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

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

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ISSUES PRESENTED FOR REVIEW

1. Should this court overrule *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), because its holding rests on the erroneous premise that *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), mandates the pretrial in camera review and potential disclosure of privately held mental health records whenever a criminal defendant makes a preliminary showing of materiality?

The State did not present this issue to the trial court or the court of appeals because those courts are bound by *Shiffra*.

2. Assuming this court finds that under some circumstances criminal defendants have a federal constitutional right to the in camera review and potential disclosure of privately held privileged records, may a circuit court require production of the records regardless of whether the privilege-holder consents to their release?

The trial court and a majority of the court of appeals said no.

3. Assuming this court finds that under some circumstances criminal defendants have a federal constitutional right to the pretrial in camera review and potential disclosure of privately held privileged records, has Samuel Johnson demonstrated an entitlement to the in camera review of T.S.'s privately held privileged therapy records?

The trial court and the court of appeals said yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, both oral argument and publication of the court's opinion are warranted.

STATEMENT OF THE CASE AND FACTS

Procedural Background

On March 24, 2011, Samuel Johnson was charged in Racine County Circuit Court with repeated sexual assault of a child, contrary to Wis. Stat. § 948.025(1)(e) (1:1). The complaint alleged that Johnson had sexually

assaulted his stepdaughter, T.S., over the course of three years, starting in June 2007, when she was twelve (*id.*).[1]

On April 13, 2011, Johnson waived his right to a preliminary hearing (4), and the State filed a single-count information containing the same charge as the criminal complaint (3).

On August 5, 2011, Johnson filed a motion and supporting memorandum seeking production of T.S.'s therapy records for in camera review (10:*Shiffra*; Pet-Ap. 157-63).[2] A hearing on the motion was held September 23, 2011 (39:1-10; Pet-Ap. 173-82). The trial court determined that Johnson was entitled to an in camera review of T.S.'s therapy records from Kristin Keeler and Dr. Garry Libster (39:8-9; Pet-Ap. 180-81). The court ordered the State to secure the records and provide them to the court (39:8; Pet-Ap. 180).

On October 7, 2011, T.S.'s attorney informed the trial court that T.S. would not consent to an in camera review of her records (20; Pet-Ap. 164-65). The State then moved the court to subpoena T.S.'s therapy records under Wis. Stat. § 146.82(2)(a)4. (*see* 24). Johnson opposed this request and moved that T.S.'s testimony be suppressed as a consequence of her refusal to consent to disclosure of her records (31:5).

On November 29, 2011, the trial court issued a Decision and Order (36; Pet-Ap. 114-56) denying both Johnson's motion to bar T.S. from testifying (36:32; Pet-Ap. 145) and the State's motion to subpoena T.S.'s records for in camera review (36:33; Pet-Ap. 146).

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[1] T.S.'s date of birth is April 21, 1995 (1:1).

[2] Because the envelope marked item 10 contains two documents, the State will cite the in camera motion as "*Shiffra*," while the motion to exclude Johnson's statements will be cited as "privileged."

The State and Johnson petitioned for leave to appeal. On January 6, 2012, the court of appeals granted both petitions (38). Following briefing, the court issued a decision affirming that portion of the circuit court's decision granting Johnson's motion for in camera review and reversing that portion of the decision allowing T.S. to testify at trial despite her refusal to release her records for in camera review. *State of Wisconsin v. Samuel Curtis Johnson, III*, No. 2011AP2864-CRAC (Ct. App. Dist. II dec'd Apr. 18, 2012); Pet-Ap. 101-13.

On November 14, 2012, this court granted the State's petition to review the court of appeals' decision.

Facts

The investigation into Johnson's sexual abuse of T.S. was prompted by a report to the Racine County Human Services Department on or about February 17, 2011, from Johnson's treatment provider in Scottsdale, Arizona (10:privileged:2).[3] According to the defense, the report from Arizona stated that while undergoing treatment there, Johnson "'disclosed he had inappropriate sexual contact with his 15 year old daughter'" (*id.*). As a result of this report, an investigator with the Racine County Sheriff's Department arranged a forensic interview with T.S. on March 16, 2011 (1:1). T.S. confirmed that Johnson had sexually assaulted her on numerous occasions, usually in her bedroom in the family residence in Racine County (*id.*:1-2). T.S. told the forensic examiner that "she finally told her mother about what was happening to her because she wanted to protect her younger sisters" (*id.*:2).

[3] The defense "Motion to Exclude Therapist/Patient Privileged Information" and supporting memorandum are contained in record 10 along with the *Shiffra* motion. On August 5, 2011, the trial court granted the defense motion to seal these documents (11). At the September 23, 2011 hearing on these motions, however, the court decided to "lift the seal with respect to matters regarding the defendant" (39:33). The court clarified that neither the *Shiffra* motion nor the State's response to it would be sealed (*id.*:34).

When interviewed on March 18, 2011, Tracie S-J., the mother of T.S. and wife of Johnson, indicated that she first suspected something was going on between Johnson and his stepdaughter in December 2010 (1:2). When Tracie confronted Johnson about her suspicions in January 2011, he initially denied any wrongdoing (*id.*). During January and February 2011, Tracie received several communications from T.S. alleging that Johnson had sexually abused her and that the abuse had started between the sixth and seventh grades, with the last incident occurring in November 2010 (*id.*). T.S. told her mother that Johnson did this "'anywhere between 15 and 20 times,'" but that she really didn't know the exact number (*id.*). Following this disclosure, Tracie confronted Johnson again; after receiving Tracie's assurance that she was not recording their conversation, he admitted to fondling T.S.'s breasts (*id.*). Tracie also related to an investigator that after Johnson left Arizona, he said he was sorry for what he did to their family and to T.S. (*id.*).

On May 2, 2011, Attorney Corey Chirafisi notified the parties and the court that he represented Tracie S-J. and advised that she was "willing and prepared to testify if necessary" (6:1). Chirafisi requested that any attempts to speak with his client go through his office (*id.*:2).

On August 5, 2011, Johnson filed a motion seeking in camera review of T.S.'s therapy records, advancing the following claim:

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

(10:*Shiffra*:2-3; Pet-Ap. 158-59.)

Johnson alleged that T.S. attended two therapy sessions in 2010 with clinical psychologist Kristin Keeler, who had been providing marriage counseling to Johnson and his wife since 2008 (10:*Shiffra*:3-4; Pet-Ap. 159-60). Johnson also alleged that T.S. "was involved in counseling and therapy with Dr. Garry Libster in 2010 relating to issues affecting her school performance, including Attention Deficit Disorder and difficulties at home" (10:*Shiffra*:4; Pet-Ap. 160). Johnson asserted that T.S.'s therapy records were "reasonably likely" to contain information "relevant and necessary" to his defense because neither therapist reported suspecting abuse despite having a duty to do so under Wisconsin's mandatory reporting statute, Wis. Stat. § 48.981:

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

(10:*Shiffra*:5-6; Pet-Ap. 161-62.)

A later filing made similar allegations:

> This counseling took place during the period of time in which T.S. alleges that Johnson was assaulting her. It is more than reasonable to infer that, due to the topic of counseling, T.S. was asked about her relationship with Johnson. Given the lack of any report by the counselors pursuant to the mandatory reporting statutes, it is equally reasonable to believe that T.S. described a relationship with Johnson that did not include him sexually abusing her. Such

> records would not simply prove a lack of reporting . . . they would contain evidence bearing directly on T.S.'s credibility.

(19:2.)

At a September 23, 2011 hearing, the circuit court ruled that Johnson had established a right to in camera review of T.S.'s privileged therapy records (39:8-9; Pet-Ap. 180-81). Although the circuit court ordered the State to provide the court with those records (*id.*), T.S.'s attorney notified the court that T.S. refused to consent to in camera inspection of them (20; Pet-Ap. 164-65).

Despite her refusal to consent to review of her records, T.S. authorized her attorney to make limited disclosures regarding T.S.'s treatment history. Specifically, in a letter to the court and counsel, T.S.'s attorney confirmed the accuracy of some of the assertions in the *Shiffra* motion:

> I have reviewed with T.S. the facts set forth in the defendant's *Shiffra* motion pertaining to the background for that motion. We offer no amendments or corrections to the factual assertions made . . . [T]he time frame of T.S.'s treatment history, the persons from whom she received treatment, and the purposes for treatment are accurately set forth in the defendant's *Shiffra* motion.

(34:1.)

At the November 10, 2011 hearing, the trial court explicitly adopted these limited disclosures as established facts (41:5; Pet-Ap. 187). Although the court gave the parties the opportunity to offer additional evidence relevant to the *Shiffra* issue, neither side did so (41:7-8; Pet-Ap. 189-99).

In its Decision and Order of November 29, 2011, the court concluded that Johnson "met the minimal burden required for conducting an *in camera* inspection which

included the uncontroverted assertion that T.S. has attention deficit disorder which called into question her ability to perceive reality and relate the same to the trier of fact" (36:13; Pet-Ap. 126). The trial court denied the State's motion requesting the court to issue a subpoena compelling T.S.'s providers to furnish T.S.'s records to the court for in camera review (36:41; Pet-Ap. 154). The court also denied Johnson's motion to bar T.S. from testifying at trial (*id.*). Instead, the court fashioned an alternate remedy for T.S.'s refusal to waive her privilege:

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

(36:41-42; Pet-Ap. 154-55.)

Johnson moved for reconsideration of the court's order on the ground the negative-inference instruction the court proposed to give violated *Shiffra*.[4] Finding that the motion presented nothing new, the court denied it (37; Pet-Ap. 171-72).

On interlocutory review of the trial court's Decision and Order, the appellate court affirmed the trial court's ruling that Johnson had established a constitutional right to have T.S.'s privileged therapy records disclosed for in camera review:

> We agree with the circuit court's order granting in camera inspection. Johnson set forth that T.S. was in counseling at the time that the alleged acts of abuse occurred and that the purpose of counseling was centered on interpersonal relationships within T.S.'s family, including her relationship with Johnson. T.S. agreed that Johnson

[4] The motion for reconsideration is not in the record.

> correctly set forth the time and purpose of her counseling sessions. It is reasonably likely, therefore, that the records contain relevant evidence of T.S.'s recitation as to her relationship with and the actions of Johnson.

Johnson, slip op. ¶ 14 (Pet-Ap. 106).

The appeals court reversed the trial court's ruling that T.S. would be allowed to testify with a negative inference instruction, holding that *Shiffra* mandated the suppression of her testimony and that the court was bound by *Shiffra*. *Johnson*, slip op. ¶ 17 (Pet-Ap. 107).

Although agreeing that Johnson had satisfied the necessary showing for in camera review (*Johnson*, slip op. ¶ 23; Pet-Ap. 110), Chief Judge Brown dissented from the majority's view that *Shiffra* mandates barring T.S.'s testimony. He accepted the State's argument that the circuit court had authority to order T.S.'s privileged therapy records for in camera review without her consent. *Johnson*, slip op. ¶¶ 24-25 (Pet-Ap. 110-11).

Additional facts appear below.

ARGUMENT

I. THIS COURT SHOULD OVERRULE *SHIFFRA* BECAUSE IT ERRONEOUSLY HELD THAT *PENNSYLVANIA V. RITCHIE* APPLIES TO PRIVILEGED RECORDS THE GOVERNMENT DOES NOT POSSESS, AND IT CREATED A DUE PROCESS RIGHT TO PRETRIAL DISCOVERY IN CONFLICT WITH UNITED STATES SUPREME COURT JURISPRUDENCE.

In *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), the court upheld a pretrial order

suppressing the testimony of an alleged sexual assault victim because she refused to allow an in camera inspection of her mental health treatment records. The court framed the first issue as "whether an *in camera* inspection is warranted under *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)." *Id.* at 602. The court said a defendant would be entitled to in camera review if he could "make a preliminary showing that the sought-after evidence is relevant and may be helpful to the defense or is necessary to a fair determination of guilt or innocence." *Id.* at 608. In adopting this standard, the court analogized to cases in which a defendant seeks disclosure of a government informant's identity, such as *Roviaro v. United States*, 353 U.S. 53 (1957). *Shiffra*, 175 Wis. 2d at 608. *Shiffra*'s holding is based solely on due process. *See id.* at 605 n.1.

As modified by *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, *Shiffra* has been the law in Wisconsin for nearly twenty years. During that time, the State has periodically urged this court to find that *Shiffra* was wrongly decided, largely because of its misplaced reliance on *Ritchie*, where the records at issue were in the government's possession. *See*, *e.g.*, *Green*, 253 Wis. 2d 356, ¶ 21 n.4.

For some of the same reasons proffered in the past, and for additional reasons discussed below, the State urges this court to overrule *Shiffra*'s holding that the Due Process Clause requires an in camera review of privately held privileged records that the State has never possessed.

A. *Shiffra* failed to articulate why *Ritchie*, which was staked on the government's duty under *Brady* to disclose evidence in its possession that is favorable to the defense, logically should apply to privately held records to which the government has no access.

In *Shiffra*, 175 Wis. 2d at 606, the State argued that one reason the victim's mental health records were not subject to in camera review under *Ritchie* was that they were not in the possession of the prosecution or any other state agency. *Id.* at 606. Rejecting this argument, the court of appeals declared itself bound by Wisconsin precedent which "makes *Ritchie* applicable to cases in which the information sought by the defense . . . is not in the possession of the state." *Id.* at 606-07. In support, the court cited *In Interest of K.K.C.*, 143 Wis. 2d 508, 422 N.W.2d 142 (Ct. App. 1988), and *State v. S.H.*, 159 Wis. 2d 730, 465 N.W.2d 238 (Ct. App. 1990). *See Shiffra*, 175 Wis. 2d at 607.

While *Shiffra* was technically correct in saying that *K.K.C.* did not involve records in the State's possession, it did involve government records, i.e., records of the Rock County Department of Social Services. Consequently, the records in *K.K.C.* were not privately held so that decision hardly supports *Shiffra*'s application of *Ritchie* to privately held privileged records.

As for *S.H.*, neither the appellant nor the guardian for the minor children even cited *Ritchie* in their respective briefs. *See Appendices and Briefs*, 159 Wis. (2D) 694-747, Tab 5.[5] Only the State cited *Ritchie*, taking the position it applied to records that admittedly were in the possession of a private counseling center. *S.H.*, 159 Wis. 2d at 733. Because the other parties did not dispute

[5] *Appendices and Briefs* can be found in the State Law Library.

Ritchie's relevance, the court of appeals did not question its applicability, simply accepting the State's assertion. But regardless of whether the *S.H.* court gave much thought to applying *Ritchie* in the context of privately held records, its adoption of *Ritchie* was dicta because the court found that S.H. had abandoned the *Ritchie* issue on appeal. *Id.* at 738. *See American Family Mut. Ins. Co. v. Shannon*, 120 Wis. 2d 560, 565, 356 N.W.2d 175 (1984) ("dictum is a statement not addressed to the question before the court or necessary for its decision"). Because the court's adoption of *Ritchie* was dicta, the *Shiffra* court was not bound by it. *State v. Matson*, 2003 WI App 253, ¶ 24, 268 Wis. 2d 725, 674 N.W.2d 51.

But even if the State is wrong, and *S.H.'s* application of *Ritchie* to privately held records was not dicta and did bind the *Shiffra* court, *S.H.*'s. conclusion that *Ritchie* applies to privately held counseling records does not bind this court. Given that *Shiffra* rests on the premise that there exists a constitutional due process right to pretrial discovery of privately held records and that *Ritchie* and cases interpreting it do not support this premise, this court should revisit and overrule *Shiffra*.

The Supreme Court framed the issue in *Ritchie* as "whether and to what extent a State's interest in the confidentiality of its investigative files concerning child abuse must yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence." 480 U.S. at 42-43. During pretrial discovery in his criminal prosecution for sex crimes against his minor daughter, Ritchie had served a subpoena on a protective service agency established by the State to investigate cases of suspected child mistreatment and neglect. The subpoena ordered the agency, Children and Youth Services (CYS), to turn over records relating to the charges against Ritchie, as well as earlier records compiled when CYS had investigated a separate report that his children were being abused. CYS refused to comply, claiming the records were privileged under a Pennsylvania statute which provides that all CYS records

must be kept confidential, subject to eleven specific exceptions. One exception allowed the agency to disclose reports to a '"court of competent jurisdiction pursuant to a court order."' *Id.* at 44 (citing a Pennsylvania statute). After reviewing a portion of the CYS files, the trial judge refused to order CYS to disclose the files. Ritchie was ultimately convicted on all counts.

When Ritchie's appeal reached the Pennsylvania Supreme Court, it vacated Ritchie's convictions, ruling that his rights to confrontation and compulsory process had been violated by the trial court's refusal to order CYS to disclose its files to defense counsel. 480 U.S. at 45-46. The Supreme Court granted Pennsylvania's petition for a writ of certiorari.

In examining Ritchie's claim that withholding the file violated his right to compulsory process, the Court -- after concluding that the Due Process Clause of the Fourteenth Amendment offers no lesser protection than that conferred by compulsory process -- adopted a due process analysis. 480 U.S. at 56.[6] The Court began its due process discussion by citing three cases dealing with the government's duty to disclose evidence within its possession: *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976); and *Brady v. Maryland*, 373 U.S. 83 (1963). 480 U.S. at 57.

Just as the CYS files were in the possession of a state agency, the evidence at issue in *Brady*, *Agurs* and *Bagley* was in the possession of the state (*Brady*) or the federal government (*Agurs* and *Bagley*). Unlike the situation in which a testimonial privilege belongs to a witness, the conflict between Ritchie's constitutional rights and the privileged character of the records he sought

[6] A four-member plurality summarily rejected Ritchie's confrontation claim, finding that the right to confrontation does not compel the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. 480 U.S. 39, 53 (1987).

was not a conflict between a defendant and a private party. Rather, the privilege belonged to the Commonwealth of Pennsylvania rather than a private citizen. The Court's focus on the Commonwealth as privilege-holder is clear from its references to "the State's interest in confidentiality" (480 U.S. at 59) and "the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations" (*id.* at 61).

Nothing in *Ritchie* even hints that the High Court thought its rulings would apply to privileged records neither created by nor in the possession of the government. In fact, the plurality cited approvingly the declaration in *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977), that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." 480 U.S. at 59-60. Despite this language, *Shiffra* relied on *Ritchie* in creating a due process right to pretrial discovery in a criminal case that is untethered from the government's obligation under *Brady* to disclose to the defense favorable evidence within the government's possession.

Applying a standard developed against the backdrop of the government's duty to disclose *Brady* evidence to privately held privileged records inaccessible to the government represented a quantum leap from *Ritchie* to *S.H.* and *Shiffra.* That quantum leap was ill-advised because, as numerous courts outside Wisconsin have recognized, *Ritchie*'s due process analysis does not apply to records not within the government's possession. Moreover, as will be discussed in section I.B., the underlying premise in *Shiffra* conflicts with Supreme Court decisions like *Weatherford v. Bursey*, *supra*, and *Wardius v. Oregon*, 412 U.S. 470 (1973).

Just a year after *Ritchie*, the Vermont Supreme Court in *State v. Percy*, 548 A.2d 408, 415 (Vt. 1988), declared that "[t]he pretrial discovery right set out in *Ritchie* applies solely to information in the hands of the State." Since then, a host of other courts—state and

federal—have reached the same conclusion. *See*, *e.g.*, *United States v. Hach*, 162 F.3d 937, 947 (7th Cir. 1998)[7] ("While we have our doubts that the defendant can meet his burden of showing that the information in Richardson's records is material . . . his attempt to bootstrap onto *Ritchie* suffers from a graver problem-the evidence is not and never was in the government's possession."). *See also United States v. Skorniak*, 59 F.3d 750, 755 (8th Cir. 1995); *United States v. Shrader*, 716 F.Supp.2d 464, 473 (S.D.W.V. 2010); *People v. Hammon*, 938 P.2d 986, 991-93 (Cal. 1997); *State v. Famiglietti*, 817 So.2d 901, 907 (Fla. Dist. Ct. App. 2002); *In re Subpoena to Crisis Connection, Inc.*, 949 N.E.2d 789, 799-802 (Ind. 2011); *Goldsmith v. Maryland*, 651 A.2d 866, 871 (Md. 1995).

In the words of the *Goldsmith* court,

> [T]he psychotherapist-patient privileged records at issue in the instant case were not kept by a state agency or required to be kept by a state agency. Therefore no disclosure is required under *Brady*. Thus, not only does [a Maryland statute] prohibit discovery of the privileged records requested by Goldsmith, but nothing in *Ritchie* . . . would constitutionally require the pre-trial discovery sought by Goldsmith of a private psychotherapist's records which are "shielded from all eyes," state or defense.

651 A.2d at 873.

The foregoing cases support the State's contention that *Shiffra* and its forerunner, *S.H.*, rest on the erroneous premise that the due process right to pretrial in camera review and potential disclosure of state investigative files at issue in *Ritchie* also extends to privately held privileged records that the government did not create and has never

[7] Because the Seventh Circuit is convinced that *Ritchie* applies only to evidence in the government's possession, the court in *United States v. Hach*, 162 F.3d 937, 947 n.5 (7th Cir. 1998), erroneously concluded that Wisconsin cases like *Shiffra* are based on state law rather than the federal constitution.

possessed. But if the foregoing cases do not persuade this court to overrule *Shiffra*, its conflict with Supreme Court jurisprudence – as detailed below – should convince this court that *Shiffra* was wrongly decided.

B. *Shiffra* conflicts with Supreme Court jurisprudence.

Shiffra and its progeny create a federal due process entitlement to pretrial discovery. As a result, the *Shiffra* line of cases conflicts with *Weatherford*, 429 U.S. 545, and *Wardius*, 412 U.S. 470, both of which leave no doubt that apart from evidence the prosecution is duty-bound to disclose under *Brady*, the Due Process Clause does not afford criminal defendants a right to pretrial discovery.

In *Weatherford*, the Court determined that *Brady's* prohibition on the prosecutor's concealment of evidence favorable to the accused does not mean the prosecutor must reveal pretrial the names of all witnesses who will testify unfavorably. 429 U.S. at 559. And in *Wardius*, after noting the absence of statutory provisions requiring the State to reveal the names and addresses of witnesses it planned to call to refute the defendant's alibi, the Court rejected any suggestion that "the Due Process Clause of its own force requires Oregon to adopt such provisions." 412 U.S. 475.

Consistent with *Weatherford* and *Wardius*, courts have almost uniformly held that, absent a state statute or court rule to the contrary, an accused is not entitled to take pretrial depositions of potential witnesses. *See* Romualdo P. Eclavea, Annotation, *Accused's Right to Depose Prospective Witnesses Before Trial in State Court,* 2 A.L.R.4th 704, 711-22 (1980 and June 2012 Supp.).

Just recently, the Seventh Circuit cited *Weatherford* for the proposition that the Constitution does not create an entitlement to pretrial discovery. *Young v. Holder*, 462 Fed. Appx. 626, 628 (7th Cir. 2012). Similarly, the

Maryland court in *Yearby v. State*, 997 A.2d 144, 151 n.8 (Md. 2010), invoked *Weatherford* as support for the statement that "*Brady* disclosure thus is fundamentally distinct from discovery rules, which . . . are not grounded in either the Federal or State Constitution." *Id.* at 151.

Shiffra and its progeny do not attempt to reconcile the creation of a due process right to pretrial discovery of privately held records with *Weatherford* or *Wardius*, even though this court has in other contexts cited those cases for the principle that there is no general constitutional right to pretrial discovery in a criminal case. *See State v. Ruiz*, 118 Wis. 2d 177, 196 n.4, 347 N.W.2d 352 (1984); *State v. Humphrey*, 107 Wis. 2d 107, 116 n.4, 318 N.W.2d 386 (1982). Nor is the State aware of any case outside Wisconsin that attempts to reconcile this tension.

The conflict between *Shiffra* and Supreme Court jurisprudence presents an additional reason for this court to overrule it. Not only does the Supremacy Clause command this result;[8] as this case illustrates, allowing in camera review of a victim's privileged therapy records gives an unintended advantage to defendants like Johnson, who are intimately familiar with their alleged victims and their counseling history. Johnson has knowledge of T.S.'s therapy records from Keeler because she was his marriage counselor and suggested counseling for T.S. Johnson used that knowledge to seek access to T.S.'s records and – as things now stand – to short-circuit his prosecution for assaulting T.S. In contrast to Johnson, a defendant who is charged with sexually assaulting a complete stranger will have no prior knowledge of her mental health history and will not be positioned to bring a successful *Shiffra* motion. And because such a defendant has no right to a pretrial deposition of the complainant to explore whether she has a history of therapy, he may never discover that information. At the same time, a defendant unfamiliar

[8] *See State v. Jensen*, 2011 WI App 3, ¶ 26, 331 Wis. 2d 440, 794 N.W.2d 482 (Supremacy Clause compels adherence to United States Supreme Court precedent on matters of federal law, although it means departing from state supreme court decisions).

with his victim prior to an assault will not have at his disposal the type of personal information Johnson certainly has about his stepdaughter. Thus, *Shiffra* unintentionally bestows a significant benefit on defendants charged with assaulting family members that defendants charged with assaulting strangers do not enjoy.

In light of *Shiffra*'s conflict with Supreme Court cases, this court should overrule *Shiffra.*

C. Apart from being legally flawed, *Shiffra* and cases like it overestimate the value of therapy records.

This court may be loath to overrule *Shiffra* in the belief that doing so will deprive defendants of crucial evidence. But contrary to *Shiffra*'s assumption that the quality and probative value of information contained in mental health records "may be better than anything that can be gleaned from other sources," 175 Wis. 2d at 611, communications made during mental health treatment usually have low evidentiary value. The prevalent assumption that such records have significant evidentiary value was debunked in many of the amicus briefs filed in *Jaffee v. Redmon*, 518 U.S. 1 (1996), where the Supreme Court recognized a psychotherapist-patient privilege under the Federal Rules of Evidence.

Over a dozen professional organizations filed amicus briefs in *Jaffee*. The Brief of the American Academy of Psychiatry and the Law as *Amici Curiae* in Support of Respondents, *Jaffee v. Redmond*, 518 U.S. 1 (No. 95-266), warned the High Court about the evidentiary pitfalls attending the use of statements made during therapy:

> [S]tatements made in the course of therapy--as in a case of post-trauma counseling--will often be highly misleading if taken out of context and presented (in an adversarial contest) in court. A

> whole range of possibly contradictory statements can be expected in therapy, perhaps especially in therapy that is aimed at helping a patient work through a wrenching emotional experience that is likely to provoke a powerful sense of guilt, self-doubt, or other strong emotions. Yet such statements present obvious grave risks of unreliability and unfair prejudice when exploited by lawyers in the heat of the battle for legal victory.
>
> To counteract such risks, the therapist might have to offer wide-ranging testimony to try to provide a proper context for assessing therapeutic statements. But such efforts are likely to be fruitless, distracting, and grossly intrusive beyond any possible relevance. The therapist might not only have to explain the dynamics of (her method of) psychotherapy, but also present a full picture of the emotional and psychological context in which particular statements were made. The risks of disclosures not even relevant to the proceedings would be substantial. Thus, breaching a psychotherapist-patient privilege will often make little contribution to, and might even undermine, the judicial system's goal of efficiently and fairly finding facts.

Id. at 22.

The Menninger Foundation's amicus brief expressed similar sentiments and is representative of other submissions in support of the *Jaffee* respondents. *See* Brief of the Menninger Foundation as Amicus Curiae Supporting Respondents at 27, *Jaffee v. Redmond*.

In addition to detracting from the view that criminal defendants might have a due process right to in camera review of therapy records, the generally low evidentiary value of such records also sets them apart from the CYS records in *Ritchie*, which were files from two investigations into the alleged abuse of Ritchie's children. This low evidentiary value provides yet another reason for this court to overrule *Shiffra*.

II. IF THIS COURT ADHERES TO *SHIFFRA*'S INTERPRETATION OF *RITCHIE* OR REPLACES IT WITH A SCHEME STILL INVOLVING IN CAMERA REVIEW OF PRIVILEGED RECORDS, THEN THIS COURT SHOULD HOLD THAT THE PRIVILEGE MUST SOMETIMES YIELD TO AN ACCUSED'S CONSTITUTIONAL RIGHTS.

If this court adheres to *Shiffra*'s holding that a defendant has a due process right to pretrial in camera review of privileged records, or replaces *Shiffra* with a scheme that still requires occasional in camera review, then it is imperative to overrule *Shiffra*'s holding that a witness can be barred from testifying as a sanction for refusing to release her records.[9] As the State will demonstrate below, the remedy of witness preclusion was flawed from its inception because it ignores the public's substantial interest in the fair and effective administration of criminal justice. Moreover, the negative effects of witness preclusion have been magnified by *Crawford v. Washington*, 541 U.S. 36 (2004), which makes it more difficult to prosecute sexual assault and other crimes absent the victim's testimony than it was when *Shiffra* was decided.

[9] In *State v. Speese*, 199 Wis. 2d 597, 613, 545 N.W.2d 510 (1996), this court indicated that the issue "whether the sanction of witness preclusion represents an appropriate sanction when the holder of the privilege refuses to waive the privilege and allow an *in camera* inspection" remains unresolved. Presumably, the court meant that *it* had not resolved the question; the court of appeals in *Speese* assumed witness preclusion is appropriate, if not mandated by, *Shiffra*. *See State v. Speese*, 191 Wis. 2d 205, 225, 528 N.W.2d 63 (Ct. App. 1995).

A. Standard of review.

Whether Wis. Stat. § 905.04 must yield to a defendant's constitutional right to in camera review, such that a circuit court may order privileged therapy records to be released for in camera inspection without the privilege-holder's consent, is a question of law for this court's independent review. *See Green*, 253 Wis. 2d 356, ¶ 20.

B. Suppression of testimony as a remedy for a witness's refusal to waive her privilege under § 905.04 ignores the substantial public interest in the fair and effective prosecution of crime.

Shiffra cited no authority for its conclusion that witness preclusion is the only feasible remedy for a witness's refusal to consent to in camera review of her privileged records. 175 Wis. 2d at 612. Nevertheless, other states admittedly have adopted this remedy as the sanction for a witness's refusal to waive a statutory privilege, rather than ordering production of the witness's records, where a criminal defendant has established a constitutional right to their production and potential discovery. *See* Clifford A. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 2007 Or. L. Rev. 1, 18-19 (2007). Fishman cites Connecticut, Michigan, Nebraska, New Mexico and South Dakota as examples. *Id.*

Shiffra and the out-of-state cases endorsing witness preclusion all suffer from the same defect, however. They fail to factor in the very important stake the public has in the effective administration of the criminal justice system, acting as if the only interests worthy of consideration are those of the defendant and the witness.

For example, in *State v. Trammell*, 435 N.W.2d 197, 201 (Neb. 1989), the court in finding inadmissible

the testimony of a witness who refused to waive the physician-patient privilege said this was "the only method by which both the right of the witness and the right of the defendant may be accommodated." Like the *Shiffra* court, the Nebraska court failed to mention the public's interest in convicting criminal offenders and preventing them from committing future crimes against future victims.

Similarly, when the Michigan court in *People v. Stanaway*, 521 N.W.2d 557, 577 (Mich. 1994), said "suppression of the complainant's testimony is the appropriate sanction," it did not acknowledge – let alone discuss – the deleterious effect suppression would have on the citizenry's interest in effective prosecution.

Nor did the New Mexico court in *State v. Gonzales*, 912 P.2d 297, 303 (N.M. App. 1996), even advert to the public's interest when it cited *Shiffra* as its sole authority for suppressing the testimony of a victim who refused to produce her medical and psychotherapy records for in camera inspection.

Unlike the *Shiffra* court, the Kentucky court realized that the public interest must be considered in fashioning an appropriate remedy:

> If, as here, the witness is the victim of the crime without whose testimony the prosecution could not prove its case, must the case be dismissed if the victim refuses to waive the privilege? If so, what of "the fair administration of justice" and the aim "that guilt shall not escape"? *Nixon,* 418 U.S. at 708–09[.] . . . Our conclusion . . . that a defendant's constitutional right to compulsory process prevails over a witness's statutory claim of privilege obviates the need to further complicate the procedure by placing the fate of the prosecution in the hands of a witness.

Commonwealth v. Barroso, 122 S.W.3d 554, 565 (Ky. 2003).

Consistent with the *Barroso* court's sentiments, Professor Fishman has warned that there is "a serious problem" with suppressing a witness's testimony if the witness refuses to waive a privilege: "[I]n essence [it] gives the witness the legal authority to preclude the prosecution of a dangerous predator." 2007 Or. L. Rev. 1, 24.

A review of reported Wisconsin cases reveals that a defendant's attempt to obtain privileged treatment records almost invariably arises in the context of a sexual assault prosecution where the victim's records are the subject of the desired disclosure. *See*, *e.g.*, *Green*, 253 Wis. 2d 356; *State v. Rizzo*, 2002 WI 20, 250 Wis. 2d 407, 640 N.W.2d 93; *State v. Solberg*, 211 Wis. 2d 372, 564 N.W.2d 775 (1997); *State v. Robertson*, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 105; *State v. Walther*, 2001 WI App 23, 240 Wis. 2d 619, 623 N.W.2d 205; *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996); *State v. Munoz*, 200 Wis. 2d 391, 546 N.W.2d 570 (Ct. App. 1996); and *Shiffra*, 175 Wis. 2d 600. The only exception to this pattern that comes to mind is *State v. Richard A.P.*, 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998). While *A.P.* was also a sexual assault prosecution, it involved the defendant's successful attempt to obtain in camera review and partial disclosure of mental health records of the five-year-old victim's mother.

That these cases most often involve a sexual assault defendant's attempt to secure his accuser's mental health records should convince this court that adhering to *Shiffra*'s suppression remedy poses a significant danger to the public. Allowing a sexual assault victim to effectively determine whether the prosecution of her assailant can proceed runs the risk that some sexual offenders will escape conviction and be free to prey on other victims. Such a result is certainly inimical to the public's interest, but in particular to future victims of the defendant who remains at liberty because the victim he chose to assault decided not to waive her privilege.

In determining whether victims should continue to wield veto power over criminal prosecutions, this court cannot ignore those instances in which a sexual assault victim's refusal to waive her privilege is influenced, if not dictated, by the defendant. A victim of domestic violence who is sexually assaulted by her live-in boyfriend is just one example. As this court is undoubtedly aware, victims of domestic violence are often reluctant to press charges or testify against their attackers. This could be because the attacker is the father of the victim's children, provides financial support to them, or has threatened retaliation if the victim continues her efforts to have him prosecuted. Regardless of the victim's motivation, however, courts should not be unwittingly complicit in a defendant's efforts to stymie the prosecution by giving the victim an easy way out, i.e., by letting her say no to an in camera inspection of her records. After all, the inability to prosecute a domestic-violence sexual abuser will often result in the perpetrator's continued presence in the household where the victim resides and his continued role in her life. Certainly this is not a situation this court wants to foster, but it will by continuing to sanction witness preclusion in response to a victim's refusal to waive her § 905.04 privilege.

While the charges here do not arise in the domestic violence context, T.S. undoubtedly is experiencing some of the same pressures faced by victims of domestic violence. Because the charged crime involves her stepfather, seventeen-year-old T.S. must realize that her testimony could tear apart her family, particularly the marital relationship between Johnson and her mother. As the trial court recognized, being barred from testifying may be appealing to T.S. (36:29; Pet-Ap. 142).

If this court embraces *Shiffra*'s remedy of witness preclusion, T.S.'s decision against waiving her privilege will come at the expense of the criminal justice system.

Assuming the allegations against Johnson are true,[10] he will escape prosecution for victimizing a child over a three-year span. And because he remains married to T.S.'s mother, he presumably will reside in the same home as T.S. and her younger sisters, whose protection T.S. cited as a reason for reporting the abuse to her mother (*see* 1:2).

Apart from the fact *Shiffra* and cases from other state courts endorsing suppression of a witness's testimony are fatally flawed because they ignore the public's stake in effective prosecution of crimes like sexual assault, the sea change in confrontation law triggered by *Crawford* should also cause this court to jettison *Shiffra*'s holding.

Under *Crawford* and its progeny, some of a victim's statements that were formerly admissible at trial even if the victim was unavailable to testify are now inadmissible. For example, when *Ohio v. Roberts*, 448 U.S. 56 (1980), governed confrontation analysis, this court in *State v. Bauer*, 109 Wis. 2d 204, 222, 325 N.W.2d 857 (1982), held that admission of the deceased victim's preliminary hearing testimony satisfied the Confrontation Clause. In *State v. Stuart*, 2005 WI 47, ¶ 3, 279 Wis. 2d 659, 695 N.W.2d 259, however, this court recognized that post-*Crawford*, admission of a non-testifying declarant's preliminary hearing testimony would violate the defendant's right to confrontation.

Crawford therefore makes it less likely now than it was at the time of *Shiffra* (1993) or *Green* (2002) that the State will be able to continue a prosecution once the victim is barred from testifying. This court must face that reality in deciding whether to retain that portion of *Shiffra* requiring suppression of a victim's testimony as a sanction for her refusal to waive her therapist-patient privilege.

[10] The State recognizes that at this juncture, Johnson enjoys the presumption of innocence.

Practical support for the State's view that this court should abandon *Shiffra*'s endorsement of witness preclusion comes from the trial court's decision. The trial court's conclusion that "barring the testimony of T.S. is an inappropriate sanction for her assertion of her statutory communication privilege" (36:29; Pet-Ap. 142) caused the court to fashion a remedy that *Shiffra* eschewed and that both parties in the court of appeals agreed was erroneous. Specifically, the trial court ruled that T.S. would be permitted to testify despite her refusal to consent to review of her records, and that a special jury instruction would be given. The instruction the court envisioned would inform the jury of the order for in camera review, T.S.'s statutory privilege to prevent disclosure of her records and her decision to do so; the instruction would then tell the jury it could infer that the evidence in T.S.'s records would have been helpful to the defense (36:37; Pet-Ap. 150).

Although legally erroneous, the trial court's determination to circumvent *Shiffra*'s witness-preclusion remedy illustrates the court's recognition that there is something wrong about short-circuiting the prosecution of an alleged child molester by suppressing the child-victim's testimony when she refuses to waive her privilege. Like the trial court (*see* 36:29-31; Pet-Ap. 142-44), this court should be bothered by the prospect that a defendant who has admitted inappropriate sexual contact with a minor victim can escape prosecution because she has decided not to consent to in camera review of her records.

For the above reasons, this court should hold that witness preclusion is not the appropriate remedy when a victim refuses to consent to in camera review of her privileged records, following a determination that the accused has a constitutional entitlement to such review. Rather, as explained below, in those circumstances the court should use Wis. Stat. § 146.82(2)(a)4. to compel production of the records.

C. Wisconsin Stat. § 146.82(2)(a)4. offers a mechanism for ordering the production of privileged records when the privilege-holder does not consent to their release.

After the trial court ruled that Johnson had made the showing of materiality required by *Shiffra*/*Green* but T.S. refused to waive her privilege, the State moved to subpoena T.S.'s therapy records under § 146.82(2)(a)4., which provides that confidential medical records shall be released without informed consent . . . "[u]nder a lawful order of a court of record" (29). The State argued that the circuit court could "lawfully order" the release of T.S.'s records because the constitutional rights at stake if Johnson established a right to in camera review trump T.S.'s statutory privilege (*id.*).

Although the State renewed this argument in the court of appeals, the majority implicitly[11] rejected it, holding that "***Shiffra*** mandates the suppression of T.S.'s testimony." *Johnson*, slip op. ¶ 17; Pet-Ap. 107. Dissenting from this view, Chief Judge Brown agreed with the State that § 146.82(2)(a)4. provides a mechanism for obtaining T.S.'s records without her consent, assuming Johnson has established a constitutional entitlement to them:

> I am convinced that, if an alleged victim refuses to release medical or counseling records to the court for in camera inspection, the court may compel release anyway, pursuant to WIS. STAT. § 146.82(2)(a)4. No case binds me to an opposite conclusion–not ***Shiffra***, nor ***Green*** nor ***Speese*** nor any other case cited by Johnson.
>
> WISCONSIN STAT. § 146.82(1) establishes the state of Wisconsin's policy that medical records are confidential and that records may not be released

[11] The majority opinion did not cite § 146.82(2)(a)4.

> without informed consent. However, § 146.82(2) lists specific instances where records may be released without consent. One of those instances is § 146.82(2)(a)4., which explicitly allows release without consent "[u]nder a lawful order of a court of record." I acknowledge that, generally, this statute cannot trump WIS. STAT. § 905.04, known in Wisconsin as the "physician-patient privilege" (even though it covers other kinds of medical providers). But I agree with the State that, when the defendant has established a *constitutional right* to an in camera review, the constitution trumps the privilege and the court may lawfully order release of the records for that limited purpose.

Johnson, slip op. ¶¶ 24-25; Pet-Ap. 110-11 (footnote omitted).

The dissent is correct. While it is true that § 146.82(2)(a)4. does not itself prevail over § 905.04, if this court determines that Johnson and other defendants sometimes may have a constitutional right to in camera review of records covered by the privilege statute, then a circuit court order compelling production of the records becomes "a lawful order of a court of record" under that statute. In other words, a constitutional exception becomes engrafted onto § 905.04.

Certainly there is some authority for the proposition that § 905.04 must on rare occasions yield to other important public interests. For example, in *Schuster v. Altenberg*, 144 Wis. 2d 223, 249-50, 424 N.W.2d 159 (1988), this court held that § 905.04 "must yield" if a patient poses an imminent threat to himself or others. As the court of appeals observed in *State v. Agacki*, 226 Wis. 2d 349, 359, 595 N.W.2d 31 (Ct. App. 1999), the "dangerous patient exception" adopted in *Schuster* is not among the enumerated exceptions to the privilege this court promulgated[12] in § 905.04, yet it trumps the patient's privilege to confidentiality.

[12] As the *Agacki* court clarified, the rules of evidence – including § 905.04 – were promulgated by this court and not the

More recently, three members of this court in *Johnson v. Rogers Memorial Hospital, Inc.*, 2005 WI 114, 283 Wis. 2d 384, 700 N.W.2d 27, declared that "public policy requires creating an exception to therapist-patient confidentiality and privilege where negligent therapy is alleged to have caused accusations against parents for sexually or physically abusing their child." *Id.* ¶ 71. That segment of the court decided that even if the privilege-holder did not consent to an in camera review of her records, the civil plaintiff could compel their production without her consent. *Id.* ¶ 75.

That Wis. Stat. § 905.04 may give way to public policy exceptions adopted by this court supports the State's argument that it may also give way to a defendant's constitutional rights and the public's interest in the effective prosecution of crime. In those situations, § 146.82(2)(a)4. authorizes a court to obtain privileged records without the patient's consent.

As a final matter, the State notes that in one important respect, a witness who is compelled to produce her records receives more protection than a witness who is forced to choose between voluntary disclosure and suppression of her testimony. As the *Barosso* court observed, "a witness whose privileged information is compelled by court order has not disclosed it voluntarily. Thus, the privilege remains intact for purposes other than the criminal proceeding in which it was compelled." *Barosso*, 122 S.W.3d at 565.

Under Wis. Stat. § 905.11, T.S. would waive her therapist-patient privilege if she decided to surrender her records for in camera review because that decision would be regarded as voluntary. In contrast, a court order requiring the production of her records without her consent would not constitute a waiver, and T.S.'s privilege

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legislature. *State v. Agacki*, 226 Wis. 2d 349, 359 n.8, 595 N.W.2d 31 (Ct. App. 1999)

would remain intact for purposes outside this criminal prosecution.

In summary, if this court adheres to *Shiffra* or replaces it with a scheme that also includes in camera review of privileged records, it should hold that in those rare instances where in camera review is constitutionally mandated, the circuit court can compel production of the records under § 146.82(2)(a)4. although they are otherwise privileged under § 905.04.

III. JOHNSON DID NOT MAKE THE PRELIMINARY SHOWING OF MATERIALITY REQUIRED BY *GREEN* BECAUSE HE HAS NOT DEMONSTRATED THAT HE NEEDS T.S.'S RECORDS TO ESTABLISH HER FAILURE TO DISCLOSE JOHNSON'S ABUSE TO HER THERAPISTS.

A. *Green*'s modification of the *Shiffra* standard.

In *Green*, 253 Wis. 2d 356, this court rejected language in *Shiffra* allowing in camera review whenever evidence is "'relevant and *may be helpful to the defense*.'" *Id.* ¶ 25. This court clarified that "a defendant must show a 'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence." *Id.* ¶ 32. It explained that "[a] motion for seeking discovery for such privileged documents should be the last step in a defendant's pretrial discovery" and that "a defendant must set forth a fact-specific evidentiary showing, describing as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense." *Id.* ¶¶ 33, 35. A request for in camera review must be based on more than "mere speculation or conjecture as to what information is in the records" or a "mere contention that the victim has been involved in counseling related to prior sexual assaults or the current

sexual assault." *Id.* ¶ 33. The evidence sought cannot be merely cumulative to evidence the defendant already has available. *Id.* This court summarized the heightened standard:

> [T]he preliminary showing for an in camera review requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant. We conclude that the information will be "necessary to a determination of guilt or innocence" if it "tends to create a reasonable doubt that might not otherwise exist." . . . This test essentially requires the court to look at the existing evidence in light of the request and determine . . . whether the records will likely contain evidence that is independently probative to the defense.

Id. ¶ 34 (citation omitted).

B. Standard of review.

Whether a defendant has established a constitutional right to in camera review of privileged therapy records by making a preliminary showing of materiality is a question of law. *Green,* 253 Wis. 2d 356, ¶ 19. The trial court's findings of fact are reviewed under the clearly erroneous standard. *Id.* ¶ 20.

C. Johnson's theory of materiality.

Before determining if the trial court erred in ruling that Johnson was entitled to in camera review of T.S.'s records, it is necessary to review Johnson's asserted reasons for seeking access to this material.

Contrary to the trial court's statements, the crux of Johnson's *Shiffra* motion was NOT that he needed T.S.'s records "to determine [her] ability to recall and accurately

relate historical events based in part on a condition of Attention Deficit Disorder" (*see* 36:32; Pet-Ap.145). Rather, as Johnson made clear in the court of appeals, he never alleged and was not claiming that T.S. suffered from ADD and therefore had an impaired ability to perceive or recall events. Brief of Respondent in *State v. Johnson*, No. 2011AP2864-CRAC, at 13 n.2.

This is Johnson's theory for why he needs T.S.'s records: 1) T.S. attended therapy sessions during the time frame in which she claims Johnson sexually assaulted her; 2) one purpose of therapy was to explore intrafamilial relationships, including T.S.'s relationship with Johnson; 3) despite being mandatory reporters, neither therapist reported sexual abuse; 4) this means T.S. did not disclose and may have denied any sexual contact with Johnson. *See* 10:*Shiffra*:2-3; Pet-Ap. 158-59.

In examining whether Johnson satisfied the *Shiffra/Green* showing, this court should limit its consideration to the theory Johnson did advance in his pleadings and in the court of appeals and not to the theory the trial court erroneously believed he was advancing.[13]

D. The lower courts erred in finding that Johnson had satisfied *Green*'s heightened standard.

Despite citing *Green*, neither of the courts below followed its directives in assessing whether Johnson had made the preliminary showing of materiality entitling him to in camera review of T.S.'s records.

[13] The circuit court's unilateral emphasis on T.S.'s alleged ADD is troubling because ADD is not associated with an inability to accurately recall or relate events. *See* Diagnostic and Statistical Manual of Mental Disorders-Text Revision 85-93 (4th ed. 2000) (listing ADD symptoms) (Pet-Ap. 193-202).

Green requires the trial court to "look at the existing evidence in light of the request [for records]" (253 Wis. 2d 356, ¶ 34) and cautions that a motion seeking discovery of privileged records "should be the *last* step in a defendant's pretrial discovery" (*id.* ¶ 35; emphasis added). The trial court ignored this directive, considering only the evidence summarized in the criminal complaint and in the parties' briefs (*see* 36:31, 39; Pet-Ap. 145, 152), including Johnson's admission in Arizona and Tracie S.-J.'s recounting of his admissions to her (36:39; Pet-Ap. 152). Significantly, the trial court failed to examine the audio and visual recording of T.S.'s forensic interview with the Child Advocacy Center, despite taking judicial notice that such a recording would have been made and provided to the defense (36:39; Pet-Ap. 152). Nor is there any indication that the court examined any other discovery the State provided to the defense, such as police reports and witness interviews. Ironically, the court in its written decision lamented the lack of evidence presented to it for purposes of deciding the *Shiffra* motion:

> [N]ot one scintilla of live testimony or exhibit was placed before this court by either party to this action . . . and this Court is left with consideration of "factual" representations found in the pleadings, briefings and the supplemental materials of the non-party T.S.

(36:5; Pet-Ap. 118.)

The court failed to recognize that *Green* requires it to look at all the evidence in existence when the court rules on the *Shiffra* motion; without knowing what evidence had been made available to Johnson as part of discovery, the court could not make an informed decision about whether T.S.'s therapy records were reasonably likely to contain evidence that was necessary to the determination of guilt or innocence. And in lamenting that neither party had provided live testimony or exhibits, the court seemingly suggested that the State has some burden to produce such evidence when in fact the burden

falls squarely on the defendant seeking review of privileged records.

The requirement that the court examine the other evidence available to the defendant is not the only directive from *Green* that the trial court ignored. Johnson also had to show how the information he sought "supports his . . . particular defense" and had to "undertake a reasonable investigation into [T.S.'s] background" through other means before seeking her records. 253 Wis. 2d 356, ¶ 33. The trial court effectively absolved Johnson from either requirement.

Johnson has never identified what his defense to the charges might be, other than to lodge a general denial of guilt. For example, Johnson has not asserted that T.S. had some motive for falsely accusing him of sexually assaulting her and that her therapy records might contain evidence bearing on that motive. Johnson's failure to identify a nexus between his expected defense and T.S.'s records distinguishes this case from *Shiffra*, where the defense was consent and Shiffra's theory was that Pamela's extensive psychiatric history may have caused her to perceive consensual sex as nonconsensual. *See Shiffra*, 175 Wis. 2d at 602-12.

Nor did the trial court hold Johnson to the requirement that he first undertake a reasonable investigation into T.S.'s background before seeking her records. Given that Johnson is married to T.S.'s mother and the three of them presumably resided in the same household during 2010, the year T.S. was in counseling, Johnson is well-positioned to conduct such an investigation. After all, Johnson and Tracie discussed T.S. during their marriage counseling sessions with Kristin Keeler; those discussions caused her to recommend that T.S. "become involved in the counseling to discuss the familial relationships" (10:*Shiffra*: 3-4; Pet-Ap. 159-60). Johnson is privy to the types of behavioral problems exhibited by T.S. or related to him by Tracie and others that prompted Keeler to recommend T.S.'s

involvement in family counseling. Johnson, who remains married to Tracie, may be able to obtain information from her that makes it unnecessary for him to invade T.S.'s privacy by obtaining her records. Counsel for Tracie has advised the parties that attempts to interview his client should go through him (6:2), but Johnson has never asserted that he made any such request. It is unknown whether Johnson may be able to elicit from his wife the fact T.S. acknowledged that she never told her therapists Johnson was sexually assaulting her because she didn't want to hurt Tracie or didn't want the family to be torn apart. While the State admittedly is speculating that such admissions might exist, Johnson has not shown that he made any efforts to discover whether they do; he has not "reasonably investigate[d] information related to the victim" before setting forth his offer of proof. *Green*, 253 Wis. 2d 356, ¶ 35.

The trial court was not alone in failing to adhere to *Green*'s commands. The court of appeals paid lip service to *Green*'s standard but never examined other evidence available to Johnson or discussed any efforts Johnson made to investigate T.S.'s background before filing his *Shiffra* motion. The appeals court simply summarized Johnson's theory of materiality and then made the conclusory statement that "[i]t is reasonably likely . . . that the records contain relevant evidence of T.S.'s recitation as to her relationship with and the actions of Johnson." *Johnson*, slip op. ¶ 14; Pet-Ap. 106.

Both lower courts ignored the fact that Johnson almost certainly does not need T.S.'s records to prove that T.S. did not tell either Keeler or Libster that Johnson was sexually abusing her even though T.S.'s 2010 therapy sessions occurred during a portion of the three-and-one-half years during which Johnson is alleged to have assaulted T.S. and even though one reason she saw Keeler was to "discuss the familial relationships" (10:*Shiffra*:4; Pet-Ap. 160). T.S. through counsel has admitted attending the therapy sessions alleged in the *Shiffra* motion and the reasons for seeking counseling (34:1). Assuming T.S.

testifies at trial, Johnson can elicit this information from her without accessing her records.

Johnson can also establish through the testimony of Racine County investigators that the first report they received about Johnson's alleged abuse came from Arizona in 2011 and that they had not received such a report from Keeler or Libster. It is also likely that T.S. would testify that the first time she disclosed the abuse was to her mother in 2011. Such testimony would be a tacit admission that she never told Keeler or Libster about it during therapy. Additionally, Johnson could have the trial court instruct the jury that under Wis. Stat. § 48.981(2), Keeler and Libster both have a duty to report suspected abuse.

Given the availability of the testimony and jury instruction discussed above, Johnson has not shown that he needs T.S.'s records to prove that she did not disclose any abuse during therapy sessions conducted during a portion of the charging period. Support for this contention comes from *People v. Higgins*, 784 N.Y.S.2d 232 (N.Y. App. Div. 2004).

Higgins sought to introduce records maintained by social workers regarding the victim's counseling in order to show that she failed to report the abuse during numerous counseling sessions. 784 N.Y.S.2d at 234. After reviewing the records and examining one of the social workers in camera, the trial court permitted the victim's therapists to testify that they treated the victim, her mother and Higgins. The victim also testified that she revealed the abuse only to a few friends. *Id.* In his summation, Higgins' counsel noted that the counselors did not report any crimes perpetrated against the victim, and the trial court instructed the jury that both social workers "would have a professional obligation to report any instances of suspected child abuse or maltreatment revealed during the course of the victim's treatment." *Id.* The appellate court found that the trial court's refusal to permit the social workers to testify further was not

erroneous and did not prevent Higgins from confronting his accuser. *Id.*

Although Higgins received in camera review of his victim's counseling records, here in camera review is unnecessary to give Johnson what Higgins enjoyed. Johnson already has enough evidence to establish that T.S. did not tell either therapist that Johnson was sexually assaulting her; he does not need her therapy records to confirm this. And if Johnson wants, the trial court can instruct his jury that Keeler and Libster would have had a duty to report Johnson's alleged abuse of T.S. if the conditions in § 48.981(2) existed.

While the State's primary argument in this section is that Johnson did not need T.S.'s records to support his theory, the State is not conceding that T.S.'s apparent failure to disclose Johnson's abuse to either therapist is exculpatory. Rather, as the Michigan court in *Stanaway*, at 576 n.41, commented, "Silence in this circumstance would not prove that the offense did not occur." Similar to our situation, Stanaway's attorney asserted that the complainant's counseling records would be exculpatory "if they revealed that the complainant had opportunities to confide regarding the alleged sexual incidents but was silent." *Id.* The court summarily rejected "this asserted need for negative evidence." *Id.*

Insofar as Johnson is asserting that T.S.'s records not only show a failure to disclose but may actually contain statements denying abuse or describing a relationship inconsistent with abuse, Johnson has established no more than a mere possibility that the records contain this type of evidence. Particularly with respect to Dr. Libster, there is no reason he would have asked T.S. if Johnson was sexually assaulting her. The impetus for T.S.'s therapy sessions with Libster was "issues affecting her school performance, including Attention Deficit Disorder and difficulties at home." 10:*Shiffra*:4; Pet-Ap. 160. The final session was held July 27, 2010 (*id.*), five months before Tracie suspected

something was going on between Johnson and T.S. (1:2), and six months before T.S. disclosed the abuse to her mother in an e-mail (*id.*). Absent evidence that it would have been Libster's practice to explicitly ask a patient like T.S. whether a family member was sexually assaulting her, it is speculative to assert that T.S. denied to Libster that Johnson was abusing her. Given that Tracie'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.

As for T.S.'s two counseling sessions with Keeler,[14] she was first and foremost the marriage counselor for Johnson and Tracie (10:*Shiffra*:3-4; Pet-Ap. 159-60). Based on the *Shiffra* motion, it appears that including T.S. in two of Keeler's sessions was an adjunct to exploring the relationship problems between Johnson and Tracie. Under these circumstances, it is doubtful Keeler asked T.S. whether her stepfather was sexually abusing her. More likely, Keeler's focus was on how T.S. got along with Johnson generally, whether T.S. resented him for taking the place of her father, whether he and her mother agreed about house rules and discipline, etc. Certainly Johnson can ask Tracie – who has expressed her continued willingness to testify (6:1) – why Keeler thought it would be beneficial to include T.S. in some counseling sessions. Right now there is no indication Johnson has made any effort to ask her.

The foregoing discussion establishes that Johnson did not satisfy *Green*'s preliminary showing of materiality and that neither the trial court nor the court of appeals required him to comply with the directives laid down in *Green*. Therefore, even if this court rejects the State's first two arguments, it could reverse the lower courts on the narrow ground that Johnson did not establish his entitlement to in camera review under *Green*. While that course of action might be tempting, the State asks the

[14] The *Shiffra* motion does not specify which of the 2010 sessions involved only T.S.; the latest possible session was September 29, 2010 (10:*Shiffra*:3-4; Pet-Ap. 159-60).

court to tackle the broader and admittedly more complicated issues of whether *Shiffra* was wrongly decided and whether witness preclusion is a proper sanction for a victim's refusal to waive her privilege under § 905.04.

CONCLUSION

This court should overrule *Shiffra*'s holding that an accused sometimes has a due process right to in camera review of privately held privileged records. Alternatively, this court should hold that suppression of testimony is not an appropriate remedy for a witness's refusal to waive her privilege under § 905.04; rather, circuit courts can require production of privileged records for in camera review without the privilege-holder's consent. Lastly, this court should reverse the lower courts' determination that Johnson made the preliminary showing of materiality established in *Green*.

Dated this 28th day of December, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,936 words.

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I hereby certify that:

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

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Dated this 28th day of December, 2012.

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