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Recent Case: United States v. Hayes, 227 F.3d 578 (6th Cir. 2000)

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RECENT CASES

EVIDENCE — SIXTH CIRCUIT HOLDS THAT *TARASOFF* DISCLOSURES DO NOT VITIATE PSYCHOTHERAPIST-PATIENT PRIVILEGE. — *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000).

In 1996, the Supreme Court recognized the existence of a federal psychotherapist-patient privilege in *Jaffee v. Redmond*.[1] The Court did not explain, however, how this evidentiary privilege should coexist with a psychotherapist's so-called *Tarasoff* duty to breach confidentiality when necessary to protect third parties against whom a patient has articulated serious threats.[2] *Jaffee* included a footnote indicating that the privilege was not intended to invalidate this duty,[3] but left unclear whether the privilege continues once disclosure of the patient's threats has breached confidentiality.[4] Indeed, the two circuits that have considered this issue since *Jaffee* have adopted divergent approaches. The Tenth Circuit indicated in *United States v. Glass*[5] that once a psychotherapist has appropriately disclosed a patient's threats, those statements are no longer protected by privilege in a subsequent prosecution

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[1] 518 U.S. 1, 15 (1996) ("[W]e hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence."). The Court included licensed psychiatrists, psychologists, and social workers engaging in psychotherapy in its definition of "licensed psychotherapist." *Id.* The Court also explained that a patient may waive this privilege. *Id.* at 15 n.14.

[2] The Supreme Court of California first recognized this duty, commonly called the "dangerous patient" exception to confidentiality, in *Tarasoff v. Regents of the University of California*, 529 P.2d 553 (Cal. 1974) (*Tarasoff I*). There, the court held that a psychotherapist treating a mentally ill patient has "a duty to use reasonable care to give threatened persons such warnings as are essential to avert foreseeable danger arising from his patient's condition or treatment." *Id.* at 559. In 1976, the Supreme Court of California reheard the case. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976) (en banc) (*Tarasoff II*). In *Tarasoff II*, the court modified the nature of the "duty to warn" described in *Tarasoff I* and adopted a broader "duty to protect." *Id.* at 345. A majority of states now recognize some form of this duty, in either statutory or case law. George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: the* Tarasoff *Duty and the* Jaffee *Footnote*, 74 WASH. L. REV. 33, 47–48 (1999).

[3] *Jaffee*, 518 U.S. at 18 n.19 ("[W]e do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."). This footnote constituted the Court's sole mention of the issue.

[4] With the exception of California and Oregon, most states have similarly left this question unanswered. Harris, *supra* note 2, at 34–35. The California Evidence Code specifically states that the state's psychotherapist-patient privilege ceases once disclosure of a patient's statements is warranted. CAL. EVID. CODE § 1024 (West 1995). The Oregon Supreme Court, by contrast, has held that *Tarasoff* disclosures do not vitiate Oregon's psychotherapist-patient privilege. State v. Miller, 709 P.2d 225, 236–37 (Or. 1985).

[5] 133 F.3d 1356 (10th Cir. 1998).

of the patient.[6] The Sixth Circuit, however, rejected that approach last year in *United States v. Hayes*.[7] Faced with the unusual prosecution of a patient solely for uttering — without carrying out — threatening remarks to his psychotherapist about a federal employee, the *Hayes* majority held that the *Jaffee* privilege prevented the psychotherapist from testifying to those threats in court, despite their previous disclosure. Yet as the dissent remarked, the majority's overly broad language implied that a psychotherapist should *never* be permitted to testify about a patient's threats, even when those threats have already been disclosed and are offered as evidence of the patient's guilt of a subsequently committed crime.[8] This blanket approach is inconsistent with the rationale underlying the *Jaffee* privilege, and future courts should narrow the privilege to include only cases in which the crime is the threat itself.

In 1997, postal worker Roy Lee Hayes, suffering from a severe depression accompanied by psychotic symptoms, began to behave erratically at work.[9] He sought professional help and repeatedly informed his psychotherapists of his desire to kill his supervisor, postmaster Vera Odle.[10] None of these psychotherapists, however, warned Odle of his threats.[11] As Hayes's condition worsened, he ended up in the care of social worker James Van Dyke, to whom he confided his detailed plans to kill Odle.[12] Van Dyke allegedly informed Hayes that he could not keep such statements confidential, and subsequently warned Odle of Hayes's threats.[13] Odle consulted Postal Inspector Terrance Vlug, who obtained from Van Dyke Hayes's medical records, including those containing the threats.[14] Vlug filed a criminal complaint against Hayes, charging him with threatening to murder a federal official.[15]

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[6] *Id.* at 1359–60. The *Glass* court stated that the crucial issue is whether the disclosure was *necessary* to avert a serious threat of harm to a third party. If so, the court indicated, the *Jaffee* privilege no longer protects the communication. *See id.* at 1360 ("[O]n remand, the district court must proceed under Fed. R. Evid. 104(a) to determine whether, in the context of this case, the threat was serious when it was uttered and whether its disclosure was the only means of averting harm to the [intended victim] when the disclosure was made.").

[7] 227 F.3d 578 (6th Cir. 2000).

[8] *Id.* at 588 (Boggs, J., dissenting).

[9] *Hayes*, 227 F.3d at 580.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* Under Tennessee law, if a patient has made an actual, credible threat to harm a person, a psychotherapist may disclose the patient's communications to the extent necessary to warn or protect the potential victim. TENN. CODE ANN. § 24-1-207(c)(1) (2000).

[14] *Hayes*, 227 F.3d at 580–81.

[15] *Id.* at 581. The United States Code makes it illegal to

> threaten[] to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under such section, with intent to impede, intimidate, or interfere with such official . . . while

A grand jury indicted Hayes, who filed a motion to dismiss the indictment and to suppress his medical records as well as any testimony from psychotherapists whom he had seen.[16] The magistrate judge recommended suppression of the statements made to psychotherapists other than Van Dyke, but admission of Hayes's statements to Van Dyke.[17] The district court, however, applied the *Glass* standard[18] and found that Hayes's statements to Van Dyke should also be privileged, as Van Dyke's disclosure to Odle had not necessarily been the only means of protecting her.[19] Because the information from Van Dyke and the other psychotherapists had formed the basis of the indictment, the district court dismissed the case.[20]

A three-judge panel of the Sixth Circuit affirmed, but on different — and far more privilege-friendly — grounds. Writing for the majority, Judge Ryan[21] rejected the *Glass* approach and argued that the privilege issue should be considered in isolation from the confidentiality exception.[22] Even when a patient's threatening statements create a *Tarasoff* duty to disclose, he stated, the psychotherapist-patient privilege still prevents a psychotherapist from testifying to those threats at any criminal prosecution.[23] He asserted that the *Jaffee* footnote meant only that the privilege must give way when psychotherapists need to testify in protective court proceedings (such as involuntary commitment hearings) to fulfill their duty to protect third parties, not that the privilege would cease altogether once disclosure had occurred.[24]

Judge Ryan's argument for recognizing a distinction between psychotherapist-patient confidentiality and privilege rested mainly on policy considerations. He argued that the *Tarasoff* confidentiality exception serves the immediate function of preventing serious harm to

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engaged in the performance of official duties, or with intent to retaliate against such official . . . on account of the performance of official duties . . . .

18 U.S.C. § 115(a)(1) (1994).

16 *Hayes*, 227 F.3d at 581.

17 *Id.*

18 *See supra* note 6.

19 *Hayes*, 227 F.3d at 581. This ruling meant that no one — including Odle — could testify in court to Hayes's threatening statements to Van Dyke, even though they had previously been disclosed.

20 *Id.*

21 District Judge Duggan joined Judge Ryan's opinion.

22 *Hayes*, 227 F.3d at 583–84.

23 *Id.* at 586 ("[C]ompliance with the professional duty to protect does not imply a duty to testify against a patient in criminal proceedings[,] . . . and such testimony is privileged and inadmissible if a patient properly asserts the psychotherapist/patient privilege.").

24 *Id.* at 585. Judge Ryan acknowledged that this interpretation reflected a shift from the Sixth Circuit's pre-*Jaffee* approach to this question, as expressed in *United States v. Snelenberger*, 24 F.3d 799, 802 (6th Cir. 1994). He thus held that *Snelenberger* could no longer be considered "good law" on the issue. *Hayes*, 227 F.3d at 586.

third parties.[25] Although the existence of this exception may affect a patient's candor in therapy sessions, this effect is likely to be "marginal" and is outweighed by the need to protect third parties.[26] By contrast, a privilege exception and a psychotherapist's concomitant warnings to his patient that his statements could result in criminal liability "would certainly chill and very likely terminate open dialogue."[27] Given the significant public interest in effective psychotherapy, Judge Ryan argued, the costs of allowing a psychotherapist to testify at a patient's prosecution would outweigh its benefits.[28]

Judge Boggs dissented.[29] First, he questioned whether the *Jaffee* privilege even covered Hayes's communications with Van Dyke, because Van Dyke was not yet a licensed counselor.[30] He also argued that Hayes had waived the privilege by continuing to threaten Odle after Van Dyke had warned him that such threats would not be kept confidential.[31] Moreover, he expressed his concern that the "court's rule would apparently be the same even if the victim of the threat ended up dead, in a fashion exactly paralleling the material revealed to the mental health professional."[32] Judge Boggs suggested an alternative rule: privilege would preclude admission of "anything said up to the point at which notice is given that the actual or threatened criminal conduct being discussed is no longer covered by confidentiality."[33]

The *Hayes* majority correctly noted that the *Jaffee* footnote did not establish a "precedentially binding 'dangerous patient' exception" to the psychotherapist-patient privilege; it was too ambiguous to do so. Indeed, *Jaffee* made clear its expectation that future cases would delineate the full contours of the privilege.[34] Nonetheless, *Jaffee* did suggest an analytical approach for this delineation. The *Jaffee* Court explained that it had recognized a general privilege because the policy interests supported by the privilege — namely, the enhancement of ef-

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[25] *Hayes*, 227 F.3d at 583.

[26] *Id.* at 584–85.

[27] *Id.* at 585. Judge Ryan also noted that most states recognize no such exception. *Id.*

[28] *Id.*

[29] *Id.* at 587 (Boggs, J., dissenting).

[30] *Id.* at 588 n.1. In response, the majority argued that there was no evidence that Hayes was aware that Van Dyke was not licensed, and that it would "be grossly unfair to strip Hayes of the protections of a federal evidentiary privilege simply because his counselor was not what he held himself out to be." *Hayes*, 227 F.3d at 587.

[31] *Id.* at 588 (Boggs, J., dissenting). The majority disagreed, arguing that "in order to secure a valid waiver of the protections of the psychotherapist/patient privilege from a patient, a psychotherapist must provide that patient with an explanation of the consequences of that waiver suited to the unique needs of that patient," and that no such explanation had been provided to Hayes. *Hayes*, 227 F.3d at 587.

[32] *Id.* at 588 (Boggs, J., dissenting). The majority did not respond to this specific concern.

[33] *Id.* at 589.

[34] Jaffee v. Redmond, 518 U.S. 1, 18 (1996).

fective psychotherapy, which is premised on open communication — outweighed the evidentiary benefit from denying the privilege.[35] Yet the Court also stated that in some situations the privilege would need to "give way" — particularly in cases implicating the duty to protect.[36]

Given the Court's affirmation of the psychotherapist-patient privilege in *Jaffee*, the *Hayes* majority was correct to revisit the Sixth Circuit's approach to the privilege with regard to the *Tarasoff* duty to protect.[37] The majority should have recognized, however, the atypical nature of the case at hand. Because the target of Hayes's threats was a federal employee, the government could prosecute Hayes for merely uttering threatening statements about her to his therapist. But in the far greater number of cases, the intended victim is unlikely to be someone about whom it is illegal to utter threats. In these situations, even after the psychotherapist warns the potential victim, no criminal prosecution can commence — and no privilege question can arise — until the patient has harmed or attempted to harm the third party.

As Judge Boggs indicated in his dissent, the majority's broad language failed to distinguish between these two categories of cases.[38] But the two prosecutorial contexts are qualitatively different, and determining whether a "dangerous patient" exception to the *Jaffee* privilege should apply to each requires two separate analyses under the *Jaffee* balancing test. In both contexts, of course, the *Tarasoff* "dangerous patient" exception to confidentiality already applies. The issue is thus whether, in each category, an analogous "dangerous patient" exception to privilege would inflict significant damage on the psychotherapeutic relationship beyond that already caused by the confidentiality exception. In fact, the effect of such an exception to the privilege is likely to differ greatly from one category to the other.

When the object of a patient's anger is a federal employee or official, the effect of implementing a "dangerous patient" exception to the privilege is severe because the threatening remarks are criminal in themselves. Without the exception, the gravest risk that a patient faces in revealing a desire to harm a federal official is the possibility of a *Tarasoff* breach of confidentiality to protect the official. Although daunting, this possibility does not necessarily deter a significant number of patients from continuing with therapy.[39] But when the privilege

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[35] *Id.* at 11–12.

[36] *Id.* at 17–18.

[37] As noted above, the Sixth Circuit had previously ruled that disclosure did vitiate the psychotherapist-patient privilege. *See supra* note 24.

[38] *Hayes*, 227 F.3d at 588 (Boggs, J., dissenting).

[39] *See, e.g.*, Toni Pryor Wise, Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of* Tarasoff, 31 STAN. L. REV. 165, 177 (1978). Wise notes that in a study of 1272 psychotherapists, conducted one year after *Tarasoff II*, only one-fourth "reported observing in their patients some reluctance to discuss their violent tendencies when the patients

exception is combined with the confidentiality exception, the risk a patient faces in revealing a desire to harm a federal official increases dramatically: he faces incarceration for the mere fact of having made that statement to his psychotherapist.

Here, the need to protect effective psychotherapy outweighs the evidentiary need for such information. Although the evidentiary need for the information is significant — the psychotherapist's testimony is the only incriminating evidence — vitiating the privilege in this context would greatly undermine a psychotherapist's ability to treat a patient who has violent feelings toward a federal official. The *Hayes* majority thus correctly held that the privilege should apply in this rare context.[40] The effectiveness of psychotherapy should not vary according to the identity of the threatened third party.

But in the more likely scenario in which uttering a threat is not an offense in and of itself, a "dangerous patient" exception to the privilege would have a less significant impact on psychotherapy's effectiveness. Even without this exception, a psychotherapist must warn his patient that credible statements regarding an intent to harm a third party cannot be kept confidential. An analogous "dangerous patient" exception to the privilege would only require a psychotherapist to add that if, despite the psychotherapist's protective measures, the patient *does* harm the third party, the psychotherapist could be compelled to testify against the patient. The critical question is thus whether a significant number of patients who disclose their violent impulses to their psychotherapists even after learning of the *Tarasoff* exception would become unwilling to do so when advised that if they actually acted on those impulses, their psychotherapists might have to testify against them.

The *Hayes* majority offered no rationale for its belief that there would be many such patients,[41] and, in fact, psychological literature

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learned that the therapist might in some circumstances breach confidentiality." *Id.* at 177. Similarly, only one-fourth of the psychotherapists had ever lost a patient because of the patient's fear that the psychotherapist would breach confidentiality. *Id.* at 177 n.67; *see also* Fillmore Buckner & Marvin Firestone, *"Where the Public Peril Begins": 25 Years After* Tarasoff, 21 J. LEGAL MED. 187, 221 (2000) ("Based upon the case law and surveys over the past 25 years, even if confidentiality must be breached, the earlier anticipated negative effects have not materialized. There is just no evidence thus far that patients have been discouraged from coming to therapy, or discouraged from speaking freely once there, for fear that their confidentiality will be breached."). *But see* Daniel O. Taube & Amiram Elwork, *Researching the Effects of Confidentiality Law on Patients' Self-Disclosures*, 21 PROF. PSYCHOL.: RES. & PRAC. 72, 74 (1990) (concluding that "the extent to which patients are informed about the law and the extent to which the law is consequential for them are two of the factors that determine whether limitations to privacy will affect patients' self-disclosures").

[40] Compare this rule to the one proposed by the dissent. Under Judge Boggs's proposal, the privilege would be vitiated even in cases in which the threat itself was the crime, as long as the patient uttered the threat after receiving notice from the psychotherapist.

[41] The *Hayes* majority simply stated in conclusory fashion that an exception "would certainly chill and very likely terminate open dialogue," without distinguishing between the two different

suggests that few patients would react in this way. Those patients who remain in therapy even after being advised of the limits on confidentiality typically do so because they recognize their need for help and believe that psychotherapy may provide it.[42] If handled appropriately, the psychotherapist's discussion with his patient about his duty to protect third parties can even improve both the therapeutic relationship and the patient's progress.[43] In short, a patient's primary concern in these cases is often to overcome his desire to harm a third party rather than fear that he will be convicted if he does commit the harm.[44]

Thus, adding a privilege exception to the confidentiality exception in this prosecutorial context would not have nearly the detrimental impact on psychotherapy's effectiveness that such an addition would have when making the threat is itself a crime. The evidentiary benefit from such an exception to the privilege, however, might well be considerable. In the event that a patient actually carried out or attempted to carry out threats that his psychotherapist had already disclosed, the psychotherapist's testimony could be critically important in establishing such elements as identity, motive, and absence of mistake. *Jaffee*'s balancing test thus favors an exception to the privilege with regard to previously disclosed threats that the patient subsequently carries out. Although the *Hayes* court appropriately used the *Jaffee* rationale to reconsider its approach to the specific factual scenario at issue, it should not have been so quick to declare that the psychotherapist-patient privilege prevents a psychotherapist from testifying to his patient's threatening statements in *all* subsequent criminal prosecutions.

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prosecutorial contexts in which a patient's statements might be used against him. *Hayes*, 227 F.3d at 585.

[42] *See* Robert D. Miller, Gary J. Maier & Michael Kaye, Miranda *Comes to the Hospital: The Right to Remain Silent in Civil Commitment*, 142 AM. J. PSYCHIATRY 1074, 1076 (1985) (describing the results of a study in which a psychotherapist informed patients that anything they said during therapy sessions could be used against them in an involuntary civil commitment hearing and noting that the majority of the patients still engaged in open disclosure with the therapist, largely because of their perceived need for help and their belief that talking to the staff was necessary to obtain it).

[43] *See* James C. Beck, *A Clinical Survey of the* Tarasoff *Experience*, *in* THE POTENTIALLY VIOLENT PATIENT AND THE *TARASOFF* DECISION IN PSYCHIATRIC PRACTICE 60 (James C. Beck ed., 1985). Beck describes eighteen cases in which a patient's threatening statements toward a third party prompted his psychotherapist to consider warning that third party. Beck concludes:

> Cases in which the clinician discusses the warning with the patient before giving it typically show no bad effects resulting from the warning. In some of these cases, especially when the therapist clearly sees the potential violence as a therapeutic issue (and correspondingly sees the duty to warn as having clinical relevance), the discussion of the warning appears to have a positive impact on the psychotherapeutic process, and on the development of the [patient-therapist] alliance.

Id. at 80.

[44] *See, e.g.*, *id.* at 63–64 (describing one patient who stated "with considerable intensity" that she was afraid she might strangle her infant grandson).