No. 20-

IN THE

Supreme Court of the United States

TRACY WILL VAUGHN,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, consistent with the constitutional right to present a defense, a state may declare a sexual assault accuser's counseling records absolutely privileged even when the counseling is used to develop the accuser's testimony and the counseling is conceded by the prosecutor to be the basis for the development of the charge.

RELATED CASES

State v. Vaughn, 73CR-18-151, Circuit Court of White County, Arkansas. Judgment entered on January 11, 2019.

Vaughn v. State, CR-19-591. Arkansas Court of Appeals. Opinion issued on March 18, 2020. (Appendix C).

Vaughn v. State, CR-19-591, Arkansas Supreme Court. Opinion issued on October 8, 2020.

Note: A case filed in the Court of Appeals, the intermediate appellate court, retains the same case number upon review in the Arkansas Supreme Court.

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CITATION TO OPINION BELOW

The Arkansas Supreme Court opinion below is reported as *Vaughn v. State*, 2020 Ark. 313, 608 S.W.3d 569. It is found in Appendix A. That opinion superseded an opinion of the Arkansas Court of Appeals, the intermediate appellate court, reported as *Vaughn v. State*, 2020 Ark. App. 185, 598 S.W.3d 549. It is found in Appendix C.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257. The decision of the Arkansas Supreme Court denying relief was issued on October 8, 2020. This petition, being filed within 150 days thereof pursuant to this Court's order of March 19, 2020, is timely.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

nor be deprived of life, liberty, or property, without due process of law;

Sixth Amendment, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor...

Fourteenth Amendment, United States Constitution

nor shall any state deprive any person of life, liberty, or property, without due process of law;

RULE 503, Arkansas Rules of Evidence.

PHYSICIAN AND PSYCHOTHERAPIST-PATIENT PRIVILEGE

(a) Definitions. As used in this rule:
(1) A "patient" is a person who consults or is examined or interviewed by a physician or psychotherapist.
(2) A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.
(3) A "psychotherapist" is (i) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or, (ii) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.
(4) A communication is "confidential" if not intended to be disclosed to

third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.
(5) A "medical record" is any writing, document or electronically stored information pertaining to or created as a result of treatment, diagnosis or examination of a patient.
(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing his medical records or confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.
(c) Who May Claim the Privilege. The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.
(d) Exceptions.
(1) Proceedings for Hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.
(2) Examination by Order of Court. If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.
(3) Condition and Element of Claim or Defense.
A. There is no privilege under this rule as to medical records or

communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he or she relies upon the condition as an element of his or her claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his or her claim or defense.

B. Any informal, ex parte contact or communication with the patient's physician or psychotherapist is prohibited, unless the patient expressly consents. The patient shall not be required, by order of court or otherwise, to authorize any communication with the physician or psychotherapist other than (i) the furnishing of medical records, and (ii) communications in the context of formal discovery procedures.

STATEMENT OF THE CASE

Tracy Will Vaughn was convicted of one count of Sexual Assault in the Second Degree, Ark. Code Ann. § 5-14-125, in the Circuit Court of White County, Arkansas. He was sentenced to five years in the Arkansas Division of Corrections. He was acquitted of two other counts, and a directed verdict was granted on the fourth count.

In June, 2016, Vaughn had come under suspicion for the nature of his relationship with the daughter of his girlfriend when he made some remarks about the daughter and her friends "skinny-dipping" in his swimming pool. Vaughn was interviewed and gave a lengthy statement discussing the allegations but denying any sexual component. The girlfriend's daughter, referred to here as K.H., was interviewed and denied any sexual contact by Vaughn. No criminal charge was filed. K.H. was sent to counseling. After over a year of counseling, she emerged with allegations against Vaughn. The State then filed a felony information against Vaughn on February 26, 2018, stating in the affidavit in pertinent part that:

> On June 13, 2016, three white female juveniles (DOB redacted), (DOB redacted), and (DOB) were interviewed at the Child Safety Center located in Searcy, Arkansas. All three juveniles disclosed of being allowed to skinny dip, curse, and watch inappropriate movies while in the care of Mr. Tracy Vaughn. When juvenile (DOB redacted) was interviewed, she disclosed that Tracy made her and (DOB redacted) touch each other inappropriately while they were nude in his pool. Juvenile (DOB redacted) recently disclosed during her therapy session that Tracy exposed his penis and made her touch it. The juvenile also disclosed that she touched his penis multiple times while she was swimming in his pool located at 347 S Highway 323, Searcy, Arkansas.
>
> (Record at 5)

Vaughn moved for provision of the records, arguing *inter alia* the constitutional right to present a defense, entitlement to *in camera* examination with provision under *Pennsylvania v. Ritchie*, 480 U.S. 379, 107 S.Ct. 989 (1987), and waiver by the State placing them at issue in the affidavit. (Record at 24-26) The circuit court ordered the prosecutor to provide the records to it. That court held that the records were absolutely privileged from disclosure even under *Ritchie*,

but noted that there were various records which would be of interest to the defense. The request was renewed several times, including after K.H. testified about the counseling in her testimony. Those renewals occurred at pp. 129, 131, 150-154, 515 and 518-525 of the record and are quoted in Appendix D.

On appeal, Vaughn argued that he needed access to the records in order to write a cogent argument. The Arkansas Court of Appeals granted that motion but ordered the briefs to be filed under seal. The Court of Appeals agreed that Vaughn should have been allowed the records under a waiver theory, but that the denial was harmless error. *Vaughn v. State*, 2020 Ark. App. 185, 598 S.W.3d 549. Vaughn petitioned for review in the Arkansas Supreme Court. After oral argument, the Arkansas Supreme Court majority affirmed on different grounds — that the records were absolutely privileged. *Vaughn v. State*, 2020 Ark. 313, 608 S.W.3d 569. Justices Hart and Wynne dissented separately, but agreed that any privilege was superseded by the right to present a defense at least to the extent of a *Ritchie* examination and the handover of exculpatory materials. As set forth below, Justice Hunt clearly felt that the material was exculpatory.

The Arkansas Supreme Court has denied Vaughn's request to unseal the record for the limited purpose of providing a redacted summary of the records at issue. (Appendix B). Thus, in lieu of presenting the records, Vaughn quotes the dissenting opinion of Justice Hart, which is in the public domain and which will give this Court a flavor of what Vaughn had been unable to access for trial or to describe to this Court in his petition.

> K.H. was also interviewed by State investigators. Whatever the substance of that interview was, the State apparently deemed K.H.'s account insufficient to commence a criminal prosecution, as no charges were filed against Vaughn at that time. However, K.H. was then sent to a private counselor, and the records from those counseling sessions are contained in the record on appeal.
>
> As did the dissent in *Johnson v. State*, I find the content of these counseling records too important to ignore. 342 Ark. 186, 204–05, 27 S.W.3d 405, 417 (2000) (Brown, J., dissenting). Vaughn's theory of defense at trial was that K.H.'s allegations of sexual contact were false and spurred by other adults in the wake of the skinny-dipping revelation. The contents of these counseling records reveal a great deal of evidence that would have been relevant to and supportive

of Vaughn's theory.

The records show that for the first several months of counseling, K.H. specifically and repeatedly denies that Vaughn had ever touched her inappropriately. They also show that by around the six-month mark, the counselor had begun prodding K.H. and her mother to let the counselor know about any "new memories" K.H. may have. After nearly another six months of this treatment, K.H. reportedly tells her counselor, "I'm going to come clean," reporting what the counselor describes as "three new parts" of her sexual abuse, one of which is apparently the bathtub incident. The counselor notes, "Client was scared to tell mom 3 new parts of the sexual abuse. With my help, client told mom about 'Meany' ... Mom reacted appropriately and praised client for sharing with her and being brave." The counselor then helps K.H. turn her account into a written "trauma narrative" from which she could deliver these allegations to State authorities. On February 21, 2018, nearly two years after Vaughn and K.H. were initially interviewed, the State filed one count of second-degree sexual assault and three counts of sexual indecency against Vaughn, with the supporting affidavit specifically noting that the allegations were "recently disclosed during [K.H.'s] therapy session."

True or not—it appears that K.H.'s sexual-contact allegations against Vaughn were born, grown, and pruned during these sessions with the

counselor. At trial, the defense should have been able to present this information to the jury to aid in its assessment of the truth.

Specifically, the defense should have been able to use prior inconsistent statements contained in the counseling records to test the credibility of K.H.'s allegations of sexual contact. The defense should have been able to illustrate the specific timing and evolution of K.H.'s allegations, and to show alternative sources where the information contained in those allegations may have come from. Importantly, the defense (who was prohibited from even knowing the identity of K.H.'s counselor) should have been able to subpoena the counselor to the courtroom, and to examine the counselor about her continuing requests for "new memories" from K.H. and her mother. The defense should have been able to ask about the counselor's methodology, and to potentially bring in an expert of his own to show whether the counselor's methodology might have led to a false accusation.

The jury should have heard all this information, but it didn't. All it heard about the counseling was that K.H. had previously denied the allegations. The rest of the evidence was kept from both the defense and the jury based on an assertion of K.H.'s psychotherapist privilege. But even without his best evidence, Vaughn successfully defended against three of the four charges at trial, and the jury gave Vaughn the minimum sentence for the one charge he was convicted of. If Vaughn had been able to use the information from the counseling to support his

defense, the jury may very well have acquitted him.

2020 Ark. 313, 12-14, 608 S.W.3d 569, 576-577

REASONS FOR GRANTING THE WRIT AND ARGUMENT

THE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE PROHIBITS A STATE FROM DECLARING A SEXUAL ASSAULT ACCUSER'S COUNSELING RECORDS ABSOLUTELY PRIVILEGED WHEN THE COUNSELING IS USED TO DEVELOP THE ACCUSER'S TESTIMONY AND THE COUNSELING IS ANNOUNCED AS THE DEVICE BY WHICH THE ACCUSATION IS DEVELOPED.

This case presents this Court with an opportunity to more fully develop the contours of law when the constitutional right to present a defense — an amalgam of the rights of due process, confrontation and compulsory process under the Fifth, Sixth and Fourteenth Amendments— collides with a state's claim of absolute privilege in counseling, even records having the effect — or even the purpose— of developing the accuser's testimony.

In this case, the Arkansas Supreme Court took the strictest possible interpretation of this Court's decisions in *Pennsylvania v. Ritchie*, 480 U.S. 379, 107 S.Ct. 989 (1987), and *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923 (1996), to the detriment of the numerous cases supporting and enforcing the right to present a defense. Rather,

the Arkansas Supreme Court has confirmed its doctrine that a privilege under Rule 503 of the Arkansas Rules of Evidence is absolute, absent a waiver, even when the counseling regimen doubled as an investigation and the prosecution in its affidavit for a warrant of arrest explicitly designated the counseling as the basis for development of the accusation. This absolute privilege is unjustified by *Ritchie*, *Jaffee* and the cases enforcing the right to present a defense. What happened in Vaughn's case is an example of why such a privilege should not be regarded as absolute. This Court should grant certiorari to further delineate the law and to hold that the right to present a defense cannot be automatically defeated by an assertion of privilege.

As the Statement of the Case describes, Vaughn had come under suspicion for sexual assault. However, the suspected victim, his girlfriend's nine year old daughter, denied any sexual assault had occurred. Vaughn was not charged, but the child was sent to counseling. Over the ensuing months, her testimony was developed and eventually established as sufficient for charging Vaughn.

Vaughn sought the counseling records before the trial court and

was denied all access, renewing the requests during trial, including when the child discussed the counseling in her testimony. The trial judge held that the records were absolutely privileged, while conceding that the defense would be interested in the records. On appeal, the Arkansas Court of Appeals granted access for purpose of writing the appeal. That court eventually held that although Vaughn was entitled to have had them, the denial was harmless error. However, on review, a majority of the Arkansas Supreme Court took the position that:

> We must now consider whether Vaughn is constitutionally entitled to disclosure of the privileged records. He contends this issue implicates the rights to confrontation and compulsory process under the Sixth Amendment and due process under the Fourteenth Amendment. He also asserts violation of our analogous provisions in Article 2, Sections 8 and 10 of the Arkansas Constitution.
>
> Relying on *Jaffee*, we previously held that the psychotherapist privilege preempts the need to discover all admissible evidence. See *Johnson v. State*, 342 Ark. 186, 196–97, 27 S.W.3d 405, 412 (2000). In other words, the privilege is paramount to the need to gain access to the privileged material for evidentiary purposes. Id.; see also *Kinder v. White*, 609 Fed. App'x 126, 130 (4th Cir. 2015) ("the public benefit produced by the recognition of the psychotherapist-patient

privilege is sufficiently weighty to trump the cost to the administration of justice of precluding the use of relevant evidence"). Vaughn seeks to distinguish Johnson on the basis that the prosecution had access to K.H.'s records. See *Johnson*, 342 Ark. at 197–98, 27 S.W.3d at 413. Given that the State cannot waive the patient's privilege—and K.H. did not waive the privilege here—we do not find that distinction persuasive. See supra.

Under *Ritchie*, due process and compulsory process would require the State to turn over the evidence in its possession that is both favorable to Vaughn and material to guilt or punishment if the Arkansas statute allowed for disclosure. See *Holland*, 2015 Ark. 341, at 17, 471 S.W.3d at 189 (citing *Ritchie*, 480 U.S. at 52, 107 S.Ct. 989). Unlike the statute in Ritchie, however, the privilege of private psychotherapy records has not been qualified by the legislature. Indeed, it remains absolute. See Ark. R. Evid. 503; compare *Taffner v. State*, 2018 Ark. 99, at 12, 541 S.W.3d 430, 437 (statute allowing disclosure of certain DHS records requires in camera review under *Ritchie*). Moreover, the record does not show that the State truly had access to the records. Indeed, the prosecution stated it obtained the records only to comply with the court's disclosure order for in camera review. As the State points out, this assertion was unopposed by Vaughn below.

The right to confrontation under the Sixth Amendment guarantees a defendant an opportunity for effective cross-examination and the right to face those who testify against him. See *Ritchie*, 480 U.S. at 51, 107 S.Ct. 989

(plurality opinion). The *Ritchie* Court flatly rejected the claim that a defendant is entitled to access confidential records simply to aid in cross-examination: "[T]he Confrontation Clause only guarantees 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish.' " Id. at 53, 107 S.Ct. 989, (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (emphasis in original)). The Court specifically noted the ability to question adverse witnesses does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Id. at 53, 107 S.Ct. 989. Indeed, the Confrontation Clause has never been recognized as an independent method of enforcing pretrial disclosure of impeachment information. *United States v. Wright*, 866 F.3d 899, 912 n.3 (8th Cir. 2017) (citing Ritchie, 480 U.S. at 52, 107 S.Ct. 989). Vaughn contends he needed access to the records to show that K.H. did not initially disclose the abuse and in fact denied it. He essentially seeks to bootstrap the trial right to confront witnesses into a pretrial discovery right. This claim does not place the right to confrontation at issue and thus we reject Vaughn's argument.

In sum, we reject Vaughn's argument that *Ritchie* requires an in camera examination of records and communications shielded by the absolute psychotherapist-patient privilege.

Affirmed; court of appeals opinion vacated

2020 Ark. 313, 9-11, 608 S.W.3d at 574-575

Even assuming arguendo the correctness of the statement that the Arkansas General Assembly has not created a *Ritchie* type exception for such records, that should not be the end of the inquiry. Perhaps the most salient reason is that the prosecution itself put the records at issue when it set forth the claims developed after over a year of counseling as the basis for the charge. This had the effect of transmuting the shield of privilege into a sword, a practice forbidden by this Court. E.g. *Mitchell v. United States*, 526 U.S. 314, 322, 119 S.Ct. 1307, 1312 (1999). The *Ritchie* right should be expanded to include the circumstances where a state purports to make records absolutely privileged.

The Arkansas Supreme Court has also misapprehended *Jaffee* as sustaining an absolute privilege. Although *Jaffee* recognized a federal psychotherapist privilege, it was a civil case and did not deal with constitutional issues at all. In fact, the *Jaffee* court noted:

> These considerations are all that is

> necessary for decision of this case. A rule that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner. Because this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would "govern all conceivable future questions in this area."
>
> 518 U.S. 1, 18, 116 S.Ct. 1923, 1932

Moreover, the situation presented in this case is precisely evoked by Justice Scalia's dissent, joined by Chief Justice Rehnquist:

> The Court has discussed at some length the benefit that will be purchased by creation of the evidentiary privilege in this case: the encouragement of psychoanalytic counseling. It has not mentioned the purchase price: occasional injustice. That is the cost of every rule which excludes reliable and probative evidence—or at least every one categorical enough to achieve its announced policy objective. In the case of some of these rules, such as the one excluding confessions that have not been properly "Mirandized," see Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the victim of the injustice is always the impersonal State or the faceless "public at large." For the rule proposed here, the victim is more likely to be some individual who is prevented from proving a valid claim—or (worse still) prevented from establishing a valid defense.

> The latter is particularly unpalatable for those who love justice, because it causes the courts of law not merely to let stand a wrong, but to become themselves the instruments of wrong.
>
> 518 U.S. 1, 18-19, 116 S.Ct. 1923, 1932-1933

Of course, there are numerous cases of this Court sustaining the right to present a defense, including but not limited to *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920 (1967); *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105 (1974); *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704 (1987); *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142 (1986); and *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727 (2006).

This case presents this Court with a real-world example of how an overexpansive psychotherapy privilege collides with the fundamental constitutional right to defend oneself. This Court should grant certiorari to establish an analysis more consistent with that right, including— as in this case— that the counseling operated as the functional equivalent of an investigation and that the prosecution publicly ascribed the counseling regimen as the basis for the

development of the charge, and that consequently *Ritchie* should be interpreted to require access to the type of evidence at issue here.

CONCLUSION

Vaughn prays that the Court grant this petition and, upon plenary consideration, vacate the decision of the Arkansas Supreme Court and grant all such other relief to which he may be entitled.

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APPENDIX A

SUPREME COURT OF ARKANSAS

No. CR-19-591

	Opinion Delivered: October 8, 2020
TRACY WILL VAUGHN APPELLANT	APPEAL FROM THE WHITE COUNTY CIRCUIT COURT [NO. 73CR-18-151]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE ROBERT EDWARDS, JUDGE
	AFFIRMED; COURT OF APPEALS OPINION VACATED.

SHAWN A. WOMACK, Associate Justice

Tracy Will Vaughn was convicted of second-degree sexual assault and sentenced to sixty months' imprisonment. This appeal centers on his victim's therapy records. We hold that the records are protected from disclosure by the absolute psychotherapist-patient privilege in Arkansas Rule of Evidence 503. The conviction is affirmed.

I.

In February 2018, Vaughn was charged with sexually assaulting nine-year-old K.H. He was also charged with three counts of sexual indecency with a child, which involved K.H. and her friend, B.W. The White County Sheriff's Office initiated an investigation in June 2016 following a report from B.W.'s father. The girls were interviewed at the Child Safety Center in Searcy.[1] During the interview, B.W. stated that Vaughn made the girls

[1] Child Safety Centers are part of a statewide program to provide a comprehensive and coordinated response to child abuse investigations. *See* Ark. Code Ann. § 9-5-102

touch each other inappropriately while they were nude in his pool. At that time, K.H. denied any sexual contact by Vaughn. When Vaughn was interviewed by police, he admitted that he touched K.H.'s genitals three times and that she had touched his penis once through clothing. Vaughn stated that K.H. had crawled on top of him in bed and "hunched" him. He also admitted to becoming aroused when K.H. danced "provocatively" near him.

The investigator's affidavit, attached to the criminal information, recounted the admissions from the June 2016 investigation. The affidavit noted that K.H. "recently disclosed during her therapy session that [Vaughn] exposed his penis and made her touch it [and] that she touched his penis multiple times while she was swimming in his pool." Citing the reference to K.H.'s therapy sessions, Vaughn moved for disclosure of her medical and counseling records on April 18, 2018. He asserted a right to the records under the state and federal constitutions. He also argued that the psychotherapist-patient privilege did not apply and had been waived or estopped by the prosecution. Citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), and *Brady v. Maryland*, 373 U.S. 83 (1963), Vaughn sought to compel the State to disclose the records or, alternatively, requested the court to conduct an *in camera* review for exculpatory or impeachment material.

At a pretrial hearing on May 16, the circuit court stated the records would be submitted for an *in camera* review under *Ritchie*. The record is unclear on when or how this decision arose and whether the court ordered the prosecution to obtain the records. In any event, the State arrived at the hearing with K.H.'s therapy records spanning from 2011

(Repl. 2016). The Center conducts forensic interviews that are not subject to the privilege at issue here.

through 2018. The first set of records were timestamped on May 15—the day before the hearing. The second set of records included a subpoena dated May 10. At Vaughn's request, the State was instructed to determine whether B.W. had any therapy records. Her records, dating before and after the alleged incident with Vaughn, were obtained a week later following a subpoena from the prosecutor.

At the next hearing, Vaughn argued the records were not privileged because the therapy was conducted at the insistence or sponsorship of the State. In response, the prosecutor informed the court that the girls had previously been treated by the same providers and returned to their therapists after the alleged incidents on their own accord. The prosecutor also stated that "up until the Court asked the State to get the records, we did not have access, we did not seek to admit those records[.] . . . And we would argue [K.H. and B.W.] have not waived that privilege that allows them to get assistance that they need, other than if there is something exculpatory to the Defendant."

The court rejected the claim that the victims were sent to therapy for investigative purposes because many of the records were created years before the allegations against Vaughn arose. Ruling from the bench, the court held that the therapy records were absolutely privileged under Arkansas Rule of Evidence 501 and Arkansas Code Annotated § 17-27-311 (Repl. 2018).[2] It made no determination regarding the existence of any exculpatory material, but noted it read the records and tabbed significant pages for appellate review. The therapy records were entered into the record as sealed court exhibits. The jury

[2] The circuit court cited Rule 501 but ruled that the records fell under the patient and psychotherapist privilege. That privilege is found within Rule 503 and is the privilege at issue in this case.

subsequently convicted Vaughn of sexually assaulting K.H. in the second degree and sentenced him to sixty months' imprisonment. He was acquitted of two counts of sexual indecency; the third was dismissed on directed verdict.[3]

Vaughn's appeal was initially considered by the Arkansas Court of Appeals. *See Vaughn v. State*, 2020 Ark. App. 185, 598 S.W.3d 549. It determined that Arkansas privilege law did not absolutely shield the records in this case and that the circuit court should have conducted an *in camera* review for favorable evidence under *Brady*. The court of appeals nevertheless affirmed the conviction after reviewing the records and finding they did not satisfy *Brady*'s materiality requirement. This was not an *in camera* review. Instead, the court of appeals gave the parties full access to the sealed records prior to briefing. We cannot condone the court of appeals' troubling approach to the victims' records.[4] As the *Ritchie* Court explained:

> To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the [State's] compelling interest in protecting its child abuse information. If the [] records were made available to defendants, *even through counsel*, it could have a seriously adverse effect on [Arkansas's] efforts to uncover and treat abuse. . .. The [State's] purpose would be frustrated if this confidential material had to be disclosed upon demand to a defendant charged with criminal child abuse, simply because a trial court may not recognize exculpatory evidence. Neither precedent nor common sense requires such a result.

Ritchie, 480 U.S. at 60–61 (emphasis added).

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[3] Because Vaughn was acquitted of the count involving B.W., we will refer only to K.H.'s records going forward. However, the same analysis applies to B.W.'s records.

[4] The court of appeals recently cited its decision in an order granting a defendant access to his victim's sealed records. *See Turnbo v. State*, No. CR-20-505 (Order, Sept. 9, 2020). For the reasons explained by *Ritchie*, *infra*, such orders are inappropriate and can no longer stand.

We granted Vaughn's petition for review and now consider this appeal as though it was originally filed in this court. *See Martin v. Smith*, 2019 Ark. 232, at 2, 576 S.W.3d 32. A circuit court's ruling on the admissibility of evidence will be reviewed for abuse of discretion. *See Vidos v. State*, 367 Ark. 296, 304, 239 S.W.3d 467, 474 (2006). Questions involving the interpretation of law will be reviewed *de novo*. *See Holt v. McCastlain*, 357 Ark. 455, 460–61, 182 S.W.3d 112, 116 (2004).

II.

Vaughn alleges two overarching errors in the circuit court's determination that K.H.'s therapy records were protected from disclosure by the psychotherapist-patient privilege. He first contends the privilege was waived. Vaughn next argues that his constitutional rights of confrontation, compulsory process, and due process warrant provision of all confidential records for an *in camera* examination under *Ritchie*. The State objects to the waiver argument and insists that K.H. did not waive the privilege. We agree with the circuit court that the psychotherapist-patient privilege bars Vaughn's access to the records and reject the assertion that an *in camera* evaluation is required.

A.

All fifty states, the District of Columbia, and the United States Supreme Court have recognized some form of a psychotherapist-patient privilege. *See Jaffee v. Redmond*, 518 U.S. 1, 12 (1996). The policy behind the privilege is to encourage patients to communicate openly with their therapists and to prevent disclosure of the patient's infirmities. *See State v. Sypult*, 304 Ark. 5, 8, 800 S.W.2d 402, 403 (1990). Indeed, "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust." *Jaffee*, 518 U.S. at 10. The privilege

serves the greater public interest by facilitating effective mental health care, which is "a public good of transcendent importance." *Id.* at 11. In Arkansas, the privilege is provided in Arkansas Rule of Evidence 503(b):

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing his medical records or confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

This privilege governs in both criminal and civil state court proceedings. *See Holland v. State*, 2015 Ark. 341, at 14, 471 S.W.3d 179, 188; Ark. R. Evid. 101. In addition to the evidentiary privilege, Arkansas statutes also provide that "confidential relations and communications" between a therapist and client "are placed upon the same basis as those between an attorney and a client." Ark. Code Ann. § 17-27-311(a) (counselors); Ark. Code Ann. § 17-97-105(a) (Repl. 2018) (psychologists).

The parties do not dispute that K.H.'s therapy records fall within the scope of Rule 503. Vaughn instead challenges whether the privilege was waived. The patient may of course waive the privilege by voluntarily disclosing or consenting to disclosure of any significant part of the privileged matter. *See* Ark. R. Evid. 510. But as the prosecution emphasized at the second pretrial hearing, K.H. did not waive the privilege. Vaughn nevertheless argues the privilege was waived by the affidavit's reference to details K.H. disclosed during therapy and by the child's testimony during cross-examination. In our view, the privilege was not waived by these acts.

Rule 503 gives the patient the privilege. *See McKenzie v. Pierce*, 2012 Ark. 190, at 7, 403 S.W.3d 565, 570; Ark. R. Evid. 503(b). In other words, the State cannot waive K.H.'s privilege. *Id.* Though Vaughn makes the conclusory assertion that mandated reporter laws waive the patient's privilege, we decline to make such a ruling in this case. We simply find no basis to conclude that the affidavit's reference in this case waives K.H.'s privilege.

We are similarly unpersuaded by the assertion that K.H. waived the privilege in response to cross-examination. It is well settled that a witness in a criminal case does not waive the privilege by testifying because the State, not the witness, is the party in a criminal proceeding.[5] *See Collins v. State*, 2019 Ark. 110, at 6, 571 S.W.3d 469, 472; Ark. R. Evid. 503(d). As the Fifth Circuit has explained, a "defendant does not get to crack open every confidential communication with a victim's psychotherapist simply because that victim may have discussed facts with her psychotherapist that are relevant to the issues at trial." *United States v. Murra*, 879 F.3d 669, 680 (5th Cir. 2008). "[A]lthough a patient may not refuse to disclose any relevant fact within her knowledge merely because she discussed those facts in a confidential communication with her psychotherapist, she cannot be compelled to answer the question, 'What did you say to your psychotherapist?'" *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395–96 (1981)).

K.H. was forthcoming with factual responses to Vaughn's cross-examination, but she did not reveal any confidential communications. She admitted that she attended therapy

[5] Vaughn argues in his supplemental brief that the State can waive the privilege for a victim because the victim is a *de facto* party to the criminal proceeding. We will not consider this argument as it was not briefed at the court of appeals. *See Fuson v. State*, 2011 Ark. 374, at 8–9, 383 S.W.3d 848, 854.

following the sexual assault, but she did not testify to any privileged communications discussed with her therapists. Vaughn was aware of K.H.'s non-privileged statements to the Child Safety Center denying any sexual assault. He also knew that K.H. disclosed details of sexual assault to a therapist that were mentioned in the criminal affidavit. When asked, K.H. provided the names of her new providers and an estimate of how many times she discussed the sexual assault with them. She also admitted to the discrepancy between the affidavit and the initial Child Safety Center interviews. K.H. explained that she was too scared to admit the abuse at the interviews immediately following the assault.

We do not find that the disclosure to the circuit court waived the privilege in this case. Though the record is not clear on how or when the records were compelled from K.H.'s providers, the prosecution clearly stated that K.H. did not waive the privilege. It likewise emphasized that it did not have access to the records until the court ordered production. Indeed, the dates of the subpoenas and timestamps indicate that the records were obtained near the time of the *in camera* review and well after the criminal information was filed. A claim of privilege is not defeated by a disclosure which was compelled erroneously or made without opportunity to claim the privilege. *See* Ark. R. Evid. 511. We conclude the therapy records and communications are privileged under Rule 503.

B.

We must now consider whether Vaughn is constitutionally entitled to disclosure of the privileged records. He contends this issue implicates the rights to confrontation and compulsory process under the Sixth Amendment and due process under the Fourteenth

Amendment. He also asserts violation of our analogous provisions in Article 2, Sections 8 and 10 of the Arkansas Constitution.

Relying on *Jaffee*, we previously held that the psychotherapist privilege preempts the need to discover all admissible evidence. *See Johnson v. State*, 342 Ark. 186, 196–97, 27 S.W.3d 405, 412 (2000). In other words, the privilege is paramount to the need to gain access to the privileged material for evidentiary purposes. *Id.*; *see also Kinder v. White*, 609 Fed. App'x 126, 130 (4th Cir. 2015) ("the public benefit produced by the recognition of the psychotherapist-patient privilege is sufficiently weighty to trump the cost to the administration of justice of precluding the use of relevant evidence"). Vaughn seeks to distinguish *Johnson* on the basis that the prosecution had access to K.H.'s records. *See Johnson*, 342 Ark. at 197–98, 27 S.W.3d at 413. Given that the State cannot waive the patient's privilege—and K.H. did not waive the privilege here—we do not find that distinction persuasive. *See supra*.

Under *Ritchie*, due process and compulsory process would require the State to turn over the evidence in its possession that is both favorable to Vaughn and material to guilt or punishment if the Arkansas statute allowed for disclosure. *See Holland*, 2015 Ark. 341, at 17, 471 S.W.3d at 189 (citing *Ritchie*, 480 U.S. at 52). Unlike the statute in *Ritchie*, however, the privilege of private psychotherapy records has not been qualified by the legislature. Indeed, it remains absolute. *See* Ark. R. Evid. 503; *compare Taffner v. State*, 2018 Ark. 99, at 12, 541 S.W.3d 430, 437 (statute allowing disclosure of certain DHS records requires *in camera* review under *Ritchie*). Moreover, the record does not show that the State truly had access to the records. Indeed, the prosecution stated it obtained the records only to comply

with the court's disclosure order for *in camera* review. As the State points out, this assertion was unopposed by Vaughn below.

The right to confrontation under the Sixth Amendment guarantees a defendant an opportunity for effective cross-examination and the right to face those who testify against him. *See Ritchie*, 480 U.S. at 51 (plurality opinion). The *Ritchie* Court flatly rejected the claim that a defendant is entitled to access confidential records simply to aid in cross-examination: "[T]he Confrontation Clause only guarantees 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish.'" *Id.* at 53, (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis in original)). The Court specifically noted the ability to question adverse witnesses does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. *Id.* at 53. Indeed, the Confrontation Clause has never been recognized as an independent method of enforcing pretrial disclosure of impeachment information. *United States v. Wright*, 866 F.3d 899, 912 n.3 (8th Cir. 2017) (citing *Ritchie*, 480 U.S. at 52). Vaughn contends he needed access to the records to show that K.H. did not initially disclose the abuse and in fact denied it. He essentially seeks to bootstrap the trial right to confront witnesses into a pretrial discovery right. This claim does not place the right to confrontation at issue and thus we reject Vaughn's argument.

In sum, we reject Vaughn's argument that *Ritchie* requires an *in camera* examination of records and communications shielded by the absolute psychotherapist-patient privilege.

Affirmed; court of appeals opinion vacated.

HART and WYNNE, JJ., dissent.

SUPREME COURT OF ARKANSAS

No. CR-19-591

	Opinion Delivered: October 8, 2020
TRACY WILL VAUGHN APPELLANT	APPEAL FROM THE WHITE COUNTY CIRCUIT COURT [NO. 73CR-18-151]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE ROBERT EDWARDS, JUDGE
	DISSENTING OPINION.

JOSEPHINE LINKER HART, Associate Justice

I dissent. In sum, where a charge of sexual assault only comes after nearly a year of prompting and pruning by the victim's counselor, before which the victim had specifically and repeatedly denied that any sexual assault had ever occurred, there is no fair trial for the defendant unless he has access to the victim's counselor and related counseling records.

I. *Background*

Tracy Vaughn stands convicted of a sex crime based on the allegation that he touched K.H.'s vagina for purposes of "sexual gratification" while he was giving her a bath. This allegation against Vaughn did not come from K.H., at least not initially. The State's pursuit of Vaughn began after the father of one of K.H.'s friends, upset after learning his daughter had been skinny-dipping with K.H. in the pool at Vaughn's residence, made a report to police. Vaughn submitted to an interview with police on June 13, 2016—an interview which quickly turned into an interrogation. Despite the interrogation continuing for hours on end, with the officers repeatedly accusing Vaughn and baiting him to acknowledge some

form of guilt,[1] Vaughn admitted to no criminal activity. One of the many things that came up during Vaughn's interrogation was the aforementioned incident in the bathtub. Vaughn acknowledged giving K.H. a bath, but he denied that any touching was for the purpose of sexual gratification.

K.H. was also interviewed by State investigators. Whatever the substance of that interview was, the State apparently deemed K.H.'s account insufficient to commence a criminal prosecution, as no charges were filed against Vaughn at that time. However, K.H. was then sent to a private counselor, and the records from those counseling sessions are contained in the record on appeal.

As did the dissent in *Johnson v. State*, I find the content of these counseling records too important to ignore. 342 Ark. 186, 204–05, 27 S.W.3d 405, 417 (2000) (Brown, J., dissenting). Vaughn's theory of defense at trial was that K.H.'s allegations of sexual contact were false and spurred by other adults in the wake of the skinny-dipping revelation. The contents of these counseling records reveal a great deal of evidence that would have been relevant to and supportive of Vaughn's theory.

The records show that for the first several months of counseling, K.H. specifically and repeatedly denies that Vaughn had ever touched her inappropriately. They also show that by around the six-month mark, the counselor had begun prodding K.H. and her mother to let the counselor know about any "new memories" K.H. may have. After nearly another six months of this treatment, K.H. reportedly tells her counselor, "I'm going to come clean,"

[1] The trial judge noted from the recording that the interrogating officer was "making somewhat of a fool of himself."

reporting what the counselor describes as "three new parts" of her sexual abuse, one of which is apparently the bathtub incident. The counselor notes, "Client was scared to tell mom 3 new parts of the sexual abuse. With my help, client told mom about 'Meany' … Mom reacted appropriately and praised client for sharing with her and being brave." The counselor then helps K.H. turn her account into a written "trauma narrative" from which she could deliver these allegations to State authorities. On February 21, 2018, nearly two years after Vaughn and K.H. were initially interviewed, the State filed one count of second-degree sexual assault and three counts of sexual indecency against Vaughn, with the supporting affidavit specifically noting that the allegations were "recently disclosed during [K.H.'s] therapy session."

True or not—it appears that K.H.'s sexual-contact allegations against Vaughn were born, grown, and pruned during these sessions with the counselor. At trial, the defense should have been able to present this information to the jury to aid in its assessment of the truth.

Specifically, the defense should have been able to use prior inconsistent statements contained in the counseling records to test the credibility of K.H.'s allegations of sexual contact. The defense should have been able to illustrate the specific timing and evolution of K.H.'s allegations, and to show alternative sources where the information contained in those allegations may have come from. Importantly, the defense (who was prohibited from even knowing the identity of K.H.'s counselor) should have been able to subpoena the counselor to the courtroom, and to examine the counselor about her continuing requests for "new memories" from K.H. and her mother. The defense should have been able to ask

about the counselor's methodology, and to potentially bring in an expert of his own to show whether the counselor's methodology might have led to a false accusation.

The jury should have heard all this information, but it didn't. All it heard about the counseling was that K.H. had previously denied the allegations. The rest of the evidence was kept from both the defense and the jury based on an assertion of K.H.'s psychotherapist privilege. But even without his best evidence, Vaughn successfully defended against three of the four charges at trial, and the jury gave Vaughn the minimum sentence for the one charge he was convicted of. If Vaughn had been able to use the information from the counseling to support his defense, the jury may very well have acquitted him.

II. *Federal Constitutional Rights*

Withholding this information from Vaughn and from the jury violated Vaughn's constitutional rights. As the Supreme Court of the United States has observed, Vaughn has a constitutional right to present a complete defense at trial:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, [410 U.S. 284 (1973)], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308, (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S., at 485; cf. *Strickland v. Washington*, 466 U.S. 668, 684–685 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273 (1948); *Grannis v. Ordean*, 234 U.S. 385 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." *United*

> *States v. Cronic*, 466 U.S. 648, 656, (1984). See also *Washington v. Texas*, supra, 388 U.S., at 22–23.
>
> *Crane v. Kentucky*, 476 U.S. 683, 690–91 (1986) (parallel citations omitted).

Further, Vaughn has a constitutional right to exculpatory and impeachment material within the State's possession. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). He also has a constitutional right to an in camera hearing to determine whether information subject to State confidentiality law contains any such exculpatory or impeachment material. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

Haling Vaughn to trial on these allegations while denying him access to any of the related counseling information violates the aforementioned constitutional guarantees. Vaughn has not even received the in camera review contemplated by *Ritchie*, or at least he did not receive a ruling on whether there was any exculpatory or impeaching material contained in the counseling records. The trial judge did note that there were "significant pages" that would be of interest to the defense contained in the counseling records, and placed them under seal for the record on appeal.

Note that there was no physical or medical evidence of any sex crime in this case. The only direct evidence was the allegation of sexual contact by K.H., and that allegation only came after a year's worth of undying efforts from K.H.'s counselor. If what the counselor finally procured from K.H. is the version of events that is to be believed, after K.H. had so repeatedly denied those very same allegations, then the substance of the

counselor's actions should have been part of the evidence presented to the jury. Without that, there is no fair trial in a case like this one. Put simply, the State's case against Vaughn has not withstood the "crucible of meaningful adversarial testing." *Crane*, *supra*. There is no valid state justification for withholding this evidence from the defense in this case, and refusing to remedy this violation invites the State to use private counseling as an inaccessible surrogate for a proper law enforcement investigation.

For these reasons, Vaughn's conviction cannot stand. Procedurally, because the trial judge never ruled as to whether the records contained any exculpatory or impeaching information, we should reverse and remand for further proceedings from that point in the litigation. Surely Vaughn is at least entitled to the constitutional protection afforded to the appellant in *Ritchie*.

III. *Psychotherapist Privilege under Arkansas State Law*

As a matter of state law, there are problems with the assertion and acknowledgement of privilege over K.H.'s counseling records.

A. Attachment

First, there is at least a question of fact as to whether privilege attached to the communications between K.H. and the counselor in the first place. Rule 503 of the Arkansas Rules of Evidence, which details the physician-patient privilege and connected rules, states:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing his medical records or confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, physician or psychotherapist, and persons who are participating in the

> diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

Ark. R. Evid. 503(b). The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient, and a patient has a privilege to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his mental or emotional condition. Ark. R. Evid. 503(c); *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006). However, Rule 503(b) does not grant a privilege to "any information," only "communications" between the patient and doctor, and confidential ones at that. *Id.*

Rule 503 further provides in pertinent part:

> (a)(4) A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

Note that privilege is only available for confidential communications "made for the purpose of diagnosis or treatment," and communications are only confidential where they are "not intended to be disclosed to third persons[.]"

Here, it challenges reason to simply accept that K.H.'s communications with the counselor are privileged. In light of K.H.'s initial and continued denials of any wrongdoing by Vaughn, there is a very real question as to whether K.H. was sent to counseling for purposes of "diagnosis or treatment," or whether she was sent there to be groomed into a complaining witness. Further, one cannot say that the communications between K.H. and Vaughn were confidential, as there is every indication that the communications were

intended to be disclosed to State investigators. K.H. interviewed with State investigators about these very same allegations, then she was sent to counseling, and then eventually she was sent back to State investigators after she "came clean" during counseling. These are factual issues into which the defense, especially in a case like this one, must be able to inquire.

B. Waiver

To the extent the communications between K.H. and the counselor were privileged, the privilege was waived by the time Vaughn was charged and brought to trial. Ark. R. Evid. 510 provides as follows:

> A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

The supporting affidavit from Vaughn's charging document makes it plain: the State charged Vaughn after being presented with allegations by K.H. that were "recently disclosed during her therapy session." The information developed during the counseling sessions is the same information the State used to charge Vaughn—certainly a "significant part of the privileged matter." Accordingly, any privilege over the evidence in question was waived, and the circuit court's withholding of the evidence on that basis was erroneous.

IV. *Conclusion*

For the reasons set forth above, we should reverse and remand for further proceedings. In the meantime, perhaps the Supreme Court of the United States could address what seems to be an increasingly prevalent situation: Where allegations against a defendant were developed in a purportedly privileged setting, does the defendant (and the

jury) get to know how those allegations developed, or does the assertion of privilege defeat the defendant's right to support his defense?

I dissent.

SUPREME COURT OF ARKANSAS

No. CR-19-591

TRACY WILL VAUGHN APPELLANT	**Opinion Delivered:** October 8, 2020
V.	APPEAL FROM THE WHITE COUNTY CIRCUIT COURT [NO. 73CR-18-151]
STATE OF ARKANSAS APPELLEE	HONORABLE ROBERT EDWARDS, JUDGE
	DISSENTING OPINION.

ROBIN F. WYNNE, Associate Justice

Because I believe that a criminal defendant's constitutional right to present a complete defense must outweigh the psychotherapist-patient privilege, I respectfully dissent. Of course, it is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the plurality expressed no opinion on whether the result "would have been different if the statute had protected the CYS files from disclosure to *anyone,* including law-enforcement and judicial personnel." *Ritchie*, 480 U.S. at 57, n.14. The result should be the same. The privilege must yield to a criminal defendant's constitutional rights. I would reverse and remand for the circuit court to conduct an in camera review of the counseling records.

APPENDIX B

FORMAL ORDER

STATE OF ARKANSAS,)

) **SCT.**

SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD, ON FEBRUARY 18, 2021, WAS THE FOLLOWING PROCEEDING, TO-WIT:

SUPREME COURT CASE NO. CR-19-591

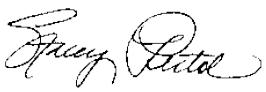
TRACY WILL VAUGHN APPELLANT

V. APPEAL FROM WHITE COUNTY CIRCUIT COURT – 73CR-18-151

STATE OF ARKANSAS APPELLEE

APPELLANT'S MOTION FOR ACCELERATED CONSIDERATION OF MOTION FOR PERMISSION TO INCLUDE SEALED MATERIAL IN PETITION FOR WRIT OF CERTIORARI IS GRANTED. APPELLANT'S MOTION FOR PERMISSION TO INCLUDE SEALED MATERIAL IN PETITION FOR WRIT OF CERTIORARI IS DENIED. WYNNE, J., WOULD GRANT.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACEY PECTOL, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 18TH DAY OF FEBRUARY, 2021.



_____

CLERK

BY: _____

DEPUTY CLERK

ORIGINAL TO CLERK

CC: JEFFREY MARX ROSENZWEIG
PAMELA RUMPZ, SENIOR ASSISTANT ATTORNEY GENERAL

APPENDIX C

ARKANSAS COURT OF APPEALS

DIVISION I

No. CR-19-591

TRACY WILL VAUGHN APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** March 18, 2020 APPEAL FROM THE WHITE COUNTY CIRCUIT COURT [NO. 73CR-18-151] HONORABLE ROBERT EDWARDS, JUDGE AFFIRMED

BRANDON J. HARRISON, Judge

This criminal appeal, with a state-law-privilege twist, concerns whether the State failed to provide material evidence to Vaughn's defense attorney in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady*'s essence is that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

A White County Circuit Court jury convicted Tracy Vaughn of sexually assaulting nine-year-old K.H. and sentenced him to five years' imprisonment. The jury acquitted Vaughn on two counts of sexual indecency with a child, charges that involved K.H. and her friend, B.W. This appeal centers on counseling that K.H. received, the content of certain records, and whether Vaughn's counsel should have been allowed access to them.

K.H. received mental-health counseling before and after the events that led to the sexual-assault charges against Vaughn occurred. Vaughn argued in the circuit court that he should have been given access to K.H.'s counseling records because they likely contained evidence favorable to his defense. The court ultimately denied Vaughn access and did not perform a *Brady* analysis. The court reasoned that the counseling records were absolutely privileged under Arkansas Rule of Evidence 501[1] and Ark. Code Ann. § 17-27-311 (Repl. 2018).[2] Consequently, the circuit court rejected Vaughn's argument that he was entitled to potentially exculpatory evidence contained in K.H.'s mental-health records under *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). *Ritchie* is a post-*Brady* case that held a defendant has a due process right to require a state agency to disclose exculpatory or impeachment evidence that it possesses. *Ritchie*, 480 U.S. at 57. In this case, the circuit court ultimately ruled that "the patient/client/therapist privilege is paramount and irrespective of exculpatory evidence. These [mental-health] records are not subject to inspection."

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[1]The circuit court miscited Arkansas Rule of Evidence 501. The psychotherapist-patient privilege of Ark. R. Evid. 503 is at issue in this appeal.

[2]This statute states:

> (a) For the purposes of this chapter, the confidential relations and communications between a licensed counselor and a client, a licensed associate counselor and a client, a licensed marriage and family therapist and a client, or between a licensed associate marriage and family therapist and a client are placed upon the same basis as those between an attorney and a client.
>
> (b) Nothing in this chapter shall be construed to require that any privileged communication be disclosed.

The court's decision was one of federal constitutional magnitude because, in this case, it was the prosecution who procured the counseling records as best we can tell. More specifically, the State appears to have provided the disputed counseling records to the court during a pretrial hearing after procuring them using subpoenas. (More on this later.) It also appears that neither K.H. (acting through a parent or guardian) nor her health providers raised any evidentiary privilege to block the prosecuting attorney from receiving confidential communications that occurred between K.H. and her counselor.

Vaughn argues to this court that the circuit court erred when it denied him access to the counseling records, which violated his federal and state constitutional rights. Vaughn seeks a new trial because, in his view, being kept in the dark about the counseling records' content prejudiced him at trial.

I. *K.H.'s Counseling Records*

Vaughn appears to have first learned about the counseling issue from an affidavit that the State attached to its initial criminal information. That affidavit recited that K.H. had "recently disclosed *during her therapy session* that Tracy [Vaughn] exposed his penis and made her touch it." (Emphasis added.) This revelation prompted Vaughn's counsel to move the court to compel the prosecuting attorney to disclose K.H.'s counseling (or mental-health) records pursuant to due process rights he claimed under the Fourteenth Amendment to the United States Constitution. *See Brady*, 373 U.S. 83; *United States v. Bagley*, 473 U.S. 667 (1985); *Ritchie*, 480 U.S. 39; article 2, section 8 of the Arkansas Constitution; Arkansas Rules of Criminal Procedure 17.1(a)(iv) and 17.4(a). In his motion, Vaughn argued that "the State has waived any privilege, or should be estopped from asserting it, inasmuch as the

affidavit accompanying the felony information asserts that an accuser 'recently disclosed in her therapy session that Tracy exposed his penis and made her touch it.'" According to Vaughn, Arkansas's psychotherapist-patient privilege set forth in *Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000), and *Holland v. State*, 2015 Ark. 341, 471 S.W.3d 179, does not apply because "the counseling would have been part of the investigative and prosecutorial process and not independent of it . . . [and] those state law privileges must fall before due process guarantee set forth in *Ritchie*." He therefore asked the circuit court to compel the State to disclose these records to him. Alternatively, he asked the court to review the records in camera and assess them for exculpatory or impeachment material.

The circuit court held a pretrial hearing on motions that included Vaughn's discovery motion. The prosecuting attorney arrived at the pretrial hearing with K.H.'s counseling records. The circuit court received them from the prosecutor and placed three exhibits under seal in three separately sealed envelopes. They are labeled court's exhibits Nos. 1, 2, and 3. The first exhibit contains the alleged *Brady* material that Vaughn says prejudiced his case when the prosecutor refused to disclose it. Court's exhibit No. 1 covers K.H.'s records that were generated by one counselor who treated K.H. from approximately January 2011 through January 2018 (Provider A).

Court's exhibit No. 2 contains the following: K.H.'s records from a second provider (Provider B) that were generated in 2018; a copy of a 10 May 2018 subpoena from the White County Prosecuting Attorney's Office to the "Keeper of the Records [of Provider B]"; and a fax transmittal sheet from Provider B to the prosecuting attorney.

Court's exhibit No. 3 consists of: B.W.'s July 2016 records from Provider C, which is an outpatient service provider, and a White County prosecutor subpoena demanding those records.

During the pretrial hearing, the prosecuting attorney argued that sealed exhibits 1, 2, and 3 should not be disclosed to defense counsel:

> [Vaughn] acts as if these—both of these girls, the first time they ever go to treatment is after this case and they are sent there by the State. Both of them were in treatment with those same providers previously. Now, yes, they did go back after this happened, but they've not been ordered there by the State and we've not—*up until the Court asked the State to get the records*, we did not have access, we did not seek to admit those records[.] . . . And we would argue that they [the victims] have not waived that privilege that allows them to get assistance that they need, other than if there is something exculpatory to the Defendant. (Emphasis added.)

The record is not clear on which provider's records, if any, the court asked the State to get, in what manner the court communicated its request, or when this occurred. Nor is it clear whether Vaughn's counsel was told that the court asked the State to get some of K.H.'s counseling records, if it in fact did so.

What we do know is that the prosecutor's office sent a subpoena demanding K.H.'s records to Provider B and a subpoena demanding B.W.'s records to Provider C. How the prosecutor procured Provider A's records (the ones at issue here) is unclear because the record does not contain a subpoena from the prosecutor's office as to that provider. We assume a third subpoena was used but cannot state that as a fact. No party below made a good record on how the records were procured from the various providers. And no party made a good record on whether K.H.'s parent(s) or legal guardian(s) were made aware of what was going on. There is no written authorization in the records from a person legally

empowered to permit the State to get confidential health information. Nor, as we have said, is there anything in the record showing that the three separate care providers, or K.H. herself through a representative, attempted to resist the subpoenas for the same reasons the State now says that Vaughn was never entitled to receive them. No statutory authority was cited, or otherwise obviously invoked, for the disclosure of the confidential information.

Despite the unknowns, we know that defense counsel argued during the hearing that, among other things, he needed to know "whether they're telling the truth or not and that records of treatment would be the best evidence." He also argued that the recorded statement Vaughn gave to the police in 2016 contained statements by police officers "about whether the girls are going to have to go to therapy" and that "some of these [records] appear to be the records of the therapy that is referred to [in the police interview]." Vaughn asked to examine the records with the prosecutor "sitting right there so I can discuss particular issues more cogently . . . and we can do this under seal."

The court ruled from the bench that the State did not send the girls to therapy "for investigative purposes" because the "first 118 pages" of the records "occurred in 2011 through '14, before these allegations came to light in 2016[.]" Although it is clear enough that the court reviewed the records to some extent, it is not clear to what extent or to what depth, content-wise, the court did so. In the end, the court ruled from the bench that K.H.'s records were absolutely privileged under Arkansas law and therefore could not be disclosed to Vaughn under any circumstance.

In response to Vaughn's request for a more specific ruling, the court said this:

> With respect to *Ri[t]chie*, that is a case that dealt with the Pennsylvania statute that made the entire investigative file of the Child Protective Services

> Agency in Pennsylvania privileged and not specifically address patient/client records, therapists, interviews. . . . I am going to stand by my ruling, that the patient/client/therapist privilege is paramount and irrespective of exculpatory evidence. These records are not subject to inspection of admissibility and your objection—exceptions are noted. . . . I'm finding that the privilege granted to a child in seeking therapy with a licensed associate counselor or doctor—I hate to use this word, trumps the due process, confrontation and other Constitutional rights you claim. . . . That's for the Appellate Court to determine if they think I'm wrong on the privilege issue.

Despite numerous proffers as to what the undisclosed records might contain, the court rejected all of Vaughn's requests and arguments to that effect before and during the trial. During a bench conference held while K.H. was on the stand, Vaughn explained why court's exhibit No. 1 (Provider A's records) would aid his cross-examination.

> It is—it is my—it is my belief that . . . the girl has been coached and—and to make the allegation of touching—touching by Mr. Vaughn, . . . her testimony is she—she made the claim first only to this Ms.—the counselor after she's denied it the second time. Anyway, and then, of course, I'm going to need the records for that, obviously, you're denying it[.]

The circuit court replied, in part:

> I have made my ruling a number of times that the counseling records are not admissible and that the statements she made to the counselor were not admissible. . . . I am not going to let you do anything with the counseling records based on my prior ruling. Period.

The case was fully tried, and Vaughn was convicted of one count of sexually assaulting K.H. in the second degree. Vaughn filed his notice of appeal and, in due course, the record.

After the record was lodged with this court's clerk, Vaughn's counsel moved this court for access to the three sealed court exhibits, which he had never seen. We granted the motion and allowed both parties access to the sealed exhibits so that they could make

informed arguments on appeal regarding the correctness of the circuit court's decision to deny Vaughn access to the disputed therapy records.

A. Did the State Access and Withhold K.H.'s Records and Thereby Trigger *Brady*?

In a typical case—meaning absent a statutory exception, the victim's consent, or a court order—a person's health records are not any more accessible to a prosecuting attorney than to a defense attorney. Here, however, the prosecuting attorney possessed the records at issue. Whether that was done at the behest of the circuit court, or on the lawyer's own initiative, *Brady* was triggered. *See, e.g.*, *State v. Allen*, 1999 WL 5173 (Tenn. Crim. App. Jan. 8, 1999). But the circuit court did not fully perform a *Ritchie/Brady* analysis because it hung its decisional hat solely on Arkansas privilege law. That decision was an error of law on these facts.

A criminal defendant has a due process "right to put before a jury evidence that might influence the determination of guilt," or, in other words, a right to obtain and present exculpatory evidence. *Ritchie*, 480 U.S. at 56. In addition, the Sixth Amendment to the United States Constitution provides a criminal defendant with the right to confront witnesses, which is achieved through cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315 (1974). The Arkansas Supreme Court has also recognized that Ark. R. Crim. P. 17.1 requires the State to disclose to defense counsel relevant or exculpatory material "which is or may come within [its] possession, control, or knowledge[.]" *Johnson v. State*, 342 Ark. 186, 197, 27 S.W.3d 405, 412–13 (2000), *cert. denied*, 532 U.S. 944 (2001).

Here is how the *Brady* process generally works. When a defendant like Vaughn has made "some plausible showing" that information that the prosecuting attorney or state agent

has would be "both material and favorable to his defense," and the records are not absolutely privileged under state law, then the defendant is entitled to an in camera review of the evidence, at a constitutional minimum. *Ritchie*, 480 U.S. at 58 n.15 (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867(1982)).[3] *Compare Taffner v. State*, 2018 Ark. 99, at 12, 541 S.W.3d 430, 437 (holding that a defendant was entitled to an in camera review of DHS records involving a victim in a child-rape case when there was a preliminary showing that the records contained allegedly false accusations by the victim of sexual abuse and Arkansas statutes involving DHS permitted disclosure in certain circumstances) *with Holland*, 2015 Ark. 341, at 13–15, 471 S.W.3d at 187–88 (holding private records of victim's disclosure of sexual abuse to a therapist were not discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963)).

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[3]In *Ritchie*, the Pennsylvania legislature only protected the CYS records with a qualified privilege. *Id.* at 57–58. Other types of records may be absolutely privileged in Pennsylvania. *See Pa. v. Wilson*, 602 A.2d 1290, 1297 (Pa 1992) (holding that defendant was not entitled to disclosure of victim's records held by a rape crisis center where those records were protected by an absolute statutory privilege); *N.D. v. Spath*, 581 N.W.2d 123, 126 (N.D. 1998) (rejecting defendant's confrontation clause claim and noting that although the evidentiary privilege at issue contained some limited exceptions, it did not contain a general exception for disclosure of records pursuant to court order). But other courts have found that a defendant's constitutional rights to a fair trial and to confront the witnesses against him may override a medical-patient privilege. *See, e.g.*, *N.Y. v. Maynard*, 363 N.Y.S.2d 384 (Sup. Ct. 1974). The Supreme Court of the United States has recognized privacy interests and policy justifications for protecting psychotherapist records under the federal rules of evidence. *See, e.g.*, *Jaffee v. Redmond*, 518 U.S. 1 (1996). So a victim's interest in privacy, the legislature's intent to maintain such a privilege, and public-policy reasons for preserving confidential communications between victim and counselor are all considerations when deciding whether a victim's counseling records must be disclosed to defense counsel assuming the privilege has been properly asserted and established. State courts have reached different conclusions about a criminal defendant's constitutional right to pierce an absolute sexual-assault counselor privilege. *Compare In re Crisis Connection, Inc.*, 949 N.E.2d 789, 802 (Ind. 2011) *with Mass. v. Dwyer*, 859 N.E.2d 400, 419 (Mass. 2006).

In *Johnson*, our supreme court rejected the argument that a criminal defendant has the right to see a victim's privileged mental-health records during pretrial discovery—or examine them during a pretrial witness-competency hearing. *Johnson*, 342 Ark. at 193, 27 S.W.3d at 410. There is no holding, however, on whether a criminal defendant's constitutional rights *at trial* may outweigh the victim's right to assert a privilege—especially when the State has previously obtained the disputed records by subpoenas based on its own initiative or at the court's behest. In fact, the prosecuting attorney in *Johnson* did not access or possess the victim's mental-health records. *Id.* at 197, 27 S.W.3d at 412 (stating that the appellant's argument "presupposes that the State had access to or knowledge of the records and their contents.").[4] *Johnson* therefore cannot control this case.

This case is different. Here the prosecutor had in hand K.H.'s records from two separate private counseling centers. The printed date on court's exhibit No. 1 from Provider A is 15 May 2018. The facsimile transmittal date from Provider B is 11 May 2018. Provider C's records relate solely to B.W. and are relevant only because they contain a response from Provider C, on 25 May 2018, to the White County prosecuting attorney's subpoena. The pretrial hearing on Vaughn's discovery motion was held in August 2018.

It does not appear that Vaughn ever tried to compel the production of K.H.'s records by way of a subpoena like the State did; nor did he seek to compel testimony from her therapist at trial. But even if K.H.'s records could be kept completely confidential—

[4]The dissenting justices would have held that Johnson "was hamstrung in his cross-examination of [the victim] and in his defense in general and, thus, was denied his right to a fair trial." *Johnson*, 342 Ark. at 207, 27 S.W.3d at 418 (Brown, J., dissenting).

meaning a defendant would not be entitled to the records under any circumstance—K.H.'s records were not, in fact, kept confidential because they were disclosed to the prosecutor.

Having determined that the State possessed the disputed therapy records, for *Brady* purposes, the next question is whether the evidence was "favorable to [the] accused." *Brady*, 373 U.S. at 87.

B. Was the Withheld Evidence Favorable to Vaughn?

Vaughn made a plausible showing that some of K.H.'s counseling records were procured and possessed by the prosecutor and that the records contained impeachment or exculpatory evidence critical to his defense. In our view, the circuit court should have conducted an in camera review of K.H.'s records for evidence favorable to his defense. We disagree with the State's assertion that K.H. asserted a privilege that shielded the records from review.

The State correctly notes that "[t]he privilege under Ark. R. Evid. 503 does not belong to the State. It belongs to the patients and their physicians who are presumed to have the authority to claim the privilege." Yet, the State does not identify any point in time in this case when K.H., her parents or guardians, or her healthcare providers *asserted* any privilege or otherwise resisted the State's subpoenas. Of course, the subpoenas beg this question: if the State recognizes that K.H. holds the privilege then why did it send the subpoenas? Where is an on-the-record discussion with the court, initiated by the prosecutor, on why it should not be ordered to procure the records if that is, in fact, what happened? As we have said a few times now, we cannot be certain what happened and when because there is no record on this critical facet of the proceedings.

The State argues that Vaughn did not ask the court to make an in camera review. But he did ask, and the circuit court did exactly that, although the depth to which it went is murky. It is clear, however, that the court's "no disclosure" decision was not based on a *Brady* analysis. "I am going to stand by my ruling, that the patient/client/therapist privilege is paramount and irrespective of exculpatory evidence."

What to do? This court has in the past remanded a case to the circuit court and directed it to conduct an in camera review of what an appellant claims to be *Brady* material. But that has been done when it was known that the circuit court never looked at the material. *E.g.*, *Harper v. State*, 2019 Ark. App. 163, 573 S.W.3d 596. Our supreme court, on the other hand, has held that a remand is unnecessary when the circuit court had already reviewed the information. *See, e.g.*, *Holland*, 2015 Ark. 341, at 18, 471 S.W.3d 179, 190. This case falls into the latter category. Consequently, we will review the *Brady* issue rather than remand the case to the circuit court.

So, is the disputed information favorable to Vaughn? Yes. K.H. was, without question, a critical witness for the prosecution during the trial; and court's exhibit No. 1 contains potentially exculpatory and impeachment evidence relevant to her testimony. The second prong of *Brady* has therefore been met. *See Strickler v. Greene*, 527 U.S. 263, 282 n.21 (1999) ("Our cases make clear that *Brady*'s disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness."); *see also Williams v. Taylor*, 529 U.S. 420, 438 (2000) (main witness's mental-health record was potential *Brady* material when there were "repeated references to a 'psychiatric' or 'mental health' report in a transcript"). We move to the third *Brady* element.

C. Was the Evidence in K.H.'s Records Material?

Vaughn argues that he was prejudiced by the nondisclosure because the records show that K.H.'s version of events changed during counseling, that she asserted facts at trial that she had previously denied, and that Provider A's records generally cast doubt on her testimony. Vaughn believes he could have effectively impeached K.H.'s testimony by showing that the course of counseling or therapy caused her story to change, that the therapy used "recover[ed] memories" and "dreams," and that K.H. had expressly denied the sexual abuse many times to her counselor. He also says that he could have retained an expert witness to help him critique what happened during K.H.'s therapy if he had access to the records sooner. Specifically, Vaughn contends that K.H.'s therapist helped coach the "trauma narrative" that was ultimately reported to law enforcement, years after the alleged events occurred.

To prevail under *Brady*'s "materiality" prong, Vaughn must show that the disputed records create a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Isom v. State*, 2018 Ark. 368, at 4, 563 S.W.3d 533, 538, *cert. denied*, 140 S. Ct. 342 (2019) (applying *United States v. Bagley*, 473 U.S. 667, 682 (1985)). And a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Bagley*, 473 U.S. at 682. *But compare Jimenez v. State*, 918 P.2d 687 (Nev. 1996) (adopting a more protective "possibility" standard under Nevada's state constitution); *N.Y. v. Fuentes*, 907 N.E.2d 286, 289 (N.Y. 2009) (Under New York law, if the defendant has "ma[de] a specific request for a document" that is withheld, then the appropriate standard to measure materiality is whether there is "a

reasonable possibility" that the failure to disclose the exculpatory evidence contributed to the verdict.).

We acknowledge the force of Vaughn's argument and the surrounding circumstances, but we nonetheless hold that there is no reasonable *probability* that the results of the trial would have been different had the exculpatory/impeachment evidence contained in K.H.'s disputed records been disclosed to Vaughn.

The jury convicted Vaughn of second-degree sexual assault. A person commits sexual assault in the second degree under Ark. Code Ann. § 5-14-125(a)(3) (Repl. 2013) if he is eighteen years of age or older and engages in sexual contact with another person who is not his spouse and is less than fourteen years of age. "Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female. Ark. Code Ann. § 5-14-101(11). With these statutory elements in mind, we will explain why it was not reasonably *probable* (as opposed to merely possible) for the undisclosed records to have changed the trial result.

The State's brief catalogs some sexual instances that, when viewed in a light favorable to the State, support the verdict. We need not get into those details here because a primary problem for Vaughn, under our *Brady* analysis, is his interview by police detectives on 13 June 2016. We will concentrate on it for brevity's sake. By doing so we do not minimize K.H.'s testimony, which the jury was free to accept or reject. A focus on Vaughn's statement, however, amply supports our *Brady* decision.

As we have said, the full interview of Vaughn by the police was received as evidence at trial, as State's exhibit no. 15 by way of a video recording. During that four hours-plus

interview, which often meandered and was at times unclear, Vaughn admitted touching K.H.'s vagina while she was in the bathtub. He admitted going into the bathroom, sitting on the toilet, and using his phone while K.H. was bathing. Here is an excerpt of Vaughn's recorded police statement that was played to the jury during his trial:

DETECTIVE: Did you ever touch the bare—bare vagina?

VAUGHN: Yes, I mean, I've said in the bath tub it was just a—kind of, like I said, just washed, you know, because she'd want me to wash her and I washed her. I, you know,

DETECTIVE: How many times have you touched her bare vagina?

VAUGHN: Once.

DETECTIVE: Was that in the bedroom or the bathroom?

VAUGHN: The bathroom.

DETECTIVE: How did you do that? How did you touch her?

VAUGHN: She was—I had washed her back, washed her butt, and she was kind of on her hands and knees in the bath tub and I washed.

DETECTIVE: And you accidentally touched her or did you—

VAUGHN: No, I mean, I just kind of, just washed her. Not really, just—it wasn't like a –like—it wasn't nothing like that.

DETECTIVE: Now, I'm not saying you put a finger in or anything like that. Hand against skin—

VAUGHN: Uh-huh.

DETECTIVE: —is it only one time in the bathroom?

VAUGHN: Yes.

DETECTIVE: Okay. Did you just rub around and that feeling came back and you're like, oh shit, I got to quit and—

VAUGHN: No. It wasn't like rub around, it was just wash.

We acknowledge that during the police interview, Vaughn consistently denied being aroused or gratified by touching K.H.'s vagina. And we note that he was not criminally charged until more than two years after the police interview.

K.H. testified about the bathing incident at trial. She said that during the summer of 2016 she turned nine years old, and at that time she and her mother lived in Vaughn's home. K.H. testified that Vaughn would sit on the toilet "on his phone, drinking." She told the jury about a time that Vaughn entered the bathroom while she was taking a bath, put his hands into the water, and touched her vagina:

> And he leans over and since I was in the water in the bathtub, he swishes his hand around the water and each time I move, he'd get closer to me and then about four or five times, he would touch my vagina [with his hands].

On cross-examination, K.H. said that she told "Ms. Felicia" (at Child Safety Center) twice that no one had touched her vagina. During the trial she said the opposite: Vaughn had touched her. Defense counsel asked, "[B]ut all these times before you said no, didn't you?" K.H. replied, "Because I think I was just scared to admit that he did it." So the jury heard that K.H. had denied to investigators, at least twice, that Vaughn had touched her; in fact, she had told them nothing happened. K.H. testified that she was "pretty sure [she] told [the sexual abuse] to Ms. Sara [counselor at Provider A] after we stopped going to the Child Safety Center." The jury also heard that K.H. made the allegations against Vaughn approximately two years after the touching had occurred and after she had been counseled.

There was no disagreement that Vaughn touched K.H.'s vagina; his version and her version did not contradict one another on the essential point that there was a "touching,

directly or through clothing, of the sex organs" of K.H. Nor was there any dispute that K.H. first denied the abuse multiple times only to disclose it two years later after she had been in counseling. Vaughn may have been able to impeach K.H. in some manner with the undisclosed records. That, of course, can be a critical moment during a trial. But he was able to elicit testimony that K.H. had changed her story during the course of counseling and cross-examined her at trial.

Cases interpreting the "sexual contact" definition focus on whether the act was done for the purpose of sexual gratification. *E.g.*, *Chawangkul v. State*, 2016 Ark. App. 599, 509 S.W.3d 10; *see also Farmer v. State*, 341 Ark. 220, 223, 15 S.W.3d 674, 676 (2000) (The State must prove that the desire for sexual gratification is a "plausible reason for the act."). Granting the undeniable importance of impeachment evidence, the point remains that Vaughn admitted touching K.H.'s vagina, and in the end, the jury was tasked with deciding whether Vaughn's touching K.H. in the bathtub—among other interactions the State adduced at trial—was done for sexual gratification. He said it was not in the interview. Only Vaughn will ever know whether he acted with the purpose of sexually gratifying himself. Therefore, we cannot say that the undisclosed records would have made enough of a difference on a key element of the sexual-assault charge: whether it was plausible that the admitted vaginal touching occurred for sexual gratification. "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal[.]" *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). But it must be shown that the favorable evidence, in the context

of the entire case, could "put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

K.H.'s counseling records shed no light on Vaughn's purpose when he touched her. Whatever the content of K.H.'s records, the jury would still have had to determine, based on all that it heard at trial, whether a forty-six-year-old man who touched a nine-year-old girl's vagina in the bathtub did so with the purpose of sexually gratifying himself. In our view, the absence of the undisclosed records does not undermine our confidence in the jury's verdict; therefore, the records were not "material" under *Brady*. This means that Vaughn suffered no prejudice under *Brady*'s standard.

II. *Conclusion*

Vaughn's conviction for second-degree sexual assault is affirmed.

Affirmed.

SWITZER and VAUGHT, JJ., agree.

APPENDIX D

THE COURT: The legislature, again, recognizes the paramount status of the confidentiality privilege between patient and a doctor or a therapist, and without addressing whether any of these records reveal exculpatory statements or evidence, the Court finds that the records in and of themselves are privileged and are not subject to disclosure to the Defendant under any circumstances that are before the Court. (R. 129)

MR. ROSENZWEIG: If I heard you correctly, you held that this was -- this -- your decision was made upon an application of law, but without regard to whether anything in there was exculpatory. That -- am I stating that correctly?

THE COURT: That is correct.

MR. ROSENZWEIG: Okay. Your Honor, our position is this, of course, you referred to the fact that privilege is as called by the Constitution, Statute or by the Rules of Evidence. The U.S. Supreme Court has dealt with this issue in Pennsylvania vs. Ritchie, and in Ritchie, the U.S. Supreme Court, specifically concealed that such otherwise privileged materials may, in fact, be exculpatory and thus accessible to the Defendant. (R. 131)

THE COURT: I'm finding that the privilege granted to a child in seeking therapy with a licensed associate counselor or doctor -- I hate to use this word, trumps the due process, confrontation and other Constitutional rights you claim. R 133)

MR. ROSENZWEIG: Your Honor, I would also renew my objection to the Court's refusal to provide us access to the counseling records of the accusers in this case. I understand the Court has already ruled, and of course, made it's holding, but note our objections and it is our position that it is particularly prejudicial since it was the course of counseling that caused K.H. to develop, change, increase, etc., her statement and so, I'm going to, again, renew my objection. I assume the Court's position will be the same.

THE COURT: My ruling stands with respect to the exclusion of discussion about counseling for either or both of the victims and I believe a clear record earlier for my reasons and they remain the same.
MR. ROSENZWEIG: Your Honor, what is the --
THE COURT: Mr. Rosenzweig, let me try to --
MR. ROSENZWEIG: Oh, I'm sorry, Your Honor.
THE COURT: Try not to interrupt me, okay?
MR. ROSENZWEIG: I wasn't trying to interrupt. . I --just quick on the draw here.
THE COURT: Yes, sir. Go ahead.
MR. ROSENZWEIG: Thank-you. What is the Court's position if I make reference in opening statement or in cross examination to the fact that either or both went to counseling? I would like to develop that issue and if I can't do it on cross examination, I would like to make a proffer outside the presence of the jury with regard to them on that issue. So, what I don't want to do is get held in contempt, among other things, and I just need to where the Court is on that so I can make my record, but conform to your rulings.
THE COURT: What is the State's position?
MS. MCCOY: Judge, I -- and Norene, do you --
MS. SMITH: No, go ahead.
MS. MCCOY: I'm just saying that if you've already ruled that topic inadmissible, he can't talk about it in opening, because it's not going to be admitted into evidence, just like anything else that he knows is not going to be admissible into evidence, you can't reference it in opening. He can proffer it all day long, but he can't reference it in opening.
THE COURT: I'm going to rule in the Defendant's favor that he can and you can put forth in proper form of a question to either or both of the victims, "Did you have professional counseling with respect to the allegations in this case?" And they can admit or deny it as they choose to do. He cannot or you cannot go into who the counselor was, when it was, what or where it took place, any substance or specificity with respect to the questions and answers, but the fact that a witness, purported victim, was seeing professional counseling, I don't see that that's a problem and I would allow that.
MR. ROSENZWEIG: Your Honor, let me ask you specifically this, can I enlist or bring out on opening or in direct examination that, for instance, K.H., made one set of statements and then after a year of counseling, then added to and made those statements? In fact, it was the fact that she allegedly opened up in counseling after a number of months that caused them to, essentially, reopen this investigation and --

THE COURT: You're going into a prohibited area there, as I just – [*emphasis supplied*]
MR. ROSENZWEIG: Okay. That's -- that's --
THE COURT: -- explained.
MR. ROSENZWEIG: -- that's what I needed to know and it's my position that I should be allowed to get into that. I understand the Court's ruling and I will abide by the Court's ruling. I just wanted to make sure I understood it and made the appropriate objection.
THE COURT: Okay.
(R 150-154)

MR. ROSENZWEIG: One, I just wanted to make sure my court record, of course, we will comply with the Court's instruction on -- complying with the Court's instructions concerning the counseling issue. I just wanted to make sure I stated the basis for my objection is we believe that this was relevant under Rules 401 and 402, and furthermore, that the exclusion will adversely effect and violate our Constitutional right to present a defense, specifically, under Federal and State constitutional guarantees of due process, compulsory process and particularly, in this case, confrontation. So, I wanted to state the basis for my objection and I assume that hasn't changed your mind.

THE COURT: I stand by my previous ruling that the testimony concerning counseling concerning counseling is not admissible under the laws of the State of Arkansas and I have noted your objections I think now probably at least ten times and I'm sure you will make them again. (R 189-190)

MR. ROSENZWEIG: I would like to renew my motion for the counseling records because I think they may be explicitly relevant by her saying that she first said this to the counselor after she had denied twice at the Child Safety Center, so I'll renew my motion for access to the counseling records.
THE COURT: And I reaffirm my previous ruling. Those records are not admissible. (R 515)

MR. ROSENZWEIG: Yeah, yeah, I understand. Anyway, what I would like to do, for the purpose of the appellate record, is to proffer by questioning her outside the presence of the jury.
THE COURT: It will be denied. I'm not going to allow proffered testimony outside the presence of the jury of this little girl.
MR. ROSENZWEIG: Well, note my objections, Your Honor. May I make a speaking proffer now?
THE COURT: Go ahead.
MR. ROSENZWEIG: It is my belief that that proffer would show that the girl has been coached and to make the allegation of touching by Mr. Vaughn, which she said specifically said several times because her testimony is she made the claim first only to the counselor after she's denied it the second time. Anyway, and then, of course, I'm going to need the records for that, obviously, you're denying it, but I -- anyway, that's what I wish to do. I thought you were going to allow me to make a proffer.
THE COURT: I have made my ruling a number of times that the counseling records are not admissible and that the statements she made to the counselor were not admissible. You have introduced today through her interview to what you want to call prior inconsistent statements and that's fine, but I am not going to let you do anything with the counseling records based on my prior ruling period.
(R 518-519)

THE COURT: Court will come back to order in Case No. CR-18-151. I want to clear up for the record, I checked during the noon hour with the court reporter and the counseling records that continue to be a subject of some concern in this case were admitted as an exhibit under seal on the August 28, 2018, pre-trial, and I will, by incorporation, incorporate them as an exhibit into this record for purposes of appellate review.
MR. ROSENZWEIG: Thank-you, Your Honor.
THE COURT: And I want to clarify your request at the end of the morning session to make a proffer of testimony from K.H. concerning the counseling records. I denied that because the counseling records I had deemed to be inadmissible for all purposes in this case. The records are there for the appellate court to look at. If they determine that those records are admissible, whatever

proffer you can make, it's in that record and you can discuss it on appeal. The same as to your second request to make a proffer concerning counseling records. Again, the counseling records are available to the appellate court for review. I have determined they are inadmissible for all purposes in this case. If the appellate court determines that are admissible, they can review them and you can make whatever argument you wish at that time.

MR. ROSENZWEIG: May I respond?

THE COURT: Okay.

MR. ROSENZWEIG: Thank-you. . Your Honor, I wanted just the counseling, but I wanted to further inquire of her, even if I didn't get the counseling records about -- more about the course of counseling, because you have restricted in chambers before trial -- restricted what I had asked about --

THE COURT: What I told you at the in chambers hearing was you could ask her, which you did, if she went to counseling, and that's all you can do.

MR. ROSENZWEIG: And what I was seeking to do was make a proffer to delve further into the course of her counseling.

THE COURT: And that's not admissible --

MR. ROSENZWEIG: And whether I have the records or not, that's what I wanted to make a proffer and it is our position that they were made especially relevant now even if you had been correct before now that your continue to adherence to your ruling, we respectfully say it would be erroneous because it was apparently as a result of the further counseling that she made claims that she had never made before. Even though a year had lapsed, approximately, between the first interview and the second interview, in which she was in counseling, and in fact, it was the fact of the alleged disclosures of what was claimed in the Affidavit to be the disclosures that caused the second interview. And the second interview she still denied stuff which she --

THE COURT: I'm going to stop you at this point. You're making conclusions that may or may not be correct that's not in the record. What I ruled was that you were not allowed to ask her questions about her course of counseling because that, in my opinion, was not admissible before and remains not admissible at the end of her testimony and I am not going to accept any further argument. The matter is over with. That's my ruling. I just want to clarify as to what my ruling was.

(R 518-525)