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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

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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ISSUE PRESENTED

In *Pennsylvania v. Ritchie*,[1] the United States Supreme Court issued a narrow decision addressing a unique situation: the intersection between a defendant's due process pretrial right to disclosure of government-held records under *Brady*[2] and a state statute providing qualified confidentiality of those records. Under those circumstances, the Court determined that courts should balance a defendant's pretrial *Brady* right against the state's interest in maintaining confidentiality in its investigatory files, and developed a pleading standard and in camera review procedure for those circumstances.

In *Shiffra*,[3] the court of appeals misinterpreted *Ritchie* to require its in camera procedure to apply to a significantly broader class of circumstances: situations where a defendant seeks a victim's privately held, statutorily privileged, mental health records.[4] It based its holding on a defendant's trial right to present a complete defense, which *Ritchie* did not rely on; it extended that trial right to the context of pretrial discovery, contrary to Supreme Court law; and it applied *Ritchie* to private, statutorily privileged records without considering that the privilege protected the records from disclosure.

Should this Court overrule *Shiffra* and its progeny?

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[1] *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

[3] *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993).

[4] The State uses the term "victim" to refer to the privilege-holder for simplicity. It does not mean to suggest that defendants filing pretrial *Shiffra/Green* motions do not enjoy the presumption of innocence or to exclude non-victim witnesses whose records may be subject to a *Shiffra/Green* motion.

The lower courts lack authority to overrule this precedent. Only this Court can, and should, overrule it.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is customary for this Court. The State requests oral argument.

INTRODUCTION

This Court appropriately departs from stare decisis with caution, and does so only with compelling justifications: when a decision is objectively wrong or unsound in principle, when it involves an objectively erroneous statutory interpretation, when developments in the law have undermined the rationale behind a decision, or when the decision is shown to be unworkable in practice. Departure from stare decisis to overrule *Shiffra* is warranted.

Shiffra was wrongly decided and unsound in principle. It extended the limited, *Brady*-based holding in *Ritchie* to permit access to private, privileged, and confidential records, based on an incorrect understanding of *Ritchie* and adherence to two cases that did not analyze *Ritchie*. As discussed in Part I, there is no due process basis for a defendant to access a witness's privately held and privileged mental health files.

The *Shiffra/Green*[5] process has also proven to be unworkable in practice and contrary to multiple public policies. As discussed in Part II, these motions disproportionately affect and target victims alleging sexual assault and domestic violence, which has grievously harmed Wisconsin's strong interest in protecting the therapist-patient

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[5] *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. *Green* further defined the pleading standard required for in camera review, but it did not modify *Shiffra*'s holding as to the applicability of *Ritchie* to private files.

privilege. They also undermine the public's interest in prosecuting sexual assault complaints and policies promoting open judicial proceedings. Further, the *Shiffra/Green* process presents numerous practical difficulties in protecting files released by third parties, and is contrary to Wisconsin's long legacy as a leader in protecting crime victims.

Defendants do not have a constitutional right to discover a victim's privileged mental health records outside the government's possession. This Court should join the multiple other courts that have so found, and overrule *Shiffra*.

ARGUMENT

I. The court of appeals in *Shiffra* wrongly extended *Ritchie* to require a process to allow defendants pretrial discovery of a victim's private and privileged records.

Due process does not require allowing defendants to seek pretrial discovery of private files that the government does not possess and that are protected by a statutory privilege without an applicable exception for the sought-after use. Accordingly, there is no legal basis for reaffirming *Shiffra*. This Court should overrule it.

In this Part, the State starts with *Ritchie* and explains why its holding is limited to much narrower circumstances than what the court in *Shiffra* misinterpreted *Ritchie* to reach. The State then discusses the *Shiffra* holding and identifies its foundational flaws—including reliance on an inapplicable due process right and binding itself to noncontrolling language in previous court of appeals cases—demonstrating why it was wrongly decided.

A. The Court in *Ritchie* created a procedure for limited situations when *Brady* intersects with statutes protecting the confidentiality of nonprivileged, government-held investigative records.

1. *Ritchie* involved government-held records protected only by a qualified confidentiality statute.

Ritchie was charged with sex crimes against his daughter, who reported those assaults to police. *Pennsylvania v. Ritchie*, 480 U.S. 39, 43 (1987). The police referred the matter to Children and Youth Services (CYS), a state-created protective service agency to investigate cases of suspected child mistreatment. *Id.* at 43.

Ritchie served a subpoena on CYS ordering it to turn over to him records "concerning his daughter," and records compiled a year earlier when CYS had "investigated a separate report" that his children were being abused. *Id.* at 43. CYS refused to comply, citing a Pennsylvania statute providing that all CYS records, "shall be confidential," but subject to multiple exceptions; one of those exceptions required release of those records to a "court of competent jurisdiction pursuant to a court order." *Id.* at 43 & n.2, 44 (citing 11 Pa. Stat. Ann. § 2215(a)(5) (Purdon Supp. 1986)). After reviewing a portion of the CYS file, and accepting a CYS representative's explanation that there was no medical report in the record, the trial court refused to order CYS to disclose the files. *Id.*

After Ritchie was convicted, the Pennsylvania appellate courts reversed. Ultimately, the Pennsylvania Supreme Court held that CYS's failure to disclose the file violated Ritchie's confrontation and compulsory process rights and that Ritchie was entitled access to the entire CYS file. *Id.* at 46.

The Supreme Court granted certiorari and addressed "whether and to what extent a State's interest in the confidentiality of its investigative files concerning child abuse" must be trumped by a criminal defendant's constitutional rights. *Id.* at 42–43. Ritchie argued that his rights to confrontation, compulsory process, and due process all required disclosure. *Id.* at 51–56.

A four-member plurality rejected Ritchie's confrontation argument, concluding that that right does not compel "pretrial disclosure of all information that might be useful in contradicting unfavorable testimony." *Id.* at 53. The majority also declined to engage in a compulsory process analysis; instead, it viewed its due-process analysis as the appropriate framework. *Id.* at 56.

The Court based its due-process analysis on cases involving the government's duty to disclose material exculpatory or impeachment evidence within its possession. *Id.* at 57 (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985); *United States v. Agurs*, 427 U.S. 97 (1976); and *Brady v. Maryland*, 373 U.S. 83 (1963)). Indeed, in *Ritchie*, there did not appear to be a dispute that the CYS files were in the government's possession through its state-created agency charged with investigating child-abuse allegations.

Rather, the focus was on the materiality inquiry under *Brady*. In *Ritchie*, no one could say whether the file contained material information because the parties had not seen the file and the trial court reviewed only part of it. *Ritchie*, 480 U.S. at 57. In response to Pennsylvania's argument that its interest in confidentiality trumped any materiality inquiry, the Court demurred. It agreed that while "the public interest in protecting this type of sensitive information is strong," that interest does not "necessarily prevent[ ] disclosure in all circumstances." *Id.* at 57–58. Rather, the Court explained, when the governing statutes reflected legislative intent that otherwise-confidential agency files could be disclosed when a

court of competent jurisdiction so orders, the government could be compelled to provide the court those files for a materiality determination under *Brady*. *Id.* at 57–58.

So, *Ritchie* permits courts to balance the competing interests between a defendant's Sixth Amendment due process rights and state laws protecting the confidentiality of certain government records. However, its applicability is limited and depends on two key, and related, conditions. *Accord State v. Lynch*, 2016 WI 66, ¶ 27, 371 Wis. 2d 1, 885 N.W.2d 89 (lead opinion) (identifying these "two key takeaway points" from *Ritchie*). First, its holding applies the balancing test only to files in the government's possession. Second, its holding does not apply to records that the Legislature has designated as privileged from disclosure and has not established an applicable exception to that privilege. The State addresses both points below.

2. *Ritchie's* holding applies only when the sought-after records are in the government's possession.

The first takeaway from *Ritchie* is that its holding, rooted in *Brady*'s pretrial right to disclosure of exculpatory evidence that the government possesses, is limited to disputes over files in the government's possession. There, government possession included files held by a state-established agency tasked with investigations into child abuse that could lead to potential criminal prosecutions. Indeed, the *Ritchie* Court recognized that limitation, discussing the government's overall interest in "protecting *its* child-abuse information," all framed in language reflecting that the government, through its state-created investigatory agency CYS, possessed the records and was responsible for the information contained therein:

> If the CYS records were made available to defendants, even through counsel, it could have a seriously adverse effect on *Pennsylvania's efforts to uncover and*

> *treat abuse*. Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child *have a state-designated person* to whom he may turn, and to do so with the assurance of confidentiality. . . . Recognizing this, the *Commonwealth—like all other States—has made a commendable effort* to assure victims and witnesses that they may speak *to the CYS counselors without fear of general disclosure*.

Ritchie, 480 U.S. at 60–61 (emphasis added) (footnote omitted). In other words, the right to maintain confidentiality of the files in *Ritchie* belonged to the government, not the victim or a third party.

Accordingly, the Supreme Court's reliance on *Brady* was apt. Prosecutorial "possession" includes relevant evidence held by other arms of the government tasked with investigating the case. *See Strickler v. Greene*, 527 U.S. 263, 281 (1999) (stating that under *Brady* a prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police") (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). The Court has never construed *Brady* to create a freestanding constitutional right to pretrial discovery of potential evidence, no matter who holds it and irrespective of any privilege it may enjoy. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one").

This Court, too, has long recognized that "there is no general constitutional right to access information in criminal cases." *Lynch*, 371 Wis. 2d 1, ¶ 47 (lead opinion) (collecting cases). "Accordingly, a defendant is entitled to access information only to the extent outlined in Wis. Stat. § 971.23, our criminal discovery statute." *Id.* There is nothing in Wis.

Stat. § 971.23 suggesting that a defendant has a right to pretrial discovery of a victim's privately held, confidential, and privileged counseling records.

Other courts have recognized that *Ritchie* applies only to records in the government's possession. Pennsylvania, for example, has understood *Ritchie* to apply only to government-possessed files.[6] The Seventh Circuit likewise has recognized that *Ritchie* requires records in the government's possession. *United States v. Hach*, 162 F.3d 937, 947 (7th Cir. 1998). Of those other state and federal courts considering the issue, numerous have held the same.[7]

As a practical matter, when *Ritchie* applies to records outside the government's possession, defendants can gain an unparalleled evidentiary advantage over the State. If a court finds what it deems material exculpatory information during

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[6] *See, e.g.*, *Commonwealth v. Kennedy*, 604 A.2d 1036, 1046 (Pa. Super. 1992); *see also Commonwealth v. Davis*, 650 A.2d 452, 460 (Pa. Super. Ct. 1994) (stating that when "information pertaining to the victim's sexual assault counseling is in the possession of the Commonwealth" the state's absolute privilege statute did not bar disclosure).

[7] *See, e.g.*, *Newton v. Kemna*, 354 F.3d 776, 784 (8th Cir. 2004) (stating that the *Ritchie* balancing test only applies to state-held files); *United States v. DeLeon*, 426 F. Supp. 3d 878, 918 (D. N.M. 2019) (no duty for government to provide files outside its possession); *United States v. Shrader*, 716 F. Supp. 2d 464, 473 (S.D. W.V. 2010) (*Ritchie* does not apply to confidential records not in government possession or control) *United States v. Duckey*, 2008 WL 619145, *1 (D. Ariz. 2008) (same); *Vaughn v. State*, 608 S.W.3d 569, 574–75 (Ark. 2020) (same); *Goldsmith v. State*, 651 A.2d 866, 873 (Md. Ct. App. 1995) (where psychotherapist-patient privileged records were not in possession of state agency, nothing in *Ritchie* "would constitutionally require the pre-trial discovery" of the sought-after records); *People v. Stanaway*, 521 N.W.2d 557, 569 (Mich. 1994) (*Ritchie* doesn't apply to materials outside the government's possession); *State v. Bell*, 469 P.3d 929, 936–37 (Utah 2020) (same); *State v. Percy*, 548 A.2d 408, 415 (Vt. 1988) (same).

in camera review, it turns over that exculpatory evidence only. Yet the records may also contain inculpatory evidence or contextual information that would undercut the allegedly exculpatory material. In effect, to assist his defense, the defendant obtains context-free evidence from privileged records that never were available to the government to aid in its prosecution, and the government can't counter such evidence with inculpatory or contextual content from the same files. This result is not only contrary to *Ritchie*'s foundation on a defendant's rights under *Brady*, but also to the rights of the public and State, and to the notion that access to privately held files is necessary to fulfill the judicial system's truth-seeking function. *See, e.g.*, *State v. Grande*, 169 Wis. 2d 422, 434, 485 N.W.2d 282 (Ct. App. 1992) (noting that this Court has recognized the State's rights to a fair trial and opportunity to convict) (citing *State v. Copening*, 100 Wis. 2d 700, 723–24, 303 N.W.2d 821 (1981)); *see also State v. Behnke*, 203 Wis. 2d 43, 56, 553 N.W.2d 265 (Ct. App. 1996).

3. For *Ritchie* to apply, any confidentiality rule or privilege must contain an exception that applies to the facts at hand.

Ritchie further establishes that when the question whether a defendant's right to disclosure overcomes the State's interest in maintaining confidentiality in its files arises, the exceptions in the applicable confidentiality and privilege statutes are dispositive. And Wisconsin's privilege statute does not contain any exception that allows for disclosure of private mental health records in nonhomicide criminal trials.

a. Privilege and confidentiality statutes serve different functions.

Though the terms confidentiality and privilege are often used interchangeably, they serve different practical and legal functions. Confidentiality refers to the professional norm or ethic that information pertaining to clients will not be shared with third parties. *See Lynch*, 371 Wis. 2d 1, ¶ 19 (lead opinion) (citation omitted). Privilege refers to the disclosure of confidential information during legal proceedings; its purpose is to protect relationships, e.g., attorney-client, spousal, healthcare provider-patient. *See id.*

A statute providing confidentiality in certain communications does not necessarily establish a privilege. *See, e.g.*, *In re John Doe Proceeding*, 2004 WI 65, ¶ 14, 272 Wis. 2d 208, 680 N.W.2d 792 (stating that statute establishing that certain data is to be kept confidential did not necessarily establish a legal privilege from disclosure). But when a constitutional, statutory, or common-law privilege protects a relationship involving confidential communications, the party receiving privileged information must keep it confidential unless the discloser waives the privilege. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 709–10 (1974); *State v. Gilbert*, 109 Wis. 2d 501, 507–08, 326 N.W.2d 744 (1982) (interests protected by legal privilege can "outweigh the public interest in the search for truth" in legal proceedings) (citation omitted).

Ritchie involved a statute requiring CYS to maintain confidentiality in communications between it and its clients, unless disclosure was requested by "[a] court of competent jurisdiction pursuant to a court order." *See* 11 Pa. Stat. Ann. § 2215 (Purdon Supp. 1986). Although confidential, these communications had no statutory privilege protecting them from disclosure in legal proceedings. The *Ritchie* Court recognized the distinction: "[t]his is not a case were a state

statute grants CYS the absolute authority to shield its files from all eyes." *Ritchie*, 480 U.S. at 57–58. It compared the statute at issue, section 2215, with a different Pennsylvania statute providing an absolute "statutory privilege for communications between sexual assault counselors and victims." *Id.*[8] In other words, the Court recognized that whether a defendant's right to disclosure of confidential government-held materials overcame the State's interest in maintaining that confidentiality depended on whether the Legislature contemplated their use in the type of judicial proceedings at hand. In *Ritchie*, the Pennsylvania Legislature had contemplated such use by recognizing applicable exceptions to confidentiality of the records and by not creating a privilege against their disclosure.

Subsequent Supreme Court law supports the understanding that private, privileged files are not subject to disclosure absent a recognized exception. In *Jaffee*, the Supreme Court reviewed a decision of the Seventh Circuit regarding whether a common-law psychotherapist-patient

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[8] That statute established the following privilege to apply to confidential communications between a victim and a sexual assault counselor:

> **(b) Privilege.** —A sexual assault counselor has a privilege not to be examined as a witness in any civil or criminal proceeding without the prior written consent of the victim being counseled by the counselor as to any confidential communication made by the victim to the counselor or as to any advice, report or working paper given or made in the course of the consultation.

42 Pa. Cons. Stat. § 5945.1 (1982). Under Pennsylvania law, materials subject to that privilege are only discoverable if the defendant shows that the state possesses the materials. *See Davis*, 650 A.2d at 460 (stating that privilege in section 5945.1 is inapplicable "where information pertaining to the victim's sexual assault counseling is in the possession of the Commonwealth").

privilege exists under Rule 501 of the Federal Rules of Evidence and prevents compelled disclosure of privately held therapy files. *Jaffee v. Redmond*, 518 U.S. 1 (1996). The Court discussed at length the great importance of protecting communications between a psychotherapist and patient. It emphasized that even the "mere possibility of disclosure" could harm the development of the patient-therapist relationship and the therapist's ability to help the patient. *Id.* at 10–11. "[T]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id.* at 11. Contrasting that "transcendent importance" in maintaining that privilege with the modest, at best, "evidentiary benefit" of denying it, the Court held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501." *Id.* at 15.

The Court further rejected the Seventh Circuit's and other courts' view that the psychotherapist-patient privilege should be balanced against the need for evidence in a given case:

> Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. . . . [I]f the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

Jaffee, 518 U.S. at 17–18 (citation omitted).

So, the Court in *Jaffee* established that the psychotherapist-patient privilege has a near-absolute effect

protecting those communications from disclosure. The *Jaffee* Court identified only one example in which the privilege must give way, which was "if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." *Id.* at 18 n.19. Disclosure in that situation, however, would be much narrower in purpose and scope (disclosing only what was necessary to protect the patient's or another person's safety) than the wholesale in camera review of months' or years' worth of therapy records that are typically subject to a *Shiffra/Green* motion to discover evidence for use by the defendant against the patient.

Hence, the *Jaffee* holding squares with the interpretation of *Ritchie* that a qualified state rule protecting the confidentiality of government-held files justified the balancing test in *Ritchie*, but wouldn't extend to private communications protected by a privilege without applicable exceptions.

Numerous other courts have declined to apply *Ritchie* to private communications protected by a statutory privilege with no exceptions identified for use in criminal trials.[9] For example, Pennsylvania courts have held that the holding in *Ritchie* is inapplicable to permit a defendant to seek access to sexual-assault counselor-client files protected by a statutory privilege where the state legislature identified no applicable exceptions to pierce that privilege. *See Commonwealth v.*

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[9] *See, e.g.*, *People v. Turner*, 109 P.3d 639 (Colo. 2005) (communications between domestic advocate agency and abuse victim were privileged); *State v. Famigletti*, 817 So. 2d 901, 907 (Fla. Dist. Ct. App. 2002) (*Ritchie* does not authorize invasion of testimonial privilege); *In re Crisis Connection, Inc.*, 949 N.E.2d 789, 799–802 (Ind. 2011) (*Ritchie* does not apply to victim-advocate privilege, which excludes from its protection disclosure by persons affiliated with the State); *State v. J.G.*, 619 A.2d 232, 237 (N.J. Super. App. Div. 1993) (declining to permit in camera disclosure to absolutely privileged files); *see also* cases cited, *supra* note 7.

Wilson, 602 A.2d 1290, 1297 (Pa. 1992). As discussed below, Wisconsin's qualified confidentiality statutes yield to Wis. Stat. § 905.04, Wisconsin's privilege statute. And section 905.04 does not contain an applicable exception to permit criminal defendants in nonhomicide cases to overcome the privilege protecting therapist-patient records.

b. In Wisconsin, there is no exception to the therapist-patient privilege justifying application of the *Ritchie* balancing test.

Mental health records are subject to both confidentiality and privilege statutes. The former provide that records are to remain confidential unless the patient or a person authorized by the patient gives informed consent for their release. *See* Wis. Stat. §§ 51.30(4)(a) (governing mental health treatment records); 146.82(1) (governing medical health care records). These statutes, like the controlling confidentiality statute in *Ritchie*, recognize circumstances that permit access without informed consent, including "under a lawful order of a court of record," or to a county department, "a sheriff or police department, or a district attorney for purposes of investigation of threatened or suspected child abuse or neglect." Wis. Stat. § 146.82(2)(a); *see also* Wis. Stat. § 51.30(4)(b)4. ([p]ermitting access to mental health records "pursuant to a lawful court order of a court of record").

In contrast to the facts in *Ritchie*, where there was no applicable privilege statute, communications between a patient and health care provider—including a physician, psychologist, and professional counselor, among others—are protected by Wisconsin's privilege statute, Wis. Stat. § 905.04. Section 905.04(2) establishes a general rule of privilege that allows the patient to prevent disclosure for use in legal proceedings of their confidential communications with their

provider. And both sections 51.30 and 146.82 contain provisions saying that section 905.04 supersedes those statutes or otherwise governs the disclosures allowed in them, meaning the "lawful order of a court of record" must fit into one of the delineated exceptions in section 905.04(4). *See* Wis. Stat. §§ 51.30(6); 146.82(1).

None of the exceptions in 905.04(4) recognizes access to private, confidential files in criminal cases other than in homicide trials. Notably absent from the statute is any exception to the privilege "when the disclosure relates directly to the facts or immediate circumstances" of any other type of criminal case. *Id.* Most of the exceptions relate to guardianship, paternity, or juvenile proceedings. Wis. Stat. § 905.04(4)(a)–(c), (g), (i). Others relate to records that involve tests for intoxication, are mandatory reports of certain injuries, abuse, or neglect, or contain threats of school violence. Wis. Stat. § 905.04(4)(e)–(f), (h).

The final exception does not recognize legislative intent for the release of privileged health records for use in criminal matters, other than in homicide trials. Wis. Stat. § 905.04(4)(d). This exception is for "communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient," but under just two circumstances: (1) "in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense," or, (2) "after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense." Wis. Stat. § 905.04(4)(c). That exception appears to be aimed at civil trials in which the patient's condition is an element of the claim; it does not reflect legislative intent that a pretrial discovery request in a nonhomicide criminal matter could lift the privilege.

Thus, the privilege is absolute when the records are sought for the purposes typically requested in a

Shiffra/Green motion, i.e., to impeach the victim's credibility in a sexual assault or domestic violence trial. The operation of section 905.04 distinguishes Wisconsin's scheme from the confidentiality statute at issue in *Ritchie*.

B. The court of appeals in *Shiffra* misinterpreted *Ritchie* and improperly relied on cases that do not analyze *Ritchie*.

In *Shiffra*, an adult woman, P., claimed that Shiffra sexually assaulted her after the two met at a bar; Shiffra's planned defense was that the contact was consensual. *Shiffra*, 175 Wis. 2d at 602–03. Before trial, the State disclosed to Shiffra that P. "has a history of psychiatric problems which may affect her ability to perceive and relate truthful information." *Id.* at 603. Based on that information, Shiffra moved to access P.'s records reflecting her "psychiatric history, psychiatric records and . . . medical information from any doctors, hospitals or counselors" she had seen regarding her mental condition. *Id.* The trial court granted the order, P. refused to waive her privilege, and the court barred her from testifying at trial. *Id.* at 604–05.

On the State's appeal, the parties agreed that if Shiffra had a due process right to the court's in camera review of the files, it would be based on *Ritchie*. *Id.* at 606. The court of appeals, accordingly, began with general statements that the question "implicates Shiffra's constitutional right to due process of law." *Id.* at 605. It then, however, invoked not *Brady* or the due process right to disclosure of government-possessed exculpatory evidence, but rather *California v. Trombetta*, 467 U.S. 479, 485 (1984), and stated that due process requires that criminal defendants "must be given a meaningful opportunity to present a complete defense." *Shiffra*, 175 Wis. 2d at 605.

The court then dismissed the State's arguments why *Ritchie* did not apply. As for the fact that P.'s records were not

in the possession of the prosecution or some other government agency, it declared itself "bound by Wisconsin precedent" in *In re K.K.C.*, 143 Wis. 2d 508, 511, 422 N.W.2d 142 (Ct. App. 1998), and *State v. S.H.*, 159 Wis. 2d 730, 736, 465 N.W.2d 238 (Ct. App. 1990), claiming that "both cases unequivocally adopted *Ritchie* as the law in Wisconsin even when the records are not in the state's possession." *Shiffra*, 175 Wis. 2d at 607. It summarily dismissed the State's argument that P.'s records, unlike Ritchie's, were privileged under section 905.04, stating that under *S.H.* and *K.K.C.* "a statute allowing for confidentiality is not a barrier to *in camera* review." *Id.* at 607. The Court then claimed that Shiffra made an adequate preliminary showing of materiality—even though he had significant information from P. herself about her mental health issues—for in camera inspection of P.'s files, writing that trial judges were equipped to balance the competing interests:

> If we ignore[ ] the mandate of *Ritchie* and deny Shiffra's request for *in camera* inspection, we would be disregarding the best tool for resolving conflicts between the sometimes competing goals of confidential privilege and the right to put on a defense. Public policy and the history of our judicial system require that Wisconsin's courts embrace *Ritchie* in the manner prescribed by our court in *K.K.C.* and *S.H.*

Id. at 611–12.

1. *Shiffra*'s foundation on *Trombetta*, *K.K.C.*, and *S.H.*, was no foundation at all.

Shiffra was wrongly decided for many reasons. For the purpose of whether it should be overruled to the extent that it applies to privileged records not in the government's possession, the State focuses on two points.

a. *K.K.C.* and *S.H.* did not require the *Shiffra* court to extend *Ritchie* to private files or to overlook the privilege statute.

First, the *Shiffra* court wrongly understood *K.K.C.* and *S.H.* to bind it to the propositions that (a) *Ritchie* applies to privately held records, and (b) "a statute allowing for confidentiality is not a barrier to *in camera* review." *Id.* at 606–07. Both of those cases involved unreasoned decisions adopting *Ritchie* without confronting the question of government possession, and both misread *Ritchie* to hold that a confidentiality statute cannot bar a defendant from seeking disclosure.

K.K.C., 143 Wis. 2d 508, is a three-page opinion involving a defendant's request for in camera review of records concerning seven juvenile victims and held by the Rock County Department of Social Services. The records were protected from disclosure under Wis. Stat. § 48.78(2)(a), which provided an exception to confidentiality "by order of the court." *K.K.C.*, 143 Wis. 2d at 509. After the juvenile court ordered the department to deliver its files to a criminal court for in camera review, the court of appeals reversed and held that the juvenile court should review the records. *Id.* at 511. Accordingly, the question in *K.K.C.* was not how broadly or even whether *Ritchie* applied, but which court under the circumstances should conduct the in camera review.

In response to the defendant's claim that his due process rights would be violated if the criminal court did not review the files, the court of appeals stated, essentially, that the claim was not ripe because the defendant had not moved the criminal court to conduct an in camera review. *Id.* at 511. It reflected that the defendant could move the criminal court for the records under *Ritchie*, and that he could get review in that court with an adequate pleading, but it did not engage in any analysis of *Ritchie*. *Id.* at 511. At no point did the court of

appeals state that *Ritchie* applied to privately held files, nor did it discuss the privilege statute or its applicability.

In *S.H.*, the sought-after records were held by a private counselor and privileged under Wis. Stat. § 905.04. The defendant, who was accused of sexually assaulting his three children, sought access to those records on statutory grounds, believing that his having signed medical release forms on their behalf in the past permitted him access to the records. *S.H.*, 159 Wis. 2d at 733–35. The court rejected his statutory arguments, holding that the privilege in section 905.04 trumped a parent's right to consent to release. *Id.* at 736–37.

S.H. also argued that he had a constitutional right to access under *Pulizzano*,[10] which the court found inapplicable. *Id.* at 737. The court of appeals then observed that S.H. abandoned any constitutional argument available to him, writing that while *Ritchie* "controls S.H.'s constitutional right to compel disclosure of confidential records," S.H. failed to appeal from the circuit court's denial of his *Ritchie* motion. *Id.* at 737–38. Hence, the only purpose of the *S.H.*'s court mention of *Ritchie* was to explain that S.H. had abandoned any constitutional argument on appeal.

Neither of those cases required the *Shiffra* court to extend *Ritchie* to privately held files privileged under section 905.04. *K.K.C.* involved government-possessed files that were not privileged and arguably fell within the ambit of *Brady*.[11] The *S.H.* court discussed *Ritchie* only to point out that S.H.

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[10] *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990).

[11] Though the court in *K.K.C.* overstated *Ritchie*'s holding, the court's application of *Ritchie* there appears to be sound: that case involved records held by a government investigative agency, there was a statutory exception providing for disclosure of the records by order of the court, and there appeared to be no applicable privilege statute.

abandoned any *Ritchie*-based argument, and did not discuss section 905.04 at all.

So, the *Shiffra* court erroneously read those two cases and their non-application of *Ritchie* as binding it to apply *Ritchie* to private records enjoying an absolute statutory privilege in nonhomicide criminal cases. That was an unfounded expansion of the limited-scenario holding in *Ritchie* to private records protected by a non-analogous statute. The court in *Shiffra* also declined to interpret the privilege statute, section 905.04, and assumed that it operated no differently from the confidentiality statute in *Ritchie*, which is akin to an objectively wrong statutory interpretation. *Cf. Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405 ("We are not required to adhere to interpretations of statutes that are objectively wrong.").

b. The *Shiffra* court was wrong to read *Ritchie* as relying on a defendant's due process right to present a complete defense.

Second, the court of appeals in *Shiffra* wrongly invoked *Trombetta* and a defendant's due process right to present a complete defense as a basis for its holding. *Shiffra*, 175 Wis. 2d at 605. As discussed, *Ritchie* was premised on a different due process right—a defendant's right to disclosure of material, favorable evidence in the government's possession under *Brady*. The court of appeals' approach also failed to consider that a defendant's right to present a complete defense is limited and does not extend to a pretrial discovery request.

The due process right to disclosure of exculpatory materials in the government's possession and the due process right to present a complete defense are very different rights. While the *Trombetta* Court recognized that both rights involve "what might loosely be called the area of

constitutionally guaranteed access to evidence," it explained *Brady* and its line of cases involved evidence in the government's possession. *Trombetta*, 467 U.S. at 485 (citation omitted). It then stated that it was not clear whether "the Due Process Clause imposes on the government the additional responsibility of guaranteeing criminal defendants access to exculpatory information beyond the government's possession." *Id.* at 486. The *Trombetta* Court then addressed the actual issue in that case—an alleged due process violation where the government failed to preserve evidence on behalf of a criminal defendant—holding that the due process clause "does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-analysis tests at trial." *Id.* at 491.

In effect, then, the court of appeals in *Shiffra* used general language in *Trombetta* recognizing the due process trial right to a complete defense to sidestep *Ritchie*'s express reliance on the distinct pretrial due process right to disclosure in *Brady*. And by so extending the principles in *Ritchie* to pretrial disclosure requests for materials not in the government's hands, it created a general due process right to pretrial discovery, which the Supreme Court has expressly held does not exist. *See, e.g.*, *Weatherford*, 429 U.S. at 559 ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."). Nor, as the State explains below, does the law governing a defendant's right to present a complete defense support expanding *Ritchie* to require a mechanism for pretrial access to privileged files not in the government's possession.

2. The Supreme Court would not have held that the right to present a complete defense supported application of the in camera procedure in *Ritchie*.

Though a defendant's right to "a meaningful opportunity to present a complete defense," *Trombetta*, 467 U.S. at 485, sounds like an all-encompassing, broad right, it's actually quite narrow. That right is a trial right implicated when a defendant has evidence that they wish to present at trial but are prevented from doing so by the categorical application of state evidentiary rules untethered from any legitimate purpose for its exclusion. *Id.*

And it is typically a difficult claim on which to prevail. That is so because "[s]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes v South Carolina*, 547 U.S. 319, 324 (2006) (citations omitted). Accordingly, a defendant's right to present a defense is abridged only by the application of state evidentiary rules that both "'infring[e] upon a weighty interest of the accused' *and* [that] are 'arbitrary' or 'disproportionate to the purposes they were designed to serve." *Id.* at 324–25 (citation omitted) (emphasis added). Put differently, evidentiary rules infringe on the right to present a complete defense only when the rules "excluded important defense evidence but . . . did not serve any legitimate interests." *Id.* at 325.

"Only rarely [has the Supreme Court] held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." *Nevada v. Jackson*, 569 U.S. 505, 509 (2013). For example, in *Washington v. Texas*, 388 U.S. 14 (1967), a set of Texas laws categorically barred co-actors in the charged crime from testifying for the defendant (though they could testify for the State). Because those rules were arbitrary and served no

legitimate purpose, they violated Washington's constitutional right to present a defense. *Id.* at 22–23. Similarly, in other cases, the Court has granted relief when evidentiary rules excluding whole categories of defense evidence had an arbitrary effect with no rational purpose.[12]

The right-to-present-a-complete-defense jurisprudence is inapplicable to a pretrial discovery motion for a crime victim's mental health records. Again, the right to present a complete defense is a trial right that is implicated when a state evidentiary rule arbitrarily excludes defense evidence for no legitimate state purpose. A defendant's inability to access communications pretrial that he has no right to reach given their private, privileged, and confidential nature is not an arbitrary and lacking-in-legitimate-purpose evidentiary exclusion; indeed, it's not a trial exclusion at all.

If there is any due process right to production of evidence pretrial outside the *Brady* context, the seemingly closest right is compulsory process. *See Ritchie*, 480 U.S. at 56 ("Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and

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[12] *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) (state law rule barring a defendant's third-party perpetrator evidence when the State offered forensic evidence of guilt was arbitrary and did not rationally serve any legitimate end); *Rock v. Arkansas*, 483 U.S. 44, 62 (1987) (state rule per se prohibiting the admission of the defendant's hypnotically refreshed testimony was arbitrary and violated her due process rights); *Crane v. Kentucky*, 476 U.S. 683, 687 (1986) (state evidentiary rule categorically excluding a defendant's trial testimony bearing on the credibility of his confession was arbitrary and served no valid state justification); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (holding that state evidentiary rule categorically barring Chambers from impeaching his own witness and that State did not even attempt to rationalize violated Chambers' right to present a defense).

the right to put before a jury evidence that might influence the determination of guilt."). But that is still not a general right to have the government produce evidence outside its possession; the Court has "never squarely held that the Compulsory Process Clause guarantees the right to discover the *identity* of witnesses, or to require the government to produce exculpatory evidence." *Id.*

Moreover, the Court has recognized that compulsory process does not require the production of evidence protected by a privilege barring that evidence—such as the psychotherapist-patient privilege recognized in Wis. Stat. § 905.04 and *Jaffee*—from use in the particular circumstances for which it is sought. *Taylor v. Illinois*, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, *privileged*, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly.") (emphasis added).

Accordingly, the *Shiffra* court's unwarranted expansion of *Ritchie*'s limited *Brady*-based holding under the banner of the right to present a complete defense lacked foundation in federal constitutional law. Even if that due process right is implicated, it is a trial (not pretrial) right, and protecting from disclosure "communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition" serves a legitimate purpose and is proportionate to the ends it promotes.

3. Overruling *Shiffra* will not thwart defendants' opportunities to present a meaningful defense.

Again, a defendant has no pretrial due process right beyond *Brady*'s concern with government-held materials that

would justify the in camera procedure set forth in *Shiffra*. Overruling *Shiffra* will not hamper a defendant's ability to present a defense. The lead opinion in *Lynch* set forth multiple reasons why, *Lynch*, 371 Wis. 2d 1, ¶¶ 67–72 & n.31; the State agrees with most of that reasoning,[13] but expands on a few of those points.

To start, defendants have a right to confront and cross-examine the victim and other witnesses at trial. *See Crawford v. Washington*, 541 U.S. 36, 42 (2004); *Ritchie*, 480 U.S. at 51. Under *Crawford*, a victim's presence is required at trial to permit admission of his or her preliminary hearing testimony and other statements alleging the crime. *See State v. Stuart*, 2005 WI 47, ¶ 3, 279 Wis. 2d 659, 695 N.W.2d 259 (recognizing that admission of a non-testifying declarant's preliminary hearing testimony would violate the defendant's right to confrontation).

At trial, defendants have significant evidence available to them to cross-examine the victim. Often the nature of the reporting itself provides opportunities for cross-examination and a vigorous defense. It is not unusual in sexual assault and domestic violence cases—which is where nearly all *Shiffra/Green* motions are filed—to delay reporting, to offer inconsistent or contradictory versions of events, or to be unsure of dates and details. Moreover, victims in sexual assault cases, particularly children, are subjected to forensic interviews that a defendant can use to highlight

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[13] The State disagrees that "[a] defendant could ask a treatment provider who would have been subject to the mandatory reporting requirements if he or she ever reported the defendant to authorities." *Lynch*, 371 Wis. 2d 1, ¶ 72 (lead opinion). In the State's view, such testimony would unlikely ever be relevant, helpful to the defendant, or not also protected by the privilege in Wis. Stat. § 905.04.

contradictions and inconsistencies with an initial disclosure to a parent, reporter, law enforcement, or anyone else.

Finally, if a defendant has enough of a factual basis under the *Green* standard to assert that therapy records likely contain evidence that the victim is routinely dishonest or has difficulty perceiving the truth, that factual basis is by necessity not exclusive to the therapy files. Hence, a defendant can cross-examine the victim on all the facts he would otherwise raise in a *Shiffra/Green* motion. The defendant can introduce character witnesses to testify about the victim's character for truthfulness. He can do all the impeachment he would do if he were on trial in any other criminal case that turned on credibility. His lack of access to treatment files does not violate any of his due process rights when they are not possessed by the government, they do not contribute to the investigation or prosecution of the crime, they provide the jury with nothing that can't be introduced through cross-examination or other evidence, and they are protected by a privilege designed to insulate the vital relationship of trust and confidentiality between a therapist and patient.

In all, due process and *Ritchie* do not require a procedure permitting a defendant to seek access to victim's private, privileged, and confidential mental health records. Because *Shiffra* incorrectly interpreted *Ritchie*, this Court should overrule it.

II. Preserving *Shiffra*'s holding paving access to a crime victim's private, privileged, and confidential records is contrary to public policy.

In addition to the lack of constitutional support for *Shiffra*'s holding, two policy concerns warrant additional discussion.

First, adherence to stare decisis has been a factor in preventing this Court from reaching a majority on whether to

overrule *Shiffra*. *See, e.g.*, *Lynch*, 371 Wis. 2d 1, ¶ 88 (Abrahamson, J. & Bradley, A.W., J., concurring in part, dissenting in part). As discussed above, overruling *Shiffra* is justified because it has no foundation in due process, and, as discussed below, the decision is unworkable in practice and developments in the law have undermined its rationale. Accordingly, adherence to stare decisis should no longer tie this Court's hands.

Second, and relatedly, the court of appeals in *Shiffra* claimed that, in addition to precedent in *K.K.C.* and *S.H.* binding it, "[p]ublic policy and the history of our judicial system" required it to apply the *Ritchie* balancing test to privileged records outside the government's possession. *Shiffra*, 175 Wis. 2d at 612. But years of courts applying *Shiffra* and *Green* demonstrate that *Shiffra* is unsound in principle and unworkable in practice, contrary to public policy.

A. Adhering to stare decisis to maintain *Shiffra* is not warranted.

"The principle of stare decisis applies to the published decisions of the court of appeals" and compels this Court to follow those decisions' precedent, "unless a compelling reason exists to overrule it." *Wenke,* 274 Wis. 2d 220, ¶ 21. "Nonetheless, stare decisis contemplates that under limited circumstances our court may overrule erroneous holdings." *Id.* While stare decisis serves important interests, it "'is not a mechanical formula for adherence to the latest decision,' and a court should, in applying the doctrine of stare decisis, overturn [precedent] when the situation calls for such measure." *Bartholomew v. Wisconsin Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 2006 WI 91, ¶ 31, 293 Wis. 2d 38, 717 N.W.2d 216.

The Supreme Court likewise recognizes these foundational principles, stating that "when governing

decisions are unworkable or are badly reasoned," it "has never felt constrained to follow precedent." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citation omitted). To that end, *"[s]tare decisis* is not an inexorable command." *Id.* at 828. "This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" *Id.* (citation omitted). Moreover, "[c]onsiderations in favor of *stare decisis*" are at their lowest "in cases . . . involving procedural and evidentiary rules." *Id.*

Along those lines, this Court has identified the following justifications for overruling a precedent: (1) "changes or developments in the law have undermined the rationale behind a decision;" (2) the decision was "unsound in principle;" or (3) the decision proved to be "unworkable in practice." *Bartholomew*, 293 Wis. 2d 38, ¶ 33. "A court must keep in mind 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.'" *Id.*

B. Nearly 30 years of *Shiffra* motions reflect that it's unworkable in practice and has disproportionately harmed victims alleging sexual assault and domestic violence.

1. *Shiffra/Green* motions arise almost exclusively in sexual assault and domestic violence cases.

Defendants in Wisconsin file *Shiffra/Green* motions almost exclusively in sexual assault and domestic violence cases. While the State does not collect data on these filings, a Westlaw search of appellate cases citing to *Shiffra* since it was decided identified just four cases in which a defendant

filed a *Shiffra/Green* motion in cases alleging crimes other than sexual assault or domestic violence.[14]

That *Shiffra/Green* motions arise primarily in sexual assault and domestic violence cases isn't a surprise. *Ritchie*, after all, involved claims of child sexual assault; it follows that the procedure in *Shiffra*—another sexual assault case—would arise more often in those cases than other matters.

But that these motions so rarely arise in other cases is striking. Neither the holding in *Ritchie* nor in *Shiffra* is premised on the defendant being accused of sexual assault or domestic violence. Ultimately, those holdings are aimed at allowing a defendant to access material to impeach a witness's credibility and ability to truthfully testify. And impeaching witness credibility is central in all criminal cases. Yet we rarely, if ever, see *Shiffra/Green* motions to access mental health records of police officers, complaining witnesses, or eyewitnesses in criminal cases other than sexual assaults or domestic violence, i.e., cases in which the victims are typically female or children and vulnerable given the nature of their allegations.

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[14] Those cases were *State v. Kletzien*, 2008 WI App 182, 314 Wis. 2d 750, 762 N.W.2d 788 (homicide by intoxicated use of a vehicle); *State v. Ballos*, 230 Wis. 2d 495, 602 N.W.2d 117 (Ct. App. 1999); *State v. Napper*, Nos. 94-3260-CR, 94-3261-CR, 1996 WL 515629 at *7 (Wis. Ct. App. Sept. 12, 1996) (unpublished) (first-degree intentional homicide); and *State v. Kutska*, No. 97-2962-CR, 1998 WL 644759, at *1 (Wis. Ct. App. Sept. 22, 1998) (unpublished) (first-degree intentional homicide).

These results of course offer a limited picture: the Westlaw search only produces appellate cases. It does not include every *Shiffra/Green* motion filed in trial court, or cases in which a motion was filed but not at issue on appeal. But as officers of the court, counsel for the State assert, based on their experience handling criminal appeals and working with prosecutors on these issues, that these motions rarely, if ever, appear in other criminal cases.

The proliferation of these motions in sexual assault cases resuscitates long-held attitudes and rules in American law specifically reflecting "a stance of overt suspicion toward rape accusers." Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*. 166 U. Penn. L. Rev. 1, 21 (2017). It wasn't until the 1970s or so that many states, including Wisconsin, made reforms to expand the circumstances in which sexual assault could be charged; eliminate legal barriers to prosecuting sexual assaults, including repealing rules requiring corroboration, proof of resistance, and a "prompt complaint"; striking instructions "explicitly warning the jury to use special suspicion" in weighing a sexual assault accuser's testimony; and barring inquiries into the victim's sexual history to prove consent and to impeach credibility. *Id.* at 21–25; *see also* 2 Wayne R. LaFave, Subst. Crim. L. § 17.1(a) (3d ed. 2020).

Despite those reforms,[15] the long-standing biases reflecting doubt in the credibility of sexual assault and domestic violence victims live on through the *Shiffra/Green* process. To that end, the process does not serve any identifiable policy or purpose.

Permitting defendants access to these materials is not necessary for the jury to make a credibility determination. Wisconsin courts have long trusted juries to determine witness credibility, *see Nabbefeld v. State*, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978), all without accessing witnesses'

[15] Support for these reforms was far from unanimous. One criminal law expert infamously urged maintaining the corroboration requirement, observing that while an alleged victim's word alone could permit a prosecutor to pursue charges for physical assault, robbery, fraud, and other crimes, it was not enough for a charge of rape because "ladies lie." William M. Freeman, *Ex-Magistrate Ploscowe Dies; Criminal-Law Expert Was 71*. N.Y. Times, at 36 (Sept. 22. 1975).

private therapy files. That a victim may be alleging sexual assault does not leave juries unable to assess credibility.

The process does not serve a particular need for our courts' truth-seeking function in sexual assault cases. Contrary to popular opinion that a significant number of sexual assault victims lie about alleged assaults,[16] false claims in these cases are uncommon. One reputable study estimated the rate of false claims to be 5.9 percent; another identified an even lower rate (in the two- to five-percent range) when the accuser is a child.[17] Moreover, there is no data suggesting that rates of false reporting are higher in sexual assault cases than they are for any other criminal case. Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53 Tulsa L. Rev. 1, 6 & n.43 (2017).

In addition, that many sexual assault cases lack third-party witnesses (often prompting the bias-proliferating label, "he said, she said") does not justify the process endorsed by *Shiffra*. Significant numbers of burglaries and robberies occur without third-party eyewitnesses.[18] Yet no one calls those crimes "he said, she said" cases or expresses concerns that the

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[16] *See* Katie M. Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*. 65 Sex Roles 761, 767 (2011) (collecting studies reflecting public belief that between 19 and 50 percent of rape accusations are false).

[17] *See* William O'Donohue et al., *The Frequency of False Allegations of Child Sexual Abuse: A Critical Review*, 27 J. Child Sexual Abuse 459, 471 (2018); David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 Violence Against Women 1318, 1329–30 (2010)).

[18] Data collected in a report prepared for the United States Department of Justice reflected that 95.3 percent of burglaries and 51.9 percent of robberies lack witnesses, compared to 78.3 percent of sexual assaults. Joseph Peterson et al., *The Role and Impact of Forensic Evidence in the Criminal Justice Process* at 62, 92, 109 (2010), https://www.ojp.gov/pdffiles1/nij/grants/231977.pdf.

verdict will turn on credibility determinations. Nor do we typically see *Shiffra/Green* motions filed in those cases.

Even within sexual assault cases, the *Shiffra* rule disproportionately burdens victims alleging sexual assault by a family member or acquaintance. Defendants who have a close relationship to the victims are more often in a position to know their histories, and more likely to have enough information about whether and where a victim had received therapy to file a *Shiffra/Green* motion.

These unintended disparate results of *Shiffra* provide additional reasons to doubt its soundness in policy.

2. Frequent, routine, and difficult-to-challenge-and-review in camera proceedings are contrary to public policy.

Within sexual assault cases, *Shiffra/Green* motions are filed almost routinely. Indeed, attorneys in the criminal appeals and criminal litigation units of the Department of Justice field questions from prosecutors encountering these motions on a weekly, at times daily, basis.[19] To that end, if a victim alleging sexual assault has seen or is seeing a therapist (and sometimes, as occurred in this case, if the victim has

[19] The same Westlaw search noted above revealed that since *Shiffra* was decided, this Court has addressed eight cases (including this one) involving a *Shiffra* issue, and the court of appeals has issued 12 published cases, and as of this writing, 39 unpublished opinions on it.

That data does not offer a full picture. It does not include pending appeals, cases where a *Shiffra/Green* motion was filed but not raised as an issue on appeal, cases that were not appealed, or prosecutions that ceased after the victim declined to consent and the court excluded her testimony.

merely possibly seen one),[20] a *Shiffra/Green* motion is nearly inevitable; if counsel doesn't file one, they are almost certainly inviting an ineffective assistance claim. *See State v. Robertson*, 2003 WI App 84, ¶ 11, 263 Wis. 2d 349, 661 N.W.2d 10 (recognizing defendant's ability to file a postconviction *Shiffra/Green* motion to support claim seeking a new trial).

The ubiquity of these motions creates two glaring harms. First, and most obviously, *Shiffra/Green* proceedings are difficult for victims and effectively require their participation in these hearings. At a minimum, those proceedings create uncertainty that communications the victims shared with a therapist with the promise of confidentiality will be released, possibly to their alleged assailant, as a price for pursuing prosecution of a sexual assault claim. In many cases, the victims sought treatment because of the defendant's actions. And in cases in which the defendant files a postconviction *Shiffra/Green* motion, any closure the victim received through the conviction evaporates by being pulled back into court to oppose the motion or worse, decide whether to consent to in camera review or release.

Second, more motions mean more frequent in camera proceedings, which is contrary to policies promoting open judicial proceedings. *See Gilmore v. Palestinian Interim Self-Government Authority*, 843 F.3d 958, 968 (D.C. Cir. 2016) (stating that openness of judicial proceedings preserves both the appearance and reality of fairness in adjudications). Accordingly, in camera proceedings are generally disfavored and "should be rare." *See People v. Contreras*, 907 N.E.2d 282,

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[20] Johnson filed his original *Shiffra/Green* motion in March 2018 seeking in camera review of therapy files from counseling that he thought was "highly likely" T.A.J. may have sought, even though he could not offer any proof that T.A.J. had seen a mental health professional, who he saw, when, or why. (R. 21:1–2.) As of the hearing on the standing question a year later, it was still not clear whether T.A.J. had any relevant therapy records. (R. 57:49.)

285 (N.Y. 2009). Even the Supreme Court has cautioned against their routine use: "[o]ur endorsement of the practice of testing proponents' privilege claims through *in camera* review of the allegedly privileged documents has not been without reservation. . . . There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings." *United States v. Zolin*, 491 U.S. 554, 570–71 (1989). [21]

This disfavor of routine in camera proceedings makes sense: the judge's factual and legal determinations remain off the record, leaving neither party a meaningful opportunity to argue their position, identify errors, or challenge the decision. *Shiffra*, by extending the *Ritchie* balancing test to privately held, privileged, and confidential records, encourages routine use of what should be rare proceedings.

3. The *Shiffra* process, when applied to records held by third parties, is frequently unworkable and creates additional harms contrary to public policy.

As discussed, *Shiffra*'s reach to private, confidential, and privileged records erodes the therapist-patient relationship and is contrary to strong public policy protecting that relationship. *See* Wis. Stat. § 905.04; *Jaffee*, 518 U.S. at 17–18 (citation omitted) ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

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[21] Importantly, the only reason the Court contemplated in camera review of privileged material in *Zolin* was because the attorney-client privilege at issue there contained a potentially applicable exception, allowing disclosure if the communications were made in furtherance of fraud or crime. *Zolin*, 491 U.S. at 562–63.

Wisconsin has recognized the importance of maintaining the privilege "to encourage patients to freely and candidly discuss medical concerns with their physicians by ensuring that those concerns will not unnecessarily be disclosed to a third person." *Steinberg v. Jensen*, 194 Wis. 2d 439, 459, 534 N.W.2d 361 (1995) (citation omitted). As another state court put it, "rape traumatizes its victims to a degree far beyond that experienced by victims of other crimes." *Wilson,* 602 A.2d at 1295. The policy favoring absolute privilege from disclosure should therefore carry even greater weight in sexual assault cases, because the victim's "willingness to disclose information quite obviously is based upon" the therapist's promise that all communications will be kept confidential. *Id.* When that confidentiality is threatened or removed, "that trust is severely undermined, and the maximum therapeutic benefit is lost." *Id.* This harms both the victim and the public, "whose interest in the report and prosecution of sexual assault crimes is furthered by the emotional and physical well-being of the victim." *Id.*

Second, even if the records are "only" disclosed to a judge, it is still a significant intrusion on the victim's privacy. As a practical matter, the records are disclosed to not "only" the judge, but to judge's staff (and, potentially, appellate judges and their staff). Even such curtailed disclosure nevertheless "intrudes on the rights of the victim and dilutes the statutory privilege." *State v. Pinder*, 678 So. 2d 410, 415 (Fla. Ct. App. 1996) (citation omitted). And that that disclosure "only" goes to a judge is not necessarily reassuring to victims, particularly those in one-, two-, or three-judge counties in which the victim is likely to know the judge or staff outside of court. There, victims are placed in the untenable position of consenting to disclosure to not just a judge or clerk they will never see again, but someone they regularly encounter in the community. Even in larger counties, the

victim has to face that judge at bond hearings and other proceedings knowing that the judge viewed their records.

Third, and relatedly, the protections and rights afforded victims during the *Shiffra/Green* process are often not as robust as they would seem, in part because these proceedings occur so often and because they involve countless third-party therapy providers. To start, victims asked to consent to disclosure of records held by their private therapists typically don't know what's in the records or what they are consenting to. Similarly, courts do not always permit a victim to see materials before consenting to release materials to the defendant after in camera review.

The *Shiffra/Green* procedure is often described as protecting victims from unnecessary disclosure. *See, e.g.*, *Lynch*, 371 Wis. 2d 1, ¶ 198 (Ziegler, J., dissenting) (citing *State v. Solberg*, 211 Wis. 2d 372, 387, 564 N.W.2d 775 (1997)). Yet, as a practical matter, the more *Shiffra/Green* motions are filed, the more frequently courts are likely to grant them. That's not because courts are routinely abdicating their duties in applying the standard; it's because the *Green* standard is a forgiving one. *See State v. Green*, 2002 WI 68, ¶ 35, 253 Wis. 2d 356, 646 N.W.2d 298 (describing the pleading standard as not "unduly high for the defendant," and advising courts "in cases where it is a close call [to] generally provide an in camera review.")[22]

Moreover, when private providers send records in response to an order, they sometimes mistakenly send them to the prosecutor or defendant directly. Even when providers send them to the court, clerks may not be aware of the

[22] The Seventh Circuit has suggested that the *Green* standard for obtaining in camera review may be less burdensome than the standard in *Ritchie*. *See Moseley v. Kemper*, 860 F.3d 1020, 1024 (7th Cir. 2017).

sensitive nature of the files and mistakenly publish the records to the parties.

These problems reflect that *Shiffra* reaches more broadly than it should, and certainly broader than the Court in *Ritchie* (and later in *Jaffee*) endorsed. If the in camera procedure was instead limited to the circumstances in *Ritchie*—government-held records subject to a qualified confidentiality and no privilege—most of these risks would be eliminated. It would cut down the potential number of third parties involved in proceedings, and it would allow the court and parties to better control and protect what is turned over, to obtain informed consent from the victims, and to ensure that their privacy rights remain protected throughout the process.

C. *Shiffra* is contrary to Wisconsin's legacy as a leader in victim rights and violates statutory and constitutional protections afforded victims.

Wisconsin's visionary policies and efforts to protect victim rights further reflect why *Shiffra* was wrongly decided and why overrule is warranted.

Wisconsin has established itself as a leader in recognizing and enforcing victim rights. In 1980, it was the first state to enact a bill of rights for victims and witnesses of crime. *See* 1979 Wis. Act 219 (establishing chapter 950 of the statutes); *see also* Crime Victims' Rights in America: A Historical Overview, OVC Archive, available at https ://www.ncjrs.gov/ovc_archives/ncvrw/2005/pg4b.html (last visited Nov. 3, 2021). It followed that first in 1983, by passing the first child victim and witness bill of rights. *See* 1983 Wis. Act 197. And ten years later, voters ratified article I, section 9m of the Wisconsin Constitution to add a constitutional dimension to victim rights. *See* Wis. Const. art. I, § 9m (1993). That amendment provided that the "state shall treat crime

victims . . . with fairness, dignity, and respect for their privacy" and that it "shall ensure that crime victims have all of the following privileges and protections as provided by law," including "reasonable protection from the accused throughout the criminal justice process." *Id.*

Wisconsin's efforts to recognize and protect victim rights didn't end there. In 1997, the Legislature expanded victim rights under chapter 950, codifying over 50 specific rights and providing policy enforcing those rights. *See* 1997 Wis. Act 181, 237, 283. And in 2020, voters ratified an amendment to article I, section 9m of the Wisconsin Constitution to again establish constitutional dimension to those rights. The 2020 amendment also recognized additional specific rights, including the rights "[t]o be treated with dignity, respect, courtesy, sensitivity, and fairness"; "[t]o privacy"; and "[t]o refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused." Wis. Const. art. I, § 9m(2)(a), (b), (L) (2020). The amendment further guarantees those rights will "be protected by law in a manner no less vigorous than the protections afforded the accused." Wis. Const. art. I, § 9m(2).

Against that background, *Shiffra* has been a black mark on Wisconsin's legacy as a leader in crime-victim rights, and is contrary to Wisconsin's statutory and constitutional provisions protecting them. *Shiffra*'s holding violates the guarantees in chapter 950 and the 2020 amendment. Recall that the balancing test in *Ritchie* was aimed at weighing the *government*'s interest in privacy in *its* files against a defendant's right to access certain materials that the government possessed. By expanding that test to apply to requests for private records for which the victim is the privilege holder, the court of appeals in *Shiffra* has effectively substituted the *victim* for the government in that balancing test, pitting the victim (who may not have counsel or another advocate) directly against the defendant. This shift

compromises the guarantee that victim rights will "be protected by law in a manner no less vigorous than the protections afforded the accused." Wis. Const. art. I, § 9m(2). It compromises a victim's rights to privacy and to be treated with dignity, respect, courtesy, sensitivity, and fairness. And by conditioning the victim's ability to testify at trial on consenting to release the records likewise limits her right "[t]o refuse a . . . discovery request made by the accused. Wis. Const. art. I, § 9m(2)(L).

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Thirty years of *Shiffra* is more than enough. The special justifications required to depart from stare decisis are present: *Shiffra* is contrary to law and public policy, it disproportionately harms some of the most vulnerable victims in our state, and it contravenes the protections granted by chapter 950 and the 2020 amendment. And as discussed above, neither *Ritchie*, nor any other Supreme Court case law, nor any other federal constitutional due process principle supports maintaining *Shiffra*'s holding as applied to privately held, privileged, and confidential files.

It is time to stop subjecting traumatized victims to yet another violation by allowing unwarranted, invasive inquiries into their privileged mental health records, and to begin treating them with the dignity and respect they've been promised. *Shiffra* should be overruled.

CONCLUSION

This Court should overrule *Shiffra* and its progeny.

Dated this 6th day of December 2021.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,980 words.

Dated this 6th day of December 2021.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019–20)

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. § (Rule) 809.19(12) (2019–20).

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 6th day of December 2021.

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