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In the Name of "Justice": *Shiffra-Green* Motions and Their Unintended Harms

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IN THE NAME OF "JUSTICE": *SHIFFRA-GREEN* MOTIONS AND THEIR UNINTENDED HARMS

Sexual assault victims face many barriers to reporting the violence they have experienced. As few as one-third of sexual assaults are reported to the police and even fewer result in criminal charges. The criminal justice system can be grueling for sexual assault victims and carries with it the possibility of testifying at trial in front of their perpetrators, an experience that is daunting at best and terrifying at worst. Because of how few cases make it into the court system, along with how difficult the process can be for victims, any legal mechanisms that would create an unnecessary barrier to a victim participating in the process must be critically examined. One such barrier in Wisconsin is known as a Shiffra-Green *motion. This motion received its name from two separate criminal sexual assault cases that helped to shape the legal rules around a defendant's right to request access to privileged information, often used to gain access to a victim's mental health records. This Comment explores where challenges to victims' credibility originate, the legal privilege afforded to victims' records, and the evolution of federal and state law that gave birth to the* Shiffra-Green *motion. Finally, the Comment concludes with recommendations for Wisconsin to modify or eliminate the motion.*

I. INTRODUCTION

This Comment will unpack the history behind a legal tool available to defendants in Wisconsin, the *Shiffra-Green* motion, in an attempt to shed light on its harms and critically examine its legal justifications. What follows first is an example of the harm caused by this mechanism. This example does not represent any specific victim but rather is a composite of the victims whose lives have been impacted by the *Shiffra-Green* motion and whose victimizations are memorialized in the many cases that have reached the appellate courts in Wisconsin.

M is a twenty-five-year-old woman[1] living in Wisconsin who was sexually abused by an uncle when she was a child. As a result, she struggles with post-traumatic stress disorder (PTSD)[2] and depression.[3] One night, she is at a party

1. For this example, the victim is a woman; the reality of sexual violence is that it impacts individuals of all genders and is perpetrated by both men and women. *Fast Facts: Preventing Sexual Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 22, 2022), https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html [https://perma.cc/6YX4-UGJ4].

2. Post-traumatic stress disorder (PTSD) is a disorder that can develop after an individual experiences a traumatic event. Symptoms include nightmares, flashbacks, intrusive memories, hypervigilance, intense anxiety, and avoidance of reminders of the traumatic event. *Post-traumatic Stress Disorder*, AM. PSYCHOL. ASS'N, https://www.apa.org/topics/ptsd# [https://perma.cc/6KFT-MAP7].

3. "Depression is a mood disorder that occurs when feelings of sadness and hopelessness continue for long periods of time . . . ." *Depression*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/articles/depression [https://perma.cc/786M-5YQQ]. Depression is one of the "most common" effects of sexual violence. *Effects of Sexual Violence*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/effects-sexual-violence [https://perma.cc/U86P-2AZP].

and runs into her brother's friend, P, who she knows and trusts. Although M has a few drinks and is intoxicated, she is not so drunk that she is not aware of her surroundings. M gets a ride home from the party from P who, instead of dropping her off and leaving, comes into her apartment and rapes her. M is in shock that someone she trusted would do this. She wonders how she could experience sexual violence for the second time in her life and feels that the assault must have been her fault for drinking or allowing him to come to her apartment. M asks herself what she might have done or said that caused P to rape her. She tells a close friend the next morning who believes her and encourages her to go to the hospital to get checked out. M endures an exam where a nurse collects evidence from her body. The exam is overwhelming and invasive, and M struggles to comprehend her next steps. She is scared to go to the police for fear they will blame her for the rape. She is also worried about ruining P's life or her relationship with her brother.

M eventually tells her brother, who does not believe her and blames her for the sexual assault. He knows about M's mental health struggles and questions whether she was actually raped or if what she thinks happened was really a flashback of the sexual abuse from her past. He confronts P, who denies raping M. M's brother shares his theory about M's mental health struggles with P.

Devastated by her brother's reaction, M starts to see a counselor and begins to process what happened. She works through her self-blame and begins to recognize that the rape was not her fault. Eventually, reporting to the police becomes a more attractive option for healing and ensuring that P is not able to rape others. Two months after the night of the party, M reports the rape to police. The police investigate and charge P with sexual assault. Before trial, P learns that M went to counseling prior to reporting to the police and recalls what M's brother said about her flashbacks and PTSD. P files a motion for the judge to review her counseling records with the justification that they would contain information about M's mental health diagnoses and their impact on her ability to distinguish a flashback from reality. The judge finds that P has provided sufficient evidence to warrant an *in camera*[4] review of M's mental health records. M is faced with an impossible choice. She can waive her privilege and release her counseling records to the court knowing that they could be used to attack her credibility, or she can refuse to waive her privilege and consequently have her testimony barred, effectively ending the criminal case. By choosing either option, M feels she will be retraumatized and let down by the criminal justice system. She is left feeling as though she should have never reported the rape.

4. An *in camera* review is where the judge reviews records privately in his or her chambers. *In Camera*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Though the impact on M may be difficult to comprehend for those whose lives have not been impacted by sexual violence, M's retraumatization by the system is not atypical. Unfortunately, our country has a long history of struggling to effectively address incidents of sexual violence in a manner that truly serves those victims who come forward.[5]

In Wisconsin, defendants in criminal sexual assault cases have a legal tool at their disposal, a *Shiffra-Green* motion,[6] which potentially allows access to victims' privileged counseling records and includes the consequence of victims being silenced (their testimony barred) if they refuse to waive their privilege to the records.

This Comment will critically examine the judicial and constitutional roots of this mechanism and offer future directions for Wisconsin. Part II will explore the problem of sexual violence and the historical roots of the judicial system treating rape myths as valid justifications to challenge a victim's credibility. Part III will examine the federal and state foundations for therapist-client privilege, including exceptions to privilege. Part IV will delve into Wisconsin's history in navigating exceptions to privilege and the path by which the *Shiffra-Green* motion came to be. Finally, Part V will explore possible future directions for Wisconsin to move away from *Shiffra-Green*.

5. Though early American laws treated rape as a serious crime, the court system "found multiple ways to minimize its prosecution against certain male subjects or citizens." SHARON BLOCK, RAPE AND SEXUAL POWER IN EARLY AMERICA 128 (2006). This had not drastically changed by the mid-twentieth century, when "[j]udges and juries were often skeptical of women's claims of rape, especially those women who knew their attacker." CATHERINE O. JACQUET, THE INJUSTICES OF RAPE: HOW ACTIVISTS RESPONDED TO SEXUAL VIOLENCE, 1950–1980, at 15 (2019). Despite there being monumental changes in response to crime victims from the 1950's to today (including a proud moment for Wisconsin as the first state to pass a Crime Victims' Bill of Rights), the legacy of our country ineffectively addressing sexual assault is reflected in the small numbers of sexual assault victims whose perpetrators receive a criminal charge and the even smaller number whose perpetrators are convicted. OFF. OF VICTIMS OF CRIME, 2022 NATIONAL CRIME VICTIMS' RIGHTS WEEK RESOURCES GUIDE (2022) https://ovc.ojp.gov/ncvrw2022/landmarks-508.pdf [https://perma.cc/SW5S-FYZK]; *infra*, Part II.

6. The *Shiffra-Green* motion allows a defendant in a criminal case to request access to a victim's privileged records, with the justification that the records contain evidence that would be valuable to the defense. If a victim refuses to disclose the record, he or she can be barred from testifying. 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence*, § 511.2, at 451 (4th ed. 2017).

II. UNDERSTANDING THE FOUNDATIONS OF CHALLENGES TO RAPE VICTIMS' CREDIBILITY

A. Sexual Assault: The Scope of The Problem

Sexual violence is widely recognized as a public health problem and has serious and wide-ranging impacts for victims and communities.[7] According to a 2015 national survey, 43% of women and almost 25% of men in the United States experienced some form of sexual violence (defined as "rape, being made to penetrate someone else, sexual coercion, and/or unwanted sexual contact") in their lifetime.[8] Sexual violence impacts victims, their friends and family members, their communities, and society as a whole. Consequences for victims can include (among many others) PTSD, flashbacks, panic attacks, self-harm, eating disorders, sleep disturbances, depression, anxiety, and suicidal thoughts.[9] Friends and family members are impacted as secondary victims and may experience anger, shock, guilt, helplessness, as well as strain in their relationship with the person who was assaulted.[10] Given that the estimated lifetime cost of rape is $122,461 per victim, the detrimental impact of sexual assault on a community and on a societal level is evident, as is the need for it to be prevented and its effects mitigated.[11]

Unfortunately, the criminal justice system, which is the primary method of addressing sexual assault in the United States, is largely ineffective in holding perpetrators accountable. Sexual assaults are vastly underreported, with only 16% to 32% of rape victims reporting the assault to police.[12] The reasons why a victim might decide not to report the sexual assault vary, but could include

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7. *Fast Facts: Preventing Sexual Violence*, *supra* note 1; *Effects of Sexual Violence*, *supra* note 3.

8. SHARON G. SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW & JIERU CHEN, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2015 DATA BRIEF-UPDATED RELEASE 2–3 (2018), https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf [https://perma.cc/XT5D-5X57].

9. *Effects of Sexual Violence*, *supra* note 3.

10. Courtney E. Ahrens & Rebecca Campbell, *Assisting Rape Victims as They Recover from Rape*, 15 J. OF INTERPERSONAL VIOLENCE 959, 960-62, 978 (2000).

11. *Fast Facts: Preventing Sexual Violence*, *supra* note 1.

12. Estimates of rape reporting to law enforcement differ widely based on the methods used in the survey; the less descriptive the question is in defining rape, the higher the percentage of reports are (because fewer individuals identify that they were raped). Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 146–48 (2012); RACHEL E. MORGAN & JENNIFER L. TRUMAN, CRIMINAL VICTIMIZATION, 2019, U.S. DEP'T OF JUST. 6–7 (2020), https://bjs.ojp.gov/content/pub/pdf/cv19.pdf [https://perma.cc/W8BX-YX4G].

fear of retaliation, not being believed, or being blamed for the assault.[13] A victim may also be deterred by either believing that the police cannot help or by the possibility that the criminal justice system will revictimize them.[14] Even when victims overcome the barriers to reporting a sexual assault, they may not obtain the justice they seek. It is estimated that only 25.6% of perpetrators of rape are arrested.[15] Of those arrested for committing rape, only 50% are convicted of a felony and 8% are convicted of a misdemeanor.[16] Understandably, many victims seek alternative methods of obtaining justice, including restorative justice.[17]

Given the current inefficacy of our criminal justice system in achieving justice for sexual violence victims, it is crucial to reduce barriers to a victim's participation in the process. One such barrier is the threat to a victim of being forced to disclose counseling records to a judge, or even worse, these records (or a description of their contents) being released to the defendant.

In Wisconsin, defendants in a sexual assault criminal case have a mechanism known as a *Shiffra-Green* motion by which they can request the judge to review the victim's private, privileged treatment records in an attempt to discover evidence that would support the defense, most often in challenging the credibility of the victim.[18] If a victim refuses to waive the privilege protecting the records, he or she is barred from testifying.[19] It is not difficult to imagine how this process could harm a sexual assault victim. In fact, this process has its roots in a criminal justice system that has historically harmed victims.

B. The Legacy of Rape Myths and Fear of False Allegations

A victim's fear of not being believed and being blamed for the rape are unfortunately grounded in a historical reality of how rape allegations are handled by the American criminal justice system. At the outset of the country's founding, if a woman came forward with a rape allegation, she was often

13. Sammy Caiola, *How Rape Affects Memory and the Brain and Why More Police Need to Know About This*, NAT'L PUB. RADIO (Aug. 21, 2021), https://www.npr.org/sections/ health-shots/2021/08/22/1028236197/how-rape-affects-memory-and-the-brain-and-why-more-police-need-to-know-about-thi [https://perma.cc/6MQN-63QQ].

14. *Id.*

15. Lonsway & Archambault, *supra* note 12, at 150.

16. *Id.* at 154.

17. Ginny Graves, *How a Radical Approach to Dealing with Sexual Assaults May Heal Trauma*, GOOD HOUSEKEEPING (Aug. 6, 2021), https://www.goodhousekeeping.com/life/a37234704/ restorative-justice/ [https://perma.cc/2K5W-SKVE].

18. Blinka, *supra* note 6, § 511.2, at 451–52.

19. *Id.*

presumed to be lying until she was able to prove otherwise.[20] This was not just general cultural sentiment; justice of the peace manuals at the time stressed the necessity to critically assess the credibility of the victim, citing the ease at which false reports could be made.[21] For example, if the victim reported that the rape occurred in a place that was highly populated where presumably many people would have overheard her struggle, if she did not cry for help and she failed to come forward promptly after the rape, she would likely be seen as fabricating the allegation.[22]

The characteristics of what was seen as a false allegation (e.g., delayed reporting, lack of injury, a victim not fighting back against a perpetrator) are now recognized to be rape myths.[23] In fact, the belief that false allegations are commonplace is a rape myth in itself, and estimates put false reporting rates at only 2–8%.[24] Rape myths persist and impact a victim's experience with the criminal justice system. When law enforcement personnel, crime lab analysts, jurors, judges, and attorneys endorse these stereotypical beliefs about rape, it can have negative consequences. For example, when they endorse rape myths, police officers are more likely to approach a victim with skepticism and less likely to investigate the assault thoroughly, and crime lab analysts are less likely to process sexual assault evidence kits.[25]

It is impossible to separate historical (and current[26]) beliefs regarding false allegations of rape from the issue at hand regarding defendants' attempts to access victims' counseling records. Significantly, most of the foundational criminal cases regarding a defendant's right to request a victim's confidential

20. BLOCK, *supra* note 5, at 131.

21. *Id.* at 129–30.

22. *Id.* at 130.

23. Olivia Smith & Tina Skinner, *How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials*, 26 SOC. & LEGAL STUD. 441, 443–44 (2017).

24. KIMBERLY LONSWAY, JOANNE ARCHAMBAULT & DAVID LISAK, NAT'L SEXUAL VIOLENCE RES. CTR., FALSE REPORTS: MOVING BEYOND THE ISSUE TO SUCCESSFULLY INVESTIGATE AND PROSECUTE NON-STRANGER SEXUAL ASSAULT 2 (2009), https://www.nsvrc.org/sites/default/files/publications/2018-10/Lisak-False-Reports-Moving-beyond.pdf [https://perma.cc/666E-Y68M].

25. Smith & Skinner, *supra* note 23, at 443; Rebecca Campbell & Giannina Fehler-Cabral, *"Just Bring Us the Real Ones": The Role of Forensic Crime Laboratories in Guarding the Gateway to Justice for Sexual Assault Victims*, 37 J. OF INTERPERSONAL VIOLENCE 3675, 3676–77 (2020).

26. Some police officers perceive false reporting rates to be as high as 30–50%. Dana Weiser, *Confronting Myths About Sexual Assault: A Feminist Analysis of the False Report Literature*, 66 FAM. REL. 46, 47 (2017).

or privileged records both federally and in Wisconsin have stemmed from incidents of sexual violence.[27]

When sexual assault victims are presumed to be lying, it seems justifiable to attack their credibility in any way necessary, including mining their history for evidence of mental illness or a pattern of dishonesty. Courts have legitimized defendants' attacks on victims' credibility by granting *in camera* reviews based on questionable justifications.[28] This process appears to be rooted in the belief that false allegations are commonplace, so a defendant must gather all possible information to prepare a defense despite the slim likelihood that the information gleaned from the *in camera* review would meaningfully benefit the defense and regardless of the cost it may have to the victim or the fact that the information could likely be found elsewhere (e.g., in cross-examining the victim). Courts have granted *in camera* reviews to examine a victim's mental health and treatment records on the grounds that a victim's depression or PTSD diagnosis impacted her ability to accurately recall the assault or caused her to misinterpret the defendant's behavior, that a victim's previous sexual assault made it difficult for her to distinguish flashback from reality, that a victim's previous reports of sexual assault were false and thus proved she lied about the defendant raping her, and that a victim failed to disclose the assault to a treatment provider so it must not have occurred.[29] Generally, the assumption is that the records could contain evidence either that the victim is not being truthful or was not capable of discerning the truth or reality.[30]

The implication that a history of sexual assault or mental illness can alter a victim's memory such that he or she is not able to accurately report a sexual assault is troubling. In reality, experiencing sexual violence increases a victim's risk for future victimization, with some estimates showing almost half of child sexual abuse victims experiencing revictimization.[31] Furthermore, it is the most marginalized and vulnerable people, including those who have mental illness,

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27. *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39 (1987); State v. Shiffra, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); State v. Solberg, 211 Wis. 2d 372, 564 N.W.2d 775 (1997); State v. Green, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298; State v. Johnson, 2013 WI 59, 348 Wis. 2d 450, 832 N.W.2d 609 (per curiam); State v. Lynch, 2016 WI 66, 371 Wis. 2d 1, 885 N.W.2d 89.

28. State v. Robertson, 2003 WI App 84, ¶ 27, ¶ 31, 263 Wis. 2d 349, 661 N.W.2d 105; *Shiffra*, 175 Wis. 2d at 603, 612; *Solberg*, 211 Wis. 2d at 375; State v. Lynch, 2015 WI App 2, ¶ 11, ¶ 36; State v. Johnson, 2012 WI App 62, ¶ 4, ¶ 14.

29. *Robertson*, 2003 WI App 84, ¶ 27; *Shiffra*, 175 Wis. 2d at 612; *Solberg*, 211 Wis. 2d at 375; *Lynch*, 2015 WI App 2, ¶ 11; *Johnson*, 2012 WI App 62, ¶ 4.

30. *See Robertson*, 2003 WI App 84, ¶ 27.

31. Hannah E. Walker, Jennifer S. Freud, Robyn A. Ellis, Shawn M. Fraine & Laura C. Wilson, *The Prevalence of Sexual Revictimization: A Meta Analytic Review*, 20 TRAUMA, VIOLENCE, & ABUSE 67, 70 (2017).

who experience the highest rates of sexual violence.[32] Paradoxically, the characteristics (i.e., mental illness or previous experience of sexual assault) that are seen as proving that a rape allegation is baseless are the same characteristics that put an individual at greater risk for victimization of sexual assault. The untenable situation this creates requires a critical examination of the legal justifications for a mechanism that could result in a defendant gaining access to a victim's mental health records. This starts with an examination of privilege and the evolution of exceptions to privilege.

III. THE RIGHT TO PRIVACY AND THERAPIST-CLIENT PRIVILEGE

A. Therapist-Client Privilege for Sexual Assault Victims

The importance of privacy and privilege in the therapist-client relationship is well-established.[33] Maintaining confidentiality of client communications and records is an ethical obligation for social workers, counselors, and psychologists.[34] To establish the connection necessary to do the work of therapy, a counselor must develop trust with a client, done in large part by

32. *E.g.*, Lisa A. Goodman, Michelle P. Sayers, Kim T. Mueser, Stanley D. Rosenberg, Marvin Swartz, Susan M. Essock, Fred C. Osher, Marian I. Butterfield & Jeffrey Swanson, *Recent Victimization in Women and Men with Severe Mental Illness: Prevalence and Correlates*, 14 J. OF TRAUMATIC STRESS 615, 616–17 (2001) (individuals with severe mental illness experience high rates of recent and lifetime sexual assault); *Responding to Transgender Victims of Sexual Assault*, OFC. FOR VICTIMS OF CRIME (OVC) (June 2014), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/forge/sexual_numbers.html [https://perma.cc/K3WX-K8SQ] (half of transgender individuals experience sexual violence at some point in their lifetime); LEIGH ANN DAVIS, THE ARC OF THE U.S., PEOPLE WITH INTELLECTUAL DISABILITIES AND SEXUAL VIOLENCE 3 (2011), https://thearc.org/wp-content/uploads/forchapters/Sexual%20Violence.pdf [https://perma.cc/X8ZN-55J7] (people with disabilities experience higher rates of victimization, and those with intellectual disabilities experience the highest rates of violent victimization); Jameta Nicole Barlow, *Black Women, the Forgotten Survivors of Sexual Assault*, AM. PSYCHOL. ASS'N: IN THE PUBLIC INTEREST (Feb. 2020), https://www.apa.org/pi/about/newsletter/2020/02/black-women-sexual-assault [https://perma.cc/YTQ7-CBTB] (black women experience disproportionate rates of sexual violence).

33. The terms psychologist, counselor, therapist, psychotherapist, and social worker will be used interchangeably as they all refer to providers of mental health interventions that require confidentiality. ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 4.01 (AM. PSYCHOL. ASS'N 2017), https://www.apa.org/ethics/code [https://perma.cc/L4EZ-UXAN]; CODE OF ETHICS § B (AM. COUNSELING ASS'N 2014) [hereinafter CODE OF ETHICS (ACA)], https://www.counseling.org/resources/aca-code-of-ethics.pdf [https://perma.cc/8G5C-LC6Y]; CODE OF ETHICS § 1.07 (NAT'L ASS'N OF SOC. WORKERS 2021) [hereinafter CODE OF ETHICS (NASW)], https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English [https://perma.cc/32C8-873A]. Additionally, Wisconsin's privilege statute, section 905.04, applies to professional counselors, psychologists, marriage and family therapists, and social workers. Wis. Stat. § 905.04 (2019–20), *as amended by* 2021 Wis. Act 22.

34. ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, *supra* note 33, § 4.01; CODE OF ETHICS (ACA), *supra* note 33, § B; CODE OF ETHICS (NASW), *supra* note 33, § 1.07.

ensuring that the client's privacy will be protected.[35] This foundation of trust and privacy is paramount for victims of violent crimes because victims need a safe space to heal from the trauma they have experienced and process the revictimization that many experience from navigating the criminal justice system.[36] To understand the value that legislatures and courts have given therapist-client privilege and the need for counseling records to be protected, one need only look toward its foundation in federal and state law. Though this Comment focuses primarily on Wisconsin case law, it will also review federal privacy protections and constitutional exceptions to these protections, as these have helped to shape Wisconsin's current state.

B. Federal Therapist-Client Privilege

In *Jaffee v. Redmond*, the United States Supreme Court held that psychotherapist-client communications are privileged.[37] *Jaffee* involved therapy records of a defendant rather than a victim.[38] The defendant was a police officer who fatally shot a man and began seeing a clinical social worker shortly after.[39] In examining whether the defendant's records should be released, the Supreme Court reasoned that any loss of discoverable evidence if the records are withheld is outweighed by the benefit of affording privilege to the therapist-client relationship.[40] The Court predicted that if therapy records became discoverable it would have a chilling effect on the information that individuals share with the therapist, particularly when the reason they are receiving treatment has the potential to rise to litigation.[41]

Prior to this case coming before the Supreme Court in 1996, Rule 501 of the Federal Rules of Evidence was the method by which privilege was determined in federal courts.[42] Rule 501 instructs federal courts to determine whether privilege exists by interpreting common law "in the light of reason and experience."[43] Without a clear designation, the United States Courts of Appeals' decisions varied in whether they granted privilege to client-

35. CODE OF ETHICS (ACA), *supra* note 33, § B.

36. Bridget M. McCafferty, *The Existing Confidentiality Privileges as Applied to Rape Victims*, 5 J.L. & HEALTH 101, 105–106 (1990).

37. Jaffee v. Redmond, 518 U.S. 1, 18 (1996).

38. *Id.* at 4.

39. *Id.* at 3.

40. *Id.* at 12.

41. *Id.* at 11–12.

42. *Id.* at 7.

43. FED. R. EVID. 501.

psychotherapist communications.[44] *Jaffee* provided a clear path for clients and therapists with respect to how they can expect their communication and records to be treated in federal cases.

C. Wisconsin's Privilege Statutes

Wisconsin codified privilege between patients and physicians in 1975 with section 905.04 and extended this privilege to psychologists in 1977.[45] Marriage and family therapists, social workers, and professional counselors were added to the privilege statute in 1992.[46] Wisconsin's privilege statute allows a client to refuse to disclose confidential information generated or shared in the course of treatment and allows the client to prevent anyone else from disclosing this information.[47] The statute outlines a number of exceptions to this privilege, including certain types of proceedings and reports of child abuse or school violence.[48] Notably, the statute does not include an exception for a judicial order or *in camera* review without consent.

Wisconsin also recognizes the particular importance of confidentiality and privacy for victims of domestic violence or sexual assault.[49] Enacted in 2002, section 905.045 allows the communications and records that a victim of sexual assault or domestic violence may have with an advocate to be protected from disclosure.[50] Unlike the privilege afforded to therapists and psychologists in section 905.04, the victim-advocate privilege contains only two exceptions to privilege, for a report of child abuse or a threat of violence at a school.[51]

D. Constitutional Justifications for Exceptions to Privilege

The privileges established in both federal and state forums are not absolute and are subject to exceptions in cases where a criminal defendant shows that information contained in a confidential record is material to establishing a

44. *Jaffee*, 518 U.S. at 7. The Second and Sixth Circuits recognized privilege, while the Fifth, Ninth, Tenth, and Eleventh Circuits did not recognize privilege. *See In Re* Doe, 964 F.2d 1325, 1326 (2d Cir. 1992); *In re* Zuniga, 714 F.2d 632, 639 (6th Cir. 1983); United States v. Burtrum, 17 F.3d 1299, 1300 (10th Cir. 1994); *In re* Grand Jury Proceedings, 867 F.2d 562, 565 (9th Cir. 1989); United States v. Corona, 849 F.2d 562, 567 (11th Cir. 1988); United States v. Meagher, 531 F.2d 752, 753 (5th Cir. 1976).

45. 1975 Wis. Act 393; 1977 Wis. Act 61.

46. 1991 Wis. Act 160.

47. Wis. Stat. § 905.04(2) (2019–20).

48. Wis. Stat. § 905.04(4)(a), (am), (e), (em) (2019–20).

49. Wis. Stat. § 905.045(2) (2019–20).

50. *Id*.; 2001 Wis. Act 109.

51. Wis. Stat. § 905.045(4) (2019–20).

defense.[52] Proponents of exceptions to privilege argue that they are grounded in a defendant's constitutional rights; namely that they are grounded in the right to compel a witness to testify, to confront an accuser, and the right to due process.[53] A brief discussion of each follows, as well as an examination of the relative strength of the justifications as applied to a defendant's access to a victim's privileged records.

i. Compulsory Process Clause

The compulsory process clause affords defendants in a criminal case the right to "have compulsory process for obtaining witnesses in [their] favor."[54] It gives defendants the right to compel witnesses to testify during trial and has been extended to the right of a defendant to present exculpatory evidence.[55] Some scholars have argued that the compulsory process clause even goes so far as to entitle a defendant to compel the testimony or discovery of evidence that would be protected by privilege as long as it is exculpatory.[56] Courts have held that while there is a possibility that the compulsory process clause justification affords this right, it has not been well-established and thus would not stand as the sole constitutional basis for a defendant's right to discovery of privileged information.[57]

ii. Confrontation Clause

The confrontation clause gives defendants the right "to be confronted with the witnesses against [them]."[58] This has been interpreted to ensure the defendant has the opportunity to cross-examine a witness under oath and in front of a jury who then can assess the witness's credibility.[59] While defendants have argued that this gives them the right to access exculpatory evidence in a victim's privileged records, this has been rejected by several courts, which held that the clause did not afford a defendant the right to pretrial discovery.[60]

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52. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 58 (1987); State v. Shiffra, 175 Wis. 2d 600, 606–07, 499 N.W.2d 719, 721–22 (Ct. App. 1993).

53. For example, see the defendants' arguments and the courts' analyses of a defendants' constitutional rights in *Ritchie*, 480 U.S. at 45 and *Shiffra*, 175 Wis. 2d at 605 n.1.

54. U.S. CONST. amend. VI.

55. Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 151–52 (1974).

56. *Id*. at 161 ("No interest protected by a privilege is sufficiently important to outweigh the defendant's right to establish his innocence through the presentation of clearly exculpatory evidence.").

57. *See Ritchie*, 480 U.S. at 56; State v. Lynch, 2016 WI 66, ¶ 45, 371 Wis. 2d 1 885 N.W.2d 89.

58. U.S. CONST. amend. VI.

59. Jerrilee Sutherlin, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause*, 9 IND. L. REV. 418, 419 (1976).

60. *See Ritchie*, 480 U.S. at 53; *Lynch*, 2016 WI 66, ¶ 42.

iii. Due Process Clause

Defendants are ensured due process through the United States Constitution, which states, "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."[61] The Supreme Court has interpreted this to require that prosecutors "comport with prevailing notions of fundamental fairness."[62] Additionally, defendants must have "a meaningful opportunity to present a complete defense."[63] It is within the due process clause that the Supreme Court found grounds for the defendant to request an *in camera* review of confidential records in *Pennsylvania v. Ritchie*.[64]

E. Federal Case Law Creating an Exception to Privilege: Pennsylvania v. Ritchie

The United States Supreme Court analyzed the issue of a defendant's request for records that were protected by a qualified privilege statute in *Pennsylvania v. Ritchie*. George Ritchie was charged with sexually abusing his thirteen-year-old daughter.[65] She reported the abuse and was referred to the state child protective agency, Children and Youth Services (CYS).[66] Ritchie subpoenaed her records during discovery; CYS refused to comply with the request and the trial court judge would not enforce the subpoena.[67] Ritchie was convicted on all counts.[68] Although he was able to cross-examine his daughter thoroughly during the trial, Ritchie claimed that the trial court violated the confrontation clause of the Sixth Amendment and his due process rights under the Fourteenth Amendment by refusing to enforce the subpoena for CYS's records.[69] The case reached the Pennsylvania Supreme Court, which held that Ritchie's conviction was to be vacated and the case remanded to the lower court where Ritchie would be entitled to review the entire CYS file.[70] The United States Supreme Court granted certiorari.[71]

The Supreme Court held that Ritchie was entitled to have the records reviewed *in camera* by the judge to determine if they contained evidence that

61. U.S. CONST. amend. XIV.
62. California v. Trombetta, 467 U.S. 479, 485 (1984).
63. *Id.*
64. *Ritchie*, 480 U.S. at 56.
65. *Id.* at 43.
66. *Id.*
67. *Id.* at 43–44.
68. *Id.* at 45.
69. *Id.*
70. *Id.* at 46.
71. *Id.*

would have changed the outcome of the trial.[72] The Court reasoned that, although there are strong policy reasons to uphold privilege in these circumstances, the statute at issue did not provide for unqualified privilege.[73] Specifically, the statute allowed for information to be disclosed in response to a court order:

> (a) [R]eports made pursuant to this act including but not limited to report summaries of child abuse . . . and written reports . . . as well as any other information obtained, reports written or photographs or x-rays taken concerning alleged instances of child abuse in the possession of the department, a county children and youth social service agency or a child protective service *shall be confidential and shall only be made available to:*
>
> . . . .
>
> *(5) A court of competent jurisdiction pursuant to a court order*.[74]

According to the Court, privilege does not always preclude disclosure of information, particularly when a statute does not provide absolute privilege.[75] Additionally, the Court held that the rights afforded to Ritchie under the Compulsory Process Clause were no greater than those under the Due Process Clause.[76] Under the Due Process Clause, the Court held that Ritchie had the right to request and obtain evidence that was material to a finding of guilt or innocent, and this right was not completely barred by privilege, especially because the privilege was qualified.[77] In this case, to obtain an *in camera* review of the privileged information, Ritchie had to demonstrate that if he had obtained any evidence contained within the documents prior to the trial, there would have been a "reasonable probability" that the case would have had a different outcome.[78] The Court went on to outline the appropriate procedure for a request of privileged records: after a defendant has met the standard for materiality, the judge could conduct an *in camera* review to determine if material evidence exists in the records, and release to the defense if found.[79]

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72. *Id.* at 58.

73. *Id.* at 57–58.

74. *Id.* at 43 n.2 (emphasis added) (quoting the relevant portion of the Pennsylvania statute at issue).

75. *Id.* at 57–58.

76. *Id.* at 56.

77. *Id.* at 57–58.

78. *Id.* at 57.

79. *Id.* at 60.

Even though *Ritchie*'s holding appeared to apply narrowly only to treatment records protected by a qualified privilege statute and held by the state (not a private third party), it was adopted in Wisconsin shortly after to apply to privately held therapy records protected by an unqualified privilege statute.[80]

IV. A SERIES OF WRONG TURNS: *SHIFFRA* AND ITS PROGENY

Through a series of decisions, the Wisconsin Court of Appeals and Wisconsin Supreme Court applied *Ritchie* in a manner that went beyond what was intended in the original holding. Wisconsin courts have determined that *Ritchie*, which allowed access to a victim's privileged records held by a state agency based on a statute that contained a court order exception, applied to privately held records protected by Wisconsin's privilege statute, which contains no such exception.[81] In *Ritchie*, the Supreme Court distinguished the statute in question which applied to records held by a state agency from the state's sexual assault counselor unqualified privilege statute, emphasizing the fact that the state agency did not have unqualified privilege in holding the victim's records.[82] The Court intentionally declined to extend the holding to circumstances where a privilege statute is unqualified.[83] Despite this, Wisconsin courts applied *Ritchie* absent a thorough analysis or justification as to why the holding served as precedent even though Wisconsin's statute has no exceptions to privilege.[84] What follows is a review and analysis of the path Wisconsin courts have taken in applying *Ritchie* and creating a mechanism by which a defendant can request access to a victim's mental health records.

A. Early Applications of Ritchie

The first Wisconsin case to apply *Ritchie* was *In Interest of K.K.C.*, where the Wisconsin Court of Appeals ruled that *Ritchie* entitled a criminal defendant to an *in camera* review of confidential records by the court if those records were determined to be material to the case.[85] The records in question in *K.K.C.* were juvenile records held by the Rock County Department of Social Services, a state agency.[86] The court decided that *Ritchie* would be applicable despite the

80. *See* State v. S.H., 159 Wis. 2d 730, 738, 465 N.W.2d. 238, 241 (Ct. App. 1990); State v. Shiffra, 175 Wis. 2d 600, 606–07, 499 N.W.2d 719, 722 (Ct. App. 1993).

81. *Shiffra*, 175 Wis. 2d at 606–07; State v. Green, 2002 WI 68, ¶ 31, 253 Wis. 2d 356, 646 N.W.2d 298.

82. 480 U.S. at 57.

83. *Id.* at 57 n.14.

84. *Shiffra*, 175 Wis. 2d at 606-607; *Green*, 2002 WI 68, ¶ 31.

85. K.K.C. v. State (In Interest of K.K.C.), 143 Wis. 2d 508, 511, 411 N.W.2d. 142, 144 (Ct. App. 1988).

86. *Id.* at 509.

defendant having made no motion for an *in camera* review of the records at the time of the appeal.[87]

Following *K.K.C.*, the next published case to address *Ritchie*'s application to confidential and privileged records was *State v. S.H.*[88] S.H. was charged with sexually assaulting his three children.[89] Utilizing the procedure by which parents can receive copies of their children's treatment records, S.H. signed a medical release form seeking his children's privately held counseling records.[90] The Wisconsin Court of Appeals denied the release of records based on the medical release that S.H. signed because the records were privileged under section 905.04.[91] However, without an analysis of whether *Ritchie* extends to privately held privileged records or an explicit intention to extend *Ritchie*'s holding in this manner, the court ruled that *Ritchie* entitled S.H. to request an *in camera* review of his children's treatment records as long as he established that the records contained information material to his defense.[92] Similarly to *K.K.C.*, the court in *S.H.* decided that privately held, privileged records would be subject to *in camera* review under *Ritchie* despite this issue not being presented to the court (the defendant had moved for an *in camera* review but failed to appeal that particular motion).[93]

B. Wisconsin's Misapplication of Ritchie *Solidified:* State v. Shiffra

State v. Shiffra marked the first time an appeal directly requiring the issue of *Ritchie*'s application was before the Wisconsin Court of Appeals.[94] A brief review of the facts and procedural history are helpful to provide context for the court of appeals' decision. Shiffra was charged with sexually assaulting a woman, Pamela P., at his apartment.[95] Pamela reported the sexual assault to police the same night it occurred.[96] The day before the trial, Shiffra moved to adjourn based on information he had obtained from the prosecution indicating that Pamela "ha[d] a history of psychiatric problems which may [have] affect[ed] her ability to perceive and relate truthful information."[97] The adjournment was granted and Shiffra requested Pamela's psychiatric records so

87. *Id.* at 511.
88. State v. S.H., 159 Wis. 2d 730, 738, 465 N.W.2d. 238, 241 (Ct. App. 1990).
89. *Id.* at 733.
90. *Id.*
91. *Id.*
92. *Id.* at 738.
93. *Id.*
94. State v. Shiffra, 175 Wis. 2d 600, 605, 499 N.W.2d 719, 722 (Ct. App. 1993).
95. *Id.* at 602.
96. *Id.*
97. *Id.* at 603.

that he would "not be bound by [her] own self-reporting of the effects of her psychiatric disorders on her ability to perceive and relate truthful testimony."[98] The state objected to an *in camera* review of the records on the grounds that Pamela's account was corroborated by other evidence and the records were protected by absolute privilege by section 905.04.[99] The trial court ruled in Shiffra's favor, finding that he presented sufficient evidence to show materiality.[100] The court gave Pamela the opportunity to waive her privilege granted by section 905.04; when she declined to waive her privilege and release her records for an *in camera* review, the court barred her from testifying.[101] The state appealed the trial court's order barring Pamela from testifying.[102]

In an attempt to persuade the court to adopt a narrow application of *Ritchie*'s holding, the State argued[103] that because Pamela's records were held by a private counseling agency and protected by a statute that provided absolute privilege, they differed from those in *Ritchie* which were protected by a statute that provided qualified privilege and the records were held by a county agency.[104] The court rejected these arguments, citing the precedent set by *K.K.C.* and *S.H.* as compelling it to apply *Ritchie*'s holding to privately held privileged records such as the victim's, and was unconvinced by the State's categorization of the application of *Ritchie* in these previous cases as dicta.[105]

Furthermore, the court of appeals upheld the trial court's decision to bar Pamela's testimony as a consequence for her refusal to waive the privilege to her treatment records.[106] The court reasoned that although there was other evidence that the defendant could have utilized to bring the victim's credibility into question, it sufficed as grounds for an *in camera* review that her treatment records could have contained additional information of greater "quality and probative value" that might confirm the existing evidence.[107] Therefore, the court held that the sole appropriate sanction for Pamela's refusal to submit her

98. *Id.*

99. *Id.* at 604.

100. *Id*.

101. *Id.* at 604–05.

102. *Id.*

103. The state also made two additional arguments regarding *Ritchie* that are not vital to this analysis: first, it argued that the records were not in "direct nexus" with the sexual assault at issue because the records were "temporally remote" from the incident; second, it argued that because *Shiffra* involved a pretrial decision regarding materiality of the information in the records and *Ritchie* involved a post-conviction analysis of materiality, the *Ritchie*'s reasoning could not be applied. *Id.* at 606.

104. *Id.*

105. *Id.* at 607.

106. *Id.* at 612.

107. *Id.* at 611 (emphasis omitted).

treatment records was to bar her from testifying, thus protecting Shiffra's right to a fair trial.[108] The State proposed an alternative sanction by which Pamela would testify and the jury would be informed of her refusal to disclose the records; the court rejected this sanction and argued that it was insufficient because the jury could view it as "a reasonable exercise of her right to privacy rather than an attempt to hide something material to the credibility of her testimony."[109]

The court established a standard by which a defendant could establish materiality of information in a victim's records to obtain an *in camera* review but created some confusion by describing the standard in two different ways. In one portion of the opinion the court said the defendant should show the information in the records is "relevant and *may be helpful* to the defense or is necessary to a fair determination of guilt or innocence."[110] In the same opinion, the court also describes the standard as requiring the records to be "relevant and *may be necessary* to a fair determination of guilt or innocence."[111] The Wisconsin Supreme Court would later clarify this standard in 2001 in *State v. Green*, discussed below.[112]

In the cases that followed *Shiffra*, the Wisconsin Supreme Court declined to address the issue of whether *Ritchie* applied to privately held treatment records protected by a privilege statute that contains no exception for a judicial order.[113] In *State v. Speese*, decided in 1996, the supreme court cited the fact that the questions regarding *Ritchie* were not fully briefed by the parties as rationale for it declining to render an opinion on the issue.[114] In the next case before the Wisconsin Supreme Court in 1997, *State v. Solberg*, the court appeared to accept *Shiffra*'s application of *Ritchie* to privately held records protected by privilege, and did not reference any objections to the contrary from the State.[115] In 2002 this trend continued in *Rizzo*, where the supreme court did not mention *Ritchie* and instead simply applied *Shiffra* as the appropriate precedent.[116]

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108. *Id.*

109. *Id.* at 606 n.4.

110. *Id.* at 608 (emphasis added).

111. *Id.* at 610 (emphasis added).

112. State v. Green, 2002 WI 68, ¶ 34, 253 Wis. 2d 356, 646 N.W.2d 298.

113. *See* State v. Speese, 199 Wis. 2d 597, 614, 545 N.W.2d 510, 517 (1996); State v. Solberg, 211 Wis. 2d 372, 386, 564 N.W.2d 775, 781 (1997); State v. Rizzo, 2002 WI 20, ¶ 48, 250 Wis. 2d 407, 640 N.W.2d 93.

114. *Speese*, 199 Wis. 2d at 610 n.12.

115. *Solberg*, 211 Wis. 2d, 386–87.

116. *Rizzo*, 2002 WI 20, ¶¶ 48–53.

Despite the fact that the supreme court either declined to address the issue of applying *Ritchie* or failed to acknowledge the issue in these cases, *Green* cited the decisions as binding precedent regarding *Ritchie*'s application to privileged, privately held treatment records without analysis.[117] Instead, the *Green* court focused on clarifying the standard for obtaining records set by *Shiffra*.[118]

C. Revisiting and Refining: State v. Green

Green was charged with sexually assaulting a thirteen-year-old girl who had initially disclosed that he engaged in sexual contact and sometime later disclosed that he had actually forced intercourse.[119] Citing the fact that the victim did not disclose the assault right away and did not initially disclose that the incident involved penetration, Green requested an *in camera* review of the victim's counseling records.[120] The trial court denied Green's motion, and Green appealed.[121] The Wisconsin Court of Appeals affirmed the judgment and the case reached the Wisconsin Supreme Court.[122]

The court explored the standard for a defendant to establish the existence of material evidence contained within a victim's records.[123] The court reviewed a number of previous considerations or standards set by *Shiffra* and other precedent for a defendant to request an *in camera* review including: (1) the defendant must produce a "fact-specific evidentiary showing" outlining as specifically as possible what information they are seeking from the records; (2) it is not sufficient for the defendant to merely point out that the victim sought counseling for sexual assault (whether previous or current); (3) the defendant must reasonably investigate via other means first and then make an evidentiary showing that goes beyond "mere speculation or conjecture"; and (4) the information sought cannot just be cumulative to evidence already available.[124]

Finally, the court clarified some seemingly conflicting language in *Shiffra* that obfuscated the standard of evidentiary showing for materiality that a defendant must meet.[125] The court in *Shiffra* had stated both that an *in camera* review was justified when the defendant showed that the evidence in the records

117. *Green*, 2002 WI 68, ¶ 21 n.4.
118. *Id.* ¶ 34.
119. *Id.* ¶¶ 2–6.
120. *Id.* ¶ 9.
121. *Id.* ¶ 9, 15.
122. *Id.* ¶ 17.
123. *Id.* ¶ 28.
124. *Id.* ¶ 33.
125. *Id.* ¶ 25.

"may be helpful to the defense" and also that the evidence "may be necessary to a fair determination of guilt or innocence."[126] The *Green* court determined that a higher threshold is necessary, that a defendant must show that there is a "*reasonable likelihood* that the records contain relevant information necessary to a determination of guilt or innocence."[127] The court explained further that the records will be considered "necessary to a determination of guilt or innocence" if they create "a reasonable doubt that might not otherwise exist."[128] Once the defendant establishes that there is sufficient basis for an *in camera* review, the judge follows an even higher standard to determine whether the records should be released to the defendant.[129] This standard requires that the court determine if the records hold "any relevant information that is 'material' to the defense."[130]

Green established a clear standard for defendants to meet when requesting an *in camera* review of victims' privileged records. However, it was a missed opportunity for the supreme court to revisit the rationale behind *Shiffra* and its application of *Ritchie*. What follows next are two cases where the Wisconsin Supreme Court attempted to correct the missteps in *Shiffra* and *Green* but failed to reach a majority to enact meaningful change.

D. Two Decades After Shiffra: State v. Johnson

Twenty years after *Shiffra*, the Wisconsin Supreme Court reviewed the application of *Ritchie* to privileged counseling records with a critical eye, albeit with very little rationale or analysis.[131] Johnson was charged with repeated sexual assault of his stepdaughter from the time she was twelve to fifteen-years-old.[132] With the rationale that the case hinged on the victim's testimony, Johnson filed a *Shiffra-Green* motion for an *in camera* review of her counseling records.[133] Johnson justified the review by pointing out that the victim was in counseling during the time that she alleged the abuse to have occurred and because the purpose of counseling was to discuss difficulties she was having with Johnson, it was likely that the records contained exculpatory evidence.[134] The circuit court granted Johnson's motion and the victim subsequently refused to waive her privilege to her counseling records.[135] The circuit court held that

126. *Id.* (emphasis omitted).
127. *Id.* ¶ 34 (emphasis added).
128. *Id.*
129. *Id.* ¶ 31.
130. *Id.*
131. State v. Johnson, 2013 WI 59, 348 Wis. 2d 450, 832 N.W.2d 609 (per curiam).
132. State v. Johnson, 2012 WI App 62, ¶ 3, 341 Wis. 2d 492, 815 N.W.2d 407.
133. *Id.* ¶¶ 3–4.
134. *Id.* ¶ 4.
135. *Id.* ¶¶ 6–7.

the victim would not be compelled to produce her records and also would not be barred from testifying.[136] Instead, the circuit court developed an alternative to barring the victim's testimony: the jury would be informed that she had been ordered by the court to produce her counseling records and that she had refused to waive her privilege.[137] The jury would also be instructed to presume that the records contained information favorable to the defense as a result of her refusal to waive her privilege.[138]

The case reached the Wisconsin Supreme Court, which addressed three issues: (1) should *Shiffra* be overruled; (2) if not, did Johnson meet his burden for an *in camera* review of the victim's records; and (3) could the circuit court require that the victim release her privileged records?[139] The majority of the court could not agree on overruling *Shiffra*, but showed some willingness to depart from precedent by holding that, despite her refusal to waive her privilege, the victim need not be barred from testifying.[140] The court also held that the victim could not be compelled to produce her counseling records.[141]

Johnson and the State moved the court to reconsider to provide clarification because the previous opinion "left the parties and the circuit court without sufficient guidance or ability to proceed consistent with precedent."[142] The court then held that because it remained deadlocked, the court of appeals' decision (which required that the victim's testimony be barred[143]) stood.[144] The court reiterated that there was no majority to overrule *Shiffra* and precedent required that the victim's testimony be barred when she refused to waive the privilege to her records.[145] Only one of the five justices would have overturned *Shiffra*.[146] Justice Bradley concurred in part and dissented in part and expressed her disagreement with the court's characterization of its previous opinion.[147] Significantly, Justice Bradley noted that neither *Shiffra* nor *Green* mandated that victims' testimonies be barred if they refuse to release their records for an *in camera* review, but rather that *Shiffra* only required that there be some sort

136. *Id.* ¶ 9.

137. *Id.* ¶ 1.

138. *Id.*

139. State v. Johnson, 2013 WI 59, ¶¶ 2–4, 348 Wis. 2d 450, 832 N.W.2d 609 (per curiam).

140. *Id.* ¶ 6–7.

141. *Id.*

142. State v. Johnson, 2014 WI 16, ¶ 2, 353 Wis. 2d 119, 846 N.W.2d 1 (per curiam) (opinion on reconsideration).

143. *Johnson*, 2012 WI App 62, ¶ 19.

144. *Johnson*, 2014 WI 16, ¶ 1.

145. *Id.* ¶¶ 3–4.

146. *Id.* ¶ 9.

147. *Id.* ¶ 15.

of remedy and was not proscriptive on what that must be.[148] Ultimately, the *Shiffra-Green* process remained intact.

E. A Deeper Look at Shiffra *and a Court Divided:* State v. Lynch

Soon after the second *Johnson* case, the Wisconsin Supreme Court once again tackled the question of whether *Shiffra* should stand as precedent.[149] Lynch was charged with multiple counts of sexually assaulting a child.[150] The sexual assault report and charges came years after the actual incidents, and the victim reported that the abuse occurred around the same time she was sexually assaulted by her father (who had been convicted of the abuse).[151] Lynch moved for an *in camera* review of the victim's mental health records from 1993 to 2011, asserting that the records would demonstrate that "(1) the complainant exhibit[ed] ongoing symptoms of post traumatic stress disorder, which he argue[d] affect[ed] her memory; (2) the complainant did not report Lynch to any treatment providers as a child; and (3) the complainant ha[d] sociopathic personality disorder, a symptom of which is frequent lying."[152] The circuit court found that Lynch provided sufficient evidence to merit an *in camera* review, and the victim refused to waive her privilege to her records.[153] The State appealed, the court of appeals upheld the circuit court's findings, and the State appealed again to the supreme court.[154]

The supreme court was once again divided on whether *Shiffra* should be overturned and whether barring a victim's testimony is the appropriate remedy for a victim's failure to release records for an *in camera* review.[155] Justice Gableman presented the plurality opinion of the court, representing three of the seven justices.[156] Justice Gableman outlined that he, Chief Justice Roggensack, and Justice R.G. Bradley would overturn *Shiffra*.[157] He proceeded to critically analyze the legal justifications outlined in *Shiffra* and concluded that *Shiffra* should not have been decided as it was.[158]

Specifically, the plurality explained that, although due process requires that a defendant be able to present a meaningful defense and a defendant has a right

148. *Id.* ¶ 19.
149. State v. Lynch, 2016 WI 66, ¶ 2, 371 Wis. 2d 1, 885 N.W.2d 89 (plurality opinion).
150. *Id.* ¶ 12.
151. *Id.* ¶¶ 9–10.
152. *Id.* ¶ 13.
153. *Id.* ¶ 14–15.
154. *Id.* ¶¶ 15–16.
155. *Id.* ¶ 7.
156. *Id.*
157. *Id.*
158. *Id.* ¶ 8.

to exculpatory evidence held by the State, this does not extend to a victim's privileged records.[159] It also explored the journey from *Shiffra* to the present case and criticized both the extension of *Ritchie* to privately held, privileged records and the adoption of that precedent.[160] The court pointed out that, even without access to privileged records, defendants still have the opportunity to build a meaningful defense both because the prosecution has an obligation to turn over exculpatory evidence and because defendants have the opportunity to cross-examine and call witnesses at trial to challenge the credibility of the victim.[161]

The remaining members of the court varied on how the case should be decided. Justice Abrahamson and Justice Ann Walsh Bradley outlined in their partial dissent that they would not overturn *Shiffra* because there was no reasonable justification to depart from precedent.[162] They instead would have the court compel the victim to produce the privileged records rather than bar her testimony.[163] Justice Prosser would not overturn *Shiffra*, and although he recognized the issues that the process potentially creates in forcing victims to waive their privilege to counseling records or have their testimony barred, he advocated for adapting *Shiffra-Green* instead of abandoning it.[164] Finally, Justice Ziegler expressed that she would maintain *Shiffra* and its progeny, including the remedy of barring the victim's testimony.[165] Because the court was divided, the lower court's decision stood, and *Shiffra-Green* remained the controlling authority.

V. WHERE ARE WE NOW? RECOMMENDATIONS FOR FUTURE DIRECTIONS

Wisconsin courts have thus far allowed the *Shiffra-Green* mechanism for defendants to request victims' records to survive. This has created the untenable situation where Wisconsin sexual assault victims are potentially forced to

159. *Id.* ¶ 54.

160. *Id.* ¶¶ 36, 39.

161. *Id.* ¶¶ 69–71.

162. The reasons the court departs from precedent include "changes or developments in the law that undermine the rationale behind a decision; the need to make a decision correspond to newly ascertained facts; a showing that a decision has become detrimental to coherence and consistency in the law; a showing that a decision is unsound in principle; and a showing that a decision is unworkable in practice." *Id*. ¶¶ 94–95 (Abrahamson & Ann Walsh Bradley, JJ., concurring in part and dissenting in part) (internal quotation marks omitted) (quoting State v. Young, 2006 WI 98, ¶ 51 n.16, 294 Wis. 2d 1, 717 N.W.2d 729).

163. The justices relied on a state statute classifying patient records as confidential, stating that the court could utilize this to compel the victim to produce the records. *Id.* ¶ 120 (Abrahamson & Ann Walsh Bradley, JJ., concurring in part and dissenting in part).

164. *Id.* ¶ 181 (Prosser, J., dissenting).

165. *Id.* ¶ 193 (Ziegler, J., dissenting).

choose between disclosing their privileged records or having their testimony barred. Moving forward, Wisconsin has a couple of different directions it can pursue to prevent or mitigate the harm done by the *Shiffra-Green* process, including overturning *Shiffra* or allowing alternative remedies outside of barring a victim's testimony.

A. The Ideal Path: Overturn Shiffra

The most effective solution to restoring privilege protections for victims in Wisconsin lies with the courts in overturning *Shiffra*. As Justice Gableman outlined in *Lynch*, there is no constitutional right to discovery of privileged records.[166] Thus, *Shiffra*'s extension of *Ritchie* to privately held, privileged records was incorrect.[167] Furthermore, some scholars suggest that courts should not even consider a defendant's request for privileged records held by a third party, and that no balancing test is required.[168] This approach has been adopted by a number of states that have held that privilege cannot be trumped by the defendant's right to a meaningful defense because the privilege is absolute.[169] Overturning *Shiffra* would be the best way to ensure that the harmful process of defendants forcing victims to disclose their privileged records would not continue.

B. The Next Best Option: Pursue Other Remedies Outside of Barring the Victim's Testimony

If the Wisconsin Supreme Court will not overturn *Shiffra*, the next best option is to adopt alternative remedies to barring a victims' testimony if they refuse to disclose their records. Though it was not adopted by the Wisconsin Supreme Court, the circuit court in *Johnson* proposed such a remedy.[170] The jury would be informed that a victim both refused to waive his or her privilege and disclose the requested records, and the jury would be instructed to presume

166. *Id.* ¶ 54.

167. *Id.* ¶ 31.

168. Wendy J. Murphy, *Privacy Rights in Mental Health Counseling: Constitutional Confusion and the Voicelessness of Third Parties in Criminal Cases*, 39 J. AM. ACAD. PSYCHIATRY L. 387, 391 (2011).

169. People v. Hammon, 938 P.2d 986, 992–93 (Cal. 1997) (adopting absolute psychologist-patient privilege); People v. Tauer, 847 P.2d 259, 261 (Colo. App. 1993) (adopting absolute psychologist-patient privilege); Famiglietti, 817 So. 2d 901, 901 (Fla. Dist. Ct. App. 2002) (absolute psychotherapist-patient privilege); People v. Foggy, 521 N.E.2d 86, 86 (Ill. 1988) (absolute rape crisis counselor privilege); Commonwealth v. Wilson, 602 A.2d 1290, 1290 (Pa. 1992) (absolute sexual assault counselor-victim privilege); Jennifer L. Hebert, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 Tex. L. Rev. 1453, 1466 n.109 (2005) (noting the same).

170. State v. Johnson, 2012 WI App 62, ¶ 1, 341 Wis. 2d 492, 815 N.W.2d 407.

that the records contained information favorable to the defense.[171] While this alternative is not ideal, it at least still allows the victim to testify and the case to continue.

C. Promising Changes Ahead? A Shift in the Court's Composition

Change to the *Shiffra-Green* process is largely in the hands of the courts, which have failed to alter *Shiffra-Green* in the nearly three decades since the standard was established. The Wisconsin Supreme Court has not revisited *Shiffra-Green* since 2016 with *Lynch*. However, the court's composition has changed in the last six years. Justice Patience D. Roggensack and Justice Rebecca G. Bradley remain on the court, and both had endorsed the need to overturn *Shiffra*.[172] On the other hand, Justice Ann Walsh Bradley and Chief Justice Annette Ziegler also remain on the court and both had expressed the need to follow *Shiffra* as precedent.[173] More importantly, Justice Rebecca Dallet, Justice Brian Hagedorn and Justice Jill Karofsky have joined the court since *Lynch*. Unless the justices from the *Lynch* court significantly shift their positions, the addition of Justices Dallet and Karofsky might mean reform for the *Shiffra-Green* motion. Justice Dallet has been described as "tak[ing] care to protect the innocent and . . . victims" which could indicate that she would rule in favor of overturning the harmful precedent.[174] Additionally, Justice Karofsky's history of working with crime victims may also favor her supporting reform for *Shiffra*. [175] Finally, although it is unclear whether Justice Hagedorn would support departing from the court's precedent here (he tends to side with both the conservative and liberal justices[176]), if Justices Dallet and Karofsky were to join Justices Roggensack and R.G. Bradley to create a majority, *Shiffra* could likely be overturned regardless.

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171. *Id.*

172. State v. Lynch, 2016 WI 66, ¶ 7, 371 Wis. 2d 1, 885 N.W.2d 89 (plurality opinion).

173. *Id.*

174. Molly Beck, *Dallet Has a History of Hearing Tough Cases*, WIS. ST. J., Mar. 25, 2018, at A.10.

175. Shawn Johnson, *Judge Jill Karofsky Promotes Progressive Values in Wisconsin Supreme Court Run*, WIS. PUB. RADIO: SWING STATE (Apr. 1, 2020), https://www.wpr.org/judge-jill-karofsky-promotes-progressive-values-wisconsin-supreme-court-run [https://perma.cc/9DDZ-9HCP].

176. Laurel White, *Experts: Slimmer Conservative Majority on Wisconsin Supreme Court Could Unite Justices*, WIS. PUB. RADIO (Aug. 4, 2020) https://www.wpr.org/experts-slimmer-conservative-majority-wisconsin-supreme-court-could-unite-justices [https://perma.cc/58U3-MRDC].

D. A Final Note on the Value of a Victim's Records to a Meaningful Defense

Justice Ziegler predicted that, if the court were to overturn *Shiffra*, "[t]he potential for error . . . [would be] substantial."[177] Assuming that she is referring to the error of failing to allow a defendant access to exculpatory evidence in a victim's records and the defendant being wrongfully convicted as a result, it is not clear that there is a substantial potential for this to occur. First, false allegations of sexual assault, as previously noted, are low.[178] Additionally, defendants have alternative methods to build a meaningful defense and challenge victims' credibility, as noted in *Lynch*.[179] Finally, it is unclear that there is any likelihood that victims' records contain exculpatory evidence. Further research into how many *Shiffra-Green* motions lead to *in camera* reviews and how many of these in turn lead to the court disclosing the records would be useful. If Wisconsin chooses to maintain *Shiffra-Green*, it is critical to evaluate its utility.

VI. CONCLUSION

Crime victims in Wisconsin, particularly sexual assault victims, deserve better protections for their privileged records. What started with the United States Supreme Court's decision in *Ritchie* to provide a narrow exception to allow access for records held by a state agency under a qualified privilege statute has mutated in Wisconsin to a broad exception allowing access to privately held counseling records protected under an unqualified privilege statute. Rather than maintain an additional barrier to victims' participation in the criminal justice system, Wisconsin must turn to reform. Without it, the system will continue to unintentionally harm victims.

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177. *Lynch*, 2016 WI 66, ¶ 230 (plurality opinion).

178. Lonsway, Archambault & Lisak, *supra* note 24.

179. The court points out that defendants can still build a meaningful defense with the following: (1) the presumption of innocence until proven guilty; (2) "the right to physically confront and cross-examine witnesses as well as . . . compel the attendance of witnesses at trial;" (3) the prosecutor's "constitutionally-mandated duty to disclose to the defendant exculpatory evidence;" (4) the ability to "call other witnesses [to] . . . testify about the complainant's character for truthfulness;" and, (5) mandatory reporting laws, which would allow the defendant to "ask a treatment provider who would have been subject to the mandatory reporting requirement if he or she ever reported the defendant to the authorities." *Lynch*, 2016 WI 66, ¶¶ 68–72.

* J.D., expected 2024, Marquette University Law School. Thank you to my husband, friends, and family who listened, encouraged, and patiently challenged procrastination throughout my time in law school. This Comment is dedicated to the countless survivors of violence I have met as an advocate, counselor, family member, and friend.