

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**

SUPPLEMENTAL BRIEF OF APPELLANT

LEGAL ACTION OF WISCONSIN, INC.

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ISSUE PRESENTED

1. Should the court overrule *State v. Shiffra*, 175 Wis.2d 600, 499 N.W.2d 719 (Ct. App. 1993)?

This issue was not presented to nor addressed by the Court of Appeals.

INTRODUCTION

Since 1993, *State v. Shiffra* and its progeny have opened the door for the private mental health records of crime victims being released to a defendant despite victims having a fundamental right to privacy, an established doctor-patient privilege, and numerous laws restricting these records as confidential. 175 Wis.2d 600, 499 N.W.2d 719 (Ct. App.). TAJ brought this pending appeal because, as a crime victim with those and other rights, he is entitled to have his voice heard in opposition to *Shiffra-Green* motions. Such standing is necessary and required by the law precisely to protect TAJ from the injury resulting in the release of these records, and the violation of his rights as a crime victim.

Having heard arguments on these issues, this Court now asks a more fundamental question: should this Court overturn *State v. Shiffra*? As noted in oral arguments, this question has been brought to this Court twice before. First in 2013 in *State v. Samuel Curtis Johnson*. 2013 WI 59, 348 Wis.2d 450, 832 N.W.2d 609 (*per curiam*) (clarified on reconsideration by 2014 WI 16, 353 Wis.2d 119, 845 N.W.2d 1 (*per curiam*)). And again in 2016 in *State v. Patrick Lynch*. 2016 WI 66, 371 Wis.2d 1, 885 N.W. 89. In both cases, the Court was unable to reach a controlling decision on how to address *State v. Shiffra*.

This appeal, however, is rooted in facts and law significantly different from those at issue in both *State v. Johnson* and *State v. Lynch*. See *Generally, Johnson*, 2013 WI 59 and *Lynch*, 2016 WI 66. There has been a significant change in the state of the law since *State v. Shiffra* was decided. The Wisconsin Legislature has consistently increased and bolstered the rights and protections of crime victims, with the intent to have those rights enforced in the same manner and with the same vigor as the rights of defendants. See Wis. Stat. §950.01.

TAJ reiterates and stands by his argument that standing gives him the right to be heard in opposition to a defendant's *Shiffra-Green* motion. However, in answer to this Court's question, TAJ also argues that *State v. Shiffra* should be

overturned because, as a result of the recognition of additional rights of crime victims, *Shiffra's* original rationale has been undermined, and its continued use results in inconsistency and incoherence in the law.

LEGAL STANDARD

“Stare decisis contemplates that under limited circumstances a court may overrule outdated or erroneous holdings.” *Cook v. Cook*, 208 Wis.2d 166, 186, 560 N.W.2d 246 (1997). “Consequently, *stare decisis* is not a mechanical formula for adherence to the latest decision.” *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 96, 264 Wis. 2d 60, 665 Wis. 2d 257, quoting *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed2d 1520 (1991). “[T]he power of the court to repudiate its prior rulings is unquestioned, though not often exercised.” *Johnson Controls, Inc.*, 2003 WI 108, ¶ 96 (quoting *Schwanke v. Garlt*, 219 Wis. 367, 371, 263 N.W. 176 (1935)). See also *State v. Denny*, 2017 WI 17, ¶ 70, n.16, 373 Wis. 2d 390, 891 N.W.2d 144.

In *Johnson Controls, Inc.*, the Court set forth six, somewhat overlapping, criteria for overruling precedent: (1) changes or developments in the law have undermined the rationale behind the decision, (2) a need to make the decision correspond to newly ascertained facts, (3) the precedent has become detrimental to the coherence and consistency in the law, (4) the prior decision is unsound in principle, (5) the prior decision is unworkable in practice, and (6) reliance interests are implicated. *Johnson Controls, Inc.* 2003 WI 108, ¶ 98, 99.

Though controlling, the court does not have to consider every factor in deciding whether to overturn a case or doctrine. *Denny*, 69-71. The court may also look at other considerations, such as where the legislative prerogative to overturn a case is present. *Johnson Controls*, 2003 WI 108, ¶ 141.

The doctrine of *stare decisis* is an essential bedrock of the law, designed to protect the rule of law and the reliability of decisions. *Id.* Yet use of the doctrine must also balance against the changing of circumstances, society, and the law itself. *State v. Stevens*, 181 Wis.2d 410, 511 N.W.2d 591 (1994). The Court in *Johnson Controls* also noted that it does “more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision.” *Johnson Controls*, 2003 WI 108, ¶ 100.

ARGUMENT

In both *Johnson* and *Lynch*, the State argued that *State v. Shiffra* should be overturned because it was predicated on an erroneous interpretation of *Pennsylvania v. Ritchie* and therefore was unsound in principle. Brief and Appendix of Plaintiff-Appellant-Petitioner, State of Wisconsin, *State of Wisconsin v. Patrick J. Lynch*, Appeal No. 2011AP2680, 2015 WL 3761117, (Apr.30 2015) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L.Ed.2d 40 (1987)). In the State's Reply Brief in this case, the State continues to make this argument as a basis for overturning *Shiffra* (State Br. p. 26-27, footnote 4). Historically, this argument has not been found persuasive enough for a majority of justices to agree that *Shiffra* be overturned, especially in the face of stare decisis.

TAJ agrees with the State's argument that *Shiffra* was incorrect in expanding *in camera* inspections of records to include the private records of citizens instead of being limited to documents in the possession of the State. TAJ agrees with the State's position that *Shiffra* was erroneously decided. However, TAJ asserts that there are other compelling reasons for this Court to overturn *Shiffra*.

This Court should overturn *State v. Shiffra* because the laws recognizing rights for crime victims, enumerated in both Chapter 950 and the Wisconsin Constitution, make *Shiffra* inconsistent with the case's original decision, and detrimental to the coherence and consistency in the law.

I. *State v. Shiffra* Should Be Overturned Because Its Rationale is Undermined by Advancements in Victim Rights Laws.

The essence of *Shiffra* and its progeny is balance. In its conclusion, the Court in *Shiffra* held that reliance on the holding in *Ritchie* and the judicial authority to conduct *in camera* inspections was the proper method for "resolving conflicts between the sometimes competing goals of confidential privilege and the right to put on a public defense." *Shiffra*, 175 Wis.2d 600 at 611-612.¹ The basic rationale of *Shiffra* is an attempt to balance the rights of a private citizen who is the subject of the requested records and a defendant who seeks those records in order to

¹ The complete ruling in *Shiffra* also found that the proper remedy for the refusal to release records was to sanction the victim by suppressing her testimony at trial. *Shiffra*, 175 Wis.2d 600 at 724. However, TAJ limits his discussion of *Shiffra*'s ruling to what is considered the procedure of a *Shiffra-Green* motion, not the after effects of a potential court order. This is for two reasons. First, in the present case there has yet to be a *Shiffra-Green* hearing and thus no facts pertaining to whether TAJ chose to release his records. To delve into that debate (which is also discussed at length in *State v. Lynch*) would be premature. Second, TAJ argues that *State v. Shiffra* be overturned because it ignores the changes in law creating rights for crime victims. If the fundamental basis of *Shiffra*'s ruling is no longer valid, then the secondary question of possible sanction or remedy for failure to release records is also no longer valid, or at least, no longer relevant.

protect his due process rights to a fair trial. *Id.* However, developments in the law since *Shiffra* was decided now undermine the balance the Court originally struck.

When *State v. Shiffra* was decided in 1993, it did not consider the concept of specific rights for crime victims. See *Shiffra*, 175 Wis.2d 600. The Court described the central problem of the case as “balanc[ing] the defendant’s constitutional right to a fair trial against the state’s interest in protecting its citizens by upholding a statutorily created privilege.” *Id.* at 609. The victim was not even considered a unique individual with their own interest or stake in the matter, despite the defendant’s request being for her personal, private, and confidential mental health records.

The landscape of the law has changed dramatically since then. In April 1993 (a month after *Shiffra* was decided), the Wisconsin Constitution was amended to add Article I, § 9m, affirming that “the state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy.” WI Const. art. I, § 9m. In 1997, Wisconsin Act 18 rewrote and expanded the enumerated rights in Wis. Stat. § 950.04, setting forth a detailed list of some thirty-six unique rights for crime victims. In 2011, the Legislature passed Wisconsin Act 283 which had two main effects on crime victim rights. First, it added § 950.04(1v)(ag), making “fairness and respect for a crime victim’s privacy an enforceable right.”² Second, and more significantly, it added a new provision, Wis. Stat. § 950.105, giving victims a direct mechanism by which to enforce their rights. This provision 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.

Wis. Stat. § 950.105.

Under § 950.105, crime victims have the right to be heard, to argue, orally and by motion, in order to protect and defend against violations of their rights.

² The Legislature created the new provision shortly after the Court’s decision in *Schilling v. State Crime Victim Rights Bd.*, 2005 WI 17, 278 Wis.2d 216, 692 N.W.2d 623. In that case, this Court held that the Amendment’s language was merely a statement of purpose and did not itself provide an enforceable self-executing right. *Id.* The passage of Wisconsin Act 283 ensured that to be treated with “fairness, and a respect for privacy” was an enumerated and enforceable right for crime victims.

This includes, as T.A.J. has argued throughout this case, the ability to assert his rights of privilege, confidentiality, and privacy to protect treatment records.

In 2020, the ballot question commonly known as “Marsy’s Law” was passed by voters. Under the newly amended Article 1 Section 9m, crime victims now have expanded constitutional rights, including, but not limited to, the right to (a) be treated with dignity, respect, courtesy, sensitivity and fairness; (b) to privacy; (f) to reasonable protection from the accused throughout the criminal...justice process; (i) to be heard in any proceeding during which a right of the victim is implicated, and (l) to refuse [a]...discovery request made by the accused or any person acting on behalf of the accused. WI. Const. art. I. § 9m.

The *Shiffra* Court reasoned that it had struck a balance between the defendant’s constitutional rights and the public interest in protecting the sanctity of the privilege at issue. 175 Wis.2d 600, at 609. However, the subsequent development of Wisconsin victim rights law put into play a new set of interests which *Shiffra* does not address.

Today, if a court were to balance the rights of the defendant and the interests of the crime victim in deciding whether to grant a motion for *in camera* review, that court would have to consider not only the new constitutional rights listed above, but also the victim’s statutory right to “fairness and respect for their privacy” under § 950.04(1v)(ag), updated confidentiality laws in §146.82, § 51.30 and 45 CFR 160, and the right to standing under § 950.105. *State v. Shiffra* and the resulting *Shiffra-Green* motion procedure cannot account for or reconcile with these rights.

To create an effective balancing test the court must recognize the rights and protections available to all those implicated, the state, the defendant(s), and the victim(s). The original rationale of *State v. Shiffra* does not consider victims as unique agents separate from the state, nor does it account for the rights now available to crime victims. As outlined above, victims today have significant rights which were not considered in the original rationale behind *Shiffra*. Thus, *Shiffra*’s rationale leaves out significant statutory and constitutional rights that have been recognized for victims over the years and that substantially change the balancing factors in deciding a request for *in camera* inspection.³ *Shiffra* does not address or contemplate these rights and laws in the creation of its balancing test or in the standard of proof defendants must meet.

³ TAJ notes that even in *Pennsylvania v. Ritchie*, the Court was balancing the due process rights of the defendant against a limited statutory right of confidentiality. *Shiffra* heavily relied on *Ritchie* to establish its balancing test, yet *Ritchie* cannot provide any direction on how a court should balance the due process rights of the defendant against a constitutional right of privacy for crime victims. Subsequently, neither can *Shiffra*.

Furthermore, *Shiffra*'s original rationale no longer makes sense because victims are no longer beholden to the State to represent their specific interests. This change is not only significant, but necessary. For example, in its previous arguments in *State v. Lynch*, the State has argued that *Shiffra* hampers their ability to prosecute and therefore protect the public because if a victim refuses to release their records, their often necessary testimony is suppressed, and the State is unable to proceed with prosecution. Brief and Appendix of Plaintiff-Appellant-Petitioner, State of Wisconsin, *State of Wisconsin v. Patrick J. Lynch*, Appeal No. 2011AP2680, 2015 WL 3761117, (Apr.30 2015). As an alternative to their request to overturn *Shiffra*, the State has previously proposed its own modification to the *Shiffra* framework. Specifically, they suggested that when a victim refuses to release their records, the courts be allowed to use the exception in § 146.82 for a valid court order so that the records can be received regardless of the victim's objection. *Id.* In short, the State would fix *Shiffra* by abandoning victims and ignoring their rights all together.

The original rationale of *Shiffra* ignored victims as independent entities with rights to enforce and a desire to protect their confidential and privileged records, even if the State does not agree. In this appeal, the State's failure to object to the defendant's request for *in camera* inspection of TAJ's records left TAJ voiceless and his rights unenforced. Such a result is contrary to the rights set forth in Chapter 950 and the newly amended Constitution. In the face of these laws and the development of victim rights the basic rationale of *State v. Shiffra* is no longer valid or reliable.

II. *State v. Shiffra* Should Be Overturned Because It Has Become Detrimental to the Coherence and Consistency of the Law.

The decision to overturn decades of precedent is not to be taken lightly. The Court in *Johnson Controls*, emphasized that:

The rationales for following the doctrine of stare decisis are familiar. They include:

[1] the desirability that the law furnish a clear guide for conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; [2] the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and [3] the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

264 Wis.2d 60, 94. The Court further emphasized the need for consistency in the law and the importance of stare decisis in contributing to the perceived integrity of the judicial process. *Id.* at 95. Yet the same principles that support adherence to stare decisis, support overturning *Shiffra*.

Destare decisis may not be a simple matter of meeting one, two or even three of the criteria set forth in *Johnson Controls*. 264 Wis.2d 60, 94. But the decision to overturn precedent should adhere to the same standards and rationale used to support stare decisis. In this case, it is not upholding *State v. Shiffra* which maintains public faith in the judiciary, rather it is upholding and confirming the laws established in Chapter 950 and the Legislative and citizen support evidenced in the passage of Marsy's Law. Rights for crime victims have been repeatedly established, advanced, and supported. Enforcing these rights creates certainty of law, faith in the court, and faith in the integrity of the judicial system.

State v. Shiffra and its progeny do not address or even recognize existing rights for crime victims. Should *State v. Shiffra* be allowed to remain, then those laws would lose meaning and authority. Victims would not be able to rely on them for protection, their enforcement would be inconsistent in relation to other victim rights issues, and the judiciary would appear inconsistent and unpredictable in its recognition of Chapter 950 and Article 1 Section 9m.

Allowing *State v. Shiffra* to remain despite the new laws which undermine it would result in the same inconsistency and confusion. It would jeopardize the coherence and effectiveness of victim rights laws. Furthermore, it would likely result in multiple interpretations and conflicting decisions by the lower courts, as they individually navigate how new victim rights laws affect *Shiffra-Green* motions. Without guidance from this Court, individual circuit court judges will be forced to make ad hoc decisions in an attempt to bring cohesion and consistency to this area, resulting in unequal and unpredictable treatment for victims. Such inconsistency undermines public trust in the judiciary and legal system generally, cutting against a core purpose of stare decisis. The procedure set for in *Shiffra* is at direct odds with a victim's right to privacy, right to refuse discovery requests, and right to reasonable protection from the accused. Trial courts are left unable to simultaneously honor the demands of *Shiffra* and the Wisconsin Constitution.

State v. Shiffra does not account for the rights of crime victims, yet it is precisely these rights created by the Legislature that need to be enforced and must be considered when balancing competing interests in discovery requests. The continued use of an outdated and undermined *State v. Shiffra* would be detrimental to the coherence and consistency of the law. Thus, *State v. Shiffra* should be overturned.

III. Regardless of Whether *State v. Shiffra* is Overturned, this Court Must Grant Victims Standing in Order to Reconcile the Law.

The question about the fate of *Shiffra* raises a new consideration: the role of victim rights laws, specifically Wis. Stat. § 950.105 and Article I, Section 9m of the Wisconsin Constitution, and how they change the existing *Shiffra-Green* procedure, as well as the underlying *State v. Shiffra* ruling. Irrespective of this Court's decision about overturning *State v. Shiffra*, these victim rights laws remain. Clear direction from this Court on a victim's standing is necessary to protect victim rights and to ensure uniformity and clarity among the lower courts.

If this Court overturns *State v. Shiffra*, TAJ's original appeal would not be rendered moot and his request for this Court to grant standing remains viable. "An issue is moot when its resolution will have no practical effect on the underlying controversy." *Tavern League of Wisconsin, Inc. v. Palm*, 2021 WI 33, ¶ 15, 396 Wis. 2d 434, 443, 957 N.W.2d 261, 266 (*quoting Portage Cty. v. J.W.K. (In re J.W.K.)*, 2019 WI 54, ¶11, 386 Wis. 2d 672, 927 N.W.2d 509.). The issue of TAJ's standing will almost certainly have a practical effect on the underlying controversy regardless of the continued validity of the *Shiffra* line of cases, because the defendant would still be free to seek access to TAJ's records.

Overturning *State v. Shiffra* would not result in a corresponding rule limiting a defendant's pretrial discovery rights. Nor would it negate a defendant's due process rights to a fair trial. Defendants may attempt to use other discovery methods such as subpoenas to request records, motions arguing that privileges have been waived, and arguments that the requested records meet specific exceptions or are not covered by any privilege or confidentiality rule. As such, victims' standing to assert and protect their rights remains vital. Privileges, like all rules of evidence, are not self-executing or enforcing. Victims would, even in a world with an absolute privilege, still require standing to make that privilege meaningful by enforcement in court. Thus, regardless of how this Court disposes of *Shiffra*, victims require a seat at the table and a place in the courtroom to ensure that their rights are protected.

Even assuming, arguendo, that TAJ's claim of standing was rendered moot, this Court has also recognized several exceptions to Wisconsin's mootness doctrine:

"(1) the issues are of great public importance; (2) the constitutionality of a statute is involved; (3) the situation arises so

often a definitive decision is essential to guide the trial courts; (4) the issue is likely to arise again and should be resolved by the court to avoid uncertainty; or (5) the issue is capable and likely of repetition and yet evades review.”

2021 WI 33, ¶ 15, 396 Wis. 2d 434, 443, 957 N.W.2d 261, 266. This appeal centers on an issue of great public importance: victim rights, their interpretation, and their usage in criminal cases. TAJ’s standing to be heard in response to motions like those under *Shiffra-Green* is, and will remain, likely to arise again. The question of victim standing, specifically a clear statutory interpretation of Wis. Stat. §950.105, is therefore necessary to avoid uncertainty and provide guidance to the lower courts for future litigation.

Neither the text of Wis. Stat. § 950.105 nor the language of WI. Const. art. I. § 9m(2)(i) limit standing to the *Shiffra-Green* context or to requests for privileged records. Both refer broadly to “...any proceeding during which a right of the victim is implicated...”. A ruling from this Court clarifying that these two provisions grant a victim standing would provide critical guidance to the lower courts that will have to give form and substance to these new rights. It will also provide guidance to the growing number of victim rights attorneys who want to help victims understand and assert those rights independently.

Thus, TAJ’s request that this Court find that he has proper standing to be heard as a crime victim is not moot and must be decided. In doing so, TAJ asks this Court to hold that victim standing is granted under a proper statutory interpretation of Wis. Stat. § 950.105. While the Court of Appeals ignored Wis. Stat. § 950.105 in favor of relying on the new Amendment, this is not sufficient to protect victims and ensure standing.

First, as the Court likely knows, the new Amendment is currently being challenged in the Court of Appeals, alleging that it is unconstitutional on grounds unrelated to the claims at issue in this case.⁴ Second, since the Court of Appeals in this case grounded its analysis of standing solely in the constitutional Amendment, should the Amendment be found unconstitutional, the grounds providing TAJ standing would also disappear. Thus, circuit courts and crime victims would be back to square one, having to relitigate this appeal, creating confusion and delay in the process.

Furthermore, the interpretation of §950.105 is independently necessary. Whether §950.105 grants victims standing, both in the *Shiffra-Green* context and

⁴ *Wisconsin Justice Initiative, Inc. v. Wisconsin Elections Commission*, Appeal No.2020AP002003. As of the date of this writing, CCAP indicates that all briefing has been completed, and the case is pending a decision from the Court of Appeals, District 4.

outside it, is still a question of first impression not addressed by this Court. TAJ argues that §950.105 grants broad standing to victims, but this interpretation has not been addressed by any court before, resulting in a lack of clarity and uniformity. Affirming the unequivocal grant of standing to victims under §950.105 would ensure that victims in all circuit courts across the state are provided with an opportunity to be heard and to assert and protect the rights provided to them in Chapter 950 and under all the statutes.

CONCLUSION

TAJ respectfully requests that this Court find that crime victims have the proper standing to be heard in court in response to any motions requesting *in camera* inspections of their private, privileged and confidential records. TAJ respectfully request that this Court find that such standing is legally provided independently and uniquely under both Wis. Stat. §950.105 and the newly Amended Constitution. From these rights and the legal standing afforded victims, TAJ argues that he would have a right to be heard in response to Mr. Johnson's motion regarding his private health records, but further that Mr. Johnson's motion is based on improper and outdated law precisely because it has ignored TAJ's rights.

There has been a significant change in the law since *State v. Shiffra* was decided in 1993. These changes, in the form of new and stronger victim rights laws, makes *State v. Shiffra* unworkable, and undermine its original rationale (which arguably was decided improperly). Most of all, the continued use of *Shiffra* as it has existed would be detrimental to the coherency and consistency of the law, specifically the rights of crime victims.

There are multiple grounds upon which this Court is justified in departing from the doctrine of stare decisis and overturning *State v. Shiffra*. It is timely and appropriate to overturn its precedent and to permit a fresh look at how to balance the competing interests of defendants, the State, and, most significantly, crime victims.

Dated December 6, 2021.

Respectfully submitted,

Dated December 6, 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 4492 words.

Dated this 6 day of December, 2021.

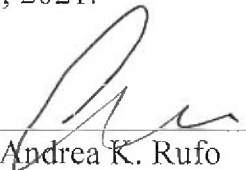


Andrea K Rufo
Attorney for the Appellant, T.A.J.**CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)**

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 6 day of December, 2021.



Andrea K. Rufo
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