PUBLIC

IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff / Appellee, vs. DAVID CHADWICK, Defendant / Appellant.	Case No: 20190818-SC

REPLACEMENT BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, FROM A CONVICTION ON ONE COUNT OF SEXUAL ABUSE OF A CHILD, A SECOND DEGREE FELONY,
BEFORE THE HONORABLE JUDGE JAMES TAYLOR

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ORAL ARGUMENT REQUESTED

Appellant is not currently incarcerated on this case

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INTRODUCTION

David Chadwick was charged with four identical counts of sexual abuse of a child. Neither the Information nor the jury instructions directed the jury to distinguish between the four counts. During deliberations, when the jury asked how to distinguish between the counts, specifically asking which conduct applied to which count, defense counsel warned that failure to specifically instruct the jury would be "an invitation for them to reach a non-unanimous verdict". The court felt that forcing the jury to decide the "specific allegations that were suggested would invade their provinces of finder of fact." R.1123. The trial court rejected the jury's request and overruled Chadwick's objection, instead concluding that it the jury only need decide "if the State has or has not proven beyond a reasonable doubt the occurrence of one, two, three, or four behaviors that violate the law as described in the evidence. The order of the counts is of no particular consequence." R.486. When the jury asked for a second time, the judge

doubled down, and informed the jury that comments by counsel in closing argument were "neither pleadings nor facts" and that the jury needed only determine "if the State has proven… that the statute was violated, in some way, once, twice three time (sic), or four times or if the State has failed to meet that burden of proof." R.435. The court then authorized the jury to refuse to "relate any specific act or incident to a particular count" if they so choose. R.435. These instructions, in light of the jury's questions and the other instructions, denied Chadwick the constitutional guarantee of a unanimous verdict.

A trial court's obligation to review privileged records *in camera* is not a one-time job. According to the United States Supreme Court, "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." *Pennsylvania v. Richie*, 480 U.S. 39, 60, 170 S.Ct. 989, 94 L.Ed.2d 40 (1987). Yet, as the trial progressed and the State presented a new theory that related to alleged trauma caused by Chadwick's conduct, the trial court here refused to disclose any further information because he was "not in a position to have digested the full import of those records". R.841. The court believed that because its original review was only "looking for the specific areas of question that were included… in the motion" there was "just no way [it] could comply with" the renewed request for new information. R.841. That refusal to comply with the constitutional duty and

obligation was an error.

STATEMENT OF THE ISSUES

1. Whether the trial court incorrectly declined to instruct the jury on the requirement that the jury's verdicts must be unanimous as to the specific act underlying each count. The issue was preserved by both by Chadwick's motion for directed verdict, and Chadwick's objection to the Court's instructions following the jury's repeated requests for information connecting a particular course of conduct with each count. R.897-898, R.435, R.486, R.1123-1125, R.1110-1111.

Appellate courts review claims of error in the jury instructions for correctness. *State v. Lambdin*, 2017 UT 46, ¶11, 424 P.3d 117. The right to a unanimous verdict is constitutional. Because this preserved error is constitutional, it cannot be considered harmless unless the government proves it is harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Bond*, 2015 UT 88, ¶¶36-46, 361 P.3d 104.

2. Whether the district court erred in its ruling on Chadwick's renewed motion for access to the complaining witness's mental health records under Rule 14(b) of the Utah Rules of Criminal Procedure and Rule 506 of the Utah Rules of Evidence. This issue was preserved by Chadwick's mid-trial renewed request. R.840-841.

Generally, "[w]hether a trial court errs in denying a motion for access to a victim's mental health records is a question of privilege." *State v. J.A.L.*, 2011 UT 27, ¶21, 262 P.3d 1. And this Court reviews the district court's ruling on privilege for correctness. *State v. Blake*, 2002 UT 113, ¶6, 63 P.3d 56.

However, in this instance the trial court did not decide a question of privilege because the court refused to review the records. Though there does not appear to be any case addressing the standard of review on this precise point, Chadwick asserts that the exercise of the trial court's duty is reviewed on appeal for correctness.

STATEMENT OF THE CASE

A. Facts of the case

Preface to the facts

Courts on appeal are required to "review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly." *State v. Holgate*, 2000 UT 74, ¶2, 10 P.3d 346. In this case, Chadwick was convicted in Count 1 but acquitted in Counts 2, 3, and 4. Because the jury was not instructed to connect each count with any specific alleged conduct, it is impossible on appeal to know which verdicts apply to which factual allegation. Because of this ambiguity, and because Chadwick was found not guilty on 3 of the 4 identical counts, this Court should view and recite the evidence in the light most favorable to his innocence on each count. Chadwick's denial of any inappropriate touching must be viewed in the

light most favorable to his acquittal. So too, F.L.'s testimony alleging abuse must be viewed in the light most favorable to Chadwick's acquittal.

Trial testimony

Aaron Tischner is a former Utah County Sheriff's who was referred to a report of a woman who has alleged she had been "inappropriately touch[ed]" by her landlord when she was "between the ages of nine to ten". R.755-757. Tischner contacted the F.L., interviewed her, and then introduced her to the victim services coordinator. R.758. In May of 2016, Tischner and another officer met with David Chadwick and interviewed him at his home in Eagle Mountain. R.758.

Tischner asked Chadwick if he knew F.L. R.764. Chadwick told the police he knew her and that she lived in his basement with her mother and siblings. R.764. When asked about his interactions with F.L., Chadwick told the police she was "a little standoffish with him." R.765. Chadwick confirmed that he did have a "game room or game/movie room" and that he watched movies and "just mainly played video games down there." R.765. When asked if he was ever asked to babysit F.L., Chadwick said it was usually her brother that watched her. R.765.

Chadwick confirmed that it was normal for kids to come watch movies and play games at his house. R.765. Tischner asked Chadwick if he had ever touched F.L. "on the breast, butt or vagina, and he stated that he had not." R.766. Tischner then asked if F.L. had touched him and Chadwick said that "if she was sitting on his lap that there would be contact" with her hand and his "penis area". R.766.

"Chadwick stated that sometimes she would just move [her hand] away and sometimes she would hold it there, and she could hold it there for about 10, 15 seconds." R.768. "Sometimes [he] would move it away [himself] or [he] would just ignore it." R.768.

Chadwick told the police he was not married and a virgin, "and because of that, any contact in that area he would get aroused and have an erection." R.768. Chadwick said that F.L. would regularly sit in his lap and if there was contact with his penis, he would become aroused, "but if she moved away and there wasn't any contact, then he would no longer be aroused." R.768-769. He "would either move her hand or ignore it." R.775.

The officers asked Chadwick about the "catch it game", something that had been described to them by F.L., and Chadwick denied it ever happened. R.770. When asked whether he ever pulled his penis out of his pants "and rubbed it against her butt", though he acknowledged that F.L. may "have felt it through her underwear", Chadwick "denied ever pulling it out." R.771, R.777. When asked about tickling F.L., Chadwick denied any tickling going on. R.771-772. Chadwick denied every touching F.L. in an inappropriate way. R.775.

F.L. lives in Lehi with her husband and three children. R.789. Chadwick lived "kitty-corner to [F.L.'s] best friends," the Baums, who she lived with in 1999. R.790-791. The Baum's introduced F.L. to Chadwick as "a really cool person and an awesome playroom or like TV room with a Nintendo 64 and bunch of movies

and an empty basement to roller skate in". R.792. Chadwick was in his 30's when they met, he was not married, had no children and lived alone. R.794-795.

F.L. says she would go to his house "[p]retty regularly" after that. R.795. She also lived in the house for a time. F.L.'s family "started staying there in 2000 upstairs off and on in his spare bedroom. Then [Chadwick] finished his basement and [they] moved downstairs, but [they] did go upstairs because it was the only kitchen". R.796.

F.L. reported "something extraordinary happened" once when Chadwick was watching her because she was sick, and her mother was working. R.808, R.813. F.L. claimed she was sitting on Chadwick's lap on the couch in the living room and claims "[she] felt something hard on [her] butt and [she] went to move off and he said, 'No, it's okay, you can stay.'" R.808, R.822. F.L. says she felt something touching her "right buttocks" as she sat sideways on his lap. R.809. As she got older, F.L. realized the hard thing was his penis. R.808.

F.L. testified that Chadwick later asked her if she "wanted to play with it", or if she wanted to "play a game." R.808. She claims Chadwick said, "Just try and catch it." R.809. F.L. got down on her knees in front of Chadwick. R.810. According to her testimony, Chadwick was holding his partially erect penis inside his sweatpants, and "he would move it under his pants." R.809-811. F.L. grabbed his penis with her hand, through the pants, three or four times. R.811. On one instance when F.L. grabbed his penis, Chadwick "thrust his hips", he "moved his pelvic

[sic]." R.811-812. The game stopped when there was a knock at the door. R.812. Chadwick jumped up and told F.L. to hide. R.812. Chadwick later told F.L. not to tell anyone because they would not understand. R.812.

F.L. described another incident where she was sitting in Chadwick's lap. R.814. It was dark and they were watching a movie in the TV room, sitting on the futon. R.815, R.821. F.L. was wearing on oversized tee shirt and underwear. R.816. She says she was chewing on or sucking on Chadwick's shirt, "and he had taken his penis out of his pants and was rubbing it up against [her] underwear." R.814. F.L. claimed Chadwick was rubbing his penis along her buttocks and her vagina. R.814. She did not see his penis but says she knew it was exposed because she could feel the skin on the skin of her leg. R.817.[1] It didn't last very long and ended when her mother opened the door. R.816. Even though Chadwick was reportedly doing this when F.L.'s mother opened the door, it "wasn't uncommon for [her] to be sitting on his lap, and [F.L.] had an oversized tee shirt, so there was nothing to be seen." R.816-817. When her mother came in F.L. "used it as an excuse to get up after a moment." R.817.

F.L. also said Chadwick would tickle her and slip his hand up her shirt. R.818, R.822. During that tickling, his hands would sometimes touch her skin under her shirt, "[a]long the rib cage and slip" on to her breast and nipple area.

[1] F.L. admitted she previously told the police there was never any skin-to-skin contact. R.831

R.818. F.L. does not remember how many times it occurred between the ages of 8 and 11. R.819. F.L. told the officers the tickling occurred when she was 9 or 10 and that she did not have breasts at that point. R.831. F.L. also said Chadwick would sometimes pin her to the ground and "grind his hips" while he tickled her. R.819.

F.L. says the tickling ended when she was about 11 when she changed her behavior, "started getting angry, telling him to stop." R.823-824. F.L. told her older sister "at least some of it when [she] was 11" and then "wrote it down when [she] was 12 while [F.L.] was staying with her [sister] in Phoenix." R.825. F.L. told her sister "about the game" and "about that evening" but doesn't "remember what else [she] had told her…" R.826.

In the years since, F.L. began seeing therapists and told them "parts of the details". R.833-834. When asked whether she had forgotten the details, F.L. denied saying she did not remember the details when meeting with her therapists. R.834. Instead, F.L. said she "did not want to talk about it a lot of the time because [she doesn't] like to talk about it, and [she] did tell them that." R.834. When confronted with the allegation that she had specifically told therapists at Wasatch Mental Health that she did not remember the details of sexual abuse, F.L. repeatedly challenged defense counsel with questions about which therapist he was referring to, but because of the limited information in the court's ruling, counsel was "not

sure." R.835.[2] F.L. said she told the therapists she couldn't remember the details of the abuse in order to avoid talking about them." R.844-845.

F.L. said she did find at least two therapists she trusted, Sandy Moody and "Brian" at Wasatch. R.836. She went to therapy to work through trauma, to receive coping skills. R.837. F.L.'s trauma was from F.L. had "been in a car accident" (R.838), "watched a cow get shot in the head" (R.842), and was abused by two other people "bad enough to be addressed in therapy" (R.843). F.L. claimed she engaged in "burning" and "cutting" and "pretty extreme self-harm", "[s]tuff that normal 11 year olds don't do" in response to the trauma she attributed to Chadwick. R.845.

Chadwick testified he lived in Eagle Mountain for 21 years. R.900. In 1999 he worked full-time with the Army National Guard as an Active Guard Reserve. R.900. Chadwick has a large video collection, about 1500 videos, of which 150 to 200 are Disney movies. R.901. He's been a fan of Disney movies since he was a kid and has been collecting them since he first got a job. R.902.

[2] [redacted]

Chadwick remembers F.L.'s family. R.902. "They were friends of the family that lived near" him. R.902. They were living in a neighbor's house when the family approached him "to see if [he] could put them up for a little while". R.902. Chadwick agreed to finish his basement for them, and during the construction they could live with him on the first floor. R.902. Before the construction was completed, F.L. and her family "spent a considerable time upstairs". R.913.

Chadwick knew F.L. R.904. "She was a friendly kid", "talkative, enjoyed life." R.904. F.L. did not come over to his house by herself before her family moved in. R.911. Chadwick and F.L. were friendly, and occasionally he "did watch movies with her", a "couple times a week" during that time period, and a few times a month he watched a movie with F.L. alone. R.904-905. F.L. would sit on Chadwick's lap "[m]aybe one time out of five that [they] were together." R.905. Chadwick doesn't ever remember watching a movie with F.L. in the evening. R.917.

Of those times, maybe "once in five times that she sat on [his] lap" F.L. would come in contact with his penis, and "[w]hen there's contact, [he] got an erection. It was just a physical response to the contact." R.905. Chadwick "felt no sexual stimuli about it. [He] didn't enjoy it. [He] didn't try to get her to touch [him]." R.905. He would "either push [the penis] out of the way or move her body so that her hand could move away from it." R.906. "There were a couple of occasions where [Chadwick] just ignored it and she removed her hand after a few

seconds." R.906. When F.L.'s "buttocks would brush up against his genital area" Chadwick would "either move her over to the other knee so there wouldn't be any contact, or [he'd] set her off to the side." R.906. He would move her away from his penis "and the arousal would go away." R.906.

Chadwick denied that the "catch it" game every occurred. R.907. "That never happened." R.907. Chadwick never directed F.L. to touch his penis, he never placed her hand on his penis, he never reached inside his pants and moved his penis around while F.L. was there, and he never took his penis out or rubbed it on any part of F.L.'s body. R.907.

Chadwick admits that he did tickle F.L. R.907. It included "just playing around and tickling her sides or under her arms" when she was between 8 and 11. R.908. But Chadwick denies ever touching her breasts or having any sexual contact with F.L. in any way. R.908.

B. Procedural history of the case

In the Information, David Chadwick was charged with 4 counts of Sexual Abuse of a Child, each a second degree felony. R.001-003. The Information does not associate each count with any specific act. Count 1 was alleged to have occurred "on or about May 1, 1999." R.001. Counts 2-4 were alleged to have occurred "on or about January 1, 2000." R.002. The probable cause statement in the information described that Chadwick put F.L. "on his lap and she could feel that he was having an erection," that he "had her touch his penis through the clothing",

"[h]e did this numerous times", and that Chadwick "would also take his penis and place his bare skin against the victim's underwear as she sat on his lap." R.002.

The district court held a preliminary hearing on June 21, 2017. During the hearing, F.L. testified that she had seen four therapists over the last few years. R.050. When asked whether she discussed the allegations against Chadwick with those therapists, the State objected that it was "dangerously close to the medical privilege" and the court sustained the objection. R.050.

Chadwick later filed a discovery motion asking the court for an order requiring the State to disclose the "[n]ames and contact information for any therapist seen by alleged victim" based on her testimony at the preliminary hearing. R.028. The State responded to the request and acknowledged that, although Chadwick had "only requested 'names and contact information' for the therapists, there is no reason to contact them other than to attempt to glean from them privileged information related to the alleged victim." R.096-097. The State argued that Chadwick had not met the required showing for an *in camera* review of F.L.'s privileged medical records. R.097. Chadwick responded by arguing that the State's position prematurely assumed that Chadwick intended to contact the therapists and that the names and contact information was not protected or privileged information or records. R.102.

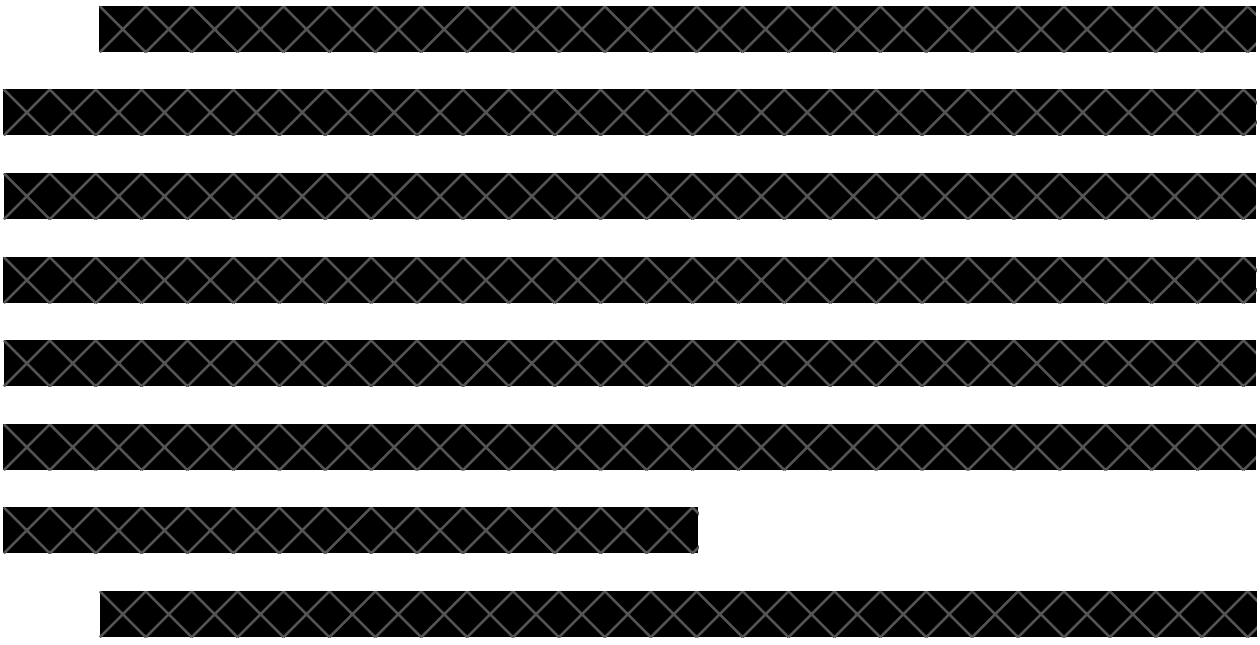
The State later withdrew its objection and agreed to provide Chadwick the information he requested in the discovery motion. R.520.

The State's victim coordinator contacted F.L. and asked for a list of all the therapists she had seen; to which F.L. responded with a description of several counseling and treatment centers. However, the State did not provide the information immediately to defense counsel. R.524. Instead, Chadwick had to file another discovery request, this time for "any and all communications, written or oral, between the alleged victim and any member of the Utah County Attorney's Office or the Utah County Sheriff's Office regarding any therapy received by the alleged victim regarding the alleged abuse." R.109. Chadwick also requested "[a]ny and all health treatment records of the alleged victim that have been obtained by the Utah County Attorney's Office." R.109. On January 2, 2018, the State then "provided a response to [Chadwick's] discovery request…" so the motion became moot. R.533.

On January 17, 2018, Chadwick filed a motion for In Camera Review of Therapy Records, and a Motion for Release of Therapy Records based on the list of treatment providers F.L. gave to the State. R.115-123. In it, Chadwick discussed the right of a defendant to access otherwise privileged medical records that are exculpatory or that related to a witness's mental impairment or ability to testify with accuracy and truthfulness. R.119-120. Chadwick asserted that because F.L. had disclosed that she discussed the alleged incidents with many therapists and school counselors and had provided a list of those therapists, Chadwick was entitled to an *in camera* review for relevant and material information to discover

the possibility of inconsistent statements about the alleged abuse, evidence probative of bias or improper motive, evidence of exaggeration, evidence of memory recovery techniques, and evidence relevant to statute of limitations defenses. R.115-123.

At a hearing following the motion, the State stipulated to the *in camera* review and the parties were ordered to prepare orders and subpoenas. R.537-538. The court later issued an order authorizing the subpoenas for "all therapy and counseling records for" F.L. from Motivational Empowerment Counseling, Wasatch Mental Health, Center for Change, Sandy Counseling Centers, Provo Canyon Behavioral Health, Meadow Elementary School, and Snow Springs Elementary School, authorizing Chadwick to issue subpoenas to these entities with instructions to provide the records to the court for *in camera* review. R.234-236.



[redacted]

[redacted]

[redacted]

Chadwick went to trial on four identical counts of sexual abuse of a child, each a second degree felony, each alleged in the jury instructions to have occurred "beginning in 1999 and concluding in 2002". R.468.[3]

During trial, Chadwick attempted to use the limited mental health information he had received from his 14(b) motion. It must be clear, Chadwick was not provided copies of any of the mental health records, redacted or otherwise. The district court only issued its rulings which purported to quote from those records. In other words, there was no document upon which Chadwick could rely in his presentation of evidence, only the district court's purported quotations from the records it reviewed. The context, the therapists involved, and the meaning of these quotations were withheld from Chadwick.

The State began questioning F.L. about her mental health treatment and the purpose of that treatment. The State asked, if she went to therapy "to address… any of the incidents that you've talked about here today?" (referring to the alleged abuse. R.836. F.L. said "Yes, if I can find a therapist that I trust." R.836. The State

[3] But see R.001-002. Count 1 in the Information alleged the incident occurred on or about May 1, 1999 (when F.L. would have been 8 years old), while Counts 2, 3, and 4 were alleged to have occurred on or about January 1, 2000 (when F.L. would have been 9 years old). See R.788 (F.L. testified her birthday is June 4, 1990). By the end of 2002, F.L. would have been 12 years old. The Information was never amended to match the times described in the jury instruction.

asked "was any of it to process trauma?" R.836. F.L. answered "Yes", that she worked through her trauma in therapy and that therapy helped her with coping skills to "process the trauma on [her] own". R.837. F.L. then went on to describe how her trauma, the trauma caused by the incidents in this case, caused her panic attacks, and nightmares, and caused anxiety from just being in a specific city. R.837.

Chadwick reasonably wanted to respond and rebut the claim that F.L.'s trauma and emotional disfunction proved he had committed the abuse. To do so, Chadwick renewed his request for judicial review of F.L.'s mental health records because the court was "under a continuing obligation to release portions [of the mental health records] that become relevant as the trial progresses." R.841.

As counsel pointed out at trial, the district court was "more aware of what is in the records that have been provided by the therapists than Counsel is. Only portions were released to Counsel." R.840. And during trial when defense counsel was questioning F.L., he asked the court to release portions "that become relevant as the trial progresses." R.841. The court refused to consider whether any other records should be released because it was not in a "position to have digested the full import of those records." R.842.

The closing jury instructions included a single elements instruction for all

four identical counts of sexual abuse of a child.[4] The instruction did not differentiate any count from any other, and merely designated that each of them occurred "during a period beginning in 1999 and concluding in 2002". R.468. The district court did direct the jury to consider each identical charge separately, and that "[f]or each count, in order for you to find Mr. Chadwick guilty of the offense of sexual abuse of a child you must find beyond a reasonable doubt that by separate and distinct conduct" Chadwick engaged in the prohibited conduct. R.468. However, the instruction did not specify that each juror must agree with all other jurors about what act(s) support each count. The jury was not provided a separate jury unanimity instruction.[5]

In its closing argument, the State *argued*[6] that the four counts were based on

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[4] R.468. Instruction No. 5 is attached as Addendum C.

[5] Instruction No. 14 does inform the jury that they "all must agree before a verdict of the jury may be stated" but does not explain what that agreement must include. R.477. See also R.485 (Instruction No. 22 also says each juror "must all agree to find a verdict.").

[6] Closing arguments are not binding statements of law. The judge's "assignment is to preside and see that the rules of law and procedure are followed. [the judge] will decide all questions of law that arise during the trial" and the judge "will instruct you on the law that you *must* follow and apply in deciding your verdict." R.452 (emphasis added). "[F]inal statements [by the attorneys] are not evidence but will be given to assist you in evaluating the evidence… You may accept or reject those arguments as you see fit." R.463. "On the other hand, and with equal emphasis, I instruct you that you are *bound* to accept the rules of law that I give you whether you agree with them or not." R.463 (emphasis added). "Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence." R.475. "Argument, speculation, or recitation of information from counsel is not evidence, but merely an attempt to explain evidence you have heard." R.483.

> "no less than on four occasions he did this touching or took indecent liberties. The first one was the catch it game… No. 2 is the time where she was sitting on his lap watching the movie and he pulled out his penis, his bare penis and rubbed it against her buttocks and vagina over the underwear and against her inner high, bare leg. The third -- the third count is that Mr. Chadwick did touch [F.L.'s] breast both over and under the shirt when tickling her, including her nipples; and the fourth count is that [F.L.] said the tickling and touching of the breasts occurred on more than one occasion. In fact, she said it was frequently. We don't know how many times, but it was more than one. So we've charged that conduct twice. No. 3 and 4 for the tickling of the breasts."

R.952-953.

Defense counsel then argued in closing about what he "consider[ed]" the "four cornerstones of the judicial system", which included the following paragraph about trial by a unanimous jury:

> "The instructions inform you that you have to consider each incident separately. There has to be separate conduct on each charge that has to be decided unanimously. I appreciate the State for going through and saying what they're alleging happened for each of these counts.
>
> Suppose you get into the jury room and half of you say we believe that the State has proved incident A but not incident B. The other half of you say well, we believe the State has proved incident B but not incident A. What you don't have is a unanimous verdict on one count for a conviction and then not guilty on the other. What you have in that situation is not a unanimous verdict on either count. Does that make sense? So each incident has to be considered separately, and has to have a unanimous verdict as to each charged incident."

R.960-961.

But that explanation was not sufficient, nor could it be. During deliberations, the jury sent a series of questions about the factual allegations as they related to the several counts. See R.435, R.486. In the first question the jury

asked, "if they could have a verdict form that specifically identified, in some way, a particular course of conduct to connect to each count." R.486. The court called both sets of counsel and "read aloud the question it had received and then read aloud a written response the court had already formulated." R.1110. The court's planned response was to inform the jury that it was the jury's job "to determine if the State had proven one, two, three, or four incidents of sexual abuse of a child beyond a reasonable doubt, and the order of the counts is unimportant." R.1110. Defense counsel objected and asked the court to "identify for the jury the particular incident for each count." R.1111. Counsel "argued that failure to do so was an invitation for [the jury] to reach a non-unanimous verdict on each incident". R.1111.

The court overruled Chadwick's objection and "declined to instruct the jury more specifically regarding the identification of the counts with particular alleged incidents." R.1111. Instead, the court responded that they jury "should consider the evidence and argument of counsel to determine if the State has or has not proven beyond a reasonable doubt the occurrence of one, two, three, or four behaviors that violate the law as described in the evidence. The order of the counts is of no particular consequence." R.486.

Sometime later, the court received a second question from the jury, which the court recorded as:

"Does Count 1 represent the 'catch it' game as described in court?"

> "Does Count 2 represent David Chadwick rubbing his bare penis against [F.L.'s] legs, buttocks, and/or vagina?"
> Does Count 3 represent David Chadwick touching [F.L.'s] breasts and/or nipple area while tickling her?"
> Does Count 4 represent David Chadwick touching [F.L.'s] breasts and/or nipple area while tickling her?"

R.435.

The court again called defense counsel and the prosecutors on a conference call. R.1111. "The Court was going to instruct the jury that *no, the counts alleged do not apply to specific incidents of conduct, and that what is important is the number of events proved*." R.1111 (emphasis added). Because defense counsel's objections on this point had "been overruled twice already", he did not object a third time. R.1111. As the district court later put it, defense counsel had already "made an adequate and timely objection, as he has described in his affidavit." R.1123.

After discussing the jury question with counsel on the phone, the court responded to the jury with a written instruction as follows:

> "In response to an earlier question the Court noted that 'You should consider the evidence and argument of counsel to determine if the State has or has not proved beyond a reasonable doubt the occurrence of one, two, three, or four behaviors that violate the law as described in the evidence. The order of the counts is of no particular consequence."
>
> "Counsel may have suggested specific behaviors to correspond to specific counts during closing argument, but arguments and characterization of the evidence by counsel are neither pleadings nor facts. It is for you to determine from a consideration of all the facts if the State has proven beyond a reasonable doubt that the defined statute was violated, in some way, once, twice three time (sic), or four times or if the State has failed to meet that burden of proof. You may

> choose to relate a specific conduct or incident to a particular count to assist your deliberation, but that is up to you. It is your sole province to determine the facts of this case."

R.435.

The jury eventually returned a guilty verdict in Count 1, and acquitted Chadwick in Counts 2, 3, and 4. R.436, R.978. Though the State argued in closing that Count 1 "was the catch it game", (R.952-953), the court specifically instructed the jury that "[t]he order of the counts is of no particular consequence" and that it was for the jury only to "determine from a consideration of all the fact if the State has proven beyond a reasonable doubt that the statute was violated, in some way, once, twice three time (sic), or four times or if the State has failed to meet that burden of proof." R.435. The jury was directed it could "choose to relate a specific conduct or incident to a particular count to assist [its] deliberations, but that [was] up to [them]." R.435.[7]

It is important to be clear here, the jury, after asking if it should connect specific allegations to each count, was told by the judge that they need not relate specific conduct with any particular count and that they must only determine how many counts had been proved. Thus, the record does not reveal which conduct or specific act the jury as a whole, or any individual juror, found the State had proved

[7] See also R.486 ("You should consider the evidence and argument of counsel to determine if the State has or has not proven beyond a reasonable doubt the occurrence of one, two, three, or four behaviors that violate the law as described in the evidence. The order of the counts is of no particular consequence.").

beyond a reasonable doubt for its verdict in Count 1. Neither does it reveal whether each juror agreed which facts had been proved, nor which conduct or specific acts the jury, or any individual juror, found the State had failed to prove in Counts 2, 3, and 4.

C. Disposition in the court below

On September 19, 2019, Chadwick was sentenced to serve 1 to 15 years in prison and pay a fine. R.602. The court suspended the prison sentence and placed Chadwick on probation for 48 months, and ordered 180 days in jail. R.602-603, R.495.

Chadwick filed a timely notice of appeal on September 30, 2019. R.501. Following the notice of appeal, Chadwick filed two motions to correct or complete the record. The first related to the absence of the rule 14(b) therapy records reviewed by the district court in the appellate record. The court of appeals granted Chadwick's motion and the district supplemented the record with documents it reviewed in camera.

The second motion related to the lack of any recording of the district court's consultations and discussions with counsel following the jury's questions during deliberations. The court of appeals granted Chadwick's motion and temporarily remanded the case to correct or supplement the record. The district court held several hearings, received a declaration from trial counsel, and made findings about what occurred during those conversations. The court found that trial

counsel "made an adequate and timely objection" to the jury instructions, and that his affidavit is "factually correct" and a "recitation of what occurred". R.1123-1125.

SUMMARY OF THE ARGUMENT

David Chadwick was charged with four counts of sexual abuse of a child based on several allegations that were factually distinct in their nature and time of occurrence. However, at trial the jury was never instructed that their verdict on each count must be unanimous or that each juror must agree that the same conduct constituted the same offense in each count. When the jury asked for such an instruction it was refused and the trial court specifically told the jury it need only agree on how many counts of sexual abuse Chadwick had committed. That failure to instruct the jury denied Chadwick the right to a unanimous verdict, and there can be no confidence that the one count that resulted in a guilty verdict reflecting each juror being convinced beyond a reasonable doubt that Chadwick engaged in the same conduct that would satisfy the elements of the offense.

The trial court erred by refusing to review of the therapy records made following Chadwick's motion to access those records pertinent to his defense. The State's presentation of evidence changed the evidentiary landscape and the court had a duty to disclose any other portions of the records that "become important as the proceedings progress", even if those records were "deemed immaterial upon original examination". *Richie*, 480 U.S. 39, 60. The court's obligation was not nullified just because it had not "digested" the contents of the records during its

original review. That refusal was erroneous.

ARGUMENT

I. The Trial Court Incorrectly Instructed the Jury on the Unanimous Verdict Requirement

A. The Unanimous Verdict Clause

"In criminal cases the verdict shall be unanimous." UTAH CONST. ART. I, SECTION 10. The requirement of jury unanimity "is not met if a jury unanimously finds only that a defendant is guilty *of a crime*.'" *State v. Hummel*, 2017 UT 19, ¶26, 393 P.3d 314 (citing *State v. Saunders (II)*, 1999 UT 59, ¶60, 992 P.2d 951 (plurality opinion)). "The Unanimous Verdict Clause requires unanimity as to each count of *each distinct crime charged* by the prosecution and submitted to the jury for decision." *Hummel*, 2017 UT 19, ¶26 (emphasis in original).

As verdict would not be unanimous, or constitutionally valid, if some jurors found the defendant guilty for a robbery at 7-eleven in Salt Lake on Tuesday and others for a robbery at Smiths in Provo on Wednesday, "even though all jurors found him guilty of the elements of the crime of robbery." *Hummel*, ¶28 (citing *Saunders II*, ¶60). "These are distinct counts or separate instances of the crime of robbery, which would have to be charged as such." *Id*. Though it is true that time itself is not an element of an offense and jurors need not "unanimously agree as to just when the criminal act occurred," jurors do have to unanimously agree that a particular act occurred, they have to be unanimous about which robbery they

believe occurred. *State v. Alires*, 2019 UT App 206, fn.4, 455 P.3d 636. "Jury unanimity means unanimity as to a specific crime and as to each element of the crime." *Saunders II*, ¶60.

Here, the State presented what it claimed were at least 4 distinct crimes, at least 4 separate incidents constituting sexual abuse of a child, each occurring at different times supported by different factual allegations. Like the robbery example above, the 'catch it game' during a babysitting incident would be a completely separate crime from rubbing a penis on buttocks, and they would both completely separate crimes from the multiple tickling allegations.

In *Saunders* the defendant was charged with one count of attempted rape of a child and one count of sexual abuse of a child for allegations made against him by his eight-year-old daughter. *Saunders II*, ¶4. At trial the complaining witness "gave somewhat conflicting, confused testimony" that cumulatively alleged defendant had touched her "thirty-one times", though the touchings were not linked "to any specific date or event" and some of the touchings were associated with the application of ointment. *Saunders II*, ¶5. The defendant's testimony claimed he had applied Desitin to the child's vaginal and buttocks area to treat diaper rash-like irritation caused by the wetting [urinating in pants] but had done so no more than five times." *Saunders II*, ¶6. The jury was instructed that "[t]here is no requirement that the jurors be unanimous about precisely which act occurred or when or where the act or acts occurred. The only requirement is that each juror believe, beyond a

reasonable doubt, that at least one prohibited act occurred sometime between October of 1991 and May of 1992, in Salt Lake County, involving the victim and the defendant." *Id*., ¶58. There was no special verdict form. The attempted rape charge was dismissed for insufficient evidence and the jury found the defendant guilty of sexual abuse of a child. *Id*., ¶7.

On appeal the defendant challenged the quoted jury instruction under the plain error doctrine, but this Court rejected the claim by concluding that the jury unanimity cases "provide no uniform rule… that… would have made it obvious to the trial court that Instruction No. 26 would be erroneous." *State v. Saunders (I)*, 893 P.2d 584, 589 (Utah Ct. App. 1995), see *Saunders II*, 1999 UT 59, ¶61. On certiorari, Utah Supreme Court examined the applicable case law and concluded that there was adequate support for the "fundamental proposition that unanimity was necessary as to all elements of an offense" and thus, the "trial court should have been aware of the defects in instruction 26." *Saunders II*, ¶61.[8] The error was thus plain.

"Instruction 26 violated the constitutional requirement of jury unanimity"

[8] Though the justices in *Tillman* disagreed about whether the instruction actually complied with the unanimity requirement, there was no disagreement "as to the proposition that there had to be unanimity as to each specific aggravating circumstance. In other words, *Tillman* held that a guilty verdict was not valid if some jurors found one aggravating circumstance and other jurors found another aggravating circumstance; it was not enough that they simply unanimously agree on guilt." *Saunders II*, ¶64 (citing *State v. Tillman*, 750 P.2d 546 (Utah 1987).

because it "stated that 'there is no requirement that the jurors be unanimous about precisely which act occurred or when or where the act or acts occurred." *Saunders II*, ¶65. "Thus, some jurors could have found the touchings without the use of Desitin to have been criminal; others could have found the touchings with Desitin to have been criminal; and the jurors could have completely disagreed on when the acts occurred that they found to have been illegal." *Saunders II*, ¶65. Because the "jury could have returned a guilty verdict with each juror deciding guilt on the basis of a different act by [the] defendant," the court held that "it was manifest error under Article I, section 10 of the Utah Constitution not to give a unanimity instruction." *Saunders II*, ¶62.

The court of appeals considered a similar case. In *State v. Alires*, 2019 UT App 206, the defendant "was charged with six counts of aggravated sexual abuse of a child based on distinct touches prohibited by the statute." *Alires*, ¶22. The evidence at trial was that the defendant had touched the complaining witness at least six times and the defendant's daughter twice on the same night, but the jury was not instructed which alleged touches related to which counts. Rather, "the State argued that the jury could convict Alires on four counts based on any of the six alleged touches of the [complaining witness] in 'any combination.'" *Id*, ¶22.

Because the jury was

> "never instructed that it must unanimously agree that Alires committed the same unlawful act to convict on any given count… some jurors might have found that Alires touched the [complaining witness's]

> buttocks while dancing, while others might have found that he touched the [complaining witness's] breast while tickling. Or the jury might have unanimously agreed that all of the touches occurred, but some might have found that Alires had the required intent to gratify or arouse sexual desires only while trying to dance with the friend, while others might have found that he only had sexual intent when he tickled the friend. In other words, the jurors could have completely disagreed on which acts occurred or which acts were illegal."

Id., ¶23. Because elements instructions did not "link each count to a particular act, instructing the jury that it must agree as to which criminal acts occurred is critical to ensuring unanimity on each element of each crime." *Id*.[9]

B. The Original Jury Instructions in this Case

After the close of evidence, the jury was instructed on the elements of the four counts of sexual abuse of a child in one single elements instruction. See R.468.[10] The jury was told each count "makes an identical charge but must still be considered separately." R.468. But the instructions do not explain how that separate consideration was supposed to happen. They were told that a guilty verdict must be proved "by separate and distinct conduct for each count," though the instruction does not associate any count with any alleged conduct. R.468. Nor does the instruction inform the jury that they must be unanimous as to which elements of the offense they found beyond a reasonable doubt. In other words, for each individual count, the instruction does not require the jury to unanimously agree that Chadwick

[9] *See also State v. Case*, 2020 UT App 81, 467 P.3d 893; *State v. Gollaher*, 2020 UT App 131, 474 P.3d 1018.

[10] Instruction 5, R.468, is attached as Addendum C.

touched the anus, or touched the buttocks, or the breasts, or the genitalia, or otherwise took indecent liberties. The jury was only required treat each count separately.

The jury was also instructed that their "verdict must be in writing, signed by [the] foreperson" and that their "verdict for each separate count must be either: A. Guilty of sexual abuse of a child as charged in the Information; or B. Not guilty." R.485. Finally, the jury was instructed that "[b]ecause this is a criminal case, [they] must all agree to find a verdict." R.485.

As a whole, the original jury instructions did not satisfy the unanimity requires as explained in *Saunders*, *Hummel*, *Alires*, *Case*, and *Gollaher*. And things only got worse from there.

C. The Jury's Questions and the District Court's Supplemental Instructions

After some deliberation, the jury sent a question to the court asking, "if they could have a verdict form that specifically identified, in some way, a particular course of conduct to connect with each count." R.486. In other words, they wanted to know if Count 1 applied to a specific act, and so on. This initial question from the jury showed that the jury instructions, and primarily the elements instruction, did not provide sufficient clarity to the jury about how they were to apply the elements separately and distinctly to the several allegations. It also demonstrates that the jury either did not remember, or did not accept as binding upon them, the State's

comments in closing argument seeking to connect an allegation with each count. See R.952-953. The question showed jury wanted to know how to consider each identical charge "separately", how to determine whether the identical charges were proved "by separate and distinct conduct for each count". R.486.

In response to the jury's question, Chadwick told the trial court it should "identify for the jury the particular incident alleged for each count" and that "failure to do so was an invitation for them to reach a non-unanimous verdict on each incident as long as there was unanimous agreement regarding the number of incidents that occurred." R.1111. But rather than answer the question and clarify, as Chadwick requested and law required it to do, the trial court responded that the jury need not concern itself with that question and only needed "to determine if the State has or has not proven beyond a reasonable doubt the occurrence of one, two, three, or four behaviors that violate the law as described in the evidence. The order of the counts is of no particular consequence." R.486. In other words the court told the jury, 'don't trouble yourselves with trying to identify which facts go with which count or even which facts each of you agree on, just focus on what number you can all agree on.' This response from the court erroneously and prejudicially directed the jury away from unanimity and toward deciding only how many convictions they could convict on.

To the jury's credit, it was not so easily deterred. Sometime later the jury sent another question asking whether four specific incidents represented specific counts.

See R.435. This time the jury provided a suggested designation, presumably based on the State's closing argument.[11] But the court's second response was even more troubling than the first. After repeating its earlier instruction that the jury need only decide how many times Chadwick broke the law and could ignore the order of the counts, the court then told the jury that counsels' closing arguments connecting facts to counts were "neither pleadings nor facts", and that the jurors could "choose to relate a specific conduct or incident to a particular count to assist your deliberation, but that is up to you. It is your sole province to determine the facts of this case." R.435.

When the jury asked whether specific conduct needed to relate to a specific count, the jury was told that it did not. It was up to them, and they could choose whether or not they wanted to specifically associate the distinct incidents with separate counts. The only thing they were required to do was to "determine… if the State has proven beyond a reasonable doubt that the defined statute was violated, in some way, once, twice three time (sic), or four times or if the State has failed to

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[11] See R.435 ("Does Count 1 represent the 'catch it' game described in court?"
"Does Count 2 represent David Chadwick rubbing his bare penis against [F.L.'s] legs, buttocks, and/or vagina?"
"Does Count 3 represent David Chadwick touching [F.L.'s] breasts and/or nipple area while tickling her?"
"Does Count 4 represent David Chadwick touching [F.L.'s] breasts and/or nipple area while tickling her?").
See R.952-953 (State's closing argument where the State called Count 1 the "catch it" game, Count 2 rubbing his penis against her buttocks and vagina, Count 3 and 4 touching her breasts and nipples while tickling on more than one occasion.).

meet that burden of proof." R.435.

D. The Jury Instructions Violated the Unanimous Verdict Clause

This case is very like *Alires*, though the error here is more troubling given the jury's repeated request for clarification, trial counsel's request to give it to them, and the trial court's repeated refusal to require unanimity, in fact repeatedly urging the jury away from unanimity. In this case Chadwick was charged with four identical counts of sexual abuse of a child based on distinct allegations of conduct. *Compare Alires*, ¶22. The information charged Chadwick with four identically-worded counts of sexual abuse of a child without distinguishing the counts by specific act, and only one count alleged a distinct timeframe, but that distinction was not carried over into the jury instructions.[12] *Compare Alires*, ¶22. At trial, F.L. testified that Chadwick unlawfully held her on his lap while he had an erection multiple times, caused her to touch his clothed penis, rubbed his bare penis against her buttocks, and touched her breasts while tickling multiple times.

As case law makes clear, the Unanimous Verdict Clause requires that a jury be adequately instructed not only that their verdict must be unanimous, but about what unanimity means; the jury must be instructed that their verdict "must be unanimous on all elements of a criminal charge for a conviction to stand." *Hummel*,

[12] Count 1 in the Information did have an earlier "on or about" date than Counts 2, 3, and 4, (R.001-002) but that distinction was invisible in the instructions (R.453, R.468) which only claimed each of the allegations occurred between May 1999 and January 2000.

2017 UT 19, ¶26. "A jury is not unanimous if the jury instructions allow for conviction 'with each juror deciding guilt on the basis of a different act by [the] defendant.'" *State v. Percival*, 2020 UT App 75, ¶26, 464 P.3d 1184 (*citing Saunders II*, 1999 UT 59, ¶62). Yet this is exactly what the jury instructions allowed, even encouraged, in this case. The trial court explicitly directed the jury away from unanimity when they were seeking clarification, when they were expressing concern about how to be unanimous. The court told them now to worry about which facts were associated with which counts and to only worry about how many counts were proved. "[T]he jury was never instructed that it must unanimously agree that [Chadwick] committed the same unlawful act to convict on any given count." *Alires*, ¶23.

Given the instructions, the only thing this Court can be confident of is that all the jurors were convinced that Chadwick committed one, and no more than one, act of sexual abuse. Some jurors might have found that Chadwick played the 'catch it' game one time, while others might have believed he rubbed his penis on F.L.'s buttocks one time; another might have believed one, but not more than one, incident of tickling involved an illegal touching of the breast, while another might have believed none of these and convicted Chadwick for letting F.L. sit on his lap while he had an erection (via the indecent liberty variant). Because "neither the charges nor the elements instructions link[ed] each count to a particular act, instructing the jury that it must agree as to which criminal acts occurred is *critical* to ensuring

unanimity on each element of each crime." *Alires*, ¶23. Without that instruction, especially following the jury's questions demonstrating its confusion on the issue, Chadwick's right to a unanimous jury evaporated and the State was allowed to procure one guilty verdict from a handful of allegations, any one of which each individual juror might have accepted. This was an error and a violation of the constitutional right to a unanimous verdict. The trial court should have corrected the error and failing to do so was unreasonable under the circumstances.

E. The State's Closing Argument Did Not Eliminate the Error

In *State v. Paule*, the Utah Court of Appeals held that "jury unanimity problems can be *mitigated* in one of two ways. First, a trial court can give a specific jury unanimity instruction" an second, "the prosecutor can specifically identify for the jury—usually in opening statement or in closing argument—'which act supported each charge.'" 2021 UT App 120, ¶43 (emphasis added), *cert. granted*, Case 20220039-SC (Utah Supreme Court July 11, 2022) (*quoting State v. Alires*, 2019 UT App 206, ¶22, 455 P.3d 636 (internal citation omitted). Given its arguments in *Paule*, Chadwick anticipates the State will argue here that the trial court's refusal to instruct the jury in this case was *mitigated* by the prosecutor's closing argument. Chadwick asserts that the court of appeals' holding in *Paule* is constitutionally infirm, as demonstrated by the facts and circumstances in this case, and that this Court should reject the court of appeals' adoption of the Kansas election rule.

The court of appeals' holding in *Paule* is that, although the evidence

presented to the jury supported multiple factual bases for the single charge, because the prosecutor "consistently maintained during trial… that the underlying act for which it sought conviction" he "properly took advantage of one of the pathways identified in our case law to obviate any jury unanimity problem". *Paule*, 2021 UT App 120, ¶¶45, 48. Chadwick now joins the defendant in *Paule* in his assertion that the court of appeals has mistakenly adopted this approach to mitigate and obviate the "problem" of ensuring the right to a unanimous jury.

In *Saunders II*, this Court held that it was plain error to not instruct the jury that they must be unanimous about which acts support each count. The Court did not discuss whether the prosecutor focused on, or elected, one act as the basis for the charge, yet the holding is still relevant since, at the time the jury was instructed (prior to closing argument), it was an obvious error not to provide a unanimity instruction. If prosecutorial election is a valid solution to this problem, the holding in *Saunders* would have needed to explain whether that election ever occurred. It didn't, and thus *Saunders* does not support the claim that prosecutorial election, as the State characterizes, it is a valid solution to the unanimity problem here.

Preservation – This Court might consider the question of whether Chadwick was obliged to preserve an argument challenging the legitimacy of the doctrine defining multiple "pathways" to juror unanimity when he requested the jury be instructed in this case. To begin, the court of appeals decision in *Paule* was filed on

November 12, 2021. Prior to the *Paule* decision, the Utah Court of Appeals had mentioned this alternative method of unanimity *mitigation*, but not applied it,[13] one time in *Alires*, which was released on December 19, 2019. Chadwick made his objection to the lack of an unanimity instruction on August 6, 2019. R.897, R.1109-1112. This was years before the court of appeals applied the alternative method of mitigating the unanimity problem in *Paule* and months before it was even mentioned in *Alries*. In August of 2019 there was no argument to preserve as there was no suggestion in any case or by the court that an attorney's arguments could replace the need for the judge to instruct the jury on the law.

[13] In *Alires*, the court was considering whether trial counsel rendered effective assistance by failing to request a specific instruction on juror unanimity where the State charged multiple counts of identical sex offenses and presented evidence of multiple acts arguably meeting the elements of the charge. The court found that counsel acted deficiently because the jury was never instructed that it "must agree as to which criminal acts occurred" which was "critical to ensuring unanimity on each element of each crime." *Alires*, ¶¶22-23. The court identified the State's failure to "elect which act supported each charge" as the triggering event creating a need for an instruction. *Id*., ¶22. However, because the prosecutor did not identify which act related to which count, the court's holding in *Alires* did not reach whether doing so would make an instruction unnecessary. That step was not taken until *Paule*. Chadwick asserts that the facts of this case demonstrate the error in the court of appeals' reasoning in *Paule*. Here, even where the prosecutor attempted to connect each count with specific acts, the jury was still uncertain whether they were obligated to follow the prosecutor's selection. R.486, R.435. R. Without an instruction from the judge on the law (R.452), the jury was repeatedly told to consider the statements of the attorneys as arguments intended to persuade. In the face of the direct instructions from the court that there was no need for unanimity, any "election" from the prosecutor was impotent to protect Chadwick's constitutional right.

F. The Error is Not Harmless Beyond a Reasonable Doubt

Not all errors in jury instructions are reversible. Defendants who successfully demonstrate error on appeal must also demonstrate that the instructional error was harmful. *See State v. Leech*, 2020 UT App 116, fn. 7, 473 P.3d 218 (*citing* UTAH R. CRIM. PROC. 30(a)). But an error of constitutional proportions will never be considered harmless unless it was harmless beyond a reasonable doubt. And the burden of proving harmlessness is on the government. *State v. Soto*, 2022 UT 26, ¶90, 513 P.3d 684 (a violation of state constitutional right to impartial jury the State must show the error did not contribute to the verdict); *State v. Crowley*, 2014 UT App 33, §17, 320 P.3d 677 (preserved unconstitutional jury instruction error reviewed presumed prejudicial unless proved harmless beyond a reasonable doubt); *State v. Walker*, 2017 UT App 2, §37, 391 P.3d 380 (the State bears the burden of proving an unconstitutional jury instruction is harmless beyond a reasonable doubt). See also *State v. Vander Houwen*, 177 P.3d 93, 100 (Wash. 2008) (harmless beyond a reasonable doubt standard applied to unanimity error). Here, the government cannot prove beyond a reasonable doubt that, but for the erroneous instruction on unanimity, the jury would have convicted Chadwick in Count 1.

One difficult part about discussing the weakness of the evidence in this case is that, given the ambiguity in the verdict and acquittal on Counts 2, 3, and 4, it's impossible to know which allegation to focus on, though some problems are applicable to each of the allegations. For example, F.L.'s memory and the remoteness

of these allegations. This trial occurred in August 2019 and it is alleged the offenses occurred in 1999-2000, 20 years earlier. See R.961-962. F.L. admitted that her memory was impaired by post-traumatic stress disorder. R.061.

Further, F.L.'s allegations were not supported by any other witness and no physical evidence was presented in support. Chadwick denies anything inappropriate happened. He did admit that he was sensitive to unintentional physical touch and acknowledged he may have become aroused while F.L. sat on his lap, but denied any sexual intent. As with the evidence in *Alires*, "the surrounding circumstances" for much of the complained of conduct "were sufficiently ambiguous that members of the jury could have easily reached different conclusions as to which acts were done with the required sexual intent." *Alires*, ¶29.

Another way to look at the prejudice analysis is as a statistical one. In other words, asking whether there is a reasonable likelihood of a more favorable result by examining the probability of having the incorrectly instructed jury reach a unanimous verdict. What is the probability that every single juror connected the same factual scenario with Count 1?[14] To do so, first assume for the sake of argument that the only four factual scenarios the jury was considering were those included in

[14] Since Chadwick was acquitted on Counts 2, 3, and 4, it may be unnecessary to consider the probability that all the jurors associated all the same factual scenarios with all the same counts. Those numbers get incredibly small, by the way.

the second jury question,[15] and let's call those scenarios A, B, C, and D. Because the court told them they need not link any count to any allegation, there is a 1 in 4 chance that any given juror associated scenario A (or scenario B, etc.) with Count 1, that is a 25% chance. Now, since there were 8 jurors, each with his/her own 1 in 4 chance of matching scenario A with Count 1, that means there is a 1 in 32 chance that all eight jurors associated scenario A with Count 1. A 1 in 32 chance is a 3.125% chance. Statistically, just considering Count 1, there is a 96.875% chance that at least one of the jurors attributed a totally different factual scenario to the guilty verdict in Count 1 than the other jurors. Statistically, there is a 96.875% chance the verdict in Count 1 was not unanimous.

The government now bears the burden of proving beyond a reasonable doubt that, despite the long statistical odds, every single juror ignored the jury instructions and the court's order to follow the instructions, and agreed on which allegations applied to which count. Frankly, the government can't do it. It's highly likely some of the jurors found the Chadwick guilty in Count 1 based on scenario A, while other jurors found him guilty based on scenario B, C, or D. Chadwick was acquitted on Counts 2, 3, and 4; how much confidence can there be in the verdict in Count 1? Don't those numbers alone show there is a reasonable likelihood of a more favorable

[15] See R.435. It is not entirely clear that such a presumption is warranted when the State also presented other factual allegations that may have been part of the jury's analysis.

outcome if all the jurors were required to consider the same factual scenario for Count 1? And if there is a reasonable likelihood of a more favorable result, the State cannot prove the error was harmless beyond a reasonable doubt.

Though the statistical analysis may not be conclusive, it is very persuasive, especially in light of the appellate requirement that courts "presume that a jury followed the instructions given it unless the facts indicate otherwise." *State v. Lee*, 2014 UT App 4, ¶25, 318 P.3d 1164 (cleaned up). That means we presume the jury did not trouble itself with the order of the charges or require each juror to associate Count 1 with the 'catch it' game, as the court instructed. This Court must presume that the jury only asked how many instances the State had proved. That presumption makes the low statistical likelihood very troubling.

And even ignoring those numbers, the totality of the evidence shows there is a reasonable likelihood of a more favorable outcome if the judge had required unanimity. As explained above, the jury acquitted Chadwick on 3 of the 4 counts, signaling the jury had at least some hesitation in accepting much of F.L.'s testimony. And because there is no way to know which conduct the jury found had occurred, it is impossible to contrast the persuasiveness of one allegation against another, making it impossible for the State to defend the single guilty verdict on the strength of the record evidence. It's not as if the State can respond and say that the evidence for the 'catch it' game (or any other allegation) was strong, since we have no way of knowing which allegation each juror believed and which three allegations each juror

rejected. Nor can the State prove harmlessness by trying to argue the strength of cumulative allegations, since we know each of the jurors rejected all but one of the allegations. There is no way the State can prove harmlessness beyond a reasonable doubt. For all these reasons the error refusing to require juror unanimity is a harmful one and must result in reversal.

G. Chadwick Cannot be Retried on Remand

Because Chadwick was denied his constitutional right to a unanimous verdict, this Court must reverse his conviction on Count 1. Chadwick cannot be retried on any of the allegations contained within the Information, or any allegations within the same criminal episode. First, Counts 2, 3, and 4 resulted in acquittal, and thus, double jeopardy prohibits retrial on those counts. Second, where the facts supporting conviction in Count 1 cannot be distinguished from the counts on which he was acquitted, retrial is also prohibited by double jeopardy. See *Dunn v. Maze*, 485 S.W.3d 735, 747-749 (Ken. 2016), *Goforth v. State*, 70 So.3d 174, 190 (Miss.2011), *Madsen v. McFaul*, 643 F.Supp.2d 962, 968 (N.D. Ohio 2009).[16]

Finally, the same criminal episode statute also prohibits the State from filing a new information and alleging any charges that occurred within the jurisdiction of

[16] Chadwick acknowledges that the court of appeals characterized the double jeopardy issue as not yet being ripe in footnote 7 in *Alires*. However, given the fact that no Utah appellate court has actually addressed the question, Chadwick raises the issue here to avoid any later claim of waiver, and asks the Court to include directions to the district court consistent with the right against double jeopardy in its reversal order.

the district court below and were known to the prosecuting attorney at the time of the original information. UTAH CODE §76-1-402.

H. Plain Error

Though it seems unlikely, given the information contained in the supplemental record, in the event that the State tries to claim the error was not preserved, Chadwick asserts in the alternative that the instruction error was plain, and the trial court should have corrected the error without prompting. Errors are obvious when the law governing the error was clear at the time the error was made. *State v. Dean*, 2004 UT 63, ¶16, 95 P.3d 276.

The error in this case was plain because the jury asked its question on August 6, 2019, more than ten years after the Supreme Court issued its decision in *Saunders II*. From that decision it would have been obvious as "a fundamental tenet of criminal law" that courts must instruct jurors that they must be "unanimous about precisely what act occurred." *Saunders II*, 1999 UT 59, ¶¶58-59. The trial court should have known that the single elements instruction, especially in light of the jury's repeated questions, did not require the jurors to agree on which conduct related to separate the counts which violates the .

As for harm requirement for plain error, the above described harmfulness argument applies here as well. The only difference is that the burden of proving harm falls on an appellant for an unpreserved constitutional error. But as

demonstrated above, there is a reasonable likelihood of a more favorable outcome if the trial court had properly instructed the jury.

II. The District Court Erred in its Ruling Refusing to Conduct a Renewed Review of the Complaining Witness's Mental Health Records

This Court has already denied Chadwick, and any other defendant appealing from a Rule 14(b) *in camera* review, the ability to challenge the materiality of the suppressed records. See *State v. Chadwick*, 2023 UT 12, ¶¶35-36, 42, 54. Instead, Chadwick is only "entitled to argue that he was prejudicially harmed by errors the trial court made." *Chadwick*, 2023 UT 12, ¶54. Chadwick now asserts that the trial court erred when it denied his renewed request for a review and release of materials made relevant by the State's questions and by F.L.'s testimony at trial.

After defense counsel was elicited an admission from F.L. that she had told "a lot" of therapists that she did not remember the details of the abuse, the prosecutor asked F.L. what the purpose of going to therapy was. R.836. F.L. responded, "[t]o work on myself" and to "deal with coping skills." R.836. Believing there may be more fruitful areas of rehabilitation, the prosecutor then prompted F.L. asking whether she used treatment "to process trauma?" R.836. F.L. responded, "Yes" and that, to an extent she worked through trauma in her therapy and she learned "coping skills" as a way "to process the trauma on [her] own". R.836-837. The State then asked if "it helped [F.L.] in any aspect regarding the

incidents" involving Chadwick. R.837. F.L. went on to testify that, because of those skills and her progress, she stopped "burn[ing]" and that she can "wake up from a dream and go back to sleep" and can go to Eagle Mountain "and relax, without just sitting there thinking about the past the entire time." R.837.

These questions and answers introduced the idea that F.L. has suffered significant trauma, trauma that caused her significant distress and impacted her life. Clearly the State wanted to show the jury that F.L.'s claims about the abuse were credible as evidenced by the trauma for which she needed treatment and coping skills. Defense counsel correctly recognized this, and sought to demonstrate that F.L. had experienced trauma from "other sources". R838. Because F.L. had "made it sound as if she… couldn't even go to the store without break down and having a panic attack because of what Mr. Chadwick did", Chadwick needed to "explor[e] the possibility that there are other contributors to that… because the jury is otherwise left with the impression that" that these symptoms are real and attributable to Chadwick. R.839-840. As the Supreme. Court noted, the right to confrontation, the right to cross-examine, includes the opportunity to show that a witness is biased or that the testimony is exaggerated or unbelievable. *Pennsylvania v. Richie*, 480 U.S. 39, 51-52 (1987) (*quoting United States v. Abel*, 469 U.S. 45, 50 (1984)).

The State having opened that door, and F.L. having walked through it, F.L. then requested time to think about how to answer the question about other sources

of trauma she had experienced. R.838. The court allowed Chadwick to present additional testimony on this point but not any "exhibits that haven't been identified in advance. Indeed, we made a ruling based on what we observed in the records, but we don't have those records here. We don't have… even the names of the therapists." R.840. Counsel, recognizing how limited his cross examination on this point would be, reminded the court it was "under a continuing obligation to release portions that become relevant a the trial progresses." R.840-841. This was, of course, true. According to the Court in *Richie*, the trial court's "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." *Richie*, 480 U.S. 39, 60.

F.L.'s trauma and treatment thereof had previously been ruled irrelevant. But when the State and F.L. introduced evidence of that trauma, the significant impact it had on her life, and the benefits she derived from the coping skills she learned in therapy, they did so to point all of this evidence at Chadwick and his abuse. That evidence made F.L.'s treatment and records of other trauma in her life critically important to Chadwick's defense. Where the court had previously only examined the records for and produced "portions that contain a factual description of alleged abuse by Mr. Chadwick… any report of those events by the counselor to law enforcement and any methods used to refresh or enhance…

memory", the court was now being asked, and properly so, to disclose records of which were now relevant to the State's and F.L.'s claims that her trauma and need for coping mechanisms were attributed to "the incidents that [F.L. had] spoken of" at trial. R.235, R.837.

But the trial judge refused to revisit the records, claiming there was "just no way that [it] could comply with that" constitutional obligation because it was "not in a position to have digested the full import of those records." R.841. Instead, Chadwick's counsel was expected to ask F.L. questions and simply live with the answers because he was "stuck with the answers you get." R.840. This contradicted the court's obligation, or as the Supreme Court put it, the trial court's "duty" to review the records anew as the "proceedings progress[ed]" and it contradicted the court's "obligat[ion] to release information material to the fairness of the trial." *Richie*, 60.[17]

This was error. The trial court was obliged to perform a renewed *in camera* review for information material to the defense. This Court, just as the Supreme

[17] See also *Ellsworth v. Warden*, 242 F.Supp.2d 95, 112 (Dist. Ct. N.H. 2003) While the degree of specificity of a defendant's original request may bear on the materiality of the withheld information, the court's obligation to disclose exculpatory and impeachment information does not depend on a specific request. *Ritchie*, 480 U.S. at 58 n.15. The obligation is continuing so that "information that may be deemed immaterial upon original examination may become important as the proceedings progress." Id. at 60; *see also McCambridge v. Hall*, 266 F.3d 12, 21-22 (1st Cir. 2001); *Love v. Johnson*, 57 F.3d 1305, 1313 (4th Cir. 1995).

Court in *Richie* did, should remand the case to the district court with an order to perform an *in camera* review of the records.

That order should direct the court not only to review the records for information material to Chadwick's renewed request, for portions of the records related to F.L.'s claims of trauma and coping skills, but also for portions of the records responsive to the trial court's original *in camera* review order. As has been made clear by the voluminous briefing in this case, Chadwick claims, and with good reason, that the trial court's original *in camera* review failed in many respects. Given this Court's decision, Chadwick has been entirely prevented from challenging the materiality decision of the trial court. The only way to challenge the materiality decisions of a trial court performing a 14(b) *in camera* review is to that very court.

A. The Trial Court's Error was Harmful

"[A] criminal defendant's entitlement to cross-examine a witness increases in sensitivity in direct proportion to the witness's importance to the prosecution's case." *Bui v. DiPaolo*, 170 F.3d 232, 241-42 (1st Cir. 1999). It is strange to imagine how a defendant in Chadwick's situation could argue harm where he is prevented from discussing the nature and details of the evidence he was prevented from accessing, and prevented from admitting. Here, Chadwick's need access to the therapy records, and his limit to his ability to cross examine F.L. was at "its apex" because F.L. was the only direct witness to the allegations and there was no physical or

eyewitness evidence to support her allegations.

But it is not impossible to estimate how the suppressed therapy records would have had an impact on the jury's assessment of both F.L.'s and the State's credibility. The State, in an effort to bolster 20 year old memories, presented F.L.'s claims about her psychological illness as proof of the truth of her claims against Chadwick. In a case where the only two relevant witnesses were F.L. and Chadwick, and where each juror found F.L.'s allegations unpersuasive on three of the four counts, it is not difficult to see how the potential of inconsistent statements, exaggerations, proof of other traumatic events, and memories issues could have changed the outcome in Chadwick's behalf. Remember, the State bears the burden to disproving any harm beyond a reasonable doubt.

This is a case where every piece of evidence which calls F.L.'s already doubted testimony into question has the reasonable likelihood of a more favorable result on Count 1. And this is a case where the district court's refusal to review the records for important evidence in these records was an error that prejudiced Chadwick and his right to due process and to a fair trial.

CONCLUSION AND SPECIFIC RELIEF SOUGHT

Because the trial court erred in instructing the jury, Chadwick was denied the right to a unanimous verdict and his conviction should be reversed. Because the district court erred in denying Chadwick access to relevant and material therapy records, this Court should order his conviction reversed.

RESPECTFULLY SUBMITTED this 14th day of August, 2023.

/s/ Douglas Thompson
Appointed Appellate Counsel

CERTIFICATE OF COMPLIANCE WITH RULE 24(a)(11)

I certify that this brief complies with the following requirements of Rule 24(a)(11) of the Utah Rules of Appellate Procedure:

A. The total word count of this brief is 13,854. It was prepared in Microsoft Word.

B. This brief contains non-public information, therefore, a version with all such information removed is also being filed.

/s/ Douglas Thompson

CERTIFICATE OF MAILING

I certify that I emailed a copy and sent two paper copies of the foregoing brief to the Utah State Attorney General, Appeals Division, criminalappeals@agutah.gov, P.O. Box 140854, Salt Lake City, Utah 84114-0854 on this 14th day of August, 2023.

/s/ Douglas Thompson

ADDENDA

A – R.486 First Response to Jury Question
B – R.435 Second Response to Jury Question
C – R.468 Jury Instruction 5

Addendum A – R.486 First Response to Jury Question

Addendum B – R.435 Second Response to Jury Question

Addendum C – R.468 Jury Instruction 5