IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Specialist (E-4) **BRANDON Z. MILLER** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. ARMY 20230026 USCA Dkt. No. 25-0025/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issue Presented

WHETHER THE TOTAL CLOSURE OF THE COURT OVER APPELLANT'S OBJECTION VIOLATED HIS RIGHT TO A PUBLIC TRIAL.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On January 19, 2023, an enlisted panel, sitting as a general court-martial, found Appellant guilty, contrary to his pleas, of one specification of disobeying a superior commissioned officer and one specification of sexual assault in violation

of Articles 90 and 120, UCMJ, 10 U.S.C. §§ 890 and 920, respectively. (JA028). The military judge sentenced Appellant to be reduced to the grade of E-1; to be confined for thirty months; and to be dishonorably discharged. (JA029).

The convening authority approved the findings and sentence on February 14, 2023. (JA030). The military judge entered judgment on February 23, 2023. (JA031).

On July 19, 2024, the Army Court summarily affirmed and denied reconsideration on August 29, 2024.

On October 28, 2024, Appellant filed a timely petition. On February 12, 2025, this Court granted review.

Statement of Facts

The military judge twice closed the courtroom in this case under Military Rule of Evidence [Mil. R. Evid.] 412. (JA025, JA027). The second closure occurred over defense counsel's explicit objection, who asserted the need for "a constitutional analysis as to why the hearing is going to be closed." (JA027). The military judge responded, "Your objection is noted and is overruled." (JA027).

The second closure concerned the alleged victim's anger and frustration that her *four* prior allegations of sexual assault were non-prosecuted for lack of evidence and her statement made in an interview indicating that *this* time there would be retribution.

Issue Presented

WHETHER THE TOTAL CLOSURE OF THE COURT OVER APPELLANT'S OBJECTION VIOLATED HIS RIGHT TO A PUBLIC TRIAL.

Summary of Argument

Appellant had a Sixth Amendment right to a public trial at the Mil. R. Evid. 412 hearing. This right was violated when the military judge failed to satisfy, indeed fail to even acknowledge, the standard for closure established in *Waller v. Georgia*, 467 U.S. 39 (1984). The provision in Mil. R. Evid. 412 that hearings "shall be closed" cannot absolve the violation. Even if Mil. R. Evid. 412 mandates closure, no law can circumvent the constitutional requirement to satisfy *Waller* on a case-by-case basis. The remedy is a new Mil. R. Evid. 412 hearing.

This Court, however, need not ultimately decide whether the Sixth Amendment public trial right applies to Mil. R. Evid. 412 hearings. Rule for Courts-Martial [R.C.M.] 806 also affords Appellant a right to a public trial, and it made the *Waller* standard applicable to courts-martial, including *all* Article 39, UCMJ, sessions. Reading Mil. R. Evid. 412 harmoniously with R.C.M. 806, the closure provision in Mil. R. Evid. 412 must be read as mandating closure where the *Waller* standard under R.C.M. 806(b)(4) is satisfied. Because *Waller* was not satisfied, R.C.M. 806(b)(4) was violated, and because remedies for R.C.M. 806

violations are the same as constitutional violations under this Court's recent precedent, the appropriate remedy remains a new Mil. R. Evid. 412 hearing.

Standard of Review

This Court reviews the military judge's decision to close the courtroom for an abuse of discretion.[1] *United States v. Hasan*, 80 M.J. 181, 204 (C.A.A.F. 2024).

Law and Argument

A. The closure for the Mil. R. Evid. 412 hearing over Appellant's objection violated his public trial right under the Sixth Amendment.

1. The Sixth Amendment public trial right applies to Mil. R. Evid. 412 hearings.

The Sixth Amendment affords a right to a public trial in all criminal prosecutions. U.S. Const. Amend. VI. "Without question, [this] right . . . is applicable to courts-martial." *Hasan*, 84 M.J. at 204 (quoting *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985)).

This is not to say that proceedings must *always* be open. The public trial right is not absolute, and closure is constitutionally permissible provided the four-factor standard in *Waller* is met: "[(1)] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [(2)] the closure must

[1] Federal courts review public trial violations de novo. *See e.g.*, *United States v. Barronette*, 46 F. 4th 177, 191-92 (4th Cir. 2022); *United States v. Allen*, 34 F. 4th 789, 794 (9th Cir. 2022); *United States v. Cervantes*, 706 F. 3d 603, 612 (5th Cir. 2013). Appellant prevails here under either standard.

be no broader than necessary to protect that interest, [(3)] the trial court must consider reasonable alternatives to closing the proceeding, and [(4)] [the trial court] must make adequate findings supporting the closure." *Waller*, 467 U.S. at 48.

The Supreme Court has not articulated a concrete test to determine what trial proceedings the public trial right encompasses (and, thus, when the *Waller* standard applies), *see Commonwealth v. Jones*, 37 N.E.3d 589, 604 (Mass. 2015), but courts have found *Waller*, itself, instructive. *Id*. There, the Court held that the public trial right applies to a pretrial suppression hearing. *Waller*, 467 U.S. at 47. In making that determination, the Court noted four values of the right: (1) ensuring the public sees an accused dealt with fairly, (2) reminding the judge and prosecutor of their responsibility, (3) encouraging witnesses to come forward, and (4) discouraging perjury. *Id*. at 46. It concluded that these aims and interests were "no less pressing" in a suppression hearing. *Id*. at 46.

Since *Waller*, courts have determined the public trial right applies where *Waller*'s values are implicated by the proceeding. *See United States v. Waters*, 627 F.3d 345, 360 (9th Cir. 2010) ("the public-trial right attaches to those hearings whose subject matter involve[s] the values that the right to a public trial serves.") (internal citations and quotations omitted); *see also Jones*, 37 N.E.3d at 603 ("Various United States Circuit Courts of Appeals have . . . turned to [*Waller*'s

values] to determine whether the public trial right attaches to a given proceeding.") Applying this analysis, courts have held the public trial right applies to a variety of pretrial hearings. *See e.g.*, *Waters*, 627 F. 3d at 360; *United States v. Edwards*, 303 F.3d 606, 616 (5th Cir. 2002); *Ali v. United States*, 398 F.Supp.3d 1200, 1220 (C.M.C.R. 2019); *State v. Rogers*, 919 N.W.2d 193, 201 (N.D. 2018).

Similar to these decisions, hearings under Mil. R. Evid. 412 implicate the *Waller* values. The nature of these hearings implicate the first two *Waller* values. As the military's "rape-shield law," *United States v. Gaddis*, 70 M.J. 248, 253 (C.A.A.F. 2011), Mil. R. Evid. 412 bars evidence of an alleged victim's "sexual behavior" or "sexual predisposition," subject to three enumerated exceptions. *See* Mil. R. Evid. 412(a), (b) (2019 ed.). Importantly, the third of these exceptions—and the one implicated here—is for "evidence the exclusion of which would violate the accused's constitutional rights." Mil. R. Evid. 412(b)(3). In cases implicating this exception, the hearing facilitates the military judge's vital gatekeeping role under Mil. R. Evid. 412 to "preserv[e] the constitutional rights of the accused to present a defense." *United States v. Banker*, 60 M.J. 216, 219 (C.A.A.F. 2004). Thus, public attendance would help assure the accused is dealt with fairly and would remind the military judge of her "awesome responsibility." *United States v. Wordlaw*, ARMY 20230235, 2025 CCA LEXIS 102, at *33, n. 19 (Army Ct. Crim. App. Mar. 12, 2025) (internal citations and quotations omitted).

Rule 412 hearings also implicate the last two *Waller* values. Under Mil. R. Evid. 412, parties "may call witnesses, including the victim, and offer relevant evidence" at the hearings. Mil. R. Evid. 412(c)(2). Holding these types of hearings in public may encourage other witnesses in attendance to come forward and would also serve as a critical check on those who do testify. Here, the alleged victim testified under oath at the Mil. R. Evid. 412 hearing where she flatly denied statements she reportedly made in an earlier interview, and she did so free of any concerns of public scrutiny.

The conclusion that the public trial right applies to Mil. R. Evid. 412 hearings finds support in other jurisdictions holding the right applies to rape-shield proceedings. In *Commonwealth v. Jones*, for example, the Massachusetts Supreme Court held the Sixth Amendment public trial right applied, finding that its rape-shield hearings were neither a routine administrative matter nor trivial. *Jones*, 37 N.E.3d at 604. The *Jones* court reasoned, "[l]ike a pretrial suppression hearing [in *Waller*], the determination emerging from a rape shield hearing often will have a critical impact on the trial itself, particularly in cases that hinge on the issue of consent. *Id*. Moreover, "the admissibility of evidence otherwise barred under the rape shield law hinges on a showing that the evidence fits into one of the exceptions to the statute," and thus, like suppression hearings, the outcome

"depends on the resolution of factual matters." *Id.* (quoting *Waller*, 467 U.S. at 47).

While a few states have held differently, *Jones* rightly found these cases unpersuasive. *Id*. at 605. The "crux" of the other decisions, *Jones* said, was that the hearings concerned the exclusion of irrelevant evidence, which "should not be heard at all." *Id.* In rejecting this, *Jones* noted that under its rape shield statute, evidence could be precluded even if it was relevant, *id*. at 606, and in any event, the public trial right did not apply only to proceedings where relevant evidence was presented. *Id*. at 606.

Jones further reasoned the concern these decisions raised about dissuading victims to come forward "confuse[d] the threshold inquiry into whether the public trial right attaches to a rape shield hearing at all with the ultimate validity of a decision to close the court room during the hearing." *Id*. at 606. As *Jones* pointed out, the court's holding was not requiring that these hearings be open, only that closure standard under *Waller* must first be applied. *Id*. at 607.

Jones' rationale applies with equal force to Mil. R. Evid. 412 hearings. And *Jones* is not alone. *See State v. Hoff*, 385 P.3 945, 949 (Mon. 2016) ("The right to a public trial clearly attaches to pretrial suppression hearings, including a [rape-shield] hearing."); *State v. Kelly*, 545 A.2d 1048, 1052 (Conn. 1988) (finding prosecutor's failure, over Kelly's objection, to furnish a compelling need to close

the courtroom for a rape shield ruling would require remand).

Additionally, the conclusion that the public trial right applies to Mil. R. Evid. 412 hearings is consistent with court decisions since *Waller* that have reaffirmed the public trial right applies to pretrial motions in limine. *State v. Morales*, 932 N.W.2d 106, 114-15 (N.D. 2019) (citing approvingly *Rovinsky v. McKasckle*, 722 F.2d 197, 201 (5th Cir. 1984)); *contrast United States v. Norris*, 780 F.2d 1207, 1210-11 (5th Cir. 1987) (finding public trial right did not apply to a bench conference on a "routine" evidentiary matter that occurred in the presence of jury).

Accordingly, Appellant's Sixth Amendment public trial right applied to the Mil. R. Evid. 412 hearing in this case.

2. The closure failed to satisfy Waller's four-factor standard.

Notwithstanding the right to a public trial, closure is constitutionally permissible where *Waller*'s four-factor standard is met. *Waller*, 467 U.S. at 48. Here, however, the military judge's wholesale rejection of the need to apply this standard after Appellant's explicit demand for a constitutional analysis was a clear abuse of discretion. *See United States v. Ortiz*, 66 M.J. 334, 339 (C.A.A.F. 2008), rev'd on other grounds by *Hasan*, 84 M.J. at 206, n. 16. Therefore, the closure

failed to satisfy *Waller*'s standard and violated Appellant's Sixth Amendment public trial right. [2]

3. The closure provision in Mil. R. Evid. 412 that hearings "shall be closed" cannot absolve the constitutional violation.

The "four *Waller* factors must be considered on a case-by-case basis . . . ." *United States v. Yazzie*, 743 F.3d 1278, 1288 (9th Cir. 2014). As the Supreme Court has held, "a rule of mandatory closure . . . is constitutionally infirm." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 611, n. 27 (1982). This is so even where the mandatory closure rule advances a compelling interest because "the circumstances of the particular case may affect the significance of [that] interest." *Id*. at 608. Thus, the decision on closure must be left to the trial court in each specific case.

This is no different for the provision in Mil. R. Evid. 412 that hearings "shall be closed." Mil. R. Evid. 412(c)(2). While the privacy interests of an alleged victims certainly *can* be a compelling interest to justify closure, a mandatory

[2] Even if the standard had been applied, closure would not have been appropriate in Appellant's case. Privacy interests from allegations reported to police in the hopes of a prosecution cannot be so compelling as to overcome the right to public trial. *See Scheetz v. The Morning Call*, 946 F.2d 202, 207 (3d Cir. 1991) (finding no privacy interest in a police report documenting an incident even though that report never led to formal charges). Moreover, the details of these assaults were not explored nor were they necessary to defense's motion.

provision for all Mil. R. Evid. 412 cases fails to account for circumstances impacting that interest in particular cases. This includes, for example, where an alleged victim is willing to testify publicly, *see id.* at 609, or where his or her testimony was already part of a public proceeding, *Kelly*, 545 A.2d at 1052-53, or where he or she already volunteered the information to the media or on public facing social websites and apps. *Cf. Id*. And it does not account for the circumstances of this case where accusations were reported to law enforcement in the hopes of an eventual (and public) prosecution. *See Scheetz v. The Morning Call*, 946 F.2d 202, 207 (3d Cir. 1991). Because the sweep of a mandatory provision would be overly broad, such a provision "cannot be viewed as a narrowly tailored means of accommodating [an alleged victim's privacy] interest." *Globe Newspaper*, 457 U.S. at 609.

In short, if the closure provision in Mil. R. Evid. 412 is construed as non-mandatory, *Waller*'s standard applies. But even if the provision is construed as mandatory, the provision is "constitutionally infirm," and *Waller*'s standard still applies. In either instance, the constitutional violation is plain.

4. The remedy for the Sixth Amendment violation in this case is a new Mil. R. Evid. 412 hearing.

A violation of the Sixth Amendment public trial right is structural error, and when, as here, the error is preserved and raised on direct review, it will generally result in a new trial. *Weaver v. Massachusetts*, 582 U.S. 286, 299 (2017). In

Waller, however, where the closure was separable, the Court remanded instead for a new rehearing of the closed proceeding. *Waller*, 467 U.S. at 50. This *Waller* remedy is the appropriate remedy here. If the new hearing results in a change of outcome, Appellant is then entitled to a new trial. *Id*.

B. The closure for the Mil. R. Evid. 412 hearing over Appellant's objection also violated his right to a public trial under R.C.M. 806.

1. The R.C.M. 806 public trial right applies to the Mil. R. Evid. 412 hearing.

Separate from the Sixth Amendment right, R.C.M. 806 provides a right to a public trial. As R.C.M. 806 states, "[e]xcept as provided *in this rule*, courts-martial shall be open." R.C.M. 806(a) (emphasis added).

Under R.C.M. 806(b)(4), the standard for closures "mirrors" *Waller*'s four-factor standard. *Hasan*, 84 M.J. at 205. Subsection (b)(4) provides for no other standard or exceptions for closures.

Rule 806 ostensibly applies to *all* Article 39(a), UCMJ, sessions. The definition of "court-martial" includes Article 39(a) sessions without limitation. *See* R.C.M. 103(8)(B). Moreover, the text of R.C.M. 806 does not exempt any specific proceeding from its rule.

An obvious tension exists between R.C.M. 806 and the closure provision in Mil R. Evid. 412 this Court must resolve, and this Court's "duty [is] "to interpret [the rules] as a harmonious whole rather than at war with one another." *Epic. Sys.*

Corp. v. Lewis, 584 U.S. 497, 502 (2018). Thus, where "a [harmonious] construction is possible and reasonable" between two conflicting rules, courts have "an obligation to avoid the conflict." *Servotronics, Inc. v. Rolls-Royce, LLC*, 975 F.3d 689,695 (7th Cir. 2020).

Interpreting "shall be closed" in Mil. R. Evid. 412(c)(2) as requiring closure where the *Waller* standard under R.C.M. 806(b)(4) is satisfied provides a harmonious reading that is possible and reasonable. Two facts support this conclusion.

First, underscoring this interpretation is the fact that R.C.M. 806 did previously provide an exception for closure "when expressly authorized by another provision of this Manual," *see* R.C.M. 806(b) (2002 ed.), but this text was explicitly deleted. This change occurred in 2004 when *Waller*'s standard was finally incorporated, Exec. Order No. 13365, 3 C.F.R. 71334 (2004), and years after Mil. R. Evid. 412 had already been amended to say that hearings "shall be closed." Exec. Order No. 13086, 3 C.F.R. 30078 (1998). The deletion signifies the President's intent to change the meaning of the rule, *see United States ex rel. Williams v. NEC Corps.*, 931 F.2d 1493, 1502 (11th Cir. 1991), and reading "shall be closed" in Mil. R. Evid. 412 as mandatory without qualification impermissibly puts this deleted text back into R.C.M. 806.

Second, the constitutional doubt canon counsels in favor of reading Mil. R. Evid. 412's closure provision as mandatory only to the extent it satisfies *Waller* under R.C.M. 806(b)(4). *See United States v. Kohlbek*, 78 M.J. 326, 332 (C.A.A.F. 2019) ("statutes should be interpreted in a way that avoids placing [their] constitutionality in doubt.") (internal quotations and citations omitted). For the reasons articulated *infra*, a mandatory provision has significant constitutional implications.

Therefore, on a harmonious reading of R.C.M. 806 and Mil. R. Evid. 412, R.C.M. 806(b)(4) applied to this hearing.[3]

[3] There is another reason R.C.M. 806 applies to the hearing. Rule 412 arguably does not encompass previous claims of sexual assault. If Mil. R. Evid. 412 did not apply, neither did its closure provision, and R.C.M. 806 necessarily applied by default. This Court, itself, has questioned the applicability of assaults under Mil. R. Evid. 412, stating in *United States v. Erikson* that "[w]e fail to see how the sexual assault of a victim relates to that victim's 'sexual behavior' or 'sexual predisposition.'" 76 M.J. 231, 235, n. 2 (C.A.A.F. 2017). While *Erikson* did not decide this because the parties failed to raise it, *id*., its reasoning was sound. Rule 412 defines "sexual predisposition" as "mode of dress, speech, or lifestyle," Mil. R. Evid. 412(d), which does not reasonably speak to prior assaults. And "sexual behavior," defined as "any sexual behavior not encompassed by the alleged offense," Mil. R. Evid. 412(d), speaks to *consensual* activity. Accordingly, the ordinary meaning of "sexual behavior" is "conduct *aimed* at engaging in sexual activity." *United States v. Papakee*, 575 F.3d 569, 573 (8th Cir. 2009) (emphasis added).

2. The closure failed to satisfy Waller's four-factor standard as incorporated in R.C.M. 806(b)(4).

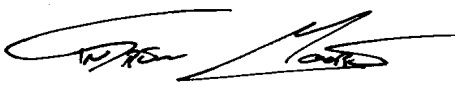
Since R.C.M. 806(b)(4) incorporates *Waller*'s standard, it was an abuse of discretion to fail to comply with subsection (b)(4) for the same reasons it was an abuse of discretion to fail to satisfy *Waller* under the Sixth Amendment.

3. The remedy for a R.C.M. 806 public trial violation is a new Mil. R. Evid. 412 hearing.

For violations of R.C.M. 806, this Court has held that, because the standards are the same for closure under the Sixth Amendment, "the remedy for a violation for R.C.M. 806 must also be the same." *Hasan*, 81 M.J. at 205, n. 15. That is to say, Appellant receives a new Mil. R. Evid. 412 hearing, and if the outcome of the hearing changes, he is entitled to a new trial. *Waller*, 467 U.S. at 50.

Conclusion

Appellant was denied his right to a public trial per both the Sixth Amendment and R.C.M. 806. Therefore, Appellant respectfully requests this Honorable Court grant relief.



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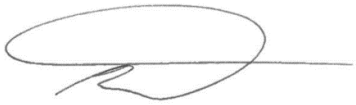

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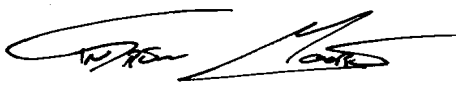

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Miller, Crim App. Dkt. No. 20230026, USCA Dkt. 25-0025/AR was electronically with the Court and Government Appellate Division on April 1, 2025.

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