FILED
11-23-2020
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

SUPREME COURT

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State of Wisconsin,
Plaintiff-Respondent,

Appeal No. 2019AP664 CR

T.A.J.,
Appellant,

v.

Alan S. Johnson

Waupaca County Case
No. 17CF56

Defendant-Respondent-Petitioner.

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ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AND REMANDING AN ORDER OF THE CIRCUIT COURT IN WAUPACA COUNTY CIRCUIT COURT BRANCH III, THE HONORABLE RAYMOND HUBER PRESIDING

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# PETITION FOR REVIEW

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**PETITION FOR REVIEW**

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## INTRODUCTION

The defendant-petitioner, Alan S. Johnson (hereinafter "Johnson"), petitions the Supreme Court of Wisconsin, pursuant to Wis. Stat. §§ 808.10 and 809.62, to review the decision of the Wisconsin Court of Appeals, District IV, in State of Wisconsin, TAJ v. Alan S. Johnson, Appeal No. 19AP664-CR, filed on October 29,2020.

## STATEMENT OF ISSUES

I. WHETHER AN ALLEGED VICTIM IN A CRIMINAL CASE HAS STANDING UNDER THE 2020 WISCONSIN CONSTIUTIONAL AMENDMENT TO LODGE LEGAL ARUGMENTS IN OPPOSITION TO A DEFENDANT'S MOTION FOR IN CAMERA REVIEW.

On Interlocutory Appeal, the Court of Appeals Answered: Yes.

II. WHETHER THE 2020 WISCONSIN CONSTITUTIONAL AMENDMENT APPLIES RETROACTIVELY TO AN ALLEGED VICTIM'S REQUEST FOR STANDING TO LODGE LEGAL ARUGMENTS IN OPPOSITION TO A PENDING MOTION FOR IN CAMERA REVIEW WHICH WAS FILED, AND PERTITENT ISSUE LITIGATED, PRIOR TO THE ENACTMENT OF THE AMENDMENT.

On Interlocutory Appeal, the Court of Appeals Answered: Yes.

## STATEMENT OF THE CRITERIA SUPPORTING REVIEW

This case raises the question of whether an alleged victim may file motions, submit briefs or pleadings, and present arguments at *Shiffra-Green* hearing. This novel question centers on a defendant's constitutional right to present a meaningful defense and the recent amendment to the Wisconsin constitution.

Wis. Stat. § 809.62(1r) sets forth criteria to determine if the Supreme Court shall review a case. Review may be granted if "[a] real and significant question of federal or state constitutional law is presented." Wis. Stat. § 809.62(1r)(a). Review is also

appropriate in cases where the petition "demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority." Wis. Stat. § 809.62(1r)(b). Similarly, review will be considered if it will "help develop, clarify or harmonize the law" and if "the case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or the question presented is a novel one, the resolution of which will have statewide impact; or the question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court." Wis. Stat. § 809.62(1r)(c). Review may also be granted if the underlying Court of Appeals' decision is "in conflict with controlling opinions of the United States Supreme Court or the supreme court or other Court of Appeals' decisions." Wis. Stat. § 809.62(1r)(d).

In the instant case, review would satisfy a number of the criteria above. Review by the Supreme Court would resolve a significant, novel question of state constitutional law by determining whether an alleged

victim has standing to lodge legal arguments, in writing and at hearing, in response to a defense *Shiffra-Green* motion, and if such standing exists whether it is retroactive. The Supreme Court has not considered this question subsequent to the passage of the 2020 amendment to the Wisconsin Constitution. Lower courts have a great need for the Supreme Court to establish law regarding an alleged victim's standing subsequent to the passage of the recent amendment and how proceedings should operate in future cases statewide. Review is also warranted to clarify whether settled law under *In re Jessica J.L., 223 Wis. 2d 622, 589 N.W.2d 660, (Ct. App. 1998)*, which held an alleged victim lacks of standing to lodge legal arguments in opposition to a defendant's *Shiffra-Green* motion in circuit court, has been abrogated by recent constitutional amendment. Review should also be granted because Court of Appeals' holding that *Jessica J.L.* has been abrogated is in conflict with controlling opinions in *State v. Shiffra,* 175 Wis. 2d 600, 499, N.W.2d 719 (Ct. App. 1993), *State v. Green*,2002 Wi 68, 253 Wis. 2d 356, 646 N.W.2d 298, and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

Accordingly, Johnson petitions this court to review the adverse decision of the Court of Appeals under Wis. Stat. § 809.62(1g).

**STATEMENT OF THE CASE**

Pursuant to the Wisconsin Rule of Appellate Procedure 809.62(2)(d), Johnson provides this statement of the case and abbreviated version of the full set of facts previously set forth in the briefs filed in the Court of Appeals and the opinion of the Court of Appeals.

Johnson is charged with series of offenses. (10:1-5). Johnson filed a *Shiffra-Green* motion for in camera inspection of certain mental health records regarding alleged victim TAJ. (21:1-3). A pretrial hearing occurred on March 13, 2019, where TAJ sought standing to lodge legal arguments at hearing and in writing in opposition to Johnson's motion. (57:1-60, App. 127-131). The circuit court concluded that TAJ lacked standing to lodge such legal argument and issued an order denying standing to participate in the *Shiffra-Green* hearing based on the holding in *In re Jessica J.L.* (42:1-2, App. 125-126). The Court further held that the holding in that case had not been abrogated by any subsequent

Wisconsin Statute enacted following that case. (42:1-2, App. 127-131).

The Court of Appeals granted TAJ petition to appeal by permission. (App. 102) After initial briefing at the Court of Appeals, a constitutional amendment altering article I, section 9m of the Wisconsin Constitution was enacted. The amendment provided an additional listing of the rights of crime victims and to be heard regarding those rights enumerated. Supplementary briefing was ordered by the court. After such briefing, the Court of Appeals, District IV issued its decision, reversing the trial court and remanding for further proceedings based on the passage of the 2020 amendments to the Wisconsin Constitution. (App. 102). The court held that the recent amendment granted standing to oppose, and to be heard regarding the opposition to, Johnson's *Shiffra-Green* motion and that the amendment applies retroactively to the request for standing. (*Id.*)

Johnson petitions the Supreme Court to review the decision of the Wisconsin Court of Appeals, District IV. The Court of Appeals, in its decision, noted because the "dispositive conclusions" of its decision regarding the

above issues, it did "not consider other arguments raised by parties to this appeal" regarding standing and further stated "if a decision on one point disposes of the appeal, the court will not decide other issues raised." (App. 107). Johnson does not waive any of the arguments previously raised regarding standing but not considered by the Court of Appeals.

## ARGUMENT

### I. The recent amendments to the Wisconsin Constitution do not provide standing to alleged victims to oppose in writing and at hearing a defendant's *Shiffra-Green* motion, nor do they abrogate the holding of *Jessica J.L.* which held that that alleged victims lack such standing.

The principles and basis for the holding in *In Re Jessica J.L.* remain consistent with the recent constitutional amendments. As such, a real and significant question of state constitutional law exists for the court to clarify. The Court of Appeals' decision appears to be in conflict *State v. Shiffra*, *State v. Green*, and *Pennsylvania v. Ritchie*.

A plain reading of the 2020 Constitutional Amendment indicates that alleged victims do not have the ability to file motions, make legal arguments, or participate in

*Shiffra-Green* hearings or otherwise participate in the prosecution of a defendant. Wis. Const. art 1, § 9m(2) states:

> (2) In order to preserve and protect victims' rights to justice and due process throughout the criminal and juvenile justice process, victims shall be entitled to all of the following rights, 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:
> (a) To be treated with dignity, respect, courtesy, sensitivity, and fairness.
> (b) To privacy.
> (c) To proceedings free from unreasonable delay.
> (d) To timely disposition of the case, free from unreasonable delay.
> (e) Upon request, to attend all proceedings involving the case.
> (f) To reasonable protection from the accused throughout the criminal and juvenile justice process.
> (g) Upon request, to reasonable and timely notification of proceedings.
> (h) Upon request, to confer with the attorney for the government.
> (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.
> (j) To have information pertaining to the economic, physical, and psychological effect upon the victim of the offense submitted to the authority with jurisdiction over the case and to have that information considered by that authority.
> (k) Upon request, to timely notice of any release or escape of the accused or death of

> the accused if the accused is in custody or on supervision at the time of death.
> (l) To refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused.
> (m) To full restitution from any person who has been ordered to pay restitution to the victim and to be provided with assistance collecting restitution.
> (n) To compensation as provided by law.
> (o) Upon request, to reasonable and timely information about the status of the investigation and the outcome of the case.
> (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.

Rules of construction dictate that interpretation begins with the language of the provision. *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. "If the meaning of the language is plain, the court should ordinarily stop the inquiry." *Id.* The court should assume that the legislature's intent is expressed in the language used. Id. at ¶ 44.

The recent amendment provides a specific listing of the rights of alleged victims. Nowhere within these rights are the abilities to file motions, make legal arguments, or participate in the prosecution of a

defendant.

An alleged victim may be heard regarding only the rights specifically enumerated with Section 9m(2). The rule construction *expressio unius est exclusio alterius* holds that when one or more things of a class are expressly mentioned in, others things of the same class are excluded. The 2020 amendment exhaustively lists the rights held by an alleged victim. The list does not include the right to argue, to litigate, to contest, to file briefs or motions or pleadings, or to otherwise participate in the prosecution of the defendant.

The recent amendments are not contrary to previous caselaw holding that a nonparty alleged victim in a criminal action may not participate in the criminal prosecution of the defendant including at a *Shiffra-Green* hearing. *In re Jessica J.L.*, 223 Wis.2d 622, 630, 589 N.W.2d 660, 664 (Ct. App. 1998). In *Jessica J.L.*, the defendant sought certain health care records for which the alleged victim had a statutory privilege to refuse to disclose them and to prevent others from disclosing them without consent. *Id.* at 629. On appeal, the alleged victim contended that her Guardian ad Litem should be

permitted to participate in the *Shiffra-Green* motion hearing with regard to the defendant's request for in-camera inspection of the records. *Id.* The court concluded that a *Shiffra-Green* motion is a proceeding related to the determination of whether a defendant was guilty of the crime charged and part of the prosecution of the defendant. *Id.* at 630. "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 prosecuting attorney may participate in the prosecution of a defendant in circuit court and that participation with regard to a *Shiffra* motion is a part of that prosecution, the court affirmed the circuit court's denial of the victim's request to appear and oppose the *Shiffra* motion. *Id.* at 635-636.

The reasoning supporting *Jessica J.L.*'s holding remain viable following the passage of the 2020 amendment. The 2020 amendment does not provide the right to participate in the prosecution of the defendant or

participate in *Shiffra-Green* hearings. Accordingly, review is warranted to clarify whether *Jessica J.L.* has been abrogated.

*Jessica J.L.* has not been abrogated by the recent constitutional amendment because the amendment also specifically prohibits granting party status to a victim. Wisconsin Constitution Article 1, Section 9m states that it "is not intended and may not be interpreted . . . to afford party status in a proceeding to any victim." Wis. Const. art. 1, § 9m(6). While the court in *Jessica J.L.* noted that personal privacy concerns were an important consideration at *Shiffra-Green* hearings, these concerns did not provide a basis to confer additional party status and permit victim participation in such a proceeding. *Id.* at 636. A victim's right to prevent disclosure of health care records remained viable under this decision, but such a right is not basis to confer party status and the ability to litigate legal issues. *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, the principles forming the basis of the holding in *Jessica J.L.* remain controlling. A *Shiffra-Green* proceeding is part of the prosecution of the defendant and the recent amendment does not provide a right for an alleged victim to participate. The recent amendment only provides the right to be heard regarding the specifically enumerated rights under Wis. Const. art 1, § 9m(2). Because the constitutional provision does not provide a right to participate in the prosecution of the defendant, only the State and the Defense may lodge legal arguments regarding a *Shiffra-Green* proceeding. A victim's right to prevent disclosure of health care remained viable un Jessica J.L. and remains viable under the recent amendment. 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.

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 the defendant's rights and the state's interests in protection of its citizens." *Id.* "Information sought by the defense [which] is protected by statute and is not in the possession of the state" is subject to potential in-camera review if the defendant meets the relevant burden under the *Shiffra-Green* framework. *Id.* at 607; *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. If a defendant makes a sufficient showing, a circuit court must review the sought after records in camera to determine whether the records have "any independent probative value." *Shiffra*, 175 Wis. 2d at 611.

The Confrontation Clause provides a defendant the right to meaningfully conduct cross-examination. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S. Ct. 989, 998, 94 L. Ed. 2d 40 (1987). "[T]he right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." *Id.* at 51–52. Criminal defendants have

"the right to put before a jury evidence that might influence the determination of guilt. *Id.* at 56. The *Shiffra-Green* framework ensures these principles are maintained and strictures of the Confrontation Clause are met.

Permitting an alleged victim to participate in the prosecution of the defendant by lodging legal arguments in response to a *Shiffra-Green* motion undermines a defendant's right to present a complete defense with a constitutionally guaranteed ability to cross examine a complaining witness. An alleged victim is often the party to be cross examined and his or her records are a likely basis for which cross examination will occur if a court was to find "independent probative value." An alleged victim has incentive to limit the nature of a potential cross examination and limit the records available for in-camera inspection. Accordingly, a *Shiffra-Green* proceeding, wherein a defendant is obligated to make a sufficient showing to trigger in-camera review and an in-camera review of evidence achieves the proper balance between the defendant's rights and the state's interests in protection of its

citizens, should not be upset. Adding additional parties to the proceeding, who have purposes other than prosecution of the defendant and a constitutional defense, imperils a court's evaluation of independent probative value.

Accordingly, a need exists for additional clarification regarding the interpretation of the recent amendment, whether the recent amendment abrogates the previously settled law under *Jessica J.L*, and whether the ruling of the Court of Appeals is in conflict with *Shiffra-Green* and *Pennsylvania v. Ritchie*.

**II. Review is warranted because the recent amendment to the Wisconsin Constitution does not apply to a criminal case that was commenced prior to the effective date of the amendment and of which the pertinent issue was litigated to the circuit court prior to the amendment.**

A novel question of state constitutional law exists to determine whether any standing of an alleged victim to lodge legal arguments regarding a defense *Shiffra-Green* motion is retroactive in application to cases currently pending where the standing issue had already been litigated. "The established rule is that constitutional amendments which deal with the

substantive law of the state are presumed self-executing in nature and prospective in effect." *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 731, 150 N.W.2d 447, 453 (1967). Subsection (2)(i) of the 2020 constitutional amendment states that "[u]pon request, [the victim is] 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." See Wis. Const., art. 1, § 9m(2)(i). Under *Kayden*, such requests may occur prospectively in matters where the relevant legal issue has not already been litigated.

The Court of Appeals holding in this matter is contrary to *Kayden*. The Court of Appeals held that the recent amendments had "been put into operation without need for further action by the legislature" and were therefore self-executing. (App. 117). In turn, the Court of Appeals then held that the "self-executing nature of the amendment as a whole is an indication that it was intended to apply to motions pending in pending criminal cases." (*Id.*). However, when "the amendment effects a change in substantive law . . . is presumed to

be prospective in effect." *Kayden*, 34 Wis. 2d at 731. Standing for an alleged victim to participate in a *Shiffra-Green* proceeding was already denied at the trial court. As such, a conflict with controlling opinions of the Wisconsin Supreme Court exists meriting additional review in this matter.

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. 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. 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. All provisions of recent amendments are self-executing. Wis. Const. art. 1, § 9m(3). None explicitly indicate a retroactive application or effect. The legislature was undoubtedly aware of its ability to make an amendment retroactive in application and retroactive in application to matters where the pertinent issue has already been litigated. Yet, the recent amendments do not include explicit provisions indicating retroactive application and instead identify a self-executing, prospective effect.

The language of the amendments do not support inferring a retroactive application to matter where the pertinent issue was already litigated. For instance, contrary to the Court of Appeals opinion, reference to parole in subsection (2)(i) does not explicitly identify a retroactive intent. The Court of Appeals found that "the use of the term "parole" in subsection (2)(i) confirms" an intention to make retroactive application of the amendment. (App. 120). The Court continued that because "of the implementation of TIS-I and TIS-II, the term 'parole' is no longer used for supervision of a convicted criminal after his or her release from prison.

Instead, the term used is 'extended supervision.'" (*Id.*) For that reason, the Court continued, "only criminal cases pending as of the effective date of the amendment, some of which may be concluded in terms of post-conviction and appeal rights, have "parole" available to the convicted felon. As a result, the use of the term "parole" in the 2020 constitutional amendment leads to the conclusion that there is clear intent that the amendment applies to motions pending in cases initiated prior to the effective date of the amendment." (*Id.*)

Contrary to this reasoning, parole remains applicable for future cases and convictions under Wis. Stat. § 973.014(1g). Parole may still exist for matters that are not yet barred by the statute of limitations. As such, it is not clearly apparent that retroactive application can be appropriately inferred under this language. Review by the Supreme Court would resolve a novel question of state constitutional law as to whether any standing of an alleged victim standing is retroactive. The Supreme Court has not considered this question subsequent to the passage of the 2020 amendment to the Wisconsin Constitution and lower courts have a

need for the Supreme Court to establish law regarding this issue.

**CONCLUSION**

For the reasons stated in the above petition, the defense believes that the court should grant review of this case.

Dated this _____ day of November, 2020.

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**CERTIFICATION**

I certify that this Petition for Review conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and 809.62(4) for a petition produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this petition is twenty-two (22) pages.

Dated this____ day of November, 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:_____

_____
Nathan J. Wojan