STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2019AP664
(Waupaca County Case No. 2017CF56)

STATE OF WISCONSIN,

Plaintiff-Respondent,

T.A.J.,

Appellant,

v.

ALAN S. JOHNSON,

Defendant-Respondent-Petitioner.

SUPPLEMENTAL NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Review From a Decision of the Court of Appeals, District IV, Reversing and Remanding an Order Denying T.A.J. Standing, Entered in Waupaca County Circuit Court, the Honorable Raymond S. Huber Presiding

Ellen Henak
State Bar No. 1012490
Robert R. Henak
State Bar No. 1016803

HENAK LAW OFFICE, S.C.
5205 N. Ironwood Road, Suite 100
Milwaukee, Wisconsin 53217
(414) 283-9300

Counsel for Wisconsin Association of Criminal Defense Lawyers

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The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief pursuant to this Court's Order of October 14, 2021, requesting supplemental briefing on whether this Court should overrule ***State v. Shiffra***, 175 Wis.2d 600, 499 N.W.2d 719 (Ct. App. 1993).

Wisconsin courts repeatedly have held over the past 25+ years that the ***Shiffra/Green*** standard properly balances the rights and interests of the defendant, the alleged victim, and the court's truth-seeking function. This Court repeatedly has rejected attempts to overrule those standards. *See* ***State v. Lynch***, 2016 WI 66, 371 Wis.2d 1,

885 N.W.2d 89; ***State v. Johnson***, 2013 WI 59, 348 N.W.2d 450, 832 N.W.2d 609, *reconsideration granted*, 2014 WI 16, 353 Wis.2d 119, 846 N.W.2d 17; ***State v. Solberg***, 211 Wis.2d 372, 564 N.W.2d 775 (1997).

The strict requirements a defendant must meet prior to courts asking any alleged victim to consent to disclosure of treatment records under current law, *see* ***State v. Green***, 2002 WI 68, ¶¶34-35, 253 Wis.2d 356, 646 N.W.2d 298, makes disclosure rare. In those rare cases, the right of alleged victims to refuse to consent to disclosure keeps ***Shiffra*** from infringing on either the constitutional or statutory privacy rights of victims. Neither the Wisconsin constitution, *see* Wis. const. art. I. 9m(2), or any statute, *see* Wis. Stats. §950.04(2), grant victims the right to testify while withholding non-cumulative, relevant information necessary to a determination of guilt, *see* ***Green***, 2002 WI 68, ¶34. Short of disallowing testimony, no remedy for the concealment of this information protects a defendant's right to a defense. ***Shiffra*** therefore properly balances the rights and interests at stake.

WACDL therefore asks this Court to re-affirm ***Shiffra***, as modified by ***Green***, 2002 WI 68, ¶34.

ARGUMENT

This Court Should Re-Affirm *State v. Shiffra*, 175 Wis.2d 600, 499 N.W.2d 719 (Ct. App. 1993).

Under current law, when defendants have established, in good faith, "a specific factual basis demonstrating a reasonable likelihood that [a witness's treatment] records contain relevant information necessary to a determination of guilt or innocence and [are] not

merely cumulative to other evidence available to the defendant," the witness is asked to consent to release of those records for *in camera* review by the trial court. If the witness consents, the trial court review the records *in camera*. ***Solberg***, 211 Wis.2d at 386-87. If the witness does not consent, then he or she may not testify.

During *in camera* review, the court determines "whether the records will likely contain evidence that is independently probative to the defense." ***Green***, 2002 WI 68, ¶34. If the court determines nothing in the records meets that standard, the defense never sees the records. No matter what, the judge must keep them confidential. *See* SCR 60.04(1)(m).

If the court determines that some of the information does meet the standard, then only the information that meets the standard is released *and only if the alleged victim consents*. ***Solberg***, 211 Wis.2d at 386-87. If consent does not occur, then the court bars the witness from testifying.

This case therefore does not affect whether alleged victims can prevent courts and defendants from accessing their treatment records. Alleged victims already have that right under ***Shiffra/Green***. The procedure does not force any victim to allow the court or the defense access to their treatment records, even when those records are reasonably necessary to discovery of the truth.

This case really concerns whether witnesses, specifically alleged victims, have a right to testify while using evidentiary privilege to hide information relevant to determining the truth. It is about whether they can testify while preventing effective cross-examination and questioning of their credibility.

This case is not really about privacy or about victims' state constitutional right to privacy, *See* Wis. const. art. I, §9m(2)(b), or their statutory rights to privacy, *see* Wis. Stats. §950.04(1v)(ag). It is about whether, contrary to the dictates of the Wisconsin constitution, victims can use that Constitution "to supersede a defendant's federal constitutional rights" to due process. *See* Wis. const. art. I, § 9m(6).

A. Due Process Requires that a Defendant Have Access to a Witness's Treatment Records When Those Records Contain Relevant and Necessary Information

Defendants have a "due process right to be given a meaningful opportunity to present a complete defense." ***Solberg***, 211 Wis.2d at 387. *See also* ***California v. Trombetta***, 467 U.S. 479 (1977). Although "[t]here is no general constitutional right to discovery," ***Weatherford v. Bursey***, 429 U.S. 545, 559 (1977), "the Due Process Clause guarantees the defendant a right to a trial based on truth seeking which can only be accomplished by allowing him or her to present a complete defense," ***State v. Behnke***, 203 Wis. 2d 43, 56, 553 N.W.2d 265 (Ct. App. 1996).

Part of the right to a defense is the ability to cross-examine witnesses to establish a defense. As the United States Supreme Court explained in ***Davis v. Alaska***, 415 U.S. 308, 316 (1974), "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." The key purpose of confrontation is "to secure for the opponent the opportunity of cross-examination," ***id***. (quoting 5 J. Wigmore, Evidence §1395, p. 123 (3d ed. 1940)), although the Constitution does not prevent the imposition of

reasonable limits, *see* ***Delaware v. Fensterer***, 474 U.S. 15, 20 (1985) (per curiam).

But it is one thing to understand that a defendant has a constitutional right to present a defense and another to understand how crucial treatment records are to the defense in some cases.

Juries in sexual assault cases often must determine guilt or innocence by determining credibility of witnesses. Particularly in sexual assault cases, independent eyewitnesses are rare because most sexual activity occurs in private settings and therefore only two people know the circumstances firsthand. Shawn E. Fields, *Debunking the Stranger-in-the-Bushes Myth: The Case for Sexual Assault Protection Orders*, 2017 Wis. L. Rev. 429, 440. In addition, physical evidence may be lacking or non-existent.

Thus, for defendants, explaining why the jury should not believe the alleged victim is crucial. Their ability to explain likely determines whether they are found not guilty. Traditionally, the means for attacking the credibility of witnesses has been to attack the alleged victim's ability to perceive or to raise questions about the witness' memory or honesty by use of prior inconsistent statements. Tom Riley, *The ABC's of Cross-Examination*, 41 Drake L. Rev. 35, 48-55 (1992).

Treatment records may contain key information. For example, treatment records can contain evidence that an alleged victim has made previous false accusations of sexual assault, *see, e.g.,* ***State v. Walther***, 2001 WI App 23, ¶¶4, 11-12, 240 Wis.2d 619, 623 N.W.2d 205; *see also* ***State v. William C.***, 841 A.2d 1144 (Conn. 2004); ***Commonwealth v. Feliciano***, 816 N.E.2d 1205 (Mass.

Jud. Ct. 2004), that other events account for various alleged injuries, ***Walther***, 2001 WI App 23, ¶¶4, 11-12, that an alleged victim has recanted, *see, e.g.,* ***State v. Peseti***, 65 P.3d 119, 132-33 (Hawaii 2003); ***State v. L.J.P.***, 637 A.2d 532, 537 (N.J. 1994), or that an alleged victim's psychiatric disorders have an affect on the ability to perceive or relate events, *see, e.g.,* ***Shiffra,*** 175 Wis.2d at 602-603.

B. Privilege Holders Traditionally Have Not Been Allowed to Assert Privilege While Pursuing a Particular Result

Evidentiary privileges never were intended to act as both a shield and a sword. Prohibiting alleged victims from hiding key information while testifying is not radical. Nor do alleged victims have any constitutional or statutory right to testify at trial. The law therefore should not see their exclusion from testifying as an extraordinary remedy when they choose to conceal evidence critical to assessing their allegations.

Privileges "interfere with the trial's search for the truth, and must be strictly construed, consistent with the fundamental tenet that the law has the right to every person's evidence." ***State v. Echols***, 152 Wis.2d 725, 736-37, 449 N.W.2d 320 (Ct. App. 1989). Under Wisconsin law, when a holder of a privilege "voluntarily discloses or consents to disclosure of any significant part of the matter or communication," the privilege is waived unless the disclosure itself was privileged. Wis. Stats. §905.11; *see, e.g.,* ***State v. Denis L.R.***, 2004 WI App 51, ¶¶15-16, 270 Wis.2d 663, 678 N.W.2d 326 (2004). Thus, at a minimum, victims may not disclose the privileged treatment information to the state and still claim privilege when asked to disclose it to the defendant.

But even when privileged material remains undisclosed, having to choose between evidentiary privileges and the pursuit of one's goals in court is common. "While the assurance of confidentiality may encourage relationships of trust, privileges inhibit rather than facilitate the search for truth." ***People v. Stanaway***, 521 N.W.2d 557, 565 (Mich. 1994) (citing 1 McCormick, *Evidence* (4th ed.), §72, at 268-70). Privileges generally are not favored and are narrowly interpreted, ***State v. Meeks***, 2003 WI 104, 20, 263 Wis.2d 794, 66 N.W.2d 859, because "[at] its core, the adversary system is based upon the proposition that an examination of all of the persons possessing relevant information, which will lead to the discovery of all of the relevant facts, will produce a just result," ***Glenn v. Plante***, 2004 WI 24, ¶20, 269 Wis.2d 575, 676 N.W.2d 413.

The physician-patient privilege statute, Wis. Stats. §905.04, recognizes the unfairness inherent in allowing someone to simultaneously hide information relevant to determining the truth while pursuing a claim where the privilege-holder's medical condition is at issue. Wisconsin Statutes §905.04(4)(c) specifically excludes from the privilege "communications relevant to or within the scope of discovery in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense."

Similarly, both attorney-client privilege, Wis. Stats. §905.03, and attorney-client confidentiality, SCR 20:1.6, yield when a client pursues a claim against an attorney. The privilege does not apply when clients claim attorneys have breached duties to them, Wis. Stats. §905.03(4)(c), and defendants alleging ineffective assistance of counsel waive

both privilege and confidentiality by pursuing that claim, ***State v. Flores***, 170 Wis.2d 272, 277-78, 488 N.W.2d 116 (Ct. App. 1992).

C. Victims Have No Constitutional or Statutory Right to Testify at Trial

Article 9m of the Wisconsin Constitution does not grant victims any right to testify at trial nor does any statute provide such a right, *see* Wis. Stats. §950.04. Article 9m, §(2)(e) provides only a right to attend the trial, if there is one. Section (2)(i) grants a right "[u]pon request, to be heard in any proceeding during which a right of the victim is implicated, *including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon*." (emphasis added). The absence of "trial" from this list is glaring.

The omission of a specific right to be heard at trial is particularly noteworthy in light of the origin of Article 9m. The provision is based on the Marsy's Law provision in the California Constitution. *See* Legislative Reference Bureau, Constitutional Amendment Relating to Crime Victims' Rights, 5 Reading the Constitution 1, 6 (2020) (found at https: //docs.legis.wisconsin/gov/misc/lrb/reading_the_ constitution/crime_victims_rights_amendment_5_1.pdf).

In California, the law has given more thought to the role of victims in sexual assault trials than Wisconsin law has. California Civil Code Section 1219 specifically covers testimony of sexual assault and domestic violence victims. Wisconsin has no similar provision.

Section 1219 removes a court's power to require victims to testify by forbidding the use of the contempt power when victims refuse to testify. Given that

background and that level of sensitivity to the desires of sexual assault victims, the absence of a specific provision in the California constitution granting victims a right to testify if they wish indicates an absence of intent to create any such power.

In addition, to the extent that alleged victims are seeking to testify while concealing probative information, what they are seeking is a "right" to testify without fear of contradiction or cross-examination. Yet cross-examination "is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." ***Pointer v. Texas***, 380 U.S. 400, 405 (1965). As a result, that desire is neither a right protected by law nor one worthy of weight in our adversarial system.

D. Current Law Properly Balances the Rights of Defendants, the Truth-Seeking Function of the Courts, and the Interests of Victims

Because ***Shiffra*** keeps the control over private records completely in the hands of victims and because victims have no right to testify, *see* 8-9, 14-15, *supra*, ***Shiffra*** does not implicate victims' constitutional or statutory rights to privacy. There simply is no conflict between the defendant's rights and the alleged victim's *unless* the witness is allowed to testify while simultaneously concealing information likely or actually needed for a fair assessment of the alleged victim's testimony. Instead, if and only if an alleged victim refuses consent to release records, it pits the defendant's constitutional rights in presenting a defense against the victim's desire to convict that particular defendant by testifying without contradiction.

As this Court has previously acknowledged, the

Shiffra procedure was intended to strike "an appropriate balance between the defendant's right to be given a meaning and the policy interests underlying the Wis. Stats. §905.04(2) privilege." ***Solberg***, 211 Wis.2d 387. In addition, it was intended to "strike a balance between the witness's right to privacy...and the truth-seeking function of our courts." ***Behnke***, 203 Wis.2d at 55.

No remedy other than exclusion of a non-consenting witness's testimony will strike this balance. Forcing consent violates the alleged victim's rights to privacy. *See* Wis. const. art. I, §9m(2)(b); Wis. Stats. §950.04(1v)(ag). Contempt is inappropriate because the witness is not obligated to consent to disclosure. *See* ***Shiffra***, 175 Wis.2d at 612. Adjournment solves nothing because it will not make the information necessary to the defense available. *See* ***id***.

Nor will a jury instruction cure the damage to the defense. Allowing the alleged victim to testify while withholding information "probative to the defense," *see* ***Green***, 2002 WI 68, ¶34, but telling the jury of the failure to consent does not adequately protect the defendant's right to present a defense. First, the exercise of a privilege "is not a proper subject of comment by judge or counsel." *See* Wis. Stats. §905.13(1). Second, as the Court recognized in ***Shiffra***, 175 Wis.2d at 612 n.4:

> The jury will know only that the witness has exercised her privilege not to divulge her personal mental history. A reasonable juror might well consider this decision to be a reasonable exercise of her right to privacy rather than an attempt to hide something material to the credibility of her testimony.

Third, allowing alleged victims to testify while concealing probative information is not consistent with the

notion that due process does not allow the state to mislead the jury. Prosecutors have an obligation not to present evidence or argument that they know or should know is untrue and must act to correct any such evidence. *See, e.g.,* ***Giglio v. United States,*** 405 U.S. 150, 153-54 (1972). Consistency with this idea should not allow the state to present a witness that the state knows is or may be hiding something material.

Overruling ***Shiffra*** may cause other practical problems. A defendant's constitutional rights to confrontation, compulsory process and to present a defense necessarily entitled the defendant to subpoena relevant therapy providers to trial, especially as not everything a provider knows would necessarily be privileged.[1] *See, e.g.,* ***Goldsmith v. State,*** 651 A.2d 866, 870-71 (Md. 1995). Thus, even when a defendant's right to present a defense does not require determining whether the defendant should have treatment records pre-trial, the situation may require a decision whether to release those records at the time of trial. ***State v. Johnson***, 102 A.3d 295, 301-03 (Md. 2014).

This reality means that the issue likely is not *whether* some balancing test occurs, but *when*. Any therapist subpoena likely would provoke a motion to quash, requiring the same balancing of interests accomplished now under

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[1] Only confidential communications are privileged, Wis. Stats. §§ 905.04(2), 904.045(2), so, for example, mere presence at a treatment provider's office is not enough for privilege. *See* ***State v. Migliorino***, 170 Wis.2d 576, 489 N.W. 2d 687 (Ct. App. 1992). In addition, for example, mandatory reporting statutes regarding evidence of abuse or neglect of a child, *see* Wis. Stats. §48.981(2) & (3)(a), result in there being no therapist-patient privilege regarding counseling that discloses alleged child abuse. *See* ***Denis L.R.***, 2005 WI 110, ¶¶36-58.

Shiffra/Green. *See*, *e.g.*, ***Lane v. Sharp Packaging Sys., Inc.***, 2002 WI 28, ¶ 56, 251 Wis.2d 68, 640 N.W.2d 788 (*in camera* review required for materials that may be subject to attorney-client privilege). Hearing the matter pretrial would avoid delay and inconveniencing the jury. *See* Wis. Stat. §906.11; ***State v. McClaren***, 2009 WI 69, ¶3, 318 Wis.2d 739, 767 N.W.2d 550 ("Foreseeing potential obstacles to a smoothly run trial and taking the necessary steps to avoid them is manifestly within the inherent power of a circuit court.")

Finally, as a practical matter, the balance previously struck has succeeded. The requisite showing for *in camera* review insures that the alleged victim is not requested to choose between release of private records or not testifying except when ample reason for requiring that choice exists. The alleged victim's right to prevent disclosure protects the victim's privacy while excluding the testimony of those who do not consent protects the defendant's right to a fair trial and the truth-seeking function of the courts at trial.

CONCLUSION

For the reasons set forth above, this Court should reaffirm ***Shiffra/Green***.

Dated at Milwaukee, Wisconsin, January 5, 2022.

Respectfully submitted,

WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Amicus Curiae

HENAK LAW OFFICE, S.C.

Attorney Ellen Henak
State Bar No. 1012490
Attorney Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

5205 N. Ironwood Road, Suite 100
Milwaukee, Wisconsin 53217
(414) 283-9300
ellen.henak@sbcglobal.net

WIS. STAT. (RULE) 809.19(8)(d) CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. (Rules) 809.19(8)(b) and (c) for a nonparty brief produced with a proportional serif font. The length of this brief is 2,954 words.

Ellen Henak

WIS. STAT. (RULE) 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this petition is identical to the text of the paper copy of the brief.

_____
Ellen Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 5th day of January, 2022, I caused 22 copies of the Supplemental Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____
Ellen Henak

Johnson Amicus Brief Shiffra marked.wpd