

**RECEIVED**

STATE OF WISCONSIN **09-17-2019**

C O U R T O F A P P E A L S **CLERK OF COURT OF APPEALS  
OF WISCONSIN**

DISTRICT IV

---

State of Wisconsin,  
Plaintiff-Respondent,

Appeal No. 2019AP664 CR

T.A.J.,  
Appellant,

v.

Alan S. Johnson

Waupaca County Case  
No. 17CF56

Defendant-Respondent.

---

**RESPONSE BRIEF OF DEFENDANT-RESPONDENT**

---

**On Appeal from Waupaca County Circuit Court, the  
Honorable Raymond S. Huber presiding**

---

PETIT & DOMMERSHAUSEN, S.C.  
By: Nathan J. Wojan  
State Bar No. 1072766  
1650 Midway Road  
Menasha, WI 54952  
Phone: (920) 739-9900  
Fax: (920) 739-9909

Attorneys for the  
Defendant-Respondent

**TABLE OF CONTENTS**

	<u>Page</u>
INTRODUCTION. . . . .	1
STATEMENT OF ISSUE. . . . .	2
STATEMENT ON ORAL ARGUMENT AND PUBLICATION. . . . .	2
STATEMENT OF THE CASE . . . . .	2
STANDARD OF REVIEW. . . . .	3
ARGUMENT. . . . .	4
I.    Wis. Stat. § 950.105 provides nonparties a limited standing right to assert only narrowly tailored rights enumerated in Chapter 950 . . . . .	4
a.    Chapter 950 does not provide a right to make legal arguments or otherwise participate in the prosecution of a defendant. . . . .	5
b.    The Wisconsin Constitution does not provide a right to nonparty alleged victims to make legal arguments or otherwise participate in the prosecution of a defendant . . . . .	8
c.    No other sections of Wisconsin Statutes provide a right to nonparty alleged victims to make legal arguments or otherwise participate in the prosecution of a defendant . . . . .	9
d. <i>Gabler v. Crime Victims' Rights Bd.</i> does not stand for the proposition that nonparty alleged crime victims have standing to make legal arguments to courts . . . . .	12

II. Establishment of a nonparty's capability to intercede in a criminal prosecution is contrary to the plain meaning of the statute, unnecessary, and will destabilize the due process rights of accused persons . . . . .	14
III. A nonparty does not have the right to participate in a criminal prosecution by making legal arguments to the court and the circuit court's reliance on Jessica J.L. was not in error . . . . .	18
CONCLUSION . . . . .	24

**CASES CITED**

<i>C.A.K. v. State</i> , 154 Wis. 2d 612, 453 N.W.2d 897 (1990) . . . . .	6,11
<i>FAS, LLC v. Town of Bass Lake</i> , 2007 WI 73, 301 Wis. 2d 321, 733 N.W.2d 287 . . . . .	6
<i>Gabler v. Crime Victim Rights Bd.</i> , 2017 WI 67 . . . . .	12
<i>In re Jessica J.L.</i> , 223 Wis. 2d 622, 589 N.W.2d 660, (Ct. App. 1998) . . . . .	18,20
<i>Kenna v. United States District Court</i> , 435 F.3d 1011 (9 <sup>th</sup> Cir. 2006). . . . .	22,23
<i>Perra v. Menomonee Mut. Ins. Co.</i> , 2000 WI App 215, 239 Wis.2d 26, 619 N.W.2d 123 . . . . .	6
<i>State v. Braun</i> , 152 Wis. 2d 500, 449 N.W.2d 851 (1989) . . . . .	19
<i>State v. Chambers</i> , 173 Wis. 2d 237, 496 N.W.2d 191 (Ct. App. 1992 ) . . . . .	16
<i>State v. Denis L.R.</i> , 2005 WI 110, 283 Wis. 2d 358, 699 N.W.2d 154 . . . . .	21

<i>State v. Green</i> , 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298 . . . . .	3,14, 17
<i>State v. Shiffra</i> , 175 Wis. 2d 600, 499 N.W.2d 719, (Ct. App. 1993) . . . . .	.2,3,14
<i>State ex rel. Kalal v. Circuit Court for Dane Cty.</i> , 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 . . . . .	4,9
<i>State ex rel. Montgomery v. Padilla</i> 268 Ariz. 560 (Ct. App. 2015). . . . .	23
<i>Truttschel v. Martin</i> , 208 Wis. 2d 361, 560 N.W.2d 315 (Ct. App. 1997) . . . . .	3
<i>Woznicki v. Erickson</i> , 202 Wis. 2d 178, 549 N.W.2d 699 (1996). . . . .	20,21

**STATE CONSTITUTIONAL PROVISIONS**

WI. CONST. Art. 1, § 9m . . . . .	8,20
-----------------------------------	------

**FEDERAL STATUTES CITED**

10 U.S.C. § 806b. Art. 6b . . . . .	23
10 U.S.C. § 1044e . . . . .	23
18 U.S.C. § 3771(e) (2) (a) . . . . .	22

**WISCONSIN STATUTES CITED**

Wis. Stat. § 809.22 . . . . .	2
Wis. Stat. § 809.23(1) (a) . . . . .	2
Wis. Stat. § 809.23(3) (c) . . . . .	22
Wis. Stat. § 950.04 . . . . .	5,13

Wis. Stat. § 950.04 (1v) (ag) . . . . .	7
Wis. Stat. § 950.04 (1v) (ag) - (zx) . . . . .	5
Wis. Stat. § 950.105. . . . .	4
Wis. Stat. § 971.23 (6m) . . . . .	17
Wis. Stat. § 978.05 (1) . . . . .	9, 19
Wis. Stat. § 978.045. . . . .	19

**OTHER STATE STATUTES CITED**

A.R.S. § 13-4401-4439 . . . . .	23
---------------------------------	----

STATE OF WISCONSIN  
C O U R T O F A P P E A L S  
DISTRICT IV

---

State of Wisconsin,  
Plaintiff-Respondent,

Appeal No. 2019AP664 CR

T.A.J.,  
Appellant,

v.

Alan S. Johnson  
Defendant-Respondent.

Waupaca County Case  
No. 17CF56

---

**RESPONSE BRIEF OF DEFENDANT-RESPONDENT**

---

**On Appeal from Waupaca County Circuit Court, the  
Honorable Raymond S. Huber presiding**

---

**INTRODUCTION**

The defendant-respondent, Alan S. Johnson (hereinafter, "Johnson"), objects to TAJ's motion and request to participate in the prosecution by making filings and arguments related to a *Shiffra-Green* proceeding. Johnson files this brief in response. The ruling of the circuit court should be affirmed.

## **STATEMENT OF ISSUE**

WHETHER AN ALLEGED VICTIM IN A CRIMINAL CASE HAS STANDING UNDER CHAPTER 950 TO FILE MOTIONS AND MAKE LEGAL ARGUMENTS TO THE COURT REGARDING ISSUES RAISED BY PARTIES TO THE ACTION.

Circuit Court Answered: No.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Oral argument is not necessary as the defendant-respondent (hereinafter "Johnson") anticipates that the briefs of the parties will fully meet and discuss the issues on appeal. Publication would be appropriate as the published opinion would either establish a rule of law or apply already established law to a factual situation different from that in currently published opinions. Wis. Stats. §§ 809.22 and 809.23(1)(a) 2 and 3.

## **STATEMENT OF THE CASE**

Johnson stands accused of five counts of alleged violations of Chapter 948. (6:1-5, App. 101-105). Johnson denies the presently filed charges. Johnson denies the alleged facts as stated by TAJ. TAJ's brief at 2-3. The matter remains pretrial. During the pendency of the matter, Johnson filed motions for in-camera inspection of records of the alleged victim TAJ pursuant to *State*

*v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719, (Ct. App. 1993); and *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. (21:1-3, App. 106-108). Counsel for alleged victim TAJ filed an Objection to Johnson's *Shiffra-Green* motion on January 7, 2019. (39:1-14, App. 109-122). Johnson filed a reply on February 6, 2019, objecting to TAJ's motion to the court. (40:1-3, App. 123-125).

On May 13, 2019, the Court held a hearing to address whether TAJ had standing to file motions and make legal arguments in opposition to Johnson's motion for in-camera inspection and the Court denied TAJ the ability to file such motions and arguments on the basis of Chapter 950 and prior caselaw. (42:1-2, App. 126-127). A hearing on Johnson's *Shiffra-Green* motion has not yet occurred.

#### **STANDARD OF REVIEW**

"Whether a nonparty has a right to participate in a criminal prosecution involves a question of statutory interpretation, which we review without deference to the decision of the circuit court." *Truttschel v. Martin*, 208 Wis. 2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1997).



## ARGUMENT

### **I. Wis. Stat. § 950.105 provides nonparties a limited standing right to assert only narrowly tailored rights enumerated in Chapter 950.**

TAJ does not have standing to lodge legal arguments regarding Johnson's *Shiffra-Green* motion. Wisconsin Statute Section 950.105 provides that "[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." Statutory interpretation "begins with the language of the statute [and if] the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124.

Because the language of the statute is plain, an alleged crime victim has standing to assert his or her rights as a crime victim under Chapter 950, or his or her rights found within article I, section 9m, of the Wisconsin Constitution, or his or her rights found elsewhere in the Wisconsin Statutes.

**a. Chapter 950 does not provide a right to make legal arguments or otherwise participate in the prosecution of a defendant.**

A plain reading of Wis. Stat. § 950.04 does not provide a nonparty alleged victim of crime a right to make legal arguments to the court or otherwise participate in the prosecution of a defendant. Wis. Stat. § 950.04(1v)(ag)-(zx) provides a lengthy and comprehensive listing of specific rights, with explanations and qualifications, to alleged victims of crime. The rights provided are exhaustively listed by the legislature. Rights to participate in prosecution or lodge legal arguments regarding defense motions are not included. Because the right to make legal arguments in response to defense filings or otherwise participate in the prosecution of the defendant are not included among the rights listed in Wis. Stat. § 950.04(1v)(ag)-(zx), nonparty alleged victims do not hold such a right under Chapter 950.

Rules of statutory construction weigh against a nonparty's request to make legal arguments to the court or to otherwise participate in the prosecution of the defendant. The rule of statutory construction *expressio*

*unius est exclusio alterius* holds that when one or more things of a class are expressly mentioned in a statute, others things of the same class are excluded. See generally *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶ 27, 301 Wis. 2d 321, 341, 733 N.W.2d 287, 297; *Perra v. Menomonee Mut. Ins. Co.*, 2000 WI App 215, ¶ 12, 239 Wis. 2d 26, 619 N.W.2d 123. “[T]he enumeration of specific alternatives in a statute is evidence of legislative intent that any alternative not specifically enumerated is to be excluded.” *C.A.K. v. State*, 154 Wis. 2d 612, 621, 453 N.W.2d 897 (1990).

Chapter 950 provides a class of rights that are expressly mentioned by statute, which means that other rights not expressly mentioned are excluded. Accordingly, the right to make legal arguments, to file motions, to file response arguments, and to otherwise participate in the prosecution of the defendant is not included. Even if the exhaustive listing of rights found in Chapter 950 was deemed ambiguous, enumeration of such a lengthy listing of rights in the statute is evidence of legislative intent that any additional rights not specifically enumerated are to be excluded. It would be

unreasonable to assume that the legislature was not aware it could provide for rights to lodge legal arguments or file response arguments in the enumerated list.

Nonparties do not have standing or the right to make legal arguments to the court under a right to privacy under Chapter 950. TAJ inaccurately states that alleged victims of crime have a "right to privacy, to be treated with dignity and respect" under Chapter 950. TAJ's Brief at 9. Instead, Wisconsin Statute Section 950.04(1v)(ag) states that a victim has the right, "[t]o be treated with fairness, dignity, and respect for his or her privacy by public officials, employees, or agencies. This paragraph does not impair the right or duty of a public official or employee to conduct his or her official duties reasonably and in good faith." Respect for privacy of an alleged victim is an important feature of the statute. However, TAJ continues in his brief that victims have standing to assert a right to lodge legal arguments against a defendant's motion on the basis of a right to privacy. TAJ's Brief at 9-10. Chapter 950 provides no generalized right to privacy that therefore permits an

alleged victim to make arguments to a court or file responses to legal issues raised by defense counsel.

**b. The Wisconsin Constitution does not provide a right to nonparty alleged victims to make legal arguments or otherwise participate in the prosecution of a defendant.**

A plain reading of Article 1, Section 9m of the Wisconsin Constitution does not provide a nonparty alleged victim of crime a right to make legal arguments to the court or otherwise participate in the prosecution of a defendant. The relevant constitutional provision states:

This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy. This state shall ensure that crime victims have all of the following privileges and protections as provided by law: timely disposition of the case; the opportunity to attend court proceedings unless the trial court finds sequestration is necessary to a fair trial for the defendant; reasonable protection from the accused throughout the criminal justice process; notification of court proceedings; the opportunity to confer with the prosecution; the opportunity to make a statement to the court at disposition; restitution; compensation; and information about the outcome of the case and the release of the accused. The legislature shall provide remedies for the violation of this section. Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law.

WI. CONST. Art. 1, § 9m.

The Wisconsin Constitution does not provide a nonparty standing to file motions, make legal arguments, file responsive pleadings, or participate in the prosecution of a defendant. Without an explicit inclusion of such rights, a nonparty alleged victim does not have a basis under the Wisconsin Constitution to seek such a role in a criminal proceeding.

**c. No other sections of Wisconsin Statutes provide a right to nonparty alleged victims to make legal arguments or otherwise participate in the prosecution of a defendant.**

Nowhere in TAJ's brief is a statute-based right of a nonparty alleged victim to file a motion or to make a legal argument to a court during a prosecution of criminal court matter. By contrast, Wisconsin law provides that District Attorneys "prosecute all criminal actions before any court within his or her prosecutorial unit and have sole responsibility for prosecution of all criminal actions." Wis. Stat. § 978.05(1). Therefore, the court should "assume that the legislature's intent is expressed in the statutory language." *Kalal*, 2004 WI 58 at ¶ 44. "Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some

circumstances, but is not the primary focus of inquiry.”  
*Id.* Chapter 950 clearly outlines the enumerated rights of crime victims and provides narrow standing for the exercise of those rights. “It is the enacted law, not the unenacted intent, that is binding on the public.”  
*Id.* Therefore, if the meaning of the statute is plain the inquiry should conclude. *Id.* District Attorneys prosecute criminal offense and conduct the proceedings related to such prosecution. Alleged victims have a role in the proceedings only as outlined by Chapter 950.

Accordingly, TAJ’s speculative assertions that the legislature’s intentions in the development of Chapter 950 support his position are outside the scope of the court’s present review. Furthermore, TAJ merely cites varied matters that touched upon the broad objectives of Chapter 950 rather than provision of legislative materials or other sources that provide evidence of a legislative intent to provide nonparties the right to file motions or make legal arguments in a criminal prosecution. Confidential records are treated with sensitivity under Wisconsin law, but nowhere within this sensitivity can it be inferred that nonparty alleged

victims have the ability to litigate legal issues in criminal court.

TAJ's historical summary does not provide a basis for him to participate in the prosecution of the defendant by filing responsive pleadings or making legal arguments to a court. TAJ's brief provides an identification of ten (10) initial rights provided to victims of crime in 1979 on to the present list of forty-eight (48) rights. TAJ's brief at 9-12. TAJ's speculative history appears to support the premise that the legislature was aware that initial incarnations of Chapter 950 were limited in scope. Thus, the legislature has added additional provisions to Chapter 950 to provide more rights in an ongoing list format. "[T]he enumeration of specific alternatives in a statute is evidence of legislative intent that any alternative not specifically enumerated is to be excluded." *C.A.K. v. State*, 154 Wis. 2d at 621. The legislature was presumably aware that it could have created a provision that provided a nonparty the right to participate in some or all aspects of the prosecution of a defendant amongst its list. It did not.



Because no right to make legal arguments to a court or otherwise participate in the prosecution of a defendant is found under the statutes or the Wisconsin Constitution, TAJ does not have standing to make legal arguments to the court in response to defense legal motions.

- d. *Gabler v. Crime Victims' Rights Bd.* does not stand for the proposition that nonparty alleged crime victims have standing to make legal arguments to courts.**

While *Gabler* provides an overview of the powers of the Crime Victims' Rights Board and elements of Chapter 950, it does not provide a nonparty alleged victim with standing to intervene in criminal cases by filing responsive legal arguments or pleadings. *Gabler v. Crime Victim Rights Bd.*, 2017 WI 67. TAJ cites *Gabler* as basis for his right to intervene in a criminal prosecution by filing legal arguments in response to a defense motion and again focuses on an unenumerated privacy right. By contrast, in that case, a trial judge challenged the Crime Victims' Rights Board disciplinary review of his decision to postpone a criminal defendant's sentencing. *Id.* The *Gabler* court focused its analysis on a victim's a right to "have his or her interest considered when the

court is deciding whether to grant a continuance in the case.” Wis. Stat. § 950.04. A right to file arguments was not sought.

Contrary to TAJ’s recitation, at issue in that case was whether Chapter 950 was “unconstitutional as applied to a judge” in the circumstances surrounding the adjourned sentencing. *Id.* at ¶ 27. In its holding, the Supreme Court stated that “encroachment on judicial power degrades the judicial independence that serves as a bulwark protecting the people against tyranny.” *Id.* at ¶ 2. “By statutorily authorizing executive action against the judiciary, the legislature unconstitutionally conferred power on an executive board to impair, improperly influence, and regulate the court.” *Id.* Therefore, the court held that Chapter 950 as applied to the judge in that matter was unconstitutional and void. *Id.* at ¶ 2.

The *Gabler* court did not hold that nonparty alleged victims have a right to file motions and make legal arguments in response to a defendant’s filing in a criminal prosecution. Therefore, TAJ does not possess such a right under that case.

**II. Establishment of a nonparty's capability to intercede in a criminal prosecution is unnecessary and will destabilize the due process rights of accused persons.**

The interests of alleged victims are protected by the *Shiffra-Green* process. Under present law, a circuit court is compelled to follow the protocols in *Shiffra-Green*. In this matter, it can hold a hearing on Johnson's pending motion for in-camera inspection. If the court deems appropriate, it can order an in-camera inspection of sought-after records. Pursuant to *Shiffra-Green*, the alleged victim can refuse to consent to production of the proposed records. *Shiffra*, 175 Wis. 2d at 612. TAJ's interests are already protected in that the court must follow the law concerning the records. If a *Shiffra-Green* hearing is held, the circuit court can best assess the nature of the request and whether the evidentiary showing necessary to order an in-camera inspection has been met by Johnson. If the court is so satisfied, it can order the production of the records it deems relevant for purposes of in-camera review. After review, the court may disclose these records, consistent with the law, if the further provisions of *Shiffra-Green* are satisfied. If the court deems the only portions of records are

relevant to the defense, it can redact non-relevant information and produce any materials it deems appropriate under law. Lastly, the court may conduct a review and determine that no records shall be disclosed and thus no private records would be released to the parties. A court's review under the above process is consistent with caselaw and with Wis. Stat 146.82.

Accordingly, nonparty alleged victims' interests are protected by the *Shiffra-Green* process. Under Chapter 950 a nonparty alleged victim will be entitled to appropriate notice, information, and the ability to consult with counsel regarding any orders issued by the court. Chapter 950 and the *Shiffra-Green* process do not provide some acute need of alleged victims to not only have the ability to consult with counsel, but also then with standing to make legal arguments to the court regarding the same. Increasing the number of parties to the action will not promote additional compliance with the law by a court.

Because an alleged victim's interests are protected by *Shiffra-Green* and Chapter 950, interference by an alleged victim in the criminal proceeding will

unnecessarily risk a defendant's due process rights. During the course of a criminal proceeding, a defendant may make many types of motions to the court.

For instance, a defendant could file motion to dismiss on the basis of a duplicitous charge. Duplicity is defined as a charging of more than one offense in a single count. *State v. Chambers*, 173 Wis. 2d 237, 250, 496 N.W.2d 191 (Ct. App. 1992). Such charges are rife with potential due process violations. Duplicitous charges violate an accused person's right to be adequately informed, to be protected from double jeopardy, and to be protected from a jury conflating evidence of several acts to render a verdict without unanimously deciding regarding any specific act. If such a charge is filed, a defendant may seek dismissal or amendment of such a charge to prevent such grievous violations. Permitting a nonparty alleged victim to make responsive legal arguments to a defense filing could result in a court making improper rulings because the court must then weigh the arguments of the parties along with the individual interests of the alleged victim who

has no interest in a defendant's right to be informed of charges or double jeopardy concerns.

Similarly, a defendant may move the court for an order requiring production of materials, for the purpose of an in-camera inspection, pursuant to Wis. Stat. § 971.23(6m) on the grounds that the materials may contain relevant and exculpatory evidence. A defendant has a due process right to discover such materials before trial. *Green*, 2002 WI 68 at ¶ 32. "A defendant must show a 'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence." *Id.* *Green* provides a detailed instruction regarding the threshold showings and other requirements for a court to order production of materials for in-camera inspection. *Id.* at ¶ 33. Because interests of alleged victims are protected under the present process, protecting the roles of the prosecution and the defense should also be maintained.

Establishment of additional standing to nonparty alleged victims to make legal arguments to the court is unnecessary and will invade the due process rights of a defendant.

**III. A nonparty does not have the right to participate in a criminal prosecution by making legal arguments to the court and the circuit court's reliance on Jessica J.L. was not in error.**

A nonparty alleged victim in a criminal action may not participate in the criminal prosecution of the defendant. *In re Jessica J.L.*, 223 Wis. 2d 622, 630, 589 N.W.2d 660, 664 (Ct. App. 1998); See Wis. Stat. § 950.04. In *Jessica J.L.*, a defendant sought in-camera inspection of medical records. *Jessica J.L.*, 223 Wis. 2d at 627. The court ordered such inspection of records and also ordered that a Guardian ad Litem for the alleged victim be appointed for the purpose of reviewing her rights regarding disclosure of the records. *Id.* Subsequently, the Guardian ad Litem moved to reopen proceedings and challenge the materiality of the records sought via in camera inspection. *Id.* The circuit court held that the Guardian ad Litem lacked standing to a court to move to revisit an issue in a criminal prosecution. *Id.* On appeal, the complaining witness asserted that she had standing to direct her counsel to participate in the "criminal proceedings in regard to all *Shiffra-Green*

determinations, to force [the defendant] to make a showing that the records sought are relevant and necessary to a fair determination of his guilt or innocence." *Id.* at 628.

Because proceedings related to a *Shiffra-Green* motion are part of the prosecution, a nonparty does not have standing to file motions or make legal arguments at a *Shiffra-Green* hearing. *Id.* at 630. On appeal in *Jessica J.L.*, the court reasoned that proceedings related to a "*Shiffra* motion are part of [the] prosecution." *Id.* "The only attorneys who may prosecute a sexual assault on behalf of the State in circuit court are a district attorney or a special prosecutor appointed pursuant to § 978.045, STATS. *State v. Braun*, 152 Wis. 2d 500, 506-07, 449 N.W.2d 851, 853 (1989); §§ 978.05(1) and 978.045, STATS." *Id.* "Because [the court concluded that] only a district attorney or a duly appointed special prosecutor may participate in the prosecution of a sexual assault in circuit court and that participation in regard to a *Shiffra* motion is a part of that prosecution, [the court affirmed] the circuit court's denial of [the guardian ad litem's] request to appear on [the complaining witness's]



behalf in that regard.” *Jessica J.L.*, 223 Wis. 2d at 635-636.

The creation of Wisconsin Statute Section 950.105 does not abrogate *Jessica J.L.* The court’s holding was based on whether a minor victim, through a guardian ad litem, had standing to have counsel participate in the criminal proceedings in regard to all *Shiffra-Green* determinations. *Id.* at 628. A crime victim, under § 950.105, has a right to assert his or her rights as a crime victim under the statutes or under article I, section 9m, of the Wisconsin Constitution. Because the right to file motions or make legal arguments is not included among those rights, *Jessica J.L.* remains applicable. *Shiffra-Green* hearings are part of the prosecution and thus outside the enumerated rights of nonparty alleged victims. Therefore, TAJ does not have standing or the right to file such motions or lodge such arguments.

TAJ’s citation to *Woznicki v. Erickson* is also misapplied. In *Woznicki*, a defendant was charged with a criminal offense related to employer personnel records. *Woznicki v. Erickson*, 202 Wis. 2d 178, 181-82, 549 N.W.2d

699, 701 (1996). An investigation ensued, wherein a district attorney subpoenaed the defendant's complete personnel file. *Id.* Charges were later dropped. *Id.* Subsequently, the defendant moved a court for an order prohibiting the District Attorney from releasing the personnel records. *Id.* While the "court recognized the reputational and privacy interests that were inherent in the records," the circumstances of this matter are not applicable to the issues at hand. That case focused on a subpoena issued by a prosecutor, not an in-camera inspection sought under a defense filing.

*State v. Denis L.R.* does not abrogate *Jessica J.L. State v. Denis L.R.*, 2005 WI 110, 283 Wis. 2d 358, 699 N.W.2d 154. In that case, a defendant moved for in camera inspection. *Id.* at ¶ 12. As part of the defendant's materiality showing, an affidavit was submitted that referenced conversations had between a witness and the mother of the alleged victim. *Id.* The questions for the court centered on who held any therapist-patient privilege and whether the mother waived the therapist-patient privilege of her daughter by discussing the matter with the witness. *Id.* at ¶ 1. The court did not

evaluate whether the nonparty alleged victim had standing or the right to participate in the *Shiffra-Green* process by filing motions or making legal arguments.

Similarly, the unpublished case cited by TAJ is not persuasive. TAJ's brief at 34. Pursuant to Wis. Stat. § 809.23(3)(c), TAJ was required to "file and serve a copy of the opinion with the brief or other paper in which the opinion is cited." *Id.* Such a filing has not occurred. In that case, it appears that the State and the defendant brought that appeal and that the issue in that matter was the proper remedy for a failure to produce records following an order for inspection, not whether the nonparty had the right to participate in the *Shiffra-Green* hearing.

The remaining authorities cited by TAJ do not abrogate *Jessica J.L.*, nor are they persuasive. The Federal Crime Victim Rights Act (CVRA) does not apply to matter in Wisconsin Courts as it relates to victims of federal crimes. 18 U.S.C. § 3771(e)(2)(a). Similarly, *Kenna v. United States District Court* involved a Federal Criminal Proceeding, which is not applicable to the present matter, and it centered on whether a crime

victims' right under CVRA to be reasonably heard included right to allocute at sentencing. *Kenna v. United States District Court*, 435 F.3d 1011, 1016 (9<sup>th</sup> Cir. 2006). *State ex rel. Montgomery v. Padilla* centered the Arizona Victim Rights Act. *State ex rel. Montgomery v. Padilla* 268 Ariz. 560 (Ct. App. 2015). The Arizona act provides that "the victim has standing to seek an order, to bring a special action or to 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." A.R.S. § 13-4401-4439. But that statute does not provide a right for nonparties to participate in the prosecution.

Lastly, TAJ's citation to 10 U.S.C. § 1044e, the Special Victim Counsel, for military proceedings is unpersuasive. Similar to the above citations, no provision in the federal military code provide a right to participate in the prosecution of a defendant. 10 U.S.C. § 806b. Art. 6b. provides rights to be protected; notice; not to be excluded from proceedings; to be heard regarding continuation of confinement prior to trial of the accused, at sentencing or a clemency hearing; confer with counsel for the government; restitution; freedom

from unreasonable delay; treated with fairness and respect. No rights to file motions or responsive legal arguments are enumerated in those provisions. None of the remaining authorities cited by TAJ offer additional insights into the dispute at hand and do not offer persuasive value.

### **CONCLUSION**

A plain reading of the governing statutes directs that TAJ may not file motions or make legal arguments to the court in response to a defense motion. The holding in *Jessica J.L.* remains valid and it has not been materially changed by the developments in Chapter 950. Proceedings related to a *Shiffra-Green* motion are part of the prosecution. *Id.* Abilities to participate in those proceedings are not enumerated in the rights afforded under Chapter 950. *Id.* Therefore, TAJ does not have standing to file motions or make legal arguments in response to defense filings at a *Shiffra-Green* hearing.

The circuit court properly denied TAJ's motion and the ruling of the circuit court should be affirmed.

Dated this \_\_\_\_\_ day of September, 2019.

---

PETIT & DOMMERSHAUSEN, S.C.  
By: Nathan J. Wojan  
Attorneys for the Defendant-  
Appellant  
State Bar No. 1072766  
1650 Midway Road  
Menasha, WI 54952  
Phone: (920) 739-9900  
Fax: (920) 739-9909

**CERTIFICATION**

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or 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.

Dated this \_\_\_\_\_ day of September, 2019.

\_\_\_\_\_  
Nathan J. Wojan

**CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with mono spaced font. This brief has twenty-seven (27) pages.

Dated this \_\_\_\_\_ day of September, 2019.

\_\_\_\_\_  
Nathan J. Wojan

I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 \_\_\_\_\_ day of September, 2019.

---

Nathan J. Wojan