IN THE UTAH SUPREME COURT

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

REPLY BRIEF OF APPELLANT

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PARTIES TO THE PROCEEDING

STATE OF UTAH - District Court Plaintiff, Appellee in the Utah Court of Appeals, Appellee in the Utah Supreme Court.

DAVID CHADWICK - District Court Defendant, Appellant in the Utah Court of Appeals, Appellant in the Utah Supreme Court. Mr. Chadwick is not currently incarcerated.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTORY PROVISIONS AND RULES

CASES

IN THE UTAH SUPREME COURT	
STATE OF UTAH, Plaintiff / Respondent, vs. DAVID CHADWICK, Defendant / Appellant.	Case No. 20190818-SC

ARGUMENT

I. The trial court incorrectly instructed the jury on the unanimous verdict requirement

A. This issue is preserved

The State's brief attempts to transform Chadwick's claim, manufacturing controversy where none exists. Chadwick preserved his claim, he properly requested the district court instruct the jury by identifying "the particular incident alleged for each count." R.1111. Chadwick warned the court that "failure to do so was an invitation for [the jury] to reach a non-unanimous verdict on each incident, as long as there was unanimous agreement regarding the number of incidents that occurred." R.111. The court refused to give an instruction requiring the jurors to agree on which incidents applied to which counts. As the district court found, counsel "made an adequate and timely objection" and "I did overrule him. He did ask me to instruct the jury to decide that the behavior did or did not occur in the specified incidence (sic) that were

suggested by the State. I, as a matter of law, felt that that would invade the juror's province, and I overruled that objection." R.1123-1124. Chadwick objected to the district court's refusal to instruct the jury on requirement that they must agree about the "specific incidence" (sic) which make up each count is preserved.

The State now argues that Chadwick seeks a different remedy on appeal. State's Brief, 17-19. The State argues that Chadwick did not ask for "a specific-unanimity instruction" a narrow remedy, and instead "requested on an election" a broad remedy. State's Brief, 20. Chadwick replies that this argument demands far too much of the perseveration requirement, misconstrues the record, and misunderstands Chadwick's appellate claims.

1. Chadwick presented the issue to the district court

The State claims Chadwick "requested only an election" as a remedy to the unanimity problem presented by the State's case and that he now argues for some different remedy, some different kind of instruction. State's Brief, 20. But that is not right, not even close.

The State had made an election, it did so when it argued in closing that Count 1 applied to the catch it game, Count 2 applied to the sitting on the lap incident, Counts 3 and 4 were for two instances of tickling. R.952. That election had already occurred when the jury brought its concern to the court. The court's response, or lack of response, left the jury with the State's election. The remedy Chadwick sought was a court instruction, an order, directing the jury that it must

be unanimous by connecting "the particular incident alleged for each count." R.1111.

There is no such thing as judicial election, there is only judicial direction, judicial instruction. Chadwick did not ask the judge to *elect* which conduct applied to which counts. Chadwick sought an instruction, a court order to the jury, that they "couch or consider the totality of the facts of the case in terms of specific allegations"; he sought "to instruct the jury to decide that the behavior did or did not occur in the specific incidence that were suggested by the State." R.1123. This was a request for an instruction that the jury be required to unanimously agree in each count about what factual allegations support the verdict. There is no significant distinction between the remedy requested on appeal and the instruction that would have been given if the district court did not overrule the objection. R.1123.

Chadwick's request was not simply to remind the jury about what the State had argued, to repeat its election; there would have been no point to repeating the State's argument. The jury's questions made it clear they remembered what the State had *argued*, the jury wanted to know, as an order of the court, something on the level of *a pleading or fact* (R.435), whether they were supposed to agree in each count; they wanted "a verdict form that specifically identified… a particular course of conduct to connect with each count" (R.486); they wanted to know, not from the State but from the court and "as a matter of

law" whether they were supposed "to decide that the behavior did or did not occur in the specific incidence that were suggested by the State" (R.1123).

When Chadwick requested an instruction, it was for a specific unanimity instruction directing the jury that it must unanimously agree about what conduct applied to that count. When the court refused, it did not do so because the State's election in closing was sufficient, it was because the court believed that requiring the jury to agree "that the behavior did… occur in the specific incidence that were suggested by the State… would invade the juror's province". R.1123. The judge refused to require unanimity because he believed the jurors should be allowed not follow the State's election, and that the jurors only needed to decide whether the "statute was violated, in some way, once, twice three time (sic), or four times". R.435.

2. Chadwick makes the same claim on appeal

The State claims that, rather than seeking an election instruction remedy as he supposedly did below, Chadwick now seeks some unspecified specific unanimity instruction remedy. But the State does not identify what that new instruction is, and that is because Chadwick's initial brief does not contain it.

Instead, Chadwick has argued on appeal that the district court should have "instructed that their verdict 'must be unanimous on all elements of a criminal charge'", and informed the jury that it would not be unanimous if "'each juror decid[ed] guilt on the basis of a different act by the defendant.'"

Appellant's Brief, 35-36 (citing *Hummel*, 2017 UT 19, ¶26; *State v. Percival*, 2020 UT App 75, ¶26, 464 P.3d 1184 (cleaned up)). Chadwick has argued that a failure to require unanimity through this direction allowed the State "to procure one guilty verdict from a handful of allegations, any one of which each individual juror might have accepted." Appellant's Brief, 37. This appellate argument is the same as the trial court argument, that by refusing to require the jury to connect the counts to specific conduct, the jury was being invited "to reach a non-unanimous verdict on each incident". R.1111, Appellant's Replacement Brief, 35-36 ("the jury was never instructed that it must unanimously agree that [Chadwick] committed the same unlawful act to convict on any given count.").

The State claims Chadwick has now "abandoned his request for an instruction identifying which alleged acts related to which counts" because he "appears to assert that the remedy he requested below is 'constitutionally infirm.'" State's Brief, 20 (citing Appellant's Replacement Brief, 37). But this is an unfair reading of Chadwick's arguments and again seeks to equate a prosecutor's arguments with a court order.

Chadwick does criticize election as a legitimate remedy for a unanimity problem, this case reveals why. But there is a huge difference between a prosecutor arguing to the jury that they can connect one incident with a specific count and the judge ordering the jury that they must do so. As the trial court so tellingly instructed the jury, "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." R.435. The court then left it "up to [the jury]" to decide whether they wanted to "choose to relate a specific conduct or incident to a particular count" but they were only required to "determine if the State has or has not proven… the occurrence of one, two, three, or four behaviors that violate the law". R.435.

Chadwick's criticism of election on appeal aligns with his request at trial, and that same request on appeal that the jury should have been instructed that they must agree which counts were based on which allegations. The need for this request is manifested by the truth of what the trial court said; the prosecutor's election in closing argument could be ignored by the jury at their whim. An instruction from the judge could not. This case is precisely the example needed to reveal the constitutional infirmity of the State's preferred way to *mitigate* a jury unanimity problem.

Election happened here, and it failed to ensure that the jury reach a unanimous verdict. Chadwick's objection and request for an instruction at trial was not for a repeated election, it was for an order requiring the jury to agree as to which criminal acts occurred for each count. Chadwick has abandoned nothing.

B. The error was obvious

Chadwick has argued, in the alternative, that even if his objection to the lack of a unanimity instruction did not properly preserve this issue for appeal that the plain error exception applies. To be clear, Chadwick's main argument, as repeated above, is that this issue was adequately preserved.

The State argues that it was not plain error to refuse to instruct the jury that they must be unanimous about what conduct was connected to what count. The State argues that, because there is no nationally-recognized "rule requiring a specific-unanimity instruction in all multiple-act cases", it would not have been obvious to the district court that it should provide an instruction requiring unanimity in response to the jury questions. State's Brief, 21-22. Chadwick disputes this national requirement and relies on his obviousness argument in the opening brief. This Court's holding *Saunders* does most of the heavy lifting.

It is worth pointing out, however, that the State's obviousness arguments require a view of the proceedings that is woefully incomplete. It is not just that the court should have known that a specific unanimity instruction must be given in all "multiple-act" cases. This is not a case in which unanimity was just the subtext to the general unanimity instructions provided. This case would be completely different, and the plain error analysis would be completely different, if the jury had not revealed its conundrum. The plain error analysis for this case is much more specific; it is whether the court plainly erred when it instructed the

jury after the jury requested direction on unanimity. This necessarily includes whether the court's two supplemental instructions were obviously wrong. From that perspective there is no question, the error was obvious.

There did not need to be a nation-wide majority position on when a "specific-unanimity instruction" is required for these added instructions to be obviously wrong. It was obviously wrong to tell the jury that did not need to "relate a specific conduct or incident to a particular count" and that it need only "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". R.435. None of the cases cited by the State suggest any lack of clarity on this specific scenario, or on these specific instructions. The State cites no support for a district court to affirmatively direct the jury away from unanimity and only require the jury to agree on the number of "behaviors that violate the law". R.1486, R.1435. The State cites no support for a district court to instruct the jury that it only needed to "determine… if the State has proven… that the defined statute was violated, *in some way*, once, twice three time, or four times". R.435 (emphasis added). The State cites no support for a district court to instruct the jury that it could choose not to "relate a specific conduct or incident to a particular count". R.435. In fact, even as the State puts it, it was "clear" from *Saunders*, the court "must not tell the jury it does *not* have to be unanimous about something it must agree on." State's Brief, 23 (citing *State v. Saunders*, 1999 UT 59, ¶62).

The question is not whether it would be obvious to a district court must provide a specific unanimity instruction in some hypothetical case involving multiple identical counts. The question is, when faced with multiple identical counts and a jury asking how to differentiate between the counts, whether it would have been obvious that the court must not instruct the jury that there was no need to distinguish between the counts and only need agree on how many guilty verdicts to return. There is no confusion in the law on this point, and no justification for the district court's instructions here. The law was clear, the district court was prohibited from telling the jury that it did not need to agree about which conduct related to which count, yet that is exactly what it did. This is an obvious error.

C. The error is not harmless beyond a reasonable doubt

The State disputes that it bears the burden of proving the error here was harmless beyond a reasonable doubt because, as the State claims, this is not a federal constitutional error, and because state constitutional errors are not entitled to a presumption of prejudice. State's Brief, 40. The State asserts that the only thing the judge did wrong was "not explaining what it means to be unanimous", something it considers a "trial error." State's Brief, 41.

Fortunately for Chadwick, the State also admits that if "the court told the jury it did not need to be unanimous about something it had to agree on" it "would no doubt amount to a constitutional error". State's Brief, 40. The State

again admits that it would be a constitutional error to "affirmatively mistat[e] the unanimity requirement". State's Brief, 41. The State makes these concessions but fails to recognize them as such because it also fails to adequately grapple with what the court actually did when it refused to give requested unanimity instruction and instead doubled down on the unanimity problem. The State argues, again without adequately accounting for the supplemental instructions and the context in which they were given, that the instructions taken as a whole did not misstate the law on unanimity.

But in order to defend that position, the State should be required to explain how anyone could read the instructions in response to the jury questions, even in the context of the other "incomplete" unanimity instructions (State's Brief, 40-41), and believe that the jurors were required to "agree on the underlying criminal acts Chadwick committed." State's Brief, 43. Chadwick asserts that such an explanation cannot be reasonably made. Chadwick encourages the Court to accept the State's concession: the district court's response to Chadwick's objection affirmatively misstated the unanimity standard and qualifies as a constitutional error afforded the presumption of prejudice.

Rather than requiring the jury to connect specific acts with specific counts as requested by Chadwick, and rather than directing the jury back to the general unanimity instructions given earlier, the court affirmatively directed the jury that it need not unanimously agree on each element for each count, that it could

separate the allegations from the suggestions made by the State, and that it could reduce the verdicts to a simple agreement on the number of crimes committed. This is more than an *incomplete* set of unanimity instructions. It is more than failing to explain what unanimity means. It is an absolutely and fundamentally wrong description of the unanimity requirement.

The State agrees, under these circumstances, this would be a constitutional error subject to a presumption of prejudice. The State is required to prove the error was harmless beyond a reasonable doubt and has failed to do so.

D. The error was harmful

Chadwick has argued, as an alternative, that if proof of harm is required, that proof is evident from the record. Chadwick maintains that harm is presumed based on the constitutional nature of the preserved error, but now responds to the State's arguments on harmlessness.

The State challenges the usefulness of the statistical analysis made in Chadwick's opening brief, claiming it ignores context, context which it believes makes any error harmless. State's Brief, 45. While Chadwick acknowledged the limitation of the statistical view (Appellant's Replacement Brief, 43), it cannot be ignored in the fashion attempted by the State, especially in context.

The important context ignored by the State is that, after receiving the general unanimity instructions (the ones that did not explain "what it means to be unanimous") the jury sent two questions to the court, both times asking for

help to understand this aspect of unanimity, and in response the court gave two very flawed instructions. In that context it is clear the jury would not have understood the instructions had required unanimity and only required the jurors to agree on the *number* of "behaviors that violate the law". R.435. They were instructed that they were only required to "determine… if the State has proven… that the defined statute was violated, *in some way*, once, twice three time, of four times". R.435 (emphasis added). That is the context. That repeated numerical assertion by the court is the context which invites the statistical analysis. That instruction from the court, directing the jurors that they can refuse to relate specific conduct to specific counts as long as they agree how many crimes occurred almost requires at least a consideration of the mathematical likelihood of non-unanimity.

The State claims that because "[j]urors deliberate together, not in isolation" this court should presume they must have consulted and did agree on what acts applied to what count. State's Brief, 45. But that presumption ignores the jury's questions and the court's responses. The repeated questions from the jury reveal a breakdown in that presumed collaboration. If they all agreed about which conduct applied to which counts, there was no need to ask, and certainly not twice. And in response to the jury's requests for help, requests to know how to be unanimous, they were told they didn't need to decide which conduct applied to which count, and they were told the State's attempt to connect certain acts

with certain counts in closing were "neither pleadings nor facts" and could be ignored.

But it's even worse than that. The jury wanted to know whether they had to connect conduct with counts, and how to do that. If the judge was merely *reducing the impact of the State's election*, it would have only said, "[t]he order of the counts is of no particular consequence." R.486. And the jury could still have been told they must agree as a group about which acts connected with which counts, regardless of the order. Or the jury could have been referred to the general instructions about agreement with the hope they would infer the full meaning of unanimity. But that didn't happen. Instead, when they asked about unanimity the jury was told:

> You should consider the evidence and argument of counsel to determine if the State has of 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.

R.486 (emphasis added). Then, when the jury asked again, the court took it further. After telling the jurors they were free to ignore the State's arguments, the court repeated its numerical direction and then authorized the jury to refuse to connect facts to counts:

> **You may choose to relate a specific conduct or incident to a particular count to assist your deliberation, <u>but that is up to you</u>.**

R.435 (emphasis added). The plain meaning of these instructions is clear. 'You' (each juror or the jury collectively) can choose whether you want to connect facts

to counts in your deliberation. But if you don't want to, you don't have to.' This says more than saying, 'feel free to deviate from the State's election.' When the court authorized the jury not to "relate specific conduct… to a particular count" it released the jury from any relationship, not just from the State's preference. The *only* thing required under these instructions was for the jury to determine whether the State proved "that the defined statute was violated, *in some way*, once, twice three time, or four times or if the State has failed to meet that burden of proof." R.435.

Compare that to the erroneous instruction in *Saunders*:

> Before the jury arrives at a guilty verdict, the law requires that each of the jurors be satisfied beyond a reasonable doubt that an act alleged in the Information occurred. *There 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.

Saunders, 1999 UT 59, ¶58 (italic emphasis in original, bold emphasis added). Chadwick concedes that the instruction there was worse, but only by degrees. It's true, the court here did not use the word "only". But the logic of the instruction in *Saunders* is flawed in exactly the same way the logic here was flawed here, and both sets of instructions lead the jury to the same conclusion: unanimity does not require agreement about which act constitutes the offense.

And tellingly, in both cases the court incorrectly directed the jury to focus on the number of acts proved.

Nowhere in the instructions, original or supplemental, was jury ever told they must agree among themselves about which conduct applies to which count. Nowhere. The State claims the jury was told the counts must be considered separately, and each count must be supported by separate and distinct conduct. State's Brief, 33 (R.468). True enough. That does not tell the jury anything about unanimity in the sense here. It tells them not one iota about the constitutional requirement that each juror agree with every other juror about what Chadwick did. Under the instructions each juror would have considered each count separately, and each juror would have required Count 1 to be supported by conduct distinct from the conduct related to other counts. And yet each juror, as directed by the court in response to questions about this specific aspect of unanimity, would have understood that they did not have to relate specific conduct to a particular count. Each juror would have understood that, as long as each juror agreed that one violation of the law had been proved, they could unanimously agree to guilt in Count 1.

The district court's responsive instructions eliminate any doubt that the jury would have read between the lines of the general unanimity instructions and understood unanimity. This is harmful.

II. The district court erred by refusing to conduct a renewed review of the mental health records after the State made them material

Chadwick has claimed that the State's questioning about trauma, and F.L.'s testimony in response, changed the claims presented by the State and the defenses needed by Chadwick. That change gave rise to the obligation for the court to conduct a renewed review of the mental health records. The State's response is that because the original motion and stipulation did not cover this new area of privileged material Chadwick was required, in the middle of trial and after the State had opened the door to this additional area, to file a new Rule 14(b) motion and litigate everything anew before the court was required to perform a renewed *in camera* review. Chadwick now replies that this argument ignores the clear holding of the U.S. Supreme Court. The State's brief does not even mention *Pennsylvania v. Richie*, not once.

A. This matter is reviewed for correctness, not clear error

As an initial matter, the State claims that, because this question of privilege "turn[s] on factual issues", this Court should review the district court's refusal to perform a review of the mental health records for clear error, rather than correctness. State's Brief, 55. That's not right because the court did not make any relevant factual determinations that this court must afford deference when it denied Chadwick's legitimate and necessary request.

The State's position is immediately refuted by the case it next cites, *State v. Martin*, 1999 UT 72, 984 P.2d 975. There the court conducted a pretrial in camera review of the victim's mental health records, just like this case. There the court disclosed a portion of the records and retained the remainder, just like this case.[1] One difference is that in *Martin* there is no indication that the defendant asked the court during trial to perform a renewed review based on some trial evidence. That did happen here. And yet, even in *Martin*, this Court held that "[b]ecause the record does not indicate that the trial court conducted an ongoing review of this sealed file, we remand and direct the trial court to review the file in light of the actual trial proceedings and to determine if the file contains any information that is material and has a reasonable likelihood of producing a more favorable outcome". *Martin*, ¶19. That result is doubly appropriate here, no clear error required.

B. The district court erred

For the State, when Chadwick asked the court "to release portions that become relevant as the trial progresses", he was seeking "to unilaterally expand the stipulation permitting the court's original *in camera* review to include records he never established the right to access." State's Brief, 56. The State claims that

[1] Although presumably the trial court in *Martin* actually disclosed the mental health records themselves, as opposed to purporting to quote individual sentences from them in a ruling.

anything outside the scope of the stipulation was subject to a completely new Rule 14(b) process. This is all wrong.

First of all, Chadwick had demonstrated he had the right to access the records. F.L. testified that she suffered trauma from Chadwick's abuse (there was a "physical, mental, or emotional condition" that was "an element of any claim or defense"). F.L. testified she was seeing these therapists, testified they were addressing her trauma. The records had already been subpoenaed. Under any view of the Rule 14(b) process, Chadwick had established that an *in camera* review was required. The only question left was whether the court would discover material evidence within the records, which the court refused to do. And that refusal was not based upon some supposed failure on Chadwick's part but upon the court's inability to have "digested the full import of those records." R.841. As Chadwick pointed out, regardless of whether the court remembered everything in the records, it was "under a continuing obligation to release portions that became relevant as the trial progresses." R.841. Chadwick had certainly demonstrated that records related to treatment of F.L. for trauma were relevant to the claims and defenses being presented at trial.

The State again hangs its hat on the fact that it originally stipulated to the "specific categories of information" that the judge was supposed to disclose to Chadwick and that the original review was only for that narrow area. The State believes that stipulation deprives Chadwick of the right to expect the court to

protect his due process right to material exculpatory evidence as the case proceeded. There is nothing in the 14(b) case law, nor in the federal due process cases that give rise to the 14(b) process, that limits the court's duty to disclose additional evidence when the materiality of that other relevant exculpatory evidence is apparent.

Take *Ritchie*. The trial court reviewed some of the records *in camera*, then refused to order disclosure. After the Pennsylvania Supreme Court upheld a reversal with an order authorizing defense counsel access to the records search for evidence helpful to the defense, the U.S. Supreme Court affirmed and reversed in part. The defendant there had asked for the records because he believed they might contain exculpatory information. According to the Court, due process entitled the defendant to have the trial court "determine whether [the records] contain[] information that probably would have changed the outcome of this trial." *Pennsylvania v. Ritchie*, 480 U.S. 39, 58, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). "If a defendant is aware of specific information in the [CYS] file (e.g., the medical report), he is free to request it directly from the court, and argue in favor of its materiality." *Ritchie*, 60. "Moreover, the duty to disclose is ongoing", the DUTY to disclose is ongoing. *Id*. (emphasis added).

That duty is the court's. "[I]nformation 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.* When the proceedings progress, the materiality of certain evidence changes. As Justice Blackman keenly recognized in his concurring opinion, "[i]mpeachment evidence is precisely the type of information that might be deemed to be material only well into the trial, as, for example, after the key witness has testified." *Id.*, 65-66. "[T]rial courts should be particularly aware of the possibility that impeachment evidence of a key prosecution witness could well constitute the sort whose unavailability to the defendant would undermine confidence in the outcome of the trial." *Id*.

When the proceedings progress, the claims and defenses change, too. The trial court's refusal to reconsider the records because it was "not in the position to have digested the full import of those records" was an abdication of its duty under due process. R.841. The court was wrong, there was a way to "comply with that", even if it had not digested it all on the first review; that was is a renewed review for "portions that became relevant as the trial progresses." R.841.

That obligation of ongoing disclosure belongs to the court. "[I]n some circumstances, the full exculpatory value of certain records may not be clear until after the witness has testified at trial and more is known about the case and the witness. Trial courts should therefore be aware that the duty to disclose is an ongoing duty that continues through trial. Courts should also be receptive to any renewed requests for in camera review that may be based on new information

learned at trial". *Douglas v. State*, 527 P.3d 291, 309. In *Douglas*, the defendant believed the victim had received significant medical and psychological treatment and filed a motion requesting discovery of these medical records. The court denied the pretrial motion for *in camera* review because the records were privileged and he had not met the standard by only offering speculative assumptions about the victim's medical history. *Douglas*, 296-297.

During trial the victim's "cognitive functioning emerged, including the fact that she *had* suffered a traumatic brain injury" and memory issues. *Douglas*, 297-298. Defense counsel "renewed his request for an *in camera* review of the neuropsychological reports… arguing that the testimony at trial had established that R.D. had a traumatic brain injury and that she might have cognitive difficulties and problems perceiving and remembering events." *Id.*, 298. The court denied the request, holding it was precluded from any further review. On appeal the Alaska Supreme Court reviewed the case for error and held that "by the time of the renewed motion at trial, it was clear that [the victim's file] would likely contain information that was relevant to [the victim's] ability to accurately perceive, recount, and/or recall the events in dispute and that this information could be directly relevant to the defense attorney's ability to effectively cross-examine [the victim] at trial." *Douglas*, 302. Because the trial evidence demonstrated the records likely contained exculpatory evidence, the trial court erred in denying a mid-trial *in camera* review.

Finally, the State denies that it bears the burden of proving this error was harmless beyond a reasonable doubt. Although it is true that details of harm cannot be known officially known until the case is remanded that the *in camera* review is collected, "if the *in camera* review reveals evidence that qualifies as both favorable and material, the [trial] court shall disclose that evidence to the parties and allow the parties to brief the question of whether non-disclosure of this information was harmless beyond a reasonable doubt." *Douglas*, 313.[2]

C. Even under the clear error standard, the trial court clearly erred because this Court should be convinced a mistake was made

The State defends the district court's "ultimate conclusion" that it need not perform a renewed record review, even if it used the wrong reasoning, because Chadwick was asking the court to look for information it had not been asked to look for before. State's Brief, 59. But that is exactly what the ongoing duty to disclose contemplates; as the proceedings progressed additional evidence became material to the fairness of the trial. The State cannot and does not claim that the district court did not have the ongoing duty to disclose. When the court refused to even review whether disclosure was necessary, it made a mistake.

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[2] See *State v. Peseti*, 65 P.3d 119, 130 (Haw. 2003) ("[T]he denial of a defendant's right to confront adverse witnesses is subject to the harmless-beyond-a-reasonable-doubt standard of review."); see also *Spencer v. State*, 642 P.2d 1371, 1376 (Alaska App. 1982) (applying constitutional standard of harmless beyond a reasonable doubt to an error involving discovery of a witness's psychiatric records held by the State).

Again, consider the progress of the trial. Chadwick established, based both on the record testimony and the stipulation, that F.L.'s therapy records did exist. In his motion he cited to an interview transcript where F.L. told the detective she had talked to therapists over the years about Chadwick, told him about the memory techniques her therapists had used on her, described the places she had been for therapy. R.116-117. Chadwick presented evidence that F.L. was receiving this treatment "to help her cope". R.129. And that she "usually stop[ped] at that point… 'cause… I don't want to remember". R.129. F.L. told the detective she wasn't complying with the therapists' recommendations to write down her memories because "it hurts to (sic) much to write down anything". R.130. Through the transcript he established that F.L. was seeing therapists to help her cope and to remember what happened.

Then, at trial, the State introduced evidence on direct that F.L. had "talked with therapists about [these incidents]". R.826. Chadwick attempted "to establish a foundation for maybe why she's going to different therapists. It would be apart from trauma related to my client's interactions with her", but the State objected, and the court sustained it. R.833. Then, based on the limited information he had about F.L.'s therapy, Chadwick attempted to impeach F.L. by confronting her about her statements to therapist regarding her memory. R.833-835. F.L. claimed that her refusal to discuss the details was not a memory problem. That was the

extent of mental health information that had been provided, that was the extent of the impeachment opportunity.

But then the State asked F.L., "[w]hat was the purpose for going to therapy?" R.836. The State asked if F.L. went to therapy "to address… any of the incidents that you've talked about here today?" R.836. The State then asked, "What were some of the things that you would do in therapy?" R.836. F.L. answered, "Mostly I deal with coping skills." R.836. The State asked, "was any of it to process trauma?" R.836. F.L. responded "Yes", and that she went to learn coping skills to "process trauma on [her] own". R.836-837.

The State went on asking about her progress with those coping skills, about how the trauma affects F.L., about whether her treatment has "helped [F.L.] in any aspect regarding the incidents that [she had] spoken of" in court. R.837. F.L. testified she has made progress, her responses to panic attacks improved, she can calm herself, and she can go to Eagle Mountain (where Chadwick lives). R.837.

This focus on F.L.'s trauma, on her therapy to address that trauma, on the skills she learned in therapy to cope with that trauma, on her improvement in dealing with panic attacks, all came from the State's questioning about trauma. In response, Chadwick asked F.L. about the sources of her trauma because he needed to "explor[e] the possibility that there are other contributors to that [trauma]… because the jury otherwise is left with the impression that of course

she's telling the truth, because otherwise why would she be" experiencing these symptoms and needing these coping strategies from treatment. R.839-840.

It was in this context that the court declined to even consider disclosing any further records to Chadwick. There are no "factual issues" that support this decision. It was a legal error; it was clear error.

III. The Amicus filing

F.L. has filed a brief "in support of the State of Utah/Appellee and [of] affirmance of the conviction". In it, F.L. does not address the merits of the claims raised before the court, and only makes "one small but important point about the procedures for litigating the confidentiality of crime victim's mental health records." Amicus Brief, 1. F.L. argues that because crime victims are often unrepresented they are ill-equipped to voluntarily waive their privileges and that courts should seek to protect those privileges "in a manner no less vigorous than protections afforded criminal defendants." Amicus Brief, 2. Chadwick wholeheartedly agrees that courts should vigorously protect the rights and privileges afforded to individuals by the state and federal constitutions, statutes and codes, and applicable legal rules. Chadwick agrees that courts often bear the responsibility to protect unrepresented individuals from the government a

But it is worth pointing out that, in most cases involving the Rule 506 privilege, waiver of the privilege is not the primary question, though it is true in this case F.L. did take some actions which did or could have waived her privilege

under Rule 510(a). In most Rule 506 cases, the question that is litigated is the existence of the privilege at all.

Rule 506 provides that "No privilege exists" "[f]or communications relevant to an issue of the physical, mental, or emotional condition of the patient… in any proceeding in which that condition is an element of any claim or defense". UTAH R. EVID. 506(d). The privilege and the policies underlying it, is entirely subject to that definition. The language used in legal conversations (and holdings) often suggests that a defendant in a criminal case must 'overcome' the patient's privilege, but the truth is that if the litigation involves a claim or defense to which the patient's condition is an element, there is no privilege to overcome.

That was certainly the case in the portion of the records focused on at this stage in the proceedings, and it is the reason the trial court correctly recognized that the State had "opened the door" to a discussion of F.L.'s mental health treatment. Regardless of whether F.L. "made any choice to 'open the door' to a further and expanded examination of her records", the course of the litigation, as led by the State's attempt to portray Chadwick's abuse as the source of F.L.'s trauma and need for therapy, led to a scenario where her records were not privileged.

F.L. characterizes that as a waiver involuntarily placed upon her by the State, but under the language of the rule the privilege exists only if the condition

is not an element of any claim or defense in a case. The State does not "waive" the privilege for F.L. by raising her condition as a component of its claims. Chadwick does not "waive" the privilege for F.L. by raising her condition as a component of his defense. The language of the rule itself merely limits the existence of the privilege, regardless of the patient's holder's interest in obtaining or maintaining the privilege, to scenarios outside of litigation that involve the condition. It is true that the procedures created by this Court to establish the non-existence of the privilege have placed a heavy burden on criminal defendants to both establish that an exception to the privilege exists (there is a condition and that it is an element of a claim or defense) and demonstrate to a reasonable certainty that the requested records contain exculpatory evidence. *State v. Bell*, 2020 UT 38, ¶15.

But the point is that when Rule 506 allows for the admission of communications between a patient and a treating physician or mental health therapist it does so not because the court finds a waiver about which the holder of the privilege needs to be warned, it is because the subject matter of the litigation, the claims and defenses, prevents the existence of the privilege to begin with.

F.L. next argues that "it should be incumbent on criminal defendants (such as Chadwick) to, where possible, litigate these issues concerning confidentiality of records as early as possible—when crime victims are not effectively disabled

from protecting the confidentiality of their records." Amicus Brief, 4. Of course, the criminal defendant in this case (Chadwick), did litigate the issue of the existence of F.L.'s privilege early in the case, beginning immediately after F.L. testified about her mental health treatment at the preliminary hearing. R.49-50 (preliminary hearing was held on June 21, 2017); R.28 (defendant filed a discovery request for information related to F.L.'s therapists on June 21, 2017); R.109 (defendant filed a discovery request for information related to F.L. communications about her therapy with prosecutors on November 21, 2017); R.115 (defendant filed a motion for 14(b) subpoenas on January 17, 2018); (the trial was held in August of 2019).

Obviously, if Chadwick had known the State intended to introduce F.L.'s mental health treatment to prove she sought help coping with trauma she suffered because of Chadwick's actions, the pretrial litigation would have been different. Because the State surprised Chadwick with this claim at trial, changing the evidentiary landscape in the middle of F.L.'s testimony, and because Chadwick had hitherto been previously denied any access to any mental health records, his ability to anticipate this claim and his need for a defense against it was quite limited. This is precisely why the U.S. Supreme Court recognized the ongoing due process duty to reassess the existence of the privilege "as the proceedings progress". *Ritchie*, 60. F.L.'s criticism of Chadwick here is misplaced.

CONCLUSION AND SPECIFIC RELIEF SOUGHT

Because the district court erroneously instructed the jury that its verdicts need not be unanimous, the conviction in Count 1 must be reversed. Because the court refused to review the victim's mental health records for material exculpatory evidence, the case must be remanded for such a review. If any material evidence is located, the conviction must be reversed.

RESPECTFULLY SUBMITTED this 5th day of December, 2024.

/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 7,005. It was prepared in Microsoft Word.

B. Neither this brief, nor its addendum, contains any non-public information as described in Rule 21(g).

/s/ Douglas Thompson

CERTIFICATE OF MAILING

I certify that I emailed a copy of the foregoing brief and will mail two paper copies,, to the Utah State Attorney General, Appeals Division, criminalappeals@agutah.gov, P.O. Box 140854, Salt Lake City, Utah 84114, and to F.L., cassellp@law.utah.edu and heidi@utahvictimsclinic.org, 33335 South 900 East, Suite 200, Salt Lake City, Utah 84106, on this 5th day of January, 2024.

/s/ Douglas Thompson