IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Additional Issue Presented

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

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012), because Appellant's approved sentence included a dishonorable discharge and confinement for one year or more. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of sexual abuse of a child, in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2012). The Members sentenced Appellant to five years of confinement and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

On May 14, 2021, the lower court affirmed the findings—striking the words "hips" and "on divers occasions" from the Specification—and reassessed the sentence to three years of confinement and a dishonorable discharge. *United States v. Mellette*, 81 M.J. 681, 701 (N-M. Ct. Crim. App. 2021).

On July 13, 2021, Appellant petitioned this Court for review. On September 7, 2021, this Court granted the Petition. On November 1, 2021, Appellant filed his Brief and the Joint Appendix. On December 20, 2021, the United States filed its Answer. On January 13, 2022, this Court ordered the Parties to file Supplemental Briefs on the Additional Issue. On January 18, 2022, Appellant filed his Reply.

Statement of Facts[1]

A. The United States charged Appellant with sexual assault of a child and sexual abuse of a child.

The United States charged Appellant with penetrating the fifteen-year-old Victim's vulva with his penis, and with touching her buttocks, thighs, hips, and back on divers occasions with an intent to gratify his sexual desires. (J.A. 49–52.)

B. Pretrial, the Victim disclosed details of her mental health diagnoses and treatment.

In June 2018, law enforcement interviewed the Victim. (J.A. 366–420.) After gathering background information and building rapport, (J.A. 366–77), they asked her to "kind of start at the beginning" and "tell us what happened" with Appellant, (J.A. 377). The Victim immediately responded: "I was put in the hospital because I was cutting. That was in August 2013." (J.A. 377.)

[1] The United States incorporates and expands upon the Statement of Facts in its Answer. (*See* Appellee's Ans., Dec. 20, 2021.)

[redacted]

C. Pretrial, Appellant moved to compel disclosure of the Victim's mental health records. The Military Judge denied the Motion, concluding (1) she did not waive her psychotherapist-patient privilege, and (2) even if she did, the waiver only applied to what she had already disclosed.

[redacted]

[redacted]

D. The lower court held the Military Judge erroneously concluded the Victim did not waive her privilege.

On appeal, the Navy-Marine Corps Court of Criminal Appeals concluded the psychotherapist-patient privilege protects diagnoses and treatment. *Mellette*, 81 M.J. at 692. But the Military Judge "erred in summarily rejecting the Defense argument that [the Victim] 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." *Id.* at 693. It noted the language of Mil. R. Evid. 510(a) "is plainly broader than the military judge's interpretation that 'even if the privilege were waived, it would only be as to those matters already disclosed.'" *Id.* And as the Victim "openly discussed her mental health matters with multiple people on multiple occasions," the "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." *Id.*

Argument

THE LOWER COURT ERRED BY CONCLUDING THE VICTIM WAIVED HER PSYCHOTHERAPIST-PATIENT PRIVILEGE: SHE DID NOT DISCLOSE A SIGNIFICANT PART OF HER CONFIDENTIAL COMMUNICATIONS, AND, UNDER THE CIRCUMSTANCES, IT WAS NOT INAPPROPRIATE TO ALLOW HER TO RETAIN THE PRIVILEGE. REGARDLESS, ANY WAIVER WOULD ONLY APPLY TO THE MATTERS SHE ALREADY DISCLOSED.

A. The standard of review is de novo.

This Court "review[s] a lower court's legal conclusions de novo" but gives its "factual findings more deference, and will not reverse such findings unless they are clearly erroneous." *United States v. McCollum*, 58 M.J. 323, 336 (C.A.A.F. 2003) (citation omitted). "Findings of fact are clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been

committed." *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (citation and internal quotation marks omitted).

B. A person waives her psychotherapist-patient privilege by voluntarily disclosing any significant part of her confidential communications.

A person waives her privilege to "a confidential matter or communication" if she "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." Mil. R. Evid. 510(a).

"Voluntary disclosure applies only where the speaker elects to share a substantial portion of a privileged communication with a party outside of the privileged relationship." *McCollum*, 58 M.J. at 338–39 (citations omitted). While "communications made in the presence of third parties, or revealed to third parties, are not privileged," waiver occurs only where the speaker conveys "the overall substance of the conversation." *United States v. McElhaney*, 54 M.J. 120, 131–32 (C.A.A.F. 2000) (citations omitted). There is no knowledge requirement, so "the privilege is waived, regardless of whether the privilege holder was aware that: (1) the communication was privileged, or (2) consenting to the disclosure of the communication waived the privilege." *United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013).

C. The lower court erred by concluding the Victim completely waived her privilege[2] under Mil. R. Evid. 510(a). She neither disclosed a significant part of protected communications, nor under circumstances that made it inappropriate to allow her to claim privilege. Regardless, any waiver would only apply to matters she already disclosed.

1. The Victim's one-time disclosure of diagnoses and treatment is not a significant part of her protected communications [redacted] of privileged mental health treatment.

Courts analyze whether an individual disclosed a "significant part" of a confidential communication "in the particular factual context" of the case. *See McElhaney*, 54 M.J. at 132. Courts interpreting statutes similar to Mil. R. Evid. 510(a) have consistently found limited disclosures do not constitute waiver. *See, e.g.*, *San Diego Trolley, Inc. v. Superior Court*, 87 Cal. App. 4th 1083, 1094 (2001) (disclosing diagnosis and treatment at deposition not "significant part" of communications); *Gerner v. Superior Court*, 1 Cal. App. 5th 301, 318 (2016) (no waiver by disclosing "purpose of psychiatric treatment"); *Vaughn v. State*, 608 S.W.3d 569, 573 (Ark. 2020) (no waiver for affidavit's reference to details disclosed in therapy or testimony during cross examination).

In *United States v. Babarinde*, 126 F.Supp.3d 22 (D.D.C. 2015), the defendant claimed the victim waived her psychotherapist-patient privilege when, at

[2] This assumes the lower court correctly concluded that Mil. R. Evid. 513 protects diagnoses and treatment. *Mellette*, 81 M.J. at 692. If not, then the Victim could not have waived privilege by disclosing non-privileged matters, and Mil. R. Evid. 513 still protects her undisclosed mental health records and communications.

a competency hearing, she "identified her mental health diagnoses and described to the Court what medications she was taking and the impact those medications had on her emotional and cognitive abilities." *Id.* at 25. She also "discussed her mental health condition with the prosecuting attorneys and [law enforcement] when she was brought in to discuss her testimony at trial." *Id.* at 26. Regardless, in concluding that the victim did not waive privilege, the court did not rely on—or address—the scope of the privilege; rather, it emphasized that "at no point was 'the substance of [her] therapy sessions' disclosed." *Id.* at 25 (brackets in original).

Similarly, in *San Diego Trolley, Inc.*, the court concluded that a patient does not waive her psychotherapist-patient privilege even by disclosing "the *purpose* of psychiatric treatment." 87 Cal. App. 4th at 1093. In California, "confidential communication . . . includes a diagnosis made and the advice given by the psychotherapist in the course of that treatment." *Id.* at 1096 n.3 (citing Cal. Evid. Code § 1012). But the victim's disclosure of "the fact that she was being treated for anxiety by a psychiatrist and the medications the psychiatrist had prescribed" cannot "be construed as disclosing any significant part of her communications with her psychiatrist." *Id.* at 1094.

[redacted]

[redacted] But she did not disclose the "substance" of her psychotherapy. *See Babarinde*, 126 F.Supp.3d at 25; *San Diego Trolley*, 87 Cal. App. 4th at 1094. As the pertinent facts in this case are very similar to both *Babarinde* and *San Diego Trolley*, so too should be the conclusion: the Victim did not waive her privilege, and the lower court's contrary ruling was erroneous. This approach aligns with those courts interpreting similar statutes. *See Gerner*, 1 Cal. App. 5th at 318; *Vaughn*, 608 S.W.3d at 573.

[redacted]

Thus, her one-time disclosure of only her diagnoses and treatment—and not the underlying confidential communications [redacted] of privileged mental health treatment—is not a "significant part" of her mental health treatment. *See* Mil. R. Evid. 510(a).

Regardless, the lower court's conclusion that the Victim "discussed her mental health matters with multiple people on multiple occasions" is clearly erroneous. *Mellette*, 81 M.J. at 693. As discussed, *supra*, the Victim did not disclose any diagnoses or treatment to law enforcement, (*see* J.A. 377); [redacted]

[redacted] Thus, the lower court's holding that she disclosed "on multiple occasions" should leave this Court "with the definite and firm conviction" that the lower court made a "mistake." *See Mellette*, 81 M.J. at 693; *Frost*, 79 M.J. at 109.

2. The lower court erred by concluding the circumstances of the Victim's disclosure made it inappropriate to allow her to maintain the privilege.

"Disclosure under certain circumstances may not be 'inappropriate' and the information will retain its privileged character." *United States v. Smith*, 33 M.J. 114, 118 (C.A.A.F. 1991) (quoting Drafter's Analysis, Manual for Courts-Martial, United States, App. 22, at A22-50 (2016 ed.)). To meet the privilege's purpose, "participants in the confidential conversation 'must be able to predict with some certainty whether particular discussions will be protected.'" *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)). "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Id.* at 17.

In *United States v. McClure*, No. ARMY 20190623, 2021 CCA LEXIS 454 (A. Ct. Crim. App. Sept. 2, 2021), when the sexual assault nurse examiner asked the victim "about any mental disabilities," the victim disclosed she "suffered from 'bipolar with depression' and ADHD [attention-deficit/hyperactivity disorder]."

Id. at *5 (brackets in original). The victim also disclosed "'a list of medication[s],' seven in total, that she was taking." *Id.* At trial, the appellant claimed she waived privilege by disclosing "both her mental health diagnoses . . . as well as her seven prescribed medications." *Id.* at *15. On appeal, the court agreed with the logic of *Babarinde* and concluded "that the mental health records sought by appellant were, and remained, privileged notwithstanding [the] victim's disclosures to the SANE and captured in the forensic sexual assault evaluation form." *Id.* at *20. It further held that even if the disclosure was a significant part of the communications, the circumstances—"made in the course of receiving medical treatment following a sexual assault"—allowed her to still claim the privilege. *Id.*

[redacted] Thus, under these circumstances, it would not be inappropriate to allow the Victim to retain her privilege, and the lower court's contrary ruling was erroneous. *See Mellette*, 81 M.J. at 693.

Also, the lower court's reasoning that waiver would inappropriately allow "a privilege holder to delimit discoverable evidence to establish advantageous facts," *id.* at 693 n.14, impermissibly considers the "evidentiary need for disclosure," which

the Supreme Court rejected in *Jaffee* because such a consideration "would eviscerate the effectiveness of the privilege." *See Jaffee*, 518 U.S. at 17.

Finally, the lower court erroneously focused on the timing of the Victim's treatment "immediately prior to and during the timeframe of the charged offenses," and allegations, which were "delayed for a number of years and eventually occurred in response to a child-custody dispute." *Mellette*, 81 M.J. at 693. Neither are relevant to waiver. Under Mil. R. Evid. 510(a), a Victim waives privilege by disclosing "any significant part of the matter or communication *under such circumstances* that it would be inappropriate to allow the claim of privilege." Mil. R. Evid. 510(a) (emphasis added). Put simply, a court analyzes the circumstances of the *disclosure*, not the treatment or allegations. The lower court thus erred in concluding that the disclosures "occurred under such circumstances that it would be inappropriate to allow the claim of privilege." *See Mellette*, 81 M.J. at 693.

3. Even if the Victim waived her privilege, under both the text of Mil. R. Evid. 510(a) and case law, the waiver applies to only her diagnoses and treatment: matters she already disclosed.

a. The plain text of Mil. R. Evid. 510(a) compels the result that the Victim only waived privilege to the matters she already disclosed.

Voluntary disclosure waives the privilege to the "confidential matter or communication." Mil. R. Evid. 510(a). Thus, the waiver applies only to the disclosed "matter" or "communication"—not all privileged matters or

communications. Otherwise, the phrase "matter or communication" would be superfluous. *See, e.g., United States v. Adcock*, 65 M.J. 18, 24 (C.A.A.F. 2007) (citation omitted) (noting statutes "should be interpreted to give meaning to each word"); *see also United States v. Sager*, 76 M.J. 158, 162 (C.A.A.F. 2017) (same).

Here, the lower court's misreading of Mil. R. Evid. 510(a) led it to wrongly dismiss the Military Judge's "interpretation that even if the privilege were waived, it would be only as to those matters already disclosed." *Mellette*, 81 M.J. at 693. Indeed, the lower court emphasized, "disclosure of *any significant part* of the matter or communication *under such circumstances that it would be inappropriate to allow the claim of privilege*," but ignored the words "matter or communication." *Id.* (emphasis in original). But because the phrase "matter or communication" connotes a single unit—a "matter" or a "communication"—disclosure of a "significant part" of that single unit waives the privilege only to that single unit; not to all other privileged communications. *See Adcock*, 65 M.J. at 24.

b. Military and federal case law also compel the result that the Victim only waived privilege to the matters she already disclosed.

"There is no bright line test for determining what constitutes the subject matter of a waiver, rather courts weigh the circumstances of the disclosure, the

nature of the legal advice[3] sought and the prejudice to the parties of permitting or prohibiting further disclosures." *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349–50 (Fed. Cir. 2005) (citing *In re Keeper of the Records XYZ Corp.*, 348 F.3d 16, 23 (1st Cir. 2003) (explaining "evaluation demands a fastidious sifting of the facts and a careful weighing of the circumstances")).

In *Morales*, the Air Force held a "patient may elect to invoke the privilege with respect to one such confidential communication, but not another." 2017 CCA LEXIS 612, at *21. It noted that this Court in *Jasper* "did not hold that consent to disclosure of one communication required disclosure of a different communication; rather it held that, under the circumstances, prior consent to disclose a communication to trial counsel waived the privilege with respect to that same communication at trial." *Id.* at *21–22.

[redacted]

Accordingly, she only waived "that particular communication" between her and her psychotherapist that included the diagnoses and treatments that she disclosed. *See Morales*, 2017 CCA LEXIS 612, at *21. [redacted] Because she "elect[ed] to invoke the privilege with respect to

[3] Just as the lower court analogized to the "very similar" language in the lawyer-client privilege to conclude that Mil. R. Evid. 513 protects diagnoses and treatment, *Mellette*, 81 M.J. at 692, so too should this Court look to federal case law analyzing the scope of waiver in the context of the attorney-client privilege.

one such confidential communication," any waiver only applies to the matters she already disclosed. *See Morales*, 2017 CCA LEXIS 612, at *20–21.

Conclusion

The United States respectfully requests that this Court affirm the findings and sentence as adjudged.

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1. This Brief complies with the type-volume limitation of Rule 24(c)(1) of this Court's Rules of Appellate Procedure because it contains fewer than 14,000 words.

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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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