IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Wendell E. MELLETTE, Jr.** Electrician's Mate (Nuclear) First Class (E-6) U.S. Navy, Appellant	**SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT** USCA Dkt. No. 21-0312/NA Crim. App. Dkt. No. 201900305

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Issue Presented

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

Statement of Statutory Jurisdiction

Appellant incorporates the statement of statutory jurisdiction from his brief filed with this Court on November 1, 2021.

Statement of the Case

Appellant incorporates the statement of the case from his brief filed with this Court on November 1, 2021.

Statement of Facts

Appellant incorporates the statement of facts from his brief filed on November 1, 2021, and supplements them with the following:

A. Without prompting, S.S. disclosed her "cutting" history to NCIS while explaining the allegations against Appellant.

The Naval Criminal Investigative Service (NCIS) interviewed S.S. before trial.[1] At the time of the interview, she was nineteen.[2] Before the interview began, an agent explained that her participation was voluntary, and that if she was "uncomfortable about anything, just, you know, let us know that you're

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[1] J.A. 366.

[2] *Compare* J.A. 292 (reflecting that S.S. was born in July 1998) *with* J.A. 366 (listing date of NCIS interview of June 2018).

uncomfortable about it, or don't want to talk about it."[3] The agent then asked S.S. to "tell us what happened."[4]

Even though the agent had made no reference to S.S.' mental health, S.S.' first words were: "I was put in the hospital because I was cutting. That was in August of 2013."[5] She then explained that "after [she] got out" of the hospital, she "starting trusting" Appellant, whom she claimed began touching her during car rides or when he spent time alone with her.[6]

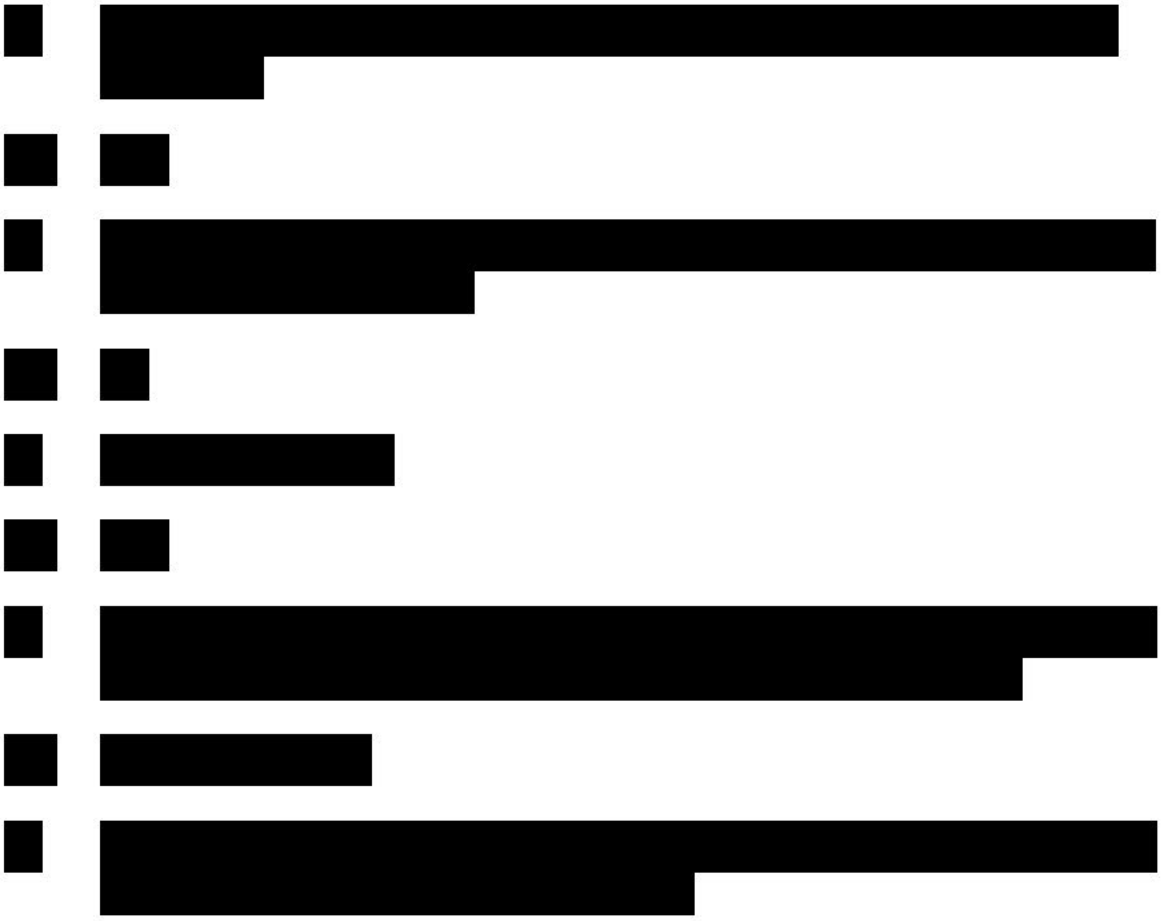
B. In a deposition the Government provided in discovery, S.S. disclosed details of her mental health history, including when she began self-harm; why she went to inpatient treatment; and her medication history—[redacted].

Months after her NCIS interview, S.S. answered questions in a deposition relating to a child custody dispute between her older sister and Appellant.[7] Before trial, the Government provided a transcript of the deposition in discovery and told the defense S.S. "made statements relevant to the present case" in the deposition.[8]

At the deposition, an attorney who objected on S.S.' behalf was present but did not assert the psychotherapist-patient privilege at any time, nor did S.S. assert the privilege. In the deposition, S.S. answered numerous questions about her

[3] J.A. 368.
[4] J.A. 377.
[5] J.A. 377.
[6] J.A. 378-79.
[7] J.A. 483.
[8] J.A. 462.

mental health, including the following from the attorney representing Appellant:



SS: Depression, anxiety and self-harm.[9]

After this, S.S. disclosed the name and location of the mental health institution at which she received care—[redacted]—and explained how she came to be admitted there:

[9] J.A. 490.

After explaining that she was treated [redacted], S.S. then answered questions about medications she received there:

[10] J.A. 491-92.

Q: Okay. While you were at Vista, I assume they were putting you on a medication program?

SS: Yes.

Q: Okay. Do you recall the medications you were prescribed?

SS: Prozac.

[redacted]

Next, S.S. answered questions about her discharge from Vista, medications she received, and her follow-up treatment plan:

[redacted]

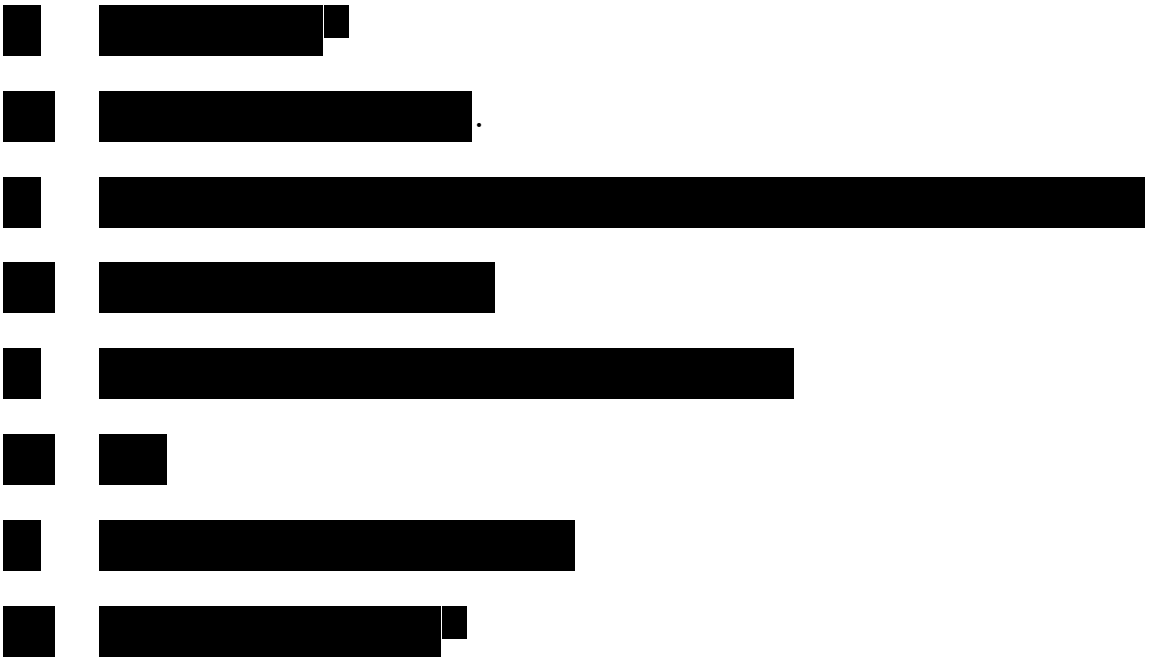
Q: Okay. And what was the medication you were asked to continue with?

SS: The Prozac.

[11] J.A. 493.

Q: Okay. Have you ever taken any other medication for the diagnosis that you received at [redacted] other than Prozac?

SS: Yes, but I don't remember the names of them. We only tried them for a short amount of time



S.S. also revealed she had been taking medications in 2019, nearly six years after her discharge from [redacted] and only months before trial.

Q: Okay. Have any side effects from these medications?

SS: Not really, not until recently.

Q: Okay. Can I ask what the side effects were?

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[12] Abilify is the brand name for the "antipsychotic drug" whose active ingredient is Aripiprazole, and it "is marketed for the treatment of schizophrenia, bipolar disorder, irritability associated with autistic disorder in pediatric patients, and as an add-on treatment for depression." *See Otsuka Pharm. Co. v. Sandoz, Inc.*, 678 F.3d 1280, 1284 (Fed. Cir. 2012).

[13] J.A. 493-95.

SS: I was having really bad nightmares.

[redacted]

[redacted] stopped taking them because I was having the really bad nightmares.

[redacted]

[14] J.A. 495-96.

[redacted]

[15] J.A. 496.
[16] J.A. 496-97.
[17] J.A. 497.
[18] J.A. 497.
[19] J.A. 508.
[20] J.A. 508.
[21] J.A. 508-09.

[redacted]

[22] J.A. 509.

[redacted][3]

[redacted]

C. In the deposition, S.S. also referenced her mental health in the context of her allegations against Appellant.

[redacted]

[23] J.A. 524-25.
[24] J.A. 561-62.
[25] J.A. 550.
[26] J.A. 562-63.
[27] J.A. 563.
[28] J.A. 517.

[redacted]

[29] J.A. 517.
[30] J.A. 549-50.

[redacted]

D. S.S. discussed her mental health history with trial counsel, but refused interviews with the defense and invoked her privilege.

Before trial, S.S. agreed to speak with the Government, including about her mental health condition, but refused interviews with the defense.

[redacted]

Following the deposition, S.S. disclosed further details about her mental health history to trial counsel months later.[33] Trial counsel made the following notes detailing what S.S. said during the interview:

[redacted]

[31] J.A. 549-50.
[32] J.A. 508.
[33] J.A. 573. In an Article 39(a), UCMJ, session, the defense referred to the notes contained in J.A. 573 as "the government's notes with Ms. S.S. regarding her mental health." *See* J.A. 586.

[redacted]

The day following the interview, S.S. sent trial counsel an email stating that she "would like to use [her] privilege to keep [her] mental health records from being accessed by the defendant."[35] [redacted]

E. Before trial, Appellant argued that S.S. had waived the privilege by openly discussing substantive details of her mental health treatment, while the Government argued she did not *fully* do so.

Citing R.C.M. 703 as well as the Fifth and Sixth Amendments, the defense moved before trial to "order the production of and conduct an *in camera* review of" S.S.' "mental health records: to include the dates visited said mental health provider, the treatment provided and recommended, and her diagnosis."[37]

Of relevance to this brief, the defense argued that "S.S. waived any confidential communications regarding her mental health treatment by speaking to NCIS agents and attorneys at a family law deposition[.]"[38]

Citing M.R.E. 510, the defense explained that "[a]t no time did [S.S.] state

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[34] J.A. 573.
[35] J.A. 584.
[36] J.A. 444 [redacted]
[37] J.A. 438. The defense also requested the names of S.S.' "mental health treatment provider" as well as her "prescription history." *See* J.A. 446.
[38] J.A. 442-43.

she did not want to talk about this or otherwise wanted to keep her mental health issues private."[39] It added:

> [S.S.] does not claim the privilege at either time [during her NCIS interview and deposition], and she is going into a significant part of her communication by going beyond her diagnosis and into her behavior ("cutting") as well as the side effects of her medication, and how she got into the mental health program in the first place.[40]

In opposition, the Government argued that S.S. had not waived "*all* claim to privilege" and that "[a]lthough [S.S.] has disclosed some information regarding her mental health diagnoses and prescriptions, she has not disclosed her specific communications with mental health service providers, or her mental health records."[41] Thus, it argued, S.S. "has not waived her privilege to refuse disclosure to the underlying communications she had with mental health service providers, or the mental health records associated with those communications."[42]

F. The military judge denied the defense motion, ruling that S.S. had not waived her privilege and if she had, it was only as to what she already disclosed.

At an Article 39(a), UCMJ, session, the defense told the military judge that if he believed the information it requested—"to include the diagnosis of Ms. S.S. and her treatment plan and the dates of her treatment"—was privileged, S.S. had

[39] J.A. 443.
[40] J.A. 443.
[41] J.A. 578.
[42] J.A. 578.

"gone so in depth into this, she has waived the privilege."[43] The defense said it was asking for "the details of what [S.S.] has already said because . . . there's so much information out there, she's waived the privilege."[44]

The defense advanced several reasons for the evidence's relevance:

> We have a reason to believe that the complaining witness was diagnosed with borderline personality disorder or a similar type of . . . personality disorder based on the self-harm, self-cutting behaviors, based on the anxiety and depression [S.S.] mentioned and the likelihood that if someone goes to inpatient treatment—if their self-harm and depression is so severe that they have to go to inpatient treatment . . . it is more likely [than] not that she had some sort of personality disorder.[45]

Additionally, the defense argued that S.S.' treatment plan following her inpatient care would indicate the dates S.S. was in counseling and, thus, when Appellant could not have committed the alleged offenses.[46] The defense argued the same applied if the treatment plan in the months following the inpatient treatment showed that S.S. was under her parents' supervision, as her mother suggested during her deposition.[47]

Additionally, the defense argued that S.S.' "medications are incredibly important" in that S.S. revealed having side effects. The defense argued that if an additional side effect of S.S.' medication was to hinder her "memory," then "that's

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[43] J.A. 590.
[44] J.A. 591.
[45] J.A. 592.
[46] J.A. 593.
[47] J.A. 594.

incredibly important to credibility, v[e]racity, and our ability to fully cross-examine her in court."[48] The defense explained that it had "tried several times" to speak with the Government's witnesses to learn this information, but that "[n]one of their witnesses have agreed to speak to us."[49]

The military judge denied the motion on the record and in a written ruling. On the record, he noted S.S "might have told the truth and she might have not told the truth., but she stated with enough clarity and particularity for the defense to be aware of what she states are her conditions."[50]

His written ruling devoted two lines to the waiver argument. He stated: "The Court rejects the defense's argument that SS waived the privilege by discussing her treatment with NCIS or in a state court deposition. But[,] even if the privilege were waived, it would be only as to those matters already disclosed."[51]

G. The CCA concluded that S.S. had waived her privilege by "openly discussing" her treatment history with others.

Before the CCA, Appellant argued, *inter alia*, that "S.S. waived protection of Mil. R. Evid. 513 when she openly discussed her in-patient treatment at a mental health facility; her history of depression, anxiety, and self-harm; and an incomplete recounting of her prescribed medications" along with "her extensive history with

[48] J.A. 594.
[49] J.A. 597.
[50] J.A. 607.
[51] J.A. 616.

mental health counseling and side-effects from prescribed medications."[52]

The Government argued the information S.S. disclosed was not privileged, and alternatively, that the military judge was correct to rule that "any waiver would not apply beyond those matters [S.S.] already disclosed."[53]

The CCA concluded the military judge "erred in summarily rejecting the Defense argument that [S.S.] waived the privilege by discussing her mental health diagnoses and treatment, including her prescribed medications, with her family, with NCIS, and during her civil deposition."[54] It found S.S. "openly discussed her mental health matters with multiple people on multiple occasions" and "her disclosures were voluntary, involved a significant part of the matters at issue, and occurred under such circumstances that it would be inappropriate to allow the claim of privilege."[55] It added that "[t]o 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, [M.R.E. 510,]'s broader language seeks to avoid."[56]

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[52] *See* Appellant's Br. and Assignments of Error (June 15, 2020) at 43.
[53] *See* Ans. on Behalf of Appellee (Nov. 12, 2020) at 30.
[54] *Mellette*, 81 M.J. 681, 693 (N-M. Ct. Crim. App. 2021).
[55] *Id*.
[56] *Id*. at 693 n.14.

Summary of Argument

While a patient enjoys a privilege under M.R.E. 513(a) to shield confidential communications between the patient and a psychotherapist, the party asserting privilege has the burden of showing the privilege was not waived. M.R.E. 510(a) states the privilege is waived when the holder "voluntarily discloses . . . any significant part of the matter or communication" such that it is "inappropriate to allow the claim of privilege." This can be done by disclosing the substance of therapy sessions with a third party or by offering evidence of one's mental health in litigation.

Here, S.S. waived her psychotherapist-patient privilege in both ways. She voluntarily revealed numerous details about her mental health history, and did so in evidentiary settings—a deposition, an NCIS interview, and in an interview with trial counsel. She then invoked the privilege when the defense requested information relating to these disclosures. At a minimum, her statements revealed a significant part of the "matter" of her mental health treatment.

Thus, the CCA did not err by concluding that allowing an assertion of the privilege under these circumstances would be inappropriate. This Court should reverse, allowing the defense to review the requested evidence with an expert at an evidentiary hearing and to be heard on how the denied evidence prejudiced him.

Argument

THE CCA DID NOT ERR BY CONCLUDING S.S. WAIVED THE PSYCHOTHERAPIST-PATIENT PRIVILEGE SINCE SHE VOLUNTARILY DISCLOSED SIGNIFICANT PARTS OF HER MENTAL HEALTH HISTORY IN A DEPOSITION, TO NCIS, AND TRIAL COUNSEL BEFORE INVOKING THE PRIVILEGE WHEN THE DEFENSE REQUESTED INFORMATION ON THE SAME SUBJECT MATTER.

Standard of Review

A military judge's resolution of a privilege issue is reviewed under the abuse of discretion standard.[57] However, where, as here, the "court's decision rests on legal principles, we apply the de novo standard of review."[58]

A. A privilege is typically deemed waived as to the subject matter of the disclosure when its holder "voluntarily discloses . . . any significant part of the matter or communication" such that it is "inappropriate to allow the claim of privilege."

M.R.E. 513(a) generally allows a "patient" to "refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist . . . in a case under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating

[57] *United States v. Harpole*, 77 M.J. 231, 234-35 (C.A.A.F. 2018).
[58] *Hawkins v. Stables*, 148 F.3d 379, 382 (4th Cir. 1998); *Harpole*, 77 M.J. at 234-35 (explaining within context of waiver of a privilege that "legal questions, including the interpretation of a rule's language, are reviewed de novo").

diagnosis or treatment of the patient's mental or emotional condition."[59] The person "claiming the privilege has the burden of establishing by a preponderance of the evidence that the communication is privileged."[60]

This privilege is qualified by M.R.E. 510(a), which provides in relevant part:

> A person upon whom these rules confer a privilege against a disclosure of a confidential . . . communication waives the privilege if the person or the person's predecessor 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.[61]

As to disclosures to third parties, since the privilege generally "depends upon confidentiality and breaching this confidentiality as to one person destroys it as to the world, courts regularly find that such disclosures justify discovery of formerly privileged by current litigants unless the disclosure was itself privileged."[62] Waiver "often is held to extend beyond materials revealed and to include any other materials or communications on the same subject matter."[63]

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[59] MANUAL FOR COURTS-MARTIAL [M.C.M.], UNITED STATES (2019), Military Rule of Evidence (MIL. R. EVID.) 513(a).
[60] *Id*. at 235; *accord United States v. Bolander*, 722 F.3d 199, 222 (4th Cir. 2013) ("The burden rests on the person invoking the privilege to demonstrate its applicability, including the absence of any waiver of it.").
[61] MIL. R. EVID. 510(a).
[62] *See* 8 Charles Alan Wright, et al., *Federal Practice and Procedure* §2016.4 (3d ed. 2010).
[63] *Id*. at §2016.2; *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) ("Furthermore, any voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege, not only as to the specific communication disclosed but often as to all

B. This Court has found waiver of privilege where a person voluntarily discloses the substance of privileged statements to third parties and selectively reveals communications during litigation.

In *United States v. McElhaney*, this Court found that the appellant waived the marital privilege under M.R.E. 504 over a conversation with his wife by voluntarily revealing substantive parts of the conversation to others.[64] After the appellant's wife intercepted a letter the complaining witness sent him, he told his wife he loved the complaining witness and that the two had attempted sex.[65]

He then wrote a letter to the complaining witness' parents, explaining that he and the complaining witness had exchanged "stolen kisses."[66] He also wrote a letter to the complaining witness, telling her: "the cat is out of the bag" since his wife "read the letter," adding that he would "keep no secrets about you and me."[67]

Even though the appellant had not *also* told others about his statement to his wife that he and the complaining witness attempted sexual intercourse, the military judge admitted this statement at trial.[68] This Court affirmed, stating the appellant's conduct "communicate[d] more than the mere fact that a conversation occurred with his wife; they show his intent to have [the complaining witness] understand

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other communications relating to the same subject matter.").
[64] 54 M.J. 120, 130-31 (C.A.A.F. 2000).
[65] *Id*. at 131.
[66] *Id*.
[67] *Id*.
[68] *Id*.

the overall substance of the conversation by relying upon their shared history."[69]

Likewise, in *United States v. Jasper*, this Court found waiver of the communications to clergy privilege under M.R.E. 503. In *Jasper*, the complaining witness gave the pastor permission to disclose her communications to trial counsel.[70] After the pastor told trial counsel the complaining witness told him she fabricated the allegations, trial counsel disclosed the statement to the defense.[71] Before trial, the complaining witness asserted her privilege, claiming she did not intend the statements to be disclosed to anyone other than trial counsel.[72]

On appeal, this Court found there had been waiver.[73] Surveying decisions that found waiver merely based on the "failure to take adequate precautions to maintain confidentiality," this Court found that to suppress the statements based on the holder's lack of knowledge of how her statements would be used would "require a 'knowing' and 'intelligent' waiver where no such language appears in M.R.E. 510(a)."[74] This Court concluded that waiver applies where a holder "voluntarily consents" to disclose privileged communications to trial counsel "without express limitation" and it would be "inappropriate to allow a claim of

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[69] *Id*. at 132 (quoting MIL. R. EVID. 510(a)).
[70] *United States v. Jasper*, 72 M.J. 276, 279 (C.A.A.F. 2013).
[71] *Id*.
[72] *Id*.
[73] *Id*. at 280-81.
[74] *Id*. at 281.

privilege to prevent Appellant from using those statements at trial."[75]

C. Waiver of the psychotherapist-patient privilege occurs where a holder discusses "the substance" of his mental health history with others; answers questions relating to his mental health in a deposition; or places his mental health in issue during litigation.

While this Court has not directly addressed waiver of the psychotherapist-patient privilege, other federal courts doing so have followed a similar approach to the rationale underlying *McElhaney* and *Jasper*.

The Sixth Circuit has explained that "a patient can waive the protections of the psychotherapist/patient privilege by disclosing the substance of therapy sessions to unrelated third persons."[76]

Similarly, the Fourth Circuit has found waiver where the holder answered questions about his mental health during a deposition without asserting the privilege.[77] In *United States v. Bolander*, the appellant was questioned in a deposition about his participation in a sexual offender treatment program.[78] Rather than invoke his psychotherapist-patient privilege, the appellant "openly discussed his participation" in the program, "including the numerous admissions he made

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[75] *Id*.
[76] *United States v. Hayes*, 227 F.3d 578, 586 (6th Cir. 2000).
[77] *Bolander*, 722 F.3d at 223; *contra Hibbs v. Marcum*, 2018 U.S. Dist. LEXIS 26725, at *11 (W.D. Ky. 2018) (finding no waiver where defendant "assert[ed] that he testified . . . that, to the extent he has ever received any psychotherapy, he reasonably expected the communications to be private and confidential").
[78] *Bolander*, 722 F.3d at 223.

during that program."[79] In finding Boland waived the privilege, the court relied on *Hawkins v. Stables*.[80]

In *Hawkins*, the Fourth Circuit found waiver of the attorney-client privilege on the entire subject of a wiretap based on the following colloquy in a deposition:

> Q: Is it true or not that Larry Diehl, in his capacity as your [divorce] attorney, told you to take a wiretap off the phone at the marital residence?
>
> A: No, sir. Because I wouldn't have discussed that with him, since it didn't happen. So, therefore, he would have no need to make mention of that to me.[81]

Relatedly, a leading treatise has explained that "[w]hen a party puts privileged matter in issue as evidence in a case, it thereby waives the privilege as to all related privileged matters on the same subject."[82] This rule also applies where "the privilege-holder seeks to use some protected material as evidence but asserts privilege to withhold other related material from disclosure."[83] The rationale is that "the use of some privileged material as evidence provides a basis for insisting that all related material also be disclosed."[84]

Another treatise has similarly stated that "[w]here the client makes claims or

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[79] *Id*.
[80] *Id*. at 223 (citing *Hawkins*, 148 F.3d at 384)).
[81] *Hawkins*, 148 F.3d at 381.
[82] Wright, et al., *Federal Practice and Procedure* at §2016.6.
[83] *Id*.
[84] *Id*.

defenses that put in issue those aspects of his mental or emotional condition that connect closely with the psychotherapy that he obtained, he waives the protection of the privilege for communications that bear directly on such claims or defenses."[85] Courts may not impose "full waiver as to all communications on the same subject matter where the client has merely disclosed a communication to a third party, as opposed to making some use of it."[86]

D. Since S.S. voluntarily disclosed numerous details of her mental health history with third parties, including in litigation settings, before invoking her privilege when the defense sought surrounding information, the CCA correctly found she waived the privilege.

Before trial, S.S. shared intimate details of her mental health treatment with attorneys in a deposition, to NCIS, and with trial counsel.

As in *Bolander*, S.S. voluntarily addressed numerous matters relating to her mental health in a deposition, including:

- [redacted]
- [redacted]
- the reason she sought such treatment and possible diagnoses;[89]

[85] *See* Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* §5.43 (4th ed. 2013) (citing *Koch v. Cox*, 489 F.3d 384, 390-91 (D.C. Cir. 2007) (disclosing records of consultations with psychopharmacologist on heart medications and lipid disorder did not waive privilege for communications with social worker)).
[86] *In re Sealed Case*, 676 F.2d at 809 n.54.
[87] J.A. 490.
[88] J.A. 491.
[89] J.A. 490.

- [redacted][90]
- the names of medications she received in inpatient treatment;[91]
- the amount of time she spent in inpatient treatment;[92]
- that she was given a follow-up treatment plan on discharge;[93]
- [redacted]
- [redacted]
- the medication she was prescribed upon discharge;[96]
- side effects from medications;[97]
- the date she recently began and stopped taking medications;[98]
- [redacted]
- [redacted]
- [redacted]

[90] J.A. 491.
[91] J.A. 491.
[92] J.A. 493.
[93] J.A. 494.
[94] J.A. 494.
[95] J.A. 495.
[96] J.A. 494.
[97] J.A. 495.
[98] J.A. 495.
[99] J.A. 496; J.A. 573.
[100] J.A. 508.
[101] J.A. 508.

Applying the Sixth Circuit's standard, these statements disclosed "the substance of therapy sessions to unrelated third persons."[106] The Government can hardly claim otherwise: its argument rests on the notion that diagnosis and treatment history are confidential communications between the patient and provider under M.R.E. 513(a).[107] But even if this were not so, like the appellant's revealing statements in *McElhaney*, S.S.' statements at least revealed a "significant part of the matter" of her mental health history to the outside world, destroying the confidentiality of this subject and making a claim of privilege inappropriate.[108]

The same would apply to S.S.' mother's statements. As the "predecessor" of the privilege,[109] S.S.' mother revealed more significant parts of S.S.' treatment

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[102] J.A. 524.
[103] J.A. 525.
[104] J.A. 549.
[105] J.A. 550.
[106] *Hayes*, 227 F.3d at 586.
[107] *See* Ans. on Behalf of Appellee (Dec. 20, 2021) at 20.
[108] MIL. R. EVID. 510(a).
[109] *Cf.* MIL. R. EVID. 510(a) (stating that there can be waiver, *inter alia*, if the person *or the person's predecessor while holder of the privilege* voluntarily

history, including that S.S. underwent a [redacted]

It is also important that S.S. discussed her mental health history in evidentiary settings since this arguably placed her mental health "in issue." At the outset, it is easy to understand why the Government conceded that S.S.' statements in the deposition were relevant to Appellant's court-martial.[112] Aside from revealing mental health struggles and discussing the allegations against Appellant, S.S. also claimed [redacted][3] The defense wanted to verify this. It sought to review S.S.' treatment and medication history to determine whether her medications hindered her memory, whether she had a disorder relevant to her credibility, whether she was particularly suggestible, or whether her medications created side effects bearing on the reliability of her testimony.[114] Reviewing this information was especially

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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).

[110] J.A. 550.

[111] J.A. 562-63.

[112] J.A. 462.

[113] J.A. 549 ("Just dates and times.").

[114] J.A. 445, 592, 594 ([redacted]

important given that one of S.S.' medications may have been [redacted] Thus, as the defense told the military judge, it was seeking "the details of what [S.S.] has already said because . . . there's so much information out there, she's waived the privilege."[115]

Aside from the deposition, S.S. arguably placed her mental health in issue in her NCIS interview. When an NCIS agent asked her what happened, she explained that she was "put in the hospital because [she] was cutting" and that this occurred "in August of 2013."[116] She added that "after [she] got out" of the hospital, she "starting trusting" Appellant before he started taking advantage of her.[117] This suggested a link between her condition and Appellant's actions.

Finally, like *Jasper*, S.S. spoke with trial counsel about her mental health while refusing to speak with the defense. While it is unclear exactly what she disclosed to trial counsel, trial counsel's interview notes reflect that she informed trial counsel [redacted]

[redacted]

[115] J.A. 591.
[116] J.A. 377.
[117] J.A. 378-79.
[118] J.A. 573.

[redacted] Yet the day after speaking with trial counsel about her mental health history, S.S. invoked her privilege after being advised that the defense was seeking production of the requested information.[120]

As the CCA aptly noted, to conclude that the privilege applied here "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, [M.R.E. 510,]'s broader language seeks to avoid."[121] Thus, the CCA correctly concluded that the military judge's view that any waiver would only extend to what S.S. already disclosed was erroneous.[122]

E. This Court should remand for an evidentiary hearing, allowing Appellant to review and be heard on the evidence it sought.

In reversing, this Court should "restore the parties to the position in which they found themselves pretrial" on the issue of S.S.' mental health history.[123] Due

[119] J.A. 507-08 (emphasis added).
[120] J.A. 584.
[121] *Mellette*, 81 M.J. at 693 n.14; *accord Koch*, 489 F.3d at 390 ("The 'prohibition against selective disclosure of confidential materials derives from the appropriate concern that parties do not employ privileges both as a sword and as a shield.'") (citation omitted).
[122] *Mellette*, 81 M.J. at 693.
[123] *United States v. Bernal-Obeso*, 989 F.2d 331, 336 (9th Cir. 1993) (ordering an evidentiary hearing "to restore the parties to the position in which they found

to S.S.' waiver of the privilege, this Court should order that the following evidence relating to S.S.' mental health treatment be produced: identify of providers; dates of treatment; diagnoses; prescription history; and treatment history, including treatment provided and recommended.[124]

Given the need to scientifically interpret the evidence, the defense should be permitted to consult with an expert, as it did at trial. Consistent with precedent, this Court should allow Appellant to be heard before a *DuBay* military judge on how the information may have prejudiced him.[125]

Conclusion

This Court should set aside the lower court's judgment and remand for a *DuBay* hearing.

Respectfully submitted,

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themselves pretrial, but with counsel for the defendant fully enlightened as to the facts surrounding the issue" regarding undisclosed impeachment evidence).

[124] J.A. 438, 446.

[125] *United States v. Reece*, 25 M.J. 93, 95-96 (C.M.A. 1987) (instructing that mental health evidence erroneously not produced at trial be reviewed by counsel under confidentiality and allow *DuBay* military judge to "hear argument and rule on the relevance of the evidence").

Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 24(c)(2) because it contains fewer than 14,000 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font.

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on January 26, 2022.

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