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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP000664-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

T.A.J.,

Appellant,

v.

ALAN S. JOHNSON,

Defendant-Respondent-Petitioner.

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

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SUPPPLEMENTAL AMICUS CURIAE BRIEF OF WISCONSIN STATE PUBLIC DEFENDER

KELLI S. THOMPSON
State Public Defender
State Bar No. 1025437

KATIE R. YORK
Appellate Division Director
State Bar No. 1066231

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-7125
yorkk@opd.wi.gov

Attorneys for the State Public Defender

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ARGUMENT

Shiffra should not be overturned because it was correctly decided and overturning it would be contrary to stare decisis.

Shiffra was decided nearly 30 years ago. Then, like now, the state argued *Pennsylvania v. Ritchie*[1] is distinguishable and should not apply to privately-held, privileged records. *State v. Shiffra*, 175 Wis. 2d 600, 606, 499 N.W.2d 719 (Ct. App. 1993). *Shiffra* rejected those arguments and for nearly three decades Wisconsin courts have explained its reasoning and rejected similar arguments. *State v. Green*, 2002 WI 68, ¶21 n. 4, 253 Wis. 2d 356, 646 N.W.2d 298; *see also State v. Lynch*, 2016 WI 66, ¶189, 371 Wis. 2d 1, 885 N.W.2d 89 (Zeigler, J., dissenting) (cases where the state voiced displeasure or tried to overturn *Shiffra*).

The state is validly concerned about protecting an individual's private records. However, the defense has an equally important concern in ensuring fundamentally fair trials and protecting against wrongful convictions. *Shiffra/Green* strikes an appropriate balance between these two important interests.

The state's renewed request to overturn *Shiffra* is analyzed under the doctrine of stare decisis, which this Court follows "scrupulously because of [an] abiding respect for the rule of law." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI, 108, ¶94, 264 Wis. 2d 60, 665 N.W.2d 257 (citation omitted). This Court explained,

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

> Fidelity to precedent ensures that existing law will not be abandoned lightly. When existing law "is open to revision in every case, 'deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.'" Consequently, this court has held that "any departure from the doctrine of stare decisis demands special justification."

Id. (quotation omitted).

Factors to consider in deciding whether to overturn precedent include: (1) whether "changes or developments in the law have undermined the rationale behind a decision," (2) whether "there is a need to make a decision correspond to newly ascertained facts," (3) whether "there is a showing that the precedent has become detrimental to coherence and consistency in the law," (4) whether "the prior decision is unsound in principle," (5) whether "it is unworkable in practice," (6) whether "reliance interests are implicated," (7) whether the case was correctly decided, and (8) "whether it produced a settled body of law." *Id.* at ¶98-99. The state alleges *Shiffra* was not correctly decided, unsound in principle, and is unworkable. The state is wrong. And, the factors not argued by the state weigh heavily against overturning nearly 30 years of well-settled law.

A. *Shiffra* was correctly decided and based upon sound legal principles.

1. The privilege is not absolute.

The state argues *Ritchie* involved qualified confidentiality protections, as opposed to a privilege, making *Ritchie* inapplicable here. This argument fails. But first, it must be noted that the *Shiffra/Green* procedure *never* pierces privilege. Although a difficult

decision is required, the patient is *always* given the choice whether to waive privilege. *Green*, 253 Wis. 2d 356, ¶35. This is true even though, arguably, release could be mandated under Wis. Stat. § 146.82(2).

Section 905.04(2), provides patients "a privilege to refuse to disclose and to prevent any other person from disclosing *confidential* communications." (Emphasis added). It then provides eleven circumstances where there is "no privilege," including "for information contained in a report of child abuse or neglect" under Wis. Stat. § 48.981(3). Section 48.981(2), lists people mandated to report child abuse or neglect and subsection (3), describes the government entity to be notified and what investigation follows.

Further, § 146.82(2)(a)11. – addressing confidentiality of health care records – states, "patient health care records *shall* be released upon request *without informed consent*" to law enforcement or a district attorney "for purposes of investigation" or "prosecution" of suspected child abuse or neglect. (Emphasis added). Likewise, § 146.82(2)(a)4., mandates release of confidential records "without consent" "[u]nder a lawful order of a court of record." Thus, like *Ritchie*, in certain circumstances, confidential records can be released to the state and by court order.

2. *Shiffra/Green* is not "general" pretrial discovery.

The state argues *Shiffra* created a general due process right to pretrial discovery. Not so. Although there is no *general* constitutional right to discovery in criminal cases, the stringent *Shiffra/Green* standard is a far cry from broad discovery requests for which there is no constitutional right. The accused must first

demonstrate there is "a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence." *Green*, 253 Wis. 2d 356, ¶34. The defense "must articulate how the information sought corresponds to his or her theory of defense," it cannot be cumulative, and the defense must first conduct an independent investigation. *Id.* at ¶35.

Thus, *Shiffra/Green* is not about *general* pretrial discovery. It is about the need to obtain particularized, material evidence to effectuate a fundamentally fair, and thus constitutional, trial. *See State v. Maday*, 179 Wis. 2d 346, 354, 507 N.W.2d 365 (Ct. App. 1993) ("pretrial discovery is a fundamental due process right.") After all, "privileges contravene the fundamental principle that the public has a right to every man's evidence," and thus, must be strictly construed so as not to unnecessarily transcend "the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980).

3. *Shiffra* appropriately balanced two important interests.

The foundation of the state's argument now, and then, involves distinguishing *Ritchie* when records are privately-held. In *Ritchie*, the United States Supreme Court addressed whether the defendant had a right to receive favorable - but confidential - information from a protective service agency charged with investigating cases of suspected mistreatment or neglect. *Ritchie*, 480 U.S. at 43. The defense raised three constitutional justifications for release: confrontation, compulsory process, and due process.

A plurality concluded the right to confrontation was a trial right, "designed to prevent improper

restrictions on the types of questions that defense counsel may ask during cross-examination," and thus, did not require pre-trial release of the records. *Id.* at 52-54. Three justices disagreed with the plurality's interpretation. Justice Blackmun explained that without use of the records, cross-examination would appear speculative and as a baseless attack on a blameless witness. *Id.* at 64 (Blackmun, J., concurring). Similarly, Justices Brennan and Marshall concluded, "[d]enial of access to a witness' prior statements thus imposes a handicap that strikes at the heart of cross-examination." *Id.* at 66 (Brennan, J. & Marshall, J. dissenting).

Without a majority decision on the confrontation issue, the Court addressed compulsory process. *Id.* at 55. It concluded, at minimum, defendants "have a right to the government's assistance in compelling attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Id.* It concluded the "Fourteenth Amendment precedents addressing the fundamental fairness of trials establish a clear framework for review," and therefore, adopted a due process analysis, noting it did not need to decide how compulsory process and due process protections differ. *Id.*

Finally, the Court addressed due process and remanded for further proceedings to determine whether the privileged records contain material information - *i.e.*, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 57-58. Balancing Ritchie's right to a fair trial and the importance of confidential records, the Court concluded an *in camera* inspection would best protect both interests. *Id.* at 60.

Ritchie did not foreclose use of a similar *in camera* procedure for similar circumstances - *i.e.*, for material, privately-held records. To the contrary, the Court "express[ed] no opinion" on whether the result would have been different had the records been protected "from disclosure to *anyone*, including law enforcement and judicial personnel." *Id.* at 57, fn. 14 (emphasis in original). Recall, like *Ritchie*, § 146.82(2), permits disclosure to law enforcement and upon court order.

Although *Ritchie* cited *Brady v. Maryland*, 373 U.S. 83 (1963), which addressed the government's duty to disclose exculpatory evidence, it did not limit the constitutional importance of defense access to exculpatory evidence to that in the government's possession. Instead, it addressed the facts presented.

"The right of an accused in a criminal trial to due process is in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). A criminally charged person must defend against accusations made by an individual *and* the governmental resources employed to support that accusation. As to the latter point, the government has immense investigative power that is not matched by an individual person. For example, there are entire law enforcement agencies used for investigation. The government is entrusted with the power to execute search warrants, upon a showing of probable cause, on a person's property or even their body. Such searches are extensive and invasive. The government also has the power to subpoena records, including privileged records. *See* Wis. Stat. §§ 968.135, 146.82(2)(a)11.

An accused person does not have comparable power. They cannot search a person's home to find exculpatory evidence. They do not equal authority to

subpoena privileged records. One carefully crafted way an accused person can defend against the power of the government, in limited but important circumstances, is *Shiffra/Green*.

As the state recognizes, false accusations happen. The state cites a "reputable" study indicating an estimated 5.9 percent of sexual assault allegations are false. It acknowledges the same could be true for other criminal cases. (State's supplemental brief, 42). An accurate number is difficult to determine, but the point is – false accusations happen. Wrongful convictions happen. The state's argument that the problem is uncommon and therefore "does not serve a particular need for our court's truth-seeking function" ignores the purpose behind the constitutional protections at issue – *i.e.*, "to ensure that a miscarriage of justice does not occur." *U.S. v. Bagley*, 473 U.S. 667, 675 (1973).

That is precisely why *Shiffra* balanced the right to present a defense with protections afforded by a statutory privilege. In doing so, it cited *California v. Trombetta*, 467 U.S. 479. (1984), which explained,

> Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 … (1982). Taken together, 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**.

Id. at 485 (emphasis added). The Court acknowledged that its "access-to-evidence" cases were less clear regarding the extent due process imposed additional responsibility on the government to guarantee access to exculpatory evidence outside its possession. However, it did not foreclose such a right, rather, the Court acknowledged its existence. *Id.* at 486. The constitution guarantees that a defendant has "a meaningful opportunity to present a complete defense" whether that right is rooted in the Due Process Clause, the Compulsory Process Clause, or the Confrontation clause. *Crane v. Kentucky*, 476 U.S. 683, 690.

The state cites *Trombetta*, 467 U.S. at 485, for the proposition that a defendant's right to present a defense is a trial right implicated when a defendant is prevented from presenting evidence "by the categorical application of state evidentiary rules untethered from any legitimate purpose for its exclusion." (State's supplemental brief, 33). In short, this is not what *Trombetta* says.

It also cites *Holmes v. South Carolina*, 547 U.S. 319, 324-25, as concluding the defendant's right to present a defense is "*only* abridged 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.* (emphasis added). Although *Holmes* provides an example of how a defendant's right to present a defense can be abridged, it does not say – or even suggest – that is the *only* way such a right is abridged. Again, the Court addressed the facts presented.

B. *Shiffra/Green* is necessary protection against wrongful convictions.

The state expresses surprise about higher use of *Shiffra/Green* in sexual assault and domestic abuse cases. This should be unsurprising as the complainant's allegations in such cases are often the sole evidence against the defendant. Consider a child sexual assault allegation with delayed reporting. There is no physical evidence and often times the alleged offense date is a moving target. *See State v. Kempainen*, 2015 WI 32, 361 Wis. 2d 450, 862 N.W.2d 587 (four-month window for alleged offense date was sufficient notice satisfying due process). Therefore, an accused person cannot use physical evidence – *e.g.*, DNA – to defend oneself and cannot provide an alibi because there is no definitive date alleged. Challenging the veracity of the allegation is the only defense.

Now imagine, this is one of the 5.9 percent of false allegations. If the defense shows there is "a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence," the information is not cumulative, and relates to the theory of defense, protection under *Shiffra/Green* is necessary to ensure a fundamentally fair trial and to protect against wrongful convictions.

The state argues *Shiffra/Green* motions are routinely filed and asserts its Criminal Appeals Unit regularly fields questions. There is no way to test these anecdotal assertions, but questions from prosecutors suggest unfamiliarity with *Shiffra/Green*, meaning infrequent use. This is consistent with equally anecdotal information from the State Public Defender's Appellate Division where staff attorneys rarely review cases with *Shiffra/Green* issues, and even more rarely litigate such issues.

Moreover, the state incorrectly asserts *Shiffra/Green* motions are "nearly inevitable" if an alleged victim is in counseling. Such a motion is plainly frivolous and easily rejected. *Green*, 253 Wis. 2d 356 at ¶33 ("The mere contention that the victim has been involved in counseling related to prior sexual assaults or the current sexual assault is insufficient.") Likewise, the state erroneously asserts failure to file a *Shiffra/Green* motion in the aforementioned situation would "almost certainly" invite an ineffective assistance of counsel claim. This, again, is untrue and frivolous.

For the prosecution, it feels like *Shiffra/Green* commonly risks release of privileged records, harming victims. For the defense, it feels like innocent people are at higher risk of wrongful conviction without *Shiffra/Green*. Both are valid concerns that must be balanced. Hence, *Shiffra/Green*.

C. Many jurisdictions have adopted *Shiffra/Green*-type procedures.

Wisconsin is not unique in providing a procedure for the defense to obtain material evidence from privileged or confidential records. Although courts rely on varied reasoning, they agree fundamental fairness requires an opportunity, in limited circumstances, for access to such records.[2] Still, *Shiffra/Green* is among

[2] *See e.g. State v. Slimskey*, 779 A.2d 723, 731-32 (Conn. 2001) (balancing statutory privilege against confrontation rights) *State v. Trammell*, 435 N.W.2d 197 (Neb. 1989) (similar); *In re Doe*, 964 F.2d 1325 (2nd Cir. 1992) (similar); *State v. Gonzales*, 912 P.2d 297, ¶21 (N.M. Ct. App. 1996) (*in camera* review); *State v. Karlen*, 589 N.W.2d 594 (S.D. 1999) (same); *United States v. Alperin*, 128 F. Supp. 1251 (N.D. Cal. 2001) (same); *State v. Duffy*, 6 P.3d 453 (Mont. 2000) (same); *State v. Hummel*, 483 N.W.2d 68 (Minn. 1992) (records may be released after prerequisites met); *State v. White*, 141 S.W.3d 460 (Mo.

the most robust, with a challenging burden for the defense. And, it provides additional protection for the privilege-holder, as release is *never* mandated.

The state cited state and federal decisions to support its arguments. (State's supplemental brief, fn. 7, 9). However, several of those cases endorse a *Shiffra/Green*-type procedure. For example, in *People v. Stanaway*, after reviewing cases from multiple jurisdictions, the court adopted a procedure similar to Wisconsin's current standard announced in *Green*. 521 N.W.2d 557, 574 (Mich. 1994). Likewise, in *In re Crisis Connection, Inc.*, the court denied an *in camera* review, but still weighed the accused's right to present a complete defense with the victim advocate privilege. 949 N.E.2d 789, 801-02 (Ind. 2011).[3]

2004) (balances legislature's interest in confidential records with release "necessary to prevent the conviction of an innocent person"); *State v. Pinder*, 678 So. 2d 410 (Fla. Ct. App. 1996) ("stringent test" before in camera review); *Commonwealth v. Dwyer*, 859 N.E.2d 400, 417-18 (Mass. 2006) (defense counsel reviews records); *see also Lynch,* 371 Wis. 2d 1, ¶97 (Abrahamson, J. & Bradley, A.W., J., concurring in part, dissenting in part); Wayne R. LaFave, et al., 6 *Criminal Procedure* § 24.3(f) & n. 207 (4th ed. 2015).

[3] *See also State v. Percy* 548 A.2d 408, 415 (Vt. 1988) (did not preclude the possibility due process could require access to privately-held, privileged information); *State v. J.G.*, 619 A.2d 232, 237 (N.J. Super. App. Div. 1993) (compelling circumstances could warrant release of records); *State v. Bell*, 469 P.3d 929 (Utah (2020) (concern about appropriate balance between constitutional rights and privileged records); *State v. Goldsmith*, 651 A. 2d 866 (Md. Ct. App. 1995) (rejected *pre-trial* request to privileged records, but "a fair trial may outweigh the right to assert a privilege at the trial stage").

Finally, *Shiffra/Green* is not the only exceptional circumstance where a privilege may be breached in Wisconsin. In the context of the rape shield law, "evidence of a complainant's prior sexual conduct may be so relevant and probative that the defendant's right to present it is constitutionally protected." *State v. Pullizano*, 155 Wis. 2d 633, 647-48, 456 N.W.2d 325 (1990). And, this Court established "a public policy exception" to the therapist-patient privilege in third-party negligence cases where the treatment allegedly caused false memories of child abuse. *Johnson v. Rogers Memorial Hospital, Inc.*, 2005 WI 114, ¶¶63-65, 283 Wis. 2d 384, 700 N.W.2d 27.

In sum, *Shiffra/Green* is a rarely used, but necessary, protection for a fundamentally fair process which seeks to avoid miscarriages of justice.

CONCLUSION

For these reasons, the Court should not overturn *Shiffra.*

Dated this 10th day of January, 2022.

Respectfully submitted,

KATIE R. YORK
Appellate Division Director
State Bar No. 1066231

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-7125
yorkk@opd.wi.gov

Attorney for the State Public Defender

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,000 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 10th day of January, 2022.

Signed:

KATIE R. YORK
Appellate Division Director