Paul Cassell (6078)
Utah Victims Project
S.J. Quinney College of Law
at the University of Utah
383 S. University St.
Salt Lake City, UT 84112
Telephone: (801) 585-5202
pgcassell.law@gmail.com
(no institutional endorsement implied)

Heidi Nestel (7948)
Utah Crime Victims Legal Clinic
3335 South 900 East, Suite 200
Salt Lake City, UT 84106
Telephone: (801) 746-1204
heidi@utahvictimsclinic.org

Counsel for Appellant/Limited-purpose Party/Crime Victim T.T.

IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Appellee, vs. SETH CLARK JOLLEY, Defendant/Appellee. _____ T.T., Appellant/Limited-purpose Party/Crime Victim	**Case No. 20240290-SC** Trial Court No. 221600125

REPLY BRIEF OF T.T.

CURRENT AND FORMER PARTIES

I. Current Parties to the Appeal

All parties to this appeal—i.e., T.T., Seth Clark Jolley, and the State—are listed in the case caption above.

II. Parties to Earlier Proceedings

The same parties were participants in the earlier trial court proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

OTHER AUTHORITIES

REPLY BRIEF OF T.T.

Pursuant to Rule 24(c), Utah Rules of Appellate Procedure, appellant T.T. submits this brief in reply to new matters raised in Defendant's response brief. (The State's response brief supports T.T.)

ARGUMENT

Utah's "rape *shield*" rule provides for a hearing before a rape victim can be forced to testify about her prior sexual history at trial. Defendant seeks to convert a hearing designed to shield rape victims from testifying into one that defendants will frequently employ to force them to testify. Defendant works this transformation by conflating the procedural issue of how the district court should conduct the hearing with the substantive issue of how the district court should ultimately rule. The rape shield rule's text and structure make clear that the district court is required to make its admissibility ruling without in-person testimony from a rape victim. Utah R. Evid. 412(c)(1) provides that, at the hearing, the district court "must … give the victim and parties a right to attend and be heard." A "right" to attend is not a license for defendants to force rape victims to attend and question them. Thus, based on Rule 412, this Court should reverse the district court's decision below.

This Court should also reverse the district court based on T.T.'s state constitutional rights under Utah's Victims' Rights Amendment, Utah Const. art. I,

§ 28(1)(a). This Court has called on litigants to help develop state constitutional law surrounding individual rights. T.T. has answered that call in an area—crime victims' rights—where additional judicial opinions would be helpful. And, in addition, the Legislature has directed that "[a]n appellate court shall review all properly presented issues" concerning adverse rulings on victims' rights claims. Utah Code § 77-38-11(c). T.T. has properly presented her state constitutional claims, and this Court should address them.

Compelling T.T. to attend and testify at a rape shield hearing for no good reason violates T.T.'s state constitutional right to be free from "harassment and abuse," as well as denying her state constitutional right to be treated with "fairness, respect, and dignity." *Id.* The Court should reverse on these grounds as well.

I. T.T. IS ENTITLED TO PURSUE APPELLATE PROTECTION OF HER RIGHTS AT A RAPE SHIELD HEARING.

Both Defendant and the State agree with T.T. that she can appeal the denial of her motion to quash a subpoena directed to her. T.T. Br. at 12-14. Her motion below asserted important and personal rights under Rule 412 and the state constitution, and she is entitled to seek protection of those rights through an interlocutory appeal. At the outset of its ruling, this Court should note this important jurisdictional point.

Rape victims already face considerable uncertainty about how their rights will be protected in the criminal justice system. Indeed, Utah's rape shield rule was adopted "to ensure that sexual assault victims are not 'deterred … from participating in prosecutions because of the fear of unwarranted inquiries into [their] sexual behavior.'" *State v. Tarrats*, 2005 UT 50, ¶ 20, 122 P.3d 581 (quoting Utah R. Evid. 412 Adv. Comm. Note). This Court should lay to rest any uncertainty and specifically hold that rape victims are entitled to pursue an appeal challenging rape shield rulings like the one below rejecting a victim's assertion of state constitutional and other rights.

II. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT RAPE VICTIMS CAN BE COMPELLED TO TESTIFY AT A RAPE SHIELD HEARING.

In her opening brief, T.T. explained that the district court inappropriately converted a rule giving victims "a right" to attend and be heard at a rape shield hearing into one where they are forced to attend and testify about sensitive subjects whose admissibility has yet to be decided. T.T. Br. at 14-21 (citing Utah R. Evid. 412(c)(3) (emphasis added)).

In response, the State agreed with T.T. that she should not be forced to testify at the rape shield hearing. As the State explains, such a hearing "serves a limited purpose to 'provide[] the victim with a final opportunity to be heard prior to

having his or her sexual history discussed in open court.'" State Br. at 14-15 (quoting *State v. Quinonez-Gaiton*, 2002 UT App 273, ¶12, 54 P.3d 139).

In his response, Defendant argues that the rape shield rule allows him to subpoena T.T. and force her to testify. Def. Br. at 16-21. But his argument conflates his contention that her testimony will ultimately be admissible at trial with the pre-trial procedures for the trial court to rule on admissibility. Defendant argues that T.T.'s testimony about prior sexual behavior with him will be admitted. *See* Def. Br. at 17-18 (citing Utah R. Evid. 412(b)(2) (allowing a court to potentially admit evidence involving "specific instances of a victim's sexual behavior with [a defendant] … if offered to prove consent"). But in skipping over the procedural issue to the ultimate outcome, the Defendant misses the point of T.T.'s appeal. T.T. is not seeking review of whether her testimony about her prior sexual behavior with Defendant will ultimately be admitted. *See* T.T. Br. at 25 n.10 ("Because the district court has not ruled on the admissibility of the prior sexual history evidence, T.T. is not asking this Court to review that issue in the first instance."). Instead, the only issue she presents is whether Defendant can force her to testify at the rape shield hearing.

In seeking to force T.T. to testify before the trial, Defendant is, of course, departing from the standard procedures in criminal cases. Victims of robbery, larceny, and other crimes are not required to testify in advance of trial about

whether their testimony is admissible.[1] It would be odd to read the evidence rules to force rape victims to testify about sensitive sexual topics before trial when victims of other crimes are not.

Nothing in the rape shield rule's text suggests such a strange result. Utah Rule 412 contains several subsections. Rule 412(a) provides that evidence showing a victim's prior sexual behavior or predisposition is generally inadmissible. Then, Rule 412(b) lists several exceptions, including admissibility to prove consent in certain limited situations. And, finally, Rule 412(c) provides for a hearing "[i]f a party intends to offer evidence under Rule 412(b) …." Utah R. Evid. 412(c)(1). At this hearing, the district court "must … give the victim and parties *a right* to attend and be heard." *Id.* (emphasis added)*; see also* Rule 412, Adv. Comm. Note (before admitting prior sexual history testimony under an exception, the trial court "must hold a hearing in camera at which the alleged victim must be afforded *the right to be present* and an o*pportunity to be heard*" (emphases added).

[1] Rape law reformers have long noted other peculiarities in rape law that have treated rape victims differently from victims of other crimes. *See, e.g.,* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom,* 77 COLUM. L. REV. 1, 8 (1977) ("By contrast, in a crime like robbery, also a nonconsensual and forcible version of an ordinary human interaction, the law imposes no special burden of [physical] opposition." (internal quotation omitted)); SUSAN ESTRICH, REAL RAPE 29, 40-41(1987) ("Rape is unique … in the definition that has been given to nonconsent--one that has required victims of rape, unlike victims of any other crime, to demonstrate their 'wishes' through physical resistance.").

As this structure makes clear, the hearing gives rape victims the "right" and "opportunity" to attend and be heard. And the *only time* a district court will hold a rape shield hearing is when the admissibility of testimony under one of the rule's exceptions is at issue. As the proponent of admitting evidence under an exception, a defendant must shoulder the burden of explaining why a victim's testimony at trial fits within an exception, such as the consent exception. Under Rule 412(c)(1)(A), the defense must file a motion that "specifically describes the evidence and states the purpose for which it is to be offered …." Utah R. Evid. 412(c)(1)(A). It may be "counterintuitive to protect alleged victims' privacy interests by requiring defendants to provide sufficient information to permit the court to weigh the probative value of the sexual history, but that is what the rule requires." *State v. Bravo*, 2015 UT App 17, ¶ 27 n.6, 343 P.3d 306.

Here, Defendant made a proffer which, he claimed, demonstrated that T.T.'s testimony about her prior sexual history would be admissible at trial. The district court should have decided this issue based on that description and related arguments—rather than forcing T.T. to take the stand and testify. Of course, Defendant has access to that information about *his* interactions with T.T. As the State observes, to the extent that his proffer was somehow lacking, Defendant "has only himself to blame." State Br. at 23.

Both T.T. and the State explained in their earlier briefs that Defendant is impermissibly attempting to use the rape shield hearing to expand his proffer—i.e., for discovery purposes. In *State v. Blake*, this Court held that the purpose of a Rule 412 hearing is not "to attempt discovery of evidence." 2002 UT 113, ¶ 7, 63 P.3d 56. *Blake*, therefore, affirmed a trial court's denial of a Rule 412 hearing where the defendant's "stated purpose in requesting [the] 412 hearing [was] to question [the] alleged victim." *Id.* (internal quotation omitted). The "plain language of rule 412 … provides for a hearing 'only if the court sees the applicability of one of the limited exceptions and intends to admit such evidence.'" *Id.* (*quoting State v. Quinonez-Gaiton*, 2002 UT App 273, ¶12, 54 P.3d 139). In general, "[s]uch a hearing provides the victim with a final opportunity to be heard prior to having his or her sexual history discussed in open court." *Quinonez-Gaiton*, 2002 UT App 273, ¶12.

Both T.T. and the State repeatedly cited *Blake* (and the related Court of Appeals decision in *Quinonez-Gaiton*). *See, e.g.,* T.T. Br. at 2, 17, 18 (citing *Blake* and *Quinonez-Gaiton*); State Br. at 10, 11, 12, 13, 14, 20, 21 (citing *Blake* and *Quinonez-Gaiton*). In response, Defendant offers … nothing. He fails to cite *Blake*. Nor does he cite *Quinonez-Gaiton*. He also fails to even allude to T.T.'s and State's repeatedly stated positions that he is seeking to use the rape shield hearing for discovery purposes. Thus, this Court can straightforwardly resolve this case through an undisputed application of *Blake*. *Blake* holds that a defendant cannot use the rape

shield hearing for discovery purposes. That is exactly what Defendant is trying to do here. Thus, based on *Blake*, this Court should reverse and remand with directions to the district court that it rule on admissibility without further discovery into T.T.'s prior sexual history.

Defendant relies primarily on *State v. Richardson*, 2013 UT 50, 308 P.3d 526. But that case involved this Court's review of a trial court ruling excluding prior sexual history evidence at trial. *Id.*, ¶ 18. This Court reversed the trial court's decision that the evidence at issue was not relevant. *Id.*, ¶ 32 (reversing because of the trial court's "misunderstanding of our relevance rules"). Thus, *Richardson* sheds no light on the procedural question T.T. presents here about how to conduct a rape shield hearing. Indeed, *Richardson* itself appears to presuppose that trial courts will make admissibility rulings based on a proffer. *See id.*, ¶ 17 (noting trial court's ruling based on "the proffered testimony"); ¶ 21 (discussing the "sexual history evidence proffered by" the defendant); ¶¶ 29, 30, 31 (reversing trial court ruling excluding the "proffered evidence").

While failing to contest the central procedural issue here, Defendant does dispute whether a "presumption of inadmissibility" is in play in a rape shield hearing. Def. Br. at 16-17. Defendant acknowledges this Court's long-settled holding that "a presumption of inadmissibility" applies when considering whether to admit testimony "of a rape victim's past sexual conduct." *State v. Boyd*,

2001 UT 30, ¶ 41, 25 P.3d 985; *accord State v. Beverly*, 2018 UT 60, ¶ 56 n.58, 435 P.3d 160 (quoting *Boyd* and applying "a presumption of inadmissibility").[2] But Defendant seems to believe that this presumption of inadmissibility somehow disappears in the face of his mere allegation of admissibility under one of Rule 412's exceptions.

But the presumption of inadmissibility is not so weak that it disappears in the face of a defendant's mere contrary assertion. If Defendant's position were true, then the presumption would *always* disappear because defendants will only contest issues in a rape shield hearing when an exception is at issue.

This Court's previous decisions prove that the presumption of inadmissibility survives a defendant's argument that one of Rule 412's exceptions is in play. In *Boyd,* for example, the defendant argued that a rape victim's prior sexual behavior was admissible to show consent. 2001 UT 30, ¶¶ 41-42. And this Court affirmed the district court's determination that "the probative value of the evidence did not outweigh its inherent prejudicial value." *Id.*, ¶ 43. Similarly, in *Beverly*, the defendant argued that prior sexual behavior was a source of injuries attributed to him, an exception under Rule 412(b)(1). 2018 UT 60, ¶¶ 56-59. This Court affirmed the district court's exclusion of the proposed testimony,

[2] These holdings stem from the "unique evidentiary problems" that evidence of a victim's prior sexual conduct presents. *See* Rule 412, Adv. Comm. Note (citing *State v. Johns*, 615 P.2d 1260, 12645 (Utah 1980)).

specifically relying on the presumption explained in *Boyd.* This Court in *Beverly* observed that "we presume a rape victim's past sexual conduct is inadmissible." *Beverly*, 2018 UT 60, ¶ 56 & n.58 (citing *Boyd*). Thus, *Boyd* and *Beverly* both applied a presumption of inadmissibility in cases where a defendant was alleging that prior sexual history was admissible.

Ultimately, Defendant advances a strange position. Defendant acknowledges that Utah's rape shield rule was adopted "to ensure that sexual assault victims are not 'deterred … from participating in prosecutions because of the fear of unwarranted inquiries into [their] sexual behavior.'" *State v. Tarrats*, 2005 UT 50, ¶ 20 (quoting Utah R. Evid. 412 Adv. Comm. Note). But Defendant seeks to convert a rule designed to *shield* victims from intrusive inquiries into sexual behavior into one that forces such inquiries. Nothing in the text of the rule suggests this bizarre result. Indeed, as T.T. pointed out in her opening brief (without response from Defendant), when the Court's rules allow a defendant to call witnesses, they specifically so provide. *See* T.T. Br. at 16 (citing Utah R. Crim. P. 7(i) (providing that in a preliminary hearing, a defendant may "call witnesses")).

Defendant also fails to respond to T.T.'s argument that the federal rape shield rule was altered to strip out any right of a judge to hear testimony at the rape shield hearing. *See* T.T. Br. at 16 n.5. As the Advisory Committee Note to the 1994 Amendment to Fed. R. 412(c) explains, the federal rule originally contained a

provision allowing a judge to hold an in-chambers hearing and to "accept evidence on the issue of whether such condition of fact is fulfilled" to justify admission of prior sexual history evidence. That language was later deleted from the federal rule. T.T. Br. at 16 n.5. Because Utah Rule 412 is patterned on Federal Rule 412, *Tarrats*, 2005 UT 50, ¶ 20, this deletion is also instructive in interpreting the state rule.

The district court fleetingly acknowledged what is obvious—that "there is an imposition to the alleged victim" in forcing her to testify about prior sexual behavior. R. 348. The district court thought that this "imposition" was "why 412 hearings are intended to be in-camera …." R. 348. But when a rape victim is forced to recount details of her sexual interactions with an accused rapist, even an in-camera hearing is no mere "imposition." *See generally* DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS 99-129 (2021) (reviewing how the criminal justice system shames rape victims and causes self-doubt); ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 81-99(1999) (reviewing the harmful effects of defense questioning on rape victims).

Here, acting through legal counsel, Defendant intends to question T.T. about such sensitive issues as whether she "performed oral sex on him," "invited him to have sex with her by opening her legs while completely undressed and pulling him on top of her," and "moaned during sexual activity" with him. Def.

Br. at 11.[3] Being compelled to testify about such sensitive subjects is likely to lead to retraumatization. *See* Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81 (2020) (discussing the "retraumatization" of victims in the courtroom); *see also* Laura Niemi, *Victim Blaming in the Case of Sexual Assault*, in THE SAGE ENCYCLOPEDIA OF PSYCHOLOGY AND GENDER, 1756–57 (Kevin L. Nadal ed., 2017). Indeed, for some rape victims, the experience of being compelled to recount their sexual history is akin to a "second rape." *See* Rebecca Campbell et al., *Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239, 1250 (2001); *see also* Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence*, 14 VIOLENCE & VICTIMS 261, 267 (1999); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC.

[3] In this case, Defendant is represented by legal counsel. But if the Court approves Defendant's strategy here, in other cases the accused rapist himself could call a rape victim to testify at a rape shield hearing and personally question her about his previous sexual history with her. *See* Tyler C. Carlton, *A Balancing Act: Providing the Proper Balance Between a Child Sexual Abuse Victim's Rights and the Right to Personal Cross-Examination in Arizona*, 49 ARIZ. ST. L.J. 1453, 1453 (2018) (providing examples of such tactics); *see also* Jennifer Sullivan, *Rape Victim's Threat to Jump Off Courthouse Roof May Derail Case*, SEATTLE TIMES (Nov. 4, 2010) (a twenty-one-year-old woman, who was sexually abused as a toddler, attempted to commit suicide by jumping off the courthouse roof when the defendant sought to personally cross-examine her), available at http://www.seattletimes.com/seattle-news/rapevictims-threat-to-jump-off-courthouse-roof-may-derail-case/. *Cf. State v. Pedockie*, 2006 UT 28, ¶ 26, 137 P.3d 716 (discussing defendant's right to self-representation).

JUST. RES. 313, 316 (2002) (citing Tracy Bennett Herbert & Christine Dunkel Schetter, *Negative Social Reactions to Victims: An Overview of Responses and Their Determinants*, in LIFE CRISES AND EXPERIENCE OF LOSS IN ADULTHOOD 497–518 (Leo Montada et al. eds., 1992)).[4]

In reasoning that Rule 412 does "not give an alleged victim a right to refuse to testify … [or] provide a basis to quash a subpoena" (R. 348), the district court had things backward. As the rule's structure makes clear, the victim is not obligated to provide pre-trial testimony to help a defendant prove his position. It is the defendant who must provide a sufficient proffer for a pre-trial ruling on admitting the testimony. This Court should reverse the district court because it fundamentally misunderstood that Utah's rape shield rule operates to protect rape victims, not harm them.

[4] Compelled testimony from rape victims can also force difficult choices about how the victims should protect themselves. One study of sexual assault victims found that victims are more likely to experience traumatizing attitudes by those around them if they present against the gendered stereotype of a hysterical crying victim—a phenomenon the researchers termed "demeanor bias." Frans Willem Winkel & Leendert Koppelaar, *Rape Victims' Style of Self-Presentation and Secondary Victimization by the Environment: An Experiment*, 6 J. INTERPERSONAL VIOLENCE 29, 35 (1991).

III. IN FORCING T.T. TO TESTIFY AT THE RAPE SHIELD HEARING, THE DISTRICT COURT IGNORED HER STATE CONSTITUTIONAL RIGHTS

This Court should also reverse the district court on state constitutional grounds.

A. The Court Should Reach T.T.'s State Constitutional Arguments.

1. The Court Should Explicate Fundamental Rights Provided in Utah's Victims' Rights Amendment to Help Develop a Body of Victims' Rights Law.

This Court should reverse the decision below based on both the rules of evidence *and* T.T.'s state constitutional rights. T.T. is aware that in some situations, federal courts prefer to resolve controversies on non-constitutional grounds where possible. *See Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)). *But see* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE J.L. 71 (1984) (criticizing this approach). But this prudential preference should not woodenly apply to this case involving the Utah Constitution. It is difficult to locate a clear example of this Court using this preference for non-constitutional grounds to avoid interpreting fundamental rights in the Utah Constitution.[5] Indeed, this Court has cautioned that, for

[5] A separate issue arises under what is called the canon of constitutional avoidance, where this Court will interpret a statute to avoid raising grave doubts as to its constitutionality in order to best determine legislative intent. *See, e.g., Utah*

example, avoiding a state constitutional due process issue through a rules-based decision would be "ill advised" because it could "prospectively render much procedural due process in [Utah] a dead letter." *State v. DeJesus*, 2017 UT 22, ¶ 33, 395 P.3d 111. This Court has also observed that avoiding constitutional interpretation by relying just on court rules could ultimately "be subject to constitutional challenge on the ground that [the rule] provide[s] less protection than constitutionally mandated." *Id.*, ¶ 33 n.48.

In other cases, this Court has reached state constitutional arguments where doing so would "serve to clarify the state of the law in this area." *Am. Bush v. City of So. Salt Lake*, 2006 UT 40, ¶ 7, 140 P.3d 1235. Indeed, this Court has even invited litigants (particularly criminal defendants) to raise state constitutional arguments to help develop a body of state constitutional law. *See State v. Earl*, 716 P.2d 803, 806 (Utah 1986) ("It is imperative that Utah lawyers brief this Court on relevant state constitutional questions."). As this Court recently explained, "[w]e continue to encourage parties to press state constitutional claims to further develop these important principles" regarding the "interplay between federal and state protections of individual rights." *State v. Tran*, 2024 UT 7, ¶ 44 n.3.

Dept. of Transp. v. Carlson, 2014 UT 24, ¶ 23. That canon is inapplicable here, as the constitutionality of a statute is not in doubt.

Interpreting the state constitutional rights at issue here is even more important than in the other cases where this Court has encouraged litigants to present such rights. Utah's Victims' Rights Amendment lacks a federal analog. *Cf. State v. Tran*, 2024 UT 7, ¶ 20, 545 P.3d 248 (discussing whether to interpret federal or state constitutional issues first). If the Court declines to reach T.T.'s state constitutional claims, it will leave a void in the law regarding the applicable state constitutional protections for rape victims at rape shield hearings. This Court has emphasized its "call . . . for litigants to participate in the development of state constitutional principles." *State v. Tran*, 2024 UT 7, ¶ 44 n.3, 545 P.3d 248 (citing *State v. Tiedemann*, 2007 UT 49, ¶ 38, 162 P.3d 1106). Utah's Victims' Rights Amendment has been part of this State's organic law for nearly three decades now. Yet few judicial decisions exist regarding how courts should apply the Amendment's provisions—particularly the open-ended provisions at issue here.[6]

This case presents an important opportunity for this Court to clarify the state constitutional law in the area. Unlike criminal defendants, many crime victims—and rape victims in particular—are unrepresented by legal counsel. *See generally*

[6] Lack of judicial interpretation of open-ended crime victims' rights provisions appears to be a general problem throughout the country. *See* Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 127 (2020) (discussing need for development of Florida's state victims' rights provision protecting "fairness" and "respect for the victim's dignity").

Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67 (2015). As a practical matter, then, crime victims are often unable to pursue appellate litigation involving state constitutional issues. Here, T.T.'s pro bono legal counsel had answered this Court's call and properly appealed important state constitutional issues. This Court should address those issues to fulfill its role as "the ultimate and final arbiter of the meaning of the provisions in the Utah Declaration of Rights and the primary protector of individual liberties." *Brigham City v. Stuart*, 2005 UT 13, ¶ 13, 122 P.3d 506 (quoting *State v. Anderson*, 910 P.2d 1229, 1240 (Stewart, J., concurring)).

2. The Legislature Has Directed That Appellate Courts Should Reach All Properly-Presented Crime Victims' Rights Issues.

An additional reason exists for this Court to address T.T.'s state constitutional claims: The Legislature has required this Court to address them. Presumably recognizing the difficulties for victims to effectively litigate their rights, the Utah Legislature has crafted a special rule for crime victims' rights cases that promotes appellate courts developing victims' rights caselaw. In Utah Code § 77-38-11(c), the Legislature has directed that "[a]n appellate court shall review all properly presented issues" concerning adverse rulings on victims' rights claims. This statute implements the legislative design that Utah "appellate courts" will become "'the court of victims['] rights enforcement. Where an issue has been

identified as substantive, the appellate courts would have the oversight authority.'" Paul G. Cassell, *Balancing the Scale of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment,* 1994 UTAH L. REV. 1373, 1420 n.236 (quoting *Statutory Provisions on Victims' Rights: Hearings on S.B. 156 Before the Senate Judiciary Comm.*, 50th Utah Leg., Gen. Sess. (Feb. 11, 1994) (statement of Sen. Craig A. Peterson, sponsor of the implementing statute to the Utah Victims' Rights Amendment) (Sen. Recording B)).

Here, T.T. pressed her state constitutional arguments in the district court. *See* T.T. Br. at 3-4 (describing T.T.'s preservation of the state constitutional issues). Having lost below, she now has properly presented them to this "appellate court." *See* T.T. Br. at 21-25 (advancing state constitutional arguments). Both the State and Defendant concede that T.T. has properly presented issues regarding her state constitutional rights in rape shield hearings. *See* State Br. at 2 (joining T.T.'s state constitutional arguments); Def. Br. at 21-23 (arguing against T.T.'s state constitutional claims). Thus, the issue is now fully briefed and ripe for review by this Court. This Court should rule on T.T.'s state constitutional issues and reverse the district court for its failure to protect T.T.'s state constitutional rights.

B. T.T. Possesses State Constitutional Rights Not to Testify at the Rape Shield Hearing.

In her opening brief, T.T. argued that the district court not only misinterpreted the rape shield rule but also that it failed to protect her state

constitutional rights. *See* T.T. Br. at 21-25 (citing Utah Const., art. I, § 28(a)(1)). T.T. specifically explained that, in forcing her to testify, the district court violated her state constitutional rights to be "free from harassment and abuse" and her rights to be "treated with fairness, respect, and dignity." T.T. Br. at 22-25 (citing Utah Const. art. I, § 28(a)(1)).

In response, the State agrees with T.T.'s submission that forcing her to testify without any clear reason violated her state constitutional rights. *See* State Br. at 17-19. As the State concludes, "[r]equiring T.T. to testify was unreasonable and violated T.T.'s constitutional rights to fairness and be free from harassment and abuse." State Br. at 19.

In his response, Defendant disputes T.T.'s state constitutional arguments. *See* Def. Br. at 22-23. He claims that the trial court "determined that the *only way* for it to properly exercise its gatekeeping function regarding the admissibility of Defendant's proposed evidence was to actually hear the evidence." Def. Br. at 22 (emphasis added). But the district court failed to specifically consider T.T.'s state constitutional claims. And, even as recharacterized by Defendant's counsel, the district court's ruling contains no finding that T.T. needed to testify in order to permit the court to make its admissibility ruling. Again, the district court's actual ruling was that Rule 412 does "not give an alleged victim a right to refuse to testify … [or] provide a basis to quash a subpoena." R. 348. The district court never said

that the "only way" (Def. Br. at 22) it could make a proper ruling was to force T.T. to recount her prior sexual behavior with Defendant.

Nor could it have made such a finding. In countless trials across this state, trial courts make evidentiary rulings without hearing live testimony from witnesses. Utah's rape shield hearing even goes beyond conventional evidentiary requirements and facilitates a trial court ruling by requiring a defendant to provide a written proffer specifically describing the prior sexual history "evidence and stat[ing] the purpose for which it is to be offered." Utah R. Evid. 412(c)(1)(A). The district court never explained why it was necessary to depart from the normal approach for evidentiary rulings and to force T.T. to testify about sexual subjects. The district court should have ruled based on Defendant's proffer and related presentations from counsel.

Defendant also argues that holding the rape shield hearing in camera minimizes the intrusion into a victim's privacy, citing *State v. Bravo*, 2015 UT App 17, 343 P.3d 306. Def. Br. at 22. But *Bravo* supports T.T.'s position. In *Bravo*, the Court of Appeals stated that we "acknowledge that it is counterintuitive to protect alleged [rape] victims' privacy interests by requiring defendants to provide sufficient information to permit the court to weigh the probative value of the sexual history, but that is what the rule requires." *Id.*, ¶27 n.6. Then, in the next sentence, the Court of Appeals stated that "[t]he intrusion into a victim's privacy

interests is somewhat ameliorated by the confidential nature of a [R]ule 412 hearing, which mandates that allegations of prior sex acts be *contained in sealed motions* and heard only in closed court unless they are ultimately deemed admissible." *Id.* (emphasis added). In referencing "sealed motions," the Court of Appeals was describing the standard Rule 412 procedure of making a ruling based on a defendant's "motion" describing the victim's sexual history rather than in-court testimony from the victim. *See* Utah R. Evid. 412(c)(1)(A).

In one last attempt to find an (unarticulated) basis for the district court's ruling, the defendant tries to wheel out the big gun of *his* constitutional rights. He argues that "[t]he reality is that ours is an adversarial criminal justice system, and Defendant's constitutional rights to present a defense and confront his accuser must prevail." Def. Br. at 22. Of course, T.T. recognizes the reality that a criminal defendant possesses such constitutional rights. But those confrontation rights—under both the federal and state constitutions—apply only *at trial*. *See United States v. Mitchell-Hunter*, 663 F.3d 45, 51 (1st Cir. 2011) (collecting federal cases noting that the federal Confrontation Clause has "historically applied to testimony elicited at, and evidence produced for, trial" and concluding it was unable to find "a single case extending the right to confrontation beyond the context of trial"); *State v. Lopez*, 2020 UT 61, ¶ 45, 474 P.3d 949 (noting that confrontation rights do not extend to preliminary hearings); *State v. Timmerman*, 2009 UT 58, ¶¶ 10-11, 218

P.3d 590 (acknowledging defendant's right to confrontation is a "trial right" and does not apply to preliminary hearings).

While a defendant's confrontation rights apply only at trial, T.T.'s state constitutional rights specifically apply "*throughout* the criminal justice *process*." Utah Const. art. I, § 28(1)(a) (emphasis added). Obviously, a rape shield hearing is one part of the "criminal justice process." The open-ended provisions in section (1)(a) of the Utah Victims' Rights Amendment are not limited to any specific point in the process.

Ultimately, it is Defendant who fails to recognize a new "reality"—that Utah's criminal justice system must now respect the specific rights of crime victims. As this Court has acknowledged, today "crime victims have extensive rights in criminal justice proceedings in Utah." *State v. Lopez*, 2020 UT 61, ¶ 49, 474 P.3d 949. In particular, the "1995 amendment to the Utah Constitution established a right of crime victims '[t]o be treated with fairness, respect, and dignity,' and a right to 'be free from harassment and abuse throughout the criminal justice process.'" *Id.* (citing Utah Const. art. I, § 28(1)(a)). Under the Amendment, "[u]nfair practices that, for example, deny crime victims respect or dignity are unconstitutional under the Amendment." Paul G. Cassell, *Balancing the Scale of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment,* 1994 UTAH L. REV. 1373, 1387 (internal quotation omitted).

While these state constitutional provisions are self-executing, *id.* at 1387 n.68, crime victims' rights are further delineated by statute. Under Utah Code § 77-38-2, the victim's right to "fairness" encompasses the right to be treated "reasonably, even-handedly, and impartially," *id.* § 77-38-2(3); the right to be free from "abuse" is a right to be free from treatment that would "injure, damage, or disparage," *id.* § 77-38-2(1); and the right to be free from "harassment" is the right to be free from being treated "in a persistently annoying manner," *id.* § 77-38-2(4). The Legislature has also specifically placed a favorable rule of construction into the Victims' Rights Act, requiring that "[a]ll of the provisions contained in this chapter shall be construed to assist the victims of crime." Utah Code § 77-38-12(1).[7] Defendant makes no real effort to explain how his subpoena respects T.T.'s constitutional rights.

T.T. possesses state constitutional rights at the rape shield hearing—and allowing Defendant to advance such questioning would "ultimately intrude on the constitutional and statutory rights of [rape] victims." *Lopez*, 202 UT 61, ¶ 51.

[7] The Legislature also indicated its intent to create broadly enforceable rights for victims, by stating that "[i]t is the view of the Legislature that the provisions of this chapter, and other provisions enacted simultaneously with it, are substantive provisions within inherent legislative authority. In the event that any of the provisions of this chapter, and other provisions enacted simultaneously with it, are interpreted to be procedural in nature, the legislature also tends to invoke its power to modify procedural rules under the Utah Constitution." Utah Code § 77-38-13.

Accordingly, this Court should reverse the district court's decision forcing T.T. to testify on state constitutional grounds as well.

CONCLUSION

This Court should reverse the district court's denial of T.T.'s motion to quash the Defendant's subpoena compelling her to testify about prior sexual history at a rape shield hearing.

Respectfully submitted on October 4, 2024.

/s/ Paul G. Cassell
Paul G. Cassell
Utah Victims Project

Heidi Nestel
Utah Crime Victims Legal Clinic

Counsel for Appellant/Limited-purpose Party/Crime Victim T.T.

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24, Utah R. App. P., this reply brief contains 5,735 words, excluding tables, addenda, and certificates of counsel.

I also certify that in compliance with rule 21, Utah R. App. P., this brief, including any 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).

Pursuant to Supreme Court Standing Order No. 11, paper copies will be filed with the Court and served upon counsel of record within 7 days.

/s/ Paul G. Cassell
PAUL G. CASSELL
Counsel for Appellant/Limited-purpose Party/Crime Victim T.T.

CERTIFICATE OF SERVICE

I certify that on October 4, 2024, I electronically filed the foregoing REPLY BRIEF OF APPELLANT with the Clerk of the Court by using the Utah Appellate Court's electronic e-filing system which sent notification of the filing to the following:

Hwa Sung Doucette
Utah Attorney General's Office
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
hdoucette@agutah.gov

Scott N. Weight
Esplin/Weight
290 West Center Street
P.O. Box "L"
Provo, UT 84603-0200
scott@esplinweight.com

*/s/ Paul G. Cassell*_____
Paul G. Cassell
Counsel for Appellant/Limited-purpose Party/Crime Victim T.T.