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SUPREME COURT

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-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING A NONFINAL ORDER ENTERED IN WAUPACA COUNTY CIRCUIT COURT, THE HONORABLE RAYMOND S. HUBER, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## ISSUES PRESENTED

1. Does Wis. Stat. § 950.105, which 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," confer standing upon an alleged crime victim[1] to oppose a defendant's *Shiffra/Green* motion to compel production and in camera review of the victim's private, privileged, and confidential mental health records?

The circuit court held that section 950.105 did not confer standing on a victim. The court of appeals did not address this question, resolving the issue on state constitutional grounds.

This Court should hold that section 950.105 confers standing on an alleged crime victim to oppose a defendant's *Shiffra/Green* motion for production and in camera review of the victim's mental health records.

2. In April 2020, Wisconsin voters chose to amend article I, section 9m of the Wisconsin Constitution. That amendment provides, in part, that crime victims may "assert and seek in any circuit court or before any other authority of competent jurisdiction, enforcement" of their rights, privileges, and protections provided under the law.

a. Does the 2020 amendment confer standing upon an alleged crime victim to oppose a defendant's *Shiffra/Green* motion?

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[1] In this brief, the State uses the phrases "alleged crime victim," "alleged victim," "crime victim," and "victim" interchangeably.

b. If so, does the 2020 amendment apply to T.A.J., the crime victim here, given that the amendment went into effect after this criminal case commenced and while T.A.J.'s interlocutory appeal was pending at the court of appeals?

The circuit court did not decide these issues. The court of appeals held that the 2020 amendment conferred standing for a crime victim to oppose a defendant's *Shiffra/Green* motion, and that it applied to T.A.J.

This Court should affirm the court of appeals.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case for which this Court grants review, oral argument and publication are warranted. As for oral argument, the State respectfully requests that this Court allow it oral argument time in addition to the time allotted to Johnson and to T.A.J.

## SUPPLEMENTAL STATEMENT OF THE CASE

In 2017, the State charged Johnson with counts of sexual assault of a child and other counts based on allegations by K.L.J., Johnson's daughter, and T.A.J., Johnson's son. (R. 6:3–5.)

This case remains in a pretrial posture. Before the circuit court, Johnson filed a *Shiffra/Green* motion in March 2018 seeking in camera review of therapy files from counseling that Johnson believed T.A.J. may have undergone. (R. 21:1.) In January 2019, T.A.J., by his own counsel, filed a brief opposing Johnson's *Shiffra/Green* motion. (R. 39.)

The only hearing on the motion came in March 2019, at which the sole issue was whether T.A.J.'s counsel had standing to oppose the motion. T.A.J.'s argument in support was based primarily on the crime victim bill of rights enacted

in chapter 950 of the Wisconsin Statutes. (R. 57.) At that hearing, the prosecutor took no position on whether T.A.J. had standing to oppose the motion. (R. 57:2, 45.)

The circuit court held that T.A.J. lacked standing to oppose Johnson's *Shiffra/Green* motion. (R. 57:45–48.) It primarily relied on *In re Jessica J.L.*, 223 Wis. 2d 622, 589 N.W.2d 660 (Ct. App. 1998), noting that its holding that a victim lacked standing to argue against a *Shiffra/Green* motion appeared to remain good law and unchanged by chapter 950. (R. 57:48–50.)

The merits of Johnson's motion have not yet been litigated. After the court denied T.A.J.'s motion, it stated that it had not "addressed the issue of whether [T.A.J.'s] medical records should be reviewed in camera. . . . that's an issue that may need some more litigation by the State." (R. 57:48.) That was so because at the time that Johnson had filed his *Shiffra/Green* motion, it was not apparent that T.A.J. had any relevant records for the court to review. (R. 57:49.)

In addition, the resolution of the *Shiffra/Green* motion as to T.A.J.'s records depended on the outcome of two unsettled matters related to records obtained from K.L.J., which the court had already reviewed in camera. First, K.L.J.'s records required redactions to be completed before they were turned over to Johnson's counsel. (R. 57:49–51.) Second, there was also a pending motion to sever the charges against Johnson relating to K.L.J. from those involving T.A.J. (R. 57:52.) According to Johnson's counsel, the resolution of those matters might affect his *Shiffra/Green* motion for T.A.J.'s files. (R. 57:52.) As Johnson's counsel stated, if severance occurred and the parties completed review of K.L.J.'s records, "that would potentially . . . impact the nature of any future litigation for [T.A.J.'s] potential records." (R. 57:53–54.)

T.A.J.'s counsel filed a petition for interlocutory appeal, which the court of appeals granted. The court ordered the State to be named as an additional respondent in the appeal with an opportunity to file a respondent's brief. At that point, the issue on appeal was whether Wis. Stat. § 950.105, which the Legislature enacted in 2011, conferred standing to an alleged crime victim to oppose a *Shiffra/Green* motion and in doing so, superseded the holding in *Jessica J.L.*

In May 2020, after the parties submitted their briefs, but before the court of appeals issued a decision, the court invited additional briefing on whether the just-enacted amendment to article I, section 9m of the Wisconsin Constitution, informally known as "Marsy's Law," (hereinafter "2020 amendment"), conferred standing to alleged crime victims to oppose a *Shiffra/Green* motion and whether it applied to T.A.J. under the circumstances. After the parties and the amicus Wisconsin Association of Criminal Defense Lawyers submitted supplemental briefs, the court of appeals reversed the circuit court's ruling. *State v. Johnson*, 2020 WI App 73, ¶ 1, 394 Wis. 2d 807, 951 N.W.2d 616.

The court of appeals held that the 2020 amendment by its plain language and context conveyed standing to crime victims to oppose a defendant's *Shiffra/Green* motion for production and in camera review of their privileged and confidential records. *Id.* ¶¶ 24–27. It also held that the amendment applied to T.A.J. notwithstanding that the State commenced the criminal case before the 2020 amendment went into effect. *Id.* ¶¶ 38–40. The court declined to address whether Wis. Stat. § 950.105 also conferred standing to T.A.J. *Id.* ¶ 13 n.9.

Johnson filed a petition for review, which this Court granted.

## STANDARDS OF REVIEW

Whether a crime victim has standing to oppose a *Shiffra/Green* motion brought by the victim's alleged assailant is an issue of law that this Court reviews de novo. *State v. Popenhagen*, 2008 WI 55, ¶ 23, 309 Wis. 2d 601, 749 N.W.2d 611.

Interpretation of a state constitutional provision is a question of law that this court reviews de novo, *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 16, 295 Wis. 2d 1, 719 N.W.2d 408, as is a question of statutory interpretation, *Pasko v. City of Milwaukee*, 2002 WI 33, ¶ 23, 252 Wis. 2d 1, 643 N.W.2d 72.

## SUMMARY OF ARGUMENT

Crime victims have statutory and constitutional rights to privacy and statutory rights to maintaining that privacy and confidentiality in privileged health care records. Wisconsin Stat. § 950.105, by its plain language, conveys standing to a crime victim to enforce those rights in court, which includes opposing a defendant's *Shiffra/Green* motion for production and in camera review of that victim's privileged and confidential health care records.

Likewise, the 2020 amendment to Wis. Const. art. I, § 9m also recognizes that victims have standing to challenge a defendant's *Shiffra/Green* motion.

Accordingly, Wis. Stat. § 950.105 and the 2020 amendment, either together or individually, abrogate the holding in *Jessica J.L.* that victims lack standing to assert arguments against *Shiffra/Green* motions in criminal proceedings. In addition, the reasoning in *Jessica J.L.* does not comport with common-law principles of standing and should be overruled.

Finally, if the 2020 amendment is the only source of authority to permit T.A.J. standing to oppose the *Shiffra/Green* motion here, it applies to T.A.J. in this matter, given that the merits of Johnson's *Shiffra/Green* motion for in camera review of T.A.J.'s treatment records has yet to be argued and decided.

## ARGUMENT

### I. Wisconsin Stat. § 950.105 confers standing upon an alleged crime victim to oppose a defendant's *Shiffra/Green* motion in circuit court.

#### A. Statutory construction requires courts to interpret language consistent with the statute's purpose and context.

In interpreting a statute, this Court "begins with the plain language of the statute" and "generally give[s] words and phrases their common, ordinary, and accepted meaning." *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110).

The court must interpret statutory language "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." *Id.* (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). That contextual interpretation must be reasonable and "avoid absurd or unreasonable results." *Id.* (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49).

In addition, "courts should not add words to a statute to give it a certain meaning." *Fond du Lac Cty. v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989). Rather, courts must "interpret the words the

legislature actually enacted into law." *State v. Fitzgerald*, 2019 WI 69, ¶ 30, 387 Wis. 2d 384, 929 N.W.2d 165.

"A statute is ambiguous if it is susceptible to more than one reasonable understanding." *State v. Grady*, 2007 WI 81, ¶ 15, 302 Wis. 2d 80, 734 N.W.2d 364 (citing *Kalal*, 271 Wis. 2d 633, ¶ 47). If a statute is ambiguous, a reviewing court may examine extrinsic sources, such as legislative history, to guide its interpretation. *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 50). Alternatively, this Court may consult legislative history "to confirm or verify a plain-meaning interpretation." *Kalal*, 271 Wis. 2d 633, ¶ 51.

### B. The plain language of Wis. Stat. § 950.105 provides that crime victims have standing "to assert . . . his or her rights as a crime victim" in circuit court.

#### 1. The plain language of the statute recognizes victims' standing to enforce their rights.

A crime victim's right to assert his or her privileges and protections as a crime victim is codified in Wis. Stat. § 950.105, which provides:

> **Standing.** 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. This section does not preclude a district attorney from asserting a victim's statutory or constitutional crime victim's rights in a criminal case or in a proceeding or motion brought under this section.

By its plain language, Wis. Stat. § 950.105 recognizes that a crime victim may "assert" in circuit court "his or her rights as a crime victim under the statutes or under article I, section 9m" of the state constitution. That is a legislative

conveyance of standing; it is difficult to understand those words to mean anything different.

Context supports this interpretation. To start, the Legislature titled this section "Standing." While titles "are not part of the statutes," Wis. Stat. § 990.001(6), they can be "helpful in interpretation" and are "permissible indicators of meaning" to resolve ambiguity. *State v. Dorsey*, 2018 WI 10, ¶ 30, 379 Wis. 2d 386, 906 N.W.2d 158. Titles can "confirm statutory interpretation or even . . . resolve an ambiguity. Titles may provide context." *State v. Lopez*, 2019 WI 101, ¶ 30, 389 Wis. 2d 156, 936 N.W.2d 125. By titling this statute "Standing" and providing in the first sentence that a crime victim has a right to assert his or her rights in circuit court, the Legislature intended to convey standing to victims.

The second sentence in section 950.105 does not change that interpretation. Rather, it provides that conveying the standing to crime victims neither creates an exclusive means for them to assert their rights, nor prevents a prosecutor from asserting their rights on their behalf. *See* Wis. Stat. § 950.105 ("This section does not preclude a district attorney from asserting a victim's statutory or constitutional crime victim's rights in a criminal case or in a proceeding or motion brought under this section.").

Indeed, as this Court has observed, "Wisconsin Stat. § 950.105 assures victims a mechanism for directly asserting their own rights in court." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 59, 376 Wis. 2d 147, 897 N.W.2d 384; *see also id.* ¶ 59 n.23 ("In Wisconsin, crime victims' rights are a matter of constitutional and statutory law, and Wis. Stat. § 950.105 confirms that victims may assert those rights in court.").

So, whether a particular victim has standing in circuit court under section 950.105 turns fundamentally on what statutory or constitutional rights that victim is seeking to

assert. As discussed below, a defendant's *Shiffra/Green* motion seeking production and in-camera review of a victim's privileged mental health records implicates crime victim rights recognized both in the statutes and in the state constitution.

### 2. A *Shiffra/Green* motion implicates crime victim rights and privileges protected by statute and in the Wisconsin Constitution.

#### a. A crime victim has standing in *Shiffra/Green* proceedings to assert their statutory rights and privileges.

A victim's right to assert their protections with regard to privileged mental health records is grounded in statute. Wisconsin Stat. § 905.04(2) recognizes a person's right to maintain confidentiality and privilege in their mental health records. *See* Wis. Stat. § 905.04(2) ("A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental, or emotional condition."). Likewise, Wis. Stat. § 146.82 requires that "[a]ll patient health care records shall remain confidential."

In addition, Wis. Stat. § 950.04(1v)(ag), the crime victims bill of rights, recognizes a crime victim's right "[t]o be treated with fairness, dignity, and respect for his or her privacy by public officials, employees, or agencies." Wis. Stat. § 950.04(1v)(ag).

When a criminal defendant files a *Shiffra/Green* motion seeking access to the victim's mental health records, the defendant is asking a court to pierce the alleged crime-victim's statutory privilege and right to maintain privacy and

confidentiality. *See* Wis. Stat. §§ 146.82; 905.04(2). Such a request, by necessity, implicates the guarantee that a crime victim's privacy is to be treated with fairness, respect, and dignity. Wis. Stat. § 950.04(1v)(ag). Hence, a *Shiffra/Green* motion—particularly when, as here, the defendant seemingly seeks access to privately held mental health records—implicates the victim's rights to be treated with fairness, dignity, and respect for their privacy and their privilege in maintaining confidentiality in their medical records. Thus, under Wis. Stat. § 950.105, a victim has standing to assert their rights to maintain that statutorily protected privilege and confidentiality.

**b. Wisconsin's constitution, before and after the 2020 amendment, identified crime victim rights implicated by *Shiffra/Green* proceedings.**

In addition to Wisconsin's statutes, the Wisconsin Constitution—both before and after the 2020 amendment—recognized a crime victim's right to privacy and maintaining the confidentiality of health records.

Before the 2020 amendment, Wis. Const. art. I, § 9m (2017–18) broadly recognized crime victims' rights: "This state shall treat crime victims, as defined by law, with fairness, dignity, and respect for their privacy." The previous version of section 9m enumerated some of the constitutional "privileges and protections"—or rights[2]—guaranteed to crime victims. And while none of those listed constitutional protections expressly referenced a victim's rights in specific

[2] Article I, section 9m uses the phrase "privileges and protections," which is meant to be synonymous with "rights." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 66 n.3, 376 Wis. 2d 147, 897 N.W.2d 384.

relation to a defendant's *Shiffra/Green* request, the provision recognized a broad right to "reasonable protection from the accused throughout the criminal justice process." Wis. Const. art. I, § 9m (2017–18).

Wisconsin Const. art. I, § 9m (2019–20), as amended, created six subsections. As relevant to this discussion, subsection (2) encompasses and expands upon the rights identified in the previous version of section 9m. The amended version identifies crime victims' rights "to justice and due process" and other enumerated 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."

Those rights in subsection (2), which echo the expansive list of statutory rights in Wis. Stat. § 950.04(1v)(ag)–(zx), include the following rights that can be implicated by a defendant's *Shiffra/Green* motion:

- "(a) To be treated with dignity, respect, courtesy, sensitivity, and fairness";
- "(b) To privacy";
- "(f) To reasonable protection from the accused throughout the criminal and juvenile justice process";
- "(i) Upon request, to be heard in any proceeding during which a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon";
- "(L) To refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused"; and
- "(p) To timely notice about all rights under this section and all other rights, privileges, or protections of the victim provided by law, including how such rights, privileges, or protections are enforced."

Wis. Const. art. I, § 9m(2).

In summary, a plain-language reading of Wis. Stat. § 950.105 recognizes victims' ability to assert their statutory or constitutional rights in circuit court; this assertion need not be through a district attorney. And the Wisconsin statutes—through chapter 950 and the privilege to maintain confidentiality in health records in Wis. Stat. §§ 146.82(1) and 905.04(2)—as well as the enumerated rights in Wis. Const. art. I, § 9m(2) (2019–20), each recognize crime-victim rights and privileges that can be affected by a *Shiffra/Green* motion.

### C. This plain-language reading is consistent with Wisconsin cases holding that courts are to liberally construe the law of standing.

This Court also may consider prior case law in interpreting statutory language and its context. *See Augsburger v. Homestead Mut. Ins. Co.*, 2014 WI 133, ¶ 16, 359 Wis. 2d 385, 856 N.W.2d 874. Such rulings "may illumine how we have previously interpreted or applied the statutory language." *Id.* (quoting *Belding v. Demoulin*, 2014 WI 8, ¶ 16, 352 Wis. 2d 359, 843 N.W.2d 373).

This Court has stated that Wisconsin Stat. § 950.105 conveys standing to victims, though it did not engage in a full statutory analysis to reach that conclusion. *Gabler*, 376 Wis. 2d 147, ¶ 59 & n.23. While the State is not aware of any Wisconsin cases applying a full statutory construction analysis to the language in Wis. Stat. § 950.105, prior case law addressing questions of standing supports this Court's conclusion in *Gabler* and the plain-language interpretation of section 950.105.

In Wisconsin, courts "liberally construe[]" the law of standing. *In re Paternity of J.S.P.*, 158 Wis. 2d 100, 106, 461 N.W.2d 794 (Ct. App. 1990) (citing *Bence v. City of Milwaukee*,

107 Wis. 2d 469, 478, 320 N.W.2d 199 (1982)). They "will not construe the law of standing narrowly or restrictively." *Park Bancorporation, Inc. v. Sletteland*, 182 Wis. 2d 131, 145, 513 N.W.2d 609 (Ct. App. 1994).

"The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has alleged a personal stake in the outcome which is at once related to a distinct and palpable injury and a fairly traceable causal connection between the claimed injury and the challenged conduct." *Id.* While standing to protect rights more often arises in the civil context, courts have found it appropriate in the context of criminal proceedings. *See, e.g.*, *Payment of Witness Fees in State v. Brenizer*, 179 Wis. 2d 312, 316–17, 507 N.W.2d 576 (Ct. App. 1993) (county was aggrieved by court order appointing experts for criminal trial at the county's expense, and county therefore had standing to appeal the order).

Considering the language of Wis. Stat. § 950.105 against the backdrop of Wisconsin's policy of liberally construing standing, section 950.105 conveys standing for an alleged crime victim to oppose a *Shiffra/Green* motion. Indeed, the alleged victim indisputably "has a personal stake in the outcome" of such proceedings. If the court rules that in camera review is warranted, the alleged victim is faced with a dilemma: they can authorize their provider to release the records for a judge to inspect, which violates their privacy and the confidentiality of their records. It risks exposing the victim's thoughts and statements made in the safety of a therapeutic, confidential environment. It risks undermining the trust between the victim and therapist and eroding any progress the victim may have made in counseling.

On the other hand, if the alleged victim chooses to maintain their privilege and refuses to permit release of the records, the consequences are similarly harsh: they would be

barred from testifying at trial, which, in many cases, would prevent the prosecution from proceeding at all. Those personal stakes are related to "a distinct and palpable injury"—forced disclosure of privileged records and deeply personal information in exchange for the ability to testify—that has a causal connection to the "challenged conduct," i.e., the motion and any resulting order.

In sum, victims in *Shiffra/Green* proceedings have a deeply personal stake in the outcome related to a distinct and palpable injury. They have standing in *Shiffra/Green* proceedings.

### D. The drafting history of Wis. Stat. § 950.105 reflects intent to convey standing to victims in these situations.

The plain language of section 950.105 is not ambiguous; hence, there is no need to review the legislative history. Nevertheless, the drafting history of the law confirms the plain-language interpretation that its drafters intended to convey crime victims the ability to directly enforce their rights. *See Kalal*, 271 Wis. 2d 633, ¶ 51.

Wisconsin Stat. § 950.105 was enacted through 2011 Wisconsin Act 283, which originated as Assembly Bill 232. The standing provision in section 950.105 was initially proposed by Tony Gibart, Policy Coordinator of the Wisconsin Coalition Against Domestic Violence. In an email to the bill's sponsor, Gibart proposed the following language to be created in chapter 950:

> Standing (a) The victim has standing in the courts of this state to assert rights provided under this chapter, ch. 938 and article I section 9m, of the Wisconsin constitution and to seek an order or injunctive relief.
>
> (b) At the victim's or witness's request, the district attorney may assert on the victim's or witness's rights

> provided under this chapter, ch. 938 and article I section 9m before the courts of this state.

Memorandum from Tony Gibart, Policy Coordinator, Wis. Coal. Against Domestic Violence, to Rep. Andre Jacque, Wis. Leg. (Apr. 15, 2011) (available in drafting file for 2011 Wis. Act 283, https://docs.legis.wisconsin.gov/2011/related/drafting_files/wisconsin_acts/2011_act_283_ab_232/02_ab_232/11_1942df.pdf at pp. 12–14).

Gibart followed that proposed language with an explanation that it was currently unclear whether victims had standing to assert their rights outside the Crime Victims Rights Board (CVRB), that the CVRB process is not necessarily timely or effective in meeting victims' needs, and that victims should be able to assert their rights and obtain immediate relief directly in court:

> Victims should be able to seek redress from the court handling the case in which a violation has occurred. Since the CVRB was created, uncertainty has existed as to whether victims could only vindicate their rights through the CVRB process. Many have argued that victims may also ask the court hearing the criminal case for an order protecting their rights. Practically speaking, in some cases, if a violation occurred, the court, and not the CVRB, is the only entity that can immediately correct the violation. The CVRB process may take too long for the victim's rights to be effectively restored. At least four other states have provided statutory authority for the victim to seek immediate redress in court while the case is pending.

*Id.* at 14.

Language providing for victim standing appeared in subsequent drafts of the bill. In September 2011, Julie Braun, the CVRB Operations Director, emailed the bill's sponsors with additional proposed modifications. Braun suggested language that, aside from some structural and grammatical

modifications, is substantively identical to what appeared in the final bill:

> **950.105 Standing**. A crime victim has a right to assert his or her rights in a district court in the county in which his or her rights as a crime victim under the statutes or under article I., section 9m of the Wisconsin Constitution were allegedly violated. This section does not preclude a district attorney from asserting a victim's statutory or constitutional victim's rights in a criminal case or in a proceeding or motion brought under this section.

Memorandum from Julie Braun, Operations Director, Crime Victims Rights Board, to Rep. Andre Jacque and Chairman Carey Bies, Wis. Leg. (Sept. 19, 2011) (available in drafting file for 2011 Wis. Act 283, https://docs.legis.wisconsin.gov/2011/related/drafting_files/wisconsin_acts/2011_act_283_ab_232/03_aa1_ab232/11a1509df.pdf at p. 13).

Braun explained that the proposed language was designed to simplify and clarify how victims could enforce their rights:

> Section 4. 950.105 provides victims of crime with standing to assert their crime victims rights in court. Again, the CVRB supports the concept of this section but has concerns that the current language may create confusion about the process by which a crime victim may exercise this right. Because this section contemplates that victims may assert their crime victims rights in court *pro se*, clarity of process is of the utmost importance. The CVRB noted these specific concerns:
>
> - The proper venue for bringing an action may be unclear to victims who are unfamiliar with the court structure and/or venue statutes. Specifying jurisdiction will help define the process by which this right is exercised.

> - The reference to the CVRB on line 16 may be confusing to victims and is not necessary to confer standing.
>
> - The language regarding district attorney "representation" could create unclear—and possibly unmet—expectations and complicate the ability of victims and prosecutors to work together on a prosecution. It would be helpful, however, to maintain permissive language in this section so it is clear that district attorneys are not prevented from helping victims assert their rights.

*Id.* at 12–13.

Taken together, the proposed language and modifications all reflect legislative intent to convey standing to crime victims and to make that mechanism as simple and easy to invoke as possible. Those documents further confirm that the plain language reading that the statute conveys standing to victims is correct.

### E. Johnson's arguments are not persuasive.

Johnson seems to argue that since section 950.04(1v) does not include provisions expressly authorizing victims to file motions or make legal arguments, the statute does not grant standing. (Johnson's Br. 31–33.) But section 950.04(1v) simply lists the statutorily recognized rights that victims can assert in court. Johnson's interpretation effectively ignores section 950.105's express grant of victim standing.

Johnson otherwise equates a victim's appearing in court to oppose a *Shiffra/Green* motion as participating in the prosecution, which Wis. Stat. § 978.05(1) makes the exclusive responsibility of the prosecutor. (Johnson's Br. 34–36.) But an alleged victim's defending their right to maintain their privacy and privilege in health records on a matter that directly threatens those rights is not "prosecuting" the

defendant or usurping the prosecutor's role and responsibility under section 978.05(1).

In sum, Wis. Stat. § 950.105 confers standing to T.A.J. to oppose in circuit court the *Shiffra/Green* motion seeking production and in camera review of his privileged therapy records. For the reasons that follow, article I, section 9m of the Wisconsin Constitution, as amended in 2020, supports that conclusion and likewise recognizes a victim's ability to oppose a defendant's *Shiffra/Green* motion in circuit court.

## II. The 2020 amendment to Wis. Const. art. I, § 9m also recognizes a crime victim's standing to assert their rights and applies to T.A.J.

The court of appeals correctly held that the 2020 amendment to article I, section 9m of the Wisconsin Constitution confers standing to crime victims to oppose a defendant's *Shiffra/Green* motion.

In reaching that conclusion, the court of appeals also held that the 2020 amendment abrogated the holding of *Jessica J.L.* that a crime victim did not have standing to challenge a *Shiffra/Green* motion. The court of appeals' holding was correct, though as discussed below, the holding in *Jessica J.L.* was also superseded when Wis. Stat. § 950.105 was enacted in 2012.

Finally, the court of appeals held that the 2020 amendment applied to T.A.J. "retroactively," where the criminal action had commenced and the circuit court ruled on the standing issue before the passage of the amendment, which occurred while the issue was pending before the court of appeals.

If this Court agrees that Wis. Stat. § 950.105 conferred standing to T.A.J., this Court need not address whether the 2020 amendment did so and whether it applies to T.A.J.,

though this Court's answer to at least the former question would be helpful. As for the latter question, the State agrees with the court of appeals that the amendment applies to T.A.J. under the circumstances. T.A.J.'s crime-victim rights were vested, the question whether he had standing to oppose Johnson's *Shiffra/Green* motion was not yet final—i.e., it was still a live controversy before the court of appeals—and the parties have not yet litigated Johnson's *Shiffra/Green* motion.

### A. The amendment identifies numerous crime victim rights implicated by *Shiffra/Green* proceedings.

Before the 2020 amendment became effective, article I, section 9m provided:

> **Victims of crime.** Section 9m. This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy. This state shall ensure that crime victims have all of the following privileges and protections as provided by law: timely disposition of the case; the opportunity to attend court proceedings unless the trial court finds sequestration is necessary to a fair trial for the defendant; reasonable protection from the accused throughout the criminal justice process; notification of court proceedings; the opportunity to confer with the prosecution; the opportunity to make a statement to the court at disposition; restitution; compensation; and information about the outcome of the case and the release of the accused. The legislature shall provide remedies for the violation of this section. Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law.

Wis. Const. art. I, § 9m (2017–18).

The 2020 amendment became effective in May 2020. It expanded article I, section 9m and created six subsections.

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

As noted above in Part I.B.2.b, subsection (2) identifies crime victims' rights "to justice and due process" and lists other 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," many of which may be implicated when a defendant files a *Shiffra/Green* motion seeking in camera review of a crime victim's privileged mental health treatment records. *See* Wis. Const. art. I, § 9m(2)(a), (b), (f), (i), (L), and (p).

In that subsection, the 2020 amendment makes the right to be treated with dignity, respect, courtesy, sensitivity, and fairness as a self-executing right, not just a statement of purpose. Privacy, likewise, is a stand-alone right in the state constitution; a *Shiffra/Green* motion implicates a crime victim's right to privacy and confidentiality in the fact that they received mental health treatment, in addition to the contents of those treatment records. Further, a crime victim is entitled to the "right to be heard" in proceedings implicating their rights, to refuse discovery requests, and to notice on how they may enforce their rights and privileges, all of which can be implicated by a *Shiffra/Green* motion.

As discussed next, the amendment also provides means by which a victim may enforce those rights.

### B. The 2020 amendment, like Wis. Stat. § 950.105, conveys standing to a crime victim to enforce their rights.

Subsection (3) to the amendment provides that, except for the right to restitution, "all provisions of this section are self-executing" and permits the Legislature to "prescribe

further remedies for the violation of this section and further procedures for compliance with and enforcement of this section." Wis. Const. art. I, § 9m(3).[3]

The amendment also establishes the procedural and remedial tools for victims to assert their rights:

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

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

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

It bears emphasis that the amendment, like Wis. Stat. § 950.105, recognizes multiple, nonexclusive means for a crime victim to enforce those rights. Notably, the victim or their attorney—not just the district attorney—may enforce rights on their behalf in circuit court or any other court with jurisdiction. Wis. Const. art. I., § 9m(4)(a). By necessity, that

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[3] *Cf. Schilling v. State Crime Victims Rights Bd.*, 2005 WI 17, ¶ 26, 278 Wis. 2d 216, 692 N.W.2d 623 (holding that first sentence of art. I, § 9m (2005–06) was statement of purpose and did not provide "a self-executing right" that the CVRB could enforce through private reprimand).

provision conveys standing to a crime victim to be heard in *Shiffra/Green* hearings.

As the court of appeals correctly concluded, based on the plain language of the 2020 amendment and Wis. Stat. §§ 146.82 and 905.04(2), "it is manifest that:"

- T. has the right to be heard in a circuit court proceeding that implicates his rights or privileges;
- T.'s right to be heard when his rights are implicated must be protected in a no less vigorous manner than is Johnson's right to be heard when his rights or privileges are implicated; and
- T's rights and privileges include the confidentiality and privilege regarding his health care records.

*Johnson*, 394 Wis. 2d 807, ¶ 26. Given those manifest propositions, "the only reasonable conclusion that can be drawn is that the 2020 constitutional amendment grants T. standing to oppose Johnson's *Shiffra-Green* motion for an *in camera* review of T.'s health care records." *Id.* And given the conclusion that the "amendment grants T. standing to oppose, and make arguments objecting to, Johnson's pending *Shiffra-Green* motion for an *in camera* review of T.'s confidential and privileged health care records, it then follows that the amendment abrogates *Jessica J.L.*" *Id.* ¶ 27.

That decision is correct: in addition to Wis. Stat. § 950.105, the 2020 amendment bolsters the conclusion that crime victims have standing to be heard in *Shiffra/Green* proceedings. Moreover, given the clear directives in the 2020 amendment to the Wisconsin Constitution and Wis. Stat. § 950.105, *Jessica J.L.* does not direct a different result.

### C. *Jessica J.L.* is no longer good law.

#### 1. Wisconsin Stat. § 950.105, the 2020 amendment, or both supersede *Jessica J.L.*'s holding that crime victims lack standing to participate in *Shiffra/Green* proceedings.

The circuit court held that T.A.J. lacked standing, based on a court of appeals' decision, *Jessica J.L.* There, the court held that a sexual assault victim's guardian ad litem lacked standing to "participate in the criminal prosecution of the defendant." *Jessica J.L.*, 223 Wis. 2d at 630. The court understood "[p]roceedings related to [the defendant's] *Shiffra* motion" to be a "part of his prosecution," thus precluding a victim's guardian ad litem or counsel from participating. *Id.* Johnson, for his part, primarily relies on the holding in *Jessica J.L.* to argue that T.A.J. lacks standing here. (Johnson's Br. 21–25, 34–35.)

The enactment of Wis. Stat. § 950.105 and the adoption of the 2020 amendment to article I, § 9m, superseded that holding in *Jessica J.L.* As discussed above, both the statute and the amendment establish and recognize standing for crime victims to assert their statutory and constitutional victim rights, particularly their rights to privacy and maintaining privilege in their health records recognized in art. I, § 9m(2) and Wis. Stat. §§ 146.82; 905.04(2). Indeed, a crime victim has a personal stake related to a distinct and palpable injury regarding the release and disclosure of their privileged mental health records. Accordingly, this Court should recognize that the holding in *Jessica J.L.* was superseded by either Wis. Stat. § 950.105, the 2020 amendment, or both.

### 2. Even based on common-law principles, the reasoning in *Jessica J.L.* does not appear to remain viable.

Even if *Jessica J.L.* was not superseded or abrogated by statute or the 2020 amendment, its reasoning does not hold up under common-law standing principles. *Jessica J.L.* was an early case in the line of *Shiffra/Green* case law. It was decided before the Legislature's 2012 enactment of Wis. Stat. § 950.105, and before this Court's decision in *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, which modified the pleading standards required for in camera review.

Since *Jessica J.L.* was decided, this Court has implicitly recognized privilege-holder standing in *State v. Denis L.R.*, 2005 WI 110, ¶ 5, 283 Wis. 2d 358, 699 N.W.2d 154. There, the child-victim's guardian, Dawn, sought to intervene in the defendant's criminal proceedings to protect the victim's therapist-patient privilege after the court ordered an in camera interview of the child's therapist. Though Dawn was not a privilege holder for the child's records, this Court implied that Dawn could have standing to intervene if she was:

> [I]n Dawn's motion to intervene in the circuit court, Dawn claimed she was the privilege holder for [the victim]. With Dawn now arguing she is not [the victim's] privilege holder because she is not [the victim's] guardian for purposes of Wis. Stat. (Rule) § 905.04, Dawn does not explain how she has any interest in this litigation or standing to intervene.

*Id.* ¶ 30 n.9.

Moreover, the majority's reasoning in *Jessica J.L.* has not held up. To start, the majority reasoned that proceedings related to a defendant's *Shiffra/Green* motion "are part of his prosecution" and therefore barred a victim's attorney from participating. *Jessica J.L.*, 223 Wis. 2d at 630–31. But a

*Shiffra*/*Green* motion necessarily demands a victim's participation in the proceedings by seeking out her privileged health care records:

> It is only a slight extension of *Shiffra* to conclude that a crime victim whose health care records are sought has standing to complain that a defendant does not meet the *Shiffra* requirements for the *in camera* inspection. The victim is not engaging in the prosecution of the defendant by asserting that his or her health care records do not belong in court in the first place.

*Id.* at 637 (Dykman, J., dissenting). In other words, a victim challenging a *Shiffra*/*Green* motion is merely seeking to maintain their privacy and privilege in records that otherwise have had no role in the investigation or prosecution of the defendant. The victim is not taking on a prosecutorial role.

The *Jessica J.L.* majority also reasoned that the victim's interest could be adequately satisfied by the district attorney's duty to provide notice of a *Shiffra* motion and a right to object. *Id.* at 631–32 (majority). In so reasoning, it relied on *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996), *superseded by statute as recognized in Moustakis v. Dep't of Justice*, 2016 WI 42, ¶ 27, 368 Wis. 2d 677, 880 N.W.2d 142, in which this Court held that a subject of open records requests had the right to receive notice of the requests and an opportunity to object to the disclosure. *Jessica J.L.*, 223 Wis. 2d at 631–32.

But in *Woznicki*, this Court also held that subjects of open record requests had a right to seek judicial review of a district attorney's decision to disclose those records. *Woznicki*, 202 Wis. 2d at 194–95. Accordingly, the subject's privacy rights were vindicated not just by notice and an opportunity to object, but also the ability to intervene.

Further, the *Jessica J.L.* majority suggested that a prosecutor can adequately represent and protect a victim's interest in maintaining her privilege in private health records. *Jessica J.L.*, 223 Wis. 2d at 631–32. That reasoning lacks support for two reasons.

First, the prosecutor is not the victim's attorney. They do not necessarily share the same interests as the victim in sexual assault cases, particularly with regard to a *Shiffra/Green* motion to access the victim's mental health records. Even if the prosecutor and victim seek the same outcome (denial of the motion), they may offer different reasons for the denial based on their unique roles in the proceedings.

And while the State agrees that a *Shiffra/Green* motion may be challenged based solely on legal standards governing pleading requirements, that a prosecutor can oppose a motion on legal grounds is not a reason to preclude a victim or their advocate of choice from asserting their rights. To that end, a *Shiffra/Green* motion could turn on factual points that only the victim could offer. And the victim, for a variety of reasons, simply may not want or trust the prosecutor to be their advocate on these points.

Which leads to the second point: when a defendant—as Johnson does here—seeks access to a victim's private privileged records, the prosecutor is not necessarily in the best position to respond to the allegations in the *Shiffra/Green* motion.[4] The prosecutor is unlikely to know

[4] Wisconsin courts have interpreted a defendant's right to seek a victim's mental health records, as set forth in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), to encompass not just records in the State's possession but also those held by private facilities and that are unrelated to the investigative and prosecutorial process. *See*

beyond what the defendant asserts whether there are records to obtain, who holds them, what time periods they span, and other relevant circumstances in their creation. The prosecutor likewise has no power or ability to turn over the records or ask the private facility to turn them over.

Indeed, as long as the *Shiffra/Green* line of cases hold that a defendant has a right to seek private mental health files that are not in the State's possession, *Shiffra/Green* proceedings necessarily invite the victim to assert their right to privacy and privilege in maintaining it in their records. So too, they invite participation by the custodian, i.e., the facility that holds the records, if it is subject to an order to release them. *See, e.g.*, *In re J.S.P.*, 158 Wis. 2d at 106–07 (health care clinic had standing to challenge court order compelling it to produce otherwise confidential records because it was "aggrieved by the fact that it [was] being compelled to bring otherwise confidential records to court, and confidentiality is a key part of [the facility's] services").

In short, simply because the proceeding in which the *Shiffra/Green* motion is litigated is criminal in nature does not preclude a victim or other aggrieved party from asserting

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*State v. Shiffra*, 175 Wis. 2d 600, 606–07, 499 N.W.2d 719 (Ct. App. 1993). Though *Shiffra* remains controlling law and the issue whether it applies to privately held records is not before this Court in this case, the State maintains its longstanding position that *Shiffra* is incorrect to the extent that it holds that *Ritchie* applies to records outside the State's possession. *Accord United States v. Hach*, 162 F.3d 937, 947 (7th Cir. 1998) (stating that *Ritchie* does not apply when the information the defendant seeks is not in the government's possession); *see also State v. Lynch*, 2016 WI 66, ¶ 36, 371 Wis. 2d 1, 885 N.W.2d 89 (Gableman, J., lead opinion) ("*Ritchie* . . . never should have been stretched to cover privileged records held by agencies far removed from investigative and prosecutorial functions.").

their rights to privacy and privilege in the sought-after records. *Jessica J.L.* is no longer good law.

### D. Johnson's arguments to the contrary are not persuasive.

Johnson argues that interpreting the amendment to provide standing violates his right to present a complete defense. (Johnson's Br. 7–8.) But it is difficult to see how allowing a victim to be heard in opposition to a *Shiffra/Green* motion would do that. Nothing about permitting a victim standing to argue changes the legal test for in camera review. A victim's arguments opposing a *Shiffra/Green* motion at a minimum allow them to be heard on their own terms. The victim's arguments may also clarify ambiguities and factual misconceptions in the defendant's motion. But a victim's providing additional legal arguments or factual clarifications to assist the court in a decision that greatly affects their privacy cannot arguably undercut a defendant's right to present a defense.

Johnson further argues that the language in the 2020 amendment is not specific enough to recognize a victim's right to oppose a *Shiffra/Green* or other defense motion. (Johnson's Br. 8–12.) The State agrees with T.A.J. (T.A.J.'s Br. 22–25) that the rights and proceedings listed in subsection (2) are nonexclusive, particularly given the amendment's broad language recognizing that

> [T]he 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(4)(a). Again, a victim has rights to privacy and to maintain confidentiality in health records through general and specific constitutional and statutory provisions. It is not reasonable to read subsection (4)(a)'s broad language to preclude victims from being heard when a defendant seeks production and in camera review of those privileged and confidential records.

Johnson further reads subsection (4) narrowly to allow a victim only the right to file a supervisory writ to assert their right to refuse to disclose records *after* a court has granted a *Shiffra/Green* motion and ordered production for in camera review. (Johnson's Br. 12–16.) That narrow reading conflicts with the broad language in subsection (4) granting a right to be heard to enforce their rights. To that end, victims do not require a separate proceeding or mechanism to assert their rights to refuse to disclose records. Indeed, whether the victim agrees to disclose her records is already part of *Shiffra/Green* proceedings. In all events, to understand the amendment to limit victims' ability to assert their rights so drastically reads out any meaningful mechanism in the constitution for victims to protect their rights.

Finally, Johnson equates a victim's ability to be heard on a *Shiffra/Green* motion with improperly participating in the prosecution. (Johnson's Br. 17–21.) He argues that because a victim lacks party status in a criminal proceeding, they cannot be heard in opposition to a *Shiffra/Green* motion. (Johnson's Br. 21–25.)

To start, if the State believed that a victim's having standing to oppose in court to a *Shiffra/Green* motion interfered with prosecutors' exclusive, statutory duty to prosecute, it would be the first to say so. But as explained, a victim's self-advocacy in *Shiffra/Green* proceedings is about enforcing the victim's rights to privilege and privacy; it is not usurping the district attorneys' or special prosecutors'

exclusive duty to prosecute a criminal case. *See* Wis. Stat. §§ 978.045; 978.05(1).

Further, the court of appeals soundly addressed and rejected Johnson's points. *Johnson*, 394 Wis. 2d 807, ¶¶ 45–46. The court noted that the amendment does not purport to grant victims the ability to prosecute defendants, a point on which Johnson ultimately agreed. *Id.* ¶ 45. It wrote that "[g]ranting T. standing to oppose, and make arguments to the circuit court in the criminal case supporting his opposition to, a *Shiffra-Green* motion concerning his privileged and confidential health care records does not impair Johnson's rights because T.'s input to the circuit court on the merits of Johnson's motion does not implicate the hallmarks of substantive criminal law," i.e., proving Johnson's guilt, creating a new substantive crime, or increasing the penalty for the charged crimes. *Id.* ¶ 46 (footnote omitted) (citing *State v. Lagundoye*, 2004 WI 4, ¶¶ 21–22, 268 Wis. 2d 77, 674 N.W.2d 526). Rather, "[g]ranting T. standing in these circumstances allows T. only to contest Johnson's *Shiffra-Green* motion by communicating his arguments to the court directly about why the motion should be denied or limited in a manner in the discretion of the circuit court." *Id.*

### E. The amendment applies to T.A.J.

The court of appeals correctly concluded that the 2020 amendment applies to T.A.J. to confer standing on his opposition to the *Shiffra/Green* motion in this case. *Johnson*, 394 Wis. 2d 807, ¶¶ 29–40. It reached that conclusion by reviewing the legislative history, ratification campaign, amendment's self-executing provision, and other language of the amendment, all of which supported "the intent that the 2020 constitutional amendment applies to pending motions in cases initiated prior to passage of the amendment." *Id.* ¶ 38.

Again, since Wis. Stat. § 950.105 already conveyed standing to T.A.J., this Court need not answer whether the 2020 amendment applies to T.A.J. Should it reach this question, however, the State agrees with the court of appeals' reasoning.

Generally, whether a new law, statute, or rule applies retroactively or prospectively depends on whether the law, statute, or rule is substantive, procedural, or remedial. *See City of Madison v. Town of Madison*, 127 Wis. 2d 96, 101–02, 377 N.W.2d 221 (Ct. App. 1985). New substantive laws apply prospectively; procedural and remedial laws apply retroactively. *Id.* To that end, new constitutional criminal procedural rules apply retroactively to pending cases, including those on direct review or "not yet final." *See Lagundoye*, 268 Wis. 2d 77, ¶ 2.

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

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

These standards are consistent with the common-law Blackstonian doctrine, which "provides that 'a decision to overrule or repudiate an earlier decision is retrospective in operation'" unless the new decision affects substantive criminal laws by making a previously non-criminal act criminal. *State v. Picotte*, 2003 WI 42, ¶¶ 42, 47, 261 Wis. 2d 249, 661 N.W.2d 381.

As the court of appeals noted, the self-executing nature of the amendment in subsection (3) reflects an intent that the amendment would be put into operation without any further action by the Legislature. *Johnson*, 394 Wis. 2d 807, ¶ 34. That function supports the conclusion that the amendment would apply to pending criminal cases like the one here.

In addition, the remaining language of the statute reflects intent that the amendment would apply to alleged crime victims in T.A.J.'s position. To start, the amendment expressly contemplates application to people who became victims before the effective date of the amendment, as well as current and future victims. Subsection (2) provides that the rights described in the amendment "shall vest at the time of victimization." Wis. Const. art. I, § 9m(2). That vesting occurs before commencement of a criminal case; there's nothing in article I, section 9m to suggest that it should apply to only future victims or prospective criminal cases. Nothing in the amendment, after all, affects a defendant's rights; it is focused on the rights of the victim, which vest at the time of the crime.

On that point, the State agrees with the court of appeals, *Johnson*, 394 Wis. 2d 807, ¶ 36, that the question of when rights vest and whether the amendment applies to a particular victim are different topics. Yet having a victim's rights—which are a condition precedent to a victim's having standing in the first place—vest at the time of the crime reflects intent that the amendment's application is not conditioned on when the criminal proceedings commenced.

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

And the amendment applies to active controversies like the one presented here, i.e., whether a crime victim can challenge a defendant's *Shiffra/Green* motion. Just as the amendment evinces intent that it applies to both current and future victims, by all indications the amendment—particularly paragraphs (4)(a) and (b) setting forth the procedural and remedial tools by which victims can enforce their rights—likewise applies to this case, which involved an active nonfinal controversy when the amendment came into effect.

Johnson argues that the 2020 amendment does not specify retroactive effect, and that it therefore can only operate prospectively, and therefore not to T.A.J. (Johnson's Br. 28.) He asserts that application of the amendment in this case would be retroactive because this is "a criminal case that was commenced prior to the effective date of the recent amendment[] and of which the pertinent issue was litigated to the circuit court prior to the amendment[]." (Johnson's Br. 29.)

The State disagrees with Johnson's view that application of the amendment to this case could be termed "retroactive." This isn't a situation where, for example, T.A.J. is trying to re-litigate a *Shiffra/Green* issue that had already been decided or challenging such a decision in a case that has closed. Rather, "the pertinent issue" that T.A.J. seeks standing on which to be heard—the *Shiffra/Green* motion for his records—has not yet been decided by the circuit court. Further the question whether T.A.J. has standing to challenge the *Shiffra/Green* issue has remained live throughout the appellate process.

Accordingly, T.A.J. has standing to make arguments opposing Johnson's *Shiffra/Green* motion. That right is conveyed by either statute, Wis. Stat. § 950.105, or the 2020 amendment to article I, section 9m of the Wisconsin Constitution, or both. And even if that right is only conveyed by the Wisconsin Constitution, it applies to T.A.J. under the circumstances.

## CONCLUSION

This Court should affirm the court of appeals.

Dated this 9th day of June 2021.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,067 words.

Dated this 9th day of June 2021.

SARAH L. BURGUNDY
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 9th day of June 2021.

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