Case No. 20220272-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

BREVAN BRINGHURST BAUGH,
Defendant/Respondent.

Brief of Petitioner

On Writ of Certiorari to the Utah Court of Appeals

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INTRODUCTION

Jury unanimity cases often present two questions. First, what does the jury need to be unanimous about? Second, how does that requirement need to be conveyed to the jury? The answer to the first question was clear at the time of Brevan Bringhurst Baugh's trial, but the answer to the second was not. The court of appeals erred by conflating the two questions and holding that counsel was ineffective for not requesting appropriate unanimity instructions here.

The State presented evidence at trial that Baugh made his daughter masturbate him on three occasions, but it charged only two counts of aggravated sexual abuse of a child and did not link each count with a specific

criminal act. The law was clear that the jury had to agree on which act or acts the defendant committed in order to convict. And the jury was told that its verdict had to be unanimous. But whether that general unanimity instruction was enough to adequately inform the jury that it had to agree on the specific criminal act or acts underlying any conviction was unclear at the time of Baugh's trial.

Fifteen days *after* Baugh's trial, in *State v. Alires*, the court of appeals held that in multiple-act cases like this, the jury must be given a more specific unanimity instruction stating not only that the verdict must be unanimous but also that the jury must agree on the specific act underlying the conviction. *Alires* further held that trial counsel in that case should have recognized the need for a specific unanimity instruction and was thus deficient in not requesting one.

After the jury convicted Baugh of one count and acquitted him of the other, Baugh appealed. The court of appeals relied on *Alires* to hold that the law should have been clear to counsel and that counsel was deficient for not requesting a specific unanimity instruction. But the court was mistaken—both here and in *Alires*—because the law was unsettled on how the jury needs to be instructed on unanimity in multiple-act cases. *Alires* based its holding on a case that offered no guidance on whether a general unanimity

instruction was sufficient. *Alires* also ignored a string of conflicting authority from this Court on that very question. What's more, the most recent guidance from this Court—*State v. Evans*—established that it is not plain error to forgo a specific unanimity instruction when the jury is presented with multiple alternatives. A competent attorney thus could have reasonably concluded that there was no need to request a specific unanimity instruction here. The Court should overrule *Alires* on this point and reverse.

The Court should also reverse because the court of appeals' prejudice holding conflicts with this Court's precedent and with *Strickland* itself. *Evans* held that giving only a general unanimity instruction created no more than a "slight" risk of "confusion" about the unanimity requirement and was therefore harmless. But here the court of appeals concluded that the absence of a more specific unanimity instruction likely affected the verdict. Even if that conclusion could be squared with *Evans*, it cannot be squared with *Strickland* because the court of appeals never took the next step and analyzed whether there was a reasonable probability of a more favorable verdict had a specific unanimity instruction been given in this case. Failing to engage in this counterfactual analysis—and asking only whether the alleged deficiency affected the verdict—had the effect of shifting the burden to the State to disprove prejudice.

Had the court of appeals engaged in the analysis *Strickland* requires, it would have rejected Baugh's ineffective-assistance claim. If the jury had been told it had to agree on the criminal act supporting any conviction, it likely would have agreed at the very least on the one act Baugh admitted he was "sure" he committed when he was "out of it" because of drug use.

The Court should therefore overrule *Alires*, clarify that *Strickland* requires a counterfactual analysis, and reverse.

STATEMENT OF THE ISSUES

1. Whether the court of appeals erred in concluding Baugh's counsel performed deficiently in not requesting a specific unanimity instruction.

This issue was presented on pages 12-18 of the State's petition for certiorari review.

2. Whether the court of appeals erred in concluding Baugh was prejudiced by any deficient performance in not requesting a specific unanimity instruction.

This issue was presented on pages 18-19 of the State's petition for certiorari review.

STATEMENT OF THE CASE

A. Fact Summary

Baugh's daughter, Sasha,[1] accused him of forcing her to masturbate him. R479-82, 487. She said he did it on three occasions. The first two occurred at the family home in Nibley. R479-81, 487. Sasha's family was living in the Nibley house in 2012, when Sasha was ten years old. R488-89, 678. The third incident occurred while Baugh was living in a Logan apartment after he separated from Sasha's mother. R481-82, 489-90. Baugh moved into the apartment in April 2014, when Sasha was twelve years old, and he lived there for the rest of that year. R482, 489, 894-95.

Sasha described the abuse in detail: They lay together in bed, Baugh had Sasha reach under his underwear and put her hand on his penis, then, as Sasha explained, he "grabbed my hand and told me to do it harder and rubbed my hand up and down until white stuff came out." R480-81. She described a similar pattern for each separate incident. R479-81, 487.

After the last instance of abuse in 2014, and while Baugh was still living in the apartment, he took Sasha for a walk and admitted to her "that he knew what he had done was wrong and he repented to God, and God wanted [her] to forgive him because he was working on it." R482-83.

[1] A pseudonym.

Sasha bottled all this up for a few years because she "didn't want to ruin [her] dad's life" or "create more problems with [her] family." R486. But Sasha's memories of Baugh's abuse came flooding back one day when Baugh commented on Sasha's clothing choices. R483-84, 491-92. Baugh remarked that while her manner of dress deviated from their church's standards, "he was okay with it." R492. After hearing Baugh's remark, Sasha left the room feeling "scared" and like she "couldn't breathe." R484.

When Sasha later told her mother that Baugh had made her feel "awkward and … uncomfortable," her mother suggested that Sasha see a therapist. R484. Sasha was hesitant, but eventually agreed. R485. She was too afraid to verbalize her abuse to the therapist, however, so she instead wrote down what Baugh made her do to him. R485-86.

Phone Call. After the therapist reported Baugh's abuse to police, a detective arranged to have Sasha call Baugh and confront him about his abuse while the detective listened and recorded the call. R486, 505-07. During that call, Baugh said he believed Sasha's allegation that he abused her while he was living in his apartment in 2014, although he claimed he did not remember doing so because he was trying to numb himself by abusing drugs and medication. R862-78.

The call began with Sasha mentioning the abuse and telling Baugh that she was "really struggling" because of it. R864. Baugh responded by first denying making Sasha touch his penis and asked if she was misremembering things. R864. When Sasha reminded Baugh that he had admitted to and apologized for sexually abusing her, Baugh claimed that he was apologizing only for inadvertently exposing her to pornography—a picture of a "hand job"—when the family lived in the Nibley house. R865-66. Baugh repeatedly denied ever abusing Sasha in the Nibley house. R871, 872.

But Baugh eventually admitted that if Sasha was saying he had sexually abused her at his Logan apartment, then he "believe[d]" her. R867. He told Sasha, "[I]f you say I did it, then—then I'm sure I did. I'm sure I did." R869, 871. He added, "[I]f you say it happened, it happened, hmm, and I'm not going to deny it." R872.

Baugh claimed that he could not remember sexually abusing Sasha because he was "messed up a lot" when he lived at the apartment and was "doing a lot to forget" and "make [him]self numb." R868, 872. Sasha's mother had attempted suicide right before the couple separated, and Baugh described having taken "a lot of medicines to specifically try and make [him]self numb" and "forget the trauma." R680, 872.

But Baugh conceded, "I've got to own that, even if I did it while on a whole bunch of medications or high on pot or whatever and don't remember it, but I've got to own it." R874. He later added, "[Y]ou say it happened, and I have to own it and have to be remiss. I was in a bad spot, and I just have to say that I'm sorry and that nobody should ever have to be in that spot, especially you." R875-76. He repeatedly apologized for the abuse. R867, 869, 871, 874, 876.

Police Interview. Following the recorded phone call, a detective arrested Baugh and interviewed him. R884-917. Baugh denied the sexual abuse but admitted to two improper events involving Sasha. R884-917. Baugh first admitted that he had inadvertently exposed Sasha to pornography once. R891-92. He explained that when he lived with the family in the Nibley house, Sasha saw a pornographic picture of "a hand job" that he accidentally left open on his computer. R891-92. Baugh also admitted that once when she was very young, Sasha had walked in on him masturbating in the bathroom. R900.

Baugh first said he could not remember or corroborate whether the apartment incident occurred. R887, 891, 893, 896, 899. But he also denied ever having Sasha touch his penis. R903, 905-06, 909, 914-15. He suggested that it was "very possible" that Sasha happened to be "up against" him when he

was out of it. R912. He conceded, however, that he had told Sasha during the recorded phone call that he believed her accusation of abuse at his apartment in 2014, because he was "messed up" and was taking "a whole lot of things" during that time. R895-96, 912. As for the incident in the apartment, he told the detective he was "certainly not going to deny it." R915.

Baugh denied fantasizing about his own daughter, but he admitted to the detective that he had "all sorts of stepdaughter fantasies." R908. He stated that he was "lucky" he "[re]married a gal who has just boys," because he "would worry about" having a stepdaughter. R910.

Near the end of the interview, the detective asked if Baugh had Sasha "giving [him] hand jobs for years." R917. Baugh said, "For years. Okay. No." R917. The detective asked when "the last time" was, and Baugh said it was "at the Nibley house." R917.

B. District Court Proceedings

The State charged Baugh with two counts of aggravated sexual abuse of a child. R1-3. Count one alleged abuse occurring sometime in 2012, while count two alleged abuse occurring sometime in 2014. R1-3. The jury instructions likewise explained that count one charged 2012 abuse while count two charged 2014 abuse. R263-64. Sasha's trial testimony identified the houses in which the abuse happened, but she did not identify when it

happened—other than to establish that it happened before she turned fourteen. R482. She described three distinct instances of abuse, two occurring at the Nibley house and one occurring at the apartment. R479-81, 487.

Baugh testified and said that when he told the Detective that the "last time" anything sexual had happened between him and Sasha was at the Nibley house, he was referring to the unintentional pornography exposure that the detective had referenced just a few questions earlier. R694-95. Baugh also said that during the recorded phone call, he had agreed with Sasha's claim of abuse at the Logan apartment not because it happened, but because he wanted to "meet her where she's at and accept" and "support" her. R686. He said he only wanted Sasha to "feel validated" and help her "deal with whatever issues she's going through," R695, because "she's entitled to feel however she wants to feel, even if she is getting things mixed up," R686.

Two jury instructions emphasized the requirement of a unanimous verdict. One said, "Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found 'guilty' or 'not guilty.'" R260. That instruction also gave the jurors guidance on how to approach deliberations in a way that would help them "reach a unanimous agreement on a verdict." R260. A second instruction reiterated the unanimity requirement by directing the foreperson to fill out the verdict form "to reflect

the jury's unanimous decision." R261. But the jurors were not given a more specific unanimity instruction telling them that they had to agree on the specific acts that support any conviction.

During closing argument, the prosecutor asserted, "Now, we haven't charged everything that we could have. We charged two counts. And those two counts can be fulfilled with—with any two of those experiences, any two of those incidents that she described, those can be the elements of both of these counts." R777.

The jury acquitted Baugh of count one (the 2012 abuse) but convicted of count two (the 2014 abuse). R243, 263-64. The trial court sentenced Baugh to imprisonment for fifteen years to life. R330-31.[2]

C. Court of Appeals Proceedings

Baugh appealed and claimed, among other things, that his counsel was ineffective for not insisting on an instruction that required the jury to unanimously agree on a specific act for each count of conviction. *See State v. Baugh*, 2022 UT App 3, ¶11, 504 P.3d 171. The court of appeals agreed and reversed. *Id.* ¶27.

[2] After the court of appeals reversed, the district court issued a certificate of probable cause and released Baugh pending disposition of all appellate proceedings. Dkt. #169, *State v. Baugh*, Case No. 181100862.

The court first noted that the jury must unanimously agree on a specific act for each count of conviction. *Id.* ¶14. Relying on its opinion in *State v. Alires*, 2019 UT App 206, 455 P.3d 636, the court then held that when the State does not specify which of several qualifying acts supports each charge, trial counsel performs deficiently by not insisting on an instruction that explicitly tells the jury it must unanimously agree on the specific act that supports each count of conviction. *Baugh*, 2022 UT App 3, ¶¶15-19.

The State argued that *Alires* could not control because it was issued after Baugh's trial and, in any event, misinterpreted this Court's precedent. *See id.* ¶14 n.3. The court recognized that *Alires* post-dated Baugh's trial, but it held that *Alires*'s reasoning controlled because "the *Alires* court thoroughly identified the established law that should have indicated the need for defense counsel in that case to request appropriate unanimity instructions." *Id.* The court reasoned that the *Alires* court correctly relied on both *Hummel* and *State v. Saunders*, 1999 UT 59, 992 P.2d 951, as establishing that when Baugh's trial occurred, the law clearly required a specific unanimity instruction in multiple-act cases when the State does not specify a particular act for each charge. *See Baugh*, 2022 UT App 3, ¶14 n.3.

The court further held that the lack of a specific unanimity instruction prejudiced Baugh because the court could not tell whether Baugh's jury was

in fact unanimous. *See id.* ¶¶20-25. First, the court noted that although the count on which the jury convicted covered abuse that occurred in 2014, Baugh lived in both the Nibley house and the apartment in 2014, and Sasha's testimony tied the abuse only to specific locations and not specific dates. *Id.* ¶21. Thus, it was "entirely possible that some (but not all) of the jurors convicted on count two based on the belief that the alleged abuse occurred at the family house, while some other (but not all) jurors convicted based on the belief that the abuse occurred at the apartment." *Id.* Second, the court disagreed with the State's characterization of Baugh's statements in the phone call and police interview as admissions. *Id.* ¶¶22-24. Given the various ways the jury could have interpreted Baugh's statements, the court held it could not be "confident as to how [the jury] viewed the evidence" or whether the jury was unanimous. *Id.* ¶¶22, 24. Finally, the court reasoned that the prosecutor's closing argument inviting "the jury to take any allegation and apply it to any count … openly invited the jury to engage in a free-for-all when applying the acts to the counts" and therefore likely contributed to a nonunanimous verdict. *Id.* ¶25. The court therefore reversed. *Id.*¶27.

SUMMARY OF ARGUMENT

I. The court of appeals relied on *Alires* to conclude that it should have been clear to counsel that a specific unanimity instruction was required. But the court was mistaken—both here and in *Alires*—for three reasons. First, *Alires* misread *Saunders* as a majority opinion. Because *Saunders* was a plurality, it could not establish any controlling precedent. Second, the most *Saunders* could stand for is the proposition that it is plainly erroneous to not give *any* unanimity instruction or to tell the jury it does *not* have to be unanimous about something it *must* be unanimous about. None of those scenarios apply here. Third, both here and in *Alires*, the court of appeals failed to account for a string of fractured opinions from this Court that offered conflicting guidance on the need for a specific unanimity instruction. Based on that legal landscape, a competent attorney could reasonably conclude that a general unanimity instruction was adequate. Indeed, counsel could reasonably think that given a common sense reading of the jury instructions, there was no risk that a jury would think that they could unanimously agree on a verdict by disagreeing on the criminal act that the defendant committed.

II. The court of appeals erred twice in its prejudice analysis. First, the opinion conflicts with this Court's holding in *Evans* that only "slight confusion" could result about the need for unanimity on alternative elements

when a general unanimity instruction is given. Again, it is highly unlikely that a jury that is told its verdict must be unanimous would think it could reach a unanimous agreement by disagreeing on the criminal act the defendant committed—unless someone told the jury that's what unanimity means in a criminal trial. The court of appeals thought the prosecutor did that here, but he didn't. He simply said it was up to the jury to decide which act to base the conviction on.

Second, the court of appeals did not engage in the counterfactual analysis that *Strickland* requires. It concluded—contrary to *Evans*—that the verdict was likely the product of the missing specific unanimity instruction. And it ended its analysis there. But *Strickland* requires more. Not every error that affects the verdict will lead to a reasonable probability of a more favorable result absent the error. Foregoing that counterfactual analysis had the effect of shifting the burden to the State to disprove prejudice.

Had the court of appeals analyzed that counterfactual question, it would have held that there was no prejudice here. Sasha's testimony was clear and consistent. The only inconsistency came from Baugh's shifting stories. Had the jury been told it had to agree on the criminal act that supported the conviction, it likely would have agreed at the very least that Baugh committed the one act he said he was sure he committed.

ARGUMENT

The Utah Constitution's Unanimous Verdict Clause provides, "In criminal cases the verdict shall be unanimous." Utah Const. art. I, §10. This "requires unanimity as to each count of *each distinct crime charged* … and submitted to the jury for decision." *State v. Hummel*, 2017 UT 19, ¶26, 393 P.3d 314. To convict, jurors must therefore unanimously agree "that the prosecution proved each element of the crimes in question beyond a reasonable doubt." *Id.* ¶50. If the prosecution charges one count but presents evidence of two separate acts that could each independently satisfy the *actus reus* element of the charged crime, then the jury would have to unanimously agree which of the two criminal acts were proven beyond a reasonable doubt, or that both were. *See id.* ¶28.

In such multiple-act cases, the scope of the unanimity requirement was clear by the time of Baugh's trial. But how that requirement had to be conveyed to the jury was not. Fifteen days after Baugh's trial, the court of appeals held in *State v. Alires*, 2019 UT App 206, 455 P.3d 636, that in multiple-act cases in which the prosecutor does not elect a specific act for each charge, the court must give a specific unanimity instruction telling the jury that it must agree on the criminal act underlying each count of conviction—a general instruction telling the jury that its verdict must be unanimous is

"plainly insufficient." *Id.* ¶¶22-23 & n.5. The court thus held that Alires's counsel was deficient because that requirement should have been "readily apparent," and it held that he was prejudiced because the lack of a more specific unanimity instruction affected the jury's verdict. *Id.* ¶¶24, 28-30.

Here, the court of appeals followed *Alires*, concluding that the requirements for instructing the jury in multiple-act cases should have been clear at the time of Baugh's trial and that Baugh was prejudiced because the lack of a more specific unanimity instruction likely affected the verdict.

But *Alires* incorrectly assessed the state of the law at the time of Baugh's trial, and the court of appeals was wrong to follow *Alires*. The authority *Alires* relied on does not support its holding, and a string of conflicting opinions from this Court would have provided little guidance to counsel. A competent attorney surveying the case law at the time of Baugh's trial thus could reasonably conclude that the general unanimity instruction was adequate.

As for prejudice, the court of appeals' decision conflicts with both this Court's precedent on the effect of not giving a specific unanimity instruction and with *Strickland* itself by failing to engage in a counterfactual analysis. On the latter, if the court of appeals had run through a counterfactual analysis, it would have concluded that there was no reasonable probability of a more favorable verdict had a more specific unanimity instruction been given.

I.

The court of appeals erred in concluding that the need for a specific unanimity instruction should have been clear to counsel given the state of the law.

The jury was given a general unanimity instruction, but the court of appeals held that counsel was deficient for not requesting a more specific unanimity instruction or special verdict form. *Baugh*, 2022 UT App 3, ¶13. Relying on its opinion in *Alires*, the court reasoned that at the time of Baugh's trial, "the law was well enough established" that counsel "should have recognized the need to request appropriate unanimity instructions." *Id.* ¶14 n.3. True, the requirement that the jury agree on the specific criminal act underlying each conviction would have been clear at the time of Baugh's trial. *See Hummel*, 2017 UT 19, ¶¶26, 28, 50. Yet the law on unanimity *instructions* was anything but clear before *Alires* was issued, fifteen days after Baugh's trial.

To succeed on his ineffective-assistance claim in the court of appeals, Baugh had to show that his counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Reasonableness is judged in light of "prevailing professional norms." *Id.* at 688. Admittedly, the reasonableness of counsel's performance does not depend exclusively on "the law in effect at the time of trial." *State v. Silva*, 2019 UT 36, ¶20, 456 P.3d 718. But the existing legal landscape is still

something a court must consider in determining whether counsel's performance "was reasonable considering *all* the circumstances." *Strickland*, 466 U.S. at 688 (emphasis added). This Court has therefore reiterated that the "'law available to counsel at the time of the representation'" is a necessary consideration when evaluating the reasonableness of counsel's performance. *State v. Gallegos*, 2020 UT 19, ¶35, 463 P.3d 641.

Alires said the law on unanimity "should have been readily apparent" given this Court's "holding" in *State v. Saunders*, 1999 UT 59, 992 P.2d 951, and that under *Saunders*, general unanimity instructions like the ones given here are "plainly insufficient." *See Alires*, 2019 UT App 206, ¶¶23 n.5, 24. And here, the court of appeals held that if the law was clear at the time of Alires's trial, it would have been clear at the time of Baugh's. *Baugh*, 2022 UT App 3, ¶14 n.3. But *Alires* was wrong about the state of the law for three reasons.

First, *Alires* misread *Saunders* as a majority opinion. *Saunders* contains no majority opinion on the question of unanimity. One justice joined the lead opinion. 1999 UT 59, ¶¶56-67 (Stewart, J., joined by Durham, J.). Two concurred in the result. *Id.* ¶68 (Russon, J., concurring in the result); *id.* ¶70 (Howe, C.J., concurring and dissenting). And one dissented. *Id.* ¶77 (Zimmerman, J., concurring and dissenting). "[A] plurality opinion … does not establish precedent." *State v. Mohi*, 901 P.2d 991, 996 n.3 (Utah 1995). Thus,

Saunders would not have made it clear to counsel that a specific unanimity instruction was required. The only thing that would have been "readily apparent" from *Saunders* is that it had no controlling "holding" as a mere plurality and that the law on jury unanimity instructions was unsettled.[3]

Second, *Saunders* did not—indeed, could not—answer whether a general unanimity instruction was adequate to convey the unanimity requirement to the jury in multiple-act cases. Saunders was charged with one count of sexual abuse of a child, but the State presented evidence of several alleged instances of abuse. 1999 UT 59, ¶5 (plurality opinion). The district court did not give a general unanimity instruction. Instead, it gave what amounted to a non-unanimity instruction: "'There is no requirement that the jurors be unanimous about precisely which act occurred … .'" *Id.* ¶58 (emphasis omitted). A plurality of the Court concluded that (1) when the jury hears evidence of more criminal acts than there are charges, jurors must be unanimous about which criminal act supports the conviction, and (2) it was plain error to instruct the jury otherwise. *See id.* ¶¶60, 63-65.

[3] The Court has mistakenly described *Saunders* as a majority opinion on unanimity. *State v. Evans*, 2001 UT 22, ¶17, 20 P.3d 888. But the Court corrected course in *Hummel*, accurately labeling *Saunders* a plurality opinion. *Hummel*, 2017 UT 19, ¶26.

Saunders's first conclusion is certainly relevant to multiple-act cases like this, in which the State does not tie a specific allegation to each charge. But deciding what the jury must be unanimous about is not the same as deciding how the jury must be instructed on the unanimity requirement. Even if the plurality opinion in *Saunders* were a majority holding, the only guidance it provides on unanimity *instructions* is that it is error "not to give a unanimity instruction" at all, and to instead instruct the jury that it need *not* be unanimous. *Id.* ¶62. The *Saunders* plurality says nothing about what a proper unanimity instruction must look like. *See id.* ¶¶56-65.

The court of appeals here held that in addition to *Saunders*, this Court's decision in *State v. Hummel*, 2017 UT 19, 393 P.3d 314, was part of the "established law" on which *Alires* relied to conclude that counsel "should have recognized the need to request appropriate unanimity instructions." *Baugh*, 2022 UT App 3, ¶14 n.3. But *Hummel* offered even less guidance on this question than *Saunders*. *Hummel* addressed whether the jury had to agree on the method or means by which a defendant committed an offense. *Hummel*, 2017 UT 19, ¶¶3, 19, 24, 30 & n.9, 51. The Court said nothing about the adequacy of a general unanimity instruction, because it concluded that unanimity was not required to the level of specificity that the defendant argued it was. *Id.* ¶¶63 n.21, 65.

The third reason *Alires* was wrong about the state of the law is that it failed to account for the many fractured and conflicting opinions this Court has issued on the question of unanimity instructions. *See Saunders*, 1999 UT 59, ¶78 (Zimmerman, J., concurring and dissenting) (noting that Court's decisions have long been "badly fractured" on jury unanimity). And it conflicts with the Court's most recent pronouncement that forgoing a specific unanimity instruction is not obvious error. *State v. Evans*, 2001 UT 22, ¶¶15-17, 20 P.3d 888. Given the confusion in this Court's precedent, the court of appeals was wrong to hold that all competent counsel would have recognized the need for a specific unanimity instruction here.

The Court's first important case about unanimity instructions was *State v. Rasmussen*, 68 P.2d 176 (Utah 1937). Like so many of this Court's unanimity cases, *Rasmussen* was a deeply fractured decision. But a majority coalesced around a holding that the jury was adequately instructed in a multiple-act case even without a specific unanimity instruction. It is not clear that even a general unanimity instruction was given in that case, but the instructions told the jury that before convicting, "you"—meaning the jury as a body—must find that "one or more" of several alleged predicate acts had been proven beyond a reasonable doubt. *See id.* at 186-87 (Larson, J., concurring in part and dissenting in part). Three justices concluded that the instructions adequately

told the jury it had to agree on the predicate act or acts. *Id.* ("To say that the jury may not have come to a unanimity on the act or acts of which defendant was guilty, is to say that the jurors utterly disregarded the instructions of the court."); *id.* at 183-84 (Wolfe, J., concurring in the result) (concluding instructions adequately conveyed that "the jurors must all agree on one or more specifications" that supported the verdict); *id.* at 185 (Folland, J., concurring) (concluding that while instruction "might have been more artistically worded," it "sufficiently conveys the information that the jurors should unite in finding the existence of one or more of the acts charged" and "no juror would be misled" to think otherwise).

Despite *Rasmussen*'s holding, the Court later treated the issue as unresolved. In *State v. Tillman*, 750 P.2d 546 (Utah 1987) (*Tillman I*), the Court again reached a deeply fractured decision, and four justices wrote separately on the question of how the jury must be instructed about unanimity in cases in which the jury is given multiple alternatives that could independently satisfy the elements of the offense. Two justices concluded that a general unanimity instruction was adequate—one of whom cited *Rasmussen* for support. *Id.* at 563 n.53, 567-68 (lead opinion) ("'Normally, a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications form the basis of the

guilty verdict.'"); *id.* at 577-80 (Stewart, J., concurring and concurring in result) (citing *Rasmussen* for conclusion that "clear impact" of elements instruction and general unanimity instruction was to instruct jury on need for specific unanimity). Two concluded that it was inadequate, without any mention of *Rasmussen*. *Id.* at 588 (Durham, J., concurring and dissenting); *id.* at 591 (Zimmerman, J., concurring and dissenting). And the fifth justice did not directly address whether a general unanimity instruction was adequate, because he would have held that unanimity was not required to the level of specificity the defendant argued it was. *Id.* at 582 (Howe, J., concurring in result). Thus, although a majority of justices in *Tillman I* held that the jury had to unanimously agree on which alternative elements supported the conviction, *Saunders*, 1999 UT 59, ¶64 (plurality opinion), the evenly split *Tillman I* court adopted no controlling rule on how the jury had to be informed of that requirement.

The next year, the Court issued yet another fractured decision on the issue in *State v. Bishop*, 753 P.2d 439 (Utah 1988), *overruled on other grounds by State v. Menzies*, 889 P.2d 393 (Utah 1994). This time, at least, the Court's dueling opinions ultimately reached a controlling holding. But unfortunately—and compounding the already existing confusion—the Court's holding in *Bishop* directly conflicted with its holding in *Rasmussen*.

Bishop was convicted of aggravated murder, but the jury was given only a general unanimity instruction that did not expressly tell the jury it had to be unanimous as to which aggravator it found. *Id.* at 478-79 (lead opinion). In a concurring opinion, Justice Zimmerman concluded that "the jury was not properly instructed as to the need for unanimity on each element" but that the error was harmless. *Id.* at 494 (Zimmerman, J., concurring in the result). Two other justices joined the concurring opinion on that point, making a majority. *Id.* at 489 (Stewart, J., concurring in part and concurring in the result); *id.* at 491 (Durham, J., concurring separately). Yet despite the conflict with *Rasmussen*, the concurrence did not mention that case, let alone overrule it.

The confusion continued after *Bishop*. In Tillman's post-conviction case, the Court held—once again in a fractured opinion—that the general unanimity instruction and elements instructions at issue in *Tillman I* "were not perfect on this point, but they did not violate the rule." *Tillman v. Cook*, 855 P.2d 211, 216, 222 (Utah 1993) (*Tillman II*) (lead opinion with Howe, J., concurring); *id.* at 222-24 (Durham, J., concurring separately); *id.* at 224 (Zimmerman, J., concurring). Two justices wrote separately to explain their agreement with that conclusion, explaining that they felt bound by the "holding" of *Tillman I*, and that the instructions were "correct" in the sense

that some justices concluded that specific unanimity was not required at all in that case. *Id.* at 222-24 (Durham, J., concurring separately); *id.* at 224 (Zimmerman, J., concurring). One justice dissented, concluding that no majority formed around the correctness of the unanimity instruction in light of the "highly unusual permutation of votes." *Id.* at 226-27 (Stewart, J., dissenting).

Saunders followed. Yet even in that case—which included a *non*-unanimity instruction—the Court once again could not reach consensus on its approach to unanimity. Justice Zimmerman, the author of the *Bishop* concurrence, specifically dissented on the question of unanimity under a plain-error analysis because of the lack of clarity in the law. 1999 UT 59, ¶¶77-78 (Zimmerman, J., concurring and dissenting). "No fair review of our case law regarding juror unanimity could result in the conclusion that the proper rules are obvious." *Id.*

Finally, in *State v. Evans*, 2001 UT 22, 20 P.3d 888, the Court was able to reach unanimous agreement on the question of unanimity instructions. But perhaps unsurprisingly, the primary principle around which the Court was able to unify was that this Court's prior cases on the subject were simply unclear. The Court held that it was not obviously erroneous for the district court to fail to give "a specific instruction on jury unanimity" when the jury

was presented with multiple alternatives. *Id.* ¶¶15-17. The jury was presented with two possible aggravating circumstances for an offense, it was told that it had to decide each element beyond a reasonable doubt, and it was given a general unanimity instruction like the ones here and in *Alires*. *See id.* ¶15 n.1; Brief of Appellee at 19, *State v. Evans*, 2001 UT 22 (No. 980181-SC), 2000 WL 34475391 (noting that jury in *Evans* was instructed as follows: "'This being a criminal case, a unanimous concurrence of all jurors is required to find a verdict'"). Evans complained that the district court plainly erred by not instructing "the jury that they had to unanimously agree on one of the aggravating circumstances" to convict. 2001 UT 22, ¶15 n.1. The Court did not address whether the lack of a specific unanimity instruction was error. Rather, it held that the instructions were not obviously erroneous because the instructions did not "rise to the level of the 'non-unanimity' instruction at issue in *Saunders*." *Id.* ¶17 (footnote omitted).

Thus, at the time of Alires's and Baugh's trials, the case law from this Court was fractured and conflicting—and had been for decades. The most recent pronouncement from this Court was that forgoing a specific unanimity instruction was not obvious error. And if it was not obvious error to forgo a specific unanimity instruction in *Evans*, it would not have been "plainly insufficient" to do so in *Alires* or here. *See Alires*, 2019 UT App 206, ¶23 n.5.

Competent counsel could have looked at *Evans*, taken its holding at face value, and moved on to more fruitful arguments. And if counsel dug deeper, he would have found confusion and conflict in the case law. Perhaps one competent attorney could survey that law and conclude—as some members of this Court had concluded—that a specific unanimity instruction is required. *See Bishop*, 753 P.2d at 494 (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). But another competent attorney could—like other members of this Court—reasonably reach the opposite conclusion. *See, e.g.*, *Rasmussen*, 68 P.2d at 184-85 (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).

Perhaps this Court will, in some future case, resolve the conflict and conclude that a specific unanimity instruction is required in cases like this. But "[t]he law does not require counsel to raise every available nonfrivolous defense." *Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009). Baugh's counsel should "not be faulted for … lack of foresight." *Harrington v. Richter*, 562 U.S. 86, 110 (2011). Nor should he be faulted for "a reasonable miscalculation" in reading the tea leaves. *Id.* Given the confusion in the law, the argument that Baugh's and Alires's appellate counsel pursued—with the luxury of time to

thoroughly research the issue—was not the kind of unsettled but clear argument that all competent counsel would have pursued at trial. *Contra State v. Eyre*, 2008 UT 16, ¶¶11-12, 19-21, 179 P.3d 792 (holding counsel ineffective for not advancing novel statutory interpretation of offense elements). To hold otherwise would be to demand "something close to 'perfect advocacy'—far more than the 'reasonable competence' the right to counsel guarantees." *Maryland v. Kulbicki*, 577 U.S. 1, 5 (2015) (per curiam).

Nor was requesting a specific unanimity instruction so important that it presented "a battle that [all] competent counsel would have fought." *State v. Ray*, 2020 UT 12, ¶32, 469 P.3d 871. A competent attorney would have known that jury instructions, taken as a whole, need only "'fairly instruct the jury on the law applicable to the case.'" *State v. Maestas*, 2012 UT 46, ¶148, 299 P.3d 892. A competent attorney would have known 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 (alteration in original) (quoting *Boyde v. California*, 494 U.S. 370, 380-81 (1990)). A competent attorney would have known that the jury here was told that "every single juror must agree with the verdict before the defendant can be found 'guilty' or 'not guilty,'" and that it was told that the verdict must "reflect the jury's unanimous decision." R260-61. And a competent attorney

could reasonably conclude that when a jury is told that its verdict must be unanimous, there is little risk that the jurors would think they could reach a unanimous decision by disagreeing on which criminal act they believed the defendant committed. 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). Counsel could reasonably think that repeatedly telling the jury its decision had to be "unanimous" was enough to fairly instruct the jury on the need to agree on the criminal act that supported each count of conviction. *See* R260-61.

Further, counsel could reasonably conclude that, once a jury has been generally instructed to be unanimous, the risk that the jury would think it *did not* have to unanimously agree on the specific criminal act arises only when someone explicitly tells them that. That is what happened in *Saunders*, when the court told the jury, "'There is no requirement that the jurors be unanimous about precisely which act occurred … .'" 1999 UT 59, ¶¶58-65 (emphasis omitted). And that is what happened in *State v. Gollaher*, 2020 UT App 131, 474 P.3d 1018, where the prosecutor told the jury it could "'pick or choose'" which acts it could rely on "without 'necessarily having to agree from juror to juror.'" *Id.* ¶¶11, 34 (brackets omitted).

The court of appeals seemed to think the same thing happened here. *Baugh*, 2022 UT App 3, ¶¶18, 25. The prosecutor said in closing that "those two counts can be fulfilled with—with any two of those experiences," and that "any two of those incidents … can be the elements of both of these counts." R777. The court said this argument "directly contradicted the basic principles of unanimity." 2022 UT App 3, ¶18.

But that wasn't a non-unanimity argument. It was a non-election. Unlike the prosecutor in *Gollaher* or the court in *Saunders*, the prosecutor here never told the jury it did not have to *agree* on which act satisfied which count. He said only that the jury could use any act for any count. There was nothing improper about that argument. As long as the jury was unanimous as to which act or acts they selected, they *could* use "any two of those incidents" to satisfy the two counts. R777. And that would be true even if they were given the instruction Baugh now says they should have received. The argument thus did not contradict the basic principles of unanimity. It simply highlighted that the prosecutor was not making an election. And as explained above, a competent attorney could reasonably conclude, pre-*Alires*, that the general unanimity instructions were adequate even when the prosecutor did not make an election.

The court of appeals was also concerned that "we cannot know which one of the three instances of alleged abuse (one of two in the family house or the one in the apartment) was the one for which the jury convicted him." *Baugh*, 2022 UT App 3, ¶17. And it seemed to imply that this uncertainty should have alerted counsel to the need for a specific unanimity instruction.

But the Unanimous Verdict Clause does not guarantee Baugh the right to know the basis of the jury's verdict. It guarantees only that the jury be unanimous in selecting that basis. Otherwise, our constitution would mandate special verdicts in criminal cases, which it doesn't. *Hummel*, 2017 UT 19, ¶41 (noting Court's "longstanding refusal" to require special verdicts). In fact, counsel could have done exactly what Baugh says he should have done—request a specific unanimity instruction—and we still would not know the basis of the jury's decision. The jury did not have to tell the court which act it agreed on. It only had to return a unanimous verdict. Again, the defect the court of appeals identifies simply highlights the lack of election, which would not have alerted all competent counsel to the need for a specific unanimity instruction before *Alires*.

Finally, the court of appeals concluded that the absence of a specific unanimity instruction "'effectively lowered the State's burden of proof,'" which no competent attorney would have allowed. *Baugh*, 2022 UT App 3,

¶19 (quoting *Alires*, 2019 UT App 206, ¶25). But that conflicts with this Court's recognition that only "slight confusion" about the unanimity requirement may arise from a general unanimity instruction. *Evans*, 2001 UT 22, ¶17. Expressly telling the jury it does *not* have to be unanimous about the specific criminal act would, no doubt, effectively lower the State's burden. But because the risk of the jury misunderstanding the unanimity requirement is only "slight" in the absence of a non-unanimity instruction or argument, *see id.*, a competent attorney could conclude that the general unanimity instruction did not effectively lower the State's burden. And given the risk of only slight confusion, a competent attorney simply could have overlooked the issue before *Alires* held that to do so was unreasonable. *See Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic."); *Williams v. Kelly*, 816 F.2d 939, 950 (4th Cir. 1987) (noting oversight may be reasonable).

The Court should therefore overrule *Alires*, reverse the court of appeals here, and hold that counsel acted reasonably.[4]

[4] The Court may save for another day the question of whether *Alires* correctly held that a specific unanimity instruction is required in multiple-act cases whenever the State fails to make an election. Here, the Court need only overrule *Alires* on the question of whether the law on unanimity instructions should have been clear to counsel and that counsel thus acted unreasonably in not requesting a specific unanimity instruction.

II.

The court of appeals' prejudice analysis conflicts with this Court's decision in *Evans* and with the Supreme Court's decision in *Strickland*.

The court of appeals also erred in holding that Baugh was prejudiced by the lack of a specific unanimity instruction. To prove prejudice, Baugh was required to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. And this analysis begins with a "strong presumption" that the jury's verdict was reliable. *Id.* at 696. Baugh was required to "affirmatively prove" otherwise, *id.* at 693, by showing that the reasonable probability of a more favorable result is "'a demonstrable reality and not a speculative matter,'" *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998).

The court of appeals erred in holding that Baugh met that burden, for two independent reasons. First, the decision conflicts with this Court's precedent stating that the type of error here is harmless in cases like this. Second, the decision conflicts with *Strickland*'s mandate that prejudice be assessed using a counterfactual analysis of the likelihood of a more favorable verdict absent any deficient performance. Had the court engaged in that analysis, it would have found no prejudice.

A. The court of appeals overlooked this Court's holding in *Evans* that only slight risk of confusion results from the lack of a specific unanimity instruction in cases like this.

The court of appeals' decision conflicts with *Evans*. As noted, *Evans* involved a case in which the jury was given a general unanimity instruction but was presented with evidence of multiple alternative elements that could each independently support a conviction. 2001 UT 22, ¶15 n.1; Brief of Appellee at 19, *State v. Evans*, 2001 UT 22 (No. 980181-SC), 2000 WL 34475391. The defendant argued on appeal that he was entitled to a more specific unanimity instruction. 2001 UT 22, ¶¶15-16. The Court held that the defendant was not prejudiced, explaining that it was "unconvinced that the slight confusion that may have arisen from the wording of the instructions used here presents a reasonable likelihood of a more favorable result for defendant." *Id.* ¶17.

Indeed, the court of appeals reached the same conclusion in another case in which the jury was given a general unanimity instruction but the defendant claimed his counsel should have requested a more specific one. In *State v. Kitzmiller*, 2021 UT App 87, 493 P.3d 1159, the court of appeals relied on a general unanimity instruction and a proper elements instruction to conclude it was "unlikely that the jury thought it did not have to agree" on which criminal acts supported a charge for which no election was made. *Id.*

¶¶21, 24-25. If no prejudice resulted from the lack of a specific unanimity instruction in *Evans* and *Kitzmiller*, no prejudice resulted here.

Not only was *Evans* controlling in the court of appeals, its logic is compelling. As explained in Point I above, it is exceedingly unlikely that, when a jury is instructed that its verdict must be unanimous, it will think it can reach a unanimous agreement by disagreeing about the criminal act that satisfied the elements of the offense. That misunderstanding becomes reasonably likely only when someone incorrectly tells the jury that's what unanimous means in a criminal trial. *See, e.g.*, *Saunders*, 1999 UT 59, ¶¶58, 65 (plurality opinion) (noting that, in light of non-unanimity instruction, "some jurors could have found" one set of facts as basis for conviction and "others could have found" another); *Gollaher*, 2020 UT App 131, ¶11.

Here, as noted in Point I, the court of appeals concluded that the prosecutor made that kind of non-unanimity argument when he told the jury that the two counts of sexual abuse could "be fulfilled … with any two of … [the] incidents" Sasha described. R777. The court said this argument "openly invited the jury to engage in a free-for-all when applying the acts to the counts." 2022 UT App 3, ¶25; *see also id.* ¶18 (concluding in deficient-performance analysis that prosecutor's argument "directly contradicted the basic principles of unanimity").

But the prosecutor's argument did no such thing. Rather, it correctly informed the jury that any of the acts Sasha described could independently satisfy the charged counts. The prosecutor essentially told the jury that it—the jury as a body—got to decide which criminal act supported each charge. *Cf. Tillman I*, 750 P.2d at 580 (Stewart, J., concurring and concurring in result) (concluding that jury instructions' reference to "you" "rather clearly refers to the jurors collectively"). In other words, the prosecutor told the jury that the State was not making an election so the jury got to make that call. Indeed, when the prosecutor does not make an election, who else can make that determination if not the jury? In telling the jury that it had to choose which incident to rely on for each count, the prosecutor did not state, or even imply, that the jurors did not have to agree in making that choice.

Because the prosecutor did not make a non-unanimity argument, *Evans* controls. The court of appeals should have held that the "slight confusion" that "may" arise from the lack of a specific unanimity instruction was not enough to create "a reasonable likelihood of a more favorable result" had

such an instruction been given. *Evans*, 2001 UT 22, ¶17; *see also Kitzmiller*, 2021 UT App 87, ¶¶21, 24-25.[5]

B. The court of appeals did not engage in the counterfactual analysis *Strickland* requires, instead improperly analyzing only the possible effect of any error on this jury.

Not only did the court of appeals' prejudice analysis conflict with this Court's holding on the potential for harm in cases like this, it also conflicted with *Strickland*'s mandatory framework for evaluating prejudice. A prejudice analysis that asks only whether counsel's challenged performance affected the verdict—as the court of appeals did here—does not amount to the true counterfactual inquiry that *Strickland* requires. The result was, in effect, to shift the burden to the State to disprove prejudice. Had the court of appeals faithfully applied *Strickland*, it would have held that Baugh had not proved prejudice.

[5] In fairness to the court of appeals, the State did not rely on *Evans* for its prejudice argument in that court, although it did rely on *Evans* to ask the court to depart from *Alires* in its deficient-performance analysis. On prejudice, the State focused on a counterfactual analysis under *Strickland*. Yet the fact stands that the court of appeals' decision conflicts with this Court's controlling prejudice holding in *Evans*.

1. The court of appeals erroneously focused on the effect of counsel's omission on this verdict but did not analyze the probability of a more favorable verdict absent the alleged error as *Strickland* commands.

Strickland requires courts to assess prejudice by asking whether, "absent the errors," there is a reasonable probability of a more favorable verdict. *Strickland*, 466 U.S. at 695-96. That involves "asking how a hypothetical trial would have played out absent the error." *Lee v. United States*, 582 U.S. 357, 365 (2017) (contrasting prejudice analysis in plea context with analysis in trial context). This Court has repeatedly recognized the counterfactual nature of that inquiry. "*Strickland* and the cases that follow it illustrate that to evaluate prejudice, we assess counterfactual[] scenarios—that is, what would have happened but for the ineffective assistance … ." *Ross v. State*, 2019 UT 48, ¶76, 448 P.3d 1203; *accord State v. Samora*, 2023 UT 5, ¶22, --- P.3d ---; *State v. Ring*, 2018 UT 19, ¶36, 424 P.3d 845. "To decide whether a trial affected by error is reasonably likely to have turned out differently we have to consider a hypothetical—an alternative universe in which the trial went off without the error." *State v. Ellis*, 2018 UT 2, ¶42, 417 P.3d 86.

Rather than engage in that counterfactual analysis, the court of appeals took an empirical or historical view, asking whether and to what extent the jury in Baugh's trial was not unanimous because of the error. Although the court correctly stated the *Strickland* prejudice test at the beginning and end of

its prejudice analysis, *Baugh*, 2022 UT App 3, ¶¶20, 26, it didn't apply that test. It analyzed only the likelihood that this jury was, in fact, not unanimous—in other words, the likelihood that not requesting a specific unanimity instruction affected the actual verdict that was rendered. But the court "stopped this analysis short" by not then going on to "'ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.'" *State v. Garcia*, 2017 UT 53, ¶¶41-42, 424 P.3d 171 (quoting *Strickland*, 466 U.S. at 696). In *Garcia* this Court reversed the court of appeals for finding prejudice based solely on how an error "might have impacted" the trial and not engaging in the counterfactual inquiry *Strickland* requires. *Id.* ¶¶41-42, 48. It should do the same here.

The court of appeals' misapplication of *Strickland* is evident at several points in the court's analysis. First, the court noted that the jury instructions linked each count to a specific time but that the evidence linked each criminal act to a specific place, not a specific time. *Baugh*, 2022 UT App 3, ¶21. The court reasoned that this disconnect "creates a reasonable probability that *the jurors did not agree* on which act of alleged abuse supported each count." *Id.* (emphasis added). But *Strickland* prejudice does not turn on how this jury was

affected by counsel's deficient performance. It turns on how a hypothetical jury deciding the same case "absent the error" would probably rule.

Second, the court noted the various ways Baugh's statements in the phone call could be interpreted, and it highlighted Baugh's explanations at trial for his statements. *Id.* ¶¶22-24. The court reasoned that given the "potential variability in the way the jury could have viewed the evidence," the court "cannot be confident as to *how [the jury] viewed the evidence*." *Id.* ¶24 (emphasis added); *see also id.* ¶22 (concluding court was unable to say "there is no reasonable probability that *the jury found* his explanation credible" (emphasis added)); *id.* (stating that court could not "conclude that the jury *must have unanimously agreed*" (emphasis added)). Again, this analysis improperly considered only how this jury's judgment was possibly affected by the error, not whether a hypothetical jury would have reached a different result "absent the error."

Third, the court emphasized that it was "entirely possible" that the jury was not in fact unanimous, with "some (but not all) of the jurors *convict[ing] on count two based on* the belief that the alleged abuse occurred at the family house, [and] some other (but not all) jurors *convict[ing] based on* the belief that the abuse occurred at the apartment." *Id.* ¶21 (emphases added). But *Strickland* asks whether there is a "reasonable probability" that a jury would

have been unable to reach a unanimous agreement on the specific criminal act had it been told it had to, not whether it's possible the jury didn't reach such an agreement.

Fourth, the court noted the eight-hour deliberation and said that it—along with the prosecutor's argument that the court mistakenly viewed as a non-unanimity argument, *supra* Point II(A)—"suggests that *the jury might have struggled with the evidence*." *Id.* ¶25 (emphasis added). Again, mere possibilities—grounded in this jury's deliberations and disconnected from any "reasonable probability" of a different result absent the error—are not enough to show prejudice.[6]

The distinction between *Strickland*'s counterfactual analysis and the court of appeals' historical analysis is important. Anything less than a true counterfactual analysis produces redundant retrials—even when counsel performs deficiently, retrial is unnecessary when there is no reasonable

[6] The closest the court came to a counterfactual analysis is when it said, "[W]e remain unable to identify one charge on which we can say with confidence it would have convicted." *Baugh*, 2022 UT App 3, ¶24. Assuming the court was speaking of what would have happened had the jury been given a specific unanimity instruction—which is not at all clear—this was not a true counterfactual analysis because the court conflated the counterfactual with the historical. The sole reason the court gave for its conclusion was that the evidence did not show "that the jury unanimously agreed." *Id.*

likelihood that an error-free trial would have produced anything but another conviction.

Consider a claim that counsel should have objected to extensive and detailed other-acts evidence in a sexual assault case. Hearing such evidence will often affect the jury's verdict. But if, for example, the evidence of the charged crime was overwhelming, or if inadmissible evidence was cumulative of admissible evidence, then there would be no reasonable probability of a more favorable verdict had counsel successfully objected to the other-acts evidence. *See Ring*, 2018 UT 19, ¶¶38-42 (assuming verdict was affected by admission of similar prior act of child molestation that prosecutor highlighted in closing, but holding that not objecting to admission was harmless because even absent the error, "the State could have made essentially the same closing argument that it did" based on two other properly admitted prior acts of child molestation).

Or consider a claim that counsel should have objected to an erroneous jury instruction. Jurors are presumed to follow the court's instructions, so an instruction that affirmatively misleads the jury will often affect the verdict. But if, for example, the instruction addressed an uncontested or minor point, or if the evidence of guilt on a contested point was substantial, then there would be no reasonable probability of a more favorable verdict had counsel

insisted on a correct instruction. *See Garcia*, 2017 UT 53, ¶¶23, 41, 45-48 (taking court of appeals' conclusion as given that erroneous imperfect-self defense instruction affected verdict, but holding counsel's error harmless because of strength of evidence on intent).

True, courts may appropriately start a prejudice analysis by asking whether the jury was likely affected by counsel's alleged deficiency. If counsel's error likely did *not* affect the jury's actual verdict, then there necessarily is no reasonable probability of a different verdict absent the error. "But the converse is not true." *Cf. State v. Ray*, 2020 UT 12, ¶34, 469 P.3d 871 (discussing role of strategy in deficient-performance analysis). An error may affect the actual verdict in the sense that a conscientious jury will consider the evidence in front of them in light of the instructions given, but preventing or remedying that error would not necessarily create a reasonable likelihood of a different verdict. Thus, the analysis must not stop with asking whether the verdict was affected by an error.

Strickland is clear on this point, discussing both the historical and counterfactual aspects of the prejudice inquiry. It stated that the purpose of the prejudice inquiry is to determine whether counsel's deficiency was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687. But it emphasized that "not every error that

conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* at 693. Thus, it is "not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* "Virtually every act or omission of counsel would meet that test … ." *Id.*

Strickland thus adopted a specific test for measuring reliability: whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

A historical analysis is dispositive under *Strickland* only when counsel's deficiency "had no effect on the judgment." *See id.* at 691. But when the deficiency likely affected the judgment, *Strickland* requires further analysis. That further analysis may be informed by the likely effect of counsel's error on the proceeding. *Strickland* teaches that considering the effect of counsel's errors on the jury's findings can help focus the counterfactual analysis. *See id.* at 695-96. "Some of the factual findings will have been unaffected by the errors," and those "unaffected findings" should be taken "as a given." *Id.* Other errors "will have had an isolated, trivial effect," and still others "will have had a pervasive effect … , altering the entire evidentiary picture." *Id.* Although courts should "tak[e] due account of the

effect of the errors on the remaining findings," they must do so in furtherance of the counterfactual analysis of whether "the decision reached would reasonably likely have been different absent the errors." *See id.* at 696. Thus, apart from the narrow circumstance where an error had no effect on the verdict, a historical analysis of the effect of an error cannot answer the question *Strickland* requires the court to answer.

This Court departed from *Strickland*'s counterfactual framework in *State v. Grunwald*, 2020 UT 40, 478 P.3d 1. *See id.* ¶¶2 n.1, 22 & n.21, 25 & n.25, 26, 46, 57 & n.70, 63, 75-78 & n.91. The Court created a two-part prejudice test for ineffective-assistance claims based on erroneous jury instructions. *Id.* ¶22. Under the *Grunwald* test, a court asks first whether there is a "*possibility* that the jury *convicted the defendant based on* factual findings that would not have led to conviction had the instructions been correct" and, second, whether there is a "reasonable *probability* that at least one juror *based its verdict on* those factual findings." *Id.* (emphases added; additional emphasis omitted).

In other words, both steps of the *Grunwald* analysis focus on the likelihood that the verdict was affected by the error—first examining the possibility that the verdict was affected, then examining the probability. *See id.*; *see also id.* ¶¶85, 103-05 & nn.92, 95-96 (Lee, J., dissenting) (criticizing Court's "substantial reformulation" of *Strickland*). *Grunwald* insists that its

prejudice test accords with *Strickland.* 2020 UT 40, ¶¶22 n.22, 78 n.91 (majority opinion). But its insistence on considering only the historical effects of the instructional error transparently violates *Strickland*'s "absent the error" formulation.

The misunderstanding appears to arise from *Grunwald*'s belief that its analysis is actually counterfactual because it considers whether the jury likely convicted on a basis that correct instructions would have foreclosed. *See id.* ¶¶22, 78 n.91. But that's just another way of saying the verdict was a product of error. Thus, *Grunwald*'s two-step analysis does not answer the question *Strickland* asks. As shown, there may be any number of reasons that a jury that convicted on an improper basis would, absent the error, still convict.

This Court should disavow *Grunwald*'s reformulation of *Strickland*. Although the court of appeals did not cite *Grunwald*, it made the same analytical error here. Reversing the court of appeals based on its departure from *Strickland* without also disavowing *Grunwald* would perpetuate the conflict between controlling Supreme Court precedent and Utah courts' misapplication of that precedent. "The standard of proof for ineffective assistance of counsel claims 'is a matter of federal law … .'" *Garcia*, 2017 UT

53, ¶40 (quoting *State v. Sessions*, 2014 UT 44, ¶37, 342 P.3d 738). And federal law as dictated by the Supreme Court requires a counterfactual analysis.[7]

Because this Court is "duty bound to follow" Supreme Court precedent on this question, *Gallegos*, 2020 UT 19, ¶58, disavowing *Grunwald* does not implicate principles of *stare decisis*. Even so, those principles support overruling *Grunwald*. As explained above, *Grunwald*'s reasoning is wrong. It cannot be squared with *Strickland*'s requirement of a counterfactual analysis. And it violates principles of federalism to perpetuate a test that the Supreme Court has rejected for Sixth Amendment claims. *See Eldridge v. Johndrow*, 2015 UT 21, ¶22, 345 P.3d 553 (identifying "consistency with other legal principles" as relevant *stare decisis* consideration). Nor has it become "firmly established in Utah law." *See id.* ¶33. *Grunwald*'s two-step inquiry is barely three years old, and "newer precedents are likely to be less firmly established." *Id.* ¶34. In fact, its novel test has been applied only twice, and then only in the context of ineffective-assistance claims involving erroneous elements instructions. *See State v. Eyre*, 2021 UT 45, ¶¶32-33, 500 P.3d 776; *State v. Seach*, 2021 UT

[7] While *Grunwald* was not wrong to start its analysis by looking at the effect of the error on the actual verdict, maintaining that two-step test as a precursor to *Strickland*'s counterfactual analysis risks distracting courts from the constitutionally required analysis. "Language matters and, over time, even small variations can take on lives of their own and distort the analysis." *Gallegos*, 2020 UT 19, ¶58.

App 22, ¶¶20, 24, 483 P.3d 1265. True, the court of appeals' unanimity cases have often applied, without citing, a version of *Grunwald*'s test, in that the court overlooks the counterfactual inquiry. But as established in Point II(B)(2) below, that has proved unworkable because it has effectively shifted the burden to the State to disprove prejudice. *See Eldridge*, 2015 UT 21, ¶22 (identifying how well precedent has worked in practice as relevant *stare decisis* consideration).[8]

[8] The Court could distinguish *Grunwald*. That decision said its two-part prejudice test applied to "the context of erroneous jury instructions," 2020 UT 40, ¶22, and it has been applied only in the context of erroneous *elements* instructions. This case involves neither. In unanimity cases the error itself occurs not in the lack of a jury instruction, but when a duplicitous charge is filed or "submitted to the jury"—a charge alleging "separate offenses in a single count." Wayne R. LaFave *et al.*, 5 Crim. Proc. §19.3(d) (4th ed. Nov. 2021 Update); *see also State v. Germonto*, 868 P.2d 50, 58 (Utah 1993). Jury instructions are one way to "cure the error." LaFave, *supra*, at §19.3(d); *see also Germonto*, 868 P.2d at 58. And the Supreme Court applies *Strickland*'s counterfactual analysis to claims involving counsel not requesting a curative instruction—not to mention every other ineffective-assistance case. *See Berghuis v. Thompkins*, 560 U.S. 370, 389-91 (2010) (finding no prejudice from counsel's decision not to "request a limiting instruction" because the "record establishes that it was not reasonably likely that the instruction would have made any difference in light of all the other evidence of guilt"). But rather than distinguishing *Grunwald*, the Court should stanch the confusion that flows from allowing state precedent to persist in conflict with *Strickland*.

2. The court of appeals' error had the effect of shifting the burden to the State to disprove prejudice.

By skipping the counterfactual analysis required by *Strickland*, the court of appeals effectively shifted the burden to the State to disprove prejudice. The court essentially required Baugh to make only a *prima facie* showing that the lack of a specific unanimity instruction "had some conceivable effect on the outcome of the proceeding." *See Strickland*, 466 U.S. at 693. As *Strickland* noted, "Virtually every act or omission of counsel would meet that test … ." *Id.* Even if the standard is raised from a conceivable effect to a reasonable probability—but still limited to asking whether the alleged deficiency affected the outcome—skipping the critical counterfactual inquiry absolves the defendant of his burden to "affirmatively prove prejudice" under the test *Strickland* has outlined. *See id.*

While the burden-shifting effect of the court of appeals' opinion may not be apparent on its face, that effect is clear in another unanimity case from the court of appeals. In *State v. Garcia-Lorenzo*, 2022 UT App 101, 517 P.3d 424, the court of appeals identified two categories of cases when it has concluded that the lack of a specific unanimity instruction is harmless—when the prosecutor makes an election, and when the defendant does not contest the underlying acts "'and there is no meaningful and relevant basis upon which to distinguish the various acts underlying the charges.'" *Id.* ¶¶49-50 (quoting

State v. Mottaghian, 2022 UT App 8, ¶66, 504 P.3d 773). The court then analyzed whether *the State* had shown that the case fit within one of those safe-harbor categories. *See id.* ¶¶51-57. And although the court at times referred to the likelihood of a more favorable verdict "had the jury been given a specific jury unanimity instruction," *id.* ¶50, the court's categorical analysis was not truly counterfactual. The court concluded by saying "there is at least a reasonable probability, on the record before us, that the absence of a specific jury unanimity instruction *made a difference in the outcome of the case*," because the court was "unpersuaded by the State's arguments" that the case fit into one of the two established harmless-error categories. *Id.* ¶57 (emphasis added). *See also Mottaghian*, 2022 UT App 8, ¶¶64-66 (citing *Alires* and *Baugh* for the proposition that prejudice is established when it is "possible that the jury had rendered a non-unanimous verdict," before going on to distinguish *Alires* and *Baugh* based on a counterfactual analysis); *State v. Mendoza*, 2021 UT App 79, ¶¶19-21, 496 P.3d 275 (improperly stating that "the ultimate

question" is "whether the jury reached any level of unanimity," before moving on to a proper counterfactual analysis).[9]

The root of this analytical defect lies in *Alires* itself. As with *Garcia-Lorenzo*, the *Alires* court at times phrased the test in counterfactual terms. *Alires*, 2019 UT App 206, ¶¶26-27, 29. But the substance of its analysis was not counterfactual. *See id.* ¶¶28-30. First, the court concluded that because the evidence was conflicting and not overwhelming, "there is a reasonable probability that *the jury did not unanimously agree* that the same two acts occurred." *Id.* ¶28 (emphasis added). The court explained that given the ambiguity in the evidence, "the jury could have easily reached different conclusions" about what happened and which acts were done with the requisite intent: "some jurors may have found" one set of facts while "[o]thers may have concluded" that another set of facts occurred. *Id.* ¶29. The court then concluded that, by the mere fact that the jury may not have been unanimous given the many "different interpretations" of the evidence that were possible, there was a reasonable probability of a more favorable result

[9] This Court provisionally granted the State's petition for a writ of certiorari in *Garcia-Lorenzo*, 20220802-SC, and stayed the case pending the outcome of this case and *State v. Paule*, 20220039-SC—another case involving a claim of ineffective assistance based on counsel not requesting a specific unanimity instruction.

with a specific unanimity instruction. *See id.* Finally, the court pointed to the prosecutor's argument and a question the jury submitted during deliberations to conclude that "the absence of a proper unanimity instruction *had a palpable impact* on the jury deliberations." *Id.* ¶30 (emphasis added).

In short, *Alires* neglected the counterfactual analysis *Strickland* requires, focusing instead on the likelihood—or even the mere possibility—that the lack of a specific unanimity instruction affected the jury's actual verdict. As *Garcia-Lorenzo* and this case illustrate, the effect of *Alires*'s approach to prejudice has been to place the burden on the State to disprove prejudice in ineffective-assistance claims involving unanimity instructions.[10]

The court of appeals' concern about potential unanimity issues is understandable given the constitutional nature of the right to a unanimous verdict. But even when important constitutional guarantees are at stake, the court cannot jettison *Strickland*'s controlling standard.

[10] Not all court of appeals opinions have followed *Alires*'s lead on prejudice in unanimity cases. Some solidly ground their analysis in *Strickland*'s counterfactual inquiry. *E.g.*, *State v. Percival*, 2020 UT App 75, ¶¶27-33, 464 P.3d 1184.

3. Under a true counterfactual analysis, Baugh suffered no prejudice.

Had the court of appeals properly followed *Evans*, it would not have needed to reach the counterfactual analysis. *Evans* dictates that there is risk of only "slight confusion" when a general unanimity instruction is given, *Evans*, 2001 UT 22, ¶17, so not giving a more specific unanimity instruction likely "had no effect on the judgment," *Strickland*, 466 U.S. at 691. This was not a case where the instructions affirmatively misled the jury. At worst, they created the possibility that the jury was not unanimous. But as explained in Point II(A) above, even that possibility was remote, and nothing in the record suggests it was realized here. In other words, even the historical analysis should have disposed of Baugh's claim under *Strickland* and *Evans*. With at most a slight risk of confusion arising from the general unanimity instruction, removing that slight risk in all likelihood would have led to the same verdict.

But assuming the court of appeals were correct that, under the facts of this case, there was a likelihood that the verdict was affected by the lack of a specific unanimity instruction, there is no reasonable probability of a more favorable verdict had the jury been given such an instruction.

The court of appeals largely based its prejudice holding on the lack of a clear admission by Baugh and on the disconnect between the elements instructions (which identified a date for each charge) and the evidence (which

identified a location for each act). *Baugh*, 2022 UT App 3, ¶¶21-24. These facts may have prevented the court of appeals from definitively saying which act the jury likely agreed on. But if the jury had been told it must unanimously agree on the specific criminal act underlying each count, nothing in the record suggests a reasonable probability that the jury would have acquitted on the second count.

Baugh argued to the court of appeals that not giving a specific unanimity instruction was harmful due in part to "the dearth of consistent evidence." *Id.* ¶20. But the only inconsistency was Baugh's protean story. Sasha's testimony was clear and consistent. There was no confusion about what she says happened, and her testimony presented the jury with three distinct acts, not a mishmash of memories that the jury would have had trouble sorting out.

Sasha testified that Baugh made her touch his penis when they lived in the Nibley house. R479. She said, "He would have me put my hand on his penis and—and [move] my hand up and down him until the white stuff came out … ." R479. She said this happened twice at the Nibley house, "one time on his bed in his room, and then another on [Sasha's] bed when he would tuck [her] in at night." R479-80. With the incident in Baugh's bed, Sasha said they were lying in bed when Baugh pushed her arm down and made her

reach under his underwear and keep rubbing his penis "[u]ntil he was no longer hard." R480-81. With the incident in her bed, Sasha said Baugh came to tuck her in and he lay in her bed. R487. She fell asleep lying on his chest, and then Baugh made her put her hand under his underwear and "do the same thing." R487. Sasha also testified that the same thing happened once in the apartment: "We were both laying on his bed, and he had me put my hand on his penis. … He grabbed my hand and told me to do it harder and rubbed my hand up and down until white stuff came out … ." R481. She also said Baugh later apologized to her, saying "he knew what he had done was wrong and he repented." R483.

On cross-examination, counsel did not elicit a single inconsistency in Sasha's testimony or in prior statements. R488-96. Counsel explored possible motives Sasha might have for falsely accusing her father. R491-93. But the most counsel got was an admission that Sasha was "upset" with Baugh "over the way that he was disciplining [her] and trying to make time with [her] and commenting on [her] clothing." R492-93.

Baugh, on the other hand, gave a range of responses to Sasha's consistent accusations. On the phone call, Baugh first denied ever having Sasha touch his penis. R864. But he eventually said he "believe[d]" Sasha's allegation that he made her touch him in the apartment. R867. He repeatedly

told her he would not deny it, and although he did not remember because he was on "a lot of medicines," he was "sure" he did it. R867-69, 871-72, 874-76. At trial, Baugh denied the abuse outright. R685. He tried to explain away his statements on the phone call by saying he just wanted to "validate[]" and help Sasha "deal with whatever issues she's going through." R686, 695. But Baugh also told the detective, who presumably didn't need validation, that he was not going to deny the abuse. R915. In fact, Baugh gave the detective several different explanations for the abuse in the apartment: he first said he could not remember or corroborate whether the apartment incident occurred, R887, 891, 893, 896, 899, then denied ever having Sasha touch his penis, R903, 905-06, 909, 914-15, then conceded it was "very possible" Sasha happened to be "up against" him when he was "out of it," R912, then finally said he was "certainly not going to deny it," R915. In short, Baugh consistently denied having Sasha touch his penis in the Nibley house, but his various statements about the abuse in the apartment were equivocal, evasive, and conflicting.

Along with repeatedly admitting that the abuse in the apartment could have happened, Baugh admitted that he had "stepdaughter fantasies" and was glad his new wife had only sons. R908, 910.

Given Sasha's clear and consistent testimony, Baugh's conflicting statements and admission that the abuse in the apartment could have

happened, and his admission to having "stepdaughter fantasies," the outcome of a counterfactual analysis is clear. Had the jury been told it had to unanimously agree on the criminal act or acts underlying each charge for which it convicted, there was a solid basis in the evidence for the jury to agree on any one of the acts, and at the very least the jury likely would have agreed that Baugh committed the one act he repeatedly acknowledged he was sure he committed.

Had the court of appeals engaged in the counterfactual analysis that *Strickland* requires, it would have concluded that Baugh failed to prove prejudice.

CONCLUSION

For all these reasons, the Court should overrule the holding of *Alires* and its progeny about the state of the law on unanimity instructions and how that affected the reasonableness of counsel's actions, disavow *Grunwald*'s reformulation of *Strickland* prejudice—including the variant applied in this and other court of appeals unanimity cases—and reverse. The Court should then remand to the court of appeals so it may address Baugh's other claims that it did not reach in light of its reversal.

Dated May 10, 2023.

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Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24, Utah R. App. P., this brief contains 13,267 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21, Utah R. App. P., 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 May 10, 2023, the Brief of Petitioner, including the addenda, was filed with the Court by email in a searchable PDF attachment and served upon respondent Brevan Bringhurst Baugh's counsel of record at:

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/s/ *Melanie Kendrick*

* No more than 7 days after filing by email, the State will file with this Court eight paper copies of the brief, including the addenda. Upon request, the State will serve two paper copies thereof to the respondent's counsel of record. *See* Utah R. App. P. 26(b).

Addenda

Addendum A

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
BREVAN BRINGHURST BAUGH,
Appellant.

Opinion
No. 20200178-CA
Filed January 13, 2022

First District Court, Logan Department
The Honorable Angela Fonnesbeck
No. 181100862

Emily Adams, Freyja Johnson, and Cherise M. Bacalski, Attorneys for Appellant

Sean D. Reyes and Christopher D. Ballard, Attorneys for Appellee

JUDGE DAVID N. MORTENSEN authored this Opinion, in which JUDGES MICHELE M. CHRISTIANSEN FORSTER and JILL M. POHLMAN concurred.

MORTENSEN, Judge:

¶1 During its closing argument at Brevan Bringhurst Baugh's trial for two counts of aggravated sexual abuse of a child, the State referenced testimony of three instances of alleged abuse. But the State then told the jury that "those two counts can be fulfilled with . . . any two of those experiences" and that "any two of those incidents . . . described . . . can be the elements of both of these counts." The jury rendered a split verdict, and Baugh now appeals, contending that defense counsel provided ineffective assistance for failing to ensure the jury received proper instruction regarding unanimity. We agree; accordingly,

we vacate Baugh's conviction and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 While Baugh lived at the family house from 2012 to April 2014, his daughter Sasha[1] saw a pornographic image of a "hand job" Baugh had left "up on the computer." On another occasion, she "walked in on [him] masturbating." In April 2014, when Baugh separated from his wife, Sasha's mother, Sasha and her siblings spent their time with Baugh at his apartment.

¶3 Several years later, while Sasha was visiting Baugh, he made a comment to Sasha about her clothing choices, stating that even though the clothing choices were inconsistent with standards by which they aspired to live, he was otherwise "fine" with them. The comment upset Sasha, and memories of the past started "coming back." Unsettled by the incident, Sasha reported her discomfort to her mother, who then suggested Sasha see a therapist. During an ensuing therapy session, Sasha disclosed that, years before, Baugh had, on various occasions, forced her to touch his penis and give him "hand jobs."

¶4 The detective who responded to the therapist's report of abuse invited Sasha to conduct a recorded confrontation call "to get . . . some type of evidence . . . from" Baugh. But when Sasha initially confronted Baugh about the abuse, he denied it and asked if she was "misremembering things." When Sasha reminded him that he had taken her aside and apologized, Baugh insisted the apology was for her inadvertent exposure to pornography, and he stated, "[M]y concern here is that you're putting that together with something . . . about me that didn't happen."

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1. A pseudonym.

¶5 As Sasha pressed and insisted that the abuse occurred, Baugh responded, "Well, what I certainly can't do is deny that and say that you're absolutely wrong because you get to feel however—you—you get to remember it however you remember it, and I can't deny that." When Sasha pressed further and described the abuse in detail, Baugh responded, "[Sasha], that's terrible. And I am very sorry for that. . . . I have no recollection of that. I am terribly sorry." And when pressed again and again, Baugh responded, "I am not denying it. . . . And—if you say I did it, then—then I'm sure I did. I'm sure I did." Baugh then denied that any abuse occurred at the family house. But Baugh's memory of the time period he was living in the apartment was fuzzier; he insisted that he "was messed up a lot," "was doing a lot to forget," and was taking "a lot of medicines to specifically try and make [himself] numb" and to make himself "forget the trauma" of his separation from Sasha's mother. "I guess what I'm saying," he continued, "is, if you say it happened, it happened . . . and I'm not going to deny it." He then said,

> I would never physically take your hand and put it down my pants. If I did that at the [apartment], I can, hmm, totally accept that and say, oh, that's awful. . . . And I've got—and I've got to own that, even if I did it while on a whole bunch of medications or high on pot or whatever and don't remember it, but I've got to own it.

¶6 Shortly after the confrontation call, Baugh was arrested, and the investigating detective followed up with an interrogation. During the interrogation, Baugh conceded that he did not deny the accusation of abuse in the apartment but attributed his failure to deny to being "out of it" during the time he lived at the apartment. Baugh also conceded that Sasha had been exposed to pornography but he consistently and repeatedly denied the abuse allegations. The interrogation concluded with the following exchange:

> Detective: "Have you had your daughter giving you hand jobs for years?"
>
> [Baugh]: "For years. Okay. No."
>
> Detective: "And when was the last time?"
>
> [Baugh]: "It would be at the [apartment] here is what you're telling me. I'm telling you at the [family house]."

The State charged Baugh with two counts of aggravated sexual abuse of a child: one count for abuse that allegedly occurred in 2012 and one count for abuse that allegedly occurred in 2014.

¶7 At trial, Baugh testified that when he told the detective that "the last time something sexual happened between" him and Sasha was at the family house, he was not referring to any abuse but was referring only to the pornography exposure. Even though he maintained that no abuse had ever occurred, Baugh also explained that he had not disputed Sasha's claim of abuse at the apartment because he "wanted to . . . meet her where she's at and accept her" and provide "support," and because he wanted Sasha "to feel validated" and help her "deal with whatever issues she's going through." Baugh expressed his reasoning that "she's entitled to feel however she wants to feel, even if she is getting things mixed up." Baugh, however, maintained his position—"I didn't do what she's accusing me of."

¶8 Sasha on the other hand testified about three specific instances of abuse. She testified that Baugh had made her touch and rub his penis on two occasions at the family house—once in his bed and once in her bed—and on one occasion at the apartment. But nowhere in her testimony did Sasha explain specifically when the alleged abuse occurred.

¶9 During closing argument the State said,

> Now, we haven't charged everything that we could have. We charged two counts. And those two counts can be fulfilled with—with any two of those experiences, any two of those incidents that she described, those can be the elements of both of these counts.

Neither the court nor defense counsel took issue with this statement. However, the jury instructions informed the jury that "[o]pen discussion" could help it "reach a unanimous agreement on a verdict." The instructions also directed the jury that it should "[t]ry to reach a unanimous agreement, but only if [it could] do so honestly and in good conscience" and that "every single juror must agree with the verdict before the defendant can be found 'guilty' or 'not guilty.'" And although the instructions distinguished the counts based on the date of the alleged abuse—2012 for count one, and 2014 for count two—the verdict forms required the jury to indicate only whether it unanimously agreed that Baugh was "guilty" or "not guilty" for each count and not whether it agreed on which instance of alleged abuse constituted the crime for which the jury agreed to convict. The parties have not identified, and we have not found, anywhere in the record where defense counsel requested either specific unanimity instructions pertinent to each count or a special verdict form requiring the jury to specify which act was linked with each conviction.

¶10 The jury then retired to deliberate, but nearly seven hours into those deliberations—a few minutes after 10:00 p.m.—it indicated that it had arrived at an impasse. The court responded by orally instructing the jury through the bailiff "to go back and keep trying"—recounting the incident for the record only after

the fact.[2] And at 11:43 p.m. the jury issued a split verdict, acquitting Baugh on one count of aggravated sexual abuse of a child in 2012 and convicting him on one count of aggravated sexual abuse of a child in 2014. Baugh appeals.

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2. Through one issue raised on appeal—that we need not resolve—Baugh sought relief based on the court's failure to make a contemporaneous record of how the jury was instructed when it reported its impasse. In light of this, we note the significance of *any* supplemental instructions and emphasize how important it is for the court to record all the instructions the jury receives rather than try to recreate the record after the fact. Furthermore, we express our concern with the practice of trial courts instructing juries without involvement of counsel. *Cf. State v. Johnson*, 2016 UT App 223, ¶ 22 n.4, 387 P.3d 1048 ("A court is not required to consult counsel before responding to a jury's question by simply referring the jury back to instructions already approved by counsel. However, such a course of action is risky because the court's response to a jury question may be construed as a new instruction." (cleaned up)). We also advise trial courts to refrain from orally communicating with a jury through a bailiff and off the record. In this case, had we needed to resolve the issue, we would not have had the information necessary to do so because, although the trial court attempted to reconstruct the record, the court's summary shed no light on what the bailiff actually said to the jurors. *Cf. State v. Martinez*, 2021 UT App 11, ¶ 58, 480 P.3d 1103 (Christiansen Forster, J., concurring) ("[T]he district court's failure to record the in-chambers discussion with counsel or to memorialize what interaction occurred with [the] jury and how [a jury instruction] was presented to an apparently deadlocked jury did a disservice to [the defendant] and his appellate counsel by hampering their attempt to re-create that record two years post-trial.").

ISSUE AND STANDARD OF REVIEW

¶11 Baugh contends that defense counsel rendered constitutionally "ineffective assistance in failing to ensure that the jury was properly instructed regarding unanimity." In particular, Baugh asserts that "[t]he jury was not instructed that [it] must unanimously agree as to which of the three alleged incidences constituted each [of the two] charged crime[s]" and that this failure prejudiced his defense. (Emphasis omitted.) "When a claim of ineffective assistance of counsel is raised for the first time on appeal, there is no lower court ruling to review and we must decide whether the defendant was deprived of the effective assistance of counsel as a matter of law." *State v. Beckering*, 2015 UT App 53, ¶ 18, 346 P.3d 672 (cleaned up).

ANALYSIS

¶12 To prevail on a claim that defense counsel rendered ineffective assistance in failing to ensure the jury received proper unanimity instruction, Baugh must make a two-part showing. *See State v. Scott*, 2020 UT 13, ¶ 28, 462 P.3d 350. First, Baugh must show that "his counsel's performance was deficient in that it fell below an objective standard of reasonableness," *id.* (cleaned up), that is, "whether, considering all the circumstances, counsel's acts or omissions were objectively unreasonable," *id.* ¶ 36. Second, Baugh must show that "the deficient performance prejudiced the defense," *id.* ¶ 28 (cleaned up), in such a way as "to undermine confidence in the outcome of the proceeding"—i.e., "that the outcome of [the] case would have been different absent counsel's error," *id.* ¶ 43 (cleaned up). Here, Baugh has carried his burden.

I. Deficient Performance

¶13 Regarding deficient performance, Baugh contends that defense counsel's assistance "fell below an objective level of

reasonableness" when he "did not ensure that the jury was instructed that [it] must unanimously agree on which of the three alleged instances [of abuse] constituted the criminal act for each charge on which [it] convicted [him]." We conclude that under the circumstances of this case, it constituted deficient performance for counsel to fail to request that the jury receive proper unanimity instruction through either specific unanimity instructions for each count or a special verdict form requiring the jury to specify which alleged act was linked with each conviction.

¶14 The Sixth Amendment to the United States Constitution; Article 1, Section 10 of the Utah Constitution; and rule 21(b) of the Utah Rules of Criminal Procedure each require "that in criminal trials, a jury reach a unanimous verdict." *State v. Mendoza*, 2021 UT App 79, ¶ 9, 496 P.3d 275; *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (discussing the applicability of the Sixth Amendment's unanimity requirement to criminal trials). Moreover, the "requirement of unanimity is not met if a jury unanimously finds only that a defendant is guilty of a crime"—instead, the jury must reach "unanimity as to each count of each distinct crime charged." *State v. Hummel*, 2017 UT 19, ¶ 26, 393 P.3d 314 (cleaned up). In other words, the jury must "agree on a specific criminal act for each charge in order to convict." *State v. Alires*, 2019 UT App 206, ¶ 22, 455 P.3d 636.[3]

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3. The State contests the applicability of *State v. Alires*, 2019 UT App 206, 455 P.3d 636, to this case. Specifically, the State argues that *Alires* does not apply because it was not published until a few days after the trial occurred. But the *Alires* court thoroughly identified the established law that should have indicated the need for defense counsel in that case to request appropriate unanimity instructions. *Id.* ¶¶ 17–25. The *Alires* court noted that "[t]he right to a unanimous verdict in criminal cases is

(continued…)

¶15 In *Alires*, counsel rendered deficient performance by "propos[ing] instructions that did not require the jury to be unanimous as to the specific acts supporting each count of conviction." *Id.* ¶ 17. In that case, the defendant had been charged with six counts of aggravated sexual abuse of a child against two different children, but the jury heard testimony of at least eight instances of such abuse—six against the first child and two against the second. *Id.* ¶ 22. In relation to the six allegations involving the first child, the State argued that "the jury could convict . . . on four counts based on any of the six alleged touches . . . in 'any combination.'" *Id.* And in relation to the two allegations concerning the second child, "the State did not identify which alleged touch . . . related to which count." *Id.*

(…continued)
guaranteed by Article 1, Section 10 of the Utah Constitution (the Unanimous Verdict Clause)." *Id.* ¶ 18. The court then went on to cite *State v. Saunders*, 1999 UT 59, ¶ 60, 992 P.2d 951 ("The Article I, section 10 requirement that a jury be unanimous is not met if a jury unanimously finds only that a defendant is guilty of a crime."), and *State v. Hummel*, 2017 UT 19, ¶ 26, 393 P.3d 314 ("The Unanimous Verdict Clause requires unanimity as to each count of each distinct crime charged by the prosecution and submitted to the jury for decision." (cleaned up)). And based on the established law, the *Alires* court concluded, "Where neither the charges nor the elements instructions link each count to a particular act, instructing the jury that it must agree as to which criminal acts occurred is critical to ensuring unanimity on each element of each crime." *Alires*, 2019 UT App 206, ¶ 23. Accordingly, if the law was well enough established at the time *Alires* was tried, such that the *Alires* court could determine that counsel there performed deficiently in failing to request a proper unanimity instruction, the law was also well enough established that defense counsel here should have recognized the need to request appropriate unanimity instructions.

"Once the State failed to elect which act supported each charge, the jury should have been instructed to agree on a specific criminal act for each charge in order to convict," *id.*, but counsel did not request such an instruction, and "[a]s a result, the jury was never instructed that it must unanimously agree that [the defendant] committed the same unlawful act to convict on any given count," *id.* ¶ 23. Accordingly, in that case, "[i]t was objectively unreasonable for . . . counsel to propose jury instructions that did not require unanimity as to the specific act that formed the basis of each count resulting in conviction."[4] *Id.* ¶ 24.

¶16 Likewise, in this case, Baugh faced multiple charges for aggravated sexual abuse of a child, but the jury heard testimony of more instances of alleged abuse than the State charged. *See supra* ¶¶ 6–8. And the instructions "did not require the jury to be

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4. Importantly, whether a failure to request a proper unanimity instruction results in prejudice will depend on the facts of each case. For example, in some circumstances the evidence will be such that although the instructions could allow for a mix-and-match approach, it will be apparent that the jury would have agreed on a certain act for each count if the need for such agreement had been explained to it. *See*, *e.g.*, *State v. Paule*, 2021 UT App 120, ¶¶ 44–45 (holding that unanimity was not a concern where the State presented evidence that could support multiple bases for an obstruction of justice charge but focused on only one of those bases in prosecuting the case). In short, where there are multiple criminal acts at issue, the lack of a unanimity instruction does not necessarily equal prejudice—the specific facts and circumstances of each case and the strength or weakness of the evidence will be paramount to determining if prejudice has been established. *See*, *e.g.*, *State v. Case*, 2020 UT App 81, ¶ 26, 467 P.3d 893.

unanimous as to the specific acts supporting each count of conviction." *See Alires*, 2019 UT App 206, ¶ 17.

¶17 As in *Alires*, nothing in this case conclusively linked the allegations to the counts listed in the instructions. While the instructions here did link each count with a certain timeframe—2012 for count one and 2014 for count two—the instructions did not link each count with a particular act because nothing the jury heard at trial linked any particular act with an associated timeframe. Sasha was never asked to explain when the alleged abuse occurred, and although she indicated that two instances of abuse occurred at the family house and one instance of abuse occurred at the apartment, the association between an instance of abuse (alleged to have occurred in a specific place) and a particular count (alleged to have occurred during a particular time) was not established because Baugh lived at both the family house and the apartment in 2014. Notably, the jury did not convict Baugh on count one, the count associated with 2012, when Baugh undisputedly lived only at the family house. And although the jury convicted Baugh on count two, because Baugh lived in both the family house and the apartment in 2014, we cannot know which one of the three instances of alleged abuse (one of two in the family house or the one in the apartment) was the one for which the jury convicted him.

¶18 Further, like the prosecutor in *Alires*, the State apparently sought to use this ambiguity to its advantage by inviting the jury to convict on both counts based on the idea that "those two counts can be fulfilled with—with any two of those experiences" and that "any two of those incidents . . . can be the elements of both of these counts." As this court stated in *Alires*, "Where neither the charges nor the elements instructions link each count to a particular act, instructing the jury that it must agree as to which criminal acts occurred is critical to ensuring unanimity on each element of each crime." *Id.* ¶ 23. The prosecutor's comments directly contradicted the basic principles of

unanimity, and defense counsel neglected to request that the jury was otherwise properly instructed.

¶19 "[T]he jury [had] to be unanimous as to the specific acts supporting each count of conviction." *See id.* ¶ 17. And without a sufficient link to the actions in the instructions themselves, an instruction requiring as much was "critical to ensuring unanimity." *See id.* ¶ 23. "By failing to require juror unanimity as to each underlying act, the instructions—coupled with the prosecutor's closing argument—effectively lowered the State's burden of proof." *See id.* ¶ 25. And where defense "counsel bears a duty to assist the defendant in reaping the benefits of a jury trial and to hold the State to its full and complete burden of proof," such a failure constitutes deficient performance. *See State v. Mendoza*, 2021 UT App 79, ¶ 17, 496 P.3d 275.

II. Prejudice

¶20 Regarding prejudice, Baugh contends that the ambiguity in the jury instructions, the dearth of consistent evidence, and the State's invitation for the jury to apply any act to any charge all work together to establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," such that our confidence in the proceeding's outcome should be undermined. (Cleaned up.) Baugh persuades us on this point, and we determine that "consider[ing] the totality of the evidence," defense counsel's deficient performance has undermined our confidence in the proceeding's outcome. *See State v. Alires*, 2019 UT App 206, ¶ 27, 455 P.3d 636 (cleaned up).

¶21 Although Sasha testified about two instances of abuse at the family house and one instance of abuse at the apartment, Baugh resided in the family house from 2012 until April 2014 and also resided in the apartment in 2014. Thus, the jury had no way of inferring *when* two of the alleged acts of abuse occurred based on *where* the acts occurred. The jury instructions

distinguished the counts, not by location but based on the date of the alleged abuse—2012 for count one and 2014 for count two. By attempting to link the counts with acts that occurred at a particular time but not at a particular location, the unanimity that would otherwise have been inherent in the conviction based on location was lost when the jury heard no evidence about when the alleged abuse occurred. The fact that the jury heard nothing specific about when each act occurred creates a reasonable probability that the jurors did not agree on which act of alleged abuse supported each count. As noted, the jury heard allegations that two acts of abuse occurred in the family house and one occurred in the apartment. But the jury did not convict Baugh on count one, the 2012 count, which occurred when Baugh lived only at the family house. And because Baugh lived in both the family house and the apartment in 2014, we cannot know if the jury agreed that the conviction for count two, the 2014 count, was for one of the two alleged acts of abuse in the family house or the alleged act of abuse in the apartment. It is therefore entirely possible that some (but not all) of the jurors convicted on count two based on the belief that the alleged abuse occurred at the family house, while some other (but not all) jurors convicted based on the belief that the abuse occurred at the apartment.

¶22 Further, although the alleged abuse that occurred in the apartment had to have occurred in 2014, the evidence of that abuse is not so overwhelming that we can conclude that the jury must have unanimously agreed on that act—as opposed to an alleged act of abuse at the family house—as the basis for its conviction on count two for abuse in 2014. *See id.* ("A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." (cleaned up)). Sasha reported the abuse years after it occurred, while Baugh maintained—through the confrontation call, the interrogation, and the trial—that no abuse happened in the family house and that he had no memory of any abuse at the

apartment. And although the State asserts that Baugh "admitted to" the act of abuse in the apartment, it points to no language where Baugh expressly admitted the allegations and it instead insists that his non-denial is actually an admission. But at trial Baugh denied abusing Sasha and testified that he did not deny Sasha's accusations because he wanted to validate his daughter's feelings even though he maintained she was "getting things mixed up." And while the jury was free to disregard his explanation, we cannot, on this cold record, conclude that there is no reasonable probability that the jury found his explanation credible.

¶23 Moreover, we note the State has relied on Baugh's alleged admission both below and on appeal; but importantly, the theory of this admission's origin and significance has changed. At trial, in support of its claim that Baugh had admitted to abuse, the State relied on the exchange at the end of the interrogation where Baugh responded to the detective's question about whether he "had [his] daughter giving [him] hand jobs for years." Specifically, the State argued that Baugh's statement was an admission that he had abused Sasha at the family house. On appeal, however, the State acknowledges that this statement was ambiguous and shifts its focus to Baugh's failure to deny the allegations during the confrontation call as the critical admission.

¶24 But admission or not, the very fact that the State can espouse multiple theories regarding the existence of an admission demonstrates the potential variability in the way the jury could have viewed the evidence—that is, we cannot be confident as to how it viewed the evidence including any possible admission. Indeed, regarding the failure to deny the allegations during the confrontation call, we do not know whether the jury believed this was because the abuse actually occurred or because Baugh truly was validating Sasha. And regarding the interrogation question about whether Baugh had

been abusing Sasha for years, we do not know whether the jury understood Baugh's response to be an admission or whether it accepted his explanation that any response he gave referred to her exposure to pornography. Accordingly, the jurors might have attributed different significance to different explanations, and given that any admission would also not establish that the jury unanimously agreed which act constituted the crime for which it convicted, we remain unable to identify one charge on which we can say with confidence it would have convicted.

¶25 Finally, we view the State's invitation to the jury to take any allegation and apply it to any count as significantly undermining our confidence in the proceeding's outcome. *See id.* ¶ 26. The State argued that the "two counts can be fulfilled with . . . any two of those experiences" that Sasha described and that "any two of those incidents . . . can be the elements of both of these counts." The State openly invited the jury to engage in a free-for-all when applying the acts to the counts, and in so doing, rejected any theory that the acts that had been testified to were specially linked to particular counts based on the timing and location of the underlying criminal act. *Cf. id.* ¶ 30 (expressing concern with the verdict in part because "[t]he State told the jury in closing argument that any of the alleged acts against a particular victim could support any of the charges relating to that victim"). Following this invitation (an invitation that loomed large in the absence of any specific unanimity instruction), the jury deliberated over a case with relatively simple facts for nearly seven hours before announcing that it had arrived at an impasse. The court instructed the jury to keep trying, and at 11:43 p.m., over an hour later, the jury returned with a split verdict. All this suggests that the jury might have struggled with the evidence.

¶26 Accordingly, considering all the circumstances, we see a reasonable probability that but for defense counsel's deficient performance, the proceeding's outcome would have differed—in

other words, under these circumstances our confidence in the outcome has been undermined.

CONCLUSION

¶27 Because defense counsel performed deficiently when he did not request that the jury receive proper unanimity instruction, and because this deficiency prejudiced Baugh's defense in such a way that undermines our confidence in the proceeding's outcome, we vacate Baugh's conviction and remand for further proceedings.[5]

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5. "Ordinarily, a defendant who prevails on an ineffective assistance of counsel claim is entitled to a new trial. But where the counts of conviction cannot be distinguished from the counts on which the defendant was acquitted, a retrial may be prohibited by the Double Jeopardy Clause. We express no opinion on the merits of the double-jeopardy issue, which will not be ripe unless and until the State seeks a retrial." *Alires*, 2019 UT App 206, ¶ 31 n.7 (cleaned up).

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of January, 2022, a true and correct copy of the attached OPINION was sent by standard or electronic mail to be delivered to:

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Judicial Secretary

TRIAL COURT: FIRST DISTRICT, LOGAN DEPT, 181100862
APPEALS CASE NO.: 20200178-CA

Addendum B

INSTRUCTION No. 26

In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach a unanimous agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence.

Try to reach unanimous agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own.

Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found "guilty" or "not guilty." In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment as to whether the evidence presented by the prosecutor proved each charge beyond a reasonable doubt.

INSTRUCTION No. 27

Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson should not dominate the jury's discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get the chance to speak. The foreperson's opinions should be given the same weight as those of other members of the jury. Once the jury has reached a verdict, the foreperson is responsible for filling out and signing the verdict form(s) on behalf of the entire jury.

For each offense, the verdict form will have two blanks—one for "guilty" and the other for "not guilty." The foreperson will fill in the appropriate blank to reflect the jury's unanimous decision. In filling out the form, the foreperson needs to make sure that only one blank is marked for each charge.