Paul Cassell (6078)
Utah Appellate 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

OPENING 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.

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INTRODUCTION

This appeal involves an important question regarding the proper operation of Utah's "rape shield" rule, Utah R. Evid. 412. The appeal is brought by T.T.[1] from a district court order denying T.T.'s motion to quash a defense subpoena, which seeks to force her to testify at a rape shield hearing to be held under Utah Rule of Evidence 412. Because Utah's rape shield rule is designed to *prevent* rape victims from being forced to testify about sexual issues, the district court order forcing T.T. to testify should be overturned.

The underlying facts in the criminal case involve a rape charge alleging that fifteen-year-old T.T. was too intoxicated to consent to intercourse—intercourse Defendant concedes occurred. But Defendant seeks to force T.T. to be questioned by defense counsel at a rape shield hearing about her prior sexual behavior. The district court held that Defendant had made a sufficient "threshold" showing to force T.T. to testify at the rape shield hearing—but did not find specifically that the sexual behavior evidence was admissible at trial. This ruling stands Rule 412 on its head, converting it from a rule designed to protect victims from being examined about their presumptively inadmissible prior sexual history into a rule that requires such questioning. This Court has repeatedly held that a rape victim's

[1] As an alleged victim of rape, T.T. proceeds by way of pseudonym (as she has in the district court), through legal counsel.

prior sexual history is protected by "a presumption of inadmissibility," *State v. Beverly*, 2018 UT 60, ¶56 n.58, 435 P.3d 160 (quoting *State v. Boyd*, 2001 UT 30, ¶41, 25 P.3d 985). And this Court has recognized that the purpose of a Rule 412 hearing is not "to attempt discovery of evidence." *State v. Blake*, 2002 UT 113, ¶7, 63 P.3d 56. This Court should give effect to these principles and reverse the order forcing T.T. to testify at the rape *shield* hearing.

STATEMENT OF THE ISSUES

T.T. raises the following issues:

Issue 1 – The Rule 412 Issue: Did the trial court err in interpreting Rule 412 of the Utah Rules of Evidence to permit a defendant charged with rape to subpoena the victim and force her to testify about her prior sexual behavior and disposition before making a showing that the testimony he seeks to elicit is admissible at trial?

***Standard of Review*:** This issue concerns the proper interpretation of Rule 412's procedures and district court power under Utah R. Crim. P. 14(a)(2) to quash unreasonable subpoenas. This Court reviews these "matters of law … for correctness." *State v. Salt*, 2015 UT App 72, ¶11, 347 P.3d 414; *see also State v. Lopez*, 2020 UT 61, ¶¶32-33, 474 P.3d 949 (reviewing legal issues surrounding crime victims' motion to quash a subpoena under correctness standard); *State v. Bravo*,

2015 UT App 17, ¶10, 343 P.3d 306 (reviewing interpretation of Rule 412 "for correctness").

Issue 2 – The Victim's Rights Issues: Did the trial court err in holding that the defense subpoena to T.T. did not violate her rights to (among other things) be "treated with fairness, respect, and dignity" and to be "free from harassment and abuse" under the Utah Constitution, art. I, § 28(1)(a), where the subpoena sought to force her to testify about her prior sexual behavior and disposition before a determination that such testimony was admissible at trial?

Standard of Review: This issue presents legal questions concerning the proper interpretation of the Utah Victims' Rights Amendment, Utah Const., art. I, § 28(1)(a), which promises crime victims (among other things) state constitutional rights to be "treated with fairness, respect, and dignity" and to "be free from harassment as abuse," as well as Utah R. Crim. P. 14(a), which promises crime victims a right to quash an "unreasonable" subpoena. In concluding that the admissibility of T.T.'s testimony was not a prerequisite to questioning her about her prior sexual behavior, the trial court made legal determinations that this Court now reviews de novo "for correctness." *State v. Salt*, 2015 UT App 72, ¶11; *see also State v. Lopez*, 2020 UT 61, ¶¶32-33.

Preservation of the Issues: On first learning that the district court intended to force T.T. to testify at the rape shield hearing about her prior sexual behavior,

T.T.'s counsel immediately noted an objection. T.T.'s counsel requested that the district court require that T.T. be subpoenaed, so that she could more fully develop her objections. R. 334-35.[2] Following a defense subpoena, T.T. filed a motion to quash the subpoena and a detailed supporting memorandum. R. 164-71. On March 5, 2024, the trial indicated that it had reviewed T.T.'s motion to quash and was denying it. R. 195-96. Accordingly, T.T. fully preserved the two issues above.

STATEMENT OF THE CASE

This appeal is taken by T.T. from a district court order forcing her to testify about her sexual history and disposition at a rape shield hearing. The relevant facts in the trial court and this Court are as follows:

I. Trial Court Proceedings.

T.T. is the victim in the underlying criminal case. She was fifteen years old at the time of the alleged rape.

On August 1, 2022, the State (Juab County) filed a three-count Criminal Information against Defendant. Count 1 charged Defendant with rape, a first-degree felony, in violation of Utah Code § 76-5-402, in that Defendant, on or about May 1, 2017, did have sexual intercourse with T.T. without her consent. R. 1-2.

On August 22, 2023, a preliminary hearing was held on the rape charge. Detective Brady Talbot from the Juab County Sherrif's Office testified, and

[2] Citations to the assembled record in this case are to "R. [Bates #]".

through him, the prosecution introduced an "1102 Statement" from T.T. R. 109-10.[3] In her statement, T.T. said that she was "raped" by Defendant. R. 213 (1102 Statement). She further explained that she was drinking with a girlfriend, another boy, and Defendant, leading up to the rape:

> … I ended up drinking even more[.] [B]ecause I was drunk [name redacted] offer[e]d me to sleep in her room[.] Since I was drunk, [Defendant] carried me [downstairs.] … [Redacted] ended up walking in and tried to get [Defendant] to leave[.] [T]hey started arguing and she ended up going back up stairs[.] [Defendant] then tried to get me to p[er]form oral sex on him[.] I kept telling him no and pushed him away[.] I was drunk and weak. I was in and out of consciousness. I remember him taking off my pants and him pulling his down and him moving to on top of me[.] I said no[.] [H]e smushed me[.] [T]hat was the last time I said no[.] I don[']t remember much after that[.] [W]hen I came to again he was pulling his penis out of me and jerked himself off either on the bed sheets or on my stomach. [M]y bra and shirt were still on[.]

Id. (identifying information of other individuals redacted).

At the conclusion of the preliminary hearing, the district court found probable cause supported the rape charge. R. 112. Several weeks later, on September 12, 2023, the Defendant was bound over to stand trial. R. 113.

Following arraignment, on November 16, 2023, the Defendant filed a Motion to Offer Evidence of the Victim's Prior Sexual Conduct and an

[3] *E.g.*, a statement under oath from the victim of a crime, made admissible in a preliminary hearing by operation of Utah Rule of Evidence 1102. *See generally State v. Lopez*, 2020 UT 61, ¶2 (discussing Rule 1102 statement to be used to establish probable cause at preliminary hearings).

incorporated Statement of Evidence. R. 123-26. The motion argued that Defendant was entitled to offer evidence of T.T.'s prior sexual conduct, pursuant to Rule 412(b)(2) of the Utah Rules of Evidence (victims' sexual conduct with Defendant) and Rule 412(c)(1)(a) (victim conduct that the Constitution requires to be admitted). According to the Motion, "Defendant may testify that the sexual encounter for which he has been charged was but one of numerous consensual sexual encounters between these two individuals over the course of several years, and that the alleged victim's conduct and verbal expressions on the night in question were indistinguishably similar to their past sexual encounters." R. 124.

On December 19, 2023, Crystal Powell of the Utah Crime Victim's Legal Clinic filed a notice of appearance as T.T.'s counsel. R. 129. The next day, December 20, 2023, T.T.'s counsel filed a Memorandum in Opposition to Defendant's 412 Motion. R. 131-37. The opposition explained that, under Rule 412, a defendant was required to file a motion that "specifically describes the evidence and states the purpose for which it is to be offered." R. 132-33. T.T. explained that, in his motion, Defendant had "not provided any meaningful detail as to the previous encounters supported by any evidence that he and the victim engaged in sex in a manner so similar to the alleged incident that a jury would believe he thought there was consent." R. 134.

On January 1, 2024, Defendant replied to T.T.'s opposition. R. 139-44. Defendant initially argued that T.T. did not have "standing" to move to exclude any evidence at trial. R. 140. Defendant then turned to the specificity of his proffer of evidence. He "supplement[ed]" his earlier proffer with a seven-point description of the evidence he proposed to introduce regarding T.T.'s prior sexual contact with him, i.e., that she:

> (1) contacted him to hang out late in the evening or at night;
> (2) cuddled and "spooned" with him;
> (3) kissed his neck;
> (4) told him he was "cute" and "attractive;"
> (5) touched him all over his body with her hands;
> (6) performed oral sex on him;
> (7) helped him undress and removed her own clothing with or without his help;
> (8) invited him to have sex with her by opening her legs while completely undressed and pulling him on top of her;
> (9) moaned during sexual activity …

R. 141.

On January 2, 2024, the district court held a scheduling conference. Counsel for T.T. requested an opportunity to file a sur-reply, which the district court allowed. R. 146.

On February 2, 2024, T.T. filed a sur-reply to Defendant's motion. R. 148-52. T.T. argued that she was a limited-purpose party to the proceedings who was entitled to present her own arguments regarding the Rule 412 issues. R. 149-50.

On February 6, 2024, the district court held a hearing on the Rule 412 issues. The district court ruled that it "agree[d] with the alleged victim that [she] do[es] have a right to oppose a 412 hearing under the Victims' Rights Statute and our case law." R. 334. Turning to the merits of the issue, the district court held that the proposed issues offered by the defendant "are proper questions to be asked in an in-camera hearing on 412. Ultimately, their admissibility at trial is something that [I] will decide later. But as far as proceeding at the 412 hearing, I will allow the defendant to inquire as to those specific issues raised in the motion." R. 334.

At this point, T.T.'s counsel was surprised and asked for clarification: "Your Honor, I'm not clear on the ruling, inquire from whom?" *Id.* at 4-5. The district court responded: "From the alleged victim." R. 334-35.

T.T.'s counsel then explained that T.T. was not subpoenaed to testify and that, had T.T. been subpoenaed, counsel would have objected. R. 335. The district court responded: "[W]hat I'm saying is that the defendant met his burden in his motion by addressing specific instances that are, for which 412 contemplates the defendant to be able to at least inquire at a 412 hearing." R. 334.

Following further discussion about whether a subpoena was required, T.T.'s counsel explained that she wanted a formal subpoena so that T.T. could "object to testifying at [the rape shield] hearing" and "file a motion on that and preserve all of the rights that she has." R. 338. The district court directed defense counsel to

serve a subpoena on T.T.'s counsel and for T.T.'s counsel to then move to quash. R. 339.

Following the service of a subpoena on T.T. through counsel, on February 13, 2024, T.T. filed a detailed motion to quash the subpoena served on her. R. 164-71. T.T.'s motion explained that, under Utah Rule of Criminal Procedure 14(a)(2), a court can quash a subpoena that is unreasonable. R. 165 (citing *State v. Lopez*, 2020 UT 61, ¶ 40). The motion further explained that a subpoena to force T.T. to testify was unreasonable unless and until Defendant had satisfied the requirements of Rule 412, including demonstrating the admissibility of prior sexual history evidence at trial: "Switching that burden to the victim does little more than to open up the victim to attack about the victim's sexual life.… The court must not put the burden on the victim.… To force the victim to testify before the defendant has met his burden effectively renders the protection obsolete." R. 167-68.

In addition to a Rule 412 argument, T.T. also advanced arguments that forcing her to testify at the Rule 412 hearing would violate her state constitutional rights. R. 170 (citing Utah. Const., art. I, § 28(1)(a) (crime victims have the rights to be "treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process").

In response, Defendant argued that he had satisfied the "threshold requirement" for forcing T.T. to testify at the 412 hearing. R. 176.

On March 5, 2024, the district court held a short hearing and made an oral ruling denying the victims' motion to quash. The district court stated:

> … I agree with [Defendant] that the purpose of the 412 hearing is so that the Court can identify the evidence that, the evidence that the Court needs to consider for presentation to a jury.
>
> I agree that there is an imposition to the alleged victim to that, but that is why 412 hearings are intended to be in-camera or in a closed session and that the rules of evidence under 412 and the procedure set in place for that hearing do not give an alleged victim a right to refuse to testify … or do not provide a basis to quash a subpoena. So I will order that the alleged victim must be present to testify at the upcoming 412 hearing.

R. 348. The district court directed defense counsel to prepare an order to that effect. On March 21, 2024, the district court entered its order denying T.T.'s motion to quash. R. 195-96.

II. Supreme Court Proceedings.

On March 21, 2024, T.T. swiftly petitioned this Court for permission to appeal from the district court's interlocutory order denying the motion to quash the subpoena under Rule 5 of the Utah Rules of Appellate Procedure. This Court ordered responses to the petition. The State supported T.T.'s petition. Defendant opposed the petition.

On May 24, 2024, this Court granted T.T. permission to appeal the interlocutory order.

SUMMARY OF THE ARGUMENT

This Court adopted Utah's rape shield rule "in response to anachronistic and sexist views that a woman who had consented to sexual activity in the past was more likely to have consented to sexual relations with an alleged rapist." *State v. Eddington,* 2023 UT App 19, ¶ 36 n.12, 525 P.3d 920. Like other rape shield rules, Utah's rule has the purpose of "encourag[ing] the reporting of sexual assaults and … prevent[ing] victims from feeling as though they are on trial for their sexual histories." 75 C.J.S. Rape § 7 (Mar. 2024 update). Thus, their aim is "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 advisory comm. note). And yet the district court's atypical approach stands the very purpose of Utah Rule 412 on its head. Rather than preventing a rape victim from being forced to testify about prior sexual conduct, the district court has transformed a "shield" hearing into a "testimony" hearing—i.e., a hearing at which victims must often testify. This Court should reverse the erroneous ruling below.

ARGUMENT

I. T.T. IS ENTITLED TO PURSUE INTERLOCUTORY APPELLATE RELIEF TO PROTECT HER RIGHTS.

Before turning to the merits of this appeal, it is important to emphasize that T.T. is entitled to pursue appellate protection of her rights. Through this appeal, T.T. seeks appellate review of *her* motion to quash a subpoena directed to *her*. Her motion 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.

Utah Rule of Evidence 412 gives T.T. rights that she is entitled to protect. Under Rule 412(c)(2), the prosecution "shall timely notify the victim" of any motion to use prior sexual history evidence at trial. Utah R. Evid. 412(c)(2). Thereafter, the district court "must conduct an in camera hearing and give the victim and parties a right to attend and be heard." Utah R. Evid. 412(c)(3). By requiring notice and extending the right to be heard, the rule gives victims a personal stake in the proceedings. Indeed, as the Fourth Circuit has held regarding Federal Rule of Evidence 412,[4] "[t]he text, purpose, and legislative history of rule 412 clearly indicate that Congress enacted the rule for the special benefit of the

[4] Utah's Rule 412 is largely based on the parallel federal rule. *State v. Tarrant*, 2005 UT 50, ¶20.

victims of rape." *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (allowing victim to appeal adverse Rule 412 ruling).

T.T. also possesses standing to appeal to this Court from a denial of *her* motion to quash. *See, e.g., State v. Lopez*, 2020 UT 61, ¶26 (recognizing the right of crime victims to appeal under Rule 5(a) from denial of a motion to quash subpoena); *see also State v. Brown*, 2014 UT 48, ¶16, 342 P.3d 239 (recognizing limited-party status of victim to appeal from restitution decision).

At issue in this petition is whether the defense can force a rape victim to testify at a rape shield hearing about prior sexual behavior and disposition before a determination that the testimony is admissible at trial. This issue cannot be reviewed following a final judgment in the rape trial. As the Fourth Circuit explained in allowing a rape victim to take an interlocutory appeal from an adverse ruling interpreting Federal Rule 412:

> The rule makes no reference to the right of a victim to appeal an adverse ruling. Nevertheless, this remedy is implicit as a necessary corollary of the rule's explicit protection of the privacy interests Congress sought to safeguard.… No other party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of the victim's rights. Therefore, the congressional intent embodied in rule 412 will be frustrated if rape victims are not allowed to appeal an erroneous evidentiary ruling made at a pre-trial hearing conducted pursuant to the rule.

Doe v. United States, 666 F.2d 43, 46 (4th Cir. 1981). The Fourth Circuit could identify no harm to the defendant from allowing an interlocutory appeal. On the

other hand, "the injustice to rape victims in delaying an appeal until after the conclusion of the criminal trial is manifest. Without the right to immediate appeal, victims aggrieved by the court's order will have no opportunity to protect their privacy from invasions forbidden by the rule." *Id.* at 46.

II. THE TRIAL COURT'S DECISION INAPPROPRIATELY FORCES A RAPE VICTIM TO TESTIFY WHEN HER TESTIMONY HAS NOT BEEN DETERMINED TO BE ADMISSIBLE AT TRIAL.

Turning to the merits, the trial court's decision to allow T.T. to be subpoenaed and forced to testify about her prior sexual history at the rape shield hearing should be reversed. The decision rests on a misinterpretation of Rule 412 and a failure to protect T.T.'s rights under victims' rights enactments.

A. The District Court Misinterpreted Utah Rule 412.

Rape shield rules "like Utah's were adopted in response to anachronistic and sexist views that a woman who had consented to sexual activity in the past was more likely to have consented to sexual relations with an alleged rapist." *State v. Eddington*, 2023 UT App 19, ¶36 n.12. *See generally* ROGER C. PARK ET AL., EVIDENCE LAW (5th ed. 2021) (discussing the "historical suspicion of women charging rape" that rape shield rules were designed to overcome). Like other rape shield rules, Utah's rape shield rule has the purpose of "encourag[ing] the reporting of sexual assaults and … prevent[ing] victims from feeling as though they are on trial for their sexual histories." 75 C.J.S. Rape § 7 (Mar. 2024 update).

The rules were 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 advisory comm. note).

Against this backdrop, it would be surprising to learn that Utah's Rule 412 creates a mechanism for defendants to force rape victims to answer inquiries about their past sexual history—even where such testimony has not been determined to be admissible at trial. And an examination of the rule's text makes clear that no such counterintuitive result follows. The rule gives the victim "*a right to attend and be heard*" at a rape shield hearing. Utah R. Evid. 412(c)(3) (emphasis added). The district court inappropriately converted a rule giving victims "a right" to attend into one where they are forced to attend and testify about sensitive subjects whose admissibility has yet to be decided.

The Advisory Committee Note to Rule 412 confirms this conclusion. In describing the procedures associated with Rule 412, the Note indicates that before admitting any prior sexual history evidence, 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). In extending a "right" to victims and an "opportunity to be heard," the Note underscores the Rule's design of providing victims an opportunity to address the potential admissibility of such evidence—

not suffering the potential indignities associated with being questioned by defendants accused of raping them.

The contrast between Rule 412 and other Utah rules is readily apparent. This Court will recall that in *State v. Lopez*, 2020 UT 61, it considered the effect of Rule 7(i) of the Utah Rules of Criminal Procedure concerning preliminary hearings. That Rule specifically stated that "[a]t the conclusion of the state's case, the defendant may testify under oath, *call witnesses*, and present evidence. The defendant may also cross-examine adverse witnesses." Here, of course, no such provision exists allowing defendants to "call witnesses" at a rape shield hearing—for the obvious reason that the only witness a defendant would typically want to call would be the rape victim who is seeking judicial protection against testifying. *See McKitrick v. Gibson*, 2021 UT 48, ¶37, 496 P.3d 147 (giving effect to omissions in language "by presuming all omissions to be purposeful.").[5]

[5] It is also notable that the federal rape shield rule was altered to strip out any right of a judge to take evidence at the rape shield hearing. As the Advisory Committee Note to the 1994 Amendments to Fed. R. 412(c) explains, the federal rule originally contained a provision allowed a judge to hold an in-chambers hearing—and "accept evidence on the issue of whether such condition of fact is fulfilled" to justify admission of prior sexual history evidence. That language was deleted from the federal rule. Because Utah Rule 412 is patterned on Federal Rule 412, *Tarrats*, 2005 UT 50, ¶20, this deletion of language from the federal rule allowing a trial judge to "accept evidence" is also instructive in interpreting the state rule.

Defendant has indicated that he subpoenaed T.T. because he wants to question her "regarding the [prior sexual history] evidence sought to be admitted." R. 176. And further that he "seeks to further demonstrate to the court the appropriateness and relevance of this evidence." R. 179. But this Court has held that the purpose of a rule 412 hearing is not "to attempt discovery of evidence." *State v. Blake*, 2002 UT 113, ¶7, 63 P.3d 56. This Court has therefore affirmed the denial of rule 412 hearings where the defendant's "stated purpose in requesting a 412 hearing is to 'question [the] alleged victim." *Id.* 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.[6]

As the State has cogently explained (State Resp. to Pet. at 6), once the district court ruled that Defendant had proffered enough specific evidence of prior sexual behavior between him and T.T. to obtain a hearing, no justification existed for forcing T.T. to take the stand and be questioned about her prior sexual history. The

[6] In the special situation where a defendant seeks to establish that an alleged victim has made prior false accusations of rape, the district court in its discretion may hold a hearing on the subject. *See State v. Clark*, 2009 UT App 252, ¶28, 219 P.3d 631.

only purpose of the rule 412 hearing at that point was to give *T.T.* an opportunity to be heard about the admissibility of the evidence—not to allow *Defendant* to force T.T. to take the stand so he could question her. *See Blake*, 2002 UT 113, ¶7; *Quinonez-Gaiton*, 2002 UT App 273, ¶12. Defendant's only purpose for questioning T.T. at that point, in other words, would be to use rule 412 as a discovery tool—the very purpose *Blake* and other similar decisions forbids.

The district court also seemed to think that the fact that a Rule 412 hearing is held in camera was sufficient to protect a victim's privacy. But that conclusion overlooked the obvious invasion of privacy involved in forcing a victim to testify about prior sexual behavior. And the attendees at an in camera hearing would likely include not only the judge but also a court reporter, prosecutor(s), defense attorney(s), clerk(s), a bailiff, and the defendant. Preventing victims from having to testify about private matters that are inadmissible in the trial at all is the goal of the rape *shield* rule—a shield the district court's ruling destroyed.

Moreover, the district court never explained why the victims' testimony was necessary for it to make a ruling regarding the admissibility of the defense's proffered testimony—including a ruling on Rule 403. This Court has stated that "[w]hen applying rule 403 to the admissibility of a rape victim's past sexual conduct, there is a presumption of inadmissibility," *State v. Boyd*, 2001 UT 30, ¶41, 25 P.3d 985, such that this "evidence is admissible only when the court finds under

the circumstances of the particular case such evidence is relevant to a material factual dispute and its probative value outweighs the inherent danger[s]" listed in rule 403, *id.* (quoting *State v. Williams*, 773 P.2d 1368, 1370 (Utah 1989)); *see also State v. Beverly*, 2018 UT 60, ¶¶55-56 & n.58; Utah R. Evid. 412 Advisory Comm. Note ("Rule 412 creates a specific rule expressly disfavoring the admission of evidence of sexual behavior and predisposition in criminal proceedings").

As part of that presumption of inadmissibility under Utah Rule 412, the defense must shoulder the burden of filing 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. Here, Defendant proffered a description that, he claimed, demonstrated the admissibility at trial of T.T.'s prior sexual history with him. The district court should have made that determination of whether presumptively inadmissible testimony was somehow admissible based on the defense motion describing that prior sexual history—rather than forcing the victim to testify about that history.

In seeking to force the victim to testify about her prior sexual history for which "there is a presumption of inadmissibility," *State v. Beverly*, 2018 UT 60, ¶56

n.58 (quoting *Boyd*, 2001 UT 30, ¶41), the subpoena at issue here was unreasonable. And under Utah R. Crim. P. 14(a)(2), the district court "may quash or modify a subpoena if compliance would be unreasonable." It is hard to imagine a more unreasonable subpoena than one forcing a rape victim to testify about prior sexual history that is presumptively inadmissible under a rule specifically designed to preclude such testimony. The district court should be reversed on that ground alone. *See Lopez*, 2020 UT ¶ 53 ("a subpoena compelling alleged victims to testify is *per se* 'unreasonable' when it seeks testimony that is immaterial to the probable-cause determination … and would unnecessarily intrude on the rights of victims.").

It is important to understand that the issue of Rule 412's protections has enormous consequences for the prosecution of rape and other sex crimes in this State. Sadly, "[s]exual assault is a significant social, criminal justice, and health care issue in Utah." UTAH STATE UNIV., SEXUAL ASSAULT AMONG UTAH WOMEN: A 2022 UPDATE 1 (Aug. 3, 2022) ("UTAH STATE 2022 REPORT").[7] According to an anonymous survey conducted by Utah's Commission on Criminal and Juvenile Justice in 2007, one in three Utah women experience sexual assault in their lifetimes, and one in six Utah women experience rape (sexual assault with vaginal or anal penetration). CHRISTINE MITCHELL & BENJAMIN PETERSON, UTAH CCJJ,

[7] Available at https://www.usu.edu/uwlp/files/snapshot/42.pdf.

RAPE IN UTAH 2007: A SURVEY OF UTAH WOMEN (May 2008).[8] But only a small fraction of these assaults are successfully prosecuted. UTAH STATE 2022 REPORT, *supra*, at 1-4.

If defense counsel here is permitted to force a rape victim to testify at a Rule 412 hearing, such an approach will presumably become part of the standard defense playbook—leading to many other cases involving this very issue under Rule 412. Most criminal cases resolve by plea bargain before trial—preventing any need for most rape victims to testify at all. The ruling below has the clear potential to change Utah's law from typically *preventing* rape victims from testifying about prior sexual history into one often *requiring* them to do so.

B. The District Court Misinterpreted Victims' Rights Enactments.

The district court should also be reversed for failing to protect T.T.'s state constitutional rights. While T.T. clearly presented such rights below, the district failed to even discuss them—much less explain how its ruling protected T.T.'s rights.

As an initial matter, T.T. is clearly a protected "victim" with rights under the Utah Victims' Rights Amendment, art. I, § 28. While at trial Defendant will enjoy a presumption that he is innocent of raping T.T., for purposes of applying

[8] Available at https://www.jrsa.org/jrsa-documents/sac-victimization/utah2007-rape.pdf.

Utah's Victims' Rights Amendment, the critical question is the scope of the charging document. *See, e.g., State v. Beltran-Felix*, 922 P.2d 30, 31–34 (Utah Ct. App 1996) (recognizing that a victim in a rape case had rights under the Amendment before conviction at trial); *see also State v. Brown*, 2014 UT 48, ¶1, 342 P.3d 239, 240 (finding existence of rights for the "alleged victim of the sex crimes charged in this criminal case"). *See generally* DOUGLAS E. BELOOF, PAUL G. CASSELL, MEG GARVIN & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 76 (4th ed. 2018) ("in most contexts in criminal procedure, the term 'the victim' means effectively 'the victim as alleged in the indictment'").

Here, the Criminal Information specifically charges that Defendant raped T.T. R. 1-2. This is all that is required to confer victims' rights on her. *See* Utah Code § 77-38-2(9)(a) ("Victim of a crime" means "any natural person against whom the *charged* crime . . . is alleged to have been perpetrated or attempted . . . ." (emphasis added)).

Turning to the scope of the rights to be free from harassment and abuse and to be treated with fairness, respect, and dignity, it was the intent of the drafters that Amendment "effects a fundamental change in the criminal justice system. Instead of adopting a two-party, *State v. Defendant*, paradigm, this provision requires that the system consider interests of third parties, specifically crime

victims." Paul G. Cassell, *Balancing the Scales of Justice: The Case for Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1375, 1387.

With these points in mind, the district court violated T.T.'s state constitutional rights in failing to quash Defendant's subpoena. It would be harassing and abusive to force T.T. to testify about sensitive subjects involving her prior sexual history for no substantial reason. And it would not be treating her fairly and with respect and dignity to require her to do so.

Adding further support to these conclusions is the implementing statute for the Victims' Rights Amendment, which defined terms in the Amendment. Of particular importance here, the Legislature broadly defined "harassment" as meaning "treating the crime victim in a persistently annoying manner" and "abuse" as meaning "treating the crime victim in a manner so as to injure, damage, or disparage." Utah Code § 77-38-2 (defining these words for purposes of the Utah Const.). It also defined "fairness" as meaning "treating the crime victim reasonably, even-handedly, and impartially." Utah Code § 77-38-2(3). While these terms appear in a statute, it is important to understand that this particular statute is part of a constitutional enforcement scheme and thus has extra force above and beyond ordinary statutory provisions. *See* Utah Const., art. I, § 28(4) ("The Legislature shall have the power to enforce and define this section by statute."); *cf.* U.S. Const. amend. XIV, § 5 (giving Congress the power to "enforce by appropriate

legislation the provisions of this article"); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (recognizing broad scope for Congress' enforcement power under section 5). And it is also important to understand that the Legislature has 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).[9]

Under these statutory definitions, forcing T.T. to testify at the rape shield hearing would violate her constitutional rights. Surely it "injures, damages, and disparages" a victim when she is compelled to testify, in the presence of her abuser, about sensitive sexual subjects for no substantial reason. For example, the word "injury" is conventionally defined as "an *unjust* or *undeserved* inflicting of suffering or harm." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1164 (1993) (part of first definition) (emphasis added). Enforcing the subpoena would treat the victim "in a manner so as to injure, damage, or disparage." Clearly, facing an alleged abuser would be traumatizing for any victim, particularly where the

[9] 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.

abuser has gained the trust of the victim. But for purposes of this case, however, the Court need not explore the outer limits of these constitutional provisions. The Court can simply conclude that it would be "unjust" or "undeserved" trauma to force T.T. to testify here, where her testimony is *presumed* to be unnecessary. *See generally* Douglas E. Beloof, *Enabling Rape Shield Procedures Under Crime Victims' Constitutional Privacy Rights*, 38 SUFFOLK U.L. REV. 291 (2005). The district court should have at least addressed this clearly presented state constitutional issue. And without finding that the evidence was admissible, the district court should have quashed the subpoena as a violation of T.T.'s state constitutional rights.[10]

CONCLUSION

This Court should reverse the district court's denial of T.T.'s motion to quash.

[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. It should be clear, however, that T.T. has advanced substantial arguments against admissibility. First, Defendant has not described any of the prior incidents with any meaningful specificity—information that would naturally be within his knowledge. Second, as is apparent from T.T.'s 1102 Statement, the dispositive issue in this case revolves around T.T.'s impairment and Defendant's understanding of her inability to consent. Nothing in Defendant's Rule 412 proffer of seven facts relates to impairment issues. Third, Defendant has not attempted to show the connection between events that occurred many months before the alleged rape. *Cf.* Utah Code § 76-5-406 ("Consent to any sexual act or prior consensual activity between or with any party does not necessarily constitute consent to any other sexual act.").

Respectfully submitted on July 26, 2024.

/s/ Paul G. Cassell
Paul G. Cassell
Utah Appellate 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 brief contains 5,744 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 hereby certify that I caused to be delivered, via email, on July 26, 2024, the foregoing

OPENING BRIEF FOR T.T.

to counsel for the following:

1. State of Utah
   via counsel William Hains at whains@agutah.gov;

2. Appellant Jolley
   via counsel Scott Weight at scott@esplinweight.com.

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

Addenda

Utah Rule Evidence 412. Admissibility of Victim's Sexual Behavior or Predisposition.
Effective: 11/1/2023

(a) Prohibited Uses. The following evidence is not admissible in a criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions. The court may admit the following evidence if the evidence is otherwise admissible under these rules:

(1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; or

(3) evidence whose exclusion would violate the defendant's constitutional rights.

(c) Procedure to Determine Admissibility.

(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time; and

(C) serve the motion on all parties.

(2) Notice to the Victim. The prosecutor shall timely notify the victim or, when appropriate, the victim's guardian or representative.

(3) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing are classified as protected.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Utah Constitution, Article I, Section 28. [Declaration of the rights of crime victims.]

(1) To preserve and protect victims' rights to justice and due process, victims of crimes have these rights, as defined by law:

(a) To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process;

(b) Upon request, to be informed of, be present at, and to be heard at important criminal justice hearings related to the victim, either in person or through a lawful representative, once a criminal information or indictment charging a crime has been publicly filed in court; and

(c) To have a sentencing judge, for the purpose of imposing an appropriate sentence, receive and consider, without evidentiary limitation, reliable information concerning the background, character, and conduct of a person convicted of an offense except that this subsection does not apply to capital cases or situations involving privileges.

(2) Nothing in this section shall be construed as creating a cause of action for money damages, costs, or attorney's fees, or for dismissing any criminal charge, or relief from any criminal judgment.

(3) The provisions of this section shall extend to all felony crimes and such other crimes or acts, including juvenile offenses, as the Legislature may provide.

(4) The Legislature shall have the power to enforce and define this section by statute.