NATIONAL CRIME VICTIM LAW INSTITUTE

Victims' Right to be Present at Military Proceedings:
Checklist of Arguments, Considerations, and Practice Pointers

Victims have the right, under Article 6b of the Uniform Code of Military Justice, to not be excluded from any public[1] military justice proceedings.[2] This right includes non-physical participation in and access to proceedings.[3] The right to not be excluded is presumed and may only be overcome if a party seeking exclusion can meet the heavy burden of showing by "clear and convincing evidence" that the victim's testimony would be "materially altered" by hearing other testimony at the same proceeding.[4]

This handout is designed to support attorneys representing or working with a victim in the military justice system whose right to be present is implicated. It provides arguments, considerations, and practice pointers for use when: affirmatively moving to allow a victim to remain in the courtroom throughout proceedings, pursuant Article 6b; or opposing a party's motion to exclude the victim under Military Rule of Evidence (MRE) 615.[5]

- ❑ **Determine Whether and to What Extent the Victim Wants to Be Present.**
  - The right to be present is not limited to trial but applies to all proceedings. Victims have the right to be present in pretrial, trial, and post-trial proceedings.[6]
  - Victims may change their mind over the course of proceedings about whether and how they want to participate.
  - Although victims often testify first at trial, they are not required to do so to exercise their right to be present.

- ❑ **Assert the Presumption: Victims Have a Right to Be Present.**
  - Victim presence is the default rule under Article 6b and MRE 615.
  - MRE 615 incorporates the right as an express exception to witness sequestration.

- ☐ **Emphasize the High Burden for Exclusion: "Clear and Convincing Evidence."**
  - "Clear and convincing evidence" is proof that produces "a firm belief or conviction" about the facts being established.[7]
  - The party seeking exclusion must show it is *highly likely* that the victim-witness will materially alter their testimony after hearing other testimony at the same proceeding.[8]
  - The mere possibility that the victim will alter their testimony is insufficient.[9]
  - To meet the "materially alter" requirement for exclusion, the moving party must show that the victim's testimony will change in a way that is substantial and could affect outcome.[10] Minor or stylistic changes to testimony do not meet this burden.

☐ **Point to Relevant Situations Where Courts Have Found Exclusion Was Not Warranted.**

- The victim will testify about a different incident or topic than other witnesses.[11]
- The victim will testify about factual, objective, and/or corroborated evidence.[12]
- No evidence shows *how* presence in court would change the victim's testimony.[13]

☐ **Assert the Victim's Other Rights.**

- Excluding victims from proceedings can violate their right to be treated with fairness and respect for their dignity.[14]
- Victims' presence can be critical for the protection and enforcement of other rights (e.g., presence at a release proceeding allows a victim to immediately learn of release and any conditions imposed, enabling them to create a safety plan in support of their right to reasonable protection,[15] presence at proceedings involving access to their records allows a victim to inform the court of the need for redaction, thereby safeguarding their right to privacy[16]).

☐ **Emphasize that Defendants Do Not Have a Right to Exclude Victims.**

- Defendants do not have a constitutional right to exclude victims from proceedings.[17]
- Exclusion is unnecessary to ensure fairness; cross-examination, prior statements, and impeachment can be used to challenge inconsistencies in victims' testimony.[18]

☐ **Argue Public Policies Supporting Victims' Presence.**

- As the individuals directly harmed by crime, victims have a unique and compelling interest in justice[19] and their presence safeguards fairness of the proceedings.
- Victim presence at military proceedings can further the public's broad interest in ensuring victim wellbeing.[20]

☐ **Seek Remedies for Exclusion.**

- If exclusion occurs in violation of Article 6b/MRE 615, consider filing a petition for writ of mandamus to the Court of Criminal Appeals.[21]
- Remedies may include:
  - An order to allow presence.
  - Reopening proceedings to allow participation.
  - Disclosure of missed testimony or evidence.
  - Access to recordings or transcripts.

Note on Civilian Case References: Military court decisions interpreting victims' right to be present are limited, but federal civilian case law is instructive, as the right to be present under Article 6b and MRE 615's victim exception mirror language in federal civilian law. Given this alignment, this handout contains multiple references to federal civilian case law interpreting the right under the Crime Victims' Rights Act (CVRA).

[1] Sex offense victims also have an express right to attend non-public hearings regarding the admissibility of evidence related to their sexual behavior. *See* Mil. R. Evid. 412(c)(2) (stating that "[t]he victim must be afforded a reasonable opportunity to attend and be heard" at a rape shield hearing).

[2] 10 U.S.C. § 806b(a)(3).
[3] Where the parties participate in a proceeding in writing, instead of oral comments, the right to not be excluded can include the right to access written comments. *See A.M. v. United States*, No. 201700158, 2017 WL 3225013, at *4 (N-M. Ct. Crim. App. July 31, 2017) (finding that counsel's written comments submitted for a preliminary hearing are "functionally equivalent to oral comments in every regard" and emphasizing that "to the extent that those written comments might address any MIL. R. EVID. 412, 513, or 514 matters directly related to the [victim-]petitioner, the ability to advocate or challenge the application of those clear victims' protections require that the petitioner's VLCs receive those aspects of the parties' written comments, have an opportunity to consult with the government counsel regarding them, and potentially address concerns directly to the PHO [(preliminary hearing officer)]," but noting that "[i]t is not clear that the trial and civilian defense counsel's written comments are part of the preliminary hearing, such that the petitioner must be provided a copy of them before the PHO completes the report to the convening authority, if those written comments involve only the ultimate issues to be addressed in the PHO's report—probable cause, jurisdiction, form of the charges, potential recommended additional charges, and disposition of the charges. ").
[4] *See* 10 U.S.C. § 806b(a)(3) (affording victims "[t]he right not to be excluded from any public hearing or proceeding described in [10 U.S.C. § 806b(a)] paragraph (2) unless the military judge or preliminary hearing officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding."
[5] Mil. R. Evid. 615(e) ("At a party's request, the military judge must order witnesses excluded so that they cannot hear other witnesses' testimony, or the military judge may do so sua sponte. This rule does not authorize excluding . . . a victim of an offense from the trial of an accused for that offense, unless the military judge, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that hearing or proceeding").
[6] Under Article 6b, victims have the express right to be present at: "(A) A public hearing concerning the continuation of confinement prior to trial of the accused. (B) A preliminary hearing under section 832 of this title (article 32) relating to the offense. (C) A court-martial relating to the offense. (D) A post-trial motion, filing, or hearing that may address the finding or sentence of a court-martial with respect to the accused, unseal privileged or private information of the victim, or result in the release of the accused. (E) A public proceeding of the service clemency and parole board relating to the offense." 10 U.S.C. § 806b(a)(2).
[7] *See United States v. Green*, 62 M.J. 501, 503 (A.F. Ct. Crim. App. 2005) (quoting Department of the Army Pamphlet (D.A. Pam.) 27–9, *Military Judge's Benchbook,* ¶ 6–4 (Sep. 2002)); *see also* D.A. Pam., 27-9, *Military Judges Benchbook*, ¶ 6–4 (July 2025) (providing, in the context of sample jury instructions regarding mental responsibility at the time of an offense, that "[w]hether the evidence is clear and convincing requires weighing, comparing, testing, and judging its worth when considered in connection with all the facts and circumstances in evidence"). The "clear and convincing evidence" standard is an intermediate standard of proof; it falls between "preponderance of the evidence," which requires a showing that something is more likely than not, and "proof beyond a reasonable doubt." *Green*, 62 M.J. at 503.
[8] *See In re Mikhel*, 453 F.3d 1137, 1139 (9th Cir. 2006) (emphases in original) (interpreting the right to be present under the federal Crime Victims' Rights Act, and observing that "a district court must find by clear and convincing evidence that it is *highly likely,* not merely *possible,* that the victim-witness will alter his or her testimony").
[9] *See id.* (emphasis in original) (stating that "[a] mere *possibility* that a victim-witness may alter his or her testimony as a result of hearing others testify is . . . insufficient to justify excluding him or her from trial").
[10] *See* "Material," *Black's Law Dictionary* (12th ed. 2024) ("Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential <material alteration of the document>."); *see also DB By & Through Johnson v. Lippert*, No. ARMY MISC 20150769, 2016 WL 381436, at *2, n.5 (Army Ct. Crim. App. Feb. 1, 2016) (observing that, under Article 6b(a)(3), a victim may only be excluded where there is clear and convincing evidence that a victim's presence would alter their testimony in a way that would likely affect the court's findings and sentence).
[11] *See, e.g.*, *United States v. Lofton*, 69 M.J. 386, 392 (C.A.A.F. 2011) (finding that accused was not prejudiced by any violation of MRE 615 that may have occurred when a victim's family members sat in on an indecent assault trial and allegedly related trial testimony to three of the victims, where: the first testifying victim's testimony could not have been shaped by the others; the accused was acquitted of charges involving the third testifying victim; and testimony of the second victim was about an incident that was distinct from the first victim's and remained consistent when she was called to testify a second time as a defense witness).
[12] *See, e.g.*, *United States v. Morgenstern*, 725 F. App'x 546, 549 (9th Cir. 2018) (finding that child sexual abuse victims' parents did not materially alter their testimony by remaining in the courtroom during trial, where parents'

testimony "consisted of establishing the ages of their children and describing each family's general relationship with [defendant]," "[n]either parent testified to witnessing any abuse," and "[t]he government's case rested largely on photographic and video evidence taken from [defendant's] hard drives"); *United States v. Johnson*, 362 F. Supp. 2d 1043, 1056 (N.D. Iowa 2005) (granting the government's motion to permit victim-witnesses to observe the guilt phase of trial where "each of these witnesses appears likely to testify during the 'merits phase' only as to discrete factual events surrounding the disappearance of the murder victims and to identify certain clothing and other items recovered during various searches, which are not matters susceptible to 'material alteration' from hearing the testimony of other witnesses").

[13] *See, e.g.*, *United States v. Jefferson*, No. 2:23-CR-00109-LK, 2025 WL 72119, at *3 (W.D. Wash. Jan. 10, 2025) (finding that the government had not met its burden of providing clear and convincing evidence to support its request for victim exclusion where it offered broad references to the victim's inconsistent statements and submitted a text exchange in which the victim indicated sympathy for defendant; and explaining that the victim's appearance "as a motivated defense-favorable witness does not clear the high bar that Congress set for exclusion of a victim-witness from trial").

[14] *See* 10 U.S.C. § 806b(a)(9) (affording victims the right to be treated with fairness and respect for their dignity).

[15] *See* 10 U.S.C. § 806b(a)(1) (affording victims "[t]he right to be reasonably protected from the accused").

[16] *See* 10 U.S.C. § 806b(a)(9) (affording victims the right to be treated with respect for their privacy).

[17] Federal and state courts have consistently concluded that defendants do not have a general constitutional right to exclude victims from the courtroom. *See, e.g.*, *United States v. Edwards*, 526 F.3d 747, 758 (11th Cir. 2008) (affirming the district court's denial of a motion to exclude the victim-witnesses and observing that "[a] criminal defendant has no constitutional right to exclude witnesses from the courtroom"); *Carmona-Bernacet*, 663 F. Supp. 3d at 204 (stating that "[t]he defendants have no constitutional right to exclude [the victim] from the courtroom" and citing cases); *State v. Williams*, 960 A.2d 805, 813 (N.J. App. Div. 2008) ("A criminal defendant has no federal constitutional right to exclude witnesses from the courtroom." (citing cases)); *State v. Beltran-Felix*, 922 P.2d 30, 33–34 (Utah Ct. App. 1996) (concluding that the victim's constitutional or statutory right to be present did not facially violate defendant's due process or fair trial rights).

[18] *See, e.g.*, *Carmona-Bernacet*, 663 F. Supp. 3d at 181–82 (stating that mere speculation that the victim will alter their testimony cannot sustain their exclusion from the court room and that a defendant may address any prior inconsistent statements during cross-examination and may impeach them under rules of evidence); *United States v. Bauldwin*, No. 19-CR-3579 MV, 2022 WL 4016745, at *3 (D.N.M. Sept. 2, 2022) (noting court's sensitivity to concerns that a sex crime victim's age and general vulnerability, coupled with the nature of the allegations and the passage of time, "could make it highly likely that the testimony of other witnesses would subconsciously alter their own," but concluding that the facts before the court were insufficient to justify excluding the victim from the courtroom and "can be addressed via focused cross-examination")..

[19] *See* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 534 (2005) ("More directly than anyone else, the crime victim—the person harmed by the crime—has the greatest interest in the successful prosecution of a criminal case. A crime victim simply deserves to watch the trial of her victimizer.").

[20] *See* Paul G. Cassell, The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis, 5 Phoenix L. Rev. 301, 320 (2012) ("[T]he right to attend the trial may be critical in allowing the victim to recover from the psychological damage of a crime.").

[21] *See* 10 U.S.C. § 806b(e)(1), (e)(4)(A), (e)(4)(F) ("If the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32) or a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule. . . (4) Paragraph (1) applies with respect to the protections afforded by the following: (A) This section (article) . . . [and] (F) Military Rule of Evidence 615, relating to the exclusion of witnesses.").