IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201100378
Heather D. LUBICH, Electronics Technician Second Class (E-5) U.S. Navy Appellant	)	USCA Dkt. No. 12-0555/NA

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

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Issue Granted

WHETHER THE MILITARY JUDGE ERRED BY OVERRULING DEFENSE COUNSEL'S FOUNDATION AND AUTHENTICATION OBJECTIONS AND ADMITTING COMPUTERIZED DATA EVIDENCE GATHERED BY AN UNNAMED NMCI ANALYST WHO USED AN UNIDENTIFIED PROCESS WITH UNKNOWN RELIABILITY TO COLLECT DATA RELATED TO APPELLANT'S NETWORK USER ACTIVITY.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006), because Appellant's approved sentence included a punitive discharge. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A panel of members with enlisted representation sitting as a special court-martial convicted Appellant, contrary to her pleas, of one specification of attempted larceny, one specification of wrongfully and knowingly transferring, possessing, or using a means of identification of another person, and one specification of impersonating a commissioned officer with the intent to defraud, in violation of Articles 80 of 134, UCMJ, 10 U.S.C. §§ 880 and 934 (2006). The Members sentenced her to forty-five days' confinement, forfeiture of $1,300 pay per month for two months, and a bad-conduct discharge. The

Convening Authority approved the sentence and, except for the bad-conduct discharge, ordered it executed. On direct appeal, the Navy-Marine Court of Criminal Appeals affirmed the findings and sentence. This Court granted review on September 6, 2012.

Statement of Facts

The Government charged Appellant with fraudulently impersonating her supervisor, a commissioned officer, by using her supervisor's name, personal information, and Leave and Earnings Statement (LES) to apply for a $10,000 loan from Omni Financial, Inc. (J.A. 15; Charge Sheet, Nov. 9, 2010.)

In the Government's case-in-chief, the Government called Mr. Erik Schmidt, a cyber forensics examiner employed by Naval Criminal Investigative Service (NCIS). (J.A. 18.) Mr. Schmidt forensically examined six Compact Discs-Read Only Memory (CD-ROMs) containing Appellant's Navy-Marine Corps Intranet (NMCI) account data. (J.A. 18-19.) After receiving an NMCI data request form from NCIS, NMCI's Information Assurance Department provided the discs to NCIS. (J.A. 19, 28.) Mr. Schmidt testified that the data on the CD-ROM were cookies that were automatically created by websites visited by the user of Heather Lubich's NMCI account. (J.A. 19-21.) Using an automated forensics tool programs, EnCase Forensics Tools and AccessData Forensics Tool Kit, he processed the data to create a 179-page computer-generated report, Prosecution Exhibit 19. (J.A. 19-20;

Pros. Ex. 19.) Prosecution Exhibit 19 is titled Internet Explorer Cookie Index. (Pros. Ex. 19.) Appellant's NMCI username appears repeatedly throughout Prosecution Exhibit 19. (Pros. Ex. 19.)

The Trial Defense Counsel objected when the Government offered Prosecution Exhibit 19 on the grounds of Mr. Schmidt's personal knowledge to authenticate the exhibit. (J.A. 20.) The Military Judge directed an Article 39(a) session to address this objection. (J.A. 21.) Upon hearing Trial Defense Counsel explain his objection, the Military Judge expanded Trial Defense Counsel's objection to also include an objection based on the Confrontation Clause. (J.A. 25.) Also upon hearing the explanation of Trial Defense Counsel's objection, Trial Counsel opined Trial Defense Counsel would have the same objection to Prosecution Exhibit 23. (J.A. 26.) Trial Defense Counsel confirmed this. (J.A. 26-27.)

Prosecution Exhibit 23 is a second internet history report showing Appellant's NMCI account internet history. (J.A. 31-32.) Prosecution Exhibit 23, however, was generated in a different manner using the protected storage system provider section of the NTUSER.DAT file. (J.A. 30; Pros. Ex. 23.) Similar to the internet cookie profile for an NMCI account, the NTUSER.DAT file can be retrieved to reveal which internet sites Appellant's NMCI account visited. (J.A. 31.) Also similar to Prosecution

Exhibit 19, Prosecution Exhibit 23 was generated using automated forensic tools and was based on the data on the CD-ROM provided by NMCI. (J.A. 31-32; Pros. Ex. 23.) Appellant's NMCI username appears repeatedly throughout Prosecution Exhibit 23. (Pros. Ex. 23.)

At the Article 39(a) session, Mr. Schmidt testified that he had contacted NMCI and confirmed that NMCI used an automated process to produce Appellant's NMCI account data. (J.A. 28.) In this automatic process, he testified that NMCI only entered Appellant's user account information and the process automatically searched the server logs and then the work station, on which Appellant had logged onto, and remotely pulled Appellant's NMCI data. (J.A. 28.) Appellant's NMCI data contained "NTUSER.DAT" files bearing Appellant's user name and password. (J.A. 31, 43.)

Mr. Schmidt testified that NMCI informed him that after running this automated process, NMCI copied the automatically retrieved NMCI data to a CD-ROM data disc and normally delivers the disc via FedEx to his office. (J.A. 28, 32.) In this case, an NMCI employee delivered the CD-ROM directly into Mr. Schmidt's hands. (J.A. 32.) Mr. Schmidt further testified that NMCI informed him that NMCI's only interaction with actual data would have been their copying it to the data disc. (J.A. 29.) Mr. Schmidt on cross-examination acknowledged that he

could not testify to who personally verified which computers Appellant had used, as he was not familiar with "the entire process in that manner" and only understood the NMCI process as it had been "explained to [him] over the phone" by NMCI's Information Assurance Office. (J.A. 29.)

Upon hearing Mr. Schmidt's testimony and counsels' arguments regarding authentication and the Confrontation Clause, the Military Judge made the following ruling:

> I believe that argument goes more to the weight of the evidence, and you certainly can explore that in cross-examination. The objection is overruled. I find that both Prosecution Exhibits 19 and 23 for identification have been sufficiently authenticated and that the Confrontation Clause is not implicated because we're dealing with an automated process, no conclusions in these documents themselves and, again, it's an automated process with very little discretion involved on the part of the person that was obtaining the data.
>
> So Prosecution Exhibits 19 and 23 for identification are received into evidence.

(J.A. 34.)

Summary of Argument

The Military Judge did not abuse her discretion in admitting Prosecution Exhibits 19 and 23, as the Military Judge need only be satisfied, by a preponderance of the evidence, that the matter in question was what it purported to be. Appellant's NMCI account data was automatically stored and collected by an NMCI process requiring minimal human interaction. Giving this automated process, and the lack of any allegation or appearance

of tampering, the NMCI data disc provided to Mr. Schmidt contained only machine-generated data, which Mr. Schmidt was able to confirm his understanding of its collection process and authenticity through communications with NMCI.

Accordingly, the Military Judge did not err when he found by a preponderance of the evidence that Prosecution Exhibits 19 and 23 were what they purported to be. Mr. Schmidt's testimony provided a sufficient basis detailing NMCI's collection process and his analysis of the evidence to show a reasonable probability that the disc he received from NMCI contained Appellant's NMCI account data. His not personally collecting the data in question goes to its weight and not admissibility.

Argument

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION IN ALLOWING PROSECUTION EXHIBITS 19 AND 23 BECAUSE MR. SCHMIDT HAD SUFFICIENT KNOWLEDGE OF THE FORENSIC REPORT'S DATA COLLECTION TO PROPERLY AUTHENTICATE THE EXHIBITS.

A. The Military Judge did not abuse her discretion in allowing Mr. Schmidt to authenticate Appellant's NMCI data.

1. Standard of review.

A military judge's ruling admitting or excluding evidence is reviewed for an abuse of discretion. *United States v. Harris*, 55 M.J. 433, 438. The abuse of discretion standard is a strict

one, calling for more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000).

2. Mr. Schmidt need only be generally familiar with NMCI's data collection process in order to lay proper foundation.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Mil. R. Evid. 901(a). This rule permits authentication of a document by the testimony of a witness who has knowledge that a "matter is what it is claimed to be." Mil. R. Evid. 901(b)(1).

"The requirement that the witness providing the foundation only be generally familiar with the process is eminently reasonable." *United States v. Garces*, 32 M.J. 345, 347 (C.M.A. 1991). "All that is required is that 'the witness is shown not only to have knowledge of the declarant's business, but also some knowledge of the particular activity of the business which generates the report.'" *Id*. at 348 (citing *United States v. Dababneh*, 28 M.J. 929, 936 (N-M.C.M.R. 1989).

In *Garces*, the court found that the witnesses, without personal knowledge of the actual collections of electronic funds, "showed sufficient understanding of the record systems to explain them to the military judge and to establish the reliability of the entries on the documents." *Garces,* 32 M.J.

at 347. There, the appellant was found guilty of an identity theft and credit card scheme. The employees of the merchants who sold the goods ordered by the appellant testified about other documents in the sales chain. *Id.* The witnesses described the process for taking credit-card orders, assessing losses to merchants, preparing shipping logs, and making tracer requests. *Id.* However, they were not the persons who made the actual entries and in some cases were not even the records' custodians. *Id.*

In *Dabaneh*, the case cited by *Garces*, the court held that "[i]t is not essential that the offering witness be the one who prepared the business records." *Dabaneh*, 28 M.J. at 937 (citation omitted). "Any person in a position to attest to their authenticity is competent to lay the requisite foundation for admissibility [under Fed.R.Evid. 803(6)]." *Id*. (citation omitted.) With regard to the business records hearsay exception, the *Dabaneh* court noted that the above test may not be directly applicable where the authenticating witnesses does not belong to the record-making organization. *Id*. at 937. Nonetheless, an individual who does not work at the organization that created the records may still be qualified to lay the business records exception if their organization integrates those documents into their own business records. *Id*.

Although courts have recognized that authentication of electronically stored information may require greater scrutiny than that required for the authentication of "hard copy" documents, they have been quick to reject calls to abandon the existing rules of evidence when doing so. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 542-43, 2007 U.S. Dist. LEXIS 33020 (D. Md. 2007). "Determining what degree of foundation is appropriate in any given case is in the judgment of the court." *Id.* at 544. "The required foundation will vary not only with the particular circumstances but also with the individual judge." *Id.* "Obviously, there is no 'one size fits all' approach that can be taken with authenticating evidence. . . ." *Id.*

Here, Mr. Schmidt through his own experience and discussions with NMCI confirmed that the data was collected through an "automated process." (J.A. 28.) Moreover, Appellant's NMCI username repeatedly appears throughout Prosecution Exhibits 19 and 23. (Pros. Ex. 19; Pros. Ex. 23.) Accordingly, he was sufficiently able to establish that Prosecution Exhibits 19 and 23 were a "cookie profiles" from Appellant's NMCI account. (J.A. 30.) In showing that the data disc was what it purported to be, Mr. Schmidt testified that he received the disc directly from NMCI, (J.A. 32), and that he had confirmed his understanding of NMCI's collection process by contacting NMCI and verifying the disc he received from NMCI

contained data that was gathered using NMCI's automated collection process, (J.A. 28). Moreover, he noted that this process was used to automatically pull Appellant's pre-saved user data from both the NMCI server logs and Appellant's work stations. (J.A. 28.) He testified that NMCI copied the collected information to the disc, delivered it to him, and that he had not manipulated the data in any manner. (J.A. 28-29, 32.) Indeed, Mr. Schmidt provided a great deal of information to the Military Judge and, though he did not work for NMCI, he was familiar with NMCI's collection process. (J.A. 28, 30, 32.)

Under *Garces* and *Dabaneh*, Mr. Schmidt need only be generally familiar with NMCI's process and not have personal knowledge of the actual evidence collection. Similar to the witnesses in *Garces* and *Dabaneh,* Mr. Schmidt offered testimony detailing the automated NMCI process used to retrieve Appellant's NMCI user data. (J.A. 24, 28, 30.) Although he did not personally initiate NMCI's automatic data search and verified his understanding of the data collection process through conversations with NMCI, *Garces* and *Debaneh* show he is not required to have personally collected the data in order for him to authenticate the data. And as there is no hearsay objection before this Court, there is no need for Mr. Schmidt to lay the additional foundation for the business records hearsay exception. Accordingly, all that was required is a general

understanding of the process, of which Mr. Schmidt was able to testify.

Appellant cites *Lorraine v. Markel Am. Ins. Co.*, a civil action taken in the district court of Maryland, to relay "the unique issues concerning authenticity and accuracy" of computer data reporting. (Appellant's Br. at 9.) However, the *Lorraine* court notes that although computer data may require greater scrutiny than "hard copy" documents, courts have been "quick to reject calls to abandon the existing rules of evidence when doing so. *Lorraine*, 241 F.R.D. at 542-43. The *Lorraine* court goes on to acknowledge that "[d]etermining what degree of foundation is appropriate in any given case is in the judgment of the court." *Id.* at 544. And that the "the required foundation will vary not only with the particular circumstances but also with the individual judge." *Id.* Given NMCI collected the data through an automated process, Appellant's NMCI username appears through out the data, and Mr. Schmidt spoke with NMCI about their automated collection process, the facts of this case show the Military Judge did not abuse her discretion in admitting Prosecution Exhibits 19 and 23.

In sum, *Lorraine, Garces,* and *Dabaneh*, each support the Military Judge's determination that Prosecution Exhibits 19 and 23 were what they purported to be, and that their admission into evidence was proper.

3. The Military Judge need only be satisfied in reasonable probability that the article is what it purports to be and has not been changed in important respects.

"If the items sought to be introduced are readily identifiable, a foundation may be established by an identifying witness." *United States v. Maxwell,* 38 M.J. 148, 150 (C.M.A. 1993)(citations omitted). "The Court need only be satisfied that in reasonable probability the article is what it purports to be and has not been changed in important respects." *Id*. (citations omitted). "If the trial judge is satisfied that in reasonable probability the evidence has not been altered in any material respect, he may permit its introduction." *Id.* (citations omitted). "The Government may meet its burden of proof with direct or circumstantial evidence." *Id*. at 150-151. "Gaps in the chain of custody" do not necessarily prevent admission of evidence. *Id.* at 152. (citations omitted). Any deficiencies in that chain "go to the weight of the evidence rather than its admissibility." *Id.* (citations omitted).

In *Maxwell,* the government's witnesses were unable to provide testimony about the actual collection of appellant's blood sample and the court still found sufficient circumstantial evidence to show that the blood sample at issue was indeed the appellant's. *Maxwell*, 38 M.J. at 151. There, appellant's blood was taken for a blood-alcohol test, while he was receiving

treatment at an emergency room. *Id.* The doctor who ordered the blood-alcohol test had little recollection of the night appellant entered the emergency room. *Id.* The nurse who treated appellant stated he could not remember who drew appellant's blood. *Id.* Indeed, only the lab technician could recall the night in question, testifying that he received a blood sample labeled "John Doe" and that blood sample tested for a blood-alcohol content that was above the legal limit. *Id.*

In *United States v. Lundy*, the Fifth Circuit found that sufficient foundation was laid for electronic "chat conversations" by Deputy Sheriff Joseph Giroux as there was no evidence of motive to alter the data. *United States v. Lundy*, 676 F.3d 444, 453 (5th Cir. 2012). In *Lundy*, the appellant argued that Giroux, the investigating officer, was not qualified to operate the software that indicated whether Giroux properly archived the chats. *Id.* In determining if the data had been properly authenticated, the *Lundy* court looked to *Slattery v. United States,* No. 2:98CR125-B, 2005 U.S. Dist. LEXIS 47318 at *7-8 (N.D. Miss. Sept. 30, 2005) to determine if sufficient foundation had been laid. *Lundy*, 675 F.3d at 453. The court noted that in *Slattery* there was evidence of modification, as the testifying witness had a motive to alter the texts. *Id.* However, in *Lundy*, there was no such evidence. *Id*. Accordingly, the *Lundy* court found it was "[was] a stretch to compare the

authentication provided by Giroux with that of the [witness] in *Slattery.*" Accordingly, Giroux could lay proper foundation for the disputed data. *Id.*

4. Mr. Schmidt's testimony provided a reasonable probability that the CD-ROM he received from NMCI was a copy of Appellant's NMCI account data.

The Military Judge did not abuse her discretion in allowing Prosecution Exhibits 19 and 23, as Mr. Schmidt's testimony provided a reasonable probability that the disc he received from NMCI contained Appellant's NMCI account data. First, Appellant's facts mirror *Maxwell* in that Mr. Schmidt was unable to provide personal testimony regarding the actual collection of the evidence, but he was able to testify to the overall collection process and discern that the evidence admitted was what it purported to be. Like the witnesses in *Maxwell*, Mr. Schmidt could not testify to the actual collection of Appellant's NMCI data. However, Mr. Schmidt was able to rely upon his knowledge as a cyber-forensics examiner and his work experience with NMCI to testify regarding NMCI's automated data collection procedure. Also, like the lab technician in *Maxwell*, Mr. Schmidt was able to clearly discern that the data on the CD-ROM was indeed Appellant's NMCI user data. Unlike the fungible blood-sample in *Maxwell*, Appellant's NMCI data contained "NTUSER.DAT" files which contain Appellant's user name and

password, making the NMCI data readily identifiable to Appellant. (J.A. 31, 43.)

The Record supports that the data reported in Prosecution Exhibits 19 and 23 are in fact Appellant's NMCI user account information, as (1) Appellant's NMCI username appears throughout the self-evidently computer-generated exhibits, (2) Mr. Schmidt confirmed the automated nature of NMCI's collection process, and (3) Appellant provides no evidence of motive to alter the data. Appellant cites *In Re Vee Vinhee*, in which, a bankruptcy court lists an eleven pronged test to assist in authenticating evidence. (Appellant's Br. at 10.) That court noted that such "questions are becoming more important" because digital technology makes it easier to *alter* text of documents." *In Re Vee* Vinhee, 336 B.R. 437, 445-46 (B.A.P. 9th Cir. 2005)(emphasis added). Although the Military Judge does not cite or refer to the *In Re Vee Vinhee's* test, the test's purpose remains satisfied by the foundation evidence provided to the Military Judge. Again, the evidence reviewed by the Military Judge included (1) Appellant's NMCI username and password repeatedly appearing throughout the computer-generated printouts, (2) Mr. Schmidt having confirmed and testified to the automatic nature of NMCI's data collection process, and (3) no evidence of motive to alter the data. The Record clearly shows that Prosecution

Exhibits 19 and 23 are what they purport to be, reports containing Appellant's NMCI account data.

Accordingly, the direct and circumstantial evidence in Appellant's case make the admission of the evidence even more favorable than the admitted evidence in *Maxwell,* and the Record reveals the evidence within Prosecution Exhibits 19 and 23 was Appellant's NMCI account user information. Accordingly, the Military Judge did not err in admitting these exhibits.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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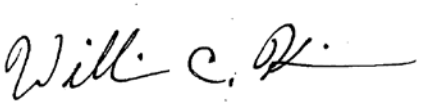

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