IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

Wendell E. MELLETTE
Electrician's Mate (Nuclear) First Class (E-6)
United States Navy,
Appellant

USCA Dkt. No. 21-0312/NA

Crim. App. No. 201900305

PATIENT/VICTIM S.S.'S AMICUS CURIAE BRIEF ON ADDITIONAL GRANTED ISSUE

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WHETHER THE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT THE VICTIM WAIVED THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.

INTEREST OF AMICUS CURIAE

Appellant Mellette was convicted of sexually abusing Amicus Curiae Patient/Victim S.S., his fifteen-year-old sister-in-law. Appellant is asking this Court to reverse his conviction because he asserts the military judge and lower court erred when it determined S.S.'s diagnoses and treatments were privileged under M.R.E. 513. If this Court grants Appellant relief, S.S.'s diagnoses and treatments will be disclosed to the Appellant and the government. S.S. has a legal interest in the Court's decision concerning her psychotherapist privilege.

FACTS REGARDING WAIVER

S.S. disclosed to others few or no confidential communications she had with her psychotherapist. The Appellant argued that S.S. waived her privilege by "repeatedly discussing her mental health **issues** with various third parties. *United States v. Mellette*, 81 M.J. 681, 690 (N-M. Ct. Crim. App. 2021) (emphasis added). The NMCCA found that S.S. "openly discussed her mental health **matters** with multiple people on multiple occasions" and that "her disclosures . . . involved a significant part of the **matters** at issue." *Id.* at 693 (emphasis added).

Significantly, the Appellant does not argue and the NMCCA does not find that S.S. discussed or disclosed any confidential communication between S.S. and

her psychotherapist. The Appellant argues only that S.S. discussed mental health **issues**, and the NMCCA finds only that she discussed mental health **matters**.

Amicus curiae S.S. presents the facts explaining why the Appellant did not argue and the NMCCA could not find that S.S. disclosed any of her confidential communications with psychotherapists.

The evidence that S.S. discussed mental health "matters" with persons other than her psychotherapists consists of: [redacted] The following facts are established by this evidence.

S.S.'s April 25, 2019 Deposition.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

S.S. did not disclose any confidential communications.

ARGUMENT

I. Standard of Review.

The military judge's ruling is reviewed for an abuse of discretion. *Mellette*, 81 M.J. at 690; citing *United States v. Chisum*, 77 M.J. 176, 179 (C.A.A.F. 2018). A military judge abuses his discretion when he (1) predicates his ruling on findings of fact that are not supported by the evidence of record; (2) uses incorrect legal principles; (3) applies correct legal principles to the facts in a way that is clearly unreasonable, or (4) fails to consider important facts. *Mellette*, 81 M.J. at 690-91, citing *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017). A military judge's conclusions of law are reviewed de novo. *Id.* citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

II. The NMCCA Did Not Find that the Military Judge Abused His Discretion.

The NMCCA did not find that the military judge abused his discretion when he found that S.S. did not waive her M.R.E. 513 privilege. The applicable part of M.R.E. 510 provides:

> "A person upon whom these rules confer a privilege against disclosure of a **confidential matter or communication** waives the privilege if the person . . . while holder of the privilege voluntarily discloses or consents to disclosure of any **significant part** of the **matter or communication** under such **circumstances that it would be inappropriate** to allow the claim of privilege." (emphasis added).

The military judge properly recited and applied M.R.E. 510 when he found that S.S. did not waive her privilege.[2] The judge further found that even if S.S. had waived the privilege, it would only be waived as to those matters already disclosed. J.A. at 613, 616.

In the portion of its opinion discussing waiver, the NMCCA does not find that the military judge abused his discretion or incorrectly applied the law. *Mellette*, 81 M.J. at 693. The NMCCA holds only that the military judge "erred" in rejecting the arguments that S.S. waived her privileged and "erred" in finding the information requested by the Defense was privileged. *Id.* "Erring" is not an abuse of discretion. The NMCCA failed to apply the appropriate standard of review.

[2] The NMCCA did not address the military judge's finding that S.S. did not waive her privilege. The NMCCA erred by ignoring this finding. The NMCCA addressed only the judge's finding that, even if waived, the privilege would be waived only to those matters already disclosed. *Mellette*, 81 M.J. at 693. The NMCCA ignored the primary and completely independent basis for the judge's finding.

III. The NMCCA Conflates "Matters" with "Confidential Communications."

In its opinion, the NMCCA does not find that S.S. disclosed any confidential communications or even confidential matters to any other person because the facts do not support such a finding. The NMCCA instead incorrectly applies M.R.E. 510 by conflating "matters" with "confidential communications."

Under M.R.E. 510, a person waives her privilege when she voluntarily discloses "any significant part of the matter or communication under such circumstances that it would be inappropriate of allow the privilege." The "matter or communication" quoted in the preceding sentence are the "**confidential** matter or communication" that a "person upon whom these rules confer a privilege against disclosure of a confidential matter or communication."

The NMCCA repeatedly (five times) discusses that S.S. disclosed mental health "matters" (*Mellette*, 81 M.J. at 693-94), but never limits its analysis to "confidential matters." In fact, the NMCCA errs by discussing "matters" and not "confidential communications.

M.R.E. 510 uses both words, "matters" and "communications" because some privileges involve confidential communications (lawyer-client, communications to clergy, marital privilege, psychotherapist-patient privilege, and the victim advocate-victim privilege), some privileges do not involve communications but involve only confidential matters (identity of informants,

political vote, and deliberations of courts and juries),[3] and some privileges may involve communications and matters (classified information and government information).

The error in finding a waiver of the M.R.E. 513 psychotherapist privilege involving confidential communications because nonconfidential matters were disclosed is apparent if a comparison is made to other privileges for confidential communications. Consider the scenario where a student meets with his parents and his team coach to discuss a serious injury to the student's teammate. The student, parents and coach discuss the details of the incident and they collectively decide the student should seek legal advice and representation of an attorney. The attorney defends the student in a criminal court. The student tells his parents and friends the dates he needs to meet with his attorney, tells them the outcome of pretrial hearings and rulings, and tells them what charges are pending against him.

Under the NMCCA's significant part of the "matter" analysis, the student would have waived his privilege even if he did not disclose any confidential communications between him and his attorney. If the student tells his parents that the attorney does not think the student will be convicted of the most serious charge

[3] For example, the deliberations of a single military judge involve no communication but is only a matter. If the judge discloses a significant part of his confidential deliberations under circumstances that would make it inappropriate to allow the privilege, his privilege would be waived.

but perhaps lesser charge, this disclosure of the attorney's prediction or diagnosis would waive the entire attorney-client privilege of everything discussed between them.

There is no indication that either the Supreme Court or CAAF has ever considered the psychotherapist-patient privilege to be "less worthy" than any other recognized privilege. *United States v. Tinsley*, No. 20200337, 2021 CCA LEXIS 679, at *33 (A. C. Crim. App. Dec. 15, 2021). Unless the Court is prepared to apply the NMCCA's disclosure of nonconfidential matters analysis to the attorney-client and other confidential communications privileges, the Court must find that the NMCCA erred when it found that S.S.'s disclosure of nonconfidential "mental health matters" waived her M.R.E. 513 privilege to prevent disclosure of her confidential communications with her psychotherapist. S.S. did not disclose to anyone a significant part of her confidential communications with her psychotherapists.

IV. The NMCCA Inappropriately Held that the Circumstances Made It Inappropriate to Allow S.S.'s Claim of Privilege.

The NMCCA erred when it analyzed the phrase "such circumstances that it would be inappropriate to allow the claim of privilege." The NMCCA held that S.S disclosed a significant part of the matters at issue under such circumstances that it would be inappropriate to allow the claim of privilege. *Mellette*, 81 M.J. at 693. In a footnote, the NMCCA states, "To conclude otherwise would allow a

privilege holder to delimit discoverable evidence to establish advantageous facts and then invoke the privilege to deny the evaluation of their context, relevance, or truth—thus **turning the privilege from a shield into a sword**—a circumstance the waiver rule's broader language seeks to avoid." *Mellette*, 81 M.J. at 693, n.14 (emphasis added).

While the NMCCA recites the "shield to sword" analogy, it fails to analyze or demonstrate how the analogy applies. There is no factual basis to assert that S.S. disclosed confidential communications in a manner that would turn the shield of her privilege into a sword. She did not disclose confidential communications that favor her in either the civil suit or the court-martial, and then tactically asserted and hid behind the privilege for unfavorable confidential communications. There is no basis for the NMCCA's shield-sword analogy.

The NMCCA reveals why it believes the circumstances make it inappropriate to allow the claim of privilege, and it has nothing to do with S.S.'s disclosure to others of nonprivileged mental health matters. The NMCCA explains that S.S.'s stated diagnoses and possible other diagnosis could impact her credibility. *Id.* The NMCCA explains that S.S.'s medications could have interactive side affects with potential for an adverse effect on her memory. *Id.*[4]

[4] To the extent the NMCCA is analyzing the relevance of S.S.'s diagnoses and medications, the NMCCA concludes they are relevant without any supporting
(continued...)

The NMCCA then reveals the heart of its improper reasoning by explaining this case "involve[es] a delay in reporting for several years, allegations that Stacy had previously denied, and a **report made under circumstances** -revolving around the custody battle over [S.S.'s niece] . . . ." *Id.* (emphasis added). The NMCCA is not able to explain why S.S.'s disclosures of nonconfidential matters create circumstances that would make allowing the claim of privilege inappropriate. The NMCCA erred because it considered circumstances unrelated to the disclosures. The delay of reporting, previously denying allegations, and the custody battle may all be reasons to question S.S.'s credibility (and the Appellant fully questioned S.S.'s credibility on these issues), but these reasons are unrelated to whether S.S. waived her privilege under M.R.E. 510.

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evidence in the record. In her initial amicus curiae brief and before reviewing the sealed briefs and joint appendix, S.S. argued that the Appellant presented no evidence (1) that S.S. had borderline personality disorder, (2) that borderline personality disorder affected S.S.'s ability to remember, perceive or tell the truth, or (3) that the medications prescribed or could have been prescribe affected S.S.'s memory. S.S. Amicus Curiae Brief at 4-11.

Now that S.S. has reviewed the sealed briefs and joint appendix, S.S.'s arguments are mirrored by the military judge's reasoning and findings. This Court should focus on the military judge's reasoning and findings (at J.A. 616-17) because they are ignored by the NMCCA and parties. [redacted]

CONCLUSION

Patient/Victim S.S. respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 26, 2022 a copy of the foregoing was transmitted by electronic means to the following:

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