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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

Waupaca County Case
No. 17CF56

Defendant-Respondent.

SUPPLEMENTAL BRIEF OF DEFENDANT-RESPONDENT

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

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.	1
STATEMENT OF ISSUES	2
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.	2
STATEMENT OF THE CASE	3
ARGUMENT.	3
I. The recent amendments to the Wisconsin Constitution do not apply to a criminal case that was commenced prior to the effective date of the recent amendments and of which the pertinent issue was litigated to the circuit court prior to the amendments	3
II. The recent amendments to the Constitution do not abrogate the holding of <i>Jessica J.L.</i> regarding the lack of standing of a victim to oppose a <i>Shiffra-Green</i> motion made by a defendant in a criminal case.	7
III. The recent amendments do not abrogate or materially affect the interpretation of Wis. Stat. § 950.105.	12
IV. A victim does not have standing to assert his or her position regarding a defense discovery request in addition to arguments made by the State	15
CONCLUSION	17

CASES CITED

<i>Dairyland Greyhound Park, Inc. v. Doyle</i> , 2006 WI 107, 295 Wis. 2d 1.	4, 5
--	------

<i>In re Jessica J.L.</i> , 223 Wis. 2d 622, 589 N.W.2d 660 (Ct. App. 1998)	7, 9, 10, 11, 14, 15, 16, 17, 18
<i>Kayden Industries, Inc. v. Murphy</i> , 34 Wis. 2d 718, 150 N.W.2d 447 (1967)	4, 5
<i>State ex rel. Kalal v. Circuit Court for Dane Cty.</i> , 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110	13
<i>State v. Green</i> , 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.	17
<i>State v. Gonzales</i> , 2002 WI 59, 253 Wis.2d 134. . .	3, 4, 5, 6
<i>State v. Shiffra</i> , 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993)	7, 8, 9, 11, 15, 16, 17

STATE CONSTITUTIONAL PROVISIONS

Wis. Const. art. 1, § 9m	11, 15
Wis. Const. art 1, § 9m(2) (a)-(p).	10
Wis. Const. art. 1, § 9m(2).	16
Wis. Const. art 1, § 9m(2) (p).	10
Wis. Const. art. 1, § 9m(3).	6
Wis. Const. art. 1, § 9m(4) (a)	12
Wis. Const. art. 1, § 9m(6).	7, 10, 14, 15, 16, 17
Wis. Const. art. 1, § 25	5

WISCONSIN STATUTES CITED

Wis. Stat. § 7.70(3) (a).	4
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Wis. Stat. § 7.70(3)(h)	3,5
Wis. Stat. § 809.22	2
Wis. Stat. § 809.23(1)(a)	2
Wis. Stat. § 950.105.	2,12, 13,15

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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 supplemental brief pursuant to order of the court and responds to the questions posed by the court.

STATEMENT OF ISSUES

1. Whether the recent amendments to the Constitution apply in a criminal case, such as the case that is the subject of this appeal, that was commenced prior to the effective date of the recent amendments to the Constitution and of which the pertinent issue was litigated in the circuit court prior to the amendments?
2. Whether any recent amendment to the Constitution abrogates the holding of *Jessica J.L.* regarding the lack of standing of a victim to oppose a *Shiffra-Green* motion made by a defendant in a criminal case?
3. Whether any recent amendment to the Constitution abrogates, or affect in any way material to this appeal the interpretation of, Wis. Stat. § 950.105?
4. Whether, in a criminal case in which the State and a victim both oppose a discovery request made by a defendant, such as a *Shiffra-Green* motion, does the victim have standing to assert his or her position regarding that discovery request to the court in writing and at a hearing in *addition* to argument made by the State.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as 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

This is an appeal from a judgment entered on May 13, 2019, in the circuit court for Waupaca County, which declined to permit counsel for TAJ to make legal arguments regarding Johnson's *Shiffra-Green* motion. The court concluded that the counsel for TAJ lacked standing to make such legal arguments to the court.

This is a supplemental brief filed with the Court of Appeals to the court in response to the questions raised by its May 19, 2020, order.

ARGUMENT

- I. **The recent amendments to the Wisconsin Constitution do not apply to a criminal case that was commenced prior to the effective date of the recent amendments and of which the pertinent issue was litigated to the circuit court prior to the amendments.**

The recent amendments to the Constitution do not apply to Johnson's matter or a criminal case similarly postured because the amendments are prospective.

A constitutional amendment goes into effect "upon the certification of a statewide canvas of the votes." *State v. Gonzales*, 2002 WI 59, ¶ 25, 253 Wis. 2d 134, 145. Section 7.70(3)(h) "sets forth the effective date of a constitutional amendment as the 'time the

chairperson of the [State Elections Board] or the chairperson's designee certifies that the amendment ... is approved.'" *Gonzales*, 253 Wis. 2d, ¶¶ 12-13. Wis. Stat. § 7.70(3)(a) provides that the chairperson of the commission shall "publicly canvass the returns and make his or her certifications and determinations on or before ... the 15th day of May following a spring election." Wis. Stat. § 7.70(3)(a). Accordingly, the recent amendments became effective following the chairperson's designation as approved.

A court should not infer a retroactive application of a constitutional amendment if no intention to make such an amendment retrospective in operation is clearly apparent from the terms of the amendment. *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 732, 150 N.W.2d 447, 453 (1967). "[C]onstitutional amendments that deal with the substantive law of the State are presumed to be prospective in effect unless there is an express indication to the contrary." *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 22, 295 Wis. 2d 1, 30 (citing *Kayden*). A self-executing constitutional amendment, requiring no additional legislative action to

become effective, is presumed prospective in effect. *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d at 731, 150 N.W.2d at 453. If an amendment fails to explicitly identify its retroactive application to pre-existing issues, then the amendment does not operate retrospectively. *Dairyland*, 295 Wis. 2d, ¶ 22.

Constitutional amendments are prospective in nature unless such amendments explicitly state otherwise. In *Gonzales*, a defendant was convicted of carrying a concealed weapon and later filed a motion for post-conviction relief asserting Wisconsin's concealed weapon law was unconstitutional on its face and unconstitutional as applied to him as a result of the adoption of Article I, Section 25 of the Wisconsin Constitution. *Gonzales*, 253 Wis. 2d at ¶ 5. The court found that the constitutional amendment may be silent as to effective date. *Id.* at ¶ 30. The court held that section 7.70(3)(h) provides that state constitutional amendments are effective after canvass and certification if the amendment is silent as to an effective date. *Id.* As such, the court did not infer a retroactive applicability when none was found in the constitutional amendment.

All provisions of recent amendments are self-executing. Wis. Const. art. 1, § 9m(3). The legislature was undoubtedly aware of its ability to make an amendment retroactive in application. The recent amendments do not include explicit provisions indicating retroactive application and instead identify a self-executing and prospective effect. Accordingly, a criminal case that was commenced prior to the effective date of the recent amendments and of which the pertinent issue was litigated to the circuit court prior to the amendments is a settled issue based on the effective law at the time of litigation.

The amendments made to section 9m of the Wisconsin constitution were voted on and certified following commencement of this action and after the litigation at issue. Because the recent amendments are self-executing and do not provide language indicating a retroactive applicability, the recent amendments are prospective. Much like the *Gonzales* court, this court should not infer retroactive applicability when none is found within the amendments and direct language to the contrary is present.

II. The recent amendments to the Constitution do not abrogate the holding of *Jessica J.L.* regarding the lack of standing of a victim to oppose a *Shiffra-Green* motion made by a defendant in a criminal case.

The recent amendments to the Constitution do not abrogate the holding of *Jessica J.L.* because the principles and basis for its holding remain consistent with the recent amendments.

The recent amendments "may not be interpreted to supersede a defendant's federal constitutional rights." Wis. Const. art. 1, § 9m(6). A criminal defendant has a constitutional right to be given a meaningful opportunity to present a complete defense. *State v. Shiffra*, 175 Wis. 2d 600, 605, 499 N.W.2d 719, 721 (Ct. App. 1993). An in-camera review of evidence achieves the proper balance between a defendant's constitutional rights and the state's interests in protection of its citizens. *Id.*

The recent amendments are not contrary to *Jessica J.L.*'s holding that 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). In that matter, the defendant sought certain health care

records for which Jessica had a statutory privilege to refuse to disclose them and to prevent others from disclosing them without consent. *Id.* at 629. On appeal, Jessica contended that her Guardian ad Litem should be permitted to participate in the *Shiffra-Green* motion hearing with regard to the defendant's motion for the records. *Id.* The court concluded that a *Shiffra-Green* motion is a proceeding related to whether a defendant was guilty of the crime charged. *Id.* at 630. Therefore, the proceeding was part of the prosecution of the defendant. *Id.* Because these proceedings are part of the prosecution, the court held that 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. *Id.* Non-parties were not similarly empowered to raise legal arguments or advance positions at such a proceeding. *Id.* While court noted that personal privacy concerns were an important consideration, these concerns did not provide a basis to confer additional party status and permit victim participation in such a proceeding. *Id.* The court further held that a defendant's right to exculpatory information is necessary to a fair trial and

due process. *Id.* A victim's right to prevent disclosure of health care records was also an important consideration for the court, but not basis to confer party status. *Id.* Ultimately, the court held that "both interests [of privacy and due process] may best be preserved by obligating the State to give notice to the victim . . . when a *Shiffra-Green* motion seeking her health care records has been filed, and to provide a reasonable time for the victim to notify the district attorney that she does not object to the disclosure of those records." *Id.* at 665.

Accordingly, a court is empowered to review such a motion on its merits under *Jessica J.L.* and to conduct the necessary balancing of the defendant's constitutional rights alongside the victim's recently enacted rights through an in-camera review. The recent amendments do not direct that a court must conduct its assessment in a different fashion. A court must still weigh the right to privacy found under the recent amendments along with the defendant's due process rights. The recent amendments do not constrain the court's capability to conduct such a review and the court must

still follow current law regarding the production, review, and disclosure of such records.

Furthermore, *Jessica J.L.* has not been abrogated because the recent amendments specifically prohibit granting party status to a victim. Wisconsin Constitution Article 1, Section 9m "is not intended and may not be interpreted . . . to afford party status in a proceeding to any victim." Wis. Const. art. 1, § 9m(6). The recent amendments specifically do not provide a victim a right to participate in the prosecution of the defendant or to lodge legal arguments or participate in a hearing as envisioned in *Jessica J.L.*

Instead, the recent amendments provide series of updated rights, similar to the previous listing in chapter 950, which include a right to dignity, fairness, notice, and to information among others. Wis. Const. art 1, § 9m(2)(a)-(p). Section 2(1) provides a right to be heard in any proceedings which a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon, and to refuse a discovery request. *Id.* at § 9m(2)(p). However, this right does not provide the ability to

argue, to litigate, to contest, or to otherwise participate in the prosecution of the defendant any of these proceedings.

Because victims do not have the right to participate in the prosecution of the defendant under Wis. Const. art. 1, § 9m, the ruling of *Jessica J.L.* remains valid and applicable. Jessica possessed rights to notice, to information, and the right to refuse to produce records. While the recent amendments may have offered Jessica an updated listing of rights, the right to participate in the prosecution or to lodge legal arguments in proceedings related to whether a defendant was guilty of the crime charged was not among them. *Shiffra-Green* hearings are part of the prosecution and thus outside the constitutional or statutory rights of nonparty alleged victims. *Jessica J.L.*, 223 Wis. 2d at 630. Absent a direct bestowal of an ability to participate in the prosecution of the defendant, *Jessica J.L.* remains valid law as its governing principles and holding remain applicable.

III. The recent amendments do not abrogate or materially affect the interpretation of Wis. Stat. § 950.105.

The recent amendments do not abrogate or materially affect the interpretation of Wis. Stat. § 950.105. That section provides 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." Wis. Stat. § 950.105. Recently enacted, Article 1, Section 9m(4)(a) of the Constitution provides that victims "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." The recent amendments are devoid of any direct language abrogating Wis. Stat. § 950.105.

Both provisions identify that victims have the ability to assert his or her constitutional rights in court. Each provides that a victim may assert his or her statutory rights or rights afforded by law. While change to the structure of the language has occurred, neither is substantively dissimilar. The recent amendments

provide that a victim may now seek to assert his or her rights "in any circuit court or before any other authority of competent jurisdiction" rather than "in a court in the county in which the alleged violation occurred." However, a new substantive standing to file motions, make legal arguments, or otherwise participate in the prosecution is not included.

A court is not at liberty to disregard the plain and clear words of the recent amendments. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 664, 681 N.W.2d 110, 124. Courts are to give language in its common, ordinary, and accepted meaning. *Id.* at 663. Absent clear language abrogating Wis. Stat. § 950.105, the recent amendments only provide a constitutionally based capability for a victim to seek to assert the enforcement of his or her rights specifically provided under law. Without a more encompassing description of additional standing for victims, prior law remains effective with regard to standing.

The legislature was undoubtedly aware it could have conferred more rights at more hearings or conferred

standing for party status or party like status to victims. The legislature could have included the right to file motions or litigate issues in discovery request hearings, but it did not provide for those rights in the amendments. Without such a provision for standing, crime victims do not possess the right to participate in the prosecution of the defendant. *Jessica J.L.*, 223 Wis. 2d at 630. Courts should utilize the ordinary and accepted meaning of the language contained in the amendments.

Section 9m(6) of the recent amendments provides that "[t]his section is not intended and may not be interpreted to supersede a defendant's federal constitutional rights or to afford party status in a proceeding to any victim." Wis. Const. art 1. § 9m(6). Victims have the ability to assert rights provided under law but not in a manner that would afford him or her party status to join litigation associated with the prosecution of the defendant. As such, the recent amendments operate in the same manner as the principles announced in *Jessica J.L.*

Accordingly, a victim retains his or her ability to assert such rights as provided under law as he or she

did prior to the amendments. A victim still lacks the right to participate in the prosecution of the defendant and Wis. Stat. § 950.105 has not been abrogated or materially modified.

IV. A victim does not have standing to assert his or her position regarding a defense discovery request in addition to arguments made by the State.

The victim does not have standing to assert his or her legal position regarding a discovery request to the court in writing and at a hearing in addition to argument made by the State. A victim is not a party to the action. *Jessica J.L.*, 223 Wis. 2d at 630. Wis. Const, art. 1, § 9m "is not intended and may not be interpreted to supersede a defendant's federal constitutional rights or to afford party status in a proceeding to any victim." Wis. Const. art. 1, § 9m(6).

A victim may assert, and only has standing to assert, the rights provided in section 9m of the Constitution or the statutes. Because the right to participate in the prosecution, and any proceeding that bears upon guilt or innocence, is not included amongst these rights, the victim may not assert a position on such a discovery request in addition to the State. *Shiffra-Green*

proceedings bear upon whether a defendant is guilty of the crime charged. *Jessica J.L.*, 223 Wis. 2d at 630. Beyond the right to refuse, or to acquiesce, a discovery request, a victim may not otherwise participate in such a proceeding.

The victim's rights conferred under the Wisconsin Constitution, and standing to assert those rights, "preserve and protect victims' rights to justice and due process", Wis. Const. art. 1. § 9m(2), without infringing upon the defendant's constitutional rights. A criminal defendant has a constitutional right to be given a meaningful opportunity to present a complete defense. *Shiffra*, 175 Wis. 2d at 605, 499 N.W.2d at 721. In addition, the recent amendments "may not be interpreted to supersede a defendant's federal constitutional rights." Wis. Const. art. 1, § 9m(6).

A victim does not possess the right to assert a legal position or other basis for his or her refusal or acquiescence to a discovery request. No right to lodge such arguments is included amongst the recent amendments or necessarily inherent within a right to refuse a discovery request. The ability to seek enforcement of a

right is unlike to the ability to lodge a legal argument in addition to and independent of the State.

A defendant's constitutional right to due process and a meaningful opportunity to prepare a complete defense would be infringed by a victim asserting his or her position regarding a defense discovery request in addition to arguments made by the State. A defendant's rights would be so infringed because a victim does not have standing to raise such arguments and because Article 1, § 9m(6) specifically prohibits such action. Such action by a victim would needlessly jeopardize the rights of the defendant and would limit the right to a complete and meaningful defense.

CONCLUSION

A plain reading of the recent amendments does not provide standing to 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 recent amendments. 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 July, 2020.

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CERTIFICATION

I certify that if this appeal is taken from 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 July, 2020.

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-four (24) pages.

Dated this _____ day of July, 2020.

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 July, 2020.

Nathan J. Wojan