April 2, 2025

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

BRANDON Z. MILLER
Specialist (E-4), U.S. Army
Appellant.

Crim. App. No. ARMY 20230026

USCA Dkt. No. 25-0025/AR

BRIEF OF THE AIR FORCE APPELLATE DEFENSE DIVISION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

Dwight H. Sullivan
U.S.C.A.A.F. Bar No. 26867
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
Email: dwight.sullivan.1@us.af.mil

Pilar G. Wennrich, Col, USAF
U.S.C.A.A.F. Bar No. 33334
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
Email: pilar.wennrich@us.af.mil

Counsel for Amicus Curiae

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COMES NOW the Air Force Appellate Defense Division, by and through undersigned counsel, and pursuant to Rule 26(b)(1) of this Honorable Court's Rules of Practice and Procedure, files this amicus curiae brief in support of Appellant.

ISSUE PRESENTED

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

Amicus curiae accepts Appellant's statement of statutory jurisdiction, statement of the case, statement of facts, and standard of review.

SUMMARY OF ARGUMENT

Military Rule of Evidence (M.R.E.) 412(c)(2) provides that a hearing to determine the admissibility of evidence of an alleged victim's sexual behavior or predisposition "shall be closed."[1] Such automatic exclusion of the public from every Article 39(a) session concerning the admissibility of evidence under M.R.E. 412 offends the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[2] This Court should either construe the Manual for Courts-Martial as requiring a case-specific determination before closing a session or strike down M.R.E. 412(c)(2) as unconstitutional.

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[1] MIL. R. EVID. 412(c)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2024 ed.) [hereinafter 2024 MCM].
[2] U.S. CONST. amend. VI.

Courts apply principles of statutory construction when construing the *Manual for Courts-Martial*.[3] A fundamental canon of statutory construction provides that laws should be interpreted to avoid serious doubts as to their constitutionality.[4]

Interpreting the *Manual for Courts-Martial* to compel the automatic closure of hearings concerning the admissibility of evidence offered under M.R.E. 412 would create serious constitutional doubts. The Supreme Court has established a four-part test which courts must apply before "any stage of a criminal trial" may be closed.[5] Automatic closure of M.R.E. 412 hearings are inconsistent with that Supreme Court precedent. Additionally, constitutional provisions are construed based on their ratifiers' understanding.[6] The Sixth Amendment's ratifiers would have understood an M.R.E. 412 admissibility hearing to be part of a "trial," thereby placing such hearings within the scope of that Amendment's public trial right.

This Court can and should construe the *Manual for Courts-Martial* to avoid the constitutional doubt that would arise from automatically closing M.R.E. 412 admissibility hearings. In 2004, the President amended Rule for Courts-Martial (R.C.M.) 806(b) to remove language providing that "a session may be closed over

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[3] See, *e.g.*, *United States v. Lucas*, 1 C.M.R. 19, 22 (C.M.A. 1951).
[4] *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247–51 (2012) ("Constitutional-Doubt Canon"; "A statute should be interpreted in a way that avoids placing its constitutionality in doubt.").
[5] *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam).
[6] *See*, *e.g.*, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022).

the objection of the accused only when expressly authorized by another provision of this Manual."[7] As amended, R.C.M. 806 allows a court-martial to be closed only if a four-step process is satisfied.[8] That change post-dates the amendment to M.R.E. 412 that provided for automatic closure of admissibility hearings.[9] Thus, applying both the constitutional-doubt canon and the *lex posterior derogat legi priori* legal maxim ("the rule that the more recent of two conflicting statutes shall prevail"),[10] this Court should give effect to R.C.M. 806 instead of M.R.E. 412(c)(2).

Finally, if this Court were to conclude that it cannot interpret the *Manual for Courts-Martial* to avoid M.R.E. 412(c)(2)'s automatic closure rule, it should hold that provision unconstitutional under the Sixth Amendment's public trial guarantee.

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[7] Exec. Order No. 13365, 69 Fed. Reg. 71333, 71334 (2004).
[8] *See*, *e.g.*, R.C.M. 806(a), (b)(4), 2024 MCM, *supra* note 1.
[9] Exec. Order No. 13088, 63 Fed. Reg. 30065, 30078 (1998).
[10] *See*, *e.g.*, *Patterson v. Independent Sch. Dist.*, 742 F.2d 465, 468 (8th Cir. 1984).

ARGUMENT

The constitutional-doubt canon favors construing the *Manual for Courts-Martial* to require a military judge to conduct a case-by-case determination of whether to close a hearing concerning the admissibility of evidence under M.R.E. 412.

A. The constitutional-doubt canon

This Court has long held that, "[t]ypically, legislation is interpreted in a way that will avoid constitutional problems."[11] As this Court has explained, under the "constitutional doubt" canon, "statutes 'should be interpreted in a way that avoids placing [their] constitutionality in doubt."[12] The Supreme Court has similarly observed:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[13]

This Court's jurisprudence firmly establishes that the rules of statutory construction are used to construe the *Manual for Courts-Martial*.[14] Thus, not

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[11] *United States v. Kalscheuer*, 11 M.J. 373, 376 n.8 (C.M.A. 1981) (citing 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.11 (4th ed. 1973) (commonly known as SUTHERLAND STATUTORY CONSTRUCTION)). *Accord*, *e.g.*, *United States v. Fosler*, 70 M.J. 225, 232 (C.A.A.F. 2011); *United States v. McDonagh*, 14 M.J. 415, 417 (C.M.A. 1983).

[12] *United States v. Kohlbek*, 78 M.J. 326, 332 (C.A.A.F. 2019) (quoting ANTONIN SCALIA & BRYAN A. GARNER, supra note 4, at 247).

[13] *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

[14] *E.g.*, *Lucas*, 1 C.M.R. at 22; *United States v. Clark*, 62 M.J. 195, 198 n.13 (C.A.A.F. 2005); *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007).

surprisingly, this Court has applied the constitutional-doubt canon when construing a *Manual for Courts-Martial* provision.[15]

B. Automatic closure of M.R.E. 412 hearings with no case-specific consideration of the need for closure raises serious constitutional doubts

"Serious doubt" arises as to the constitutionality of automatic closure of hearings to consider the admissibility of evidence under M.R.E. 412. In its 2010 decision in *Presley v. Georgia*, the Supreme Court ruled that *Waller v. Georgia* "provided standards for courts to apply before excluding the public from *any stage of a criminal trial*."[16] Those standards prescribe a four-step process that must be followed before a criminal trial is closed:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.[17]

Automatic closure of every hearing on the admissibility of evidence under M.R.E. 412 violates that Supreme Court ruling.

Moreover, an M.R.E. 412 hearing would fall within the Sixth Amendment's ratifiers' understanding of the word "trial."[18] Such a hearing bears the essential

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[15] *Kohlbek*, 78 M.J. at 332 (using constitutional-doubt canon to construe M.R.E. 707).
[16] *Presley*, 558 U.S. at 213 (emphasis added).
[17] *Waller v. Georgia*, 467 U.S. 39, 48 (1984).
[18] *See Bruen*, 597 U.S. at 28 (noting that a constitutional provision's "meaning is fixed according to the understandings of those who ratified it").

attributes of a late-eighteenth century American criminal trial.[19] It is an adversarial proceeding[20] with a public prosecutor[21] conducted before a judge in a courtroom where witnesses are called to the stand and questioned by counsel for both parties,[22] who then argue to a judge who rules on the admissibility of the evidence.[23] If the

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[19] *See generally* Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323 (2009) [hereinafter Jonakait, *Rise of the American Adversary System*].

[20] *See* Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 94 (1995) [hereinafter Jonakait, *Origins of the Confrontation Clause*] (observing that when adopting the Sixth Amendment's right to counsel, "the Framers were not incorporating English law. Instead, they were constitutionalizing an existing American practice that had emerged before the Bill of Rights. Shortly after Independence, twelve of the thirteen states guaranteed that the accused could be represented by counsel. While the concept that defense counsel helped ensure fair proceedings in all cases was in its English infancy, American society by 1776 saw unfettered defense lawyers as essential for criminal justice. Indeed, a number of colonies even before the Revolution permitted defense counsel in ordinary criminal cases." (internal footnote and paragraph break omitted)).

[21] Jonakait, *Rise of the American Adversary System*, *supra* note 19, at 328 ("In eighteenth-century America, . . . public officials began to assume the duty of prosecuting criminal cases, and by Independence public prosecution existed in all parts of the land.").

[22] Jonakait, *Origins of the Confrontation Clause*, *supra* note 20, at 108 ("America had adopted an adversary system, with defense cross-examination at its core, by the time of the Bill of Rights").

[23] *See*, *e.g.*, Jonakait, *Rise of the American Adversary System*, *supra* note 19, at 345, 349–51 (referencing a 1794 Delaware criminal case in which "the prosecutor objected to a defense witness as incompetent, and the witness was not allowed to testify" (*State v. Farson*, 1 Del. Case. 23 (1794)), a 1795 Pennsylvania criminal case in which "the prosecutor successfully objected when the defense counsel sought to introduce hearsay" (*Respublica v. Langcake and Hook*, 1 Yeates 415 (Pa. 1795)), a 1796 North Carolina criminal case in which the trial judges (there were two) allowed the solicitor general, over defense objection, to impeach a witness he called with a prior inconsistent statements (*State v. Norris*, 2 N.C. 429 (1796)), and an 1800

Sixth Amendments' ratifiers could be reanimated, taken to an M.R.E. 412 hearing, and asked if it is a "trial," their answer would no doubt be an overwhelming "yes."

The argument for the Sixth Amendment public trial right's applicability is even stronger in the military than civilian criminal context. Federal Rule of Evidence 412 (F.R.E.) provides, in relevant part, "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."[24] "In camera" is a Law Latin term whose literal translation is "in a chamber."[25] When the M.R.E.s were originally promulgated, F.R.E. 412 provided, in relevant part, "If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible."[26] The comparable portion of M.R.E. 412 provided, "If the military judge determines that the offer of proof contains evidence described in subdivision (b), the military judge shall conduct a hearing, which may

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federal criminal case in which the report "contains a long footnote explaining the court's rulings on a number of evidentiary issues" (*The Ulysses*, 24 F. Cas. 515, 516–17 n.2 (C.C.D. Mass. 1800) n.b.: the version of this case available on Lexis omits the reporter's summary of the trial, which includes the lengthy footnote concerning evidentiary rulings. The full opinion is available at https://babel.hathitrust.org/cgi/pt?id=chi.28263130&seq=523.).

[24] FED. R. EVID. 412(c)(2).

[25] BLACK'S LAW DICTIONARY (11th ed. 2019). The first definition *Black's Law Dictionary* provides for the term is "In the judge's private chambers." The second is "In the courtroom with all spectators excluded."

[26] Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, § 2, 92 Stat. 2046, 2046.

be closed, to determine if such evidence is admissible."[27] The M.R.E.'s drafters explained:

> Rule 412(c) provides the procedural mechanisms by which evidence of past sexual behavior of a victim may be offered. The Rule has been substantially modified from the Federal Rule in order to adapt it to military practice. . . . Reference to hearings in chambers has been deleted as inapplicable; a hearing under Article 39(a), which may be without spectators, has been substituted. The propriety of holding a hearing without spectators is dependent upon its constitutionality which is in turn dependent upon the facts of any specific case.[28]

While the drafters' analysis is not binding, it is persuasive.[29] The persuasive value should be particularly high here, where the drafters included "Mr. Andrew Effron" and the analysis "was prepared primarily by Major Fredric Lederer, U.S. Army."[30]

When M.R.E. 412(c)(2) was changed in 1998 to make closure mandatory rather than case-specific, the President retained the "hearing" language in lieu of the F.R.E. 412's reference to "a hearing in camera."[31] Thus, proceedings to determine the admissibility of evidence under M.R.E. 412 retain their trial-like nature.

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[27] MIL. R. EVID. 412(c)(2), Exec. Order No. 12198, 45 Fed. Reg. 16932, 16961 (1980).
[28] Change No. 3, Manual for Courts-Martial, United States, 1969 (Revised Edition), at App. 18, A18-66, Analysis of the 1980 amendments to the *Manual for Courts-Martial* (Sept. 1, 1980), https://babel.hathitrust.org/cgi/pt?id=mdp.39015069823873 [hereinafter Analysis of the 1980 amendments to the *Manual for Courts-Martial*].
[29] *United States v. Toy*, 65 M.J. 405, 410 n.3 (C.A.A.F. 2008).
[30] Analysis of the 1980 amendments to the *Manual for Courts-Martial*, *supra* note 28, at A18-1.
[31] Exec. Order No. 13088, 63 Fed. Reg. 30065, 30078 (1998). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141(b), 108

C. A construction of the *Manual for Courts-Martial* that avoids the constitutional issue is "fairly possible"

Rule for Courts-Martial (R.C.M.) 806(a) provides, "Except as otherwise provided in this rule, courts-martial shall be open to the public."[32] Rule 806(b)(4) specifies when a court-martial may be closed:

> Courts-martial shall be open to the public unless (A) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (B) closure is no broader than necessary to protect the overriding interest; (C) reasonable alternatives to closure were considered and found inadequate; and (D) the military judge makes case-specific findings on the record justifying closure.[33]

R.C.M. 806(b)(4) and M.R.E. 412(c)(2) are incompatible. This Court can resolve that inconsistency within the *Manual for Courts-Martial* by using the constitutional-doubt canon to give effect to the former instead of the latter.

Choosing to enforce R.C.M. 806(b)(4) in lieu of M.R.E. 412(c)(2) finds additional support in the legal maxim *lex posterior derogate legi priori*, under which when two provisions conflict, the later in time prevails.[34] The original R.C.M. 806(b)

Stat. 1796, 1918–19 (1994) (amending, *inter alia*, FED. R. EVID. 412(c)(2) to provide, "Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard.").

[32] R.C.M. 806(a), 2024 MCM, *supra* note 1. The version of R.C.M. 806(a) in the 2019 *Manual* was identical.

[33] R.C.M. 806(b)(4), 2024 MCM, *supra* note 1. The version of R.C.M. 806(b)(4) in the 2019 *Manual* was identical.

[34] *See*, *e.g.*, *Patterson*, 742 F.2d at 468; *Harding v. VA*, 448 F.3d 1373, 1376 n.2 (Fed. Cir. 2006). *See also United States v. Under Seal*, 709 F.3d 257, 262 n.2 (4th Cir. 2013) (referring to "*leges posteriores priores contrarias abrogant*—the rule that the

included a clause stating, "a session may be closed over the objection of the accused only when expressly authorized by another provision of this Manual."[35] Executive Order 13365 of December 3, 2004, deleted that language, adopting in its place language in R.C.M. 802(b)(2) that is substantively identical to the current R.C.M. 806(b)(4).[36] In choosing between the incompatible M.R.E. 412(c)(2) and R.C.M. 806(b)(4), the *lex posterior derogat legi priori* maxim favors the latter. This Court can and should hold that R.C.M. 806(b)(4) has superseded M.R.E. 412(c)(2), thereby giving effect to the more recent of two conflicting *Manual* provisions while also avoiding a construction that would create serious constitutional doubt.

Finally, if this Court were to conclude that it cannot construe the *Manual* to avoid giving effect to M.R.E. 412(c)(2), then for the reasons discussed above concerning why that rule creates constitutional doubt, this Court should hold that it is unconstitutional under the Sixth Amendment's public trial guarantee.

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more recent of two conflicting statutes shall prevail."); *Southern Scrap Material Co. LLC v. ABC Ins. Co.*, 541 F.3d 584, 593 (5th Cir. 2008); (referring to "the longstanding principle that when two statutes irreconcilably conflict, the more recent statute controls").

[35] R.C.M. 806(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984 ed.).

[36] Exec. Order No. 13365, 69 Fed. Reg. 71333, 71334 (2004).

Respectfully submitted,

WENNRICH.PILAR.G.1277964100 Digitally signed by WENNRICH.PILAR.G.1277964100 Date: 2025.04.02 16:22:01 -04'00'

Dwight H. Sullivan
U.S.C.A.A.F. Bar No. 26867
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
Email: dwight.sullivan.1@us.af.mil

Pilar G. Wennrich, Col, USAF
U.S.C.A.A.F. Bar No. 33334
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
Email: pilar.wennrich@us.af.mil

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 26(f) because it contains 2677 words exclusive of the index, table of cases, and certificates of counsel.

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Dwight H. Sullivan
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 26867
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762
240-612-4770
dwight.sullivan.1@us.af.mil

Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court, and a copy served on counsel for Appellant and the Army Government Appellate Division on April 2, 2025.

Dwight H. Sullivan
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 26867
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762
240-612-4770
dwight.sullivan.1@us.af.mil