the state's interest in—and right to—the fair administration of justice and prosecuting Lynch for sexually assaulting A.M. when she was a child.

The Kentucky Supreme Court discussed in *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003) how the in camera review process can impede the fair administration of justice. It called the process Johnson supports—asking victims to release therapy records and then barring their testimony if they do not—"unworkable or unwieldy." *Id.* at 565. It explained:

> If, as here, the holder of the privilege is a minor, the trial judge would be required to determine who has authority to assert or waive the privilege on the child's behalf. . . . 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 guilty shall not escape"? 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.

Id. (citations omitted).

When the fair administration of justice is considered, the choice between the state's mechanism for getting privileged therapy records for in camera review and the circuit court's order barring A.M.'s testimony is clear.

In camera review motions are often made in sexual assault or domestic violence cases that often heavily depend on victims' testimony. Giving victims a choice

between releasing records or having their testimony barred consequently gives victims unprecedented control over whether such prosecutions go forward. This is particularly true in light of *Crawford v. Washington*, 541 U.S. 36 (2004), which postdates *Shiffra* and *Green* and limits the state's ability to present out-of-court statements.

The state meanwhile loses complete control of the prosecution it brought. The state has no role in the in camera review process, other than arguing against in camera review. It does not do anything to trigger in camera review, and it does not control whether defendants move for in camera review or whether victims agree to release privileged therapy records for in camera review.

The competing interests seem pretty clear in this case: every indication is that A.M. is sincerely trying to keep her therapy records private. But factors other than the privacy interests embodied in Wis. Stat. § 905.04 often come into play. Victims may be reluctant to have the prosecution go forward if they have a relationship with the defendant. Further, even if victims support the prosecution, they still may not choose to release privileged therapy records. Being given the choice about whether to release records forces victims to assume some responsibility—and blame—for a prosecution. Victims may be pressured by family members to withhold records or be afraid of being ostracized for not or may be affected by their own feelings of guilt or ambivalence. The danger of such alternative interests is particularly great with child victims, who may be under the care of or subject to the decisions of people loyal (or married) to the defendant. When such alternative interests come into play, the in camera review process really becomes as much a method for blocking prosecutions as anything else.

Neither the supreme court nor this court has resolved whether a defendant's constitutional rights trump victims' statutory privilege. The supreme court has recognized as open questions whether (1) "the physician-patient privilege is absolute or, alternatively, must yield to an

accused's constitutional right to a meaningful opportunity to present a complete defense" and (2) "a person's refusal to waive the privilege should preclude that person from testifying at trial." *Speese*, 199 Wis. 2d at 608, 613-14.

But the supreme court has held, or at least suggested, that Wis. Stat. § 905.04 must at times give way to public policy interests. In *Schuster v. Altenberg*, 144 Wis.2d 223, 249-50, 424 N.W.2d 159 (1988), the supreme court held that Wis. Stat. § 905.04 "must yield" if a patient poses an imminent threat to himself or others. Similarly, in *Johnson v. Rogers Memorial Hospital, Inc.*, 2005 WI 114, 283 Wis.2d 384, 700 N.W.2d 27, a plurality of the supreme court held 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.

The state is *not* seeking a public policy exception to Wis. Stat. § 905.04, just adherence to established law that the Constitution trumps statutes. Still, *Altenberg* and *Johnson* support the state's position. That Wis. Stat. § 905.04 can give way to non-constitutional public policy interests only serves to underscore that Wis. Stat. § 905.04 must give way to defendants' constitutional rights and the state's interest in the fair administration of justice.

An obvious concern with the state's argument is how it affects victims. The state does not take victims' privacy concerns lightly. It notes the following:

First, the state maintains as its primary argument that Lynch did not establish a constitutional right to in camera review of A.M.'s privileged therapy records. It asks this court to reinvigorate or at least reaffirm the constitutional standard. Such reinvigoration or reaffirmation would help victims. As the state discusses above, in camera review orders themselves are difficult for victims; they give legitimacy to allegations that a victim is "crazy." The best way of protecting victims, in

turn, is to maintain the high threshold in *Green*. Placing the onus on circuit courts to order privileged therapy records may encourage courts to do that. At the very least, it will force circuit courts to face the constitutional and practical significance of in camera review orders, in a way that the current system of casting off responsibility for such orders onto prosecutors and victims does not. Courts will not be able to do what the circuit court here did and rest on the presumption that victims will go along with in camera review (96:7; A-Ap. 118).

Second, giving victims a choice is not a panacea. It may make things more difficult to victims. It makes victims even more vulnerable than they already are to their own guilt feelings and to finger-pointing and harassment by people loyal to the defendant.

Third, a circuit court may actually protect victims' right to keep records privileged by ordering privileged records for in camera review. This is rather counterintuitive. It has to do with how the privilege is waived. Wisconsin Stat. § 905.11 provides a privilege holder "waives the privilege" if she "voluntarily discloses or consents to the disclosure of any significant part of the matter or communication." It does not provide for partial or conditional waivers or waivers just for in camera review. A defendant (or third party) could arguably claim, therefore, that a victim waived the privilege for all purposes by releasing records for in camera review. By taking victims out of the equation, the state's argument avoids the possibility of such inadvertent or inevitable waivers. *See* Wis. Stat. § 905.12 ("Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.").

Fourth, there is a safety valve. Prosecutors hold it, as they do in every case. Though victims certainly have a special interest in their therapy records, the competing interests at play with in camera review motions are not

unique. The same conflicting interests often arise in the sexual assault and domestic violence cases in which in camera review motions are common. Prosecutors have a right—and obligation—to pursue cases sometimes when victims do not want to. Prosecutors also have a corresponding ability and responsibility, however, to listen to victims and to take victims' concerns into account when bringing charges and disposing of cases. *See* Wis. ch. § 950 (basic bill of rights for victims and witnesses). A prosecutor may well choose to dismiss a case or reach a plea deal to keep a victim's privileged therapy records from being ordered for in camera review or disclosed after in camera review.

Once again, the state is *not* arguing that circuit courts be given unlimited authority to order privileged therapy records for in camera review. The state's argument concerning circuit court's authority to order privileged therapy records is a continuation, not a circumvention, of *Green*. The state advocates for a very limited authority to order privileged therapy records, one completely dependent on a defendant establishing a constitutional right to in camera review. The state submits that a circuit court has authority to order privileged therapy records for in camera review only when—and precisely because—a defendant has established a constitutional right to in camera review. The state maintains as its primary position that the circuit court lacked authority to order A.M.'s privileged therapy records for in camera review because Lynch did not make the constitutional showing mandated in *Green*.

CONCLUSION

The state asks this court to reverse the circuit court's order for in camera review of A.M.'s privileged therapy records because Lynch did not established a constitutional right to in camera review.

In the alternative, if this court concludes that Lynch has a constitutional right to in camera review of A.M.'s privileged therapy records, the state asks this court to remand this case to the circuit court with instructions for the circuit court to order A.M.'s records for in camera review pursuant to Wis. Stat. § 146.82(2)(a)4.

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Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

REBECCA RAPP ST. JOHN
Assistant Attorney General
State Bar #1054771

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
stjohnrr@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 9715 words.

_____
Rebecca Rapp St. John
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 27th day of February, 2012.

_____
Rebecca Rapp St. John
Assistant Attorney General