No. 22-636

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

REPLY BRIEF FOR PETITIONER

PETER COOTE
Counsel of Record
PENNONI ASSOCIATES INC.
1900 Market Street
Third Floor
Philadelphia, PA 19103
(215) 254-7857
pcoote@pennoni.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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REPLY BRIEF

The Court of Appeals for the Armed Forces ("CAAF") judgment below materially departs from the accepted and usual course of judicial proceedings on an important federal question. The respondents offer little substantive opposition to the questions presented by petitioner S.S. ("Stacey").[1] Instead, they focus on procedural arguments that do not withstand scrutiny.

Congress and the President have joined to provide victims of military sexual assault a psychotherapist privilege. The CAAF, an Article I court, ignored the plain language of M.R.E. 513 by ordering an in camera review to ferret out Stacey's diagnoses and treatments. The respondents argue that the CAAF's order in violation of M.R.E. 513 is not reviewable by this Court. The Supreme Court has a duty to correct the CAAF's blatant disregard for the legal rights of military sexual assault victims.

I. Diagnoses and Treatments Are Privileged Under M.R.E. 513.

The respondents argue that this Court's analysis in *Jaffee v. Redmond*, 518 U.S. 1 (1996) is inapplicable because *Jaffee* recognized a common law privilege while M.R.E. 513 is codified. U.S. Br. in Opp. 12; Mellette Br. in Opp. 9. Even assuming the inapplicability of *Jaffee*, their argument is flawed.

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[1] As in her petition, S.S. uses the pseudonym "Stacey" that the Navy-Marine Corps Court of Criminal Appeals ("NMCCA") used in its opinion. App. 44.

The respondents agree with Judge Maggs' dissent in *Mellette*. Judge Maggs explained that construing federal common law privileges "has no clear application to the interpretation of codified privileges." App. 27. If this Court's decisions applying federal common law privileges are not applicable to the interpretation of M.R.E. 513, then *Trammel v. United States*, 445 U.S. 40 (1980) does not apply either. The CAAF should have construed M.R.E. 513 applying standard principles of statutory construction. App. 8.

The United States incompletely quotes the CAAF to assert that its decision "'rest[ed] solely on the specific text' of M.R.E. 513." U.S. Br. in Opp. 6, 12. The full quote states, "[O]ur analysis rests solely on the specific text of M.R.E. 513*(a) and the Supreme Court's mandate—and our own precedent—that states that evidentiary privileges 'must be strictly construed.'*" App. 17-18, citing *Trammel*, 445 U.S. at 50 (emphasizing omitted language).

Contrary to the United States' argument,[2] the CAAF's decision did not rest solely on the specific text of M.R.E. 513, but it rested equally upon *Trammel*'s "strictly construed" language. The CAAF's reliance on *Trammel* is evident by its repeated citation of it. App. 3 ("admonition"), 8-9, 12, 17-18. Although it applied the "strictly construed" language, the CAAF emphasized that it did not apply *Trammel*'s consideration of whether the public good promoted by

[2] The United States' position reversed three times since it argued at the court-martial that diagnoses and treatments were privileged.

a privilege transcended the normal principle of using all rational means for finding the truth. Pet. 8.

Even ignoring this misapplication of *Trammel*, the CAAF violated the normal rules of statutory construction. The meaning of statutory language is determined by the language itself, the specific context in which the language is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). 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).

By its own admission, the CAAF considered the language of only M.R.E. 513(a) and did not consider the rule as a whole. App. 17-18. The CAAF violated the plain language of M.R.E. 513(e)(3) when it ordered an in camera rummage through Stacey's records to tease out diagnoses and treatments. M.R.E. 513(e)(3) permits an in camera review only to determine whether an enumerated exception applies, and for no other reason.

The CAAF recognized the relevancy of the M.R.E. 513(e) procedures by stating that the diagnoses and treatments should have been produced "subject to the procedural requirements of M.R.E. 513(e)." App. 18-19. As explained by Stacey, the CAAF violated M.R.E. 513(e)(3) when it ignored all but its first sentence. Pet. 17-18.

The CAAF's interpretation of M.R.E. 513(a) in isolation from the purpose, context, and procedural requirements of the entire rule violates Stacey's privilege and M.R.E. 513(e)(3). This case meets the

Court's criteria for review because the CAAF's judgment materially departed from the accepted and usual course of judicial proceedings. The Court should exercise its supervisory responsibility and grant Stacey's petition.

II. The CAAF Erred by Denying Intervention.

The respondents do not challenge the petitioner's arguments regarding why the CAAF erred by denying Stacey's motion to intervene. The United States argues only that the CAAF's denial was not an abuse of discretion because no statute specifically authorized appellate intervention. U.S. Br. in Opp. 13.

This Court reviews a lower court's intervention decision for abuse of discretion. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011-12 (2022). A court abuses its discretion when it has an erroneous view of the law. *Id.* at 1012. The United States speculates that the CAAF based its denial of Stacey's motion upon the absence of specific statutory authority to grant intervention.[3]

The United States argues that unless a statute specifically authorizes an action, the CAAF is without jurisdiction to take that action. U.S. Br. in Opp. 13. It supports this argument by citing to *Ctr. for Constitutional Rights ("CCR") v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013). Although CCR did not

[3] The CAAF did not provide any legal or factual justification for denying Stacey's intervention motion. App. 40. It then denied her motion for a written opinion explaining the intervention denial and jurisdiction dismissal. C.A.A.F. Order (September 29, 2022).

move for intervention, the CAAF nevertheless treated CCR as a party, allowing it to file pleadings and motions, present oral argument, and be named in the case caption. Notably, the CAAF did not dismiss CCR's pleadings and motions as being outside the CAAF's jurisdiction because of CCR's nonparty status.

In *L.R.M. v. Kastenberg*, 72 M.J. 364, 368-69, 372 (C.A.A.F. 2013), the CAAF held that nonparty status "does not preclude standing," allowed the victim party status in the caption, and granted her relief. The CAAF discussed its long-standing precedent that the holder of a privilege has the right to contest and protect the privilege. *Id*. at 368; citing its prior precedents, including *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997); *Carlson v. Smith*, 43 M.J. 401 (C.A.A.F. 1995). In *Carlson*, the CAAF *sua sponte* added the nonparty victim as a respondent. *L.R.M.*, 72 M.J. at 368.

Given the CAAF's long history of recognizing nonparties' rights to contest and protect privileges and its refusal to provide a written opinion denying Stacey's motion to intervene, the United States' speculative argument that the CAAF denied intervention because it did not have explicit statutory authority is unpersuasive.

Victims of military sexual assault have statutory rights under 10 U.S.C. §806b, and the CAAF has the obligation to afford victims their rights. Without formally granting intervenor status, the CAAF has historically afforded nonparties limited participant standing. *L.R.M.*, 72 M.J. at 368-69. No statute or rule prohibits privilege holders from

intervening in military courts. Allowing victims to intervene does not break with the CAAF's precedents but ensures the neutrality and integrity of their judgments. *United States v. Denedo*, 556 U.S. 904, 917 (2009).

III. Petitioner Does Not Need to Be a Party.

Respondent argues that this Court's precedents and rules permit only parties to petition for certiorari. U.S. Br. in Opp. 8-9. This Court has "never restricted the right to appeal to named parties." *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002). The Court recognizes exceptions when an interested nonparty is bound by an adjudication. *Id.* Stacey is bound by the CAAF's adjudications that her diagnoses and treatments are not privileged.

Karcher v. May, 484 U.S. 72 (1987), relied upon by the respondents, predated the Court's decision in *Devlin*. In *Karcher*, the Court determined its jurisdiction under 28 U.S.C. §1254 which allowed only parties to petition for certiorari. 28 U.S.C. §1259 gives this Court jurisdiction to review certain CAAF cases without regard to party status. If the petitioner meets constitutional standing requirements, this Court has jurisdiction.

To establish Article III standing, a person must suffer a concrete injury traceable to the decision below that would be fully addressed by this Court's reversal of the judgment. *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2196 (2020).

Stacey's standing is beyond dispute. Disclosure of Stacey's privileged records to the man who sexually abused her would be humiliating and painful. Like the petitioner in *Seila*, the disclosure of documents Stacey prefers to withhold is a concrete injury. *Seila*, 140 S. Ct. at 2196. This injury is directly traceable to the CAAF's decision compelling disclosure of Stacey's diagnoses and treatments. *Id*. If this Court reverses, Stacey's injury would be fully redressed. *Id.*

The respondents argue that although 28 U.S.C. §1259 does not mention "party," the Court should nevertheless insert "party" into it. U.S. Br. in Opp. 10; Mellette Br. in Opp. 4. The United States argues that *Lance v. Dennis*, 546 U.S. 459, 465 (2006) holds that under 28 U.S.C. §1257 one who is not a party cannot appeal a judgment because 28 U.S.C. §1257, like 28 U.S.C. §1259, does not mention the word "party." *Id*. This Court's jurisdiction in *Lance* was pursuant to 28 U.S.C. §1253 and not 28 U.S.C. §1257. *Lance*, 546 U.S. at 462-63. *Lance* is not applicable here.

Respondent United States asserts "this Court's rules *only* 'entitle[]' 'parties' – namely, the 'parties to the proceeding in the court whose judgment is sought to be reviewed' – 'to file documents in this Court.'" U.S. Br. in Opp. 9 (emphasis added) (quoting with extensive splicing Sup. Ct. R. 12.6). Rule 12.6 does not prohibit nonparties in the lower court from petitioning or from filing documents in this Court. It simply states that all parties in the lower court are deemed to be parties in this Court. The rule eliminates the need for parties below to demonstrate continued standing but nevertheless allows them to decline participation.

While "the better practice is for such a nonparty to seek intervention for purposes of appeal," *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009), this Court has allowed nonparties in the lower court to petition for certiorari. Where the rights of the nonparty were "vitally affected by the lower court's decision," this Court has allowed the nonparty to file a petition for certiorari when those rights were abandoned by the losing party who had previously defended them. Stephen M. Shapiro et al., *Supreme Court Practice* § 6.16(c), at 6-62 (11th ed. 2019).[4]

Although Stacey followed "the better practice" by moving to intervene at the CAAF, the respondents argue that the Court cannot grant certiorari on the first question. U.S. Br. in Opp. 9-10; Mellette Br. in Opp. 5. The cases cited by the United States do not preclude a grant of certiorari to address the first question. In *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U. S. Philips Corp.*, 510 U.S. 27, 30-32 (1993) (per curiam), the Court had already granted certiorari when the petitioner presented in its merits brief an intervention question that was neither presented in its petition nor fairly included therein. The Court reversed its improvidently granted certiorari because it was "chary of considering issues not presented in petitions for certiorari" and wanted to inform petitioners that it disapproved of the practice of "smuggling additional questions into a case after we grant certiorari." *Id.* at 32, 34. Petitioner Stacey is

[4] Respondent cited this same section of this same treatise. U.S. Br. in Opp. 9.

not smuggling in any additional questions but has squarely presented the intervention issue.

This Court should grant certiorari for Stacey's first question to decide whether psychiatric diagnoses and treatments are privileged under M.R.E. 513.

IV. The Petition Was Timely.

The respondents argue that Stacey did not timely file her petition because of the difference between "rehearing" and "reconsideration." U.S. Br. in Opp. 11 n.2; Mellette Br. in Opp. 6. This Court has always treated petitions for reconsideration at the CAAF as petitions for rehearing under Sup. Ct. R. 13.3. The CAAF decided *United States v. Denedo*, 66 M.J. 114 (C.A.A.F. 2008) on March 11, 2008. On April 4, 2008, the CAAF denied the government's motion for reconsideration. *United States v. Denedo*, 66 M.J. 371 (C.A.A.F. 2008). This Court's docket in *Denedo* (at https://www.supremecourt.gov/search.aspx?filename =/docketfiles/08-267.htm) indicates that the government applied to extend the time to file a petition from July 3, 2008. July 3, 2008, is 114 days from March 11, 2008, and 90 days from April 4, 2008. On November 25, 2008, the Supreme Court granted certiorari. The CAAF uses the term "reconsideration" in its rules because under 10 U.S.C. §863, "rehearing" statutorily means "retrial." There is no difference between "rehearing" and "reconsideration" under this Court's rules.

The respondents also argue that the time to file a petition is extended only if a *party* petitions for rehearing. The respondents splice Rule 13.3 so that the phrase "or *sua sponte* considers rehearing" is

omitted. U.S. Br. in Opp. 9; Mellette Br. in Opp. 6. The CAAF *sua sponte*, on its own and not by the motion of any party, considered reconsidering its judgment and dismissed reconsideration on September 13, 2022.[5] Rule 13.3's purpose is to clarify that the clock does not begin to run until the judgment is final. Finality is established for all persons by the later of judgment or rehearing denial. Stacey's petition was timely filed on December 12, 2022.

V. The CAAF's Judgment Is Not Interlocutory.

Respondent United States argues that this case is in an interlocutory posture because the CAAF has remanded for further proceedings.[6] U.S. Br. in Opp. 13-14. The CAAF's decision is final for Stacey under the collateral order rule. *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 105 (2009).

Stacey's petition is not an interlocutory appeal that would disrupt trial proceedings. Even if it were an interlocutory appeal from a court-martial, 10 U.S.C. §806b(e) would provide Stacey the right to petition the NMCCA and the CAAF to protect her privilege. The United States' argument, U.S. Br. in Opp. 14-15, that Stacey cannot seek interlocutory

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[5] CAAF denied Stacey's motion for a written opinion concerning dismissal due to lack of jurisdiction. C.A.A.F. Order (September 29, 2022). Without a written opinion, there is no basis to distinguish between "denial" and "dismissal." If CAAF had jurisdiction to issue its judgment, it had jurisdiction to reconsider it.

[6] The Florida court proceeding has no bearing on this case because it will decide only state law claims. U.S. Br. in Opp. 8, 15.

review here but could seek it at a court-martial injects an element of fortuity and capriciousness. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Loc. 283 v. Scofield*, 382 U.S. 205, 216, 222 (1965). If this argument were accepted, a victim who loses a privilege ruling at a court-martial would be allowed by 10 U.S.C. §806b(e) to seek review in the military appellate courts, but a victim who wins the court-martial ruling would be precluded from defending her win here and in the military appellate courts on appeal by the convicted service member. *Id.*

A final decision is one "by which a [trial court] disassociates itself from the case." *Mohawk*, 558 U.S. at 106. The court-martial dissolved after it convicted respondent Mellette. There is nothing further it can do in this case.

Even if this case were in an interlocutory posture, the collateral order rule would permit this Court's review if the CAAF's order (1) conclusively determined the disputed question; (2) resolved an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment. *Mohawk*, 558 U.S. at 105.

The CAAF's judgment conclusively decided that diagnoses and treatments are not privileged under M.R.E. 513. The scope of M.R.E. 513 is an important question that is completely separate from the merits of the court-martial.

In *Mohawk*, a party's claim of privilege could be remedied on normal appeal by vacating an adverse judgment and remanding for a new trial. *Id.* at 109.

Other avenues of review included defying disclosure and incurring sanctions. *Id.* at 110-11. These options, like in *Doe v. United States*, 749 F.3d 999 (11th Cir. 2014), are not available to Stacey.

In *Doe*, the sexual predator Jeffrey Epstein asserted his attorney-client privilege in a civil lawsuit brought by his victims against the United States. Limited intervenor Epstein appealed the district court's order to disclose privileged communications. The victims asserted that the circuit court lacked jurisdiction because of this Court's decision in *Mohawk*. *Id*. at 1003.

The court, applying *Mohawk*, found that "Epstein's only opportunity to challenge the disclosure order is *now* because there will not be an adverse judgment against him." *Id.* at 1005 (emphasis in original). Epstein could not defy disclosure and risk contempt because the order was not directed at him. *Id*. at 1006. Epstein was allowed to press his appeal under the collateral order doctrine and *Mohawk*.

In this case, respondent asserts that the petitioner *may* be able to move to limit production or assert her rights under M.R.E. 513(e) and 10 U.S.C. §806b. U.S. Br. in Opp. 14-15. The respondent's assertion is incorrect. The CAAF ordered production of Stacey's diagnoses and treatments. This is the law of the case, and the lower courts will not reexamine this decision. The military judge appointed by the NMCCA has ordered production and subpoenaed Stacey's medical providers. U.S. Br. in Opp. 7-8. Stacey cannot defy the order because it is directed at her medical providers.

Like Epstein, Stacey's only opportunity to challenge the CAAF's decision is now. Recognizing a sexual predator's right to challenge the disclosure of his privilege while denying a sexual assault victim her right to challenge would be unjust. The CAAF's decision is reviewable by certiorari.

CONCLUSION

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

Respectfully submitted,

PETER COOTE
Counsel of Record
PENNONI ASSOCIATES INC.
1900 Market Street
Third Floor
Philadelphia, PA 19103
(215) 254-7857
pcoote@pennoni.com

Counsel for Petitioner