No. 25-____

IN THE

Supreme Court of the United States

BRANDON Z. MILLER,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

STEPHEN I. VLADECK
Counsel of Record
600 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 662-9313
svladeck@gmail.com

JONATHAN F. POTTER
ANDREW W. MOORE
Appellate Defense Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060

Counsel for Petitioner

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QUESTION PRESENTED

If a court-martial defendant in a sexual assault case seeks to introduce evidence concerning the past sexual activity or predisposition of the alleged victim, Military Rule of Evidence (M.R.E.) 412(c)(2) requires the trial judge to conduct a hearing to determine whether the evidence may be admitted—and to automatically close that hearing to the public, without any case-specific assessment of the need for closing the courtroom.

In petitioner's case, a divided Court of Appeals for the Armed Forces (CAAF) held that this automatic-closure rule does not violate the Sixth Amendment's Public Trial Clause—solely because Rule 412 hearings are not part of the "trial" the Clause protects, and therefore do not trigger the case-specific analysis for closing pre-trial proceedings that this Court required in *Waller* v. *Georgia*, 467 U.S. 39 (1984). The CAAF's holding, from which Judge Maggs dissented, deepens an existing split of authority among state supreme courts—which have divided, 3-1, over whether automatic closures of comparable pre-trial hearings violate the Sixth Amendment.

The question presented is:

Whether the Public Trial Clause of the Sixth Amendment requires case-specific determinations of necessity and narrow tailoring before an M.R.E. 412 hearing can be closed to the public.

PARTIES TO THE PROCEEDING

Petitioner is Brandon Z. Miller. Respondent is the United States.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

Other than the direct appeal that forms the basis for this petition, there are no related proceedings for purposes of Rule 14.1(b)(iii). Petitioner is currently in the custody of the U.S. Bureau of Prisons while he serves a prison sentence for unrelated convictions in a civilian federal court. *See United States* v. *Miller*, No. 3:21-cr-158 (M.D. Tenn.).

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INTRODUCTION

"This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage." *In re Oliver*, 333 U.S. 257, 266 (1948); *see also Estes* v. *Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring) ("[T]he public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings."). The right to a public trial guaranteed to criminal defendants by the Sixth Amendment does not just extend to state courts, as *Oliver* held; it also applies to courts-martial, as the CAAF's predecessor ruled nearly 50 years ago. *See United States* v. *Grunden*, 2 M.J. 116, 120 (C.M.A. 1977); *see also ABC, Inc.* v. *Powell*, 47 M.J. 363 (C.A.A.F. 1997). *See generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 161–62 (2d ed. 1920) (recounting the broad historical tradition of public proceedings in courts-martial).

As this Court has long made clear, "the Sixth Amendment right to a public trial extends *beyond* the actual proof at trial." *Presley* v. *Georgia*, 558 U.S. 209, 212 (2010) (per curiam) (emphasis added). Thus, this Court has held that the Public Trial Clause applies to pre-trial proceedings such as suppression hearings, *see Waller* v. *Georgia*, 467 U.S. 39 (1984); and jury voir dire, *see Presley*, 558 U.S. 209. As those cases make clear, the Public Trial Clause applies because public access to such pre-trial proceedings is essential to "ensuring that judge and prosecutor carry out their duties responsibly," to "encourag[ing] witnesses to come forward," to "discourag[ing] perjury," or some combination of all three. *Waller*, 467 U.S. at 46 (citations omitted).

To be sure, the Public Trial Clause does not *mandate* open proceedings. Rather, even when the Clause otherwise applies, courts can close their proceedings to the public—but only upon case-specific showings of both necessity and narrow tailoring:

> [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.

Id. at 48 (citing *Press-Enterprise Co.* v. *Super. Ct.*, 464 U.S. 501, 511–12 (1984)); *see Weaver* v. *Massachusetts*, 582 U.S. 286, 298 (2017) ("Though these cases should be rare, a judge may deprive a defendant of his right to an open courtroom by making proper factual findings in support of the decision to do so."); *cf. Pitts* v. *Mississippi*, 607 U.S. 1 (2025) (per curiam) (reiterating that the Sixth Amendment Confrontation Clause requires case-specific analysis before witness testimony can be screened from a jury).

Like every state and the civilian federal courts, *see* Fed. R. Evid. 412, the military has adopted a rule that limits when defendants in sexual assault cases can introduce at trial evidence of the alleged victim's past sexual activity or predispositions. *See* M.R.E. 412. These "rape shield" laws are designed "to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to sexual offense prosecutions in the past." App. 23a (Maggs, J., dissenting) (citations and internal quotation marks omitted).

But M.R.E. 412 does much more than just limit the circumstances in which such evidence can be admitted in a court-martial; it *requires* the trial judge to (1) hold a hearing in any case in which the accused seeks to introduce such evidence; and (2) *close* that hearing to the public, no matter what. *See* M.R.E. 412(c)(2). M.R.E. 412 thus mandates the automatic closure of hearings that bear all the hallmarks of Founding-era criminal trials: They are adversarial proceedings conducted before a judge in a courtroom in which witnesses are called to the stand and questioned on the record by prosecutors and defense counsel—who then argue over the admissibility of such evidence. *See Presley*, 558 U.S. at 212–13.

In petitioner's case, the CAAF held that M.R.E 412's automatic-closure rule does not violate the Sixth Amendment. App. 12a. That conclusion rested solely on the CAAF's view that M.R.E. 412 hearings are not part of the "trial" the Public Trial Clause protects. But as Judge Maggs explained, such reasoning cannot be reconciled with *Waller*, and it directly conflicts with *Commonwealth* v. *Jones*, 37 N.E.3d 589 (Mass. 2015), and *State* v. *Hoff*, 385 P.3d 945 (Mont. 2019)—both of which held that the Public Trial Clause *does* apply to "rape shield" hearings materially indistinguishable from those under M.R.E. 412. App. 18a–22a (Maggs, J., dissenting); *see also State* v. *Kelly*, 545 A.2d 1048, 1051–53 (Conn. 1988) (reaching the same conclusion).

Judge Maggs is correct on both counts. This Court should grant certiorari because the CAAF's holding that the Public Trial Clause doesn't apply to M.R.E. 412 hearings deepens a division of authority among courts of last resort, and because it reached the wrong answer to a constitutional question of surpassing importance to sexual assault prosecutions nationwide.

DECISIONS BELOW

Petitioner's court-martial is unreported. The Army Court of Criminal Appeals' decision summarily affirming petitioner's conviction and sentence is also unreported, but is reprinted in the Appendix at 28a. The Court of Appeals for the Armed Forces' decision in petitioner's case is reported at 86 M.J. 188 (C.A.A.F. 2025), and is reprinted in the Appendix at 1a.

JURISDICTION

The Court of Appeals for the Armed Forces affirmed petitioner's conviction and sentence on September 24, 2025. App. 1a. On December 4, 2025, the Chief Justice extended the time within which to file a petition for certiorari to and including February 20, 2026. This Court has jurisdiction under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Under the Sixth Amendment, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI.

In sexual assault cases, M.R.E. 412 generally bars the admission into evidence of "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior," or "[e]vidence offered to prove any alleged victim's sexual predisposition." M.R.E. 412(a). The rule provides for three specific exceptions—allowing the admission of:

(a) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(b) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(c) evidence the exclusion of which would violate the constitutional rights of the accused.

M.R.E. 412(b)(1). If an accused seeks to admit otherwise inadmissible evidence on the ground that it falls into one of M.R.E. 412(b)'s exceptions, M.R.E. 412(c)(1) imposes a series of procedural requirements, and then provides that, "[b]efore admitting evidence under this rule, the military judge *must* conduct a hearing, which *shall* be closed." M.R.E. 412(c)(2) (emphases added).

STATEMENT OF THE CASE

A. The Public Trial Clause

As Justice Black wrote for this Court nearly 80 years ago, "[t]he traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*." *Oliver*, 333 U.S. at 268–69 (footnotes omitted). Guaranteeing a public trial to criminal defendants "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Id.* at 270; *see also Estes*, 381 U.S. at 583 (Harlan, J., concurring) ("A

public trial is a necessary component of an accused's right to a fair trial . . . .").[1]

The right to a public trial is not—and never has been—absolute. Rather, in *Waller*, this Court made clear that the Sixth Amendment protection can be overcome upon the same showing by the government of a compelling need for closing the courtroom—and that the closure is narrowly tailored—that the Court had already embraced in its First Amendment public access cases. *See* 467 U.S. at 48 (citing *Press-Enterprise*, 464 U.S. at 511–12).

But *Waller* also made clear that, in criminal cases, the Public Trial Clause applies beyond the trial itself—and necessarily extends to at least some pre-trial proceedings, including, as in *Waller*, suppression hearings. Most recently, in *Presley*, this Court thought the application of *Waller* to jury voir dire to be so obvious as to warrant summary adjudication. *See* 558 U.S. at 212–13. Neither *Waller* nor *Presley* provides a conclusive test for identifying the specific pre-trial proceedings to which the Public Trial Clause applies, but both are at least probative as to (1) the fact that it applies to *some* pre-trial proceedings; and (2) the reasons why suppression hearings and jury voir dire both trigger its protections.

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1. A separate line of cases has recognized a right of public *access* to criminal prosecutions under the First Amendment. *See, e.g.*, *Press-Enterprise*, 464 U.S. at 505–10; *Globe Newspaper Co.* v. *Super. Ct.*, 457 U.S. 596, 603–10 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 563–75 (1980) (plurality opinion). Although petitioner's challenge to the automatic-closure provision of M.R.E. 412 rests solely on the Sixth Amendment, this Court has often looked to its First Amendment jurisprudence to inform the scope of the Public Trial Clause. *See, e.g.*, *Presley*, 558 U.S. at 213.

B. The Public Trial Clause in Courts-Martial

Despite a footnote insinuating to the contrary in *Oliver*, *see* 333 U.S. at 266 n.12, the tradition of public trials is just as firmly rooted in courts-martial as it is in civilian criminal courts. As Winthrop noted in his treatise, "[o]riginally (under the Carlovingian kings), courts-martial . . . were held *in the open air*, and in the Code of Gustavus Adolphus, criminal cases before such courts were required to be tried '*under the blue skies*.' The modern practice has inherited a similar publicity." WINTHROP, *supra*, at 161 (citations omitted).

Thus, although this Court has long suggested that the Sixth Amendment's Jury Trial Clause does not apply to courts-martial, *see Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950), the CAAF and its predecessors have recognized a constitutional right to a public trial since 1956, *see United States* v. *Brown*, 22 C.M.R. 41 (C.M.A. 1956), and have expressly applied the Sixth Amendment's Public Trial Clause to courts-martial since 1977. *See Grunden*, 2 M.J. at 120 ("The right of an accused to a public trial is a substantial right secured by the Sixth Amendment to the Constitution of the United States.").

The CAAF has not just regularly applied the Public Trial Clause to courts-martial; it has looked to cases about the scope of the right in civilian courts as not just informative, but conclusive. *See, e.g.*, *ABC*, 47 M.J. at 365. And although some pre-trial proceedings are unique to courts-martial (like the Article 32 proceedings to which the CAAF held the Public Trial Clause applies in *ABC*), the CAAF has otherwise interpreted and enforced the Clause symmetrically.

C. Military Rule of Evidence 412

M.R.E. 412 was initially promulgated by the President in 1980 as part of the first Military Rules of Evidence—17 months after Congress first enacted Fed. R. Evid. 412. *See* Exec. Order 12,198, 45 Fed. Reg. 16,932, 16,961 (Mar. 12, 1980); *see* Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, § 2, 92 Stat. 2046, 2046; *see also* App. 4a–5a (retracing the origins of M.R.E. 412).

As originally adopted, M.R.E. 412 provided that, if the military judge determined that evidence the accused sought to admit might fall within one of the exceptions to exclusion, he "shall conduct a hearing, which may be closed, to determine if such evidence is admissible." M.R.E. 412(c)(2) (1980). In their commentary, the rule's drafters explained that "[t]he propriety of holding a hearing without spectators is dependent upon its constitutionality which is in turn dependent upon the facts of any specific case." Change No. 3, *Manual for Courts-Martial*, United States, 1969 (revised ed.), App. 18, at A18-66 (Sept. 1, 1980), *available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015069823873&seq=260.

As relevant here, M.R.E. 412 was re-adopted in 1998 with new language that, among other things, provided for automatic closure of the hearings the rule requires for resolving admissibility. *See* Exec. Order 13,086, 63 Fed. Reg. 30,065, 30,078 (May 27, 1998). There does not appear to be any contemporaneous explanation for why the President chose to adopt an automatic-closure rule in 1998—after courts-martial had followed the case-specific approach contemplated by the rule's drafters for the preceding 18 years.

D. Petitioner's Case

On January 19, 2023, an enlisted panel, sitting as a general court-martial, found petitioner 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. The military judge sentenced petitioner to be reduced to the grade of E-1; to be confined for thirty months; and to be dishonorably discharged. *See* App. 3a.[2]

As Judge Maggs summarized, there were two different pre-trial hearings in petitioner's case respecting his requests to admit evidence that he claimed fell within one of M.R.E. 412(b)'s exceptions:

> The military judge ruled that the evidence at issue during the first hearing could be admitted under one of the exceptions found in M.R.E. 412(b). Conversely, [he] ruled that the evidence proffered at the second hearing could not be admitted at the court-martial. The record contains the testimony of witnesses, the arguments of counsel, and the decision of the military judge, but all of this is under seal and thus not available for the public to see.

Id. at 17a (Maggs, J., dissenting).

Petitioner's counsel timely objected to the second automatic closure, arguing that the trial judge needed to perform "a constitutional analysis as to why the hearing is going to be closed," and citing to the CAAF's decision in *United States* v. *Hershey*, 20 M.J. 433, 435–

2. Petitioner 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, 10 U.S.C. §§ 920, 928.

36 (C.M.A. 1985) ("Without question, the sixth-amendment right to a public trial is applicable to courts-martial." (footnote omitted)). The judge responded that the Public Trial Clause objection "is noted and is overruled." App. 30a.

After the Convening Authority approved the findings and sentence, the Army Court of Criminal Appeals summarily affirmed petitioner's conviction and denied a timely petition for rehearing. *Id.* at 28a. Petitioner then filed a petition for review with the CAAF, asking the court of appeals to decide "whether the total closure of the court over Appellant's objection violated his right to a public trial."

The court granted the petition. *Id.* at 26a. On plenary review, the CAAF held that the answer was "no." Writing for a 4-1 majority, Judge Hardy offered four reasons why this Court's analyses for applying the Public Trial Clause to suppression hearings in *Waller* and to jury voir dire in *Presley* should not extend to M.R.E. 412 hearings:

1) "[U]nlike suppression hearings—where a party attempts to exclude evidence that is otherwise going to be admitted at trial—the subject matter of a M.R.E. 412 hearing is presumed to be inadmissible and therefore excluded from trial," *id.* at 8a;

2) "[W]e do not view M.R.E. 412 hearings to be as case critical or potentially dispositive as suppression hearings," *id.* at 8a–9a;

3) "[W]e do not believe that M.R.E. 412 hearings invoke the same concerns about transparency and public scrutiny as suppression hearings," *id.* at 9a–10a; and

4) "[U]nlike the voir dire process, M.R.E. 412 hearings have no historical tradition of being public as they are relatively new creations." *Id.* at 10a.

And although the majority "acknowledge[d] that M.R.E. 412 hearings share some characteristics with the core phases of courts-martial to which the public trial right applies," including "the calling of witnesses and the presentation of evidence," "these similarities in form do not overcome the significant differences in substance described above." *Id.* at 11a.[3]

Judge Maggs dissented, explaining in detail why "a hearing under M.R.E. 412 is the kind of hearing for which an individualized determination is necessary under [*Waller* and *Presley*]." *Id.* at 16a (Maggs, J., dissenting). As he wrote, not only was CAAF's ruling inconsistent with the Massachusetts Supreme Judicial Court's analysis in *Jones*, but *Jones* was, in his view, more faithful to *Waller* and *Presley*. *See id.* at 21a ("[I]n many cases, the admission of evidence important to the court-martial may turn on the outcome of an M.R.E. 412 hearing in the same way as it may turn on the outcome of a suppression hearing.").[4]

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3. The CAAF also analyzed Rule 806 of the *Rules for Courts-Martial*, which provides that "Except as otherwise provided in this rule, courts-martial shall be open to the public." R.C.M. 806. The majority concluded that R.C.M. 806 must give way to the automatic-closure rule of M.R.E. 412(c)(2) because of the "well-established canon of statutory interpretation [that] the specific governs the general." App. 14a. Petitioner is not contesting the CAAF's interpretation of R.C.M. 806 here.

4. Judge Maggs also acknowledged, but did not rely upon, an argument advanced by the Air Force Appellate Defense Division in an *amicus* brief—that the "original public meaning" of the

Having concluded that the Public Trial Clause *does* apply to M.R.E. 412 hearings, Judge Maggs outlined the analysis that courts-martial should provide before closing those hearings to the public. As he explained, "For most M.R.E. 412 hearings, the named victim's privacy likely will be the kind of 'overriding interest' that the Supreme Court addressed in *Waller*. . . . But the usually important interest in the named victim's privacy might not be 'overriding' in all cases," hence the need for a case-specific assessment of the need for closure. *Id.* at 23a. That analysis did not "answer the question of whether the second M.R.E. 412 hearing in this case should have been open or closed, in whole or in part"; it merely led "to the conclusion that the military judge erred *by not making an individualized determination* whether that hearing should be closed once the accused objected to its closure." *Id.* at 24a.

Finally, Judge Maggs turned to the remedy for the Public Trial Clause violation in petitioner's case. Because petitioner preserved his Public Trial Clause objection on direct appeal, Judge Maggs explained that the remedy required by *Waller* is for a military trial judge operating under the terms of *United States* v. *DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to consider whether the government could have carried its case-specific burden to close the second M.R.E. 412 hearing in petitioner's case. If so, then the trial court's error in automatically closing that hearing was harmless. If not, then the error would require a new, *public* M.R.E. 412 hearing—and, depending upon is outcome, potentially a new trial in petitioner's case. *See* App. 24a.

Public Trial Clause would clearly have encompassed proceedings such as M.R.E. 412 hearings. App. 19a n.2.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS A SPLIT OVER WHETHER THE PUBLIC TRIAL CLAUSE APPLIES TO RAPE SHIELD HEARINGS

As all five of the CAAF's judges acknowledged, whether the Sixth Amendment's Public Trial Clause applies to rape shield hearings is a question that has already divided multiple state supreme courts—including three that have held, contra the CAAF, that the Clause *does* apply to such proceedings. The CAAF's decision in this case deepens that split—which is one that only this Court can resolve.

A. State Supreme Courts are Divided, 3-1, Over Whether Rape Shield Hearings Implicate the Public Trial Clause

At least four state supreme courts have directly confronted the question of whether the Public Trial Clause of the Sixth Amendment applies to rape shield hearings. And three of the four have answered that question in the affirmative.

Connecticut was first. In *Kelly*, the Connecticut Supreme Court held that *Waller* applies to trial court closures of pre-trial rape shield hearings—and concluded that the closure in that particular case was inconsistent with *Waller*. *See* 545 A.2d at 1051–53.[5]

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5. The Connecticut Supreme Court also held in *Kelly* that the error was harmless in the defendant's case. *See* 545 A.2d at 1054. A federal district court subsequently disagreed—and granted habeas relief on the ground that a preserved Public Trial Clause violation was structural error. *See Kelly* v. *Meachum*, 950 F. Supp. 461, 468 (D. Conn. 1996); *see also Weaver*, 582 U.S. at 299 (reaffirming that Public Trial Clause claims preserved on direct appeal are structural error).

Likewise, in *Hoff*, the Montana Supreme Court held that *Waller* applied to a Sixth Amendment Public Trial Clause challenge to the closure of a rape shield hearing. *See* 385 P.3d at 949 ("The right to a public trial clearly attaches to pretrial suppression hearings, including a [rape shield] hearing."). In that case, specifically, the court held that *Waller* was satisfied—but only after reviewing the trial judge's case-specific reasons for the closure. *See id*. at 950.

But the most thorough discussion of the Public Trial Clause and rape shield hearings came in *Jones*. As Massachusetts' Supreme Judicial Court explained,

> A rape shield hearing is neither a routine administrative matter nor is it "trivial" to the trial. On the contrary, a rape shield hearing has a far closer kinship to pretrial suppression hearings, to which the United States Supreme Court decided in *Waller* that the Sixth Amendment public trial right attaches, than to any of the routine administrative matters that courts have subsequently determined may be conducted in a closed court room. Like a pretrial suppression hearing, 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. . . . The outcome of a rape shield hearing, then, like that of a pretrial suppression hearing, "frequently depends on a resolution of factual matters."

Id. at 604 (quoting *Waller*, 467 U.S. at 47).

The *Jones* court also explained why it disagreed with courts that had reached the opposite conclusion. As it noted, evidence barred under rape shield laws is

not necessarily "irrelevant"; "the rape shield hearing *may* result in a finding that the weight and relevancy of the evidence does outweigh its prejudicial effect, and that the evidence consequently may be presented at trial"; and, in any event, "we discern no support for the assumption that the public trial right attaches only to proceedings at which relevant evidence is presented." *Id*. at 605–06 (citations omitted).[6]

And beyond these judicial decisions, at least one state has recently amended its own rape shield law to reflect these understandings—repealing an automatic closure rule and replacing it with *Waller*'s case-specific considerations. *See* N.D. R. EVID. 412(c)(2) ("In a criminal case, the court may conduct an *in camera* hearing for a compelling reason only after applying and announcing on the record the factors establishing the overriding interest for courtroom closure.").[7]

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6. *Jones* also rejected the argument that a Public Trial Clause violation could be remedied by the subsequent trial's openness:

> The subsequent presentation of certain evidence at trial cannot "cure" the problem resulting from the mandatory closure rule any more than the subsequent release of a pretrial suppression hearing transcript could "cure" the closure of the hearing. The notion that the ultimate presentation of evidence at trial somehow may retroactively remedy the closure of the hearing is particularly misguided because it was the improperly closed hearing itself that determined the scope of the evidence that could be presented at trial.

37 N.E.3d at 606.

7. The amendment, which took effect on March 1, 2023, was adopted in response to *State* v. *Martinez*, 956 N.W.2d 772 (N.D. 2021). *See* Joint Proc. Comm., Minutes of Meeting, at 9–12 (Apr. 29, 2022), https://www.ndcourts.gov/Media/Default/Committees/JointProcedure/2022/April%202022%20Minutes.pdf.

On the other side of the ledger, the Oregon Supreme Court is the one state high court to conclude that the Public Trial Clause does *not* apply to rape shield hearings—holding, along lines similar to those adopted by CAAF in this case, that such proceedings do *not* implicate the interests *Waller* identified. *See State* v. *Macbale*, 305 P.3d 107, 121–22 (Or. 2013).[8]

Critically, *none* of the courts to consider this question have identified any material differences among the state rape shield laws at issue. After all, rape shield hearings are generally focused on the admissibility of the exact same types of evidence, and automatic closure rules are … automatic. These rulings have *disagreed* with each other, but they haven't even attempted to *distinguish* each other—for the simple and ineluctable reason that they can't.

B. The CAAF's Decision in This Case Squarely Deepens That Split

The CAAF's decision in petitioner's case reinforces—and deepens—the existing split among state supreme courts. Although both the majority opinion and Judge Maggs's dissent somehow missed Connecticut, both opinions highlighted the Massachusetts, Montana, and Oregon decisions—and explained, in particular, why they were not (or were) persuaded by the Massachusetts Supreme Judicial Court's analysis in *Jones*. *See, e.g.*, App. 6a–8a & n.5; *id*. at 22a (Maggs, J., dissenting).

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8. Intermediate appeals courts in two states have reached the same result as *Macbale*, although neither state's supreme court has decided the question. *See State* v. *Hicklin*, 527 P.3d 1183, 1187–88 (Wash. Ct. App. 2023); *State* v. *McNeil*, 393 S.E.2d 123, 126–27 (N.C. Ct. App. 1990).

Critically for present purposes, the CAAF followed its longstanding precedent applying the Public Trial Clause to courts-martial—and the government never made any argument that it shouldn't or couldn't. *See id.* 6a ("[T]here is no dispute that the public trial right applies generally to courts-martial."). Before the CAAF, the government argued only that the Public Trial Clause didn't apply to an M.R.E. 412 hearing, specifically—and that, even if it did, mandatory closure was consistent with *Waller*.

The upshot is that the CAAF's decision, even in the specific context of courts-martial, is on all fours with the state supreme court decisions discussed above—and, thus, only deepens the existing split among state supreme courts. As of today, five courts of last resort have considered whether the Public Trial Clause requires case-specific analysis before rape shield hearings can be closed—and the split is 3-2 in favor.

C. Only This Court Can Resolve the Split

Finally, and perhaps most obviously, only this Court can conclusively resolve the division of authority among these courts. Individual states can, of course, amend their rape shield laws to moot the question—by requiring case-specific analysis before the closure of any pre-trial hearings, as North Dakota required as of 2023. But the fact that, in the 42 years since *Waller* was decided, North Dakota is the only state to have taken that step suggests that such a nationwide policy shift is unlikely.

Nor, as the separate opinions below suggest, will further percolation bring additional light rather than heat to this division of authority. As suggested above, these five courts have applied the exact same set of principles to answer the exact same question about

the exact same type of hearing. The answers have consistently fallen into one of two camps—depending upon how closely (or not) the reviewing court sees the analogy between rape shield hearings and the suppression hearings at issue in *Waller* and jury voir dire at issue in *Presley*. Allowing more lower state and federal courts to consider this question is unlikely to uncover arguments that haven't already been made—or to obviate the need for this Court to have the last word. Even if the underlying constitutional question were unimportant (and, as Part II explains, it isn't), certiorari would still be warranted to resolve this division of authority sooner, rather than later.[9]

II. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE

Beyond the division of authority identified in Part I, this Court should also grant certiorari because the scope of the Public Trial Clause is a question of exceptional importance—especially in the context of laws and rules requiring categorical closures of adversarial judicial proceedings. Indeed, earlier this term, this Court summarily reversed the Mississippi Supreme Court in the analogous context of the Sixth Amendment's Confrontation Clause—holding that a state law automatically screening child-abuse victims from the jury while they testified in criminal cases was unconstitutional *because* it required no case-specific analysis. *See Pitts*, 607 U.S. at 1 (citing *Maryland* v. *Craig*, 497 U.S. 836, 857 (1990)).

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9. The fact that M.R.E. 412 both mandates a hearing *and* that the hearing be closed makes this case an especially *good* vehicle for resolving the split. After all, *Waller* violations can occur in individual cases even in jurisdictions that *don't* require hearings or automatic closure. In the military, any violations are systemic.

And even in the specific context of the Public Trial Clause, the importance of carefully delineating the line between those pre-trial proceedings that *are* covered by the Sixth Amendment and those that are not is—or, at least, ought to be—manifest, especially with respect to a specific type of pre-trial proceeding that virtually every jurisdiction provides in the same material respects.

A. M.R.E. 412's Automatic-Closure Rule is Modeled on—and Mirrors—Rule 412 of the Federal Rules of Evidence

As Judge Maggs noted, part of the importance of resolving whether the Public Trial Clause applies to M.R.E. 412 hearings is because that rule is modeled on the rape shield law for federal *civilian* courts—Rule 412 of the Federal Rules of Evidence. *See* App. 19a–20a & n.3 (Maggs, J., dissenting). In his words,

> M.R.E. 412 is similar to Fed. R. Evid. 412, which this Court has described as M.R.E. 412's "federal analogue." Amendments to M.R.E. 412 have ensured that M.R.E. 412 and Fed. R. Evid. 412 remain "closely align[ed]." Thus, Fed. R. Evid. 412(a) and 412(b) contain the same general prohibitions and exceptions as M.R.E. 412(a) and 412(b). And much like M.R.E. 412(c)(2), Fed. R. Evid. 412(c)(2) provides: "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." Given the similarity of the two provisions, this Court has considered cases under Fed. R. Evid. 412 when interpreting M.R.E. 412.

Id. at 19a n.3 (alteration in original).

The CAAF majority was "not aware of any cases addressing the constitutionality of M.R.E. 412's civilian counterpart Fed. R. Evid. 412." *Id.* at 6a n.5. The reason for that is the only feature of M.R.E. 412 *not* shared by Fed. R. Evid. 412—the *requirement* that the trial judge hold a hearing. Federal district judges are *not* required to hold a hearing when considering the admissibility of evidence under Fed. R. Evid. 412. But should they choose to do so, the question presented would bear directly on whether those hearings could categorically be closed—or whether they could be closed only after and in light of the case-specific analysis mandated by *Waller*.

B. This Court Has Repeatedly Reaffirmed the Importance of Case-Specific Analysis in Considering Sixth Amendment Claims

As *Press-Enterprise*, *Waller*, and *Presley* make clear for the Public Trial Clause, and as *Pitts* reaffirmed for the Confrontation Clause, this Court has long stressed the importance of case-specific analysis when it comes to overriding a criminal defendant's Sixth Amendment rights. That case law recognizes—and reflects—a balance between the general protections the Constitution enshrines and the possibility that the government might have especially compelling arguments to override those protections in specific cases.

For that balance to serve its purpose, this Court needs to carefully police the line between the pre-trial proceedings to which the Public Trial Clause applies, and those to which it does not. Thus, even *without* the division of authority identified above, the question presented in this case would be of sufficient importance, on its own, to justify granting certiorari.

C. CAAF's Decision in This Case Cannot Be Reconciled With *Waller* and *Presley*

But perhaps the most compelling reason to grant certiorari in this case—and to resolve the split identified above—is because the CAAF majority (along with the Oregon Supreme Court) was wrong, and Judge Maggs (along with the highest courts of Connecticut, Massachusetts, and Montana) was right. Wherever the line may be drawn between those pre-trial proceedings that implicate the Public Trial Clause and those that don't, rape shield hearings clearly fall on the constitutionally protected side of the line—*because* of what this Court has already established in *Waller* and *Presley*.

When he was still on the Minnesota Supreme Court, then-Justice Stras helpfully distilled the considerations this Court has looked to in deciding which pre-trial proceedings implicate the Public Trial Clause. In his words, "[o]ne of the lessons from *Waller* is that a closure is less likely to be constitutionally acceptable when a hearing involves live witness testimony . . . ." *State* v. *Smith*, 876 N.W.2d 310, 343 (Minn. 2016) (Stras, J., concurring). To that end, "the relevant question is whether a criminal proceeding resembles, and thereby possesses the characteristics of, a bench or jury trial." *Id.*[10]

10. The specific question in *Smith* was whether a trial court had violated the Sixth Amendment by briefly closing the courtroom to discuss "an issue of evidentiary boundaries, similar to what would ordinarily and regularly be discussed in chambers or at a sidebar conference." 876 N.W.2d at 330. The court held that the closure did not violate the Public Trial Clause because it was "administrative in nature." *Id.*

The question of whether the pre-trial proceeding at issue "resembles" a bench or jury trial is "relevant" for two independent reasons: First, *Waller* itself held that the Public Trial Clause's applicability reflects whether the underlying proceeding is functionally equivalent to the work of the trial itself. *E.g.*, 467 U.S. at 47 ("[A] suppression hearing often resembles a bench trial: witnesses are sworn and testify, and of course counsel argue their positions. The outcome frequently depends on a resolution of factual matters.").

And second, insofar as the Public Trial Clause's applicability to pre-trial proceedings can and should be understood by reference to the original public meaning of a "trial," *see* App. 19a n.2 (Maggs, J., dissenting), the answer to the question presented will presumably turn on whether the pre-trial proceeding bears the essential attributes of a Founding-era criminal trial. Again, per then-Justice Stras:

> When a criminal proceeding involves the presentation of witness testimony, the arguments of counsel on a disputed question, or invocation of the court's fact-finding function, it is more likely to be subject to the requirements of the Sixth Amendment, whether or not it involves what appears to be an administrative task or a routine evidentiary motion.

Smith, 876 N.W.2d at 343 (Stras, J., concurring).

The Oregon Supreme Court, in contrast, concluded that the applicability of the Public Trial Clause turns only on whether the pretrial hearing is "'an integral part of the trial,'" and "'involve[s] the values that the right to a public trial serves.'" *Macbale*, 305 P.3d at 121 (quoting *United States* v. *Waters*, 627 F.3d 345, 360 (9th Cir. 2010)).

Ultimately, if the analysis *should* be focused on whether there is "the presentation of witness testimony, the arguments of counsel on a disputed question, or invocation of the court's fact-finding function," then the question whether the Public Trial Clause applies to rape shield hearings should answer itself. If the applicability of the Public Trial Clause to pre-trial proceedings turns on considerations and characteristics *other* than those identified by Justice Stras in *Smith* and the Massachusetts Supreme Judicial Court in *Jones*, it would still behoove this Court to grant certiorari—so it can articulate them.[11]

III. THERE ARE NO OBSTACLES TO THIS COURT'S REVIEW

As Parts I and II explained, the question presented implicates a deep and entrenched division among state supreme courts and CAAF, and raises a constitutional question of exceptional importance. Beyond those compelling reasons for this Court to resolve the question presented, there are no obstacles that would prevent this Court from reaching and resolving that question in petitioner's case.

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11. Writing for the CAAF majority, Judge Hardy suggested that applying the Public Trial Clause to M.R.E. 412 hearings "would also call into question the constitutionality of federal grand jury proceedings, which are generally secret under Federal Rule of Criminal Procedure 6(e)." App. 11a n.7. This argument ignores the entirely distinct functional and formal role that the grand jury plays relative to the underlying criminal prosecution. "[I]n view of the grand jury proceeding's status as *other* than a constituent element of a 'criminal prosecutio[n],' we have said that certain constitutional protections afforded defendants in criminal proceedings have no application before that body." *United States* v. *Williams*, 504 U.S. 36, 49 (1992) (quoting U.S. CONST. amend. VI) (second alteration in original).

A. Congress Has Reaffirmed This Court's Jurisdiction Over the CAAF

First, even before the recent amendment to 28 U.S.C. § 1259(3), this petition would have fallen comfortably within this Court's appellate jurisdiction. Not only did petitioner timely raise his Sixth Amendment objection at trial and preserve it on appeal, but the CAAF *granted* his discretionary petition for review and handed down a final decision in his case—thereby triggering even the pre-2024 version of § 1259(3). *See* 28 U.S.C. § 1259(3) (2020) (giving this Court jurisdiction to review "[d]ecisions of the [CAAF] . . . in . . . [c]ases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10").

To be sure, two justices have raised constitutional objections to the jurisdiction conferred by § 1259, *see Ortiz* v. *United States*, 585 U.S. 427, 463 (2018) (Alito, J., dissenting). But those objections provide no basis for denying certiorari here. Not only has this Court *continued* to exercise jurisdiction to review decisions by the CAAF in the years since those objections were voiced, *see, e.g.*, *United States* v. *Briggs*, 592 U.S. 69 (2020), but Justice Gorsuch, who joined Justice Alito's dissent in *Ortiz*, nevertheless joined in *reversing* the CAAF on the merits in the most recent case to reach this Court via § 1259—the very relief petitioner is seeking here. *Id.* at 79 (Gorsuch, J., concurring).

And insofar as it's relevant, Congress has responded to questions respecting the scope of this Court's jurisdiction over the CAAF only by expanding it. *See* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136, 261–62 (2023) (codified at 28 U.S.C. § 1259). There is,

therefore, no viable argument that this Court lacks appellate jurisdiction to reach the question presented.

B. Petitioner Will Not Be Able to Vindicate His Sixth Amendment Claim on Collateral Review

Direct review of the CAAF's decision in this case is not only appropriate as a constitutional and statutory matter; it is petitioner's only remaining procedural pathway to vindicating his Sixth Amendment rights.

It is well-settled both within and without the military that civilian courts may entertain collateral challenges to the convictions and sentences of courts-martial only if the military failed to give "full and fair consideration" to the petitioner's constitutional arguments. *See, e.g.*, *Burns* v. *Wilson*, 346 U.S. 137, 142 (1953) (plurality opinion); *see also Thomas* v. *U.S. Disciplinary Barracks*, 625 F.3d 667, 670–71 (10th Cir. 2010). The "full and fair consideration" standard does not apply to challenges to the personal or subject-matter jurisdiction of a court-martial, but it *does* apply to constitutional objections that do *not* implicate the military court's jurisdiction—such as petitioner's Sixth Amendment Public Trial Clause claim.

Here, there is no argument that the CAAF failed to give "full and fair consideration" to that claim; indeed, the substantial disagreement between the majority and Judge Maggs's dissent is entirely to the contrary. Instead, petitioner's argument is simply that the CAAF's resolution of his constitutional claim was incorrect. As a non-jurisdictional objection to his military conviction and sentence, petitioner's only pathway to legal relief is therefore this direct appeal.

C. Petitioner is Entitled to Case-Specific Analysis of Whether His M.R.E. 412 Hearing Was Wrongly Closed

Finally, because petitioner preserved his Sixth Amendment objection both in the trial court and on appeal, there is no question that he would be entitled to relief if this Court sides with Judge Maggs's dissent—or that the appropriate relief would be for a military judge to conduct the case-specific analysis *Waller* requires to decide whether the second M.R.E. 412 hearing in petitioner's case should have been closed. As this Court has long reiterated, Public Trial Clause violations, especially when preserved by the defendant on direct appeal, represent the type of structural error for which no showing of prejudice is required. *See, e.g.*, *Weaver*, 582 U.S. at 290 ("In the direct review context, the underlying constitutional violation—the courtroom closure—has been treated by this Court as a structural error, i.e., an error entitling the defendant to automatic reversal without any inquiry into prejudice."); *see also Waller*, 467 U.S. at 49. The remedy is not *necessarily* a new trial—but rather for a military trial judge to conduct the case-specific closure analysis that *Waller* mandates *before* deciding whether the second M.R.E. 412 hearing should be (and should have been) closed. *See id.* at 50 ("[T]he remedy should be appropriate to the violation.").

To be sure, it is entirely possible, as Judge Maggs suggested below, that the government would be able to *satisfy* the factors for closing pre-trial proceedings that this Court articulated in *Waller*. App. 24a–25a (Maggs, J., dissenting). And if that's the result that the trial court reaches in petitioner's case, no new M.R.E. 412 hearing (let alone a new trial) will be

necessary. *See Waller*, 467 U.S. at 50 ("If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest.").[12]

The relevant point for present purposes is that it is to *that* burden that the government should be held. Indeed, there are likely to be compelling reasons for trial judges to close many—if not most—rape shield hearings, perhaps including the hearings in petitioner's case. But not all of them. The reason why this Court should grant certiorari is for the cases in which no such reasons exist, or in which the countervailing justifications for openness are stronger—where the government will necessarily lack a basis for depriving criminal defendants of their long-settled and constitutionally enshrined right to have all relevant parts of their criminal prosecutions take place in public.

* * *

12. As noted above, petitioner is currently in the custody of the U.S. Bureau of Prisons serving a sentence for unrelated convictions in federal district court—with a release date of October 24, 2029. *See ante* at ii. Thus, whatever were to happen on the remand to which he should be entitled, he would presumably remain subject to civilian federal incarceration for the duration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN I. VLADECK
Counsel of Record
600 New Jersey Ave., NW
Washington, DC 20016
(202) 662-9313
svladeck@gmail.com

JONATHAN F. POTTER
ANDREW W. MOORE
Appellate Defense Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060

Counsel for Petitioner

February 20, 2026

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Brandon Z. Miller, Specialist
United States Army, Appellant

No. 25-0025
Crim. App. No. 20230026

Argued May 21, 2025—Decided September 24, 2025

Military Judges: Jacqueline Tubbs (arraignment) and Adam S. Kazin (trial)

For Appellant: *Captain Andrew W. Moore* (argued); *Lieutenant Colonel Autumn R. Porter*, *Major Bryan A. Osterhage*, and *Jonathan F. Potter,* Esq. (on brief).

For Appellee: *Captain Nicholas A. Schaffer* (argued); *Colonel Richard E. Gorini* and *Major Justin L. Talley* (on brief).

Amicus Curiae in Support of Appellant: *Colonel Pilar G. Wennrich*, USAF, and *Dwight H. Sullivan*, Esq. (on behalf of the Air Force Appellate Defense Division) (on brief).

Judge HARDY delivered the opinion of the Court, in which Chief Judge OHLSON, Judge SPARKS, and Judge JOHNSON joined. Judge MAGGS filed a separate dissenting opinion.

Judge HARDY delivered the opinion of the Court.

Like the federal civilian courts and all state courts, the military justice system includes a rule—Military Rule of Evidence (M.R.E.) 412—that restricts the

ability of an accused charged with a sexual offense to introduce evidence about the past sexual activity or predisposition of the alleged victim.[1] If an accused seeks to admit evidence covered by the rule, the President has ordered that the military judge must conduct a closed hearing to determine whether the evidence may be admitted. M.R.E. 412(c)(2). We granted review in this case to determine if the automatic closure of such hearings violates an accused's constitutional or regulatory right to a public trial. Because we conclude that neither the Sixth Amendment public trial right nor the Rule for Courts-Martial (R.C.M.) 806 public trial right extends to hearings conducted pursuant to M.R.E. 412, the military judge did not err when he closed the M.R.E. 412 hearings during the pretrial phase of Appellant's court-martial. We therefore affirm the decision of the United States Army Court of Criminal Appeals (ACCA).

I. Background

The Government charged Appellant with two specifications of sexually assaulting civilian B.M. in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2018).[2] Prior to trial, the defense filed two motions to admit evidence under M.R.E. 412(b). Following Appellant's arraignment, the military judge conducted an Article 39(a) session[3]

1. M.R.E. 412 and its civilian federal and state law equivalents are commonly known as rape shield laws.

2. Although not relevant to this appeal, the Government also charged Appellant with one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2018), and one specification of willfully disobeying a superior commissioned officer in violation of Article 90, UCMJ, 10 U.S.C. § 890 (2018).

3. 10 U.S.C. § 839(a) (2018).

and closed the courtroom to the public as required by M.R.E. 412(c)(2) to litigate the defense's first motion. The defense did not object to the closure. About a year later, the military judge conducted a second Article 39(a) session to litigate the defense's second motion and again ordered the courtroom's closure. This time, defense counsel objected to the closure and requested that the military judge consider whether the closure violated Appellant's constitutional right to a public trial. The military judge noted the objection and overruled it without further comment.

On January 19, 2023, a panel with enlisted members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of sexual assault and one specification of willfully disobeying a superior commissioned officer, in violation of Articles 90 and 120, UCMJ, respectively. The ACCA summarily affirmed. *United States v. Miller*, No. ARMY 20230026, slip op. at 1 (A. Ct. Crim. App. July 19, 2024) (per curiam) (unpublished). We granted review of the following issue:

> Whether the total closure of the court over Appellant's objection violated his right to a public trial.

United States v. Miller, 85 M.J. 375 (C.A.A.F. 2025) (order granting review).

II. Standard of Review

This Court reviews a military judge's decision to close the courtroom for an abuse of discretion. *United States v. Hasan*, 84 M.J. 181, 204 (C.A.A.F. 2024). Finding an abuse of discretion calls for more than a difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). Rather, to constitute an abuse of discretion, the challenged decision must be "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *Id.* (citations omitted) (internal quotation

marks omitted). Additionally, interpreting the interplay between provisions of the R.C.M. and the M.R.E. is a question of law that we review de novo. *United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019).

III. Discussion

Before this Court, Appellant raises two arguments, one based on the Constitution, and one based on the R.C.M. First, Appellant argues that the military judge's closure of his M.R.E. 412 hearings violated his Sixth Amendment right to a public trial under *Waller v. Georgia*, 467 U.S. 39 (1984). Second, even if the Sixth Amendment public trial right does not extend to M.R.E. 412 hearings, Appellant argues that the President extended a qualified public trial right to such hearings when he promulgated R.C.M. 806(b)(4). For the reasons set forth below, we hold that neither the Sixth Amendment nor R.C.M. 806 applies to M.R.E. 412 hearings and that the military judge did not err by conducting closed hearings as required by M.R.E. 412(c).

A. Military Rule of Evidence 412

In 1978, Congress enacted the Privacy Protection for Rape Victims Act to protect the privacy of rape victims. Pub. L. No. 95-540, § 1, 92 Stat. 2046, 2046-47 (1978). The act amended the Federal Rules of Evidence by creating Rule 412, which stated: "in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible." § 2(a), 92 Stat. at 2046-47. Two years later, when the President promulgated the first Military Rules of Evidence, he incorporated a similar

rule as M.R.E. 412. Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 14, 1980).

The version of M.R.E. 412 that governed Appellant's court-martial states:

> (a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that a victim engaged in other sexual behavior; or
>
> (2) Evidence offered to prove a victim's sexual predisposition.

M.R.E. 412(a) (2019 ed.).[4] The rule further provides three exceptions under which evidence otherwise inadmissible under M.R.E. 412(a) may still be admitted. M.R.E. 412(b). If an accused, such as Appellant, wishes to offer evidence pursuant to one of the three exceptions, the rule establishes a procedure by which the military judge will hold a hearing to determine whether the proffered evidence will be admitted. M.R.E. 412(c). Importantly for the purpose of this appeal, the rule dictates that the hearing "shall be closed." M.R.E. 412(c)(2).

B. The Sixth Amendment Public Trial Right

The Sixth Amendment guarantees the accused in a criminal prosecution the right to a "public trial." U.S. Const. amend. VI. This fundamental right traces its roots back a millennium to England prior to the Norman Conquest and is an indispensable attribute of the Anglo-American trial. *See Richmond Newspapers,*

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4. All further citations to the Military Rules of Evidence and Rules for Courts-Martial in this opinion refer to the *Manual for Courts-Martial*, United States (2019 ed.) (*Manual* or *MCM*), unless otherwise noted.

Inc. v. Virginia, 448 U.S. 555, 564-73 (1980) (chronicling a historical overview of the right to a public trial). Consistent with this tradition, our predecessor Court affirmed that the Sixth Amendment right to a "public trial" applies to courts-martial. *United States v. Hershey*, 20 M.J. 433, 435-36 (C.M.A. 1985).

Although there is no dispute that the public trial right applies generally to courts-martial, there is less certainty—both in the civilian and the military courts—about the scope of the right. The Supreme Court has made clear that the right applies to "the actual proof at trial" (i.e., the presentation of evidence to the jury), *Waller*, 467 U.S. at 44, but it has never clarified how far the right extends beyond that core application or articulated a test for determining whether the right applies to specific pretrial hearings.[5]

The Supreme Court has, however, confirmed that the public trial right does apply to two specific pretrial proceedings—suppression hearings and voir dire—but not for the same reasons. In *Waller*, the Court concluded that suppression hearings are often just as important as the trial itself, noting that in many criminal trials, the suppression hearing determines

5. We are not aware of any cases addressing the constitutionality of M.R.E. 412's civilian counterpart Fed. R. Evid. 412, but state courts have split over whether the public trial right applies to state law rape shield hearings. 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 (Mont. 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 (Or. 2013) (upholding in camera requirement for the rape shield hearings).

the outcome because defendants often accept a plea deal if they lose a motion to suppress critical evidence. 467 U.S. at 46-47. The Court also observed that challenges to the seizure of evidence frequently attack the conduct of law enforcement and prosecutors, issues in which there is a strong public interest in transparency and increased public scrutiny. *Id*. at 47.

In *Presley v. Georgia*, the Supreme Court concluded that if the First Amendment granted the public the right to attend juror selection proceedings (as it had previously held in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984)), then "there is no legitimate reason" not to extend the same right of a proceeding open to the public to a criminal defendant under the Sixth Amendment. 558 U.S. 209 (2010) (per curiam). In *Press-Enterprise*, the Court based its conclusion on two factors: (1) that the selection of jurors had historically been a presumptively public process in both colonial America and in England, and (2) that opening a proceeding to the public enhances both the basic fairness of the proceeding and the appearance of fairness to the public. 464 U.S. at 505-08.

Appellant argues that the values discussed in *Waller* are implicated by M.R.E. 412 hearings, and therefore the Sixth Amendment right to a public trial should extend to M.R.E. 412 hearings as well. In support of this argument, Appellant relies primarily on *Jones*, a decision from the Supreme Judicial Court of Massachusetts in which that court concluded that the public trial right extended to in camera hearings conducted under the Massachusetts rape shield law. 37 N.E.3d at 603-07 (examining Mass. Gen. Laws ch. 233, § 21B). The Massachusetts court reasoned that rape shield hearings have "a far closer kinship to pretrial suppression hearings" than to routine

administrative matters that other courts have ruled may be closed. *Id*. at 604. The court further concluded that, like suppression hearings, the judge's determination during a rape shield hearing will often have "a critical impact on the trial itself." *Id*. The court also rejected the reasoning of other state courts that have concluded that the Sixth Amendment public trial right does not extend to their states' rape shield hearings. *Id*. at 605-06.

We are not persuaded by Appellant's arguments or by the *Jones* opinion. In our view, M.R.E. 412 hearings are fundamentally different from suppression hearings and voir dire for several reasons. First, unlike suppression hearings—where a party attempts to exclude evidence that is otherwise going to be admitted at trial—the subject matter of a M.R.E. 412 hearing is presumed to be inadmissible and therefore excluded from trial. The President has predetermined that evidence of a sexual offense victim's past sexual behavior or sexual predisposition is irrelevant to the question of the accused's guilt unless it meets one of three express exceptions. M.R.E. 412(a), (b). And except for when the evidence is constitutionally required to be admitted to protect the accused's due process rights, qualifying under one of the other two exceptions is still not sufficient on its own to admit the proffered evidence. The President has further ordered that M.R.E. 412 evidence is still inadmissible unless the probative value of such evidence outweighs the danger of unfair prejudice to the victim's privacy. M.R.E. 412(c)(3). And even then, the proffered M.R.E. 412 evidence could still be excluded for prejudice, confusion, waste of time, or other reasons under M.R.E. 403. M.R.E. 412(c)(3).

Second, we do not view M.R.E. 412 hearings to be as case critical or potentially dispositive as

suppression hearings. The evidence litigated in M.R.E. 412 hearings is so collateral that it is rebuttably presumed to be irrelevant. Suppression hearings, in contrast, typically involve essential evidence such as confessions, identifications of the accused, or the physical evidence providing the basis of the charges at trial. Suppression hearings carry such weight that the outcome of the hearing often results in charges being dropped or a plea being taken. *Waller*, 467 U.S. at 46 ("suppression hearings often are as important as the trial itself"). Additionally, suppression hearings often turn on the determination of contested factual matters that require resolution for a ruling on exclusion to be reached. Conversely, M.R.E. 412 hearings typically turn on legal questions—whether one of the exceptions applies and whether the proffered evidence's probative value outweighs unfair prejudice to the victim's privacy. Because the outcome of M.R.E. 412 hearings turn on questions of relevance, probative value, and prejudice, we view these rulings more akin to a pretrial conference concerning an evidentiary matter than a suppression hearing.[6] *Cf. Richmond Newspapers*, 448 U.S. at 598 n.23 (Brennan, J., concurring in the judgment) (noting that the implicit guarantee of the First Amendment of the public to attend criminal trials does not restrict judges' ability to conduct conferences in chambers, "inasmuch as such conferences are distinct from trial proceedings").

Third, we do not believe that M.R.E. 412 hearings invoke the same concerns about transparency and

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6. In *Jones*, the Massachusetts court asserted without explanation that the outcome of rape shield hearings "'frequently depends on a resolution of factual matters.'" 37 N.E.3d at 604 (quoting *Waller*, 467 U.S. at 47). At least in the context of M.R.E. 412, we disagree with that assessment.

public scrutiny as suppression hearings. Suppression hearings often involve allegations of law enforcement negligence or malfeasance. Such misconduct strikes at the heart of due process and personal liberty, and the public airing of such behavior is of paramount interest to the public writ large. *Waller*, 467 U.S. at 47 ("The public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny."). In contrast, evidence of a specific victim's past sexual behavior or predisposition has little value to the public. Indeed, an express purpose of M.R.E. 412 is to prevent unnecessary airing of a victim's sexual history. *See MCM*, Analysis of the Military Rules of Evidence app. 22 at A22-29 (1984 ed.) (explaining that M.R.E. 412 "is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to [sexual offense prosecutions]"). And if the evidence proffered at a M.R.E. 412 hearing is determined to be admissible, that evidence will be presented in open court during the public portion of the accused's trial.

Finally, unlike the voir dire process, M.R.E. 412 hearings have no historical tradition of being public as they are relatively new creations. But while rape shield hearings may be novel, the exclusion of presumptively irrelevant evidence from a trial is most certainly not. Indeed, "a presupposition involved in the very conception of a rational system of evidence" is the fundamental principle "which forbids receiving anything irrelevant, not logically probative." James Bradley Thayer, *Preliminary Treatise on Evidence at the Common Law* 264-65 (1898). Accordingly, historical precedent does not support the public airing of irrelevant evidence.

We acknowledge that M.R.E. 412 hearings share some characteristics with the core phases of courts-martial to which the public trial right applies. M.R.E. 412 hearings may involve the calling of witnesses and the presentation of evidence. But these similarities in form do not overcome the significant differences in substance described above.

We also recognize that the Supreme Court in *Waller* identified several "aims and interests" that contributed to its conclusion that the public trial right applies to suppression hearings. 467 U.S. at 46. Appellant argues that the public trial right should also apply to M.R.E. 412 hearings because some of these interests—such as ensuring that the public sees that the accused is fairly dealt with and not unjustly condemned; ensuring that the judge and prosecutor carry out their duties responsibly; and discouraging perjury—are also implicated in M.R.E. 412 hearings. We are not persuaded by this argument for two reasons. First, these *Waller* "aims and interests" are arguably implicated in every phase of a court-martial, which would call into question the constitutionality of every courtroom closure and in camera review dictated by the Manual, including those in M.R.E. 505 (classified information), M.R.E. 506 (government information), M.R.E. 507 (identity of informants), M.R.E. 513 (psychotherapist-patient privilege), and M.R.E. 514 (victim advocate-victim privilege). We do not believe that the Supreme Court in *Waller* intended to extend the public trial right to every pretrial proceeding in a criminal trial.[7] Second, the Supreme Court also recognized encouraging witnesses to come

7. Such an interpretation of *Waller* would also call into question the constitutionality of federal grand jury proceedings, which are generally secret under Federal Rule of Criminal Procedure 6(e).

forward as an important interest in *Waller*. 467 U.S. at 46. As noted above, an express purpose of M.R.E. 412 is to protect the victims of sexual offenses from embarrassing and degrading cross-examination. This *Waller* interest is advanced by the closure of M.R.E. 412 hearings rather than degraded by it.

Taking all these factors into account, we conclude that the right to a public trial under the Sixth Amendment does not extend to M.R.E. 412 hearings. These hearings have a discrete and limited purpose involving evidentiary determinations and are not part of the "trial" for purposes of the public trial right. Consequently, *Waller* and its standard are inapplicable, and the military judge did not violate the Sixth Amendment by closing the courtroom for the M.R.E. 412 hearing.

C. Rule for Courts-Martial 806

Even though the Sixth Amendment public trial right does not apply to M.R.E. 412 hearings, the President has the authority under Article 36, UCMJ, 10 U.S.C. § 836 (2018), to grant servicemembers greater protections than those guaranteed by the Constitution. Consistent with this principle, Appellant argues that the President conferred on servicemembers a qualified right to a public M.R.E. 412 hearing via R.C.M. 806 regardless of the applicability of the Sixth Amendment.

R.C.M. 806 states: "Except as otherwise provided in this rule, courts-martial shall be open to the public." R.C.M 806(a) (2019 ed.). The rule further provides:

> 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.

R.C.M. 806(b)(4) (2019 ed.). This is essentially a codification of the four-factor test presented by the Supreme Court in *Waller* for determining whether the closure of a suppression hearing was justified. *Hasan*, 84 M.J. at 205 & n.14 (noting that the same standard applied to both constitutional and R.C.M. court closure claims).

Appellant's argument is based on an alleged tension between M.R.E. 412(c)(2), which mandates the closure of M.R.E. 412 hearings, and R.C.M 806(a), which expressly states that courts-martial "shall be open to the public" unless "otherwise provided by this rule." Noting that R.C.M. 806 does not expressly exclude any proceedings from its application, Appellant argues that we must interpret M.R.E. 412(c)(2) to require closure only if the four-factor *Waller* test codified in R.C.M. 806(b)(4) has been satisfied.[8] Because the military judge did not consider whether R.C.M. 806(b)(4) was satisfied in this case, Appellant argues that the military judge abused his discretion when he closed Appellant's M.R.E. 412 hearing. Again, we disagree.

As an initial matter, it is not clear why "courts-martial" in R.C.M. 806(a) should be interpreted any broader than the Supreme Court interprets "trial" in

8. Appellant also argues in a footnote that M.R.E. 412 did not apply in this case because the evidence in question was prior allegations of sexual assault, not the victim's sexual behavior or predisposition. *See, e.g.*, Fed. R. Evid. 412, Advisory Committee Notes to 1994 Amendments ("Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404."). Given our resolution of Appellant's other arguments, we need not address this issue.

the Sixth Amendment. *See Waller*, 467 U.S. at 43-44 (interpreting trial as the "presentation of evidence to the jury" and "the actual proof at trial"). Appellant cites R.C.M. 103(8)(B) in support of his argument that R.C.M. 806(a) applies to all Article 39(a) hearings, but that provision addresses who is part of a court-martial rather than which procedures are part of a court-martial for the purposes of R.C.M. 806. Furthermore, R.C.M. 103(8)(B) includes the caveat "depending on the context" which further undermines Appellant's argument. Given that R.C.M. 806 expressly incorporates the Supreme Court's test from *Waller*, we see no obvious reason why the public trial right in R.C.M. 806(a) would be any broader than the right guaranteed by the Sixth Amendment.

But we need not determine the precise scope of the R.C.M. public trial right because even if we accepted Appellant's interpretation of R.C.M. 806(a), we still do not agree with his broader argument. Any tension between M.R.E. 412 and R.C.M. 806 would easily be resolved through the application of a well-established canon of statutory interpretation: the specific governs the general. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). As explained by the Supreme Court, this canon is particularly true when there is a comprehensive statutory scheme and the drafters have purposely addressed specific concerns with specific solutions. *Id*. This canon is often applied when there is a general rule of permission or prohibition that is contradicted by a contrary specific rule. *Id*. To harmonize the scheme, the specific provision is interpreted as an exception to the general rule. *Id*.

Here, the *Manual* presents a comprehensive scheme for conducting courts-martial. R.C.M. 806(a) is a general rule that prohibits the closure of courts-

martial to the public. In contrast, M.R.E. 412(c) is a narrow mandate for closed proceedings in very specific circumstances. It only applies if a party has properly moved to offer a certain type of evidence, under a specific exception to the general prohibition of said evidence. Following the canon, M.R.E. 412(c)(2) is properly interpreted as an exception to R.C.M. 806's general rule. Accordingly, the restrictions in R.C.M. 806(b)(4) do not apply to the closure of M.R.E. 412 hearings.

D. Conclusion

Neither the Sixth Amendment public trial right nor the public trial right conferred by R.C.M. 806 applies to hearings conducted pursuant to M.R.E. 412(c)(2). We therefore answer the granted issue in the negative and hold that the military judge's closure of the courtroom did not violate Appellant's right to a public trial.

IV. Judgment

The decision of the United States Army Court of Criminal Appeals is affirmed.

Judge Maggs, dissenting.

The Court holds that a military judge may close a hearing on the admissibility of evidence under Military Rule of Evidence (M.R.E.) 412 without conducting a case-by-case analysis of whether the closure would violate the accused's Sixth Amendment right to a public trial. This holding, in my view, conflicts with the Supreme Court's decisions in *Waller v. Georgia*, 467 U.S. 39 (1984), and *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam), and this Court's

decision in *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997).

In *Waller*, the Supreme Court held that a trial judge may close certain types of hearings over the accused's objection only after making a determination on the specific facts of the case: (1) that closing the hearing will advance an "overriding interest," (2) that the closure is "no broader than necessary to protect that interest," and (3) that there are no "reasonable alternatives" to closing the hearing. 467 U.S. at 48; *see also Presley*, 558 U.S. at 213-14 (following *Waller*). This Court reached the same conclusion in *ABC, Inc.*, holding that a decision to close certain types of hearings "must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis." 47 M.J. at 365.

For reasons that I will explain, I conclude that a hearing under M.R.E. 412 is the kind of hearing for which an individualized determination is necessary under these precedents. No such determination was made in this case. I therefore would remand the case for additional proceedings to ascertain whether the omission of the individualized determination caused any prejudice. Because the Court affirms without ordering such a remand, I respectfully dissent.

I. Background

M.R.E. 412(a) generally bars admission of evidence offered to prove that the victim of a sexual offense "engaged in other sexual behavior" or offered to prove the "victim's sexual predisposition." M.R.E. 412(b), however, recognizes certain exceptions to this general prohibition. M.R.E. 412(c) then establishes procedures that the military judge must follow if an accused seeks admission of evidence under one of these exceptions. Important here, M.R.E. 412(c)(2) specifies: "Before

admitting evidence under this rule, the military judge must conduct a hearing, *which shall be closed*." (Emphasis added.)

In this case, the military judge twice closed the court-martial to conduct a hearing pursuant to M.R.E. 412(c)(2) to determine whether proffered evidence was admissible under the exceptions in M.R.E. 412(b). The military judge ruled that the evidence at issue during the first hearing could be admitted under one of the exceptions found in M.R.E. 412(b). Conversely, the military judge ruled that the evidence proffered at the second hearing could not be admitted at the court-martial. The record contains the testimony of witnesses, the arguments of counsel, and the decision of the military judge, but all of this is under seal and thus not available for the public to see.

Prior to the second hearing, trial defense counsel objected to its closure. Trial defense counsel argued that the military judge could not close the court-martial to the public without "a constitutional analysis as to why the hearing is going to be closed." The military judge briefly responded that the objection "is noted and is overruled." The United States Army Court of Criminal Appeals (ACCA) summarily affirmed in a per curiam decision. We granted review to decide the question "[w]hether the total closure of the court over Appellant's objection violated his right to a public trial."

II. Discussion

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. This Court has previously held that the Sixth Amendment right to a public trial applies to a court-martial. *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A.

1985). This case presents three questions about the right to a public trial. The first question is whether a hearing under M.R.E. 412 is covered by the Sixth Amendment right to a public trial. If this kind of hearing is covered, the second question is whether the military judge's summary decision to close the hearing violated that right. And if a violation did occur, the third question is what remedy is necessary.

A. Scope of the "Public Trial" Right

The right to a public trial "extends beyond the actual proof at trial." *Waller*, 467 U.S. at 44. In *Waller*, for example, the Supreme Court held that the public trial right applied to a hearing on a motion to suppress wiretap evidence. *Id.* at 43. Similarly, in *Presley*, the Supreme Court held that the public trial right extended to voir dire proceedings. 558 U.S. at 209; *see also Press-Enterprise Co. v. Superior Ct. of California*, 464 U.S. 501, 513 (1984) (holding that the First Amendment also requires public voir dire proceedings).[1] In *ABC, Inc.*, this Court held that the public trial right extended to a preliminary hearing under Article 32, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 832 (1994). 47 M.J. at 365.

The Supreme Court has not announced a specific rule for determining the portions of a criminal

1. The Supreme Court has reasoned that the First Amendment implicitly provides a right of public access to trials. *Presley*, 558 U.S. at 211-12 (explaining precedents in this area). The Supreme Court has not determined whether the right to a public trial under the Sixth Amendment is "coextensive" with this First Amendment right in all contexts. *Id*. at 213. But in *Waller* and *Presley*, which were Sixth Amendment cases, the Supreme Court relied "heavily" on *Press-Enterprise*, which was a First Amendment case. *Id*. at 212-13.

proceeding that are subject to the public trial right.[2] In the absence of such a rule, however, the Supreme Court decision in *Waller* provides guidance for determining the types of proceedings that are covered by the public trial right. The Supreme Court in *Waller* first observed that public trials serve important functions, such as allowing the public to see whether an accused person is treated fairly; ensuring the prosecutor, judge, and jury act responsibly; encouraging witnesses to come forward; and discouraging perjury. 467 U.S. at 46. The Supreme Court then reasoned that "[t]hese aims and interests are no less pressing in a hearing to suppress" evidence than in "the trial itself." *Id.* (citations omitted).

Neither the Supreme Court nor this Court has decided the issue of whether the public trial right applies to hearings under M.R.E. 412 or its federal civilian analogue, Fed. R. Evid. 412.[3] State courts are

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2. The Air Force Appellate Defense Division (AFADD), as amicus curiae, briefly but helpfully addresses the original meaning of the term "public trial" in the Sixth Amendment. AFADD argues that a hearing analogous to a hearing under M.R.E. 412 would have been considered part of a "public trial" at the time of the Sixth Amendment's adoption because "[s]uch a hearing bears the essential attributes of a late-eighteenth century American criminal trial." Although this argument may well be correct, I hesitate to rely on it because neither the Government nor Appellant discusses the original meaning of "public trial" in their briefs. I therefore confine my analysis to the precedents of the Supreme Court and this Court and leave the question of the original meaning of "public trial" for a future decision.

3. M.R.E. 412 is similar to Fed. R. Evid. 412, which this Court has described as M.R.E. 412's "federal analogue." *United States v. Gaddis*, 70 M.J. 248, 255 (C.A.A.F. 2011). Amendments to M.R.E. 412 have ensured that M.R.E. 412 and Fed. R. Evid. 412 remain "closely align[ed]." *Manual for Courts-Martial, United States*, Analysis of the Military Rules of Evidence app. 16 at A16-

divided on whether the public trial right applies to state law analogues of M.R.E. 412 and Fed. R. Evid. 412. *Compare, e.g.*, *Commonwealth v. Jones*, 37 N.E.3d 589, 602 (Mass. 2015) (holding that the public trial right extends to hearings under the state law equivalent of Fed. R. Evid. 412 and M.R.E. 412), *with State v. Macbale*, 305 P.3d 107, 122 (Or. 2013) (holding the opposite).

Having considered the thorough arguments of the parties, I am persuaded that the public trial right does apply to an M.R.E. 412 hearing. In my view, this issue is largely controlled by the reasoning of this Court in *ABC, Inc.* In *ABC, Inc.*, the Court considered whether an investigative hearing under Article 32, UCMJ, was properly closed to the public and press. That case, like this case, involved allegations of sexual misconduct involving multiple victims. The investigating officer had closed the hearing under Article 32, UCMJ, in part to "shield the alleged victims from possible news reports about anticipated attempts to delve into each woman's sexual history."[4] 47 M.J. at 364. But following the Supreme Court's decision in *Press-Enterprise Co.* and other cases, the Court held that

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3 (2019 ed.) [hereinafter Drafters' Analysis]. Thus, Fed. R. Evid. 412(a) and 412(b) contain the same general prohibitions and exceptions as M.R.E. 412(a) and 412(b). And much like M.R.E. 412(c)(2), Fed. R. Evid. 412(c)(2) provides: "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." Given the similarity of the two provisions, this Court has considered cases under Fed. R. Evid. 412 when interpreting M.R.E. 412. *E.g.*, *Gaddis*, 70 M.J. at 252-53.

4. The current version of Article 32, UCMJ, 10 U.S.C. § 832(d)(3) (2024), states that a "victim may not be required to testify at the preliminary hearing." *ABC, Inc.* was decided before the victim's right to refuse to testify at an Article 32 hearing was added to the UCMJ.

"the military accused is likewise entitled to a public Article 32 investigative hearing." *Id.* at 365 (citations omitted).

I see no persuasive way of distinguishing *ABC, Inc.* and this case. Both cases concerned hearings prior to trial on the merits involving testimony as to the sexual experiences of alleged victims. There was no reason to believe that all testimony presented at the Article 32, UCMJ, hearing would later be proffered or admitted at the court-martial. But the Court still found that the right to a public trial required the Article 32, UCMJ, hearing to be presumptively open. *Id.*

Although the Government does not distinguish ABC Inc., the Government argues that M.R.E. 412 hearings are unlike other hearings that deal with the merits of a case because M.R.E. 412 creates a "rule of exclusion" where the evidence at issue is presumed to be irrelevant. But the type of evidence proffered in an M.R.E. 412 hearing is not always irrelevant. It may be admitted if one of the exceptions in M.R.E. 412(b) applies. Indeed, this Court has overturned decisions made by military judges to exclude evidence under M.R.E. 412 when this Court determined that the evidence did fall into one of the exceptions outlined under M.R.E. 412(b) and that exclusion of the evidence was prejudicial to the accused. *E.g.*, *United States v. Ellerbrock*, 70 M.J. 314, 320-21 (C.A.A.F. 2011); *United States v. Buenaventura*, 45 M.J. 72, 80 (C.A.A.F. 1996); *United States v. Jensen*, 25 M.J. 284, 289 (C.M.A. 1987); *United States v. Dorsey*, 16 M.J. 1, 8 (C.M.A. 1983); *United States v. Gray*, 40 M.J. 77, 80-81 (C.M.A. 1994). In short, in many cases, the admission of evidence important to the court-martial may turn on the outcome of an M.R.E. 412 hearing in the same way as it may turn on the outcome of a suppression hearing.

In this respect, I agree with the reasoning of the Supreme Judicial Court of Massachusetts in *Jones*. Addressing closed hearings under a Massachusetts "rape shield law" analogue to Fed. R. Evid. 412, the court in that case stated:

> A rape shield hearing is neither a routine administrative matter nor is it "trivial" to the trial. On the contrary, a rape shield hearing has a far closer kinship to pretrial suppression hearings, to which the United States Supreme Court decided in *Waller* that the Sixth Amendment public trial right attaches, than to any of the routine administrative matters that courts have subsequently determined may be conducted in a closed court room. Like a pretrial suppression hearing, 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. Additionally, 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 .... The outcome of a rape shield hearing, then, like that of a pretrial suppression hearing, "frequently depends on a resolution of factual matters." *Waller*, 467 U.S. at 47.

Jones, 37 N.E.3d at 604 (citation omitted).

B. Possible Closure Despite the Public Trial Right

Although in my view the right to a public trial extends to hearings under M.R.E. 412, I recognize that this right is not absolute. *Press-Enterprise Co.*, 464 U.S. at 509. On the contrary, closures of proceedings covered by the public trial right may occur in some instances, although these closures "must be rare and only for cause shown that outweighs the value of openness." *Id*.

In *Waller*, the Supreme Court held that a hearing to which the public trial right extends may be closed if (1) "the party seeking to close the hearing ...

advance[s] an overriding interest that is likely to be prejudiced," (2) "the closure [is] no broader than necessary to protect that interest," and (3) the "trial court ... consider[s] reasonable alternatives to closing the proceeding." *Waller*, 467 U.S. at 48. The trial court also must "make findings adequate to support the closure" under these considerations. *Id*. And as noted previously, this Court held in *ABC, Inc.* that the determination whether to close a portion of the court-martial "must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis." *ABC, Inc.*, 47 M.J. at 365 (citing *Globe Newspaper Co. v. Superior Ct. for the Cnty. of Norfolk*, 457 U.S. 596, 609 (1982)).

Accordingly, if the accused requests that an M.R.E. 412 hearing be open, the military judge must make an individualized determination of whether the accused's public trial right must yield in accordance with *Waller* and *ABC, Inc.* For most M.R.E. 412 hearings, the named victim's privacy likely will be the kind of "overriding interest" that the Supreme Court addressed in *Waller*. This Court, indeed, previously has recognized that "M.R.E. 412 is intended to 'shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to'" sexual offense prosecutions in the past. *Gaddis*, 70 M.J. at 252 (quoting Drafters' Analysis app. 22 at A22-35 (2008 ed.)). Accordingly, in a given case, a military judge may conclude, after an individualized analysis, that the hearing or portions of the hearing should be closed.

But the usually important interest in the named victim's privacy might not be "overriding" in all cases. For example, the named victim for whatever reason might not oppose an open hearing with respect to some matters. And even if some parts of a hearing

should be closed under the test in *Waller*, other parts of the hearing may not need to be closed. For example, if counsel are merely arguing about legal issues, such as the meaning of M.R.E. 412 or legal precedents, without disclosing confidential facts, closure may be unnecessary.

C. Remedy in This Case

The foregoing discussion does not answer the question of whether the second M.R.E. 412 hearing in this case should have been open or closed, in whole or in part. Instead, it leads only to the conclusion that the military judge erred by not making an individualized determination whether that hearing should be closed once the accused objected to its closure. In *Waller*, the Supreme Court dealt with a similar situation by remanding the case and ordering an individualized determination of whether parts of the hearing in question should have been open and whether a new hearing should be held. *Waller*, 467 U.S. at 50. The Supreme Court further explained that "[i]f, after a new ... hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest." *Id.*

Following this precedent, the appropriate remedy here would be to remand the case for a *DuBay* hearing.[5] In the *DuBay* hearing, the military judge would make an individualized determination whether Appellant's M.R.E. 412 hearing should have been closed. If this case-by-case determination were to reveal that the M.R.E. 412 hearing should have been closed, any error in failing to make a case-by-case

5. *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

determination in the first instance would be harmless, and the findings and sentence should be affirmed.

On the other hand, if the *DuBay* military judge were to determine that the second M.R.E. 412 hearing in this case should not have been closed, then a public M.R.E. 412 hearing would have to be held. What happens next would depend on the outcome of the public hearing. If the public hearing resulted in the same suppression of the evidence that already occurred at the original trial, then a rehearing would be unnecessary, and the findings and sentence would have to be affirmed. Otherwise, a new trial with the new evidence would be necessary unless exclusion of the evidence was harmless.

III. Conclusion

For the foregoing reasons, I would not affirm the decision of the United States Army Court of Criminal Appeals at this time but would instead remand the case for further proceedings consistent with my opinion.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Brandon Z. Miller,
Appellant

USCA Dkt. No. 25-0025/AR
Crim. App. No. 20230026

ORDER GRANTING REVIEW

On consideration of the petition for grant of review of the decision of the United States Anny Court of Criminal Appeals, it is, by the Court, this 12th day of February, 2025,

ORDERED:

That said petition is hereby granted on the following issue:

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

Appellant will file a brief on or before March 5, 2025; Appellee will file an answer brief no later than 21 days after the filing of Appellant's brief; and Appellant may file a reply brief no later than 7 days after the filing of Appellee's answer brief.

For the Court,

/s/ David A. Anderson
Deputy Clerk of the Court

cc: The Judge Advocate General of the Anny
Appellate Defense Counsel (Osterhage)
Appellate Government Counsel (Talley)

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Before
WALKER, POND, and PARKER
Appellate Military Judges

UNITED STATES, Appellee

v.

Specialist BRANDON Z. MILLER
United States Army, Appellant

ARMY 20230026

Headquarters, Fort Campbell
Jacqueline Tubbs and Adam S. Kazin, Military Judges
Lieutenant Colonel Ryan W. Leary, Staff Judge Advocate

For Appellant: Colonel Philip M. Staten, JA; Major Robert W. Rodriguez, JA; Captain Kevin T. Todorow, JA (on brief); Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Major Robert W. Rodriguez, JA; Captain Kevin T. Todorow, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Justin L. Talley, JA; Captain Joshua A. Hartsell, JA (on brief).

19 July 2024

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

/s/

JAMES W. HERRING, JR.
Clerk of Court

UNITED STATES ARMY TRIAL JUDICIARY

Excerpts from Transcript of Article 39(a) Session
October 11, 2022

MJ: This Article 39(a) session will come to order. All parties present when the court recessed are again present. At this time, we will take up the defense motion to introduce evidence under Military Rule of Evidence 412. I will close the Court at this time. I would ask all spectators to please leave the courtroom. The bailiff please post himself outside the courtroom and making sure that no one enters.

CDC: Your Honor, for purposes of the record. I would object to the hearing being closed under the First and Second [sic] Amendment, as in U.S. versus--citing in U.S. versus Hershey. There needs to be a constitutional analysis as to why the hearing is going to be closed.

MJ: So, I think I understood the First Amendment Did you say the Second Amendment?

CDC: Sixth.

MJ: Sixth. Okay. I'm sorry. That was going to be very confusing to me. Your objection is noted and is overruled.

CDC: Thank you, Your Honor.[*]

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*. A scanned copy of the original pages from this transcript (from the Record of Trial) appears in the Joint Appendix filed in the Court of Appeals for the Armed Forces—at page JA27.