Criminal Procedure
Discovery – Private Health Care Records – "Victims"
***State v. Johnson*, 2023 WI 39 (filed May 16, 2023)**

HOLDING: The Wisconsin Supreme Court overruled the *Shiffra/Green* doctrine as "wrongly decided," "unworkable," and "undermined" by later developments.

SUMMARY: The supreme court overruled 30 years of case law dealing with criminal defendants' efforts to access private treatment records of crime victims. In the so-called *Shiffra/Green* line of cases, the courts struggled to reconcile a victim's rights to both the confidentiality of private health-care records and the evidentiary privilege between patients and providers with a defendant's demands to scrutinize such records for possible exculpatory evidence.

Here the defendant was charged with sexually assaulting his own children. Under *Shiffra/Green* protocols, he sought an in camera review of the victims' mental health and counseling records. The state took no position on the motion, but the defendant's son, T.A.J., filed a brief in opposition. Initially, litigation centered on T.A.J.'s standing to oppose the motion, but the supreme court later ordered both parties to submit briefs on the constitutionality of the *Shiffra/Green* doctrine.

The supreme court overruled *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), and *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, as well as other cases "to the extent they can be read to permit in camera review of privately held, privileged health records in a criminal case upon a showing of materiality" (¶ 1 n.3).

The majority opinion authored by Justice Dallet comprehensively critiqued the *Shiffra/Green* doctrine in light of the court's commitment to *stare decisis*. Three "special justifications" supported overruling *Shiffra/Green* (¶ 23). First, "*Shiffra* is unsound in principle" because it incorrectly applied U.S. Supreme Court case law [*Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)] involving publicly held records to "privately held and statutorily privileged health records" (¶¶ 24, 29). Second, "*Shiffra* is also unworkable in practice because it cannot be applied consistently and is inherently speculative" (¶ 34). "Finally, since it was decided, *Shiffra* has been undermined by two related developments in the law: the removal of procedural and evidentiary barriers to prosecuting sexual assault cases and the passage of statutory and constitutional protections for crime victims" (¶ 40).

Justice R.G. Bradley concurred, agreeing that the majority "correctly overrules *Shiffra*" yet in so doing failed to "respect" separation-of-powers principles.

Justice Karofsky also concurred, joining the majority in full but writing separately to "illustrate" the ways in which *Shiffra* was unworkable (¶ 78).

Justice A.W. Bradley dissented, joined by Chief Justice Ziegler. The dissent conceded that *Shiffra/Green's* procedures were not perfect but said they were workable and the principles of *stare decisis* did not warrant overruling the doctrine.

Criminal Procedure
Confrontation – Hearsay – Harmless Error
***State v. Barnes*, 2023 WI 45 (filed June 6, 2023)**

HOLDING: Harmless error occurred when one police officer testified to a statement made by another police officer during an arrest.

SUMMARY: A jury convicted Barnes of selling methamphetamine to an informant. Barnes' defense primarily was the following: 1) his assertion that he was the one buying drugs from the informant, and 2) his assertion that police officers conducted a slipshod investigation. During trial, the lead police officer testified that he ordered the arrest as soon as another officer said he observed the drug transaction. That second officer was not permitted to testify because of a discovery violation by the state. Over a hearsay objection, the trial judge permitted introduction of the second officer's statement not for its truth but only to show why the lead officer gave the arrest order.

In an unpublished decision, the court of appeals affirmed, reasoning that because the statement was not admitted for its truth (the drug buy) but only to explain the lead officer's state of mind, it was not testimonial hearsay for Sixth Amendment purposes. Alternatively, any error was harmless.

The supreme court affirmed in an opinion authored by Justice R.G. Bradley. The court assumed without deciding that error occurred in the admission of the statement (*see* ¶ 27). Nonetheless, the supreme court concluded that any error was harmless, based on the supreme court's close analysis of the "overwhelming" trial evidence, including recorded telephone conservations and testimony by other officers about events as well as the recovery of evidence from both the defendant's and the informant's cars (¶ 30).

Chief Justice Ziegler, joined by Justice Roggensack, concurred in the majority opinion but wrote separately to explain why no error occurred. They concluded that the second officer's statement was properly admitted only to prove the state of mind of the officer who heard it, not for its truth that a drug sale had occurred. Because the offending statement was not used for its truth, it was neither hearsay under evidence law nor "testimonial hearsay" for confrontation purposes.

Sex Offender Registration – Convictions on "2 or More Separate Occasions" – Earned Release Program
***State v. Rector*, 2023 WI 41 (filed May 23, 2023)**

HOLDINGS: 1) The circuit court did not err in requiring the defendant to comply with sex offender registration requirements for 15 years rather than for life. 2) The circuit court did not abuse its discretion in denying the defendant eligibility for the Earned Release Program (ERP).

SUMMARY: Rector was convicted in a single proceeding of five counts of possession of child pornography. The circuit court sentenced him to 8 years' initial confinement and 10 years' extended supervision. It also ordered him to comply with sex offender registration requirements for 15 years.

The Department of Corrections (DOC) thereafter requested the circuit court to amend the judgment of conviction because the DOC thought Wis. Stat. section 301.45(5)(b)1. required Rector to register


BLINKA


HAMMER

In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize all decisions of the Wisconsin Supreme Court (except those involving lawyer or judicial discipline).

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as a sex offender for life. The circuit court denied the motion.

This appeal followed. The matter was before the supreme court on certification from the court of appeals. In a majority opinion authored by Justice Karofsky, the supreme court affirmed.

Wis. Stat. section 301.45(5)(b)1. requires lifetime registration as a sex offender when a "person has, on 2 or more separate occasions, been convicted … for a sex offense." There was no dispute that the defendant was convicted of a "sex offense" (¶ 11 n.4). The issue before the court was whether convictions based on charges filed in a single case and occurring during the same hearing have occurred on "2 or more separate occasions," thus requiring lifetime registration. Treating resolution of this issue as a straightforward matter of statutory interpretation, the court held that "when a person is convicted based on charges filed in a single case during the same hearing, then those convictions have not occurred on 'separate occasions'" (¶ 19). Therefore, the circuit court did not err in requiring Rector to comply with registration requirements for only 15 years (*see* ¶ 6).

[*Editors' notes:* 1) Possession of child pornography is not among the sex crimes for which a single violation requires lifetime registration (¶ 44 n.21). 2) The majority devoted a substantial portion of this opinion to distinguishing the meaning of "2 or more separate occasions" in the sex offender registration statute from a different meaning the court has ascribed to "separate occasions" language used in the habitual criminality statute. *See* Wis. Stat. § 939.62(2).]

In a footnote, the majority stated that "[t]he facts of this case – where Rector's convictions were filed in a single case and occurred during the same hearing – provide a sufficient basis to determine that the convictions did not occur on separate occasions. We leave for another day whether or not convictions that only meet one of those two conditions have occurred on separate occasions" (¶ 19 n.5).

The court also considered Rector's challenge to the circuit court's refusal to allow him to participate in the ERP, a drug treatment program that can result in a reduction of the participant's term of confinement in prison. *See* Wis. Stat. § 302.05. The circuit court determined that Rector was ineligible for this program because in essence the defendant's substance abuse was not a reason for his possession of child pornography. This demonstrated that the court was not "closed to individual mitigating factors." Rather, the judge found that Rector's individual mitigating factors did not warrant eligibility for the ERP. The circuit court did not abuse its discretion in denying Rector eligibility for the program (¶ 50).

Justice R.G. Bradley filed an opinion concurring in part and dissenting in part, in which Chief Justice Ziegler and Justice Roggensack joined.

Municipal Law

Rezoning – Procedural Due Process

***Miller v. Zoning Bd. of Appeals*, 2023 WI 46 (filed June 6, 2023)**

HOLDING: There is no procedural-due-process right to impartial decision-makers when a legislative body such as the Lyndon Station village board enacts, repeals, or amends a generally applicable law like a zoning ordinance.

SUMMARY: Jan Miller is a trustee on the Lyndon Station village board. In that capacity she cast the deciding vote in favor of her daughter and son-in-law's application to amend the village's zoning ordinance to rezone their vacant residential property for commercial development. A local business owner, Thomas Miller (no relation to Jan Miller [hereinafter Trustee Miller]), opposed the rezoning for multiple reasons. He and other residents also questioned whether Trustee Miller had a conflict of interest that should preclude her from participating in the vote. Thomas Miller appealed the rezoning decision to the village's zoning board of appeals (ZBA), which upheld the village board's decision.

Thomas Miller sought certiorari review of the ZBA's decision. The circuit court reversed the ZBA's decision, concluding that Trustee Miller's participation in the village board vote violated due process because she was not a fair and impartial decision-maker. In a published decision, the court of appeals reversed. *See* 2022 WI App 51. In a unanimous opinion authored by Justice Dallet, the supreme court affirmed the decision of the court of appeals.

The supreme court concluded that "there is no due process right to impartial decision-makers when a legislative body like the Village Board enacts, repeals, or amends a generally applicable law like the zoning ordinance" (¶ 1). To reach this conclusion, the court relied on case law that distinguishes legislative acts from adjudicative acts. For adjudicative actions like deciding civil or criminal cases, a fair trial in a fair tribunal is a basic requirement of procedural due process (*see* ¶ 13).

"When legislative actions are at issue, however, those affected by the legislation are not entitled to *any* process beyond that provided by the legislative process" (¶ 14) (internal quotations and citation omitted). "[B]ecause a legislative determination provides all the process that is due, partiality on the part of legislators does not violate the Due Process Clause" (*id.*) (internal quotations and citations omitted).

Applying these principles, the court held that "the Village Board's vote to amend the zoning ordinance and rezone the [subject] property was a legislative act. The Village Board rezoned the [subject] property by amending the Village's generally applicable zoning ordinance. In other words, the Village Board changed the law. It did not apply existing law to individual facts or circumstances, as it would if it were making an adjudicative decision like whether to grant a variance or permit a legal non-conforming use" (¶ 19). "What matters is that the Village Board made a prospective change by enacting, repealing, or amending existing generally applicable law. The Village Board's action was thus legislative in nature, and for that reason, [Thomas] Miller was not entitled to an impartial decision-maker" (¶ 20).

State Constitutional Law

Amending the State Constitution – Sufficiency of Ballot Questions – Marsy's Law

***Wisconsin Just. Initiative Inc. v. Wisconsin Elections Comm'n*, 2023 WI 38 (filed May 16, 2023)**

HOLDING: The "Marsy's Law" amendment of the Wisconsin Constitution was validly submitted to and ratified by Wisconsin voters.

SUMMARY: In 2022, Wisconsin voters ratified a lengthy amendment, commonly known as Marsy's Law, that contained many crime victims' rights provisions. The question on the ballot that the Wisconsin Legislature put to state residents read as follows: "*Additional rights of crime victims.* Shall section 9m of article I of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?" (¶ 10).

Wisconsin Justice Initiative Inc. and several state residents (hereinafter "WJI") brought multiple challenges to the ballot question. The circuit court granted declaratory judgment in favor of WJI, concluding that the ballot question failed to meet all requirements for amending the state constitution with respect to the

question's content and form. The court of appeals certified the case to the supreme court. In a majority opinion authored by Justice Hagedorn, the supreme court reversed the circuit court.

Article XII, section 1 of the Wisconsin Constitution provides that the legislature has a duty "to submit such proposed amendment or amendments to the people in such manner and at such time as the legislature shall prescribe." WJI argued that the ballot question ran afoul of this provision. It contended that the question failed to contain "every essential" of the proposed amendment and that it misled voters in several respects by neglecting the amendment's effects on the rights of criminal defendants (¶ 4).

The supreme court disagreed. Examining the original meaning of the constitution, the court discerned no such requirement that every essential detail of an amendment be included in the ballot question. "The constitution itself requires only that the legislature 'submit' the proposed amendment to the people" (¶ 5).

Said the court: "While WJI takes issue with the wording, completeness, and implications of the ballot question, we conclude the question was not fundamentally counterfactual such that voters were not afforded the opportunity to approve the actual amendment" (*id.*). "Article XII, Section 1 does not require any substantive discussion of the amendment in the ballot question submitted to the people. No explanation or summary is constitutionally commanded" (¶ 47). Thus, "Marsy's Law was validly submitted to and ratified by the people of Wisconsin, as the constitution requires" (¶ 66).

WJI also argued that Marsy's Law constituted "more than one amendment" and therefore voters should have been given the opportunity to "vote for or against such amendments separately" (¶ 14).

Again, the supreme court disagreed. Article XII, section 1 of the constitution provides that "if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately." The court has interpreted this provision to mean that the legislature has discretion to submit several distinct propositions as one amendment if they relate to the same subject matter and are designed to accomplish one general purpose (*see* ¶ 6). The court concluded that Marsy's Law "had the single general purpose of expanding and protecting victims' rights, and all provisions of the proposed amendment further this purpose" (¶ 66).

[*Editors' note:* Wis. Stat. section 5.64(2) provides that the ballot used to amend the state constitution "shall give a concise statement of each question ..." In this case, WJI did not develop any separate arguments using this statute and thus the court did not address the statute, choosing instead to focus its attention solely on the requirements of the constitution itself (*see* ¶ 30).]

In addition to the majority opinion summarized above, multiple concurring opinions involving combinations of justices were also filed in this case. Justice A.W. Bradley filed a dissent.

Torts

Negligence – Statute of Limitation – Wis. Stat. § 893.587

***Fleming v. Amateur Athletic Union of the U.S. Inc.*, 2023 WI 40 (filed May 17, 2023)**

HOLDING: The plaintiff's negligence claim was barred by the statute of limitation.

SUMMARY: Between 1997 and 2000, Fleming was a member of the Madison Spartans Youth Basketball Club, a youth basketball program affiliated with the Amateur Athletic Union of the United States Inc. (AAU). The AAU is a nonprofit multisport organization dedicated to the promotion and development of amateur sports and physical fitness programs. It sponsors and sanctions athletic events, including basketball tournaments in Wisconsin and Minnesota. Fleming's coach was Shelton Kingcade, an adult who coached the Madison Spartans and Fleming's school basketball team. Kingcade applied for and became a member or volunteer affiliated with AAU and maintained this affiliation at all relevant times. For a team's coach to participate in AAU tournaments, the coach had to be a member of the AAU (*see* ¶ 5).

Kingcade sexually assaulted Fleming several times during the period referenced above, when Fleming was between the ages of 13 and 16. For this conduct, Kingcade was convicted of sexual assault offenses. In 2020 Fleming filed this civil action in Dane County Circuit Court alleging that the AAU was negligent in hiring, retaining, and supervising Kingcade. Among other things Fleming alleged that the AAU was aware or should have been aware that Kingcade had been convicted in 1990 of second-degree sexual assault of a minor (*see* ¶ 6) The circuit court granted the AAU's motion to dismiss based on the three-year statute of limitation for negligence claims. *See* Wis. Stat. § 893.54(1m)(a).

In a published decision, the court of appeals reversed. *See* 2022 WI App 46. In a majority opinion authored by Chief Justice Ziegler, the supreme court reversed the court of appeals.

The issue in the case was whether Fleming's negligence action was time-barred. Fleming argued that the ordinary three-year limitation period for negligence actions was not applicable to her claim. Fleming contended that Wis. Stat. section 893.587 should apply instead. This statute requires that "[a]n action to recover damages for injury caused by an act that would constitute a violation of" certain Wis. Stat. chapter 948 sexual assault offenses against children "shall be commenced before the injured party reaches the age of 35 years or be barred." According to Fleming, Wis. Stat. section 893.587 governs her negligence claim because she alleged that the AAU negligently hired, retained, and supervised Kingcade, who sexually assaulted her between 1997 and 2000 (*see* ¶ 2).

The supreme court concluded that "Fleming's negligence claim against AAU was not timely filed. Wisconsin Stat. § 893.587 does not provide the governing statute of limitations for Fleming's negligence claim against AAU because her claim is not '[a]n action to recover damages for injury caused by an act that would constitute a violation of' an enumerated ch. 948 offense. Instead, Fleming's 'action to recover damages' is 'for' 'injury caused by an' entirely different act – AAU's act of negligently hiring, retaining, and supervising Kingcade. Because Fleming does not allege that AAU committed an enumerated injury-causing act, her claim is not '[a]n action to recover damages' to which § 893.587 applies. The governing time limit is instead the three-year statute of limitations under Wis. Stat. § 893.54 as extended by Wis. Stat. § 893.16, which the parties agree would bar Fleming's negligence claim against AAU if applicable. Accordingly, Fleming's claim is time-barred, and the circuit court was correct to grant AAU's motion to dismiss" (¶ 44).

Justice Karofsky filed a dissenting opinion that was joined in by Justice A.W. Bradley and Justice Dallet.

Legal Malpractice – *Pierringer* Releases – Settlement Evidence – Bias – Indemnification

***Allsop Venture Partners III v. Murphy Desmond SC*, 2023 WI 43 (filed June 2, 2023)**

HOLDING: In a legal malpractice action, the circuit court properly admitted evidence that the plaintiff had settled with several former codefendants under a *Pierringer* release.

SUMMARY: A media company used a "midco transaction" while attempting to avoid paying high taxes when its principals sold the business. It did so with the assistance of a tax law firm, an accounting firm, and a corporate law firm. After the deal closed, the IRS assessed taxes and penalties. Shareholders of the media company then sued the three assisting firms.

The tax firm and the accounting firm settled with the plaintiffs, who signed a *Pierringer* release and filed an amended complaint that removed the allegations against the two defendants who settled. ("A *Pierringer* release operates as a satisfaction of that portion of the plaintiff's cause of action for which the settling joint tortfeasor is responsible, while at the same time reserving the balance of the plaintiff's cause of action against a nonsettling joint tortfeasor" (¶ 1 n.2).)

The legal malpractice claim against the corporate law firm went to trial. Although the jury found the corporate law firm partially negligent, the indemnification agreement left the plaintiffs with no additional recovery. In an unpublished decision, the court of appeals affirmed.

The supreme court affirmed in an opinion authored by Justice Hagedorn that addressed four claims of error. First, the circuit court properly admitted evidence of the *Pierringer* release. Although settlement evidence is normally excluded by Wis. Stat. section 904.08, the plaintiffs' settlement plainly raised issues regarding bias and prejudice (*see* ¶¶ 24-25). And while case law explicitly precludes evidence of the amount of such settlements, here it was the plaintiffs who disclosed the amounts to the jury (which "shocked" the trial judge). The settlement pointedly demonstrated how the plaintiffs' "story changed" along with their incentives at trial against the corporate law firm (¶ 26). The supreme court addressed the case law on using settlements to prove bias, reiterating that "this statutory exception should not be expansively construed" (¶ 29). It also credited the trial judge's use of a limiting instruction (*see* ¶ 30).

Second, the defendant's closing argument did not warrant a new trial even though counsel strayed from the use of the settlement to show "bias" (which was okay) and instead referred to "liability" (which was not okay). The supreme court said that counsel's mistake was "a single dark cloud on an otherwise sunny day. The statement comprised two sentences in almost 80 pages of closing argument transcript." Considered together with the limiting instruction, the error did not warrant a new trial (¶¶ 34-35).

Third, no error occurred in the admission of the "superseded" complaint (that is, the pre-settlement version of plaintiffs' claims).

Fourth, the court addressed and rejected the plaintiffs' contention that the corporate law firm was not entitled to indemnification. The opinion reviewed the case law on indemnification and *Pierringer* releases (*see* ¶ 43). In effect, "the plaintiff who executes a *Pierringer* release effectively stands in the shoes of the settled defendants. So if the non-settled defendants are entitled to indemnity from the settled defendants, the responsibility for the loss shifts from the settled defendants to the plaintiff" (¶ 44). This is true even when, as here, the two settling parties were found to be intentional tortfeasors while the nonsettling defendant was found negligent (*see* ¶ 49). The court saw "nothing in the record that shows anything other than joint liability" (¶ 48).

Chief Justice Ziegler dissented, joined by Justice Roggensack and Justice R.G. Bradley. The dissent expressed concern that the exception now swallows the rule and creates a "back door for litigants to introduce evidence of *Pierringer* releases for the prohibited purposes" (¶ 51). **WL**