STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2011AP002680-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

PATRICK J. LYNCH,

Defendant-Respondent.

APPEAL FROM NON-FINAL ORDER BARRING ALLEGED VICTIM'S TESTIMONY ENTERED IN DODGE COUNTY CIRCUIT COURT THE HONORABLE ANDREW P. BISSONNETTE PRESIDING

BRIEF OF DEFENDANT-RESPONDENT PATRICK J. LYNCH

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STATEMENT OF THE ISSUES

1. Did Patrick Lynch make the preliminary showing necessary for the circuit court to order an *in camera* review of A.M.'s privileged treatment records? The circuit court ruled that Mr. Lynch had made the required showing.

2. In the event that an alleged victim declines to release privileged treatment records for *in camera* review, may a circuit court override the long-standing remedy of barring the alleged victim from testifying, and instead override the alleged victim's declination and order the disclosure of the records under Wis. Stats. §146.82(2)(a)4 ?

The circuit court refused to override A.M.'s invocation of her privilege and instead followed the well-established procedure set forth in *State v. Shiffra*, 175 Wis.2d 600, 499 N.W.2d 719 (Ct. App. 1993) and *State v. Green*, 2002 WI 68, 253 Wis.2d 356, 646 N.W.2d 298 and barred A.M. from testifying at Lynch's trial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This appeal involves the application of well-settled rules of law to a recurring fact situation. Therefore, Patrick J. Lynch

does not request publication of this court's opinion. Mr. Lynch takes no position as to oral argument.

STATEMENT OF THE CASE

This case involves the State's appeal of a non-final order of the circuit court which granted Patrick Lynch's motion for *in camera* review of an alleged victim, A.M. The order also provided that if A.M. refused to allow the court access to her records for that *in camera* review, A.M.'s testimony would be barred at trial. (110:1-15; A-Ap. 101-119).

Patrick Lynch was charged with two counts of first degree sexual assault, contrary to Wis. Stats. §948.02(1), and one count of stalking, in violation of Wis. Stats. §940.32(2). The assaults were alleged to have taken place during the Summer of 1989. (1:4; A-Ap. 123). A.M. also claimed that during this same period of time she was being assaulted by her own father, who was a friend of Lynch. A.M.'s father was convicted in 1993 of sexually assaulting A.M. (31:3, 19, 27, 32). The criminal complaint setting forth these allegations

against Lynch was not filed until December, 2010. (1; A-Ap. 121).

On May 19, 2011, Lynch filed a motion seeking disclosure of various psychiatric and psychological treatment records pertaining to A.M. from 1993 to 2011, or, in the alternative, for an *in camera* examination of same. (48:1-5; A-Ap. 133-138).

The State did provide some records to Lynch's counsel in response to the motion. Those consisted of therapy and medical records of A.M. to which privilege did not attach because they had been provided in connection with the prosecution of A.M.'s father. (47; 51:1 A-Ap. 131-32, 144). On July 26, 2011, Lynch filed an amended offer of proof in support of his request for *in camera* review of A.M.'s mental health records, specifically the records compiled by Dr. Black and Dr. Heilizer for the years 1993 through 2011. Both the initial motion and amended offer of proof with their accompanying affidavits and exhibits are set forth in the State's appendix. (48; 60; 92; A-Ap. 198; 133; 172) Lynch argued that A.M. had claimed to be the victim of multiple sexual assaults

committed by her own father in approximately 1990-1991 and that A.M. had disclosed the sexual assaults perpetrated by A.M.'s father when A.M. was hospitalized at a psychiatric hospital in Madison in approximately March, 1992 while a minor. Further, that A.M. had entered into counseling with Dr. Sionag Black in 1992. Subsequently, Dr. Black wrote a letter to Dodge County Circuit Judge Klossner in relation to the then pending sentencing hearing of A.M.'s father in which Dr. Black advised the court, "I do want you to know that as her (A.M.'s) therapist I did carefully assess the possibility of any other person who might of (sic) been involved. (As a perpetrator of assaults on A.M.) She identified no one." (92:11-12; 96:3, A-Ap.107; 208-209)

In addition, the motions and offer of proof provided the circuit court with evidence that A.M. went through great amounts of stress during the period of the reported sexual assaults, that A.M. likely suffered from some form of post-traumatic stress disorder (PTSD) and that A.M. remained in treatment for approximately thirteen to fifteen years after the

reported assaults committed by A.M.'s father. (96:5-6; A-Ap.109-110)

Finally, as a part of Lynch's motions and offer of proof, he provided the circuit court with an opinion letter from Dr. Bev Wolfgram, a psychiatric advanced practice nurse prescriber, who reviewed the available mental health records of A.M. Dr. Wolfgram opined that there was definitely a reasonable likelihood that the information in the mental health records that were being sought would show that A.M. continued to suffer from PTSD and depression and also, in her opinion, that there was definitely a reasonable likelihood that A.M. has a sociopathic personalty disorder. (92:13; A-Ap. 210).

Lynch argued that because Dr. Black was a mandatory reporter, who was treating A.M. in connection with her symptoms related to the assaults committed by A.M.'s father, and further because Dr. Black explicitly advised that she had asked A.M. if any other person had committed any assaults the clear inference was that A.M. either expressly denied or never claimed that there had been any sexual assaults committed by Lynch. In addition, Lynch argued that the existence of the

diagnoses of PTSD and sociopathic personality disorder were directly relevant to A.M.'s credibility.

After a hearing on Lynch's motion which was held on June 17, 2011, the circuit court, on September 6, 2011, issued a written decision and order granting the motion for an *in camera* examination of A.M.'s records. (74; 96, A-Ap. 214-334; 105-121)

A.M. notified the State that she would not release those medical records "[u]nless and until" the circuit court's order was reviewed by another court or the prosecution declined to appeal. The State filed a petition for leave to appeal and the Court of Appeals denied that petition and remanded the matter to the circuit court. (110:1-2, A-Ap.101-102) A.M., by letter, advised the court that she was refusing to consent to any release of records to the circuit court for purposes of an *in camera* inspection and accordingly, pursuant to *Shiffra*, the circuit court entered an order barring A.M. from testifying at Lynch's trial. (110:2; A-Ap. 102). The State appealed from that non-final order barring A.M.'s testimony.

ARGUMENT

I. LYNCH MADE AN AMPLE SHOWING UNDER *SHIFFRA* AND *GREEN* TO OBTAIN *IN CAMERA* REVIEW OF A.M.'S PRIVILEGED TREATMENT RECORDS.

A. Showing Required for *In Camera* Review

In *State v. Shiffra*, *supra* the court held that a defendant may obtain an *in camera* review of privileged records upon a showing of materiality. The *Shiffra* court noted that a defendant's right to due process, and in particular the right to a meaningful opportunity to present a complete defense, is implicated in seeking such a review. Countervailing that constitutional interest of an individual accused of a crime is the statutory privilege under Wis. Stats. §905.04(2) which protects such records from disclosure. The statutory privilege provides that the patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to a treatment provider. Id. In striking the balance of those competing interests, the *Shiffra* court concluded that an *in camera* review of such otherwise privileged records should be ordered when "the defendant makes a

preliminary showing that the sought after evidence is material to his or her defense." Id. at 605.

The showing required to obtain an *in camera* review set forth by the court in *Shiffra* was modified in *State v. Green*, 2002 WI 68, 253 Wis.2d 356, 646 N.W.2d 298. While the requirements for obtaining an *in camera* review were, in a nuanced fashion, heightened, the court in *Green* emphasized that the burden was not unduly high for making the threshold showing for an *in camera* examination of records. In Mr. Lynch's case, Judge Bissonnette was clearly well aware of the appropriate legal standard to be met for an *in camera* examination, and he explicitly set it forth in his order.

> The Court understands that the standard for the required showing was modified and increased from *State v. Shiffra* to *State v. Green*, 253 Wis.2d 356. The defendant must show a reasonable likelihood that the records will be necessary for a fair determination of guilt or innocence. *State v. Green*, *Id* at ¶ 33. The defendant must set forth a fact specific evidentiary showing describing as precisely as possible what is sought and how it is relevant. *Id* at ¶ 33. As the Wisconsin Supreme Court further noted in *Green*, however:
>
> > A good faith request will often require support though motion and affidavit from the defendant. Our standard is not intended, however, to be unduly high for the defendant before an in camera review is ordered by the circuit court. The defendant, of course will most often be

> unable to determine the specific information in the records. Therefore, in cases where it is a close call, the circuit court should generally provide an in camera review. *State v. Green*, *Id.* at ¶ 35 (96:4; State's Appendix A-Ap 108) (emphasis in original order)

The circuit court in this case applied the correct legal standard to the facts and to Mr. Lynch's offer of proof. In its order granting an *in camera* review, the circuit court properly considered the following:

- That the Court believed the evidence would show that A.M.'s father was a friend of Patrick Lynch during that time frame, and it is alleged in the present case that Patrick Lynch was assaulting A.M. during those same years that she was being assaulted by her father. (96:3; A-Ap. 107)

- That A.M. was a victim of multiple assaults by her own father, in approximately 1990-1991. That A.M. was hospitalized on a suicide attempt, and that thereafter she was referred to treatment with Dr. Sionag Black in Beaver Dam, for treatment related to the sexual assaults, and that A.M. definitely spoke with Dr. Black about the sexual assaults perpetrated on her by her father. (96: 1-12; A-Ap. 105-116)

- Despite the disclosures against her father which A.M. made to Dr. Black, the defense had reason to believe that there were no such disclosures by A.M. against

Patrick Lynch.[1] In fact, the record contains a letter written by Dr. Black to Dodge County Circuit Court Judge Klossner in relation to the then pending sentencing hearing of A.M.'s father. Dr. Black advised Judge Klossner, "*I do want you to know that as her therapist I did carefully assess the possibility of any other person who might of (sic) been involved.* (As a perpetrator of assaults on A.M.) *She identified no one*." (92:11-12; 96:3; A-Ap. 107; 208-209) (emphasis supplied).

- That there was evidence from which the court could find that A.M. had likely suffered from some form of post-traumatic stress disorder stemming from the assaults committed by her father. In addition in the defense offer of proof, it was proffered that both case law and medical journals indicated that PTSD may impair a witness from being able to truthfully recall and testify regarding the events that presumably resulted in the PTSD.[2] (96:5-6; A-Ap. 109-110)

Given this factual backdrop, it is clear that Lynch made a sufficient showing for the *in camera* examination ordered by

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[1]Such an inference was completely well founded; since A.M. was a minor at the time, treatment providers would have been legally obligated to report any allegations of abuse or sexual assault by Lynch.

[2]As just one example, the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders Fourth Edition (DSM-IV) in listing the diagnostic criteria for PTSD, notes one of those criteria to be "acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, *illusions, hallucinations, and dissociative flashback episodes*...." (DSM-IV 428) (emphasis supplied)

the circuit court. Lynch showed that A.M. was being counseled concerning the sexual assaults committed by A.M.'s father. Lynch showed that A.M. reported the assaults committed by A.M.'s father. Further, that the counselors were mandatory reporters who therefore had to report whether they had reasonable cause to believe that A.M. had been the subject of abuse. Wis. Stats. §48.981(2). Lynch also showed that A.M. was directly questioned concerning whether any other persons had assaulted her and none of the mandatory reporters reported same. In fact, Dr. Black specifically reported that she had questioned A.M. and that A.M. denied assaultive conduct by Lynch or indeed by any other person. In addition, Lynch's offer of proof set forth diagnoses, namely PTSD and sociopathic personality disorder which are relevant to A.M.'s credibility.

That Lynch made a sufficient showing is underscored by the courts' decisions in *Speese*. In *State v. Speese*, 199 Wis.2d 597, 545 N.W.2d 510 (1996), *Speese (II)*, the defendant sought psychiatric records related to the complainant's admission at a mental health facility. The basis for the motion was that (1) questions about sexual abuse are routinely posed to an

adolescent at a mental health facility; (2) had the alleged victim revealed any sexual encounters with or abuse by the defendant, the mental health professionals would have been obliged to report same and, (3) because the allegations of the defendant's abuse did not surface until seven months later, the alleged victim's medical and psychiatric records must demonstrate that the alleged victim had been either silent about any sexual abuse by the defendant or had denied it outright. Id. at 600-601. The circuit court in *Speese* had granted an *in camera* review but subsequently did not disclose any records to the defendant after that *in camera* review. The Court of Appeals reversed holding that the circuit court should have disclosed the records. *State v. Speese*, 191 Wis.2d 205, 528 N.W.2d 63 (Ct. App. 1995) *Speese (I)* Id. at 223-24. When the Supreme Court reversed it held that any error by the circuit court was harmless. However, in doing so, the Supreme Court noted *"we acknowledge that a victim's failure to report alleged incidents of sexual abuse to hospital personnel has the potential to discredit the victim's testimony."* *Speese (II)* at 604. (emphasis supplied)

The showing made by Lynch was stronger than that demonstrated in *Speese*. In *Speese*, there was no indication that the alleged victim was asked whether any other person had abused her. As noted previously, A.M. was asked by Dr. Black whether any other person had abused or assaulted A.M. In spite of A.M.'s later allegations that contemporaneous with the assaults committed by A.M.'s father, Lynch assaulted her as well, she identified no other perpetrator when questioned by Dr. Black.

In addition, given the showing that Lynch made of the diagnosis of PTSD and sociopathic personality disorder, Lynch made a showing that the otherwise privileged records of A.M. may contain information affecting A.M.'s credibility. In such cases, courts have ordered an *in camera* review of those records. *Shiffra*, *supra*, *State v. Robertson*, 203 WI App. 84, 263 Wis. 2d 349, 661 N.W.2d 105.

There can be no question that such information which could affect the credibility of A.M. is clearly sufficient to demonstrate the reasonable likelihood that the records contained relevant information necessary to a determination of guilt or

innocence. The records for which Lynch sought and was granted *in camera* review are the best evidence of A.M.'s denial that any person other than her father assaulted A.M. They further are the best evidence of diagnoses that affect A.M.'s credibility. The records would not be cumulative to any other evidence Lynch possesses. Thus, it is quite clear that Lynch made a sufficient preliminary showing for the *in camera* examination and the circuit court was unquestionably correct in so finding.

B. The State's Challenges to Mr. Lynch's Showing For a Preliminary *In Camera* Examination and the State's Challenges to the Circuit Court's Conclusion that Mr. Lynch Had Met His Burden for Ordering Such an *In Camera* Examination of A.M.'s Records are Without Merit

The State has challenged the sufficiency of Mr. Lynch's preliminary showing, a showing which the circuit court found met the burden under *Shiffra* and *Green, supra* for ordering an *in camera* examination of A.M.'s records. The State's challenge, while at times bewildering, is based on neither the law or the facts. That challenge should be rejected by this court. Mr. Lynch considers each of the State's arguments insofar as they can be discerned, in turn.

1. The State's challenge that Mr. Lynch was "too thorough."

The first argument advanced by the State is, it seems, that Lynch was too thorough in making his offer of proof. (State's Brief at pgs. 13-14). Apparently, the State wants this court to reject the well-reasoned decision of the circuit court to order an *in camera* examination of A.M.'s records because *too many* factual allegations were set forth by Mr. Lynch. No doubt, if a lesser factual basis for an *in camera* review had been set forth, the State would be challenging Mr. Lynch's showing for that reason. Such a challenge would at least have had some rational basis, but that is not the nature of the State's challenge. Rather, as noted, it is the polar opposite – i.e. that Lynch set forth too much not too little. Here, as set forth above in this brief, Mr. Lynch set forth a detailed offer of proof showing the reasonable likelihood that A.M.'s records would contain relevant information necessary to a determination of Mr. Lynch's guilt or innocence. So whatever the State is driving at with its apparent argument about Mr. Lynch being too thorough, the fundamental issue is simply whether Mr. Lynch met the *Shiffra/Green* standard for the *in camera* examination of A.M.'s records.

Again, the circuit court carefully examined the record and found that Mr. Lynch met that threshold - a threshold which is "less stringent than the standard applied by the court during its *in camera* inspection." *Green*, *supra* 2002 WI 68 ¶31. That conclusion should be affirmed by this court. The remainder of the State's challenges are addressed below.

2. The Mandatory Reporter Argument

One of the factors that the circuit court considered in granting Mr. Lynch's motion for *in camera* disclosure was that the court could conclude that A.M. was the victim of multiple assaults perpetrated by her own father in approximately 1990 - 1991 and that the court believed A.M. disclosed the sexual abuse by her father while A.M. was hospitalized on a suicide attempt, and that thereafter she was referred to Dr. Sionag Black for treatment related to the sexual assaults. The circuit court noted that A.M. definitely spoke with Dr. Black about the sexual assaults perpetrated on A.M. by her father. Since A.M. was a minor when in treatment, Dr. Black, as a treatment provider would have been legally obligated to report any allegations of abuse or sexual assault by Lynch, had any such allegations been

made. Despite the disclosures that A.M. made against her father at the hospital and to Dr. Black, the defense had made a showing that there were no such disclosures to Dr. Black or to medical staff by A.M. against Patrick Lynch. Indeed, as a part of Mr. Lynch's preliminary showing, he provided evidence that Dr. Black specifically advised Circuit Court Judge Klossner at the time of the sentencing of A.M.'s father, "I do want you to know that as her (A.M.'s) therapist I did carefully assess the possibility of any other person who might of (sic) been involved. (As a perpetrator of assaults on A.M.) *She identified no one*." (92:11-12; 96:3; A-Ap. 107; 208-209). (Emphasis supplied).

The State dismissively terms this basis for *in camera* review as Lynch's "mandatory reporter syllogism." (State's Brief at pg. 14). The State's argument in this regard is without merit.

The State first contends that Lynch "'overstates' the importance of A.M.'s possible failure to disclose the sexual assaults to her therapist" and that "sexual assault victims often delay disclosing sexual assault, particularly child victims sexually assaulted by a family friend and authority figure." Id.

at pg. 14. Finally, the State argues that the delay in A.M.'s reporting is "something for a defendant to explore at trial." Id. at 14.

Mr. Lynch has already in this brief set forth some of the reasons why A.M.'s non-reporting is relevant - and those did not simply have to do with incredibly long delay in A.M. making those allegations. Secondly, the State's assertion, (which is unsullied by citation to any authority or empirical evidence), that sexual assault victims ostensibly often delay disclosing sexual assault, mischaracterizes what occurred in this case. A.M. did not delay disclosing sexual assaults; she in fact disclosed the sexual assaults she claimed were perpetrated by A.M.'s father. So we do not have in this case a simple delay in reporting. Rather, there was contemporaneous reporting by A.M. about her father. And, although the alleged assaultive conduct by Lynch was supposedly occurring at the same time as the assaults by A.M.'s father, there was a lengthy period where no allegations were made by A.M. against Mr. Lynch. Then after many years, A.M. purported to "remember" assaults allegedly committed by Lynch. That sequence of events is, in fact, contrary to the

State's assertion that there is nothing unique about the non-reporting.

The State is entitled to try and advance its ostensible explanations as to why A.M. delayed disclosing her allegations against Lynch when she had not delayed making her allegations her own father, but to adopt the State's phraseology, that is something for the State to explore at trial. It does not change the fundamental fact that Mr. Lynch made a sufficient showing for the *in camera* examination.

The State also challenges both Mr. Lynch's directing the circuit court's attention to the decision in *State v. Speese*, 191 Wis.2d 205, 528 N.W.2d 63 (Ct. App. 1995) (*Speese I*), and the circuit court's reliance on both that decision and the Supreme Court's decision in that same case. *State v. Speese*, 199 Wis.2d 597, 545 N.W.2d 510 (1996). (*Speese II*) (State's Brief pgs. 15-16).

If this particular challenge of the State is to be deciphered as a contention that the circuit court was in error in its use of the Court of Appeals decision in *State v. Speese(I)*, that is simply an incorrect analysis of the opinions.

In *Speese(I)* the circuit court after an *in camera* review, denied a defense request made pursuant to *Shiffra* for access to the sexual assault victim's psychiatric records. The Court of Appeals found that the defense had made the requisite showing under *Shiffra*, reasoning that because the victim was a minor, and the medical providers would thus have been obligated to report an allegation of sexual abuse, it was a reasonable inference that the victim did not tell the hospital staff about the defendant's sexual assault of her. *Speese(I)* at 223. Far from wholly rejecting the analysis of the Court of Appeals, the Supreme Court in *Speese(II)* actually acknowledged the relevancy a failure to report has on the issue of credibility. *Speese(II)* at 604 ("while we acknowledge that a victim's failure to report alleged incidents of sexual abuse to hospital personnel has the potential to discredit the victim's testimony. . ."). The court in *Speese(II)*, however, was reviewing a case that had gone to trial without the disclosure of the records to defense counsel. It therefore undertook a harmless error analysis and found that in that particular case, considering all of the evidence, including

the strength of the prosecution's evidence,[3] that even if the circuit court erred in denying access to the records, such error did not affect the outcome of the trial. *Speese (II)* at 606.

This case is in a far different posture. Judge Bissonnette was making a determination of whether an *in camera* examination should be ordered; the question of subsequent disclosure to defense counsel is one to be made in the future. Judge Bissonnette was clearly well aware of the appropriate *Shiffra/Green* standard to be met, Mr. Lynch met that standard, and the circuit court was correct in so finding.

Allowing the *in camera* review ordered by the circuit court in this case would not "open the floodgates" as contended by the State (State's Brief at pg. 16). Mr. Lynch's preliminary showing did not consist of a mere conclusory allegation that the alleged victim had been receiving psychiatric counseling. Rather, Lynch's showing demonstrated that A.M. received psychiatric/psychological counseling during which there was selective reporting by A.M. about a family member, i.e., her

[3] This evidence included, among other things, an admission by the defendant to his step-daughter that he had sexually abused the victim. *Speese (II)* at 606.

father, a statement by one of A.M.'s counselors that even when pressed, A.M. identified only her father as the perpetrator of assaults, and that then, after an extraordinarily long delay, and apparently after more counseling, the purported "recovered memory" by A.M. that Lynch also had allegedly assaulted her.

As discussed elsewhere in this brief, Lynch's preliminary showing also demonstrated the likelihood of specific mental illness diagnoses with respect to A.M. which bear upon her truth telling capacity.

Thus the State's alarmist argument about this case somehow opening the door to *in camera* review in virtually every case should be disregarded. The parade of imagined terribles proffered by the state have nothing to do with the facts of this case.

The State then launches a quite extraordinary challenge. It claims that Mr. Lynch's preliminary showing for an *in camera* examination is somehow deficient because "it is not clear mandatory reporters always do report child abuse allegations." (State's Brief at pg. 17). In other words, the State contends that Lynch's preliminary showing falls short of the

mark because it relies on the presumption that mandatory reporters will comply with the law. This challenge as well has no basis.

The mandatory reporting law is clear, and the sanctions for non-compliance with its requirements are harsh. Mandatory reporters, which includes, among others, physicians, social workers, nurses, and professional counselors are obligated to report suspected abuse when they have reasonable cause to suspect that a child whom they have seen in the course of their professional duties has been abused or neglected. Wis. Stats. §48.981(2). Whoever intentionally violates the mandatory reporting requirement by failing to report as required may be fined not more than $1,000 or imprisoned not more than 6 months or both. Wis. Stats. §48.981(6).

In spite of this clear legal obligation, the State contends that there are ostensibly reasons why mandatory reporters may not, as required by law, report child abuse allegations. The State claims that a mandatory reporter may not "pick up on" allegations, particularly those made by a child; a mandatory reporter may want to explore allegations further; a mandatory

reporter may not want to jeopardize an ongoing therapeutic relationship; the mandatory reporter may believe that the costs of disclosure outweigh the benefits, particularly if a patient is no longer in danger of abuse but would be devastated by disclosure; or a mandatory reporter may be confused about reporting obligations; and finally, because a required report of abuse to the authorities extinguishes the privilege under Wis. Stats. §905.04(4)(e)2. (State's Brief at pg. 17-18).

Most of these ostensible reasons, or more properly, speculations without any authority or empirical evidence, as to why mandatory reporters may not report allegations have nothing to do with this case. It must be emphasized, again, that there was, in fact, reporting by a mandatory reporter, Dr. Black. Clearly, Dr. Black had no confusion about her obligation under the law or concerns about jeopardizing a therapeutic relationship with A.M. Dr. Black reported the abuse perpetrated by A.M.'s father. Further, Dr. Black quite properly made further inquiry concerning whether any other person had abused A.M. As noted elsewhere in this brief, Dr. Black informed a Dodge County Circuit Court Judge that A.M. identified no one other than her

father as being involved as a perpetrator. (92:11-12; A-Ap. 208-209) More broadly, the State's speculation as to why a mandatory reporter would not report suspected abuse is contrary to the principle that all persons are presumed to know and will follow state law. *Brown v. State*, 230 Wis.2d 355, 378, 602 N.W.2d 79 (Ct. App. 1999). This presumption applies to lay persons who serve as jurors, *State v. Lacount*, 2008 WI 59, ¶23, 310 Wis.2d 85, 750 N.W.2d 780 and to public officials. *State ex rel. Wasilewski v. Bd. of School Directors of City of Milwaukee*, 14 Wis.2d 243, 266, 111 N.W.2d 198 (1961). It should surely apply to mandatory reporters as well.

Thus, the circuit court's determination in this case that the non-reporting by A.M.'s medical providers, who were subject to the mandatory reporting requirement of Wisconsin law, was relevant and was a basis for ordering *in camera* review was entirely reasonable, and was consistent both with accepted legal principle and with *Speese(I)* and *Speese(II)*.

3. PTSD

The State has claimed that the PTSD symptoms displayed by A.M. are somehow an insufficient basis for granting an *in camera* review. As a part of this challenge, the State must therefore also be challenging the Circuit Court's finding after its review of the record that there was "certainly a sufficient record from what is available from the Posthuma trial to find that A.M. has likely suffered from some form of PTSD, whether or not it has been accompanied by psychosis." (96: 6; A-Ap. 110). As an initial matter, Lynch would note that the circuit court's finding regarding A.M. likely suffering from PTSD was a factual one. The State has not suggested how this factual finding was erroneous at all, much less clearly erroneous. Indeed, Dr. Black's letter to Judge Klossner alone, was a sufficient basis for this factual finding. In that letter Dr. Black expressly noted her observations of "[s]ymptoms more characteristic of post traumatic stress disorder . . . . She (A.M.) has experienced intrusive symptomatology such as flashbacks and nightmares throughout the past year. These pertain directly to experiences with her father. She has startle responses and the hypervigilance

characteristic of persons who have undergone significant trauma." (92:10-11; A-Ap. 207-208)

The State then challenges Lynch's showing by comparing this case to two cases in which *in camera* review was granted, *Shiffra* and *State v. Robertson*, 2003 WI App. 84, 263 Wis.2d 349, 661 N.W.2d 10.

In fact, the showing made by Lynch was in many ways even stronger than the showings made in those two cases. Lynch, just like the prevailing defendant in *Shiffra*, made a showing that the complainant likely suffered from post traumatic stress disorder. Lynch, just as the complainant in *Shiffra*, made a showing of treatment of the alleged victim for a lengthy period of time for psychiatric illness. A.M., just like the alleged victim in *Shiffra*, had been assaulted by a family member, namely her stepfather. In *Shiffra* however, there was no evidence of selective or delayed reporting as there is in this case. Nevertheless, the finding of the existence of PTSD was sufficient for the court in *Shiffra*. The *Shiffra* court found that the complainant's psychiatric difficulties might affect both her

ability to accurately perceive events and her ability to relate the truth. Id. at 612. The same is true here.

In *Robertson*, the defendant was charged with sexual assault. He claimed a defense of consent at trial. The alleged victim had been diagnosed with clinical depression with psychotic features, although those were not further described. The court in *Robertson* turned to the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders Fourth Edition (DSM IV) which indicated that a person who has depression with psychotic features:

> [I]ndicates the presence of either delusions or hallucinations (typically auditory). . . most commonly the content of the delusions or hallucinations is consistent with the depressive themes. . . Id. at ¶27.

The *Robertson* court found that information in the alleged victim's records concerning her psychiatric treatment and the nature of the psychotic features presented by the alleged victim's depression could explain her behavior in a way that was not possible at trial. This in turn could have affected the alleged victims's credibility at trial and therefore it was error to deny the *in camera* review. Id. at ¶28.

Here, the court found ample evidence that A.M. suffered from PTSD. The DSM IV indicates with respect to PTSD one of the diagnostic criteria to be "acting or feeling as if the traumatic event were recurring (includes a sense or reliving the experience, *illusions, hallucinations, and dissociative flashback episodes*. . . ." DSM-IV pg. 428 (emphasis supplied). Just as in *Robertson*, then, the records are likely to contain information which affects credibility and accordingly the circuit court's order for an *in camera* examination of A.M.'s records was correct and should be affirmed.

4. Dr. Wolfgram

The State also challenges as a basis for ordering an *in camera* review, the opinion of Dr. Wolfgram, and more specifically her opinion that there was "definitely a reasonable likelihood that A.M. also has sociopathic personality disorder." (78:2; A-Ap. 181) (State's Brief at 22-23). The State contends that the circuit court rejected Dr. Wolfgram's opinion about A.M. having a diagnosis of being a sociopath. This contention that the circuit court rejected this opinion of Dr. Wolfgram is yet another mischaracterization by the State. The circuit court judge

merely found that there was no need to "hang his hat" on the opinion set forth in Dr. Wolfgram's letter; that there was a sufficient basis to order *in camera* review without it. The circuit court in this case held that even in the absence of the Wolfgram opinion letter, it was clear that Mr. Lynch was entitled to an *in camera* inspection of the medical records. (96:8; A-Ap. 112)

Although the circuit court found that Dr. Wolfgram's opinion concerning the reasonable likelihood that A.M. has a sociopathic personality disorder was not necessary in order to order an *in camera* review of A.M.'s records, that letter is nonetheless telling, and in fact provides yet another basis for *in camera* review. Dr. Wolfgram outlined A.M.'s history of "exaggerated symptoms for a purpose" and histrionic behavior. She also described that records that were examined which demonstrated feigned loss of consciousness. In addition, Dr. Wolfgram noted what has been already set forth in this brief, namely the non-reporting of any assaults by Lynch when in treatment with Dr. Black notwithstanding Dr. Black's carefully addressing with A.M. the possibility of offenders other than A.M.'s father. (78:3; A-Ap. 182). Just as was the case with the

diagnosis of PTSD in *Shiffra* and the diagnosis of clinical depression with psychotic features in *Robertson*, the diagnosis of sociopathic personality disorder bears directly on credibility. Dr. Wolfgram set forth in her opinion letter that the disorder includes the behavioral features of manipulative and conning, pathological lying, lack of remorse, and irresponsibility and unreliability. (78:3; A-Ap. 182) In addition Dr. Wolfgram expressed her opinion that there was a reasonable likelihood that A.M.'s mental health records would show A.M. to have a sociopathic personality. (78:4; A-Ap.183) Accordingly, although not necessary for Judge Bissonnette's decision to order *in camera* review, the expert opinion letter of Dr. Wolfgram serves as yet another basis for that review.

C. The *In Camera* Review Standard is Well Settled and Does Not Need "Reinvigorating."

Finally, the State urges this court to "reinvigorate or at least reaffirm" what it characterizes as the "high threshold" for obtaining *in camera* review. The State also contends that this court and by implication circuit courts consider *in camera* review "no big deal, just confidential review by a Judge." And,

the State adds, motions seeking in camera review "are the epitome of putting a victim on trial." (State's Brief at 24-25)

First, the State misstates the standard to be met for *in camera* review set forth in *Green*. The *Shiffra* standard was indeed refined and heightened somewhat in *Green*, but it in fact says that the defendant must show a *reasonable* likelihood that the records will be necessary for a fair determination of guilt or innocence. *Green*, at ¶32. Contrary to the State's assertion, the standard for *in camera* review is not a high threshold, and in close cases, in camera review should be granted:

> A good faith request (for *in camera* review) will often require support through motion and affidavit from the defendant. *Our standard is not intended however to be unduly high for the defendant before an in camera review is ordered by the circuit court.* The defendant, of course, will most often be unable to determine the specific information in the records. Therefore, in cases where it is a close call, the circuit court should generally provide an *in camera* review. *Green*, *supra* at ¶35. (Emphasis supplied).

As to the State's contention that this court or the circuit courts will consider ordering *in camera* review "no big deal" Mr. Lynch cannot improve upon the statement of the Court of Appeals in *Shiffra*:

> We believe that the State's position shows too little confidence in the role of the trial court in balancing a person's right to confidentiality of mental health records

> against the defendant's right to present a defense. That lack of confidence is unfounded. A judge's duties were aptly described nearly two centuries ago in the landmark case of *Marbury v. Madison*, 1 CRANCH.137 (1803). There, Justice John Marshall stated, "If two laws conflict with each other the courts must decide on the operation of each. . . This is of the very essence of judicial duty." Id. at 177-78. *Shiffra, supra* at 611.

The State has advanced no facts that would support a conclusion that the circuit court in this case considered its order for an *in camera* examination of records "no big deal," and there is absolutely no reason to believe that circuit courts in general will not conscientiously discharge their duties in deciding whether to order *in camera* review.

The circuit court in this case carefully considered the competing interests in Mr. Lynch's case, made well supported findings of fact and applied the correct legal standard. Those competing interests include not only those of A.M. but also the interest of Mr. Lynch in being able to defend against these criminal charges. He is the person who is actually "on trial", and the nature of the charges against Mr. Lynch make his right to defend all the more important. "[A] falsely accused defendant can be gravely harmed. . . . it is indisputable that being labeled a child abuser is one of the most loathsome labels in society and

most often results in grave physical, emotional, professional, and personal ramifications." *Johnson v. Rogers Memorial Hospital, Inc.*, 2005 WI 114, ¶64, 283 Wis.2d 384, 700 N.W.2d 27 (internal citation omitted)

The circuit court found there was a factual basis to find there was specific omission of accusing Mr. Lynch when, at the same time A.M. was disclosing the assaults perpetrated by her father. And, just as in *Shiffra and Robertson*, there was a nexus shown between diagnoses or likely diagnoses of A.M. and her ability to accurately perceive or recount reality and her credibility. This was more than sufficient to warrant an *in camera* review, and the circuit court was correct in ordering that such a review be conducted. Its order granting *in camera* review with respect to A.M.'s records should be affirmed.

II. THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT IT COULD NOT ORDER A.M. TO DISCLOSE HER PRIVILEGED RECORDS WITHOUT A.M.'S CONSENT; IT WAS ALSO CORRECT IN HOLDING THAT IN THE EVENT A.M. REFUSED TO CONSENT TO RELEASE HER RECORDS, THE REMEDY WAS TO BAR A.M. FROM TESTIFYING AT TRIAL.

The State has also argued that if an alleged victim declines to consent to an *in camera* review of his or her privileged records, a court is empowered to order disclosure of those privileges records without consent under Wis. Stats. §146.82(2)(a)4. This statute allows access to medical records without consent "under a lawful order of a court of record." The State's request to upend almost two decades of precedent should be rejected.

A. Neither Circuit Courts, Nor the Court of Appeals Have the Authority to Order an Alleged Victim's Privileged Records to be Disclosed Without Consent. The Privilege is Absolute and May Not be Overridden by Court Order.

It is clear that the privilege conferred by Wis. Stats. §905.04(2) is absolute in the context of this case. The language of the statute is clear. It provides:

> 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. . .

Significantly, in *Speese(I)* the Court of Appeals wrote "the patient privilege in §905.04(2), Stats., is absolute in the

sense that nothing in the statute authorizes a court to use a communication within the privilege for any purpose in a criminal action. In *Shiffra*, we treated the privilege as absolute." *Speese*, 191 Wis.2d at 219 (footnote and internal citations omitted).

In *State v. Solberg*, 211 Wis.2d 372, 564 N.W.2d 775 (1997), the court had ordered disclosure of an alleged victim's records pursuant to a *Shiffra* motion. The Supreme Court had to determine whether the Court of Appeals had the authority to actually review the patient's records which led to the Supreme Court reviewing the record for evidence of a signed release. The Supreme Court held:

> A circuit court should conduct an *in camera* review of privileged medical records when a defendant makes a preliminary showing that the sought after evidence is material to his or her defense, *and the privilege holder consents to a review of those records.* Id. at 383 (Emphasis supplied)

Solberg thus makes it clear that there needs to be a release for the circuit court to review records - otherwise the privilege forecloses such review.

This absolute nature of the privilege leads to the first part of Mr. Lynch's response, i.e., that any order compelling

disclosure of medical records without consent under Wis. Stats. §146.82(a)(2)4 would not be "a lawful order" of a court of record.

The second prong to Mr. Lynch's response is that neither circuit courts nor intermediate appellate courts are empowered to overturn precedent. The situation presented in this court is that Mr. Lynch made a motion, pursuant to *Shiffra*, for *in camera* examination of A.M.'s otherwise privileged records. The circuit court applied *Shiffra* and *Green* and ordered the *in camera* examination of those records. A.M. invoked and declined to waive her privilege under Wis. Stats. §905.04. Again, pursuant to *Shiffra*, the circuit court ordered that A.M. would be barred from testifying at trial. (110: 1-3; A - Ap. 101-103. There is no question that the circuit court's ruling was the correct one under *Shiffra*. In *Shiffra* the Court of Appeals held that the alleged victim was "not obligated to disclose her psychiatric records." *Shiffra*, *supra* at 612. In *Shiffra* the court also had to make a determination as to whether the circuit court erroneously exercised its discretion when it suppressed the alleged victim's testimony as a sanction for her refusal to release

the records. The *Shiffra* court held that the circuit court committed no error in barring the testimony and that "[i]n this situation, no other sanction would be appropriate." Id. Since this court is in the same situation, both factually and legally, as that presented in *Shiffra*, it simply does not have the authority to modify or in any way change the holding in *Shiffra*. *Cook v. Cook*, 208 Wis.2d 166, 189-90, 560 N.W.2d 246 (1997). "[O]nly the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals."

The unassailable fact that this court is not empowered to modify *Shiffra* is dispositive on the question of whether this court can upend almost two decades of precedent and order disclosure of medical records without consent. However, in the interest of completeness, Mr. Lynch will address the substance of the argument present by the State, albeit briefly.

The State has argued in this regard that circuit courts may compel the alleged victim's privileged records for *in camera* examination because the defendant's constitutional rights trump the alleged victim's privilege, which is only statutory in nature.

(State's Brief at pg. 30). The State's syllogism here is that Lynch has the due process right to a fair trial which encompasses the right to have an *in camera* examination of A.M.'s records upon a sufficient showing under *Shiffra* and *Green*. Secondly, that A.M.'s right to keep those records confidential is statutory. These two rights are supposedly in conflict. Ergo, Lynch's constitutional rights must trump A.M.'s statutory privilege.

However, the syllogism breaks down. The two rights do not actually conflict. Federal law only trumps State law where the two laws actually conflict. *Ware v. Hylton*, 3 U.S. 199 (1796). That they do not conflict is exemplified in *Pennsylvania v. Ritchie*, 480 U.S. 39, 46 (1987) and by the court's decision in *Shiffra*, 175 Wis.2d at 611-612.

The two rights co-exist by virtue of the very carefully calibrated procedure fashioned over decades. The courts in Wisconsin have carefully balanced the competing values, *i.e.*, the alleged victim's statutory privilege and the due process rights of the accused in the *Shiffra/Green* procedure. That procedure requires an initial showing of relevance, and judicial

oversight, while carefully considering the rights of the accused. The result of the State's suggestion is at best paradoxical and at worst disingenuous and perverse. The State, on the one hand, has labored mightily to block Lynch's effort to obtain a fair trial by means of obtaining disclosure of A.M.'s otherwise privileged records, even to the trial court judge. However, having failed at that attempt, it now wants the court to trample A.M.'s privilege set forth in Wis. Stats. §905.04 and order disclosure over A.M.'s objection. The effect of the suggested change would be that the court would take complete control over the records - rendering the privilege a nullity. It is a suggested change which tramples the individual autonomy and privacy interests of the alleged victim and vests all control and power in the State. In fact, the State expressly takes umbrage at the "unprecedented control over whether such prosecutions go forward," that alleged victims purportedly have under the present *Shiffra/Green* procedure. It is a suggested change that would have a chilling effect on alleged victims seeking treatment, since they would know they would have no control over disclosure in the event of a prosecution. Indeed, sometimes alleged victims will decline

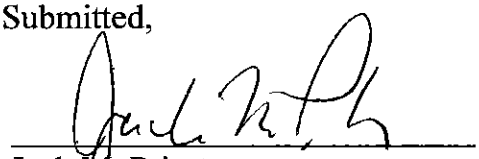
to disclose, and sometimes prosecutions will be stymied as a result. But that is not a reason to overturn the carefully calibrated procedure fashioned over almost two decades. That procedure protects both the due process rights of the accused and the privacy interest of the alleged victim in his or her privileged records.

CONCLUSION

For the above reasons and based on the above authorities, Mr. Lynch respectfully requests that this Court affirm the circuit court's order for *in camera* review of A.M.'s privileged therapy records, and in the event that A.M. declines to release those records, that it affirm the circuit court order barring A.M.'s testimony at trial.

Dated this 2nd day of May, 2012.

Respectfully Submitted,



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FORM AND LENGTH CERTIFICATION

In accord with Wis. Stats. § (Rule) 809.19(8), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 8689 words.

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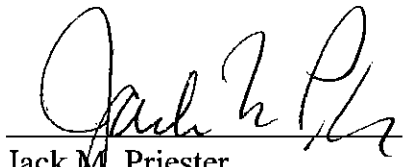

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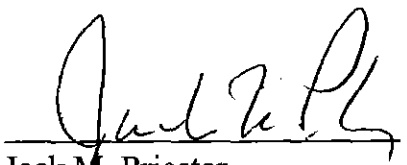

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding appendix (if any) which complies with the requirements of Wis. Stat. §(Rule) 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.

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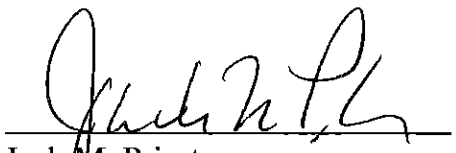

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