No. 21-636

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

BRIEF FOR WENDELL E. MELLETTE JR. IN OPPOSITION

MAJ JASPER CASEY, USMC
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, S.E.
Building 58, Suite 100
Washington, DC 20374

Counsel for Respondent Mellette

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules of the Supreme Court of the United States:

Military Rules of Evidence:

BRIEF FOR WENDELL E. MELLETTE, JR. IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (CAAF) (Pet. App. 1-39) is reported at 82 M.J. 374. CAAF's order denying S.S.'s renewed motion to intervene, and dismissing S.S.'s petitions for clarification and reconsideration for a lack of jurisdiction (Pet. App. 40-41) is reported at 83 M.J. 36.

The panel opinion of the Navy-Marine Corps Court of Criminal Appeals (NMCCA) (Pet. App 42-80) is reported at 81 M.J. 681.

JURISDICTION

CAAF entered judgment on July 27, 2022. CAAF subsequently denied S.S.'s motion to intervene, and dismissed her petitions for clarification and reconsideration on September 13, 2022.

S.S. argues that this court has jurisdiction under 28 U.S.C. § 1259, because CAAF granted Respondent Mellette's petition for review from the NMCCA pursuant to 10 U.S.C. § 867(a)(3). However, this Court has not acquired jurisdiction because no *party* to the litigation has timely petitioned this Court for a writ of certiorari.

STATEMENT

During the pendency of the NCIS investigation into the allegations against Respondent Mellette, the complaining witness, S.S., revealed that she had spent time in a mental health facility. (Pet. App. 4). Similarly, in parallel to the criminal investigation, S.S. sat for a deposition as part of a child custody

dispute between Respondent Mellette and his ex-wife (S.S.'s sister). (Pet. App. 4). During this deposition, S.S. again disclosed that she had spent a week in a mental health facility, and revealed at least part of her diagnosis, her treatment plan during her stay, and the follow-up treatment plan she received after discharge. (Pet. App. 4).

After the Government denied Respondent Mellette's discovery request for this evidence, Respondent Mellette moved to compel production of S.S.'s mental health records, particularly requesting diagnoses and treatments. (Pet. App. 4). Respondent Mellette asserted that the requested information was "relevant to issues of suggestion, memory, and truthfulness" with respect to S.S. (Pet. App. 5). The military judge denied Respondent Mellette's motion to compel, holding that the documents Respondent Mellette sought were protected by the psychotherapist-patient privilege under M.R.E. 513. (Pet. App. 5).

At Respondent Mellette's court-martial, a critical issue was whether the charged sexual activity between Respondent Mellette and S.S. occurred before or after she turned sixteen years old—the age of consent under the UCMJ. (Pet. App. 5). Respondent Mellette's defense counsel focused on S.S.'s inability to provide specific dates for the charged incidents. (Pet. App. 6). S.S. repeatedly answered that she did not know or was not sure when the charged events occurred, which Respondent Mellette's defense highlighted during closing argument. (Pet. App. 6).

On appeal to the NMCCA, both Respondent Mellette and the United States argued that the military judge erred in holding that records revealing

diagnosis and treatment plans were privileged under M.R.E. 513. (Pet. App. 6). The NMCAA disagreed, holding that the plain language of M.R.E. 513 protected such records and that it would be absurd to conclude otherwise. (Pet. App. 6). However, the NMCAA further held that S.S. waived the privilege by revealing details of her diagnosis and treatments to her family, NCIS, and during her civil deposition. (Pet. App. 6). The NMCAA, finding error, only held that Respondent Mellette was prejudiced with respect to some of the charged events that were only supported by S.S.'s testimony. (Pet. App. 7). The NMCCA ordered some of the language stricken from the specification, but otherwise affirmed the finding of guilt while reassessing the sentence to three years' confinement and a dishonorable discharge. (Pet. App. 6).

CAAF granted review to determine (in part) whether the patient-psychotherapist privilege established by M.R.E. 513 protects information related to diagnosis and treatments from disclosure. (Pet. App. 7-8). In the majority opinion, CAAF concluded that based on a plain reading of the text of M.R.E. 513, such evidence is not privileged. (Pet. App. 8).

ARGUMENT

Because S.S. was not a party to the litigation, and was denied intervenor status at CAAF, she does not have standing to petition this Court for a writ of certiorari challenging the merits of the CAAF opinion. Similarly, her Petition was filed jurisdictionally out of time. Alternatively, even if S.S. has standing, CAAF's decision is sound and should not be disturbed.

I. S.S. DOES NOT HAVE STANDING TO CHALLENGE THE MERITS OF THE CAAF DECISION.

Rule 12(6) of this Court (Review on Certiorari: How Sought; Parties) states "All *parties* to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court . . . ." (Emphasis added).

In her petition for a writ of certiorari, S.S. specifically acknowledged that she is "not a party." (S.S. Petition at 26). S.S. also acknowledged that under 28 U.S.C. § 1254, only a party to a case may petition the Supreme Court for review. (S.S. Petition at 26). S.S. makes the argument that 28 U.S.C. § 1259 (covering Supreme Court jurisdiction over cases arising from CAAF) does not limit Supreme Court jurisdiction to petitions from parties. However, this interpretation would create an unusual carve-out in which non-parties would have standing in cases arising out of CAAF, which would be a vast departure from this Court's usual jurisdiction.

S.S. argues that an "intervenor" in a court of appeals proceeding may seek certiorari. (S.S. Petition at 26 (citing *Karcher v. May*, 484 U.S. 72, 77 (1987)). But as described above, CAAF denied S.S.'s attempts to intervene in this case, and dismissed various filings

due to a lack of jurisdiction. Thus, S.S. was neither an intervenor nor party before CAAF. She is therefore not entitled to file a petition for a writ of certiorari challenging the merits of CAAF's opinion before this Court.

Respondent Mellette recognizes that there is authority for the proposition that denial of a motion to intervene is generally appealable. (*Marino v. Ortiz*, 484 U.S. 301 (1988)). However, S.S.'s petition to this Court purports to challenge CAAF's substantive decision in this case—not the narrow issue of whether she was improperly denied intervenor status. S.S. acknowledges that "CAAF's denial of [S.S.'s] motion to intervene enables her to petition this Court for review of that denial." (S.S. Petition at 26). But that is the limit of S.S. what may appeal to this Court.

As described above, because S.S. was not a party to the litigation before CAAF, she does not have standing to challenge the merits of CAAF's opinion before this Court.

II. S.S.'S PETITION FOR A WRIT OF CERTIORARI WAS NOT TIMELY. THIS COURT LACKS STATUTORY JURISDICTION.

Rule 13(1) of this Court (Review on Certiorari: Time for Petitioning) states "a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." Rule 13(2) is explicit that "The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time."

Rule 13(3) goes on to explain that "But if a petition for rehearing is timely filed in the lower court by any *party* . . . the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the rehearing." (Emphasis added).

CAAF issued its opinion on 27 July 2022, which serves as the date of entry of judgment. The deadline for a party—either Respondent Mellette or the United States—to file a petition with this Court expired on or about 25 October 2022. Even assuming (without conceding) that S.S. had standing to challenge the merits of CAAF's opinion before this Court, her deadline had long expired by 12 December 2022.

Respondent Mellette acknowledges that S.S. filed a "Motion to Intervene" along with a "Petition for Reconsideration" (amongst other filings) with CAAF on 9 August 2022. CAAF denied the motion and dismissed the petition—for lack of jurisdiction—on 13 September 2022.

However, S.S.'s 9 August 2022 filings with CAAF did not impact this Court's filing deadline regarding the merits of CAAF's opinion. S.S. was not a *party* to the CAAF litigation, as demonstrated by CAAF's denial of S.S.'s "Motion to Intervene." Further, S.S. offers no support for the proposition that a non-party's "Petition for Reconsideration" has the same effect as a party's "petition for rehearing" contemplated by Rule 13(3).

III. ALTERNATIVELY, CAAF'S RATIONALE IS SOUND, AND THE DECISION SHOULD NOT BE DISTURBED

Even if, in arguendo, this Court determines that S.S. has standing to challenge the merits of CAAF's opinion, the petition for a writ of certiorari should still be denied.

In arriving at its opinion, CAAF credited this Court's guidance that "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence." (Pet. App. 9) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). CAAF also credited this Court's guidance that evidentiary privileges "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel*, 445 U.S. at 50; (Pet. App. 9).

CAAF then turned to the text of M.R.E. 513, which states (in relevant part) that a patient has a privilege to refuse to disclose "a confidential communication . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." (Pet. App. 10 (quoting M.R.E. 513(a)). In interpreting this rule, CAAF expressed that it had "no doubt" that communications between a patient and a psychotherapists involving diagnosis and treatments are privileged, and that a medical record could theoretically transcribe such communications in a way to render the records privileged. (Pet. App. 10).

The critical question for CAAF was whether the rule also protected *other* evidence that does not qualify as a communication—such as a patient's routine medical records. (Pet. App. 10). In answering this question, CAAF noted that the phrase "communication made between the patient and a psychotherapist" does not naturally include other evidence, such as routine medical records, that do not memorialize actual communications between the patient and the psychotherapist." (Pet. App. 11). CAAF further noted that in promulgating M.R.E. 513, the President specifically chose to use the word "communication" rather than broader nouns such as "documents," "information," or "evidence," and the President's inclusion of the limiting phrase "made between the patient and a psychotherapist" must have meaning. (Pet. App. 11).

CAAF then held that "Based on the plain language of M.R.E. 513, and mindful of the Supreme Court's admonition that privileges must be strictly construed, we conclude that diagnoses and treatments contained within medical records are not themselves uniformly privileged under MRE 513." (Pet. App. 3). Therefore, CAAF concluded that the military judge and NMCCA erred in holding that the documents Respondent Mellette sought were not protected from disclosure by M.R.E. 513(a). (Pet. App. 18).

This rationale is sound and is consistent with this Court's prior precedent. Accordingly, CAAF's opinion should not be disturbed.

S.S. argues that CAAF's decision that diagnoses and treatments are not privileged under M.R.E. 513 "conflicts with this Court's holdings" in

Jaffee v. Redmond, 518 U.S 1 (1996). (S.S. Petition at 7). But there is no conflict.

In *Jaffee*, this Court recognized that there is privilege over *confidential communications* made between a psychotherapist and her patients under F.R.E. 501. 518 U.S. 1. In doing so, this Court weighed the privilege against "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)). This Court in *Jaffee* also noted that because it was the first case in which this Court recognized a psychotherapist-patient privilege, it was neither "necessary nor feasible to delineate its full contours in a way that would govern all future questions." (*Id.* at 18).

Moreover, in the present case CAAF analyzed a psychotherapist-patient privilege that is distinct and separate from the privilege this Court found under F.R.E. 501 in *Jaffee*. F.R.E. 501 does not name specific privileges. Rather, F.R.E. 501 authorizes federal courts to define new privileges by interpreting "common law principles . . . in light of reason and experience." By contrast, M.R.E. 513 specifically pertains to the psychotherapist-patient privilege, so CAAF was tasked with conducting a different analysis than this Court conducted in *Jaffee*.

In its opinion analyzing this separate and distinct psychotherapist-patient privilege under M.R.E. 513, CAAF reached the same conclusion as this Court did in *Jaffee*—that the privilege pertains to confidential communications. In doing so, CAAF—just as this Court in *Jaffee*—emphasized this Court's precedent that evidentiary privileges "must be strictly construed

and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." (Pet. App. 9 (quoting *Trammel*, 445 U.S. at 50)).

CAAF's strict construction of M.R.E. 513 is consistent with *Jaffee*. There is no compelling reason to disturb the opinion.

S.S. also argues that CAAF ignored the unambiguous language of M.R.E. 513(e)(3) regarding in camera review. (S.S. Petition at 17-21). This is a misinterpretation of M.R.E. 513(e)(3) and CAAF's opinion. This section of M.R.E. 513 lays out a procedural framework for determining whether otherwise confidential communications may still be admissible. Here, CAAF determined that evidence of a patient's diagnosis and treatment are not covered by the M.R.E. 513 privilege. Therefore the procedures outlined in M.R.E 513(e)(3) are not relevant to the non-privileged evidence Respondent Mellette sought in this case.

Finally, S.S. argues that CAAF's decision throws the military justice system into "chaos" and that "witnesses who have ever sought psychotherapy may have their privileged psychotherapy records reviewed to determine whether diagnosis exist to may discredit their testimony." (S.S. Petition at 23-24). But this is not chaos. The ability to confront one's accuser (including with non-privileged evidence) is a basic tenant of due process in the American justice system. CAAF's opinion correctly protects that basic right.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MAJ. JASPER CASEY, USMC
Navy-Marine Corps
Appellate Review Activity
1254 Charles Morris Street, S.E.
Building 58, Suite 100
Washington, DC 20374

Counsel for Respondent Mellette

MAY 2023