STATE OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent-
Petitioner,

v. Appeal No. 2011AP2864-CRAC

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

NON-PARTY BRIEF OF THE WISCONSIN COALITION AGAINST SEXUAL ASSAULT ("WCASA")

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* The Wisconsin Coalition Against Sexual Assault ("WCASA") is a non-profit membership agency comprised of organizations and individuals—including forty-seven sexual assault service providers—working to end sexual violence in Wisconsin. See WCASA's Motion for Leave to File a Non-Party Brief ¶ 1 n.2 for a list of WCASA member agencies. At the request of the Director of State Courts, Godfrey & Kahn, S.C. formerly represented the Racine County Circuit Court in its response to the petition for a writ of prohibition sought by the State of Wisconsin seeking to stay the circuit court proceedings while an interlocutory appeal proceeded. *See State of Wisconsin ex rel. State of Wisconsin v. Racine County Circuit Court and the Honorable Eugene Gasiorkiewicz*, No. 12-AP-659-W. The court of appeals denied the State's petition, which was linked to a procedural issue, and that matter is no longer pending. As affirmatively disclosed in the motion to file a nonparty brief, neither the Director of State Courts nor the Racine County Circuit Court has any objection to the representation of WCASA by Godfrey & Kahn, S.C., for purposes of this appeal. Likewise, WCASA has been fully informed of that prior representation and has no objection.

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INTRODUCTION

This appeal gives the Court an opportunity to right a two-decade-old wrong. *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), although decided in the midst of reform for sexual assault victims, fails to heed their voices. Instead, it drives victims to an impossible choice between protecting their intimate thoughts and seeing that their assailant is prosecuted. There is no constitutional justification for putting victims in this untenable position.

Three interested parties—the defendant, the victim, and the State—have presented seemingly conflicting interests. The defendant has a right to due process; the victim has a right to privacy and confidentiality; and the State has an interest in the prosecution of crime. Each party is motivated to protect its own interest, yet none strikes an appropriate balance among the three.

Overturning *Shiffra* will strike the proper balance: a system that fairly adjudicates guilt while preserving victims' rights. The Wisconsin Coalition Against Sexual Assault ("WCASA") agrees with the State that *Shiffra* must be rejected because its constitutional underpinnings are flawed: there is no due process right to pre-trial discovery from non-government sources. If this Court overturns *Shiffra* in its entirety, all objectives will be achieved without any dilution of defendants' rights. WCASA also agrees with T.S. that her

authority over disclosure must remain inviolate. As such, if the Court—despite clear law and policy—finds a due process right to pre-trial discovery of privileged therapy records, the victim must retain the final say over the disposition of those records.

ARGUMENT

I. *SHIFFRA* IMPROPERLY REWRITES AN EVIDENTIARY PRIVILEGE THAT THE LEGISLATURE HAD THE CONSTITUTIONAL AUTHORITY TO ESTABLISH.

Shiffra rewrites Wisconsin's privilege statute without constitutional justification. The privilege codified at Wis. Stat. § 905.04 (2) gives a patient the "privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition . . . ." The statute lists eleven exceptions to the privilege, including homicide trials (if "the disclosure relates directly to the facts or immediate circumstances of the homicide") and the patient's reliance on the condition as an element of a claim or defense. Wis. Stat. § 905.04(4)(c), (d) (2011-12). None of the eleven exceptions apply here.

In *Shiffra*, however, the Court of Appeals carved out a new exception, one that is both expansive and amorphous. *Shiffra*, 175 Wis. 2d at 608 (allowing *in camera* review of privileged treatment records based on showing that evidence "is relevant and may be helpful to the defense or is necessary to

a fair determination of guilt or innocence"). As modified by this Court in *State v. Green*, "the 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." 2002 WI 68, ¶ 34, 253 Wis. 2d 356, 646 N.W.2d 298. Although the legislature made an exception for only one category of criminal *trial*—homicide—*Shiffra* and *Green* broaden the exceptions to encompass *pre*-trial discovery for virtually any criminal prosecution. Further, the standard "is not intended . . . to be unduly high," and circuit courts have been instructed—"in cases where it is a close call"—to "generally provide an in camera review." *Green*, 253 Wis. 2d 356, ¶ 35.

There is no constitutional basis for rewriting the therapist-patient privilege as conceived by the legislature. The enforcement of evidentiary privilege is consistent with a defendant's due process rights. "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988); *see also United States v. Scheffer*, 523 U.S. 303, 308 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions."). "[S]tate and

federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308. The therapist-patient privilege is not arbitrary or disproportionate. The privilege serves a vital interest—protecting patients' privacy interests—by taking a narrow category of communications out of the evidentiary mix in trials for crimes other than homicide. As such, enforcement of the privilege does not violate a defendant's constitutional rights.

Other jurisdictions provide for an absolute privilege without violating defendants' rights. *Commonwealth v. Kyle*, 533 A.2d 120, 130 (Pa. Super. Ct. 1987) (upholding absolute psychotherapist-patient privilege and explaining "the privilege does not unfairly place the defense in a disadvantageous position; like the defense, the prosecution does not have access to the confidential file and, thus, cannot use the information to make its case"); *People v. Foggy*, 521 N.E.2d 86, 91-92 (Ill. 1988) (affirming the absolute privilege between victims and rape crisis counselors, citing to the legislature's intent); *see generally* Nat'l Crime Victim Law Inst., *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases,* Violence Against

Women Bulletin (June 2011), *available at* http://law.lclark.edu/live/files/11779 (WA1).[1] The Seventh Circuit, in rejecting a federal defendant's bid to access a prosecution witness's therapy records, recognized that "a failure to show that the records a defendant seeks are in the government's possession is fatal to the defendant's claim" that he is entitled to those records. *United States v. Hach*, 162 F.3d 937, 947 (7th Cir. 1998).

Support for the proposition that an absolute privilege does not violate a defendant's constitutional rights is also found in the attorney-client privilege. Indeed, as one court has asked: "In a different setting, would it be proper for a court to conduct an in camera invasion of an attorney-client privilege to determine if the privileged communication was helpful to an accused?" *United States v. Doyle*, 1 F. Supp. 2d 1187, 1191 (D. Or. 1998) (quashing subpoena that sought counseling records of kidnapping victim to rebut "extreme psychological injury" sentencing enhancement). The answer, of course, is no. When a cooperating defendant testifies against his co-defendants, "[c]an anyone imagine the court granting a motion by the defendants to examine the cooperating defendant's attorney *in camera*?" *Id.* A criminal defendant seeks counsel from an attorney. His victim seeks

[1] All articles cited in this brief are included in the Appendix filed herewith and referenced with page numbers WA__.

counsel in therapy. They each have an absolute privilege with the person from whom they seek counsel. There is no reason the former privilege should be inviolate while the latter gives way on a showing that is "not . . . unduly high." *Green*, 253 Wis. 2d 356, ¶ 35.

II. *SHIFFRA* FAILS TO ACCOUNT FOR VICTIMS' RIGHTS AND ALLOWS COURTS TO RELY ON FALSE ASSUMPTIONS ABOUT SEXUAL ABUSE.

The *Shiffra* decision appeared in the midst of a revolution in laws governing sexual violence and victims' rights. The first wave occurred in the 1970s, when states began passing reforms that eliminated marital rape exceptions and relieved rape victims of having to reveal prior sexual history or prove physical resistance. Many other key changes came after *Shiffra* was decided in 1993. The federal Violence Against Women Act was passed the following year, and in 1996 the Supreme Court recognized a psychotherapist privilege under the Federal Rules of Evidence. *See Jaffee v. Redmond*, 518 U.S. 1 (1996). In Wisconsin, the month after the Court of Appeals decided *Shiffra*, the state constitution was amended to expressly protect the rights of victims: "This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy."[2] Wis. Const. art. I, § 9m. In 2009, the Wisconsin Victim Privacy Act established that sexual assault

[2] Crime victims also have a right to personal privacy under the U.S. Constitution. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (noting the right of privacy encompasses an "individual interest in avoiding disclosure of personal matters").

victims may not be compelled to submit to credibility-assessing medical examinations or pre-trial depositions by defense attorneys. *See* 2009 Wis. Act 138. Further statutory protections for crime victims were added just last year. *See* 2011 Wis. Act 283.

Twenty years after it was decided, *Shiffra*'s age shows. Nowhere is this more clear than in the opinion's failure to recognize the victim's legal interest in the privacy of her therapy files. The Court of Appeals derived its rule by analogy "to cases in which a defendant seeks disclosure of a government informant's identity." *Shiffra*, 175 Wis. 2d at 608. "Both situations," the court observed, "require us to balance the defendant's constitutional right to a fair trial against the state's interest in protecting its citizens by upholding a statutorily created privilege." *Id.* at 609. Conspicuously absent is any acknowledgment that the victim—the individual whose privileged and confidential records are to be disclosed—has any interest or say in the disposition of her records.[3] The rights at stake, according to *Shiffra*, belong to the defendant and to the State. When this Court modified

[3] In *Shiffra*, the Court of Appeals rebuked the State for having "too little confidence in the role of the trial court in balancing a person's right to confidentiality of mental health records against the defendant's right to present a defense." *Shiffra*, 175 Wis. 2d at 611. Thus, the court referenced the victim's "right to confidentiality"—after ignoring it throughout the opinion—only to critique the State's effort to protect that right. However, as discussed *infra*, any disclosure—even for *in camera* review—is a violation of a victim's privacy rights and may have a chilling effect.

Shiffra in *Green*, the victim and her rights remained absent from the discussion.

Shiffra's omission of any recognition of the victim's interest is, by itself, a reason to revisit the opinion. Only after the victim is reinserted into the picture does the injustice come to light. A victim who has had the courage to come forward and report a sexual crime may be forced to watch her assailant go free if she does not sacrifice her legal right to privacy. There is no reason to impose such a penalty on the victim because the law is clear defendants do not have a pre-trial right to discovery from third parties, and in fact such a penalty treads on victims' right to access justice.

Unfortunately, the application of *Shiffra* in practice demonstrates that there is good reason to be concerned for victims' privacy. *Shiffra* permits courts to draw conclusions based on erroneous assumptions about victims' responses to sexual abuse. For example, in the present case as well as others, the circuit court has ordered *in camera* review of therapy records for the sole purpose of establishing that the victim did not disclose the abuse in therapy. The failure to disclose abuse has no probative value and cannot be used as a basis for impeaching a victim who acknowledged the abuse only later. *See* Tonya Lippert, Theodore P. Cross, Lisa Jones & Wendy Walsh, *Telling Interviewers About Sexual Abuse: Predictors of Child Disclosure at Forensic*

Interviews, 14 Child Maltreatment 100 (2009) ("Lippert") (WA9) ("Research on children and adults indicates that children often significantly delay disclosure of sexual abuse or keep the abuse a secret into adulthood."); Sarah E. Ullman, *Social Reactions to Child Sexual Abuse Disclosures: A Critical Review*, 12 J. of Child Sexual Abuse 89, 93 (2003) ("Ullman") (WA27) ("[R]epresentative samples suggest that close to one-third of women never disclose their [child sexual abuse] experiences, whereas two-thirds do disclose, with many waiting for years before telling anyone."). Disclosure rates for victims of sexual abuse are highly variable; many victims wait years to disclose, and others never do. *See* Ullman at 92-93 (WA26-27) (discussing "prevalence of disclosure"). When the victim is a child, when the abuser is an immediate family member, or when the abuse is particularly severe or occurs over a long period of time, victims will often delay disclosure and even deny the abuse for a host of reasons: they feel shame, they blame themselves, or they do not want to disrupt the family. *See, e.g.*, Lippert at 102 (WA11) (citing study that found older children wait longer to disclose to the police or social services than their younger peers); Ullman at 98 (WA32) ("[C]hildhood disclosures can be more problematic if they concern intrafamilial abuse where perpetrators have much more to lose in terms of family relationships and may in fact still be abusing the child.").

That a victim did not tell a therapist of her abuse has no probative value in assessing the defendant's guilt. A victim's silence should not, as a matter of law, be relied on as evidence for impeachment or any other purpose. Consequently, the intent to establish a victim's silence is not a valid purpose for pursuing the victim's confidential records. *See State v. Reed*, 21 P.3d 137, 146 (Or. Ct. App. 2001) (rejecting defendant's argument that he was entitled to the victim's psychotherapy records in order to demonstrate that the victim failed to discuss any abuse with psychotherapist because under such reasoning "*nothing* would be privileged").

III. THE VICTIM'S CONTROL OVER HER CONFIDENTIAL RECORDS MUST REMAIN INVIOLATE.

As a matter of statutory construction, the State's proposed remedy if this Court finds that defendants' constitutional rights can require pre-trial access to victims' privileged psychotherapy records is groundless: Wisconsin law does not allow a patient's will to be overridden in this context. Any modification to *Shiffra* cannot compromise the victim's ultimate authority to decide whether and to whom her records are disclosed.

Section 146.82(1) establishes a baseline rule: "All patient health care records shall remain confidential." An exception to that rule appears in the next subsection: "Notwithstanding sub.(1), patient health care records shall be released upon request without informed consent in the following

circumstances," including "4. Under a lawful order of a court of record." Wis. Stat. § 146.82(2)(a). The entry of a "lawful order" is an exception to the rule that appears in sub.(1)—it is not an exception to the distinct and more specific statutory privilege established in section 905.04.

In order for counseling to be effective, the victim must be assured of complete confidentiality. As the Supreme Court recognized in the cornerstone case *Jaffee v. Redmond*, "Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." 518 U.S. at 10. Releasing a victim's confidential records without consent undermines the recovery process and is a direct violation of the victim's reassertion of autonomy, which can halt or even reverse the victim's recovery. *See, e.g., id.* ("[T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.").

Complete confidentiality encompasses not just prevention of disclosure to the defendant, but also to the court for *in camera* inspection. *See Foggy*, 521 N.E.2d at 92 (stating that warning victims that their confidential records could be viewed by a judge *in camera* "would seriously undermine the valuable, beneficial services of those programs that are within the protection of the statute"); *see generally State v. Pinder*, 678 So. 2d 410, 415 (Fla. Dist.

Ct. App. 1996) ("Even in camera disclosure to the trial judge (and to court reporters, appellate courts and their staff) intrudes on the rights of the victim and dilutes the statutory privilege." (internal citation omitted)).

Furthermore, as a matter of reason, forcing the disclosure of victims' confidential records will only harm the viability of sexual abuse prosecutions in the long run. Victims must come forward to report sexual abuse before prosecution is even an option. In order to come forward, however, they must be confident that their confidentiality will be preserved. If victims do not have the ultimate say over the disposition of their confidential records, they will be less willing to report sexual abuse in the first place. In fact, in jurisdictions that have gone from an absolute rape-crisis center privilege to a diluted privilege, quantifiable data shows an unmistakable drop in the number of victims seeking help. *See* Beth Stauder, *Criminal Law and Procedure (Evidence) – Pennsylvania Establishes New Privilege for Communications Made to a Rape Crisis Center Counselor*, 55 Temp. L.Q. 1124, 1146 n.120 (1982) (WA79); *Commonwealth v. Wilson*, 602 A.2d 1290, 1294 n.6 (Pa. 1992) (noting the detrimental effect that the Pennsylvania supreme court's decision diluting the absolute privilege had on rape crisis centers, including by victims requesting the return of their records or terminating counseling for fear that their private information would become public); Christine Burke,

Just How Many Times Does She Have to Say No? The Evolution of a Defendant's Right to Access His Victim's Rape Counseling Records in Massachusetts, 25 New Eng. J. on Crim. & Civ. Confinement 147, 162 n.122 (1999) (WA97) (the number of rapes reported to the police declined and many victims refused to talk to rape counselors following Massachusetts supreme court decision allowing defense counsel direct access to records) (citing Ellen M. Crowley, *In Camera Inspections of Privileged Records in Sexual Assault Trials: Balancing Defendants' Rights and State Interests under Massachusetts' Bishop Test*, 21 Am. J.L. & Med. 131, 144 n.133 (1995) (WA129)).

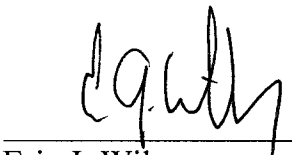
No matter how the Court resolves this appeal, the victim must retain the right to bar the disclosure of her confidential records.

CONCLUSION

For the reasons set forth above, WCASA urges this Court to adhere to the statutory privilege established in Wis. Stat. § 905.04 and overturn *Shiffra*'s flawed holding that *in camera* review of privileged and privately held therapy records may be necessary to protect defendants' constitutional rights. Furthermore, the Court must preserve the victim's final authority over the disposition of her privileged records.

Dated this 8th day of February, 2013.

GODFREY & KAHN, S.C.

By: 

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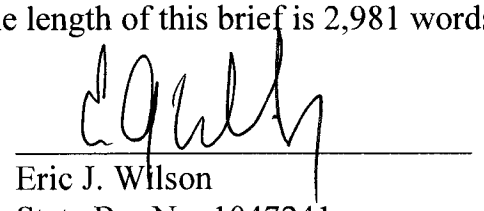
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes § 809.19(8)(b) and (c)(2) for a brief produced with a proportional serif font. The length of this brief is 2,981 words.



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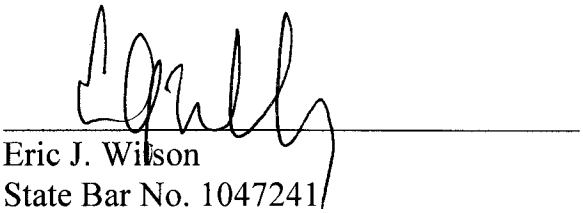

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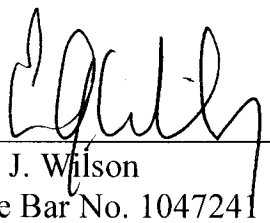
APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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



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