STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

CASE NUMBER 11AP2864-CRAC

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

CROSS-APPELLANT'S REPLY BRIEF

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ARGUMENT

I. JOHNSON'S RIGHT TO PRETRIAL DISCLOSURE OF MATERIAL INFORMATION WITHIN T.S.'S COUNSELING RECORDS IS BALANCED AGAINST T.S.'S RIGHT TO CONFIDENTIALITY IN HER ABSOLUTELY PRIVILEGED COUNSELING RECORDS; THESE RIGHTS ARE SATISIFED BY THE *IN CAMERA* PROCESS, AND, IF T.S. EXERCISES HER PRIVILEGE, THE LAW PROTECTS JOHNSON'S RIGHTS BY FORBIDDING T.S.'S TESTIMONY.

A. The State Has Affirmatively Conceded Or Failed To Refute Nearly Every Significant Issue Presented on Cross-Appeal.

The State's Cross-Respondent Brief concedes nearly every significant issue presented by this cross-appeal. The State concedes the following:

1) That suppressing T.S.'s testimony will protect Johnson's due process rights. "Johnson is correct that barring T.S.'s testimony would prevent his rights from being violated." (State's Resp. Br. at 8.)

2) That Wisconsin appellate courts have recognized suppression as the proper remedy for a defendant if an alleged victim asserts her privilege upon a court order for *in camera* inspection. "The state recognizes Wisconsin courts have [authorized suppression of an alleged victim's testimony if she refuses to waive her privilege]." (Id. at 9.)

3) That the medical records statute does not provide a mechanism to compel production of T.S.'s privileged records without her consent. "The state agrees with Johnson that the medical records statute, Wis. Stat. § 146.82(2)(a)4. does not provide a way around the

privilege statute, Wis. Stat. § 905.04[1]." (State's Resp. Br. at 11.) Likewise, "[t]he privilege statute's supremacy over the medical records statute . . . ." (Id.)

It goes without saying that the State has conceded these arguments. ***See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted). Given the significance of these issues to the Court's determination of this cross-appeal, these concessions alone are sufficient for the Court to grant Johnson the relief he seeks.

In addition to affirmatively conceding a number of significant arguments, the State fails to refute Johnson's assertion that the Federal Constitution only trumps State law when two laws actually conflict. (Johnson's Br. at 23); (State's Resp. Br. at 11.) Rather than address the merits of Johnson's position, the State merely rehashes, without any legal authority, that the Constitution must trump Wis. Stat. § 905.04. (State's Resp. Br. at 11.) The State's failure to refute Johnson's argument is a concession that Johnson's constitutional right and T.S.'s privilege are both protected by the balancing approach of the *in camera* review process. (Johnson's Br. at 21-24); ***see Charolais***, 90 Wis. 2d at 109; ***see also State v. Pettit***, 171 Wis.2d 627, 646-647, 492 N.W.2d 633 (Ct. App. 1992) (appellate courts may decline to address inadequately briefed issues).

B. The State Consistently Mischaracterizes The Issue Presented On Cross-Appeal.

Beyond conceding or failing to refute a myriad of Johnson's arguments, the State consistently mischaracterizes the issue presented by this appeal. The constitutional right implicated here is not the right "to *in*

[1] Inexplicably, despite conceding that the medical records' statute does not provide a mechanism to compel records for *in camera* review, the State nevertheless asks the Court to compel T.S.'s records for *in camera* review using the medical records' statute in its conclusion. (See State's Resp. Br. at 11, 12.)

camera review," as the State says on at least 17[2] occasions. Johnson, like every criminal defendant, has the constitutional right to disclosure of a witness's records that "contain relevant information necessary to a determination of guilt or innocence." ***State v. Green***, 2002 WI 68, ¶ 34, 253 Wis. 2d 356, 646 N.W.2d 298. The right is to disclosure. The *in camera* process is merely the procedure by which the right to disclosure is fulfilled. If, as the State repeatedly asserts, the right is to *in camera* review, then the right is fulfilled once a circuit court reviews the documents. If the State's verbiage is followed to its logical conclusion, then disclosure of useful information to the defense never occurs and the right to disclosure is meaningless.

Furthermore, given the State's mischaracterization of the issues, Johnson is compelled to respond to a number of the State's other remarks.

First, the State complains that Johnson "never established a right to have T.S.'s testimony barred." (State's Resp. Br. at 9.) What Johnson established was that a sufficient basis existed for the circuit court to review T.S.'s records *in camera* to determine whether any material evidence contained therein should be disclosed to Johnson. This is not an unduly high burden and close cases should be decided in favor of *in camera* review. ***Green***, 2002 WI 68 at ¶ 35. Barring T.S.'s testimony is the remedy provided to protect Johnson for his inability to review T.S.'s records.

The common law maxim *ubi jus ibi remedium*[3]—for every wrong, there must be a remedy—is enshrined in the Wisconsin Constitution. "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive . . . ." Wis. Const. Art. I, § 9. Johnson has suffered a wrong; he has been denied a meaningful opportunity to present a complete defense.

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[2] In its Cross-Respondent Brief, the State refers to either criminal defendants or Johnson having a constitutional "right to in camera review" at least 17 times. (See State's Resp. Br. at 1,2,5-12.)

[3] ***See Wick v. Wick***, 192 Wis. 2d 260, 212 N.W.2d 787, 788 (1927) (Crownhart, J., dissenting).

Accordingly, to remedy his wrong, this very Court has explained that T.S. must be barred from testifying. ***State v. Shiffra***, 175 Wis. 2d 600, 612, 499 N.W.2d 719 (Ct. App. 1993). To hold otherwise would declare that Johnson has no remedy for a violation of his rights.

Second, this case does not involve an as-applied challenge to any statute in any way, as the State suggests. (State's Resp. Br. at 9.) Johnson has never asserted that Wis. Stat. § 905.04 is unconstitutional, either on its face or as applied to him. Such a challenge would be resoundingly hollow, as Wis. Stat. § 905.04 has neither been applied to Johnson at all, nor could an evidentiary privilege statute (or, illogically, a violation thereof) form the basis for a criminal prosecution.

Third, although the State hangs its hat on the Wisconsin Supreme Court's remark[4] that it has never resolved whether Wis. Stat. § 905.04 is absolute or must yield for *in camera* review, to say that "no case . . . resolves the issues . . . the state presents here . . ." is wholly disingenuous. (State's Resp. Br. at 10.)

As Johnson noted in his initial brief and the State concedes (State's Resp. Br. at 9), Wisconsin appellate courts, including this one, have had a number of opportunities to address suppression as a remedy and all have said that suppression is the only remedy. ***See, e.g. Shiffra***, 175 Wis. 2d at 612; ***State v. Behnke***, 203 Wis. 2d 43, 57, 553 N.W.2d 265 (Ct. App. 1996), ***pet. for rev. denied***, 205 Wis. 2d 135, 555 N.W.2d 815 (1996); ***State v. Speese***, 191 Wis. 2d 205, 224, 528 N.W.2d 63

[4] ***State v. Speese***, 199 Wis. 2d 597, 608, 614, 545 N.W.2d 510 (March 20, 1996). Moreover, the State's comment that Johnson's reliance on ***Jaffee v. Redmond*** is "misplaced" misses the mark. (State's Resp. Br. at 8). ***Jaffee*** was decided by the United States Supreme Court shortly after the supreme court decided ***Speese***. ***See Jaffee v. Redmond***, 518 U.S. 1 (June 13, 1996). Accordingly, the ***Jaffee*** holding—rejecting a balancing component to the Federal psychotherapist privilege—could not have been considered by the Wisconsin Supreme Court in ***Speese*** and, accordingly, ***Jaffee***'s holding is highly pertinent.

(Ct. App. 1995), ***rev.'d on different grounds***, 199 Wis. 2d 597, 545 N.W.2d 510 (1996).

Similarly, Wisconsin appellate courts have had a number of opportunities to determine whether the use of *in camera* review and suppression of a witness' testimony as a mechanism to protect a defendant's constitutional right to disclosure is "appropriate." (State's Resp. Br. at 8); ***Behnke***, 203 Wis. 2d at 55-57; ***see also State v. Solberg***, 211 Wis. 2d 372, ¶ 23, 564 N.W.2d 775 (1997). In ***Behnke***, the court of appeals was confronted with the same complaints lodged by the State here. 203 Wis. 2d at 55-57. The court noted: "We . . . acknowledge that the 'costs' of the health care provider privileges are principally shifted to the State." ***Id***. at 56. However, "[t]he Due Process Clause . . . prevents the State from shifting the costs associated with the health care provider privileges to criminal defendants. If the State sees a problem with these privileges, it should lobby the legislature for a change in the law." ***Id***.

Remarking on the appropriateness of the *in camera* review process, the supreme court in ***Solberg*** said:

> Such a procedure strikes an appropriate balance between the defendant's due process right to be given a meaningful opportunity to present a complete defense and the policy interests underlying the Wis. Stat. § 905.04(2) privilege. We described the public policy behind the privilege in ***Steinberg***, 194 Wis.2d 439, 534 N.W.2d 361. In that case, we stated: 'The public policy underpinning the privilege is to encourage patients to freely and candidly discuss medical concerns with their physicians by ensuring that those concerns will not unnecessarily be disclosed to a third person.'
> ***Id***. at 459, 534 N.W.2d 361. We believe that giving the defendant an opportunity to have the circuit court conduct an *in camera* review of the privileged records, while still allowing the patient to preclude that review, addresses both the interests of the defendant and the patient.

Solberg, 211 Wis. 2d 372, ¶ 23 (emphasis added) (footnote omitted).

Fourth, the State resorts to falsehoods in its Response brief in an attempt to deal with the clear language of ***Solberg***. The State says that "neither party in ***Solberg*** raised the constitutional issue the state raises here . . . [and that t]o decide the constitutional issue, the supreme court would have had to have been presented with it . . ." (State's Resp. Br. at 10.) These remarks are demonstrably false.

The University of Wisconsin Law Library possesses electronic copies of appellate briefs dating back to November 1992. UW Law Library, Wisconsin Briefs, http://library.law.wisc.edu/eresources/wibriefs/ (last visited April 4, 2012). A review of the parties' briefs in ***Solberg*** directly contradicts the State's remarks here.

In ***Solberg***, the State petitioned the supreme court for review. The State's second issue presented for review was: "Is the privilege codified in sec. 905.04(2), Stats., absolute, or must the privilege occasionally yield to an accused's right to present a complete defense?" (State's Opening Br. in ***Solberg*** at 25; C.A.-Reply App. at 125.)

In its ***Solberg*** brief, the State extensively argued the same issues it presents to this Court. A few examples: "Because ***Shiffra*** rested on at least two faulty assumptions regarding the scope of ***Ritchie***, this court should overrule ***Shiffra*** and hold that a defendant's right to due process does not entitle him to pierce the psychologist-patient privilege . . ." (State's Opening Br. in ***Solberg*** at 24; C.A.-Reply App. at 124.) Similarly:

> [I]f this court finds there are situations in which a defendant is constitutionally entitled to *in camera* review or discovery of otherwise privileged records, then this court should overrule ***Shiffra***'s holding that the privilege-holder retains the right to prevent disclosure,

> whereupon she can be disqualified from testifying at trial. [A]llowing victims of . . . sexual assault to effectively sabotage the prosecution of their assailants by the simple expedient of refusing to waive a privilege is completely contrary to good public policy.

(State's Opening Br. in ***Solberg*** at 47; C.A.-Reply App. at 147).

Undeterred by Solberg's protestations that the State's arguments were previously waived, the State replied with, again, many of the same arguments it sets forth today. The State suggested that "allowing a defendant's constitutional rights to occasionally trump the victim's statutory patient-psychologist privilege will not require the prosecutor to abort a criminal prosecution." (State's Reply Br. in ***Solberg*** at 9; C.A.-Reply App. at 209.) The State then, as it does now, argued that "the victim's statutory privilege must yield [if a defendant made a sufficient materiality showing]." (Id.)

Fifth (and lastly), the State's final argument—that compelling disclosure of privileged records despite the witness's privilege actually protects witnesses—is unpersuasive and merits only a short reply. (State's Resp. Br. at 11.) The State, without citing any authority, fails to explain why prosecutions involving orders for *in camera* review of privileged records differ from any other prosecution. ***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). All prosecutions are dependent upon the cooperation and participation of witnesses. There is nothing special about cases involving *in camera* review of a witness's privileged records, subject to the witness's consent. Thus, the State's attempt to elevate cases involving this issue above all other prosecutions is wholly without merit.

Considering the State's mischaracterization of the issues at hand, its failure to refute Johnson's arguments, its affirmative concessions, and its misinformation, it is apparent that Johnson is entitled to

the relief he seeks on cross-appeal; namely, suppression of T.S.'s testimony at trial in the event she continues to assert her privilege.

CONCLUSION

For all the reasons stated here and in his Combined Brief of Respondent-Cross-Appellant, Johnson respectfully requests that this Court affirm the circuit court's order granting *in camera* review of T.S.'s therapy records. Further, Johnson requests that the Court vacate the circuit court's November 29, 2011 decision and order and 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 9th day of April, 2012.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,280 words.

Dated this 9th day of April, 2012.

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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.

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APPENDIX

App. Pages

State's Opening Brief before the Wisconsin
Supreme Court in ***State v. Solberg***,
Case No. 95-0299-CR 101-153

State's Reply Brief before the Wisconsin
Supreme Court in ***Solberg*** 201-213

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. (RULE) § 809.19(2)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and (b).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. (RULE) § 809.19(13)(f)

I hereby certify that I have submitted an electronic copy of this appendix which identical in content and format to the printed form of the appendix filed as of this date.

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