No. 25-999

# In the Supreme Court of the United States

BRANDON Z. MILLER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the military judge overseeing petitioner's court-martial proceedings violated the Sixth Amendment by holding a closed hearing, pursuant to Military Rule of Evidence 412, to determine the admissibility of presumptively excluded evidence of the sexual history of the alleged sex-offense victim.

**ADDITIONAL RELATED PROCEEDINGS**

General Court-Martial (Ft. Campbell, Kentucky):

*United States* v. *Miller*, (January 20, 2023)

United States Army Court of Criminal Appeals:

*United States* v. *Miller*, No. 20230026 (July 19, 2024)

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-25a) is reported at 86 M.J. 188. The summary order of the United States Army Court of Criminal Appeals (Pet. App. 28a-29a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on September 24, 2025. On December 4, 2025, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 20, 2026. The petition was filed on February 18, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

### STATEMENT

Following a trial before a general court-martial, petitioner was convicted on one specification of sexual

assault, in violation of Article 120 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920, and one specification of willfully disobeying a superior commissioned officer, in violation of Article 90 of the UCMJ, 10 U.S.C. 890. See Pet. App. 3a. The court-martial sentenced petitioner to 30 months of confinement, a reduction in rank, and a dishonorable discharge. CAAF App. 29. The convening authority approved the findings and the sentence. *Id.* at 30-31. The Army Court of Criminal Appeals (Army CCA) affirmed. *Id.* at 8. The Court of Appeals for the Armed Forces (CAAF) granted review and affirmed. Pet. App. 1a-25a.

1. In September 2019, petitioner, then a specialist in the Army, committed a penetrative sexual assault of victim B.M. CAAF App. 9. In addition, in May 2019, petitioner willfully disobeyed a lawful order from his superior commissioned officer to remain at least 500 feet away from another soldier. *Ibid.* Petitioner was charged with disobeying a superior commissioned officer under Article 90, two specifications of sexual assault under Article 120, and assault consummated by battery under Article 128. CAAF App. 9.

Under Military Rule of Evidence (M.R.E.) 412, two types of evidence—evidence "offered to prove that [a] victim engaged in other sexual behavior" and evidence "offered to prove [a] victim's sexual predisposition"—are "generally inadmissible" in any court-martial proceedings "involving an alleged sexual offense." M.R.E. 412(a). M.R.E. 412(b) provides three exceptions under which such presumptively barred evidence may be admitted at the court-martial: specific instances of sexual behavior offered to prove that physical evidence (such as semen) is from a source other than the accused; specific instances offered by the accused to show consent

or by the prosecution; and evidence necessary to preserve the accused's constitutional rights. See *ibid.*

M.R.E. 412(c) specifies that on receipt of a motion to admit evidence under one of those exceptions, "the military judge must conduct a hearing, which shall be closed," to consider the motion. Petitioner made two such motions here. Pet. App. 2a-3a. In each, the military judge followed the required procedure: He convened a hearing under UCMJ Article 39(a), 10 U.S.C. 839(a), and closed the courtroom as required by M.R.E. 412(c)(2). Pet. App. 2a-3a. Petitioner did not object to the closure of the first hearing, at which the judge granted his motion and admitted the evidence that he had proffered. *Id.* at 3a, 17a; CAAF App. 25-26. Petitioner did object to the closure of the second hearing, Pet. App. 3a; his objection was overruled, and the second closed hearing resulted in the exclusion of the evidence at issue, *id.* at 3a, 17a; CAAF App. 27.

The court-martial convicted petitioner on one sexual-assault specification and the disobedience specification but acquitted him on the remaining charges. Pet. App. 2a; CAAF App. 12.

2. The Army CCA affirmed in a summary opinion. Pet. App. 3a. The CAAF granted review and likewise affirmed. *Id.* at 1a-25a.

The CAAF noted at the outset that its predecessor court's decision in *United States* v. *Hershey*, 20 M.J. 433 (C.M.A. 1985), cert. denied, 474 U.S. 1062 (1986), had concluded that the Sixth Amendment's public-trial right applies in the context of military courts-martial. Pet. App. 5a-6a. Assessing the contours of that right, the CAAF noted that this Court held in *Waller* v. *Georgia*, 467 U.S. 39 (1984), that the Sixth Amendment generally requires that "the actual proof at trial" be open to the

public, but has never held that the public-trial right applies broadly to all pretrial proceedings. Pet. App. 6a (quoting *Waller*, 467 U.S. at 44). The CAAF then explained that "for several reasons," M.R.E. 412 hearings are "fundamentally different" from the "two specific pretrial proceedings"— suppression hearings and jury voir dire—to which this Court has concluded "that the public trial right does apply." Pet. App. 6a.

The CAAF observed that, in contrast to suppression hearings to which the right was applied in *Waller*, "the subject matter of a[n] M.R.E. 412 hearing is presumed to be inadmissible and therefore excluded from trial." Pet. App. 8a. The CAAF also observed that the admissibility of proffered evidence "so collateral that it is rebuttably presumed to be irrelevant" is not "as case critical or potentially dispositive as suppression hearings," and that M.R.E. 412 hearings do not "invoke the same concerns about transparency and public scrutiny as suppression hearings," which "often involve allegations of law enforcement negligence or malfeasance." *Id.* at 8a-10a. And in contrast to the voir-dire process to which the Court applied the public-trial right in *Presley* v. *Georgia*, 558 U.S. 209 (2010) (per curiam), M.R.E. 412 hearings "have no historical tradition of being public." Pet. App. 10a.

The CAAF additionally analyzed "aims and interests" that this Court had identified in *Waller*, "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." Pet. App. 11a. And "for two reasons," the CAAF found those aims and interests did not require opening M.R.E. 412 hearings. *Ibid.* First, the CAAF noted that the *Waller* interests

"are arguably implicated in every phase of a court-martial" and thus could "call into question the constitutionality of every courtroom closure and in camera review dictated by the Manual [for Courts-Martial]," including hearings on "classified information," "identity of informants," and various privileges. *Ibid.* Second, the CAAF emphasized that *Waller* had "also recognized encouraging witnesses to come forward as an important interest"—an interest "advanced by the closure of M.R.E. 412 hearings," which "protect the victims of sexual offenses from embarrassing and degrading cross-examination." *Id.* at 11a-12a.

Judge Maggs dissented. Pet. App. 15a-25a. In his view, the Sixth Amendment's public-trial right extends to an M.R.E 412 hearing. *Id.* at 15a-16a. He would thus have remanded to the military judge for an individualized determination of whether closure was warranted in this case. *Id.* at 24a-25a.

**ARGUMENT**

Petitioner renews his contention (Pet. 13-28) that the Sixth Amendment required the pretrial hearing to determine the admissibility of his victim's sexual history under M.R.E. 412(c) to be open to the public. The CAAF correctly rejected that contention, and the narrow disagreement in the state courts as to their individual rape-shield rules does not warrant this Court's review in this case. Indeed, this case would be an unsuitable vehicle in which to address the scope of the Sixth Amendment's public-trial right because the Sixth Amendment does not extend to courts-martial. This Court denied certiorari in a recent case presenting a public-trial claim in the context of an Army court-martial, *Hasan* v. *United States*, 145 S. Ct. 1470 (2025) (No. 24-5225), and it should follow the same course here.

1. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI. That provision, which applies to "all criminal prosecutions" (*ibid.*), grants a defendant the right to a trial with five characteristics: it must be (1) speedy, (2) public, and (3) by a jury that is both (4) impartial and (5) from the State and district in which the crime was committed.

It is well settled, however, that the Sixth Amendment's "right to trial by jury" does not apply to "trials by courts-martial." *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950) (citing *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942), and *Kahn* v. *Anderson*, 255 U.S. 1, 8 (1921)); see *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *id.* at 137-138 (Chase, C.J., concurring in the judgment). And this Court has observed that "'cases arising in the land or naval forces' * * * are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth." *Quirin*, 317 U.S. at 40 (citing *Milligan*, 71 U.S. (4 Wall.) at 123, 138-139).

"[T]he historical evidence" also "strongly suggests that the provisions of the Bill of Rights were not originally understood to apply to courts-martial." *Ortiz* v. *United States*, 585 U.S. 427, 482 & n.4 (2018) (Alito, J., dissenting, joined by Gorsuch, J.). Courts-martial are special Executive Branch tribunals that enforce "military discipline" in the context of a unique legal tradition for military personnel, and their proceedings thus "are not criminal prosecutions within the meaning of the Constitution." *Id.* at 482; cf. *Davis* v. *United States*, 512 U.S. 452, 463 n.* (1994) (Scalia, J., concurring) (noting the government's position that "court-martial cases are

not 'criminal prosecutions' within the meaning of the Sixth Amendment") (citation and internal quotation marks omitted).

As petitioner notes (Pet. 7), the CAAF and its predecessor court have held that the Sixth Amendment's public-trial right generally applies to courts-martial, *e.g.*, *United States* v. *Hershey*, 20 M.J. 433, 435-436 (C.M.A. 1985), cert. denied, 474 U.S. 1062 (1986). Whether the Sixth Amendment's public-trial right for "criminal prosecutions," U.S. Const. Amend. VI, applies in court-martial cases is not typically dispositive because the President, as Commander-in-Chief, has independently ordered that, subject to certain exceptions, "courts-martial shall be open to the public." Rules for Courts-Martial 806(a). In this case, however, petitioner's objection to the closed M.R.E. 412 hearing during his court-martial proceedings is premised on the contested view that the Sixth Amendment's public-trial right applies in full to courts-martial. See, *e.g.*, Pet. i, 13; see also Pet. App. 12a-15a (rejecting Rule 806 claim).

The Court would therefore be presented with a substantial threshold question—one not meaningfully addressed in the petition for a writ of certiorari or the decision below—that might moot out the question presented in the petition. While petitioner faults (Pet. 17) the government for not disputing the Sixth Amendment's applicability in the CAAF, this Court's ability to consider that issue does not depend on the government objecting to the CAAF's longstanding precedent. See, *e.g.*, *United States* v. *Vonn*, 535 U.S. 55, 58 n.1 (2002); see also, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997) ("A respondent is entitled * * * to defend the judgment on any ground supported by the record.").

Consideration of a question presented premised on the disputed applicability of the Sixth Amendment would not be a useful investment of the Court's limited resources. Indeed, assuming the applicability of the public-trial right would be particularly inappropriate because even if it applies in some form, it may apply only to a limited extent—a matter that any appropriate disposition of the case could not avoid confronting. Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 65-78 (1981).

2. Even assuming that the Sixth Amendment's public-trial right does extend to court-martial proceedings, the CAAF correctly applied this Court's Sixth Amendment precedents to conclude that an M.R.E. 412 hearing need not be open to the public.

In *Waller* v. *Georgia*, 467 U.S. 39 (1984), the Court for the first time addressed "the extent to which [the public-trial] right extends beyond the actual proof at trial" and held that a closed suppression hearing—which had lasted seven days and resulted in the denial of the defendant's motion to suppress key evidence—violated the Sixth Amendment. *Id.* at 42-44, 48-49. A quarter-century later, in *Presley* v. *Georgia*, 558 U.S. 209 (2010) (per curiam), the Court held "that the Sixth Amendment right to a public trial extends," in addition, "to the voir dire of prospective jurors." *Id.* at 213 (emphasis omitted). But even petitioner does not contend that *Waller* and *Presley* extend the public-trial right to all proceedings ancillary to a trial. And as the CAAF recognized (Pet. App. 8a-10a), the public-trial right does not have the perverse effect of allowing the accused to force a public hearing about the exact same victim-sexual-history information that the rule is designed to protect.

As the CAAF observed (Pet. App. 8a), unlike the presumptively *admissible* evidence challenged at a

suppression hearing, the subject matter of an M.R.E. 412 hearing is presumed to be *inadmissible* at the ensuing court-martial. The President has determined that an alleged victim's sexual history is irrelevant to the question of the accused servicemember's guilt unless the proffered evidence meets one of the narrow exceptions identified in the rule. See M.R.E. 412(a) and (b). That proffered evidence, which is "so collateral that it is rebuttably presumed to be irrelevant," contrasts sharply with the "essential evidence, such as confessions, identifications of the accused, or the physical evidence providing the basis of the charges at trial" litigated in a suppression hearing. Pet. App. 9a.

In addition, while suppression proceedings "often turn on the determination of contested factual matters, * * * M.R.E. 412 hearings typically turn on legal questions" that are "more akin to a pretrial conference concerning an evidentiary matter than a suppression hearing." Pet. App. 9a. And aside from the factual-legal distinction, the two types of proceedings address matters of incommensurate public interest. "Suppression hearings often involve allegations of law enforcement negligence or malfeasance" that "strike[] at the heart of due process and personal liberty" and are "of paramount interest to the public writ large." *Id.* at 10a. But "evidence of a specific victim's past sexual behavior or predisposition has little value to the public," *ibid.*—indeed, the very point of M.R.E. 412 is to spare the victim the embarrassment of its public disclosure.

That central feature of M.R.E. 412 also makes closure appropriate under the "aims and interests" analysis undertaken in *Waller*. See *Waller*, 467 U.S. at 46; Pet. App. 11a. *Waller* recognized that one of the principal interests served by "a public trial" is "encourag[ing]

witnesses to come forward." 467 U.S. at 46. But in the sensitive context of an alleged sex-offense victim's sexual history, public access would yield the opposite result: *dis*couraging victims from coming forward, lest they be subjected to "the invasion of privacy" and "potential embarrassment" inherent to "public disclosure of intimate sexual details." Fed. R. Evid. 412 advisory committee's note (1994 Amendment) (discussing similar general federal rule of evidence); see *Michigan* v. *Lucas*, 500 U.S. 145, 150 (1991) (recognizing the "valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy").

Such public exposure would also be substantially in the accused's control, as he can force an M.R.E. 412 hearing simply by asserting a claim for an exception under M.R.E. 412(c). Petitioner correctly observes (Pet. 26-27), that even if the public-trial right applied, a judge would still have the ability to close the hearing upon certain individualized findings. See, *e.g.*, *Presley*, 558 U.S. at 213. But the very premise of his petition must be that some substantial subset of hearings *would* be open. Permitting exceptions to an otherwise-blanket rule of inadmissibility, and giving the accused an unqualified right to a hearing when he asserts such an exception, should not come at the constitutional price of public embarrassment (or even shaming) of the victim.

3. The narrow disagreement in the state courts concerning the permissible scope of state rape-shield laws does not warrant this Court's review in this case.

While no court has held that a pretrial hearing into an alleged victim's sexual history must categorically be open to the public, state courts have disagreed as to whether closure must rest on judicial findings or may

instead rest on a legislative judgment. Three state courts of last resort have taken the view that closure of a hearing regarding evidence presumptively excluded under a rape-shield rule must be supported by a judge's individualized findings. See *State* v. *Kelly*, 545 A.2d 1048, 1050-1053 (Conn. 1988); *Commonwealth* v. *Jones*, 37 N.E.3d 589, 601-609 (Mass. 2015); *State* v. *Hoff*, 385 P.3d 945, 949-950 (Mont. 2016). The Oregon Supreme Court, in turn, has recognized that a closed-hearing requirement enacted by a legislature in a rape-shield law does not violate the Sixth Amendment. *State* v. *Macbale*, 305 P.3d 107, 121-122 (2013) (en banc).

Thus, although "[a]ll 50 states now have some type of protection to shield rape complainants from having to disclose publicly their past sexual activities," Catherine L. Kello, *Rape Shield Laws—Is It Time for Reinforcement?*, 21 U. Mich. J. L. Reform 317, 317 n.3 (1988), less than a tenth of state high courts have weighed in on the applicability of the Sixth Amendment. Only one of those state high courts has actually granted (limited and ancillary) relief in a case applying a public-trial right. See *Kelly*, 545 A.2d at 1054 (affirming on harmlessness grounds); *Hoff*, 385 P.3d at 950 (affirming because judge made adequate findings to support closure); see also *Jones*, 37 N.E.3d at 608 (requiring new rape-shield hearing in decision ordering new trial on independent grounds). And even petitioner recognizes (Pet. 27) that "there are likely to be compelling reasons for trial judges to close many—if not most—rape shield hearings" even if the Court decides the question presented in his favor.

Moreover, no federal appeals court has yet had occasion to decide whether the Sixth Amendment's public-trial right applies to the rape-shield provision in

Federal Rule of Evidence 412(c)(2), which is similar (though not identical) to M.R.E. 412 and provided the basis for the military rule. See Pet. App. 6a & n.5. Petitioner attributes (Pet. 20) the lack of decisional law to the absence of a requirement that a federal district court hold a hearing when considering evidence under Rule 412. But courts are in fact required to conduct a hearing "in camera" (and thus out of public view), in which "the victim and parties" will have "a right to attend and be heard," before admitting otherwise-shielded evidence. Fed. R. Evid. 412(c)(2). And the Rule further provides that "[u]nless the court orders otherwise, * * * the record of th[at] hearing must be and remain sealed." *Ibid.* The absence of caselaw thus suggests that the issue does not frequently arise; at the very least, the Court lacks any views from any court of appeals.

Finally, this case—concerning the application of a presidential directive in the unique context of military courts-martial—is an unsuitable vehicle in which to resolve the nascent variation in state-court decisions. As discussed above, pp. 6-8, *supra*, petitioner can prevail only if the Court agrees (or at least assumes) that the Sixth Amendment's public-trial right extends to court-martial proceedings. But a military-specific ruling—either that the public-trial right does not attach to court-martial proceedings at all or that it applies differently than to civilian proceedings—would not necessarily resolve the conflict in the state courts.

Indeed, recognizing the uniqueness of the military's role, this Court routinely denies petitions for writs of certiorari in military cases that might raise substantial constitutional claims if they had arisen in the civilian context. *E.g.*, *Wheeler* v. *United States*, 145 S. Ct. 2750

(2025) (No. 24-678); *Anderson* v. *United States*, 144 S. Ct. 1003 (2024) (No. 23-437); *Larrabee* v. *Del Toro*, 144 S. Ct. 277 (2023) (No. 22-1082); *Bess* v. *United States*, 141 S. Ct. 2792 (2021) (No. 20-489); *Hennis* v. *United States*, 141 S. Ct. 1052 (2021) (No. 20-301). Forgoing review in such cases is generally appropriate because the military is a community that stands "apart from civilian society," *Parker* v. *Levy*, 417 U.S. 733, 744 (1974), and whose oversight is committed principally to Congress and the President, see U.S. Const. Art. I, § 8, Cl. 14 (authorizing Congress to "make Rules for the Government and Regulation of the land and naval Forces"); U.S. Const. Art. II, § 2, Cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States."). That disposition is appropriate here.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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