NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

	)	GENERAL COURT-MARTIAL
U N I T E D S T A T E S	)	
	)	GOVERNMENT RESPONSE TO
v.	)	DEFENSE MOTION FOR APPROPRIATE
	)	RELIEF
	)	
Douglas S. Wacker	)	(Compel discovery, production of privileged
XXX XX 3913	)	records, site visits, and responses to
Captain	)	interrogatories)
U.S. Marine Corps	)	
		28 October 2010

1. Nature of Motion

This is the government's response (in part) to the defense motion to compel discovery. For purposes of simplicity, the government will submit its response to the portions of the defense motion addressing production of lay or expert witnesses in a separate motion. The government opposes the motion.

2. Summary of Facts

The government concurs that the two defense requests for discovery in this case were submitted by the defense on 18 June 2010 and 23 August 2010. The government disputes that certain portions of those requests were "never answered," as the government fully answered the defense discovery requests on 1 July 2010 and 25 August 2010.

With regard to the site visit requests, the government notes that the defense, by its own admission, has already taken an investigative trip to New Orleans at government expense. The defense request for a site visit to Seattle is currently in abeyance, pending the result of the defense motion to exclude evidence of uncharged misconduct occurring in Seattle.

The government has provided extensive discovery to the defense in this case. In addition to the complete NCIS investigation provided to the defense during prior proceedings at MCRD,

San Diego, which was several hundred pages long, the government has provided the defense with several hundred pages of additional documentation obtained by the government since the preferral of charges on board MCAS Miramar.

At the request of the trial counsel, NCIS SA M.J. Lewis performed NCIC checks on Jessica Brooder, Elizabeth Cook, Nicole Cusack, and Rebecca Abdullah. All positive results were provided by email to the defense. The trial counsel represents to the court that a diligent search for any derogatory information contained in the personnel files of SA J.R. Burge and SA Lewis has been performed with negative results.

3. Discussion

Article 46, UCMJ provides that "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence". R.C.M. 701 develops this further and explains that "[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence." Our courts have recognized that "[m]iltary law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts." *United States v. Reece*, 25 M.J. 93, 94 (C.M.A. 1987) *citing United States v. Mougenel*, 6 M.J. 589, 591 (A.F.C.M.R. 1978) *pet. denied* 6 M.J. 194 (1979). The information requested must be relevant and necessary to the subject of the inquiry, and the request must be reasonable. *Id.* at 95. In addition, "[d]espite the lengthy military tradition of generous disclosure, there is no unqualified right to have everything for which one may ask." *United States v. Branoff* 34 M.J. 612, 617-618 (A.F.C.M.R. 1992) (*rev'd on other grounds*).

Relevance is defined by M.R.E. 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence." Evidence is "necessary" when it would contribute to a party's presentation of the case in some positive way on a matter in issue. R.C.M. 703(f)(1) and *Reece* at 95. Whether a request is reasonable is fact-specific. *Reece* at 95. Finally, requests which are "speculative" and/or "insubstantial" are properly denied as irrelevant and unnecessary. *See United States v. Briggs* 46 M.J. 699, 702 (A.F.Ct.Crim.App.1996). In addition, requests for privileged information may properly be denied. For the reasons outlined below, the defense requests in this case should be denied as irrelevant and unreasonable.

Military discovery process does not require the government to waste time answering frivolous defense interrogatories masquerading as a "Bill of Particulars Request" or a request to calculate time for speedy trial purposes

Although military discovery procedure is, in numerous respects, more extensive than in civilian practice, military criminal discovery has no equivalent to the civil court practice of serving written interrogatories on the opposing party. See Fed.R.Civ.Pro. 33. The Manual for Courts-Martial does provide the defense an opportunity to request a "Bill of Particulars" if and only if a Bill of Particulars is necessary to provide the defense adequate notice of the crimes charged:

> The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger or surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.
>
> A bill of particulars should not be used to conduct discovery of the Government's theory of the case, to force detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial.

R.C.M. 906(b)(6), discussion. In light of this discussion, it is worth reproducing the defense request for a "Bill of Particulars" in full:

a. Charge I, Spec 1: Exactly how did Capt Wacker attempt to rape Elizabeth Easley? Does the government allege force or threats were used here against Ms. Easley? Does the government allege that Ms. Easley was rendered unconscious by Captain Wacker, if so how?

b. Charge II, Spec 1: Exactly how did Capt Wacker rape Jessica Brooder? Does the government allege force or threats were used here against Ms. Brooder? Does the government allege that Ms. Brooder was rendered unconscious by Captain Wacker, if so how?

c. Charge III, Spec 1: Is the conduct charged in this specification distinct in any way from the conduct described at Charge I, Spec 1? If so, how?

d. Charge III, Spec 2: Is the conduct charged in this specification distinct in any way from the conduct described at Charge I, Spec 1 or Charge III, Spec 1? If so, how?

e. Charge III, Spec 3: Is the conduct charged in this specification distinct in any way from the conduct described at Charge II, Spec 1? If so, how?

f. Charge III, Spec 4: What does the government mean by sexual intercourse in this charge? What evidence (if any) does the government have about Capt Wacker's intent to deceive?

None of the various requests by the defense even truly meet the standard for a bill of particulars, defined by Black's Law Dictionary as "a formal, detailed statement of the claims or charges brought by a plaintiff or a prosecutor." As such, the defense request is little more than a pretext for serving written interrogatories on the government in order to obtain information about the government's trial strategy and theory of the case. Even if the federal civil rules regarding interrogatories were applicable, the defense request would still fail because it is a request to conduct discovery of the government's theory of the case and restrict the government's proof at trial, rather than to provide factual information. The defense request for a so-called bill of particulars falls plainly into the category of requests which do not justify a response under R.C.M. 906(b)(6).

The defense is sufficiently on notice of the charges against the accused to prepare for trial, particularly in light of the extensive history of litigation regarding the specific charged offenses in this case. The defense has had no problem articulating a theory of the case during the Article 32 proceeding and in the various "fact" sections of the defense motions. Therefore, the defense request for a bill of particulars is a frivolous attempt to waste the trial counsel's (and now the court's) time and therefore should be denied.

The defense request to have the government calculate the number of days of excludable delay for speedy trial purposes is similarly vacuous. All delay since the preferral of charges on 7 January 2010 has been negotiated between the trial and the defense counsel in this case. Therefore, the defense has access to the information necessary to make any speedy trial calculation.

<u>The defense has not demonstrated its entitlement to additional privileged mental health counseling records relating to the alleged victims in this case.</u>

Although the defense has previously been voluntarily provided extensive records of mental health counseling with regard to Ms. Cook and Ms. Brooder, mainly relating to their efforts to normalize their lives after having been assaulted by the accused, the defense is still on a fishing expedition to find additional records. The defense has not shown why they would be entitled to any additional records, even if they existed.

The rule of privilege in Mil.R.Evid. 513(a) protects "a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." The records requested by the defense clearly fall within this category. Although the rule sets out several exceptions where the privilege does not apply, the defense makes no showing why any exception would apply in this

case. There is no exception under Mil.R.Evid. 513 for when the defense counsel finds the privilege inconvenient, pretends that it does not exist, and hopes that the government and the court will do the same.

In order to obtain privileged mental health records under Mil.R.Evid. 513, the moving party must make a threshold showing that the inspection might yield evidence that an exception to nondisclosure applied. *United States v. Klemick,* 65 M.J. 576, 579 (N-M.Ct.Crim.App. 2006). The moving party should: 1) set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to M.R.E. 513; 2) determine if the information sought is merely cumulative of other information available; and 3) make reasonable efforts to obtain the same or substantially similar information through non-privileged sources. *Id*. at 580. At this time, the defense has failed to make such a threshold showing.

<u>The defense fails to meet its burden to show why the defense is entitled to a second trip to New Orleans at government expense.</u>

The defense concedes that the defense counsel and a defense clerk have already traveled to New Orleans at government expense to investigate this case. In support of its motion to compel funding for a second trip, the defense does little more than to assert that the clerk who originally travelled with the defense to New Orleans has since changed duty stations. The defense provides no other information about the identity of this unnamed clerk, where the unnamed clerk is now stationed, and what information this unnamed clerk would supposedly testify to. Additionally, the defense does not explain how any testimony offered by the unidentified clerk could not be offered by other witnesses, or would do any more than lay the foundation for unambiguous factual information that could be the subject of a stipulation of fact or expected testimony. The defense does not explain why the defense was unable to obtain

information regarding hotel employees the first time the defense traveled to New Orleans, or why the defense cannot obtain that information by other means now. Given that the defense bears the burden on this motion and has failed to carry it, the defense motion to compel additional funding for a site visit should be denied.

Regarding the motion to compel a site visit to Seattle, that request will be reviewed by the convening authority at the appropriate time if the defense motion to exclude evidence under Mil.R.Evid. 413 is denied. Conversely, if the defense Mil.R.Evid. 413 motion is granted, the defense request to travel to Seattle would be mooted.

The defense request for production of potential impeachment material has been complied with and is therefore moot.

As discussed in the summary of facts, the government has made a diligent search for impeachment material regarding the specific government witnesses named by the defense, and disclosed any positive results- even those which are entirely irrelevant. However much the defense may desire that more impeachment material be produced, the government is under no obligation to conjure up derogatory material when it cannot be produced by a diligent search. Therefore, this portion of the defense motion is moot.

The defense request for production of emails relating to alleged unlawful command influence is irrelevant, based on speculation, and intrudes on privileged information.

As discussed in the government's response to the defense motion to dismiss the current charges due to alleged unlawful command influence (UCI) in a former proceeding, the defense claims of UCI in previous proceedings are entirely moot. Therefore, any emails that may hypothetically related to the defense's previous UCI motion on board MCRD San Diego are irrelevant. Moreover, the defense simply refers to a broad category of "UCI emails" without providing any specific proffer of what the defense expects to find in the email accounts it seeks

disclosed from various senior officers, much less articulating facts why the defense expects to find it there. Once again, the defense plan is apparent to maximize the discovery burden on the government, while doing the absolute minimum defense homework to even explain why discovery is requested other than making vague allegations of UCI. The defense provides no proffer whatsoever, even speculation, regarding the relevance or necessity of documentation pertaining to the accused's transfer from MCRD San Diego to MCAS Miramar.

Additionally, the defense request includes information that is privileged under Mil.R.Evid. 502. The rule establishes a general rule of privilege between a client and a lawyer. Under the rule, a "client" includes a "person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer." The government or a command constitutes a client under this rule. Federal courts have recognized that the government – just like corporations and persons – is entitled to the attorney-client privilege. *See, e.g., In re Lindsey*, 148 F.3d 1100, 1104 (D.C. Cir 1998) ("Courts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts."). For example, the First Circuit found an attorney-client privilege "between the Corps of Engineers and the U.S. Attorney in connection with anticipated litigation." *Town of Norfolk v. Army Corps of Eng'rs*, 968 F.2d 1438, 1457 (1st Cir. 1992). The defense requests for emails from staff judge advocates, and communications between the convening authority (or his chief of staff), intrude on the privilege without stating that any exception applies. Even if the court finds that some of these emails are discoverable, any order should be carefully tailored to avoid intruding on privileged communications between the convening authority and any attorney providing legal advice to the command.

<u>Facebook and MySpace entries</u>

The defense also fails to demonstrate the necessity for entries from social networking websites from the alleged victims in this case. The defense claim that the victims have "behaved more like prosecutors hunting their defendant instead of like victims" is not only downright offensive, it still does not show how any myspace or facebook entries from the alleged victims would be relevant. The government respectfully submits that, whatever ideas the defense counsel may have about how a 24-year-old law student *should* behave after being raped, dropping out of classes, delaying her legal education and transferring law schools in order to avoid seeing her attacker, the prospect that the victims in this case would have some combination of anger and interest in the judicial process is not particularly shocking by any stretch of the imagination. In any event, the defense does not provide any clue what evidence they expect to gain that is probative of any fact at issue in the case, and they are not entitled to discovery of private information solely based on speculation or a desire for a fishing expedition.

Victims' addresses

The email addresses and phone numbers for Ms. Brooder, Ms. Cook, and Ms. Cusack are all included in discovery that has been previously provided to the defense. Therefore, the request for email addresses and phone numbers is moot. With regard to current residential addresses for the alleged victims, the defense provides no explanation whatsoever for why this information is vital or even in any way helpful for the preparation of the defense case. However, the government is concerned about the safety of the victims, and their concerns for their own safety, if their addresses are disclosed to the accused. Therefore, the government respectfully requests that the court deny the defense motion to compel disclosure of the victims' home addresses and, in the alternative, if disclosure to the defense is required, that the court order the defense counsel not to disclose the victims' addresses to the accused.

4. Relief Requested

The government requests that the court deny the motion.

5. Evidence and burden of proof

The defense bears the burden of proof by a preponderance of the evidence as the moving party. As evidence, the government offers the government's discovery log and the trial counsel's email dated 26 August 2010 pertaining to background checks on government witnesses.[1]

6. Oral Argument

The government desires oral argument on this motion only in rebuttal or to answer any questions from the court.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of this response was served on the court and defense counsel by electronic mail on 28 October 2010.

E. S. DAY
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Trial Counsel

[1] Previously provided as Enclosure (4) to the government's motion to exclude improper cross-examination of Ms. Cook and Ms. Brooder.