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IN THE UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/ Appellee,

vs.

DAVID M. CHADWICK,
Defendant/ Appellant.

Case No. 20190818-SC

**AMICUS BRIEF OF F.L., CRIME VICTIM IN THE MATTER, IN SUPPORT
OF THE STATE OF UTAH/APPELLEE AND IN AFFIRMANCE OF THE
CONVICTION**

**FILED
UTAH APPELLATE COURTS**

DEC 11 2023

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INTEREST OF F.L., CRIME VICTIM IN THE MATTER

F.L. is the victim in this case and has participated in earlier proceedings to protect the confidentiality of her mental health counseling records. As the crime victim in this matter, F.L. continues to have a vested interest in the outcome of the appeal, particularly as it relates to the conviction of the person that perpetrated heinous crimes against her and decisions that might affect the treatment of her confidential mental health records. F.L. is entitled under Utah Code 77-38-4 to file an amicus brief in any appeal related to the crime against her. F.L. also provided timely notice to the parties via email on December 05, 2023. Counsel for the state consented to the filing on December 06, 2023. Counsel for the Appellant objected to the filing of this amicus on December 11, 2023. This brief is authored by counsel for F.L. without the contribution of any kind from any party, entity, or person and accompanied by a motion for leave to file an amicus brief.

F.L. fully supports the position of the State that Chadwick's conviction should be affirmed. F.L. files this short amicus brief to make one small but important point about the procedures for litigating the confidentiality of crime victims' mental health records.

ARGUMENT

Appellant Chadwick argues that he was entitled to a review of F.L.'s confidential records in the middle of trial – while F.L. was physically seated on the

stand. Chadwick's Br. at 46–50. The State has fully explained why Chadwick's argument lacks any merit. *See* State's Br. at 54–61.

But one additional practical point argues against Chadwick's position. If the Court were to disagree with the State and adopt Chadwick's position, then the Court should also provide strong guidance to lower courts about how to protect crime victims' rights in such re-examination circumstances. Unlike criminal defendants, many crime victims will lack legal counsel. And while they are physically sitting on the stand testifying, it will likely be difficult—if not impossible—for them to contact legal counsel or otherwise press their arguments about the confidentiality of their counseling records.

Trial courts should be encouraged to be alert to the rights of crime victims in such circumstances. In cases where trial witnesses might incriminate themselves while testifying, many trial judges have intervened to provide information to the trial witness or to allow consultation with counsel. *See* MCCORMICK ON EVIDENCE § 131 at 303 (8th ed. 2020). This Court should likewise encourage trial judges to be alert to issues concerning crime victims' rights. Indeed, it is the intent of the legislature that the rights of crime victims “are honored and protected by law in manner no less vigorous than protections afforded criminal defendants.” Utah Code 77-31-1(1).

For example, in this case, issues surrounding the scope of cross-examination arose because the State asked various questions that the court judge concluded had “opened the door” to further questioning of F.L. R. 839. But it is strange, to say the least, that questions by the State to an unrepresented crime victim, which the victim then dutifully answered, somehow “opened the door” to the release of *her* confidential records.

The State, of course, is not free to waive a privilege held by F.L. or other crime victims. And F.L. never made any choice to “open the door” to a further and expanded examination of her records. Nor could her response to either the state or the defendant be construed as a waiver of any privilege she continued to hold. Under Rule 506, F.L. has not “voluntarily” waived any of her rights to privacy. Similarly, to waive an evidentiary privilege, a privilege holder must “*voluntarily* disclose[] or consent[] to the disclosure” of the privileged communication. Utah R. Evid. 510(a)(1) (emphasis added). Besides, while it is true that F.L. answered the state’s question regarding the fact that therapy taught her coping skills, R. 836; neither those questions nor F.L. answers went beyond the scope of the stipulation of the in camera review. As to the defense, when asked by the defense: “what other sources of trauma did you have in your life besides Mr. Chadwick,” F.L.’s response was that “I’ve been in a car accident.” R. 838. Moreover, the defense’s questions could not have implicated the court’s continuing obligation to review the records

for information that became relevant. *State v. Martin*, 1999 UT 72, ¶19, 984 P.2d 975. The defense’s question was “what other sources of trauma did you have in your life besides Mr. Chadwick;” and not “what other sources of trauma did you learn coping mechanisms for during therapy or what other sources of trauma did you deal with in therapy.” Even if other sources of trauma F.L experienced (which she answered) became material, nothing in the record establishes that her therapy records would have provided insight into that trauma nor did F.L give an answer that could remotely be seen as a waiver. See *State v. Boyer*, 2020 UT App 23, ¶ 54 n.10, 460 P.3d 569. Indeed, F.L. clearly testified that talking about her trauma in therapy was not something she did. “I don’t like to work through trauma in there -- I mean, to an extent I work through therapy -- through trauma in therapy, *but not talk*. Does that make sense?” R. 837. Emphasis Added. While F.L. did not open the door to her mental health records or provide any other reason for a continuing review of those records, crime victims frequently are faced with this very circumstance – that once they take the stand to testify their rights as victims are forgotten and suspended.

For these reasons, 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. And here, when Chadwick

stipulated to a limited review of F.L.'s counseling records, that was all that he was entitled to.

CONCLUSION

Chadwick's conviction should be affirmed.

Respectfully submitted on December 11, 2023.

/s/ Paul G. Cassell

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rules 25 and 24(g), Utah Rules of Appellate Procedure, this brief contains 1,389 words, including the table of contents, table of authorities, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered, via email, on December 11, 2023. the foregoing response in opposition to Chadwick's petition for access to records, to counsel for the following:

1. State of Utah
via counsel William Hains at whains@agutah.gov;
2. Appellant Chadwick
via counsel Douglas J. Thompson atdoug@morrissethompson.com.

/s/ Paul G. Cassell
Paul G. Cassell
Attorney for Crime Victim/Limited-
purpose Party F.L.