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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP000664-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

T.A.J.,

Appellant,

v.

ALAN S. JOHNSON,

Defendant-Respondent-Petitioner.

On Review from 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 Hon. Raymond S. Huber, Presiding

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AMICUS CURIAE BRIEF OF WISCONSIN STATE PUBLIC DEFENDER

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ARGUMENT

The *Shiffra*/*Green*[1] procedure already specifies the limited standing afforded alleged victims[2] when an accused person seeks confidential records.

Alleged victims have limited standing when a *Shiffra*/*Green* motion is filed to: (1) assert that their records are privileged and confidential (an issue rarely, if ever, in dispute) and (2) make the ultimate decision about whether their records are released. Allowing alleged victims to litigate a claim related to guilt or innocence, such as whether the defense met its initial *Shiffra*/*Green* burden, is fundamentally different than asserting one's rights as a victim or litigating a claim ancillary to the criminal prosecution where the alleged victim was aggrieved in some appreciable manner.

An alleged victim's privileged records are already protected by *Shiffra*/*Green*, as release is prohibited without consent. That protection is fundamental to the *Shiffra*/*Green* procedure which also balances the accused's constitutional right to present a complete defense. Because of that protection, arguing against the substantive motion is not about whether a victim's right to confidential records has been violated. It has not been. The records cannot be disclosed without consent. It is about whether there is "a reasonable likelihood the records contain relevant information necessary to a determination of guilt or

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[1] *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

[2] Throughout the brief "alleged victim" is used because this case is pre-trial and Mr. Johnson is presumed innocent.

innocence," thus, a substantive issue about guilt or innocence. *See Green*, 253 Wis. 2d 356, ¶34. As such, the alleged victim does not have standing to litigate the substantive claims raised in a *Shiffra*/*Green* motion.

The State Public Defender (SPD) asks for any decision in this case to be limited to litigation related to a *Shiffra*/*Green* motion, as it involves a unique balance between a person's "absolute statutory privilege to refuse to disclose" their records, *Jessica J.L. v. State (In re Jessica J.L.)*, 223 Wis. 2d 622, 629, 589 N.W.2d 660 (Ct. App. 1998), and the accused's right to a fair trial, specifically the right to present a complete defense. If this Court concludes that an alleged victim is permitted to present legal arguments about whether an accused person met his initial burden for an *in camera* inspection, the SPD agrees with the Wisconsin Association of Criminal Defense Lawyers (WACDL) that such participation is akin to a nonparty amicus curiae.

A. *Shiffra*/*Green* procedure.

There is a specific procedure for courts to follow when a defendant requests access to an alleged victim's privileged and confidential records. *Shiffra*, 175 Wis. 2d 600 (Ct. App. 1993); *Green*, 253 Wis. 2d 356. Inherently, there are competing rights and interests when a defendant seeks access to privileged records. *Green*, 253 Wis. 2d 356, ¶23. The defendant's constitutional right to a fair trial, specifically the "right to a meaningful opportunity to present a complete defense" must be balanced with the state's interest in protecting a patient's privileged records. *Id.*; *Shiffra*, 175 Wis. 2d at 609.

To balance those interests, *Shiffra* established, and *Green* clarified, a two-step process where the defense has the initial burden. First, in order to obtain an *in camera* review of privileged records, the defense must set forth "a fact-specific evidentiary showing, describing as precisely as possible the information sought from the records and how it is relevant to and supports his particular defense." *Green*, 253 Wis. 2d 356, ¶33. The defense must demonstrate "a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence." *Id.* at ¶34. In addition, the evidence cannot be merely cumulative to other evidence available to the defense. *Id.* Evidence is "necessary to a determination of guilt or innocence" if it "tends to create a reasonable doubt that might not otherwise exist." *Id.* (citation omitted).

The defense has a duty to reasonably investigate information related to the alleged victim making the request for *in camera* inspection. *Id.* at ¶35. "A motion seeking discovery for such privileged documents should be the last step in a defendant's pretrial discovery." *Id.*

If the defense meets this initial burden, the alleged victim is given the option of refusing to release the documents for an *in camera* inspection. If the alleged victim permits release, the court conducts the review. *Id.* at ¶35. The records do not go to the defense. *Id.* This Court in *Green* expressed its "confidence in the circuit courts" to determine whether disclosure is necessary based upon the competing interests. *Id.* After all, balancing difficult conflicts is "the very essence of judicial duty." *Shiffra*, 175 Wis. 2d at 611.

Second, if the records are released for the inspection, the court "must determine whether the records contain *any relevant information that is*

'material' to the defense of the accused." *Green*, 253 Wis. 2d 356, ¶31 (citation omitted; emphasis in original). This is a more stringent standard than the defense's initial burden. *Id.* If the court determines after an *in camera* review that some records should be disclosed to the defense, the alleged victim again has the right to refuse to release those records.

Thus, the procedure set forth in *Shiffra* and *Green* preserves the accused's right to present a defense but also requires the defense to meet a fairly onerous initial burden, related to guilt or innocence, before a judge is permitted to do an *in camera* inspection. The procedure also protects the alleged victim's privileged records by prohibiting release without the alleged victim's consent, even if the records contain relevant information "material to the defense of the accused." In other words, the procedure balances two important interests and allows the alleged victim to: (1) assert that the records are privileged (which is rarely, if ever, in dispute) and (2) make the ultimate decision about whether the privileged records are released.

B. The alleged victim does not have standing beyond that established by *Shiffra*/*Green*.

Although an alleged victim has standing to assert that his records are privileged and make the ultimate decision about whether those records are released, the alleged victim does not have standing to litigate a *Shiffra*/*Green* motion. Neither the general principles of standing, chapter 950, nor the Wisconsin Constitution[3] permits more.

[3] This is true regardless of the application of the recent constitutional amendment.

T.A.J., the state, and amici in support of T.A.J., conflate an alleged victim's standing to assert statutory and constitutional rights or claim to be aggrieved in some appreciable manner by issues ancillary to the criminal prosecution, with standing to litigate substantive issues related to guilt or innocence in a criminal prosecution.

To be clear, this case is not about whether T.A.J.'s mental health and counseling records are privileged and confidential. *See* Wis. Stat. §§ 950.04, 146.82. Nor is it about the court ordering release without the alleged victim's consent. Instead, it involves whether the alleged victim is permitted to litigate a substantive claim related to guilt or innocence. The *Shiffra*/*Green* procedure already prohibits release of confidential records without consent, protecting the alleged victim's right, while also balancing the accused person's constitutional right to have a meaningful opportunity to present a complete defense.

As the litigants and amici agree, an alleged victim is not a party to the criminal prosecution. *See* Wis. Const. Art. 1, § 9m(6) ("This section is not intended and may not be interpreted to supersede a defendant's federal constitutional rights or to afford party status in a proceeding to any victim"). An alleged victim has the option of pursuing civil remedies, but does not have the option of prosecuting another person in order to deprive that person of his liberty.[4]

[4] Prosecutors have wide discretion when issuing charges, however, when a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds probable cause. *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979); Wis. Stat. § 968.02(3).

However, Wisconsin has long recognized the importance of an alleged victim's involvement in criminal cases. Alleged victims have both statutory and state constitutional rights. Wis. Stat. § 950.04(1v); Wis. Const. Art. 1, § 9m(2).[5] Section 950.104, also gives alleged victims limited standing to "assert, in a county in which the alleged violation occurred [circuit court], **his rights as a crime victim** under the statutes or under article I, section 9m of the Wisconsin Constitution." (Emphasis added).

T.A.J. alleges that pursuant to § 950.105, "the right to standing applies to any rights that properly belong to, or can be claimed by, crime victims under **any and all** Wisconsin statutes." (T.A.J.'s brief, 9; emphasis added). This is an overly broad interpretation of § 950.105 because it ignores the qualifier before "under the statutes." An alleged victim has the right to assert "**his rights as a crime victim** under the statutes..." (Emphasis added). An alleged victim may have many statutory rights unrelated to being a crime victim. Section 950.105 only confers standing to assert rights "as a crime victim" under the statutes.

For example, the fact a person's medical records are privileged and confidential is not related to one's status as a victim. Every person, victim or not, is afforded those rights. Thus, asserting rights under Wis. Stat. §§ 905.04, 146.82, is not the same as asserting one's "**rights as a crime victim** under the statutes…" Rights as a crime victim have a special meaning, they are delineated in Wis. Stat. § 950.04(1v) and Wis. Const. Art. 1, § 9m(2). T.A.J.'s interpretation renders the phrase "as a crime victim" superfluous. *See State ex. rel. Kalal v. Circuit Court for Dane Cty.*,

[5] This section of the Constitution was recently amended. The amendment is often referred to as "Marsy's Law."

2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.")

However, as the amicus brief in support of T.A.J. correctly notes, an alleged victim's standing is not necessarily confined to § 950.105. "The law of standing is liberally construed" and permits a nonparty to dispute a judgment or order if they have been "aggrieved in some appreciable manner by the court." *In re J.S.P.*, 158 Wis. 2d 100, 106, 461 N.W.2d 794, 796 (Ct. App. 1990) (citations omitted). "A person is aggrieved if the judgment bears directly and injuriously upon his interests." *Ford Motor Credit Co. v. Mills*, 142 Wis. 2d 215, 217, 418 N.W.2d 14, 15 (Ct. App. 1987).

Specifically, in the *Shiffra*/*Green* context, an alleged victim has the right to: (1) assert that the records sought are privileged and confidential and (2) make the ultimate decision about whether the records can be released. This is logical because the right at issue is the right to confidential records. Asserting those rights in the way proscribed by *Shiffra* and *Green* is consistent with the rule that an alleged victim has standing when aggrieved in some appreciable manner. Ultimately, the records will remain confidential *unless* release is permitted by the alleged victim. Thus, unless those records are impermissibly ordered to be released without consent, the alleged victim is not "aggrieved in some appreciable manner" for purposes of standing.

If there was a dispute about whether the records were privileged and confidential, T.A.J. would have standing to argue the records are protected. *See In re J.S.P.*, 158 Wis. 2d 100, 107, 461 N.W.2d 794, 796 (Ct. App. 1990). That is not the issue here. In *J.S.P.*,

the court ordered Family Planning Health Services, Inc., to release an individual's health records for purposes of a defense in a paternity action. *Id.* at 105. The court concluded Family Planning had standing to appeal the order because it was "aggrieved by the fact that it is being compelled to bring otherwise confidential records to court, and confidentiality is a key part of Family Planning's services." *J.S.P.*, 158 Wis. 2d at 107. Therefore, Family Planning had standing to appeal an order ancillary to the paternity action because it was aggrieved by that order. It did not have standing to litigate the substantive issues involved in the paternity action.

Likewise, In *Polk County v. State Public Defender*, the court concluded Polk County had standing to appeal the order appointing experts at county expense in a criminal case because Polk County was aggrieved by the order since the county was ordered to pay for the expert. *Polk County v. State Public Defender*, 179 Wis. 2d 312, 316, 507 N.W.2d 576, 578 (Ct. App. 1993). Again, this was an order ancillary to the criminal prosecution where a nonparty was aggrieved by the order. Neither T.A.J., the state, nor the amici, have cited a case where a nonparty was permitted to litigate a substantive issue related to guilt or innocence in a criminal prosecution.

Following this logic, if a court were to order release of privileged records, despite an alleged victim's choice not to disclose his records, the alleged victim would have standing to dispute that order. Of course, such an order would be unlikely and would be a proper subject of a supervisory writ.[6]

[6] The SPD agrees with the nonparty brief filed by WACDL where it explains a supervisory writ is the appropriate procedure for review.

Additionally, the recent amendment to the Wisconsin Constitution provides victims with the right to be heard in proceedings where "the right of a victim is implicated" or to seek enforcement of rights, privileges, and protection afforded "to the victim by law." Wis. Const. Art. 1, § 9m(2)(i), (4)(a). Again, the issue here involves keeping certain records confidential. Nothing in the *Shiffra/Green* procedure requires, or allows release of confidential records without consent.

Thus, beyond the parties disputing whether records are in fact confidential or a court ignoring the law and ordering release of confidential records without consent, there is no right to invoke via the constitutional amendment. Whether the accused meets his initial burden does not implicate any rights because regardless of whether the burden is met, release is prohibited without consent, thus the victim's rights are protected. An alleged victim disliking or disagreeing with the need to choose between release of records and a court-imposed remedy if there is "a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence," does not transform a legal issue related guilt or innocence into an issue enforcing a victim's right.

Therefore, neither general principles of standing, § 950.105, nor the Wisconsin Constitution permit an alleged victim to make substantive legal arguments about whether the defense has met its burden for an *in camera* inspection.

As has been the long-standing practice, and further enumerated in the recent constitutional amendment, the alleged victim has the right to be heard at hearings related to release, plea, sentencing, etc., as the court should consider an alleged victim's

input when making related discretionary decisions. *See* Wis. Const. Art. 1, § 9m(2)(i). For example, in imposing sentence, the court can use the victim's statement as support for its discretionary decision to select a specific sentence.

Likewise, the alleged victim is allowed to assert her rights as a crime victim. For example, an alleged victim should be permitted to assert his right to have the court consider his interests in exercising its discretion about whether to allow a continuance. *See* Wis. Stat. § 950.04(1v)(ar). Asserting this type of right, as delineated in § 950.04 or the Wisconsin Constitution, is fundamentally different than making substantive legal arguments about guilt or innocence.

Therefore, the decision in *Jessica J.L.* was correct and subsequent changes to chapter 950 and the Wisconsin Constitution did not change the efficacy of that decision. In *Jessica J.L.*, the court again stated people have "an absolute statutory privilege to refuse to disclose" their records. *Jessica J.L.*, 223 Wis. 2d at 629. Like here, Jessica alleged to adequately protect her right of confidentiality in her records, her guardian ad litem should be permitted to participate in litigation of the *Shiffra* motion. *Id.* The court correctly concluded Jessica's guardian ad litem could not participate in the *Shiffra* litigation because the claim dealt with the guilt or innocence of the accused. *Id.* As explained earlier, the right to keep the records confidential is absolute and remains absolute even with a successful *Shiffra*/*Green* motion. Arguing that the accused's initial burden has not been met is not asserting a right of the victim, it is participating in the prosecution by litigating an issue related to guilt or innocence.

Allowing the alleged victim to make legal arguments related to substantive claims in a criminal prosecution is a slippery slope. For instance, note T.A.J.'s broad request for this court to "definitively hold[] that Wis. Stat. § 950.105 guarantees crime victims the same standing afforded to other interested litigants, including 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'." (T.A.J.'s brief, 15; emphasis added). With such a broad interpretation there seems to be no difference between the role of the prosecutor and the role of the alleged victim.

A *Shiffra*/*Green* motion is unique in the sense that it involves the alleged victim's privileged records. But, the confidentiality of those records is already protected because release is prohibited without consent. Thus, T.A.J. and the state are not simply asking to allow T.A.J. to assert its right to privileged records. They are asking for T.A.J. to be permitted to litigate issues related to guilt or innocence. In that respect, what prevents an alleged victim from prosecuting other claims affecting guilt or innocence? The implications of a broad decision would be far-reaching and largely unknown. Thus, the SPD asks for a narrow decision related to *Shiffra*/*Green* only.

CONCLUSION

For these reasons, the Court should conclude that *Jessica J.L.* was correctly decided and alleged victims have limited standing consistent with *Shiffra* and *Green* but do not have standing to make legal arguments about whether the defense has met its burden.

Dated this 16th day of July, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms 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 2,997 words.

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

Dated this 16th day of July, 2021.

Signed:

KATIE R. YORK
Appellate Division Director