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SUPREME COURT

STATE OF WISCONSIN

SUPREME COURT

State of Wisconsin,
Plaintiff-Respondent,

Appeal No. 2019AP664 CR

T.A.J.,
Appellant,

v.

Waupaca County Case
No. 17 CF 56

Alan S. Johnson

Defendant-Respondent-Petitioner.

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

BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

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Jillian Slaight, Constitutional Amendment
 Relating to Criminal Victims’ Rights,
 Reading the Constitution, March 2020,
 Volume 5, Number 1. 28

ISSUES PRESENTED

I. Whether an alleged victim in a criminal case has standing under the 2020 Wisconsin Constitutional Amendment to lodge legal arguments in opposition to a Defendant's Motion for In Camera Review.

On Interlocutory Appeal, the Court of Appeals Answered: Yes. Circuit Court: Not addressed due to the matter being raised prior to the 2020 Amendment.

II. Whether the 2020 Wisconsin Constitutional Amendment applies retroactively to an alleged victim's request for standing to lodge legal arguments in opposing to a pending motion for in camera review which was filed, and pertinent issue litigated prior to the enactment of the amendment.

On Interlocutory Appeal, the Court of Appeals Answered: Yes. Circuit Court: Not addressed due to the matter being raised prior to the 2020 Amendment.

III. Whether Wis. Stat. § 950.105, which provides in relevant part that, "[a] crime victim has a right to assert, in a court in the county in which the alleged violations occurred, his or her rights as a crime victim under the statutes or under article 1, section 9m of the Wisconsin Constitution," confers standing upon the alleged crime victim in this matter.

On Interlocutory Appeal, the Court of Appeals declined to answer due to the prior sections of its holding. The Circuit Court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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. Oral argument

may be appropriate if ordered by the Court because the arguments raised are centered on a meritorious controversy regarding a question of law. While the brief presents developed theories and legal authorities, oral argument may offer additional information relevant to the issues in dispute. Wis. Stats. §§ 809.22 and 809.23(1)(a) 2 and 3.

STATEMENT OF THE CASE

The Nature of the Case. This is an interlocutory appeal from the order of the circuit court, entered in Waupaca County by the Honorable Raymond Huber, denying standing to TAJ, an alleged victim in a criminal case, to lodge legal arguments at hearing, and in writing, in opposition to the Defendant's (Johnson's) motion for in camera inspection. (57:1-60, App. 127-131). The circuit court concluded that the Appellant, TAJ, lacked standing to lodge legal arguments in response to the *Shiffra-Green* motion and issued an order denying standing to participate in a hearing on the issue 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 subsequent Wisconsin Statutes enacted following that case. (42:1-2, App. 127-131).

TAJ filed an interlocutory appeal which was accepted by the Court of Appeals. (App. 102). After initial briefing at the Court of Appeals, a constitutional amendment altering article I, section 9m of the Wisconsin Constitution was enacted (2020 amendment). (App. 105). The 2020 amendment provided an additional listing of the rights of crime victims and an ability to be heard regarding those enumerated rights or other statutory rights. See Wis. Const. art. 1, § 9m. Supplementary briefing was ordered by the court in response to the 2020 amendment and after such briefing, the Court of Appeals, District IV issued its decision, reversing the trial court 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.*)

Therefore, the matter was remanded for further proceedings consistent with its opinion. This Court then

granted Johnson's petition for review regarding whether TAJ or a similarly situated alleged victim possesses the requisite standing to lodge legal arguments in response to a *Shiffra-Green* motion.

Johnson now respectfully requests that this Court reverse the Court of Appeals' decision reversing the circuit court's order denying standing to TAJ.

The Court of Appeals' Decision. The Court of Appeals reversed and remanded for further proceedings consistent with its order that alleged victims possess standing to lodge legal arguments in response to a defense in camera inspection motion. First, the Court of Appeals held that recent amendment to the Wisconsin Constitution, regarding the rights of crime victims, grants an alleged victim standing to oppose, and to be heard regarding his or her opposition to, a defendant's motion for an in-camera review of the health care records. Accordingly, the court held, the pertinent holding in *Jessica J.L.* is abrogated. Second, the Court of Appeals held that the grant of standing in the recent constitutional amendment applies retrospectively to TAJ's request for standing to oppose, and to be heard regarding his opposition to,

Johnson's pending motion for an in-camera review of TAJ's health care records. Lastly, the Court of Appeals stated that based on its determinative conclusions it did not consider other arguments raised by the parties to the appeal, including whether legal authorities subsequent to the *Jessica J.L.* opinion but prior to passage of the 2020 constitutional amendment were dispositive.

STANDARD OF REVIEW

Whether a nonparty has standing to file pleadings in, make arguments, and otherwise participate in a criminal prosecution in circuit court opposing a *Shiffra-Green* motion is an issue of law reviewed de novo. *In re Jessica J.L.*, 223 Wis. 2d 622, 627, 589 N.W.2d 660, 663 (Ct. App. 1998). Interpretation of state constitutional provisions is an issue of law that the court reviews de novo. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 16, 295 Wis. 2d 1, 719 N.W.2d 408. The interpretation of statutory provisions presents a question reviewed de novo. *Truttschel v. Martin*, 208 Wis. 2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1997).

ARGUMENT

A defendant is entitled to in camera review and potential disclosure of confidential records of an alleged victim by the trial court if the defendant makes a sufficient preliminary showing that records contain evidence material to the defense. *State v. Shiffra*, 175 Wis. 2d 600, 610 (1993); *State v. Green*, 2002 WI 68, ¶ 33, 253 Wis. 2d 356, 380, 646 N.W.2d 298, 309. A defendant is required to reasonably investigate information related to the alleged victim before making an offer of proof regarding the sought-after information and necessity of its production and review. *Id.* ¶¶ 34, 35. The court reviews in camera these confidential records if the defendant can set forth a specific factual basis demonstrating a reasonable likelihood that the sought-after records contain relevant information necessary to the determination of guilt or innocence of the defendant and that the sought-after records are not cumulative to other records available to the defendant. *Id.* An alleged victim holds the right to refuse to disclose sought-after records after a court has made the determination that a defendant has met the sufficient threshold showing and

that the records may be relevant. *Shiffra*, 175 Wis.2d at 612.

TAJ lacks standing to participate in a *Shiffra-Green* proceeding. While TAJ possesses the capability to refuse disclosure of sought-after records under the 2020 constitutional amendment and Chapter 950, TAJ does not possess the standing to litigate the pertinent issues associated with a *Shiffra-Green* motion under these provisions.

I. An alleged victim does not have standing under the 2020 Wisconsin Constitutional Amendments to lodge legal arguments in opposition to a Defendant's Motion for In Camera Review.

The 2020 Wisconsin Constitutional Amendment does not provide standing to nonparties to make legal arguments or file motions in opposition to a Defendant's *Shiffra-Green* motion. 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. *Shiffra*, 175 Wis. 2d at 605. Included with the meaningful opportunity to present a complete defense is the constitutional right to discover confidential records.

Pennsylvania v. Ritchie, 480 U.S. 39, 58, 107 S. Ct. 989, 1002, 94 L. Ed. 2d 40 (1987). *Shiffra*, 175 Wis. 2d at 610.

The 2020 amendment provides series of rights similar to the listing already provided in chapter 950. See Wis. Const. art. 1, § 9m(2). An alleged victim has the right to be heard in proceedings where “a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon.” Wis. Const. art. I, § 9m(2). While an alleged victim may possess a confidentiality right or privilege regarding his or her records under statute, see Wis. Stat. §§ 146.82(1) and (2) and 905.04(2), he or she does not have a right to argue in opposition to a *Shiffra-Green* motion under Wis. Const. art. 1, § 9m(2) merely because the records may be confidential.

- a. **The plain language of the 2020 amendments do not provide standing to an alleged victim to litigate in opposition to a *Shiffra-Green* motion.**

The 2020 Wisconsin constitutional amendment does not provide a right to litigate the merits of legal issues associated with the prosecution of the defendant, nor the ability to argue against a defendant’s due process

right to discover confidential records that are material to a defense. Wis. Const. art. 1, § 9m(2) provides in part:

"victims shall be entitled to all of the following rights . . .

(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.

. . .

(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."

A plain reading of the 2020 amendment and the context of its provisions weighs against an alleged victim's ability to argue in opposition to a defendant's *Shiffra-Green* motion. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. The language of the amendment should be "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*

The 2020 amendment provides no enumerated right to litigate in opposition to a defendant's motion for in camera inspection or in opposition to any other defense motion. Drafters of the 2020 amendment could have provided specified litigation response rights to alleged victims within the language of the amendment. No such language is included. Instead, a clause is provided within the 2020 Amendment 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.” Wis. Const. art. I, § 9m(2). The listed proceedings do not include discovery hearing or other evidentiary litigation. The plain language of the provisions does not contain explicit standing to litigate in response to a defense motion. Further, the contextual placement of the ability “to be heard” does not mention discovery motions or other similar evidentiary motions. The rule of construction *expressio unius est exclusio alterius* holds that when one or more things of a class are expressly mentioned, others things of the same class are excluded. See *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶ 27, 301 Wis. 2d 321, 341, 733 N.W.2d 287, 297; *Perra v. Menomonee Mut. Ins. Co.*, 2000 WI App 215, ¶ 12, 239 Wis. 2d 26, 619 N.W.2d 123. No right to participate in those aspects of the prosecution should be inferred absent direct language providing such a right when a significant listing of rights is otherwise provided.

An alleged victim’s narrow standing is demonstrated by the enforcement provisions under Wis. Const. art. 1,

§ 9m(4)(a). That section provides that victims “may assert . . . enforcement of the rights in this section and any other right, privilege, or protection afforded [and that] the court . . . with jurisdiction over the case shall act promptly on such a request and afford a remedy for the violation of any right of the victim.” *Id.* Victims “may obtain review of all adverse decisions concerning their rights as victims by courts or other authorities with jurisdiction under par. (a) by filing petitions for supervisory writ in the court of appeals and supreme court.” Wis. Const. art. 1, § 9m(4)(b). The enforcement provisions are devoid of rights to argue legal questions regarding the controversy at hand or argue in response to party pleadings. Absent a provision granting such rights, none should be inferred when the enforcement provisions already provide specific mechanisms to assert explicit rights.

Victims are afforded the ability to assert a right under the section and seek a remedy from the circuit court or appellate court through a supervisory writ. *Id.* The enforcement section provides a “right to assert,” it does not provide a the “right to litigate” or to

"temporarily enter the prosecution." A victim can seek "enforcement" of his or her rights but lacks explicit authority to request a judicial ruling in opposition to a legal position advanced by the defendant. For instance, an ability to be heard regarding the terms of release under the enforcement provisions is wholly dissimilar to a request for an order to deny a bail based on arguments regarding legal questions of bail. An ability to assert an enumerated, limited right is not standing to participate in the prosecution of the defendant.

A *Shiffra-Green* motion is a proceeding that does not invoke the enforcement section of the 2020 amendment. Circuit courts are directed to hear from a victim regarding enumerated rights and appeals courts are directed to issue supervisory writs regarding enforcement of those rights when warranted. Wis. Const. § 9m(4)(a) and (b). Legal questions, and potential appellate review of the same, associated with a court's ruling on a discovery initiative pursuant to a *Shiffra-Green* motion are outside of the assertion of a privacy right. While victims have a privacy interest with regard to medical records, see Wis. Stat. §§ 146.82(1) and (2)

and 905.04(2), no right to advance a legal position regarding a discovery question within the prosecution is inherent within the privacy interest.

Victims possess the right to refuse disclosure of a confidential record. A victim's refusal right is a right protected under the 2020 amendment. Wis. Const. art. § 9m(1). Under *Shiffra-Green*, a victim holds the right to refuse to disclose sought after records after a court has made the determination that a defendant has met the threshold showing and that records may be relevant. *Shiffra*, 175 Wis. 2d at 612. Under Wis. Const. art. 1, § 9m(4), victims may assert this right in circuit court and reference his or her ability to refuse to disclose such records. If he or she was subject to a contempt order for failure to produce such records, he or she is empowered under the 2020 amendment to assert his or her right to refuse disclosure. An alleged victim could also seek a supervisory writ in the Court of Appeals to enforce his or her right to refuse disclosure. These sections provide a framework for victims to assert such privacy rights and be heard regarding enumerated rights, not to litigate as parties to the action.

Victims lack sufficient standing to direct appeal to enforce their rights, other than by seeking a supervisory writ. Wis. Const. art. 1, § 9m(4)(b). Such a limitation further emphasizes the narrow, non-party status of victims. Direct appeal may be available for litigants to the matter, but supervisory writ is provided for non-party victims. The 2020 amendments provide that a victim “may obtain review of all adverse decisions . . . by filing petitions for supervisory writ.” *Id.* Narrowing a victim’s mechanism of appellate review to nonparty supervisory writ confirms that a victim does not have a role in prosecution of a criminal case, or its constituent parts, on direct appeal.

A supervisory writ is substantially different than direct appeal further confirming narrow non-litigation standing. To justify issuance of a supervisory writ, “a petitioner must demonstrate that: (1) an appeal is an inadequate remedy; (2) grave hardship or irreparable harm will result; (3) the duty of the trial court is plain and it . . . acted or intends to act in violation of that duty; and (4) the request for relief is made promptly and speedily.” *State ex rel. Dep't of Nat. Res. v.*

Wisconsin Ct. of Appeals, Dist. IV, 2018 WI 25, ¶ 9, 380 Wis. 2d 354, 365, 909 N.W.2d 114, 119-20. A supervisory writ is not a mechanism to obtain review of a trial court decision that is merely adverse to a party's legal position on the matter. A supervisory writ "serves a narrow function: to provide for the direct control of lower courts, judges, and other judicial officers who fail to fulfill non-discretionary duties, causing harm that cannot be remedied through the appellate review process." *Kalal*, 2004 WI 58, ¶ 24. A supervisory writ is "an extraordinary and drastic remedy that is to be issued only upon some grievous exigency." *Id.*, ¶ 17.

Absent a demonstration of grave hardship and obvious disregard of a plain duty by the trial court, an appeals court would not issue such a writ. *Id.* A court evaluating a motion under *Shiffra-Green* is not a matter necessarily raising supervisory writ analysis because the court is obligated to weigh any offer of proof, utilize discretion, review records in-camera, and may only release relevant records. *Shiffra*, 175 Wis. 2d at 610. The alleged victim may still refuse to produce the sought-after records. *Id.* at 612.

Provision of standing to alleged victims to litigate in response to a defendant's *Shiffra-Green* motion is outside the plain reading and context of the provisions. Expanded standing to appeal rulings within the prosecution opens the case to an immeasurable list of potential legal positions that may tenuously touch upon an interest of an alleged victim that may be subject to litigation at the circuit court or on direct appeal. The 2020 amendment prevents boundless litigation by nonparties in criminal cases by providing a list of rights to be heard and a specific mechanism for review.

An alleged victim's right to privacy under the 2020 amendment does not include an ancillary right to litigate against a *Shiffra-Green* motion. An alleged victim's right to privacy under the 2020 amendments is undefined. A common definition should be used for review of this provision. *Kalal*, 2004 WI 58, ¶ 45. Black's law dictionary defines private as "relating or belonging to an individual" or "confidential or secret." Black's Law Dictionary 553 (2nd ed. 2001). A confidential record belonging to an individual does not present an internal ancillary right to assert a right to participate in the

prosecution of a defendant. Included within a confidential record belonging to an individual is not the ability to litigate any legal issue, no matter how slightly, that touches upon the interest. A private record does not inherently present a right to move to dismiss a criminal action, to move to join defendants or offenses, or to litigate discovery initiatives. No such abilities should be inferred.

A defendant is entitled to in camera review of confidential records of an alleged victim by the trial court if the defendant makes a sufficient preliminary showing that records contain evidence material to the defense. *Shiffra*, 175 Wis. 2d at 610; *State v. Green*, 2002 WI 68, ¶ 33, 253 Wis. 2d 356, 380, 646 N.W.2d 298, 309. A defendant is required to reasonably investigate information related to the alleged victim. *Id.* ¶¶ 34, 35. A circuit court conducts an in-camera review of these confidential records after the defendant has set forth a specific factual basis demonstrating a reasonable likelihood that the sought-after records contain relevant information necessary to the determination of

guilt and that the sought-after records are not cumulative to records available to the defendant. *Id.*

Significant legal questions are raised following the filing of a *Shiffra-Green* motion. The trial court must determine whether the defendant has reasonably investigated information regarding the alleged victim prior to making the offer of proof. Such evaluation by the court centers on the defendant's investigation, offer of proof, and presentation to the court. A court's examination of the same does invoke upon a confidentiality interest for an alleged victim. Next, the court weighs whether the defendant has made the sufficient showing that sought-after records contain relevant information necessary to the determination of guilt. An evaluation of a charged offense, its elements, and the relevance of sought-after records disproving or going towards those elements is a legal question. This examination does not touch upon a privacy interest of an alleged victim. A court also weighs whether the sought-after records are cumulative to other evidence available to the defense. Again, this does not raise a confidentiality interest or other right listed in the

2020 Amendments. An alleged victim's interest in records does not bear upon a court's evaluation of these legal questions and none should be inferred.

By contrast, the types of proceedings "during which a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon" do touch upon the rights of alleged victims. Wis. Const. art. I, § 9m(2). These rights are narrowly tailored to provide an alleged victim the ability to be heard in "non-testimonial" or "offer of proof" proceedings. For instance, at a sentencing hearing an alleged victim would have the right to be treated with dignity; to privacy; to have proceedings free from delay; to be notified and to attend; and to be heard regarding these rights if adequate provision was not provided. These proceedings include arenas where a victim's rights are touched upon and the mechanism for their hearing is available. By contrast, no right to "litigate the pertinent issue" at a suppression hearing or discovery hearing is provided amongst the list.

Accordingly, Wis. Const. art. I, § 9m(2) does not confer an standing to argue in response to a defendant's

Shiffra-Green motion. "Standing is a concept that restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not done." *Three T's Trucking v. Kost*, 2007 WI App 158, ¶ 16, 303 Wis. 2d 681, 736 N.W.2d 239. Mere listing of a privacy right within the 2020 amendment, and a potential to be heard, does equate standing to litigate all issues that merely reference that interest no matter where within the prosecution of the defendant. Instead, the ability relates to the ability to establish that privacy interest as a privacy interest to the court in specified settings. An alleged victim does not possess the right to argue in opposition to a *Shiffra-Green* motion.

b. An alleged victim does not have standing to litigate in opposition to a *Shiffra-Green* motion because he or she is not a party to the action.

A nonparty alleged victim in a criminal action may not participate in the criminal prosecution of the defendant because he or she is not a party to the action. *In re Jessica J.L.*, 223 Wis. 2d 622, 630, 589 N.W.2d 660, 664 (Ct. App. 1998). For instance, in *In re Jessica J.L.*, 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 based on her privacy interest in 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.* Counsel for the victim is unable to advance legal arguments in relation to the motion. *Id.*

Non-parties are not empowered to raise legal arguments or advance positions regarding *Shiffra-Green* motions at hearing. *Id.* While the court noted that personal privacy concerns were an important consideration, these concerns did not provide a basis to

confer additional party status to a victim and to also 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.* 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 . . . 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.

Because proceedings related to a *Shiffra-Green* motion are part of the prosecution, the principles and basis for the holding in *Jessica J.L.* remain consistent with the recent amendments. A trial court is required to review a *Shiffra-Green* motion on its merits, evaluate the legal questions triggered by such a filing, 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. Courts are capable of this task.

The 2020 amendment has not abrogated principles supporting the holding in *Jessica J.L.* because the recent amendments prohibit granting party status to a victim. Wis. Const. art. 1, § 9m(6). That section states that "is not intended and may not be interpreted . . . to afford party status in a proceeding to any victim." *Jessica J.L.* stands for the proposition that victims are not parties to a criminal court action and the 2020 amendments confirm this status. If nonparties can file motions on occasion, an artificial addition to the 2020 amendments is created wherein nonparty obtains party status on limited occasions. Because the 2020 amendments prohibit conferring party status, such a result would be absurd.

Because victims do not have party status under Wis. Const. art. 1, § 9m, the principles supporting *Jessica J.L.* remain valid. Similar to this matter, the victim in *Jessica J.L.* 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 and to be heard regarding those rights, the right to participate in the prosecution or to lodge legal arguments in response to a *Shiffra-Green* motion is not presented. Because responsive arguments are related to whether a defendant is guilty of the crime charged, these legal questions are at the heart of the prosecution of the matter. *Shiffra-Green* hearings are thus outside the constitutional or statutory rights of nonparty alleged victims to participate. *Jessica J.L.*, 223 Wis. 2d at 630. Absent a direct bestowal of an ability to participate in the prosecution of the defendant, the principles supporting *Jessica J.L.* remains valid.

Accordingly, TAJ lacks standing to oppose, and to be heard regarding the opposition to, Johnson's *Shiffra-Green* motion.

II. The recent amendment to the Constitution does 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.

The ballot question presented does not affirmatively indicate a retroactive application to past controversies. Wis. Const. art. 1, § 9m(3). The ballot question presented to Wisconsin voters asked:

Additional rights of crime victims. Shall section 9m of article I of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?

See Jillian Slaight, Constitutional Amendment Relating to Criminal Victims' Rights, Reading the Constitution, March 2020, Volume 5, Number 1.

Accordingly, the provisions of recent amendments are self-executing and prospective in nature. The legislature was undoubtedly aware of its ability to make an amendment retroactive in application and such language could have been posed to include retroactive application. The recent amendments do not include explicit provisions indicating retroactive application.

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 language to the contrary is present. Consequently, 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.

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

III. Wis. Stat. § 950.105 provides nonparties limited standing to assert narrowly tailored rights enumerated in Chapter 950 or the Wisconsin Constitution.

TAJ lacks standing to lodge legal arguments regarding Johnson's *Shiffra-Green* motion or otherwise

participate in the prosecution of the defendant under Wis. Stat. § 950.105. An alleged crime victim has standing to assert his or her rights as a crime victim under Chapter 950, or his or her rights found within the Wisconsin Constitution, or his or her rights found elsewhere in the Wisconsin Statutes. *Id.* While an alleged victim may have an assertable confidentiality right in his or her records, he or she lacks the standing necessary to litigate or to make legal arguments regarding legal questions arising from a defendant's due process right to pursue discovery. An alleged victim lacks a direct assignment of standing to participate in the prosecution beyond the narrowly tailored areas where alleged victims have the right to assert his or her rights as a victim.

A plain reading of section 950.105, and the related sections of that chapter 950, confirms the narrow standing afforded alleged victims. Statutory interpretation "begins with the language of the statute [and if] the meaning of the statute is plain, we ordinarily stop the inquiry." *Kalal*, 2004 WI 58, ¶ 45. Section 950.105 provides that "[a] crime victim has a

right to assert, in a court in the county in which the alleged violation occurred, his or her rights as a crime victim under the statutes or under article I, section 9m, of the Wisconsin Constitution." As such, "a crime victim has the right to assert ... his or her rights as a crime victim" found under statute or the Wisconsin constitution.

The relevant statutory authorities in Chapter 950 providing "rights as crime victims" does not include a right to litigate, to make legal arguments, or otherwise participate in the prosecution. Wis. Stat. § 950.04 provides a listing of "rights as a crime victim." A plain reading of the same does not provide a nonparty alleged victim of crime a right to make legal arguments to participate in the prosecution of a defendant. Instead, Wis. Stat. § 950.04(1v)(ag)-(zx) provides a lengthy and comprehensive listing of specific rights, similar to the 2020 amendments, to alleged victims of crime. The rights provided are exhaustively listed and outlined in detail. Rights to participate in prosecution or lodge legal arguments regarding defense motions are not included. Because the right to file motions or make

legal arguments in response to defense filings are not included among the rights listed in Wis. Stat. §§ 950.04(1v)(ag)-(zx), nonparty alleged victims do not hold such a right under Chapter 950. A statutory basis for an ability to file motions or make legal arguments in opposition to *Shiffra-Green* motion does not exist under Chapter 950.

Rules of statutory construction weigh against a nonparty's request to make legal arguments to the court or to otherwise participate in the prosecution of the defendant. The rule of statutory construction *expressio unius est exclusio alterius* holds that when one or more things of a class are expressly mentioned in a statute, others things of the same class are excluded. See *FAS, LLC*, ¶ 27; *Perra*, at ¶ 12. "[T]he enumeration of specific alternatives in a statute is evidence of legislative intent that any alternative not specifically enumerated is to be excluded." *C.A.K. v. State*, 154 Wis. 2d 612, 621, 453 N.W.2d 897 (1990). Accordingly, a court should not infer more areas of standing or add additional rights for alleged victims when such an expansive list is

enacted. Rights or standing outside of the enumerated list are expressly excluded.

Chapter 950 provides a class of rights that are explicitly mentioned by statute, which means that other rights not expressly mentioned are excluded. The right to make legal arguments, to file motions, to file response arguments, and to otherwise participate in the prosecution of the defendant are not included. Even if the exhaustive listing of rights found in Chapter 950 was deemed ambiguous, enumeration of such a lengthy listing of rights in the statute is evidence of legislative intent that any additional rights not specifically enumerated are to be excluded. It would be unreasonable to assume that the legislature was not aware it could provide for rights to lodge legal arguments or file response arguments in the enumerated list. As such, no standing right under Wis. Stat. § 950.04 is present.

As stated above, the 2020 constitutional amendments provide a comprehensive listing similar to Chapter 950. The 2020 amendments similarly do not include rights to file motions, make legal arguments in response to defense pleadings or otherwise participate in the prosecution. A

court is not at liberty to disregard the plain and clear words of the recent amendments. See *Kalal*, 2004 WI 58, ¶ 46. Courts are to give language is given its common, ordinary, and accepted meaning. *Id.* at ¶ 45.

The legislature was undoubtedly aware it could have conferred more rights at more hearings or conferred standing for party status to victims under Chapter 950 or the 2020 Amendment. The legislature could have included the right to file motions or litigate issues in discovery hearings, but it did not provide for those rights in the amendments to be exercised under Wis. Stat. § 950.105. Without such a standing provision, crime victims do not possess the right to participate in the prosecution of the defendant. *Jessica J.L.*, 223 Wis. 2d at 630.

Furthermore, Section 9m(6) of the recent amendments provide 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 party status

to join litigation or prosecution. As such, Wis. Stat. § 950.105 operates in the same manner as the principles announced in *Jessica J.L.* Wis. Stat. § 950.105 does not provide standing to TAJ to file legal arguments or orally argue at hearing in response a *Shiffra-Green* motion.

No other sections of Wisconsin Statutes provide a right to nonparty alleged victims to make legal arguments or otherwise participate in the prosecution of a defendant. Provisions under Wisconsin law regarding confidentiality of health care records, see Wis. Stat. §§ 146.82(1) and (2) and 905.04(2), similarly do not include standing to litigate legal issues in a criminal proceeding within them. A legal question could emerge as to what is a confidential record and what threshold must be met to assert that a record meets the definition of confidential record. However, no right to litigate whether a confidential record sought has been properly raised by a defendant in a *Shiffra-Green* motion is inherent with a right to confidentiality. Therefore, Wis. Stat. § 950.105 does not provide standing to raise separate statutory challenges to a defense discovery initiative.

By contrast, Wisconsin law provides that District Attorneys "prosecute all criminal actions before any court within his or her prosecutorial unit and have sole responsibility for prosecution of all criminal actions." Wis. Stat. § 978.05(1). The court should "assume that the legislature's intent is expressed in the statutory language." *Kalal*, 2004 WI 58 at ¶ 44. Chapter 950 clearly outlines the enumerated rights of crime victims and provides narrow standing for the exercise of those rights. "It is the enacted law, not the unenacted intent, that is binding on the public." *Id.* District Attorneys prosecute criminal offense and conduct the proceedings related to such prosecution.

Accordingly, Wis. Stat. § 950.105 provides nonparties limited standing to assert narrowly tailored rights and does not provide standing to oppose a *Shiffra-Green* motion.

CONCLUSION

For the reasons stated in the above, Johnson now respectfully requests that this Court reverse the Court of Appeals' decision reversing the circuit court's order denying standing to TAJ.

Dated this _____ day of March, 2021.

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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of March, 2021.

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 thirty-nine (39) pages.

Dated this _____ day of March, 2021.

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 March, 2021.

Nathan J. Wojan