STATE OF WISCONSIN

COURT OF APPEALS

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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Johnson was Denied His Constitutional Right to Effective Assistance of Counsel because Trial 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.

The state concedes that trial counsel's failure to set forth or apply the governing legal standard under ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, in seeking *in camera* review of the complainant's mental health treatment records constituted deficient performance. (State's Resp. at 6).

Two issues remain in dispute. First, whether Johnson can meet his initial burden for *in camera* review of the sought-after records had trial counsel applied the available facts to the proper legal standard. Second, whether trial counsel's deficient performance prejudiced Johnson.

In regard to the second issue in dispute, the state's argument that trial counsel's deficient performance did not prejudice Johnson is premature because it is unknown whether *in camera* review of the sought-after records will result in the disclosure of relevant evidence to the defense. (*See* State's Resp. at 6-7). To establish prejudice, Johnson "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)). As a result, a prejudice determination cannot be made without full knowledge of whether or not *in camera* review of the

sought-after records discloses information material to the defense.

Johnson acknowledges that he cannot meet his burden to show prejudice *if* the *in camera* review does not result in the disclosure of records. Put differently, if the defense receives no additional information as a result of the *in camera* review, Johnson is in the same position as he was prior to entering his plea; therefore, he cannot establish prejudice.

As a result, the focus here is whether Johnson would have met his burden to obtain *in camera* review had trial counsel applied the available facts to the proper legal standard. "[T]he 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." ***Green***, 253 Wis. 2d 356, ¶19.

In his brief-in-chief, Johnson set forth what is known about A.M.H.'s treatment history and its relation to the 2009 recanted allegation and the 2013 allegations against Johnson as well as the purported flashbacks occurring during counseling, and A.M.H.'s lack of credibility. (Brief-in-Chief at 17-20). Based on this specific factual basis, Johnson asserted that the mental health treatment records would be likely to contain: (1) a full description of the flashbacks experienced during therapy, (2) a psychological explanation or diagnosis relating to the flashbacks, and (3) a psychological explanation of A.M.H.'s inability to tell the truth or accurately recall events. (*Id.* at 17-20). This specific factual basis sets forth far more than a general assertion that *in camera* review is warranted because the complainant has

been involved in counseling. In fact, the state's response does not assert that Johnson failed to set forth the specific factual basis required by ***Green***. (*See* State's Resp. at 9-12). Rather, the state posits that the records sought would be cumulative to other information known by or available to the defense. (State's Resp. at 6-7, 9-12).

The crux of the state's argument is that "the defense literally had someone on the inside of the counseling providing information directly to the defendant and trial counsel." (State's Resp. at 11). The record, however, does not support the state's assertion that A.M.H.'s mother attended each of A.M.H.'s counseling sessions, that she reviewed A.M.H.'s counseling records, or that she conveyed all possible information that would also be contained in mental health treatment records.

At the postconviction hearing, Johnson testified that A.M.H.'s mother had "limited conversations" with him about A.M.H.'s treatment records and he testified that A.M.H.'s mother never signed a release to obtain the records for the defense. (144:41). Johnson also testified that A.M.H.'s mother discussed her daughter's treatment "[i]n some instances" and that Johnson knew of the locations of the treatment providers. (*Id.* at 42). And while trial counsel testified that A.M.H.'s mother believed Johnson over her daughter and was willing to testify for the defense, counsel offered no detail of what the mother's testimony would be. (*Id.* at 25, 28).

A.M.H.'s mother's willingness to testify for the defense and her knowledge of her daughter's mental health treatment is not a substitute for clinical notes and records reflecting contemporaneous observations by mental health professionals. As the court of appeals in ***State v. Shiffra***,

175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), recognized: "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). The same statement from ***Shiffra*** is certainly true here where there is no indication that A.M.H.'s mother has the type of mental health training or education necessary to allow her to conclude that A.M.H.'s mental health negatively impacted her ability to perceive or remember events. In fact, defense counsel sought the mental health treatment records, in part, so that they could be reviewed by Dr. Hollida Wakefield, a licensed psychologist specializing in sexual abuse allegations and recovered memory. (App. 121-125; 63:7-8).

Moreover, there is no indication that A.M.H.'s mother attended each and every counseling session with A.M.H. or that A.M.H.'s providers informed her mother of what occurred at each session. In fact, the Child Protective Services (CPS) report detailing the February 2015 allegation indicates that staff members at the Mikan Day Treatment School were not freely sharing information with A.M.H.'s mother. (106:34). The CPS report states that "[A].M.H. had been moody during her counseling sessions and today finally reported the incident." (*Id.*). The report continues: "The reporter wanted to remain anonymous and asked if Mikan staff could be contacted first if this agency was going to contact the family for further investigation. Mikan staff could then better help A[.M.H.] through this." (*Id.*). This indicates not only that information was not freely exchanged between Mikan and A.M.H.'s mother, but also that Mikan was providing individual treatment to A.M.H.

In addition, A.M.H.'s mother's cooperation with the defense is not as clear cut as the state would make it seem.

Certainly, A.M.H.'s mother indicated that she believed Johnson over her daughter and that she was willing to testify about her daughter's dislike of Johnson. (144:25, 27). From this cooperation it cannot be surmised that A.M.H.'s mother was a virtual member of the defense team. In fact, the record indicates that A.M.H.'s mother was in a very difficult position. As expected, as a result of the 2015 allegations, CPS began an investigation into the family. (106:34-37). CPS had previously conducted an investigation due to the 2013 allegation. (106:24-33). During the 2013 CPS investigation, A.M.H.'s mother indicated that the investigation caused her a great deal of stress, in part, due to A.M.H.'s father's desire to obtain full custody and placement of A.M.H. However, A.M.H. remained in her mother's custody and was in her care at the time of the 2015 allegations with A.M.H.'s father having visitation rights at this time. (106:35-36). Much like CPS's involvement after the 2013 allegation, A.M.H.'s custody and placement with her mother would likely be in jeopardy again due to the new allegations and investigation.

Importantly, despite ongoing treatment as a direct result of the 2009 recanted allegation and the 2013 allegations against Johnson, the record does not indicate that the defense had any of the sought-after mental health treatment records, that A.M.H.'s mother had obtained any of these records, or that defense was given any indication of A.M.H.'s specific diagnoses. As a result, this case stands in sharp contrast to ***State v. Lynch***, 2015 WI App 2, 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.

In ***Lynch***, the defense obtained mental health treatment records pertaining to the complainant from the state's discovery disclosure and relied, in part, on these records to

assert that additional mental health treatment records should be examined *in camera*. ***Id.***, ¶¶12-13. The state asserted that *in camera* review would be cumulative in light of Lynch's "access to significant evidence of [the complainant's] 'reporting history.'" ***Id.***, ¶37. Despite the defense already having mental health treatment records pertaining to the complainant, the court of appeals held that the information now sought by the defense was not cumulative. ***Id.***, ¶¶38-39. Here, there is no indication that defense counsel had access to the sought-after mental health treatment records or the specific information that these records are likely to contain. This explains why counsel repeatedly sought *in camera* review. Furthermore, information relayed from A.M.H.'s mother to the defense or the jury in regard to A.M.H.'s treatment would be far less probative than records themselves.

The state also surmises that since defense counsel did not include any information obtained from A.M.H.'s mother in the motions seeking *in camera* review that nothing from the counseling sessions was beneficial to the defense. (State's Resp. at 10). A more plausible explanation, however, is that A.M.H.'s mother was not disclosing specific information regarding A.M.H.'s counseling sessions because she was not privy to that information. If defense counsel had access to all the necessary information through A.M.H.'s mother, then why did counsel repeatedly seek *in camera* review of A.M.H.'s mental health treatment records? If A.M.H.'s mother was part of the defense team then why didn't she obtain her daughter's treatment records and disclose them to the defense?

Trial counsel testified at the postconviction hearing that the sought-after records were of a marginal value to the defense (144:15-16). This testimony is not credible in light of

counsel's vigorous pursuit of *in camera* review nor is it reasonable considering that the contents of the records are unknown. Counsel filed two motions and made arguments at four separate hearings in favor of *in camera* review. (App. 114-153; 38; 132:6-14; 133:8-13; 135:5-6; 63; 137:9-15). In addition, counsel's second motion seeking *in camera* review contained the Wakefield affidavit, which referred to the importance of the records to the defense as "critical." (63:3).

The circuit court found that trial counsel's strategy would be: (1) Johnson did not commit the crimes, (2) A.M.H. fabricated the allegations either because she was influenced to do so or because therapy skewed her perceptions, and (3) A.M.H. was not a credible person. (App. 107; 143:3). Johnson maintains that the sought after records are likely to contain a full description of the flashbacks experienced during therapy, a psychological explanation or diagnosis relating to the flashbacks, and a psychological explanation of A.M.H.'s inability to tell the truth or accurately recall events. (Brief-in-Chief at 17-20). It is unreasonable for trial counsel to conclude that the impact of the records on the defense would be marginal considering the trial strategy and the information the records are likely to contain. Finally, trial counsel's conclusion about the impact of the records was made without actual knowledge of what they contain.

The state indicates that regardless of the mental health treatment records, Wakefield would have testified as a defense expert on memory and "flashback" allegations. (State's Resp. at 3). However, without access to the sought-after records, there would not be a proper foundation for Wakefield's testimony as to A.M.H.'s memory or "flashback" experiences. And without further detail about A.M.H.'s experiences it is unclear whether Wakefield could offer

relevant and probative testimony because she would be unable to tie her expertise to the facts surrounding the "flashbacks" likely contained in the sought-after records. This is exactly why Wakefield referred to the records as "critical."

In sum, the state made no assertion that Johnson failed to set forth "a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence . . .". *See* ***Green***, 253 Wis. 2d 356, ¶19. For the reasons stated above, and previously stated in the brief-in-chief, the sought-after records are "not merely cumulative to other evidence available to the defendant." *See id*. Thus, Johnson has met his burden under ***Shiffra/Green*** and the circuit court erred in ordering otherwise.

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 23rd day of October, 2017.

Respectfully submitted,

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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 2,118 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 23rd day of October, 2017.

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