STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2011 AP 2864-CR

STATE OF WISCONSIN,
Plaintiff-Appellant-Cross-Respondent,

v.

SAMUEL CURTIS JOHNSON III,
Defendant-Respondent-Cross-Appellant.

APPEAL FROM NON-FINAL ORDER ENTERED IN RACINE COUNTY CIRCUIT COURT, THE HONORABLE EUGENE A. GASIORKIEWICZ PRESIDING

COMBINED BRIEF OF RESPONDENT AND CROSS-APPELLANT

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BRIEF OF RESPONDENT

STATEMENT OF ISSUES

This Court granted interlocutory appeal to both parties based on their respective petitions. Johnson lists the State's two issues first, as it is designated the Appellant-Cross-Respondent.

1. The State's first issue on appeal is: Did Johnson make the preliminary showing required for a circuit court to order in camera review of T.S.'s privileged therapy records?

The circuit court answered in the affirmative.

2. The State's second issue on appeal is: Could the circuit court lawfully order T.S.' therapy records to be released for in camera review under Wis. Stats. § 146.82(2)(a)(4).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Johnson does not request oral argument or publication. The parties have set forth the relevant facts in their briefs, and the issues raised involve no more than the application of well-settled rules of law to a recurring fact situation.

STATEMENT OF THE CASE

This is an interlocutory review of the circuit court's order, which granted Johnson's motion for *in camera* review, but refused to provide the exclusive remedy provided for in Wisconsin when a witness refuses to consent to the disclosure of privileged records for *in camera* review.

In a criminal complaint dated March 24, 2011, the State of Wisconsin accused Johnson of repeated acts of sexual assault of a child. (1; State's Appendix at 144). According to the complaint, Johnson allegedly

assaulted T.S. beginning when she was in 6th or 7th grade and continuing until November of 2010. (1:1-3; State's App. at 144-146).

On August 5, 2011, Johnson filed a motion seeking production of T.S.'s counseling records for *in camera* inspection. (10: State's Appendix at 149). Johnson asserted that T.S. had visited with clinical psychologist Kristin Keeler ("Keeler") for two separate one-on-one sessions in 2010, and that T.S. was involved in counseling and therapy with Dr. Garry Libster ("Libster") in 2010 on 12 specific occasions. (10:3-4; State's Appendix at 149-151). The subject matter of these counseling sessions included T.S.' interpersonal relationships within the family, including her relationship with Johnson. (Id. at 150-151). These sessions occurred during the time period in which T.S. alleges that Johnson was engaging in acts of sexual abuse. (Id.:5-6; 150-152).

Johnson argued that because there was and is no indication that either Libster or Keeler made any reports of abuse pursuant to their duties as mandatory reporters, the compelling inference is that T.S. either denied or never made any reference to inappropriate sexual contact by Johnson despite being asked about her relationship with him. (Id.). Accordingly, Johnson asserted, the counseling records of Keeler and Libster likely contain information with a substantial and direct bearing on T.S.'s credibility in the form of statements by her that describe a non-abusive relationship with Johnson. (Id.). The materiality of such information, Johnson argued, is especially significant in a case such as this one where there is no corroborating physical evidence. (Id.: 6; State's Appendix at 153).

On September 23, 2011, the circuit court granted Johnson's motion to produce T.S.'s counseling records for *in camera* review pursuant to ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) and ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. After the court announced its ruling, the prosecution requested that a status hearing be set

"because clearly the minor and her parents have the ability to object to that, and there is consequences, and we were going to ask for a status based upon the review." (39:10; State's App. at 248). A status hearing was set for October 21, 2011.

Prior to that status hearing, T.S., through counsel, invoked her privilege and refused to consent to the release of her records for *in camera* review. Counsel for T.S. further provided that T.S.' natural parents were supportive of her decision in this regard, and that all were aware of the likely effect of her assertion of the privilege. (20).

At the status hearing on October 21, 2011, the circuit court asked the parties and the attorney for T.S. to provide the circuit court with briefs regarding the remedies they believed were provided for by law. (40; C.A.-App. 401-10).

In response to the circuit court's October 21, 2011 order, Johnson continued to assert that the remedy, pursuant to ***Shiffra*** and its progeny, is to bar T.S. from testifying at trial in the event T.S. continues to assert her privilege. (27; State's App. at 185-190). The State argued that the circuit court should subpoena the records from the health care providers. (29; State's App. at 205-210).

The circuit court rendered its decision and order regarding the continued assertion of T.S.'s privilege on November 29, 2011. (36; State's App. at 101-143). The circuit court "determined that there exist three potential remedies . . . two of which have been proffered by the defense and the state." (36:25; State's App. at 126; C.A.-App. at 101). The court rejected Johnson's position, holding that suppression of T.S.'s testimony "is inappropriate given the specific facts of this case and significantly impairs the rights and obligations of the State." (Id.) The circuit court also rejected the State's position, holding that subpoenaing the providers' records would eviscerate the "'absolute'

nature of [T.S.'s] privilege." (Id.:31; State's App. at 132; C.A.-App. 107).

Rather than adopting either of the parties' positions, the circuit court created a remedy suggested in a decades-old Stanford Law Review note. (36:26; State's App. at 127; C.A.-App. at 102). The court's remedy: "allow[] [T.S.] to testify at trial and grant[] the defense a jury instruction indicating the Court's ***Shiffra*** ruling, T.S.' assertion of her statutory communication privilege and a presumption that the content of those records would have been helpful to the defense." (Id.). "This solution is supported in legal commentary discussing this very issue." (Id., Citing Robert Weisberg, *Defendant v. Witness*, Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges, 30 Stan. L. Rev. 935, 983-985 (1978)).

On December 1, 2011, Johnson moved the circuit court to reconsider its November 29, 2011, decision and order, emphasizing that ***State v. Shiffra*** had specifically considered and rejected the circuit court's proposed remedy of permitting the alleged victim to testify with a cautionary instruction. (State's App. at 237-238). On December 7, 2011, the circuit court denied Johnson's motion for reconsideration. (37; C.A.-App. 501-02).

Both the State and Johnson petitioned for leave to appeal. The State sought review on two issues: whether Johnson made a sufficient showing under ***Shiffra*** and ***Green***, and whether the circuit court could compel T.S.'s records over her privilege. Johnson sought review on only one issue: whether the circuit court's remedy for the invocation of privilege by T.S. was contrary to controlling case law.

On January 6, 2012, this court granted both parties' petitions. (38).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY GRANTED JOHNSON'S MOTION FOR *IN CAMERA* REVIEW UNDER *SHIFFRA* AND *GREEN*.

A. General Principles Of Law

A defendant's right[1] to present a complete defense entitles a defendant, under certain circumstances, access to an alleged victim's privileged records. ***See Shiffra***, 175 Wis. 2d at 605. To access the alleged victim's privileged records, a defendant must make a preliminary showing of materiality. ***Id***. Upon that showing, the records are to be reviewed by the circuit court *in camera* for a determination of whether disclosure to the defense is necessary. ***State v. Solberg***, 211 Wis. 2d 372, 386-387, 564 N.W.2d 775 (1997). The supreme court has enunciated the materiality standard as follows: "[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." ***State v. Green***, 2002 WI 68 at ¶ 34.

The circuit court ruled that Johnson had satisfied his preliminary burden under ***Shiffra*** and ***Green***. The court said specifically that Johnson's motion "allege[d] specific knowledge that counseling did occur between the alleged victim and concerning her relationship with the defendant. Thus substantiating relevancy and materiality in the eyes of this court." (39:7; State's Appendix at 245; C.A.-App. at 207). The court then specifically held that Johnson had made a more specific

[1] This Court in ***Shiffra*** specifically considered both parties arguments as to the constitutional basis for a defendant's access to privileged records. 175 Wis. 2d at 605 n. 1. ("Because we decide this case based on a due process analysis, we do not address the confrontation and compulsory process issues raised by the parties.")

showing than the defendant in ***Green*** and thus was entitled to in camera review. (Id.: 8; State's App. at 246; C.A.-App. at 208). The circuit court's analysis was correct.

B. Johnson Made A Sufficient Showing

In his motion for production of counseling records for *in camera* inspection, Johnson alleged that the complainant, T.S., had been involved in counseling with two specific counselors and that one of the topics of the counseling was her interpersonal relationships in the family, including her relationship with Johnson. (10:3; State's App. At 149-153). Johnson alleged that these counseling sessions occurred during the time period in which Johnson was allegedly abusing T.S. (10:3-5; State's App. at 150-152). Both counselors were mandatory reporters and thus duty-bound under Wisconsin law to report whether they had a reasonable cause to believe that T.S. was the subject of abuse. ***See*** Wis. Stats. § 48.981(2); (10:5; State's App. at 152). The lack of any such report establishes a compelling inference that T.S. either denied or did not disclose any abusive conduct by Johnson during her privileged counseling sessions about her relationship with him. (Id.). It is important to note that T.S., through counsel, confirmed every factual allegation made by Johnson relative to her counseling, including the dates and topics thereof. (34). The circuit court correctly ruled that Johnson's showing was sufficient under ***Shiffra*** and ***Green***. (39:7-8; State's App. at 245-46; C.A.-App. at 207-08).

The sufficiency of Johnson's showing is confirmed by the ***Speese*** cases. In ***State v. Speese***, 199 Wis. 2d 597, 545 N.W.2d 510 (1996), the defendant sought access to the medical and psychiatric records arising from the accuser's stay at a mental health facility during the time period in which the abuse was alleged to have taken place. ***Id***. at 600. The defendant in ***Speese*** reasoned that: (1) questions about sexual abuse are routinely posed to an adolescent at a mental health facility; (2) had the alleged victim revealed any abuse

the counselors would have been bound to report it under the mandatory reporter laws; and (3) the fact that the allegations of abuse did not surface until seven months later indicated that the victim must have been silent about any abuse or denied it outright. ***Id***. at 600-01. The circuit court in ***Speese*** granted *in camera* review and subsequently did not disclose any records to the defendant. ***Id***. at 601. The court of appeals reviewed the case and ruled that Speese had satisfied the requirements of the preliminary showing required by ***Shiffra***, and reversed the case on the grounds that the trial court should have disclosed the records to the defendant. ***State v. Speese***, 191 Wis. 2d 205, 223-24, 528 N.W.2d 63 (Ct. App. 1995). The supreme court reversed, holding that any error by the circuit court in not disclosing the records was harmless. ***Speese***, 199 Wis. 2d at 606. The supreme court did not review the court of appeals' holding that ***Speese*** had satisfied the preliminary showing requirements.

The preliminary showing by Johnson was significantly stronger than the showing in ***Speese***, which was sufficient. The showings are similar in that the accuser was in some sort of mental health treatment or counseling during the time period in which the abuse allegedly occurred, and no report of abuse by the counselors was made. Johnson's showing, however, contains additional information that compels a finding that Johnson has satisfied his burden under ***Shiffra*** and ***Green***.

In ***Speese***, there was no indication that accuser's stay at the mental health facility was connected to the defendant in any way. The defendant merely alleged that, generally, questions about sexual abuse are routinely asked of juveniles in a treatment setting. In this case, the records sought are of counseling specifically directed at addressing the relationship between Johnson and T.S. Given the topic of counseling, it is highly probable that T.S. was asked about her relationship with Johnson both in general terms and whether the relationship was abusive. Accordingly, the records are likely to do more than

simply show a lack of reporting; they are highly likely to contain statements by T.S. that either flatly deny an abusive relationship with Johnson, or describe a relationship with Johnson inconsistent with abuse. Where there has been a showing that otherwise privileged records may call an accuser's credibility into question, courts have granted *in camera* review. ***See, e.g., Shiffra, State v. Robertson***, 2003 WI App 84, ¶ 28, 263 Wis. 2d 349, 661 N.W.2d 105 (accuser's records ordered for *in camera* inspection as they could provide explanation for conduct and affect accuser's credibility); ***cf. Jessica J.L. v. State***, 223 Wis. 2d 622, 589 N.W.2d 660 (Ct. App. 1998) (preliminary showing insufficient for *in camera* review where no allegations that information could draw credibility into question).

Information bearing on the credibility of T.S., the accuser and main witness in this case, is highly relevant to Johnson's defense. Johnson stands charged with one count of repeated acts of sexual assault of a child. (3; State's App. at 147). Accordingly, the State must prove at least three acts consisting of either first- or second-degree sexual assault of T.S. There is not a single piece of corroborating physical evidence in this case. The credibility of T.S. will be the paramount issue for the defense at trial. As such, any statements by T.S. denying abuse by Johnson, or any statements describing a relationship with Johnson that are inconsistent with abuse are highly relevant and are necessary to a determination of innocence. ***Green***, 2002 WI 68 at ¶ 34.

Such evidence, if it exists in the records, would not be cumulative to other evidence available to Johnson elsewhere. Contrary to the State's straw-man argument (State's Br. at 11-12), Johnson did not seek *in camera* review of the records because they would show a reporting delay. Johnson alleged that the records were likely to contain statements by T.S. that either denied abuse by Johnson or described a relationship in terms inconsistent with abuse. There is no other evidence available that T.S. had been asked specifically about her relationship with Johnson during the time in which he was allegedly abusing her. If the records contain the type

of information that Johnson has alleged, such would be the only evidence of its kind in this case.

While ***Green*** slightly altered the showing required by ***Shiffra***, ***Green*** reaffirmed that a request for *in camera* inspection is only a preliminary showing:

> [W]e emphasize that the defendant in this case is trying to make a preliminary showing to compel an *in camera* review by the circuit court. As such, a defendant is not required to carry the same burden as that required of the circuit court when it conducts its *in camera* inspection to determine whether to disclose the records. We discussed the circuit court's role during its *in camera* review in ***State v. Solberg***, 211 Wis.2d 372, 564 N.W.2d 775 (1997). In particular, we stated that, "[i]n conducting an *in camera* inspection of an alleged victim's privileged records, the circuit court must determine whether the records contain any relevant information that is 'material' to the defense of the accused.' " ***Id***. at 386-87, 564 N.W.2d 775 (emphasis added) (quoting ***Pennsylvania v. Ritchie***, 480 U.S. 39, 58 (1987)). The preliminary burden for seeking an *in camera* review must be less stringent than the standard applied by the court during its *in camera* inspection.

Green, 2002 WI 68, ¶ 31. The court continued:

> Our standard is not intended . . . to be unduly high for the defendant before an *in camera* review is ordered by the circuit court. The defendant, of course, will most often be unable to determine the specific information in the records. Therefore, in cases where it is a close call, the circuit court should generally provide an *in camera* review.

Id. at ¶ 35. The circuit court recognized in its decision granting Johnson's motion that the threshold showing is not unduly high. (39:6; State's App. at 244; C.A.-App. at 206). The circuit court concluded that Johnson's showing was sufficiently specific to distinguish it from cases where a "vague proffer" was held insufficient. (Id.). This was correct.

C. The State's Attack On Johnson's Preliminary Showing Under *Shiffra/Green* Is Unsupported By The Facts And The Law

1. The State's Argument Rests On Incorrect Factual Premises And The Adoption Of A Presumption Inconsistent With The Law

The State argues that Johnson's preliminary showing (referred to by the State as his "mandatory reporter syllogism") "fails in three important respects." (State's Br. at 11). The State's attempt to disassemble Johnson's argument is fatally flawed.

The State first argues that Johnson "vastly overstates the importance of T.S.'s possible failure to disclose the sexual assaults to her therapists." (State's Br. at 11). The State's argument in support of this assertion demonstrates its fundamental misunderstanding of the purpose for which Johnson sought disclosure of the records. The State argues, without citation to authority, that "sexual assault victims often delay disclosing sexual assault, particularly child victims sexually assaulted by family members like Johnson." (Id.). The State further argues that a delay in reporting is simply something for a defendant to "explore at trial." (Id.). As discussed previously, however, the records were not sought to establish a reporting delay; rather, they were sought to expose statements T.S. might have made specifically denying abuse by Johnson or describing a relationship inconsistent with abuse. The State's misunderstanding of this issue renders its argument on this point meritless.

The State's second complaint about Johnson's showing suffers the exact same fate. The State makes what appears to be an argument that the evidence would be cumulative, stating: "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." (Id. at 11-12). Again, Johnson's request had, and has, nothing to do with proving a reporting delay. The State's argument is nothing more than a straw-man, erected for a takedown without addressing the arguments actually put forth by Johnson and accepted by the circuit court.

The third attack by the State is the most remarkable. According to the State, Johnson's preliminary showing is flawed because it relies on the presumption that mandatory reporters will comply with the law. (Id.).

Mandatory reporters are obligated by law to report suspected abuse to authorities when they have reasonable cause to believe that their child patient is or may become a subject of neglect or abuse. See Wis. Stats. § 48.981(2) and (3). Mandatory reporters who fail to report as obligated are subject to criminal penalties of a fine of up to $1,000 and incarceration for up to six months. Wis. Stat. § 48.981(6).

The State argues that there are any number of reasons why a mandatory reporter might choose to ignore his or her obligations. None of the reasons provided, however, are supported by law. There are no exceptions to the reporting requirement for a situation where: (1) the mandatory reporter "may not want to explore allegations further;" (2) the mandatory reporter may not "want to jeopardize an ongoing therapeutic relationship;" (3) the mandatory reporter believes that "the costs of disclosure outweigh the benefits;" (4) the mandatory reporter is "confused about reporting obligations;" or (5) because a required report under Wis. Stat. § 48.891 extinguishes the privilege under Wis. Stat. § 905.04(4)(e)2. (State's Br. at 12-13).

To accept the State's critique is to accept and rely upon the proposition that a health-care provider will not act in accordance with their obligations under the law, under penalty of criminal sanction. To find fault in Johnson's presumption that the law will be followed

would be inconsistent with well-established and foundational principles underlying the administration of the law. ***See e.g., Brown v. State***, 230 Wis. 2d 355, 602 N.W.2d 79 (Ct. App. 1999) (all persons are presumed to know state law); ***State v. Lacount***, 2008 WI 59, ¶ 23, 310 Wis. 2d 85, 750 N.W.2d 780 (jurors are presumed to follow jury instructions); ***State ex rel. Wasilewski v. Bd. of Sch. Directors of City of Milwaukee***, 14 Wis. 2d 243, 266, 111 N.W.2d 198 (1961) (it is presumed that public officials discharge their duties or perform acts required by law in accordance with the law). In short, it is eminently reasonable, if not required, to presume that the mandatory reporters in this case, and in any case, would have followed their legal obligations to report any abuse they had reasonable cause to suspect.

The State's arguments against the logic of Johnson's preliminary showing are not on point, are wholly without merit, and do not demonstrate any error by the circuit court in its conclusion that Johnson had satisfied the requirements for *in camera* inspection.

2. There Is No Requirement That A Defendant Requesting *In Camera* Review Demonstrate That The Records Will Contain Information About A Witness's Ability To Perceive Or Recall Events

The State next argues that Johnson's showing is insufficient because it is not similar to two cases in which *in camera* review was granted, ***Shiffra***, and ***State v. Robertson***, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 10. (State's Br. at 13-14). The State highlights what it describes as a difference of "quality" between Johnson's offer of proof and those of ***Shiffra*** and ***Robertson***. One can only presume that the State is suggesting that some showing of mental illness affecting

a witness's ability to recall events is required.[2] This argument is unavailing.

No case has held that a defendant must make a showing that the subject of the records suffers from a mental illness or disorder that affects his or her ability to perceive or recall events. In both ***Shiffra*** and ***Robertson***, *in camera* review was ordered because the information believed to be in the records was relevant to the complaining witness's credibility. ***Shiffra*** at 600 (the victim's psychiatric difficulties might affect both her ability to accurately perceive events and her ability to relate the truth); and ***Robertson*** at ¶ 28 (records could provide an explanation for victim's conduct and affect her credibility). That the accuser's credibility in each case was potentially impeachable because of a mental health condition is of no special import; it is simply that the accuser's credibility was at issue in each of those cases for those particular reasons.

Here, Johnson's showing was specific to the facts at hand and sufficient to satisfy the test under ***Green***. Johnson alleged—and counsel for T.S. affirmed—that T.S. was in counseling related specifically to her relationship with Johnson during the period of time in which she alleges he was abusing her, and that neither of her counselors reported any suspicion of abuse (which they would have been obligated to do). Therefore, in the context of this counseling, it is highly likely T.S. was asked about her relationship with Johnson. Further, given the lack of any report, it is highly likely that T.S. either directly denied abuse or described a relationship free of abuse. If such statements are contained in the records, they would be directly contrary to allegations T.S. has made. Such information is actually more relevant and probative than the information sought in ***Shiffra*** and ***Robertson***, which was that the accuser may

[2] As discussed in the State's brief, despite language by the circuit court to the contrary, Johnson never alleged that T.S. suffered from ADD and, thus, had an impaired ability to perceive or recall events. (State's Br. at 15-16). Johnson only cited ADD as one of the reasons T.S. was in counseling. T.S.'s condition in this regard is otherwise not relevant to this appeal.

have general problems with accurate perception and recall of events. Further, a similar, albeit weaker, showing to Johnson's was deemed sufficient by the court of appeals in ***State v. Speese***, 191 Wis. 2d 205, 219, 528 N.W.2d 63 (Ct. App. 1995), ***rev'd on other grounds***, 199 Wis. 2d 597, 545 N.W.2d 510 (1996).

Contrary to the State's suggestion, Johnson has done more than "merely allege[] that the victim is engaged in counseling related to prior sexual assaults or the current sexual assault." (State's Br. at 15). Johnson showed the specific topic of counseling and how the circumstances surrounding it demonstrated a reasonable likelihood that the records of that counseling contained relevant information necessary to a determination of guilt or innocence. Johnson has, therefore, made an ample preliminary showing for *in camera* inspection. It is up to the circuit court to determine if any such information exists in the records and whether it should be further disseminated to Johnson.

3. Affirming The Circuit Court Would Not Result In A Dangerous Expansion Of A Defendant's Right To *In Camera* Review

The State sounds the warning that if Johnson's showing is deemed sufficient, the door is opened to *in camera* review anytime an accuser has received therapy for a sexual assault. (State's Br. at 14). This is simply false. As discussed directly above, Johnson did far more than simply allege that T.S. was in counseling. The specific facts and circumstances of the counseling <u>in this case</u> are sufficient to require *in camera* review. If T.S. had not been involved in counseling specifically related to her relationship with Johnson, and if the counseling had not taken place during the time period in which the abuse was allegedly occurring, it is highly unlikely that Johnson could have satisfied the minimum requirements of ***Green***. Recognition that Johnson's showing was sufficient expands nothing; rather, it reinforces both the requirement that a specific factual basis be alleged and

the principle that a defendant is attempting to make only a preliminary showing at the stage of the process.

Lastly, Johnson would be remiss if he did not address the State's contentions relative to the practice of circuit courts. (State's Br. at 17). The State laments that "circuit courts often do not treat *in camera* review as the constitutional challenges they are," that circuit courts treat such motions as "no big deal," and that circuit courts require defendants "merely to cite some basis" for *in camera* review. (Id.). The State makes these assertions without citation to any case, research study, or authority, and uses them to set up its closing argument that motions for *in camera* review are "the epitome of putting the victim on trial." (Id.). ***See W.H. Pugh Coal Co. v. State***, 157 Wis. 2d 620, 634, 460 N.W.2d 787 (Ct. App. 1990) (citations without any legal authority need not be addressed).

This argument lacks any relevance to the issues before the court. Further, it ignores the fact that the process for *in camera* review was designed to protect the privacy of victims by balancing that privacy against the constitutional rights of the defendant. The *in camera* review process is not a slap in the face to victims; it is a balanced approach designed to protect their privacy rights and prevent unfettered access by the accused.

The circuit court correctly balanced those competing interests in this case, and its ruling granting *in camera* review should be affirmed.

II. THE CIRCUIT COURT CANNOT ORDER T.S. TO DISCLOSE HER PRIVILEGED RECORDS WITHOUT HER CONSENT.

Although difficult to precisely discern, the State appears to be arguing that an alleged victim's privileged records can be compelled for *in camera* review, without the alleged victim's consent, pursuant to Wis. Stat. § 146.82(2)(a)(4). (See State's Br. at 19-20). The State bases its arguments on either abstract or undeveloped assertions and principles, including that: Johnson's due

process rights trump T.S.'s privilege, (id. at 21) and that "the fair administration of justice" demands that T.S.'s privilege must yield. (Id. at 22-25). For the following reasons, the State's arguments are unpersuasive.

A. Circuit Courts Do Not Have the Authority To Order An Alleged Victim's Privileged Records To Be Disclosed Without Consent

The State argues that Wis. Stat. § 146.82(2)(a)(4) provides a circuit court with authority to order an alleged victim's privileged records to be disclosed without her consent. (State's Br. at 19-20). This argument fails for two reasons. First, T.S.'s privilege under Wis. Stat. § 905.04 is absolute, and, absent some exception to the privilege, Wisconsin appellate courts consistently recognize that she may refuse to consent to disclosure of her privileged records. Wis. Stat. § 905.04; ***Shiffra***, 175 Wis. 2d at 612; ***State v. Speese***, 191 Wis. 2d at 219 (Ct. App. 1995). Second, Wis. Stat. § 146.82(2)(a)(4) is a general statute requiring a "lawful order of a court of record," which, in turn, is governed by the more specific Wis. Stat. § 905.04 and its many enumerated exceptions—none of which authorize a court to order T.S.'s records disclosed without her informed consent. ***See City of Muskego v. Godec***, 167 Wis. 2d 536, 546, 482 N.W.2d 79 (1992).

1. T.S.'s Privilege Is Absolute

The circuit court cannot compel T.S.'s records to be disclosed without her consent because T.S.'s privilege in her confidential treatment records is absolute. Wis. Stat. § 905.04(2); ***Speese***, 191 Wis. 2d at 219.

Wis. Stat. § 905.04(2) plainly provides: "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information or obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition . .

." The purpose of the privilege is "to prevent the unnecessary disclosure of 'confidential' information." ***State v. Denis L.R.***, 2005 WI 110, ¶ 37, 283 Wis. 2d 358, 699 N.W.2d 154 (***citing Steinberg v. Jensen***, 194 Wis. 2d 439, 464, 534 N.W.2d 361 (1995)). The privilege exists to ensure free and candid discussions between a patient and physician about mental health concerns and to "ensure that those concerns will not be unnecessarily disclosed to third persons." ***Denis L.R.***, 2005 WI 110 at ¶ 37 (citation omitted).

In ***State v. Speese***, the court of appeals considered the language of Wis. Stat. § 905.04(2) and ***Shiffra*** and concluded: "The patient privilege in § 905.04(2), Stats., is absolute in the sense that nothing in the statute authorizes a court to use a communication within the privilege for any purpose in a criminal action. In ***Shiffra***, we treated the privilege as absolute." ***Speese***, 191 Wis. 2d at 219 (footnote and internal citations omitted). Within that holding, the court noted: "Section 905.04(4), Stats., creates exceptions to the privilege, but it does not allow a court to order disclosure when the privilege exists." ***Speese***, 191 Wis. 2d at 219 n. 12.

In ***State v. Solberg***, 211 Wis. 2d 372, 564 N.W.2d 775 (1997), the circuit court ordered disclosure of a complaining witness's treatment records in a sexual assault case pursuant to ***Shiffra***. On appeal, the supreme court had to determine whether the court of appeals had the authority to review the patient's records, which in turn required it to determine whether the circuit court had authority to review the records originally. ***Solberg***, 211 Wis. 2d at 383. The supreme court said: "A circuit court should conduct an *in camera* review of privileged medical records when the defendant makes a 'preliminary showing that the sought-after evidence is material to his or her defense,' and the privilege holder consents to review of those records." ***Id***. (emphasis added). Given the lack of clarity in the trial court record, the supreme court had to determine whether the witness had, in fact, consented to the circuit court's review of the records at issue. ***Id.***

The court reviewed the sealed documents and located a signed release by the witness. "This release," said the court, "evinces the consent necessary for the circuit court's review of the privileged medical records." ***Id***. at 384. The court went on to suggest in a footnote that if a release is to be used to show the required consent, the release should contain language "designed to notify the victim that they need not sign the release." ***Id***. at 385 n. 6. Considered together, Wis. Stat. § 905.04(2), ***Shiffra***, ***Speese***, and ***Solberg*** make it clear that the circuit court can only review a complaining witness's privileged records *in camera* with consent of the witness, because those records are subject to an absolute privilege.

Furthermore, the State's implicit suggestion that the nature of the T.S.'s privilege should depend on the extent to which the State needs T.S.'s testimony to prove its case is wrong. (See State's Br. at 22-25). Such balancing and weighing of whether a privilege should give way in the interests of justice was rejected by the United States Supreme Court in ***Jaffree v. Redmond***, 518 U.S. 1 (1996). In ***Jaffree***, the Supreme Court considered whether statements made by a law enforcement officer to a clinical social worker after the officer shot and killed a man were protected from compelled disclosure in the subsequent civil rights action brought the decedent's family. ***Id***. at 4-5. The Seventh Circuit had qualified its recognition of the patient-psychiatrist privilege, stating that the privilege "would not apply if, 'in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests.'" ***Id***. at 7 (quotation omitted). Opining on the nature of the patient-psychiatrist privilege, the Supreme Court noted that the privilege is "rooted in the imperative need for confidence and trust." ***Id***. at 10 (quotation omitted). Further, the Supreme Court stated: "Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development

of the confidential relationship necessary for successful treatment." ***Id***.

In light of the importance of the patient-psychiatrist privilege, the Court rejected the Seventh Circuit's balancing component of the privilege. ***Id***. at 17. "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." ***Id***. The Court therefore held "that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." ***Id***. at 15.

Considering the language of Wis. Stat. § 905.04(2), the appellate decisions in ***Shiffra***, ***Speese***, and ***Solberg***, along with the Supreme Court's rejection of balancing the privilege against the interests of justice in ***Jaffree***, it is clear that T.S.'s privilege to refuse to disclose her confidential therapy records is absolute and cannot be eviscerated by an order compelling her records to be disclosed.

2. The General Language Of Wis. Stat. § 146.82(2)(a)(4) Is Controlled By The Specific Language Of Wis. Stat. § 905.04 And Its Enumerated Exceptions

Wis. Stat. § 146.82(2)(a)(4) is a general statute and is qualified by the requirement that a court's order be "lawful." As a general statute, Wis. Stat. § 146.82(2)(a)(4) is governed by the more specific statute, Wis. Stat. § 905.04, and all its enumerated exceptions to the patient-physician privilege. ***See Godec***, 167 Wis. 2d at 546; ***see also Morales v. Trans World Airlines, Inc.***, 504 U.S. 374, 384 (1990) ("it is a commonplace of statutory construction that the specific governs the general . . .")

In ***Godec***, the supreme court was tasked with determining whether the circuit court could, under Wis. Stat. § 146.82(2)(a)(4), issue an *ex parte* order to obtain results of Godec's blood alcohol test. 167 Wis. 2d at 539. A circuit court judge issued an order for a subpoena of the results of Godec's blood alcohol test. ***Id***. at 541. Once armed with Godec's inculpatory test results, the City obtained convictions in the municipal court against Godec for operating while intoxicated and operating with a prohibited blood alcohol concentration. ***Id***. The circuit court, after finding that Godec's records were protected by Wis. Stat. § 905.04 and that Godec refused to consent to disclosure, ordered the blood alcohol test results suppressed and dismissed the operating with a prohibited blood alcohol concentration citation. ***Id***. at 541-542.

On appeal, the City argued that the exception to Wis. Stat. § 905.04(4)(f) for blood alcohol test results pierced the privilege and, accordingly, the circuit court's order under Wis. Stat. § 146.82(2)(a)(4) was "lawful." 167 Wis. 2d at 543-544. The supreme court considered the operation of both statutes and stated: "sec. 146.82, Stats., concerning confidentiality of patient health care records, is a general statute when compared to the more specific sec. 905.04(4)(f), which concerns tests for intoxication. When we compare a general statute and a specific statute, the specific statute takes precedence." 167 Wis. 2d at 546 (citations omitted). Thus, the exception to the patient-physician privilege applied, the privilege did not exist, and the circuit court had lawful authority to order Godec's test results disclosed without his consent. ***Id***. at 546-547.

At the supreme court in ***Speese***, the State argued that ***Godec*** supported the proposition that circuit courts have the authority to subpoena records for *in camera* reviews in cases such as this**.** ***Speese,*** 199 Wis. 2d 597, 601 n. 6, 545 N.W.2d 510 (1996). However, the supreme court expressed its reservations about the State's assertions, observing that while Wis. Stat. § 905.04 contains a number of exceptions to the general rule of the privilege, "it contains no exception

comparable [to the statute in ***Pennsylvania v. Ritchie***, 480 U.S. 39 (1987)], allowing disclosure to a court of competent jurisdiction pursuant to court order." 199 Wis. 2d at 609 n. 10.

Because the State cannot reasonably assert that any of the exceptions to Wis. Stat. § 905.04 apply to the case at hand, it follows that the circuit court cannot "lawfully" order T.S.'s absolutely privileged records disclosed without her consent. The State cannot bootstrap the general language of Wis. Stat. § 146.82(2)(a)(4) to eviscerate T.S.'s absolute privilege, a point the circuit court recognized in its order. (36:31; State's App. at 132; C.A.-App. at 107).

Because the general language of Wis. Stat. § 146.82(2)(a)(4) is guided by the more specific Wis. Stat. § 905.04 and all its exceptions, 146.82 is not a proper mechanism to compel T.S.'s records to be disclosed without consent.

B. Any Conflict Between Johnson's Due Process Rights And T.S.'s Privilege Is Reflected In, And Resolved By, The *In Camera* Process Itself

The State also suggests that circuit courts have the authority to compel an alleged victim's privileged medical records for *in camera* review because Johnson's due process rights trump T.S.'s privilege. (State's Br. at 21). The State's hypothesis requires the following logic: 1) Johnson has the right to fair trial, which, per ***Ritchie*** and ***Shiffra***, includes the right to have a court conduct an *in camera* review of T.S.'s records upon a sufficient showing; 2) T.S.'s right to confidentiality in her privileged records is only a statutory right; 3) Johnson's rights conflict with T.S.'s; therefore, 4) Johnson's rights must trump T.S.'s right to confidentiality in her privileged records and the circuit court can compel the records to be produced. (See State's Br. at 20-21.) However, the State's logic falls apart at step three. Any conflict that may exist between T.S.'s privilege and Johnson's due process rights is

contemplated in, and satisfied by, the *in camera* process itself.

The perceived conflict between T.S.'s privilege and Johnson's constitutional rights is nonexistent. The State claims Johnson's rights "trump" T.S.'s right to confidentiality in her privileged records. (State's Br. at 21). However, federal law only[3] "trumps" state law where the two laws actually conflict. ***See generally Ware v. Hylton***, 3 U.S. 199 (1796) (Virginia law preventing British creditor's recovery of American debtor's debt must yield to treaty between United States and Britain allowing recovery). Here, there is no conflict; the two rights (Johnson's due process rights and T.S.'s right to confidentiality) can and do co-exist. This co-existence was recognized by the Supreme Court in ***Ritchie***, 480 U.S. at 46, and by this very court in ***Shiffra***, 175 Wis. 2d at 611-612. The two rights co-exist by balancing the alleged victim's privacy rights against the defendant's due process rights, and both are protected by the *in camera* review process. ***Id***.

The *in camera* process contemplates that a defendant is entitled to exculpatory information and that the alleged victim's counseling records may contain exculpatory information. ***See id***. at 605. The *in camera* process similarly contemplates that the alleged victim has privacy interests in her counseling records, and she may not want those records disclosed to anyone—especially to her confronters—unless she consents to disclosure, and until a court determines their disclosure to be necessary. ***See generally id***.

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[3] As relevant here. There exist three forms of federal preemption of state laws, but two could not possibly apply to this case. "Federal preemption of state laws occurs in three circumstances: (1) Congress explicitly states its intention to preempt state law; (2) a federal statutory or regulatory scheme shows intent to occupy the field to the exclusion of state law; (3) operation of state and federal law actually conflict." ***M & I Marshall & Ilsley Bank v. Guar. Fin., MHC***, 2011 WI App 82, ¶ 23, 334 Wis. 2d 173, 800 N.W.2d 476. The State appears to be arguing that this case presents a conflict of the third type, i.e., that Wis. Stat. § 905.04 conflicts with Johnson's due process rights.

The *in camera* review process is not a ruling in favor of a defendant's rights "despite" the alleged victim's rights, as the State claims. (State's Br. at 21). Rather, the *in camera* review process reflects a reasoned balancing of the "sometimes competing goals of confidential privilege and the right to put on a defense." ***Shiffra***, 175 Wis. 2d at 611-612. In ***State v. Behnke***, the court of appeals, seemingly responding to similar complaints levied by the State here, explained that the *in camera* process "attempts to strike a balance between the witness's right to privacy, which is embodied in the health care provider privileges, and the truth-seeking function of our courts, which is rooted in the Due Process Clause of the Fourteenth Amendment." 203 Wis. 2d 43, 56, 553 N.W.2d 265 (Ct. App. 1996), ***pet. for rev. denied***, 205 Wis. 2d 135, 555 N.W.2d 815 (1996).

The State's citation to ***Marbury v. Madison***, 5 U.S. (1 Cranch) 137 (1803) is a shallow attempt to create a constitutional crisis where none exists. ***Shiffra*** rejected a similar simplistic suggestion out-of-hand, quoting ***Marbury***: "'If two laws conflict with each other, the courts must decide on the operation of each…. This is the very essence of judicial duty.' Judges were bound to balance difficult conflicts at the time of ***Marbury*** and they are bound to do so now." ***Shiffra***, 175 Wis. 2d at 611 (quoting ***Marbury***, 5 U.S. (1 Cranch) at 177-178). As above, whatever conflict exists between Johnson's due process rights and T.S.'s right to confidentiality is resolved by the *in camera* process itself and has been for nearly two decades.

Undeterred, the State then argues that Johnson's right to *in camera* review is "hollow" without a corresponding right to forcibly compel the records themselves. (State's Br. at 21). The mechanism to secure the records already exists—the circuit court, pursuant to its authority under ***Ritchie*** and ***Shiffra***, ordered the records disclosed for *in camera* review. Once ordered, the alleged victim has the right to protect the confidentiality in her privileged records.

The hollowness that so concerns the State is filled, and Johnson's due process rights protected, when a court orders the alleged victim's testimony suppressed, thereby providing a remedy to Johnson for the inability to have the records reviewed *in camera*. ***Shiffra***, 175 Wis. 2d at 612 ("the only method for protecting Shiffra's right to a fair trial was to suppress [the alleged victim's] testimony if she refused to disclose her records.")

The State's complaints about the process by which circuit courts are able to obtain an alleged victim's privileged records for *in camera* review ignore (or are perhaps driven by its discontent with) the plain mandate of this very court: that a circuit court cannot compel disclosure of an alleged victim's records because her privilege is absolute, and, absent her consent to disclosure, she is barred from testifying at trial in order to protect the defendant's due process rights. ***Id***.

CONCLUSION

For all the reasons stated, Johnson respectfully requests that this Court affirm the circuit court's order granting *in camera* review of T.S.'s therapy records, and affirm that part of the circuit court order holding that it did not have authority to compel T.S.'s counseling records for disclosure without her consent.

BRIEF OF CROSS-APPELLANT

STATEMENT OF ISSUES

Did the circuit court err by allowing T.S. to testify despite her refusal to provide counseling records for *in camera* review pursuant to the circuit court's order under ***State v. Shiffra***?

The circuit court refused to impose the current remedy provided for under Wisconsin law, and chose instead a remedy permitting the alleged victim to testify, but with a cautionary instruction to the jury.

ARGUMENT

When T.S. refused to consent to the disclosure of her privileged therapist records for *in camera* review, the circuit court refused to impose the remedy mandated by existing precedent, crafting instead a remedy that had been specifically rejected by existing precedent.

I. IN THE EVENT T.S. CONTINUES TO ASSERT HER PRIVILEGE, SUPPRESSION OF HER TESTIMONY IS THE ONLY REMEDY; THE CIRCUIT COURT ERRED IN CONCLUDING OTHERWISE.

A. Suppression Is The Only Remedy Recognized In Wisconsin And Available To Protect Johnson's Rights

Suppression is the only remedy recognized in Wisconsin for situations where an alleged victim asserts her privilege to refuse to disclose confidential records after a circuit court orders an *in camera* review pursuant to ***Shiffra***. The circuit court clearly erred by ordering a remedy other than suppression.

The ***Shiffra*** court stated the "only method of protecting [the defendant]'s right to a fair trial [is] to suppress [the alleged victim]'s testimony if she refused to disclose her records." ***Id.*** When the State

complained about the ***Shiffra*** remedy years later, the court of appeals said: "These complaints . . . were addressed in ***Shiffra***, and the remedy set out in that case is still valid." ***State v. Behnke***, 203 Wis. 2d 43, 57, 553 N.W.2d 265 (Ct. App. 1996).

In ***State v. Speese***, the court of appeals held that where the defendant made the required preliminary showing as to the victim's psychiatric records under ***Shiffra***, "the trial court should have ordered that unless [the victim] consented to an *in camera* inspection of those records, she would not be permitted to testify at the trial" pursuant to ***Shiffra***. ***State v. Speese***, 528 N.W.2d 63, 71, 191 Wis.2d 205 (Ct. App. 1995).

Every Wisconsin court to address this issue has reached the same conclusion: suppression is the proper remedy. ***Shiffra***, 175 Wis. 2d at 612; ***Behnke***, 203 Wis. 2d at 57; ***Speese***, 191 Wis. 2d at 224 (Ct. App. 1995); ***see also State v. Bryan Leather***, unpublished decision, Court of Appeals District I, 2010AP354-CR (April 5, 2011) (App. 601-610) (stating that an *in camera* review takes place "after the patient has consented to disclosure." ***Id***. at ¶ 28); ***see also State v. Donovan Lewis***, unpublished decision, Court of Appeals District IV, 2009AP2531-CR, (August 26, 2010) (App. 701-706) (Subsequent to the defendant's showing of materiality, the alleged victim refused to disclose confidential records for *in camera* review, knowing the probable consequence would be suppression of the alleged victim's statements and testimony at the trial. ***Id***. at ¶ 8. The court granted the defendant's motion to suppress the alleged victim's statements and bar his testimony. ***Id***. While the court of appeals reversed and remanded, it did not do so on the ***Shiffra*** remedy.)

Unsurprisingly, the Wisconsin Judicial Benchbook-Criminal, published by the State Bar of Wisconsin and the Wisconsin Supreme Court Office of Judicial Education, recognizes that a circuit court should suppress the testimony of a witness who refuses to disclose her confidential records. CR 26-25 (2011).

Even foreign jurisdictions recognize the ***Shiffra*** suppression remedy. In fact, in ***Commonwealth v. Barroso***, a case upon which the State heavily relies for its suggestion that *in camera* review impedes the fair administration of justice, the Kentucky Supreme Court recognized and cited ***Shiffra*** for the proposition that, in Wisconsin, "[i]f the witness refuses to waive the privilege, the witness is precluded from testifying . . ." ***Barroso***, 122 S.W.3d 554, 564-565 (Ky. 2003).

Given the existing, undisturbed precedents defining suppression of testimony as the remedy in this situation, the circuit court clearly erred by refusing to bar T.S.' testimony and by inventing its own remedy instead. ***State v. Hayes***, 2004 WI 80, ¶ 14, n. 9, 273 Wis. 2d 1, 681 N.W.2d 203. (Published opinions of the court of appeals are precedential for lawyers, trial courts, the court of appeals, and the supreme court.)

B. Other Remedies Have Already Been Considered And Rejected

Remedies other than suppression were considered and rejected in ***Shiffra***. In ***Shiffra***, this court said the circuit court could not hold the alleged victim in contempt "because she is not obligated to disclose her psychiatric records." 175 Wis. 2d at 612. Nor would an adjournment of Shiffra's case be useful "because the sought-after evidence would still be unavailable." ***Id***. A cautionary jury instruction, such as the one proposed by the circuit court here, was similarly rejected:

> The state suggests that one solution would be to allow [the alleged victim] to testify despite her continuing assertion of her confidentiality privilege, but to allow the defendant to tell the jury that she has refused to allow access to her records. We hold that this is no solution at all. The jury will know only that the witness has exercised her privilege not to divulge her personal mental history. A reasonable juror might well consider this decision to be a reasonable exercise of her right to privacy rather than an attempt to hide something material to the credibility of her testimony. While the state

> terms the allowing of a comment by the defense to be a "sanction against" the complaining witness, it is reasonable to believe that the jury will instead consider the witness' choice with favor. The state's suggestion has no merit.

Shiffra, 175 Wis. 2d at 612 n. 4 (emphasis added). The circuit court's imposition of a remedy that was rejected by the court of appeals is clearly erroneous. ***State v. Hayes***, 2004 WI 80 at ¶ 14, n. 9.

C. As The State Recognizes, The Circuit Court's Remedial Order Is Unworkable, Unprecedented, and Must Be Reversed

Both parties agree that the circuit court's proposed remedy for T.S.'s decision to protect her privileged records is flawed and requires reversal, albeit on slightly different grounds. (State's Br. at 28). Johnson addresses these numerous concerns in turn:

First, as stated above, the negative inference instruction proposed by the circuit court was already considered and rejected in ***Shiffra***, 175 Wis. 2d at 612 n. 4. ***Shiffra*** stands for the proposition that suppression is the only remedy. ***See generally Shiffra***. As the State correctly notes, the negative inference instruction also violates Wis. Stat. § 905.13. (State's. Br. at 28).

Second, the circuit court's unprecedented remedy casts the parties and the alleged victim into uncharted territory and raises more questions than it answers. As examples, in the event this case proceeds to trial with T.S. continuing to invoke her privilege, how will the court's cautionary instruction read? What basis in law will the instruction have? When will the jury be cautioned? Before T.S. testifies? During her testimony? After her testimony? At closing? Will the defense be permitted to comment on T.S. invoking her privilege in *voir dire*? During opening statements? To what extent will the defense be permitted to comment on T.S.'s invocation during closing arguments? To what extent will the defense be permitted to cross-examine T.S. about her counseling or her invocation of

her privilege? What effect will the instruction will have on the jury's deliberations? Will the jury disregard the cautionary instruction and instead credit T.S. for seeking to protect her privacy? To what extent will the jury speculate as to what may be contained in T.S.'s records?

The questions raised by the circuit court's order were put to rest in ***Shiffra***, when this Court ruled that suppression is the only remedy.

Third, the circuit court's justifications for the remedy it chose are hardly compelling. The circuit court's order cites fifteen "circumstances peculiar and specific" to the case. Six of the "circumstances" cited by the court are neither peculiar nor specific to this case—they would exist in any case where an alleged victim refuses to disclose her privileged records for *in camera* inspection after a defendant has made a sufficient materiality showing under ***Shiffra***:

1) That a defendant has a sixth amendment confrontation right (36:37; C.A-App. at 113);
2) That the State has the exclusive power to bring criminal prosecutions (Id.);
3) That under ***Shiffra***, an alleged victim being barred from testifying may deprive the State of its ability to prosecute (37:38; C.A-App. at 114);
4) That the State and Johnson are equally deprived of the evidence contained in T.S.'s records (36:37; C.A-App. at 113);
5) That T.S. is presumed competent as a witness (36:40; C.A-App. at 116); and
6) That circumstances presented by these facts implicate the weighing of an alleged victim's right to refuse to disclose confidential records versus a defendant's right to a fair trial (36:39-40; C.A-App. at 115-16).

Two of the "circumstances peculiar and specific" to this case cited by the court would exist in any case where the State is accusing a defendant of sexually assaulting a child:

1) That consent is not a viable defense (36:39; C.A-App. at 115); and
2) That the alleged victim's interview or interviews with child protective services (or a similar investigative body) is available to the defendant (36:38; C.A-App. at 114).

Four of the "circumstances" are irrelevant to a determination of remedy or remedies:

1) That T.S. has a familial relationship with Johnson (36:37; C.A-App. at 113);
2) That Johnson has an intact relationship with T.S.'s mother; (36:37; C.A-App. at 113)
3) That T.S.'s mother and natural father respect T.S.'s decision not to disclose her records (36:37; C.A-App. at 113); and
4) That T.S. fully understands and appreciates her decision not to disclose her records (36:38; C.A-App. at 114).

The three remaining "circumstances" cited by the circuit court to explain its decision are wrong:

1) That Johnson's allegedly incriminating statements are cumulative to whatever exists in T.S.'s counseling records (Id.);
2) That Johnson's allegedly incriminating statements to Tracie S-J, Johnson's wife and T.S.'s mother, are cumulative to whatever exists in T.S.'s counseling records (Id.); and, most importantly,
3) That the facts presented by this case are an issue of "first impression in this State" (36:39; C.A-App. at 115).

The facts of this case do not present an issue of first impression. As demonstrated above, a number of Wisconsin courts have addressed the specific issue of the proper remedy available to a defendant when an alleged victim refuses to disclose privileged records.

Every court to decide the issue has ruled that the alleged victim's testimony must be suppressed.

As to the circuit court's reasoning that any evidence found in T.S.'s records would be cumulative, Johnson disagrees. Johnson has no other evidence of inconsistent statements or denials of abuse by T.S. Furthermore, evidence related to the credibility of T.S. could not possibly be cumulative—it is the central issue in the case. The State must prove at least three acts of first or second degree sexual assault to convict Johnson, and it must do so without physical evidence. Therefore, any information bearing on the credibility of T.S. is paramount. Lastly, the type of evidence here—statements to T.S.'s counselors—are uniquely compelling and could not be reasonably considered cumulative even if Johnson had other evidence of inconsistent statements made by T.S.

CONCLUSION

For the foregoing reasons, Johnson requests that the Court vacate that portion of the circuit court's November 29, 2011 decision and order pertaining to the remedy for T.S.'s refusal to consent to *in camera* review, and that the Court remand this matter to the circuit court with instructions to enter an order suppressing T.S.'s testimony at trial, should she continue to refuse to disclose her privileged records for *in camera* review.

Dated this 13th day of March, 2012

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. (Rule) § 809.19(6)(b) and § 809.19(8)(c) for a combined brief of respondent cross-appellant produced with a proportional serif font. The length of the Respondent portion of the brief is 7,084 words; the length of the Cross-Appellant portion of the brief is 1,864 words.

Dated this 13th day of March, 2012.

Attorneys for Defendant-Respondent-Cross-Appellant

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

I hereby certify that I have submitted an electronic copy of this brief, 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.

Dated this 13th day of March, 2012.

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