STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2020AP1876-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOMAS JAYMITCHELL HOYLE,

Defendant-Appellant.

RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

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The State of Wisconsin opposes the relief Tomas Jaymitchell Hoyle seeks in his supplemental brief to this Court. Hoyle argues that, in light of the Wisconsin Supreme Court's recent opinion in *State v. Johnson*,[1] if he is not granted a new trial on his newly discovered evidence claim, then the case should be remanded so Hoyle can have a rehearing on his newly discovered evidence claim "with an opportunity to subpoena Hannah and her counseling records." (Supp. Br. 7, 15.) Under no circumstances is he entitled to this relief. Hoyle has never stated a valid reason for needing the records. *Johnson* does not alter that conclusion; in fact, it provides additional reasons to deny Hoyle's new request for relief. This Court should reject Hoyle's argument and affirm the circuit court on the three claims remaining at issue in this appeal.

STATEMENT OF ISSUES

While this response brief focuses on the arguments Hoyle raised in his supplemental brief, the State restates the three issues that remain in this appeal, to clarify how they should be decided after the Wisconsin Supreme Court's remand in *State v. Hoyle*[2] and in light of *Johnson*:

1. A defendant may be granted a new trial based on newly discovered evidence if there is a reasonable probability that the evidence would have raised a reasonable doubt in the jury's mind about the defendant's guilt. Here, Hoyle discovered evidence after trial that conflicted with the victim's testimony that she had discussed the sexual assault with her counselor. The circuit court denied Hoyle's new trial motion. Did the court err?

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[1] *State v. Johnson*, 2023 WI 39, 407 Wis. 2d 195, 990 N.W.2d 174.

[2] *State v. Hoyle*, 2023 WI 24, 406 Wis. 2d 373, 987 N.W.2d 732; *see also* Wis. Sup. Ct. Order dated April 6, 2023, Appeal No. 2020AP1876-CR.

No. Although relevant to the victim's credibility, the counseling issue was a collateral one and her inconsistent statements would not have given the jury a reasonable doubt about Hoyle's guilt.

This Court should affirm, for the reasons provided in the State's initial response brief. (State's Br. 18–20.)[3]

2. Under pre-*Johnson* precedent, a defendant may be granted postconviction in camera review of the victim's counseling records if they are necessary to a determination of guilt or innocence and are not cumulative to evidence already available. Here, Hoyle seeks review of the victim's counseling records solely due to her inconsistent statements about whether she discussed the sexual assault in counseling. The court denied the motion. Did the circuit court err?

No. Under *Shiffra/Green*[4] and *Robertson*,[5] which articulated the governing standards before *Johnson* was decided, the records are not relevant to the question of Hoyle's guilt or innocence. Confirmation that the victim made inconsistent statements about whether she discussed the sexual assault in therapy is cumulative to the evidence already in the record and collateral to the question of Hoyle's guilt or innocence.

This Court should affirm. Hoyle has never provided a plausible reason to review Hannah's mental health records.

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[3] In this supplemental brief, the State refers to Hoyle's opening brief, filed March 1, 2021, as "Hoyle's Br." The State refers to its initial response brief, filed May 21, 2021, as "State's Br." The State refers to Hoyle's supplemental brief to this Court, filed June 26, 2023, as "Supp. Br."

[4] *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.

[5] *State v. Robertson*, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 105.

That aside, because the Wisconsin Supreme Court has now overruled *Shiffra/Green*, Hoyle may not obtain any relief on his claim for postconviction review of the victim's counseling records.

3. A defendant may be granted a new trial if the State suppressed, even inadvertently, evidence that is favorable to the accused and material to guilt. Here, Hoyle discovered postconviction two documents that he contends are favorable and material. The circuit court denied a new trial on this ground. Did the circuit court err?

No. The documents are neither favorable nor material, are cumulative to other evidence, and contain inconsistencies between the victim's first recorded report of the assault and her later statements that are insignificant at best.

This Court should affirm, for the reasons provided in the State's initial response brief. (State's Br. 30–39.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither are warranted. The three remaining issues in this case can be decided on the briefs, and by applying well-settled precedent to the facts. Wis. Stat. § (Rule) 809.23(1)(b)1.

STATEMENT OF THE CASE

The State primarily relies on the Statement of the Case provided in its initial response brief to this Court. (State's Br. 8–14.) Additional procedural history will be discussed as necessary below.

ARGUMENT

I. Hoyle is not entitled to a remand to pursue Hannah's mental health records.

Hoyle argues that if this Court does not grant him a new trial,[6] then he is entitled to a remand so he can subpoena Hannah and her counseling records to a new postconviction hearing on his newly discovered evidence claim. (Supp. Br. 7, 15.) He's wrong for at least three reasons. First, the records are not needed to decide his newly discovered evidence claim. Second, if he loses on his newly discovered evidence claim, then by logical extension, he would have lost on his *Shiffra/Green* and *Robertson* claim as well, so remanding in the alternative is not warranted. Third, *Johnson* has foreclosed his *Shiffra/Green* and *Robertson* claim. Allowing him a remand to pursue a subpoena for those records would significantly compromise the rights of the victim, and would only broaden his claims beyond what has already been argued and briefed.

A. This case presents no reason to review Hannah's mental health records.

Hoyle filed a postconviction motion that included a request for in camera review of Hannah's counseling records "based on their materiality to a newly discovered evidence claim." (Supp. Br. 8; R. 63:8–13.) Hoyle's newly discovered

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[6] In the circuit court and the court of appeals, Hoyle argued that he alternatively is entitled to a remand if he is not granted a new trial solely on his newly discovered evidence claim. (R. 63:8; Hoyle's Br. 33.) His supplemental brief seems to have broadened this argument; he now argues that if he is not granted a new trial on any of his claims (including his *Brady* claim), then he should receive a remand in the alternative. (Supp. Br. 7, 15.) This Court should only consider the relief he asked for during initial briefing, subject to post-briefing developments such as *Johnson*.

evidence claim is solely based on the ground that Hannah told the presentence investigator that "she has not discussed the sexual assault with her counselor because she does not want to constantly relive the assault." (R. 31:4–5; 63:3–7.) This differed from her trial testimony attributing her calm demeanor to discussing the assault in therapy. (R. 91:167–68.) Hoyle argued that the counseling records were material under *Shiffra/Green* because, "[b]ased on [Hannah's] own statements to the PSI writer, the counseling records will show that she did not discuss the sex assault with her counselor, in direct contradiction to her trial testimony." (R. 63:11–12.)

Hoyle's asserted reason to obtain review of Hannah's health records—their "materiality" to his newly discovered evidence claim—is without merit. Hoyle has never needed the records to pursue his newly discovered evidence claim. The "newly discovered evidence" is Hannah's statement to the presentence investigator that she had not discussed the sexual assault with her counselor, in contrast to her trial testimony that she had. (R. 63:5.) Hannah's conflicting statements are already in the record. (R. 31:4–5; 91:167–68.) The analysis turns on whether her statement to the presentence investigator, regardless of its accuracy, "create[s] a reasonable probability that a jury hearing this evidence would have a reasonable doubt about Hoyle's guilt." (State's Br. 18–19); *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42. It doesn't. (State's Br. 18–20.) Hannah's statement to the presentence investigator does not need to be verified to make this determination. (State's Br. 18–19.)

B. If Hoyle does not prevail on his newly discovered evidence claim, then by logical extension, he would have lost on his *Shiffra/Green* and *Robertson* claim as well.

Hoyle sought in camera review of Hannah's medical records *only* if this Court rejected his newly discovered

evidence claim. (State's Br. 24; Hoyle's Br. 33.) But there has never been a reason for the court to review or provide Hoyle access to Hannah's mental health records if he loses on his newly discovered evidence claim. (Supp. Br. 7.)

If this Court rejects the newly discovered evidence claim, it will do so because it finds that the discrepancy between Hannah's trial testimony and her statement to the presentence investigator creates no "reasonable probability" that the jury "would have had a reasonable doubt as to the defendant's guilt" had it "heard the newly-discovered evidence." *Plude*, 310 Wis. 2d 28, ¶ 32.

As the State explained in its initial response brief, there is no reasonable probability that the jury would have reached a different result if it had been presented with her conflicting statement to the PSI investigator. (State Br. 18–20.) *Green* (now overruled by *Johnson*) contained a materiality standard that required a showing of a "'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence." *State v. Green*, 2002 WI 68, ¶ 32, 253 Wis. 2d 356, 646 N.W.2d 298. Although the *Green* materiality standard was more generous to Hoyle than the *Plude* standard, he did not meet that standard, either. (State's Br. 24–26.)

This case has never presented a credible reason to review Hannah's medical records in the event Hoyle loses on his newly discovered evidence claim. As explained next, *Johnson* does not alter that conclusion, and in fact, provides additional reasons to deny a remand to allow Hoyle to pursue those records.

C. *Johnson* has foreclosed Hoyle's *Shiffra/Green* and *Robertson* claim, and allowing him a remand to pursue a subpoena for those records would compromise the rights of the victim.

Johnson has now overruled *Shiffra*/*Green* to the extent those cases could be read to permit in camera review of privately held, privileged health records in a criminal case upon a showing of materiality. *State v. Johnson*, 2023 WI 39, ¶ 47, 407 Wis. 2d 195, 990 N.W.2d 174. *Robertson* allowed the same basic relief as *Shiffra/Green* in the postconviction context. *State v. Robertson*, 2003 WI App 84, ¶ 26, 263 Wis. 2d 349, 661 N.W.2d 105. Because *Robertson* incorporated *Shiffra/Green's* materiality standard to determine whether posttrial in camera review of mental health records was permissible, (State's Br. 22), *Robertson* is no longer a viable avenue to obtain those records, either. *See Johnson*, 407 Wis. 2d 195, ¶ 47 (overruling *Shiffra/Green* and others to extent they could be read to permit in camera review of privately held, privileged health records in criminal case upon showing of materiality).

Johnson applies retroactively. "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *State v. Koch*, 175 Wis. 2d 684, 694, 499 N.W.2d 152 (1993) (citation omitted). In light of *Johnson*, Hoyle cannot prevail on his claim for in camera review of Hannah's mental health records. He can no longer obtain any relief on this claim whatsoever. But in any event, as explained in the State's initial response brief, he did not meet the relevant standards under *Shiffra/Green* and *Robertson*, anyway.

As a workaround, Hoyle argues that if doesn't receive a new trial on his remaining claims, including his newly discovered evidence claim, he should be allowed a remand to subpoena Hannah for her mental health records. (Supp. Br. 15.) But again, he has never provided a plausible reason to obtain Hannah's records if this Court rules against him on his newly discovered evidence claim. Allowing him a remand to pursue a subpoena for those records would seriously compromise Hannah's rights as a victim, and runs the risk of improperly allowing Hoyle to broaden his claims beyond the scope of what he sought in his initial postconviction motion. (R. 63.)

Hoyle argues that he should get another shot at the records in light of *Johnson*, because "[w]hen an appellate court announces a new rule that affects other pending appellate cases, the standard practice is to remand the pending case to the circuit court so it may apply the new rule." (Supp. Br. 7.) He cites *Kenyon v. Kenyon*[7] for that proposition. But that case is inapplicable. There, the supreme court reviewed a circuit court's discretionary decision to deny modification of spousal maintenance. *Kenyon v. Kenyon*, 2004 WI 147, ¶¶ 7, 10, 277 Wis. 2d 47, 690 N.W.2d 251. The circuit court applied the wrong legal standard in rendering its decision. *Id*. ¶ 3. "[I]n conformity with the controlling precedent at the time, the circuit court did not consider the fairness objective in relation to both parties." *Id*. But after the circuit court denied the motion, the supreme court issued an opinion in another case that clarified that "once a substantial change in the parties' financial circumstances is demonstrated, the circuit court must consider the dual maintenance objectives of support and fairness when modifying a maintenance award." *Id*. The supreme court

[7] *Kenyon v. Kenyon*, 2004 WI 147, ¶ 36, 277 Wis. 2d 47, 690 N.W.2d 251.

therefore reversed the decision of the court of appeals and remand for a new hearing under the appropriate standard. *Id*.

This case is different. *Johnson* did not clarify the standard a court should use when granting relief on a specific claim, as was the case in *Kenyon*. Rather, *Johnson* did away with the claim altogether.

Shiffra/Green created a process that permitted in camera review of privately held, privileged health records in a criminal case upon a showing of materiality. *Johnson*, 407 Wis. 2d 195, ¶ 47. *Robertson* incorporates *Green*'s materiality standard in the context of postconviction review of confidential records to support a newly discovered evidence claim. *Robertson*, 263 Wis. 2d 349, ¶ 26. The *Johnson* court deemed *Shiffra/Green* "unsound in principle because it rests on a misinterpretation of the United States Supreme Court's decision in *Ritchie*[8] and harms the therapist-patient relationship." *Johnson*, 407 Wis. 2d 195, ¶ 47. Further, the *Shiffra/Green* standard proved "unworkable in practice because it is inherently speculative and cannot be applied consistently." *Id*. And the standard "has been undermined by developments in the law regarding sexual assault and domestic violence and by the adoption of new statutory and constitutional provisions protecting the rights of victims, and is therefore detrimental to coherence in the law." *Id*. (*citing, e.g*., Wis. Const. art. I, § 9m; Wis. Stat. § 950.04.)

Thus, after *Johnson*, defendants can no longer rely on *Shiffra/Green* and *Robertson*, which essentially created an exception to the statutory privilege for confidential mental health records, to obtain in camera review of those records.

In light of the foregoing, granting a remand is not appropriate if this Court denies Hoyle relief on his newly discovered evidence claim. The State does not concede that

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

after *Johnson*, a defendant can now "simply serve" a victim "with a subpoena duces tecum to appear, with her counseling records, at the postconviction hearing" on a newly discovered evidence claim. (Supp. Br. 14.) But this Court need not decide what the post-*Johnson* landscape should look like (Supp. Br. 11–14), because in this case, such relief is not appropriate under any circumstances.

The reasoning provided in the State's initial response brief applies equally here. The premise of Hoyle's intent to serve a subpoena duces tecum is that the discrepancy between Hannah's statements at trial and the PSI report undermines her credibility. But he has never explained how Hannah's counseling records could help him to exploit that discrepancy. If the records confirm her statement to the presentence investigator—that she did not discuss the abuse with her counselor—Hoyle will know no more than he knows now. All the counseling records would prove is that Hannah's statement to the presentence investigator was true and that her trial testimony was not—something that this Court would have to assume to be true when analyzing Hoyle's newly discovered evidence claim.

If Hoyle were to subpoena Hannah and her mental health records, Hannah could assert privilege or move to quash, based on the fact that the motion was unduly burdensome, oppressive or unreasonable. *Pophal v. Siverhus*, 168 Wis. 2d 533, 550, 484 N.W.2d 555 (Ct. App. 1992.) There would be ample basis to assert unreasonableness, given the flaws noted above.

Hoyle suggests that the circuit court would have to decide whether Hannah waived the privilege in light of her trial testimony. (Supp. Br. 8.) When Hannah testified at trial, Hannah was not aware of Hoyle's new argument that she could waive her statutory privilege by testifying. To allow Hoyle to return to circuit court, subpoena her for her records, and then argue that she waived her privilege in light of recent

legal developments, would seriously undermine this victim's statutory and constitutional rights, including her right to assert privilege of these documents and her right to privacy. *Johnson*, 407 Wis. 2d 195, ¶ 47 (citing, e.g., Wis. Const. art. I, § 9m; Wis. Stat. § 950.04).

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Analyzing Hoyle's second issue pre-*Johnson* or post-*Johnson* yields the same result. A remand for further opportunities to seize Hannah's mental health records is not appropriate. Hoyle is not entitled to a new trial, and he is not alternatively entitled to a remand for a rehearing on his newly discovered evidence claim with an opportunity to subpoena Hannah and her counseling records.

CONCLUSION

The State of Wisconsin respectfully requests that this Court affirm the conviction, sentence, and order denying postconviction relief entered in the court below.

Dated this 30th day of August 2023.

Respectfully submitted,

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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 2,407 words.

Dated this 30th day of August 2023.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 30th day of August 2023.

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