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	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. ARMY 20230026 USCA Dkt. No. 25-0025/AR

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.

Law and Argument

The public trial right under both the Sixth Amendment and Rule for Courts-Martial [R.C.M.] 806 requires the military judge to satisfy all four prongs of the *Waller* standard *before* a total closure occurs. *Waller v. Georgia*, 467 U.S. 39, 43 (1984);[1] R.C.M. 806(b)(4). The presumption is openness, and the military judge

[1] Under the four-part test, a closure must meet all four prongs: [(1)] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [(2)] the closure must 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 43.

ordered the total closure of this Military Rule of Evidence [Mil. R. Evid.] 412 hearing without any analysis whatsoever. (JA027; *see*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610). That was error.

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

1. The application of the Waller values should be conducted on a case by case basis.

"*Waller* provided standards for courts to apply before excluding the public from *any* stage of a criminal trial." *Presley v. Georgia*, 558 U.S. 209, 213 (2010). As outlined in the Appellant's opening brief, there is no constitutional mandate for *all* Mil. R. Evid. 412 hearings to be open; however, the *Waller* values must be assessed on an individual case basis before closing a Rule 412 hearing. (*see*, Appellant's Br. at 4).

The Government's analysis fails to recognize that each Mil. R. Evid. 412 hearing presents unique circumstances. For example, the Government argues the fourth *Waller* value, discouraging perjury, has little utility in a 412 hearing because such hearings "bear[] little risk of perjury, as a closed pre-trial hearing allows the alleged victims to provide embarrassing or intimate details more openly." (Gov Br. at 11-12). However, this very case cuts against that argument. At the Mil. R. Evid. 412 hearing, the defense was not interested in any embarrassing or intimate

details but instead exposing inconsistencies and misstatements by the purported victim.

2. Rule 412 hearings resemble a bench trial.

The Supreme Court, in *Waller*, emphasized the similarities to a bench trial and the case-dispositive characteristics of suppression hearings. *Waller,* 467 U.S. at 46-47. Like the suppression hearing in *Waller*, Mil. R. Evid. 412 hearings are similar to bench trials.[2] But the Government's attempt to draw a parallel between a Mil. R. Evid. 412 hearing and a grand jury, thereby justifying its closure, lacks support within the military justice system. (*see*, Gov. Br. at 12). First, grand juries are not part of the trial. *See, United States v. Calandra*, 414 U.S. 338, 343 (1974); *In re Oliver*, 333 U.S. 257, 272-73 (1948). Conversely, Mil. R. Evid. 412 hearings are part of the trial. Second, within the military justice framework, a grand jury bears a closer resemblance to an Article 32 hearing, which this Court has determined must generally be open. *See*, *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997).

3. Rule 412 hearings are often case-dispositive.

The Government asserts that Mil. R. Evid. 412 hearings "rarely become case-dispositive." (Gov. Br. at 3 and 11). But the rulings of this Court have

[2] 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).

underscored the essential importance of a Mil. R. Evid. 412 hearing in courts-martial, resulting in the reversal of numerous convictions due to military judges abusing their discretion applying Rule 412.[3] Additionally, the Government ignores Appellant's argument establishing the application of the public trial right to Mil. R. Evid. 412 hearings is consistent with judicial decisions following *Waller*, which reaffirmed that the public trial right encompasses pretrial motions in limine. (*see*, Appellant's Br. at 9). Therefore, the Appellant's Sixth Amendment right to a public trial was applicable to the Mil. R. Evid. 412 hearing in this case.

4. The closure was not narrowly tailored.

The Government asserts that the closure was narrowly tailored; however, it fails to identify how it was tailored or specify how privacy concerns were an "overriding interest" in this case. (*see*, *Waller,* 467 U.S. at 43; R.C.M. 806(b)(4)). A rule is not narrowly tailored if it is applied uniformly to all cases. *Globe Newspaper Co.,* 457 U.S. 596, 609. (such a provision "cannot be viewed as a

[3] *See*, *United States v. Leonhardt*, 76 M.J. 821(C.A.A.F. 2017) (military judge erred in excluding evidence of other sexual behavior between the victim and appellant offered by the defense pursuant to Mil. R. Evid. 412); *United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011) (the military judge limited the cross-examination of the alleged victim concerning a prior affair); *United States v. Buenaventura*, 45 M.J. 72 (C.A.A.F 1996) (military judge erred in his decision to limit cross-examination of an 8-year-old victim and the government's expert witness in a child sex abuse case about previous abuse by grandfather); *United States v. Jensen*, 25 M.J. 284 (C.M.A. 1987) (military judge did not allow the defense to offer specific instances of prior sexual conduct).

narrowly tailored means of accommodating [an alleged victim's privacy] interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the [government's] legitimate concern for the well-being of the [alleged] victim necessitates closure.") Thus, per *Waller* and R.C.M. 806, a military judge has the discretion to close the hearing after, but only after, making sure the closure is narrowly tailored.

B. The military judge erred by failing to comply with Rule for Courts-Martial 806(b)(4) before ordering a total closure of court.

The Government asserts unequivocally "[t]he plain language of Mil R. Evid 412(c)(2) makes it a mandatory provision, making R.C.M. 806(b)(4)'s statutory balance test inapplicable." (Gov. Br. at 3). However, the Government fails to address the inconsistencies between the President's language in R.C.M. 806 and Mil. R. Evid. 412, and focuses on R.C.M. 806's Discussion. Furthermore, the absence of authoritative citations to support its arguments underscores that caselaw nor rules support its stance.

1. The Government failed to reconcile the President's changes to Rule for Courts-Martial 806.

The Government also fails to address the 2004 changes to R.C.M. 806 by which the President removed the words "a session may be closed over the objection of the accused only when expressly authorized by another provision of this Manual." (Exec. Order No. 13365, 69 Fed. Reg. 71333, 71334 (2004); *see*,

Appellant Br. at 13; Air Force Defense Appellate Division *Amicus Curiae* Br. at 2-3). Instead, the Government focuses on the Manual for Courts-Martial [MCM] Discussion on Rule 806.

After the 2004 changes to R.C.M. 806, this Court must provide a harmonious reading of the two rules for practitioners. But to endorse the Government's stance, this Court must implicitly restore the language that the President explicitly removed from Rule 806. In many instances, if the military judge adheres to R.C.M. 806, most Mil. R. Evid. 412 hearings will be conducted in closed session. But military judges must conduct the R.C.M. 806 analysis. In this case, as an examination of the closed session shows, the hearing would likely have been public had the military judge addressed the *Waller* factors per R.C.M. 806(b)(4).

The Government finds the phrase "*See also* Mil R. Evid. 412(c)(2), 505(k)(3), and 513(e)(2)" as somehow providing support for its claim that all 412 hearings are automatically closed. (Gov. Br. at 9, quoting R.C.M. 806(b)(4) Discussion). But "*See also*" in the Discussion of R.C.M. 806 does not mean this rule does not apply to Mil. R. Evid. 412. If that was so, the President would not have removed the words "a session may be closed over the objection of the accused only when expressly authorized by another provision of this Manual."

Also, the Discussion would say the phrase "*but see,*"[4] or "this Rule does not apply to Mil. R. Evid. 412." In any event, the "Discussion' sections . . . are not part of the [MCM] and . . . do not contain official rules or policy," and this Court has declined to follow the Discussion when the Discussion has failed to account for amendments to the rule. *United States v. Davis*, 63 M.J. 171, 175 (C.A.A.F. 2006).

2. 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." *United States v. Hasan*, 81 M.J. 181, 205, n. 15. (C.A.A.F. 2024). Thus, Appellant must receive 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.

[4] "*But see*" indicates that the source that follows clearly supports a proposition contrary to the main proposition. *The Bluebook: A Uniform System of Citation*, R. 1.2(c), at 63 (21st ed. 2021).

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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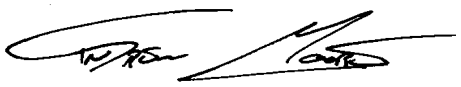

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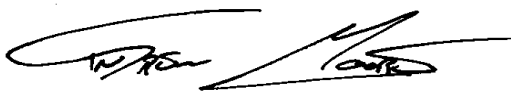
I certify that a copy of the foregoing in the case of *United States v. Miller*, Crim App. Dkt. No. ARMY 20230026, USCA Dkt. 25-0025/AR was electronically filed with the Court and Government Appellate Division on April 22, 2025.



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