STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2019AP000664

STATE OF WISCONSIN,

Plaintiff-Respondent,

T.A.J.,

Appellant,

v.

ALAN S. JOHNSON,

Defendant-Respondent.

APPEAL FROM THE ORDER DENYING TAJ STANDING, ENTERED IN WAUPACA COUNTY CIRCUIT COURT, THE HONORABLE RAYMOND S. HUBER PRESIDING

APPELLANT's BRIEF

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STATEMENT OF THE ISSUE

ISSUE 1: Does a victim in a criminal case have standing under Wisconsin Stat. Chapter 950 to independently oppose, orally or in writing, a Motion for *In Camera* Review of his or her mental health records?

The Circuit Court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary for this appeal. The briefs submitted for the appeal will fully present the legal issues, the record is relatively short, and all relevant documents have been included in the Appendix. *See* Wis. Stat. §809.22(1)(b).[1]

The decision should be published. The issues raised by this appeal affect crime victims across the state. *See* Wis. Stat. §809.23(1)(a)(5). Through Wisconsin Chapter 950, the legislature has provided crime victims with constitutional and statutory rights to protect their interests in criminal proceedings. These rights are meaningless, however, unless crime victims have a mechanism for asserting and protecting them. A published opinion in this case will establish what that mechanism is and how victims can employ it, which is a matter of "substantial and continuing public interest." *See.* Wis. Stat. §809.23(1)(a)(5). The answer to this question is especially critical to victims of sexual assault, as they commonly face demands for their private records. Victims who are aware of this uncertainty may be

[1] All statutory references in this brief are to Wisconsin Statutes 2018-19 unless otherwise specifically stated.

compelled to ignore their own treatment needs because they do not want their perpetrators to have access to their privileged and confidential counseling records. Alternatively, victims who have already sought counseling or therapy may - because of the threat that their intimate treatment details will be publicly exposed - refuse to assist in prosecutions that might produce requests for their protected treatment records.

These outcomes run directly counter to the promises made to crime victims in our statutes and constitution and undercut the public policies that crime victims' rights laws were designed to protect.

STATEMENT OF THE CASE

Facts of the criminal charges

According to the Criminal Complaint in this case, Alan Johnson is accused of sexually assaulting his son, the Appellant, TAJ[2] (R 6:1-5, A 1-5). The Complaint alleges that, for a period of several years, Johnson assaulted both TAJ and TAJ's sibling, KLJ, when they were children (R 6:3-5, A 3-5).

TAJ estimated that the abuse began while he was in Kindergarten and continued regularly until he was in Eighth grade (R 6:4, A 4). The abuse included numerous incidents of sexual assault where Johnson forced TAJ to bend over so Johnson could rub his penis against TAJ's buttocks (R

[2] The Supreme Court has determined that crime victims like TAJ and his sibling, KLJ, should be referred to by "identifiers" to "better protect [their] privacy and dignity interests" as crime victims. Wis. Stat. §809.86. Therefore, this Brief uses the victims' initials.

6:4, A 6). TAJ recounted at least two times Johnson grabbed and fondled TAJ's penis (R 6:4, A 4). TAJ also recounted numerous incidents that extended until he was in Twelfth grade where Johnson forced TAJ to watch pornographic images (R 6:5, A 5).

Both TAJ and KLJ reported that, during the years of assaults, Johnson was extremely controlling, and would often threaten them to prevent them from telling anyone about the abuse (R 6:3-5, A 3-5).

In November 2016, after having flashbacks and seeking counseling, KLJ decided to report the abuse (R 6:3, A 3). TAJ also came forward to report the abuse he endured (R 6:4-5, A 4-5). As a result, Johnson was charged criminally on February 2, 2017 (R 6:1-5, A 1-5).

On April 4, 2017, after bind-over, the District Attorney ("D.A.") formally filed an Information against Johnson (R 11:1-3, A 6-8). The Information charges Johnson with one count of Incest, two counts of 1st Degree Sexual assault – Contact with a Child Under Age 13, and one count of Causing a Child Under 13 to View/Listen to Sexual Activity (R 11:1-3, A 6-8). For all these counts, the victim is identified as TAJ (R 11:1-3, A 6-8). The Information also contains one count of 2nd Degree Sexual Assault of a Child, one count of Child Enticement, and four counts of Incest, for conduct involving KLJ (R 11:1-3, A 6-8).

Facts of Motion for Victims' Protected Records

As part of his defense strategy, Johnson, through counsel, sought information that would challenge the credibility of TAJ and KLJ. On September 8, 2017, Johnson filed a *Motion for an In Camera Inspection of KLJ's Mental Health Records* ("*Shiffra-Green* motion") (R 15:1-2). Three

months later, he filed a brief in support of that motion (R 16:1-1). The D.A. did not file a written response to Johnson's motion.

On December 13, 2017, the Court took up Johnson's motion and granted the *in camera* inspection of KLJ's records (R 17:1-1). At the hearing the D.A. either supported or did not object to the defense motion (A 15).

On March 29, 2018, Johnson filed a second *Shiffra-Green* motion, this time to obtain TAJ's confidential and privileged mental health records (R 21:1-3). The D.A. did not respond in writing to this motion.

TAJ and KLJ were concerned that they were not being properly informed of the proceedings or being consulted on the case. Worried about protecting their rights as crime victims, they each sought independent legal counsel through a new Crime Victims' Rights Project, staffed by attorneys from Legal Action of Wisconsin and Wisconsin Judicare, Inc.

On May 11, 2018, Attorneys Amanda R. Rabe and William Baynard of Wisconsin Judicare, Inc. filed a Notice of Appearance on behalf of KLJ (R 29:1-2). On September 4, 2018, Attorney Andrea K Rufo of Legal Action of Wisconsin, also counsel for the Appellant, filed a Notice of Appearance on TAJ's behalf (R 38:1-2). On October 23, 2018, counsel for TAJ informed the District Attorney's office that TAJ did not want any of his privileged, confidential records released and wanted, therefore, to contest Johnson's *Shiffra-Green* motion. The D.A. still did not file any response to Johnson's motion.

On January 7, 2019, TAJ filed an objection to Johnson's *Shiffra-Green* motion (R 39:1-14). The objection included support for TAJ's

standing to file the motion (R 39:1-14). The D.A. did not file a written response to TAJ's objection.

On February 6, 2019 Johnson filed a reply to TAJ's motion. He argued that, under his interpretation of Wis. Stat. Chapter 950 and the decision in *Jessica J.L. v. State (In re Jessica J.L.)*, 223 Wis. 2d 622, 589 N.W.2d 660 (Ct. App. 1998), crime victims lacked standing to enforce their rights by briefing or by making oral arguments, specifically in response to efforts which may require them to disclose privileged and confidential mental health records (R 40:1-3).

A hearing on the standing issue was held on March 13, 2019 (R 57:1-60, A 22-82). At the hearing, counsel for TAJ and KLJ argued that crime victims have standing to respond to motions for their privileged, confidential mental health records (R 57:1-45, A 22-67). Johnson argued in opposition (R 57:30-39, A 52-61). The D.A. took no position (R 57:43, A 65).

After listening to the arguments, the Circuit Court ruled orally that crime victims have no standing to file motions in criminal cases, citing *Jessica J.L., Id.* as controlling law (R 57:45-51, A 67-73). The Circuit Court then set a date, May 24, 2019, for the required *Shiffra-Green* materiality hearing, at which time access to TAJ's records would be decided (R 57:57, A 79). The Circuit Court informed counsel for KLJ and TAJ that they would not be allowed to present arguments, in writing or orally, at the materiality hearing (R 57: 57-58, A 79-78). On March 26, the Circuit Court signed a written order denying TAJ standing (R 42:1-2, A 83).

TAJ timely filed a motion for leave to appeal on April 29, 2019 (R 45:1-20). The Court of Appeals granted TAJ's motion on May 7, 2019, ordering that the State be named as an additional respondent in the appeal (R 51:1-2).

STANDARD OF REVIEW

Statutory interpretation is a question of law. *See, e.g., CED Props., LLC v. City of Oshkosh*, 2018 WI 24, ¶20, 380 Wis. 2d 399, 909 N.W.2d 136. The standard of review for questions of law, including statutory interpretation, is *de novo*. *Enbridge Energy Co., Inc. v. Dane Cty.*, 2019 WI 78, ¶ 19, 929 N.W.2d 572, 580.[3]

Statutory interpretation "'begins with the language of the statute,'" and "[i]f the meaning of the statute is plain, [reviewing courts] ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoted source omitted). In interpreting statutes, reviewing courts give statutory language "its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* Both the context of statutory language and the structure of a statute or series of statues are important to meaning so "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related

[3]The Court of Appeals can, of course, "benefit" from the circuit court's analysis. *See, e.g., Jones v. Estate of Jones*, 2002 WI 61, ¶ 9, 253 Wis. 2d 158, 646 N.W.2d 280.

statutes." *Id.* ¶46. Statutes must be interpreted "reasonably, to avoid absurd or unreasonable results." *Id.* "Where possible," statutory language must also be read " to give reasonable effect to every word, in order to avoid surplusage." *Id.*

ARGUMENT

I. INTRODUCTION

TAJ is the victim of significant, long-term child sexual abuse by his biological father, Alan Johnson. Johnson now seeks through a *Shiffra-Green* motion to invade TAJ's privacy and force TAJ to provide his private counseling records to the Court for an *in camera* review. If Johnson's motion is granted, TAJ must choose to either lose his privilege and protection of his confidential records by consenting to release, or to decline to release his records and risk being barred from testifying at trial. *State v. Shiffra*, 175 Wis. 2d 600, 612, 499 N.W.2d 719 (Ct. App. 1993); *State v. Lynch*, 2016 WI 66, 37 Wis. 2d 1, 885 N.W.2d 89.

TAJ has sought to protect his statutory right to privacy over those records by arguing, through a written response filed by counsel, that Johnson's request failed to meet the materiality requirements for an *in camera* inspection under *Shiffra-Green*. The D.A. took no action or position relative to Johnson's *Shiffra-Green* motion. TAJ's only option for expressing his legal objections to the Court, and to assert his right to privacy, is to intervene independently, through his own counsel.

Johnson argued that TAJ, as a crime victim, lacks standing to file any kind of written motion in the criminal case and, specifically, that TAJ

lacks standing to respond to a *Shiffra-Green* motion. The D.A. took no position on TAJ's standing. The Circuit Court agreed with Johnson, denying TAJ's objections to the motion and assertion of his rights.

The Circuit Court's order denying TAJ standing leaves him without a way to protect his crime victim right to privacy during the criminal proceedings. Although he might seek a remedy for a violation of his rights through some separate civil legal action, such as a petition for a writ or through a complaint to the Crime Victims Rights Board, those options will not prevent the violation of his rights in the first place, nor will those options ensure ongoing protection of them. Furthermore, if the court incorrectly decides the *Shiffra-Green* motion, there is no effective way to remedy that error because judges are immune from any liability or sanction for rights violations committed in the course of their judicial duties. *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384.

Thus, the question of victim standing in this matter lies at the heart of crime victims' rights law. Without standing, how can crime victims enforce the rights assured to them by Chapter 950 and the Wisconsin Constitution?

The Circuit Court's order is contrary to law. Under Chapter 950, the Wisconsin Constitution, and the Supreme Court's decision in *Gabler*, *Id.*, it is clear that crime victims do have legal standing to directly assert their rights to privacy over their privileged and confidential records, and to act in accordance with the protection of their rights during criminal proceedings.

II. THE PLAIN LANGUAGE OF WIS. STAT. §950.105 GUARANTEES TAJ THE RIGHT TO OBJECT AND TO BE HEARD, ORALLY AND IN WRITING, IN RESPONSE TO JOHNSON'S *SHIFFRA-GREEN* MOTION

A. Relevant Law

In the decades since Wisconsin first recognized the need to protect the rights of crime victims, victims' legal position in the criminal justice system has evolved. In addition to the general founding legal principals of respect for individual rights, Wisconsin Constitution, Article 1, §9m and Chapter 950 now guarantee specific rights for victims of crime, including the "right to privacy, to be treated with dignity and respect," and to "reasonable protections from the accused throughout the criminal justice system." Wis. Stat. §950.105 guarantees crime victims standing to assert, directly or through their own counsel, these rights and others created by statute in the course of criminal proceedings.

Wisconsin has often been at the forefront of protecting victims. The first incarnation of a victim's rights statute came in Chapter 950, passed in 1979 and published in 1980. While a monumental step forward for victim rights, the original Chapter 950 nonetheless contained a relatively anemic list of enumerated rights for crime victims and witnesses. These rights were primarily designed to ensure that victims received adequate information about court proceedings, to assist in receiving stolen property or restitution, and to create a safe space for victims at court proceedings. Of the ten enumerated rights in this original version of Wis. Stat. §950.04, nearly all of the rights are phrased as obligations of the State or a judge to do

something for an otherwise passive victim (e.g. "to be informed"; "to be notified"; "to receive"; "to be provided.").

Moving to embrace victim rights more effectively, the passage of 1997 Wisconsin Act 181 changed Chapter 950 significantly, reflecting the legislature's understanding that victims were not mere passive entities to be "informed" and "assisted," but, rather, active, autonomous, interested participants with rights they could demand and enforce.

Recognition of victim agency, and the need to hold the criminal justice system accountable, was reinforced by the addition of Wis. Stat. §950.09, creating the Crime Victims Rights Board (CVRB): a board under the Department of Justice with the authority to investigate complaints alleging violations of these rights. Under the new law, if the CVRB determined that a victim's rights had been violated, the CVRB could reprimand the public official who violated the right, assess a fine against the violator, refer the violator to the judicial commission, and obtain "equitable relief on behalf of a victim if such relief is necessary to protect the rights of the victim." *Id.*

The legislature created the CVRB as an extra-judicial administrative process, independent of the actual court case in which a victim might otherwise seek to enforce their rights. Thus, while the CVRB represented a real commitment to protecting victim rights, its ability to protect those rights was still limited by statute to issuing a reprimand, without authority to reinstate or restore the alleged rights. *Id.* §950.09(2). Likewise, the legislature clarified that a violation of a victim's right in a case cannot undo the completed criminal proceeding. *See* §950.09(2)(c) ("the board may not

seek to appeal, reverse or modify a judgment of conviction or a sentence in a criminal case.").

Through 1997 Wisconsin Act 181, the legislature also amended Wisconsin Chapter 950 by revising and expanding the list of enumerated rights in Wis. Stat. §950.04. The statute was first restructured to distinguish the rights of victims (§950.04(1v)) from the rights of witnesses (§950.04(2w)), indicating the legislature's continuing, or growing, recognition of the importance of protecting crime victims from further victimization by the criminal justice system.

The content of Wis. Stat. §950.04(1v) was also expanded, setting forth a detailed list of some thirty-six unique rights for crime victims. Several of these rights required the court to actively consider the individual interests of the victim. For example, while the original 1980 version of Wis. Stat. §950.04 expressed in Wis. Stat. §950.04(9) that victims were "entitled to a speedy disposition of the case in which they are involved," Wis. Stat. §950.04(1v)(a) made that right enforceable: providing victims the right "to have his or her interest considered when the court is deciding to grant a continuance." The court was now required to consider a victim's position before granting a continuance, and, thus, also required to allow the victim an opportunity to express their interests and position on the matter. Similarly, Wis. Stat. §950.04(1v)(d) provided a victim the right to "request an order for, and to be given the results of testing to determine the presence of a sexually transmitted disease." Under Wis. Stat. §950.04(1v)(em), victims, again, had the right to express their opinion and have the Court consider their interest in determining "whether to exclude persons from a

preliminary hearing." None of the new statutory provisions limit the victim to any particular way of expressing or demanding these rights.

The legislature's new emphasis on victims' direct participation in criminal cases is apparent in other provisions of Wis. Stat. §950.04(1v). The newly constructed Wis. Stat. §950.04(1v) guarantees, for example: the right to speak at sentencing (§950.04(1v)(m)), to be interviewed as part of a presentence investigation report (§950.04(1v)(p)), to have input in parole decisions (§950.04(1v)(n)), to provide the court with information as to the effect of the crime on the victim (§950.04(1v)(pm)), and others. All of these rights presuppose that a victim might address the court and assert their right to be heard on these issues regardless of whether their wishes are consistent with the position of the district attorney.

Several years later, the legislature passed 2011 Wisconsin Act 283, enacting Wis. Stat. §950.105. This provision, entitled "Standing," provides:

> **Standing.** A crime victim has a right to assert, in a court in the county in which the alleged violation occurred, his or her rights as a crime victim under the statutes or under article I, section 9m, of the Wisconsin Constitution. This section does not preclude a district attorney from asserting a victim's statutory or constitutional crime victim's rights in a criminal case or in a proceeding or motion brought under this section.

This new provision of Wis. Stat. Chapter 950 directly addressed crime victims' need for a legally protected means of making their voices heard in a criminal proceeding.

B. Wis. Stat. §950.105 unambiguously creates standing for crime victims.

Because §950.105 is unambiguous, the Court need look no further for the legal authority to grant TAJ standing in this matter. The plain language of this statute gives crime victims, like TAJ, independent statutory authority to exercise their rights in a criminal proceeding in which they are involved.[4]

To deduce the meaning of a statute, Wisconsin law requires consideration of the meaning of each word, phrase, and sentence. *State v. Quintana*, 2008 WI 33, ¶14, 308 Wis. 2d 615, 748 N.W.2d 447; *see also State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967)("In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute"). A common-sense interpretation of the statute is supported by the dictionary definition of "assert" and "standing".[5] Merriam Webster's online dictionary defines "assert" both as "speaking forcefully" and as acting to "compel or demand acceptance or recognition of (something, such as one's authority)." Merriam-Webster, *Definition of* assert, https://www.merriam-webster.com/dictionary/assert (last visited August 13, 2019). The same dictionary defines "standing" as "a position from which one may assert or enforce legal rights and duties". Merriam

[4] It also codifies victims' preexisting right to bring civil actions in appropriate cases and identifies the venue for those actions.

[5] *See e.g., State ex re. Girouard v. Circuit Court*, 155 Wis. 2d 148, 156, 454 N.W. 2d 792 (1990)("Resort[ing] to definitions, statutory or dictionary, is appropriate for the purpose of determining meaning that is plain on the face of the statute.")

Webster, *Definition of* standing *(Entry 2 of 2)*, https://www.merriam-webster.com/dictionary/standing (last visited August 13, 2019).[6]

The plain language of the statute clearly creates a broad right of standing for crime victims. Wis. Stat. §950.105 authorizes victims to assert violations "under the statutes" or "under Article 1, section 9m of the Wisconsin Constitution." The phrase "[t]he statutes" means exactly what it says: under any state statutes that create rights, victims have standing to assert those rights in the context of criminal proceedings. [7]

Furthermore, this plain meaning interpretation of the statute is strongly supported by the title of Wis. Stat. §950.105: "Standing".

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[6] *See also* **Black's Law Dictionary (11th ed. 2019)**(available through WESTLAW) which defines assert as "**1.** To state positively. **2.** To invoke or enforce a legal right.". Both definitions make it clear that "asserting a right" is a non-technical way of saying that the person has "standing" in at least a limited context. *See* Black's Law Dictionary (11th ed. 2019))(available through WESTLAW) which defines standing as a "party's right to make a legal claim or seek judicial enforcement of a duty or right."

[7] The context of the entire Chapter also supports this reading. Courts must presume that legislatures choose words deliberately, *See State v. Olson,* 175 Wis. 2d 628, 641, 498 N.W.2d 661 (1993) (appellate court must assume that legislature purposefully selected statutory language); and that the use of different words in an act or chapter is also significant. See *Kett v. Community Credit Plan, Inc.,* 228 Wis. 2d 1, 14, 596 N.W.2d 786 (1999) (legislature's use of different terms in Wisconsin Consumer Act "shows a deliberate legislative intent to give meaning to the words").
Wisconsin Stat. Chapter 950 refers to rights "under this chapter", Wis. Stat. §950.03, "rights under s. 950.04", Wis. Stat. §950.045, "services under this section", Wis. Stat. §950.055, "reimbursement under this section,"Wis. Stat.§950.06, "rights and services … under this chapter. Wis. Stat. §950.07, " "any power or duty under this chapter or under article I, section 9m, of the Wisconsin constitution," Wis. Stat. §950. 10, and a number of enumerated statutes. The phrase the "statutes" appears only once in the Chapter: in Wis. Stat. §950.105. This Court must, therefore, presume the legislature intended the distinction it made and intended the standing language to apply to all statutes creating rights that a crime victim could assert.

Wisconsin courts have repeatedly confirmed that titles may be used to aid plain language interpretations. *See, e.g.*, *Raymaker v. Am. Family Mut. Ins. Co.*, 2006 WI App. 117, ¶30, 293 Wis. 2d 392, 718 N.W.2d 154. This title confirms the meaning of the statute because it reinforces the common-sense, plain meaning of the text.

The Wisconsin Supreme Court's 2017 discussion of Wis. Stat. §950.105 supports TAJ's interpretation. The Supreme Court found certain portions of the statutory authority of the CVRB unconstitutional and explained that its decision does not leave victims powerless to assert and enforce their rights. *Gabler*, 2017 WI at ¶59. According to the Supreme Court, Wis. Stat. §950.105 created that authority and mechanism because it allows crime victims to address potential rights violations during a criminal proceeding. *Id.*

> Although we prohibit the Board from disciplining judges because executive review of judicial decisions violates fundamental separation of powers principles, crime victims nonetheless have recourse for their grievances against judges. *Wisconsin Stat. § 950.105 assures victims a mechanism for directly asserting their own rights in court.* We reserve for future cases more comprehensive discussion of the interplay between victims' rights and procedural tools, such as *intervention*, writs of mandamus, and supervisory writs. *Because victims may assert their rights in court, these procedural mechanisms could offer alternative remedies for victims seeking to vindicate their rights. And because these procedural means could offer recourse for victims within the unified court system, they would not pose a threat to the judiciary's independence.*

Id. (emphasis added).

Clearly, the Supreme Court has recognized that Wis. Stat. §950.105 authorizes direct interventions in criminal cases while not precluding

victims' use of other tools-such as writs of mandamus and supervisory writs. *See id.* [8]

Most importantly, TAJ's plain language interpretation of the statute comports with the statement of purpose in Article 1 section 9m of the Wisconsin Constitution ("this state shall treat crime victims, as defined by law, with fairness, dignity, and respect for their privacy") and with the explicit statement of legislative intent set forth in Wis. Stat. §905.01:

> In recognition of the civic and moral duty of victims and witnesses of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of such citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state, the legislature declares its intent, in this chapter, to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy and sensitivity; and that the rights extended in this chapter to victims and witnesses of crime are honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants. *Id.*

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[8] Under Wisconsin's law, it is clear that crime victims would have had the right, outside of the 2011 legislation that codified victim standing in Wis. Stat. §950.105, to initiate an action for mandamus or a supervisory writ in the appropriate court. *See, e.g., Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Com.*, 69 Wis. 2d. 1, 9, 230 N.W.2d 243 (1975); *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n.*, 2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789(standing depends on (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged.) *Id.* at 421-422. A crime victim in TAJ's situation clearly satisfies the criteria for standing by having a personal interest in protecting their statutorily protected records. If Wis. Stat. §950.105 did not "add something" to the existing standing doctrine - the right to intervene in an existing criminal proceeding - it would be largely superfluous. A plain language interpretation of a statute should avoid, "where possible" an interpretation of the statutory language that makes part of the text superfluous.

The Wisconsin Supreme Court has repeatedly affirmed that, in enacting Chapter 950, the legislature intended to protect the dignity and the privacy of crime victims. *See, e.g. Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, ¶ 14, 372 Wis. 2d 460, 474, 888 N.W.2d 584, 591 (discussing the well-established policy interest in protecting the privacy of victims of crime—especially children affected by very sensitive crimes); *see also Schilling v. Crime Victims Rights Bd.*, 2005 WI 17, ¶ 26, 278 Wis.2d 216, 692 N.W.2d 623 (the legislature intends that state actors seek to minimize the "further suffering" of crime victims).

Johnson's interpretation of the statute cannot be reconciled with these clear statements of intent. It would be unthinkable to conclude the legislature intended to promise victims rights but then deny victims the means to enforce those rights. It is equally unthinkable to imagine that the legislature intended to deny victims dignity by reducing them to silence and helplessness in the face of threatened violations of their rights. That would be a truly absurd result. *See City of Kaukauna v. Vill. of Harrison*, 2015 WI App 73, ¶ 9, 365 Wis. 2d 181, 189, 870 N.W.2d 680, 683–84, *citing Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶ 15, 293 Wis.2d 123, 717 N.W.2d 258 ("A statute may be said to have absurd results when the interpretation of its plain language leads to ' unreasonable or unthinkable results' and 'open disbelief of what a statute appears to require.'")

C. Even if Wis. Stat. §950.105 were ambiguous, the statute still must be construed to provide standing for TAJ to assert his rights orally and by written motion in response to Johnson's motion.

A statute is ambiguous only if reasonably well-informed persons could interpret its meaning in two or more senses. *Kalal*, 2004 WI at ¶ 47. A statute is not ambiguous simply because there is a disagreement as to its meaning; rather "the test for ambiguity examines the language of the statute 'to determine whether well-informed persons *should have* become confused, that is, whether the statutory ... language *reasonably* gives rise to different meanings.' " *S.O. v. T.R. (In re C.R.)*, 2016 WI App 24, ¶ 17, 367 Wis. 2d 669, 877 N.W.2d 408(citation omitted).

In his argument to the Circuit Court, Johnson suggested--and the Court agreed—that, because Wis. Stat. §950.04 does not expressly provide crime victims with an enumerated right to file a motion in court, crime victims are, therefore, precluded from filing any motions or requests, much less a written response to a *Shiffra-Green* motion (R 57:38, A 51). This argument is flawed for several reasons.

First, this argument implies that Wis. Stat. §950.105 is "ambiguous" with respect to whether standing is limited to asserting rights enumerated only under Chapter 950's Victim Bill of Rights. Two reasonably well-informed persons could not interpret the meaning of Wis. Stat. §950.105 to exclude standing to enforce those rights created by other statutes. Under this reading of Chapter 950, crime victims whose enumerated rights are being violated could assert their position, but not in the form of a formal

written response. That interpretation is unreasonable because it renders Wis. Stat. §950.105 meaningless.

Second, this interpretation would also negate many of the enumerated rights articulated in the Crime Victim Bill of Rights. Johnson incorrectly conflates the granting of a right with the procedural method used to enforce that right in a court proceeding. For the purpose of criminal procedure, a motion is defined in Wis. Stat. §971.30(1) as "an application for an order." Where rights are created by statute, the statute itself need not prescribe the exact method by which the right is asserted. Many of the explicitly enumerated rights given to victims inherently assume the right to file motions. For example, in Wis. Stat. §950.04(iv) crime victims have the right to object to a continuance (§950.04(iv)(ar)); the right to request an order for testing of a communicable disease (§950.04(iv)(d)); the right for the court to consider their wishes in determining whether to exclude witnesses at a preliminary hearing (§950.04(iv)(em)); and the right to request a speedy disposition (§950.04(iv)(k)). None of these rights can be requested unless a victim or his representative moves the court for an order, a process done through filing a motion.

It is true that Wis. Stat. §950.04(iv) does not explicitly articulate a victim's right to argue orally or to write a letter to the court. However, Johnson's strained reading of the statute is simply absurd. The legislature cannot have intended to create enumerated rights that victims could only assert through mime or some other form of silent appeal.

Third, it is equally unreasonable to suggest that Wis. Stat. §950.105's standing limits the ability of a crime victim to assert their rights and have standing solely through the State. Many cases involve a victim

and a district attorney who disagree about an issue related to a crime victim right. For example, a district attorney might request a continuance or not object to a defendant's request for a continuance for strategic reasons, despite the fact that the victim adamantly opposes further delay. It is absurd to suggest that a crime victim's rights can *only* be asserted by a district attorney who does not actually represent that crime victim.

Such a reading also cannot be reconciled with the complete text of Wis. Stat. §950.105. The second sentence of Wis. Stat. §950.105 provides that the statute does not "preclude" a district attorney from also asserting a victim's statutory or constitutional rights "in a criminal case or in a proceeding or motion brought under this statute." There would be no need to say that a district attorney is not precluded from speaking for a victim in a criminal case unless the first sentence in Wis. Stat. §950.105 guarantees a victim their own independent standing to assert their rights directly or by retained counsel.

Even if the Court determines that Wis. Stat. §950.105 is ambiguous or that Wis. Stat. §950.105's statutory language suggests standing is restricted to enumerated rights and does not extended to rights created by other statutes, Johnson's interpretation remains untenable given the legislature's dominant focus on protecting crime victims. This unreasonable position ignores the enumerated right to " be treated with fairness, dignity, and respect for his or her privacy by public officials, employees, or agencies." Wis. Stat. §950.04(1v)(ag). Respect for a crime victim's privacy requires that TAJ be allowed to assert his right to privacy by responding to Johnson's *Shiffra-Green* motion.

Not only has the legislature placed a clear importance on the protection of crime victims and their rights, it has also created significant laws to protect the private and confidential records of its citizens. Of primary concern is the protection of mental health records given the highly sensitive and potentially embarrassing material contained in such records. *Steinberg v. Jensen*, 194 Wis. 2d 439, 459, 534 N.W.2d 361 (1995).

Medical and mental health records in Wisconsin are confidential under Wis. Stat. §146.48(1) and §51.30; and protected by privilege under Wis. Stat. §905.04. The release of private records is also heavily protected under the federal Health Insurance Portability and Accountability Act (HIPAA). 45 C.F.R. §164.512. Both the State and Federal Government have emphasized the significance of protecting personal health information and the confidentiality of medical records, and with good reason.

There is significant public policy supporting confidentiality in all medical treatment, but especially in instances of mental health, and in instances of abuse or other victimization. These protections exist to encourage patients to freely and candidly discuss medical concerns with their physicians by ensuring that those concerns will not be disclosed to a third person. *Steinberg*, 194 Wis. 2d at 459.

Confidentiality reassures citizens that they can seek help without repercussion. The doctor-patient privilege encourages patients to be honest with medical professionals and thus receive the proper care. For victims of sexual assault especially, these privacy measures are particularly important in providing a necessary assurance of privacy so that they feel safe in seeking out help.

Most recently, in the lead decision in *State v. Lynch*, the Wisconsin Supreme Court noted that the doctor-patient privilege "serves the crucial purpose of ensuring that individuals who may be suffering as a result of a traumatic experience, like sexual assault, can freely and openly communicate with and be treated by their mental health provider." 371 Wis. 2d at 49. In discussing the significance of the doctor-patient privilege, the lead decision relied on the US Supreme Court's reasoning in *Jaffee v. Redmond,* 518 U.S. 1, 18, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996). Specifically, that:

> Effective psychotherapy, by contrast 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. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communication made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for treatment.

Id. at 10.

The significance of these public interests has consistently influenced the development of case law related to *Shiffra-Green* motions. *Lynch*, 2016 WI 66. Such motions require the courts to balance a citizen's fundamental rights to privacy with a defendant's right to access evidence against him and present a defense. *Id.* Unlike most discovery where the relevant records are collected and maintained by the State, a victim's private medical records subject to *Shiffra-Green* are uniquely not in the possession or control of the State. These records can only be provided by consent of the privilege holder, the victim. Thus, a defendant, by filing a *Shiffra-*

Green motion, actively inserts the victim into the criminal proceeding for the limited purpose of addressing the confidentiality of their records.

To protect the victim's right to privacy, and the public policy priority to ensure effective treatment, a court must ensure that a defendant meets certain requirements before a victim can be forced to decide whether to turn over private records for the court's review. In *Shiffra*, the Court first ruled that if a defendant could provide a proper showing of relevancy for an *in camera* inspection of the requested confidential records, then a court may find it appropriate-- under certain circumstances--for the due process rights of the defendant to outweigh the privacy interests of the record holder. 175 Wis.2d 600.

In *State v. Green*, the Wisconsin Supreme Court heightened the "threshold showing requirement... [i]n light of the strong public policy favoring protection of counseling records." 2002 WI 68, ¶32-33, 253 Wis. 2d 356, 646 N.W.2d 298. The initial hurdle of a *Shiffra-Green* motion is often referred to as the "materiality test." It requires a defendant to present a written offer of proof that "describe[s] as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense." *Id.* at ¶33. A defendant is required to reasonably investigate information related to the victim and to "clearly articulate how the information sought corresponds to his or her theory of defense." *Id.* at ¶35. The defendant's offer of proof should allege "material facts... [that] list what records actually exist... [and] explain why any such records may be relevant." *State v. Allen*, 2004 WI 106, ¶33, 274 Wis. 2d 568, 682 N.W.2d 433.

A defendant's motion "must establish more than 'the mere possibility' that psychiatric records 'may be helpful' in order to justify disclosure of an *in camera* inspection." *State v. Munoz*, 200 Wis. 2d 391, 396-397, 546 N.W.2d 570 (Ct. App. 1996). A defendant must meet the materiality test by providing more than a statement that the records "may contain evidence useful for impeachment on cross-examination" because "[t]his need might exist in every case involving an accusation of criminal sexual conduct." *Green*, 253 Wis. 2d at 378 (citing *People v. Stanaway*, 446 Mich. 643, 681 521 N.W.2d 557(Mich. 1994)). Otherwise, an offer of proof that provides only a defendant's speculative conjecture or bare-bones conclusive statements may be denied without a hearing. *See State v. Smith*, 60 Wis. 2d 373, 380, 210 N.W.2d 678 (1973).

The courts have repeatedly emphasized that this materiality requirement is not merely a procedural hoop to jump through on the way to an *in camera* review, but rather a crucial gatekeeper and a fundamental protection of a victim's privacy rights. Once an *in camera* inspection is granted, a victim faces significant consequences and limited options. Therefore, it is crucial that a victim, like TAJ, be able to defend his right to privacy at the materiality stage of a *Shiffra-Green* motion.

For all of these reasons, it is fundamentally unreasonable to conclude that "respect for privacy" does not include the right to try to protect one's own privacy by responding directly to a *Shiffra-Green* motion. Thus, even if the court finds that Wis. Stat. §950.105 is ambiguous as to the scope of the standing created by the statute, under either the broad or more limited interpretation, the intent of the legislature was surely to guarantee that TAJ

and other victims in his position, have the right to argue, orally or in writing, in opposition to a *Shiffra-Green* motion.

D. Victims need independent standing because district attorneys are not, and cannot be victims' attorneys.

In its oral ruling, the Circuit Court concluded that Chapter 950 did not give victims any right to "appear of record in a criminal proceeding" (R 57:46, Ap 68). The Court explained: "I don't think there's anything within the Constitution of Wisconsin or the Crime Victim Rights delineated in 950 that says that we end up with additional attorneys who have standing to make arguments before the Court" (R 57:48, Ap 70). The Circuit Court did not explain, because it could not, how this conclusion reconciles with Wis. Stat. §950.105. The Court also did not explain, because it could not, how this conclusion reconciles with the statutory and ethical obligations of a district attorney which specifically precludes them from acting as the victim's counsel.

The Circuit Court expressed concern that allowing victim counsel to assert standing relative to their Chapter 950 rights is tantamount to making them full parties in a criminal case. Such concern is unfounded. TAJ does not seek to become a full party to the criminal case. Rather, TAJ seeks standing only for a specific reason: to respond to Johnson's request for TAJ's confidential records. Holding that TAJ has legal standing to independently oppose Johnson's motion permits his participation on a very specific basis, in a limited capacity. Such limited participation does not automatically open the courtroom door to full participation by victims in any and all proceedings in the case.

Our criminal justice system has long emphasized the need for independent district attorneys who would have no private interest in the outcome of a case. In Wis. Stat. §978.05, district attorneys are specifically (and exclusively) tasked with "prosecut[ing] all criminal actions before any county within his or her prosecutorial unit" and they are to "have sole responsibility for prosecution of all criminal actions." By creating these independent offices of district attorneys to prosecute crimes, both the legislature and courts sought to provide defendants with fair, impartial criminal prosecutions free of bias. *See, e.g., Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978); *State v. Mann*, 123 Wis. 2d 375, 394 N.W.2d 209 (1985).

While victims may believe the district attorney is someone advocating on their behalf, district attorneys represent the interests of the State rather than a specific victim. *See* §978.05, §978.06, Wis. SCR 20:3.8. It is not uncommon for the interests of a victim and the interest of the State to diverge or outright conflict. A victim, for example, may decide they no longer want a case to be prosecuted; they may have opinions on who should be called to testify; or they may disagree with facts of the investigation or strategies of the case. While a victim may have a right under Chapter 950 to voice those opinions to the district attorney, they cannot demand or require that the district attorney comply with their wishes. To insist, as the Circuit Court does here, that the district attorney alone can speak to the court on behalf of the victim either threatens prosecutorial independence (by suggesting that district attorneys must argue positions they do not wish to take) or render the rights of crime victims unenforceable (by requiring

victims to depend upon someone who disagreed with their positions to argue them fully and fairly).

Under Wis. Stat. §978.05, the district attorney controls prosecutorial decisions. Unlike an attorney hired to represent an individual, the district attorney never has an attorney-client relationship with a victim. Thus the district attorney owes no corresponding duties to the victim, and the victim has no corresponding attorney-client privilege. A district attorney is bound by statutory law and ethical rules to take actions that could directly conflict with the victim's wishes and rights, such as the dismissal of a case for lack of probable cause. [10] The district attorney's duty is to the truth and to pursuing cases they believe can be proven beyond a reasonable doubt. *See e.g., Biemel v. State*, 71 Wis. 444, 445, 37 N.W. 244 (1888)("The duty of the prosecuting attorney is to proceed with all fairness in presenting the cause of the state to the jury and in prosecuting the whole case, even though parts of the case as presented should make in favor of the innocence of the accused.").

It is even more problematic that, while district attorneys have a duty under Chapter 950 to keep a victim informed of proceedings and actions, they are nonetheless ethically barred from giving the victim any legal advice, especially as it pertains to the exercising or waiving of specific rights. Wis. SCR 20:3.8, Wis. SCR 20:4.3.

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[10] *See also* Wisconsin's Rules of Professional Conduct for Attorneys, Supreme Court Rules Chapter 20. *See* specifically, Wis. SCR 20:3.8 which sets out the special responsibilities of a prosecutor. None of those responsibilities includes acting as victim counsel.

Nowhere is this conflict more obvious than in the context of a *Shiffra-Green* motion. Unquestionably, the determination to grant an *in camera* inspection of the victim's records implicates a victim's statutory and constitutional rights and privileges. As previously discussed, if a court grants an *in camera* inspection of the victim's records, the victim is required to then decide to either waive their rights and provide their records or risk being barred from testifying at trial, which could reasonably result in the outright dismissal of the case.

Despite these high and complicated stakes, a victim without standing to reply to a *Shiffra-Green* motion is left without anyone who can give them legal advice and without a meaningful way to give voice to their concerns. The district attorney may take an opposite position from the victim on whether to release records. Or, the district attorney may simply, as in the present case, not contest the defendant's motion for strategic or other reasons. A district attorney has a number of factors to consider in how they present their case, from evaluating the strengths and weaknesses of the case, to strategically determining what evidence to submit or exclude. A victim may disagree with the district attorney's choices, but the choices remain the district attorney's alone.

These decisions are well within a district attorney's duties and rights, as well as their ethical obligations. Yet, this reflects the conundrum that arises when victims are denied independent standing to intervene to protect their rights: since so many of these decisions are rooted in legal strategy, rules of evidence or specific case law, it is unlikely that a *pro se* victim with no legal background will be in a position to understand all of their rights, options, and possible consequences.

Nevertheless, the district attorney is legally and ethically unable to counsel a victim on these complex issues to ensure a victim's understanding, nor can they advise the victim on what actions to take. Especially in the context of discussing the release of private records in response to a *Shiffra-Green* motion, district attorneys must be acutely aware of the need to remain neutral in conveying information to a victim, lest they are accused of being misleading or of influencing a victim to make the decision most favorable to the State's case. It is precisely in this kind of situation when victims should be advised to consult with their own attorney, and precisely the time when independent counsel is needed to advocate both in and out of court on that victim's behalf.

> It is clear that a prosecutor represents the public in general, and the state in particular. It is clear that a prosecutor carries absolute discretion in exercising the power to arrest, to prosecute or plea, to settle or dismiss. It is also clear that a victim of a crime is not a designated player, or "party," in the legal rule book. Only the defendant and the prosecutor "have an interest" in the criminal justice arena, which gives them "standing." Lastly, it is clear that there is unrest far and wide among citizens, of whom some 35 million are crime victims. Their collective voice should be deafening, but unfortunately it officially cannot be heard.

Judith Rowland, *Illusions of Justice: Who Represents the Victim?*, 8 St. John's J. Legal Comment 177, 178 (Fall 1992).

Despite the Circuit Court's ruling, it is clear that district attorneys cannot ethically or practically act as crime victims' attorneys. Chapter 950, and particularly Wis. Stat. §950.105, recognizes this fundamental truth and

authorizes crime victims, when necessary,[11] to represent themselves or to retain an attorney to represent them.

E. The Circuit Court erred in relying on *In re Jessica J.L.* as controlling law.

In *Jessica J.L.*, a defendant charged with sexual assault of a child filed a *Shiffra* motion requesting the child's counseling records[12]. 223 Wis.2d 622. The D.A. did not object to the motion and waived any hearing on the materiality of the motion, without providing notice to or getting

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[11] In this case, the need for outside counsel is self-evident. D.A. Isherwood chose not to object to Johnson's initial *Shiffra-Green* Motion of KLJ. According to the CCAP notes, D.A. Isherwood agreed with Johnson's request during what was originally scheduled as the materiality hearing. Six months later, when Johnson filed the motion for *in camera* review of the records of TAJ, D.A. Isherwood again failed to file any written response. TAJ recognizes that the State may have strategic reasons to not contest either *Shiffra-Green* motion. However, that strategic choice by the State cannot be the basis for denying a victim's right to try to protect his or her privacy.

> It is not the function of anyone in law enforcement to represent the victim. Police are charged with investigating cases, prosecutors represent the state in its effort to hold criminals accountable, and judges are ultimately responsible for ensuring that defendants are deemed innocent until proven guilty beyond a reasonable doubt. All of these actors share a responsibility and concern for the safety and welfare of victims of crime. When the interests of victim's conflict with their professional responsibilities, as they often do, ethical members of the criminal justice system cannot prioritize the victim's needs. For example, advocates working in the prosecutor's office can do valuable work in supporting victims through a prosecution, but information they receive from a victim must be disclosed to the defendant it is constitutes exculpatory evidence. Symposium, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 Suffolk U. L. Rev. 253, 278-79 (2005).

[12] *Green*, 2002 WI 68, which advanced and makes up half of what we call today the "*Shiffra-Green*" motion was not decided until 2002. The defendant's motion in *Jessica J.L.*, which was decided in 1998, was thus technically only a *Shiffra* motion.

consent from the victim. Concerned about the juvenile victim's understanding of the options for releasing records for the *in camera* inspection, the circuit court appointed a Guardian ad Litem ("GAL"). When the GAL learned that the D.A. had consented to the materiality of the *Shiffra* motion without any input from the victim, the GAL filed a motion requesting that the circuit court vacate the order for *in camera* inspection and, instead, reset the matter for a materiality hearing on the merits of the defendant's motion. Ultimately, the circuit court held that the GAL lacked standing to make such a request and to participate in the "criminal proceedings in regard to all *Shiffra* determinations, to force [the defendant] to make a showing that the records sought are relevant and necessary to a fair determination of guilt or innocence." 223 Wis. 2d at 638.

As a basis for its holding, the Court of Appeals offered a summary of the case law leading to the creation of an independent district attorney, and the necessity of an unbiased prosecution to ensure a fair criminal justice system. *Id.* The Court then reasoned: (1) there is a continued need for unbiased independent district attorneys to ensure the defendant a fair trial and (2) §978.05 limits any acts of prosecution to the full authority of the district attorney. Thus, a private attorney for a victim, under Wis. Stat. §978.05, lacked standing to "participate in the prosecution of a sexual assault in circuit court," including participation in regard to a *Shiffra* motion which the Court defined as "part of that prosecution." *Id.* at 635-36.

Although *Jessica J.L.* may initially appear on point, it is, upon review, irrelevant to the standing question raised by this case. Most significantly, *Jessica J.L.* was decided prior to the legislature expressly providing victim standing in Wis. Stat. §950.105; *Jessica J.L.* was decided

in 1998, while §950.105 was enacted in 2012. Whatever the status of *Jessica J.L.* prior to 2012, its precedential value changed after 2012 when the legislature explicitly recognized that crime victims have the right to assert their own rights directly during criminal proceedings. *See* Wis. Stat. §990.001(7)("A revised statute is to be understood in the same sense as the original unless the change in language indicates a different meaning so clearly as to preclude judicial construction."); *see also Progressive N. Ins. Co. v. Romanshek,* 2005 WI 67, ¶ 52, 281 Wis.2d 300, 697 N.W.2d 417 ("a construction given to a statute by the court becomes a part of the statute, barring subsequent pertinent legislation.").

The Court in *Jessica J.L.* clearly recognized the need for a victim to be heard as to the possible release of their own private records. Not finding any guidance on how this could be done, the Court turned to open records law and relied heavily on *Woznicki v. Erickson*, 202 Wis.2d 178, 549 N.W.2d 699 (1996). The decision in *Woznicki* is notable in that it ruled that when there was an open records request that might infringe on the privacy interest of the subject of the records, the records could not be released until the subject was given notice, and "a right to object to that pending disclosure." *Id.* at 194.

Following the example set in *Woznicki*, the Court in *Jessica J.L.* also found that the victim had a right to be heard and voice an objection. At the time however, there was no statutory provision for which the Court could rely on to grant standing to a victim to be heard independently. Instead, the Court put the onus of speaking for the victim on the district attorney, even though such a decision might compromise the idea of an independent

prosecution. Had Wis. Stat. §950.105 been enacted at the time, it is likely the Court would have turned to it in reaching its holding.

Jessica J.L. does not address any of the issues raised by a *Shiffra-Green* motion in the context of Chapter 950 victims' rights. The parties did not raise, brief, or argue anything about those issues and the Court of Appeals was not required to raise those issues for them. However, the absence of discussion of the issues further supports treating *Jessica J.L.* as irrelevant to both the issue in this case, and the finding that Wis. Stat. §950.105 provides legal standing for victims.

Given this history, it is not surprising that, as the body of *Shiffra-Green* law developed since 1998, *Jessica J.L.* has played a minimal role. In fact, the case has only been cited in four published cases and in all of those cases, *In re Jessica* is cited exclusively for the section of the Court's ruling that addressed the materiality threshold determination. No court furthers the *Jessica J.L.* mandate that, upon the filing of a *Shiffra-Green* motion, the district attorney must present the argument desired by the victim.

In other cases, where *Jessica J.L.* might logically be cited by courts or parties, the same silence exists. For example, *State v. Denis L.R.* dealt with a *Shiffra-Green* motion for the counseling records of a minor child. 2005 WI 110, 283 Wis. 2d 358, 699 N.W.2d 154. In the course of arguments, it was alleged that, based on statements made by the child's mother to a third individual, the child's doctor-patient privilege had been waived and thus the records could be released. *Id.* The trial court allowed the mother to intervene with independent counsel to argue that the privilege had not been waived and the records should remain confidential. When the trial court ruled against the mother, the mother appealed. *State v. Denis*

L.R., 2004 WI App 51, 270 Wis. 2d 663, 678 N.W.2d 326. The Court of Appeals sided with the circuit court, so the mother appealed again to the Wisconsin Supreme Court, who accepted the case for review. 2005 WI 110. Both decisions discussed only whether the records were confidential. The mother's standing to intervene, as the privilege holder and crime victim, was never raised as an issue. *Id.*

Likewise, although unpublished, *State v. Johnson* presents persuasive authority for a victim appearing in court with counsel in opposition to a *Shiffra-Green* motion. 2012 WI App 62, 341 Wis. 2d 492, 815 N.W.2d 407.[14] Again, the victim intervened with independent counsel to express the victim's wishes after the *in camera* inspection had been granted, as the victim's refusal in *Johnson* ran counter to the district attorney's position. *Id.* Although the central issue in the case was the proper remedy when a victim refused to consent to an *in camera* inspection, the fact that no party challenged the role or presence of the victim's attorney reflects an understanding that the victim has standing and that the district attorney is not the victim's attorney.

Standing for victims to participate in *Shiffra-Green* motions is also consistent with law developed in in other jurisdictions. Much like Wis. Stat. §950.105, the Federal Crime Victims Rights Act, 18 U.S.C. §3771, establishes a victim's standing to assert their rights and, in doing so, affirmatively acknowledges the role of private counsel in the proceedings.[15]

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[14] Wis. Stat. §809.23(3) permits the citation to unpublished decisions after July of 2009 for persuasive value only.

[15] "Where Wisconsin and federal statutes are similar in language and operation and where there is no Wisconsin case on point, appellate courts of this state have looked to federal

Furthermore, in *Kenna v. United States Dist. Court*, a federal court affirmed a crime victim's standing to be heard in court, noting "our interpretation advances the purposes of the CVRA. The statute was enacted to make crime victims full participants in the criminal justice system." 435 F.3d 1011, 1016 (9th Cir. 2006).

Other states have also acknowledged a victim's right to participate in criminal proceedings, to hire an attorney to represent them in those proceedings, and to distinguish between the role of prosecution and the role of a private attorney in advocating for a victim. The New Jersey Victim Bill of Rights grants the victim the right "[t]o appear in any court before which a proceeding implicating the rights of the victim is being held, with standing to file a motion or present argument on a motion filed to enforce any right conferred herein or by Article I, paragraph 22 of the New Jersey Constitution, and to receive an adjudicative decision by the court on any such motion." N.J. Stat. § 52:4B-36 (r).

In *State ex rel. Montgomery v. Padilla*, the Arizona Supreme Court analyzed Arizona's Victim Rights Act: Ariz. Rev. Stat. § 13-4437. 238 Ariz. 560, 565-66, 364 P.3d 479 (Ct. App. 2015). The Court upheld the Act's language allowing a victim not only the right to be represented by personal counsel, but also affirmed that the Act provided a victim with "standing to seek an order, to bring a special action or file a notice of appearance in an appellate proceeding seeking to enforce any right or to challenge an order denying any right guaranteed to victims." *Id.* at 566.

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decisions for aid and in determining the intent of our statutes." *Grams v. Boss*, 97 Wis. 2d 332, 346, 294 N.W.2d 473 (1980).

The Court then specifically ruled that these rights were not limited to appellate procedures because "limiting the ability to enforce the rights enumerated in VBR and VRIA[16] to orders issues by appellate courts (but prohibiting trial courts from issuing such orders) would largely nullify those rights." *Id.*

One of the most robust laws in support of victims' rights is found in 10 U.S.C. §1044e, which created in 2012 the Special Victim Counsel (SVC) for military proceedings. The SVC provides independent legal counsel to victims of sex-offenses in military proceedings. Lawyers are provided to victims not only for consultation and support but for "representing the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the alleged sex-related offense." 10 U.S.C. §1044e(b)(6).

> Special Victim Counsel for sexual assault victims have been established in an effort to "ensure[e] that sexual assault victims are treated with...dignity and respect." Civilian processes, dominated by a drive to increase reporting over-valuing dignity, fairness, and respect for privacy continue to re-victimize sexual assault victims...The civilian process must address this exclusion of survivors if it is to progress. For this to happen, sexual assault victims must have independent lawyers representing them in exercising and enforcing their legal options. The alternative, leaving protection of victims' rights to the parties, gives only the parties control over the existence and scope of victims' rights and utterly eviscerates victim agency.

Symposium, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 Ohio St. J. Crim.L. 67, 85-86 (2015).

Like these other jurisdictions, the Wisconsin legislature has placed a

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[16] The Court uses abbreviations to stand in for Arizona's Victim Bill of Rights (VBR) and Arizona's Victims Rights Implementation Act. (VRIA).

significant emphasis on creating and protecting victim rights through the Wisconsin Constitution, Article 1, §9m and Wis. Stat. Chapter 950. The creation of Wis. Stat. §950.105 is in clear recognition that for these rights to have meaning, as the legislature intended, crime victims must be given standing to appear with counsel in the criminal proceeding where those rights are being violated and to independently object, oppose or otherwise prevent the violation of their rights.

CONCLUSION

TAJ respectfully asks this Court to vacate the Circuit Court's order denying TAJ standing to participate in and independently object to Johnson's *Motion for In Camera Review of TAJ's Confidential and Private Mental Health Records*.

It is a fundamental tenet of our legal system that there must be a means to protect a right, else that right loses all meaning and effect. "Where there's a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded." *Marbury v. Madison*, 5 U.S. 137, 163, 2 L.Ed. 60 (1803). As a crime victim, protected by Chapter 950 and Article 1, section 9m of the Wisconsin Constitution, TAJ has statutory and constitutional rights, including personal autonomy over his own medical and mental health treatment records. Those rights are meaningless unless he has a vehicle for enforcing them-or at least asserting them-before he is subject to any court mandated loss of privacy.

Dated this 19th day of August 2019.

Respectfully submitted,

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CERTIFICATION OF FORM/LENGTH

Andrea K Rufo herein certifies that this motion meets the form and length requirements of Wis. Stat. §809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of the brief is 10,481 words.

Dated this 19th day of August 2019.

Andrea K Rufo

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

Andrea K Rufo herein certifies the following:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed on this date. A copy of this certificate has been served along with (10) paper copies of this brief and appendix with the court and (3) paper copies of this brief and appendix to all attorneys of record.

Dated this 19th day of August 2019.

Andrea K Rufo

CERTIFICATION OF SERVICE

I, Andrea K Rufo, herein certify that I am employed by Legal Action of Wisconsin, which is located at 4900 Spring St., Suite 100 Racine, WI 53402 and that on the 19th day of August, 2019 I hand delivered 10 copies each of Appellant's Brief and Appellant's Appendix to the Office of the Clerk of the Court of Appeals at 110 E. Main St., Suite 215 Madison, WI, 53707. I hereby certify that three (3) copies each of the Appellant's Brief and Appellant's Appendix were also hand delivered by me to the Plaintiff-Respondent State of Wisconsin at the offices of the Department of Justice at 17 W Main St. Madison, WI 53707. I further certify that three (3) copies each of the Appellant's Brief and Appellant's Appendix were deposited on August 19, 2019 in the U.S. Mail, securely enclosed, the postage prepaid for first class mail and addressed to:

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Dated this 19th of August 2019.

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