STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2019AP664-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

T.A.J.

Appellant,

v.

ALAN S. JOHNSON,

Defendant-Respondent.

ON APPEAL FROM THE DENIAL OF A NONFINAL ORDER ENTERED IN WAUPACA COUNTY CIRCUIT COURT, THE HONORABLE RAYMOND S. HUBER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Constitutional Provisions

Statutes

Other Authorities

ISSUE PRESENTED

Does a crime victim have standing to challenge a criminal defendant's *Shiffra/Green* motion for access to the victim's privileged and confidential mental health records?

The circuit court said, "No."

This Court should say, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State agrees that oral argument is likely not necessary to resolve this appeal. That said, if this Court would find argument helpful, the State would welcome the opportunity to participate. The State also agrees that publication is warranted.

ARGUMENT

Crime victims such as T.A.J. have standing to challenge a defendant's *Shiffra/Green* motion.

This case, which is before this Court on interlocutory appeal, asks whether a crime victim has standing to challenge a defendant's *Shiffra/Green* motion to disclose and access the victim's otherwise privileged and confidential mental health records. In granting T.A.J.'s petition for leave to appeal, this Court named the State as an additional respondent and stated that it "may file a respondent's brief." (R. 51:2.)

The State agrees with T.A.J.'s position that a crime victim in his position has standing to challenge a defendant's *Shiffra/Green* motion. While this brief overlaps T.A.J.'s brief in some respects, it also offers supplemental points in support of T.A.J.'s position.[1]

[1] Because counsel for the State anticipates that T.A.J. will submit a reply brief, the State's brief does not directly respond to the brief of the other respondent in this case, Alan S. Johnson.

A. Wisconsin Stat. § 950.105 provides that crime victims have standing "to assert . . . his or her rights as a crime victim."

The State agrees with T.A.J.'s analysis regarding section 950.105. (T.A.J.'s Br. 7–17.) Wisconsin Stat. § 950.105 confers victims standing to assert their rights in criminal matters, including their rights related to a defendant's request for medical records under *Shiffra/Green*.

A person's right to assert his or her privileges and protections as a crime victim is codified in Wis. Stat. § 950.105, which provides:

> **Standing.** A crime victim has a right to assert, in a court in a 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.

Put bluntly, "Wisconsin Stat. § 950.105 assures victims a mechanism for directly asserting their own rights in court." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 59, 376 Wis. 2d 147, 897 N.W.2d 384; *see also id.* ¶ 59 n.23 ("In Wisconsin, crime victims' rights are a matter of constitutional and statutory law, and Wis. Stat. § 950.105 confirms that victims may assert those rights in court.").

By its plain language, Wis. Stat. § 950.105 recognizes that a crime victim has standing to assert rights "as conferred under the statutes" and constitution. So, the question whether a particular victim has standing to raise a particular challenge under section 950.105 turns in part on what right of the victim the action or proceedings implicates.

In the context of a criminal defendant's *Shiffra/Green* motion seeking access to mental health records, article I,

section 9m of the Wisconsin Constitution recognizes crime victims' right to privacy by requiring the state to treat them fairly, with dignity, and with respect:

> This state shall treat crime victims, as defined by law, with fairness, dignity, and respect for their privacy.

Section 9m enumerates some of the constitutional "privileges and protections"—or rights[2]—guaranteed to crime victims. And while none of those listed constitutional protections expressly references a victim's rights with regard to a defendant's *Shiffra/Green* request,[3] the provision recognizes a broad right to "reasonable protection from the accused throughout the criminal justice process." Wis. Const. art. I, § 9m.

---

[2] Article I, section 9m uses the phrase "privileges and protections," which is meant to be synonymous with "rights." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 66 n.3, 376 Wis. 2d 147, 897 N.W.2d 384.

[3] Wisconsin is in the process of amending its constitution to create and recognize specific constitutional rights for crime victims through the Marsy's Law Crime Victim Rights Amendment. *See* 2017 Senate Joint Resolution 53; 2019 Senate Joint Resolution 2. The proposed amendment creates additional constitutional rights for a crime victim, including the right to "be treated with dignity, respect, courtesy, sensitivity, and fairness" and the right "[t]o privacy." 2019 Sen. J. Res. 2, section 2 (proposed additions to article I, section 9m(2)(a) and (b)). The amendment also provides that those rights are self-executing and recognizes a victim's standing to protect those rights in circuit court and on appeal. 2019 Sen. J. Res. 2, section 3 (proposed creation of article I, section 9m(4)(a) and (b)). The amendment has passed two consecutive legislative sessions and will be on the statewide ballot in the April 2020 election. Thus, it may become relevant to this case depending on when this Court issues its decision. That said, regardless whether the amendment passes next spring, the State maintains its position articulated here that chapter 950 of the statutes confers standing rights to crime victims such as T.A.J. to challenge a defendant's *Shiffra/Green* motion in circuit court.

In addition, a victim's right to assert his or her privileges and protections with regard to privileged mental health records is grounded in statute. Wisconsin Stat. § 950.04(1v)(ag) is among the many general rights listed in a basic bill of rights for crime victims. That section recognizes a crime victim's right "[t]o be treated with fairness, dignity, and respect for his or her privacy by public officials, employees, or agencies." Wis. Stat. § 950.04(1v)(ag). And Wis. Stat. § 905.04(2) recognizes a person's right to maintain confidentiality and privilege in his or her mental health records. *See* Wis. Stat. § 905.04(2) ("A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental, or emotional condition.").

And when a criminal defendant files a *Shiffra/Green* motion seeking access to the victim's mental health records, he is asking a court to pierce that privilege and confidentiality on his behalf. Moreover, the request, by necessity, implicates the guarantee that a crime victim's privacy is to be treated with fairness, respect, and dignity. Hence, a *Shiffra/Green* motion—particularly when, as here, the defendant seeks access to mental health records that are not in the possession of the prosecution or a state agency—implicates the victim's rights to be treated with fairness, dignity, and respect for his or her privacy and his or her privilege in maintaining confidentiality in his or her medical records. Thus, under Wis. Stat. § 950.105, a victim should have standing to assert his or her rights to maintain that privilege and confidentiality. And, as discussed below, that interpretation of Wis. Stat. § 950.105 would be consistent with the general rule that Wisconsin courts liberally construe the law of standing.

B. Consistent with the broad rights recognized in article I, section 9m and Wis. Stat. § 950.105, Wisconsin courts liberally construe the law of standing.

As discussed, article I, section 9m and Wis. Stat. § 950.04 provide broad recognition that crime victims have a right to fair and respectful treatment and respect for their privacy. And, section 950.105 recognizes a crime victim's ability to directly assert his or her rights. The broad language in those provisions echoes the longstanding approach in Wisconsin that courts broadly apply standing principles.

In Wisconsin, courts "liberally construe[]" the law of standing. *In re Paternity of J.S.P.*, 158 Wis. 2d 100, 106, 461 N.W.2d 794 (Ct. App. 1990) (citing *Bence v. City of Milwaukee*, 107 Wis. 2d 469, 478, 320 N.W.2d 199 (1982)). Put differently, "[t]his Court will not construe the law of standing narrowly or restrictively." *Park Bancorporation, Inc. v. Sletteland*, 182 Wis. 2d 131, 145, 513 N.W.2d 609 (Ct. App. 1994) (citing *State v. Milashoski*, 159 Wis. 2d 99, 107, 464 N.W.2d 21 (Ct. App. 1990), *aff'd*, 163 Wis. 2d 72, 471 N.W.2d 42 (1991)). "The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has alleged a personal stake in the outcome which is at once related to a distinct and palpable injury and a fairly traceable causal connection between the claimed injury and the challenged conduct." *Id.* (citing same). While standing to protect rights more often arises in the civil context, it has been recognized in criminal proceedings as well. *See, e.g.*, *Payment of Witness Fees in State v. Brenizer*, 179 Wis. 2d 312, 316–17, 507 N.W.2d 576 (Ct. App. 1993) (county was aggrieved by court order appointing experts for criminal trial at the county's expense, and county therefore had standing to appeal the order).

A person who has privileged mental health care records "has a personal stake in the outcome" of a *Shiffra/Green* motion. If the court rules that in camera review is warranted,

the person must choose between authorizing his or her provider to release the records for inspection by a judge and refusing to do so. If the person chooses the latter, the consequences are severe: he or she would be barred from testifying at trial, which, in many cases, would prevent the prosecution from proceeding at all. That personal stake is related to "a distinct and palpable injury"—disclosure of their privileged records and otherwise private information in exchange for the ability to testify—that has a causal connection to the "challenged conduct," i.e., the motion and any resulting order.

C. *Jessica J.L.* is superseded by Wis. Stat. § 950.105.

The circuit court here, in holding that T.A.J. lacked standing, relied on this Court's holding in *Jessica J.L.* There, this Court held that a sexual assault victim's guardian ad litem lacked standing to "participate in the criminal prosecution of the defendant." *In re Jessica J.L.*, 223 Wis. 2d 622, 630, 589 N.W.2d 660 (Ct. App. 1998). The Court understood "[p]roceedings related to [the defendant's] *Shiffra* motion" to be "a part of his prosecution," thus precluding a guardian ad litem or counsel for the victim from participating.[4] *Id.*

The State agrees with T.A.J. (T.A.J.'s Br. 30–37), that *Jessica J.L.*'s continuing viability is questionable at best in light of Wis. Stat. § 950.105. Specifically, *Jessica J.L.*, which was a relatively early case in the development of *Shiffra/Green* case law, was decided before the Legislature enacted Wis. Stat. § 950.105. That statute, as discussed, created standing for crime victims to assert their victim rights under the constitution and statutes. Further, as discussed

[4] This Court decided *Jessica J.L.* before the supreme court decided *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, so the motion at that time was known as a *Shiffra* motion.

above, a crime victim has a personal stake related to a distinct and palpable injury regarding the release and disclosure of his or her privileged mental health records. For those reasons, this Court need not follow the rule in *Jessica J.L.* because Wis. Stat. § 950.105 supersedes it.[5]

Further, the State found no example of Wisconsin courts applying *Jessica J.L.* to hold that victims lack standing to assert rights related to privilege and confidentiality in mental health records. To the contrary, courts have implicitly recognized victim standing in at least one criminal case, *State v. Denis L.R.*, 2005 WI 110, ¶ 5, 283 Wis. 2d 358, 699 N.W.2d 154. There, the child-victim's guardian, Dawn, sought to intervene in the defendant's criminal proceedings to protect the victim's therapist-patient privilege after the court ordered an in camera interview of the child's therapist. Though it does not appear that anyone contested Dawn's standing to intervene, the supreme court appeared to suggest that Dawn, as the child's guardian, would have standing to intervene in the criminal matter to protect her child's therapist-patient privilege:

> [I]n Dawn's motion to intervene in the circuit court, Dawn claimed she was the privilege holder for [the victim]. With Dawn now arguing she is not [the victim's] privilege holder because she is not [the victim's] guardian for purposes of Wis. Stat. (Rule) § 905.04, Dawn does not explain how she has any interest in this litigation or standing to intervene.

Id. ¶ 30 n.9.

---

[5] This Court may recognize that case law is superseded by statute. *See, e.g.*, *State ex rel. Baade v. Hayes*, 2015 WI App 71, ¶ 8 n.3, 365 Wis. 2d 174, 870 N.W.2d 478 (recognizing that rule in *Prue v. State*, 63 Wis. 2d 109, 114, 216 N.W.2d 43 (1974), was superseded by statute).

In addition, *Jessica J.L.* enacted "some new rules for district attorneys to follow" when reversing "the trial court on a matter not appealed and without a brief from the district attorney whose actions the majority now disapproves." *See In re Jessica J.L.*, 223 Wis. 2d at 636 (Dykman, J., dissenting). To that end, the majority incorrectly reasoned that proceedings related to a defendant's *Shiffra/Green* motion "are part of his prosecution" and therefore barred a victim's attorney from participating. *Jessica J.L.*, 223 Wis. 2d at 630–31.

But, as Judge Dykman expressed in his dissent, a *Shiffra*/*Green* motion necessarily pulls the victim into proceedings by requiring him or her to either consent or refuse to release his or her private records for in camera review. *Id.* at 637 (Dykman, J., dissenting). Judge Dykman continued:

> It is only a slight extension of *Shiffra* to conclude that a crime victim whose health care records are sought has standing to complain that a defendant does not meet the *Shiffra* requirements for the *in camera* inspection. The victim is not engaging in the prosecution of the defendant by asserting that his or her health care records do not belong in court in the first place.

Id. (Dykman, J., dissenting). In other words, a victim challenging a *Shiffra/Green* motion is merely seeking to maintain his or her privacy and privilege in records that otherwise have had no role in the State's investigation or prosecution of the defendant. The victim is not seeking to prosecute the defendant or occupy any role reserved for the prosecutor.

The Court also employed faulty reasoning that the victim's interest could be adequately satisfied by the district attorney's duty to provide notice of a *Shiffra* motion and a right to object. In announcing that reasoning, the *Jessica J.L.*

court relied on *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996),[6] but only to a point. Namely, the Court relied on *Woznicki* with regard to its recognition that, to balance the public's interest in inspecting public records and the subject's interest in privacy, the subject had the right to receive notice of requests for disclosure and an opportunity to object to disclosure. *Jessica J.L.*, 223 Wis. 2d at 631–32.

But the *Jessica J.L.* court failed to note that in *Woznicki*, the court also held that subjects of such open record requests had a right to seek judicial review of a district attorney's decision to disclose those records. *Woznicki*, 202 Wis. 2d at 194–95. In other words, the subject's privacy rights were vindicated not just by notice and an opportunity to object, but also the ability to challenge the disclosure in court.[7]

Further, the *Jessica J.L.* decision suggests that a prosecutor can adequately represent and protect a victim's interest in maintaining her privilege in private health records. That reasoning is faulty for two reasons. First, as T.A.J. points out (T.A.J.'s Br. 33–34), the prosecutor is not the victim's attorney. He or she does not necessarily share the same interests as the victim (or the victim's guardian) in sexual assault cases, particularly with regard to a motion for access to the victim's mental health records.

---

[6] *Woznicki* was superseded by statute on other grounds. *See Moustakis v. Dep't of Justice*, 2016 WI 42, ¶ 27, 368 Wis. 2d 677, 880 N.W.2d 142.

[7] After *Woznicki* was decided, the Legislature codified the common law right for subjects of record requests to intervene in Wis. Stat. § 19.356(4).

Second, when a defendant—as Johnson does here (R. 21:1–2)—seeks access to a victim's *private* privileged records, the prosecutor is not in the best position to respond to the allegations in the *Shiffra/Green* motion.[8] The prosecutor is unlikely to not know beyond what the defendant asserts in his motion who holds the sought-after records, what time periods they span, and other relevant circumstances in their creation. The prosecutor likewise has no power or ability to turn over the records or ask the private facility to turn them over.

Indeed, as long as *Shiffra/Green* and its progeny hold that a defendant has a right to seek private mental health files that are not in the State's possession, *Shiffra/Green* proceedings necessarily invite the victim to assert his or her privilege. So too, arguably, they invite participation by the custodian, i.e., the facility that holds the records, if it is subject to an order to release them.

---

[8] Wisconsin courts have interpreted a defendant's right to seek a victim's mental health records, as set forth in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), to encompass not just records in the State's possession but also those unrelated to the investigative and prosecutorial process held by private facilities. *See State v. Shiffra*, 175 Wis. 2d 600, 606–07, 499 N.W.2d 719 (Ct. App. 1993). Though *Shiffra* remains controlling law, the State maintains its longstanding position that *Shiffra* is wrong to the extent that it holds that *Ritchie* applies to privately held records that the State does not possess. *Accord United States v. Hach*, 162 F.3d 937, 947 (7th Cir. 1998) (stating that *Ritchie* does not apply when the information the defendant seeks is not in the government's possession); *see also State v. Lynch*, 2016 WI 66, ¶ 36, 371 Wis. 2d 1, 885 N.W.2d 89 (Gableman, J., lead opinion) ("*Ritchie* . . . never should have been stretched to cover privileged records held by agencies far removed from investigative and prosecutorial functions.").

On that latter point, this Court has recognized in other contexts (a paternity action) that a nonparty medical facility has standing to appeal an order to disclose a patient's privileged records. *J.S.P.*, 158 Wis. 2d at 107. In *J.S.P.*, this Court recognized that a nonparty has standing to appeal a court order "if he or she has a substantial interest adverse to the judgment or order." *Id.* And there, the medical facility was "aggrieved by the fact that it [was] being compelled to bring otherwise confidential records to court, and confidentiality is a key part of [the facility's] services." *Id.*

While the issue in this case asks whether a victim has standing to assert his rights regarding a *Shiffra/Green* motion in circuit court, *J.S.P.* and the law on appellate standing suggest that individuals aggrieved by a court order to disclose privileged records would have the right to appeal such an order. Given that, it is not apparent why those individuals would lack standing to assert their rights with respect to disclosure of privileged records in the circuit court in the first instance.

In sum, the Legislature's enactment of Wis. Stat. § 950.105 has superseded the holding in *Jessica J.L.* that crime victims lack standing to protect their rights to maintain privacy in mental health records sought through a *Shiffra/Green* motion. Alternatively, if this Court disagrees with—but feels bound by—*Jessica J.L.*, it may signal its concerns by certifying the appeal to the supreme court, or by deciding the appeal "but stating its belief that the prior case was wrongly decided." *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

CONCLUSION

This Court should reverse the order of the circuit court denying T.A.J. standing to assert his rights implicated by Johnson's *Shiffra/Green* motion.

Dated this 17th day of October 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,225 words.

_____
SARAH L. BURGUNDY
Assistant Attorney General

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 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 17th day of October, 2019.

_____
SARAH L. BURGUNDY
Assistant Attorney General