STATE OF WISCONSIN

SUPREME COURT

STATE OF WISCONSIN,
Plaintiff-Respondent,

Appeal No. 2019AP664 CR

T.A.J.,
Appellant,

v. Waupaca County Case
No. 17 CF 56

ALAN S. JOHNSON,
Defendant-Respondent-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AND REMANDING AN ORDER OF THE CIRCUIT COURT IN WAUPACA COUNTY CIRCUIT COURT BRANCH III, THE HONORABLE RAYMOND HUBER PRESIDING

SUPPLEMENTAL RESPONSE BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

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INTRODUCTION

The defendant-respondent-petitioner, Alan S. Johnson (hereinafter, "Johnson"), asks this Court to reject the State's request to overrule *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993). This Court should reject such a request because it seeks to overrule the long-established standard for the limited cases where it is necessary for a trial court to balance and protect the privacy interests of witnesses with a criminal defendant's right to a fair trial and the truth-seeking function of the trial.

State v. Shiffra, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. In the present case, the merits of the *Shiffra-Green* motion have not yet been heard. The State raised its request in a footnote to its brief after it neglected to object to *Shiffra* at the trial court, declined to raise the argument in the Court of Appeals, and failed to raise any objection to *Shiffra* in its response to the petition for review to this Court. Further, the State has already recognized that "*Shiffra* remains controlling law." The standards under *Shiffra* and *Green* have been binding precedent for over twenty-five years.

ISSUE PRESENTED

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

The State neglected to raise this issue in the lower courts.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication would be appropriate as the published opinion would apply already established law to a factual situation different from that in currently published

opinions. Wis. Stat. § 809.23(1)2. The Court has previously ordered that "upon consideration of the supplemental briefs, the court will advise the parties if it determines that additional oral argument is necessary for the proper resolution of this case." Should the Court deem oral argument necessary, Johnson is prepared to offer oral argument in support of his position.

ARGUMENT

The standards established in *Shiffra*, and later clarified in *Green*, properly balance and protect the privacy interests of witnesses with the defendant's ability to present a meaningful defense and to a fair trial. *Green*, 2002 WI 68, ¶ 20, 253 Wis. 2d 356, 369, 646 N.W.2d 298, 304. The standards under *Shiffra* and *Green* are properly grounded on the *Pennsylvania v. Ritchie* holding which provides that a defendant possesses a due process right to seek in-camera inspection and potential disclosure of privileged materials determined by the court to be material to the determination of guilt or innocence and therefore necessary to the presentation of his or her defense. *Pennsylvania v. Ritchie*, 480 U.S.

39, 60-61, 107 S.Ct. 989, 1002-03, 94 L.Ed.2d 40 (1987). The *Shiffra-Green* standard does not conflict with other jurisprudence of the U.S. Supreme Court or this Court, nor other constitutional or statutory provisions. The State's reliance on the supposed distinction between privately held records and records of a state agency does not alter this analysis, nor does it focus on confidential versus privileged records. Courts have repeatedly held that the *Shiffra-Green* standard utilizes a sound mechanism for challenging circumstances when a criminal defendant has demonstrated his or her material need for privileged materials essential to a complete defense. Further, principles of stare decisis also weigh against overturning *Shiffra* as no sufficient special justification warranting overturning such a well-established rule are present. Lastly, no changes in the chapter 950 or the recent constitutional amendment modify the burdens of a defendant, nor obligations of the court in a *Shiffra-Green* analysis to protect privacy interests.

I. The Court should reject the State's request to overrule *Shiffra*.

The *Shiffra* holding appropriately balances privacy interests and the right to a fair trial. An "in camera

review of evidence achieves the proper balance between the defendant's rights and the state's interests in protection of its citizens." *Shiffra*, 175 Wis. 2d at 605, (citing *Pennsylvania v. Ritchie*, 480 U.S. at 60-61). A defendant seeking access to a witness's privileged treatment records not in the possession of the State must set forth a specific factual basis demonstrating that there is a reasonable likelihood that the sought-after records contain relevant information necessary to a determination of guilt or innocence and that these records are not merely cumulative to other evidence already available to the defendant. *Shiffra*, 175 Wis. 2d at 610; *Green*, 2002 WI 68, ¶ 33. A defendant must reasonably investigate the witness's background, counseling, and records through other means prior to records being made available for in-camera review. *Id.* Records are subject to in-camera review if a court finds such material to be necessary to the determination of guilt or innocence at trial. *Id.* Records are "necessary to a determination of guilt or innocence" if the records tend "to create a reasonable doubt that might not otherwise exist." *Id.* at ¶34. A court independently

examines the existing evidence and the threshold showing of the defendant to determine whether the sought-after "records will likely contain evidence that is independently probative to the defense." *Id.* If a defendant meets this high burden, records sought by the defense which may be privileged are subject to in-camera review of the court. *Id.* at ¶ 37. Courts may deny such a motion in the absence of the requisite substantial showing and a court may defer a ruling or require the defendant to pursue "a subsequent motion if the record has not had time to develop." *Id.* at ¶35. A fishing expedition by the defense is prohibited. *Id.* at ¶33. Appellate courts also serve as an additional level of review to ensure proper balancing of the interests analyzed under the *Shiffra-Green* analysis.

Witness privileges are balanced with a defendant's due process rights throughout the *Shiffra-Green* analysis. Witness consent is required prior to the court's in-camera review and is again also required prior to the court's disclosure of records. *State v. Solberg*, 211 Wis. 2d 372, 383, 564 N.W.2d 775, 780 (1997); *Shiffra*, 175 Wis. 2d at 612. As such, an alleged victim

holds the ability to refuse to disclose sought-after records after the determination that a defendant has met the sufficient threshold showing. *Id.* A defendant is not allowed his own individual review of the records at issue prior to final disclosure of a court. *Id.*

The *Shiffra-Green* standard balances "the defendant's due process right to be given a meaningful opportunity to present a complete defense and the policy interests underlying the Wis. Stat. § 904.05(2) privilege." *Solberg*, 211 Wis. 2d at 387. "[G]iving the defendant an opportunity to have the circuit court conduct an in-camera review of the privileged records, while still allowing the patient to preclude that review, addresses both the interests of the defendant and the patient." *Id.* Ultimately, the procedure furthers both the truth-seeking functions of the trial and the defendant's rights to a fair trial on the one hand and the witness's privacy interests on the other.

Should the defendant make the sufficient preliminary showing in-camera review and the privilege holder witness declines to release records for in-camera review, a defendant's right to a fair trial is safeguarded by

barring the privilege-holder's testimony at trial. *Shiffra*, 175 Wis. 2d at 612, 499 N.W.2d 719. Under that circumstance, a defendant has already demonstrated "a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and...not merely cumulative to other evidence available to the defendant." *Green*, 253 Wis. 2d 356, ¶34. As such, preclusion of the privilege-holder's testimony at trial is warranted and is "the only method of protecting [the defendant's] right to a fair trial" when the defendant would otherwise be deprived of material information necessary to the determination of innocence or guilt. *Shiffra*, 175 Wis. 2d at 612. Accordingly, the required threshold showing by the defendant for in-camera review of records ensures a witness is not required to make the choice between the release of materials and not testifying unless there is a full showing of such need and an independent judicial examination of the same. In-camera review utilizes the impartiality of the court to cautiously assess the need for privileged records and determine whether such records are necessary to the right to present a complete defense.

Ultimately, *Shiffra-Green* achieves the proper balance between the defendant's rights and witness interests in efficient administration of the court's truth-seeking function.

a. *Shiffra* was correctly decided.

Shiffra correctly interprets *Pennsylvania v. Ritchie* and other applicable jurisprudence and applies those principles properly to meet the requisite balancing of a defendant's due process rights with witness privilege interests. Courts have repeatedly maintained confidence in a circuit court's capability to apply the *Shiffra-Green* standards balancing the interests involved in the requisite assessment; e.*g.*, *Green*, 2002 WI 68, ¶35. In *Shiffra*, the Court of Appeals evaluated whether a defendant was entitled to an in-camera inspection of the complaining witness's past mental health records and whether preclusion of the alleged victim's testimony at trial is the proper sanction for refusal to submit the records to an in-camera review. *Shiffra*, 175 Wis. 2d at 604-5. The court first stated that, "[t]his question implicates *Shiffra's* constitutional right to due process of law. *Id.* (citing *Ritchie*, 480 U.S. at 56.). The court

further noted, "[u]nder the due process clause, a criminal defendant must be given a meaningful opportunity to present a complete defense." *Shiffra*, 175 Wis. 2d at 605 (citing *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, (1984)). Appropriately, the court looked to *Ritchie* to determine that Due Process provides that an in-camera review of sought-after privileged records "achieves the proper balance between the defendant's rights and the State's interests in protection of its citizens." *Shiffra*, 175 Wis. 2d at 605.

The *Ritchie* holding is not premised on a distinction between publicly versus privately held records. *Ritchie*, 480 U.S. at 60-61. The State's continued reliance on its limited distinction between publicly held records and privately held records is in error and has been rejected numerous times. *See Behnke*, 203 Wis. 2d at 55; *Solberg*, 211 Wis. 2d 372, 564 N.W.2d 775 (1997); *Green*, 2002 WI 68. This Court should again reject it. The Due Process rationale of *Brady v. Maryland*, 373 U.S. 83 (1963), requires the disclosure of material exculpatory evidence in the possession or knowledge of the State and its investigative agencies. *Id.* at 87-88. However, that isn't

the limit of due process rights. In *Shiffra*, the State also argued that "that this case 'does not fall within the ambit of Ritchie' because...records are not in the possession of the prosecution or any other state agency" and that the records "are absolutely protected from disclosure by statute, whereas the *Ritchie* case involved a statute that allowed disclosure in certain circumstances." *Shiffra*, 175 Wis. 2d at 606. The court rejected these arguments holding that Wisconsin precedent applies *Ritchie* to cases in which the information sought by the defense is protected by statute and is not in the possession of the State. *Id.* at 606-07 (citing *K.K.C.*, 143 Wis. 2d at 511, 422 N.W.2d at 144 (material sought was confidential); *S.H.*, 159 Wis. 2d at 736, 465 N.W.2d at 240-41 (material sought was privileged and in the possession of a private counseling center)).

As such, the *Shiffra* court acknowledged that *Ritchie* was not premised solely in relation to records in the government possession. Therefore, weight must remain on the *Ritchie* holding that Due Process requires a trial court to review in camera confidential records identified as material to the defense so long as the sufficient

threshold showing is made. *Ritchie*, 480 U.S. at 43. This Court affirmed these principles in *Green*, stating that so long as a defendant "set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence... and not merely cumulative," then in-camera review of such records under *Shiffra* meet the obligations of Due Process and privilege. *Green*, 2002 WI 68, ¶34

b. The *Shiffra-Green* standard properly protects the Due Process rights of a criminal defendant and privacy interests of witnesses.

The State's attempted distinction between a privileged record and a confidential record similarly fails. In each instance, a defendant could demonstrate material need for records essential to a defense but the State's argument obfuscates the truth-seeking function of the court in favor of a mislaid emphasis on statutory language. In these circumstances, the State would appear to argue that a confidential record which may hold the same private information as a privileged record remains subject to the *Shiffra-Green* standard but a privileged one would not. (State's brief p. 21). The truth-seeking

function of the court is undermined by such characterization.

Ritchie does not stand for the proposition that only confidential, but not privileged, records are subject to review. In a previous rejection of that argument, the Court of Appeals emphasized that such an argument "misconstrues the reasoning of *Ritchie* and *Shiffra*." *Behnke*, 203 Wis. 2d at 55. Instead, the Court acknowledged that the *Shiffra-Green* standard decisions balance the truth-seeking function of the Court under the Due Process Clause under the Fourteenth Amendment with a witness's privilege in records maintained by health care providers. *Id.* This Court expounded on that line of reasoning by noting that "[s]uch a procedure strikes an appropriate balance between the defendant's due process right to be given a meaningful opportunity to present a complete defense and the policy interests underlying the Wis. Stat. § 904.05(2) privilege." *Solberg*, 211 Wis. 2d at 387. The *Green* court also confirmed this analysis by stating that "[t]his court recognized the validity of *Shiffra* in...*Solberg*, ... and

in *State v. Rizzo*, 2002 WI 20, ¶53, 250 Wis. 2d 407, 640 N.W.2d 93. We will not depart from this precedent." Id.

The *Shiffra* court also properly acknowledged the holdings in *Trombetta* and a defendant's due process rights to exculpatory evidence and also to present a complete defense. *Shiffra*, 175 Wis. 2d at 605. The *Trombetta* court emphasized that "[u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984). The Court acknowledged that "[w]e have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *Id.* To safeguard that right, the Court emphasized the "area of constitutionally guaranteed access to evidence," Id. (*Citing United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3447, 73 L.Ed.2d 1193 (1982)), and that this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the

integrity of our criminal justice system." *Trombetta*, 467 U.S. at 485.

Trombetta was centered on the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants. *Id.* at 486-87. In that assessment, the Court remarked it was less clear under the Due Process Clause what obligation to deliver exculpatory information required the State to preserve evidence not expected to play a role in the accused's defense. *Id.* Accordingly, such a holding was not a limitation on a defendant's rights to present a complete defense, but a reference to the obligations of the State to maintain records. As such, reference to *Trombetta* in *Shiffra* was centered on the right to a complete defense, not the government's obligation to preserve a record.

The *Shiffra-Green* standard correctly applies the principles of the *Ritchie* holding balancing the Due Process rights for defendants with protection of privacy considerations of witnesses. While a state agency held the records in question in *Ritchie*, the records were not in possession of the prosecution, nor was the state agency considered an arm of the prosecution. *Ritchie*,

480 U.S. at 57. As such, *Ritchie* provided directive on how courts were to balance and protect the rights of the defendant and the witness with regard to consideration of evidence. Absent from the opinion is a dispositive distinction between publicly or privately held.

There is no evident fundamental distinction between privileged or confidential records under *Ritchie*. With regard to privately held records, the United States Supreme Court has not yet presented specific directives for disclosure of a witness's records necessary to a fair trial that are held in private hands. What is has done is acknowledge that "[u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." *Trombetta*, 467 U.S. at 485. Criminal defendants are to "be afforded a meaningful opportunity to present a complete defense." *Id.*

The State's rule that a defendant's right to present a complete defense is trial right that is limited to only applications when a state evidentiary rule arbitrarily excludes defense evidence for no legitimate purpose is inaccurate. (*See* State's brief p. 37). "Whether rooted

directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 319, 126 S.Ct. 1727, 1728, 164 L.Ed.2d 503 (2006) (citing Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636.). Wisconsin Courts require that a meaningful opportunity to present a complete defense includes a trial court's assessment of the *Shiffra-Green* standard. *Green*, 2002 WI 68; *Solberg*, 211 Wis. 2d 372; *Behnke*, 203 Wis. 2d 43; *Shiffra*, 175 Wis. 2d 600. The State's argument that instead the right to present a complete defense is narrowed to whether rules of evidence serve a legitimate purpose in excluding defense evidence hides the basis for the right to present a complete defense.

Additionally, Wisconsin is free to make determinations centered on the principles of federal due process noted in *Trombetta*, state due process, state statute, or public policy. Wisconsin may determine that its constitutional Due Process jurisprudence further

emphasizes the truth-seeking function of trial and defendant's right to a fair trial than that what may be recognized by the United States Supreme Court regarding the federal constitution. *E.g., State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977); see *United States v. Hach*, 162 F.3d 937, 947 n.5 (7th Cir. 1998) (interpreting *Shiffra* as being based on state law). Wisconsin already provides for such emphasis on "a meaningful opportunity to present a complete defense," by this Court's previous determinations that "a defendant has a right to postconviction discovery when the sought-after evidence is relevant to an issue of consequence," *State v. O'Brien*, 223 Wis. 2d 303, 320-21, 588 N.W.2d 8 (1999), without an explicit US Supreme Court decision acknowledging such right.

c. *Shiffra* was correctly decided because it protects witness privacy considerations while ensuring the defendant's right to a fair trial.

A witness retains the ability to waive the privilege and release the records subject to the analysis and findings of the circuit court. *Green*, 2002 WI 68, ¶ 33. Further, the *Shiffra-Green* standard does not force disclosure of privileged information because the witness

retains the ability refuse consent. *Solberg*, 211 Wis. 2d at 386. A trial court's in-camera review of material information further preserves a witness's statutory privilege by preventing unwanted disclosures of privileged information. *Id.* In-camera review does not terminate the privileged nature of the of the sought-after records. *United States v. Zolin*, 491 U.S. 554, 569 (1989). As such, a witness's consent to such a review does not also waive the privilege for other purposes including release of information reviewed in-camera without an additional consent by the witness. *Solberg*, 211 Wis. 2d at 386-87. If the records do not contain relevant information material to the defense, the circuit court does not disclose the records or any information therefrom to the defendant. *Id.*

II. The *Shiffra-Green* standard does not conflict with other authority or law.

Shiffra is not in conflict with other U.S. Supreme Court jurisprudence, nor does that jurisprudence suggest that the U.S. Supreme Court would preclude the provisions of *Shiffra*. Contrary to the State's assertions, *Jaffee v. Redmond* does not control interpretation and application of the standards identified by *Shiffra and*

Green (State's Brief p. 23). *Shiffra* centers a defendant's due process rights in the scope of a criminal prosecution and review of a state evidentiary privilege within state criminal procedure. *Jaffee*, on the other hand, is a case of federal interpretation of federal rules in a civil suit context. *Jaffee v. Redmond*, 518 U.S. 1, 9-10, 116 S.Ct. 1923, 1928, 135 L.Ed.2d 337 (1996). The U.S. Supreme Court evaluated a federal psychotherapist privilege with regard to the defendant and licensed clinical social worker within a federal civil rights action. *Jaffee*, 518 U.S. at 5. The Court was tasked with determining whether statements made in the treatment setting are protected from compelled disclosure in that civil action. *Id.* While the Court determined that these particular statements were not subject to disclosure, "[b]ecause this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would 'govern all conceivable future questions in this area.'" *Id.* at 18. Accordingly, *Jaffee* is silent as to the Court's interpretation of a privilege with regard to a criminal prosecution,

particularly where Due Process of the accused concerns are present. This Court should not speculatively hold based on any other presumption.

Furthermore, "Wisconsin courts are not bound by decisions of the United States Supreme Court when federal law does not govern the dispute." *State v. Gary M.B.*, 2004 WI 33, ¶ 17, 270 Wis. 2d 62, 75, 676 N.W.2d 475, 482. "While decisions of the Supreme Court interpreting the Federal Rules of Evidence may be persuasive authority, they are not binding on this court." *State v. Blalock*, 150 Wis. 2d 688, 702, 442 N.W.2d 514 (Ct. App. 1989). As noted above, Wisconsin courts are free to interpret State rules differently than federal interpretation of federal law. Accordingly, even if *Jaffee* offered guidance to state criminal courts, Wisconsin has outlined *Shiffra-Green* as the proper standard to balance due process and privilege. As the *Jaffee* court itself recognized, "there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." *Jaffee*, 518 U.S. at 18.

Wisconsin has recognized that the standard under *Shiffra-Green* is the mechanism to respect privacy while also maintaining the Due Process right in a fair trial. Wrongful conviction arising from no access to records identified material to the determination of guilt or innocence is a fundamental deterioration of the right to a fair trial. Wisconsin courts have already noted a "justifiable repugnance" towards persons convicted of sexual abuse of a child and identified a false accusation as a grave harm. *Sawyer v. Midelfort*, 227 Wis. 2d 124, 143, 595 N.W.2d 423, 433 (1999). Public policy exceptions to the therapist-patient privilege have already been found by this Court in acknowledgment of such grave harm. *Johnson v. Rogers Mem'l Hosp., Inc.*, 2005 WI 114, ¶ 65, 283 Wis. 2d 384, 415, 700 N.W.2d 27, 42.

Statutory privileges under Wis. Stat. § 905.04 are also appropriately acknowledged under *Shiffra-Green*. Merely because Wis. Stat. § 905.04 does not provide language regarding a criminal defendant's ability to access records under *Shiffra-Green* in nonhomicide cases does not foreclose such review. Instead, *Shiffra-Green* standard meets the impetus of Wis. Stat. § 905.04 while

maintaining the requisites of a defendant's Due Process rights in a criminal prosecution. A patient may hold a statutory privilege of evidence regarding communications made or information obtained or disseminated for purposes of diagnosis or treatment. Wis. Stat. § 905.04(2) & (3). Accordingly, *Shiffra-Green* is not inconsistent with Wis. Stat. § 905.04. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition. Wis. Stat. § 905.04(2) and (3). Witnesses maintain this ability under the *Shiffra-Green* standard. Furthermore, an in-camera inspection of confidential records under *Shiffra* is not restricted to mental health records, so too much emphasis on such records is misplaced. *State v. Navarro*, 2001 WI App 225, 248 Wis. 2d 396, 636 N.W.2d 481.

Privileges in Wisconsin are purely statutory. *See State v. Migliorino*, 170 Wis. 2d 576, 588, 489 N.W.2d 678, 682-683 (Ct. App. 1992). "While the psychotherapist-patient privilege generally is intended to facilitate

treatment by assuring the confidentiality of therapeutic communication, the privilege does not automatically or absolutely foreclose the introduction of such communication in court." *State v. Agacki*, 226 Wis. 2d 349, 357-58, 595 N.W.2d 31, 36 (Ct. App. 1999). Contrary to the State's emphasis (State Brief 26), subsection (4) is a list of 'exceptions' identifying material as not privileged under specific circumstances, not material that is privileged but subject to disclosure under certain circumstances. Each of the exceptions contains language often starting the subsection indicating "there is no privilege" or similar. *See* Wis. Stat. § 904.04(4)(a-i). Absence of an exception identifying that material sought-after under *Shiffra-Green* is not dispositive with regard to such motions. Under the *Shiffra-Green* standard, an in-camera inspection of the victim's mental health records is only permitted because the defendant must have established more than the mere possibility that the requested records might be necessary for a fair determination of guilt or innocence. *State v. Walther*, 2001 WI App 23, 240 Wis. 2d 619, 623 N.W.2d 205. The *Shiffra-Green* standard acknowledges that material

sought may hold a statutory privilege, a privilege is not a complete bar of all access and review. Instead, the *Shiffra-Green* standard holds that if the defendant can make the substantial showing of materiality and necessity to the presentation of a defense, materials, which may be privileged records, are to be produced to the court as essential to the presentation of the defense. If the witness elects not to disclose the materials, he or she retains the ability to refuse consent to disclosure.

Thus, the statutory privilege cited by the State does not substantially modify the assessment of *Shiffra*'s application of *Ritchie* and Due Process principles.

III. Principles of stare decisis direct that the Court should reject the State's request as *Shiffra* remains consistent law and policy.

The *Shiffra-Green* standard should also be maintained under principles of stare decisis and public policy. Wisconsin courts have relied on the standard for decades. *E.g.*, *Green*, 2002 WI 68; *Solberg*, 211 Wis. 2d 372; *Shiffra*, 175 Wis. 2d 600; *In re K.K.C.*, 143 Wis. 2d 508; *S.H.*, 159 Wis. 2d 730. Accordingly, extra weight must be accorded to the principle of stare decisis. Stare decisis

"further[s] fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶95, 264 Wis. 2d 60, 665 N.W.2d 257. Adherence to precedent is "fundamental to the rule of law," and existing precedent should "not be abandoned lightly" or without "special justification." Id. ¶94. "We need finality in our litigation." *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

The State and Appellant also fail to suggest any reason why the Court should reach a different decision now than it has reached in the past. "Stare decisis is the motto of courts of justice." *Ableman v. Booth*, 11 Wis. 498, 522 (1859). This Court follows the doctrine of stare decisis scrupulously because its abiding respect for the rule of law. *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 115, 665 N.W.2d 257, 285. Accordingly, any departure from the doctrine of stare decisis requires special justification. *Schultz v. Natwick*, 2002 WI 125, ¶ 37, 257 Wis. 2d 19, 653 N.W.2d 266.

No special justification to overturn *Shiffra* is provided. Instead, focus unnecessarily seeks to relitigate well settled issues and past cases. The State's request to overrule such a long-established standard would undermine the routinized mechanisms of meeting the truth-seeking function of the trial. *Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); *Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. Courts repeatedly have emphasized confidence in the circuit courts' ability to properly apply the *Shiffra-Green* standard balancing the competing interests involved in such analysis. E.*g.*, *Green*, 2002 WI 68, ¶35.

None of the requisite criteria for overturning a past decision is properly articulated. The State does not cite changes or developments in the law that have undermined the rationale behind an earlier decision. *See State v. Stevens, 181 Wis. 2d 410, 442, 511 N.W.2d 591, 600.* Nor does it identify newly ascertained facts warranting change. *See Id.* The State attempts to identify that past precedent has become detrimental consistency and workability in the law but, as described above, such

distinctions are not dispositive or inconsistent. (*See Id)*.

The State primarily seeks to argue that the past precedent has become detrimental to coherence and consistency in the law (State's brief p. 39). It cites that the motions are only filed in sexual abuse and domestic violence (*Id.*). The State offers no data, but premises this argument on a Westlaw search (State's brief 39-40). It then jumps and states this makes the problem of reporting distrust worse (*Id.*). The State appears to use the rarity of such motions as a basis to identify they are only pursued in specific actions contrary to policy. However, motions filed under *Shiffra-Green* are not so confined to such matters. *Navarro*, 2001 WI App 225, 248 Wis. 2d 396, 636 N.W.2d 481.

Instead, courts have repeatedly maintained their confidence in a circuit court's capability to apply the *Shiffra-Green* standards and principles balancing the sets of interests involved in assessment; e.g., *Green*, 2002 WI 68, ¶35; *Behnke*, 203 Wis. 2d at 57; *Shiffra*, 175 Wis. 2d at 611.

Contrary to its assertion, the State's Westlaw search is only further articulation that the motions are rare and the appropriate confidence placed in courts to meet the obligations of *Shiffra-Green* when a defendant seeks such information. After threshold showing, records holder can deliver material to the court and the court alone subject to witness consent. Risk of records being sent elsewhere or other harm is not evident. Public policy is not weakened by such a protected and limited type of review only in the circumstances outlined by *Shiffra-Green*. Unnecessary emphasis on a statutory privilege contravenes the fundamental principle that such privileges should be construed and limited by courts to only exclude relevant evidence if such exclusion has a public good transcending the principle of using all rational means for ascertaining the truth. *Trammel v. United States*, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980); See also Wis. Stat. § 905.01.

The limited circumstances under which a motion for in camera review remains consistent with public policy. The State emphasizes its Westlaw search of cases, and the motions being filed in allegations of sexual assault

or domestic violence, as a basis in public policy to critique the *Shiffra-Green* standard. (State's brief p. 39-40). The State then speculatively asserts that this survey demonstrates that the filing of such a motion "resuscitates long-held attitudes and rules" to view accusers with suspicion. (State's brief p. 41). The State further emphasizes a study it finds persuasive that a certain percentage of sexual assault allegations are falsely made, but apparently tolerable because public policy should weigh against *Shiffra* motions. (State's brief p. 42-43).

However, the State fails to acknowledge that in-camera review already only arises in circumstances where there is substantial basis already proffered by the defense. In addition, in-camera review occurs for only information that is material to the defense. Under the State's reasoning, a complaining witness could outright admit fabrication of accusations to providers and would maintain the ability to assert in court the validity of allegations. Even if a defendant could produce substantial evidence of need to review such records, the State would prefer that a defendant's right to present a

complete defense and the search for truth to be limited to prevent any 'chilling effect' on the provider relationship. By contrast, public policy would better direct that the communications between provider and patient are privileged and also that such records may be subject to in camera review in the limited circumstances identified under *Shiffra-Green*. A judge privately reviewing the information is not such a grievous breach of the provider-patient relationship that it would eliminate or reduce the efficacy of such a relationship. If a judge determines records reviewed in-camera as material to the defense and essential for the search for truth, public policy would favor the patient-provider relationship not be perverted to prevent the search for truth in favor of a privilege to shield deceit. Further, anecdotal argument that prosecutors routinely inquire regarding motions filed under *Shiffra-Green* without evidentiary basis is similarly not persuasive. Courts have a mechanism under *Shiffra-Green* to evaluate such motions and have the capability to deny as appropriate.

In-camera review remains an appropriate public policy mechanism to review records sought under *Shiffra-*

Green. The *Shiffra-Green* standard is a circumstance where courts appropriately use the tool of in-camera inspection. Contrary to the State's argument, *U.S. v. Zolin* involves the government seeking the records of a third party as part of a criminal investigation and the Due Process rights connected to criminal investigation by the government when records may be reviewed outside of the defendant's purview. The court was tasked with deciding whether an in-camera review of sought-after attorney-client records was appropriate under the crime-fraud exception. *Zolin,* 491 U.S. at 554. The court noted that a "blanket rule allowing in camera review as a tool for determining the applicability of the crime-fraud exception...would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk." *Id.* at 571. "There is also reason to be concerned about the possible due process implications of routine use of in camera proceedings." Id. Any policy disfavoring such review was therefore tethered to the defendant's due process rights. *Shiffra-Green* is also centered on a defendant's Due Process right, but acknowledges the privacy and privilege considerations of

witnesses by use of in-camera review. As such, the State's comparison of the investigatory police authority of the State with the limited capability of a criminal defendant to request in-camera review misconstrues the issues reviewed in *Zolin*.

The *Shiffra-Green* process remains efficiently workable and understandable to implement. A defendant must meet a substantial burden and threshold showing for review. Subject to consent, in-camera review may occur and subject to second consent, disclosure of records deemed material. A defendant's fair trial should not be infringed because of the possibility that a records holder may mistakenly send records to a wrong recipient. Such a mistake would be a dispute between patient and provider, not the defendant and the right to a fair trial.

IV. Victim rights laws do not alter the evaluation of *Shiffra-Green* for courts.

Contrary to the Appellant's brief, changes in victim's rights law does not alter the protection and balancing of the *Shiffra-Green* standard. The 2020 Wisconsin Constitutional Amendment does not modify the Court's obligations, nor the defendant's burdens under a

Shiffra-Green motion. The recent amendments "may not be interpreted to supersede a defendant's federal constitutional rights." Wis. Const. art. 1, § 9m(6). A criminal defendant has a constitutional right to be given a meaningful opportunity to present a complete defense. *O'Brien*, 223 Wis. 2d at 320; *Shiffra*, 175 Wis. 2d at 605. Included with the meaningful opportunity to present a complete defense is the constitutional right to access necessary materials as previously discussed. *Ritchie*, 480 U.S. at 58; *Shiffra*, 175 Wis. 2d at 610.

The rationale of the *Shiffra-Green* standard adheres to a victim's privacy interests. "A defendant must set forth a fact-specific evidentiary showing, describing as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense." *Green*, 2002 WI at ¶ 33. "Such a procedure strikes an appropriate balance between the defendant's right to be given a meaningful opportunity to present a complete defense and the policy interests underlying the Wis. Stat. §904.05(2) privilege." *Solberg*, 211 Wis. 2d at 387. The mechanism holds a witness's right to privacy, embodied in the health care

provider privileges, and the truth-seeking function of our courts, rooted in the Due Process Clause of the Fourteenth Amendment to provide a workable solution to the need for information. *Behnke*, 203 Wis. 2d at 56.

The 2020 amendment provides series of rights similar to the listing provided in chapter 950. *See* Wis. Const. art. 1, § 9m(2). While an alleged victim may possess a confidentiality right or privilege regarding his or her records under statute, the burden on a defendant or the obligations under *Shiffra-Green* for the court remain. Ultimately, chapter 950 is a recognition of the interests already balanced under *Shiffra*. As such, the *Shiffra-Green* standard properly allows courts to appropriately balance and protect victim interests and rights.

Victims possess the right to refuse disclosure of a privileged record under *Shiffra-Green* and this is consistent with the 2020 amendment and the chapter 950 rights. Wis. Const. art. I, § 9m(1). Under *Shiffra-Green*, a victim holds the right to refuse to disclose sought-after records after a court has made the determination that a defendant has met the threshold showing and that records may be relevant. *Shiffra*, 175 Wis. 2d at 612.

Under Wis. Const. art. 1, § 9m(4) and chapter 950, victims may assert this right in circuit court and reference his or her ability to refuse to disclose such records and nothing in *Shiffra-Green* undermines these rights. A victim may exercise such a right irrespective of the position of a prosecutor. No re-balancing or re-evaluation of process is necessary.

Shiffra-Green preserves a defendant's right to present a complete defense and also requires the defense to meet the substantial threshold showing for the materiality of information going towards guilt or innocence before a judge is permitted to do an in-camera inspection. A witness's privileged records are also protected by prohibiting release without consent even if the records contain relevant information "material to the defense of the accused." Under the 2020 amendment and Chapter 950, witnesses have the ability to assert in court that the records are privileged and determine whether the privileged records are released. Nothing within any changes in victim rights law shifts the protection and balancing of rights under the *Shiffra-Green* standard. Ultimately, sought-after records remain

privileged and if not consented to disclosure, outside of review consistent with victim rights law.

CONCLUSION

For the reasons stated, Johnson now respectfully requests that this Court reject the State's request to overrule *State v. Shiffra*.

Dated this 22nd day of December, 2021.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with mono spaced font. This brief has thirty-seven (37) pages.

Dated this 22nd day of December, 2021.

Nathan J. Wojan

I hereby certify that:

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

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

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

Dated this 22nd day of December, 2021.

Nathan J. Wojan