PUBLIC

IN THE UTAH COURT OF APPEALS

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

REVISED 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

This brief is submitted as a revision the brief filed on September 1, 2020, following the Court's April 14, 2021 order re-sealing the counseling records and directing Chadwick to file a revised brief omitting the records. This places Chadwick in an impossible position on appeal. The issue related to the records requires a review of the records to determine whether the contents of the records are material, "whether there is a reasonable probability that, if the evidence is disclosed to the defense, the results of the proceeding will be different" (*State v. Blake*, 2009 UT 79, ¶23, 222 P.3d 1144 (*citing State v. Cardall*, 1999 UT 51, 982 P.2d 79)), or "a probability sufficient to undermine confidence in the outcome" (*Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987)).

But the Court's order has denied Chadwick the ability to present argument on that question. Without being able to refer to the records or their contents it has become unclear what, if anything, an appellant can do to meet its burden on appeal to demonstrate the suppressed evidence is material. Without access to the specific

evidence, an appellant cannot be expected to persuade the appellate court that the evidence is material. Rather, the reviewing court is obliged, without the benefit of the parties' help, to fully review the contents of the records and apply the reasonable probability materiality assessment. See *Blake*, 2002 UT 113, ¶23, 63 P.3d 56 ("Despite the problems inherent in *in camera* review without the presence of counsel, such review represents a satisfactory method of balancing the interests of privacy and full reporting of crime with defendants' ability to present the base case at trial.").

Chadwick believes the Court's order re-sealing the records was in error and urges the Court to reconsider, and in so doing, urges the Court to consider the arguments referencing the contents of the records in Chadwick's original private brief. Doing so would allow the Court to remain a neutral arbiter on the question of materiality. Without the benefit of the parties' arguments, this court must take a position similar to an advocate, putting itself in the position of having to formulate defense arguments based on the evidence in the records, and having to then analyze how those defense arguments supported by the evidence would have had an impact on the outcome of the case.

In the alternative, if the Court is convinced that a *in camera* review *de novo* is the proper appellate procedure, Chadwick is forced to vaguely gesture toward fruitful areas. Without the ability to refer to the content of the records, Chadwick cannot actually argue the merits of materiality, he can only make arguments about how certain kinds of evidence within the records would be material if they are in

fact present in the records.[1]

With one hand tied behind his back, Chadwick implores the Court, in its *de novo* materiality review, to view these records with an *advocate's eye* and to earnestly consider how these records would be necessary and effective from the defendant's perspective.

STATEMENT OF THE ISSUES

1. Whether the trial court incorrectly declined to instruct the jury on the requirement that the jury's verdicts be unanimous as to the specific act underlying each count. The issue was preserved by Chadwick's objection to the Court's instruction following the jury's request for information connecting a particular course of conduct with each count. 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.

2. Whether the district court erred in its ruling on Chadwick's 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 motion, which was stipulated by the State.

[1] See *State v. Betony*, 2021 UT App 15, ¶¶36-39, 482 P.3d 852. This Court concluded the defendant there failed to provide specific examples other than to generally state that the [] records 'would have supported or, at a minimum, given the defense, its witnesses and the court the entire evidentiary picture rather than one having to be pieced together from various sources…'" It seems the defendant there failed, even having access to the records. Here Chadwick cannot even point to the content of the records to show how they are material.

R.115-123, R.537-538.

"Whether 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. This Court reviews the district court's ruling on privilege for correctness. *State v. Cegers*, 2019 UT App 54, ¶20, 440 P.3d 924. *See also Blake*, 2002 UT 113, ¶6, 63 P.3d 56. "[B]ecause 'the existence of a privilege or an exception thereto is a question of law,' we must determine de novo whether the [] records were material." *Betony*, 2021 UT App 15, ¶36 (quoting *State v. Worthen*, 2008 UT App 23, ¶9, 177 P.3d 664).

STATEMENT OF THE CASE

A. Facts of the case[2]

• Preliminary hearing[3]

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[2] 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. As will be explained in more detail below, 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 facts. 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. After all, Chadwick must be presumed innocent on at least three of these counts where he was acquitted, and it is impossible to know which facts the jurors found him guilty on.

[3] Testimony from the preliminary hearing is presented here because it was the only evidence before the district court when Chadwick moved to gain access to the complaining witness's mental health records. To the extent that the materiality question for this Court is distinct from materiality question for the district court, the trial testimony is also presented in order to establish the facts against which this Court's materiality assessment may be performed. "'In the context of a case yet to go to trial, the test becomes more difficult to apply because the trial court must anticipate the efficacy of the material contained in the records in persuading the

At the preliminary hearing the complaining witness, F.L.,[4] testified that when she lived in Eagle Mountain, in the late 90s, she met David Chadwick because he lived "kitty-corner" to the home where she was living with her friend. R.035. F.L. believes this was in 1999, when she was eight. R.035. Her friend took her to Chadwick's house because he had a Nintendo 64 and video games. R.036. She and her friends, the neighbor girls, also roller skated in Chadwick's basement. R.036. "It became a common thing to go over to his house. [F.L.] would go over there sometimes when [she] was sick." R.037.

One time when F.L. was sick and home from school and because her mother was working, she stayed at Chadwick's house. R.040. F.L. recalls that she sat in Chadwick's lap while they were watching a moving and "noticed that he'd become erect. So [she] went to move off and he told [her] it was okay to stay." R.038. F.L. claims Chadwick then asked her if she wanted to touch his penis, and she said she did. R.038. "It turned into a game where [F.L.] ended up kneeling on the ground in front of him" and "he had his hand underneath his pants, and moving it around so that I could catch it." R.039. F.L. testified that when she would catch Chadwick's penis, her hand was on the outside of his pants and he would move her hand down.

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fact-finder to discredit the victim'… whereas an appellate court has the benefit of reviewing the material context of a trial that has already taken place." *Betony*, 2021 UT App 15, fn.8 (citing *Blake*, 2002 UT 113, ¶23).

[4] At the time of the alleged incidents, the complaining witness was known as T.S. Since that time, she has changed her name to F.L. For the sake brevity and to avoid unnecessary confusion, anytime the record refers to the name T.S. Chadwick will use the name F.L.

R.039. F.L. described the penis as being partially erect, not hard or stiff, but "in between". R.054. F.L. claimed there was a knock at the door and the game ended. R.041. She claims Chadwick told her not to tell anyone about it. R.041.

F.L. does not remember whether this happened more than one time, but this is the only time she remembers. R.060-061. She testified she believes it may have happened more than one time because she has PTSD. R.061. F.L. testified she was diagnosed with PTSD by a "psychiatrist and a therapist". R.061.

Later, in early 2000, F.L. and her family started living with Chadwick. R.041. There was an incident, when she was 9 or 10, where F.L. was sitting on Chadwick's lap while they were watching TV and his penis became erect. R.042, R.055. F.L. could feel his penis under his pants. "He did end up pulling it out from his pants and rubbing it against the underwear" F.L. was wearing, "toward [her] bottom more." R.043. F.L.'s mom then "opened the door and he stopped, but she didn't notice anything wrong because it wasn't uncommon for [F.L.] to be sitting on his lap." R.044.

On other instances F.L. claimed Chadwick would pass F.L. in the hallway and would grab her and tickle her sides and caress her breasts, moving his hand across the chest. R.044-045, R.056. F.L. says touching her breasts happened more than one time. R.046. Sometimes it would happen over her shirt and "[s]ometimes it slipped up the shirt because of the way he grabbed [her]." R.057. It stopped about the time F.L. turned eleven. R.046. Chadwick would also pin her to the ground and hold her down with his hips to tickle her ribs. R.045, R.059.

F.L. first reported the abuse to her sister when she was eleven. F.L. grades started to drop, and she began cutting herself, so her sister asked if anything had happened. R.062-063. F.L. told her sister exactly what she testified to, and "possibly more", but she didn't know. R.063. When F.L. was interviewed by the police she told them she had seen a number of therapists since 2012. R.049. See also R.127, 129. F.L. testified she had seen four therapists. R.050.

• Trial testimony

Aaron Tischner is a former Utah County Sheriff's 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 complainant and interviewed her and then introduced her to the victim services coordinator. R.758. Then in May of 2016, Tischner and another officer met with David Chadwick at his home in Eagle Mountain. R.758. They interviewed him in his home.

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 said he did not recall it ever happening. 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. While F.L., her mother, her sister, and her brother lived with the Baum family, there were four Baum girls and several cousins living there, too. R.791-792. 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, not married, with 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 remembers his house pretty well, it was "in [her] memory." R.796. She also lived in the house. Her family "started staying there in 2000 upstairs off and on in his spare bedroom. Then he 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 home sick, and her mother was working. R.808, R.813. F.L. was sitting on his 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. 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. F.L. admits she previously told the officers there was never any skin-to-skin contact. R.831. It didn’t last very long and ended when her mother opened the door. R.816. Even though Chadwick was 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 in the living room. R.818, R.822. During that tickling, his hands would touch her skin

under her shirt, "[a]long the rib cage and slip" on to her breast and nipple area. R.818. F.L. does not remember how many times it occurred between the ages of 8 and 11. R.819. F.L. admitted that she 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. said Chadwick would 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 [she] was staying with her 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. The sister was saving it for F.L. "for if [she] ever did decide to come forward." R.825.

F.L. began seeing therapists and told them "parts of the details". R.833-834. She denied saying she did not remember the details when meeting with her therapists. R.834. Instead, she 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. said she was not sure. R.835. F.L. asked which therapist she said that to, because she was not going to "talk to a therapist that [she] did not know". R.835. When asked again, 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. 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).

Chadwick testified he has lived in Eagle Mountain for 21 years. R.900. In 1999 he worked with the Army National Guard full-time 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.

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 in the evening with F.L. 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. 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 original 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 attribute each count with a 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. At the conclusion of the hearing the court found the State had "met its burden of proof." R.079, R.080. Chadwick then entered a not guilty plea on each count. R.094, R.512.

Following the preliminary hearing, Chadwick 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. However, when the State did not provide the information, Chadwick filed 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. According to the transcript of the oral argument, the State "provided a response to [Chadwick's] discovery request…" so the issue 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. 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 [redacted] authorizing Chadwick to issue subpoenas to these entities with instructions to provide the records to the court for *in camera* review. R.234-236.

After an *in camera review*, the court ruled that the records provided by [redacted] The court did not provide Chadwick any of these

records or describe their content in its ruling.

In its ruling on its review of the [redacted] The court did not provide Chadwick copies of these records, redacted or otherwise. Instead, the court described those references by apparently quoting from the records in its written findings.

From a [redacted] The court found "no further description of the abuse, report to law enforcement or efforts to enhance or refresh the memory of the alleged victim." R.250.

The court purportedly quoted [redacted]

[redacted]

The court cited [redacted]

The court ruled that the records provided by [redacted] The court did not provide Chadwick access to the Sandy Counseling Centers records or describe their content.

In its ruling on its review of [redacted] The court then found there "is no further description or information about Mr. Chadwick or the alleged incidents. There is no other information within the

records that would fall within the parameters of the Order." R.262-263. The court did not provide Chadwick with a copy of these records, redacted or otherwise.

Chadwick was tried on four identical counts of sexual abuse of a child, each a second degree felony, each alleged to have occurred "beginning in 1999 and concluding in 2002". R.468. In opening statements, the State explained to the jury that they would present evidence that F.L. would sit on Chadwick's lap and "[w]henever her little bum was sitting in his lap on top of his penis he was sexually aroused", that they played the "Catch it" game, that another time he rubbed his exposed penis "against her bum", and finally that "there were many times that [Chadwick] would tickle her" and "touch her around her breasts and her nipple area." R.742-744.

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 records, redacted or otherwise. The district court only issued its ruling which purported to quote from those records. The context, the dates, and the meaning of these quotations were withheld from Chadwick. 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 did not provide anything else from the records because it said it was not in a "position to have digested the full import of

those records." R.842.

The closing instructions included a single elements instruction for all four counts of sexual abuse of a child.[5] In it, the district court directed 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.

During deliberations, the jury sent a series of questions to the judge related to which factual allegations corresponded to which 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 on a conference call 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.

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

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 3 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 [c]ourt again had a pre-formulated response ready prior to calling for attorney input." R.1111. "The [c]ourt 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. Because defense counsel's objections on this point had "been overruled twice already", he did not object a

third time. R.1111.[6]

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

> "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 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]

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[6] As the district court later put it, defense counsel "made an adequate and timely objection, as he has described in his affidavit." R.1123.

[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

It is important to be clear here, the jury was told that they need not relate specific conduct with any particular count. 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 beyond a reasonable doubt for its verdict in Count 1. Neither does it reveal 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. This Court granted Chadwick's motion and the district supplemented the record with documents it reviewed in camera.[8]

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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.").

[8] Those records were originally classified by this Court as private, released to the parties, and citations to those records were included in Chadwick's initial private briefs. The records were later "re-sealed" by the Court and Chadwick was ordered to file this revised brief omitting F.L.'s confidential counseling records. See Court of Appeals' April 14, 2021 Order Sealing Appellate Record.

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. This Court 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 identical counts of sexual abuse of a child based on several allegations that were 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 told specifically that the jury 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 because the Court can have no confidence that the one count that resulted in a guilty verdict was the result of each juror being convinced beyond a reasonable doubt that Chadwick engaged in the same conduct that would satisfy the elements of the charged offense.

The trial court erred in its ruling and review of the therapy records made following Chadwick's motion to access those records pertinent to his defense. A

review of those sealed records on appeal will demonstrate that the trial court either missed obvious references throughout the records that should have been disclosed or erred in its assessment whether that information was material to Chadwick's defense. In either case, the court erred and that error prejudiced Chadwick's defense.

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). A verdict would not be 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.

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.[9] The error was thus plain.

"Instruction 26 violated the constitutional requirement of jury unanimity" 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

[9] 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).

Article I, section 10 of the Utah Constitution not to give a unanimity instruction." *Saunders II*, ¶62.

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, 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*.

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 a 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 is 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 "touched the anus", or touched the buttocks, or the breasts, or the genitalia, or otherwise took indecent liberties.

The jury was 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.

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

After some time unknown time spent deliberating, 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. It appears from the question that the jury instructions, and primarily the elements

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

instruction, did not provide sufficient clarity to the jury about how they were to apply the elements to the separate and distinct counts. The jury wanted to know how to consider each identical charge "separately", how to determine whether the identical offenses were proved "by separate and distinct conduct for each count". R.486.

Chadwick told the 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, 'don't trouble yourselves with trying to identify which facts each of you agree on, and just focus on what number you can all agree on.' This instruction erroneously and prejudicially directed the jury away from unanimity and toward assessing 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 erroneous 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 jury 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 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

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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.).

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 this case Chadwick was charged with four identical counts of sexual abuse of a child based on distinct conduct prohibited by the statute. *Compare Alires*, ¶22. The information charged Chadwick with four identically-worded counts[12] of sexual abuse of a child without distinguishing the counts by act or timeframe. *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.[13]

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*, 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).

[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 single elements instruction (R.468).

[13] The State's closing argument characterized the 4 counts as (1) the 'catch it' game, (2) rubbing his penis on her buttocks/vagina, (3) and (4) at least two incidents of tickling and touching her breast. See R.952-953. However, because the jury was specifically instructed that this characterization was not a pleading or fact, and because the State presented other evidence that could have arguably met the elements of the crime, the jury was not obliged to apply that characterization.

Yet this is exactly what the jury instructions allowed in this case. In fact, the district court explicitly directed the jury away from unanimity when they were seeking clarification. 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.

Without such an instruction, some jurors might have found that Chadwick played the 'catch it' game, while others might have believed he rubbed his penis on F.L.'s buttocks, 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 as an indecent liberty. 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. Harmful Error

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)). A trial court's error is not harmful unless there is a reasonable likelihood of a more favorable result, unless confidence in the verdict is undermined. See *State v. Reece*, 2015 UT 45, ¶¶39-40, 349 P.3d 712. The facts and outcome in this case demonstrate that there is a reasonable likelihood of a more favorable result and this Court's confidence in the verdict in Count 1 should be undermined.

Much like the evidence in *Alires*, the evidence in this case was far from overwhelming. See *Alires*, ¶¶28-30. The 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 charges claimed the offenses occurred in 1999-2000, nearly 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 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.

Chadwick also asserts that this Court, with its access to F.L's therapy records, may be able to identify harm associated with the unanimity error as well. Any records that contain inconsistent statements or memory problems would bolster the prejudice demonstrated by the jury's verdicts.

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 the second jury question,[15] and let's call those scenarios A, B, C, and D. 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

[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.
[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.

all eight jurors associated scenario A with Count 1, that 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. Meaning, it's highly likely some of the jurors found the defendant guilty in Count 1 based on scenario A, while other jurors found him guilty based on scenario B, C, or D. And because Chadwick was acquitted on Counts 2, 3, and 4, had the counts and the allegations been linked, it's also highly likely, without the error, there would have been a more favorable outcome. How much confidence can there be in such a verdict? Don't those numbers alone show there is a reasonable likelihood of a more favorable outcome if all the jurors were required to consider the same factual scenario for Count 1?

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 to defend the 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 the jury believed. Nor can the State challenge harmfulness by trying to argue the strength of each of the allegations, since we know each of the jurors rejected all but one of the allegations. For all these reasons the error in requiring juror unanimity is a harmful one and must result in reversal.

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

G. Plain Error

Though it seems unlikely, given the information contained in the supplemental record, in the event that this Court finds 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

[16] Chadwick acknowledges that this Court characterized the double jeopardy issue as not yet being ripe in footnote 7 in *Alires*. However, given the fact that no Utah Court has actually addressed the question, and this Court did not express an opinion on the merits of the issue, 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.

conduct related to separate the counts.

As for harm requirement for plain error, the above described harmfulness argument applies here as well.

II. This Court's Order Re-Sealing the Therapy Records on Appeal Denies Chadwick Due Process and Fundamental Fairness

In response to the Court's April 14, 2021 order, Chadwick now asserts that the current sealed state of the therapy records on appeal violates his right to appeal, to due process on appeal, and to fundamental fairness. Chadwick asks the to consider the references and arguments related to materiality contained in the private brief he filed on September 1, 2020.

Rule 14(b) does not specifically address the sealing or unsealing of records for review by the Court or the parties on appeal. Rule 506 does not specifically address the sealing or unsealing of records for review on appeal. Neither does Utah Code §77-38-1 et seq., nor does Utah Const., art. I, §28. No statute, or case law, or rule, or anything requires this Court to seal these records on appeal. Nothing requires this Court to remove the content of these records from the appellate discussion, briefing and argument, and nothing authorizes this Court to eliminate an appellant's constitutional right to challenge the district court's ruling on appeal.

The federal due process clause requires that appeals conform to standards of fundamental fairness and, accordingly, that counsel on appeal be made available and provide effective assistance. *Evitts v. Lucey*, 469 U.S. 387, 396, 105

S.Ct. 830, 83 L.Ed.2d 821 (1985).[17] In order to provide effective assistance on appeal and "make that appeal more than a 'meaningless ritual'", counsel on appeal must "be able to assist in preparing and submitting a brief to the appellate court… and must play the role of an advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Evitts*, 393 (citing *Swenson v. Bolser*, 386 U.S. 258, 18 L.Ed.2d 33, 87 S.Ct. 996 (1967) and *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)). In so doing, appellate counsel must be given access to the complete record, especially the portions of the record upon which the decision being appealed was based.

In *Entsminger v. Iowa*, 386 U.S. 748, 749, 751, 87 S.Ct. 1402, 18 L.Ed.2d 501 (1967), where an Iowa law provided for a "clerk's transcript" on appeal, as opposed to a "transcript of evidence [and] the briefs and arguments of counsel", the United States Supreme Court found the appeal to be an inadequate and ineffective "review of the merits of the proceedings culminating in a conviction." So too here, the Court's order removing the records reviewed by the district court from the parties' access on appeal renders appellate counsel's obligation to perform his constitutional duty effectively and completely on appeal a farce. "By such action 'all hope of any adequate and effective appeal at all'… was taken from the" defendant. *Entsminger*, 386 U.S. 748, 751 (citing *Lane v. Brown*, 372 U.S.

[17] Though States are not obliged under the federal constitution to provide appeals of right to criminal defendants, when they do "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts*, 469 U.S. 387, 392.

477, 485, 83 S.Ct. 786, 9 L.Ed.2d 892 (1963)).

Of course, F.L.'s privacy interests must be considered, and Chadwick's rights to appeal, to due process, to confrontation, to present a defense, to fundamental fairness, and to effective assistance of counsel on appeal must be balanced against those privacy interests. That balance can and should be struck in a way that preserves the right to a meaningful appeal with the effective assistance of counsel and the function of appellate courts as neutral arbiters. The Court can and should return to the process it began with, classify the records as private. Authorize counsel for the parties to access the records for the purpose of preparing briefs and oral arguments and restrict any other access. Order the parties to file any briefs or other documents containing private information consistent with Rule 21(h). Limit access to the records to those required to address the issue, but do not render the right to appeal meaningless and do not eliminate the right to effective counsel.

III. The District Court Erred in its Ruling on Chadwick's Motion for Access to the Complaining Witness's Mental Health Records

If this Court disagrees with the argument immediately above, and instead believes the appropriate method for reviewing 14(b) materiality decision is for this Court to conduct its own *in camera* review of the evidence and apply a *de novo* application of the materiality assessment, Chadwick asserts in the alternative that the Court should view the evidence with an "advocate's eye." Rather than failing to "digest[] the full import of those records," as the district court admittedly did (R.841), this Court should look at the records in the context of the entirety of the

case, and consider how the information contained in the records, and F.L.'s statements within the records, would have given rise to defense arguments and had an impact on all aspects of the defense and on the jury's assessment of the State's evidence.

According to the parties' stipulated motion and the district court's order, the court was to review the records and provide Chadwick "portions that contain a factual description of the alleged abuse by Mr. Chadwick and circumstances surrounding those events, any report of those events by the counselor to law enforcement, and any methods used to refresh or enhance the memory of the alleged victim regarding those events." R.235. Any information and evidence within those records that related to those areas, and which are material, should have been provided to Chadwick.

Chadwick now asserts that the district court's rulings on the *in camera* review did not provide him with the evidence contained within the records to which he was constitutionally entitled. However, the briefing obligation normally placed on an appellant cannot apply here because Chadwick has been prevented from access to the records, and prevented from referring to the contents of the records in his arguments about why the content of those records are material.

In compliance with the Court's order re-sealing F.L.'s records and directing Chadwick to remove all citations and references to the records, Chadwick now presents his materiality arguments in a quite different form. Previously Chadwick had quoted from the records themselves and demonstrated how that evidence,

generally F.L.'s own statements and admissions, within the records was material to Chadwick's defense. Because such arguments and demonstrations are no longer available, Chadwick now vaguely points to areas and themes which, if evidence in these areas and themes exist, they would be material to Chadwick's defense.

A. If the records include differing factual descriptions of the alleged abuse, they would be material

As the preliminary hearing testimony and F.L.'s statements to the police made plain, she had discussed the allegations against Chadwick with her several therapists and was treated with "EMR" to address memory related issues. R.049-050, R.127-129. And as Chadwick made clear in his motion, F.L.'s statements to her therapists about the alleged abuse was critical to his ability to cross examine her and challenge the reliability of her testimony. Based on the State's stipulation, the district court found that F.L.'s "factual description of the alleged abuse by Mr. Chadwick" would be material and should be disclosed. R.234-235. If the district court failed to disclose instances of F.L.'s factual descriptions of the events included in these records, especially if those instances were inconsistent with F.L.'s preliminary hearing or trial testimony, that would be an error because F.L.'s credibility regarding the allegations themselves, surely would raise a substantial likelihood of a more favorable result.

This is a case where the only evidence of abuse came from F.L. and her memory of what occurred between her and Chadwick over 20 years before the trial. Her credibility, the accuracy of her memories, and the jury's assessment of the reliability of that evidence in contrast to Chadwick's denials, is the beginning and

ending of this case. Nothing could be more material to the case than evidence that F.L.'s memory and past descriptions of the allegations have changed over time and depending upon who she is talking to. Evidence that in some instances F.L. characterized Chadwick's conduct in one way and in other instances another is material. Evidence that in some instances F.L. claimed the abuse happened during one timeframe and in other instances in another timeframe is material. Because the State's case lives or dies on F.L.'s credibility, there is a reasonable likelihood of a more favorable outcome if the records contain evidence that F.L.'s allegations against Chadwick changed over time, and this Court, if it discover evidence of these inconsistent allegations in the records, should conclude that this evidence was material to the case and should have been disclosed.

B. If the records include descriptions of F.L.'s memory treatment, they would be material

In his motion, Chadwick identified facts which showed there was reason to suspect that F.L. had been treated using EMDR, or Eye Movement Desensitization and Reprocessing, with respect to her memory and coping with past abuse. R.116-117, R.122. Chadwick provided the court with references in an interview with the investigating officer where F.L. and her husband told the officer her therapists "want her to start EMR and supposedly that's supposed to help her cope with these (inaudible) memory back to where she can recall (inaudible)." R.129. These statements were made in context of F.L. admitting to the officer that her memory of these events was incomplete, that she did not want

to remember, and that she could look through her journals to see if she had any memories, which she could use to "corroborate what she said today". R.130-131.

If this Court's review of the records reveal that they contain evidence that F.L. was treated using EMDR it should conclude that such evidence was material. Can there be any doubt that evidence showing F.L.'s trial testimony was impacted by the use of memory enhancing or memory altering techniques would be material? Not only for the jury's sake, but for the purpose motions in limine? Can there be any serious question that evidence of tampering with F.L.'s memory before she testified at trial would have a real impact on the jury's assessment of her credibility regarding 20-year-old memories? And combine that with any evidence of admissions by F.L. that her memories were incomplete, were confused etc., and the materiality of any EMDR evidence is manifest.

C. Any and all material evidence should have been disclosed

Granting a criminal defendant access to reliability evidence is "important in the case of documentary evidence, [and] it is even *more important* where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). It must be clear, Chadwick maintains his innocence and denies he committed any of the offenses described at trial. His defense, which proved to be mostly successful at trial, was to demonstrate that F.L.'s claims against him were unreliable, that her memory was incorrect or incomplete. The

fact that he was almost entirely prevented from admitting significant evidence that was highly probative on the question of F.L.'s reliability, and still managed to be acquitted on 3 of the 4 counts, shows that the suppressed evidence would have had an impact on Count 1.

It's true, Chadwick was able to ask F.L. on cross examination about the therapists she had been treated by, and asked about whether she told a therapist she couldn't remember the details of the abuse. R.833-835. But when F.L. deflected the question and asked for more details, because Chadwick had not been provided the records that described her lack of memory he could not respond. R.834-835.[18]

Any evidence within the records that showed F.L.'s memory of the abuse was incomplete, any evidence of F.L.'s admission that she did not accurately remember what happened would have been material to impeach F.L.'s trial testimony. Any evidence within the records showing F.L.'s prior statements about the allegations was inconsistent with her sworn testimony would have been material to impeach F.L.'s testimony. Any evidence within the records that showed F.L.'s mental health or risky behaviors would have been material to show her memory could have been tainted.

[18] "Q. When you went to Wasatch Mental Health in October of 2012 did you report to your therapist that there was sexual abuse at the house but that you couldn't remember the details?
A. Which therapist was it?
Q. Wasatch Mental Health.
A. Which therapist?
Q. I'm not -- I'm not sure."

And any evidence within the records that showed F.L. participated in memory restoration techniques or treatment would have been material, perhaps even to the point of excluding her testimony altogether.[19] Counsel could have retained an expert witness to discuss the science behind and opine upon the use of EMDR. Counsel could have demonstrated to the jury how that treatment could have an impact on F.L.'s memory, on the details she had in the past admitted did not possess, and the memories she claimed were vague. Denying Chadwick access to evidence proving EMDR had occurred prevented him from pursuing this line of questioning.

D. The Trial Court's Error was Harmful

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. It is also difficult because it is impossible to know what illegal conduct the jury, or individual jurors, believed Chadwick committed. Chadwick was convicted in Count 1 and acquitted in every other count. And without knowing which allegation the jury convicted him on, means it is impossible to argue specifically how the suppressed records would have had an effect on the outcome.

But it is not impossible to estimate how the suppressed therapy records would have had an impact on the jury's assessment of the accuracy of F.L.'s memory and

[19] See *State v. Tuttle*, 780 P.2d 1203, 1210-1213 (Utah 1989) (Utah agrees with the majority of courts that "hypnotically enhanced testimony should not be admitted into evidence.")

her credibility. 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 3 of the 4 counts, it is not difficult to see how inconsistent statements about the abuse, admissions about no-existent memories, about vague memories, and changes in dates and details, could have changed the outcome in Chadwick's behalf. It's not difficult to see how a history of delusions and hallucinations, of drug use and of alcohol abuse by a young child, could have created reasonable doubt on one more count.

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 error in failing to recognize the relevance and materiality of these records was an error that prejudiced Chadwick and his right to a fair trial. Chadwick should have been given these records and should have been given the chance to present the admissible portions to the jury. This Court should conclude that the evidence within the sealed records is material to Chadwick's defense and reverse the district court's order. This Court should reverse Chadwick's conviction.

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 13th day of May, 2021.

/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 13,550. 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 13th day of May, 2021.

/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
D – R.234 Order to Authorize Subpoena for Material to be Reviewed *in camera*

Addendum A – R.486 First Response to Jury Question

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,	:	
		Jury Question
Plaintiff,	:	
vs.		
	:	
David M. Chadwick		Case No. 171400984
	:	
		Judge James R. Taylor
Defendant.	:	

During deliberation the Court received a communication via the bailiff in charge of the jury that asked if they could have a verdict form that specifically identified, in some way, a particular course of conduct to connect with each count. After discussion with counsel the Court informs the jury as follows:

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.

August 6, 2019

Judge James R Taylor

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST. COURT • UTAH COUNTY •

Addendum B – R.435 Second Response to Jury Question

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,	:	
		Jury Question
Plaintiff,	:	
vs.		
	:	
David M. Chadwick		Case No. 171400984
	:	
		Judge James R. Taylor
Defendant.	:	

During deliberation the Court received a written question from the deliberating jury:

"Does Count 1 represent the "catch it" game as described in court?"
"Does Count 2 represent David Chadwick rubbing his bare penis against Ms. Larsen's legs, buttocks, and/or vagina?"
"Does Count 3 represent David Chadwick touching Ms. Larsen's breasts and/or nipple area while tickling her?"
"Does Count 4 represent David Chadwick touching Ms. Larsen's breasts and/or nipple area while tickling her?"

After consultation with Counsel the Court responds:

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 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."

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 of the facts if the State has proven beyond a reasonable doubt 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. 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.

August 6, 2019

Judge James R Taylor

Addendum C – R.468 Jury Instruction 5

INSTRUCTION NO. ___5____

Each count in this case makes an identical charge but must still be considered separately. For each count, in order for you 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 for each count:

1. David Chadwick,

2. during a period beginning in 1999 and concluding in 2002,

3. In Utah County, Utah,

4. knowingly, intentionally or recklessly touched the anus, buttocks, breast, or genitalia of a child under 14 years of age or otherwise took indecent liberties with such a child,

5. With intent to cause substantial emotional or bodily pain to any person, or with the intent to arouse or gratify the sexual desire of any person.

Addendum D - R.234 Order to Authorize Subpoena for Material to be Reviewed *in camera*

The Order of the Court is stated below:
Dated: February 12, 2018 11:41:29 AM **/s/** JAMES R TAYLOR
District Court Judge

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

State of Utah,	:	
Plaintiff	:	Order to Authorize Subpoena for Material to be Reviewed *in camera*
vs.	:	Date: January 24, 2018
David Chadwick,	:	Case Number: 171400984
Defendant	:	Judge James R. Taylor

This matter is before the Court on Defendant's Motion for *in Camera* review of mental health records. The State has stipulated that the Defendant is entitled to production of the records under Utah law. Based upon the stipulation the Court finds that production of the records in accordance with Rule 14, Utah Rules of Criminal Procedure is proper. It is ORDERED:

The following entities are ordered to produce all therapy and counseling records for Flora Tiffany Larsen:

Motivational Empowerment Counseling
Sandy Moody, LCSW
789 Bamberger
Suite A
American Fork, Utah 84003

Wasatch Mental Health
578 East 300 South #101
American Fork, Utah 84003

Center for Change

1790 N State Street
Orem, Utah 84057

Sandy Counseling Centers
8184 South Highland Drive
Suite C8
Sandy, Utah 84093

Provo Canyon Behavioral Health
1350 East 750 North
Orem, Utah 84097

Meadow Elementary School
500 West 200 South
Lehi, Utah 84043

Snow Springs Elementary School
850 South 1700 West
Lehi, Utah 84043

Counsel for the Defendant may issue subpoenas to each entity in accordance with Rule 45, Utah Rules of Civil Procedure to require the production of the records. Each subpoena shall direct that the records be provided directly to the Fourth District Court, Judge James R. Taylor for *in camera* review. Upon receipt of the records the Court will conduct a review of the records and then disclose only those portions that contain a factual description of alleged abuse by Mr. Chadwick and circumstances surrounding those events, any report of those events by the counselor to law enforcement, and any methods used to refresh or enhance the memory of the alleged victim regarding those events.

Except as presented in open court in connection with evidentiary hearings in this case or as necessary to inform experts for expert testimony any information obtained by subpoena issued

under this order shall not be disseminated, shared or disclosed to any entity beyond counsel or experts retained for this case. Persons who receive information for purposes related to this case shall not further publish, disseminate or share that information except as necessary for testimony or research in connection with this case. Records received for review by this Court which are not disseminated shall be retained as part of the Court record but shall be sealed documents, not available for public view or inspection.

--------- End of Order, electronically signed and dated at the top of the document.-----

Copies of this Order mailed to:

Counsel for the Plaintiff:

Utah County Attorney
100 East Center, Suite 2100
Provo, Utah 84606

Counsel for the Defendant:

Dustin M. Parmley, Utah County Public Defenders

Mailed this _____day of _____, 2018, postage pre-paid as noted above.

_____
Court Clerk