PUBLIC

Case No. 20190818-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellee,

v.

DAVID M. CHADWICK,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for sexual abuse of a child, a second-degree felony, in the Fourth Judicial District, Utah County, the Honorable James R. Taylor presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE RULES

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INTRODUCTION

A jury convicted David Chadwick of one count of sexual abuse of a child and acquitted him of three counts. Chadwick raises two claims on appeal.

The first involves the absence of a specific-unanimity instruction. The jury was given a single elements instruction, with no differentiation among the four counts, and evidence was presented of more than four criminal acts. In closing argument, the State elected which alleged acts supported which counts, but when the jury asked for clarification during deliberations the district court told the jury it was not bound by the State's election.

Chadwick objected to that response and asked the court to specify which alleged acts related to which counts. On appeal, however, Chadwick abandons that claim. Instead, he argues that the district court should have done something he never asked it to do—give a specific-unanimity instruction telling the jury that it must agree on a specific criminal act for any count on which it convicts. Not doing so, he says, was plainly erroneous.

Chadwick has not shown error, obvious or otherwise. At the time of Chadwick's trial, Utah law on unanimity instructions was unclear. The court of appeals has since adopted what is known elsewhere as the either/or rule—requiring either that the State elect which act supports which charge, or that the court give a specific-unanimity instruction. But at the time, the majority rule—which this Court should endorse—required specific-unanimity instructions only when there is a genuine risk of a non-unanimous verdict based on the totality of the circumstances.

It would not have been obvious that this case carried such risk. The State made an election in closing argument, the court gave a general-unanimity instruction telling the jury it must be unanimous, defense counsel explained to the jury that unanimity meant agreeing on the same criminal act, and the evidence of guilt was clear and straightforward. For the same reasons, any error was harmless.

Chadwick's second appellate claim involves the district court's refusal to conduct an ongoing *in camera* review of the victim's therapy records. The parties stipulated before trial that the district court could review the victim's therapy records for three specific categories of information. When the victim testified about other sources of trauma besides Chadwick, Chadwick argued that the court had to reexamine the victim's records and disclose records that became material based on that testimony.

Chadwick was not entitled to another *in camera* review because what he requested at trial was for the district court to unilaterally overrule and expand the scope of the parties' stipulation for *in camera* review to cover records that fell outside the parties' stipulation. Because Chadwick never made the threshold showing that would entitle him to *in camera* review for that information, the court did not err when it denied the request to reexamine the victim's records.

STATEMENT OF THE ISSUES

1. Did the district court plainly err when it did not give a specific-unanimity instruction in response to Chadwick's request to specify which alleged acts related to each count?

Standard of Review. Rulings on jury instructions are reviewed for abuse of discretion for preserved claims, with the level of discretion depending on

the type of issue presented. *State v. Berriel*, 2013 UT 19, ¶8, 299 P.3d 1133. But because Chadwick did not preserve his claim that the district court should have given a specific-unanimity instruction, he must show that some exception to preservation applies, such as plain error. Utah R. Crim. P. 19(e); *State v. Johnson*, 2017 UT 76, ¶57 n.16, 416 P.3d 443.

2. Did the district court clearly err when it refused to conduct a second *in camera* review of the victim's therapy records to look for information beyond the scope of the parties' stipulation?

Standard of Review. When privilege turns on questions of law, it is reviewed for correctness; when, as here, it turns on questions of fact, it is reviewed for clear error. *State v. Bell*, 2020 UT 38, ¶10, 469 P.3d 929.

STATEMENT OF THE CASE

Consistent with settled appellate standards, the State presents the facts "'in a light most favorable to the jury's verdict.'" *State v. Gallegos*, 2020 UT 19, ¶2 n.1, 463 P.3d 641. Chadwick claims "it is impossible on appeal to know which verdicts apply to which factual allegations," so he says the Court should view the facts "in the light most favorable to his innocence on each count." Repl.Br.Aplt.4.

The Court has recognized that when erroneous jury instructions make it unclear "which version of events the jurors accepted in reaching a guilty

verdict," the traditional approach to viewing the facts "is not helpful." *State v. Eyre*, 2021 UT 45, ¶14, 500 P.3d 776. But the Court did not adopt Chadwick's radical proposition that the reviewing court should assume the defendant's innocence. Rather, it directed reviewing courts to "examine the evidence of all factual scenarios presented to the jury upon which the jury could have convicted under the erroneous instruction." *Id.*

As explained in the argument section below, the instructions were incomplete at worst, not erroneous, and the complete context of the case makes it possible for the Court to determine the version of events the jury likely based its conviction on. *Eyre*'s modified standard is thus unnecessary. But at the very least, the Court should follow *Eyre* rather than Chadwick's novel and unsupported suggestion that the Court view the facts in the light most favorable to Chadwick's innocence—a conclusion the jury expressly rejected.

A. Factual Summary

F.L. accused Chadwick of sexually abusing her when she was between 8 and 11 years old. R791, 814, 819, 823. She described two specific instances and one recurring behavior. She said the first instance happened when she was sick during the school day, and her mother asked Chadwick—a single man in his thirties who lived nearby—to watch F.L. R790, 794-95, 808, 813.

F.L. sat on Chadwick's lap as they were either watching a movie or playing a video game, and she felt his penis become erect. R808, 919. F.L. started to move off Chadwick's lap, but he said, "'No, it's okay, you can stay.'" R808. After a little while, Chadwick asked her if she wanted to "play a game." R808-09. Chadwick put his hand in his sweatpants and moved his erect penis around, telling F.L. to "try and catch it." R809. Now kneeling on the floor, F.L. complied, grabbing his penis three or four times. R810-11. The last time she grabbed it, Chadwick thrust his hips forward. R811-12. But a knock at the door put an end to it, and Chadwick told F.L. to hide and not tell anyone because they wouldn't understand their "relationship." R812-13.

F.L.'s family soon moved in with Chadwick because the place they were staying was too crowded. R796, 902. F.L. would sit on Chadwick's lap a couple times a week as they watched movies or played video games. R829, 918-19. F.L. regularly felt Chadwick's erect penis when she sat on his lap. R829. She described one incident when she was sitting on his lap watching a movie, chewing and sucking on his T-shirt. R814. F.L. was wearing only an oversized tee shirt and underwear for pajamas, and she said she felt—but did not see—Chadwick's bare, erect penis rub against her skin on her inner thigh and against her underwear, touching her vagina and buttocks. R814-17. F.L.'s mom opened the door and came into the room; F.L. thought her mother did

not see what was happening because the oversized tee shirt covered it, but F.L. used the interruption as an opportunity to leave after a moment. R816-17.

Chadwick often tickled F.L. when she was living with him. R818, 907-08. F.L. said that when he did, he would pin her down and "grind his hips" into her, and he would "slip" his hand under her shirt and touch her breast and nipple area, then say, "Oops, sorry." R818-19. F.L. said this happened a lot. R819. By the time she was 11 years old, F.L. would get angry at Chadwick when he tickled her like that and tell him to stop. R824. Though she continued to live with Chadwick until she was 14 years old, the tickling had mostly stopped by age 11. R819, 823.

F.L. did not disclose the abuse to law enforcement until she was in her twenties. R757, 788. But at least four years before disclosing to law enforcement, she started therapy to address the abuse and other trauma. R826, 828, 834, 836-38, 842-43.

B. Procedural History

The State charged Chadwick with four second-degree felony counts of sexual abuse of a child. R1-2. Although Count I specified a date about eight months earlier than the other three counts, the counts did not otherwise differentiate the conduct associated with each charge. R1-2.

Before trial, Chadwick moved for *in camera* review of F.L.'s therapy records. R115-23. But the parties reached a stipulation and submitted a proposed order asking the court to review the records and "disclose only those portions that contain [1] a factual description of alleged abuse by Mr. Chadwick and circumstances surrounding those events, [2] any report of those events by the counselor to law enforcement, and [3] any methods used to refresh or enhance the memory of the alleged victim regarding those events." R235; *see also* R537-38, 541. The court signed the stipulated order, the records were released to the court, and after *in camera* review the court issued orders that quoted excerpts from records falling within the scope of the stipulated order. R234, 247-51, 258, 262-63, 284.

At trial, Chadwick used those excerpts to draw out a concession from F.L. that she told "a lot" of therapists that she did not remember the details of the abuse. R833-35. However, the court allowed the jury to submit questions for the witnesses, and F.L. stated in response to one such question that she told her therapists she could not remember simply to avoid talking about the details—not because she could not remember. R844-45; *see also* R836.

Chadwick also asked F.L. what other sources of trauma she experienced besides Chadwick's abuse. R838. The State objected, but the

court overruled the objection, noting that the State had opened the door by asking F.L. about using therapy to address the trauma she suffered from Chadwick's abuse. R836-39. When the court cautioned Chadwick that he would be "stuck with the answers" F.L. gave in response to any questions about additional trauma, Chadwick argued that the court was "under a continuing obligation to release portions [of F.L.'s therapy records] that become relevant as the trial progresses." R840-41. The court responded that there was "no way" it could comply with that request, explaining that when it conducted the *in camera* review, it was "looking for the specific areas of question[s] that were included in the order." R841.

After the State rested, Chadwick testified. He specifically denied each allegation. R907-08. But he otherwise corroborated much of F.L.'s testimony, such as her description of the living arrangements and that F.L. would sit on Chadwick's lap while he had an erection. *Compare* R796, 799, 832, *with* R901-04, 913-14, 918-20, 930-31. In fact, Chadwick said that F.L. would sit on his lap a couple times a week—perhaps 200-300 times total—while they watched movies or played video games. R918-20, 922. Chadwick admitted that whenever F.L.'s buttocks touched his penis, or if her hand slipped into his lap and touched his penis, he would get an erection. R905, 920-21. He said that happened about twenty times. R936-37. When it did, he said he would

usually reposition her or move her hand so there was no contact with his penis, and as soon as there was no contact his erection would go away. R906. But "a couple" times he just "ignored" her hand on his erect penis and waited for her to remove it. R905-06, 921, 930. He insisted that any contact with his penis lasted no more than ten to fifteen seconds. R922, 928-29, 936-38. He said the erection was "just a physical response" to the contact and that he would never "try to get her to touch" his penis or try to rub it against her. R905, 926. But he admitted that his clothed, erect penis "could have rubbed against her." R931.

The jury instructions contained a single elements instruction that did not differentiate among the four counts, either by date or specific conduct.[1] R468. But it did tell the jury that each "identical charge must still be considered separately," and that to find Chadwick guilty for any one count, the jury must find beyond a reasonable doubt that Chadwick committed each element of the offense based on "separate and distinct conduct for each count." R468. The jury was further instructed—twice—that each juror must agree before a verdict could be entered. R477, 485.

[1] The information specified a different date for the first count, but it was never read to the jury. *See* R453.

Chadwick argued that "not narrowing down … which incident is charged with each allegation" violated due process. R897. Chadwick was particularly concerned that basing one of the charges on tickling happening "lots of times" was "too vague as a matter of due process." R897-98. The court rejected the due-process argument, ruling that Chadwick had "reasonable notice" of what was being alleged. R898. The court also volunteered that because the charges were broad, Chadwick was entitled to broader double-jeopardy protections, covering "all that the State can allege during that … time period." R898.

In closing argument, the prosecutor elected which alleged acts related to which counts: Count I was for Chadwick coercing F.L. to grab his penis; Count II was for Chadwick rubbing his bare penis against F.L.; and Counts III and IV were for Chadwick touching F.L.'s breasts, which she said happened more than once. R952-53. The prosecutor also told the jury that the State had not charged Chadwick for the times there was incidental contact his erect penis, because that conduct did not "meet[] the elements of the crime." R968-69.

Defense counsel, in turn, told the jury that unanimity was one of four "cornerstones of the judicial system." R956. And he explained that unanimity meant they had to agree on the specific criminal act to convict:

> Suppose you get into the jury room and half of you say we believe that the State has proved incident A but not incident B. The other half of you say well, we believe the State has proved incident B but not incident A. What you don't have is a unanimous verdict on one count for a conviction and then not guilty on the other. What you have in that situation is not a unanimous verdict on either count.

R960-61. Counsel explicitly tied his unanimity explanation to the elements instruction stating that each count had to be supported by "separate conduct." R960.

During deliberations, the jury sent the court two questions. The first asked for "a verdict form that specifically identified, in some way, a particular course of conduct to connect with each count." R486. The court proposed responding that it was up to the jury to decide how many counts were proven and the order of the counts was unimportant. R1110, 1117. Chadwick objected and asked the court to "identify for the jury the particular incident alleged for each count," arguing that not doing so risked the jury agreeing unanimously only to the number of instances, not which instance was proved. R1110-11, 1117.

The court overruled the objection, reasoning that an instruction tying specific alleged acts to specific counts "would invade the juror's province" as factfinder. R1123. Instead, the court answered 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.

R486.

The second question tied specific alleged acts to each count—consistent with the prosecutor's election of charges in closing argument—and asked the court to confirm whether the jury was correct. R435. The court repeated its response to the first question and added the following paragraph:

> 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[s], 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.

R435.

The jury convicted on Count I and acquitted on the rest. R436. The court asked if Chadwick wanted the jury polled, and he declined. R979.

The court placed Chadwick on probation, and Chadwick timely appealed. R494-96, 501. In the court of appeals and this Court, the parties litigated whether Chadwick's appellate counsel could access F.L.'s sealed therapy records to brief the appeal, and that litigation led to two opinions

from this Court. In *F.L. v. Utah Court of Appeals*, the Court held that F.L. had standing as a limited-purpose party to respond to Chadwick's request for access to her records on appeal. 2022 UT 32, ¶43, 515 P.3d 421. The court of appeals then certified the case to this Court, and Chadwick filed a pre-briefing motion seeking access to F.L.'s sealed records. The Court denied the motion, holding that any challenge to the district court's *in camera* review must rely on the record created below and "conventional appellate principles." *State v. Chadwick*, 2023 UT 12, ¶¶35-36, 44, 54, --- P.3d ---.

SUMMARY OF ARGUMENT

I. Chadwick argues that the district court was required to give a specific-unanimity instruction, telling the jury it needed to agree on the same conduct for each offense. Not doing so, he argues, amounted to a violation of his state constitutional right to a unanimous verdict and requires the State to disprove prejudice beyond a reasonable doubt.

Chadwick's appellate claim is unpreserved because he never asked for the remedy he now says the court had to provide: a specific-unanimity instruction. Chadwick is thus limited to plain-error review.

Chadwick has not shown obvious error. At the time of Chadwick's trial, the law on unanimity instructions was unclear in Utah. The court of appeals has since adopted the either/or approach to unanimity instructions,

requiring either an election by the State or a specific-unanimity instruction. But adoption of that rule was not a foregone conclusion. The majority rule at the time required a specific-unanimity instruction only when the circumstances of the case present a genuine risk of a non-unanimous verdict.

Under that more flexible rule, it would not have been obvious to the court—even with its response to the jury—that there was a genuine risk of a non-unanimous verdict. The instructions as a whole told the jury that each juror needed to agree before entering a verdict and that each count must be supported by separate and distinct conduct, defense counsel told the jury those instruction meant they needed to agree on a specific act to convict for each count, the prosecutor gave the jury a possible way to connect each allegation to each count, and the evidence was simple and straightforward.

Nor has Chadwick shown prejudice. Because his claim is unpreserved, he bears the burden of proving prejudice. He would also bear the burden if the claim were preserved because any error does not amount to constitutional error. But even if it did, Chadwick has not shown that a presumption of prejudice should apply under the Utah Constitution. And for much the same reason there was no genuine risk of a non-unanimous verdict, any error here was harmless even beyond a reasonable doubt.

II. Chadwick also challenges the district court's refusal to reexamine F.L.'s therapy records during trial. But Chadwick asked the court to expand the scope of the parties' stipulation and conduct an *in camera* review for records he never established a right to access—records about other sources of F.L.'s trauma. Whatever ongoing review of therapy records may be appropriate in the typical case, a party that stipulates to limited *in camera* review is not entitled to have the court reexamine the victim's therapy records for *additional* information without first making the requisite showing to justify broadened *in camera* review—a showing Chadwick never made.

ARGUMENT

I.

Chadwick has not shown that the court plainly erred by not giving a specific-unanimity instruction.

Chadwick argues that the Utah Constitution required the court to give a specific-unanimity instruction, stating that the jury had to agree on the same conduct for each count. Repl.Br.Aplt.26, 35-37. But Chadwick never asked for a specific-unanimity instruction. Although he objected to the court's response to the jury question, the remedy he requested was a binding election from the State—a claim he abandons on appeal. He must therefore show plain error to prevail—a showing he tries but ultimately fails to make.

A. Chadwick did not preserve his claim that a specific-unanimity instruction was required.

Chadwick argues that he preserved the issue of whether a specific-unanimity instruction was required because at the close of the State's case he pointed out the lack of specification in the charges and then, when the jury asked for specification, he objected to the court's refusal to specify which alleged acts related to which charges. Repl.Br.Aplt.3.

But the issue Chadwick raises on appeal is not the same issue he advanced below. On appeal, Chadwick argues that the district court should have given a specific-unanimity instruction to cure a defect in the charges. Repl.Br.Aplt.3. At trial, Chadwick argued that the district court should have cured that defect by giving an instruction specifying which alleged acts related to which charges. R1111. Because Chadwick asks for a new remedy on appeal, the issue is not preserved.

"'An issue is preserved for appeal when it has been presented to the district court in such a way that the court has an opportunity to rule on it.'" *Johnson*, 2017 UT 76, ¶15 (brackets omitted). Providing that opportunity requires a party to timely and specifically raise the issue and support the claim with evidence and legal authority. *Id.* Furthermore, the specificity requirement applies not just to identifying the problem, but also the remedy. "'Requiring preservation of a remedy prevents a party from avoiding seeking

the remedy at trial for strategic reasons only to raise the issue on appeal if the strategy fails.'" *State v. Martin*, 2017 UT 63, ¶34, 423 P.3d 1254 (brackets omitted).

Requiring preservation of specific remedies is particularly important where, as here, different remedies address different concerns. When Chadwick objected at the close of the State's case, he alleged two related problems with the charges: duplicity and lack of specificity. R897-98. "Duplicity is 'the joinder of two or more distinct and separate offenses in a single count.'" *State v. Germonto*, 868 P.2d 50, 58 (Utah 1993). And lack of specificity arises when the charges or elements instructions present multiple "identically-worded counts" of the same offense "without distinguishing the counts by act." *See State v. Alires*, 2019 UT App 206, ¶22, 455 P.3d 636. Such problems can raise issues of inadequate notice, double-jeopardy concerns, and the risk of a non-unanimous verdict. *Germonto*, 868 P.2d at 58; *United States v. Alsobrook*, 620 F.2d 139, 142 (6th Cir. 1980).

Two widely recognized remedies for such defects are having the State elect a single alleged act for each charge, or providing a specific-unanimity instruction telling the jury that it must agree on the specific criminal act underlying each count on which it convicts. *See Germonto*, 868 P.2d at 58; *Alires*, 2019 UT App 206, ¶22. A specific-unanimity instruction, however,

does not address whatever due-process or double-jeopardy concerns may exist. Only an election directly mitigates each potential issue that may arise from duplicitous and insufficiently specific charges.

Given the different reach of each remedy, the Court should not treat a request for one as preserving a request for the other. Doing so ignores the legitimate tactical reasons that can motivate a defendant's choice to request one and not the other and thus creates the incentive for gamesmanship. *See Martin*, 2017 UT 63, ¶34. For example, a defendant may choose to insist on the broader protections of an election, believing that a specific-unanimity instruction would not adequately protect his due-process and double-jeopardy rights. Alternatively, a defendant may choose to request only a specific-unanimity instruction, believing that, under the facts of his case, the lack of election will lead to confusion among the jurors and will make it more difficult for them to come to a unanimous verdict. *See Alires*, 2019 UT App 206, ¶30. A defendant may also believe he has adequate notice to defend against the allegations and that any latent double-jeopardy issue would inure to his benefit, so there would be no need for a broader remedy. *See Cosio v. State*, 353 S.W.3d 766, 775 (Tex. Crim. App. 2011) ("A defendant may choose

not to elect so that the State is jeopardy-barred from prosecuting on any of the offenses that were in evidence.").[2]

Here, Chadwick requested only an election. At the close of the State's case, he argued that due process required the State to "narrow[] down … which incident is charged with each allegation." R897. And when the jury asked for a verdict form tying a specific incident to each count, R486, Chadwick "asked that the Court identify for the jury the particular incident alleged for each count." R1111, 1117. Although Chadwick identified the risk of non-unanimity as a concern, R1111, the remedy he requested was broader than a specific-unanimity instruction.

On appeal, however, Chadwick has abandoned his request for an instruction identifying which alleged acts related to which counts. In fact, he appears to assert that the remedy he requested below is "constitutionally infirm." Repl.Br.Aplt.37 (asking Court to reject election as legitimate remedy). Chadwick now argues that the only way the district court could

[2] Chadwick points to cases from other jurisdictions to argue that if this Court were to reverse, double jeopardy would bar any retrial. Repl.Br.Aplt.44. As discussed in Point I(E) below, the State disputes that proposition and agrees with Chadwick's concession that the argument is unripe. But the existence of cases in other jurisdictions supporting Chadwick's position demonstrates that it would not be unreasonable for a defendant to think that leaving a latent double-jeopardy issue in a case like this could work to his advantage.

have responded to his objections was by doing something he never asked the court to do: "instruct the jury on the requirement that the jury's verdicts must be unanimous as to the specific act underlying each count." Repl.Br.Aplt.3; *see also* Repl.Br.Aplt.26, 32, 35-37, 45. "Without that instruction," Chadwick says, his "right to a unanimous jury evaporated." Repl.Br.Aplt.37.

Because Chadwick never asked for a specific-unanimity instruction below, his claim that the district court was constitutionally required to give one is unpreserved. Thus, review is limited to the only preservation exception Chadwick argues—plain error. Repl.Br.Aplt.45-46. That requires Chadwick to show obvious, prejudicial error. *Johnson*, 2017 UT 76, ¶20.

B. The standard governing unanimity instructions was not obvious at the time of Chadwick's trial.

"The Unanimous Verdict Clause requires that '[i]n criminal cases the verdict shall be unanimous.'" *State v. Hummel*, 2017 UT 19, ¶25, 393 P.3d 314 (quoting Utah Const. art. I, §10). To convict, jurors must therefore unanimously agree "that the prosecution proved each element of the crimes in question beyond a reasonable doubt." *Id.* ¶50. And each juror must agree that the defendant committed the same criminal act for each count. *See id.* ¶¶26-30. While the need for unanimity as to the specific criminal act was clear at the time of Chadwick's trial, how the jury needed to be told about it was not.

Chadwick cannot show an obvious abuse of discretion because the law on unanimity instructions was unsettled. Chadwick advocates for an absolute rule requiring a specific-unanimity instruction in all multiple-act cases. Repl.Br.Aplt.35-39. But that rule is an outlier nationally. The majority rule at the time required a specific-unanimity instruction only when there is a genuine risk of a non-unanimous verdict. And Utah law was unclear on the matter.

The lack of clarity in Utah law stems from several fractured and conflicting opinions on the matter. The Court originally adopted a rule in a fractured decision that specific-unanimity instructions are *unnecessary* to convey the need for agreement as to alternative criminal acts. *State v. Rasmussen*, 68 P.2d 176, 183-84 (Utah 1937) (Wolfe, J., concurring in the result); *id.* at 185 (Folland, J., concurring); *id.* at 186-87 (Larson, J., concurring in part and dissenting in part). With little analysis and no acknowledgment of the Court's original rule, the Court later held in another fractured decision that specific-unanimity instructions are required. *State v. Bishop*, 753 P.2d 439, 494 (Utah 1988) (Zimmerman, J., concurring in the result); *id.* at 489 (Stewart, J., concurring in part and concurring in the result); *id.* at 491 (Durham, J., concurring separately), *overruled on other grounds by State v. Menzies*, 889 P.2d 393 (Utah 1994). Then in a plurality opinion the Court pointed to neither of

those precedents and instead pointed to another case where the Court was unable to agree on how the jury had to be instructed about unanimity. *See State v. Saunders*, 1999 UT 59, ¶61, 992 P.2d 951. What was clear, the plurality concluded, was that the court must give *some* unanimity instruction and must not tell the jury it does *not* have to be unanimous about something it must agree on. *Id.* ¶¶62, 65.

Little wonder, therefore, that the Court's most recent word on *how* the jury needs to be instructed about unanimity is that the law is unclear. *See State v. Evans*, 2001 UT 22, ¶17, 20 P.3d 888. The Court thus held in *Evans* that in multiple-acts cases, it is not obvious error to give only a general-unanimity instruction—one that says the verdict must be unanimous. *Id.* ¶¶3-6, 9-10, 15-17 & n.1.[3]

Because there was "'no *settled* appellate law to guide the trial court'" at the time of Chadwick's trial, Chadwick cannot show obvious error. *State v. Dean*, 2004 UT 63, ¶16, 95 P.3d 276 (emphasis added).

True, unlike *Evans,* this was not *only* a multiple-acts case, but also a case with multiple identical, undifferentiated charges. And four months *after*

[3] Although *Evans* did not describe the instructions that were given, the use of a general-unanimity instruction is implied, and the State's brief in *Evans* confirms one was given. *See State of Utah v. Jason Junior Evans*, Brief of Appellee at 19, 2000 WL 34475391.

Chadwick's trial, in *State v. Alires* the court of appeals looked to other jurisdictions to adopt what is known as the either/or rule for cases like this: When the jury is given multiple identically-worded charges or evidence is presented of more criminal acts than there are charges, either the State must elect which act supports which charge or the court must instruct the jury "to agree on a specific criminal act for each charge in order to convict." 2019 UT App 206, ¶22.

But the either/or rule is not the only approach to unanimity instructions. In fact, before the court of appeals evened the score, the either/or rule was the minority rule among the two major approaches nationwide. Eighteen jurisdictions applied the either/or rule.[4] Nineteen—

[4] *Jackson v. State*, 342 P.3d 1254, 1257 (Alaska Ct.App. 2014); *State v. Klokic*, 196 P.3d 844, 847 (Ariz.Ct.App. 2008); *People v. Jones*, 792 P.2d 643, 658-59 (Cal. 1990) (en banc); *Shahgodary v. State*, 336 So. 3d 8, 12-13 (Fla.Dist.Ct.App. 2022); *State v. Arceo*, 928 P.2d 843, 874-75 (Haw. 1996); *Baker v. State*, 948 N.E.2d 1169, 1177-78 (Ind. 2011); *State v. Santos-Vega*, 321 P.3d 1, 7 (Kan. 2014); *Johnson v. Commonwealth*, 405 S.W.3d 439, 455-56 (Ky. 2013), *overruled on other grounds by Johnson v. Commonwealth*, No. 2021-SC-0541-MR, 2023 WL 4037845 (Ky. June 15, 2023); *State v. Stempf*, 627 N.W.2d 352, 356-58 (Minn.Ct.App. 2001); *State v. Celis-Garcia*, 344 S.W.3d 150, 157 (Mo. 2011) (en banc); *State v. Gaddie*, 971 N.W.2d 811, 817-18 (N.D. 2022); *State v. Huish*, 208 N.E.3d 270, 285 (Ohio Ct.App. 2023); *State v. Muhm*, 775 N.W.2d 508, 518-20 (S.D. 2009); *Cosio v. State*, 353 S.W.3d 766, 776 (Tex.Crim.App. 2011); *State v. Nicholas*, 151 A.3d 799, 804-05 (Vt. 2016); *State v. Vander Houwen*, 177 P.3d 93, 99 (Wash. 2008) (en banc); *State v. Marcum*, 480 N.W.2d 545, 551-53 (Wis.Ct.App. 1992); *Walker v. State*, 521 P.3d 967, 984-86 (Wyo. 2022).

including nearly every federal circuit—applied a more flexible rule.[5] The remaining outliers appear to fall into three categories: adopting a strict election rule,[6] recognizing a general-unanimity instruction as always sufficient,[7] or requiring a specific-unanimity instruction regardless of whether the government makes an election (the rule Chadwick advocates).[8]

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[5] *United States v. Estevez*, 961 F.3d 519, 527 (2d Cir. 2020); *United States v. Beros*, 833 F.2d 455, 461 (3d Cir. 1987); *United States v. Tipton*, 90 F.3d 861, 885 (4th Cir. 1996); *United States v. Holley*, 942 F.2d 916, 925-26 (5th Cir. 1991); *United States v. Duncan*, 850 F.2d 1104, 1113-14 (6th Cir. 1988); *United States v. Schiro*, 679 F.3d 521, 533 (7th Cir. 2012); *United States v. Hiland*, 909 F.2d 1114, 1139 (8th Cir. 1990); *United States v. Payseno*, 782 F.2d 832, 835-36 (9th Cir. 1986); *United States v. O'Brien*, 131 F.3d 1428, 1432 (10th Cir. 1997); *United States v. North*, 920 F.2d 940, 951 (D.C. Cir. 1990); *People v. Wagner*, 434 P.3d 731 (Colo.App. 2018); *Green v. State*, 238 A.3d 160, 179-80 (Del. 2020); *Commonwealth v. Conefrey*, 650 N.E.2d 1268, 1271-72 (Mass. 1995); *People v. Bailey*, 873 N.W.2d 855, 863-64 (Mich.Ct.App. 2015); *State v. Stutzman*, 398 P.3d 265, 270 (Mont. 2017); *State v. Greene*, 623 A.2d 1342, 1345 (N.H. 1993); *State v. Parker*, 592 A.2d 228, 232-33 (N.J. 1991); *State v. Godoy*, 284 P.3d 410, 414 (N.M. Ct.App. 2012); *State v. Wilson*, 823 S.E.2d 892, 898-99 (N.C. Ct.App. 2019).

[6] *R.A.S. v. State*, 718 So. 2d 117, 122 (Ala. 1998) (allowing specific-unanimity instruction only when nature of case makes election difficult); *State v. Qualls*, 482 S.W.3d 1, 11, 16-17 (Tenn. 2016) (same); *Cooksey v. State*, 752 A.2d 606, 619-20 (Md. 2000) (always requiring pre-trial election).

[7] *See United States v. Lamb*, 162 F. App'x 889, 893 (11th Cir. 2006); *Petras v. State*, No. CACR05-839, 2006 WL 1756860, at *7 (Ark.Ct.App. June 28, 2006); *Archer v. State*, 118 So. 3d 612, 626 (Miss.Ct.App. 2012).

[8] *See United States v. Newell*, 658 F.3d 1, 23 (1st Cir. 2011); *State v. Douglas C.*, 285 A.3d 1067, 1087 (Conn. 2022); *Hagood v. United States*, 93 A.3d 210, 217 (D.C. 2014); *State v. Severson*, 215 P.3d 414, 431 (Idaho 2009); *State v. Hanscom*, 152 A.3d 632, 635-36 (Me. 2016).

The flexible approach—what had been the majority rule—recognizes that "[i]n the routine case, a general-unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, *even where an indictment alleges numerous factual bases for criminal liability*." *United States v. Beros*, 833 F.2d 455, 460 (3d Cir. 1987) (emphasis added). With some variation in the specific test, cases adopting the flexible approach generally require a specific-unanimity instruction only when the circumstances of the case create a "genuine risk" of a non-unanimous verdict. *See, e.g.*, *United States v. Duncan*, 850 F.2d 1104, 1113-14 (6th Cir. 1988).

In short, at the time of Chadwick's trial the law was not so clearly settled that the district court should have concluded on its own that a specific-unanimity instruction was required. True, the court of appeals held in *Alires* that the law on unanimity instructions should have been clear to all competent counsel. *See Alires*, 2019 UT App 206, ¶¶23-24 & n.5. But as shown above, it was anything but clear.[9] Given the competing approaches nationally, the court of appeals' subsequent adoption of the either/or rule would not have been obvious. *See Dean*, 2004 UT 63, ¶18. And in the face of

[9] In another case pending before the Court, the State has asked the Court to overrule *Alires*'s holding that the law should have been clear to all competent counsel. *See State v. Baugh*, 20220272-SC.

two well-established competing approaches to unanimity instructions, it certainly would not have been obvious that the district court should have adopted the outlier rule Chadwick advances.

C. The widely recognized flexible approach to unanimity instructions supports the court's decision to give only a general-unanimity instruction here.

Under the flexible approach to unanimity instructions—which this Court should adopt—the district court could reasonably conclude that a specific-unanimity instruction was unnecessary.

1. A general-unanimity instruction is adequate unless the circumstances of the case present a genuine risk of a non-unanimous verdict.

Among the various approaches to unanimity instructions, the flexible approach is most consistent with Utah's original rule, with common sense, and with Utah law on jury instructions generally. The Court should therefore endorse that rule over Chadwick's outlier rule or the court of appeals' either/or rule.

As noted, Utah originally recognized that a specific-unanimity instruction was unnecessary to inform the jury that it must agree on the criminal acts the defendant committed. *Supra* Point I(B). As one justice later explained, when a jury is given a general-unanimity instruction and an elements instruction that tells the jury that "you" must find each element

beyond a reasonable doubt, the jury would naturally understand that "you" "rather clearly refers to the jurors collectively." *State v. Tillman*, 750 P.2d 546, 579-80 (Utah 1987) (Stewart, J., concurring and concurring in result). The jury would thus understand the need to "act unanimously with respect to each element of the offense," including when deciding among alternative elements. *Id.* at 580.

Common sense supports that understanding. After all, "unanimous" means "being of one mind: agreeing in opinion, design, or determination," or "having the agreement and consent of all without dissent." Unanimous, *Webster's Third New International Dictionary* 2482 (1993). When a jury is told that its verdict must be unanimous, it is exceedingly unlikely that it will think it can reach a unanimous agreement by disagreeing about the criminal act the defendant committed.

That is not to say that a specific-unanimity instruction should never be required. The instructions as a whole and the circumstances of the case may create a situation where the risk of a non-unanimous verdict is significant enough that denial of a requested specific-unanimity instruction would be an abuse of discretion. *See State v. Parker*, 592 A.2d 228, 232-33 (N.J. 1991). And prudence may often counsel use of a specific-unanimity instruction, when requested, in situations short of that. *See United States v. Ryan*, 828 F.2d 1010,

1020 (3d Cir. 1987), *abrogated on other grounds by United States v. Wells*, 519 U.S. 482 (1997).

But the strict nature of the either/or rule—not to mention Chadwick's proposed rule—is at odds with Utah law on jury instructions generally. Jury instructions are to be examined "'in their entirety'" and must be upheld "'when the instructions taken as a whole fairly instruct the jury on the law applicable to the case.'" *State v. Maestas*, 2012 UT 46, ¶148, 299 P.3d 892. "Thus, a trial court does not err by refusing a proposed instruction 'if the point is properly covered in other instructions.'" *Id.* And in determining whether the instructions fairly instruct the jury, the appellate court should "give the language of the instructions [its] ordinary and usual import," *State v. Kennedy*, 2015 UT App 152, ¶35, 354 P.3d 775, remembering that "'[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might,'" *State v. Hutchings*, 2012 UT 50, ¶25, 285 P.3d 1183. Furthermore, the "precise wording and specificity" of jury instructions "is left to the sound discretion of the trial court." *State v. Aly*, 782 P.2d 549, 550 (Utah Ct.App. 1989). "If pointing to an ambiguity in an individual instruction were enough, almost no set of instructions would survive." *State v. Lambdin*, 2017 UT 46, ¶47, 424 P.3d 117.

Given the consonance between Utah law and the widely recognized flexible approach to unanimity instructions, the flexible approach is the most appropriate rule.

2. The district court could reasonably conclude that there was no genuine risk of a non-unanimous verdict, obvious or otherwise.

Under the flexible approach to unanimity instructions, the district court acted well within its discretion by not giving a specific-unanimity instruction—especially where Chadwick did not ask for one. As noted, the "touchstone" of the flexible approach is whether there is a "genuine risk" of a non-unanimous verdict. *Duncan*, 850 F.2d at 1113-14. A court could reasonably conclude that there was no genuine risk of a non-unanimous verdict here, even with the jury questions and the court's response.

Some courts note that specific-unanimity instructions are required when there is some "tangible indication of jury confusion." *See Duncan*, 850 F.2d at 1114. But the proper focus is not jury confusion in general, but confusion that creates a genuine risk that the jury will return a non-unanimous verdict. Thus, one court held that a specific-unanimity instruction was necessary when the jury "sought specific information" during deliberations about the jury's "*need to agree on one or more*" alleged criminal acts for each count. *Id.* at 1111, 1114 (emphasis added). Yet another court held

that a specific-unanimity instruction was *not* required when the jury asked for clarification of the elements instructions for the charged offenses. *Parker*, 592 A.2d at 234. "In so doing, the jury did not indicate that it was confused concerning its responsibility to reach a unanimous verdict." *Id.*

The jury questions here do not show "confusion regarding the unanimity issue." *See id.* In fact, the questions could show that rather than being confused, "this was a 'conscientious' and sophisticated jury." *See id.* The jury first asked for "a verdict form that specifically identified … a particular course of conduct to connect with each count." R486. That question shows a conscientious jury that likely wanted to make sure its verdict on the various counts accurately reflected its decision. When the court declined the request and told the jury that the order of the counts was "of no particular consequence," the jury asked whether it should connect each count with specific alleged acts as identified by the State's election. R435, 486. That question shows a sophisticated jury that likely recognized the discrepancy between the State's election and the court's most recent instruction that the order of the counts was unimportant—a discrepancy that was resolved when the court responded by saying the State's election was a matter of argument and it was up to the jury to relate specific alleged acts to specific counts if it saw fit. R435.

But even if the questions are read as indicating jury confusion, it was confusion about why the jury was given a single elements instruction with four separate counts—not confusion about "their need to agree" about what Chadwick did. *See Duncan*, 850 F.2d at 1111, 1114.

Typically, the State's election of charges in closing argument would eliminate any risk of a non-unanimous verdict. But the impact of the State's election here was admittedly reduced by the court effectively telling the jury it was not bound by the State's election. R435. Still, the court's response did not increase the risk of a non-unanimous verdict.

Chadwick disagrees, arguing that the district court "directed the jury away from unanimity" by telling the jury it "need *only* agree on how many counts of sexual abuse Chadwick had committed." Repl.Br.Aplt.26, 33 (emphasis added); *see also* Repl.Br.Aplt.1-2, 33-36, 43.

But that assertion ignores both the language of the court's response to the jury questions and the jury instructions as a whole. The district court did *not* tell the jury it did not have to agree on the specific act or acts Chadwick committed. The jury would have understood from all the instructions that each juror had to agree on much more than just the number of crimes committed, and nothing in the court's response to the jury's questions said otherwise.

In its final jury instructions, the court twice told the jury that its verdict had to be unanimous. One instruction said, "Your verdict must express the individual opinion of each juror. Because this is a criminal case, all must agree before a verdict of the jury may be stated. But that verdict must be the expression of what each of you have individually concluded." R477. Another instruction reiterated the need for unanimity when returning a verdict on "each separate count": "Because this is a criminal case, you must all agree to find a verdict." R485.

The jury was also instructed on what it meant to return a verdict. The court repeatedly emphasized that the State had "the burden of proving each element of the charges beyond a reasonable doubt." R467; *see also* R454, 467-68. Although a single elements instruction was given to cover all four counts, the court cautioned the jury that each charge "must still be considered separately" and that each charge must be supported "by *separate and distinct conduct*," which the jury "must find beyond a reasonable doubt." R468 (emphasis added).

In the context of the general-unanimity instructions and the directive to decide each element beyond a reasonable doubt, the jury naturally would have understood the requirement of separate and distinct conduct for each count to mean that each juror had to agree on the separate and distinct

conduct for that count. After all, the jury was *not* told that it need only agree on the end result; rather, it was told that it had to agree *before* they could reach the end result. R477 ("[A]ll must agree before a verdict of the jury may be stated."); *see also* R485. Together these instructions operated to direct the jury on the need for specific-unanimity.

There is no reasonable likelihood that any juror would have read those instructions and thought that she could agree to a guilty verdict for any one count while disagreeing with other jurors about what "separate and distinct conduct" supported that count. If some jurors believed that Chadwick had F.L. grab his penis but did not commit any other criminal act, and others believed that he rubbed his penis on F.L. but did not commit any other criminal act, no reasonable juror would have believed that a guilty verdict on Count I would have been based on conduct "separate and distinct" from the other alleged acts. R468. Surely such disagreement would have come out in deliberations, and the jury would have understood that convicting on Count I in that scenario was not an option under the unanimity requirement presented in the jury instructions.

The court's answers to the jury questions do not contradict those basic principles. Nor do they define unanimity as meaning unanimity "only" as to "how many counts were proved." Repl.Br.Aplt.35. The first response stated

that the jury had "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." R486. That does not suggest that in deciding how many counts were proved, the jury did not need to agree on the specific acts supporting the counts. The court added that "[t]he order of the counts is of no particular consequence." R486. That statement conveyed only that the jury could, for example, disregard the State's election and associate Count I with Chadwick rubbing his penis on F.L. and Count II with Chadwick coercing F.L. to grab his penis. But saying the order is of no consequence does not suggest that the jury may disagree about which of those two acts Chadwick committed and still return a guilty verdict.

The court's second response just elaborated on the two concepts identified in its first response. It reiterated that the jury had to decide how many times Chadwick violated the statute. R435. It acknowledged that the prosecutor had "suggested specific behaviors to correspond to specific counts during closing argument," but it told the jury that it "may choose to relate a specific conduct or incident to a particular count to assist your deliberation, but that is up to you." R435. That statement does not conflict with the need for specific-unanimity.

The court in effect told the jury that there was nothing special about the numbering of the counts. As far as unanimity is concerned, the court was right. As long as the jury unanimously agreed on which criminal acts Chadwick committed, it did not matter whether it came to that agreement by relating any particular act to a particular count. If the jury agreed, for example, that the only criminal act Chadwick committed was to rub his penis on F.L., then it did not matter whether it marked "Guilty" on Count I, Count II, or some other count. While the jury may have found it useful in deliberating to first designate specific acts as being tied to specific counts for ease of discussion, the jury could just as easily discuss the evidence without regard to specific counts—identical as they were—decide which separate and distinct criminal acts they agree Chadwick committed, and then return a verdict for the number of crimes they unanimously found.

Defense counsel's closing argument further removed any risk of a non-unanimous verdict. Counsel explained to the jury that when the elements instruction said each count must be based on separate and distinct conduct, that meant that the jurors had to agree on what conduct Chadwick committed. R960-61. He told the jury that if half of the jurors believed Chadwick committed "incident A but not incident B," and the other half believed he committed "incident B but not incident A," convicting of one

count would not be a unanimous verdict. R960-61. Counsel called this a "cornerstone[] of the judicial system." R956. In rebuttal, the prosecutor twice challenged *other* arguments counsel made by telling the jury, "That's not the law." R968, 971. But the prosecutor never challenged counsel's explanation of the unanimity requirement. And the court did not correct it either.

Even though the jury was instructed that it was the judge's role to instruct on the law, R452, 463-64, it was also told that the parties' arguments were "intended to help you in understanding the evidence *and in applying the law*," R475 (emphasis added). And as explained above, counsel's explanation of what unanimity means was wholly consistent with the court's instructions. *Contra State v. Campos*, 2013 UT App 213, ¶62, 309 P.3d 1160 (holding that parties' arguments that "conflicted with the jury instructions" could not cure misstatement of law in instructions). Defense counsel's uncontested explanation that unanimity requires agreement on specific acts thus further removed any risk of a non-unanimous verdict.

Finally, the straightforward nature of the factual and legal allegations further supports the conclusion that there was no genuine risk of non-unanimity. For the nature of the allegations to create a genuine risk of non-unanimity, courts typically require allegations that are "exceptionally complex," *Ryan*, 828 F.2d at 1020, such as complex fraud schemes with

multiple factual theories overlapping with multiple legal theories, or multiple contradictory or unrelated factual theories advanced to support each count, *see id.*; *United States v. Fairchild*, 819 F.3d 399, 412-13 (8th Cir. 2016); *United States v. Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992); *Beros*, 833 F.2d at 461-62.

There was nothing complex or confusing about the factual and legal allegations here. Even though the elements instructions did not tie specific alleged acts to specific counts and one of the counts covered multiple tickling incidents, the allegations were straightforward and simple. F.L. testified about specific instances of sexual abuse and one recurring behavior. "Here, the alleged acts were closely interrelated and carried out by a single individual." *United States v. Schiff*, 801 F.2d 108, 115 (2d Cir. 1986) (no genuine risk of non-unanimous verdict); *see also Parker*, 592 A.2d 230, 234 (finding no genuine risk even where witnesses gave conflicting statements about multiple acts, because alleged acts "were conceptually similar"). Furthermore, the State told the jury that Chadwick getting aroused when F.L. sat on his lap did not "meet[] the elements of the crime," R968-69, so there was no genuine risk that any juror would have convicted Chadwick based only on his admission to "letting F.L. sit on his lap while he had an erection." Repl.Br.Aplt.36. The straightforward nature of the allegations and evidence thus created no risk of a non-unanimous verdict.

In short, when the circumstances of the case are considered as a whole, there was no genuine risk of a non-unanimous verdict. The straightforward and simple nature of the allegations, the jury instructions, and the parties' arguments effectively eliminated the risk of a non-unanimous verdict, even considering whatever confusion the jury may have had based on the undifferentiated charges. Withholding a specific-unanimity instruction thus was not "'beyond the limits of reasonability,'" such that "'no reasonable person would take the view adopted by the trial court.'" *State v. Arguelles*, 2003 UT 1, ¶101, 63 P.3d 731 (brackets omitted). At the very least, the need for a specific-unanimity instruction would not have been obvious.

D. Any error was harmless, even beyond a reasonable doubt.

In any event, Chadwick suffered no prejudice from the lack of a specific-unanimity instruction. Chadwick argues that the State must prove that any error was harmless beyond a reasonable doubt. But that heightened standard does not apply because Chadwick's claim is unpreserved, the case at worst involves non-constitutional instructional error, and Chadwick has not shown that a presumption of prejudice applies even if any error were constitutional. Chadwick must therefore prove a reasonable likelihood of a more favorable result absent any error.

Even so, omitting a specific-unanimity instruction was harmless beyond a reasonable doubt.

1. Chadwick bears the burden of proving prejudice.

Chadwick argues that this case involves "an error of constitutional proportions." Repl.Br.Aplt.39-40 & n.13. And Chadwick argues that for state constitutional error, the State bears the burden of proving beyond a reasonable doubt that any error was harmless. Repl.Br.Aplt.40.

Chadwick is wrong for several reasons. First, because his claim is unpreserved, Chadwick unquestionably bears the burden of proving prejudice. *State v. Bond*, 2015 UT 88, ¶41 n.14, 361 P.3d 104 ("[F]or unpreserved state constitutional questions, the burden to prove plain error does not change: a defendant must demonstrate that an obvious and prejudicial error occurred.").

Second, any error here does not amount to constitutional error. Instructional error would no doubt amount to constitutional error if the court told the jury it did not need to be unanimous about something it had to agree on. *See Saunders*, 1999 UT 59, ¶65 (plurality). Chadwick argues that is what happened here. Repl.Br.Aplt.1-2, 26, 33-34, 36, 43. But as explained above, that is incorrect. *See supra* Point I(C)(2). The court never told the jury it did not need to agree on the acts that supported each charge. At worst, the

instructions were incomplete. "This not a case in which a court incorrectly stated general principles. … The court correctly instructed the jury that it must be unanimous in its verdict." *Parker*, 592 A.2d at 233.

The error—if any—came in not explaining what it means to be unanimous. The Court has already suggested that the defendant bears the burden of proving prejudice when claiming that a superfluous instruction creates the potential for a verdict that violated the Unanimous Verdict Clause. *See Hummel*, 2017 UT 19, ¶42. Incomplete instructions implicate constitutional rights in similarly indirect ways. Calling this a constitutional error would be akin to calling it constitutional error when a court tells the jury it must decide the case beyond a reasonable doubt but does not define that standard. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course.").

Many courts state with little analysis that not providing a specific-unanimity instruction in the face of duplicitous charges amounts to constitutional error. *See, e.g.*, *United States v. Newell*, 658 F.3d 1, 26, 28 (1st Cir. 2011). But short of a direct constitutional violation—like affirmatively misstating the unanimity requirement—error in jury instructions does not

amount to constitutional error unless "'there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991).[10] It is not enough "that the instruction is undesirable, erroneous, or even 'universally condemned.'" *Cupp v. Naughten*, 414 U.S. 141, 146 (1973).

Nor is it enough that the instructions create a "theoretical" or "abstract and conjectural" possibility of misdirecting the jury. *Id.* at 148-49. "[T]he proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." *Victor*, 511 U.S. at 6. And that inquiry requires an examination of the evidence, the "argument of counsel," and "the context of the overall charge" to determine whether an erroneous instruction "so infected the entire trial that the resulting conviction violates" the constitution. *See Cupp*, 414 U.S. at 146-47.

General-unanimity instructions do not inherently create a reasonable probability that the jury was not unanimous. When a jury is told its verdict must be unanimous, it is exceedingly unlikely the jury would think it could

[10] Although federal law is not controlling, the Court should adopt a similar rule acknowledging that not all instructional error amounts to constitutional error.

agree on a verdict by disagreeing about what the defendant did. *See United States v. Natelli*, 527 F.2d 311, 325 (2d Cir. 1975) ("It is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict."). Even if a specific-unanimity instruction should have been given here, the trial court's instructions on unanimity were at worst incomplete but were otherwise correct. The court's instructions, taken as a whole, did not create a reasonable likelihood that the jury believed it did not have to agree on the underlying criminal acts Chadwick committed.

Finally, even if the case involves preserved error of constitutional magnitude, Chadwick has not shown that the heightened standard he advocates should be extended to state constitutional error of this nature. In *Chapman v. California*, the United States Supreme Court held that the government bears the burden of proving beyond a reasonable doubt that any "federal constitutional error" is harmless. 386 U.S. 18, 24-26 (1967). But this Court has "never squarely decided" whether the federal harmless-beyond-a-reasonable-doubt standard is required under the Utah Constitution. *State v. Bell*, 770 P.2d 100, 106 n.12 (Utah 1988).

Indeed, the Court has taken a more nuanced approach to the Utah Constitution. In *State v. Soto*, the Court held that when a presumption of

prejudice applies to a claim that improper juror contact violates the state constitutional right to an impartial jury, the State "may rebut the presumption of prejudice only by showing that the improper jury contact was harmless beyond a reasonable doubt." 2022 UT 26, ¶88, 513 P.3d 684. *Soto* did *not* adopt a general rule requiring that standard for all state constitutional claims. Rather, it applied the heightened standard only when a presumption of prejudice is triggered.

Selecting the standard by which the State may overcome a presumption of prejudice does not mean the presumption of prejudice applies to all state constitutional claims. Thus, *Soto* began its analysis by addressing the reasons for the "'strict approach'" of imposing a presumption of prejudice on impartial-jury claims in the first place. *Id.* ¶¶33-37. Despite *Soto*'s identification of potentially relevant factors, Chadwick does not engage in any of that analysis in his opening brief to prove that a presumption of prejudice applies to his unanimous-verdict claim. "Without a presumption of prejudice, [Chadwick] must show harm in order to prevail on his claim." *Maestas*, 2012 UT 46, ¶71.

In short, Chadwick bears the burden of proving prejudice because his appellate claim is not preserved, the alleged error does not amount to

constitutional error, and Chadwick has not shown that a presumption of prejudice should apply to his unanimous-verdict claim.

2. The instructions viewed as a whole, the argument, and the evidence make any error harmless.

Chadwick tries to establish prejudice by analyzing the statistical probability that eight people would independently associate four separate scenarios (allegations A, B, C, D) with the same four categories (counts 1, 2, 3, 4). Repl.Br.Aplt.41-42. He argues that "there is a 96.875% chance" the jury was not unanimous. Repl.Br.Aplt.42.

But that's not how prejudice is determined. Jurors deliberate together, not in isolation from one another. And they do so in the context of the entire proceedings in which they participated. Thus, appellate courts must "conduct a more holistic, case-by-case prejudice inquiry." *See State v. Argueta*, 2020 UT 41, ¶58 & n.15, 469 P.3d 938, *abrogated on other grounds by State v. Green*, 2023 UT 1, 532 P.3d 930. Context matters, and a statistical analysis contains none.

In context, omitting a specific-unanimity instruction was unlikely to lead the jury to a non-unanimous verdict. Rather, it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999).

As an initial matter, because a general-unanimity instruction typically "suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict," *Natelli*, 527 F.2d at 325, omitting a specific-unanimity instruction will generally create no more than a risk of "slight confusion." *Evans*, 2001 UT 22, ¶17.

If a general-unanimity instruction typically risks creating only slight confusion on the need for unanimity as to the specific criminal act, the instructions here carried even less risk of confusion—and therefore even less likelihood that Chadwick was prejudiced by any error. The jury was twice instructed that each juror had to agree *before* reaching a verdict, R477, 485, and it was explicitly told that each count had to be supported by separate and distinct conduct, R468.

If the import of those instructions was ambiguous, defense counsel spelled it out in closing argument, explicitly pointing to the elements instruction as the basis for the specific-unanimity requirement. R960-61. Defense counsel's clear and uncontested explanation that unanimity required agreement on the specific act makes it unlikely the jury returned a non-unanimous verdict. And as noted above, Point I(C)(2), the district court's response to the jury did not contradict counsel's explanation of the unanimity

requirement. *See Evans*, 2001 UT 22, ¶17 (relying on absence of "non-unanimity" instruction to find harmless error).

Thus, even if the instructions could have been clearer, the jury was told that each juror had to agree before entering a verdict, that a conviction on any one count had to be supported by separate and distinct evidence from any other count, that the particular numbering of the counts was irrelevant, and—through counsel—that if the jurors did not agree on the specific criminal act for any one count then the verdict was not unanimous. Given what the jury was told, no rational juror could reasonably believe they could convict on one count without each juror agreeing on the specific criminal act that supported that count. *See Neder*, 527 U.S. at 3.

The strength of the evidence also makes it clear beyond a reasonable doubt that a jury would not have reached a more favorable verdict had it been given a specific-unanimity instruction. Although Chadwick explicitly denied each allegation, the evidence against Chadwick was unequivocal. F.L. described the abuse in detail, and her testimony was clear and largely consistent. In fact, Chadwick's cross-examination of F.L. pointed to only two potential inconsistencies—F.L. never told the detective that Chadwick's penis touched her leg, but at trial she said it touched her inner thigh; and she told her therapists that she could not remember any details of the abuse. R817,

831, 834-35. F.L. acknowledged the discrepancy on the first point, explaining that she had focused on "the most important part," which was Chadwick's penis touching her vagina over her underwear. R831. On the second point, F.L. explained that she told the therapists she did not remember because she did not want to talk about it. R844-45.

In short, Chadwick did not focus his case on pointing out inconsistencies in F.L.'s allegations because there were hardly any, and the two discrepancies he identified were easily explained. F.L.'s clear, unequivocal, and largely consistent testimony thus stands in stark contrast to the equivocal and conflicting evidence that prompted reversal for lack of a specific-unanimity instruction in *Alires*. *See* 2019 UT App 206, ¶¶9-10, 28.

Yet Chadwick attempts to undermine the evidence that *was* presented by using evidence that was *not* presented to the jury—F.L.'s statement at the preliminary hearing that "her memory was impaired by post-traumatic stress disorder." Repl.Br.Aplt.41 (citing R61). But Chadwick cannot undermine the strength of the evidence before the jury by pointing to evidence that was not before the jury. Even when prejudice is presumed, the harmlessness inquiry asks whether the court can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Neder*, 527 U.S. at 19. Giving a specific-unanimity instruction would not have alerted the jury to

preliminary hearing testimony that defense counsel never presented at trial. Such information is simply irrelevant to an assessment of the strength of the evidence.

Chadwick also argues that any error was prejudicial because it is "impossible to know" the basis of the jury's verdict. Repl.Br.Aplt.40-41, 43-44. Chadwick is correct that the factual basis for the jury's decision cannot be known with certainty. But pointing to an outsider's inability to peer into the black box of jury deliberations does not address whether a rational jury would have found Chadwick guilty of at least one count absent the error. *See Pleasant Grove City v. Terry*, 2020 UT 69, ¶33, 478 P.3d 1026 (affirming that propriety or impropriety of jury verdict must be established without "peer[ing] into the jury's black box"). In other words, Chadwick "speculates that the jury might have not been unanimous, but speculation is not enough." *United States v. Deason*, 965 F.3d 1252, 1268 (11th Cir. 2020).

In any event, the basis of the jury's decision is not as mysterious as Chadwick suggests. The State made an election of charges, and the jury's second question shows that even though the jury wanted clarification to confirm they got it right, the jury had tracked and remembered the State's election. *Compare* R435, *with* R952-53. The court told the jury it did not have to line up specific alleged acts with specific counts but that it was free to do

so if it believed it would be helpful in its deliberations. R435. The jury's questions suggest that the jury likely found it helpful to do so. And with the court's endorsement of that approach to deliberating, the jury likely did just that—tying specific alleged acts to specific counts in the way they proposed, which was right in line with the State's election. R435, 952-53. In other words, the State's election, the jury's question, and the court's response all suggest that the jury associated Count I with Chadwick coercing F.L. to grab his penis.

That inference is reinforced by the evidence. Although F.L.'s testimony about each allegation was clear and unequivocal, she gave the most specific, detailed descriptions of Chadwick coercing F.L. to grab his penis and of Chadwick rubbing his bare penis on her. *Compare* R808-13 (grabbing penis), *and* R814-17 (bare penis), *with* R818-19 (breast-touching). And as noted above, the only potential inconsistency Chadwick was able to elicit about any particular incident related to the account of Chadwick rubbing his bare penis on F.L.'s inner thigh. R817, 831. Thus, the evidence, the argument, the jury question, and the court's response all make it likely that during deliberations the jury tied Count I to Chadwick coercing F.L. to grab his penis.

Given the strength of the evidence on the one incident the jury was most likely to have associated with Count I, the court's instructions that the

jury must all agree and that each count must be supported by separate and distinct evidence, and defense counsel's uncontested explanation that agreement as to the underlying criminal act was required, it is clear beyond a reasonable doubt that a rational jury would have unanimously found Chadwick guilty of the same criminal act and convicted of one count had it been given a specific-unanimity instruction.

E. The Court lacks jurisdiction to address the unripe question of whether Chadwick could be retried in the event of reversal.

Chadwick asks this Court to order the district court not to retry him if he prevails on appeal, claiming it would violate double jeopardy because "the facts supporting conviction in Count 1 cannot be distinguished from the counts on which [Chadwick] was acquitted." Repl.Br.Aplt.44 & n.16. Chadwick concedes that his double-jeopardy claim is unripe, but he argues that the Court should nevertheless "include directions to the district court" not to retry him because "no Utah appellate court has actually addressed the question." Repl.Br.Aplt.44 n.16.

The Court lacks jurisdiction to do what Chadwick asks because, as Chadwick admits, whether he may be retried is indeed unripe. *Alires*, 2019 UT App 206, ¶31 n.7. The Court has stated that its jurisdiction is limited to "matters involving 'a conflict over the application of a legal provision' that has 'sharpened into an actual or imminent clash of legal rights and

obligations between the parties.'" *Teamsters Loc. 222 v. Utah Transit Auth.*, 2018 UT 33, ¶14, 424 P.3d 892. But when "'there exists no more than a difference of opinion regarding the hypothetical application of a provision to a situation in which the parties might, at some future time, find themselves,'" the issue is unripe for resolution. *Archuleta v. State*, 2020 UT 62, ¶37, 472 P.3d 950 (emphasis omitted). Without an actual dispute, deciding an unripe issue amounts to "nothing more than an advisory opinion." *Utah Dep't of Transp. v. Ivers*, 2009 UT 56, ¶19, 218 P.3d 583.

Unless and until the Court reverses *and* the State chooses to retry Chadwick on Count I, there is no more than a difference of opinion about whether double jeopardy would bar retrial. And that decision—whether to retry Chadwick—is a discretionary call the trial prosecutor will make in consultation with F.L. if and when the need arises. In other words, "the parties might, at some future time, find themselves" engaged in an actual dispute over whether Chadwick may be retried. *See Archuleta*, 2020 UT 62, ¶37. But until they do, the question is unripe.

Chadwick cites nothing to support his claim that the Court may rule on a concededly unripe question simply because "no Utah appellate court has actually addressed the question." Repl.Br.Aplt.44 n.16. In fact, the Court has stated just the opposite: deciding an issue "to avert a future case" does

not justify reaching an unripe question. *Teamsters Loc. 222*, 2018 UT 33, ¶14. Rather, the unsettled nature of the question reinforces the need to avoid deciding it. Although Chadwick cites cases from other jurisdictions that reach the conclusion he advocates, controlling authority could support the conclusion that double jeopardy does not bar retrial on Count I. *See Bravo-Fernandez v. United States*, 580 U.S. 5, 19, 21 (2016) (holding, in context of inconsistent verdicts, that defendants "bear the burden of demonstrating that the jury *necessarily resolved* in their favor the question" on which they are being retried, and if defendants "cannot establish the factual predicate … namely, that the jury in the first proceeding actually decided that they did not violate the … statute," then double jeopardy does not bar retrial (emphasis added)); *State v. Hilberg*, 61 P. 215, 216-17 (Utah 1900) (stating, in context of case involving single charge, that double jeopardy would not bar trial on additional allegations presented in first trial because, as a matter of law, the State is deemed to have elected the first criminal act of which it presented evidence at trial).

The Court should thus wait until the issues are sharpened into a real dispute between the parties, rather than offering an advisory opinion on academic questions. The Court should accept Chadwick's concession that his double-jeopardy claim is not ripe and not address the issue at all, lest the

district court mistake any double-jeopardy discussion as putting a thumb on the scale either for Chadwick or the State.

II.

The district court did not clearly err in rejecting Chadwick's mid-trial request to reexamine the victim's therapy records for information that fell beyond the scope of the parties' stipulation.

The parties stipulated that the district court could conduct an *in camera* review of F.L.'s therapy records before trial. That stipulation extended to review and release of three specific categories of records. R234-36. Later, when the court ruled during trial that Chadwick could ask F.L. about other sources of trauma (besides Chadwick) for which she sought counseling, Chadwick asked the court to unilaterally expand the scope of the earlier stipulation and reexamine F.L.'s therapy records for information that might assist his cross-examination. R838-41.

Chadwick argues that the district court erred when it denied his request to reexamine F.L.'s records. Repl.Br.Aplt.46-50. He argues that once the court ruled that the State had opened the door to Chadwick asking F.L. about other sources of trauma, the court was required to reexamine F.L.'s therapy records and disclose records material to that new issue. Repl.Br.Aplt.48-49.

Questions of privilege that turn of factual issues are reviewed for clear error. *Bell*, 2020 UT 38, ¶10. Because the court's refusal to reexamine the victim's records turns on the specifics of Chadwick's request and the parties' prior stipulation, this issue is reviewed for clear error, just like "all … 'fact-like' determinations of mixed questions." *In re E.R.*, 2021 UT 36, ¶¶11, 30, 496 P.3d 58.[11]

To show clear error, Chadwick must show that the court's decision is "against the clear weight of the evidence" or otherwise convince the Court that "a mistake has been made." *State v. Walker*, 743 P.2d 191, 193 (Utah 1987). This is no easy task, for when "'there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *State v. Aziakanou*, 2021 UT 57, ¶57, 498 P.3d 391.

[11] This will likely be the case in every situation where a defendant challenges the district court's denial of a request for ongoing review. *See Randolph v. State*, 2022 UT 34, ¶39 n.11, 515 P.3d 444 (stating that standards of review are determined "on a categorical level"). The court's decision will turn not only on the nature of the request, but also the court's assessment of the complexity of the evidence at trial (which affects materiality review) and the court's determination of whether it adequately recalls the substance of the records and can determine whether additional records are material without viewing the records again. Such fact-intensive assessments should be reviewed for clear error, *In re E.R.*, 2021 UT 36, ¶¶11, 30, if not abuse of discretion, *Judd v. Bowen*, 2018 UT 47, ¶8, 428 P.3d 1032.

The court did not clearly err when it denied Chadwick's request to reexamine F.L.'s therapy records, because Chadwick asked the court to unilaterally expand the stipulation permitting the court's original *in camera* review to include records he never established a right to access.

Because "the duty to disclose material evidence is ongoing," the Court has recognized that it is error for a district court not to conduct an ongoing review once the right to access the records has been established. *State v. Martin*, 1999 UT 72, ¶19, 984 P.2d 975. But as the Court recognized in this case, "conventional appellate principles" apply to such claims. *Chadwick*, 2023 UT 12, ¶¶35-36, 44. "Chadwick must rest on arguments advanced below" to challenge the lack of any ongoing review by the district court. *See id.* ¶¶35-36 (paraphrasing, with approval, F.L.'s argument). Because of the important policies behind the preservation rule, the Court has applied it "to every claim." *State v. Holgate*, 2000 UT 74, ¶11, 10 P.3d 346. Thus, review should be limited to what Chadwick asked for below and nothing more.

Chadwick obtained the initial *in camera* review by virtue of the parties' stipulation. That stipulation authorized the disclosure of three narrow, specific categories of information: (1) factual descriptions of abuse by Chadwick, (2) therapists' reports of those events to law enforcement, and (3) any methods used to refresh or enhance F.L.'s memory of those events. R235.

At trial, Chadwick did *not* ask the court to conduct an ongoing review of F.L.'s records to determine whether anything within the scope of the original stipulation became material during trial. Rather, he asked the court to go beyond the stipulation, reviewing F.L.'s records for new information that was material to his claim that F.L.'s trauma was caused by someone or something other than Chadwick. R838-41. His request that the court reexamine F.L.'s records and "release portions that become relevant" came in the context of the court's ruling that Chadwick could ask F.L. about other sources of trauma but that he was "stuck with the answers" he got. R840-41. Chadwick acknowledges this context, admitting that he asked the court to look for "records related to F.L.'s claims of trauma and coping skills" to assist his cross-examination "on this point." Repl.Br.Aplt.48-50. In contrast, Chadwick admits, "the court had previously only examined the records for and produced 'portions that contain'" information consistent with the parties' stipulation. Repl.Br.Aplt.48-49.

The distinction between the narrow scope of the stipulation and what Chadwick asked for during trial is critical, because Chadwick never established a right to access records about other sources of trauma.

When a defendant seeks access to a victim's therapy records, he must show that an exception to the rules of privilege exists and that, "with

reasonable certainty, 'exculpatory evidence exists [in the mental health therapy record] which would be favorable to [the] defense.'" *Bell*, 2020 UT 38, ¶¶15-16 (alterations in original); *see also* Utah R. Crim. P. 14(b)(1), (2) (governing subpoenas and orders for victims' records); Utah R. Evid. 506(b), (d) (governing therapist–patient privilege). Furthermore, the records must be identified "with particularity" and the request must be "reasonably limited as to subject matter." Utah R. Crim. P. 14(b)(2).[12] Once those requirements are met, the district court conducts an *in camera* review of the records to determine whether they are material. *State v. Worthen*, 2009 UT 79, ¶¶15, 45-50, 222 P.3d 1144; *State v. Blake*, 2002 UT 113, ¶23, 63 P.3d 56. After each part of the above test has been satisfied, the court discloses "only those portions that the requesting party has demonstrated a right to inspect." Utah R. Evid. 14(b)(4).

That multi-part test is "sequential." *Bell*, 2020 UT 38, ¶16. Review for materiality and subsequent disclosure is inappropriate if the other prerequisites are not satisfied first. *See id.*; *Worthen*, 2009 UT 79, ¶¶14-15.

[12] Rule 14 was amended after Chadwick's trial, but the State refers to the current version because the changes are not material to this appeal.

Here, Chadwick skipped the initial showing by reaching a stipulation with the State agreeing to a narrow *in camera* review. The stipulation stated that the district court would "disclose only those portions" that fell within the stipulation. R235. But at trial, Chadwick asked the district court to go beyond that stipulation and review F.L.'s therapy records for information he never "demonstrated a right to inspect." *See* Utah R. Crim. P. 14(b)(2), (4). Regardless whether information about other sources of trauma would have been material, Chadwick never made the sequential showing to establish a right to access such records. *Id.* (stating that court may disclose "only those portions that the requesting party has demonstrated a right to inspect"); *Bell*, 2020 UT 38, ¶16.

The court did not clearly err when it denied Chadwick's request. Although the court initially suggested it had no obligation to conduct an ongoing review, it then acknowledged the true problem: Chadwick was asking the court to look for information to rebut the inference that F.L.'s trauma was caused by Chadwick, but the court's original *in camera* review was limited to "the specific areas of question that were included in the order." R841.

Even so, it is the court's "ultimate conclusion" that matters, not its reasoning in getting there. *State v. Green*, 2023 UT 10, ¶65 & n.41, 532 P.3d 930.

Chadwick asked the court to unilaterally expand the scope of the stipulation to include material Chadwick never established a right to see. Even if Chadwick's request could reasonably be viewed two ways—one justifying reexamination of F.L.'s records and one justifying the denial of the request—that is not enough to show clear error. *See Aziakanou*, 2021 UT 57, ¶57. Because the court could reasonably conclude that Chadwick was asking for records that fell outside the scope of the stipulated order and that Chadwick made no showing to justify an expanded *in camera* review, the court did not clearly err in denying the request.

In any event, Chadwick requests the wrong remedy for the alleged error. He claims he is entitled to reversal of his conviction unless the State can prove that erroneously denying a second *in camera* review was harmless beyond a reasonable doubt. Repl.Br.Aplt.51.

The appropriate remedy for any error here is not reversal, but remand for a second *in camera* review, as this Court previously suggested in this very case. *See Chadwick*, 2023 UT 12, ¶54 ("If he is successful, the result could be that we remand to the trial court for an additional *in camera* review."). That was also the course followed in *Martin*. *See* 1999 UT 72, ¶19. Indeed, Chadwick is entitled to a new trial only if *he* can prove that an error was prejudicial. *Hummel*, 2017 UT 19, ¶42 (noting that "longstanding caselaw on

harmless error" places the burden on the appellant "to prove not only *error* but *prejudice*"); *Martin*, 1999 UT 72, ¶19 (suggesting usual prejudice standard applies upon remand for second *in camera* review). And he cannot prove prejudice without the records. Thus, if the Court remands for a second *in camera* review, the parties should then be given the opportunity to address whether any newly disclosed records would have created "a reasonable likelihood of producing a more favorable outcome" had they been disclosed during trial. *Martin*, 1999 UT 72, ¶19. But because Chadwick has not shown clear error in the first place, remand is not warranted.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on November 27, 2023.

SEAN D. REYES
Utah Attorney General

/s/ William M. Hains
WILLIAM M. HAINS
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 13,861 words, excluding the table of contents, table of authorities, addenda, 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.

/s/ William M. Hains
WILLIAM M. HAINS
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on November 27, 2023, the Brief of Appellee was filed with the Court in a searchable PDF attachment to an email, and served upon the appellant's counsel and the victim's counsel by email at:

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Counsel for victim F.L.

Pursuant to the current Administrative Order for Court Operations During Pandemic, paper copies will be filed with the Court, and served upon counsel of record, at a later date as directed by the Clerk of the Court, if not sooner.

/s/ Melanie Kendrick

Addenda

Addendum A

The Order of the Court is stated below:
Dated: September 19, 2019 12:03:19 PM
At the direction of:
/s/ JAMES R TAYLOR
District Court Judge
by
/s/ MINDY IGE
District Court Clerk

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs. DAVID M CHADWICK, Defendant.	:	Case No: 171400984 FS Judge: JAMES R TAYLOR Date: September 19, 2019

PRESENT
Clerk: mindyi
Prosecutor: MILLER, BRIAN
Defendant Present
Defendant's Attorney(s): PARMLEY, DUSTIN

DEFENDANT INFORMATION
Date of birth: August 27, 1966
Audio
Tape Number: 7A Tape Count: 9:05-9:29

CHARGES
1. SEX ABUSE OF A CHILD - 2nd Degree Felony
Plea: Not Guilty - Disposition: 08/07/2019 Guilty

SENTENCE PRISON
Based on the defendant's conviction of SEX ABUSE OF A CHILD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE
On the maximum sentence imposed, case to run concurrent to other cases, but is suspended at this time.

Commitment is to begin immediately.

SENTENCE JAIL SERVICE NOTE
Good time is authorized if Defendant qualifies.

SENTENCE FINE
Charge # 1 Fine: $803.00
Suspended: $0.00
Surcharge: $368.95
Due: $803.00

Total Fine: $803.00
Total Suspended: $0
Total Surcharge: $368.95
Total Principal Due: $803.00
Plus Interest
Defendant is to pay a fine of 803.00 which includes the surcharge. Interest may increase the final amount due.
Fine payments are to be made to Adult Probation and Parole.

SENTENCE FINE PAYMENT NOTE
Defendant to pay at least $50 per month towards the fine with the first payment being made within 30 days of release from custody and is to continue until paid in full.

ORDER OF PROBATION
The defendant is placed on probation for 48 month(s).
Probation is to be supervised by Adult Probation and Parole.
Defendant to serve 180 day(s) jail.
Defendant is to report to the Utah County Jail.

Defendant is ordered to report to Adult Probation and Parole and enter into an agreement and comply strictly with the terms of probation.
Defendant is ordered to obey all laws, State, Local and Federal, and have no further violations during the probation period.
Defendant is ordered to notify the Court and Adult Probation and Parole of a current address at all times, and is ordered to make him/herself available to Adult Probation and Parole and the court when requested to do so.

Defendant is ordered to pay restitution and/or supervision fees at the discretion of Adult Probation and Parole and/or by direction of the Court.
Defendant is ordered to submit his/her person, vehicle, place of residence or any property under his/her control without the necessity of a warrant any time, day or night for search by Adult Probation and Parole or any other peace officer.
Defendant is ordered to remain drug/alcohol free for the duration of probation, and submit to tests to determine the presence of these substances without the necessity of a warrant.
Defendant is ordered to abstain from possessing or using alcohol while on probation and ordered not to frequent establishments where alcohol is the chief item of order.
Defendant is ordered not to frequent any places where drugs/alcohol are used or sold, nor associate with any person using, possessing or consuming alcohol or illegal drugs.
Defendant is not to obtain prescriptions for controlled substances without prior knowledge and approval of the probation officer.
Defendant is ordered to comply with the Response and Incentive Matrix, if available where residing.
Defendant is to abide by Sex Offender Group A conditions as directed by Adult Probation and Parole.
Defendant is to obtain a sex offender evaluation and complete recommended treatment.

The court notes that on page 2 of the presentence report under the education/employment heading it gives inaccurate information regarding employment. The employment statements in the other areas of the presentence report are accurate.

CUSTODY

The defendant is remanded to the custody of the Utah County Jail.

End Of Order - Signature at the Top of the First Page

Addendum B

INSTRUCTION NO. ____4_____

This is a criminal action brought by the State of Utah against Mr. Chadwick in which he is accused of committing four crimes each described as sexual abuse of a child. When Mr. Chadwick was arraigned in this case he entered a plea of not guilty to each count which placed upon the State the burden of proving each element of the charges beyond a reasonable doubt.

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.

INSTRUCTION NO. __14____

Your verdict must express the individual opinion of each juror. Because this is a criminal case, all must agree before a verdict of the jury may be stated. But that verdict must be the expression of what each of you have individually concluded. That means that each of you must make up your own mind rather than simply "go along." You certainly should consider and value the observations and opinions of other jurors as you discuss the evidence and you should never obstinately cling to a position without good reason. Cooperate with other jurors to understand and weigh all of the evidence. Don't hesitate to change an opinion if you become convinced you were wrong, at first. But also don't surrender an honest conviction about what the evidence only because of the opinion of another juror for the mere purpose of returning a verdict.

INSTRUCTION NO. __22____

When you retire to deliberate, you will select one of your members to act as foreperson who will preside over your deliberations. Your verdict must be in writing, signed by your foreperson, and when found must be returned by you into this Court.

Your 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.

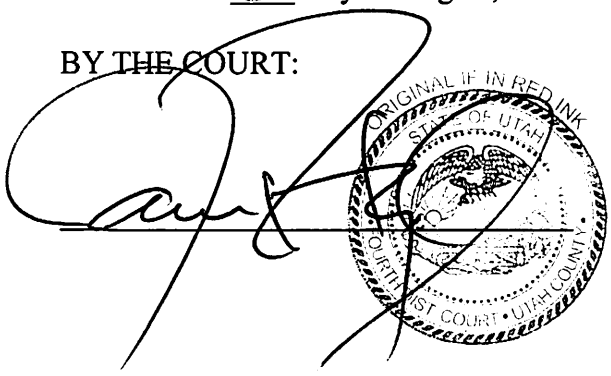
I will provide you with a blank verdict form. When you have agreed upon your verdict, your foreperson should sign the verdict form and notify the officer having you in charge, who will conduct you back into Court.

Because this is a criminal case, you must all agree to find a verdict.

You may take these instructions with you to the jury room for further deliberations.

DATED this 6 day of August, 2019.

BY THE COURT:



Addendum C

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 •

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 D

THE COURT: All right, Mr. Miller.

MR. MILLER: Can you guys see me okay with the blinds in the back now, just a little better? Okay, first off I want to thank you for serving on this jury. It's a -- it really is a thankless responsibility, but our justice system works because of your participation, and it really is the best justice system.

You've heard from -- instructions from the Judge. You've heard from the attorneys in this case. You've heard from the detective. You've heard from [redacted] the victim, and you've heard from Mr. Chadwick, the defendant in this case. Shortly you'll be given this case to decide whether the facts show beyond a reasonable doubt that Mr. Chadwick is guilty of those four counts of child sex abuse.

I ask that you carefully consider the things that you heard at trial, weigh the evidence and credibility of those that testified. Please use your logic, look at the evidence, don't let common sense go out the window.

On its surface this case is pretty simple, it's pretty straightforward. However, this case has extremely complicated [redacted] life, and these past 20 years have been difficult because of what has been talked about in this trial. It's something that she clearly struggles with almost 20 years later. We could see that during her testimony.

But the case is simple. A single man in his 30's,

Mr. Chadwick, created a cool house that was fun. He had games, videos -- movies, he had a Nintendo 64, computers, he even had Mario Cart, which is an awesome game, and he used this to make a fun place. A place where [redacted] wanted to be, where she would come over with her friend before -- before she lived in the house.

When she would come over Mr. Chadwick would let her sit on his lap, and he knew that he would get aroused. His testimony was that many times when she sat on his lap that he got aroused, and that was something that was expected if there was contact. He also rubbed his erect penis on [redacted] He tickled her breasts. He tricked her into playing a game which resulted in her grabbing his penis multiple times.

Now, this happened a long time ago. This was almost -- almost 20 years ago, but it is never too late for a victim to come forward in this type of case, for [redacted] to come forward and talk about what happened. The passage of time does not diminish the accountability and the consequences Mr. Chadwick is to receive. The passage of time does not diminish the importance of protecting our children and our communities. The passage of time does not diminish justice and the rule of law, and the passage of time does not diminish the credibility of the victim [redacted]

Let's talk a little bit about the evidence that was presented to you. Unfortunately with these kind of cases there

is rarely a smoking gun. There's not always a video that we can watch that shows it happened, something that would make your job really easy. It's a lot of he said/she said. That's what this case is. So the evidence is the testimony. The evidence is the credibility of those that testified.

Do you believe [redacted] Larsen? Do you believe the things that she said? We heard [redacted] testimony, also known as [redacted] when she was younger, same person, and she said the same things happened when she first reported this three years ago to police.

What she testified to was that she was introduced to Mr. Chadwick when she was only eight years old, early in 1999. That Mr. Chadwick was very friendly. He had [redacted] and her friend over. They played at his house. He was a primary teacher. He had movies. He had video games. He had computers, space to roller skate in the basement. He had it all, except for one thing. Kids. He didn't have kids. There were no kids living in the home. He was a single man.

He used all these fun things and him being a fun guy to lure [redacted] into his home. He did this to groom her, gain her trust and take advantage of her. He took her on trips. He did nice things for her.

MR. PARMLEY: Objection, facts not in evidence.

MR. MILLER: Your Honor, I believe that [redacted] testified to the trips.

THE COURT: I'm going to sustain the objection. I don't recall that testimony. Make sure you confine yourself to the facts.

MR. MILLER: He would regularly have [redacted] sit on his lap. He talked about that. She talked about that. [redacted] testified that she often felt his erection when he was on -- when she was on his lap, and he never told her to get off.

He talked about that, too. She told you about the first incident when he got an erection when she was sitting on his lap, and she started to get off, and he said, "No, it's okay. Do you want to touch it? Let's play a game." It was that catch it game. He instructed her what to do.

He had her get in front of him. She said she got on her knees in front of him on the couch, and he put his hand underneath his pants. She says she remembers him wearing the tee shirt and the sweat pants, and he grabbed his erect penis and moved it around and encouraged her to catch it.

She said that she did catch it three or four times. I believe three or four times, and she testified that on the last time that he thrust his hips forward, presumably for his own sexual gratification. This only stopped when there was a knock at the door, and she hid. Afterwards he said, "Don't tell anybody. They wouldn't understand our relationship."

She testified of a time when she was watching a movie with him, again on his lap, cuddling with him, something that

often occurred. She was wearing a long shirt as a nightgown, and underwear underneath that. She said that he began to rub his erect penis on her underwear, the parts that covered her buttocks and her vagina.

She said she knew that it was his bare penis because she could feel the skin-to-skin when it touched her leg and her thigh. She said she didn't see it. She had the big -- the oversized shirt and was sitting on his lap, but she felt it, and she knew what skin-to-skin was.

You heard how he frequently tickled her, frequently slipping in an oops way underneath her shirt all the way up to the breast area. That included the nipple area. This is something that often occurred, that happened on more than one occasion.

You heard from Sergeant Tischner, then Detective, when he interviewed Mr. Chadwick. You heard about this interview, both through the detective and from -- from Mr. Chadwick. You heard some from the -- from the transcript, and you heard that Mr. Chadwick mostly minimized his interactions with [redacted]. He told the detective that she was mostly standoffish. This is when they -- when the detective initially talked to him, that she was mostly standoffish. That she mostly played downstairs. That they mostly played video games instead of movies, and [redacted] mostly sat on the ground when they were together. That was what he said when he was first encountered with this.

At a certain point in the interview Mr. Chadwick apologized for anything that he did to [redacted] and -- [redacted] and said he was sorry. Eventually Mr. Chadwick acknowledged certain things in his interview.

After 19 years he -- or 16 years at that time, he did remember [redacted] sitting on his lap several times, and making contact with it, and the detective testified that he would look down and signal towards his groin, his penis. He stated that he never trapped her hand and never moved it there, which is consistent with what [redacted] said, but he did recall her touching it.

He said he would leave her hand there on his penis. He said to the detectives at one point about a minute. Other times he said 10 to 15 seconds. Either is a long time. You felt the 15 seconds.

He said that -- his testimony was that this happened 20 times. When asked if he got an erection when she touched him there or sat on his lap he said that he gets aroused anytime someone touches him there.

He acknowledged that there were times where she might have or would have felt his erection and he admitted that he would have [redacted] sit on his lap for hours at a time, sometimes through a whole movie. This is with him knowing that he would get an erection and he still allowed and encouraged this behavior.

He said he would stay aroused as long as there was contact, which you can use your common sense and your reasoning to think about how much contact there would be in that area when somebody sits on your lap.

He recalled [redacted] sitting on his lap regularly, which contradicted the earlier statements that she was standoffish, that she mostly sat on the ground. When if he -- when asked if he remembered his penis being against her underwear, he said he didn't recall, but it could have happened. You and I know that is not something that just happens, and a man would remember something like that if it were to happen; but he doesn't deny it. He says it could have happened.

All the statements by Mr. Chadwick corroborate [redacted] testimony. The things that he goes as far as to mitigate and acknowledge are consistent with what [redacted] said, but he doesn't go all the way until it -- to the point where he believes it's inappropriate, but you heard from him that he believes that it's not inappropriate for a kid to sit on his lap and for him to have an erection and for that kid to feel the erection.

All of these statements corroborate [redacted] testimony, but from his interview we do know -- or I should say that he made sure to minimize his responses, but from his interview we do note that he gets aroused when anyone touches his penis area. So he makes a house where it's cool for [redacted] to come over, and encourages her to sit on that lap, knowing that there

would be contact. He knows full well that he will get an erection when [redacted] sits on his lap and makes contact with his penis, and it continues for years.

The only reason for that to continue with him knowing what would happen and what the consequences are of him sitting --of her sitting on his lap is for his own sexual gratification and pleasure. There's no other reason for that.

Now, because of [redacted] disclosure, talking about what happened, going to police, getting -- getting this case initiated, Mr. Chadwick has been charged with four counts of sex abuse of a child. I'd like to turn your attention to jury instruction No. 5, if you could.

This is the -- basically the breakdown of the statute, what has to be shown in order to find Mr. Chadwick guilty. It's the same charge for all four counts, but there's different ways that you can get there, but I'll go through it.

We have to show that David Chadwick, No. 1 -- and his identity is not in dispute. There's not a question of whether we're talking about somebody else. This was in his home he was the only person there. The detectives identified Mr. Chadwick. The -- [redacted] identified Mr. Chadwick. Mr. Chadwick acknowledged the time that he spent with [redacted] So we know, No. 1, Mr. Chadwick.

During a period beginning in 1999 and concluding in 2002, [redacted] testified that this began when she was about 8

years old, and beginning in 1999, and stopped when she was about 11. So this contact fits in that -- that time span. We have to show that this occurred in Utah County. The testimony is that Mr. Chadwick lives in Eagle Mountain. He lived in Eagle Mountain. He's in the same —- the same place now where this occurred, and Eagle Mountain is in Utah County.

No. 4, that he knowingly, intentionally or recklessly touched the anus, buttocks, breast or genitalia of a child under 14 years of age, which [redacted] was at the time, or otherwise took indecent liberties with such a child. We'll talk about indecent liberties a bit. So either touching any of those private parts, or also taking indecent liberties with such child.

No. 5, with the intent to cause substantial emotional or bodily pain to any person, which is not being alleged in this case, or with the intent to arouse or gratify the sexual desire of any person.

This is supported by the erection, by him doing something that he said he knew aroused him, being touched in that area. By going out of his way to frequently slip under the shirt and touch the breast area of [redacted] The fact that he thrusted during the catch it game when she grabbed his penis, and his penis was erect and he put his hips forward.

I'll have you turn to No. 7. Indecent liberties is defined as conduct that is serious as touching the anus,

buttocks or genitals of a child or breast of a female. In deciding whether conduct amounts to indecent liberties, which is included in page No. 5, use your judgment and common sense. What is indecent liberties? The law -- this instruction allows you to use your judgment on this.

You may consider factors such as the duration of the conduct, the intrusiveness of the conduct against [redacted] person, whether [redacted] requested that her conduct stop, whether the conduct stopped upon request, the relationship between [redacted] and the defendant, [redacted] age, and whether [redacted] was forced or coerced to participate, and any other factors that you consider relevant.

That's a list of suggestions and things to look at. Not all of them will apply. Some of them do, but you can use your common sense, and you can look at other factors that you find relevant.

The bottom sentence says, "The fact that the touching may have occurred over touching does not preclude a finding that the conduct amounted to indecent liberties." So the fact that he was rubbing his penis over her underwear in the buttocks and the vagina area is irrelevant that it was over the clothing. It's the same offense, whether over or under.

Now, there's four counts. The basis for the four counts is that no less than on four occasions he did this touching or took indecent liberties. The first one was the

catch it game. She first talked about sitting on his lap. When -- when she tried to get off he said, "Do you want to touch it?" his erect penis, and they played the game. That's No. 1.

No. 2 is the time where she was sitting on his lap watching the movie and he pulled out his penis, his bare penis and rubbed it against her buttocks and vagina over the under-wear and against her inner thigh, bare leg.

The third -- the third count is that Mr. Chadwick did touch [redacted] breast both over and under the shirt when tickling her, including her nipples; and the fourth count is that [redacted] said the tickling and touching of the breasts occurred on more than one occasion. In fact, she said it was frequently. We don't know how many times, but it was more than one. So we've charged that conduct twice. No. 3 and 4 for the tickling of the breasts.

Now, there's no reason to doubt [redacted] She tried to tell somebody when she was only 12 years old. She said she told her sister. Nothing came of it. Nobody protected her. She told her therapist over the years. How much she told them depended on who the therapist was, but she went to these thera-pists to process through this trauma, to learn coping skills to -- how to handle these traumatic things that happened to her.

She disclosed the sex abuse three years ago to police, ready to take this on. She said she wanted to stop running

from it, hoping to see justice. Now, after 20 years you may not remember details, but you know if an incident like this occurred. You remember the impactful moments in your life.

[redacted] coming forward with this, telling police to testify here at trial -- and testifying here at trial is a hard thing to do. I think everybody in this courtroom could see how difficult it was for her to give her testimony. To be in the same room as the person who did the things to you.

People don't go out of their way to do hard things if they don't have to, but they do hard things when it's the right thing to do. The easy thing would have been for her not to tell police, not get involved in this process, not have to tell eight strangers about her darkest moments.

There's no reason to doubt her testimony. She's credible. She remembers details almost two decades later. What he was wearing, where they were, what they were doing. She remembered chewing on his shirt during that time, watching a movie. She talks about specifics. She's a brave woman to do something so hard, coming forward with no benefit to herself aside from possibly closure and justice.

Mr. Chadwick corroborated much of what [redacted] said, but minimized it. He wants us to think it's not a big deal. Well, it is. This is a big deal, the things that happened. The things that [redacted] said that happened are a big deal. Even the things that Mr. Chadwick said that happened, in spite of

him not thinking they're a big deal, they are.

Enticing and luring a young girl, relative or not, over to his house, making it so she can live there, so they can sit on his lap -- so [redacted] can sit on his lap, and he can get an erection and rub it on her and have her touch it is not okay. It is sex abuse. It is against the law. Also, please keep in mind that a child cannot consent to a sexual contact with an adult. Even if the child participates in the catch it game, it is still sex abuse that does not change.

I know this is not a rape case, and there's certainly more serious conduct that's out there that one could do, but that does not excuse this behavior. We don't think it's not a big deal by comparison. There is a law against this. It is illegal, and it is still wrong, and it has harmed the victim, that young girl, and she still suffers today.

The evidence shows that Mr. Chadwick lured her onto his lap. This aroused her -- or aroused him. That he got erections. He knew he'd get erections. He had her touch the erections. He did not do anything to prevent her from touching his erections. He liked it. He allowed this to continue for years.

I ask that you use your reasoning and your common sense, your judgment. Don't be tripped -- tripped up with what ifs. You don't need to run through every possible scenario when deliberating. You just need to use your judgment and

decide whether this happened.

Upon review of the testimony presented to you, you will be firmly convinced that these things did happen to [redacted] and accordingly you should find the defendant guilty on all four counts. Thank you.

THE COURT: Thank you. Mr. Parmley?

(High pitch noise coming from microphone)

THE COURT: Push that down.

MR. PARMLEY: I'm not sure that it's that way.

THE COURT: Is it the speaker right there? Try that. Give that a try. Okay.

MR. PARMLEY: All right. Hopefully we don't get that squealing noise. That's rather annoying. Thank you for your participation these last couple of days. I appreciate the fact that lots of questions have been asked. It shows that you're paying attention. That you're thinking about what's been presented, and the system only works when we've got jurors who are willing to examine things and to take a good, hard look at it. So thank you for your attention and participation.

There are I consider four cornerstones of the judicial system that we have that help to protect our liberties, help to protect us against abuse by the State. These cornerstones don't exist in many countries around the world. More and more of them are adopting protections and safeguards, but there are still many countries in the world that don't. These four

cornerstones are the presumption of innocence, the requirement of proof beyond a reasonable doubt, the rule of law, and trial by unanimous jury.

First of all, the presumption of innocence. Every person that is charged with a crime by the State, the State has power to investigate and arrest and prosecute, but every person who is arrested, charged, prosecuted starts with the presumption that he is not guilty. That he is innocent of what he is accused of doing. He or she. That is a vital safeguard for all of us. That the State just can't accuse somebody and point the finger without proving it.

Connects over into the second cornerstone, proof beyond a reasonable doubt. If you think about it like -- kind of like a football game, but with a difference in the rules. Each team only gets to play one side of the ball. The ball starts 100 yards away from the goal line. The defense is trying to keep it there, or prevent it from marching all the way across the field to the other goal line. The prosecution is trying to punch it in 100 yards away. Presumption of innocence says you start there, 100 yards away from the goal line. White as snow. The person is considered to be completely innocent.

You move the ball by presenting evidence, by presenting testimony, exhibits, witnesses, and the referee has to decide how far down the field they've moved it. Fifty yard line, it's a coin toss. Could it have happened? Maybe, maybe not.

Closer to the goal line, you're starting to believe, okay, this probably happened; but not until you get to the goal line do you have proof beyond a reasonable doubt.

(High pitch noise coming from microphone)

THE COURT: Counsel, approach. Let's fix that squeal if we can.

(Discussion at the bench off the record)

MR. PARMLEY: Do we have the --

THE COURT: All right, that was somebody else's siren, not our fault.

MR. PARMLEY: So the goal line is proof beyond a reasonable doubt. As in the Court has instructed you, that burden is only met with proof that leaves you firmly convinced of the defendant's guilt. If there is any real possibility that the defendant is not guilty, there's -- that's reasonable doubt, and they haven't crossed the goal line.

It doesn't have to be like speculating, you know, your wild speculations or don't necessarily count as a reasonable doubt, but if based on the -- in the evidence if there is room for a real possibility that he's not guilty, there's your reasonable doubt, and they haven't punched it into the goal line.

Third cornerstone is rule of law. You can't accuse somebody and say they're a bad person, they did something bad, and therefore they should be punished. We have crimes that

are defined by the law, crimes that have been decided by a Legislature saying this conduct, this particular conduct is going to be illegal. Things that fall outside of what the Legislature has defined, even if we think that might not be appropriate, is not illegal and is not a basis for a conviction.

In this particular case, the crime that he's charged with is defined for you in instruction No. 5. I want you to carefully consider the conduct that would be criminal and conduct that would not be criminal.

Criminal conduct would include with a sexual intent -- with the intent to arouse or gratify the sexual desire of any person, and that's important and I'll get back to that. Would include knowingly or intentionally or recklessly touching a child on their anus, buttocks, breast or genitalia, or otherwise taking indecent liberties with a child.

Indecent liberties is also defined by law. It doesn't just mean things we consider to be outside of polite behavior, which is, you know, the common reference to indecent, the common meaning of indecent. If I walk up and down Main Street swearing like a sailor, then, you know, I' probably being indecent, but that's -- and even if there are children present, I am not taking indecent liberties with a child. That's not what this is referring to.

Indecent liberties is defined in instruction 7, and

the definition is "conduct that is as serious as touching the anus, buttocks or genitals of a child or the breast of a female child." It has to rise to that same level in seriousness. Then it gives you a list of factors that you can think about in deciding whether the conduct at issue rises to that same level.

Having a child sit on your lap, even if there is a possibility that this child can brush up against your genitals is not taking indecent liberties with the child. Now, I will concede that taking a penis out of pants and rubbing it against a child would be indecent liberties. That's an obvious question, but -- or forcing a child to stipulate somebody -- to stimulate an adult sexually would also be taking indecent liberties with that child. That's not a close question.

On the other side, though, having a child sit on your lap and a child drops their hand down and brushes against the genitals, that's not taking indecent liberties with a child, even if it's happened before. That falls outside of the defined law. That is not conduct as serious as molesting a child.

Then trial by a unanimous jury. The instructions inform you that you have to consider each incident separately. There has to be separate conduct on each charge that has to be decided unanimously. I appreciate the State for going through and saying what they're alleging happened for each of these counts.

Suppose you get into the jury room and half of you

say we believe that the State has proved incident A but not incident B. The other half of you say well, we believe the State has proved incident B but not incident A. What you don't have is a unanimous verdict on one count for a conviction and then not guilty on the other. What you have in that situation is not a unanimous verdict on either count. Does that make sense? So each incident has to be considered separately, and has to have a unanimous verdict as to each charged incident.

Okay, going back to proof beyond a reasonable doubt, without that cornerstone the whole system collapses. The State has the burden of proof. The defense does not need to prove anything in order to prevail. It's not a question of who do you believe. It's a question of what has been proven.

Now, there's been a lot of talk about memory, and the State shared a childhood story during opening. I hope they'll allow me the same privilege here. I remember when I was a child, probably about nine or ten years old, getting into a bicycle accident, chipping my tooth. I remember falling off. I remember hitting the pavement. I remember having to go to the dentist. I remember it vividly. I have that memory.

The problem is it never happened. I -- it happened to my brother. I heard about it, but in my mind that memory was created, and I can't distinguish it from other memories of things that actually did happen to me. There's nothing about the memory itself that is different from other memories that I

have, or different in power or strength or vividness.

Memories are not necessarily reliable things. You're looking back in this case 20 years ago. Something may have happened to her. Was it Mr. Chadwick? I don't know. Mr. Chadwick says that he didn't do anything to her. Was it something that was an innocent incidental contact; he got an erection from her brushing up against him, and then details have been added over the years? I don't know. That can happen. Memories can change, especially given enough time.

It's a common experience. You look back 20 years ago in your life, I'm sure everybody's had the experience of experiencing the same event with another person and having drastically different memories of it. Memories that can't both be true, memories that contradict each other. It happens.

So the issue in this case, can we be sure beyond a reasonable doubt that Mr. Chadwick is guilty, or is there a real possibility that he's not? I would submit that there is a real possibility that he is not guilty. Our system is based on the principal that it's better to let ten guilty people go free than to convict one innocent one. That's why we have a presumption of innocence and why we require proof beyond a reasonable doubt.

In this case there is only two witnesses; Mr. Chadwick and [redacted]. No other evidence. She says she wrote something down when she was 12. We don't have that. Where is it?

Gone. Don't know. She talked to people about some things that have happened in her life, most notably therapists. She didn't just talk about Mr. Chadwick. We weren't able to get a whole lot of detail from her testimony. There was a good solid minute where she was too traumatized to even say anything, when asking about other -- other sources of trauma. Could she be conflating memories, mixing things up?

We don't have any other evidence, only her testimony. Like I said, I don't -- I don't think she's lying about anything, but you can be telling your truth and it still not be the truth. Saying what you firmly believe, and it not be accurate, and not be right. That's possible.

What Mr. Chadwick describes is innocent, incidental contact that happens when children live in close proximity to adults. Anyone with children has that -- has had the experience of them placing their hands in places which you'd rather not have their hands placed. It happens.

With Mr. Chadwick, incidental, unintentional contact causes a physical reaction. Doesn't mean he's trying to get her to do it. Doesn't mean he has a sexual intent when he has her on his lap. Doesn't mean he's trying to get aroused. It just happens.

He admits that. When talking to the police he admits things that make him look bad. Why? Because he's telling the truth. It would be so much easier to just say, "Oh, no, she's

never been on my lap. No, that's -- nothing like that could have ever been -- happened or been misinterpreted as something that it wasn't." But instead he said, "Yeah, occasionally her hand would brush against my penis, and when that happened I'd either move her or try to ignore it, and eventually she'd move it herself, move her hand away herself."

That's not taking indecent liberties with a child. That's not criminal behavior. Twenty years ago people weren't as hyper aware about children sitting on their laps as they are today. That has changed. Twenty years ago he wouldn't consider it inappropriate to have that child continue to sit on his lap when she wanted to sit on his lap to watch a -- when watching a movie.

Now, we are hyper aware of that type of thing. He would have no reason to prevent her in the future from sitting on his lap, and he didn't lure her into his home. They moved in across the street, across the way with a neighbor and didn't have room and the Sager family approached him and said, "Do you have room for us? It's really crowded over here." He said, "Sure. I'm finishing my basement. You can live upstairs while I'm getting the basement finished, and then you can move down-stairs."

Regarding the tickling, they're making a -- adults tickle children. It's one of the most common ways of playing with children, and you heard her testimony that at the age when

he would tickle her, she didn't even really have breasts yet. As she grew up and developed, he stopped. He stopped tickling her. Nothing indecent about that.

Mr. Chadwick, like a decent human being, when told that somebody was suffering because of things that -- that they remember him doing, expressed sympathy. Expressed sympathy for [redacted] "I'm sorry she's going through a hard time." That's not an admission of guilt. That's not an admission of criminal conduct.

"I'm sorry if she got uncomfortable when I had an erection and she was -- when she was sitting on my lap. I'm sorry if that's affected her." That's the decent thing to do. That's not -- but every time he was asked, "Did you do this? Did you do this? Did you do this? Did you do this?" which would be the allegations that [redacted] was making, he said, "No, that didn't happen. I didn't do that. That never happened." He's been consistent about that the entire way through.

Then one other point about the rule of law, the -- one of the elements of the offense is that any conduct had to be done with the intent to arouse or gratify the sexual desire. Incidental arousal is not the same thing as intentional arousal. If he got an erection because something brushed up against his penis, that is incidental arousal.

Intentional arousal is trying to get aroused, trying

to gratify sexual desire, acting with a purpose to fulfill that desire. That's different. A physical response to physical stimulus unintended is not sexual abuse of a child.

State asks you not to get hung up on what ifs. Well, the what ifs are important. That's what reasonable doubt is, is what if there's a real possibility, if there's a real possibility that Mr. Chadwick is not guilty? Even if I think that he -- even if somebody thinks that he probably is guilty, that what if is important. If it's a real what if, if it's a real possibility that he's not guilty, the verdict has to be not guilty. If there's a real possibility that he's not guilty then it hasn't been proven beyond reasonable doubt, and the verdict has to be not guilty.

Again, thank you for your time and attention, participation, taking it seriously. You're going to go -- this is the last time I get to speak to you. The State gets another -- another shot at this. Just because I don't stand up and refute whatever he says doesn't mean I don't want to. Just that's just how the rules are.

This is my last chance to speak to you, and I am asking you to find Mr. Chadwick not guilty. Go back in that jury room, consider the evidence, consider what was said, and realize that there has not been proof beyond a reasonable doubt, that Mr. Chadwick very well could be telling the 100 percent truth. I believe that he is.

MR. TAYLOR: Objection, your Honor. He's verifying with regards to the defendant.

THE COURT: Sustained. Counsel's personal opinion is not relevant.

MR. PARMLEY: I ask you guys to come to the conclusion that there is a real possibility that Mr. Chadwick is telling the truth, and to find him not guilty. Thank you.

THE COURT: Thank you. Mr. Taylor.

MR. TAYLOR: Thank you. I know you're about done. It's just like oh, my gosh, just a few more minutes. So the reason that the State has two opportunities to address you at the very end is because we have the burden of proof. So I'm not going to go over everything that Mr. Miller said, but I do want to talk about a couple of things.

So one of the things that I do want to first of all address is with regards to proof beyond a reasonable doubt. Mr. Parmley gave you an analogy of a football being placed, you know, at the one yard line and having to go all the way, 100 yards. Now, in your mind's eye, that may give you the impression that you have to have some sort of percentage associated with this, a hundred percent.

When I was reading those juror questionnaires, if you remember filling that out, it asks, you know, what did you -- what you believe reasonable doubt, beyond a reasonable doubt is, and I thought some of the quest -- or some of the answers

were really quite insightful and really good for non-lawyers to be able to give that definition; but one of the definitions that I saw at least a few times it says that the State has to prove it 100 percent. That's not the law.

The analogy of going 100 yards and equating that to percentages, that's not the law. If that was the law, then you would be instructed so. It's not 100 percent. If you look at that instruction, proof beyond a reasonable doubt, it says "proof beyond a reasonable doubt leaves you firmly convinced," and then that next sentence is really important. "There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt."

So there can be some doubts. That's what the law says. You don't have to know for absolute certainty everything. I think the most helpful word that if you were to look at that is "firmly convinced" of his guilt.

Now, Mr.-- Dustin. I always call him Dustin -- defense Counsel, when he talks about brushing incidental contact, that is not a crime. You have heard Mr. Miller talk about what it is that we're alleging. We're not talking about the brushing or the incidental contact meeting the elements of the crime. We're talking about the things that Mr. Miller went over.

One thing that is important about brushing and incidental contacts, and those multiple, multiple times admitted to

by Mr. Chadwick, "At least 20 times she touched my penis with her hand, and for many seconds," it provides insight into his sexual motivations and how he's sexually aroused. So that may not be the conduct for which he's being charged, but it gives you insight.

I wasn't there. You weren't there, but just based upon his own testimony that you heard today and the things that he told the officers, he was sexually aroused. There was no doubt about it. What was really insightful is when I asked him some of those questions with regards to whether or not he thought that conduct was inappropriate. He said, "No." That gives you huge insight as to who this man is.

One of the things that's really been pretty interesting about this whole case is that catch it game. Who in their right mind would come up and just make up something like that? A little girl talking about a man with his hands underneath his pants maneuvering his penis, would she even comprehend to come up with something like that?

She's -- this is the sort of thing that you just think of well, if she's just making it up, why didn't she just say, "He had me touch his penis"? But he made it into a game. She talked about the game. Does that makes sense, everything that she said? He's sexually aroused, she's sitting on his lap, he's got an erect penis. She feels it, she tries to get off, and he says, "Let's play a game."

Then she describes this weird game. How many of you thought about a man putting his hands in his sweats with an erect penis and playing around with it? This is something that's so bizarre, it's like really? She made that up? She just concocted that? You sat and listened to her.

Mr. Parmley says it's not a question of who you believe. No, it really is a question of who you believe, because that is your evidence, and you have to weigh the evidence. The evidence is that she told you that this is what he did. She also talked about, you know, yeah, I was on his lap and he was rubbing his penis against me. That's the conduct.

One of the things that's been talked about a little bit is with regards to breasts of this young girl, and whether or not they were developed. If you look at instruction No. 7, indecent liberties, it says, "Indecent liberties is defined as conduct that is as serious as touching the anus, buttocks or genitals of a child, or the breast of a female child."

It doesn't talk anything about developed breasts, and in the elements instruction it doesn't say you know what, in order to be able to be guilty of this, there has to be a certain development with regards to the female. If that was the requirement, then the law would say so, but it says "touching the breasts of a child under the age of 14."

So if you touch a child, a girl who's 9, and her

breasts aren't fully developed, that's okay. Don't worry about it. I can do it for sexual purposes, but the breasts aren't developed, so therefore it's okay. It's not a crime. I can tickle a girl, I can rub her nipples, and because her breasts aren't developed, then that's okay. That defies common sense and that's not what the law says.

So just because her breasts weren't developed at that time doesn't mean that there can't be sexual gratification from an individual rubbing the breasts of a female. The law allows you to look at the breasts, look at that conduct.

One of the things Mr. Parmley also said is that it's better that ten people go free than to convict one innocent person. That's not the law. There is nowhere the instructions that talk about that. Somebody somewhere made that statement and it seems to come up every single time in trial. That is not the law.

The law is that you are to look at the facts and the evidence in this case and decide whether or not he's guilty. You're not to worry about you know what, hey, it's better that these ten people go free than convict one innocent man. You need to find out and you need to determine whether or not Mr. Chadwick, and him alone, is guilty, whether you're firmly convinced that he committed these crimes.

Just quickly, Mr. Parmley mentioned that maybe [redacted] is conflating memories. You didn't hear any testimony with

regards to other sorts of abuse. The evidence that you have in front of you is the abuse associated with Mr. Chadwick. So conflating memories, that's saying something about facts not in evidence. Don't try to speculate what memories may or may not have been conflated. Look at the evidence that you have and decide that way.

One of the things that I think is really important, and I hope that you do, is that when you go back you'll talk about how many things were the same or similar between what [redacted] told you and what Mr. Chadwick told you. How many things were corroborated? If you went down a list and if you guys put together a list from the layout of the home to the movies to everything that happened in there, those lists are going to almost be parallel and similar to each other.

He corroborates a lot of the stuff that she's talking about when she's nine, ten years old. The only thing that he doesn't mention specifically is that, you know, yeah, we didn't play the catch it game. Yeah, her hand wasn't on my penis. No, that wasn't the catch it game. Maybe he didn't call it the catch it game back then, or pulling the penis out.

You have to think about physically how would that happen. I don't want to get too descriptive, but if you had -- sitting down, and if you have your sweats on, it's not that difficult to pull down your sweats and to pull out your penis. That's a stretchy -- sweats are made to be taken off easily,

and that elastic band around that waist is stretchy, and that can easily happen with very little effort.

The State has talked about four counts, and when you go back there and deliberate you may think you know what, hey, we feel really, really good proof beyond a reasonable doubt on these two counts. On these other ones, you know what, we're just not quite sure. If you feel that he's guilty of one count, find him guilty of that one and not guilty of the other three. If you feel that he's guilty of two or three, that's okay, too. Guilty of four, that's all right. Look at each count -- excuse me, look at each count individually and then decide.

So it's not an all or nothing here. You can do one count or all counts, but the evidence that you have should leave you firmly convinced that what happened happened, and what Mr. Chadwick did is that he committed child sex abuse. According to that jury instruction, instruction No. 5, that he did those things. Thank you for your time and I appreciate your attention.

THE COURT: Thank you very much, and I appreciate both Counsel. This case was well and professionally tried. Thank you.

MR. TAYLOR: Thank you, Judge.

THE COURT: Ladies and gentlemen, we're now going to swear the bailiff that he will take you to the jury room to begin deliberations. It's the middle of the day and I'll bet

Addendum E

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:

[redacted]

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