STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2017AP729-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WAYNE A. JOHNSON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief, Both Entered in the Barron County Circuit Court, the Honorable James C. Babler, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

Page

ISSUE PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 9

A. Summary of Johnson's Ineffective Assistance of Counsel Claim and Governing Legal Standards 9

B. Trial counsel performed deficiently by failing to set forth the legal standard governing a defendant's right to *in camera* review of mental health treatment records and by failing to apply the available facts to the proper legal standard. 12

1. Counsel failed to properly assert the well-established legal standard governing *in camera* review of mental health treatment records. 12

2. Had trial counsel applied the available facts to the proper legal standard, Johnson would have met his initial burden for *in camera* review. 15

a. There is a reasonable likelihood that A.M.H.'s treatment records would contain a full description of the flashbacks she experienced during therapy and a psychological explanation for these flashbacks as well as a psychological explanation for her inability to truthfully recall, relay, or remember events. 17

b. The information Johnson seeks to obtain through *in camera* review is necessary to a determination of guilt or innocence. 20

c. The information Johnson seeks to obtain through *in camera* review is not cumulative to other information known by the defense. 20

C. If the results of the *in camera* review reveal relevant information material to the defense then Johnson would have insisted on going to trial; therefore, trial counsel's deficient performance prejudiced Johnson. 23

CONCLUSION 24

CASES CITED

Commonwealth v. Fuller,
423 Mass. 216, 667 N.W.2d 847 (Mass. 1996).....13

Hill v. Lockhart,
474 U.S. 52 (1985).....12

Lockhart v. Fretwell,
506 U.S. 364 (1993).....12

Pennsylvania v. Ritchie,
480 U.S. 39 (1987).....13

State v. Bentley,
201 Wis. 2d 303, 548 N.W.2d 50 (1996).....12

State v. Felton,
110 Wis. 2d 485, 329 N.W.2d 161 (1983).....11, 14

State v. Green,
2002 WI 68, 253 Wis. 2d 356,
646 N.W.2d 298 .....1 passim

State v. Harper,
57 Wis. 2d 543, 205 N.W.2d 1 (1973).....14

State v. Lynch,
2015 WI App 2, 359 Wis. 2d 482,
859 N.W.2d 125 21

State v. Lynch,
2016 WI 66, 371 Wis. 2d 1, 885 N.W.2d 89.....21

State v. Machner,
92 Wis 797, 285 N.W.2d 905 (Ct. App. 1979) 15

State v. Maday,
179 Wis. 2d 246, 507 N.W.2d 365
(Ct. App. 1993).....5, 13

State v. McDowell,
2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500.....11

State v. Pitsch,
124 Wis. 2d 628, 369 N.W.2d 711 (1985).....10, 11

State v. Rizzo,
2000 WI 20, 250 Wis. 2d 407, 640 N.W.2d 93.....5, 13

State v. Sanchez,
201 Wis. 2d 219, 548 N.W.2d 69 (1996).....11

State v. Shiffra,
175 Wis. 2d 600, 499 N.W.2d 719
(Ct. App. 1993).....1 passim

State v. Smith,
207 Wis. 2d 258, 558 N.W.2d 379 (1997).....11

State v. Solberg,
211 Wis. 2d 372, 564 N.W.2d 775 (1997).....13

Strickland v. Washington,
466 U.S. 668 (1984).....10, 11

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

Amend. VI.....10

Amend. XIV.....10

Wisconsin Constitution

Wis. Const. Art. 1, § 7 10

Wisconsin Statutes

752.31(2)(f) 1

752.31(3) 1

809.23(1)(b)4 1

940.225(3m) 2

ISSUE PRESENTED

Under ***State v. Shiffra***,[1] as modified by ***State v. Green***,[2] a criminal defendant has a constitutional right to *in camera* review of otherwise privileged mental health records upon a preliminary showing of "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."

The issue in this case is whether trial counsel performed ineffectively by failing to properly assert the well-established legal grounds under ***Shiffra/Green*** to obtain *in camera* review of the complainant's mental health treatment records.

The circuit court answered: No. (144:50-51; 143:2, 18-19; App. 102-103, 106, 112-113).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because the briefs will adequately address all relevant issues. Publication is not appropriate because this is a one-judge appeal. *See* Wis. Stat. §§ 752.31(2)(f) and (3) and (Rule) 809.23(1)(b)4.

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[1] ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993).

[2] ***State v. Green***, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298.

STATEMENT OF THE CASE AND FACTS

Synopsis

In February of 2015, A.M.H. reported to Social Worker Lee Ann Davison at the Mikan Day Treatment School[3] (hereinafter Mikan) that Johnson had sexual contact with her on November 28, 2014. (1:1-2). The following month, Kim Stein, a therapist at Mikan, called police to report a separate allegation "after A.M.H. reported having flashbacks of past incidents with her mother's boyfriend, Wayne [Johnson]." (*See* 49:5). The "flashback" involved A.M.H. recalling that Johnson had drawn a "tattoo" with markers on her breast in August of 2014. (49:5-6).

As a result of A.M.H.'s reports, the state filed charges against Johnson in two separate cases. (1; 49:5-6). Both cases consisted of one count of first-degree child sexual assault in violation of Wis. Stat. § 948.02(1)(e). (1; 49:5-6). Johnson's trial attorney filed two motions and made arguments during at least four different hearings in pursuit of *in camera* review of A.M.H.'s mental health treatment records. (App. 114-153; 38; 132:6-14; 133:8-13; 135:5-6; 63; 137:9-15). The court ultimately denied counsel's requests for *in camera* review. (137:14-15).

Approximately two weeks later, Johnson entered a plea to two counts of fourth-degree sexual assault contrary to Wis. Stat. § 940.225(3m) as part of an agreement. (139:2). The plea agreement provided that the first-degree child sexual assault charge in one case would be amended to two counts of

[3] The Mikan Day Treatment School is a treatment program provided by Marriage & Family Health Services, Ltd., in Rice Lake, Wisconsin.

fourth-degree sexual assault and the first-degree child sexual assault charge in the other case would be dismissed and read in at sentencing. (139:2). The parties agreed to recommend two-years' probation for each of the fourth-degree sexual assault counts to run concurrently. (139:2; 140:4, 6). The court accepted the joint recommendation of the parties, withheld sentence, and ordered two-years' probation on each count, concurrent. (App. 154-158; 140:9, 10-11). Johnson filed a timely notice of intent to pursue postconviction relief. (82).

A.M.H.'s Prior Allegations & Counseling

The allegations A.M.H. reported in 2015 were not the first allegations she made against Johnson. A.M.H. spent June and July 2009 with her father, step-mother, and step-siblings in Texas. (106:2). Toward the end of this visit her step-mother spoke with A.M.H. (then age 7) about A.M.H. inappropriately touching her 9 year-old step-sister. (106:2). A.M.H. then stated that Johnson had touched her vagina over her underwear. (106:2).

As a result of this allegation, the Wisconsin Department of Children and Families (DCF) received a referral from a Texas child protection agency. (106:2). Approximately one month later, A.M.H. recanted her allegation during an interview with DCF and police saying that Johnson had never touched her vagina and that she had not told the truth in Texas. (106:2, 8). The 2009 DCF report states that A.M.H.'s mother immediately enrolled A.M.H. in counseling "after hearing of the possible sexual abuse." (106: 7). This counseling started on August 4, 2009, just 8 days after the allegation was referred to DCF. (*See* 106:2, 7).

In August 2013, A.M.H.'s father reported that A.M.H. (then age 11) had told her paternal grandmother during a visit

that Johnson had inappropriately touched her. (106:9). Police spoke with A.M.H. who indicated that Johnson had spoken to her about sex, that he had never inappropriately touched her, but that he had showed her a video of him and A.M.H.'s mother having sexual intercourse. (106:10). In a later interview with police, A.M.H. stated that Johnson asked her for a favor, meaning sexual intercourse, but she said no. (106:13-14). A.M.H. then stated that Johnson showed her a video involving Johnson and A.M.H.'s mother engaged in oral sex. (106:13-14). Eventually, Johnson was charged in Barron County Case No. 13-CF-246 with causing a child to view or listen to sexual activity and exposing a child to harmful descriptions. (49:8).

No evidence of the alleged video involving Johnson and A.M.H.'s mother was recovered. (49:1-2, 12). The investigation did, however, reveal cable billing records indicating that pornographic videos were ordered from A.M.H.'s home while Johnson was at work. (49:10, 14-15). V.L.G., a friend of A.M.H., told police that A.M.H. had purchased 20-22 pornographic movies through a cable provider while Johnson and A.M.H.'s mother were at work. (106:17). V.L.G. also described another incident in which A.M.H. showed her a pornographic movie that had been left in a portable DVD player. (106:18). In June 2014, the state dismissed the charges in Barron County Case No. 13-CF-246. (49:7)

As she did following the recanted 2009 allegation, A.M.H.'s mother decided there was a need for A.M.H. to receive counseling due to the 2013 allegations A.M.H. made against Johnson. First, a police report from the 2013 allegation indicates that A.M.H. had previously been seeing a counselor at the OMNI Clinic in Barron, Wisconsin, and that A.M.H.'s mother would be in contact with the counselor

again. (106:22). Second, a 2013 DCF assessment states "[a]fter the sexual abuse report [A.M.H.'s mother] made an appointment for A.[M.H.] to see a counselor." (106:32). This report then states that A.M.H. started counseling on September 17, 2013, at Mikan (Marriage and Family Counseling) and that counseling would be ongoing. (106:32). Finally, a 2015 DCF Assessment confirms that A.M.H. started counseling in the Fall of 2013 at Mikan and that she started seeing Tamilyn White in October 2013. (106:35).

Trial counsel's efforts in pursuit of* in camera *review

On October 13, 2015, based on the 2009 recantation, the 2013 dismissed charges, and A.M.H.'s reports of the "flashback" allegation made while in treatment at Mikan, Johnson's trial attorney moved for an independent psychological evaluation of A.M.H. as well as *in camera* review of A.M.H.'s prior psychological or mental health treatment records. (App. 114-116; 38). This motion stated that "medical psychological records and assessments are discoverable, subject to the Court's approval after an in camera review" citing ***State v. Rizzo***, 2000 WI 20, ¶3, 250 Wis. 2d 407, 640 N.W.2d 93, and ***State v. Maday***, 179 Wis. 2d 246, 507 N.W.2d 365 (Ct. App. 1993). (App. 114-115; 38:1-2).

On November 2, 2015, the circuit court addressed the defendant's motion for *in camera* review of A.M.H.'s treatment records. (132:2). The court stated "there's absolutely no evidentiary grounds here for me to even order an *in camera* inspection of medical records." (App. 133; 132:13). However, based on Johnson's assertion that A.M.H.'s mother could testify to the nature of the counseling records sought, the court held the matter open for an evidentiary hearing. (132:1-14).

Two days later, at a November 4, 2015, motion hearing, the court gave trial counsel a second opportunity to assert a basis to allow *in camera* review of A.M.H.'s medical or treatment records. (App. 138; 133:9). Counsel did not call any witnesses to testify to the nature of A.M.H.'s counseling. In addition, the court indicated that counsel's motion contained no citation to ***State v. Green***, 253 Wis. 2d 356, that ***Green*** "sets forth the grounds in which a defendant is entitled to medical records[,]" and "the law is quite clear, you just do not get them in because you want them." (App. 138; 133:9). Trial counsel argued that access to A.M.H.'s prior records was necessary due to the allegations being made during treatment and to determine the circumstances under which the "flashback" allegation was reported. (App. 139-141; 133:10-12). The court reiterated the ***Green*** standard on the record—"a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of the guilt or innocence and is not merely cumulative of other evidence available to the defendant"—and allowed 14 days for the defense to file an amended motion. (App. 141-142; 133:12-13, 15) (citing ***Green***, 253 Wis. 2d 356, ¶19).

At a December 21, 2015, motion hearing the court again addressed the defense's request for *in camera* inspection of A.M.H.'s treatment records. (App. 144; 135:3). Counsel had not filed an updated motion and relied on the October 13, 2015 motion. (135:3). In regard to the release of A.M.H.'s treatment records, counsel again argued access was justified considering one allegation arose from a "flashback" while in therapy: "The flashback's the basis of the complaint, and we assume that we're entitled to those records." (App. 145; 135:5). The court commented that counsel had not cited legal authority to allow access to A.M.H.'s records and denied access "at this time." (App. 145; 135:6).

On April 11, 2016, counsel filed a second motion for an independent psychological evaluation of A.M.H. and for release of her treatment records. (App. 117-120; 63). The updated motion did not contain any citation to the ***Green*** standard that the court had twice referenced during the November 4, 2015, motion hearing. Rather, the motion cited ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), stating:

> "To be entitled to an *in camera* inspection, the defendant must make a preliminary showing that the sought-after evidence is material to his or her defense." *Shiffra*, 175 Wis. 2d at 605. The defendant need only establish that the sought-after evidence "may be helpful." *Id.* at 608. The initial burden on the defense is minimal. *Id.* at 609; *State v. Johnson*, 2014 WI 16, 353 Wis. 2d 119, 846 N.W.2d 1.

(App. 117-118; 63:2). In addition, the motion asserted that review of A.M.H.'s prior treatment records "could well be critical in Mr. Johnson's defense." (App. 119; 63:3). In support of this statement, the motion included an affidavit from Hollida Wakefield, a licensed psychologist specializing in sexual abuse allegations and recovered memory, indicating that review of A.M.H.'s prior records was necessary to determine whether A.M.H. had been influenced while in treatment to make allegations against Johnson and to determine A.M.H.'s "functioning." (App. 121-125; 63:7-8).

The court heard argument on the renewed motion seeking access to A.M.H.'s treatment records. (137:2, 9). Defense counsel asserted "the law requires that we demonstrate that the evidence may be relevant[]" and "the burden . . . is very minimal." (App. 150; 137:12). Counsel further asserted that the sought-after records were necessary for Wakefield to review for indications that A.M.H. had

inaccurately recalled events, especially the "flashback" allegation. (App. 150-151; 137:12). The court determined that the defense's assertion that A.M.H. was in counseling when the allegations were made was not enough to meet its initial burden under ***Green*** and denied the request for *in camera* inspection. (137:13-14).

Shortly thereafter, Johnson entered a plea, as referenced earlier, to resolve both cases. (139). The court withheld sentence and imposed two years of probation for each count. (App. 154-158; 140:9-11).

Postconviction proceedings

In his postconviction motion, Johnson sought to withdraw his plea and asserted that defense counsel was ineffective for failing to properly assert both the legal and factual grounds required under ***Green*** to obtain *in camera* review of A.M.H.'s mental health treatment records. (105:1). Johnson argued that had trial counsel applied the available facts to the proper legal standard, he would have met his initial burden for *in camera* review. (105:1). Further, Johnson asserted that whether he was ultimately prejudiced by counsel's deficient performance would depend on whether the *in camera* review resulted in the disclosure of records material to his defense. (105:1). If the *in camera* review resulted in such a disclosure, Johnson would not have plead guilty and would have insisted on going to trial. (105:1).

The circuit court held an evidentiary hearing on April 4, 2017, and took additional argument from counsel on April 5, 2017. (144; 143). Following the evidentiary hearing, the circuit court made a number of findings in regard to counsel's trial strategy and the information known to trial counsel at the time he sought *in camera* review of A.M.H.'s mental health treatment records. (App. 106-109; 143:2-5).

The court found that counsel would have argued at trial that Johnson did not commit the crimes, that A.M.H. fabricated the allegations because she was either influenced by others or because "her perceptions were skewed by therapy," and that A.M.H. was not a credible individual. (App. 107; 143:3). The court also found that trial counsel "spent hours" reviewing the discovery and knew A.M.H. was in counseling and had recanted a prior allegation against Johnson. (App. 106-108; 143:2-4). In addition, the court found that A.M.H.'s mother did not believe the allegations, that she had provided information to the defense, and that she had taken "part in the treatment or therapy of [A.M.H.]." (143:4).

Ultimately, the circuit court denied Johnson's postconviction motion. (App. 112-113; 143:18-19). It found trial counsel deficient for failing to understand the applicable legal standard. (App. 102-103, 106, 112; 144:50-51; 140:2, 18). However, the court further found that Johnson failed to meet his burden for *in camera* review so that trial counsel's "missing the proper legal standard did not prejudice the defendant in any way." (App. 112; 143:18). A written order was entered accordingly. (113). This appeal follows. (115).

ARGUMENT

Johnson was Denied His Constitutional Right to Effective Representation of Counsel because Counsel Failed to Properly Assert the Well-Established Legal Grounds for Seeking *In Camera* Review of Mental Health Treatment Records and Failed to Set Forth the Required Factual Basis to Obtain *In Camera* Review.

A. Summary of Johnson's Ineffective Assistance of Counsel Claim and Governing Legal Standards.

Trial counsel performed deficiently by failing to apply the available facts to the long-established materiality burden placed on defendants seeking *in camera* review of treatment records under ***Shiffra/Green***. As a result of counsel's deficient performance, the circuit court denied Johnson *in camera* review of A.M.H.'s treatment records. Had trial counsel adequately moved for *in camera* review based on the information known to him, Johnson would have been afforded the opportunity to have the circuit court review A.M.H.'s treatment records.

The ultimate question of whether trial counsel's deficient performance prejudiced Johnson cannot be determined until after the court conducts an *in camera* review of A.M.H.'s treatment records. Johnson maintains that if the *in camera* review results in disclosure of records to him containing relevant information material to his defense then he would not have pled guilty and would have insisted on going to trial, thus establishing that trial counsel's deficient performance prejudiced him. If an *in camera* review results in no disclosure of records to Johnson, he cannot establish prejudice to allow plea withdrawal.

Criminal defendants are guaranteed the right to effective assistance of counsel under both the United States Constitution and the Wisconsin Constitution. U.S. Const. amend. VI and XIV; Wis. Const. Art. 1, § 7. Wisconsin courts utilize the two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), to determine whether a defendant was denied his or her constitutional right to effective counsel. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). A defendant must show that counsel's performance was deficient and that such deficient performance resulted in prejudice. ***Strickland***, 466 U.S. at 687; ***Pitsch***, 124 Wis. 2d at 633.

The questions raised by ***Strickland***'s two-part test present mixed questions of law and fact. ***Pitsch***, 124 Wis. 2d at 633-34. A reviewing court will uphold the circuit court's factual findings unless they are clearly erroneous. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. However, whether defense counsel was deficient or whether such deficient performance was prejudicial are questions of law requiring de novo review. ***Id.***

Counsel's performance is deficient when it falls "below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. To prove deficient performance a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Id.*** at 690. Trial counsel's decisions are judged according to the prudent-lawyer standard, which requires an attorney to be "skilled and versed" in the criminal law and to make decisions based upon facts and law upon which an ordinarily prudent lawyer would have relied. ***State v. Felton***, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983).

Counsel's deficient performance prejudices the defendant when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***; ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). This is not an "outcome determinative" test; in other words, the defendant need not prove that, in the absence of the error, he would not have been convicted. ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997). Instead, the "touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the

proceeding fundamentally unfair.'" ***Id.*** (quoting ***Lockhart v. Fretwell***, 506 U.S. 364, 372 (1993))."

In the context of plea withdrawal based on ineffective assistance of counsel, "the defendant seeking to withdraw his or her plea must allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (quoting ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985)).

B. Trial counsel performed deficiently by failing to set forth the legal standard governing a defendant's right to *in camera* review of mental health treatment records and by failing to apply the available facts to the proper legal standard.

1. Counsel failed to properly assert the well-established legal standard governing *in camera* review of mental health treatment records.

In 1993, the court of appeals first set forth the process under which criminal defendants in Wisconsin may obtain in camera review of otherwise privileged treatment records upon a showing of materiality. ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993). ***Shiffra*** stated the materiality burden required the defendant to 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 2002, the Wisconsin Supreme Court clarified and modified ***Shiffra*** stating: "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." ***State v. Green***, 2002 WI 68, ¶34, 253 Wis. 2d 356, N.W.2d 298. "[I]nformation will be 'necessary to a determination of guilt or innocence' if it 'tends to create a reasonable doubt that might not otherwise exist.'" ***Id.*** (*quoting* ***Commonwealth v. Fuller***, 423 Mass. 216, 667 N.W.2d 847 (Mass. 1996)).

If a defendant meets the initial materiality burden under ***Shiffra/Green*** for *in camera* review and the complainant authorizes release of the sought-after records, the court reviews the records *in camera* to "determine whether the records contain any relevant information that is 'material' to the defense of the accused." ***State v. Solberg***, 211 Wis. 2d 372, 386, 564 N.W.2d 775 (1997) (*quoting* ***Pennsylvania v. Ritchie***, 480 U.S. 39, 58 (1987)).

Here, trial counsel filed a motion and an amended motion seeking *in camera* review of A.M.H.'s treatment records. (App. 114-125; 38; 63). Counsel also made arguments in pursuit of *in camera* review at four separate hearings. (App. 126-153; 132:6-14; 133:8-13; 135:5-6; 137:9-15). Counsel's first motion seeking *in camera* review was focused almost entirely on a request to have the complainant undergo an independent psychological evaluation under the ***Rizzo***, 250 Wis. 2d 407, and ***Maday***, 179 Wis. 2d 246, cases. The motion contained no reference to the ***Shiffra/Green*** standard and no mention of what the records would be reasonably likely to contain. Counsel's arguments on this motion at the November 2, 2015, November 4, 2015, and December 21, 2015, hearings also failed to include any reference to the governing legal standard

set forth in ***Green***. Despite the circuit court's specific reference and recitation of the ***Green*** standard at the November 4, 2015, hearing, trial counsel never referenced the standard or applied the facts of this case to the standard.

Counsel's second motion seeking *in camera* review included the defendant's burden under the ***Shiffra*** case, but failed to cite or recognize that ***Shiffra*** had been modified in 2002 by ***Green***. (*See* App. 114-118; 63:1-2). Neither the renewed motion nor counsel's arguments at the May 11, 2016, hearing on the renewed motion demonstrated that counsel understood the proper legal standard for seeking *in camera* review of mental health treatment records.

Additionally, trial counsel's failure to set forth the legal standard governing *in camera* review of the sought-after records resulted in a failure to set forth the type of specific factual basis required under ***Green***. Counsel's motions and arguments never provided a specific factual basis to demonstrate the reasonable likelihood that the sought-after records would contain relevant and necessary information to a determination of guilt or innocence. *See* ***Green***, 253 Wis. 2d 356, ¶34. (*See* App. 114-153; 38; 63; 132:6-14; 133:8-13; 135:5-6; 137:9-15).

Effective representation requires that "[t]rial counsel's decisions . . . be based upon facts and law upon which an ordinarily prudent lawyer would have then relied." ***Felton***, 110 Wis. 2d. at 503. Further defined, "a prudent lawyer must be 'skilled and versed' in the criminal law." ***Id.*** at 502 (quoting ***State v. Harper***, 57 Wis. 2d 543, 205 N.W.2d 1 (1973)). Finally, the prudent lawyer standard requires counsel's representation to "be based upon knowledge of all facts and all the law that may be available." ***Id.*** at 202.

Here, the record repeatedly indicates that trial counsel was not "skilled and versed" in the procedure under ***Shiffra/Green*** to obtain *in camera* review of mental health treatment records. When asked at the ***Machner***[4] to explain his legal theory in seeking *in camera* review, counsel refused to answer and stated that his theory was "set forth in the motion." (144:8, 12). However, counsel's motions never set forth the governing legal standard to obtain *in camera* review under ***Green*** nor did the motions apply the available facts to the ***Green*** standard. Although trial counsel testified at the ***Machner*** hearing that he was familiar with both ***Shiffra*** and ***Green***, there is no indication in the record that counsel ever attempted to obtain *in camera* review by applying the controlling standard from the ***Green*** case. (144:12).

This is precisely the reasoning the circuit court used when it found counsel's performance to be deficient stating "Mr. Willett did not properly understand the ***Green*** case and what needed to be filed or what information needed to be provided to the [c]ourt." (App. 107; 143:3).

In sum, under the same reasoning expressed by the circuit court, counsel's failure to set forth the law governing *in camera* review of mental health treatment records and failure to apply the governing law to the facts of this case falls below the expected standard of a reasonable lawyer and constitutes deficient performance.

2. Had trial counsel applied the available facts to the proper legal standard, Johnson would have met his initial burden for *in camera* review.

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[4] ***State v. Machner***, 92 Wis 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Under ***Green***, "the standard to obtain 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." ***Id.***, 253 Wis. 2d 356, ¶19. However, the court has explained that the defendant's materiality burden "is not intended . . . to be unduly high before an in camera review is ordered by the circuit court." ***Id.***, ¶35. In fact, the Wisconsin Supreme Court has recognized the difficulty a defendant faces in describing the specific information likely to be contained in the sought-after records. *See* ***id.***, ¶35. Additionally, access to *in camera* review implicates a defendant's constitutional right to a fair trial. ***Green***, 253 Wis. 2d 356, ¶20. As a result, "where it is a close call, the circuit court should generally provide an in camera review." ***Id.***, ¶35.

On review, this Court will uphold the circuit court's factual findings unless clearly erroneous. ***Id.***, ¶20. However, whether Johnson has met the preliminary showing under ***Green*** to receive *in camera* review of the sought-after records raises a question of law that this Court reviews de novo. ***Id.***

Had trial counsel's motions or arguments in favor of *in camera* review contained an application of the available information regarding A.M.H.'s history of treatment and information disclosed during discovery to the proper ***Shiffra/Green*** framework, Johnson would have met his initial burden for *in camera* review of the sought-after records.

a. There is a reasonable likelihood that A.M.H.'s treatment records would contain a full description of the flashbacks she experienced during therapy and a psychological explanation for these flashbacks as well as a psychological explanation for her inability to truthfully recall, relay, or remember events.

There is a reasonable likelihood that A.M.H.'s treatment records would contain added information about A.M.H.'s flashbacks, which occurred during therapy and which formed the basis of one of the charges. First, whether A.H.M. has been diagnosed with post-traumatic stress disorder or a related disorder involving flashbacks as a symptom is necessary to make a determination of Johnson's guilt or innocence. Nothing is known about the reason why A.L.M. experienced a flashback or whether she may suffer from a disorder which would cause her to experience flashbacks that do not depict actual events. Records from counseling, especially from the session or sessions where flashbacks occurred, are reasonably likely to indicate what triggered the flashback.

Second, the complaint pertaining to the flashback allegation indicates that A.M.H. reported having numerous flashbacks involving Johnson; however, there is no indication in the discovery materials what these flashbacks may have involved. (49:5). There is a reasonable likelihood that the records would contain additional information and follow-up regarding these flashbacks involving Johnson. This information is relevant to Johnson's guilt or innocence as it may tend to discredit A.M.H.'s reports of having flashbacks

involving Johnson or provide evidence that the flashbacks she experienced do not depict actual events.

Information regarding these flashbacks is critical to Johnson's defense considering that A.LH. reported one allegation during ongoing treatment at Mikan that was described as a "flashback" in the complaint and because of the nature of flashbacks themselves. As the Wakefield affidavit submitted alongside trial counsel's second motion for *in camera* review explains, sexual abuse allegations arising from flashbacks must be carefully scrutinized because "[t]he reconstructed memory can sometimes include highly detailed but inaccurate versions of an event and even of completely false events." (App. 122; 63:6) (citing numerous publications on memory and false memory). Wakefield also stated that sexual abuse allegations made by children to adults who believe the child has been abused raise issues specific to reconstructed memory considering that "repetition of an erroneous account can result in the child coming to a subjective belief that a false memory is a real experience." (App. 123; 63:7). Finally, Wakefield's affidavit stated that for the individual experiencing the flashback "[i]t is impossible to differentiate between a flashback about an actual event or an imaginary one." (App. 123; 63:7).

In addition, the discovery materials reveal that A.M.H. has received counseling from various providers since at least 2009 and that she was in counseling at Mikan when she disclosed the current allegations. Importantly, the discovery materials also indicate that periods of treatment coincided with both the recanted 2009 allegation and the dismissed 2013 allegations.

Specifically, in August 2009, A.M.H.'s mother immediately sought counseling for A.M.H. in response to the

2009 allegation, which was subsequently recanted. A.M.H.'s mother also initiated counseling appointments in 2013 as a result of the 2013 allegations, which were eventually dismissed.

Furthermore, A.M.H.'s 2009 recantation and statements to police during the 2013 investigation indicate that A.M.H.'s is not known to be a credible individual and that she harbored intense disdain for Johnson, her mother's long-term boyfriend. A.M.H.'s mother indicated to police in 2013 that "A[.M.H] fabricates stories to get out of trouble . . . ." (106:39) Samantha Reed, a neighbor, also indicated that A.M.H. "is sometimes prone to telling stories." (106:41). Furthermore, the discovery materials from the 2013 case indicate that A.M.H. had an extreme dislike of Johnson and had written "I hate Wayne" on her lunchbox. (106:22).

A.M.H.'s inability to be truthful is also evident from her reporting of the 2013 allegation. In this case, A.M.H. first told her grandmother that Johnson had inappropriately touched her and asked for a "sexual favor." (106:9). When police spoke with A.M.H. she indicated that Johnson asked her to do a favor and then "began to ask questions about sex." (106:10). A.M.H. then told police that Johnson had played a video of him and her mother "having sex." (106:10). However, despite the initial allegation, she later denied that Johnson had ever touched her inappropriately. (106:10, 14).

With this unique counseling history and A.M.H.'s lack of credibility as well as the court's findings that counsel's trial strategy would have been to question A.M.H.'s credibility and ability to accurately recall events, there is a reasonable likelihood that A.M.H.'s treatment records contain additional relevant information necessary to a determination of Johnson's guilt or innocence. Specifically, due to

A.M.H.'s counseling history, which coincides with the past allegations involving Johnson, there is a reasonable likelihood that her treatment records would contain a diagnosis or documented symptoms that would explain A.M.H.'s difficulties with relaying truthful information. This is relevant evidence to support Johnson's defense that A.M.H. fabricated the allegations.

b. The information Johnson seeks to obtain through *in camera* review is necessary to a determination of guilt or innocence.

The sought-after information is necessary to a fair determination of Johnson's guilt or innocence especially considering that there are no witnesses or physical evidence to support the allegations against Johnson and his defense at trial would be that A.M.H. fabricated the allegations. As a result, A.M.H.'s credibility, whether she has received a diagnosis involving flashbacks as a symptom, and her motivations for making false allegations are "critical", as trial counsel himself argued, components of Johnson's defense.

c. The information Johnson seeks to obtain through *in camera* review is not cumulative to other information known by the defense.

Despite ongoing treatment as a result of the 2009 and 2013 allegations against Johnson and during which A.M.H. also made the current allegations against Johnson, the discovery is silent in terms of A.M.H.'s specific mental health history and diagnosis.

Although the circuit court found that A.M.H.'s mother provided information to the defense and had participated in some of the counseling sessions, the sought-after information

is not cumulative to other information available to the defense. In fact, in cases where defendants have had access to certain mental health records or mental health history, the court of appeals has allowed in camera review of additional records. *See* ***State v. Lynch***, 2015 WI App 2, ¶¶37-39, 359 Wis. 2d 482, 859 N.W.2d 125, *affirmed by an equally divided court* ***State v. Lynch***, 2016 WI 66, 371 Wis. 2d 1, 885 N.W.2d 89; see also ***Shiffra***, 175 Wis. 2d at 610-11.

For example, in ***Shiffra***, the state asserted that the sought-after records would be cumulative to the information already available to the defendant in regard to the complainant's mental health history. ***Id.*** at 610. The court of appeals disagreed that the sought after records would be cumulative indicating:

> It may well be that the evidence contained in the [sought-after] psychiatric records will yield no information different from that available elsewhere. However, the probability is equally as great that the records contain independently probative information. It is also quite probable that the *quality* and probative *value* of the information in the reports may be better than anything that can be gleaned from other sources.

Id. at 611 (emphasis in original).

Similar to the court's reasoning on cumulativeness in ***Shiffra***, the circuit court's finding that A.M.H.'s mother provided information to the defense and participated in some joint counseling sessions does not make the sought-after information cumulative. First, there is no indication that A.M.H.'s mother obtained or provided any counseling records to defense counsel. That is why trial counsel sought an order for release of A.M.H.'s records. Second, even if A.M.H.'s mother could testify about her daughter's mental

health treatment, information contained in the mental health treatment records, created by independent mental health professionals, would be of a higher quality and more probative value than the mother's testimony. Finally, the record indicates a tension between Mikan and A.M.H.'s mother and that the providers working with A.M.H. at Mikan were not freely exchanging information with A.M.H.'s mother. (*See* 106:35).

Additionally, information contained in the sought-after records such as a diagnosis or documented symptoms to explain the underlying reasons for A.M.H.'s untruthfulness is not cumulative to past instances of untruthfulness or generalized witness statements about A.M.H.'s reputation for not being credible. This is because a documented diagnosis or symptoms indicating an inability to truthfully relay events would specifically explain the underlying reason for A.M.H.'s past acts of untruthfulness. Evidence to explain A.M.H.'s behavior is much more compelling to a fact finder than a description of the behavior itself. Furthermore, an underlying diagnosis to explain A.M.H.'s lack of truthfulness would bolster Johnson's defense that A.M.H. is capable of not just telling white lies, but also of fabricating the serious allegations against him.

By failing to apply the available information to the materiality burden clearly set forth by ***Shiffra/Green*** trial counsel performed deficiently. As a result of this deficient performance, the circuit court denied Johnson *in camera* review of the complainant's treatment records.

C. If the results of the *in camera* review reveal relevant information material to the defense then Johnson would have insisted on going to trial; therefore, trial counsel's deficient performance prejudiced Johnson.

Whether Johnson can establish that trial counsel's deficient performance prejudiced him depends on the results of the circuit court's *in camera* review of the sought-after records. If the court's *in camera* review results in disclosure of relevant and material evidence supporting his defense that A.M.H. fabricated the allegations, then Johnson would have insisted on going to trial. Under this scenario, trial counsel's deficient performance prejudiced Johnson. However, Johnson concedes that if the *in camera* review results in no disclosure of records to the defense then he cannot establish prejudice.

Johnson's insistence on taking both cases to trial is apparent from the record. Johnson first appeared in court on April 2015 and pre-trial proceedings in these cases did not conclude until May 20, 2016. During this time, numerous evidentiary issues were litigated in preparation for trial. In addition, the only mention of plea negotiations on the record occurred at the May 20, 2016, hearing, which was just nine days after the court denied Johnson's request for *in camera* review of A.M.H.'s treatment records. Although Johnson eventually pled to reduced charges as part of an agreement, his decision to do so was directly related to the court's denial of his request for *in camera* review of A.M.H.'s records.

Finally, trial counsel's belief that *in camera* review of the sought-after records constituted a marginal component of the defense's case is not a reasonable belief. (*See* 144:15-16). Counsel vigorously sought the *in camera* review as evidenced

by his two motions and numerous arguments in favor of the review. His second motion seeking *in camera* review cites to the Wakefield affidavit, which categorizes the importance of the records as potentially "critical in Mr. Johnson's defense." (63:3). Finally, without the benefit of knowing what the records contain it is not reasonable for trial counsel to draw the final conclusion that the records were of marginal importance to Johnson's defense.

CONCLUSION

For the reasons above, Johnson requests that this Court reverse the circuit court and remand with instructions to perform an *in camera* review of A.M.H.'s mental health treatment records.

Dated this 29th day of June, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,963 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

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

Dated this 29th day of June, 2017.

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A P P E N D I X

I N D E X
T O
A P P E N D I X

Page

Circuit Court's Findings and Decision
Denying Postconviction Relief.....101-113

Defendant's October 13, 2015, Motion
for *In Camera* Review.....114-116

Defendant's April 11, 2016, Motion
for *In Camera* Review.....117-125

Excerpts from Trial Counsel's Arguments
for *In Camera* Review:

November 2, 2015, Hearing.....126-135

November 4, 2015, Hearing.....136-142

December 21, 2015, Hearing 143-145

May 11, 2016, Hearing.....146-153

Judgment and Amended Judgment of Conviction 154-158

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 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 one or more initials or other appropriate pseudonym or designation 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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