Cite as 2018 Ark. 99

SUPREME COURT OF ARKANSAS

No. CR-16-1024

	Opinion Delivered: March 29, 2018
CHRIS BEASON TAFFNER APPELLANT	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. 72CR-15-16-6]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE MARK LINDSAY, JUDGE
	AFFIRMED IN PART; REMANDED FOR FURTHER PROCEEDINGS.

COURTNEY HUDSON GOODSON, Associate Justice

Appellant Chris Beason Taffner (Taffner) appeals his conviction on two counts of rape and three counts of sexual assault in the second degree, for which he was sentenced to an aggregate term of 140 years' imprisonment. For reversal, Taffner argues that the circuit court erred when it (1) denied his motion for directed verdict, (2) excluded the testimony of Jonathan Zovak, (3) prevented him from conducting a reasonable cross-examination of one of the victims, and (4) denied his motion for a new trial after a juror had concealed her position as a court-appointed child advocate during voir dire. We affirm in part and remand for further proceedings.

I. *Background*

Taffner and his wife were adoptive parents to AT, BT, KT, JT, and NT, five children who came into the Taffner home through the foster-care system. Taffner and his wife also periodically fostered other children. The couple fostered MG from October 2014 to December 2014. In December 2014, BT overdosed on Oxycontin, which was provided to her by MG. MG was sent to a drug-treatment facility, and when she returned, the Taffners told her that they could no longer foster her. MG later alleged that Taffner had touched her breasts on two occasions. Consequently, the State charged Taffner with second-degree sexual assault based on MG's allegations. MG was at least fourteen at the time of the alleged offense. During an investigation of MG's allegations, BT alleged that Taffner had inappropriately touched her, and also that he had forcibly penetrated her and forced her to perform oral sex on him. Taffner was charged with two counts of rape and one count of second-degree sexual assault for the incidents involving BT, who was thirteen at the time of the alleged offense. KT initially denied any inappropriate touching or sexual contact but later alleged that Taffner often touched her breasts. Taffner was charged with one count of second-degree sexual assault for doing so when KT was under the age of fourteen.

On January 8, 2016, Taffner filed a motion in limine in which he sought to use specific instances of dishonesty to impeach the juveniles' testimony pursuant to Arkansas Rule of Evidence 608(b) and to offer evidence as to their reputation for honesty. The court held a hearing on the motion on January 12, 2016. At the hearing, Taffner argued that he should be allowed to question BT about false charges she had made against her

biological father that had been investigated but found to be unsubstantiated. The hearing also involved other issues and ended without a ruling regarding BT's questioning.

On March 11, 2016, Taffner filed a motion to compel production of a Department of Human Services (DHS) file, which Taffner argued contained a report of a sexual-abuse allegation BT made against her biological father that was found to be unsubstantiated. That same day, the court ordered production of the file for an in camera review of its impeachment or exculpatory value. The file was brought to the court, and another hearing was held later that day. At that hearing, the court considered whether the DHS file should be produced to Taffner. The court noted that BT's biological father's rights had been terminated, and in the termination order, Judge Stacey Zimmerman stated that BT had disclosed sexual abuse by her father. The court found there was no evidence that BT had recanted her allegations by the time the termination order was entered, and the court further found "there is no need for me to examine the juvenile file." The court asked the State to prepare a written order reflecting the ruling.[1] The hearing then ended.[2]

Taffner's trial began on March 14, 2016, and ended on March 16, 2016. On the second day of the trial, the prosecution called BT as a witness. Before BT testified, the court excused the jurors, and the parties revisited the issue of which questions Taffner

[1] The order was signed on March 15, 2016, and entered the next day.

[2] Although BT's father's parental rights were terminated, Judge Zimmerman relied on Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(*a*) (Supp. 2009), and § 9-27-341(b)(3)(B)(vii)(*a*), which involve grounds for termination other than sexual abuse. The court did not rely on § 9-27-341(b)(3)(B)(vi), which provides for immediate termination of parental rights when the juvenile has been the victim of sexual abuse perpetrated by the parent.

would be allowed to ask her. During the hearing, the court noted that Ark. R. Evid. 411, known as the rape-shield rule, prevented Taffner from questioning BT about her prior allegation of sexual abuse if BT continued to assert that the allegation was true. However, the court did allow BT to be questioned as to the truthfulness of her prior allegation against her biological father. BT was therefore questioned outside the presence of the jury, and she testified that her allegations of sexual abuse by her biological father were false. After BT's testimony, the circuit court ruled that when the jury returned Taffner could ask BT if she made an allegation against her biological father, if it was true, how long ago the allegation was made, and how old she was at the time. The court further said, "And that's it. Nothing like records that we've talked about in the past and then that's going to be the end of that subject matter." The trial resumed, and BT was questioned accordingly about her prior allegation against her biological father. When the defense asked BT if the prior allegation was true she said, "Now that I know the terms that they use, it is not true."

At the close of the State's case, Taffner moved for a directed verdict with respect to the charge relating to MG. Taffner argued that MG was not a credible witness, but the court denied his motion. The trial proceeded to Taffner's presentation of his defense.

In his defense, Taffner sought to introduce the testimony of Jonathan Zovak, who would have stated that MG had a reputation for dishonesty. Taffner planned to introduce Zovak's testimony through Ark. R. Evid. 608(a), which allows the attack of a witness's reputation for truthfulness. The State argued that Zovak's testimony was barred by Ark. R. Evid. 411, the rape-shield rule, because Zovak was a convicted sex offender, and MG was

his victim. The State reasoned that Zovak would need to be impeached by his conviction, which would then violate Rule 411's prohibition of the use of a victim's prior sexual conduct to attack a witness's credibility. According to the State, Taffner was attempting an "end-around" the rape-shield rule. Taffner argued that he was attempting to introduce the evidence through Rule 608(a) and did not plan to reference MG's sexual history; however, the court ruled Zovak's testimony inadmissible under Rule 411.

At the close of his case-in-chief, Taffner again moved for a directed verdict. Taffner raised a new argument that the State had failed to prove that his alleged touching of MG involved forcible compulsion. Taffner argued that without evidence of forcible compulsion, he could not be convicted of second-degree sexual assault for touching MG because she was over the age of fourteen at the time of the alleged offense. The circuit court denied Taffner's motion, and he was convicted of all counts.

II. *Points on Appeal*

A. Sufficiency of the Evidence

An appeal from the denial of a motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Brunson v. State*, 368 Ark. 313, 245 S.W.3d 132 (2006). Therefore, due to double-jeopardy concerns, we first address Taffner's argument that the circuit court erred by denying his motion for a directed verdict. *Hicks v. State*, 2017 Ark. 262, 526 S.W.3d 831.

Taffner argues that because MG was at least fourteen at the time of the alleged offense, the state failed to offer substantial evidence of forcible compulsion as required by

Ark. Code Ann. § 5-14-125(a)(1) (Repl. 2013). That statute prohibits a person from engaging in sexual contact with another person by forcible compulsion. Sexual contact includes an act of sexual gratification involving the touching of the breast of a female. Ark. Code. Ann. § 5-14-101(10). Forcible compulsion is defined by Ark. Code. Ann. § 5-14-101(2) to include "physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person." Arkansas Rule of Criminal Procedure 33.1 requires a challenge to the sufficiency of the evidence to be made by a motion for a directed verdict at the close of the State's case-in-chief and at the close of the defense's case-in-chief. Rule 33.1 requires the motion to "state the specific grounds therefor." Taffner moved for a directed verdict at both stages. However, Taffner did not argue a lack of evidence of forcible compulsion at the close of the State's case. The only argument he made with respect to MG was that she was not a credible witness. In fact, when he renewed his motion for a directed verdict at the close of the defense case, Taffner's attorney specifically said that he had a new argument. Taffner's attorney then went on to argue that there was no proof of a threat of serious bodily injury, death, or kidnapping of MG. The circuit court also recognized Taffner's "new argument" in denying the second motion. We agree that Taffner presented a new argument that the State failed to provide substantial evidence of forcible compulsion and therefore hold that it was not preserved for review.

B. Zovak's Testimony

Taffner next argues that the circuit court abused its discretion by excluding the testimony of Jonathan Zovak. According to Taffner, Zovak would have testified as to MG's

reputation for dishonesty pursuant to Ark. R. Evid. 608(a), and Taffner argues that the testimony was not excludable under Ark. R. Evid. 411. Zovak had been convicted of fourth-degree sexual assault of MG. The State argued that Zovak should not be allowed to testify because in order to impeach Zovak, the State would be required to violate Ark. R. Evid. 411 by introducing evidence of Zovak's criminal history, which would in turn reveal MG's sexual history. The circuit court agreed with the State in excluding the testimony.

A circuit court's evidentiary ruling will not be reversed in the absence of an abuse of discretion and a showing of prejudice. *McKeever v. State*, 367 Ark. 374, 240 S.W.3d 583 (2006). Taffner argues that the testimony was allowed under Rule 608 and was not prohibited under Rule 411. Taffner further argues the court's erroneous ruling prejudiced him because the State's entire case turned on the credibility of the witnesses. The circuit court ruled that Rule 411 specifically excludes reputation evidence, that Zovak would testify as to MG's reputation, and that as a result, he could not testify. Under Rule 608(a), a witness's reputation for truthfulness may be attacked in the form of opinion or reputation evidence. However, Rule 411(b) provides:

> [O]pinion evidence, reputation evidence, or evidence of specific instances of the victim's prior sexual conduct with the defendant or any other person, evidence of a victim's prior allegations of sexual conduct with the defendant or any other person, which allegations the victim asserts to be true, or evidence offered by the defendant concerning prior allegations of sexual conduct by the victim with the defendant or any other person if the victim denies making the allegations is not admissible *by the defendant*, either through direct examination of any defense witness or through cross-examination of the victim or other prosecution witness, to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose.

(Emphasis added.)

Here, Zovak's testimony could best be impeached by referring to his conviction. Taffner argues that Zovak's testimony was not excludable under Rule 411 because the rule prevents the defendant, not the State, from introducing evidence of a victim's prior sexual conduct. Taffner further argues that he was planning to attack MG's reputation for honesty, not her sexual history.

We hold that the circuit court erred by excluding Zovak's testimony under Rule 411 for the following reasons. First, the plain language of Rule 411 prohibits the defendant, not the State, from introducing evidence of a witness's sexual history. We construe court rules using the same means and canons of construction used to interpret statutes. *City of Fort Smith v. Carter*, 364 Ark. 100, 216 S.W.3d 594 (2005). The first rule in considering the meaning and effect of the statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. In other words, if the language of the statute is plain and unambiguous, the analysis need go no further. *Id.* The unambiguous language of Rule 411 demonstrates that it applies to the defendant, not the State. Therefore, the State could have impeached Zovak with his conviction involving MG without violating Rule 411. Second, although the State could have impeached Zovak with the conviction involving MG, it was not required to do so. Finally, the State could have impeached Zovak with evidence of his past sexual

assault conviction without reference to the fact that MG was the victim. Therefore, Zovak's testimony should have been allowed.

Although the circuit court erred by excluding Zovak's testimony, our analysis does not end there because we must still determine if the error resulted in prejudice. *See Edison v. State*, 2015 Ark. 376, 472 S.W.3d 474 (holding prejudice is not presumed by an evidentiary ruling but must be demonstrated). We conclude that it did not. Zovak would have testified that MG had a reputation for dishonesty. Although Zovak's testimony was excluded, Taffner was allowed to present essentially the same testimony from Donald "Catfish" Holt, a neighbor who testified that MG was a "schemer" who tried to blame others and get her way, while acting as if she was an innocent child. Zovak's testimony would have been cumulative to Holt's. *See Lacy v. State*, 2010 Ark. 388, 377 S.W.3d 277 (holding that the exclusion of cumulative evidence was not an abuse of discretion). We therefore hold that there was no prejudice in its exclusion.

C. Cross-Examination of BT

Next, Taffner argues that he was prevented from conducting a reasonable cross-examination of BT for two reasons. First, Taffner argues that the DHS file he requested was suppressed in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Second, Taffner argues that, in violation of the Sixth Amendment's Confrontation Clause, he was prohibited from inquiring into the reasons BT made a false allegation of sexual abuse against her biological father. Because Taffner's cross-examination arguments raise constitutional questions, our standard of review is de novo. *Davis v. State*, 2011 Ark. 373.

1. *The DHS file*

Taffner's request for the DHS file was denied by the circuit court. Although the court conducted an in camera hearing before the trial to determine whether the information contained therein should be disclosed to Taffner, the court concluded that it would not be disclosed. At that point in the proceedings, the court believed that BT had not recanted her allegation that her biological father had sexually abused her. The court ruled that Taffner's questioning would be limited to whether BT had made an allegation of sexual abuse against her biological father, if the allegation was true, and how long ago it happened. The court specifically ruled that no documentation would be allowed.

a. File access

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the defendant was charged with sexual offenses against his minor daughter. The matter was referred to the state's Children and Youth Services (CYS) agency for investigation, and the defendant sought in discovery the records related to the charges at issue in the case, as well as records from a separate report that the defendant's children were being abused. The State refused to turn over the records, despite the existence of a state statute that allowed such records to be disclosed to a court. Although the lower court refused to order production of the records, the Pennsylvania Supreme Court concluded that the trial court's refusal to order production of the records violated the United States Constitution's Confrontation Clause and the Compulsory Process Clause. Pennsylvania appealed. The United States Supreme Court determined that the circuit court should have at least reviewed the file to determine the

materiality of its content. The Supreme Court did not agree with Ritchie's argument that he was entitled to access to the entire file. The Court concluded that Ritchie's rights could be protected by remanding to allow the trial court to review the file to determine whether it contained information that probably would have changed the outcome of the trial. Specifically, the court held:

> We therefore affirm the decision of the Pennsylvania Supreme Court to the extent it orders a remand for further proceedings. Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial. If the records maintained by CYS contain no such information, or if the nondisclosure was harmless beyond a reasonable doubt, the lower court will be free to reinstate the prior conviction.

Id. at 58.

Previously, we have said that unfounded reports of sexual abuse contained in DHS records could not be disclosed to a criminal defendant. *Fox v. State*, 314 Ark. 523, 863 S.W.2d 568 (1993); *Douthitt v. State*, 326 Ark. 794, 935 S.W.2d 241 (1996). However, those cases interpreted prior statutory law, which did not allow the disclosure to defendants of unfounded reports of sexual abuse contained in DHS records. Current Arkansas law allows the disclosure in a criminal case of unsubstantiated reports of child maltreatment contained in DHS records. Ark. Code Ann. § 12-18-910 (Supp. 2017). Just as in *Ritchie*, where the Pennsylvania statute allowed for disclosure, our statute does as well. Therefore, we believe that *Ritchie* is directly on point in reviewing this matter. Based upon *Ritchie*, we hold that the circuit court erred by failing to review the DHS file to determine whether it contains information that was material to Taffner's defense.

b. Remedy

Because we find that the circuit court erred with respect to the DHS file, we must determine the appropriate remedy. In doing so, we again look to *Ritchie*. Although Taffner suggests that the remedy is to grant him a new trial, we disagree. In *Ritchie*, the Supreme Court observed that the Pennsylvania statute did not prohibit all disclosure of CYS records. Because the Pennsylvania statute allowed disclosure of CYS records pursuant to a court order, the Supreme Court concluded that the statute did not prevent all disclosure in a criminal prosecution. *Id.* Our statute, like the Pennsylvania statute in *Ritchie*, allows disclosure of unsubstantiated reports to the parties in a criminal case under the terms of a protective order issued by the court. Ark. Code Ann. § 12-18-910(f)(4). We believe that the approach set forth in *Ritchie* is applicable. This matter must be remanded so the circuit court can conduct an in camera review of the file and determine if Taffner is entitled to any of the information it contains.[3]

2. *Questioning permitted*

Taffner also argues that he was not allowed to conduct a reasonable cross-examination of BT because the court limited him to asking her whether she previously made a false allegation of sexual abuse against her biological father, and when that charge

[3] Justice Hart in dissent observes that suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment. Although she finds a *Brady* violation in Taffner's lack of access to the DHS file, we believe that determination is premature in light of the fact that the file was never reviewed and the actual contents of the file are not part of the record.

was made. Taffner generally alleges that he should have been allowed to inquire more fully into the circumstances of BT's false allegation.

The Sixth Amendment's Confrontation Clause provides a criminal defendant the right to physically face those who testify against him, and the right to conduct effective cross-examination. *Davis*, *supra*. The denial of a defendant's right to expose the jury to facts from which jurors could appropriately draw inferences relating to a witness's reliability is a constitutional error. *Winfrey v. State*, 293 Ark. 342, 738 S.W.2d 391 (1987). Here, Taffner was able to question BT about the truth of her prior allegation. BT testified, although with some equivocation, that her allegation against her biological father was false. Taffner was therefore able to successfully impeach BT regarding the allegation. Based on the record before us, we cannot say that the circuit court denied Taffner the right to expose the jury to facts from which the jurors could draw inferences relating to BT's reliability. *See id*. We do, however, recognize that Taffner's argument for more extensive questioning of BT may have been different depending on the information contained in the DHS file.[4] On remand, if the DHS file contains evidence material to Taffner's defense, he may argue that the evidence demonstrates a need for additional questioning of BT.

D. Juror misconduct

[4] Outside the presence of the jury, BT testified that the allegation she made against her biological father was false. At trial, BT's testimony was equivocal, but Taffner's attorney did not make any further argument at that time that additional questioning should be allowed.

Finally, Taffner argues that the circuit court abused its discretion when it denied his motion for a new trial based on a juror's failure to reveal in voir dire her role as a court-appointed child advocate. After the trial, Taffner learned that juror Michelle Mullins was a volunteer with Court Appointed Special Advocates for Children (CASA). Taffner then filed a motion for a new trial, arguing that Mullins concealed this relationship during voir dire. The decision whether to grant or deny a motion for new trial lies within the sound discretion of the circuit court, and this court will reverse only if there is a manifest abuse of discretion. *Harrison v. State*, 371 Ark. 652, 269 S.W.3d 321 (2007). A circuit court's factual determinations on a motion for a new trial will not be reversed unless clearly erroneous, and the circuit court determines issues of credibility. *Smart v. State*, 352 Ark. 522, 104 S.W.3d 386 (2003).

The party moving for a new trial bears the burden of proving, first, that juror misconduct occurred, and second, that there was a reasonable probability of resulting prejudice. *Holsombach v. State*, 368 Ark. 415, 246 S.W.3d 871 (2007). The court does not presume prejudice but rather presumes that jurors are unbiased and qualified to serve, and the appellant has the burden to show otherwise. *Holloway v. State*, 363 Ark. 254, 213 S.W.3d 633 (2005).

Taffner faults Mullins for not responding to two questions asked of venire members. Mullins was silent when asked if she had "been employed by or are associated with any party, witness, or attorney." Mullins was also asked if she "had any prior contact with law enforcement." Mullins's silence in response to the questions does not amount to

misconduct. First, Mullins was not a state employee. Second, if the court were to conclude that Mullins's work with CASA was an association with the State, virtually anyone who had any involvement with the State or courts could be prevented from serving on a jury if asked these specific questions. Third, Mullins's incidental contact with court bailiffs during her work with CASA is not sufficient to establish prior contact with law enforcement. Further, Taffner has not established a reasonable probability of prejudice. Therefore, Taffner is not entitled to reversal on this point.

III. *Conclusion*

In sum, we affirm the circuit court's rulings denying Taffner's motions for a directed verdict and for a new trial. The circuit court erred by not allowing Zovak's testimony, but we conclude that there was no prejudice. The circuit court also erred by not conducting an in camera review of the DHS file to determine if it contained information material to Taffner's defense; therefore, we remand for further proceedings. On remand, the circuit court must conduct an in camera review of the DHS file pursuant to the procedure set forth in *Ritchie*. If the file contains "information that probably would have changed the outcome" of the trial, Taffner should receive a new trial unless "the nondisclosure was harmless beyond a reasonable doubt." *Ritchie* at 58. If the file contains no evidence likely to change the outcome of the trial, or if the nondisclosure is harmless beyond a reasonable doubt, the circuit court should leave the verdicts undisturbed, as prescribed by *Ritchie*.

Affirmed in part; remanded for further proceedings.

WYNNE, J., concurs in part and dissents in part.

BAKER and HART, JJ., dissent.

ROBIN F. WYNNE, Justice, concurring in part and dissenting in part. I join the majority opinion in all respects except that I would go further regarding the cross-examination of BT. In addition to remanding for an *in camera* review of the DHS file as required by *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), I would reverse and remand for a new trial based on the improper limitations the circuit court placed on the cross-examination of BT. Therefore, I respectfully dissent in part for the reasons outlined below.

The Sixth Amendment to the United States Constitution and art. 2, § 10 of the Arkansas Constitution guarantee the right of an accused in a criminal prosecution to be confronted with the witnesses against him. The right of confrontation provides two types of protection for defendants in criminal cases: the right to face those who testify against them and the opportunity to conduct effective cross-examination. *Gordon v. State*, 326 Ark. 90, 94, 931 S.W.2d 91, 93 (1996). The right to cross-examine is not unlimited, and a circuit court has wide latitude to impose reasonable limits on cross-examination based upon concerns about confusion of issues or interrogation that is only marginally relevant. *See id.* To determine whether the restrictions placed on the right to cross-examine a witness rise to the level of a constitutional deprivation, we look to the record as a whole to determine if the restrictions imposed created a substantial danger of prejudice to appellant. *Id.*

As one of three alleged victims, and as the one leveling the most serious charges (rape), BT's testimony was critical to the State's case. With no physical evidence to support the charges, BT's credibility was key. Applying Arkansas Rule of Evidence 608(b),[5] the circuit court found that the prior false allegation of sexual abuse was relevant to BT's credibility. However, the court ruled that the defense's cross-examination would be limited to whether she had made an allegation against her biological father, whether it was true, and how long ago the allegation was made. This drastic limitation on the scope of cross-examination resulted in appellant being deprived of a reasonable cross-examination of BT. A prior, false allegation of sexual abuse by BT is probative of her character for untruthfulness, and particularly so in this case because it hinged on BT's credibility in alleging rape and sexual abuse by her adopted father. To compound this problem, BT testified outside the presence of the jury that her allegation against her biological father was false, but she did not make the same unqualified admission in front of the jury when she instead stated, "Now that I know the terms that they use, it is not true." This is not such a resounding impeachment that appellant "could hardly hope for more," as the State argues.

---

[5] Ark. R. Evid. 608, Evidence of character and conduct of witness, provides in pertinent part:

> (b) *Specific Instances of Conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . . .

Rather, in my view, the circuit court abused its discretion by not allowing any questioning regarding the similarity of the prior false accusation to the crimes charged.

I would hold that appellant has shown both a violation of his right to a reasonable cross-examination of BT and prejudice. Accordingly, I would reverse and remand for a new trial.

KAREN R. BAKER, Justice, dissenting. I dissent from the majority's decision that this case must be reversed and remanded for the circuit court to review the DHS file to determine whether it contains information that was material to Taffner's defense. Because Taffner failed to proffer the DHS file, I would affirm the circuit court's ruling.

In *Brown v. State*, 368 Ark. 344, 347, 246 S.W.3d 414, 416 (2007), during cross-examination of the victim, Brown discovered that the State had a calendar where the victim and the victim's mother had set out events and dates related to the alleged crimes. Brown sought access to the calendar and the circuit court denied Brown access and ruled that calendar was work-product. On appeal, Brown asserted that the circuit court erred, but we were unable to reach the merits because Brown did not proffer the calendar. We explained,

> we cannot reach the issue of whether the calendar contained work product because Brown did not proffer the calendar and make it part of the record. Where evidence is excluded by the circuit court, the party challenging that decision must make a proffer of the excluded evidence at trial so that this court can review the decision, unless the substance of the evidence is apparent from the context. *Arnett v. State*, 353 Ark. 165, 122 S.W.3d 484 (2003). The substance of the evidence in this case is not apparent. The evidence concerning what is written on the calendar is conflicting; however, this court cannot review a document that is not before it.

Here, as in *Brown*, the substance of the evidence is not apparent. Because Taffner failed to proffer the DHS file, it is not part of the record before this court for us to review.

Further, although I agree that the circuit court erred in failing to review the DHS file, there is no way for us to determine whether Taffner was prejudiced by this error, when the DHS file was not proffered. Here, the substance of the evidence is not apparent and there is no way for this court to determine whether any evidence material to Taffner's defense was contained in the file. In fact, it is apparent that no exculpatory evidence could possibly be contained in the file and the only possible material evidence that could be contained in the DHS file would be impeaching. Even if impeaching evidence is contained in the file, it is clear that it would not be admissible as extrinsic evidence. Ark. R. Evid., 613(b) (2017). Because Taffner was able to ask in cross-examination if the allegations B.T. made against her biological father were true, and she admitted that the allegations were not true, Taffner was allowed to impeach B.T.'s credibility in the manner provided for by the Rules of Evidence and nothing contained in the DHS file could have been used as impeaching evidence as it would have been extrinsic evidence. Because it is not apparent that material evidence was contained in the DHS file and the file was not proffered, I would affirm the circuit court.

JOSEPHINE LINKER HART, Justice, dissenting. Because the majority opinion declines to address an easily identifiable *Brady* violation, ignores an entirely unreasonable restriction of a key witness's cross-examination, and then returns this case to the trial court in a manner allowing for it to be discretely and improperly disposed of without any

mechanism for appellate review, I must dissent. Each of Taffner's arguments on appeal are tailored to support the broader assertion that he did not receive a fair trial below, an assertion that is inescapably correct. The jury in this case simply was not presented with all the evidence it should have been, and we cannot afford confidence to its verdict. Taffner has already established that he has a right to a new trial, and this right does not hinge upon what the trial court represents is or is not contained in the DHS file on remand.

Background

For a full understanding of this case, it is necessary to recount several of the events that transpired below, many of which are not mentioned in the majority opinion. Before trial, Taffner filed a motion to compel the State to produce a "DHS File" containing reports from a Maltreatment Act investigation (the "Maltreatment Investigation Reports") of prior allegations of sexual abuse that one of the complaining witnesses, BT, had levied against her biological father, Chris Murray. The prosecution has access to the Maltreatment Investigation Reports pursuant to Ark. Code Ann. § 12-18-910, but a defendant cannot obtain access to those same reports without a court order so permitting. The Maltreatment Act investigation resulted in an "unsubstantiated" finding, where the burden of proof for a "true" finding was only a preponderance of the evidence. During the pretrial hearing that took place after the DHS file was delivered to the circuit court's chambers pursuant to Taffner's motion to compel, the circuit court announced that it would not even look at the DHS file or allow Taffner to see any of its contents.

The circuit court based this decision upon its purported belief that BT's prior allegations against Mr. Murray were not actually false. To support its purported belief, the circuit court relied on the past decision by the Washington County Juvenile Judge to terminate Mr. Murray's parental rights in a dependency-neglect case. This termination of parental rights ("TPR") order was based at least in part on Juvenile Judge Stacey Zimmerman's finding that BT had "disclosed sexual abuse by father." The circuit court stated that it had *spoken to Judge Zimmerman* between the time the file was ordered to be delivered and the time the hearing began, and added that Judge Zimmerman would have accounted for the Maltreatment Act investigation's unsubstantiated finding before terminating Mr. Murray's parental rights.

In response, Taffner reiterated that the Maltreatment Act investigation, unlike the dependency-neglect case, had resulted in an "unsubstantiated" finding. Additionally, Taffner requested to present the circuit court with a report from BT's counselor, reflecting that BT had since admitted that her allegations against Mr. Murray were false. The circuit court immediately and directly cut off Taffner's request with, "No, you may not." The circuit court would then conclude the hearing by ruling that Taffner would not receive access to any of the file's contents and that the circuit court had no cause to look at the file either.

Later, on the second day of trial, after Taffner had continued to press the issue by filing a motion for an in camera determination of relevancy, the circuit court held a hearing outside the presence of the jury during which BT testified about her prior

allegations against Mr. Murray. During her in camera testimony, BT admitted without qualification that her prior allegations against Mr. Murry had been false. However, the circuit court continued to deny Taffner access to any of the DHS file's contents. The circuit court then informed Taffner that he would only be permitted to ask BT three specific questions about her prior allegation on cross-examination: (1) whether she had made prior allegations of sexual abuse against her biological father, (2) when those allegations had been made, (3) whether the allegations had been untrue, and nothing more. The circuit court made it clear that "whatever the answer is, you're stuck with it," and reiterated that "[t]here will be no documentary evidence regarding these issues." When the trial resumed and defense counsel asked BT the questions permitted on cross-examination, BT offered a different response from that she had just given a few minutes prior: "Now that I know the terms they use, it is not true." Defense counsel did not ask BT any questions about the prior allegation beyond what the circuit court had permitted. Later that day, the circuit court signed an order memorializing its decision from the pre-trial hearing that Taffner had failed to establish that BT's prior allegations against Mr. Murray had been untrue. The same order was filed the following morning.

With regard to the trial itself, it suffices to say that this case lacked compelling physical evidence, and that the three complaining witnesses' versions of events and credibility as a general matter were subject to impeachment. Taffner's entire theory of the case at trial was that the three complaining witnesses were telling a coordinated lie, and any ruling that inhibited Taffner's ability to cross-examine the complaining witnesses'

credibility or versions of events would have been particularly impactful. The jury could not have convicted Taffner unless it believed the complaining witnesses' testimony.

The DHS File and Brady

I now turn to the DHS file and the Maltreatment Investigation Reports contained therein. The suppression of the DHS file in its entirety was a *Brady* violation, which warrants a new trial, not just an in camera review of the file. "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." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This court has observed that there are three components to a *Brady* violation: "(1) the evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued." *Lacy v. State*, 2010 Ark. 388, at 24–25, 377 S.W.3d 227, 241 (citing *Strickler v. Greene*, 527 U.S. 263 (1999)). The remedy for the suppression of *Brady* material is a new trial where the suppressed evidence would have been "material" to the defendant's claim of innocence, and the evidence meets the definition of materiality "if there is a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 281 (emphasis added). Materiality's "reasonable probability" definition is interpreted as follows:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of

> confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression *undermines confidence in* the outcome of the trial.

Kyles v. Whitley, 514 U.S. 419, 434 (1995).

The majority opines that *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) controls the resolution of this case. There, the Commonwealth of Pennsylvania had charged the defendant with sexually assaulting a minor living in his home, and the defendant sought access to a state CYS file relating to an investigation of a prior allegation levied by the same complaining witness. A Pennsylvania statute provided that the CYS files were to be kept secret unless a court ordered their production, and the defendant argued that he should have access to the CYS file because it "might" contain favorable evidence. The trial court declined to review the file in its entirety, and denied the defendant access to the file. On appeal, the *Ritchie* Court provided a mechanism through which a trial court can determine whether certain information in the State's possession, information that is kept secret pursuant to state law, would qualify as *Brady* material that must be disclosed to the defense, without curtailing the State's interest in confidentiality any more than is necessary. That mechanism is an in camera review by the trial court to determine whether the information or any part of it would be "material" to the defendant's claim of innocence. The *Ritchie* Court held:

> We find that Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for in camera review. Although this rule denies Ritchie the benefits of an "advocate's eye," we note that the trial court's discretion is not unbounded. If a defendant is aware of specific

> information contained in the file (e.g., the medical report), he is free to request it directly from the court, and argue in favor of its materiality. Moreover, the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.

Id. at 60.

Similar to Pennsylvania's CYS files in *Ritchie*, the Maltreatment Investigation Reports at question in this case are subject to an Arkansas confidentiality statute, and similar to the trial court in *Ritchie*, the circuit court in this case declined to even conduct an in camera review of the DHS file containing the Maltreatment Investigation Reports. This is where the majority halts its analysis, concluding that this case is just like *Ritchie* and that we need only return it to the trial court for an in camera review of the DHS file, which will then determine whether Taffner receives a new trial.

The majority's conclusion ignores the fact that all *Ritchie* represents is a mechanism to facilitate due process, a mechanism that is inapplicable to the case at bar. It is important to note that, in *Ritchie*, the defendant had no idea whether the CYS file in question actually contained favorable evidence, only that it might. *See* Brief for Petitioner at 7, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (defense counsel arguing to trial court that "(t)here could be defense witnesses disclosed by their records here," that "(he)'d like to see the doctor's report," which he thought to be contained in the CYS file (although he had no idea what the report reflected), that "[t]here could be matters in there that could be favorable to the defendant," etc.). Indeed, the Commonwealth of Pennsylvania

characterized the defendant's efforts as a "fishing expedition" in its brief. *Id.* at 12, 22. There is nothing in *Ritchie* to suggest that a defendant is not entitled to a given piece of information if he can establish its materiality independent of an in camera review, in which case a new trial is required for the nondisclosure of that piece of information. *See Brady*, *supra* (nondisclosure of material information requires a new trial). In fact, *Ritchie* specifically contemplates this scenario: "If a defendant is aware of specific information contained in the file (e.g., the medical report), he is free to request it directly from the court, and argue in favor of its materiality." *Ritchie*, 480 U.S. at 60.

This is precisely what occurred in the case before us. It is undisputed that the DHS file contained the Maltreatment Investigation Reports relating to BT's prior false allegation against her biological father, and these reports were plainly material to Taffner's claim of innocence. The juvenile judge had terminated the parental rights of Chris Murray, BT's biological father and an authority figure in her life, on the basis of BT's sexual-abuse allegations; and now Taffner, BT's adoptive father and another authority figure in her life, stands accused of BT's sexual-abuse allegations as well. The circuit court continued to deny Taffner his requested access to the Maltreatment Investigation Reports (or anything else in the DHS file) even after BT acknowledged through her in camera testimony both that she made the allegations against her biological father and that those allegations had been false.

At that point, the circuit court was inescapably apprised that the DHS file contained highly relevant impeachment evidence on BT in the form of the Maltreatment Investigation Reports. As such, there is no meaningful dispute as to whether Taffner had

established for the circuit court that the DHS file contained *Brady* material. *See United States v. Bagley*, 473 U.S. 667 (1985) (disavowing any difference between exculpatory and impeachment

evidence for *Brady* purposes); *see also Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006) ("[T]he *Brady* duty extends to impeachment evidence as well as exculpatory evidence."). The suppression of the Maltreatment Investigation Reports absolutely undermines confidence in the outcome of Taffner's trial, which lacked compelling physical evidence and turned upon the credibility of witness testimony. Therefore, remanding for an in camera review of the DHS file is not necessary to determine whether Taffner should receive a new trial because it is already apparent that the suppression of the Maltreatment Investigation Reports constituted a *Brady* violation; instead, this court should hold that Taffner is entitled to a new trial.[1]

Prejudice from the Brady *Violation*

[1]Justice Baker takes issue with the fact that Taffner never made a formal proffer of the DHS File to the circuit court, as generally required by Rule 103(a)(2). However, "there is no need for a proffer in either of two situations. First, there is no need for a proffer where the substance of the offer was apparent from the context within which the questions were asked. Second, . . . Rule 103(a)(2) does not contemplate a proffer of evidence when the information is unavailable to the cross-examiner." *Henderson v. State*, 279 Ark. 435, 439, 652 S.W.2d 16, 19 (1983). Here, obviously, the DHS File was not available to Taffner for a proffer, and at any rate, Taffner presented the circuit court with enough information to establish that it contained *Brady* material. As such, Taffner's argument is properly preserved. Acknowledging any argument to the contrary would allow the State to simply refuse to tell the defense the details of any undisclosed *Brady* material or why any such information could be favorable as a means of insulating that same *Brady* violation from appellate review.

Justice Baker suggests in her dissent that, even if the circuit court erred in this regard, "it is apparent that no exculpatory evidence could possibly be contained in the file and the only possible material evidence that could be contained in the DHS file would be impeaching," and that any such impeachment evidence would be inadmissible pursuant to Ark. R. Evid. 613(b). With all due respect, this position is without merit, for at least four reasons.

First, this assertion confounds a constitutional due process guarantee with an evidentiary rule. The question of whether certain information qualifies as *Brady* material, which must be provided to the defense whenever the prosecution becomes aware of its existence, is separate and apart from the question of whether all or part of that same information would be admissible at a jury trial for one evidentiary *purpose* or another (e.g., using circumstances of a person's prior bad acts to show that person's motivation to lie in a given situation, using a person's prior inconsistent statements to contradict that person's testimony given at trial, etc.) or in one evidentiary *form* or another (e.g., a documentary exhibit, witness testimony based upon personal knowledge, etc.). Investigating a case and trying a case simply are not the same thing.

Second, Rule 613(b) only addresses the use of a witness's prior inconsistent statements. Justice Baker's position presumes (1) that the only useful thing Taffner could have gotten out of the DHS File would be prior inconsistent statements from BT, and (2) that the only way to impeach a witness is through the use of a prior inconsistent statement; both of these presumptions are incorrect. The Child Maltreatment Act's plain language

shows that the DHS File would contain more than just BT's prior inconsistent statements.[2] Additionally, prior inconsistent statements are just one of many ways contemplated by the rules of evidence to show that a complaining witness's allegations should not be believed. *See, e.g.*, Ark. R. Evid. 404(b) (permitting use of person's prior acts to show bias, motivation, knowledge, common plan, etc.); Ark. R. Evid. 608(a) (addressing use of opinions or reputation relating to a witness's character for truthfulness); *see also Ritchie*, 480 U.S. at 51-52 ("Had the files been disclosed, Ritchie argues that he might have been able to

---

[2]The Maltreatment Investigation Reports would have involved, at the very least, interviews of:

> (1) The child as provided under § 12-18-608;
> (2) The parents, both custodial and noncustodial;
> (3) If neither parent is the alleged offender, the alleged offender;
> (4) Current or past healthcare providers when the allegation of child maltreatment was reported by a healthcare provider; and
> (5) Any other relevant persons.

Ark. Code Ann. § 12-18-605(a). The investigators would have had the authority to enter homes and schools, to obtain school, medical, and personnel records, to conduct criminal background checks, to conduct physical examinations, etc. Ark. Code Ann. §§ 12-18-609 through 615. Generally, the Maltreatment Investigation would have sought to ascertain:

> (1) The existence, cause, nature, and extent of the child maltreatment;
> (2) The existence and extent of previous injuries;
> (3) The identity of the person responsible for the child maltreatment;
> (4) The names and conditions of other children in the home;
> (5) The circumstances of the parents or caretakers of the child;
> (6) The environment where the child resides;
> (7) The relationship of the child or children with the parents or caretakers; and
> (8) All other pertinent data.

Ark. Code Ann. § 12-18-606.

show that the daughter made statements to the CYS counselor that were inconsistent with her trial statements, or perhaps to reveal that the girl acted with an improper motive. Of course, the right to cross-examine includes the opportunity to show that a witness is *biased*, or that the testimony is *exaggerated* or *unbelievable*.") (emphasis added).

Third, even if we were to address Taffner's cross-examination of BT about her prior allegations solely in terms of Rule 613(b)[3], that rule *allows* the use of extrinsic evidence of a prior inconsistent statement if "the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon[.]" Ark. R. Evid. 613(b). In this case, BT was afforded (and took advantage of) an opportunity to explain her prior allegations, but the circuit court, as discussed in greater detail below, did not permit Taffner to conduct any meaningful cross-examination of BT's explanation. Assuming that Rule 613(b) was applicable to the questions Taffner was permitted to ask BT about her prior false allegation, the only conditions necessary for allowing the use of

[3]Again, it is not clear what application Rule 613(b) would have in this context. Without the file, Taffner had no way to even know which of BT's statements at trial could be attacked with a prior inconsistent statement. The only legitimate "prior inconsistent statement" Taffner knew of during BT's cross-examination was that which she had given just a few minutes before during her in camera testimony. BT unequivocally admitted during her in camera testimony that her prior allegation had been false, but when asked the same questions in front of the jury, she attributed the prior statement to a lack of understanding. However, Taffner could not even make use of her in camera statement because the circuit court had already told him that he could go no further than the three questions prescribed.

extrinsic evidence that were not met in this case were those which would have protected Taffner's interests, i.e., those that the circuit court ignored.

Fourth, Justice Baker presumes that the DHS File would only consist of "impeachment" evidence pertaining to BT's prior allegations against Mr. Murray, to be distinguished from any "exculpatory" evidence that would pertain directly to BT's relationship with Taffner, but this is not necessarily the case. While we know that Mr. Murray's dependency-neglect case ended with the termination of his parental rights in 2011, and we know the Maltreatment Investigation resulted in an "unsubstantiated" finding, we do not know when the Maltreatment Investigation began or ended. If Taffner's and BT's adoptive relationship began with BT coming to Taffner's home as a foster child after being removed from Mr. Murray's home (a progression that is not at all uncommon in the foster care system), it is entirely possible that the Maltreatment Investigation took place after BT was already living with Taffner. Indeed, the Arkansas Court of Appeals opinion from Mr. Murray's appeal of Judge Zimmerman's TPR order reflects that one "Chris Tefner (sic)" had been serving as BT's foster father since August of 2010, and even testified at Mr. Murray's TPR hearing. *Murray v. Arkansas Dept. of Human Services*, 2011 Ark. App. 588, 4, 385 S.W.3d 897, 899. As such, it is entirely possible that the DHS File contains information pertaining directly to BT's relationship with Taffner.

Overall, the prejudice associated with the suppression of the DHS File in its entirety cannot be understated. This suppression did not just deprive Taffner of the file's use for purposes of Rule 613(b) or Rule 608(b). It deprived Taffner of the ability to adequately

investigate and develop his claim of innocence; it violated Taffner's right to cross-examine the witnesses against him; and it deprived Taffner of the file's use for literally any evidentiary or investigative purpose whatsoever.

Impermissible Restrictions of BT's Cross-Examination

Additionally, as Justice Wynne points out in his opinion, this *Brady* violation was further compounded when the circuit court limited Taffner's cross-examination of BT about the prior allegation to three pretailored questions in violation of the Sixth Amendment to the United States Constitution. The Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." U.S. Const. amend. VI. "Confrontation means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974). "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." 5 John H. Wigmore, *Evidence* § 1395, at 123 (3d ed. 1940). In *Davis*, a burglary case in which the trial court prevented the defendant from using the fact that a witness was on juvenile probation for burglary to impeach that same witness, the Supreme Court stated:

> On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless

> witness. . . On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. *Petitioner was thus denied the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.*

415 U.S. at 318 (emphasis added).

The excerpt from *Davis* above seems to be an eerily accurate characterization of what transpired during BT's cross-examination at Taffner's trial. The jury, without more, had no reason to believe that BT's prior false allegation was attributable to anything more than a misunderstanding. This case turned upon the credibility of witness testimony, and BT's story and credibility were already vulnerable to attack; additional inquiry into the circumstances of BT's past allegations could have made "the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676. As such, I feel that the circuit court's restrictions upon BT's cross-examination violated Taffner's right to confront the witnesses presented against him, and that he is thus entitled to a new trial.

Prejudice from the Suppression of Zovak's Testimony

Additionally, I disagree with the majority's assertion that Taffner was not prejudiced by the circuit court's refusal to allow Jonathan Zovak to testify about MG's reputation for untruthfulness in her home community. To support this assertion, the majority opinion hangs its hat on the fact that another one of Taffner's witnesses, Donald "Catfish" Holt, Taffner's neighbor and personal friend, was permitted to testify. Zovak, who had resided in MG's home community for eighteen years and who has never met Taffner, would have

testified to MG's reputation for untruthfulness in her home community. As the majority correctly points out, Holt testified that MG was a "schemer" who tried to blame others and get her way, while acting as if she was an innocent child; the majority suggests that this testimony would be "essentially the same" as Zovak's and that Zovak's testimony would thus be cumulative to Holt's.

This is incorrect. Holt offered testimony of his opinion as to MG's untruthfulness, but Zovak would have offered testimony of MG's reputation for untruthfulness in her home community; these are not the same types of evidence and cannot be characterized as cumulative to each other. *See* Ark. R. Evid. 608(a); *see also* John Wesley Hall, Jr., *Trial Handbook for Arkansas Lawyers* § 38:1 (18 ed. 2017) (outlining foundational requirements for reputation evidence). Furthermore, Zovak, unlike Holt, has never met Taffner, so Zovak's testimony would not be subject to the same inference of bias that Holt's testimony was. As such, the circuit court's refusal to allow Zovak to testify was plainly prejudicial to Taffner.

Juror Misconduct

Additionally, I reject the majority's intimation that no juror misconduct occurred in this case. Juror Mullins was a court-appointed special advocate ("CASA") in child welfare cases. Mullins could not have become a CASA without swearing an oath before a state circuit judge, and Mullins's responsibilities as a CASA brought her into state circuit courts with regularity—specifically before Judge Zimmerman, the same judge with whom the trial court was engaged in ex parte communications about the DHS File before Taffner's trial.

During voir dire, the members of the jury panel were asked whether they had any relationship with the State. Other members of the panel responded that they worked for the Department of Human Services, which required them to appear in state court for child welfare cases, but Mullins remained silent. During the hearing on Taffner's motion for a new trial, Mullins testified that she listened to the questions asked during voir dire "very carefully," and added that she felt the questions were aimed more at determining whether one was an "employee" of the State, as opposed to a CASA, which the circuit court felt would be better characterized as a "volunteer." The circuit court embraced this employee-volunteer distinction and denied Taffner's motion for a new trial.

This is incorrect. Mullins attempted to insulate her failure to disclose her own bias by shifting the blame to Taffner for failing to ask the correct questions to elicit her bias during voir dire. However, the voir dire questions were not tailored only to state employment, but more broadly to any relationship with the State, and Mullins's failure to disclose her relationship with the State was misconduct. As such, Taffner should have been entitled to a new trial if that misconduct resulted in even a "*reasonable possibility* of prejudice," which it certainly did. *See Henderson v. State*, 349 Ark. 701, 708, 80 S.W.3d 374, 378 (2002) (citing *State v. Cherry*, 341 Ark. 924, 20 S.W.3d 354 (2000); *Dillard v. State*, 313 Ark. 439, 855 S.W.2d 909 (1993); *Larimore v. State*, 309 Ark. 414, 833 S.W.2d 358 (1992) (emphasis added). The circuit court's refusal to grant Taffner a new trial on that basis was an abuse of discretion.

Improper Directive to the Circuit Court on Remand

Instead of granting Taffner a new trial, the majority returns Taffner's case to the same trial court that has repeatedly ignored its constitutional obligations so that the trial court may conduct an in camera review of the DHS file, at which point the trial court will only be obligated to grant Taffner a new trial if it discovers "information that (in the opinion of the circuit court) *probably would have changed the outcome of the trial*." Majority Opinion, pp. 15 (emphasis added). This is absolutely contrary to the Supreme Court's definition of materiality for purposes of *Brady*.

The majority cites *Ritchie* for its proposition that the circuit court need only grant Taffner a new trial if it discovers information in the file that "probably would have changed the outcome of the trial." *Ritchie* reiterated the Supreme Court's rule that evidence qualifies as "material" for purposes of *Brady* if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Ritchie*, 480 U.S. at 57. I do not dispute that the *Ritchie* opinion contains one single intimation that the defendant in that case would be entitled to a new trial if, on remand, the trial court determined that the file in question contained information that "probably would have changed the outcome of his [first] trial." *Ritchie*, 480 U.S. at 58. However, regardless of whether this phrasing could be attributed to the actual legal definition of materiality at the time *Ritchie* came down, the Supreme Court has since stated, in plain and unambiguous terms, that materiality's "reasonable probability" definition does not mean "more likely than not." Again, seven years after *Ritchie*, the Supreme Court held:

> The question is *not* whether the defendant would more likely than not have received a different verdict with the evidence, *but whether in its absence he received a fair trial*, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression *undermines confidence in the outcome of the trial*.

Kyles, 514 U.S. at 434 (1995) (emphasis added). One simply cannot argue that the disclosure of the Maltreatment Investigation Reports would not have created, at the very least, a reasonable probability of a different outcome in Taffner's trial. Their suppression does not just undermine confidence in the outcome of Taffner's first trial; it also undermines the public's faith in the judiciary as a general matter.

The cumulative effect of these errors is overwhelming. As such, I would reverse for a new trial.

Kezhaya Law, by: *Matthew A. Kezhaya*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.