STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP664-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

T.A.J.,

Appellant,

v.

ALAN S. JOHNSON,

Defendant-Respondent-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING AND REMANDING AN ORDER ENTERED IN WAUPACA COUNTY CIRCUIT COURT, THE HONORABLE RAYMOND S. HUBER, PRESIDING

SUPPLEMENTAL REPLY BRIEF OF PLAINTIFF-RESPONDENT

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ARGUMENT

The court of appeals in *Shiffra* wrongly extended *Ritchie* to allow defendants pretrial discovery of a victim's private and privileged records.

Shiffra was wrongly decided and unsound in principle. (State's Supp. Br. 27–37.) The court of appeals in *Shiffra* premised its rule, which provided a means for defendants to access a victim's confidential, private, and privileged health care records on *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). But that reliance was incorrect.

Ritchie governs confidential files in the government's possession and that trigger the government's due process obligations to disclose favorable material evidence under *Brady*. *Ritchie* did not address private records protected by a statutory privilege. There is no other theory of due process that supports the court's decision in *Shiffra*. And no state constitutional provision, statute, or public policy justifies maintaining *Shiffra* as good law. Departure from the principle of stare decisis is warranted to overrule *Shiffra*.

A. *Shiffra* was wrongly decided.

1. Defendants have no due process right to pretrial discovery of a victim's confidential, privileged, and private health care records.

Johnson appears to make two due process-based arguments: (1) the court in *Shiffra* correctly interpreted *Ritchie*, and (2) alternatively, *Ritchie* doesn't direct the holding in *Shiffra* but *Shiffra* is still soundly based on the right to present a complete defense and courts' truth-seeking function. (Johnson's Supp. Br. 14–16, 20–21, 23–24). The State addresses each.

Johnson first relies on *Ritchie* but misunderstands it. He argues that the holding was based on a generalized due

process right to present a complete defense and that the Court did not distinguish between private and public records. In Johnson's view, *Shiffra* appropriately applied the in camera review process in *Ritchie* to a victim's private, confidential, and privileged health care records. (Johnson's Supp. Br. 14–15.)

These premises are wrong. Nowhere in *Ritchie* did the Court invoke the right to present a complete defense, or cite to any case discussing it. *See Ritchie*, 480 U.S. at 51–61. Its holding was rooted in *Brady* and its progeny. *Id.* at 57–59. And the *Ritchie* Court *did* distinguish between private and public records when it relied on *Brady* in addressing a defendant's right to access favorable evidence in the government's possession. *Id.* at 56. Contrary to Johnson's claim that the records in *Ritchie* were outside the prosecutor's possession (Johnson's Supp. Br. 20–21), the files were those of a public agency tasked with investigating potential abuse, *Ritchie*, 480 U.S. at 43, and therefore were within the scope of what *Brady* requires prosecutors to assess for potential value to the defense. *See Kyles v. Whitley*, 514 U.S 419, 437 (1995) (stating that prosecutors' duty to disclose under *Brady* includes a duty "to learn of any favorable evidence known to *the others acting on the government's behalf in the case*" (emphasis added)).

Johnson then abandons *Ritchie*, arguing it isn't controlling when it comes to the distinction between private and public records, and that there is no U.S. Supreme Court case directing this Court to uphold *Shiffra*. (Johnson's Supp. Br. 20–21.) The State couldn't agree more. As argued (State's Supp. Br. 28–31), the court of appeals in *Shiffra* incorrectly felt bound by its limited discussions of *Ritchie* in *K.K.C.* and *S.H.* There is no controlling case from the Supreme Court requiring this Court to adhere to *Shiffra*. Nor is there any

basis in the federal or state constitutions,[1] statutes, or public policy supporting the continued viability of *Shiffra*.

Leaving *Ritchie* aside, Johnson insists that the *Shiffra* rule is correctly premised on a defendant's right to present a complete defense. He criticizes the State's discussion of that right as too limited (Johnson's Supp. Br. 21–22), but he offers no alternative interpretation to explain why or how that right applies in the *Shiffra/Green* context.

2. There is no constitutional, statutory, or policy basis to uphold *Shiffra*.

Johnson also argues that *Shiffra* should be upheld because Wisconsin courts in *Behnke*, *Solberg*, and *Green* have previously rejected some of the State's arguments why *Shiffra* was wrong. (Johnson's Supp. Br. 15, 18–19, 22.) Nothing in those cases require this Court to uphold *Shiffra* or compel it to adhere to stare decisis.

In *Behnke*, the issue on appeal was whether the circuit court correctly denied Behnke's pretrial and postconviction motions to inspect the victim's medical and mental health records. *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996). After affirming those rulings, the court of appeals addressed the State's efforts to preserve an argument to overturn *Shiffra* for this Court's review, *id.* at 55, even though the court of appeals lacked power to overrule or modify *Shiffra*. *See Cook v. Cook*, 208 Wis. 2d 166, 188–90, 560 N.W.2d 246 (1997). Because that portion of the court's decision was "broader than necessary and not essential to the determination of the issues before it," it is dictum and not controlling. *Estate of Genrich v. OHIC Ins. Co.*, 2009 WI 67,

[1] Johnson fails to develop an argument that *Shiffra*'s holding might be sustainable under state constitutional due process protections. (Johnson's Supp. Br. 21–22.)

¶ 39, 318 Wis. 2d 553, 769 N.W.2d 481 (citation omitted) (defining dictum).

Even so, the reasoning in *Behnke*'s dictum was incorrect. The court's statement that the test in *Ritchie* was not about keeping a level evidentiary playing field between the State and the defendant did not square with its own precedent. *See, e.g.*, *State v. Maday*, 179 Wis. 2d 346, 353, 507 N.W.2d 365 (Ct. App. 1993) (stating that pretrial discovery operates in part "to make trials fair by providing a level playing field").

Moreover, like the *Shiffra* court, the court in *Behnke* did not address *Ritchie*'s reliance on *Brady* or its language balancing the government's (not a victim's) interest in confidentiality with the defendant's right to access favorable, government-possessed materials. *See Behnke*, 203 Wis. 2d at 55–56.

In *Solberg*, the issue was not *Shiffra*'s viability, but rather whether appellate courts could access records to review a circuit court's in camera decision. *State v. Solberg*, 211 Wis. 2d 372, 374–75, 564 N.W.2d 775 (1997). The *Solberg* court's "recognition" of *Shiffra* was simply a statement mischaracterizing the balancing test like the court had in *Behnke*, i.e., the test was designed to balance the defendant's rights against the patient's (not the government's) interests. *Id.* at 387. And *Solberg* was far from the final word on *Shiffra*. Indeed, members of the *Solberg* court recognized that its decision left open many questions, including whether Wis. Stat. § 905.04 created an absolute privilege from disclosure in these circumstances. *Id.* at 391 (Abrahamson, C.J., & Bradley, J., concurring).

In *Green*, this Court summarily rejected the State's argument that *Shiffra* wrongly reached private records. *See State v. Green*, 2002 WI 68, ¶ 21 n.4, 253 Wis. 2d 356, 646 N.W.2d 298. It based that rejection on the *Shiffra* court's

reliance on *K.K.C.* and *S.H.*, and its own recognition of the validity of *Shiffra* in *Solberg* and *State v. Rizzo*, 2002 WI 20, ¶ 53, 250 Wis. 2d 407, 640 N.W.2d 93. *Green*, 253 Wis. 2d 356, ¶ 21 n.4. Yet *K.K.C.* and *S.H.* barely discussed *Ritchie*, let alone explained why it would apply to private records. And the "recognized validity" of *Shiffra* in *Solberg* and *Rizzo* simply involved the court's stating what *Shiffra*'s balancing test was, not an endorsement or analysis.

Relatedly, Johnson says that *Shiffra* was correct on the theory that its balancing test is fair. (Johnson's Supp. Br. 23–24.) He reasons that victims are amply protected by their ability to refuse consent and the limited nature of in camera review. (Johnson's Supp. Br. 24.) He is wrong for three reasons.

First, Johnson omits the fact that if the victim refuses consent, she cannot testify at trial, which in most cases means that the prosecution ends. *See Crawford v. Washington*, 541 U.S. 36, 53–54 (2004) (barring admission of testimonial statements of witness who did not appear at trial).[2]

Second, the problem with *Shiffra* isn't the balancing test as applied to confidential government files, but instead as applied to reach private records. In cases that align with *Ritchie*,[3] the in camera process is the least intrusive means for a court to assess whether government-held confidential records contain material information while protecting the

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[2] *Crawford* was decided after *Behnke*, *Solberg*, *Green*, and *Rizzo*; to the extent that those courts endorsed *Shiffra*, they did not consider *Crawford*'s effect on the balancing test. Likewise, WACDL, in arguing that excluding the victim's testimony is a just remedy, does not address *Crawford* or acknowledge how necessary a victim's testimony is to prosecutions. (WACDL Supp. Br. 15–17.)

[3] As noted (State's Supp. Br. 30 n.11) the circumstances in *K.K.C.* reasonably aligned with those in *Ritchie* and likely justified application of the balancing test there.

confidential nature of the files. But as discussed (State's Supp. Br. 17–18, 49), *Shiffra* and its progeny improperly substitute *the victim* for the government in that balancing test to justify its reach to confidential, private, and privileged records outside of the *Brady* context.[4]

Johnson also argues that *Jaffee v. Redmond*, 518 U.S. 1 (1996), is not directly controlling. (Johnson's Supp. Br. 24–25.) The State invokes *Jaffee* not because it is directly controlling, but because its reasoning reflects that the Supreme Court would not likely endorse extending the *Ritchie* balancing test to privileged psychotherapist-patient records. Johnson does not address the State's argument on that point. (State's Supp. Br. 22–24.)

Third, Johnson fails to acknowledge that in cases where Wisconsin courts have recognized some limited right to pretrial discovery, those holdings were rooted in affording defendants *reciprocal*—and thus fair—discovery of evidence in the State's possession.

For example, in *Maday*, 179 Wis. 2d 346, the court of appeals permitted a trial court to order a sexual assault victim to undergo a pretrial psychological evaluation by a defense expert where the State intended to introduce evidence

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[4] Johnson and WACDL inaccurately insist that the balance is between the victim's interests and the defendant's rights; WACDL also implicitly treats the victim as a party that pursues "one's goals in court" and wields the psychotherapist-patient privilege as a sword to "hide information relevant to determining the truth." (WACDL Supp. Br. 12–13.) The truth-seeking function of courts has never been interpreted to allow defendants to reach any private information they may desire. Further, as WACDL argued in its original amicus brief, victims are not parties in prosecutions.

generated by a psychological examination by its experts.[5] *Id.* at 349–50. So there, all of the examinations were solely for forensic trial purposes; none of the experts were the victims' treating therapists. *Id.* Hence, the court held that fundamental fairness required that the defense be permitted conduct its own forensic psychological examination to counter the State's.[6]

Similarly, in *State v. Migliorino*, 170 Wis. 2d 576, 598, 489 N.W.2d 678 (Ct. App. 1992), the State charged the defendant with trespass to a medical facility and thus had to show that the entry "tended to create or provoke a breach of the peace." The court of appeals held that the defendant was entitled to pretrial discovery of the identity of patients in the facility whom the State intended to offer as witnesses to prove the "breach of the peace" element.[7] *Id.* at 592. Like in *Maday*, the grant of discovery was in the interests of leveling the playing field: the State intended to call the patients as witnesses. *Id.* at 587–88. Unlike the privileged records at issue in a *Shiffra/Green* motion, the court recognized that the

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[5] The Legislature has since amended Wis. Stat. § 971.23 to preclude courts from ordering such examinations on either party's behalf. *See* 2009 Wis. Act 138, § 5.

[6] In *State v. Schaefer*, 2008 WI 25, ¶¶ 22–23, 308 Wis. 2d 279, 746 N.W.2d 457, this Court favorably invoked *Maday*'s recognition of a defendant's meaningful pretrial discovery right. Notably, however, this Court framed that right by invoking *Brady* and the right to access favorable evidence in the government's possession. *Id.* ¶ 22.

[7] It bears noting that the *Migliorino* court based its holding in the Compulsory Process Clause and incorrectly cited *Ritchie* for the proposition that that Clause gave defendants a right to discovery of the identity of witnesses. *State v. Migliorino*, 170 Wis. 2d 576, 586, 489 N.W.2d 678 (Ct. App. 1992); *cf. Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (acknowledging that the Court has "never squarely held that the Compulsory Process Clause guarantees the right to discover the *identity* of witnesses").

defendant was not seeking any medical information about these patients and "mere physical presence in a physician's office is not within the ambit of [section 905.04]." *Id.* at 588. Accordingly, the defendant was entitled to learn their identities, to which he was otherwise entitled under Wis. Stat. § 971.23(1)(d).

Those pretrial discovery cases are on a different plane than *Shiffra*. In *Maday* and *Migliorino*, the State possessed information that it intended to introduce against the defendant at trial, and the defendant had no way to attack it without a reciprocal opportunity to explore it pretrial. Moreover, neither party was seeking to introduce anything protected by the privilege statute. In contrast, there is nothing reciprocal about a defendant's seeking a victim's private, privileged counseling records. The State lacks access to those records—even after they're turned over to the defense. It never plans to introduce them or to rely on them to prove its case. To the contrary, section 905.04(4) would prevent the State from accessing (without consent) a victim's mental health records even if it wished to do so. Unlike in *Maday* and *Migliornio*, there is no reciprocity concern and or skewed playing field that *Shiffra* corrects by enabling a defendant to access private, privileged, and confidential records.

Finally, Johnson writes that this Court can recognize a public policy exception to justify reaffirming *Shiffra*. (Johnson's Supp. Br. 26–27.) But he fails to explain what public policy would require *Shiffra* to remain law, and simply reiterates that *Shiffra* was correct on the theory that victims retain the right to refuse to consent to the release of her records. (Johnson's Supp. Br. 27–30.)

There is no sound argument buried within Johnson's circular reasoning. Johnson points to no policy supporting a rule permitting defendants to file a motion that and effectively requires victims' pretrial participation, forcing

them to choose between consenting to the release of their confidential, private, and privileged records, or forgoing testifying and effectively ending the prosecution.

B. Departing from stare decisis is warranted.

Johnson asks this Court to adhere to stare decisis because Wisconsin courts have relied on the *Shiffra* standard for decades. (Johnson's Supp. Br. 30.) But as discussed above, none of that reliance involved a serious review of the soundness of *Shiffra* or agreement by a majority of this Court, especially after *Crawford* dramatically affected the consequences of a victim's refusal to consent, Wisconsin's enactment of chapter 950 protections, and its ratification of Marsy's Law to its constitution.

Johnson strangely asserts that the State and T.A.J. offered no reasons why the Court should overrule *Shiffra*. (Johnson's Supp. Br. 31.) To the contrary, the State spent most of its supplemental brief offering these reasons: *Shiffra* was wrongly decided. (State's Supp. Br. 27–37.) It is unworkable in practice and disproportionately harmful to sexual assault victims and prosecutions (State's Supp. Br. 39–43); it promotes near-routine use of in camera proceedings in criminal matters when such proceedings should be rare (State's Supp. Br. 43–45); the process does not guarantee the victim the ability to provide informed consent and risks unnecessary disclosure of private files (State's Supp. Br. 45–48); and it is contrary to Wisconsin's sterling record in recognizing and protecting victim rights. (State's Supp. Br. 48–49).

Finally, Johnson and WACDL dismiss the frequency with which these motions are filed and granted and the many practical (and victim rights) problems that arise with the *Shiffra/Green* process. Both insist that the process is necessary to courts' truth-seeking function, and that overruling *Shiffra* will eviscerate defendants' ability to cross-

examine their accusers. (Johnson's Supp. Br. 33–35; WACDL Supp. Br. 8, 11–12.)

Yet these motions and corresponding disclosures are far from rare. They are ubiquitous in sexual assault and domestic violence cases. And they are unnecessary for the defendant to attack the victim's credibility. As noted (State's Supp. Br. 39–48), if a defendant has enough information to file a *Shiffra/Green* motion, he can cross-examine and impeach witnesses on those points. In a typical sexual-assault case, the victim will have reported the assaults multiple times: to loved ones; to school staff; to medical personnel; to police; to a forensic interviewer. Defendants can introduce virtually every inconsistency victims utter or do before, during, or after the alleged assaults. And they can offer witnesses to the victim's character for truthfulness.

WACDL's claim that victims use the privilege against disclosure of their counseling records to "hide" the "truth," and that this has nothing to do with the victim's privacy, is outrageous. (WACDL's Supp. Br. 9–10.) The whole purpose of evidentiary privileges is to recognize that some relationships must be inviolable or their benefit is lost. Privileges do not crumble in court simply because communications within the privileged relationship might provide some party an evidentiary benefit. If that were true, the attorney-client privilege should surely be the first to give way.

These motions are filed and granted almost exclusively in sexual assault and domestic violence cases. If these records were necessary to the truth-seeking function of the courts, they would arise in all cases where the case turns on credibility—yet they do not. Bluntly, the truth-seeking function is harmed far more when a victim is barred from testifying than when a defendant cannot access private mental health care records that rarely, if ever, contain non-cumulative favorable and material evidence.

CONCLUSION

This Court should overrule *Shiffra* and its progeny.

Dated this 12th day of January 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) (2019-20) for a brief produced with a proportional serif font. The length of this brief is 2,988 words.

Dated this 12th day of January 2022.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) (2019–2020)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12) (2019–20).

I further certify that:

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

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

Dated this 12th day of January 2022.

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