IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Specialist (E-4) **BRANDON Z. MILLER,** United States Army, Appellant	)	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:

Granted Issue

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] reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2019) [UCMJ]. The statutory basis for this Court's jurisdiction rests upon Article 67(a)(3), UCMJ, 10 U.S.C. § 867.

Statement of the Case

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

violation of Articles 90 and 120, UCMJ.[1] (JA012; JA028). Appellant was sentenced to confinement for thirty months (for the sexual assault),[2] reduction to E-1, and a dishonorable discharge. (JA011; JA029). On February 14, 2023, the convening authority took no action. (JA030). On February 23, 2023, the military judge entered judgment. (JA031). On July 19, 2024, the Army Court affirmed the findings and sentence. (JA008).

Statement of Facts

On October 11, 2022, the military judge conducted an Article 39(a) session and ordered the courtroom's closure to consider the defense motion to introduce evidence under Military Rule of Evidence (Mil. R. Evid.) 412. (JA027). Defense counsel objected to closure and requested constitutional analysis "under the First and [Sixth] Amendment, as in *U.S. versus . . . Hershey*." (JA027). The military judge noted the objection and overruled it without further comment. (JA027).

[1] Appellant was found not guilty of sexual assault (by placing in fear) and of assault consummated by battery in violation of Articles 120 and 128, UCMJ. (JA028).

[2] Appellant received no confinement for the willful disobedience. (JA 029).

Summary of Argument

The Sixth Amendment's public trial right does not attach to a hearing under Mil. R. Evid. 412(c)(2). This Rule presumes evidentiary exclusion, dealing with collateral matters and narrow exceptions. Unlike suppression hearings, Mil. R. Evid. 412 hearings are rarely case-dispositive and do not implicate governmental misconduct. The mandatory closure provision helps accomplish the compelling interests of protecting alleged victims of sexual offenses; discouraging the introduction of inflammatory and irrelevant details of an intimate nature; and encouraging victim reporting and participation for sex crime prosecutions. The interests of a public trial do not apply to the same degree, and rape-shield hearings do not have a tradition of accessibility.

Even if the public trial right attaches to Mil. R. Evid. 412 hearings, the military judge did not abuse his discretion by applying mandatory closure. This statutory provision is narrowly tailored to accomplish the compelling governmental interests underlying protection of victims and exclusion of irrelevant evidence. The Supreme Court's *Waller* analysis does not apply to mandatory closure provisions when so limited. If this Court finds the provision overbroad, however, the appropriate remedy is individualized *Waller* analysis.

The plain language of Mil. R. Evid. 412(c)(2) makes it a mandatory provision, making R.C.M. 806(b)(4)'s statutory balancing test inapplicable. The

Discussion following R.C.M. 806(b)(4) also differentiates between its individualized determinations and the separate requirements of Mil. R. Evid. 412(c)(2). Imposing R.C.M. 806(b)(4)'s standard onto Mil. R. Evid 412 hearings would be inappropriate if this Court finds no Sixth Amendment violation.

Granted Issue

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

Standard of Review

This Court reviews a military judge's closure of courtroom proceedings for an abuse of discretion. *United States v. Ortiz*, 66 M.J. 334, 338 (C.A.A.F. 2008).

Law and Argument

Under Mil. R. Evid. 412, evidence of a victim's sexual behavior or predisposition generally "is not admissible in any proceeding involving an alleged sexual offense." Mil. R. Evid. 412(a). With only narrow exceptions, Mil. R. Evid. 412 is a rule of exclusion that a proponent must overcome to admit applicable evidence. *United States v. Gaddis*, 70 M.J. 248, 251-52 (C.A.A.F. 2011). It was adopted from, and largely mirrors, Federal Rule of Evidence 412. *See* Fed. R. Evid. 412; *see also* Manual for Courts-Martial, United States, Analysis of the 1980 Amendments to the Military Rules of Evidence, app. 22 at A22-29 (1984 ed.). Fed. R. Evid. 412 was promulgated as the Privacy Protection for Rape Victims Act of

1978 and has remained in effect since that time. Pub. L. No. 95-540, 92 Stat. 2046 (1978). Nearly every state also adopted a rape-shield rule around the same time. *See, e.g.*, *Neeley v. Commonwealth*, 437 S.E.2d 721 (Va. Ct. App. 1993) (stating that between 1974 and 1984, "virtually every state adopted some [such] form of protection for complaining witnesses in sexual assault cases").

The purpose of Mil. R. Evid. 412 is to "shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to [sexual offense prosecutions]."[3] Prior to the rape-shield laws, "defense lawyers were permitted great latitude in bringing out intimate details about a rape victim's life. Such evidence quite often serves no real purpose and only results in embarrassment to the rape victim and unwarranted public intrusion into her private life." *United States v. Sanchez*, 44 M.J. 174, 178 (C.A.A.F. 1996) (quoting 124 Cong. Rec. 34912 (1978)).

Mil. R. Evid. 412(c)(2) states the military judge *shall* close the court to conduct the hearing.[4] (Emphasis added). Furthermore, this provision requires the

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[3] Manual for Courts-Martial, United States, Analysis of the Military Rules of Evidence app. 22 at A22-35 (2008 ed.) [Drafter's Analysis]; *see also United States v. Banker*, 60 M.J. 216, 219 (C.A.A.F. 2004) (noting that Mil. R. Evid. 412 "was intended to safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process.").

[4] Fed. R. Evid. 412 has required a closed session ("in chambers" or "in camera") since its inception. Privacy Protection for Rape Victims Act. Mil. R. Evid. 412

"motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1113 and remain under seal" unless the proper authority orders otherwise. Mil. R. Evid. 412(c)(2). The courts have found that the procedural requirements under Mil. R. Evid. 412 apply both to the defense and government. *Banker*, 60 M.J. at 223 (C.A.A.F. 2004).

The Sixth Amendment to the United States Constitution grants a criminal accused "the right to a speedy and public trial." U.S. Const. amend VI. "Without question, the sixth amendment right to a public trial is applicable to courts-martial." *United States v. Hershey*, 20 M.J. 433, 435-36 (C.M.A. 1985) (citing *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977); *United States v. Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956)).

While not absolute,[5] this public trial right has extended to some specific portions of the pre-trial process,[6] including suppression hearings. *Waller v.*

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initially differed, stating such hearing "may be closed," but it was modified nearly three decades ago to "shall be closed." Exec. Order No. 13088, 63 Fed. Reg. 30065, 30078 (1998).

[5] Federal law allows for limited court closures to protect against disclosure of sensitive information. For example, 18a U.S.C. § 6 requires that "a hearing to make all determinations concerning the use, relevance, or admissibility of classified information . . . shall be held in camera if the Attorney General certifies to the court . . . a public proceeding may result in the disclosure of classified information." Classified Information Procedures Act, 18a U.S.C. § 6, 96 Pub. L. No. 456, 94 Stat. 2025 (1980).

[6] "The Supreme Court has, in two cases, extended this [Sixth Amendment] public-trial right to specific proceedings beyond the actual proof at trial." *Jordan v.*

Georgia, 467 U.S. 39 (1984). The Supreme Court in *Waller* did not give an exact test for what parts of the criminal pre-trial process to which this right attaches, but it relied on four factors in finding it applicable to suppression hearings: (1) the public seeing an accused fairly treated; (2) the judge and prosecutor "kept keenly alive to a sense of their responsibility and to the importance of their functions;" (3) encouraging witnesses to come forward; and (4) discouraging perjury. *Id.* at 46. The Supreme Court focused on the resemblance to a bench trial, the case-dispositive nature of suppression hearings, and the public interest in scrutinizing police and prosecutor misconduct. *Id.* at 46-47.[7]

When the Supreme Court found the public trial right attached to suppression hearings, it applied the test for proper court closure under *Press-Enterprise v. Superior Court of California*, 464 U.S. 501 (1984): "[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." *Waller*, 467 U.S. at 48. Federal and

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Lamanna, 33 F.4th 144, 151 (citing *Waller* for suppression hearings and *Presley v. Georgia*, 558 U.S. 209 (2010)(per curiam), for jury voir dire).

[7] When later evaluating the closely-related First Amendment right to a public trial, the Supreme Court also focused on (1) the relevant session's "tradition of accessibility" and (2) "whether public access plays a significant positive role in [its] functioning." *Press-Enterprise Co. v. Superior Court II*, 478 U.S. 1 (1986).

military courts have not addressed whether the Sixth Amendment right to a public trial applies to a rape-shield hearing; state courts have provided conflicting answers.[8]

A constitutional violation of this public trial right does not require automatic reversal and an immediate new trial. Instead, the Supreme Court found in *Waller* that "the remedy should be appropriate to the violation." *Waller*, 467 U.S. at 50. It remanded "to the state courts to decide what portions [of a new suppression hearing], if any, may be closed." *Id*. This allowed protection of the appellant's Sixth Amendment rights while not providing the "windfall" of a new trial unless the new hearing resulted in "some . . . material change" in circumstances. *Id*.

Waller dealt with a party's request to close a suppression hearing and did not address mandatory closure statutes. While the Supreme Court has struck down such a state statute for violating the public trial right, the majority in that case emphasized "our holding is a narrow one: that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, n. 27 (1982). When the right to a

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[8] *Compare Commonwealth v. Jones*, 37 N.E.3d 589 (Mass. 2015) (finding mandatory closure of rape-shield hearings unconstitutional), *and State v. Hoff*, 385 P.3d 945, 949 (Mon. 2016) (finding right to public trial attached to rape-shield hearing), *with State v. McNeil*, 393 S.E.2d 123, 126-27 (N.C. Ct. App. 1990) (finding no error in closure of rape-shield hearing and distinguishing from *Waller*), *and State v. Macbale*, 305 P.3d 107 (Ore. 2013) (upholding in-camera requirement for the rape-shield hearings).

public trial applies, mandatory closure provisions can only be constitutional if "necessitated by a compelling governmental interest" and "narrowly tailored to serve that interest." *Id.* at 607.

Rule for Courts-Martial (R.C.M.) 806(b)(4) incorporates the four-factor *Waller* test for application prior to closing a court-martial and overcoming the presumption of openness. The Discussion for R.C.M. 806 states "[a] session may be closed over the objection of the accused or the public upon meeting the constitutional standard set forth in this Rule." R.C.M. 806(b)(4) discussion. Following this statement, the Discussion provides: "*See also* Mil. R. Evid. 412(c)(2), 505(k)(3), and 513(e)(2)." *Id*.

A. The military judge did not abuse his discretion in closing the court because the Sixth Amendment right to a public trial does not apply to the narrow hearing under Mil. R. Evid. 412.

A closed hearing for Mil. R. Evid. 412 does not violate an accused's right to a public trial. It deals with a narrow issue, focused primarily on the behavior or characteristics of someone other than the accused. Such hearing is limited in fact-finding, instead concerned with the application of proposed facts to a legal framework of exclusion and exceptions. It concerns sensitive information about the victim, which will only be presented in a public forum if first determined to meet the stringent relevance and balancing tests. This military rule and its federal and

state counterparts are relatively new[9] but have a well-established tradition of "in camera" or "closed" requirements. And public access would not play a "significant positive role in the functioning of the particular process in question." *Press Enterprise II*, 478 U.S. at 11-12 (finding such positive role in relation to California's extensive preliminary hearings).

A session under Mil. R. Evid. 412 is distinguishable from the suppression hearing found in *Waller*. The military's rape-shield statute is a rule of exclusion, with evidence only admitted when relevant to narrow exceptions or when constitutionally required; a victim's other sexual behavior or predisposition is a collateral matter and presumed irrelevant in sex offense cases.[10] By contrast, the sole purpose of a suppression hearing is to keep out what is presumptively admissible evidence. Though testimony may be taken at a Mil. R. Evid. 412 hearing, the hearing primarily involves making a narrow legal determination[11] on a

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[9] With the recent advent of victims' rights and exclusion of general promiscuity evidence, it is doubtful the Constitution's Drafters would have recognized this hearing, dealing with a collateral matter under a rule of exclusion, and contemplated it in crafting the guarantee of a "speedy and public trial." U.S. Const. amend VI.

[10] Similarly, Mil. R. Evid. 513 codifies the patient-psychotherapist privilege, allowing the patient "to prevent any other person from disclosing" qualifying communications. Mil. R. Evid. 513(a). To protect this sensitive information, a hearing regarding the production or admission of such "records or communications" must be closed. Mil. R. Evid. 513(e)(2).

[11] The military judge must make factual findings to rule on Mil. R. Evid. 412 motions. This fact-finding, however, is limited. *Cf. United States v. Schumacher*,

collateral issue. No factual matter is decided nor is any evidence admitted. Unlike suppression hearings, the Mil. R. Evid. 412 hearing rarely becomes case-dispositive[12] and has no bearing on the public interest in probing police or prosecutor misconduct.

Similarly, the *Waller*-cited benefits of a public trial apply with considerably less force at a Mil. R. Evid. 412 hearing. The public always has an interest in seeing the accused fairly treated, but it is the alleged sex offense victim facing far greater scrutiny at this session. The benefit of military judges and prosecutors remaining focused on their responsibilities is similarly limited when considering the typical closure length and narrow focus on evidence presumed inadmissible. More compelling is the interest in witnesses coming forward: a closed hearing under Mil. R. Evid. 412 aims to encourage more victims to report sexual crimes without the fear of shaming and embarrassment so prevalent in the past. The opposing "benefit" of encouraging others to divulge sexual details about the alleged victim creates a trial within a trial at best and undercuts the rule's intent at worst. Finally, this limited pre-trial matter bears little risk of perjury, as a closed pre-trial hearing allows alleged victims to provide embarrassing or intimate details

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70 M.J. 387, 389-90 (C.A.A.F. 2011) (stating "the military judge must answer the legal question of whether there is some evidence upon which members could reasonably rely to find that each element of the defense has been established.").

[12] In scope and duration, it also differs from a lengthy preliminary hearing that "functions much like a full-scale trial." *Press-Enterprise II*, 478 U.S. at 7.

more openly. All testimony is still subject to confrontation and cross-examination, and any evidence found admissible can then be presented in a public session.

Closed sessions of a public trial occur in other circumstances, like grand jury proceedings or routine evidentiary matters[13]. With their compelling interests for secrecy, opportunity for public scrutiny in further proceedings, and tradition of mandatory closure, grand jury sessions do not have an attendant right of public access. *See, e.g.*, *Press Enterprise II,* 478 U.S. at 9. While not a precise analogue, the nature of a Mil. R. Evid. 412 hearing mirrors the grand jury's justifications for mandatory closure more closely than the required openness of a suppression hearing, which requires extensive fact-finding and has a tradition of accessibility. The limited subject matter, exclusionary presumption, and compelling protective interest of Mil. R. Evid. 412 only amplifies the inapplicability of the Sixth Amendment's public trial right to its required hearing.

B. Even if the right to public trial applies to Mil. R. Evid. 412, the Rule does not require individualized *Waller* determinations.

Assuming *arguendo* that the Sixth Amendment right to a public trial applies here, mandatory court closure is not automatically unconstitutional. Congress made a determination to protect an alleged victim's sensitive information and decided it

[13] *See United States v. Norris*, 780 F.2d 1207, 1210 (5th Cir. 1986) (rejecting public trial right attaching to chamber conferences related to "routine evidentiary" questions, which required "the application of legal principles to admitted or assumed facts").

outweighed the benefits of a public hearing. The military judge did not abuse his discretion by following this well-established law. He had no other reasonable choice. Therefore, if the Sixth Amendment's public trial right applies to Mil. R. Evid. 412, the statutory provision for mandatory closure requires strict scrutiny.

Closed Mil. R. Evid. 412 hearings protect alleged victims from attacks on their general character for chastity or embarrassment about perceived promiscuity. *See* Drafter's Analysis. This provides a compelling governmental interest: shielding victims from intrusive and public attacks on their character, encouraging their open participation in trial, and protecting against the public introduction of irrelevant information. *See Jones*, 37 N.E.3d at 602-03 (emphasizing "the compelling interest underlying the rape shield statute" and that the "requirement for an in camera hearing . . . reflects a legitimate interest in guarding against the public revelation of facts that can only smear a rape victim, and in protecting complainants and encouraging victim cooperation") (internal citations and quotation marks omitted).

Mandatory closure under Mil. R. Evid 412(c)(2) is also narrowly tailored to serve that compelling interest. The only evidence adduced in this setting necessarily will fall within the narrow categories of the alleged victim's other sexual behavior or sexual predisposition. This is a collateral issue about evidence presumed inadmissible unless falling into more narrow exceptions. Such sensitive

information of limited relevancy differs from the trial testimony of minor victims, the subject of the mandatory closure provision in *Globe Newspaper*. Any Mil. R. Evid. 412 evidence found admissible under a relevant exception, however, will then be heard in open court. Rape-shield statutes focus less on "the [general] physical and psychological well-being of a" victim[14] and more on reducing the publication of specific sensitive information. *Globe Newspaper*, 457 U.S. at 610. Mil. R. Evid. 412 operates as a rule of exclusion, and ensuring initial protection of sensitive, inadmissible information is appropriately narrow in every circumstance.

If this Court finds, however, the mandatory closure provision of Mil. R. Evid. 412 unconstitutional, it should also find that trial judges should conduct individualized *Waller* analysis prior to closing Mil. R. Evid. 412 hearings. The military judge then would determine whether the hearing warrants closure.

C. Rule for Courts-Martial 806(b)(4) does not apply to the mandatory closure provision of Mil. R. Evid 412(c)(2).

The clear language of Mil. R. Evid. 412(c)(2) requires hearing closure. The Rule does not give the military judge any discretion. To read its "shall" language as subject to R.C.M. 806's closure analysis contradicts its plain meaning. "The first step [in statutory interpretation] is to determine whether the language at issue has a

[14] The Supreme Court rejected the second asserted interest in *Globe Newspaper*, encouraging minor victims to come forward and provide accurate testimony, as not justifying mandatory disclosure in that case. The Government acknowledges that this asserted interest mirrors a portion of the rape-shield's intent.

plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *United States v. Valentin-Andino,* __ M.J. ___, 2025 CAAF LEXIS 248 (C.A.A.F. March 31, 2025) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)). By Mil. R. Evid. 412(c)(2)'s plain language mandating closure, it cannot be subject to R.C.M. 806(b)(4) and its balancing test.

Furthermore, the Discussion following R.C.M. 806(b)(4) specifically highlights Mil. R. Evid. 412(c)(2). Along with other rules that provide procedures for closure (Mil. R. Evid. 505(k)(3) & 513(e)(2)), the Discussion cites Mil. R. Evid. 412(c)(2) with "*See also*." This differentiates the mandatory closure provision from "meeting the . . . standard in" R.C.M. 806. By the statute's plain meaning and the R.C.M. 806 Discussion's explicit reference to the mandatory closure provisions, Mil. R. Evid. 412(c)(2) is clearly distinct from the statutory balancing test. Therefore, there is no statutory conflict requiring remedial action. The military judge did not abuse his discretion in complying with the explicit language and accepted meaning of Mil. R. Evid. 412(c)(2).

Conclusion

The United States respectfully requests this Honorable Court affirm the judgment of the Army Court.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **3,629** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on April 15, 2025.

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