STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP2864-CRAC

---

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

v.

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

---

ON REVIEW OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING IN PART AND REVERSING IN PART AN ORDER ENTERED IN RACINE COUNTY CIRCUIT COURT BY THE HONORABLE EUGENE A. GASIORKIEWICZ

---

# RESPONSE BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-CROSS-APPELLANT

---

Attorneys for Defendant-Respondent-Cross Appellant

MICHAEL F. HART SBN 1001528
CRAIG S. POWELL SBN 1046248
GEOFF MISFELDT SBN 1065770
KOHLER & HART, S.C.
735 North Water Street, Suite 1212
Milwaukee, WI 53202
Phone: (414) 271-9595
Facsimile: (414) 271-3701

MARK D. RICHARDS SBN 1006324
STEPHEN J. MEYER SBN 1011807

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

## STATUTORY PROVISIONS



## OTHER AUTHORITIES

## ARGUMENT

### I. *Shiffra* Correctly Established Procedural Mechanisms To Enforce Defendants' Existing Due Process Rights And Should Be Reaffirmed, Again, To Further The Principles of *Stare Decisis*.

#### A. *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) Must Be Upheld Again.

In ***Shiffra***, the court of appeals considered, for the first time, the scope of a defendant's due process right to present a defense by obtaining privileged third-party records and, in the process, established procedural mechanisms to enforce that right while considering the witness's privacy interests. 175 Wis. 2d 600.

In ***Shiffra***, the defendant allegedly engaged in one-time sexual relations with the alleged victim. 175 Wis. 2d at 602. Before trial, the defense discovered that the alleged victim had a psychiatric history that may have affected her ability to perceive and relate truthful information. ***Id***. at 603. Based on this information, the defendant moved to compel the alleged victim's privileged counseling records. ***Id***.

The circuit court ordered the records produced, but gave the alleged victim 21 days to disclose her records. ***Id***. When she refused to disclose her records, the circuit court barred her from testifying. ***Id***. at 604-605.

The court of appeals framed the issues before it as follows: "The first issue is whether an *in camera* inspection is warranted under ***Pennsylvania v. Ritchie***, 480 U.S. 39 (1987) . . . The second issue is whether preclusion of the alleged victim's testimony at trial is the proper sanction for her refusal to submit the records to an *in camera* review." 175 Wis. 2d at 602. ***Shiffra*** later explained that whether *in camera* review was warranted under ***Ritchie*** "implicate[d] Shiffra's constitutional right to due process of law." ***Id***. at 605, (citation and footnote omitted). Because ***Shiffra*** considered the first issue as implicating a defendant's right to due process[1], it did not "address the

[1] Although ***Shiffra*** and ***Ritchie*** were decided with a due process analysis, Johnson notes that compelling privileged third-party records for *in camera* review of their materiality theoretically implicates a defendant's rights to compulsory process and to confront witnesses.

confrontation and compulsory process issues raised by the parties." 175 Wis. 2d at 605 n.1.

In ***Shiffra***, the State argued that the defendant was not entitled to *in camera* review of privately-held privileged records under ***Ritchie*** because "there is no indication that the records the defendant wants disclosed are in the possession of a state agency." (State's Br. at 16 in ***Shiffra***; Resp.-App. at 101.) The court rejected the State's arguments that ***Ritchie*** was inapplicable, saying: "We are bound by Wisconsin precedent, which clearly makes ***Ritchie*** applicable to cases in which the information sought by the defense is protected by statute and is not in the possession of the state." ***Shiffra***, 175 Wis. 2d at 606-607; ***citing K.K.C.***, 143 Wis. 2d 508, 511 (Ct. App.. 1988); and ***State v. S.H.***, 159 Wis. 2d 730, 736, 465 N.W.2d 238 (Ct. App. 1990).

In ***Shiffra***, as here, the State complained that ***K.K.C.*** and ***S.H.*** were non-binding dicta. (State's Br. at 11-12.) The ***Shiffra*** court rejected the State's complaints: "We do not agree. Both cases unequivocally adopted ***Ritchie*** as the law in Wisconsin

even when the records are not in the State's possession." 175 Wis. 2d at 607.

In addition to explaining that a defendant has a due process right to *in camera* review of privileged third-party records, ***Shiffra*** also established the defendant's preliminary burden to trigger *in camera* review. 175 Wis. 2d at 608, ***modified by State v. Green***, 2002 WI 68, ¶ 34, 253 Wis. 2d 356, 646 N.W.2d 298. To develop this standard, the ***Shiffra*** Court analogized to government-informer privilege cases, noting that both situations "require us to balance a defendant's constitutional right to a fair trial against the State's interest in protecting its citizens by upholding a statutorily created privilege." 175 Wis. 2d at 609.

The ***Shiffra*** court remarked about the State's arguments, saying: "the State's position shows too little confidence in the role of the trial court in balancing a person's right to confidentiality in mental health records against a defendant's right to present a defense." ***Id.*** at 611. Later, that "[i]f we ignored the mandate of ***Ritchie*** and deny Shiffra's request for *in camera* inspection, we

would be disregarding the best tool for resolving conflicts between the sometimes competing goals of confidential privilege and the right to present a defense." 175 Wis. 2d at 611-612.

After finding that the defendant met his burden to trigger *in camera* review, and given that the alleged victim refused to disclose her privileged records, the ***Shiffra*** court addressed its second issue: whether suppression of the alleged victim's testimony at trial was appropriate. ***Id***. at 612. The ***Shiffra*** court said that suppression was the only remedy:

> In this situation, no other sanction would be appropriate. The court did not have the authority to hold Pamela in contempt because she is not obligated to disclose her psychiatric records. An adjournment in this case would be of no benefit because the sought-after evidence would still be unavailable. Under the circumstances, the only method of protecting Shiffra's right to a fair trial was to suppress Pamela's testimony if she refused to disclose her records.

***Shiffra***, 175 Wis. 2d at 612.

The State spends 10 pages of its brief-in-chief re-arguing the exact same thing it has unsuccessfully argued for 20 years—that ***Shiffra*** improperly extended the due process right to *in camera* review of privileged third-party records enunciated in ***Pennsylvania v.***

***Ritchie***, 480 U.S. 39 (1987). (State's Br. at 9-19.) The Court should put an end to the State's serial litigation of this issue and reaffirm, in no uncertain terms, that defendants have a due process right to *in camera* review of privately-held privileged records to determine if the records contain information necessary for a fair determination of guilt or innocence.

*Stare decisis* "further[s] fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case." ***Johnson Controls, Inc. v. Employers Ins. Of Wausau***, 2003 WI 108, ¶ 95, 264 Wis. 2d 60, 665 N.W.2d 257. This Court explained that adherence to precedent is "fundamental to the rule of law," and that existing precedent should "not be abandoned lightly" or without "special justification." ***Id***. at ¶ 94. Despite these commands, an exhaustive review of the State's position over the past 20 years demonstrates that it has unsuccessfully relitigated the propriety of ***Shiffra*** at nearly every opportunity.

In 1996, in ***Speese***, the State argued to this Court that "***Ritchie*** should not logically or legally extend to the private records . . ." (State's Br. at 11 in ***State v.***

***Speese***, 199 Wis. 2d 597, 545 N.W.2d 510 (1996); Resp.-App. at 201.) This Court did not accept the State's argument, even though it was presented with the opportunity because the circuit court had ordered *in camera* review of privileged third-party records. 199 Wis. 2d at 610 n. 12.

Also in 1996, in ***Munoz*** and in ***Behnke***, the State complained to the court of appeals that it "does not agree with ***Shiffra***'s conclusion that [***Ritchie***] applies to the disclosure of private records . . .." (State's Br. at 5 in ***State v. Behnke***, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996); Resp.-App. at 301; *see also* State's Br. at 9 in ***State v. Munoz***, 200 Wis. 2d 391, 546 N.W.2d 570 (Ct. App. 1996); Resp.-App. at 401.) In ***Behnke***, the court of appeals thoroughly addressed and rejected the State's arguments:

> In regard to the substantive reasoning of ***Shiffra***, the State argues that the decision wrongly extended [***Ritchie***], to cover a witness's medical records even when the State does not have possession of, or access to, the records. The State focuses on how the records in Ritchie were in the possession of a government agency and thus suggests that the decision was grounded on the constitutional duty of the government to turn over exculpatory evidence to the defendant. . . . In those situations when the State does not have access to the records because the witness has asserted a health care provider privilege, which

Antoinette could have done in this case, the State believes that the requirement for an in camera review set out in ***Ritchie*** should not apply. The State believes that its case should not be hampered by a witness who strives to maintain privacy. Moreover, it sees no potential unfairness in such situations because neither the State nor the defendant can use the records. The playing field is kept completely level.

The State, however, misconstrues the reasoning of ***Ritchie*** and ***Shiffra***. These decisions are not about keeping a level playing field between the State and the defendant. Rather, these decisions attempt 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. . . . Of course, the conflict between these legislative and constitutional policies most often arises in the context of criminal litigation. But that is to be expected when the legislature establishes a statutory privilege, thereby exempting certain types of information from the judicial forum.

We further acknowledge that the "costs" of the health care provider privileges are principally shifted to the State. In a few circumstances, the State may have to completely forgo a case when one of its witnesses refuses to turn over the information. . . . Nonetheless, the Due Process Clause guarantees the defendant a right to a trial based on truth seeking which can only be accomplished by allowing him or her to present a complete defense. . . . The Due Process Clause thus 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.

The State also complains about the practical effects of the ***Shiffra*** decision on its ability to prosecute a case. It believes that forcing the State to pressure its witness into releasing the information or forgoing this witness's testimony is not fair. The State asserts that it should not be forced to make its witness reveal private information. And a witness, most likely the

> accuser, should not be forced to disclose private and personal information to have the defendant brought to justice.
>
> These complaints, however, were addressed in ***Shiffra***, and the remedy set out in that case is still valid. . . . Before the defendant is allowed access to these records and the witness's privacy is sacrificed, and before the State is faced with the decision of whether it can forgo the witness and still make its case, the records must pass through a private and confidential review in the trial court's chambers. We have complete confidence in this state's trial judges to accurately and fairly balance the witness's right to privacy and the defendant's right to a trial where every piece of evidence material to determining the truth will be considered. . . . The State overestimates the burden that ***Shiffra*** places on it and its witnesses.

***Behnke***, 203 Wis. 2d 43, 55-57 (Ct. App. 1996.)

Undeterred by the court of appeals' rebuke, in 1997, in ***Solberg***, the State argued to this Court that "insofar as ***Shiffra***'s holding is premised on the view that ***Ritchie*** applies to files that have never been in the possession of the prosecution or any State agency . . . ***Shiffra***'s holding [] is erroneous." (State's Br. at 23 in ***State v. Solberg***, 211 Wis. 2d 372, 564 N.W.2d 775 (1997); Resp.-App. at 501.) This Court approved of the *in camera* process enunciated in ***Ritchie***, saying 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 at 387.

After ***Solberg***, it appeared that the State had finally stopped arguing that ***Shiffra*** was an improper extension of the principles enunciated in ***Ritchie***. In a 2001 response brief to the court of appeals, the State acknowledged, without challenge, that "Wisconsin courts have applied the ***Ritchie*** due process analysis in the context of a witness [sic] mental health records." (State's Resp. Br. at 5 in ***State v. Navarro***, 2001 WI App 225, 248 Wis. 2d 396, 636 N.W.2d 481; Resp.-App. at 601.)

That appearance was short-lived. The State revived its argument in 2002 in ***Green***.

In ***Green***, as it had argued in ***Shiffra***, ***Behnke***, and ***Speese***, the State argued that ***Shiffra*** improperly extended ***Ritchie***. (State's Resp. Br. at 8-11 in ***State v. Green***, 2002 WI 68; Resp.-App. at 701-704.) In ***Green***, the State even quoted the same cases it quotes to the Court here. (***Compare*** State's Br. at 15, ***quoting United States v. Hach***, 162 F.3d 937 (7th Cir. 1998) and ***Goldsmith v. Maryland***, 651 A.2d 866 (Md. 1995); ***with***

State's Resp. Br. at 8-10 in ***Green***; Resp.-App. at 701-703.)

This Court unanimously and unequivocally rejected the State's identical argument:

> The State contends that the holding in ***State v. Shiffra*** . . . was in error because it relied on ***Ritchie***. . . . The State argues that ***Ritchie*** was distinguishable and therefore inapplicable because it involved a situation, unlike here, where the records were in the government's possession. The ***Shiffra*** court, however, specifically rejected this argument, concluding that it was bound by Wisconsin precedent, which clearly made ***Ritchie*** applicable in cases where the information sought by the defense is not in the possession of the state. ***Shiffra***, 175 Wis.2d at 606-07 . . . citing ***State v. S.H***. . . . and ***In re K.K.C***. . . . This court recognized the validity of ***Shiffra*** in ***State v. Solberg***, 211 Wis.2d 372, 386-87, 564 N.W.2d 775 (1997), and in ***State v. Rizzo***, 2002 WI 20, ¶ 53, 250 Wis.2d 407, 640 N.W.2d 93. We will not depart from this precedent.

***Green***, 2002 WI 68, ¶ 21 n. 4 (emphasis added). Presumably, this Court meant what it said. However, a defendant is, once again, responding to the exact same argument that the State has made for 20 years.

Conspicuously absent from the State's brief-in-chief is any recognition or acknowledgement of the Court's unequivocal statement in ***Green***. The State utterly fails to provide any compelling justification for

this Court to depart from prior decisions.[2] Instead, the State purports to offer one new reason why ***Shiffra*** should be overruled, (*see* State's Br. at 10), but its only "new" reason is not new at all.

### B. The State's Only "New" Reason For Overruling *Shiffra* Is Not New.

In ***Solberg***, the State argued, as it does here, that counseling records have little evidentiary value. (***Compare*** State's ***Solberg*** Br. at 27-30; Resp.-App. at 502-505 ***with*** State's Br. at 18-20.) What was the State's support in 1997 for that proposition? The same thing it quotes here: the Menninger Foundation's *amicus* brief in support of respondents in ***Jaffee v. Redmond***, 518 U.S. 1 (1996). (State's ***Solberg*** Br. at 28-29.; Resp.-App. at 503-504.) Notably, neither the Supreme Court

[2] The criteria provided by the Court include: (1) changes or developments in the law that have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) the precedent has become detrimental to coherence and consistency in the law; (4) the prior decision is unsound in principle; (5) the prior decision is unworkable in practice; and (6) whether reliance interests are implicated. ***Johnson Controls, Inc***., 2003 WI 108, ¶¶ 98-99. Johnson asserts that none of these criteria support overruling ***Shiffra***, ***Green***, and their progeny.

in ***Jaffee*** nor this Court in ***Solberg*** referenced the *amicus* brief the State again relies on.

The State is essentially asking this Court to create a *per se* rule blocking defendants' access to a whole field of potentially exculpatory evidence merely because a self-interested *amici* claimed 15 years ago that mental health treatment records generally have low evidentiary value. Johnson trusts that this Court is not inclined to create a *per se* rule that counseling records have little evidentiary value, and, instead, will continue to trust that circuit court judges are amply qualified to make such determinations on an *ad hoc* basis.

### C. The State's Private/Public Distinction Is One Without A Difference.

Furthermore, the State's argument for overruling ***Shiffra*** is unpersuasive because it relies on a distinction without a difference. The State attempts to argue that there is a difference between privately-held and publicly-possessed records, even though Johnson has never alleged that T.S.'s records are possessed by the State. The Supreme Court of New Hampshire

explained why the distinction is one without a difference:

> ***Gagne*** [like ***Shiffra***] did not distinguish between the privileged records of a State agency and the privileged records of a private organization. The rationale in ***Gagne*** [like ***Shiffra***], balancing the rights of a criminal defendant against the interests and benefits of confidentiality, applies equally in both cases. A record is no less privileged simply because it belongs to a State agency. Likewise, a defendant's rights are no less worthy of protection simply because he seeks information maintained by a non-public entity.

***State v. Cressey***, 137 N.H. 402, 413, 628 A.2d 696 (1993); ***citing State v. Gagne***, 136 N.H. 101, 612 A.2d 899 (1992).

The State relies on an outdated Vermont Supreme Court decision for the proposition that *in camera* review pursuant to ***Ritchie*** can only occur when the records are possessed by the government. (State's Br. at 14; ***quoting State v. Percy***, 548 A.2d 408, 415 (1988). However, the Vermont Supreme Court more recently agreed with Johnson (and 20 years of Wisconsin law) and said that "there is little justification for applying a different analysis [under ***Ritchie***] when privileged records are held by private entities rather than by the government." ***State v. Rehkop***, 180 Vt. 228, ¶

18, 908 A.2d 488 (2006). "Accordingly, we have recognized that a case may arise where due process will require some access to privileged information about a victim not held by the State." ***Id***.; ***citing Percy***, 149 Vt. at 635. "[T]his is that case." ***Rehkop***, 180 Vt. 228 at ¶ 26.

### D. The Seventh Circuit Has Approved Of *Shiffra* And Its Progeny.

Lastly, as further proof that ***Shiffra*** properly established procedural mechanisms to enforce defendants' existing due process rights, the Seventh Circuit recently addressed the propriety of ***Shiffra***—and this Court's application of it—in a *habeas corpus* proceeding. ***Rizzo v. Smith***, 528 F.3d 501, 505-506 (7th Cir. 2008). Rizzo, who unsuccessfully challenged his denial of access to privileged third-party records before this Court, argued to the Seventh Circuit that this Court unreasonably applied ***Ritchie***.

In answering Rizzo's complaint that this Court's application of ***Ritchie*** was unreasonable, the Seventh Circuit said: "[this Court's] conclusion was certainly reasonable. ***Ritchie*** says that due process requires

confidential information that is potentially exculpatory to be submitted to the trial court for *in camera* review. That's exactly what Rizzo got." ***Rizzo v. Smith***, 528 F.3d at 506.

Given that the State's complaints about the correctness of ***Shiffra*** have been extensively argued, considered, and rejected by numerous Wisconsin appellate courts, Johnson asks that this Court again reaffirm ***Shiffra***'s extension of ***Ritchie*** to further the fundamental principles of *stare decisis*. This simply is not a proposition that should be relitigated in every case.

## II. The Court Should Leave The *Shiffra* Procedures Intact Because They Properly Balance A Defendant's Due Process Rights Against A Witness's Right To Confidentiality And Provide A Remedy To Defendants In Cases Where A Witness Refuses To Disclose Privileged Records.

The ***Shiffra*** procedures were summarized by this Court as follows:

> If the defendant satisfies th[e ***Green***] standard, the trial court reviews the records only if the victim consents to the review. . . . If the victim does not consent, there is no *in camera* review and the victim is barred from testifying. . . . If after the *in camera* review, the circuit court determines that the records contain relevant evidence, it should be disclosed to the defendant if the patient again consents.

***Johnson v. Rogers Mem'l Hosp., Inc***., 2005 WI 114, ¶ 73, 283 Wis. 2d 384, 700 N.W.2d 27 (citations omitted)

The State's second issue (State's br. at 20-30) is plainly an attack on the wisdom of ***Shiffra***'s suppression mandate[3]. Rather than arguing that suppression is an inappropriate remedy, the State seeks to eliminate the possibility of suppression by arguing that, upon a sufficient ***Green*** showing, circuit courts should order the production of a witness's privileged records for *in camera* review pursuant to Wis. Stat. § 146.82(2)(a)4.

The State's argument unfolds in four parts, as follows: first, that suppression fails to account for the State's interest in "the fair and effective prosecution of crime"; second, that prosecuting crimes was made more difficult by the Supreme Court's decision in ***Crawford v. Washington***, 541 U.S. 36 (2004); third, that if a defendant makes a sufficient ***Green*** showing, the defendant's right to *in camera* review of those records

[3] "Under the circumstances, the only method of protecting Shiffra's right to a fair trial was to suppress Pamela's testimony if she refused to disclose her records." ***Shiffra***, 175 Wis. 2d at 612.

"trumps" the witness's privilege, which must yield; and finally, that Wis. Stat. § 146.82(2)(a)4. provides circuit courts with a mechanism to compel the witness's privileged records. (State's Br. at 20-30.) Johnson will address the flaws in the State's arguments in turn.

### A. The *Shiffra* Procedures Are The Embodiment of The Fair Administration of Justice.

The State complains that "***Shiffra*** and the out-of-State cases[4] endorsing witness preclusion . . . fail to factor in the very important stake the public has in the effective[5] administration of the criminal justice system . . ." (State's Br. at 21.) However, for reasons Johnson will expound upon, the ***Shiffra*** procedural mechanisms are the very embodiment of the "fair administration of justice."

---

[4] At least five other States have endorsed witness suppression as a remedy to protect a defendant's rights. ***State v. Esposito***, 471 A.2d 949 (Conn. 1984); ***People v. Stanaway***, 521 N.W.2d 557 (Mich. 1994); ***State v. Trammel***, 435 N.W.2d 197 (Neb. 1989); ***State v. Gonzales***, 912 P.2d 297 (N.M. 1996); ***State v. Karlen***, 589 N.W.2d 594 (S.D. 1999).

[5] The State's brief makes it clear that an "effective" prosecution for the State is one where the State secures a conviction, regardless of the person's innocence or guilt. (State's Br. at 25 "[a]ssuming the allegations against Johnson are true . . .") Of course, Johnson recognizes that the "primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." ABA Canons of Professional Ethics, Canon 5 (1908).

Wisconsin courts have consistently contemplated and balanced a defendant's fair trial rights with a witness's privacy rights in situations like this. ***Green***, 2002 WI 68 at ¶ 23 (recapping ***Shiffra*** and noting "the competing rights and interests involved when a defendant seeks an *in camera* review of privileged records"); ***see also Rizzo***, 2002 WI 20 at ¶ 53.

Wisconsin courts have also repeatedly said that a witness's privilege and a defendant's right to a fair trial are in equipoise upon a ***Green*** showing. *In camera* review implicates "[o]n the one hand, a criminal defendant's right to due process, in particular the right to a meaningful opportunity to present a complete defense . . . On the other hand, the state has an interest in protecting a patients' privileged records, Wis. Stat. § 905.04(2), from being disclosed." ***Green***, 2002 WI 68 at ¶ 23 (footnote and internal citations omitted). "[T]he *in camera* procedure under ***Shiffra*** . . . specifically balanced the victim's interest in confidentiality against the constitutional rights of the defendant." ***State v. Rizzo***, 2002 WI 20 at ¶ 53.

For example, the initial ***Green*** showing protects witnesses from fishing expeditions and other unreasonable privacy intrusions. ***See State v. Robertson***, 2003 WI App 84, ¶ 23, 263 Wis. 2d 349, 661 N.W.2d 105 (citation omitted). Indeed, the requirements of the initial ***Green*** showing—1) specificity; 2) good faith; 3) seeking non-cumulative evidence; and 4) some likelihood that records contain relevant exculpatory evidence—create a barrier between a witness's privileged records and a defendant's access to the same, potentially breached only upon a sufficient and specific showing, made in good faith.

Furthermore, if, and only if, a defendant makes the initial ***Green*** showing, is a defendant entitled to an *in camera* review of the witness's privileged records. ***Shiffra***, 175 Wis. 2d at 605. At this stage of the ***Shiffra*** procedures, the witness is presented with an affirmative opportunity to protect his or her right to confidentiality. The witness can, as this Court has recognized, ***Solberg***, 211 Wis. 2d at 383, refuse to

waive the Wis. Stat. § 905.04 privilege to ensure that his or her privileged records are not disclosed.

If the witness elects to retain his privilege, his non-waiver is balanced against the defendant's right to a fair trial and the witness is barred from testifying at trial to protect the defendant's rights. "[The privilege-holder] alone possesses waiver rights. The court recognized this in ***Solberg***, requiring a victim's consent before a criminal defendant could access records." ***Rogers Mem'l Hosp., Inc.***, 2005 WI 114 at ¶ 175 (Bradley, J., dissenting, joined by Abrahamson, C.J.).

On the other hand, if the witness waives his or her privilege, the circuit court conducts an *in camera* review of the records. The circuit court's *in camera* review is itself a balancing because it denies defendants the benefit of an "advocate's eye" in reviewing the privileged records. ***Ritchie***, 480 U.S. at 60.

If, and only if, the circuit court identifies records to be disclosed to the defendant during the *in camera* review, then the witness again has the opportunity to exercise his privilege and prevent disclosure to the

defendant and the prosecution[6]. ***Solberg***, 211 Wis. 2d at 386-387 ("that information should be disclosed to the defendant if the patient consents to such a disclosure.")

The ***Solberg*** court explicitly stated that the ***Shiffra*** procedures "strike[] 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." ***Solberg***, 211 Wis. 2d at 387. Five years after ***Solberg***, this Court again reflected upon the ***Shiffra*** procedure, noting that "the *in camera* procedure under ***Shiffra*** . . . specifically balanced the victim's interest in confidentiality against the constitutional rights of the defendant." ***Rizzo*** at ¶ 53.

In ***Rizzo***, the defendant made the initial showing under ***Shiffra-Green***, but was denied access to the

[6] The State's primary argument—that a defendant's right "trumps" the witness's privilege and a court can simply subpoena the records for *in camera* review—fails to address situations where a circuit court compels a privilege-holder's records over non-consent and finds information subject to disclosure during its *in camera* review. ***Solberg*** explains that, in such a situation, the witness has a right to prevent disclosure to the defendant. ***Solberg***, 211 Wis. 2d at 386-387. Johnson assumes that the State's position in such a situation is that the witness's confidentiality must continue to yield, but the State is silent thus far.

witness's records after the circuit court's *in camera* review. ***Rizzo*** at ¶ 48. The defendant complained that he was entitled to all of the alleged victim's treatment records because they formed the basis for an expert's opinion. ***Id***. at ¶ 50-52. In response to Rizzo's argument, this Court said: "We do not adopt Rizzo's position because it would eviscerate the procedure for *in camera* review set forth in ***Shiffra***, which protects a victim's confidential records." ***Rizzo*** at ¶ 53.

Considered together, ***Solberg***, ***Rizzo***, ***Green***, and ***Rogers Memorial Hospital*** refute the State's argument that the ***Shiffra*** procedures involve unanswered questions. (State's Br. at 20 n. 9.) Furthermore, the State's reference to a single foreign jurisdiction's statement about the "fair administration of justice" is hardly compelling evidence that ***Shiffra***, ***Solberg***, ***Green*** and their progeny are ripe for reexamination. (State's Br. at 22.)

Perhaps the court of appeals panel in ***Behnke*** answered the State's complaints about the "fair administration of justice" most aptly:

> The State . . . misconstrues the reasoning of ***Ritchie*** and ***Shiffra***. These decisions are not about keeping a level playing field between the State and the defendant. Rather, these decisions attempt 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.
>
> . . .
>
> We further acknowledge that the "costs" of the health care provider privileges are principally shifted to the State. In a few circumstances, the State may have to completely forgo a case when one of its witnesses refuses to turn over the information. . . . Nonetheless, the Due Process Clause guarantees the defendant a right to a trial based on truth seeking which can only be accomplished by allowing him or her to present a complete defense. . . . The Due Process Clause thus 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.

***State v. Behnke***, 203 Wis. 2d 43, 56.

### B. *Crawford* Simply Could Not Have Had Any Effect on *Shiffra*'s Suppression Mandate.

In addition to arguing that ***Shiffra*** frustrates the "fair administration of justice," the State also complains that ***Crawford v. Washington*** "makes it less likely . . . that the State will be able to continue a prosecution once the victim is barred from testifying." (State's Br. at 25.) This contention is absurd.

Although ***Crawford*** now prevents the State from introducing a declarant's preliminary hearing testimony or other out-of-court testimonial statement at trial if the declarant is unavailable, ***Crawford*** has not and could not have had any effect on the ***Shiffra*** suppression mandate. To admit a witness's preliminary hearing testimony or other out-of-court testimonial statements after barring her from testifying at trial would circumvent the very purpose of the sanction.

Johnson implores the State to explain how ***Crawford*** could have had any effect on the ***Shiffra*** suppression mandate. Assuredly, by its failure to cite even a single case in support of this argument, the State will be unable to do so.

### C. A Defendant's Due Process Rights Do Not "Trump" A Witness's Privilege; Any Conflict Between The Two Interests Is Contemplated And Reconciled By The Balancing Inherent In The *Shiffra* Procedures.

The State's third argument in support of overruling ***Shiffra***'s suppression mandate is that circuit courts have the authority to compel T.S.'s privileged medical records for *in camera* review because

Johnson's due process rights trump T.S.'s privilege. (State's Br. at 27.)

The State's hypothesis requires accepting 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 her records to be produced under Wis. Stat. § 146.82(2)(a)4. (*See* State's Br. at 27-30.)

The State's logic falls apart at step three. Any apparent conflict that might exist between T.S.'s privilege and Johnson's due process rights is reconciled by the ***Shiffra*** procedures, including the *in camera* inspection itself.

The State claims that Johnson's constitutional rights "trump" T.S.'s right to confidentiality in her privileged records. (State's Br. at 28.) However, a

constitutional right only "trumps" state law where the two laws irreconcilably conflict. ***M & I Marshall & Ilsley Bank v. Guar. Fin., MHC***, 2011 WI App 82, ¶ 23, 334 Wis. 2d 173, 800 N.W.2d 476; ***see also 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).

One example of a true conflict between a State law and a constitutional right is where a State law proscribes conduct that is protected by an individual's constitutional rights. In that instance, if the law conflicts with the right, the law must either be made constitutional or be struck down. For example, in 2000, this Court struck down former Wis. Stat. § 944.205(2)(a) because it proscribed conduct that was protected by the First Amendment. ***State v. Stevenson***, 2000 WI 71, ¶ 41, 236 Wis. 2d 86, 613 N.W.2d 90. There, the Court was faced with a true conflict, which had two possible outcomes: either the law is or can be made constitutional, or the individual's constitutional rights trump the law and the law must yield.

Here, however, there is no conflict because 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 in ***Ritchie***, 480 U.S. at 46 and in ***Shiffra***, 175 Wis. 2d at 611-612. Even Judge Brown agreed in his dissent in this case: "[T]he privilege and the right to present a defense are . . . two equally conflicting interests and neither should be given absolute preference over the other." ***Johnson***, slip op. at ¶ 26, Pet.-App. at 111. The two rights co-exist by balancing a witness's privacy rights with the defendant's due process rights, and both are protected by ***Shiffra*** and its progeny. 175 Wis. 2d at 611-612.

***Shiffra*** and its progeny contemplate that a defendant is entitled to exculpatory information and that the witness's counseling records may contain exculpatory information. ***See id***. at 605. ***Shiffra*** and its progeny also contemplate that the witness has legislatively-authorized privacy interests in her privileged records, and she may not want those records disclosed to anyone. ***See generally id***.

Perhaps most importantly, suppression—the outcome mandated by ***Shiffra***—demonstrates that both rights can be simultaneously protected. In that situation, the privilege-holder retains her right to keep her confidential records private and the suppression of that witness's testimony protects a defendant's right to due process.

Therefore, because any apparent conflict between a defendant's due process rights and a witness's right to confidentiality in privileged records is reconciled by the ***Shiffra*** procedures approved of in ***Solberg***, this Court does not need to reach the issue of whether Wis. Stat. § 146.82(2)(a)4. provides a mechanism to compel privileged records to be released without consent.

However, if this Court agrees with the State that a defendant's due process rights irreconcilably conflict with and therefore "trump" a witness's right to confidentiality in privileged records, then Johnson asserts that, as a matter of statutory interpretation, Wis. Stat. § 146.82(2)(a)4. does not provide a mechanism to compel a witness's privileged records without his or her informed consent.

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

Johnson continues to argue that the decidedly general language of Wis. Stat. § 146.82(2)(a)4. is controlled by the more specific language in Wis. Stat. § 905.04 and all its enumerated exceptions to the physician-patient privilege. ***See City of Muskego v. Godec***, 167 Wis. 2d 536, 546, 482 N.W.2d 79 (1992); ***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***, this Court was tasked with determining whether the circuit court could issue an *ex parte* order to obtain results of Godec's blood alcohol test under Wis. Stat. § 146.82(2)(a)4. 167 Wis. 2d at 539. 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 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 was pierced, and the circuit court had lawful authority to order Godec's test results disclosed without his consent. ***Id***. at 546-547.

In ***Speese***, the State argued to this Court that ***Godec*** gave circuit courts 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, this 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 ***Ritchie***], 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 privileged records disclosed without her consent. If the State wants the change it seeks, it should do as the ***Behnke*** court instructed 17 years ago and "lobby the legislature for a change in the law." 203 Wis. 2d at 56.

Furthermore, the State's argument that § 146.82(2)(a)4. "authorizes a court to obtain privileged records without the patient's consent," (State's br. at 29), renders illusory the mandate of § 905.12. ***See Markham v. Cabell***, 326 U.S. 404, 409 (1945) (suggesting that Courts avoid interpreting laws in such a way as to render them illusory).

Wis. Stat. § 905.12 provides that "[e]vidence 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." If the privileged records are compelled under 146.82(2)(a)4. as the State argues, the privilege-holder has not been

given an opportunity to "claim the privilege," and the records would be inadmissible at trial. Furthermore, any "opportunity" to "claim the privilege" would hardly comport with the spirit of Wis. Stat. § 905.12, which purportedly exists to ensure that privileged records are not used in litigation without the privilege-holder's acquiescence.

In summary, 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(2)(a)4. is not a proper mechanism to compel T.S.'s records to be disclosed without consent. The State's argument also renders § 905.12 illusory.

## III. If This Court Agrees With The State That Privileged Records Should Be Compelled For *In Camera* Review Under Wis. Stat. § 146.82(2)(a)4., Then The Court Has Destroyed the *Shiffra* Balancing Approach And Must Adopt Procedures That Permit Defendants To Review The Privileged Records With An "Advocate's Eye."

Part of the reason why ***Ritchie*** authorized *in camera* inspection as a balancing of a witness's rights with a defendant's rights was that it denies the defendant the benefits of an "advocate's eye" in

reviewing privileged records for potentially useful information. ***Ritchie***, 480 U.S. at 60. Dissenters in ***Ritchie*** explained that, institutionally, trial judges are not as equipped as defense counsel at determining the utility of evidence before trial. "[O]nly the defense is adequately equipped to determine the effective use [of prior statements] for the purpose of discrediting the Government's witness and thereby furthering the accused's defense." ***Ritchie***, 480 U.S. at 71-72 (Brennan, J., dissenting), ***quoted source omitted***.

The ***Ritchie*** plurality acknowledged that *in camera* review was a compromise:

> We disagree with the decision of the Pennsylvania Supreme Court to the extent that it allows defense counsel access to the CYS file. An *in camera* review by the trial court will serve Ritchie's interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations.

480 U.S. at 61.

By creating *in camera* review procedures, ***Shiffra***, like ***Ritchie***, balanced defendants' due process rights with witness's interest in confidentiality of privileged records. This Court has repeatedly affirmed

the propriety of that balancing. ***Green*** at ¶ 23; ***Rizzo*** at ¶ 53.

Therefore, if this Court agrees with the State that a defendant's right to *in camera* review of privileged records "trumps" a witness's interest in confidentiality and further agrees with the State that Wis. Stat. § 146.82(2)(a)4. provides a mechanism to compel those privileged records to be produced over the witness's non-consent, then this Court has destroyed the balancing contemplated by ***Ritchie***, ***Shiffra***, ***Solberg***, ***Green*** and their progeny. If the Court destroys that balancing, it must afford defendants the benefits of an "advocate's eye" and permit defense counsel to review the privileged records independently.

The highest courts of at least two States have adopted procedures to do just that. ***Commonwealth v. Dwyer***, 859 N.E.2d 400 (Mass. 2006); ***State v. Cashen***, 789 N.W.2d 400 (Iowa 2010). The Massachusetts court explained that: "Despite their best intentions and dedication, trial judges examining records before a trial lack complete information about the facts of a case or a defense to an indictment, and are all too often unable to

recognize the significance, or insignificance, of a particular document to the defense." ***Dwyer***, 859 N.E.2d at 418 (citations omitted).

The Iowa Supreme Court established the following procedures:

> [1] Before a defendant may subpoena a victim's privileged records, the defendant has to 'make a showing to the court that the defendant has a reasonable basis to believe the records are likely to contain exculpatory evidence tending to create a reasonable doubt as to the defendant's guilt.' ***Cashen***, 789 N.W.2d at 408.
>
> [2] Next, the county attorney must notify the victim of the request for the privileged records, and, after conferring with the victim, the county attorney must provide an affidavit signed by the victim stating the victim either consents or opposes the disclosure. ***Id***.
>
> [3] If the victim opposes, a hearing must be held to determine 'if a reasonable probability exists that the records contain exculpatory evidence tending to create a reasonable doubt as to the defendant's guilt.' ***Id***.
>
> [4] If a reasonable probability exists that the records contain such evidence, the court shall issue a subpoena for the records to be produced under seal to the court. ***Id***.
>
> [5] The court must then enter a protective order containing stringent nondisclosure provisions, which prohibit any attorney, county attorney, or third party who is allowed to inspect or review the records from copying, disclosing, or disseminating the information contained therein. ***Id***. at 408–09.
>
> [6] If the records are produced, the defendant's attorney has the right to inspect the records at the courthouse. ***Id***. at 409.

> [7] After identifying any records he or she believes contain exculpatory evidence, the attorney shall notify the county attorney and the court of the specific records the defendant desires and request a hearing. ***Id.***
>
> [8] The county attorney may then inspect the records. ***Id.***
>
> [9] Finally, at the closed hearing, the court is to determine if the designated records contain exculpatory evidence and, if so, copies of the records are to be provided to the defense attorney and county attorney after all non-exculpatory matters are redacted. ***Id.***

***State v. Carver***, 817 N.W.2d 31 n. 1, Iowa App., April 25, 2012, No. 2-096 / 11-0848 (succinctly summarizing the ***Cashen*** procedures).

Massachusetts' highest court went even farther, establishing detailed and specific procedures for defense counsel to review privileged third-party records before any *in camera* inspection. ***Dwyer***, 859 N.E.2d at 420-23.

Both States' procedures provide that any review of potentially exculpatory privileged third-party records is conducted with an "advocate's eye." ***Ritchie***, 480 U.S. at 60. Likewise, both States' procedures provide assurances that the privileged records are kept confidential.

In summary, ***Ritchie***, ***Shiffra***, and their progeny recognize that *in camera* review is a compromise because it denies defendants the benefit of an "advocate's eye." If this Court accepts the State's argument that a circuit court must compel privileged records for production when a defendant makes the ***Green*** showing, then it has fundamentally destroyed the balancing implicit in the ***Shiffra*** procedures and must allow defendants the benefits of an "advocate's eye" in reviewing the witness's privileged records.

## IV. Johnson Clearly Made A Sufficient *Green* Showing.

### A. The State's Arguments About The Sufficiency Of Johnson's *Green* Showing Are Clearly An Improper Request For Error-Correction.

The State argues that Johnson should not have been granted *in camera* review in the first place because he did not satisfy the initial showing requirements of ***State v. Green***, 2002 WI 68 at ¶ 34. The trial court rejected this argument, concluding that Johnson made the requisite showing. (Pet.-App. at 115-116.) The court of appeals affirmed the trial court's conclusion,

recognizing that a similar showing was made by the defendant in ***State v. Speese***, 191 Wis. 2d 205, 528 N.W.2d 63 (Ct. App. 1995), and approved as sufficient by this Court. ***State v. Speese***, 199 Wis. 2d 597, 545 N.W.2d 510 (1996). The State renews its argument on this front in this Court, claiming that the trial court and court of appeals each abdicated its responsibility to hold Johnson to the ***Green*** standard.

The State is asking this Court to correct what it perceives to be errors by the lower courts in their application of the ***Green*** standard. This Court, however, is not an error-correcting court: "The supreme court's primary function is that of defining and law development. . . . The purpose of the supreme court is to oversee and implement the statewide development of the law." ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). The court of appeals' primary function, on the other hand, is error-correction. In this case, the court of appeals reviewed the circuit court's decision to grant Johnson's ***Shiffra*** motion for error and affirmed the trial court.

The institutional responsibilities of this court—to define and develop the law—are not served by accepting the State's request to review the lower courts' application of well-settled legal principles to the facts of this case. Accordingly, this Court should refrain from reviewing whether the lower courts erred in their conclusion that Johnson satisfied his burden under ***Green***.

### B. The State's Attack On The Sufficiency of Johnson's *Green* Showing Is Premised On An Erroneously Expansive Reading of *Green*.

According to the State, a trial court reviewing a defendant's request for *in camera* review under ***Shiffra*** and ***Green*** is required to review every piece of evidence turned over to the defendant in discovery as well any evidence uncovered by the defendant during his or her own investigation. (State's Br. at 33.) This is an unsupported and unreasonably expansive reading of ***Green***.

#### i. *Green* Does Not Require All Existing Evidence To Be Furnished To, Or Reviewed By, The Circuit Court.

The State first attacks the showing made by Johnson by asserting that he did not submit enough evidence for the circuit court to properly consider the motion. (State's Br. at 34.) The State makes this argument from the premise that ***Green*** requires a circuit court to consider, and thus for the defendant to submit, every piece of evidence about the case that exists: "***Green*** requires [the circuit court] to look at all the evidence in existence when [it] rules on the ***Shiffra*** motion." (State's Br. at 33.) This is an incorrect and unreasonable reading of ***Green***.

In ***Green***, this Court altered the threshold showing requirement from ***Shiffra***, but:

> conclude[d] that other requirements adopted by the court of appeals in similar cases remain applicable. In particular, 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. ***See, e.g., State v. Navarro***, 2001 WI App 225, ¶¶ 12, 17, 248 Wis. 2d 396, 636 N.W.2, ***State v. Walther***, 2001 WI App 23, ¶ 11, 240 Wis. 2d 619, 623 N.W.2d 205.

***Green*** at ¶ 33. In holding that a fact-specific evidentiary showing was necessary, this Court cited ***Navarro*** and ***Walther***. A review of those cases makes it

clear that ***Green*** was not creating a requirement that a defendant submit, or that a circuit court review, every piece of evidence available in a case.

Navarro was charged with battery by a prisoner for allegedly assaulting a correctional officer. ***State v. Navarro***, 2001 WI App 225, ¶ 1. Navarro sought *in camera* review of confidential inmate complaints related to excessive use of force by the officer. ***Id***. at ¶¶ 3-4. Navarro's counsel filed a brief in support of his request, asserting that Navarro's actions were undertaken in self-defense. Counsel argued that the records were "relevant and might prove helpful to his defense" by providing Navarro with the identity of witnesses to the officer's abuse against Navarro and other inmates. ***Id***.

The trial court denied Navarro's motion, but the court of appeals reversed and remanded for a hearing. As it related to the evidentiary showing by Navarro, the court noted that Navarro's allegations of other acts of violence by the officer "could have been considerably more specific," and further noted that the better practice would be for a defendant to include the relevant allegations in his or her ***Shiffra*** motion, or in an

affidavit filed in support of it, rather than by way of counsel's assertions in a brief or during argument, as was done in Navarro. ***Id***. at ¶ 15 n. 5. Despite the lack of specifics, the court of appeals held that the allegations communicated through counsel were sufficient to warrant a hearing, at which time Navarro could specify in greater detail the records he sought so the circuit court "may properly consider whether he has made a sufficient showing to obtain *in camera* inspection." *Id.* at ¶ 17.

However, the ***Navarro*** court did not hold, suggest, or intimate that the circuit court on remand should be provided with all of the "existing evidence" in the case in order to determine whether Navarro's request for *in camera* inspection should be granted. Rather, quite clearly, the court of appeals stated only that Navarro was entitled to a hearing at which time he would have to provide more specificity about the sought-after records, including some details about the identities of the inmates involved or what he had observed. There was no suggestion that Navarro would have to put the entire evidentiary picture of the case

against him before the court. The court needed only enough details to be able to consider whether the information, if it existed, would be relevant to his defense.

***Green*** also cited ***State v. Walther***. Like ***Navarro***, ***Walther*** is inconsistent with the State's apparent belief that the circuit court is required to review all existing evidence in a case. In ***Walther***, the defendant sought *in camera* review of medical, psychological, psychiatric, residential treatment and counseling records of the alleged victim. 2001 WI App 23 at ¶ 3. Defense counsel submitted a motion and affidavit describing witness statements collected by a defense investigator and references to police reports that contained potentially inconsistent statements by the alleged victim regarding his injuries and the identity of his assailant. ***Id***. at ¶ 4. Walther's counsel argued that the records sought were highly relevant to the witness's credibility, perception, and recall. ***Id***. The trial court denied *in camera* review, holding that Walther's preliminary showing was insufficient. ***Id***. at ¶ 8.

On review, the court of appeals reversed. As relevant to the nature of the evidentiary proffer, the court of appeals noted that neither party challenged the trial court's factual findings, and it approved of the trial court's method: "The trial court properly evaluated Walther's motion by acknowledging that it would 'assume that the information that's contained in the affidavit is true and that if [it] were to look at the records [it] would find that kind of information.'" ***Walther*** at ¶ 9. In this way, the ***Walther*** court approved as sufficient an evidentiary proffer consisting of counsel's motion and affidavit. The ***Walther*** court did not in any way suggest that an exhaustive submission and review of all evidence in the case was required.

Further, in ***Green*** itself, this Court discussed the necessity of the factual showing as "setting forth an offer or proof," and described such an offer thusly: "A good faith request will often require support through motion and affidavit from the defendant." ***Green*** at ¶ 35. Such descriptions of the factual showing are wholly inconsistent with the State's notion that a defendant is required to provide, and that the circuit court is required

to review, every piece of evidence in existence in order to properly consider a motion for *in camera* review of confidential records.

Under the State's expansive and unsupported reading of ***Green***, a circuit court would be required to conduct a mini-trial before it could properly consider a defendant's motion for *in camera* review. Since the burden is on the defendant to make the proper showing, in order for the trial court to "look at all the evidence in existence" (State's Br. at 33), the defendant would need to be able to call witnesses at the hearing, including the subject of the counseling records and the custodian of the records to, at a minimum, establish their existence. In addition, the defendant would have to be allowed to put on as many of the State's witnesses as needed, with unfettered cross-examination, in order to establish the full evidentiary picture and how the requested records could potentially further his proffered trial defense. This type of hearing and showing were clearly not contemplated by the ***Green*** court: "Our standard is not intended to be unduly high for the defendant before an *in camera* review is ordered by the court." 2002 WI 68

at ¶ 35. Further, the State cites no case in support of such an expansive reading of ***Green***. The reasonable reading of ***Green*** is that the "existing evidence" refers to what is proffered by the defendant as the basis for the motion.

Analyzed under the actual ***Green*** standard, Johnson's submission in this case was sufficient. Johnson did not simply make a bare-bones assertion that T.S. was in counseling and that she might have talked about him and made inconsistent statements. Johnson identified specific dates that T.S. attended counseling sessions (during the time period in which Johnson was allegedly assaulting her), named the therapists with whom she met, and identified that the topic of counseling was T.S.'s relationship with Johnson. Importantly, at the hearing on Johnson's motion, the circuit court acknowledged that T.S., through counsel, confirmed that Johnson's proffered factual basis for the motion was accurate. (Cir. Ct. Decision and Order; Pet.-App. at 119.)

**ii. Johnson Established A Sufficient Connection Between the Sought-After**

**Information and Johnson's Defense.**

The State also complains that the lower courts erred in granting Johnson's motion because Johnson has never identified what his defense to the charges might be. (State's br. at 34.) This is simply untrue.

As an initial matter, there are limited defenses available to a defendant in child sexual assault cases. As the State is certainly aware, defenses such as consent and mistake of age are not available to defendants in child sexual assault cases. Misidentification may be an available defense in a child sexual assault case where the defendant is a stranger, but this is not such a case. Hence, the only defense in any child sexual assault case where the defendant and complainant are acquainted is that the assault(s) did not occur as alleged. In those instances, and in this case, the credibility of the complainant is central to the defense.

Johnson clearly provided that the credibility of T.S. is the central component of his defense. In Johnson's memorandum in support of his ***Shiffra*** motion, Johnson explained how the information sought

from the records would support his defense. For example, in the introduction, counsel stated: "This information has a substantial and direct bearing on T.S.'s credibility, which is paramount in a case such as this in which there is no physical evidence." (Pet.-App. at 159.) Later in the memorandum, counsel argued:

> Any statements describing a relationship with Johnson that do 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. As such, they bear directly on the heart of Johnson's defense and tend to exculpate him. ***Green***, at ¶ 34.

(Pet.-App. at 162.) (emphasis added).

After the State provided a memorandum in opposition, Johnson replied, again arguing that the information sought was "material to Johnson's defense as such statements would go to T.S.'s credibility in a case in which there is no physical corroborating evidence." (R.19:7.) Johnson has thus made it abundantly clear that the central component of his defense will be to challenge T.S.'s credibility.

There are no independent eyewitnesses to any of the alleged assaults by Johnson and there is no physical evidence corroborating T.S.'s claims. Accordingly, any statements by T.S. made during counseling about her relationship with Johnson that specifically deny abuse by Johnson or describe a non-abusive relationship with Johnson provide compelling impeachment material and bear directly on her credibility. Therefore, the State's argument that Johnson has not related how the information in the records is material to his defense is without merit.

### iii. Johnson Conducted Independent Investigation.

The State lastly claims that the lower courts were derelict by not "hold[ing] Johnson to the requirement that he first undertake a reasonable investigation into T.S.'s background before seeking her records." (State's Br. at 34.) The State's argument in this respect is premised upon its speculative claim that Johnson can get the information contained in the records through his wife, and its mischaracterization of the evidence Johnson believes is contained within the records. The

State characterizes the sought-after evidence as showing only that T.S. never reported the alleged abuse to her counselors. (State's Br. at 34-37.) In fact, Johnson has specifically identified the information sought as T.S.'s specific denials of abuse by Johnson and descriptions of her relationship with Johnson in non-abusive terms.

First, it is clear that Johnson undertook an investigation prior to filing his ***Shiffra*** motion. In his motion, Johnson stated that:

> Counsel, based on information developed in the course of investigating this matter, is aware that the complaining witness in this case, T.S., has seen a therapist on multiple occasions to discuss issues related to interpersonal relationships within her family, including her relationship with her step-father, Johnson. Counsel is further aware that these counseling sessions occurring during the time period in which T.S. alleges that Johnson was engaging in repeated acts of sexual abuse.

(Pet-App. 158.) This statement was followed by specific information identifying the dates of the counseling sessions, the identities of the therapists, and the topics of counseling. (Pet.-App. at 159-60.)

Having identified the specifics of counseling, there is no other avenue of investigation, beyond *in camera* review, to ascertain whether T.S. specifically denied abuse by Johnson or described a positive

relationship with him during counseling. Interviewing T.S. about this question would be meaningless; her credibility is at issue, and any self-serving statements on her part would not end the inquiry. In addition, as the complaint notes, Johnson has had no contact with T.S. since the allegations were made. (R.1:2.) Given the setting in which the statements would have been made—individual counseling—there are no other witnesses to the statements who could be interviewed about them. *In camera* review is the only way to confirm whether the information Johnson seeks exists.

The State argues that the information Johnson seeks through *in camera* review could be gleaned from other sources, arguing that Johnson would have been aware of T.S.'s "behavioral problems" and could have asked his wife if T.S. ever acknowledged not telling her therapists about the abuse because she did not want to break up the family. (State's Br. at 34-35.) However, this argument is based on a false premise. Johnson is not seeking the records for evidence of behavioral problems or for the simple fact that she did not report any abuse to the counselors. Johnson has alleged that

the records are likely to contain T.S.'s denials of abuse in response to specific question on the subject, and/or descriptions of her relationship with Johnson in terms inconsistent with abuse during the time period in which Johnson was allegedly abusing her. Accordingly, the State's claim that Johnson "almost certainly does not need T.S.'s records to prove that T.S. did not tell" her therapists about the abuse, (State's Br. at 35) is nothing more than a classic straw-person argument.

For this reason, the State's argument that *in camera* review is unnecessary because Johnson could establish T.S.'s non-disclosure through "testimony and [a] jury instruction" is irrelevant and without merit. (State's Br. at 36.) The State relies on ***People v. Higgins***, 784 N.Y.S.2d 232 (N.Y. App. Div. 2004), in support of this argument. ***Higgins***, however, is non-binding on this Court and inapposite.

The defendant in ***Higgins*** sought disclosure of the complaining witness's records only to prove that she never reported abuse. 784 N.Y.S.2d at 234. Johnson's motion, however, seeks more information from the records than a simple lack of reporting. Johnson is

looking for affirmative denials or descriptions of the relationship in non-abusive terms. Such statements are likely to exist because T.S. was in counseling specifically about her relationship with Johnson.

In addition, the court in ***Higgins*** actually granted *in camera* review of records, after which it allowed limited testimony from the relevant therapist. The opinion in ***Higgins*** does not specify what was in the records reviewed *in camera* or what led the court in that instance to allow the limited testimony by the therapist. The opinion does not state whether, during her counseling, the victim in ***Higgins*** was asked directly if her father was abusing her or if she described a relationship with her father during counseling in terms inconsistent with abuse. If she had made such statements, they certainly would have been disclosed. After all, there is a significant probative difference between an inference that T.S. merely never told her counselors and specific denials and descriptions of a non-abusive relationship.

When the State finally gets around to addressing Johnson's actual showing—that the records may contain

explicit denials of abuse or descriptions of a relationship inconsistent with abuse—it relies on illogical and speculative deductions to claim that Johnson has only shown the "mere possibility" that the records contain this type of evidence. (State's Br. at 37.)

The State first argues that "[t]here is no reason [Dr. Libster] would have asked T.S. if Johnson was sexually assaulting her." (State's Br. at 37.) It is undisputed that T.S. saw Dr. Libster, in part, to discuss "difficulties at home" during the time period in which Johnson was alleged to have assaulted T.S. It is eminently reasonable to infer that, in furtherance of that discussion, Dr. Libster would have asked about interfamilial relationships within the home and any "difficulties" therein, a conversation that certainly would include questions about the nature and quality of her relationship with Johnson.

The State then posits that "[g]iven that [Johnson's wife's] suspicions were not aroused until months after T.S.'s therapy with Libster ended, there is no foundation for believing that he may have broached this topic with her." (State's Br. at 37.) This is

illogical. That Johnson's wife did not have "suspicions" about T.S. and Johnson until months after T.S.'s counseling with Libster is irrelevant to what Libster and T.S. would have discussed in private sessions.

Lastly, regarding the counseling with Keeler, the State speculates that the "more likely" focus of Keeler's therapy sessions with T.S. was the relationship between Johnson and Tracie. (State's Br. at 38.) Even if, as the State suggests, Johnson's wife could explain why Keeler thought it would be beneficial to include T.S. in therapy sessions intended to cover familial relationships, that question is inconsequential. Whatever the answer is, it cannot account for what was discussed between Keeler and T.S. in their individual sessions, which is the focus of Johnson's request.

The lower courts concluded that Johnson laid out a fact-specific basis for identifying the records sought to be reviewed and established a reasonable likelihood that the records contain information relevant and material to his defense. This was not lost on either of the lower courts, and it should not be lost on this Court. After all, Johnson's burden to make the preliminary showing is

"not unduly high" and it is the duty of the trial court to determine independent probative value after *in camera* review. ***Green*** at ¶ 35; ***Shiffra*** at 611.

## CONCLUSION

As demonstrated above, the issues presented to the Court have previously and repeatedly been decided. As such, Johnson respectfully asserts that the State's petition for review was improvidently granted and should be dismissed. However, should the Court reach the issues presented, the decision of the court of appeals must be affirmed for all the reasons stated.

Dated this 22nd day of January, 2013.

Attorneys for Defendant-Respondent-Cross-Appellant

/s/ Michael F. Hart_____
Michael F. Hart SBN 1001528
Craig S. Powell SBN 1046248
Geoffrey R. Misfeldt SBN 1065770
KOHLER & HART, S.C.
735 North Water Street, Suite 1212
Milwaukee, WI 53202
Phone: (414) 271-9595
Facsimile: (414) 271-3701
mfhart@kohlerandhart.com

Mark D. Richards SBN 1006324
RICHARDS & HALL, S.C.
209 8th Street
Racine, WI 53403
Phone: (262) 632-2200
Facsimile: (262) 632-3888
richardslaw@ameritech.net

Stephen J. Meyer SBN 1011807
MEYER LAW OFFICE
10 East Doty Street, Suite 617
Madison, WI 53703
Phone: (608) 255-0911
defender6@stephenmeyerlaw.com

## FORM AND LENGTH CERTIFICATION

I hereby certify that this Response Brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19(8)(b) and (c) for a Response produced with a proportional serif font. The length of this Response Brief is 10,900 words.

Dated this 22nd day of January, 2013.

Attorneys for Defendant-Respondent-Cross-Appellant

/s/ Michael F. Hart

Michael F. Hart SBN 1001528
KOHLER & HART, S.C.
735 North Water Street, Suite 1212
Milwaukee, WI 53202
Phone: (414) 271-9595
mfhart@kohlerandhart.com

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

I hereby certify that I have submitted an electronic copy of this Response Brief, which complies with the requirements of Wis. Stat. (Rule) § 809.19(12). I further certify that this electronic Response Brief is identical in content and format to the printed form of the Response filed as of this date.

Dated this 22nd day of January, 2013.

Attorneys for Defendant-Respondent-Cross-Appellant

/s/Geoffrey R. Misfeldt_____
Geoffrey R. Misfeldt SBN 1065770

## APPENDIX CERTIFICATION

I hereby 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.

Dated this 22nd day of January, 2013.

Attorneys for Defendant-Respondent-Cross-Appellant

/s/ Michael F. Hart__
Michael F. Hart SBN 1001528

**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.

Dated this 22nd day of January, 2013.

Attorneys for Defendant-Respondent-Cross-Appellant

/s/ Geoffrey R. Misfeldt
Geoffrey R. Misfeldt SBN 1065770

## APPENDIX TABLE OF CONTENTS