No. _____

In the
Supreme Court of the United States

S.S.,
Petitioner,
v.

UNITED STATES OF AMERICA AND WENDELL E. MELLETTE JR., ELECTRICIAN'S MATE (NUCLEAR) FIRST CLASS PETTY OFFICER UNITED STATES NAVY,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether diagnoses and treatments are privileged under the military's psychotherapist-patient privilege; and
2. Whether a privilege holder has the right to intervene in a criminal appeal for the limited purpose of protecting her privilege.

PARTIES TO THE PROCEEDINGS

S.S. ("Stacy", a pseudonym given by the Navy-Marine Corps Court of Criminal Appeals) is the Petitioner.

The United States of America and Wendell E. Mellette, Jr., Electrician's Mate (Nuclear) First Class Petty Officer, United States Navy are the Respondents.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

> *United States v. Mellette*, General Court-Martial in the Navy-Marine Corps Trial Judiciary, Southern Judicial Circuit.
>
> *United States v. Mellette*, Navy-Marine Corps Court of Criminal Appeals, No. 201900305.
>
> *United States v. Mellette*, United States Court of Appeals for the Armed Forces, No. 21-0312.

The Court of Appeals for the Armed Forces returned the record of trial to the Judge Advocate General of the Navy for remand to the Navy-Marine Corps Court of Criminal Appeals for further proceedings.

There are no other proceedings in state, federal, or military trial or appellate courts directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner S.S. ("Stacy")[1] respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces ("CAAF"). The CAAF's judgment held that diagnoses and treatments were not privileged under the military's psychotherapist-patient privilege.

OPINIONS BELOW

The CAAF's opinion is reported at *United States v. Mellette*, 82 M.J. 374 (C.A.A.F. 2022) and reproduced at App.1-39. The CAAF's order denying reconsideration is reported at *United States v. Mellette*, __ M.J. ___, 2022 LEXIS 647 (C.A.A.F. Sept. 13, 2022) and reproduced at App.40-41.

The United States Navy-Marine Corps Court of Criminal Appeals ("NMCCA") opinion is reported at *United States v. Mellette*, 81 M.J. 681 (N-M. Ct. Crim. App. 2021) and is reproduced at App.42-80.

The sealed court-martial ruling relating to Petitioner's psychotherapist privilege is unreported and reproduced in the sealed Supp.App.1-17.

JURISDICTION

The CAAF entered judgment on July 27, 2022. The CAAF denied Petitioner's timely petition for reconsideration on September 13, 2022. This Court has jurisdiction under 28 U.S.C. § 1259 because it is

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[1] The Navy-Marine Corps Court of Criminal Appeals used the pseudonym "Stacy" in its opinion when referring to S.S. App.44. This petition will also use "Stacy."

a case in which the CAAF granted a petition for review under 10 U.S.C. § 867(a)(3).

MILITARY RULE OF EVIDENCE PROVISION INVOLVED

Military Rule of Evidence ("M.R.E.") 513, Psychotherapist-patient privilege is reproduced at App.88-92.

Other relevant statutory provisions and rules are included at App.87, 93-97.

STATEMENT OF THE CASE

Petitioner Stacy is the victim of military sexual abuse. A court-martial convicted Respondent Electrician's Mate First Class Wendell E. Mellette of sexual abuse of a child, his fifteen-year-old sister-in-law Stacy. App.43.

When she was fifteen, Stacy sought psychotherapy counseling for depression, anxiety, and self-harm. She spent a week in an in-patient treatment program and thereafter received psychotherapy treatment as an out-patient. App.44.

Stacy sought justice by participating in the court-martial of her brother-in-law who betrayed a child's trust. By its decision to order an in camera review of Stacy's psychotherapy records, the CAAF is violating Stacy's privilege.

A. Court-Martial Proceedings.

The court-martial had jurisdiction to try Respondent Mellette under 10 U.S.C. § 802(a).

During the court-martial proceedings, Respondent Mellette moved to compel the production

of Stacy's mental health records, specifically requesting Stacy's diagnoses and treatments. Supp.App.1. The military judge denied the motion because he found that Respondent Mellette failed to meet his burden to present a specific factual basis demonstrating the requested information would yield information admissible under an exception to the privilege. Supp.App.14-15. The military judge further found that even if Stacy's diagnoses and treatments were not privileged, Respondent Mellette failed to establish they were relevant and necessary. Supp.App.16. The military judge found that Respondent was engaged in a "fishing expedition." Supp.App.16.

The court-martial panel convicted Respondent Mellette of sexual abuse of a child by touching Stacy with an intent to gratify his sexual desire. App.48.

B. The NMCCA Proceedings.

The NMCCA had jurisdiction under 10 U.S.C. § 866(b).

On his appeal to the NMCCA, Respondent Mellette and Respondent United States agreed that the military judge abused his discretion by denying his motion to compel production of Stacy's mental health diagnoses and treatments. App.43. They both argued that psychiatric diagnoses and treatments were not privileged under M.R.E. 513. App.53. Petitioner Stacy was not represented by counsel at the NMCCA and was unaware of the issues raised by the respondents.

The three-judge panel of the NMCCA rejected the respondents' argument and held that diagnoses and treatments are privileged under M.R.E. 513. The NMCCA analyzed applicable military and Supreme Court law, including *Trammel v. United States*, 445 U.S. 40 (1980) and *Jaffee v. Redmond*, 518 U.S. 1 (1996). The NMCCA found that if the psychotherapist privilege did not cover diagnoses and treatments, patients would be deterred from seeking mental health treatment "in precisely the way *Jaffee* sought to avoid." App.56. The NMCCA agreed with the only military court that published an opinion on this issue, *H.V. v. Kitchen*, 75 M.J. 717, 719 (C.G. Ct. Crim. App. 2016).

The NMCCA affirmed Respondent Mellette's conviction for sexual abuse of a child. App.80.

C. The CAAF Proceedings.

The CAAF had jurisdiction under 10 U.S.C. § 867(a)(3).

Respondent Mellette petitioned the CAAF for review of the NMCCA judgment. The CAAF granted review of whether the NMCCA erred by concluding that diagnoses and treatments are privileged under M.R.E. 513. App.7.

Although Stacy was aware that the CAAF was reviewing her M.R.E. 513 privilege, she did not know the respondents' specific arguments because their briefs were filed under seal. Petitioner Stacy filed motions to intervene so she could defend her privilege and examine the sealed briefs to respond to the legal arguments presented in respondents' briefs. The CAAF denied Stacy's motions and her

subsequent motions for reconsideration and a written opinion explaining the CAAF's denials. App.83-86.

After Stacy filed her amicus curiae brief, the CAAF granted her motions to examine the respondents' sealed briefs. App.85. Stacy's amicus brief could only speculate on the arguments presented by the respondents because she could not view their sealed briefs until after the deadline to file her amicus brief.

The CAAF reversed the NMCCA and held that diagnoses and treatments were not privileged. App.17-18. The CAAF found that diagnoses and treatments go to the very essence of witness credibility because they may reveal defects in a witness's ability to understand, interpret, and relate events.[2] App.18. The CAAF remanded the record back to the NMCCA to conduct an in camera review to determine whether any of Stacy's mental health records should have been provided to Respondent Mellette prior to his court-martial. App.19.

Petitioner Stacy timely filed a renewed motion to intervene and a petition for reconsideration. The CAAF denied Stacy's motion to intervene and dismissed her petition for reconsideration for "lack of jurisdiction." App.40-41.

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[2] The CAAF is perpetuating the persistent perception and stigma that any psychological disorder renders a witness incapable of perceiving, remembering, or telling the truth.

REASONS FOR GRANTING THE PETITION

The CAAF's decision that diagnoses and treatments are not privileged under M.R.E. 513 conflicts with this Court's holdings in *Jaffee*, 518 U.S. at 9-15 and *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The CAAF does not cite *Jaffee*. The CAAF strictly construed the psychotherapist privilege without considering whether the psychotherapist privilege served the transcending public good this Court found in *Jaffee*.

The CAAF's decision conflicted with *Upjohn* because diagnoses and treatments are not underlying facts that are not privileged in *Upjohn*, but rather are the professional opinions of the treating psychotherapists. *See Upjohn*, 449 U.S. at 399-401.

Because the CAAF's decision departed so materially from the accepted and usual course of judicial proceedings, this Court should exercise its supervisory power. The CAAF did not give effect to all provisions of M.R.E. 513. By ordering an in camera review of Petitioner Stacy's records, the CAAF violated the specific and unambiguous provisions that prohibited an in camera review. The provisions prohibiting an in camera review are incompatible with the CAAF's finding that diagnoses and treatments are not privileged.

Protecting the diagnoses and treatments of a child seeking help from her psychotherapists is a public good that transcends the normally predominant principle of utilizing all rational means for ascertaining truth.

I. Psychotherapists' Diagnoses and Treatments are Privileged under the Military's Psychotherapist-Patient Privilege.

a. The CAAF Decided an Important Federal Question that Conflicts with Relevant Decisions of this Court.

The Court should grant Stacy's petition for certiorari because the CAAF interpreted psychotherapist privilege under M.R.E. 513 in a way that conflicts with relevant decisions of this Court. Specifically, the CAAF's decision ignored and conflicted with *Jaffee*, 518 U.S. 1, and conflicted with *Upjohn*, 449 U.S. 383.

i. The CAAF Ignored *Jaffee v. Redmond.*

The CAAF ignored and failed to apply this Court's decision in *Jaffee*, 518 U.S. 1. In *Jaffee*, this Court held that confidential communications between a psychotherapist and her patients in the course of diagnosis or treatment are privileged. 518 U.S. at 15. The Court established the psychotherapist privilege because of the "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id.* (quoting *Trammel v. United States,* 445 U.S. 40, 50 (1980)). In *Trammel*, this Court analyzed whether the privilege against adverse spousal testimony served the public good and strictly construed the privilege to the extent it did not serve the public. 445 U.S. at 51-53. Under the facts in *Trammel*, the Court explained the spousal privilege would not have fostered marital harmony but rather, could have undermined the

marital relationship by permitting one spouse to escape justice at the expense of the other. *Id.* at 52-53. The *Trammel* Court construed the spousal privilege strictly to preclude its application when it does not advance a transcending public purpose. *Id.*

The Court in *Jaffee* did not require or mention strict construction of the psychotherapist privilege. 518 U.S. 1. The need to strictly construe the psychotherapist privilege would arise only if and to the extent the privilege did not serve a transcending public good. Strict construction cannot be used to defeat the purpose of the privilege.

Here, the CAAF did not cite *Jaffee* and its decision conflicted with both *Jaffee* and *Trammel*. The CAAF emphasized that its decision did not consider whether the public good of protecting a patient's diagnoses and treatment from disclosure would transcend the normal principle of using all rational means for finding the truth. App.17-18. Its decision was based solely on the portion of *Trammel* that required strict construction of privileges. App.17-18. The CAAF ignored *Jaffee* and rewrote *Trammel* to delete any requirement to consider the public good furthered by treating diagnoses and treatments as privileged.

The CAAF's omission of any citation to *Jaffee* is surprising because the court reversed the NMCCA decision that relied upon *Jaffee*. The CAAF did not address the NMCCA's *Jaffee* analysis.

Although it recognized that privileges should be narrowly construed, the NMCCA explained that an overly narrow interpretation of the

psychotherapist privilege would undermine its purpose. App.55. The NMCCA explained that *Jaffee* "recognized the societal interest in a mentally healthy populace and found that confidentiality is [absolutely necessary for psychiatric treatment to succeed.]" App.55 (quoting *Jaffee*, 518 U.S. at 10). The "promise of confidentiality would have little value if the patient were aware that the privilege would not be honored." App.55 (quoting *Jaffee*, 518 U.S. at 13). The NMCCA found that Congress and the President intended to protect the psychotherapist privilege "to the greatest extent possible." App.56, *see also United States v. Beauge*, 82 M.J. 157, 164 (C.A.A.F. 2022) (the intent of M.R.E. 513 "is to vest control of disclosure with the patient, and in the absence of plain language to the contrary, we should not choose a reading of the rule that subverts this principle"). The CAAF has not identified any plain language within M.R.E. 513 that puts diagnoses and treatments outside of the privilege.

Because it emphatically refused to consider the public good furthered by protecting diagnoses and treatments from disclosure, the CAAF's decision conflicts with this Court's holding in *Jaffee*.

ii. The CAAF Ignored the Federal District Courts that have Applied *Jaffee* to Diagnoses and Treatments.

Although no federal courts of appeals have decided whether diagnoses and treatments are privileged, the CAAF's majority opinion ignored the holdings of the four federal district courts that have decided this issue by applying *Jaffee*. None of the

four courts allowed an in camera review of psychotherapy records. Three of the four courts decided that diagnoses and treatments are privileged. *United States v. Sheppard*, 541 F. Supp. 3d 793 (W.D. Ky. 2021); *United States v. White*, No. 2:12-cr-00221, 2013 U.S. Dist. LEXIS 49426 (S.D.W.Va. Apr. 5, 2013), *rev'd on other grounds sub nom*, *Kinder v. White*, 609 F.App'x 126 (4th Cir. 2015); *Stark v. Hartt Transp. Sys., Inc.*, 937 F. Supp. 2d 88 (D. Me. 2013).

Petitioner acknowledges the applicable language in the federal privilege is not identical to the language in in the military privilege. Under the federal rule, confidential communications between a psychotherapist and her patients "*in the course of diagnosis or treatment* are protected from compelled disclosure." *Jaffee*, 518 U.S. at 15 (emphasis added). Under the military rule, a confidential communication between the patient and a psychotherapist is privileged if "*made for the purpose of facilitating diagnosis or treatment*" of the patient's mental or emotional condition. App.88 (emphasis added).

Although not identical, "in the course of" is functionally equivalent to "for the purpose of facilitating." Diagnoses and treatments should not be analyzed differently in military courts than in federal courts. The language used in the M.R.E. 513 privilege is more like the federal privilege than the

four state privileges analyzed by the CAAF.[3] App.11-12. The CAAF majority did not cite any of the aforementioned federal cases deciding whether diagnoses and treatments are privileged.

In its published opinion, the *Sheppard* court recognized that excluding diagnoses from the privilege would undermine the point of the privilege because the possibility of disclosure would chill an individual's choice to seek treatment. 541 F. Supp. 3d at 801. The *Sheppard* court quoted *Jaffee*: "The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id*., (quoting *Jaffee*, 518 U.S. at 11). The court also relied upon *United States v. White* and *Stark v. Hartt Transp. Sys., Inc. Id*.

The district court in *White* rejected the argument that diagnoses were not privileged and was unable to "discern any rational basis for distinguishing between a diagnosis and the underlying communication for purposes of disclosure." *White*, 2013 U.S. Dist. LEXIS 49426, at *22-23. Citing *Jaffee*, 518 U.S.1, the *White* court explained:

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[3] Despite the CAAF describing these state statutes as unambiguous examples of language the President *could have* used, these state statutes are also ambiguous.

> A psychiatric diagnosis is born of and inseparably connected to private communications between a therapist and his or her patient. For this reason, any attempt to draw a line between communications and diagnoses would undermine the basis for recognizing a privilege in the first place. Like confidential communications, a psychiatric diagnosis reveals sensitive information about a patient that "may cause embarrassment or disgrace" if revealed to others. *Jaffee*, 518 U.S. at 10. A party armed with knowledge of a patient's diagnosis will be able to make an educated guess about the substance of the communications that gave rise to the diagnosis, which again defeats the purpose for which the privilege is recognized.

Id. at *23; *see also* App.30 (Maggs, J., dissenting).

The *Stark* court also found that diagnoses are privileged. 937 F. Supp. 2d at 91-92. There, the court explained that a "person's mental health diagnoses and the nature of his or her treatment inherently reveal something of the private, sensitive concerns that led him or her to seek treatment and necessarily reflect, at least in part, his or her confidential communications to the psychotherapist." *Stark*, 937 F. Supp. 2d at 91, cited in App.30 (Maggs, J., dissenting). The court recognized that the privilege would be "gutted" if a patient's diagnosis or

treatment could be disclosed so long as the exact content of confidential communications were not expressly disclosed. *Id*. at 91-92.

The only federal district court that decided that diagnoses and treatments were not privileged, *Silvestri v. Smith*, No. 14-13137, 2016 U.S. Dist. LEXIS 23764, *7-8 (D. Mass. Feb. 26, 2016), did not order an in camera review but required the plaintiff/patient to answer an interrogatory. The *Silvestri* court relied primarily on a state court's interpretation of the psychotherapist privilege codified by state statute. *Id*., (citing *In re Adoption of Saul*, 60 Mass. App. Ct. 546, 549-53, 804 N.E. 2d 359, 363-65 (2004)).

iii. The CAAF's Decision Conflicts with *Upjohn Co. v. United States.*

While purporting to apply this Court's decision in *Upjohn Co.*, the CAAF held that a patient's diagnoses and treatments were "underlying facts" and not confidential communications. App.17. The CAAF's holding fundamentally conflicts with *Upjohn* and fails to appreciate the nature of psychiatric diagnoses.

In *Upjohn*, the professional opinions and conclusions of the lawyer were not the "underlying facts" this Court addressed. The underlying facts in *Upjohn* were the facts related to payments made to foreign governments to secure business. 449 U.S. at 386, 394. There, the Court held an employee's communication of a relevant underlying fact to an attorney did not make that fact privileged. 449 U.S. at 395. This Court emphasized that the attorney-

client privilege does not protect a relevant fact known to the client merely because he told his attorney the fact. *Id*. at 396.

This Court explained the difference between a fact and a communication. *Id*. at 395. Applying the holding in *Upjohn* to the psychotherapist privilege, a patient may not refuse to disclose any relevant fact within her knowledge merely because she communicated the fact to her psychotherapist. *Id*. at 396.

Petitioner Stacy may not refuse to disclose communications between her and Respondent Mellette, but she may refuse to disclose that she told her therapist about those communications. She may not refuse to disclose where and how Respondent touched her just because she also disclosed these facts to her psychotherapist. These are the underlying facts that are not privileged under *Upjohn*. Her diagnoses are not underlying facts.

Indeed, her diagnoses are not facts but are the professional opinions of her psychotherapist. This Court has long acknowledged the inherent difficulty of diagnosing mental illness. *Addington v. Texas*, 441 U.S. 418, 430 (1979) ("The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations"); *Heller v. Doe*, 509 U.S. 312, 329 (1993). Psychiatric diagnosis is largely "based upon medical 'impressions' drawn from subjective analysis and filtered through the experience of the [psychotherapist]." *Addington*, 441 U.S. at 430. The diagnostic process makes it very difficult to reach any definite conclusions about any particular patient. *Id*.

The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5") has a cautionary statement on using the manual in court proceedings. App.95-97. The criteria for disorders were developed to meet the needs of clinicians and not the technical needs of courts. App.95. Use of the DSM-5 should be "informed by an awareness of the risks and limitations of its use in forensic settings" because of the risk that diagnostic information will be misunderstood. App.96. Diagnosis of a disorder does not imply that the patient meets the legal criteria for the presence of a mental disorder. App.96. Impairments, abilities, and disabilities vary widely for each assignment of a particular diagnosis. App.96-97. The use of the DSM-5 to determine the presence of a mental disorder by untrained individuals is not advised, and such untrained decision makers should be cautioned that a diagnosis does not imply the etiology or causes of the patient's ability to control other behaviors associated with the disorder. App.97. Any court that considers diagnoses as facts that are independent of privileged communications is unaware of the nature of psychotherapy and the risks of using diagnoses for any purpose other than treatment.

Petitioner Stacy's diagnoses are no more underlying facts than the opinions and conclusions of the attorneys in *Upjohn*. As in *Upjohn*, Respondent Mellette was free to inquire of Stacy or other witnesses any relevant underlying fact that would make Stacy less credible. However, as in *Upjohn*, Respondent cannot obtain the professional's opinion and conclusions.

b. The CAAF's Decision Departed from the Accepted and Usual Course of Judicial Proceedings.

The CAAF's decision that diagnoses and treatments are not privileged under M.R.E. 513 is so far departed from the accepted and usual course of judicial proceedings that this Court should exercise its supervisory power. This Court has a constitutional duty to supervise the CAAF under Article I, Section 8, Clause 9 of the Constitution (the "Inferior Tribunals Clause"). The CAAF is not ordained and established under Article III but is constituted as a tribunal under Article I. The Inferior Tribunals Clause requires tribunals created by Congress to remain inferior to this Court. Implicit in the inferior requirement is that this Court has a duty to supervise and correct such inferior tribunals.

The CAAF did not apply M.R.E. 513 as it is written. Congress says in a statute what it means and means in a statute what it says. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). When a statute's language is plain, the sole function of the courts is to enforce it according to its terms. *Id.*; *EV v. United States*, 75 M.J. 331, 333-34 (C.A.A.F. 2016).

Unambiguous language is susceptible to only one interpretation and must be enforced as written. *Hartford*, 530 U.S. at 6. If a rule's language is ambiguous, it is interpreted in the broader context of the rule. *King v. Burwell*, 576 U.S. 473, 492 (2015). Where only one of the permissible meanings of an ambiguous rule produces a result that is compatible with the rest of the law, that meaning prevails.

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).

The CAAF's holding is so far deviated from normal statutory construction that it calls for correction by this Court. If allowed to stand, the CAAF's decision will allow an in camera review of psychotherapy records in every case to tease out the diagnoses and treatments of victims and other witnesses.

i. The CAAF's Decision Ignored the Unambiguous Language of M.R.E. 513(e)(3) Regarding In Camera Reviews.

The CAAF determined that diagnoses and treatments are not privileged and ordered the NMCCA to obtain Petitioner Stacy's psychotherapy records so the court could conduct an in camera review to tease out and disclose diagnoses and treatments. App.19. M.R.E. 513(e)(3) unambiguously prohibits an in camera review for this purpose.

M.R.E. 513(e) establishes the procedure to determine the admissibility of patient records or communications. App.13. The CAAF ignored all but the first sentence of M.R.E. 513(e)(3). The CAAF noted that M.R.E. 513(e)(3) authorizes a military judge to conduct an in camera review. App.19 (citing only the first sentence of M.R.E. 513(e)(3)). Yet, the remainder of M.R.E. 513(e)(3) unambiguously states:

> *Prior* to conducting an in-camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

> (A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible *under an exception* to the privilege;
>
> (B) that the *requested information meets one of the enumerated exceptions* under subdivision (d) of this rule;
>
> (C) that the information sought is not merely cumulative of other information available; and
>
> (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

App.91-92 (emphasis added).

M.R.E. 513(e)(3) is quite clear that before any in camera review can be conducted, a military judge must find that the moving party showed each of the four requirements of M.R.E.513(e)(3)(A)-(D). M.R.E.513(e)(3) allows an in camera review of psychotherapy records only if the military judge finds by a preponderance of the evidence that the requested evidence meets an enumerated exception under M.R.E. 513(d). M.R.E. 513(e)(3)(A) and (B) redundantly require that the information sought meets an exception to the privilege. The redundancy was intended to make clear that in camera reviews of psychotherapy records may not be conducted for any

other reason. In camera reviews of psychotherapy records cannot be conducted to tease out possibly unprivileged information that may be among the records of privileged communications.

There is only one way to interpret M.R.E. 513(e)(3). It is unambiguous.

ii. The Language Ignored by the CAAF Was Specifically Added to Stop Routine In Camera Reviews.

A cardinal rule of construction is that a court must give effect to every clause and word of a statute. *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Under no circumstances should the CAAF have ignored the remainder of M.R.E. 513(e)(3). The history of the ignored language illustrates how important the language was to Congress and the President.

Congress gave the President the general authority to prescribe rules of evidence. 10 U.S.C. § 836. App.87. When *Jaffee* was decided in 1996, there was no psychotherapist privilege in military courts. In 1999, the President promulgated the privilege as M.R.E. 513. Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,120 (Oct. 12, 1999). Despite the creation of the privilege, in camera review and disclosure became routine, even ubiquitous. *E.V. v. Robinson*, 200 F. Supp. 3d 108, 111 (D.C. Cir. 2016), quoting *D.B. v. Lippert*, ARMY MISC 20150769, 2016 CCA LEXIS 63, at*14 (A. Ct. Crim. App. Feb. 1, 2016); *see also L.K. v. Acosta*, 76 M.J. 611, 615 n.3 (Army Ct. Crim. App. 2017), *overruled on other grounds by United States v. Tinsley*, 81 M.J. 836 (2021).

Victims of military sexual abuse, who often sought therapy to cope with the sexual abuse, had their privileged psychotherapy records produced for an in camera review and disclosed to their attacker in almost every case. *Lippert*, 2016 LEXIS CCA 63, at *13 (in camera review had become "almost certain" upon a party's request because prior to its amendment, M.R.E. 513 "essentially compelled a prudent military judge . . . to at least review the privileged communications in camera."); *J.M. v. Payton-O'Brien*, 76 M.J. 782, 787 (N-M. Ct. Crim. App. 2017). Victims were harassed and humiliated by this invasion into their privileged and confidential psychotherapy records which contained their most intimate thoughts. Victims often refused to participate in the prosecution of their abusers because the sacrifice of their privacy was too high a price to pay for justice.

In 2014, Congress remedied this problem by directing the President to make changes to M.R.E. 513. *E.V.*, 200 F. Supp. 3d at 111; *see* National Defense Authorization Act for Fiscal Year 2015 ("NDAA 2015"), Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014), App.93-94. The legislation protected patient privacy by eliminating the "constitutionally required" exception[4] and prohibiting

[4] This exception was used by military judges to disclose victims' psychotherapy records in almost every case because military judges applied a relevancy test similar to the "constitutionally required" exception in military's rape shield rule under M.R.E. 412. *Payton-O'Brien*, 76 M.J. at 785. Military judges did not view M.R.E. 513 as a privilege but looked at it through the lens of discovery. *Acosta*, 76 M.J. at 614. "It is axiomatic that if a

in camera reviews unless the military judged followed specific procedures.[5] The President signed the NDAA 2015 into law and issued Executive Order 13,696 to implement the legislation. *E.V.*, 200 F. Supp. 3d at 111. The new procedures added by the NDAA 2015 are the procedures the CAAF ignored.

The new in camera review procedures in M.R.E. 513 were not whimsically established but resulted from the careful and deliberate decisions of Congress and the President. In *Mellette*, the CAAF treated M.R.E. 513(e)(3) as though it had never been amended by the President as explicitly directed by Congress. Compare current M.R.E. 513(e)(3), App.91-92, with the version amended by NDAA 2015, App.88.

iii. M.R.E. 513(a) Is Ambiguous.

Whether a "communication made for the purpose of facilitating diagnosis or treatment" includes diagnoses or treatments themselves is ambiguous. If M.R.E. 513(a)'s language was plain and susceptible to only one interpretation, all reasonable jurists would agree on its meaning. The CAAF's two dissenting members, three judges on the NMCCA (in *Mellette* below), and two judges on the Coast Guard Court of Criminal Appeals (in *Kitchen*, 75 M.J. 717) all concluded the M.R.E. 513 privilege

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privileged communication is disclosed whenever it would be subject to the rules governing discovery then there [would be] no privilege at all." *Payton-O'Brien*, 76 M.J. at 788 n.25, quoting *Lippert*, 2016 CCA LEXIS 63, at *32.

[5] NDAA 2015, § 537 authorized a military judge to conduct an in camera review "only when" the moving party met its burden that the records met an enumerated exception to the privilege. App.94.

protected diagnoses and treatments. Three of four federal district court judges (*see supra* section I.a.ii) also found that the functionally equivalent language of the federal rule protected diagnoses and treatments. Only three members of the CAAF and one federal district court judge (in an unpublished opinion) have found that diagnoses and treatments are not themselves privileged.

iv. Interpreting the Ambiguous and Unambiguous Provisions of M.R.E. 513 Together.

In its decision, the CAAF found it "worth emphasizing" that it did not consider the proper scope of the psychotherapist privilege or whether protecting a patient's diagnoses and treatments is a transcending public good. App.17. The CAAF refused to consider the broader context or purpose of M.R.E. 513. It placed responsibility on the President who could have chosen to more clearly express his intent in M.R.E. 513.[6] By its decision, the CAAF claims to be respecting the President's choice. App.17.

The CAAF erred by applying *Trammel*'s "strictly construed" language without examining the broader context and purpose of M.R.E. 513. The unambiguous language of M.R.E. 513(e)(3) prohibits

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[6] Just as the CAAF speculates that the President could have more clearly included diagnoses and treatments, the opposite is also true. The President could have chosen language that explicitly says that diagnoses and treatments are not privileged. M.R.E. 513 does not explicitly exclude diagnoses and treatments from the reach of the privilege.

an in camera review of psychotherapy records to tease out information that may not be privileged.

Statutory construction is a holistic endeavor. *United Sav. Ass'n of Tex.*, 484 U.S. at 371. Interpreting the scope of the privilege under M.R.E. 513(a) as excluding diagnoses and treatments is not compatible with the prohibition of conducting an in camera review to tease out diagnoses and treatments and would fail to give effect to the entirety of M.R.E. 513(e)(3). It would make no sense for the Congress in NDAA 2015 and the President in Exec. Order 13,696 to preclude an in camera review to extract diagnoses and treatments if diagnoses and treatments were not included within the scope of the privilege.

To give effect to and be compatible with M.R.E. 513(e)(3), the scope of the privilege established by M.R.E. 513(a) must include diagnoses and treatments.

v. Consequences of the CAAF's Decision.

The CAAF's decision throws the military justice system into chaos, affecting victims, witnesses, defendants, and military judges. Patients' privilege and privacy will be violated which is exactly what Congress and the President sought to prevent by passing NDAA 2015 and promulgating the new M.R.E. 513. Since the CAAF decided *Mellette*, defense counsel are requesting in camera reviews in cases where a victim sought therapy. Now all witnesses who have ever sought psychotherapy may have their privileged psychotherapy records reviewed

to determine whether diagnoses exist that may discredit their testimony.

Military defendants often seek psychotherapy treatment. An arrest for a crime is sometimes the event that triggers an accused to recognize the need to seek counseling. If diagnoses and treatments are not privileged, a defendant charged with using illegal drugs could have his opioid use disorder diagnosis disclosed after an in camera review and admitted to prove guilt. Defense counsel will universally advise their clients to not seek psychotherapy counseling. This result would defeat the purpose of the psychotherapist privilege and would discourage service members struggling with psychological disorders from seeking help.

Military judges will ultimately be forced to rule on discovery motions with no guidance on either the procedures or applicable law. M.R.E. 513(e)(3) provides military judges with clear procedures and restrictions. The CAAF's decision leaves military judges with no direction.

Military judges will return to conducting in camera reviews routinely and viewing the privilege through the lens of discovery. The CAAF's decision will compel military judges to conduct in camera reviews to tease out diagnoses and treatments. The CAAF does not instruct judges on whether any level of proof is required, whether the movant must show that the diagnoses are cumulative or available through other sources, or how to conduct the in camera review.

There is no standard format for keeping psychotherapy records. Diagnoses may not be clearly stated in the records. Military judges will be required to decide the definition of a diagnosis. Are diagnoses limited to diagnoses recognized by the American Psychiatric Association's DSM-5? Or are the therapist's observations or other random thoughts included as diagnoses? The judge is a lawyer and not a trained psychotherapist. He cannot be expected to identify a diagnosis from nonuniform records prepared by a psychotherapist.

A defense counsel who is unable to get an in camera review under M.R.E. 513(e)(3)(A) may nevertheless assert an exception applies and obtain an in camera review by also asking for disclosure of a diagnosis. While the judge is reviewing the psychotherapy records for diagnoses, should he also review it for evidence of exceptions to the privilege? What should the judge do if during the in camera review, he discovers information that is not a diagnosis or treatment but is also not a privileged communication made for the purpose of diagnosis?

Military judges will have to resolve other problems as well. Since diagnoses are not facts but professional opinions, military judges will have to decide whether to apply the requirements for opinions and expert testimony in Rules for Courts-Martial 701 through 705. Testifying psychotherapists would be subject to voir dire examinations to evaluate their training, experience, and judgment, and the competing experts' opinions would confuse and mislead the trier of fact unless the

underlying privileged communications used to form their opinions were also disclosed.

The CAAF's decision violates the plain language of M.R.E. 513 and the intent of Congress and the President to protect patients' records from routine in camera review. Diagnoses and treatments are privileged under M.R.E. 513.

II. A Privilege Holder Has the Right to Intervene in a Criminal Appeal for the Purpose of Protecting Her Privilege.

Although Petitioner Stacy is not a party, this Court has jurisdiction over Stacy's petition because unlike 28 U.S.C. § 1254, 28 U.S.C. § 1259 does not limit the Court's jurisdiction to petitions of parties. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Loc. 283 v. Scofield*, 382 U.S. 205, 208-09 (1965) (under § 1254, only a party to a case may petition the Supreme Court for review). Stacy has standing because she has a legal interest in protecting her privilege.

If the Court finds that § 1259 requires a petitioner to be a party, the Court has held that an intervenor in a court of appeals proceeding may seek certiorari. *Id*. at 214; *Karcher v. May*, 484 U.S. 72, 77 (1987). The denial of a motion to intervene is appealable. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988). The CAAF's denial of Stacy's motion to intervene enables her to petition this Court for review of that denial.

The CAAF erred when it denied Petitioner Stacy's motion to intervene. "Persons affected by the disclosure of allegedly privileged materials may

intervene in pending criminal proceedings and seek protective orders, and if protection is denied, seek immediate appellate review." *United States v. RMI Co.*, 599 F.2d 1183, 1186 (3rd Cir. 1979) (citing *Gravel v. United States*, 408 U.S. 606, 608 n.1 (1972)); *United States v. Nixon*, 418 U.S. 683, 688, 690-92 (1974); s*ee also Perlman v. United States*, 247 U.S. 7, 12 (1918); *Reisman v. Caplin*, 375 U.S. 440, 445, 449 (1964); *In re Grand Jury*, 619 F.2d 1022 (3d Cir. 1980) (employer may appeal denial of motion brought as intervenor to quash grand jury subpoenas served on employees); *United States v. Hubbard*, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980).

Although the Federal Rules of Criminal Procedure, like the Rules for Courts-Martial, have no rule allowing intervention, the right to intervene in criminal cases is well established. *See United States v. Cuthbertson*, 651 F.2d 189, 193 (3rd Cir. 1981); *United States v. Bergonzi*, 216 F.R.D. 487, 492 (N.D. Cal. 2003); *United States v. Fishoff*, Criminal Action No. 15-586 (MAS), 2016 U.S. Dist. LEXIS 108301, at *4-5, (D. N.J. Aug. 16, 2016); *United States v. Hanley*, 2020 U.S. Dist. LEXIS 249215, at *7 (M.D. La. Feb. 1, 2020); *United States v. Carmichael*, 342 F. Supp. 2d 1070, 1072 (M.D. Ala. 2004).

Federal courts allow intervention on appeal. *BNSF Ry. Co. v. EEOC*, 140 S. Ct. 109 (2019); *United States v. Locke*, 529 U.S. 89, 98 (2000); *Scofield*, 382 U.S. at 208; *Price v. Dunn*, 139 S. Ct. 2764 (2019) (granted motion to intervene in a capital case); *Vargas-Colon v. Hosp. Damas, Inc.*, 561 Fed. App'x. 17, 22 n.6 (1st Cir. 2014) (provisional leave to intervene granted). In fact, Supreme Court Rule

33(1)(e) specifically mentions motions for leave to intervene.

Although no statute or rule establishes a standard for intervening in a case at an appellate court, this Court has indicated that Fed. R. Civ. P. 24 provides helpful guidance. *Scofield*, 382 U.S. at 217 n.10. Intervention in criminal cases is limited to instances in which a nonparty's federal rights are implicated by the resolution of a particular issue. *Carmichael*, 342 F. Supp. at 1072. Nonparties may intervene to challenge a request for production of privileged documents. *Id.*

To qualify for intervention in the absence of a statute, Petitioner Stacy must show: (a) timeliness of her application; (b) a substantial legal interest in the case; (c) impairment of her ability to protect that interest in the absence of intervention; and (d) inadequate representation of that interest by parties already before the court. *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1007 (6th Cir. 2006).

a. Stacy's Motion to Intervene Was Timely.

Stacy's renewed motion to intervene was timely because it was filed within ten days of the CAAF's decision. Ordering intervention for the purpose of allowing Stacy to petition this Court would not have prejudiced the parties.

b. Stacy Has Substantial Legal Interests at Stake.

Stacy has substantial constitutional, statutory, and M.R.E. 513 interests at stake that would be

impaired in the absence of intervention. The Supreme Court has emphasized the impairment requirement is minimal. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Stacy has a privilege under M.R.E. 513 to prevent an in camera review and disclosure of her confidential communications with her therapists. Stacy is a victim asserting rights under 10 U.S.C. § 806b (right to be treated with fairness and respect for her dignity and privacy).

In her motion to intervene, Stacy asserted her Fourth Amendment right to be free from the government's unreasonable search and seizure of her privileged psychotherapy records, including records of her diagnoses and treatment. M.R.E. 513 sets the limits on the reasonableness of any search or seizure of Stacy's records. Any order to produce records in violation of M.R.E. 513 is an unreasonable search or seizure in violation of the Fourth Amendment. *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997) *overruled on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997). The CAAF's decision deprived Stacy of her property (her records) and her liberty (her right to be left alone) without due process under the Fifth Amendment. The minimal process necessary would have allowed Stacy to intervene to protect her property and liberty.

c. Stacy's Ability to Protect Her Interests Were Impaired.

The CAAF's denial of Stacy's initial motion for intervention prevented Stacy from viewing the unredacted briefs filed by the parties. Her preparation of her amicus brief was impaired because

she did not have access to the arguments made by the parties. Stacy's intervention at the CAAF would have protected and perfected her appellate rights.

d. Stacy's Interests Were Not Adequately Represented by Respondent United States.

The Respondent United States did not adequately represent Stacy's interests. The United States argued against Stacy's interests before the NMCCA when it agreed with Respondent Mellette that diagnoses and treatments were not privileged. The United States was concerned only with protecting the conviction of Respondent Mellette that had already been won. The United States did not assert or defend Stacy's constitutional rights to due process or to be free from unreasonable searches or seizures. The United States did not have the detailed knowledge or understanding of Stacy's confidential communications and could not properly defend her privilege. Finally, the privilege is Stacy's privilege and not the United States' privilege. The United States did not zealously defend or adequately represent Stacy's rights.

The CAAF erred when it denied Petitioner Stacy's motion to intervene.

CONCLUSION

The Court should grant Stacy's petition for a writ of certiorari.

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