OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

October 14, 2021

To:

Hon. Raymond S. Huber
Circuit Court Judge
Waupaca County Courthouse
811 Harding St.
Waupaca, WI 54981

Terrie J. Tews
Clerk of Circuit Court
Waupaca County Courthouse
811 Harding St.
Waupaca, WI 54981

Sarah Burgundy
Wisconsin Department of Justice
17 W. Main Street
Madison, WI 53707

Veronica Fay Isherwood
District Attorney
811 Harding St.
Waupaca, WI 54981-2012

*Addresses continued on page 3

You are hereby notified that the Court has entered the following order:

No. 2019AP664-CR State v. Alan S. Johnson L.C. #2017CF56

On September 29, 2021, the court conducted oral argument in the above-captioned matter, which arises from an interlocutory appeal filed during the pending criminal prosecution of defendant-respondent-petitioner Alan S. Johnson. During the oral argument, counsel for the State of Wisconsin addressed a portion of a footnote contained in the State's response brief which states:

> Though [State v. Shiffra, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993)] remains controlling law and the issue whether it applies to privately held records is not before this Court in this case, the State maintains its longstanding position that Shiffra is incorrect to the extent that it holds that [Pennsylvania v. Ritchie, 480 U.S. 39 (1987)] applies to records outside the State's possession. Accord United States v. Hach, 162 F.3d 937, 947 (7th Cir. 1998) (stating that Ritchie does not apply when the information the defendant seeks is not in the government's possession); see also State v. Lynch, 2016 WI 66, ¶ 36, 371 Wis. 2d 1, 885 N.W.2d 89 (Gableman, J., lead opinion) ("Ritchie . . . never should have been stretched to cover privileged records held by agencies far removed from investigative and prosecutorial functions.").

State's Resp. Br. at 26-27 ft. 4. The court has determined that it would benefit from additional briefing on the following question:

Should the court overrule State v. Shiffra, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993)?

Upon the foregoing,

IT IS ORDERED that within 30 days after the date of this order the plaintiff-respondent, State of Wisconsin, must file a supplemental brief in this court addressing the issue set forth above; the appellant T.A.J. may file a supplemental brief in this court addressing the issue set forth above, or a statement taking no position on the issue; within 20 days of filing, the defendant-respondent-petitioner, Alan S. Johnson, must file either a response brief or a statement that no brief will be filed; and that within 10 days of filing, the State of Wisconsin must file either a reply brief or a statement that no reply brief will be filed and, if the appellant T.A.J. filed an opening brief, T.A.J. must file either a reply brief or a statement that no reply brief will be filed;

IT IS FURTHER ORDERED that each nonparty amicus curiae in this matter may file a file a nonparty brief addressing the above-captioned issue, not later than 14 days after the defendant-respondent-petitioner's brief or statement is filed;

IT IS FURTHER ORDERED that a person or entity not a party or previously admitted as a nonparty amicus curiae in this matter may file a motion requesting permission to file a nonparty brief in accordance with Wis. Stat. § 809.19 (7), together with a copy of the proposed brief, not later than 14 days after the defendant-respondent-petitioner's brief or statement is filed;

IT IS FURTHER ORDERED that the number, form, length, pagination, certification requirements, and filing procedures shall be the same as those governing standard appellate briefing in this court for a brief-in-chief, response brief, reply brief, and nonparty amicus briefs; and

IT IS FURTHER ORDERED that upon consideration of the supplemental briefs the court will advise the parties if it determines that additional oral argument is necessary for the proper resolution of this case.

ANN WALSH BRADLEY, J. (concurring). I concur with the order for supplemental briefing in this case. However, I would have asked the parties to address an additional question that, depending on the court's answer to the first question, may need to be considered. That question is as follows: If the court were to overrule Shiffra, what alternative procedure, if any, should be employed to balance the rights of defendants to present a complete defense with crime victims' rights to confidentiality, privilege, and privacy of their medical records?

There are significant interests implicated on both sides of this case. The court should have a clear picture of the rights at stake and full input from the parties. Therefore, I respectfully concur.

I am authorized to state that Justice REBECCA FRANK DALLET joins this concurrence.

Sheila T. Reiff
Clerk of Supreme Court

Andrea K. Rufo
Legal Action of Wisconsin, Inc.
4900 Spring St., Ste. 100
Mount Pleasant, WI 53406

Aaron Nelson
Nelson Defense Group LLC
811 First St., Ste. 101
Hudson, WI 54016

Nathaniel J. Wojan
Petit & Dommershausen SC
1650 Midway Road
Menasha, WI 54952

Erika Jacobs Petty
LOTUS Legal Clinic, Inc.
2515 N. 124th St., Ste. 201
Brookfield, WI 53005

Ellen Henak
Henak Law Office, S.C
#100
5205 N. Ironwood Road
Milwaukee, WI 53217

Kelli Sue Thompson
State Public Defender
315 N. Henry St. 2nd Fl.
P.O. Box 7923
Madison, WI 53707

Louis J. Molepske Jr.
District Attorney
1516 Church St.
Stevens Point, WI 54481

Katie R. York
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707-7862