Case No. 20220272-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

BREVAN BRINGHURST BAUGH,
Defendant/Respondent.

Reply Brief of Petitioner

On Writ of Certiorari to the Utah Court of Appeals

WILLIAM M. HAINS (13724)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180
Email: whains@agutah.gov

Counsel for Petitioner

FREYJA JOHNSON
EMILY ADAMS
MELISSA JO TOWNSEND
The Appellate Group
P.O. Box 1564
Bountiful, Utah 84054

Counsel for Respondent

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Pursuant to appellate rule 24, the State submits this brief in reply to new matters raised in the respondent's brief. The State does not respond to matters that are adequately refuted by the State's opening brief.

ARGUMENT

I.

As this Court has repeatedly recognized, the state of the law is integral to the reasonableness of counsel's performance.

At Brevan Bringhurst Baugh's trial on two counts of aggravated sexual abuse of a child, his daughter Sasha[1] described three instances of sexual abuse, any one of which would have been sufficient to support the single count on which the jury convicted. The jury was instructed that its verdict

[1] A pseudonym.

had to be unanimous, but it was not given a more specific unanimity instruction explicitly telling the jury it must agree on the criminal act or acts underlying any conviction.

The court of appeals held that Baugh's trial counsel was ineffective "for failing to ensure the jury received proper instruction regarding unanimity," either by requesting a more specific unanimity instruction or requesting a special verdict form allowing the jury to identify which criminal act or acts they agreed Baugh committed. *State v. Baugh*, 2022 UT App 3, ¶1, 13, 504 P.3d 171. Key to the court's reasoning was its conclusion here and in *State v. Alires*, 2019 UT App 206, 455 P.3d 636, that under this Court's cases, the law on unanimity "was well enough established" that not requesting such instructions was unreasonable. *Baugh*, 2022 UT App 3, ¶14 n.3.

The State argued in its opening brief that the court of appeals' deficient-performance analysis was fatally flawed because it overlooked this Court's conflicting and confusing cases on how a jury must be instructed on unanimity. Br.Pet.18-27. And in light of that case law, competent counsel could have reasonably decided that a general unanimity instruction was adequate to fairly instruct the jury on the applicable law. Br.Pet.28-33.

In his response, Baugh wholly ignores this Court's cases directly addressing the question of whether a general unanimity instruction is

adequate. Instead, he argues that "unlike with plain error, a defendant is not required to show the law is clearly established to demonstrate his counsel performed unreasonably." Br.Resp.26. As a result, he says, the state of the law on the very issue governing counsel's actions—how the jury had to be instructed on unanimity—is "beside the point." Br.Resp.26. For support, he cites this Court's decision in *State v. Silva*, 2019 UT 36, 456 P.3d 718.

Baugh stretches *Silva* further than it and this Court's subsequent cases will support. *Silva* repudiated prior cases "*limiting* … review of an attorney's performance to the law in effect at the time of trial." *Id.* ¶20 (emphasis added). It explained that under United States Supreme Court precedent, counsel is not "categorically excused from failure to raise an argument not supported by existing legal precedent." *Id.* ¶21. Counsel's performance is not judged "*only* on settled law." *Id.* ¶19 (emphasis added). In other words, *Silva* rejected a per se rule that counsel can never be deficient for not advancing an argument unsupported by current precedent.

But this case involves a very different legal landscape than one where the argument counsel did not raise was unsupported by existing legal precedent. It is not, as Baugh suggests, a case where "an appellate court has not yet issued an opinion" "dictating … the precise manner in which a jury must be instructed regarding unanimity." Br.Resp.27-28. Rather, this Court

has issued several decisions on that very question. The problem is, those cases hopelessly conflict. Because the opinions are deeply fractured, determining a holding in each case is no easy task. And divining a controlling rule from the morass of cases is even harder. As the State demonstrated in is opening brief, competent counsel could reasonably find support in the Court's cases for the proposition that a general unanimity instruction fairly instructed the jury on the need to agree on the specific criminal act underlying any conviction. Br.Pet.22-30. And if competent counsel could reasonably think the instructions were adequate to "'fairly instruct the jury on the law applicable to the case,'" counsel acted reasonably in not requesting additional instructions. *See State v. Maestas*, 2012 UT 46, ¶148, 299 P.3d 892.[2]

[2] Baugh points to cases from other jurisdictions in support of the *Alires* rule. Br.Resp.19-20 n.5. Most jurisdictions appear to follow "the 'either/or' rule," like *Alires*. *Baker v. State*, 948 N.E.2d 1169, 1176 (Ind. 2011). But several take a more nuanced approach: "In the routine case, a general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, *even where an indictment alleges numerous factual bases for criminal liability*." *E.g.*, *United States v. Beros*, 833 F.2d 455, 460 (3d Cir. 1987) (emphasis added). In those jurisdictions, more specific instructions are required only "where the complexity of the case, or other factors, creates the potential that the jury will be confused." *Id.* Alleging multiple criminal acts does not necessarily create the potential for such confusion. *See United States v. Schiff*, 801 F.2d 108, 114-15 (2d Cir. 1986) (no confusion where multiple acts were "closely interrelated and carried out by a single individual"). But as argued in the State's opening brief, the Court should save the question of what the proper approach should be for a case where that issue is preserved. Br.Pet.33 n.4.

But even if the state of the law alone were not enough here, that does not mean it is "beside the point." Br.Resp.26. Quite the contrary. Since deciding *Silva*, the Court has reiterated that counsel's performance is judged in light of the "'law available to counsel at the time of the representation.'" *State v. Gallegos*, 2020 UT 19, ¶35, 463 P.3d 641. And it recently applied that framework to reject a claim that counsel was deficient for not advancing a novel legal argument, basing its decision in part on the lack of "a published case that dictated the interpretation [counsel] advocated." *State v. Carter*, 2023 UT 18, ¶47, --- P.3d ---. In other words, the lack of supporting authority is not the only consideration in such cases, but it is an integral one.[3]

The unique state of the law here should be enough to demonstrate the reasonableness of counsel's decision to rely only on the general unanimity instruction. But the State has not relied solely on the state of the law. In addition to explaining why, in light of this Court's conflicting cases, it would have been reasonable for a competent attorney to think the general unanimity instruction fairly instructed the jury, the State explained why not requesting a more specific unanimity instruction was supported by common sense and a reasonable conclusion that the instructions created little risk of confusion

[3] *Carter* was issued the day after Baugh filed his brief.

on the question of unanimity. Br.Pet.28-33. Looking at the totality of the circumstances "from counsel's perspective at the time"—including but not limited to the legal landscape—it was reasonable for counsel to forgo a more specific unanimity instruction and the court of appeals' conclusion to the contrary was erroneous. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984).

II.

The court of appeals' prejudice analysis conflicts with United States Supreme Court precedent, this Court's precedent, and its own precedent.

The State also argued that the court of appeals erred in its prejudice analysis, abandoning *Strickland*'s counterfactual analysis and ignoring decisions from this Court and the court of appeals acknowledging that only slight risk of confusion arises from a general unanimity instruction. Br.Pet.34-58. Baugh fails to distinguish the conflicting precedent.

A. The *Grunwald* test skips a counterfactual analysis and should be disavowed.

The State argued in its opening brief that the court of appeals followed this Court's prejudice analysis in *State v. Grunwald*, 2020 UT 40, 478 P.3d 1, and asked the Court to overturn *Grunwald* because it conflicts with *Strickland*'s requirement of a counterfactual prejudice analysis. Br.Pet.39-49. The State argued that in *Grunwald*, the Court departed from *Strickland*'s requirement of a counterfactual test by adopting a two-part prejudice test that

focused exclusively on the likelihood that the jury's actual verdict was affected by instructional error. Br.Pet.46-47; *see also Grunwald*, 2020 UT 40, ¶22.

Baugh says the court of appeals "did not rely on *Grunwald*" because it did not cite *Grunwald*. Br.Resp.33 n.9. But after laying out *Grunwald*'s prejudice test, Baugh admits "the court of appeals applied these principles." Br.Resp.33-34, 36-37. Baugh offers only a limited defense of *Grunwald*, arguing that it faithfully applies "*Strickland*'s counterfactual prejudice mandate." Br.Resp.34 n.9. He makes no other response to the State's argument that overruling *Grunwald* is consistent with principles of *stare decisis*.

Baugh never explains how *Grunwald*'s test amounts to a counterfactual analysis. Instead, he merely repeats the *Grunwald* test. Br.Resp.33-34 n.9. But there is nothing counterfactual about the *Grunwald* test.

For ineffective-assistance claims involving alleged instructional error, *Grunwald* requires courts to first ask, "did the error in the jury instructions create the possibility that the jury convicted the defendant based on factual findings that would not have led to conviction had the instructions been correct[?]" *Grunwald*, 2020 UT 40, ¶22. The Court said that prong is counterfactual because it focuses on "findings that would not have led to

conviction had the instructions been correct." *Id.* ¶22 n.22 (emphasis omitted). But all that requires a court to ask is whether the instruction created the possibility that the jury actually convicted on *an impermissible basis*—a finding that correct instructions would have foreclosed. Stated in terms of unanimity, step one of the *Grunwald* test asks only whether the jury instructions created the possibility that the jury was not, in fact unanimous—that the jury convicted without reaching agreement as to the criminal act because the instructions did not explicitly tell the jury that doing so was impermissible.

The court of appeals complied with the first step of the *Grunwald* analysis when it concluded, "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." *Baugh*, 2022 UT App 3, ¶21. But, consistent with the first step of the *Grunwald* test, that conclusion does not answer the question *Strickland* requires the court to answer: whether "the defendant has met the burden of showing that the decision reached would reasonably likely have been different *absent the errors*." *Strickland*, 466 U.S. at 696 (emphasis added).

The second step of the *Grunwald* test is no more counterfactual than the first. Rather, it requires courts to ask, "is there a reasonable probability that

at least one juror based its verdict on those factual findings"—i.e., whether there is a reasonable probability that the jury convicted on an impermissible basis. *Grunwald*, 2020 UT 40, ¶22. In terms of unanimity, it asks whether there is a reasonable probability that the jury was not, in fact, unanimous. The difference between the first and second steps of the *Grunwald* test is merely one of degree—first considering the possibility that the verdict was the product of an erroneous instruction, then considering the probability. But both steps focus on the effect of error on the actual verdict, not the likelihood of a different verdict under the hypothetical scenario where no error occurred.

The court of appeals complied with the second step of the *Grunwald* test when it concluded (albeit incorrectly) that the lack of a clear election "creates a reasonable probability that the jurors did not agree on which act of alleged abuse supported each count." *Baugh*, 2022 UT App 3, ¶21. As explained in the State's opening brief, Br.Pet.40-42, the court never took the only step that ultimately matters under *Strickland* and analyzed whether there was a reasonable probability of a more favorable verdict had a more specific unanimity instruction been given. The *Grunwald* test did not require it to. But *Grunwald* cannot supplant *Strickland*.

Even if the Court believes the *Grunwald* test aids the counterfactual analysis, at most it is a preliminary step in that analysis, focusing exclusively on the historical effect of any instructional error on the actual verdict that was rendered. *Strickland*, 466 U.S. 693-96 (discussing interplay between historical and counterfactual aspects of proper prejudice analysis). The *Grunwald* test does not, by itself, satisfy *Strickland* and the Court should at the very least disavow its statements to the contrary in *Grunwald*.

B. Baugh's attempt to distinguish *Evans* is based on a misreading of the case.

The State argued that the court of appeals' prejudice analysis also conflicted with this Court's recognition in *State v. Evans*, 2001 UT 22, 20 P.3d 888, that omitting a specific unanimity instruction risked only "slight confusion," *id.* ¶17, and that under the facts of the case, that risk was not realized here. Br.Pet.35-37, 54.

In *Evans*, the jury was given only a general unanimity instruction, yet it heard evidence of multiple alternative aggravators for each charge of attempted aggravated murder. 2001 UT 22, ¶¶3-6, 9-10, 15 & n.1; Br.Pet.27. Baugh tries to distinguish *Evans* by arguing that *Evans* did not involve alternative elements on which the jury must agree; rather, he says the dispute in that case involved the "method or means through which [Evans] committed the crime." Br.Resp.40. In contrast, he says, the question here

involves instructing the jury that it had to "agree on *which* crime [Baugh] committed." Br.Resp.40.

Baugh might have a point if *Evans* had actually involved alternative methods or means on which the jury did not have to agree. *See State v. Hummel*, 2017 UT 19, ¶¶2-3, 30, 393 P.3d 314 (distinguishing between alternative elements and alternative methods, means, or theories). But it did not. As Baugh acknowledges, it involved "alternative aggravating elements." Br.Resp.40. And "the aggravating circumstance element of aggravated murder … is subject to the requirement of unanimity." *Hummel*, 2017 UT 19, ¶34 n.11. Even though each alternative aggravator presented in *Evans* would not amount to *additional crimes* if each were proved, each theory of aggravation was essentially a separate crime. *Cf. Alleyne v. United States*, 570 U.S. 99, 116 (2013) (An "aggravating fact … is an element of a distinct and aggravated crime … ."). And because the jury was presented with multiple alternative criminal acts in *Evans*, it is functionally no different than this case. The Court's conclusion that a general unanimity instruction risked only "slight confusion" thus applies with equal force here.

Baugh also tries to distinguish *Evans* on the strength of the evidence in that case. He says the defendant's own testimony in *Evans* "confirmed the

State's charges against him," whereas Baugh's testimony "consistently" and "unequivocally" denied any wrongdoing. Br.Resp.41.

Baugh gets the facts backward. The defendant's testimony in *Evans*, if believed by a jury, could have established that he was justified in his use of force. *Evans*, 2001 UT 22, ¶¶12, 22. But his testimony was unbelievable in part because of the defendant's own statements to others. *Id.* Similarly, when Baugh testified, he denied the allegations. R685. But to call his denials "consistent[]" and "unequivocal[]" ignores the shifting and varied explanations he gave. It ignores his admissions to Sasha that he was "sure" he "did it" and that he was "not going to deny it." R869, 871-72. And it ignores his statements to the police that he was "not going to deny it," that he had "all sorts of stepdaughter fantasies," and that it was "very possible" Sasha happened to be "up against" him when he was "out of it." R908, 912, 915. The jury reached a split verdict both in this case and in *Evans. See Evans*, 2001 UT 22, ¶¶1, 8. Yet, even with a split verdict and conflicting statements from the defendant, *Evans* held that the "slight confusion" that could arise from giving only a general unanimity instruction did not prejudice the defendant. *Id.* ¶17.

The court of appeals' prejudice ruling cannot be squared with *Evans*. Even having "stopped [its] analysis short" of a full counterfactual inquiry,

State v. Garcia, 2017 UT 53, ¶41, 424 P.3d 171, the court should have concluded that Baugh failed to prove prejudice.

C. Baugh also misreads *Kitzmiller*.

The State argued in its opening brief that the court of appeals' opinion also conflicted with that court's earlier decision in *State v. Kitzmiller*, 2021 UT App 87, 493 P.3d 1159, which held that the lack of a specific unanimity instruction was harmless given the general unanimity instruction and correct elements instruction. Br.Pet.35-36. Of course, this Court is not bound by *Kitzmiller*, but that case represents a faithful application of *Evans*—one the court of appeals should have followed here.

Baugh argues that *Kitzmiller* is "materially distinguishable" because it was decided based on a prosecutorial election. Br.Resp.44-45. Again, Baugh misreads the decision. While *Kitzmiller* mentioned the prosecutorial election as a basis to reject the defendant's claims, *Kitzmiller*, 2021 UT App 87, ¶¶22-23, the court did not stop its analysis there. Kitzmiller argued that the election was inadequate on one of the three challenged counts because for that one count, the State had to prove the defendant caused two or more injuries but presented evidence of half a dozen injuries. *Id.* ¶24. The court rejected that argument not because it believed the election was adequate. Rather, the court believed it was "unlikely that the jury thought it did not have to agree on

which 'two or more injuries' supported the charge," given the correct elements instruction and the fact that the jury "was generally instructed that 'every single juror must agree with the verdict.'" *Id.* ¶25.

The court of appeals should have followed the same logic here. Even if all competent counsel would have requested a more specific unanimity instruction, it is unlikely that a jury would have thought it could agree on a verdict by disagreeing on the criminal act it believed Baugh committed. And as explained in the State's opening brief, nothing in the record suggests a jury would have been unable to agree on at least one criminal act if only it had received a more specific unanimity instruction. Br.Pet.54-58.

CONCLUSION

For the foregoing reasons and those specified in the State's opening brief, this Court should reverse the judgment of the court of appeals and remand so the court may consider Baugh's remaining claims.

Date October 11, 2023.

SEAN D. REYES
Utah Attorney General

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

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24, Utah R. App. P., this reply brief contains 14 pages, 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 October 11, 2023, the Reply Brief of Petitioner was filed with the Court by email in a searchable PDF attachment and served upon respondent Brevan Bringhurst Baugh's counsel of record at:

Freyja Johnson
Emily Adams
Melissa Jo Townsend
The Appellate Group
fjohnson@theappellategroup.com

/s/ *Melanie Kendrick*

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