# JOHN SPIROS

State Representative • 86th Assembly District


# *Assembly Bill 570*

December 21, 2017

*Testimony from Rep. Spiros*

Hello, and thank you Chairman Ott and members of the Assembly Committee on Judiciary for allowing me to have the opportunity to share my testimony with you today regarding Assembly Bill 570, which would help to address an issue that has unfortunately, negatively impacted many crime victims in Wisconsin.

Under Wisconsin law, a patient's mental and physical health care records are privileged and confidential. There are many compelling reasons for protecting these types of records – perhaps at the top of the list is the need to ensure that a patient feels they can freely and candidly discuss medical and mental health concerns with their providers without fear that those most private of conversations could become public without their consent. However, there is a line of case law that has developed over the years that allows a criminal defendant to seek the mental health records of their victims and, unfortunately, the circumstances under which these motions are granted vary widely and have exceeded prior Supreme Court precedent.

When a defendant requests a victim's privileged mental health records there are two competing interests. On one hand, there is the defendant's right to due process, in particular the right to present a meaningful and complete defense. On the other hand, there is the victim's privacy interest and the victim's right to protect their privileged records. We worked hard to try and strike a balance in this bill – vigorous protection of a victim's rights without depriving defendants of theirs. We also needed to make sure that we created a clear process that judges could follow when reviewing these types of motions.

Now, one thing you will not hear me say today is that this is a simple bill. This is not a simple bill because this is not a simple issue. It is complex and there was a lot of case law and competing interests to consider. Thankfully, we had a lot of help from experts and legal practitioners at the Department of Justice who are not only familiar with this issue but see the problems and confusion created by these motions in their daily practice. This bill is the result of three years of work to create a product that provides clear guidance for courts and fair treatment for all parties involved.

These motions are most often filed by the defense in sexual assault and domestic violence cases. Victims of these violent crimes often seek out counseling to try and heal and move forward after such a traumatic event. Not only do these motions have a chilling effect on a victim's participation in the criminal justice system, they make it difficult for a therapist to provide effective counseling to these individuals. Inconsistent case law has left us with a process that is


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time consuming, yields uncertain results and challenges prosecutors to provide accurate information to crime victims.

This bill, the product of controlling Wisconsin case law, provides a clear procedure for all parties to follow when seeking access to a crime victim's private mental health care records. It clarifies the required burden defendants must meet in order to obtain an in camera review of the records and keeps the victim in control of whether their private records will be released to the court.

After the bill was introduced and circulated more widely among District Attorney's we were made aware of a few changes that could be made to better protect victims. Specifically, the amendment clarifies that information contained in a victim's mental health records must be so compelling as to be necessary to the determination of guilt or innocence in order for it to be deemed necessary to the defense. In doing so I believe we are scaling back these motions so they only apply in the types of scenarios for which they were originally intended.

Thank you again for allowing me the opportunity to share testimony in support of this bill, and I welcome any questions.


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## PREPARED TESTIMONY OF ATTORNEY GENERAL BRAD D. SCHIMEL

Assembly Committee on Judiciary
Thursday, December 21, 2017

Good morning Chairman Ott and committee members. Thank you for the opportunity to testify on Assembly Bill 570.

To illustrate the necessity and importance of AB 570, I want to take a few minutes and tell you a story about a criminal case involving a girl that I will refer to as "Kristy." When Kristy was 13 years old, she disclosed that she was repeatedly sexually assaulted by her mother's boyfriend over the course of the prior year. He forced her to have vaginal and oral intercourse.

Tragically, Kristy had previously been sexually assaulted by two family members when she was younger. Both were convicted and sent to prison for assaulting her. Not surprisingly, Kristy needed considerable counseling to try to heal emotionally and psychologically from these prior sexual assaults.

In the case Kristy revealed when she was 13, Kristy's mother's boyfriend, a repeat child sex offender, was charged with four counts of Sexual Assault of a Child. Following the preliminary hearing in the case, the defendant (Kristy's mother's boyfriend), filed a motion for an *in camera* inspection of Kristy's privileged mental health records. That means the defendant wanted the judge to go through Kristy's private and extraordinarily personal counseling records relating to her PRIOR sexual abuse to decide whether to turn those records over to the defendant to use against her. Imagine if any of our most personal thoughts and anxieties were threatened to be exposed to someone who wanted to embarrass or attack us.

In support of his motion, the defendant pointed out that Kristy had difficulty testifying at the preliminary hearing, needed a comfort item with her and requested that her mother sit close to her. Does that seem abnormal? The defendant then asserted that since Kristy had been sexually assaulted by two other individuals previously and had been involved in extensive counseling prior to and subsequent to the alleged assaults in his case, the court should look and see if there is anything in the counseling records that could be useful to the defense.

The defendant told the court he ***believed*** an examination of her psychiatric records was essential to his defense in order to attack her credibility.

Following a hearing, the circuit court **granted** the defendant's motion and ordered Kristy to consent to an *in camera* inspection of **FIVE YEARS** of Kristy's counseling records. The court said this was to see if there were any issues of truthfulness and whether Kristy had a history of providing incorrect information or making other complaints that were found to be untruthful, despite **having no basis** to believe Kristy's mental health records contained any such information. That is what we call a "fishing expedition" and it is wrong to intimidate a victim of an assault and give them **only two terrible choices**: consent to an invasion of their most private feelings or give up on their effort to seek justice.

Because Kristy was only 13 years old, her mother needed to consent to release of her counseling records for an *in camera* inspection. In an effort to protect Kristy, Kristy's mother did NOT consent. As a quick note, Kristy was not entitled to an advocate to help her make her own decision. Imagine if the parent making the decision was interested in protecting the offender. AB 570 fixes that and gives victims the right to an attorney to advise them and represent their interests. Federal grant money will cover the costs of those attorneys, and DOJ already has advocacy organizations lined up to take on this responsibility. Neither the counties nor the Public Defender will bear any costs for these attorneys.

Because Kristy's mom refused to allow access to the counseling records, Kristy was banned from testifying at the jury trial. There were no other witnesses. There rarely are. Thus, the State had no choice but to ultimately dismiss the case. That means the offender got away with it with no jury ever hearing the facts.

I want to make one other point about Kristy's case: the trial court ordered the inspection of her records for reasons unsupported by Wisconsin case law! This has become a common occurrence as trial courts struggle to interpret the Supreme Court ruling in the *Green* case from 15 years ago. Kristy's story is one that happens all too often in our criminal justice system in Wisconsin.

You will hear more about the offender who got away with assaulting Kristy from one of the most respected criminal prosecutors in our state, Michelle Viste. She is currently our Director of the State Office of Crime Victim Services, and is a former Deputy District Attorney from the Dane County DA's Office. What she will tell you might bring you to tears.

Victim participation in the criminal justice system is critical. Offenders cannot be held accountable and prevented from victimizing again if victims do not participate in the justice system. A victim should not be forced to choose between seeking

treatment and seeking justice. Motions seeking the release of privileged records have a chilling effect on a victim's participation in the criminal justice system.

It is important to begin by making clear that in almost all other circumstances, the law provides **an absolute privilege of confidentiality** in mental health records. A defendant accused of a crime has an absolute privilege to refuse to reveal counseling records, and a prosecutor may not violate that privilege under any circumstance. Unless a criminal tells their medical professional about a plan to commit a future crime, we can never force them or their counselor to share what they said in counseling.

The protections we give to criminal defendants are appropriate. **We are not here asking for the same protections for innocent crime victims**. Under AB 570, a defendant's right to a fair trial will still trump a crime victim's privacy, but only when the defendant makes a proper showing that access to counseling records will provide information that is crucial to a fair trial. AB 570 does not infringe upon a defendant's right to a fair trial. It just sets clear standards that restore some degree of dignity to victims.

Defendants most often file motions seeking access to victim mental health records in sexual assault and domestic violence cases, however, these are the exact types of crimes that often cause victims to seek mental health treatment in the first place. Additionally, the potential that these records may be revealed to the offender adversely impacts a therapist's ability to provide effective counseling in what should be a confidential setting.

I sincerely applaud the work done for the past three years by Senator Petrowski, Representative Spiros and my team at the Department of Justice to address this injustice. This bill before the committee represents the voice of judges, defense attorneys, prosecutors, therapists, and victim advocacy groups. While the bill may not have full-throated support of all who came to the table, it is intended to strike the proper balance between a victim's privacy interests and a defendant's right to present a defense.

It is important to note that **other states and the federal system provide an absolute privilege** against release of private mental health records, and those laws have been upheld as constitutional. **I cannot emphasize enough that this bill does not go that far**, but, again, simply attempts to strike a balance and create a clear standard.

Unfortunately, as it stands now, the circumstances under which these motions are granted vary widely and frequently exceed prior Supreme Court precedent. Presently, there is no clear and consistent test for determining whether a defendant has made a sufficient preliminary showing for courts to order *in camera* inspections. The last two cases to reach the Wisconsin Supreme Court seeking clarification of just what is

required to justify an examination of a victims healthcare records have resulted in a failure to provide clear guidance to trial judges and litigants. That's why this legislation is needed. In the absence of any clear test or procedure, courts will often err on the side of granting the motion, which then requires the victim to consent to release, or be barred from testifying.

AB 570, while rooted in the strongest aspects of controlling case law, necessarily goes much further to protect the privacy rights of victims. AB570:

- Prevents "fishing expeditions" into a victim's most intimate and privileged mental health records;
- Provides a clear procedure for all parties to follow when seeking access to a crime victim's private mental health care records;
- Clarifies the required burden defendants must meet in order to obtain an in camera review of the records;
- Provides for specific victim notification;
- Gives guidance to all parties during these proceedings;
- Gives the victim the right to actually see what the court is planning to turn over before deciding whether to consent; and
- Perhaps most importantly, this bill provides victims ultimate control in the review and disclosure of their records.

Although these things might seem to be the least we can do to treat victims fairly, the current confusing state of the case law does not give them these rights. AB 570 does.

Due to a recent case in which the justices of our supreme court were unable to reach a majority decision, trial court judges are granting *in camera* reviews based on court of appeals decisions that have modified long-standing Supreme Court precedent. In a recent Supreme Court case, some justices called for the legislature to address this issue through legislation. We offer you that opportunity.

Under the bill, if a judge is satisfied that a defendant has made the necessary showing, the crime victim has the opportunity to decline to consent to the *in camera* review. If the victim declines to consent, the victim is still permitted to testify. Under current practice, the victim would be prohibited from testifying should she decline an *in camera* review and in almost every case, charges would then be dismissed.

Under AB 570, if the victim consents to an *in camera* review of her mental health records, the court will review the records to determine if they should be released. If the judge determines that the information meets the high bar for disclosure and orders the records be released to the defendant, a victim has the right to appeal this order. After the appeal, or after it is determined that there will be no appeal, a victim again has the opportunity to decline to consent to the release of records. At this point, if a victim declines to have her records disclosed, she is not permitted to testify.

Beyond laying out a step-by-step process for a court to follow, the bill also provides clear and substantial victim notification rights, including:

- Notification that a motion has been filed;
- Notification of the right to decline consent;
- A clear statement that the victim has not waived any privilege by disclosing the records; and
- Notification of the right to counsel as to this limited issue.

The Department of Justice, through the utilization of grant funds has already established a statewide network of attorneys who stand ready to assist victims specifically in these types of proceedings.

The bill:

- Reaffirms and provides more clarity to chapter 950, which currently provides victims standing in criminal proceedings; and
- Lays out a clear record retention policy and prohibits dissemination of the records to ensure that at the conclusion of the motion proceedings or the trial, the parties will be properly divested of these sensitive, privileged mental health records, and any records in the possession of the court are properly and securely stored to prevent duplication and dissemination to other parties.

I would like to touch briefly on the Assembly Amendment 1, introduced by the authors. This amendment is a result of further input from district attorneys who practice sensitive crimes on the front lines. We had many fruitful discussion and saw significant merit in additional strengthening of the bill and protection of victims in this context.

More and more survivors of sexual assault are coming forward to demand justice, and are finding a more welcoming justice system and a more accepting societal reaction. There is no better time than now for us to do more for girls like "Kristy" and the many victims who have come before her and will come after. We must raise the threshold for access to private mental health records to prevent any intrusion into, or chilling effect on the therapist/patient relationship. This bill goes a long way to achieving those ends and protecting victims.

Thank you for the opportunity to testify on AB 570 and I look forward to your support.

If you have any additional questions please contact Lane Ruhland, Director Government Affairs at ruhlandle@doj.state.wi.us.

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Assembly Committee on Judiciary
Thursday, December 21, 2017
Assembly Bill 570

Good morning Chairman Ott and members,

Thank you for allowing us to testify on Assembly Bill 570, which creates a statutory process for accessing the treatment records of victims in criminal prosecutions. We would like to thank Senator Petrowski and his staff for the opportunity to review and to provide feedback on most of the language in the bill before its introduction. Although several changes were made at our request, the overall result of this bill would be to create a procedure that undermines due process and heightens the risks of wrongful conviction.

The process in Wisconsin for a defendant to access treatment is presently set forth by caselaw – Pennsylvania v. Ritchie (US Supreme Court), State v. Shiffra (Court of Appeals) and State v. Green (Supreme Court). In Wisconsin, the test is known as *Shiffra/Green.*

Currently, before defendants can obtain an alleged victim's confidential treatment records, they must first "set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." That burden alone is difficult because the records in question are confidential and have not been previously disclosed. The Supreme Court even noted that "the defendant, of course, will most often be unable to determine the specific information in the records."

If that difficult standard is met, and if the victim consents, then the court will conduct an in camera review to determine whether the records should be disclosed to the defense. If the victim withholds consent, either to allow an in camera review, or withholds consent to disclose to the defendant after the in camera review, then the court must fashion a remedy. In *Shiffra*, the remedy was to suppress the victim's testimony if they refused to disclose their records.

The goal of the *Shiffra/Green* process is to balance the competing interests of a criminal defendant and an alleged victim with regards to confidential treatment records. The criminal defendant has a right to due process and the right to a meaningful opportunity to present a complete defense. Patients have an interest in protecting privileged treatment records. The Supreme Court in Green explained, "We have confidence in the circuit courts… to make a proper determination as to whether disclosure of the information is necessary based on the competing interests…"

Although this process is often associated with sexual assault cases, the process can be used in any case (and is especially important when there are no eyewitnesses other than the defendant and complaining witness).

The current process established by case law has significant barriers in place to prevent a defendant from obtaining the records without meeting an already high burden. SPD attorneys who have recently litigated *Shiffra/Green* motions have commented that it is very hard to a defendant to show that the

records will contain information essential to the defense. And even if that burden is met, the court reviews the records first, not the defendant. This burden is very difficult to meet, and records are rarely ordered released. One recent example saw a judge grant the motion and, upon in camera review, decided some records were relevant while others were not. This decision is a good example of the role the court plays in the current process and the discretion it has in deciding what is considered exculpatory. While there are not hard statistics, it is our experience that a significant majority of current *Shiffra/Green* motions do not make it to or through the in camera review process, being dismissed by a judge early in the process.

There are specific areas of concern in the bill that SPD would like to bring to the committee's attention. Again, many of these have been discussed with the Senate author.

***Articulated defense***

AB 570 as amended defines "necessary to an articulated theory of defense" as "means that the evidence is necessary to a determination of guilt or innocence by tending to create reasonable doubt that would not otherwise exist." (p. 3, lines 5-7)

It is the definition as it is applied later in the bill that causes concern. As written, it appears to create a magic-words test in addition to meeting the burden to conduct the in camera review. The concern, based on the "articulated defense" definition on its own, would be that the defendant may articulate a specific piece of evidence, but if the treatment records don't contain that exact language, but are nonetheless exculpatory, that the records won't be released.

The author, however, has made changes in the course of drafting the bill that includes language that attempts to address this issue. AB 570 as introduced includes language that should ameliorate some of these concerns. At this time, we are not requesting additional changes but will monitor the bill to ensure that this carefully crafted section remains intact.

***Motion process and standard***

The statutory process created by AB 570 has higher burdens than current case law, which creates a statutory and practical barrier to meaningful access to review these records. "Fact-specific good faith offer of proof," "someone with personal knowledge," and "the potential benefit to the defendant from disclosure outweighs the harm to the crime victim from disclosure" are all new statements of burden and standards of review to the process that unnecessarily increase the risk that people will be wrongfully convicted.

***In camera balancing test***

As mentioned in the prior paragraph, the standard "...and that the potential benefit to the defendant from disclosure outweighs the harm to the crime victim from disclosure..." is something the court must consider **before** conducting an in camera review. This standard puts judges in a difficult position because at the point they are supposed to conduct this balancing test, they have not yet reviewed the contents of the records to know whether they have potential benefit to the defendant.

***Counsel for victim***

Page 5, lines 4-9 creates a right to court-appointed counsel for victims in the proceeding related to the release of records. This provision raises several questions and concerns.

First, allowing for court-appointed counsel with the right to be heard at both the trial and appellate court level comes close to granting victim's party status in criminal proceedings. Although it would be left up to the court should this bill pass, it raises questions of what happens if the prosecutor and victim's counsel disagree on the best path forward in the prosecution.

Second, "reasonable time" is allowed for the victim to secure counsel. In addition, page 6, lines 13-16 contemplate a 45-day timeframe for the victim to notify the court whether they intend to appeal a decision to release records following an in camera review. During both of these processes, a defendant who is still considered innocent is potentially deprived of liberty. This provision sets up a direct conflict between the defendant's constitutional right for a speedy trial and the allowances for court-appointed counsel for the alleged victim.

Finally, it is unclear who is paying for these attorneys and what their rate of compensation will be. The current rate for assigned counsel appointed by the SPD in conflict of interest cases is $40 per hour, the lowest hourly rate in the nation. The Supreme Court rate of reimbursement when a judge appoints an attorney at county expense is $70 per hour. Neither the bill nor any of the fiscal estimates indicate who will pay how much to fulfill the statutory right to court appointed counsel allowed by the bill.

***Privilege***

As described to us, the language on page 9, lines 3-7 is intended to say that agreeing to allow the records to be disclosed in the context of one case doesn't forever waive the confidentiality privilege the patient may hold as it relates to contexts apart from the criminal case in which they are being disclosed. As written, however, the language could be interpreted to say that even after agreeing to both an in camera review and disclosure of the records, the victim could assert privilege in the immediate case. This subsection should be clarified to remove that ambiguity.

***Affidavit of destruction***

Language was included in the introduced version of AB 570 on page 7, lines 18-21 related to destroying information at the end of the case. This section of the bill received significant attention in the drafting process to account for Supreme Court retention rules and statutory privacy requirements. The rule must allow for appellate counsel and the defendant to have access to the records based on the same rules and regulations. The requirement that defense attorneys and prosecutors submit an affidavit affirming that the confidentiality and destruction rules have been followed is a cumbersome additional step that does not recognize that prosecutors and defense counsel alike are bound by professional rules and responsibilities.

***Assembly Amendment 1***

While our testimony references changes that were made to the specific issue areas we already discussed, there are two items in the amendment on which we wanted to comment.

First, item 17 creates a new fourth offer of proof that is not sufficient to meet the burden for obtaining a person's medical records. The point of the language on page 4, lines 3-10 in the bill, is to prevent perceived "fishing expeditions" for records. We understand and appreciate that goal, which is most often the primary consideration by judges in the current system. The three current standards are limiting, but arguably useful. The new item 4 in the amendment (inconsistent statements), however, creates an unreasonable burden. The issue is that the language does not differentiate between minor and major inconsistencies. Again, arguably a minor inconsistency such as a slight time discrepancy should not be enough to allow access to the records. A major inconsistency such as a statement creating reasonable doubt, or even identifying someone other than who has been charged (or highlighting the alleged victim's uncertainty), is clearly an exculpatory record. The language in the amendment is simply overly broad.

The other issues involves adding the word "substantially" to the balancing test related to both the in camera review and records disclosure. Again, this change pushes the burden to a degree that creates a meaningful barrier to records that will put Wisconsin law at odds with federal case law.

This area of the law has been challenging for many years. Repeated reviews by courts at the state and federal level have attempted to come up with a better process than previous case law created. Ultimately, the primary concern with AB 570 is that it creates a process that will make an already high burden practically unattainable, unintentionally increasing the risk of having an innocent person convicted of a serious crime.

It is worth noting that access to these records was the creation of case law by a federal court and subsequently adopted in Wisconsin through Wisconsin Supreme Court case law. If the state law is not practically in line with the federal guidelines, the state will likely be at risk of litigation in the federal court system. The current case law balances privacy rights with constitutional rights related to access to information necessary to present a defense, and any additional restrictions on presenting a defense will in all likelihood lead to constitutional challenges.

Thank you again for the opportunity to provide information on Assembly Bill 570. While the current case law may not be seen as working well in all instances, we do not believe that AB 570 is the answer to any real or perceived problems. As the Supreme Court demonstrated in the *Lynch* decision, this area of law is very complex and requires a more comprehensive discussion.

# Wisconsin Justice Initiative

To: Assembly Committee on the Judiciary
From: Gretchen Schuldt, Executive Director
Subject: Assembly Bill 570
Date: Dec. 21, 2017

Thank you for this opportunity to provide testimony on AB 570.

The Wisconsin Justice Initiative opposes AB 570. The Schiffra/Green process that exists already provides adequate safeguards to crime victims; the process created under this bill increases the possibility that innocent parties will be wrongfully convicted of crimes.

The State Supreme Court, in *State v. Green*, 253 Wis.2d 356 (2002), set a standard for examining a victim's mental health records that requires the defendant seeking the record to provide "a specific factual basis demonstrating a reasonable likelihood that the records *contain relevant information necessary to a determination of guilt or innocence* and is not merely cumulative to other evidence available to the defendant." (Emphasis added.)

The proposed bill would allow a victim to block access to critical, exculpatory information even when a jury needs the information to arrive at a just verdict. It blunts a defendant's ability to pursue the truth.

In *Green*, our Supreme Court opined that "We have confidence in the circuit courts to ... make a proper determination as to whether disclosure of the information is necessary based on the competing interests involved in such cases."

Circuit court judges remain capable of balancing the competing interests under existing Schiffra/Green standards.

Thank you.

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December 21, 2017

The Assembly Committee on Judiciary

Representative Jim Ott, Chair

Re: 2017 AB 570

Dear Chairman Ott,

Please accept this letter in lieu of my testimony at today's public hearing.

While I respect those who have offered their support for this bill, myself and other prosecutors have profound reservations. The most significant is the provision that allows the defense to comment on the fact that a victim has not given permission for a trial court to examine their confidential counseling records.

Confidential counseling records are privileged, and current law provides the same protection for these records that all people have in statements made to their physicians, clergy, or lawyers. Under current law, privileged communications are close to sacred, and no one is ever allowed to comment at trial on the fact that someone might have refused to waive their right to confidentiality. Our statutes even guarantee that a person can 'pull back' privileged information that was surrendered through compulsion or where the person simply didn't know they had the right to keep the information private.

> 905.12 Privileged matter disclosed under compulsion or without opportunity to claim privilege. Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

I simply cannot recall a fact pattern where a party opponent is allowed to comment on another person's invocation of a privilege in front of a jury. This bill would

change that, but only where the comments would be directed against the victim's interests. This bill specifically provides that if a victim refuses to release their confidential counseling records for examination by a judge, the defense may "comment" on this fact at trial. It is unknown whether "comment" means a discussion during closed argument, or whether it might even include the ability to cross examine a victim about this when she testifies.

I understand that many victim advocacy groups view this bill as an improvement to current law. It's true that under current law a victim who refuses to surrender their records for a private inspection when ordered to do so by a judge loses the right to testify at all. Because of this, I find that most judges are extremely careful when even considering whether an in camera inspection should occur in the first place. Here, by 'loosening up' the potential consequences to an 'uncooperative' victim, I submit that more judges will be willing to demand the records in the first place. This will violate more victim's confidences and likely deter people from seeking counseling in the first place. However, the true consequences are much worse than that.

I've been trying these cases – with these issues – for more than 25 years. Juries struggle with sensitive crimes prosecutions more than any other because not only is the gravity of the offense -- and the potential punishment -- obvious, but too often there's also very little evidence. Today's television would have the public believing that forensic testing tells the whole story, but in my experience the presence of genetic material and DNA simply alters the defendant's claims from 'it never happened' to consent. In the end, juries are always left looking at the defendant, then victim, and asking themselves 'who do I believe?'

Then the judge gives the jury the reasonable doubt instruction, telling them: 'If you can construe the evidence based on any reasonable hypothesis consistent with the defendant's innocence you shall do so and render a verdict of Not Guilty.' It's in this context that the defendant's ability to 'comment' on the victim's invocation of her privilege to her counseling records becomes profound. The defense attorney will tell the jury something along these lines:

> 'You know the gravity of the decision you have to make, and the judge's instructions have told you that unless you are firmly convinced of my client's guilt you must find him not guilty. It's hard enough to know who is telling the truth in any case, but consider that

in this case we know that you have been denied the ability to learn important evidence that might have helped the defendant at trial. This wasn't my client's fault, but was the result of a choice made by the victim. How can you be firmly convinced of my client's guilt when you know, at a minimum, that there was material evidence that they did not want or allow you to see?'

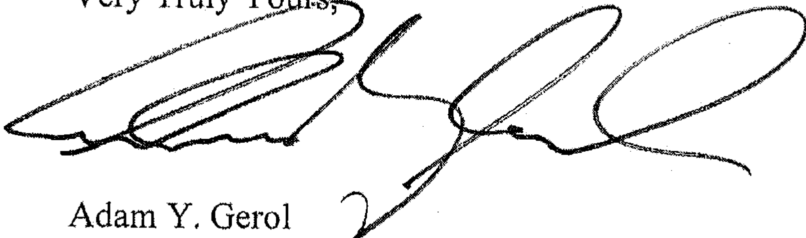
In my experience, despite any prosecution rebuttal as to the sanctity of counseling records, victim's rights, etc., the defendant will win every time.

So while I understand that many people might see this bill's provisions allowing victims to still testify after refusing access to records as a victory, it's a pyrrhic one at best. This bill might look like something that will help victims, but the game is not worth the price of admission.

Most practitioners were comfortable with the earlier jurisprudence of State v. Green that provided the analysis of how and when a person's privileges must yield to the due process rights of a criminal defendant. This bill comes before you now because of two recent cases by the Wisconsin Supreme Court that turned this subject matter into a quagmire. That said, the next time our Court visits these issues there will be at least two new justices. I submit that it would be better to wait and see how they resolve this common-law issue before any statutory solution is taken up.

That said, if the Legislature wishes to solve this matter there's no reason why a victim must be treated in the fashion this bill contemplates. Legally, the Legislature could choose to declare such comment 'off-limits', or even prohibit the defense access to these records at all. There's no constitutional right to discovery, and other states provide greater protections than this bill proposes. http://www.lclark.edu/live/files/7851-white-paper-pretrial-discovery.pdf .

Very Truly Yours,



Adam Y. Gerol

Ozaukee County District Attorney