STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP664 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

T.A.J.,

Appellant,

v.

ALAN S. JOHNSON,

Defendant-Respondent.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AND REMANDING AN ORDER DENYING T.A.J. STANDING, ENTERED IN WAUPACA COUNTY CIRCUIT COURT, THE HONORABLE RAYMOND S. HUBER PRESIDING

RESPONSE BRIEF OF APPELLANT

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1. Does Wis. Stat. § 950.105 grant standing to crime victims like T.A.J. to assert their rights in criminal proceedings regarding *in camera* inspections of their private records?

   The Court of Appeals did not address this issue, finding that since there was standing for victims to assert their rights under the new 2020 Wisconsin Constitutional Amendment, there was no need to determine if the same rights were provided in Wis. Stat. §950.105.

2. Does the 2020 Wisconsin Constitutional Amendment to Article I, Section 9m apply retroactively?

   The Court of Appeals answered: Yes.

3. Does Article I, Section 9m of the Wisconsin Constitution give crime victims like T.A.J. standing to assert their rights in criminal proceedings regarding *in camera* inspections of their private records?

   The Court of Appeals answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

T.A.J. agrees that this case warrants oral argument and publication. A decision by this Court will clarify for victims, prosecutors, and defendants alike that Wis. Stat. § 950.105 and Wis. Const. Art. I, § 9m, separately and together, give victims standing to assert their rights in criminal proceedings regarding *in camera* inspections of their private records, including through written and oral argument.

STATEMENT OF THE CASE

The procedural history set forth by Defendant-Respondent-Appellant Alan Johnson is generally accurate. T.A.J. adds key facts pertinent to this Court's analysis to clarify the following: 1) the District Attorney's position during the proceedings; and 2) the current procedural posture regarding the underlying *Shiffra-Green* proceedings.

Facing multiple counts of sexual and physical abuse against two victims, T.A.J. and K.L.J., Johnson filed a *Motion for In Camera Inspection* of K.L.J.'s mental health and counseling records.[1] (R 11:13, 15:1-2). The District Attorney ("D.A.") did not file a written response or object to the release of K.L.J.'s records at the motion hearing. The trial court granted Johnson's motion, ordering K.L.J. to release her records for *in camera* review. (R 17:1).

Johnson later filed a second *Shiffra-Green* motion, the subject of this appeal, to access T.A.J.'s mental health and counseling records (R 21:1-3). Once again, the D.A. did not file a written response to Johnson's motion. By this point, T.A.J. and K.L.J. had each retained private counsel. T.A.J. filed a written response objecting to the motion and arguing his standing to participate, primarily under Wis. Stat. § 950.105. (R 39:1-14).

During what was supposed to be a hearing on the merits of Johnson's *Shiffra-Green* motion, counsel for T.A.J. argued that T.A.J. had standing to assert, orally and in writing, his right to privacy over his records in response to Johnson's motion. (R 57:1-45). Johnson opposed. (R 57:30-39). The D.A. took no position. (R 57:43).

The court ruled orally that Wis. Stat. § 950.105 does not afford crime victims standing to file motions in criminal cases, citing *In re Jessica J.L.*, 223 Wis. 2d 622, 589 N.W.2d 660 (Ct.App.1998) as controlling law. (R 57:45-51). The court scheduled a new hearing to decide the *Shiffra-Green* motion for T.A.J.'s records. (R 57:57-58). The court ruled that T.A.J. could not present arguments, in writing or orally, at that upcoming hearing. (R 57:57-58).

[1] As this Court knows, such filings are known as *Shiffra-Green* motions based on the standard for which they are named, taken from *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) and *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

Prior to that hearing, T.A.J. filed an interlocutory appeal about the court's standing decision. (R 45:1-20). The court stayed the *Shiffra-Green* hearing pending resolution of this appeal and has not ruled on the merits of Johnson's underlying motion. (R 52:1-4).

STANDARD OF REVIEW

The issues presented in this appeal involve questions of statutory and constitutional interpretation, which this Court reviews *de novo*. *See Noffke v. Bakke*, 2009 WI 10, ¶9, 315 Wis. 2d 350, 760 N.W.2d 156; *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶16, 295 Wis. 2d 1, 719 N.W.2d 408 (citing *Wagner v. Milwaukee Cty. Election Comm'n*, 2003 WI 103, ¶18, 263 Wis.2d 709, 666 N.W.2d 816).

ARGUMENT

Crime victims like T.A.J. have the legal authority to be heard in criminal courts, through oral and written argument, in response to motions to inspect their private records. Victims in Wisconsin derive this authority from statutory and constitutional guarantees.[2] Legal rights—including the rights of crime victims—lose their meaning without the enforcement mechanism of standing.

Standing is critical both to individuals who have an interest in the adjudication of a legal issue and to our adversarial legal system itself. As the United States Supreme Court stressed in a general discussion of Article III standing, that unique personal interest is what makes the legal system effective. *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663, 678 (1962). The *Baker* Court explained that the essential standing question is "[whether] the appellants [have] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" *Baker v. Carr*, 369 U.S. at 204.

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[2] These express rights to standing reflect well-rooted common law principles. When granted, standing confers on the individual in question the ability to make legal arguments by motion, orally, in writing, or by any other means of litigation. *See State ex rel. Parker v. Sullivan,* 184 Wis. 2d 668, 678 n.6, 517 N.W.2d 449 (1994). It is not uncommon for legislators to affirm or clarify the parameters of standing doctrine through legislation. In this state, legislators have enacted a victim rights statute including a provision entitled "Standing" and the voters have amended the state constitution to include provisions on standing.

Johnson's argument ignores the long-standing common law link between a legally protected interest and the right of individuals to assert those interests to avoid an impending injury. Johnson similarly ignores that this tradition informs the plain or ordinary meaning of the word "standing." Instead, while acknowledging that victims have rights, Johnson asserts that they have lesser standing to assert them because the statutory and constitutional provisions that create victims' rights do not: (1) contain an explicit, enumerated right to "litigate" or "make legal arguments" in court; (2) grant crime victims the right to act as prosecutors; or (3) afford crime victims "party" status in criminal cases.

This strained, and ultimately circular, argument has no support in the plain language of the relevant statutory and constitutional law, producing an absurd result. According to Johnson, victims have rights, but can only protect them if they can convince someone to listen to them without making motions, writing briefs, arguing orally, or directly requesting courts to decide legal questions.

This Court, like the Court of Appeals, should reject Johnson's defective logic and affirm crime victims' standing to assert and defend their statutory and constitutional rights.

This Court should also do what the Court of Appeals did not: confirm that crime victims have standing under Wis. Stat. § 950.105, as they do under Article I, § 9m of the Wisconsin Constitution. A clear decision on that issue is essential for two reasons. First, Article I, § 9m faces a constitutional challenge in the Court of Appeals, in the pending case of *Wisconsin Justice Initiative, Inc. v. Wisconsin Elections Commission*, Court of Appeals District III, No. 2020AP2003. Absent a definitive answer to the question of whether T.A.J. and other crime victims have standing under § 950.105, the constitutional challenge will cast a shadow of uncertainty on the continuing validity of the Court of Appeals' decision in this case for months to come.

Second, even if the constitutional challenge fails, courts will have to parse for themselves how the new provisions of Article I, § 9m interact with Chapter 950.[3] An opinion construing § 950.105 will provide a baseline from

[3] As the Court of Appeals rightly noted, a constitutional amendment or statute can supersede case law. *State v. Johnson*, 2020 WI App 73, ¶27, 394 Wis. 2d 807, 827, 951 N.W.2d 616, 625.

which courts, attorneys, and interested parties can fully assert and understand victims' rights under statutory and constitutional law. If this Court affirms victims' standing under Wis. Stat. § 950.105 and Article I, § 9m(4), no doubts will remain about victims' ability to discern and assert their other rights.

Given the particular need for certainty at this moment, T.A.J.'s response brief will begin by arguing that the plain language of Wis. Stat. § 950.105 unambiguously provides T.A.J. (and other crime victims) standing to respond to Johnson's *Shiffra-Green* motion. The response will then address both the general question of whether Article I, § 9m applies retroactively in general, and the more specific question of whether that question applies to T.A.J. under the facts in this case. Finally, this response will argue that Article I, § 9m both ratifies crime victims' existing statutory right to standing and grants additional constitutional rights to crime victims.

I. Wis. Stat. § 950.105 Guarantees T.A.J. Standing to Argue Against Johnson's Motion for *In Camera* Review.

Despite this Court's order to address whether Wis. Stat. § 950.105 affords standing to T.A.J., Johnson barely acknowledges, let alone engages with, the plain language of the statute titled "Standing."[4]

Statutory interpretation "begins with the language of the statute." *State ex. rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citing *Seider v. O'Connell*, 2000 WI 76, ¶¶43, 236 Wis. 2d 211, 232, 612 N.W.2d 659, 669). A reviewing court should give statutory language "its common, ordinary and accepted meaning," and technical or specifically defined words or phrases should be "given their technical or special definitional meaning." *Id.* (citing *Bruno v. Milwaukee Cty.*, 2003 WI 28, ¶8, 20, 260 Wis. 2d 633, 660 N.W.2d 656; Wis. Stat. § 990.01(1)). To discern plain meaning, Wisconsin courts also look to context and structure—in other words, the relationship of the language to "surrounding or closely-related statutes"—to avoid "absurd or unreasonable results." *Id.*, ¶ 46 (citations omitted). Courts read statutory language "to give reasonable effect to every word, in order to avoid surplusage." *Id.* (citations

[4] Johnson claims to present a plain meaning reading, but his brief never takes the necessary first step. Rather than beginning with the language of Wis. Stat. § 950.105, Johnson immediately turns to isolated and unrelated phrases in Chapter 950 to assert that § 950.105's words cannot mean what they say.

omitted). If this analysis provides a "plain, clear meaning," the Court finds the statute unambiguous and ends its analysis there. *Id.* (citations omitted).

Johnson concedes that the critical portions of Wis. Stat. § 950.105 unambiguously grant victims standing. Yet he maintains that such standing is not applicable in this case, or in any instance of a request for *in camera* records. Johnson's reading of the statute is wrong and leads to absurd results. The plain meaning of key words in the "Standing" statute, verified by closely related statutes and legislative history, clearly establishes that crime victims have standing to assert their rights in criminal proceedings, including their right to oppose requests for confidential and privileged records.

A. The Phrase "Right to Assert" Means that Victims Have Standing in the Plain and Clear Meaning of that Term.

Wis. Stat. § 950.105 contains the following provision:

> **Standing**. A crime victim has *the 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 1 section 9m, of the Wisconsin Constitution. This section does not preclude a district attorney from asserting a victim's rights in a criminal case or in a proceeding or motion brought under this section.

The italicized language contains the key to this appeal—and, for victims, the courtroom. Merriam-Webster defines "assert" as "to state or declare positively and often forcefully or aggressively," or "to compel or demand acceptance or recognition of (something, such as one's authority)." Merriam-Webster, *Definition of* assert, https://www.merriam-webster.com/dictionary/assert (last visited May 12, 2021). The Oxford English Dictionary provides similar meanings: "To maintain the cause of, take the part of; to champion, protect, defend…To claim (something) as belonging to oneself or another, to declare one's right to, or possession of." *Oxford English Dictionary* (Vol. 1, 2nd Ed. 1989). "To assert" thus means to argue actively and stake a claim over one's interests. "To assert" does *not* mean the passive recognition of a need.

Black's Law Dictionary reinforces the inextricable connection between the verb "to assert" and the rights one possesses in the legal context: "[t]o state positively" or "[t]o invoke or enforce a legal right." Assert, *Black's Law Dictionary* (11th ed. 2019). Legal rights, unlike natural rights, derive from laws codified by a given legal system. *See* Right, *Black's Law Dictionary* (11th ed. 2019). Because asserting or enforcing a "legal right"

relies on a system of laws, it cannot be detached from regular courtroom proceedings.

To "assert" a legal right means attempting to manifest it. If crime victims have the "right to assert" their legal rights, the ordinary meaning of those words necessarily must include the right to make legal arguments, request legal rulings, and otherwise engage in the system through which individuals obtain decisions about their legal rights. When Wis. Stat. § 950.105 gives victims the right "to assert" their rights, it therefore also plainly gives them standing to argue and protect their rights.

The statute title, "Standing," strongly supports this interpretation. *See Raymaker v. Am. Family Mut. Ins. Co.*, 2006 WI App 117, ¶30, 293 Wis. 2d 392, 718 N.W.2d 154 (titles aid plain language interpretation). Merriam-Webster defines "standing" as "a position from which one may assert or enforce legal rights and duties." Merriam-Webster, *Definition of* standing (Entry 2 of 2), https://www.merriam-webster.com/dictionary/standing (last visited May 12, 2021). The common meaning of "standing" thus reinforces the common meaning of "assert."

Together, the dictionary definitions of these words—the most important source to which courts turn to interpret a statute—confirm that Wis. Stat. § 950.105 provides victims the right to participate in and litigate proceedings about their rights. *See Kalal*, 2004 WI at ¶45 (citations omitted).

Under Johnson's interpretation, the right "to assert" means something he does not, or cannot, define. Rather than beginning with the words of this statute, Johnson begins from the faulty premise that victims' enumerated rights in Wis. Stat. § 950.04 define the plain language of Wis. Stat. § 950.105. He concludes that because Wis. Stat. § 950.04 does not expressly delineate specific legal means through which victims can utilize their standing, no such means exist. He repeatedly contends that, because Wis. Stat. § 950.04 lacks an explicit right to "lodge legal arguments," "litigate," or "file motions," T.A.J. therefore lacks standing for the same. (D. Br. 31-32). In essence, Johnson argues that Wis. Stat. § 950.105 would only afford crime victims the right to assert their rights if they had a separate right to assert their rights—a veritable Escher drawing in linguistic form that no legislature could reasonably intend to create.

T.A.J., by contrast, relies on the dictionary definitions of the key terms— "the right to assert … rights as a crime victim"—to argue that Wis.

Stat. § 950.04 and Wis. Stat. § 950.105 are complementary statutes. Wis. Stat. § 950.04 enumerates some victims' rights and Wis. Stat. § 950.105 provides the enforcement mechanism by which victims can realize those rights as well as others in which they have an interest.

B. Wis. Stat. § 950.105 Authorizes Standing to Assert Rights "Under the Statutes."

This right to standing applies to any rights that properly belong to, or can be claimed by, crime victims under any and all Wisconsin statutes *including* T.A.J.'s privilege and confidentiality interests over his private medical records. *See* Wis. Stats. §§ 905.04, 146.82.

Wis. Stat. § 950.105 allows victims to assert their rights "under the statutes." "The" is a definite article that points to a particular noun. The noun here ("statutes") is the plural of "statute." Wis. Stat. § 950.105 does not modify or qualify the word. The ordinary meaning of this phrase is clear: victims have standing to assert rights from under any of "the statutes."[5]

Chapter 950 uses limiting language elsewhere, but not here. The statute narrows other rights to "this chapter" or a given "section." *See e.g.*, Wis. Stat. §§ 950.03, 950.09. Chapter 950 only uses this broader phrase "under the statutes" once: § 950.105. This Court must presume the legislature chose the word "statutes" intentionally in order to afford victims standing to assert any statutory rights pertinent to a crime victim outside of Wis. Stat. § 950.04(1v), including victims' rights to patient privilege (§ 905.04) and confidentiality (§ 146.82). *See Kett v. Cmty. Credit Plan, Inc.*, 228 Wis. 2d 1, ¶¶22–23, 596 N.W.2d 786 (1999) (courts presume legislature chose words deliberately, with purpose, and that different words in an act or chapter signal significance).

Johnson does not seem to disagree with this, conceding that a crime victim has "standing to assert his or her rights…under Chapter 950…the Wisconsin Constitution, or his or her rights found elsewhere in the Wisconsin Statutes." (D Br. 30). He even embraces T.A.J.'s interpretation of "under the statutes," recognizing T.A.J.'s statutory confidentiality interest in his records. (D Br. 30).

But despite acknowledging the centrality of victim rights to Chapter 950, Johnson insists there is nothing absurd about divorcing the substantive

[5] This includes all applicable state statutes that implicate the legally cognizable interests of crime victims.

rights under Wis. Stat. § 950.04(1v)(ag) from any direct means of enforcing those rights, such as the standing provided under Wis. Stat. § 905.105. Under Johnson's theory, all substantive rights are meaningless unless they are reinforced by statutory language that expressly describes the precise legal tools one can use to enforce each specific right.

Johnson's reasoning is unpersuasive. None of the language in Wis. Stat. § 950.105 indicates that the statute creates a radical split between substantive rights and enforcement procedures. A reviewing court cannot construe language that is not there. *See, e.g., Jefferson v. Dane Cty.*, 2020 WI 90, ¶35, 394 Wis. 2d 602, 951 N.W.2d 556 (noting a court "will not add words the legislature did not employ"). In the larger context of other civil rights laws, Johnson's argument finds no support. Defendants are not prohibited from filing suppression motions against an unlawful search and seizure just because the Fourth Amendment does not include the phrase "a defendant has a right to file motions and litigate this right." *See* U.S. Const. amend. IV.

C. Crime Victims' Rights, Including Standing Rights, Belong to Crime Victims, Not District Attorneys.

Johnson's argument that victims lack standing because litigating motions, especially *Shiffra-Green* motions, is the sole purview of a District Attorney is also contradicted by the plain language of the statute.

The second sentence of Wis. Stat. § 950.105 provides notice that the section "does not preclude a district attorney from asserting a victim's right[.]" District attorneys could already assert rights on behalf of victims prior to this provision—the parties here do not dispute this. This language would therefore become unnecessary surplusage, contrary to *Kalal*, if the first sentence of § 950.105 did not guarantee victims standing to assert their rights, whether directly or by counsel, on their own behalf. *See Kalal*, 2004 WI at ¶45. While Wisconsin courts have recognized that statutes can sometimes contain redundant words, "[t]he canon against surplusage guides us to read legislative language 'where possible to give reasonable effect to every word.'" *Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2019 WI 24, ¶17, 385 Wis. 2d 748, 924 N.W.2d 153 (quoting *Kalal*, 2004 WI at ¶46).

Without independent standing, a crime victim must rely on the prosecution to assert his or her rights. As this case shows, requiring a victim to assert their rights solely through the State would be problematic, if not absurd. Prosecutors working under a district attorney have no obligation to adhere to a victim's interests, cannot form an attorney-client relationship

with or legally advise the victim, and must prioritize the interests of society in furtherance of prosecuting the crime at hand. *See* §§ 978.05–978.06; Wis. SCR 20:3.8.

The facts in this case demonstrate the potential for conflict between the interests of victims and prosecutors. If a prosecutor thinks it would be in the best interest of the case for the victim to disclose their records, or sees no strategic advantage in taking a position on the issue, that prosecutor would retain all of the discretion, but none of the motivation, to advocate for protection of the victim's privacy over their records. (*See* R 57:43).

Because a prosecutor/DA is not a victim's lawyer, victims cannot compel a prosecutor to do what the victim wants. *See e.g.*, Wis. Stat. §§ 950.04(1v)(i)-(j). To require prosecutors alone to speak to the court on behalf of the victim would threaten both prosecutorial independence (by forcing prosecutors to argue positions they do not support) and the fundamental concept of victim rights (by forcing victims to depend on an interlocutor who cannot always prioritize their interests).

Johnson cites only one statute—Wis. Stat. § 978.05—in support of his assertions that victims cannot participate in motions for a victim's private records. As part of a chapter comprised largely of administrative and procedural rules establishing Wisconsin's statewide system of public prosecutors, Wis. Stat. § 978.05 sets out a general list of DA responsibilities, including "the sole responsibility for the prosecution of all criminal actions." In the context of the chapter and statute, "sole responsibility" means the authority to determine whether to prosecute a case and, through a unit, to ensure a prosecution is carried out. Nothing in § 978.05 limits the participation of third parties in criminal proceedings where they have legally protected interests at stake. Sections 978.05 and 950.105 are not mutually exclusive, and in fact, they can easily be harmonized. In short, Wis. Stat. §§ 978.05 and 950.105 simply create distinct roles for district attorneys and crime victims based on their distinct legal interests.[6]

[6] Dismissing the independent authority afforded to victims via Wis. Stat. § 950.105 would require this Court to ignore not merely one or two words, but an entire sentence, of the Standing provision. T.A.J.'s reading, by contrast, gives reasonable effect to every word in the second sentence and clarifies that, under the new statutory provision, prosecutors remain an option, but not the only option, by which victims can assert their rights.

D. Related Statutes and Legislative History Confirm T.A.J.'s Argument that Wis. Stat. § 950.105 Gives Victims Standing in the Ordinary Meaning of that Term.

Closely related statutes and legislative history provide ample support for T.A.J.'s reading of Wis. Stat. § 950.105.

1. Related Statutes Support Independent Standing for Victims to Assert Respect for Their Privacy during Criminal Proceedings.

Read together, Wis. Stat. §§ 950.04(1v)(ag) and 950.105 reflect a clear concern for privacy rights manifested in a number of other statutory provisions. T.A.J. could exercise his § 950.105 right to standing to argue his rights under § 905.04 or § 146.82, his statutory rights to patient privilege and confidentiality respectively. *See* Wis. Stat. § 905.04 (codifying patient-provider privilege); Wis. Stat. §§ 51.30, 146.48(1) (imposing a duty on providers to keep patients' health records confidential).[7] As § 905.04 and § 146.82 also pertain to record holders' privacy rights, they represent closely related laws that underscore the Wisconsin statutes' consistent focus on protecting the privacy rights of its residents. Arguably, Wis. Stat. § 950.04(1v)(ag) incorporates all of these rights via use of the term "privacy."

Courts have repeatedly recognized that privacy laws are particularly critical for crime victims, acknowledging this as a well-established policy concern. *See e.g.*, *Steinberg v. Jensen*, 194 Wis. 2d 439, 459, 534 N.W.2d 361, 368 (1995) (protections exist to encourage patients to freely and candidly discuss medical concerns with their physicians by ensuring that those conversations will not be disclosed to a third person); *State v. Lynch*, 2016 WI 66, ¶63, 371 Wis. 2d 1, 885 N.W.2d 89 (citations omitted) (doctor-patient privilege "serves the crucial purpose of ensuring that individuals—especially individuals who may be suffering as a result of a traumatic experience, like sexual assault—can freely and openly communicate with and be treated by their mental health provider"); *Jaffee v. Redmond*, 518 U.S. 1, 10, 116 S. Ct. 1923, 1928, 135 L.Ed.2d 337, 345 (1996) ("Effective psychotherapy . . . depends upon an atmosphere of confidence and trust . . . [therefore] the mere possibility of disclosure [of confidential communications] may impede development of the confidential relationship necessary for successful treatment.").

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[7] *See also* Health Insurance Portability and Accountability Act ("HIPAA"), 45 C.F.R. 164.512 (patients' federal protections over healthcare record confidentiality).

Demanding that a judge inspect a victim's privileged and confidential mental health records clearly implicates these important interests, underscoring the centrality of Wis. Stat. § 950.105 to the goals of Chapter 950. Privilege and confidentiality reassure crime victims that they can seek the help they need without the fear of embarrassment or repercussions. They can report a crime without the fear of government invasion into their private, privileged conversations. These protections encourage victims to be honest with their healthcare providers and thus receive the care they need. No matter the sensitivities and sensibilities of a court, *in camera* inspection breaks the seal of privilege.

This is why victims like T.A.J. must be able to assert their rights over their records before a judge orders their review.

2. The Legislative History of Wis. Stat. § 950.105 Further Verifies T.A,J.'s Interpretation.

In 2005, the *Schilling* Court held that a crime victim outraged by a D.A.'s actions during closing argument could not obtain relief through the Crime Victim Rights Board ("CVRB") because the "fairness, dignity and respect for their privacy" language she relied on (part of the old version of Article I, § 9m) was only a statement of purpose, creating no enforceable, self-executing right. *See Schilling v. State Crime Victims Rights Bd.*, 2005 WI 17, ¶¶20–27, 278 Wis. 2d 216, 692 N.W.2d 623. The Legislature responded by amending Wis. Stat. § 950.04(1v) to create provision (ag), bestowing victims with the legal right "[t]o be treated with fairness, dignity and respect for his or her privacy by public officials, employees, or agencies." 2011 Wisconsin Act 283 (2011 A.B. 232).

Critically, in the same Act, the Legislature created Wis. Stat. § 950.105—enumerating victims' right to standing. *Id.* Since closely related statutes inform intent, these twin amendments passed in the wake of *Schilling* demonstrate the Legislature's intent to give victims the ability to assert in court an enforceable right to respect for their privacy. *Kalal*, ¶ 46 (citations omitted). Together, the history of these provisions makes clear that the statutes provided victims with an individual right to respect for their privacy that they could independently enforce in court. The history of these provisions confirms T.A.J.'s interpretation of the statute. *See e.g., United States v. Sahm*, 2019 WI 64, ¶12, 387 Wis. 2d 259, 928 N.W.2d 545 (c

Courts may use legislative history to confirm or "verify" a statute's plain meaning, even when it is unambiguous).

The drafting record clearly shows that the legislation was intended to give crime victims an independent means of enforcing their rights without relying on a prosecutor or the CVRB in light of the harassment a victim had experienced at the hands of former prosecutor and then-CVRB chair Ken Kratz. *See* Drafting Request by Rep. André Jacque, April 15, 2011 (forwarding Memo from Wisconsin Coalition Against Domestic Violence Policy Coordinator Tony Gibart). The Drafting Request also cites *Schilling* as impetus for the legislation and explicitly links the new statutes to standing in criminal courts because "[v]ictims should be able to seek redress from the court handling the case in which a violation has occurred." *Id.* The Request goes on to contemplate the need for victims to be able to ask "the court hearing the criminal case for an order protecting their rights" because "[p]ractically speaking, in some cases, if a violation occurred, the court, and not the CVRB, is the only entity that can immediately correct the violation." *Id.*

The passage in 2012 of Wis. Stat. § 950.105 occurred more than a decade after an appeals court decided *Jessica J.L. v. State (In re Jessica J.L.),* 223 Wis. 2d 622, 589 N.W.2d 660 (Ct.App. 1998). Johnson repeatedly relies on to *Jessica J.L.* to support his argument that a victim acts as a prosecutor by opposing a *Shiffra-Green* motion. Yet, as the Court of Appeals recognizes, a victim's participation in a *Shiffra-Green* motion does not infringe on a defendant's rights because the victim's input on the merits of the motion does not implicate the hallmarks of substantive criminal law. Relying on *State v. Lagundoye*, 2004 WI 4, ¶¶21–22, 268 Wis. 2d 77, 674 N.W.2d 526 (citations omitted), the Court of Appeals reasoned that a victim's opposition to a *Shiffra-Green* motion is not dispositive of a defendant's criminality. More importantly, as a matter of law, Wis. Stat. § 950.105 supersedes and abrogates this holding in *Jessica J.L.* to the extent the decision is inconsistent with it.

The legislative history strongly affirms that Wis. Stat. § 950.105 is intended to confer standing in just this type of situation, especially in cases where, as in the instant case, the trial prosecutor has not taken it upon themselves to represent to the circuit court a victim's interest in and right to respect for their privacy. (*See* R 57:43).

3. T.A.J.'s Interpretation Is Consistent with *Gabler*'s Acknowledgment that § 950.105 Offers Victims a Court-Based Enforcement Mechanism.

In its first victim rights case after *Schilling*, this Court held that the CVRB could not "discipline" a judge for acts taken during a trial without violating the separation of powers. *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶59, 376 Wis. 2d 147, 897 N.W.2d 384. Recognizing that its decision seemed once again to deny crime victims a remedy for their wrongs, the Court observed that victims had a powerful protection because "Wisconsin Stat. § 950.105 assures victims a mechanism for directly asserting their own rights in court." *Id.*

T.A.J.'s case gives this Court the opportunity to fulfill the promise of *Gabler* by definitively holding that Wis. Stat. § 950.105 guarantees crime victims the same standing afforded to other interested litigants, including the rights to be heard, to take a legal position, to file motions, to demand action, and to seek a ruling on any issue that implicates their rights "under the statutes."

II. The 2020 Amendment to Article I, § 9m of the Wisconsin Constitution Applies to T.A.J. Under the Particular Circumstances of this Case Regardless of How the Court Decides the Retroactivity Question.

After initial briefing to the Court of Appeals had concluded, Wisconsin voters ratified a Constitutional Amendment to Article I, § 9m of the State Constitution. The Amendment, known popularly as "Marsy's Law," appeared on the ballot in the April 7, 2020 election. The Amendment went into effect on May 4, 2020, after the Wisconsin Election Commission certified the results. *See* 2020 Spring Election and Presidential Preference Vote, Statewide Referendum, Canvass Reporting System, County by County Report (WEC, May 4, 2020).

In response, the Court of Appeals requested supplemental briefing on how the passage of Marsy's Law would affect the current case, and specifically whether the new Amendment should apply retroactively to this case. In their supplemental briefs, T.A.J. and Johnson agreed that the legal principles set forth by *Dairyland* and *Kayden Industries* govern the retroactivity of a constitutional amendment in Wisconsin. *See Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 731, 150 N.W.2d 447, 453 (1967) and *Dairyland*, 2006 WI at ¶22. *Kayden* considers the interaction between

state statutes and a recently enacted amendment in light of what the Court describes as an established rule of construction:

> [C]onstitutional amendments *which deal with the substantive law of the state are presumed self-executing in nature and prospective in effect,* and that such amendments repeal inconsistent statutes and common law which arose under the constitution before the amendment.
>
> A constitutional provision is self-executing if no legislation is necessary to give effect to it, and if there is nothing to be done by the legislature to put it in operation. A constitutional provision contemplating and requiring legislation is not self-executing.' 16 Am.Jur. (2d), Constitutional Law, p. 280, sec. 94.

34 Wis. 2d at 731 (emphasis added). In *Dairyland,* the Court confirmed the primary rule for determining whether a constitutional amendment has a prospective or retrospective effect:

> *[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...* Because the 1993 Amendment is silent with regard to the issue [here], the Amendment is not retrospective in operation.

2006 WI at ¶22 (citing *Kayden*, 34 Wis. 2d at 731) (emphasis added).

Based on that rule, T.A.J. initially argued that the 2020 amendment to Article I, § 9m was presumed to apply prospectively,[8] for three reasons: (1) most of the amendment "deals" with the substantive law of the state; (2)

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[8] Wisconsin and other state cases suggest this presumption can be overcome if there are "extrinsic sources that leave no doubt that such was the voters' manifest intent.." However, *Kayden* cites an instructive treatise as a source for the rule. 16 C.J.S. Constitutional Law § 116.

ratifiers intended it to be self-executing; and (3) the text lacks an "express" indication that retroactive application was intended. *See* Wis. Const. Art. I, § 9m.[9]

The State's supplemental brief on retroactivity acknowledged the *Kayden/Dairyland* rule but went on to reach a different conclusion from T.A.J. and Johnson. The State argued there were unique problems with applying the primary rule to this particular amendment. It noted:

> As amended, categorizing article I, section 9m as substantive, procedural, or remedial as a whole is difficult. The amendment is substantive, to the extent that subsections (1) and (2) define "victim" and identify and enumerate victim rights. The amendment also contains procedural and remedial elements[.]

(Supplemental Brief of Plaintiff-Respondent, State of Wisconsin, 5).

The State suggested that an adequate answer to the question of whether the Amendment as a whole was retroactive would require a twofold parsing of the Amendment: once to determine which parts affected substantive law and which affected procedural law; and a second time to determine which parts would have a prospective effect and which should be applied retroactively.

In its decision, the Court of Appeals took a different approach to applying the *Kayden/Dairyland rule.* After agreeing the constitutional text did not include an express retroactivity provision, the Court of Appeals turned to extrinsic sources. *Johnson*, 2020 WI App at ¶32; *see also Dairyland*, 2006 WI at ¶22; *Kayden*, 34 Wis. 2d at 731. The Court of Appeals looked at key language throughout the Amendment and concluded that the Amendment applied retroactively because of the nature of victim rights in the criminal justice context:

> The 2020 constitutional amendment's delineation of rights of a victim to be heard in proceedings that may not occur for years after a case is initiated, such as sentencing, revocation, parole, and expungement

[9] A majority of states apply the same or virtually identical rule. *See, e.g., People v. Dean*, Ill. 2d 244, 255-56, 222 Ill. Dec. 413, 418-19, 677 N.E.2d 947, 952-53 (1997) and *State v. Fay*, 173 N.H. 740, 745–46 (2020).

> hearings, together with a requirement that a circuit court must act "promptly" on a victim's assertions of rights afforded to the victim under the amendment, are antithetical to the proposition that this amendment does not apply retrospectively to pending motions.

Johnson, 2020 WI App at ¶38.

The opinion also cites, as support for its conclusion, truth in sentencing statutes which include express statements about an effective date, explaining that if the intent of the legislature was for prospective application of the amendment "we would expect to see language such as that which accompanied the implementation of these statutes." *Id*. at ¶38. The Court of Appeals decision seems to turn *Dairyland* on its head by using the absence of a statement of explicit intent for the amendment to apply retroactively as the strongest evidence for retroactivity.

Taken together, the Court of Appeals' opinion and the State's observations about the unique nature of this Amendment both identify what appears be a novel question of law: Should *Kayden* and *Dairyland* be applied to the amendment as a whole, or does the rule require courts to parse the elements of an amendment to determine which is procedural and which is substantive? After answering this question, a court must then decide which parts apply prospectively and which parts apply retroactively. No Wisconsin case has precisely addressed this question.

The Court of Appeals' reasoning suggested there was something in the nature of victim rights that required retroactive application. Indeed, there are aspects of the Amendment that could potentially lose meaning if not interpreted as retroactive, and other aspects and possible interpretations which would encourage finding an intent for the law to be read as retroactive.[10] This raises another series of questions about how the *Dairyland/Kayden* presumption could be used or rebutted. Once again, however, no Wisconsin cases address this question.

In response to these novel questions, this Court could decide to clarify or amend the rule articulated in *Kayden* and *Dairyland* or delve into parsing

[10] These include the vesting of rights at time of victimization, the use of "throughout" the criminal process, and the emphasis on vigorously upholding the rights of all victims.

out the various parts of the Amendment. Given the specific facts in this case, however, T.A.J. argues alternatively that the Court could leave the larger issue for another day, and affirm the Court of Appeals' decision on different, narrower grounds.

First, T.A.J. notes that this Court could decide this case solely on statutory grounds, finding that Wis. Stat. § 950.105 provides T.A.J. standing to be heard in opposition to Johnson's *Shiffra-Green* motion.

The Court could also affirm the Court of Appeals decision on the grounds that the particular procedural history and facts of this case do not require a determination of whether the Amendment is retroactive. The trial court's decision, which T.A.J. appeals from, denied T.A.J. standing to appear at the future materiality hearing on Johnson's *Shiffra-Green* motion. Once T.A.J.'s interlocutory appeal was accepted by the Court of Appeals, however, the circuit court stayed the hearing and decision on the merits of Johnson's *Shiffra-Green* motion pending this appeal. (R 52:1-4). Since that future hearing never occurred, the prohibitions against T.A.J.'s participation have never been applied.

T.A.J.'s constitutionally protected right to "assert" the rights afforded to him by the Amendment will thus enable his participation during those proceedings—in the future, or prospectively. The Amendment vests rights to crime victims at the time of victimization. Wis. Const. Art. I, § 9m(2). Even if the Amendment's rights only applied prospectively, though, T.A.J. would have started enjoying these constitutional rights at the time of the Amendment's enactment while this interlocutory appeal was pending. *See* Wis. Const. Art. I, § 9m(2), (4)(a). There is no dispute that Article I, § 9m applies prospectively, at a *minimum*. Johnson's *Shiffra-Green* motion is still pending; therefore, T.A.J.'s constitutional rights have vested and apply regarding those proceedings. Since the materiality hearing has not occurred, T.A.J.'s standing to be heard would not require the trial court to undo any orders related to that motion, or disadvantage Johnson for lack of notice or reversal of a favorable ruling.

T.A.J. thus has the standing and rights guaranteed him under the Amendment, including the ability to be heard in opposition to Johnson's

pending *Shiffra-Green* motion, without requiring this Court to make a finding as to the retroactivity of each aspect of the Amendment.

III. Article I, § 9m as Amended Provides T.A.J. the Constitutional Right To Be Heard on Johnson's Motion for *In Camera* Review.

The Amendment to Article I, § 9m constitutionalizes the standing for crime victims created by Wis. Stat. § 950.105. It also incorporates into the state constitution rights created by Chapter 950, including rights to fairness, dignity, privacy, reasonable protection from the accused, and the right to refuse discovery requests from the accused. Article I, § 9m of the Wisconsin Constitution now provides, in pertinent part:

> (2) In order to preserve and protect victims' rights to justice and due 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…and fairness.
>
> (b) To privacy[.]
>
> (f) To reasonable protection from the accused throughout the criminal…justice process[.]
>
> (i) Upon request, to be heard in any proceeding during which a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, and pardon[.]
>
> (L) To refuse [a]…discovery request made by the accused or any person acting on behalf of the accused[.]
>
> (3) [A]ll provisions of this section are self-executing[.]
>
> (4)(a) In addition to any other available enforcement of rights or remedy for a violation of this section or of other rights, privileges, or protections provided by law, the victim, the victim's attorney or other lawful representative, or the attorney for the government upon request of the victim may assert and seek in any circuit court or before any other authority of competent jurisdiction, enforcement of the rights in this section and any other right, privilege, or protection afforded to the

> victim by law. The court or other authority 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[.]

Wis. Const. Art. I, § 9m(2)(a)-(b), (f), (i), (L), (3)-(4)(a).

As the Court of Appeals rightly concluded, the plain language of Article I, § 9m and the history of its passage establish conclusively that T.A.J. and other crime victims have constitutional standing to assert their constitutional and statutory rights during criminal proceedings, such as in response to a defendant's discovery request for the victim's private health records.

In interpreting a constitutional amendment, courts focus on "legislative intent." *Dairyland*, 2006 WI at ¶114 (citing *Kalal*, 2004 WI at ¶¶36–52). Courts still prioritize the "plain meaning" of a constitutional provision's words but also draw upon extrinsic sources. *Id.* at ¶117 (citations omitted). Courts thus consider the debates surrounding a given constitutional amendment and the relevant practices common at the time of the amendment. This includes "contemporary debates and explanations of the provision both inside and outside legislative chambers." *Id.*, ¶117 (citations omitted). Courts can also consider the first laws passed by the legislature after the amendment's enactment as the earliest interpretation of the provision.[11] *Id.*

Johnson ignores this standard for the most part, opting instead to cherry-pick those provisions of the Amendment he believes best serve his argument, while ignoring the sections that support T.A.J.'s standing. Johnson then presents an argument in support of denying victims standing based on generic, unfocused assertions about what the terms "prosecution" and "party" may have required prior to the amendment.

A. The Plain Meaning of Article I, Section § 9m Constitutionalizes T.A.J.'s Standing Rights.

The Court of Appeals correctly held that crime victims like T.A.J. have standing to assert their rights in *Shiffra-Green* proceedings under the newly amended Article I, § 9m. The ordinary meaning of the words chosen

[11] The Legislature has not yet taken legislative action specifically to interpret the Amendment since its adoption, so T.A.J.'s analysis centers on the first two factors.

to amend Article I, § 9m demonstrate the clear intent of both lawmakers and voters to give victims the opportunity to be heard during the course of criminal proceedings in the circuit courts, including the standing to enforce their rights as defendants do—with legal arguments, with or without their own attorney.

As amended, the standing provision of Article I, § 9m is comprehensive: victims can assert before "any" circuit court or "any" other relevant authority their § 9m rights or "any other right, privilege, or protection afforded to the victim by law." Wis. Const. Art. I, § 9m(4)(a). The word "any," the logical equivalent of "all" or "every," encompasses all and every possible scenario of a given category. *See In re A.P.*, 2019 WI App 18, ¶12, 386 Wis. 2d 557, 927 N.W.2d 560 (citations omitted) (noting that "'[a]ny' means 'one, some, or all indiscriminately of whatever quantity'"). Section 9m uses similarly universal language regarding the victim's right to be heard in "any proceeding" that implicates a right. Wis. Const. Art. I, § 9m(2)(i).

Ignoring these words, Johnson doubles down on his assertion that crime victims lack standing, particularly in the context of *Shiffra-Green* motions. Johnson's first argument against victims' constitutional right to standing simply echoes his statutory argument: to wit, that because the Amendment does not specifically enumerate a right to litigate and file motions, and victims cannot act as prosecutors, victims lack standing to be heard in court.

Johnson's first argument lacks merit for the reasons argued earlier. Johnson also argues that assertions of a right to privacy against discovery motions violates a defendant's federal rights. He specifically notes in the context of Shiffra-Green motions, that a defendant's rights are violated because a defendant "has a constitutional right to confidential records." (D. Br. 7).

Despite Johnson's claims, there is no constitutional right to confidential records. Johnson cites two cases in support of this alleged right, namely *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L.Ed.2d 40 (1987), and the original *Shiffra* case. Neither case supports his position,

however. In *Pennsylvania v. Ritchie,* the Court did not hold that defendants had a constitutional right to confidential records. Rather, the Court wrestled with balancing the importance of confidentiality against a defendant's due process rights. *Id*. In order to ensure the proper weighing of interests, the Court established the right to "in camera reviews," but only justified by certain circumstances. *Id.* at 58. The *Shiffra* court adopted the *Ritchie* court's reasoning in part, as the foundation for the materiality test and *in camera* requirements that form the basis of Wisconsin's *Shiffra-Green* standard. *Shiffra* is distinguishable from *Ritchie* on a number of grounds, but not the important one: confidential records requests require a balancing of interests, and defendants have no absolute right to examine confidential records.

Granting T.A.J. standing to argue in opposition to the merits of Johnson's *Shiffra-Green* motion does not violate any constitutional rights of the defendant. Refusing to let T.A.J. be heard would, however, violate his constitutional rights as a victim.

Johnson's second argument fails because he ignores Wis. Const. Art. I, § 9m(2)(i) provision of an inclusive, non-exhaustive list of examples of the types of proceedings during which victims have rights to assert. The ratifiers' use of "any" here, as with the standing provision in §9m(4)(a), indicates their intent to provide victims with the broadest possible opportunity to weigh in on their rights before criminal court proceedings. *See In re A.P.*, 2019 WI App at ¶12.

Johnson argument depends on a misapplication of the *expressio unius* canon. He claims that because Wis. Const. Art. I, § 9m(2)(i) contains one or more things within a class expressly mentioned ("proceedings"), the absence of a similar thing means that thing is excluded. However, the rule of *expressio unius* does not support such a negative inference when application of the rule would nullify aspects of the provision. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940–41, 197 L.Ed.2d 263, 276 (2017). Here, as in *SW General*, excluding examples of proceedings not listed in Wis. Const. Art. I, § 9m(2)(i) would nullify certain other rights of victims (such as the right to refuse discovery requests from a defendant), should the court handle such a matter at a hearing or proceeding not mentioned by name in this list. Neither

the drafters of the Amendment, nor the voters, could have reasonably intended such a pervasive internal inconsistency within this Amendment.

The Court should therefore decline to apply the rule of *expressio unius* and give the word "includes" "its common, broad, non-exclusive meaning." *State v. Popenhagen*, 2008 WI 55, ¶45, 309 Wis. 2d 601, 749 N.W.2d 611. The more appropriate rule in this case is *ejusdem generis*, which can be applied when a general word "is either preceded or followed by specific words[.]" *Id.* Courts construe the general word to include items that are "similar in nature to the enumerated items" as long as they are "germane to the objectives" of the law. *Id.* To this end, the general term "any proceeding" in § 9m(2)(i) applies to unmentioned proceedings akin to those specifically enumerated—those that implicate the right of a victim. Like a release, plea, or sentencing hearing, proceedings about *in camera* inspection of a victim's records at a minimum implicate a victim's rights to fairness, dignity, privacy, and reasonable protection from the accused.

This Court should reject Johnson's narrow interpretation and decline to read restrictive language into the Constitution where none exists. *See In re A.P.*, 2019 WI App at ¶13. Using a universal term indicates the Legislature's and voters' intent to provide victims with the broadest possible opportunity to assert their rights before a court of law.

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Johnson's assertions about party standing are equally unpersuasive. One need not be a "party" to have protectable interests in a criminal case. Anyone served with a *subpoena duces tecum* in a criminal case is a "non-party" to the case while possessing the legal authority to challenge the legal basis of the subpoena under Wis. Stat. §§ 968.12, 968.135, and 805.07. Under Wis. Const. Art. I, § 9, however, a crime victim not only has legally protected interests that certain proceedings implicate; under Wis. Stat. § 950.105, the victim has *constitutionally protected* rights to challenge such an incursion into their private records.

Johnson (wisely) concedes that Article I, § 9m directs courts to hear from victims regarding their enumerated rights, but he contends that the Amendment does not apply to a *Shiffra-Green* materiality hearing because that proceeding somehow evades any application of the enumerated rights of

victims that would allow them to be heard, although the motion comes as a discovery request from the accused relating to records over which the victim holds privacy rights—implicating not one but multiple constitutional victims' rights. Wis. Const. Art. I, § 9m(2)(a)-(b), (f), (L).

According to Johnson, the victim's privacy interest comes into play in a *Shiffra-Green* proceeding only after a motion has been granted and *in camera* review conducted; in other words, that privacy interest only activates when a victim must choose either to release their records or face consequences for refusing to release them. This argument runs afoul of the wording, intent, and purpose of the Amendment. To allow victims in T.A.J.'s position the opportunity to assert their rights only at this point (in the dubious form of deciding whether to release records after *in camera* review) equates to asking the victims to relinquish their rights altogether or pay a penalty. Doing so also places the victim squarely between the proverbial rock and a hard place, while further obviating the need for the victim even to participate at all. *See Shiffra*, 175 Wis. 2d at 600; *Green*, 2002 WI at 68. Courts cannot reasonably assume that the Amendment's ratifiers intended to allow such wholesale frustration of the broad rights they have plainly afforded to crime victims.

B. The Drafting Files, Testimony, and Ratification Debates Documenting the History of Article I, § 9m Solidify T.A.J.'s Interpretation that the Amendment Provides Standing for Victims to Assert Rights During *In Camera* Proceedings.

1. The Drafting Files Support T.A.J.'s Interpretation of the Amendment.

The Amendment's drafting files support T.A.J.'s and the Court of Appeals' interpretations of the Constitutional Amendment. Drafting requests to the Wisconsin Legislative Reference Bureau ("LRB") from the office of Sen. Van Wanggaard show this key drafter characterized Article I, § 9m(4)(a) as the "standing" paragraph. The Senator's office underlines his intent for victims to enjoy standing in a criminal case at both the circuit and appellate court levels. Drafting Request by Sen. Van Wanggaard, March 27, 2017; June 5, 2017. The Senator's Drafting Request also intentionally inserts the word "criminal" into the Amendment's statement of purpose: "to

preserve and protect victims' rights to justice and due process throughout the criminal…justice process." *See* Wis. Const. Art. I, § 9m(2); Drafting Request by Sen. Van Wanggaard, June 5, 2017.

The LRB Analysis reflects that understanding. The LRB Analysis of victims' right to be heard in "any proceedings" does not focus on the list of examples that Johnson finds so telling. Rather, the analysis concludes simply that the Amendment provides crime victims the right "[t]o be heard in any proceeding during which a right of the victim is implicated" without mentioning any specific proceedings. *See* Wis. Const. Art. I, § 9m(2)(i); 2019 S.J.R. 2 (2019 Enrolled Joint Resolution 3); 2017 S.J.R. 53 (2017 Enrolled Joint Resolution 13). The LRB Analysis succinctly summarizes the most critical parts of a bill, and courts read these summaries to understand what legislators understood an amendment to mean when they voted on it. *See* Wisconsin Bill Drafting Manual (2019–20), § 4.03(3)(a); *see e.g.*, *Dairyland*, 2006 WI at ¶32. The LRB Analysis confirms that legislators intended victims to be able to assert their rights in any criminal proceeding implicating their right, and not just those listed in Wis. Const. Art. I, § 9m(2)(i).

2. Legislative Hearing Testimony About the Amendment Confirms T.A.J.'s Interpretation.

Legislative hearing testimony further shows that the drafters, lawmakers, and the public were focused on victims' standing and right to be heard. *See e.g.*, *Amendment to Section 9m of Article I of the Constitution relating to the Rights of Crime Victims (First Reading): Hearing on S.J.R. 53, A.J.R. 47 Before the Senate Committee on Judiciary and Public Safety, Assembly Committee on Criminal Justice and Public Safety*, 2017–18 Leg. Sess. (June 15, 2017) [hereinafter *Legis. Hearing 2017* (statements of Sen. Van Wanggaard, Rep. Todd Novak, Wisconsin Coalition Against Sexual Assault); *Amendment to Section 9m of Article I of the Constitution relating to the Rights of Crime Victims (Second Reading): Hearing of S.J.R. 2, A.J.R. 1 Before the Senate Committee on Judiciary and Public Safety, Assembly Committee on Criminal Justice and Public Safety*, 2019–20 Leg. Sess. (Jan. 10, 2019) [hereinafter *Legis. Hearing 2019*] (statements of Sen. Van Wanggaard, Rep. Todd Novak). Even those with concerns about the amendment recognized that it would strengthen a victim's ability to assert their interests in criminal court proceedings. *Legis. Hearing 2017*, (statement of Strang Bradley LLC) ("Indeed, as I read this, it would allow a victim to

speak directly to the court at every proceeding, as I cannot think of any proceeding that would not 'implicate[]' a 'right of the victim' under this SJR.").

3. The Amendment's Ratification Campaign Demonstrates the Public's Shared Understanding that the Constitution Would Allow Victims to Assert Their Rights in Criminal Proceedings.

At the time of its proposal, the Amendment was part of a broader public dialogue. The Amendment campaign framed its goal as "ensur[ing] that victims have equal rights as the accused[.]" About Marsy's Law for Wisconsin, Marsy's Law for Wisconsin.[12] The campaign acknowledged that Wisconsin already had a constitutional provision for crime victims in Article I, § 9m. Proponents, opponents, and neutral parties alike therefore questioned the necessity and consequences of the Amendment. *See e.g.*, *Legis. Hearing 2017* (statements of the Wisconsin State Public Defender office, UW-Madison Law and Frank J. Remington Center Undersigned Faculty, Strang Bradley LLC); *Legis. Hearing 2019* (statements of the Wisconsin State Public Defender office, the ACLU of Wisconsin). Despite some lack of clarity about the relationship between existing statutory rights and the new constitutional language, both the campaign and Department of Justice described the intended effect of the Amendment as strengthening victims' existing constitutional rights and constitutionalizing their statutory rights in order to make their enforcement easier and more uniform. *See Legis. Hearing 2017* (statement of Department of Justice Attorney General Brad Schimel); Press Release, Marsy's Law, Wisconsin Attorney General Kaul Announces Support for Marsy's Law for Wisconsin (Jan. 17, 2019).[13]

Voters had every reason to believe, based on the public campaign and the language of the ballot question, that ratifying the Amendment would strengthen the enforcement of victims' rights by making it clearer that victims could assert those rights in court. *See Dairyland*, 2006 WI at ¶37 (citing *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 192–94, 204 N.W. 803, 808 (1925)) (stating "[the] court presumes that…the information used

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[12] Available at: https://www.equalrightsforwi.com/about_marsys_law

[13] Available at: https://www.equalrightsforwi.com/wisconsin_attorney_general_kaul_announces_support_for_marsy_s_law_for_wisconsin

to educate the voters during the ratification campaign provides evidence of the voters' intent").

Interpretations by Wisconsin's Department of Justice (DOJ), LRB, and the courts corroborate T.A.J.'s interpretation, both in terms of voters' understanding leading up to the election, as well as the practices before and after the amendment's ratification. *See Dairyland*, 2006 WI at ¶117. At the time of the Amendment's drafting and adoption, it was well understood that crime victims already had standing to be heard in court, and that the Amendment would only solidify this existing right. In a memo outlining the anticipated changes that the Amendment would bring, Attorney General Josh Kaul set forth five differences. Standing was not listed as a change in his explanatory statement because victims already enjoyed this right under Wis. Stat. § 950.105. Memorandum from the Wis. DOJ, Atty. General Josh Kaul, to Lead Election Specialist Diane Lowe, Wis. Elections Comm'n, Explanatory Statement for Proposed Constitutional Amendment (Feb. 27, 2020).

The LRB echoed the Attorney General's understanding of the effects of the amendment. Memorandum from LRB, Jillian Slaight, Constitutional Amendment Relating to Crime Victims' Rights, 5 Reading the Constitution 1 (Mar. 2020). An explanatory memo circulated among Wisconsin courts after the election acknowledged that

> Victims previously had a right to standing and the ability to assert a violation of their rights in circuit court under § 950.105. Marsy's law *[sic]* creates a new constitutional provision that allows victims to assert and seek enforcement of their rights guaranteed under the constitution, or any applicable law, in circuit court. Art. I, § 9m(4)(a).

Thus, a review of the circumstances at the time of the Amendment's introduction in the legislature and at the time of its adoption by voters reveals both the purpose and intent of the Amendment: to provide crime victims with more robust rights, and to ensure victims standing to be heard in court in order to enforce and protect those rights.

CONCLUSION

To be meaningful, a victim's right to be heard must be enforceable—by the victim. Wis. Stat. § 950.105 and the newly amended Article I, § 9m

of the Wisconsin Constitution both expressly afford crime victims this right. These statutory and constitutional standing guarantees make understanding and enforcing victims' rights more consistent throughout the state.

For these reasons, T.A.J. respectfully requests that this Court hold that T.A.J. has standing under both Wis. Stat. § 950.105 and Article I, § 9m of the Wisconsin Constitution to be heard in opposition to Johnson's Motion for *In Camera* Review.

T.A.J. further requests that this Court clarify that both the statutory and constitutional standing rights are substantially similar and likewise guarantee standing to victims in criminal proceedings such as requests for *in camera* inspection of victim records.

Dated May 13, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief confirms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is **9,694** words.

Dated this 13th day of May, 2021.

Andrea K Rufo
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of May, 2021.

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