NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	GENERAL COURT-MARTIAL
v.	)	GOVERNMENT RESPONSE TO DEFENSE MOTION TO QUASH
Douglas S. Wacker XXX XX 3913 Captain U.S. Marine Corps	)	(Subpoena of accused statements) 13 July 2010

1. Nature of Motion: The defense has moved to preclude the government from obtaining via subpoena any emails or chat messages maintained in the accused's google.com account. The government opposes the motion. Additionally, the government moves that the court conduct an in camera review of records obtained from google.com in order to segregate privileged and unprivileged information.

2. Summary of Facts:

a. The accused is charged with rape, attempted rape, and conduct unbecoming of an officer and a gentleman. The bulk of the charged offenses, including the rape of Ms. Jessica Brooder, occurred on the night of 3-4 April, 2007 in a hotel in New Orleans, LA.

b. At the time of the charged offenses, the accused was a first-year law student at the University of San Diego. The accused maintained an email account on google.com, Douglas.wacker@gmail.com. The accused frequently used this email account to contact other students, either via traditional email ("Gmail") or via instant messages through the Google "chat" feature. Google chat ("Gchat") is frequently used by law students to communicate, both outside of school and during classes (via laptop).

c. The morning after the charged offenses, 4 April 2007, the accused spoke with the two alleged victims, Ms. Brooder and Ms. Elizabeth Cook. The accused initially claimed that

"nothing happened." After Ms. Cook confronted him with her memory of seeing Ms. Brooder naked, the accused claimed that "more clothes came off, but nothing else," or words to that effect, and continued to deny that any intercourse occurred.

d. On the afternoon of 4 April 2007, Ms. Brooder and Ms. Cook purchased flights home to San Diego and Arizona, respectively. During a lay-over in Charlotte, NC, Ms. Brooder went to an airport bathroom to check her tampon, which she had not changed since the previous day. Ms. Brooder saw blood in her pants and discovered that her tampon was displaced several inches up her vaginal canal.

e. On 21 June 2007, the accused spoke at a tape recorded administrative student disciplinary hearing entitled "Critical Issues Board" convened by the University of San Diego regarding the incident that forms the basis of the charges. The accused claimed during the hearing that he and the two women had discussed having a "threesome," and went back to a hotel room. He claimed that they began kissing and fondling each other until Ms. Cook left, after which he and Ms. Brooder began masturbating each other. The accused denied that any sexual intercourse occurred, that either woman was excessively intoxicated, or that either woman passed out.

f. The accused has also discussed the charged offenses on various occasions with several of his law school classmates. In particular, the accused told Mr. Alex Lowder in 2007 that both women were intoxicated and that one of them had passed out, but he did not have sex with either woman. The accused also told Mr. Joseph Gorman in 2007 that he did not have sex with either woman, but that he was concerned about the possibility of surveillance camera footage being recovered from the lobby of the hotel because both women were drunk and it would not look good for him.

g. Ms. Brooder saved a pair of basketball shorts and a pair of jeans that she had worn after leaving the accused's room on the night in question. Both items of clothing were tested in January and February of 2009 by the U.S. Army Criminal Investigative Laboratory (USACIL), which confirmed the presence of the accused's semen on the crotch of the basketball shorts.

h. In the spring of 2008, a former girlfriend of the accused's, Ms. Nicole Cusack, revealed to several friends that in December of 2006 in Seattle, WA, she had experienced an incident with the accused similar to that reported by Ms. Brooder. Ms. Cusack had gone out for the evening with the accused, and at some point in the evening had become extremely intoxicated and required the accused's assistance to get back to her sister's house. Ms. Cusack's memory of the rest of the evening includes substantial amounts of "lost time;" however, Ms. Cusack could recall vomiting on herself, being in the shower and falling down with the accused laughing at her, and waking up in bed with the accused having sex with her. Ms. Cusack and the accused later discussed the night in question via Gchat.

i. The day after the Seattle incident, the accused called another classmate, Mr. Anand Upadhye, and told Mr. Upadhye that Ms. Cusack had gotten extremely intoxicated to the point of vomiting on herself and falling down naked in the shower. The accused did not mention any sexual contact.

j. When the accused became aware that Ms. Cusack had reported the Seattle incident in March of 2008, he contacted Mr. Gorman via Gchat. In that Gchat, the accused discussed both the claim by Ms. Cusack, acknowledging that the claim by Ms. Cusack related to a time that they had "hooked up," and the ongoing investigation regarding the New Orleans incident. The accused asked Mr. Gorman and Mr. Lowder to speak to Ms. Cusack and encourage her to stop talking about the Seattle incident, including stating in a Gchat message that "I just don't think

she knows that her off-the-cuff remarks can be very damaging." After Mr. Gorman and Mr. Lowder persuaded Ms. Cusack to stop talking about the Seattle incident, Mr. Gorman informed the accused via Gchat and the accused responded "I appreciate it."

k. In October of 2008, Naval Criminal Investigative Service (NCIS) Special Agent (SA) J.R. Burge interviewed Capt Christopher Blosser, a close friend of the accused and a classmate at USD Law School. After that interview, Capt Blosser discussed the ongoing NCIS investigation via Gchat with the accused. In those Gchat messages, the accused claimed that NCIS would not need to be talking to other law school students if they had evidence against him.

l. At an Article 32 hearing in April 2010, the detailed defense counsel, Capt Hur, cross-examined Ms. Cusack extensively regarding her relationship with the accused. Capt Hur attempted to cross-examine Ms. Cusack regarding alleged prior drug use and her sexual predisposition. When government counsel objected to both lines of questioning, Capt Hur repeatedly referenced and brandished a printed stack of Gmail and Gchat messages between the accused and Ms. Cusack, but did not disclose these documents to the government.

m. The Article 32 investigating officer (IO) recommended that the charges relating to the New Orleans incident be referred to this general court-martial. The IO recommended that the charges relating to Ms. Cusack be dismissed, due to Ms. Cusack's relationship with the accused after the Seattle incident. The government has given notice of intent to offer evidence of the Seattle incident involving Ms. Cusack pursuant to Mil.R.Evid. 404(b) and 413.

n. On 28 June 2010, the government provided notice, pursuant to 18 U.S.C. 2703(b), that the government intends to obtain stored communications by the accused maintained on his

google.com account. [1] The trial counsel consulted with a trial attorney at the Department of Justice Computer Crimes and Intellectual Property Section regarding proper procedure under 18 U.S.C. 2703 prior to sending the notice. The government's notice did not mention privileged attorney-client communication in any way. In fact, the emergency motion filed by the defense on 29 June 2010 was the first time that the government became aware that the accused and defense counsel used the accused's Google account to exchange purportedly privileged information.

3. Discussion

a. The government may obtain stored communications over 180 days old via a subpoena with prior notice to the subscriber.

The defense motion correctly cites 18 U.S.C. 2703 as the source of applicable law governing this case. However, the defense misstates the law regarding the government's burden to obtain information under the statute. In particular, the defense completely ignores the black-letter distinction in the statute between the requirements for obtaining information via subpoena pursuant to 18 U.S.C. 2703(b)(1)(B)(i), and obtaining information via a court order pursuant to 18 U.S.C. 2703(b)(1)(B)(ii) and 2703(d). The defense motion simply assumes that the government is required to obtain a 2703(d) order by making a showing to the court of the necessity for such an order, yet disregards the fact that the statute clearly states that a subpoena and a court order are alternatives under the statute for different degrees of discovery. See 18 U.S.C. 2703(b) ("A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection… with prior notice from the governmental entity

[1] The government concedes that the notice should have stated that the government sought a subpoena under Article 47, UCMJ rather than a federal grand jury subpoena.

to the subscriber or customer if the governmental entity— **(i)** uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; *or* **(ii)** obtains a court order for such disclosure under subsection (d) of this section") (emphasis added).

The Stored Communications Act, 18 U.S.C. 2703 provides for varying degrees of government access to stored communications, such as emails or chat messages, with varying levels of process. See generally Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending it*, 72 Geo. Wash. L. Rev. 1208 (2004) (hereinafter Kerr). "A simple subpoena combined with prior notice compels three categories of information: basic subscriber information, plus any opened e-mails or other permanently held files… plus any contents in temporary "electronic storage" such as unretrieved e-mails in storage for more than 180 days. A 2703(d) order plus prior notice is sufficient to compel all noncontent records, plus any opened e-mails or other permanently held files … plus any contents in temporary "electronic storage" such as unretrieved e-mails in storage for more than 180 days. Put another way, a 2703(d) order plus prior notice compels everything except contents in temporary "electronic storage" 180 days or less. Finally, a search warrant is needed to compel everything stored in an account." *Id*. at 1222-23. A chart summarizing the available means of process to obtain varying types of stored content is in Kerr at 1223.

"One interesting aspect of § 2703 is that it generally allows the government to obtain greater process when lesser process will do. If a provision of § 2703 allows government agents to compel information with a subpoena, it also allows them to obtain that information with a 2703(d) order; if it allows agents to obtain information with a 2703(d) order, then a search warrant is also acceptable. Why might the government want this option? The main reason is efficiency. Investigators may decide that they need to compel several types of information, some

of which can be obtained with lesser process and some of which requires greater process. The 'greater includes the lesser' rule in § 2703 allows the government to obtain only one court order--whatever process is greatest--and compel all of the information in one order all at once." Kerr at 1220.

In the present case, the government intends to seek information for which only a subpoena is necessary: stored communications over 180 days old. 18 U.S.C. 2703(b)(1)(B) clearly provides the government with alternative means of obtaining these communications: a subpoena *or* a 2703(d) order. By way of illustration of the "greater includes the lesser" rule discussed *supra*, if the government sought both the communications at issue here (requiring either a subpoena, warrant, or 2703(d) order) and the type of records described in 18 U.S.C. 2703(c) (requiring either a warrant or 2703(d) order), it could obtain both via a 2703(d) order. However, to obtain only communications older than 180 days, the government need only issue a subpoena with prior notice. See 18 U.S.C. 2703(b)(1)(B)(i).

Article 47 of the UCMJ, as implemented by R.C.M. 703(e)(2)(C), which authorizes a trial counsel to issue a subpoena duces tecum relating to a referred court-martial, is clearly the type of subpoena contemplated by 18 U.S.C. 2703(b)(1)(B)(i). The government may use a subpoena under 2703(b) as long as the government gives prior notice to the subscriber, which the government has done here. In order to issue such a subpoena, the trial counsel needs only a good faith belief that the requested evidence may be relevant at court-martial. The government is under no burden to make the same showing to the court required by 18 U.S.C. 2703(d) when the government seeks only a subpoena.

b. Statements of the accused regarding the charged offenses or relevant uncharged misconduct are material and relevant evidence.

Under R.C.M. 703(f)(1), "Each party is entitled to the production of evidence which is relevant and necessary." Mil.R.Evid. 401 establishes "a low threshold of relevance." *United States v. Reece,* 25 M.J. 93, 95 (C.M.A. 1987). As noted in the nonbinding Discussion accompanying R.C.M. 703(f)(1): "Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue."

The accused's version of the charged events is clearly "a matter in issue" in any criminal case. Statements of the accused are particularly important in a case where the accused has made conflicting and evolving statements regarding the charged offenses and uncharged misconduct, and when the accused's version of events arguably contradicts the available physical evidence. In this case, the accused's Gmail and Gchat conversations with Capt Blosser, Mr. Gorman, and Ms. Cusack indicate clearly that the accused's stored Gmail and Gchat conversations contain discussion of the charged offenses and relevant uncharged misconduct. Additionally, the accused clearly demonstrated a desire to discuss the events surrounding the charges with various law school classmates. These facts, taken in combination with the overall pervasiveness of Gmail and Gchat as a means of communication in law school at the time of the charged acts, and the accused's frequent use of Gmail and Gchat, support a reasonable inference that the accused used his Google account to discuss the charged offenses. Such communications are a unique source of evidence because they provide a literally verbatim transcript of the statements of the accused that cannot be obtained from any other source. Although the government cannot describe the communications sought with complete specificity because the trial counsel has not yet seen them, the government has a reasonable expectation that such communications will be

found. This is enough to support the issuance of a subpoena under 18 U.S.C. 2703(b), because it is grounded in good faith beyond mere speculation.

The Supreme Court has adopted a four-factor test to determine the necessity of a subpoena under the Federal Rules of Criminal Procedure when an opposing party has made a motion to quash the subpoena. Under this test, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition." *United States v. Nixon*, 418 U.S. 683, 699-700 (1974).

It is not clear whether the *Nixon* standard applies under the Manual for Courts-Martial as well as the Federal Rules of Criminal Procedure. A Westlaw search by the trial counsel found that the only citation to the *Nixon* four-factor test in a military case was in a dissent. *United States v. Wuterich*, 67 M.J. 63, 84 (C.A.A.F. 2008) (Ryan, J., dissenting). However, even assuming that the *Nixon* standard applies, the government easily meets this burden. With respect to the first and final factors, the government has a good faith basis to believe that relevant communications by the accused will be contained in the emails and chats sought by the government. With respect to the second and third factors, this information cannot be obtained except through a subpoena, and due to the likely volume of information, the government will need to inspect this information in advance of trial.

In *Nixon*, the Special Prosecutor sought to compel production of the so-called "Watergate Tapes" from the President. The Special Prosecutor introduced evidence that some of the tapes

contained conversations relating to the break-ins. *Nixon*, 418 U.S. at 700. Although the Special Prosecutor could not describe the contents of the remaining tapes, the court held that "the identity of the participants and the time and place of the conversations, taken in their total context, permit a rational inference that at least part of the conversations relate to the offenses charged in the indictment." *Id*. Similarly, in this case, the combination of 1) the Gmail and Gchat messages of which the government is already aware in which the accused discussed the charged offenses and relevant uncharged misconduct, 2) the accused's willingness to discuss the charged offenses with his classmates through various forms of communication, and 3) the frequency of the accused's use of Gmail and Gchat, permit a rational inference that at least some of the communications by the accused sought by the government relate either to the charged offenses or to relevant uncharged misconduct.

c. The accused cannot preclude discovery of unprotected information on his email account simply by corresponding with defense counsel using the same account.

The defense accuses the government, without any basis in fact, of attempting to obtain privileged attorney-client communications. In fact, the government does not *want* to see any potentially privileged attorney-client communications because the discovery of such communications could taint the government's ability to use other evidence obtained independently but later in time. The defense claim in essence is that because the government is seeking emails, and the accused may have emailed his defense counsel, that the government is seeking emails between the accused and defense counsel. This argument falls apart on its face.

The vast majority of the emails on the accused's Google account do not implicate attorney-client privilege in any form. The defense argument, in effect, is that the accused can turn his entire email account into a fortress of privilege immune from discovery simply by

sending a single email to defense counsel. The defense has completely failed to articulate why Mil.R.Evid. 502 prevents the government from discovering the remaining portions of the accused's email account, and therefore to carry its burden on this motion.

d. The military judge or a neutral third party may conduct an in camera review of any electronic discovery provided by Google in order to separate privileged and unprivileged material.

Under R.C.M. 703(f)(4)(C), when a party has requested relief from a subpoena or order of production, "the military judge may direct that the evidence be submitted to the military judge for an in camera inspection in order to determine whether such relief should be granted." See *Wuterich*, 67 M.J. at 79. An in camera review may be conducted to determine whether a claimed privilege or an exception applies to certain evidence. See Mil.R.Evid. 505(i)(4), Mil.R.Evid. 506(i), Mil.R.Evid. 513(e)(3). An in camera review is an appropriate means to determine whether an exception to attorney-client privilege applies to certain communications. *United States v. Zolin*, 491 U.S. 554, 565-570 (1989).

The Court in *Zolin* noted that *in camera* inspection ... is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure." *Id*. at 572 (citation omitted). In this case, the in camera review sought by the government is even less intrusive, because the government does not seek to have the military judge review the contents of privileged communications in order to determine if an exception applies, only to have the military judge sort the accused's emails between those to which the privilege applies and those which implicate no attorney-client privilege at all. Such a remedy is a straightforward, practical way to address any privilege issues raised by defense counsel.

The government can structure the subpoena so that responsive records would be sent under seal to a neutral officer at the Joint Law Center, MCAS Miramar, rather than the trial counsel, and subsequently provided under seal to the military judge for an in camera review. The electronic discovery produced by Google in response to an 18 U.S.C. 2703(b) subpoena may be searched and sorted by sender and recipient. In order to separate privileged communications between the accused and counsel from the vast bulk of unprivileged emails and chats in the accused's account, the military judge would not even need to view the content of any such communications- the necessary determination regarding the privileged or unprivileged status of any email could be determined simply by viewing the "to" and "from" lines of each email, which would typically be visible without even opening the email. Once the privileged information is removed, the military judge may provide the remainder of the unprivileged communications to the trial counsel.

e. The defense request to call the trial counsel as a witness on the motion should be denied.

The defense motion included a request for the production of the trial counsel, Captain Evan Day, USMC, as a witness on the motion. That request is denied. Even by the standards for production of an ordinary witness, the defense has failed provide a synopsis of expected testimony sufficient to show the relevance and necessity of opposing counsel as a witness. See R.C.M. 703(c)(2)(B)(i). Nothing in the summary of facts in the defense motion requires the testimony of the trial counsel. Of course, the burden for production of a witness is significantly higher when a party seeks to call opposing counsel to the stand, particularly if the request potentially implicates the ethical rule that an attorney may not act as a witness and an advocate in the same case. Calling opposing counsel merely to create a conflict and potential basis for withdrawal is an improper basis for a witness request.

Neither can the defense request be justified by a desire on the part of the defense to examine the trial counsel regarding the government's investigation and prosecution strategy. Any such questions asked by the defense would be precluded by work-product privilege and not subject to discovery. The defense request to produce opposing counsel is nothing more than a cheap attempt to interfere with the opposing counsel's duties and the government's investigation and prosecution of its case.

4. <u>Evidence and Burden of Proof</u>

a. The government offers the following evidence on this motion:

Encl (1): Excerpt from Article 32 Investigating Officer's report dated 5 May 2010 (Summary of Witness Testimony)

Encl (2): Transcript of USD "Critical Issues Board"

Encl (3): USACIL DNA branch reports

Encl (4): Sworn statement of Anand Upadhye

Encl (5): Gchat messages between accused and Joseph Gorman

Encl (6): Gchat messages between accused and Capt Blosser

The government may offer additional evidence on this motion, to include the testimony of an appropriate communications specialist (06XX Military Occupational Specialty) in order to demonstrate the practicality of the in camera review requested by the government.

b. The defense bears the burden of proof on this motion as the moving party.

5. <u>Relief Requested:</u>

a. The government requests that the court deny the motion.

b. The government requests that, if the court denies the motion, the court conduct an in camera review of the response to the subpoena provided by Google.

6. Oral Argument

The government desires oral argument on this motion. However, if the defense cannot or will not appear in court prior to 6 August 2010 to argue the motion that they have brought, the government requests that the court decide this motion on the written submissions in order to avoid undue delay.

//s//
E. S. DAY
Captain, U.S. Marine Corps
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this motion was provided to the court and opposing counsel by electronic mail on 13 July 2010.

//s//
E. S. DAY
Captain, U.S. Marine Corps
Trial Counsel