STATE OF WISCONSIN

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

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

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

The issue in this case is whether a crime victim has standing to challenge a criminal defendant's *Shiffra/Green* motion for access to the victim's privileged and confidential mental health and other medical records. The State has filed a brief arguing that Wis. Stat. § 950.105 establishes that victims have that right and abrogates case law holding otherwise.

In answer to this Court's additional questions, the recent amendment to Wis. Const. art. I, § 9m, applies to this case and bolsters the State's and T.A.J.'s position that victims have standing to enforce their rights to privacy and privilege in maintaining confidential records when a defendant files a *Shiffra/Green* motion. The amendment, like Wis. Stat. § 950.105, abrogates the holding of *In re Jessica J.L.*, 223 Wis. 2d 622, 626, 630, 589 N.W.2d 660 (Ct. App. 1998). In addition, the amendment is wholly consistent with Wis. Stat. § 950.105 and adds constitutional dimension and clarity to a crime victim's ability to enforce their rights and privileges under the law.

Finally, the State has yet to take any position on the merits of the *Shiffra/Green* motion, which as of the filing of this interlocutory appeal, was not ripe for a decision due to other threshold issues. Regardless of what the State's position will be on the merits of the motion after remand, a victim has standing to enforce their rights implicated by a *Shiffra/Green* motion.

ARGUMENT

I. The 2020 amendment to Wis. Const. art. I, § 9m applies to T.A.J.

This Court asked whether the recent amendment in art. I, § 9m applies to a criminal case "that was commenced prior to the effective date . . . [and] in which the pertinent

issue was litigated in the circuit court" before the amendment's effective date.

As discussed below, Wis. Const. art. I, § 9m establishes and reaffirms the rights of crime victims and identifies procedural mechanisms by which they can assert those rights. It applies to current and future crime victims in matters in criminal cases where they have a live right, including in matters in which the litigation commenced before the effective date. The State begins with a discussion of article I, section 9m as amended.

A. The amendment identifies numerous victim rights and provides procedural and remedial mechanisms by which victims may assert those rights.

On April 7, 2020, Wisconsin voters ratified a statewide referendum proposing an amendment to Wisconsin Const. art. 1, § 9m, which concerns the rights of crime victims. An amendment passed by referendum takes effect following canvassing and certification of the results. *State v. Gonzales*, 2002 WI 59, ¶ 30, 253 Wis. 2d 134, 645 N.W.2d 264. The results from the April 2020 election were certified on May 4, 2020,[1] and the amendment became effective on that day.

Before the amendment, article I, section 9m provided:

> **Victims of crime.** Section 9m. 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;

[1] *See* Wisconsin Elections Commission, Wisconsin Election Results, April 2020 Spring Election and Presidential Preference Primary Results, https://elections.wi.gov/elections-voting/results (last visited June 5, 2020).

> 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.

Wis. Const. art. I, § 9m (2017–18).

The amendment expanded article I, section 9m and created six subsections. Subsection (1) defines victim as, among other things, "[a] person against whom an act is committed that would constitute a crime if committed by a competent adult." Wis. Const. art. I, § 9m(1)(a)1.

Subsection (2) then identifies crime victims' rights "to justice and due process" and "which shall vest at the time of victimization and be protected by law in a manner no less vigorous than the protections afforded to the accused." Those rights, which encompass and expand upon the rights previously set forth in article I, section 9m, echo in many respects the expansive list of statutory rights in Wis. Stat. § 950.04(1v)(ag)–(zx). Among the rights identified in subsection (2) are "(a) To be treated with dignity, respect, courtesy, sensitivity, and fairness"; "(b) To privacy"; "(f) To reasonable protection from the accused throughout the criminal and juvenile justice process"; "(i) Upon request, to be heard in any proceeding during which a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon"; "(L) To refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused"; and "(p) To timely notice about all rights under this section and all other rights, privileges, or protections of the victim

provided by law, including how such rights, privileges, or protections are enforced." Wis. Const. art. I, § 9m(2).

Subsection (3) provides that except for the right to restitution, "all provisions of this section are self-executing" and permits the Legislature to "prescribe further remedies for the violation of this section and further procedures for compliance with and enforcement of this section." Wis. Const. art. I, § 9m(3).

Paragraph (a) of subsection (4) establishes the procedural and remedial tools for victims to assert their rights:

> In addition to any other available enforcement of rights or remedy for a violation of this section or of other rights, privileges, or protections provided by law, the victim, the victim's attorney or other lawful representative, or the attorney for the government upon request of the victim may assert and seek in any circuit court or before any other authority of competent jurisdiction, enforcement of the rights in this section and any other right, privilege, or protection afforded to the victim by law.

Wis. Const. art. I, § 9m(4)(a). Paragraph (4)(b) establishes that a victim may obtain appellate review of all adverse decisions under paragraph (4)(a) by filing a petition for supervisory writ. *Id.* § 9m(4)(b).

Finally, subsection (6) makes clear that article I, section 9m does not "supersede a defendant's federal constitutional rights or . . . afford party status in a proceeding to any victim." Wis. Const. art. I, § 9m(6).

B. The amendment applies to any crime victim who has a live right to assert in their criminal matter.

Generally, whether a new law, statute, or rule applies retroactively or prospectively depends on whether the law, statute, or rule is substantive, procedural, or remedial. *See*

City of Madison v. Town of Madison, 127 Wis. 2d 96, 101–02, 377 N.W.2d 221 (Ct. App. 1985). New substantive laws apply prospectively; procedural and remedial laws apply retroactively. *Id.* To that end, new constitutional criminal procedural rules apply retroactively to pending cases, including those on direct review or "not yet final." *See State v. Lagundoye*, 2004 WI 4, ¶ 2, 268 Wis. 2d 77, 674 N.W.2d 526.

As with statutes and rules, state constitutional amendments dealing with substantive law are presumed to be prospective in effect unless there is an express indication to the contrary. *Kayden Industries, Inc. v. Murphy*, 34 Wis. 2d 718, 731, 150 N.W.2d 447 (1967). "[S]uch amendments repeal inconsistent statutes and common law which arose under the constitution before the amendment." *Id.*

The distinction between substantive, procedural, and remedial laws "is relatively clear." *City of Madison*, 127 Wis. 2d at 102. "If a statute simply prescribes the method—the 'legal machinery'—used in enforcing a right or a remedy, it is procedural." *Id.* (citation omitted). "If, however, the law creates, defines or regulates rights or obligations, it is substantive—a change in the substantive law of the state." *Id.* Similarly, "[a] remedial statute is one which is 'related to remedies or modes of procedure which do not create new or take away vested rights, but only operate in furtherance of a remedy or confirmation of rights already existing.'" *Id.* (citation omitted).

As amended, categorizing article I, section 9m as substantive, procedural, or remedial as a whole is difficult. The amendment is substantive, to the extent that subsections (1) and (2) define "victim" and identify and enumerate victim rights. The amendment also contains procedural and remedial elements in paragraphs (4)(a) and (b), which are most relevant to whether a victim has standing to enforce his or her substantive rights and privileges in a criminal matter.

And in that respect, paragraphs (4)(a) and (b) would arguably apply retroactively.

That said, to resolve the issue in this case, this Court need not decide what parts of the amendment apply retroactively and which apply prospectively in any of the myriad of challenges a victim could assert in a criminal proceeding. Even assuming that the amendment would have prospective application, it applies here.

To start, the amendment expressly contemplates application to people who became victims before the effective date of the amendment, as well as current and future victims. Subsection (2) provides that the rights described in the amendment "shall vest at the time of victimization." Wis. Const. art. I, § 9m(2). That vesting occurs before commencement of a criminal case; there's nothing in article I, section 9m to suggest that it should apply to only future victims or future criminal cases. Nothing in the amendment, after all, affects a defendant's rights; it is focused on the rights of the victim, which vest at the time of the crime.

Further, the amendment applies to persons who became victims well before its effective date. Many of the rights vested at the time of victimization may lie dormant until well into a criminal case and even after it becomes "final" for prosecutorial purposes. For example, subparagraph (2)(i) provides the right "to be heard in any proceeding during which a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon." That spectrum of proceedings by necessity includes pending and even "final" criminal cases, for instance, in the case of a victim's ability to assert her rights in a parole, revocation, or expungement hearing. Accordingly, the statute applies prospectively to active controversies implicating the victim's vested rights. When the criminal case commenced is not relevant.

To that end, the amendment prospectively applies to active controversies like the one presented here, i.e., whether a crime victim can challenge a defendant's *Shiffra/Green* motion. To the extent that this Court suggests that "the pertinent issue was litigated in the circuit court" before the effective date, the pertinent issue here—whether the victim has standing to oppose Johnson's *Shiffra/Green* motion—is a nonfinal issue still being litigated before *this* Court. Just as the amendment evinces intent that it applies to both current and future victims, by all indications the amendment—particularly paragraphs (4)(a) and (b) setting forth the procedural and remedial tools by which victims can enforce their rights—likewise applies to an active pending controversy when the amendment came into effect.

A final point: the question before this Court is limited. This Court is deciding whether the victim in this active controversy has standing to seek enforcement of his rights to privacy and privilege in maintaining confidentiality in his health records. This Court need not reach whether the amendment applies to final matters in completed criminal proceedings or whether victims have standing to oppose motions other than *Shiffra/Green* motions in criminal matters. Given the broad range of rights and mechanisms for seeking enforcement of those rights in chapter 950 and Wis. Const. art. I, § 9m, the State expects that courts will need to consider the applicability of the amendment on a case-by-case basis. Accordingly, this Court need not craft a one-size-fits-all interpretation of the victim-rights amendment and statute. The State's arguments are, and this Court's holding should be, limited to the context of pending *Shiffra/Green* motions.

II. The amendment abrogates *Jessica J.L.* for the same reasons that Wis. Stat. § 950.105 does.

The State maintains that Wis. Stat. § 950.105 abrogated or superseded *Jessica J.L.*'s holding that victims lack standing to challenge a defendant's *Shiffra/Green* motion. (State's Br. 6–11.) The amendment to article I, section 9m bolsters that position and makes clear that *Jessica J.L.* is no longer good law.

Wisconsin Stat. § 950.105 "assures victims a mechanism for directly asserting their own [statutory and constitutional] rights in court." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 59, 376 Wis. 2d 147, 897 N.W.2d 384. Wisconsin Const. art. I, § 9m(4)(a) amplifies and enhances that mechanism. While Wis. Stat. § 950.105 speaks solely in terms of rights—and creates standing for a victim to enforce his or her statutory and constitutional right to privacy in opposition to a *Shiffra/Green* motion—the amendment goes a step further by recognizing a victim's ability to seek "enforcement of the rights in this section and any other right, *privilege*, or protection afforded to the victim by law." Wis. Const. art. I, § 9m(4)(a).

The word *privilege* in the amendment is significant because it echoes language in Wis. Stat. § 905.04(2) establishing that "[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."

To be sure, "privileges and protections" are construed synonymously with "rights." *Gabler*, 376 Wis. 2d 147, ¶ 66 n.3. Still, the inclusion of the word *privileges* in the amendment resolves any arguable ambiguity in Wis. Stat. § 950.105 as to whether its establishment of victim standing to enforce *rights* also includes standing to enforce *privileges*, such as the

privilege in maintaining the confidential nature of medical records.

In addition, if one could argue that Wis. Stat. § 950.105 requires further legislation for it to have force—a position with which the State disagrees—article I, section 9m is self-executing. Accordingly, the Legislature need not take additional steps for victims to enforce their rights. Section 950.105 and Wis. Const. art. I, § 9m(4)(a) squarely respond to and abrogate the holding in *Jessica J.L.* that victims lack standing to object to *Shiffra/Green* motions.

Finally, nothing in the amendment contradicts the State's reasons (State's Br. 7–11) why *Jessica J.L.* is no longer good law.

In sum, Wis. Const. art. I, § 9m(4)(a) and Wis. Stat. § 950.105 abrogated *Jessica J.L.*'s holding that victims lack standing to oppose *Shiffra/Green* motions.

III. The amendment is consistent with Wis. Stat. § 950.105 and bolsters the State's interpretation that the statute supports reversal.

As discussed, presuming that the amendment is prospective in effect, "such amendments repeal inconsistent statutes and common law which arose under the constitution before the amendment." *Kayden Industries*, 34 Wis. 2d at 731. Hence, the question is whether the amendment is consistent with Wis. Stat. § 950.105.

It is. As argued, section 950.105 establishes standing for a victim to challenge violations of his or her statutory or constitutional rights, whether it be through his or her counsel, a district attorney, or both. (State's Br. 2–4.)

Wisconsin Const. art. I, § 9m(4)(a) is consistent with section 950.105. Paragraph (4)(a) recognizes a victim's ability, under the constitution, to "assert and seek in any circuit court . . . enforcement of the rights in this section and any other

right, privilege, or protection afforded to the victim by law." This constitutional enforcement power is "[i]n addition to any other available enforcement of rights or remedy for a violation of this section or of other rights, privileges, or protections provided by law." In short, the text of paragraph (4)(a) recognizes that the law currently provides some ability for victims to enforce—or seek a remedy for violations of—their rights and makes clear that it is not repealing those laws.

And as discussed, paragraph (4)(a) expressly includes "privileges" and "protections provided by law" as the things a victim is entitled to assert. "Privileges" and "protections provided by law" indisputably must include a victim's statutory privilege in maintaining the confidentiality of his or her private medical records. *See* Wis. Stat. § 905.04(2).

Moreover, section 950.105 speaks of a victim's right to assert their rights in the court where the "alleged violation occurred." In comparison, paragraph (4)(a) contemplates an even broader range of actions for a victim by recognizing their ability—present-tense—to "assert and seek in any circuit court or before any other authority of competent jurisdiction, enforcement of" their rights under the constitution, statutes, and law. In other words, even if one could read section 950.105 to possibly limit a victim's ability to assert his or her right to privacy and privilege in maintaining the confidentiality of records subject to a *Shiffra/Green* motion, paragraph (4)(a) resolves that ambiguity and affirmatively recognizes a victim's entitlement to enforce their rights in that context.

IV. The State on appeal takes no position on the *Shiffra/Green* motion because that issue is not before this Court and has not yet been decided by the circuit court.

Next, this Court wrote: "T.A.J. contends, and the State does not dispute, that in the circuit court the State took no position on whether the circuit court should grant Johnson's

Shiffra-Green motion. Does the State continue to take no position on whether the circuit court should grant Johnson's *Shiffra-Green* motion?"

To start, it is not quite correct to say that the prosecutor affirmatively took "no position" on the merits of T.A.J.'s motion. The State did not dispute that point in its initial brief because it did not understand T.A.J. to be making that argument or the point to be relevant to the issue of standing.

As T.A.J. pointed out, Johnson filed his *Shiffra/Green* motion seeking in camera review of T.A.J.'s records in March 2018, and the prosecutor did not file a written response to T.A.J.'s motion. (R. 21; T.A.J.'s Br. 4.) Yet the State's lack of written response should not be understood to be "no position," because it appears that the motion for in camera review of T.A.J.'s records has not become ripe for a decision.

The only hearing on the motion came in March 2019, at which the sole issue was whether T.A.J.'s counsel had standing. (R. 57.) At that hearing, the prosecutor affirmatively took no position on whether T.A.J. had standing to oppose the motion. (R. 57:2, 45.) However, the issue whether the motion had merit was not before the court; the prosecutor was never asked for her position on the merits of the motion.

Indeed, after the court denied T.A.J.'s motion, it stated that it had not "addressed the issue of whether [T.A.J.'s] medical records should be reviewed in camera. . . . that's an issue that may need some more litigation by the State." (R. 57:48.) That later hearing, argument, and decision was required because at the time of the filing of Johnson's motion, it was not apparent that T.A.J. had any relevant records for the court to review. (R. 57:49.)

In addition, the resolution of the motion as to T.A.J.'s records depended on the resolution of two unsettled matters related to K.J. First, the motion with regard to T.A.J.'s

records relied heavily on what was in K.J.'s records, which the court had already reviewed in camera, and which were subject to redactions that were still being finalized before they were turned over to Johnson's counsel. (R. 57:49–51.) Second, there was also a pending motion to sever the charges relating to K.J. from those involving T.A.J. (R. 57:52.) Accordingly, whether the motion for T.A.J.'s files was still viable depended on what was in K.J.'s records and whether the charges were severed. (R. 57:52.) As Johnson's counsel stated, if severance occurred and the parties completed review of K.J.'s records, "that would potentially . . . impact the nature of any future litigation for T.J.'s potential records." (R. 57:53–54.)

Hence, unlike its neutral position on victim standing, the State simply had not announced its position on the merits of the *Shiffra/Green* motion because there was no position for it to take at that point. The merits of the motion were not before the circuit court given the outstanding threshold issues of victim standing, severance, and potential mootness. And here, once this appeal becomes final, the case will remand to the circuit court, at which point if Johnson opts to pursue his *Shiffra/Green* motion as to T.A.J., the prosecutor will make clear her position on whether to grant the motion.

V. A victim has standing to oppose a *Shiffra/Green* motion regardless of the State's position on the merits.

Nothing in article I, section 9m or Wis. Stat. § 950.105 requires the victim and State to occupy different positions regarding the merits of the *Shiffra/Green* motion for victims to have standing to seek enforcement of their rights and privileges. To start, the State and victim may well be seeking the same outcome but for different reasons based on their unique roles in the proceedings. Indeed, the State is acting as prosecutor, who represents the people of Wisconsin, not the victim personally. The victim and his or her counsel, on the

other hand, are advocating for his or her personal rights and privileges, which may not wholly correspond with the prosecution's position.

And as argued (State's Br. 9–11), the State arguably could be in an adequate position to oppose a *Shiffra/Green* motion if it can base that argument solely on legal standards regarding pleading requirements. Yet, without an attorney-client relationship with the victim (and in more than a few cases, the prosecutor and victim may have a frosty or nonexistent relationship), the State typically is in a poor position to respond to the specific factual allegations and materiality claims in the motion. It is likewise often in a poor position to know, beyond what the defendant asserts, details relevant to the victim's statutory and constitutional rights, such as whether records exist, where they are, and what they may contain.[2] To that end, the State and the victim may be seeking the same outcome, but victims may not trust prosecutors to be their advocates and to fully defend their rights and privileges.

The bottom line is that the amendment provides victims the opportunity to advocate for their personal rights in a *Shiffra/Green* hearing. That the State and victim may be seeking the same outcome on the motion does not deprive victims of standing to seek enforcement of their constitutional, statutory, and other rights and privileges.

Accordingly, victims have standing to oppose defendants' *Shiffra/Green* motions under Wis. Const. art. I,

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[2] There is a typo in the State's original brief on page 10 in the second sentence. The sixth word in that sentence, "not," should be struck so that the sentence reads: "The prosecutor is unlikely to 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." (State's Br. 10.) Counsel for the State regrets the error.

§ 9m, which applies to the active controversy here, and under Wis. Stat. § 950.105. The constitutional amendment and section 950.105 do not conflict with each other; they abrogate the conflicting holding in *Jessica J.L.* Lastly, nothing in section 950.105 or article I, section 9m suggests that the State and victim must disagree on the merits for the victim to have standing to challenge a *Shiffra/Green* motion.

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 and remand for further proceedings.

Dated this 4th day of August 2020.

Respectfully submitted,

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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 3982 words.

Dated this 4th day of August 2020.

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 4th day of August 2020.

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