STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2011AP2864-CRAC

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

SAMUEL CURTIS JOHNSON, III,

Defendant-Respondent-Cross-Appellant.

APPEAL FROM INTERLOCUTORY ORDER
ENTERED IN RACINE COUNTY CIRCUIT COURT
WITH THE HONORABLE EUGENE A.
GASIORKIEWICZ PRESIDING

PLAINTIFF APPELLANT CROSS-RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF 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 innocence" and "not merely cumulative to other evidence available to the defendant." *State v. Green*, 2002 WI 68,

[1] Similar issues are presented in another pending interlocutory appeal: *State of Wisconsin v. Patrick J. Lynch*, District II, 2011AP2680CR.

¶ 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 Samuel Johnson establish that he has a constitutional right to in camera review of victim T.S.'s privileged therapy records?

The circuit court ruled Johnson 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 Johnson established that he has a constitutional right to in camera review of T.S.'s privileged therapy records, do his constitutional rights trump T.S.'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 order T.S.'s privileged therapy records. It reasoned that T.S.'s statutory privilege is absolute and that the constitutional rights at issue do not apply to pretrial discovery.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state requests publication because this case presents two important issues:

The first issue involves the showing defendants must make to establish a constitutional right to in camera review of privileged therapy records. The constitutional standard needs reinvigorating or at least reaffirming. Circuit courts often do what the circuit court here did: they treat the required showing as a "minimal burden" and do not require defendants to meet the high threshold the Wisconsin Supreme Court mandated in *Green*, 253 Wis. 2d 356, ¶¶ 33-35.

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). Depending on how these questions are answered, the second issue has the potential to solve many of the problems generated when victims do not release privileged records for in camera review.

The state welcomes oral argument. The state would particularly appreciate the opportunity to answer questions concerning its argument that circuit courts may lawfully order privileged therapy records to be released for in camera review when defendants establish a constitutional right to in camera review.

STATEMENT OF THE CASE

Samuel Johnson is charged with one count of repeated sexual assault of a child, in violation of Wis. Stat. § 948.025(1)(e) (1; 3; A-Ap. 144-47). Johnson is alleged to have sexually assaulted his stepdaughter, T.S., over the course of three years, starting the summer after T.S. finished sixth grade (1; A-Ap. 144-46).

Johnson filed a motion for in camera review of T.S.'s therapy records (10; A-Ap. 148-54). He claimed:

> There is a reasonable likelihood that the records relating to her therapy contain exculpatory information necessary for a proper defense. Specifically, the records are likely to demonstrate that T.S. discussed her relationship with Johnson as part of her therapy sessions, and that T.S. either denied or did not disclose to her therapist any sexual contact with, or abuse by, Johnson.

(10:2-3; A-Ap. 149-50.)

Johnson submitted that T.S. attended two therapy sessions in 2010 with clinical psychologist Kristen Keeler, who was providing marriage counseling to Johnson and his wife, T.S.'s mother (10:3-4; A-Ap. 150-51). Johnson also submitted that T.S. "was involved in counseling and therapy with Dr. Garry Libster in 2010 relating to issues affecting her school performance, including Attention Deficit Disorder and difficulties at home" (10:5; A-Ap. 152). Johnson argued that T.S.'s therapy records were "reasonably likely" to contain information "relevant and necessary" to his defense because neither therapist reported abuse despite being mandatory reporters:

> This lack of any reporting compels the inference that T.S. never made any mention of inappropriate sexual contact by Johnson despite discussing her relationship with him in a privileged setting.
>
> Any statements describing a relationship with Johnson that does not include abusive conduct would constitute prior inconsistent statements in light of T.S.'s accusations; as such they create ample grounds for impeachment. Furthermore, due to the fact that such statements or denials were made in the context of counseling which was sought for the express purpose of dealing with relationships amongst the family members, these records present potentially compelling evidence of T.S.'s incredibility.

(10:5-6; A-Ap. 152-53.)

Johnson later added in reply to the state's arguments against in camera review:

> This counseling took place during the period of time in which T.S. alleges that Johnson was assaulting her. It is more than reasonable to infer that, due to the topic of counseling, T.S. was asked about her relationship with Johnson. Given the lack of any report by the counselors pursuant to the mandatory reporting statutes, it is equally reasonable to believe

> that T.S. described a relationship with Johnson that did not include him sexually abusing her. Such records would not simply prove a lack of reporting, as the state argues, they would contain evidence bearing directly on T.S.'s credibility.

(19:2; A-Ap. 162.)

The circuit court ruled that Johnson established a right to in camera review (39:8-9; A-Ap. 246-47). It reasoned at a motion hearing: "The moving papers of the defendant allege specific knowledge that counseling did occur between the alleged victim and concerning her relationship with the defendant" (39:7; A-Ap. 245). It added in its written decision: "the defendant . . . met the minimal burden required for conducting an *in camera* inspection which included the uncontroverted assertion that T.S. has attention deficit disorder which called into question her ability to perceive reality and relate the same to the trier of fact" (36:13; A-Ap. 113).

The circuit court ordered the state "to secure and provide" it with T.S.'s therapy records for in camera review (39:8; A-Ap. 246).[2] T.S. refused to release her records however (20; A-Ap. 169-70).

The state moved the circuit court to subpoena T.S.'s therapy records under Wis. Stat. § 146.82(2)(a)4., which provides that confidential medical records "shall be released without informed consent . . . [u]nder a lawful

[2] The mechanism for securing T.S.'s privileged therapy records is problematic for two reasons in addition to the ones discussed below. First, if the state took possession of T.S.'s privileged therapy records, its discovery obligations would arguably be triggered. Johnson would then have a right to the records, or at least to in camera review of the records, without any additional showing. *See State v. Speese*, 191 Wis. 2d 205, 528 N.W.2d 63 (Ct. App. 1995) *reversed on other grounds* 199 Wis. 2d 597, 605, 545 N.W.2d 510 (1996). Second, having to effectuate a release puts prosecutors in an awkward role both practically and ethically. Prosecutors have to advise victims, whom they do not represent, and who may or may not support a prosecution, about a choice that could completely undermine a prosecutor's case.

order of a court of record." (29; A-Ap. 205-10). It argued the circuit court could "lawfully order" the release of T.S.'s therapy records because the constitutional rights at stake if Johnson established a right to in camera review trump T.S.'s statutory privilege (*id.*).

Johnson moved the circuit court to bar T.S.'s testimony (27; A-Ap. 185-90). He characterized barring T.S.'s testimony as "the remedy provided for in the controlling case law" (*id.*). He claimed the circuit court lacked authority to order T.S.'s therapy records and said the state was "ask[ing] [the circuit] court to overrule the existing law of Wisconsin" (31:3; A-Ap. 215).

The circuit court denied both parties' motions and ordered:

> The Court rules that T.S. will be allowed to testify at the trial in this matter; that T.S. may assert her statutory communication privilege but that the court will allow a jury instruction inferring that the information not disclosed by T.S. would be helpful to the defense position in this matter. The defendant will then be limited at trial with respect to cross-examination on the issue of assertion of privilege as stated within the body of this decision.

(36:41-42; A-Ap. 141-42).

Johnson moved the circuit court to reconsider its order. He claimed the negative inference instruction the circuit court ordered violated *Shiffra* (37:1; A-Ap. 237). The circuit court denied Johnson's motion, concluding Johnson did not present anything new (37; A-Ap. 237-38).

Both the state and Johnson petitioned for leave to appeal. The state petitioned for leave to appeal both the circuit court's ruling that Johnson established a right to in camera review and the circuit court's order declining to order T.S.'s records for in camera review. Johnson petitioned for leave to appeal the circuit court's order refusing to bar T.S.'s testimony.

This court granted both parties' petitions. It designated the state the appellant because the state challenges the circuit court's preliminary ruling that Johnson established a right to in camera review (38).

ARGUMENT

I. JOHNSON DID NOT ESTABLISH A CONSTITUTIONAL RIGHT TO IN CAMERA REVIEW OF T.S.'S PRIVILEGED THERAPY RECORDS.

A. Introduction.

The state believes that this case should be decided on the first issue alone. It maintains as its primary position that Johnson did not establish a constitutional right to in camera review, so the circuit court erred in ordering in camera review. If this court agrees, there will be no need to consider the state's alternative argument that circuit courts may lawfully order privileged therapy records for in camera review if a defendant establishes a constitutional right to in camera review.

B. 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 constitutional showing to obtain 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.[3] But this court reasoned: "Under the due process clause, criminal 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 interests in protection of its citizens." *Id.*

The Wisconsin Supreme Court clarified in *Green*, 253 Wis. 2d 356, what a defendant must show 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. 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

[3] 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).

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." *Green*, 253 Wis. 2d 356, ¶¶ 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 (citation 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.*

C. Johnson did not establish a constitutional right to in camera review of T.S.'s privileged therapy records.

Johnson effectively lodged 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 despite T.S.'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. Consequently, the question here is not whether Johnson gave a reason for in camera review. It is whether Johnson established a constitutional right to in camera review despite T.S.'s statutory right to keep her therapy records private.

Johnson clearly did not.

Johnson based his offer of proof on the following syllogism: T.S. attended therapy in part to discuss their relationship. T.S.'s therapists did not report any sexual assault allegations despite their role as mandatory reporters. So T.S. must have denied that Johnson sexually assaulted her or made statements inconsistent with her current allegations.

Lynch's mandatory-reporter syllogism fails in three important respects:

First, Johnson vastly overstates the importance of T.S.'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 member like Johnson. 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.

Second, Johnson fails to explain why he needs T.S.'s privileged therapy records to establish T.S.'s delay

in reporting that he sexually assaulted her. Johnson has never claimed that T.S.'s privileged therapy records contain information of a quality or probative value regarding T.S.'s delay unavailable elsewhere. If anything, the opposite seems true: there are better ways for Johnson to establish T.S.'s delay in reporting that he sexually assaulted her. Johnson cannot use T.S.'s therapy records to prove that T.S. *never* disclosed the sexual assaults during the period she was in therapy. The best way for Johnson to prove T.S.'s actual delay would be comparing the offense date with the date of T.S.'s initial disclosure or by questioning T.S., T.S.'s mother, or others about any delay and the circumstances of T.S.'s disclosure. (T.S.'s mother has moved out of state but said that she is willing to come to Wisconsin to testify (30; A-Ap. 211-12)).

Third, the mandatory-reporter syllogism hinges on the assumption that mandatory reporters always report child abuse allegations. But a mandatory reporter may not report allegations for all sorts 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.[4] These issues may weigh particularly heavily on a mandatory reporter because the "reporting [of] abuse to the authorities under Wis. Stat.

[4] 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. 339-40).

§ 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 fact that reporting depends as much on mandatory reporters as victims unhinges the assumption underlining the mandatory-reporter syllogism, thus turning the mandatory-reporter syllogism on its head.

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 Johnson's showing is a far cry from the showing made by defendants courts have determined to have established a right to in camera review. The defendants who established a right to in camera review showed that privileged therapy records likely contained unique information directly targeting a victim's ability to recall or relate events accurately.

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 also 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 *State v. Robertson*, 2003 WI App 84, 263 Wis.2d 349, 661 N.W.2d 105. 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, 10. 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.*, ¶ 9. 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.

Johnson does not allege anything approximating the showings in *Shiffra* and *Robertson*. It is not just a matter of Johnson alleging different facts. It is the *quality* of Johnson's offer of proof. Johnson did not allege anything more than that T.S. was in therapy in part to discuss their relationship but that her therapists did not report abuse despite their role as mandatory reporters.

Johnson's mandatory-reporter syllogism opens the door for in camera review *anytime* a victim has received therapy for a sexual assault. 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 or doctor 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.

Recognition of such an expansive right to in camera review 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.

The circuit court compounded the problems of Johnson's mandatory-reporter syllogism with its use of Johnson's statement that T.S. attended therapy in part to address Attention Deficit Disorder (ADD).

The circuit court cited as one of the bases for in camera review Johnson's "uncontroverted assertion that T.S. has attention deficit disorder which called into question her ability to perceive reality and relate the same to the trier of fact" (36:13; A-Ap. 113). It is unclear

where the circuit court got the idea that ADD somehow affects T.S.'s ability to perceive and relate reality. Johnson never claimed ADD did; he just said T.S. was in therapy in part to address her ADD (10:4; A-Ap. 151). The circuit court suggested that the state had as much responsibility as Johnson for establishing whether ADD "could affect T.S.' perceptions of reality and ability to relate truth" (36:13; A-Ap. 113). But it was not the state's job to prove a negative or unilaterally establish the absence of symptoms Johnson never alleged. Johnson had the burden of establishing a constitutional right to in camera review.

The circuit court's unilateral emphasis of T.S.'s alleged ADD is particularly troubling because ADD is not associated with an inability to accurately recall or relate events or anything affecting credibility. *See* Diagnostic and Statistical Manual of Mental Disorders 78-85 (4th ed. 2000) (listing ADD symptoms) (A-Ap. 326-34).

Moreover, even if ADD were associated with something compromising credibility, the pertinent question would still be on T.S. and her particular symptoms. Johnson could not establish a constitutional right to in camera review just by claiming that T.S. has a condition sometimes associated with symptoms. He would have to establish a reasonable likelihood that T.S.'s privileged records contained unique information about T.S. The supreme court made this clear in *Green* by clarifying that defendants must make a particularized, targeted showing to establish a constitutional right to in camera review. 253 Wis. 2d 356, ¶¶ 33-35. *See also State v. Behnke*, 203 Wis. 2d 43, 54, 553 N.W.2d 265 (Ct. App. 1996) (This court was "troubled" by the defendant'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.").

The circuit court's acceptance of Johnson's mandatory-reporter syllogism and use of T.S.'s alleged ADD ultimately reflects a bigger problem, one not only present in this case but many cases. Circuit courts often do not treat in camera review motions as the constitutional challenges they are. Circuit courts instead do what the circuit court here did. They consider in camera review as "no big deal, just confidential review by a judge." They do not appreciate that victims may not release records and question the motives of victims who refuse.[5] They treat the required showing as a "minimal burden" (36:12; A-Ap. CITE). They require defendants merely to cite some basis for in camera review and place as much onus on the state to refute allegations as they do on defendants to allege enough to make the constitutional showing.

But it is not "no big deal" or "just in camera review." 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 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 extremely 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

[5] The circuit court here, for example, questioned T.S.'s right to refuse. Though it called T.S.'s privilege "absolute" in its written decision, it lamented at a hearing: "The Court has significant problems with a fifteen year old child declining to obey a court order with respect to medical records. I'm not even sure a fifteen year old is legally obligated or has the ability to decline" (40:7; A-Ap. 281).

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 Johnson did not come close to making the required constitutional showing.

II. IF JOHNSON HAD ESTABLISHED A CONSTITUTIONAL RIGHT TO IN CAMERA REVIEW OF T.S.'S PRIVILEGED THERAPY RECORDS, THE CIRCUIT COURT SHOULD HAVE ORDERED THE 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 Johnson did not come close to establishing a constitutional right to in camera review of T.S.'s privileged therapy records. The state raises the second issue in the alternative, a precaution in case this court concludes Johnson 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 T.S.'s privileged therapy records for in camera review because Johnson 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 T.S.'s privileged therapy records for in camera review (39:8; A-Ap. 246). This plan was thwarted, however, when T.S. refused to release her records (20; A-Ap. 169-70).

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.[6] Wisconsin 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

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[6] 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 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. 338).

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 T.S.'s privileged therapy records for the in camera review if Johnson really made the constitutional showing. The state is just taking the circuit court's in camera review order to the 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 Johnson did not establish a constitutional right to in camera review. If the circuit court is correct that Johnson has a constitutional right to in camera review, however, it is unclear why or how Johnson's constitutional right would not trump T.S.'s statutory privilege.

The circuit court rejected the state's argument on the ground that the Sixth Amendment rights to confrontation and compulsory process are not pretrial rights (36:19, 29; A-Ap. 119, 129). The circuit court failed to account for the fact that *Ritchie, Shiffra*, and *Green*—and the entire in camera review process—are based on defendants' due process right to a fair trial. The circuit court did not mention Johnson's due process rights. The circuit court also did not explain how Johnson could have a constitutional right to in camera review before trial without a corresponding constitutional right to secure records for in camera review; the former right is rather hollow without the latter.

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.

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 guilt 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).

These concerns are borne out here.

By all accounts, T.S. made an informed decision not to release her records for in camera review. T.S. was 16 years-old and had an attorney (20:2; A-Ap. 170). T.S.'s attorney informed the circuit court that T.S. "had the benefit of discussing her options with her parents" and "the benefit of the advice of an independent attorney" who "informed her of the possible impact th[e] decision could have on the prosecution" (20:2; A-Ap. 169-70). But that does not end the story or ameliorate the concern. The fact

remains that Johnson is T.S.'s stepfather—T.S.'s mother's husband—and that T.S. knew she could possibly block Johnson's prosecution by refusing to release her records for in camera review.

The circuit court recognized both the state's interest in the fair administration of justice and T.S.'s position when it refused to bar T.S.'s testimony. It explained that the state "has no control over T.S., the alleged victim or her choice in asserting her statutory communication privilege" but "has a great interest in protecting children from sexual abuse and prosecuting those who perpetrate such crimes" (36:28; A-Ap. 128). It also explained "that these prosecutions are difficult to prove and challenging to the State, especially, as here, where there are family members involved" and that "T.S.'s mother continues to be married to the defendant, and her interests can diverge from those of T.S." (*id.*). It concluded:

> Barring the testimony under the specific circumstances of this case would deprive the State of its exclusive statutory power to prosecute and leaving to private citizen victims the power to prevent prosecution of crimes this State has a great interest in pursuing.
>
> The court is of the opinion that under the specific factual basis existing in this case, barring the testimony of T.S. is an inappropriate sanction for her assertion of her statutory communication privilege.
>
> It is not lost that child victims of sexual assault are reluctant to testify in such prosecutions. Indeed, the complaint in this matter expresses that T.S. was emotional, nervous and exhibited reluctance to discuss the events during her interview at the Child Advocacy Center. While it may be appealing to T.S., especially in view of her counsel indicating to her that if she asserts her statutory communication privilege she will likely be barred from testifying, to do so serves as an outlet to relieve her from testifying at trial. While this court is empathetic to her reluctance, this State has a great interest in prosecution of sexual abusers and her cooperation in

> the charge of the State, under the circumstances of this case, should not be lightly extinguished.

(39:29; A-Ap. 129.)

When the fair administration of justice is considered, the choice between the state's proposed mechanism for getting privileged therapy records for in camera review and Johnson's proposal of giving victims a choice between releasing their therapy records or having their testimony barred becomes clear. Barring victims' testimony seriously impedes the state's interest in the fair administration of justice and ability to prosecute crimes.

In camera review motions are often made in sexual assault or domestic violence cases that heavily depend on victims' testimony. Giving victims in such cases a choice between releasing records or having their testimony barred 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 victims' out-of-court statements.

The decision about whether to release privileged therapy records may end up being about much more than privacy given the dynamics of sexual assault or domestic violence cases. Victims may be reluctant to have the prosecution go forward if they have a relationship with the defendant. Moreover, even if victims support a prosecution, being given the choice about whether to turn over records puts victims in a difficult position. It forces them 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.

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.

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.[7]

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

[7] The supreme court also raised as an open question who can assert the privilege for a minor witness. *Speese*, 199 Wis. 2d at 607. The state does not address this question because T.S. had an attorney whose representation all the parties apparently accepted. The state will provide additional briefing on the issue at the court's request or if Johnson raises it as an issue.

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 Johnson did not establish a constitutional right to in camera review of T.S.'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 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 (40:7; A-Ap. 281).

Second, giving victims a choice between releasing privileged therapy records is not a panacea. It may make things more difficult to victims, particularly victims who were abused by a relative or friend. It forces victims to assume responsibility—and blame—for prosecutions. It makes victims even more vulnerable than they already are to finger-pointing, harassment, and guilt. Such problems are particularly great when victims are children, who may have little or no say over releasing records.

Third, a circuit court may actually protect a victim's 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 unrelated to the criminal case) could arguably claim 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. Stat. ch. 950 (rights of victims and witnesses of crime). 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 T.S.'s privileged therapy records for in camera review because Johnson did not make the constitutional showing mandated in *Green*.

D. The circuit court's order violates Wis. Stat. § 905.04 and *Shiffra* and will be impossible to follow and enforce at trial.

The parties agreed about one thing in their respective petitions for leave to appeal: the circuit court's order permitting but limiting T.S.'s testimony and calling for a negative inference to be drawn from T.S.'s refusal to release her therapy records is seriously flawed. The state notes four problems with the circuit court's order:

First, the negative inference jury instruction the circuit court ordered violates Wis. Stat. § 905.13. Wisconsin Stat. § 905.13(1) provides: "The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom." Wisconsin Stat. § 905.13(3) provides: "Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom." The circuit court reasoned that Wis. Stat. § 905.13 does not apply because T.S. is not a party. Wis. Stat. § 905.13 is not limited to parties however. It refers to "*a* claim of privilege" without reference, or limitation, to parties. *See State v. Heft*, 185 Wis. 2d 288, 517 N.W.2d 494 (1994) (The Wisconsin Supreme Court applied Wis. Stat. § 905.13 to a nonparty witness in a criminal case.).

Second, the negative inference jury instruction violates *Shiffra*. This court rejected a proposal for a similar negative inference instruction in *Shiffra*. It called the proposal "no solution at all" for protecting a defendant's constitutional rights because "[a] reasonable juror might well consider this decision to be a reasonable exercise of [a victim's] right to privacy rather than an attempt to hide something material to the credibility of her testimony." *Shiffra*, 175 Wis. 2d at 612 n.4.

Third, the circuit court's order would be difficult or impossible to follow and enforce. The circuit court ruled that there "will be limitations on the cross-examination of T.S. regarding her assertion of the privilege, prohibiting questions that inherently or inferentially invade the privilege" but that Johnson would not be limited "from testing the strength and reasoning behind any explanation offered by T.S. as to why she chooses to assert the privilege." (36:37; A-Ap. 137). It is unclear how this would—or even could—play out in practice. T.S. may well have chosen to assert the privilege precisely because of what she discussed with her therapists. The uncertainty about how to enforce the circuit court's order would make it difficult for the circuit court and parties to abide by the order at trial and could spawn a bevy of issues for postconviction appeal.

Fourth, the circuit court's solution is internally inconsistent. The circuit court effectively held that Johnson established a constitutional right to in camera review but then turned around and held that T.S.'s statutory privilege trumps Johnson's constitutional rights. The circuit court then responded to T.S.'s decision not to release her privileged therapy records by limiting Johnson's ability to cross-examine T.S. about precisely the information it ruled Johnson has a constitutional right to have reviewed in camera.

CONCLUSION

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

In the alternative, if this court concludes that Johnson has a constitutional right to in camera review of T.S.'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 T.S.'s records for in camera review pursuant to Wis. Stat. § 146.82(2)(a)4.

Dated: February 22, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8310 words.

_____
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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 22nd day of February, 2012.

_____
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