STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP2864-CRAC

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent-Petitioner,

v.

SAMUEL C. JOHNSON, III,

Defendant-Respondent-Cross-Appellant.

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

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT-PETITIONER

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ARGUMENT

I. STARE DECISIS DOES NOT REQUIRE ADHERENCE TO JURISPRUDENCE THAT WAS WRONGLY DECIDED AND CONFLICTS WITH SUPREME COURT PRECEDENT.

Johnson first argues that stare decisis requires this court's adherence to *State v. Shiffra*, 175 Wis. 2d 600, 499

N.W.2d 719 (Ct. App. 1993), and that the State has provided no new reason for jettisoning *Shiffra*. Contrary to Johnson's assertion, stare decisis does not compel blind adherence to a line of cases premised on an analytical flaw. Moreover, the State's contention that *Shiffra* conflicts with Supreme Court jurisprudence – a contention to which Johnson does not respond – provides a reason for overruling *Shiffra* that the State has not previously advanced.

Johnson's criticisms notwithstanding, the State is mindful that this court generally "adheres to stare decisis to maintain confidence in the reliability of court decisions, promote evenhanded, predictable, and consistent development of legal principles, and contribute to the actual and perceived integrity of the Wisconsin judiciary." *Dairyland Greyhound Park v. Doyle*, 2006 WI 107, ¶ 93, 295 Wis. 2d 1, 719 N.W.2d 408 (citation omitted). Despite this general rule, this court has recognized that "[s]tare decisis is neither a straightjacket nor an immutable rule. . . . We do more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision." *Johnson Controls v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 100, 264 Wis. 2d 60, 665 N.W.2d 257.

Much of the State's argument for why *Shiffra* and its progeny are wrongly decided admittedly has been advanced in prior appeals. One important exception is the argument that *Shiffra*'s creation of a federal due process right to pretrial discovery conflicts with Supreme Court cases like *Wardius v. Oregon*, 412 U.S. 470 (1973), and *Weatherford v. Bursey*, 429 U.S. 545 (1977). Not only does Johnson ignore this argument; he wrongly asserts that the State's only "new" reason for abandoning *Shiffra* is the low evidentiary value therapy records possess. *See* Johnson's brief at 12-13.[1] Johnson's failure to respond to

[1] Johnson at 13 of his brief disparages the State's reliance on an amicus brief filed fifteen years ago. A more recent law review article suggests that the evidentiary value of therapy records has since diminished due to the perceived risk that records might be used

the claim that *Shiffra* conflicts with Supreme Court precedent effectively concedes this point. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corporation,* 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

While Johnson faults the State for relying on cases predating *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, *Shiffra*'s questionable foundation was mentioned in a post-*Green* article, Paul G. Cassell, "Treating Crime Victims Fairly: Integrating Victims Into the Federal Rules of Criminal Procedure," 2007 Utah L. Rev. 861, 915 n.319. There the author – referencing *Shiffra* and *State v. S.H.*, 159 Wis. 2d 730, 465 N.W.2d 238 (Ct. App. 1990) – declared that "[t]he Wisconsin decisions do not offer a principled reason for extending *Ritchie* to private records and should not be regarded as persuasive authority here."

That same year, the federal court in *United States v. Mikulewicz*, No. 07-CR-089-S, 2007 WL 5490148, *1 (W.D. Wis. 2007) (Reply-Ap. 101-02), denied a defense motion to produce mental health records of a government witness who planned to implicate Mikulewicz in methamphetamine dealing, observing that "[t]he fact that the government never has possessed [the witness's] mental health or drug treatment records is fatal to Mikulewicz's motion. *See United States v. Hach,* 162 F.3d 937, 947 (7th Cir. 1998)."

That this court in *State v. Speese*, 199 Wis. 2d 597, 545 N.W.2d 510 (1996), and *State v. Solberg*, 211 Wis. 2d 372, 564 N.W.2d 775 (1997), rebuffed the State's attempts to overturn *Shiffra* is not surprising, nor is it fatal to the State's argument now. *Speese* reached this court in an entirely different posture than this case presents, with the circuit court having conducted an in camera review of the victim's privileged records. *See* 199 Wis. 2d at 611. This court commented on the State's argument that *Shiffra*

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in court. Clifford A. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1, 63 n.249 (2007).

was incorrectly decided (*id.* at 610 n.12) but found that this and other issues "either are not presented or are not fully briefed." *Id.* at 607. Rather than decide whether to overrule three-year-old precedent, this court decided the appeal on the basis of harmless error.

Likewise, it was unnecessary for this court in *Solberg* to address the State's argument that *Shiffra*'s application of *Ritchie* was erroneous. Based on the prosecutor's concession that Solberg had made the preliminary showing of materiality required by *Shiffra* and the victim's consent to have the circuit court examine her records, the court had conducted an in camera review of the medical and psychiatric records. *Solberg*, 211 Wis. 2d at 376 and 385 n.6. The issue became whether the circuit court had erroneously exercised its discretion in refusing to disclose those records to the defense.

As for *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996), the court was wrong when it characterized *Ritchie* as a decision "attempt[ing] to strike a balance between the witness's right to privacy . . and the truth-seeking function of our courts." *Id.* at 56. As the State established in its opening brief, the *Ritchie* Court framed the contest as one between the defendant's right to due process and the Commonwealth's need to protect the confidentiality of those involved in its child abuse investigations. Unlike the situation here and in *Shiffra*, the privilege-holder in *Ritchie* was Pennsylvania, not a private party. This legally important distinction escaped the *Shiffra* court, as did the distinction between the informant privilege in Wis. Stat. § 905.10(1), which is held by the federal government or the state, and the privilege in Wis. Stat. § 905.04, which is held by a private party.[2]

[2] The *Shiffra* court found the informant cases different from cases involving the privilege under § 905.04 because the former "involve a statute authorizing *in camera* review." *State v. Shiffra*, 175 Wis. 2d 600, 609, 499 N.W.2d 719 (Ct. App. 1993). What the court failed to recognize is that the informant privilege belongs to the government whereas the privilege in § 905.04 does not. Where the

Finally, *Rizzo v. Smith*, 528 F.3d 501 (7th Cir. 2008), is hardly authority for the view that *Shiffra* was correctly decided. Given the highly deferential standard of review applicable to state-court decisions under the AEDPA, and the fact Rizzo had obtained in camera review of the victim's records, the Seventh Circuit had no reason to examine the correctness of *Shiffra*.

In short, stare decisis does not require this court's adherence to *Shiffra*'s application of *Ritchie* to privately held privileged records. Rather, for the reasons set forth in the State's opening brief and above, it is time to admit that because *Ritchie*'s due-process analysis derives from the government's duty to disclose exculpatory information in its possession, extending *Ritchie* to privileged third-party records the State has never possessed is erroneous. Moreover, by creating a constitutional right to pretrial discovery and possible disclosure of privileged records, *Shiffra* conflicts with established Supreme Court jurisprudence, a point Johnson does not contest.

II. LIKE THE *SHIFFRA* LINE OF CASES, JOHNSON IGNORES THE COSTS THAT WITNESS PRECLUSION IMPOSES ON THE PUBLIC'S INTEREST IN THE EFFECTIVE ADMINISTRATION OF THE CRIMINAL JUSTICE SYSTEM.

A. Johnson has no answer for the State's criticism that *Shiffra*'s witness-preclusion remedy shortchanges the public.

The State has argued that *Shiffra* and out-of-state cases adopting witness preclusion as a remedy when a witness refuses to waive her privilege are flawed because

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privilege-holder is also the prosecuting entity, different rules should apply than where a private party owns the privilege.

they fail to accommodate the public's stake in the effective prosecution of crime. Rather than meeting this criticism head-on, Johnson takes a cheap shot, claiming that the State's brief "makes it clear that an 'effective' prosecution . . . is one where the State secures a conviction, regardless of the person's innocence or guilt." Johnson's brief at 18 n.5.

To support his cheap shot, Johnson cites a clause from the State's brief, i.e., "[a]ssuming the allegations against Johnson are true." *Id.* Disingenuously, Johnson omits the footnote following "true": "The State recognizes that at this juncture, Johnson enjoys the presumption of innocence." State's opening brief at 25 n.10. In truth, the (partially) quoted sentence does not support his scurrilous claim that the State regards a prosecution as effective even if an innocent person is convicted. The State's point was that *if* Johnson were guilty of the crime charged, *Shiffra*'s remedy of witness preclusion would wrongly allow him to escape prosecution.

Johnson correctly asserts that retaining *Shiffra*'s witness-preclusion remedy means that a witness can preserve her privilege under § 905.04 without violating any due-process right a defendant might have to pretrial in camera review or disclosure of the witness's privileged records.[3] The glaring problem with witness preclusion that Johnson ignores is its failure to accommodate the interest of the public – including the defendant's future victims – in seeing that criminal conduct is punished. Leaving the public out of the equation results in a windfall to the defendant, i.e., if the trial court decides he has made the showing *Shiffra/Green* requires, and the victim refuses to waive her privilege, the trial court's ruling becomes the equivalent of a "get-out-of-jail-free" card. Simultaneously, prosecutorial discretion receives a body blow, as the

[3] While *Shiffra* does effectuate the victim's right to prevent even the trial judge from seeing her privileged records, it does so at a cost to the victim. Specifically, an order for in camera review forces the victim to choose between her privilege and the prosecution of a person charged with sexually assaulting her.

decision whether to continue a prosecution effectively now rests with the victim and not the prosecutor.

In parroting statements by this court and the court of appeals approving in camera review as striking a proper balance between the constitutional rights of the defendant and the victim's interest in confidentiality of her records, Johnson's brief suffers from the same flaw in reasoning as the *Shiffra* line of cases. That flaw is his failure to acknowledge, let alone attempt to justify, the costs witness preclusion exacts on the public's interest in the fair and effective prosecution of crime.

B. *Crawford* may make witness preclusion a more draconian remedy than the court of appeals intended.

Replying to the argument that witness-preclusion is a more severe sanction after *Crawford v. Washington*, 541 U.S. 36 (2004), Johnson contends that *Crawford* had no effect on *Shiffra*'s witness-suppression remedy because a witness's out-of-court statements are necessarily barred as part of witness preclusion. While Johnson specifically references only "out-of-court testimonial statement[s]" as prohibited under *Shiffra* (Johnson's brief at 25), his assertion logically encompasses all out-of-court statements by the witness because the testimonial/nontestimonial dichotomy was nonexistent when *Shiffra* was decided.

No Wisconsin appellate court has decided whether *Shiffra*'s witness preclusion is limited to live testimony or extends to the witness's otherwise admissible hearsay statements. *See* Daniel D. Blinka, *Wisconsin Evidence* § 511.2 at 390 n.8 (3d ed. 2008): "Although the courts have yet to rule on this issue, the judge should also preclude the State's use of hearsay statements by the witness/declarant even where the confrontation right has been otherwise satisfied." Language in pre-*Crawford* decisions suggests that the appeals court did not believe

all of a victim-witness's out-of-court statements would be excluded along with her live testimony. For example, in *Behnke*, 203 Wis. 2d at 56, the court said that "[i]n a few circumstances, the State may have to completely forgo a case when one of its witnesses refuses to turn over the information." Had the court envisioned wholesale exclusion of the witness's out-of-court statements, it would have recognized that more than "a few" prosecutions would have to be abandoned.

Although not adopted in Wisconsin, Blinka's view supports Johnson's belief that witness preclusion would also prohibit introduction of the witness's admissible hearsay statements. Assuming that view is correct, it fortifies the State's contention that witness preclusion is inimical to the effective functioning of the criminal justice system. Were the State barred from introducing ANY of the victim's statements and not just her live testimony, then whenever the defendant makes the *Shiffra/Green* showing but the victim declines to waive her privilege, the only prosecutable sexual assaults will be those involving eyewitness testimony and/or DNA evidence. Of course, this is not one of those cases.

For the above reasons and those advanced in the State's opening brief, if this court retains *Ritchie* or replaces it with a different scheme involving in camera review, this court should hold that witness preclusion is not an appropriate remedy.[4]

[4] Johnson's argument that if a court can order production of a victim's records without consent, then defense counsel must be allowed to review them (Johnson's brief at 35-38), is illogical. The records would still undergo in camera review, with the trial court deciding whether defendant is entitled to disclosure of any portion.

III. JOHNSON FAILED TO MAKE *GREEN*'S REQUIRED SHOWING.

A. This court should reject Johnson's plea to disregard this issue.

Johnson contends that the State's arguments about the sufficiency of his *Green* showing are "an improper request for error-correction." Johnson's brief at 38. In support, he cites case law stating that this court's primary function is to define and develop the law. *Id.* at 38-39.

Contrary to Johnson's assertion, there is nothing improper about argument III. in the State's opening brief. The petition for review at 3 asked this court to examine whether Johnson had made the necessary showing entitling him to in camera review of T.S.'s therapy records. Had this court believed that issue undeserving of its review, it could have limited the grant of the State's petition to the first two issues presented. *See* Wis. Stat. (Rule) § 809.62(6). By granting the petition without condition, this court signaled its belief that all of the issues raised in the petition are properly before it. *See State v. Weber*, 164 Wis. 2d 788, 789, 476 N.W.2d 867 (1991) ("the issues before the court are the issues presented in the petition for review").

And while this court's primary function is not error-correction, it has shown its willingness to engage in error-correction to resolve an appeal. *See*, *e.g.*, *State v. Funk*, 2011 WI 62, 335 Wis. 2d 369, 799 N.W.2d 421 (holding that circuit court erred in finding juror subjectively and objectively biased against defendant).

B. *Green* requires the trial court to do more than examine the evidence proffered by the defense in deciding whether to order in camera review of a victim's privileged records.

Johnson contends that the State's attack on the sufficiency of his *Green* showing is premised on an overly expansive reading of *Green*. Whereas the State argued that the trial court erred in considering only the evidence summarized in the criminal complaint and in the parties' briefs, Johnson asserts that *Green*'s directive to the circuit court to examine "the existing evidence" (*Green*, 253 Wis. 2d 356, ¶ 34) means only the evidence "proffered by the defendant as the basis for the motion." Johnson's brief at 47.

Admittedly, the State's assertion that the trial court must examine "all the evidence" in existence may be an overbroad reading of *Green* under some circumstances. But Johnson's view that the trial court need consider only the evidence the defense includes in its motion is preposterous. *Green*'s statement that a motion seeking discovery of a witness's privileged records "should be the last step in a defendant's pretrial discovery" (253 Wis. 2d 356, ¶ 35) suggests that at a minimum, the court must consider all discovery afforded the defense involving the witness's statements. Here, that discovery would include the recording of T.S.'s forensic interview, which the trial court did not examine before concluding that Johnson had made the showing required by *Green*. Without knowing what the victim has said about the charged crime, the trial court cannot make an informed decision about whether there is a reasonable likelihood the records will be necessary in determining guilt or innocence. Construing *Green*'s reference to "the existing evidence" as meaning only the evidence highlighted in the motion allows the defense to provide a false picture of its need for privileged information and improperly shifts the burden to the State to show why access to the records is unnecessary.

C. Statements of T.S. denying abuse or describing a relationship inconsistent with abuse would not be material.

While the State submits that Johnson has shown but a mere possibility that T.S.'s records contain statements denying sexual abuse or describing a relationship inconsistent with abuse, such statements would not "'tend[ ] to create a reasonable doubt that might not otherwise exist.'" *Green*, 253 Wis. 2d 356, ¶ 34.

Johnson has admitted an improper sexual relationship with T.S. to his wife and a counselor, both of whom are ostensibly available to testify. Given this evidence, T.S.'s denial of abuse during therapy preceding her disclosure to her mother would not be material. Children abused by a family member commonly deny that abuse is occurring, often because they fear the ramifications of disclosure. For example, in *State v. Domke*, 2011 WI 95, ¶ 12, 337 Wis. 2d 268, 805 N.W.2d 364, the ten-year-old victim did not want to disclose the assaults because she didn't want Domke to go to jail. She stated that "she had loved Domke and . . . did not want to report the abuse because she did not want to break up her family." *Id.* at ¶ 55.

As in *Domke*, no evidence suggests T.S. had a motive to fabricate the assaults. In light of Johnson's admissions, her description of a nonabusive relationship with Johnson would not be material and would not warrant in camera review under *Green*.

CONCLUSION

This court should grant the relief requested in the State's brief-in-chief.

Dated this 5th day of February, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2997 words.

_____
Marguerite M. Moeller
Assistant Attorney General

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of February, 2013.

_____
Marguerite M. Moeller
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